

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

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

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

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## **PRELIMINARY STATEMENT**

On April 27, 2009, this Court ruled that defendant Michael Foods “unlawfully discriminated as to price,” in violation of the Robinson-Patman Act. Order at 1. The Court permanently enjoined Michael Foods “from discriminating unlawfully in price in favor of Sodexho and against Feesers” and Sodexho “from continuing to induce or receive unlawful price discrimination from Michael Foods.” *Id.*

Within days, Michael Foods made clear that it has no intention of abiding by this Court’s injunction. In a letter dated May 1, 2009, Michael Foods wrote 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,” and that “[e]ffective immediately, Michael Foods will not accept any orders from Feesers until further notice.” Michael Foods added, however, that “if Feesers will stipulate to a stay of the injunction pending the appeal, Michael Foods would welcome the opportunity to continue the current pricing arrangements between Michael Foods and Feesers.” Thus, Michael Foods made clear its intent to defy the Court’s 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.

To further extort Feesers, Michael Foods cancelled without notice several shipments of product that it was contractually obligated to deliver on May 1, 2009 and early the following week. Michael Foods stated that it would release those shipments only if Feesers agreed (1) to pay the higher price this Court had just ruled unlawful, and (2) that "this arrangement [would] not violate the Court's injunction." In order to avoid immediate and irreparable harm to itself and its customers, Feesers was forced to agree to a variation of this demand. However, on Monday, May 4, Michael Foods categorically refused Feesers' request to extend this arrangement until this Court can hear the instant Motion, demanding that Feesers stipulate to a stay of the injunction as a condition for receiving any additional Michael Foods products.

Michael Foods applied further extortionate pressure to Feesers by contacting at least one of Feesers' major customers and informing it that Michael Foods would no longer be supplying Feesers. Michael Foods similarly contacted UniPro, the distributor buying group, and told it not to provide any discounts for any Michael Foods products that Feesers might purchase from UniPro sources. In so doing, Michael Foods sent a stern

warning to the rest of the marketplace that it would not tolerate any attempts to enforce the law against it.

As discussed herein, the law is clear that a defendant cannot evade an injunction by reading its language in a manner that eviscerates its meaning –the very essence of contempt. Moreover, the law is also clear that in cases under the Robinson-Patman Act, 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. *See Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962).

As a remedy for Michael Foods’ contempt, Feesers moves this Court for an injunction compelling Michael Foods to comply with the terms of this Court’s Order by filling Feesers’ future purchase orders at the lawful, non-discriminatory prices required by that Order. Additionally, because Michael Foods’ abrupt termination of supplies to Feesers threatens it with imminent and irreparable harm, Feesers also seeks an *immediate* temporary restraining order compelling Michael Foods to supply Feesers’ requirements at lawful, non-discriminatory prices until this Court rules on Feesers’ motion for contempt.

## STATEMENT OF FACTS

The Court is very familiar with the history of this case. After five years of hard-fought litigation, including an appeal to the Third Circuit and a three-week trial, this Court ruled on April 27, 2009 in favor of Feesers, Inc. (“Feesers”) on price discrimination claims against Michael Foods, Inc. (“Michael Foods”) and Sodexho, Inc. (“Sodexho”). *See* Court’s Order, dated April 27, 2009 [Dkt. No. 395] (“Order”) at 1-2. The Court permanently enjoined Michael Foods “from discriminating unlawfully in price in favor of Sodexho and against Feesers” and Sodexho “from continuing to induce or receive unlawful price discrimination from Michael Foods.” *Id.* at 1.

On April 29, 2009, counsel for Feesers wrote to Michael Foods requesting, in light of the Court’s injunction, that “Michael Foods immediately (1) make available to Feesers the same deviated prices that it currently provides to Sodexho with respect to food products that Feesers and Sodexho resell in the same geographic area, and (2) pay to Feesers non-product-specific discounts and allowances equivalent to the discounts and allowances that it has paid to Sodexho.” Declaration of Eamon O’Kelly, dated May 5, 2009 (“O’Kelly Decl.”) Ex. A.

Michael Foods had another idea in mind, however. As it admitted in a letter to Feesers' counsel, Michael Foods had decided by no later than April 30 (when it cancelled orders that it was contractually obligated to deliver to Feesers the next day), 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,*" and that "[e]ffective immediately, Michael Foods will not accept any orders from Feesers until further notice." O'Kelly Decl. Ex. B at 1 (emphasis added). In short, Michael Foods takes the defiant and unfounded position that the Court's injunction requires Michael Foods to cease supplying Feesers entirely.

Michael Foods' contempt of the judicial process does not end there. Michael Foods' May 1 letter goes on to state that "if Feesers will stipulate to a stay of the injunction pending the appeal, Michael Foods would welcome the opportunity to continue the current pricing arrangements between Michael Foods and Feesers." *Id.* at 2. In other words, rather than following the appropriate procedure of moving this Court to stay the injunction (perhaps realizing that such a motion would not likely be granted), Michael Foods has chosen to engage in extortionate "self-help" by



which it seeks to force Feesers to accept Michael Foods' unlawful discriminatory pricing while an appeal is pending.

The first inkling that Feesers had of Michael Foods' conduct was on the morning of Friday May 1, 2009, when deliveries of Michael Foods products scheduled for that day either did not arrive or were abruptly cancelled. *See* Declaration of John Tighe, dated May 5, 2009 ("Tighe Decl.") ¶¶12-13. Feesers was informed by a carrier responsible for another delivery scheduled for Monday, May 4, that this delivery had been cancelled also. Tighe Decl. ¶14.

Although Feesers made strenuous efforts to find out from Michael Foods and its broker, iMark, why the deliveries had been cancelled, it was not until relatively late on that Friday afternoon that Michael Foods' counsel sent its letter stating that Michael Foods was suspending all sales and shipments to Feesers pending appeal. O'Kelly Decl. Ex. B at 1; Tighe Decl. ¶18.

With respect to the specific deliveries that Michael Foods had cancelled (and additional deliveries scheduled for May 5), Michael Foods stated that it "is willing to release these orders upon a written statement from Feesers that it will accept and pay for these orders at the prices governing these purchases as of the date the orders were placed and that this

arrangement does not violate the Court’s injunction.” O’Kelly Decl. Ex. B at 1; Tighe Decl. ¶19.

Michael Foods’ decision to cut off Feesers threatened potentially disastrous consequences for Feesers and its customers. Food distribution is a highly competitive business where customer service is paramount. Tighe Decl. ¶23. Thus, if Feesers is suddenly unable to supply its customers with key products, such as Michael Foods eggs and potatoes, Feesers will suffer immediate and irreparable harm to its reputation and goodwill. *Id.*

Feesers’ customers will also suffer. Were institutional food purchasers to find themselves suddenly left short of the Michael Foods products that they expect to purchase from Feesers, they would have to scramble to try to find an alternative supplier. *Id.* ¶31. As a result, the dietary needs of nursing home residents, hospital patients, students, and others who reside or work at those institutions might not be met. *Id.*

In light of the dire consequences facing Feesers and its customers, Feesers’ Chief Operating Officer John Tighe felt that he had no choice but to give in to Michael Foods’ demand with respect to the specific orders that had been planned. *Id.* ¶20. Therefore, he directed Feesers’ counsel to send a letter to Michael Foods’ counsel that stated: “if Michael

Foods releases the specific orders referenced in your letter ... dated today, Feesers (1) will accept and pay for these orders at the prices stated in the orders, and (2) will not claim that this arrangement violates the Court's injunction." *Id.*; O'Kelly Decl. Ex. C.

As a result of this arrangement, Michael Foods delivered to Feesers on Monday the products it had promised Friday. But even that brief delay forced Feesers to leave several customers short of egg products, harming Feesers' reputation and goodwill. Tighe Decl. ¶24.

Shockingly, Michael Foods has turned up the extortionate pressure even higher. It has now denied Feesers' request to continue this arrangement for fulfilling orders pending resolution of Feesers' request for a temporary restraining order ("TRO"). O'Kelly Decl. Ex. D. Consequently, Feesers will likely start running out of Michael Foods products later this week or early next week. Tighe Decl. ¶35.

The damage to Feesers will be severe and irreparable if it is unable to procure the key Michael Foods products that its customers want throughout the appellate process. Tighe Decl. ¶32. Moreover, if Feesers' customers are forced to turn to Feesers' competitors as alternative sources of supply for Michael Foods' egg and potato products, these customers may

switch their purchase of other products to Feesers' competitors, causing Feesers further irreparable harm. *Id.* ¶33.

In the past few days, Michael Foods has been putting more and more pressure on Feesers to subvert the Court's Order. On May 1, a Michael Foods representative contacted Eat'n Park/Cura Hospitality, an important Feesers customer, and informed it that Feesers would no longer be able to supply it with Michael Foods products. Tighe Decl. ¶26. On the same day, Michael Foods wrote to UniPro, the distributor buying group of which Feesers is a member, and informed UniPro that Michael Foods had suspended its relationship with Feesers. Tighe Decl. ¶36; Ex. D. Michael Foods then told Unipro not to apply deductions or allowances to any purchases by Feesers of Michael Foods products from any UniPro source. *Id.*

The only way to end Michael Foods' contemptuous conduct, and protect Feesers from irreparable harm, is to immediately compel Michael Foods to make its products available to Feesers at the lawful, non-discriminatory prices required by the Court's Order.

## ARGUMENT

### **I. Motion for Contempt**

A party seeking an order of contempt must show that (1) a valid court order existed, (2) the respondent had knowledge of the order, and (3) the respondent failed to comply with the order. *See John T. v. Del. Cty. Intermediate Unit, et al.*, 318 F.3d 545, 552 (3d Cir. 2003) (int. cit. omitted). Because this standard is easily satisfied here, Feesers' motion should be granted and Michael Foods should be enjoined from defying this Court's injunction by refusing to supply Feesers with egg and potato products at the non-discriminatory prices required by the Court. Moreover, because Michael Foods' conduct is causing immediate and irreparable harm to Feesers, and Feesers is likely to succeed, the Court should issue an immediate temporary restraining order requiring Michael Foods to supply food products to Feesers at non-discriminatory prices while this Motion for Contempt is pending.

#### A. The Court's Order Was Valid and Known to Michael Foods

There is no dispute that the Order enjoining Michael Foods from discriminating unlawfully in price in favor of Sodexo and against Feesers is valid and is known to Michael Foods. Indeed, Michael Foods goes so far as to make the pretextual claim that its decision to terminate

supplies to Feesers, which would defeat the purpose of the Order, was actually undertaken to “comply” with the Order itself. *See* O’Kelly Decl. Ex. B at 1; *see also* Tighe Decl. Ex. D.

B. Michael Foods Is Failing to Comply with the Court’s Order

Not only has Michael Foods failed to comply with the Court’s Order, but also, by its conduct, it treats the Order, this Court, and the judicial process with naked contempt. The Order states, in relevant part, that “Michael Foods has unlawfully discriminated as to price against Feesers ... in violation of the Robinson-Patman Act,” that “Michael Foods is hereby enjoined from discriminating unlawfully in price in favor of Sodexho and against Feesers,” and that “Sodexho is hereby enjoined from continuing to induce or receive unlawful price discrimination from Michael Foods.” Order at 1. The Order thus clearly was intended to grant Feesers’ request of injunctive relief requiring Michael Foods to sell its products to Feesers at the same prices at which it sells them to Sodexho.

Nevertheless, no sooner was the ink on the Order dry than Michael Foods decided to defy it. The first hint that Feesers had of this was on the morning of May 1, when scheduled deliveries of Michael Foods products did not arrive. Tighe Decl. ¶12. Feesers spent most of the day on Friday trying to ascertain why the deliveries had been disrupted. *Id.* ¶¶12-

17. It was not until the middle of that afternoon that Michael Foods sent a letter notifying Feesers of its decision to suspend supplies. *See* O’Kelly Decl. Ex. B at 1; Tighe Decl. ¶18.

In its letter, Michael Foods revealed that it would “cease processing all pending orders and ha[d] reversed orders that were in-transit to Feesers’ warehouse.” O’Kelly Decl. Ex. B at 1. As Michael Foods knew it would, this abrupt cancellation of deliveries that Feesers was relying on to serve its customers left Feesers with its back against the wall. Indeed, under the circumstances, Feesers had no choice but to accede to Michael Foods’ demand that Feesers “pay for these orders at the prices governing these purchases as of the dates the orders were placed” and provide Michael Foods with a written statement that Feesers would not claim that those higher payments violated the Court’s injunction.<sup>1</sup> *Id.*; Tighe Decl. ¶20.

The transparent purpose of Michael Foods’ conduct was to force Feesers to accept, pending appeal, Michael Foods’ continued unlawful price discrimination in favor of Sodexo in a naked defiance of the Order. As Michael Foods explained, “[e]ffective immediately, Michael Foods will not accept any orders from Feesers until further notice ... [o]f course, if

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<sup>1</sup> Consistent with that representation, and without prejudice to any other position, Feesers is not here claiming that the higher prices charged by Michael Foods for these specific orders violated the Court’s injunction.

Feesers will stipulate to a stay of the injunction pending the appeal, Michael Foods would welcome the opportunity to continue the current pricing arrangements between Michael Foods and Feesers.” O’Kelly Decl., Ex. B at 1-2. By trying to force Feesers to accede to a stay under duress, rather than moving for a stay of the injunction, Michael Foods compounds its contempt of this Court.

This Court made clear that it expected Michael Foods to comply with the Order either by raising its prices to Sodexo or lowering the national distributor list price at which Feeser and other distributors purchased the relevant products. *See* Court’s Opinion, dated April 27, 2009 (“Opinion”) at 82. It did not envision that Michael Foods could subvert the Order by not selling to Feesers at *any* price. In fact, the part of the Order directed to Sodexo makes it clear that Sodexo may not “receive” any discriminatory prices from Michael Foods. Order at (1)(c). However, such discrimination would occur even if Feesers were cut off by Michael Foods, as numerous other distributors, such as Sysco, would continue to pay the higher discriminatory prices maintained by Michael Foods while Sodexo did not.<sup>2</sup>

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<sup>2</sup> For this reason, while not the subject of this Motion, Sodexo is also in contempt for knowing that it continues to receive discriminatory prices



Michael Foods' behavior constitutes not just contempt for the Court's April 27th ruling, but also contempt for the integrity of the judicial process as a whole. After years of litigation, this Court weighed the voluminous evidence presented at trial and concluded that Michael Foods was unlawfully discriminating as to price against Feesers and in favor of Sodexo. Yet, Michael Foods not only decided to defy the Court's order by cutting off supplies to Feesers entirely, it had the temerity to assert that this end run around the judicial process was compelled by its desire to "comply" with the April 27th Order. If a defendant could comply with an injunction to cease discriminating as to price by terminating the disfavored purchaser, the Robinson-Patman Act would be a dead letter. Applying Michael Foods' logic to the seminal *Morton Salt* case, for example, Morton Salt could have complied with the order in that case by cutting off all grocery stores that competed with A&P. That is not the law in this Circuit.<sup>3</sup>

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from Michael Foods, as Michael Foods has apparently not lowered the national distributor list price or raised its prices to Sodexo.

<sup>3</sup> The pretextual nature of Michael Foods' position is exposed by the letter it sent to UniPro warning it not to apply rebates to Feesers' purchases of Michael Foods products from other sources. Tighe Decl. Ex. D. If Feesers were to purchase Michael Foods products from third parties, such transactions could not conceivably constitute sales at discriminatory prices by *Michael Foods*. The clear purpose of this letter is to punish Feesers and discourage other distributors from seeking to enforce the law.

In *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962), the Third Circuit held that a wholesaler which brought a Robinson-Patman Act action to bar price discrimination by a drug manufacturer was entitled to an injunction *pendente lite* prohibiting defendant from terminating its dealings with the wholesaler completely. *A fortiori*, where, as here, the question of liability has been conclusively decided and an Order finding violation of the Robinson-Patman Act has been entered, there are even stronger reasons for issuing such an injunction. This Court has already concluded that Michael Foods is unlawfully discriminating as to price, and Michael Foods has been enjoined from any further such price discrimination. Like the defendant in *Bergen Drug*, Michael Foods should be enjoined from terminating its dealings with Feesers. It should not be permitted to effectively render nugatory this Court's injunction enforcing the Robinson-Patman Act.

Michael Foods also cannot evade its obligations under the Court's Order by claiming that it simply is "refusing to deal" with Feesers. Although a business has a general right to deal or not to deal with whomever it chooses, *see U.S. v. Colgate & Co.*, 250 U.S. 300 (1919), such right is "neither absolute nor exempt from regulation." *Lorain Journal Co. v. U.S.*, 342 U.S. 143, 155 (1951); *Aspen Skiing Co. v. Aspen Highlands Skiing*

*Corp.*, 472 U.S. 585, 601 (1985) (“The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified”). As the Third Circuit has held, a “defendant can choose customers, but it should not be permitted to do so in order to stifle the main action.” *Bergen Drug*, 307 F.2d at 727; *see also Lorain Journal* at 155-56. This is especially so where, as here, the defendant has a long history of dealings with Feesers, makes its product available to all other distributors, and concedes that it lacks any justification for its new refusal to deal other than its desire not to comply with the Robinson-Patman Act pending appeal.<sup>4</sup>

It is no defense for Michael Foods to claim that it has not literally disobeyed the terms of the Order, but has sought only to devise a scheme to work around them – without complying with the Order’s clear intent to make non-discriminatory prices available to Feesers. This kind of litigator’s gamesmanship is not countenanced in this Circuit. *See U.S. v. Christie Industries*, 465 F.2d 1002, 1007 (3d Cir. 1972) (“The language of an injunction must be read in the light of the circumstances surrounding its

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<sup>4</sup> The issue in this motion is not whether Michael Foods’ conduct may violate the Sherman Antitrust Act as an unlawful refusal to deal. Rather, the issue is whether Michael Foods’ conduct is designed to circumvent the intent of this Court’s Order and the enforcement of the Robinson-Patman Act and thus constitutes contempt.

entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent.”).

The facts in *Christie* are instructive. Defendant, a fireworks manufacturer that had been enjoined from selling to minors a certain “firecracker assembly-kit,” sought to overturn the district court’s order of contempt on the grounds that although defendant continued to sell and ship the kits’ constituent parts, it had ceased marketing or selling those parts as a single fireworks kit. The defendant pointed to the district court’s statement to defense counsel that only “that particular package” was enjoined. The Third Circuit upheld the contempt order, ruling that the mere fact the components were not “advertised or sold as a ‘kit’” did not relieve Christie of its underlying obligation to keep fireworks from being circulated to children, which was the mischief that the injunction sought to prevent.

The same principles require that Feesers’ motion be granted here. Feesers sought, and received, relief in the form of an injunction unambiguously barring Michael Foods from continuing its “stunning” level of price discrimination in favor of Sodexho and against Feesers. Opinion at 32. The injunction also required that Sodexho not continue to receive *any* unlawful price discrimination from Michael Foods – which would include

discrimination against not just Feesers, but other competing distributors who purchase from Michael Foods at the national distributor list price. That price discrimination is the “mischief the injunction sought to prevent.” Michael Foods may not now evade its judicially-imposed obligations on “merely technical grounds.” *Christie Industries*, 465 F.2d at 1007; *see also Magnesco Rests. v. Arthur Treacher’s Fish & Chips, Inc.*, 689 F.2d 1150, 1156 (3d Cir. 1982) (finding defendant in contempt because its behavior violated the “thrust of the restraining order,” even if not its specific terms).

C. Feesers is Entitled to Temporary and Permanent  
Injunctive Relief Compelling Michael Foods to Offer  
Egg and Potato Products to Feesers at Non-Discriminatory Prices

The required remedy for Michael Foods’ contempt of the Court’s Order is the entry of an injunction compelling it to continue offering food products to Feesers at lawful, non-discriminatory prices. Given that Feesers is threatened with immediate and irreparable harm by the refusal to supply any further products unless it agrees to a stay of the injunction, this Court also must grant an immediate TRO requiring Michael Foods to continue to sell to Feesers until this Court rules on the merits of the instant Motion.

There is no question that district courts have broad equity power to grant or deny an injunction. *U.S. v. Price*, 688 F.2d 204, 210

(1982); *Bergen Drug*, 307 F.2d at 726; *Bateman v. Ford Motor Co.*, 302 F.2d 63, 66 (3d Cir. 1962). As courts of equity, district courts have “the power to fashion any remedy deemed necessary and appropriate to do justice in the particular case.” *Price*, 688 F.2d at 211. Specifically, a district court can act where a party’s conduct is calculated to frustrate litigation or, in this case, a court’s final, binding resolution of litigation. *Bergen Drug*, 307 F.2d at 728; *see also Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925 (3d Cir. 1941).

In order to be entitled to injunctive relief, a movant must show that (1) it is likely to prevail on the merits (or has already prevailed); (2) it would be irreparably harmed without the requested relief; (3) the respondent will not suffer irreparable harm as the result of the requested relief; and (4) the injunction sought is in the public’s interest. *See, e.g., Univ. of Tex. v. Camenisch*, 451 U.S. 390, 392 (1981). Feesers meets all four of these criteria and this Court should thus issue the requested temporary and permanent injunctive relief.

1. Feesers Will Likely Prevail on the Merits of Its  
Motion for an Order of Contempt

As discussed in Section I, *supra*, Feesers will likely prevail on the merits of this Motion for an Order of Contempt. Indeed, as Michael Food admits in its May 1 letter, the purpose of its abrupt termination of

Feesers is to force Feesers to accede to Michael Foods' continued unlawful price discrimination – the very conduct enjoined by the Court Order.

2. Feesers Will Be Irreparably Harmed  
Unless Immediate Injunctive Relief is Granted

As the Court knows from the trial, Michael Foods products are a very important food item for many of Feesers' institutional customers. Many institutions frequently serve egg and/or potato products to the individuals who consume food at those institutions. Tighe Decl. ¶25. In the case of nursing homes, for example, eggs are a staple of the residents' diet and an important source of protein. *Id.* The Michael Foods brands are regarded highly by those institutions and many institutions will not accept products supplied by another manufacturer as substitutes. *Id.* ¶28. Indeed, because many institutions (including public institutions) require that manufacturers and their products be pre-approved or "qualified," such institutions simply could not accept many other suppliers' products. *Id.*

Further, many customers include Michael Foods products in Requests for Proposals or in market basket comparisons, and Michael Foods products are regarded as a bellwether for price comparisons. *Id.* ¶29. In addition, about 60 percent of Feesers' sales of Michael Foods products to its customers are subject to some level of contract pricing. Opinion at 28. That is, those customers have negotiated discounted pricing from Michael Foods,

and Michael Foods makes those price deviations available to Feesers specifically for use with those customers. Tighe Decl. ¶30. If Feesers can not obtain products from Michael Foods, then it may not be able to effectively compete for the business of those institutions which require Michael Foods products. *Id.* Indeed, even Michael Foods' three-day delay of its scheduled May 1 shipment forced Feesers to short several customers on their orders of Michael Foods products. Tighe Decl. ¶24; Ex. C.

Michael Foods' extortionate actions following its initial decision to cut off supplies to Feesers further exacerbates the immediate harm to Feesers. On May 1, Michael Foods contacted Eat'n Park, an affiliate of Feesers' major customer, Cura Hospitality ("Cura"). Cura is a significant end-user of Michael Foods' products, and Michael Foods informed Eat'n Park that Feesers would no longer be able to supply such products. Tighe Decl. ¶26. A representative of Eat'n Park/Cura thereafter contacted Feesers to express grave concerns about the possible disruption to Cura's business. *Id.* ¶¶26-27.

The situation here is thus similar to that in *Bergen Drug*, where the wholesaler's business was highly dependent on its continuing to do business with the defendant drug manufacturer. There, as here, "the record fail[ed] to show that plaintiff could purchase such products under the same



terms that it had purchased them from Defendant,” and it does not appear that defendant had similarly refused to sell its products to any other similarly situated wholesaler. *See Bergen Drug*, 307 F.2d at 728. The retaliatory and contemptuous nature of Michael Foods’ action thus weighs strongly in favor of immediate injunctive relief. Feesers is the only distributor that is being cut off by Michael Foods and the only stated reason for this cutoff is the entry of the Court’s Order in favor of Feesers and the decision of Michael Foods not to comply with the Robinson-Patman Act. O’Kelly Decl. Ex. B.

Feesers has been informed that this Court will not be in session until May 11. Although Feesers’ reluctant accession to Michael Foods’ extensive demands allowed it to provide food to its customers the week of May 4, Michael Foods has categorically refused to accept any further purchase orders unless Feesers agrees to a stay. Indeed, Michael Foods would not even agree to continue the companies’ temporary arrangement pending this Court’s hearing of the instant motion, meaning that Feesers will begin to run out of Michael Foods products later this week. Without a temporary restraining order in place, Feesers will suffer immediate irreparable damage as a result of Michael Foods’ contempt.

3. Defendants Would Not Suffer Irreparable Harm as a Result of the Requested Relief

This Court has already found that complying with the terms of the April 27th Order, and ceasing its unlawful price discrimination against Feesers, would not cause irreparable harm to Michael Foods. Opinion at 82.

4. The Public Has a Strong Interest in the Requested Relief

Finally, the public interest favors the requested injunctive relief. Allowing Michael Foods to defy the Court's Order would make a mockery of the judicial process and the Robinson-Patman Act. Feesers has spent years in litigation to challenge Michael Foods' discriminatory pricing behavior. If Michael Foods is allowed to nullify this Court's Order by terminating supplies to Feesers, this would deter other victims of unlawful price discrimination from ever bringing such actions, rendering the Robinson-Patman Act nugatory and undermining the judicial process as a whole.

## CONCLUSION

For all of the foregoing reasons, 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 5, 2009  
New York, New York

Respectfully Submitted,  
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