Nos. 09-2548 & 09-2952

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

REPLY BRIEF FOR APPELLANT MICHAEL FOODS, INC.

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INTRODUCTION

Feesers' brief attempts to evade the central issues in this case by consistently overstating what this Court held in the prior appeal, what the district court determined on remand, and the degree to which the district court's determinations constituted findings of fact rather than mixed questions of law and fact.[1] This Court *did not* hold that evidence or arguments presented by Feesers conclusively established the *Morton Salt* inference of competitive injury; if that were true, there would have been no need to remand this case for a trial. And not once in Feesers' 85-page brief does it acknowledge the limited and highly constrained nature of the competition that the district court found. Feesers pretends that the district court found that it and Sodexo compete for the resale of hundreds of individual food products, and that Sodexo competes by selling food separate from its management services. F32.[2] The district court actually found that Feesers and Sodexo compete only "when a customer considers switching from self-op to food service management, or vice versa," A24, and that "Sodexho only sells food to managed institutions in conjunction with its food management services," A9.

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[1] This Court's "review of issues of pure law, or mixed questions of law and fact, is plenary." *Jones v. Chemetron Corp.*, 212 F.3d 199, 204-205 (3d Cir. 2000).

[2] "A_" refers to the parties' Joint Appendix. "F_" refers to Feesers' brief. "M_" refers to Michael Foods' opening brief.

Feesers' argument (like the district court's own reasoning) rests entirely on the proposition of law that under *Morton Salt* the actual nature of the competition between these companies must be ignored, and this Court must instead consider the competitive impact of hypothetical *separate* sales of Michael Foods products by Sodexo, even though such sales never occur. *Morton Salt* requires no such counterfactual gymnastics. It involved an industry (the grocery business) where the parties *did* compete for resales of thousands of individual items, separately. In cases involving sales of finished goods or packages, where individual components *are not* sold separately, the courts have recognized that the *Morton Salt* analysis should be directed at the competition that actually occurs. *See, e.g., Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951). Feesers has no persuasive response. It pretends that those cases apply only to manufactured goods, but one of the cases it cites involved the provision of services using component products—just like this case. *Marty's Floor Covering Co. v. GAF Corp.*, 604 F.2d 266, 270 (4th Cir. 1979).

On the meeting competition defense, Feesers reads this Court's opinion in *Viviano Macaroni Co. v. FTC*, 411 F.2d 255 (3d Cir. 1969), as establishing a stringent duty to verify the terms and duration of a competing offer. That is a poor reading of *Viviano*, which by its own terms addressed only situations where the seller has serious reasons to doubt the honesty of the buyer's claims. Regardless,

Feesers' expansive verification duty cannot be reconciled with the Supreme Court's opinion ten years later in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979) ("*A&P*"), which held that a seller had a meeting competition defense *as a matter of law* even though it knew less than Michael Foods knew here.

Feesers' attempt to salvage the district court's contempt determination paints a misleading picture of both the facts and the law. The Robinson-Patman Act ("RPA") expressly permits a seller to eliminate any price discrimination by ceasing sales to the previously disfavored purchaser. Such action cannot be contempt of an injunction that essentially required Michael Foods to comply with the Act. And it cannot be contempt for Michael Foods to suggest a stay of an injunction pending appeal, when the applicable rules *required* Michael Foods to confer with Feesers before seeking such relief from the district court.

More broadly, Feesers completely ignores the interpretive principles outlined by the Supreme Court in *A&P* and *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180-81 (2006), and by this Court in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 228 & n.17 (3d Cir. 2008). The RPA must be construed narrowly to minimize conflicts with

the broader policies of the antitrust laws. *Id.*; M17.[3] Feesers turns those principles on their head by asking this Court to find substantial harm to competition that does not exist, a duty to engage in "verification" efforts that everyone agrees would be pointless and impossible, and a cognizable contempt in conduct expressly authorized by the statute.

ARGUMENT

I. THE *MORTON SALT* INFERENCE EITHER WAS NOT TRIGGERED, OR WAS SUCCESSFULLY REBUTTED

A. *Morton Salt* Does Not Require This Court To Ignore How Products Are Actually Sold When Assessing Competitive Effects

Feesers suggests that Michael Foods should not be allowed "to reargue that *Morton Salt* does not apply." F30. Of course *Morton Salt* applies here; it is one of the leading Supreme Court RPA cases. The question is what that decision *means* in these particular circumstances.

Feesers does not dispute that *Morton Salt* requires proof that the price difference is "substantial" and that a price difference, no matter how large, is not "substantial" unless it is "of such magnitude as to affect substantially competition." *Volvo*, 546 U.S. at 180. As Michael Foods explained, M21-30, that issue must be

[3] Feesers asserts that the judicial duty to circumscribe the RPA applies only in primary-line cases and "has no application in a secondary or tertiary line price discrimination case." F64 n.19. Feesers is wrong. *Volvo*, *A&P*, and *Toledo Mack* are all secondary-line cases. *See also Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953).

assessed in the context of the competition that actually occurs between the parties. *Morton Salt* involved competition between grocery stores that separately competed for sales of thousands of individual products. The Supreme Court understandably rejected the argument that price discrimination that actually caused the plaintiff to lose sales in a distinct line of commerce (salt) could be ignored simply because the plaintiff was still able to compete for sales of many other products. This case is completely different, because the parties do not compete for sales of individual products. The right analogy would be if the favored purchaser in *Morton Salt* had been a restaurant rather than a retail grocer, and had competed against the plaintiff grocer only when consumers decide whether to cook at home or eat out. In a case like *that*, the right question would be whether the restaurant's price advantage on salt could cause the grocery store to lose *any sales at all*. The answer is surely no, and nothing in the Supreme Court's opinion in *Morton Salt* requires this court to ignore that reality.

Feesers points to a line of cases involving facts nearly identical to *Morton Salt* itself—where the parties competed to sell hundreds of individual items that could each be purchased separately.[4] Michael Foods relies on cases much more

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[4] F50-51 (citing *Boise Cascade Corp.*, 113 F.T.C. 956, 979 (1990) (dealers sold thousands of office products); *United Biscuit Co. v. FTC*, 350 F.2d 615, 622 (7th Cir. 1965) (grocery stores sold more than just defendant's cookies and crackers); *Moog Indus., Inc. v. FTC*, 238 F.2d 43, 51-52 (8th Cir. 1956) (customers handled numerous lines of automobile repair or replacement parts)). Feesers'

closely on point here, addressing how to determine substantiality when the purchaser does not sell the price-discriminated good by itself, but rather sells an integrated product or package that contains that good.[5] M24-25. Those cases recognize that a price difference on one component of a package or finished product is not "substantial," and does not trigger the *Morton Salt* inference, unless it is significant enough to substantially affect competition for the overall bundle. *E.g., Minneapolis-Honeywell*, 191 F.2d at 792.

Feesers argues that its line of cases, involving competition for hundreds of individually sold products, is more apposite than the component-product cases for two reasons. First, Feesers claims that the component-product cases are limited to products that are "merely components of larger manufactured goods," just as a "transistor is a 'component' of a radio," and that those cases do not apply if the products are provided as part of a service package. F51. The case law is not limited in the manner Feesers suggests. Indeed, Feesers cites (*id.*) the Fourth

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reliance on *United Biscuit* is particularly telling, since it was decided by the same court that decided *Minneapolis-Honeywell*—which is far more factually apposite here.

[5] The only case Feesers cites that even resembles a component-part case is *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791 (10th Cir. 1970). F50. There the Tenth Circuit decided whether a case alleging price discrimination on trading stamps given away with purchases of goods was appropriate for class certification. *Gold Strike* strongly supports Michael Foods, not Feesers. The Tenth Circuit cited *Minneapolis-Honeywell* and *Quaker Oats* and held that the plaintiff's claim would fail if it turned out that "the price differential [on the stamps] was de minimis in relation to the overall cost [of the products sold]" because in those circumstances, the price difference "could have had no effect upon competition." *Id.* at 796.

Circuit's decision in *Marty's Floor Covering*, which, just like this case, involved the provision of services using individual product supplies. 604 F.2d at 270. *Marty's* considered a claim by a contractor who included the price-discriminated good (floor tile) as part of a package of installation services. The Fourth Circuit held that competition between contractors was not injured by the price discrimination on floor tile, because "[t]he price of tile is only a part of the total bid." *Id.*

Second, Feesers claims that *Minneapolis-Honeywell* and similar cases are irrelevant because the district court found that "Sodexo offers two distinct functions to its customers: management (performed by Sodexho itself) and distribution and procurement (for which Sodexho subcontracts with distributors)." F32. Feesers implies that the district court found that Sodexo separately sells thousands of individual food products, rather than an integrated package of foodservice management. *Id.* The district court actually found the exact opposite—that "Sodexho only sells food to managed institutions in conjunction with its food management services." A9. There is nothing inconsistent about the district court's findings that Sodexo performs multiple functions for its customers, and that Sodexo sells food only as part of a package of services. The same is true in many of the integrated-product cases—like *Marty's*, where the contractor

procured the tile and other goods and also installed them, but did not sell tile separate from the overall installation package. 604 F.2d at 270.

B. Feesers' Reliance On Law Of The Case And Waiver Is Meritless

Feesers betrays the weakness of its position under the case law by grasping for meritless waiver and "law of the case" arguments.

Feesers claims that this Court held during the first appeal "that the evidence of discrimination in the record was sufficient to apply the *Morton Salt* inference of competitive injury." F3. This Court merely noted that "*if* substantial price discrimination between competing purchasers over time is established [at trial], then the inference of competitive injury arises." *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 216 (3d Cir. 2007); *id.* at 213. This Court never even discussed, much less decided, how the nature of the competition or substantiality of any price discrimination should be assessed. How could it have? It was not until after trial on remand that the district court made its findings about the narrow and limited nature of competition between Feesers and Sodexo. Feesers' "law of the case" arguments (F30) greatly overstate what this Court held, and imply that this Court pointlessly remanded for a trial with a preordained result.

Feesers similarly misstates the burden that this Court imposed on Michael Foods to rebut the inference. Relying on a single phrase taken out of context, Feesers claims that "this Court could not have stated more clearly that to rebut the

Morton Salt inference, Appellants had the burden of proving that institutions switched from Feesers to Sodexho 'for reasons unrelated to Sodexho's lower food prices' generally, and not just the prices of Michael Foods products." F51 (citing *Feesers*, 498 F.3d at 214 n.9). This Court held no such thing.[6]

To the contrary, in the body of the opinion this Court expressly held that Michael Foods could rebut the *Morton Salt* inference with evidence showing that "*the price discrimination* does not cause foodservice facilities to decide to buy food from Sodexho rather than Feesers." *Feesers*, 498 F.3d at 216 (emphasis added). This Court also quoted the Supreme Court's similar holding that "'th[e] inference may be overcome by evidence breaking the causal connection between *a price differential* and lost sales or profits.'" *Id.* (emphasis added) (quoting *Falls*

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[6] What this Court actually said in that footnote was:

> *The threshold question is whether a reasonable factfinder could conclude that Sodexho and Feesers directly compete for resales of Michael Foods products among the same group of customers.* The difference in the character of these two businesses might very well be determinative at the next stage of the analysis discussed below, *namely, in evaluating defendants' evidence that facilities choose to buy from Sodexho rather than Feesers for reasons unrelated to Sodexho's lower food prices*. It may well be found, based on defendants' evidence, that the different character of Sodexho's business, rather than its lower food prices, causes customers to buy food from Sodexho rather than Feesers. If this is the case, then Feesers' claim under the Robinson-Patman Act fails. However, this is not the same as finding that they are not in "actual competition."

Feesers, 498 F.3d at 214 n.9 (emphasis added).

City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435 (1983)). The only "price discrimination" or "price differential" at issue in this case is on Michael Foods products. Thus, this Court held that Michael Foods could rebut the inference by showing that *its* prices do not cause institutions to outsource with Sodexo instead of self-operating and buying from Feesers.

Feesers' claim that Michael Foods has "waived" the right to argue that Sodexo-level prices are functionally available to Feesers in most competitive matchups (F46) is similarly baseless. As the prevailing party on summary judgment, Michael Foods was not required to raise the district court's rejection of its "functional availability" defense in the first appeal in order to preserve the issue for this appeal. *Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-58 (3d Cir. 2007) (argument not waived by failing to raise it during prior appeal because defendants were appellees; appellees are "not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds"); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 385 (3d Cir. 2007) ("[appellees'] failure to raise [an] issue does not waive it").

In any event, for purposes of this appeal, Michael Foods has accepted the district court's speculation that there may have been some competitive matchups where Feesers did not have immediate access to Sodexo-matching prices on Michael Foods products. (These are the hypothetical "thief-in-the-night"

scenarios, where Sodexo attempts to convert a Feesers customer to foodservice management and succeeds before Feesers can even ask Michael Foods for the right to match Sodexo's pricing. M31-32.) Michael Foods' point is that, even if Feesers did not have access to Sodexo-matching prices in all such hypothetical situations, it is still undisputed that Sodexo's prices *were* available to Feesers in the vast majority of competitive encounters between these companies. M30-32. That undisputed reality must be considered when evaluating whether the price discrimination that existed was "substantial," in the sense of substantially affecting the competition between Feesers and Sodexo. Feesers does not, and cannot, deny that *that* issue is properly before this Court.

C. Feesers Failed To Show That The Price Differences Are "Substantial" In The Context Of The Competition The District Court Found

Feesers argues that the price differences here are competitively "substantial" because the district court found that the percentage differences (on Michael Foods products, standing alone) are large. F44-45. Feesers incorrectly claims that Michael Foods "only" contests the district court's substantiality conclusion by claiming that Feesers receives deviated prices on most of its own purchases. F45. To the contrary, Michael Foods explained in detail why any price difference on its products cannot be substantial as a matter of law because there is no reasonable

possibility that it will affect an institution's decision to self-operate or outsource. M26-36.

Feesers does not dispute that the price differences on Michael Foods products amount to *at most* a *four-tenths of one percent* (0.4%) savings in an institution's total costs if it changed foodservice operations to obtain Michael Foods products through Sodexo rather than from Feesers. M32-33. The district court never found that such a minuscule price difference could affect an institution's decision to switch. Feesers nonetheless pretends that it proved that customers in "this industry" will make decisions based on a difference of "two cents" per case or "seven tenths of one percent." F45. But the evidence it cites is referring to the price sensitivity of customers choosing between two *distributors* competing head-to-head for the sale of an identical set of goods. Feesers offered no evidence that there is such price sensitivity at the point when customers are choosing between self-operating and outsourcing to Sodexo.

Feesers' sole support for its claim that "customer loyalty is compromised at two cents a case" is this Court's 1990 opinion in *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1539 (3d Cir. 1990). But *Serv-a-Portion* involved price discrimination between two distributors, competing for the sale of the same individual products (portion-controlled condiment packets) to the same customer. *Id.* at 1526-27. In those circumstances, the parties *agreed* that a customer might

decide between two distributors selling identical goods based on price differences as low as two cents a case. *Id.* at 1539. Those facts have nothing to do with this case, where institutions are not simply deciding between sellers of identical sets of goods, but rather are deciding whether to self-operate or outsource.

Sodexo's supposed "admission" that "seven-tenths of one percent can make a difference" (F45) is irrelevant for the same reason. Feesers is referring to testimony from Sodexo's Mr. Pazzanese that one of the reasons that Sodexo chose to buy products from another distributor, Sysco, instead of from Feesers was because Sysco offered a lower markup on the goods than Feesers, and therefore Sodexo could buy the same set of goods more cheaply from Sysco than it could from Feesers. A2506-07(Pazzanese). Again, small differences can make a difference when *distributors* are competing head to head to sell the same set of goods.

Feesers mischaracterizes these two citations to gloss over the central evidentiary hole in its case. There is *no* evidence that any customer would ever decide how to structure its foodservice operations based on a 0.4% savings. All evidence in the record is to the contrary. M30-36. Feesers' expert admitted that he could have conducted a study to determine the price sensitivity of customers choosing between self-operating and outsourcing—the only relevant price sensitivity issue here—but he did not. A1241-42(Larner). Feesers produced no

other evidence to fill that evidentiary gap. Michael Foods, on the other hand, offered undisputed evidence to show that such a minuscule price difference would not matter to customers at the operative decision-making point, including the testimony of customers who actually made that decision. M9-11, 30-36.

Feesers pretends it proved that Michael Foods products are "extremely important" for many institutional customers (F52), thus implying that small differences in the prices of such products might matter. Feesers asked the district court to make that finding below (A14336, 14340), but the court refused because no evidence supports it. Feesers cites to a handful of self-serving quotes from its own employees that "eggs" and "potatoes" generally are important to some customers. F52. But Michael Foods makes only processed egg products and refrigerated potato products; it does not sell shell eggs or frozen french fries—the two most popular egg and potato products. A1628, 1633-36, 1641(Westphal); A1259, 1261-62(Larner); *cf.* A1130(Bowman) (claiming that "potatoes" in the form of frozen french fries are important to schools). Feesers carefully avoided even *asking* any witness at trial whether Michael Foods products are important to customers. No witness (not even Feesers' own witnesses) testified that Michael Foods' processed egg and refrigerated potato products were important to any

competitive decision, much less the decision to switch between self-operating and outsourcing.[7] Actual customers unanimously testified to the contrary. M9-11, 36.

Feesers' citation to the testimony of Sodexo's Jay Marvin is unhelpful. Marvin expressly testified that eggs are *not* important to Sodexo's customers in terms of the volume of goods that they purchase; he merely agreed with Feesers' attorney's statement that most long-term care facilities are likely to "have an egg choice on their menu" for "health and nutrition" purposes. A1362.

D. Feesers' Claim That A Ruling In Favor Of Michael Foods Would Preclude RPA Claims For The Entire Foodservice Industry Is Unfounded

Feesers argues that, if this Court follows the *Minneapolis-Honeywell* line of cases and recognizes that the price discrimination on Michael Foods products was not substantial enough to affect the competition that the district court found, then "no company in the food distribution industry could ever assert an RPA claim." F50. Of course there are plenty of industries in which the terms of the RPA simply

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[7] Feesers wrongly suggests that the district court found lost sales because it found that some customers switched from using Feesers as their distributor to outsourcing with Sodexo. F54 n.12. The district court did not find that any customer switched from Feesers to Sodexo based on the price of Michael Foods products, and acknowledged that Feesers did not prove any sales lost on that basis. A81-82. Michael Foods affirmatively proved that none of the "hundreds" of customers that Feesers claims switched did so based on the price of Michael Foods products. M10-11.

give it no role to play—such as customized truck sales[8] and all service industries.[9] Feesers implies that the RPA should be read expansively to ensure that it creates a cause of action for every price disparity in the economy, when the actual interpretive presumptions (*see* M17) are directly opposite. Regardless, Feesers' claim is unfounded for several reasons.

First, this case involves only the narrow form of competition the district court found between distributors and foodservice management companies. A ruling in favor of Michael Foods would not, for example, prevent distributors from bringing RPA claims against manufacturers giving more favorable prices to *other distributors.* Feesers successfully brought that type of claim in the *Serv-a-Portion* case.

Second, Feesers' and the district court's theory that Michael Foods should be held liable because the pricing Sodexo receives from hundreds of different manufacturers *in the aggregate* has a substantial effect on competition would punish Michael Foods for the independent pricing decisions of those other manufacturers—decisions that may be perfectly lawful and over which Michael

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[8] *Volvo, supra; Toledo Mack, supra*.

[9] FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 59 (1962) (RPA "come[s] into play only if the challenged discrimination stems from a price in the sale of 'commodities.' Since this commodity concept confines the statute to the sphere of *tangible products*, a wide range of commercial activities remains outside the statutory coverage of price discrimination. Sales of services or intangibles are clearly outside the Act.").

Foods has no control. M26. This Court need not address whether a plaintiff could pursue an RPA case based on a theory of aggregated *unlawful* pricing because Feesers never tried to bring that case. Feesers wrongly suggests (F53) that it was somehow *prevented* from pursuing such a theory when the district court excluded its evidence concerning prices that Sodexo received from *three* of the hundreds of other manufacturers that it uses. But Feesers never claimed or offered to prove that there was anything unlawful about these three manufacturers' prices, or that their products, together with Michael Foods' products, made up a competitively significant percentage of any institution's purchases. *See, e.g.*, Memorandum of Law in Support of Plaintiff Feesers, Inc.'s Motion for Summary Judgment 36-38 (Nov. 17, 2005). Feesers sought to rely on this evidence to prove its Section 2(f) claim against Sodexo by showing that Sodexo knowingly receives lower prices from other manufacturers. *Id.* at 42-43. And the district court properly excluded the evidence because it had concerns with its quality. A182.

II. MICHAEL FOODS ESTABLISHED A MEETING COMPETITION DEFENSE

Feesers tries to distract attention from the district court's misunderstanding of the *law* governing the meeting competition defense, by suggesting that the court's bottom-line conclusion should be reviewed for clear error. F57-58.[10]

[10] Feesers mentions that Michael Foods did not address the meeting competition defense in the context of the 2005 potato supply agreement. F56 n.14.

However, as in *A&P*, the historical facts relevant to the defense are undisputed. The district court *credited* the testimony and subjective good faith of Michael Foods' chief negotiator, Wass, and simply reached the *legal* conclusion that good faith could not be recognized in circumstances like these because the court stressed the perceived policies underlying the RPA rather than the Supreme Court's and this Court's admonitions to construe the RPA narrowly. In *A&P*, the Supreme Court held that the defendant was entitled to a meeting competition defense *as a matter of law*; this Court should do the same here. Once the law is correctly understood, it becomes clear that any adverse factual conclusion embedded in the court's ultimate conclusions was clearly erroneous in light of the court's other findings of historical fact, which are undisputed.

The principal issue for this Court is whether the district court properly held that Michael Foods had a legal obligation to verify the specific terms and duration of the competing offer, and whether uncertainty about those terms precludes good faith as a matter of law. M43-44. Michael Foods demonstrated that the facts concerning verification here are virtually indistinguishable from those in *A&P*. M38-43.

That is because the district court's opinion and injunction are based solely on conduct from 1999 until 2004. A67. Feesers' expert only compared prices from 2000 to 2004. A30. The district court made no findings or conclusions about pricing associated with the 2005 potato contract and therefore it is not a basis for the injunction. A67.

Feesers claims that the facts of *A&P* "bear little resemblance to those here" because Borden told A&P that it had another bid, whereas Sodexo did not say that it had another bid from a specific competitor during the 1999 egg negotiation or the 2002 potato negotiation, and mentioned Sunny Fresh by name only toward the end of the 2002 egg negotiation. F59-60. In *A&P*, however, the buyer never told Borden the name of the specific competitor, 440 U.S. at 83, and in *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 47 (7th Cir. 1992), the buyer merely told the seller that the requested concession was not "overly competitive." With respect to the 1999 egg negotiations, Wass stated (in testimony the district court credited, A76) that, although Michael Foods might not have known the name of the specific competitor, Michael Foods knew it was in a "competitive situation with [a] competitor" (A67) and Michael Foods had multiple conversations with Sodexo about the "scope" of the prices being offered by the competition (A68). With respect to the 2002 potato negotiations, Michael Foods already knew it was competing against Reser's because Reser's was the incumbent. A2456-57, 2418-19(Wass). It is insignificant that Sodexo did not mention Sunny Fresh by name until later in the 2002 egg negotiations. Feesers cannot deny that Michael Foods learned who the competitor was before it actually submitted its winning bid. And Wass testified that based on her experience, she assumed the entire time that Sunny Fresh was pursuing Sodexo's business. A69.

Feesers suggests there was something improper about Michael Foods relying on its past experience with Sodexo and its competitors (F61), but *Gypsum* expressly held that the "seller's past experience with the particular buyer in question" is relevant to establishing good faith where the seller is unable to verify the specific terms of the competing offer. *United States v. United States Gypsum Co.*, 438 U.S. 422, 455 (1978).

Feesers cites no authority to support its claim that Michael Foods had a duty to verify the specific terms of the competing offer under the circumstances here, where the parties had a long and trustworthy relationship and where Michael Foods had no reason to doubt what Sodexo was claiming. M44-45. Feesers insists that *Viviano* requires verification of specific terms in all circumstances. F56, 63. But in *Viviano* this Court stressed that the seller had no experience with the buyer, 411 F.2d at 257, and relied on a prior case that had required verification "in circumstances which strongly suggested that the buyers' claims were without merit," *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746, 759 (1945). The *Viviano* Court also rejected much of the seller's testimony as not credible. 411 F.2d at 258.

To the extent there was ever any ambiguity about whether *Viviano* should be read more broadly to require verification in all instances, *A&P* and *Gypsum* dispelled it. *Gypsum* provided a list of factors a seller can rely on to show good

faith when it is unable to verify the specific terms of the competing offer; most if not all of those factors are present here. 438 U.S. at 454; M40-42. And *A&P* held—in the face of contrary "factual" conclusions by an agency and an appellate court below—that a buyer acted in good faith as a matter of law even though it could not verify the specific terms of the competing bid, because the buyer and seller had an established, trustworthy business relationship. 440 U.S. at 84; M46. In *A&P*, Borden could not possibly have verified the terms that A&P claimed because A&P never told Borden the name of the competitor with the better bid. 444 U.S. at 83.

Feesers acknowledges *Gypsum's* teaching that, unless a seller has substantial reason to doubt the accuracy of a buyer's claim, it is "entitled to make the sale," 438 U.S. at 454 n.29, but asserts without any support that Michael Foods "*should* have doubts about [Sodexo's] reliability." F62. The district court did not find that Michael Foods had any reason to doubt Sodexo, and there is no evidence to support such a conclusion. Feesers is apparently asking this Court to ignore the longstanding relationship between Michael Foods and Sodexo, during which Michael Foods always found Sodexo to be trustworthy (M40), and instead impose a rule that a seller must doubt the reliability of any large buyer in every negotiation simply because it is a large buyer. That suggestion is inconsistent with *A&P* and reflects a fundamental misunderstanding. Both Feesers and the district court

appear to be under the misimpression that making pricing concessions "to win the business of a large and powerful buyer" is inconsistent with making concessions to meet competition. F59, 61; A77. But the large power buyers are the ones most likely to attract competitive offers from sellers and therefore the ones for which sellers will most often need to meet competition.[11] The fact that the meeting competition defense will often be available in such circumstances does not defeat the purposes of the RPA; it effectuates them.

III. FEESERS HAS FAILED TO REBUT MICHAEL FOODS' SHOWING THAT IT WAS NOT IN CONTEMPT OF THE APRIL 27 ORDER

Feesers mischaracterizes the facts underlying the district court's contempt order to divert this Court's attention from the real issue—an unprecedented court order mandating that one company do business with another, even though the RPA expressly allows sellers to eliminate price discrimination by refusing to deal with the disfavored buyer.

A. Michael Foods Did Not "Coerce" Feesers

Feesers' defense of the district court's contempt determination is based largely on a single attorney-to-attorney letter in which Michael Foods announced

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[11] As the Supreme Court said in *Standard Oil Co. v. FTC*, 340 U.S. 231, 249-250 (1951), where "a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors," both "plain language and established practice" allow the seller to meet that competition for its large customer's business.

its decision to suspend sales to Feesers as a method of complying with the district court's injunction against price discrimination. F71; A267. In that letter, Michael Foods offered to continue to sell to Feesers at historic prices if Feesers would agree to a stay of the injunction. A267. Feesers characterizes this routine offer as "extortion" and "coercion" and tries to give this Court the false impression that Michael Foods repeatedly pressured Feesers to agree to accept prices that the district court had said were discriminatory. F71-72, 76. It also asks this Court to conclude that Michael Foods was acting in bad faith when it offered to stipulate to a stay and that "the proper course of action" would have been to file a motion for a stay with the district court. F76.

Under the local rules of the Middle District of Pennsylvania, Michael Foods could not have filed a motion for a stay without first certifying that it had asked Feesers to agree to the relief requested. M.D. Pa. LR 7.20. Moreover, parties cannot effect a stay of an injunction by their own agreement. Fed. R. Civ. P. 62. Thus, even if Feesers had accepted Michael Foods' proposal, the agreement would have been meaningless without the district court's express approval. Surely, asking for Feesers' agreement (as required by court rules) to seek interim relief that could be granted only *by the court itself* cannot constitute contempt or any form of coercion or extortion.

Feesers' allegation that Michael Foods "threatened to halt all deliveries unless Feesers agreed to continue paying discriminatory prices" is completely unfair. F24. *At Feesers' request*, Michael Foods agreed to fill certain orders already pending at the time Michael Foods suspended sales to Feesers, and only after Feesers agreed *not* to use that courtesy against Michael Foods. A306, 260.

Feesers' claim that Michael Foods tried to "coerc[e]" Feesers into agreeing to the stay when it sent letters to customers notifying them of the suspension (F71, 73) is also inaccurate. Michael Foods notified Feesers on May 1, 2009, that it was suspending sales. A259. Later that day, Michael Foods sent letters to four customers notifying them of the suspension and advising them of alternative sources of Michael Foods products. A259-60. In those letters, Michael Foods also expressly acknowledged that the customers may choose to purchase competing products through Feesers. A270. Michael Foods did not send those letters to Feesers, nor was Feesers copied on them, so they could not have been intended to "coerc[e]" Feesers into anything. F71, 73. The letters were intended to notify *Michael Foods'* customers of the changes so they could make any necessary business decisions. A259-60. Feesers did not even become aware of the letters until Michael Foods put them into evidence when opposing Feesers' contempt motion.

B. Feesers Failed To Show That Michael Foods Violated The April 27 Order

Feesers acknowledges that the April 27 order simply prohibits Michael Foods from "discriminating *unlawfully* in favor of Sodexho and against Feesers," (A84 (emphasis added)), but Feesers pretends that the district court gave Michael Foods only three options for complying with this order. F70-71. In fact, the district court merely suggested some ways in which Michael Foods could comply with the order and continue selling to Feesers. A82. The court did not and could not preclude Michael Foods from complying with the order by exercising its statutory right to suspend sales to Feesers.

Feesers cites *United States v. Christie Industries, Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972), for the proposition that parties cannot act so as to continue to achieve "the mischief the injunction seeks to prevent." F75. But the purported mischief that the April 27 order addressed, indeed, the only "mischief" Feesers ever alleged, was Michael Foods' price discrimination *on direct sales* to Feesers. A84. Michael Foods' suspension of sales to Feesers does not effectuate that mischief; it eliminates the possibility of it as a matter of law. M50-52. The district court said as much by acknowledging that a refusal to deal is not a violation of the RPA. A98.

Feesers makes no serious effort to defend the district court's erroneous conclusion that the decision, *by Feesers*, to purchase Michael Foods products from

third parties results in tertiary-line price discrimination *by Michael Foods* "against Feesers." F77; M53-55. Feesers knows that under no case, including *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), could Feesers' purchase of Michael Foods products from others constitute illegal conduct by Michael Foods "against Feesers"—which is the only conduct the injunction prohibits. A84; M53-55. Instead, Feesers claims that Michael Foods attempted to continue the "mischief" prohibited by the April 27 order by "ensuring" that Feesers had to pay higher prices than Sodexo had negotiated if Feesers elected to purchase Michael Foods products from third parties. F75, 78.[12] This theory makes no sense. Michael Foods does not force Feesers to buy its products from third parties, and Feesers could easily offer its customers the numerous substitute products that it carries. A261-62, A272-79.[13] Feesers' unilateral decision to buy from third parties cannot subject Michael Foods to RPA liability, or the statutory right to suspend sales would become meaningless. Every terminated dealer could manufacture an RPA claim by simply going out and purchasing the products from a third party and then

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[12] Michael Foods was aware that Feesers might choose to buy its products from third parties. Thus, to ensure that Feesers could not claim that Michael Foods was replicating a direct buyer-seller relationship with Feesers through those parties, Michael Foods notified certain third parties that it would not honor discounts for their resales to Feesers. A263-64.

[13] At least one of the customers Michael Foods notified chose to continue using Feesers and to switch to substitute products, even though it had been purchasing Michael Foods products for almost 20 years. A262-63.

claiming that the price it paid was higher than the price the manufacturer offered to its direct customers. *Cf. L&L Oil Co. v. Murphy Oil Corp*., 674 F.2d 1113, 1120 (5th Cir. 1982) (rejecting plaintiff's claim that defendant violated RPA by terminating him and forcing him to pay higher prices on the "spot market").

C. Feesers Cites No Authority For Its Claim That The District Court Has Independent Authority To Issue The Permanent Injunction Under Section 16 Of The Clayton Act

Just as it did in response to Michael Foods' stay motion, Feesers devotes far more time to trying to defend the district court's remedial power under Section 16 of the Clayton Act than to establishing any basis on which the court could have held Michael Foods in contempt under the RPA in the first place. F78-85. The district court had no authority to issue an injunction under Section 16 unless it was to remedy "a violation of the antitrust laws." 15 U.S.C. § 26. Because both Feesers and the district court acknowledge that Michael Foods did not violate the RPA by refusing to deal with Feesers (A94), Section 16 did not confer any authority on the district court to issue the mandatory injunction.

No case supports Feesers' and the district court's assertion that Section 16 permits courts to order relief that is inconsistent with the plain terms of the RPA. F79-80. Both rely on inapposite cases involving injunctions that prevented conduct that would otherwise have constituted a restraint of trade under Section 1 or 2 of the Sherman Act. None of those cases involved the RPA, or conduct that

did *not* violate the Sherman Act. *See* cases cited at F79-80. Although Feesers is correct that Section 16 defines the scope of injunctive relief for all antitrust violations, the remedy that a court can issue under Section 16 is limited by the specific underlying antitrust violation. 15 U.S.C. § 26.

Feesers' reliance on *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962), is misplaced for that reason. *Bergen* was a monopolization case, and this Court issued a preliminary injunction requiring the defendant to continue dealing with the plaintiff in order "to maintain the status quo" during the course of the litigation, because the plaintiff had produced uncontroverted evidence that cutting off sales would intimidate necessary witnesses and make it "impossible" to "prosecute the main claim under the antitrust laws." *Id.* at 728. Feesers has never argued that suspension of sales to it would intimidate any witnesses, or otherwise prevent it from prosecuting its claims to judgment. There was no risk of "stifling the main action" here, because the case was over. The district court had already entered judgment in Feesers' favor.

Finally, Feesers misunderstands the meaning of "bona fide" in the statutory proviso. F84-85. Courts have long interpreted the "bona fide" aspect of the proviso merely to exclude from protection a manufacturer's sham transactions. *Great Atl. & Pac. Tea Co. v. Cream of Wheat Co.*, 224 F. 566, 572 n.8 (S.D.N.Y.) (interpreting precursor to RPA), *aff'd*, 227 F. 46 (2d Cir. 1915). The legislative

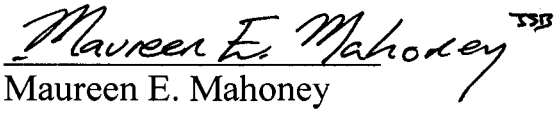
history (F84) is entirely consistent with this long-established interpretation. Feesers has never claimed that Michael Foods engaged in any sham transactions.

CONCLUSION

For the foregoing reasons, and the reasons in defendants' opening briefs, 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.

September 21, 2009

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

(1) the Reply 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 Reply 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 6,943 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 Reply Brief for Appellant Michael Foods, Inc. is identical; and

(4) the electronic copy of the Reply Brief for Appellant Michael Foods, Inc. was scanned for electronic viruses on September 21, 2009 before transmission to this Court using McAfee VirusScan + Anti-Spyware Module 8.0 software and no viruses were detected.

Dated: September 21, 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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