SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

THREE LIMES, INC. D/B/A
THE PURPLE CARROT

Plaintiff,

Index No.:

- against -

CHEF'D LLC

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S PETITION FOR A TEMPORARY RESTRAINING ORDER AND INJUNCTION IN AID OF ARBITRATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

BACKGROUND 2

A. The Fulfillment Services Agreement Between TPC and Chef'd Sets Forth the Terms of the Parties' Business Relationship 2

B. Chef'd Unilaterally Demands Price Increases, In Violation of the Terms of the Agreement 5

C. Chef'd Imperils TPC's Business if TPC Does Not Immediately Pay $250,000 and Agree to Chef'd's Extra-Contractual Demands 10

ARGUMENT 12

I. The Arbitration Award May be Rendered Ineffectual Without Injunctive Relief 12

II. TPC is Likely to Succeed on the Merits in Arbitration 14

III. TPC Will Be Irreparably Injured Without Injunctive Relief 15

IV. The Equities Tip in Favor of TPC 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page(s)**

Bernstein v. Navani,
131 A.D.3d 401 (1st Dep't 2015) 13, 14

CanWest v. Mirkaei Tikshoret,
9 Misc. 3d 845 (Sup. Ct. N.Y. County 2005) 12, 14, 15, 16

Div of Triple T Serv., Inc. v. Mobil Oil Corp.,
60 Misc.2d 720 (Sup. Ct. 1969), *aff'd* 34 A.D.2d 618 (2d Dep't 1970)..........13, 14

Gallo v. Johnson Oil Co.,
11 A.D.2d 718 (2d Dep't 1960) 13, 14

Jacob H. Rottkamp & Son, Inc. v. Wulfost Farmer, LLC,
14 Misc. 3d 382 (Sup. Ct. Suffolk County 2007) 15

Madison Square Garden Corp. v. Universal Pictures Co.,
7 N.Y.S. 2d 845 (1st Dep't 1938) 16

Mr. Natural v. Unadulterated Food Prods.,
152 A.D.2d 729 (2d Dep't 1989) 16

Second on Second Café Inc. v. Hing Sing Trading, Inc.,
66 A.D.3d 255 (1st Dep't 2016) 14, 15

York Agents, Inc. v. Bethlehem Steel Corp.,
36 A.D.2d 62, *aff'd* 29 N.Y.2d 808 (1st Dep't 1971) 13, 14

Witham v. Vfinance Investments, Inc.,
17 Misc. 3d 1136(A), 2007 WL 4244698 (Su. Ct. N.Y. County 2007)...........12, 16

Statutes

CPLR 7502(c) 2, 12

N.Y. U.C.C. § 2-716 14

Petitioner Three Limes, Inc. d/b/a The Purple Carrot ("TPC"), by its counsel of Slarskey LLC, submits this memorandum of law in support of its petition for a temporary restraining order and preliminary injunction in aid of arbitration

PRELIMINARY STATEMENT

TPC seeks a temporary restraining order and preliminary injunction in aid of arbitration, without which it is at imminent risk from Defendant Chef'd LLC's threat to shut down fulfillment services, leaving TPC unable to satisfy more than 40,000 customer orders per month, and facing catastrophic business failure. Chef'd has unfairly threatened to shut down fulfillment of TPC's orders because TPC refuses to accede to Chef'd's demand for an 18.5% premium over the parties' agreed upon contract price, or to make a $250,000 payment reflective of Chef'd's unilateral demands for super-contractual pricing. Refusing to be held hostage to Chef'd's demands, TPC has issued a 120-day notice of cancellation of the agreement, in accordance with its terms. The termination provisions require Chef'd to continue performing its fulfillment services—at a minimum until the 120 days expires, and longer if needed to effectuate an orderly transition of services. Chef'd, however, has stated that in the absence of TPC making the $250,000 payment, and acceding to *in terrorem* demands for a price increase, "Chef'd will no longer service [TPC's] account"—despite its contractual obligation to do so, and despite the corresponding irreparable injury it would cause to TPC's business.

Making matters worse, Chef'd has recently informed TPC that it intends to enter the direct-to-consumer marketplace—in direct competition with TPC—such that Chef'd's demands are not only without any contractual right, but they are also unfair and anti-competitive.

Yesterday, TPC issued its termination notice, and simultaneously notified Chef'd that TPC will seek arbitration of the parties' disputes—including Chef'd's refusal to service

TPC's account pending termination. Under these circumstances, both the parties' agreement and CPLR § 7502(c) warrant the issuance of an injunction in aid of arbitration: if Chef'd shuts down fulfillment services pending an arbitrator determination, any award compelling Chef'd to perform may be rendered ineffectual.

Chef'd's conduct is utterly inconsistent with its contractual obligations, and is little more than a naked power play to exert its leverage over TPC as a means of extracting improper price concessions, and threatening TPC's marketplace position. The Court should issue an order enjoining Chef'd from shutting down its fulfillment services, or demanding changes to the contract price, pending an award of an arbitrator or the conclusion of the termination and post-termination processes.

BACKGROUND

A. The Fulfillment Services Agreement Between TPC and Chef'd Sets Forth the Terms of the Parties' Business Relationship

On February 18, 2016, TPC and Chef'd entered into a "Fulfillment Services Agreement," (the "FSA"), which sets forth the terms under which Chef'd is obligated to perform fulfillment services for TPC. (*See* Verified Compl. ¶ 8 and Ex. 1 (February 18, 2016 Fulfillment Services Agreement.)

Section 1.1 of the FSA provides that "[d]uring the Term, subject to the terms and conditions of this Agreement, Chef'd ***shall provide to TPC the fulfillment services specified in Exhibit A hereto***…" (*Id.*, Ex. 1 § 1.1 (all emphasis supplied unless specified).) Exhibit A to the FSA sets forth Chef'd's fulfillment obligations, which include purchasing ingredients; packaging materials and documentation; order processing; shipping; and collaboration with TPC.

Section 1.2 of the FSA provides that "[a]s ***full consideration*** for Chef'd's performance of the Services, ***TPC shall pay the fees specified in Exhibit B hereto (the***

"Fees"). " Exhibit B provides for a fixed monthly fee of $17,500 per month, as well as fees to be applied on a per order basis: "From and after June 1, 2016," TPC is obligated to pay [redacted] provides that:

> The 'Initial Term' of this Agreement shall begin on the Effective Date and shall continue for a period of one (1) year, unless earlier terminated in accordance with this Article IV. ***This Agreement shall renew automatically for one or more one (1) year 'Renewal Terms' commencing after the expiration of the Initial Term***, and thereafter, after the expiration of the each Renewal Term, unless either Party elects not to renew by written notice to the other Party no later than ninety (90) days prior to the expiration of the Initial or each Renewal Term. ***The 'Term' of this Agreement shall comprise the Initial Term and any Renewal Terms.*** (*Id.*, Ex. 1 § 4.1.)

The FSA contains a termination provision, which provides for termination as a matter of "Convenience" by either party. (Verified Compl. § 4.2(a).) That provision provides that "[e]ither Party may terminate this Agreement at any time for convenience upon not less than one hundred twenty (120) days written notice to the other Party." (*Id.*) Thus, under the FSA, termination becomes effective 120 days from the provision of a termination notice. (*See id.*)

The FSA contains a "Post-Termination Performance" provision, Section 4.4 of the FSA, which provides that "***[n]otwithstanding the lapse or termination by either Party*** of this

[1] TPC is also obligated to pay, "[f]rom and after July 1, 2016," "[t]he actual and documented purchase cost (inclusive of tax and shipping to Chef'd) of ingredients purchased in accordance with Exhibit A, plus a carrying charge thereon of 7.5%.

Agreement, ***Chef'd shall continue to perform the Services*** and TPC shall continue to remit amount due to Chef'd under this Agreement ***for outstanding orders submitted to Chef'd for fulfillment hereunder prior to the effective date of such lapse or termination.***" (Verified Compl., Ex. 1 § 4.4.)

The FSA also contains a "Transition Services" provision, which entails that "***Upon the termination*** or lapse of this Agreement ***Chef'd shall…***(iv) ***provide at Chef'd's then standard rate such additional transition assistance as requested in writing by TPC to effect the orderly transition of the services to TPC or its designee.*** The terms and conditions of this Agreement will be deemed to survive with respect to the performance of the transition services described in this Section 4.5." (*Id.*, Ex. 1 § 4.5.) Thus, by the unambiguous terms of the FSA, even ***after*** termination is effective, Chef'd may be obligated—at TPC's election—to continue to provide Services, at its standard contractual price (set forth in Exhibit B of the FSA) to assure "the orderly transition of the services to TPC or its designee." (*Id.*)

Section 11.3 of the FSA contains an "Amendment and Waiver" provision, which provides that any "amendment or waiver will be binding upon any Party hereto only if such amendment or waiver is set forth in writing executed by both parties," and that "[n]o course of dealing between or among any persons having any interest in this Agreement will be deemed effective to modify or amend any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement." (Verified Compl., Ex. 1 § 11.3.) The provision further provides that "[n]o delay or omission by a Party to exercise rights hereunder shall impair any such rights or shall be construed to be a waiver of any such default or any acquiescence thereto." (*Id.*)

Section 8.6 of the FSA contains Dispute Resolution provisions, including that in the event of an unresolvable dispute, "the Parties will promptly submit such dispute to binding arbitration" in the "City of New York," (*Id.*, Ex. 1 § 8.6(c)), but that "[n]othing shall prevent either Party from directly seeking injunctive or other equitable relief from any court of competent jurisdiction in situations where damages would not adequately compensate for an alleged breach of this Agreement." (*Id.* § 8.6(d).) The parties agreed that the FSA would be "governed by and construed in accordance with the internal laws of the State of New York, without regard to the principles of conflicts of laws." (*Id.* § 11.6.)

B. Chef'd Unilaterally Demands Price Increases, In Violation of the Terms of the Agreement

TPC was launched in the Fall of 2014, based in Massachusetts, and at the outset of its operations, handled its own fulfillment processes. (*See* Verified Compl. ¶ 17.) In or around September 2015, TPC and Chef'd began discussing an alliance, by which Chef'd would provide fulfillment services to TPC. (*See id.*) In November 2015, the parties entered into an interim agreement, pursuant to which Chef'd began fulfilling west coast requirements for TPC, out of Chef'd's El Segundo, California facilities. (*See id.*, Ex. 1.)

The parties entered into the FSA on February 18, 2016. (*See* Verified Compl., Ex. 1.) By the middle of March 2016, TPC had transitioned all of its fulfillment service to Chef'd. Chef'd continued to fulfill TPC's west coast requirements out of El Segundo, while TPC's east coast orders were filled out of Chef'd's New York City fulfillment center. (*See id.* ¶ 18.)

TPC grew rapidly through 2016: Having earned $1.4 million in revenue in 2015, TPC earned $9.7 million in 2016 and is on pace, in 2017, to reach $30 million. In 2017, TPC introduced a new product line in conjunction with TB12, the sports program developed by New

England Patriots' quarterback Tom Brady. (*See id.* ¶ 19.) TPC regularly exceeds the 15,000 unit threshold in orders fulfilled by Chef'd, qualifying [redacted]

In late 2016, and into 2017, the parties began discussing changes to their relationship. (*See id.* ¶ 20.) But neither Chef'd nor TPC issued a written notice of termination prior to automatic renewal of the FSA on February 18, 2017. Thus, pursuant to its terms, the FSA automatically renewed for another year term on February 18, 2017. (*See id.*)

In March, 2017, Chef'd proposed a new agreement, which would effectively have raised its pricing per [redacted] The parties continued negotiations, in light of Chef'd's proposal, without agreement. (*See id.* ¶ 21.)

On April 19, 2017, Kyle Ransford, the Founder and CEO of Chef'd, sent Andrew Levitt, the Founder & CEO of TPC, an email stating that he would be "happy to push off [a] call" to continue the ongoing negotiations, if TPC would "agree that this week will be a box"—effectively a raise [redacted] over the contractually-agreed upon pricing for the bulk of TPC's orders. (*See id.*, Ex. 2 (2017.04.09 email chain).) Levitt responded "Absolutely not! We have never discussed that you can have the ability to unilaterally increase price…We will not accept a unilateral price increase." (*Id.*) Levitt also noted that Ransford had just recently requested a top-end price of [redacted] ***less*** per unit than Chef'd was now unilaterally demanding. (*See id.*)

Negotiations between the parties continued, and in mid-to-late May, Chef'd provided a draft contract to TPC, proposing a unit price of [redacted] for monthly orders between 10,000 and 17,500, and $28 for monthly orders exceeding 17,500. (*See id.* ¶ 23.) This proposal would have resulted in unit price increases of [redacted] nit. (*See id.*)

Meanwhile, Chef'd had begun issuing invoices to TPC based on its unilateral demand [redacted] (*See id.* ¶ 24 and Ex. 9 (sample invoice).) On June 8, 2017, Chef'd sent a legal notice to TPC, stating that TPC was "in default of [its] obligations to pay the sum of $242,894 that is owed on services performed by Chef'd for [TPC] for April and May 2017," which was based, in part, upon Chef'd's unilaterally-asserted price [redacted] (*See id.* Ex. 3, (June 8, 2017 letter).) TPC—without auditing the invoice, and under threat that Chef'd would "hold future orders until payment is made," *id.*—made a payment the next day, seeking to preserve its supply relationship with Chef'd, and without any alternative for delivering its product if Chef'd were to shutdown its fulfillment operations. (*See* Verified Compl. ¶ 24.) At the same time, TPC proposed that the parties execute the draft contract proposed by Chef'd on May 22, 2017, *i.e.*, with a top-tier [redacted] "to be in place for upwards of 9 months to allow our teams to get back to the business of running the business." (*Id.* ¶ 24.)

Chef'd did not execute the revised agreement supplied by TPC, which reflected the terms initially proposed by Chef'd on May 22, 2017. (*See* Verified Compl. ¶ 25.) Instead, it continued to issue invoices at its unilaterally-determined price [redacted] (*See id.*) TPC, in an effort to maintain goodwill between the parties, began paying at the rate of [redacted] (in the two highest volume tiers), expecting—based on Chef'd's prior offers and the state of negotiations between the parties—that the parties would eventually reach a new agreement with a retroactive adjustment. Notwithstanding these overpayments, the binding contractual rate remained as set forth in Exhibit B to the FSA. (*See* Ex. 1, Ex. B (note also Section 11.3 prohibiting amendments to the agreement except in writing).)

On July 19, 2017, TPC's executives traveled to California to meet with Chef'd's executives, in an attempt to resolve the outstanding negotiations over a new contract. (*See*

Verified Compl. ¶ 26.) The parties discussed overhauling the Chef'd/TPC relationship, with TPC taking on additional responsibilities for sourcing, and thus reducing Chef'd's obligations. (*See id.*) Returning home, TPC believed that they had reached alignment with Chef'd to implement, on a temporary basis, the [redacted] pricing reflected in Chef'd May 22, 2017 proposal, while the parties finalized plans for changes to their relationship. (*See id.*)

On July 21, 2017, TPC provided an updated version of the proposed contract initially offered by Chef'd on May 22, 2017, executed by TPC. (*See* Verified Compl., Ex. 4, (July 21, 2017 email from TPC).) Chef'd did not respond to the proposal, implicitly rejecting it, and continued to invoice at its unilateral [redacted] (*See* Verified Compl. ¶ 27.)

In August 2017, Chef'd fulfilled approximately 30,000 orders for TPC out of Chef'd's east coast fulfillment center located in New York, and approximately 19,000 orders for TPC out of Chef'd's west coast fulfillment center. (*See id.* ¶ 28.) Fulfillment was similar in September 2017. (*See id.*)

The dispute between Chef'd and TPC came to a head in late September. (*See* Verified Compl. ¶ 29.) On September 27, 2017, one of Chef'd's accountants inquired of TPC as to the "open invoice balance." (*See id.*, Ex. 5 (Sept. 27, 2017 email chain).) TPC responded to Chef'd that the executives would need "to talk live" about this issue, because "there is history to any open balances," *i.e.*, the fact that Chef'd had been invoicing at the wrong price—which it had unilaterally set—rather than the contract-price authorized by the FSA. (Verified Compl. ¶ 29, Ex. 5.) When Chef'd's CFO indicated that he had "a pretty good tally of what's out there," TPC responded that the companies "probably have the same tally" (on units), but it was necessary "to talk it through since there is not consensus on what is actually owed." (*Id.*)

On October 3, 2017, Chef'd's General Counsel, Tim Harvey, sent an email to TPC's CEO, with a revised version of the draft agreement from May 2017, now demanding [redacted] *ee* Verified Compl. Ex. 6 (2017.10.03 email and draft contract, § 4(b)).) Harvey stated that Chef'd "would need this [new agreement] in place before October 16 shipment dates," (*id.*) threatening that Chef'd would not abide by its contractual servicing obligations if TPC did not accede to the unilateral price increase from Chef'd. (*See* Verified Compl. ¶ 30.) ***This new demand from Chef'd reflected a unilateral,*** [redacted] ***price increase—more than 18.5% over the $27 contractually-agreed-upon price set forth in the FSA***. (*See id.* and Ex. B.)

On October 12, TPC's CFO spoke with Chef'd's CFO, and expressed concern over the email threat issued by Chef'd's attorney. (*See id.* ¶ 31.) TPC expressed the view to Chef'd that perhaps the best thing to do would be to recognize that the FSA was no longer a viable agreement, and thus wind it down. (*See id.*) As noted above, Section 4.2 of the FSA contains within it a termination for convenience provision, which provides for a 120-day wind down period upon the provision of a termination notice. (*See id.*) Sections 4.4 and 4.5 also provide for Chef'd to provide post-termination services to TPC, such that Chef'd "shall continue to perform the Services … for outstanding orders submitted to Chef'd for fulfillment hereunder prior to the effective date of such lapse or termination," (Verified Compl., Ex. 1 § 4.4), and shall "effect the orderly transition of the services to TPC or its designee." (*Id.* § 4.5.)

Chef'd's response was to issue another demand letter, dated Friday October 13, 2017, and sent by email on Saturday October 14, by which Chef'd demanded (i) payment by TPC of $252,173.56, by October 17, 2017, based on its unilaterally elevated prices (*see* Verified Compl. ¶ 29), and (ii) agreement to the new terms demanded by Chef'd on October 3, 2017 (*i.e.*, [redacted]. (Verified Compl., Ex. 7 (2017.10.13 Demand Letter).) Chef'd threatened that "[u]nless payment in the amount of $252,173.56 is received by us in full immediately," it would "hold future orders until payment is made," and that unless TPC agreed to Chef'd's unilateral demands to change the contract and increase pricing [redacted] "by Tuesday, October 17th, 2017, Chef'd will no longer service this account." (*Id.*)

On Tuesday October 17, 2017, TPC issued its notice of termination pursuant to Section 4.2(a) of the FSA, informing Chef'd that TPC will seek an arbitration award (i) directing specific performance of Chef'd's termination and transition services pursuant to Sections 4.4 and 4.5 of the FSA; (ii) a declaration as to the price terms and payment obligations for Chef'd's services; and (iii) an accounting for the overpayment that TPC has made since February 2017. (*See id.* ¶ 33 and **Exhibit 8** (2017.10.17 Termination Notice).) TPC simply cannot risk the possibility that Chef'd will destroy its business by shutting down fulfillment, as it has threatened imminently to do. (*See id.*) Thus, TPC also informed Chef'd that it would seek injunctive relief, to assure the continuity of its fulfillment services until an arbitrator rules otherwise, or until the 120-day wind down period expires, along with any need for post-termination transition services. (*See id.*)

C. Chef'd Imperils TPC's Business if TPC Does Not Immediately Pay $250,000 and Agree to Chef'd's Extra-Contractual Demands

Chef'd's *in terrorem* demands that TPC immediately pay more than $250,000 in overcharges, and agree to unilateral demands to renegotiate the terms of the FSA, are essentially a form of economic extortion. (*See* Verified Compl. ¶ 34.) Chef'd is the source of more than 90% of TPC's fulfillment, and has been for more than a year and half. (*See id.*) Were Chef'd to stop "servicing this account," because TPC will not accede to Chef'd's improper extra-contractual demands, TPC would have no way of delivering the more than 40,000 meal packages that it expects to deliver in the month of October. (*See id.*)

More specifically, it is a complex process to deliver TPC's product to its customers, which begins at least six weeks prior to delivery, when TPC provides Chef'd with recipes and ingredients required for the meal plan assembly. (*See id.* ¶ 35.) Three weeks out, TPC provides Chef'd with projections for the number of orders it will required, at which time Chef'd orders 80%-90% of the products required for meal kit delivery. (*See id.*) Those numbers are refined in the three weeks leading up to delivery. (*See id.*) On the Thursday before a Monday delivery, TPC provides Chef'd with a final count. (*See id.*) Chef'd then portions out the meal kit on Thursday, prepares the meal kit on Friday and Saturday, boxes the meals on Sunday, and ships them out on Monday evening for courier delivery, via ground transportation such as Federal Express, OnTrac, or LaserShip. (*See id.*)

The entire fulfillment process is highly-specified and time-sensitive, requiring particular care and attention because of the food products involved. (*See* Verified Compl. ¶ 36.) If Chef'd is permitted to cease "servic[ing] [TPC's] account," it will take months to replace those fulfillment services, during which time TPC will unavoidably lose customer goodwill and market share; its reputation for reliability will be impacted; and it will irretrievably lose the opportunity to serve its clientele during the interim period during which TPC is forced to find a replacement source of fulfillment services. (*See* Verified Compl. ¶ 36.) Notably, it is precisely because of the critical nature of these fulfillment services that the parties' agreement contains the 120-day termination transition period, and also provides for post-termination transition services at TPC's option, to ensure orderliness and minimal disruption to TPC's business. (*See id.*) Emergency injunctive relief is required to assure that next week's shipments go out in a timely manner.

What makes Chef'd's conduct more egregious is the apparent anti-competitive nature of it, not just the extra-contractual demands that it has made. (*See* Verified Compl. ¶ 37.)

From the outset of the relationship, Chef'd has been primarily focused on its core business of back-end fulfillment for companies like TPC. (*See id.*) On September 28, however, Chef'd told TPC that it was developing plans to move directly into the retail business—in direct competition with TPC—based on its perception that there is a market opportunity for Chef'd to service the direct-to-consumer, plant-based market in which TPC operates. (*See id.*) Thus, it appears that Chef'd's threat to shut down TPC's fulfillment has an anti-competitive purpose, to go along with its unilateral demand for price increases. (*See id.*)

ARGUMENT

CPLR 7502(c) provides for temporary and permanent injunctive relief in aid of arbitration when a petitioner demonstrates "(1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; (3) a balancing of the equities which favors the issuance of injunctive relief; and (4) that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." *CanWest v. Mirkaei Tikshoret*, 9 Misc. 3d 845 (Sup. Ct. N.Y. County 2005) (internal quotations and citations omitted); *see also Witham v. Vfinance Investments, Inc.*, 17 Misc. 3d 1136(A), 2007 WL 4244698 at *3, (Sup. Ct. N.Y. County 2007) (same, citing *CanWest*). TPC readily meets each of these criteria.

I. The Arbitration Award May be Rendered Ineffectual Without Injunctive Relief

Under the statute, the first consideration for determining whether a preliminary injunction under CPLR 7502(c) should be granted is whether "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." *CanWest*, 9 Misc. 3d at 868 (quoting CPLR 7502(c).)

On Saturday, October 14, 2017, Chef'd threatened that it "will not ship any orders after October 27th, unless payment [of $252,173.56] is made [immediately]," (Verified Compl., Ex. 7), and it has stated that it will "no longer service this account" unless TPC accedes to Chef'd's demands to "sign another agreement" that increases Chef'd's payments by more than 18%. (*Id.*) As set forth above, TPC disputes that the $252,173.56 is properly invoiced, because it is based upon Chef'd's unilaterally imposed price increases, which are inconsistent with the terms of the FSA. (*See supra* at 8-10.) And TPC will not accede to Chef'd's extortionate demand of an 18.5% price increase, which is inconsistent with the parties' pricing terms set forth in Exhibit B to the FSA. (*See id.* and Verified Compl., Ex. 1 at Ex. B.)

In arbitration, TPC will seek a declaration that Chef'd's conditioning of its performance upon TPC's acceptance of new contractual terms constitutes a repudiation of the existing, binding FSA. *See*, *e.g.*, *Bernstein v. Navani*, 131 A.D.3d 401, 406-07 (1st Dep't 2015) (demand for performance of terms that defendant had "no right to insist" upon constitutes repudiation); *York Agents, Inc. v Bethlehem Steel Corp.*, 36 A.D.2d 62, 64 (1st Dep't 1971) (conditioning performance upon party executing "a new agreement" is an "unqualified repudiation" of the existing agreement), *aff'd*, 29 N.Y.2d 808 (1971).

TPC will seek an award of specific performance that requires Chef'd to perform its fulfillment obligations under the FSA—including post-termination and transitional services provided for under Sections 4.2(a), 4.4, and 4.5—based on the irreparable injury to TPC that will result from Chef'd's refusal to fulfill TPC customer orders. *See*, *e.g.*, *Gallo v. Johnson Oil Co.*, 11 A.D.2d 718, 718 (2d Dep't 1960) (requiring specific performance of contract to supply plaintiff with gasoline); *Div. of Triple T Serv., Inc. v Mobil Oil Corp.*, 60 Misc.2d 720, 723 (Sup. Ct. 1969), *aff'd* 34 A.D.2d 618 (2d Dep't 1970) (specific performance "is properly accorded to requirements contracts and other agreements akin thereto"); N.Y. U.C.C. § 2-716 & cmt. 2 ("output and requirements contracts involving a particular or peculiarly available source or market present today…"). *See also Second on Second Café Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d 255, 272 (1st Dep't 2016) ("loss of the goodwill of a viable, ongoing business" constitutes irreparable harm). It may take months, however, to conclude and confirm that arbitration. Plainly, if injunctive relief is not granted by this Court, any award of specific performance that TPC might obtain would be rendered ineffectual. Thus, the first criterion under 7502(c) is readily met. *See, e.g.*, *CanWest*, 9 Misc. 3d at 868.

II. TPC is Likely to Succeed on the Merits in Arbitration

For the reasons set forth above, TPC is likely to succeed on the merits of the arbitration: Chef'd's insistence that TPC accept terms inconsistent with the FSA constitutes a repudiation—and thus a breach—of that agreement. *See*, *e.g.*, *Bernstein*, 131 A.D.3d at 406-07; *York Agents, Inc.*, 36 A.D.2d at 64; By its integrated, written terms, the FSA renewed itself on February 18, 2017. (*See* Verified Compl. Ex. 1 § 4.1.) The price terms are contained in Exhibit B thereof, (*id.*, Ex. B), and the parties have not executed any amendment or modification of the agreement. (*See id.* § 11.3 (prohibiting modification or amendment without written agreement).) Thus, Chef'd's demands for an 18.5% increase in pricing, and that TPC enter into a ***new*** agreement as a condition of Chef'd performing its existing obligations, is plainly a repudiation and breach of the FSA. *See*, *e.g.*, *Bernstein*, 131 A.D.3d at 406-07; *York Agents, Inc.*, 36 A.D.2d at 64. For the reasons set forth in Argument I, TPC is likely to obtain an award of specific performance. *See*, *e.g.*, *Gallo*, 11 A.D.2d at 718; *Div. of Triple T Serv., Inc.*, 60 Misc.2d at 723; N.Y. U.C.C. § 2-716 & cmt. 2 ("output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation").

III. TPC Will Be Irreparably Injured Without Injunctive Relief

As noted above, the "loss of the goodwill of a viable, ongoing business" constitutes irreparable harm. *See, e.g.*, *Second on Second Café Inc.*, 66 A.D.3d at 272. In addition, a plaintiff's "inability to fulfill its supply agreements with its numerous customers," and its inability to purchase replacement product, may result in "severe and irreparable injury to plaintiff's business reputation." *Jacob H. Rottkamp & Son, Inc. v Wulforst Farms, LLC*, 17 Misc. 3d 382, 388 (Sup. Ct. N.Y. County 2007) (enjoining defendant from interfering with harvesting practices).

Chef'd has been fulfilling TPC's west coast orders for two years, since November 2015, and assumed responsibility for east coast *and* west coast order in March 2016. (*See supra* at 5-6.) TPC has no viable alternative, other than Chef'd, for fulfilling the more than 40,000 monthly orders that it delivers to its customers. (*See supra* at 11.) Thus, there is simply no doubt that if TPC is unable to deliver its client's orders as a result of Chef'd's refusal to fulfill those orders, TPC will suffer irreparable injury, in the form of its inability to deliver orders, loss of goodwill with its customers, and reputational injury. *See Second on Second Café Inc.*, 66 A.D.3d at 272 (noting the irreparable injury to goodwill built up over "years of operation"); *Jacob H. Rottkamp & Son*, 17 Misc. 3d 382 (noting "severe and irreparable" injury to business reputation from inability to fill customer orders).

IV. The Equities Tip in Favor of TPC

The balance of equities generally tips in favor of a party who (i) who will be irreparably injured absent injunctive relief; (ii) would be unable to obtain an effectual remedy through arbitration without injunctive relief; and (iii) seeks to maintain the status quo. *CanWest*, 9 Misc.3d at 872; *see also Witham*, 17 Misc.3d 1136(A), 2007 WL 4244698 at *6 (same). A party that acts with an anticompetitive purpose acts in a fundamentally inequitable manner. *See*, *e.g.*, *Madison Square Garden Corp. v. Universal Pictures Co.*, 7 N.Y.S. 2d 845, 851 (1st Dep't 1938) (exercising "equitable jurisdiction" to prohibit "unfair competition"). The balance assuredly tips in favor of a party when "[a]bsent a preliminary injunction, there is no assurance that the plaintiff will be able to stay in business pending trial." *Mr. Natural v. Unadulterated Food Prods.*, 152 A.D.2d 729, 730 (2d Dep't 1989) (enjoining the termination of five distributor agreements).

In this case, there is no question that TPC will be irreparably injured absent injunctive relief, when Chef'd refuses to service its account beginning immediately. As set forth above, the award of specific performance necessary to assure that Chef'd performs its obligations—pursuant to the parties' existing agreement terms—will be ineffectual if TPC is forced to wait until the conclusion of arbitration to obtain that award. TPC seeks only to maintain the *status quo*, *i.e.*, the fulfillment processes that Chef'd has been performing for the last two years on behalf of TPC, and within a defined time frame as TPC terminates and transitions the fulfillment service. Chef'd is acting with a fundamentally inequitable purpose, when its actions are viewed against the backdrop of it nascent efforts to compete in the space. And there is no guarantee that—absent injunctive relief—TPC will be able to stay in business until the conclusion of the arbitration. Under these circumstances, the equities tip decidedly in favor of issuing the requested injunctive relief. *See CanWest*, 9 Misc.3d at 872; *Witham*, 17 Misc.3d 1136(A), 2007 WL 4244698 at *6; *Mr. Natural*, 152 A.D.2d at 730.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for temporary and permanent injunctive relief in aid of arbitration should be granted.

Dated: October 18, 2017
New York, NY

SLARSKEY LLC

By:____________________________
David Slarskey
800 Third Avenue
New York, NY 10022
(212) 658-0661
Counsel for Three Limes, Inc. d/b/a The Purple Carrot