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 REPLY BRIEF IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Woodman's Food Market, Inc. ("Woodman's"), submits the following Reply Brief in support of its motion requesting issuance of a Preliminary Injunction pursuant to 15 U.S.C. § 26, 15 U.S.C. § 13(e), and F.R.C.P. 65(a).

SUPPLEMENTAL FACTS

The following facts have come to light since Woodman's filed its Motion for Issuance of a Preliminary Injunction and Statement of Facts upon which it intended to rely in support of said motion:

1) In its Brief opposing Woodman's Motion to unseal certain pleadings, Clorox withdrew its "meeting competition" defense in relation to Woodman's Motion for issuance of a Preliminary Injunction. In so doing, Clorox also expressly withdrew any reliance on the redacted information included in its responsive pleadings for the purpose of opposing Woodman's motion. In its Brief Opposing Woodman's Motion to Unseal Documents [Doc 43], Clorox stated as follows:

> "Clorox should not be put to a Hobson's choice between fully opposing Plaintiff's motion for a preliminary injunction and disclosing its proprietary distribution and negotiation strategies. Nevertheless, because disclosure of the information poses such a great risk of commercial harm, Clorox will withdraw its meeting competition defense--including all of the redacted information-for purposes of opposing the preliminary injunction.[1] The redacted information will no longer be relevant to the preliminary injunction motion. If the Court reaches the preliminary injunction motion-which the Court indicated during the December 19, 2014 pretrial conference might not happen for some time-then the Court would need to decide only (1) whether Plaintiff has stated a claim as a matter of law under Section 2(e) of the Robinson-Patman Act and (2) whether Plaintiff is likely to incur irreparable harm unless the Court orders Clorox to sell the products at issue to Plaintiff.
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> > [FN 1] Plaintiff's brief concedes that its motion is not necessary if Clorox does not rely on the information under seal. Pl.'s Mot. to Unseal 7 ("If Clorox persists in its request that the Court consider the sealed documents when reaching a decision on Woodman's motion for entry of a preliminary injunction, the seal must be lifted."). As stated, to expedite this matter, Clorox withdraws all reliance on the sealed information for purposes of contesting Plaintiff's motion for a preliminary injunction."

[Doc 43, pp. 2-3, FN 1].

2) The Court's Opinion & Order denying Clorox's Motion to Dismiss contains the following conclusions of law:

> "[T]he FTC's decisions in *Luxor* and *General Foods* are directly on point in this case, and Clorox has failed to persuade me that they are no longer good law. Further, the FTC has made clear in its recently revised guidelines 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. Woodman's allegations are sufficient to state a claim under the Robinson-Patman Act."

[Doc 50, p. 10].

3) Woodman's has recently purchased and stocked some of Clorox's "large value products" (a/k/a "Tweener" products) after selling the stockpiled balance of large packs it had in its inventory at the time of the commencement of this action. [Anundson Aff., ¶ 4, 5; Ex. 1].

INTRODUCTION

In conjunction with withdrawing its meeting competition defense, Clorox informed the Court on page 43 of its Brief Opposing Woodman's Motion to Unseal that it will "need to decide only (1) whether Plaintiff has stated a claim as a matter of law under Section 2(e) of the Robinson-Patman Act and (2) whether Plaintiff is likely to incur irreparable harm unless the Court orders Clorox to sell the products at issue to Plaintiff." [Doc 43, p. 3].

The Court has since decided that Woodman's has stated a claim as a matter of law under Section 2(e) of the Robinson-Patman Act. That leaves only the issue of "whether Plaintiff is likely to incur irreparable harm unless the Court orders Clorox to sell the products at issue to Plaintiff." **Id**.

Clorox's unambiguous position is that the only issue the Court should now consider is whether Woodman's is likely to suffer irreparable harm if the Court does not enter the requested injunctive relief. Notwithstanding, out of an abundance of caution, Woodman's will address all arguments presented in the unredacted portions of Clorox's November 24, 2014 Brief. All redacted statements of fact and all arguments premised thereon will be disregarded.

LEGAL ANALYSIS

I. CLOROX'S INTRODUCTORY COMMENTS

Clorox presented an overview of the issues on Pages 1-3 of its Brief. [Doc 28, pp. 1-3]. On page 1, Clorox alleges that its "product distribution system . . . is commonplace in the United States economy and benefits competition and consumers." There are no facts in the record to support this allegation.

On page 2, Clorox argues that there is no valid legal basis under the 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. [Doc 28, p. 2]. Clorox distorts Woodman's legal position. Regardless, the Court has found that there exists a valid legal basis for Woodman's claims. [Doc 50, p. 10]. The Court has similarly rejected the arguments presented in the second paragraph of page 2.

In the last paragraph of page 2, Clorox outlines its arguments regarding irreparable harm. Those arguments will be addressed later in this Brief.

At the top of page 3, Clorox argues that "the equities strongly favor Clorox." Clorox should not be heard to present this argument, as it is inconsistent with the position adopted by Clorox in its Brief dated January 5, 2015. [Doc 43, p. 3]. Regardless, the first alleged supporting fact has been redacted, and there is no support for the claim that [redacted] [Doc 28, p. 3]. Any support that may have existed for this claim has been redacted. The claim must likewise be considered redacted.

In the last paragraph of its introductory comments on page 3, Clorox argues that issuance of a preliminary injunction is contrary to the public interest. Once again, the Court should disregard this argument, as it is inconsistent with the position adopted by Clorox in its later-filed Brief. [Doc 43, p. 3]. In support of this argument, Clorox presents legal arguments rejected by the Court in its Opinion & Order denying Clorox's Motion to Dismiss. [Doc 50, pp. 9-10]. Woodman's will address this argument in more depth when discussing the injunctive relief elements.

II. INJUNCTIVE RELIEF STANDARD

Clorox argues that the decision in ***Winter v. Natural Res. Def. Council, Inc***., 555 U.S. 7 (2008), changed the legal landscape by establishing that an injunction can issue only when the plaintiff is likely to prevail on the merits. [Clorox Br., p. 8]. Woodman's does not deny that the ***Winter*** decision includes the language identified by Clorox. Nor does Woodman's deny that the 7th Circuit recently quoted ***Winter*** favorably in ***Univ. of Notre Dame v. Sebelius,*** 743 F.3d 547 (7th Cir. 2014).

The question, then, is what does "likely" mean? Chief Judge Easterbrook wrote the decision in ***Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co***., 582 F.3d 721 (7th Cir. 2009), another decision in which the 7th Circuit quoted ***Winter*** favorably. Assessing the necessary quantum of proof at the preliminary injunction stage, the 7th Circuit found that:

> "Irreparable injury is not enough to support equitable relief. There also must be a plausible claim on the merits, and the injunction must do more good than harm (which is to say that the "balance of equities" favors the plaintiff). See ***Winter v. Natural Resources Defense Council, Inc***., 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)." ***Hoosier***, 582 F.3d at 725.

The Court then concluded:

> "On the subject of irreparable injury, appellate review is deferential at the preliminary injunction stage, and we lack an adequate basis on which to disagree with the district court's assessment. That leaves the question whether Hoosier Energy has a plausible theory on the merits—not necessarily a winning one, but a claim strong enough to justify exposing John Hancock to financial risks until the district court can decide the merits." ***Hoosier***, 582 F.3d at 725.

Other circuits examining their preliminary injunction "sliding scale" tests have similarly concluded that their well-established preliminary injunction standards survive ***Winter***. The 9th Circuit recently addressed the issue in great detail. In ***Alliance for the Wild Rockies v. Cottrell***, 632 F.3d 1127 (9th Cir. 2011), the Court engaged in the following analysis:

"The Seventh Circuit was the first to hold that the sliding scale test survives ***Winter***, and that a weaker claim on the merits can still justify a preliminary injunction depending on the amount of "net harm" that could be prevented by the injunction. Citing ***Winter***, Judge Easterbrook wrote:

> 'Irreparable injury is not enough to support equitable relief. There also must be a plausible claim on the merits, and the injunction must do more good than harm (which is to say that the "balance of equities" favors the plaintiff). How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief.
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> ***Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.***, 582 F.3d 721, 725 (7th Cir.2009) (internal citations omitted).'

The Second Circuit decision came down after the Supreme Court had decided two post-***Winter*** cases, ***Munaf v. Geren***, 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008), and ***Nken v. Holder***, 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). Prior to ***Winter***, the Second Circuit had employed a "serious questions" sliding scale test:

> 'For the last five decades, this circuit has required a party seeking a preliminary injunction to show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and balance of hardships tipping decidedly toward the party requesting the preliminary relief. The "serious questions" standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction. Because the moving party must not only show that there are "serious questions" going to the merits, but must additionally establish that "the balance of hardships tips *decidedly* " in its favor, its overall burden is no lighter than the one it bears under the "likelihood of success" standard.
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> ***Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.***, 598 F.3d 30, 35 (2d Cir.2010) (emphasis in original; internal quotations omitted).'
>
> Judge Walker explained why the Second Circuit's "serious questions" test survived ***Winter:***

> 'The value of this circuit's approach to assessing the merits of a claim at the preliminary injunction stage lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation.
> ....
> The Supreme Court's recent opinions ... have not undermined its approval of the more flexible approach.... None of the three cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict "likelihood" [of success] requirement in cases that warrant it.
> ....
> If the Supreme Court had meant for ***Munaf***, ***Winter***, or ***Nken*** to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself.... We have found no command from the Supreme Court that would foreclose the application of our established "serious questions" standard as a means of assessing a movant's likelihood of success on the merits.... Thus, we hold that our venerable standard for assessing a movant's probability of success on the merits remains valid.... *Id.* at 35–38.'"
>
> ***Cottrell***, 632 F.3d at 1133-34.

Paraphrasing ***Hoosier***, "that leaves the question whether [Woodman's] has a plausible theory on the merits—not necessarily a winning one, but a claim strong enough to justify exposing [Clorox] to financial risks until the district court can decide the merits." See ***Hoosier***, 582 F.3d at 725. Woodman's will now address the preliminary injunction factors in the order presented by Clorox.

III. PLAINTIFF HAS SUFFICIENT LIKELIHOOD OF SUCCEEDING ON THE MERITS.

In its Brief dated January 5, 2015, Clorox defined the likelihood of success standard as "whether Plaintiff has stated a claim as a matter of law under Section 2(e) of the Robinson-Patman Act." [Doc 43, p. 3]. Woodman's agrees. This standard is consistent with the 7th Circuit's interpretation of ***Winter***, which requires that a movant demonstrate only that there be "a plausible claim on the merits." ***Hoosier***, 582 F.3d at 725.

Consistent with ***Hoosier***, Clorox argued in Section I.A. of its Brief opposing Woodman's motion for entry of a preliminary injunction that "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," and that "Plaintiff has failed to state a claim for discriminatory furnishing of promotional services or facilities in violation of Sections 2(d) and 2(e)." [Doc 28, p. 9]. Clorox explained that "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." [Doc 28, p. 10].

The Court rejected Clorox's arguments in its Opinion and Order denying Clorox's motion to dismiss. The Court concluded that "the FTC's decisions in ***Luxor*** and ***General Foods*** are directly on point in this case, and Clorox has failed to persuade me that they are no longer good law. Further, the FTC has made clear in its recently revised guidelines 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." [Doc 50, p. 10].

The Court determined that "Woodman's allegations are sufficient to state a claim under the Robinson-Patman Act. [Doc 50, p. 10]. This satisfies the standard advanced by Clorox

("whether Plaintiff has stated a claim as a matter of law under Section 2(e) of the Robinson-Patman Act") and by the 7th Circuit interpreting ***Winter*** (that the movant assert "a plausible claim on the merits.") See ***Hoosier***, 582 F.3d at 725.

In Section I.B. of its Brief opposing Woodman's motion, Clorox argues that its "channel plan qualifies for the 'meeting competition' exemption to the Robinson-Patman Act. 15 U.S.C. § 13(b). [Doc 28, pp. 14-16]. Clorox subsequently withdrew this defense for the purpose of opposing Woodman's motion[1]. [Doc 43, pp. 2-3, FN 1]. In light of Clorox's unqualified withdrawal of the meeting competition defense, Woodman's will not respond to the arguments presented in Section I.B. of Clorox's Brief.

Clorox's meeting competition defense was its only affirmative defense to the statutory claims presented by Woodman's. Given the Court's conclusion that Woodman's has stated a claim under the Robinson-Patman Act, Woodman's has established a sufficient likelihood of succeeding on the merits of its claim.

Despite Clorox's protestations (see Doc 28, p. 13), Robinson-Patman Act was established for the very purpose of preventing the abuses presented here. In ***Morris Electronics of Syracuse, Inc. v. Mattel, Inc.***, 595 F. Supp. 56 (N.D.N.Y. 1984), the Court discussed the concerns that led to the adoption of the Robinson-Patman Act:

> "With regard to the question of whether the alleged injury is a type "about which Congress was likely to have been concerned," ***McCready***, 457 U.S. at 478, 102 S.Ct. at 2548, the court notes, first, "that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' " ***Jefferson Cty. Pharmaceutical Ass'n. v. Abbott Laboratories,*** 460 U.S. 150, 103 S.Ct. 1011, 1017, 74 L.Ed.2d 882 (1983), *citing, inter alia,* ***F.T.C. v. Fred Meyer, Inc.***, *supra. See also,* H.C. Hansen, "**Robinson-Patman Law: A Review & Analysis**," 51 *Fordham L.Rev.* 1113, 1120–24 (May 1983). More specifically, §§

[1] "Clorox will withdraw its meeting competition defense--including all of the redacted information--for purposes of opposing the preliminary injunction." [Doc 43, p. 3].

2(d) and 2(e) were enacted to prevent sellers from circumventing the ban on price discrimination in § 2(a) by discriminating between buyers through advertising and other sales promotional allowances. ***F.T.C. v. Fred Meyer, Inc***., 390 U.S. at 350–52, 88 S.Ct. at 909, 910.

Undoubtedly, the special focus of Congress' concern in enacting §§ 2(d) and 2(e) were the independent merchants who competed with large chain stores. As the Court noted in ***F.T.C. v. Fred Meyer, Inc***., *id.* at 349–50, 88 S.Ct. at 908–09:

> 'The role within the statutory scheme which Congress intended for § 2(d) is well documented in the legislative history. An investigation of chain store buying practices undertaken by the Federal Trade Commission, at Congress' request, had indicated that § 2 of the Clayton Act was an inadequate deterrent against outright price discrimination. The investigation also revealed that certain practices by which large buyers induced concessions which their smaller competitors could not obtain were wholly beyond the reach of § 2. It is significant that congressional concern had focused on the buying practices of large retailers, particularly the chain stores, because it was felt that they were threatening the continued existence of the independent merchant.'

Moreover, the Court also explained in that case that "the competition with which Congress was concerned in § 2(d) was that between buyers *who competed in resales* of the supplier's products." *Id.* at 356, 88 S.Ct. at 912 (emphasis added)."

Morris Electronics, 595 F. Supp. at 61-62.

Further, "[p]romotional discrimination [under Subsection 2(e)] is illegal *per se*, irrespective of competitive impact and without resort to statutory justification." ***Kirby v. P. R. Mallory & Co., Inc***., 489 F.2d 904, 910-911 (7th Cir. 1973). The 7th Circuit's conclusion is consistent with the controlling United States Supreme Court precedent. In ***F.T.C. v. Simplicity Pattern Co.,*** 360 U.S. 55, 79 S. Ct. 1005, 3 L. Ed. 2d 1079 (1959), the Supreme Court concluded as follows:

> "Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations. Subsection (c) applies to the payment or receipt of commissions or brokerage allowances 'except for services rendered.' Subsection (d) prohibits the payment by a seller to a customer for any services or facilities furnished by the latter, unless 'such payment * * * is

> available on proportionally equal terms to all other (competing) customers.' Subsection (e), which as noted is the provision applicable in this case, makes it unlawful for a seller 'to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale * * * by * * * furnishing * * * 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.'
>
> It terms, the proscriptions of these three subsections are absolute. Unlike s 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition."
>
> ***F.T.C. v. Simplicity Pattern Co.***, 360 U.S. 55, 65, 79 S. Ct. 1005, 1011-12, 3 L. Ed. 2d 1079 (1959).

Woodman's ultimate burden at trial will be to prove only that Clorox violated the letter of Subsection 2(d) or (e). Woodman's has a sufficient likelihood of doing so. For the purposes of the present motion, the Court has found that Woodman's has stated a claim under the Robinson-Patman Act, and [redacted] [redacted] [See Doc 24 generally, and particularly at ¶¶ 10, 14-16, 24]. Woodman's unquestionably has a plausible theory on the merits -- a claim strong enough to justify exposing Clorox to financial risks until the district court can decide the merits. See ***Hoosier***, 582 F.3d at 725. Woodman's has satisfied this prong of the test for the issuance of preliminary injunctive relief.

IV. WOODMAN'S HAS DEMONSTRATED A SUFFICIENT LIKELIHOOD OF IRREPARABLE INJURY.

A. WOODMAN'S HARM IS NOT SPECULATIVE.

Clorox argues that Woodman's "has not provided any facts to indicate that it would be irreparably harmed without preliminary relief." It contends that Woodman's "merely notes that customers have purchased the contested products and claims that he is "concerned" about lost

sales. Woodman Affidavit ¶¶ 37, 38 (emphasis added)." [Doc 28, p. 17]. Such is an inaccurate characterization of the facts presented by Woodman's.

The concern expressed by Woodman's does not relate to things that "may" happen. Woodman's concern was expressed in relation to things that "will" happen if a temporary injunction is not entered. In his Affidavit, Clint Woodman stated as follows:

> "37) Woodman's is justifiably concerned that its current large pack purchasers **will** stop buying their Clorox products from Woodman's once Woodman's is forced to sell the smaller, more expensive packs of those products and raise its prices on those products due to the higher unit cost.
>
> 38) Woodman's is further concerned that those same customers, upon learning that the large packs they prefer to purchase are still available at Sam's Club and Costco, **will** stop shopping at Woodman's and start purchasing those products, and other products that, until now, they have been purchasing from Woodman's, at Sam's Club and Costco."
>
> [Doc 3, ¶¶ 37-38].

The fact that Woodman's is concerned about these happenings is frankly immaterial for purposes of the motion before the Court. What is material is that Woodman's "current large pack purchasers will stop buying their Clorox products from Woodman's once Woodman's is forced to sell the smaller, more expensive packs of those products and raise its prices on those products due to the higher unit cost," and will stop shopping at Woodman's and start purchasing those products, and other products that, until now, they have been purchasing from Woodman's, at Sam's Club and Costco." Woodman's does not contend that it is possible that these events may transpire. It contends that they will happen if injunctive relief is not entered.

The facts here are easily distinguished from those presented in ***East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co***., 414 F.3d 700, (7th Cir. 2005). In that case, the plaintiff argued:

> "that its members will lose confidence in the union if, pending trial, Bellon is permitted to flout the parties' agreement with apparent impunity. Plaintiff contends that this loss of confidence cannot be measured in or remedied with dollars, and can be prevented only through an immediate injunction."

Id., at 704.

The Court concluded that the union's concern about the lost confidence of its members constituting irreparable harm was too speculative to justify entry of a preliminary injunction. ***Id.*** The Court reasoned that:

> "Given the frequency of litigation between unions and employers, Local 100's members likely understand that lawsuits take time to resolve disputes, and that the absence of an immediate victory does not imply defeat. The union is free to explain the difficulties of litigation to its members if they ask why more is not being done sooner. And if some members' confidence is shaken, the chance that vindication of the union at trial would not restore that confidence is too speculative to justify a preliminary injunction." ***Id***. (Emphasis Supplied).

Ultimately, like any other preliminary injunction matter, the issue was distilled down to whether a final judgment could undo any harm sustained by the moving party while the case was pending. The Court found that the union was unable to maintain its burden on this issue. In contrast, harm to Woodman's is not speculative. It will be sustained, and neither a permanent injunction nor an award of damages will undo that harm.

B. WOODMAN'S DAMAGES MAY NOT BE EASILY CALCULATED.

Clorox argues that Woodman's claims that its "injuries cannot be quantified is implausible on its face." [Doc 28, p. 18]. It further argues that "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." [Doc 28, p. 18].

Clorox's arguments miss the mark. Woodman's acknowledges that it could calculate lost profits on the sale of those particular items that it used to sell in large packs, but is no longer able

to do so. Woodman's has never claimed an inability to do so. Woodman's position is that "the loss of these large pack customers to their competitors, Sam's Club and Costco, will irreparably harm Woodman's because it will be impossible for Woodman's to determine and prove what additional products those customers will purchase from Sam's Club and Costco that, until now, they have purchased at Woodman's." [Doc 3, ¶ 40].

It is the lost sales of items other than Clorox large packs upon which Woodman's will be unable to calculate its lost profits. Common sense tells us that a customer who is compelled to go to a competitor to purchase an item no longer available at Woodman's will purchase additional items when it patronizes that competitor; additional items that it would otherwise have purchased at Woodman's. To the extent deemed necessary, Woodman's will establish this fact through expert testimony to be presented at a hearing on its motion.

For the purpose of determining whether a party will suffer irreparable harm, a damages remedy can be inadequate because:

> "The nature of the plaintiff's loss may make damages very difficult to calculate. . . . In principle, any profits lost . . . as a result of being terminated for breach of an implied exclusive-dealing contract can be monetized, and awarded as damages; but in practice it may be very difficult to distinguish the effect of the termination from the effect of other things happening at the same time, and to project that effect into the distant future." ***Roland Machinery Co. v. Dresser Industries***, 749 F.2d 380, 386 (7th Cir.1984).

Such is the case here. Woodman's could easily present evidence of diminished sales and lost profits on items other than Clorox products formerly sold in large packs and assert that its customers must now be purchasing those items at club stores when they go there to purchase the large packs that they used to purchase as Woodman's. However, it would "be very difficult to distinguish the effect of the termination [of the sale of large packs] from the effect of other things happening at the same time, and to project that effect into the distant future." ***Id***.

The authorities rejecting the argument that damages are too difficult to calculate all include a variation on the same conclusion: "losses are purely financial, easily measured, and readily compensated[2]"; "The dollar amount of these [lost] sales will not be difficult to calculate[3]"; "this amount is a pecuniary value that is 'easily measured' and 'readily compensated[4]"; and "losses can easily be calculated in terms of lost profits[5]."

All of these decisions denying injunctive relief include findings to the effect that the moving party's damages are "easily measured" or "can easily be calculated." The opposite is true here. Woodman's damages in the form of lost sales of non-Clorox products are not of the sort that have been found to be easily measured. On the contrary, it would be impossible to determine whether such sales were lost because of a myriad of market forces or because customers were buying these items at club stores because they were compelled to shop there to purchase large packs.

Woodman's damages are more akin to those at issues in ***Abbott Laboratories v. Mead Johnson & Co.,*** 971 F.2d 6 (7th Cir. 1992). In this case, Abbot Laboratories sought a preliminary injunction against Mead Johnson. It sought to halt Mead's alleged false advertising and trade dress infringement practices through its sale and marketing of a competing oral electrolyte maintenance solution ("OES"). ***Abbott,*** 971 F.2d at 9.

The Court noted that

> "Abbott and Mead are, for all practical purposes, the only two competitors in the United States OES market. Abbott's product is called 'Pedialyte,' while Mead's is called 'Ricelyte.' Competition in this market is of surprisingly recent vintage, as Pedialyte enjoyed a virtual monopoly until Mead introduced Ricelyte in 1990.

[2] ***Praefke Auto Elec. & Battery Co., Inc. v. Tecumseh Products Co., Inc***. 255 F.3d 460 (7th Cir. 2001).
[3] ***S & S Sales Corp. v. Marvin Lumber & Cedar Co.***, 435 F.Supp.2d 879, 886 (E.D.Wis. 2006).
[4] ***First American Real Estate Solutions, L.P. v. Moore***, 2005 WL 1910902, 3 (N.D.Ill. 2005).
[5] ***Kuraki America Corp. v. Dynamic Intl of Wisconsin, Inc.***, 2014 WL 2876014 (E.D.Wis. 2014).

> The two products are virtually identical; only their carbohydrate components differ." ***Id***.

With only two competitors in the market selling virtually identical products, one would think that calculating damages would have been a relatively simple task. However, the Court found that there could be different reasons that consumers would choose to buy one product over another, and that choosing to purchase the product for certain reasons would not give rise to a claim for damages by Abbott. The Court concluded:

> "In theory, one could differentiate between the two groups of consumers, and thus calculate the damages arising from Mead's campaign. In practice, however, it would "be very difficult to distinguish the effect of the [campaign] from the effect of other [factors causing consumers to purchase Ricelyte], and to project that effect into the distant future." ***Roland Mach.***, 749 F.2d at 386. This difficulty would appear to render monetary relief inadequate, and hence Abbott's injury irreparable. ***American Hosp. Supply***, 780 F.2d at 597." ***Abbott,*** 971 F.2d at 18.

Woodman's situation is similar. While some consumers may choose to purchase large packs and other goods at club stores because they are no longer able to purchase large packs at Woodman's, other market factors will cause similar consumer behavior. It simply is not possible to separate the wheat from the chaff. This difficulty would appear to render monetary relief inadequate, and hence Woodman's injury irreparable.

Clorox argues that Woodman's is not entitled to a preliminary injunction because "Plaintiff's multi-million dollar business would not be in jeopardy if some customers were to shop at Plaintiff's competitors." [Clorox Brief, p. 18]. This argument does not reflect the controlling legal standard.

> "To establish irreparable harm, however, a plaintiff need not demonstrate that the denial of injunctive relief will be fatal to its business. See ***General Leaseways, Inc. v. National Truck Leasing Ass'n***, 744 F.2d 588, 591 (7th Cir.1984). It is usually enough if the plaintiff shows that its legal remedies are inadequate. See ***Weinberger v. Romero–Barcelo***, 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72

> L.Ed.2d 91 (1982) (collecting cases); ***Lopez v. Garriga***, 917 F.2d 63, 68 (1st Cir.1990). If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel. See, e.g., ***Multi–Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co***., 22 F.3d 546, 551 (4th Cir.1994); ***K–Mart Corp. v. Oriental Plaza, Inc***., 875 F.2d 907, 915 (1st Cir.1989); ***Danielson v. Local 275, Laborers Int'l Union,*** 479 F.2d 1033, 1037 (2d Cir.1973). Thus, a cognizable threat of such harm can support a restraining order."

Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 18-19, 31 UCC Rep. Serv. 2d 327, 1996 WL 708880 (1st Cir. 1996).

Ross-Simons notably found that "there is no mechanical test that permits a court to make an exact calculation of the quantum of hard-to-measure harm that will suffice to justify interim injunctive relief." ***Ross-Simons,*** 102 F.3d at 19. The Court concluded that:

> "Ross–Simons made the requisite showing because, absent a restraining order, it would lose incalculable revenues and sustain harm to its goodwill . . . [D]ue to the uniqueness of Baccarat crystal, Ross–Simons could not simply replace the Baccarat line with some other brand, and, without the availability of Baccarat, its bridal registry business would suffer. The resultant damage, including lost sales of other registry items, alienation of future registrants, and harm to its reputation, would defy accurate quantification."

Ross-Simons, 102 F.3d at 19.

The Court also concluded:

> "the availability of a product line is as important, if not more important, than the amount of sales generated. See, e.g., ***Supermarket Servs., Inc. v. Hartz Mountain Corp***., 382 F.Supp. 1248, 1256 (S.D.N.Y.1974) (noting the importance of offering a particular brand lest customers go elsewhere)."

Ross-Simons, 102 F.3d at 19-20.

Woodman's faces similar harms incapable of calculation. Injunctive relief is necessary to prevent Woodman's from experiencing irreparable harm.

1) DAMAGE TO GOOD WILL IS INCALCULABLE.

As determined in ***Ross Simons***, damage to the good will of a company is another element of damages that does not lend itself to easy calculation[6]. The inability to carry a certain product line can cause such damages. In a case in which Minolta had ceased doing business with a customer, the Court found that "it would be impossible to estimate or compute Interphoto's damages for the loss of good will it will suffer as a result of being unable to provide its retail customers with Minolta's products." ***Interphoto Corp. v. Minolta Corp***., 295 F. Supp. 711, 724 (S.D.N.Y.) aff'd, 417 F.2d 621 (2d Cir. 1969).

Citing ***Interphoto*** in a later decision, the Second Circuit Court of Appeals stated:

> "[T]erminating the delivery of a unique product to a distributor whose customers expect and rely on the distributor for a continuous supply of that product almost inevitably creates irreparable damage to the good will of the distributor. ***Jacobson & Co. v. Armstrong Cork Co.,*** 548 F.2d 438, 444–45 (2d Cir.1977) (threatened loss of customers and good will from manufacturer's termination of supply of a brand of products to distributor posed irreparable injury); ***Interphoto Corp. v. Minolta Corp***., 295 F.Supp. 711, 723–24 (S.D.N.Y.) ("it would be impossible to estimate or compute [movant's] damages for the loss of good will it will suffer as a result of being unable to provide its retail customers with [opponent's] products."), aff'd, 417 F.2d 621 (2d Cir.1969) (per curiam). See also ***Bergen Drug Co. v. Parke, Davis & Co***., 307 F.2d 725, 728 (3rd Cir.1962); ***Supermarket Services, Inc. v. Hartz Mountain Corp***., 382 F.Supp. 1248, 1256–57 (S.D.N.Y. 1974).

Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907-08, 1990 WL 67394 (2d Cir. 1990).

C. A THREATENED LOSS IS SUFFICIENT UNDER 15 U.S.C. § 26.

15 U.S.C. § 26 provides in relevant part that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States

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[6] By its very nature, injury to goodwill and reputation is not easily measured or fully compensable in damages. Accordingly, this kind of harm is often held to be irreparable. *See, e.g.,* ***K–Mart***, 875 F.2d at 915; ***Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp***., 799 F.2d 6, 14–15 (1st Cir.1986); ***Ross-Simons***, 102 F.3d at 20.

having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title." (Emphasis supplied).

15 U.S.C. § 26 specifically provides for the issuance of injunctive relief to prevent violations of the anti-trust laws. It also specifically provides that loss or damages stemming from a violation of the anti-trust laws do not have to be realized in order for injunctive relief to issue. It is sufficient that loss or damage is threatened by unlawful, anti-competitive actions.

47 U.S.C. § 553 contains a similar authorization of injunctive relief for violation of laws relating to the unauthorized reception of cable service. It provides that a Court presented with such a violation may "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a)(1) of this section." 47 U.S.C. § 553(c)(2). Courts interpreting this provision have found that:

> "where federal statutory violations are involved, courts have interpreted that "only a bare minimum showing of irreparable harm is required before a court may issue injunctive relief." ***Century–ML Cable Corp. v. Díaz***, 43 F.Supp.2d 166, 172 (D.P.R.1998); *see also* ***Time Warner Cable of New York City v. Freedom Electronics, Inc.***, 897 F.Supp. 1454, 1460 (S.D.Fla.1995) ("[S]everal federal courts have held that absence of justification for violation of clear statutory rights virtually eliminates the necessity of showing irreparable harm"); ***Home Box Office, Inc. v. Pay TV of Greater New York***, 467 F.Supp. 525, 529 (E.D.N.Y.1979)"
>
> ***San Juan Cable LLC v. Telecommunications Regulatory Bd. of Puerto Rico***, 598 F. Supp. 2d 233, 235, 2009 WL 414334 (D.P.R. 2009).
>
> In the ***HBO*** decision cited by ***San Juan Cable***, the Court reasoned as follows:
> "But where, as here, a defendant shows no justification for continuing to violate a plaintiff's clear statutory rights, there is no reason to withhold preliminary relief even without a showing of the same quantum of "irreparable" damage as would be required where plaintiff's ultimate success was more doubtful. . . . Defendant claims that it will be irreparably damaged by the issuance of a preliminary injunction because it will be put out of business. But in determining whether to grant relief the court may consider only harm to defendant's legal rights. **Any damages which the temporary injunction inflicts on defendant is occasioned not by the preliminary nature of the decision but by Section 605 of the Act.**

> **The only business of defendant which will be prohibited is the unauthorized use of something to which it has no fair claim.**
>
> ***Home Box Office, Inc. v. Pay TV of Greater New York, Inc.,*** 467 F. Supp. 525, 529-30, 45 Rad. Reg. 2d (P & F) 927, 1978-81 Copr. L. Dec. P 25088 (E.D.N.Y. 1979). (Emphasis supplied).

Here, Clorox has withdrawn any legal defense it has to what the Court has, at least preliminarily, determined to be a violation of the Robinson-Patman Act. Clorox cannot be heard to argue that it should be able to continue to violate the Robinson-Patman Act, and that Woodman's should be relegated to pursuing damages - a remedy not requested by Woodman's in its Complaint, and a remedy that would be extremely difficult, if not impossible, to establish to the required degree of probability.

At a minimum, Clorox's actions in violation of the Robinson-Patman Act threaten to damage Woodman's good will, competitive position, and financial position in the marketplace. Such is sufficient under the statute to warrant the issuance of injunctive relief.

D. A FINAL JUDGMENT WILL NOT RESTORE WOODMAN'S TO ITS PRE-SUIT CONDITION.

The ability of a final judgment to undo harm is the ultimate question the court must address. In ***Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc***., 549 F.3d 1079 (7th Cir. 2008), the Girls Scouts of the United States of America ("GSUSA") sought to reduce the chartered territory of the Girl Scouts of Manitou Council, Inc. ("Manitou"). Manitou declined to participate in a restructuring proposed by GSUSA, which prompted the national organization to undertake proceedings to unilaterally reduce Manitou's chartered territory. Manitou filed suit against GSUSA and sought a preliminary injunction to prevent any changes to its jurisdiction pending final resolution of its claims. ***Manitou,*** 549 F.3d at 1082.

The District Court denied Manitou's motion for a preliminary injunction. The 7th Circuit reversed. The Court reasoned as follows:

> A harm is "irreparable" if it "cannot be prevented or fully rectified by the final judgment after trial." ***Roland Mach.***, 749 F.2d at 386. The district court found not only that Manitou had failed to demonstrate it would be injured absent a preliminary injunction, but also that any alleged injuries were not irreparable, i.e., that any injuries would be rectifiable following a final judgment on the merits by simply restoring the taken jurisdiction to Manitou.
>
> As we have shown, however, simply returning the territory to Manitou following trial will not account for the incalculable losses Manitou risks in the interim—namely, the potential loss of property, employees, or its entire business, as well as damage to its goodwill. These harms are both real and irreparable.
>
> ***Manitou,*** 549 F.3d at 1089-1090.

"The premise of the preliminary injunction is that the remedy available at the end of trial will not make the plaintiff whole; and, in a sense, the more limited that remedy, the stronger the argument for a preliminary injunction—provided the remedy is not limited for reasons that would make a preliminary injunction equally inappropriate." ***American Hosp. Supply Corp. v. Hospital Products Ltd.***, 780 F.2d 589, 594 (7th Cir. 1985).

A permanent injunction granting Woodman's requested relief will not make Woodman's whole unless a preliminary injunction is granted as well. Without a preliminary injunction, Woodman's will be irreparably harmed.

V. THE EQUITIES STRONGLY FAVOR WOODMAN'S

Woodman's has previously set forth in this and our initial brief the facts and arguments that demonstrate that it will be irreparably harmed if the Court denies its request for a preliminary injunction preserving the *status quo* by compelling Clorox to continue selling Woodman's the large packs of Clorox products that it has been purchasing for years. Clorox' response is set forth at page 19 of its brief, but virtually all of its argument is based upon facts

which were redacted from the Rexing Affidavit. As noted previously, Clorox has announced its intention to withdraw its meeting competition defense and its reliance upon any of the facts which it had previously redacted from the Rexing Affidavit.

What remains on page 19 of its brief is a bare statement that Clorox faces stiff competition from other brands and Club Store private labels followed by a statement that Plaintiff would be unable to cure certain unspecified financial injuries that would be suffered by Clorox if the Court subsequently lifted the preliminary injunction. The redacted brief gives no indication what those injuries would be, or why they would be sustained by Clorox if it was merely required to continue selling large packs of its products to Woodman's.

Clorox is asking the Court to rule that the balance of equities favors Clorox. In making this request, Clorox initially relied upon the Affidavit of Rick Rexing, its Vice President for National Sales Accounts. In that Affidavit, Mr. Rexing states, at paragraphs 14-15:

[redacted]

[redacted]

[Doc 24, ¶¶ 14-15].

In filing this Affidavit, [redacted] Clorox admits this in the face of

the provisions of Section 2(e) of the Robinson-Patman Act requiring that it make all promotional services available to all customers on proportionally equal terms.

Clorox cannot oppose a motion for a preliminary injunction by arguing that it will suffer damages if it is forced to comply with the law. In ***Home Box Office, Inc. v. Pay TV of Greater New York, Inc.,*** 467 F. Supp. 525, 529-30 (E.D.N.Y. 1979), the Court rejected such a claim, stating:

> "Defendant claims that it will be irreparably damaged by the issuance of a preliminary injunction because it will be put out of business. But in determining whether to grant relief **the court may consider only harm to defendant's legal rights. Any damages which the temporary injunction inflicts on defendant is occasioned not by the preliminary nature of the decision but by Section 605 of the Act.** The only business of defendant which will be prohibited is the unauthorized use of something to which it has no fair claim."

Clorox cannot argue that the balance of the equities favors Clorox if the harm it wishes to avoid is the loss of profits it could otherwise receive if it was free to violate the Act.

VI. CONTRARY TO PUBLIC POLICY, DENIAL OF A PRELIMINARY INJUNCTION HERE WOULD ONLY ENCOURAGE AND FACILITATE ACTIVITY IN VIOLATION OF THE ACT.

Clorox has been providing a promotional service to Club Stores, the offering of large packs of products. According to the Rexing Affidavit, [redacted] [Doc 24, ¶ 18].

Woodman's strenuously contends that allowing Clorox to continue to discriminate against Woodman's would encourage other sellers to acquiesce to demands by powerful retail customers that they too discriminate against Woodman's and other competitors of those large retail customers.

If the express public policy underlying the existence of the Robinson-Patman Act is to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power," as stated in ***Jefferson Cty. Pharmaceutical Ass'n. v. Abbott Laboratories***, 460 U.S. 150, 159,103 S.Ct. 1011, 1017, 74 L.Ed.2d 882 (1983), citing, *inter alia*, ***F.T.C. v. Fred Meyer, Inc.***, 390 U.S. 341, 349, 88 S.Ct. 904, 908, 19 L.Ed.2d 1222 (1968), that public policy will not be advanced by denying the preliminary injunction requested by Woodman's.

Clorox argues, at pages 19-20 of its Brief In Opposition To Plaintiff's Motion For Preliminary Injunction, that Clorox's channel policy has no effect on competition between Clorox and its competitors, but, as noted in ***Jefferson Cty. Pharmaceutical Ass'n.***, supra, such competition is not the focus of the Robinson-Patman Act. The actions of Clorox, as expressly admitted in the Rexing Affidavit, are precisely the type of behavior that gave rise to the adoption of the Robinson-Patman Act. No public policy will be advanced by denying the preliminary injunction.

At page 20 of its brief, Clorox cites to ***Volvo Trucks North America, Inc. v Reeder-Simco GMC, Inc.,*** 546 U.S. 164, 180-181, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006), for the proposition that Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations. Clorox fails to include the following language that appears just a few lines later in that opinion:

> "In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands."
>
> ***Volvo***, 546 U.S. at 181.

Unlike ***Volvo***, this is such a case, and there is nothing in the ***Volvo*** decision that suggests or even infers that the goals of Robinson-Patman, as described in ***Jefferson Cty. Pharmaceutical,*** supra, have lost any of their vitality to protect smaller independent retailers [redacted]

CONCLUSION

"The Robinson–Patman Act was designed to reach discriminations 'in their incipiency, before the harm to competition is effected. It is enough that they 'may' have the prescribed effect.'" ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.***, 509 U.S. 209, 252, 113 S.Ct. 2578, 2603 (U.S. 1993); citing ***Corn Products Refining Co. v. FTC***, 324 U.S. 726, 738, 65 S.Ct. 961, 967, 89 L.Ed. 1320 (1945). (Emphasis added).

Woodman's has demonstrated that it has a sufficient likelihood of success on the merits, that it will likely suffer irreparable harm if the injunction is not granted, and that it has no adequate remedy at law. A trial on the merits cannot be conducted before Woodman's is harmed, and a later-issued permanent injunction will not compensate Woodman's for sales and customers lost during the pendency of this action if a preliminary injunction is not issued. Harm for which a final remedy will not compensate the plaintiff is by definition irreparable. See ***Rio Grande Community Health Center, Inc. v. Rullan***, 397 F.3d 56, 76 (C.A.1 (Puerto Rico) 2005); citing Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 11A ***Federal Practice & Procedure*** § 2948.1, at 149 (2d ed. 1995).

Woodman's submits that the harm that Clorox may experience as a result of the issuance of a preliminary injunction should be disregarded. Clorox has no legally protectable interest in profits earned as a direct result of engaging in conduct proscribed by our federal, anti-trust laws.

Consideration of the public interest should also favor protecting those who are the intended beneficiaries of our laws, not the interests of those who choose to disregard the laws for their personal gain. Regardless, an award of damages guaranteed by the injunction bond will fully compensate Clorox for any harm that it may experience as a result of entry of a preliminary injunction. As a result, any harm that Clorox may suffer may not be considered irreparable.

Based on the foregoing, Woodman's respectfully requests that the Court enter a preliminary injunction ordering Clorox to maintain the status quo by making available for purchase by Woodman's all large pack products which Clorox sold to Woodman's until September 30, 2014, and which Clorox continues to sell to other retailer customers competing with Woodman's in the distribution of Clorox's products.

Dated this 18th day of February, 2015.

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