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

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| Woodman's Food Market, Inc.,<br><br>Plaintiff,<br><br>v.<br><br>The Clorox Company,<br><br>and The Clorox Sales Company,<br><br>Defendants. | Civil Action No. 14–CV–734 |

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Defendants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") respectfully submit this Brief in support of their Motion to Dismiss Plaintiff Woodman's Food Market, Inc.'s ("Plaintiff") Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

## INTRODUCTION

In August of this year, Clorox adopted the type of distribution program that manufacturers throughout the country use every day. Clorox determined that it could meet customer demand and lower its costs by selling different sizes and packaging formats of its products through different types of retailers.

Plaintiff asks this Court to adopt a new rule that would make this ubiquitous distribution format a *per se* violation of federal antitrust law. Plaintiff does not dispute that a manufacturer has the absolute right to decline to sell any retailer *all* sizes of a particular product line. *See United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.3d 468, 470–71 (7th Cir. 1980). Plaintiff nonetheless asks the Court to expand the Robinson-Patman Act to provide that a manufacturer that sells *any* item in a product line to *any*

retailer violates the federal antitrust laws if the manufacturer does not offer to sell that retailer *every* item in that product line.

Not surprisingly, no federal court has ever adopted such a sweeping and anticompetitive restriction on commerce. Nor could it, because such an expansion of the antitrust laws would contradict the Supreme Court's holdings that protecting "*interbrand* competition"—*i.e.*, competition among different brands of similar products—"is the 'primary concern of antitrust law,'" and that the Robinson-Patman Act "signals no large departure from that main concern." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180–81 (2006) (quoting *Cont'l T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51–52, n.19 (1977)) (emphasis added). Indeed, Plaintiff's proposed new antitrust rule runs headlong into the Supreme Court's caution that courts "resist interpretation[s]" of the Robinson-Patman Act that are "geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Id.*

Given the legal infirmities of Plaintiff's approach and the damage that it would do to competition and consumers, it comes as no surprise that Plaintiff's Complaint fails to state a claim. Plaintiff alleges that Clorox has violated Sections 2(d) and 2(e) of the Robinson-Patman Act, based entirely on Clorox's decision not to sell Plaintiff 11 SKUs out of the more than 480 that Plaintiff has purchased from Clorox. Complaint ¶ 14. Plaintiff's Complaint also makes reference to a Section 2(a) violation, though Plaintiff has not sought preliminary injunctive relief on that basis.

Clorox moves to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiff has failed to adequately plead virtually every element of its claims under Sections 2(d), 2(e), and 2(a). The Complaint fails to state a claim under Sections 2(d) and 2(e) because the conduct to which Plaintiff objects—the sale of larger-volume products

to certain customers—does not constitute the provision of a "service" or "facility" under either section. The Complaint does not state a claim under Section 2(a) because it fails to plead, as it must, that Clorox charged different prices to different customers for the same product, and that such pricing harmed competition. Instead, the Complaint alleges that Clorox sold *different* products to different retail customers, and it provides only boilerplate assertions about any competitive effects. As a matter of law, these mere "labels and conclusions" are deficient and require dismissal. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007).

## BACKGROUND[1]

### I. The Parties

The Clorox Company and The Clorox Sales Company are Delaware corporations based in Oakland, California that manufacture and market consumer and professional products. Clorox's offerings include branded bleach and cleaning supplies, charcoal, household cleaners, plumbing fluid, cat litter, sandwich bags, wraps and containers, salad dressings and sauces, natural personal care products, and water-filtration products. Complaint ¶ 3. Clorox's professional brands include cleaning and infection-control products for the health care industry. Clorox sells its products to more than 30,000 supermarkets and other retailers in the United States, which range from small convenience stores to very large retailers, such as Wal-Mart, Costco, and Sam's Club, to e-retailers, including Amazon. Clorox manufactures more than 1,000 stock-keeping units ("SKUs").

Plaintiff Woodman's Food Market is a retailer with 15 locations in Illinois and Wisconsin. Plaintiff purchases more than 480 different SKUs from Clorox. Complaint ¶ 14.

[1] Clorox limits its discussion of the facts in this motion to those alleged in and attached to Plaintiff's Complaint, as well as facts readily available in the public record. Clorox will provide additional facts in its response to Plaintiff's motion for a preliminary injunction. However, Clorox respectfully requests that the Court withhold decision on Plaintiff's request for a preliminary injunction until it resolves Clorox's motion to dismiss.

## II. Clorox's Channel Strategy

In early 2014, Clorox management decided to review the company's distribution strategy in order to better serve its customers and consumers. Clorox's review was prompted by two factors. First, Clorox's retail customers were requesting that Clorox provide them with differentiated products. Complaint ¶ 29 & Exhibit 3. Second, Clorox believed that revising its distribution strategy would streamline its distribution system, reducing costs and making a greater range of products available to consumers. *Id.* Clorox determined that it could optimize its supply chain by distinguishing between various retail and distribution channels, including "General Market" and "Club" Stores. Id. This strategy was designed to make Clorox's products more competitive, grow its sales, and improve the efficiency of its distribution network. Id. Notably, Plaintiff acknowledges that Clorox explained to Plaintiff that the channel program had the following procompetitive objectives:

- "simplify [Clorox's] go to market strategy";
- "streamline operations";
- "deliver [Clorox's] best cost . . . by regulating the products we sell to customers/channels";
- meet "customers' desires for differentiated products from manufacturers"; and
- "create[ ] the right assortment of sizes and brands for customers/channels based on their shoppers and maximize[ ] both the customer and Clorox sales."

*Id.*

To implement this channel program, Clorox developed distinct SKU lists that it would sell to General Market and to Club Stores. *Id.* This distribution strategy is similar, if not identical, to that used by thousands of manufacturers across the United States. Clorox categorized Plaintiff in the General Market channel, as it did for all supermarkets. Clorox put the Club Stores—Costco and Sam's Club—in a different channel.[2] *See id.*

[2] Clorox also classified BJ's Wholesale Club as a Club Store. Sales to BJ's are not relevant to this case because BJ's stores are not located in the states where Plaintiff operates. *See, e.g., Best Brands*

In early September 2014, Clorox officials met with Plaintiff to discuss the change. Clorox explained that as a result of its new distribution model, Clorox would not fill further orders from Plaintiff on the following eleven Club Store SKUs:

- 192-count Glad quart-size freezer bags;
- 112-count Glad gallon-size freezer bags;
- 144-count Glad gallon-size food storage bags;
- 460-count Glad sandwich-size food storage bags;
- 150-count Glad tall kitchen drawstring bags;
- 200-count Glad tall kitchen quick-tie bags;
- 42-pound Fresh Step scoop cat litter;
- 42-pound Scoop Away complete cat litter;
- 2-pack of 64-ounce Kingsford lighter fluid;
- 3-pack of 130-ounce Clorox regular concentrated bleach; and
- 2-pack of 40-ounce Hidden Valley ranch dressing.

Complaint ¶ 16.[3]

Plaintiff then brought this lawsuit on October 28, 2014.

## ARGUMENT

Clorox moves to dismiss Plaintiff's Complaint in its entirety because Plaintiff has failed to allege virtually all of the required elements for each of its claims.

### I. Legal Standard

A complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[F]ormulaic recitation of the elements of a cause of action" is not

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*Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 585–86 (2d Cir. 1987) (holding that no Robinson-Patman Act liability is possible where purchasers operate in different territories).

[3] Clorox also placed a 2-pack of 20-pound Kingsford charcoal in the club channel, but Clorox allowed Plaintiff to continue purchasing that SKU. Complaint ¶ 31.

sufficient. *Twombly*, 550 U.S. at 555. Factual allegations are presumed true, but "legal conclusion[s] couched as a factual allegation" are not. *Id.* (internal quotation marks omitted).

The Supreme Court has urged courts to take particular care with allegations that, although potentially consistent with illegal conduct, are nevertheless more likely explained by lawful behavior. *See Iqbal*, 556 U.S. at 682–83; *Twombly*, 550 U.S. at 557; *Coalition For A Level Playing Field, L.L.C. v. AutoZone, Inc.*, 737 F. Supp. 2d 194, 215–16 (S.D.N.Y. 2010) (dismissing Robinson-Patman Act complaint because the alleged conduct was equally capable of being lawful). Where the facts alleged in the complaint do not allow the court to infer more than "the mere possibility of misconduct," the complaint will not meet the requirement that the plaintiff "show" it is entitled to relief. *Iqbal*, 556 U.S. at 679.

## II. The Complaint Fails To State A Claim Under Section 2(d) Or 2(e) Of The Robinson-Patman Act

Plaintiff has failed to state a claim for discriminatory furnishing of promotional services or facilities in violation of Sections 2(d) and 2(e).

15 U.S.C. § 13(d) (emphasis added) states that:

> 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 . . . 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.

And 15 U.S.C. § 13(e) (emphasis added) provides:

> 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.

These sections generally prohibit a manufacturer from paying promotional allowances or providing services to a preferred customer in connection with its resale of the manufacturer's goods. *See* American Bar Ass'n, Price Discrimination Handbook 60 (2013). A manufacturer may not, for example, pay to advertise its product in one customer's stores without offering proportionally equal advertising services to its other customers. The purpose of Sections 2(d) and 2(e) is to prevent disguised price discrimination in the form of promotional payment or services. *See George Haug v. Rolls Royce Motor Cars*, 148 F.3d 136, 144 (2d Cir. 1998). Because the two subsections contain substantively similar language, the courts have analyzed them almost identically. *See* Price Discrimination Handbook at 59.

Plaintiff contends that a manufacturer's decision to sell a larger-volume product to one customer but not another implicates Section 2(d) or 2(e). The heart of Plaintiff's argument is that "a large pack of a particular product constitutes the provision of a promotional service [covered by Sections 2(d) and 2(e)] that helps the customer sell a product at retail." Complaint ¶ 15. This contention is wrong as a matter of law.

First, Plaintiff's argument that a large package size is covered by Sections 2(d) or 2(e) conflicts with the plain language of the statute, which refers to "services" and "facilities," not product characteristics such as product size. The courts have not provided a conclusive definition of "services" and "facilities," but those terms must be given a sensible reading that is consistent with ordinary usage. *See Taniguchi v. Kan Pac. Saipan, Inc.*, 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). It is not sensible to read "services or facilities"—as Plaintiff would—to include a SKU of a product that contains a substantially larger volume of a certain kind of item. A 42-pound bag of cat litter is not a "service" or "facility"; it is just a *product*.

Second, Clorox is aware of no federal court decision that has ever adopted Plaintiff's interpretation. In light of the plain meaning of the language of the statute, it is not surprising that federal court cases litigated under Section 2(e) have nothing to do with the type or the size of product sold. Rather, consistent with the legislative history of the Robinson-Patman Act, courts have recognized that "[S]ection 2(e) was aimed at advertising and promotional services." *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1118, 1119 (5th Cir. 1982). Promotional services are things like "fees to vendors if they followed certain guidelines regarding the placement of advertising materials" and "gifts to give away to [ ] purchasers," *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 520–21 (6th Cir. 2004); "marketing or advertising services," *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 379–80 (4th Cir. 1992); "cooperative advertising payments [and] store placement allowances, " *Am. Booksellers Ass'n v. Houghton Mifflin Co.*, No. 94 Civ. 8566, 1995 U.S. Dist. LEXIS 2522, *20–22 (S.D.N.Y. Mar. 3, 1995); or "advance notification of a rebate," *Morris Elecs. of Syracuse, Inc. v. Mattel, Inc.*, 595 F. Supp. 56, 64–65 (N.D.N.Y. 1984).[4]

The only authority that Plaintiff cites to support its position is a nearly 75-year old decision by the Federal Trade Commission. *See In re Luxor, Ltd.*, 31 F.T.C. 658 (1940).[5] But that decision does not provide a sound basis for asking this Court to adopt a sweeping expansion

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[4] *See also Monsieur Touton Selection v. Future Brands, LLC*, No. 06 Civ. 1124, 2006 U.S. Dist. LEXIS 52966, at *18 (S.D.N.Y. Aug. 1, 2006) (Sections 2(d) and 2(e) "were designed to prohibit indirect price discrimination in the form of advertising and other promotional allowances"); *Ashkanazy v. Rokeach & Sons, Inc.*, 757 F. Supp. 1527, 1553 (N.D. Ill. 1991) (holding that "sections 2(d) and 2(e) of the Act proscribe indirect price discrimination effected through discriminatory advertising and service allowances"); *John Peterson Motors, Inc. v. Gen. Motors Corp.*, 613 F. Supp. 887, 898 (D. Min. 1985) ("The weight of authority appears to conclude . . . that § 2(e) was aimed at advertising, merchandising, and other promotional services . . . .").

The Seventh Circuit has also held that, in some circumstances, a manufacturer can be liable under Section 2(e) for providing timely delivery to some purchasers but consistently late delivery to others. *See Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 588 (7th Cir. 1971). But this case is not about delivery.

[5] The FTC reached a similar conclusion in *In re Gen. Foods Corp.*, 52 F.T.C. 798 (1956).

of the Robinson-Patman Act. It is a decision by an administrative agency that is not binding on this (or any other) Court. Moreover, the FTC recently did not endorse *Luxor* in its revised "Fred Meyer" Guidelines. *See* Guides for Advertising Allowances and Other Merchandising Payments and Services, 79 Fed. Reg. 58245 (Sept. 29, 2014). In commentary to the revised Guidelines, the Commission addressed a similar packaging issue and merely observed that no federal court has "squarely addressed the question of whether the provision of special packaging or package sizes to only some competing customers may violate section 2(e) of the Act." *Id.* at 58248. The Commission retained the phrase "*special* packaging, or package sizes" in its list of items potentially covered by Section 2(e). *Id.* (emphasis added). But the FTC suggested, consistent with the modifier "special," that packaging may fall within Section 2(e) only as it relates to advertising and promotional programs for a product. To illustrate this limitation, the FTC provided a new example that concerned a seasonal promotion, not a long-term distribution strategy: if, "[d]uring the Halloween season, a seller of multi-packs of individually wrapped candy bars offers to provide those multi-packs to retailers in Halloween-themed packaging," the packaging could be a promotional service covered by Section 2(e). *Id.* at 58249.

Clorox's club-size products are not like Halloween-themed packaging: they are not a temporary device to drive up business during a particular season, they are not a form of advertising, and they are not promotional programs. Club-size products are simply one type of product, which Clorox sells year-round through one channel in order to increase both its own sales and those of its retail customers. Complaint ¶ 29 & Exhibit 3 (noting Clorox's conclusion that the channel program "maximizes both the customer and Clorox sales"). The "Robinson-Patman [Act] does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations." *Volvo*, 546 U.S. at 181 n.4.

Furthermore, the FTC has been backtracking from the policies that underlie the *Luxor* decision for decades. In 1980, the Commission explained that the legislative history of Sections 2(d) and 2(e) "evidences the relatively narrow scope that Congress intended these specific provisions to have." *In re Gibson*, 95 F.T.C. 553, 726 (1980). Accordingly, the Commission concluded that "courts have an obligation to ensure" that the sections are "reasonably, and not expansively, construed." *Id.* Most recently, the FTC recognized that the "Robinson-Patman Act should be construed to be consistent with the antitrust laws generally," which are focused on the protection of *interbrand* competition, not the protection of individual competitors. 79 Fed. Reg. at 58247 (citing *Volvo*, 546 U.S. 164).[6]

Fundamentally, Plaintiff is alleging not that Clorox denied it a service or facility, but that Clorox *refused to deal* with Plaintiff on a small set of SKUs. *See* Complaint ¶ 37 (alleging that Clorox sells "large packs to [Plaintiff's] competitors at retail without making those large packs available to [Plaintiff]"). This allegation is fatal to Plaintiff's claim, because the courts have repeatedly held that a refusal to deal does not violate Section 2(d) or 2(e). *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470–71 (7th Cir. 1980) (holding that the Robinson-Patman Act "does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell"); *see also, e.g., Purdy Mobile Homes, Inc. v. Champion Home Builders*, 594 F.2d 1313, 1318 (9th Cir.

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[6] *Luxor* and *General Foods* are relics of an era when vertical delineations between manufacturers and distributors were considered *per se* anticompetitive and the antitrust laws were used to protect individual companies. For the past three decades the Supreme Court has repeatedly overturned decisions such as *Luxor*, finding that they are inconsistent with the antitrust law's goal of protecting competition. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007) (vertical restraints "can increase interbrand competition by facilitating market entry for new firms and brands"); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (holding that vertical maximum price fixing is not per se illegal because it may have procompetitive benefits); *GTE Sylvania*, 433 U.S. at 54–57 ("[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products").

1979) (holding that a manufacturer's "refusal to sell a line of products to a prospective customer while maintaining sales of the product to other customers is . . . not the type of discrimination prohibited by the Robison-Patman Act"); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 682–83 (10th Cir. 1984); *Fresh N' Pure Distribs., Inc. v. Foremost Farms USA*, No. 11-C-470, 2011 U.S. Dist. LEXIS 136307 (E.D. Wisc. Nov. 28, 2011) (dismissing complaint because a refusal to do business cannot give rise to a Robinson-Patman claim).

The bottom line is that Clorox's channel program will lower costs and increase sales. Manufacturers lawfully adopt such plans openly every day. They are not illegal. *See Volvo*, 546 U.S. at 181 (courts should "resist [an] interpretation [of the Robinson-Patman Act that is] geared more to the protection of [an] existing *competitor*[ ] than to the stimulation of *competition*).[7]

## III. The Complaint Fails To State A Claim Under Robinson-Patman Section 2(a)

Almost as an afterthought, Plaintiff's Complaint includes a handful of references to price discrimination in violation of Section 2(a) of the Robinson-Patman Act. It is not clear whether Plaintiff means to pursue this claim; Plaintiff omits any reference to Section 2(a) in its description of the action and barely references Section 2(a) in a scattering of conclusory allegations in the Complaint. *See* Complaint ¶¶ 30, 57, 59(a), 68, and 78. Plaintiff also excluded its Section 2(a) claim from its motion for a preliminary injunction.[8]

In any event, Plaintiff does not come close to stating a claim for price discrimination. Section 2(a) provides:

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[7] The "meeting competition" defense in Section 2(b)—which protects a seller who furnishes discriminatory promotional services or facilities if that seller acted in response to competition—applies to alleged violations of Section 2(d) and 2(e). *See* 15 U.S.C. § 13(b); *Centex-Winston Corp.*, 447 F.2d at 588 (holding that Section 2(b) "applies to a charge of violating Section 2(e)"). While it is not procedurally appropriate to raise these defenses on a motion to dismiss, if Clorox is required to answer Plaintiff's Complaint, Clorox will assert that defense and reserves its right to do so.

[8] *See* Pl. Motion for Prelim. Inj. 1–2 ("The grounds for the Preliminary Injunction . . . are that Clorox's refusal to sell the products at issue to [Plaintiff] violates 15 U.S.C. § 13(e) . . . .").

> It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . and *where the effect of such discrimination may be substantially to lessen competition* or tend to create a monopoly in any line of commerce . . . .

15 U.S.C. § 13(a) (emphasis added). To state a claim for a violation of Section 2(a), a plaintiff must plead facts sufficient to show three key elements: (1) that the defendant sold two different buyers products of the same grade and quality; (2) that the seller discriminated in price as between the plaintiff and another buyer; and (3) that the discrimination substantially lessened competition. *See Dynegy Mktg. & Trade v. Multiut Corp.*, 648 F.3d 506, 522 (7th Cir. 2011). The Complaint is deficient at every step.

**A. Plaintiff's Complaint Is Not About Products Of Like Grade And Quality**

The Complaint fails to adequately plead that Clorox has discriminated in price "between different purchasers of *commodities of like grade and quality*." 15 U.S.C. § 13(a) (emphasis added). Rather, the entire premise of the Complaint is Plaintiff's dissatisfaction with Clorox's decision to sell Plaintiff *different* SKUs than those that it sells to Club Stores. Complaint ¶¶ 27–29, 34; *see generally Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 710 (8th Cir. 2004) ("Products are not of like grade and quality if there are substantial physical differences in products affecting consumer use, preference or marketability.") (internal quotation marks omitted), *rev'd on other grounds*, 546 U.S. 164 (2006).[9]

Aware of this problem, Plaintiff urges the Court to adopt a new omnibus holding that, under the Robinson-Patman Act, any size SKU of an item (*e.g.*, salad dressing), no matter how

[9] Plaintiff also fails to adequately plead that Clorox completed *two different sales* at different prices. The Complaint says only that Club Stores "*will be* able to buy and sell [club-size SKUs]." Complaint ¶ 36 (emphasis added). Without a specific allegation that two sales have been *completed*, Plaintiff's Section 2(a) claim never gets out of the starting gate. *See Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co.*, No. 10-0124, 2010 U.S. Dist. LEXIS 88958 (E.D. La. Aug. 24, 2010) (dismissing Robinson-Patman complaint because it failed to allege two actual sales; an offer for a discriminatory price arrangement is not sufficient).

small the package, is of the same grade and quality as the largest-size SKU of the product. Clorox is aware of no court that has ever taken this position.[10] And Plaintiff supports it with little more than conclusory allegations that track the language of the statute. *See* Complaint ¶ 59 (arguing that "when [Club] stores are also selling products of a like grade and quality at retail," Clorox is prohibited "from discriminating as to price, under 15 U.S.C.A. § 13(a)"). To the extent that the Complaint does offer specific allegations, it acknowledges that Club Store SKUs are distinct products. That is, Plaintiff alleges that it wants to purchase Club Store SKUs precisely because they are different from other package sizes in terms of consumer use or preference: consumers "prefer to purchase large packs" because of "the convenience of being able to purchase and carry those products home less frequently." Complaint ¶ 38.

**B. Plaintiff's Complaint Is Not About Discrimination In Price**

Relatedly, Plaintiff has not pled that Clorox discriminated *in price* as between Plaintiff and another buyer. Plaintiff alleges that in the future Clorox will charge Costco and Sam's Club a lower "unit price" for certain products than it will charge Plaintiff. Complaint ¶ 36. But ranch dressing, cat litter, and charcoal are not like automotive gasoline—they are not sold "by the ounce," just as sandwich and trash bags are not sold by the bag. Plaintiff's theory, if adopted, would have thousands of manufacturers continually calculating per unit costs across a range of

[10] The American Bar Association's Antitrust Section has taken the contrary position, noting that different SKUs in the same category do not satisfy the "like grade and quality" requirement of Section 2(a). *See* Comments of the Section of Antitrust Law of the ABA in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Robinson-Patman Act Study Issues (April 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_amc-rp.authcheckdam.pdf. ("Enforcement of the RPA Accomplishes Little to Protect Small Businesses as a Group. The RPA specifically does not condemn refusals to deal. It is argued that when faced with a choice between risking RPA liability and simply refusing to sell to small business, many firms do the latter. A firm with a substantial base of larger purchasers can more readily sell to them alone, rather than include small transactions, which introduces the threat of legal liability. *Or it can refuse to deal with smaller purchasers with respect to different product lines, or offer different SKUs for products in the same category to smaller and larger purchasers (so that the "like grade and quality" element of a Section 2(a) claim cannot be met).*") (emphasis added).

different-sized SKUs to determine if they are in compliance with the Robinson Act. This is not the law. Plaintiff has failed to plead that Clorox charged different prices for the same product, an omission that warrants dismissal of Plaintiff's 2(a) claim. *See House of Brides, Inc. v. Alfred Angelo, Inc.*, No. 11 C 7834, 2014 U.S. Dist. LEXIS 1850 (N.D. Ill. Jan. 8, 2014) (dismissing Robinson-Patman complaint because it failed to allege that the plaintiff paid a different price to purchase the defendant's products in any transaction); *Staton Holdings, Inc. v. Russell Athletic, Inc.*, No. 3:09-CV-0419-D, 2009 U.S. Dist. LEXIS 108603, at *24–25 (N.D. Tex. Nov. 20, 2009) (dismissing plaintiff's Section 2(a) complaint because it did not "permit the reasonable inference that [the defendant's] price discrimination was substantial").

**C. Plaintiff's Complaint Does Not Plausibly Plead Harm To Competition**

Finally, and fundamentally, Plaintiff has failed to adequately allege that Clorox has "injure[d], destroy[ed], or prevent[ed] competition." 15 U.S.C. § 13(a). Section 2(a) proscribes only "price discrimination [that] threatens to injure competition." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). The Seventh Circuit has also emphasized that Section 2(a) "is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental." *Am. Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963); *see also Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) ("The Act refers not to the effect upon competitors, but to the effect upon competition in general. That is, analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses.").

In order to plead harm to competition, Plaintiff must at minimum show that "a favored competitor received a *significant* price reduction over a *substantial period* of time." *Volvo*, 546 U.S. at 177 (emphases added). But Plaintiff cannot, because Clorox's channel program took

effect just this fall, and Plaintiff still has Club Store SKUs in stock. Complaint ¶ 43; *cf. Mathew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-cv-04236, 2014 U.S. Dist. LEXIS 95522, at *22 (N.D. Cal. July 11, 2014) (denying motion to dismiss where the complaint pled 16 months of injury).

Moreover, even if Plaintiff could demonstrate a sustained price discrepancy at some point in the future, the bareness of the Complaint makes clear that Plaintiff could never show a reduction in overall competition. Instead of offering market facts, the Complaint merely speculates that "[w]ithout competition from [Plaintiff], Sam's Club and Costco will be able to raise their prices on large pack items." Complaint ¶ 40. But this is just the type of conclusory legal assertion that is not sufficient to sustain a claim under *Twombly*. The Complaint does not allege any of the predicate facts that Plaintiff would need to prove in order to support its hypothesis that Clorox's channel program would reduce competition. At the outset, Plaintiff would need to show some form of market power. *See, e.g.*, *Volvo*, 546 U.S. at 181 (holding that the plaintiff could not show harm to competition in part because "there is no evidence that any favored purchaser possesses market power"); *see generally*, 23A Phillip E. Arreda & Herbert Hovenkamp, Antitrust Law ¶ 2301b, at 7 (3d ed. 2012) ("In the absence of market power, a vertical restraint cannot be anticompetitive."). In this circumstance, the predicate facts to make such a showing would include that:

(1) Costco and Sam's Club are not constrained by competition with each other, or the many other retailers in the regions where Plaintiff's stores are located;

(2) the price of club-size products is not constrained by competition from smaller-size products; and

(3) the price of Clorox-brand products is not constrained by competition from competing brands and private label products.

Aware that none of these conditions exist, and that Clorox and its customers (including Plaintiff) face intense competition, Plaintiff grasps at the fact that it does not charge a membership fee, unlike Costco and Sam's Club. Complaint ¶ 41. But this solitary allegation does not indicate that Clorox's channel program is likely to harm competition. A membership fee is one component of the total retail price of a product and, as shown, Plaintiff has not begun to allege the facts needed to support a reasonable inference that Clorox's channel program would increase prices. Even spotting Plaintiff its flawed one-dimensional price metric, the Complaint does not allege that Plaintiff would charge lower prices for Club Store SKUs than those charged by Costco and Sam's Club, even after accounting for the cost of the membership fees.

In short, Plaintiff has not pled, and cannot plead, that Clorox's channel program will reduce competition, an omission that requires dismissal of its Section 2(a) claim. *See Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1299 (10th Cir. 2008) (affirming dismissal of Robinson-Patman case where plaintiffs "d[id] not allege any facts showing how any of the Individual Defendants' behavior substantially lessens or injures *competition*, but rather plaintiffs allege only injury to themselves"); *Big River Indus., Inc. v. Headwaters Res., Inc.*, 971 F. Supp. 2d 609, 623 (M.D. La. 2013) (holding that a Robinson-Patman complaint was deficient because it failed to allege facts demonstrating that the defendant's policy had an effect on competition); *High Tek USA, Inc. v. Heat & Control, Inc.*, No. 12-CV-00805, 2012 U.S. Dist. LEXIS 100538 (N.D. Cal. July 18, 2012) (dismissing Robinson-Patman complaint because it failed to establish discrimination among companies in direct competition).[11]

[11] Clorox also maintains that its conduct meets the criteria for the "meeting competition" and "cost justification" defenses to Section 2(a) of the Robinson-Patman Act, and may meet the criteria for the "functional availability" defense. *See* 15 U.S.C. § 13(b). In an appropriate pleading, Clorox will establish that even if Plaintiff can establish a *prima facie* violation of Section 2(a), Clorox's conduct was protected by one or more of these defenses.

## CONCLUSION

For these reasons, Clorox respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

Dated: November 20, 2014

s/ Joshua H. Soven

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of November, 2014, I caused a copy of the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
Joshua H. Soven