

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.

Civil Action No. 14–CV–734

**DEFENDANTS’ BRIEF IN OPPOSITION TO PLAINTIFF’S
MOTION FOR LEAVE TO AMEND COMPLAINT**

Defendants The Clorox Company and The Clorox Sales Company (collectively, “Clorox”) respectfully submit this Brief in Opposition to the Motion for Leave to Amend filed by Plaintiff Woodman’s Food Market, Inc. (“Plaintiff”). Plaintiff may not amend its complaint because this Court no longer has subject matter jurisdiction. The case is moot, and it became moot nearly a month prior to Plaintiff’s motion.¹

As set forth in Clorox’s motion to dismiss the complaint as moot, this case became moot—thereby depriving the Court of subject matter jurisdiction—on February 24, 2015, when Clorox unilaterally elected to no longer do business with Plaintiff. That same day, Clorox moved to dismiss the case pursuant to the Court’s holding that “Clorox may refuse to deal” with

¹ On Tuesday, March 17, 2015, Plaintiff’s counsel informed Clorox’s counsel that he intended to file an amended complaint that day. Clorox requested that Plaintiff delay filing the amended complaint so that the parties could again try to resolve their differences through a mutually acceptable agreement. Plaintiff’s counsel responded that he would agree to delay filing the amended complaint only if Clorox agreed not object to the proposed amended complaint on the ground of timeliness. *See* Fed. R. Civ. Pro. 15(a). Clorox agreed to Plaintiff’s proposal because it believed that the interests of both parties would be best served by a reasonable settlement. Unfortunately, the parties were not able to resolve the matter. If the Court grants Plaintiff leave to amend its complaint, Clorox reserves all its rights to respond, including the right to file a motion to dismiss on the ground that the amended complaint fails to state a claim for relief.

Plaintiff. Op. & Order Denying Defs.’ Mot. to Dismiss 10. The Court’s holding is consistent with the well-settled law that there can be no claim under the Robinson-Patman Act when a supplier refuses to deal with a retailer. *See Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980) (affirming dismissal because “[Section] 2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell”); *Mullis v. Arco Petrol. Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (although the “plaintiff apparently took the position that the termination itself was discriminatory[,] . . . such discrimination does not violate the Robinson-Patman Act” because “the statute does not require a seller to create or to maintain a customer relationship with any buyer or prospective buyer”); *Fresh N’ Pure Distribs., Inc. v. Foremost Farms USA*, No. 11-C-470, 2011 U.S. Dist. LEXIS 136307 (E.D. Wis. Nov. 28, 2011) (dismissing complaint because a refusal to do business cannot give rise to a Robinson-Patman claim).

A lawsuit cannot persist if it becomes moot. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (“If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.”) (internal quotation marks omitted). This includes a motion to amend the complaint. In *Fox v. Board of Trustees of the State University of New York*, 42 F.3d 135, 144 (2d Cir. 1994), the district court had entered an order “denying Plaintiffs permission to amend their complaint after the case had become moot.” The Second Circuit affirmed, holding that “once a case is moot, it is no longer justiciable in federal court and must be dismissed.” *Id.* Here, this Court’s subject matter jurisdiction was exhausted when Clorox informed Plaintiff that it was ending their business relationship. Without jurisdiction, the Court cannot grant Plaintiff leave to amend the complaint.

Plaintiff has known for months that it would cease to have a claim under the Robinson-Patman Act if Clorox elected not to sell products to Plaintiff. *See* Pl.’s Br. in Opp. to Defs.’ Mot. to Dismiss 15 (“Clorox could refuse to do business with Woodman’s altogether, but it has not done so.”). The case law made that clear, as did the Order of this Court. Yet Plaintiff never sought to add new allegations or claims. Plaintiff’s proposal to amend now is “simply an attempt to avoid dismissal due to mootness,” and therefore must be denied. *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 631 (3d Cir. 2013) (affirming district court denial of a motion for leave to amend); *see also Danzy v. Johnson*, 417 F. Supp. 426, 430 (E.D. Pa. 1976) (denying a motion for leave to amend where “[t]he motion appear[ed] to be nothing more than an afterthought to avoid dismissal for mootness”).

CONCLUSION

For these reasons, Clorox respectfully requests that the Court deny Plaintiff’s Motion for Leave to Amend.

Respectfully submitted,

Dated: March 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2015, I caused a copy of the foregoing BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO AMEND to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven

Joshua H. Soven