IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

THE CLOROX COMPANY and
THE CLOROX SALES COMPANY,

Defendants.

OPINION AND ORDER

14-cv-734-slc

In this antitrust case, plaintiff Woodman's Food Market, Inc. contends that defendants The Clorox Company and The Clorox Sales Company ("Clorox") violated the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (d) and (e) and § 1 of the Sherman Act by offering to sell "large pack" products only to "club" retailers such as Costco and Sam's Club and not "general market" stores like Woodman's. Clorox has filed three motions to dismiss in this case. I have denied two, and the third is pending before the court:

- On February 2, 2015, I denied Clorox's motion to dismiss the Robinson-Patman Act claims, finding that even though Clorox legally may refuse to deal with a particular retailer, the use of special packaging and package sizes to benefit only certain customers stated a claim sufficient to survive front-end dismissal. **Dkt. 50**.

- On April 27, 2015, I denied Clorox's motion to dismiss for lack of subject matter jurisdiction, determining that even though Clorox discontinued its dealings with Woodman's, Woodman's may still qualify as a purchaser with standing under the Act because it continues to purchase Clorox products through wholesalers. **Dkt. 77**.

- Clorox's third motion to dismiss, dkt. 84, challenges Woodman's newly-added Sherman Act claim. This will be the subject of a separate order.

Clorox has moved to certify the February 2 and April 27, 2015 orders for interlocutory appeal under 28 U.S.C. § 1292(b). **Dkt. 89**. I am GRANTING Clorox's motion for the reasons stated below.

OPINION

Under 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal if the order (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." This type of appeal is discretionary and should "be used sparingly." *Asher v. Baxter International Inc.*, 505 F.3d 736, 741 (7th Cir. 2007). *See also Lu Junhong v. Boeing Co.*, ___ F.3d ___, 2015 WL 4097738, at *4 (7th Cir. July 8, 2015) (court of appeals reviews district court's entire order rather than particular issues presented). An interlocutory appeal does not stay proceedings in the district court unless the district judge or the court of appeals orders a stay. *Espenscheid v. DirectSat USA, LLC*, 2011 WL 2132975, at *1 (W.D. Wis. May 27, 2011) (citing § 1292(b)).

Woodman's does not dispute that the appeal would involve questions of law, which the Court of Appeals for the Seventh Circuit has noted typically "reference a question of the meaning of a statutory or constitutional provision, regulation or common law doctrine." *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000). The questions raised in both motions to dismiss required the court to determine the scope and meaning of the price discrimination provisions in 15 U.S.C. §§ 13(d) and (e): (1) whether large-sized products constitute promotional services or facilities; and (2) whether a retailer who buys solely from a wholesaler can be defined as a purchaser. Woodman's argues that neither question is controlling.

A question of law "is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district-court proceedings." 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3930, at p. 496 (2012). Further, certification is appropriate "even though [the] decision might not lead to reversal on appeal, if interlocutory

reversal might save time for the district court, and time and expense for the litigants." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (quoting *id.* at p. 159-60 (1977)). *See also In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 605 (7th Cir. 1997) ("fact that [issue] may in the end not prove decisive does not show that the district judge and we were wrong to certify his ruling on the issue under 28 U.S.C. § 1292(b)").

A reversal from the court of appeals on either of my decisions likely would dispose of Woodman's Robinson-Patman Act claims, requiring reversal of any final judgment in Woodman's favor. Although Woodman's contends that the February 2015 order on large-size packaging addresses only two of its seven claims for relief, all of Woodman's claims relate to the same alleged course of conduct on the part of Clorox: Clorox's decision not to sell Woodman's certain large-sized products. If the court of appeals disagrees with my decision that large-size packages can constitute a promotional service under §§ 13(d) and (e), then all of Woodman's claims for declaratory and injunctive relief under those subsections go away. Similarly, if the court of appeals determines that Woodman's does not qualify as a purchaser under subsections (d) and (e), Woodman's would not have standing to bring any claim under the Robinson-Patman Act.

With respect to the standing question, Woodman's argues that because its remaining claim under § 1 of the Sherman Act entitles it to a court order "enjoining Clorox from refusing to sell Clorox products directly to Woodman's," it may again become a direct purchaser with standing to sue under the Robinson-Patman Act. Dkt. 93 at 12. As Clorox points out, however, it is unclear what authority this court has to order Clorox to resume direct sales to Woodman's as a remedy to a § 1 violation.[1] Woodman's certainly has not cited any authority for such a measure. Although the court may be able to order Clorox and its alleged co-conspirators to stop

[1] Section 1 of the Sherman Act prohibits a contract, combination or conspiracy between two or more companies that exerts an unreasonable restraint on trade or commerce.

specific conduct restraining trade or commerce, ordering Clorox to resume and continue its business relationship with Woodman's is another matter. I also question Woodman's unsupported reasoning that a court-ordered *remedy* under the Sherman Act could provide it the standing necessary to bring suit under the Robinson-Patman Act.

In any event, even if Woodman's has a viable Sherman Act claim[2] and eventually obtains an injunction of some sort, an interlocutory appeal of the February and April orders would save time and expense for the court and the parties by demarcating–and likely narrowing–the playing field for the court and the parties. For similar reasons, resolving the promotional service and standing questions would materially advance the litigation by eliminating certain claims or at least by streamlining the issues. 16 Wright, Miller & Cooper § 3930 at p. 505 (requirement of controlling question of law closely related to requirement that appeal materially advance ultimate termination of litigation).

Finally, I am persuaded that there are substantial grounds for differences of opinion with respect to both of my orders. In the February 2015 order, I acknowledged that no federal court has addressed whether a special package size constitutes a promotional service under subsection (d) or (e) of the act. Dkt. 50 at 6-7. In the absence of case law, Woodman's relied on a pair of old-but-never-revoked administrative decisions and a series of FTC guidelines. Although I was persuaded by Woodman's reasoning, the question is by no means settled in this circuit. *See Intercon Solutions, Inc. v. Basel Action Network*, ___ F.3d ___, 2015 WL 3941463, at *2 (7th Cir. June 29, 2015) (accepting interlocutory appeal where district court recognized that it had taken sides on important and debatable issue that was open in Seventh Circuit); *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 626-27 (7th Cir. 2010) (certifying interlocutory appeal related to pleading standards in antitrust litigation because it presented novel issue and scope of law was

[2] Clorox has challenged the basis of Woodman's Sherman Act claim in its most recently-filed motion to dismiss.

unsettled). There is a similar dearth of case law related to the issue of whether purchasers include retailers who purchase from wholesalers. Although I found in the April 2015 order that the Supreme Court in *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) defined the term "customer" as including retailers who buy through wholesalers, only one federal appellate court appears to have examined that definition in the past 47 years, *Lewis v. Philip Morris Inc.*, 355 F.3d 515 (6th Cir. 2004).

Considering all of these concerns together, it makes sense to certify this court's February and April decisions for interlocutory review. Because neither party has requested a stay, I have not considered whether this would be appropriate.

ORDER

IT IS ORDERED that defendant Clorox motion to certify this court's February 2 and April 27, 2015 orders for interlocutory appeal under 28 U.S.C. § 1292(b) is GRANTED.

Entered this 17th day of July, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge