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 PRELIMINARY INJUNCTION

Defendants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") submit this Brief in Opposition to the Motion for a Preliminary Injunction filed by Plaintiff Woodman's Food Market, Inc. ("Plaintiff"). Clorox respectfully requests, however, that the Court first resolve its motion to dismiss Plaintiff's Complaint. As explained in that motion, there is no need for the Court and the parties to expend the resources that would be involved in a preliminary injunction hearing, because Plaintiff's Complaint fails to state a claim. In the event that the Court decides to first address the preliminary injunction motion, the Court should deny the motion because Plaintiff has not come close to satisfying any of the four mandatory elements.

First, Plaintiff cannot establish that it is likely to succeed on its claims under Sections 2(d) and 2(e) of the Robinson-Patman Act, because those claims fail as a matter of law.[1] Plaintiff is asking this Court to do what no federal court has ever done—enjoin and declare *per se* unlawful a product distribution system that is commonplace in the United States economy and benefits competition and consumers. Specifically, Plaintiff requests that the Court expand the

[1] Plaintiff does not seek preliminary relief on its Section 2(a) claim.

Robinson-Patman Act to require that, when a manufacturer sells *any* product in a product line to *any* retailer, the manufacturer must offer to sell that retailer *every* product in that line. There is no valid legal basis for such a rule.

Simply put, Plaintiff's assertion that any particular product that it wants to buy is a "service" or "facility" covered by Sections 2(d) and 2(e) is wrong. Such an interpretation is contrary to the plain meaning of the statute, has never been adopted by any federal court, and conflicts with the Supreme Court's holding that courts should "resist interpretation[s]" of the Robinson-Patman Act that are "geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006).

Second, Plaintiff has not established that it is likely to suffer irreparable harm in the absence of preliminary relief, nor could Plaintiff ever do so. The only live issue here is Clorox's decision not to sell Plaintiff *five* products (out of the thousands in Plaintiff's stores) that Clorox sells to Club Stores.[2] Plaintiff offers nothing but implausible speculation that its inability to purchase these five products would cause it to lose business. Indeed, Plaintiff concedes that it has absolutely no idea how much business it might lose or when such losses might occur. Plaintiff is at a loss to address these dispositive questions because it apparently has not gathered, much less presented, any of the relevant evidence, such as consumers' shopping patterns and the availability of other products. These evidentiary omissions require rejection of Plaintiff's request for preliminary relief.

[2] Plaintiff's Complaint refers to twelve products. Complaint ¶ 16. In fact, as of now, only five products are at issue. Clorox still supplies Plaintiff with the charcoal SKU, Rexing Affidavit ¶ 8; Woodman Affidavit ¶ 24, and Costco and Sam's Club stores in the applicable regions only purchase five of the remaining eleven products. Rexing Affidavit ¶ 8.

Third, the equities strongly favor Clorox. Stripped of its rhetoric, Plaintiff's motion offers only a theory that no federal court has ever adopted in order to prevent purported damages that it concedes cannot be estimated now or in the future. In contrast, Clorox has submitted evidence to show that its channel policy was adopted in order to [redacted] lower its costs. The evidence also shows that to require Clorox to sell the contested products to Plaintiff would create a material risk that Clorox will lose substantial sales.

Last, a preliminary injunction is contrary to the public interest because the rule and results sought by Plaintiff conflict with the well-established objectives of the antitrust laws. Plaintiff's purpose is nothing more than an attempt to protect every parameter and facet of its preferred business model. But the Supreme Court has repeatedly held that neither the antitrust laws in general nor the Robinson-Patman Act in particular "bar a manufacturer from restricting its distribution networks to improve the efficiency of its operations." *Volvo*, 546 U.S. at 180–81.[3] This is because the "primary purpose" of the antitrust laws is to promote "*competition among manufacturers selling different brands* of the same type of product," as opposed to "*competition among retailers* selling the same brand." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) (emphases added). Plaintiff's papers are silent as to how preliminary relief will advance interbrand competition, an omission that further underscores why the Court should deny its motion.

STATEMENT OF FACTS

I. The Parties

Virtually all of the established relevant facts are not in dispute. Clorox manufactures and markets consumer and professional products. The company's offerings include branded bleach

[3] The *Volvo* decision explains the well-accepted economics that "a simultaneous reduction of intrabrand competition [can stimulate] interbrand competition." 546 U.S at 181 & n.4 (internal quotation marks omitted).

and cleaning supplies, charcoal, household cleaners, plumbing fluid, cat litter, sandwich bags, wraps and containers, salad dressings and sauces, natural personal care products, and water-filtration products. Clorox's professional brands include cleaning and infection-control products for the health care industry. Rexing Affidavit ¶ 2.

Clorox manufactures and sells more than 1,100 stock keeping units, or "SKUs." Many of Clorox's brands are manufactured in a range of different size products, including 76 products designed for Club Stores. In the United States, Clorox sells its products to more than 30,000 retailers, which range from small convenience stores to very large retailers, such as Wal-Mart, Costco, and Sam's Club. Rexing Affidavit ¶¶ 3, 4.

[redacted]

[redacted] Clorox offers only 76 products to Club Stores, [redacted]

[redacted]

[redacted]

To date, this case concerns only five products. Plaintiff references twelve Club-Store products that it believes Clorox sells to Club Stores, but not to Plaintiff. In fact, Costco and Sam's Club have purchased only five of the products that Clorox no longer sells to Plaintiff:

[redacted]

[redacted]

Indeed, Clorox faces substantial competition from other companies' brands and private label products that are manufactured by retailers (*e.g.*, Costco's Kirkland brand). Consequently, Clorox's customers, including Club Stores, can readily substitute competing products if they are not satisfied with Clorox's prices and offerings. Rexing Affidavit ¶¶ 9[redacted]

In 2014, Clorox management reviewed the Company's distribution strategy in order to better serve its customers and to increase Clorox's sales. [redacted] Clorox determined that revising its distribution strategy would reduce costs and enable Clorox to provide a greater range of products to consumers. Rexing Affidavit ¶ 16.

In conducting the review, the company analyzed: (1) the costs of its various distribution channels; (2) mechanisms to increase the sales of Clorox products; and (3) policies that could

improve the assortment of products that Clorox could offer its customers. Rexing Affidavit ¶ 17. Ultimately, Clorox determined that it could increase its sales by adopting a channel strategy. Clorox's modification to its distribution system is designed to make Clorox's products more competitive, grow sales, and improve the efficiency of its distribution network. Clorox implemented a revised channel plan in August 2014, which classified retailers into different categories, including General Market and Club Stores. Clorox concluded that the channel plan could ensure sufficiently different products for both Club and General Market stores, as well as decrease the likelihood of service disruptions. Rexing Affidavit ¶ 18.

To implement the channel plan, Clorox developed distinct sets of products that it would sell to General Market stores and to Club Stores. There are 76 products on the Club Store list, compared to over 1,000 on the General Market list. [redacted]

As part of its new channel plan, Clorox developed new large-format "large value products" for General Market stores. The large value products are only available in the General Market channel; Clorox does not sell them to Club Stores. Clorox offers both its Club-Store and large value products all year, rather than for a limited period of time. Rexing Affidavit ¶ 22.

Clorox's contemporaneous business documents reflect that Clorox implemented the channel plan [redacted] to lower its costs. The presentation that Clorox provided to Plaintiff explained that the channel plan was designed to:

- "simplify [Clorox's] go to market strategy";
- "streamline operations";
- "deliver [Clorox's] best cost . . . by regulating the products we sell to customers/channels";
- meet "customers' desires for differentiated products from manufacturers"; and

- "create[ ] the right assortment of sizes and brands for customers/channels based on their shoppers and maximize[ ] both the customer and Clorox sales."

Complaint ¶ 29 & Exhibit 3.

On September 2, 2014, Clorox personnel met with Phil Woodman, Plaintiff's owner, to discuss Clorox's channel plan. At this meeting, Clorox explained to Mr. Woodman that Clorox had classified Plaintiff as a General Market store, which would allow it to purchase more than 1,000 products. Under the channel plan, Plaintiff is able to purchase virtually all Clorox products (including the large value products), except for Club-Store products. Clorox does not make the value products available to Club Stores. To date, Plaintiff has refused to purchase the large value products. Rexing Affidavit ¶ 23.

ARGUMENT

Plaintiff has not demonstrated that it is entitled to preliminary injunctive relief on its claims that Clorox violated Sections 2(d) and 2(e) of the Robinson-Patman Act. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. Plaintiff has failed to satisfy each requirement.

I. Plaintiff Is Not Likely To Succeed On The Merits

The Supreme Court was clear in *Winter* that an injunction can issue only when the plaintiff is *likely* to prevail on the merits. 555 U.S. at 20. And the Seventh Circuit has recently confirmed that standard. *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014) ("Another requirement for preliminary relief is that the plaintiff be likely to win its suit in the

district court. The Supreme Court's decision in the *Winter* case states flatly that 'a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits.'"). Plaintiff is thus simply wrong that it must show only a "better than negligible" chance of success to receive an injunction. Plaintiff's Motion at 4.

Plaintiff cannot show that it is likely to prevail on its Section 2(d) and 2(e) claims because those claims fail as a matter of law. The crux of Plaintiff's case is its argument that Clorox's decision to not sell it Club-Store products constitutes the denial of a *service or facility* that Clorox is required to provide under 2(d) and 2(e). Plaintiff's Motion at 6–8. But as explained in Clorox's brief in support of its Motion to Dismiss Plaintiff's Complaint—the arguments of which are included here for the Court's convenience—Plaintiff's position is legally incorrect.

Plaintiff also cannot succeed because Clorox's channel plan is covered by the "meeting competition" provision of the Robinson-Patman Act. *See* 15 U.S.C. § 13(b). [redacted] The Robinson-Patman Act expressly exempts from liability business practices that are targeted to respond to competitors' pricing and promotional strategies. *See* § 13(b).

A. The Complaint Fails To State A Claim Under Section 2(d) Or 2(e) Of The Robinson-Patman Act

Plaintiff has failed to state a claim for discriminatory furnishing of promotional services or facilities in violation of Sections 2(d) and 2(e).

15 U.S.C. § 13(d) (emphasis added) states that:

> 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 . . . 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.

And 15 U.S.C. § 13(e) (emphasis added) provides:

> 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.

These sections generally prohibit a manufacturer from paying promotional allowances or providing services to a preferred customer in connection with its resale of the manufacturer's goods. *See* American Bar Ass'n, Price Discrimination Handbook 60 (2013). A manufacturer may not, for example, pay to advertise its product in one customer's stores without offering proportionally equal advertising services to its other customers. The purpose of Sections 2(d) and 2(e) is to prevent disguised price discrimination in the form of promotional payments or services. *See George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 144 (2d Cir. 1998). Because the two subsections contain substantively similar language, the courts have analyzed them almost identically. *See* Price Discrimination Handbook at 59.

Plaintiff's claim fails because its argument, Complaint ¶ 15, that "a large pack of a particular product constitutes the provision of a promotional service [covered by Sections 2(d) and 2(e)] that helps the customer sell a product at retail" is wrong. First, Plaintiff's position conflicts with the plain language of Sections 2(d) and 2(e), which refer to "services" and "facilities," not product characteristics such as size. The courts have not provided conclusive definitions of "services" and "facilities," but those terms must be given a sensible reading that is consistent with ordinary usage. *See Taniguchi v. Kan Pac. Saipan, Inc.*, 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). It is

not sensible to read "services or facilities"—as Plaintiff would—to include a SKU of a product that contains a substantially larger volume of a certain kind of item. A 42-pound bag of cat litter is not a "service" or "facility"; it is just a *product*.

Second, Clorox is aware of no federal court decision that has ever adopted Plaintiff's interpretation. Rather, consistent with the plain meaning of the statute and the legislative history of the Robinson-Patman Act, courts have recognized that "[S]ection 2(e) was aimed at advertising and promotional services." *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1118, 1119 (5th Cir. 1982). Promotional services are things like "fees to vendors if they followed certain guidelines regarding the placement of advertising materials" and "gifts to give away to [ ] purchasers," *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 520–21 (6th Cir. 2004); "marketing or advertising services," *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 379–80 (4th Cir. 1992); "cooperative advertising payments [and] store placement allowances, " *Am. Booksellers Ass'n v. Houghton Mifflin Co.*, No. 94 Civ. 8566, 1995 U.S. Dist. LEXIS 2522, *20–22 (S.D.N.Y. Mar. 3, 1995); or "advance notification of a rebate," *Morris Elecs. of Syracuse, Inc. v. Mattel, Inc.*, 595 F. Supp. 56, 58–59 (N.D.N.Y. 1984).[4]

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[4] *See also Monsieur Touton Selection v. Future Brands, LLC*, No. 06 Civ. 1124, 2006 U.S. Dist. LEXIS 52966, at *18 (S.D.N.Y. Aug. 1, 2006) (Sections 2(d) and 2(e) "were designed to prohibit indirect price discrimination in the form of advertising and other promotional allowances"); *Ashkanazy v. Rokeach & Sons, Inc.*, 757 F. Supp. 1527, 1553 (N.D. Ill. 1991) (holding that "sections 2(d) and 2(e) of the Act proscribe indirect price discrimination effected through discriminatory advertising and service allowances"); *John Peterson Motors, Inc. v. Gen. Motors Corp.*, 613 F. Supp. 887, 898 (D. Min. 1985) ("The weight of authority appears to conclude . . . that § 2(e) was aimed at advertising, merchandising, and other promotional services . . . .").

The Seventh Circuit has also held that, in some circumstances, a manufacturer can be liable under Section 2(e) for providing timely delivery to some purchasers but consistently late delivery to others. *See Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 588 (7th Cir. 1971). But this case is not about delivery. *Centex* held that "the statute covers the furnishing of 'any services or facilities.' We must not construe this Section in a manner that strains its language[.]" *Id.* at 587. Tto interpret Section 2(e) here to cover a *product* would certainly strain the language and violate *Centex*. Delivery is arguably a service; products in the aisles at a retail store are not.

The only authority that Plaintiff cites to support its position is a nearly 75-year old decision by the Federal Trade Commission. *See In re Luxor, Ltd.*, 31 F.T.C. 658 (1940).[5] But that decision does not provide a sound basis for asking this Court to adopt a sweeping expansion of the Robinson-Patman Act. It is a decision by an administrative agency that is not binding on this (or any other) Court. Moreover, the FTC recently did not endorse *Luxor* in its revised "Fred Meyer" Guidelines. *See* Guidelines for Advertising Allowances and Other Merchandising Payments and Services, 79 Fed. Reg. 58245 (Sept. 29, 2014). In commentary to the revised Guidelines, the Commission addressed a similar packaging issue and merely observed that no federal court has "squarely addressed the question of whether the provision of special packaging or package sizes to only some competing customers may violate section 2(e) of the Act." *Id.* at 58248. The Commission retained the phrase "*special* packaging, or package sizes" in its list of items potentially covered by Section 2(e). *Id.* (emphasis added). But the FTC suggested, consistent with the modifier "special," that packaging may fall within Section 2(e) only as it relates to advertising and promotional programs for a product. To illustrate this limitation, the FTC provided a new example that concerned a seasonal promotion, not a long-term distribution strategy: if, "[d]uring the Halloween season, a seller of multi-packs of individually wrapped candy bars offers to provide those multi-packs to retailers in Halloween-themed packaging," the packaging could be a promotional service covered by Section 2(e). *Id.* at 58249.

Clorox's Club-Store products are not like Halloween-themed packaging: they are not a temporary device to drive up business during a particular season, they are not a form of advertising, and they are not a promotional program. Club-Store products are simply one type of product, which Clorox sells year-round through one channel in order to increase both its own

[5] The FTC reached a similar conclusion in *In re General Foods Corp.*, 52 F.T.C. 798 (1956).

sales and those of its retail customers. Rexing Affidavit ¶ 22. The "Robinson-Patman [Act] does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations." *Volvo*, 546 U.S. at 181 n.4.

Furthermore, the FTC has been backtracking from the policies that underlie the *Luxor* decision for decades. In 1980, the Commission explained that the legislative history of Sections 2(d) and 2(e) "evidences the relatively narrow scope that Congress intended these specific provisions to have." *In re Gibson*, 95 F.T.C. 553, 726 (1980). Accordingly, the Commission concluded that "courts have an obligation to ensure" that the sections are "reasonably, and not expansively, construed." *Id.* Most recently, the FTC recognized that the "Robinson-Patman Act should be construed to be consistent with the antitrust laws generally," which are focused on the protection of *interbrand* competition, not the protection of individual competitors. 79 Fed. Reg. at 58247 (citing *Volvo*, 546 U.S. 164).[6]

Fundamentally, Plaintiff alleges not that Clorox denied it a service or facility covered by Section 2(d) or 2(e), but that Clorox *refused to deal* with Plaintiff on a small set of SKUs. *See* Complaint ¶ 37 (alleging that Clorox sells "large packs to [Plaintiff's] competitors at retail without making those large packs available to [Plaintiff]"). This reality is fatal to Plaintiff's claim, because the courts have repeatedly held that a refusal to deal does not violate Section 2(d) or 2(e). *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470–71 (7th Cir. 1980) (the

[6] *Luxor* and *General Foods* are relics of an era when vertical delineations between manufacturers and distributors were considered *per se* anticompetitive and the antitrust laws were used to protect individual companies. For the past three decades the Supreme Court has repeatedly overturned decisions such as *Luxor*, finding that they are inconsistent with the antitrust law's goal of protecting competition. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007) (vertical restraints "can increase interbrand competition by facilitating market entry for new firms and brands"); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (holding that vertical maximum price fixing is not per se illegal because it may have procompetitive benefits); *Cont'l Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54–57 (1977) ("[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products").

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"); *see also, e.g.*, *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1318 (9th Cir. 1979) (a manufacturer's "refusal to sell a line of products to a prospective customer while maintaining sales of the product to other customers is . . . not the type of discrimination prohibited by the Robison-Patman Act"); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 682–83 (10th Cir. 1984); *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).

B. Clorox Cannot Be Liable Under The Robinson-Patman Act Because It Acted To Meet Competition

Even if the Court were to conclude that Clorox's refusal to deal with Plaintiff on Club-Store products is prima facie covered by Sections 2(d) and 2(e), Plaintiff still cannot demonstrate that it is likely to succeed on the merits, because Clorox's channel plan qualifies for the "meeting competition" exemption to the Robinson-Patman Act. 15 U.S.C. § 13(b). To prevent the Robinson-Patman Act from impeding the competitive process, Congress provided that a company cannot violate the law if its conduct was directed at competing with the services or facilities offered by a competitor.

15 U.S.C. § 13(b) provides that:

> [N]othing herein contained shall prevent a seller rebutting [a] prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

This provision protects a seller that is forced to lower its prices in order to keep the customer's business. *See Standard Oil Co. v. FTC*, 340 U.S. 231, 251 (1951). The defense

applies to Sections 2(d) and 2(e), as well as 2(a). *See Ludwig v. Am. Greetings Corp.*, 282 F.2d 917, 918 (6th Cir. 1960); 14 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶¶ 2322, 2363g2, at 78, 302 (3d ed. 2012).

The meeting competition defense covers a seller who "was threatened with a termination of purchases" if it did not offer special treatment to a particular buyer. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 455 (1978). For example, in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 84 n.17 (1979), the Supreme Court found that the defense was proven where a "[Seller] was faced with a credible threat of termination of purchases by [Buyer]" if the seller did not make a lower offer on price. Similarly, in *Cadigan v. Texaco, Inc.*, 492 F.2d 383, 386 (9th Cir. 1974), the court found that the defendant-seller could not be liable because the buyer had "indicated that it would terminate the arrangement with [seller] if the discount was not raised."

The meeting competition exemption is not limited to circumstances when a particular customer threatens to terminate a seller; it also allows a manufacturer to respond to competitors' market-wide practices. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). "There is no evidence that Congress intended to limit the availability of § 2(b) to customer-specific responses." *Id.* at 448. Rather, a "single low price . . . may be extended to numerous purchasers if the seller has a reasonable basis for believing that the competitor's lower price is available to them." *Id.*

The principles of *Great Atlantic*, *Cadigan*, and *Falls City* are directly on point here. [redacted]

[redacted]

Rexing Affidavit ¶ 19. This decision falls squarely within Section 2(b) of the Statute and therefore cannot be the basis of liability under the Robinson-Patman Act.

II. Plaintiff Has Failed To Demonstrate Irreparable Injury

Preliminary relief cannot issue unless the movant demonstrates that irreparable harm is *likely* without an injunction. *Winter*, 555 U.S. at 21. The mere "possibility" of irreparable harm is not sufficient. *Id.* "If the moving party cannot make this showing, 'a court's inquiry is over and the injunction must be denied.'" *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005) (quoting *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)).

Here, Plaintiff has not and cannot demonstrate a likelihood of irreparable injury in the absence of an injunction. First, and dispositive, Plaintiff has not provided any facts to indicate that it would be irreparably harmed without preliminary relief. In his affidavit, Mr. Woodman merely notes that customers have purchased the contested products and claims that he is "*concerned*" about lost sales. Woodman Affidavit ¶¶ 37, 38 (emphasis added). Similarly, Plaintiff's brief simply speculates that "*[i]f* Woodman's loses customers because of the inability to sell large packs of Clorox products, it *may* lose those customers for life." Plaintiff's Motion at 11 (emphases added). Nowhere does Plaintiff offer any evidence that near-term irreparable harm is *likely*. These defects require that Plaintiff's motion be denied. *See East St. Louis*, 414 F.3d at 705–06 ("[A] plaintiff cannot obtain a preliminary injunction by speculating about hypothetical future injuries.").

Plaintiff is forced to speculate because it has not gathered, analyzed, or presented any of the facts needed to back-up its claim that it will irreparably lose business. For example, Plaintiff has not:

- Estimated how many customers are likely to alter their entire shopping habits based on Plaintiff's inability to offer the disputed Clorox Club-Store products;
- Explained why it could not stock greater quantities of competing branded products or private-label products in place of Clorox's offerings;
- Quantified how many Costco stores and Sam's Clubs that compete with Plaintiff's stores actually stock the five disputed Clorox Club-Store products, and how often they stock them; or

- Analyzed potential customer responses to Clorox's "value" products, which Plaintiff has declined to stock.[7]

Second, Plaintiff's conclusory assertion that its alleged injuries cannot be quantified is implausible on its face. At minimum, it would be a simple matter to determine whether there is a decline in Plaintiff's sale of cat litter, bleach, salad dressing, and lighter fluid. Plaintiff declines even to contemplate this basic accounting, preferring to focus on hypothetical losses of customers based on the lack of availability of five products. But the "harm [that] plaintiff points to . . . eludes calculation [precisely] because it is speculative, not because, if it occurred, it could not be quantified." *East St. Louis*, 414 F.3d at 705.

Plaintiff cites preliminary injunction cases that cover atypical situations, Plaintiff's Motion at 11,[8] such as when damages would come "too late to save plaintiff's business." *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994).[9] Here, Plaintiff's multi-million dollar business would not be in any jeopardy if some customers were to shop at Plaintiff's competitors. *See Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1092 (7th Cir. 1988) (An injunction is not appropriate where, as here, it would "not affect the continued success of the company").[10]

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[7] To the extent that Plaintiff refuses to stock these large size value products at all, it has not "mitigate[d] against damages," Plaintiff's Motion at 10, but has exacerbated them.

[8] *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992), is distinguishable because the holding was based partially on the fact that the market for a special type of baby formula is "unlike typical consumer product markets." *Id.* at 10.

[9] In *Gateway East Railway*, the Seventh Circuit affirmed a grant of a preliminary injunction where the district court had found that, without an injunction, the plaintiff would suffer either a loss of goodwill or would go out of business. 35 F.3d at 1140.

[10] Plaintiff also concedes that it has not suffered any injury to date. Plaintiff's Motion at 10 ("Since [Plaintiff] still has a stock of large pack items on hand, [Woodman Affidavit ¶ 35], it will not experience any damages in the event a preliminary injunction is granted within a reasonable time after filing.") (second brackets in original); Woodman Affidavit ¶ 35 ("[Plaintiff] has an inventory of large pack items on hand that will enable it to continue offering these products for a brief period of time").

III. The Balance Of The Equities Strongly Favor Clorox

The balance of the equities also favors denying Plaintiff's motion. As demonstrated above, Plaintiff has made no showing whatsoever that it needs preliminary injunctive relief to avoid irreparable harm. [redacted] Clorox faces stiff competition from other brands and Club Store private label products. Rexing Affidavit ¶ 9. [redacted]

Nor is it likely that Plaintiff would be able to cure these substantial financial injuries if the Court subsequently lifted the injunction. Plaintiff mentions the possibility of an injunction bond to compensate Clorox for its damages from an injunction, Plaintiff's Motion at 12–13 [redacted]

IV. A Preliminary Injunction Is Not In The Public Interest

Finally, the public interest does not favor an injunction because it would be contrary to the policies underlying the antitrust laws. Plaintiff acknowledges that "it is axiomatic that the antitrust laws were passed for the protection of competition, not competitors." Plaintiff's Motion

at 13 (*quoting Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224–25 (1993)) (brackets and emphases omitted); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) ("primary purpose" of the antitrust laws is to promote "*competition among manufacturers selling different brands* of the same type of product," not "*competition among retailers* selling the same brand") (emphases added). But Plaintiff does not purport to show that Clorox's channel policy will have any effect on competition between Clorox and its competitors.

Similarly, Plaintiff entirely ignores the Supreme Court's recent in *Volvo* that "Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations." *Volvo*, 546 U.S. at 180–81. That is exactly what Clorox did here.

CONCLUSION

For these reasons, Clorox respectfully requests that the Court deny Plaintiff's motion for a preliminary injunction. Moreover, for the reasons stated, Clorox respectfully requests that this Court resolve Clorox's Motion to Dismiss before holding a preliminary injunction hearing.

Respectfully submitted,

Dated: November 25, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 2014, I caused a copy of the foregoing BRIEF IN OPPOSITION TO A PRELIMINARY INJUNCTION to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
Joshua H. Soven