

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.

**WOODMAN’S STATEMENT OF RECORD FACTS AND
STATEMENT OF FACTS IT INTENDS TO PROVE**

Plaintiff, Woodman’s Food Market, Inc. (“Woodman’s”) has moved the Court for 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). Woodman’s submits the following statement of those facts of record and those facts that it intends to establish and rely upon at the hearing conducted on its motion for a preliminary injunction.

FACTS CENTRAL TO CLAIM OF A VIOLATION OF 15 U.S. CODE § 13(e)

1) Until October 1, 2014, Woodman’s purchased from Clorox and Clorox Sales a number of “large pack” products. Large pack products are just that, larger containers or packages of a particular product that are typically offered to customers at a cost savings per unit of contents over the prices that would typically be paid per unit of that same product when sold in smaller containers or packs. The product within a “large pack” is of the same quality and grade as the product contained within a smaller pack of that same product. [Doc #3, ¶ 4]. [The above facts will also be established at the preliminary injunction hearing through the testimony

of Phil Woodman, President and CEO of Woodman's, who will, among other things, identify the large packs that Woodman's has historically purchased using Woodman's invoices and other records maintained in the ordinary course of business].

2) At a meeting of Woodman's and Clorox representatives conducted on September 9, 2014, Woodman's was informed that, as of October 1, 2014, it would no longer be permitted to purchase the large packs of Clorox products it had been purchasing from Clorox for years. Woodman's was further informed that, as of October 1, 2014, only three retailers in Clorox's so-called "club channel" (Sam's Club, Costco and B.J.'s) would now be permitted to purchase the large packs of Clorox products that Woodman's had been purchasing. [Doc #3, ¶¶ 19, 20, 24, 26]. [The above facts will also be established at the preliminary injunction hearing through the testimony of Phil Woodman, President and CEO of Woodman's, who will authenticate the printed Power Point slides presented by Clorox at the 9/9/14 meeting [Doc #3, Ex 3], and will testify as to oral representation made by Clorox's representative].

ELEMENTS OF INJUNCTIVE RELIEF

A. PLAINTIFF HAS SOME LIKELIHOOD OF SUCCESS ON THE MERITS.

3) Clorox has instituted a sales policy, under the terms of which, only a certain class of retailers is permitted to purchase large packs of their products. [Doc #3, ¶¶ 21, 22, 27, 28, 29]. [These facts will also be established at the preliminary injunction hearing through the testimony of Phil Woodman, President and CEO of Woodman's].

4) Large packs are promotional "services or facilities" within the meaning of 15 U.S.C. § 13(e). [This fact will be proven at the preliminary injunction hearing by way of expert testimony and legal argument presented orally and in writing].

5) Many customers prefer buying large packs because they provide lower unit prices and customer convenience. [These facts will be established at the preliminary injunction hearing through the testimony of Phil Woodman].

B. PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW.

6) Woodman's will no longer be able to sell the products its customers have become accustomed to purchasing. [Doc #3, ¶¶ 29, 30, 36]. [The above facts will also be established at the preliminary injunction hearing through the testimony of Phil Woodman].

7) An indeterminate portion of Woodman's 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 large packs (and other products) that, until now, they have been purchasing from Woodman's, at Sam's Club and Costco. [Doc #3, ¶ 38]. [This fact will be further proven at the preliminary injunction hearing by way of expert testimony].

8) It would be extremely difficult, if not impossible, to calculate the damages sustained as a result of Woodman's customers purchasing large packs and other products at Sam's Club and Costco as a result of their unavailability at Woodman's. [Doc #3, ¶ 39]. [This fact will be further proven at the preliminary injunction hearing by way of expert testimony].

C. PLAINTIFF WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED.

9) Woodman's still has a stock of large pack items on hand [Doc #3, ¶ 35]. [This fact will also be established at the preliminary injunction hearing through the testimony of Phil Woodman].

10) Woodman's has not yet experienced any damages as a result of the unavailability of large pack Clorox items, but will soon begin to experience such damages. [Doc #3, ¶ 36]. [This fact will also be established at the preliminary injunction hearing through the testimony of

Phil Woodman, who will testify as to the remaining stock on hand, if any, of the large pack items that it has historically purchased from Clorox and sold to its customers].

11) As a result of the difficulty in calculating damages to a reasonable degree of certainty sustained as a result of Woodman's customers purchasing large packs and other products at Sam's Club and Costco as a result of their unavailability at Woodman's [Doc #3, ¶ 39], Woodman's will suffer financial damages for which it will not be able to make a recovery against Clorox. [This fact will be further proven at the preliminary injunction hearing by way of expert testimony].

12) Woodman's has not made a claim for damages against Clorox in this action. [Doc #1, pp. 19-22].

D. DEFENDANT WILL NOT SUFFER IRREPARABLE HARM IF THE INJUNCTION IS GRANTED.

13) Woodman's has been purchasing large packs from Clorox for years. [Doc #3, ¶ 34]. [This fact will also be established at the preliminary injunction hearing through the testimony of Phil Woodman].

14) The injunctive relief requested by Woodman's requests the Court to maintain the *status quo* by making available to Woodman's those large packs that 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. [Doc #2, p. 1].

15) Any monetary damages that Clorox may suffer may be remedied by monetary damages, the payment of which may be guaranteed by an injunction bond. [This fact will be proven at the preliminary injunction hearing by way of expert testimony].

E. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING THE INJUNCTION.

16) Clorox's sales policy of selling large packs only to club stores impairs the ability of all consumers to obtain Clorox's products at the least expense. [This fact will be proven at the preliminary injunction hearing by way of expert testimony].

17) Clorox's sales policy creates not only a favored class of retailer - it also creates a favored class of consumer. Not every consumer can afford to pay the membership fee required in order to purchase goods at a club store. [Doc #3, ¶ 33]. [This fact will be further proven at the preliminary injunction hearing by way of expert testimony].

18) Sam's Club memberships cost between \$45 and \$100 per year. [Doc #3, ¶ 14]. [This fact will be further established at the preliminary injunction hearing through the testimony of Phil Woodman, who will authenticate records setting forth the cost of a membership fee].

19) Costco memberships cost between \$55 and \$110 per year. [Doc #3, ¶ 14]. [This fact will be further established at the preliminary injunction hearing through the testimony of Phil Woodman, who will authenticate records setting forth the cost of a membership fee].

20) Clorox's sales policy has the effect of allowing only those persons with the financial means to purchase a club membership to obtain its goods at the lowest prices. [This fact will be established at the preliminary injunction hearing by way of expert testimony].

21) Entry of the injunctive relief requested by Woodman's will in no way harm the public interest. [This fact will be established at the preliminary injunction hearing by way of expert testimony].

Dated this 14th day of November, 2014.

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)