IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FEESERS, INC., Plaintiff v. MICHAEL FOODS, INC. and SODEXHO, INC. Defendants	Civil Action No. 1:04-cv-576-SHR (Honorable Sylvia H. Rambo)

DEFENDANT MICHAEL FOODS, INC.'S OPPOSITION TO PLAINTIFF FEESERS, INC.'S MOTION FOR CONTEMPT AND A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Feesers' motion asks this Court to read its existing injunction as a mandatory permanent decree that compels an apparently perpetual business relationship between Feesers and Michael Foods, and to hold Michael Foods in contempt for supposedly violating that decree. But Feesers never asked for such an order, the Court never entered one, and Michael Foods certainly never violated an order that never existed.

Feesers' claim that the injunction creates a compulsory business relationship is baseless. Michael Foods has an explicit statutory right under the Robinson-Patman Act to choose to suspend sales to Feesers, thus simultaneously avoiding any price discrimination under the Act and complying with the express terms of this Court's injunction forbidding that discrimination. This Court's carefully worded injunction neither requires Michael Foods to sell products to Feesers, nor affects Michael Foods' right to eliminate price discrimination by ceasing sales to Feesers.

Although Feesers claims that the Court "intended" to require Michael Foods to sell to Feesers, the injunction provides narrowly that Michael Foods "is hereby enjoined from discriminating unlawfully in price in favor of Sodexho and against Feesers" and does not impose any other obligation. The RPA provides that "[n]othing herein contained shall prevent persons engaged in selling goods, wares,

or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. §13(a). A manufacturers' suspension of sales to a disfavored purchaser is not "in restraint of trade" under the Act unless it violates Section 1 or 2 of the Sherman Act, and Feesers' concedes that it is not alleging that. Thus, a manufacturer does not violate the RPA by suspending sales to a disfavored purchaser as a way of avoiding price discrimination; as one court said, "we understand this to be the nature" of the Act. *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 439 F.3d 653, 669 (10th Cir. 2006).

This Court's injunction does not override this statutory provision. The Second Circuit has upheld a manufacturer's right to terminate sales to disfavored customers alleging price discrimination, even when that manufacturer was subject to a government decree that enjoined it from discriminating in price between the disfavored and favored customers, and even where it was apparent that the manufacturer had terminated the disfavored customers because they had filed the antitrust lawsuit. *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 870 (2d Cir. 1962).

Feesers relies almost exclusively on *Bergen*, a decision that has no application to this case. Feesers is wrong that *Bergen* requires a perpetual course of dealing. The Third Circuit there entered a preliminary injunction against a

manufacturer's termination of a dealer who accused it of monopolization and price discrimination. The court of appeals found that a ***temporary*** injunction was justified during trial because the manufacturer's termination "further[ed] the monopoly" that the plaintiff was challenging. Therefore, because the manufacturer's action was "in restraint of trade," it was not protected by Section 13(a)'s proviso. Feesers admits that Michael Foods' suspension of sales does not constitute a restraint of trade.

Lacking a recognized legal basis to compel Michael Foods to continue to deal with it, Feesers resorts to hyperbole and invective in an attempt to obtain a right that is denied by the very statute under which it sued. Feesers complains that Michael Foods engaged in "extortionate" conduct by suggesting a stipulated stay of the injunction pending appeal. That accusation is irresponsible. Michael Foods exercised its statutory right to suspend sales to Feesers, in order to avoid any claim by Feesers that it was engaging in ongoing price discrimination. If Feesers had agreed to a stay, there would be no need to suspend sales, and Michael Foods merely informed Feesers of that fact. The exercise of a right (including the offer to forego it for consideration) is not extortion, as a matter of law. *Brokerage Concepts v. United States Healthcare*, 140 F.3d 494, 524 (3d Cir. 1998). Michael Foods' offer to maintain the parties' relationship is not a contempt of the Court's power and does not entitle Feesers to a second injunction.

To obtain an equitable remedy, Feesers also must show that it will be irreparably harmed if this Court does not compel Michael Foods to sell products to Feesers. Feesers claims that it will be irreparably injured because it may lose customers if it is unable to sell Michael Foods products. Of course, even if that were true, it would not constitute irreparable injury; the loss of customers is easily compensable with money damages. But there is no factual basis for Feesers' argument in any event. Feesers can sell to its customers the competitive products that it already carries. Feesers can also obtain Michael Foods products from other distributors or resellers, as Feesers concedes. And its customers can always purchase from other distributors.

In the end, Feesers cannot establish by clear and convincing evidence that Michael Foods is in contempt of the Court's order, nor can it show irreparable harm. Thus, the Court should deny Feesers' motion.

FACTS

Feesers' entire case depends upon the terms of this Court's injunction. The Court found that "the Act prohibits Michael Foods from discriminating in price against Feesers and in favor of Sodexho." Slip. Op. at 82. The Court then found that Feesers "is entitled to an injunction prohibiting Michael Foods from engaging in such discrimination." *Id*. The Court entered a prohibitory injunction enjoining Michael Foods "from discriminating unlawfully in price in favor of Sodexho and

against Feesers." Order at 1. The Order does not contain a mandatory provision requiring Michael Foods to sell products to Feesers or to Sodexho, nor did Feesers seek such an injunction.

After receiving this Court's order, and considering its options, Michael Foods informed Feesers that "Michael Foods will comply with the Court's injunction by suspending sales and shipments to Feesers until resolution of its appeal of the Court's judgment." Declaration of Alfred C. Pfeiffer, Jr. Ex.2. Michael Foods also noted that it would continue selling to Feesers if Feesers would agree to a stay of the injunction pending appeal. *Id.*

Later that day, counsel for Feesers told counsel for Michael Foods that Feesers needed the Michael Foods product covered by the pending orders, and volunteered that it would stipulate in writing that it would not argue that paying Feesers' usual and customary prices for these orders violated the injunction. *Id.* Ex.3. Michael Foods agreed to accommodate that request. *Id.* ¶5

On Sunday May 3, Feesers' counsel advised Michael Foods' counsel that Feesers intended to file a motion for contempt and to seek a TRO forcing Michael Foods to sell to Feesers pending the outcome of the contempt proceedings. *Id.* Ex.4. Subsequently, after Feesers learned that the Court would not be able to hear its motion for at least a week, Feesers then asked Michael Foods to continue selling

products to Feesers until such time as Feesers could secure an order of contempt against Michael Foods. *Id.* ¶7. Michael Foods declined Feesers' request.

Feesers does not claim that Michael Foods violated any contract by suspending sales to it because there is not and never has been any contractual supply agreement between Feesers and Michael Foods. Declaration of Michael A. Elliott ¶12 ("Elliott"). Michael Foods and Feesers do business through an informal arrangement where Feesers submits a purchase order when it wishes to buy product, and Michael Foods fills the purchase order. *Id.*

Feesers has never had any standing purchase orders for Michael Foods products, nor has Feesers ever made any commitments to purchase a certain volume of Michael Foods products. *Id.* ¶14. Feesers' purchase orders to Michael Foods fluctuate, both in terms of the types of products and the quantity of particular products that it orders at any given time. *Id*.

Feesers claims that, without an injunction compelling Michael Foods to sell to Feesers, Feesers or its customers would be unable to fulfill their needs for egg and potato products. That is not true. Feesers can supply its customers with the competitive egg and potato products that it already carries, or it can obtain Michael Foods products from distributors other than Feesers, as Mr. Tighe admits. Tighe ¶37. Feesers can also obtain Michael Foods products from Dot Foods, a company

that resells products to broad-line distributors. Elliott ¶23. Feesers' customers can also purchase from other distributors. *Id.*

Feesers highlighted Eat'n Park as a customer relationship that it feared would be damaged by the unavailability of Michael Foods products. Mem. at 21. But Eat'n Park proves just the opposite of Feesers' claim. Though Eat'n Park has been purchasing Michael Foods products for nearly 20 years, Eat'n Park has decided to continue to do business with Feesers and to purchase other manufacturers' egg and potato products from Feesers. Elliott ¶28.

ARGUMENT

Although Feesers correctly states the standard that it must meet in order to obtain a temporary restraining order, it does not satisfy the two "essential elements," a likelihood of success or irreparable injury. If it fails to prove either one of the elements, its motion fails. *Mettler-Toledo, Inc. v. Acker*, 908 F. Supp. 240, 245 (M.D. Pa. 1995). Feesers has not met any part of the standard let alone the two most important components of it.

I. FEESERS HAS NOT SHOWN ANY LIKELIHOOD OF PROVING CONTEMPT

Feesers' request for injunctive relief relies on the notion that Feesers is likely to prevail on its motion for contempt. That motion for contempt requires Feesers to show by "clear and convincing evidence" that Michael Foods violated

the express terms of the Court's injunction. *Derrick F. v. Red Lion Area School District*, 2007 U.S. Dist. LEXIS 16085, at *12 (March 7, 2007) (Rambo, J.).

A. Feesers' Claim That Michael Foods Cannot Suspend Sales To Feesers Conflicts With The Express Terms Of The Act

1. The RPA Permits Manufacturers To Refuse To Deal With Disfavored Purchasers Even When An Injunction Requires Them To Avoid Price Discrimination

Feesers' contempt motion hinges on its ability to establish that this Court imposed a mandatory permanent injunction that requires Michael Foods to sell products to Feesers at nondiscriminatory prices. But the Court did not enter such an order, nor would it be consistent with the RPA had it done so. The Act permits Michael Foods to choose to comply with the injunction by refusing to deal with Feesers.

The Act expressly states that "nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. §13(a). This provision means that a manufacturer is immune from liability for price discrimination when it refuses to deal with a disfavored buyer. In *B-S Steel of Kansas Inc. v. Texas Industries, Inc.*, 439 F.3d 653, 669 (10th Cir. 2006), for example, the court held that the plaintiff lacked standing to obtain injunctive relief against defendants' price discrimination because it was no longer a purchaser of the defendants' product. The court rejected plaintiff's argument that this holding

would allow defendants to simply cease selling to a customer complaining of price discrimination and effectively cut off the customer's ability to seek injunctive relief because "[i]t is well established that a refusal to deal simply does not fall within the proscription of Section 2(a) of the RPA." *Id.*

Similarly, in *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1022 (2d Cir. 1989), a terminated distributor sought injunctive and declaratory relief on the basis of the manufacturer's price discrimination. The court denied its request on the ground that "[s]ince [defendant] is no longer selling to [plaintiffs], *as is its right*, there is no danger that it will sell to them on discriminatory terms in violation of 15 U.S.C. § 13." *Id.* (emphasis added).

Finally, in *L&L Oil Company, Inc. v. Murphy Oil Corp.*, 674 F.2d 1113, 1121 (5th Cir. 1982), the plaintiff complained that the manufacturer had violated Section 2(a) by terminating sales to it, thus forcing it to buy the product on the "spot market" at substantially higher prices. The court rejected this claim on the ground that Section 2(a) requires two sales at discriminatory prices; "a supplier who merely refuses to sell a product to a customer will not be held in violation of Section 2(a)" because there is no price discrimination and the refusal to deal is specifically authorized by the Act.

An injunction prohibiting price discrimination does not affect a manufacturer's right to refuse to deal with a disfavored buyer, precisely because refusal to deal is not a discrimination. *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 870 (2d Cir. 1962). There, the FTC obtained an injunction against the defendant's discriminatory pricing. Two of defendant's customers sued under the RPA, and the manufacturer terminated their accounts. The court denied the plaintiffs' request for a preliminary injunction requiring the manufacturer to continue to deal with them. *Id.* The court held that, even though the FTC decree precluded the defendant from discriminating in price among its customers, the RPA does not impose an obligation on the defendant to deal with plaintiffs, thus its termination of plaintiffs to avoid discriminating against them did not give the plaintiffs a right to remain customers. *Id.*

This Court's injunction prohibited Michael Foods from discriminating in price as between Feesers and Sodexho. Michael Foods' suspension of sales complies with that directive, as expressly authorized by the Act. Feesers thus has no likelihood of proving that Michael Foods' suspension of sales was in contempt of the Court's decree.

2. Feesers Cannot Establish That Michael Foods' Suspension of Sales Was A "Restraint Of Trade"

A court may enjoin a suspension of sales that furthers a restraint of trade. But suspending sales to a disfavored customer is not a restraint of trade as a matter

of law. In *L&L Oil*, the terminated plaintiff argued that the manufacturer's refusal to deal was a form of price discrimination. The court of appeals stated that "restraint of trade has a very specific meaning in the context of antitrust laws;" it is "actions accompanied by an unlawful agreement within the meaning of Section 1 of the Sherman Act, [or] actions conceived with a monopolistic purpose within the meaning of Section 2 of the Sherman Act." 674 F.2d at 1120 n.8. Thus, "the elimination of wholesalers from the market-place is not necessarily 'in restraint of trade' even though in the literal sense trade is restrained." *Id*.

Feesers' claim that Michael Foods' suspension of sales is in retaliation for Feesers' successful prosecution of its lawsuit, and therefore a restraint of trade, is also untenable. It is well established that a manufacturer's decision to terminate a dealer that has prosecuted an antitrust case against it is not an unlawful purpose and does not constitute a violation of the antitrust laws. *See, e.g.*, *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 890 (9th Cir. 1982) (refusal to deal after settlement of an RPA suit is not a restraint of trade absent proof that it furthered a conspiracy or monopoly); *High-Tech Communications, Inc. v. Panasonic Co.*, 1995 WL 65133, at *2 (E.D. La. 1995) (manufacturer free to terminate plaintiff for the "dual purpose of retaliating against the plaintiff for commencing the [RPA] lawsuit and making it financially impossible to prosecute its claims" because the termination did not operate as a restraint of trade); *Simplicity Patterns*, 298 F.2d at

871 (refusal to deal with disfavored plaintiffs not unlawful restraint of trade even if motivated by retaliation for the antitrust lawsuit).

3. *Bergen* Does Not Hold That Feesers Can Obtain A Permanent Injunction Requiring Michael Foods To Deal With It

Feesers claims that *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962), holds that a defendant "cannot evade its legal duty to sell products at non-discriminatory prices to a plaintiff by cutting off supplies to that plaintiff entirely." Mem. at 3. That is false. *Bergen* did not hold that a manufacturer has a permanent duty to continue to deal with a plaintiff who accuses it of price discrimination.

In *Bergen*, plaintiff sued defendant for "discriminatory dealing and monopolizing and attempting to monopolize." 307 F.2d at 727. The manufacturer terminated the plaintiff, who then moved for a preliminary injunction to require the defendant to continue to deal with it during the litigation. The Third Circuit held that the district court had the power in equity to grant this preliminary injunction because it was "apparent that [the defendant's refusal to deal] will further the monopoly which plaintiff alleges defendant is attempting to bring about and which, if proved, would entitle plaintiff to permanent relief." *Id.* at 728. Thus *Bergen* holds that, where a plaintiff might be able to obtain a permanent injunction against

termination because it may prove that the termination furthers a restraint of trade, a court may preliminarily enjoin the termination.

Bergen has literally nothing to do with this case. Feesers has not alleged monopolization or any other antitrust violation, much less that suspending sales to Feesers would advance such a violation. Instead, Feesers had conceded that it is *not* asserting any such claim. Mem. at 16 n.4.

Bergen is inapposite for several other reasons as well. The injunction was a preliminary one "to maintain the status quo" during the course of the litigation and the plaintiff had produced uncontroverted evidence that cutting off sales would make it "impossible" for it to "prosecute the main claim under the antitrust laws" because it would intimidate necessary witnesses. *Id.* at 728.

None of those factors exists here. First, this motion involves the scope of an existing permanent injunction, not whether the Court should issue a preliminary injunction preserving the status quo until plaintiff can prove its right to permanent relief. Second, a permanent injunction requiring Michael Foods to continue to deal with Feesers is expressly unavailable under the RPA. Third, while Feesers parrots *Bergen*'s language that the lack of an injunction would have the effect of "stifling the main action," it ignores what that language actually meant in the case. Feesers makes no argument that suspension of sales to it will intimidate any witnesses, or

otherwise prevent it from prosecuting its claims to judgment. Nor could it; the Court has already entered judgment in its favor.

B. The Court's Injunction Does Not Require That Michael Foods Comply With It By Continuing To Sell To Feesers And Thus Michael Foods Is Not In Contempt Of It

This Court's injunction simply enjoined Michael Foods "from discriminating unlawfully in price in favor of Sodexho and against Feesers." Order at 1. Feesers concedes that Michael Foods has not violated the actual "specific terms" of the injunction but rather says that Michael Foods is attempting to "circumvent [its] intent" and attempts to dismiss this difference as "merely technical." Mem. at. 18. But contempt does not lie *unless* the defendant violates the specific terms of the injunction. "[P]rohibited conduct will not be implied from [injunction] orders; [such orders] are binding only to the extent they contain sufficient description of the prohibited or mandated acts." *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971) (no contempt where district court found specific aspect of conduct unlawful but did not mention it in injunction).[1]

Feesers relies on cases holding that parties cannot act so as to continue to achieve "the mischief the injunction sought to prevent." *Id.* at 17-18. But the

[1] Feesers' argument that Michael Foods is violating the injunction by continuing to sell to Sodexho at discriminatory prices while allegedly selling to other distributors, such as Sysco, at "higher discriminatory prices" cannot support its contempt motion. Sysco is not a party to this suit and this Court's entry of judgment in no way pertains to Sysco, so this unsupported assertion cannot form the basis for a finding of contempt.

mischief the injunction addressed, indeed, the only "mischief" Feesers ever alleged, was price discrimination on contemporaneous sales to Feesers and Sodexho. Michael Foods' suspension of sales to Feesers does not effectuate that mischief; it eliminates the possibility of it.[2]

C. Michael Foods' Exercise Of Its Right To Suspend Sales Does Not Give Feesers An Independent Basis To Demand Perpetual Continuation Of The Business Relationship

Recognizing that Michael Foods is not in contempt of the Court's existing injunction, Feesers apparently seeks a second permanent injunction based on the theory that Michael Foods' offer to continue sales to Feesers at historic prices during Michael Foods' appeal of this Court's injunction is contemptuous of this Court's power and warrants injunctive relief. Feesers argues that this Court can issue an injunction "where a party's conduct is calculated to frustrate litigation or in this case, a court's final binding resolution of litigation." Mem. at 18-19.

Feesers cites no legal authority that would permit this Court to enter a

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[2] Feesers' cases are therefore inapposite. In *United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1006 (3d Cir. 1972) (Mem. at 17-18), for example, the injunction sought to prevent the "mischief" of shipping fireworks to children, and the government had specifically requested an injunction precluding not just the shipment of firework kits, but also the shipment of the kit's component parts. When the court enjoined shipping of the kits, the defendant tried to evade the injunction by separately shipping the component parts of the kit. *See also* Mem. at 18 (citing *Magnesco Restaurants, Inc. v. Magnesco Treacher's Fish & Chips, Inc.*, 689 F.2d 1150, 1156 (3d Cir. 1982) (refusing to allow defendant to evade injunction that expressly prohibited interfering with plaintiff's sources of supply by claiming that injunction did not identify any suppliers by name).

mandatory permanent injunction requiring a perpetual business relationship, on any ground, let alone on the grounds that Feesers urges. Feesers' argument starts from the false assumption that Feesers had a legal right to compel Michael Foods to sell to it at nondiscriminatory prices, so that it can pretend Michael Foods was attempting to coerce Feesers to abandon that legal right. But the RPA does not give Feesers that right, nor does it authorize this Court to order that relationship. This Court cannot rewrite its injunction to impose an obligation not authorized by the very statute under which Feesers proceeded.

Feesers' claim, that *Bergen* holds that this Court can exercise its general equity powers to issue an injunction on the basis of what Feesers terms Michael Foods' "intimidation and coercion," is not correct. *Bergen* held that the court could issue a *preliminary* injunction to preserve the litigant's ability to prosecute its claim under the antitrust laws, and to have access to witnesses to help it do so.[3]

Here, the litigation is concluded and Feesers does not claim the suspension

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[3] The *Simplicity* court said, in dicta, that a court might have the power to enjoin a termination in the exercise of its general powers of equity if the evidence showed that the termination was intended to coerce the plaintiff into dropping the lawsuit. However, the court went on to say that, even assuming the existence of such equitable power, it would be wrong to exercise in the circumstances of a commercial relationship where the plaintiff had no legal right to continue to buy from the manufacturer. Here of course, Feesers' lawsuit is complete, so Michael Foods' suspension of sales cannot coerce it to take any action. But more importantly, here, Feesers has no legal right to continue to buy products from Michael Foods.

of sales will affect its ability to defend the judgment on appeal. Feesers instead argues that Michael Foods' conduct will send a "stern warning to the rest of the marketplace that it [will] not tolerate any attempts to enforce the law against it," apparently suggesting that suspension of Feesers may discourage future lawsuits. But that is not grounds for contempt.

A "civil contempt order is strictly remedial." *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 910 (3d Cir. 1975). "It is not designed to vindicate the court's authority but to recompense one of the private parties for loss caused by the failure of the other to observe the court's order." *Id.* Thus, in *Universal Athletic*, the Third Circuit found that a civil contempt order had to be vacated because the defendant had not violated the copyright laws and therefore there was no basis for the district court's injunction in the first instance. *Id.* Here, because there is no loss to recompense, there is no basis for a contempt order. Accordingly, this Court should deny Feesers' request for a second injunction arising from Michael Foods' conduct apart from its price discrimination.

II. FEESERS HAS NOT SHOWN ANY IMMINENT IRREPARABLE HARM

Feesers must also show "irreparable harm and inadequacy of legal remedies," *Sampson v. Murray*, 415 U.S. 61, 88 (1974), where "compensation in money cannot atone for it." *D'Angelo Bros., Inc. v. Clarius*, 2006 U.S. Dist. LEXIS 57846, at *34-35 (M.D. Pa. Aug. 17, 2006).

Feesers claims that it will suffer "severe and irreparable" injury if it cannot obtain Michael Foods products because its customers might seek those products elsewhere. Mem. at 21. But the loss of customers is, by definition, the loss of sales, which are compensable by money damages. *DeAngelo Bros.*, 2006 U.S. Dist. LEXIS 57846, at * 34-35.

In any event, Feesers' claim that it cannot obtain Michael Foods products is false. It can purchase Michael Foods products from other distributors or redistributors and Michael Foods does not control those transactions. Elliott ¶¶23-24. Feesers admits this. Tighe ¶ 37.

Feesers also claims that Michael Foods products are uniquely important to food service operators. Even if these statements are an accurate representation of the views of unnamed third-party customers, they do not establish that Feesers will be irreparably injured or the customers harmed; both Feesers and the customers can obtain Michael Foods products from multiple other sources. Elliott ¶¶23-27.[4]

Moreover, Feesers' claims about what its customers may do or think are pure speculation and therefore cannot support a TRO. *DeAngelo Bros.*, 2006 U.S. Dist. LEXIS 57846, at *35. For example, Feesers cites to Eat'n Park expressing

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[4] These statements are completely at odds with the trial record in this case. Not a single witness, including Feesers' witnesses, testified that *Michael Foods* egg and potato products are bellwether products or uniquely important to customers.

"grave concerns" about the possible disruption of its business. Mem. at 21. But Eat'n Park has already decided to continue to do business with Feesers and to purchase other manufacturers' egg and potato products from Feesers, instead of Michael Foods products. Elliott ¶28. Feesers has not submitted proof that any of its other customers, upon hearing of Michael Foods' termination of its distribution arrangement with Feesers, will choose differently. Moreover, even if they did, the only injury Feesers would incur is at most a "temporary loss of income," an injury imminently remediable by money damages. *Sampson*, 415 U.S. at 90.

Feesers also complains that Michael Foods informed UniPro about its decision to suspend its relationship with Feesers, and told UniPro that it would not honor any requests for deviations by third-parties that chose to resell Michael Foods products to Feesers. Mem. at 9. But Michael Foods never told anyone not to sell Michael Foods' products to Feesers. Elliott ¶32. It merely informed UniPro that it would not honor deviated pricing discounts on orders that other distributors resell to Feesers. *Id.* Ex.7. That is because Michael Foods does not want to replicate a buyer-seller relationship with Feesers by providing it with discounts it would receive if it were purchasing directly from Michael Foods. *Id.* ¶32.

Because any injury Feesers might incur is speculative and amounts to nothing more than lost income, Feesers cannot establish an imminent threat of irreparable harm sufficient to entitle it to a TRO.

III. MICHAEL FOODS WOULD SUFFER SUBSTANTIAL HARM IF THE COURT FORCED IT TO DO BUSINESS WITH FEESERS INDEFINITELY

Michael Foods would suffer significant injury if the Court forced it to do business with Feesers in perpetuity and therefore this factor weighs against an injunction. If Michael Foods were required to do business with Feesers, Michael Foods could not continue selling products to both Feesers and Sodexho, unless it radically altered its business practices, causing substantial financial injury. Elliott ¶17.

IV. NO THIRD PARTIES WILL BE HARMED AS A RESULT OF MICHAEL FOODS' SUSPENSION OF FEESERS AS A DISTRIBUTOR

Michael Foods' unilateral suspension of sales to Feesers will not result in harm to any third parties, and therefore the public's interest does not weigh in favor of an injunction. Feesers' argument that Michael Foods' conduct will render institutions unable to meet the dietary needs of their residents is unsupported fantasy. Feesers' customers can easily meet whatever dietary requirements they have by purchasing competitive products from Feesers, or buying Michael Foods products from other sources, *including Feesers* (through other distributors or redistributors). Elliott ¶¶23-27. Contrary to Mr. Tighe's statement that its customers would have to "scramble" to find alternative suppliers (Tighe ¶31),

many customers already use more than one broad-line distributor, Elliott ¶10, so buying from one versus another would be no hardship.

Feesers also claims that, absent an injunction forcing Michael Foods to do business with it, the RPA "would be a dead letter." Mem. at 14. But that is a concern Feesers should raise with Congress, not this Court.

CONCLUSION

For the foregoing reasons, the Court should deny Feesers' motion.

Dated: May 11, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 7.8(b)(2)

Pursuant to Local Rule 7.8(b)(2), it is hereby certified that the foregoing memorandum of law contains 4,887 words (exclusive of the title page, table of contents, table of authorities, signature block, this certificate, and certificate of service), according to the Microsoft® Word 2003 word processing system used to prepare it, and that the brief therefore complies with the type-volume limitations of Local Rule 7.8(b)(2).

Dated: May 11, 2009

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