IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

****

GOURMET GALLERY CROWN BAY, INC., and ZAKARIA SUID,	)	**CASE NO. ST-2014-CV-513**
Plaintiffs,	)	**ACTION FOR DECLARATORY JUDGMENT, INJUNCTION REFORMATION, RESCISSION ESCROW OF RENT AND DAMAGES**
v.	)	
CROWN BAY MARINA, L.P.,	)	
Defendant.	)	**JURY TRIAL DEMANDED**

MEMORANDUM OPINION

Before the Court is Plaintiffs' Motion for Preliminary Injunction, which was filed on November 7, 2014, and Plaintiffs' Renewed Motion for Preliminary Injunction, which was filed on January 29, 2015 (collectively, Plaintiffs' "Motions"). Defendant has filed responses in opposition to both of Plaintiffs' Motions, and Plaintiffs have filed a reply to Defendant's Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction. The parties came before the Court for an evidentiary hearing on Plaintiffs' Motions on May 12–13, 2015.

Plaintiffs' Motions will be denied because Plaintiffs have not made a clear showing that they are entitled to injunctive relief. Although Plaintiffs have demonstrated a reasonable probability of success on the merits, Plaintiffs have not demonstrated that they will suffer irreparable harm, and Plaintiffs have introduced no evidence that the balance of hardships weighs in favor of issuing an injunction. Finally, the public interest would be harmed if this Court issued an injunction that will result in the closure of an ongoing business. Accordingly, the injunction requested by Plaintiffs shall not issue.

BACKGROUND

This case concerns an alleged violation of a restrictive use clause contained in a commercial lease agreement. Defendant is party to a lease agreement (the "Lease Agreement") with Plaintiff Gourmet Gallery Crown Bay, Inc. ("Gourmet Gallery"). Gourmet Gallery's president and chief executive officer is Plaintiff Zakaria Suid ("Suid").[1] The Lease Agreement was entered into on or about June 7, 1991,[2] and provides that Defendant, as landlord,[3] shall lease space at Crown Bay Marina to tenant Gourmet Gallery in exchange for period payments of rent and other charges. The purposes for which the demised premises may be used are defined in Exhibit E to the Lease Agreement ("Exhibit E"). Exhibit E states that the demised premises shall be used:

[1] Compl. ¶ 2a.
[2] Prelim. Inj. Hrg. Joint Ex. 1.
[3] Defendant is a successor-in-interest to Crown Bay Marina Joint Venture-I, the original landlord.

for a gourmet grocery store to include, but not necessarily limited to, the following merchandise:
- Gourmet cooking oil and spices
- Wine, beer, liquor, sodas
- Deli and bakery
- Fresh and frozen meat
- Tobacco products
- Magazines and newspapers
- High quality canned and bottled products (e.g. gourmet jellies and vegetables[)]
- Fresh pastas
- Custom order department (i.e. charter yacht provisioning)[4]

Exhibit E then recites the restrictive use clause at issue, which states that:

Landlord is not providing Tenant with any exclusive right to the sale of the above described merchandise except that, as long as Tenant provides such goods and services with displays and inventories appropriate to Tenant's Crown Bay Marina[,] Landlord agrees to not lease space in the Marina for a store which shall carry groceries, liquor, produce, drugs, delicatessen, fish and meat or the items listed above.[5]

Following the text of the restrictive use clause, Exhibit E provides three exceptions:

"Nothing shall prohibit Landlord from leasing premises in the Marina to: (a) a hotel operator . . . ; (b) any tenant who shall operate its leased premises as a bar or restaurant . . . ; and (c) tenants that carry specially packaged food products or liquor as novelty or gift items, so long as such products shall not represent a principal percent (in excess of 30%) of its overall inventory."[6]

Nowhere in the Lease Agreement are the terms "grocery," "groceries," "store," or "restaurant" defined. The Lease Agreement has been subject to five amendments, but the provisions contained in Exhibit E remain in force.

On September 1, 2014, Defendant entered into a lease agreement with third-party Scoops & Brew, LLC ("Scoops & Brew").[7] [8] Scoops & Brew operates out of the gazebo located in Crown Bay Marina. Copies of photographs attached to Defendant's Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction show some of the items sold by Scoops & Brew: milkshakes in at least six flavors; a variety of baked goods; boxes of brand-name tea; various snack bars; soft-serve ice cream; both regular and vegan gelato; at least seven flavors of sorbet; and various brews

[4] Prelim. Inj. Hrg. Joint Ex. 2.
[5] *Id.*
[6] *Id.*
[7] Crown Bay Marina Commercial Space Lease Agreement, Prelim. Inj. Hrg. Joint Ex. 9, at 1.
[8] Following the Court's request, the parties briefed the issue of whether Scoops & Brew's joinder was required. Both parties took the position that Scoops & Brew's joinder was not necessary.

of coffee.[9] During the evidentiary hearing held on May 12–13, 2015, Defendant also introduced evidence that Scoops & Brew would begin selling milkshakes containing alcohol.[10] The lease agreement between Defendant and Scoops & Brew states that the permitted use of the premises leased by Scoops & Brew is: "Ice Cream Parlor, Specialty Coffee, Logo Merchandise, & Prepared Food Items."[11] A photograph that purports to show Scoops & Brew's business license for 2014 shows that Scoops & Brew is licensed as a "Coffee Shop & Ice Cream Parlor."[12] A photograph that purports to show Scoops & Brew's business license for 2015 shows that Scoops & Brew is licensed as a "Coffee Shop & Ice Cream Parlor," a "Delicatessen," a "Tavern," and one other classification, which is illegible in the photograph.[13]

Plaintiffs argue that, by permitting Scoops & Brew to sell the goods described in the preceding paragraph, Defendant has violated the restrictive use clause contained in Exhibit E. Plaintiffs argue that the goods sold by Scoops & Brew constitute "groceries" within the meaning of Exhibit E, and Exhibit E prohibits Gourmet Gallery from leasing space in the Crown Bay Marina to another tenant that sells groceries.[14] Plaintiffs have further argued that Scoops & Brew is not a restaurant within the meaning of Exhibit E's exceptions to the restrictive use clause.

Plaintiffs have thus petitioned the Court for a preliminary injunction "prohibiting and enjoining [Defendant] from allowing [Scoops & Brew] to sell ice cream, coffee, cakes, desserts, and/or any other grocery items at their Crown Bay Marina location."[15] In the alternative, Plaintiffs request "a mandatory injunction requiring the said Defendant to enforce against <u>all</u> tenants in the Crown Bay Marina, including [Scoops & Brew], the letter and spirit of the restrictions" contained in Exhibit E.[16]

STANDARD FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION.

When ruling on a motion for a preliminary injunction, this Court must consider four factors: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of injunctive relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.[17] A party seeking a preliminary injunction "has the burden of making some showing on all four injunction factors"[18] that amounts to "a clear showing that [it] is entitled to [injunctive] relief."[19]

---

[9] *See* Def.'s Opp. to Pls.' Renewed Mot. for Prelim Inj. Ex. A (purporting to be copies of photographs of the interior of Scoops & Brew, which copies evidence the various items offered at Scoops & Brew).
[10] Prelim. Inj. Hrg. Trans. Vol. II, 261:2–4.
[11] Crown Bay Marina Commercial Space Lease Agreement, Prelim. Inj. Hrg. Joint Ex. 9, at 2.
[12] Prelim. Inj. Hrg. Joint Ex. 10.
[13] Prelim. Inj. Hrg. Joint Ex. 11.
[14] Pls.' Mem. of Law in Supp. of Pls.' Renewed Mot. for Prelim Inj. 1–2.
[15] Pls.' Mot. for Prelim. Inj. 1; Pls.' Renewed Mot. for Prelim. Inj. 1.
[16] Pls.' Mot. for Prelim. Inj. 1 (emphasis in original); Pls.' Renewed Mot. for Prelim. Inj. 1 (emphasis in original).
[17] *3RC & Co. v. Boynes Trucking System, Inc.*, S. Ct. Civil. No. 2015-0016, 2015 V.I. Supreme LEXIS 22, at *5 (V.I. July 23, 2015) (quoting *Marco St. Croix, Inc. v. V.I. Housing Authority*, 62 V.I. 586, 590 (V.I. 2015); *Tip Top Construction Corp. v. Gov't of Virgin Islands*, 60 V.I. 724, 739 (V.I. 2014) (citing *Yusuf v. Hamed*, 59 V.I. 841, 847 (V.I. 2013)).
[18] *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *14.
[19] *Id.* at *18 (quoting *Yusuf*, 59 V.I. at 847) (internal quotations omitted) (alterations in original).

Because "[i]njunctive relief is an equitable remedy,"[20] and "because '[a] court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in [a] particular case,'"[21] this Court must evaluate the movant's showing on all four factors—considering them together and weighing them against each other—in order to determine whether the movant has discharged its burden.[22] Thus, "the showing on the merits may be as minimal as simply making out a prima facie case if the showing on the moving party's likelihood of irreparable harm is strong enough—and the likelihood that the injunction would cause irreparable harm to the nonmoving party is low enough—to outweigh the weaker showing on the merits."[23] Conversely, a showing of irreparable harm is "less decisive where the likelihood of success on the merits is very strong."[24]

ANALYSIS

I. PLAINTIFFS HAVE DEMONSTRATED A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

"In order to show a reasonable probability of success on the merits, [a party does not] need to show that [it] will actually prevail on the merits at trial, or that [its] success is 'more likely than not,' only that [it] has 'a reasonable chance, or probability, of winning.'"[25] At a minimum, a party "must introduce evidence supporting each element of [its] cause of action.[26] "Where the moving party makes out a very strong showing on the merits—for example a clear and convincing one—injunctive relief may still be appropriate even where the moving party's showing of [irreparable harm] is much weaker, so long as the nonmoving party's likelihood of irreparable harm is similarly very low."[27]

Here, Plaintiffs seek damages for Defendant's alleged breach of the Lease Agreement[28] along with other equitable relief.[29] Being equivalent to a breach of contract,[30] Plaintiffs will ultimately bear the burden of proving the existence of a lease agreement, the breach of an obligation arising therefrom, and damages.[31] The parties have stipulated to the existence of the

---

[20] *Id.* at *10.
[21] *Id.* (quoting *Kalloo v. Estate of Small*, 62 V.I. 571, 584 (V.I. 2015)).
[22] *Id.*
[23] *Id.* at *22 (quoting *Nuuanu Valley Ass'n v. City & Cnty. of Honolulu*, 194 P.3d 531, 547 (Haw. 2008)).
[24] *Id.* (quoting *District of Columbia v. Greene*, 806 A.2d 216, 223 (D.C. 2002)).
[25] *Yusuf*, 59 V.I. at 849 (quoting *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011)).
[26] *Id.* (citing *Punnett v. Carter*, 621 F.2d 578, 583 (3d Cir. 1980)).
[27] *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *14 (citations omitted).
[28] Compl. ¶¶ 35–36.
[29] *See id.* ¶¶ 23–34 (containing Plaintiffs' requests for injunctive relief, declaratory relief, accounting, reformation, and rescission).
[30] *Maison La Crepe v. Hilbress Assocs.*, 20 V.I. 106, 108 (V.I. Super. Ct. 1983).
[31] Following the issuance of its opinion in *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), the Supreme Court of the Virgin Islands has never defined the elements of a breach of contract claim without reliance on the Restatements of Law, or precedent derived therefrom. Although other opinions from the Superior Court have found that the elements of a breach of contract claim are so fundamental that no *Banks* analysis is necessary, *e.g.*, *Walsh v. Daly*, Case No. ST-01-CV-165, 2014 V.I. LEXIS 36, at *23–24 n.52 (V.I. Super. Ct. June 18, 2014), this Court disagrees. But this Court's task is greatly simplified by the near-uniform treatment of this cause of action. Courts in this jurisdiction have historically relied on the principles of law summarized in the Restatement (Second) of

Lease Agreement between Gourmet Gallery and Defendant. Thus, the Court's inquiry is confined to whether Plaintiffs have introduced evidence to substantiate Defendant's alleged breach of the Lease Agreement and damages resulting therefrom.

Plaintiffs have introduced this evidence. First, Plaintiffs have introduced evidence that Gourmet Gallery was granted an exclusive right to sell groceries in Crown Bay Marina. Suid testified extensively about the negotiation of the Lease Agreement,[32] explaining that he was induced by Defendant's predecessor-in-interest based upon representations that Gourmet Gallery would be granted exclusive rights to sell groceries in Crown Bay Marina.[33] Suid also testified that he initially wanted to list every item over which Gourmet Gallery would have the exclusive right of sale, but agreed to substitute such a list with the term "groceries" instead.[34] Finally, the very text of Exhibit E states that, "as long as [Gourmet Gallery] provides [the goods and services listed in Exhibit E] with displays and inventories appropriate to . . . Crown Bay Marina[,]" then "[Defendant] agrees not to lease space in the Marina for a store which shall carry groceries . . . ."[35]

Defendant introduced no evidence that Plaintiffs have failed to provide the goods and services listed in Exhibit E "with displays and inventories appropriate to . . . Crown Bay Marina."[36] Nor has Defendant introduced evidence concerning the formation of the Lease Agreement and the meaning of the restrictions set forth in Exhibit E as they were understood by the original parties to

---

Contracts, Section 235. In doing so, courts in this jurisdiction have stated that, "[t]o establish a breach of contract claim, [a party] must prove that a contract existed, that there was a duty created by that contract, that such duty was breached, and that [the party] suffered damages as a result." *E.g.*, *Chapman v. Cornwall*, 58 V.I. 431, 437 (V.I. 2013). Slight variations exist in how the elements for this cause of action are stated in other jurisdictions. *See, e.g.*, *Green v. Trinity International University*, 801 N.E.2d 1208, 1213 (Ill App. Ct. 2003) (requiring a plaintiff to prove offer and acceptance, consideration, and the existence of definite and certain contractual terms); *Magnusson Agency v. Public Entity National Company-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997) (requiring that a plaintiff prove capacity to contract); *Saari v. George C. Dates & Associates*, 19 N.W.2d 121, 122–23 (Mich. 1945) (requiring that a plaintiff prove that it performed any applicable conditions precedent to defendant's performance). However, like the courts of this jurisdiction, courts in other jurisdictions uniformly require proof of a contract, proof of a breach, and proof of damages. *E.g.*, *Ballard Group, Inc. v. BP Lubricants USA, Inc.*, 436 S.W.3d 445, 450 (Ark. 2014); *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009); *Camino Real Mobile Home Park Partnership v. Wolfe*, 1995-NMSC-013, ¶ 27, 119 N.M. 436, 445, 891 P.2d 1190, 1199; *Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45, ¶ 31, 714 N.W.2d 884, 894; *Brew City Redevelopment Group, LLC v. Ferchill Group*, 2006 WI App 39, ¶ 11, 289 Wis. 2d 795, 807, 714 N.W.2d 582, 588. Given that a plaintiff in the Virgin Islands has had to prove the same elements for a breach of contract claim that it would have to prove in any other jurisdiction in the United States, the soundest rule for the Virgin Islands is to perpetuate the rule stated by the Supreme Court of the Virgin Islands in *Chapman v. Cornwall*: to establish a breach of contract claim, a party must prove that a contract existed, that there was a duty created by that contract, that such duty was breached, and that the party suffered damages as a result. 58 V.I. at 437.

[32] *See generally* Prelim. Inj. Hrg. Trans. Vol. I, 279–318 (memorializing Suid's testimony concerning the inducements for him to open a Gourmet Gallery store in Crown Bay Marina).

[33] *Id.* at 299–301.

[34] *Id.* at 300.

[35] Prelim. Inj. Hrg. Joint Ex. 2.

[36] The fifth amendment to the Lease Agreement requires Plaintiffs to make certain capital improvements to Gourmet Gallery, time being of the essence. Defendant introduced evidence that Suid had proposed certain improvements to Gourmet Gallery as a means of recapturing business. Prelim. Inj. Hrg. Trans. Vol. II, 251:1–13. But the record is devoid of evidence that Defendant found Gourmet Gallery's existing displays to be inadequate or inappropriate.

the Lease Agreement.[37] Accordingly, the evidence in the record permits one to conclude that Gourmet Gallery enjoys an exclusive right to sell groceries in Crown Bay Marina.

Next, Plaintiffs have introduced evidence that Defendant violated the Lease Agreement by permitting Scoops & Brew to sell groceries in violation of Exhibit E. The terms "grocery" and "groceries" are not defined anywhere in the Lease Agreement. Suid testified that he considers the items sold by Scoops & Brew to be groceries,[38] and Defendant's witness, Mr. Kosei Ohno ("Ohno") testified that he considered coffee and ice cream—two of Scoops & Brew's products—to be groceries.[39] However, Ohno also testified that the nature of a grocery changes when services are added to it,[40] and Defendant has argued that Scoops & Brew "is not a grocery store."[41] Given this conflicting testimony concerning the nature of the goods sold by Scoops & Brew, there is a dispute over whether Scoops & Brew's goods constitute "groceries" within the meaning of Exhibit E. The question of whether Scoops & Brew sells groceries within the meaning of Exhibit E is thus a determination for the trier of fact.[42] Since it is possible that the trier of fact could find that Scoops & Brew sells groceries within the meaning of Exhibit E, Plaintiffs have adduced sufficient evidence to demonstrate that Defendant has violated the Lease Agreement by permitting Scoops & Brew to operate.

Plaintiffs have also introduced evidence that Scoops & Brew does not fall under any of the three exceptions contained in Exhibit E. First, it is undisputed that Scoops & Brew is not a hotel. Second, the terms "restaurant" is not defined in the Lease Agreement, and the parties have introduced conflicting testimony concerning whether Scoops & Brew is a restaurant within the meaning of the Exhibit E.[43] Given this conflicting evidence concerning the meaning of the term "restaurant," the question of whether Scoops & Brew is a restaurant within the meaning of Exhibit E represents a question of fact for the jury.[44] Thus, there is some probability that a jury could conclude that Scoops & Brew is not a restaurant within the meaning of Exhibit E. Third, although Ohno testified that he believed the specialty packaged items carried by Scoops & Brew account for approximately one percent of Scoops & Brew's inventory,[45] Defendant has not provided an itemization of Scoops & Brew's inventory to substantiate Ohno's testimony. A jury could

---

[37] Defendant did introduce testimony that the Lease Agreement and Exhibit E, "if read properly . . . should work properly," *id.* at 253:14–18, and that these documents permitted Defendant to lease space to a bar or restaurant. *Id.* at 253:19–254:8.

[38] *See id.* at 301–04 (memorializing Suid's testimony concerning "groceries").

[39] *See id.* at 291–92 (memorializing Ohno's testimony that coffee sold in a bag or a can could be considered a grocery, and that ice cream is "one of the items as a grocery item").

[40] *See id.* at 292:6–14 (containing Ohno's testimony that scooping ice cream adds a service to something that would be considered a grocery, thereby changing the character of the thing being sold).

[41] Def.'s Opp. to Pls.' Renewed Mot. for Prelim. Inj. 9.

[42] *Cf. United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 716–20 (V.I. 2011) (holding that the definition of the term "supermarket" was a question of fact for the jury when the parties had advanced competing interpretations of the term).

[43] *Compare* Prelim. Inj. Hrg. Trans. Vol. I, 133–34 (containing Morrissette's definition of a restaurant) *and id.* Vol. II 67–68 (containing Suid's definition of a restaurant), *with id.* at 258:20–260:19 (containing Ohno's explanation of the research he conducted into the definition of the term "restaurant") *and id.* at 260–65 (containing Ohno's explanation of why he believes Scoops & Brew is a restaurant). Owing to the objection by Plaintiffs' Counsel, which was sustained by the Court, the forgoing citation does not reference any discussion of a letter proffered by Defendant from legal counsel at the National Restaurant Association.

[44] *Cf. United Corp.*, 55 V.I. at 716–20 (holding that the definition of the term "supermarket" was a question of fact for the jury when the parties had advanced competing interpretations of the term).

[45] Prelim. Inj. Hrg. Trans. Vol. II, 275:9–13.

determine that Ohno's testimony is not credible, and conclude that Scoops & Brew does not fall under the third exception to Exhibit E's restrictive use clause.

Finally, Plaintiffs have introduced evidence that they have been damaged. Suid testified that he "lost a lot of [his] every day customer[s] who come[] just to drink coffee[,] that they sit right across from me."[46] Suid also testified that Gourmet Gallery now makes fewer pots of coffee than it did before Scoops & Brew began operating.[47] From this evidence, a jury could conclude that Plaintiffs have suffered damages equal to the revenue in coffee sales lost due to Scoops & Brew's operation.

In sum, it is uncontroverted that Plaintiffs and Defendant are parties to the Lease Agreement. Plaintiffs have introduced evidence that Defendant had an obligation to ensure that Gourmet Gallery retained exclusive rights to sell groceries in Crown Bay Marina, that Defendant breached that obligation, that Scoops & Brew does not fall under an exception to that obligation, and that Plaintiffs have been damaged as a result. Consequently, Plaintiffs have demonstrated a reasonable probability of success on the merits.

II. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY WILL SUFFER AN IRREPARABLE INJURY IF AN INJUNCTION DOES NOT ISSUE.

"[A] party moving for a preliminary injunction must demonstrate primarily that irreparable harm is likely."[48] Irreparable harm is "harm for which a monetary award does not adequately compensate . . . ."[49] "When the moving party's loss is a matter of simple mathematic calculation, [the movant] fails to establish irreparable injury for preliminary injunction purposes."[50] However, "[i]rreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate."[51] Because "the basic purpose of a preliminary injunction is to protect the movant from irreparable injury that would occur before a full trial took place,"[52] the Court is only concerned with whether the injuries that Plaintiffs suffer—if any—between now and the trial of this matter are irreparable in nature.

Here, Plaintiffs ask this Court to find that they have suffered irreparable injury because "customers patronizing Scoops & Brew represent a 'lost opportunity' for [Plaintiffs] to serve these patrons," because Suid "was unable to quantify the magnitude of Gourmet Gallery's losses," and because "a quantification of same appears to be impossible considering the multiple unknowns presented by [the facts of this case]."[53] Defendant contends that "[c]ustomers of any sort . . . serve

---

[46] Prelim. Inj. Hrg. Trans. Vol. II, 189:10–13.
[47] *See id.* at 188:4–8 (memorializing Suid's testimony that "we use to do, for example, thirty pots of coffee from 7:00 o'clock until 9:00 o'clock in the morning. Now we doing 11, eight, seven.").
[48] *3RC & Co. v. Boynes Trucking System, Inc.*, S. Ct. Civil. No. 2015-0016, 2015 V.I. Supreme LEXIS 22, at *11–12 (V.I. July 23, 2015).
[49] *Id.* at *11 (quoting *Yusuf v. Hamed*, 59 V.I. 841, 854 (V.I. 2013).
[50] *Id.* at *22 (quoting *Yusuf*, 59 V.I. at 854).
[51] *Yusuf*, 59 V.I. at 854 (quoting *Danielson v. Local 275, Laborers Int'l Union of North America, AFL-CIO*, 479 F.2d 1033, 1037 (2d Cir. 1973)).
[52] *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *21 (quoting Weisshar, Note, *Hazy Shades of Winter: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1018 (April 2012)).
[53] Pls.' Prop. Findings of Fact and Concl. of Law 18.

one primary purpose . . . which is to generate revenue."[54] Defendant concludes that no irreparable harm exists because Plaintiffs' damages can be measured in monetary terms.[55]

Plaintiffs' argument that they were unable to quantify the magnitude of Gourmet Gallery's losses is unpersuasive because the record demonstrates that Plaintiffs did not attempt such a quantification. Suid testified that he has not performed "any kind of survey or attempt to measure [the] change in [Gourmet Gallery's] customer base."[56] He also testified that he has not done any analysis with regard to lost sales of danishes, biscuits, cookies, muffins, delicatessen items, or any of the other items that Scoops & Brew is selling,[57] with one exception. Suid testified that he began tracking Gourmet Gallery's coffee sales approximately 40 days before the May 12–13, 2015 preliminary injunction hearing.[58] However, Plaintiffs introduced no data concerning the changes in Gourmet Gallery's coffee sales during that 40-day period, save for Suid's estimation that Gourmet Gallery may have gone from "thirty pots of coffee from 7:00 o'clock until 9:00 o'clock in the morning . . . [to] doing 11, eight, seven."[59] As the party with the burden of proof, Plaintiffs cannot sustain a claim for irreparable injury by claiming that they were unable to quantify something that they had not attempted to quantify in the first place.

Plaintiffs' argument that it would be impossible to quantify the volume of sales that Gourmet Gallery allegedly loses when individuals who would otherwise have purchased coffee from Gourmet Gallery elect to purchase coffee from Scoops & Brew is similarly unpersuasive. Suid's observations of Gourmet Gallery's coffee sales come from "ask[ing] the cashier just how many pots of coffee [Gourmet Gallery] . . . make[s],"[60] but his observations do not quantify the change in revenue from coffee sales over time.[61] Suid has not testified that those changes are difficult to measure, and any such contention lacks credibility. Suid testified that Gourmet Gallery was the first store on St. Thomas to implement electronic scanning of individual items.[62] Suid further testified that coffee sales were previously rung up as grocery sales before Suid began tracking consumption by pot.[63] This testimony demonstrates that Gourmet Gallery has the ability to itemize every cup of coffee it sells. By itemizing every cup of coffee sold, quantifying the change, if any, in the volume of coffee sales over time becomes a simple mathematical computation.

But Plaintiffs contend that the harm they suffer stems from more than lost coffee sales. Suid testified that "[t]he coffee is to attract the customer to see the store inside,"[64] and Plaintiffs argue that irreparable injury exists because it is difficult to prove how much a customer will spend

---

54 Def.'s Opp. to Pls.' Renewed Mot. for Prelim. Inj. 6.
55 *Id.* at 6–7; Def.'s Prop. Findings of Fact and Concl. of Law 13.
56 Prelim. Inj. Hrg. Trans. Vol. II, 189:14–17.
57 *Id.* at 207:22–208:20.
58 *Id.* at 187:2–6.
59 *Id.* at 188:6–8.
60 *Id.* at 207:20–21.
61 *See id.* at 188:4–8 (memorializing Suid's testimony that "I didn't do it by the dollar. I did it by – we use to do, for example, thirty pots of coffee from 7:00 o'clock until 9:00 o'clock in the morning. Now we doing 11, eight, seven.").
62 *Id.* Vol. I, 310:15–17.
63 *Id.* Vol. II, 187:20–25.
64 *Id.* at 188:23–24.

once he or she enters the store.[65] Plaintiffs own evidence contradicts this argument. Plaintiffs' witness, Lou Morrissette, owner of a restaurant adjacent to Gourmet Gallery, testified: "I have documentation that I can show that just with a cup of coffee all the ancillary items that are purchased with a cup of coffee."[66] This testimony demonstrates that it is not only possible to quantify the volume of coffee sales over time, but that it is also possible to quantify the volume of sales that occur attendant to the purchase of a cup of coffee over that same period of time. The testimony identified in the preceding paragraph also demonstrates that Plaintiffs are capable of tracking the sales of their inventory, and are thus capable of tracking revenue from the sale of inventory over time. To the extent that the trends in Gourmet Gallery's revenue have changed following the opening of Scoops & Brew, Plaintiffs have a means of quantifying any reduction in revenue they may incurred due to Scoops & Brew's opening in November 2014.

The weakness in Plaintiffs' argument lies in what Plaintiffs do not say. Underlying Plaintiffs' lost-opportunity theory of irreparable harm are three assumptions, only the first of which has been substantiated by Plaintiffs. First, Plaintiffs assume that some percentage of customers who purchase coffee from Scoops & Brew previously purchased coffee from Gourmet Gallery, but now no longer do so. When asked if he had observed former customers of Gourmet Gallery visiting Scoops & Brew, Suid testified that he "observed that [he] lost a lot of [his] everyday customer[s] who come[] just to drink coffee[,] that they sit right across from me."[67] Suid's observations constitute credible evidence that Plaintiffs' first assumption is valid. But by itself, Plaintiffs' first assumption does not establish irreparable injury. As discussed above, given the technology in use at Gourmet Gallery, the volume of Gourmet Gallery's coffee sales can be tracked and quantified. If the fact that customers purchase coffee elsewhere constitutes an injury to Gourmet Gallery, it is an injury capable of redress with a monetary figure.

Plaintiffs' lost-opportunity theory thus requires a second assumption: that the percentage of customers who now purchase their coffee from Scoops & Brew instead of from Gourmet Gallery no longer visit Gourmet Gallery to purchase other goods. Plaintiffs have introduced no evidence to substantiate the truth of this assumption, and Suid's testimony illustrates why such an assumption is not warranted. Suid testified that Gourmet Gallery carries over ten thousand items in its inventory,[68] makes sandwiches and salads,[69] carries fresh produce and operates a deli counter,[70] among other services. In Suid's words, Gourmet Gallery is "something unusual . . . [s]omething really one of a kind to draw local people."[71] Gourmet Gallery's ten-thousand item inventory dwarfs Scoops & Brew's inventory, which, according to Ohno's testimony, is mostly

---

[65] For example, Suid testified that one gentleman stopped at Gourmet Gallery to get a box of chocolate for his wife's birthday, but allegedly ended up purchasing $67,000 worth of wine. *Id.* at 131:2–25. As another example, Suid explained that tourists waiting in line for the ferry to the Westin Hotel might stop at Gourmet Gallery "[t]o pick up a bottle of water, to pick up a juice or a baby milk for their kid . . . [and] [t]hey end up walk[ing] out [having spent two to three hundred dollars]." *Id.* at 132:11–13.
[66] *Id.* at 148:4–8.
[67] *Id.* at 189:10–13.
[68] *Id.* Vol. I, 301:15–22.
[69] *Id.* at 303:14.
[70] *Id.* at 313:9–21.
[71] *Id.* at 317:22–23.

comprised of gelato, ice cream, and coffee.[72] Given this disparity in inventory, it is unreasonable to assume that a customer who elects to purchase coffee at Scoops & Brew instead of at Gourmet Gallery will cease to patronize Gourmet Gallery altogether. Plaintiffs have introduced no evidence to the contrary.

It is more plausible that Gourmet Gallery still serves its existing customers. Even if Gourmet Gallery's coffee no longer draws customers into the store, Suid testified that other items in Gourmet Gallery's inventory perform the same function as the coffee.[73] Consequently, the opportunity for customers to engage in impulse shopping still exists.

The first two assumptions do not address Plaintiffs' lost-opportunity theory in full. A third assumption that must be made is that Gourmet Gallery would be attracting new customers during the pendency of this litigation but for the existence of Scoops & Brew. Since Suid testified that he performed no analysis on changes to his customer base, such an assumption is unsupported by evidence in the record. This third assumption is further invalidated by Suid's testimony that, "[a] year before this, business was really terrible" for Gourmet Gallery.[74] Suid testified that, in 2013, "[t]hings [were] really bad"[75] because he was facing increasing utility costs[76] and competition from other stores in St. Thomas that sell groceries.[77] According to Suid, these concerns were relayed to Crown Bay Marina's management around April of 2013.[78] Suid's testimony constitutes evidence that any decrease in Gourmet Gallery's revenue or erosion of Gourmet Gallery's customer base was occurring over a year before Defendant leased space in Crown Bay Marina to Scoops & Brew. Thus, in the absence of evidence to the contrary, it is unreasonable to assume that Gourmet Gallery's business would have suddenly turned around and begun attracting new customers but for the existence of Scoops & Brew. Finally, the third assumption ignores the potential synergistic effects of Scoops & Brew's proximity to Gourmet Gallery. Suid testified that the proximity of Tickles Dockside Pub to Gourmet Gallery "will draw people [to Gourmet Gallery] because [of] where [Tickles is] located,"[79] and that "[t]he more customers we have to Tickles, they will pass by me."[80] Suid explained that "[i]f the man wants to drink, he sits on the bar his wife come and shopping [sic]. While his wife shopping [sic], he goes to Tickles to have a drink. So we complement each other."[81] And the owner of Tickles has testified that Tickles serves coffee.[82] Yet Plaintiffs have introduced no evidence that a similar phenomenon would not occur between Gourmet Gallery and Scoops & Brew. Thus, it is unreasonable to assume that Gourmet Gallery would be attracting new customers during the pendency of this litigation but for the existence of Scoops & Brew.

---

72 *See id.* Vol. II, 261:15–17 (observing that the primary food commodity served by Scoops & Brew is gelato). *See also* Def.'s Opp. to Pls.' Renewed Mot. for Prelim. Inj. Ex. A (containing copies of photographs that purport to show the other items sold by Scoops & Brew).
73 *See id.* at 132:11–13 (recounting Suid's explanation that tourists waiting in line for the ferry to the Westin Hotel might stop at Gourmet Gallery "[t]o pick up a bottle of water, to pick up a juice or a baby milk for their kid").
74 *Id.* at 99:18–19. In his testimony, Suid is referring to the year 2013, the year before he negotiated the fifth amendment to the Lease Agreement.
75 *Id.* at 100: 24–25.
76 *Id.* at 99:20–23.
77 *Id.* at 101:5–10.
78 *Id.* at 100:22–23.
79 *Id.* Vol. I, 296:12–13.
80 *Id.* at 296:15–16.
81 *Id.* at 296:18–22.
82 *Id.* at 149:14–18.

Once deconstructed, Plaintiffs' argument is only supported by Suid's testimony that he believes that he is losing existing and potential customers because Scoops & Brew operates nearby.[83] Suid's testimony constitutes evidence that Plaintiffs have suffered an injury. When weighed against the other evidence presented by Plaintiffs, however, Suid's opinion is insufficient to establish that Plaintiffs have suffered an irreparable injury due to Scoops & Brew's operation.

Plaintiffs place great emphasis on a series of unpublished opinions and orders issued by the United States District Court for the District of Arizona in the case of *Dillon Real Estate Co. v. American National Insurance Co.*[84] In *Dillon*, the parties were co-owners of a shopping center in which the plaintiff leased space for a food and drug store and a third party leased space for a dollar store.[85] When the third party began selling groceries in its dollar store, the plaintiff sued to enforce a restrictive use covenant that existed in its lease with the defendant.[86] Following trial, the jury returned a verdict in favor of the plaintiff and the court enjoined the defendant from permitting the third party to sell groceries at its dollar store.[87]

Plaintiffs' reliance on *Dillon* is misplaced. The *Dillon* Court may have been correct in its finding of irreparable harm when it observed that, given the "potential elasticity" of the term groceries, requiring an action at law over every violation of the restrictive covenant at issue "would cause the covenant to be unenforceable as a practical matter."[88] The difference between this case and *Dillon* is the nature of the relief. *Dillon* concerned the issuance of a permanent injunction following a trial, but Plaintiffs' request for a preliminary injunction is currently before the Court. Unlike a permanent injunction, a preliminary injunction functions as a provisional remedy pending the ultimate disposition of a case. Plaintiffs' evidence demonstrates that, with a combination of recordkeeping and the benefit of hindsight, an adequate calculation of the damages—if any—that Plaintiffs incur prior to the trial of this matter can be made. Because an award of damages could compensate Plaintiffs for any injury they sustain during the pendency of this case, there can be no irreparable injury. Whether a similar computation could be made following trial through some uncertain date in the future is a question that the Court need not address at this time.

III. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THE BALANCE OF HARDSHIPS FAVORS THE ISSUANCE OF AN INJUNCTION.

Plaintiffs argue that this factor is not relevant to the Court's analysis.[89] Plaintiffs claim that Scoops & Brew had preexisting knowledge of the restrictive covenant contained in Exhibit E but nonetheless chose to begin operating. Plaintiffs conclude that Scoops & Brew's rights should be

---

[83] *Id.* Vol. II, 207:6–8. See also Compl. Ex.
[84] *See, e.g.*, Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. 17 (citing to orders issued on November 10, 2010 and April 26, 2010).
[85] *Dillon Real Estate Co. v. American National Insurance Co.*, No. CV-08-01508-PHX-FJM, 2010 U.S. Dist. LEXIS 125206, at *2 (D. Ariz. Nov. 10, 2010).
[86] *Id.* at *2–3.
[87] *Id.*
[88] *Dillon Real Estate Co. v. American National Insurance Co.*, No. CV 08-1508-PHX-FJM, 2010 U.S. Dist. LEXIS 49700, at *3 (D. Ariz. Apr. 26, 2010).
[89] *See* Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. 18 (arguing that "[t]he 'harm' to [o]ther [i]nterested [p]ersons – i.e., 'Scoops & Brew' – is not [r]elevant [h]ere").

disregarded.[90] Defendant argues that Scoops & Brew could not have known of the restrictive covenant contained in Exhibit E for two reasons: first, because Plaintiffs never sent a copy of Exhibit E to Scoops & Brew; and second, because "Plaintiffs' leases and its subsequent amendments are not public record and not readily reviewable by third parties."[91]

Both Plaintiffs and Defendant mischaracterize the nature of this Court's inquiry at this stage of the analysis. In reviewing the third preliminary injunction factor, this Court must "examine whether, and to what extent . . . [the nonmoving party] will suffer irreparable harm if the preliminary injunction is issued," and determine whether the nonmoving party would suffer greater harm if the injunction were granted than the moving party would suffer if the injunction was denied.[92] Neither party has addressed the effect of an injunction on Defendant in their briefs. Instead, the parties discuss the potential impact of an injunction on Scoops & Brew. Such discussions are more appropriately addressed under the preliminary injunction factor that examines the public interest.

By taking the position that "[t]he 'balancing of the hardships' test is . . . inapplicable here,"[93] Plaintiffs have failed to carry their burden of introducing some evidence that they would suffer a greater injury absent an injunction than Defendant would suffer should an injunction issue.

IV. A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST.

Plaintiffs request a preliminary injunction that prohibits Defendant from allowing Scoops & Brew "to sell ice cream, coffee, cakes, desserts, and/or any other grocery items at their Crown Bay Marina Location . . . ."[94] Because Plaintiffs' definition of the term "grocery" effectively encompasses everything sold by Scoops & Brew, the issuance of a preliminary injunction would force Scoops & Brew to cease its operations during the pendency of this case. The operation of businesses is an affair best left to businesspeople, and the public interest is not served when courts begin deciding which business may operate and which may not. Only in the most extreme of circumstances should a court interfere in the operation of a business. The public interest is also not served when allegations of irreparable harm can form the basis for an order forcing a business to close. Additionally, the issuance of an injunction harms residents and visitors of this Territory by depriving them of the services offered by Scoops & Brew. Thus, because the issuance of a preliminary injunction requires this Court to effectively close a local business and deprive residents of this Territory of the services provided by that business, the public interest would be harmed by the issuance of an injunction.

Plaintiffs argue that the public interest favors the enforcement of restrictive covenants, and is thus served through the issuance of a preliminary injunction in this case.[95] Plaintiffs are correct as a general matter. However, when rigid enforcement of private agreements threatens to injure

---

[90] *Id.* at 19 (citing *Dillon Real Estate Co.*, 2010 U.S. Dist. LEXIS 49700, at *4–5).
[91] Def.'s Opp. to Pls.' Renewed Mot. for Prelim. Inj. 7.
[92] *Yusuf v. Hamed*, 59 V.I. 841, 856 (V.I. 2013) (quoting *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 727 (3d Cir. 2004)) (internal quotations omitted) (alterations in original).
[93] Pls.' Mem. of Law in Supp. of Pls.' Renewed Mot. for Prelim. Inj. 19.
[94] Pls.' Renewed Mot. for Prelim. Inj. 1.
[95] Pls.' Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. 20.

third parties—in this case, Scoops & Brew and its patrons—the enforcement of such agreements should yield to principles of equity.

CONCLUSION

When weighed against each other, the four factors discussed above do not support the issuance of a preliminary injunction. Plaintiffs have introduced insufficient evidence from which this Court can conclude that Plaintiffs have been irreparably injured. To the contrary, Plaintiffs' evidence suggests that Plaintiffs' losses—if any—could be mathematically calculated, and the assumptions necessary to support Plaintiffs' lost-opportunity theory of irreparable harm are not supported by the evidence. Although Plaintiffs have shown a reasonable probability of success on the merits of their case, Plaintiffs' probability of success does not outweigh Plaintiffs' failure to demonstrate irreparable harm. Since Plaintiffs have taken the position that the balance of hardships does not apply here, Plaintiffs have failed to carry their burden of introducing evidence that the balance of hardships favors the issuance of an injunction. And when these three factors are considered alongside the fact that Plaintiffs seek a Court order that effectively forces another business to cease operations, the Court is compelled to deny Plaintiffs' Motions.

In one respect, the *Dillon* case cited by Plaintiffs is on point: "whether we grant or deny [Plaintiffs' Motions], the only rational way to end this dispute is by an accord among the three parties."[96] Yet the absence of such an accord here necessitates this ruling on Plaintiffs' Motions. For the reasons set forth above, Plaintiffs' Motions will be denied. An appropriate order shall follow.

Dated: November 10, 2015

Denise M. Francois
DENISE M. FRANCOIS
Judge of the Superior Court
Of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 11/10/15
LORI BOYNES-TYSON
Court Clerk Supervisor __/__/__

[96] *Dillon Real Estate Co. v. American National Insurance Co.*, No. CV 08-1508-PHX-FJM, 2010 U.S. Dist. LEXIS 49700, at *5 (D. Ariz. Apr. 26, 2010).