

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

FRANK SEXTON ENTERPRISES, INC. : CIVIL ACTION
t/a SOMMER MAID :
 :
v. :
 :
SODIAAL NORTH AMERICA :
CORPORATION (SNAC) :
t/a KELLERS' HOTEL BAR :
and KELLERS' HOTEL BAR : NO. 97-7104

M E M O R A N D U M

WALDMAN, J.

January 14, 2002

I. Introduction

This case involves a dispute between two distributors of private label butter. Plaintiff has alleged that defendants breached an oral agreement between the parties when it refused to fill plaintiff's orders for packaged butter, raised prices for butter it did sell to plaintiff and solicited plaintiff's customers. Plaintiff also alleged that defendants engaged in discriminatory pricing to plaintiff's disadvantage. Plaintiff seeks \$60 million in damages.

Plaintiff commenced this action in the Bucks County Court of Common Pleas against Societe de Diffusion Internationale Agro-Alimentaire ("Sodiaal"), Sodiaal North America Corporation ("SNAC"), Kellers' Hotel Bar and Sodiaal Acquisition Corporation ("SAC"). The defendants subsequently removed the case to this court. In an amended complaint, plaintiff asserted claims for breach of contract (count one), tortious interference with

contractual relations (count two) and violation of the Robinson-Patman Act, 15 U.S.C. § 13(a) (count three). Plaintiff has now abandoned the claim in count two which it states in its brief is "withdrawn." Defendants Sodiaal and SAC were dismissed as parties for lack of personal jurisdiction.

Presently before the court is the motion of defendants SNAC and Kellers' Hotel Bar for summary judgement on plaintiff's remaining claims.¹

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

¹ It is now uncontroverted that Keller's Hotel Bar is an unincorporated division of SNAC. As no party has moved to amend the caption, however, the court will continue to refer to defendants in the plural.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. Of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff Frank Sexton Enterprises, Inc. ("FSE") is a closely held corporation with its principal place of business in Doylestown, Pennsylvania. Since its formation in 1990, FSE has engaged in the business of wholesaling butter, eggs and cheese purchased from others and then resold to food service companies and retail grocery markets. Frank Sexton is the corporation's

President and principal stockholder. The company uses the trade name Sommer Maid.

Defendant SNAC is a Delaware corporation which did business from 1990 through 1999 through four operating divisions. Its principal place of business is in Harleysville, Pennsylvania. The two divisions which supplied Sommer Maid during part of the 1990s are the Keller's Division ("Keller's") located in Harleysville and the Mayfair Division ("Mayfair") located in Somerset, Pennsylvania.

During the relevant period, Keller's packaged butter which was obtained from Mayfair creamery and other butter manufacturers in the Mid-West and West.² Sommer Maid purchased packaged butter from several manufacturers and packagers, including Keller's, which it stored and delivered to food service companies and retail grocery markets.

The relationship between the parties derived from a longstanding personal relationship between two industry veterans. In 1970, Frank Sexton was employed by Associated Milk Producers, Inc. ("AMPI"). In 1975, he became President of AMPI's Sommer Maid Division. Frank Sexton met Arthur Thompson shortly after he was employed by Keller's in the 1970's. In December 1989, Keller's was acquired by defendant SNAC. Mr. Thompson, then

² Keller's division was not engaged in the manufacture of butter during this period. Creameries, such as the Mayfair Division, separate cream from whole milk and then churn the cream (or "butterfat") into butter. Packagers, such as Keller's, operate equipment which divides butter into 1/4 lb., 1/2 lb. and 1 lb. units.

General Manager of Keller's, was given considerable autonomy in his continued operation of the division.

In late 1989, Mr. Sexton and Mr. Thompson began discussing potential business opportunities should Mr. Sexton purchase the assets of the Sommer Maid division of AMPI. In September 1990, Mr. Sexton formed FSE which then purchased the assets of the Sommer Maid division of AMPI. Plaintiff immediately transferred Sommer Maid's packaging and labeling equipment to Keller's. Some of the employees who were trained to operate the equipment went to Kellers.

The composition of milk is 87% water, 5% lactose, 3.7% cream³, 3.1% protein and 1.2% ash. Assuming a constant number of cows, two biological variables affect the quantity of cream production. First, the amount of milk which cows produce varies from month to month during the year. Milk production is highest in the first six months of the year and peaks in April. At the seasonal nadir in mid-autumn, production is 7% to 8% lower than peak production season. Secondly, the amount of cream as a percentage within the milk varies. It peaks in December at 3.8% and bottoms out in July at just over 3.5%. As a result of these biological factors, the supply of cream is generally higher in the spring and lower in autumn months.

³ Cream is also called "butterfat."

Between 1988 and 1996, several economic and demographic factors combined to make butter production in the eastern United States more costly. Milk produced in the East is close to large urban centers which create a high demand for fluid milk. About 40% of the milk produced in the region is dedicated to fluid use as compared, for example, with the Mid-West where 15% of the milk produced is allocated to fluid use. The remaining milk is available for less perishable production uses.

The primary production uses of milk are butter, cheese, ice cream and sour cream. Cheese and ice cream, which compete with butter for the cream supply, generate a higher profit margin than butter. Between 1988 and 1996, the supply of milk increased nationally at an annual rate of 1% while butter production decreased on average by 1.2% annually. During this same period, cheese production increased by 3.4% and ice cream production increased by 4.3% annually. In 1996, the East was home to 31% of the nation's ice cream plants.

The national percentage of milk produced in the East and Mid-West regions has decreased while the percentage of milk produced in the far Western states has increased.⁴ This is due, in large part, to the different structure of Western commercial dairy operations. The Western dairy industry is dominated by

⁴ The Northeast and Midwest market share decreased from 49.4% in 1988 to 43.9% in 1996. The Western market share of production increased from 18.4% to 24.5% during this period.

larger dairy operations with more cows and greater milk production per cow than the rest of the United States which allows for greater economies of scale. The primary raw ingredient in butter production, cream, is thus in shorter supply and higher demand in the East than in the West.

The United States Department of Agriculture ("USDA") has supported the price of milk by purchasing surplus cheese, butter and nonfat dry milk powder from the market at an announced support price. When the market price drops below the support price, the manufacturers sell to the federal government. When the market price rises above 110% of the support price, the manufacturers are permitted to "buy back" the product at 110% of the support price.⁵ As a result, the government stored butter during the peak cream production season in the spring and then sold the butter back to the manufacturers in the autumn when the supply of cream drops and the demand for butter increases.⁶

The USDA gradually lowered the support price during the 1990s from about \$1.20 per pound in 1989 to less than \$.65 per pound in 1994. Since 1994, the government has all but abandoned

⁵ In most years from 1988 to 1993, the butter support price was reduced during the second half of the year. As a result, manufacturers could "buy back" in the autumn at a price close to that at which the butter was originally sold.

⁶ The demand for butter is highest during the "baking season" of November and December. On average, 40% of retail butter sales are made during the fourth quarter.

butter storage and left to the private sector the task of storing butter and to the market the task of setting a market price.

The market price of butter is set each week by the Chicago Mercantile Exchange ("CME") where the product was traded every Friday during the period pertinent to this dispute. Because cream is the primary cost in butter production, the price of cream is closely related to the price manufacturers pass on to purchasers. The decline of the butter price support in conjunction with increased demand for cream by cheese and ice cream manufacturers caused the traditionally stable butter market to fluctuate wildly between 1994 and 1996.

At the retail level, butter is sold under a brand name such as Land O' Lakes or Keller's or a private label frequently bearing the name of the retail establishment where the butter is sold to consumers. Private label butter is generally sold at a lower cost than brand name butter. Unlike brand name butter, which is priced at a given dollar amount, private label butter is priced by what is known as an "overage" or a given amount over the price of butter trading on the CME.⁷ The market for private label butter is competitive and price sensitive. Most retailers purchase private label butter from at least two manufacturers or

⁷ When two parties agree to sell butter at 15 cents overage, in the absence of any other promises, the buyer bears the risk (and the benefit) of price changes from the time of contract until the time of delivery.

distributors. Consequently, a small increase in overage by one manufacturer could result in a significant loss of business.

In 1990, both Sommer Maid and Keller's delivered butter to several retail customers in the mid-Atlantic region. Upon transferring Sommer Maid's packaging and printing equipment to Keller's, plaintiff's primary business consisted of placing orders it obtained for private label butter from retail establishments with a packager such as Keller's.⁸ Sommer Maid has thirty-nine employees at its Doylestown facility. The facility consists of an office and refrigeration and loading space. The product is stored in Doylestown before being shipped to the customers.

Butter is usually packed for retail sale in 1/4 pound sticks that are then wrapped either two to a package, known as "half pounds," or four to a package, known as "one pound quarters." The one pound quarter packages at issue in this case are packaged in one of three different styles. Elgin packages are four 1/4 pound sticks placed two sticks on top of two sticks in a cardboard box. Eastern packages use the same 1/4 pound sticks as Elgin, however, the sticks are laid flat and are wrapped in wax paper rather than cardboard. Western packages feature 1/4 pound sticks which are shorter and wider than the

⁸ The printing equipment enables the packager to make custom labels for each private label.

Elgin and Eastern sticks. The Western sticks are wrapped in cardboard of a slightly different shape than the Elgin or Eastern package.

AMPI packaged and sold butter in all three styles. Prior to transferring Sommer Maid's packaging equipment to Keller's in 1990, Sommer Maid and Keller's were the only two packagers east of the Mississippi who had the equipment to package butter in the Western style. In the early 1990's Sommer Maid sold butter in all three packaging styles. While Keller's filled some of plaintiff's Elgin style orders, Sommer Maid made the majority of its Elgin purchases from a Wisconsin manufacturer, Madison Dairy. Keller's was, however, Sommer Maid's exclusive provider of Eastern and Western butter. In the early 1990's Sommer Maid purchased eight to nine million pounds of this butter annually, which represented 20% of Keller's total volume sold.

In 1989, Frank Sexton and Arthur Thompson began discussing the purchase of AMPI's assets and their transfer to Keller's. Just prior to Mr. Sexton's purchase of the assets in September 1990, the two men reached an agreement on behalf of their respective companies.⁹

⁹ There was no single moment when the terms of the agreement were formally set forth. Rather, as plaintiff describes it, the agreement was an understanding which developed from a series of discussions between Mr. Sexton and Mr. Thompson.

The terms of the agreement provided that: FSE would not operate a packaging facility; FSE would pick up the product at Keller's facility; FSE would supply Keller's with the printing plates needed to pack butter for FSE's customers; the overage price between the parties would not be changed without prior discussion between the parties; Keller's would package all Western and Eastern Flat Wax style butter sold by FSE, as well as other forms of butter sold by FSE to its customers; the companies would continue to sell to their present customers without competition from the other; and, as to customers supplied by both, the companies would do what was necessary to maintain the same percentage allocation of business.

As Mr. Sexton acknowledged in his deposition, the agreement was to be effectuated in part by the refusal of each party to "quote" a competitive price to a customer of the other or to offer to sell to a shared customer at a price lower than that of the other. Mr. Sexton acknowledged that when he was solicited for a price quote by a Keller's customer, he would contact Keller's to obtain the price it had quoted to the customer and then intentionally quote a higher price. When sales to shared customers declined or increased, suggesting a price differential, the parties would respectively raise or lower prices to maintain the agreed upon allocation of business. In Mr. Sexton's words, "we would carry this into the next millennium

and pretty much own the market" as "we would be unencumbered by [Keller's] competitive pricing of our accounts."¹⁰ The agreement was never memorialized in any writing.

Arthur Thompson retired as General Manager in December 1992, although he continued to play some role in Keller's business. Walt Duzinski served as General Manager of Keller's from 1993 through 1996 and Phil Kane served as General Manager from 1996 through 1999.

Plaintiff asserts that beginning in late 1993, Keller's refused to fill butter orders for Sommer Maid, raised the overage to Sommer Maid higher than that charged to retail purchasers, solicited Sommer Maid's customers and provided "market protection" to customers.¹¹

In response to higher than expected price increases, Sommer Maid stopped purchasing Elgins from Keller's in 1995 and purchased exclusively from Madison Dairy. Unlike Keller's, Madison Dairy lacked the ability to package in the Western style

¹⁰ Plaintiff's exclusive accounts were to include Tanners, Mars, Redners, Clemens and Wawa. The shared accounts in which proportionality was to be maintained included Shop-Rite and Giant. Mr. Sexton viewed the subsequent reduction by Keller's of its sales price to Giant as a breach of the parties' agreement.

¹¹ By "market protection," plaintiff refers to a practice whereby Keller's would permit the purchaser to pay the price on the day of order or the price on the day of delivery. Thus, if the price for butter increased after the order was sent to Keller's but before delivery was made, the customer was effectively insulated from the market shift.

or Eastern style. Sommer Maid placed orders with Keller's for Easterns and Westerns until January 1996 and then began packaging the orders for all of its customers in the Elgin style.

Plaintiff points particularly to evidence regarding nine customer accounts to sustain its claims.¹²

IGA/Supervalu

Supervalu operates as a distributor for a collection of independent grocery stores. Prior to the agreement, both Sommer Maid and Keller's filled Supervalu's private label butter orders. In 1994, Supervalu centralized purchasing for all of its stores in Minneapolis and assigned one butter supplier for each region. Keller's was given the Pittsburgh division which covered western Pennsylvania while Sommer Maid was given the New England division and a division covering eastern Pennsylvania.

In November 1996, Supervalu was faced with a national butter shortage which threatened to prevent it from filling orders from grocers during the peak holiday season. Sommer Maid was unable to fulfill Supervalu's orders during this period and problems persisted with Sommer Maid's inability to fill orders over the next two years. During this period, Supervalu increasingly looked to Keller's to make up the short-fall. A billing dispute erupted between Supervalu and Sommer Maid in 1998

¹² These customers operated retail markets in various states and purchased produce in interstate commerce.

relating to the latter's failure to fill orders and Supervalu ceased purchasing from Sommer Maid in December 1998.¹³

Giant Supermarkets

Giant purchased private label Elgins from both Sommer Maid and Keller's. At the time of the agreement, Keller's and Sommer Maid each handled approximately 50 percent of Giant's private label butter orders. At some point in 1995, Keller's began to offer market protection to Giant. When Giant then refused to pay Sommer Maid for butter at the price at the time of order, a billing dispute ensued and Sommer Maid subsequently lost the Giant business.

Shop N' Bag (Fleming)

Fleming Foods sells private label Elgins under the Montco brand and the Shop N' Bag brand. Keller's traditionally packed the Montco brand while Shop N' Bag had been a customer of Sommer Maid for over thirty years. In 1995, disagreement arose between Shop N' Bag and Sommer Maid over Sommer Maid's refusal to give bill-backs. Shop N' Bag then asked Keller's to handle its

¹³ Plaintiff suggests in its brief that its inability to supply Supervalu was due at least in part to the failure of defendants to supply plaintiff. Given the absence of any actual evidence of record of an unfilled order by defendants after January 1996, however, defendants' assertion that plaintiff's problems with Supervalu are irrelevant to this case is quite justified.

account because Keller's provided bill-backs as well as faster delivery and more cost effective shipping.¹⁴

Redners

Sommer Maid began selling private label Western to Redners in 1990. Redners also purchased brand name butter from Keller's. When one of Redners' drivers was picking up Keller's brand name product at its facility in Harleysville in 1995, he noticed Redners private label butter in the plant. This was reported to Gary Redners who was very upset to learn that Sommer Maid did not package its own products. At a meeting with Brett Sexton, Sommer Maid's Sales Representative, Gary Redners referred to Sommer Maid as "a bunch of con artists." Redners terminated the business relationship on September 5, 1995 and immediately began purchasing private label butter from Keller's.

Mars

Sommer Maid sold Western private label butter to Mars since 1987 and was its exclusive provider until 1995. In late 1995, Keller's refused to fill Sommer Maid's orders for Western butter. Without notifying anybody at Mars, Brett Sexton decided to fill the Mars orders with Elgin butter. Carmen D'Anna, the

¹⁴ Fleming generally attempted to reduce costs by picking up orders from its suppliers on back-hauls after a Fleming truck had unloaded its wares at the site of one of Fleming's purchasers. At the time Fleming elected to request that Keller's take the Shop N' Bag account, Fleming was purchasing and picking up Keller's margarine, cream cheeses and whipped topping.

Mars purchaser in Baltimore, discovered the Elgin style packaging and advised plaintiff that he only wanted Western packaging. Plaintiff asked Keller's to fill the order, but Keller's refused. One week later, Keller's contacted Mars and subsequently became its exclusive private label butter supplier.¹⁵

Tanner Brothers

Since at least 1988, Sommer Maid supplied Tanner with private label Western butter. In 1995, Sommer Maid successfully switched Tanner to Elgin packaging. Sometime thereafter, Monroe Tanner Jr. received a telephone call from somebody at Keller's. Dave Andrews, sales manager for Keller's, subsequently visited Tanner. Mr. Andrews informed Mr. Tanner that Keller's had been packaging Sommer Maid's private label Western style butter and asked if he would be willing to purchase butter in the Western package to assist Keller's in using the excess packaging. Mr. Tanner agreed to purchase butter from Keller's at a price lower than Sommer Maid had been charging. Keller's sold butter to Tanner from January through August of 1996, after which Tanner resumed purchasing from Sommer Maid. To recapture the business, Sommer Maid had to lower the price it had charged for the butter.

¹⁵ According to the then assistant buyer at Mars, she initially contacted a broker who told her that Keller's could produce the Western style private label she was seeking.

Wawa

For over 50 years, Wawa purchased Western private label butter from Sommer Maid. In 1995, Sommer Maid switched to Elgin style packaging to fill Wawa's orders. In a letter dated April 1, 1996, Dave Andrews requested that Wawa place private label butter orders to use up Keller's excess Wawa packaging inventory. The letter states:

As we discussed, Keller's/Hotel Bar has been packing the Wawa butter for Sommer Maid. Recently, Sommer Maid stopped purchasing Wawa carton butter from us and we are sitting on approximately 24,000 Wawa butter cartons.

Keller's/Hotel Bar would obviously like the opportunity to package for Wawa directly, however, at a minimum we would like to use up the carton's [sic] we have in our inventory. You and I can revisit this after you have had an opportunity to discuss this with your people.

Thank you again for your help with this situation. I look forward to working with you and hope to establish a direct relationship with Wawa.

Wawa declined the invitation and continued to purchase all of its private label butter from Sommer Maid. After learning of Keller's solicitation efforts, however, Sommer Maid lowered the price it charged for butter sold to Wawa.

Clemens

Brett Sexton was contacted at some unspecified time by the purchaser for Clemens who informed him that Clemens could purchase private label Westerns and Elgins at a price lower than that at which Sommer Maid was selling. As a result, Sommer Maid lowered the price for butter sold to Clemens. Although plaintiff suggests that Keller's solicited Clemens, Brett Sexton in fact

does not state that he has actual knowledge of anybody from Keller's engaging in such solicitation. There is no competent evidence of record as to how Clemens' purchaser became aware that he could purchase private label butter at a lower price than that then charged by Sommer Maid.

Shop Rite/Wakefern

Shop Rite was a customer of Sommer Maid since 1975. During the early 1990's, Sommer Maid sold approximately 75% of the Eastern flat wax style private label butter that Shop Rite purchased. In late 1993, Shop Rite placed a large order with Sommer Maid. Frank Sexton contacted Walt Duzinski but was informed that Keller's was unable to fill the order. After plaintiff informed Shop Rite that it could not fill the order, Shop Rite began searching for another supplier. Keller's subsequently filled the order and became Shop Rite's primary supplier. Sommer Maid continued to fill a smaller percentage of Shop Rite's orders. Cost issues also led Shop Rite's purchaser to buy less from Sommer Maid. By 1997, Shop Rite had made Grasslands, a Midwest packager, its primary supplier.

Elgins were the largest component of the eight to nine million pounds of butter packaged per year by Keller's for Sommer Maid. In 1990, Keller's packaged Westerns on a Benhill packaging machine which was used primarily to package Keller's brand-name package. In 1990, Sommer Maid transferred to Keller's a Moorpac machine which was also capable of packaging Westerns. Prior to the transfer, Sommer Maid and Keller's operated the only two

plants east of the Mississippi capable of packaging Westerns. The Moorpac machine, once at Keller's facility, was used primarily as backup to package Sommer Maid orders during peak periods. Sommer Maid retrieved the packaging equipment on January 30, 1997.

IV. Discussion

Defendants contend that even accepting there was an oral agreement as described by plaintiff, it involved the allocation of customers, price fixing and exchange of pricing information and thus would be illegal and unenforceable. Defendants also contend that the agreement would be unenforceable under the statute of frauds and, in any event, would be terminable at will by any party. As to plaintiff's Robinson-Patman Act claim, defendants contend that plaintiff has failed to offer any proof of price discrimination or antitrust damages.

A. Breach of Contract

An oral contract that does not specify a definite term of duration or set prescribed conditions which determine the duration is terminable at will by either party. See Weilersbacher v. PGH Brewing Co., 218 A.2d 806, 807 (Pa. 1966). See also King of Prussia Equipment Corp. v. Power Curbers, Inc., 158 F. Supp. 2d 463, 466 (E.D. Pa. 2001). Also, it is uncontested that the agreement involved the sale of goods and is thus governed by the Uniform Commercial Code. Under the Code, a contract that provides for successive performance but is

indefinite in duration may, unless otherwise agreed, be terminated by either party at any time. See 13 Pa. C.S.A. § 2309. The Pennsylvania Supreme Court has recognized that the Code did not change prior law governing contracts of indefinite duration. See Weilersbacher 218 A.2d at 808.

The contract at issue was clearly one of indefinite duration and thus terminable at will. By the fall of 1993, defendants effectively terminated any agreement concerning non-solicitation of customers and in 1994, any agreement regarding unilateral price increases. Frank Sexton himself acknowledged that he realized the contract had been terminated in the fall of 1993 when defendants refused to fill the Sommer Maid order for Shop Rite.¹⁶ Upon recognition that the contract had been terminated, plaintiff was free to continue ordering from Keller's or place its orders elsewhere. To the extent that the parties continued to conduct business following the termination, this amounted to a series of individual transactions at a price set by defendants in the familiar role of vendor and vendee.

The statute of frauds provides:

a contract for the sale of goods for the price of \$500.00 or more is not enforceable by way of

¹⁶ In his deposition, Frank Sexton testified that "I think it was a water shed. There were a couple of water sheds. That [the 1993 order] was one of them, when we realized that the gloves wee off and that the contract was-

Q. Out the window?

A. Yes."

action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.

13 Pa. C.S.A. § 2201.

For a writing to satisfy the statute of frauds, it must evidence a contract for the sale of goods, be signed by the party against whom enforcement is sought and specify a quantity.

Eastern Dental Corp. v. Issac Masel Co., Inc., 502 F. Supp. 1354, 1363 (E.D. Pa. 1980). The need for a writing for the sale of goods for \$500 or more includes requirements contracts. See Artman v. International Harvester Company, 355 F. Supp. 482, 486 (W.D. Pa. 1972); Harry Rubin & Sons v. Consolidated Pipe Co. of Am., Inc., 153 A.2d 472 (Pa. 1959). In the case of a requirements contract, while the quantity term "need not be numerically stated, there must be some writing which indicates that the quantity to be delivered under the contract is a party's requirements or output." International Prods. & Techs., Inc. v. Iomega Corp., 1989 WL 138866, *3 (E.D. Pa. Nov. 15, 1989).

The parties' agreement involved the annual sale of millions of pounds of packaged butter. Plaintiff has produced no writing indicating a contract for sale signed by defendants or an authorized agent. The only written document of record which

remotely suggests the existence of some relationship between the parties is an October 1991 sales report from Arthur Thompson to Daniel Devineau of Sodiaal. The report provides in relevant part:

The above monthly figures are for our September sales period. Our sales units are +14.5% ahead vs September 1990, while our profits are +274.7%. Some of the key factors that led to a good September: . . .

We had a custom packaging contract this September, last September we did not.

The report does not set forth any terms of an agreement, indicate the identity of the other party or specify the quantity of goods under the packaging agreement. The oblique reference in the sales report does not satisfy the statute of frauds and plaintiff has not contended otherwise. Indeed, plaintiff has not responded at all to defendants' contention that there is no enforceable contract by virtue of the statute of frauds.¹⁷

Moreover, the agreement on which plaintiff relies is illegal, violative of public policy and unenforceable.

Section 1 of the Sherman Act broadly prohibits any contract or concerted action that unreasonably restrains

¹⁷ Even assuming that the provisions of the agreement regarding division of the market and eschewing price competition to secure market share were severable from those regarding packaging and supply, plaintiff would thus have no viable contract claim for failure to supply or for the unilateral price increases.

interstate or foreign trade or commerce. See 15 U.S.C. § 1; Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238-239 (1918). In assessing illegal conduct, courts employ two distinct tests, the per se violation test and the rule of reason test. Under the per se test, "agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality" are found to be antitrust violations. Eichhorn v. AT&T Corp. 248 F.3d 131, 138 (3d Cir. 2001). Otherwise, courts employ the rule of reason test under which conduct is illegal when under all the circumstances, "the challenged acts are unreasonably restrictive of competitive conditions" in the relevant market. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 28 (1911).¹⁸

Horizontal price-fixing, where competitors at the same market level agree to fix or control the prices they will charge for their respective goods or services, is among the activities that the Supreme Court has consistently held to be illegal per se. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 435-36 (1990); Arizona v. Maricopa County Medical Soc'y, 457

¹⁸ "An analysis of the reasonableness of particular restraints includes the consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972).

U.S. 332, 344-47 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646-47 (1980); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927). The Supreme Court has also applied the per se standard to horizontal conspiracies allocating territories, reducing output, dividing up customers or imposing other non-price restraints on competitors. See Palmer v. BRG of Georgia, 498 U.S. 46, 49 (1990) (agreement not to compete in competitor's territory is "anticompetitive regardless of whether the parties split the market within which both do business or whether they merely reserve one market for one and another for the other"); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) ("agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused"); Topco Associates, 405 U.S. at 609 n.9 (horizontal territorial limits need not be accompanied by price fixing to constitute a per se violation of Sherman Act).

Plaintiff's contention that the agreement was not formed to divide customers is flatly contradicted by the stated terms and the testimony of Frank Sexton himself. He acknowledges that a term of the contract was that both parties would take no action "to disrupt the percentage of the customer's business with each company" and would not quote a competitive price to a

customer who might then shift its business. He states that "[w]e would enjoy serenity under the big tree of Kellers' Sodiaal since we would be unencumbered by their competitive pricing of our accounts and in turn, we would not take any of [Keller's] business."

Plaintiff cites an array of cases in which per se violations were not found. All are distinguishable. In Broadcast Music Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979), plaintiff challenged BMI's practice of pooling copyrights in musical works owned by musicians and then issuing a blanket license. The Court there found that the purpose of the arrangement was not to restrict pricing behavior. National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) involved a challenge to a NCAA program with the major television networks that restricted individual price negotiations between broadcasters and institutions. Without some degree of restraint, the industry was such that the product (college football telecasts) could not be made available. The Court there concluded that "what is critical is this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." Id. at 101. The purpose of the arrangement was not to restrict pricing behavior, but to make the product widely available. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S.

36 (1977), involved a vertical restraint. The Court found that vertical restrictions which promote competition are not manifestly unreasonable. Id. at 54; Northwest Stationers v. Pacific Stationary, 472 U.S. 284 (1985), involved a group boycott by purchasers. The Court stated that "the act of expulsion from a wholesale co-operative does not necessarily imply anticompetitive animus so as to raise a probability of anticompetitive effect." Id. at 296. In Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 229 (D.C. Cir. 1986), the Court found that the horizontal restraint in question preserved horizontal market efficiencies and prevented free-rider problems.

The circumstances in the cases plaintiff cites are absent here where the purpose of the agreement clearly was market allocation, maintenance of higher prices and restriction of price competition. This is even more pronounced in view of the dearth of equipment necessary to package Western and Eastern butter in the eastern half of the country.

Plaintiff correctly states that covenants not to compete which are ancillary to a larger business agreement are governed by the rule of reason. The agreement at issue, however, is quite different from the covenants not to compete to which courts have applied the rule of reason. See Eichorn 248 F.3d at 144 (no-hire agreement); McDonald v. Johnson & Johnson, 722 F.2d 1370, 1378 (8th Cir. 1983) ("When the goodwill of a business is

sold along with its other assets, such a covenant, if reasonably limited in time and geography, is necessary to protect the buyer's legitimate interests"); Lektro-Vend Corp. v. Vendo Co. 660 F.2d 255, 266-67 (7th Cir. 1981) (seller corporation's agreement not to compete for finite period with purchaser).

The agreement plaintiff seeks to enforce involves horizontal price fixing and a horizontal allocation of customers. By its terms, the agreement provides that neither party will attempt to solicit customers from the other or attempt to enhance its percentage of sales to common customers. As the purchasing decisions for private label customers are driven primarily by price, the parties necessarily would have to quote any price at a level high enough so as not to divert sales from the other party and this is precisely what Frank Sexton testified they did.¹⁹

An agreement the performance of which is criminal, tortious or otherwise against public policy is unenforceable. See American Ass'n v. Casualty Reciprocal, 588 A.2d 491, 495-96

¹⁹ Plaintiff's attempt to justify the agreement is disingenuous and unavailing. Plaintiff suggests that the arrangement allowed Keller's to increase butter production and as a result prices could be lowered, with cost savings passed on to customers. Plaintiff does not explain why competitors dividing a market and presumably seeking to maximize wealth would pass on any efficiency gains to consumers. Moreover, the thrust of plaintiff's claim is that defendants breached the agreement by engaging in competition after Mr. Thompson's departure as General Manager. All but a small fraction of the losses calculated in plaintiff's damages submission consist of profits lost when it had to reduce its prices to meet that competition and from the loss of volume or customers outright to Keller's.

(Pa. 1991); Espenshade v. Espenshade, 729 A.2d 1239, 1246 (Pa. Super. 1999); Contractor Industries v. Zerr, 359 A.2d 803, 85 (Pa. Super. 1976). See also Restatement Second of Contracts § 186 (agreement which unreasonably restricts competition is unenforceable on public policy grounds). The agreement on which plaintiff relies in support of its massive claim for damages for breach of contract is a patent violation of the Sherman Act. It is criminal, tortious and against public policy.

B. Robinson-Patman Act

Plaintiff alleges that defendants violated § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), by charging higher prices to Sommer Maid than Keller's direct-purchasing retailers.²⁰ To sustain a § 13(a) claim, a plaintiff must show that the commodities in question are sold in commerce, the commodities sold are of like grade and quality, there is

²⁰ 15 U.S.C. § 13(a) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

discrimination in price between different purchasers and such discrimination caused injury to competition. See Texaco v. Hasbrouck, 496 U.S. 543, 556 (1990). The first two elements are not contested.

In Robinson-Patman Act cases, it is useful to distinguish the vertical relationship between the discriminatory seller, the favored and unfavored buyer, and the impact of the alleged price discrimination. Id. at 559 n.15. Where a seller engages in price discrimination, the injury may fall on several different parties. A primary-line injury harms the competitors of the discriminating seller.²¹ A secondary-line injury harms the disfavored buyers vis-a-vis the favored buyers of the discriminating seller.²² A third-line injury falls upon the customers of the purchasers.

Plaintiff contends that it was a customer and competitor of Keller's and may thus assert a claim for primary-

²¹ For example, in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), the plaintiff, a manufacturer of generic cigarettes, alleged that the defendant cut prices on its own line of generics and offered discriminatory volume rebates in order to purge competition from the generic cigarette market.

²² FTC v. Morton Salt Co., 334 U.S. 37 (1948) involved bulk volume price discounts offered to salt purchasers. Only the largest purchasers of salt purchased in quantities sufficient to invoke the discount. The Court found that "in enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities." Id. at 49.

line or secondary-line injury. Plaintiff has cited no case in which a plaintiff was permitted to assert both types of injury. In any event, there is absolutely no evidence of record that Sommer Maid competed with any favored purchaser of Keller's butter, a prerequisite to establishing secondary-line injury in a price discrimination case. See Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987) (to establish secondary-line injury plaintiff must show "it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential"). See also J.F. Feeser, 909 F.2d at 1534 n.10 (price discrimination "between competing purchasers" satisfies element of injury to competition).

The essence of plaintiff's claim is that defendants diverted business from Sommer Maid, much of it from shared customers, through discriminatory pricing. This is a primary-line injury.

Price discrimination means "selling the same kind of goods cheaper to one purchaser than to another." FTC v. Anheuser Busch, Inc., 363 U.S. 536, 549 (1960) (quoting FTC v. Cement Institute, 333 U.S. 683, 721 (1948)). To show discrimination, a plaintiff must show that the sales were made contemporaneously. Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc., 159 F.3d 129, 142 (3d Cir. 1998) (plaintiff must show defendant made at least two contemporaneous sales of same

commodity at different prices to different purchasers and injury to competition from such discrimination).

Defendants correctly note that plaintiff has failed to present any records or other evidence showing contemporaneous sales by defendant of butter to plaintiff at a price higher than that at which it sold butter to retail customers. After extensive discovery including thirty depositions and the production of thousands of documents including sales records and invoices for all accounts on which plaintiff bases its claim of injury, plaintiff has presented no competent evidence that in any given week defendants sold butter to any customer at a lower price than that charged to plaintiff.

Plaintiff has produced evidence to show that the overage charged by defendant increased at a greater rate than the overage charged by Madison Dairy during the period from 1994 to 1996. That a dairy in Wisconsin increased prices at a lower rate than defendants over a two-year period does not remotely establish contemporaneous discriminatory sales by Keller's. The same is true of comparisons over six and twenty-four month periods between 1994 and 1996 of price increases by Keller's to plaintiff and various other customers. The market price of butter was set weekly on the CME. The USDA price support fell to 65 cents in 1994. The market fluctuated wildly between 1994 and 1996. That different prices may have been charged to different

customers at different times during this period does not demonstrate price discrimination within the meaning of the Robinson-Patman Act.

The portions of the deposition testimony of Frank Sexton, Brett Sexton and Harry Mattern cited by plaintiff is similarly unavailing. Frank Sexton testified that he was shocked by price increases. He acknowledged, however, that he was told the price increases were "across the board" and that he was unaware of any favored buyer who was purchasing at a lower price. Harry Mattern, plaintiff's plant manager, testified that the increased purchase price from Keller's made it harder to compete for Shop Rite's business. Mr. Mattern, however, does not say that Shop Rite was purchasing from Keller's at a price lower than it sold to plaintiff.²³ Brett Sexton testified that Sommer Maid lowered the price of Elgins to Tanner Brothers by 15 cents per pound to meet an offer by Keller's to sell Westerns to Tanner Brothers. Westerns and Elgins are different products and in any event Mr. Sexton's testimony on this point does not demonstrate discriminatory pricing by Keller's.

Defendants correctly note that it is also not enough even for a plaintiff which has shown price discrimination to prove injury to its own business. A plaintiff must also

²³ Shop Rite used several different suppliers during the 1990s and by 1997 was supplied primarily by Grasslands, a Mid-West dairy.

demonstrate a reasonable possibility that competition in the pertinent market has been harmed as a result of the price differential. See Brooke, 509 U.S. at 220; Falls City Industries v. Vanco Beverage, Inc., 460 U.S. 428, 434-435 (1988).²⁴

Plaintiff has failed to make any such showing. To the contrary, it clearly appears from the record that the private label butter market was highly competitive during the pertinent period.

Indeed, what plaintiff essentially complains about in this case is the diversion of business by defendants through competitive pricing and plaintiff's loss of profits from reducing prices to meet the competition or loss of business because of it.²⁵

VI. Conclusion

Plaintiff has shown no more than defendants' decision after Mr. Thompson stepped down as General Manager of Keller's to terminate an unwritten agreement to allocate business and stifle competition. Although the agreement contemplated the sale of

²⁴ Where the plaintiff has a secondary-line claim, competitive injury may be inferred from evidence demonstrating injury to a competitor of the favored purchaser. See Morton Salt, 334 U.S. at 46-47 (1948). See also Stelwagon, 63 F.3d at 1272 (3d Cir. 1995); George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 144 (2d Cir. 1998); Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 192 (1st Cir.), cert. denied, 519 U.S. 927 (1996).

²⁵ Plaintiff does not differentiate in its submissions between damages claimed for breach of contract and for violation of the Robinson-Patman Act. Indeed, plaintiff appears to conflate the two. It calculates a loss of profits into the indefinite future of \$20 million from the alleged breach of contract and then trebles this.

substantial quantities of products, it is not evidenced by any writing and, in the absence of any term of duration, was terminable at will by either party. Moreover, insofar as the agreement blatantly provided for an allocation of customers and suppression of competition, its enforcement would violate public policy. Plaintiff has not shown contemporaneous sales at disparate prices as required to sustain any Robinson-Patman Act claim, let alone any such action by defendants which injured competition.

Plaintiff cannot sustain its claims on the competent evidence of record. Defendants are entitled to summary judgment. Their motion will be granted. An appropriate order will be entered.

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

FRANK SEXTON ENTERS., INC. : CIVIL ACTION
t/a SOMMER MAID :
 :
v. :
 :
SODIAAL NORTH AMERICA :
CORPORATION (SNAC) :
t/a KELLERS' HOTEL BAR :
and KELLERS' HOTEL BAR : NO. 97-7104

O R D E R

AND NOW, this day of January, 2002, upon
consideration of defendants' Motion for Summary Judgment (Doc.
#67) and plaintiff's response thereto, consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is
GRANTED and accordingly **JUDGMENT** is **ENTERED** in the above action
for the defendants.

BY THE COURT:

JAY C. WALDMAN, J.