No. ______

IN THE

Supreme Court of the United States

FEESERS, INC.,

Petitioner,

—v.—

MICHAEL FOODS, INC., and SODEXHO, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), a plaintiff in a secondary-line or tertiary-line price discrimination case may establish competitive injury by proving that "a favored competitor received a significant price reduction over a substantial period of time." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177 (2006).

The question presented is:

Whether, in order to support a finding of competitive injury under the Robinson-Patman Act, a plaintiff must also prove that the favored and disfavored purchasers bought the discriminatorily priced products at the exact same moment at which they or their customers competed to resell those products.

CORPORATE DISCLOSURE STATEMENT

Feesers, Inc., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Feesers, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's summary judgment is reported at 498 F.3d 206 (App., *infra*, 1a-33a) and the opinion of the court of appeals reversing the district court's trial verdict is reported at 591 F.3d 191 (App., *infra*, 152a-190a). The district court's judgment and order following trial is reported at 632 F. Supp. 2d 414 (App., *infra*, 34a-140a). The district court's decision and order denying defendants' motions for reconsideration (App., *infra*, 141a-151a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 7, 2010 (App., *infra*, 152a), and denied petitioner's petition for rehearing on March 4, 2010 (App., *infra*, 191a-192a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(a) of the Robinson-Patman Act (RPA or Act), 15 U.S.C. § 13(a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of

> such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and 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: . . . .

STATEMENT

Petitioner, Feesers, Inc., filed a price discrimination lawsuit seeking: (1) a declaration that respondent Michael Foods, Inc., unlawfully discriminated as to price in favor of respondent Sodexho, Inc., and against Feesers, in violation of Section 2(a) of the Robinson-Patman Act, and that Sodexho knowingly induced or received such unlawful price discriminations, in violation of Section 2(f), and (2) injunctive relief against the continuation of that discrimination. Following a ten-day trial, the district court entered judgment in favor of Feesers and issued an injunction against respondents. Respondents moved for reconsideration, but the district court denied the motion. The court of appeals reversed, holding that Feesers and Sodexho "were not competing purchasers" as a matter of law because the competition between Feesers and Sodexho for any specific customer occurred before the exact moment at which Sodexho purchased Michael Foods products at discriminatory prices for resale to that customer (i.e., what the court of appeals called the "timing of the competition" requirement). App., *infra*, 156a-157a, 165a, 178a-179a. The court of appeals held that Feesers therefore could not show that it suffered competitive injury under the RPA, and instructed the district court to enter judgment as a matter of law for respondents. *Id.* at 165a, 178-179a, 190a.

1. This case presents a substantial circuit conflict on an issue that has broad practical implications for all non-retail businesses, including those, like Feesers, in the food distribution industry. The court of appeals' "timing of the competition" requirement amounts to a judicial repeal of the RPA for non-retail businesses, including the food distribution industry. Other circuits have refused to read a "timing of the competition" requirement into the RPA, and have instead consistently analyzed competitive injury for purposes of the RPA in accordance with this Court's decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), which did not include any such timing requirement. This Court, moreover, has consistently applied the *Morton Salt* competitive-injury test for more than sixty years, holding that a plaintiff "*need only prove* that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." *Morton Salt*,

334 U.S. at 45 (emphasis added). The practical effect of the court of appeals' decision is to create a judicial exemption from the RPA for certain industries—an exemption that it is the role of Congress, not the courts, to create.

2. Petitioner Feesers is a broadline distributor of food products, servicing institutional food customers within 200 miles of Harrisburg, Pennsylvania. App., *infra*, 42a. Respondent Sodexho is a food-service management, procurement, and distribution company, and the world's largest purchaser of food. *Id.* at 42a-43a. Sodexho competes with Feesers to procure food products for sale to institutional customers in the same geographic area. *Id.* at 43a-44a. Respondent Michael Foods is the largest supplier of processed eggs and potatoes in the United States. Michael Foods supplies egg and potato products to intermediaries, such as Feesers and Sodexho, for resale to institutional food customers. *Id.* at 42a.

The institutional food-service business involves the sale of food and food-related products and services to institutions such as schools, colleges and universities, and healthcare facilities. App., *infra*, 40a, 43a. Product suppliers, such as Michael Foods, manufacture food products. *Id.* at 42a. Broadline distributors, such as Feesers and Sysco Corporation (a contract distributor for Sodexho), procure and distribute food products sold by product suppliers and resell them to institutional customers. *Id.* at 42a-43a. Food-service management companies, such as Sodexho, provide various services and products to institutional customers, including the same kind of food procurement and distribution services that are provided to institutional customers by broadline distributors like Feesers. *Id.* at 42a-44a, 62a, 86a-87a.

Institutions that serve meals have several competitive options for purchasing food products. They can either perform food management services internally (known as "self-operation" or "self-op") or outsource those functions to a food management company. App., *infra*, 41a. One competitive option is for an institution to have meals prepared and served by its own employees, and to purchase the food products used in those meals from distributors, such as Feesers. *Id.* at 41a, 43a. Distributors generally purchase food products from product suppliers at standard list prices, and deliver and resell those products to the institutions at prices agreed upon by the distributors and their institutional customers. *Id.* at 42a-44a, 67a.

Another competitive option is for institutions to contract with a food management company, such as Sodexho, which provides both food management and food procurement and distribution services to its customers. App., *infra*, 42a-44a. To supply food, Sodexho generally enters into contracts with product suppliers like Michael Foods whereby it procures food at special, highly discounted prices and arranges for its resale and delivery to its institutional customers. *Id.* at 44a.

A third competitive option is a hybrid between the first two: namely, for the institutions to prepare and serve meals themselves while outsourcing the food procurement function to a group purchasing organization ("GPO"). App., *infra*, 44a. GPOs negotiate the prices at which food products are acquired from product suppliers, and then provide such food products to institutions in competition with both food management companies and distributors. *Id.* at 43a-44a, 51a-52a. Sodexho owns and operates its own GPO, Entegra. *Id.* at 56a.

Food management companies and GPOs (such as Sodexho and its Entegra division) do not typically warehouse and deliver products using their own employees, but instead subcontract these functions to chosen distributors. App., *infra*, 62a-63a. Specifically, Sodexho contracts with Sysco to purchase and deliver food products to Sodexho's institutional customers at prices that Sodexho negotiates. *Id.* at 6a-7a, 43a-44a.

Institutional customers sometimes negotiate directly with product suppliers like Michael Foods for lower prices that "deviate" from the standard list prices. *See* App., *infra*, 67a-69a. Distributors resell those products to the institutions at these "deviated" prices plus a distribution fee, and "bill back" to the supplier the difference between the list prices and the deviated prices. *Id.* at 6a, 67a, 71a n.6. Such customer-specific, deviated prices are not discriminatory because they are available to all companies that distribute food products to these customers. *Id.* at 68a-69a.

Michael Foods, however, also negotiated much lower deviated prices with Sodexho, which Sodexho then used to gain a competitive advantage over distributors like Feesers. App., *infra*, 69a, 85a; *see also id.* at 43a-66a. Specifically, Sodexho contracted with product suppliers such as Michael Foods for the purchase of food products at uniquely low prices that were available for resale to all of Sodexho's customers. *Id.* at 6a-7a, 69a, 85a. Michael Foods (and other product suppliers) sell these food products at the special deviated prices to Sodexho's contract distributor, Sysco, which delivers the products to Sodexho's institutional customers. *Id.* Sysco generally invoices Sodexho for the cost of the food at the Sodexho-negotiated, deviated prices plus Sysco's distribution fee, and Sodexho in turn generally bills the cost of the food to its institutional customers. *Id.*

3. In 2004, Feesers filed a price discrimination lawsuit seeking: (1) a declaration that Michael Foods unlawfully discriminated as to price in favor of Sodexho and against Feesers, in violation of Section 2(a) of the Robinson-Patman Act, and that Sodexho knowingly induced or received such unlawful price discriminations, in violation of Section 2(f) of the Act, and (2) injunctive relief against the continuation of that discrimination. App., *infra*, 162a. Feesers alleged that, because Sodexho was able to use its massive purchasing power to extract discriminatory prices from Michael Foods and other suppliers, Feesers was at a severe disadvantage when competing with Sodexho to sell food to institutional customers. *See id.* at 87a.

In 2006, the district court granted summary judgment in favor of respondents. The court determined that Feesers had established three of the four elements of its Section 2(a) claim: (1) Michael Foods sold food products in interstate commerce to two different purchasers, Feesers and Sysco (Sodexho's contract distributor); (2) the products sold were of the same grade and quality; and (3) Michael Foods discriminated as to price against Feesers and in favor of Sodexho. *See* App., *infra*, 9a. The district court concluded, however, that

Feesers could not establish the fourth element of its RPA claim, competitive injury. *See id.* at 11a, 15a-22a.

The court of appeals reversed. It did not disturb the district court's determination that Feesers had established the first three elements of its Section 2(a) claim. App., *infra*, 9a-10a. The court of appeals held, however, that with respect to the fourth element, competitive injury, "[t]he District Court required Feesers to prove too much." *Id.* at 15a. The court reasoned that, in order to establish competitive injury, "Feesers need only prove that (a) it competed with Sodexho to sell food and (b) there was price discrimination over time by Michael Foods." *Id.* (citing *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177 (2006)).

The majority rejected the view of a dissenting judge that Feesers and Sodexho could not be shown to be in competition, as a matter of law, because Sodexho's business is of a "different character" than Feesers'. App., *infra*, 17a n.9. The relevant question, the majority held, "is whether two companies are 'in economic reality acting on the same distribution level,' rather than whether they are both labeled as 'wholesalers' or 'retailers.'" *Id.* at 16a (quoting *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1272 (3d Cir. 1995)). The issue of fact to be determined by the district court at trial, therefore, was whether Feesers and Sodexho "are each directly after the same dollar." *Id.* at 17a.

4. The case proceeded to trial. During the ten-day trial, the district court was presented with extensive evidence, including the testimony of

respondents' executives, Feesers' employees, and ten customers hand-picked by Sodexho; some 11,000 pages of exhibits, including thousands of pages of Sodexho documents; and the unrebutted expert testimony of Feesers' economic expert. *See, e.g.*, App., *infra*, 39a-62a, 67a-85a, 89a-112a. The district court subsequently issued a detailed opinion setting forth the factual basis for its findings that, among other things, (1) Feesers competed with Sodexho to sell Michael Foods products, and (2) there was "stunning" price discrimination over time by Michael Foods in favor of Sodexho and against Feesers. *Id.* at 43a-66a, 67a-88a. As a result, the district court held that Feesers was entitled to the inference of competitive injury established in *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47 (1948). App., *infra*, 88a. The district court also held that respondents had failed to rebut this inference of competitive injury or to prove any affirmative defenses. *Id.* at 89a-132a. The court thus entered judgment in favor of Feesers and issued an injunction. *Id.* at 139a-140a.

Specifically, the district court found that at the heart of the competition between Feesers and Sodexho were Sodexho's continuous efforts to convert self-operated institutions to food-service management and the corresponding efforts by distributors, such as Feesers, to hold on to their self-op customers and to win the business of Sodexho-managed institutions. *See, e.g.*, App., *infra*, 43a-48a. In particular, the court found that:

> when an institution switches from self-op to management, the incumbent distributor is displaced. Conversely when a managed institution switches to self-op, the functions previously performed by a food ser-

> vice management company, including the sale and delivery of food, are once again performed by a distributor. Accordingly, Feesers and Sodexho compete for the same portion of an institution's food service budget.

Id. at 48a.

Moreover, the district court specifically examined the "timing of the competition" and found that "[f]ood service management companies, distributors and GPOs all compete formally and informally for the sale of food to institutions" and that this competition "was ongoing and not limited to the formal RFP [request for proposal] process." App., *infra*, 59a, 66a. The court found that institutional customers sometimes "use the RFP process to gain ideas, but remain" with a distributor, instead of hiring a food management company. *Id.* at 59a. Institutional customers do not always stay with a food management company for long, but rather "use [them] to 'fix' current problems and then return to self-op." *Id.* Sodexho itself had prepared numerous "churn reports" that tracked the back-and-forth competition for institutional customers between food management companies and distributors. *Id.* at 46a-47a.

There was also overwhelming evidence supporting the district court's finding that Michael Foods had engaged in what the district court characterized as "stunning" price discrimination in favor of Sodexho and against Feesers. App., *infra*, 73a; *see id.* at 67a-85a. As the court found, Sodexho used its massive purchasing power to obtain uniquely low prices from suppliers like Michael Foods, which it then expressly promoted when competing for institutional customers with distributors such as Feesers. *Id.* at 102a-112a. This strategy to use its massive purchasing power as a competitive advantage against distributors like Feesers was set forth in numerous Sodexho documents, and was confirmed by the testimony of Sodexho executives. *Id.* at 98a-112a. Michael Foods executives similarly testified that Sodexho, as "the big dog[ ] in contract management and healthcare," used its purchasing leverage to extract the lowest prices and highest rebates from Michael Foods. *Id.* at 128a.

Respondents moved for reconsideration, arguing that the institutional food business is a non-retail "bid market" akin to the markets for customized trucks in *Volvo Trucks*, 546 U.S. 164, and *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008). The district court denied this motion, finding that institutional food distribution is not a "bid market." App., *infra*, 141a-151a. As the court explained, in *Volvo Trucks*, "the losing bidder would never actually purchase the item which was the subject of the competition." *Id.* at 146a. There were thus never two purchasers of the discriminatorily priced products. *Id.* Respondents provided no basis to extend this holding of *Volvo Trucks* to "cases such as this, where the goods in question are perishable commodities that two competitors regularly purchase and keep in stock for resale to customers." *Id.*

5. In the decision under review, the court of appeals reversed, holding that Feesers and Sodexho "were not competing purchasers" as a matter of law. App., *infra*, 155a-156a. The court of appeals reasoned that, despite the fact that both

Feesers and Sodexho purchased Michael Foods products and competed to resell those products to the same customers, there could be no RPA claim in a non-retail industry like wholesale food distribution because Sodexho did not purchase Michael Foods products for resale to a particular institutional customer until after that institution had decided whether to purchase the products from Feesers or from Sodexho. *Id.* at 156a-157a, 178a-179a. According to the court of appeals, such a non-retail industry could be classified as a "bid market," in which, according to the court of appeals, this Court's decision in *Volvo Trucks* supported the imposition of a "timing of the competition" requirement. *Id.* at 181a-187a. Based upon this unprecedented hurdle for proving competitive injury, the court of appeals held that Feesers and Sodexho were not "competing purchasers" for purposes of the RPA. *Id.* at 156a-157a, 165a, 178a-179a.

Although the court of appeals acknowledged that such a narrow construction of the RPA resulted in "elevat[ing] form over substance," it stated that it must "dutifully follow[ ] the Supreme Court's lead by narrowly construing the RPA." App., *infra*, 168a. The court of appeals did not explain how its new timing requirement related to proving competitive injury in the wholesale food industry, especially in the face of the district court's factual findings that Sodexho had promoted and used the discriminatory prices it negotiated with Michael Foods and other suppliers to compete with Feesers and other distributors for institutional customers that were promised by Sodexho that they would receive the benefits of these discriminatory prices only if they acquired the food products through Sodexho. Nor did the court of appeals explain why non-retail industries should be treated differently under the RPA from other industries when neither Congress nor the courts interpreting the Act have ever made such a distinction.

6. Petitioner filed a petition for rehearing, which was denied without recorded dissent. App., *infra*, 191a-192a.

REASONS FOR GRANTING THE PETITION

In the decision under review, the Third Circuit adopted a novel timing requirement for proving competitive injury that does not appear in the text of the Robinson-Patman Act. In so doing, the Third Circuit created an irreconcilable conflict with the law in other circuits, which have expressly rejected the argument that the RPA's competitive-injury element has a timing requirement. The Third Circuit's new barrier to recovery in RPA cases is inconsistent not only with the decisions of other circuits, but also with more than sixty years of this Court's precedents for proving competitive injury in a secondary-line or tertiary-line price discrimination case, as most recently reaffirmed in *Volvo Trucks*. Moreover, by creating a new insurmountable hurdle for proving competitive injury in wholesale food distribution and other non-retail industries or what it termed "bid markets," the Third Circuit's decision subverts the congressional policies embodied in the RPA. Indeed, the Third Circuit's timing requirement has made it impossible for plaintiffs, like Feesers, to prosecute price discrimination claims in the food distribution industry—the very industry, ironically, in which concerns about price discrimination sparked the passage of the RPA in the first place. *See* ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law Volume I, 9 (1980). Nothing in this Court's precedents permits, let alone directs, the Third Circuit to create such a barrier to recovery under the RPA.

The need for the Court to provide additional guidance in this case is particularly compelling in this context; indeed, the Third Circuit itself admitted that it found the RPA to be confusing, and that other lower courts have experienced difficulties in applying the competitive-injury requirement of the RPA. App., *infra*, 184a n.17. That confusion will now be substantially compounded by the circuit conflict created by the Third Circuit's creation of a timing requirement. While the Third Circuit now requires that plaintiffs in an RPA case prove that the favored company purchased the discriminatorily priced products at precisely the same time at which the competition occurred, other circuits have not departed from the traditional test for competitive injury, which does not focus on the precise moment when the discriminatory sales are engineered, whether or not non-retail purchases or "bid markets" are involved. In short, this case satisfies all of the traditional criteria for certiorari, and the petition should therefore be granted.

A. The Third Circuit's Timing Requirement Creates A Fundamental Conflict With The Case Law Of Other Circuits

Until now, no court of appeals has held that a plaintiff satisfying the *Morton Salt* test cannot prove competitive injury under the RPA based on the timing of competition. The Third Circuit's new timing requirement thus represents a radical departure from the established case law of the other circuits, and the resulting conflict warrants this Court's review.

1. Before the decision below, the federal courts had uniformly held that, in order to prove a violation of Section 2(a) of the RPA, a secondary-line or tertiary-line plaintiff need only establish: (1) that there were sales to two different purchasers in interstate commerce; (2) that the products sold were of the same grade and quality; (3) that there was discrimination in price; and (4) that the price discrimination had a prohibited effect on competition. *See, e.g., Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990). In *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47 (1948), this Court established that the fourth element, competitive injury, could be proven either through evidence of lost sales or profits, or by showing that (1) the plaintiff and the beneficiary of the price discrimination were in competition, and (2) there was substantial price discrimination over time. *See, e.g., Volvo Trucks*, 546 U.S. at 177*; Texaco*, 496 U.S. at 556.

The courts of appeals have consistently applied the *Morton Salt* test without imposing any additional timing requirement. *See Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 654 (9th Cir. 1997); *Coastal Fuels v. Caribbean Petroleum*

Corp., 79 F.3d 182, 191, 193 (1st Cir. 1996); *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1201-02 (11th Cir. 1993); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987), *aff'd*, *Texaco*, 496 U.S. 543; *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 385, 387 (8th Cir. 1987).

2. The Third Circuit's decision holding that a plaintiff in a secondary-line or tertiary-line case cannot prove competitive injury under the RPA in a non-retail industry "where the competition for sales to prospective customers occurs *before* the sale of the product for which the RPA violation is alleged" creates a conflict with all of those decisions. App., *infra*, 156a-157a (emphasis in original).

Other courts of appeals have considered the question of whether the RPA's competitive injury element requires a plaintiff to prove that the purchases of the discriminatorily priced goods occurred at the same time as the competition. Those courts have refused to import a timing requirement into the RPA. The Eleventh Circuit's decision in *DeLong Equipment*, *supra*—a true bid market case—is particularly instructive. In that case, the Eleventh Circuit expressly rejected, as a matter of law, the type of timing requirement that the Third Circuit imposed here. The price discrimination in *DeLong* was related to a larger scheme between a distributor (BCS) and a supplier of media used to polish jet engine parts (Washington Mills) involving a single customer, Pratt & Whitney. *See* 990 F.2d at 1191. Washington Mills provided secret discounts to BCS that were not available to other distributors, such as

DeLong, that competed with BCS to supply media to Pratt. *Id.* Because Washington Mills also delayed in providing DeLong with specifications necessary for its approval as a distributor by Pratt, DeLong was unable to bid on an October 1983 Pratt purchase order. BCS won the bid, and supplied Pratt's anticipated media requirements for the following year. *See id.* at 1192-93, 1202. Thereafter, DeLong was hindered in its ability to compete with BCS because it could not match BCS's prices due to Washington Mills' price discrimination. Nonetheless, in 1984, DeLong succeeded in selling to Pratt small quantities of Washington Mills-manufactured media. *See id.* at 1192-93.

Washington Mills argued that DeLong and BCS were not "competing purchasers" and were not in actual competition for Pratt's business because BCS had won the October 1983 bid and filled that order with media that it purchased from Washington Mills before DeLong either (i) was qualified to bid for sales to Pratt or (ii) actually purchased any media from Washington Mills. *See id.* at 1201-02. The Eleventh Circuit rejected that argument, concluding that "there is no doubt but that both BCS and DeLong were after the same Pratt dollar" and were in "head-to-head competition" for Pratt's business. *Id.* The Eleventh Circuit further held that "[w]hile there must be two sales made by the same seller to at least two different purchasers at two different prices, *there is no requirement that the two sales be made at precisely the same time or place.*" *Id.* (emphasis added) (citations omitted).

The facts of *DeLong* are materially indistinguishable from the facts here. Just as the disfavored purchaser in *DeLong* sold some of the products at issue to Pratt after the favored purchaser won the bid, Feesers also sold some Michael Foods products to institutions after they had chosen Sodexho for food management and purchasing. *See, e.g.*, App., *infra*, 84a ("[S]ome Sodexho customers have chosen to utilize Feesers for [certain Michael Foods] purchases."); *id.* at 91a (A Feesers self-op customer "solicited proposals in an RFP process, and ultimately chose Sodexho," but continued to purchase certain Michael Foods products from Feesers.); *see also id.* at 60a-61a (finding that Sodexho's documents "demonstrate direct competition with distributors" to sell food even after a customer has awarded Sodexho a contract for food management services).

Other courts of appeals also have held that there is no "timing of the competition" requirement for proving competitive injury. For example, the Fifth Circuit rejected a timing requirement in *Hartley & Parker, Inc. v. Fl. Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962). In *Hartley*, the disfavored purchaser ceased purchasing discriminatorily priced products from the supplier, but continued to sell such products out of inventory. *Id.* at 921. The Court held that "[t]he purpose of the Act would be defeated . . . if it were given so strict a construction as to require two actual purchases at precisely the same time." *Id.* And other circuits have routinely upheld findings of competitive injury under the *Morton Salt* test without imposing a timing requirement. *See Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 654 (9th Cir. 1997); *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 191, 193 (1st Cir. 1996); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987), *aff'd*, *Texaco*, 496 U.S. 543; *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 385, 387 (8th Cir. 1987). Those decisions, moreover, involved both retail and non-retail industries. Accordingly, the Third Circuit's holding that this Court's precedents "prevent the application of the RPA" to non-retail industries, *see* App., *infra*, 165a, conflicts with the holdings of other circuits that have declined to limit the application of the RPA in non-retail markets.

For example, in *Innomed Labs, LLC v. Alza Corp.*, 368 F.3d 148 (2d Cir. 2004) (Sotomayor, J.), the Second Circuit held that non-retail distribution contracts are "unquestionably covered by the Act." *Id.* at 159. As then-Judge Sotomayor explained: "The Robinson-Patman Act was [ ] intended to apply to all commodities distribution contracts, in all positions in the distribution chain." *Id.* at 161. Rejecting the argument that exclusive distribution contracts should be excluded from the RPA, Judge Sotomayor stated that "[s]uch an arbitrary result would contravene the Act's purpose of creating even competition throughout the market, *at all levels of the distribution chain*." *Id.* (emphasis added). Judge Sotomayor further explained that the "Robinson-Patman Act was drafted amid fears that the rise of integrated chain stores would overpower the traditional distribution model and its reliance on *wholesale distributors* and retailers to move products from manufacturers to consumers." *Id.* at 160 (emphasis added).

Similarly, in *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987), where the plaintiff was a repackager that sold to retailers, the Eighth Circuit upheld an inference of competitive injury under the *Morton Salt* test without imposing an additional timing requirement in a non-retail context. The Eighth Circuit held that "*Morton Salt* requires a plaintiff to show only a substantial price difference" among competitors in order to prove competitive injury. 816 F.2d at 388.[1]

In sum, the Third Circuit has created a clear conflict among the courts of appeals on how to apply the competitive injury requirement of the Robinson-Patman Act. If the Third Circuit's timing requirement is allowed to stand, it will create massive confusion among litigants and the lower courts trying to interpret an already "complicated area of law" that has, by the Third Circuit's own admission, "flummoxed the federal courts" on multiple occasions. App., *infra*, 184a n.17. It also threatens to cause substantial confusion for national companies trying to price their products across different jurisdictions. The resulting circuit conflict, on an important issue concerning the interpretation of the Robinson-Patman Act, merits review by this Court.

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[1] *See also Hasbrouck*, 842 F.2d at 1040 ("To hold that price discrimination between a wholesaler and a retailer could never violate the Robinson-Patman Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition" and would be "contrary to the objectives of the Robinson-Patman Act."); *Mid-South Distribs. v. FTC*, 287 F.2d 512 (5th Cir. 1961) (upholding RPA claim where distributor buying groups were favored over independent distributors); *Moog Indus., Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956) (same).

B. The Third Circuit's Novel Timing Requirement Is Contrary To Sixty Years Of This Court's Precedents Concerning The Requirement Of Competitive Injury In A Price Discrimination Case

1. In its seminal *Morton Salt* decision, this Court rejected an argument that an FTC cease-and-desist order should be set aside because the FTC failed to show that the discriminatory discounts had in fact caused injury to competition. *Morton Salt*, 334 U.S. at 45-46. As the Court observed, the RPA's legislative history "makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Id.* at 43. Thus, the Court explained, a plaintiff need prove *only* substantial price discrimination among competing purchasers over time in order to satisfy the competitive injury requirement:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

Id. at 50-51.

There was no suggestion in *Morton Salt* of a timing exception to the general test for proving competitive injury, whereby a favored non-retail purchaser could evade liability under the RPA by delaying its purchases of goods to be resold to a particular customer until after it had won the competition for that customer's business. On the contrary, the Court stated that "the language of the Act, and the legislative history" make it clear that a plaintiff "*need only prove* that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." *Id.* at 45 (emphasis added).

This Court has applied the *Morton Salt* competitive-injury test for more than sixty years. *See, e.g.*, *Volvo Trucks*, 546 U.S. at 177. Similarly, as explained above, all of the courts of appeals previously followed *Morton Salt* without imposing any requirement that a non-retail plaintiff prove that its competitor purchased the products at issue at favorable, discriminatory prices at exactly the same time that the competition for the resale of those products occurred.

In its radical departure from this settled law, the Third Circuit reasoned that this Court's precedents required the "narrow[ ] constru[ction] [of] the RPA" in non-retail markets where the "'allegedly favored purchasers [bear] little resemblance to [the] large independent department stores or chain operations' that the RPA was intended to target." App., *infra*, 165a-166a (citing *Volvo Trucks*, 546 U.S. at 181); 181a. But this Court has rejected precisely the distinction that the Third Circuit drew between retail and non-retail markets for proving competitive injury under the RPA. Indeed, *Morton Salt* itself involved both retail and non-retail segments of the food distribution industry. Although the case principally involved price discrimination between favored chain stores and disfavored retailers, the defendant Morton Salt Co. also provided discriminatory prices to a *wholesaler* that passed on the price discriminations. 334 U.S. at 40-41, 42 n.5. The Court expressly rejected the proposition that competitive injury arising from the discounts provided to the favored wholesaler had not been proven, stating that such discrimination "need not be separately treated" from the discrimination in favor of the retail chain stores. *Id.* at 42 n.5.

Over the last six decades, this Court has reaffirmed the viability of the *Morton Salt* test for proving competitive injury, as well as its application to non-retail markets. *See, e.g.*, *Texaco, Inc.*, 496 U.S. at 559 (applying the *Morton Salt* test to gasoline wholesalers); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435-36 (1983) (applying *Morton Salt* to beer distributors); *see also Volvo Trucks*, 546 U.S. at 179-81 (declining to adopt a broad rule that the RPA "does not reach markets characterized by competitive bidding and special-order sales"). This Court has never held that there is a "timing" exception to *Morton Salt*, to be invoked when the favored purchaser in a non-retail market does not purchase the discriminatorily priced products at the same time at which the competition to resell the products occurs.

2. Moreover, there is no way to reconcile the Third Circuit's timing requirement with the decisions of this Court that have confirmed the appli-

cability of the RPA to situations in which the competitive injury occurs at the tertiary level or even lower down the distribution chain. *See Texaco*, 496 U.S. at 554-57; *Falls City*, 460 U.S at 436; *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647 (1969). In cases such as these, in which the competitive injury is remote from the point of discrimination, neither this Court nor the lower federal courts have ever applied a requirement that the timing of the price discrimination be simultaneous with the competitive injury that it causes.

Indeed, this Court has warned against narrowing the reach of the RPA beyond that intended by Congress, through "artificial" readings of the statutory language and "strictly literal" applications of the "competing purchasers" requirement. For example, in *Falls City*, the Court rejected the argument that the RPA does not permit a finding of competitive injury where the favored and disfavored purchasers did not compete for the same customers, but their customers competed with one another. 460 U.S at 436. Although the Court noted that, "[i]n a strictly literal sense," the favored and disfavored distributors were not "competing purchasers" as in *Morton Salt*, it unanimously held that "the competitive injury component of a Robinson-Patman Act violation is not limited to injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers." *Id.*; *see also Texaco*, 496 U.S. at 554-57 (holding that price discrimination against a disfavored buyer, which purchased directly from the supplier and competed with later customers of the favored buyer, was a violation of Section 2(a)); *Perkins*, 395 U.S. at 647 (rejecting Ninth Circuit's reading of Section

2(a) that held that there could not be competitive injury at the "fourth line" as "wholly . . . artificial" and "unwarranted by the language or purposes of the Act").

The Third Circuit's novel timing requirement rests on the proposition that Sodexho, as the favored purchaser, does not purchase Michael Foods products for resale to a *particular* customer until after it has won the competition for that customer's business, and that Feesers and Sodexho, therefore, are not "competing purchasers." App., *infra*, 178a-179a. That reasoning, however, simply ignores the role of Sysco, Sodexho's contract distributor and—as the Third Circuit itself found in its earlier opinion—the "second purchaser" for RPA purposes. App., *infra,* 10a. Regardless of the timing of Sodexho's purchases of Michael Foods products from Sysco for a particular customer, it is indisputable that Feesers and Sysco continuously purchase the same Michael Foods products on an ongoing basis and "keep [them] in stock for resale to customers." App., *infra,* 146a.

Ironically, as the Third Circuit recognized in its earlier opinion, "[t]his case is most analogous to *Texaco v. Hasbrouck*." *See* App., *infra*, 10a-11a n.5. As the court stated:

> This is a difficult case to categorize because the discrimination allegedly impacts competition between the disfavored purchaser (Feesers) and the customer of the favored purchaser (Sodexho). . . . Regardless, categorizing the discrimination in this case as second- or third-line is not essential, as long as there is a prohibited effect on competition.

Id. n.5 (citations omitted). By ignoring the contemporaneous purchases by Feesers and Sysco and focusing instead on the timing of purchases for specific customers by Sodexho (Sysco's "customer" under Section 2(a)), the Third Circuit has created a timing rule that is flatly incompatible with *Texaco*.

3. In imposing its new timing requirement, the Third Circuit stated that it was following this Court's direction in *Volvo Trucks*. That interpretation of *Volvo Trucks* is misguided. In *Volvo Trucks*, the Court overturned an RPA verdict for the plaintiff on the ground that plaintiff's evidence, which "paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B," failed to show that the plaintiff "compete[d] with beneficiaries of the alleged discrimination *for the same customer*." 546 U.S. at 178 (emphases in original). As a result, the Court held that the plaintiff had failed to provide sufficient evidence of competitive injury in a customized bid market in which only one competitor would make purchases as the winning bidder. *Id.* at 178-80.

Nothing in *Volvo Trucks* supports the timing requirement created in *Feesers II*.[2] *Volvo Trucks*

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[2] Feesers respectfully suggests that the Court may benefit from soliciting views from the United States, and particularly from the Federal Trade Commission, the expert antitrust agency charged with enforcing the RPA, on the importance of the question presented in this petition to the enforcement of the Act. The Court solicited the views of the United States in *Volvo Trucks* and may benefit from doing so here as well.

reiterated *Morton Salt*'s holding that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time." *Volvo Trucks*, 546 U.S. at 177; *see also id.* at 179 (citing with approval *Falls City*, which applied the *Morton Salt* rule). Indeed, even if the wholesale food distribution industry were a "bid market" industry, the Court in *Volvo Trucks* specifically declined to adopt a broad rule that the RPA "does not reach markets characterized by competitive bidding and special-order sales." 546 U.S. at 180-81.

Further, in holding that the plaintiff in *Volvo Trucks* had not proven a Section 2(a) violation, the Supreme Court distinguished the bid market for customized trucks in that case from the situation more commonly encountered in RPA cases, where competing purchasers resell commodity products. *Volvo Trucks*, 546 U.S. at 178-79. As the Court stated: "The [RPA] centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved *when a product subject to special order is sold through a customer-specific competitive bidding process*." 546 U.S. at 169-70 (emphasis added). That observation has no application to the *Feesers* case because the wholesale food distribution industry fits the traditional RPA paradigm. As the trial court found: "the goods in question are perishable commodities that two competitors regularly purchase and keep in stock for resale to customers." App., *infra*, 146a.

In fact, if the institutional food business could be characterized as a "bid market," then virtually every non-retail industry could be so characterized. As the district court found (in a factual finding that the Third Circuit did not disturb):

> [C]ompetition for the sale of Michael Foods egg and potato products to institutional food service customers was ongoing and not limited to the formal RFP [bid] process. Food service management companies, distributors, and GPOs all compete formally and informally for the sale of food to institutions. Even when a company initiates the RFP bidding process, which includes only food service management companies, that choice is not final or limited to the companies submitting a bid.

App., *infra*, 66a; *see also id.* at 59a (competition between Sodexho and Feesers "occurs not just in the formal request for proposal ('RFP') process, but also on an informal basis all the time").[3]

[3] The *Volvo Trucks* Court noted a need for caution in applying the RPA where "there is no evidence that any favored purchaser possesses market power." 546 U.S. at 181. Here, however, the evidence established that Sodexho was the world's largest purchaser of food and was able to use its vast power as the "big dog" in food purchasing to obtain "stunning" discounts not available to any other competitor. App., *infra*, 128a-129a; 73a. Indeed, Sodexho's own documents and trial testimony left no doubt that it was Sodexho's specific strategy to use its massive purchasing power to extract uniquely favorable price discriminations from suppliers of food to gain a competitive advantage over distributors like Feesers. *Id.* at 98a-112a; *see also id.* at 85a (Sodexho obtained the "lowest" prices and large bonuses and discounts unavailable to others). This is the classic situation in which the RPA was intended to apply. *See Morton Salt*, 334 U.S. at 43.

C. The Question Presented Is An Exceptionally Important One That Warrants This Court's Review

Finally, in holding that "the RPA was not meant to cover the type of competition present in the instant case," App., *infra*, 185a, the Third Circuit effectively created a judicial exemption from the RPA that is contrary to this Court's long line of authority holding that new antitrust exemptions should not be created by the courts.

Specifically, the Third Circuit concluded that the RPA should not apply because (1) Feesers and Sodexho are not "competing retail stores," and (2) Sodexho "operates in a bid market." App., *infra*, 181a. Not only is this holding contrary to the underlying purpose of the RPA, which was passed in part to protect "wholesale distributors," *see supra* at 19, but it also creates an impermissible judicial exemption from the RPA. This Court has consistently held that the courts should not create antitrust exemptions. *See Falls City*, 460 U.S. at 436 ("The determination whether to alter the scope of the Act must be made by Congress, not this Court."); *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 169-71 (1983) (refusing to find an exemption from the RPA because "no unambiguous evidence of congressional intent" to create that exemption existed); *Flood v. Kuhn*, 407 U.S. 258, 276-82 (1972) (stating that exemptions from the antitrust laws should be made "by legislation and not by court decision").

Furthermore, this Court has specifically analyzed the question of what exemptions exist under the RPA and held that the "only express exemption [under the RPA] is that for nonprofit institutions contained in 15 U.S.C. § 13c." *Jefferson County*, 460 U.S. at 154-55. In *Jefferson County*, the Court specifically declined to create a new exemption to the RPA, observing that "'our cases have repeatedly established that there is a heavy presumption against implicit exemptions' from the antitrust laws." *Id.* at 154-55, 158 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975)). As the Court has repeatedly instructed, "'the antitrust laws, and [the RPA] in particular, are to be construed liberally, and [ ] the exceptions from their application are to be construed strictly.'" *Id.* at 159 (quoting and citing Supreme Court cases).

The exception that the court of appeals created here is a broad one that undermines the objectives of the RPA. The Third Circuit's new timing test makes it impossible for plaintiffs to prosecute price discrimination claims in non-retail industries like food distribution. By manipulating the timing of its purchases through an intermediary such as Sysco, a power buyer like Sodexho could evade liability under the RPA simply by (1) using its purchasing power to obtain lower prices from suppliers of commodities, (2) using the competitive advantage arising from those lower prices to win customers, and (3) routing the products though an intermediary that would hold them in inventory, but (4) delaying the purchase of the goods from the intermediary for a particular customer until after it has already won that customer's business with promises of lower, discriminatory prices. That is exactly what happened in this case. *See* App., *infra*, 44a; 63a. The Third Circuit's new timing test, by "elevat[ing] form over substance," *id.* at 168a, would permit a purchaser "to defeat the statute's clear objectives by transforming unlawful, into lawful, price discrimination." *See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 750 (1st Cir. 1994) (Breyer, C.J.). This Court, however, has repeatedly instructed that the RPA should not be construed in a way that "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link in the supply chain." *Perkins*, 395 U.S. at 647; *accord Texaco*, 496 U.S. at 567 n.26.

Moreover, this Court has specifically rejected the court of appeals' reasoning that its grafting of new limitations onto the RPA is justified because some commentators have determined that the RPA is antithetical to competition policy. *Compare Jefferson County*, 460 U.S. at 170, *with* App., *infra*, 166a, 167a n.12, *and Toledo Mack*, 530 F.3d at 228 n.17. Judicial policy disagreements that have arisen subsequent to passage of the Act cannot justify reading new limitations into the RPA. *Jefferson County*, 460 U.S. at 163-69. As the Court explained:

> The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress."

Id. at 170 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941)).

The determination of "whether an exemption should be granted" "is for Congress to resolve, not this Court." *Flood*, 407 U.S. at 277; *U.S. v. Int'l Boxing Club*, 348 U.S. 236, 243 (1955). "There is no reason, in the absence of an explicit exemption, to think that Congressmen . . . intended to deny small businesses . . . protection from the competition of the strongest competitor of them all." *Jefferson County*, 460 U.S. at 170-71. Accordingly, "[t]o create an exemption here clearly would be contrary to the intent of Congress." *Id.* at 171. Certiorari should be granted to prevent the Third Circuit's policy disagreement with the RPA from rendering the Act inoperative in non-retail industries—including the very industry that motivated Congress to enact the RPA in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2, 2010

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2661

FEESERS, INC.,
Appellant

v.

MICHAEL FOODS, INC.;
SODEXHO, INC.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 04-cv-00576)
District Judge: Honorable Sylvia H. Rambo

Argued May 10, 2007

Before: RENDELL, JORDAN and
ALDISERT, *Circuit Judges*.

(Filed: August 14, 2007)

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OPINION OF THE COURT

RENDELL, *Circuit Judge.*

I.

Plaintiff Feesers, Inc. appeals the District Court's grant of summary judgment in favor of defendants Michael Foods and Sodexho in this antitrust action. In its complaint, Feesers alleged that Michael Foods violated section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), by selling its potato and egg products at lower, and thus discriminatory, prices to Sodexho. It further alleged that Sodexho violated section 2(f) of the Act, 15 U.S.C. § 13(f), by knowingly inducing the discriminatory pricing.

The District Court found that Feesers failed to prove the fourth element of its prima facie case under section 2(a), namely that the alleged discrimination had a prohibited effect on competition, because Feesers failed to show that it was in "actual competition" with Sodexho. *See Feesers,* *Inc. v. Michael Foods, Inc. & Sodexho, Inc.,* No. 04-Civ-576, 2006 WL 1274088, slip op. at 23 (M.D. Pa. May 4, 2006). We will reverse because the District Court used the wrong standard in making this determination and we conclude that Feesers has proffered sufficient evidence of competition between itself and Sodexho for sales of food products to food service facilities to allow a reasonable factfinder to conclude that these companies are in "actual competition." Moreover, the District Court erroneously put the burden on Feesers to prove not only "actual competition," but also that Michael Foods' discriminatory pricing caused Feesers to lose sales to Sodexho, rather than placing the burden on Michael Foods to rebut the inference of injury to competition that arises from proof of a substantial price discrimination between competing purchasers over time.

II.

Most of the underlying facts are undisputed. Where there is a dispute, we view the facts in the light most favorable to Feesers. *Andreoli v. Gates,* 482 F.3d 641, 644 (3d Cir. 2007).

The customers of Sodexho and Feesers are food service facilities that sell meals, snacks, and beverages, such as school, hospital, and nursing home cafeterias. Both Sodexho and Feesers sell food products to food service facilities in the States of Pennsylvania, New Jersey, Maryland, Delaware, and Virginia. Feesers is a full-line distributor of food and food-related products ("products") that distributes these products to institutional customers. Sodexho is a food service management company that provides facility management and operation services to its clients and, in most cases, also sells products to the facilities. Sodexho does not warehouse and deliver products directly to its clients, but rather contracts with its clients to procure products for them and then subcontracts with distributors who distribute the products to the facilities. Both Feesers and Sodexho contract with food service facilities to provide them with products from Michael Foods. Michael Foods is a supplier of egg and potato products.

A food service facility will contract with either Sodexho or Feesers, but not both,[1] to buy food and food-related products. A food service facility may either contract with Sodexho for Sodexho to operate the facility and procure products,[2] or contract

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[1] On a few occasions, both Sodexho and Feesers have served the same facility at the same time, but the facility contracted directly only with the food service management company, which in turn contracted with Feesers. Feesers was, at one time, the prime distributor for a food service management company called The Wood Company. Wood contracted for Feesers to be its "primary non-exclusive distributor." However, Sodexho purchased Wood part-way through the term of the Feesers-Wood primary distributor contract. The Feesers contract for the facilities previously serviced by Wood expired at the end of 2002 and was not renewed by Sodexho. Instead, Sodexho chose Sysco as its prime distributor for the region. App. 8127.

[2] When Sodexho takes on a facility as a client, Sodexho usually contracts with the facility both to procure food on behalf of the facility and to operate the facility. However, as counsel for Sodexho acknowledged at oral argument, there are a limited number of Sodexho-operated facilities for which Sodexho does not provide procurement services. For some healthcare facilities, Sodexho provides food management services, but the facility will handle its own food procurement. App. 1175, 1415 1255.

with Feesers for Feesers to procure products and the facility will self-operate or hire a third-party operator. To procure products for a facility, Feesers purchases products directly from Michael Foods and then resells the products to food service facilities.

Sodexho's process to procure products from Michael Foods for resale to food service facilities is a bit more complicated. Sodexho itself does not purchase products from Michael Foods, but employs a distributor, such as Sysco Corporation.[3] Although product suppliers like Michael Foods generate price lists that set forth the prices at which they sell food to distributors, Sodexho has negotiated lower deviated pricing with Michael Foods. The transaction proceeds as follows: Michael Foods sells products to Sodexho's designated distributor at list prices and the distributor, which is usually Sysco, then resells the products to Sodexho and provides Michael Foods with proof of delivery of products to Sodexho; Sysco invoices Michael Foods for the difference between the list price and the Sodexho-negotiated deviated price; Sodexho then purchases these products from Sysco pursuant to a "prime distributor agreement," which specifies the price that Sodexho will pay Sysco for each product. Under the agreement, Sysco sells the Michael Foods products to Sodexho for the Sodexho-negotiated price plus an agreed-upon markup. App. 9706. Sysco's resale price of

[3] Sysco is the designated "prime distributor" for Sodexho in 48 states. App. 2535. Sodexho usually determines which company will distribute the products to its facility clients, although in rare instances the facility may choose the distributor. App. 7920.

Michael Foods' products to Sodexho reflects the lower prices in the deviated pricing agreement between Sodexho and Michael Foods. *See Feesers, Inc.,* slip op. at 5.

After Sodexho purchases the Michael Foods products from Sysco at the agreed-upon prices, it resells the products to a food service facility customer and charges the cost of the products to the customer as an "operating expense." The food service facility generally does not interact directly with Sysco or any other Sodexho-designated distributor. Instead, the facility pays Sodexho for the invoiced cost of the food-plus, in most cases, a "procurement expense" of 0.9% of the invoiced amounts-as part of the facility's reimbursement of Sodexho for "operating expenses." Thus, because Michael Foods charges Sysco less for products resold to Sodexho than it charges Feesers for the same products, Sodexho's customers pay less than Feesers' customers for these products.

Feesers' customers are, in general, self-operated facilities, while none of Sodexho's customers are self-operated.[4] However, food service facilities may switch from being self-operated to being operated by a management company like Sodexho. When a self-operated facility that previously bought prod-

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[4] Entegra, a group purchasing organization ("GPO") affiliated with Sodexho, does serve self-operated facilities. Entegra provides its clients with access to a portfolio of contracts negotiated by Sodexho with suppliers of food and food-related products. A facility employing Entegra's services may use a Sodexho-contracted distributor or its own contracted distributor to distribute foods that the facility purchases pursuant to Entegra-negotiated price lists. Entegra, however, is a separate legal entity from Sodexho and is not a party to this action. App. 9100.

ucts from Feesers is converted to a Sodexho-operated facility, Sodexho operates the facility and generally also procures the new client's food products, thereby displacing Feesers. For example, the Jewish Home of Greater Harrisburg was self-operated and bought its products from Feesers. It then became a Sodexho-managed facility and stopped buying products from Feesers. St. Mary's Catholic School was also a Feesers customer and self-operated facility, which then switched to being operated by Sodexho and no longer buys products from Feesers. Sodexho will approach self-operated ("self-op") facilities to convert them to Sodexho-operated facilities. App. 1425 (Deposition of Christophe Rochette of Sodexho) ("[Y]ou asked me repeatedly, are we interested in converting self-op? That is what we are. So, I mean, I think that we should [be] clear that for the record, that yes, we convert self-op. That is what we do."). Sodexho has solicited at least five facilities served by Feesers to become Sodexho customers. Sodexho customers end up paying less for products from Michael Foods than they would pay if they were self-operated and purchased the same products from Feesers.

On the other hand, facilities also switch from being operated by Sodexho to being self-operated. In these cases, Sodexho will no longer procure food for the facility and the facility will seek out another company, such as Feesers, from which to buy its food products. The Meadows Nursing Home was a Sodexho customer and switched to being a self-operated facility and a Feesers customer, in part because Michael Foods agreed to give Feesers the same product pricing given to

Sodexho. In 1998, Sodexho lost nine accounts to self-operation. App. 1426. In 1999, eight Sodexho customers switched to being self-operated. App. 1427.

Feesers sued Michael Foods and Sodexho in the United States District Court for the Middle District of Pennsylvania, alleging that Michael Foods violated section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), by selling products at discriminatory prices to Sodexho and that Sodexho violated section 2(f) of the Act, 15 U.S.C. § 13(f), by knowingly inducing the discriminatory pricing. Defendants moved to dismiss the complaint on the grounds that Feesers had not adequately pled that it was in actual competition with Sodexho. The District Court denied the motion and allowed the parties to proceed to discovery. After discovery, the parties all moved for summary judgment.

The District Court found that Feesers had established three out of the four elements of its section 2(a) claim against Michael Foods: that sales were made to two different purchasers in interstate commerce; that the product sold was of the same grade and quality; and that defendant discriminated in price as between the two purchasers. *Feesers, Inc. v. Michael Foods, Inc. & Sodexho, Inc.*, No. 04-Civ-576, 2006 WL 1274088, slip op. at 10-18 (M.D. Pa. May 4, 2006). First, the Court noted that there was no dispute that the goods purchased from Michael Foods were of the same grade and quality. *Feesers,* slip op. at 10. The Court also found that "because the facts that establish that Michael Foods sold products at different prices are not in dispute . . . price discrimination exists within the context of the Act." *Id.* at

11. Finally, as to the requirement that there be two purchasers in interstate commerce, the Court concluded that the facts show that Michael Foods sold to two purchasers, Feesers and Sysco. The Court concluded that this is a case of "third-line" discrimination, i.e., when a seller's price discrimination harms competition between customers of the favored and disfavored purchasers. *Id.* at 12 n. 8. The Court did not reach the issue of whether Sodexho is a direct "economic" purchaser from Michael Foods, which would, presumably, make this a second-line discrimination case (i.e., discrimination that harms competition between two purchasers). Defendants do not challenge these findings on appeal.[5]

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[5] The parties do not debate whether this is a second- or third-line discrimination case, but we note that the District Court's conclusion that this is a case of third-line discrimination appears to be incorrect. This is not clearly either a second-line or third-line case, but falls somewhere in between these categories. *See George Haug Co. v. Rolls Royce Motor Cars, Inc.,* 148 F.3d 136, 141 n. 2 (2d Cir. 1998) (noting that "secondary-line price discrimination[ ] occurs when a seller's discrimination impacts competition among the seller's customers; i.e. the favored purchasers and disfavored purchasers . . . tertiary-line [discrimination] occurs when the seller's price discrimination harms competition between customers of the favored and disfavored purchasers, even though the favored and disfavored purchasers do not compete directly against another"). This is a difficult case to categorize because the discrimination allegedly impacts competition between the disfavored purchaser (Feesers) and the customer of the favored purchaser (Sodexho).

This case is most analogous to *Texaco v. Hasbrouck,* 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990), in which several gas retail stations brought suit against Texaco for selling gas to two distributors at discounted prices. The dis-

However, the District Court found that Feesers failed to proffer sufficient evidence to prove the fourth element of its prima facie case: that the discrimination had a prohibited effect on competition. *Id.* at 24. The District Court found that Feesers did not meet its burden to show that it was in "actual competition" with Sodexho as of the time of the price differential. *Id.* at 23. The District Court noted that Feesers had failed to prove that it competes with Sodexho "at the same functional level." *Id.* at 21. The Court also found that Feesers failed to proffer evidence that it lost customers to Sodexho *because of* food prices, rather than for other reasons relating to the management services Sodexho provides. Without this evidence, the Court found that Feesers could not prove that it competes with Sodexho. Accordingly, because Feesers failed to establish a prima facie case under section 2(a) of the Act, the Court granted summary judgment in favor of defendants and

tributors then resold gas to retail stations that competed directly with plaintiffs and they also operated their own retail stations that competed directly with plaintiffs. *Id.* at 549-51, 110 S.Ct. 2535. The Supreme Court did not categorize the case as a second- or third-line case, but instead observed that "[t]he additional link in the distribution chain does not insulate Texaco from liability if Texaco's excessive discount otherwise violated the Act." *Id.* at 567, 110 S.Ct. 2535; *see also Perkins v. Standard Oil Co.,* 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969) (finding actionable price discrimination resulting in injury to competition between disfavored purchaser and customer of customer of favored purchaser, but not categorizing the case as third-line or fourth-line discrimination). Regardless, categorizing the discrimination at issue in this case as second- or third-line is not essential, so long as there is a prohibited effect on competition.

denied Feesers' motion for summary judgment.[6] *Id.* at 24. Feesers now appeals.

III.

We exercise plenary review over the District Court's grant of summary judgment in favor of defendants, and we apply the same standard that the District Court should have applied. *Andreoli,* 482 F.3d at 647. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We "must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Farrell v. Planters Lifesavers Co.,* 206 F.3d 271, 278 (3d Cir. 2000).

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in relevant part that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such com-

[6] The District Court noted that, given that Feesers was unable to establish a section 2(a) claim, its section 2(f) claim against Sodexho "necessarily fails." *Feesers,* slip op. at 24.

> modities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and 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.

As the District Court correctly stated, in order to prove a violation of section 2(a) of the Robinson-Patman Act, a plaintiff must show (1) that sales were made to two different purchasers in interstate commerce; (2) that the product sold was of the same grade and quality; (3) that defendant discriminated in price as between the two purchasers; and (4) that the discrimination had a prohibited effect on competition. *See Texaco Inc. v. Hasbrouck,* 496 U.S. 543, 556, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990). This appeal concerns the fourth element of Feeser's claim under section 2(a): competitive injury. Specifically, we must decide whether the District Court applied the correct legal standard to determine whether Sodexho and Feesers are in actual competition and whether it erred in holding that Feesers did not proffer sufficient evidence to allow a reasonable factfinder to conclude that it is in actual competition with Sodexho.

To establish the fourth element of its prima facie case against Michael Foods, Feesers was required to show that there is "a *reasonable possibility* that [the] price difference may harm competition," i.e., "competitive injury." *Falls City Indus., Inc. v. Vanco Beverage, Inc.,* 460 U.S. 428, 434-35, 103 S.Ct. 1282, 75 L.Ed.2d 174 (1983) (emphasis added). As we stated in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, "[i]n keeping with the Act's prophylactic purpose, designed to prevent the occurrence of price discrimination rather than to provide a remedy for its effects, section 2(a) does not require that the discrimination must in fact have harmed competition. Instead, a reasonable possibility of harm, often referred to as competitive injury, must be shown." 909 F.2d 1524, 1531 (3d Cir. 1990) (internal citations and brackets omitted).

"Competitive injury" is established prima facie by proof of "a substantial price discrimination *between competing purchasers over time*."[7] *Falls City Indus.,* 460 U.S. at 435, 103 S.Ct. 1282 (citing *FTC v. Morton Salt Co.,* 334 U.S. 37, 46, 50-51, 68 S.Ct. 822, 92 L.Ed. 1196 (1948); *id.* at 60, 68 S.Ct. 822 (Jackson, J., dissenting in part)) (emphasis added). In order to establish a prima facie viola-

[7] Although the purchasers in *Falls City Industries* were in actual competition with one another, injury to competition between a purchaser and a customer of a purchaser is also actionable under the Act. As the Supreme Court made clear in *Perkins v. Standard Oil Co.,* 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969), there is no basis in the Act for immunizing price discrimination "simply because the product in question passed through an additional formal exchange before reaching the level of [the plaintiff's] actual competitor." *Id.* at 648, 89 S.Ct. 1871.

tion of section 2(a), Feesers does not need to prove that Michael Foods' price discrimination *actually* harmed competition, i.e., that the discriminatory pricing caused Feesers to lose customers to Sodexho. Rather, Feesers need only prove that (a) it competed with Sodexho to sell food and (b) there was price discrimination over time by Michael Foods.[8] This evidence gives rise to a rebuttable inference of "competitive injury" under § 2(a). *See Morton Salt,* 334 U.S. at 46, 68 S.Ct. 822. The inference, if it is found to exist, would then have to be rebutted by defendants' proof that the price differential was not the reason that Feesers lost sales or profits. *See Falls City Indus.,* 460 U.S. at 435, 103 S.Ct. 1282.

The District Court required Feesers to prove too much. It placed the burden on Feesers to show not only that it "actually competes" with Sodexho, but

[8] In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.,* the Supreme Court reiterated that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time." 546 U.S. 164, 126 S.Ct. 860, 870, 163 L.Ed.2d 663 (2006). In that case, the jury verdict for the plaintiff was overturned because the plaintiff's evidence, which compared "occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B" failed to show that, over time, the defendant consistently favored other Volvo dealers over the plaintiff. *Id.* at 871. The plaintiff's evidence showed that the plaintiff competed directly with other Volvo dealers for a sale to a particular customer on only two occasions and failed to show that the price discrimination on those two occasions was significant. *Id.* at 872. Thus, the plaintiff's evidence was insufficient to raise an inference of competitive injury.

also that "food costs and distribution are *the determining factors*" in a consumer's choice between hiring Sodexho or Feesers, i.e., that Sodexho's lower food prices are why customers switch from buying products from Feesers to buying products and management services from Sodexho. *Feesers,* slip op. at 45 (emphasis added). In the absence of such evidence, the District Court concluded that Feesers failed to establish "actual competition."

The District Court was concerned that Sodexho and Feesers are not at the same "functional level" and are therefore not in "actual competition" in the same market. This concern is understandable given that the facts of this case are somewhat unusual. First, the involvement of Sysco creates an additional link in the chain of distribution between Michael Foods and Sodexho, which does not exist in Feesers' distribution chain. Second, most alleged violations of section 2(a) of the Robinson-Patman Act involve competition between two traditional resellers, such as two food distributors or two retail gas stations, that buy commodities from a seller and then resell the commodities to customers. Here, however, Feesers is a traditional commodity reseller, while Sodexho resells commodities to clients only in conjunction with the sale of services, such as food preparation and facility management services.

However, as we observed in *Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.,* the relevant question is whether two companies are "in economic reality acting on the same distribution level," rather than whether they are both labeled as "wholesalers" or "retailers." 63 F.3d 1267, 1272 (3d Cir. 1995). To determine whether

Sodexho and Feesers compete to resell food products to the same group of customers, we must conduct a "careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *M.C. Mfg. Co. v. Tex. Foundries, Inc.,* 517 F.2d 1059, 1068 n. 20 (5th Cir. 1975); *see also George Haug Co. v. Rolls Royce Motor Cars, Inc.,* 148 F.3d 136, 141-42 (2d Cir. 1998) (noting that determining "the presence or absence of functional competition between purchasers of a commodity is simply a factual process which focuses on whether these purchasers were directly competing for resales among the same group of customers").[9] The District Court did not view the evidence, as it should have, in the light most favorable to Feesers, and instead found that Feesers and Sodexho do not compete, without giv-

[9] With due respect to our dissenting colleague, that Sodexho's business is of a "different character" than Feesers', Dis. Op. at 24, is beside the point when we are evaluating whether Feesers has established that it is in "actual competition" with Sodexho. 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."

ing due consideration to the evidence of actual competition proffered by Feesers.

The evidence here could lead to a different conclusion than that reached by the District Court. Although Sodexho resells Michael Foods products to food service facilities that it operates, while Feesers resells Michael Foods products to self-operated food service facilities, the evidence, viewed in the light most favorable to Feesers, shows that Feesers' customers and Sodexho's customers are not two separate and discrete groups of food service facilities. Feesers proffered evidence that customers may be self-operated for some time, then switch to Sodexho, or, alternatively, may be operated by Sodexho and then switch to self-operation. Two food service facilities, St. Mary's Catholic School and the Jewish Home of Greater Harrisburg, were Feesers customers and self-operated facilities, but then switched to being operated by Sodexho and no longer buy food from Feesers. App. 7072, 7139. Feesers also proffered evidence that the Meadows Nursing Home was a Sodexho customer and switched to being a self-operated facility and a Feesers customer, in part because Michael Foods agreed to give Feesers the same pricing as it gives to Sodexho. App. 7073. There is also evidence that Sodexho actively solicits self-operated facilities to become Sodexho-operated, and also loses some customers each year that decide to self-operate instead of using Sodexho's operation services.

Our dissenting colleague attributes customers' decisions to switch from buying products from Feesers to buying products from Sodexho to the fact that "clients may choose to switch between the market for unprepared food stuffs and the market for prepared meals." Dis. Op. at 33. He suggests that Sodexho does not sell unprepared food, but rather "prepared meals," and that we are confusing "cost accounting with actual business transactions" by concluding otherwise. *Id.* at 25. However, the record in this case belies that assertion. To the contrary, a factfinder could conclude that Sodexho sells unprepared food to its customers. The record is replete with agreements between facilities and Sodexho wherein the facilities are not charged for "prepared meals," but rather for the cost of unprepared food and supplies, the cost of labor, and a management fee. Sodexho in fact promotes its ability to get lower prices for the food products that its customers use in their facilities. Sodexho notes in its promotional materials that "food and supplies are a major portion of the cost of a food service program." App. 5121. It goes on to boast that its "extensive network of purchasing resources can lower the prices of food and supplies . . . while actually improving the quality of the products you use." *Id.* In its promotional materials and proposals to potential clients, Sodexho could not be more clear that it sells food products to its clients and passes along the price discounts that it is able to secure from its product suppliers in the price that it charges its clients for the products.[10] In fact, Sodexho's

[10] *See* App. 5121 (Proposal for Northern Burlington County Regional School District) ("Our reputation and size give us advantages over smaller food service management organizations. In turn, the savings in which [sic] we obtain will be passed on to your District. You will be charged the same prices as Sodexho Marriott Services pays for all prod-

superior product prices are touted as resulting from Sodexho's "leveraging [its] procurement power as the industry's largest purchaser of food." App. 3806 (Proposal for Abington Friends School). This is a major thrust of its sales pitch.[11] Sodexho's charging its customers for the cost of food products cannot be characterized as mere "cost accounting" any more so than any other business' charging a customer for invoiced goods is just "cost accounting." At minimum, Feesers has proffered sufficient evidence to create a genuine factual dispute as to whether Sodexho and Feesers both resell food products to the "same group of customers."

If substantial price discrimination between competing purchasers over time is established, then the inference of competitive injury arises. *See*

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ucts. Your District will receive all the benefits of our volume and trade discounts, except for cash discounts.").

[11] *See* App. 3622 (Proposal for Beth Sholom Home of Eastern Virginia) ("Utilization of the Sodexho purchasing program provides great financial benefits to our partner facilities. As the industry leader in food procurement with purchasing responsibility for approximately 5,300 facilities throughout the United States, Sodexho is able to purchase food at pricing that is not able to be realized by smaller organizations."); App. 3650 (Proposal for Lancaster Regional Medical Center) ("Sodexho Marriott Services clients benefit from the combined purchasing power of our company with Marriott International, Inc. and Sodexho Alliance. Our food and supply prices are exceptional, as are the quality and systems used to support the purchasing function. In addition to those savings, you enjoy discounts on many other items you buy, such as food service equipment, laboratory sinks, uniforms for front desk or security personnel, light bulbs, carpet, etc. Our prices for most items range from 5 to 25% lower than the next best price.").

Morton Salt, 334 U.S. at 46, 68 S.Ct. 822. However, this inference is not irrebuttable. As the Supreme Court stated in *Falls City Industries, Inc. v. Vanco Beverage, Inc.,* 460 U.S. 428, 103 S.Ct. 1282, 75 L.Ed.2d 174 (1983):

> In *Morton Salt* this Court held that, for the purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. 334 U.S. at 46, 50-51, 68 S.Ct. at 828, 830-831; see *id.* at 60, 68 S.Ct. at 835 (Jackson, J., dissenting). *In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.* F. Rowe, Price Discrimination Under the Robinson-Patman Act 182 (1962); see *Chrysler Credit Corp. v. J. Truett Payne Co.,* 670 F.2d 575, 581 (CA5 1982).

Id. at 435, 103 S.Ct. 1282 (emphasis added). The inference could be rebutted with evidence proffered by defendants that the price discrimination does not cause food service facilities to decide to buy food from Sodexho rather than Feesers. However, the District Court improperly put the burden on *Feesers* to prove that a difference in the price of products causes facilities to switch from buying from Feesers to buying from Sodexho. *Feesers,* slip op. at 22 ("It is undisputed that Michael Foods offered Feesers pricing that matched its pricing to Sodexho because the Meadows was a Sodexho client, however, Feesers failed to establish that the availability of that pricing was the determining factor for the Meadows in making the switch."). This was error. The burden is on defendants to show the absence of the causal link.

Our dissenting colleague takes issue with the Robinson-Patman Act on policy grounds and urges that we are applying it too broadly, so as to render price discrimination between non-competitors a violation of the Act. We reject this characterization of the record before us, and suggest that Congress has written the law, and courts have construed it, to apply to situations where discriminatory pricing poses a threat to competition. Viewing the evidence in the light most favorable to Feesers, a factfinder could conclude that this is such a situation. Therefore, it is for the factfinder, here the District Court, to decide whether defendants' actions fit within the contours of what Congress has proscribed. We will remand for it to do so.

IV.

Accordingly, for the reasons set forth, we will reverse the grant of summary judgment in favor of defendants and remand for further proceedings consistent with this opinion.

JORDAN, *Circuit Judge*, dissenting.

To prove its case under the Robinson-Patman Act, Feesers has tried to show that it is in actual competition with Sodexho. Feesers has argued at length about customers switching from self-operation to outsourcing and back again. Those arguments, however, start with the premise that Feesers and Sodexho sell the same products. The evidence is to the contrary, and, in my view, Feesers has failed to raise a genuine issue of material fact on this crucial point. Because summary judgment for Michael Foods and Sodexho is proper on that basis alone, I respectfully dissent.

I

The undisputed evidence in this case demonstrates that Sodexho's business is of a very different character than Feesers's. Feesers buys unprepared food from suppliers, such as Michael Foods, and resells that unprepared food to its institutional clients. Feesers's involvement ends there. Its clients then take the unprepared foods and prepare meals for their individual customers. Sodexho, on the other hand, is a food management company that contracts with institutions to manage food service operations. Its institutional clients do not themselves provide food service. Instead, Sodexho buys the unprepared food, prepares meals, and sells the prepared meals to individual customers. Unlike Feesers, Sodexho does not sell unprepared food.[12]

[12] I agree with the majority, Maj. Op. at note 4, that we should not consider the activities of Entegra Procurement Services, LLC. While it is a wholly-owned subsidiary of Sodexho, Entegra is a separate legal entity. Feesers has not presented a sufficient basis for piercing the corporate veil and holding Sodexho liable for Entegra's actions. That leaves the question of whether Michael Foods could be liable for discriminating in favor of Entegra rather than Sodexho. However, Feesers has not made out a prima facie case of price discrimination based on sales made to Entegra,

Feesers inaccurately claims the contrary is true. Relying on a contortion of terms in Sodexho's contracts with some of its institutional clients, Feesers says that Sodexho does distribute unprepared foods. More specifically, because Sodexho is sometimes reimbursed by its customers for certain operating expenses, including the cost of food, Feesers contends that Sodexho is selling unprepared food products to its clients. The District Court agreed, stating that Sodexho sells food to its institutional clients, because "[t]he Sodexho proposals and contracts that Feesers has provided as evidence establish that Sodexho, at least in some cases, accounts for food costs as a separate line item within operating costs when billing accounts." Feesers's argument and the District Court's conclusion, which, I regret, my colleagues in the majority have accepted, confuses cost accounting with actual business transactions. There is a world of difference between the two. *Cf. Creque v. Texaco Antilles Ltd.,* 409 F.3d 150, 154 (3d Cir. 2005) (holding that a conveyance of property was not actually a sale despite the use of accounting formalities, because "we must look beyond formalities and accounting entries to the true nature of the conveyance").

Sodexho and its clients agree to allocate costs and profits in various ways. For some of its clients, Sodexho operates the food service and assumes all responsibility for either making a profit or losing money. (Appx. at A1545, 12:5-8.) If sales are less than costs for those accounts, Sodexho bears the loss. (*Id.* at A1545, 12:9-11.)

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because Feesers has failed to present any evidence of such sales.

For other clients, Sodexho is reimbursed for operating costs and charges a management fee, with the remaining profit or loss either going to the client or being shared between the client and Sodexho. (*Id.* at A1546-48, 13:10-15:21.) In those cases, Sodexho invoices the client for specified operating expenses, including software, information systems, decorations, delivery services, unprepared food stuffs, and salaries for Sodexho employees. (*Id.* at A2160-61, A2177-78, A2195-96, A2215-16, A2233-34; *see also id.* at A1256-66.)

Sodexho's receiving reimbursement of such expenses according to these contracts is nothing more than an accounting method that allows Sodexho and its clients to allocate potential profits or losses. The accounting method does not mean that Sodexho is in the business of selling unprepared food, any more than it means Sodexho is a seller of computer software, or of accounting services, or decorations, or any other specifically listed operating expenses. If Microsoft tried to claim Sodexho was competing with it for software sales, it would be only marginally more of a stretch than Feesers's claim. There is no evidence supporting the notion that any Sodexho client calls and asks for a hundred bags of frozen potatoes, as they might when calling Feesers. They call Sodexho when they want prepared french fries and other ready-to-eat food for their customers. The cost accounting provisions in the Sodexho contracts simply do not support the conclusion that Sodexho sells unprepared food products in competition with Feesers.[13]

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[13] Likewise, Sodexho's promotional materials, which tout its ability to negotiate low acquisition prices for unpre-

We are left, then, with the following facts. Feesers buys and resells unprepared food. Sodexho buys unprepared food, prepares meals, and then sells the prepared meals. The precise legal issue presented is whether those facts raise a genuine issue as to "actual competition" between Feesers and Sodexho, as that requirement is properly understood under the Robinson-Patman Act. As discussed below, I do not believe they do.

II

Some historical perspective is in order. The Robinson-Patman Act has been called the "Wrong Way Corrigan" of antitrust, because it "often operates to harm consumers for the benefit of weaker or less efficient dealers. It moves antitrust policy in precisely the wrong direction." Herbert Hovenkamp, *The Antitrust Enterprise* 192 (2005). That this case is now moving forward for trial highlights both the misguided policy behind the Robinson-Patman Act and the blunt mechanisms used

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pared foods, do not demonstrate that it sells unprepared food to its clients. Those materials do not change the fact that Sodexho buys unprepared food and, instead of reselling it, uses it in a business that changes it into a different product, namely prepared meals. That Sodexho is able to operate at lower cost is important to its institutional clients not because those clients have any interest in repurchasing unprepared food. They do not, since they are not self-operating cafeterias. It is important because lower operating costs translate into more profit to be shared by Sodexho and the clients. Thus, the majority opinion is, I believe, mistaken to rely on those promotional materials as showing that Sodexho is in the business of reselling the unprepared food stuffs it acquires from Michael Foods.

to enforce it. Summing up the virtually uniform disdain which antitrust experts have long had for the Act, Judge Robert Bork wrote almost thirty years ago that "[a]lthough [the Act] does not prevent much price discrimination, at least it has stifled a great deal of competition." Robert H. Bork, *The Antitrust Paradox* 382 (1978). This case demonstrates the Act's exceedingly counter-productive character.

First of all, as a theoretical matter, there is no reason to presume that price discrimination poses a threat to competition. Price discounts are generally good for consumers. The theory behind the Act is that one competitor may use a price difference to drive its (presumably smaller and weaker) competitors out of the market. In the absence of market power, however, such a scheme is highly unlikely to succeed. A manufacturer like Michael Foods generally has no interest in shutting down efficient distribution channels for its products, because it is locked in competition with other food suppliers. Distributors like Feesers that are unhappy with the prices charged by Michael Foods have the option, in a competitive market, to get eggs and potatoes elsewhere. Thus, any real threat to competition requires monopolistic market power and could be dealt with under the Sherman Act, with the accompanying requirement for proof of such power.

That difference in required proof is crucial, and highlights why, even if price discrimination were a real threat to competition, the Robinson-Patman Act is not a good means to stop it. The *Morton Salt* inference discussed by the majority, Maj. Op. at Sec. III, allows plaintiffs to proceed to trial in a

Robinson-Patman case without any proof that competition has been or will be harmed. Instead, such plaintiffs rely on the threat of harm to themselves as a proxy for threatened harm to competition. The difficulty is that a competitor will also be harmed by vigorous competition, if that competitor cannot adjust by becoming more efficient. The Act provides no way of distinguishing between an inefficient competitor and one that is harmed by an actual threat to competition itself.

These logical flaws in the Act have led to considerable academic criticism of it and have recently prompted the Antitrust Modernization Commission, which was created by statute and appointed by the President and the leadership of Congress, to recommend that Congress repeal the Act in its entirety. Antitrust Modernization Commission, Report and Recommendations, April 2007, at iii, 317-26. According to the Commission, the Act is "antithetical to core antitrust principles," because it "protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage." *Id.* at iii.

Now, I readily acknowledge that these policy concerns cannot override the will of Congress, and I do not suggest that this Court should attempt to repeal the Act by construing it into the oblivion it so richly deserves. But, given the threat that an overly broad reading of the Act poses to desirable competition, this Court certainly should not read the Act to cover factual situations where only a tenuous argument can support its application.

That the Act should be construed relatively narrowly is not a radical approach. On the contrary, the Supreme Court has recently emphasized that the Act should be construed "consistently with broader policies of the antitrust laws." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.,* 546 U.S. 164, 126 S.Ct. 860, 873, 163 L.Ed.2d 663 (2006) (internal quotation marks omitted). Because lower prices are generally good for consumers, applying the Act broadly threatens to dampen desirable price competition, forcing consumers to pay higher prices for goods. To avoid that threat, the Supreme Court has stated that it will "resist interpretation [of the Act] geared more to the protection of existing *competitors* than to the stimulation of *competition.*" *Id.* at 872 (emphasis in original). In particular, an interpretation of the Act that protects individual distributors rather than competition between brands ignores the "primary concern" of the antitrust laws with interbrand, rather than intrabrand, competition. *Id.*; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 551 U.S. 877, 127 S.Ct. 2705, 2715, 168 L.Ed.2d 623 (2007) ("[T]he primary purpose of the antitrust laws is to protect this type of [interbrand] competition." (internal citation and quotation marks omitted)). We should be following the Supreme Court's lead in resisting such an interpretation. Instead, the decision today goes beyond even the protection of competitors to the protection of non-competitors.

The requirement that a claimant show actual competition limits the Act to its proper scope. "Mindful of the purposes of the Act and of the antitrust laws generally," the Supreme Court has explained that the Act "does not ban all price differences charged to different purchasers of commodities of like grade and quality." *Volvo Trucks,* 126 S.Ct. at 870 (internal quotation marks omitted). "[R]ather, the Act proscribes price discrimination only to the extent that it threatens to injure competition." *Id.* Therefore, while "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time," such an inference only arises if the two purchasers are in "actual competition." *Id.*; *see also Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.,* 63 F.3d 1267, 1271 (3d Cir. 1995).

The competitive injury inference was first discussed some sixty years ago in the *Morton Salt* case. 334 U.S. 37, 50-51, 68 S.Ct. 822, 92 L.Ed. 1196 (1948). There, small grocery stores were allegedly harmed by volume discounts on Morton brand salt that were given to large chain grocery stores. *Id.* at 41, 68 S.Ct. 822. That situation presented the paradigmatic set of facts that Congress was attempting to address with the Robinson-Patman Act. Congress sought to address the perceived evil of large chain stores securing volume discounts not available to small independently-owned stores. *Volvo Trucks,* 126 S.Ct. at 869 ("Congress responded to the advent of large chain stores. . . ."); *see also* Richard A. Posner, *The Robinson-Patman Act* 25-26 (1976) (calling the Act "the high-water mark of the anti-chain-store movement"). In *Morton Salt,* the competing stores purchased and resold the same commodity, table salt, to the same group of customers.

Last year, in *Volvo Trucks,* the Supreme Court declined to apply the *Morton Salt* inference, because the plaintiff, a Volvo dealer, had failed to show that it actually competed with the other dealers who allegedly received more favorable prices on trucks made by Volvo. 126 S.Ct. at 870-72. In a market that operates by bidding, the plaintiff could not show that it had ever directly competed on a bid with a favored dealer. *Id.* at 871. The Court compared the situation to the *Morton Salt* paradigm, stating that "there [was] no discrete 'favored' dealer comparable to a chain store or a large independent department store." *Id.* Thus, the Act did not prohibit the different prices offered to the Volvo dealers.

Until now, we too have limited the *Morton Salt* competitive injury inference to cases like *Morton Salt*. In *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.,* we held that the plaintiffs, including the same Feesers we see here,[14] competed with other distributors to buy and resell the same portion-controlled food products. 909 F.2d 1524, 1526-27 (3d Cir. 1990). More recently, in *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.,* we held that the plaintiff, a distributor of roofing products, could be in actual competition with a company that, although it was known as a manufacturer, actually purchased the identical roofing products and resold them to the same group of customers as did the plaintiff. 63 F.3d 1267, 1271-72 (3d Cir. 1995). In both cases, the "actual competition" arose from the resale of identical products to the same group of customers, just as in *Morton Salt*.

Similarly, the Court of Appeals for the Second Circuit has stated that "[d]etermining the pres-

[14] By the time the *J.F. Feeser* case reached this Court, J.F. Feeser, Inc. had been renamed Feesers, Inc. 909 F.2d at 1526.

ence or absence of functional competition between purchasers of a commodity is simply a factual process which focuses on whether these purchasers were directly competing for resales among the same group of customers." *George Haug Co. v. Rolls Royce Motor Cars Inc.,* 148 F.3d 136, 141-42 (2d Cir. 1998) (citing *FTC v. Fred Meyer, Inc.,* 390 U.S. 341, 349, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968)). In the *George Haug* case, a service station purchased and resold the same Rolls Royce automobile parts as a Rolls Royce dealer that allegedly received more favorable prices from the manufacturer. *Id.* at 141. Such direct competition for the resale of the same product to the same customers qualifies as "actual competition" under the Act.

In this case, Feesers has succeeded in removing the concept of "actual competition" from its foundations in *Morton Salt.* The undisputed facts show that Sodexho and Feesers do not sell the same products, not even some of the time. Feesers sells unprepared foodstuffs, while Sodexho prepares and sells meals. Sodexho does not provide unprepared food in addition to other services; it operates strictly in the separate market for prepared meals. The fact that clients may choose to switch between the market for unprepared food stuffs and the market for prepared meals does not make the markets the same and is, therefore, beside the point. To conclude that Feesers and Sodexho are in actual competition to sell to the same market, we would also have to conclude that grocery stores are in actual competition with restaurants because both types of businesses sell food. Even if, in the abstract, that could be called competition, the situation is far removed from the one in *Morton Salt* and should not be held to satisfy the requirement for "actual competition" under the Act. By sending this case back for trial, we wrongly give credence to a theory of "actual competition" so broad as to effectively read the requirement out of the Act.

Because the facts here fail to show actual competition, as required for Feesers to prove its case, I would affirm the grant of summary judgment for the defendants, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 1:CV-04-0576

Judge Sylvia H. Rambo

FEESERS, INC.,
Plaintiff,
v.

MICHAEL FOODS, INC. and SODEXHO, INC.,
Defendants.

MEMORANDUM

I. Introduction

In this Robinson-Patman Act case, Plaintiff Feesers, Inc., a broad line food distributor, claims that Defendant Michael Foods discriminated against Plaintiff by offering lower prices on its egg and potato products to Defendant Sodexho, a food service management company. Feesers charges Michael Foods with a violation of Section 2(a) of the Robinson-Patman Act for price discrimination, and Sodexho with a violation of Section 2(f) for inducing the price discrimination.

This lawsuit was initiated by Feesers on March 17, 2004. Thereafter, the parties moved for summary judgment. In May 2006, this court found that Feesers had established the first three elements of the prima facie case of price discrimination, but granted summary judgment to Defendants on the ground that Plaintiff had failed to offer sufficient evidence to establish competitive injury. Plaintiff appealed the adverse holding to the Third Circuit Court of Appeals, which reversed this court's holding that there was no evidence of competitive injury and remanded the case for trial. *See Feesers, Inc. v. Michael Foods, Inc.,* 498 F.3d 206 (3d Cir. 2007).

Over the course of three weeks in January 2008, this court held a trial and received evidence on the five issues remaining to be decided. First, whether Plaintiff is entitled to an inference of competitive injury, the fourth element of the prima facie case of price discrimination. Second, if Plaintiff receives an inference of competitive injury, whether Defendants have rebutted that inference by breaking the causal connection between the lower prices and any competitive injury. Third, whether Defendants have established the affirmative defense of "meeting competition" by showing that the lower prices to Sodexho were offered to meet the equally low prices offered by Michael Foods' competitors. Fourth, whether Plaintiff has proven that Sodexho induced price discrimination. Finally, whether Plaintiff is entitled to equitable relief. The following are the court's findings of facts and conclusions of law.

II. Prima Facie Case of Price Discrimination

The Robinson-Patman Act was passed by Congress to respond to the issue of large chain stores utilizing their great purchasing volume to secure lower prices than their smaller competitors. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, provides in pertinent part:

> 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.

15 U.S.C. § 13(a). Where a disfavored purchaser establishes that a price discrimination has caused lost sales or profits, competitive injury is established. However, in *Morton Salt*, the Supreme Court held that because the Robinson-Patman Act aims to prevent such injury, proof of lost sales or profits is not necessary to seek injunctive relief under the Act. *F.T.C. v. Morton Salt,* 334 U.S. 37, 49-51, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948). Specifically, the Court recognized that a permissible inference of competitive injury may arise where a favored purchaser receives a significant discount from the price received by its

competitors that endures over a substantial period of time. *Id*.

Accordingly, to establish an inference of price discrimination under the Robinson-Patman Act in the absence of lost sales or profits, a plaintiff must show: "(1) that sales were made to two different purchasers in interstate commerce; (2) that the product sold was of the same grade and quality; (3) that defendant discriminated in price as between the two purchasers; and (4) that the discrimination had a prohibited effect on competition." *Feesers, Inc. v. Michael Foods, Inc.,* 498 F.3d 206, 212 (3d Cir. 2007) (citing *Texaco Inc. v. Hasbrouck,* 496 U.S. 543, 556, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)).

Here, the court has already found that Plaintiff has established the first three elements of the prima facie case of price discrimination.[1] *Feesers Inc. v. Michael Foods, Inc*., 2006 U.S. Dist. LEXIS 29695, 2006 WL 1274088, at *5-8 (M.D. Pa. May 4, 2006). The only element at issue is the final one—competitive injury. The Third Circuit has instructed that:

> "Competitive injury" is established prima facie by proof of "a substantial price discrimination between competing purchasers over time." In order to establish a prima facie violation of section 2(a), Feesers does not need to prove that Michael Foods' price discrimination actually harmed competition, i.e., that the discriminatory pricing caused Feesers to lose

[1] This holding was not challenged by any party on appeal. Accordingly, this ruling remains the law of the case. (*See* Doc. 230.)

> customers to Sodexho. Rather, Feesers need only prove that (a) it competed with Sodexho to sell food and (b) there was price discrimination over time by Michael Foods. This evidence gives rise to a rebuttable inference of "competitive injury" under § 2(a). The inference, if it is found to exist, would then have to be rebutted by defendants' proof that the price differential was not the reason that Feesers lost sales or profits.

Feesers, 498 F.3d at 213 (citing *Falls City Indus., Inc. v. Vanco Beverage, Inc.,* 460 U.S. 428, 434-35, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983)).

Accordingly, in order to establish a prima facie showing of price discrimination, Feesers must demonstrate by a preponderance of the evidence that (1) it was in actual competition for the same dollar with Sodexho for the sale of food to institutional customers, and (2) Michael Foods' discrimination in price between Sodexho and Feesers was substantial over time. If this burden is met, then Feesers is entitled to an inference of competitive injury. These two elements will be discussed in turn.

A. Actual Competition

1. Legal Standard

The Third Circuit has instructed that "[t]o determine whether Sodexho and Feesers compete to resell food products to the same group of customers '[the court] must conduct a careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.'" *Feesers*, 498 F.3d at 214 (quoting *M.C. Mfg. Co. v. Tex. Foundries, Inc.,* 517 F.2d 1059, 1068 n.20 (5th Cir. 1975)). However, Feesers need not prove that the price of Michael Foods' products was the determinative factor in any customer's decision to choose Sodexho or Feesers. *Feesers,* 498 F.3d at 213-216. Instead, in order to demonstrate actual competition for the same dollar, Feesers must show that it competes with Sodexho for the same portion of an institution's food service budget. *Id*.

1. Findings of Fact

With this standard in mind, the court turns to the evidence presented at trial in this case. Feesers claims that the evidence demonstrates that it competes with Sodexho to sell Michael Foods egg and potato products to certain institutional food service customers within a 200 mile radius of Harrisburg, Pennsylvania. Defendants argue that the evidence demonstrates that Feesers and Sodexho offer two completely different services—Feesers food distribution and Sodexho food management—and that customers do not perceive the two companies to be in competition with each other. In evaluating the evidence, the court will first discuss the distribution chain in the food service industry generally, and the roles played by the parties to this suit within that system. Thereafter, the court will examine the customers for whose business Feesers claims that both it and Sodexho compete. In particular, the court will focus on the decision making process that occurs when a customer decides how to purchase food, including the timing of the decision and the factors informing it.[2] The following are the court's factual findings, established by a preponderance of the evidence presented at trial.

The food service industry generally

This case concerns competition for the sale of Michael Foods' egg and refrigerated potato products to institutions providing dining services. In order to put this competition in context, a general description of food manufacturing, distribution, and institutional dining services is required. Institutional dining services consists of meals prepared away from home. Institutions providing dining services include colleges and universities; educational institutions such as elementary and high schools; hospitals, nursing homes, and other group living institutions; and corporations.

An institutional dining services program encompasses a number of discrete functions. These

[2] In this analysis, the court looks to the customers' decision making process not to see if price of food is a determinative factor—an inquiry the Third Circuit has held is inappropriate in assessing whether the parties are in actual competition, *see Feesers, Inc.,* 498 F.3d at 213-216—but rather to determine whether and when a customer may switch from self-op (in which food is purchased and delivered from distributors such as Feesers) to food service management (in which food is purchased from food service management companies such as Sodexho who in turn arrange for purchase and delivery by distributors). Feesers and Sodexho are only in competition if customers have a choice between one to the other. The customers' motivation for choosing one company over the other is relevant to determine whether the inference of price discrimination has been rebutted, *see id.* at 216, and will be discussed at length below.

include menu planning, procurement of food, delivery of the food, hiring and supervision of employees to prepare and serve the food, and maintenance of a kitchen and cafeteria. Institutions have a wide range of options to accomplish these tasks. An institution may choose to self-operate ("self-op") its dining services program and perform all dining services tasks internally. On the other hand, an institution may choose to outsource part or all of these functions. When an institution makes the decision to outsource, it has essentially two options. The first is that the institution can act as a general contractor, and hire other companies to perform one or more food services tasks. The other option is that the institution may choose to hire a food service management company to act as a general contractor. In turn, the food service management company subcontracts the responsibility of providing one or more food service functions to other companies.

Regardless of how institutions choose to organize their dining services, all must purchase food (procurement) and have it delivered to the loading dock of the institution (distribution). Distribution is always performed by a distributor. However, for procurement—which in this context includes both bargaining for the price of the food, and purchasing the food—an institution has a number of options. It may procure food from distributors, or contract with a group purchasing organization (GPO) or food service management company to procure food. GPOs generally bargain for a lower price, but do not actually purchase the food for resale to institutions. On the other hand, food service management companies bargain with manufacturers for lower food prices and arrange for the purchase and delivery of that food for resale to the institution.

The Parties

The court now turns to the particular roles played by the parties to this case within the food service industry. Plaintiff Feesers is a broadline food distributor, carrying thousands of lines of food and food-related products from many different manufacturers. Feesers is a regional distributor based in Harrisburg, Pennsylvania, and it does most of its business within a 200 mile radius of Harrisburg, an area encompassing parts of Pennsylvania, New Jersey, Maryland, Virginia, and Delaware. Feesers' customers include all segments of the food service market; however, this litigation concerns Feesers' institutional food service customers such as hospitals, schools, nursing homes, colleges, and corporations. In addition to directly distributing food to self-op food services providers, Feesers also contracts with food service management companies to deliver food to institutional food service companies that they manage.

Defendant Michael Foods is a national manufacturer of egg and refrigerated potato products. Its egg products are sold under the brand names "Papetti's" and "M.G. Waldbaum" and its refrigerated potato products under the brand name "Northern Star." Michael Foods is the largest producer of liquid eggs in the nation.

Defendant Sodexho is a multinational food service corporation headquartered in France and which does business around the world, including the five state area in which Feesers operates. As a result of recent mergers with other food service management companies including Marriott and the Wood Company,[3] Sodexho is currently both the largest food service management company and the largest private purchaser of food in the world. Sodexho's customers are large institutions across the country, including many schools, hospitals, nursing homes, corporations, and universities within Feesers' geographical zone of operation.

Competition between Feesers and Sodexho

As a general rule, institutions with dining services fall into two categories: self-op and managed. Feesers only sells food to self-op institutions, and Sodexho only sells food to managed institutions in conjunction with its food management services. When a self-op institution procures its food from Feesers, it generally bargains with Feesers over both the price of the food and the distribution fee for delivery of that food.[4] Alternatively, a self-op may choose to utilize the services of a GPO to bargain for a lower price. In this case, the institution purchases food from a distributor at the GPO-

[3] At the time of the acquisition, Feesers was the primary distributor for the Wood Company. After the acquisition, Feesers continued to provide distribution for some former Wood accounts which were being managed by Sodexho. Feesers subsequently competed to be the primary distributor for Sodexho, but lost the bid to Sysco, a national distribution company which remains Sodexho's primary distributor.

[4] Sometimes an institution bargains directly with Michael Foods for a discount on the food, in a transaction referred to as a deviated billback. This transaction will be discussed in detail later.

negotiated price plus a payment to the distributor for delivery. On the other hand, an institution managed by Sodexho contracts with Sodexho to arrange for the procurement and delivery of raw food to the institution. Sodexho then bargains for a lower food price from the manufacturer and hires a distributor to purchase food at the Sodexho-negotiated price for resale to Sodexho at that price plus a distribution fee. Sodexho in turn bills the customer for the cost of food at Sodexho's negotiated price, plus the distribution fee. Thus, a self-op institutional food service customer purchases food from a distributor such as Feesers, while a managed institution purchases the same food from a food service management company such as Sodexho.

Though it would appear that Feesers and Sodexho serve two discrete groups of customers, in fact institutional customers regularly switch from self-op to management and vice versa. Some Feesers customers have switched to Sodexho, including the Jewish Home of Greater Harrisburg and St. Mary's Catholic School. More rarely, some Sodexho customers such as the Meadows have switched to self-op and become Feesers customers. Both Feesers and Sodexho actively seek the business of self-op institutions. The testimony at trial from both Feesers and Sodexho employees, as well as Sodexho's securities filings and strategic planning documents demonstrate that Sodexho seeks to convert self-op institutional customers to food service management. Moreover, the same documents demonstrate that Sodexho has been successful in this goal.

Sodexho Documents

Sodexho's internal documents also demonstrate competition with distributors such as Feesers to sell food to institutions such as schools, hospitals, nursing homes, and colleges. For instance, in Sodexho's Form 20-F filed with the U.S. Securities and Exchange Commission Sodexho describes its competition for the business of self-ops as follows:

> Our success depends on our ability to retain and renew existing client contracts and to obtain and successfully negotiate new client contracts.
>
> . . .
>
> Our business and growth strategies depend in large part on the continuation of a trend in business, education, healthcare and government markets toward outsourcing services. The decision to outsource depends upon customer perceptions that outsourcing may provide higher quality services at a lower overall cost and permit customers to focus on core business activities. We cannot be certain that this trend will continue or not be reversed or that customers that have outsourced functions will not decide to perform these functions themselves.
>
> Management has also identified a trend among some of our customers towards the retention of a limited number of preferred vendors to provide all or a large part of their required services.

(Sodexho Form 20-F, P303 at 8.) Additionally, in describing opportunities for future growth, Sodexho notes the following:

> Healthcare represents the largest potential market for Food and Facilities Management Services with outsourcing rates comparatively low. We estimate that more than half of this market is in short-stay centers (public and private hospitals) and the remainder in long-term care facilities for the elderly and the dependent. On average, we estimate that about one third of this food service market is currently outsourced, with short-stay facilities generally more likely to outsource than long-stay facilities by a ratio of almost two-to-one. We estimate that the education market is about one-third outsourced in food service, with about one quarter of private sector institutions and about three quarters of public institutions outsourcing food service.

(P303 at 22.)

Sodexho tracked both new self-op conversions and accounts lost back to self op in documents it referred to as "churn reports." One such churn report demonstrates that from 2000 until 2003, Sodexho gained approximately $330 million dollars in market share from self-op conversions in the hospital market, while losing approximately $142 million in accounts that converted back to self-op. (Health Care Services, Hospitals Strategic Plan, FY05-07, P160 at 40.) By contrast, competing food service management companies gained

$408 million of the market in new self-op conversions while losing $253 million back to self-op. (*Id.*) Accordingly, Sodexho concludes that it "is converting self-op faster than any other single competitor, and is closing 45% of all Self-Op conversions in the market." (*Id.*) Churn reports demonstrate that institutions regularly switch back and forth between self-op and management, but that management has been gaining market share in recent years.

In addition to describing competition *for* self-ops, Sodexho repeatedly refers to competition *with* self-ops. For example, in its securities filing, Sodexho describes competition with other food service management companies, and then goes on to describe self-ops as a source of competition:

> Competition in the industry
>
> There is significant competition in the food and facilities management services business from local, regional, national and international companies of varying sizes, a number of which have substantial financial resources. . . . Existing or potential clients may also elect to self-operate their food or other services, or to utilize other purchasing arrangements, thereby reducing or eliminating the opportunity for us to serve them or compete for the account.

(P190 at 9.) This characterization of self-ops as a competitor also appears in Sodexho strategic planning documents assessing competition in various segments of the institutional food services industry. (*See, e.g.*, Sodexho Health Care Division Three Year Plan FY01-03, P189 at 25 (describing self-op acute care institutional customers as "an increasingly formidable competitor able to effectively replicate contractor offerings" and noting that "market dynamics and internal cultural actors cause many self-op institutions to 'think twice' before outsourcing."); Sodexho Competitive Intelligence Overview Findings, Health Care Services: Hospitals Phase I, 2003, P170 at 2 (identifying self-op as Sodexho's number one competitor).)

As noted above, Sodexho, like other food service management companies, essentially performs the function of a general contractor. When a self-op becomes a Sodexho-managed institution, it relies upon Sodexho to perform all dining services functions for which it was previously responsible, including procurement and distribution of food. Though this function is still performed by a distributor, the institutional customer does not select, contract with, or pay the distributor selected by Sodexho, as it would if the institution were self-op. Thus, when an institution switches from self-op to management, the incumbent distributor is displaced. Conversely when a managed institution switches to self-op, the functions previously performed by a food service management company, including the sale and delivery of food, are once again performed by a distributor. Accordingly, Feesers and Sodexho compete for the same portion of an institutions' food service budget.

As Sodexho recognized in a number of strategic planning documents,

> Self-operated businesses can be expected to continue to seek the appropriate balance of cost savings, operational quality (including regulatory compliance), and

> patient satisfaction that meet the organization's needs and culture.
>
> The balance described above will be achieved with or without contractors depending upon an organization's needs and capabilities at any given time—there will be limited loyalty to outsourcing, in general, or any one contractor.
>
> Self-operated facilities can be expected to use contractors opportunistically—the moment value in excess of cost is not perceived (facility is now clean/in regulatory compliance, obvious cost improvements have been made, step increase in patient satisfaction has been achieved, etc.) the contracting relationship will be at risk. The 'Battle for Value' will intensify

(Competitive Intelligence Overview Findings, Health Care Services: Hospitals Phase I, 2003, P170 at 3; P182 at 2.) Similar assessments appears in other Sodexho strategic planning documents for the Senior Services sector, (*see, e.g.*, P178 at 15; P166 at 4), in the Education sector, (P190 at 103 (describing self-ops as Sodexho's number one competitor).) In its Senior Services Executive Abstract Phase I: FY 03-05, Sodexho offered the following "Summary of Competitor Strategy for Self-operated institutions:

> Support services, especially food and dining services, is considered a 'core competency' and an integral part of the resident offer provided by Senior's facilities. Contractors, therefore, are perceived as taking away administrators' value and

> expertise. Until contractors prove that they can provide needed value to respond to new market issues, there will be little movement towards outsourcing.
>
> Facilities will continue to receive much of the critical expertise they require through government resources, consultants, or vendors (e.g. menus through Sysco).

(P178 at 15; *see also* Senior Services Strategic Plan FY04-06, Competitive Intelligence, P166 at 4.)

Defendants argue that the fact that the strategic planning documents do not specifically mention distributors as a competitor category demonstrates that distributors such as Feesers do not compete with Sodexho. To the contrary, it is clear that when Sodexho refers to self-op as a "competitor," it means that self-ops are able to replicate the same functions that Sodexho itself provides. This includes procurement of food from distributors such as Feesers. Thus, when Sodexho refers to self-ops as "competitors" this includes all other companies providing functions that Sodexho seeks to contract to perform, including distributors.

In response to the trend towards segmentation of functions, Sodexho explored the possibility of unbundling its services to win self-op accounts. In the Executive Abstract, Senior Services Phase I Strategic Plan FY03-05, Sodexho took note of the following "Future Opportunit[y]"

> Co-Sourcing: This concept has been in development and some testing over the

> past 18 months in both the former Wood and Sodexho companies. A contractual approach to 'consulting', this offer may allow us to sell our services in an 'unbundled' portfolio to Systems, as well as smaller facilities. We need to continue to energetically pursue this offer as a possible solution to penetrating the self-op market.

(P178 at 29.)

GPOs as Competitors

Though Sodexho's strategic planning documents do not specifically mention distributors as competitors, they do discuss the competitive threat posed by GPOs, whose functions overlap with distributors. These documents shed further light on competition between Sodexho and distributors, including Feesers. GPOs negotiate with manufacturers for lower prices on behalf of their members. Additionally, GPOs may arrange for the sale and distribution of food at a discount, generally by contracting with a distributor. Thus, like distributors such as Feesers, GPOs perform some, but not all of the functions provided by food service management companies such as Sodexho.

Distributors and food service management companies compete with GPOs for the business of institutions providing dining services. In its strategic planning documents, Sodexho noted that "GPOs are an increasingly aggressive competitor" and warned to "[l]ook for individual GPOs to emerge as competitors in future years." (Competitive Intelligence Overview Findings, Health Care

Services: Hospitals Phase I, 2003, P170 at 2.) Sodexho found that self-ops had an "[i]ncreasing perception that comparable or better purchasing economies can be obtained through GPOs. Accordingly, there is an increasing number of facilities seeking/joining GPOs." (*Id*. at 4.)

The trend continued in the following years. In Phase I: FY 03-05 Health Care Services Strategic Plan, Sodexho describes the health care industry as "highly dynamic, challenged, and cost focused," in part due to "GPOs and e-commerce producing a commodity approach." (P1 82 at 2.) Accordingly, "as a result of these trends, health care executives will look to [Sodexho] to . . . [p]rovide products and services that deliver cost savings at acceptable quality levels or predictable cost with higher satisfaction levels." (*Id*. at 3.)

In the Hospitals 04-05 Strategic Plan—Phase II, Strategy and Ambition, Sodexho defined the Battle for Value as follows:

> Part of our business dilemma and in fact, the whole industry's business dilemma, is that our value proposition has lost its 'edge.' This challenge is clearly indicated by low penetration rates that haven't materially moved in years. Under current market dynamics, our forecast is that the hospital market will not produce enough "actionable" outsourcing decisions to sustain growth for the major competitors (see sales plan). *In general, the lines between [Sodexho], contractor capabilities, and self-operated capabilities have blurred. Contractors, therefore, are competing for the same small slice of a churning market*

> *resulting in a commodity mentality and a strained market*. This phenomenon has also, in effect, raised the basic 'price of admission' higher—features previously viewed by contractors as value added are now necessary base components of an expected offer. This is the "Battle For Value.

(P167 at 12 (emphasis added).)

Later, in its Health Care Services Hospitals FY05-07 Strategic Plan, Phase II, Sodexho observed the trend of increased competition with GPOs continuing:

> GPOs /E-Commerce: The growing number and complexity of GPOs combined with the emergence of e-commerce business applications in the procurement arena have, in effect, equalized the playing field enabling all entities to gain procurement leverage. Even a non-GPO aligned stand-alone facility can aggregate its buy with other facilities through E-commerce. Our historical pricing advantage is dramatically minimized. Additionally, GPOs increasingly dictate many or all aspects of the procurement process including product selection, distribution, etc.

(P160 at 16.) The implication of this trend for Sodexho Health Care Services is that "[h]istorical and clear point of differentiation will not be there for us in the future" "[i]ncreasing amount of time defending and explaining (market baskets, meetings, etc.) our prices" "[w]e are on the defensive and our credibility suffers" and "[c]ompetitors may gain access to our accounts through 'back door' purchasing relationships." (P160 at 16.)

In a summary of competitor strategy for Summary of Competitor Strategy for GPOs, Sodexho observed the following:

- GPOs will become even more aggressive and sophisticated in the analysis, pricing, and level of detail required from their preferred partners procurement programs
- Increasingly setting pricing structures to compete with and/or win market baskets
- Emergence of more GPOS that will target our high volume accounts . . .
- Capture all volume discount allowances possible for their members
- Require preferred partners to run all product procurement through the GPO rather than their own programs
- GPOS will increasingly act as for profit entities as they seek to add services and products for their members
- The line between alliance partner and competitor will continue to blur, and likely disappear, as GPO services and products overlap with and contradict [Sodexho's] products and services (consulting, etc.)
- Continue to improve food procurement skills

- May even begin to bid services via e-commerce
- Require partners to adhere to their program specifications (distributor, purchasing program, product specs, etc.) and impose financial penalties per contract terms for non-compliance

(P160 at 10.) Sodexho concluded: "Our primary response should be to a) re-evaluate our pricing strategy so we are competitive at the 'loading dock', . . . c) explore ways to expand Entegra's role and presence in the healthcare industry." (P160 at 10.) Sodexho's strategy to achieve dominant market share includes "Establish competitive food pricing so [Sodexho] is competitive at the loading dock versus GPO pricing structure." (P160 at 31.) In its Health Care Services Hospitals FY05-07, Strategic Plan Phase I, Sodexho acknowledged that it needed to reconsider its relationships with GPOs because "[t]he line between alliance partner and competitor will continue to blur, and likely disappear, as GPO services and products overlap with and contradict [Sodexho's] products and services (consulting, etc.)." (P161 at 50.)

This evidence demonstrates that GPOs, like distributors such as Feesers, compete with Sodexho to perform some, but not all, of the functions Sodexho offers to its customers Institutional customers may choose to procure food from Sodexho in conjunction with its management services, or they may choose to self-op and procure food from either a GPO or a distributor such as Feesers. Evidence of Sodexho's increasingly fierce competition with GPOs indicates that Feesers, Sodexho, and

GPOs are all competing for business of the same group of institutional customers.

Entegra

One response by Sodexho to increasing segmentation of functions in the food service industry was to develop its own GPO, Entegra, to provide food service procurement unbundled from the distribution and management services typically provided by Sodexho. Entegra is a wholly owned subsidiary of Sodexho, and it has access to Sodexho deviated pricing. Entegra is not a defendant to this action, but its strategic planning documents shed light on competition between Feesers and Sodexho by offering further evidence of the increasing segmentation in the institutional dining services market and the increasing interest of institutions in saving money by lowering food prices.

In a strategic planning document, Entegra describes the Health Care and Senior Services market as follows:

> Heath Care and Senior Services will be dominated by a few key GPO's . . . these health care GPO giants will lose market share as large systems opt to self-contract. In response, the GPO's will seek to maintain their profits by spilling over into the schools and campus markets where they will take hold over the next two to three years. They will find a responsive customer due to strong plays by Sysco and US Foodservice [both broadline distributors] to increase their margins in the wake of waning national competition.

(Entegra's Three-Year Plan, FY2005-2007, Phase I, P163 at 4.) Further in the same document, Entegra describes a trend towards segmentation of procurement and food service management: "It is becoming increasingly more common that health care systems will look at procurement and management as two different functions . . . Some customers are going a step further and looking at distributor and manufacturer relationships as two different functions to be outsourced." (*Id.* at 19.) Entegra summarized the risks and opportunities of this trend as follows:

> There is an increasing tendency of systems in health care to look at procurement as a separate function from the management services Sodexho provides. . . This can lead to further utilization of entegra with a resulting erosion in margins. We will need to compete for this procurement business in order to continue to have access to our contracted products. . .
>
> As systems pull back from GPO relationships they will look for providers such as Sodexho to offer services that address the needs of all of their facilities—management for some, procurement for others, cosourcing for yet others. This can be a risk and an opportunity. . . It is likely that current entegra clients will bid distribution and procurement services as two different activities in the future. . . . We expect that many will negotiate their own distribution

> agreements and look for a third party to provide manufacturer agreements.

(P163 at 20.)

The Entegra Procurement Services Three Year Plan FY 2005-2007, Phase II supports this trend:

> Opportunities, Risks & New Business—Risks continue to be in the area of pricing competitiveness and the spread of group purchasing organizations. While pricing competitiveness is a challenge for entegra from a sales and retention perspective it is increasingly becoming an issue for the retention of purchasing in Sodexho-managed business. Due to this, entegra is being considered more frequently as an option for Sodexho business.

(P159 at 6.) Entegra continued to observe the market trend towards segmentation:

> It is becoming increasingly more common that health care systems will look at procurement and management as two different functions . . . Some customers are going a step further and looking at distributor and manufacturer relationships as two different functions to be outsourced.

(*Id*. at 12.) "A strong systems offer that includes management services for select sites and procurement services for others can be a strong retention activity with existing clients or a lead-in with a potential client." (*Id*. at 13.)

Timing of Competition

Defendants argue that regardless of the evidence that Feesers and Sodexho compete for the same institutional customers, they are not in actual competition for any one customer because Sodexho typically competes only in a formal bidding process in which distributors such as Feesers do not participate. However, contrary to Defendant's assertions, the evidence presented at trial demonstrates that competition occurs not just in the formal request for proposal ("RFP") process, but also on an informal basis all the time. Sodexho sales employees regularly make informal contacts with targeted institutions, some of which are Feesers customers.

As a general matter, Defendants are correct that the evidence demonstrates that most self-op institutions engage in a formal RFP process prior to signing a contract with a food service management company. The RFP process generally only includes food service management companies such as Sodexho, Compass, and Aramark. Depending on the size and type of institution, the RFP process may be extremely detailed and lengthy and include bids on a wide range of services not provided by distributors. However, not every RFP process concludes with a contract with a food service management company. As Sodexho noted in a strategic planning document, sometimes "Self-Ops use contractors to 'fix' current problems and then return to self-op or use the RFP process to gain ideas but remain in-house." (P190 at 19.)

Additionally, Sodexho competes with distributors such as Feesers outside of the formal RFP process. Jay Marvin, Sodexho's Senior Vice President for Sales and Marketing for the Health Care Division, described how Sodexho seeks to acquire a new client. For self-ops, Sodexho first identifies institutions that meet its client profile (generally larger institutions). Sodexho sales team then makes contacts and forms relationships at the institution. The team gauges the institution's interest in management and determines whether there are any particular problems to be solved. If the institution is interested in management, then it puts out an RFP. The RFP process for hospitals is usually quite lengthy and formal, and generally only involves other food service management companies such as Aramark and Compass. The process can be less formal with senior services institutions, but a proposal is still generally required.

Moreover, in some cases, Sodexho's proposals themselves demonstrate direct competition with distributors. This can occur when a self-op institution chooses to utilize Sodexho management services while retaining distributors for some or all food procurement. For instance, in a proposal to the Beth Sholom Home of Eastern Virginia, Sodexho urged the institution, which was already a Sodexho customer, to utilize Sodexho's procurement program as well:

> Purchasing Program
>
> Utilization of the Sodexho purchasing program provides great financial benefits to our partner facilities. As the industry leader in food procurement with purchasing responsibility for approximately 5,300 facilities throughout the United States,

> Sodexho is able to purchase food at pricing that is not able to be realized by smaller organizations.
>
> Currently the full resources of the Sodexho procurement program are not being utilized. A significant portion of the department purchasing is done utilizing US Foodservice[a broadline food distributor]. It is our recommendation that Beth Sholom Home of Eastern Virginia take full advantage of the kosher procurement program and pricing afforded by its partnership with Sodexho. Use of the Sodexho kosher vendors would not only streamline the ordering process but would substantially reduce pricing, specifically in the kosher poultry market.

(P77 at 2.)

Customer Testimony

Defendants also called ten customer witnesses who testified unanimously that they did not perceive Feesers to be a competitor with Sodexho.[5] However, the court does not infer from this testimony that Feesers is not in competition with Sodexho for the sale of food to institutional customers for a number of reasons. It appeared that the witnesses believed that two companies are competitors only if they offer precisely the same set of services. At least one witness (Shippensburg) was under the impression that Feesers was

[5] The customer testimony will be addressed in greater detail when addressing Defendants' attempt to rebut the inference of competitive injury.

seeking the opportunity to bid against Sodexho in the RFP process. Many other institutions had already committed to either self-op or management at the time they were considering either Feesers or Sodexho, and accordingly their choices were limited to either distributors or management companies.

No testimony was presented by any witness for an institution that was considering a switch from self-op to management, or vice versa. However, it is clear from Sodexho's own internal documents that many institutions do regularly switch from self-op to management. Thus, the court cannot infer from the testimony of the ten customer witnesses who were not considering such a switch that no customer ever does consider such a switch. Accordingly, the court gives no weight to the conclusions of the ten customer witnesses that Feesers does not compete with Sodexho.

3. Conclusions of Law

Based on the above findings of fact, the court concludes that Feesers and Sodexho are in actual competition for the same dollar in the sale of Michael Foods products to institutional customers within Feeser's geographical zone of operation. Feesers and Sodexho both compete to sell Michael Foods egg and refrigerated potato products to the same institutional customers. The court will take this opportunity to address a few of Defendants' arguments on this point.

First, Defendants argue that Feesers competes only with other distributors such as Sysco, rather than food service management companies such as Sodexho. In support of this argument, Defendants point out that Sodexho has no delivery trucks or warehouses, and does not directly perform distribution for its clients. However, the fact that Sodexho chooses to subcontract the physical delivery of food to a distributor (generally Sysco) rather than perform this function itself is of no significance in determining whether Sodexho competes with Feesers. From the perspective of the institutional customer, that customer contracts with Sodexho to provide food and distribution, notwithstanding the fact that Sodexho in turn contracts with a distributor to perform the function. Thus, Sodexho competes with distributors in the sale of food and distribution to institutional food service customers. The Supreme Court has repeatedly stated that the Robinson-Patman Act should not be construed in a way that "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link in the supply chain." *Perkins v. Standard Oil Co. of Cal.,* 395 U.S. 642, 647, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969); *accord Texaco Inc. v. Hasbrouck,* 496 U.S. 543, 567 n.26, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990) (applying same principle to similar facts).

It is also not significant that Feesers and Sodexho have never simultaneously submitted an RFP to the same customer at the same time. As noted above, the evidence presented at trial demonstrates that competition in the industry is not confined to the formal RFP bidding process. For instance, Sodexho sales employees testified that they solicit the business of self-op facilities that have never before considered food service management. Additionally, the evidence established that some customers initiate the RFP process in order to gain ideas for how to improve their food service programs, but ultimately decide to remain self-op. Other customers utilize food service consultants to submit a self-op bid in the RFP process. Finally, some customers hire a food service management company to correct problems with their food service programs, only to return when the problems are fixed. In this competitive environment, the fact that no distributor has ever submitted a proposal in a food service management RFP process does not establish that distribution companies are not in competition with food service management companies for those accounts. Instead the evidence demonstrates that competition occurs when a customer considers switching from self-op to food service management, or vice versa. Although the customer's decision may be influenced by the RFP process, competition for an account is not confined to the process.

Defendants cite *Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006), in support of their claim that Feesers was not in competition with Sodexho for the sale of Michael Foods products. In *Volvo Trucks*, the Court held that a truck manufacturer did not violate the Robinson-Patman Act by offering different discounts to dealers submitting bids for custom-made trucks to customers because there was no actual competition between the dealers for the same customers. In reaching this conclusion, the Court carefully examined the competitive process for the sale of custom-made trucks. The record revealed that customers purchased custom-made trucks through a competitive bidding process. Customers solicited bids from numerous dealerships selling different brands of trucks, but because Volvo dealers generally operated in separate geographic zones, customers rarely submitted simultaneous bids from two different Volvo dealers at the same time. In preparing a bid, Volvo dealers often requested a discount from Volvo. In the rare instance that two Volvo dealers were submitting a bid to the same customer, Volvo's policy was to offer the same discount to both dealers. Reeder-Simco complained that other dealers received steeper discounts from Volvo, but the Court held that this was an inappropriate comparison to make because those sales involved only other non-Volvo dealers. In other words, because the competitive process for the sale of custom-made trucks was formal and limited to only a handful of dealers, Reeder-Simco was not in actual competition with other Volvo dealers in transactions in which it did not submit a bid. The Court acknowledged that Reeder-Simco competed with other Volvo dealers for the *opportunity* to bid on sales, but noted that at this stage in the competition, no dealership had secured any discount from Volvo that they could use to gain a competitive advantage over other Volvo dealers. *Id.* at 178-179. Accordingly, the Court concluded that the discounts received by other Volvo dealers during the course of any bidding process in which Reeder-Simco did not bid did not result in competitive injury to Reeder-Simco. *Id.* at 179.

Volvo Trucks teaches that in order to determine whether two purchasers are in actual competition, a court must carefully examine both the competitive process and the customers. Defendants attempt to draw an analogy between *Volvo Trucks* and the facts of this case, claiming that the competitive process for the sale of Michael Foods products is narrowly confined to the RFP process, in which Feesers and other distributors do not directly participate. However, as noted above, the court rejects Defendants' narrow view of competition in this case. The evidence presented at trial establishes that competition for the sale of Michael Foods egg and potato products to institutional food service customers was ongoing and not limited to the formal RFP process. Food service management companies, distributors, and GPOs all compete formally and informally for the sale of food to institutions. Even when a company initiates the RFP bidding process, which includes only food service management companies, that choice is not final or limited to the companies submitting a bid. *Volvo Trucks* is not controlling because competition in this case is much broader than that at issue in that case. Unlike *Volvo Trucks*, the fact that Feesers does not participate in head-to-head bidding against Sodexho in a formal RFP process does not demonstrate that Feesers does not compete with Sodexho for the sale of Michael Foods products to those customers.

B. Substantial Price Discrimination Over Time

1. Legal Standard

In order to pose a risk of injury to competition, there must be substantial price discrimination over time. "The presumption of the requisite adverse competitive effects contemplated by section 2(a) is most likely to arise when the price differential is (1) substantial enough to influence a disfavored customer's resale price; or (2) occurs in a market with low profit margins and intensive competitive conditions." *J.F. Feeser v. Serv-A-Portion,* 909 F.2d 1524, 1538 (3d Cir. 1990) (internal citations omitted). Temporary or trivial price differences are not normally enough to risk an injury to a disfavored competitor. However, the longer the discount is offered and the greater magnitude the price difference, the more likely it is that the price discrimination will cause an injury to competition.

2. Findings of Fact

The evidence presented at trial establishes that Michael Foods discriminated in price in favor of Sodexho and against Feesers in the sale of egg and potato products to a sufficient degree and duration to entitle Feesers to an inference of competitive injury. The court will now review the evidence of price discrimination presented at trial and briefly respond to Defendants' criticisms of that evidence.

Michael Foods Pricing

Michael Foods generally sells its products to distributors at list price. For egg products, Michael Foods' list price applies nationally. Because competition for potato products varies by region due to competition by relatively small regional potato product manufacturers, Michael Foods has different pricing arrangements based on region for its potato products. However, one list price applies to distributors competing within the same geographical region for the sale of Michael Foods potato products.

Until the mid-1990s, all distributors purchased food at the national list price from manufacturers, including Michael Foods. In the 1990s, some large institutions began negotiating directly with manufacturers for discounts, or deviations from the list price, in exchange for guarantees of minimum purchases. Such transactions proceed as follows: First, a distributor purchases the product at list price from the manufacturer. The product is purchased at list price because at the time of purchase, the product is destined for the distributor's warehouse, and has not yet been allocated to a particular customer. Next, the distributor sells the product to the designated customer at the deviated price plus a distribution markup separately negotiated by the customer. Finally, the distributor bills the manufacturer for the difference between the list price and the deviated price after presenting proof that the product was delivered to the customer who negotiated the deviated price.

Today, sixty percent of purchases from Michael Foods are made at deviated, rather than list price, according to Mark Westphal, CFO for Michael Foods. More large self-op institutions are negotiating directly with manufacturers. Institutions may contact manufacturers directly, or ask a distributor to assist it in securing deviated pricing. Such deviated pricing is institution-specific. In other words, a distributor may only acquire goods at the deviated price that will be sold to institutions which have secured a deviated price. This means that the institution may choose another distributor or even food service management, and still enjoy the lower price it negotiated. Though institution-specific deviated pricing results in lower pricing to some institutions, the lower pricing is unlikely to cause competitive injury because most institutions such as schools, hospitals, and nursing homes do not compete with other institutions on the basis of food costs.

In recent years, Michael Foods has extended deviated pricing to food service management companies, including Sodexho. Unlike the deviated pricing described above, Sodexho deviated pricing is not institution-specific. Instead, it applies to every institution that Sodexho manages. Accordingly, Sodexho can use its low deviated price both to win new accounts and to keep current customers. However, if a customer switches from Sodexho to either self-op or another food service management company, it loses the benefit of the lower Sodexho prices for food purchases.

In addition to deviated pricing, Michael Foods grants a number of other types of discounts. These include volume discount allowances, preferred supplier allowances, marketing allowances, blanket bid allowances, local allowances, and UniPro rebates. These discounts may be granted to either distributors like Feesers or food service management companies such as Sodexho. A volume discount allowance is a price reduction based upon the volume of a customer's purchases. A preferred supplier allowance is essentially a signing bonus for designating Michael Foods as a primary supplier of a food product. Marketing allowances are a type of discount offered for certain products temporarily in exchange for the promotion of those products for resale to customers. For instance, Michael Foods grants marketing allowances to customers who attend a food show promoting Michael Foods food products. Blanket bid allowances are discounts that apply to certain categories of customers, such as nonprofits or schools. Michael Foods also grants discounts to members of UniPro, a GPO. Essentially there are three types of UniPro discounts: (1) product-specific, volume-based rebates granted to UniPro based on the purchases of all UniPro members; (2) annual UniPro rebates to support marketing efforts; and (3) the UniPro tier growth program.

Magnitude of Price Discrimination

Having surveyed and briefly described Michael Foods' general pricing arrangements, the court now turns to the specific discounts received by Sodexho and Feesers respectively, and the competitive impact of these discounts. To establish the magnitude of the price discrimination at issue in this case, Feesers presented expert testimony and other evidence from economist Dr. Robert Larner. Defendants did not present any rebuttal expert testimony, choosing instead to rely on its cross examination of Dr. Larner and testimony by Michael Foods CFO Mark Westphal. After hearing Dr. Larner's testimony and reviewing the evidence, the court finds Dr. Larner's methodology appropriate and reliable, and his findings well supported by the evidence. The court will now briefly describe Dr. Larner's study and his conclusions, and address Defendants' criticisms of that study.

Dr. Larner examined sales data from Michael Foods, Sysco (Sodexho's primary distributor for much of the time in question), Sodexho, and Feesers from 2000 until 2004. Using that data, he compared the Sodexho deviated price (referred to by Dr. Larner as the "Sodexho delivered price")[6] for Michael Foods products with that paid by Feesers. His findings are presented in a series of charts attached to his June 13, 2005 expert report (hereinafter referred to as the "Larner Report"), and demonstrative exhibits, which were all admitted into evidence at trial.

First, Dr. Larner determined the baseline prices secured by Sodexho and Feesers respectively for the eleven Michael Foods egg and potato products most commonly purchased by Feesers. Collectively these nine egg and two potato products constitute over eighty percent of Michael Foods' total sales to Feesers. Dr. Larner then determined the Sodexho deviated price and the price paid by Feesers for the sale of Michael Foods products. To establish the Sodexho deviated price for each item, Larner started by examining the supply agreements between Sodexho and Michael Foods. For Sodexho, Larner found that the prices paid were the same

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[6] The Sodexho deviated price is the price bargained for by Sodexho and received by Sodexho's approved distributor (Sysco) for Michael Foods products that are resold to Sodexho. As discussed above, in this deviated billback transaction, Sysco initially pays the Michael Foods list price for these products, then sells them to Sodexho for the deviated price plus a separately negotiated distribution markup. Sysco then bills back Michael Foods for the difference between the list price and the Sodexho deviated price. By contrast, Feesers pays the distributor list price. Defendants dispute whether the Sodexho delivered price is the appropriate price for comparison. This argument will be discussed below.

as described in the supply agreements. Because Feesers has no supply agreements with Michael Foods, Larner looked at Michael Foods' list prices to determine the price paid by Feesers for the same products. As a member of the distributor GPO UniPro,[7] Feesers received the prices set forth on Michael Food's distributor buying group price list. Finally, Larner examined the transaction prices at which Michael Foods sold products to Feesers and Sodexho. For Sodexho, Larner found this information in Sysco's database of deviated sales data. For Feesers, this information was contained in Feeser's accounts payable database. Larner found that the prices reflected in these three sources of data were consistent, and accordingly in his analysis he compared the prices reflected in Sodexho's contract pricing documents with those in Feeser's accounts payable database.

Next Dr. Larner compared the Sodexho deviated price to the price paid by Feesers to Michael Foods. Dr. Larner's findings are presented in a series of tables attached as exhibits to his report, and in demonstrative exhibits presented at trial. In these tables, for each of the eleven top-selling Michael Foods products Larner compares the average monthly purchase price paid by Feesers with the Sodexho delivered price for the same product. These charts account for product-specific deviated

[7] Defendants introduced evidence of Feesers' receipt of discounts from Michael Foods for two purposes: (1) to demonstrate that the discrimination in favor of Sodexho was not substantial, and (2) to show that Feesers should not receive the injunctive relief it seeks because Feesers has "unclean hands" due to its receipt of customer-specific deviated pricing and UniPro discounts. The former argument is addressed here, and the latter is discussed below.

prices only, and do not include the non-product-specific preferred supplier and volume allowances, which are presented separately in Exhibit D-13. The prices listed are the average prices paid by both Feesers and Sodexho weighted by volume for each month. The tables present the price difference both in dollar and percentage terms.

The price difference Dr. Larner found is stunning. For example, in Exhibit D-1, Larner compared the pricing for table ready eggs (MF 15222), which was Michael Foods' top selling product to Feesers, accounting for 28.4% of Michael Foods' total sales to Feesers from 2000 until 2004. The average weighted monthly average price paid by Feesers for this product was $12.04 higher than the price received by Sodexho, and on average, Feesers paid 67.8% more for this product than Sodexho paid for the same product at the same time. Dr. Larner found similar differences for the next ten top selling Michael Foods products. (*See* Larner Expert Report, Exs. D-2-D-11.) Altogether, Dr. Larner found that on average from 2000 until 2004,[8] Feesers paid $9.56, or 59.% more than Sodexho for the eleven top selling Michael Foods products taken together. (*Id*. Ex. D-12.)

Moreover, this price disparity does not account for the non-product-specific discounts and allowances granted by Michael Foods, which Dr. Larner summarizes in Exhibit D-13 of his report. These discounts fall within three categories: marketing allowances, a preferred supplier allowance, and a

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[8] It should be noted that Michael Foods did not supply potatoes to Sodexho until 2002. Accordingly, in making this calculation, Dr. Larner used the weighted monthly average prices for potato products from 2002 until 2004 only.

volume growth incentive allowance. The chart reflects that both Feesers and Sodexho received some modest discounts for marketing allowances during the years in question. Feesers received a slightly higher discount than Sodexho for marketing allowances, at $.04/lb with a minimum purchase requirement, as compared with Sodexho's $.10/case ($.005/lb for a 15 lb case). However, the marketing allowance is not a pure volume discount because it requires the recipient to expend some funds and effort in marketing the product in order to be eligible.

On the other hand, Sodexho alone received the preferred supplier and volume growth incentive allowances. These discounts were in exchange for a minimum volume commitment of approximately 76 million pounds of Michael Foods egg products annually, and for designating Michael Foods as the preferred supplier of eggs and potatoes for Sodexho. (*See* 2002 Egg Contract between Sodexho and Michael Foods, P7 ¶ 3.) For the preferred supplier allowance for eggs, Sodexho received lump sum payments from Michael Foods totaling $2.2 million for the 1999 and 2002 egg contracts, as well as a retroactive allowance of $137,493 in 2002. (*See* Larner Report Ex. D-13; 2002 Egg Supply Contract between Sodexho and Michael Foods, P7.) For the 2002 potato contract, Sodexho received a total payment of $75,000 paid in lump sums of $25,000 a year from 2002 through 2004. (*Id.*) For the volume growth incentive allowance, Sodexho received a discount per pound for volume growth in sales over and above those of the previous year. (*Id.*) For example, if Sodexho sold ten percent more egg products than the previous year, it would receive a payment of $.01/lb for those sales over and above the baseline. These two allowances were paid directly to Sodexho, rather than its distributor Sysco, and Feesers received no such discounts from Michael Foods.

Although not included the weighted monthly average prices, Dr. Larner also calculated Feesers' product-specific UniPro rebates and Sodexho's product-specific allowances in comparing the prices for Michael Foods' egg products. (*See id*. Exs. D-1-D-9, columns 5 and 6.) The UniPro rebates and allowances received by Feesers are dwarfed by Sodexho's price advantage for these products. For instance, in the sale of Michael Foods' table ready eggs, Feesers received a UniPro rebate of $1.20/case from 2000 until October 2002, when the discount increased to $1.28/case. (Ex. D-1, columns 5 and 6.) On the other hand, Sodexho received a product-specific allowance for the same product in the amount of $.90/case from 2000 until 2002, when the allowance increased to $1.20/case. However, although Feesers received a slightly larger product-specific rebate than Sodexho for this product (at most $.30/case more than Sodexho), the Sodexho delivered price for the same product ranged from $ 8.70/case to $12.15/case less than the price paid by Feesers during the same time period. (*See id*. Exs. D-2-D-9, columns 5 and 6.)

It must be noted that Dr. Larner's calculations do not take into account the deviated pricing that Feesers receives in certain transactions. Feesers purchases some Michael Foods products at deviated prices as distributor for certain institutions and food service management companies. For instance, Feesers received deviated pricing as prime distributor for the Wood Company, and later briefly for Sodexho after Sodexho acquired Wood. However, Feesers' receipt of deviated pricing restricted to a particular food service management company cannot be used by Feesers to compete with that company for customers. Accordingly, it would be inappropriate to consider these restricted deviated prices when determining whether Sodexho's discount is substantial enough to cause competitive injury to Feesers.

The Sodexho deviated pricing is passed directly to customers, while the preferred supplier and volume growth incentive allowances are retained by Sodexho at the corporate level. However, there is evidence that Sodexho passes these benefits to customers indirectly, in the form of financial guarantees, interest free renovation loans, or for some customers, cash signing bonuses. For instance, the following language appears in a Sodexho proposal to Lehigh University:

> While our purchasing practices assure all units receive products and services at competitive pricing, Sodexho also negotiates corporate discounts and rebates that are realized at the corporate level. Prompt payment discounts and other rebates or allowances obtained from vendors supplies, or distribution companies, including those obtained through our national and regional purchasing arrangements based on Sodexho's total purchases, are retained a the corporate level. For example, meeting volume commitments on a national basis may result in a negotiated rebate for

> achieving this volume level, and those rebates are paid to Sodexho on a national basis, and are not realized at the account level. *Maximizing these opportunities allows Sodexho to offset corporate overhead expense and ultimately affords the opportunity to offer our customers, such as Lehigh University, financially viable and competitive agreements*.

(Sodexho Proposal to Lehigh University, P95 at 62-63 (emphasis added).)

Defendants' Criticism of Dr. Larner

Defendants challenge Dr. Larner's calculations on a number of grounds. Defendants chose not to present any expert testimony in rebuttal by their own expert economist. Instead, Defendants attacked Dr. Larner's analysis on cross examination and presented testimony by Michael Foods CFO Mark Westphal concerning Feesers' use of deviated pricing for certain customers. These criticisms and evidence will be addressed in turn.

Defendants argue that Dr. Larner should have compared the Sodexho deviated price plus Sysco's markup with the price paid by Feesers rather than the Sodexho deviated price alone, which is paid by Sysco. This argument fails for two reasons. First, Dr. Larner argues convincingly that price discrimination should be compared at the level at which it occurs, which in this case is at the initial transaction between Michael Foods and Sysco for the sale of goods at the Sodexho deviated price. While Sodexho negotiates directly with Michael Foods for the sale of food, Michael Foods does not sell its products directly to Sodexho, but rather sells them to Sodexho's designated distributor, usually Sysco. However, this additional link in the supply chain is more form than function. After all, in its contracts with customers Sodexho assumes contractual responsibility for the procurement and distribution of food, and it negotiates directly with the manufacturer for a lower price on that food. In this case, although Sysco performs the role of a distributor—a role that was formerly performed by Feesers under the Wood contract—it does not perform the same function as a distributor serving a self-op. In serving Sodexho, Sysco does not negotiate a price for the sale of food to Sodexho, or to Sodexho's customer. In any event, the deviated pricing is passed on directly to customers, who are invoiced by Sodexho for the cost of food. The cost of food consists of the Sodexho-delivered price plus a markup for distribution. The distribution markup is separately negotiated by Sodexho.

Second, Dr. Larner did an additional analysis comparing the price paid by Feesers with the Sodexho price plus the Sysco markup. This comparison appears in the E-series of tables in Dr. Larner's expert report. While this comparison slightly reduces the price disparity, it does not eliminate it. For example, when Sysco's distribution markup is considered, the price disparity in the sale of Michael Foods table-ready eggs is reduced from an average of 67.8% (Exhibit D-1) to 44.6% (Exhibit E-1).[9]

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[9] The court further notes that this is an inappropriate comparison because it does not take into account the distribution costs to Feesers associated with delivering the goods to its customers.

The court also rejects Defendants' argument that Dr. Larner's calculations fail to account for the allowances received by UniPro. This is incorrect. Dr. Larner's analysis clearly compared the UniPro rebates with the allowances secured by Sodexho in his calculations in Exhibits D-1 through D-9. Furthermore, these modest discounts scarcely compare with the massive disparity between the Sodexho deviated price and the unrestricted national distributor list price paid by Feesers.

Defendants also argue that Feesers was the beneficiary of deviated prices for specific customers, and that Dr. Larner inappropriately failed to include these deviated prices in his calculations. Mark Westphal testified that from 2000 until 2003, 77% of Feesers purchases were made at deviated prices. Michael Foods also submitted contracts for 44 separate customers who received deviated pricing and designated Feesers as the sole distributor eligible to receive such deviated pricing. However, each and every one of these price deviations was customer specific, and could not be used by Feesers to win or retain an account.

Moreover, even if the Sodexho deviated prices had been compared with the deviated prices secured by self-op institutions and other food service management companies served by Feesers, this would not alter the court's conclusion. On cross examination, Westphal admitted that none of these restricted deviated prices were nearly as great as the Sodexho deviated price. For instance, Westphal testified that the Swarthmore deviated price for Michael Foods egg products was $.725/lb as compared with Sodexho's deviated price of $.58/lb, a significant price disparity. When asked by Feesers' counsel, Westphal was unable to recall any institution that received a deviated price within $.10/lb of the Sodexho deviated price. There is a good explanation for this. In 2002, Sodexho secured a "most favored nation" clause in its egg contract, guaranteeing that no one would get a lower price than Sodexho for Michael Foods egg products. (2002 Egg Supply Contract between Sodexho and Michael Foods, P7 ¶ 5(b).)

Finally, the court rejects Defendants' argument that Sodexho-level prices were made available to Feesers. Before commencing this litigation, Feesers requested Sodexho-level deviated pricing from Michael Foods. Michael Foods agreed to the lower price only where Feesers demonstrated that it was seeking to win the account of a current Sodexho customer. Michael Foods' offer of Sodexho pricing to Feesers does not mean that the Sodexho discounts were practically available to Feesers in order to compete with Sodexho. Michael Foods offered to provide Sodexho level pricing to Feesers only upon proof that a customer was a current Sodexho customer. The problem is that Michael Foods' offer only addressed one part of competition—Feesers' attempts to win over Sodexho accounts. It does not address Sodexho's attempts to convert Feesers' self-op customers to Sodexho management. Feesers has no way of knowing when Sodexho is trying to lure its customers away—as noted above, competition in this industry is not narrowly confined to the formal RFP process, and Sodexho may spend years cultivating potential customers before convincing them to consider making a switch. Accordingly, Michael Foods' limited offer of deviated prices for Feesers to compete with Sodexho customers did not make Sodexho's deviated prices available to Feesers as a practical matter.

Substantiality of Price Discrimination

Having determined the level of price discrimination, the court must decide whether the price disparity was substantial. Whether a price discrimination is substantial depends on the particular industry and customers. The more price sensitive the industry, the more likely it is that even a small difference in price is substantial enough to cause competitive injury. Here, the evidence demonstrates that the food service industry is extremely price sensitive and populated by increasingly sophisticated and budget-conscious institutional customers. Three categories of evidence are particularly relevant: Sodexho's strategic planning and marketing documents, customer testimony, and expert opinion testimony by Dr. Larner.

Sodexho's strategic planning documents emphasize the importance of price in winning over new contracts. For example, in Phase I: FY 03-05 Health Care Services Strategic Plan, Sodexho predicted that "[o]ur client will seek a series of products and services which produce cost savings at acceptable quality levels . . . We will have to organize and allocate resources to the development of money saving products and services. . . Clients may demand to see pricing on a line item basis for ease of price/vendor comparison." (P1 82 at 5.)

Jay Marvin testified that GPOs typically serve self-op clients, and had a strong participation among acute care hospitals. As noted above, GPOs are an alternative to the use of a distributor for self-op institutions. Because of GPO pressure, Sodexho was increasingly concerned about market baskets and other line by line price comparisons requested by customers. (*Id.* at 16.) The health care strategic plan noted the following GPOs / E-commerce industry trends:

> GPOs /E-Commerce: The growing number and complexity of GPOs combined with the emergence of e-commerce business applications in the procurement arena have, in effect, equalized the playing field enabling all entities to gain procurement leverage. Even a non-GPO aligned stand-alone facility can aggregate its buy with other facilities through E-commerce. Our historical pricing advantage is dramatically minimized. Additionally, GPOs increasingly dictate many or all aspects of the procurement process including product selection, distribution, etc.

(P182 at 16.) The implications of this trend for Sodexho Senior Services are that: "[h]istorical and clear point of differentiation will not be there for us in the future" "[i]ncreasing amount of time defending and explaining (market baskets, meetings, etc.) our prices" "[w]e are on the defensive and our credibility suffers" "Competitors may gain access to our accounts through 'back door' purchasing relationships." (P182 at 16.) Likewise, in the Health Care Services Hospitals FY05-07 Strategic Plan, Phase II, Sodexho observed that "[t]he need to continually demonstrate incremental value will intensify." (P160 at 6.) Sodexho concluded that "[o]ur primary response should be to a) re-evaluate our pricing strategy so we are competitive at the 'loading dock', . . . c) explore way to expand Entegra's role and presence in the health-care industry." (*Id*. at 10.)

One of Sodexho's "Key Initiatives" was a "Purchasing Improvement Plan" with the objective "to maximize Gross Profit Margin and to maximize our GPO & Strategic Business partnerships while attempting to address the growing issues surrounding our uncompetitive market basket results in the field." (P160 at 23.) This initiative included the creation of a "Competitiveness Task Force to address food cost competitiveness in the field, addressing issues of maintaining the balance between food cost and VDA [volume discount allowance] income. . ." (P160 at 23.) In the Health Care Division Three Year Plan for 2001-2003, Sodexho declared that [t]he Health Care Division will focus on the following major initiatives for the Acute Care segment: Develop a low-cost food offering designed to reduce costs by a minimum of 10%." (P1 89 at 46.)

The significance of food costs is also demonstrated by the participation of some customers in the U.S. Department of Agriculture's Net Off Invoice ("NOI") commodity program. The NOI program allows school districts to obtain certain processed foods at a discount subsidized by the government. However, the NOI program can only be utilized by authorized distributors, *see* 7 C.F.R.

§§ 250.12, 250.3, and Sodexho's primary distributor Sysco was ineligible. Accordingly, some Sodexho customers have chosen to utilize Feesers for NOI purchases. This evidence further supports the conclusion that schools are extremely sensitive to small price differences.

Finally, at trial Dr. Larner offered his expert opinion that the price discrimination in favor of Sodexho was substantial enough to cause competitive injury to Feesers. Dr. Larner testified that the food service industry is characterized by intense competition and tight profit margins, and he concluded that the price discrimination in favor of Sodexho that he found in his expert report was substantial enough to cause competitive injury to Feesers.

Defendants dispute Dr. Larner's conclusion that the price differences noted above were substantial. Defendants argue that Dr. Larner should have performed a quantitative analysis to determine the price sensitivity of customers in the food service industry, isolating price from other factors customers consider. On cross examination, Dr. Larner conceded that such an analysis could be performed. The court is satisfied that such a study is not necessary. Defendants further argue that Larner failed to separate the effects of deviated pricing for Michael Foods products from the deviated pricing Sodexho receives from other manufacturers. However, it is well settled that where the price discrimination at issue affects only a small number of articles sold, the Robinson-Patman Act still applies. *See F.T.C. v. Morton Salt*, 334 U.S. 37, 49, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948). The court credits Dr. Larner's expert opinion that the price discrimination in favor of Sodexho was so substantial and sustained that Feesers is entitled to an inference of competitive injury.

In sum, the court finds that Michael Foods has engaged in substantial price discrimination in favor of Sodexho. Sodexho has received significant and long-term price discounts from Michael Foods, including the lowest deviated prices offered by Michael Foods. Although Feesers also received certain discounts by virtue of its membership in UniPro, these discounts are dwarfed by those granted to Sodexho. Additionally, Sodexho alone received large signing bonuses and volume based discounts. Though these discounts were not passed on to customers directly, they were used to provide other benefits to customers, a selling point to win and retain customers.

3. Conclusions of Law

Based on the evidence presented at trial, the court concludes that Feesers has established by a preponderance of the evidence that Michael Foods discriminated in price in Sodexho's favor, and that this price discrimination was significant enough in both magnitude and duration to cause competitive injury to Feesers.

Normally the quantum of proof necessary to prove substantial price discrimination depends on the level at which the discrimination occurred. Accordingly, tertiary discrimination (injury to the customers of the disfavored purchaser) generally requires a greater magnitude of price difference to injure competition than secondary discrimination (injury to the customers of the disfavored purchaser). This is because the effects of secondary price discrimination are generally less attenuated, and it is more likely the case that the discount will be passed on to the benefit of the favored purchaser's customer. However, there are limits to the usefulness of the analytical distinctions among the various levels of injury resulting from price discrimination. For instance, in cases where an institution plays a dual role, such as a company functioning as a dual distributor and retailer, courts have declined to label such discrimination as falling at a particular level. *See, e.g., Texaco v. Hasbrouck*, 496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990). The Robinson-Patman Act is concerned with the functions provided by a company, not the label that company chooses to apply.

The Third Circuit has noted that this is one of those cases that cannot be easily categorized as either secondary or tertiary discrimination, but rather falls somewhere between the two. *See Feesers, Inc. v. Michael Foods,* 498 F.3d 206, 211 n.5 (3d Cir. 2007). This is because Sodexho obtains food through its distributor Sysco, though it directly negotiates the price of that food from the manufacturer, Michael Foods. On the other hand, Feesers obtains food directly from manufacturers and sells it directly to institutional customers. Accordingly, the Sodexho transaction introduces an additional link in the supply chain.

Here, Sodexho offers two distinct functions to its customers: management (performed by Sodexho itself) and distribution and procurement (for which Sodexho subcontracts with distributors). In the context of functional discounts, the Supreme

Court has observed that "[m]anufacturers will be more likely to effectuate tertiary line price discrimination through functional discounts to a secondary line buyer when the favored distributor is vertically integrated." *Hasbrouck,* 496 U.S. at 565-66. A loose analogy may be drawn between the role played by Sodexho in the distribution chain, and that occupied by the favored dual-function wholesaler/retailers in *Hasbrouck*. Nevertheless, it is clear that the discounts secured by Sodexho from Michael Foods are not retained by Sodexho, but instead pass directly to Sodexho's customers at a level that is likely to cause those customers to choose Sodexho. The evidence also establishes that as a general matter, this is a price sensitive industry populated by increasingly sophisticated customers. Moreover, the discounts secured by Sodexho were not temporary, but rather a long-term arrangement that is precisely the type of price discrimination most likely to harm competition. Accordingly, the court finds that the magnitude of price discrimination in this case is substantial and sustained enough that 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.

Defendants' argument that there is no competitive injury because Michael Foods products constitute a small percentage of any one customer's purchases is foreclosed by the Supreme Court's decision in *F.T.C. v. Morton Salt*. In that case, the Supreme Court rejected a similar claim by large grocery store chains that price discrimination in the sale of table salt did not constitute competitive injury:

> There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. 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. Since a grocery store consists of many comparatively small articles, 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. Likewise here, egg and potato products constitute a small portion of any individual customer's food purchases from Feesers and Sodexho.

C. Competitive Injury

In sum, the court concludes that Feesers has established a prima facie case of price discrimination. Feesers is in competition with Sodexho for the sale of Michael Foods products to institutional customers, and Michael Foods engaged in substantial and sustained price discrimination in favor of Sodexho. Under the facts of this case, Feesers is entitled to the *Morton Salt* inference of competitive injury.

III. Rebuttal of Inference of Price Discrimination

A. Legal Standard

Once a plaintiff has established a prima facie case of price discrimination, the burden shifts to the defendant to rebut the inference of competitive injury. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983), citing F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 182 (1962). Here, in order to rebut the inference, Michael Foods must show an absence of a causal link between discrimination and lost sales or profits. *Feesers, Inc.,* 498 F.3d at 216; see also In re Boise Cascade, 113 F.T.C. 956 (1990).

B. Findings of Fact

Defendants claim that the evidence presented at trial demonstrates that the lower price Sodexho receives plays no role in a customer's choice between food service management or self-op serviced by a distributor such as Feesers, but instead that customers were motivated by other factors such as services. The court will examine the evidence presented at trial regarding the significance of food costs as opposed to other factors in a customer's decision to switch from self-op to food service management or vice versa. In this inquiry, the court will review three categories of evidence: testimony from customer witnesses, Sodexho's strategic planning documents, and Sodexho's marketing materials.

Food service budget for institutional customers

Whether self-op or managed, an institution's food service budget primarily consists of two factors: raw food and labor, with overhead and administrative costs make up the balance of a food service budget. The evidence presented at trial demonstrates that the price of raw food may range anywhere from 20 to 50 percent of a facility's food service budget. These numbers are not static, but may vary depending upon the efficiency of the food preparation, menus, and participation in a dining program. In other words, if food costs are higher, then food constitutes a higher percentage of the food service budget, and the cost of the entire food service budget might be higher. Moreover, the food service industry is extremely price sensitive. This finding is supported by customer testimony about the importance of the bottom line, as well as Dr. Larner's testimony.

The price of raw food is more significant to certain Sodexho customers due to the payment structure set forth in their contracts with Sodexho. Sodexho has two different types of food service management contracts: a profit and loss ("P&L") contract, and a management fee contract. In a P&L contract, which is usually offered only to larger customers, Sodexho offers a financial guarantee that the dining services will not lose money, and the institution shares in a certain percentage of the profits. On the other hand, in a management fee contract, Sodexho receives a set fee for its management services, and it bills the institution for other costs including food. An institution with a management fee contract is more likely to be sensitive to food costs because it is directly invoiced for those costs. On the other hand, customers with a P&L contract also benefit from lower food costs because that increases the profitability of the dining services.

Customer Testimony

Michael Foods relies primarily on testimony from ten customer witnesses in an effort to rebut the inference of price discrimination. According to Defendants, the testimony from these witnesses demonstrates that food costs are not a significant factor to customers. The court will first briefly review the testimony, and then explain why it finds this evidence unpersuasive.

Defendants offered testimony from customer witnesses responsible for food service operations at three schools. Robert Bruchak is in charge of dining services for Daniel Boone Area School District. Daniel Boone was originally self-op but switched to Sodexho in 2004. The change was prompted by the sudden resignation of the school's food service director. Daniel Boone solicited proposals in a formal RFP process, and ultimately chose Sodexho because Sodexho identified potential cost savings in labor management and provided a financial guarantee of profitability. Throughout this process Bruckak did not perform a line by line comparison of the cost of food, though a school board member once requested invoices. For a time, Daniel Boone continued to utilize Feesers for NOI purchasing, with savings of about $60,000 annually. According to Bruchak, Sodexho told Daniel Boone that it offered lower prices for food in its proposal, but this was not the deciding factor for Daniel Boone.

Stanley Majewski is responsible for food service operations at Bethlehem Area School District. The school district was self-op until 1999, when it switched to management under Wood and later Sodexho. At the time of the switch, the institution considered both self-op and food service management. The district's primary consideration was service, not cost, and Sodexho won the contract because it had more management experience than other bidders in the RFP process. Nevertheless, food costs constitute about forty percent of the institution's dining services budget paid to Sodexho, and that portion of the budget previously went to Feesers. There is also evidence that costs were important to the school district: to win the contract, Sodexho promised a large investment in the kitchen, and the district participates in the NOI program to save money on food costs.

David Matyas oversees food service at Central Bucks School District. The institution was previously self-op and switched to Sodexho management. The change was motivated primarily by financial considerations, particularly the financial guarantee of profitability offered by Sodexho. According to Matyas, food costs by themselves are not an important concern for the school because the financial guarantee puts the pressure on Sodexho to ensure that revenue equals expenses. Matyas believes that the financial guarantee is unrelated to Sodexho's discounts and reimbursements for food costs, but offered no explanation for this belief.

Defendants also offered testimony from two college and university customers. Dr. George Harpster is responsible for overseeing the food service program for Shippensburg University. The university has utilized food service management for as long as the witness has been responsible for dining services, at least since 1987. To choose a food service management company, the university submits requests for proposals to management companies. Shippensburg chose to give greater weight to qualitative factors than quantitative factors in the RFP process. According to Dr. Harpster, Shippensburg University has never considered self-op, and Dr. Harpster has no conception of how the institution could switch to self-op, or what factors he would consider in making the decision. Dr. Harpster testified that he was under the impression that in the instant litigation Feesers was seeking the opportunity to bid for food service contracts during the RFP process.

Wayne Clickner is a food service consultant for the fourteen public universities that are members of the Pennsylvania State System of Higher Education (PASSHE). Clickner has been involved in the RFP process for dining services at the PASSHE member schools on at least thirteen occasions. One such RFP process was Slippery Rock University, which switched from self-op to food service management with Sodexho. According to Clickner, Slippery Rock's decision to switch from self-op to management was motivated primarily by the university's desire to avoid working with unionized employees, rather than the cost of food. Clickner testified that in his time evaluating proposals, he had never observed a university choose to contract with a management company based solely on the cost of individual food items. However, total meal cost is an important consideration, and meal cost is determined in part by the cost of raw food and Sodexho's financial investment in the dining services program. Clickner also testified that all of the PASSHE schools have P&L contracts, rather than management fee contracts.

Defendants offered testimony from three retirement community customers. Michael Jacobs is responsible for food service at Deer Meadows Retirement Community. Deer Meadows Retirement Community is managed by Sodexho. Jacobs testified that he has never considered self-op in the past and would never consider it in the future. Moreover, Jacobs testified that he had no idea what factors he would need to consider in deciding to make such a switch. The institution has a management fee contract with Sodexho, so it reimburses Sodexho directly for the cost of food. Although Jacobs has never compared the cost of food in the past, he testified that if food costs increased substantially, he would investigate.

Michael Peck is responsible for dining services at York County Pleasant Acres Rehabilitation Center, a long term care facility. The facility is currently managed by Sodexho. In 2003 the facility solicited proposals by other food service management companies. Because the problems were related to service, not costs, financial considerations were given the lowest priority when the proposals were evaluated. Peck testified that he believed food costs were more fixed than labor costs, but on cross examination acknowledged that if the facility were to switch to self-op, he would utilize a GPO or seek out other purchasing options to save money on food.

Seth Levy is responsible for overseeing food services for the Jewish Home of Greater Harrisburg. The facility was self-op until 2003, when it switched to Sodexho management. The decision to outsource was made after the food management team resigned, and Levy was unable to recruit experienced replacements. The institution chose Sodexho because it offered a lower overall cost than other management companies. Sodexho's proposed budget was also significantly lower than the institution's self-op food budget. Although cost was important, at the time the decision to outsource was made, Levy did not compare the cost of specific food items on a line by line basis. Levy testified that he understood that Sodexho's promise to drive down food costs in its proposal meant that Sodexho could get a better price than its competitors because of the volume of food it purchased.

Defendants also presented testimony from two hospital customers. Joseph Gagliardo is responsible for food services at Lewistown Hospital. The hospital was self-op until 2007, when it switched to Sodexho management. The decision to switch was motivated primarily because of service issues, rather than cost, and the institution performed no line-by-line comparison of the cost of food. Lewistown Hospital has a management fee contract with an investment for renovation.

Philip Guarnaschelli is responsible for overseeing Pinnacle Health's food service operation. Pinnacle was self-op fifteen years ago but switched to Wood (later Sodexho) in 2001. When the hospital made the switch, it was concerned about labor costs and management expertise, rather than food costs. Guarnaschelli testified that at this point, Pinnacle is committed to management and would not consider returning to self-op. However, on cross examination he testified that if he were to consider switching, he would compare the total cost of management to the total cost of self-op. Guarnaschelli also testified that he would consider a savings of 25% on the cost of food significant.

Finally, Defendants presented testimony from Clyde Harris, who oversees food service operations at Air Products and Chemicals. Harris testified that the company has outsourced its dining services for at least ten years, and has no intention of ever switching to self-op. The company chooses to outsource because it does not have the skill or desire to self-op, and Harris testified that he does not know what factors the company would need to consider to make the decision to self-op.

According to Defendants, the customer testimony establishes that price is not an important consideration for institutional food service customers. Instead, Defendants claim that labor issues, management expertise, and other factors are more important to customers than price. However, the court is not satisfied that such a broad inference can be drawn from the experience and perception of these witnesses. Most of the witnesses were satisfied Sodexho customers. Sodexho promised them a low price for food, and delivered on that promise, in part by securing a lower cost for Michael Foods products than its competitors.

Though none of the witnesses could recall the price of Michael Foods products in particular, it was apparent to the court that the witnesses had not felt the need to verify Sodexho's prices. However, this does not mean that none of the customers for whom Feesers and Sodexho compete is concerned about the cost of food. This apparent lack of concern about pricing may be due to the fact that many of the witnesses had P&L contracts, rather than management fee contracts. This means that the witnesses were more concerned with the bottom line than with the component prices of the services offered by Sodexho.

Defendants point out that the Third Circuit found customer testimony pertinent to the issue of competitive injury its opinion reversing this court's grant of summary judgment in favor of Defendants. *See Feesers, Inc.,* 498 F.3d at 214-15. Indeed, if Feesers had produced customer witnesses who testified that the cost of food was the reason they switched from Feesers to Sodexho, that evidence would have been extremely persuasive on the issue of competitive injury. However, testimony presented by Defendants from a few customers who did not find price significant does not have the same weight, particularly where as here, there is other evidence suggesting that price is quite important to other customers in the same industry. Here, the testimony of Defendants' customer witnesses cannot be reconciled with other persuasive and undisputed evidence of the importance of price to other customers—namely Sodexho's strategic planning documents describing the importance of price to win and retain customers, and the proposals and promotional material submitted by Sodexho to win customers. This evidence demonstrates that the cost of food is a significant part of the food service budgets for these institutions. The court will briefly review a number of these documents submitted by Plaintiff at trial.

Sodexho Strategic Planning documents

Sodexho's strategic planning documents and testimony from Sodexho's employees demonstrate the importance of price for Sodexho to win and retain customers. Christopher Rochette, former Sodexho Senior Vice President of Strategic Planning, testified that from 2000 until 2005, Sodexho's strategic plan was to position itself as the low cost provider in the education and health market. This goal is reflected in Sodexho's strategic plans during that time. For instance, in noting increased economic pressures on hospitals, Sodexho's Health Care Services Strategic Plan Phase I: FY 03-05, predicted the following implications:

> Our client will seek a series of products and services which produce cost savings at acceptable quality levels . . . We will have to organize and allocate resources to the development of money saving products and services. . . Clients may demand to see pricing on a line item basis for ease of price/vendor comparison.

(P182 at 5.) Sodexho's strategy to achieve dominant market share included "[e]stablish[ing] competitive food pricing so [Sodexho] is competitive at the loading dock versus GPO pricing structure."

(P160 at 31.) Sodexho offered the following summary of competitor findings for self-op in its:

> Summary of Competitor Findings, Self-Operated
>
> Finding: "Increasing perception that comparable or better purchasing economies can be obtained through GPOs. Accordingly, there is an increasing number of facilities seeking/joining GPOs."
>
> Implications: "Economies of scale advantage will carry less weight than in the past, purchasing will come under increased scrutiny, more GPOs."
>
> Possible response: "Quality products and offerings at defined price points. . . Proactive market basket analysis, Procurement marketing."

(Competitive Intelligence Overview Findings, Health Care Services: Hospitals Phase I, 2003, P170 at 4.)

Likewise, Sodexho's Health Care Services Strategic Plan Phase I: FY 03-05 noted a trend towards greater cost-consciousness among its customers, fueled in part by a wider variety of procurement options, such as GPOS:

> GPOs /E-commerce industry trends
>
> GPOs /E-Commerce: The growing number and complexity of GPOs combined with the emergence of e-commerce business applications in the procurement arena have, in effect, equalized the playing field enabling all entities to gain procurement

> leverage. Even a non-GPO aligned stand-alone facility can aggregate its buy with other facilities through E-commerce. Our historical pricing advantage is dramatically minimized. Additionally, GPOs increasingly dictate many or all aspects of the procurement process including product selection, distribution, etc.

(P1 82 at 16.) The implication of this trend for Sodexho Senior Services: "Historical and clear point of differentiation will not be there for us in the future" "Increasing amount of time defending and explaining (market baskets, meetings, etc.) our prices" "We are on the defensive and our credibility suffers" "Competitors may gain access to our accounts through 'back door' purchasing relationships." (P182 at 16.) "The desire for cost reductions is the number one impetus for School Districts to consider outsourcing." (P190 at 15.)

Strategic planning documents for other segments of the institutional food service industry also emphasize the importance of food costs in winning and retaining customers. In its Strategic Plan for School Services Division, Sodexho noted that "[t]he desire for cost reductions is the number one impetus for School Districts to consider outsourcing." (P190 at 15.) The plan went on to note that "[m]anufacturers and vendors are providing value-added services that compete directly with the support services provided by private management companies," (*id.* at 18), and "[c]ompetitors, like ourselves, have not found the lever to open up demand for self-op conversion to outsourcing. Self-Ops use contractors to 'fix' current problems and then return to self-op or use the RFP process to gain ideas but remain in-house." (*Id*. at 19.)

Likewise, Sodexho's number one "strategic imperative" for its Senior Services division was the development of a "Low Cost Food Model." (P179 at 4.) There is also evidence that lower food costs were important to customers in Sodexho's corporate services division. (*See* Sodexho Corporate Services 3 Year Plan Phase I, P396 at 42 (describing initiatives to lower food costs to benefit customers).

The strategic planning documents also indicate that Sodexho utilized discounts to increase its profit margin. For instance in Sodexho's Health Care Services Strategic Plan Phase I: FY 03-05, a key initiative was a "gross profit improvement plan" achieved by lowering food costs and capturing additional volume discount allowances from manufacturers:

> Key Initiative # 7:
> Purchasing Improvement Plan
>
> Performance improvement objective
>
> To maximize Gross Profit Margin and to maximize our GPO & Strategic Business partnerships while attempting to address the growing issues surrounding our uncompetitive market basket results in the field.

(P160 at 23.) This initiative included the creation of a "Competitiveness Task Force to address food cost competitiveness in the field, addressing issues of maintaining the balance between food cost and VDA income. . ." (*Id.*) Together, these strategic planning documents indicate that lower food costs are critical both to win and retain new customers and to improve Sodexho's profit margin.

Sodexho Promotional and Marketing Materials

Even more persuasive than its strategic planning documents, however, are Sodexho's promotional and marketing materials. The marketing information admitted into evidence demonstrates that Sodexho emphasized its procurement power as a selling point when trying to win customers.

References to Sodexho's lower prices were ubiquitous in Sodexho's promotional materials to customers. For example, in a proposal to Charlestown Retirement Community, Sodexho emphasized that it could provide customers with lower prices for food than a self-op could obtain from distributors:

> **Sodexho's Procurement Systems**
>
> Sodexho Health Care Services' clients have the option of selecting the purchasing and distribution services that best meet their needs.
>
> Experience has shown that when our clients evaluate procurement and distribution, they focus largely on the cost of goods. While virtually all of the analyses performed indicate that Sodexho-procured food and supplies are less expensive than a market basket of goods of comparable specification and quality purchased from a non-Sodexho source, it is important to recognize the many other relevant factors

> to consider when evaluating procurement and distribution services.

(P74 at 11.) The proposal goes on to compare the advantages and disadvantages of food service management versus self-operation. The first two advantages of food management include "[m]inimum food procurement costs through mass purchase" and "[f]ood contract management companies employ specialized staffs which focus on bidding food items, evaluating costs daily, and developing purveyor relationships to minimize food costs." (P74 at 14.) Conversely, the number one disadvantage to self-operation is that "[a] self-operated Food Service can only obtain the purchasing power in food procurement it can negotiate. Food procurement will depend largely on the prevailing prices extended by the local market. Group purchasing contracts for food are available but are only good for certain items. . ." (P74 at 16.)

In a proposal to Messiah Village, Sodexho told customers that "you compete on costs, but you win on quality" and noted that Sodexho had a "[s]olid track record of consistently driving costs out year over year." (P62 at 4.) This language appeared in numerous other proposals, including Villa Teresa Nursing Home (P85 at 65), Jewish Home of Greater Harrisburg (P79 at 4), and the Madlyn and Leonard Abramson Center for Jewish Life (P1 18 at 3). In a proposal to Southern Ocean County Hospital, Sodexho described itself as "the industry leader in procurement" "offer[ing] vast purchasing volumes" with the outcome of reduced costs to the customer. (P142 at 28.) In another proposal submitted to Lancaster Regional Medical Center, Sodexho boasted that "[o]ur prices for most items range from 5 to 25% lower than the next best price." (P89 at 17.)

An institution's request for a "market basket" is another indication that an institution is more price-sensitive. A market basket is a list of prices on a variety of individual food items requested so that the institution can perform a line by line comparison of costs. According to Feesers' sales employees, these are almost always requested by self-op customers seeking bids from distributors. However, some institutions also request market baskets from food service management companies when considering whether to switch from self-op to management, indicating that the cost of food is a significant factor in that determination. According to Sodexho's Jay Marvin, market baskets are requested by about 10% of potential customers in the health care industry. For example, in a proposal to Lehigh University, Sodexho touts the volume based discounts it receives from manufacturers and suggests that these discounts will result in a more competitive market basket:

> As one of the largest purchasers of food in the nation, Sodexho uses this leverage to provide our customers with access to high quality, name brand products at competitive pricing. Because of the volume of our purchasing, and our ability to provide win-win guarantees to our vendors, Sodexho is a very attractive and in-demand customer for the leading manufacturers and distributors across the country.

(P95 at 62.) According to Sodexho, these volume discounts would have the following benefits to Lehigh University: "First, it assures that on a market basket approach each of our units receives competitive pricing at the account level. . . In many instances, we are able to make purchases for, or on behalf of our customers, at substantial savings." (*Id.*)

To streamline the process of preparing proposals to customers, Sodexho created certain templates, many of which emphasize that Sodexho is able to obtain lower prices on food than self-ops as a result of its larger purchasing volume. The court will now examine some of those templates in turn.

The "Focus on Procurement" template appears in a number of Sodexho's proposals to colleges and universities, including Sodexho's proposal to Camden County College:

> Sodexho is part of an international purchasing network, one of the largest private purchasing networks in the nation. It includes hotels and restaurants around the world as well as thousands of dining services partnerships around the country.
>
> Because of this volume—and our ability to provide win-win guarantees to our vendors—Sodexho is a very attractive and in-demand customer for high quality manufacturers across the country. This fact provides a number of benefits for our college and university dining service partners.
>
> First, it means the most competitive prices on the widest selection of products.

> While on occasion a local overstock or other unique situation can 'beat' us on a single item, when it comes to all the products consumed by a dining service operation day in and day out, the overall prices we are able to command on your behalf are the most competitive offered anywhere.
>
> It should be noted that these volume agreements are not with 'generics,' but with recognized leaders in every category. . . In addition, our national volume means a lot more 'extras' for our clients, such as third party training materials, supplementary marketing materials and special promotions, the opportunity to test new products, services, custom-created products and equipment as well as more responsive service than ever before.

(P94 at 83.) This template has been used by Sodexho in proposals to Alvernia College (P81 at 59), Howard Community College (P137), St. Mary's Seminary and University (P1 30), Cheyney University of Pennsylvania (P1 20), and Hood College (P1 14).

The "Tremendous National Buying Power" template is also used in Sodexho's proposals to colleges and universities, such as Bloomsburg University:

> Sodexho Marriott Services obtains only the highest quality raw food products for use in the production of all consumable items. Under the direction of our Senior Vice President for Purchasing, the Pur-

> chasing Department with its professional food buyers, adheres to the highest specifications in the industry.
>
> At Sodexho Marriott Services, our purchasing program is designed to let our professional buyers and purchasing agents apply their skills full-time to the job of providing our clients with the finest available food products at the lowest possible cost.
>
> . . .
>
> Sodexho Marriott Services' tremendous national buying power will be utilized whenever possible for cost advantages. . . .
>
> Sodexho Marriott Services maintains a corporate purchasing department that is advantageous for us in many ways. The purchasing department works with companies to obtain the lowest possible prices. The lowest prices are then locked in through long term contracts. . .

(P91 at 362.) This language also appeared in a proposal to Shippensburg University (P90 at 353).

Sodexho's "Controlling Costs by Leveraging Procurement Power as the Largest Purchaser of Food" template appears in a Sodexho proposal to the Friends School of Baltimore:

> Maximize value. We deliver the highest levels of quality and service, while staying within the funding levels. We will control costs by employing proven financial controls, training programs, and operational efficiencies, and by leveraging our pro-

> curement power as the industry's largest purchaser of food.

(P78 at 1.) A few pages later, the template continues:

> As the largest private purchaser of food in the country, Sodexho has partnerships with some of the largest, most familiar and most beloved brands in the nation. You should expect us to apply our purchasing leverage to deliver superior quality products at prices below those available to individual schools or smaller providers.

(P78 at 14.) This template appears in proposals to other schools, including the Archdiocese of Philadelphia, (P75 at 14), the George School (P1 19), Waldron Mercy Academy (P117), Abington Friends School (P61), Haverford School (P107), Salesianum School (P105), Moravian Academy (P103), and Norfolk State University (P59).

Another template, "Bringing in the Best at a Price Point Unavailable to Smaller Providers," was used in a proposal to Warren County Public Schools:

> As the largest private purchaser of food in the country, Sodexho Marriott Services has partnerships with some of the largest, most familiar and most beloved brands in the nation, bringing in 'the best' at a price point unavailable to individual schools or smaller providers.

(P150 at 150.) This template also appears in proposals to the Blue Ridge School (P88 at 19), Northern Burlington County Regional School District (P87 at 61), Piscataway Schools (P147 at 87), Carteret School District (P86 at 107), Spotswood School District (P144 at 114), Penns Valley Area School District (P141 at 67), School District of the Chathams (P140 at 79), Queen Anne's Public Schools (P80 at 115), and the Hazleton Area School District (P136 at 70).

Another Sodexho template, "Deliver prices below those available to smaller providers," was used in a Sodexho proposal to the Freehold Regional High School District:

> As the largest private purchaser of food in the country, Sodexho has partnerships with many of America's favorite brands. . . You should expect us to apply our purchasing leverage to deliver superior quality products at prices below those available to individual schools or smaller providers.

(P145 at 93 and 105.) The template goes on to tout the advantages of Sodexho's procurement leverage:

> **Procurement**
>
> Food and supplies are a major portion of the cost of a food service program. Sodexhos purchasing plan for your district consists of the following primary elements:
>
> - Buying power
>
> . . .
>
> Sodexho's extensive network of purchasing resources will continue to strive for

> lower prices of food and supplies for your District while improving the quality of the products you use. With Sodexho's buying power your District has the opportunity to experience a significant decrease in the cost of the products you use.
>
> . . .
>
> Your District will continue to benefit from Sodexho's buying expertise. Our reputation and size give us buying advantages over smaller food service management organizations. In turn, the savings in which we obtain will be passed on to your District. You will be charged the same prices as Sodexho pays for all products. Your District will receive all the benefits of our volume and trade discounts, except for cash discounts. Sodexho will utilize its technical support and its national and local buying power whenever possible to obtain the best value for your District.

(P145 at 109.) Finally, the template drives home the message that Sodexho's lower prices for food will result in reduced costs for the customer:

> - We have successfully transitioned 300 school districts from self-operation to outsource management and consulting services.
> - We are the high quality—low cost provider. . .
>
> When Sodexho assumes the management of self-operated food services, everyone

> benefits. . . . The cost always goes down. Always.

(P145 at 43.) This template was used by Sodexho in proposals to Franklin Township Schools (P127), Springfield School District (P76), Boonton Public Schools (P73), East Penn School District (P115), South Plainfield School District (P116), Berlin Township School District (P69), Manheim Township School District (P70), Chesterfield School District (P71), Daniel Boone Area School District (P65), Carmichaels Area School District (P101), and Warren County Public Schools (P150 at 181).

A template touting "reduced costs from vast purchasing volumes" was utilized in proposals to health care institutions, including Southern Ocean County Hospital:

> ***Procurement***
>
> ***Outcome: Reduced Costs***
>
> As the industry leader in food procurement, Sodexho offers vast purchasing volumes. Because of our many operations across the country, you're assured of safe, reliable products at competitive prices.

(P142 at 28.) This template also appeared in Sodexho proposals to Clearfield Hospital (P84 at 28), Holy Redeemer Health System (P82), St. Joseph Medical Center (P139 at 24), Village at Morrison's Cove (P129), St. Lawrence Rehabilitation Center (P124), Marian Manor (P113), Brookline Village (P112), St. Luke's Hospital (P60 at 151), Bridgewater Retirement Community (P104), and Lorien Nursing & Rehabilitation Center (P100).

Sodexho's Corporate Services division also utilized templates touting its lower prices. For instance, in a proposal to Bassell USA, Inc., Sodexho stated: "Why Sodexho? One of the Largest Buyers of Food in the United States. . . Assists in reducing food costs through increased purchasing power." (P83 at 34.)

C. Conclusions of Law

Based on these findings of fact, the court concludes that Defendants have failed to meet their burden of rebutting the inference of competitive injury by showing that there is no causal connection between the price discrimination and competitive injury to Feesers. The evidence presented at trial demonstrates that food costs constitute a significant portion of institutional food service budgets, and that lower food costs were an important part of Sodexho's strategic plans to win and retain customers, and improve its profit margin. Most significant, Sodexho touts its lower prices in promotional material to customers. In light of this evidence, the court declines to draw any broad inference from the testimony of the customer witnesses called by Defendants. The court concludes that Defendants have failed to rebut the inference of competitive injury.

IV. Meeting Competition Defense

A. Legal Standard

Section 2(b) of the Robinson-Patman Act permits a seller to rebut a prima facie case of discrimination by "showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C. § 13(b). This is known as the "meeting competition" defense.

The purpose of the defense is to promote competition by permitting a seller to defend itself against inroads by a competitor. Accordingly, a seller invoking this defense must establish that the price concession was granted in order to meet—not beat—a lower price offered by a competitor. If a seller successfully asserts the meeting competition defense, then there can be no liability for the buyer who induced the discriminatory prices. *Great Atlantic & Pacific Tea, Inc. v. F.T.C.,* 440 U.S. 69, 77-78, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979). In order to successfully invoke the defense, a seller need not prove that it in fact met a lower price offered by a competitor. *F.T.C. v. A.E. Staley Mfg. Co.,* 324 U.S. 746, 759-60, 65 S. Ct. 971, 89 L. Ed. 1338, 40 F.T.C. 906 (1945). However, the seller must prove that the lower price was offered in good faith to meet its competitor's price. If a seller offers a lower price in bad faith, there can be no defense, even if the price did not beat competition. *Great Atlantic & Pacific Tea, Inc.,* 440 U.S. at 83 ("Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat competition.") Conversely, if the seller acted in good faith, the defense may be invoked even where the price offered fell below that of a competitor. *See, e.g., id.* at 83-84 (upholding meeting-competition defense where seller's offer was lower than competitor's because seller's offer was reasonable and made in good faith).

Good faith is a "flexible and pragmatic, not a technical or doctrinaire, concept. 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 Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 441, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983) (quoting *In re Continental Baking*, 63 F.T.C. 2071, 2163 (1963)). In order to satisfy this standard, the seller must "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *A.E. Staley Mfg. Co.,* 324 U.S. at 759-60. Generally, to establish good faith the seller must show that it engaged in at least some reasonable inquiry to evaluate a claim of a lower price by a competitor. *Viviano Macaroni v. F.T.C.,* 411 F.2d 255 (3d Cir. 1969).

No particular method of verification is required in order to establish the meeting competition defense. However, the Supreme Court has identified a number of factors which, though not exhaustive, may be useful in evaluating the good faith of the seller. These include evidence that (1) "a seller had received reports of similar discounts from other customers;" (2) a "seller was threatened with the termination of purchases if the discount were not met;" (3) the seller's "efforts to corroborate the reported discount by seeking documentary evidence;" (4) the reasonableness of the competing offer in light of available market data;

and (5) "the seller's past experience with the particular buyer in question." *U.S. Gypsum,* 438 U.S. 422, 455, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) (internal citations and quotations omitted).

Verifying a competitor's price can be difficult. Generally the only two options available are to ask the buyer, or to ask the competitor, both of which have their drawbacks. Buyers may be reluctant to share the specifics of a competing offer, in the hope that a seller will offer an even lower price, or they might lie about the price offered. *See, e.g., In re Beatrice Foods,* 76 F.T.C. 719 (1969). Another risk is that the buyer will refuse to answer, or threaten to terminate business dealings altogether. *See, e.g., Great Atlantic & Pacific Tea Co., Inc.,* 440 U.S. at 69. On the other hand, direct communication with a competitor about prices, even for the purpose of verifying a competing offer, entails the risk of violating the price-fixing provisions of the Sherman Act. *See, e.g., United States v. U.S. Gypsum*, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). Moreover, as the Supreme Court has observed, competitors have an interest in keeping price concessions secret: "[p]rice concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process." *Id.* at 456.

Thus, 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." *U.S. Gypsum,* 438 U.S. at 455-56.

B. Findings of Fact

Michael Foods' defense centers on the negotiations for three contracts, each for a duration of three years: the 1999 egg contract, the 2002 egg contract, and the 2002 potato contract. However, the discriminatory prices persisted during the entire period at issue in this case—from 1999 until 2004. Michael Foods presented testimony from Vicky Wass, the main negotiator for Michael Foods. Defendants chose not to call Sodexho's negotiator as a witness.

For the purpose of this litigation, the first significant contract between the parties was the 1999 egg contract, which Wass negotiated on behalf of Michael Foods. This contract included deeply discounted deviated prices on many Michael Foods egg products, a million dollar signing bonus, and other rebates. Wass testified that she believed these discounts were necessary to meet competition. However, at the time this contract was negotiated, Wass did not know of any other offer by a particular competitor, but she believed competitors would offer similar prices because Sodexho was such a large and attractive customer. According to Wass, during this negotiation Sodexho did not mention any other competitor by name, describe any other offer it had received, or otherwise imply that it had received another offer. Nor did Wass do any investigation to determine whether the discounts offered by Michael Foods to

Sodexho matched similar discounts offered by competing food manufacturers:

Q. My question is, when you negotiated this '99 agreement, do you recall doing anything to check what the competitive prices were being offered to Sodexho to make sure you weren't beating those competitive prices?

A. I recall I was in a competitive situation with my competitor on the 1999 agreement as well as the 2002 agreement.

Q. In '99 specifically, do you recall seeing any prices of a competitor from Sodexho?

A. I don't recall, but I remember conversations about such.

Q. Okay. Do you recall conversations about specific prices being offered by a competitor?

A. Not specific, but in scope, yes.

Q. In scope?

A. In scope.

Q. What do you mean by in scope?

A. Essentially, where I had to be, maybe not showing me exactly a price to match a price, but looking at the entire portfolio of what I was offering and asking me to, you know, do a better job with my pricing.

Q. Well, do you recall in '99 if anyone, either orally or in writing, gave you a specific price of a competitor being offered to Sodexho?

A. Specific price, no, sir.

Q. Do you recall anyone telling you what the duration was of the offer of a competitive price they had from someone else in 1999?

A. No, I do not.

Q. So you didn't know the duration. You didn't know the specific price. Correct?

A. No, not the specific price.

Q. So all you knew was, Sodexho said, you've got to do better? I need a better price. Correct? That's fair?

A. They would tell me—yes. Generally, yes, sir.

(Trial Transcript, Jan. 18, 2008, 188:15-189:22.) Thus, when Sodexho requested price concessions, Wass simply assumed that the requested concessions matched an offer Sodexho had received from a competitor. However, Defendants presented no evidence at trial to support this assumption, and it seems more likely that Sodexho simply wanted better prices and felt that it was a big enough customer to push for it. Accordingly, the court finds that Defendants have failed to meet their burden of proving that the discounts on the 1999 egg contract were offered to meet competition.

Likewise, Defendants presented no evidence about the terms or duration of any offer Sodexho may have received from other egg or potato companies for the 2002 contracts. Wass was also responsible for negotiating the 2002 egg and potato contracts on behalf of Michael Foods. During the course of the negotiation, Wass sought advice from her supervisors, Dean Sprinkle and Mark Westphal about offering a new discount to Sodexho on the egg contract. (November 13, 2001 email from Vicky Wass to Dean Sprinkle, P210.) In this negotiation, Michael Foods was proposing to reduce the number of products on deviated pricing and instead offer larger rebates off of the list price. In the email, Wass warned Sprinkle that Sodexho "wants something significant," but the price discount proposed was not linked to any specific offer to Sodexho by a competitor:

Q. And when you were proposing, offering to him, and we'll go through the other terms of the offer, the new terms of the deal—

A. Yes.

Q. —at that point, in November 13, 2001, Sodexho hadn't mentioned a word about any competitive offer yet, correct?

A. This negotiation went on for quite a while. There was back and forth. And there was some talk—I mean, it was almost an expectation on my part that my competition would be there, number one. Number two, you know, there was an inference that I wasn't sharp enough, that this wasn't working, that, you know, he wanted something better.

Q. I understand he told you he wanted something better, it wasn't working. He didn't tell you, here is a specific competitive proposal you have to meet, right?

A. He didn't show me one.

Q. He didn't orally tell you the details of one?

A. He did not orally tell me the details of that proposal, no sir.

Q. And, in fact, on November 13, he didn't even yet mention the name of a specific competitor as of the 13, correct?

A. I can't recall. I mean these were lengthy. I mean, I can't recall.

(Trial Transcript, Jan. 18, 2008, 203:17-204:14.)

Two weeks later, in another email to Dean Sprinkle, Wass stated that Michael Foods needs to do better on its pricing and that Sodexho had told her that if Michael Foods did not do better, it would lose both the egg and the potato contract. (Email from Vicky Wass to Dean Sprinkle, P209.) When pressed for the details of this negotiation with Sodexho, Wass testified as follows:

Q. And he told me that, if we hold with this present proposal, that the egg contract will be awarded to Sunnyfresh and we will not be awarded the potato contract, correct?

A. That's correct.

Q. But he did not tell you any detail of what would be in any contract with Sunnyfresh, right, not one detail?

A. He did not give me any specific pricing, any specific rebates, no specific.

Q. About anything?

A. He told me my deal was not as good as theirs.

Q. And you didn't ask him for any of those details, right?

A. I would not. I wouldn't think to ask him for that.

Q. No one told you in the company, Vicky, if he wants us to give a better price, go out and find out the details. Ask him to give you the details. No one told you that, right?

A. It's not done that way. I mean, you can't—you're not going to go and ask the customer to provide documents, because that's unethical and it's really bad for them. The only way I would be able to confirm and 100 percent verify that would be going to Sunnyfresh, and Sunnyfresh isn't going to give me that information either. So when you are looking at that, you've got to look at all the resources and all of your experience and come up with some kind of a summation of what you think is real. I did know at the time—Sunnyfresh, traditionally, is lower cost than we are, traditionally. I do know that other agreements that we've been negotiating, not only myself, as well as my team members, were getting like, you know, like pricing. I was not surprised by the things that was coming forth on his demands. But did I see something? Did I see a document? No.

Q. You didn't hear any details either? You didn't see it or hear it?

A. I asked him how close I needed to be, you know, in order to meet the competition.

Q. Did you know how long any offer was from Sunnyfresh, whether it was a one-year deal, a two-year deal, anything about any length?

A. No.

Q. Did you know what the signing bonus would be from Sunnyfresh?

A. No.

Q. Did you know what the rebates would be from Sunnyfresh?

A. No, sir.

Q. Did you know what the specific price would be, the starting price from Sunnyfresh?

A. No, I did not.

Q. As you're sitting here today, when you made this offer, you had no way of knowing whether you were going to be below Sunnyfresh, at Sunnyfresh, or better than Sunnyfresh? You had no way to know, right?

A. There's no way to know exactly what he had on his desk.

Q. But I'm not talking about exactly, like you didn't know like to the penny. You had no way of knowing at all? You could have been 20 percent better than Sunnyfresh. You could have been 20 percent worse than Sunnyfresh. You had no way of knowing at all, right?

A. Only what my experience with—what their behavior was with other agreements, that's the only way I would have a good concrete idea that we were—that what he was saying was accurate.

(Trial Transcript, Jan. 18, 2008, 209:8-211:21.)

Wass further explained the difficulty in determining the prices offered by a competitor during examination by defense counsel:

Q. Now with such strong competition as to both eggs and potatoes, what does

Michael Foods do to try to keep informed about competitive condition, competitive pricing?

A. Well, we're limited on what we have access to, but we certainly keep our ear to the ground and are constantly watching what the markets are doing, what the egg markets and potato markets are doing, as well as what the marketplace is doing, you know, how aggressively our competitors are approaching these customers. And we get some competitive intelligence through that by just kind of knowing where they're trading or what they're providing to other—in other negotiations.

Q. Do you sometimes lose accounts to your competitors?

A. Absolutely.

Q. Do you sometimes find out competitive information through that event?

A. Very rarely. We hardly ever find out after the fact.

Q. So how hard is it to go specific information about your competitors' pricing?

A. It's very difficult. The only way we would get that, if the competition would provide that data to us.

Q. How often do your competitors tell you?

A. That would not happen at all. Also, we, our customers, it's bad form, and it's unprofessional, and it's not done, nor do we ask it very intently because we certainly don't want our customers to be sharing our pricing programs with our competition. So it's bad form to go there, and it's—we're never provided that information.

Q. Did you try to keep generally aware of market pricing, market competition?

A. Certainly.

(Trial Transcript, Jan. 28, 2008, 13:1-6.) When asked about other methods of competitive intelligence, Wass testified that Michael Foods could roughly determine the prices offered by competitors when it lost contracts through competitive bidding:

Q. . . . Was there other general market intelligence information you could look to, to see whether you thought that Sunnyfresh terms you were being told about seemed plausible?

A. The only basis that I would have is, I would know what the egg markets were doing at that time. And a lot of times, you kind of know where people are trading whenever the egg markets are where they are. Then the other piece of it is, the other contracts that were being negotiated, those that we were losing or those that we were winning, we pretty much could probably

> gather some general intelligence if indeed what was being offered up by Sodexho at that time was reasonable, not surprising.

(Trial Transcript, Jan. 28, 2008, 26:18-27:6.) However, Wass later testified that in the competitive bidding process, Michael Foods does not typically know how well its bid measured up to successful competitors:

> Q. Do you have any experience previously with Sodexho where they made a demand, and then you found it was close to your competitor's price?
>
> A. No, not afterwards, no.
>
> Q. And you don't have that experience your whole time with Sodexho, right?
>
> A. No, you normally don't find that out. It's not a public bid.

(Trial Transcript, Jan. 18, 2008, 212:5-12.)

Shortly before the commencement of the 2002 egg contract negotiations, Sodexho invited Michael Foods to submit a bid to supply potato products as well, which Michael Foods did not sell to Sodexho at that time. During these negotiations Michael Foods was aware that Resers, a competitor, was the incumbent on the contract, but it knew nothing about the terms of any offer Resers was making. In these negotiations, led by Vicky Wass, Michael Foods offered significant rebates on potato products to Sodexho. However, Wass testified at trial that Michael Foods had no way of knowing the terms of any offer by a competitor such as Resers, and how close Michael Foods' offer came:

Q. I'm asking, Ms. Wass, on the potato contract, and we'll get to the contract, you offered, for example, sizable rebates on certain kinds of potatoes, correct?

A. We offered rebates, yes, sir.

Q. And you have no way of knowing, when you offered that, whether the incumbent was offering the same rebates, bigger rebates, or smaller rebates, correct?

A. No, sir, I don't.

Q. You had no way of knowing whether or not your starting prices for potatoes were the same or different from the incumbent, correct?

A. Not unless I physically saw the actual offer, no.

(Trial Transcript, Jan. 18, 2008, 213:19-214:5.)

Towards the end, Sodexho threatened to walk away from both the egg and the potato negotiations unless Michael Foods granted the concessions it was seeking. In an email to Dean Sprinkle, Vicky Wass wrote the following:

> Just got off the phone with Mitch. He is extremely unhappy with us because he does not see that we have addressed his requests. He told me that if we hold with this present proposal that the egg contract

> will be awarded to Sunnyfresh effective September 1, 2002 and we will not be awarded the potato contract. He wants the following changes:
>
> 1) Take down the ceilings and floors to the original contract.
>
> 2) Readjust the formulas to the original contract.
>
> 3) Increase the 1,000,000 payment to 1.2 MM. $1,000,000 for the egg products piece and $ 200,000 in lieu of the reduced Better N' Eggs price.
>
> 4) Begin program January 1st which would increase the Manufacturer's rebate from 3 cents to 5 cents at that time.
>
> 5) Increase the all other products rebate at list pricing from $2.00/case to $3.00/case.
>
> 6) Mitch also wants an additional $77,000 as monetary adjustment for dollars lost by shifting the August end date to January.
>
> They are not messing around. These guys are the "big dogs" in contract management and healthcare and they are pushing their position. Please advise. Mitch wants me to respond back to him today.

(Nov. 27, 2001 Email from Vicky Wass to Dean Sprinkle, P209.) Ultimately Michael Foods won both the 2002 egg and potato contracts when it granted each of Sodexho's requests outlined in the email. However, Defendants offered no evidence that these numerous additional discounts were calculated to meet rather than beat any competing offer by Sunnyfresh. Rather, as the last paragraph of the email makes clear, Michael Foods acceded to Sodexho's demands because it was "pushing [its] position" as "'big dogs' in contract management." (*Id.*)

Moreover, even after the contracts were signed, Michael Foods offered further discounts to Sodexho. In 2003, during a period of great volatility in the egg market, Michael Foods voluntarily offered Sodexho a further concession on egg prices. (*See* November 13, 2003 letter to Sodexho, P248 at 2.) According to Wass, this discount was offered only to Sodexho and was not in response to any competitive offer by another company, but rather, as Wass explained at trial, "I offered this in the spirit of our strategic partnership with them." (Trial Transcript, Jan. 18, 2008, 245:13-14.)

For the most part, the court found Wass to be a credible and candid witness. Nevertheless the court does not accept her assertion that the discounts granted by Michael Foods to Sodexho were offered in good faith for the purpose of meeting competition. Wass's testimony establishes that she simply did not have enough information about competitive offers from other egg and potato manufacturers to craft an offer calculated in good faith to meet, and not beat Michael Foods' competition. Indeed, for the 1999 egg negotiation and most of the 2002 egg and potato negotiation, Sodexho never made reference to any other offer by a competitor. Essentially Wass cited two reasons in support of her assumption that Sodexho had received offers from Michael Foods' competitors: (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.

The court finds both of these facts insufficient to justify Wass's assumption that Sodexho had received other offers from competitors. Wass's belief that competitors could deliver the concessions Sodexho requested was based on her general knowledge of the egg market and her negotiations in other contracts. This knowledge is of little value however, given that Wass testified that she rarely learns the prices her competitors are offering. This leaves only the fact that Sodexho is a large customer likely to receive other offers from competitors due to its large purchasing volumes. However, there are two problems with inferring from this evidence that Sodexho's demands were based on its receipt of a competing offer. First, is the fact that it is in Sodexho's interest to secure a *lower* price from Michael Foods, rather than a matching price. Accordingly, it is more likely that Sodexho's demands were calculated to beat rather than meet any other offers they may have received. Indeed, Wass testified that Sodexho repeatedly told Michael Foods where it needed to be to win the contract, which is not necessarily the same as the price needed to meet competition.

However, the greater problem is that acceptance of Wass's assumption 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. If the meeting competition defense could be satisfied merely by showing that a particular customer was large and therefore likely to receive lower prices from competitors, then the Act's purpose would be largely thwarted. This is particularly true where, as here, the large buyer made no reference to any offer by any particular competitor for most of the negotiations. Moreover, when Sodexho mentioned Sunnyfresh towards the end of the negotiation, it provided Michael Foods with no information about the details or duration of that offer. Under these circumstances, Michael Foods was not in a position to make an offer reasonably calculated to meet, rather than beat the alleged offer by Sunnyfresh. In sum, the court is not persuaded that the discounts granted to Sodexho constituted a good faith offer to meet competition, rather than a concession to win the business of a large and powerful buyer.

C. Conclusions of Law

Based on the factual findings, court concludes that Michael Foods failed to demonstrate a good faith effort to meet competition by other egg and potato suppliers. This case is analogous to the situation referred to in *U.S. Gypsum*, in which the seller lacks sufficient information to make a good faith offer that meets, rather than beats that of a competitor. Instead, the court concludes that like the seller in *Viviano Macaroni*, Michael Foods' discounts were "made in an effort to obtain additional business from [the buyer] and not to defend itself against the inroads of rapacious competitors." *Viviano Macaroni Co.,* 411 F.2d at 258.

Defendants urge a different conclusion, relying upon *Great Atlantic & Pacific Tea Company*. In that case, the seller, Borden Dairy, was in negotiations with A&P, a grocery store chain, over a milk supply contract. During the course of the negotiations, A&P, a longstanding Borden customer, informed Borden that it had received a better offer from a competitor. When asked, A&P refused to provide any additional details about the offer, other than to say that the "'offer was not even in the ballpark' and that a $50,000 improvement would not be a drop in the bucket." 440 U.S. at 84. Stating that it was making the offer in order to meet competition, Borden submitted a second bid that turned out to be lower than its competitor's bid. A&P did not inform Borden that its bid was lower. On these facts, the Supreme Court found that Borden was entitled to the meeting competition defense because it reasonably relied upon a credible threat of termination by an established customer.

The instant case is distinguishable from *Great Atlantic & Pacific Tea Company* because unlike the seller in that case, Michael Foods did not seek additional information to verify Sodexho's claim that Michael Foods offer was not good enough, nor did Michael Foods inform Sodexho that it was granting the concessions for the purpose of meeting competition, rather than simply to win Sodexho's business. Accordingly, the court concludes that Defendants have failed to establish the meeting competition defense.

V. Inducement of Price Discrimination (Section 2(f))

A. Legal Standard

Section 2(f) of the Robinson-Patman Act provides that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f). "[T]he buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices." *Automatic Canteen v. F.T.C.,* 346 U.S. 61, 79, 73 S. Ct. 1017, 97 L. Ed. 1454, 49 F.T.C. 1763 (1953).

B. Findings of Fact and Conclusions of Law

Based on the court's factual findings above, which the court will not here repeat, Plaintiff has demonstrated that Sodexho knowingly induced or received the price discrimination detailed above from Michael Foods. The most persuasive evidence of knowing inducement is the promise Sodexho extracted from Michael Foods known as the "most favored nations" clause. This clause required Michael Foods to provide Sodexho with the lowest price on Michael Foods products. Although it is true that the clause did not require that the price be lower than any other purchaser, it is clear that the purpose was to secure a price well below the list price received by smaller purchasers such as Feesers. This was not just form language. The evidence demonstrates that Sodexho vigorously enforced this contractual promise. For instance, in 2002, when Sodexho acquired the Wood Company, it learned that Wood had received better pricing than Sodexho on certain products. Accordingly, Sodexho demanded and received compensation for the breach of its contract.

The court's conclusion that Sodexho knowingly induced price discrimination is also supported by Sodexho's strategic planning documents demonstrating that Sodexho intended to secure discounts from manufacturers such as Michael Foods in order to increase its profit margin and gain more market share through conversion of self-op institutions to food service management. Sodexho's promotional materials touting its ability to secure lower food prices than its competitors also support this conclusion. Altogether, the evidence at trial overwhelmingly establishes that Sodexho knowingly induced Michael Foods to discriminate in price. Thus the court concludes that Sodexho violated Section 2(f) of the Robinson-Patman Act.

VI. Equitable Relief

As the prevailing party in this action Feesers seeks two forms of equitable relief from the court. First, Feesers seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that Michael Foods has unlawfully discriminated as to price against Feesers and that Sodexho has unlawfully induced or received such price discrimination. Second, Feesers seeks injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26.[10] Specifi-

[10] Feesers also seeks reasonable attorneys' fees and court costs, which will be considered in a separate opinion and order.

cally, Feesers seeks to enjoin Michael Foods from discriminating in price for the sale of food to Feesers and Sodexho, and to enjoin Sodexho from continuing to induce or receive unlawful price discrimination from Michael Foods or any other food manufacturer that sells food to both Feesers and Sodexho. Defendants oppose equitable relief, arguing that Feesers has unclean hands due to its receipt of deviated prices, that Feesers is unlikely to be injured by Sodexho's receipt of deviated prices, and that deviated pricing is critical to Michael Foods' business. These arguments will be discussed in turn.

First, the court rejects Defendants' argument that Feesers has unclean hands as a result of its receipt of deviated pricing. As discussed above, there is a significant difference between the deviated pricing received by Sodexho and Feesers. Deviated pricing received by Feesers is customer-specific.[11] Any distributor or food service management company servicing the account would have access to the same food prices. By contrast, the deviated pricing received by Sodexho may be used by Sodexho to compete for new accounts or retain current customers. As noted above, this

[11] This customer-specific deviated pricing would only violate the Robinson-Patman Act if it had the effect of impairing competition between favored and non-favored customers. But this scenario is unlikely. Students would not choose a school or university because one cafeteria negotiated a lower price for raw food than the other. Likewise hospitals and nursing homes are unlikely to gain a competitive advantage over rival institutions based on the price of raw food at the loading dock. However, if such a showing were made, then that price discrimination would violate the Robinson-Patman Act.

pricing gives Sodexho a competitive advantage over smaller rivals competing to resell raw food products to institutional dining services. If a customer switches from self-op to Sodexho, it benefits from Sodexho's deviated prices, but if it reverts back to self-op or chooses another management company, it loses access to Sodexho's deviated prices.

Defendants further argue that an injunction is not necessary to protect Feesers from competitive injury because the deviated pricing it complains of has been in place for many years, and Feesers has been unable to identify any lost sales resulting from such pricing. The court rejects this argument. The court is satisfied that the level of price discrimination by Michael Foods in favor of Sodexho is great enough, and the customers for whom both Feesers and Sodexho compete are sophisticated enough, that it is a matter of time before that price disparity causes Feesers to lose customers to Sodexho.

Finally, Defendants warn the court of the allegedly disastrous consequences of barring deviated pricing to Sodexho. According to Michael Foods, the company would be forced into financial ruin if it were required to lower its prices to Feesers for resale to all customers. However, Michael Foods would not necessarily be required to extend lower prices to Feesers in order to comply with the Robinson-Patman Act. For instance, Michael Foods could raise Sodexho's price to match the national list price, or it could remain competitive by lowering the national list price. The court offers no opinion as to which method Michael Foods must adopt in order to comply with this order. However, it is clear that the Act prohibits Michael Foods from discriminating in price against Feesers and in favor of Sodexho. Accordingly, Plaintiff is entitled to an injunction prohibiting Michael Foods from engaging in such discrimination, and Sodexho from inducing such discrimination.

One aspect of the injunctive relief Feesers seeks against Sodexho merits further discussion. Feesers seeks to enjoin Sodexho from inducing or receiving discriminatory pricing not only from Michael Foods, but also from other manufacturers from which both Feesers and Sodexho purchase goods. The court declines to grant such broad injunctive relief. Although the evidence presented at trial suggests that Sodexho has negotiated price discounts with manufacturers other than Michael Foods, those manufacturers are not named as parties to this suit, and the details of their pricing arrangements with Sodexho are not before the court. Thus the court is in no position to determine whether Sodexho has knowingly induced or received price discriminatory pricing from other manufacturers. Accordingly, the court will enjoin Sodexho from inducing or receiving discriminatory pricing from Michael Foods, but the injunctive relief shall not extend to other manufacturers.

VII. Conclusion

For the foregoing reasons, the court finds in favor of Plaintiff. Defendant Michael Foods violated Section 2(a) of the Robinson-Patman Act by discriminating in price between competing purchasers, and Sodexho violated Section 2(f) of the Act by inducing such discrimination. An appropriate order will issue.

s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: April 27, 2009.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 1:CV-04-0576

Judge Sylvia H. Rambo

FEESERS, INC.,
Plaintiff,

v.

MICHAEL FOODS, INC. and SODEXHO, INC.,
Defendants.

ORDER

In accordance with the foregoing memorandum of law, **IT IS HEREBY ORDERED AND ADJUDGED THAT**:

(1) The Clerk of Court shall enter judgment as follows:

> (a) Michael Foods has unlawfully discriminated as to price against Feesers and Sodexho has unlawfully induced or received such price discrimination in violation of the Robinson-Patman Act.
>
> (b) Michael Foods is hereby enjoined from discriminating unlawfully in price in favor of Sodexho and against Feesers.

(c) Sodexho is hereby enjoined from continuing to induce or receive unlawful price discrimination from Michael Foods.

(2) No later than 30 days from the date of this order, Plaintiff shall submit a petition for reasonable attorneys' fees and costs, supported by affidavits describing the experience of the attorneys and their standard hourly rates. Thereafter Defendants shall have 30 days to submit a response to the petition.

s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: April 27, 2009.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 1:CV-04-0576

Judge Sylvia H. Rambo

FEESERS, INC.,
Plaintiff,

—v.—

MICHAEL FOODS, INC. and SODEXHO, INC.,
Defendants.

MEMORANDUM

Before the court are motions by Defendants Michael Foods and Sodexho to amend the court's April 27, 2009 order granting judgment in favor of Plaintiff Feesers, Inc. pursuant to Fed.R.Civ.P. 59(e). For the reasons that follow, Michael Foods' motion will be denied, and Sodexho's motion will be granted in part and denied in part.

I. Background

On April 27, 2009, following a three week bench trial, this court issued an opinion and order granting a declaratory judgment in Plaintiff's favor and issuing injunctive relief. On May 5, 2009, Plaintiff filed a motion for contempt and injunctive relief, which the court granted on May 26, 2009 (Doc. 431). On May 6, 2009, Defendant Michael Foods filed a motion to alter or amend judgment pursuant to Fed.R.Civ.P. 59(e). (Doc. 404.) A brief in support thereof was filed the same day. (Doc. 405.) On May 11, 2009, Defendant Sodexho also filed a motion to alter or amend judgment pursuant to Fed.R.Civ.P. 59(e), (Doc. 414), and a brief in support thereof, (Doc. 415). On May 21, 2009, Feesers filed briefs in opposition, (Docs. 427, 428), to which Michael Foods and Sodexho submitted reply briefs, (Docs.439, 442). Accordingly, the motions are ripe for disposition.

II. Standard

The purpose of a motion for reconsideration "is to allow a court to correct manifest errors of law or fact, or in limited circumstances, to present newly discovered evidence, but not to relitigate old issues, to advance new theories, or to secure a rehearing on the merits." *Gutierrez v. Ashcroft,* 289 F.Supp.2d 555, 561 (D.N.J.2003) (internal citations omitted). Reconsideration of a judgment is an extraordinary remedy and is generally only granted where "(1) an intervening change in the law has occurred, (2) new evidence not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises." *Id.*

III. Discussion

Defendants challenge the court's opinion and order on a number of grounds. First, Michael Foods and Sodexho argue that the Third Circuit's decision in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008) entitles them to judgment in their favor. Additionally, Sodexho argues that the order barring it from inducing price discrimination is impermissibly vague and overbroad. These arguments will be addressed in turn.

A. *Toledo Mack*

Both Defendants argue that *Toledo Mack* entitles them to judgment in their favor, but for different reasons. Michael Foods argues that *Toledo Mack* represents an intervening change in law that entitles it to a reversal of the court's judgment. Sodexho argues that the case simply applies the principles set forth in the Supreme Court's 2006 opinion in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006), and that this court committed a clear legal error by finding in Feesers' favor. However, both parties present essentially the same legal arguments that the court considered and rejected in the April 27, 2009 opinion and order.

Toledo Mack and *Reeder-Simco* concerned competition for the sale of custom made trucks among car dealerships operating in distinct geographic zones, and in both cases, courts found that competition was limited to a formal bidding process. In *Reeder-Simco,* which this court discussed at length in the April 27, 2009 opinion and order, (*see* Doc. 395 at 24-26), the Supreme Court held that a price disparity caused no competitive injury because the plaintiff had never submitted a bid in head-to-head competition with favored dealers. In *Toledo Mack,* the Third Circuit applied this holding to almost identical facts, concluding that the Robinson-Patman Act does not apply to a case involving "a single sale of a customized good via a competitive bidding process." 530 F.3d at 228.

According to Defendants, these cases entitle them to judgment in their favor because Feesers never proved that Michael Foods actually sold it any products that later became the basis for head-to-head competition with Sodexho. Defendants argue that like the situation in *Mack Trucks,* at the time a customer chooses between Sodexho and Feesers, the two companies possess nothing more than an *offer* to sell.

The court rejects as baseless Michael Foods' contention that "Feesers did not offer any evidence that Michael Foods actually sold to Feesers and Sodexho, the products that then become the basis of head-to-head competition for the same customer." (Doc. 405 at 4.) Unlike the seller in *Toledo Trucks,* Michael Foods does more than merely offer a lower price in a competitive bidding situation. The court has already determined that Michael Foods made sales to two purchasers, an element of the prima facie case of price discrimination, in its 2006 summary judgment opinion, and that holding was undisturbed by both parties on appeal, and remains the law of the case.

Defendants further argue that the timing of competition in this case precludes a finding of competitive injury. In support of this argument, Defendants cite the following passage in *Toledo Mack:*

> Although Mack dealers may compete with one another by bidding against each other for the same deal, and the amount of sales assistance Mack offers to each dealer may well determine whether a customer chooses to accept a bid from one Mack dealer or another, Mack does not sell a truck to the dealer until the customer actually selects a dealer's bid. Because no sale takes place until a customer accepts a dealer's bid, the amount of sales assistance Mack is willing to provide to a particular dealer is part of an offer by Mack to sell, not a sale. Regardless of any competition between the dealers during the bidding process, only a dealer whose bid is accepted by a customer will actually buy a truck from Mack. Therefore, only one sale, not two actually results.

530 F.3d at 228. Here, Defendants correctly point out that this court found that competition was limited to the time at which an institution is choosing between self-op and management. At this time, Defendants argue, Michael Foods has either not actually sold the products destined for those customers to Feesers and Sysco, or it has sold them at list price. Thus, according to Defendants, this situation is identical to that in *Toledo Mack,* and requires a reversal of the judgment in favor of Feesers.

Essentially, Defendants urge a reading of *Toledo Mack* that would impose a new element in the prima facie case of price discrimination under the Robinson-Patman Act—a sale of the commodity to two different sellers *prior to* the competition for the resale of those goods. However, such a reading is not warranted by *Toledo Mack,* and would be contrary to the purposes of the Robinson-Patman Act.

In *Toledo Mack,* the Third Circuit addressed the applicability of the Robinson-Patman Act to cases involving closed bidding for custom-made goods. In that case, as well as *Reeder-Simco,* the losing bidder would never actually purchase the item which was the subject of the competition. Defendants provide no support for their argument that the holding of *Toledo Trucks* should be extended to cases such as this, where the goods in question are perishable commodities that two competitors regularly purchase and keep in stock for resale to customers. Moreover, a prior sale requirement would render the Robinson-Patman Act inapplicable to price discrimination in the sale of any perishable commodity which is then resold pursuant to a supply contract that exceeds the shelf life of that commodity. The most logical reading of *Toledo Mack* and *Reeder-Simco* is that the holdings of those cases apply only to competition for the sale of custom-manufactured goods that is restricted to bidding markets. Because those cases are inapplicable to the case at bar, the court will deny Defendants' motions to amend judgment in light of *Toledo Mack.*

B. Vagueness and Overbreadth of Order

Sodexho further argues that the court's order enjoining it "from continuing to induce or receive unlawful price discrimination from Michael Foods," (April 27, 2009 Order ¶ (1)(c).), should be amended because it is vague and overbroad. Sodexho characterizes the order as an impermissibly vague "obey the law" order, and further claims that the order is insufficient to put it on notice as to what conduct would violate the order.

Federal Rule of Civil Procedure 65(d) provides that "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it was issued; (B) state its terms specifically; and (C) describe in reasonable detail-and not by referring to the complaint or other document-the act or acts restrained or required." An injunction simply commanding a defendant to obey the law does not satisfy this specificity requirement. *Belitskus v. Pizzingrilli*, 343 F.3d 632, 650 (3d Cir.2003); *see also Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981).

Sodexho claims that the injunction does not describe in reasonable detail the acts restrained or required, but rather "simply parrots the general terms of the Robinson-Patman Act" in violation of the specificity requirement of Fed.R.Civ.P. 65(d). (Doc. 415 at 7.) The court disagrees. Here, the order Sodexho challenges provides that "Sodexho is hereby enjoined from continuing to induce or receive unlawful price discrimination from Michael Foods." (April 27, 2009 Order ¶ (1)(c).) The order also includes a declaratory judgment providing that "Michael Foods has unlawfully discriminated as to price against Feesers and Sodexho has unlawfully induced or received such price discrimination in violation of the Robinson-Patman Act." (April 27, 2009 Order ¶ (1)(a).) Additionally, the order is accompanied by a 83 page trial opinion setting forth this court's findings of facts from trial and legal conclusions. Thus, the injunctive relief is far more specific than a simple command to obey the Robinson-Patman Act; it places Sodexho on notice of its conduct that violated the Act and which is now prohibited by the order.

Sodexho further argues that the order should be amended because "it contains ambiguities that give rise to two possible instances of indisputable overbreadth." (Doc. 415 at 8.) First, Sodexho argues that the order omits the *scienter* requirement because it does not specifically prohibit Sodexho from knowingly inducing or receiving price discrimination. The court does not believe the order is ambiguous, particularly in light of the this court's trial court findings in the accompanying opinion that Sodexho actively sought to obtain food at lower prices than its competitors. Nevertheless, in order to clarify Sodexho's confusion, the court will grant its request and amend the order to include the word "knowingly."

Second, Sodexho argues that the order is ambiguous and overbroad because it is not expressly limited to price discrimination against Feesers, but instead prohibits Sodexho from inducing or receiving any unlawful price discrimination from Michael Foods. Sodexho asserts that it is uncertain whether it may continue to receive its negotiated pricing if that same pricing is extended to Feesers, because that pricing would still be lower than the national list price received by other distributors. There is evidence in the record that Sodexho is in competition with distributors other than Feesers for the sale of Michael Foods products to institutional food service customers, namely Sodexho's strategic planning documents. However, the only plaintiff in this case is Feesers, and the court agrees that there is an insufficient record to support a broader injunction barring Sodexho from inducing or receiving lower prices than distributors other than Feesers.[1] Accordingly, the court will amend the injunction against Sodexho to specify that it may no longer knowingly induce or receive price discrimination against Feesers from Michael Foods.

IV. Conclusion

Michael Foods' motion to amend judgment will be denied, and Sodexho's motion to amend judgment will be granted in part and denied in part. An appropriate order will issue.

s/Sylvia H. Rambo
United States District Judge

Dated: June 30, 2009.

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[1] The court expresses no opinion on the merits of any claims other distributors may have against Sodexho if it knowingly induces or receives price discrimination from Michael Foods against other competitors.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 1:CV-04-0576
JUDGE SYLVIA H. RAMBO

FEESERS, INC.,
Plaintiff,

—v.—

MICHAEL FOODS, INC. and SODEXHO, INC.,
Defendants.

ORDER

For the reasons set forth in the foregoing memorandum of law, **IT IS HEREBY ORDERED THAT**:

(1) Michael Foods' motion to alter judgment (Doc. 404) is **DENIED**;

(2) Sodexho's motion to alter judgment (Doc. 414) is **GRANTED IN PART** and **DENIED IN PART** as follows:

(a) The motion is **GRANTED** with respect to ¶ 1(c) of the April 27, 2009 opinion and order (Doc. 395), which shall be amended to read: "Sodexho is hereby enjoined from continuing

> to knowingly induce or receive from Michael Foods unlawful price discrimination against Feesers."
>
> (b) In all other respects, the motion is **DENIED**.

(3) The Clerk of Court is directed to issue an amended judgment in accordance with this order.

s/Sylvia H. Rambo
United States District Judge

Dated: June 30, 2009.

APPENDIX D

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Feesers, Inc.,
Appellant in No. 09-2993

v.

Michael Foods, Inc.; Sodexho, Inc.,
Appellants in Nos. 09-2548 and 09-2952

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 04-cv-00576
District Judge: The Honorable Sylvia H. Rambo

Argued October 29, 2009

Before: SMITH, FISHER, and NYGAARD,
Circuit Judges.

(Filed January 7, 2010)

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OPINION

SMITH, *Circuit Judge*.

This appeal by Feesers, Inc. ("Feesers"), a food distributor, arises out of a Robinson-Patman Act claim for unlawful price discrimination, 15 U.S.C. § 13 (the "RPA"), against Michael Foods, Inc. ("Michaels"), a food manufacturer, and Sodexo, Inc. ("Sodexo"),[1] a food service management company. Feesers claims that Sodexo was able to purchase egg and potato products from Michaels at a discounted price that was unavailable to Feesers. Following a bench trial, the District Court entered judgment for Feesers. We will vacate that judgment and instruct the District Court to enter judg-

[1] Sodexho, Inc. changed its name to Sodexo, Inc. during the course of this litigation. We will refer to the company by its new name.

ment as a matter of law for Michaels and Sodexo. Feesers and Sodexo were not competing purchasers, and, therefore, Feesers cannot satisfy the competitive injury requirement of a prima facie case of price discrimination under § 2(a) of the RPA.[2] In doing so, we hold that, in a secondary-

---

[2] Section 2(a) of the RPA, in relevant part, states that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and 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: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered[.] . . . . *And provided further*, 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: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions

line price discrimination case, parties competing in a bid market cannot be competing purchasers where the competition for sales to prospective customers occurs *before* the sale of the product for which the RPA violation is alleged.

When reviewing a judgment entered after a bench trial, we exercise "plenary review over [the] [D]istrict [C]ourt's conclusions of law" and its "choice and interpretation of legal precepts." *Am. Soc'y for Testing & Materials v. Corrpro Cos.*, 478 F.3d 557, 566 (3d Cir. 2007) (internal quotations omitted). Findings of fact are reviewed for clear error. *Id.* The District Court had subject matter jurisdiction over this case under 28 U.S.C. § 1331, and we exercise appellate jurisdiction under 28 U.S.C. § 1291.

Michaels and Sodexo raise a host of issues in this appeal, but in light of this Court's decision in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008), and the Supreme Court's decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006), we need address only the issue of whether Sodexo and Feesers were "competing purchasers" for purposes of the RPA. *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 213 (3d Cir. 2007) (quoting *Falls*

> affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. § 13(a).

City Indus. v. Vanco Beverage, 460 U.S. 428, 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983)).[3]

I.

The following facts were found by the District Court after a bench trial. *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414, 418 (M.D. Pa. 2009).

Structure of the Food Service Industry

The food service industry consists of a three-tier distribution system: manufacturers sell products to distributors, who resell those products to operators, including self-operators ("self-ops") and food service management companies. *Id.* at 420-21. Self-ops are institutions that perform all dining services internally. Food service management companies perform institutions' dining services for a fee, *id.*, and primarily target schools, hospitals, and nursing homes. Sometimes operators negotiate with manufacturers for discounted prices, known as "deviated prices." *Id.* at 432. In those

[3] Three of the four requirements of a § 2(a) Robinson-Patman claim have already been established by Feesers and are not contested in this appeal. *Feesers, Inc.*, 498 F.3d at 208. Feesers has shown "that sales were made to two different purchasers[, Feesers and Sodexo,] in interstate commerce; that the product sold was of the same grade and quality; and that [Michaels] discriminated in price as between the two purchasers." *Id.* at 211. What remains for resolution by this Court is the fourth requirement, a showing "that the discrimination had a prohibited effect on competition." *Id.* at 212.

instances, the distributor purchases the product at list price from the manufacturer, sells the product to the operator at the deviated price, and receives the difference between the list price and the deviated price from the manufacturer. *Id*. An operator may also seek discounts from manufacturers by joining a Group Purchasing Organization ("GPO"). A GPO is a collection of operators who negotiate food prices collectively to achieve greater bargaining power against manufacturers and distributors. *Id.* at 421. "GPOs generally bargain for a lower price, but do not actually purchase the food for resale to institutions." *Id*.

The Parties in this Appeal

Michaels is a manufacturer of egg and potato products that sells in bulk, nationwide. *Id*. It is the largest producer of liquid eggs in the United States. *Id*. Feesers is a regional distributor that distributes Michaels's products, and others, to operators within a 200-mile radius of Harrisburg, Pennsylvania. *Id*. Sodexo is a multinational food service management company that serves institutions around the world. *Id*. Its services include planning menus, ordering food, preparing and serving meals, and overseeing labor issues. It is the largest private purchaser of food in the world. *Id*. Sodexo owns Entegra, a GPO. *Id.* at 427.

Michaels's Pricing of Food Products

Michaels sells sixty percent of its products at deviated prices. *Id.* at 432. It has offered deviated pricing to self-ops since the mid-1990s and to food service management companies, like Sodexo, since at least 1999. "[O]n average from 2000 until 2004, Feesers paid $9.56, or 59% more than [Sodexo] for [Michaels's] eleven top selling products." *Id.* at 434. This pricing difference was described as "stunning" by Feesers's expert witness. *Id.* The deviated pricing Sodexo received from Michaels was not institution-specific, so Sodexo could "use its low deviated price . . . to win new accounts and to keep current customers." *Id.* at 432.

Competition between Feesers and Sodexo

Feesers sells food to self-op institutions and food service management companies.[4] *Id.* at 421-22. Sodexo sells food in conjunction with its food service management services. *Id.* at 422. Institutional customers "regularly switch [between] self-op [and] management," and at least three institutions have switched between Feesers and Sodexo. *Id.*[5] Both companies regularly seek self-op business. *Id.* Feesers tries to distribute for self-ops while Sodexo tries to convert self-ops to food service management.

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[4] The District Court found that Feesers sold only to self-op institutions, *Feesers, Inc.*, 632 F. Supp. 2d at 421-22. This finding was clearly erroneous. The District Court's own fact finding describing Feesers's business explains that Feesers distributed food for Wood, a food service management company. *Compare id.* ("Feesers only sells food to self-op institutions[.]"), *with id.* at 421 n.3 ("Feesers was the primary distributor for the Wood Company," a food service management company.).

[5] The Jewish Home of Greater Harrisburg and St. Mary's Catholic School both switched from Feesers to Sodexo. *Feesers, Inc.*, 632 F. Supp. 2d at 422. The Meadows switched from Sodexo to Feesers. *Id.*

When a self-op switches to Sodexo, it relies on Sodexo to handle all dining services functions, such as procurement and distribution of food. *Id.* Sodexo itself is not a distributor, but it decides which distributors its customers will use. *Id.* Thus, when an institution switches from self-op to Sodexo, the incumbent distributor who distributed for the self-op may be replaced. *Id.* Because Feesers could be displaced by Sodexo's chosen distributor if Sodexo wins a self-op's business, the two companies compete "when a customer considers switching from self-op to food service management, or vice versa." *Id.* at 430.[6] Accordingly, Feesers and Sodexo "compete[d] for the same portion of an institution's food service budget." *Id.* at 420.

Competition between Feesers and Sodexo occurred informally prior to the request for proposal ("RFP") process ordinarily required by large institutions.[7] *Id.* at 428. To grow its client base, Sodexo identifies institutions that meet its client profile and then builds relationships with those institutions. *Id.* at 428-29. During informal contacts with a prospective institutional customer, Sodexo "gauges the institution's interest in man-

[6] We regard this inferred fact as highly questionable, but the finding does not rise to the level of clear error. In our view, assuming that Sodexo replaced Feesers with another distributor, Feesers's competitor would be the other distributor, not Sodexo.

[7] Food service management companies compete with each other through a formal RFP process to win institutions' business. *Feesers, Inc.*, 632 F. Supp. 2d at 428. The RFP process is usually limited to food service management companies. *Id.*

agement and determines whether there are any particular problems to be solved." *Id.* at 428. If the institution is interested in management, it will then put out a RFP and Sodexo will follow through in that process. *Id.* Aside from seeking new clients, Sodexo also touts its access to discounted foods to its existing customers that utilize it for preparation and ordering of food, but not for distribution. *Id.* at 429. This is done, in part, to encourage those customers to switch to Sodexo's chosen distributor. *Id.*[8]

Procedural History

On March 17, 2004, Feesers sought a declaratory judgment stating that (1) Michaels unlawfully discriminated in price under § 2(a) of the RPA by selling egg and potato products to Sodexo at significantly lower prices than it did to Feesers and (2) Sodexo violated § 2(f) of the RPA by knowingly inducing those discriminatory sales. 15 U.S.C. § 13(a) and (f). Feesers also sought permanent injunctive relief under § 16 of the Clayton Act. 15 U.S.C. § 26. On May 4, 2006, the District Court granted summary judgment for the defendants, concluding that Feesers had satisfied the

[8] The District Court also identified other evidence showing competition between Feesers and Sodexo, including Sodexo's SEC filings, *Feesers, Inc.*, 632 F. Supp. 2d at 422, and its internal strategic documents, *id.* at 423. None of this evidence stated that Sodexo regarded any distributor as a competitor. *Id.* at 422-23 (noting that Sodexo's SEC filings identified lower overall costs of food service management as a means of promoting itself over self operation); *id.* at 425 ("Sodex[o]'s strategic planning documents do not specifically mention distributors as competitors[.]").

first three elements of a prima facie case of price discrimination, but not the fourth element, competitive injury. "The District Court was concerned that [Sodexo] and Feesers [we]re not at the same 'functional level' and [we]re therefore not in 'actual competition' in the same market." *Feesers, Inc.*, 498 F.3d at 214.

Feesers appealed and this Court reversed.[9] We held that the District Court had applied the wrong standard in concluding that Feesers and Sodexo were not in competition. *Id.* at 208. The panel explained the proper standard and remanded the case to the District Court for further proceedings.[10]

On remand, after a bench trial, the District Court entered judgment for Feesers and enjoined Michaels from engaging in unlawful price discrimination. Michaels then suspended all sales to Feesers. In response, Feesers sought an order of contempt and a permanent injunction forbidding

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[9] We reversed in a 2-1 decision. The dissent concluded that Sodexo and Feesers were not in actual competition because they "d[id] not sell the same products." *Feesers, Inc.*, 498 F.3d at 220 (Jordan, J., dissenting). In reaching that conclusion, the dissent explained that Feesers "res[old] . . . unprepared foods to its institutional clients," whereas Sodexo "prepare[d] meals, and s[old] the prepared meals to individual customers." *Id.* at 218. (Jordan, J., dissenting). The majority disagreed, noting that "a factfinder could conclude that Sodex[o] s[old] unprepared food to its customers" because some of Sodexo's agreements with institutional clients did not charge for "'prepared meals,' but rather for the cost of unprepared food and supplies, the cost of labor, and a management fee." *Id.* at 215.

[10] The prior decision is explained in Section IV(A), *infra*.

Michaels from refusing to deal with Feesers. On May 26, 2009, the District Court held Michaels in contempt and enjoined it from refusing to "sell its products to Feesers on the same terms as they are sold to [Sodexo], so long as Feesers otherwise meets its standards as a customer." Michaels and Sodexo now appeal the District Court's judgment and the permanent injunction.

II.

"'Competitive injury' [under § 2(a) of the RPA] is established . . . by proof of 'a substantial price discrimination between *competing purchasers over time*.'" *Feesers, Inc.*, 498 F.3d at 213 (quoting *Falls City Indus.*, 460 U.S. at 435) (footnote omitted) (emphasis in original). "Feesers does not need to prove that [Michaels's] price discrimination *actually* harmed competition, *i.e.*, that the discriminatory pricing caused Feesers to lose customers to Sodex[o]. Rather, Feesers need prove only that (a) it competed with Sodex[o] to sell food and (b) [that] there was price discrimination over time by [Michaels]." *Feesers, Inc.*, 498 F.3d at 213 (footnote omitted) (emphasis in original).

To determine whether Feesers competed with Sodexo to sell food, "the relevant question is whether [the] two companies '[we]re in economic reality acting on the same distribution level.'" *Id.* at 214 (quoting *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1272 (3d Cir. 1995)). Recognizing that the phrase "economic reality" provides little guidance in how to approach the competition inquiry, this Court, in the prior appeal in this case, explained that two parties are in competition only where, after a "careful analysis of each party's customers," we determine that the parties are "each directly after the same dollar." *Feesers, Inc.*, 498 F.3d at 214 (quoting *M.C. Mfg. Co. v. Tex. Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975)). We refer to this dollar-for-dollar analysis as the competing purchaser requirement. The Supreme Court's guidance in *Volvo Trucks*, 546 U.S. at 179-80, and this Court's precedent in *Toledo Mack*, 530 F.3d at 226-29, compel us to conclude that Feesers and Sodexo were not competing purchasers. Thus, Feesers cannot satisfy the first element required to show competitive injury, and its RPA claims must fail as a matter of law.[11]

A.

In application, the competing purchaser requirement will vary based on the nature of the market and the timing of the competition. In a bid market, if the competition between the favored and disfavored purchaser occurs before the purchase of the goods from the seller, then the disfavored purchaser cannot show that it and the favored purchaser were competing purchasers. *Volvo Trucks*, 546 U.S. at 178-79. This rule prevents the application of the RPA to markets where the "allegedly favored purchasers [bear] little resemblance to [the] large independent department stores or chain operations" that the RPA was intended to

[11] Because Feesers cannot satisfy the first element required to show competitive injury, we need not discuss whether it experienced price discrimination over time.

target, *id.* at 181, and helps "construe the [RPA] 'consistently with the broader policies of the antitrust laws,'" *id.* (quoting *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)).

In practice, the rule, like other restrictions on the reach of the RPA, prevents the unprincipled application of the statute. Indeed, because the RPA often has "anticompetitive" effects that "promote rather than . . . prevent monopolistic pricing practices," *Small Business and the Robinson-Patman Act: Hearings before the Special Subcommittee on Small Business and the Robinson-Patman Act of the House Select Committee on Small Business*, 91st Cong. 146-47 (1969) (testimony of Richard A. Posner), the Supreme Court, in seeking to construe the statute consistently with the broader policies of the antitrust laws, has repeatedly limited its reach by:

- Expanding the means through which RPA defendants can attack the "competition" element of a prima facie case of price discrimination, *Texaco v. Hasbrouck*, 496 U.S. 543, 561, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990) ("A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers.") (footnote omitted);

- Focusing the competition inquiry on "interbrand competition," *Volvo Trucks*, 546 U.S. at 180;
- Explaining that the RPA does not "ban all price differences charged to different purchasers of commodities of like grade and quality," *id.* at 176 (quoting *Brooke Group Ltd.*, 509 U.S. at 220);
- "[R]esist[ing] interpretation[s] [of the RPA] geared more to the protection of existing competitors than to the stimulation of competition," *Volvo Trucks*, 546 U.S. at 181 (emphasis omitted); and,
- "[R]ecogni[zing] [that] the right of a seller to meet a lower competitive price in good faith may be the primary means of reconciling the [RPA] with the more general purposes of the antitrust laws," *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 82 n.16, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979) (interpreting RPA to provide robust meeting competition defense).[12]

[12] *Accord Falls City Indus.*, 460 U.S. at 451-52 (vacating judgment that defendant did not have a meeting competition defense); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 487 (1989) ("Courts should narrowly construe statutes that serve no plausible public purpose, and amount merely to interest-group transfers . . . . Th[is] idea helps explain a number of decisions in areas of economic regulation, such as . . . the courts' approach to the Robinson-Patman Act.") (citing Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 409-10 (1978)).

This Court has dutifully followed the Supreme Court's lead by narrowly construing the RPA. In *Toledo Mack*, we explained that we will "narrowly interpret" the RPA, even if doing so will result in "elevat[ing] form over substance." *Toledo Mack*, 530 F.3d at 228 n.17.

While the competing purchaser requirement has its roots in *FTC v. Morton Salt*, 334 U.S. 37, 46-51, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948), the most recent decisions discussing that requirement are *Volvo Trucks* and *Toledo Mack*. Both decisions emphasized that proving "substantial price discrimination between competing purchasers overtime," *Volvo Trucks*, 546 U.S. at 179 (quoting *Falls City Indus.*, 460 U.S. at 435) (emphasis omitted), requires accounting for the timing of the alleged competition and the nature of the market. *Volvo Trucks*, 546 U.S. at 178-79; *see Toledo Mack*, 530 F.3d at 228.

In *Volvo Trucks*, the Supreme Court rejected an inference of competitive injury where the plaintiff, Reeder-Simco ("Reeder"), could not show that it was a competing purchaser. *Volvo Trucks*, 546 U.S. at 179-80. Reeder was a Volvo dealer who competed with other dealers (both Volvo brand and others) through a customer-specific bidding process for sales to individuals seeking custom-built trucks. *Id.* at 169. Reeder alleged that Volvo sold trucks to other Volvo dealers at unlawfully discriminatory prices, giving those other dealers an unfair advantage in selling to prospective customers. The customer-specific bidding process began with the customer stating its specifications and inviting bids from dealers it had selected. *Id.* at 170. The selected dealers would submit bids to the customer and the dealer that won the bid would arrange for the manufacturer, in this case, Volvo, to build the truck for the customer. *Id.* Like the deviated pricing system of food manufacturers, it was common for truck manufacturers to offer "customer-specific discounts to their dealers." *Id.* Prior to submitting a bid to a customer, a Volvo dealer would ask Volvo if it could get a discount for the customer. *Id.* Volvo would then decide on a case-by-case basis what discount it would grant a particular customer based on factors like industry-wide demand and whether the customer had previously purchased from Volvo. *Id.* While the discount varied based on many factors, the dealers always knew what discounts they could offer a customer before submitting their bids to the customer. *See id.*

The specific question presented in the case was whether "a manufacturer offering its dealers different wholesale prices may be held liable for price discriminations proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer." *Id.* at 169. In deciding that question in the negative, the Supreme Court concluded that Reeder could not establish an inference of competitive injury based on the timing of the competition between the dealers and the nature of the market, Reeder's evidence of competitive injury, and the goals of the RPA.

The timing of the competition between the dealers and the nature of the market were critical to the Supreme Court's reasoning. At the initial stage of competition in the bid market, where dealers were competing to win the right to submit a bid to a customer, "competition [wa]s not affected by differential pricing [because] a dealer in the competitive bidding process approach[ed] Volvo for a price concession . . . only after it ha[d] been selected by a retail customer to submit a bid." *Id.* at 178-79. Prospective customers chose which dealers could submit bids based on a variety of factors "including the existence *vel non* of a relationship between the potential bidder and the [prospective] customer, geography, and reputation." *Id.* at 179. After the prospective customer chose who could submit bids, the relevant market narrowed to the few dealers who were chosen: "Once a retail customer has chosen the particular dealers from which it will solicit bids, 'the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale.'" *Id.* (quoting *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 719 (8th Cir. 2004) (Hansen, J., dissenting)).

The Supreme Court was also unimpressed with Reeder's evidence purporting to show competitive injury. Reeder produced three types of evidence to support its allegations.[13] The two types of evidence

[13] The first type, evidence of head-to-head comparisons between Reeder and other Volvo dealers, is not relevant in the instant case. Reeder's evidence showed only "two instances over [a] five year course" where it bid against other Volvo dealers, so called head-to-head comparisons: One instance where it and another Volvo dealer received the same discount and Reeder lost to the other dealer because the customer had previously bought from the other dealer, and one instance where it and the opposing Volvo dealer

relevant to the instant case were Reeder's "comparisons of [discounts] [it] received for four successful bids against *non-Volvo* dealers, with larger [discounts] other successful Volvo dealers received for *different sales* on which [it] did not bid (purchase-to-purchase comparisons)," *Volvo Trucks*, 546 U.S. at 177 (emphasis in original), and "comparisons of [discounts] offered to [it] in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for different sales on which [it] did not bid (offer-to-purchase comparisons)," *id.* at 177-78 (emphasis in original). These two types of evidence did not create an inference of competitive injury because (1) the alleged price discrimination did not occur for the same customer and (2) Reeder did not attempt to show that other Volvo dealers were consistently favored. *Id.* at 178.[14]

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received matching discounts from Volvo and neither won the bid. *Volvo Trucks*, 546 U.S. at 172. On this evidence, the Supreme Court noted that Reeder showed the "loss of only one sale" and that "Reeder and the other dealer received the same concession" in that instance. *Id.* at 180. In the other instance of head-to-head competition, both Volvo dealers received the same concession and neither won the bid. *Id.* The Supreme Court concluded that "if price discrimination between two purchasers existed at all, [a sale that would have resulted in $30,000 more in gross profits for Reeder] was not of such magnitude as to affect substantially competition between Reeder and the 'favored' Volvo dealer." *Id.*

[14] Notably, in this case, Feesers produced evidence showing that Michaels consistently favored Sodexo. *Feesers, Inc.*, 632 F. Supp. 2d at 434. This type of evidence was not produced in *Volvo Trucks*, so the Supreme Court never explained whether both or only one of its reasons for reject-

The Supreme Court also signaled that it was uninterested in permitting innovative applications of the RPA and would resist "interpretation[s] geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Id.* at 181 (emphasis in original). It also noted that the custom truck market bore "little resemblance to [the] large independent department stores or chain operations" that the RPA originally intended to target. *Id.*

This Court used similar reasoning in *Toledo Mack*. 530 F.3d at 226-29. That case had facts similar to *Volvo Trucks*—Toledo, a Mack truck dealer, would submit bids to prospective customers who wished to purchase customized Mack trucks. *Id.* at 209. In creating a bid, Toledo would seek out a "transaction-specific discount [from Mack] known as 'sales assistance.'" *Id.* "The amount of sales assistance [Mack offered] varie[d] according to the nature of the relationship between the dealer and the customer, the number of trucks ordered, potential competition, and other factors." *Id.* Toledo sued Mack under the RPA, claiming that it consistently received less sales assistance than other Mack dealers.

In affirming the district court's grant of summary judgment for the defendant, Mack, on the RPA claim, this Court explained that the timing of

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ing the inference of competitive injury need be rectified in order to infer competitive injury. 546 U.S. at 179 n.3. As we later explain, this Court, in *Toledo Mack*, rejected the argument that evidence showing that a certain purchaser was consistently favored was sufficient to infer competitive injury in a bid market where the competition occurred prior to the actual sale. *Toledo Mack*, 530 F.3d at 228-29.

competition and the nature of the market are critical factors to consider when determining whether the plaintiff can show that it was a competing purchaser of a favored purchaser. We concluded that because the competition between Mack dealers occurred during the bidding process, and not at the time of the actual sale, Toledo could not satisfy the competing purchaser requirement or the two purchaser requirement:

> Because no sale takes place until a customer accepts a dealer's bid, the amount of sales assistance Mack is willing to provide to a particular dealer is part of an offer by Mack to sell, not a sale. Regardless of any competition between the dealers during the bidding process, only a dealer whose bid is accepted by a customer will actually buy a truck from Mack. Therefore, only one sale, not two, actually results.

Id. at 228.

Toledo, unlike the plaintiff in *Volvo Trucks*, did not offer evidence of head-to-head competition between it and other Mack dealers. *Id.* at 215. But it did provide expert testimony regarding "the average amounts of sales assistance Mack offered to Toledo as compared with the average amount of sales assistance Mack offered to other [Mack] dealers," i.e., evidence showing that Mack consistently favored other dealers as compared to Toledo. *Id.* That evidence was rejected by this Court as irrelevant because even if the "amount of sales assistance Mack offer[ed] to each dealer . . . determine[d] whether a customer cho[se] to accept a bid from one Mack dealer or another, Mack does not sell a truck to the dealer until the customer actually selects a dealer's bid." *Id.* at 228. Thus, only one sale, not two, resulted from the competition. *Id.* This was true in part because the sale was divorced from the competition and Toledo could not show that it was a competing purchaser vis-a-vis other Mack dealers. *See id.*

Finally, the *Toledo Mack* Court noted that, like *Volvo Trucks*, "the alleged price discrimination d[id] not implicate the original purpose of the RPA because 'the allegedly favored purchasers [we]re dealers with little resemblance to large independent department stores or chain operations.'" *Id.* at 227 (quoting *Volvo Trucks*, 546 U.S. at 181).

B.

While this Court's conclusion in *Toledo Mack* undoubtedly turned on the fact that "one sale, not two, actually result[ed]," *Toledo Mack*, 530 F.3d at 228, it was not reached by a simple application of the RPA's two purchaser requirement. It was reached through the combined effect of the RPA's two purchaser and competitive injury requirements—i.e., the competing purchaser requirement. *Id.; see Falls City Indus.*, 460 U.S. at 435 (explaining competing purchaser requirement); *Volvo Trucks*, 546 U.S. at 179 (same).

In *Toledo Mack* we held that because the competition among dealers for prospective customer business occurred before the purchase of the truck to be sold to the customer by the winning dealer, the relevant market for the sale to the customer was already limited to one at the time the manufacturer sold the dealer the truck. *See Toledo Mack*, 530 F.3d at 228. Because the relevant market was only one dealer making one purchase from the manufacturer for resale to one customer, the two purchaser requirement could not be satisfied. *See id*. Thus, this Court rejected Toledo's RPA claim for lack of two purchasers, which was based on the lack of a competitive market, i.e. the lack of a competing purchaser. *See id*. This conclusion comports with *M.C. Mfg.*, 517 F.2d at 1065, the decision relied upon by this Court in *Toledo Mack*, 530 F.3d at 228, and in this Court's prior decision in this case, *Feesers, Inc.*, 498 F.3d at 214 (instructing the District Court to apply the Fifth Circuit's test to "determine whether Sodex[o] and Feesers compete to resell food products to the same group of customers") (citing *M.C. Mfg. Co.*, 517 F.2d at 1068 n.20). In addition, the Supreme Court's reasoning in *Volvo Trucks* further confirms our understanding of the competing purchaser requirement.

In *M.C. Mfg.*, two companies, Universal and H/R, manufactured lifting plugs for sales to the government. *M.C. Mfg.*, 517 F.2d at 1061. Both companies purchased "unfinished plug castings" from Texas Foundries and those castings were used to create the lifting plugs. *Id*. Both companies would purchase castings after they had won a contract with the government. *Id.* at 1067. In its complaint, Universal alleged that H/R and Texas Foundries violated the RPA because (1) Texas Foundries quoted a lower price to H/R than Universal for their respective bids for a government contract and H/R won that contract (the "1971 Contract"), *id.* at 1061-62, 1066-67, and (2) Texas

Foundries sold unfinished plug castings to Universal at a higher price in a separate contract (the "1970 Contract Extension"). *Id.* at 1065-66. Universal argued that the prices it received in the 1970 Contract Extension were unlawfully discriminatory as compared to the prices H/R received in the 1971 Contract. In doing so, Universal's allegations appeared to satisfy the two purchaser requirement because the two companies were both purchasing the same type of unfinished plug casting from Texas Foundries. This appearance, however, was misleading because the contracts from which Universal's purported injuries flowed were distinct markets open only to a single producer. *See id.* at 1067. H/R and Universal were not competing purchasers because the 1970 Contract Extension and the 1971 Contract each "represented a separate, distinct market open only to a single producer." *Id.* "The very nature of th[o]se mutually exclusive commitments in the respective contracts meant that Universal and H/R could not have been 'in competition' with respect to their separate purchases from Texas Foundries pursuant to the government contracts." *Id.* "Therefore, while the price discrepancy between [Texas Foundries's sales to H/R under the 1971 Contract and to Universal under the 1970 Contract Extension] could have affected Universal's profits under the [1970 Contract Extension], this discrimination in no way diminished Universal's competitive ability in that plug market." *Id.* Thus, even though "Universal and H/R were competitive bidders on the 1971 [C]ontract[, t]hey could not be . . . competitive purchasers as required by the Act either under their respective separate contracts or under both." *Id.*[15]

Similar reasoning was also invoked in *Volvo Trucks*. 546 U.S. at 178. There, the Supreme Court discounted the purchase-to-purchase and offer-to-purchase evidence offered by Reeder in part because that evidence did not show that Reeder competed "with beneficiaries of the alleged discrimination *for the same customer*." *Id.* (emphasis in original). "That Volvo dealers may bid for sales in the same geographic area" was of no import to the Supreme Court because that fact was not relevant to whether two dealers "compet[ed] for the same customer-tailored sales." *Id.* at 179. "Once a retail customer has chosen the particular dealers from which it will solicit bids, 'the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale.'" *Id.* (quoting *Reeder-Simco GMC, Inc.*, 374 F.3d at 719 (Hansen, J., dissenting)).

Accordingly, we reject the argument that *Toledo Mack* was a simple application of the two purchaser requirement. Implicit in the *Toledo Mack* Court's holding was the conclusion that Toledo could not show it was a competing purchaser of other Mack truck dealers. In other words, the two purchaser requirement could not be satisfied

[15] *See M.C. Mfg.*, 517 F.2d at 1066 ("Even if the sales at different prices are contemporaneous, involve goods of like grade and quality, the price distinction is not justified by good business cause, and it causes injury to the disadvantage[d] purchaser, recovery under the Act is precluded absent proof that the price variance detrimentally affected competition.").

because the relevant market of competition was limited to one dealer, one customer, and one truck manufacturer at the time of the sale of the truck, i.e., there were no competing purchasers. *Toledo Mack*, 530 F.3d at 228.

C.

Applying the teachings of *Volvo Trucks* and *Toledo Mack* to the instant case, it is clear that Feesers never experienced a competitive injury from Sodexo's purchases and sales of Michaels's products because Feesers and Sodexo were not competing purchasers. *See Volvo Trucks*, 546 U.S. at 179. The competition between Feesers and Sodexo for institutions' business occurred *prior* to Michaels's sales of food products to Feesers and Sodexo, "when a customer consider[ed] switching from self-op to food service management, or vice versa." *Feesers, Inc.*, 632 F. Supp. 2d at 430. At that time, Sodexo would not yet have secured any products from Michaels for resale to the prospective customer because the customer would only be deciding whether it wished to begin the RFP process or, if it had already chosen to engage in the RFP process, whether to invite Sodexo to participate in that process. Once the customer has chosen whether to self-operate or contract with a food service management company, "the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of [distributors or food service management companies] competing for the ultimate sale." *Volvo Trucks*, 546 U.S. at 179; *Toledo Mack*, 530 F.3d at 228. Thus, Feesers and Sodexo's competition at that early stage was irrelevant to the sales made by Michaels after that competition was complete. If an institution chose to self-operate, Sodexo would be eliminated from the competition, and if an institution chose to contract with a food service management company, Feesers would be eliminated from the competition. After making that initial decision, the customer then has to choose which distributor or food service management company it will hire. Only after that process is complete would the customer then actually purchase food from Michaels through the winning distributor or food service management company.

At all events, assuming Feesers and Sodexo engaged in head-to-head competition, and the discounts granted by Michaels to the two companies determined from which company an institution would purchase Michaels's products, the competing purchaser requirement would still not be satisfied because Michaels does not make a sale until the institution chooses a particular distributor or food service management company and then begins purchasing Michaels's products through that company. *See Toledo Mack*, 530 F.3d at 228. The relevant market at the time of the sale of Michaels's products will have already been narrowed to one—the company that won the institution's business. *See id.*

While the timing of the competition and the nature of the market compel us to conclude that Feesers and Sodexo were not competing purchasers, it is also relevant that the evidence produced by Feesers was the same type of average discount evidence produced in *Toledo Mack*.[16] Compare *Toledo Mack*, 530 F.3d at 215 (plaintiff producing evidence comparing "the average amount of sales assistance" received by the plaintiff as compared to other Mack truck dealers), *with Feesers, Inc.*, 632 F. Supp. 2d at 434 (plaintiff producing evidence showing that Sodexo consistently received "stunning" price discounts that amounted to a 59% difference in prices between Feesers and Sodexo over four years). The *Toledo Mack* Court rejected such evidence as insufficient to prove injury to competition in part because "merely offering lower prices to a customer does not give rise to a price discrimination claim." *Toledo Mack*, 530 F.3d at 227-28 (citing *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 142 (3d Cir. 1998)). A plaintiff must also show that the effect of the lower prices was to injure competition. *Toledo Mack*, 530 F.3d at 228 (citing *Crossroads Cogeneration Corp.*, 159 F.3d at 142); *Volvo Trucks*, 546 U.S. at 181. Yet that showing is impossible where,

[16] The discount schemes in *Volvo Trucks* and *Toledo Mack* were largely indistinguishable from the deviated pricing system used in the food manufacturer industry. *See Toledo Mack*, 530 F.3d at 209-10 (explaining that requests for sales assistance to Mack occurred prior to submission of bid to customer); *Volvo Trucks*, 546 U.S. at 170-71 (same). Food service management companies, self-ops, and GPOs, like the truck dealers in *Toledo Mack* and *Volvo Trucks* dealing with manufacturers, availed themselves of deviated pricing arrangements with food manufacturers. In general, these entities know the discount they will receive before they purchase products from manufacturers. Food service management companies can adjust their bid to a prospective customer to incorporate these deviated pricing arrangements.

as here, the case involves sales via a bidding process and the competition occurs before the bidding process even begins. *See Toledo Mack*, 530 F.3d at 228.

In addition, the Supreme Court's directive to narrowly construe the RPA to address the basic purposes of the statute further informs our conclusion that Feesers was not a competing purchaser of Sodexo. *Volvo Trucks*, 546 U.S. at 180-81; *see Toledo Mack*, 530 F.3d at 227. The price discrimination identified by Feesers bears "little resemblance to [the] large independent department stores and chain operations" the statute was originally intended to target. *Toledo Mack*, 530 F.3d at 227 (quoting *Volvo Trucks*, 546 U.S. at 181). Here, like in *Volvo Trucks*, there is a myriad of differences between retail stores and food service management companies and food distributors.

First, in many respects, Sodexo and Feesers do not compete. Sodexo prepares and sells meals and handles all dining service functions for its customers. Feesers only distributes food. Competing retail stores, in contrast, generally compete to sell fungible goods to the same group of customers. Second, Sodexo operates in a bid market with other food service management companies, and competes with Feesers only in a preliminary stage where a prospective customer is deciding whether to self-operate or hire a food service management company. Retail stores compete over prospective customers every time a customer decides to purchase a product, and those purchases are not made in a bid market. Third, Sodexo competes for customers with Feesers prior to purchasing food from Michaels. Retail stores generally purchase products from manufacturers and then compete with other retailers based on pricing.

In sum, because any competition between Feesers and Sodexo occurred at the time an institution was deciding whether to self-operate or hire a food service management company, and any resulting sale of Michaels's products would have to occur after that competition, Feesers cannot show that it was a competing purchaser of Sodexo. The evidence produced by Feesers only further confirms the futility of its RPA claims, because such evidence—evidence showing consistent favoring of another purchaser over the plaintiff over time by a manufacturer in a bid market—was rejected in *Toledo Mack*. Such evidence cannot support an inference of competitive injury in a bid market. Finally, the Supreme Court's instructions to narrowly construe the RPA also compel us to reject Feesers's RPA claims.

III.

The District Court, after thoughtful consideration of the *Volvo Trucks* and *Toledo Mack* decisions, determined that those decisions were not controlling for three reasons: (1) *Volvo Trucks* involved only formal competition whereas the instant case involves formal and informal competition; (2) application of *Toledo Mack* to the instant case would misconstrue that decision's holding by imposing a new requirement under the RPA, divorced from the statutory text, that the manufacturer's sale of the commodity to two different sellers occur prior to the competition for the resale of those goods; and (3) a logical reading of *Toledo Mack* limits that decision's applicability to custom-manufactured goods. We reject each of these reasons in turn.

The District Court reasoned that because "[f]ood service management companies, distributors, and GPOs all compete formally and informally for the sale of food to institutions," the instant case was distinguishable from *Volvo Trucks*, which it believed involved only a formal bidding process. *Feesers, Inc.*, 632 F. Supp. 2d at 431. Contrary to the District Court's belief, the market in *Volvo Trucks* involved both formal and informal competition. In that case, a customer's decision to request a bid from a particular dealer was based on informal competitive factors such as "an *existing relationship, . . . reputation*, and *cold calling or other marketing strategies initiated by individual dealers*." *Volvo Trucks*, 546 U.S. at 170 (internal quotation omitted) (emphasis added). Sodexo's actions were indistinguishable from the actions of truck dealers in *Volvo Trucks*. Sodexo competed for institutions' business through the formal RFP process, and through "informal contacts with targeted institutions." *Feesers, Inc.*, 632 F. Supp. 2d at 428.

The District Court's second reason, that construing *Toledo Mack* to apply to the instant case would require imposing a new requirement under the RPA that the sale of the commodity by the manufacturer to two different sellers occur prior to the competition for resale of those goods, is a misunderstanding of the competing purchaser requirement.[17] The rule the District Court describes is not new—it is simply the product of the competing purchaser requirement, which considers the relevant market, a bid market, and the timing of the competition, before the sale to the manufacturer. The *M.C. Mfg*. Court explained that there is a "competitive purchaser" requirement inherent in the "two purchaser" and "competitive injury" elements. *M.C. Mfg.*, 517 F.2d at 1067; *see Volvo Trucks*, 546 U.S. at 179; *Toledo Mack*, 530 F.3d at 228. In Feesers's prior appeal, we embraced that approach to the competing purchaser requirement by stating that Sodexo and Feesers compete only if "they are each directly after the same dollar." *Feesers, Inc.*, 498 F.3d at

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[17] That being said, the District Court's desire to avoid misapplying our precedent in this complicated area of law is commendable. Indeed, this is not the first time the RPA has flummoxed the federal courts, nor, barring a repeal of the law, will it be the last. *Compare, e.g., Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 n.2 (3d Cir. 1980) (asserting in dicta that failure to prove the "fact of injury" can conclusively bar injunctive relief) (citing *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 668 n.2, 670 n.14, 187 U.S. App. D.C. 11 (D.C. Cir. 1977)), *with Feesers, Inc.*, 498 F.3d at 213 (explaining that plaintiff need not prove actual harm to competition to receive injunctive relief) (citing *Falls City Indus.*, 460 U.S. at 435). The RPA places the federal courts in an inescapable Catch-22. We are asked to apply the RPA, a statute that "is fundamentally inconsistent with the antitrust laws," Antitrust Modernization Commission, Report and Recommendations 312 (2007), in a fashion that is "consistent[ ] with the broader policies of the antitrust laws." *Volvo Trucks*, 546 U.S. at 181 (quoting *Brooke Group*, 509 U.S. at 220). This conundrum is bound to create confusion for judges called upon to apply the RPA in a host of settings.

214 (quoting *M.C. Mfg.*, 517 F.2d at 1068 n.20). We now hold that, simply put, Feesers and Sodexo cannot compete for the same dollar because their resales of Michaels's products to institutions, by their "very nature[, were] mutually exclusive commitments." *M.C. Mfg.*, 517 F.2d at 1067.[18] The RPA does not ordinarily protect competition where "a product subject to special order is sold through a customer-specific bidding process." *Volvo Trucks*, 546 U.S. at 170 (contrasting such competition with "competition between different purchasers for resale of [a] purchased product"). In other words, the RPA was not meant to cover the type of competition present in the instant case.

Third, the District Court reasoned that a logical reading of *Toledo Mack* limited that decision's applicability to custom-manufactured goods. This conclusion is refuted by the *Toledo Mack* Court's reliance on the *M.C. Mfg*. decision, *Toledo Mack*, 530 F.3d at 228 (citing *M.C. Mfg.*, 517 F.2d at 1065 (manufacturing generic product)), and this Court's explicit guidance to apply the principles of *M.C. Mfg*. to this action. *Feesers*, 498 F.3d at 214 (citing *M.C. Mfg.*, 517 F.2d at 1068 n.20). Moreover, there is no reason to limit the reach of the *Toledo Mack* decision to customized goods because the underlying principles, pertaining to the timing of the competition and the nature of the market, remain the same whether applied to generic goods

[18] Notably, we do not hold that the sales of products by the manufacturer to two purchasers must always occur prior to the competition between the two purchasers. Our holding is limited to bid markets that closely resemble the markets in this case, *Volvo Trucks*, and *Toledo Mack*.

or customized goods. This Court's directive to "narrowly interpret the oft-questioned RPA" also supports rejection of the District Court's view. *Toledo Mack*, 530 F.3d at 228 n. 17. A narrow interpretation, one that limits the applicability of the Act, calls for taking an expansive view of *Toledo Mack's* holding and not limiting it to customized goods. *See id*. Finally, even if the *Toledo Mack* decision was limited to customized goods, Sodexo offers Michaels's food products as part of a customized service to customers. *Feesers, Inc.*, 632 F. Supp. 2d at 428 (finding that Sodexo sometimes "determines whether there are any particular problems to be solved [at an institution]").[19] Presumably, problems vary across institutions so the proposed solutions for any given institution would be tailored to that institution's needs. In fact, the mere existence of a formal RFP process shows that

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[19] For example, in a proposal to the Beth Sholom House of Eastern Virginia, Sodexo urged the institution to utilize its food procurement program to "take full advantage of [Sodexo's] kosher vendors." *Feesers, Inc.*, 632 F. Supp. 2d at 429. The proposal states that using Sodexo's kosher vendors would "streamline the ordering process [and] substantially reduce pricing" for the institution. *Id*. Kosher food purchasing is an institution-specific requirement and thus is a customized offering. The same would be true for hospitals, which utilize lengthy RFP processes to confirm that all the special needs of the hospital are met by the food service management company. In fact, the foods ordered for any particular institution would depend on the "size and type of institution" and may include "bids on a wide range of services." *Id.* at 428. Sodexo also enters into profit and loss contracts where "[it] offers a financial guarantee that the dining services will not lose money, and the institution shares in a certain percentage of the profits." *Id.* at 442.

institutions require customized contracts to serve their specific needs.

IV.

Having determined that Feesers and Sodexo were not competitors, three outstanding issues remain. First, whether this Court's holding is barred by the law of the case. Second, how this Court's holding will affect the existing permanent injunction ordered by the District Court. Third, the effect of concluding that Feesers cannot prove a § 2(a) claim against Michaels on the § 2(f) claim against Sodexo. We discuss each of the issues in turn.

A.

The "law of the case . . . doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). The "doctrine does not restrict a court's power but rather governs its exercise of discretion." *Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron*, 123 F.3d 111, 116 (3d Cir. 1997) (citations omitted). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would make a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486

U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (citing *Arizona*, 460 U.S. at 618 n.8).

Feesers argues that this Court held, in its prior opinion, that the evidence of price discrimination in the record was sufficient to apply an inference of competitive injury. If this argument were true, it would be difficult for us now to conclude that Feesers cannot show that it was a competing purchaser, as being a competing purchaser is a prerequisite to the application of the inference. Feesers's argument, however, fails for several reasons.

First, this Court's prior opinion did not hold as Feesers now claims. This Court reversed the District Court's summary judgment for the defendants explaining that the District Court used the wrong standard in concluding that Feesers and Sodexo were not in actual competition. *Feesers, Inc.*, 498 F.3d at 208. In doing so, we noted that "*if* substantial price discrimination between competing purchasers over time is established, *then* the inference of competitive injury arises." *Id.* at 216 (emphasis added). At that early stage of the litigation, this Court believed only that "Feesers ha[d] proffered sufficient evidence of competition between itself and Sodex[o] . . . to allow a reasonable factfinder to conclude that [they] [we]re in actual competition." *Id.* (internal quotation omitted). This Court then remanded the case for further proceedings consistent with its opinion. *Id.* at 216. Nowhere in the prior opinion did this Court hold that Feesers and Sodexo were competing purchasers or, more generally, that Feesers had established an inference of competitive injury. Thus, the law of the case does not prevent us from holding that Feesers and Sodexo were not competing purchasers under the RPA.

Second, our present review of this case is conducted with the benefit of a full record established at trial. That record was not available to this Court when we decided Feesers's appeal from summary judgment. We now know that Feesers cannot show that it and Sodexo were competing purchasers based on the timing of their competition and the nature of the market—issues that were never discussed in the prior opinion, presumably, because a complete record had not been established. Finally, even if this Court had previously held otherwise, our holding in this case would be a permissible reevaluation of precedent in light of intervening authority, *Toledo Mack*. *See Institutional Investors Group v. Avaya*, 564 F.3d 242, 276 n.50 (3d Cir. 2009) (citing *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1996)).

B.

The permanent injunction issued by the District Court states: "[Michaels] is enjoined from refusing to sell its products to Feesers on the same terms as they are sold to Sode[x]o, so long as Feesers otherwise meets its standards as a customer." This injunction was issued under Section 16 of the Clayton Act (1) as a remedy for contempt and (2) to prevent future competitive injury to Feesers. Because we are reversing the District Court's judgment as a matter of law, neither of its reasons for the injunction survive. An injunction issued based on civil contempt cannot stand where the underlying order on which it is based is invalid.

See Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 909-10 (3d Cir. 1975). Our holding today renders the need to protect Feesers from further injury non-existent, because Feesers, as a matter of law, is not a competing purchaser vis-a-vis Sodexo.

C.

Feesers's claim against Sodexo arises under § 2(f) of the RPA. That provision states: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f). Because a prima facie case of price discrimination under § 2(a) of the RPA cannot be established against Michaels, Sodexo cannot be held liable for inducement. *Great Atl. & Pac. Tea Co.*, 440 U.S. at 76 "[A] buyer cannot be liable if a prima facie case could not be established against a seller.").

V.

Feesers cannot show that it and Sodexo were competing purchasers, and therefore, cannot show that it suffered competitive injury under the Robinson-Patman Act. Accordingly, we will reverse the District Court's judgment for Feesers and instruct the District Court to enter judgment as a matter of law for Michaels and Sodexo.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Feesers, Inc.
Plaintiff/Appellee
—v.—

Michael Foods, Inc.; Sodexho, Inc.
Defendants/Appellants

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and Nygaard* *Circuit Judges*,

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges

* The vote of the Honorable Richard L. Nygaard, Senior Judge for the Third Circuit Court of Appeals, is limited to panel rehearing.

of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By The Court,

/s/ D. Brooks Smith
Circuit Judge

Dated: March 4, 2010

ARL/cc: All Counsel of Record