UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

J.C. PENNEY CORPORATION, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:20-cv-00364**
	§	
SEPHORA USA, INC.,	§	
	§	
Defendant.	§	

DEFENDANT SEPHORA USA, INC.'S
EMERGENCY MOTION TO DISSOLVE EX PARTE TRO AND BRIEF IN SUPPORT

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The *ex parte* temporary restraining order against Sephora USA Inc. ("Sephora") in this case is based on misrepresentations and was procured by J.C. Penney ("JCP") by improper means. In its Petition, JCP falsely contends that Sephora was supposedly seeking to gain "negotiating leverage" by threatening to terminate a contract (defined below as the "Agreement") with JCP (1) upon grounds that require arbitration and (2) with immediate consequences that would leave JCP unable to sell any beauty products in its department stores. Upon this basis, JCP convinced the state court, which did not have access to the actual facts, that JCP needed emergency relief.

No part of JCP's fanciful, one-sided narrative was or is true. In fact, it is JCP that seeks—and has obtained through its wayward TRO—"negotiating leverage" and to delay and change the basis for good faith wind-down discussions that have been underway between the parties for weeks, so that JCP can take advantage of an impending bankruptcy. Trying to salvage the discussions, Sephora merely stressed to JCP that JCP was taking actions that constituted independent "Defaults" under the Agreement. A Default, by the Agreement's express terms, is *not* subject to arbitration. Nor was Sephora proposing to do anything with immediate practical effect on JCP. Sephora merely highlighted its contractual right to serve a Default Notice, ***a mere statement of legal position***, which under the Agreement's express terms would have no practical consequences whatsoever for months on end. There would be ample time for JCP to carry on its business, as usual, while it sought appropriate legal action if it could show the Default Notice was improper under the parties' Agreement.

Sephora could have explained all of this to the state court had Sephora been given proper notice of the TRO hearing. In light of the parties' regular communications, documented by JCP's Petition itself, there was absolutely no reason for JCP to steal away to the courthouse and seek *ex parte* relief. In fact, JCP had and has no valid basis to show likelihood of success on the merits,

irreparable harm, or the other requisite elements for a TRO. Accordingly, Sephora moves to dissolve the TRO pursuant to Fed. R. Civ. P. 65(b)(4).

I. BACKGROUND

A. JCP And Sephora Jointly Operate Small Sephora Stores Within JCP Stores.

JCP operates department stores across the United States. (Ex. A ¶ 2.) Sephora sells beauty products through its own network of stores and its website. (*Id.*) Since 2006, JCP has, pursuant to the parties' contract, opened over 650 small Sephora stores within JCP department stores. (*Id.* at ¶ 3.) These stores-inside-a-store (which the parties refer to as "SiJCP") are staffed exclusively by JCP personnel with product JCP buys directly from various suppliers. (*Id*.) SiJCP currently has inventory estimated at $240 million at cost. (*Id.*) In the SiJCP installations, JCP uses Sephora branding to provide a customer experience similar to what customers would receive inside Sephora's own independent stores.

The parties' SiJCP operations are governed by an Amended and Restated Joint Enterprise Operating Agreement ("Agreement") (attached with amendments as Ex. B). The Agreement expires in 2024. (*See id.* § 1.2, as amended in Amendment 3.) The Agreement specifies five ways it can be terminated: (1) its term ends without renewal; (2) the parties mutually agree to terminate earlier; (3) one of the parties commits a Default; (4) one side suffers a change in control; or (5) itemized matters governed by the SiJCP Operating Committee cannot be resolved through arbitration. (Agreement § 9.1.)

Of those five methods, only the fifth requires that a dispute-resolution process be used before termination can be effective. (*See id.* § 2.2(d) and (e) (matters governed by SiJCP Operating Committee are subject to "Deadlock" procedures, including arbitration, before termination).) Although the parties have a number of disputes at the Operating Committee level, none of those is

at issue here. Contrary to what JCP alleges, Sephora has never referred to any Operating Committee dispute as a basis for terminating at this time. (*See* Ex. A, ¶¶ 5–6.)

Instead, any immediate issue of termination has arisen because of JCP's Default under other provisions. Section 9.2 of the Agreement specifies a series of such "Defaults," separate from Operating Committee issues, that can lead to termination. One type of Default is any "corporate or other action in furtherance of" bankruptcy or liquidation. (*Id.* § 9.2(e)). Upon an act of Default, the non-Defaulting party may provide a Default Notice, which may cause the Agreement to automatically terminate at the end of JCP's then-current monthly accounting period (which can deviate from calendar months). (*See id.* § 9.2(g).) No arbitration is required.

Importantly, the Agreement is explicit that ***there are no immediate consequences from such a termination***. In reaching their Agreement, the parties understood that neither side could snap its fingers and make over 650 SiJCP installations stop or disappear. They therefore agreed that any termination would be followed by a prolonged wind-down process called "Disengagement."

Disengagement is governed by Section 9.5 of the Agreement. Upon any termination, JCP has **120 days** when it is free to continue operating SiJCP locations and selling SiJCP goods, known as "Beauty Installation Merchandise." (*E.g.*, *id.* § 9.5 (b)(iii).) During that time, JCP can continue to use Sephora's intellectual property, including signage and branding, at SiJCP locations. (*Id.* § 9.5(c) and (d).) The only exception is if Sephora repurchases JCP's vast stockpile of Beauty Installation Merchandise inventory at the price JCP paid for it, thereby minimizing any loss to JCP. (*Id.* § 9.5(b)(ii) and (iii).) In effect, JCP has about **four months** after termination to keep operating SiJCP locations and, if it wants, slowly replace them.

B. JCP Committed Acts Of Default, Leading To Negotiations For An Agreed, Accelerated Separation.

JCP's business has been declining for years and it now faces insolvency, perhaps even liquidation, in the face of the COVID-19 pandemic. (Ex. A, ¶¶ 4–5.) It had to shutter all JCP stores. News articles have revealed that JCP has been working with restructuring counsel (the same firm representing it here) (Exs. C–D), and most recently it has been working to secure bankruptcy financing and missed a key bond payment, triggering a "bankruptcy clock" (Ex. E (JCP's "missed payment kicks off a 30-day grace period before a debt default becomes official," and JCP has been seeking financing "to fund a potential bankruptcy proceeding"); Exs. F–G). Not coincidentally, JCP's Petition and TRO seek to unfairly and unreasonably bind Sephora's hands beyond JCP's presumed bankruptcy filing date, so that JCP could use bankruptcy to increase its leverage in the parties' negotiations.

More immediately, these were "acts in furtherance of" bankruptcy, which is an express Default under Section 9.2(e) of the parties' Agreement, not subject to arbitration. In addition, in further breach of the parties' Agreement, JCP furloughed all SiJCP employees. (Ex. A ¶ 5.) The Agreement requires JCP to make SiJCP employment decisions with input from Sephora. (Agreement § 2.4(i).) More important, JPC's unilateral decision to furlough full-time SiJCP employees breached JCP's contractual duties not to violate Sephora's retail store practices or hurt Sephora's carefully cultivated brand. (*See id.* §§ 7.3 (SiJCP business must comply with "standards and practices of Sephora retail stores") and 7.8 (JCP must cooperate with Sephora "to ensure that the quality of the [Sephora] brand . . . will be maintained").) Part of Sephora's brand value lies in its commitment to its personnel and its reputation as one of "America's Best Employers." (*See* Ex. A ¶ 5; Ex. H.) Consistent with these values, Sephora chose not to lay off or furlough any full-time employees because of the pandemic shutdowns. (Ex. A ¶ 5.) JCP's contrasting, unilateral

decision to furlough full-time SiJCP employees deviated from Sephora's own retail store practices and gave Sephora a severe black eye, creating the misimpression that Sephora furloughed its own full-time employees. (*Id.*) These are incurable, material breaches and additional acts of Default, again not subject to arbitration. (*See* Agreement § 9.2(b).)

Although Sephora could have sent a Default Notice immediately for the Defaults described above, it did not do so. (Ex. A ¶ 6.) Instead, after these issues arose, it sought to negotiate for an agreed, accelerated end to the parties' Agreement. (*Id.*) Sephora never threatened to immediately shut down SiJCP stores, which it had no power to do. (*Id.*) Sephora merely made clear that it would pursue its termination rights if JCP abandoned good faith negotiations with bankruptcy looming. (*Id.*) This is evident from the correspondence between the parties that JCP attached to its Petition and pointed to as proof of Sephora's "threat." (Ex. I.) In the email from Sephora that mentioned possible termination (sent the day before JCP sought the TRO), Sephora emphasized its concerns with JCP's financial problems, including a likely bankruptcy, and Sephora pleaded with JCP to finalize a negotiated amendment to the Agreement. (Ex. A, ¶ 6.)

The message was clear: Sephora was entitled to give a Default Notice to terminate but would do so only if JCP broke off negotiations, leaving Sephora with no choice because of JCP's impending bankruptcy. Significantly, Sephora emphasized that upon *any* termination, by notice or agreement, Sephora must and would follow the long Disengagement process specified in the Agreement, thereby preventing any sudden disruptions to the SiJCP business. (*Id.*)

C. JCP Sought And Received An *Ex Parte* TRO To Prevent Termination.

Because of their longstanding business relationship and recent negotiations, the parties have been in regular, near-daily contact for weeks, as JCP's own exhibits show. (*See also* Ex. A ¶ 7.) Yet, despite easy access to Sephora, JCP provided no notice that it would file a lawsuit or seek an injunction. (*Id.*) Instead, it slipped into court and obtained an *ex parte* TRO, claiming it could

not provide even the requisite two hours' notice to Sephora before the hearing. Without so much as a mention of the Disengagement provisions, JCP told the court that it needed secrecy because Sephora might "threaten[] to, attempt[] to, or purport[] to, terminate the Agreement" (Petition ¶ 60), as if a mere statement by Sephora of its *legal* position would have dire consequences. In reality, the most Sephora could have done in those two hours was provide a Default Notice, which would have had no immediate effects, leaving ample time for the court to take any necessary action.

JCP sought an injunction calculated to extend beyond its prospective bankruptcy filing, thereby revealing, to all but the uninformed state court, its improper intention to exploit the bargaining leverage that bankruptcy might afford. JCP never informed the state court of the TRO's true purpose, nor the *real* circumstances between the parties. JCP's Petition repeatedly alleges that Sephora was obligated to arbitrate, a falsehood JCP concealed by omitting the "Default" bases for a possible termination. Indeed, JCP's Petition omits the very concept of a "Default," makes no mention of JCP's acts in furtherance of bankruptcy, and ignores Agreement provisions JCP violated by unilaterally furloughing SiJCP employees. JCP's Petition also says all SiJCP locations would have to close immediately and JCP could not offer any beauty products for sale, statements that are demonstrably untrue given the Disengagement process, which JCP concealed by omitting it from its brief and redacting those provisions from the as-filed copy of the Agreement. (*E.g.*, Petition ¶¶ 1, 48.)

Acting on JCP's deficient and misleading Petition, the state court issued an *ex parte* TRO, enjoining termination of the Agreement for 17 days. (Ex. J.)[1]

[1] On its face, the TRO does not prevent Sephora from issuing a Default Notice—the only termination step Sephora might take during the TRO period. Sephora nevertheless moves to

II. ARGUMENT

JCP obtained its TRO under false pretenses. JCP claimed that Sephora was seeking negotiating leverage, while in fact it was JCP that sought and obtained leverage through the TRO. JCP claimed that Sephora's sole bases for any potential termination were disputes regarding operating issues subject to arbitration. None of Sephora's bases raise such issues. JCP also claimed that any termination would *immediately* prevent it from using SiJCP locations and selling beauty products. The Agreement prevents this outcome, which Sephora has no legal or physical ability to impose. JCP also claimed it needed secrecy when none was required.

Acting by stealth, JCP manufactured a false impression of Sephora as supposedly attempting to use minor grievances to suddenly pull from JCP the ability to sell any beauty products. JCP was able to maintain that illusion only because JCP deprived Sephora of an opportunity to be heard. In reality, the only "threat" Sephora made was to begin a long termination process based on independent Defaults, in exact compliance with the Agreement, that would have no immediate effect or impose any imminent harm on JCP's business, and which the parties had already been negotiating.

That JCP would resort to such misrepresentations reveals it cannot justify a TRO on the facts. In reality, JCP cannot satisfy any requisite elements for a TRO, and it must be dissolved.

A. To Defeat This Rule 65(b)(4) Motion, JCP Must Show It Meets All Required Elements For A TRO.

The state court TRO is now subject to federal rules and is not entitled to any particular deference. "[O]nce a case has been removed to federal court, its course is to be governed by federal law, including the Federal Rules of Civil Procedure." *Granny Goose Foods, Inc. v. Brotherhood*

dissolve the TRO because (a) it is baseless and (b) Sephora wishes to be fully transparent about its intentions.

of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Cnty., 415 U.S. 423, 441 (1974). Any interlocutory state court order is transformed into a federal court order when the action is removed, and federal law, rather than state law, determines its enforcement and continuance. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1303–04 (5th Cir. 1988). Significantly, the order deserves "no predetermined level of deference . . . ." *Id*. at 1303.

Where, as here, a TRO has been issued without notice to the enjoined party, Fed. R. Civ. P. 65(b)(4) provides that on two days' notice to the party that obtained the *ex parte* TRO, or on shorter notice set by the court, the restrained party "may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires."

To avoid dissolution of an *ex parte* TRO, the plaintiff (here, JCP) must show it was entitled to the TRO in the first place. For state court TROs being reviewed by a federal court, this means the plaintiff must satisfy all federal requirements for an injunction. *Consol. Rest. Operations, Inc. v. Nat'l Processing Co., LLC*, No. CIV.A. 3:02CV1278G, 2002 WL 1432469, at *6 (N.D. Tex. June 28, 2002) (dissolving state court TRO for failure to meet federal requirements); *Am. First Commc'ns, Inc. v. BellSouth Telecomms., Inc.*, No. CIV. A. 99–0972, 1999 WL 203265, at *1–2 (E.D. La. April 7, 1999) (same); *see also Dixie Brewing Co. v. Dep't of Veterans Affairs*, No. 13–6605, 2013 WL 6715921, at *3 (E.D. La. Dec. 18, 2013) (motion to dissolve state court *ex parte* TRO "should be granted where [TRO] was improperly issued.").

A TRO is an extraordinary remedy that "requires an applicant to *unequivocally show* the need for its issuance." *Loco Brands, LLC v. Thomas*, No. 6:17-cv-323, 2017 WL 7050645, at *1 (E.D. Tex. June 2, 2017) (emphasis added) (citing *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997)). To obtain this remedy, a plaintiff must sufficiently establish four elements: (1) a substantial likelihood it will prevail on the merits; (2) a substantial threat that it

will suffer irreparable harm without the injunction; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the TRO is in the public interest. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). A plaintiff's failure to prove any one of those elements is fatal to its effort and requires denial of the TRO. *Loco Brands*, 2017 WL 7050645, at *1 (citing *Black Fire Fighters Ass'n v. City of Dallas, Tex.*, 905 F.2d 63, 65 (5th Cir. 1990)).

B. JCP Cannot Establish Likely Success On The Merits.

To keep its TRO, JCP must first establish that it is likely to succeed on the merits of its non-injunctive claim—that is, it is likely the Court will ultimately grant its requested declaration that Sephora has no right to state its legal position through a Default Notice expressly provided for in the Agreement. JCP cannot carry its burden to establish this requisite element because the Agreement expressly grants Sephora the right to provide a Default Notice and trigger eventual termination upon JCP's acts of Default.

Any act JCP takes in furtherance of bankruptcy or other insolvency proceedings constitutes a Default. (Agreement § 9.2(e).) The numerous acts JCP has taken in furtherance of bankruptcy are widely reported. (*See* Exs. C–G.) These include hiring bankruptcy counsel, negotiating for bankruptcy financing, and missing a key bond payment that triggers the bankruptcy countdown. (*Id.*) Undoubtedly, JCP and its counsel have already been drafting bankruptcy paperwork. These acts easily satisfy the Agreement's standard for a Default. *Cf. Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp.*, No. 09 Civ. 8285(PGG), 2010 WL 3910590, at *10 (S.D.N.Y. Sept. 29, 2010) (management directing bankruptcy lawyers to prepare for filing, and board reviewing management's plans to file, were acts in furtherance of bankruptcy sufficient to allege default). Because of this Default, Sephora is entitled to provide a Default Notice, all it was seeking to do, leading to termination at the end of JCP's current monthly accounting period. (Agreement §

9.2(g).) These facts alone mean JCP cannot show it will likely prevail on its claim for declaratory relief, and the TRO must be dissolved.

JCP's other acts of Default only add to the burden JCP cannot overcome. By furloughing all SiJCP employees as it did, JCP violated numerous provisions of the Agreement. (*See id.* §§ 2.4(i), 7.3, 7.8.) These are incurable breaches that constitute Defaults upon which Sephora can provide its Default Notice. (*See id.* § 9.2(a) and (g).) Moreover, JCP's argument that the furlough dispute is an operational one that must be arbitrated before termination is directly refuted by JCP's claim that the furlough decision was left to JCP's sole discretion. (Petition ¶¶ 27, 38.) The impact of these furloughs was not a matter for the Operating Committee, nor is it subject to the Deadlock and arbitration requirements for Operating Committee disputes. (*Compare* Agreement § 2.2(d) and (e) (dispute resolution for Operating Committee disputes), *with id.* §§ 9.1, 9.2 (g) (other terminations not subject to dispute resolution).)

The Agreement provides Sephora with a clear right to give JCP a Default Notice. JCP's inability to show otherwise dooms its TRO. By failing to establish likelihood of success, JCP cannot satisfy its burden, and the TRO should be dissolved for this reason alone. *See, e.g.*, *Loco Brands*, 2017 WL 7050645, at *1.

C. JCP Cannot Establish Irreparable Harm.

JCP cannot establish that it will suffer imminent and irreparable harm absent an injunction. It has sought to foreclose a mere statement by Sephora, expressly provided for in the Agreement, of its *legal* position through a Default Notice. Despite JCP's attempts to frame its injuries otherwise, JCP's alleged potential losses from merely receiving a Default Notice are illusory. Nothing happens immediately when JCP receives the Notice. Disengagement does not even start right away and takes months. And, even what JCP mentions as its imagined harms are all forms of lost sales, which (even if true) can be adequately remedied by a damages award.

JCP cannot show that monetary damages are insufficient. It is "well-established that an injury is irreparable only if it cannot be undone through monetary remedies." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (internal citations and extraneous punctuation omitted). Loss of income is not enough. *Sampson v. Murray*, 415 U.S. 61, 92 (1974). Nor are lost sales. *Pruvit Ventures, Inc. v. Forevergreen Int'l LLC*, 4:15-CV-571-ALM-CAN, 2015 WL 9876952, at *3 (E.D. Tex. Dec. 23, 2015). The mere possibility of irreparable harm is also not enough; instead, the plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (emphasis added). Accordingly, JCP must make a clear showing of a substantial likelihood that monetary damages will not suffice here. It has failed to make that showing.

In its Petition, JCP alleges that it would suffer three consequences if Sephora terminated the Agreement: it would lose the ability to (1) "sell customers beauty offerings in JCP stores with SiJCP locations"; (2) " provide customers with one-on-one beauty sessions"; and (3) "market beauty offerings." (Petition ¶ 48.) Though couched in varying terms, each of these alleged injuries represents no more than potential lost sales revenue that JCP claims it would suffer because of an alleged wrongful termination of the Agreement. Potential lost sales from a claimed contract breach are prototypical examples of injuries compensable by monetary damages. *See Petro Franchise Systems, LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, 796 (W.D. Tex. 2009) ("People generally enter into commercial contracts . . . for purely economic reasons and can therefore be fully compensated with damages [from] breach.") (franchisee seeking to enjoin termination of franchise failed to show money damages were inadequate).

Although JCP summarily states that termination would lead to business disruption, a loss of goodwill, and loss of clientele, damages it claims would be "difficult if not impossible to

calculate" (Petition ¶ 50), it offers no *evidence* to support these claims. Such a bare conclusion cannot support a finding of irreparable harm. *BNSF Ry. Co. v. Panhandle N. R.R. LLC*, 4:16-CV-1061-O, 2016 WL 10827703, at *3 (N.D. Tex. Dec. 30, 2016) (plaintiff's bare statements that it could not "quantify with any degree of precision the amount of economic harm" it would suffer and that it would "lose 'invaluable customer goodwill'" insufficient for injunctive relief). JCP's allegation that it will lose goodwill rings particularly hollow because its Petition is premised on operating a Sephora-branded store, and the Agreement specifically provides that any use of Sephora's intellectual property in the operation of SiJCP stores shall inure "to the benefit of Sephora and Sephora's good will," not to JCP. (Agreement § 4.1(b)(iii).) Even if termination were imminent, JCP cannot show that money damages would be inadequate to compensate it for any harm it would suffer from termination, and injunctive relief is unwarranted for that reason.

JCP also cannot show any alleged harm is imminent. JCP fails to establish the irreparable harm element for the additional reason that it cannot show its alleged injuries would be *imminent*. *See Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975) ("An injunction is appropriate only if the anticipated injury is imminent . . . ."). Harm that is speculative or remote does not warrant a grant of injunctive relief. *W. Ala. Quality of Life Coalition v. U.S. Fed. Highway Admin.*, 302 F. Supp. 2d 672, 684 (S.D. Tex. 2004).

Here, the Agreement's Disengagement process, which Sephora has repeatedly committed itself to, dictates a prolonged wind-down of SiJCP operations that forecloses any possibility of imminent harm. To the contrary, even after termination is finally effective, JCP would then have another *four months*, not just to contest termination, but also to conduct SiJCP operations in much the same way it does today. JCP's customers would not, as it alleges, be unable to purchase Sephora products or use SiJCP facilities—the SiJCP stores would remain open, and JCP would

continue to sell beauty products, to customers as the parties wound down the operations of those stores. Indeed, as both parties know, JCP currently has hundreds of millions of dollars of Beauty Installation Merchandise inventory—plenty for it to keep operating SiJCP locations during the entire Disengagement period. JCP's ability to continue its business in this manner forecloses any finding of imminent harm. *See Tex. Marine & Brokerage, Inc. v. Bennington Marine, LLC*, 1:12-CV-397, 2012 WL 12888827, at *6 (E.D. Tex. Oct. 17, 2012) (retailer could not show imminent harm from supply agreement termination because it retained supplier inventory for sale). This transition period, in addition to allowing for time to sell-down SiJCP inventory, would also allow JCP time to secure contracts with other vendors so that it could continue offering beauty products at the appropriate time after Disengagement finally ends. In sum, the parties' agreed-upon Disengagement procedures ensure that the "immediate" harm that JCP alleges would not come to pass.

D. JCP Cannot Show The Harm It Will Suffer Outweighs Harm To Sephora.

JCP similarly cannot establish the third requisite element of a TRO, the balance of harms. If the TRO is dissolved, JCP has no reason to fear Sephora's Default Notice because it will have no immediate effect on its business: JCP will still have the remainder of the monthly accounting period after receiving the Default Notice before termination becomes effective, and thereafter it will have at least 120 days from the termination date to keep selling SiJCP products and using SiJCP locations. Sephora, on the other hand, faces significant risk if its rights under the Agreement are frozen while JCP finishes preparing, and ultimately files, for bankruptcy. If the TRO remains, Sephora could be stripped of its contractual right to terminate—not just during the length of the TRO, but possibly longer, even as JCP's bankruptcy unfolds. *See Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, No. 4:15-CV-2755, 2015 WL 13660130, at *9 (S.D. Tex. Nov. 24, 2015) (denying injunction that would "force [Defendant] to remain in a business model it has

deemed inefficient, whereas, without the injunction, Plaintiff [could] pursue its other product lines"); *Bennington Marine*, 2012 WL 12888827, at *7 (denying injunction against termination of supply agreement, as it would "force [defendant] into a business relationship with [plaintiff] that is already strained" while, without the injunction, plaintiff could still sell products).

Indeed, the adverse effect of JCP's bankruptcy on Sephora is likely the real reason JCP sought the TRO. When JCP missed its mid-April bond payment, triggering a 30-day countdown to bankruptcy (*see* Ex. E), JCP had a reason to stall negotiations with Sephora and keep it from triggering termination in May because JCP's bankruptcy could forestall Sephora's ability to exercise its rights, thereby giving JCP additional leverage. This is impermissible, and the balance of harms decisively favors Sephora. *See Bianco v. Globus Med., Inc.*, No. 2:12-CV-00147-WCB, 2014 WL 1049067, at *8 (E.D. Tex. Mar. 17, 2014) ("[A]n injunction is not meant to be employed 'as a bargaining tool . . .' for 'undue leverage in negotiations[.]'") (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring)).

E. JCP Cannot Establish This TRO Serves The Public Interest.

Finally, JCP must prove that "the granting of the preliminary injunction will not disserve the public interest." *Clark*, 812 F.2d at 993. "If no public interest supports granting preliminary relief, such relief should ordinarily be denied, 'even if the public interest would not be harmed by one.'" *Texas v. United States*, 328 F. Supp. 3d 662, 740–41 (S.D. Tex. 2018) (quoting 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.4).

Texas courts have repeatedly recognized the public interest in enforcing contracts by their terms—and, accordingly, courts agree that *not* enforcing contract terms *harms* the public interest. *See, e.g., Interox Am. v. PPG Indus., Inc.*, 736 F.2d 194, 203 (5th Cir. 1984) (public interest is served "by enforcing contract terms as they were intended by the parties," and "public policy cannot require an injunction forbidding" what contract allows); *Doosan Infracore*, 2015

WL 13660130 at *9 (enjoining contract termination, "despite terms specifically allowing for termination, would harm the public interest"); *Ineos Techs. USA, LLC v. Basf Corp.*, No. 4:16-CV-1145, 2016 WL 6909296, at *5 (S.D. Tex. May 23, 2016) (same). By the Agreement's terms, Sephora is entitled to issue a Default Notice, leading to termination at the end of the accounting period and the long wind-down period thereafter. In this way, the TRO does not serve the public interest—it directly opposes it.

JCP's Petition says nothing about the public interest. Nor can JCP argue that the public has an interest in preventing a Default Notice and eventual termination. Indeed, the parties had been working toward an amicable wind-down of the Agreement. The public interest does not support the use of *ex parte* TRO proceedings to gain bargaining leverage in these ongoing discussions. *See Bianco*, 2014 WL 1049067 at *8. Furthermore, the public has no interest in enforcing a TRO founded on misleading and incomplete allegations.

III. CONCLUSION

For the reasons stated above, Sephora asks the Court to immediately dissolve the TRO.

DATED: May 4, 2020

Respectfully submitted,

/s/ C. Scott Jones

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 4, 2020, the foregoing document was served on the following pursuant to the Federal Rules of Civil Procedure:

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ATTORNEYS FOR PLAINTIFF J. C. PENNEY CORPORATION, INC.

/s/ *C. Scott Jones*
C. Scott Jones

CERTIFICATE OF CONFERENCE

Counsel for Movant has complied with the meet and confer requirement in Local Rule CV-7(h) and this motion is opposed. A personal teleconference was held on May 4, 2020 between Robert Shapiro, Joshua Mahoney, and Scott Jones for Sephora USA, Inc. ("Sephora") and Michael Slade and Jeremy Fielding for J.C. Penny ("JCP"). Counsel for Sephora outlined and explained the basis and substance of this motion, including why JCP's temporary restraining order is inappropriate under the parties' Agreement, and unnecessary and unjustified under applicable law. JCP's counsel advised that they disagree with Sephora's positions and contentions. Such discussions have conclusively ended in an impasse, leaving an open issue for the Court to resolve.

/s/ C. Scott Jones
Counsel for Movant, Sephora USA, Inc.