# Nos. 09-2548, 09-2952 & 09-2993

## IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FEESERS, INC.,
*Plaintiff-Appellee,*

v.

MICHAEL FOODS, INC. AND SODEXHO, INC.,
*Defendants-Appellants*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, No. 04-cv-576-SHR
HON. SYLVIA H. RAMBO

**BRIEF FOR APPELLANT MICHAEL FOODS, INC. AND JOINT APPENDIX VOLUME I (Pages A1 to A122)**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1.1, Defendant-Appellant Michael Foods, Inc. certifies that:

(1) *For non-governmental corporate parties list all parent corporations:* M-Foods Holdings, Inc. is the immediate parent of Michael Foods, Inc. M-Foods Holdings, Inc. is owned by Michael Foods Investors, LLC.

(2) *For non-governmental corporate parties list all publicly held companies that hold 10% or more of the party's stock:* There are no publicly held companies that own 10% or more of Michael Foods, Inc.'s stock. Funds affiliated with Thomas H. Lee Partners, L.P., a limited partnership, hold the majority of the interest of Michael Foods Investors, LLC.

(3) *If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, identify all such parties:* No publicly held corporation has a financial interest in the outcome of the proceeding before this Court.

(4) This is not a bankruptcy appeal.

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## STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this antitrust action pursuant to 28 U.S.C. §1331. Michael Foods, Inc. timely filed an appeal of the district court's July 1, 2009 amended final judgment on July 6, 2009 (A117), and this Court has appellate jurisdiction under 28 U.S.C. §1291. Michael Foods also timely filed an appeal of the district court's May 26, 2009 contempt order and permanent injunction on May 26, 2009 (A104). This Court has appellate jurisdiction over the May 26 order under 28 U.S.C. §1292(a)(1).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Michael Foods and defendant-appellant Sodexo, Inc. are entitled to judgment because there is no evidence of competitive injury as a matter of law. A23-24, A42-45, A63-64.

2. Whether Michael Foods and Sodexo are entitled to judgment because the evidence established that Michael Foods acted in good faith as a matter of law, when it offered its prices to Sodexo to meet competition. A77-78.

3. Whether the district court abused its discretion in finding Michael Foods in contempt for suspending sales to plaintiff-appellee Feesers, Inc. and in requiring Michael Foods to deal with Feesers. A92-102.[1]

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[1] Michael Foods adopts in full the issues and arguments raised in Sodexo's brief, including Argument Sections I (actual competition), II (competitive injury) and IV (injunctive relief).

## STATEMENT OF RELATED CASES

This case was previously before this Court. *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206 (3d Cir. 2007); A202.

## STATEMENT OF THE CASE

### I. NATURE AND COURSE OF PROCEEDINGS

The Robinson-Patman Act ("RPA"), 15 U.S.C. §13(a), provides that:

> It shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

Institutions like schools, hospitals and nursing homes frequently prepare and serve meals in cafeterias. A6. Such institutions can handle all aspects of their foodservice operations themselves ("self-operate"), or they can outsource some or all aspects of those operations to a foodservice management company. *Id.*

Feesers is a wholesale distributor that purchases food from manufacturers and resells it, typically either to institutions that self-operate, or to foodservice management companies. A7-8. Feesers alleges that Michael Foods, a manufacturer of processed egg and refrigerated potato products, violated the RPA by giving larger discounts to Sodexo, a foodservice management company, than to

Feesers. A1. Feesers also claims that Sodexo knowingly induced the price discrimination. *Id.* Feesers sought an injunction, but no damages. A80.

The district court initially granted summary judgment to the defendants, holding that Feesers does not compete with Sodexo. A195. A divided panel of this Court reversed, holding that there was a triable issue whether Sodexo and Feesers "directly compete for resales of Michael Foods products among the same group of customers," *Feesers*, 498 F.3d at 214 n.9, and that Feesers would be entitled to a rebuttable presumption of competitive injury if it could show such direct competition and "substantial price discrimination . . . over time," *id.* at 216. That inference "could be rebutted with evidence . . . that the price discrimination does not cause foodservice facilities to decide to buy food from Sodexho rather than Feesers." *Id.* at 216.

After a bench trial on remand, the district court concluded that Feesers and Sodexo do compete to resell food in one limited scenario: where "a customer considers switching from self-op to food service management, or vice versa." A24. The court held that an inference of competitive injury was raised, and not rebutted, because Sodexo receives significantly larger discounts from Michael Foods than Feesers does, and because institutions are likely to care about the *aggregate* cost of food when deciding whether to switch between self-operation and foodservice management. A44. The district court read the Supreme Court's

decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), to require a finding of competitive injury even if the price difference affects only a tiny fraction (here, less than 0.6%) of the finished product offered for sale. A42. The district court also rejected Michael Foods' "meeting competition" defense, held that Sodexo knowingly induced the price discrimination, and enjoined Michael Foods "from discriminating unlawfully in price in favor of Sodexho and against Feesers." A84; A116.

To comply with the injunction, Michael Foods suspended sales to Feesers. A258-59, 267. Michael Foods also proposed that Feesers join it in seeking a stay of the injunction while this appeal was pending, and indicated that with such a stay in place Michael Foods would be willing to continue to sell to Feesers at historic prices during the appeal. A268. Feesers then moved for an order of contempt and for permanent injunctive relief. A92. The district court held Michael Foods in contempt, and required Michael Foods "to sell its products to Feesers on the same terms as they are sold to Sodexho, so long as Feesers otherwise meets its standards as a customer." A103. Michael Foods timely filed a notice of appeal (A104) and a motion to stay enforcement of this order. This Court granted the motion to stay. A332.

Michael Foods timely filed a motion to alter or amend the April 27 judgment on the basis of *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d

204, 228 (3d Cir. 2008). A107. The district court denied that motion (A107) and entered an amended final judgment for Feesers. A116. Michael Foods timely filed a notice of appeal of the amended final judgment and underlying orders. A117. This Court consolidated Michael Foods' two appeals with Sodexo's appeal. A333.

## II. STATEMENT OF FACTS

The following facts, and those set forth in more detail in the Argument section, are based on the district court's post-trial findings of fact and undisputed record evidence.

### A. Structure Of The Foodservice Industry

Food products go from the farm to the fork via a three-tier distribution system: *manufacturers* sell products to *distributors*, who resell them to *operators* (including self-operators and foodservice management companies), who provide them to *consumers* as prepared meals. A1642-45(Westphal); A2403-05(Wass).

Michael Foods typically sells its products in bulk to distributors for resale to operators. A237. Michael Foods has a national list price for its egg products and a regional list price for its potato products. A27; A1646-47(Westphal). It is common in the industry, however, for particular operators to negotiate "deviated" prices. A1649-51(Westphal); A2411(Wass). If the distributor sells products to an operator who has negotiated a deviated price, the distributor bills back Michael Foods for the difference between the list price and the deviated price. A28.

Feesers distributes Michael Foods products, and thousands of other manufacturers' food and food-related products, to self-ops and foodservice management companies within a 200-mile radius around Harrisburg, Pennsylvania. A7. Feesers pays Michael Foods the deviated price negotiated by the ultimate operator to whom it resells (A37), or the list price minus certain product-specific allowances. A1675-78(Westphal).

Sodexo provides comprehensive foodservice management to its institutional customers, including planning menus, ordering food, preparing and serving meals, and overseeing all labor issues. A2125(Matyas); A2300-01(Harris); A1825(Guarneschelli). Distributors like Feesers offer none of these services. A470-71(Tighe). Sodexo does not distribute or sell food items on an individual basis, apart from its management services; you cannot pick up the phone and order a carton of eggs from Sodexo. A9. Because Sodexo has no distribution function, it must obtain the food for its management customers from distributors. A23.

Sodexo has negotiated deviated pricing for Michael Foods products, which Sodexo's distributors receive on all products to be resold to (or through) Sodexo. A28.

**B. The Significance Of Price Disparities On Michael Foods Products**

The district court credited Feesers' expert's conclusion that in some circumstances Feesers' price for certain Michael Foods items was as much as 60-

70% more than Sodexo's price. A32. Those calculations were fiercely disputed at trial, but even if they are accepted, a number of other undisputed facts are important to understanding the competitive significance of such disparities.

**First**, Michael Foods agreed to extend Sodexo's prices to Feesers in any circumstances where Feesers claimed that it was competing with Sodexo. In 2003, Feesers asked Michael Foods for Sodexo-level pricing for every operator that it serves. A480(Tighe); A1692-99(Westphal). Michael Foods refused that request because no distributor receives such pricing for all of its operators; rather, distributors receive pricing based on the specific operator to whom they are reselling. A28; A1660-63, 1697-1700(Westphal); A2734. But Michael Foods agreed that if circumstances arose where Feesers believed that it and Sodexo were vying for the same institution's business, they received the same price. A1697-1701(Westphal). Feesers took advantage of that multiple times. A3020, 3023-24 (Feesers requested and received Sodexo-equivalent pricing for (1) Abramson Center, (2) Brandywine Hospital, (3) Meadows nursing home, and (4) three other nursing homes); A489-94(Tighe); A1702(Westphal); A892-93(States). Michael Foods granted every Feesers request for Sodexo-equivalent pricing for a particular account. A493-94(Tighe); A1703(Westphal).

**Second**, Michael Foods products represent a small fraction of any institution's overall foodservice budget. Institutions spend an "extremely

insignificant" (A2082(Majewski)) and "minuscule" (A1838(Guarneschelli)) amount of money on egg and potato products generally. *See also* A2279-80(Gagliardo); A1963-64(Bruchak). Such products generally comprise "less than one percent" of an institution's overall foodservice operating budget. A1895(Peck); A1838(Guarneschelli). The percentage an institution spends on Michael Foods products is even smaller because Michael Foods does not sell shell eggs or frozen French fries, and because many other companies manufacture processed eggs and refrigerated potatoes. A1628, 1633-36, 1641(Westphal). Central Bucks School District, for example, in 2007-2008, budgeted $13,000 for eggs and potatoes generally and only $1,100 for Michael Foods products out of a total food budget of approximately $2 million and a total foodservice budget of approximately $5 million. A2133(Matyas).

Feesers' expert, Dr. Robert Larner, calculated that Michael Foods products would represent six-tenths of one percent (0.6%) of a typical institution's total foodservice budget, and that the institution could save at most *four-tenths of one percent* (0.4%) in total foodservice operation costs if it purchased Michael Foods products through Sodexo rather than from Feesers. A1250-52(Larner).

**Third**, there was no evidence that institutions ever decide between self-operating and foodservice outsourcing based on disparities that small. Dr. Larner could not testify, and the district court did not find, that there was a "reasonable

possibility" that an institution would switch its entire foodservice operation on that basis. A1252(Larner). Actual customer witnesses testified unanimously that the price of Michael Foods products "didn't have any role" in their decision to switch from self-op to Sodexo, or to stay with Sodexo instead of self-operating. A2372(Levy); A1962(Bruchak); A2113(Jacobs); A1842(Guarneschelli); A2132(Matyas); A2303-04(Harris); *Cf.* A2341(Clickner); A2011(Harpster).

Stanley Majewski, who has responsibility for foodservice at the Bethlehem Area School District, testified that the prices of egg and potato products were irrelevant to the district's decision to switch to management because they are an "extremely insignificant portion of the overall program." A2082(Majewski). Customers further testified that they would not convert to self-operation if they could obtain egg and potato products cheaper from a food distributor than through Sodexo because "that's a minimal part of the cost" of foodservice operation. A1900-01(Peck); A2305(Harris) (would not switch because "[e]ggs and potatoes are a small piece of whatever the cost may be"); A1841(Guarneschelli); A2280(Gagliardo); A2012(Harpster). For example, Robert Bruchak, business manager for the Daniel Boone School District, testified that the price difference "would be so minor" that it "wouldn't have any impact at all" on the district's decision to convert back to self-op. A1965(Bruchak); *see also* A2114(Jacobs).

Michael Foods also proved that not one of the 276 institutions for which Feesers claimed that it competes with Sodexo chose to hire Sodexo based on the price of Michael Foods products. A14651.[2] Of the 276, 257 were former customers of another foodservice management company, Wood Company, that Sodexo simply inherited when it purchased Wood in April 2001. A8; A245-46. Feesers had been serving the Wood accounts because it was Wood's prime distributor. *Id.* Feesers later lost the Wood accounts because Sodexo chose to use Sysco as its distributor instead of Feesers (A8; A2757), not because of the price of Michael Foods products. A1277-78(Larner); A1125-26(Bowman); A454-67(Tighe).

Michael Foods' pricing also did not motivate the choices of the non-Wood institutions. Five accounts *remained* with Feesers even after Sodexo submitted proposals (none mentioning Michael Foods) for their foodservice business. A456(Tighe) (Archdiocese of Philadelphia); A502-03(Tighe) (Homewood at Crumland Farms, Manheim Township School District and Messiah Village); A569-70(Layton) (Garden Spot Village); A3901, A4361, A4388, A4516. Two

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[2] Feesers listed 441 "accounts" on exhibit A14651 as customers for whom it and Sodexo allegedly competed or compete. That exhibit actually lists only 271 customers because 170 of the "accounts" are duplicates or merely reflect an additional location at a single institution. A298; A541, 559(Layton) (multiple locations at single institution are one account). Feesers identified 5 other customers, *not* included on A14651, for which it allegedly competed with Sodexo. A502(Tighe); A569-70(Layton); A886(States).

institutions actually switched *to* self-operation from outsourcing. A891-93(States) (Meadows); A559(Layton) (Somerford). Five other institutions switched from self-operating to outsourcing for reasons entirely unrelated to the price of Michael Foods' products. Lewistown Hospital, for example, sought to improve the quality of its operations. A2275, 2278-79(Gagliardo). Saint Mary's Catholic School switched because its in-house food director was retiring. A893(States). Villa Teresa switched because it wanted to renovate its kitchen. A614(Layton). The Jewish Home of Greater Harrisburg switched because of labor problems. A2364-65(Levy). The Daniel Boone School District switched to increase student participation. A1992-93(Bruchak). Feesers offered no evidence about the remaining accounts.

Institutions deciding between self-operating and hiring Sodexo do not even have the means to compare Feesers' and Sodexo's prices for Michael Foods products because Sodexo does not identify individual food product costs in its proposals, nor does it discuss the costs of individual food items with institutions when soliciting their business.[3] A1495-96(Marvin); A810-11, 824(Paulson); A694-95(Paulson). Of the 63 Sodexo proposals that Feesers introduced at trial, not

[3] A market basket is a list of prices for 50 to 200 individual products that a customer is interested in purchasing. A510(Tighe). Sodexo rarely uses market baskets. A2196-97(Toomey); A832-33(Paulson). Feesers did not introduce any Sodexo market baskets, and no witness had ever seen one that included Michael Foods products. A1513(Marvin); A519(Tighe).

one mentioned specific prices of any food products, and none mentioned Michael Foods brands at all. A282. Even after Sodexo wins an institution's business, its invoices merely identify general amounts for food costs, A846-47(Paulson), not the cost of any individual food items. A827(Paulson); A2252-53(Toomey); *see also* A1900(Peck); A2280(Gagliardo); A2305(Harris).

Even though Feesers claims that the "competition" between it and Sodexo has been going on for nearly a decade, Feesers actually conceded—and the district court found—that Feesers has never lost a single sale to Sodexo on the basis of the price of Michael Foods products. A81-82; A1331-33(Larner).

### C. Michael Foods' "Meeting Competition" Defense

Vicky Wass was the Michael Foods employee primarily responsible for negotiating with Sodexo for each of the three contracts at issue: the 1999 and 2002 egg contracts and the 2002 potato contract. A67; A2415-16(Wass). The district court found Wass's trial testimony to be "credible and candid." A76. The district court also found that each time Michael Foods agreed to a price concession, it did so believing "that the requested concessions matched an offer Sodexho had received from [Michael Foods'] competitor[s]." A68.

For the 1999 egg contract, the district court acknowledged Wass's testimony that Michael Foods knew that it was negotiating the agreement "in a competitive situation with [its] competitor." A67. Wass had conversations with Sodexo about

the "scope" of the prices that its competitor was offering, and in those conversations Sodexo told Michael Foods that it had to "do a better job with [its] pricing." A68.

The negotiations over the 2002 egg and potato contracts spanned many months with much "back and forth" between Michael Foods and Sodexo. A2426-27, 2434(Wass). Michael Foods was not supplying potato products to Sodexo at that time, but it knew that its main potato competitor, Reser's, was supplying Sodexo. A74. Each time Sodexo requested a concession, Wass brought it to her superiors at Michael Foods for guidance as to how she should respond. A2426-27(Wass). For months, Michael Foods "push[ed] back" and "[held] firm" on its proposed terms. A2427(Wass). Eventually, the negotiations reached a breaking point and, as the district court acknowledged, Sodexo told Michael Foods "that, if [Michael Foods] holds with this present proposal that the egg contract will be awarded to Sunnyfresh and [Michael Foods] will not be awarded the potato contract." A70. Sodexo also told Michael Foods that its "deal was not as good as [Sunny Fresh's]." A70. In response to Wass's question about how close Michael Foods needed to be "in order to meet the competition," A71, Sodexo supplied a list of very specific demands. A74-75; A2434(Wass). Wass testified that Michael Foods did not press for the specific details of the Sunny Fresh or Reser's bids because it knew that Sodexo would never supply that information. A70-71, 73;

A2420-21(Wass). But Michael Foods had "experience with what [Sunny Fresh's] behavior was with other agreements" (A72) including knowing that "Sunnyfresh, traditionally, is lower cost than we are" and that Michael Foods was seeing "like pricing" on other agreements they were negotiating against Sunny Fresh, Michael Foods' main national competitor. A71. Because Reser's was the incumbent, Michael Foods also had access to certain information about Reser's prices through distributors. A2410, 2449-50(Wass). Based on the available market evidence, Wass "was not surprised by the things that [were] coming forth [from Sodexo's] demands." A71. Wass also testified that she had a good and longstanding relationship with Sodexo, and considered them to be trustworthy. A2416, 2424(Wass).

## III. THE DISTRICT COURT'S OPINION

The district court acknowledged that Feesers and Sodexo operate very different businesses, but nonetheless concluded that Feesers and Sodexo compete, in a sense, when "a customer considers switching from self-op to food service management, or vice versa." A24. The district court also found that Feesers sometimes pays significantly more for Michael Foods products than Sodexo. A32.

Despite its findings about the narrow and limited nature of competition, the district court refused to consider whether the price difference was "substantial" in the context of an institution's choice between self-operating and outsourcing. The

court thought it "well settled that where the price discrimination at issue affects only a small number of articles sold, the Robinson-Patman Act still applies," citing the Supreme Court's decision in *Morton Salt*. A42. The court therefore viewed the dispositive question as whether "customers may be persuaded to switch from self-operation to food service management in order to obtain *discounts on food products* and thereby lower their overall costs of food service operation." A44 (emphasis added). The court, relying primarily on Sodexo's strategic planning and marketing documents, concluded that a substantial price advantage on food *in the aggregate* could sway an institution's decision. *Id.*

The court never found that Sodexo's purported price advantage on Michael Foods products *alone* would cause any customer to switch to (or not switch from) Sodexo. The court acknowledged that "egg and potato products constitute a small portion of any individual customer's food purchases from Feesers and Sodexho" (A45) and that "Feesers has been unable to identify any lost sales resulting from [the challenged] pricing" even though that pricing "has been in place for many years." A81.

The district court also rejected Michael Foods' meeting competition defense despite finding the testimony of Michael Foods' chief negotiator, Wass, to be "credible and candid." A76. The district court acknowledged Wass's testimony that Sodexo informed Michael Foods that its main national competitors for the sale

of processed eggs (Sunny Fresh) and refrigerated potatoes (Reser's) were offering greater price concessions than Michael Foods, and that Sodexo would switch to Sunny Fresh, and stay with incumbent Reser's, if Michael Foods did not improve its offer. A70-71. The court further acknowledged that Michael Foods evaluated Sodexo's demands in light of the available market evidence it had with respect to both Sunny Fresh and Reser's and concluded that Sodexo's demands were reasonable. A72-73.

Despite crediting this testimony, the court read *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978), as precluding the meeting competition defense where the seller "lacks sufficient information to make a good faith offer that meets, rather than beats that of a competitor." A77-78. The court distinguished the Supreme Court's subsequent decision in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82 (1979) ("*A&P*"). A78. Even though Michael Foods actually had more detail about the competing offers than the seller in *A&P*, the court apparently read that case to condition the defense on a formulaic showing that the seller asked for specific details of the competing offer, even if the buyer refused to provide them, and that the seller expressly stated that it was granting a concession for the purpose of meeting competition. *Id.*

The court entered an injunction prohibiting Michael Foods from price discriminating against Feesers. A84. When Michael Foods suspended dealing

with Feesers altogether, the court held Michael Foods in contempt and entered a permanent injunction requiring Michael Foods to sell its products to Feesers as long as it sells to Sodexo, and to give Feesers the same price as Sodexo. A103.

## SUMMARY OF THE ARGUMENT

The Supreme Court has held that expansive interpretations of the RPA put the Act "'in open conflict with the purposes of other antitrust legislation,'" and has explained "more than once" that the RPA must be "construed consistently with the broader policies of the antitrust laws." *A&P*, 440 U.S. at 80 & n.13 (citation omitted). Most recently, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180-81 (2006), the Supreme Court stressed that "[e]ven if the [RPA's] text could be construed" more broadly, "we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." (citation omitted) (emphasis in original). As this Court recently held when applying those interpretive principles, it is "no injustice to narrowly interpret the oft-questioned RPA." *Toledo Mack*, 530 F.3d at 228 n.17.

The district court in this case turned those principles on their head—interpreting the concepts of actual competition and competitive injury under the RPA expansively, while interpreting the Act's crucial "meeting competition" defense so narrowly that there is nothing Michael Foods could have done to satisfy

it. Sodexo's brief addresses several aspects of the district court's analysis, such as its erroneous conclusion that Feesers and Sodexo are in actual competition. To avoid duplication, Michael Foods adopts Sodexo's arguments in full. This brief will principally address three central errors of law in the district court's opinion:

I. The district court's entire analysis of competitive injury hinges on a misunderstanding of the Supreme Court's decision in *Morton Salt*, which involved Morton Salt's practice of charging, to large chain stores that bought in great volume, lower prices for salt than it gave to smaller buyers such as grocery stores. The Supreme Court rejected the argument that the grocery stores were not harmed because salt is such a small item, and held that the Act must be applied separately to every line of commerce where competition actually occurs. The Court held, in other words, that it is no defense to harming competition for salt sales that the victim can still compete freely for sales of many other commodities.

That holding makes perfect sense, but it has nothing to do with this case. Sodexo does not resell Michael Foods products individually, and "competes" with Feesers (if at all) *only* at the point that a customer is considering whether to switch from self-operation to outsourced management, or vice versa. The statutory question is whether there is a "reasonable possibility" that any disparity in Michael Foods' pricing could affect *that* competition. The undisputed evidence shows that Michael Foods products represent a trivial share of any institution's overall

foodservice budget and that any pricing differences on those products does not sway the institution's decision between self-operation and management. Feesers admitted that it has never lost a single dollar in sales to Sodexo because of the price of Michael Foods products, and there is no reasonable possibility that it ever will.

The district court did not genuinely disagree. Instead it concluded that *Morton Salt* required it to ask, hypothetically, whether a disparity in the *aggregate price of all food* could possibly influence institutional decisions. *Morton Salt* requires no such hypothesizing. The district court's misunderstanding caused it to view the price disparities here as "substantial" when in fact they are utterly inconsequential; to presume competitive injury where none exists; and to disregard all of the evidence actually bearing on the rebuttal question this Court posed for remand—whether "the price discrimination [on Michael Foods products] . . . cause[s] foodservice facilities to decide to buy food from Sodexo rather than Feesers." 498 F.3d at 216.

II. The district court also misunderstood the requirements of the Act's "meeting competition" defense. Michael Foods' good faith is essentially undisputed here. Its principal negotiator, whom the district court expressly found to be credible and candid, and who had a long and trustworthy relationship with Sodexo, testified consistently that Sodexo told her that Michael Foods would lose

the contracts to other competitors unless it did more; that, in response to her specific inquiries about what Michael Foods needed to do to meet that competition, Sodexo provided a list of specific requirements; and that she had credible independent reasons to believe that Sodexo was telling the truth. The Supreme Court held in *A&P* that nearly identical facts constitute a good faith effort to meet competition as a matter of law.

The district court reasoned that good faith is inherently incompatible with uncertainty, and that the meeting competition defense must be interpreted narrowly in order to give maximum effect to what the court called "the primary purpose of the Robinson-Patman Act, which is to prevent large buyers from utilizing their purchasing power to secure lower prices than their smaller competitors." A77. That is not the law, and the district court's miserly approach to the meeting competition defense is inconsistent with the interpretive principles outlined in *A&P*, *Volvo*, and *Toledo Mack*.

III. The court compounded these errors when it held Michael Foods in contempt for suspending sales to Feesers—an option the statute specifically authorizes, and that was not inconsistent with the court's initial injunction—and then, as punishment, enjoined Michael Foods from refusing to sell to Feesers. To our knowledge, no court in the history of the Act has ever issued such a remarkable and overbroad injunction.

## ARGUMENT

### I. STANDARD OF REVIEW OF FINAL JUDGMENT

On appeal from a final judgment following a bench trial, this Court exercises plenary review over the district court's conclusions of law and reviews findings of fact for clear error. *Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 236 (3d Cir. 2006). The historical facts are not meaningfully disputed; the issues on appeal principally concern the legal consequences of those facts under the "oft-questioned" RPA that both the Supreme Court and this Court have held must be "narrowly construed." *Toledo Mack*, 530 F.3d at 228 & n.17 (citing *Volvo*, 546 U.S. at 180-81).

### II. THERE IS NO REASONABLE POSSIBILITY OF COMPETITIVE HARM

The district court recognized the enormous differences in the products and services provided by Feesers and Sodexo, but nonetheless held that they "compete" in the very limited circumstance where "a customer considers switching from self-op to food service management, or vice versa." A24.[4] Even if the district court's premises are accepted, the highly constrained nature of any "competition" between Feesers and Sodexo must be considered when evaluating whether "the effect of [the] discrimination may be . . . to injure, destroy, or prevent [that] competition,"

[4] Michael Foods adopts in full Sodexo's arguments why Feesers and Sodexo do not actually compete *at all*.

15 U.S.C. §13(a)—an issue that this Court did not resolve in the prior appeal of this case. The district court failed to do so, because of a legal misunderstanding about the Supreme Court's opinion in *Morton Salt*. The *Morton Salt* inference of competitive injury either was not triggered at all, or was effectively rebutted, because there was no evidence that price disparities on Michael Foods products amounted to "substantial" price discrimination (or any meaningful difference at all) at the narrow point of "competition" that the district court found between Feesers and Sodexo. The district court wrongly thought that *Morton Salt* required a focus on the potential effect of *aggregate* food prices, rather than on the trivial differences actually attributable to Michael Foods. Once that misunderstanding is corrected, judgment must be entered for Michael Foods because the price disparities actually at issue here could not possibly have threatened competition.

### A. The District Court Misunderstood *Morton Salt* As Applied To Component Products

Feesers was required to prove that there is a "reasonable possibility that [the] price difference [between Feesers and Sodexo] may harm competition." *Feesers*, 498 F.3d at 212. Since the district court correctly recognized that any competition between Feesers and Sodexo is limited to the stage at which an institution is deciding between self-operating and outsourcing, Feesers was required to prove that the price disparities on Michael Foods products had a reasonable possibility of affecting that fundamental business decision.

The district court believed that the Supreme Court's decision in *Morton Salt* required it to disregard the fact that Sodexo resells Michael Foods products only as part of a huge package of other goods and services. But the Supreme Court's point in *Morton Salt* was that actual lost sales attributable to price discrimination cannot be disregarded just because the victim does a lot of other business. The manufacturer in *Morton Salt* argued that its discriminatory pricing of table salt could not substantially lessen competition between wholesalers or between chain stores and independent grocery stores because salt sales were a very small part of the disfavored purchasers' overall sales. 334 U.S. at 48-49. The Supreme Court rejected that argument, reasoning that "Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock," and that "there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store." *Id.* at 49.

By contrast, the dispute here concerns whether there is any reasonable possibility that Feesers will lose any sales at all because of Michael Foods' pricing. Unlike the wholesalers, grocers and chain stores in *Morton Salt*, Feesers and Sodexo do not compete for resale of thousands of small individual items. The district court recognized that Sodexo sells only one product: foodservice

management. The right analogy would be if Morton Salt had granted favorable prices to a caterer that does not sell salt separately—and that practice had been challenged by a grocery store claiming to have been injured in competition for customers who are deciding whether to hire a caterer or cook for themselves.

When, as here, the plaintiff and defendant compete only for sale of an integrated product or package, courts following *Morton Salt* have refused to infer competitive harm from price disparities relating to a small component or input—even if the disparities on that component are large. One leading case is *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), in which the FTC challenged M-H's pricing of automatic temperature controls used on oil burners. *Id.* at 787. The competition allegedly injured was the competition for the sale of finished oil burners, which have many individual parts. *Id.* at 790. The Seventh Circuit explained that "the fallacy of the Commission's position lies in its analysis of the competitive situation between the various manufacturers." *Id.* at 792. The FTC's order had "refer[red] to manufacturers 'who in fact compete in the sale and distribution of such furnace controls,' as if the controls themselves were the article of merchandise they dealt in instead of the burners of which the controls were only one part." *Id.* The Seventh Circuit explained that "[i]t may be true that if the manufacturers were generally selling controls as such, a differential of two or three dollars in the price they paid for them . . . would necessarily give

rise to a competitive advantage in sale price." *Id.* "But where the controls were used in the manufacture of burners, the cost of which was determined by many other factors . . . it cannot be said that discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so." *Id.*

Subsequent cases have followed *Minneapolis-Honeywell* on that key point. In *Marty's Floor Covering Co. v. Gaf Corp.*, 604 F.2d 266, 270 (4th Cir. 1979), the Fourth Circuit held that discrimination in tile prices could not substantially affect competition between contractors because the "price of tile [was] only a part of the total bid." And in *In re Quaker Oats Co.*, 66 F.T.C. 1131 (1964), the FTC found no competitive injury where there was "no showing that the cost of oat flour is a sufficiently significant element in the price of the finished product to be a cause of adverse competitive effects." *See also Tarr v. Gen. Elec. Co.*, 424 F. Supp. 6 (W.D. Pa. 1976) (appliance manufacturer not liable for price discrimination between home builders and retail stores because builders did not sell just appliances; they sold homes that incorporate appliances).

Like the price of finished oil burners in *Minneapolis-Honeywell*, the price that Sodexo offers an institution to manage its foodservice operations is based on many factors other than the price Sodexo receives on Michael Foods products, not the least of which are the prices that Sodexo is able to obtain from the hundreds of

other manufacturers whose products Sodexo uses.[5] A42; A1244-45, 1290-94(Larner). Unlike even *Minneapolis-Honeywell*, where the controls represented the single largest cost in the finished product, Michael Foods products represent an extremely small percentage of any institution's total food costs, and an even smaller percentage of the total costs of a foodservice operation. A45; *see also* A1242-43(Larner). The district court's focus on *aggregate* food costs essentially punishes Michael Foods for the pricing decisions of hundreds of other manufacturers—companies that are not defendants in this case and whose prices may be perfectly lawful. A41-42; A1244-45, 1290-94(Larner) (admitting that Sodexo's cost advantage over competitors is based on the collective effect of many deviated pricing programs). That reasoning also breaks the connection between a pricing disparity and any actual harm to competition—imposing liability on manufacturers of small components without regard to whether price differences ever affected a single sale of the finished product. But the RPA "does not ban all price differences," only those that actually "threaten[] to injure competition." *Volvo*, 546 U.S. at 176 (internal quotations and citation omitted).

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[5] There is no evidence that any of the discounts that Sodexo receives from other manufacturers are unlawful. A82-83. Feesers tried to introduce evidence concerning three other manufacturers' prices, but the district court properly recognized that Feesers had not sued those companies and that the evidence Feesers proposed to introduce likely would not have been sufficient to demonstrate that their prices were unlawful in any event. A182 (noting concern with Feesers' expert's admission that he had only limited information about these companies).

The district court's misunderstanding of *Morton Salt* infected several different aspects of its analysis. First, since Feesers conceded that it cannot prove any actual lost sales to Sodexo because of Michael Foods' pricing, Feesers attempted to raise a rebuttable inference of competitive harm through proof of "substantial" price discrimination sustained over time. *Morton Salt*, 334 U.S. at 50. The district court concluded that the price differentials it found here were "substantial" by looking at Michael Foods' prices in a vacuum. It should have assessed substantiality in the context of the unique and limited competition that it found between Feesers and Sodexo—which competition never occurs at the level of individual resales of Michael Foods products.

A plaintiff relying on the *Morton Salt* inference must prove that the price discrimination is substantial in the sense that it is "of such magnitude as to affect substantially competition." *Volvo*, 546 U.S. at 180. A mathematically "large" price difference is not enough; "'[o]ther factors such as the duration and type of the differentials and the nature of the industry may transform a discrimination which is substantial in amount into one which is insubstantial in effect.'" *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1538 (3d Cir. 1990) (quoting Von Kalinowski, 5 Antitrust Laws and Trade Regulation §31.01[4] (1989)). Substantiality depends on the *effect* that the price discrimination has on the particular competition at issue. *Compare Serv-a-Portion*, 909 F.2d at 1539 (22-

24% price difference from competing distributors substantial where undisputed "that customer loyalty was compromised at two cents a case"), *with Interstate Cigar Co. v. Sterling Drug Inc.*, 655 F.2d 29, 31 (2d Cir. 1981) (25% discount not substantial because no showing it "would tend to lessen competition substantially"). There must be a "causal relation" between the price discrimination and "reasonably probable substantial lessening of ability to compete on the part of the unfavored customers." *Am. Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963).

Even a 100% difference in the prices paid by Ford and General Motors for car stereo knobs would not be "substantial" in the legally relevant sense, because Ford and GM never compete for the resale of knobs alone. Because of its misunderstanding of *Morton Salt*, the district court here never asked the correct question, which is whether the price difference *on Michael Foods products* was "of such magnitude as to affect substantially" the only competition the court found exists: a customer's decision to switch from self-op to outsourcing, or vice versa. *Volvo*, 546 U.S. at 180.

Second, the district court's misunderstanding also transformed the *Morton Salt* inference into an irrebuttable presumption. The Supreme Court has held that "[i]n the absence of direct evidence of displaced sales, this inference [of competitive injury] may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus., Inc. v.*

*Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (citing F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 182 (1962)). The same treatise the Supreme Court relied on in *Falls City* goes on to explain (*contra* the district court's misunderstanding of *Morton Salt*) that, "if the supplier's price differential concerns a component rather than a resale product, the respective purchasers' divergent operations prior to *their* resale may overcome and outweigh any causal connection between the supplier's prices and *their* competition." Rowe, at 186-87; *id.* at 181 ("the inference of competitive injury from a supplier's price variations is remotest when the price spread . . . concerns a . . . component product"). This Court's prior opinion understood the inquiry perfectly by holding that Michael Foods could rebut the inference with evidence "that the price discrimination [on Michael Foods products] does not cause foodservice facilities to decide to buy food from Sodexo rather than Feesers." 498 F.3d at 216.

The district court instead required Michael Foods to prove that the *aggregate* cost of *all* food products is irrelevant to an institution's decision between self-operating and outsourcing. A46. The court concluded that Michael Foods had not rebutted the *Morton Salt* inference because "*food costs* constitute a significant portion of institutional food service budgets, . . . lower *food costs* were an important part of Sodexho's strategic plan to win and retain customers, and improve profit margin," and "Sodexho touts its lower prices in promotional

material to customers." A63-64 (emphasis added). The district court never found that the cost of *Michael Foods products* are a significant portion of institutions' budgets, that Sodexo touted *Michael Foods* prices to customers, or that lower costs on *Michael Foods products* were important to Sodexo's plan to improve profit margins. The district court's misunderstanding of *Morton Salt* thus caused it to disregard the question this Court posed for remand and to find a reasonable possibility of competitive injury from Michael Foods' pricing without any evidence.

### B. The Undisputed Evidence Confirms That Michael Foods' Prices Create No Reasonable Possibility Of Harm To Competition Between Feesers And Sodexo

When the legal and factual questions are correctly framed, the evidence conclusively demonstrates that the price disparity for Michael Foods products is immaterial to any competition that exists between Feesers and Sodexo. The undisputed facts establish that Feesers proved no price discrimination "substantial" enough to raise an inference of competitive harm under *Morton Salt*, and (for the same reasons) that Michael Foods carried any burden of proof it had to rebut such an inference.

#### 1. Feesers Could Obtain Sodexo-Level Pricing From Michael Foods For Almost Any Competitive Matchup With Sodexo

In the vast majority of cases where Feesers was purportedly competing with Sodexo, Feesers could give institutions the same Michael Foods prices as Sodexo.

Beginning in 2003, Michael Foods offered Feesers the same pricing as Sodexo whenever Feesers and Sodexo were selling or attempting to sell to the same institution. A1697-1701(Westphal). Feesers took advantage of that offer multiple times. A3020, 3023-24(Tighe); A489-94(Tighe); A1702(Westphal); A892-93(States). Thus, for the vast majority (if not all) "competitive" situations between Feesers and Sodexo, Michael Foods product prices could not have been a factor in the institution's decision as a matter of fact or law. *Metro Ford Truck Sales, Inc. v. Ford Motor Co*., 145 F.3d 320, 326 (5th Cir. 1998) ("If the challenged lower price was in fact—and not merely theoretically—made available to the allegedly disfavored purchasers, the seller cannot be held liable under Section 2(a)."); *FLM Collision Parts, Inc. v. Ford Motor Company*, 543 F.2d 1019, 1025 (2d Cir. 1976) (same).

The district court was concerned that there might be occasions when Feesers would not know that Sodexo was soliciting its customers and therefore would not know to ask Michael Foods for Sodexo's price. A38. The district court did not find (and Feesers did not offer) any evidence to suggest that this has ever actually happened in the real world. Presumably such a customer would at least have attempted to solicit a better deal from Feesers before switching the entire structure of its foodservice operations from self-operation to Sodexo. And once Feesers

knew that Sodexo was soliciting that customer, it could ask Michael Foods for Sodexo-matching prices.

Michael Foods respectfully submits that the thief-in-the-night competition hypothesized by the district court is so speculative and unrealistic that this Court should hold that Sodexo's pricing was fully available to Feesers, as a matter of law. *Metro Ford Truck*, 145 F.3d at 326. At a minimum, however, the hypothetical nature of that scenario must be factored into the court's assessment of whether any price disparity is "substantial" or poses a reasonable possibility of competitive harm. In at least the vast majority of competitive encounters between Feesers and Sodexo, *there was no price disparity at all*.

**2. Michael Foods Products Represent A Trivial Share Of An Institution's Foodservice Budget**

The undisputed evidence also showed that eggs and potatoes generally, and Michael Foods products specifically, are a trivial expense in the overall landscape of any institution's foodservice budget.

Feesers' own expert, Dr. Robert Larner, calculated that even assuming (generously) that Michael Foods products could account for up to 2% of an institution's total food costs (food costs being 32% of the total foodservice budget), Michael Foods products would comprise roughly six-tenths of one percent (0.6%) of an institution's total foodservice budget. A1250-51(Larner). Thus even Larner's putative average 68.5% disparity in the pricing of Michael Foods

products[6] would mean a *four-tenths of one percent* (0.4%) savings in an institution's total costs if it changed foodservice operations to purchase Michael Foods products through Sodexo rather than from Feesers. A1251-52(Larner).[7]

Dr. Larner could not testify that there was a "reasonable possibility" that a customer would switch its entire foodservice operation on the basis of such an insignificant savings. A1252(Larner). Feesers did not offer and the district court did not find any other basis on which to conclude that an institution would decide how to structure its foodservice operation based on 0.4% savings.

The unrebutted evidence at trial demonstrated conclusively that institutions do not decide how to structure their foodservice operations based on small differences in raw food costs. The decision involves far more serious considerations than saving 0.4% on eggs and potatoes, including whether to lay off

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[6] Dr. Larner's disparity calculation is, in any event, seriously overstated. He never compared the actual prices that Feesers and Sodexo paid to acquire Michael Foods products. For Feesers' price he used the Michael Foods list price. But it is undisputed that Feesers *never* paid the list price for any Michael Foods products. A1678, 1683(Westphal). Feesers purchased 77% of its Michael Foods products under deviated pricing arrangements (A37), and received product-specific allowances for the remaining 23%. A1675-78(Westphal).

[7] This hypothetical likely overstates the significance of Michael Foods' products to institutional customers. The evidence at trial showed that Michael Foods products represent less than 1 percent of an institution's total raw food budget. *Supra* at 7-8. The district court found that the price of raw food may range from 20 to 50 percent of a facility's foodservice budget. A46. Thus, a 68.5% savings on Michael Foods products represents a total savings of at most 0.3% and as little as 0.1%.

staff, *e.g.*, A2276-77(Gagliardo), or whether to risk the health and welfare of patients and students (and government penalties) if food is not prepared properly or served timely. *E.g.*, A1887-88, 1917-18(Peck). As the district court found during summary judgment, institutions choose Sodexo over Feesers because of "functional differences" between the services they provide. A195; *see also* A2135(Matyas) (Feesers does "not add value to the raw food products. Sodexho takes the raw food products, plans menus, prepares it, serves it, cleans it up afterwards."); A1839(Guarneschelli). Institutions choose foodservice management over self-operation to take advantage of the expertise and comprehensive services that management companies offer. *Supra* at 6.

Indeed, at the time an institution is choosing between self-op and Sodexo it does not know the prices that Sodexo is proposing to charge it for Michael Foods products, or even whether Sodexo intends to use Michael Foods products in any prepared meals. Sodexo does not identify individual food product costs in its proposals, nor does it discuss the costs of individual food items with customers when soliciting their business. A1495-96(Marvin); A810-11, 824(Paulson); A694-95(Paulson). Of the 63 Sodexo proposals that Feesers introduced at trial, not one mentioned specific prices of *any* food products, and none mentions Michael Foods brands at all. A282. Sodexo provides a market basket of specific products on the rare occasion that a customer requests one (A58; A2196-97(Toomey); A832-

33(Paulson)), but Feesers did not introduce any Sodexo market baskets at trial, and no witness had ever seen one that included Michael Foods products. A1513(Marvin); A519(Tighe).

Perhaps the most persuasive evidence that Feesers is in no danger of losing business to Sodexo based on Michael Foods' prices is the fact that it has never happened in nearly a decade, as the district court itself conceded. A81. Where a pricing practice has existed for a substantial time without causing any actual injury, there is no reasonable possibility that the practice will cause injury in the future.

In *DrugMart Pharmacy Corp. v. American Home Products Corp.*, No. 93-cv-5148, 2007 WL 4526618, at *1 (E.D.N.Y. Dec. 20, 2007), the court found that the plaintiffs had not suffered any actual injury from the challenged pricing over ten years. *Id.* at *14. The court refused to grant injunctive relief, because it is not "reasonable to assume that the same practice creates a credible threat of antitrust injury to the [plaintiffs] in the future when it has failed to inflict such injury in the past." *Id.* ("Neither law nor equity favor granting the [plaintiffs] the benefit of such a remote doubt."); *see also Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 n.2 (3d Cir. 1980) ("failure to prove the fact of injury" after 7 years of allegedly unlawful conduct precludes damages and injunctive relief); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 671 n.14 (D.C. Cir. 1977) ("[W]here the programs in question have been in existence long enough for their potential

effects on dealers to manifest themselves, the difference in the two standards [for damages and injunctive relief] is not so consequential.").

Like *DrugMart*, even though Michael Foods has offered the challenged prices to Sodexo for more than a decade (A2438(Wass); A3748), Feesers concedes and the district court found that Feesers has never lost a sale to Sodexo due to Michael Foods' prices. A81-82; A1331-33(Larner); A1129-33(Bowman). Therefore, there is no reasonable possibility of such harm in the future.

Michael Foods proved at trial that real customers have not chosen and would not choose between self-operation and outsourcing based on Michael Foods product prices. This Court finds the live testimony of actual customers "most persuasive." *Serv-a-Portion*, 909 F.2d at 1537. Actual customers testified unanimously that they did not and would not decide whether to self-operate or outsource based on the price of Michael Foods products.[8] *Supra* at 9-10. And Michael Foods systematically demonstrated that not a single one of the 276 customers identified by Feesers as potential subjects of competition between Feesers and Sodexo had ever switched to Sodexo on that basis. *Supra* at 10-11.

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[8] The district court dismissed the significance of this testimony on the ground that many of the witnesses had P&L contracts, rather than management fee contracts, and therefore "were more concerned with the bottom line than with the component price of the services offered by Sodexho." A52. In fact, seven of the eleven witnesses had management fee contracts at some point in time. A50(Jacobs); A51(Gagliardo); A2088-89(Majewski); A1915(Peck); A3321(Bruchak); A2370-71(Levy); A2302(Harris).

## III. THE DISTRICT COURT ERRED IN REJECTING MICHAEL FOODS' MEETING COMPETITION DEFENSE

Section 2(b) of the RPA permits a seller to rebut a prima facie case of price discrimination with evidence showing "that his lower price . . . was made in good faith to meet an equally low price of a competitor." 15 U.S.C. §13(b). "Meeting competition" is an absolute defense to RPA liability. *Falls City*, 460 U.S. at 438.

The Supreme Court has noted that "it is the concept of good faith which lies at the core of the meeting-competition defense." *Gypsum*, 438 U.S. at 454. Thus, "[a] good faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the §2(b) defense." *Id*. at 453. The Supreme Court has expressly rejected the notion that sellers must verify the details of competing offers in order to invoke the defense. *Id.* at 457. Instead, the test for good faith is "flexible and pragmatic, not technical or doctrinal" and depends on "the facts and circumstances of the particular case." *Id*. at 454. "The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *Falls City*, 460 U.S. at 441 (quotations and citation omitted). Courts have identified several factors that may provide evidence of good faith, including the seller's past experience with the buyer, the buyer's rejection of the seller's initial proposal, the buyer's demand for improved terms, threats by the buyer to switch its business to a competitor, and the reasonableness

of the discount in terms of available market data. *Gypsum*, 438 U.S. at 454; *A&P*, 440 U.S. at 82.

### A. The Supreme Court Has Held That Materially Indistinguishable Facts Establish The Meeting Competition Defense As A Matter Of Law

None of the facts underlying Michael Foods' meeting competition defense is in dispute. The district court made express findings as to many of them and credited the rest by finding Michael Foods' witness "credible and candid." A76. The facts here are nearly identical to the facts on which the Supreme Court found it "virtually inescapable" that a seller had proved the meeting competition defense as a matter of law. *A&P*, 440 U.S. at 84.

*A&P* involved a bid by a seller, Borden, to supply private-label milk to a buyer, A&P. *Id.* at 72. Borden and A&P had a longstanding business relationship. *Id.* After receiving Borden's first bid, A&P solicited other bids. *Id.* at 83. A&P then contacted Borden and said "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ballpark." *Id.* Borden asked for "some details" about the competitive offer, but A&P would not give any details except to say that "a $50,000 improvement on Borden's bid 'would not be a drop in the bucket.'" *Id.* Borden then responded with a much lower bid, which (unbeknownst to Borden) was substantially lower than the competing offer.

The FTC and Second Circuit had not reached the "meeting competition" issue, so there were no actual findings in the case that Borden acted in good faith to meet competition. Nonetheless, the Supreme Court saw no need for a remand because it concluded that Borden "quite clearly did" satisfy the requirements of the defense. *Id.* at 82. The Supreme Court held that, in light of Borden's "established business relationship" with A&P, Borden "could justifiably conclude that A&P's statements were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with [A&P]." *Id.* at 84. The Court held that Borden acted in good faith even though Borden could not ascertain the details of the competing bid. Borden had asked for more details but A&P refused, and Borden could not ask its competitor to verify its bid without risking Sherman Act liability. *Id.* The Court thought it "virtually inescapable" that Borden acted in good faith by greatly increasing its discount when it was "[f]aced with a substantial loss of business and unable to find out the precise details of the competing bid." *Id.*

The undisputed facts in this case are not meaningfully different from *A&P*. The district court found Michael Foods' negotiator, Vicky Wass, to be "a credible and candid witness" (A76), and found that each time Wass made a price concession to Sodexo she believed that she was doing so to "match[] an offer Sodexho had received from a competitor." A68, 76.

Like Borden with A&P, Michael Foods had an "excellent," "long standing and long term" business relationship with Sodexo. A2416(Wass); *A&P*, 440 U.S. at 84; *see also Gypsum*, 438 U.S. at 454 (seller's past experience with buyer evidences good faith). Wass had dealt with Sodexo since the "early '90's" (A2415-16(Wass)), and she knew them to be "trustworthy, very up front, very professional." A2424(Wass). In all her prior dealings with them, she had never discovered that Sodexo had been untruthful in any negotiation. A2425(Wass).

As the district court acknowledged, Wass negotiated the 1999 egg contract in a "competitive situation." A67. Sodexo rejected Michael Foods' initial offer and said "you've got to do better" and "I need a better price." A68. Though Wass knew that Sodexo would not give her the specific prices being offered by the competition, she had multiple conversations with Sodexo about the "scope" of those prices; Sodexo told her "essentially, where [she] had to be," and Michael Foods made concessions accordingly. *Id.* The district court concluded that Michael Foods did not establish a meeting competition defense for these negotiations principally because Sodexo had not mentioned a specific competitor by name. A67. However, in *A&P*, A&P never told Borden the name of a specific competitor either. 440 U.S. at 83; *see also, e.g., Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 47 (7th Cir. 1992) (affirming summary judgment where seller merely told buyer that requested concession was not "overly

competitive"). Thus, even if Michael Foods' 1999 negotiations were somehow relevant to an injunction that Feesers sought more than a decade later, *cf. DrugMart*, 2007 WL 4526618, at *14, Michael Foods clearly had a meeting competition defense for those prices.

Sodexo and Michael Foods subsequently negotiated an extension of the 1999 egg contract and a potato contract. In November 2001, Sodexo informed Michael Foods that its primary competitor, Sunny Fresh, was offering greater price concessions on egg products than Michael Foods, and that Sodexo would switch to Sunny Fresh if Michael Foods did not improve its offer. A70, 74; A2426-27(Wass); A4759. Sodexo also informed Michael Foods that it would not obtain the potato contract if it did not agree to Sodexo's terms. A4759; A2456-57(Wass); A1563(Wass). Michael Foods knew that it was competing against its primary competitor on potato products, Reser's, because Reser's was the incumbent supplier. A2456-57, 2418-19(Wass). *A&P*, 440 U.S. at 84; *Gypsum*, 438 U.S. at 454 (buyer's rejection of seller's initial proposal, demand for improvement in seller's bid, and threats to switch business to competitor all evidence seller's good faith).

Like Borden in *A&P*, Wass pressed Sodexo for details, asking her counterpart at Sodexo "how close [Michael Foods] needed to be . . . in order to meet the competition." A71; A2428(Wass) ("I said, Mitch, you know, help me

here. Where do I need to be, you know, to meet this competition?"); A2473(Wass). In response, Sodexo "gave [Michael Foods] the specific areas that [it] needed to change in [its] proposal in order to meet the Sunnyfresh proposal that [Sodexo] had." A2473, 2428-30, 2448(Wass); A4759. Like Borden, Michael Foods could not go to Sunny Fresh or Reser's for verification of the terms of their offers without risking Sherman Act liability for price fixing. So it agreed to Sodexo's terms.

The district court attempted to distinguish *A&P* on two grounds. First, the court concluded that, "unlike the seller in [*A&P*], Michael Foods did not seek additional information to verify Sodexho's claim that Michael Foods' offer was not good enough." A78. But the only thing that Borden did to try to verify the competing offer was to ask A&P for "some details" about it. 440 U.S. at 84. A&P refused to provide any details and said only that "a $50,000 improvement . . . would not be a drop in the bucket." *Id*. Here, Wass asked "how close [Michael Foods] needed to be . . . in order to meet the competition," A71, and Sodexo gave her a list of specific terms. Wass phrased her request in terms of what Michael Foods needed to do instead of asking what the specific terms of the competing offers were, but surely that is a distinction without substance. *Gypsum,* 438 U.S. at 454 (test for good faith is "flexible and pragmatic"). And her inquiry actually elicited far more specific and useful information from Sodexo than Borden's

inquiry in *A&P* did. Wass also testified consistently that she knew there was no chance that Sodexo would ever tell her the specific terms of the competing offers. A70-71, 73; A2420-21(Wass). Good faith does not require negotiators to ask questions that they know will never be answered. *A&P*, 440 U.S. at 74 (buyer's disclosure of competing terms would be "contrary to normal business practice").

Second, the district court attempted to distinguish *A&P* on the ground that Michael Foods did not "inform Sodexho that it was granting the concessions for the purpose of meeting competition, rather than simply to win Sodexho's business." A78. But Wass asked Sodexo's negotiator "Where do I need to be, you know, to meet this competition," A2428(Wass), Sodexo responded with a list of specific items, and Wass agreed to those items. A2473(Wass). Good faith does not require her to restate the obvious. The Supreme Court has explained that there are no "[r]igid rules and inflexible absolutes" in determining good faith under Section 2(b). *Gypsum*, 438 U.S. at 454. The district court found that Wass believed, in good faith, that she was meeting competitive offers when she made the pricing concessions. A68, 76. The availability of the defense cannot turn on whether she said those words out loud to Sodexo.

### B. The District Court Was Wrong To Conclude That The Facts Here Triggered A Heightened Verification Requirement

Despite *A&P*'s holding to the contrary, the district court believed that the law requires a seller to attempt to verify the specific terms and duration of the

competing offer, and that substantial uncertainty about those terms somehow defeats good faith. The court held that:

> in a situation where a seller has limited information about the prices offered by his competitors, the meeting competition defense may be unavailable "since unanswered questions about the reliability of a buyer's representations may well be inconsistent with a good-faith belief that a competing offer had in fact been made."

A66 (quoting *Gypsum*, 438 U.S. at 455-56).

The court misread *Gypsum.* In *Gypsum*, the Supreme Court noted that the meeting competition defense might be unavailable when a seller has "substantial reasons to doubt the accuracy of reports of a competing offer" and is "unable to corroborate [it] in any of the generally accepted ways." 438 U.S. at 456. *Gypsum* actually stands for exactly the opposite of what the district court concluded—unless a seller has substantial reason to doubt the accuracy of the buyer's claim, it "is entitled to make the sale." *Id.* at 454 n.29 (adopting FTC position that seller is entitled to make sale as long as seller "cannot ascertain that the buyer is lying").

Michael Foods did not have substantial reason to doubt the accuracy of what Sodexo claimed. Wass testified consistently that she had a strong foundation for believing that Sodexo was accurately characterizing what Michael Foods needed to do to meet competition. Michael Foods had a longstanding relationship with Sodexo and every reason to believe Sodexo to be trustworthy. And the concessions that Sodexo sought from Michael Foods were consistent with the

pricing that Michael Foods was seeing in the marketplace from Sunny Fresh and other competitors, A2421-22, 2440, 2448-49(Wass). Based on experience with other contracts, Michael Foods knew that Sunny Fresh generally offered lower prices than Michael Foods (A2440) and thus reasonably concluded that "what [Sunny Fresh] was asking was in line with what [Michael Foods] would have expected the competition to be doing with [Sodexo]." A2422(Wass). And because Reser's was Sodexo's incumbent potato provider at the time, Michael Foods had market information about Reser's pricing as well as other market intelligence about the prices of potato products. A2418-19, 2457, 2410, 2433-34, 2449-50, 2473-74(Wass); A74. *Gypsum,* 438 U.S. at 454 (evaluating reasonableness of discount in terms of available market data evidences good faith); *Reserve Supply*, 971 F.2d at 48 (good faith established where seller evaluated offer in light of market conditions, even though seller obtained no independent verification of competitive offer).

The district court's reliance on the pre-*A&P* decisions in *Viviano Macaroni Co. v. FTC*, 411 F.2d 255 (3d Cir. 1969), and *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), to support its conclusion that Michael Foods did not do enough to verify Sodexo's prices is misplaced. Neither of those cases held that investigation or verification of specific terms are required to establish good faith in

all circumstances. To the contrary, both cases involved sellers with specific reasons to doubt, or no reason to know, the reliability or character of the informant.

In *Staley*, the Court stated that the seller offered the lower prices "in circumstances which strongly suggested that the buyers' claims were without merit." 324 U.S. at 759. Moreover, the seller offered no evidence to show that it had any reason to trust the information that it received or the reliability of the informant. *Id.*

In *Viviano*, the seller had no prior experience with the buyer. 411 F.2d at 257. In these circumstances, relying on *Staley*, this Court found it problematic that the seller had done nothing to investigate or verify the reliability of the buyer. *Id.* at 259. Moreover, the lower court rejected much of the seller's testimony as not credible. *Id.* at 258.

The facts of *Viviano* and *Staley* stand in stark contrast to those here and in *A&P*, where the parties had longstanding and trustworthy business relationships. *A&P*, 440 U.S. at 84; A2424(Wass). And here, unlike *Viviano*, the district court expressly found Wass to be credible. A76. *A&P* rejected the *Staley*/*Viviano* rule in circumstances where the reliability of the buyer was not in question, 440 U.S. at 84 n.17, and other courts have followed that distinction. *E.g.*, *Reserve Supply*, 971 F.2d at 46-47 (no independent verification obligation for long-time customer "whose representations would [not] normally create suspicion"). Regardless, even

where the seller has "vague, generalized doubts about the reliability of . . . the buyer" the Supreme Court has made clear that good faith could be established by "evidence that a seller had received reports of similar discounts from other customers, . . . or was threatened with a termination of purchases if the discount were not met," *Gypsum*, 438 U.S. at 455, all of which were true here.

The district court believed that Wass "simply did not have enough information . . . to craft an offer calculated in good faith to meet, and not beat Michael Foods' competition" because she knew only that "(1) Sodexho's demands for lower prices were in line with what Wass expected her competitors could deliver; and (2) Sodexho is a very attractive customer likely to receive other offers from Michael Foods' competitors due to its large purchasing volume." A76. Wass knew more than Borden knew in *A&P*, and—in the absence of specific reasons to doubt the buyer's credibility—good faith requires nothing more. The district court noted that it would be in Sodexo's interests to elicit an offer from Michael Foods beating, not just meeting, the competition. But of course that is always true, and was true in *A&P*.

The district court's principal concern seemed to be a perception that sellers will frequently know what Wass knew when selling to large buyers, and that widespread recognition of the meeting competition defense in such circumstances "would be contrary to the primary purpose of the Robinson-Patman Act, which is

to prevent large buyers from utilizing their purchasing power to secure lower prices than their smaller competitors." A77. But the meeting competition defense was always intended to "temper[] the §2(a) prohibition of price discrimination" by ensuring that Section 2(a) does not "abolish competition or so radically . . . curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Gypsum*, 438 U.S. at 450. The Act's purpose is not thwarted by respecting the limits that Congress placed on it, particularly when those limits are essential to preventing serious conflict between the RPA and the rest of the antitrust laws—which, of course, strongly *favor* non-predatory price discounting. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."). The meeting competition defense is "the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers." *A&P*, 440 U.S. at 83 n.16. The district court's inclination to interpret the meeting competition defense narrowly, and the Act's proscriptions against discounting expansively, is directly contrary to the interpretive guidance provided by the Supreme Court in *A&P* and *Volvo*, and by this Court in *Toledo Mack*.

## IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REQUIRING SALES TO FEESERS

If the Court vacates the judgment in favor of Feesers, it must also vacate the district court's May 26, 2009 order finding Michael Foods in contempt and granting Feesers a permanent mandatory injunction. A civil contempt citation must be vacated where the underlying order on which it is based is found to be invalid. *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 910 (3d Cir. 1975).

Even if this Court affirms the judgment, it should still vacate the May 26 Order and permanent injunction. This Court reviews for abuse of discretion a contempt order and permanent injunction. *Freethought Society v. Chester County*, 334 F.3d 247, 255-56 (3d Cir. 2003); *Chao v. Community Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007). "[S]ince an abuse of discretion exists where a decision rests upon an erroneous conclusion of law," this Court has "plenary review over the District Court's underlying legal conclusions." *Freethought*, 334 F.3d at 255-56; *see also Chao*, 474 F.3d at 88 (vacating contempt order where court erred as a matter of law). Because the contempt order and permanent injunction are based on erroneous interpretations of the RPA and Section 16 of the Clayton Act, the district court abused its discretion by holding Michael Foods in contempt and issuing a permanent mandatory injunction.

### A. Michael Foods' Suspension Of Sales To Feesers Was Not A Contempt Of The April 27 Order

The district court issued its mandatory injunction supposedly as a remedy for its finding that Michael Foods was in contempt of its April 27 Order. A84. But contempt requires a holding that a party has violated the plain terms of an order. *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971). The April 27 Order merely enjoined Michael Foods "from discriminating unlawfully in price in favor of Sodexho and against Feesers." A84. The plain language of the April 27 Order does *not* require that Michael Foods sell products to Feesers. *Id.*; *Cf. Pacific Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1118 (2009) (duty to deal permissible only in "rare instances").

This Court has held that price discrimination requires "at least two contemporary sales of the same commodity at different prices to two different purchasers." *Toledo Mack*, 530 F.3d at 228; *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939) (same). Since the suspension of sales to Feesers leaves only one direct sale by Michael Foods (to Sysco at a Sodexo-negotiated price), the suspension complied with the injunction to cease discriminating in price against Feesers. *L&L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1121 (5th Cir. 1982) (no violation of the RPA from a refusal to deal because RPA requires two sales).

The district court acknowledged that the RPA does not give Feesers a substantive right to demand that Michael Foods continue to sell products to Feesers. A98-99. Nevertheless, the court concluded that it had the general equitable power to require Michael Foods to sell products to Feesers. The RPA expressly provides that "nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. §13(a).[9] Courts have universally held that this proviso shields a manufacturer from liability for price discrimination when it refuses to deal with a disfavored buyer. *B-S Steel of Kansas Inc. v. Texas Inds., Inc.*, 439 F.3d 653, 669 (10th Cir. 2006) (plaintiff could not obtain injunction after termination because "'a refusal to deal' simply does not fall within the proscription[s]" of the RPA); *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1022 (2d Cir. 1989) (terminated distributor could not maintain action under RPA; "[s]ince [defendant] is no longer selling to [plaintiffs], as is its right, there is no danger that it will sell to them on discriminatory terms in violation [of the RPA]"). The

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[9] The RPA protects a refusal to deal unless it is "in restraint of trade." 15 U.S.C. §13(a). "'[R]estraint of trade' has a very specific meaning in the context of antitrust laws;" it is "actions accompanied by an unlawful agreement within the meaning of §1 of the Sherman Act, [or] actions conceived with a monopolistic purpose within the meaning of §2 of the Sherman Act." *L&L Oil*, 674 F.2d at 1120 n.8. Feesers and the district court agree that Michael Foods' suspension of sales to Feesers was not in restraint of trade. A98 n.6.

district court cannot use its "general equitable power" to expand the substantive requirements of the statute in a manner plainly inconsistent with Congress's intent.

In *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 870 (2d Cir. 1962), the FTC obtained an injunction that (like this one) barred the defendant from discriminating in price among its customers. Two customers alleged price discrimination under the RPA, and the defendant-manufacturer terminated them. The court refused to compel the defendant-manufacturer to resume sales, holding that the RPA imposed no obligation on the defendant to deal with plaintiffs despite the FTC decree. *Id.* The district court here brushed away the holding in *House of Materials* on the ground that plaintiffs there had no contractual right to continue the purchasing relationship. But neither does Feesers here, as the court recognized. A91. *House of Materials* is therefore dispositive: In the face of an injunction prohibiting price discrimination against the plaintiff, the manufacturer is entitled under the RPA, and the terms of the injunction, to cease sales to the disfavored purchaser.

### B. The District Court Did Not Articulate Any Other Valid Basis For Contempt

Having acknowledged that it could not hold Michael Foods in contempt for refusing to deal with Feesers, the district court held Michael Foods in contempt for what it termed Michael Foods' "continued dealings with Feesers in defiance of the order." A95. First, the district court concluded that Michael Foods is "indirectly"

discriminating against Feesers (which the court mischaracterized as "tertiary line" discrimination) because, when Feesers chooses to buy Michael Foods products from other distributors, it pays a price higher than Sodexo's negotiated price. A93-94. Second, the district court held that Michael Foods' offer to sell to Feesers at its historic prices, if it would agree to stay the injunction pending appeal, was extortion and constituted contempt. A93. Neither theory supports a finding of contempt.

### 1. There Is No Tertiary-Line Price Discrimination Against Feesers

The district court's ruling that Michael Foods engaged in tertiary-line discrimination because Feesers chose to buy Michael Foods products indirectly from third parties at prices higher than the Sodexo prices is wrong as a matter of law. As Feesers conceded and the district court held, Feesers cannot maintain a tertiary-line injury claim against Michael Foods based on its purchases from third parties, because only direct purchasers can maintain such a claim. A94-95. "[A]n individual can have no cause of action under [the RPA] unless he is an actual purchaser from the person charged with discrimination." *Klein v. Lionel Corp.*, 237 F.2d 13, 15 (3d Cir. 1956).

The court misapplied the doctrine of tertiary harm under the RPA to find that Michael Foods "inserted an additional link" in the chain of distribution when Feesers chose to buy Michael Foods products from another distributor. Then,

building on its error, the court miscast Michael Foods' direct sales to the other distributor as a direct sale to Feesers.

The court cited *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969) in support of its view that an additional link in the chain does not insulate a manufacturer from a tertiary-line price discrimination claim. However, the court completely misapplied *Perkins* to this case. Perkins was the direct-purchasing wholesale customer of the defendant seller. *Id.* at 644. The seller sold gasoline to another wholesaler at a price lower than the seller afforded to Perkins. *Id.* at 644-45. The favored wholesaler then resold the gas to a partially owed subsidiary, which resold it to gas stations that competed with Perkins' own retail gas stations. *Id.* The Supreme Court did not apply the concept of tertiary liability to replace the RPA's essential element of two direct sales by the same seller. Rather, finding no competitive harm from the price discrimination at the wholesale (secondary sales) level, the Supreme Court looked for competitive harm at the retail (tertiary sales) level. *Perkins* does not hold that a seller violates the RPA if an indirect customer, like Feesers, buys goods at a higher price than the seller offers to its direct customers.

Feesers' theory makes no sense, and would expand liability under the RPA beyond all manageable limits. Every seller adds a markup when it resells goods, and Michael Foods does not control what purchasers do with its products once

those products leave Michael Foods' control. Michael Foods cannot be responsible for the fact that Feesers unilaterally went out and found someone from whom it could purchase Michael Foods products at a higher price than Sodexo pays.

Moreover, the district court's circular reasoning that, "[e]ven if Feesers lacks standing to initiate a suit against Michael Foods for tertiary price discrimination, Feesers has standing to enforce [the April 27 Order]" (A95) is unavailing. Feesers can only "enforce" provisions that the April 27 Order actually contains. Everyone agrees that the April 27 Order only prohibits price discrimination "against Feesers" (A84) and that the purported tertiary-line discrimination is not *against Feesers*.

### 2. Michael Foods' Offer To Sell To Feesers If Feesers Would Agree To A Stay Of The Injunction Was Not Contempt

The district court also wrongly held that Michael Foods "disobeyed" the court's April 27 Order by "requiring" Feesers to accept its historic prices as a condition of continued sales pending appeal, and that Michael Foods' suggestion that the parties jointly seek a stay of the injunction was somehow "extortion." A93.

Michael Foods had the express statutory right to comply with the district court's order by suspending sales to Feesers. Michael Foods offered to forgo its statutory right to refuse to deal with Feesers if Feesers would agree to a stay of the court's injunction pending appeal. A306, 309-10, 260. The district court held that

merely making that offer was contempt. But it is common to negotiate a stay pending appeal, and even if Feesers had accepted the offer, the agreement would have been meaningless without the district court's express approval, because parties cannot effect a stay of an injunction by their own agreement. Fed. R. Civ. P. 62. The mere fact that Michael Foods proposed a process that would have required court approval establishes that it was not trying to "extort" anything from Feesers. Further, the exercise of rights (and offers to forgo them for consideration) are not extortion, as a matter of law. *Brokerage Concepts v. United States Healthcare*, 140 F.3d 494, 524 (3d Cir. 1998).

### C. Section 16 Of The Clayton Act Does Not Give The District Court Independent Authority To Force Sales To Feesers

#### 1. A Court's Ability To Craft Injunctions Under Section 16 Must Be Based On Its Finding Of An Antitrust Violation

The district court concluded that, despite the fact that it could not require Michael Foods to sell to Feesers under the RPA, it had the power to do so under Section 16 of the Clayton Act as a remedy for contempt. The court held that the RPA proviso preserving a manufacturer's right to choose its customers was merely "a limitation on liability ... rather than a restriction on the available remedies under Section 16 of the Clayton Act for violation of the Robinson-Patman Act." A98. But the Clayton Act does not give the district court power to enjoin conduct that does not violate the RPA. Section 16 merely allows courts to issue injunctions to

protect against "threatened loss or damage *by a violation of the antitrust laws*." 15 U.S.C. §26 (emphasis added).

The court's own conclusion that Michael Foods did not violate the RPA by refusing to deal with Feesers means that the May 26 Order is an abuse of discretion because it does not remedy any "violation of the antitrust laws." Further, no other court has ever ordered an RPA defendant to deal with a purchaser, under Section 16 or otherwise.

Indeed, all of the cases upon which the district court relied to support the May 26 Order involved injunctions that remedied a restraint of trade under Section 1 or 2 of the Sherman Act. For example, in *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980), the plaintiff claimed that the defendant terminated it for refusing to participate in a price-fixing conspiracy. *Id.* at 480. The court approved an order requiring the defendant to deal with the plaintiff because the termination itself would otherwise further the underlying conspiracy. *Id.* at 485. Here, in contrast, suspending sales to Feesers does not further a Sherman Act or an RPA violation; indeed, it *eliminates* the possibility of an RPA violation.

The court also relied on this Court's opinion in *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962), to support its view that it has the equitable power, untethered to an antitrust violation, to require Michael Foods to

deal with Feesers. In *Bergen*, plaintiff sued for "discriminatory dealing and monopolizing and attempting to monopolize." *Id.* at 727. The manufacturer terminated the plaintiff, who then moved for a *preliminary* injunction. This Court required the defendant to continue to deal with the plaintiff during the litigation because the refusal to deal would "further the monopoly which plaintiff alleges defendant is attempting to bring about." *Id.* Thus *Bergen* simply holds that a court may enjoin a termination where it would further a restraint of trade. The district court acknowledged that there is no restraint of trade here. A98 n.6.

### 2. The Court's Conclusion That Michael Foods' Suspension Of Sales Was Not "Bona Fide" Is Wrong As A Matter Of Law

Finally, the district court held that, even if it were to accept Michael Foods' argument that the RPA proviso limited its equitable powers under Section 16, the proviso was inapplicable because the statute requires such transactions to be "bona fide." A98. The court concluded that Michael Foods' "sole reason" for the suspension of sales was to "keep its discriminatory pricing arrangements intact" and thus its reason "could not be considered bona fide." *Id.*

The court's interpretation that a refusal to deal is not "bona fide" if it is motivated by a desire to terminate a disfavored purchaser is contrary to the holding, reached by every other court that has considered the issue, that manufacturers may terminate customers to avoid, or even in retaliation for, RPA

claims. As one court said, the fact that a defendant can avoid the RPA by terminating the disfavored purchaser is "the nature" of the Act. *B-S Steel*, 439 F.3d at 669. Defendants in RPA cases routinely terminate plaintiffs that sue them and courts universally hold such actions proper. *E.g.*, *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 890 (9th Cir. 1982) (refusal to deal after settlement of RPA suit is not unlawful absent proof that it furthered conspiracy or monopoly); *High-Tech Communications, Inc. v. Panasonic Co.*, No. 94-1477, 1995 WL 65133, at *2 (E.D. La. Feb. 15, 1995) (manufacturer may terminate plaintiff for "dual purpose of retaliating against the plaintiff for commencing the [RPA] lawsuit and making it financially impossible to prosecute its claims" because termination was not restraint of trade); *House of Materials*, 298 F.2d at 871 (refusal to deal with disfavored plaintiffs not unlawful restraint of trade even if motivated by retaliation for the antitrust lawsuit).

The court's tortured reading of the "bona fide transaction" exception eviscerates the plain meaning of the statute and cannot support use of Section 16 to force Michael Foods to sell to Feesers.

## CONCLUSION

For the foregoing reasons, this Court should (1) reverse the judgment below in its entirety and order that judgment be entered in favor of defendants, and (2) reverse the May 26 Order and vacate the permanent injunction. At a minimum, in the alternative, the Court should remand for further factfinding.

August 7, 2009

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## CERTIFICATION OF BAR MEMBERSHIP

I, Maureen E. Mahoney, certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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## CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

(1) the Brief for Appellant Michael Foods, Inc. complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman font;

(2) the Brief for Appellant Michael Foods, Inc. complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,981 words, excluding those parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated using the word count function on Microsoft Word software;

(3) the text of the electronic and hard copies of the Brief for Appellant Michael Foods, Inc. is identical; and

(4) the electronic copy of the Brief for Appellant Michael Foods, Inc. was scanned for electronic viruses on August 7, 2009 before transmission to this Court using McAfee VirusScan + Anti-Spyware Module 8.0 software and no viruses were detected.

Dated: August 7, 2009

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## CERTIFICATE OF SERVICE

I, Maureen E. Mahoney, certify that on August 7, 2009, I caused a copy of this Brief for Appellant Michael Foods, Inc. and Joint Appendix Volume I (Pages A1-A122) to be filed with the Clerk of Court using the CM/ECF system, and to be served via Federal Express on the following counsel of record:

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