

IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2006

No. 33

EASTSIDE VEND DISTRIBUTORS, INC.,
Petitioner,
v.
THE PEPSI BOTTLING GROUP, INC.,
Respondent.

On Appeal from the Circuit Court for Baltimore City
(Kaye A. Allison, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
QUESTIONS PRESENTED	3
STATEMENT OF FACTS.....	3
SUMMARY OF ARGUMENT	16
STANDARD OF REVIEW	18
ARGUMENT	19
I. Entry Of The Requested Injunction Would Alter, Rather Than Maintain, The Status Quo Between The Parties	19
II. The Court of Special Appeals Was Correct In Ruling That The Circuit Court Did Not Abuse Its Discretion When It Found That Eastside Failed to Show A Likelihood Of Success On The Merits	24
A. Eastside Has Not Shown A Nexus Between The Denial Of Rebates And Price Discrimination.....	25
B. Eastside Has Not Established A Likelihood Of Success On Its Claims of Price Discrimination.....	26
1. The Circuit Court’s finding that Eastside and Mars do not compete is well-supported by the evidence	28
2. The Circuit Court’s ruling that Eastside failed to demonstrate a likelihood of success given its “scant” evidence of price discrimination was not an abuse of discretion	30
III. The Lower Courts Were Correct In Holding That Eastside Did Not Establish Irreparable Harm	36
IV. Eastside Is Unable To Show That The Balance Of Convenience And Public Interest Tip In Its Favor	43
CONCLUSION	45
PERTINENT RULES & UNPUBLISHED CASES	
APPENDIX	Apx. 1

TABLE OF AUTHORITIES

Cases

<i>Blackwelder Furniture Co. of Statesville v. Selig Manufacturing Co.</i> , 550 F.2d 189 (4th Cir. 1977).....	42
<i>Bouldis v. U.S. Suzuki Motor Corp.</i> , 711 F.2d 1319 (6th Cir. 1983)	34, 38
<i>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993)	27
<i>Burke v. Burke</i> , 204 Md. 637 (1954).....	31
<i>Chertkof v. Dep’t of Natural Res.</i> , 43 Md. App. 10 (1979)	23
<i>Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.</i> , 990 F.2d 25 (1st Cir. 1993)	<i>passim</i>
<i>Colandrea v. Wilde Lake Cmty. Ass’n, Inc.</i> , 361 Md. 371 (2000)	19
<i>DMF Leasing, Inc. v. Budget Rent-A-Car of Md., Inc.</i> , 161 Md. App. 640 (2005)	18, 24
<i>Dairy King, Inc. v. Kraft, Inc.</i> , 645 F. Supp. 126 (D. Md. 1986).....	36
<i>Department of Transportation Motor Vehicle Admin. v. Armacost</i> , 299 Md. 392 (1984)	<i>passim</i>
<i>Devose v. Herrington</i> , 42 F.3d 470 (8th Cir. 1994)	26
<i>Eastside Vend Distribs., Inc. v. Coca-Cola Enters., Inc.</i> , No. 24-C-04-003998, 2006 WL 1516012 (Md. Ct. App. May 8, 2006)	6, 29
<i>El Bey v. Moorish Science Temple of Am., Inc.</i> , 362 Md. 339 (2001)	<i>passim</i>
<i>FTC v. Morton Salt Co.</i> , 334 U.S. 37 (1948)	35, 36
<i>Falls City Indus., Inc. v. Vanco Beverage, Inc.</i> , 460 U.S. 428 (1983).....	28, 35
<i>Fogle v. H & G Rest., Inc.</i> , 337 Md. 441 (1995).....	<i>passim</i>
<i>Hunter Group, Inc. v. Smith</i> , 164 F.3d 624 (4th Cir. 1998).....	22
<i>In re Irrevocable Standby Letter of Credit No. SE444393W</i> , 336 F. Supp. 2d 578 (M.D.N.C. 2004)	43

<i>J.F. Feeser, Inc. v. Serv-A-Portion, Inc.</i> , 909 F.2d 1524 (3d Cir. 1990).....	33, 35
<i>John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.</i> , 588 F.2d 24 (2d Cir. 1978)	42
<i>Jones v. State</i> , 357 Md. 408 (2000).....	25, 44
<i>Kahl v. Consol. Gas Elec. Light & Power Co. of Balt.</i> , 189 Md. 655 (1948).....	19
<i>Kasten Constr. Co. v. Jolles</i> , 262 Md. 527 (1971).....	23
<i>LeJeune v. Coin Acceptors, Inc.</i> , 381 Md. 288 (2004).....	19
<i>Lerner v. Ammerman</i> , 56 Md. App. 134 (1983).....	23
<i>Lerner v. Lerner</i> , 306 Md. 771 (1986).....	<i>passim</i>
<i>Maloof v. State Dep't of Env't</i> , 136 Md. App. 682 (2001)	19, 20
<i>Mays v. Massey-Ferguson, Inc.</i> , No. CV187-131, 1990 WL 80673 (S.D. Ga. Apr. 26, 1990).....	36
<i>Metro Ford Truck Sales, Inc. v. Ford Motor Co.</i> , 145 F.3d 320 (5th Cir. 1998).....	34, 38
<i>Mikeron, Inc. v. Exxon Co., U.S.A.</i> , 264 F. Supp. 2d 268 (D. Md. 2003).....	32
<i>Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.</i> , 22 F.3d 546 (4th Cir. 1991)	41, 42, 43
<i>Nationwide Mut. Ins. Co. v. Hart</i> , 73 Md. App. 406 (1988).....	21
<i>O.M. Droney Beverage Co. v. Miller Brewing Co.</i> , 365 F. Supp. 1067 (D. Minn. 1973).....	33
<i>Omega World Travel, Inc. v. Trans World Airlines</i> , 111 F.3d 14 (4th Cir. 1997).....	26
<i>Refrigeration Eng'g Corp. v. Frick Co.</i> , 370 F. Supp. 702 (W.D. Tex. 1974).....	43
<i>Renbaum v. Custom Holding, Inc.</i> , 386 Md. 28 (2005)	24, 44
<i>Riley v. United Servs. Auto. Ass'n</i> , 161 Md. App. 573 (2005).....	31
<i>Rose Confections, Inc. v. Ambrosia Chocolate Co.</i> , 816 F.2d 381 (8th Cir. 1987).....	36

<i>S & F Corp. v. Am. Express Co.</i> , 377 N.E.2d 73 (Ill. App. Ct. 1978)	22
<i>Safeway Inc. v. CESC Plaza Ltd. P’ship</i> , 261 F. Supp. 2d 439 (E.D. Va. 2003).....	42, 43
<i>Standard Hydraulics, Inc. v. Kerns</i> , 387 S.E.2d 130 (W. Va. 1989)	21, 22
<i>State Dep’t of Health & Mental Hygiene</i> , 281 Md. at 550	<i>passim</i>
<i>Texaco, Inc. v. Hasbrouck</i> , 496 U.S. 543 (1990)	27, 35
<i>Upper Midwest Sales Co. v. Ecolab, Inc.</i> , 577 N.W.2d 236 (Minn. Ct. App. 1998).....	22
<i>Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.</i> , 546 U.S. ____, 126 S.Ct. 860 (2006)	27, 35, 41
<i>Wagner v. A & B Personnel Sys., Ltd.</i> , 473 P.2d 179 (Colo. Ct. App. 1970).....	22
<i>Young v. Cities Serv. Oil Co.</i> , 33 Md. App. 315 (1976)	31

STATUTES

15 U.S.C. § 13(a).....	27
Md. Code Com. Law § 11-202(a)(2)	27, 28
Md. Code Com. Law § 11-204(a)(3)	27
Md. Code Com. Law § 11-204(b)(4)	28

RULES

Md. R. 15-501(b).....	<i>passim</i>
Md. R. 8-131(b)(1)	24, 44

MISCELLANEOUS

2A Md. Law Encyclopedia, Appeals § 58 (2006).....	23
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STATEMENT OF THE CASE

This interlocutory appeal arises from the denial of a request by Petitioner Eastside Vend Distributors, Inc. (“Eastside”) for a preliminary injunction requiring Respondent The Pepsi Bottling Group, Inc. (“PBG”) to pay rebates to Eastside pursuant to the terms of an expired 2004 “vending operator” rebate agreement. Having lost its motion after a two-day hearing in the circuit court, and having lost its subsequent pleas for injunctive relief in the circuit court and the court of special appeals, Eastside now tries to change its fortunes by rewriting the record in this case and by raising issues that never were presented to or addressed by the courts below.

Despite its claims to the contrary, *see* Pet. for Cert. at 1; Pet’r Br. at 1, Eastside’s motion never was about price discrimination. Rather, its motion, which was filed almost a year after this suit began, sought to require PBG to pay Eastside *rebates* according to an expired 2004 rebate agreement, which contained different terms (both in the amount of rebates and the terms on which they were paid) than the new 2005 agreement that PBG offered to its vending customers, including Eastside. That Eastside’s motion sought rebates pursuant to the expired 2004 agreement is confirmed by Eastside’s proposed order, which would require PBG to “pay *rebates* to Eastside . . . according to the same terms and conditions as Eastside received such *rebates* during the period of September 5, 2004 through December 25, 2004.” (Apx. 30.) (emphasis added).

Eastside’s chief complaint on appeal is that the circuit court, after weighing the evidence before it, declined to draw inferences in Eastside’s favor when concluding that Eastside was not entitled to injunctive relief. Eastside’s supposed evidence of price

discrimination was, in the words of the circuit court, “scant,” “thin at best,” and did not show any actual price discrimination. (E. 271-73.) Eastside opted not to examine PBG’s actual customer invoices, but instead relied on hand-picked cash register receipts of *retail* prices and hearsay testimony from its own CEO in hopes that the court would infer material, sustained *wholesale* price discrimination by PBG. Noting that sellers, including Eastside itself, sell beverage products below cost to attract customers, the circuit court properly refused to infer sustained wholesale price discrimination from such isolated and indirect evidence. Furthermore, the circuit court found that, based on the absence of evidence of irreparable injury, it could not “say Eastside is harmed at all” by the loss of rebates. (E. 273-74.) This Court, therefore, should uphold the circuit court’s denial of the preliminary injunction since, as the court of special appeals held, there was no abuse of discretion.

The court of special appeals affirmed the circuit court, agreeing that “Eastside’s evidence did not show a likelihood of success on the merits of its claims.” (Op. at 21.) It also found that Eastside had not shown that it would be irreparably harmed by the loss of the rebates, noting that any “rebate losses that Eastside has, and will suffer, can be easily ascertained, given [PBG’s] specific rebate structure, and the ability to quantify Eastside’s purchases and sales of [PBG] products.” (Op. at 26.)

The court of special appeals also concluded that extending the terms of the expired agreement as requested by Eastside would violate the very purpose of preliminary injunctive relief by altering, rather than maintaining, the status quo between the parties. As the court noted, an injunction should not issue because “[a]t the time of the filing of

this motion . . . [Eastside] had no contractual or legal basis to force [PBG] to adhere to a contract which had expired and a rebate program it no longer offered.” (Op. at 45.) In affirming the circuit court’s denial of Eastside’s motion, the court of special appeals recognized that Eastside’s loss of rebates was a result of its own refusal to accept the terms of the proposed 2005 vending operator agreement, offered to all of PBG’s vending customers.

QUESTIONS PRESENTED

(1) Whether the circuit court abused its discretion in finding that Eastside failed to show a likelihood of success on the merits sufficient to justify the issuance of a preliminary injunction requiring PBG to pay Eastside rebates pursuant to an expired vending operator agreement that no longer exists for any other customer.

(2) Whether the circuit court abused its discretion in finding that Eastside failed to show that it would be irreparably harmed by denial of its motion for a preliminary injunction.

STATEMENT OF FACTS

PBG is one of several licensed bottlers of Pepsi-Cola products, bottling and selling beverage products made under trademark licenses from PepsiCo, Inc. and other companies. (E. 45 ¶ 2.) Under these licenses, PBG is authorized to sell only for ultimate resale to end users within the specified geographic boundaries of its territory. (E. 45 ¶ 2.) PBG is prohibited by the terms of these licenses from selling to customers that cause its products to be resold to customers outside PBG’s territory. (E. 45 ¶ 2.) Consequently, PBG ordinarily does not sell to wholesalers because of the risk that the product would be

“transshipped” into other bottlers’ territories. (E. 46 ¶ 2.) PBG does, however, sell to distributors that serve niche markets, such as reselling to local vending machine operators, provided that the distributor does not resell to other wholesalers, commonly referred to as “cash and carries,” that PBG has no knowledge of and that pose a threat of transshipping.¹ (E. 46 ¶ 2.)

Eastside is a reseller of beverages and snack foods located in Baltimore City, Maryland that has purchased Pepsi products from PBG for about thirty years. From the early 1980s through late 2003, Eastside was engaged in the business of selling beverages and snack food items *only* to vending machine operators. (E. 71, 115.) During this time, contrary to its assertions in its brief, Eastside did not sell to cash-and-carry wholesalers. *Compare* E. 12 ¶ 7 (“Eastside has operated a business in [Baltimore] City that sells beverages and snack food items *only* to vending machine suppliers, owners and operators”) (emphasis added) *with* Pet’r Br. at 2 (“For more than 30 years, Eastside has operated a business in Baltimore City that sells beverage and snack food items to vending machine owners and operators *and other wholesale customers*”) (emphasis added). This fact is significant because the rebate program at issue in this motion was designed for and offered to PBG’s vending customers only.

¹ The record below established that transshipping threatens the business of a bottler such as PBG and the brands it carries for several reasons. First, PBG is unable to control the quality of transshipped products (e.g., by ensuring that “Best if Used By” guidelines are followed). (E. 47 ¶ 5, 230.) Second, the costly returnable plastic trays in which the product is delivered often are not returned when products are transshipped. (E. 47-48 ¶ 5, 230.) Finally, selling through multiple layers of distribution increases the chances that product will be sold into another bottlers’ territory, causing PBG to be in breach of its exclusive license agreements. (E. 48 ¶ 5.)

Through 2004, PBG and Eastside entered into annual “vending operator” rebate agreements providing Eastside with rebates based on its beverage purchases from PBG. These vending operator agreements provided Eastside with rebates for its sales to vending operators and were premised upon Eastside’s promise to sell only to vending machine operators and not to other types of customers, such as cash and carries. In fact, Eastside’s CEO, Theodore DeWald, Jr., has admitted that as a condition to receiving the rebates under the agreements, he agreed “[n]ot to sell to . . . customers other than vending machine operators” because he was “getting the price that was designed to go to vending machine operators.” (E. 142.)

Despite its promise to sell only to vending machine operators, Eastside began selling to cash and carries in or about October 2003, motivated by a desire to earn inflated growth incentive rebates by selling to customers that were not vending operators, but the wholesalers that PBG did not want its customers to supply. (E. 69, 135-36, 144.) Moreover, Eastside negotiated for a new vending rebate agreement in 2004 even though Mr. DeWald knew the rebates were intended for sales to vending customers and even though Mr. DeWald intended to use those rebates to sell to cash and carries. The circuit court acknowledged that, over this time period, Eastside had transformed its business into something it never had been before, “add[ing] to its customer base for its best years it has ever had.” (E. 274.) In 2004, Eastside’s sales to cash and carries accounted for about 40 to 45 percent of its total sales, with revenues increasing to about \$16 million. (E. 108.) Mr. DeWald admitted that Eastside was able to sell to these cash and carries precisely

because it was taking advantage of price rebates intended for vending machine operators. (E. 143.)

The Underlying Case. In May 2004, at a time when Eastside was receiving rebates, Eastside filed a complaint in the Circuit Court for Baltimore City alleging, *inter alia*, that PBG and Coca-Cola Enterprises, Inc. (“CCE”) were violating the Maryland Antitrust Act by engaging in unlawful price discrimination. It also alleged that Mars Super Markets (“Mars”—the domicile of which Eastside relied on to defeat federal diversity jurisdiction) knowingly received and induced, and aided and abetted, the alleged discriminatory prices in violation of the Act. (E. 26-29.) Eastside’s claims against PBG alleged that the bottler charged Eastside higher prices than PBG charged other customers, even with the vending rebates that Eastside was continuing to receive.² Throughout the rest of 2004, after the filing of Eastside’s complaint, PBG continued to pay Eastside rebates and fulfill all other contractual obligations pursuant to the terms of the 2004 vending operator agreement.

Vending Operator Agreement for 2005. The present appeal involves the failure of Eastside to agree to the terms of the 2005 vending operator agreement. As discussed above, Eastside continued to receive rebates throughout 2004 pursuant to the vending rebate agreement, which was intended for PBG’s vending customers, despite Eastside’s decision to sell to cash-and-carry wholesalers. The 2004 agreement provided Eastside a

² All three defendants moved to dismiss the complaint. The circuit court, *inter alia*, dismissed all of Eastside’s claims against Mars and dismissed Eastside’s rule-of-reason claims against CCE and PBG. *Eastside Vend Distribs., Inc. v. Coca-Cola Enters., Inc.*, No. 24-C-04-003998, 2006 WL 1516012 (Md. Ct. App. May 8, 2006).

quarterly rebate of \$2.30 for each case of 20-ounce bottles purchased and \$0.95 for each case of 12-ounce cans purchased, provided that Eastside's total purchases of each product equaled or exceeded the volume of each product purchased during the same quarter in 2003. (E. 55 ¶ 3D.) In addition, the 2004 agreement offered tiered growth rebates that increased as the percentage growth over the prior year increased.³ Consequently, given that Eastside's volume almost doubled in 2004, Eastside was paying a net price of no more than \$11.50 for all 20-ounce bottles it bought, and for each case of 20-ounce bottles above what it bought in 2003, Eastside was paying only \$10.00 per case. (See E. 54-57, 88.) For 12-ounce cans, it was paying \$6.05 (base price of \$7.00 less the \$0.95 rebate), and as low as \$4.55 for cases of 12-ounce cans beyond the volume purchased in 2003. (See E. 54-57, 87.)

The 2004 vending agreement terminated on **December 25, 2004**. (E. 289.) This vending rebate agreement was not continued for any of PBG's customers beyond that date.

In early 2005, Joe Kreft, a PBG Senior Key Account Manager, personally presented Mr. DeWald with a proposed 2005 vending agreement, (E. 90), which contained the same terms as those offered to all other vending customers that year, (E. 334 ¶ 4.) The new agreement offered a \$2.40 rebate for cases of 20-ounce bottles and \$0.95 for cases of 12-ounce cans. (E. 60.) In addition, the 2005 agreement replaced the

³ For example, if Eastside increased its volume by 1 to 5 percent over the prior year, it received an additional \$0.50 per case rebate. Increases between 5 and 10 percent yielded an additional \$1.00 per case rebate, while increases above 10 percent entitled Eastside to an additional \$1.50 per case rebate. (E. 54 ¶ 3A.)

growth rebate contained in the 2004 agreement with a flat \$0.50 per case rebate for any case over the customer's prior year purchases. (E. 60.) The agreement formalized the requirement that customers agree not to "resell the Products to other resellers/distributors," and included provisions requiring customers to purchase Gatorade from PBG rather than other sources, and requiring that at least 25 percent of the customer's purchases be of non-carbonated products in order to receive a \$0.25 per case rebate. (E. 63.) Mr. DeWald acknowledged in his testimony that at this initial meeting he and Mr. Kreft went through the proposed contract "line by line." (E. 90-91.)

On February 9, 2005, Eastside rejected the proposed 2005 vending agreement and counter-proposed various changes. (E. 59-60.) Eastside crossed out the provision prohibiting resale to other resellers/distributors, ostensibly on the ground that Eastside was selling to vending machine operators. (*See* E. 59-61.) In addition, Eastside deleted the Gatorade provision and lowered the 25 percent non-carbonated mix rebate requirement to 12 percent. (*See* E. 59-61.)

After Mr. DeWald sent the February 9 counter-proposal, Mr. Kreft and Doug Aitken, another PBG representative, revisited Eastside in mid-February 2005 to discuss the proposed agreement. (E. 95.) At this meeting, the parties again went through the proposed 2005 agreement "line by line," and specifically discussed the disputed terms. (E. 95, 99.) Again, the meeting concluded with no agreement. (E. 99.)

On March 9, 2005, Mr. Kreft, Mr. Aitken, and Michael Schwartz, then-Vice President for Food Services, returned to Eastside. (E. 103-04.) For a third time the parties went over the agreement "line by line," but failed to reach any resolution of the

disagreement. (E. 106, 108.) As Mr. Schwartz noted, the provision prohibiting resales to resellers/distributors was inserted in 2005 in a further effort to stop transshipping of PBG products through wholesalers. (E. 49 ¶ 8.) However, in the case of Eastside, which had been serving vending operators that technically could be considered resellers, PBG was willing to negotiate a resolution so that Eastside could remain eligible for the 2005 vending operator agreement and continue reselling to vending operators, but not expand into sales to wholesalers such as cash and carries. (E. 219-20, 334 ¶ 5.) Negotiations never made it that far, however, because the PBG representatives were thrown out of Eastside's offices. (E. 334 ¶ 5.) Needless to say, the parties still did not arrive at a resolution over the 2005 vending operator agreement.

Motion for a Preliminary Injunction. Instead, Eastside turned to the courts to force PBG to give what Eastside could not obtain through negotiation—the benefits of rebates intended for vending customers without the obligations imposed by the contract. On March 30, 2005, almost a full year after it originally filed its lawsuit, Eastside filed a motion for a preliminary injunction in the Circuit Court of Baltimore City, which is the subject of this appeal. Notably, Eastside did not move for preliminary relief when it brought its complaint for price discrimination; it only brought its motion seeking rebates after it rejected the obligations underlying in the 2005 rebate agreement.

The preliminary injunction motion asked the circuit court to order PBG to “pay rebates to Eastside . . . according to the same terms and conditions as Eastside received such rebates during the period of September 5, 2004 through December 25, 2004.” (Apx. 30.) In other words, Eastside was seeking an order requiring PBG to pay Eastside rebates

according to the 2004 vending agreement, even though that agreement had expired in December 2004, and despite the fact that no other PBG customer was receiving rebates under that agreement. Eastside's after-the-fact insistence that its motion does not seek rebates under the expired agreement, but merely requests the court to require PBG to charge "the same prices it charges Eastside's competitors," Pet'r Br. at 1, is contradicted by the fact that at every stage of this proceeding—in its original motion, at the hearing, in its motions to the circuit court and court of special appeals for injunctions pending appeal, and in its appeal to the court of special appeals—Eastside has asked the reviewing court to order PBG to pay *rebates* to Eastside.⁴

The Circuit Court's Hearing. The circuit court conducted a two-day evidentiary hearing on the motion. Eastside tried to prove that Sam's Club and Mars received better prices than Eastside, not by presenting invoices showing the wholesale prices at which

⁴ Even a cursory review of the record demonstrates that Eastside's motion is about rebates, not prices. *See, e.g.*, Apx. 30 (requesting the court to require PBG to "pay rebates to Eastside . . . according to the same terms and conditions as Eastside received such rebates during the period of September 5, 2004 through December 25, 2004."); (E. 32) (Pl.'s Mot. for Prelim. Inj. at 1) ("Eastside . . . files this motion for a preliminary injunction prohibiting [PBG] from denying Eastside rebates on the Pepsi products that Eastside purchases from [PBG] . . ."); Apx. 2 (Pl.'s Mem. in Supp. of Prelim. Inj.) ("Eastside seeks this Court's intervention to prohibit [PBG] from withdrawing this and all future rebate payments until this case can be decided on the merits."); *id.* ("[T]his court should . . . enter a preliminary injunction prohibiting Pepsi from excluding Eastside from any and all rebate programs . . ."); Pl.'s Br. to Ct. Spec. App. at 1 (describing its motion as one to require PBG "to continue its years-old practice of paying Eastside rebates on Pepsi products that Eastside purchases from [PBG] until a final decision is made on the merits"); *id.* at 2 (describing its motion as seeking to "requir[e] [PBG] to pay rebates on products it sells to Eastside"); *id.* at 6 (noting that its motion would "require [PBG] to continue paying rebates to Eastside pending a final decision on the merits"); *id.* at 21 ("[PBG] should continue to honor the rebate terms and conditions from its 2004 agreement"); Pl.'s Reply Br. to Ct. Spec. App. at 9 ("The terms and conditions of the expired 2004 rebate contract should continue to govern . . .").

these stores bought from PBG—though PBG’s actual prices to these customers were available to Eastside at the hearing, (E. 224; Apx. 32)—but by presenting cash register receipts, showing *retail* prices from shopping trips to Sam’s and Mars, (E. 109-10, 118, 122.) Eastside argued that such evidence sufficed to establish that PBG must have been charging Eastside discriminatory prices.

At the close of Eastside’s case, and before PBG presented any evidence,⁵ the court concluded that Eastside “ha[d] not met its burden for issuance of a preliminary injunction.” (E. 275.) First, the court found that Eastside failed to show a likelihood of success on the merits of its price discrimination claim. According to the court, Eastside’s evidence of price discrimination was “scant” and “thin at best.” (E. 271-72.) The circuit court refused to infer discriminatory pricing from the Sam’s receipts, noting, based on Mr. DeWald’s testimony that Eastside itself often sold below cost, that “it is just as reasonable . . . to conclude that Sam’s Club is selling below cost as is Eastside in an effort to syphon off Eastside’s business.” (E. 272.) Moreover, as to the Mars receipt, the court noted that “Mars and Giant^[6] are in a business so different from Eastside as to present no valid basis for comparison of PBG[’s] pricing schedules.” (E. 273.)

⁵ Given that PBG was never required to present any evidence, were this Court to consider issues not appealed by Eastside and reverse the decisions of the lower courts on all four *Armocost* factors, the proper procedure would be to order further proceedings in the Circuit Court and not to order a preliminary injunction as Eastside suggests. *See* Md. R. 15-501(b) (expressly providing that a preliminary injunction is to be “granted after opportunity *for a full adversary hearing* on the propriety of its issuance but before a final determination of the merits of the action.”) (emphasis added).

⁶ Though Eastside repeatedly complains that Giant is a favored customer, Eastside never has offered any evidence concerning the prices at which Giant purchased Pepsi products from PBG.

Second, the court concluded that Eastside did not carry its burden to demonstrate irreparable harm. Although Mr. DeWald offered unsubstantiated testimony that without the rebates Eastside would be forced to raise its prices and that the effect would be “detrimental,” the court found that Eastside would not suffer irreparable harm in light of Mr. DeWald’s own testimony that customers are attracted to Eastside, not because of price, but in large part because of “the convenience of offering multiple vending machine products in one location.” (E. 128, 273.) Moreover, because there had been “no quantification or even an attempt at a quantification of the effect of a higher price for Pepsi products on overall sales” (again, Eastside’s only evidence presented to the circuit court on this topic was the general assertion that the loss of rebates would be “detrimental”), the court concluded that it could “not speculate that the harm would be substantial or irreparable, [as] there [were] simply too many variables not addressed.” (E. 273-74.) The court also found “uncontroverted evidence” that “PBG sold [to] Eastside as a distributor to vending machine operators when in fact they [i.e., Eastside] added cash and carry stores.” (E. 274.) By adding this new line of customers, Eastside’s volume artificially had spiked up to the best years Eastside ever had. Accordingly, because PBG’s pricing was “just catching . . . up to the reality of Eastside’s business,” the court concluded that it could not “say that Eastside is harmed at all” by the loss of the rebates. (E. 274.)

As for the remaining factors governing entitlement to a preliminary injunction, which Eastside did not appeal, the court incorrectly concluded that the balance of convenience weighed in Eastside’s favor because “PBG could absorb the cost of paying

Eastside rebates during the course of this litigation.” (E. 274.) It also found the public interest factor to be “closely tied” between the parties given the nature of the underlying claim and the public’s interest in “seeing that the parties reach their own contractual agreements and not have those imposed upon them by the Court.” (E. 274-75.)

Pursuant to this ruling, the circuit court issued an order on May 23, 2005, denying Eastside’s motion for a preliminary injunction. (E. 320.) Eastside filed motions for injunctions pending appeal with the circuit court and the court of special appeals, both of which were denied on July 6 and July 7, 2005, respectively. (E. 340-41.)

Court of Special Appeals. The court of special appeals unanimously affirmed in an unpublished opinion, holding that the circuit court did not abuse its discretion by denying Eastside’s motion for a preliminary injunction. The court first considered the preliminary injunction standard under Maryland law, emphasizing that “the purpose of a preliminary injunction is to preserve the status quo between the parties.” (Op. at 17) (quotation omitted). The court then considered whether Eastside had shown a likelihood of success on the merits of its underlying price discrimination claims.⁷ After reviewing

⁷ The court of special appeals pointed out that if the circuit court had been correct in its finding that the balance of convenience weighed in Eastside’s favor, the trial court should have evaluated whether Eastside “raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation” rather than applying the likelihood of success standard. (Op. at 20.) The lower appellate court recognized, however, that the balance of convenience actually favored PBG, and not Eastside, since entering Eastside’s injunction would force PBG into a contract that it would not freely enter and would place Eastside in the unique position of being the only PBG customer to receive rebates according to the expired 2004 agreement, (Op. at 45), a situation equivalent to court-imposed price discrimination in Eastside’s favor. The court of special appeals concluded, therefore, that the balance of convenience tipping in PBG’s favor meant that Eastside was required to

the evidence presented to the court below, and giving due deference to the trial judge's discretion to weigh the evidence, the intermediate appellate court agreed with the circuit court that "Eastside's evidence did not show a likelihood of success on the merits of its claims." (Op. at 21.)

The court also agreed with the circuit court that Eastside had not shown irreparable harm stemming from a denial of the motion for preliminary injunction. Recognizing that Eastside's motion seeks court-ordered rebate checks, and rejecting the argument that the harm is unquantifiable, the court reasoned that "the amounts of the rebate losses that Eastside has, and will suffer, can be easily ascertained, given [PBG's] specific rebate structure, and the ability to quantify Eastside's purchases and sales of [PBG's] products." (Op. at 26.) Consequently, because Eastside "may have a sufficient remedy at law that would satisfy any losses incurred by not receiving the rebates from [PBG]," the reviewing court found that the circuit court "did not err in denying the motion for a preliminary injunction, and in reaching its conclusion that Eastside did not prove it would suffer irreparable or substantial harm." (Op. at 26-27.)

The court of special appeals highlighted the impropriety of granting an injunction in this case for two additional reasons. First, Eastside's loss of rebates was a result of its own refusal to accept the terms of the 2005 vending agreement, which was offered to all PBG's vending customers. Eastside tried to amend the agreement by deleting the resellers/distributors and Gatorade provisions and by lowering the 25 percent non-

demonstrate a likelihood of success on the merits of its claims and not just that there were substantial questions going to the merits. (Op. at 21.)

carbonated mix requirement to 12 percent—all of which were important to PBG and the amendment of any one of which was sufficient grounds for PBG to reject the counterproposal. (*See* E. 190-91, 193.) The loss of rebates was therefore not the result of a termination of any agreement or any alleged discriminatory treatment, or, as Eastside asserts, in retaliation for filing a complaint—Eastside could have had the 2005 vending agreement if it wanted it. Its insistence that it could not sign the agreement is without merit. PBG offered Eastside the 2005 vending agreement on three separate occasions and the record is undisputed that PBG would have allowed Eastside to sign the agreement and still resell to vending machine operators. What Eastside really wanted, however, was to keep arbitraging the vending rebates for sales to cash and carries. Thus, “Eastside’s claim of price discrimination ha[d] no nexus to the circumstances underlying the termination of the [rebate] Agreement,” (*Op.* at 47), a fact that further supported the conclusion that an injunction should not issue.

Second, the court recognized that issuing the requested preliminary injunction—extending the terms of the expired vending agreement until the conclusion of this case—would violate the purpose of injunctive relief by altering, rather than maintaining, the status quo between the parties. As the court noted, the proposed injunction should not issue because “at the time of this motion . . . [Eastside] had no contractual or legal basis to force [PBG] to adhere to a contract which had expired and a rebate program it no longer offered” to any of its customers. (*Op.* at 45.) In short, not only had Eastside failed to establish the necessary elements for preliminary relief, it could not even present a case

consistent with the fundamental purpose of a preliminary injunction—maintaining the status quo.

On May 3, 2006, Eastside filed a petition for certiorari requesting this Court to consider whether the lower courts erred in holding that Eastside had not shown a likelihood of success on the merits or irreparable harm. Importantly, Eastside’s petition did not request this court to consider the other two *Armacost* factors, i.e., balance of convenience and the public interest. This Court granted Eastside’s petition on June 14, 2006.

SUMMARY OF ARGUMENT

Eastside’s requested injunction is not appropriate, as the court of special appeals rightly held, because extending the terms of the expired 2004 rebate agreement beyond the expiration of the contract would contradict the purpose of injunctive relief by altering, rather than maintaining, the status quo. Moreover, even considering Eastside’s arguments on the likelihood of success and irreparable harm, this Court should affirm the rulings below, first, because the circuit court correctly found, based on the “scant” evidence presented, that Eastside failed to carry its burden to establish all four factors required under *Department of Transportation Motor Vehicle Admin. v. Armacost*, 299 Md. 392, 404 (1984), and *Fogle v. H & G Rest., Inc.*, 337 Md. 441, 456 (1995), and second, because the court of special appeals, giving proper deference to the trial court’s findings, concluded that there was no abuse of discretion. Neither of the courts’ rulings “condones” price discrimination as Eastside argues. Nor did the court of special appeals require Eastside to prove that its business would be destroyed.

As to Eastside's failure to show a likelihood of success, both courts reviewed the evidence presented and rejected the conclusion that PBG had discriminated against Eastside in price. This conclusion was reasonable given that Eastside did not bother to enter into evidence the actual prices PBG was charging Sam's and Mars, evidence that was available to it at the hearing. (E. 224; Apx. 32.) Instead, Eastside invited the court to infer substantial and sustained price discrimination based on some retail cash register receipts allegedly obtained from a customer's shopping trips. Much of this evidence showed that Eastside actually paid *less*, or could have if it had taken the 2005 rebates, than the prices at which Sam's and Mars were selling to the public. Additionally, the record "contains other evidence that militates against an eventual finding" of price discrimination, *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25, 26 (1st Cir. 1993)—namely, that it was likely that Sam's was selling below cost given Mr. DeWald's testimony that even Eastside itself often sold below cost.

The evidence on irreparable harm was just as weak. There was no evidence before the trial court of lost customers, lost goodwill or damage to Eastside's business. To the contrary, the evidence was clear that Eastside had almost doubled its business, in part, by arbitraging the vending rebates for sales to cash and carries. The court of special appeals, moreover, recognized that Eastside's motion was seeking rebate checks—something that is readily quantifiable.

As to the balance of convenience and the public interest, Eastside did not appeal the decisions on these factors, therefore, this Court should refuse to entertain its arguments. Nevertheless, the finding of the court of special appeals that the balance of

convenience favors PBG should be affirmed. Finally, the public interest favors PBG since parties should be free to contract without intervention from the courts.

STANDARD OF REVIEW

The rulings of the lower courts should not be disturbed as Eastside has not carried its burden of establishing that all—or even any—of the factors necessary for a preliminary injunction weigh in its favor. As this Court set forth in *Armacost*, a plaintiff seeking a preliminary injunction must demonstrate “(1) the likelihood that the plaintiff will succeed on the merits; (2) the ‘balance of convenience’ determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.” 299 Md. at 404-05 (citing *State Dep’t of Health & Mental Hygiene v. Balt. County*, 281 Md. 548, 554-57 (1977) (footnote omitted)). In cases involving private parties, “the party seeking the injunction must prove the existence of *all four* of the factors set forth in *Armacost* in order to be entitled to preliminary relief.” *Fogle*, 337 Md. at 456 (emphasis in original). “The failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief.” *Id.* As long as the “trial judge correctly identifies and applies these factors,” the judge’s decision should not be disturbed “absent an abuse of discretion.” *DMF Leasing, Inc. v. Budget Rent-A-Car of Md., Inc.*, 161 Md. App. 640, 648 (2005); accord *Lerner v. Lerner*, 306 Md. 771, 776 (1986); *State Dep’t of Health & Mental Hygiene*, 281 Md. at 554.

In a case like this, in which the plaintiff relied heavily on indirect evidence and inferences to make its claim, an appellate court should defer to the trial court’s well-

supported findings since the circuit court “has the discretion to grant or deny a request for injunctive relief in general equity matters.” *Colandrea v. Wilde Lake Cmty. Ass’n, Inc.*, 361 Md. 371, 394 (2000). A circuit court’s decision to deny a request for injunctive relief is subject to “limited” review because the Court of Appeals “do[es] not . . . finally determine the merits” of the parties’ arguments. *Armacost*, 299 Md. at 404. Instead, viewing the evidence in the light most favorable to the prevailing party, *El Bey v. Moorish Science Temple of Am., Inc.*, 362 Md. 339, 353 (2001), Maryland appellate courts consider whether the lower court abused its discretion “in examining the four factors that must be found in order to issue [a] preliminary injunction.” *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 300 (2004). As this Court has noted, “it is a rare instance in which a trial court’s discretionary decision to grant or to deny a preliminary injunction will be disturbed.” *State Dep’t of Health & Mental Hygiene*, 281 Md. at 550.

ARGUMENT

I. Entry Of The Requested Injunction Would Alter, Rather Than Maintain, The Status Quo Between The Parties.

As a threshold matter, and before any consideration of Eastside’s arguments about its likelihood of success or irreparable harm becomes necessary, Eastside’s motion was correctly denied because it failed to meet the primary “purpose of a preliminary injunction,” which “is to preserve the status quo between the parties, pending a hearing on the merits.” *Maloof v. State Dep’t of Env’t*, 136 Md. App. 682, 692 (2001); accord *Kahl v. Consol. Gas Elec. Light & Power Co. of Balt.*, 189 Md. 655, 658 (1948) (“[I]t is fundamental that a preliminary injunction does not issue as a matter of right, but only

where it is necessary in order to preserve the status quo.”) The status quo to be preserved is “the last, actual, peaceable, noncontested status which preceded the pending controversy.” *State Dep’t of Health & Mental Hygiene*, 281 Md. at 556 n.9 (quotation omitted); *accord Maloof*, 136 Md. App. at 692.

Contrary to what Eastside would have this Court believe, Eastside’s motion for preliminary injunction always has been about rebate checks. Although Eastside alleged price discrimination when it filed a complaint in May 2004, it never sought a preliminary injunction until the dispute arose over the terms of the 2005 rebate program. Eastside has repeatedly insisted that it receive rebates from its first motion to the circuit court, in which it sought an order for PBG to “pay rebates to Eastside . . . according to the same terms and conditions as Eastside received such rebates during the period of September 5, 2004 through December 25, 2004” (i.e., the 2004 vending agreement). (Apx. 30.)

As the court of special appeals realized, however, ordering the payment of rebates would not return the parties to the “last, actual, peaceable, noncontested status which preceded the pending controversy.” *State Dep’t of Health & Mental Hygiene*, 281 Md. at 556 n.9 (quotation omitted). The record below is clear—the status quo in this case is one in which PBG performed fully under the 2004 vending agreement with Eastside, the 2004 vending agreement expired by its own terms on December 25, 2004 (several months before Eastside filed this motion), PBG offered a new 2005 vending agreement to Eastside on the same terms and conditions as all other vending customers, but Eastside

rejected that agreement because it did not like the terms of the new agreement.⁸ Thus, consistent with the court of special appeals' conclusion, the status quo is one in which Eastside "had no contractual or legal basis to force [PBG] to adhere to a contract which had expired and a rebate program it no longer offered," (Op. at 45), and in which Eastside is in "the position of an offeree to a proposed new Agreement, who made a counteroffer which was rejected," (Op. at 47-48.)

The court of special appeals' ruling reflects the fact that to grant Eastside's motion would require an extension of a contract that had expired and that PBG no longer offered to any other customer. Approving Eastside's motion for rebates, therefore, would contravene the principle that "[i]njunctive relief based on a contract must be coextensive with the terms of the contract." *Standard Hydraulics, Inc. v. Kerns*, 387 S.E.2d 130, 131 (W. Va. 1989) (citing cases). This is true because a preliminary injunction modifying the terms of a contract would alter, rather than maintain, the status quo between the parties. Courts in this and other jurisdictions routinely have declined to issue injunctions that would extend expired or terminated contractual rights. *See, e.g., Nationwide Mut. Ins.*

⁸ Eastside tries to suggest that PBG's offer of rebates in 2005 was "illusory" because of the 2005 agreement's prohibition of selling to other "resellers/distributors." *See* Pet'r Br. at 3. The evidence in the hearing was undisputed, however, that this provision was standard in all vending agreements offered by PBG to its vending customers in 2005 (i.e., it was not unique to Eastside), the provision was inserted as part of PBG's efforts to combat transshipping, and PBG was willing to negotiate a resolution so that Eastside could enter into the 2005 agreement and still sell to its traditional vending customers. (E. 219-20, 334 ¶ 5.) Nevertheless, there were two other provisions—the Gatorade purchase requirement and the 25 percent non-carbonated beverage mix provision—that Eastside tried to amend. But all of these provisions were important to PBG and it would not have accepted the amendments to any one of these terms. (*See* E. 190-91, 193.) Consequently, there was no meeting of the minds on these provisions.

Co. v. Hart, 73 Md. App. 406, 413 (1988) (holding that court could not issue preliminary injunction to extend covenant not to compete beyond its contractual expiration date); *Hunter Group, Inc. v. Smith*, 164 F.3d 624, at *3 (4th Cir. 1998) (unpublished) (same); *Standard Hydraulics, Inc.*, 387 S.E.2d at 131 (same); *Upper Midwest Sales Co. v. Ecolab, Inc.*, 577 N.W.2d 236, 244 (Minn. Ct. App. 1998) (reversal of an injunction requiring a manufacturer to perform according to expired agreements); *S & F Corp. v. Am. Express Co.*, 377 N.E.2d 73, 77-78 (Ill. App. Ct. 1978) (holding that trial court erred in granting preliminary injunction requiring performance of restaurant agreement “until further order of court” where contract expressly provided for termination by either party upon written notice); *Wagner v. A & B Personnel Sys., Ltd.*, 473 P.2d 179, 180 (Colo. Ct. App. 1970) (holding that lower court erred in issuing injunction extending covenant not to compete beyond time period specified by contract).

Furthermore, by asking this Court to reconstitute the 2004 rebate agreement, Eastside is demanding better pricing than PBG is providing to any of its customers against whom Eastside claims it competes, since PBG raised its prices to all customers and restructured its rebate program in 2005 (and again in 2006). The irony is that by claiming to be treated worse than other PBG customers, Eastside actually is seeking to be treated *better* than other PBG customers, making a mockery of the concept of status quo.⁹

⁹ In the court of special appeals, Eastside claimed that the status quo would not be altered by its proposed injunction because Eastside and PBG’s course of dealing established an implied contractual right to the rebates beyond the termination of the 2004 agreement. Appellant’s Br. at 21; Reply Br. at 10. Eastside’s claim is misguided, however, because any presumption of contractual renewal is overcome by a “showing that the parties intended to change the terms of the continuing agreement.” *Lerner v. Ammerman*, 56

Conceding that its request to have the 2004 agreement resurrected just for itself is untenable, Eastside now attempts to rewrite history by suggesting that its motion asks the Court to require PBG to charge “the same prices it charges Eastside’s competitors.” Pet’r Br. at 1. Again, since it filed this motion in 2005—almost a year after it instituted its lawsuit—Eastside repeatedly has been asking for particular *rebates*, not for unspecified prices. Moreover, Eastside’s motion does not provide any details on the pricing it would like to receive. For example, there is no indication of which competitors or for which products Eastside would like its prices to match. What about customers that paid more than Eastside for one package, but less for another—does Eastside want to select the best prices from each? And what about PBG’s statutory right to charge different prices to different customers (e.g., to meet competition)? Would this right be destroyed, or would PBG continually have to request relief from the circuit court in order to match competitive offers in the marketplace? All of these considerations reinforce the inappropriateness of Eastside’s eleventh-hour change of relief, which should not be entertained at this stage of the appeal. *See, e.g., Kasten Constr. Co. v. Jolles*, 262 Md. 527, 533-34 (1971) (“Having elected to pursue a different and potentially more rewarding remedy, [plaintiff] cannot change the theory of its case after an unfavorable judgment.”); *Chertkof v. Dep’t of Natural Res.*, 43 Md. App. 10, 16 (1979) (noting that “[a] petitioner is bound to the theory he elects to pursue at trial”); 2A Md. Law Encyclopedia, *Appeals* § 58 (2006) (“On appeal, the parties are restricted to the theory on which the case was tried

Md. App. 134, 142 (1983). Eastside was put on notice no later than early February 2005 that PBG was not going to agree to the same terms again. (E. 90, 91, 95, 99, 106, 108.)

in the court below, and they cannot assume an attitude inconsistent with, or different from, that taken by them at trial.”). For this reason alone, Eastside’s request for a preliminary injunction should be denied.

II. The Court of Special Appeals Was Correct In Ruling That The Circuit Court Did Not Abuse Its Discretion When It Found That Eastside Failed to Show A Likelihood Of Success On The Merits.

Even considering Eastside’s arguments, it is clear that the conclusion that Eastside did not show a likelihood of success on the merits is well-grounded in the record and not an abuse of discretion. This Court has stated that the party seeking a preliminary injunction must actually “demonstrate[] a likelihood of success on the merits.” *Armacost*, 299 Md. at 405. In other words, “if the facts as . . . shown by the evidence, are not ‘full and sufficiently definite and clear, in support of the right asserted, and that such right has been violated,’ the court will not order preliminary relief.” *Fogle*, 337 Md. at 456 (quoting *State Dep’t of Health & Mental Hygiene*, 281 Md. at 554).

Lerner, 306 Md. at 783, 790, and *DMF Leasing, Inc.*, 161 Md. App. at 649, recognized that the “likelihood of success on the merits” standard could be displaced with the substantial questions standard in cases where the movant makes a strong showing of irreparable harm and the balance of convenience weighs in the movant’s favor. In this case, however, the court of special appeals held that the balance of convenience weighed in PBG’s favor, (Op. at 22-23), and, significantly, Eastside did not petition this Court to reverse that determination. Eastside cannot now challenge the lower court’s ruling on this factor. *See, e.g.*, Md. R. 8-131(b)(1); *Renbaum v. Custom Holding, Inc.*, 386 Md. 28, 33 n.2 (2005) (refusing to consider question presented in brief but not presented in

petition for certiorari); *Jones v. State*, 357 Md. 408, 419 (2000) (“Under our certiorari process, this Court will only consider matters on appeal raised in a petition for writ of certiorari that we have granted.”). Moreover, the fact, as both lower courts held, that Eastside has not shown irreparable harm confirms that the likelihood of success standard applies. *See, e.g., Lerner*, 306 Md. at 784 (“The importance of probability of success increases as the probability of irreparable injury diminishes.”) (quotation omitted). Eastside does not even allege that it can satisfy this standard—thus, the Court should affirm the lower courts’ holdings.

A. Eastside Has Not Shown A Nexus Between The Denial Of Rebates And Price Discrimination.

In its continual efforts to make this case about something it is not, Eastside completely ignores the central focus of its motion—rebate checks—when arguing that it has shown evidence of price discrimination. Eastside’s premise that it is not seeking “to vindicate . . . a contract right” is facially wrong. *See* Pet’r Br. at 10. As the court of special appeals recognized, and as Eastside’s motion clearly states, this motion expressly seeks to continue a contractual relationship granting Eastside rebates, but on terms of Eastside’s choosing.

Eastside’s failure to obtain rebates is a consequence of its own actions, not price discrimination. Eastside did not ask for preliminary relief when it filed its lawsuit in May 2004. It only did so after it rejected the terms of the 2005 agreement that PBG offered. It is uncontested that PBG offered all of its vending operator customers the same 2005 vending agreement. Mr. DeWald received the 2005 PBG vending agreement in early

2005 on three separate occasions. On each of those occasions, he rejected three different terms of the agreement, (E. 59-60, 63), terms to which all other PBG vending customers agreed, (*see* E. 334 ¶ 4). The rejection of any one of those terms, not to mention all three, was adequate grounds for PBG to refuse to accept Eastside's counterproposal. (*See* E. 190-91, 193.)

As aptly put by the court of special appeals, "Eastside's claim of price discrimination has no nexus to the circumstances underlying the termination of the [vending operator] Agreement." (Op. at 47.) Thus, Eastside's loss of rebates cannot be remedied under a theory of price discrimination, and accordingly there is no likelihood that Eastside will prevail on its claim. *See Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997) ("[A] preliminary injunction may never issue to prevent an injury or harm which not even the moving party contends was caused by the wrong claimed in the underlying action."); *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994).

B. Eastside Has Not Established A Likelihood Of Success On Its Claims of Price Discrimination.

Moreover, even if Eastside's preliminary injunction motion were considered to be based on a claim of price discrimination rather than failure to contract, both lower courts correctly concluded that Eastside's "scant" evidence did not satisfy its burden of showing a likelihood of success on the merits. A claim of price discrimination requires a showing of (i) differences in price, (ii) to two different buyers purchasing from a single seller, (iii) of commodities or services of like grade and quality, (iv) that may injure competition.

See, e.g., Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 555 (1990).¹⁰ Notwithstanding Eastside’s assertion that it has a right to be “charged the same prices that [PBG] charges other purchasers,” Pet’r Br. at 10, the Supreme Court has been clear that the Robinson-Patman Act actually “does not ‘ban all price differences charged to different purchasers of commodities of like grade and quality,’ . . . rather, the Act proscribes ‘price discrimination only to the extent that it threatens to injure competition.’” *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. ___, 126 S.Ct. 860, 870 (2006) (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)). Thus, a successful plaintiff must show that it is in actual competition with a favored purchaser. *See Volvo*, 126 S.Ct. at 870. Further emphasizing that these laws should not be read to create static, uniform pricing structures, the Maryland Antitrust Act, like its federal counterpart, specifies several circumstances in which price differentials are expressly permitted. For example, price differences between competing purchasers

¹⁰ The General Assembly has provided that in interpreting the Maryland Antitrust Act, “the courts [are to] be guided by the interpretation given by the federal courts to the various statutes dealing with the same or similar matters.” Md. Code Com. Law § 11-202(a)(2). The text of the Robinson-Patman Act and section 11-204 (a)(3) of the Maryland Antitrust Act are largely parallel, except that the Robinson-Patman Act applies only to sales of commodities while the Maryland Antitrust Act applies to both sales of commodities and services. *Compare* 15 U.S.C. § 13(a) (“It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . .”) *with* Md. Code Com. Law § 11-204 (a)(3) (“A person may not . . . discriminate in price among purchasers of commodities or services of like grade and quality . . .”).

are not unlawful if made in an effort to meet the equally low price of a competitor.¹¹ *See* Md. Code Com. Law § 11-204(b)(4).

As both lower courts found, the evidence Eastside presented to the trial court did not establish a likelihood of success of proving unlawful price discrimination for at least two reasons—there was no evidence of competition between Eastside and Mars and there was no actual evidence of price discrimination.

1. The Circuit Court’s finding that Eastside and Mars do not compete is well-supported by the evidence.

Eastside’s evidence wholly fails to make the necessary showing of a likelihood of success on its price discrimination claims. To begin with, Eastside’s supposed pricing evidence about Mars is irrelevant since Eastside failed to provide evidence that Mars and Eastside are in competition with each other or perform the same function. (E. 273.) Eastside argues that one Mars receipt that purportedly was given to Eastside by a customer suffices to establish competition between the two. But the record contained more persuasive evidence that Eastside does *not* compete with grocery stores. For instance, Mr. DeWald acknowledged that his business is located in an industrial warehouse, that there are no consumer displays, that Eastside does not advertise directly to consumers, that there is no consumer foot traffic in Eastside’s warehouse and that the warehouse is closed to the public. (E. 145-46.) This led the trial court to conclude that

¹¹ Thus, if CCE, a competitor of PBG, offers one of PBG’s customers a lower price than PBG is offering, PBG can lower its price to that customer without lowering its price to all of PBG’s other customers. *See, e.g., Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 438 (1983).

“Mars . . . [is] in a business so different from Eastside as to present no valid basis for comparison of PBG[’s] pricing schedules.” (E. 273.)

Eastside tries to mend this evidentiary hole on appeal by arguing in a footnote that Judge Allison later changed her mind in her opinion on the motions to dismiss. *See* Pet’r Br. at 13 n.6. However, her opinion on the motion to dismiss concerning the sufficiency of allegations in Eastside’s complaint cannot possibly cast doubt on her finding of fact at the preliminary injunction hearing that Mars and Eastside do not compete. In the motion to dismiss context, Judge Allison was required to “assume the truth of all well pleaded relevant and material factual allegations in the complaint.” *Eastside Vend Distribs.*, 2006 WL 1516012, at *2. Accordingly, she had to accept the truth of the allegation that Eastside competes against Mars even though the evidence is to the contrary. In contrast, at the preliminary injunction hearing Eastside had the burden to demonstrate actual competition between the two, *see, e.g., Fogle*, 337 Md. at 456, a burden it did not carry, and the judge had the duty to weigh the evidence before her, including assessing the credibility of the witnesses, *El Bey*, 362 Md. at 353. The suggestion that Eastside and Mars compete—based on the hearsay, conclusory evidence of one cash register receipt from one shopping trip—was far outweighed by Mr. DeWald’s testimony that he does not sell products to retail consumers from his industrial warehouse. That Mars and Eastside are not in competition with each other, therefore, is a reasonable conclusion, well-grounded in the record before the trial court. This alone is enough to establish that Eastside has no real prospect of success on the merits.

2. The Circuit Court’s ruling that Eastside failed to demonstrate a likelihood of success given its “scant” evidence of price discrimination was not an abuse of discretion.

As to Sam’s, Eastside asked the circuit court to infer, based on Sam’s *retail* prices, that PBG’s *wholesale* prices to Sam’s were lower than PBG’s *wholesale* prices to Eastside. *See* Pet’r Br. at 14 (“The evidence gives rise to the reasonable inference that [PBG] charged Sam’s Club lower prices than it charged Eastside for these products.”). The trial court did not draw the inference Eastside requested, however, and instead found no reliable evidence of price discrimination—again, a conclusion that was based on the actual evidence before the court.

For example, Eastside produced Sam’s invoices from December 2004 showing that Sam’s was charging \$13.72 for a case of 20-ounce bottles of Pepsi-Cola. (*See* E. 295-300) (Pl.’s Hr’g Ex. 8). But Mr. DeWald testified that in 2004 Eastside was paying only \$11.50—\$13.80 *less* a \$2.30 per case rebate. (E. 88.) In other words, Eastside paid a net price of \$11.50 for a product that Sam’s sold to a third party at \$13.72. *Compare* Mr. DeWald’s testimony on direct examination at (E. 88) (“Q: So a \$13.80 price [for cases of 20-ounce sodas] would be reduced to \$11.50? A: That’s correct”) *with* (E. 121) (“Q: What does [Exhibit 8] show in terms of the price that Mr. Silverman was able to get from Sam’s Club for Pepsi in 20 ounce bottles? A: \$13.72”); (*see also* E. 289-92) (Pl.’s Hr’g Ex. 5) (Eastside’s 2004 vending operator agreement which set a price of \$13.80 for 20-ounce bottles (at E. 292) and a rebate of \$2.30 for each case of 20-ounce bottles (at E. 290)). Making it even less likely that Eastside had paid more for those products than Sam’s is the fact that Eastside’s \$11.50 price did not include the effect of the 2004

growth rebate and that, by December 2004, Eastside was receiving given the fact that its sales almost doubled that year. (See E. 289) (providing rebates of up to \$1.50 per case for sales growth above 10 percent). This means that for cases of 20-ounce bottles above Eastside's purchases in 2003, Eastside was paying prices as little as \$10.00 per case. Certainly, the trial court did not abuse its discretion by refusing to infer price discrimination from evidence that Sam's was selling cases of 20-ounce bottles for \$13.72 at a time when Eastside was paying as little as \$10.00 for the same product.

As for Eastside's receipts from Sam's in early 2005 (the only other pricing evidence presented to the trial court),¹² the circuit court declined to draw the inference Eastside was seeking, something that was within the court's discretion to do. Eastside wanted the court to find price discrimination by comparing the wholesale price that Eastside paid with the retail price Sam's was charging customers. Instead, the trial court

¹² On page 11 of its opening brief, Eastside cites to an invoice that it claims indicates that PBG sold 12-ounce cans to Sam's at a lower price than it sold the same product to Eastside. (See E. 337-38.) This invoice was improperly handed to the circuit court on the argument on the motions to dismiss, it was not before the circuit court when it made its decision on this motion, it was not a part of the record on appeal, and PBG timely and appropriately objected to Eastside's reliance on these invoices in the court of special appeals, Appellee's Br. at 22 n.8. Consequently, this invoice should not be considered by this Court. See, e.g., *Burke v. Burke*, 204 Md. 637, 646 (1954) ("We have no power to inspect documents or consider evidence which was not offered below . . ."); *Riley v. United Servs. Auto. Ass'n*, 161 Md. App. 573, 601 (2005) (refusing to consider evidence that was not considered by the trial court in rendering the challenged decision); *Young v. Cities Serv. Oil Co.*, 33 Md. App. 315, 317 n.3 (1976) (declining to consider evidence printed in appellate appendix because it was not admitted into evidence in the trial court). In any event, it does not establish that Eastside, which undisputably, paid less than Sam's for 20-ounce bottles, was discriminated against, especially because if it had taken the 2005 rebates offered to it, Eastside could have paid as little as \$4.80 for 12-ounce cans. (See E. 122) (Eastside paid a base price of \$7.25 for cases of 12-ounce cans in 2005) and (E. 60) (showing rebates of \$0.95 and \$0.50 available for cases of 12-ounce cans in 2005).

concluded, based on Mr. DeWald's testimony that Eastside often sells below cost, that "it is just as reasonable . . . to conclude that Sam's Club is selling below cost as is Eastside in an effort to syphon off Eastside's business." (See E. 272.) Thus, with no direct evidence of price discrimination before it, the court concluded that Eastside simply had not met its burden of establishing a likelihood of success on the merits. See, e.g., *Mikeron, Inc. v. Exxon Co., U.S.A.*, 264 F. Supp. 2d 268, 275-76 (D. Md. 2003) (holding that plaintiff failed to show discriminatory pricing under Robinson-Patman Act and Maryland Antitrust Act where record contained no direct evidence of the actual prices charged).

A powerful illustration of the appropriateness of the trial court's decision is the First Circuit's opinion in *Coastal Fuels of Puerto Rico*, 990 F.2d at 26. In an opinion written by then-Chief Judge Stephen Breyer, the First Circuit upheld the trial court's denial of a preliminary injunction based on a record similar to the one presented here. The First Circuit reviewed a record showing that the resale prices of plaintiff's competitors' were at or below the prices the plaintiff received from the defendant, that the plaintiff lost \$1.3 million during a time that it expected to turn a profit, that defendant inadvertently sent to the plaintiff an invoice purportedly showing sales to one of the plaintiff's competitors at prices below those charged to plaintiff, and that two executives from the defendant told the plaintiff's executives that the defendant was charging the plaintiff's competitors lower prices. *Id.* In the face of evidence analogous to that which Eastside claims it has presented, the First Circuit held that the plaintiff had not satisfied its burden of showing a likelihood of success on the merits. In so holding, the court

noted that the “record is not at all specific about the prices charged,” as there was no evidence of the “actual prices” the alleged favored customers paid. *Id.* The court acknowledged that at trial the plaintiff may “produce more specific price information,” but, the court reasoned, “the opposite may also prove true. At this stage, a court could reasonably want to see more evidence—insisting that the plaintiff make a somewhat stronger, more specific, showing of a likely violation of law.” *Id.* at 27; *see O.M. Dronney Beverage Co. v. Miller Brewing Co.*, 365 F. Supp. 1067, 1071 (D. Minn. 1973) (holding that distributor was not entitled to preliminary injunction where it offered only speculative, indirect evidence in support of its claims of price discrimination).

Eastside relies heavily on the case of *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531-32 (3d Cir. 1990), for the proposition that its indirect evidence *must* give rise to the inference that PBG charged Eastside higher prices than it has charged Sam’s. Pet’r Br. at 12, 14. But the *J.F. Feeser* decision was dictated by the procedural posture of that case. The *J.F. Feeser* court had granted the defendant’s motion for summary judgment; thus, the appellate court determined only whether there was a “genuine issue of material fact” and consequently was required to make “all reasonable inferences in [the plaintiff’s] favor.” *J.F. Feeser*, 909 F.2d at 1531. The opposite presumption applies in this case, where plaintiff bears the burden of establishing its entitlement to injunctive relief. *See, e.g., Fogle*, 337 Md. at 456. The circuit court was required to evaluate the evidence before it and the court of special appeals on review was obliged to give deference to the trial court’s findings and view the facts in the light most favorable to PBG. *See El Bey*, 362 Md. at 353. Moreover, the parties in *J.F. Feeser* were both

distributors and presented no evidence of below-cost selling in their market. The trial court here found that Eastside had sold Pepsi products below cost, supporting a reasonable inference that sellers of soft drinks, including Sam's, similarly might sell below cost to attract customers. The "scant" evidence presented by Eastside left room for reasonable conclusions other than price discrimination because "a court could reasonably want to see . . . a somewhat stronger, more specific, showing of a likely violation of law . . . before finding a likelihood of success on the merits." *Coastal Fuels*, 990 F.2d at 27.

There are other compelling reasons warranting the circuit court's decision, affirmed by the court of special appeals, that Eastside failed to show a likelihood of success on the merits. First, the rebates Eastside was seeking in 2005 were made available to it; Eastside simply did not like all the terms to which it had to agree (i.e., the no sales to resellers/distributors provision, the Gatorade purchasing requirement, and the 25 percent non-carbonated beverage purchase mix requirement). Had Eastside chosen to take the rebates for its sales to vending customers, it would have been paying as little as \$11.50 per case of 20-ounce bottles versus the evidence that Sam's sold the same products for \$13.72. (*See* E. 54-57, 88.) Not only would this contradict any inference that Sam's was paying PBG less than Eastside, but the availability of the same or better pricing is a complete defense to claims of price discrimination. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326 (5th Cir. 1998) (concluding that "a price discount equally available to all purchasers for the same customer and product is not price discrimination"); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th

Cir. 1983) (noting that “a claim of price discrimination will not lie if the buyer failed to take advantage of a price concession which was realistically and functionally available”).

Second, Eastside’s hand-picked, “selective comparisons” of retail prices to wholesaler prices are precisely the type of evidence rejected by the First Circuit in *Coastal Fuels* and by the Supreme Court in *Volvo Trucks*, its most recent pronouncement on the Robinson-Patman Act. In *Volvo Trucks*, where the Supreme Court reversed findings of unlawful price discrimination by the trial and appellate courts, the Court criticized the plaintiff for failing to show that the alleged favored purchasers “were consistently favored vis-à-vis [plaintiff]” and noted that there had been no “systematic study” of pricing between the purchasers.” 126 S.Ct. at 871. The Court, therefore, “decline[d] to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality.” *Id.*

Finally, Eastside’s citations to *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), are not persuasive. Eastside tries to avail itself of the inference of competitive injury recognized in *Morton Salt*. See Pet’r Br. at 12. Before a plaintiff may rely on the “*Morton Salt* inference,” however, it must show “substantial price discrimination” “over time.” See, e.g., *Falls City Indus.*, 460 U.S. at 435 (noting that inference of competitive injury under *Morton Salt* arises from “proof of a substantial price discrimination between competing purchasers over time”). Eastside’s cherry-picked evidence allegedly from a few shopping trips by one customer does not rise to the level that the courts require to establish the *Morton Salt* inference. Compare *J.F. Feeser*, 909 F.2d at 1526 (proof of discrimination over a four-year period sufficient), and *Texaco*, 496 U.S. at 547 (price

differences over many years sufficient), and *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 387-88 (8th Cir. 1987) (discrimination over a period of more than two years sufficient), with *Mays v. Massey-Ferguson, Inc.*, No. CV187-131, 1990 WL 80673, at *3 (S.D. Ga. Apr. 26, 1990) (holding that “one sale on one date to one competitor cannot constitute substantial price discrimination ‘over time’”); *Dairy King, Inc. v. Kraft, Inc.*, 645 F. Supp. 126, 130 (D. Md. 1986) (holding that two-week discount period was too short to permit *Morton Salt* presumption). Eastside’s “scant” evidence does not satisfy this test and the lower courts were correct in holding that this evidence did not establish a likelihood of success on the merits.

III. The Lower Courts Were Correct In Holding That Eastside Did Not Establish Irreparable Harm.

Not only were the lower courts correct in holding that Eastside had not carried its burden to show a likelihood of success on the merits, but also that Eastside did not show that irreparable harm would result from the denial of the injunction. This Court has recognized that “irreparable injury is suffered whenever monetary damages are difficult to ascertain or are otherwise inadequate.” *El Bey*, 362 Md. at 355 (citation omitted). However, “[t]he mere assertion that apprehended acts will inflict irreparable injury is not enough. The complaining party must allege and prove facts from which the court can reasonably infer that such would be the result.” *Id.* at 354. Eastside claims that the circuit court and court of special appeals erred in holding that Eastside failed to show that it would be irreparably harmed if its proposed injunction did not issue. Eastside also asserts that the court of special appeals rested its irreparable harm holding entirely on a

lack of proof that Eastside's business would be "destroyed." Pet'r Br. at 16. The intermediate appellate court never issued such a ruling, however.

Acknowledging that a harm that is unquantifiable can be irreparable, *see El Bey*, 362 Md. at 355, the court of special appeals held that Eastside "still failed to satisfy its burden" of showing irreparable harm. (Op. at 25.) In reaching this conclusion, the court focused on the fact that Eastside, through its preliminary injunction motion, is seeking quarterly rebate checks, the amounts of which "can be easily ascertained." (Op. at 26.) The court reasoned, "it is apparent that [Eastside], in light of the rebate payment relief it is seeking, may have a sufficient remedy at law that would satisfy any losses incurred by not receiving rebates from [PBG]." *Id.* Moreover, the court realized that this was not a case in which the plaintiff could not stay in business pending a trial on the merits, a reasonable conclusion given that Eastside remains in business more than a year after the hearing on this motion in the trial court. Thus, the lower appellate court did not require Eastside to prove that its business would be destroyed before it could prove irreparable harm. The court simply applied settled Maryland law to the facts, and found that Eastside had failed to carry its burden of showing that any harm it suffered would be irreparable.

The court of special appeals' irreparable harm decision, however, was based on more than whether Eastside's harm was quantifiable. The court's analysis actually rests largely on facts that Eastside never even confronts or disputes—that there simply was no rebate agreement between Eastside and PBG that required reinstatement. The lower appellate court rightly recognized that the 2004 vending rebate agreement had expired by

its own terms and that Eastside's failure to secure the 2005 vending agreement was its own doing—first by changing its business from a supplier of vending operators to a supplier of cash and carries, and second by demanding changes to the 2005 agreement that PBG could not accept. Moreover, Eastside could have eliminated the alleged harm—the lack of rebates—by simply signing the 2005 agreement. Again, Eastside tries to convince this Court that the rebates were unavailable to it due to the prohibition on reselling to “resellers/distributors.” But the undisputed evidence on this point was that PBG was willing to negotiate a solution so that Eastside could have the 2005 rebate agreement and continue selling to its vending customers. The fact that these rebates were made available to Eastside is not only a complete defense to a claim of price discrimination, *see, e.g., Metro Ford*, 145 F.3d at 326; *Bouldis*, 711 F.2d at 1326, but also negates any notion that the failure to grant the preliminary injunction—as opposed to Eastside's own actions—has caused any harm. *See Lerner*, 306 Md. at 791 (“The factor of irreparable injury can include the necessity to maintain the status quo.”) (quoting *State Dep't of Health & Mental Hygiene*, 281 Md. at 554) (internal quotation marks and alterations omitted). More importantly, the record was clear that Eastside rejected two required terms of the standard rebate contract, i.e., the Gatorade requirement and the non-carbonated mix. These were terms that were important to PBG and that Eastside refused to accept. (*See* E. 190-91, 193.)

In addition, even if Eastside is taken to be making a claim of discriminatory pricing rather than a failure to contract, there was simply no evidence before the trial court establishing that Eastside had suffered irreparable harm. If it is assumed that loss of

business or goodwill may in some circumstances constitute irreparable harm, there was no probative evidence of such losses here. The only evidence of purported harm Eastside offered at the hearing was the vague assertion by Mr. DeWald that raising his prices would have a “detrimental” effect and result in a “major loss of business.” (E. 128.) As this Court has stated, “[t]he mere assertion that apprehended acts will inflict irreparable injury is not enough. The complaining party must allege and prove facts from which the court can reasonably infer that such would be the result.” *El Bey*, 362 Md. at 354. Yet at no time did Eastside present facts that would allow the circuit court, or the court of special appeals, to “reasonably infer” irreparable harm. Given this lack of evidence, the lower courts’ rulings were well within their discretion when they concluded that Eastside had not shown irreparable harm.

Eastside seriously distorts the record when it points to three companies—Paramount Vending, Franhill Vending and Columbia Vending—as alleged examples of business it lost as a consequence of the alleged price discrimination. The only evidence concerning Paramount Vending was that Paramount asked Mr. DeWald whether Eastside could sell it 20-ounce Pepsi products at \$13.50, which Eastside could not without the rebate (but could have if Eastside had taken the rebates). (E. 114-15.) Eastside misrepresents the record when it cites to a statement by Mr. DeWald that Paramount was a large customer of Eastside’s. Pet’r Br. at 5 n.5. In reality, Paramount Vending was never a customer of Eastside’s. (E. 115.) When asked what volume of business Eastside was doing with Paramount, Mr. DeWald testified, “zero.” (E. 115.) And when asked

whether it was true that Paramount “never purchased Pepsi products from you,” he answered “[t]hat’s correct.” (E. 115.)

Franhill was mentioned at the hearing only by Mr. DeWald as the alleged source of some Sam’s Club and Mars cash register receipts. (*See* E. 121, 123.) There was absolutely no testimony that Eastside was losing any business from Franhill Vending as a result of Eastside not receiving rebates in 2005. Similarly, there was no evidence presented at the hearing—and there never has been any evidence presented to date—that Columbia Vending has in fact stopped buying product from Eastside.¹³

Mr. DeWald’s post-hearing affidavit did not help Eastside bridge this significant evidentiary gap merely by claiming that Eastside had raised its prices by some unspecified amount and that sales had dropped from a high of \$370,000 per week (inflated by its sales to cash and carries) to a low of \$187,000 per week. (*See* E. 336 ¶ 2.) Simply comparing some unspecified high and low points in sales does not provide the detailed facts from which irreparable injury may be reasonably inferred. Likewise, the assertion that two employees “have stopped working for Eastside on account of the substantial fall off in Eastside’s sales,” (E. 336 ¶ 3), is not proof of harm either. Eastside still fails to address the many variables the circuit court found missing. For instance,

¹³ At the hearing, Eastside offered improper hearsay evidence that Columbia Vending would not buy from Eastside if Eastside’s price for 20-ounce bottles rose to \$14.95. *See* (E. 125-27.) The circuit court appropriately sustained PBG’s objection to this testimony. (E. 127.) The fact is, there never has been any evidence that Eastside lost Columbia Vending as a customer, though Eastside has had ample opportunity to make that claim if it had happened. Even in his post-hearing affidavit, in which he claimed to have “lost customers,” Mr. DeWald does not mention losing Columbia Vending after raising his prices by some unspecified amount. (*See* E. 336 ¶ 2.)

Eastside did not actually produce any evidence that it had lost business to anyone, much less to an allegedly favored purchaser; again, Eastside was hoping the court would draw that inference. Additionally, there is no mention of how high Eastside raised prices; Eastside still provides no details on how many and which customers it lost—it simply reiterates the same baseless and bald assertion that “it has lost customers”; there is no identification of any specific customers lost and whether these were traditional vending customers or cash and carries; there is no mention that it is operating at a loss; nor is there any mention of how the profitability of the other products Eastside sells (i.e., other Pepsi products, Coca-Cola and other soft drink products, and snack foods) affects Eastside’s business. *See Volvo Trucks*, 126 S.Ct. at 871 (noting that “selective comparisons” of alleged price discrimination are not sufficient to “show the injury to competition targeted by the Robinson-Patman Act”).

This case is fundamentally different than those cited by Eastside in support of its irreparable harm argument. For example, in *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 548-49 (4th Cir. 1991), the court was faced with two cable television providers who were fighting over the defendant’s conduct in misappropriating the plaintiff’s cable equipment at an apartment building. The plaintiff alleged that the defendant conspired with the building manager to disconnect the plaintiff’s cable network and replace it with the defendant’s network, while allowing the defendant to use the plaintiff’s cable system installed in the building to provide cable service to the building’s tenants (plaintiff’s customers). *Id.* Instrumental in the court’s finding of irreparable harm were that “the historical average of [the

plaintiff's] revenue [did] not provide an adequate basis for measuring the potential loss of revenue"—meaning that quantification of loss was not possible—and that there was a “threat of a permanent loss of customers,” especially in light of the fact that the defendant had essentially stolen the plaintiff's cable equipment within the apartment building, was using that equipment to serve plaintiff's customers, and (because an apartment only needs one cable service provider) plaintiff no longer had access to those customers. *Id.* at 552.

Eastside's claims of harm, assuming they could be established, do not rise to this level. As the court of special appeals found, any harm Eastside might experience is decidedly quantifiable. The amount of rebates applicable to the volume of Eastside's sales is a calculable amount. Moreover, any decline in sales could be determined since there is a sufficient baseline of past sales and profits from which to calculate any harm. *See, e.g., Safeway Inc. v. CESC Plaza Ltd. P'ship*, 261 F. Supp. 2d 439, 470 (E.D. Va. 2003) (holding that plaintiff could not establish irreparable harm where there was evidence of past sales and profits sufficient to serve as a baseline to calculate damages resulting from denial of preliminary injunction). Indeed, Mr. DeWald's affidavit, which specifies the amount by which he claims his sales have declined, supports this notion.

Nor does Eastside's unsubstantiated claims of lost goodwill establish irreparable harm. In cases like *Blackwelder Furniture Co. of Statesville v. Selig Manufacturing Co.*, 550 F.2d 189, 192-93 (4th Cir. 1977), the plaintiff had been completely “deprived totally of the opportunity to sell an entire line of merchandise” and incurred injury to goodwill precisely because it could no longer be “a dependable distributor which offers a full line of goods.” *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 29 (2d

Cir. 1978) (internal quotation marks omitted). There is no evidence here that Eastside is unable to buy and sell Pepsi products or to continue operating as a full line distributor of vending products. *See Coastal Fuels*, 990 F.2d at 27 (rejecting plaintiff's claim of irreparable harm based on loss of goodwill in price discrimination case where plaintiff had access to alternative supply of good); *In re Irrevocable Standby Letter of Credit No. SE444393W*, 336 F. Supp. 2d 578, 581-82 (M.D.N.C. 2004) (holding that party could not establish irreparable harm under *Multi-Channel* given lack of evidence of a permanent loss of customers); *Safeway Inc.*, 261 F. Supp. 2d at 471 (movant could not show irreparable harm where there was no showing that denial of injunction would harm its reputation and goodwill); *Refrigeration Eng'g Corp. v. Frick Co.*, 370 F. Supp. 702, 714 (W.D. Tex. 1974) (holding that plaintiff had not established irreparable harm in price discrimination case where plaintiff could "prevent any loss of good will by continuing to sell at prices which are acceptable to its customers, with the expectation of compensation if any loss occurs in the event it prevails at a trial on the merits"). Thus, Eastside cannot meet its burden to establish irreparable harm and the rulings below should be affirmed.

IV. Eastside Is Unable To Show That The Balance Of Convenience And Public Interest Tip In Its Favor.

Eastside also claims that the court of special appeals erred in concluding that the balance of convenience and public interest factors did not weigh in its favor. However, Eastside's petition for certiorari, and consequently this Court's order granting certiorari, does not present any question as to these factors. *See Pet'r Br.* at 22-24. It is well-established that this Court only considers issues raised in a petition for certiorari or in a

cross petition. *See, e.g.,* Md. R. 8-131(b)(1); *Renbaum*, 386 Md. at 33 n.2; *Jones*, 357 Md. at 419. Therefore, as the court of special appeals' holdings on the balance of convenience and public interest factors were not appealed, Eastside should not be permitted to raise these issues at this time.

If the Court does address these arguments, it should reject them. The court of special appeals recognized that "if this injunction were to issue, [PBG] would have to 1) revive a rebate system it discontinued for one, specific customer, and 2) be obligated on a contract to which it would not enter on its own terms." (Op. at 23.) In essence, what Eastside's injunction seeks, and what the court of special appeals refused to condone, is court-ordered price discrimination in its favor.

According to Eastside, the court erred in its holding "because restoration of the rebates was not the ultimate or only objective of Eastside's request for injunctive relief." Pet'r Br. at 22. As demonstrated above, however, Eastside's repeated claims that its motion seeks something other than restoration of the rebates are directly contradicted by the record in this case. The court of special appeals did not err in construing the motion and its supporting documentation as written, and refusing to extend to Eastside a rebate program that is not available any other PBG customer.

Finally, as both lower courts correctly stated, the public interest is vindicated when private parties are allowed to negotiate contracts without the interference of the courts. (E. 275; Op. at 23.)

CONCLUSION

As demonstrated above, Eastside's motion for a preliminary injunction never asked for the same prices as some other competitor. Rather, its motion requested the circuit court to require PBG to pay it rebates according to an expired vending rebate agreement that is no longer offered to any PBG customer. As the court of special appeals concluded, the circuit court did not abuse its discretion in finding that Eastside had failed to show a likelihood of success on the merits or that it would be irreparably harmed if the injunction did not issue. For these reasons, Respondent respectfully requests that this Court affirm.

Respectfully submitted,



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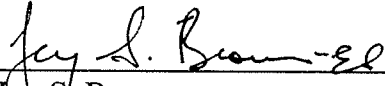
Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman (13 point). In compliance with Md. R. 8-501(e), Respondent has included additional parts of the record as an appendix in order to respond to arguments made by Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 6th day of September, 2006, I caused two true copies of the foregoing **Brief of Respondent** to be served via first-class, postage prepaid, mail upon the following counsel of record:

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