IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PENN MART SUPERMARKETS, INC., t/a THRIFTWAY,	:	
Plaintiff,	:	
v.	:	**C.A. No. 20405-NC**
NEW CASTLE SHOPPING LLC d/b/a, a/k/a New Castle Shopping Associates, NWL HOLDINGS, INC., and NWL OF NEW CASTLE, INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: July 25, 2005
Date Decided: December 15, 2005

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NOBLE, Vice Chancellor

Plaintiff Penn Mart Supermarkets, Inc. ("Thriftway") operates a supermarket in the Penn Mart Shopping Center (the "Center") in New Castle, Delaware. Its lease with its landlord, Defendant New Castle Shopping LLC (the "Landlord"), protects it from competition by other tenants in the operation of a supermarket and in the "sale of food or food products intended for off-premises consumption." The other large unit at the Center houses a National Wholesale Liquidators discount store.[1] NWL acquired its leasehold rights under an order of the Bankruptcy Court which authorized it to "operate as a typical NWL."[2] The NWL facility at the Center, operating as a typical NWL, sells a not insubstantial quantity of "food and food products intended for off-premises consumption." In addition, NWL sells a wide range of inedible items typically sold in supermarkets, including, for example, paper products and cleaning supplies. Thriftway brought this action seeking injunctive relief and damages based on NWL's competitive activities, which it views as barred by the protective covenant contained in its lease.

[1] The National Wholesale Liquidators defendants are NWL of New Castle, Inc. and its parent, NWL Holdings, Inc. There is no reason to distinguish between them and, collectively, they are referred to as "NWL."

[2] Joint Exhibit ("JX") 4 (Order Approving Assumption and Assignment of Lease for Store No. 27 located in New Castle, Delaware (the "Order"), *In re Ames Dept. Stores, Inc.*, Case Nos. 01-42217 through 01-42221 (Bankr. S.D.N.Y. Feb. 27, 2003)). NWL assumed a lease that has been held by Ames Department Stores, Inc. ("Ames").

In this memorandum opinion, which sets forth the Court's post-trial findings of fact and conclusions of law, several issues are presented for consideration:

1. What is the scope of the protective covenant in Thriftway's lease? Do the words "food or food products intended for off-premises consumption" encompass items typically found in the supermarkets, such as cleaning supplies, or are they limited to edible items and those products used in the preparation of food?

2. Is NWL, which had no actual knowledge of Thriftway's protective covenant before it acquired its leasehold interest at the Center, bound by that covenant?

3. What consequences, if any, does the Bankruptcy Court's order hold for enforcement of Thriftway's protective covenant?

4. Must Thriftway be deemed to have waived (or abandoned), in whole or in part, the benefit of the protective covenant because of food sales that have occurred over the last several decades at the Center?

5. What damages, if any, has Thriftway suffered as the result of any infringement by NWL, with the acquiescence of the Landlord, of the protective covenant?

I. FINDINGS OF FACT[3]

A. *The Protective Covenant*

Thriftway has operated a supermarket and has been an anchor tenant at the Center since 1988. Thriftway is an assignee of a lease (the "Thriftway Lease") under which Food Fair Stores, Inc. became the first occupant of the supermarket unit in the Center. That lease, executed on or about April 23, 1965, provided in pertinent part:

> 10. In order to induce Tenant to enter into this Lease, Landlord agrees . . . that [it shall not] use, suffer, permit or consent to the use or occupancy of . . . any part of the Entire Premises as a supermarket or *for the sale of food or food products intended for off-premises consumption*, or for a discount or promotional department store, such as E. J. Korvette, G.E.M., G.E.X., Zayre's, J. M. Fields, or any similar operations. (See Rider — Section 32.)
>
> 32. Rider to Section 10. Notwithstanding any of the provisions of Section 10 to the contrary, Landlord may lease stores within Entire Premises for the following uses upon the following terms and conditions:
>
> (a) One bakery selling home-style baked goods, baked by the proprietor thereof.
>
> (b) One delicatessen store having a maximum total area of 2,000 square feet and containing facilities for table service to customers.[4]

[3] Not all of the Court's findings of fact are presented under this heading. For convenience, some findings of fact (especially those regarding Thriftway's damages claim) are set forth during the analysis of various issues.

[4] JX 1 (Lease Agreement) ¶¶ 10, 32 (emphasis added).

A Notice of Lease, which included the terms of paragraph 10 of the Thriftway Lease, was duly recorded among the land records of New Castle County, Delaware.[5] The Landlord acquired its interest in the Center in 1986 and is bound by the Thriftway Lease and its protective covenant to the extent that it has not been waived by Thriftway.[6]

B. *The Center and the Sale of Food*

The Center is at the intersection of two busy highways—the DuPont Highway and Basin Road. Access is not particularly convenient and, now almost 40 years old, the Center has not aged gracefully. At each end of the Center are two large anchor stores—one is occupied by Thriftway and NWL occupies the other, a unit previously leased by Ames. In between are numerous smaller retail units.

Food is sold in several of those units. For example, Blockbuster, GNC, the Variety Store, Penn Mart Liquors, Nino's Pizzeria, and the Hong Kong Restaurant sell food. Thriftway, however, has not objected to the sale of food by these other tenants whose sales consist primarily of snacks and seasonal products (such as Halloween candy) and prepared food for off-premises consumption (takeout).[7]

[5] Plaintiff's Exhibit ("PX") 1.

[6] The Landlord, at the time of acquiring its interest in the Center, did not "put too much credence," in the protective covenant because it knew (1) that Ames and other stores were selling food and (2) Ames, a discount store, had long operated in the Center in direct violation of the terms of the protective covenant. Trial Tr. at 576.

[7] Anthony Grisillo and Regina Grisillo, the current owners of Thriftway, acquired it in 1988.

Before NWL came to the Center in 2003, the principal vendors of food, in addition, of course, to Thriftway, were Ames, Rite Aid, and Dollar Tree. Ames sold candy, cookies, holiday candies, Nabisco and Frito Lay products, Herr's potato chips, canned hams, Slim Jims, Pepsi products and other sodas, bottled water, teen drinks and summer juices, seasonal items (including relish, ketchup and mustard for Memorial Day and Labor Day), canned goods, soups, pie fillings and canned fish.[8] Additionally, Ames sold other non-edible, non-food items that Thriftway would characterize as protected under its covenant, such as Windex and Ajax. Ames' food inventory, at least with regard to a number of items, was not available on a consistent basis. Rite Aid, a drugstore, sold the following food items: pasta, cookies, sugar, instant and regular coffee, Cremora, soups, canned vegetables, canned fish, pasta sauce, various types of baking goods, such as cake mixes and cooking oils, soda, bottled water, juices, snack foods, and seasonal goods.[9] Thriftway never objected to the sale of food at Ames or Rite Aid.[10]

[8] Trial Tr. at 690-99 (testimony of Irvin Gatling, receiving manager, who worked for the Ames store in the Center for 24 years).

[9] Trial Tr. at 438-49 (testimony of Barry Phillips, the district manager of Rite Aid, testifying as to the period 1995-99). A former employee of Rite Aid at the Center, James Mort, testified that most of the food sold by Rite Aid was snack food and that the Rite Aid at the Center did not have enough space for a substantial inventory of the other items identified above. Trial Tr. at 831-32.

[10] Ames and other stores at the Center were selling food in 1988 when Mr. and Mrs. Grisillo acquired Thriftway. They were aware of those sales and of stores that opened later and sold food. Nonetheless, in 2000, Mr. Grisillo executed a Tenant Estoppel Certificate which recited, "[t]hat insofar as Tenant currently has knowledge, the Landlord has fulfilled all of its duties of an inducement nature, and is not in default in any manner in the performance of any of the terms, covenants, or provisions of said Lease." Defendants' Exhibit ("DX") 2; Trial Tr. at 181-83.

However, when Dollar Tree became a tenant in November 2002, Thriftway did object to its sale of food. In order to sell food without becoming embroiled in a dispute with Thriftway, Dollar Tree obtained a specific waiver, applicable to Dollar Tree only, from Thriftway allowing it to sell food at the Center.[11] This agreement was brokered by a representative of the Landlord.[12] The waiver restricts Dollar Tree from selling certain types of food and limits its retail area for food to 800 square feet.[13] Nevertheless, Dollar Tree sells a wide range of foods including pasta, sauces, canned goods, salad dressing, snacks, drinks, and candy.[14] Unlike NWL's store at the opposite end of the Center, Dollar Tree's store is close to Thriftway.

Although a Notice of the Thriftway Lease was duly recorded soon after execution, it was never amended to reflect the evolution of the Center, including food sales at other stores in the Center, operation of a discount department store in the Center, or Thriftway's specific waiver of its protective covenant for the benefit of Dollar Tree.

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[11] *See* JX 3.

[12] Thus, the Landlord, before NWL became a tenant, was on notice that Thriftway continued to claim the benefit of the protective covenant.

[13] JX 3. Dollar Tree agreed to refrain from selling "fresh produce, meat, bakery, dairy or frozen products" and certain brands supplied by Fleming Companies, Inc. ("Fleming"), Thriftway's principal supplier.

[14] Trial Tr. at 537. It also sells paper towels, household cleaners and detergents. *Id*. at 533.

NWL is a "discount department store" that sells a "wide variety of products."[15] It sells clothing, electronics, closeout goods, cleaning supplies, ready to assemble furniture, and other household goods at discount prices. NWL also sells food. While the NWL at the Center sells some milk, orange juice, and, perhaps, eggs, the food and food products sold by NWL consists of nonperishable products such as canned goods, coffee, pasta, pasta sauce, cookies, snacks, candy, drinks, and other similar items. NWL does not sell fresh meat, produce, frozen foods, ice cream, fresh seafood, baked goods, or hot foods. Although the exact amount of food sold at NWL fluctuates due to seasonal marketing strategies and NWL's ability to obtain discount items, food accounts for six or seven percent of NWL's sales.[16]

NWL's food sales, however, differ from those of Ames and Rite Aid: NWL has an entire section of its store devoted to food sales (a "Food Department"); its Food Department is prominently advertised in the front of the store; it has an automatic replenishment system (ensuring some degree of consistency in selection); and it has an extensive list of food items.[17]

[15] *Id*. at 659-60 (testimony of Robert Kwiatkowski, Vice President of Real Estate, NWL).
[16] *Id.* at 661. The food sales at a "typical NWL" range from seven to ten percent. *Id.*
[17] *See* PX 5 & 6. The list of items that it could purchase from its suppler, White Rose (the same supplier that Thriftway would eventually use), contained at least 1,000 items. Trial Tr. at 426 (testimony of Jack Zumba, Senior Vice President, White Rose Foods).

C. *Ames' Bankruptcy and NWL's Assumption of the Ames Lease*

Ames, the previous other anchor tenant at the Center, operated a discount department store at the Center from the early 1970's until the fall of 2002 under a lease (the "Ames Lease") which provided in part:[18]

> Tenant may occupy the premises for any lawful purpose, except the operation of a food supermarket if a food supermarket is then in operation in the shopping center and *except for any use for which other premises in the shopping center are occupied pursuant to an exclusive right and use granted by the Landlord*.[19]

On August 20, 2001, Ames filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York.[20] Its store at the Center closed on November 9, 2002.[21] The Landlord filed a Motion to Compel Assumption or Rejection of a Certain Unexpired Lease of Nonresidential Residential Property on January 28, 2003.[22] Thereafter, Ames moved to assume its lease and to assign it to NWL. The Ames' Lease was assigned to NWL during the bankruptcy proceedings.[23] The Order, dated February 27, 2003, approving the

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[18] Pretrial Stipulation ("PT Stip.") ¶ 10. Ames was a discount department store, but Thriftway's predecessor (and Thriftway after it became a tenant) did not object to Ames' presence at the Center based on the prohibition against discount department stores in its lease.
[19] JX 2 at 8 (emphasis added).
[20] PT Stip. ¶ 13.
[21] *Id*. ¶ 10. Ames' closing had a deleterious impact on the Center. As a representative of the Landlord testified: "It was a mess. A tenant who occupied 50,000 square feet, one-third of the shopping Center, moved out. It had a dramatic impact on the shopping center. The parking lot was empty. The best of times—Friday, Saturdays, Sundays—the parking lot was empty." Trial Tr. at 599 (testimony of Allen Pilevsky). Some tenants sought rent reductions; two tenants went out of business.
[22] PT Stip. ¶ 18.
[23] *Id*. ¶ 14.

assignment provides: "Notwithstanding any provision of the [Ames] lease to the contrary . . . NWL may operate the Premises as a typical NWL department store, as same are currently operated, and none of the foregoing shall be deemed a breach or default of any provision of the [Ames] lease."[24] "The Landlord did not inform NWL or the United States Bankruptcy Court for the Southern District of New York of the restrictive covenant in Thriftway's lease prior to Ames assigning its lease to NWL."[25] Furthermore, "NWL did not review the land records of New Castle County with respect to the Ames Lease or the Thriftway Lease."[26] However, "[b]efore acquiring its leasehold interest, NWL reviewed the Ames Lease and physically inspected the [Center]."[27] Additionally, the Landlord did not object to Ames' assigning its lease to NWL.[28]

After filing this action, Thriftway appeared in Bankruptcy Court on October 21, 2003, to object to the Order. The Bankruptcy Court noted that the

[24] JX 4.
[25] PT Stip. ¶ 16. There was testimony at trial that the Landlord sent NWL representatives—at their request—a copy of the Thriftway Lease. *See* Trial Tr. at 631 (testimony of A. Pilevsky). However, NWL denies that it received a copy. *See id.* at 655-56 (testimony of R. Kwiatkowski). Because the parties stipulated that the Landlord did not inform NWL of Thriftway's protective covenant and because the trial testimony is, at best, ambiguous, the Court accepts that NWL never received a copy of the Thriftway Lease.
[26] PT Stip. ¶ 12.
[27] *Id.* ¶ 11.
[28] *Id*. ¶ 17.

Delaware Courts "should deal with the matters of Delaware State law as they see fit."[29] Additionally, the Bankruptcy Court stated:

> I am making it clear, that [the Order] was not intended in any way, shape or form to affect [Thriftway's] rights under its own lease, that is, [Thriftway's] lease. Whatever rights [Thriftway] has in that regard are unaffected by the [the Order]. I also am making it clear that the [Order] was permissive, not mandatory, except to the extent that it prohibited the landlord from complaining that [NWL] would be violating the Former Ames lease by conducting operations in the manner that [NWL] ultimately has done.[30]

The Bankruptcy Court did not formally modify the Order.

II. CONTENTIONS

Thriftway now seeks damages and injunctive relief against the Landlord and injunctive relief against NWL. Thriftway contends that, by permitting NWL to sell food at the Center, the Landlord breached Thriftway's protective covenant and the Landlord is liable to Thriftway for damages measured both in terms of lost profits and the cost to regain those customers lost to NWL's improper competitive acts. According to Thriftway, the sale of food by NWL will continue to cause irreparable harm. In response, the Landlord argues that it is not liable to Thriftway; asserts an unclean hands defense; argues that Thriftway has waived its covenant by knowingly permitting the sale of food by other stores at the Center for quite some time; and invokes the doctrine of legal impracticability due to the

[29] JX 5 at 87.
[30] *Id.* at 86.

Order. Additionally, the Landlord argues that Thriftway has not proven actual damages caused by NWL's alleged wrongful competition. NWL presents many of the same contentions: it focuses upon the Order authorizing it to operate as a "typical NWL"; its lack of notice of the restrictions contained in the Thriftway Lease; and the absence of any harm to Thriftway as the result of its operations.

III. ANALYSIS

A. *Thriftway's Protective Covenant*

NWL's operations, of course, breach the literal terms of Thriftway's protective covenant prohibiting the sale of "food or food products intended for off-premises consumption." In dispute are the scope of the protective covenant and its continued viability.

1. Scope of the Covenant

The protective covenant was drafted to protect Thriftway's predecessor from competition from the sale of "food or food products intended for off-site premises consumption."[31] The parties sharply dispute the meaning of this phrase, drafted more than forty years ago. Thriftway contends that the parties intended to preclude the sale of items sold in supermarkets; it proposes an interpretation akin to

[31] The covenant also prevented the operation of another supermarket and a discount department store. Thriftway does not argue that NWL is a supermarket, and any objection to a discount department store has long since been waived.

"groceries."[32] Thriftway asserts that, for example, "food products" would include those items used in the preparation of food and the subsequent clean-up. Moreover, Thriftway points out that supermarkets sell consumables, while department stores are generally viewed as selling durable goods. The Center was designed to have one of each; they would complement each other—not compete with each other. Most of the inedible items sold in "grocery" stores, such as cleaning supplies, are fairly characterized as "consumables." Finally, Thriftway argues that the term "food products" has an industry-based understanding that is different from that "presumed by an uneducated consumer."[33] The Defendants, on the other hand, point out that the drafters could have used the term "groceries" but did not. They, thus, suggest that any interpretation should be premised upon whether a product is edible or will be incorporated into something that is edible.

The parties agree upon the principles which guide the Court in resolving a contract interpretation dispute.[34] "[T]he court will first 'examine the entire agreement to determine whether the parties' intent can be discerned from the

[32] The term "groceries" is defined as "articles of food and other goods sold by a grocer." WEBSTER'S NEW INT'L DICTIONARY 1001 (3d ed. 1993). A "grocer" is defined as "a dealer in staple foodstuffs (as coffee, sugar, flour) and usu. meats and other foods (as fruits, vegetables, dairy products) and many household supplies (as soap, matches, paper napkins)." *Id.*

[33] Pl.'s Opening Br. at 10. This argument is made despite Thriftway's answer to an interrogatory to the effect that the words at issue are to be accorded their "plain and ordinary meaning." *See* DX 45; Trial Tr. 122-24. The interrogatory answers were signed by Mr. Grisillo who had been in the supermarket business for several decades and, thus, presumably was familiar with industry-specific terms.

[34] "General principles of contract construction guide interpretation of restrictive covenants." *Tusi v. Mruz*, 2002 WL 31499312, at *3 (Del. Ch. Oct. 31. 2002).

express words used, or alternatively, whether its terms are ambiguous.'"[35] When the contract is "clear on [its] face," the words will be given "the meaning that 'would be ascribed to them by a reasonable third party.'"[36] "[A] contract [will be deemed] ambiguous if the provisions are "reasonably susceptible to two or more meanings."[37]

The term "food or food product intended for off-premises consumption" is not ambiguous. The parties do not question the meaning of "food." Thus, the inquiry turns to the meaning of "food product." The plain meaning of that term is a product not eaten directly or by itself but, instead, one that goes into the making of a food that is ingested.[38] Bleach, matches, detergents, paper towels, and the like (although constituents of a grocery inventory) are not "food or food products" as those words are understood in regular usage. The interaction of the words "food or food products" with the words "intended for off-premises consumption" confirms this analysis. If "food and food products" included those items not to be

[35] *Interactive Corp. v. Vivendi Universal, S.A.*, 2004 WL 1572932, at *9 (Del. Ch. July 6, 2004) (quoting *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003)).
[36] *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *4 (Del Ch. Aug. 3, 2004) (quoting *True N. Commc'ns, Inc. v. Publicis S.A.*, 711 A.2d 34, 38 (Del. Ch. 1997), *aff'd*, 705 A.2d 244 (Del. 1997)). This standard is, of course, necessary in this instance because neither of the current parties to the Thriftway Lease was involved in its drafting.
[37] *Amtower v. Hercules Inc.*, 1999 WL 167740, at *11 (Del. Super. Feb. 26, 1999). *See also Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 309 (Del. Ch. 2002) ("To demonstrate ambiguity, a party must show that the instruments in question can be reasonably read to have two or more meanings.").
[38] An example would be shortening, which (at least one hopes) is not ingested directly.

ingested—for example, paper towels or bleach—the off-premises qualification would not be necessary because a customer would not consume (i.e., use) them at the Center. The words "off-premises" were, one can reasonably conclude, intended to allow for restaurants at the Center, but they also modify more than just food. The off-premises provision would be surplusage if it modified items which would not be consumed on premises. It is these items to which Thriftway seeks to extend the covenant. In sum, the Court need not, and should not, look to extrinsic evidence to ascertain the meaning of the phrase "food and food products intended for off-premises consumption."[39] Accordingly, Thriftway has failed in its efforts to extend the protective covenant to the myriad products sold in a supermarket which are not intended for human consumption. Thus, NWL, as with every other tenant at the Center, is free to sell, at least as far as Thriftway's protective covenant is concerned, bleach, detergent, greeting cards, sponges, and the like.

[39] That the concept embodied in the phrase "food or food products" could have been captured more precisely does not make the phrase ambiguous. Even if the phrase were ambiguous, the extrinsic evidence relied upon by Thriftway would not carry the day. If those words are given their "plain and ordinary meaning," as suggested by Mr. Grisillo in Thriftway's interrogatory answers, it is difficult to escape the notion of "edible." That leaves Thriftway with the burden of establishing an industry usage that would supersede the plain meaning. That task, given the passage of forty years, is not an easy one, but more importantly, the various industry experts were not able to agree upon a common meaning and, as between the two, the Court concludes that the Defendants' expert offered the more plausible explanation. In his judgment, within the industry, the phrase "food and food products" would be understood to include only those items which could be ingested. *See* Trial Tr. 708-09 (testimony of Conrad Stephanites, Defendants' industry expert). In short, this takes the analysis back to the Defendants' principal point: if the drafters had intended to encompass groceries, they easily could have accomplished that goal.

2. Waiver of the Covenant

With the scope of the protective covenant limited, for purposes of this action, to edible items, the Court now turns to the Defendants' contention that Thriftway has abandoned or waived its protective covenant by permitting sales of food at the Center by other tenants.[40] Although sometimes interchanged, "waiver" and "abandonment" are two distinct concepts:

> Abandonment . . . occurs when all beneficiaries have relinquished their rights to enforce a particular covenant or a general plan of covenants. Waiver usually involves a failure to object to other violations of the same or similar servitudes such that it would be unfair to allow the claimant to enforce the servitude against the current violation.[41]

There is ample evidence that a baseline of food sales occurred regularly at the Center both before (for a period measured in decades) and after NWL's arrival. Thriftway, other than in response to food sales by Dollar Tree and NWL, did not object. Allowing minor violations of a protective covenant, of course, does not necessarily amount to waiver or abandonment.[42] "A property owner is not precluded from enforcing a deed restriction which materially affects her merely because she previously failed to complain of a violation which did not materially

[40] Because it is an affirmative defense, the Defendants bear the burdens of proof and persuasion on the issue of waiver. *Warwick Park Owners Ass'n, Inc. v. Sahutsky*, 2005 WL 2335485, at *4 (Del. Ch. Sept. 20, 2005).

[41] *Tusi*, 2002 WL 31499312, at *3 (internal quotations and citations omitted). The only beneficiary of the protective covenant at issue is, of course, Thriftway.

[42] *See Brookside Cmty., Inc. v. Williams*, 290 A.2d 678, 682 (Del. Ch. 1972), *aff'd*, 306 A.2d 711 (Del. 1973).

affect her in the enjoyment of her property."[43] The continued viability of a protective covenant despite multiple violations, thus, depends upon the materiality of those violations to the covenant holder. For example, in the context of enforcement of a restrictive covenant in a residential community, the proximity of the violation to a particularly homeowner is of significance because, as pointed out in *Henderson v. Chantry*, a violation of a fence-height restriction is of little moment to a homeowner several blocks away.

Two significant factors distinguish *Henderson*: First, in *Henderson*, all of the homeowners had the individual right to enforce the restriction; here, only Thriftway is the beneficiary of the covenant and no other tenant has an interest in its enforcement. Second, especially with NWL's business location at the opposite end of the Center, Thriftway has not attributed any significance to proximity. Nonetheless, the teaching of *Henderson* is unequivocal: immaterial, individual violations of a restrictive covenant do not jeopardize the covenant holder's rights to prevent subsequent material violations.[44] On the other hand, an aggregation of individually insubstantial violations may collectively satisfy a materiality standard. Measuring materiality in this context is not easy. A quantitative approach,

[43] *Henderson v. Chantry*, 2003 WL 139765, at *4 (Del. Ch. Jan. 10, 2003) (quoting *Cox v. Melson-Fulsom*, 956 S.W.2d 791, 794 (Tex. App. 1997)).

[44] In the residential context, a separate consideration sometimes arises. There are instances where differential enforcement especially when the enforcement process is controlled by a homeowners' association, may jeopardize the continued effect of the covenant.

however desirable theoretically, is often not practicable because of the difficulty in obtaining (and applying) data. A qualitative effort, focused upon what an objective and reasonable third-party observer would conclude, is the best framework for the task. Inquiry into whether the covenant holder subjectively believes that a particular merchant's (or a group of merchants') conduct to be material is just that: it is too subjective to be a reasonable basis for determining commercial rights and obligations.

The question, thus, necessarily becomes one of whether the business culture at the Center has changed to the extent that, because of significant sales at the Center over the years of certain types of food and food products, it is no longer equitable or reasonable to enforce the protective covenant, in whole or in part. Against this backdrop, the Court turns to the fact-intensive inquiry of whether Thriftway has waived its rights, in whole or in part, under the protective covenant.

The sale of food and food products by others at the Center has largely been restricted to nonperishables. Fresh meat and seafood, frozen foods (except for certain ice cream products), produce, fresh baked goods, dairy products,[45] and deli products were not sold.

[45] Orange juice was sold although it is not clear if it was refrigerated or not; otherwise, there was no sale of milk, eggs, cheese, yogurt, and the like until NWL began to sell, perhaps on a somewhat intermittent basis, a limited selection of milk (possibly restricted to 1% and 2% in gallon and half-gallon containers), and eggs, as well as refrigerated orange juice.

The list of foods sold by others at the Center, and sold without objection by Thriftway, is extensive.[46] For example, dry pasta and pasta sauces (not refrigerated) were sold without complaint. These products were routinely available from multiple merchants. NWL also sells—but Thriftway has objected to its sale of—pasta and pasta sauce by other tenants at the Center. By having failed to object to the sales of pasta and pasta sauce, Thriftway has lost its right to deny that opportunity to others now.[47] If a restrictive covenant is to be given effect, there must be a discernible line to mark the boundary between acceptable and unacceptable conduct. The prudent person, such as the Landlord or a prospective tenant, who confronts the business conditions at the Center, would reasonably conclude that the sale of pasta and pasta sauce is not burdened by a restrictive covenant.

The competitive challenge brought by NWL to Thriftway with respect to pasta and pasta sauce is not merely that it sells spaghetti and one or two types of pasta sauce. Instead, NWL, on a reasonably regular basis, sells a number of pasta products and several different pasta sauces.[48] The Court's inquiry, at least when it

[46] Not only did Thriftway not object, but also it confirmed in 2002 in a Tenant Estoppel Certificate that its leasehold rights generally were not being violated. DX 2.

[47] Without jeopardizing its rights, it can reach an accommodation, as it did with Dollar Tree, that allows certain conduct which otherwise would be inconsistent with its rights. Thriftway, however, is necessarily charged with knowledge of the products sold at other stores in the Center. Those other sales are readily accessible and a merchant armed with a competition covenant has some responsibility to monitor the public activities of those burdened by it.

[48] In addition to spaghetti, one can find ziti, rigatoni, penne, lasagna, and rotini at NWL.

is focused upon a specific food group such as pasta and pasta sauces, becomes: does a waiver by Thriftway of its right to object to some sales of dry pasta and pasta sauce constitute a waiver to all sales of dry pasta and pasta sauce? Or, by acquiescing in competition in the form of sales from a somewhat limited selection of items in a food category (for purposes of this example, pasta and pasta sauce) did Thriftway waive its right to object to a larger and broader inventory of dry pasta and pasta sauces at a competing store?

Similar questions arise with respect to other categories of nonperishable food and food products sold at the Center. Canned vegetables, for instance, were sold by others at the Center. NWL may offer a wider selection, but shoppers at the Center had reasonable options, beyond Thriftway for their purchase of canned vegetables. Canned tuna has regularly been sold at the Center; NWL carries a wide range of canned seafood, including canned tuna.[49] Although NWL has an inventory of baking goods that goes beyond any previous merchant's sales efforts, baking supplies, such as cake mixes and cooking oils, were carried by others.

In short, a broad range of nonperishable food and food products has regularly been sold at the Center. Indeed, no significant category of nonperishable food and food products for which there have been no previous sales has been

[49] Indeed, NWL may carry a broader selection than does Thriftway, especially its inventory of canned sardines. *See* Trial Tr. at 270.

identified. The sales were material, regular, pervasive, and accepted. Even without the sales by Dollar Tree, the reasonable observer of commercial activity at the Center would conclude that nonperishable food and food products could be sold there without objection. Accordingly, the Court finds that the Defendants have demonstrated by a preponderance of the evidence that Thriftway has waived its protective covenant as to the sale of nonperishable food and food products.[50]

[50] Thriftway has never satisfactorily addressed the inescapable fact that substantial sales of food and food products have occurred over the years at the Center. At a minimum, NWL is certainly entitled to sell food and food products in a manner consistent with the historical baseline. Unfortunately, as a pragmatic matter, it is impossible to enforce fairly a restrictive covenant unless a workable line can be perceived. Although NWL's food sales quantitatively and qualitatively have exceeded the historical experience, no one has proposed a plausible basis for defining that limit of its protective covenant that would accommodate the history of food sales at the Center. From this record, there is no principled basis for limiting the volume (whether in terms of dollar value, number of products, or allocated floor space) of NWL's sale of nonperishable foods and food products. Defining the scope of the waiver in terms of perishable and nonperishable at least is consistent with the actual sales activities at the Center; moreover, it also establishes a reasonably clear line of demarcation, one that could be discerned on reasonable inquiry or inspection. Over the years, Thriftway (and its predecessors) were faced with choices regarding the sale of food by others. Insisting upon an absolute and rigid enforcement of a restrictive covenant against food sales, without allowing some flexibility on the part of the covenant holder, would, one can conclude, interfere with the formation of those desirable symbiotic relationship among tenants at a shopping center and would ignore what the parties to the covenant most likely intended: that the supermarket, *i.e.*, Thriftway, would not have a significant competitor with respect to its basic business. Yet, Thriftway failed to assert its rights over such a long period of significant food sales by others that it would be inequitable now to enforce the protective covenant as to the sales of nonperishable foods.

The Landlord also argues that fundamental changes in the nature of the commercial activity at the Center over almost four decades have made it unreasonable to expect that the goals of the protective covenant can be achieved and have made efforts to enforce the protective covenant to any extent unreasonable. *See, e.g.*, *El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066 (Del. 1984). As to the sale of nonperishables, the Landlord is correct. However, although many changes have occurred at the Center, there is no other supermarket and no other seller of fresh foods. Protection of Thriftway from competition from a supermarket and from the sale of fresh foods remains an achievable goal. Thus, the Landlord cannot meet the change in community standards test advanced in *El Di* in order to defeat the protective covenant in its entirety.

Conversely, Thriftway has not waived its protective covenant as to the sale of perishables.[51]

B. *Liability of NWL*

1. Notice of Thriftway's Protective Covenant

Thriftway is pursuing injunctive relief for violation by NWL, a third party, of its *own* lease. It is *not* pursuing injunctive relief against NWL or the Landlord under NWL's lease (the "Ames Lease").[52] Under *Reeve v. Hawke*,[53] a subsequent lessee who knowingly acts in violation of a covenant benefiting another can be enjoined from engaging in such conduct regardless of whether the subsequent lessee's lease prohibits the conduct.[54] The notice to the subsequent tenant required in *Reeve* may "be constructive rather than actual."[55] Thus, if NWL (the subsequent lessee) had knowledge, actual or constructive, of restrictions on Ames' operations

[51] There is one exception to this conclusion. Thriftway has waived the covenant with respect to the sale of ice cream snack products. Although the conclusion that Thriftway has waived its protective covenant with respect to the sale of nonperishables precludes most of Thriftway's claim against NWL (because NWL's inventory of food and food products consists primarily of nonperishables), it does not resolve the matter fully because of NWL's limited sales of perishables—milk, eggs, and orange juice, items which readily fall within the scope of "food and food products."

[52] This claim, presented in Count II of Thriftway's Amended Complaint, was previously dismissed by way of summary judgment.

[53] 136 A.2d 196 (Del. Ch. 1957).

[54] *Id.* at 201 ("The theory behind the granting of relief against a subsequent lessee who is not a party to the covenant sued upon is that when such a defendant has knowledge of the terms of the first lease he may not be permitted to benefit from his later lease covering the same or similar business.").

[55] *Id. See also, Mendenhall Vill. Single Homes Ass'n v. Harrington*, 1993 WL 257377, at *2 (Del. Ch. June 16, 1993).

arising out of the Thriftway Lease then, even though those restrictions were not expressly set forth in the Ames Lease, NWL may be bound under *Reeve* by those restrictions.

NWL did not have actual notice of Thriftway's protective covenant. "Actual notice is an awareness of the alleged restriction by the purchaser at the time of purchase."[56] The Pre-trial Stipulation recites that the Landlord did not inform NWL of Thriftway's protective covenant before it assumed the Ames Lease[57] and there is no evidence that NWL knew of it from any source other than the Landlord.[58]

NWL, however, did have constructive notice of the protective covenant. "Constructive notice is normally established by properly recording the instrument that contains the alleged restriction."[59] A party is charged with the knowledge to

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[56] *Greylag 4 Maint. Corp. v. Lynch-James*, 2004 WL 2694905, at *5 (Del. Ch. Oct. 6, 2004).
[57] PT Stip. ¶ 16.
[58] NWL did review the Ames Lease which contained a prohibition against a supermarket at the Center and the use of the premises in a manner inconsistent with any exclusive use granted to other tenants. Despite a general request of the Landlord by NWL for the Ames Lease, the Landlord did not provide a copy. It is general industry practice for the landlord of a shopping center to inform prospective tenants of lease-based restrictions on their projective use. Trial Tr. at 656 (testimony of R. Kwiatkowski). As the NWL representative testified:

> Q: Generally . . . the Landlord makes you aware of restriction?
> A: Yes. What we do is we put down our use and what we want it to be. They do their research. They also come back—because we want a warranty that we can operate how we wanted to operate. We want a warranty from the landlord. They make us aware of it. . . .

Id. at 682-83. That the Landlord may have warranted, explicitly or implicitly, to NWL that its intended uses would not be inconsistent with the rights of other tenants, of course, does not protect NWL from viable claims asserted by Thriftway.
[59] *Greylag 4 Maint. Corp.*, 2004 WL 2694905, at *5 (internal quotations omitted).

be gained from reviewing the properly recorded documents whether or not any search of the records is, in fact, performed. Because the notice of the Thriftway Lease was properly and publicly recorded,[60] NWL's investigation of those records would have informed it of Thriftway's protective covenant.[61]

NWL, however, argues that actual knowledge of the Notice of Lease would not have informed NWL that it would be operating in violation of Thriftway's covenant. NWL's argument has three components. First, the recorded notice of the Thriftway Lease has never been updated to reflect developments at the Center over almost four decades. If NWL had read the notice of lease, it would have learned that the same paragraph that prohibits selling food also prohibits the operation of a discount department store in the Center.[62] It is undisputed that this part of the covenant was waived by Thriftway's predecessor; yet the recorded lease was not updated. Thus, if someone had read the recorded notice of lease after learning of the Ames store at the Center, it would have been reasonable to doubt that covenant was still binding. Second, although the recorded notice of lease contains a prohibition against the sale of "food or food products for off-premises consumption," many stores at the Center were selling food. Perhaps it would be

[60] *See* PX 1.
[61] NWL was aware that shopping center leases (or memoranda of those leases) are sometimes recorded. *See* Trial Tr. at 681 (testimony of R. Kwiatkowski). Tenants record memoranda of lease to inform the world of their rights.
[62] PX 1 ¶ 10.

unreasonable to expect Thriftway to re-record the notice of lease every time, for example, Blockbuster decided to sell a new brand of candy; it would, however, according to NWL, also be unreasonable to charge someone who has read the notice of lease and investigated the sales practices of the stores at the Center with knowledge of an enforceable covenant. Finally, Dollar Tree's food selection at the Center was relatively expansive,[63] but its specific waiver was not recorded. Thus, a prospective tenant who searched the New Castle County records would not have known that Dollar Tree had received a waiver and it would not have been unreasonable to assume that the sale of a wide range of food was permitted. However, NWL's argument as to notice, one that has practical appeal, fails because it could not have prudently assumed that the covenant had been abandoned (or waived in its entirety).[64] NWL, of course, never made the conscious decision

[63] *See supra* text accompanying note 13.

[64] Careful review of the notice of lease might have provided NWL with an additional basis for concluding that its operations would not impinge upon Thriftway's rights. The notice of lease set forth a term of the lease and its renewal options. The lease, although executed in 1965, did not commence until possession of the unit was obtained. Although not clear from the record, that most likely (as would be expected) was in 1967, allowing two years for construction. The initial term would end on the next April 30 to occur after fifteen years following the initial date of possession. Four options periods of five years each were granted to the tenant, thereby allowing for twenty years of renewal. Accordingly, the total period of occupancy within the terms of the notice of lease would have been slightly more than thirty-seven years, assuming two years of construction and thirty-five years as the product of complete exercise of all renewal rights. Thus, the protective covenant described in the notice of lease most likely would have expired by its own terms in the spring of 2002 or 2003. NWL took possession in the spring of 2003. Accordingly, under its most likely reading, the obligations described in the notice of lease would have expired before NWL began retail sales at the Center. This argument, however, was not advanced by the Defendants and, thus, the Court does not rely upon it.

that the covenant had been waived (because it did not know of the covenant) but, even if it had, it would have proceeded at its own risk. Its activities violate the clear language of the covenant. The question of the protective covenant's continued viability required careful analysis. Indeed, NWL's argument that conditions at the Center superseded any notice available in New Castle County's land records is essentially a reprise of its argument that Thriftway waived its rights under the protective covenant.

In sum, NWL is charged with constructive notice of Thriftway's protective covenant and is bound by its terms, unless, for other reasons, the covenant cannot be enforced.[65]

2. The Bankruptcy Court's Order

NWL, as well as the Landlord, relies upon the Order authorizing NWL's assumption of the Ames Lease. The Order provided: "Not withstanding any provision of the [Ames Lease] to the contrary . . . NWL may operate the premises as a typical NWL department store . . . and none of the foregoing shall be deemed a breach or default of any provision of the [Ames] Lease."[66] The Defendants

[65] Although the protective covenant only expressly addressed the Landlord's conduct, NWL, understandably, has not argued that Thriftway cannot seek enforcement against NWL simply because there is no prohibition expressly binding the tenant.

[66] As the Court observed in its consideration of summary judgment motions: "A Bankruptcy Court order that adversely impacts the rights of nonparties to the bankruptcy proceedings may seem harsh; however, it is clear that private contract rights may 'take a back seat' to a Bankruptcy Court's decision." *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2004 WL 2633302, at *3 n.18 (Del. Ch. Nov. 10, 2004).

contend that the Order precludes this Court from enforcing Thriftway's protective covenant because NWL is operating as "a typical NWL department store" and, thus, enforcement by this Court would be inconsistent, both as a matter of judicial authority and as a matter of comity, with the rights conferred upon NWL by the Order.

A careful reading of the Order, especially as amplified by the Bankruptcy Court during the hearing in which Thriftway sought relief from the scope of the Order, requires rejection of the Defendants' argument. First, the Order, by its express terms, only purports to modify the duties and rights prescribed by the Ames Lease—not the Thriftway Lease. Second, when the Thriftway Lease was brought to the attention of the Bankruptcy Court, its response was enlightening:

> I am making it clear, that [the Order] was not intended in any way, shape or form to affect [Thriftway's] rights under its own lease, that is, [Thriftway's] lease. Whatever rights [Thriftway] has in that regard are unaffected by [the Order]. I also am making it clear that the Assignment Approval Order was permissive, not mandatory, except to the extent that it prohibited the landlord from complaining that [NWL] would be violating the Former Ames lease by conducting operations in the manner that [NWL] ultimately has done.[67]

That gloss can more fairly be read as disclaiming any intent to modify Thriftway's rights under the Thriftway Lease.

In theory, the protective covenant of Thriftway's Lease is implicated in two ways: First, under the Ames Lease which incorporated restrictions contained in

[67] JX 5 at 86.

leases of other tenants; and, second, under its express terms which were set forth in a properly and publicly recorded document. The Order clearly modified the terms of the Ames Lease and, thus, Thriftway can find no support from that lease or the intent of the drafters to impose the restrictions of the Thriftway Lease through the Ames Lease. The Order, however, does not expressly impinge upon the Thriftway Lease and, more importantly, the Bankruptcy Court has confirmed that, in approving the Order, it did not intend to do so.

Thus, the protective covenant of Thriftway's Lease of which NWL had constructive notice and of which the Landlord, of course, had actual notice, was not eviscerated by the Order.

C. *Thriftway's Effort to Prove Damages*

1. Legal Impracticability—The Landlord's Avoidance Efforts

As an initial matter, the Landlord argues that its conduct with respect to Thriftway's protective covenant is excused by the doctrine of legal impracticability. The Landlord relies upon the Order and argues that it precludes compliance with the terms of the Thriftway Lease. That argument has already been addressed. However, even if the Landlord could not satisfy the terms of the Thriftway Lease without running afoul of the Order, it does not follow that it would not be liable for the harm that its actions (or its inaction) caused. A party who contributed to the impracticability of performance is not entitled to use

impracticability as a defense.[68] In particular, a party who consents to a court order cannot later claim legal impracticability due to that order.[69] In this instance, the Landlord had actual knowledge (for example, from Thriftway's specific waiver to Dollar Tree) that Thriftway believed that some part of its protective covenant remained in existence and, nonetheless, consented to the Order.[70] Therefore, the Landlord cannot claim legal impracticability as a defense.

2. Proof of Damages

Thriftway claims that it is entitled to monetary damages for the harm caused to it by the Landlord's failure to enforce its protective covenant. It seeks to recover both the profits lost during a one year period after NWL's opened in May

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[68] *See Peckham v. Indus. Sec. Co.*, 113 A. 799, 802 (Del. Super. 1921) ("A party will not be permitted to escape liability under his contract by securing or consenting to an injunction."). *See also In re Fin. Corp.*, 17 B.R. 497 (Bankr. W.D. Mo. 1981).

[69] *See In re Martin Paint Stores*, 199 B.R. 258, 265 (Bankr. S.D.N.Y. 1996) ("Under this doctrine, the entry of a judicial order that renders performance legally impossible excuses the party who must perform as long as he did not cause or fail to prevent the entry of the judicial order.").

[70] The Landlord is charged with the responsibility of knowing that the "typical NWL" would infringe upon Thriftway's protective covenant in accordance with its terms. By consenting to the assignment of the Ames Lease to NWL, the Landlord addressed its problems of rent and vacancy, but those benefits were obtained, in part, at the cost of Thriftway's protective covenant. The Landlord facilitated that result and never addressed with either NWL or the Bankruptcy Court the collateral consequences. It may be that the same result would have been obtained—but that is a matter for speculation. *See, e.g.*, *Heilig-Meyers Co.*, 294 B.R. 660 (E.D. Va. 2001) (rejecting proposed assignment of shopping center lease because of threat of direct competition to another tenant with an exclusive operating right). In short, the Landlord was burdened by this surviving aspect of Thriftway's protective covenant; it would avoid its consequences through the Order allowing NWL to operate as a "typical NWL." Legal impracticablilty, as a defense that might otherwise have been available to the Landlord, is not available because the Landlord readily agreed to its terms without bringing up the incidental benefits (such as avoiding difficulties with Thriftway that were similar to those encountered with the Dollar Tree lease) that it might receive from implementation of the Order.

2003[71] and the costs necessary to recover its lost business. Thriftway attempted to prove damages under its view of an expansive protective covenant, i.e., one that covered both perishable and nonperishable foods and food products as well as those items normally sold in supermarkets or grocery stores that are not eaten.

In light of the Court's assessment of not only the scope of the protective covenant but also of the extent of Thriftway's waiver of the covenant, Thriftway's efforts to establish damages fails.[72] But, even if there had been no partial waiver of the covenant, Thriftway's attempt to prove damages was fundamentally flawed. In order to resolve on a comprehensive basis the dispute among the parties, the Court turns to Thriftway's damages claim.[73]

At about the time NWL opened its store at the Center, Thriftway experienced a decline in sales, all of which it seeks to attribute to NWL's presence. Thriftway premises its calculation of lost profits on that decline in sales and employs an event analysis methodology. Event analysis may be a reasonable methodology for calculating damages attributable to a particular happening. Not only must the event and the consequences, i.e., damages, be temporally and

[71] Proof of damages after May 2004 was precluded because of Thriftway's untimely production of its projections of future lost profits.

[72] For clarity and simplicity, the Court uses the data relied on by the parties who were debating the question based on a potentially broader covenant.

[73] This effort may serve another purpose: even though NWL's operations, including its sale of items not subject to the protective covenant, may have adversely affected Thriftway's business, Thriftway has grossly overstated the extent of any harm.

logically connected, but also other potential causes of similar consequences must be excluded or otherwise factored into the analysis. Thriftway's sales during the period of May 2003 through May 2004 were $540,218 less than its sales for the period of May 2002 through May 2003. Thriftway blames the entire decline in its sales on NWL's competition. Through reference to its average cost of goods sold, Thriftway claims that its profits on these "lost sales" would have been $129,036. Thriftway's attempt to prove damages, however, fails for several reasons: (1) a number of other causes likely contributed to the decline in its sales and, thus, the fundamental premise upon which its event analysis rests is not supported by the facts; (2) the sales data which it used reflect many items not protected by the covenant or not sold by NWL; and (3) regardless of the scope of its waiver, it made no effort to account for the baseline of food sales in which it had acquiesced, either at the Center in general or, more specifically, by Ames.[74]

a. *Thriftway Cannot Isolate NWL's Opening from Other Negative Developments*

Thriftway's efforts to prove damages based on an event analysis methodology are inadequate because Thriftway is unable to separate the effects of

[74] Thriftway's damage calculations depend, first, on ascertaining NWL's effect on its sales and, then, the impact of lost sales on its profits. The major shortcoming is Thriftway's failure to attribute, in a quantifiable and credible fashion, a loss of sales to NWL.

different events that occurred at the same time.[75] As Mr. Shopa testified, "I'm at a loss with how to go about an accurate way to ascribe or apportion damages to any one of these [alternative or contributing reasons for Thriftway's losses]. There's no way that I could see to do it."[76] There are three separate and distinct causes that contributed to Thriftway's loss of sales and that were not accounted for in Thriftway's damages calculation: (1) increased competition in the area and within the Center; (2) the bankruptcy of Fleming; and (3) a major construction project on Basin Road (the road on which the main entrance to the Center is located). Each of these potential causes will be discussed in turn.

(i) Other Competition and Declining Sales

Thriftway's sales began declining even before NWL opened on May 20, 2003. For example, it experienced declining sales for four consecutive weeks and declining customer counts for six consecutive weeks before NWL began its operations.[77]

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[75] "The plaintiffs must show, if they can, that they have been deprived of profits by reason of the competition of the defendants. . . . The measure of damages is the loss sustained by the plaintiffs by reason of the violation by the defendants of their agreement." *Scotton v. Wright*, 121 A. 180, 185 (Del. Super. 1923).

[76] Trial Tr. at 523 (testimony of T. J. Shopa, Defendants' damages expert witness).

[77] DX 10, DX 11, PX 14, PX 15. In addition, of the 20 weeks leading up to NWL's opening, sales were down for 11 of those weeks and customer counts were down for 12 weeks. Comparing weekly sales numbers from year to year is not as helpful as when the sales are compared over a longer term. Bad weather or holidays may have an impact on the sales in any given week. Although projecting continued declines based on these data cannot be done with great confidence, they do demonstrate clearly that other factors were adversely affecting Thriftway's sales around the time of NWL's arrival at the Center. Moreover, one must be careful in reviewing weekly sales and weekly customer data because there usually will be data

Thriftway's customers had several options for their grocery items.[78] Most of these competitors had been operating before NWL opened, and there was no massive exodus of customers from Thriftway to competitors; instead, there were small decreases.[79] When disruptions such as road construction or the bankruptcy of Thriftway's supplier occurred, the customers in Thriftway's area had other, more easily-accessible options if they grew dissatisfied with Thriftway.

In terms of internal competition at the Center, Dollar Tree's presence—and close proximity to Thriftway—is alleged to have been a cause of Thriftway's lost sales. In the agreement between Dollar Tree and Thriftway, Dollar Tree was limited to 800 square feet of retail area for food sales; was prohibited from selling fresh produce, meat, bakery, dairy, or frozen items; and agreed not to carry certain private brand labels.[80] Dollar Tree has generally operated within this agreement.[81] Although Dollar Tree's business does not offer the consistency of products of a supermarket and often carries "distressed" items, Dollar Tree has an expansive

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points, if taken out of context which can be employed to support almost any conclusion. Nevertheless, NWL convincingly points out that Thriftway's customer count for the week of April 26, 2003, only a month before NWL's opening, was its lowest customer count since the week of January 6, 2001. DX 12; PX 15.

[78] Trial Tr. at 346 (testimony of Burt Flickinger, Thriftway's food industry expert witness). The choices included Pathmark, Save-A-Lot, Acme, Superfresh, and BJ's. *Id*. at 346-47.

[79] *See* PX 15.

[80] JX 3.

[81] Trial Tr. 558 (testimony of Edmund Mitchell, store manager, Dollar Tree).

selection of food that includes many items sold by Thriftway.[82] Thus, Dollar Tree's presence at the Center had *some* negative impact on Thriftway's sales.

(ii) Fleming's Bankruptcy

A second cause of Thriftway's decrease in sales was the bankruptcy of Fleming in April 2003. Fleming was Thriftway's primary supplier and, as with the loss of any major supplier, its bankruptcy came with consequences.[83] As Conrad Stephanites, the Landlord's expert, opined: "Good wholesalers and good supermarket operators have a very unique relationship. They usually stay together for years. . . . [L]eaving a supplier, leaving a wholesaler—I have been on both ends of it—is like a divorce. It's ugly. You change everything about the way you run the store."[84]

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[82] On December 3, 2004, the Court visited the Center at the request of the parties. Some observations that the Court made put evidence from the trial into context and other observations constituted substantive evidence. Both the contextual assistance and factual background gained from the site visit were helpful to the Court and may be considered in the resolution of this dispute. *See Jackson v. Copeland*, 1996 WL 74712, at *1 (Del. Ch. Jan. 11, 1996), *aff'd*, 683 A.2d 58 (Del. 1996) (TABLE) ("The viewing requested, and consented to, by the parties constituted an additional fact finding opportunity by the Court albeit uncomplicated by cross-examination of the Court's ability to see what there was to be seen and to draw logical and reasonable inference from both those sights and the extraordinary experience of riding in the Plaintiffs' counsel's vehicle over the subject matter of this neighborhood dispute. Much like a jury (sitting as a trier of fact), observations were necessarily made and conclusions drawn from the experience that constitute 'evidence.' Those evidentiary observations and conclusions upon which I relied in resolving this matter on November 29, 1995 are clearly set forth in writing, are a part of the record and constitute evidence in this case. If the parties did not contemplate they would be, why have a viewing of the premises by the trier of fact in the first place? While the Defendants' wish to quarrel with the observations made as well as the conclusions drawn from them, their contentions are wholly without merit.").

[83] Fleming's problems in reliably supplying Thriftway had begun as early as 2001.

[84] Trial Tr. at 735 (testimony of C. Stephanites).

Problems that usually result from a store having to change its supplier are labor issues,[85] label issues,[86] and consistency of selection.[87] Mr. Grisillo testified that the Fleming bankruptcy cost Thriftway minimal damages only,[88] and he never told his expert witnesses that the Fleming bankruptcy had any impact on Thriftway's sales; this, in turn effected his experts' testimony regarding the impact (both quantitatively and qualitatively) that Fleming's bankruptcy had on Thriftway's sales and profits.[89]

Mr. Grisillo's testimony and, thus, Thriftway's claim for damages were discredited by an Objection to Cure signed by him and filed on Thriftway's behalf in the Fleming bankruptcy proceeding. After Mr. Grisillo testified that he "[n]ever told anybody" that "Fleming had an impact on [Thriftway's] losses[,] sales or

[85] *Id.* at 735 (testimony of C. Stephanites).

[86] *Id.* at 737-38 (testimony of C. Stephanites). These "label issues" consist of UPC codes having "internal numbers" for the supplier. The "internal numbers" are different for each supplier and switching suppliers would result in supermarkets having to "physically go and take those tags off, because you use an electronic machine to order the product. The machine will not work. . . . You have to go through an entire store, and you have to reallocate. You have to place the new items. You have to take the Fleming private label and discard it." *Id.* at 737.

[87] *Id.* at 738 (testimony of C. Stephanites).

[88] *See, e.g.*, *id.* at 159 (testimony of A. Grisillo) (denying that Fleming had any material impact). Mr. Grisillo's testimony was unambiguous: "Q. [By Mr. Mondros] Did you ever tell anybody that Fleming was causing you lost profits or lost sales or lost customers? A. No, because it really wasn't anything out of the ordinary operation of a business." Trial Tr. at 107.

[89] *See, e.g.*, *id.* at 159-60 (testimony of A. Grisillo). Mr. Grisillo stated that Fleming's bankruptcy had only a minimal effect on his business because he "double tagged" all the items in Thriftway and located a supplemental supplier. *Id.* at 84-85 (testimony of A. Grisillo). The supplemental supplier was White Rose, to which Thriftway eventually transitioned in June 2003. *Id*. at 419 (testimony of J. Zumba).

damages,"[90] the Landlord brought forth the Objection to Cure on July 24, 2003, which Thriftway had previously submitted to the Bankruptcy Court and which set forth "estimates that its post-petition damages for the period from April 1, 2003 through July 15, 2003 (because of problems with Fleming) total an additional $69,800."[91] The document further states: "[Fleming's] service level[] deficiencies resulted in lost sales, customer dissatisfaction and the loss of customers, excessive labor costs and additional significant other damages."[92] Interestingly, if one prorates the damages that Thriftway reported to the Bankruptcy Court over the time period covered, the daily amount of harm which Thriftway represented to the Bankruptcy Court was caused by Fleming's Bankruptcy is nearly double that which it now claims was caused by NWL. On a daily basis, Fleming's bankruptcy, as alleged in the Bankruptcy Court filings, cost Thriftway $658 each day in damages, while the daily damage caused by NWL, using Thriftway's expert's numbers, is $353 per day.[93] The timeframe covered by the Objection

[90] Trial Tr. at 160 (testimony of A. Grisillo).
[91] DX 46 (Combined Objection to Cure Amount and to Assignment of Executory Agreements (the "Objection"), *In re Fleming Companies, Inc.*, Case No. 03-10945 (Bankr. D. Del. July 24, 2003)) ¶ 6. Thriftway's total claim against Fleming was in excess of $325,000. Fleming and Thriftway resolved their dispute through the forgiveness of a $330,000 debt owed by Thriftway to Fleming. Trial Tr. at 165-67.
[92] DX 46 ¶ 5.
[93] The daily damages attributed to Fleming from April 1, 2003 to July 15, 2003 was $658.00 ($69,800 over 106 days). The average daily claim of Thriftway as set forth in this action is $353.00 ($129,036 over 366 days).

(April through July of 2003) coincided with the period when NWL entered the Center.

Thriftway argues that the Objection is not reliable because it is unclear whether it relates to sales. Thriftway, however, ignores that it squarely represents that Fleming's problems resulted in "lost sales, customer dissatisfaction and the loss of customers, excessive labor costs and additional significant other damages."[94] These all necessarily factor into Thriftway's declining sales and profits. The Objection clearly and unambiguously demonstrates the substantial harm that Flemings' problems and its ultimate bankruptcy had for Thriftway. That Fleming discontinued its supply of product to Thriftway shortly after NWL's opening is substantial proof that Thriftway's problems at that time cannot fairly be attributed exclusively (or materially) to NWL.[95]

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[94] DX 46 ¶ 5.

[95] The Landlord seeks dismissal of this action under the unclean hands doctrine.

> "Reprehensible conduct on the part of a party litigant which violates the fundamental concepts of equity jurisprudence will not be tolerated. A Court of Equity is a Court of Conscience. Righteous conduct and fair dealing by the litigants is the very backbone of the maxim. Litigants seeking the aid of the Court must not only due so with clean hands, but must keep them clean after entry and until the final determination of the cause."

Bodley v. Jones, 59 A.2d 463, 470 (Del. 1947). *See also Morente v. Morente*, 2000 WL 264329, at *1 (Del. Ch. Feb. 29, 2000). The Landlord contends that the testimony of Mr. Grisillo that Fleming's bankruptcy caused no harm to Thriftway is so at odds with his representations to the Bankruptcy Court that the Fleming bankruptcy caused damages measured in the hundreds of thousands of dollars to Thriftway that this Court should sanction that conduct by dismissing this action. The Court is unable to reconcile Mr. Grisillo's testimony and Thriftway's claim for damages in this Court with the verified pleadings signed by Mr. Grisillo and filed by Thriftway in Fleming's bankruptcy. It is, however, a sufficient consequence of Mr. Grisillo's conduct that the underpinning for Thriftway's damages claim has been substantially eroded. Mr. Grisillo's

Additionally, Thriftway points to two other potential problems with the Objection: (1) that it was not produced during discovery; and (2) that it was introduced for impeachment purposes only. The argument that this document is inadmissible because it was not produced during discovery fails because it was Thriftway's document (signed by Mr. Grisillo himself) and Thriftway has not pointed this Court to any discovery request seeking a document of this nature from the Landlord. Second, the Objection was admitted for impeachment purposes only and it is only considered as such. However, it bears reiterating that this document completely undermines Thriftway's damage calculation and the credibility of Mr. Grisillo's testimony that Fleming's bankruptcy (as well as the balance of the adverse factors considered here) had little or no impact on Thriftway's business.

(iii) Road Construction

Thriftway, in its damage calculations, did not account for the adverse consequences resulting from a major construction project involving Basin Road which provides the main entrance to the Center.[96] The construction project had a

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conduct not only compromised Thriftway's efforts to prove damages, but it also raises substantial doubt about much of the expert testimony sponsored by Thriftway. For example, Mr. Grisillo told both Mr. Claybrook and Mr. Flickinger that the Fleming bankruptcy caused Thriftway no harm. (Trial Tr. at 159-60). Those experts were entitled to rely upon what Mr. Grisillo told them. However, because what Mr. Grisillo told them is materially inconsistent with his representations to the Bankruptcy Court, their opinions, through no fault of the experts, become entitled to substantially less weight.

[96] *See* DX 27 (a Delaware Department of Transportation ("DelDOT") Construction Project Brochure).

negative effect on the Center during the period for which Thriftway seeks damages[97] because, as the Basin Road entrance grew more congested, the Center became less accessible.[98] Although Thriftway contends that it did not suffer a significant harm from the road construction surrounding the Center, the Court concludes that the Basin Road construction had some adverse effect on Thriftway's sales and customer count. To begin, the road construction affected the other stores at the Center. Thriftway argues that the construction actually helped its customer count because drivers would cut through the Center to avoid traffic and because it was the only "destination store" at the Center.[99] An example may clarify Thriftway's argument: although consumers might not fight road construction to

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[97] *See, e.g.*, Trial Tr. at 618-19 (testimony of A. Pilevsky). The Defendants contend that the project began at the end of March 2003 and was completed in September 2004 (thus spanning Thriftway's damages period), but the record does not establish the duration of the project with sufficient specificity. According to DX 27, the DelDOT brochure, construction was to start in March 2003 and conclude in eight months.

[98] *See also, id.* at 540 (testimony of E. Mitchell) ("There was lane restrictions at different points. There was no access one way left or right into the shopping center. They took four lanes to two lanes. As the paving project expanded, they had traffic stopped at different times, which would bottleneck people from getting up and down Basin Road. . . . [Customers told me they] were unhappy with the fact that the project was going on, and they did not want to sit in traffic that was out there just to come to shop at the Dollar Tree.") In addition, other tenants called the Landlord and complained. Trial Tr. at 619 (testimony of A. Pilevsky).

[99] *Id.* at 82-83 (testimony of A. Grisillo). Thriftway denies that the Basin Road construction had more than a "negligible" impact on its sales, *id.* at 191 (testimony of A. Grisillo), as it contends that a "destination" store, such as a supermarket, is less impacted by construction. *Id.* A "destination store" is a store where consumers must shop to obtain essentials (e.g., milk), as opposed to a "nondestination store" where it is not essential for customers to shop (e.g., rental videos at Blockbuster).

Additionally, as apparent from the Court's site visit, the parking lot at the Center is not easy to navigate, as there is not a clearly defined route to travel across it. If drivers were cutting through the parking lot to reduce the inconvenience from the roadwork, one would expect that the parking lot would become even more difficult to navigate and burdened by increased congestion.

rent a movie (a discretionary expenditure), a consumer still must go to the grocery store to purchase food and other essentials. However, Thriftway's argument is undercut by the number of competing grocery stores selling similar products in the vicinity but which were not affected by the road construction. Thus, Thriftway had no economic power over consumers that would require them to face road construction in order to shop for essentials at Thriftway, as contrasted with any other local store where essentials could be purchased. Finally, the Court credits the testimony of Mr. Shopa, based on his years of advising various businesses, that road construction affecting access to a commercial venture can be expected to have adverse consequences for both sales and profits.[100]

b. *Thriftway's Damages Calculations Include Items Not Covered by Thriftway's Protective Covenant and Items Not Sold by NWL*

Thriftway's damages calculation compares Thriftway's total sales between May 2003 and May 2004 with its sales level from the previous year. The obvious problem with this methodology is that it includes items that are *not* protected by Thriftway's covenant and items not sold by NWL.

(i) Items Not Covered by the Protective Covenant

By premising its damages upon all of its sales, including an extensive list of items not covered by the covenant, Thriftway has grossly overstated its claim and

[100] Trial Tr. at 496-97 (testimony of T. J. Shopa).

has provided the Court with no practical basis for arriving at a more realistic number.

(ii) Items Not Sold by NWL

Thriftway sells many items that NWL does not carry. First, Thriftway carries more brands than NWL. For example, Thriftway carries a wide range of cereal; NWL sells but a few. Second, and more importantly, there are many types of food carried by Thriftway that are not carried by NWL or are only offered by NWL at a minimal level. These include dairy (other than limited milk, eggs, and orange juice selections) fresh meats, fresh produce, and frozen foods. Thriftway, however, has accounted for none of these products in its damages calculation. Perhaps a customer would buy cereal at NWL even though she would have preferred a cereal available at Thriftway, but, as to those categories of food not carried by NWL, there simply is no showing that any reduction in Thriftway's sales can be blamed on NWL.[101]

[101] It is somewhat surprising that Thriftway chose not to emphasize its historic sales data for specific product classifications. The Defendants suggest that this may reflect a conscious litigation strategy by Thriftway, because reduction in sales across the various product lines carried by Thriftway would suggest that NWL had relatively little impact, or had no impact, on the reduction in sales. Alternatively, the Defendants posit that any effort to focus on those products carried by NWL would lead to such a small damages figure as to eliminate any economic incentive that may have prompted Thriftway to bring this action.

The Defendants, however, did submit Thriftway's weekly sales reports, with daily breakdowns of sales on a category-by-category basis. DX 31. The Court reviewed those reports and compared them over the relevant periods. That effort did not change the Court's conclusion.

c. *A Few Words About the Consequences of Variable Costs*

Thriftway relies upon expert testimony to convert the lost sales it attributes to NWL's competition into lost profits. Montague Claybrook, a certified public accountant, testified that Thriftway suffered a loss of profits of "approximately $129,036 between the end of the NWL store opening and the end of May 2004."[102] Mr. Claybrook used an event analysis methodology: he subtracted Thriftway's preceding 52-week sales in May 2004 from its preceding 52-week sales in May 2003. He then multiplied the difference in sales by the average cost of goods sold (76.1%) to establish the costs that would have been incurred if sales had not declined. Those costs were then subtracted from the "lost sales" to establish "lost profits" of $129,036. The Defendants' expert witness—Thomas John Shopa, also a certified public accountant—used the same methodology, but arrived at a different number for Thriftway's lost profits: $62,935.[103] Mr. Shopa attributed this discrepancy to Mr. Claybrook's failure to account for variable costs (namely, labor and operating costs) in his analysis. Mr. Claybrook believed that they would adjust with the downturn, but Mr. Shopa adjusted the projection of costs upward because he concluded that the decline in costs would lag behind the decline in sales.

[102] Trial Tr. at 211 (testimony of Montague Claybrook, Thriftway's expert witness).
[103] Mr. Shopa, for these purposes, assumed that all of the "lost sales" could be attributed to NWL. *Id.* at 484 (testimony of T. J. Shopa).

Although adjustment for variable expenses may be "[a] key aspect of a lost profits analysis,"[104] the Court need not resolve the debate because of Thriftway's failure to succeed during the preliminary stage of the analysis—establishing lost sales fairly attributable to NWL's activities in violation of the protective covenant.

d. *Costs Necessary to Recover Lost Business*

Thriftway presented expert testimony that it would cost between $850,000 and $900,000 in advertising and pricing programs over a two-year period commencing in the spring of 2004 to reestablish its store count (i.e., the number of customers lost).[105] For the reasons set forth above, the reduction in Thriftway's customer count has not been shown by Thriftway to be fairly attributable to the opening (or operation) of NWL.[106] Because Thriftway has not proven that NWL is responsible for the reduction in its customer count, it follows that no damages are warranted.[107]

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[104] *Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 858 A.2d 392, 425 (Del. Ch. 2004), *rev'd in part on other grounds*, 872 A.2d 944 (Del. 2005).
[105] Trial Tr. at 310-12 (testimony of B. Flickinger).
[106] Moreover, it is difficult to reconcile Thriftway's reduced customer count with the fact that NWL does not carry those core products—fresh meat, produce, refrigerated items—that most shoppers purchase on a regular basis. If the customer count had not changed appreciably but sales had declined substantially, one could reasonably infer that shoppers were buying the products sold by NWL at NWL and then completing their shopping at Thriftway. This view of the reduction in customer count suggests—although it does not clearly prove—that Thriftway was losing shoppers to other supermarkets.
[107] The Court needs not, and thus does not, assess the reasonableness of Thriftway's claim if, in fact, NWL had caused an appreciable decline in its customer count.

In summary, Thriftway has failed to show that NWL caused it quantifiable damages, either in terms of loss of profits or the cost to regain loss of customers. The burden, of course, is on the plaintiff to show damages.[108] In terms of lost profits, Thriftway's damage calculation was inflated by an overly expansive[109] and overly simplistic[110] methodology. In terms of loss of customers and profits, Thriftway's argument that competition from Dollar Tree, the Basin Road construction, and, most importantly, the Fleming bankruptcy, did not have any effect on its sales or customers is unpersuasive. These events had *some* meaningful impact on Thriftway's customer count and sales and, in the face of Thriftway's representation to the Bankruptcy Court regarding Fleming's bankruptcy, assertions to the contrary from Thriftway here have little credibility.[111] Accordingly, Thriftway has not met its burden of proving damages.

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[108] *See, e.g.*, *Kronenberg v. Katz*, 872 A.2d 568, 609 (Del. Ch. 2004) ("Under Delaware law, plaintiffs must prove their damages with a reasonable degree of precision and cannot recover damages that are merely speculative or conjectural.") (internal quotations omitted).

[109] By including grocery products in the term "food or food products intended for off-premises consumption," as well as nonperishable food items for which the covenant had been waived, the calculation was overexpansive.

[110] By simply looking at the decrease in sales of all products, and not products sold by NWL or protected by Thriftway's protective covenant, even if broadly interpreted, the calculation was also oversimplistic.

[111] Thriftway's credibility is further undermined by its insistence that every penny of lost sales must be attributable to NWL. It is unreasonable to contend that the other factors reviewed above had no impact. If there is a rational approach for allocating the reduction in sales across the various factors, Thriftway has not proposed one. The impression—it may be too much to call it a finding of fact—that one draws from the evidence is that NWL had a relatively small (but, from the record, unquantifiable) net effect on Thriftway. A consumer could not do the "weekly shopping" at NWL because of the narrow inventory—no fresh products except for some milk and juice. The frequency with which consumers would go all the way to the other end of the

3. Nominal Damages

"Even where actual damages cannot be demonstrated, the breach of a contractual obligation often warrants an allowance of nominal damages."[112]

> 'Nominal' damages are not given as an equivalent for the wrong, but rather merely in recognition of a technical injury and by way of declaring the rights of the plaintiff. Nominal damages are usually assessed in a trivial amount, selected simply for the purpose of declaring an infraction of the Plaintiff's rights and the commission of a wrong.[113]

Center to purchase separately some canned goods, such as tuna, is not clear. Yet it is also likely that some of the food bought at NWL was by consumers who otherwise would have made the purchase at Thriftway. NWL, however, likely had a comparable, if not greater, consequence in terms of other "household consumable products"—detergents, cleaning supplies, and the like—and those items were not within the scope of the protective covenant. Moreover, a large anchor store left empty by Ames was a drain on the Center and even Thriftway likely suffered as a result of its demise. A busier shopping center—as a result of NWL's presence—may well have brought some countervailing benefit to Thriftway. In sum, quantification of the harm here is difficult. It is not a matter of demanding precision from Thriftway because it would be sufficient if Thriftway could provide a reasonable estimate or a reasonable basis for determining the losses that it may have suffered. Thriftway, however, has failed to meet this burden.

The initial report of Mr. Claybrook (Thriftway's damages expert) pegged damages at $340,000, but, after being advised of a mistake, Mr. Claybrook had to reduce that number by two-thirds. Trial Tr. at 207. As noted above, however, even with that adjustment, his efforts at determining damages or in providing the Court with a basis for making such a determination fail because of a number of factors, including Thriftway's failure to acknowledge the existence of other credible causes explaining the loss of sales and, thus, the unreasonable assertion that NWL was solely responsible for the reduction in sales, and, most importantly, the inconsistency between Mr. Grisillo's testimony and his representations to the Bankruptcy Court. Delaware Rule of Evidence 702 requires the Court to determine if an "expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline." *MG Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 523 (Del. 1999) (internal punctuation omitted). Mr. Claybrook's opinion does not fully meet that standard here because he failed to exclude items that NWL does not sell, failed to exclude items which NWL sells but which are not within the scope of the protective covenant, and relied upon Mr. Grisillo's statement that Fleming caused no harm to Thriftway. Thus, his opinion is entitled to little or no weight and the Court, thus, is left without any sensible means of arriving at a number. The "right" number, the Court nonetheless is convinced, would be a small one.

[112] *Palmer v. Moffat*, 2004 WL 397051, at *4 (Del. Super. Feb. 27, 2004).

[113] *USH Ventures v. Global Telesystems Group, Inc.*, 796 A.2d 7, 23 (Del. Super. 2000).

The Landlord's failure to protect Thriftway's rights under its protective covenant warrants nominal damages. As discussed earlier, the Landlord was aware of Thriftway's covenant and consented to the operation of a store where food sales, both quantitatively and qualitatively, significantly exceeded the sales from other stores ever operating in the Center. However, while Thriftway has shown that the Landlord breached its covenant with Thriftway, Thriftway has fallen far short of meeting its burden to show actual damages. Accordingly, "for the purpose of declaring an infraction of the Plaintiff's rights and the commission of a wrong," the Court awards Thriftway one dollar in nominal damages.

D. *Injunctive Relief*

In order to earn a permanent injunction, a plaintiff, in addition to achieving actual success on the merits of its claim, must also demonstrate that "it will suffer irreparable harm if injunctive relief is not granted," and that "the harm that would result if an injunction does not issue outweighs the harm that would befall the opposing party if the injunction is issued."[114]

[114] *Draper Commc'n, Inc. v Del. Valley Broadcasters LP*, 505 A.2d 1283, 1288 (Del. Ch. 1985). *But see* 1 DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §§ 12:2[d] at 12-26, 12-2[f] at 12-31 (2005) (acknowledging the permanent injunction standard set forth in *Draper* while observing that "[w]here final injunctive relief is sought and the applicant has established the right that is to be enforced and the existence of irreparable harm, the Court of Chancery's discretion to decline to award an injunction based on a balancing of the equities in favor of the defendant is substantially circumscribed.").

Thriftway has achieved actual success on the merits of its claim to the extent that NWL has been selling milk, eggs and refrigerated orange juice (all, of course, perishable foods). Although NWL's sales of these items may be small and irregular,[115] Thriftway is still the beneficiary of a covenant that precludes those sales at the Center. Calculating the damages suffered by Thriftway from those sales is not an easy or reliable effort. Not only do the potential lost sales have a direct impact, but the sales of products such as milk at a deep discount, do have collateral consequences, such as loss of customers.[116] It is not that the irreparable harm (to the extent that that concept can be quantified) will be great; it is that Thriftway has demonstrated that the sale of such products will likely cause it harm—because of the violation of its protective covenant—that cannot fully and completely be remedied by an award of damages. In short, in the absence of permanent injunctive relief, Thriftway will suffer irreparable harm if NWL is allowed to continue selling its "high velocity" dairy products. As to a balancing of the equities, the sale by NWL of dairy products appears to be an insignificant portion of its marketing efforts. The Landlord has articulated no reason as to why

[115] The value of the sales is not clear. Perhaps the sale of these items would be best characterized as "incidental." Indeed, when the Court made its site visit, NWL had no milk in its coolers.
[116] *See, e.g.*, Trial Tr. at 197 (testimony of A. Grisillo); *id*. at 383-84 (testimony of B. Flickinger). As Mr. Flickinger observed, NWL offers "the best selling items of milk, eggs, and orange juice" from a supermarket's dairy department. *Id*. at 383.

prohibiting the sale of dairy products would work a hardship on it.[117] It must be remembered that Thriftway has contractual rights; neither the Landlord nor NWL is entitled to deprive Thriftway of those significant commercial rights, to the extent that they now exist.[118]

In sum, Thriftway has earned permanent injunctive relief preventing NWL from selling perishable dairy products[119] at the Center.[120]

IV. CONCLUSION

For the reasons set forth above, Thriftway is entitled to limited permanent injunctive relief against NWL and the Landlord prohibiting the sale by NWL at the Center of refrigerated dairy products, including milk, eggs, and orange juice. Otherwise, Thriftway's application for permanent injunctive relief is denied. Additionally, although the Landlord violated Thriftway's protective covenant, Thriftway has not proved any quantifiable damages and, therefore, Thriftway is not entitled to monetary damages from the Landlord. However, in recognition of the breach of the Landlord's protective covenant, the Court awards Thriftway one

[117] To the extent that it may expose the Landlord to a claim for damages from NWL, that simply is the price the Landlord must pay for overlooking its contractual duties to Thriftway.

[118] It perhaps should be reiterated that the protective covenant not only shields Thriftway from competition from the sale by others of dairy products, but also the sale by others of items such as fresh meats, produce, fresh seafood, and deli products.

[119] This includes refrigerated orange juice which is sold in the dairy departments of supermarkets.

[120] The duration of the injunction cannot be determined from the current record. *See supra* note 64.

dollar in nominal damages. No costs are assessed against NWL.[121] Whether Thriftway is entitled to an award of attorneys' fees and costs under paragraph 21 of the Thriftway Lease is a question that will be reserved pending additional argument from the parties.[122]

Counsel are requested to confer and to submit an implementing form of order within ten days.

[121] Under Court of Chancery Rule 54(d), the award of costs is in the discretion of the Court. It is difficult to consider Thriftway as a prevailing party when, after all that has occurred in this proceeding, it achieves an award of only nominal damages and an injunction against NWL's intermittent and minimal sale of a few dairy products. Moreover, Thriftway's conduct in this litigation—specifically, when the testimony given regarding the impact of the Fleming bankruptcy is contrasted with DX 46 as filed in the Bankruptcy Court—counsels against any award of costs from NWL.

[122] Following post-trial oral argument, the Landlord sought leave to supplement the record with new evidence (Thriftway's recent excess rent or "override" calculations) demonstrating that Thriftway's sales have been increasing. That application is denied. The trial was, of course, complete, but, more significantly, the increase in sales by Thriftway could be the product of a number of factors unrelated to NWL's operations that would have occurred in any event. Without an inquiry into the possible causes for the increase, an effort that does not appear to be justified, no inferences that might inform the Court's judgment in this matter can reasonably be drawn.