

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION**

	X	
	:	
FEESERS, INC.,	:	Case No. 1:CV-04-576
Plaintiff,	:	
v.	:	(Judge Rambo)
MICHAEL FOODS, INC. and	:	
SODEXHO, INC.,	:	
Defendants.	:	
	X	

**PLAINTIFF FEESERS, INC.’S REPLY IN FURTHER SUPPORT
OF ITS MOTION FOR AN ORDER OF CONTEMPT AND
TEMPORARY AND PERMANENT INJUNCTIVE RELIEF**

ARGUMENT

As Feesers described in its opening brief, Michael Foods made clear its intent to defy the Court's April 27 Order by (1) claiming, contemptuously, that the Order itself required it to terminate supplies of egg and potato products to Feesers, and (2) using that claim to pressure Feesers into acceding to continued, unlawful price discrimination, in defiance of the Court's Order, while any appeal of that Order is pending. In its opposition, Michael Foods does not seriously address these issues at all. Instead, Michael Foods contends that its conduct is a refusal to deal and is not unlawful under the Robinson-Patman Act. But Michael Foods is simply arguing the wrong issue: Feesers never claimed that the Robinson-Patman Act imposes a duty to deal. The issues in this motion are the appropriate scope of injunctive relief after a Robinson-Patman Act violation has been found, and the ability of this Court to prevent a defendant from evading a Court Order and coercing a plaintiff to agreeing to a stay. For the reasons discussed in Feesers' opening papers and herein, the Court should grant Feesers' motion.

I. Feesers Challenges Michael Foods' Conduct As Contempt of the Court's April 27 Order, Not As an Independent Violation of the Robinson-Patman Act

Michael Foods' principal argument in opposition to Feesers' motion for a contempt order and TRO is that its conduct is simply a "refusal to deal" that is not forbidden by Section 2(a) of the Robinson-Patman Act. Defendant Michael Foods, Inc.'s Opposition Brief, dated May 11, 2009 ("Opp'n") at 1-3, 8-13, 15-21. Michael Foods is attacking a straw man. Feesers does not claim that the Robinson-Patman Act imposes a duty to deal, or that Michael Foods has breached any such statutory duty. Rather, for the reasons set forth in Feesers' opening papers, Michael Foods' conduct in terminating Feesers' supply of egg and potato products constitutes contempt of this Court's April 27 Order, which enjoined Michael Foods from discriminating as to price in favor of Sodexo and against Feesers.

Because Feesers does not claim that Michael Foods' conduct in cutting off the supply of food products to Feesers is an independent violation of the Robinson-Patman Act, the cases relied upon by Michael Foods are simply inapposite. *See B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 439 F.3d 653, 668-69 (10th Cir. 2006) (dismissing Robinson-Patman Act claim where plaintiff had ceased purchasing from the defendants); *H.L. Hayden Co. v. Siemens Med. Systems*, 879 F.2d 1005, 1021-22 (2d Cir.

1988) (stating that terminated dealer could not maintain claim under the Robinson-Patman Act); *L&L Oil Co., Inc. v. Murphy Oil Corp.*, 674 F.2d 1113, 1121 (5th Cir. 1982) (stating that although terminated dealer’s “cause of action might be cognizable under other federal antitrust laws ... [plaintiff] does not have a cause of action under the Robinson-Patman Act”).

Michael Foods also relies upon *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962), in which a supplier refused to renew contracts with customers that had previously brought a treble damages action against it for Robinson-Patman Act violations. *See* Opp’n at 2. At issue was whether the supplier’s refusal to renew the contracts “was *itself* a violation of the antitrust laws,” a question that the Second Circuit answered in the negative. *Id.* at 869 (emphasis added). The court denied plaintiff’s request for an injunction ordering the defendant to enter into a new supply contract, reasoning that defendant’s “refusal to deal after the original contract term expired did not have the legal effect of *depriving* [the plaintiff] *of a remedy for past injury*,” because the plaintiff was seeking only monetary damages. *Id.* at 872 (emphasis added).¹

¹ In declining to order the defendant to enter into a new supply contract, the Second Circuit cited to *Bergen Drug Co. v. Parke, Davis & Co.*, (D.N.J. October 18, 1961), in which the district court denied the plaintiff’s request for an injunction requiring the defendant to continue to supply products to the defendant. That district court decision was later reversed by the Third

The Second Circuit went on to note, however, that under certain circumstances the district court “could have enjoined Simplicity’s conduct in the proper exercise of its general equity powers” and that such a restraint “would be akin to an exercise of the court’s contempt power for the purpose of protecting the integrity of the judicial system.” 298 F.2d at 871. Such circumstances are presented here, where Michael Foods’ conduct is aimed squarely at depriving Feesers of the *only* remedy Feesers sought for the competitive injury caused by Michael Foods’ “stunning” and ongoing price discrimination – this Court’s injunction ordering Michael Foods to cease discriminating as to price against Feesers and in favor of Sodexo.

Although the Robinson-Patman Act does not itself impose any general duty to deal, the Third Circuit has specifically held that a defendant may not cease to supply products where to do so would frustrate the workings of the Act. *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F. 2d 725 (3d Cir. 1962) (reversing district court’s denial of mandatory injunction). Michael Foods attempts to distinguish *Bergen Drug* on the ground that the litigation in that case was still ongoing at the time the plaintiff sought an injunction. Opp’n at 12-13. But here, where the Court has entered a judgment holding that Michael Foods unlawfully discriminated as to price,

Circuit. *See Bergen Drug Co. v. Parke, Davis & Co.*, 307 F. 2d 725 (3d Cir. 1962).

the rationale for an appropriate injunction is even stronger than it was in *Bergen Drug*, where it was still possible that the plaintiff would not prove unlawful price discrimination.

In addition to its attempt to misdirect the court by addressing the wrong legal issue, Michael Foods also engages in a sleight of hand by labeling its conduct as a “refusal to deal” in the first place. As Michael Foods wrote in its May 1, 2009 letter to Feesers, it would “welcome the opportunity” to deal with Feesers, as long as “Feesers [would] stipulate to a stay of the injunction pending the appeal” in order to “continue the current pricing arrangements between Michael Foods and Feesers.” Plaintiff Feesers, Inc.’s Opening Brief, dated May 5, 2009 (“Op. Br.”) at 1, 5, 13; Declaration of Eamon O’Kelly, dated May 5, 2009 (“O’Kelly Decl.”) Ex. B. That is not a “refusal to deal,” but simply an offer to continue dealing *at an unlawful price*, which is precisely the conduct enjoined by this Court.²

II. This Court Has the Power to Order the Equitable Relief Sought by Feesers

Michael Foods implies throughout its opposition that this Court lacks the authority to grant the relief necessary to effectuate its April 27

² Michael Foods also devotes several pages of its opposition to rebutting another claim that Feesers never made – that Michael Foods’ decision to cut off supply of food products constitutes an independent antitrust violation as a “restraint of trade.” Opp’n at 10-12.

Order. *See generally* Opp'n at 1-3, 8-13, 15-17. It is black letter law, however, that courts have authority under their general equitable powers as well as Section 16 of the Clayton Act to fashion whatever remedies may be necessary to prevent injuries caused (or threatened) by a violation of the antitrust laws. *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679, 697 (1978) ("Having found the Society guilty of a violation ... the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences."); *U.S. v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (stating that a district court has "an obligation to intervene" to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance"); *U.S. v. United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968) (holding it was the duty of the district court to prescribe relief that would end the antitrust violation and "assure the complete extirpation of the illegal" conduct); *U.S. v. Ward Baking Co.*, 376 U.S. 327, 330-331 (1964) (stating that an injunction under Section 16 must be broad enough to "prevent future violations and eradicate existing evils").

Having found that Feesers had proved its price discrimination claims at trial, this Court permanently enjoined Michael Foods "from discriminating unlawfully in price in favor of Sodexho and against Feesers."

Court's Order, dated April 27, 2009 [Dkt. No. 395] ("Order") at 1. Michael Foods defiantly responded by informing Feesers that "Michael Foods will comply with the Court's injunction by suspending sales and shipments to Feesers until the resolution of its appeal of the Court's judgment."³ Op. Br. at 1, 5-6; O'Kelly Decl., Ex. B. Thus, through its contemptuous insistence that the Court's order *requires* it to cease supplying Feesers with food products, coupled with its extortionate demand that for supply to resume, Feesers would have to acquiesce in Michael Foods' unlawful price discrimination scheme, Michael Foods makes it clear that to enforce the April 27 Order, this Court must compel Michael Foods to continue fulfilling Feesers' purchase orders but at non-discriminatory prices.

Such mandatory relief is well within the Court's equitable powers. For instance, in *Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980), after a jury found the defendants liable for antitrust

³ As discussed in Feesers' opening brief, the Third Circuit does not tolerate contorted readings of an injunction that are designed to evade its intent. See Opening Br. at 16-17, discussing *U.S. v. Christie Industries*, 465 F.2d 1002, 1007 (3d Cir. 1972). Michael Foods attempts to distinguish *Christie* on the grounds that even though the injunction at issue only specifically addressed the shipment of complete firework kits, the "government *requested* an injunction precluding ... the shipment of the kit's component parts." The court in *Christie* did not decide that the injunction had been violated based on what the prevailing party had *requested*, but rather on what mischief the district court had intended to forestall when it granted the injunction. 465 F.2d at 1007.

violations, the district court permanently enjoined them from refusing to deal with the plaintiff on the same terms as the plaintiff's competitors. *Id.* at 479. On appeal, the defendants argued (like Michael Foods here), that they had a right to deal with whomever they pleased and the district court had exceeded its authority. *Id.* at 485. The Seventh Circuit upheld the district court's injunction, holding that once an antitrust violation is proven, the district court "has the duty to compel action by the [defendants] that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. ... [R]elief to be effective must go beyond the narrow limits of the proven violation." *Id.*, quoting *Ward Baking Co.*, 376 U.S. at 330.

The Seventh Circuit found that where defendants "were likely to terminate the plaintiff's supply after the instant suit in order to covertly achieve their unlawful purposes, it [was] especially appropriate to require the defendant to sell generally on a non-discriminatory basis in addition to enjoining the proven violations." 633 F.2d at 485, citing *Int'l Salt Co. v. U.S.*, 332 U.S. 392, 400 (1947). Here, of course, Michael Foods leaves no doubt that absent a similar injunction, it *will* "terminate the plaintiff's supply ... in order to ... achieve [its] unlawful purposes." *See also U.S. v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (characterizing compulsory sale

provisions as a recognized injunctive remedy for antitrust violation); *Besser Mfg. Co. v. U.S.*, 343 U.S. 444, 447 (1952) (same).

Moreover, Michael Foods' conduct in the days immediately after it stopped supplying food products to Feesers underscores the need for a mandatory injunction to enforce the April 27 Order. In its opposition, Michael Foods brazenly insists that Feesers will suffer no harm as a result of Michael Foods' conduct because Feesers can obtain Michael Foods products from other distributors or from redistributors such as Dot Foods. Opp'n at 4, 6-7, 18-21. As Feesers' Chief Operating Officer, John Tighe, attested in support of Feesers' motion, however, Michael Foods wrote to the distributor buying group UniPro warning it not to pass on any Michael Foods allowances or discounts to Feesers.⁴ Declaration of John Tighe, dated May 5, 2009 ("Tighe Decl.") ¶36; *id.* Ex. D. Feesers has subsequently learned that Michael Foods wrote a similar letter to the redistributor Dot Foods, warning it also not to pass on allowances or discounts on any Michael Foods products that it resold to Feesers. Declaration of Thomas R. Brandt, dated May 13, 2009 ("Brandt Decl.") ¶8. Thus, Michael Foods has made sure that

⁴ Michael Foods admits that it "informed UniPro that it would not honor deviated pricing discounts on orders that other distributors resell to Feesers" because it "does not want to [provide Feesers] with discounts it would receive if it were purchasing directly from Michael Foods." Opp'n at 19.

no matter what source Feesers purchases Michael Foods products from, it will have to pay the full national distributor list price for those products.

As this Court has found, Michael Foods sells food products to Feesers and other distributors at national list prices and to Sodexo at different, much more favorable prices. Court's Opinion, dated April 27, 2009 [Dkt. No. 395] ("Opinion") at 27-32. As long as Michael Foods continues to discriminate in price in favor of Sodexo and against distributors that purchase at list prices, the price discrimination *against Feesers* that this Court held to be unlawful and has enjoined will continue unabated. This is true whether Feesers (i) capitulates to Michael Foods' extortionate demand that it stipulate to a stay of the April 27 Order pending appeal, or (ii) purchases Michael Foods products from other distributors that have themselves paid the national distributor list prices. The latter arrangement would constitute tertiary-level price discrimination, where the distributors that resold to Feesers would purchase at the list prices and Sodexo's contract distributor would purchase at the Sodexo deviated prices, and Feesers would be at a more severe competitive disadvantage than ever in trying to compete with Sodexo. As both this Court and the Third Circuit have unequivocally held, such tertiary price discrimination is

unlawful. *See* Opinion at 43-45; *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 211 n.5 (3d Cir. 2007).⁵

Finally, Michael Foods protests that the Court cannot compel it to sell to Feesers in perpetuity. Opp'n at 20. This is yet another red herring. Feesers is only asking that it be allowed to purchase Michael Foods products at non-discriminatory prices – the same prices at which Michael Foods sells to Feesers' competitor, Sodexho. Feesers does not dispute that Michael Foods could discontinue supply if it had a legitimate business reason for doing so (for example, a deterioration in Feesers' credit rating or an inability by Feesers to pay its bills). Indeed, the Seventh Circuit rejected an identical argument by defendants in *Trabert & Hoeffler*, noting that the defendants could “petition for alteration of the injunction upon a showing of legitimate business reasons unrelated to a desire to restrain competition.” 633 F.3d at 485. But Michael Foods has made no effort to offer any such legitimate business reason here – as its demands to Feesers make clear, the only reason that it has cut off supplies is Feesers' refusal to knuckle under to Michael Feesers' extortionate pricing demands.

⁵ Indeed, recognizing this, the Court permanently enjoined Sodexho “from continuing to induce or receive unlawful price discrimination from Michael Foods.” Order at 1.

III. Feesers Has Satisfied the Other Requirements for Injunctive Relief

A. Feesers Has Demonstrated Immediate and Irreparable Harm

Much as Michael Foods might wish to minimize the harm facing Feesers should this Court not grant its motion, it has no answer to the detailed sworn declaration of Feesers' chief operating officer, John Tighe, that Michael Foods' conduct threatens Feesers' goodwill and reputation and to impair its relationships with its customers. As is noted by one of the cases cited by Michael Foods, *DeAngelo Bros., Inc. v. Clarius*, 2006 U.S. Dist. LEXIS 57846 at *36 (M.D. Pa. Aug. 17, 2006), injury to goodwill and reputation constitutes irreparable harm; *see also Kos Pharms. v. Andrx Corp.*, 369 F.3d 700 (3d Cir. 2004) (same); *Novus Franchising, Inc. v. Taylor*, 795 F.Supp. 122 (M.D. Pa. 1992) (same).

Moreover, as discussed above, there is no merit to Michael Foods' contention that Feesers will not be harmed by Michael Foods' conduct because Feesers can always obtain Michael Foods' products from other sources. As long as Michael Foods continues to discriminate in price in favor of Sodexho and against everyone else, the very harm that this lawsuit sought to redress – injury to Feesers in its ability to compete with Sodexho – will persist.

B. Michael Foods Will Not Suffer Irreparable Harm

Michael Foods' conclusory assertion that it will suffer "significant" (not irreparable) injury if the injunctive relief is granted (Opp'n at 20), is directly at odds with this Court's findings and thus must be rejected. *See* Opinion at 82. Michael Foods states that if it were required to sell products to Feesers at non-discriminatory prices, it would have to "radically alter" its business practices. Opp'n at 20. Altering its illegal business practices is, of course, precisely what this Court has ordered Michael Foods to do. Order at 1; Opinion at 82-83.

C. The Public Will Be Harmed by Michael Foods' Conduct

Again, Michael Foods has no real answer to Mr. Tighe's sworn statement that Feesers' customers will be harmed if their ability to procure Michael Foods' egg and potato products is disrupted. Neither has Michael Foods any answer – other than a sarcastic rejoinder that Feesers should lobby Congress – to Feesers' concern that the Robinson-Patman Act would be rendered nugatory if a defendant that was found liable for price discrimination were permitted to terminate supply to its victims unless they agreed to continue paying the unlawful discriminatory prices. Opp'n at 17, 21.

CONCLUSION

For the foregoing reasons and the reasons set forth in Feesers' opening papers, Feesers respectfully requests that this Court enter an order of contempt against Michael Foods and grant Feesers' request for an injunction and temporary restraining order. Feesers also requests that the Court order Michael Foods to pay the fees and costs incurred by Feesers in bringing this motion, and award any other relief that the Court deems just and proper.

Dated: May 13, 2009
New York, New York

Respectfully submitted,
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