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

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Whether the Third Circuit correctly rejected the existence of competitive injury under the Robinson-Patman Act in this case, given the specific nature and timing of the competition allegedly injured by price discrimination, where:

(a) the competition alleged involves both (1) an end-customer-specific bidding competition that confers the exclusive right on a product purchaser to resell the product for use by the end customer, and (2) purported competitors that operate at different functional levels of the supply chain; and

(b) the favored purchaser does not purchase the product at a lower price while the alleged competition is ongoing, but rather fills special orders for those products at that price after the competition has concluded.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

Respondent Michael Foods, Inc., is a wholly owned subsidiary of Michael Foods Group, Inc., which is a wholly owned subsidiary of MFI Midco Corporation, which in turn is wholly owned by MFI Holding Corporation. The majority of voting securities of MFI Holding Corporation are owned by funds or other investment vehicles controlled by GS Capital Partners, which is part of the private equity group at Goldman Sachs Group, Inc., a company that is publicly traded on the New York Stock Exchange.

Respondent Sodexo, Inc., is a wholly owned subsidiary of Sodexo, S.A., a company that is publicly traded on the Euronext Paris Stock Exhange.[*]

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[*] On January 22, 2008, during the course of this litigation, Sodexo publicly announced that it had changed the spelling of its name from Sodexho. *See* Pet.App. 155a n.1.

TABLE OF CONTENTS

Restatement of Question Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Respondents' Brief in Opposition 1

Restatement of the Case 4

Reasons for Denying the Petition 14

I. Feesers Mischaracterizes the Third Circuit's Holding 15

II. The Alleged Circuit Splits Are Illusory 18

III. The Alleged Conflicts With This Court's Decisions Are Illusory 25

IV. This Case Is A Poor Vehicle To Consider The Relevance of Timing To Competitive Injury Under the RPA 29

Conclusion 35

TABLE OF AUTHORITIES

Page(s)

CASES

Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987) 5, 30

Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947) 5

DeLong Equipment Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186 (11th Cir. 1993) 18, 19, 20

Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983) 6, 21, 25, 27

FTC v. Morton Salt Co., 334 U.S. 37 (1948) ....*passim*

FTC v. Sun Oil Co., 371 U.S. 505 (1963) 30

Godfrey v. Pulitzer Publ'g Co., 276 F.3d 405 (8th Cir. 2002) 29

Hartley & Parker, Inc. v. Fl. Beverage Corp., 307 F.2d 916 (5th Cir. 1962) 20, 21

In re Quaker Oats Co., 66 F.T.C. 1131 (1964) 34

M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059 (5th Cir. 1975) ....*passim*

Marty's Floor Covering Co. v. GAF Corp., 604 F.2d 266 (4th Cir. 1979) 34

Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951) 34

TABLE OF AUTHORITIES
(continued)

Page(s)

Perkins v. Std. Oil Co. of Cal.,
395 U.S. 642 (1969) 32, 33

Texaco Inc. v. Hasbrouck,
496 U.S. 543 (1990) .... *passim*

The Monrosa v. Carbon Black Export, Inc.,
359 U.S. 180 (1959) 33

Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.,
530 F.3d 204 (3d Cir. 2008) .... *passim*

Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen,
130 S. Ct. 584 (2009) 33

United States v. Grubbs,
547 U.S. 90 (2006) 30

Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.,
546 U.S. 164 (2006) .... *passim*

White Indus., Inc. v. Cessna Aircraft Co.,
845 F.2d 1497 (8th Cir. 1988) 30

STATUTES

15 U.S.C. § 13 1

15 U.S.C. § 13(a) 4, 5, 10

15 U.S.C. § 13(b) 12

15 U.S.C. § 13(f) 10

OTHER AUTHORITIES

Eugene Gressman et al., *Supreme Court Practice* § 4.3, at 242 (9th ed. 2007) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 181 (1962) 35

RESPONDENTS' BRIEF IN OPPOSITION

This case arises under the Robinson-Patman Act ("RPA"). 15 U.S.C. § 13. Petitioner Feesers, Inc. ("Feesers"), a wholesale food distributor, alleges that Respondents engaged in unlawful price discrimination. Respondents are Michael Foods, Inc. ("MFI"), a manufacturer of egg and potato products, and Sodexo, Inc. ("Sodexo"), a management company that operates food-service facilities at large institutions, such as school cafeterias. Pet.App. 155a, 158a. In brief, the Third Circuit rejected Feesers' claim because it is based on unusual facts that fall outside the RPA's text, which is tailored to prevent price discrimination from injuring competition between product resellers due to the ability of one competitor to purchase its resale inventory at more favorable prices. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 169-70, 175-76, 180-81 (2006).

In particular, the nature and timing of the "competition" alleged here materially differ from paradigm RPA cases. Feesers and Sodexo are not competing wholesale distributors. Rather, Feesers claims it "competes" with Sodexo when an institution with a food-service facility is deciding between two operational formats: either 1) self-operating its facility, which requires, among other things, independently selecting a distributor (such as Feesers) for the facility; or 2) retaining a management company (such as Sodexo), which will, among other things, recommend a distributor that the institution should use. Feesers claims that this *operational decision* is the subject of "competition" with Sodexo because it will have *collateral effects* on whether Feesers or a *different distributor* will be chosen to resell MFI products for use by that facility. And Feesers further claims Sodexo wins and retains clients in this "competition" because MFI provides a price rebate to distributors *if and when* they resell MFI products for use at facilities managed by Sodexo. *See* Pet. 9-11; Pet.App. 158a-62a.

The Third Circuit concluded that, given the unusual "nature" and "timing" of this alleged "competitive injury," there is no RPA violation because Feesers and Sodexo are not "competing purchasers" of differentially priced MFI products. Pet.App. 156a-57a, 179a. It reasoned that, under RPA precedent, price discrimination is not unlawful where the differentially priced sale of a product occurs *only after* an end-customer-specific bidding competition in which the favored purchaser wins the *exclusive* right to resell that product to the end customer. *See id.* 168a-78a, 182a-87a. The court explained that such sales do not trigger the RPA's prohibition against price discrimination between "two purchaser[s]" that causes "competitive injury," because the favored purchaser has already locked in a special-order resale and thus is not competing with other purchasers to resell that product out of its general inventory. *See id.* 174a-75a, 184a-85a. The court held that, here likewise, the so-called "competition" over an institution's operational decision occurs in a "bid market" in which either the management company (here, Sodexo) or the wholesale distributor (here, Feesers) has *already* prevailed *before* MFI provides any discount for the products to be resold. *See id.* 178a-82a.

Notably, the court admonished that its "holding [was] limited to bid markets that closely resemble the markets in this case [and the cited RPA precedents]." *Id.* 185a n.18. Thus, it was "*not* hold[ing] that the sales of products by [a] manufacturer to two purchasers must *always* occur prior to the competition between the two purchasers." *Id.* (emphases added).

Accordingly, Feesers is wrong to assert that "[t]he question presented" is whether the RPA requires that "the favored and disfavored purchasers bought the discriminatorily priced products at the exact same moment at which they or their customers competed to resell those products." Pet. i. And Feesers is wrong to claim that the decision below "judicial[ly] repeal[s] … the RPA for non-retail businesses," such as those in "the food distribution industry." *Id.* 3. The Third Circuit rendered no such holding, and its decision lacks such hyperbolic effects. Feesers mischaracterizes that decision in a transparent attempt to construct illusory conflicts with the decisions of other circuits or this Court.

In reality, the Third Circuit's fact-specific holding accords with the only two court of appeals decisions confronting similar circumstances. *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008). Likewise, it is consistent with *Volvo Trucks* and this Court's other RPA decisions. Furthermore, the peculiar facts of this case render it a poor vehicle for resolving the general relevance of timing to RPA competitive injury. For these reasons, certiorari review is unwarranted.

RESTATEMENT OF THE CASE

1. Rather than "ban[ning] all price differences charged to different purchasers of commodities of like grade and quality," "the [RPA] proscribes price discrimination only to the extent that it threatens to injure competition." *Volvo Trucks*, 546 U.S. at 176 (internal quotation marks omitted). It "centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product[s]." *Id.* at 169-70. Its scope reflects Congress's concern in 1936 that small retailers could be wiped out by "powerful buyers" such as "large chainstores" that used "the[ir] clout to obtain lower prices for [the] goods" that they competed to resell. *Id.* at 175.

Accordingly, RPA § 2(a) makes it

> unlawful for any person … either directly or indirectly[] to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, … and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a). A plaintiff thus must prove four elements: "(1) that sales were made to two different purchasers in interstate commerce; (2) that the product sold was of the same grade and quality; (3) that [the seller] discriminated in price as between

the two purchasers; and (4) that the discrimination had a prohibited effect on competition." Pet.App. 13a (citing *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990)). This case involves the application of, and relationship between, the last two statutory elements.

Because the RPA requires price discrimination "between different purchasers," 15 U.S.C. § 13(a), "no single sale can violate the [RPA]," for "[a]t least two transactions must take place in order to constitute a discrimination." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947). When the seller's price discrimination between the two requisite purchasers is alleged to harm competition between the *purchasers* (or their customers)—as opposed to harming competition with the *seller*—the case is described as a secondary-line (or tertiary-line) case. *Volvo Trucks*, 546 U.S. at 176.

In such cases, proving "actual competition" requires "show[ing] that, as of the time the price differential was imposed, the favored and disfavored purchasers [or their customers] competed at the same functional level … and within the same geographic market," *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584-85 (2d Cir. 1987), to resell the discriminatorily priced products to "*the same customer*," *Volvo Trucks*, 546 U.S. at 178-79. As the Third Circuit summarized, for "actual competition" to exist between two purchasers (or their customers), they must "in economic reality [be] acting on the same distribution level" to "compete to resell [the] products [purchased] to the same group of customers." Pet.App. 16a-17a.

Furthermore, proving "competitive injury" in such cases requires "show[ing] … a reasonable possibility that [the] price difference" between the two purchasers "may harm [the] competition" identified. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). Under *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), a "prima facie" "inference" of such "competitive injury" may be established by "proof of a substantial price discrimination … over time" "between competing purchasers" (or between purchasers reselling to competing customers). *Falls City Indus.*, 460 U.S. at 435-36.

2. This case involves applying these statutory requirements to the food-service-industry sector that enables large institutions such as colleges and hospitals to provide meals to their stakeholders (e.g., students or patients). Before reaching the consumer, food travels through a "three-tier distribution system": from food-product manufacturers, to broad-line wholesale food distributors, to operators of institutional food-service facilities. Pet.App. 158a-62a. Each party here represents one of the tiers.

First, MFI manufactures processed egg products and refrigerated potato products. It sells those products in bulk to distributors. *Id.* 159a. MFI competes with other egg-product manufacturers such as Sunny Fresh and potato-product manufacturers, such as Reser's. J.A. 1634-35, 1640-41.

Second, Feesers is a regional broad-line wholesale distributor. Pet.App. 159a. Distributors purchase food products from manufacturers, warehouse them in wholesale inventory until they are resold for use at an institutional food-service facility, and then deliver them to the facility's loading dock. *See id.* 62a-63a; J.A. 467-68. Feesers competes with other distributors, such as Sysco and U.S. Foodservice. J.A. 596.

Third, an institution providing food service has two basic options. It can self-operate, using its employees to handle the operational responsibilities. Or it can outsource some or all of those functions to a food-service management company. Pet.App. 158a.

Sodexo is a management company that competes with other management companies, such as Aramark and Compass. *Id.*; J.A. 781. Sodexo generally charges a fee, or shares the profits, for performing facility-operator functions. *See* Pet.App. 158a, 186a n.19. These functions include planning menus, choosing food-product brands, serving meals, and managing labor. *Id.* 159a. Another function that Sodexo performs is to *negotiate* with manufacturers for lower prices for food consumed at its client-institutions. *See infra* at 9-10.

Sodexo's functions are limited, however, to those otherwise performed by a *facility operator*. Sodexo does *not* perform the *distributor*'s function of purchasing food from manufacturers for warehousing in inventory until resale and delivery to client-facilities. Pet.App. 161a. Indeed, "Sodexo has no delivery trucks[,] warehouses," or wholesale inventory. *Id.* 62a-63a; J.A. 496-98, 2490. Rather, *whenever* Sodexo is retained to operate a facility at an institution that has not already arranged for distribution services, Sodexo must arrange for a distributor to deliver food products from its inventory to the client-institution's loading dock. Pet.App. 44a; J.A. 496-98, 590-91.

Through a competitive bidding process, Sodexo has selected certain prime distributors, such as Sysco, that it generally prefers using. Pet.App. 6a n.3, 43a n.3. Feesers is not currently a Sodexo prime distributor. *Id.* 43a n.3. But client-institutions can request another distributor, and Sodexo will honor such requests. *Id.* 6a n.3; J.A. 823, 2204-06. Indeed, Feesers itself has served as the distributor for Sodexo-managed institutions. Pet.App. 43a n.3, 83a-84a. In short, as the Third Circuit explained, unlike Feesers, "Sodexo itself is not a distributor." *Id.* 161a.[1]

Thus, a self-operating institution's decision to retain Sodexo as its facility operator does not *itself foreclose* Feesers from serving as the facility's distributor, because Sodexo is not a distributor and the managed institution can choose a distributor other than Sodexo's prime distributors. At worst, the selection of Sodexo as a facility's operator *adversely affects the likelihood* that Feesers will subsequently be chosen as the facility's distributor, because Feesers has lost a competition with other distributors to be one of Sodexo's prime distributors. When a self-operating institution switches to management under Sodexo, Feesers is more likely to be displaced by Sodexo's prime distributors; on the other hand, when a Sodexo-managed institution switches to self-operation, Feesers gains the

[1] Feesers mischaracterizes the record by asserting that "Sodexho is a … distribution company." Pet. 4; *see also id.* 5. The district court's factual findings do *not* describe Sodexo as a "distribution company." Pet.App. 42a-44a. To the contrary, those findings confirm that Sodexo needs to "arrange for the procurement and delivery of raw food to the institution" by "hir[ing] a distributor." *Id.* 44a.

opportunity to seek distribution business directly from the institution. *See id.* 160a-61a.

3. Pricing in this industrial sector works as follows. Product manufacturers maintain general list prices at which they sell to distributors, who, in turn, resell to facility operators at those prices plus a profit markup. Pet.App. 68a; J.A. 240. However, manufacturers sell substantial amounts of product at "deviated" prices for specific institutions, Pet.App. 68a, to deter those institutions from choosing competitors' products, J.A. 1649-51. Such institution-specific discounts generally do not run afoul of the RPA, because (among other reasons) colleges and similar institutions rarely compete with each other to resell food products. Pet.App. 69a.

Deviated prices are typically provided through a billback arrangement: (1) the product manufacturer initially sells to distributors at the list price, because distributors purchase for their wholesale inventory, not for particular institutions; (2) when, however, a manufacturer's product is purchased from the distributor for use at a particular facility that has negotiated a deviated price, the distributor charges only that price (plus its markup); and (3) the manufacturer then rebates the difference to the distributor for reselling to a facility entitled to the deviated price. *Id.* 68a; J.A. 1652-54.

As Sodexo performs the food-selection function for numerous institutions, it negotiates with manufacturers for deviated prices on the collective behalf of its institutional clients. Pet.App. 105a-111a. Sodexo has negotiated deviated-price agreements with numerous manufacturers, *id.* 137a, including MFI, *id.* 68a-73a. Under these agreements, manufacturers such as MFI initially sell their products to distributors at the general wholesale list price. But *after* Sodexo is retained to manage an institution and places orders with its chosen distributor for that institution, the distributor resells at the deviated price (plus its markup), and then receives a rebate from the manufacturer for the difference. *Id.* 6a-7a, 68a, 71a n.6; J.A. 1652-60.[2]

4. On these facts, Feesers filed suit against MFI and Sodexo. Feesers claimed that MFI violated RPA § 2(a) due to its deviated-pricing agreement with Sodexo. Feesers further claimed that Sodexo violated RPA § 2(f) by knowingly inducing MFI's violation. Pet.App. 9a; 15 U.S.C. § 13(a), (f).

a. On cross-motions for summary judgment, the district court held Feesers satisfied the first three elements of its § 2(a) claim, *see supra* at 4-5, because MFI had made interstate sales of equivalent goods at different prices to two purchasers—Feesers and *Sysco* (not Sodexo). Pet.App. 9a-10a. But the court held that Feesers had not established "competitive injury" because it failed to show "actual competition" with *Sodexo*. *Id.* 11a.

b. On appeal, a divided panel of the Third Circuit reversed because the district court had "used

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[2] Feesers distorts the record by stressing that "Feesers and Sysco continuously purchase the same [MFI] products on an ongoing basis and keep them in stock for resale to customers." Pet. 25 (internal quotation marks omitted); *see also id.* 6-7. But ongoing purchases by Sysco and Feesers are made *at the same MFI list price*, because Sysco purchases from MFI for its *wholesale inventory* and it never receives a Sodexo-related discount unless and until it resells MFI products for a Sodexo-managed institution. Sodexo, moreover, has no inventory *at all*, because it special-orders products for its management clients.

the wrong standard in making th[e] determination" concerning "actual competition." *Id.* 3a-4a, 188a. The Third Circuit held that "actual competition" exists so long as Sodexo and Feesers are "in economic reality acting on the same distribution level" to "compete to resell [MFI] products to the same group of customers." *Id.* 16a-17a. Viewing the summary-judgment record "in the light most favorable to Feesers," the court held that "Feesers ha[d] proffered sufficient evidence to create a genuine factual dispute." *Id.* 18a-20a. Judge Jordan, dissenting, would have affirmed "[b]ecause the facts … fail[ed] to show actual competition." *Id.* 33a.

c. After a trial on remand, the district court ruled for Feesers. *Id.* 35a, 138a. The court held it was "of no significance" that Sodexo does not perform the distribution services that Feesers provides. *Id.* 62a-63a. The court adopted Feesers' theory that "competition occurs when a customer considers switching from self-op to food service management, or vice versa," due to Feesers' potential "displace[ment]." *See id.* 48a, 64a. Thus, based simply on evidence that institutions switch from self-operation to management, that Sodexo seeks to convert self-operated institutions, and that some of Feesers' or Sodexo's customers have previously converted, *id.* 43a-56a, the court held that Sodexo and Feesers are in "actual competition," *id.* 62a.

It further held that Feesers was entitled to the *Morton Salt* inference of competitive injury, *see supra* at 6, reasoning that the *overall* amount of deviated pricing Sodexo has negotiated with MFI and *other non-party manufacturers* is sufficiently "substantial" *in the aggregate* to affect the operational-switching "competition." Pet.App. 81a-88a. The court did not dispute that the price difference for MFI products *alone*—which Feesers' expert calculated would save a typical institution at most 0.4% of its total food-service operational costs, J.A. 1250-52—was too insignificant to affect an institution's operational-management decision. Instead, the court deemed that fact legally irrelevant because it believed a product-specific focus was "foreclosed by … *Morton Salt*." Pet.App. 87a.

Thus, after rejecting the defendants' remaining arguments—including that their pricing agreements fall within the RPA's meeting-competition defense, *id.* 112a-32a; 15 U.S.C. § 13(b)—the court granted injunctive relief. Pet.App. 139a-40a.

d. The Third Circuit reversed, holding that the competitive-injury finding was legally untenable. *Id.* 155a-57a, 187a-90a.

As a threshold matter, the court expressed its "view" that there is no actual competition *at all*, because, "assuming that Sodexo replace[s] Feesers with another distributor, Feesers's competitor would be the other distributor, not Sodexo," which "itself is not a distributor." *Id.* 161a & n.6. But the court reluctantly accepted the contrary "finding" below, deeming it a "highly questionable" "inferred fact" that "d[id] not rise to the level of clear error." *Id.*

The Third Circuit concluded that, regardless, the district court's competitive-injury ruling was legally erroneous. *Id.* 164a-65a. Relying upon this Court's decision in *Volvo Trucks*, its own decision in *Toledo Mack*, and the Fifth Circuit's decision in *M.C. Mfg.*, the court below ruled that the RPA does not proscribe differentially priced product sales that occur *only after* an end-customer bidding competition in which the favored purchaser wins the *exclusive* right to resell those products to the end customer. *See id.* 168a-78a, 182a-87a. The court explained that, in such situations—where the lower-priced sale is made to a purchaser that has already locked in a special-order resale and thus is not competing with other purchasers to resell that product out of its general inventory—the favored and disfavored purchasers are not "competing purchaser[s]," as is required by "the combined effect of the RPA's two purchaser and competitive injury requirements." *See id.* 174a-75a, 184a-85a. And the court held that, here also, "Feesers and Sodexo [are] not competing purchasers" of differentially priced MFI products, because the so-called "competition for sales to prospective customers occurs" "in a bid market" that always concludes "*before* the sale of the product for which the RPA violation is alleged." *Id.* 156a-57a.

That fact-specific holding was narrowly grounded in the "nature" and "timing" of the "competition" identified by the district court. *Id.* 179a. The Third Circuit recognized that MFI *never* sells products to Sysco at the Sodexo-discounted price until Sodexo *has already won* the "competition" for the operational decision of the institution to which those products will be resold. Only *after* Sodexo is chosen as the institution's operator does MFI rebate Sysco the discount for any products that Sodexo *later* orders for that institution. *See id.* 158a-59a, 178a, 181a-82a; *see also supra* at 9-10 & n.2.

The Third Circuit further observed that price discrimination in the sale of products that the favored purchaser has previously won the exclusive right to resell bears "little resemblance" to price discrimination in the sale of products to purchasers who must subsequently compete to resell those purchased products. *See* Pet.App. 181a-82a, 185a. It found the "myriad of differences" significant, because this Court has emphasized that the latter scenario is the central concern of the RPA and has cautioned against RPA constructions sweeping more broadly. *See id.* 165a-66a, 181a, 185a (citing *Volvo Trucks*, 546 U.S. at 169-70, 180-81).

Consistent with that fact-sensitive rationale, the Third Circuit emphasized that its "holding [was] limited to bid markets that closely resemble the markets in this case, *Volvo Trucks*, and *Toledo Mack*." *Id.* 185a n.18. In short, the court unambiguously admonished that it was "*not* hold[ing] that the sales of products by the manufacturer to two purchasers must *always* occur prior to the competition between the two purchasers." *Id.* (emphasis added).

e. Feesers filed a rehearing petition, which was summarily denied without dissent or a request for a response. *Id.* 191a-92a.

REASONS FOR DENYING THE PETITION

A "genuine conflict" in authority warranting this Court's review arises only "when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Eugene Gressman et al., *Supreme Court Practice* § 4.3, at 242 (9th ed. 2007). In contrast, the conflicts alleged by Feesers are primarily based on interpretations of the decision below that the court unambiguously disavowed. The Third Circuit's narrow, fact-specific ruling does not "genuinely conflict" with any decision of a court of appeals or this Court. Rather, that ruling accords with the "holdings" of the few decisions that have addressed "very similar facts." Indeed, this case's unique facts render it a particularly unsuitable vehicle for this Court to consider the proper temporal relationship between discriminatory sales and actual competition. Under a proper legal construction of the RPA, Feesers and Sodexo do not "compete" *at all*, and MFI's discount for Sodexo's clients is too *insubstantial* to trigger the *Morton Salt* inference.

I. FEESERS MISCHARACTERIZES THE THIRD CIRCUIT'S HOLDING

A. Feesers contends that "[t]he question presented" is whether the RPA requires that "the favored and disfavored purchasers bought the discriminatorily priced products *at the exact same moment* at which they or their customers competed to resell those products." Pet. i (emphasis added). Feesers repeatedly attributes that rigid rule to the Third Circuit, *id.* 3, 14, 22, 24, and then identifies "conflicting" cases rejecting it, *id.* 17-18, 24. But Feesers attacks a straw man.

Not a single word in the Third Circuit's opinion imposes such a stringent rule of synchronicity. To the contrary, the Third Circuit's holding clearly permits RPA claims where purchasers do not *begin* resale competition until *after* they purchased the products at discriminatory prices, since the "competition" would *not* "occur[] *before* the [discriminatory] sale." Pet.App. 157a. Even 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*." *Id.* 185a n.18. The Third Circuit was crystal clear that it was "*not* hold[ing] that the sales of products by [a] manufacturer to two purchasers must *always* occur prior to the competition between the two purchasers." *Id.* (emphases added).

Accordingly, the Third Circuit has not provided a safe harbor for "power buyer[s]" to "evade liability under the RPA" "[b]y manipulating the timing" of their discounted purchases. Pet. 30. Regardless of *timing*, the *nature* of the competition in paradigm RPA cases, *see supra* at 4, hardly resembles either the functionally separated "competition" between "food service management companies and food distributors," Pet.App. 161a & n.6, 181a-82a, or the individually tailored special-order bid markets in *Volvo Trucks* and *Toledo Mack*, *id.* 169a-70a.

B. Feesers also insists that the Third Circuit's holding exempts from the RPA "non-retail businesses," such as those "in the food distribution industry," Pet. 3, 13-14, 29-32, and then trumpets the existence of "conflicting" RPA cases involving such businesses, *id.* 19-20, 22-24. But, once again, Feesers slays imaginary dragons.

The phrase "non-retail" *never* appears in the Third Circuit's opinion. Nor is there any foundation for Feesers' suggestion that the opinion implicitly excluded from the RPA *all* such competition, *regardless* of the relative timing between such competition and any discriminatory sales. To the contrary, the Third Circuit plainly contemplated that the RPA would proscribe discriminatorily priced sales that injured competition between Feesers and *other distributors* to resell food products from their *general inventory*. Pet.App. 161a n.6, 181-82a. Competitive injury of *that* type "resembl[es]" the harm that "the statute was originally intended to target." *Id.* 181a-82a.

Nor does non-retail competition—either inside or outside the food-distribution industry—*necessarily*, or even *usually*, involve "bid markets" where the discriminatory sales occur *after* the conclusion of the competition for the resale of those products to non-retail customers. Pet.App. 185a n.18. After all, as Feesers tacitly concedes, the paradigm case of *Morton Salt* involved discriminatory sales to favored wholesalers that plainly *preceded* the competition with disfavored wholesalers to resell the differentially priced products to retailers. Pet. 22-23 (citing *Morton Salt*, 334 U.S. at 42 & n.5).

Feesers is also wrong in asserting that this market is the same as every other non-retail industry simply because there are *ongoing* efforts (though infrequently successful) to convince institutional food-service facilities to reconsider their operational decisions. Pet. 27-28. In the usual non-retail RPA case, distributors are constantly competing to resell *wholesale inventory* that was *previously purchased* at discriminatory prices. Here, however, regardless of the fact that a Sodexo-managed institution might change back to self-operation at any moment, *no* MFI product is *ever* sold at a discriminatory price unless and until Sodexo has won the earlier "competition" for *that* product's resale. Looking backward, every deviation rebate that Sysco received for MFI products distributed to a facility occurred only *after* Sodexo ordered those products as that facility's retained operator; and, looking forward, Sodexo will not have placed any *future* orders for that facility and so Sysco will not receive any more deviated billbacks for MFI products for that facility. *See supra* at 9-10 & n.2.

C. In sum, the Third Circuit neither adopted an "exact same moment" test nor exempted non-retail businesses from RPA protection. Rather, based on the specific facts about the "nature" and "timing" of the "competition" identified, Pet.App. 178a-82a, it held that there "cannot be competing purchasers where the competition for sales to prospective purchasers occurs *before* the sale of the product for which the RPA violation is alleged" *and* the competition occurs in "bid markets that closely resemble the markets in this case, *Volvo Trucks*, and *Toledo Mack*," *id.* 156a-57a, 185a n.18.

II. THE ALLEGED CIRCUIT SPLITS ARE ILLUSORY

A. Feesers cites myriad cases that it claims conflict with the decision below. But they are all inapposite.

1. Feesers principally relies on *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993). In that pre-*Volvo Trucks* case, however, the question whether the discriminatory sales post-dated the relevant resale competition was not squarely pressed by the defendant, passed upon by the court, or presented by the underlying facts.

Washington Mills (a "media" manufacturer) did *not* defend on the ground that its discounted sales to BCS (the favored purchaser) occurred *only after* BCS had won the competition with DeLong (the disfavored purchaser) to resell that purchased media to Pratt (the end customer). *See id.* at 1190-93, 1201-02. Instead, it argued that "DeLong and BCS were not in functional or geographic competition with one another," based, apparently, on the fact that "BCS was primarily a New England distributor [while] DeLong [was] a southeastern one" and the fact that BCS was making purchases "for a year" *before* DeLong. *See id.* at 1202. The Eleventh Circuit held that this defense "border[ed] on the ridiculous" because "there is no requirement that the two sales be made at precisely the same time or place." *Id.*

Although Feesers emphasizes that ruling, Pet. 17, it is irrelevant here. The Third Circuit in this case did *not* adopt a "precisely the same time" rule. And, conversely, *DeLong*'s rejection of a "requirement that *the two sales* be made at precisely the same time," 990 F.2d at 1202 (emphasis added), says nothing about whether the discounted sale of a product must occur *before* the *competition* to resell that product. The two issues are distinct, since purchasers can buy products at discriminatory prices at *different times in the past* yet engage in *ongoing* competition to resell those products from their *inventory*. Thus, as the Eleventh Circuit's decision did not rule on the specific "competing purchaser" question presented here, it cannot possibly conflict with the Third Circuit's holding.

Furthermore, the facts in *DeLong* did not clearly implicate that question. BCS was competing to resell media that, at least in part, it had *previously* purchased at discriminatory prices. As a "wholesale" "distributor," BCS used "earlier purchases of media" that had been made at discounted prices to "fulfill[]" part of Pratt's "order." *See id.* at 1190, 1192. In other words, although BCS "bid" to make sales to Pratt, it *competed* for those bids, at least in part, using products from its *inventory* that it had *previously* purchased at discriminatory prices. *See id.* at 1192. It thus was a "competing purchaser" under the Third Circuit's holding. Indeed, *regardless* of the timing, because BCS and DeLong were "distributor[s] of media with … business[es] [that were] quite similar," *id.* at 1190, their resale competition would fall outside the Third Circuit's holding, which was "limited to bid markets" that lack sufficient "resemblance" to the paradigm case of generally competing retailers or wholesalers, Pet.App. 181a-82a, 185a n.18; *see also supra* at 15-16.

Finally, to the extent—if any—that *DeLong* has conflicting implications for "bid markets" with the timing presented here, the Eleventh Circuit may reconsider it in light of this Court's subsequent decision in *Volvo Trucks*. For this reason as well, *DeLong* does not present a mature circuit conflict warranting immediate attention.

2. Feesers similarly relies on the statement in *Hartley & Parker, Inc. v. Fl. Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962), that the RPA should not be "given so strict a construction as to require two actual purchases at precisely the same time." *Id.* at 921. To repeat, the Third Circuit adopted no such construction. Nor was its actual holding implicated in *Hartley*. There, as the court explained, the disfavored purchaser had ceased purchasing, but still

possessed "substantial stock on hand" that it had purchased at discriminatory prices and was competing with the favored purchaser to resell. *Id.* In other words, although the initial sales occurred at different times, the discriminatory sale still occurred *before* the resale competition, and so the Third Circuit's "competing purchasers" rule was satisfied. Indeed, the Fifth Circuit in *Hartley* plainly did not reject the Third Circuit's "competing purchaser" rule, given that the Fifth Circuit later expounded that rule in *M.C. Mfg.* *See infra* at 23-24.

3. Feesers also asserts that "circuits have routinely upheld findings of competitive injury under the *Morton Salt* test without imposing a timing requirement." Pet. 15-16, 18-19. But none of the cited cases was analyzing competition that had concluded *before* the discriminatory sales occurred, let alone in a "bid market" of the nature the Third Circuit identified here. Consequently, as Feesers tacitly concedes, none of these boilerplate *Morton Salt* cases *expressly holds* that a temporal connection is *not* required in such circumstances.

Instead, Feesers essentially argues that those cases must have *implicitly* rejected a temporal requirement, because they lack any explicit reference to its existence. But the negative inference that Feesers draws is wrong. The Third Circuit's "competing purchaser" rule is "not new," but rather is "inherent" in the "combined effect" of the well-settled "two purchaser and competitive injury requirements." Pet.App. 174a, 184a. As the court emphasized, this Court itself has repeatedly described *Morton Salt* as requiring "competing purchaser[s]." *Id.* 174a (citing *Falls City*, 460 U.S. at

435; *Volvo Trucks*, 546 U.S. at 179). This case simply presents the infrequently occurring question whether a purchaser is a "competing purchaser" with respect to a differentially priced purchase made after competition in a "bid market" is already over.

Feesers' negative inference replicates the error this Court corrected in *Volvo Trucks*. There, the Eighth Circuit had upheld liability after mechanically applying the RPA elements *seriatim*—i.e., concluding that Reeder was a purchaser, that it purchased at higher prices than other purchasers, and that, over time, the relative price discrimination injured its ability to compete with those favored purchasers. *Volvo Trucks*, 546 U.S. at 173-74. But this Court reversed, holding that the elements are *inter-related*: Reeder was required to introduce evidence that it "compete[d] with beneficiaries of the alleged discrimination *for the same customer*," not just that discrimination in *non-competing* sales generally weakened its business and thereby impaired its ability to compete against purchasers in *head-to-head* competitions that were themselves *non-discriminatory*. *See id.* at 178-79. This Court was well aware that the standard recitation of the RPA elements does not contain the explicit requirement that the price discrimination identified and the competition affected must pertain to the "same customer." *See id.* at 176-77; *id.* at 185-86 (Stevens, J., dissenting). But it held that that such a nexus was nonetheless inherent in the concept of "*competing purchasers*." *See id.* at 179. Likewise, here, the question is whether that nexus also requires that "bid market" competition be ongoing at the time of the discriminatory purchases.

4. Finally, Feesers cites a handful of cases that confirm the RPA's application to non-retail competition. Pet. 19-20. But the Third Circuit did not hold otherwise, and Feesers does not even suggest that any of these cases involved non-retail competition that concluded *before* the differentially priced sales were made, let alone that such timing was present in a "bid market" of the nature here.

B. Feesers further errs by claiming that, "[u]ntil now, no court of appeals" has adopted a "timing of competition" requirement like the one adopted below. Pet. 15. As the Third Circuit recognized, two past cases have presented similar facts, and both rejected RPA liability. Pet.App. 172a-86a.

1. The first is the Fifth Circuit's 1975 decision in *M.C. Mfg.* There, "Universal" and "H/R" both manufactured a type of military hardware known as a "lifting plug" for sale to the federal government. 517 F.2d at 1061. To manufacture a lifting plug, both companies would purchase from Texas Foundries ("TF") an "unfinished plug casting," which was "a basic casting made by a foundry [that] ha[d] not been machined and threaded into its final form as a lifting plug." *Id.* at 1061 n.2. Critically, however, both companies purchased unfinished plug castings from TF only *after* they had won a specific government contract for lifting plugs. *Id.* at 1067 & n.17. Universal alleged an RPA violation because: (1) TF quoted a lower unfinished-plug price to H/R than to Universal for a government contract over which the two competed; (2) TF actually sold the plugs to H/R at that lower price when H/R won the contract; and (3) TF sold unfinished plugs to Universal at the higher price for a different

government contract. *See id.* at 1061-62, 1066-67. The Fifth Circuit held that these facts could not support competitive injury. *Id.* at 1066-67.

It reasoned that, although "Universal and H/R were competitive bidders on the [second] contract," "[t]hey could not be … competitive purchasers as required by the Act[,] either under their respective separate contracts or under both." *Id.* at 1067. As it explained, "[e]ach contract represented a separate, distinct market open only to a single producer. …The very nature of these *mutually exclusive commitments* in the respective contracts meant that Universal and H/R could not have been *'in competition' with respect to their separate purchases* from [TF] pursuant to the government contracts." *Id.* (emphases added).

2. In 2008, the Third Circuit applied the same rule in *Toledo Mack*. There, the plaintiff, a Mack Truck dealer, argued that the manufacturer ("Mack") violated the RPA by offering less favorable discounts (called "sales assistance") to the plaintiff than to other dealers when the dealers were formulating bids to sell trucks to prospective consumers. 530 F.3d at 227-28. Partly relying on *M.C. Mfg.*, the court rejected the argument. It acknowledged that "Mack dealers may compete with one another by bidding against each other for the same deal, and the amount of sales assistance Mack offers to each dealer may well determine whether a customer chooses to accept a bid from one Mack dealer or another." *Id.* at 228. Nonetheless, the court found it dispositive that "only a dealer whose bid is accepted by a customer will actually buy a truck from Mack." *Id.* Consequently, as the Third Circuit reaffirmed here,

the dealers were not "competing purchaser[s]." Pet.App. 174a.

3. The Third Circuit heavily relied on *M.C. Mfg.* and *Toledo Mack*, but Feesers never discusses, let alone distinguishes, them. Yet these cases, separated by more than *three decades*, are important for three reasons: *first*, they confirm the Third Circuit's holding is consistent with the apposite RPA precedent; *second*, they demonstrate the uniqueness of such timing in RPA cases; and *third*, they belie Feesers' assertion that the decision below will open the floodgates to manipulative timing.

III. THE ALLEGED CONFLICTS WITH THIS COURT'S DECISIONS ARE ILLUSORY

A. None of this Court's cases presented competition with the same "nature" and "timing" analyzed in the decision below, Pet.App. 156a-57a, 179a, 185a n.18, save for a single exception *supporting* that decision.

Although Feesers alleges conflicts with *Morton Salt*, *Texaco*, and *Falls City*, those cases did not involve discriminatory product sales that occurred *only after* the resale competition for those products had ended, let alone "bid markets" with such timing. Pet. 21-23. This Court's *only* RPA case presenting such circumstances is *Volvo Trucks*.

There, Reeder presented "two instances" in which it had competed "head to head" with another Volvo dealer to make a sale of custom-built trucks, such that a discriminatorily priced sale would not have occurred until *after* the favored purchaser won the end-customer's bid. *Volvo Trucks*, 546 U.S. at 179-80. Volvo argued that the timing of any such sale meant there would be no "discrimination between different *purchasers*." *Id.* at 180 (internal quotation marks omitted). This Court held that, due to insufficient evidence of discrimination with respect to those two instances, it "need not decide" whether the RPA "reach[es] markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory." *Id.*

This Court could have easily disposed of that "timing" question if it were truly answered by "sixty years of this Court's precedents concerning the requirement of competitive injury in a price discrimination case." Pet. 21 (capitalization altered). Indeed, although this Court technically left the question open, its opinion strongly signals that it *agreed* with Volvo: "[t]he [RPA] centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product[s]," which "ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process." *See Volvo Trucks*, 546 U.S. at 169-70; *see also id.* at 178-79 (holding that even price discrimination causing injury to "competitors" is insufficient when that injury does not result from head-to-head competition to resell products purchased at different prices).

B. Because the remainder of this Court's cases are inapposite, Feesers generates illusory conflicts by mischaracterizing their scope.

1. Feesers primarily argues that the Third Circuit's "timing exception" conflicts with *Morton Salt*'s statement that a plaintiff "'*need only prove* that a seller had charged one purchaser a higher price for like goods than he had charged one or more

of the purchaser's competitors.'" Pet. 21-22 (quoting *Morton Salt*, 334 U.S. at 45; emphasis added by Feesers). Feesers thereby repeats the errors it made with respect to the decisions of courts of appeals containing boilerplate recitations of the *Morton Salt* test: (1) *Morton Salt* had no occasion to pass on the timing issue; (2) the "purchaser's competitors" language in *Morton Salt* is consistent with the Third Circuit's "competing purchasers" rule; and (3) Feesers' interpretation of the "purchaser's competitors" language is inconsistent with *Volvo Trucks*. *See supra* at 21-22.

2. Feesers additionally claims that the Third Circuit's "timing requirement" is irreconcilable with this Court's tertiary-line cases, because the discriminatory purchases there were not "simultaneous" with the "remote" injury that occurred when downstream repurchasers later competed to resell. Pet. at 23-24. But that conflict is of Feesers' own making, because the Third Circuit did not require simultaneity. The *actual* holding below is perfectly consistent with tertiary-line injury: when the discriminatory sales occur *before* the downstream repurchasers compete to resell those products, *see, e.g.*, *Falls City*, 460 U.S. at 436, the downstream sellers are "competing [re]purchaser[s]" who fall outside the Third Circuit's holding here, Pet.App. 174a (citing *Falls City*, 460 U.S. at 435).

3. Feesers also argues that, "[b]y ignoring the contemporaneous purchases by Feesers and Sysco and focusing instead on the timing of purchases for specific customers by Sodexho …, the Third Circuit has created a timing rule that is flatly incompatible with *Texaco*." Pet. at 25-26. But the

Third Circuit did not ignore the contemporaneous purchases by Sysco. It simply recognized that those purchases are initially made *at the same price* as Feesers and become *discriminatory* only if and when Sysco resells to a Sodexo-managed institution and receives the deviated billback from MFI—i.e., after the alleged "competition" for that institution's management decision is *finished*. *See* Pet.App. 158a-59a, 178a, 181a-82a; *see also supra* at 9-10 & n.2, 17-18.

Nothing in *Texaco* foreclosed the Third Circuit from characterizing the timing of the discriminatory sales in this fashion, as *Texaco* did not involve deviated billbacks or timing questions *at all*. Rather, it involved *contemporaneous* price discrimination between distributors and direct-purchasing retailers who competed with the distributors' retail customers. *See Texaco*, 496 U.S. at 546-51. The issue was whether the discrimination could be *justified* as a functional discount for wholesalers, and this Court held that, on the evidence there, the putative wholesaler discount was "gratuitous" as it was not "reasonable reimbursement" for performing the wholesaler function. *See id.* at 556, 562-67. *Texaco* thus has nothing to do with the *timing* of MFI's sales to Sysco.

4. Finally, Feesers contends that, by excluding "non-retail industries like food distribution" from the reach of the RPA, the Third Circuit's holding conflicts with this Court's rejection of judicially created exemptions to the RPA. Pet. 29-32. Once again, however, the conflict is in Feesers' imagination, for the Third Circuit did not foreclose the application of the RPA to "non-retail" industries.

Moreover, regardless of the *scope* of the Third Circuit's holding, it was not an *exemption* from the RPA, but an *interpretation* of the RPA's text and precedent. Pet.App. 168a-86a. In seeking an interpretation consistent with the RPA's purpose and place in federal antitrust policy, *see id.* 166a-67a, 181a-82a, the Third Circuit faithfully followed this Court's repeated "caution[] against" "constructions" of the RPA that "extend beyond [its] prohibitions … [and thus] give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Volvo Trucks*, 546 U.S. at 180-81 (citing multiple cases).

IV. THIS CASE IS A POOR VEHICLE TO CONSIDER THE RELEVANCE OF TIMING TO COMPETITIVE INJURY UNDER THE RPA

As discussed above, the Third Circuit carefully limited its "timing" holding based on the unusual "nature" of the alleged competition between Feesers and Sodexo. For that reason alone, this case is a bad vehicle to generally determine whether competitive injury exists under the RPA where discriminatory product sales occur only after the resale competition has concluded. More fundamentally, however, this case is a wholly unsuitable vehicle to consider that question, because, under a proper legal construction of the RPA, Feesers and Sodexo do not compete *at all* and MFI's discount for Sodexo's clients is too *insubstantial* to trigger the *Morton Salt* inference.

A. Because the possibility of "injury to competition" in this case "is logically limited by the necessity that the purchasers [or their customers] be competitors in the first place," *Godfrey v. Pulitzer Publ'g Co.*, 276 F.3d 405, 410 (8th Cir. 2002), the existence of "actual competition" is "predicate to an intelligent resolution of the question presented," *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006). And that is particularly true since the Third Circuit's timing rule was informed by the peculiar nature of the so-called "competition." Pet.App. 181a-82a. Thus, this Court would never reach the timing issues discussed above, for its inquiry would end upon its determination that RPA "competition" is absent here.

1. The Third Circuit acknowledged that, for "actual competition" to exist between two purchasers (or their customers), they must "in *economic reality* [be] acting on the *same distribution level*" to "compete to resell [the] products [purchased] to the same group of customers." Pet.App. 16a-17a (emphases added). This requirement is well established. *See, e.g.*, *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963) ("Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned."); *Best Brands*, 842 F.2d at 584-85; *White Indus., Inc. v. Cessna Aircraft Co.*, 845 F.2d 1497, 1498-1500 (8th Cir. 1988). Yet, here, the record indisputably establishes that, even when an institution is considering whether to self-operate, Feesers and Sodexo are "in economic reality" seeking to perform functions on entirely different levels of the distribution chain and thus are not in "actual competition" to resell MFI products.

Because Sodexo is a management company that performs a facility-operator's functions, it does not perform the wholesale distribution function, but merely arranges for a distributor to do so. *See supra* at 7. It normally uses one of the prime distributors that won a separate bidding competition for that role, but will use another distributor, *including Feesers*, if its client-institution requests. *See id.* at 8. Accordingly, the economic reality is that Sodexo steps into the shoes of its client institutions as facility operator. It becomes a *customer* of distributors like Feesers, not their *competitor*, and thereby acts on a different level of the supply chain.

Of course, selecting Sodexo as a facility's operator may *adversely affect the likelihood* that Feesers will be chosen as the facility's distributor, because Feesers lost the competition with *other distributors* to be Sodexo's prime distributor. *See id.* at 8-9. But it is an economic fallacy to leap from the fact that a change in operator alters the competitive landscape *among* distributors to the conclusion that the new operator itself competes *against* the displaced distributors whom the old operator viewed more favorably. Consider, for example, a law firm that regularly uses one printing company for legal briefs, and a client whose in-house legal department regularly uses a different printing company. Under Feesers' erroneous logic, the law firm and the client's preferred printer are in competition *with each other* just because the printer will lose business when the client decides to hire the law firm to write a brief rather than to write the brief itself.

Feesers' injury thus derives from its inability to compete, not with Sodexo, but with the other distributors that made better bids to be Sodexo's prime distributor. Feesers' argument is essentially that MFI cannot discount its prices for Sodexo's clients because such pricing may have adverse collateral consequences for Feesers. But this Court has "resist[ed]" such RPA "interpretation[s]," which are "geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo Trucks*, 546 U.S. at 181.

2. The Third Circuit actually *agreed* with the foregoing argument, expressing its "view" that, "assuming … Sodexo replace[s] Feesers with another distributor, Feesers's competitor would be the other distributor, not Sodexo," which "itself is not a distributor." Pet.App. 161a & n.6. But the Third Circuit viewed the district court's "highly questionable" contrary conclusion as an "inferred [finding of] fact" that it could not disturb. *Id.*

In reality, the district court made an erroneous *legal conclusion*. It acknowledged the indisputable fact that Sodexo merely "arrange[s] for" distribution and "does not directly perform distribution for its clients." *Id.* 62a-63a. The court simply made the "conclusion[] of law," *id.* 62a (capitalization altered), that this fact was "of no significance," for that fact supposedly demonstrated merely that Sodexo "chooses to subcontract the physical delivery of food to a distributor … rather than perform this function itself," *id.* 63a. The court reasoned that this case therefore falls within the legal principle that the RPA "should not be construed" to "allow price discriminators to avoid [its] sanctions … by the simple expedient of adding an additional link in the supply chain." *Id.* (citing *Perkins v. Std. Oil Co. of Cal.*, 395 U.S. 642, 647 (1969), and *Texaco*, 496 U.S. at 567 n.26).

The district court's reliance on *Perkins* and *Texaco* was legally flawed. Those cases hold that, when two companies are *actually competing* at the same distribution level in economic reality, *artificial and economically irrelevant* links cannot be inserted elsewhere in the supply chain to avoid RPA liability. *See Perkins*, 395 U.S. at 644-47; *Texaco*, 496 U.S. at 546-47, 556, 562-67. Here, however, Sodexo has not added a link to the distribution chain; it merely has hired a competitor of Feesers at the link at which Feesers operates and Sodexo does not.

Accordingly, the Third Circuit mistakenly characterized the absence of competition as a dubious factual finding rather than an erroneous legal conclusion. In any event, however characterized, this threshold ruling is so manifestly erroneous that it is a serious vehicle problem.

B. Furthermore, given that this Court prefers to "decide[] questions of public importance … in the context of meaningful litigation," it refrains from deciding such questions where an obvious alternative ground for affirmance would render its decision academic for the litigants, *see The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959), including where the alternate ground was pressed but not passed upon below, *see Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 130 S. Ct. 584, 595-96 (2009). And here, among several such grounds, *see supra* at 12; Pet.App. 157a, the district court committed patent error in its application of the *Morton Salt* inference.

The district court found MFI's price discounts for Sodexo's clients to be "substantial" under *Morton Salt*, even though it is undisputed that those prices disparities, *on their own*, are too insignificant to affect the identified "competition" over an institution's operational-management decision, which is based on myriad costs (and other factors) besides the relative pricing of MFI products. *See supra* at 11-12. The court believed that *Morton Salt* required disregarding the absence of an MFI-specific effect on the "competition" alleged. Pet.App. 87a-88a. But *Morton Salt* did not so hold, nor did it have any occasion to do so. There, both wholesalers and retailers competed to resell the manufacturer's differentially priced products *individually* to their respective customers: that form of competition was *directly* affected by product-specific discriminatory pricing, because it was not *inextricably intertwined* with the prices of other manufacturers' products. *See* 334 U.S. at 48-49.

However, where, as here, the competition allegedly affected involves an *integrated* product or package of which the differentially priced product is merely a *component*, courts applying *Morton Salt* have refused to infer competitive injury if the differential pricing is relatively insignificant to the overall price of the integrated good, regardless of whether the price disparity for the specific component is large. The leading case is *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 792 (7th Cir. 1951); *see also, e.g.*, *Marty's Floor Covering Co. v. GAF Corp.*, 604 F.2d 266, 270 (4th Cir. 1979). Notably, in *Minneapolis-Honeywell*, the FTC misinterpreted *Morton Salt* just as the district court did here, but, after being reversed by the Seventh Circuit, the FTC has acquiesced in that holding since at least 1964. *See In re Quaker Oats Co.*, 66 F.T.C. 1131, 1191-92 (1964). Indeed, until the misapplication of *Morton Salt* by the district court below, the *Minneapolis-Honeywell* rule had been settled law for decades. *See* F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 181, 186-87 (1962). Feesers thus has no realistic hope of reversing the Third Circuit's judgment.

C. Accordingly, even were this Court otherwise interested in whether the timing of discriminatory sales is relevant to the existence of competitive injury under the RPA—notwithstanding the absence of a genuine conflict in authority—this Court should at the very least wait for a case where the antecedent question of actual competition is undisputed and where resolution of the timing question would be material for the litigants.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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