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

MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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The Clorox Company and the Clorox Sales Company (collectively, "Clorox") respectfully seek permission to file the attached Reply In Support Of Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) ("reply brief").

The district court in this case certified for appeal two of its orders denying Clorox's motions to dismiss. The first order is based on an unprecedented expansion of Section 2(e) of the Robinson-Patman Act; the second order is an unprecedented abridgement of a manufacturer's right to choose its own customers.

Clorox demonstrated in its Petition that both orders feature a controlling question of law; that there is substantial ground for difference of opinion as to the resolution of each question; and that immediate appeal of either order will materially advance the ultimate disposition of this case. Interlocutory review is warranted because the district court's first order called into question the legality of distribution strategies practiced by countless manufacturers every day. Interlocutory review is also warranted because the district court's second order leaves no apparent ability for manufacturers to exercise their decades-old right to choose their own customers.

In its Opposition, Plaintiff Woodman's Food Market, Inc. ("Plaintiff") disputes that the district court properly certified these two orders for interlocutory appeal under § 1292(b). Plaintiff contends that the legal questions in this case are open-and-shut matters without any room for disagreement. But Clorox's reply brief will show that the interpretation of the Robinson-Patman Act adopted below will, unless corrected, produce absurd results that would harm competition in the marketplace.

Plaintiff's defense of that ruling is based on a mischaracterization of the Supreme Court's decision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). Clorox's reply brief will show that Plaintiff's argument conflicts with the Supreme Court's holding in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), that a manufacturer may choose its own customers.

Plaintiff's Opposition also mischaracterizes Plaintiff's own legal claims by suggesting that this appeal implicates fewer than all of its Robinson-Patman Act claims. The district court rejected this same argument, a conclusion that Plaintiff erroneously calls "speculative dicta." Opp. 20. Clorox's reply brief will show that an interlocutory appeal is likely to resolve *the entire* dispute between the parties, not just a portion of it.

Dated: August 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 13, 2015, an electronic copy of the foregoing Motion for Leave to File Reply in Support of Petition for Permission to Appeal was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Clerk's CM/ECF system and was served by the Notice of Docket Activity upon the following registered CM/ECF users.

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Plaintiff's Brief in Opposition to Clorox's Petition concedes that the two issues certified for interlocutory appeal are pure questions of law. Plaintiff also concedes that the foundational issue—whether large-size packages constitute "services or facilities" under Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e)—has never been addressed by a federal court in the 79-year history of the Act.

Plaintiff's Opposition hinges on the implausible argument that there is no disagreement on the two certified questions because: (a) two long-since-forgotten administrative rulings (from 1940 and 1956) about promotional services trump the last four decades of antitrust jurisprudence from the Supreme Court; and (b) a 1968 case about discrimination as to promotional services suddenly (and silently) overrules 95 years of consistent support for a manufacturer's right to choose its own customers. Plaintiff's position on the contestability of "promotional services" is all the more implausible because Plaintiff cannot find any support for its interpretation in the language of the statute or in the decades of case law applying it. The modern FTC has refused to acknowledge the existence of the administrative opinions on which Plaintiff relies so heavily, much less to apply them in the face of thousands of manufacturers adopting the same policy that is challenged here.

Plaintiff's Opposition demonstrates that its real objective is to disguise a claim for *price* discrimination as a claim about discrimination in the furnishing of "services or facilities." Plaintiff's core objection to Clorox's channel distribution strategy has nothing to do with services or facilities, but rather is that Clorox allegedly sells its large-size packages at "lower unit prices." Opp. 1. Plaintiff engages in

this maneuver because a claim for price discrimination, which is prohibited by Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), requires proof of harm to competition. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 178–79 (2006). In contrast, a Section 2(e) claim for "services or facilities" discrimination—at issue here—does not. *See Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973).

Plaintiff did not bring a claim under Section 2(a), *see* Clorox Pet. Ex. A at 1 n.1, because Plaintiff cannot show competitive harm. As the district court found, during months of litigation, Plaintiff has never shown that it has lost a single sale, much less demonstrated harm to competition. *See* Clorox Pet. at 8; No. 14-734, Dkt. 91 (W.D. Wis. May 28, 2015). Indeed, the district court has found that Plaintiff's theory of harm, even to itself, is implausible. No. 14-734, Dkt. 91 at 5 (rejecting Plaintiff's "conclusory and self-serving . . . [and] conjectural" theory of harm).

The district court also disagreed with Plaintiff's argument that it has "other" Robinson-Patman Act claims that are not covered by the meaning of "services or facilities." *See* Clorox Pet. Ex. C at 3. As the district court held, "[i]f the court of appeals disagrees with my decision[s] . . . then all of Woodman's claims for declaratory and injunctive relief . . . go away." *Id.*

Finally, the district court rejected Plaintiff's attempt to use its belated Sherman Act claim—brought only when Clorox terminated the parties' business relationship—to breathe life into its Section 2(e) claim. *See id.* at 4 (no "court-ordered remedy under the Sherman Act could provide" Plaintiff what it seeks). Even if

Plaintiff decides to pursue its belated Sherman Act claim, that claim could never yield Plaintiff's desired relief: an order that required Clorox to sell Plaintiff every product and every package size in perpetuity.

In short, Plaintiff's Opposition does not undermine the district court's holding that the two certified questions are appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). Immediate appeal will accelerate the ultimate disposition of this case no matter how the Court rules on the merits. Either the Court will agree with Clorox and this litigation will end entirely, or the Court will agree with Plaintiff and significantly streamline the issues for further proceedings.

I. Both Of The Certified Questions Are Novel And Subject To Substantial Disagreement

Plaintiff is wrong to argue that the questions in this case are easy, and thus that an appeal is not appropriate. The district court correctly concluded that both certified questions entail substantial ground for difference of opinion.

A. The Meaning Of Promotional Services

Plaintiff concedes that no federal court has ever before held that a large-size package of a particular commodity is a promotional service connected with that commodity under Section 2(e) of the Robinson-Patman Act. Opp. 12 ("this may be a question of first impression"). And Plaintiff does not contest the tension that exists between its proposed interpretation of Section 2(e) and modern antirust precedent from the Supreme Court. Instead, Plaintiff cites district courts holding that not all matters of first impression are suitable for permissive appeal. Opp. 11. That misses the point. This Court has held that important, novel questions like those here often

entail substantial disagreement for purposes of § 1292(b). *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F. 3d 1000, 1007–08 (7th Cir. 2002).

Plaintiff next argues that there can be *no dispute* that Clorox must sell its large-size packages to every retailer in the country, because those packages "impact [ ] the ability of a retailer to sell the products in those packages to the ultimate consumer." Opp. 10. Plaintiff ignores that the text of Section 2(e), and all federal cases interpreting it, distinguish between a product and the promotional services that are connected with that product. Plaintiff would collapse that distinction by deeming any feature of a product that impacts its ability to be sold to consumers a promotional service connected with the product. But *every feature* of a product is designed to increase its ability to be sold to consumers. Plaintiff's rule would produce the absurd consequence that *everything* about a product is also a promotional service, and thus a manufacturer would be required to sell every product that it manufactures to every retailer that desires them. That is wrong. Promotional services for products are things like display cases and advertising; they are not features of the product itself, and they do not include every package size sold in America.

Again, the *only* support that Plaintiff can find for its interpretation of the statute is *In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *In re General Foods Corp.*, 52 F.T.C. 798 (1956). Opp. 10. Those are non-binding administrative decisions that the FTC did not reference in its recent guidance on the meaning of Section 2(e). Moreover, those decades-old decisions come from a different era of antitrust jurisprudence. Unlike in the days of *Luxor* and *General Foods*, the Supreme Court's con-

temporary cases are receptive to vertical restraints (*i.e.*, those between a manufacturer and a retailer, like the channel strategy here), because they often further the interbrand competition that is the purpose of the anti-trust laws. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 890–91 (2007). The Court has held as much for nearly forty years. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977). The Robinson–Patman Act must be read in accord with modern antitrust law, because that statute "signals no large departure from antitrust law's primary concern, interbrand competition." *Volvo*, 546 U.S. at 168.

Plaintiff discounts the fact that countless manufacturers openly use the same channel distribution as Clorox as nothing but widespread lawlessness equivalent to speeding, Opp. 14, rather than a reflection of reasonable disagreement with Plaintiff's expansive reading of Section 2(e). *See* Opp. 13. Plaintiff asks the Court to ignore the fact that the FTC has not brought even a single enforcement action to stop this ubiquitous conduct, even though Plaintiff contends that it is *per se* unlawful. Plaintiff's argument defies common sense. The far more logical conclusion is that the widespread nature of the distribution practices at issue, and the FTC's refusal to mention (much less apply) its decisions in *Luxor* and *General Foods*, show that Plaintiff's reading of Section 2(e) is *at least* contestable, and likely incorrect.

B. The Meaning Of Purchaser

Manufacturers have a nearly century-old right under the antitrust laws to choose their own customers. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Plaintiff concedes as much. Opp. 17 ("the general rule [is] that a seller gets to choose its customers"). But Plaintiff argues that *FTC v. Fred Meyer, Inc.*, 390

U.S. 341 (1968), silently marks a sweeping "exception to the general rule," such that retailers that buy from wholesalers can demand every size of every product from manufacturers. *Id.* at 16–17. Accordingly, Plaintiff contends that the meaning of "purchaser" in Section 2(e) is not appropriate for this Court's review because the answer to that question "is clearly set forth and explained in *Fred Meyer*," such that it does not "make any difference that Clorox chose to terminate [Plaintiff] as a customer." *Id.* at 15–16.

But *Fred Meyer* never mentions *Colgate*, so it cannot be automatically read to abridge a manufacturer's right to choose not to sell to a particular retailer. *Fred Meyer*, which also never mentions Section 2(e), "hold[s] only that, *when a supplier gives [promotional] allowances to a direct-buying retailer*, [it] must also make them available" to those who purchase from wholesalers. 390 U.S. at 358 (emphasis added). Of course, the very premise of *Fred Meyer* is contested here: Clorox argues that its large-size packages are not promotional allowances.

Regardless, under Plaintiff's distorted reading of *Fred Meyer*, the only way for a manufacturer to cut ties with a customer pursuant to *Colgate* is to "choose to not do business with wholesalers." Opp. 15. That cannot be right. A manufacturer is not required to entirely stop selling to all wholesalers—thereby preventing Clorox products from reaching thousands of smaller retailers that do not have the scale to purchase directly—just for the purpose of terminating a single customer. At the very least, the tension between *Fred Meyer* and *Colgate* means that the question warrants this Court's review.

II. Immediate Appeal Will Certainly Advance, And Likely Resolve, This Litigation

Resolution of either certified question will materially advance the ultimate disposition of this case. If large-size packages are not promotional services, then Plaintiff's Robinson-Patman Act claim fails immediately. *See* Clorox Pet. Ex. A at 6. Similarly, if Plaintiff is no longer a "purchaser" of Clorox products, then it is not entitled to bring *any* claims under Section 2(e). *See* Clorox Pet. Ex. C at 3.

Plaintiff argues that it will continue to have other viable Robinson-Patman Act claims even if this Court reverses the district court's decisions. *See* Opp. 17–18. In fact, however, every so-called additional "claim" is merely a proposed *remedy*. As the district court held when Plaintiff made this same argument below, "all of [Plaintiff's] claims relate to the same alleged course of conduct," and "all of [Plaintiff's] claims for declaratory and injunctive relief" rely on whether "large-size packages can constitute a promotional service." Clorox Pet. Ex. C at 3.[1]

Finally, Plaintiff argues that even if this Court rules that Plaintiff is no longer a "purchaser" because Clorox has ceased to do business with Plaintiff, then Plain-

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[1] Plaintiff belittles the district court's conclusion as "speculative dicta." Opp. 20. But the soundness of the district court's conclusion is reinforced by Plaintiff's own Opposition, in which every one of the so-called "claims" turns on the meaning of the phrase "services or facilities." *See id.* at 3 ("The first claim" is for declaratory judgment barring discrimination in "the provision of services or facilities"); *id.* at 3–4 ("The second claim" is that Clorox "must make [ ] promotional services . . . available to all of its customers"); *id.* at 4 ("The third claim" is that large-size packages "constitute[ ] a promotional service"); *id.* (the first injunctive "claim" would preclude Clorox from using different distribution channels to discriminate); *id.* at 5 (the next "claim" seeks disclosure of "the existence of . . . promotional services"); *id.* (the final claim seeks an injunction mandating "access to the special promotional service of large packs").

tiff can *become* a purchaser once again, "and thus entitled to pursue all of its Robinson-Patman Act claims[,] if the District Court were to order Clorox" to sell its products to Plaintiff as a remedy for the alleged Sherman Act conspiracy. Opp. 19. As the district court has already found, Plaintiff's logic is faulty. *See* Clorox Pet. Ex. C at 3–4. The Sherman Act does not permit an injunction that would order Clorox to do business with Plaintiff, which would thereby create a right for Plaintiff to sue under the Robinson-Patman Act. *See id.*

In short, if this Court agrees with Clorox that Plaintiff is not a purchaser under the Robinson-Patman Act, then Plaintiff's Sherman Act claim will have no purpose. A ruling from this Court on the meaning of Section 2(e) is certain to streamline this litigation and may well end it altogether.

* * *

The two questions that the district court certified for appeal are the most important questions in this litigation and they are the subject of substantial dispute. The questions have significant importance far beyond the circumstances of this case. This Court's immediate review is necessary and appropriate under 28 U.S.C. § 1292(b).

Conclusion

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

Dated: August 13, 2015

Respectfully submitted,

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