UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

Case No. 14-CV-734

THE CLOROX COMPANY,
THE CLOROX SALES COMPANY,
And
UN-NAMED CO-CONSPIRATORS

Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff, Woodman's Food Market, Inc. (hereinafter "Woodman's") respectfully files this Reply Brief in Support of Motion for Leave to Amend Complaint as a reply to the Brief of The Clorox Company and The Clorox Sales Company (hereinafter collectively "Clorox").

I. BECAUSE CLOROX IS OBLIGATED TO MAKE SURE THAT LARGE PACKS OF ITS PRODUCTS ARE AVAILABLE TO ALL RETAILERS COMPETING WITH COSTCO, SAM'S CLUB AND B.J.'S, REGARDLESS OF WHETHER THEY PURCHASE DIRECTLY FROM CLOROX OR THROUGH WHOLESALERS, IT IS IRRELEVANT THAT CLOROX STOPPED SELLING DIRECTLY TO WOODMAN'S.

Clorox's Brief in Opposition to Plaintiff's Motion for Leave to Amend Complaint [Doc.73] argues, incorrectly, that the Court lacks jurisdiction to permit an amendment to the Complaint because the lawsuit was rendered moot by its decision to refuse to deal with Woodman's.

Woodman's filed this lawsuit seeking to compel Clorox to sell it large packs of Clorox products because Clorox had announced its decision to limit future sales of those large packs to

three club stores, Costco, Sam's Club and B.J.'s. Woodman's contended that the sale of these large packs was a promotional service covered by the language of 15 U.S.C.A. § 13(e), which required that Clorox must make those large packs available to **ALL** customers, including Woodman's, on proportionally equal terms.

Clorox filed a motion to dismiss with a supporting brief, [Doc.20][Doc.21] respectively. Clorox argued therein that the case failed to state a claim for relief because the sale of large packs was not a promotional service, and that it therefore had the right to refuse to offer large packs of Clorox products to Woodman's. The Court disagreed. [Doc.50]

On February 24, 2015, instead of filing its Answer to the Complaint, Clorox notified Woodman's that, effective immediately, it was discontinuing all sales to Woodman's. Immediately thereafter, Clorox filed its Motion to Dismiss Complaint as Moot [Doc.63].

Woodman's filed its Motion for Leave to Amend Complaint [Doc.67] on March 20, 2015, along with its Proposed Amended Complaint [Doc.68] and supporting brief [Doc.70] asserting, first, that Woodman's remains a purchaser of Clorox products pursuant to the ruling of the U.S. Supreme Court in ***F.T.C. v. Fred Meyer, Inc.***, 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968). That case held, at p. 910, that a retailer that purchases product at wholesale remains a customer of the seller, for purposes of the Robinson-Patman Act, even though the retailer is not purchasing product directly from the seller.

Clorox filed a brief in opposition to Woodman's request for leave to amend the complaint. [Doc.73] In its brief, Clorox argues that the Court should distinguish ***Fred Meyer*** from the facts of the present case because the sellers in that case had not terminated the retailers purchasing at wholesale as customers, as Clorox has done in this case. The distinction is meaningless. Effectively, retailers purchasing from wholesalers do so because the seller is

unwilling to sell to them directly. Consequently, retailers purchasing from wholesalers customarily do not deal directly with manufacturers such as Clorox.

Clorox's argument for a distinction between this case and ***Fred Meyer*** also overlooks the fact that a seller, such as the sellers in ***Fred Meyer*** or Clorox in this case, could not legally tell a wholesaler that it was not allowed to sell Clorox products to a particular retailer, such as Woodman's, without being guilty of an unlawful attempt to boycott the disfavored retailer.

In ***Fred Meyer***, the Court of Appeals ruled that a seller, such as Clorox, was obligated to make sure that the promotional service it provided to favored retailers was also made available to retailers, such as Woodman's, who purchase through wholesalers:

> "We cannot assume without a clear indication from Congress that s 2(d) was intended to compel the supplier to pay the allowances to a reseller further up the distributive chain who might or might not pass them on to the level where the impact would be felt directly. We conclude that the most reasonable construction of s 2(d) is one which places on the supplier the responsibility for making promotional allowances available to those resellers who compete directly with the favored buyer.
>
> . . . **We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales.** Nothing we have said bars a supplier, consistently with other provisions of the antitrust laws, from utilizing his wholesalers to distribute payments or administer a promotional program, **so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product.**" ***Id.*** at 357-358. (Emphasis supplied.)

Applying the ruling in ***Fred Meyer***, the Court must acknowledge that regardless of Clorox's desire to stop selling directly to Woodman's, Clorox remains obligated to make sure that the large pack promotional services it provides to Costco, Sam's Club and B.J.'s are also made available on comparably equal terms to all competitors of Costco, Sam's Club and B.J.'s, including Woodman's, even if Woodman's purchases its Clorox products from a wholesaler.

The ruling in ***Fred Meyer*** and the FTC ***Guides for Advertising Allowances and Other Merchandising Payments and Services***, 79 FR 16 C.F.R. Part 240 (FTC Sept. 29, 2014) [Doc.1-6] which were just revised by the F.T.C. in September, clearly establish that Clorox is obligated to make sure that all retailers competing with Costco, Sam's Club or B.J.'s, including Woodman's, have access to large packs of Clorox products, regardless of whether they purchase directly from Clorox or not. Clorox goes to great length to point out that the Court is not bound by the FTC Guides, but Clorox offers no authority showing that the Supreme Court ruling in ***Fred Meyer*** has been overruled or that the "rules and guides promulgated by the Commission for the regulation of such practices" as they are described in ***Fred Meyer*** above, are no longer good law.

A ruling by this Court allowing the requested amendment of the complaint would not contradict the ruling in ***United States v. Colgate & Co.***, 250 U.S. 300, 307(1919). ***Colgate*** holds only that a seller can refuse to deal with another company. Nothing in ***Fred Meyer*** requires that Clorox do business with or enter into any contract with Woodman's or any of the other retail competitors of Costco, Sam's Club or B.J.'s. Clorox must, however, make large packs of its products available to wholesalers, and make sure that they make them available to their customers selling at retail who want them. Even though ***Colgate*** says that Clorox can refuse to sell to Woodman's, ***Fred Meyer*** places an affirmative burden upon Clorox to make sure that this promotional service is made available to all retailers competing with Costco, Sam's Club and B.J.'s., even those, such as Woodman's, to which Clorox does not sell directly.

Because this is so, none of the issues raised by this lawsuit were rendered moot by Clorox's decision to stop selling product directly to Woodman's.

II. CLOROX FAILS TO ACKNOWLEDGE OR EVEN ADDRESS THAT THERE ARE ANTI-TRUST LIMITS TO A SELLER'S ABILITY TO STOP SELLING TO A CUSTOMER.

The Clorox Brief in Opposition to Plaintiff's Motion for Leave to Amend Complaint [Doc.73] argues only that its decision to stop dealing with Woodman's renders this lawsuit moot, thereby depriving this Court of jurisdiction to grant leave to amend the complaint. The authorities Clorox relies upon only address the right of a seller to stop doing business with a customer. We have already addressed those arguments in the preceding section of this brief.

Woodman's Brief in Support of Motion for Leave to Amend Complaint [Doc.69] also argues (1) at pp. 11-19, that Clorox has violated § 1 of the Sherman Act by engaging in a conspiracy to exclude Woodman's from competition in the sale of large packs of Clorox products, and (2) at pp. 20-24, that Clorox's decision, on February 24, 2015, to stop doing business with Woodman's, constituted an act done in furtherance of that conspiracy.

Clorox's brief makes no attempt to address these allegations. By failing to respond to these arguments, Clorox has conceded them. ***Bonte v. U.S. Bank, N.A.***, 624 F.3d 461, 466 (7th Cir. 2010).

Neither ***Harper Plastics, Inc. v. Amoco Chems. Corp.,*** 617 F.2d 468, 470 (7th Cir. 1980), nor ***Mullis v Arco Petrol. Corp***, 502 F.2d 290, 294 (7th Cir. 1974), cited by Clorox at pp. 2 of its brief, says a seller is always free to refuse to sell to a customer.

Clorox, at p. 2 of its brief, misstates the holding in ***Fresh n' Pure Distribs., Inc. Foremost Farms USA,*** No. 11-C-470, 2011 U.S. Dist. LEXIS 136307 (E.D. Wis. Nov. 28, 2011), when it asserts, incorrectly, that "a refusal to do business **cannot** give rise to a Robinson-Patman claim." (Emphasis supplied.) To the contrary, ***Fresh n' Pure***, at p. 4, says only that "a

refusal to do business with a particular entity **generally** does not violate the Robinson-Patman Act." (Emphasis supplied.)

Clorox's brief never addresses the principal established in ***A. C. Becken Co. v. Gemex Corp.***, 272 F.2d 1, 4 (7th Cir. 1959), that the right to stop dealing is neither absolute nor exempt from regulation. Rather, ***Becken*** states:

> ". . . the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according to defendant's existing illegal plan of doing business in violation of § 1. **Plaintiff was not rejected as a customer by defendant because of any other reason. It follows that the facts alleged and established by the evidence state a cause of action under § 1 of that Act.**" (Emphasis supplied.)

Because Clorox's brief makes no attempt to show that it had a valid reason for its decision to discontinue all sales to Woodman's, ***Becken*** holds that the Court can conclude that the facts alleged in the proposed Amended Complaint [Doc.68 at ¶¶20-24 and 74] establish a cause of action under § 1 of the Sherman Act. Because the proposed Amended Complaint alleges facts sufficient to establish a cause of action under § 1 of the Sherman Act, which arose prior to the filing of this suit, and was simultaneously continued by the Clorox decision to discontinue all sales to Woodman's, there has not been a time at which this case has been or has become moot.

Woodman's has had valid, justiciable claims against Clorox at all times since this action was filed. It would be inequitable to dismiss this action on mootness grounds. A dismissal would not terminate this litigation. It would merely force Woodman's to file a new lawsuit raising anew the claims set forth in its proposed Amended Complaint. A dismissal would merely prolong this litigation and cause an undue waste of judicial resources. Nor would such a dismissal serve the interests of justice. In determining whether a judicial action would affect the interests of justice, the Court in the Eastern District of Wisconsin has stated that:

> "The "interest of justice" includes such concerns as trying related litigation together, having a judge who is familiar with the applicable law try the case and insuring speedy trials. *Coffey,* 796 F.2d at 221; *see also Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 30 (1988) (interest of justice embraces public interest factors of systemic integrity and fairness, rather than private interests of litigants and their witnesses).

Aqua Fin., Inc. v. The Harvest King, Inc., 07-C-015-C, 2007 WL 2686838, at p. 2 (W.D. Wis. Sept. 11, 2007).

If this case were to be dismissed, the rulings of this Court would constitute the law of the case in any subsequent litigation between the parties. Dismissal would require that a new judge, in order to correctly apply the law of the case, review and familiarize herself, with the pleadings, briefs and rulings of this Court.

> "The law-of-the-case doctrine generally holds that " 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.' " ***United States v. Cleveland,*** 1995 WL 535110 (N.D.Ill.1995), quoting ***Donohoe v. Consolidated Operating & Prod. Corp.,*** 30 F.3d 907, 910 (7th Cir.1994), quoting, ***Arizona v. California,*** 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). Put another way, "the same issue presented a second time in the same case in the same court should lead to the same result." ***LaShawn A. v. Barry,*** 87 F.3d 1389, 1393 (D.C.Cir.1996). The 7th Circuit has stated that "[t]he law of the case doctrine is not to be lightly disregarded. It is 'based on the salutary and sound public policy that litigation should come to an end.' " ***Rothner v. City of Chicago,*** 929 F.2d 297, 301 (7th Cir.1991), quoting, ***Shakman v. Dunne,*** 829 F.2d 1387, 1393 (7th Cir.1987), quoting, ***White v. Murtha,*** 377 F.2d 428, 431 (5th Cir.1967), *cert. denied,* 484 U.S. 1065, 108 S.Ct. 1026, 98 L.Ed.2d 991 (1988). To this end the 7th Circuit states that the doctrine should be applied absent "unusual circumstances" or "compelling reason[s]."

Jeanine B. by Blondis v. Thompson, 967 F. Supp. 1104, 1107-08, 1997 WL 318038 (E.D. Wis. 1997)

So far, no such reasons have been offered by Clorox.

III. WOODMAN'S HAS NOT SLEPT ON ITS RIGHTS.

Clorox cites to ***CMR D.N. Corp. v. City of Philadelphia***, 703 F.3d 612 (2013), for the proposition that Woodman's filed the proposed Amended Complaint simply to avoid dismissal due to mootness." In that case, the Plaintiff learned of the availability of new claims three years

before seeking to add them to its complaint, ***CMR***, 703 F.3d at 629, and did not attempt to add them to its complaint until after it had filed several briefs totaling hundreds of pages addressing claims that its lawsuit was moot, ***Id*** at 630.

Woodman's vigorously contends the facts in this case bear no resemblance to those in ***CMR.*** Woodman's contends that the Rexing Affidavit [Doc.24] constitutes a sworn acknowledgement by Clorox that it [redacted], in violation of § 1 of the Sherman Act. Since receiving the Rexing Affidavit, Woodman's has had the intention to amend its complaint [redacted].

Woodman's intended to depose Mr. Rexing right after Clorox answered the Complaint, establishing the positions it intends to take in this action. Clorox's Answer was due on February 16, 2015. Clorox, in a Text Only Order [Doc.61], obtained an extension until February 24, 2015, to file its Answer,.

Clorox did not file its Answer on February 24, 2015, but moved, instead, for an order dismissing this lawsuit on mootness grounds. Woodman's filed its Motion for Leave to Amend the Complaint roughly three weeks later, on March 20, 2015. The record is clear that Woodman's has not been sleeping upon its rights or delaying the prosecution of this litigation. It had every intention of moving to amend its Complaint [redacted]

Clorox seeks to prevent Woodman's [redacted] by terminating all dealings with Woodman's, an $8.3 million per year customer. It has cited no

action by Woodman's justifying its decision to stop selling to Woodman's, leaving the Court free to conclude that Clorox is terminating Woodman's only because Woodman's is rightly insisting upon its right to purchase large packs of Clorox products. The Court is also free to conclude that Clorox is seeking to terminate Woodman's in the hope that, by doing so, it could prevent Woodman's from bringing its § 1 Sherman Act complaint against Clorox [redacted].

CONCLUSION

This case was not rendered moot by Clorox's decision to stop selling product to Woodman's. The ***Fred Meyer*** case makes clear that Clorox is obligated, under 15 U.S.C.A. § 13(e), to make the promotional service of large packs of Clorox products available to all retailers on proportionally equal terms, even those retailers who, like Woodman's, purchase Clorox products through wholesalers. Clorox has failed to address the Sherman Act § 1 arguments. For all of the reasons set forth in this brief, and all other documents on file with the Court, Woodman's requests that the Court grant it leave to amend the complaint.

Dated this 3rd day of April, 2015.

VON BRIESEN & ROPER, S.C.
Attorneys for Plaintiff,
Woodman's Food Market, Inc.

By: */s/ John A. Kassner*

John A. Kassner,
State Bar Number: 1014336
jkassner@vonbriesen.com

Kraig A. Byron
State Bar Number: 1020236
kbyron@vonbriesen.com

Mailing Address:

VON BRIESEN & ROPER, S.C.
Tenney Plaza – Suite 1000
3 South Pinckney Street
Madison, WI 53703

(608) 661-3969 Direct (John Kassner)
(608) 316-3199 Direct Fax (John Kassner)

(608) 661-3981 Direct (Kraig Byron)
(608) 316-3184 Direct Fax (Kraig Byron)

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