

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 SUR-REPLY BRIEF IN RESPONSE
TO DEFENDANTS'-PETITIONERS' PETITION
FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

Dated at Madison, Wisconsin, this 14th day of August, 2015.

Counsel of Record:

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

Kraig A. Byron
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.

TABLE OF CONTENTS

	<u>Page No.</u>
ARGUMENT	1
I. THE DISTRICT COURT OPINION AND ORDER OF AUGUST 13, 2015, ACKNOWLEDGES THAT IT HAS NOT RULED UPON ANY OF WOODMAN’S OTHER CLAIMS OR POSSIBLE CLAIMS, AND WOODMAN’S HAS NOT WAIVED ANY ARGUMENT WITH RESPECT TO ANY OTHER CLAIM THAT IT MAY HAVE	1
CONCLUSION.....	3
CERTIFICATE OF SERVICE.....	5

TABLE OF AUTHORITIES

No Authorities Cited in this Brief

Argument

- I. **The District Court Opinion and Order of August 13, 2015, acknowledges that it has not ruled upon any of Woodman's other claims or possible claims, and Woodman's has not waived any argument with respect to any other claim that it may have.**

At page 2 of its August 13, 2015, Reply Brief, [Doc.8-2] The Clorox Company and the Clorox Sales Company (hereinafter collectively "Clorox") argue that:

"[T]he district court . . . 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 Plaintiffs 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)."

Hours after Clorox filed its proposed Reply Brief, the District Court issued its Opinion and Order of August 13, 2015, [Doc. # 113], a true and correct copy of which is attached hereto as a supplement to the Supplemental Appendix, at Supp. App. 150-154, in which it directly contradicts this contention, at Supp.App.152:

". . . Woodman's expresses concern that this court may have prematurely reached a decision on the viability of its claims under both the Robinson-Patman Act and Sherman Act; Woodman's stresses that it should not be found to have waived its rights to pursue relief on any claims that have not yet been argued on their merits before the court. Woodman's is correct that apart from the matters addressed in conjunction with Clorox's first two motions to dismiss, dkts. 20 and 63, this court has not ruled on any of Woodman's other claims or possible claims, and Woodman's has not waived any argument with respect to any other claim that it may have. Apart from expressing its concerns about some of Woodman's arguments, this court has not reached a decision on the viability of any of Woodman's claims except for those addressed in the February and April orders."

Because the trial has not ruled upon the merits of any of Woodman's Food Market, Inc.'s (hereinafter "Woodman's") other claims, it would be premature for Clorox to seek permission for interlocutory appeal of anything other than the two issues directly addressed by the District Court in its Opinion and Order of February 2, 2015, [App.Exh.A] and its Opinion and Order of April 27, 2015. [App.Exh.B]

Contrary to the assertion in Clorox's footnote at page 7 of its Reply Brief, the District Court agrees with counsel for Woodman's that the District Court's statements concerning its authority to order a particular remedy were in fact *dicta*. [Supp.App.152]

The District Court acknowledges it has only ruled upon the merits of Woodman's argument that the provision of large packs constitutes a promotional service that must be made available on proportionally equal terms to all retailers competing in the retail sale of a product, regardless of whether those retailers purchased directly from Clorox or from independent wholesalers. The District Court acknowledges that Woodman's has the right to pursue those other arguments following a contrary ruling by this Court on either of the two issues decided by the District Court.

Woodman's therefore reiterates its contention that a resolution of the issues on which Clorox seeks interlocutory appeal will extend, rather than shorten the time required to complete this litigation.

This Court should deny the Petition precisely because, as Clorox contends at page 8 of its Reply Brief, this litigation has significance beyond the circumstances

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

25659531_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 SUR-REPLY BRIEF TO DEFENDANTS'-PETITIONERS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using e-mail on August 14, 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 14, 2015, at Madison, Wisconsin.

/s/ John A. Kassner

DECLARANT