UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KRAFT FOODS GLOBAL, INC.,	:	CASE NO. 10 CV 09085 (CS)
Plaintiff,	:	**PLAINTIFF'S REPLY MEMORANDUM ON "LIKELIHOOD OF SUCCESS ON THE MERITS" IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION**
-against-	:	
STARBUCKS CORPORATION,	:	
Defendant.	:	

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I. INTRODUCTION

At the core of this merits briefing is one question: does Starbucks have the right to terminate the R&G Agreement based on a Material Breach? With the benefit of Starbucks' opposition, the answer is a resounding "No."

On October 5, 2010, Starbucks asserted a laundry list of "material breaches," many of which ostensibly occurred years before and none of which were previously asserted by Starbucks as grounds for termination of the Agreement. Despite Kraft's objections and the institution of an arbitration under the Agreement's dispute resolution provision, Starbucks relied on these *assertions* as it pressed forward to take the Kraft/Starbucks CPG Business, *without ever substantiating its claims*. When presented with the opportunity to validate its *assertions* with evidence, Starbucks' brief in opposition to Kraft's preliminary injunction motion offers nothing more than half truths, misrepresentations, and outright falsehoods. Moreover, in an implicit admission that the alleged breaches were fabricated, Starbucks has simply abandoned allegations of breach that it previously claimed were so fundamental as to warrant forfeiture of a $500 million per year business.[1]

Once the Court looks beyond Starbucks' rhetoric and misdirection, it will find that there is no merit whatsoever in Starbucks' attempt to portray Kraft's performance under the contract – performance Starbucks once praised – as an abject failure such that Starbucks has been denied the fundamental benefits it expected to derive from the R&G Agreement. To the contrary, it is no mystery why Starbucks offered to pay $750 million for the Kraft/Starbucks CPG Business in August 2010. Starbucks' allegations of breach are so poorly supported that even Starbucks cannot reasonably believe that it has a legitimate basis to terminate the R&G Agreement under ¶ 5.B(iii). Indeed, it does not. Starbucks' quest to take the business pursuant to 5.B(iii), despite the consequent irreparable harm to Kraft and its customers, warrants the equitable intervention

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[1] Starbucks has abandoned its claim that Kraft breached the R&G Agreement by: 1) failing to spend the contractually required Minimum A&P Amount; 2) breaching the exclusivity provision by promoting Yuban brand coffee; 3) failing to adopt an effective marketing campaign; and 4), failing to devote sufficient personnel and resources to perform its obligations under the Agreement.

by this Court.

II. STARBUCKS' ALLEGATIONS THAT KRAFT "MATERIALLY BREACHED" THE R&G AGREEMENT ARE FRIVOLOUS

To demonstrate a likelihood of success on the merits for the purposes of preliminary injunction, Kraft need show only that its "probability of . . . prevailing is better than fifty percent."[2] In contrast, Starbucks, as the party claiming the right to terminate for material breach, bears a much heavier burden. It must prove in the arbitration that Kraft did, in fact, fail to honor specific obligations imposed by the Agreement *and* that those breaches were so egregious as to fundamentally deprive Starbucks of the essential benefits for which it bargained. Starbucks has not, and cannot, meet its heavy burden, because the facts show just the opposite. Far from impairing the business, Kraft increased the size of the business tenfold.[3]

A. Starbucks Must Show That Kraft's Alleged Breaches "Significantly Impaired" The Value Of The R&G Agreement.

Under the R&G Agreement, Starbucks must demonstrate that some defect in Kraft's performance "*significantly impaired* the value of [its] bargained-for benefits under [the] Agreement or . . . cause[d] or threaten[ed] to cause *significant* financial, brand equity and/or other injury to [Starbucks.]"[4] The stringent standard embodied in the R&G Agreement is consistent with the formulation of "material breach" under New York law. Under New York law, a party may be excused from further performance of its contractual obligations only when the other party commits a *material* breach, *i.e.*, one that is so substantial as to defeat the purpose of the entire transaction.[5] As New York's highest court has explained, a "material" breach must be "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" before the extraordinary remedy of

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2 *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985); s*ee IDG USA, LLC v. Schupp*, No. 10-76, 2010 U.S. Dist. LEXIS 84668, at * 28 (W.D.N.Y. Aug. 18, 2010) ("[S]uccess need not be a certainty to obtain a preliminary injunction.") (citations omitted).

3 *See, e.g.*, Declaration of Lori Acker ("Acker Initial Decl.") (Doc. No. 21) 72).

4 R&G Agmt., ¶ 1 (defining "Material Breach").

5 *See Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997); *Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383, 414 (S.D.N.Y. 2004).

rescission will be permitted.[6] Moreover, each alleged breach "must be viewed in light of [the party's] substantial compliance with . . . other obligations" under the contract to properly determine if that particular alleged breach meets the stringent materiality standard.[7]

B. Starbucks Fails to Demonstrate Any Breach, Yet Alone a Material Breach

Starbucks' now abbreviated list of allegations of "Material Breach" fall into two categories: (a) those involving an alleged failure to use commercially reasonable efforts; and (b) those involving sales promotion and budgeting. The "facts" Starbucks offers to support its allegations fall into three categories: inaccuracies, misrepresentations, or distractions. As shown below and in the concurrently filed declarations, Starbucks' remaining allegations are as bereft of factual support as those that Starbucks has abandoned.

1. Starbucks Cannot Establish that Kraft Failed to Use Commercially Reasonable Efforts.

By any measure, Kraft's performance under the Agreement has been excellent.[8] Kraft has grown Starbucks' U.S. CPG Business net revenues by 84%.[9] Revenues generated by the CPG business under Kraft's stewardship have grown from $50 million to more than $500 million.[10]

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6 *Callanan v. Powers*, 199 N.Y. 268, 284 (1910).

7 *Frank Felix.*, 111 F.3d at 289.

8 As support for its material breach allegations, Starbucks offers selective and out-of-context statements by senior Kraft executives expressing dissatisfaction with the state of the Kraft/Starbucks CPG business or the Kraft/Starbucks relationship. Those statements add nothing to the merits inquiry, however. First, they did not suggest, let alone admit, that Kraft materially breached the R&G Agreement. For that matter, they do not even address the particular obligations Kraft allegedly breached. Moreover, read in context, it is clear that the Kraft executives were referring to short term results that were attributable to factors unrelated to Kraft effectiveness in promoting Starbucks products.

9 This performance is almost exactly the same as Starbucks' own performance with respect to its U.S. store business, which has grown by 85% over the same period. Consistent with Starbucks misrepresentations, despite virtually identical sales growth, it impugns Kraft's performance while lauding their own. *See* Supplemental Declaration of Lori Acker ("Acker Supp. Decl.") ¶ 5, 6.

10 *See* Acker Supp. Decl., ¶ 3; s*ee* Acker Initial Decl., ¶ 64. In no way has Kraft "allowed itself to be been [sic] beaten by Starbucks' competitors." Opp. Brief at 3–4. As set forth in Ms. Acker's initial Declaration, in the face of increased competitive pressures during the recent and on-going economic recession, Kraft was able to prevent a significant decline in Starbucks' market position through increased A&P spending, new products, and expanded distribution. *See* Acker Initial Decl., ¶ 76. In addition, Kraft sought to grow the Starbucks CPG Business through innovation and other opportunities; however Starbucks repeatedly stymied those efforts. *See id.*, ¶¶ 67-71. Starbucks fails to address, let alone rebut, any of these facts. Instead, Starbucks simply ignores them.

This Court, however, need not select the measure to evaluate Kraft's performance – and Starbucks cannot create a measure on the fly – because the parties explicitly agreed upon the measure: Under the R&G Agreement, Kraft is obligated to use "commercially reasonable efforts, ***consistent with [its] business practices, policies, strategies*** and the terms of this Agreement to market the Licensed Products."[11] This standard is significant in two key respects. First, it explicitly defines a pragmatic standard for the on-going business relationship, as distinct from the high standard that the parties set as grounds to end the relationship for a "Material Breach." For example, Kraft is not required, as is often the case in contrast, to use its "best efforts."[12] Indeed, courts construing language similar to what the parties agreed upon have found it to be a less exacting standard than "best efforts."[13] In fact, courts tend to find that "commercially reasonable efforts" require nothing more from a party than using its "business discretion" or "good faith business judgment" when executing its contractual obligations.[14] Second, the parties agreed that the relevant benchmark is Kraft's own practices – "consistent with [***its***] *business practices, policies, strategies*" – emphasizing that neither Starbucks' business judgment, nor its self-created measures for performance, is proper for deeming Kraft's performance to be in breach of Agreement.

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[11] R&G Agmt., ¶ 3.B (emphasis added). In its Opposition, Starbucks neglects to provide the Court with the full standard; instead Starbucks merely says that Kraft is obligated to provide "'commercially reasonable efforts.'" Opp., pp. 2–3. The combination of an exacting standard for "Material Breach" and a far less demanding standard for performance strongly suggests that parties intended that their agreement would be sufficiently flexible to allow a long-term relationship to develop and grow in response to changing market conditions.

[12] *See Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co*., 30 N.Y.2d 34, 45–46 (1972) (affirming finding that while defendant acted in good faith, it did breach its contractual duty to use its "best efforts" to promote author's works); *see generally* 2 Farnsworth on Contracts § 7.17(c) (3d ed. 2010) ("Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed on those contracting parties that have undertaken such performance. ***The two standards are distinct and that of best efforts is the more exacting*** . . . .") (emphasis added).

[13] *In re Chatuteaugay Corp*., 155 B.R. 636, 647 (Bankr. S.D.N.Y. 1993) (adopting as appropriate the construction "that by using the term 'reasonable efforts,' the parties necessarily intended to impose a lesser obligation than would have been required had they chosen to use the term 'best efforts'").

[14] *See Bear, Stearns Funding, Inc. v. Interface Group-Nev., Inc*., Case No. 03 Civ. 8259, 2007 WL 1988150, *22–23 (S.D.N.Y. July 10, 2007) (holding that the term "commercially reasonable efforts" is concerned with a party's "*business discretion*" and "*good faith business judgment*" and stating that a violation of the duty to "use commercially reasonable efforts to obtain the best price cannot be established simply by observing, in hindsight, that Bear Stearns could have done something differently that would have produced a better result") (emphasis added). Tellingly, Starbucks fails to offer the Court any guidance on how to interpret this standard.

The centerpiece of Starbucks' claim that Kraft failed to use commercially reasonable efforts is that Starbucks lost "market share."[15] Market share, however, is not even a measure of performance under the Agreement. Indeed, the phrase "market share" is nowhere in the Agreement. The actual standard to be measured is "Distributor Net Sales," which are defined in terms of absolute dollar amounts. For all the words that Starbucks devotes to market share, Starbucks does not even allege Kraft missed the Distributor Net Sales targets.[16]

Equally surprising is Starbucks' reliance on a metric that the Agreement does not contemplate as bearing on a breach.[17] Starbucks' representations with respect to "market share" are misleading. Starbucks complains only of market share in the *premium* coffee segment. Starbucks' market share in the coffee segment remained nearly constant, an impressive result given all of the new competitors in the market. Between 1998 and 2010, Kraft grew Starbucks' share of the total coffee segment by more than tenfold (0.9% in 1998 to 10.6% in 2010) and Kraft maintained Starbucks' market share in super premium.[18] In addition, under Kraft's stewardship, Starbucks remains the leader of the CPG premium coffee segment, with 1.5 times the market share of the next large player.[19]

Starbucks' other claims of breach for failure to use commercially reasonable efforts are also flawed factually as well as, and utterly untethered to the Agreement:

1. Starbucks alleges that Kraft's decision to increase price in 2008 was a Material Breach. However, pricing decisions are expressly committed to Kraft's "sole" discretion (*see* R&G Agmt., ¶ 3.E) and the transfer price rose significantly as to warrant an increase.[20] Underscoring the misleading nature of this allegation is the

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15 Opp., p. 1, 3–4.

16 *See* R&G Agmt., ¶ 5.C.

17 The R&G Agreement does not mention "market share" for a good reason. Total market value, rather than specific market share, is the more appropriate measure of success. Kraft, with the Starbucks brand, has been instrumental in securing meteoric growth in the total market of coffee, which in turn has generated higher revenue. Indeed, market share is not even a legitimate indicia of performance under the circumstances. Starbucks was the initial entrant in the Premium coffee category. Its success inspired competitors, which increased the size of the Premium segment and reduced Starbucks' relative share. *See* Supplemental Declaration of Stephen J. Hoch ("Hoch Supp. Decl."), ¶ 3, 6-12. Such a reduction is not unexpected nor an indication of failure; rather it is an indication of success. *See id.*

18 *See* Hoch Supp. Decl., ¶ 6-7.

19 *See* Acker Supp. Decl., ¶ 3, 6.

20 *See* Acker Supp. Decl., ¶ 9.

following fact: On the same day Starbucks filed its opposition asserting a material breach due to the 2008 price increase, Starbucks President Jeff Hansberry *recommended* that Kraft increase the price of Starbucks' CPG coffee by $1 in February 2011 for the same reason, *i.e*. because the transfer price rose.[21]

2. Starbucks alleges that Kraft's decision to cut trade spending in 2009 was a Material Breach. However, nothing in the R&G Agreement prohibits Kraft from cutting trade spending in a particular quarter and Starbucks does not even attempt to show that these decisions by Kraft were, in any way, inconsistent with its "good faith business judgment." Underscoring the invalidity of this claim, Starbucks fails to mention that Starbucks requested that Kraft decrease its spend on advertising, promotion, and trade at the end of Starbucks' fiscal year in 2009 so that the Starbucks employees could get a bonus.[22]

3. Finally, Starbucks alleges that Kraft's failure to meet certain in-store metrics constituted a Material Breach. However, these metrics do not provide the grounds for a Material Breach, but instead are to be remedied by an "Action Plan" and/or a conversation with the Management Committee. Also, Starbucks complaint that Kraft's level of "out-of-stocks" for Starbucks products was 42% in 2009 misrepresents the reality.[23] With an average of 35.9 Starbucks facings in grocery stores, the out of stock level Starbucks cites in fact means that 97% of Starbucks products are on shelf and available at a given time.[24]

In sum, allegations of breach, material or otherwise, must, at a minimum, be tied to the actual terms of the contract. Starbucks has not shown that Kraft's decisions regarding sales performance lacked good faith business judgment, nor has Starbucks shown Kraft "significantly impaired" the value of the contract. As such, Kraft fully expects to prevail on the merits.

2. Starbucks' Allegations Regarding Sales Promotion/Marketing and Budgeting Are Without Merit

Starbucks asserts that Kraft denied it "the right … to be fully involved in significant aspects of sales planning and execution"[25] and implies that it was left adrift with little information or contact from Kraft. Quite the contrary is true.[26]

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[21] *See* Acker Supp. Decl., ¶ 9, Ex. 4.

[22] *See* Acker Supp. Decl., ¶ 25, 27.

[23] Opp., p. 5.

[24] *See* Acker Supp. Decl., ¶ 43.

[25] Opp., p. 6. "Fully involved" is not a term that is used in the R&G Agreement.

[26] Part of Starbucks' assertion is based on a Declaration by Larry Cronin. Opp., p. 6–8. Mr. Cronin's declaration is rife with unsupported and inaccurate assertions. *See* Cronin Decl., ¶ 24. When Mr. Cronin does provide a specific example of purported misconduct by Kraft, it withers under close examination. For example, Mr. Cronin falsely asserts that during a sales call on "a major retailer in the Northwest" Kraft not only excluded Mr. Cronin from the sales call but spent most of the time talking about a Kraft brand (Maxwell House) and "very little time talking about Starbucks." Cronin Decl., ¶ 17. In reality, Kraft spent relatively little time

1. Ms. Waits claims to "have been frustrated in our efforts to establish a working relationship" with Kraft. *Reality*: Ms. Waits had her office *in Kraft's Tarrytown complex*. She sat among the Kraft team dedicated to the Kraft/Starbucks CPG Business, working closely with them day in and out.[27] Her complaints about the lines of communications between her and Kraft are highly suspect.[28]

2. Starbucks claims that Kraft failed to communicate regarding sales promotions or obtain approvals. *Reality*: In June 2010 alone, the Kraft Sr. Brand Manager of Starbucks, participated in approximately 82 hours of meetings with Starbucks, exchanged nearly 440 emails with Starbucks, fielded more than 70 requests from Starbucks, and *sent more than 80 requests for approvals to Starbucks*.[29]

3. Starbucks claims it did not get the opportunity to review sales presentations. *Reality*: Kraft involved Starbucks in significant sales planning and presentations by working jointly with Starbucks to plan for and develop the sales presentation templates that Kraft will use with major customers and for major initiatives.[30] Ultimately, the sell-in story for Starbucks-brand products is the template jointly developed by Starbucks and Kraft and tailored to an individual customer. Starbucks develops and approves templates. In addition, Kraft has invited Starbucks to participate in significant sales calls.[31]

4. Starbucks claims that Kraft "materially" breached the R&G Agreement by failing to obtain approvals for five specific advertising programs.[32] *Reality*: Starbucks was presented with all five programs. Starbucks approved four of the five programs (the fifth did not go forward). In any event Starbucks omits a critical piece of context: In total, the five programs it mentioned represented less than 1% of the total marketing spend that year.[33]

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talking about Starbucks because (i) Starbucks products were already offered in the stores, while Maxwell House products were not; and (ii) more critically, Starbucks refused to allow Kraft the new "Natural Fusions" product. *See* Supplemental Declaration of Mike Prchlik ("Prchlik Supp. Decl."), ¶¶ 34-40.

27 *See* Acker Supp. Decl., ¶¶10–14.

28 Equally suspect is Starbucks allegation, which it raises for the first time in this proceeding, that Kraft failed to provide it with "all market research and consumer data, as required by the R&G Agreement." Opp., p. 10. In support of this assertion, Starbucks suggests that Kraft withheld "Brand Health Tracker" reports and failed to respond to a June 10, 2010 request for a list of "all research conducted in the previous year." *See* Waits Decl., ¶ 41. Again, there is an unbridgeable gap between the allegations and the reality: Kraft promptly responded to Starbucks' request within three business days and Ms. Waits received a copy of the response. *See* Acker Supp. Decl., ¶ 20.

29 *See* Acker Supp. Decl., ¶ 15.

30 *See, e.g.*, Declaration of Mike Prchlik ("Prchlik Initial Decl."), ¶¶ 13–24.

31 Prchlik Initial Decl., ¶¶ 22–24 (describing Kraft's efforts to introduce Starbucks to customers and include Starbucks in key customer strategic calls); *see also* Nojaim Decl. ¶ 3.

32 These are five isolated examples of incremental, customer-controlled promotions in 2009 and 2010. *See* Acker Initial Decl., ¶¶ 21–26 (describing customer programs). Starbucks asserts for the first time that Kraft failed to

Finally, Starbucks' argument that Kraft has failed to supply required budgets is flatly wrong.[34] Moreover, Starbucks makes no effort to address Kraft's evidence initially submitted on this point.[35]

III. STARBUCKS IS PRECLUDED BY THE DOCTRINE OF ELECTION OF REMEDIES FROM TERMINATING THE R&G AGREEMENT

Where a contracting party materially breaches an agreement, the non-breaching party "can elect to terminate the contract and recover liquidated damages or [it] can continue the contract and recover damages solely for the breach."[36] New York law does not allow the non-breaching party to do both: "[o]nce [the non-breaching] party elects to continue the contract, [it] can never thereafter elect to terminate the contract based on that breach . . . ."[37] A non-breaching party will be deemed to have elected to continue the contract where it either continues to perform or accepts performance from the breaching party following a material breach.[38]

Here, Starbucks contends that Kraft committed material breaches that occurred months, if not years prior to its October 5, 2010 notice of material breach. However, with full knowledge of those purported material breaches, Starbucks elected to continue its performance under the R&G Agreement, and to accept Kraft's performance, including an uninterrupted stream of lucrative payments from Kraft.

Contrary to Starbucks' assertion, the "no waiver provision" in the R&G Agreement does not protect Starbucks from making an election in the face of a material breach or from being

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obtain advertising approvals in connection with a September 2010 Safeway coupon book initiative. Opp., p. 8.

33 *See* Acker Supp. Decl. ¶ 30, 32–34, 37. For larger campaigns, Starbucks is intensely involved. *See, e.g., id.* at ¶ 37.

34 *See* Acker Supp. Decl., ¶ 21, 22, 38, 39 (describing detailed budgets Kraft has provided, budget reviews, and Starbucks' praise of Kraft).

35 Another blatant example of an outright inaccuracy can be found in Waits Decl., ¶41 in which she states that "Mr. Price asked for a list of all research" and "[w]e never received such a list." In fact, less than three business days later, Kraft sent the requested, comprehensive list. *See* Acker Supp. Decl. ¶ 20.

36 *ESPN, Inc. v. Office of Comm'r of Baseball*, 76 F. Supp. 2d 383, 387 (S.D.N.Y. 1999) (quoting *Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1011–12 (S.D.N.Y. 1995)).

37 *Id.*

38 *See Bigda*, 898 F. Supp. at 1011.

bound by that election.[39] Having chosen to continue and receive the benefit of the R&G Agreement notwithstanding Kraft's alleged material breaches, Starbucks is precluded from terminating the Agreement based on those alleged breaches.[40]

IV. WHEN VIEWED IN TANDEM, KRAFT'S LIKELIHOOD OF SUCCESS AND LIKELIHOOD OF IRREPARABLE HARM WEIGH HEAVILY IN FAVOR OF GRANTING INJUNCTIVE RELIEF

The strong likelihood that Kraft will prevail on the merits in the arbitration bolsters its petition for preliminary injunctive relief by making its showing of irreparable harm that much more compelling. As discussed in Kraft's Reply Brief on irreparable harm, the predicted harm and the likelihood of success on the merits must be juxtaposed and weighed in tandem: "[t]he decision to grant or to deny a preliminary injunction depends in part on a flexible interplay between the likelihood of irreparable harm to the movant and the court's belief that there is a 'reasonable certainty' that the movant will succeed on the merits at a final hearing."[41]

Here, Kraft has demonstrated not only a strong likelihood of success on the merits, but also a strong likelihood of irreparable harm. In the absence of injunctive relief, Kraft will not be

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[39] *See ESPN*, 76 F. Supp. 2d at 388–90; *see also Sofi Classic S.A. v. Hurowitz*, 444 F. Supp. 2d 231, 239 (S.D.N.Y. 2006) ("the Waiver Provision does not excuse Plaintiffs from the consequence of their election [of remedies]").

The lone authority upon which Starbucks relies, *American Movie Classics Co. v. Time Warner Entertainment, L.P.*, No. 603625/03, 2005 WL 3487852 (N.Y. Sup. Ct. July 8, 2005), is cited for the unremarkable proposition that "non-waiver clauses are valid and enforceable." Opp., p. 10. Neither that case, nor the principle for which Starbucks says it stands is of any moment here. First, *American Movie Classics* is distinguishable because in that case the terminating party had no "actual knowledge" of a breach and thus could not have elected a remedy. 2005 WL 3487852, at *13. Second, the benign fact that the "no waiver" clause in the R&G Agreement is enforceable does not excuse Starbucks from making an election. As the *ESPN* court explained, "waiver and election are distinct principles that do not overlap but rather control different phases of the contractual relationship." 76 F. Supp. 2d at 390. Waiver, on the one hand, "determines whether something has occurred – an action or inaction – to alter or eliminate a term of the parties' agreement or an available remedy" going forward. *Id.* Election, on the other, "applies *in the absence of a waiver* when one party has, in fact, breached the agreement." *Id.* (emphasis added). In that context, the party must either terminate or continue, but not both. *Id.* Here, Kraft is not asserting that Starbucks' delay in raising its material breach allegations has resulted in the contract provisions on which they are based being eliminated, *i.e.*, a waiver. Instead, Kraft is simply asserting that, by accepting performance after the occurrence of the alleged breaches, Starbucks is foreclosed under the election of remedies doctrine from raising them as a basis for termination.

[40] Starbucks offers no legal support for its assertions that it should be excused from its election to continue with the R&G Agreement because it was being "patient" with Kraft and that to do so would "penalize" it for its supposed "efforts to make the relationship work." Opp., pp. 5, 11. As the court made clear in *ESPN*, there is no such justification when a non-breaching party is faced with a material breach.

[41] *Packard Instrument Co. v. ANS, Inc.*, 416 F.2d 943, 945 (2d Cir. 1969).

able to be restored to the *status quo ante* if, as is likely, it ultimately prevails. Among other injuries, Kraft will suffer the following:

- The permanent loss of a valuable business to which it is contractually entitled;
- The permanent loss of the undisputed contractual right to seek specific performance of the R&G Agreement;
- The permanent loss of its contractual right to 180 days of advance (and unambiguous) knowledge that it will lose the right to sell Starbucks CPG Products, which would have given it a meaningful opportunity to fill the gap in its product portfolio and mitigate the irreparable harm to its competitiveness prospects in the super premium coffee category;
- The lasting and incalculable damage to its goodwill and customer relationships from Starbucks' improper conduct and unfounded allegations; and
- The incalculable reputation injury to Kraft as a result of Starbucks' reckless allegations of material breach, which they have injected into the media.

In contrast to these irreparable injuries, Starbucks will suffer little, if at all, from a preliminary injunction. The limited relief sought by Kraft would not impose any new obligations on Starbucks; it simply would require Starbucks to continue doing for a few more months what it has done for the last 12 years and allow the continuation of a business relationship that has delivered record results over the last 12 months. As the Second Circuit has held, there is no hardship when a defendant "need do only what it has done."[42]

V. CONCLUSION

For all the foregoing reasons and for all of the reasons discussed in Kraft's moving papers and in its papers submitted in connection with the issue of irreparable harm, Kraft respectfully requests that this Court grant it a preliminary injunction.

[42] *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 909 (2d Cir. 1990).

Dated: New York, New York.
January 21, 2011

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