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

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEESERS, INC.,
Plaintiff-Appellee,

v.

MICHAEL FOODS, INC. AND
SODEXHO, INC.
Defendants-Appellants

On Appeal from the United States District Court
For The Middle District of Pennsylvania

PETITION FOR REHEARING AND REHEARING EN BANC OF FEESERS, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES AND RULES

TREATISES

LOCAL RULE 35.1 STATEMENT
FOR REHEARING OR REHEARING EN BANC

Feesers, Inc., through its undersigned counsel, respectfully petitions this Court for a rehearing or rehearing *en banc*. Petitioner's counsel expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, *i.e.* the panel's decision is contrary to the decisions of this Court in *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206 (3d Cir. 2007), *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008), and *Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), and of the Supreme Court in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), and *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

PRELIMINARY STATEMENT

In *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206 (3d Cir. 2007) ("*Feesers I*"), this Court reversed the district court's grant of summary judgment against Feesers and remanded the action for trial. It held that, as a matter of law, Feesers had presented sufficient evidence from which a factfinder could conclude that Feesers and defendant Sodexho (through its prime distributor Sysco) were competing purchasers for purposes of the Robinson-Patman Act ("RPA"). *Id*. at 208. After a full trial, the district court rendered a verdict for Feesers, finding that Feesers and Sodexho competed, and that such competition was substantially lessened because Sodexho knowingly induced "stunning" price discrimination by defendant Michael Foods. *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414 (M.D. Pa. 2009) (A1-A103).

In January 2010, a different panel of this Court overturned that verdict in a decision that directly contradicts *Feesers I* and threatens to create massive confusion as to how this Circuit will apply the RPA in the future. *Feesers, Inc. v. Michael Foods, Inc.*, Nos. 09-2548, 09-2952, 09-2993 (3d Cir. Jan. 7, 2010) ("*Feesers II*") (attached as Ex. A). *Feesers II* should be reheard or reheard *en banc* for three reasons: (1) it conflicts with *Feesers I* and thus violates the law of the case doctrine and this Circuit's rules; (2) it misapplies controlling authority from the Supreme Court and this Circuit to repeal judicially the RPA in the institutional food distribution industry; and (3) it overrules the district court's findings of fact at trial despite conceding that they were not clearly erroneous.

GROUNDS FOR REHEARING

I. *Feesers II* Improperly Overturns *Feesers I*

As this Court noted in *Feesers I*, in order to prove a violation of Section 2(a) of the RPA, Feesers had to show that: (1) sales were made to two different purchasers in interstate commerce; (2) the product sold was of the same grade and quality; (3) there was discrimination in price; and (4) the price discrimination had a prohibited effect on competition. *Feesers I*, at 212. The Court affirmed the district court's holding that Feesers was entitled to summary judgment on the first three elements of its claim, specifically holding that "as to the requirement that there be two purchasers in interstate commerce … the facts show that Michael Foods sold to two purchasers, Feesers and Sysco [Sodexho's prime distributor]," within the meaning of the RPA. *Id*. at 210-11.[1]

Feesers I held that in order to prove the fourth element, competitive injury, Feesers only had to show that: "(a) it competed with Sodexho to sell food and (b) there was price discrimination over time by Michael Foods." *Id.* at 213. It also held that, based on the record evidence at the close of discovery, "Feesers has proffered sufficient evidence of competition between itself and Sodexho for sales of food products to foodservice facilities to allow a reasonable factfinder to conclude that these companies are in 'actual competition.'" *Id*. at 208. The Court

[1] As *Feesers I* explained, "Sodexho itself does not purchase products from Michael Foods, but employs a distributor, such as Sysco Corporation." *Id*. at 209. The ruling that this satisfied the two-purchaser requirement "remains the law of the case." *Feesers, Inc. v. Michael Foods, Inc.*, No. 1:cv-04-0576, slip op., at A109-10 (M.D. Pa. June 30, 2009) (reconsideration opinion included in appendix).

remanded the case for trial, instructing the district court to determine whether the evidence demonstrated that Feesers and Sodexho competed to sell food.

A ten-day trial was held in January 2008. Having followed this Court's instructions to the letter, the district court concluded in an exhaustive 83-page opinion that Feesers had proven competitive injury, as a factual matter, under the test set forth in *Feesers I*. Because the trial court further found that defendants had not proven any affirmative defenses, it entered judgment in favor of Feesers.

Feesers II reversed and ordered that judgment be entered for defendants. Unwilling to accept the previous ruling of *Feesers I* that the evidence presented was legally sufficient to prove a RPA violation, the panel in *Feesers II* negated *Feesers I* and held that Feesers and Sodexho "were not competing purchasers" as a matter of *law*. Effectively imposing an additional (and unprecedented) legal requirement for proving competitive injury, *Feesers II* held that, in a "secondary-line price discrimination case," in what it termed a "bid market," competitive injury could not be proven "where the competition for sales to prospective customers occurs *before* the sale of the product for which the RPA violation is alleged." *Feesers II*, at 6.

A. *Feesers II*'s Holding That Feesers and Sodexho Can Not Be "Competing Purchasers" Is Precluded by the Law of the Case Doctrine

Feesers II cannot be squared with *Feesers I*. As *Feesers II* acknowledged, *Feesers I* explicitly held that there were two purchasers within the meaning of the RPA: Feesers and either Sodexho or its subcontractor distributor, Sysco. *Feesers*

II, at 7 n.3 (citing *Feesers I*, 498 F.3d at 211).[2] Moreover, *Feesers I* expressly held that: (1) in order to prove that it was in "actual competition" for purposes of the RPA, Feesers was required only to show that Feesers and Sodexho competed to sell food; and (2) Feesers had presented evidence from which a reasonable factfinder could conclude that Feesers and Sodexho were in actual competition. *Feesers I*, at 208. In other words, *Feesers I* held that there was no *legal* bar to Feesers' ability to prove actual competition with Sodexho, within the meaning of the RPA, as a factual matter at trial.

As a result, *Feesers II*'s holding that Feesers and Sodexho cannot be "competing purchasers" as a matter of law unequivocally violates the law of the case doctrine, which directs that "one panel of an appellate court generally will not reconsider questions that another panel has decided on a prior appeal in the same case." *See The St. Thomas-St. John Hotel & Tourism Assoc., Inc. v. Gov't of the U.S. Virgin Islands*, 357 F.3d 297, 301 (3d Cir. 2004); *In re City of Phila. Litig.*, 158 F.3d 711, 717-18 (3d Cir. 1998) (doctrine is intended to "protect traditional ideals such as finality, judicial economy and jurisprudential integrity."). Moreover, this Court's rules make clear that: "It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels.

[2] In particular, *Feesers I* held that this is not a simple case of secondary line price discrimination, but rather a case that falls between secondary and tertiary line discrimination because (i) Feesers and Sysco (as Sodexho's prime distributor) satisfy the two-purchaser requirement by continuously and contemporaneously purchasing Michael Foods products, while (ii) Feesers and Sodexho compete at the next level. *Feesers I*, at 211 n.5. *Feesers II* simply ignores this law of the case.

Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court *en banc* consideration is required to do so." Third Circuit Internal Operating Procedure 9.1.

The *Feesers II* panel asserts that "[n]owhere in the prior opinion did this Court hold that Feesers and Sodex[h]o were competing purchasers," and that as a result, the "law of the case does not prevent us from holding that Feesers and Sodex[h]o were not competing purchasers." *Feesers II*, at 36. But this is judicial sleight of hand by a panel that made it clear that it felt duty bound to avoid a finding of RPA liability. *See id.* at 15-17 ("[W]e will 'narrowly interpret' the RPA, even if doing so will result in 'elevat[ing] form over substance.'"). *Feesers I* held that the two-purchaser requirement was satisfied by the continuous and contemporaneous sale of Michael Foods products to Feesers and Sysco (Sodexho's contract distributor). *Feesers I*, at 211. It also held that the evidence was sufficient, as a matter of law, to support a finding of competitive injury and actual competition between Feesers and Sodexho. *Id.* at 208. Nothing more was required, under the holding of *Feesers I*, to prove a RPA violation.

In ruling, as a matter of law, that Feesers and Sodexho cannot be competing purchasers, *Feesers II* necessarily reversed the binding decision in *Feesers I* that such competition could be found on this factual record. Indeed, if *Feesers II*'s legal ruling were applied, then the *Feesers I* panel would have had to reverse its

decision and would never have ordered what the *Feesers II* panel has now ruled to be a completely unnecessary ten-day trial.

B. *Feesers II* Erred in Concluding That Its Authority to Reverse *Feesers I* Is Provided by an Intervening Change in the Law

Feesers II states that if its decision is inconsistent with *Feesers I*, the law of the case doctrine does not apply because of an intervening change in the law. Specifically, the panel points to the Supreme Court's decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), and this Court's decision in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008) as compelling a different result.[3]

In *Volvo Trucks*, the Supreme Court overturned a RPA verdict 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*

[3] As a threshold matter, neither *Volvo Trucks* nor *Toledo Mack* can constitute intervening law. *Volvo Trucks* was decided in 2006; was extensively briefed by the parties in *Feesers I*; and was considered in *Feesers I*. Indeed, the centerpiece of defendants' rejected argument in *Feesers I* was identical to the no competing purchaser holding adopted by the *Feesers II* panel. *See* pp. 3-5 *supra*. And, although *Toledo Mack* was decided after *Feesers I*, it involved a straightforward application of *Volvo Trucks* to almost identical facts. Further, even if *Toledo Mack* did represent a change in this Circuit's law, it is not a decision by a superior court and thus would not supersede *Feesers I* under the law of the case doctrine. *U.S. v. Rivera*, 365 F.3d 213 (3d Cir. 2004) ("This Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedent."); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981) (same).

customer." *Volvo Trucks*, 546 U.S. at 178 (emphases in original). As a result, it held that plaintiff had failed to raise an inference of competitive injury, but expressly declined to rule more broadly that the RPA "does not reach markets characterized by competitive bidding and special-order sales." *Id*. at 180-81.

Nothing in *Volvo Trucks* supports the decision reached in *Feesers II* to overturn *Feesers I*. As *Feesers I* observed, *Volvo Trucks* "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.'" *Feesers I*, at 213 n.8 (quoting *Volvo Trucks*, 546 U.S. at 177). In *Feesers I*, the Court applied the *Morton Salt* test and held, after considering *Volvo Trucks*, that Feesers (unlike the plaintiff in *Volvo Trucks*) *did* present evidence that would allow a factfinder to conclude that Feesers competed with Sodexho to sell the products at issue to the same customers.[4] *Feesers I*, at 208.

[4] *Feesers II*, by contrast, concluded that *Volvo* "signaled" that the RPA should be interpreted narrowly, particularly in the context of non-retail markets which it claimed "bore 'little resemblance to [the] large independent department stores or chain operations' that the RPA originally intended to target." *Feesers II*, at 21 (quoting *Volvo Trucks* at 181). But the *Feesers I* panel was well aware of *Volvo Trucks* when it held that the distinction between "wholesalers" and "retailers" was illusory under the RPA – what matters is "whether two companies are 'in economic reality acting on the same distribution level.'" *Feesers I*, at 214 (quoting *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1272 (3d Cir. 1995)); *see also Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 567 (1990); *Mid-South Distribs. v. FTC*, 287 F.2d 512 (5th Cir. 1961) (upholding RPA claim where distributor buyer groups were favored over independent distributors); *Moog Indus. Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956) (same). This case, which pits independent

Toledo Mack, which featured a customized bid market almost identical to that in *Volvo Trucks*, is also consistent with *Feesers I.* In *Toledo Mack*, this Court merely 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.*, such cases necessarily fail to meet the two-purchaser requirement articulated in *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129 (3d Cir. 1998) and *M.C. Mfg. Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975) ("[T]here must be actual sales at two different prices to two different actual buyers."). By contrast here, the district court found, and *Feesers I* affirmed, there *were* actual sales at two different prices to two different buyers – Feesers and Sysco (the prime distributor for Sodexho). *Feesers I*, at 211. That ruling is the law of the case and nothing in *Toledo Mack* justifies the reversal of this holding in *Feesers I*.

Nor was there any basis for the *Feesers II* panel to reverse *Feesers I* on the purported ground that this case involves a bid market, in the sense that that concept

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food distributor Feesers against Sodexho, "the largest private purchaser of food in the world," A8, is precisely what Congress had in mind when passing the RPA. *See* ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law Volume I, 8-18 (1980) (RPA motivated by the fact that large supermarket chains were placing smaller outlets at a disadvantage by using their huge purchasing power to obtain food products at favorable prices from suppliers).

was applied in *Volvo Trucks* and *Toledo Mack.*[5] The question of whether the food distribution industry involves a bid market was extensively briefed by the parties in *Feesers I* and thus rejected by that Court as a basis for precluding a finding of competitive injury in this case. Indeed, defendants' assertion that "Feesers' showing of actual competition is even weaker than that of the plaintiff in *Volvo Trucks* because Feesers … could not provide evidence of even a single instance in which Feesers and Sodexho submitted a competing bid or proposal to any institution of any kind" was rejected by *Feesers I*, at 213, 214-15. Br. for Appellees in No. 06-2661, at 30 (filed Aug. 23, 2006). Having already concluded as a matter of law that there were two purchasers for purposes of the RPA, *Feesers I* held that the only remaining question of competitive impact for the district court to resolve at trial was whether Feesers and Sodexho "compete to resell food products to the same group of customers." *Feesers I*, at 214.[6]

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[5] Contrary to the reasoning in *Feesers II*, in analyzing the competitive impact of discriminatory pricing, it makes no difference from an economic standpoint whether the actual purchases come before or after the competition based on that pricing. Virtually every market could be characterized as this sort of "bid market," rendering the RPA a nullity – a conclusion the *Feesers II* panel sought to obscure by stating that its "holding is limited to bid markets that closely resemble the markets in this case, *Volvo Trucks*, and *Toledo Mack*." *Feesers II*, at 33 n.18. Since the food distribution market here bears no resemblance to the customized bid markets in the latter cases, the ruling provides no guidance to the lower courts and amounts to a judicial repeal of the RPA for the entire wholesale food distribution industry.

[6] *Feesers II* asserts that the "intervening facts" exception to the law of the case doctrine applies because its "present review of this case [was] conducted with the benefit of a full record established at trial." *Feesers II*, at 36. But, as the case cited by the panel for this proposition makes clear, this exception to the law of the case

Moreover, the district court specifically found, after a lengthy trial, that the market in this case was factually different from the bid markets in *Volvo Trucks*, *Toledo Mack* or *M.C. Manufacturing*, and that Feesers and Sodexho were in actual competition with one another. As discussed next, without a finding of clear error, the *Feesers II* panel is bound by that determination.

II. *Feesers II* Is Irreconcilable with the District Court's Unchallenged Findings of Fact

Feesers II's reversal of *Feesers I* rests on the *Feesers II* panel's holding that "in a secondary-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." *Feesers II*, at 6. But this holding cannot stand in the face of the undisputed factual findings of the district court – none of which have been held to be clearly erroneous. As the district court found, this case involved continuous and contemporaneous purchases of the same Michael Foods products by two purchasers (Feesers and either Sodexho or its contract distributor, Sysco) that occurred *before*, *during*, and *after* the time at which Feesers and Sodexho compete for customers choosing between food product providers.

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doctrine *only* applies where there is *new evidence* not previously present in the record. *Pub. Interest Research Group of N.J., Inc. v. Magnesium Elecktron*, 123 F.3d 111 (3d Cir. 1997). It is inapplicable to the instant case, where there was no relevant discovery after summary judgment and the entire record on this issue was presented to the panel in *Feesers I*.

A. A Bid Market Analysis Is Inapplicable Because the District Court's Unchallenged Factual Findings Establish That Purchases and Competition Continue After Customers Choose Between Foodservice Management or Self Operation

Feesers II's opinion is based on the false factual premise that competition between Sodexho and Feesers is tied to a specific point in time for each customer and that once an institution opts for food management or self operation, the competition is over. *Feesers II*, at 26-28. The district court, however, specifically found, as a matter of fact, 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 process." A26; *see also* A20. The district court also found that customers in this market sometimes "use the RFP process to gain ideas, but remain" with a distributor instead of hiring a management company. A20. Moreover, customers do not always stay with a management company for long, but rather "use [them] to 'fix' current problems and then return to self-op." *Id.*; *see also* A667 (Sodexho executive admitting same); A962-63 (same). As the undisputed evidence showed at trial, Sodexho's contracts are terminable on short notice, which allows Feesers and Sodexho to compete continuously for the same customer. A688. Indeed, the district court specifically considered the evidence on the "timing of competition," A20, and found that competition occurs "not just in the formal [RFP] process," but "*all the time*." *Id*. (emphasis added).

The district court also found, as a matter of fact, that Sodexho continues to compete with distributors such as Feesers to sell food products to the exact same customers even *after* Sodexho has converted such customers to food management. *See, e.g.*, A21 (finding that Sodexho's documents "demonstrate direct competition with distributors" to sell food even after a customer has awarded Sodexho a contract for some of its "management services while retaining distributors for some or all food procurement"); *Id*. (discussing Sodexho proposal to customer that states "[a] significant portion of the [customer's] purchasing is done utilizing [a competing distributor]"); A41 ("[S]ome Sodexho customers have chosen to utilize Feesers for [certain Michael Foods] purchases."); *see also* A2244-45.

For example, the district court found that "Daniel Boone [School District] solicited proposals in an RFP process, and ultimately chose Sodexho," but "[f]or a time, Daniel Boone continued to utilize Feesers for [some of its food product] purchasing." A47-48. This fact finding was based on the undisputed testimony of a customer who explained 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, A1989 (emphasis added):

> 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. (emphases added). The undisputed trial testimony also provided examples of other Sodexho-managed institutions that continued to purchase Michael Foods products from Feesers after Sodexho started to provide them with food management services. A855-58, A864, A2526.

These fact findings of continuous competition to sell food products have not been found to be clear error. They thus preclude the *Feesers II* holding that the sale of food products by Feesers and Sodexho are the type of bid markets found in *Volvo* and *Toledo Mack*, where two dealers compete for a one-off sale of a customized product and the competition is over once one of them wins the bid.

As the district court found, without clear error, "institutions *regularly* switch back and forth" between management companies and distributors. A11 (emphasis added).[7] Indeed, Sodexho sales employees "regularly" and "actively" attempted to lure Feesers customers away at times when no RFP has been issued. A20; A10; *see also* A414 and A416-17; *Feesers I*, at 210 ("Sodexho has solicited at least five facilities served by Feesers to become Sodexho customers."). Customers' switching back and forth between Sodexho and Feesers was also undisputed at trial. *See* A10 ("[S]ome Sodexho customers such as the Meadows have switched to self-op and become Feesers customers."); A872-79; A559 (identifying examples of former Sodexho customers that switched back to self operation and now

[7] *See also id.* at A9 ("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."); A14("[W]hen Sodexho refers to self-ops as 'competitors' this includes … distributors.").

purchase food products from Feesers); *see also Feesers I*, at 210 ("The Meadows Nursing Home was a Sodexho customer and switched to being a … Feesers customer, in part because Michael Foods agreed to give Feesers the same product pricing given to Sodexho."). There is simply no way to reconcile the *Feesers II* holding with these undisputed factual findings of continuous competition between Feesers and Sodexho to sell non-custom eggs and potato products. *See* A109-11; *see also* A24-26 ("*Volvo Trucks* is not controlling because competition in this case is much broader than that at issue in that case.").[8]

B. *Feesers II* Conflicts with *Feesers I*'s Summary Judgment Holding That Feesers Factually Satisfied the Two-Purchaser Requirement

Feesers I also upheld the district court's summary judgment finding that Michael Foods sold to two contemporaneous purchasers, "Feesers and Sysco," as a matter of fact. *Feesers I*, at 211; *see also supra*. *Feesers II*, which finds no "competing purchaser," cannot be reconciled with this finding. *Feesers II*, at 27-28. In fact, as both *Feesers I* and the district court found, at the time before, during, and after the point when a customer chooses between Feesers and Sodexho, Feesers and Sysco are simultaneously purchasing the Michael Foods products which they compete to sell to the same customers (in Sysco's case, on behalf of

[8] Further, as the district court found, "[t]he 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." *Feesers I*, at 215. *Feesers I* was also unequivocal that Sodexho sells non-custom food products to its customers just like Feesers. *Id.* ("Sodexho could not be more clear that it sells food products to its clients."); *id.* at 208 ("Sodexho … sells products to the facilities.").

Sodexho): "[T]he goods in question are [ ] commodities that two competitors *regularly purchase* and *keep in stock* for resale to customers." A111 (emphases added); *see also* Br. for Appellant Sodexho, filed Aug. 7, 2009, *available at* 3d Cir. Doc. No. 00319759900, at 4 (Sodexho admitting that distributors such as Feesers and Sysco "purchase a full range of food products from various manufacturers, warehouse those purchased products in wholesale inventory until they are resold for use at institutional food-service facilities"). It was on this undisputed factual record that *Feesers I* found that the bid market decision in *Volvo Trucks* did not preclude the application of the RPA to Feesers' claims. A111; *Feesers I*, at 211 n.5 ("[T]he additional link in the distribution chain does not insulate [a subsequent purchaser] from liability ….") (quoting *Texaco*, 496 U.S. at 567).[9] The contrary ruling in *Feesers II* simply cannot stand.

[9] The *Feesers II* panel attempts to draw an analogy between "the deviated pricing system of food manufacturers" and the "customer-specific discounts to their dealers" offered by the truck manufacturers in *Volvo Trucks.* *Feesers II*, at 18. This attempted analogy is negated by the factual findings of the district court because "although the deviations are paid after the first transaction, the agreement that they will be paid exists from the start." A190. As the district court found, "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." A28. Under the holding of *Feesers II*, even two foodservice management companies could never "compete" for the same customer because the later invoicing of a billed-back deviation would preclude any application of the RPA. Such a ruling cannot be reconciled with *Feesers I*.

CONCLUSION

For the foregoing reasons, Feesers respectfully requests that this Court grant its petition for rehearing or rehearing *en banc*.

Dated: January 21, 2010
New York, New York

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 21, 2010, the foregoing Petition for Rehearing and Rehearing *En Banc* was filed with the Clerk of Court using the CM/ECF system, and served via Federal Express on the following counsel of record:

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