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 SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT AS MOOT

Defendants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") respectfully submit this Brief in support of their Motion to Dismiss Plaintiff Woodman's Food Market, Inc.'s Complaint as Moot. On February 24, 2015, Clorox informed Plaintiff that it had exercised its legal right to permanently discontinue its sales of all Clorox products to Plaintiff, effective immediately. *See* Attachment A. As a matter of law, this decision by Clorox renders moot Plaintiff's request for injunctive relief in this case, and Plaintiff has not requested any damages. There is no possibility that Clorox could potentially infringe on any of Plaintiff's rights under the Robinson-Patman Act in the future, because Clorox's discontinuation of all its sales of its products to Plaintiff is permanent. Accordingly, Plaintiff's Complaint should be dismissed with prejudice.[1]

[1] Because this case is moot, Clorox has not filed an Answer to the Complaint. In the event that the Court were to deny this motion to dismiss, Clorox would file its Answer the next business day.

BACKGROUND

Clorox is a Delaware corporation based in Oakland, California, that manufactures and markets consumer and professional products. Plaintiff Woodman's Food Market is a retailer with 15 locations in Illinois and Wisconsin.

On October 28, 2014, Plaintiff brought this suit alleging that Clorox had violated Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(d) and (e), because Clorox no longer offered to sell to Plaintiff certain large-size products that Clorox sells to other retailers. The Complaint sought only injunctive and declaratory relief; it did not bring a claim for damages. Complaint ¶¶ 60, 69, 75, 81, 86, 94. Clorox moved to dismiss the Complaint for failure to state a claim for relief, contending that selling large-size products does not constitute the provision of "services or facilities" within the Robinson-Patman Act. On February 2, 2015, the Court denied Clorox's motion to dismiss, holding that "even though Clorox may refuse to deal with a particular retailer, Clorox cannot use special packaging and package sizes to benefit only certain customers." Op. & Order Denying Def.'s Mot. to Dismiss 10.

While Clorox respectfully disagrees with the Court's ruling that larger-sized products may fall within the provision of "services or facilities" under the Robinson-Patman Act, and while Clorox believes it has strong defenses against Plaintiff's Robinson-Patman Act claim, Clorox has determined that it is not in the company's interests to incur the substantial time and expense that would be required to continue this litigation.[2] Accordingly, on February 24, 2015, Clorox's counsel provided notice to Plaintiff's counsel that Clorox had exercised its legal right to permanently discontinue Clorox's sales of all Clorox products to Plaintiff, effective immediately.

[2] Clorox advised the Court on February 18, 2015 that it was withdrawing its assertion of the meeting competition defense for the duration of this litigation.

ARGUMENT

The mootness doctrine, which is premised on both "constitutional requirements and prudential considerations," requires that the case "contain a live dispute through all stages of litigation." *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 149 (7th Cir. 2011). A request for injunctive relief may become moot due to "significant changes since the filing of the suit." *Chicago United Indus. Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006). Where the activity challenged by the plaintiff "has been completely discontinued and no present effects can be found," the case is moot. 13C Wright & Miller et al., *Federal Practice & Procedure: Jurisdiction* § 3533.5 (3d ed., updated Sept. 2014). Similarly, "[a] case becomes moot where there is no reasonable expectation that the [alleged] wrong will be repeated." *Winokur v. Bell Fed. Sav. & Loan Ass'n*, 560 F.2d 271, 274 (7th Cir. 1977) (internal quotation marks omitted).

To state a violation of Section 2(e) of the Robinson-Patman Act, Plaintiff must allege that Clorox "discriminate[d] in favor of one purchaser against *another purchaser* or purchasers of a commodity bought for resale" with regard to the provision of promotional "services or facilities." 15 U.S.C. § 13(e) (emphasis added). A party that is not a "purchaser" cannot state a claim for a Section 2(e) violation. As a result, there can be no claim under Section 2(e) when a plaintiff "complains that [defendant] refused to sell certain product lines to it and eventually terminated its dealership. It has long been recognized that the statute does not require a seller to sell to, or maintain a customer relationship with, any buyer or prospective buyer." *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1318 (9th Cir. 1979). A seller's refusal to deal with a customer—including termination of an existing customer—is not a violation of the Robinson-Patman Act. *See, e.g., Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980) (the Robinson-Patman Act "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) (holding that 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); *see also* Op. & Order Denying Def.'s Mot. to Dismiss 10 (noting that "Clorox may refuse to deal with a particular retailer").

Clorox's decision to permanently cease all its sales to Plaintiff eliminates any need for injunctive relief in this case. Since Clorox "is no longer selling to [Plaintiff], as is its right, there is no danger that it will sell to [Plaintiff] on discriminatory terms in violation of 15 U.S.C. § 13, and accordingly no basis for a Robinson-Patman injunction." *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1022 (2d Cir. 1989). Nor will dismissing this case as moot deprive Plaintiff of the opportunity to recover monetary damages, because Plaintiff has never pursued any damages. Pl.'s Br. in Support of Mot. for Prelim. Inj. 10 ("damages are not sought by [ ] Plaintiff").

In sum, Clorox has permanently ceased the alleged discrimination against Plaintiff in the provision of services or facilities, and there is no reasonable expectation that Clorox will engage in any such conduct in the future. Consequently, there is no injunctive relief for the Court to award and the case is moot. *See Nelson v. Miller*, 570 F.3d 868, 882 (7th Cir. 2009) ("A court's power to grant injunctive relief only survives if such relief is actually needed.").

CONCLUSION

For these reasons, Clorox respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

Dated: February 24, 2015

s/ Joshua H. Soven

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2015, I caused a copy of the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS AS MOOT to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
Joshua H. Soven