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MEMORANDUM

May 14, 2009

BY ELECTRONIC MAIL

TO: Mr. Mark Allen, President & CEO
Mr. Steve Potter, Senior Vice President, Industry Relations
International Foodservice Distributors Association

FROM: Olsson Frank Weeda Terman Bode Matz PC

RE: ***Feesers v. Michael Foods, Inc. – Analysis, Discussion and Implications for Food Service***

This memorandum supplements an earlier memorandum provided to you on April 29, 2009.

I. Introduction and Background

On April 27, 2009, the United States District Court for the Middle District of Pennsylvania released a significant court decision regarding pricing and competition in the foodservice industry. In a lengthy and extremely fact-intensive opinion, U.S. District Court Judge Sylvia H. Rambo found that Plaintiff Feesers, Inc. (Feesers), a broad line foodservice distributor, was in actual competition with Sodexho, Inc. (Sodexho), a foodservice management company, for the business of providing food products to institutional foodservice customers. Further, the District Court held that food manufacturer Michael Foods, Inc. (Michael Foods), had offered lower prices over a substantial period of time on its egg and refrigerated potato products to Sodexho than it had made available to Feesers and that Sodexho had induced those lower prices. Because it deemed Sodexho and Feesers to be in competition with one another to obtain the same foodservice dollar from the same customer for the same product from Michael Foods, the District Court held that Sodexho and Michael Foods had violated the price discrimination-related prohibitions of the Robinson-Patman Act (“the Act” or “the RPA”). *Feesers v. Michael Foods, Inc.*, No. 1:04-cv-00576, slip op. (M.D. Pa. Apr. 27, 2009) (Slip op. or *Feesers III*).

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Feesers did not seek damages in this case. Rather, it sought and obtained an Order from the District Court enjoining Sodexho from inducing or receiving discriminatory pricing from Michael Foods and enjoining Michael Foods from discriminating unlawfully in price in favor of Sodexho and against Feesers.

The decision stands as an important holding in foodservice distribution commerce. At its most basic, the decision may be interpreted as holding, based upon the facts presented in the litigation, that a traditional foodservice distributor can be in competition with a foodservice management company and that, therefore, manufacturers must make the same pricing available to both types of companies for the same foods going to the same customers. Slip op. at 23. Significantly, the District Court extends that reasoning to group purchasing organizations (GPOs), as well. Slip op. at 26. So read, a manufacturer may have to make available to a traditional foodservice distributor the same pricing for the same foods it makes available to GPOs and foodservice management companies. *Id.*

The whole of the *Feesers* litigation is nuanced, and reasonable minds may differ as to its impact upon pricing and competition in the foodservice industry. This short memorandum is intended to provide a summary of key implications but is not intended to, nor does it provide, legal advice. In determining its pricing policies, each company must make its own individual business decisions, in light of its interpretation of applicable law, and in consultation with its own legal counsel experienced in antitrust law, including class of trade matters and company pricing practices.

We note further that this proceeding has not concluded. Michael Foods and Sodexho have asked the District Court to reconsider its decision and will likely appeal the District Court's Order and injunction to the U.S. Court of Appeals for the Third Circuit. Briefing on the motion for reconsideration will continue through May 2009.

Additionally, after receiving the District Court's Order and injunction, Michael Foods informed Feesers that it would no longer sell food products to Feesers pending Michael Foods's appeal to the Third Circuit. On May 5, 2009, Feesers filed a Motion for Temporary Restraining Order (TRO), contending that Michael Foods is in violation of the District Court's April 27 Order and injunction. Feesers asked the District Court to issue a new Order that Michael Foods must continue to supply Feesers and comply with the April 27 Order and injunction, by either providing to Feesers the same pricing Michael Foods provides to Sodexho, or increasing its prices to Sodexho so that the prices are commensurate with the prices Feesers pays. In a May 7 letter to the District Court, counsel for Michael Foods asserts that Feesers's motion is baseless and that Michael Foods is free to terminate sales to a plaintiff that claims price discrimination. Michael Foods responded further with lengthy briefing to the District Court on May 11. The District Court will hear Feesers's motion on May 15.

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Those who are interested in the outcome and impact of this case upon their businesses should continue to monitor this proceeding carefully. The papers filed in the District Court proceedings are available through the Court's PACER system: <https://ecf.pamd.uscourts.gov/cgi-bin/ShowIndex.pl>.

II. Implications Of The Decision Going Forward

Key points of the *Feesers* litigation for the foodservice industry include the following:

- For the moment, and at least for businesses in the Middle District of Pennsylvania, the *Feesers* decision is likely to be regarded as “the law.” The Middle District of Pennsylvania is an area that includes Scranton, Harrisburg, Wilkes-Barre, and Williamsport.
- As the District Court was applying, in a fairly formulaic way, the specific law and instructions of the Third Circuit in *Feesers v. Michael Foods, Inc.*, 498 F.3d 206 (3d Cir. 2007) (*Feesers II*), arguably the April 27 decision in *Feesers III* might be, or could be, extended to all distributors doing business in the Third Circuit – *i.e.*, in the states of Pennsylvania, Delaware, New Jersey and in the U.S. Virgin Islands.
- According to the Third Circuit, the relevant question is whether the distributor and the foodservice management company are, in economic reality, acting on the same distribution level rather than how they are respectively labeled. For purposes of the RPA, the issue for the District Court to determine is whether the distributor and the foodservice management company (or GPO) are competing against one another to resell the same food products to the same customers. If they each are directly competing for the same dollar, they are competing for purposes of liability under the RPA. *Feesers II*, 498 F.3d at 208; Slip op. at 4-5, 23.
- *Feesers III*, at its most basic, may be interpreted as holding that a traditional foodservice distributor is in competition with a foodservice management company and, therefore, that manufacturers must make the same pricing available to both types of companies for the same foods going to the same customers. Slip op. at 23, 26. Going further, the District Court states that a manufacturer would have to make available to a traditional foodservice distributor the same pricing for the same foods it makes available to GPOs and foodservice management companies. Slip op. at 17-18, 26.
- The fact that the foodservice management company used a distributor and did not actually purchase the food itself was not determinative. The District Court and the Third Circuit reasoned that RPA liability could not be avoided simply by adding an additional link in the supply chain. *Feesers II*, 498 F.3d at 211 n.5; Slip op. at 23.

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- Though customer-specific deviated pricing results in lower pricing to some institutions, the District Court did not deem these discounts, sometimes acceptable under the RPA, relevant to the case. Slip op. at 28.
- The District Court was not persuaded that the foodservice distributor had been able to obtain comparable pricing from the manufacturer through membership in a buying cooperative. It found that even the buying cooperative's prices were not comparable to the deviated pricing the foodservice management company obtained from the manufacturer. Slip op. at 34.
- The District Court also was not persuaded that the distributor and the foodservice management company were not selling the same foods because the foodservice management company sold meals and the distributor sold individual foods. The relevant transaction was the fact that both the foodservice management company and the distributor were providing food products to the institutional user customer. *Feesers v. Michael Foods, Inc.*, 2006 WL 1274088, at *8 (May 4, 2006 M.D. Pa.) (Summary Judgment Op. or *Feesers I*).
- Under the District Court's Order, it would appear that a manufacturer has two methods of compliance – it could increase the prices it charges to the foodservice management company, or it could lower the prices it charges to the distributor. If the latter, as it would then be providing preferential pricing to one distributor but not others, the manufacturer could be vulnerable to a charge of discriminatory pricing in violation of the RPA as to other distributors. In theory, the manufacturer would likely have to extend the foodservice management company pricing to all distributors. Slip op. at 82.

* * *

Below, additional factual and legal background of this complex litigation is provided.

III. The Factual and Legal Background

- On March 17, 2004, Feesers sued Michael Foods and Sodexo alleging that Sodexo induced and obtained from Michael Foods, and Michael Foods provided, discriminatory prices and discounts not available to Feesers, in violation of the RPA.
- Feesers alleged that Michael Foods did not make the same prices that it offered to Sodexo available to Feesers and that Feesers was competing with Sodexo for the same customers. Feesers alleged that, in failing to offer it the Sodexo prices, Michael Foods violated the RPA and that Sodexo induced Michael Foods's RPA violation.

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- Feesers asked the District Court to enter an Order enjoining Sodexho and Michael Foods from violating the RPA, and such other relief, including costs, the District Court deemed proper. Feesers did not seek damages.
- To establish an RPA violation, Feesers would be required to show four important elements:
 1. the seller, Michael Foods, discriminated in the price of goods;
 2. to two different purchasers (Sodexho and Feesers) in interstate commerce;
 3. where the goods sold were of the same grade and quality; and
 4. the price discrimination had a prohibited effect on competition.
- There were three significant court decisions in the *Feesers* line of cases:
 - *Feesers I* – The District Court entered summary judgment to Feesers on the first three elements necessary to establish an RPA violation, but held that Feesers failed to demonstrate the fourth, a prohibited effect on competition.
 - *Feesers II* – Feesers appealed that determination on the prohibited effect upon competition to the Third Circuit and, ultimately, prevailed in *Feesers II*. The Third Circuit issued specific instructions on how to determine if Michael Foods’s pricing had a prohibited effect upon competition, and remanded the matter back to the District Court Judge for further proceedings.
 - *Feesers III* – On remand, the District Court held a January 2008 bench trial on the limited issue of prohibited effect on competition. On April 27, 2009, the court issued a new Opinion holding that, under the law provided by the Third Circuit, Feesers met its burden of demonstrating competitive injury and so prevailed in its entirety on the RPA claims against Michael Foods and Sodexho. The District Court entered a final Order and injunction providing that:
 - Michael Foods unlawfully discriminated as to price against Feesers and Sodexho unlawfully induced or received such price discrimination in violation of the RPA.
 - Michael Foods is enjoined from discriminating unlawfully in price in favor of Sodexho and against Feesers.
 - Sodexho is enjoined from continuing to induce or receive unlawful price discrimination from Michael Foods.

IV. The Elements Of Feesers’s Establishment Of Price Discrimination

As identified above, there are four elements Feesers had to demonstrate in order to succeed on its RPA claim against Michael Foods and Sodexho: (1) price discrimination; (2) two different purchasers; (3) goods of the same grade and quality; and (4) prohibited effect upon competition.

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How these elements have been demonstrated in the course of the three *Feesers* decisions is described below.

1. Price Discrimination – Michael Foods Sold the Same Product to Feesers and to Sodexho, but at Different Prices.

Under the first requirement of the RPA, Feesers had to establish that Michael Foods made a different price available to Feesers than it did to Sodexho. The District Court found that although Sysco Inc. (Sysco) (Sodexho's distributor, acting on Sodexho's behalf) paid Michael Foods the list price, it billed Michael Foods back for a portion of the cost of any products sold to Sodexho, so that Sodexho/Sysco only paid a deviated price. Feesers, on the other hand, paid the higher list price. The District Court rejected Sodexho's argument that Feesers had comparable Michael Foods pricing available to it via movable volume discounts available through Feesers's membership in UniPro Foodservices, as even these prices were not comparable to the deviated pricing Sodexho obtained from Michael Foods. *Feesers I* at 5; Slip Op. at 42-45.

Thus, the District Court held that element one of an RPA violation had been proven. Michael Foods had indeed offered discriminatory prices.

2. Two Different Purchasers – An RPA Case Could Arise Even Though Michael Foods Never Sold Food to Sodexho.

Another element of an RPA violation is establishing that a single seller sold the same goods to two different purchasers. Here, Michael Foods and Sodexho argued that Michael Foods never actually sold any food to Sodexho, but sold to Sysco, Sodexho's distributor, who in turn sold to Sodexho. Feesers first urged the District Court to look beyond the "form" of this arrangement to its true "substance," arguing that Sodexho was the "true" direct purchaser because it negotiated the price and controlled the quantities purchased from Michael Foods. The District Court did not need to reach this "form over substance" argument. Instead, the District Court was satisfied that the "two competing purchasers" element of the RPA was satisfied where Michael Foods sold its egg and potato products to Sysco and to Feesers – one vendor selling product to two purchasers. *Feesers I* at 6.

Although the typical RPA case might involve discriminatory prices available to purchasers who are in actual competition with one another (*e.g.*, Feesers and another broad line distributor), "injury to competition between a purchaser and a customer of a purchaser is also actionable under the Act." *Feesers II*, 498 F.3d at 213 n.7 (internal quotations and citations omitted). In other words, an RPA violation can still arise even where "the product in question passed through an additional formal exchange before reaching the level of [the plaintiff's] actual competitor." *Id.* (quoting *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969)).

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3. **Same Grade and Quality of Goods – Michael Foods Sold the Same Food to Feesers and to Sodexho, Even Though Sodexho Prepares Meals.**

The third element that must be established in an RPA case is that the goods sold at different prices to two different purchasers are of the same grade and quality. Michael Foods argued that Sodexho sold meals, not egg and potato products, and that Sodexho did not resell products in the original form in which it had purchased them. Feesers, on the other hand, did not sell prepared foods. The District Court rejected this argument. The relevant transaction was the one in which Sodexho provided food products to the institutional user. Further, Feesers was able to demonstrate through Sodexho's proposals and contracts that, in at least some cases, Sodexho accounted for food costs as a separate line item. Accordingly, the District Court concluded that the form of the goods Sodexho sold its customers was the same as the form of the goods Feesers sold to its customers. *Feesers I* at 6-7.

4. **Prohibited Effect Upon Competition – Sodexho and Feesers are In Direct Competition for the Same Dollar and Michael Foods's Price Discrimination Was Substantial Over Time.**

As instructed by the Third Circuit in *Feesers II*, the District Court looked at whether Feesers was entitled to an inference of competitive injury, which would be determined by an examination of whether: (1) Feesers was in actual competition for the same dollar with Sodexho for the sale of food to institutional customers; and (2) Michael Foods's discrimination in price between Sodexho and Feesers was substantial over time. *Feesers II*, 498 F.3d at 213; Slip op. at 4.

a. **Actual Competition for the Same Dollar**

The District Court held that "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 foodservice budget." Slip op. at 5. In reviewing the evidence presented at trial, the District Court noted that although "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." *Id.* at 9. "Both Feesers and Sodexho actively seek the business of self-op institutions." *Id.* at 10. Further, "[d]istributors and foodservice management companies compete with GPOs for the business of institutions providing dining services." *Id.* at 15.

The District Court held:

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 Feesers' geographical zone of operation. Feesers and Sodexho both compete

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to sell Michael Foods egg and refrigerated potato products to the same institutional customers.

Id. at 23.

The District Court specifically rejected Sodexho's argument that Feesers competes only with other distributors, rather than foodservice management companies such as Sodexho:

[T]he fact that Sodexho chooses to subcontract the physical delivery of food to a distributor . . . rather than perform this function itself is of no significance in determining whether Sodexho competes with Feesers. . . . [T]he 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.

Id. at 23 (internal quotations and citations omitted).

The District Court concluded that “[f]ood service management companies, distributors, and GPOs all compete formally and informally for the sale of food to institutions.” *Id.* at 26

b. Discrimination In Price Is Substantial Over Time

This is a highly fact-specific aspect of the District Court's opinion. Based upon the report and testimony of an expert for Feesers, there were, so the District Court found, “stunning” differentials in pricing between Sodexho/Sysco and Feesers. For example, for table ready eggs, “[t]he 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.” Slip op. at 32. Further, “the foodservice industry is extremely price sensitive and populated by increasingly sophisticated and budget-conscious institutional customers.” *Id.* at 39.

The District Court held:

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

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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.

Id. at 42.

The District Court, therefore, held 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.” *Id.* at 42.

c. Rebutting the Presumption of Price Discrimination

Once Feesers established a prima facie case of price discrimination, the burden shifted to Sodexho and Michael Foods to rebut the inference of competitive injury. Slip. op. at 45. Here, in order to rebut the inference, Michael Foods had to demonstrate an absence of a causal link between discrimination and lost sales or profits. *Id.* at 45-46.

Based on these extensive facts before the Court, the District Court concluded that Defendants “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.” *Id.* at 63. Nor were defendants able to show that the lower prices Michael Foods offered to Sodexho were a good faith effort to “meet competition.” *Id.* at 64.

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We hope you find the foregoing useful and informative. If you have any questions, please contact us.