UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

Case No. 14-CV-734

THE CLOROX COMPANY,
THE CLOROX SALES COMPANY,
And
UN-NAMED CO-CONSPIRATORS,

Defendants.

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

Plaintiff, Woodman's Food Market, Inc. (hereinafter "Woodman's"), respectfully submits this Memorandum in Opposition to Defendants' Motion to Certify for Interlocutory Appeal of the Court's Orders Denying Defendants' Motions to Dismiss. The Defendants, The Clorox Company and The Clorox Sales Company (hereinafter collectively "Clorox"), have previously filed three Motions to Dismiss this matter.

THE CASE TO DATE

Woodman's initial Complaint asked the Court for declaratory and injunctive relief as follows:

1. A declaration that there is no valid basis, under the provisions of 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, when those stores are also selling commodities of like grade and quality at retail, and then using its arbitrary placement of Woodman's into that channel or classification as a justification;

a. for discriminating as to price, under 15 U.S.C.A. § 13(a); or,

b. for paying or contracting 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, under 15 U.S.C.A. § 13(d); or,

c. for discriminating in 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 under 15 USC § 13(e).

2. A declaration 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.

3. A declaration that, under the provisions of 15 U.S.C.A. §§ 13(d) and 13(e), if Clorox fails to notify a customer of the existence of such a promotional service, discount or allowance being offered to a competitor selling at retail, after that customer has expressly requested disclosure of such programs, Woodman's can 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.

4. A declaration that the offer of special size packages of a product 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 on proportionally equal terms to all Clorox customers selling at retail.

5. An injunction enjoining Clorox and Clorox Sales from discriminating against Woodman's in violation of the provisions of 15 U.S.C.A. §§ 13(a), 13(d) and

13(e) by placing Woodman's into a different "channel" or classification than Sam's Club and Costco have been placed in, and using that placement as a justification for unequal treatment.

6. An injunction enjoining Clorox and Clorox Sales from offering discounts, allowances and/or promotional services on the sale of products to favored retailers without disclosing the existence of those discounts, allowances and/or promotional services to Woodman's on proportionally equal terms.

7. An injunction enjoining Clorox and Clorox Sales from discriminating in the offer of special size packages of products of comparable grade and quality to some but not all of its retail customers without offering to make such packaging available to Woodman's on proportionally equal terms.

The first motion to dismiss filed by Clorox [Doc. 21] was filed on November 20, 2014. It asked the Court to dismiss the lawsuit for failure to state a claim for which relief could be granted. Clorox's Motion challenged only claims 4 and 7 of the Woodman's Complaint. Thus, it argued only that the provision of large packages of a product does not constitute a promotional service covered by Section 2(e) of the Robinson-Patman Act. Clorox's First Motion to Dismiss made no attempt to dispute Claims for Relief 1, 2, 3, 5 and 6.

On February 2, 2015, the Court denied Clorox's First Motion to Dismiss, concluding, at page 10, that "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."

Because Clorox did not attempt to attack Woodman's Claims for Relief 1, 2, 3, 5 and 6, the Court had no basis to, nor did it, rule on whether those claims also stated claims under the Robinson-Patman Act. Woodman's therefor insists that all seven of its initial Claims for Relief remain pending before this Court.

On February 24, 2015, Clorox notified Woodman's [Doc. 64-1] that it was discontinuing all dealing with Woodman's, effectively immediately. On that same date, Clorox filed its second Motion to Dismiss [Doc. 63]. In that Motion, Clorox contends that this lawsuit was rendered moot by its termination of all business dealings with Woodman's.

On April 27, 2015, the Court entered its Decision and Order [Doc. 77] denying Clorox's second Motion to Dismiss. In so ruling, the Court stated:

> "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.")
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> 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."

Woodman's filed its First Amended Complaint [Doc. 78] in this action on April 28, 2015. In that document, Woodman's added a new claim asserting a violation of Section 1 of the Sherman Act. At paragraphs 20-21 of that document, Woodman's alleges that Clorox had entered into a conspiracy, contract or combination with other unnamed club stores to restrain trade by engaging in a concerted boycott and refusal to deal with Woodman's and other retailers in the sale of large packs of Clorox products. At paragraph 74 of that document, Woodman's asserts that Clorox terminated Woodman's as a customer on February 24, 2015, in order to further its conspiracy with as-yet unnamed club stores seeking to exclude Woodman's and other retailers from competition in the sale of large packs of Clorox products.

On May 22, 2015, Clorox filed its Motion to Certify for Interlocutory Appeal the Court's Orders Denying Defendants' Motions to Dismiss [Doc. 89]. In that motion, Clorox asks the Court to certify this case to the Seventh Circuit Court of Appeals to review the Court's Opinion and Order of February 2, 2015 [Doc. 50] denying Clorox's first motion to dismiss, and the Court's Opinion and Order of April 27, 2015 [Doc. 77] denying Clorox's second motion to dismiss.

ARGUMENT

Motions to Certify a case for interlocutory appeal are governed by 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.

28 U.S.C.A. § 1292 (West)

Under this statute, the Trial Court has discretion as to whether it will certify the case for appellate review. ***Swint v. Chambers County Commn.***, 514 U.S. 35, 47, 115 S. Ct. 1203, 1210, 131 L. Ed. 2d 60, (1995). To succeed on such a motion, Clorox must satisfy this Court (1) that it involves a question of law, (2) that the law in question is controlling, (3) that the ruling of the Court on that law is contestable, and (4) that a resolution by the Court of Appeals must promise to speed up the litigation. ***Ahrenholz v. Board of Trustees of University of Illinois***, 219 F.3d 674, 675 (2000). ***Ahrenholz*** further held, at page 676, that ***all*** of these criteria must be satisfied

in order for the District Court to certify its order(s) to the Court of Appeals for interlocutory review.

Interlocutory appeals are generally disfavored. In ***Caraballo-Seda v. Municipality of Hormigueros***, 395 F.3d 7, 9 (1st Cir., 2005), the Court found:

> "interlocutory certification under 28 U.S.C. § 1292(b) should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority. ... As a general rule, we do not grant interlocutory appeals from a denial of a motion to dismiss. . . . This reflects our policy preference against piecemeal litigation."

Clorox's brief [Doc. 90] divides its analysis into two sections separately addressing each of the Court's two Order's denying Clorox's motions to dismiss. Our analysis will follow that same pattern.

I. CLOROX FAILS TO SATISFY THE REQUIREMENTS FOR INTERLOCUTORY REVIEW OF THE COURT'S FEBRUARY 2, 2015, DENIAL OF THE FIRST CLOROX MOTION TO DISMISS.

Clorox asserts, at pages 6-7 of its brief [Doc. 90], that the Court's order holding in the affirmative that the provision of large size packages constitutes a "service or facilities" that must be furnished to customers on a non-discriminatory basis, represents a *controlling* question of law. Citing ***Ahrenholz***, 219 F.3d at 676, Clorox says, at page 6 of its brief, that a question of law is *controlling* "if interlocutory reversal might save time for the district court, and time and expense for the litigants."

Having noted what the case law provides, Clorox makes no serious attempt to address the impact an interlocutory appeal would have on the time it will take to litigate this matter. As noted above, Woodman's initial complaint sets forth seven separate claims for relief, but Clorox's first motion to dismiss only addresses two of those seven claims. Even if the Court of Appeals were to reverse the Court's ruling on Clorox's first motion to dismiss (which

Woodman's would vigorously oppose), this matter will still proceed on the remaining five Claims for Relief. The time it takes to complete this litigation will necessarily be extended by the time it takes for this matter to be temporarily diverted to the Court of Appeals to undertake and complete its interlocutory review on those two claims. Regardless of the outcome of that interlocutory appeal, the matter will necessarily have to be remanded back to this Court to address the remaining five Claims for Relief.

It is difficult to see how the piecemeal interlocutory review of the Court's decision would provide any saving of time or expense to the parties or this Court.

Next, at pages 7-8 of its brief, Clorox asserts that the question before the Court involves a substantial ground for difference of opinion. Having said that, Clorox cites ***Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.***, 153 F.3d 938, 943 (9th Cir. 1998); ***Lewis v. Philip Morris Inc.***, 355 F.3d 515, 520-21 (6th Cir. 2004); and ***Hinkelman v. Shell Oil Co.***, 962 F.2d 372-378-79 (4th Cir. 1992), in support of its assertion that "every federal court that has interpreted 'services or facilities' in Section 2(e) has done so in a way that would exclude package sizes."

First of all, a reading of each of these cases reveals that none of them contain any language that even inferentially "would exclude package sizes" as a service or facility covered by Section 2(e). To the contrary, **each of the three cases cited by Clorox at pages 7-8 of its brief** has favorably and expressly referenced the F.T.C. guidelines, including its reference to "special packaging or package size" as services or facilities covered by Section 2(e):

> ***Portland 76 Auto/Truck Plaza, Inc. v Union Oil Co. of Cal.***, 153 F.3d 938, 945 (9th Cir. 1998);
>
> ***Lewis v. Philip Morris Inc.***, 355 F.3d 515, 522 (6th Cir. 2004); and
>
> ***Hinkelman v Shell Oil Co.***, 962 F.2d 372, 378-79 (@ footnote 9) (4th Cir. 1992).

More importantly, each of the following cases has also favorably and expressly referenced the F.T.C. guidelines, including its reference to "special packaging or package size" as services or facilities that would be covered by Section 2(e):

Harper Plastics, Inc. v. Amoco Chemicals Corp., 617 F.2d 468, 472, (7th Cir. 1980);

Major Mart, Inc. v. Mitchell Distribg. Co., Inc., 46 F. Supp. 3d 639, 665 (S.D. Miss. 2014);

Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC, 484 F.3d 865, 872 (6th Cir. 2007);

Hinkleman v. Shell Oil Co., 962 F.2d 372, 379 (4th Cir. 1992), as amended (July 21, 1992);

Carlo C. Gelardi Corp. v. Miller Brewing Co., 502 F. Supp. 637, 649 (D.N.J. 1980); and

Cecil Corley Motor Co., Inc. v. Gen. Motors Corp., 380 F. Supp. 819, 850 (M.D. Tenn. 1974).

Clorox has offered no authority in support of its contention that this case involves a substantial ground for difference of opinion. Contrary to its assertion, the courts have consistently cited favorably to the FTC Guides For Advertising Allowances And Other Merchandising Payments And Services, 16 C.F.R. Part 240, §240.7, as a non-exclusive list of services and facilities covered by sections 2(d) and 2(e) of the Robinson-Patman Act.

At page 8, Clorox references notes from 25 years ago created by the FTC when it adopted the 1990 Guide which is no longer in effect. That version of the Guide, found at 55 Fed. Reg. 33651, 33654 (Aug. 17, 1990), like the current version, expressly includes special packages or package sizes in its list of examples of promotional services that constitute covered services or facilities under 2(e). While Clorox suggests that the inclusion of package sizes in that list was a close call, the FTC, in 1990, went out of its way, at page 33654, to note that it did not want to include any ambiguous service or facility in its list of examples. It then proceeded to expressly

include package sizes in the list of promotional services and facilities provided in the final 1990 draft of § 240.7.

Strangely, Clorox further argues, at page 8 of its brief, as follows:

> "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)."

Clorox offers no citation to FTC records to support these allegations. Woodman's can find nothing in the record indicating that the FTC declined to cite package sizes as an example of a covered promotional service or facility. To the contrary, like the 1990 draft of § 240.7 of the guide, the language of the current FTC Guide, a copy of which is on file as Appendix 1 to Doc. 37, also expressly notes at page 14 of 21, that the list of examples of "promotional services or facilities covered by sections 2(d) and 2(e) include . . . Special packaging, or package sizes..."

The purpose of Section 13(e) of the Act is to make sure that services or facilities made available by sellers, like Clorox, that assist customers, like Woodman's and the club stores, to sell products to the ultimate consumer are made available to all competing retailers, including those who purchase from wholesalers. Because large packages customarily have lower unit costs, and because there are customers who prefer the convenience of purchasing products in larger packages, larger packages of products make them more attractive to the ultimate consumer, and, as a consequence, make it easier for sellers like Woodman's and the club stores to sell Clorox products. Clearly, "package size" constitutes a promotional service that should and does qualify for protection under Section 13(e). Clorox has offered nothing to persuade the Court that this is not the case or that there is a substantial difference of opinion on the question sufficient to justify certification of the question to the Seventh Circuit.

Next, at page 9 of its brief, Clorox asserts, incorrectly, that "the Court noted that Section 2(d) of the Robinson-Patman Act is not really at issue, and the Plaintiff has not pursued a claim under Section 2(a). *Id.* at 1 n.1." This is not what the Court said. Rather, this Court said the following, at footnote 1 on page 1 of its Opinion and Order of February 2, 2015, [Doc. 50]:

> "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." (Emphasis supplied.)

The Court neither said, nor even inferred, that Section 2(d) was not at issue in this case. Clearly, Woodman's has stated and still intends to pursue its Claims for Relief under § 13(d) and (e), including Claims for Relief 1, 2, 3, 5 and 6 which are largely based upon § 13(d).

Contrary to Clorox's assertion at page 9 of its brief, the resolution of the issues raised by Clorox's petition to certify for review the Court's decision of February 2, 2015 [Doc. 50], will delay, rather than expedite, the completion of this litigation. Counsel for Woodman's anticipates that certifying this matter for interlocutory review by the Seventh Circuit would realistically add a year and a half to the time needed, and significantly increase the expenses required to complete this litigation.

In its Opinion and Decision on Clorox's first motion to dismiss, this Court found that "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." [Doc. 50, p. 10]. Clorox has failed to make any showing, let alone a compelling one, that "the ruling of the Court on that law is

contestable." In order for the law to be contestable, there must be competing authorities. Clorox has failed to establish the existence of any competing authorities.

This Court has already resolved the question of whether package size constitutes a promotional service which must be made available on proportionally equal terms. The facts needed to establish Woodman's right to relief on this claim will not significantly lengthen the time needed for discovery or trial.

Clorox offers nothing to show that there is substantial ground for difference of opinion on the issues arising out of the Court's Opinion and Order of February 2, 2015 [Doc. 50]. A second opinion by the Court of Appeals will unduly extend the time needed to resolve this litigation, and will do nothing to reduce the cost of this litigation. Clorox's request to certify that Order should be denied.

II. CLOROX FAILS TO SATISFY THE REQUIREMENTS FOR INTERLOCUTORY REVIEW OF THE COURT'S APRIL 27, 2015, DENIAL OF THE SECOND CLOROX MOTION TO DISMISS.

Starting at page 9 of its Brief [Doc. 90], Clorox asks the Court to certify the issues decided by the Court in its April 27, 2015, Opinion and Order [Doc. 77]. Specifically, Clorox seeks appellate review of the Court's decision that a retailer remains a "purchaser" under § 13(e) of the Act, even though a manufacturer refuses to conduct any sales with that retailer, if that retailer obtains the manufacturer's products from independent wholesalers.

Clorox asserts, at pages 9-10 of its brief [Doc. 90], that a reversal by the Seventh Circuit is controlling because it would "certainly conclude the litigation on [the Robinson-Patman] claims." This argument overlooks the significance of the § 1 Sherman Act claim raised by Woodman's in its First Amended Complaint [Doc. 78]. Specifically, as noted above, Woodman's has asserted, at paragraph 74 of that First Amended Complaint, that Clorox

terminated Woodman's as a customer in order to further the conspiracy to exclude Woodman's from competition with as-yet unnamed club stores in the sale of large packs of Clorox products. Woodman's asks the Court, at paragraph 6 of its prayer for relief, for

> 6. An injunction enjoining Clorox from refusing to sell Clorox products directly to Woodman's and from engaging in the type of actions described in Document 24 seeking to exclude Woodman's and other retailers from competition in the retail sale of Clorox large pack products, in violation of 15 U.S.C. § 1.

If the Court agrees that Clorox terminated Woodman's as a direct purchasing customer in order to further a conspiracy to exclude Woodman's from competition in the retail sale of Clorox large pack products, it can enjoin Clorox from refusing to sell Clorox products to Woodman's. Thus, even if the Court of Appeals would reverse the Court's decision, such a decision would not, by itself, resolve the Robinson-Patman Act claims raised by this litigation. Woodman's would, under such an order, remain a direct purchasing customer of Clorox. Such an outcome would render moot Clorox's contention that it rendered this litigation moot when it stopped selling directly to Woodman's.

Clorox is asking this Court to certify to the Seventh Circuit a question that may be rendered moot by decisions that this Court has not yet had an opportunity to address. Specifically, Clorox has filed its Defendants' Motion To Dismiss Amended Complaint [Doc. 84] on May 18, 2015, in which it asserts that Woodman's Sherman Act claims fail to state a claim upon which relief can be granted. As part of the docketing of that motion, the Court attached a briefing schedule directing Woodman's to file its Brief in Opposition to that motion on or before June 8, 2015, and directing Clorox to file its Brief in Reply on or before June 18, 2015. Because the briefing on Clorox's Motion to Dismiss is still ongoing, it is premature to conclude how the Court will rule on that motion.

Once this Court rules on the Clorox motion to dismiss the Sherman Act § 1 claim, its ruling would only constitute a ruling that the Amended Complaint had or had not stated a claim upon which relief could be granted. If the Court rules against Woodman's, Woodman's could still petition the Court for leave to amend its complaint. Consequently, without a final ruling by this Court on Woodman's Sherman Act § 1 claim, it is premature for the Court to attempt to conclude, at this time, that the question raised by the Court's Opinion and Order of April 27, 2015 [Doc. 77], which Clorox wants it to certify is indeed a "controlling" question.

Clorox next argues, at page 9 of its Brief, that the question before the Court is strictly a pure question of law that the Court of Appeals can resolve quickly, without any facts in dispute. It then argues, incongruously, at page 10, that even if the Seventh Circuit agrees with the Court's holding on what constitutes a "purchaser," the efforts of the parties to develop the record on appeal would be of benefit to them once the file was remanded to the trial court for proceeding.

Records are not made at the appellate level. The record to be relied upon by the Seventh Circuit will be the record sent to them by this Court. If this case is certified to the Seventh Circuit, whatever discovery will be needed for a trial will need to be done after this matter is returned to the trial court. Certifying the case to the Court of Appeals will only postpone until a later date the point in time at which counsel can do the discovery needed to prepare the case for trial.

Woodman's needs to reiterate, however, that a certification of this case to the Seventh Circuit before the Court makes a final ruling upon the Sherman Act § 1 claim will be premature in that it will be asking the Seventh Circuit to rule upon a potentially moot question.

At page 10, Clorox next argues that it is crucial that the ruling in ***FTC v. Fred Meyer, Inc.***, 390 U.S. 341 (1968), did not involve a scenario in which a manufacturer ceased all ties with

its former customer. Clorox argues that the combination of the Court's two rulings create a heretofore unheard of obligation, compelling a manufacturer that has ceased all direct business with a customer nonetheless to make available to a wholesaler who sells to the former customer every size of every product it manufactures.

The Court has ruled that Woodman's has stated a claim upon which relief can be granted when it asserts that, under § 13(e), a manufacturer selling any size of a product to a customer must understand that doing so will obligate it to make all size packages of that product available to that customer, if the customer wishes to purchase that product. The Court has further ruled that Woodman's has stated a claim upon which relief can be granted when it asserts that, under the ruling in ***FTC v Fred Meyers, Inc.***, 390 U.S. 341(1968), that same manufacturer, who sells any size of a particular product to a wholesaler, must make available to every customer purchasing from that wholesaler, on proportionally equal terms, every promotional service or facility that the manufacturer provides to a direct purchaser competing with that customer.

Fred Meyers, supra, is controlling law. Neither this Court nor the Court of Appeals has the power to overrule that decision. ***Agostini v. Felton***, 521 U.S. 203, 237-38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Clorox has not cited any authority holding that a manufacturer who decides to stop selling directly to a customer can direct wholesalers to also refuse to sell to that customer. Woodman's is unaware of any such authority.

Fred Meyers does not conflict with the ruling in ***U.S. v. Colgate & Co.***, 250 U.S. 300, 307 (1919), which held that a manufacturer gets to choose its customers. The error in Clorox's analysis lies in the fact that a manufacturer who sells product to a wholesaler is not doing business with the wholesaler's customers. Because Clorox is not doing business with Woodman's when Woodman's chooses to buy Clorox products from wholesalers, the case law

relied upon by Clorox that says a manufacturer can choose its customers is not relevant. Clorox still gets to choose the wholesalers with which it does business.

Because this case does not implicate or conflict with the ruling in ***Colgate***, this is not a case in which there is any ground for a difference of opinion. Clorox offers nothing to show that there is substantial ground for difference of opinion on the issues arising out of the Court's Opinion and Order of April 27, 2015 [Doc. 77]. A second opinion by the Court of Appeals will unduly extend the time needed to resolve this litigation, and will do nothing to reduce the cost of this litigation. Clorox's request to certify this second Order should also be denied.

III. CERTIFICATION OF THIS CASE WOULD NOT REDUCE UNCERTAINTY IN THE MARKETPLACE.

In its final argument, Clorox asserts that the decisions of the Court will have significant ramifications for the larger market. What it appears to argue is that forcing manufacturers and retailers to comply with the provisions of the Robinson-Patman Act will affect the way that thousands of manufacturers conduct business. On its face, Clorox appears to be inviting this Court to forward this case to the Seventh Circuit Court of Appeals based upon the policy implications inherent in compelling compliance with its terms. There are several difficulties inherent in this request.

First, the questions Clorox raises are factual in nature. Whether the Court's ruling will have the impact Clorox suggests is a fact question which this Court has not addressed. Indeed, this Court has not yet had the benefit of Clorox's answer to the Complaint, precluding it from making any findings of fact.

Second, the policy questions raised by Clorox are more properly addressed to the Legislature or the executive branch than to the courts. As noted above, numerous courts have favorably adopted the FTC Guides' list of promotional services or facilities, expressly including

their reference to the listing of "special packaging or package sizes." While those references may likely be considered dicta, since those cases did not involve package size as a critical issue, Clorox has provided no decision by any Court or by the Federal Trade Commission reflecting any dispute over the propriety of the inclusion of package size in a list of promotional services or facilities covered by Section 13(e).

The policy underlying the adoption of 2(d) and 2(e) of the Robinson-Patman Act was expressly discussed in ***Fred Meyers,*** Id. at pp. 350-52:

> "**One of the practices disclosed by the Commission's investigation was that by which large retailers induced concessions from suppliers in the form of advertising and other sales promotional allowances**. The draftsman of the provision which eventually emerged as s 2(d) explained that, even when **such payments were made for actual sales promotional services, they were a form of indirect price discrimination** because the recipient of the allowances could shift part of his advertising costs to his supplier while his disfavored competitor could not. That Congress adopted this view of the practice it sought to eliminate by s 2(d) is demonstrated by the words used by the Senate Judiciary Committee in recommending enactment of the section:
>
> > '**Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances** in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so.'
>
> **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**." (Emphasis supplied.)

The congressional concerns giving rise to the adoption of Sections 2(d) and 2(e) of the Act appear to be reflected in the concerns giving rise to this lawsuit. As noted in the Complaint, at paragraph 14 [Doc.1, p. 5], and in the First Amended Complaint, at paragraph 27 [Doc.78, p. 10]:

> "**Large pack products are** just that, larger containers or packages of a particular product that are typically are **offered to customers at a cost savings per unit of contents over the prices that would typically be paid per unit of that same product when sold in smaller containers or packs**. The product within a "large pack" is of the same quality and grade as the product contained within a smaller pack of that same product." (Emphasis supplied.)

Exclusive access to large packs permits a retailer to offer product at a lower cost than competitors.

Because the Complaint alleges this to be so, and must therefore be assumed to be true for purposes of a motion to dismiss, package size is the type of promotional service or facility that Congress sought to make available to all competitors when it enacted Sections 2(d) and 2(e) of the Robinson-Patman Act. To the extent that Clorox asks that this case be certified to the Court of Appeals because it is troubled by the policy implications of such a ruling, it is asking this Court to disregard or overturn the policy that led to the adoption of those provisions of the Act. With all due respect to this Court and the Court of Appeals, any modification of that policy is properly left to Congress or the executive branch.

Given the significance of the questions raised herein, an appeal seems likely, regardless of the outcome. At page 11 of its brief, Clorox offers up a public policy argument in support of its request for certification. Clorox asserts, and Woodman's concedes, that the litigation has significant ramifications for the larger marketplace.

Woodman's did not bring this litigation solely because of the problems it is having with Clorox as a result of its decision to stop selling large packs of its products to stores that are not in its "club channel." Woodman's confronts on a regular basis an increasing tide of manufacturers who, like Clorox, are willing to violate the Robinson-Patman Act by refusing to sell it large packs of products. Woodman's started this litigation in an effort to resolve an ever-growing problem, one that affects not only Woodman's, but other retailers across the country who must try to compete with club stores on a regular basis.

Will that larger marketplace benefit by a confusing ruling that is the product of piecemeal litigation, or will it be better served if that ruling is obtained at the conclusion of litigation conducted in accordance with the normal order for handling such cases?

Certification of this case will not shorten the duration of the litigation. Nor will it result in a clearer expression of the ultimate answers to the questions raised by this litigation. This is a case in which the parties, and those who are already following its progress through the courts, will benefit from an orderly examination of the law and facts, followed by a ruling of the Court that such an orderly examination will make possible. The Court should deny the request for certification in its entirety.

Dated this 2nd day of June, 2015.

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