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,
-and-
THE CLOROX SALES COMPANY,

Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' 2ND MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff, Woodman's Food Market, Inc., respectfully submits this Brief in Opposition to the Defendants' Motion to Dismiss the Plaintiff's Complaint on the alleged basis of "mootness" (Doc 63) and in Support of Plaintiff's Motion seeking leave to file an Amended Complaint.

OVERVIEW

Plaintiff filed this lawsuit asking the Court for declaratory and injunctive relief as follows:

1. A declaration that there is no valid basis, under the provisions of the Robinson-Patman Act, for Clorox to place Woodman's, as an operator of retail grocery stores, into a separate "channel" or classification from Sam's Club or Costco, when those stores are also selling commodities of like grade and quality at retail, and then using its arbitrary placement of Woodman's into that channel or classification as a justification:

   a. for discriminating as to price, under 15 U.S.C.A. § 13(a); or,

b. for paying or contracting for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities, under 15 U.S.C.A. § 13(d); or,

c. for discriminating in the furnishing of any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms under 15 USC § 13(e).

2. A declaration that, under the provisions of 15 U.S.C.A. §§ 13(d) and 13(e), Clorox must provide actual notice to all its customers selling a product of comparable grade and quality at retail, of every discount or allowance or promotional service it is offering to any of its customers selling that product at retail, and must make those promotional services, discounts or allowances available to all of its customers selling at retail on proportionally equal terms.

3. A declaration that, under the provisions of 15 U.S.C.A. §§ 13(d) and 13(e), if Clorox fails to notify a customer of the existence of such a promotional service, discount or allowance being offered to a competitor selling at retail, after that customer has expressly requested disclosure of such programs, Woodman's can thereafter assume that, for purposes of 15 U.S.C.A. § 13(a), those promotional services, discounts or allowances cannot be relied

upon by Clorox as a justification for having sold a product to a competitor at a lower price than the price paid by Woodman's.

4. A declaration that the offer of special size packages of a product of the same grade and quality as those offered to other retail customers constitutes a promotional service, under the provisions of 15 U.S.C.A. § 13(e), which must be made available on proportionally equal terms to all Clorox customers selling at retail.

5. An injunction enjoining Clorox and Clorox Sales from discriminating against Woodman's in violation of the provisions of 15 U.S.C.A. §§ 13(a), 13(d) and 13(e) by placing Woodman's into a different "channel" or classification than Sam's Club and Costco have been placed in, and using that placement as a justification for unequal treatment.

6. An injunction enjoining Clorox and Clorox Sales from offering discounts, allowances and/or promotional services on the sale of products to favored retailers without disclosing the existence of those discounts, allowances and/or promotional services to Woodman's on proportionally equal terms.

7. An injunction enjoining Clorox and Clorox Sales from discriminating in the offer of special size packages of products of comparable grade and quality to some but not all of its retail customers without offering to make such packaging available to Woodman's on proportionally equal terms.

Clorox filed a Motion to Dismiss this action under FRCP 12(b)(6) on November 20, 2014. [Doc 20]. That Motion was denied by the Court on February 2, 2015. [Doc 50].

On November 25, 2014, Clorox filed, among other documents, the Sealed Affidavit of Rick Rexing, Vice President for Sales, National Accounts, for The Clorox Company. [Doc 24].

[redacted]. [15 U.S. Code § 1].

Clorox filed a Motion to Dismiss Plaintiff's Complaint as Moot on February 24, 2015. [Doc 63]. Woodman's submits this Brief and supporting Affidavit in opposition to Clorox's Motion, which Woodman's regards as a motion for summary judgment.

On March 17, 2015, counsel for Clorox informed counsel for Woodman's that it would consent to the filing of an Amended Complaint by Plaintiff if Woodman's counsel agreed to engage in face-to-face settlement negotiations on March 20, 2015. Clorox counsel agreed that if a settlement agreement could not be reached by the close of business on March 20, 2015, Plaintiff would then have Clorox's permission to file an Amended Complaint.

No settlement agreement having been reached by close of business on March 20, 2015, Plaintiff filed a motion under Fed. R. Civ. P. 15 seeking leave of the Court to amend its complaint to include the Sherman Act claims described above. In addition to opposing Clorox's Motion to Dismiss (Doc 63), this Brief is submitted in support of Plaintiff's Motion for leave to file Amended Complaint filed pursuant to Fed. R. Civ. P. 15.

PROCEDURAL BACKBROUND

No statutory basis for Clorox's Motion to Dismiss is identified in the motion. Clorox stated in its motion that "[t]he ground for this motion, as set forth in the accompanying Brief, is that Clorox's recent permanent discontinuation of all its sales of Clorox products to Plaintiff means that the alleged discriminatory provision of services has ceased and, accordingly, there is no injunctive relief that the Court can award." [Doc 63, p. 1].

In its Brief in Support of its second Motion to Dismiss, Clorox stated:

> "[o]n 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." [Doc 64, p. 1; and Doc 64-1 (Attachment A)].

Clorox's Motion relies upon the truth of the assertions in the motion itself and those included in Attachment A to the motion. Such constitute "matters outside the pleadings" within the meaning of Fed. R. Civ. P. 12(d). As such, Clorox's motion "must be treated as one for summary judgment under Rule 56." [Fed. R. Civ. P. 12(d)].

Presumably, the Court and parties are to regard Clorox's affirmations and the attached correspondence as attestations to the truth of the matters alleged, akin to allegations in an Affidavit authenticating a document attached as an exhibit. While Clorox may have failed to properly support an assertion of fact as required by Rule 56(c), Woodman's does not contest the truth of the matter asserted in Clorox's motion (that 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), and does not contest the authenticity of Attachment A to Clorox's Motion. Woodman's does, however, contest the assertion that such facts render this action moot.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only "when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Goldstein v. Fidelity & Guaranty Ins. Underwriters, Inc.***, 86 F.3d 749, 750 (7th Cir.1996) (citing Fed.R.Civ. P. 56); *see also* ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48, 106 S. Ct. 2505 (1986).

The moving party bears the burden of demonstrating an "absence of a genuine issue concerning any material fact." ***Adickes v. S.H. Kress & Co***., 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). If there is evidence that would allow a reasonable jury to return a verdict in favor of the non-moving party, then summary judgment should be denied. ***Lawrence v. Kenosha County***, 391 F.3d 837, 842 (7th Cir. 2004). In ruling on a motion for summary judgment, "the admissible evidence presented by the nonmoving party must be believed and all reasonable inferences must be drawn in the non-movant's favor." ***Hunter v. Amin***, 583 F.3d 486, 489 (7th Cir. 2009).

When deciding a motion for summary judgment, the judge's function is not to weigh the evidence for himself and determine the truth of the matter, but to determine whether there is a genuine issue for trial. ***Anderson***, 477 U.S. at 249, 106 S. Ct. 2505. While it may be possible to interpret statements or documents differently, interpretation is for trial and not for summary judgment. *See* ***Shager v. Upjohn Co***., 913 F.2d 398, 402 (7th Cir.1990) ("the task of disambiguating ambiguous utterances is for trial, not for summary judgment").

ARGUMENT

I. NONE OF WOODMAN'S CLAIMS ARE MOOT.

The fundamental tenet of Clorox's argument is set forth on page 3 of its Brief, where Clorox states:

> 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. [Doc 64, p. 3].

Woodman's does not disagree with the above statement of law. Clorox then suggests that because it has permanently ceased "selling" products directly to Woodman's, that Woodman's can no longer be considered a "purchaser" within the meaning of Robinson-Patman Section 2(e). [Doc 64, p. 4]. This is an inaccurate legal conclusion with which Woodman's wholeheartedly disagrees.

A. WOODMAN'S REMAINS A "PURCHASER."

Subsections 2(d) and (e) of the Robinson-Patman Act read as follows:

> **(d) Payment for services or facilities for processing or sale**
> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a *customer* of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such *customer* in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other *customers* competing in the distribution of such products or commodities.
>
> **(e) Furnishing services or facilities for processing, handling, etc.**
> It shall be unlawful for any person to discriminate in favor of one *purchaser* against another *purchaser* or *purchasers* of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all *purchasers* on proportionally equal terms.
>
> [15 U.S. Code § 13(d)&(e)] (Emphasis supplied).

It is well-settled law that, as used in Subsections 2(d) and (e) of the Robinson-Patman Act, there is no meaningful difference between the terms "customer" and "purchaser," and that the two terms may be used interchangeably.

Guidelines for addressing issues under Subsections 2(d) and (e) of the Robinson-Patman Act were first published by the Federal Trade Commission ("FTC") in 1969, Part 240 – GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND

SERVICES (the "Guide"). The Guide was revised in 1990, and was recently revised again on September 29, 2014. A copy of the September 29, 2014, revision of the Guide, together with the comments of the FTC explaining the revisions it made and did not make, was previously filed with the Court as Document 37-1.

§ 240.4 of the Guide **(***Definition of customer*) reads as follows:

> A customer is any person who buys for resale directly from the seller, or the seller's agent or broker. In addition, a "customer" is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller. The word "customer" which is used in section 2(d) of the Act includes "purchaser" which is used in section 2(e).

That definition was first addressed in the U.S. Supreme Court case that led to the promulgation of the Guide; ***F.T.C. v. Fred Meyer, Inc***., 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968). The Court reasoned:

> "If we were to read 'customer' as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of s 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class."

Fred Meyer, 390 U.S. at 352, 88 S. Ct. at 910.

The Court continued its analysis, finding that;

> "it is clear that the direct impact of Meyer's receiving discriminatory promotional allowances is felt by the disfavored retailers with whom Meyer competes in resales. 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."

Fred Meyer, 390 U.S. at 357, 88 S. Ct. at 913.

The Court concluded by holding 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."

Fred Meyer, 390 U.S. at 358, 88 S. Ct. at 913.

The 6th Circuit Court of Appeals reviewed the issue in detail in ***Lewis v. Philip Morris Inc***., 355 F.3d 515 (6th Cir. 2004). The Court found that there was no reason to deviate from the sound reasoning of the Supreme Court in *Fred Meyer*.

> Given the clear holding in *Fred Meyer* that the third use of the word "customer" in § 2(d) includes customers who purchase through a wholesaler, it would take an extremely strong showing of Congressional intent to defeat the conclusion that the first use of the word "customer" in the same sentence carries the same meaning. While the functional analysis used in *Fred Meyer* may not weigh as heavily in favor of plaintiff-vendors' claims here as it did in favor of the FTC's argument in that case, it provides nothing near the showing necessary to establish that the meaning of "customer" in § 2(d) is not uniform.
>
> In *Fred Meyer*, the Supreme Court based its interpretation of the Robinson-Patman Act on the functional reasons behind passage of the Act. Specifically, the Court reasoned that Congress had intended to protect smaller businesses, who could not afford to purchase directly from suppliers, against the concessions larger chains would be able to force as a result of their greater market power and direct dealings with the supplier. ***Fred Meyer***, 390 U.S. at 350-53, 88 S.Ct. 904. Here, of course, the favored purchasers (the convenience stores) are not large chain stores buying directly from the supplier, but stores purchasing instead through a wholesaler. This intermediary cannot serve to distinguish the factual situation from that in *Fred Meyer* where, as here, the allegedly discriminatory supplier (Philip Morris) and the favored purchasers (the convenience stores) have direct dealings that are the allegedly unlawful behavior. That is, the functional difference between a direct purchaser and one who purchases through a wholesaler is only important where the passage through an intermediary insulates the supplier from its retailers, such as in typical price discrimination claims where the wholesaler, not the supplier, sets the actual price for the retailer. Here, the complained-of behavior consists only of promotional services rendered by Philip Morris directly to the favored stores, without any involvement of the wholesaler.

> Each of these promotions involves sustained contact and exchange of goods, services, and cash between Philip Morris and the stores. While the wholesaler sets the price of cigarettes that the store purchases, discrimination in that wholesaler-set price is not at issue in this case; the price discount provided by the promotions is. Philip Morris sets the terms of each promotion, monitors compliance with that promotion, and provides the benefit of each promotion directly to the convenience stores. See Judge Rogers's op. at 5; Plaintiffs' Brief at 5-7; Defendant's Brief at 7-8.
>
> Given the strong presumption in favor of unitary meaning of terms in the same statutory provision, and the Supreme Court's decision in *Fred Meyer*, where the complained-of services are provided directly to the retailer by the supplier, **I conclude that "customer" includes those favored customers (the convenience stores in this case) who purchase through a wholesaler, and accordingly conclude that all plaintiff-vendors have statutory standing to challenge these promotions as violations of § 2(d) and (e) of the Act.**
>
> ***Lewis v. Philip Morris Inc***., 355 F.3d 515, 536-37 (6th Cir. 2004). (Emphasis supplied).

As a result of Clorox's decision to terminate direct sales to Woodman's, Plaintiff has elected to purchase Clorox products through one or more wholesalers. [Anundson Aff, ¶ 7]. Woodman's has purchased Clorox products through one or more wholesalers since Clorox issued its February 24, 2015 termination letter filed with the Court as Document 64-1. [Anundson Aff, ¶ 6]. Woodman's intends to continue to purchase Clorox products through wholesalers as long as there remains a consumer demand for such products. [Anundson Aff, ¶ 8].

Woodman's has every right to purchase Clorox products through wholesalers and other sources. Clorox cannot prevent a wholesaler that purchases products from Clorox from reselling those products to Woodman's. Any effort by Clorox to prohibit wholesalers from selling to Woodman's would constitute an unreasonable vertical restraint of trade in violation of § 1 of the Sherman Act. See ***Leegin Creative Leather Products, Inc. v. PSKS, Inc.***, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007); ***Cont'l T. V., Inc. v. GTE Sylvania Inc.***, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

Clorox's decision to terminate direct sales to Woodman's does nothing to alter Woodman's status as a "purchaser" of Clorox's products within the meaning of 15 U.S. Code § 13(d)&(e). Once again, § 240.4 of the Guide provides that "a 'customer' is any buyer of the seller's product for resale who purchases from or through a wholesaler" . . . and that "the word 'customer' which is used in section 2(d) of the Act includes "purchaser" which is used in section 2(e)." Woodman's is a "customer" and "purchaser" of Clorox's products through a wholesaler. [Anundson Aff, ¶ 6]. As such, Woodman's has "statutory standing to challenge [Clorox's] promotions as violations of § 2(d) and (e) of the Act." See ***Philip Morris***, 355 F.3d at 536-37.

None of Woodman's claims against Clorox are moot. All claims have the same vitality as the day upon which they were filed. The fact that Woodman's is now compelled to purchase Clorox's products through a wholesaler does nothing to change the fact that Woodman's is a "customer" and "purchaser" of Clorox entitled to receive any services or facilities connected with the processing, handling, sale, or offering for sale of Clorox products upon proportionally equal terms as those accorded to any other purchaser of Clorox products. Clorox's motion for summary judgment[1] must be denied.

II. PLAINTIFF HAS PRESENTED CLAIMS AGAINST CLOROX FOR VIOLATION OF § 1 OF THE SHERMAN ACT.

Section 1 of the Sherman Act reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
>
> [15 U.S. Code § 1].

[1] As established above, while this motion is presented as a motion to dismiss, it must be treated as a motion for summary judgment because it is premised upon facts not contained within the pleadings of record.

Document 24 is the Sealed Affidavit of Rick Rexing, Vice President for Sales, National Accounts, for The Clorox Company. [redacted]. [15 U.S. Code § 1]. Plaintiff has filed a motion under Fed. R. Civ. P. 15 seeking leave of the Court to amend its complaint to include such claims in this action. Among the allegations in support of such claims are the following:

- [redacted]
- [redacted]

[Proposed Amended Complaint, ¶¶ 73-74].

Fed. R. Civ. P. 15 provides in relevant part that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

In ***Foman v. Davis***, 371 U.S. 178, 83 S. Ct. 227 9 L. Ed. 2d 222 (1962), the U.S. Supreme Court discussed Fed. R. Civ. P. 15.

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the

> amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' *Foman v. Davis*, 371 U.S. at 182, 83 S. Ct. at 230.

In ***Alvin v. Suzuki***, 227 F.3d 107, (3d Cir. 2000), the Third Circuit Court of Appeals laid out its framework of analysis.

> Leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15. Although refusals to grant leave to amend are reviewed for abuse of discretion, *see Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 654 (3d Cir.1998), it is an abuse of discretion to deny leave to amend unless "plaintiff's delay in seeking amendment is undue, made in bad faith, prejudicial to the opposing party, or [the amendment] fails to cure the jurisdictional defect," *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 886 (3d Cir.1992); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (holding that it is abuse of discretion to deny leave to amend absent a clear or declared reason such as delay, bad faith, prejudice, or a repeated failure to cure a problem in the complaint); *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir.1984) (trial court abused discretion by refusing to permit plaintiff to amend complaint where no prejudice to defendant was alleged or proved). Leave to amend may be denied, however, if amendment would be futile. *See Smith v. NCAA*, 139 F.3d 180, 190 (3d Cir.1998), *rev'd on other grounds*, 525 U.S. 459, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999). An amendment is futile if the amended complaint would not survive a motion to dismiss for failure to state a claim upon which relief could be granted. *See id.*
>
> ***Alvin v. Suzuki***, 227 F.3d 107, 121, (3d Cir. 2000).

This rationale applies even when a party seeks to add an entirely new cause of action. In ***Sperberg v. Firestone Tire & Rubber Co.***, 61 F.R.D. 78 (N.D. Ohio 1973), the plaintiff filed a motion to file an amended complaint, adding a new cause of action alleging patent infringement of a patent not at issue in the original complaint, nearly six months subsequent to filing the original complaint. ***Sperberg***, 61 F.R.D. at 79. In granting the motion, the Court noted that:

> Plaintiff's motion is filed pursuant to Rule 15, Fed.R.Civ.P. In applying Rule 15 the Court must liberally permit the amendment of pleadings. *See Studebaker Corp. v. Algripco, Inc.*, 331 F.Supp. 375 (N.D.Ohio 1970, Thomas, J.); *Jenn-Air Products Co., Inc. v. Penn. Ventilator, Inc.*, 283 F.Supp. 591 (E.D.Pa.1968). **Requested amendments are liberally granted even when the amendment seeks to add an entirely new cause of action.** *See Jenn-Air, supra*; and Cunningham v. Jaffe, 37 F.R.D. 431 (W.D.S.C.1965); and *see generally Foman v.*

> *Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). ***Id***. (Emphasis supplied).

The fact that Woodman's had no knowledge of the facts providing the basis for its new claims is also relevant. In ***Marlowe Patent Holdings LLC v. Dice Electronics, LLC***, 293 F.R.D. 688, 692, 2013 WL 775764 (D.N.J. 2013), the defendant sought leave to file an Amended Counterclaim to add a claim for inequitable conduct based on its recent discovery of evidence of which it was not aware at the time it filed its initial counterclaim. ***Marlowe***, 293 F.R.D. at 692.

The Court ultimately found that the defendant had demonstrated that good cause existed to permit the assertion of its affirmative claim of inequitable conduct; that it was diligent in moving to amend its Counterclaim following discovery of new information to support its claim; that the opposing party would not be prejudiced if the motion was granted; and, that the proposed Counterclaim was not clearly futile. ***Marlowe***, 293 F.R.D. at 696-97.

Here, Plaintiff has been diligent in presenting this amendment to the Court. Plaintiff wanted to wait until after the Court ruled on the Motion to Unseal [Doc 39]. A favorable ruling on this motion would have made it much easier and cleaner to plead the claims set forth in the proposed amended complaint[2]. The motion has been presented within a reasonable period of time following the Court's ruling on the Motion to Unseal. [Doc 62, Text Only Order, entered February 23, 2015, finding the issue to be moot].

Clorox will not be prejudiced by allowing Woodman's to amend its complaint. Clorox has not yet filed responsive pleadings in this action, and no discovery has been conducted. In other words, the parties are in the same position as they were when this action was commenced.

[2] Plaintiff's Proposed Amended Complaint relies on Document 24, which remains under seal. If Document 24 had been unsealed, it would not have been necessary to file the Proposed Amended Complaint and this Brief under seal.

Finally, Woodman's claims for a combination in restraint of trade under § 1 of the Sherman Act are not futile. [redacted]

Document 24 was filed by Clorox as part of its opposition to Woodman's Motion for entry of a Preliminary Injunction [Doc 2]. Per Clorox's representations in Document 59, Document 24 was purportedly submitted in support of a meeting competition defense, which defense was permanently withdrawn by Clorox on February 18, 2015. [See Doc 28 (redacted Clorox Brief), pp. 9, 14, 15; and Doc 59, p. 1].

[redacted]

Finally, it is axiomatic that a private plaintiff need not sue all co-conspirators to a Sherman Act violation, but may choose to proceed against any one or more of them. ***Wilson P. Abraham Const. Corp. v. Texas Indus., Inc.***, 604 F.2d 897, 904 n.15 (5th Cir. 1979) (citations omitted), aff'd sub nom. ***Texas Indus., Inc. v. Radcliff Materials, Inc.***, 451 U.S. 630 (1981). While [redacted], it is not required to do so. Woodman's can proceed only against Clorox if it so chooses. ***Id***. It has chosen to do so at this time.

A. CLOROX'S REFUSAL TO SELL LARGE PACKS TO CUSTOMERS WHO ARE NOT MEMBERS OF THE SO-CALLED CLUB CHANNEL CONSTITUTES A VIOLATION OF § 1 OF THE SHERMAN ACT.

[redacted]. Whether either is true is irrelevant. Clorox is a member of the conspiracy nonetheless.

In ***MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.***, 62 F.3d 967, (7th Cir. 1995), the 7th Circuit addressed a case presenting the following factual scenario:

> There existed two entities competing for the business of providing forklifts and other material handling and personnel moving equipment to exhibition contractors at McCormick Place. At some point, a third entity began to compete for this exhibition business. The new entity was hired to provide the equipment at upcoming McCormick Place shows and rented equipment to enable it to do so. One of the original competitors learned of this rental order and then contacted a company that it knew would be leasing certain equipment to be used at the shows. The original competitor threatened the rental company that unless it terminated any relationship with the new entity in relation to the buildings and facilities at McCormick Place, the rental company's property would be in jeopardy. The rental company acquiesced. See ***MCM Partners,*** 62 F.3d at 970 (fact scenario paraphrased for the convenience of the reader).

The district court found that the rental company's acquiescence did not establish a combination or conspiracy for purposes of Section 1 of the Sherman Act because the complaint itself indicated that the rental company acted only at the direction of and in response to pressure applied by one of its customers — that is, that they were coerced victims of their scheme. The 7th Circuit rejected this finding. It found that:

> "the district court's holding in that regard is without support in the case law interpreting section 1. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131,

161, 68 S.Ct. 915, 931, 92 L.Ed. 1260 (1948), for example, the Supreme Court dispatched a similar argument in short order:

> There is some suggestion ... that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

Later courts have applied this principle in a variety of settings, concluding that the "combination or conspiracy" element of a section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion.[3]"

MCM Partners, 62 F.3d at 973-74.

Whether Clorox was a willing participant in the conspiracy is not an issue. The only issue then is whether the conspiracy was in furtherance of a restraint of trade. In assessing what constitutes a "restraint of trade," the U.S. Supreme Court has stated:

> "[G]iven a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision."

Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 234, 68 S. Ct. 996, 1005, 92 L. Ed. 1328 (1948).

In ***Levine v. Cent. Florida Med. Affiliates, Inc.***, 72 F.3d 1538 (11th Cir. 1996), the 11th Circuit Court of Appeals outlined U.S. Supreme Court holdings relating to those restraints of trade prohibited under Section 1 of the Sherman Act.

[3] The 7th Circuit cited thirteen examples of cases in which the "combination or conspiracy" element of a section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion. Those citations may be reviewed at 62 F.3d at 974.

> The Supreme Court long ago determined that section 1 prohibits only those agreements that *unreasonably* restrain competition, *Standard Oil Co. v. United States*, 221 U.S. 1, 58–64, 31 S.Ct. 502, 515–17, 55 L.Ed. 619 (1911), thus, the unreasonableness of the agreement is the second element of a section 1 claim. In identifying which agreements unreasonably restrain competition, the Supreme Court has held that certain kinds of agreements are unreasonable per se, such as agreements among direct competitors to fix prices or to restrict output. *E.g., United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 224–26 n. 59, 60 S.Ct. 811, 845–46 n. 59, 84 L.Ed. 1129 (1940). The only inquiry in such cases is whether there was an agreement to do so, because the unreasonableness of the restraint is presumed. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344–45, 102 S.Ct. 2466, 2473–74, 73 L.Ed.2d 48 (1982); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–98, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1927). Agreements that do not fit within an established per se category are analyzed under the "rule of reason," *i.e.*, courts will engage in a comprehensive analysis of the agreement's purpose and effect to determine whether it unreasonably restrains competition. *E.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 24–25, 99 S.Ct. 1551, 1565, 60 L.Ed.2d 1 (1979).

Levine, 72 F.3d at 1545-46.

The conduct at issue here is illegal *per se* under Section 1 of the Sherman Act. [redacted]. The predictable anticompetitive effect of this restrictive conduct renders the conspiracy illegal *per se*.

The 4th Circuit Court of Appeals addressed *per se* violations in ***Cont'l Airlines, Inc. v. United Airlines, Inc.***, 277 F.3d 499 (4th Cir. 2002). The Court found that:

> "*per se* analysis, permits courts to make "categorical judgments" that certain practices, including price fixing, horizontal output restraints, and market-allocation agreements, are illegal *per se*. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985); *see also NCAA*, 468 U.S. at 100, 104 S.Ct. 2948. Practices suitable for *per se* analysis have been found over the years to "be one[s] that would always or almost always tend to restrict competition and decrease output," and that are not "designed to increase economic efficiency and render markets more, rather than less, competitive." *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 19–20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (citations omitted) (hereafter *BMI*). Such restrictions "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se* "

> without any need to conduct a detailed study of the markets on which the restraints operate or the actual effect of those restraints on competition. *State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997)."
>
> ***Cont'l Airlines***, 277 F.3d at 509.

[redacted]. [See Doc 24; Doc 1-3]. [redacted] [See Doc 3, ¶¶ 15-16]. [redacted] Further, the purchase of Clorox large pack products in Woodman's market areas now requires a club store membership. [Doc 3, ¶ 14]. Some consumers cannot afford membership fees. [Doc 3, ¶ 14].

[redacted]. The conspiracy results in less competition for the goods at issue and restricted availability of the product to the consumer. Such is contrary to the letter and the purpose of the Sherman Act.

> The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.
>
> ***Spectrum Sports, Inc. v. McQuillan***, 506 U.S. 447, 458, 113 S. Ct. 884, 891-92, 122 L. Ed. 2d 2475 (1993).

Woodman's must be permitted to amend its Complaint in order to protect the public from the failure of the market.

B. CLOROX TERMINATED DIRECT SALES TO WOODMAN'S IN FURTHERANCE OF ITS UNLAWFUL REFUSAL TO DEAL IN VIOLATION OF SHERMAN ACT § 1.

An independent decision by Clorox to not engage in direct sales with Woodman's may not violate the anti-trust laws. However, Clorox is not entitled to make such a decision in concert with others. In ***Evergreen Partnering Grp., Inc. v. Pactiv Corp.***, 720 F.3d 33, 43 (1st Cir. 2013), the First Circuit Court of Appeals addressed a Sherman Act § 1 violation in the context of a refusal to deal.

> "Section 1 of the Sherman Act does not prohibit all unreasonable restraints of trade, but "only restraints effected by a contract, combination or conspiracy." *Twombly,* 550 U.S. at 553, 127 S.Ct. 1955 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)). In evaluating whether a restraint is effected by such a combination or conspiracy in violation of § 1, " '[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from [an] independent decision or from an agreement, tacit or express.' " *Id.* (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273 (1954)). An agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld,* 467 U.S. at 771, 104 S.Ct. 2731 (internal quotation marks and citation omitted). In the context of § 1 refusal-to-deal or boycott claims, joint or concerted action must be sufficiently alleged since "[a] manufacturer ... generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); *Kartell v. Blue Shield,* 749 F.2d 922, 932 (1st Cir.1984). In alleging conspiracy, an antitrust plaintiff may present either direct or circumstantial evidence of defendants' "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto,* 465 U.S. at 764, 104 S.Ct. 1464 (citation and internal quotation marks omitted)."
>
> ***Evergreen Partnering Grp., Inc. v. Pactiv Corp.***, 720 F.3d 33, 43 (1st Cir. 2013).

In ***A. C. Becken Co. v. Gemex Corp.***, 272 F.2d 1 (7th Cir. 1959), the Plaintiff was a distributor of Gemex watch bands. The Plaintiff was informed by Gemex that in order to be a distributor of Gemex watch bands, retailers were prohibited from selling any watch bands made by competing manufacturers at a price less than the retail price suggested by such manufacturers.

Gemex, 272 F.2d at 3. In other words, in order to sell Gemex watchbands, retailers could not discount watchbands made by their competitors.

The Court succinctly analyzed the case in two paragraphs:

> The law recognizes that a manufacturer, in the battle for business, has a right to sell to whom he pleases. It follows that he has a right to stop dealing with a dealer because he thinks the dealer is acting unfairly in trying to undermine his trade. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992. He is, however, limited to a legitimate use of this weapon. The right to stop dealing is neither absolute nor exempt from regulation. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155, 72 S.Ct. 181, 96 L.Ed. 162; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277. In the latter case the court said 345 U.S. at page 625, 73 S.Ct. at page 889:
>
> > '* * * If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. * * *'
>
> A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it may not be used to accomplish an unlawful purpose. In the case at bar, the clearly established facts show a plan of operation adopted by defendant, the essential purpose of which was to limit the sale of its products to wholesalers who would agree not to sell below prices stipulated by defendant. Such an agreement is in violation of § 1 of the Sherman Act. The established facts also show that 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.

Gemex, 272 F.2d at 3-4.

Here, Clorox did not make an independent business decision to terminate direct sales to Woodman's because of market conditions or any other legitimate business interest. [redacted] [redacted] [redacted] [redacted] [Proposed Amended Complaint, ¶ 74].

[redacted] [See Doc 24, ¶ 15]. The Court denied Clorox's Motion to Dismiss on February 2, 2015. [Doc 50]. The Decision included the Court's opinion that "Clorox cannot use special packaging and package sizes to benefit only certain customers." [Doc 50, p. 10]. The Court's Decision placed Clorox at a difficult crossroads, requiring it to choose between potential legal liability and [redacted]. Clorox terminated direct selling to Woodman's because it believed that doing so would render this lawsuit moot, thereby allowing it to [redacted] [See Docs 24 and 63].

By terminating Woodman's as a customer, Clorox also sought to dissuade other retailers from pursuing claims similar to those raised by Woodman's in this litigation. [Proposed Amended Complaint, ¶ 75].

Clorox's termination of Woodman's was merely a continuance of its "concerted refusal to deal" with Woodman's[4]. Such actions are also commonly referred to as "group boycotts."

> "'Group boycotts' are often listed among the classes of economic activity that merit *per se* invalidation under § 1. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S., at 212, 79 S.Ct., at 709; *Northern Pacific R. Co. v. United States*, 356 U.S., at 5, 78 S.Ct., at 518; *Silver v. New York Stock Exchange*, 373 U.S., at 348, 83 S.Ct., at 1252; *White Motor Co. v. United States*, 372 U.S. 253, 259-260, 83 S.Ct. 696, 699-700, 9 L.Ed.2d 738 (1963). Exactly what types of activity fall within the forbidden category is, however, far from certain. "[T]here is more confusion about the scope and operation of the *per se* rule against group boycotts

[4] Termination was, in fact, a "continuance" of Clorox's concerted refusal to deal with Woodman's. Clorox's concerted refusal to deal started with its refusal to sell large packs to Woodman's. It culminated with the 02/24/15 termination of direct sales.

than in reference to any other aspect of the *per se* doctrine." L. Sullivan, Law of Antitrust 229-230 (1977). Some care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation. See *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543, 98 S.Ct. 2923, 2930, 57 L.Ed.2d 932 (1978) (concerted refusals to deal "are not a unitary phenomenon"). Cf. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S., at 9, 99 S.Ct., at 1557.

Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." Sullivan, *supra*, at 261-262. See, *e.g.*, *Silver, supra* (denial of necessary access to exchange members); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961) (denial of necessary certification of product); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (denial of important sources of news); *Klor's, Inc.*, *supra* (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, *Silver, supra; Radiant Burners, Inc.*, *supra*, and frequently the boycotting firms possessed a dominant position in the relevant market. *E.g.*, *Silver, supra; Associated Press, supra; Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941). See generally Brodley, Joint Ventures and Antitrust Policy, 95 Harv.L.Rev. 1523, 1533, 1563-1565 (1982). In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote."

Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293-94, 105 S. Ct. 2613, 2619-20, 86 L. Ed. 2d 202 (1985). (Emphasis supplied).

In the ***Klor's*** decision cited in ***Nw. Wholesale***, the U.S. Supreme Court discussed the reasoning for classifying group boycotts as *per se* violations of Section 1 of the Sherman Act.

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 466, 467-468, 61 S.Ct. 703, 707, 85 L.Ed. 949. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-*

> *Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213, 71 S.Ct. 259, 260, 95 L.Ed. 219, 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. *United States v. Patten*, 226 U.S. 525, 542, 33 S.Ct. 141, 145, 57 L.Ed. 333.
>
> ***Klor's, Inc. v. Broadway-Hale Stores, Inc.***, 359 U.S. 207, 212, 79 S. Ct. 705, 709, 3 L. Ed. 2d 741 (1959).

Faced with the prospect of having to sell large packages of its products to Woodman's, Clorox decided to sever direct sales to Woodman's altogether. [redacted]. [See Doc 24, ¶ 15]. The conspiracy between Clorox and the as-yet unnamed club stores "cripple[d] the freedom of [Clorox] and thereby restrain[ed] their ability to sell in accordance with their own judgment."

[redacted]. It started in September 2014 when Clorox informed Woodman's that, effective October 1, 2014, Clorox would no longer sell large packs to Woodman's or other retailers not in the so-called "club channel." It culminated with Clorox's February 24, 2015 termination of direct sales to Woodman's. Both are *per se* illegal under § 1 of the Sherman Act. Woodman's must be permitted to amend its Complaint to present these serious claims to the Court.

CONCLUSION

As previously addressed, the present motion must be regarded as one for summary judgment. "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." ***Masson v. New Yorker Magazine, Inc.***, 501 U.S. 496, 520, 111 S. Ct. 2419, 2434-35, 115 L. Ed. 2d 447 (1991); citing ***Anderson v. Liberty Lobby, Inc.***, 477 U.S., at 255, 106 S.Ct., at 2513.

All justifiable inferences support the conclusion that Woodman's remains a "customer" and "purchaser" of Clorox for purposes of Robinson-Patman Act Sections 2(d) and (e). All of Woodman's claims remain alive and well. Nothing is moot.

Further, all relevant considerations support Woodman's ability to amend its Complaint in response to Clorox's factual representations set forth in Document 24. It would be unjust and inequitable to not allow Woodman's to have its day in court on these claims.

Clorox's motion for summary judgment must be denied. Clorox has not shown entitlement to the refuge it seeks. Woodman's claims raise issues of substantial importance warranting consideration on the merits.

Dated this 20th day of March, 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)

25249661_1.DOC