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

FEESERS, INC., **Plaintiff,** **v.** **MICHAEL FOODS, INC. and SODEXHO, INC.,** **Defendants.**	**CIVIL NO. 1:CV-04-0576** **JUDGE SYLVIA H. RAMBO**

M E M O R A N D U M

Before the court are motions by Defendants Michael Foods and Sodexho to amend the court's April 27, 2009 order granting judgment in favor of Plaintiff Feesers, Inc. pursuant to Fed. R. Civ. P. 59(e). For the reasons that follow, Michael Foods' motion will be denied, and Sodexho's motion will be granted in part and denied in part.

I. Background

On April 27, 2009, following a three week bench trial, this court issued an opinion and order granting a declaratory judgment in Plaintiff's favor and issuing injunctive relief. On May 5, 2009, Plaintiff filed a motion for contempt and injunctive relief, which the court granted on May 26, 2009 (Doc. 431). On May 6, 2009, Defendant Michael Foods filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). (Doc. 404.) A brief in support thereof was filed the same day. (Doc. 405.) On May 11, 2009, Defendant Sodexho also filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), (Doc. 414), and a brief in support thereof, (Doc. 415). On May 21, 2009, Feesers filed briefs in opposition,

(Docs. 427, 428), to which Michael Foods and Sodexho submitted reply briefs, (Docs. 439, 442). Accordingly, the motions are ripe for disposition.

II. Standard

The purpose of a motion for reconsideration "is to allow a court to correct manifest errors of law or fact, or in limited circumstances, to present newly discovered evidence, but not to relitigate old issues, to advance new theories, or to secure a rehearing on the merits." *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 561 (D.N.J. 2003) (internal citations omitted). Reconsideration of a judgment is an extraordinary remedy and is generally only granted where "(1) an intervening change in the law has occurred, (2) new evidence not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises." *Id.*

III. Discussion

Defendants challenge the court's opinion and order on a number of grounds. First, Michael Foods and Sodexho argue that the Third Circuit's decision in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008) entitles them to judgment in their favor. Additionally, Sodexho argues that the order barring it from inducing price discrimination is impermissibly vague and overbroad. These arguments will be addressed in turn.

A. *Toledo Mack*

Both Defendants argue that *Toledo Mack* entitles them to judgment in their favor, but for different reasons. Michael Foods argues that *Toledo Mack* represents an intervening change in law that entitles it to a reversal of the court's judgment. Sodexho argues that the case simply applies the principles set forth in the

Supreme Court's 2006 opinion in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), and that this court committed a clear legal error by finding in Feesers' favor. However, both parties present essentially the same legal arguments that the court considered and rejected in the April 27, 2009 opinion and order.

Toledo Mack and *Reeder-Simco* concerned competition for the sale of custom made trucks among car dealerships operating in distinct geographic zones, and in both cases, courts found that competition was limited to a formal bidding process. In *Reeder-Simco*, which this court discussed at length in the April 27, 2009 opinion and order, (*see* Doc. 395 at 24–26), the Supreme Court held that a price disparity caused no competitive injury because the plaintiff had never submitted a bid in head-to-head competition with favored dealers. In *Toledo Mack*, the Third Circuit applied this holding to almost identical facts, concluding that the Robinson-Patman Act does not apply to a case involving "a single sale of a customized good via a competitive bidding process." 530 F.3d at 228.

According to Defendants, these cases entitle them to judgment in their favor because Feesers never proved that Michael Foods actually sold it any products that later became the basis for head-to-head competition with Sodexho. Defendants argue that like the situation in *Mack Trucks*, at the time a customer chooses between Sodexho and Feesers, the two companies possess nothing more than an *offer* to sell.

The court rejects as baseless Michael Foods' contention that "Feesers did not offer any evidence that Michael Foods actually sold to Feesers and Sodexho, the products that then become the basis of head-to-head competition for the same customer." (Doc. 405 at 4.) Unlike the seller in *Toledo Trucks*, Michael Foods does more than merely offer a lower price in a competitive bidding situation. The court has already determined that Michael Foods made sales to two purchasers, an element

of the prima facie case of price discrimination, in its 2006 summary judgment opinion, and that holding was undisturbed by both parties on appeal, and remains the law of the case.

Defendants further argue that the timing of competition in this case precludes a finding of competitive injury. In support of this argument, Defendants cite the following passage in *Toledo Mack*:

> Although Mack dealers may compete with one another by bidding against each other for the same deal, and the amount of sales assistance Mack offers to each dealer may well determine whether a customer chooses to accept a bid from one Mack dealer or another, Mack does not sell a truck to the dealer until the customer actually selects a dealer's bid. Because no sale takes place until a customer accepts a dealer's bid, the amount of sales assistance Mack is willing to provide to a particular dealer is part of an offer by Mack to sell, not a sale. Regardless of any competition between the dealers during the bidding process, only a dealer whose bid is accepted by a customer will actually buy a truck from Mack. Therefore, only one sale, not two actually results.

530 F.3d at 228. Here, Defendants correctly point out that this court found that competition was limited to the time at which an institution is choosing between self-op and management. At this time, Defendants argue, Michael Foods has either not actually sold the products destined for those customers to Feesers and Sysco, or it has sold them at list price. Thus, according to Defendants, this situation is identical to that in *Toledo Mack*, and requires a reversal of the judgment in favor of Feesers.

Essentially, Defendants urge a reading of *Toledo Mack* that would impose a new element in the prima facie case of price discrimination under the Robinson-Patman Act—a sale of the commodity to two different sellers *prior to* the competition for the resale of those goods. However, such a reading is not warranted by *Toledo Mack*, and would be contrary to the purposes of the Robinson-Patman Act.

In *Toledo Mack*, the Third Circuit addressed the applicability of the Robinson-Patman Act to cases involving closed bidding for custom-made goods. In that case, as well as *Reeder-Simco*, the losing bidder would never actually purchase

the item which was the subject of the competition. Defendants provide no support for their argument that the holding of *Toledo Trucks* should be extended to cases such as this, where the goods in question are perishable commodities that two competitors regularly purchase and keep in stock for resale to customers. Moreover, a prior sale requirement would render the Robinson-Patman Act inapplicable to price discrimination in the sale of any perishable commodity which is then resold pursuant to a supply contract that exceeds the shelf life of that commodity. The most logical reading of *Toledo Mack* and *Reeder-Simco* is that the holdings of those cases apply only to competition for the sale of custom-manufactured goods that is restricted to bidding markets. Because those cases are inapplicable to the case at bar, the court will deny Defendants' motions to amend judgment in light of *Toledo Mack.*

B. Vagueness and Overbreadth of Order

Sodexho further argues that the court's order enjoining it "from continuing to induce or receive unlawful price discrimination from Michael Foods," (April 27, 2009 Order ¶ (1)(c).), should be amended because it is vague and overbroad. Sodexho characterizes the order as an impermissibly vague "obey the law" order, and further claims that the order is insufficient to put it on notice as to what conduct would violate the order.

Federal Rule of Civil Procedure 65(d) provides that "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it was issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." An injunction simply commanding a defendant to obey the law does not satisfy this specificity requirement. *Belitskus v. Pizzingrilli*, 343 F.3d 632, 650 (3d Cir. 2003); *see also Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981).

Sodexho claims that the injunction does not describe in reasonable detail the acts restrained or required, but rather "simply parrots the general terms of the Robinson-Patman Act" in violation of the specificity requirement of Fed. R. Civ. P. 65(d). (Doc. 415 at 7.) The court disagrees. Here, the order Sodexho challenges provides that "Sodexho is hereby enjoined from continuing to induce or receive unlawful price discrimination from Michael Foods." (April 27, 2009 Order ¶ (1)(c).) The order also includes a declaratory judgment providing that "Michael Foods has unlawfully discriminated as to price against Feesers and Sodexho has unlawfully induced or received such price discrimination in violation of the Robinson-Patman Act." (April 27, 2009 Order ¶ (1)(a).) Additionally, the order is accompanied by a 83 page trial opinion setting forth this court's findings of facts from trial and legal conclusions. Thus, the injunctive relief is far more specific than a simple command to obey the Robinson-Patman Act; it places Sodexho on notice of its conduct that violated the Act and which is now prohibited by the order.

Sodexho further argues that the order should be amended because "it contains ambiguities that give rise to two possible instances of indisputable overbreadth." (Doc. 415 at 8.) First, Sodexho argues that the order omits the *scienter* requirement because it does not specifically prohibit Sodexho from knowingly inducing or receiving price discrimination. The court does not believe the order is ambiguous, particularly in light of the this court's trial court findings in the accompanying opinion that Sodexho actively sought to obtain food at lower prices than its competitors. Nevertheless, in order to clarify Sodexho's confusion, the court will grant its request and amend the order to include the word "knowingly."

Second, Sodexho argues that the order is ambiguous and overbroad because it is not expressly limited to price discrimination against Feesers, but instead prohibits Sodexho from inducing or receiving any unlawful price discrimination

from Michael Foods. Sodexho asserts that it is uncertain whether it may continue to receive its negotiated pricing if that same pricing is extended to Feesers, because that pricing would still be lower than the national list price received by other distributors. There is evidence in the record that Sodexho is in competition with distributors other than Feesers for the sale of Michael Foods products to institutional food service customers, namely Sodexho's strategic planning documents. However, the only plaintiff in this case is Feesers, and the court agrees that there is an insufficient record to support a broader injunction barring Sodexho from inducing or receiving lower prices than distributors other than Feesers.[1] Accordingly, the court will amend the injunction against Sodexho to specify that it may no longer knowingly induce or receive price discrimination against Feesers from Michael Foods.

[1] The court expresses no opinion on the merits of any claims other distributors may have against Sodexho if it knowingly induces or receives price discrimination from Michael Foods against other competitors.

IV. Conclusion

Michael Foods' motion to amend judgment will be denied, and Sodexho's motion to amend judgment will be granted in part and denied in part. An appropriate order will issue.

s/Sylvia H. Rambo
United States District Judge

Dated: June 30, 2009.

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O R D E R

For the reasons set forth in the foregoing memorandum of law, **IT IS HEREBY ORDERED THAT**:

(1) Michael Foods' motion to alter judgment (Doc. 404) is **DENIED**;

(2) Sodexho's motion to alter judgment (Doc. 414) is **GRANTED IN PART** and **DENIED IN PART** as follows:

(a) The motion is **GRANTED** with respect to ¶ 1(c) of the April 27, 2009 opinion and order (Doc. 395), which shall be amended to read: "Sodexho is hereby enjoined from continuing to knowingly induce or receive from Michael Foods unlawful price discrimination against Feesers."

(b) In all other respects, the motion is **DENIED**.

(3) The Clerk of Court is directed to issue an amended judgment in accordance with this order.

s/Sylvia H. Rambo
United States District Judge

Dated: June 30, 2009.