No. 15-3001

In the United States Court of Appeals for the Seventh Circuit

WOODMAN'S FOOD MARKET, INC.,

Plaintiff-Appellee,

v.

THE CLOROX COMPANY
AND THE CLOROX SALES COMPANY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 14-cv-734-slc – Hon. Stephen L. Crocker

REPLY BRIEF FOR DEFENDANTS-APPELLANTS THE CLOROX COMPANY AND THE CLOROX SALES COMPANY

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Introduction

Because neither the text of the Robinson-Patman Act nor any federal court precedent supports Plaintiff's interpretation of the Act, Plaintiff based its Section 2(e) claim entirely on the FTC's administrative decisions in *In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *In re General Foods Corp.*, 52 F.T.C. 798 (1956), and on the FTC's Fred Meyer Guides. Those authorities were likewise the sole basis for the district court's denial of Clorox's first motion to dismiss. But the FTC itself has now unequivocally repudiated *Luxor* and *General Foods*, and has confirmed that Plaintiff misconstrues the Fred Meyer Guides. Whatever the precise outer boundaries of Section 2(e), the regulator charged with enforcing the Robinson-Patman Act agrees with Clorox that the sale of large-size packages is well outside them.

Plaintiff's attempts to keep its case on life support despite the FTC's express rejection of Plaintiff's arguments cannot succeed. First, Plaintiff misapprehends the narrow scope of Section 2(e)'s per se liability, which prohibits discrimination only in furnishing a "service or facility" that is separate from a commercial product, unrelated to price, and promotional in nature. Clorox's distribution strategy for selling different-sized packages is not about providing a separate "service or facility," and Clorox's large-size packages are not "promotional." As the FTC observes (Br. 17–18), Clorox's channel strategy is nothing like giving away advertising, display cabinets, or anything else that the courts have held to be promotional services under Section 2(e). Moreover, Plaintiff cannot rebut the authoritative precedent holding that deny-

ing particular lines or quantities of products to a customer is not a violation of Section 2(e).

Plaintiff also cannot justify the sweeping and anticompetitive consequences that would ensue under its view of Section 2(e): manufacturers would be precluded from competing by adopting differentiated distribution systems, because they would be obligated to offer every product and every package variation to any retailer or wholesaler that wanted them. Plaintiff acknowledges (Br. 34) that it brought this suit to benefit only itself, not competition. And the FTC has correctly explained why allowing this case to survive dismissal would harm the interbrand competition that the antitrust laws exist to foster, in direct violation of the proper interpretive rubric for construing the Robinson-Patman Act mandated by *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006).

Without any precedent for its position that a large-size package is a promotional service (or a service at all), Plaintiff now contends for the first time (Br. 15–20) that it needs discovery into unspecified factual issues to determine whether Clorox's large-size packages fall within Section 2(e). But Plaintiff waived this argument by repeatedly conceding that "[w]hether a large pack of a product does or does not constitute a promotional service covered by" Section 2(e) "is *unquestionably a question of law*." No. 15-8016 (7th Cir. Aug. 6, 2015), ECF No. 3 (emphasis added). No discovery is appropriate in this case because as a matter of law, a package size developed "to meet market demand for ... larger quantities or lower unit prices" is not covered by Section 2(e). FTC Br. 24. The FTC has unambiguously confirmed

that "[Plaintiff's] allegations do not state a plausible claim" under Section 2(e) because "[Plaintiff] does *not* allege the type of hidden, promotional discrimination that Section 2(e) was designed to combat." FTC Br. 2, 21.

Plaintiff also errs in contending that it has a viable Robinson-Patman claim under *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), even though it no longer purchases anything directly from Clorox. Nothing in *Fred Meyer* says or implies that a manufacturer has a perpetual obligation to sell wholesalers every size of every product made by the manufacturer, just because some retailers (or consumers) find those products attractive. *Fred Meyer* did not involve a terminated retailer like Plaintiff, and allowing such a terminated retailer to wield the Robinson-Patman Act to permanently redesign a manufacturer's distribution policies would be inconsistent with *Volvo* and the broad right to choose one's customers recognized in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Argument

Plaintiff fails to rebut Clorox's showing that this suit must be dismissed for two independent reasons: First, as a matter of law, a large-size package is not a promotional service or facility—indeed, it is not a service or facility at all. Second, Plaintiff no longer purchases anything from Clorox, and thus it is not entitled to sue for an injunction that would re-make Clorox's distribution system.

I. Plaintiff Has Not Shown that Clorox's Large-Size Packages Fall Within Section 2(e)

Section 2(e) is limited to "services or facilities," neither of which includes package size within the plain meaning of the words. And as the FTC observed (Br.

17–18), without contradiction from Plaintiff, no federal court has come close to holding that a large-size package, or any package size for that matter, constitutes a promotional service. This case is not remotely about the type of conduct "that Congress sought to prevent" in Section 2(e). Pl. Br. 28–29.

Faced with a complete lack of statutory or precedential support, Plaintiff asks this Court to broaden dramatically the scope of the Robinson-Patman Act by holding that Section 2(e) is violated whenever "buyers with market power are using that power to secure discriminatory treatment to the detriment of disfavored buyers." Pl. Br. 32; *see also* Pl. Br. 14, 30, 31, 49, 50, 51. Plaintiff's proposed standard is wrong and directly contrary to binding Supreme Court precedent.

A. Plaintiff Ignores the Supreme Court's Instructions for Interpreting the Robinson-Patman Act

The Supreme Court's most recent decision applying the Robinson-Patman Act reaffirmed the Court's modern rule of construction for the statute: courts should "construe the Act 'consistently with the broader policies of the antitrust laws.'" *Volvo*, 546 U.S. at 181 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), and *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)). The Court explained that the "primary concern" of all antitrust laws, including the Robinson-Patman Act, is "[i]nterbrand competition." *Id.* at 180–81 (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51–52 n.19 (1977)). Thus, in cases brought under the Act, it is necessary to "resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Id.* at 181 (emphasis original). In particular, courts should be wary of

extending the Robinson-Patman Act to forbid "a vertical practice, such as a change in a supplier's distribution system," because the "market impact" of that practice "may be a 'simultaneous reduction of intrabrand competition and stimulation of interbrand competition.'" *Id.* (quoting *GTE Sylvania*, 433 U.S. at 51–52).

That rule of construction resolves this case. As the FTC explains (Br. 10–11), the "expansive interpretation of Section 2(e)" urged by Plaintiff "would ignore [the Supreme Court's] warning and undercut longstanding antitrust principles to the detriment of consumer welfare." Plaintiff has sued over a vertical practice—a change in Clorox's distribution system—and "freely acknowledges" that it is suing not to protect interbrand competition, but rather "to protect [itself] from two competitors." Pl. Br. 34. The FTC explains (Br. 19–20) how Plaintiff's reading of Section 2(e), which would require manufacturers to make all package sizes available to all retailers, would *harm* interbrand competition and diminish consumer welfare.

Federal courts have long permitted a manufacturer like Clorox "to limit the number of dealers in order 'to allow each a sales volume sufficient for efficient operation.'" FTC Br. 11–12 (quoting VII Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1441c1 (3d ed. 2010)). Antitrust law permits these 'selective distribution' policies because prohibiting them 'would deprive suppliers of efficient distribution options; would eliminate the supplier's ability to avoid inefficient, inattentive, or untrustworthy dealers; and would eliminate [a] great variety of [the] distribution mechanisms that characterize American franchising.'" FTC Br. 12 (quoting VII *Antitrust Law*, *supra* ¶ 1441c1). Accordingly, in *Volvo*, the Supreme Court held that

"Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations." 546 U.S. at 181 n.4.

As the FTC explains, although reducing the number of dealers selling a product may lessen *intrabrand* competition for a particular product, "such a restriction often promotes [interbrand] competition between *rival* products by allowing manufacturers to distribute their products more efficiently." FTC Br. 12 (quoting *GTE Sylvania*, 433 U.S. at 54). The FTC has further explained that a manufacturer's decision to sell products only to specific dealers may "induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." FTC Br. 12 (quoting *GTE Sylvania*, 433 U.S. at 55); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878, 889 (2007) (reducing the number of dealers can promote interbrand competition by encouraging the remaining dealers to promote the manufacturer's products against other brands).

Plaintiff demands broad "protection [for] less powerful buyers" against any advantage granted to larger buyers, Pl. Br. 32, but the Robinson-Patman Act was aimed at only a limited, precise category of advantage—a discriminatory price discount for the same product. *Great Atlantic*, 440 U.S. at 76; *see also* Pl. Br. 14–15 (acknowledging that the Act was aimed at "large chainstores ... with the clout to *obtain lower prices*" (emphasis added) (quoting *Volvo*, 546 U.S. at 175)). Section 2(e) is limited to prohibiting evasion of the ban on price discrimination by offering disfavored buyers the product alone while offering favored buyers both the product and a

separate, promotional service or facility connected with its resale. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959). This case does not involve any service or facility, let alone a promotional service connected with resale.

Plaintiff misreads *Volvo* to stand for the proposition that the Supreme Court "stands ready and willing to protect intrabrand competition in secondary line cases between powerful and weak buyers under Subsections 2(d) and (e)." Pl. Br. 51. That formulation is not close to correct. The Supreme Court took pains to make clear that "[e]ven if the Act's text could be construed" to impose liability for intrabrand discrimination, courts must "resist [that] interpretation" when, as here, it would expand liability under the Act by protecting *competitors* rather than *competition*. 546 U.S. at 181. *Volvo* certainly does not permit Plaintiff's extraordinary reading of Section 2(e), which would literally prohibit any buyer (of whatever size) from receiving exclusivity with respect to any package size in the marketplace. Instead, *Volvo* compels the conclusion that this Court should not be the first to authorize such an anticompetitive expansion of the Act.

Plaintiff makes no attempt to rebut the FTC's showing that Plaintiff's proposed rule for different-sized packages would diminish interbrand competition in the marketplace. FTC Br. 11–12, 19–20. Instead, Plaintiff falls back to arguing that Section 2(e) is a per se rule. That gets things backwards. Congress imposed a narrow per se prohibition on discriminatory grants of promotional services and facilities because it was concerned about the difficulty of detecting disguised price discrimination in that limited context. *See Simplicity Pattern*, 360 U.S. at 68. But

"[b]ecause application of a per se rule risks adverse consequences," the courts have held that it is necessary "to limit the scope of section 2(e) to that necessary to fulfill the section's purposes." *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 381 (4th Cir. 1992) (per curiam); *see also In re Gibson*, 95 F.T.C. 553, 726 (1980) (unless Section 2(e) is "confined to the sphere of cooperative promotional arrangements, [it] would cut across and confound the legal requirements of the separate price and brokerage provisions of the Act"), *aff'd*, 682 F.2d 554 (5th Cir. 1982). To hold Clorox liable under Section 2(e) in this case would not fulfill the Robinson-Patman Act's purpose of advancing interbrand competition, rather, it would *frustrate* that purpose by per se outlawing a procompetitive practice that is "commonplace" in the modern economy. FTC Br. 16.

Volvo rejects Plaintiff's assertion that it has pled a cognizable "secondary line injury"—i.e., an injury to a retailer arising from benefits to other retailers, Pl. Br. 13. The plaintiff in *Volvo* asserted the same type of injury, but the Act's goal of fostering interbrand competition nonetheless prevailed. And *Volvo* also confirms that Plaintiff cannot distinguish away *GTE Sylvania* as a Sherman Act case. *See* Pl. Br. 33. *Volvo* itself applied *GTE Sylvania* to the Robinson-Patman Act, 546 U.S. at 180–81, and *GTE Sylvania* establishes that vertical restrictions like Clorox's channel strategy often serve to "*promote* interbrand competition," *GTE Sylvania*, 433 U.S. at 54 (emphasis added), which is the goal of all antitrust laws, including the Robinson-Patman Act.

The fact that Plaintiff's reading of the Act would do nothing more than protect a competitor, to the detriment of consumers and interbrand competition, demonstrates—along with the statutory text and all relevant precedents construing it—that Plaintiff's interpretation of the Robinson-Patman Act is wrong.

B. Plaintiff Incorrectly Denies that Section 2(e) Is Limited to Promotional Services and Facilities

This Court, like every other authority to address the question, has held that Section 2(e) applies only when a manufacturer makes "promotional services" available to some retailers while refusing to furnish those promotional services to other retailers that purchase the same product. *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973); *accord, e.g., Hinkleman*, 962 F.2d at 379; *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1119 (5th Cir. 1982); *Gibson*, 95 F.T.C. at 726 (Section 2(e) must be "confined to the sphere of cooperative promotional arrangements").

Plaintiff nevertheless contends (Br. 24), in direct opposition to well-settled precedent, that Section 2(e) "contains no requirement that services or facilities be promotional in nature." But the federal courts have repeatedly and consistently held that the statute extends only to "promotional" services or facilities because that is the best reading of the statutory phrase that limits Section 2(e) to services or facilities "connected with" the retail "sale" of a commodity, 15 U.S.C. § 13(e). *See, e.g.*, *Kirby*, 489 F.2d at 909 (Section 2(e) "deal[s] with discrimination *in the field of promotional services* made available to purchasers who buy for resale") (emphasis added); *Hinkleman*, 962 F.2d at 380 (Section 2(e) applies only to services that "ac-

tively promote the resale ... to the retail customer"). The limitation on Section 2(e) to "promotional" arrangements thus follows from the text of the statute.

To be sure, this Court held in *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 587 (7th Cir. 1971), that Section 2(e) could apply to discrimination in the provision of timely delivery service. But *Centex-Winston* never denied that the services or facilities at issue must promote the resale of the product, and must be distinct from the product itself. The Court simply held that substantially superior delivery service—which was distinct from the lumber being sold—promoted the resale of the lumber in the unique circumstances of that case. *See id.*

Centex-Wilson's conclusion that delivery service can qualify as a promotional service has been heavily criticized, *see, e.g.*, *L & L Oil*, 674 F.2d at 1119, but that debate is beside the point here because there is no question that, post-*Centex*, this Court has limited Section 2(e) to separate services that promote the resale of the product to the consumer. As this Court held in *Kirby*, "Congress ... imposed stricter standards of legality respecting promotional discriminations than price discriminations," and "drafted [Sections] 2(d) and 2(e) to apply *exclusively* to promotional discriminations[.]" 489 F.2d at 910–11 (emphasis added).

Plaintiff errs in contending that Clorox has "misstate[d] the holding" of *Kirby*, which purportedly "does not limit services or facilities to promotional services." Pl. Br. 25–27. In fact, this Court in *Kirby* rejected precisely the argument Plaintiff makes here, explaining that "[i]n view of the strict standards of §§ 2(d) and 2(e), which focus on resale," Congress limited those provisions "exclusively" to promo-

tional discriminations, and excluded from their scope the types of conduct subject to Section 2(a). 489 F.2d 910–11. Here, Plaintiff's fundamental complaint about differences in the unit prices of Clorox's products is a complaint about price, which is *not* "exclusively … promotional," and thus has nothing to do with Section 2(e). *Id*.

C. Plaintiff Has Not Shown that Clorox's Large-Size Packages Are Promotional Services or Facilities

The briefs for Clorox and the FTC identify multiple independently sufficient reasons why Clorox's large-size packages do not qualify as promotional services or facilities under Section 2(e). First, Plaintiff's case does not arise under Section 2(e) at all, because Plaintiff focuses heavily on the unit price of large-size packages, whereas Section 2(e) applies only to services that are *unrelated* to price. Second, the FTC confirms that Plaintiff's proposed rule for Section 2(e) would harm interbrand competition. The FTC has expressly repudiated both the *Luxor* and *General Foods* administrative rulings that were Plaintiff's sole decisional support, as well as Plaintiff's misguided interpretation of the Fred Meyer Guides. Third, Plaintiff ignores the case law holding that "services or facilities" must be distinct from the product itself, that manufacturers are entitled to provide different product lines to different customers, and that services connected with the initial sale to the retailer fall outside Section 2(e). Finally, Plaintiff's argument that any package or container desired by some consumers is a promotional "service or facility" is wrong because it is inconsistent with precedent, lacks any limiting principle, and would dramatically expand the scope of Robinson-Patman liability in a manner harmful to competition.

1. Plaintiff's Claim Is About Purported Per-Unit Price Discrimination, and Is Therefore Not Actionable Under Section 2(e)

Even though Plaintiff "expressly disavow[s]" a claim under Section 2(a), Pl. Br. 37, it continues to object repeatedly to Clorox's channel strategy on the ground that large-size packages carry a lower unit price. *E.g.*, Pl. Br. 1, 2, 3, 4, 10–11, 21, 40, 41. This is fatal to Plaintiff's claim under Section 2(e).

In the original Complaint, Plaintiff alleged that Clorox used its channel strategy "as a justification ... for discriminating as to price, under 15 U.S.C.A. § 13(a)[.]" Pl. Suppl. App'x, R.S.A.120; *see also, e.g.*, R.S.A.116 ("[Club stores] will generally be able to buy and ultimately sell these large pack items at significantly lower unit costs[.]"). Plaintiff subsequently abandoned (for now) a Section 2(a) claim. S.A.1 n.1 (district court noting Plaintiff's statement that it "ha[d] not, at this time," raised a Section 2(a) claim). Nonetheless, Plaintiff continued to claim that Clorox's channel strategy is illegal because large-size packages carry lower unit prices.[1]

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[1] Plaintiff objects (Br. 8–10) to Clorox's citations to the First Amended Complaint rather than the original Complaint that was operative prior to the district court's ruling on Clorox's second motion to dismiss. This is a red herring. The district court granted Plaintiff's request to file the Amended Complaint in the second order under review, making that the operative complaint when this case was certified for interlocutory appeal. S.A.18. Moreover, as Plaintiff concedes (Br. 9), both complaints are identical in all material respects. In particular, the original Complaint includes all the same allegations about unit-price discrimination that were referenced in Clorox's opening brief. R.S.A.115–20, 123, 124–26.

As both Clorox (Br. 24–25) and the FTC (Br. 20–21) have shown, a plaintiff whose claim of discrimination relates to price—including, specifically, quantity-related pricing complaints like Plaintiff's claim of unit-price discrimination—must proceed, if at all, under Section 2(a), not Section 2(e). Plaintiff does not dispute that Section 2(e) applies only to "services unrelated to price," and must not be construed "to make nugatory the defenses specifically outlined" in Section 2(a) with respect to price. *Chi. Spring Prods. Co. v. U.S. Steel Corp.*, 254 F. Supp. 83, 84–85 (N.D. Ill.), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966); *accord Centex-Winston*, 447 F.2d at 587–88 & n.5 (reaffirming *Chicago Spring*); *Kirby*, 489 F.2d at 910–11. Plaintiff may not transform a grievance about unit prices into a Section 2(e) claim in order to avoid Section 2(e)'s harm-to-competition requirement. *See Chicago Spring*, 254 F. Supp. at 85. That result would be "incongruous," as this Court has recognized. *Centex-Wilson*, 447 F.3d at 588 n.5. Plaintiff's continued reliance on alleged unit-price discrimination simply confirms that permitting Plaintiff's claim to proceed would impermissibly "collapse the distinction" between Sections 2(a) and 2(e). *Kirby*, 489 F.2d at 910.

2. The FTC Has Confirmed that Plaintiff's Interpretation of Section 2(e) Is Wrong

The FTC has thoroughly explained (Br. 8–14, 17–18) why Plaintiff's suit must be dismissed: Plaintiff's contention that Clorox's large-size packages are promotional services is contrary to all federal cases interpreting the Act, and would prohibit procompetitive behavior.

In the more than 75 years that courts have applied the Robinson-Patman Act, no federal court has come close to holding that a large-size package (or any type of package) is actually a promotional service or facility. The distribution strategy that Plaintiff challenges in this case is nothing like the conduct that was challenged in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 743–44 (1945) (seller paid for the buyer's advertising), *Fred Meyer*, 390 U.S. at 345–46 (sellers paid for their products to appear in retailer's coupon book), *Simplicity Pattern*, 360 U.S. at 60 (manufacturer provided free display cabinets and catalogs), or any other case brought under Section 2(e). *See* XIV *Antitrust Law*, *supra* ¶ 2363e, at 292–93 n.52 (describing cases involving promotional services). Indeed, Plaintiff points to no case holding that mere package size is a service or facility *at all*, let alone that it qualifies as a promotional service within the meaning of Section 2(e).

Plaintiff's only support for its contrary interpretation had been *Luxor* and *General Foods*, together with Plaintiff's reading of the Fred Meyer Guides' references to "special packaging, or package size," which various courts have quoted in dicta. Pl. Br. 22–23, 34–35, 42. Now, however, the FTC has expressly disavowed those administrative rulings "because they are inconsistent with antitrust jurisprudence as it has developed in the last 60 years." FTC Br. 15.[2] And the FTC has also

[2] The FTC's commissioners voted unanimously to approve the Commission's amicus brief overturning *Luxor* and *General Foods*. *See* Press Release, FTC Amicus Brief Urges Appeals Court to Reverse Decision in Case of Alleged Discrimination in Package Sizes (Nov. 5, 2015), *available at* https://www.ftc.gov/news-

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rejected Plaintiff's reading of the Fred Meyer Guides, confirming that those Guides do not help Plaintiff, "and never have," because Clorox's large-size packages are not seasonal, themed packaging, and thus are not "*special*" packaging or package sizes under the Guides. FTC Br. 22 (emphasis added). Plaintiff cannot plausibly contend that it knows better than the FTC what the agency's own administrative guidance means. *See Auer v. Robbins*, 519 U.S. 452 (1997) (courts must defer to an agency's interpretation of its own regulatory pronouncements).

Plaintiff is wrong to argue (Br. 33–34) that *Hinkleman* (or any other case citing the Fred Meyer Guides) stands for the proposition that large-size packages can constitute a promotional service. *Hinkleman* had nothing to do with large-size packages; the court merely quoted the Fred Meyer Guides without discussing what "special" packaging or package size meant, since that issue was not presented. Far from supporting Plaintiff, *Hinkleman* in fact compels dismissal of Plaintiff's complaint, because *Hinkleman* confirms that, to be actionable, a service or facility must "*actively promote* the resale of [the product] to the retail customer" rather than "merely facilitate ... resale." 962 F.2d at 380 (emphasis added); *see also L & L Oil*, 674 F.2d at 1119 ("in order to be sufficiently related to the purchaser's resale the supplier must become active in the resale of the product"). Clorox's large-size pack-

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ages do not somehow *actively promote* resale. Instead, they "merely [ ] meet market demand for ... larger quantities or lower unit prices." FTC Br. 24.

Plaintiff argues (Br. 42) that the absence of on-point authority in this case suggests that manufacturers have been following the rule of *Luxor* and *General Foods* until very recently. In fact, the opposite is true, as confirmed by the FTC: Diversified distribution policies like Clorox's channel strategy are common in the marketplace, and the federal regulator charged with enforcing this statute has stated that Clorox's practice is not against the law. FTC Br. 16.

With the administrative authorities that were the foundation of Plaintiff's case now discredited, Plaintiff tries to survive dismissal by contending that fact discovery is warranted because to "[t]o win, Clorox must persuade this Court that large packages can never be a promotional service or facility." Pl. Br. 15–16; *see also* Nat'l Grocers Ass'n Br. 9. But as Plaintiff told this Court in opposing Clorox's motion for interlocutory appeal, "[w]hether a large pack of a product does or does not constitute a promotional service covered by the requirements of § 2(e) of the Robinson-Patman Act is *unquestionably a question of law*." No. 15-8016 (7th Cir. Aug. 6, 2015), ECF No. 3 (emphasis added). This case should be dismissed now—as the FTC concludes (Br. 25)—because Clorox's large-size packages are not promotional services as a matter of law, regardless of whether other forms of packaging might be promotional services in limited circumstances. Plaintiff cannot avoid dismissal with the conclusory assertion that "providing a customer with a large pack of a particular product constitutes the provision of a promotional service," Pl. Br. 18 (quoting R.S.A.112).

See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (a formulaic recitation of the elements of the cause of action is not presumed true on a motion to dismiss). And Plaintiff "cannot state a plausible claim under Section 2(e) on the theory that it was deprived of products that customers desire." FTC Br. 20.

The disagreement between the FTC and Clorox that Plaintiff seizes upon, *see* FTC Br. 23 n.14, is narrow and unrelated to this appeal: it concerns whether, *in a hypothetical different case*, special seasonal themed packaging (such as a package in the shape of a football at Super Bowl weekend) could be viewed as a promotional service that is separate from the product and thus actionable. Whatever the merit of that view—which has never been reflected in the holding of any court—Clorox's large-size packages, which are indisputably sold year-round without any theme, do not remotely resemble that type of targeted promotional effort. The FTC agrees (Br. 18) that, leaving aside the issue of seasonal, themed packaging, "the size of a package conveys no advertising or other promotional message."

Clorox has consistently argued in the alternative that even if it were possible—contrary to the plain language of the Act—for some sorts of packaging to be promotional (such as Halloween-themed packaging), Clorox's large-size products are neither promotional nor services, but merely one form of product aimed at maximizing Clorox's ability to compete. *See* Clorox Br. 39–40; S.A.8; Dist. Ct. Dkt. No. 21, at 9. The FTC unequivocally agrees. FTC Br. 25.

3. Section 2(e) Applies Only to "Services" that Are Separate and Apart from the Product, Not to Differentiated Product Mixes

Plaintiff has no response to Clorox's showing that Plaintiff's proposed rule would eliminate the statutory distinction between "commodities" themselves, on the one hand, and "services or facilities connected with" the "offering for sale" of those "commodities," on the other. Clorox Br. 33 (quoting 15 U.S.C. § 13(e)). Clorox's large-size packages *are* the product, not services or facilities that are separate from the product. *See, e.g.*, *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976) ("decision to furnish ... products, as opposed to advertising or promotional services, is not actionable"); *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 55 (4th Cir. 1974) (providing one retailer with less of a good is "discriminating in the allocation of ... the commodity itself, as opposed to a service or facility connected with the resale of the commodity"). And as the FTC explains, federal courts "unanimously hold" that Section 2(e) "do[es] not prevent a manufacturer from selling certain product lines to only a subset of its customers, or from providing those customers with a more desirable product mix than other customers." FTC Br. 12–13 (citing cases); *accord* Clorox Br. 27–29.

Plaintiff's only rejoinder is to argue that the product in this case is solely the *contents* of the package—the ranch dressing or cat litter or trash bags—but excludes the package itself, which is purportedly a separate service instead. Pl. Br. 21–22. Plaintiff is plainly wrong, because neither the quantity that is available for sale in a package nor the package's description of that quantity is a "service" at all; rather, they are an inherent *part of* the product as it is sold to retailers. Since package size

is not a separate service provided in connection with resale, it cannot be the basis of a Section 2(e) claim.

Nor are the large-size packages that Clorox sells to club stores "the same article" that is sold to general market retailers like Plaintiff, which independently precludes a claim of discrimination under Section 2(e). *Chi. Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863, 866 (7th Cir. 1949) ("refus[al] to sell [plaintiff] certain specially designed items" sold to competitors was not actionable). Indeed, Plaintiff implicitly concedes this point. Plaintiff recognizes (correctly) that it could not bring a claim for price discrimination under Section 2(a) without alleging, among other things, "that its competitors are paying a lower price for *any particular package* of a Clorox product." Pl. Br. 38 (emphasis added); *see also* Pl. Br. 40 ("the fact that unit prices on small packs of a product are typically higher than unit prices on large packs of the same product .... is not an allegation of price discrimination"). But that amounts to an admission that "small packs" and "large packs" are not the same "commodities" within the meaning of the Robinson-Patman Act. 15 U.S.C. § 13(a), 13(e).

Similarly, Plaintiff maintains that Clorox's large-size packages appeal to different customers than the grocery channel packages. *E.g.*, Pl. Br. 20 ("Each size of a package is targeted at a segment of the population that has a need that is satisfied by that particular package size."). And Plaintiff asserts that its lack of access to Clorox's "large packs" has caused it to be "cut off" from competing with the club stores, which means there is no cross-elasticity of demand between the club store

products and the grocery-channel products. Pl. Br. 30. Those contentions, too, compel the conclusion that large-size and small-size packages are not the same product for Robinson-Patman purposes. *See Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371 (2d Cir. 1958) (without cross-elasticity of demand between the products purchased by plaintiff and another retailer, plaintiff has no Section 2(d) claim).

Finally, even if Clorox's large-size packages could be considered "services" separate from the product—and they cannot—courts applying Section 2(e) "distinguish between those services or payments necessary to facilitate the original transaction from the seller to the reseller and those necessary to facilitate the reseller's subsequent marketing." XIV *Antitrust Law*, *supra* ¶ 2363e, at 291–92. "[S]ervices in connection with the original sale to the purchaser" are "not cognizable under §§ 2(d) or 2(e)." *Kirby*, 489 F.2d at 910. The quantity of a good that is offered in a package is an integral aspect of the initial transaction that is necessarily offered "in connection with the original sale to the purchaser." Accordingly, selling different package sizes is not actionable under Section 2(e).

4. Plaintiff's Interpretation of "Promotional Services" Would Produce Absurd and Anticompetitive Consequences

Fundamentally, Plaintiff's theory of this case is that Clorox's large-size packages are promotional services *because* they "are targeted toward satisfying the desire of certain customers for convenience and value." Pl. Br. 22; *see also* Pl. Br. 36 ("Large packs are offered because consumers want them. They promote resale to consumers."). That argument is at odds with the text of the statute, the purpose of the Act, and decades of case law applying it. As the FTC explains (Br. 2), Plaintiff's

rule "would radically expand the scope of Section 2(e), subvert efficient manufacturer-retailer relationships throughout the economy, and contradict the central principles of modern antitrust law."

If accepted, Plaintiff's argument would mean that *every feature and every variation* of every kind of good in the economy is actually a promotional service that must be made available to all retailers on pain of per se liability under Section 2(e). Plaintiff and its amicus unabashedly embrace this logical implication of their position. *See* Pl. Br. 20 ("For every retail customer who prefers small packages, there is another who prefers large. Each size of a package is targeted at a segment of the population that has a need that is satisfied by [a] particular package size."); Nat'l Grocers Ass'n Br. 12–15. But the necessary consequence of this remarkable position is that manufacturers would be forced to abandon the procompetitive and widespread practice of creating more efficient distribution networks and investing in differentiated product lines. Plaintiff's rule would also undo this Court's clear holding that Plaintiff cannot allege discrimination under Section 2(e) when Clorox simply makes different product lines available to different customers. *See Chicago Seating*, 177 F.2d at 866.

II. *Fred Meyer* Does Not Limit a Manufacturer's Right to Cut Off Robinson-Patman Act Claims by Refusing to Deal With a Customer

Plaintiff's Section 2(e) claim also must be dismissed because Plaintiff ceased being a "purchaser" when Clorox stopped all sales to Plaintiff. It is settled that when a manufacturer exercises its right to terminate a business relationship, the manufacturer owes no prospective duties under the Robinson-Patman Act. *See Chi-*

cago Seating, 177 F.2d at 867 (affirming dismissal of Section 2(e) claim because manufacturers "have the right to choose their customers"); *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1022 (2d Cir. 1989) (there is "no basis for a Robinson-Patman injunction" where the defendant "is no longer selling to" the plaintiff). These holdings follow directly from the Supreme Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), which Plaintiff agrees grants manufacturers a virtually unqualified right to choose their customers. Pl. Br. 45.

Nothing in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), holds otherwise, and this Court should reject Plaintiff's attempt to extend that case to this very different context. *Fred Meyer* addressed Section 2(d) and the interpretation of "customer," but never mentioned Section 2(e) or its operative term, "purchaser." Plaintiff points out that this Court and others have read Sections 2(d) and 2(e) to be "coterminous." Pl. Br. 47 (quoting *Kirby*, 489 F.2d at 909). But stretching *Fred Meyer*'s holding to govern Section 2(e), and to cover even terminated retailers, would be a substantial extension, not a mere application of settled law. Moreover, *Fred Meyer* rests on an outmoded approach to statutory construction and an acknowledged policy justification—the perceived need "to improve the competitive position of small retailers," 390 U.S. at 352—that is directly contrary to the interpretive approach mandated by more recent Supreme Court precedents. *See supra* Part I.A. Accordingly, there is no basis in law or logic for extending the reasoning of *Fred Meyer* to a separate statutory subsection and a meaningfully different factual setting.

Indeed, to extend *Fred Meyer* as Plaintiff requests would conflict with, not advance, the parallel nature of Sections 2(d) and 2(e). Section 2(d) applies when, as in *Fred Meyer*, a manufacturer pays a retailer to promote the manufacturer's products. 390 U.S. at 343. Section 2(e) applies when a manufacturer grants a retailer promotional services that actively promote the resale of the product. *Kirby*, 489 F.2d at 909; *Hinkleman*, 962 F.2d at 380. The two sections are "harmonious," Pl. Br. 47, because a retailer can either pay out of pocket for promotional services or facilities (like advertising or display cases) and get reimbursed by the manufacturer, or the manufacturer can provide them directly. The result for a genuine promotional service is the same either way: a favored retailer promotes resale of a manufacturer's products at no net cost to itself. But this harmony would disappear if Section 2(e) were extended from (i) promotional *services* that a manufacturer *gives away* to (ii) distinct *product lines* that a manufacturer *sells*, because Section 2(d) has no parallel in the latter scenario.

The fact that this Court has described Sections 2(d) and 2(e) as coterminous is thus an additional reason not to extend *Fred Meyer* or Section 2(e) into a dispute over a refusal to provide different-sized packages, which would break down the subsections' consistency. *See* Clorox Br. 49–50.[3] Plaintiff's only response (Br. 50) is to

[3] Plaintiff says that "Clorox *concede[d]* that candy provided in special Halloween-themed packaging constitutes a promotional service[.]" Pl. Br. 50 (citing Clorox Br. 39–40) (emphasis added). That is a mischaracterization of Clorox's brief. *See* Clorox Br. 40 ("Even *assuming arguendo* that mere packaging could be a promo-

(continued on next page)

contradict itself (and this Court) by saying that "nothing in [the] Robinson-Patman Act ... requires such symmetry between §§2(d) and 2(e)."

Plaintiff also offers a superficial response to the problem that extending *Fred Meyer* to this case would eviscerate *Colgate*. Even as Plaintiff acknowledges that Clorox may refuse to deal with any *retailer*, Plaintiff contends (Br. 50) that *Fred Meyer* "compels" Clorox to sell products "to wholesalers." That is wrong, because *Fred Meyer* never contemplated a manufacturer that had exercised its right to terminate a retailer. The wholesaler in *Fred Meyer* was a middleman and a facilitator of efficient distribution for certain customers that were too small to make direct purchases. 390 U.S. at 352. Here, by contrast, Plaintiff formerly made direct purchases from Clorox on a regular basis. A.5 (¶14), A.12 (¶¶38–40); R.S.A.111–12, R.S.A.188. Unlike in *Fred Meyer*, Plaintiff seeks to use independent wholesalers as a means of circumventing Clorox's unilateral business decision to terminate its relationship with Plaintiff.[4]

(continued from previous)

tional service," Clorox's products are distinguishable) (emphasis added) (internal quotation marks omitted).

[4] Plaintiff added to its Amended Complaint an allegation that Clorox decided to stop selling to Plaintiff as part of a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. *See* Pl. Br. 45 n.7. Clorox has moved to dismiss those allegations for failure to plead any facts to support the charge of conspiracy. Those claims are not at issue in this appeal. They will, however, almost certainly fail if this Court rules for Clorox on the Robinson-Patman Act claims. Indeed, the relief that Plaintiff seeks in this case—an injunction ordering Clorox to make ongoing sales to Plaintiff—is not even available in a case under Section 1.

Moreover, Plaintiff's proposal to extend *Fred Meyer* to this case is especially problematic because Plaintiff asks the Court (Br. 50) to order Clorox to make sales of certain products to wholesalers. Yet courts refuse to mandate sales in antitrust cases absent extraordinary circumstances, because they are "ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (citation omitted). A court order setting the terms on which a manufacturer must deal with retailers or wholesalers is inconsistent with the natural forces of competition in the marketplace.

Plaintiff's narrow view of *Colgate*—that Clorox's "right to terminate a customer is irrelevant" in this case because Plaintiff "does not need to have a business relationship with [Clorox] to have a right to receive" large-size packages, Pl. Br. 12, 48—would render manufacturers' *Colgate* right so easily evaded as to be meaningless. Any terminated retailer could regain the same ability to bring suit under the Robinson-Patman Act merely by purchasing from wholesalers. And according to Plaintiff, those rights would include the power to re-make a manufacturer's distribution chain so that the retailer can get access to any product that it wants from any manufacturer.

As a matter of law, however, terminating a customer entails eliminating prospective Robinson-Patman Act rights that the former customer otherwise would have enjoyed. *See Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (Stevens, J.) (even where "the termination itself was discriminatory[,] ... such dis-

crimination does not violate the Robinson-Patman Act"). The statute explicitly protects manufacturers' right to refuse to deal when it states that "nothing herein contained shall prevent [manufacturers] from selecting their own customers in bona fide transactions and not in restraint of trade[.]" 15 U.S.C. § 13(a). And all relevant case law confirms the same: manufacturers are entitled to determine to whom they will owe prospective duties under the Robinson-Patman Act. *See Chicago Seating*, 177 F.2d at 867; *H.L. Hayden*, 879 F.2d at 1022. Thus, both the statutory text and the applicable precedents squarely reject Plaintiff's claim that it may unilaterally bestow upon itself the rights of a purchaser under Section 2(e).

Ultimately, Plaintiff's argument that *Fred Meyer* should be extended so that Plaintiff can buy any product it wants, notwithstanding its termination by Clorox and *Colgate*, is the same as Plaintiff's argument throughout its brief, namely, that the Robinson-Patman Act should protect Plaintiff's own bottom line against "a competitive advantage" for "large buyers." Pl. Br. 52; *see also* Pl. Br. 49 (stating that the *Fred Meyer* Court was guided by a perceived need "to improve the competitive position of small retailers"). But that antitrust philosophy is wrong and has been superseded by the Supreme Court. *See supra* Part I.A. *Volvo* admonished that courts should "resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." 546 U.S. at 181. That rule of construction precludes the extension of *Fred Meyer* that Plaintiff seeks here.

Conclusion

The Court should reverse the orders below and remand with directions to dismiss Plaintiff's Robinson-Patman Act claims.

Dated: December 23, 2015

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1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,983 words, as determined by the word count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that, on December 23, 2015, an electronic copy of the foregoing Reply Brief of Defendants-Appellants The Clorox Company and The Clorox Sales Company was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Clerk's CM/ECF system and was served electronically on the following registered CM/ECF users:

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