

JON S. BAROOSHIAN
ELLEN M. BATES
MICHAEL R. BROWN ■
JOSEPH F. COMENZO*
EARLE C. COOLEY
DONNA R. CORCORAN
CHRISTOPHER J. CUNIO
ROBERT A. DELELLO^o
ERIKA J. DOHERTY ◆◆
JENNIFER B. FUREY
MARTIN F. GAYNOR III
BRIAN D. GROSS**
BRIAN M. HANEY
JOHN T. HUGO
JESSICA S. JACKSON ~
TRACY A. R. JOLLY
PATRICK T. JONES**
TIMOTHY C. KELLEHER III
SARAH M. KNOFF
RALPH R. LIGUORI*
JAMIE M. MAGNANI^o
HARRY L. MANION III
JOHN B. MANNING*
JAIMIE A. MCKEAN
KEITH M. MCLEAN
RICHARD W. PATERNITI
KERRI LYNNE RANDALL
CHRISTOPHER M. SHEEHAN
LISA M. SNYDER
NICHOLAS D. STELLAKIS
JONATHAN F. TABASKY**†
PATRICK S. TRACEY ◆
JOSHUA L. WEEMS ~

COOLEY MANION JONES LLP

COUNSELLORS AT LAW
21 CUSTOM HOUSE STREET
BOSTON, MASSACHUSETTS 02110-3536
(617) 737-3100
FACSIMILE (617) 737-3113
WWW.CMJLAW.COM

PAUL F. BECKWITH
LEONARD T. EVERS
ARTHUR GRIMALDO II ~
FRANK A. MARINELLI*
JOHN F. MORAN
PETER J. SCHNEIDER**
MELODY M. WILKINSON ~
OF COUNSEL

RHODE ISLAND OFFICE
ONE CENTER PLACE
PROVIDENCE, RHODE ISLAND 02903
PHONE (401) 273-0800
FAX (401) 273-0801

TEXAS OFFICE
100 EAST FIFTEENTH STREET, SUITE 320
FORT WORTH, TEXAS 75102
PHONE (817) 870-1996

October 2, 2007

~ ADMITTED IN TEXAS ONLY
*ALSO ADMITTED IN RHODE ISLAND
†ALSO ADMITTED IN CONNECTICUT
^oALSO ADMITTED IN NEW HAMPSHIRE
◆ ALSO ADMITTED IN ARIZONA
^oALSO ADMITTED IN NEW JERSEY
●ALSO ADMITTED IN PENNSYLVANIA
■ALSO ADMITTED IN NEW YORK
□ALSO ADMITTED IN MAINE

Honorable Sylvia H. Rambo
United States District Judge
United States District Court for the
Middle District of Pennsylvania
Federal Building and United States Courthouse
228 Walnut Street, P.O. Box 983
Harrisburg, PA 17108

Re: *Feesers, Inc. v. Michael Foods, Inc. and Sodexho, Inc.*, No. 04-0576

Dear Judge Rambo:

I am writing on behalf of my client Sodexho, Inc., in response to your Honor's request that each of the parties identify for the Court the issues that remain to be tried in this civil action. Simply stated, a full trial of all issues is required. Feesers bears the burden of proof with respect to all elements of its claims and the Defendants, Michael Foods, Inc. and Sodexho, bear the burden of proof with respect to their affirmative defenses. In its decision of Feesers, Inc.'s appeal, the Third Circuit Court of Appeals did not alter the traditional burdens of proof and it did not relieve Feesers of its obligation to prove its case at trial.

A full trial on the merits is necessary in light of the procedural status of this case. On November 17, 2005, Feesers, Michael Foods and Sodexho each moved for summary judgment. This Court denied Feesers' motion and granted the Defendants' motions on the grounds that Feesers had failed to adduce sufficient evidence to prove the competitive injury element of its claims. Accordingly, the Court entered judgment dismissing

Honorable Sylvia H. Rambo
United States District Judge
October 2, 2007
Page 2

Feesers' case in its entirety. It was from that judgment that Feesers appealed to the Third Circuit.

The only issue before the Third Circuit was whether a reasonable fact finder, *viewing all of the evidence in the light most favorable to Feesers*, could conclude that Feesers and Sodexho are in actual competition. The Third Circuit clearly stated the scope of the appeal as follows:

This appeal concerns the fourth element of Feesers' claim under section 2(a): competitive injury. Specifically, we must decide whether the District Court applied the correct legal standard to determine whether Sodexho and Feesers are in actual competition and whether it erred in holding that Feesers did not proffer sufficient evidence to allow a reasonable factfinder to conclude that it is in actual competition with Sodexho.

Feesers, Inc. v. Michael Foods, Inc., et al., No. 06-2661 (3rd Cir. August 14, 2007) at 13-14.

The Third Circuit reversed this Court's grant of summary judgment in favor of the Defendants because the Third Circuit decided that the District Court applied an incorrect legal standard for determining the competitive injury element and failed to "view the evidence . . . in the light most favorable to Feesers" The Third Circuit held that viewing the evidence in the light most favorable to Feesers, a fact finder "could," not should, not must, but "could," conclude that Feesers and Sodexho are in actual competition. *Id.* at 18 ("The evidence here could lead to a different conclusion than that reached by the District Court."); *Id.* at 22 ("Viewing the evidence in the light most favorable to Feesers, a factfinder could conclude that this is such a situation."). In essence, all the Third Circuit did was determine that it was inappropriate to conclude at the summary judgment stage that, as a matter of law, Sodexho and Feesers are not in actual competition. The Third Circuit, therefore, remanded for further proceedings consistent with its opinion and stated that "it is for the factfinder, here the District Court, to decide whether defendants' actions fit within the contours of what Congress has proscribed." *Id.* at 22.

At trial, the Court and the Parties will be guided by the Third Circuit's decision. The Third Circuit held that in order to establish "competitive injury" for purposes of section 2(a), Feesers must prove actual competition with Sodexho and price discrimination over time by Michael Foods. *Id.* at 14-15. If Feesers can prove actual competition with Sodexho and price discrimination over time by Michael Foods, that would give rise to "a rebuttable inference of "competitive injury" under § 2(a)." *Id.* at 15. "The inference, *if it is found to exist*, would then

Honorable Sylvia H. Rambo
United States District Judge
October 2, 2007
Page 3

have to be rebutted by defendants' proof that the price differential was not the reason that Feesers lost sales or profits." *Id.* at 16 (emphasis added). Stated differently, "[t]he inference could be rebutted with evidence proffered by defendants that the price discrimination does not cause foodservice facilities to decide to buy food from Sodexho rather than Feesers." *Id.* at 22. "The burden is on defendants to show the absence of the causal link." *Id.* at 22. In summary, the burden of proof is on Feesers to prove actual competition and price discrimination over time. If, Feesers can sustain its burden and prove that it is entitled to the *Morton Salt* inference, the burden shifts to the Defendants to offer evidence breaking the causal connection between a price differential and lost sales or profits.

Based upon statements made by Feesers' counsel during the telephonic conference that you Honor held on September 11, 2007, it appears that Feesers intends to take the position that it has already prevailed on its claims and that all that remains to be tried are the Defendants' affirmative defenses. This position is utterly incorrect. First, for the reasons previously stated, Feesers still bears the burden of persuading this Court, in its capacity as fact finder, that Feesers is in actual competition with Sodexho. Second, with respect to the other elements of Feesers' claims, the Third Circuit did not render any judgment because those elements were not at issue in the appeal. In its letter to your Honor, Michael Foods has explained in detail why a full trial on the other elements of Feesers' claims is required. Sodexho respectfully joins in the position articulated by Michael Foods.

There are two other issues, which are specific to Sodexho that deserve mention. First, in its complaint, Feesers alleges that in addition to Michael Foods three other companies, namely, Schwann's, Inc., McCain's, Inc., and Ecolab, Inc., have also discriminated against it in violation of the Robinson-Patman Act. For some reason Feesers chose not to name these companies as defendants and it is unclear at this point whether Feesers intends to pursue any claims at trial related to the alleged discrimination by these third parties. The statements made by Feesers' counsel during the last status conference to the effect that Feesers believes that it has already proven price discrimination suggests that it intends to pursue only those claims related to Michael Foods because neither this Court nor the Third Circuit made any determinations with respect to alleged discrimination by these other companies. Sodexho requests that the Court require Feesers to advise the Court and the parties whether it intends to pursue its claims related to Schwann's, McCain's and Ecolab so that Sodexho can prepare for trial accordingly.

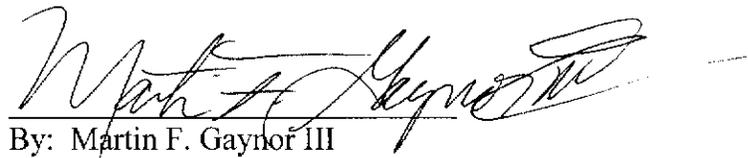
The second issue specific to Sodexho concerns the additional element that Feesers must prove at trial in order to prevail on its Section 2(f) claim against Sodexho. In

Honorable Sylvia H. Rambo
United States District Judge
October 2, 2007
Page 4

Automatic Canteen v. FTC, 346 U.S. 61 (1953), the Supreme Court held that the plaintiff in a Section 2(f) case has the burden of proving that the alleged 2(f) violator knowingly induced or received a discriminatory price that it knew was not within one of the sellers' defenses under the Robinson-Patman Act. Consequently, in order to prevail on its Section 2(f) claim against Sodexo, Feesers must prove not only the elements of its Section 2(a) claim, but also that Sodexo induced or received a price that it *knew* was prohibited by section 2(a). Neither this Court nor the Third Circuit discussed this element in their respective decisions, but it is clear that the burden of proof at trial rests with Feesers.

Respectfully submitted,

COOLEY MANION JONES LLP

A handwritten signature in cursive script, appearing to read "Martin F. Gaynor III", is written over a horizontal line.

By: Martin F. Gaynor III