Case No. 15-8016

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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
The Honorable Magistrate Judge Stephen L. Crocker

PLAINTIFF'S-RESPONDENT'S RESPONSE IN OPPOSITION TO DEFENDANTS'-PETITIONERS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Dated at Madison, Wisconsin, this 6th day of August, 2015.

Counsel of Record:

John A. Kassner
608) 661-3969 Direct
jkassner@vonbriesen.com
Phone: (608) 661-3969

Kraig A. Byron
(608) 661-3981 Direct
kbyron@vonbriesen.com
Phone: (608) 661-3981

VON BRIESEN & ROPER, S.C.
10 East Doty Street, Suite 900
Madison, WI 53703

Counsel for Plaintiff-Respondent,
Woodman's Food Market, Inc.

CORPORATE DISCLOSURE STATEMENT

Woodman's Food Market, Inc. has no parent corporation, and no publically held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

Introduction

Woodman's Food Market, Inc. (hereinafter Woodman's") operates 15 of the largest grocery stores in the United States, each of which is 235,000 square feet in size or larger. For many years it has purchased and sold at retail many products sold by the Defendants, The Clorox Company and The Clorox Sales Company (hereinafter collectively "Clorox").

Like club stores, Woodman's displays its grocery merchandise on industrial shelves and on pallets. Like club stores, Woodman's stores much of its inventory on top of the industrial shelving. Unlike club stores, Woodman's does not charge a membership fee to its customers. Woodman's strives to offer its retail customers the lowest possible price on the products that it sells. For these reasons, Woodman's believes it is in direct competition with Costco and Sam's Club, the club stores that operate in the markets in which Woodman's is doing business.

Among the products Woodman's purchases from Clorox are what we refer to as large packs of Clorox products. These large packs are the same as the large packs of Clorox products that are typically found in club stores, such Costco, Sam's Club, and BJs. Woodman's has purchased these large packs from Clorox for many years before filing this lawsuit.

Large packs are attractive to Woodman's customers primarily because large packs offer significantly lower unit prices than do smaller packs of the same grade and quality of those products. They are also attractive to Woodman's customers because they are more convenient in that customers do not have to shop for them as

frequently as they do for smaller packs of the same products. In the year preceding October 1, 2014, Woodman's purchased large packs of 12 different Clorox products, at a total cost to Woodman's of $1,681,913.20.

During a meeting between officials from Clorox and Woodman's in September of 2014, Clorox advised Woodman's that it was changing its dealings with Woodman's effective as of October 1, 2014. Clorox announced that, as of that date, it would no longer sell the large packs of Clorox products to Woodman's. At that meeting, Clorox provided Woodman's with a document setting forth its plans for those changes. [Supp. App. 36-56]. Pursuant to that document, Clorox made clear that, from that date forward, only the three stores in what Clorox called its "club channel," specifically Costco, Sam's and BJs, would be allowed to purchase large packs [Supp. App. 39]. Clorox announced that it was placing Woodman's into what it called its "general market channel," and that the unit price on the largest packs that would be available to Woodman's as a member of the "general market channel" would be 20% higher than it previously paid for the large packs.

Counsel for Woodman's, in a letter dated September 15, 2014 [Supp. App. 58-59], asked Clorox to provide Woodman's with the information that would be included in a plan prepared in accordance with § 240.8 of the Federal Trade Commission's Federal Regulation 16: Commercial Practices, part 240 – Guides for Advertising Allowances and Other Merchandising Payments and Services [Supp. App. 62].

That letter stated, in part, [Supp. App. 58], as follows:

> "Under the Robinson-Patman Act, all promotional services and allowances offered by a seller, such as The Clorox Company, must be made available to all customers on a proportional basis. The Act further provides that all

> customers, such as Woodman's Food Market, Inc., must be given notice of the availability of each of these promotional services and allowances. My client is particularly interested in receiving information as to the special packaging that The Clorox Company is providing to what you refer to as "Club Channel" customers. Under the Act, special packaging is considered a promotional service offered by the manufacturer, and as such, that packaging must also be made available to Woodman's Food Market, Inc. on a proportional basis to that which is being offered to what you choose to call "club channel" retailers.
>
> My client is in direct retail competition with two of the "club channel" retailers you have identified, Sam's and Costco. We need a copy of your plan in order to fully understand the promotional services, discounts and allowances that are available to all of our retail competitors, including Sam's and Costco, so that we too can take advantage of each of them. We recognize that we are only entitled to comparable pricing if we take full advantage of the discounts and allowances that are available. Please consider this a formal request for that information.

Clorox has failed and refused to give Woodman's the requested information.

Woodman's filed its Complaint [Supp. App. 1-79] in this lawsuit on October 28, 2014. In that Complaint, Woodman's pled three claims for declaratory relief and three claims for injunctive relief.

The first claim for declaratory relief, at paragraph 59 [Supp. App. 13-14], sought a permanent ruling that there is no basis, under the Robinson-Patman Act, for Clorox to place Woodman's, as an operator of retail grocery stores, into a separate "channel" or classification from Sam's Club or Costco, and then using its arbitrary placement of Woodman's into that channel or classification as a justification for discrimination as to price, or the payment to customers for their provision of services or facilities or for the provision of services or facilities connected with the sale of commodities.

The second claim for declaratory relief, at paragraphs 67-68 [Supp. App. 15], sought a permanent ruling that, under the provisions of 15 U.S.C.A. §§ 13(d) and 13(e), Clorox must provide actual notice to all its customers selling a product of

comparable grade and quality at retail, of every discount or allowance or promotional service it is offering to any of its customers selling that product at retail, and must make those promotional services, discounts or allowances available to all of its customers selling at retail on proportionally equal terms. It also sought a permanent ruling that, under the provisions of 15 U.S.C.A. §§ 13(d) and 13(e), a failure by Clorox to notify Woodman's of the existence of promotional service, discounts or allowances offered to competitors selling at retail, after that customer has expressly requested disclosure of such programs, would allow Woodman's to thereafter assume that, for purposes of 15 U.S.C.A. § 13(a), those promotional services, discounts or allowances cannot be relied upon by Clorox as a justification for having sold a product to a competitor at a lower price than the price paid by Woodman's.

The third claim for declaratory relief, at paragraph 74 [Supp. App. 16], sought a permanent ruling that the offer of special size packages of products of the same grade and quality as those offered to other retail customers constitutes a promotional service, under the provisions of 15 U.S.C.A. § 13(e), which must be made available to all Clorox customers selling at retail on proportionally equal terms.

The first claim for injunctive relief, at paragraph 79 [Supp. App. 17], sought injunctive relief precluding Clorox from placing Woodman's into a separate channel from Sam's Club and Costco, and using that placement as a justification to take actions in violation of the provisions of 15 U.S.C.A. §§ 13(a), 13(d) and 13(e).

The second claim for injunctive relief, at paragraphs 83-84 [Supp. App. 17-18], sought injunctive relief that would preclude Clorox from offering discounts, allowances and promotional services on the sale of products to favored retailers without disclosing the existence of those discounts, allowances and promotional services to competing retailers.

The third claim for injunctive relief, at paragraph 90 [Supp. App. 19], sought injunctive relief precluding Clorox from depriving Woodman's access to the special promotional service of large packs of items that it offers to competitors of Woodman's.

Clorox's November 20, 2014, Defendant's Brief in Support of Their Motion to Dismiss Plaintiff's Complaint [Supp. App. 113-130] focused exclusively upon Woodman's claim that large packs of a product constitute a promotional service under sections 2(d) and 2(e) of the Robinson-Patman Act. It did not challenge the other claims for declaratory or injunctive relief. The District Court's Opinion and Order of February 2, 2015 [App. Exh. A], denied all of Clorox's first Motion to Dismiss, holding, at page 10, that "Clorox cannot use special packaging and package sizes to benefit only certain customers."

Shortly after the District Court concluded that Woodman's claim that large packs constitute a promotional service had stated a claim upon which relief could be granted, Clorox ceased doing business with Woodman's altogether. Clorox then filed its May 18, 2005, Defendants' Brief in Support of Their Motion to Dismiss Plaintiff's

Amended Complaint [Supp. App. 131-149] contending the litigation was moot because Woodman's was no longer a "customer" of Clorox.

Woodman's opposed that motion, citing ***FTC v Fred Meyer, Inc.***, 390 U.S. 341, 88 S. Ct. 904, 19 L.Ed. 2d 1222 (1968), which held that a retailer that buys a seller's products at wholesale is nonetheless a customer of that seller, for Robinson-Patman Act purposes, if it sells that product at retail in competition with other retailers who buy that product directly from the seller. Woodman's supplied affidavits demonstrating it was purchasing Clorox products at wholesale, and argued that it therefore remained a customer of Clorox under the Robinson-Patman Act.

The District Court Opinion and Order of April 27, 2015, [App. Exh. B], denied Clorox's second motion to dismiss, holding, at p. 7, that:

> "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 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." [App.Exh. B]

Clorox moved to certify the February 2, 2015, and April 27, 2015, orders for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court Opinion and Order of July 17, 2015, [App. Exh. C], granted Clorox's motion. On July 23, 2015,

Woodman's moved for reconsideration of that Order, which motion is still pending before the District Court.

On July 27, 2015, Clorox filed its Petition For Permission To Appeal Pursuant To 28 U.S.C. § 1292(b) with this Court.

Statement of Jurisdiction

Clorox has petitioned this Court for permission to appeal pursuant to 28 U.S.C. § 1292(b), which reads as follows:

> **(b) When a district judge**, in making in a civil action an order not otherwise appealable under this section, **shall be of the opinion that such 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, he shall so state in writing in such order.** The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (Emphasis supplied.)

The criteria for granting a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) are discussed in this Court's decision in ***Ahrenholz v. Board of Trustees of University of Illinois***, 219 F.3d 674, 675-6 (7th Cir. 2000):

> "There are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation.
> . . .
> Unless *all* these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b).
> " (Emphasis in original)

Issues on appeal

As noted in ***Ahrenholz,*** supra, there are four criteria imposed by 28 U.S.C. § 1292(b), each of which must be satisfied, before a district court may certify an order for immediate appeal. The rule further requires that the court must address in its written order its reasoning as to the manner in which each of these four criteria are met.

Woodman's concedes that the two orders of which Clorox seeks review constitute questions of law. Whether 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. Similarly, whether Woodman's remains a "customer" of Clorox within the meaning of that term when applying §§ 2(d) and 2(e) of the Robinson-Patman Act when it buys Clorox products through a wholesaler rather than directly from Clorox as do competing club stores is also unquestionably a question of law.

Woodman's does not concede, however, that there is substantial ground for a difference of opinion as to the propriety of the two Orders in question. Nor does Woodman's agree with Clorox's contention that a resolution of either of these issues will resolve, materially advance, or speed up the completion of this litigation.

Finally, Woodman's takes issue with the assertion by Clorox that the District Court has ruled upon the viability of every one of the claims raised by the Complaint and the First Amended Complaint other. Woodman's disputes this contention and seeks to preserve its ability to pursue each of those claims not

previously expressly briefed and argued by counsel, and not addressed on the merits in either of the two Opinions and Orders which are the subject of the Clorox Petition for Interlocutory Review.

Argument

At the outset, it is important to note that the two Opinions and Orders on which Clorox seeks interlocutory appeal were orders denying motions to dismiss filed by Clorox. As such, the only pre-litigation facts that are available for consideration are those pled by Plaintiff's in its Complaint. [Supp. App. 1-79] Woodman's raises this point because there are a number of instances in the Clorox Petition where Clorox introduces facts which are not contained in the Complaint, and which are therefore beyond the permitted reach of the Court on review of Orders issued on motions to dismiss.

Both of the Orders of which Clorox seeks review were issued by the District Court at a point in time in which the original complaint was the operative pleading. Plaintiff did, however, file its First Amended Complaint [Supp. App. 80-112] the day after the District Court issued its April 27, 2015, Opinion and Order.

I. Clorox does not demonstrate a substantial difference of opinion regarding the ability of large packs to promote retail sales by merely saying that a difference of opinion exists.

Clorox asks this Court to reverse an order by the District Court agreeing that Woodman's has stated a claim upon which relief can be granted. The Complaint alleges that the sale to club stores by Clorox of large packs of a product constitutes a promotional service that must be made available to all competing retailers on

proportionally equal terms.

The Complaint [Supp. App. 5 and 9] alleged at ¶¶ 14 and 38 that customers are attracted to large packs because of the lower unit price large packs make possible and because of the convenience of having to purchase the product less frequently. If putting a product in large packs makes it easier for a retailer to sell that product to the ultimate purchaser, the provision of those packs to a retailer is a promotional service that must be made available to all retailers competing in the sale of that product, per §§ 2(d) and 2(e) of the Robinson-Patman Act.

The District Court concluded, at page 8 of its February 2, 2015, Opinion and Order [App.1] that:

> "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."

Clorox concedes, at page 11 of its Petition, that services that assist a retailer in promoting the resale of a product constitute a promotional service.

To succeed on this Petition, Clorox must satisfy this Court that there is substantial difference of opinion as to whether large packs of products assist a retailer in promoting the resale of the products in those packages. To ultimately succeed in this interlocutory appeal, Clorox must convince the Court that large packs have no impact upon the ability of a retailer to sell the products in those packages to the ultimate consumer. Clorox never attempts to make either argument.

Instead of showing the Court where that difference of opinion is found, it cites to ***Boim v. Quranic Literacy Inst. & Holy Land Found.,*** 291 F.3d 1000, 1007-08 (7th Cir. 2002) for the proposition that this is a contestable question simply because it is a question of first judicial impression. Numerous recent decisions from district courts in the Seventh Circuit require more than the mere presence of a question of first impression to establish that substantial grounds for difference of opinion exist.

In ***Village of Roxana v. Shell Oil Co.***, 12-CV-577-JPG-PMF, 2014 WL 860157, at *3 (S.D. Ill. Mar. 5, 2014), the Court refused to certify a question simply because it was a question of first impression.

> "The final issue for the Court's determination is whether the issue is contestable. This particular Roxana ordinance has not been the subject of judicial interpretation. For this reason, Shell argues that the question is contestable. ***Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev.,*** 291 F.3d 1000, 1007–08 (7th Cir.2002) (indicating that statutes of first impression are "certainly contestable"). Roxana, however, argues that there is not substantial ground for difference opinion on this matter and this issue has been considered in the context of other municipalities' ordinances. The Court agrees with Roxana and concludes that the fact that this specific Roxana ordinance has not been the subject of appellate judicial interpretation does not mean that this issue is necessarily contestable."

In another recent case, ***U.S. ex rel. Chilcott v. KBR, Inc.***, 4:09-CV-4018, 2013 WL 6797391, at *2 (C.D. Ill. Dec. 23, 2013), citing to ***Smith v. City of Chicago,*** 94 C 920, 2003 WL 1989612, at *1 (N.D.Ill. Apr. 28, 2003) (citations omitted)," the Court, in discussing the criteria applicable to a determination as to contestability when a case presents a question of first impression, ruled that, "a question of law is contestable if there are 'substantial conflicting decisions regarding the claimed controlling issue of law,' or the question 'is not settled by controlling authority' **and there is a**

'substantial likelihood ... that the district court ruling will be reversed on appeal." (Emphasis supplied.) See also ***Fairley v. Andrews,*** 2007 U.S. Dist. LEXIS 70539, 31-34 (N.D.Ill. Sept. 24, 2007); ***Calvin v. Sheriff of Will County,*** No. 03 C 3086, 2006 WL 1005141, at *4 (N.D.Ill. Apr. 14, 2006); ***Praxair, Inc. v. Hinshaw & Culbertson,*** No. 97 C 3079, 1997 WL 662530, at *2 (N.D.Ill. Oct.15, 1997).

Clorox's Petition makes no attempt to show that the District Court's ruling that large packs are a promotional service under the Robinson-Patman Act will be reversed on appeal. While this may be a question of first impression, Clorox has done nothing to satisfy this Court that there is a substantial likelihood that this Court will conclude that large packs do not assist a retailer in promoting the sale of the product in those packs to consumers.

Nor can Clorox argue that whether discrimination in the provision of promotional services in violation of §§ 2(d) and 2(e) of the Robinson-Patman Act is actionable is a question of first impression. See ***FTC v. Simplicity Pattern Co.***, 360 U.S. 55, 69-70 (1959); ***Lewis v. Philip Morris Inc.***, 355 F.3d 515, 534-35 (6th Cir. 2004).

Clorox makes no attempt to satisfy this Court that it is likely to succeed on appeal. To do so, Clorox must persuade this Court that large packs, with their lower unit prices and the convenience they provide, have no ability to promote the retail sale of the products contained in those products. Absent such a showing, this Court should conclude that the question challenged by Clorox is not "contestable." The

District Court properly concluded that Woodman's has stated a claim for which relief can be granted.

II. The separation of powers precludes this court from entertaining Clorox's invitation to disregard the § 2(e) provisions of Robinson-Patman.

Clorox concludes the first section of its argument, at page 14, with an assertion that the Court should reverse the District Court because lots of manufacturers are doing what Clorox has done. This argument relies upon facts which are not in the Complaint and which are therefore not relevant to a motion to dismiss.

Looking beyond that, however, it is not the role of this or any other Court to repeal provisions of the Robinson-Patman Act simply because they are being disregarded. Whether the law should be as it is written is a policy question constitutionally reserved to the legislative branch of the government.

It appears that opponents of the FTC Guide's treatment of large packs as a regulated promotional service have unsuccessfully lobbied the FTC to remove package sizes from the list of promotional services covered by 2(e). The fact that opponents of that provision unsuccessfully attempted to obtain its removal constitutes an acknowledgement that the behavior continues to regarded by the FTC as a violation of Robinson-Patman.

The Fred Meyer Guidelines, at § 240.7, attached as Exhibit 5 to the Complaint [Supp.App.62] provide a non-exhaustive list of services that are considered to fall within the statutory definition of a promotional service. The FTC has consistently concluded that package sizes should be included in that list of covered promotional services.

Clorox has argued, at page 12 of its Petition, that the FTC has "debated" this particular provision. A review of the annotated 2014 Revisions to the Guidelines [App. Exh. A,8] reveals that the FTC did not "debate" the continued inclusion of package size in the Guidelines. Rather, opponents of that provision requested its removal, but the FTC denied the request because:

> "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."

The proper place for opponents of the inclusion of package sizes in this list to obtain relief would be to seek modification of the Robinson-Patman Act by Congress. Until such time, however, package sizes are promotional services, which should be made available on proportionally equal terms to all competing retailers. As with a speeding ticket, it should not be a defense to argue that everyone else was violating the law too.

III. Clorox mischaracterizes the ruling of the District Court in an effort to establish a contestable question of law.

The District Court's April 27, 2015, Opinion and Order, at page 8 [App. Exh.2] cited the principal set down by the U.S. Supreme Court in ***FTC v Fred Meyer, Inc.***, 390 U.S. 341, 358 (1968), which held 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."

Analysis of the language in this holding reveals that it does not compel a supplier to do business with retailers who purchase the supplier's products through wholesalers. It provides only that a supplier who provides allowances to a direct-buying retailer must also make those allowances available on proportionally equal terms to those who buy from a wholesaler. As the Court noted, "nothing . . . bars a supplier . . . from utilizing his wholesalers to distribute payments or administer a promotional program . . ."

The District Court's Order does not compel Clorox to do business with Woodman's. It merely provides that Clorox must make sure that any promotional service it provides to a direct-buying retailer will also be made available to those who buy Clorox products from wholesalers. The decision does not contemplate that any contractual relationship will be created between Clorox and those who buy Clorox products from wholesalers. Clorox remains free to choose to not do business with wholesalers.

Nor should it make any difference that Clorox chose to terminate Woodman's as a customer. Retailers who buy Clorox products from wholesalers are not contractual customers of Clorox. They are contractual customers of the wholesaler from which they purchase Clorox products. As purchasers from wholesalers, ***Fred Meyer*** provides that they are entitled to receive on a proportionally equal basis all of the same promotional services provided by Clorox to the club stores, including the large packs of Clorox products.

Clorox argues at page 16 that "[t]o 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." Clorox fails to note that the Supreme Court, in ***Fred Meyer,*** has already addressed this concern at pages 349-352:

> "We start with the proposition that '(t)he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.'
> . . .
> Congress chose to deter such indirect price discrimination by prohibiting the granting of sales promotional allowances to one customer unless accorded on proportionally equal terms to all competing customers.
>
> Of course, neither the Committee Report nor other parts of the legislative history in so many words define 'customer' to include retailers who purchase through wholesalers and compete with direct buyers in resales. But a narrower reading of s 2(d) would lead to the following anomalous result. On the one hand, direct-buying retailers like Meyer, who resell large quantities of their suppliers' products and therefore find it feasible to undertake the traditional wholesaling functions for themselves, would be protected by the provision from the granting of discriminatory promotional allowances to their direct-buying competitors. On the other hand, smaller retailers whose only access to suppliers is through independent wholesalers would not be entitled to this protection. Such a result would be diametrically opposed to Congress' clearly stated intent to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. **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."** (Emphasis supplied.)

The question of law that Clorox asks this Court to address is not a question of first impression. The answer it seeks is clearly set forth and explained in ***Fred Meyer***. That case makes clear that it is allowing purchasers at wholesale to receive the promotional services provided by sellers like Clorox to direct buyers, even though they would not normally qualify as "customers," because to do otherwise

would "frustrate the purpose of s 2(d)."

Clorox has cited no case law that expressly addresses and overturns the exception to the general rule that a seller gets to choose its customers established by ***Fred Meyer.*** Because Clorox offers no contrary authority to ***Fred Meyer***, there is no substantial difference of opinion on this question.

IV. Because a reversal of either or both of the District Court's rulings will not resolve other pending issues before the District Court, this Court should deny Clorox's Petition for interlocutory appeal.

The District Court's first Opinion and Order only addressed and ruled upon one of the three Robinson-Patman Act claims for declaratory relief set forth in Woodman's Complaint. The District Court did not receive briefs or arguments on Woodman's claim that Clorox was obligated to disclose all of the promotional services, discounts and allowances that it was offering to other competing retailers. Nor have the parties submitted briefs or given arguments on Woodman's request for injunctive relief compelling Clorox to provide such information or be barred from relying upon Woodman's failure to take advantage of such non-disclosed promotional services, discounts or allowances as a justification for price differences. The District Court has not ruled upon either of these claims.

The District Court did not receive briefs or arguments on Woodman's claim that there is no valid basis for the creation of different channels into which it places competing retailers, and uses that classification as a justification for disparate treatment. Nor have the parties submitted briefs or given arguments on Woodman's

request for injunctive relief precluding Clorox from creating such channels. The District Court has not ruled upon either of these claims.

None of these claims is dependent upon a ruling that large packs of Clorox products constitute promotional services under the Robinson-Patman Act.

As noted above, Woodman's filed a First Amended Complaint, in which it alleges, at paragraph 20, [Supp. App. 88] that Clorox is a party to a conspiracy to exclude Woodman's from competition in the sale of large packs of Clorox products. This claim was brought pursuant to § 1 of the Sherman Act. It is based upon sworn statements submitted to the Court in a sealed affidavit signed by Rick Rexing, Vice President for Sales, National Accounts at The Clorox Company. In that affidavit, a copy of which is set forth at paragraph 19 of the First Amended Complaint, [Supp.App.85-86] Clorox admits that [redacted] (Note: Woodman's has asked the District court to unseal this affidavit, but the Court has so far refused to do so.)

Woodman's further contends at paragraphs 20-22 in its First Amended Complaint [Supp. App. 88] that Clorox's decision to terminate Woodman's as a customer was made in order to further the conspiracy to exclude Woodman's from competition in sale of large packs of Clorox products. Woodman's further asserts at paragraph 21 in its First Amended Complaint [Supp. App. 88] that Clorox is also seeking to discourage other retailers from demanding that Clorox sell them large

packs of Clorox products under the threat that they too would be cut off as a Clorox customer.

In paragraphs 101-106 of that First Amended Complaint [Supp. App. 103], Woodman's has added a claim seeking a declaration that Clorox terminated Woodman's in furtherance of the conspiracy to exclude Woodman's and other retailers from competition in the sale of large packs of Clorox products and a claim seeking injunctive relief precluding Clorox from refusing to sell directly to Woodman's.

Clorox has filed a third motion to dismiss with the District Court seeking the dismissal of the Sherman Act claims referenced above. To date, the District court has not ruled upon that motion. As a consequence, Woodman's Sherman Act claims are still pending before the District Court.

Even if this Court were to rule that Woodman's ceased to be a customer of Clorox, Woodman's would become a customer of Clorox, and thus entitled to pursue all of its Robinson-Patman Act claims if the District Court were to order Clorox to discontinue all actions aimed at excluding Woodman's from competition in the sale of large packs of Clorox products.

Woodman's raises this issue in this proceeding because counsel for Clorox has asserted, incorrectly, that the District Court has ruled that all of Woodman's Robinson-Patman Act claims would be rendered moot by a ruling reversing either of the District Court's previous rulings. It bases this assertion on language found at

page 3 of the District Court's July 17, 2015, Opinion and Order certifying this case to the Seventh Circuit [App. Exh. 3], where the Court stated as follows:

> "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."

Woodman's contends that this statement constitutes speculative *dicta* on the part of the District Court. Woodman's has not had an opportunity to be heard by the District court on any of the issues referenced above. Such would be necessary before the Court could dismiss any of these as yet unaddressed claims.

While Woodman's does not believe that the Court made this statement as a ruling of the Court, counsel for Clorox has, on several occasions, asserted that it is a ruling of the Court, and that there would therefore be no need for a remand of any portion of this litigation to the District Court if this Court were to reverse either of the District Court's rulings on the Clorox motions to dismiss. Woodman's raises this issue in order to make a record that it is not acquiescing in these assertions or waiving its right to dispute that the statement by the District Court is, in any way, intended to represent a dispositive ruling of the District Court.

Conclusion

Clorox has failed to show that either of the questions of law of which it seeks interlocutory review is contestable. Because there are questions that will require further litigation after appellate review of the two questions raised by this Petition, an interlocutory review of these two questions will not simplify, shorten or conclude this litigation. For all of the reasons set forth in this Response, the Court should deny the Petition.

Dated at Madison, Wisconsin, this 6th day of August, 2015.

Respectfully submitted:

By: */s/ John A. Kassner*

Counsel of Record:

John A. Kassner
State Bar Number: 1014336
jkassner@vonbriesen.com

Kraig A. Byron
State Bar Number: 1020236
kbyron@vonbriesen.com

VON BRIESEN & ROPER, S.C.
Attorneys for Plaintiff-Respondent,
Woodman's Food Market, Inc.

Mailing Address:

VON BRIESEN & ROPER, S.C.
10 East Doty Street, Suite 900
Madison, WI 53703

(608) 661-3969 Direct (John Kassner)
(608) 316-3199 Direct Fax (John Kassner)

(608) 661-3981 Direct (Kraig Byron)
(608) 316-3184 Direct Fax (Kraig Byron)

027007-00007

25659428_1.DOCX

CERTIFICATE OF SERVICE

I, John A. Kassner, declare:

I am a resident of Wisconsin, and I am employed in Wisconsin. I am over the age of 18, and not a party to this action. My business address is: von Briesen & Roper, s.c., 10 East Doty Street, Suite 900, Madison, Wisconsin 53703.

I hereby certify that I filed the document described as PLAINTIFF'S-RESPONDENT'S RESPONSE IN OPPOSITION TO DEFENDANTS-PETITIONERS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) (redacted version) with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using e-mail on August 6, 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 (redacted version) via e-mail and First-Class Mail to the following registered and non-CMM/ECF participants:

Thomas G. Hungar: THungar@gibsondunn.com
Joshua H. Soven: JSoven@gibsondunn.com
Michael R. Huston: MHuston@gibsondunn.com
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306

Donald K. Schott: Don.schott@quarles.com
Rachel A. Graham: Rachel.graham@quarles.com
Stacey A. Alexejun: Stacy.alexejun@quarles.com
Quarles & Brady LLP
33 E. Main Street, Suite 900
Madison, WI 53703

Executed on August 6, 2015, at Madison, Wisconsin.

/s/ John A. Kassner
DECLARANT