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

Woodman's Food Market, Inc., Plaintiff, v. The Clorox Company, et al., Defendants.	Civil Action No. 14–CV–734

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER CERTIFYING FOR INTERLOCUTORY APPEAL ITS ORDERS DENYING DEFENDANTS' MOTIONS TO DISMISS

Defendants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") submit this Brief in Opposition to the Motion for Reconsideration filed by Plaintiff Woodman's Food Market, Inc. ("Plaintiff"). Plaintiff's motion should be denied because the Court correctly determined that its two orders denying Clorox's motions to dismiss satisfy all the criteria for interlocutory appeal prescribed by 28 U.S.C. § 1292(b).

Plaintiff's two arguments as to why the Court should now reverse its decision are wrong as a matter of law. First, all of Plaintiff's Robinson-Patman Act claims are covered by the orders that the Court has certified for interlocutory appeal. Second, the Court's order will not prejudice Plaintiff with respect to its Sherman Act claim because the Court lacks the authority under the Sherman Act to impose the remedy that Plaintiff wants—a permanent injunction that requires Clorox to sell Plaintiff all of its products in perpetuity. Simply put, the Sherman Act allows suppliers to choose their customers.

I. Plaintiff Has No Other Claim Under The Robinson-Patman Act

Plaintiff's motion reiterates Plaintiff's belief that its Robinson-Patman Act claims extend beyond the two pure questions of statutory interpretation that the Court already certified for interlocutory appeal. *See* Dkt. 102 at 2–4. In fact, all of its claims derive from one or both of those two questions: (1) Are large-size packages a promotional service? and (2) Is Plaintiff still a "purchaser" with standing to litigate a Section 2(e) claim even after Clorox terminated the parties' business relationship?

Plaintiff does not have an independent claim that Clorox must provide it certain notices about promotional services. The supposed notice requirement alleged by Plaintiff applies only for a manufacturer's "customers." *Id.* at 4 (quoting 79 Fed. Reg. 58245, 58255 (Sept. 29, 2014)). But the question of whether Plaintiff is a customer (or "purchaser") is pending before the Court of Appeals. If the Court of Appeals resolves that question in Clorox's favor, then the notice requirement will not apply. Further, if the Court of Appeals determines that Plaintiff is not a "purchaser," Plaintiff will not have standing to bring *any* claim at all under Section 2(e).[1] *See* Dkt. 100 at 3 ("[I]f 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.").

II. Plaintiff Still Has Not Cited Any Authority That Supports Its Desired Remedy Under The Sherman Act

Plaintiff is also incorrect that the Court has authority under the Sherman Act to order Clorox perpetually to sell Plaintiff the products that it wants to purchase. As previously briefed, *see* Dkt. 85 at 12 n.7, only in exceptionally rare Sherman Act cases can a court order one

[1] For example, Plaintiff has no standing to claim "that there is no valid basis" for the creation by Clorox of a "club channel," Dkt. 68-1, at ¶ 84, if the Court of Appeals determines that Plaintiff is not a "purchaser" under Section 2(e). In any event, that so-called "claim" is nothing more than a request for a particular form of declaratory relief.

company to do business with another. The "essential facilities doctrine" applies only when a *monopolist* denies a *necessary* product or service to a *competitor*. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408–11 (2004); *Midwest Gas Servs., Inc. v. Ind. Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003). Plaintiff has never alleged that Clorox is a monopolist (nor could it, due to the substantial competition in the markets for the goods that Clorox produces). And Clorox and Plaintiff are not competitors. Even if Plaintiff proved a Sherman Act violation, which it will not, the circumstances necessary to bring an essential facilities claim are not present here.

Despite the Court's finding that Plaintiff "certainly has not cited any authority" for the remedies it seeks under Section 1 of the Sherman Act, Dkt. 100 at 3, Plaintiff tries again. Three of the cases that it cites have nothing to do with Sherman Act remedies. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.* held that "the District Court's rejection of *per se* analysis in this case was correct," despite a *horizontal* agreement among competitors. 472 U.S. 284, 298 (1985). *Klor's, Inc. v. Broadway-Hale Stores, Inc.* "did not address the relief to which the plaintiff was entitled," as Plaintiff notes. Dkt. 102 at 11–12; *see* 359 U.S. 207, 214 (1959) (remanding case for trial). Plaintiff makes vague reference to a district court order that went to the Supreme Court on appeal in *Times-Picayune Publishing Co. v. United States*, but the Court *reversed* that order. 345 U.S. 594, 628 (1953).

Plaintiff's reliance on *Lorain Journal Co. v. United States* is also misplaced. 342 U.S. 143, 157 (1951). There, the defendant had refused to print advertisements if the advertiser engaged in advertising through any other medium. The injunction merely barred the defendant from "refusing to publish any advertisement . . . where the reason for such refusal" is that the advertiser also advertised elsewhere. It did not mandate any affirmative conduct, and certainly

did not require a manufacturer to sell a retailer every product and package-size that it manufactures with no end date. Plaintiff cites no case where a court either "requir[ed] that [the defendant] conduct business," Dkt. 102 at 14, or ordered a manufacturer to sell a retailer a product (and certainly not in perpetuity).

CONCLUSION

For these reasons, Clorox respectfully requests that the Court deny Plaintiff's motion for reconsideration.

Respectfully submitted,

Dated: July 30, 2015

s/ Joshua H. Soven

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2015, I caused a copy of the foregoing BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
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