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October 15, 2007

BY ELECTRONIC FILING AND OVERNIGHT COURIER

Honorable Sylvia H. Rambo
United States District Judge
United States District Court for the
Middle District of Pennsylvania
Federal Building
228 Walnut Street
Harrisburg, Pennsylvania 17108-0868

Re: Civil Action No. 1:04-CV-0576, *Feesers, Inc. v. Michael Foods, Inc. et al.*

Dear Judge Rambo,

Feesers, Inc. submits this letter brief in response to the letter briefs dated October 2, 2007 submitted by defendants Sodexho, Inc. and Michael Foods, Inc. Defendants' contentions that the "Court of Appeals did not find that Feesers had established any element of its claim" (Michael Foods' letter brief ("MF Br."), at 1), and that a "full trial on the merits is necessary" (Sodexho's letter brief ("Sodexho Br."), at 1), are wishful thinking. As discussed in Feesers' opening letter brief ("Feesers Br."), the Third Circuit clearly held that Feesers has established a prima facie claim of unlawful price discrimination under Section 2(a) of the Robinson-Patman Act (the "Act"), 15 U.S.C. § 13(a), which is sufficient to give rise to a rebuttable inference of competitive injury under the doctrine of *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47 (1948). This is now the law of the case.

Defendants' contentions are meritless for the following reasons:

- Defendants' claim that they did not have standing to challenge on appeal this Court's findings that Feesers established three of the four elements of its Section 2(a) claim is wrong as a matter of law. Once Feesers had appealed this Court's judgment, defendants were free to challenge this Court's findings and argue that summary judgment could have been sustained on other grounds; as the Third Circuit noted, they simply chose not to do so.

- Moreover, because defendants failed to respond to Feesers' arguments that this Court correctly found that Feesers had established these three elements of its Section 2(a) claim, they waived their right to challenge the Court's findings later.

Those findings are now part of the Third Circuit's mandate and are the law of the case.

- Far from being mere "dicta," as defendants contend, this Court's finding that Michael Foods discriminated as to price resulted from the Court's careful analysis of the undisputed facts and was a clear holding of the Court.

- Michael Foods' contention that this Court did not actually find there was price discrimination within the meaning of the Act is not only frivolous, it is based on a blatant distortion of the language used by the Court. As the Court found, the "deviated" prices negotiated by Sodexho are the same prices that Sysco actually paid for the Michael Foods products at issue, and Feesers' expert correctly compared those prices with the prices paid by Feesers for the same products.

- Because the Third Circuit found that Feesers has established all the elements of its prima facie case of price discrimination, it is defendants who have the burden of proving that "the different character of Sodexho's business, rather than its lower food prices, causes customers to buy food from Sodexho rather than Feesers," in order to rebut the *Morton Salt* inference of competitive injury.

- Sodexho is mistaken to the extent it contends that Feesers has the burden of proving that Sodexho does not have a valid "meeting competition" defense under Section 2(b) of the Act, 15 U.S.C. § 13(b). Sodexho, like Michael Foods, has the burden of establishing such a defense.

1. By Failing to Challenge on Appeal This Court's Findings That Feesers Established Three of the Four Elements of Its Section 2(a) Claim, Defendants Cannot Challenge Those Findings Now

As the Third Circuit stated, this 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.*, 498 F.3d 206, 210-11 (3d Cir. 2007). The Court of Appeals further noted that "Defendants do not challenge these findings on appeal." *Id.* at 211. Contrary to what defendants argue, this language cannot be dismissed as idle chatter. Because this Court's findings as to the first three elements of Feesers' Section 2(a) claim were not challenged by defendants on appeal and are incorporated in the Court of Appeals' mandate, defendants are now precluded from challenging those findings under controlling law. In the Third Circuit, a district court must abide by the "letter and spirit" of the appellate court's mandate on remand. *See Casey v. Planned Parenthood of S.E. Pa.*, 14 F.3d 848, 856-57, 863 (3d Cir. 1994). In particular, the Third Circuit has held that the interests of finality and the efficient administration of the judicial system bar a district court from permitting parties to relitigate issues that were not specifically remanded for further proceedings. *See Cowgill v. Raymark Indus., Inc.*, 832 F.2d 798, 802 (3d Cir. 1987).

Notwithstanding defendants' conclusory assertions that the "Court of Appeals did not find that Feesers had established any element of its claim" and that a "full trial on the merits is necessary," defendants do not take issue with this Court's findings that Feesers established *two* of the elements of its Section 2(a) claim, that (1) sales were made to two different purchasers in interstate commerce, and (2) the products sold were of the same grade and quality. Michael Foods contends, however, that "[t]he Court's conclusion regarding price discrimination . . . is not controlling on remand." MF Br. at 3. In particular, Michael Foods argues that because it was not "aggrieved by the judgment," it had no standing to challenge on appeal the Court's finding regarding price discrimination. *Id.* at 4. Michael Foods simply is wrong as a matter of law. In *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924), the Supreme Court held that an appellee, who was not aggrieved by the judgment below, "may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." Similarly, in *Resolution Trust Co. v. Fidelity & Deposit Co. of Maryland*, 205 F.3d 615, 635 (3d Cir. 2000), the Third Circuit held that the appellee could, without a cross-appeal, advance alternative arguments in support of the summary judgment decision in its favor, noting that the Court of Appeals "may affirm the judgment on grounds alternative to those on which the district court relied."

Michael Foods relies principally on *Watson v. City of Newark*, 746 F.2d 1008, 1010 (3d Cir. 1984), for the proposition that "prevailing parties ha[ve] no standing to appeal an adverse ruling on summary judgment." MF Br. at 4. But *Watson* does *not* address the question presented here — whether an appellee may challenge unfavorable findings, in an otherwise favorable judgment, to argue for affirmance of the judgment on other grounds *in a case where the losing party appeals.* In *Watson*, the district court granted city employees' request for summary judgment and an injunction. Significantly, the losing party (the City of Newark) did not appeal. The prevailing employees, however, still took exception to some of the language in the district court's opinion and tried to appeal. The Third Circuit held that "the appellants received all the relief which they sought . . . . Accordingly, appellants may not appeal from this favorable disposition." *Watson* 746 F.2d at 1010. Similarly, in *In re DES Litigation*, 7 F.3d 20, 23 (2d Cir. 1993), another case cited by defendants, the district court dismissed the complaint and the losing plaintiffs did not appeal. Once again, the prevailing party (the defendant) objected to some of the rulings by the district court and tried to appeal, but the Second Circuit held that the defendant lacked standing. *See also EEOC v. Chicago Club*, 86 F.3d 1423, 1431 (7th Cir. 1996) (stating that "[i]t is unusual, although not impermissible, for a party to appeal from a judgment in which it prevailed") (cited in MF Br. at 4). Thus, while cases such as *Watson* and *DES* make clear that a prevailing party may not itself appeal from a favorable judgment when the losing party does not appeal, it is black letter law that when an appeal has been brought by the losing party, an *appellee* may base its argument in support of the judgment on anything appearing in the record, "although his argument may involve an attack upon the reasoning of the lower court . . . ." *Am. Ry. Express Co.*, 265 U.S. at 435; *see also Resolution Trust Co.*, 205 F.3d at 635. In short, there was nothing to prevent defendants from objecting to this Court's findings as to price discrimination or the other two elements of Feesers' Section 2(a) claim.

More importantly, when Feesers expressly urged the Third Circuit to conclude that this Court had correctly found that Feesers established price discrimination and the other two

elements, defendants not only had "standing" to challenge this Court's findings, they were *required* to do so if they were not to waive their ability to litigate those findings on remand. *See Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 437 n.11 (3d Cir. 2005), *cert. denied*, 546 U.S. 1091 (2006) ("appellee 'waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the [appellant]'") (citing *Hardy v. City Optical, Inc.*, 39 F.3d 765, 771 (7th Cir. 1994)). Feesers described in its appellate brief the extensive, undisputed evidence supporting this Court's determination that Feesers established three out of four elements of a Section 2(a) claim, including price discrimination. Appellant's Brief, dated July 21, 2006, at 4-20, 22-24, 42-48. Feesers expressly requested that the Court of Appeals "find that the district court correctly concluded that Feesers has proven the other [three] elements of its Section 2(a) claim." *Id.* at 42. In their opposition, defendants did not respond to any of the points raised by Feesers, asserting instead only that a trial would be required on any remand because "there is at least a question of fact whether Michael Foods can show that its price 'was made in good faith to meet an equally low price of a competitor.'" *See* Appellees' Brief, dated August 23, 2006, at 33 (citation omitted). On appeal, the Third Circuit exercised plenary review over this Court's grant of summary judgment. *Feesers*, 498 F.3d at 212. In the absence of any challenge by defendants to this Court's findings, the Third Circuit found that this Court found that Feesers established three out of the four elements of its Section 2(a) claim, including price discrimination. *Id.* at 210-11. Thus, under controlling Third Circuit law, by failing to respond to the issues raised by Feesers, defendants waived their right to relitigate those issues on remand. *See Beazer E., Inc.*, 412 F.3d at 437 n.11.[1]

Even if this Court were not precluded from revisiting its prior findings under the mandate doctrine, defendants could not relitigate those findings because they are the law of the case. As the Third Circuit stated, "once an *issue* is decided, it will not be relitigated in the same case, except in unusual circumstances." *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982) (emphasis added); *see also Resolution Trust Corp. v. Miller*, No. CIV. A. 92-6959, 1993 WL 306106, at *2 (E.D. Pa. Aug. 11, 1993) ("'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'" (citing *Arizona v. California*, 460 U.S. 605, 618 (1983) (emphasis added)). Thus, Michael Foods' reliance on *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 988 F.2d 414, 430 (3d Cir. 1993), is misplaced. *See* MF Br. at 4. In *Coca-Cola Bottling*, the Third Circuit found that the law of the case doctrine did not apply to "other language concerning the [] bottlers' rights in the trademark and how they affect [their] contract claim" because the district court "had not yet decided [their] common law trademark rights under the contracts . . . ." *Coca-Cola Bottling*, 988 F.2d at 429-30. Because there was no decision on the common law trademark rights under the contracts, the law of the case doctrine did not apply to the court's commentary. *Id.* In this case, however, as expressly noted by the Third Circuit, this Court *actually decided* that Feesers established three out of the four elements.

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[1] As Feesers discussed in its opening letter brief, the decision in *Security Watch, Inc. v. Sentinel Systems, Inc.*, 176 F.3d 369 (6th Cir. 1999), is particularly instructive here. Like the defendants here, the appellees in that case failed to respond to a point raised by the appellant, and the Sixth Circuit "consider[ed] the issue to be abandoned by the defendants." *See* Feesers' Br. at 7 (citing *Security Watch*, 176 F.3d at 376).

Feesers, Inc. v. Michael Foods, Inc., Civil No. 1:CV-04-0576, 2006 WL 1274088, at *5-7 (M.D. Pa. May 4, 2006).

Far from being "dicta," as Michael Foods asserts, this Court's finding that Feesers satisfied its burden of proving price discrimination was the result of a detailed and thoughtful analysis by the Court.[2] Feesers' expert economist, Dr. Robert Larner, submitted an expert report on June 13, 2005, in which he analyzed thousands of transactions comparing the prices that Feesers paid to Michael Foods for products between 2000 and 2004 with the prices at which Michael Foods sold the same products pursuant to its supply agreements with Sodexho during the same period. Neither defendants nor their expert introduced any evidence to challenge Dr. Larner's price discrimination calculations. At a hearing on March 29, 2006, Dr. Larner was subjected to hours of cross examination about his price comparisons by counsel for defendants, as well as questioning by the Court. Having heard Dr. Larner's live testimony and having carefully considered all of the arguments set forth by defendants in their briefing on the parties' cross-motions for summary judgment, the Court ruled that "because the facts that establish that Michael Foods sold products at different prices are not in dispute, the court *finds* that price discrimination exists within the context of the Act." *Feesers*, 2006 WL 1274088, at *5 (emphasis added).

Michael Foods argues in the alternative that if this Court concludes that its finding as to price discrimination is the law of the case, "the Court has ample discretion to change its finding." *See* MF Br. at 4-5 (citing *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997)). As a threshold matter, this Court has no discretion to deviate from the Third Circuit's mandate. *See, e.g., Casey*, 14 F.3d at 856-57, 863. Moreover, even if this Court had such discretion (which it does not), the case cited by Michael Foods itself makes clear that a court in the Third Circuit should exercise that discretion only under "extraordinary circumstances," such as "manifest injustice resulting from a clearly erroneous decision." *Public Interest Research Group*, 123 F.3d at 116. Michael Foods contends that the Court's finding of price discrimination was so "clearly erroneous" as to give rise to such an extraordinary circumstance here. As discussed in section 2, *infra*, however, there was nothing erroneous about this Court's finding of price discrimination. In fact, Michael Foods' suggestion that this case implicates "manifest injustice resulting from a clearly erroneous decision" is nothing short of frivolous, since the Third Circuit itself has approved this Court's finding that Feesers established substantial price discrimination over

[2] Michael Foods' use of the "dicta" label is selective. Michael Foods notes approvingly that "[t]his Court established that the two purchasers are Feesers and Sysco Corp." MF Br. at 1. Michael Foods does not explain, however, why the Court's finding that Feesers satisfied the "two purchasers" element resolved that issue, whereas the Court's finding that Feesers satisfied the price discrimination element is mere dicta. The reason is clear: Michael Foods relies on the Court's finding that Sysco was the second purchaser to support its contention that the Court erroneously compared prices paid by Feesers with deviated prices negotiated by Sodexho, when the comparison, according to Michael Foods, should have been with prices paid by Sysco. As discussed herein (*infra*, at 6-7), this contention is without merit. But the distinction between a clear finding by this Court and mere dicta cannot be based simply on whatever is expedient for Michael Foods.

time by Michael Foods. *See Feesers*, 498 F.3d at 209-13, 216. That is now the law of the case and there is no basis for this Court to revisit its finding. Indeed, if Michael Foods truly thought this Court's price discrimination finding was clearly erroneous, it should have made that argument to the Third Circuit.

2. This Court and the Third Circuit Correctly Concluded That Feesers Established Price Discrimination Within the Meaning of the Robinson-Patman Act

Michael Foods contends that, because this Court held that Sysco was the "second purchaser" for purposes of the Act, the Court clearly erred by comparing the prices Feesers paid for Michael Foods products with the "deviated" prices that were negotiated by Sodexho, when the Court should have compared the prices paid by Feesers with the prices paid by Sysco. *See* MF Br. at 2-3. This contention is factually bankrupt, and rests upon a blatant distortion of this Court's language. The *undisputed* facts establish that the prices that Sysco ends up paying for the Michael Foods products that it delivers to Sodexho or Sodexho's customers *are* the *exact same deviated prices* that Sodexho negotiates with Michael Foods. As this Court found, based on the undisputed facts:

> Sodexho has negotiated deviated pricing from Michael Foods. Michael Foods sells products to Sysco at list prices; however, Sodexho and Michael Foods have negotiated deviated pricing for all products that Sysco distributes to Sodexho. Sysco provides Michael Foods with proof of delivery of products to Sodexho or Sodexho accounts and then invoices Michael Foods for the difference between the list price and the negotiated price. . . .

Feesers, 2006 WL 1274088, at *2. As this Court noted in its ruling on the parties' cross-motions for summary judgment, Michael Foods had contended that "there is a genuine dispute regarding whether there is price discrimination because the sales to both Feesers and Sysco are based on list prices and any adjustments occur post-sale through billbacks." *Id.* at *5. The Court, however, expressly rejected this argument, holding that:

> [t]he court finds most relevant the undisputed evidence that Sysco bills Sodexho based on a cost plus of the *deviated* price rather than the list price. Although Sysco may initially pay the list price, it subsequently bills Michael Foods back for any products sold to Sodexho. Thus, with respect to the products at issue here, it is not accurate to say that Sysco pays the list price. *Michael Foods does not dispute that the ultimate price is different than the price made available to Feesers.*

Id. (first emphasis in original; second emphasis added).

It is clear that the "ultimate price" to which the Court referred is the price paid by Sysco for the Michael Foods products, net of the billback. In its letter brief, Michael Foods attempts to distort the plain meaning of the Court's language by altering the last sentence quoted above to read: "Michael Foods does not dispute that the ultimate price [to Sodexho] is different than the price

made available to Feesers." MF Br. at 3 (brackets in original). Thus, Michael Foods' contention that the Court's finding of price discrimination was "clearly erroneous" is not only frivolous, it contradicts Michael Foods' previous position with the Court.

There is similarly no merit to Michael Foods' contention that the price study conducted by Dr. Larner did not compare the prices actually paid by Feesers for Michael Foods products with the prices actually paid by Sysco for the same products. To the contrary, the prices that Sysco paid (after billbacks) to Michael Foods for the products at issue *are* the same "deviated" prices that Sodexho negotiated with Michael Foods. In his price study, Dr. Larner compared the prices that Feesers actually paid for Michael Foods products with the deviated prices that had been agreed between Michael Foods and Sodexho and paid by Sysco. *See* Expert Report of Robert J. Larner, dated June 13, 2005, at Exs. D-1 - D-12. As Dr. Larner explained in his expert report, one of the steps in "determining the prices paid for each product was an examination of the transaction prices, that is, the set of prices at which the vendors actually provided the products to Feesers and Sodexho. In Sodexho's case, *deviated transaction prices are listed in a Sysco database of Sysco's acquisitions of products for Sodexho accounts.*" *Id.* ¶ 41 (emphasis added). Dr. Larner similarly testified at the March 29, 2006 hearing that in order to determine the prices paid by the favored purchaser, he looked to "prices in a Sysco data base, which showed *the price at which Sysco was acquiring Michael Foods products for sale to Sodexho accounts . . . .*" *See* Transcript of Hearing on Summary Judgment Motions, Mar. 29, 2006, at 19:11-20:7 (emphasis added). In sum, this Court did not err when it found that "the Feesers prices used here are the list prices that Michael Foods provides to all distributors and the *Sysco-Sodexho prices* reflect only the deviated pricing arrangement between Michael Foods and Sodexho . . . ." *Feesers*, 2006 WL 1274088, at *3 (emphasis added). Based upon these findings, this Court correctly concluded that Feesers established, as a matter of law, price discrimination within the meaning of the Act. *Id.* at *5.

3. The Third Circuit Found That Feesers and Sodexho Are in Actual Competition, and That Feesers Established a Prima Facie Case That Gives Rise to a Rebuttable Inference of Competitive Injury

Michael Foods correctly notes that the Third Circuit held that in order to prove the fourth element of a Section 2(a) claim (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." *See* MF Br. at 5 (citing *Feesers*, 498 F.3d at 213). Michael Foods contends however, that Feesers has not established that it "competed with Sodexho to sell food," noting that "[t]he 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." *Id.* (citing *Feesers*, 498 F.3d at 214 n.9). As the Third Circuit made clear, however, in order to establish actual competition for purposes of its prima facie case, Feesers needed only to prove that Feesers and Sodexho are "each directly after the same dollar." *Feesers*, 498 F.3d at 214.

As Feesers described in its opening letter brief, the Third Circuit majority found that both Feesers and Sodexho seek to resell Michael Foods and other products to the same institutional customers. *See* Feesers Br. at 11 for discussion. Indeed, the Third Circuit found that "Feesers'

customers and Sodexho's customers are not two separate and discrete groups of food service facilities." *Feesers*, 498 F.3d at 214. Moreover, as the Third Circuit held, it is established from the undisputed evidence that Sodexho "promotes its ability to get lower prices for the food products that its customers use in their facilities." *Id* at 215. The Third Circuit also cited the undisputed facts that former Feesers' customers switched to Soedxho and, in one instance, a former Sodexho customer began purchasing from Feesers. *See* Feesers Br. at 11-12 for discussion. In short, as the Third Circuit held, the undisputed evidence established that Feesers and Sodexho are "each directly after the same dollar."

Michael Foods urges this Court to overlook these Third Circuit findings, by quoting, out of context, a statement by the Third Circuit that "a factfinder could conclude that Sodexho sells unprepared food to its customers." MF Br. at 5 (citing *Feesers*, 498 F.3d at 215). In making this statement, the Third Circuit was responding to the dissenting opinion, in which Judge Jordan argued that "Sodexho does not sell unprepared food, but rather 'prepared meals,'" and thus is in a business "of a 'different character' than Feesers'." *Feesers*, 498 F.3d at 214-15. The Third Circuit majority stated that "the record in this case belies that assertion." *Id.* at 215. The Third Circuit majority further instructed that whether "Sodexho's business is of a 'different character' than Feesers' is beside the point when we are evaluating whether Feesers has established that it is in 'actual competition' with Sodexho." *Id.* at 214 n.9 (citation omitted). Most importantly, the Third Circuit held as follows:

> The difference in the character of these two businesses might very well be determinative *at the next stage of the analysis . . . 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."

Id. (emphasis added).

In sum, the Third Circuit remanded for this Court to consider "*defendants' evidence*" in the "*next stage of the analysis*," when defendants seek to overcome or to rebut the *Morton Salt* inference of competitive injury that the Third Circuit found has already been established. *Id* (emphasis added). Indeed, the Third Circuit found that the undisputed facts establish that Feesers and Sodexho sell the same food products to the same types of customers in the same geographic area and thus are "each directly after the same dollar." *Id.* at 214-15. Moreover, both this Court and the Third Circuit found that there was substantial price discrimination over time by Michael Foods. *See id.* at 209-13, 216. Therefore, the Third Circuit found that Feesers had established a prima facie case under Section 2(a), giving rise to the *Morton Salt* inference of competitive injury. *Id.* at 212-13, 216. It is now the defendants' burden at trial to prove that pricing was not a factor in customers' decisions to purchase food from Sodexho rather than Feesers. *Id.* at 208, 216.

4. Defendants Have the Burden of Proving the Meeting Competition Defense

Sodexho asserts that in order for Feesers to prevail on its claim under Section 2(f) of the Act, 15 U.S.C. § 13(f), it must prove at trial that Sodexho "knowingly induced or received a discriminatory price that it knew was not within one of the sellers' defenses under the Robinson-Patman Act." Sodexho Br. at 4. To the extent that this represents nothing more than an inartful attempt to state that Feesers has the burden of proving that Sodexho knowingly received or induced the price discrimination at issue in violation of Section 2(f), Feesers does not disagree. If Sodexho intends to imply, however, that Feesers has the burden of proving that Sodexho does *not* have a valid "meeting competition" defense under Section 2(b) of the Act, 15 U.S.C. § 13(b), then Sodexho is mistaken. The burden of proving a meeting competition defense (as with other affirmative defenses) rests with the defendants. *FTC v. Sun Oil Co.*, 371 U.S. 505, 514 (1963) (defendant "has the burden of bringing himself within the exculpating provision of § 2(b)"); *FTC v. Ruberoid Co.*, 343 U.S. 470, 476 (1952) (same); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 741 (1945) (defendants "failed to sustain the burden of showing that the price discriminations were granted for the purpose of meeting competition"); *Hampton v. Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir. 1973) ("The burden of proving the [meeting competition] defense . . . is squarely on the price discriminator, and it is a burden that is not easily met." (citation omitted)).[3]

5. Feesers Intends to Present Evidence of Price Discrimination by Schwan's, McCain, and Ecolab (a) as Additional Evidence That Sodexho Knowingly Received or Induced Price Discriminations, and (b) to Support the Extent of the Injunctive Relief Required

Sodexho inquired in its letter brief whether Feesers intends to pursue price discrimination claims based on Sodexho's purchases from Schwan's Food Service, Inc. ("Schwan's"), McCain Foods USA, Inc. ("McCain"), and Ecolab, Inc. ("Ecolab"). Sodexho Br. at 3. Although Feesers has not asserted claims under Section 2(a) against those suppliers as defendants, Feesers intends to present trial evidence of Schwan's, McCain's, and Ecolab's systemic price discrimination in favor of Sodexho, in support of Feeser's claim that the Michael Foods price discrimination is part of a pattern in which Sodexho systematically induces discriminatory prices from its major suppliers, and not just Michael Foods. As the Third Circuit found:

> 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. In fact, Sodexho's superior product prices are touted as resulting from Sodexho's "leveraging [its] procurement

[3] Michael Foods concedes that it has the burden of proving a meeting competition defense. MF Br. at 6 ("Michael Foods has the right to prove that it offered its prices in good faith to meet the equally low price of a competitor.").

> power as the industry's largest purchaser of food." . . . This is a major thrust of its sales pitch.

Feesers, 498 F.3d at 215. Such evidence is clearly relevant to proving that Sodexho "knowingly" induced and received its discriminatory prices.

Feesers also intends to present evidence of knowingly induced price discrimination to Sodexho from Schwan's, McCain, and Ecolab (in addition to the price discrimination by Michael Foods), in order to support the scope of the permanent injunction that it seeks against Sodexho. Feesers has made it clear from the outset of this litigation that a permanent injunction is required to prevent Sodexho from continuing to use its massive purchasing power to gain an unlawful competitive advantage over Feesers and other competitors by systematically inducing its suppliers to give it uniquely favorable prices. Feesers seeks to level the competitive playing field through appropriate, permanent injunctive relief that would preclude Sodexho from knowingly receiving or inducing unlawful discriminatory prices to it or its contract distributors from any supplier that also sells products to Feesers in the geographic area in which Feesers competes, and not just from Michael Foods. *See, e.g., United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (stating that "[t]he purpose of relief in an antitrust case is 'so far as practicable, (to) cure the ill effects of the illegal conduct, and assure the public freedom from its continuance'" (citing *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950)); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 133 (1969) (noting that "[w]e see no reason that the federal courts, in exercising the traditional equitable powers extended to them by [Section] 16, should not respond to the 'salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts'" (citing *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 436 (1941)); *United States v. RMI Co.*, 661 F.2d 279, 282 n.7 (3d Cir 1981) (stating that "there still is ample precedent that under appropriate circumstances the court's decree can be broader than the 'narrow limits of the proven violation'" (citing *Gypsum*, 340 U.S. at 90)).

Conclusion

For all of the foregoing reasons, and for the reasons stated in Feesers' letter brief of October 2, 2007, the only issues that remain to be tried are: (1) whether defendants can satisfy their burden of proof to overcome the *Morton Salt* inference of competitive injury; (2) whether defendants can meet their burden of proof to satisfy the meeting competition defense; and (3) whether plaintiff can prove that Sodexho knowingly induced or received the discriminatory prices at issue. None of the arguments set forth by defendants in their letter briefs give rises to any additional issues to be tried or alters the parties' respective burdens of proof.

Respectfully yours,

/s/ Jeffrey L. Kessler

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