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 ORAL ARGUMENT REQUESTED

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO CERTIFY THE COURT'S ORDERS FOR INTERLOCUTORY APPEAL

Plaintiff's brief in opposition to Clorox's motion to certify the Court's orders for interlocutory appeal makes two things clear: (1) the Court should grant Clorox's motion because each of the required elements of 28 U.S.C. § 1292(b) is satisfied; and (2) Plaintiff wants to litigate this case through trial and will not settle, because its objective is a paradigm shift in the antitrust law that would require all manufacturers to sell every product to every retailer. Indeed, Plaintiff makes clear that obtaining relief from Clorox is no more than a secondary objective. This case is merely Plaintiff's opening salvo in a war of serial litigation attacking what Plaintiff characterizes as "an ever-growing problem" that affects "retailers across the country": "an increasing tide of manufacturers" that are purportedly "violat[ing] the Robinson-Patman Act" by not making every size of every product available to every retailer. Opp. at 18.

But Plaintiff's Robinson-Patman Act claims can leave the starting gate only if *both* of the following pure questions of law are resolved in Plaintiff's favor: (1) Are large-size packages "services or facilities" under Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e)? (2) Does Plaintiff remain a "purchaser" under Section 2(e) even after Clorox ceased all direct

business with it? This Court has ruled on both of these questions, and they satisfy all of the criteria for certification to the Seventh Circuit.

First, Plaintiff does not seriously dispute that reversal on either question will require immediate dismissal of its Robinson-Patman Act claims. Plaintiff's only response—that it seeks various forms of injunctive relief—is beside the point. If there is no violation of law—because the Court of Appeals agrees with Clorox on either of the certified questions—then Plaintiff is not entitled to relief, in *any* form.

Second, there is substantial ground for disagreement on these two legal questions. Plaintiff concedes that an eventual appeal is "likely" because "the litigation has significant ramifications for the larger marketplace." *Id.* at 17. Indeed, it is a virtual certainty that the Seventh Circuit will ultimately resolve the highly contested question whether, *as a matter of law*, a manufacturer must directly (or indirectly through wholesalers) make available large-size packages to any customer that wants them. Plaintiff acknowledges that a "tide of manufacturers" deny this, *id.* at 18, which only confirms the widespread disagreement in the marketplace about Plaintiff's interpretation of the Robinson-Patman Act. Such disagreement is not surprising. The Court's rulings are the first of their kind by any federal court in the 79-year history of the Robinson-Patman Act and, as Plaintiff notes, have sweeping implications for the distribution decisions of countless manufacturers.

Third, Plaintiff's contention that interlocutory appeal will "delay, rather than expedite, the completion of this litigation" is wrong. *Id.* at 10. Plaintiff has always been clear that it seeks a legal ruling that large-size products constitute "services" under Section 2(e). Dkt. 1, at ¶¶ 15, 35. Only Section 2(e) can potentially provide Plaintiff the injunctive relief it seeks. Plaintiff's belated Sherman Act claim—brought only when Clorox terminated the parties' business

relationship—cannot accomplish Plaintiff's objectives. Plaintiff theorizes that success on its Sherman Act claim would result in a court order directing Clorox to sell to Plaintiff, thereby transforming it back into a direct purchaser and a viable Robinson-Patman Act litigant. But a Sherman Act claim requires proving a reduction in competition, something that Plaintiff has effectively disavowed doing. And even if Plaintiff—someday, somehow—proved a violation of the Sherman Act, the Court could not permanently order Clorox (or anyone else) to sell Plaintiff the products that it wants. The antitrust laws do not permit an injunction that would order a manufacturer to permanently do business with a retailer. *See* VII Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1441b, at 34 (3d ed. 2010).

Plaintiff will not be prejudiced by certification of the legal issues. Seven months into the litigation, Plaintiff still has not demonstrated that it has lost a single customer. And Plaintiff has made a point of pleading that it will never be able to prove harm to itself in this case. *See* Dkt. 68, ¶ 68 ("[I]t will be impossible for Woodman's to determine and prove" that customers will buy from its competitors instead).

In short, a certified appeal will certainly expedite, and may well end, this litigation. If the Court of Appeals agrees with Clorox on either certified question, then Plaintiff's Robinson-Patman Act claims fail immediately, along with Plaintiff's goals for this litigation. Conversely, if the Court of Appeals were to uphold both of the Court's rulings, then this litigation would be significantly streamlined and could proceed expeditiously to discovery, briefing, and trial.

I. The Court's Orders Involve Controlling Questions of Law

Clorox moved the Court to certify for review its orders denying Clorox's motions to dismiss, based on two questions: (1) whether large-size packages are a special promotional service under Section 2(e); and (2) whether a retailer remains a "purchaser" under Section 2(e) even if a manufacturer refuses to make any sales to it. *Both* of these legal questions are

controlling—indeed, dispositive—of Plaintiff's Robinson-Patman Act claims in this case. If a large-size product is not a service, then Plaintiff has no claim under Section 2(e), as Clorox's decision not to sell those products is the only alleged violation of Section 2(e). Likewise, if Plaintiff is no longer a "purchaser" under Section 2(e), then Plaintiff cannot satisfy a mandatory element of its Robinson-Patman Act claim.

Plaintiff argues that Clorox's motions to dismiss (and by implication, the Court's orders) address only "two of [Plaintiff's] seven [Robinson-Patman Act] claims." Opp. at 6; *see also id.* at 1–3. This is both inaccurate and irrelevant. Plaintiff's so-called "claims" are requests for various types of injunctive and declaratory relief. Plaintiff has one Robinson-Patman Act claim: that Clorox's decision not to sell Plaintiff certain products violates Section 2(e) of the Robinson-Patman Act. While Plaintiff mentions Section 2(a) in its Amended Complaint, the Court has acknowledged Plaintiff's concession that it is not bringing a Section 2(a) claim. *See* Dkt. 50, at 1 n.1. Plaintiff also mentions Section 2(d), but the Court previously held that Plaintiff's allegations more closely fit a claim under Section 2(e). *Id.* at 6.[1]

No matter how Plaintiff chooses to sub-divide its requests for relief, its cause of action under the Robinson-Patman Act depends on *both* of its legal contentions: (1) that Clorox's large-size packages constitute "services or facilities," and (2) that Plaintiff remains a "purchaser" of Clorox products for purposes of Section 2(e). As the Court correctly recognized, questions of statutory interpretation are "[t]he crux of the parties' dispute." *Id.*; *cf. Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (a question is controlling when it is "serious to the conduct of the litigation, either practically or legally"). If the Court of Appeals disagrees with Plaintiff on

[1] The Court is correct, because a claim under Section 2(d) would require an allegation that Clorox made a payment to its club-store customers, *see* 15 U.S.C. § 13(d), and Plaintiff has never made such an allegation. Regardless, a claim under Section 2(d) would also require legal determinations that Clorox's club-store products are "services or facilities," and that Plaintiff can remain a "customer" even after being terminated by Clorox. *Id.*

either of those two questions, then Plaintiff's *entire* case under the Robinson-Patman Act is over immediately.

II. The Issues For Which Clorox Requests Certification Involve Substantial Ground For Difference Of Opinion

A. Large-Size Packages

Plaintiff's opposition brief confirms, rather than refutes, that there is substantial ground for disagreement about whether large-size products are a service under Section 2(e). First, Plaintiff has previously conceded that the Court's rulings are the first of their kind by a federal court. *See* Opp. at 16 (noting that Plaintiff's cases "may likely be considered dicta, since those cases did not involve package size"). Novelty alone establishes substantial ground for difference of opinion. *Cf. id.* at 6 (a case is suitable for interlocutory review when it "presents one or more difficult and pivotal questions of law not settled by controlling authority") (quoting *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005)). The substantial disagreement is confirmed by the fact that, as Plaintiff notes, Clorox's distribution strategy is widespread. The alternative hypothesis, that thousands of manufacturers are openly flouting clear-cut principles of antitrust law, is not plausible. And the Federal Trade Commission ("FTC" or "Commission") has not brought an enforcement action that supports Plaintiff's reading of Section 2(e) in almost sixty years. Plaintiff asks the Court (and the market) to make the unrealistic assumption that—during one of the most active periods of FTC antitrust enforcement in decades—the Commission is simply turning a blind-eye to widespread violations of the Robinson-Patman Act.

Plaintiff incorrectly argues that there can be no disagreement about the meaning of "services or facilities" because the FTC's *Fred Meyer Guides* include "special packaging or package sizes" as potential promotional services. 79 Fed. Reg. 58245, 58249 (Sept. 29, 2014).

Even assuming that the FTC is correct, there is nothing in the Guidelines to suggest that *all* large package sizes of every product are covered under Section 2(e).

Plaintiff's further contention that there is no disagreement because courts have favorably cited the *Fred Meyer Guides* misses the point. The cases that have interpreted the Guidelines have done so in a manner that is consistent with the plain meaning of the statutory terms "services" and "facilities." No court has departed from the ordinary meaning of those terms to cover package sizes, as this Court has done. There is certainly reasonable disagreement when Plaintiff's interpretation finds no support in the case law and runs counter to forty years of Sherman Act jurisprudence, as well as the Supreme Court's holding in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006), that the courts should interpret the Robinson-Patman Act in a manner that is consistent with the antitrust laws' emphasis on protecting competition, not competitors.

Plaintiff treats two antiquated, administrative decisions—*In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *In re General Foods Corp.*, 52 F.T.C. 798 (1956)—as if they were binding or persuasive authority. Opp. at 10–11. They are neither. *See, e.g.*, Dkt. 42, at 5. Indeed, the FTC apparently no longer relies on them. In 2012, the National Grocers Association (of which Plaintiff is a member) urged the FTC to expand the definition of "special packaging or package sizes" to include large-size packages offered year-round in the normal course of business without any promotional features. Nat'l Grocers Ass'n, Submission No. 563686-00011, (Mar. 1, 2013), at 6, *available at* https://goo.gl/EuFq2l. The FTC rejected this contention and "underscore[d] that special packaging or package sizes are covered *only insofar as* they primarily promote a product's resale," such as "Halloween-themed packaging." 79 Fed. Reg. at 58249 (emphasis added). For this reason as well, there is plainly room for substantial disagreement on this point.

Moreover, to the extent that there is ambiguity about the FTC's position, interlocutory review has the added benefit of providing a venue in which the FTC can clearly explain its position. While the FTC typically does not file amicus submissions in district courts unless invited to do so, the FTC more frequently submits briefs in appellate proceedings. If the FTC's position is (or is not) that a package size sold year-round is a special promotional service, and/or that Section 2(e) effectively precludes a manufacturer from ceasing to do business with a retailer, then appellate litigation will give the Commission the opportunity to say so.

B. Plaintiff's Status As Purchaser

There is also substantial ground for disagreement about the Court's ruling that Plaintiff remained a purchaser under Section 2(e) even after Clorox ceased all direct business with Plaintiff. No court has resolved whether a manufacturer has an obligation under the antitrust laws to guarantee that a retailer receives all the products it desires through a wholesaler, even when the manufacturer has terminated that retailer as a customer. Plaintiff's conclusory assertion that *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), "is controlling law" is unavailing. *See* Opp. at 14. *Fred Meyer* holds that a retailer that purchases from independent wholesalers can constitute a "customer" for purposes of Section 2(d)—which was the provision at issue there. 390 U.S. at 348. The case does not so much as *mention* Section 2(e). Moreover, the Supreme Court's decision did not discuss the present question; the facts in *Fred Meyer* did not involve an attempt to terminate a customer, and thus the case spoke only to a manufacturer's obligations to *existing* customers. Indeed, even if *Fred Meyer* were to apply to this Section 2(e) case, the Supreme Court's long-settled holding in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), would guarantee Clorox the right to terminate Plaintiff, just as Clorox is entitled to terminate any other purchaser of its products. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390,

397 (7th Cir. 2000) (the right to terminate a customer "has received consistent support from the Supreme Court even for large firms").

Plaintiff has a different view about how to harmonize *Colgate* with *Fred Meyer*, Opp. at 14–15, but it cannot claim with a straight face that the issue is sufficiently clear as to not be the subject of substantial difference of opinion. That is especially so given the breathtaking implications of this Court's decision, the practical effect of which is to create an unprecedented, perpetual obligation on manufacturers to make every size of every product available to every retailer that can locate a wholesaler. Such a requirement is contrary to every Supreme Court antitrust decision involving distribution arrangements for the last forty years. *See, e.g.*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (noting that "the antitrust laws are designed primarily to protect interbrand competition"); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.").

III. Interlocutory Appeal Will Either End This Litigation Or Streamline It

Plaintiff repeatedly contends that an interlocutory appeal will "delay, rather than expedite, the completion of this litigation." Opp. at 10; *see also id.* at 7, 13, 18. But Plaintiff never explains how. Plaintiff does not contend that there are any factual issues that would prevent the Court of Appeals from resolving its Robinson-Patman Act claims immediately. In fact, Plaintiff all-but concedes that the *ultimate* termination of this litigation will require an appeal on the two legal issues for which Clorox requests certification. *See id.* at 17. As explained above, if the Court of Appeals agrees with Clorox that its club-store products are not "services or facilities," then Plaintiff will not have five remaining claims for relief, *contra id.* at 7, it will have *zero* remaining claims for relief under the Robinson-Patman Act. Such a holding by the Seventh Circuit would certainly advance this litigation, and may well end it entirely. All

that will remain is Plaintiff's purely tactical Sherman Act claim, which will inevitably fail because Plaintiff cannot prove it and because it cannot yield Plaintiff's desired remedy. The record is clear that Plaintiff amended its complaint to allege a Sherman Act claim only when it became concerned that its Robinson-Patman Act case had become moot. *Cf.* Dkt. 37, at 15 (noting Plaintiff's view that "Clorox could refuse to do business with Woodman's altogether, but it has not done so").

To prove the Sherman Act violation that Plaintiff alleges—a conspiracy between Clorox and Club Stores in restraint of trade—Plaintiff must prove that Clorox's actions reduced competition. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). But as the Court recently held in denying Plaintiff's motion for a preliminary injunction, seven months into this litigation, Plaintiff has not shown that it has lost a single customer. *See* Dkt. 91, at 8 (noting that Plaintiff's submissions appear to indicate that "Woodman's customers are not going anywhere."). More generally, it is implausible that Plaintiff could ever prove that Clorox's decision to discontinue selling eleven products to Plaintiff could produce the required market-wide reduction in competition.

Moreover, even if Plaintiff proved an illegal conspiracy, the only possible remedy would be an order to abandon the conspiracy, which would not prevent Clorox from once again *unilaterally* terminating Plaintiff as a customer. The antitrust laws do not permit an injunction that would order a manufacturer permanently to do business with a retailer. *See* Antitrust Law, *supra* ¶ 1441b, at 34 ("[T]o ask a court to create a duty [for a manufacturer] to name new deals [for its former dealer] interferes significantly with the manufacturer's prerogative to name those terms as well as to determine the optimal number, spacing, and location of [its] dealers."). In

sum, the driver of this case is the Robinson-Patman Act claim, which is all the more reason to resolve it now in the Court of Appeals.

This litigation will benefit from taking the inevitable appeal now, so that the Seventh Circuit can either end this case or determine authoritatively (for the first time) its scope moving forward. Even if the Court of Appeals agrees with Plaintiff, the court's ruling will define the contours of the Robinson-Patman Act and a manufacturer's duties to terminated retailers, thereby narrowing the issues that the parties and the Court must address in discovery, motions practice, and trial. Expedited resolution of the legal questions in the Court of Appeals will also benefit the "larger marketplace" for which, as Plaintiff concedes, this case has "significant ramifications." Opp. at 17. Plaintiff has called into question the legality of numerous manufacturers' distribution policies, and those manufacturers deserve a chance to have the Seventh Circuit interpret the Robinson-Patman Act as soon as possible.

CONCLUSION

For these reasons and those stated in Clorox's memorandum in support of its motion, Clorox respectfully requests that the Court enter revised orders on Clorox's motions to dismiss certifying that those orders involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the orders may materially advance the ultimate termination of the litigation.

Respectfully submitted,

Dated: June 12, 2015

s/ Joshua H. Soven

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2015, I caused a copy of the foregoing REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO CERTIFY THE COURT'S ORDERS FOR INTERLOCUTORY APPEAL to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
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