No. _____

In the United States Court of Appeals for the Seventh Circuit

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WOODMAN'S FOOD MARKET, INC.,

Plaintiff-Respondent,

v.

THE CLOROX COMPANY
AND THE CLOROX SALES COMPANY,

Defendants-Petitioners.

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

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

The Clorox Company has no parent corporation, and no publicly held company owns 10% or more of its stock. The Clorox Sales Company is directly or indirectly a wholly-owned subsidiary of The Clorox Company.

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Introduction

Defendants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") respectfully request that this Court grant interlocutory review of two first-of-their kind interpretations of the Robinson-Patman Act that have created substantial uncertainty in the retail markets. The district court construed Section 2(e) of the Act to impose the following requirements, never before ordered by a court in the 80-year history of the Act: (1) a manufacturer that sells any package size of a particular product to a retailer must offer *every other* package size of that product to the retailer; and (2) even if the manufacturer discontinues all direct sales of its products to the retailer, the retailer is nonetheless entitled to sue that manufacturer under Section 2(e) if it can buy the manufacturer's products from an independent wholesaler. These novel interpretations of the Act harm competition by making it unlawful for manufacturers in most circumstances to sell different-sized packages through different retail channels, and by denying manufacturers the ability to choose the retailers with whom they will do business. The district court's rulings are incompatible with the plain language of the Act, the cases interpreting the statute, and the last four decades of antitrust jurisprudence emphasizing that the primary concern of the antitrust laws is *interbrand*, not *intrabrand*, competition.

Plaintiff in this case, Woodman's Food Market, Inc., has made the novel allegation that Clorox violated Section 2(e) of the Robinson-Patman Act simply by deciding not to sell Plaintiff certain large-size packages of its products. Clorox manufactures many different types of consumer products (e.g., salad dressing, cat litter, trash bags) in several different sizes and quantities (e.g., a 12 oz. bottle and a 2-

pack of 40 oz. bottles of Hidden Valley brand ranch dressing; or a 20 lb. bag and a 42 lb. bag of Scoop Away brand cat litter). Clorox sells certain products, in certain sizes or quantities, to the retailers that are best suited to maximize sales of those products. Countless other manufacturers do the same. This case involves Clorox's so-called large-size packages, which are larger packages of Clorox-brand consumer products that are meant to be sold on warehouse pallets in club stores.

The Robinson-Patman Act generally prohibits price discrimination (i.e., charging different prices to different customers for a commodity in reasonably contemporaneous sales) that injures competition. 15 U.S.C. § 13(a); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F. 2d 1396, 1406 (7th Cir. 1989). Section 2(e) of the Act exists to prevent *disguised* price discrimination. *See Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973). It requires a manufacturer that furnishes promotional "services or facilities" connected with the resale of a commodity to a retail customer to furnish those services or facilities to all retailers on proportionally equal terms. 15 U.S.C. § 13(e); *Kirby*, 489 F.2d at 910 (Section 2(e) applies only to promotional services that promote a product's resale). Unlike the more commonly invoked provisions of the Act, Section 2(e) does not require proof that the challenged conduct reduced competition. *See Kirby*, 489 F.2d at 910 ("[P]romotional discrimination is illegal per se, irrespective of competitive impact[.]").

For decades, the federal courts have interpreted the term "services" in Section 2(e) to be limited to services designed to *promote* the sale of the product, such as display cases for use in stores or paid-for advertising in the local newspaper. The

district court, however, relying on two administrative decisions issued by the Federal Trade Commission ("FTC") in 1940 and 1956 (that the FTC has not invoked for decades), as well as on the court's reading of the FTC's guidance, held that "services" also encompasses all *packages* of any size sold at any time. *See* Guides for Advertising Allowances and Other Merchandising Payments & Services, 79 Fed. Reg. 58245, 58246 (Sept. 29, 2014) ("Fred Meyer Guides"). Under the district court's interpretation of Section 2(e), *every package and container sold in America* is actually a "service" connected with a commodity. The district court's ruling calls into question the legality of countless manufacturers' distribution arrangements and has generated substantial uncertainty in the market because it effectively requires manufacturers to offer every size of every package that they sell to every customer.

The district court also broke new ground, in tension with modern antitrust jurisprudence, when it held that Plaintiff continues to be a "purchaser" of Clorox products under Section 2(e), even after Clorox terminated all direct sales to Plaintiff, merely because Plaintiff can obtain Clorox products through independent wholesalers. Clorox's election to terminate its business relationship with Plaintiff should have ended the litigation, because it has been settled for decades that the Robinson-Patman Act protects a manufacturer's right to refuse altogether to do business with any retailer. Yet the district court ruled that Plaintiff could defeat that right, and maintain this suit against Clorox, based solely on Plaintiff's ability to buy some Clorox products through wholesalers that Clorox does not control. The sweeping effect of the district court's rulings is that so long as a retailer can find

any independent wholesaler to sell it one size of a manufacturer's product, the manufacturer is obligated to make available to that retailer *every* size package of the product, regardless of the manufacturer's preferred plan of distribution.

The district court correctly determined that both of its holdings satisfy all the prerequisites for interlocutory review in 28 U.S.C. § 1292(b): (1) the orders involve "controlling question[s] of law"; (2) there is "substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See Metrou v. M.A. Mortenson Co.*, 781 F.3d 357, 359 (7th Cir. 2015). Both questions presented are pure questions of statutory interpretation that are controlling (indeed, dispositive) in this litigation. There is substantial ground for difference of opinion on each of the district court's holdings, which adopt novel interpretations of Section 2(e) that are contrary to its text and in tension with prior judicial interpretations of the Act. And an appeal is virtually certain to advance the ultimate termination of this case. If this Court agrees with Clorox on *either* question, then Plaintiff's Robinson-Patman Act claims will be dismissed. Even if the Court agrees with Plaintiff, it can clarify the statute and thereby substantially streamline future proceedings. The Court should grant this petition in order to resolve both the meaning of the Robinson-Patman Act and the substantial uncertainty in the marketplace created by the district court's holdings.

Statement of Jurisdiction

This Court may permit an interlocutory appeal when a district court certifies in writing that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate

appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C § 1292(b); *Cent. Soya Co., v. Voktas, Inc.*, 661 F. 2d 78, 79 n.4 (7th Cir. 1981). The district court made the requisite findings in its July 17, 2015 order (Ex. C), which certified for immediate appeal its February 2, and April 27, 2015 orders denying Clorox's motions to dismiss (Exs. A & B). This petition is timely because it is filed within ten days of the certification order. 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a).

Statement of the Issues

Section 2(e) of the Robinson-Patman Act prohibits "discriminat[ion] in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale" by "furnishing . . . services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 15 U.S.C. § 13(e).

As the district court recognized, no federal court has ever determined whether a particular size of a product could constitute a "service[ ] or facilit[y] connected with . . . commodit[ies]" under Section 2(e), as opposed to a commodity itself. *See* Ex. A at 6–7. This petition presents the Court with the opportunity to resolve that important (and, in this case, dispositive) issue, which affects thousands of manufacturers' distribution chains.

In addition, no federal court has determined whether, when a manufacturer terminates all sales to a retail customer, that retail customer can nevertheless qualify as a "purchaser" of the manufacturer's products (and thus be entitled to sue the manufacturer under Section 2(e)) merely by obtaining certain products from an in-

dependent wholesaler that the manufacturer does not control. Ex. C at 5. That question is of critical importance to manufacturers as they seek to structure their business relationships to compete effectively in the marketplace.

Statement of Facts

Clorox manufactures consumer and professional products including branded bleach, charcoal, cat litter, sandwich bags, and salad dressings, among others. Clorox sells its products to more than 30,000 supermarkets and other retailers in the United States, ranging from small convenience stores to very large retailers (such as Wal-Mart, Costco, and Sam's Club) and e-retailers including Amazon. Clorox manufactures more than 1,000 stock-keeping units ("SKUs"). Plaintiff is a retailer with 15 locations in Illinois and Wisconsin. When this litigation began, Plaintiff purchased more than 480 different SKUs from Clorox.

In 2014, Clorox determined that it could compete more effectively by implementing a channel strategy that made available a distinct set of SKUs to various retail and distribution channels, including "General Market" and "Club" stores among others. Clorox assigned many hundreds of SKUs to the General Market channel, including larger quantity SKUs of Clorox products. Clorox assigned fewer than 80 SKUs to the Club Store channel. There is almost no overlap between the sets of SKUs available in the General Market and Club Store channels. The Club Store SKUs are the largest-size packages of any item that Clorox sells.

Clorox categorized Plaintiff as a General Market retailer, similar to all other supermarkets and mass-market retailers like Wal-Mart and Target. In September 2014, Clorox officials met with Plaintiff to discuss the new distribution strategy.

Clorox informed Plaintiff that, as of October 1, 2014, Clorox would not fill further orders from Plaintiff on eleven SKUs that Plaintiff had previously purchased but that were now sold on the Club Store list. Those eleven products are:

- 192-count Glad quart-size freezer bags;
- 112-count Glad gallon-size freezer bags;
- 144-count Glad gallon-size food storage bags;
- 460-count Glad sandwich-size food storage bags;
- 150-count Glad tall kitchen drawstring bags;
- 200-count Glad tall kitchen quick-tie bags;
- 42-pound Fresh Step scoop cat litter;
- 42-pound Scoop Away complete cat litter;
- 2-pack of 64-ounce Kingsford lighter fluid;
- 3-pack of 130-ounce Clorox regular concentrated bleach; and
- 2-pack of 40-ounce Hidden Valley ranch dressing.

Plaintiff brought this lawsuit on October 28, 2014. The Complaint sought declaratory and injunctive relief that would compel Clorox to offer for sale to Plaintiff, in perpetuity, every product that Clorox manufactures.

In November 2014, Clorox moved to dismiss the Complaint for failure to state a claim. Clorox argued that the plain language of "services or facilities" in Section 2(e) does not include large-size packages and that every federal court that has interpreted "services or facilities" has done so in a way that would exclude large-size packages. The district court denied Clorox's motion on February 2, 2015. *See* Ex. A at 7–10. The court relied on two old FTC administrative decisions, *In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *In re General Foods Corp.*, 52 F.T.C. 798 (1956), even though those decisions are not binding on courts and are inconsistent with both the

language of the Act and with subsequent federal-court precedent.

Shortly thereafter, Clorox decided to end its sale of all products to Plaintiff in order to avoid the costs of litigation.[1] Clorox then moved to dismiss the case as moot on the ground that Plaintiff is no longer a "purchaser" of Clorox products under Section 2(e), and is thus unable to seek injunctive relief. (Plaintiff has not pursued damages in this case.) Clorox also argued that to the extent that Plaintiff would continue to qualify as a "purchaser" under the FTC's interpretation of that term in its Fred Meyer Guides, that interpretation deserves no deference because, among other things, the Fred Meyer Guides "do not carry the force of law." *See* 79 Fed. Reg. at 58253. On April 27, 2015, the district court denied Clorox's motion. The district court relied on the fact that the Fred Meyer Guides define a "purchaser" to include a retailer who purchases from a wholesaler, and on the court's interpretation of the Supreme Court's decision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).[2]

In May 2015, the district court denied Plaintiff's motion for a preliminary injunction. The Court held that Plaintiff had not submitted any evidence that it had incurred harm from Clorox's alleged conduct or that it was at immediate risk of irreparable harm. *See* No. 14-734, Dkt. 91 (W.D. Wis. May 28, 2015).

On July 17, 2015, the district court granted Clorox's motion to certify the

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[1] Terminating a customer does not violate the Robinson-Patman Act. *See Mullis v. Arco Petrol. Corp.*, 502 F.2d 290, 294 (7th Cir. 1974).

[2] That order also granted Plaintiff leave to amend its complaint to add allegations that Clorox conspired with club stores in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Clorox has filed a motion to dismiss these allegations for failure to state a claim, which is pending. Plaintiff's Sherman Act claims are not at issue in this petition.

Court's orders for interlocutory appeal because the orders "involve questions of law . . . [that] required the court to determine the scope and meaning of the price discrimination provisions in [Section 2(e)]." Ex. C at 2. The district court noted that "no federal court has addressed whether a special package size constitutes a promotional service . . . [and] the question is by no means settled in this circuit." *Id.* at 4. And "[t]here is a similar dearth of case law related to the issue of whether purchasers include retailers who purchase from wholesalers." *Id.* at 5.

Argument

This Court will accept an interlocutory appeal "when the statutory criteria [of 28 U.S.C. § 1292(b)] are met." *Ahrenholz v. Bd. of Trustees*, 219 F.3d 674, 677 (7th Cir. 2000). As this Court has held, a "section 1292(b) appeal [is appropriate for] an abstract issue of law, . . . resolution of which could (because it [i]s indeed a *controlling* issue) head off protracted, costly litigation." *Id.* The Court has cautioned against "a narrow interpretation of [what constitutes a] 'question of law.'" *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 626 (7th Cir. 2010). And it has accepted interlocutory appeals in cases where the district court "ha[s] taken sides on an important and debatable issue that is open in the Seventh Circuit." *Intercon Sols., Inc. v. Basel Action Network*, __ F.3d __, 2015 WL 3941463, at *2 (7th Cir. June 29, 2015). Immediate appellate review is appropriate here for these same reasons.

I. The District Court's Interpretation Of "Services Or Facilities" In Section 2(e) Meets All Criteria For Interlocutory Review

A. Whether A Manufacturer's Large-Size Packages Constitute "Services Or Facilities" Is A Controlling Question Of Law

A question of law is controlling "if interlocutory reversal might save time for

the district court, and time and expense for the litigants." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (internal quotation marks omitted). "[C]ontrolling means serious to the conduct of the litigation, either practically or legally." *Id.* (internal quotation marks omitted). A question is controlling if its resolution is "likely to affect the further course of the litigation, even if [it is] not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996); *see also Text Messaging*, 630 F.3d at 624 ("It is a *controlling* question, because [reversal would mean that] the case is likely (though . . . not certain) to be over.").

Whether large-size packages constitute "services or facilities" under 15 U.S.C. § 13(e) is a pure question of law because it is "a question of the meaning of a statutory . . . provision." *Ahrenholz*, 219 F.3d at 676. It is controlling because reversal would mean that Plaintiff's Robinson-Patman Act claims fail as a matter of law and must be dismissed. As the district court noted, "[t]he crux of the parties' dispute is whether the large packs offered by Clorox only to the club stores can be considered a promotional service under" Section 2(e). Ex. A at 6. Clorox's decision not to sell those large-size packages is the *only* alleged violation of Section 2(e).[3] Thus, the question at issue is not merely controlling, it is dispositive: "reversal from the court

[3] Plaintiff has at times suggested that it has a claim under Section 2(d) of the Robinson-Patman Act. But the district court correctly noted that Section 2(d) is not really at issue here because that would require an allegation that Clorox made a payment to its club-store customers, *see* 15 U.S.C. § 13(d), and Plaintiff has never made that allegation. Ex. A at 6. Regardless, a Section 2(d) claim would also require legal determinations that Clorox's large-size packages are "services or facilities," and that Plaintiff can remain a "customer" even after being terminated by Clorox, the same issues presented here. *Id.*

of appeals . . . would dispose of [Plaintiff's] Robinson-Patman Act claims." *Id.*

B. There Is Substantial Difference Of Opinion On This Novel Question

There is often substantial ground for difference of opinion regarding novel questions of statutory interpretation. *See Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F. 3d 1000, 1007–08 (7th Cir. 2002) ("As [the interpretation of certain federal statutes] are questions of first impression, the application of these statutes to the facts alleged here is certainly contestable, and the resolution of these issues will facilitate the conclusion of the litigation.").

The district court correctly found that there is a substantial basis for disagreement regarding the interpretation of Section 2(e). It "acknowledged that no federal court has addressed whether [large-size packages] constitute[ ] a promotional service under" Section 2(e), and that "the question is by no means settled in this circuit." Ex. C at 4. Federal courts and the FTC's Fred Meyer Guides have interpreted the term "services or facilities" to be confined to *promotional* services that assist a retailer in promoting the resale of the product. *See* 79 Fed. Reg. at 58248. Section 2(e) refers, for example, to furnishing things like cabinets for displaying products, traveling demonstrators, promotional posters, instructional brochures for merchants, monthly publications, window displays, newspaper advertising, billboard posters, and allowances to have clerks promote a product. *See, e.g.*, *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 943, 945 (9th Cir. 1998) (citing *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 60, 61 n.4 (1959)). No court has ever held that a particular package size of a commodity constitutes a "service or facility" to aid that commodity's resale. *Cf. Lewis v. Philip Morris Inc.*, 355 F.3d 515,

520–21 (6th Cir. 2004) (per curiam); *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 378–79 (4th Cir. 1992) (per curiam); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 151–52 (2d Cir. 1949).

It is true that the Fred Meyer Guides list "special packaging or package sizes," among other things, as potential promotional services. *See* 79 Fed. Reg. at 58248–49. But this interpretation does not come from case law. *Id.* at 58248 (observing that no federal court has "squarely addressed the question of whether the provision of special packaging or package sizes to only some competing customers may violate section 2(e)"). In fact, the FTC—which has not brought an enforcement action that supports Plaintiff's reading of Section 2(e) in almost sixty years—has debated whether to keep the "special packaging or package sizes" guidance at all. *See* Ex. A at 7–8. Although the FTC's most recent version of the Fred Meyer Guides preserved "special packaging or package sizes," the agency was careful to "underscore" that those materials could be covered "*only insofar* as they primarily promote a product's resale." *Id.* at 58249 (emphasis added). To illustrate this limitation, the FTC provided the example of seasonal Halloween-themed packaging for candy bars. *Id.* Clorox's large-size packages are sold year-round and have no seasonal or promotional content. Notably, the Fred Meyer Guides make no mention of *In re General Foods Corp.*, 52 F.T.C. 798 (1956) or *In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), even though the Commission addressed package size in those decisions.

The district court order denying Clorox's first motion to dismiss nonetheless relied heavily on these two antiquated administrative decisions. In *Luxor*, the FTC

asserted that certain miniature packages could constitute a service under Section 2(e), and the FTC extended that reasoning to larger packages in *General Foods*. Ex. A at 7. But these interpretations are wrong. If small packages are a promotional service, and large packages are a promotional service, then *every* size package of every commodity sold in America is a promotional service. By extension, *every product* is actually a promotional service connected with the resale of a commodity, which makes no sense as a matter of statutory interpretation or antitrust policy. The FTC has not cited these administrative rulings with approval in decades and did not mention them in the Fred Meyer Guides. Moreover, they are not consistent with the FTC's modern emphasis that Section 2(e) covers only *promotional* services. *See In re Gibson*, 95 F.T.C. 553, 678, 726 (1980) ("[Section] 2(e) should be limited to *promotional* arrangements," and "the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of [Section 2(e)] are reasonably, and not expansively, construed.").

The district court's interpretation is also inconsistent with the Supreme Court's most recent Robinson-Patman Act case, which clarified that courts should "resist [an] interpretation [of the Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006). The Court further explained that "[i]nterbrand competition . . . is the primary concern of antitrust law" and that "the Robinson-Patman Act signals no large departure from that main concern." *Id.* at 180–81 (internal quotation marks omitted).

The substantial ground for disagreement on this question is further confirmed by the fact that the practice challenged here—a manufacturer's distribution strategy that spreads products among retail customers—is ubiquitous across the United States. It is implausible that manufacturers would be openly using these distribution strategies, and would have been doing so for decades without challenge, if they violated federal law. The district court's opinion has thrown these commonplace distribution strategies into question, and manufacturers need to know how to conform their conduct to the law.

C. Immediate Appeal Will Advance The Ultimate Termination Of This Case

The threshold to satisfy the third and final requirement is low: merely that "an immediate appeal *may* materially advance the ultimate termination of the litigation." *Sterk v. Redbox Automated Retail*, 672 F.3d 535, 536 (7th Cir. 2012). Here, interlocutory appeal will materially advance the ultimate termination of this litigation because "[i]f the court of appeals [reverses], then all of [Plaintiff's] claims for declaratory and injunctive relief under [the Robinson-Patman Act] go away." Ex. C at 3. Moreover, even if this Court affirms the district court, the appeal will clarify the requirements for proving a Section 2(e) violation, thereby saving significant resources in the processes of discovery, briefing, and trial. In all events, interlocutory review "would save time and expense for the court and the parties by demarcating—and likely narrowing—the playing field for the court and the parties." *Id.* at 4.[4]

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[4] Plaintiff's newly added Sherman Act claims will quickly fade away if the Robinson-Patman Act claims are dismissed, for the reasons explained *infra* at Part III.A.

II. The District Court's Interpretation Of "Purchaser" In Section 2(e) Meets All Criteria For Interlocutory Review

A. Whether A Terminated Retailer Can Remain A "Purchaser" Is A Controlling Question Of Law

The district court's April order involves a pure question of statutory interpretation that does not implicate any factual dispute: Does a retailer remain a "purchaser" under Section 2(e) if, after being terminated as a customer by a manufacturer, the retailer obtains the manufacturer's products from independent wholesalers? This question of law is controlling in this case because reversal would mean that Plaintiff "would not have standing to bring any claim under the Robinson-Patman Act." Ex. C at 3. If Plaintiff is not a purchaser, then there is no relief for the court to award: Plaintiff is not a victim of price discrimination, so no injunction is possible, and Plaintiff has never sought damages in this case for past violations of the law. (Indeed, Plaintiff has disclaimed that it ever *could* calculate damages.) A question is controlling when it is very likely to terminate the litigation on the lead cause of action. *See Text Messaging*, 630 F.3d at 624.

B. There Is Substantial Difference Of Opinion On This Question Because The Law Allows A Manufacturer To Choose Its Customers

There is substantial ground for difference of opinion regarding whether a retailer who buys indirectly from independent wholesalers is a "purchaser" entitled to enforce the requirements of Section 2(e) against the manufacturer. Manufacturers have a decades-old right to terminate their business relationship with any customer. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). And it is settled that Robinson-Patman Act liability does not attach where a manufacturer refuses to

deal or terminates an existing customer. *See Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980) ("[Section] 2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers"); *Mullis v. Arco Petrol. Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) ("the statute does not require a seller to create or to maintain a customer relationship with any buyer"). Indeed, the district court acknowledged that "*Clorox may refuse to deal with a particular retailer*." Ex. A at 10 (emphasis added).

Nevertheless, after Clorox terminated Plaintiff as a customer, the district court refused to dismiss Plaintiff's claim for future injunctive relief under the Robinson-Patman Act. *See* Ex. B at 6–7. The district court relied on the Supreme Court's decision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), even though that case involved neither Section 2(e) nor a manufacturer that had ceased doing business with a retailer. *Fred Meyer* holds that when a manufacturer pays a retailer for promotional services, Section 2(d) requires the manufacturer to also grant those promotional payments to wholesalers so that they can be passed on to retailers that buy from wholesalers. *Id.* at 358. The case does not hold that a manufacturer must guarantee that a retailer receives every *product* it desires through a wholesaler, especially after that retailer was terminated. To read *Fred Meyer* to protect Plaintiff here would undermine Clorox's settled right to refuse to do business with Plaintiff, a right that "has received consistent support from the Supreme Court even for large firms." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000).

If Plaintiff remains a "purchaser" for purposes of Section 2(e) even after it

was terminated by Clorox, then manufacturers will suddenly have a perpetual obligation to make every size of every product available to every retailer that can locate a wholesaler. Yet that would impose a novel antitrust obligation that runs contrary to every modern antitrust decision of the Supreme Court involving manufacturers' vertical distribution practices. *See, e.g.*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (noting that "the antitrust laws are designed primarily to protect interbrand competition"); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."). The implausibility of that result confirms the substantial grounds for disagreement on this question.

C. Immediate Appeal Will Advance The Ultimate Termination Of This Case

Resolving the meaning of "purchaser" in Section 2(e) of the Robinson-Patman Act will "materially advance th[is] litigation by eliminating certain claims or at least by streamlining the issues." Ex. C at 3. Even if the Court agrees with Plaintiff, it will clarify the law so that the parties will not need to waste resources in future proceedings on extraneous issues. And if this Court determines that Plaintiff is no longer a purchaser after being terminated by Clorox, then the district court will immediately dismiss all Robinson-Patman Act claims.

III. The Court Should Exercise Its Discretion to Accept This Appeal

This Court should accept this appeal in light of the district court's and the industry's request for guidance and because the § 1292(b) criteria are met. 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3929 (3d ed., Apr. 2015).

A. Plaintiff's Sherman Act Claims Are Not A Reason To Deny Review

If this Court agrees with Clorox on *either* of the two questions presented for interlocutory review, then this entire litigation will end in short order. Although Plaintiff belatedly added Sherman Act claims to the complaint, those claims are meaningless without the Robinson-Patman Act claims. Plaintiff does not seek damages, and thus the Robinson-Patman Act is the only cause of action that could even potentially provide Plaintiff with the relief it seeks, which is an injunction that would require Clorox indefinitely to sell large-size packages to Plaintiff.

As the district court recognized, Plaintiff brought the Sherman Act claims merely as a backstop in the event that its Robinson-Patman Act claims are dismissed based on Plaintiff's termination as a Clorox customer. *See* Ex. C at 3 (noting that Plaintiff seeks "a court order enjoining Clorox from refusing to sell Clorox products directly to [Plaintiff], [so that] it may again become a direct purchaser with standing to sue under the Robinson-Patman Act"). But this strategy will not work. A Sherman Act violation, even if proved, would support only an injunction ordering Clorox not to enter an unlawful agreement; it would not authorize an injunction ordering Plaintiff to perpetually sell any products to Plaintiff. *See id.* at 4 ("question[ing] [Plaintiff's] unsupported reasoning that a court-ordered remedy under the Sherman Act could provide it the standing necessary to bring suit under the Robinson-Patman Act."). Even if the Sherman Act claim is not dismissed for failure to state a claim, it can never provide Plaintiff with the relief it seeks. Thus, the interpretation of Section 2(e) is central to any future proceedings in this case, and it is appropriate for immediate review.

B. This Court's Review Is Needed To Address Uncertainty In The Marketplace

"[N]o federal court has addressed whether a special package size constitutes a promotional service under" Section 2(e). Ex. C at 4. And "[t]here is a similar dearth of case law related to the issue of whether purchasers include retailers who purchase from wholesalers." *Id.* at 5. The public interest favors certification because these rulings by the district court have ramifications not just for these parties, but for every manufacturer and retailer throughout the country.

First, the district court's holding that a large-size package is a "service" under Section 2(e) makes it exceptionally difficult for manufacturers to use differentiated distribution channels, which are a mainstay of the modern economy that benefit competition. For example, under the district court's ruling, it may be unlawful for a manufacturer to develop a certain package size for an Internet retailer and not to offer that same size to a brick-and-mortar store that purchases other package sizes from the manufacturer (or indirectly through a wholesaler). The proper interpretation of the Robinson-Patman Act's requirement that sellers furnish proportionally equal "services or facilities" implicates billions of dollars in annual sales by thousands of manufacturers. American manufacturers decide every day (as they have for decades) to sell one size of a product to certain retailers and other sizes to other retailers. If Plaintiff is correct that the Robinson-Patman Act requires every manufacturer to sell every size of every product to every retailer on demand, then thousands of manufacturers' supply chains will be affected.

Moreover, nine decades of antitrust case law permit a manufacturer to choose its own customers. *See Colgate*, 250 U.S. at 307. By holding that a retail customer

can create standing to sue a manufacturer as a "purchaser" under Section 2(e) merely by obtaining a manufacturer's products indirectly through an independent wholesaler, the district court has left manufacturers around the country with no viable means to completely terminate their relationship with a customer.

The district court's rulings have produced substantial uncertainty in the marketplace. *See, e.g.*, Robert A. Skitol, *The Robinson-Patman Act Still Bites* (Feb. 11, 2015), http://goo.gl/5nkQFH (noting the newfound "increased complexity and mischievous uncertainty surrounding the business judgments to be made . . . [and that the] problem is that customers and competitors can exploit these new complexities and uncertainties in private litigation"). Immediate appellate review is necessary to cure that uncertainty. Plaintiff has called into question the legality of numerous manufacturers' distribution policies, and those manufacturers deserve a chance to have this Court interpret the Robinson-Patman Act as soon as possible. Were the Court to decline interlocutory review, the present uncertainty would likely continue for the several years that it would take to complete this litigation, to the detriment of competition and consumers.

Conclusion

Clorox respectfully requests that this Court grant permission to appeal from the district court's orders denying Clorox's motions to dismiss.

Dated: July 27, 2015

Respectfully submitted,

By: /s/ *Thomas G. Hungar*

Thomas G. Hungar
Counsel of Record
Joshua H. Soven
Michael R. Huston

GIBSON, DUNN & CRUTCHER LLP

Counsel for Defendants-Petitioners

CERTIFICATE OF SERVICE

I, Michael R. Huston, declare:

I am a resident of Virginia and am employed in the District of Columbia. I am over the age of 18 and not a party to this action. My business address is Gibson, Dunn & Crutcher LLP, 1050 Connecticut Ave. N.W., Washington, DC 20036.

I hereby certify that I filed the document described as **PETITION FOR PERMISSION TO APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using email on July 27, 2015.

I further certify that some of the participants in the case are not registered CM/ECF users in the Seventh Circuit. I have transmitted the foregoing document via email and First-Class Mail to the following non-CM/ECF participants:

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Executed on July 27, 2015, at Washington, DC.

/s/ Michael R. Huston
DECLARANT

APPENDIX

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

THE CLOROX COMPANY and
THE CLOROX SALES COMPANY,

Defendants.

OPINION AND ORDER

14-cv-734-slc

In this civil action for declaratory and injunctive relief, plaintiff Woodman's Food Market, Inc. alleges that defendants The Clorox Company and The Clorox Sales Company have violated the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(d) and (e), by offering to sell "large pack" products only to "club" retailers such as Costco and Sam's Club but not to "general market" stores like Woodman's.[1] Clorox has moved to dismiss Woodman's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. I am denying this motion for the reasons stated below.

ALLEGATIONS OF FACT

I. The Parties

Plaintiff Woodman's Food Market, Inc. is an employee-owned corporation based in Janesville, Wisconsin. It operates 15 retail grocery stores in Wisconsin and Illinois and has approximately 3,200 employees, 2,600 of whom work in Wisconsin.

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[1] Although Woodman's also refers to § 13(a) in its complaint, dkt. 1 at ¶¶ 57, 59, 77-78, it states in its response brief that "[t]o be clear, Woodman's has not, at this time, presented the Court with a claim that Clorox has violated Subsection 2(a) of the Act." Dkt. 37 at 17. Woodman's explains that a claim under § 13(a) would be premature because Woodman's intends to pursue such a claim only if it obtains a declaratory judgment pursuant to § 13(d) or (e). *Id.* As a result, I have not addressed Clorox's arguments regarding the dismissal of this claim. Clorox may renew its arguments if and when Woodman's decides to pursue such a claim.

Defendants The Clorox Company and The Clorox Sales Company (hereafter referred to in the singular as "Clorox") are Delaware corporations with their corporate offices and headquarters in Oakland, California. Clorox manufactures and sells a variety of consumer and professional products, including bleach, cleaning supplies, charcoal, cat litter, sandwich bags, wraps, containers, water filtration products and personal care products.

Woodman's has been a customer of Clorox's for many years. Clorox purchases over 480 different items (known as "stock keeping units" or SKUs) from Clorox.

II. Clorox Changes the Products Offered to Woodman's

Historically, Woodman's purchased a number of "large pack" products from Clorox. These products are larger containers or packages of a product that typically are offered to customers at a cost savings per unit compared to the price per unit when the product is sold in smaller containers or packages. On September 9, 2014, Clorox's Director of Sales, Customer and Industry Affairs met with representatives from Woodman's to discuss Clorox's plan for a "Differentiated Products Offering." Clorox announced that as of October 1, Woodman's would be classified as a "general market retailer" and placed in a different "channel" than Sam's Club and Costco, two of Woodman's competitors. In a document presented to Woodman's at the meeting, Clorox explained its goals: "simplify its go to market strategy with Club and General Market packs"; "streamline [its] operations and deliver [its] best cost to serve by regulating the products we sell to customers/channels"; "[m]eet[] customer's desire for differentiated products from manufacturers"; and "[c]reate[] the right assortment of sizes and brands for

customers/channels based on their shoppers [to] maximize[] both the customer and Clorox sales." *See* Compl., dkt.1 at exh. 3.

Clorox announced that as of October 1, Woodman's no longer could purchase large packs of any Clorox product except for a Kingsford charcoal 20-lb double pack. Although Woodman's still could purchase smaller packages of all of Clorox's products, Clorox would not sell these products to Woodman's at the large-pack unit price that Woodman's had been paying; in many cases, the unit price would increase. Clorox would permit only Sam's Club, Costco and BJ's (a large scale retailer not active in Wisconsin) to purchase Clorox's large packs, which meant that these three retailers would be able to buy and resell the large-pack items at a lower unit cost than Woodman's could offer on smaller packs of these same products.

Woodman's believes that many of its large-pack customers are attracted to large packs not just because the unit price is lower, but also because they don't have to buy the product and tote it home as frequently. Further, many of Woodman's customers cannot afford to purchase memberships in retailers like Sam's Club and Costco. As a result of Clorox's decision, these customers will have no choice but to pay higher prices for those products when they buy them at Woodman's. On the flipside of this coin, Woodman's also expresses concern that when customers who *can* afford club memberships discover that Clorox large packs still are available at the club stores, these customers will stop shopping at Woodman's and start purchasing those products (and the other products they need) from the club stores.

OPINION

I. Legal Standards

Clorox has moved to dismiss each of Woodman's claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. In ruling on a Rule 12(b)(6) motion, the court accepts all well-pleaded allegations as true and draws all inferences in favor of the plaintiff. *Bielanski v. County of Kane*, 550 F.3d 632, 633 (7th Cir. 2008) (citations omitted). The complaint must include "enough facts to state a claim to relief that is plausible on its face." *Hecker v. Deere & Co.*, 556 F.3d 575,580 (7th Cir. 2009) (citations omitted). This means that the complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). As the Court of Appeals for the Seventh Circuit has explained, a complaint "must suggest that the plaintiff has a right to relief . . . by providing allegations that 'raise a right to relief above a speculative level.'" *Equal Employment Opportunity Commission v. Concentra Health Servs., Inc.*, 496 F.3d 773, 777 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007)).

In deciding a Rule 12(b)(6) motion, the court may consider documents attached to the complaint, including letters and contracts, without converting the motion into one for summary judgment. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012) (citing Rule 10(c)); *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452-53 (7th Cir. 1998). Further, where allegations in the complaint are contradicted by written exhibits attached to the complaint, the exhibits trump the allegations. *Abcarian v. McDonald*, 617 F.3d 931, 933 (7th Cir. 2010).

Woodman's has brought its claims under the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13, which state:

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

These sections generally prohibit a seller from paying allowances or furnishing services to promote the resale of its products unless the allowances or services are offered to all competing customers on proportionally equal terms. *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 79 FR 58245-01 at 58246, 16 C.F.R. Part 240 (FTC Sept. 29, 2014). Promotional services or facilities are those that "somehow aid the buyer in reselling the product, such as advertising, packaging, informational brochures, and the like." Areeda Hovenkamp, XIV *Antitrust Law* ¶ 2363e at p. 291 (3d ed. 2012). Only those services "necessary to facilitate the reseller's subsequent marketing" are covered by the two provisions. *Id.* at p. 292.

Subsection (d) covers situations in which the seller pays a favored buyer for promotional services performed by the buyer; subsection (e) covers situations where the seller provides such services directly to the buyer. Julian Von Kalinowski, 1 *Antitrust Laws and Trade Regulation: Desk Edition* § 5.10[2] (2d ed. 2014) (citing *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959)). The two subsections are similar in all other respects and have been interpreted virtually identically. *Id.* at § 5.10[1]. I note that Woodman's has alleged violations of both subsections but in opposition to dismissal has advanced arguments only with respect to subsection (e), which seems to fit the facts of this case more closely. Because Clorox has advanced the same arguments with respect to both subsections, it is unnecessary to distinguish between the two.

II. Analysis

The crux of the parties' dispute is whether the large packs offered by Clorox only to the club stores can be considered a promotional service under the act. Woodman's argues that the large packs constitute special packaging that helps Clorox's retail customers resell the product to the general public. Clorox argues that package size is not a service—a 42-pound bag of cat litter is just a product—so that Woodman's complaint fails because Clorox cannot be held liable for merely refusing to sell its products to a particular retailer. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 617 F.2d 468, 470 (7th Cir. 1980) (Section "2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell").

Clorox points out that no federal court has addressed whether a special package size constitutes a promotional service under subsection (d) or (e) of the act. In the absence of case

law, Woodman's relies on a pair of old-but-never-revoked administrative decisions and a series of more recent FTC guidelines. *See In The Matter of General Foods Corporation*, 52 F.T.C. 798 (1956); *In the matter of Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Guides for Advertising*, 79 FR 58245-01. In *Luxor*, the FTC found that because the "junior" size cosmetic products offered by Luxor were more convenient to carry, reduced waste and promoted freshness, the special packaging size facilitated the resale of the products and constituted a promotional service or facility under subsection (e). 31 F.T.C. at 63. Similarly, in *General Foods*, the hearing examiner determined that the corporation's decision to offer an institutionalized size package of Maxwell House Coffee to only some of its customers violated subsection (e). 52 F.T.C. at 816-17. In both cases, the products at issue were of the same grade and quality irrespective of the size of the container in which they had been packaged.

Subsequent to these decisions, the FTC published guidelines in 1969 to help businesses comply with subsections (d) and (e). These guidelines were revised in 1990 and again in 2014. 79 FR at 58245. Section 240.7 of the guidelines recognizes that "'services' or 'facilities' have not been exactly defined by the statute or in decisions" and sets forth a non-exhaustive list of activities that the FTC considers to be promotional services under subsections (d) and (e); the list expressly includes "special packaging, or package sizes." 16 C.F.R. § 240.7. The guidelines explain that one example of "special packaging" is a seller providing its regularly offered multi-packs of individually wrapped candy bars to retailers in Halloween-themed packaging during the Halloween season. *Id.* In commentary to the 2014 guidelines, the FTC explained its decision to keep special packaging and package sizes on its list of covered promotional services:

> The Antitrust Section urged that "special packaging and package sizes" be deleted from the list because "the established law is now

> clear that partial refusals to deal with particular resellers, including refusals to sell them particular products in a product line, are not covered by the [R-P Act]." NGA opposed that suggestion, stating that the discriminatory provision of special packaging and package sizes continues to be used to advantage "power buyer[s]" when they are given the option to purchase special packaging or package sizes and competing customers are not, thereby creating "class of trade distinctions."
>
> All of the decisions cited by the Antitrust Section predate the Commission's 1990 revision of the Guides, and none of them squarely addressed the question of whether the provision of special packaging or package sizes to only some competing customers may violate section 2(e) of the Act.
>
> 79 FR at 58248.

Clorox argues that, unlike the Halloween-themed packaging described in the guidelines, its large-size products are not a temporary gimmick to drive up business during a particular season. That's true but unpersuasive. Nothing in the guidelines or the FTC decisions indicates that the statutory prohibitions on price discrimination apply only to seasonal or temporary promotions. In fact, both *Luxor* and *General Foods* involved specially-sized products that were offered on a year-round basis, just like Clorox's large-size products. As in *Luxor* and *General Foods*, it is reasonable to conclude that the special size of Clorox's large-packs is connected to the resale of those products. Woodman's has alleged that it is more convenient for customers to purchase and carry home large-pack products, and the large-packs can be (and are) offered to customers at a lower cost per unit than the smaller packs of the same product.

Although *Luxor* and *General Foods* seem dispositive, Clorox dismisses these decisions as non-binding and antiquated, asserting that they do "not provide a sound basis for asking this Court to adopt a sweeping expansion of the Robinson-Patman Act." Dkt. 21 at 8-9. According to Clorox, the FTC has been backing away from its decision in *Luxor* for decades. To illustrate

its point, Clorox cites *In re Gibson*, 95 F.T.C. 553 (1980), in which the commissioner stated: "Because of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed." *Id.* at *92.

In *Gibson*, however, the FTC was grappling generally with whether Gibson's actions in inducing their suppliers to offer payments and special pricing only to Gibson's family-owned and franchised stores at a trade show constituted violations of subsection (a) versus subsections (d) and (e). *See id.* at 93-4 (noting purpose of (d) and (e) is "prohibiting outright hard-to-detect, disguised [price] discrimination in the form of promotional allowances" to encourage resale and not initial purchase of product). Nothing in *Gibson* addresses *Luxor* or the question whether offering different sizes of the same product can be construed as special packaging. *Id.* at 94 (finding (d) and (e) did not apply because trade show perks benefitted Gibson stores with initial purchase and not ultimate consumers on resale).

Clorox also mentions in a footnote that the Supreme Court has overturned decisions similar to *Luxor* as inconsistent with the antitrust law's goal of protecting competition. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, (1997); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–57 (1977). However, as Woodman's points out, these decisions addressed whether various forms of vertical price restraints are *per se* violations of § 1 of the Sherman Act[2]; none involved any provision of the Robinson-Patman Act. *Id.*

[2] Section 1 of the Sherman Act generally prohibits agreements or contracts that restrain interstate trade or commerce. *Leegin*, 551 U.S. at 885.

In sum, 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. Woodman's allegations are sufficient to state a claim under the Robinson-Patman Act.

ORDER

IT IS ORDERED that defendants' motion to dismiss this lawsuit, dkt. 20, is DENIED.

Entered this 2nd day of February, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

THE CLOROX COMPANY and
THE CLOROX SALES COMPANY,

Defendants.

OPINION AND ORDER

14-cv-734-slc

In this civil action for declaratory and injunctive relief, plaintiff Woodman's Food Market, Inc. alleges that defendants The Clorox Company and The Clorox Sales Company ("Clorox") have violated the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a), (d) and (e), by offering to sell "large pack" products only to "club" retailers such as Costco and Sam's Club and not "general market" stores like Woodman's. In an order entered on February 2, 2015, I denied Clorox's motion to dismiss under Fed. R. Civ. P. 12(b)(6), finding that even though Clorox legally may refuse to deal with a particular retailer, the use of special packaging and package sizes to benefit only certain customers stated a claim sufficient to survive front-end dismissal. Dkt. 50. Since then, things have zigged and zagged a bit:

On February 24, 2015, Clorox unilaterally chose to end all business dealings with Woodman's. That same day, Clorox moved to dismiss Woodman's complaint as moot because Woodman's no longer was a purchaser of its products and therefore could not suffer any further alleged discrimination. Dkt. 63. Woodman's opposes that motion, arguing that it remains a "purchaser" under the act because now it will buy Clorox products through one or more wholesalers. Dkt. 69. In addition, Woodman's now seeks to amend its complaint to add claims under § 1 of the Sherman Act. Dkt. 68. Clorox rejoins that its decision to terminate its business

relationship with Woodman's has deprived this court of subject matter jurisdiction in this case, which in turn prevents the court from granting Woodman's leave to amend.

Because Woodman's has shown that it may still qualify as a purchaser with standing under the Act, I am denying Clorox's motion to dismiss and granting Woodman's motion for leave to file an amended complaint.

OPINION

I. Legal Standard

As an initial matter, the parties dispute how the court should characterize Clorox's pending motion to dismiss. Clorox contends that the complaint is moot, but it does not identify in its motion or brief which rule of civil procedure it is relying on. Woodman's apparently construed the motion as a Rule 12(b)(6) motion to dismiss for failure to state a claim and argues that the motion should be converted to a motion for summary judgment under Rule 12(d) because Clorox relies on matters outside the pleadings.

In its reply brief, Clorox states that it is moving for dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and may rely on affidavits and other materials supporting its motion. *See United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003); *Sapperstein v. Hager*, 188 F.3d 852, 855 (7th Cir. 1999) ("[W]here evidence pertinent to subject matter jurisdiction has been submitted . . . the district court may properly look beyond the jurisdictional allegations of the complaint . . . to determine whether in fact subject matter jurisdiction exists.") (internal quotation marks and citation omitted). The Court of Appeals for the Seventh Circuit has made clear that "[f]ederal courts lack subject matter jurisdiction when a case becomes moot." *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011).

Therefore, Clorox's motion is properly characterized as a motion brought pursuant to Rule 12(b)(1), and it is unnecessary to convert the motion to a motion for summary judgment under Rule 12(d).

II. Analysis

Clorox contends that Woodman's action for declaratory and injunctive relief[1] has become moot because Clorox has ended its customer relationship with Woodman's, a decision that Clorox says was within its rights under the Robinson-Patman Act, 15 U.S.C. § 13. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 617 F.2d 468, 470-71 (7th Cir. 1980) (agreeing with district court that the Act does not prohibit seller from choosing its customers or from refusing to deal with purchasers to whom it does not wish to sell); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (statute does not require seller to create or maintain customer relationship with any buyer). Therefore, contends Clorox, no live controversy remains in this lawsuit because Woodman's cannot claim protection under §§ 13(d) and (e) of the Act because only a "purchaser" may do so. *Harper Plastics*, 617 F.2d at 470-71; *see also Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 149 (7th Cir. 2011) ("A case must present a live controversy at the time of filing, contain a live dispute through all stages of litigation, and the parties must continue to have a personal stake in the outcome of the lawsuit throughout its duration.). Extending that reasoning, Clorox contends that without continuing jurisdiction, the court cannot even grant Woodman's leave to amend its complaint to add a separate claim under the Sherman Act.

[1] Woodman's does not seek monetary damages in this case.

Generally, a case may become moot where the defendant has completely discontinued the challenged activity, the discontinued activity has no present effects, and the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006); 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.5 (3d ed. 2013). Clorox points out that because it has ceased all sales to Woodman's, there no longer is any danger that it will sell to Woodman's on discriminatory terms. Woodman's responds that notwithstanding this freeze-out, Woodman's continues to be a purchaser within the meaning of the Act because it continues to purchase Clorox products through one or more wholesalers. Dkt. 71 (affidavit of Woodman's procurement director).

The two price discrimination provisions at issue in this case prohibit certain actions by sellers with respect to promotions offered to their buyers. Although § 13(d) refers to "customers" and § 13(e) refers to "purchasers" in describing who is protected by the Act, the two terms are used interchangeably. 16 C.F.R. § 240.4 ("The word 'customer' which is used in section 2(d) of the Act includes 'purchaser' which is used in section 2(e)."); Areeda Hovenkamp, XIV *Antitrust Law* ¶ 2363b (3d ed. 2012). Woodman's points out that in the *Guides for Advertising Allowances and Other Merchandising Payments and Services*, the Federal Trade Commission (FTC) has broadly defined a "customer" to include "any person who buys for resale directly from the seller, or the seller's agent or broker" and "any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller." 16 C.F.R. § 240.4. Clorox contends that the guidelines are not entitled to deference because the commission has stated that they "do not carry the force of law," 79 Fed. Reg. 58245, 58253 (Sept. 29,

2014); multiple agencies share responsibility for enforcing the Robinson-Patman Act, creating a risk that the same statutory provision will be interpreted differently by different agencies, *Rapaport v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995); and the courts and not federal agencies are charged with interpreting broadly worded statutes. But even though the *Guides* may not have the force of law, they are instructive in this case, particularly in light of Supreme Court precedent on this issue.

Shortly before the FTC issued the guidelines in 1969, the Supreme Court addressed the definition of "customer" in *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). There, the seller had paid preferential promotional allowances to a direct-buying retailer but did not make the same allowances available to retailers that purchased through wholesalers. The Court found that the seller's program should have made comparable allowances, presumably through the wholesalers, to the indirect purchasers:

> If we were to read "customer" as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of s 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class.
>
> *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 351 (1968).

Woodman's seeks–but does not obtain–additional support from a decision by the Court of Appeals for the Sixth Circuit in which the court discussed the reach of the *Fred Meyer* decision in a case where both the favored and disfavored parties purchased through intermediaries. *Lewis v. Philip Morris Inc.*, 355 F.3d 515 (6th Cir. 2004). In *Lewis*, cigarette vending machine operators, some of whom purchased indirectly through wholesalers, alleged that Phillip Morris offered promotions directly to convenience stores but did not offer any such promotions to the vending

machine operators, either directly or indirectly through the wholesaler. Although Woodman's cites language from *Lewis* that appears to grant standing to the cigarette vendors who purchased through wholesalers, this is not the court's actual holding. The opinion in *Lewis* was entered per curiam by a sharply divided panel. Although the majority confirmed *Fred Meyer*'s definition of the term "customer" in §§ 13(d) and (e), it actually refused to grant standing to the cigarette vendors who purchased through wholesalers. The majority found that an action cannot be maintained where both the favored and disfavored parties are indirect purchasers. *Id.* at 526-27. Thus the Sixth Circuit "would limit *Fred Meyer* to its actual situation—namely, where the defendant offered [promotions] to a large retailer who purchased directly but failed to offer them either to a wholesaler intermediary, or to the retailer customers of that intermediary." Hovenkamp ¶ 2363d2 at p. 291. That said, Woodman's overselling of *Lewis* is of no consequence to this court's analysis because the facts here align more tightly with the facts in *Fred Meyer*. Woodman's alleges that Clorox offers special packaging to large club stores that purchase directly from Clorox but fails to offer the same special packaging to general market stores like Woodman's, even when they purchase Clorox products through wholesalers.

Clorox posits without elaboration that *Fred Meyer* and *Lewis* are distinguishable because neither case involved a seller's refusal to deal directly with a customer. Without more, it is unclear how this distinction would have made a difference in either case. The Supreme Court explained in *Fred Meyer* that

> We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales. Nothing we have said bars a supplier, consistently with other provisions of the antitrust laws, from utilizing his wholesalers to distribute

> payments or administer a promotional program, so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product.

Fred Meyer, 390 U.S. at 358.

If the wholesalers from which Woodman's now purchases Clorox products are constrained by Clorox's decision to sell large-size products only to club stores, then the rule announced in *Fred Meyer* would apply to Woodman's. *See also* Hovenkamp ¶ 2363d2 at p. 289 ("*Fred Meyer* stands for the proposition that a seller's duty to provide proportionally equal promotional services or facilities, or payment therefor, extends downstream to buyers competing with each other at the same functional level, even if one set of buyers purchases directly from the defendant while another set purchases through intermediaries.").

Because it is possible that Woodman's can be considered a "customer" and "purchaser" with standing under the act, at least at this early stage in the litigation, Clorox is not entitled to have this lawsuit dismissed. To the extent that Clorox has additional bases to challenge whether Woodman's qualifies as a purchaser given the specific facts of this case, Clorox may raise these points at summary judgment or trial after the parties have had an opportunity to develop the record.

III. Motion for Leave to Amend Complaint

Clorox opposes Woodman's motion for leave to amend solely on the ground that the case became moot when Clorox stopped selling to Woodman's on February 24, 2015, thereby depriving the court of subject matter jurisdiction. On March 17, 2015, Woodman's notified

Clorox that it intended to file an amended complaint, but Clorox asked Woodman's to delay filing the proposed amended complaint so that the parties could attempt settlement. In return, Clorox agreed not to challenge the motion to amend as untimely. Because I have found that the case is not moot and there is no other apparent reason for denying Woodman's leave to amend, I will grant leave. *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'"); Fed. R. Civ. P. 15(a)(2) ("court should freely give leave [to amend] when justice so requires").

ORDER

IT IS ORDERED that:

(1) Defendants' motion to dismiss this lawsuit for lack of subject matter jurisdiction, dkt. 63, is DENIED; and,

(2) Plaintiff's motion for leave to amend its complaint, dkt. 68, is GRANTED.

Entered this 27th day of April, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

THE CLOROX COMPANY and
THE CLOROX SALES COMPANY,

Defendants.

OPINION AND ORDER

14-cv-734-slc

In this antitrust case, plaintiff Woodman's Food Market, Inc. contends that defendants The Clorox Company and The Clorox Sales Company ("Clorox") violated the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (d) and (e) and § 1 of the Sherman Act by offering to sell "large pack" products only to "club" retailers such as Costco and Sam's Club and not "general market" stores like Woodman's. Clorox has filed three motions to dismiss in this case. I have denied two, and the third is pending before the court:

- On February 2, 2015, I denied Clorox's motion to dismiss the Robinson-Patman Act claims, finding that even though Clorox legally may refuse to deal with a particular retailer, the use of special packaging and package sizes to benefit only certain customers stated a claim sufficient to survive front-end dismissal. **Dkt. 50**.

- On April 27, 2015, I denied Clorox's motion to dismiss for lack of subject matter jurisdiction, determining that even though Clorox discontinued its dealings with Woodman's, Woodman's may still qualify as a purchaser with standing under the Act because it continues to purchase Clorox products through wholesalers. **Dkt. 77**.

- Clorox's third motion to dismiss, dkt. 84, challenges Woodman's newly-added Sherman Act claim. This will be the subject of a separate order.

Clorox has moved to certify the February 2 and April 27, 2015 orders for interlocutory appeal under 28 U.S.C. § 1292(b). **Dkt. 89**. I am GRANTING Clorox's motion for the reasons stated below.

OPINION

Under 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal if the order (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." This type of appeal is discretionary and should "be used sparingly." *Asher v. Baxter International Inc.*, 505 F.3d 736, 741 (7th Cir. 2007). *See also Lu Junhong v. Boeing Co.*, ___ F.3d ___, 2015 WL 4097738, at *4 (7th Cir. July 8, 2015) (court of appeals reviews district court's entire order rather than particular issues presented). An interlocutory appeal does not stay proceedings in the district court unless the district judge or the court of appeals orders a stay. *Espenscheid v. DirectSat USA, LLC*, 2011 WL 2132975, at *1 (W.D. Wis. May 27, 2011) (citing § 1292(b)).

Woodman's does not dispute that the appeal would involve questions of law, which the Court of Appeals for the Seventh Circuit has noted typically "reference a question of the meaning of a statutory or constitutional provision, regulation or common law doctrine." *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000). The questions raised in both motions to dismiss required the court to determine the scope and meaning of the price discrimination provisions in 15 U.S.C. §§ 13(d) and (e): (1) whether large-sized products constitute promotional services or facilities; and (2) whether a retailer who buys solely from a wholesaler can be defined as a purchaser. Woodman's argues that neither question is controlling.

A question of law "is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district-court proceedings." 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3930, at p. 496 (2012). Further, certification is appropriate "even though [the] decision might not lead to reversal on appeal, if interlocutory

reversal might save time for the district court, and time and expense for the litigants." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (quoting *id.* at p. 159-60 (1977)). *See also In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 605 (7th Cir. 1997) ("fact that [issue] may in the end not prove decisive does not show that the district judge and we were wrong to certify his ruling on the issue under 28 U.S.C. § 1292(b)").

A reversal from the court of appeals on either of my decisions likely would dispose of Woodman's Robinson-Patman Act claims, requiring reversal of any final judgment in Woodman's favor. Although Woodman's contends that the February 2015 order on large-size packaging addresses only two of its seven claims for relief, all of Woodman's claims relate to the same alleged course of conduct on the part of Clorox: Clorox's decision not to sell Woodman's certain large-sized products. If the court of appeals disagrees with my decision that large-size packages can constitute a promotional service under §§ 13(d) and (e), then all of Woodman's claims for declaratory and injunctive relief under those subsections go away. Similarly, if the court of appeals determines that Woodman's does not qualify as a purchaser under subsections (d) and (e), Woodman's would not have standing to bring any claim under the Robinson-Patman Act.

With respect to the standing question, Woodman's argues that because its remaining claim under § 1 of the Sherman Act entitles it to a court order "enjoining Clorox from refusing to sell Clorox products directly to Woodman's," it may again become a direct purchaser with standing to sue under the Robinson-Patman Act. Dkt. 93 at 12. As Clorox points out, however, it is unclear what authority this court has to order Clorox to resume direct sales to Woodman's as a remedy to a § 1 violation.[1] Woodman's certainly has not cited any authority for such a measure. Although the court may be able to order Clorox and its alleged co-conspirators to stop

[1] Section 1 of the Sherman Act prohibits a contract, combination or conspiracy between two or more companies that exerts an unreasonable restraint on trade or commerce.

specific conduct restraining trade or commerce, ordering Clorox to resume and continue its business relationship with Woodman's is another matter. I also question Woodman's unsupported reasoning that a court-ordered *remedy* under the Sherman Act could provide it the standing necessary to bring suit under the Robinson-Patman Act.

In any event, even if Woodman's has a viable Sherman Act claim[2] and eventually obtains an injunction of some sort, an interlocutory appeal of the February and April orders would save time and expense for the court and the parties by demarcating–and likely narrowing–the playing field for the court and the parties. For similar reasons, resolving the promotional service and standing questions would materially advance the litigation by eliminating certain claims or at least by streamlining the issues. 16 Wright, Miller & Cooper § 3930 at p. 505 (requirement of controlling question of law closely related to requirement that appeal materially advance ultimate termination of litigation).

Finally, I am persuaded that there are substantial grounds for differences of opinion with respect to both of my orders. In the February 2015 order, I acknowledged that no federal court has addressed whether a special package size constitutes a promotional service under subsection (d) or (e) of the act. Dkt. 50 at 6-7. In the absence of case law, Woodman's relied on a pair of old-but-never-revoked administrative decisions and a series of FTC guidelines. Although I was persuaded by Woodman's reasoning, the question is by no means settled in this circuit. *See Intercon Solutions, Inc. v. Basel Action Network*, ___ F.3d ___, 2015 WL 3941463, at *2 (7th Cir. June 29, 2015) (accepting interlocutory appeal where district court recognized that it had taken sides on important and debatable issue that was open in Seventh Circuit); *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 626-27 (7th Cir. 2010) (certifying interlocutory appeal related to pleading standards in antitrust litigation because it presented novel issue and scope of law was

[2] Clorox has challenged the basis of Woodman's Sherman Act claim in its most recently-filed motion to dismiss.

unsettled). There is a similar dearth of case law related to the issue of whether purchasers include retailers who purchase from wholesalers. Although I found in the April 2015 order that the Supreme Court in *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) defined the term "customer" as including retailers who buy through wholesalers, only one federal appellate court appears to have examined that definition in the past 47 years, *Lewis v. Philip Morris Inc.*, 355 F.3d 515 (6th Cir. 2004).

Considering all of these concerns together, it makes sense to certify this court's February and April decisions for interlocutory review. Because neither party has requested a stay, I have not considered whether this would be appropriate.

ORDER

IT IS ORDERED that defendant Clorox motion to certify this court's February 2 and April 27, 2015 orders for interlocutory appeal under 28 U.S.C. § 1292(b) is GRANTED.

Entered this 17th day of July, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge