No. 09-1499

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

REPLY BRIEF FOR THE PETITIONER

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August 23, 2010

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REPLY BRIEF FOR THE PETITIONER

In an attempt to dissuade this Court from granting certiorari, Respondents mischaracterize the decision below. They cannot—and do not—dispute that if the decision created a new timing requirement that would effectively repeal the Robinson-Patman Act ("RPA") for the food distribution and other non-retail industries, then there is a conflict in the circuits and with this Court's precedents. Instead, they claim that the court of appeals' holding is confined to its purportedly "unusual" facts. This is incorrect.

As shown below, and in the petition, the court of appeals created a new, far-reaching exemption to RPA liability that will nullify the Act in any industry in which a power buyer can manipulate the timing of discriminatory rebates. This case thus cries out for this Court's intervention to resolve the circuit conflict and to correct the court of appeals' mistaken view that this Court has mandated the judicial repeal of the RPA because of disagreement with the congressional policy underlying the statute.

Respondents may not dispute the suitability of this case for certiorari by rearguing factual issues that were resolved against them at trial and accepted by the court of appeals. Specifically, the lower courts found as a matter of fact, and Respondents thus cannot contend otherwise, that Feesers and Sodexho were in actual competition and the price discrimination in favor of Sodexho was substantial enough to injure competition. There are thus no factual obstacles to this Court's consideration. In short, this is an ideal case in which to grant certiorari.

I. RESPONDENTS MISCHARACTERIZE THE COURT OF APPEALS' HOLDING

1. The court of appeals held that "in a secondary-line [or tertiary-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." Pet.App. 156a-157a. This new "timing" requirement has far-reaching implications for food distribution and other non-retail businesses, amounting to a judicial repeal of the RPA in such industries. *See* Pet. 13-14, 29-31.

The broad effect of the court of appeals' decision has been widely acknowledged both within the food industry and by legal commentators. For example, the Chair of the American Bar Association Antitrust Section's Price Discrimination Committee called the decision "yet another blow against the continued viability of the RPA." Scott P. Perlman, *Whither the Robinson-Patman Act? The Impact of the Third-Circuit's Feesers Decision*, The Price Point 5 (A.B.A. Sec. of Antitrust Law Summer 2010). In its amicus brief in this case, the International Foodservice Distribution Association ("IFDA") (whose members include both independent distributors and national distributors, such as Sysco) stated that the court of appeals "effectively exempt[ed] the foodservice distribution industry—and all other industries where intermediate distributors may be selected through a bid-type process for selling products and services to end users—from the reach of the [RPA]." IFDA Br. 2; *see id.* 3, 6, 14, 15.

2. Respondents do not dispute that if the court of appeals indeed imposed a timing requirement of general application to the food-distribution and other non-retail industries, then there would be a circuit conflict. Br. in Opp. 14-15. In an effort to deter the Court from resolving that conflict here, Respondents mischaracterize the court of appeals' holding, contending that it imposed no timing requirement except in the "unusual" or "peculiar" circumstances where two specific criteria are met: (a) there is one-off bidding to supply "special-order" products on an exclusive basis, and (b) the discriminatory prices are not offered to the favored purchaser until after the competition has ended. Br. in Opp. 10 n.2, 12-13, 15-16. This is false.

As the district court found and the court of appeals left undisturbed, the facts of this case do not satisfy *either* of the criteria that Respondents suggest were adopted by the court of appeals. The district court found that: (a) Feesers and Sodexho competed *continuously* to sell *commodity products* to the same institutions on a non-exclusive basis, and (b) Michael Foods' sales at discriminatory prices took place *before*, *during*, and *after* the competition between Feesers and Sodexho to resell those products. Pet.App. 43a-66a, 67a-88a, 91a, 146a.

A single example conclusively rebuts Respondents' assertion that Sodexho becomes the "exclusive" supplier of food to an institution after it wins that institution's food management business. The district court found that "Daniel Boone [School District] solicited proposals in a formal RFP process, and ultimately chose Sodexho," but "[f]or a

time, Daniel Boone continued to utilize Feesers for [some of its food product] purchasing." Pet.App. 91a. This fact-finding was based on undisputed testimony that Daniel Boone "dealt with several [distributors] that were still our vendors and close to us after Sodexho took us over," and that "Feesers was one" of those distributors, C.A. App. 1989:

> Q. So even while Sodexho is your management company, you still choose to purchase some food products from distributors, correct?
>
> A. Yes.
>
> Q. At the same time?
>
> A. Yes.

Id.

Similarly, the facts found below belie Respondents' contention that, unlike the usual RPA case where "distributors are constantly competing to resell *wholesale inventory* that was *previously purchased* at discriminatory prices," here "*no* MFI product is *ever* sold at a discriminatory price unless and until Sodexo has won the earlier 'competition' for *that* product's resale." Br. in Opp. 17. The district court found that: (a) Michael Foods continuously sells the same products to Feesers and to Sysco (on behalf of Sodexho), Pet.App. 43a-66a, 146a; (b) the discriminatory prices at which Michael Foods sells the products to Sysco are previously negotiated between Michael Foods and Sodexho, Pet.App. 67a-88a, 91a; and (3) those products are not purchased as special orders for specific institutional customers but are taken into

the distributors' general inventory and later resold out of inventory. Pet.App. 146a. Moreover, contrary to Respondents' assertion (Br. in Opp. 9, 17-18, 28), the discriminatory prices are not specific to any Sodexho customer, but are provided by Michael Foods to Sodexho on an *unrestricted* basis to be used when competing for any customer. Pet.App. 69a.

In essence, Respondents argue that because Michael Foods first invoices Sysco at its standard list prices and subsequently adjusts the invoices to account for food sold to Sodexho customers at the discriminatory "deviated" prices, the *price discrimination* is not complete until this accounting is complete. Br. in Opp. 10 n.2, 17-18. If that were true, however, all that a power buyer in a non-retail industry would need do to avoid RPA liability is to manipulate the timing of the accounting for its discriminatory purchases.[1] That cannot be the law. As this Court has repeatedly held, "substance, not form, should determine whether" the antitrust laws have been violated. *Am. Needle, Inc. v. NFL,* 130 S. Ct. 2201, 2211 (2010). Here, the court of appeals violated this mandate, explicitly admitting that it was "elevat[ing] form over substance." Pet.App. 168a.

3. Respondents repeatedly seize upon language in a footnote in the court of appeals' decision, in which it stated that it was "*not* hold[ing] that the sales of products by [a] manufacturer to two pur-

[1] This is exactly what the defendants did in *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir. 1993), but the Eleventh Circuit affirmed an RPA violation because the RPA has no "timing" requirement.

chasers must *always* occur prior to the competition between the two purchasers." Br. in Opp. 3, 14, 16 (citing Pet.App. 185a n.18). But, as one commentator has observed, that language "is difficult to reconcile with the rationale for the Court's decision, and may result in those trying to interpret the case being 'flummoxed' as to the meaning of that statement." Perlman 4-5.

Similarly misplaced is Respondents' repeated citation to the same footnote to support their assertion that "[e]ven where the competition concludes before the discriminatory sale, the Third Circuit's holding would apply *only* if the competition occurred in a 'bid market[] that closely resemble[s] the markets in this case, *Volvo Trucks* and *Toledo Mack*.'" Br. in Opp. 3, 14, 15-16, 18, 20 (citing Pet.App. 185a n.18). Whatever the court of appeals may have meant by the term "bid market" in that footnote, the district court expressly found that there is no resemblance between the competition to distribute commodity food products in this case and the bid markets for customized trucks in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), and *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008). Pet.App. 66a, 144a-46a. Because that factual finding was not disturbed by the court of appeals, it is impossible to limit the court of appeals' holding to "customized bid markets."

II. THE COURT OF APPEALS' DECISION CREATES A CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

Respondents argue that because this case has purportedly unique or unusual facts, there is no "genuine conflict" with the decisions of other circuits. Br. in Opp. 14. Respondents are mistaken.

1. Respondents attempt to distinguish *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993), and *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962), asserting that they "say[] nothing about whether the discounted sale of a product must occur *before* the *competition* to resell that product." Br. in Opp. 19. Specifically, Respondents assert that here, Michael Foods did not make any sales at discriminatory prices until after the resale competition was over, while in *DeLong* and *Hartley,* favored and disfavored purchasers competed to resell out of inventory products that had been purchased "*before* the resale competition." Br. in Opp. 20-21.

Respondents are wrong on the facts and law. As an initial matter, the district court found that Michael Foods sold to the favored and disfavored purchasers continuously, both before *and* after the competition to resell those products to specific institutional customers. Pet.App. 146a; *see also* 43a-66a. Further, both the *DeLong* and *Hartley* courts *refused* to draw *any* distinction based on whether the sales at discriminatory prices had occurred before or after the competition to resell specific products. Pet. 16-18. Indeed, *DeLong imposed RPA liability* for discriminatory sales to

the favored purchaser made *after* the resale competition had ended—a result that conflicts directly with the court of appeals' holding in this case, and which Respondents ignore. *DeLong*, 990 F.2d at 1202.

2. Respondents summarily dismiss the "myriad" other cases cited by Feesers to support the proposition that "circuits have routinely upheld findings of competitive injury under the *Morton Salt* test without imposing a timing requirement." Br. in Opp. 18, 21. Respondents contend that none of these cases "*expressly holds* that a temporal connection is *not* required." *Id.* at 21. But the key point is that, until the court of appeals' decision below, no court had ever accepted such a timing requirement.

Each of the circuit court cases cited in the petition applied the standard *Morton Salt* test for proving secondary-line price discrimination. Pet. 15-16, 18-19. Respondents admit that, under this Court's precedent, a plaintiff (a) has only to establish the four *Morton Salt* elements to prove liability under the RPA, and (b) may establish the fourth element, competitive injury, by proving (1) actual competition between the plaintiff and the beneficiary of the price discrimination, and (2) substantial price discrimination over time. Br. in Opp. 4-6. By contrast, as Respondents cannot deny, the court of appeals created a new, fifth element, which is derived from the purported "combined effect of the RPA's two purchaser and competitive injury requirements" and which was "grounded in the 'nature' and 'timing' of the 'competition' identified by the district court." *Id.* at 13, 21. It is this new timing requirement that creates

an inconsistency with *Morton Salt* and the accompanying conflict between the Third Circuit and all other circuits.

3. Respondents also perfunctorily dismiss the cases cited by Feesers that confirm the RPA applies to non-retail industries, arguing that the court of appeals did not hold otherwise. Br. in Opp. 23. But that ignores the broad effect of the court's decision. As IFDA explained in its amicus brief: "[T]he inequitable marketplace that the Third Circuit's decision creates is not limited to the foodservice distribution industry. . . . [T]he concerns raised here apply equally to the wide range of other industries in which distributors compete for end purchasers through the use of 'bid'-type processes." IFDA Br. 14.

4. Respondents contend, erroneously, that "two past cases have presented similar facts, and both rejected RPA liability." Br. in Opp. 23-25 (citing *M.C. Manufacturing Co. v. Texas Foundries*, 517 F.2d 1059 (5th Cir. 1975) and *Toledo Mack*). Both of these cases, however, simply applied traditional RPA standards to facts that were materially different from the facts of this case.

In *M.C. Manufacturing*, having noted that the existence of competitive injury "is normally a fact question," the Fifth Circuit held that the favored and disfavored purchasers were not in actual competition because the government, the sole customer, awarded "mutually exclusive" contracts each of which "represented a separate, distinct market open only to a single producer." 517 F.2d at 1066-67. Here, by contrast, the district court found that (a) Feesers and Sodexho were in actual competition and (b) competition for the business

of, and sales by Feesers to, Sodexho-managed customers continued even after Sodexho converted them to food management. Pet.App. 43a-66a, 91a.

Similarly, in *Toledo Mack*, the Third Circuit held that the RPA does not apply to cases that "involve[] a *single sale* of a customized good via a competitive bidding process." 530 F.3d at 228 (emphasis added). Because "only one sale, not two, actually results," *id.*, the plaintiff could not satisfy the RPA two-purchaser requirement. Here, by contrast, both the district court and court of appeals found that there were actual and continuous sales to two different purchasers. Pet.App. 9a-10a, 146a.

III. THE COURT OF APPEALS' DECISION IS CONTRARY TO THIS COURT'S DECISIONS

1. Respondents argue that this Court's decision in *Volvo Trucks* supports—indeed, compels—the court of appeals' holding. Br. in Opp. 25. That is not correct. In *Volvo Trucks*, 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 the purchases as the winning bidder. 546 U.S. at 178-80. Here, the district court expressly found that the food distribution industry is not a customized bid market like that in *Volvo Trucks*, and "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 [bid] process." Pet.App. 66a.

2. Respondents also contend that because this Court has never expressly rejected the court of appeals' new timing requirement, there is no con-

flict between the Court's precedents and the decision below. But as Respondents concede, this Court never had occasion to expressly "pass on the timing issue." Br. in Opp. 27. That was simply because no court had ever accepted such a requirement until the court of appeals' decision here. However, this Court has consistently held that in order to prove price discrimination under the RPA, a plaintiff need only satisfy the four-part *Morton Salt* test. Pet. 15, 21-28. The court of appeals' imposition of an additional, unprecedented timing requirement is therefore contrary to this Court's precedents.

3. Respondents assert that Feesers errs in claiming that, because the court of appeals ignores the role of Sysco (the RPA "second purchaser"), the timing requirement is irreconcilable with *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990), and the Court's tertiary-line cases. They contend that the court of appeals simply "recognized" that sales to Sysco were not discriminatory because the price discrimination was not complete until the products had been resold to Sodexho customers. Br. in Opp. 27-28.

It is Respondents who are in error. In its analysis, the court of appeals consistently treated Sodexho, not Sysco, as the second purchaser. Pet.App. 159a, 178a, 179a, 181a-182a. Moreover, the court of appeals could not have "recognized" that Michael Foods' sales to Sysco were not discriminatory because the undisputed facts are that Sysco received the discriminatory rebates negotiated by Sodexho on a continuous basis, before, during, and after its competition with Feesers to supply a particular customer. Pet.App. 67a-88a; 91a.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT

1. Respondents contend that this case is a poor vehicle for resolving the circuit split as to the purported need for a temporal relationship between discriminatory sales and resale competition because, they argue, the court of appeals' decision is narrow and based on "unusual" facts. Respondents' argument, however, rests on a mischaracterization of the district court's findings, which were accepted by the court of appeals. Respondents reargue already decided factual questions in order to make it appear that there is a dispute as to whether (a) there was actual competition between Feesers and Sodexho, and (b) the price discrimination by Michael Foods was substantial enough to harm competition. Br. in Opp. 29-35. Both of these issues were conclusively determined as a matter of fact by the district court, and those findings were accepted by the court of appeals. Pet. 9-12; Pet.App. 43a-66a, 67a-88a, 159a-161a. This Court is thus required to accord great weight to those findings. *See, e.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 US 85, 98 n.15 (1984). Respondents' efforts to dispute those findings at this late hour provide no basis for denying review.

In fact, this case is an ideal vehicle for resolving the circuit conflict and deciding the purely legal question presented in the petition for certiorari. Only this Court can prevent the decision below from causing confusion in the circuits and undermining the policies that Congress declared should be effectuated through the RPA.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, in light of the Federal Trade Commission's regulatory expertise in this area, the Court may wish to call for the views of the Acting Solicitor General.

Respectfully submitted,

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