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

Woodman's Food Market, Inc., Plaintiff, v. The Clorox Company, et al., Defendants.	Civil Action No. 14–CV–734

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE COURT'S ORDERS DENYING DEFENDANTS' MOTIONS TO DISMISS

Defendants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") respectfully submit this Memorandum in support of their Motion pursuant to 28 U.S.C. § 1292(b) to Certify for Interlocutory Appeal the Court's February 2, 2015, and April 27, 2015, Orders Denying Clorox's Motions to Dismiss. The Court's order denying Clorox's first motion to dismiss is the first ever to hold that the size of a package can constitute a "service[ ] or facility[y]" under Section 2(e) of the Robinson-Patman Act. The Court's order denying Clorox's second motion to dismiss is the first to hold that a customer can remain a "purchaser" under Section 2(e) even after a manufacturer has terminated all direct sales to that customer. The Court's orders each satisfy the standard for granting interlocutory appeal because (1) they each involve a controlling question of law in this case; (2) there is substantial ground for difference of opinion on those questions; and (3) an immediate appeal from the orders will materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b).

The Court's order denying Clorox's first motion to dismiss presents a controlling question of law because if Clorox is correct that a large-size package does not constitute a service or facility under Section 2(e), then Plaintiff Woodman's Food Market, Inc.'s ("Plaintiff")

claim under the Robinson-Patman Act will be dismissed in its entirety. There is also substantial ground for difference of opinion on this question. Clorox respectfully maintains that the Court's ruling is inconsistent with the plain language of the statute and the holdings of all applicable federal court cases, which have unanimously interpreted "services or facilities" in a way that would exclude package size. The substantial ground for disagreement is underscored by the fact that manufacturers frequently decide to sell certain package sizes to only a limited number of retail channels, a practice that has persisted for almost sixty years without a single legal challenge by the Department of Justice or the Federal Trade Commission ("FTC"). An interlocutory appeal on the meaning of Section 2(e) will materially advance the termination of this litigation because the Court of Appeals' decision will end Plaintiff's Robinson-Patman Act case altogether.[1]

The Court's order denying Clorox's second motion to dismiss also warrants interlocutory review. This order, too, involves a controlling question of law because if Clorox is correct that—after Clorox terminated all sales to Plaintiff in reliance on this Court's statement that "Clorox may refuse to deal with a particular retailer," Dkt. 50, at 10—Plaintiff is no longer a "purchaser" within the meaning of Section 2(e), then Plaintiff has no claim under the Robinson-Patman Act. There is substantial ground for disagreement on this question, which is vigorously contested. 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 Robinson-Patman liability does not attach where a manufacturer refuses to deal with a customer. *See Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980) (affirming the

[1] Plaintiff is now attempting to pursue a meritless Sherman Act claim, but Plaintiff's fundamental goal is for this Court to issue an injunction that permanently requires Clorox to offer to sell every size of each of its products to Plaintiff. If Plaintiff's Robinson-Patman Act claim is dismissed, Plaintiff will not be able to achieve its core objective.

district court's dismissal of the plaintiff's Section 2(e) claim and noting that "[Section] 2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers"). The Court's ruling is not only inconsistent with these precedents, but also effectively creates a new and permanent obligation to make all sizes of every product available to any customer that purchases any size of a product through a wholesaler.

Finally, while not necessary for the Court to certify its orders for appeal, certification will further public policy interests because interlocutory review will address the substantial uncertainty in the marketplace that the Court's rulings have produced. Immediate appellate review will inform manufacturers throughout the United States whether they can continue distribution strategies that they have pursued for decades, unchallenged, without threat of antitrust liability. In contrast, if the Court does not certify its orders, that uncertainty will likely continue for the several years that it takes to complete this litigation.

INTRODUCTION

The Clorox Company and The Clorox Sales Company are Delaware corporations based in Oakland, California, that manufacture and market consumer and professional products. Plaintiff Woodman's Food Market is a retailer with 15 locations in Illinois and Wisconsin. Plaintiff has in the past purchased more than 480 different stock-keeping units ("SKUs") from Clorox. Dkt. 68, ¶¶ 6, 26.

In August of 2014, Clorox determined that it could increase its sales, lower its costs, and better meet customer demand by selling different sizes and packaging formats of its products through different types of retailers. Accordingly, Clorox established different SKU lists for different channels of customers. Certain products that are manufactured to be sold in club stores were made available only to Clorox customers in the Club Store channel. *Id.* ¶¶ 44–50.

On October 28, 2014, Plaintiff brought this suit alleging that Clorox's channel distribution strategy violates Sections 2(d) and 2(e) of the Robinson-Patman Act. 15 U.S.C. § 13(d), (e). Clorox moved to dismiss the Complaint for failure to state a claim for relief, contending that, as a matter of law, selling club-store products does not constitute the provision of promotional "services or facilities" under the Robinson-Patman Act. Dkt. 21. On February 2, 2015, the Court denied Clorox's motion to dismiss. The Court first noted that, although Plaintiff brought claims under both Sections 2(d) and 2(e) of the Robinson-Patman Act, the facts alleged more closely fit a claim under Section 2(e). Dkt. 50, at 6. The Court also noted that "no federal court has addressed whether a special package size constitutes a promotional service under subsection (d) or (e) of the [A]ct." *Id.* But the Court held that the FTC's "decisions in [*In re Luxor, Ltd.*, 31 F.T.C. 658 (1940),] and [*In re General Foods Corp.*, 52 F.T.C. 798 (1956),] are directly on point in this case, and Clorox has failed to persuade [the Court] that they are no longer good law." *Id.* at 10. In addition, the Court determined that "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." *Id.* at 10.

Relying on the Court's statement that Clorox could "refuse to deal with a particular retailer," *id.*, Clorox informed Plaintiff by letter on February 24, 2015 that it had "decided to permanently discontinue its sale of all Clorox products to" Plaintiff in order "to avoid the substantial costs [of] continuing this litigation." Dkt. 64, Att. A. Later that day, Clorox moved to dismiss the suit as moot on the ground that "there is no injunctive relief for the Court to award" because "Clorox has permanently ceased the alleged discrimination against Plaintiff in

the provision of services or facilities, and there is no reasonable expectation that Clorox will engage in any such conduct in the future." *Id.* at 4.

On April 27, 2015, the Court denied Clorox's second motion to dismiss, holding that, "at least at this early stage in the litigation," Plaintiff could qualify as a "purchaser" of Clorox products under Section 2(e) because it has obtained Clorox products from wholesalers. Dkt. 77, at 7. While the Court's language technically left open the possibility that, at some point, Plaintiff might no longer qualify as a purchaser, the Court did not explain what changes in circumstances would bear on Plaintiff's status as a purchaser. And because the Court held that a customer remains a purchaser under Section 2(e) if it buys a manufacturer's products through an *independent* wholesaler, the Court's decision leaves no apparent opportunity for Clorox to terminate Plaintiff as a purchaser. Consequently, the Court's ruling implies that, despite ceasing all direct sales to Plaintiff, Clorox could be forced to sell Plaintiff every size of every product if Plaintiff purchases Clorox products from *any* wholesaler. No federal court has ever imposed such an obligation on a manufacturer.

ARGUMENT

28 U.S.C. § 1292(b) provides that:

> 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 Seventh Circuit has explained that a case is suitable for interlocutory appeal if it "turn[s] on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record." *Ahrenholz v. Bd. of Trs.*, 219 F.3d 674, 677 (7th Cir. 2000).

I. The Court's February 2, 2015 Order

The Court's February 2, 2015 Order denying Clorox's motion to dismiss answered in the affirmative a question of statutory construction:

> Do a manufacturer's large-size products constitute "services or facilities" that must be furnished to customers on non-discriminatory terms under 15 U.S.C. § 13(e)?

That is a pure question of law that the Seventh Circuit can decide quickly and cleanly—there are no facts in dispute for purposes of that question. The Court's order also meets every criterion described in § 1292(b). The question is controlling in this case (indeed, it is dispositive), it is vigorously contested (indeed, it is novel in the federal courts), and resolution will materially advance this litigation no matter how the Seventh Circuit rules. Providing a clear answer to the question is also critical so that manufacturers throughout the country will know how to structure their distribution networks so as to comply with a potential massive change in the meaning of the Robinson-Patman Act.

First, whether the products at issue in this case constitute promotional services or facilities under 15 U.S.C. § 13(e) is a controlling question of law. A "question of law as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine[.]" *Ahrenholz*, 219 F.3d at 676 (internal quotation marks omitted). 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) (citing 16 Wright & Miller et al., *Federal Practice and Procedure* § 3930, at 159–60 (1977)). "[C]ontrolling means serious to the conduct of the litigation, either practically or legally." *Id.* (internal quotation marks omitted) (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974)). A question of law 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).

The question before the Court in this case is controlling because it is a pure question of statutory construction without any facts in dispute. Were the Seventh Circuit to reach a different interpretation of the Robinson-Patman Act, then both this Court and the parties would save the substantial time and expense of fact discovery, expert witness presentations, summary judgment briefing, and a trial. Specifically, if the Seventh Circuit holds that large-size products do not constitute "services or facilities" under 15 U.S.C. § 13(e), then Plaintiff's Robinson-Patman Act claims categorically fail as a matter of law and must be dismissed.

Second, the question before the Court involves a substantial ground for difference of opinion. As both parties recognize, this Court's order is the first time that a federal court has ever addressed this question under the Robinson-Patman Act. Plaintiff relies on two administrative decisions of the FTC that are more than 50 years old and "guidance" (which, at best, is ambiguous) that the FTC provided in the Fred Meyer Guidelines. In contrast, Clorox contends that the FTC's two old administrative decisions are contrary to both the plain meaning of the statute and to more recent federal court decisions. As Clorox demonstrated in its prior briefing, every federal court that has interpreted "services or facilities" in Section 2(e) has done so in a way that would exclude package sizes. Section 2(e) refers, for example, to providing cabinets to display products, catalogues, or paid transportation costs, *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 943 (9th Cir. 1998) (citing *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 60 (1959)); "traveling demonstrators, promotional posters, instructional brochures for merchants, and monthly publications," *id.* at 943 (citing *Simplicity Pattern*, 360 U.S. at 61 n.4); "window display services, newspaper lineage, billboard posters, and

allowances to have clerks promote a manufacturer's products," *id.* at 945 (internal quotation marks omitted) (citing Remarks of Rep. Wright Patman Introducing H.R. 8442, 79 Cong. Rec. 9077, *reprinted in* The Legislative History of the Federal Antitrust Laws and Related Statutes 2928 (Earl W. Kintner, ed. 1980)); gifts to give away to customers, *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 520–21 (6th Cir. 2004) (per curiam); and marketing or advertising services, *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 378–79 (4th Cir. 1992) (per curiam). No court has come close to interpreting Section 2(e) so that *every package and container* (and thus, *every product*) sold in America would be a service covered by Section 2(e).

Moreover, as the Court recognized, the FTC has debated whether to keep the "special packaging or package sizes" language in its guidelines at all, Dkt. 50, at 7–8, and the agency described that debate as "a close one." 55 Fed. Reg. 33651, 33654 (Aug. 17, 1990). Even though the FTC retained "special packaging or package sizes" in the guidelines, the FTC restricted that category to "*promotional* services or facilities." 79 Fed. Reg. 58245, 58249 (Sept. 29, 2014) (emphasis added). Moreover, notwithstanding Plaintiff's certainty that the Fred Meyer Guidelines cover large-size packages, the FTC declined to cite such package sizes as an example of a service (even though it was urged to do so), and the FTC has declined for decades to challenge the conduct that Plaintiff claims is unlawful.

Finally, an immediate appeal would materially advance the ultimate termination of this litigation in a more efficient manner. The threshold to satisfy this factor 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) (emphasis in original). Here, the Court's order noted that the proper interpretation of 15 U.S.C. § 13(e) is "[t]he crux of the parties' dispute." Dkt. 50, at 6. The Court ruled on no other grounds and it addressed no other

issues. In fact, the Court noted that Section 2(d) of the Robinson-Patman Act is not really at issue, and that Plaintiff has not pursued a claim under Section 2(a). *Id.* at 1 n.1. By allowing the Seventh Circuit to provide an authoritative construction of the Robinson-Patman Act now, the Court can expedite resolution of this controversy without significant additional expenditures by the parties in discovery and briefing, or consumption of this Court's resources, on collateral issues that will not ultimately prove relevant to the Robinson-Patman claim. If the Seventh Circuit holds that large-size products do not constitute "services or facilities" under Section 2(e), then the case will unquestionably terminate more quickly, as Plaintiff's Robinson-Patman Act claims will be dismissed. And even if the Seventh Circuit agrees with Plaintiff, with the benefit of that court's opinion, the case will move more efficiently.

II. The Court's April 27, 2015 Order

The Court's April 27, 2015 Order denying Clorox's second motion to dismiss also addressed a question of statutory construction:

> Does a retailer remain a "purchaser" under 15 U.S.C. § 13(e) if a manufacturer refuses to conduct any sales with that retailer, and the retailer instead obtains the manufacturer's products from independent wholesalers?

This, too, is a pure question of law that the Court of Appeals can resolve quickly, without any facts in dispute. This question also satisfies 28 U.S.C. § 1292(b) because it is controlling, because there is substantial ground for difference of opinion, and because immediate appeal on it will materially advance the termination of this litigation.

First, this question is controlling because resolution in Clorox's favor is not merely "*likely* to *affect* the further course of the litigation," on Plaintiff's Robinson-Patman Act claims, *Sokaogon Gaming*, 86 F.3d at 659 (emphasis added), rather it would *certainly conclude* the litigation on those claims. If the Seventh Circuit determines Plaintiff is no longer a "purchaser" under Section 2(e) because Clorox refused to do business with Plaintiff, then there is no relief

available to Plaintiff on its Robinson-Patman Act claims. But even if the Seventh Circuit agrees with Plaintiff's interpretation of the term "purchaser," that holding will still affect the litigation by streamlining the questions for discovery and trial. That is, it would no longer be necessary to "raise these points at summary judgment or trial after the parties have had an opportunity to develop the record," if the Seventh Circuit were to affirm the Court's Order. *See* Dkt. 77, at 7.

There is also substantial ground for difference of opinion regarding Plaintiff's ongoing status as a "purchaser" of Clorox products. Nine decades of antitrust case law permit a manufacturer to choose its own customers. *See Colgate*, 250 U.S. at 307. Four decades of Robinson-Patman Act case law in this Circuit confirm that a manufacturer cannot be liable under Section 2(e) when it refuses to deal with a particular retailer. *See Harper Plastics*, 617 F.2d at 470–71. Clorox respectfully maintains that the Court's ruling that Plaintiff remains a purchaser under Section 2(e) is inconsistent with these well-settled precedents.[2] The Supreme Court's decision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), neither involved nor contemplated the present scenario, where a manufacturer ceases all ties with its former customer. This fact is crucial. *Fred Meyer* concerns a manufacturer's right to discriminate in the provision of promotional services; the present case, by contrast, implicates a manufacturer's right to choose its own customers. This Court's ruling, combined with its February 2, 2015 Order, potentially creates a heretofore unheard of obligation: A manufacturer that has ceased all direct business with a customer nonetheless must make available every size of every product it manufactures if the customer purchases the manufacturer's products through an independent wholesaler. The unprecedented and sweeping implications of this ruling, and its inconsistency with federal

[2] Indeed, even Plaintiff initially agreed that Clorox may refuse to conduct direct sales to it. *See* Dkt. 37, at 15 ("Clorox could refuse to do business with Woodman's altogether, but it has not done so.").

antitrust law, are precisely why this question is vigorously contested and the subject of substantial ground for difference of opinion.

Finally, determining whether Plaintiff remains a "purchaser" under Section 2(e) would materially advance the ultimate termination of this litigation. If the Seventh Circuit agrees with Clorox, then the Robinson-Patman Act claims in this litigation will end, as there would be no relief for the Court to award.

III. Public Policy Interests Favor Certification

Broader public policy interests also favor certification. As explained, the Court has issued two novel rulings that have ramifications not just for the parties, but for every manufacturer and retailer throughout the country. The proper interpretation of the Robinson-Patman Act implicates billions of dollars in retail sales by thousands of manufacturers. Every day in America manufacturers decide 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 that sells *any* size product to a particular retailer to sell *every* size product to that same retailer, then thousands of manufacturers' supply chains may be affected. Obtaining appellate review of the Court's decisions now, rather than after potentially years of litigation, will substantially reduce the uncertainty in the market that the Court's rulings have produced.

CONCLUSION

For these reasons, Clorox respectfully requests that the Court certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), its February 2, 2015 Order denying Defendants' First Motion to Dismiss and its April 27, 2015 Order denying Defendants' Second Motion to Dismiss, by entering revised orders expressly stating that the orders involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the orders may materially advance the ultimate termination of the litigation.

Respectfully submitted,

Dated: May 22, 2015

s/ Joshua H. Soven

Donald K. Schott
Stacy A. Alexejun
Rachel A. Graham
QUARLES & BRADY LLP
33 East Main Street
Suite 900
Madison, Wisconsin 53703
Telephone: 608.283.2426
Facsimile: 608.294.4923

Joshua H. Soven (admitted *pro hac vice*)
Michael R. Huston (admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2015, I caused a copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE COURT'S ORDERS DENYING DEFENDANTS' MOTIONS TO DISMISS to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
Joshua H. Soven