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 SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S ORDER CERTIFYING FOR INTERLOCUTORY APPEAL ITS ORDERS DENYING DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

Woodman's Food Market, Inc. (hereinafter "Woodman's) hereby asks the Court to Reconsider its Opinion and Order filed July 7, 2015 [Document #100], in which it granted the Motion of The Clorox Company and The Clorox Sales Company (hereinafter "Clorox") asking this Court to certify for interlocutory appeal two Orders, its February 2, 2015, Order denying Clorox's first motion to dismiss [Document #50], and its April 27, 2015, Order denying Clorox's second motion to dismiss [Document #77].

As grounds for this Motion to Reconsider, Woodman's addresses the Court's attention to statements the Court made at pages 3 - 4 of its July 7, 2015, Opinion and Order [Document #100]. Specifically, the Court made the following two statements:

> First: "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. Although Woodman's contends that the February 2015 order on large-size packaging addresses only two of its seven claims for relief, **all of Woodman's claims relate to the same alleged course of conduct on the part of Clorox: Clorox's decision not to sell Woodman's certain large-sized products.** If the court of appeals disagrees with my decision that large-size packages can constitute a promotional service under §§ 13(d) and (e), then all of Woodman's claims for declaratory and injunctive relief under those subsections go away." (Emphasis supplied.)
>
> Second: "With respect to the standing question, Woodman's argues that because its remaining claim under § 1 of the Sherman Act entitles it to a court order "enjoining Clorox from refusing to sell Clorox products directly to Woodman's," it may again become a direct purchaser with standing to sue under the Robinson-Patman Act. Dkt. 93 at 12. **As Clorox points out, however, it is unclear what authority this court has to order Clorox to resume direct sales to Woodman's as a remedy to a § 1 violation. Woodman's certainly has not cited any authority for such a measure.** Although the court may be able to order Clorox and its alleged co-conspirators to stop specific conduct restraining trade or commerce, ordering Clorox to resume and continue its business relationship with Woodman's is another matter." (Emphasis supplied.)

Woodman's is filing this Motion because it must take issue with the Court's statements on these two points. Specifically, Woodman's contends that a resolution of the large pack issue, either by this Court or by the Seventh Circuit, does not resolve all of the remaining Robinson-Patman Act claims. Additionally, Woodman's contends that it has cited authority expressly authorizing this Court to order Clorox to continue doing business with Woodman's if such an order is required to prevent Clorox from successfully engaging in activities which violate antitrust laws. We will address these two issues in detail below.

I. SECTION 2(D) AND 2(E) OF THE ROBINSON–PATMAN ACT COMPEL SELLERS, LIKE CLOROX, TO NOTIFY BUYERS, LIKE WOODMAN'S, OF THE AVAILABILITY OF ALL PROMOTIONAL SERVICES, DISCOUNTS AND ALLOWANCES IT OFFERS TO SOME BUYERS SO THAT WOODMAN'S CAN ALSO TAKE ADVANTAGE OF THEM.

Sections 2(d) and 2(e) of the Robinson-Patman Act read as follows:

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract 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.**

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to 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.** (Emphasis supplied.)

Section 2(d) imposes upon Sellers, such as Clorox, who provide payments or other consideration to customers, such as competitors of Woodman's, for services or facilities furnished by those competitor customers regarding the processing, handling, sale or offering for sale of products, a duty to make sure that those payments or other consideration are made available to all purchasers, including Woodman's, upon proportionally equal terms. Similarly, Section 2(e) makes it unlawful for Sellers, such as Clorox, to furnish promotional services or facilities to some of its customers without making sure that those terms are made available to all competing purchasers, such as Woodman's, on proportionally equal terms.

A complete copy of The Federal Trade Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C. F. R. § 240.1, 16 CFR § 240.1, which was in effect when the behavior giving rise to this action occurred is attached as Exhibit 5A [Document 1-5] to the Complaint [Document #1]. § 241.10(b) of those Guides states as follows:

> (b) Notice of available services and allowances: **The seller has an obligation to take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances.** Such notification should include enough details of the offer in time to enable customers to make an informed judgment whether to participate. **When some competing customers do not purchase directly from the seller, the seller must take steps reasonably designed to provide notice to such indirect customers.** Acceptable notification may vary. The following is a non-exhaustive list of acceptable methods of notification:
>
> (1) By providing direct notice to customers;
>
> (2) When a promotion consists of providing retailers with display materials, by including the materials within the product shipping container;
>
> (3) By including brochures describing the details of the offer in shipping containers;
>
> (4) By providing information on shipping containers or product packages of the availability and essential features of an offer, identifying a specific source for further information;
>
> (5) By placing at reasonable intervals in trade publications of general and widespread distribution announcements of the availability and essential features of promotional offers, identifying a specific source for further information; and
>
> (6) If the competing customers belong to an identifiable group on a specific mailing list, by providing relevant information of promotional offers to customers on that list. For example, if a product is sold lawfully only under Government license (alcoholic beverages, etc.), the seller may inform only its customers holding licenses. (Emphasis supplied.)

§240.7 of those Guides defines "services or facilities" as follows:

§240.7 Services or facilities.

> The terms *services* and *facilities* have not been exactly defined by the statute or in decisions. **One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer.** Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples—the list is not exhaustive—of promotional services and facilities covered by sections 2 (d) and (e):
>
> - Cooperative advertising;
> - Handbills;
> - Demonstrators and demonstrations;
> - Catalogues;
> - Cabinets;
> - Displays;
> - Prizes or merchandise for conducting promotional contests;
> - Special packaging, or package sizes.

Section 2(d) makes it a violation for a seller to pay a customer for providing any of the foregoing, while 2(e) makes it a violation for a seller to provide such services or facilities to a customer, unless the seller also makes them available to all competitors of that customer on proportionally equal terms. The final item in this non-exclusive list of services or facilities is "special packaging, or package sizes."

The Court has already ruled that "special packaging, or package sizes" does constitute a promotional service. To date, however, this Court has not been asked to address the obligation of Clorox, under § 240.10(b), to "take steps reasonably designed to provide notice to competing customers" [including Woodman's] "of the availability of promotional services and allowances" other than special packaging, or package sizes.

On September 15, 2014, prior to filing this lawsuit, Woodman's wrote to Clorox [Document #1-5] requesting that Clorox provide Woodman's with a copy of its 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 [Document #1-5]. This allegation was raised at paragraph 69 of the First Amended Complaint.

At paragraph 70 of the First Amended Complaint [Document #78], Woodman's further alleged that neither Clorox nor Clorox Sales has provided the list of promotional services and allowances offered to its customers who sell at retail that was requested by Woodman's in Document #1-5. At paragraph 71 of the First Amended Complaint [Document #78], Woodman's further alleged that as a consequence of this failure or refusal, Woodman's has no knowledge as to what promotional services or allowances Clorox is offering to Sam's Club or Costco, depriving Woodman's of the opportunity to take advantage of those promotional services or allowances in order to obtain the most advantageous terms possible for each of those products.

As noted above, Sections 2(d) and 2(e) of the Robinson-Patman Act require that Clorox notify all competing customers of the promotional services and facilities for which it compensates a customer, and that it notify all competing customers of the promotional services and facilities that it provides to a customer, so that they can take advantage of those same programs on proportionally equal terms.

Because Clorox has not provided this information, even after Woodman's had expressly requested that information, Woodman's included, within its requests for relief in this action, its Second Request for Declaratory Judgment. Specifically, at paragraphs 92-93 of its First Amended Complaint, Woodman's sought the following:

92. Woodman's seeks a ruling permanently declaring 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.

93. Woodman's seeks a further ruling permanently declaring 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.

Woodman's also included within its requests for relief in this action its Third Claim for Injunctive Relief. Specifically, at paragraph 119 and at paragraphs 121-123 of its First Amended Complaint, Woodman's sought the following:

119. On information and belief, Clorox will, unless restrained, continue to discriminate by 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 on proportionally equal terms in violation of 15 U.S.C.A. §§ 13(d) and 13(e).

121. As a direct and proximal result of such unlawful conduct, Woodman's will be threatened with injury in its business and property in that, unless Woodman's has notice of the availability of such discounts, allowances and promotional services being offered to its competitors, it will be unable to take advantage of such programs in order to purchase products of comparable grade and quality to those being sold to its competitors at comparable prices and on comparable terms, thereby damaging Woodman's ability to compete with those favored customers.

122. That unless Clorox is so restrained, Woodman's is threatened with the loss of its customers to Sam's Club and Costco because they will be able to offer Clorox products at lower prices than Woodman's can offer.

123. Woodman's is entitled to injunctive relief against such behavior under 15 U.S.C.A. § 26.

To date in this action, the Court has not been called upon to address the issues raised in these two claims for relief. While large package sizes constitutes one of many possible promotional services or facilities covered by the Robinson-Patman Act, it does not represent an exhaustive list all of the promotional services or facilities that Clorox would be obligated to disclose to Woodman's in order to comply with its obligations under Sections 2(d) and 2(e) of the Robinson-Patman Act or § 241.10(b) of The Federal Trade Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C. F. R. § 240.1.

Because this is so, a reversal by the Seventh Circuit of this Court's determination that large packs constitute a promotional service covered by §§ 2(d) and 2(e) of the Robinson-Patman Act would not "likely dispose of Woodman's Robinson-Patman Act Claims requiring reversal of any final judgment in Woodman's favor" as the Court stated at page 2 of its July 7, 2015, Opinion and Order [Document #100]. Until this Court addresses the substance of these two Claims for Relief, it would be premature for the Court to hold that these Robinson-Patman Act claims are subject to dismissal in the event of a reversal by the Seventh Circuit.

II. THE COURT HAS THE AUTHORITY TO ORDER CLOROX TO DISCONTINUE AN UNLAWFUL REFUSAL TO DEAL.

On pages 3-4 of its July 17, 2015 Opinion & Order [Document #100], the Court made the following points and posed the following queries:

> With respect to the standing question, Woodman's argues that because its remaining claim under § 1 of the Sherman Act entitles it to a court order "enjoining Clorox from refusing to sell Clorox products directly to Woodman's," it may again become a direct purchaser with standing to sue under the Robinson-Patman Act. Dkt. 93 at 12. As Clorox points out, however, it is unclear what authority this court has to order Clorox to resume direct sales to Woodman's as a remedy to a § 1 violation. Woodman's certainly has not cited any authority for such a measure. Although the court may be able to order Clorox and its alleged co-conspirators to stop specific conduct restraining trade or commerce, ordering Clorox to resume and continue its business relationship with Woodman's is another matter. [Doc 100, pp. 3-4].

The Court acknowledges that it likely has the authority "to order Clorox and its alleged co-conspirators to stop specific conduct restraining trade or commerce." That authority is derived from 15 U.S. Code § 26, which provides in relevant part as follows:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue."
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> [15 U.S. Code § 26].

Woodman's maintains that the authority of the Court "to order Clorox and its alleged co-conspirators to stop specific conduct restraining trade or commerce" includes the authority to enter all injunctive relief necessary to cease what it determines to be an unreasonable restraint of trade. Woodman's has alleged and maintains that Clorox terminated direct sales to, and unlawfully refuses to deal with, Woodman's in furtherance of its conspiracy with two or more club stores to limit the sale of certain products to fellow conspirators. If the Court finds in favor of Woodman's on this claim, it has the authority to order Clorox to cease all behavior and conduct undertaken in furtherance of the conspiracy, including its unlawful refusal to deal with Woodman's.

Clorox relies on the decision of the U.S. Supreme Court in ***United States v. Colgate & Co.***, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919). However, that decision is not controlling here. The right of a party to choose its business partners has never been absolute. The ***Colgate*** court was careful to recognize in its decision that there was no unlawful conspiracy at issue.

> "The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do. **There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually**."
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> ***United States v. Colgate & Co.***, 250 U.S. 300, 305-06, 39 S. Ct. 465, 467, 63 L. Ed. 992 (1919). (Emphasis supplied).

The limited scope of the ***Colgate*** right to choose one's business partners was later recognized by the Supreme Court in ***Fed. Trade Comm'n v. Beech-Nut Packing Co.***, 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922). The Court noted that "[i]n referring to the Colgate Case we said:

> 'The court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Company v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Co. made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.'
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> ***Beech-Nut***, 257 U.S. at 452.
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> By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. **He may not, consistently with the act, go beyond the exercise**

> **of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.**
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> ***Beech-Nut***, 257 U.S. at 452-53. (Emphasis supplied).

Woodman's acknowledged in its brief that "[a]n independent decision by Clorox to terminate direct sales to Woodman's may not have violated the anti-trust laws. However, Clorox is not entitled to make such a decision in concert with others." [Document #96, p. 31]. Woodman's maintains that, as may be inferred from the Rexing Affidavit [Document #24], Clorox's decision to terminate direct sales to Woodman's was not independent, but rather, was undertaken in furtherance of its conspiracy with as-yet unnamed club stores to unlawfully restrain trade in the retail sale of large pack products. Termination was, in fact, a "continuance" of Clorox's concerted refusal to deal with Woodman's. Clorox's concerted refusal to deal started with its refusal to sell large packs to Woodman's. It culminated with the 02/24/15 termination of direct sales.

The Court stated in its decision that Woodman's has not cited any "authority this court has to order Clorox to resume direct sales to Woodman's as a remedy to a § 1 violation." Because Woodman's was responding to a motion to dismiss and is not asking the Court to issue such relief at this stage of the proceedings, Woodman's did not address its available remedies in its brief opposing Clorox's motion to dismiss its Sherman Act claims. That said, authorities cited by Woodman's in Section IV of its brief [Document #96, pp. 30-37) contain support for the proposition that the Court may order Clorox to discontinue its unlawful, concerted refusal to deal with Woodman's.

Woodman's cited the decision in ***Klor's, Inc. v. Broadway-Hale Stores, Inc.,*** 359 U.S. 207, on multiple occasions in Section IV of its brief. In ***Klor's***, the Supreme Court did not

address the relief to which the plaintiff was entitled. However, plaintiff requested injunctive relief in the trial court. The availability of such relief was not contested by the defendant, and the Court concluded as follows:

> Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.[7] Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which 'tend to create a monopoly, " whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20. ***Klor's, Inc. v. Broadway-Hale Stores, Inc.,*** 359 U.S. 207, 212-14, 79 S. Ct. 705, 709-10, 3 L. Ed. 2d 741 (1959).

In ***Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.***, 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985), cited in Document #96 at pp. 34-35, the U.S. Supreme Court stated as follows:

> "Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." Sullivan, *supra,* at 261-262. See, *e.g., Silver, supra* (denial of necessary access to exchange members); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961) (denial of necessary certification of product); *Associated Press v. United States,* 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (denial of important sources of news); *Klor's, Inc., supra* (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, *Silver, supra; Radiant Burners, Inc., supra,* and frequently the boycotting firms

> possessed a dominant position in the relevant market. *E.g., Silver, supra; Associated Press, supra; Fashion Originators' Guild of America, Inc. v. FTC,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941). See generally Brodley, Joint Ventures and Antitrust Policy, 95 Harv.L.Rev. 1523, 1533, 1563-1565 (1982). In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote."
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> ***Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.***, 472 U.S. 284, 293-94, 105 S. Ct. 2613, 2619-20, 86 L. Ed. 2d 202 (1985).

If "directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" constitutes a per se violation of § 1 of the Sherman Act, certainly the Court has the authority to remedy such a violation by ordering that the co-conspirators discontinue the group boycott.

In ***Times-Picayune Pub. Co. v. United States***, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953), cited on page 32 of Woodman's brief, the Supreme Court found that the evidence was insufficient to establish the specific intent essential to sustain an attempt to monopolize under Section 2 of the Sherman Act. However, as indicated in the opening paragraph of the decision, the practical effect of the District Court order was that it required the defendant newspaper to accept advertising from customers it had previously rejected. Neither party challenged the authority of the District Court to do so, and the decision includes no indication that such relief was unavailable. See ***Times-Picayune Pub. Co. v. United States***, 345 U.S. 594, 596-98, 73 S. Ct. 872, 874-75, 97 L. Ed. 1277 (1953).

Finally, in ***Lorain Journal Co. v. United States***, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951), cited on page 32 of Woodman's brief, the United States Supreme Court upheld the issuance of an injunction requiring the newspaper defendant to accept advertising from businesses who also chose to advertise with a certain radio station. Prior to issuance of the

injunction, the newspaper had refused to accept advertising from such businesses. The Supreme Court found that:

> Assuming the interstate character of the commerce involved, it seems clear that if all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station, they would violate ss 1 and 2 of the Sherman Act. Cf. Fashion Originators' Guild v. Federal Trade Comm., 312 U.S. 457, 465, 61 S.Ct. 703, 706, 85 L.Ed. 949; Binderup v. Pathe Exchange, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308; Federal Trade Comm. v. Beech-Nut Packing Co., 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307; Loewe v. Lawlor, 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488; William Goldman Theatres v. Loew's, Inc., 3 Cir., 150 F.2d 738. It is consistent with that result to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of s 2 when it uses its monopoly to destroy threatened competition.
>
> **The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. 'But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.'** American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358, 41 S.Ct. 499, 500, 65 L.Ed. 983. **The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise of a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. 'In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal'.** (Emphasis supplied.) United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992. See Associated Press v. United States, 326 U.S. 1, 15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013; United States v. Bausch & Lomb Co., 321 U.S. 707, 721—723, 64 S.Ct. 805, 812, 813, 88 L.Ed. 1024.
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> ***Lorain Journal Co. v. United States,*** 342 U.S. 143, 154-55, 72 S. Ct. 181, 186-87, 96 L. Ed. 162 (1951). (Emphasis supplied).

Lorain Journal establishes the authority of the Court to order a private enterprise to discontinue a refusal to deal by affirmatively requiring that it conduct business with companies with which it would otherwise decline to do business. It is not necessary that Woodman's

establish that the Court would or should do so here. It is sufficient that the Court would have the authority to do so in the event Woodman's establishes that it is eligible for such relief.

The conspiracy between Clorox and the as-yet unnamed club stores involves a concerted refusal to deal with Woodman's. ***Lorain Journal*** establishes the authority of the Court to order a private litigant to discontinue an unlawful refusal to deal. The practical effect of the entry of such an order in this action would be to compel Clorox to resume direct sales to Woodman's.

To the extent the Court's perception that such relief may be unavailable to Woodman's may have impacted its decision granting Clorox's interlocutory appeal motion, Woodman's respectfully requests the Court to reconsider the same.

CONCLUSION

Woodman's recognizes that the decision whether to certify these questions to the Seventh Circuit Court of Appeals for interlocutory review lies within the discretion of the trial court. Woodman's further recognizes that the Court can still certify this matter for interlocutory review even if it agrees with all of the arguments raised in this Motion for Reconsideration. Woodman's brings this motion, first, because the Court can, if the arguments raised herein are sufficiently persuasive, reverse its earlier ruling to certify these two questions.

More importantly, however, the reasoning of the Court suggests, in what would appear to be *dicta*, that decisions have been made by the Court which would be premature relative to the viability of other Robinson-Patman Act claims, which have not yet been argued before the Court on their respective merits. Woodman's is concerned that its failure to raise its concerns today could subsequently be interpreted by the trial court as acquiescence by Woodman's in the July 7, 2015, ruling of this Court, justifying a conclusion by this Court that Woodman's had waived its right to pursue relief on those Robinson-Patman Act claims which have not yet been addressed

by counsel following a reversal by the Seventh Circuit of this Court's conclusion that large packs constitute a promotional service.

If this argument does not persuade the Court to reverse its ruling to certify its decision on the first motion to dismiss to the Seventh Circuit, Woodman's now seeks to preserve its right to pursue its other Robison-Patman Act claims following an adverse ruling by the appellate courts.

Woodman's is also concerned that it may not have adequately informed the Court that the authority it previously offered to the Court does, indeed, provide ample precedential judicial authority for the proposition that this Court has the power to do those things necessary to restrain unlawful activity calculated to accomplish anti-competitive objectives. Necessarily included within that authority is the power to enjoin boycotts seeking to exclude Woodman's from competition in the sale of large pack products.

Dated at Madison, Wisconsin, this 23rd day of July, 2015.

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

By: */s/ John A. Kassner*
John A. Kassner,
State Bar Number: 1014336
jkassner@vonbriesen.com

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

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)

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