No. 15-3001

In the United States Court of Appeals for the Seventh Circuit

WOODMAN'S FOOD MARKET, INC.,

Plaintiff-Appellee,

v.

THE CLOROX COMPANY
AND THE CLOROX SALES COMPANY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 14-cv-734-slc – Hon. Stephen L. Crocker

BRIEF FOR DEFENDANTS-APPELLANTS THE CLOROX COMPANY AND THE CLOROX SALES COMPANY

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-3001

Short Caption: Woodman's Food Market, Inc. v. The Clorox Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Clorox Company; The Clorox Sales Company.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Revised: Gibson, Dunn & Crutcher LLP (Thomas G Hungar; Joshua H Soven; Michael R Huston; Justin Epner)

Quarles & Brady LLP (Donald K. Schott; Stacy A. Alexejun; Rachel A. Graham)

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The Clorox Company has no parent. The Clorox Sales Company is a subsidiary of The Clorox Company.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

No publicly held company holds 10% or more stock in The Clorox Company or The Clorox Sales Company.

Attorney's Signature: s/ Thomas G. Hungar Date: 10/26/2015

Attorney's Printed Name: Thomas G. Hungar

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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Attorney's Signature: s/ Joshua H. Soven Date: 10/26/2015

Attorney's Printed Name: Joshua H. Soven

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Attorney's Signature: s/ Michael R. Huston Date: 10/26/2015

Attorney's Printed Name: Michael R. Huston

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Justin Epner Date: 10/26/2015

Attorney's Printed Name: Justin Epner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Table of Contents

Table of Contents
(continued)

Table of Authorities

Cases

Table of Authorities
(continued)

Table of Authorities
(continued)

Table of Authorities
(continued)

Statutes

Administrative Documents

Table of Authorities
(continued)

Other Authorities

Rules

Introduction

Manufacturers across the country have for decades made different-sized packages of goods available for sale to different types of retailers. Manufacturers do this because it enables efficient distribution networks and because having retailers with exclusive offerings helps manufacturers compete against other brands. Protecting that "*[i]nterbrand* competition" is "the 'primary concern of antitrust law.'" *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006) (citation omitted; emphasis added). But the Plaintiff-Appellee in this case, Woodman's Food Market, Inc. ("Plaintiff"), seeks to have this ubiquitous and procompetitive practice declared illegal for no other reason than to benefit itself.

Defendants-Appellants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") manufacture commercial products. Like many manufacturers, Clorox uses a distribution strategy that channels different package sizes of its brands to the retailers that are best suited to them, in order to increase efficiency and compete more effectively. For example, Clorox sells 16 oz. and 36 oz. bottles of Hidden Valley Ranch dressing to grocery stores, whereas it sells a 2-pack of 40 oz. bottles of Hidden Valley Ranch to club stores such as Costco. Clorox generally does not sell to club stores the packages that it sells to grocery stores, and vice versa.

The Supreme Court has emphasized that the Robinson-Patman Act "does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations" and increase its sales. *Volvo*, 546 U.S. at 181 n.4. Yet Plaintiff claims that Section 2(e) of the Act gives it (and every retailer in the country) the

right to purchase every single product, in every size package, that Clorox (and every other manufacturer) produces, thereby upending a distribution strategy that is designed to help Clorox compete effectively against other manufacturers. Before this case, no federal court had ever accepted Plaintiff's interpretation in the 80-year history of the Act.

Plaintiff's interpretation of Section 2(e) of the Robinson-Patman Act is wrong, not least because it is inconsistent with the antitrust laws' goal of protecting competition, not competitors. *Volvo*, 546 U.S. at 180–81. The core of the Robinson-Patman Act is a prohibition (with some important exceptions) on price discrimination—e.g., charging one retailer $10 for a package that the manufacturer sells to a competing retailer for $8. *See* 15 U.S.C. § 13(a). Section 2(e) of the Act, by contrast, is a narrow and rarely litigated provision that prevents manufacturers from discriminating in the provision of "services or facilities" that are "connected with" the resale of a commodity. *Id.* § 13(e). For example, a manufacturer that sells the same package to two retailers may not give a favored retailer a free display case or hire a salesperson to sell the package in the favored retailer's stores. *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959). (Another provision, Section 2(d), prohibits manufacturers from *reimbursing* a favored retailer for promotional "services or facilities" that the retailer buys. 15 U.S.C. § 13(d).)

Plaintiff here objects to Clorox's channel strategy because Clorox purportedly charges Plaintiff a higher "unit price" (e.g., a higher price per ounce of ranch dressing) than it charges on large-size packages sold to club stores. Appendix ("A.") 14–18

(¶¶49–71), A.23 (¶97), A.26–29 (¶¶115–29). But that is a claim of price discrimination that—meritless though it is—must be evaluated under *Section 2(a)*, not Section 2(e). The law is clear that Section 2(e) applies only to "services *unrelated to price*," and must not be construed "to make nugatory the defenses specifically outlined" in Section 2(a) with respect to price. *Chi. Spring Prods. Co. v. U.S. Steel Corp.*, 254 F. Supp. 83, 84–85 (N.D. Ill.) (emphasis added), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966). Plaintiff has sued Clorox under the wrong subsection.

Plaintiff's difficulty is that it cannot state a claim under Section 2(a), because the Act prohibits price discrimination only with respect to the *same product*, not different-quantity packages, and only when the discrimination threatens "substantially to lessen competition." 15 U.S.C. § 13(a). Plaintiff did not plead harm to competition, and throughout months of litigation in the district court, it never showed that Clorox's channel distribution policy has harmed competition *at all*. *See* A.96–97 (district court's finding that Plaintiff failed to show any harm to competition).

Once Plaintiff recognized these shortcomings, it abandoned its Section 2(a) claim, *see* Short Appendix ("S.A.") 1 n.1, and focused its attention on Section 2(e), which does not require pleading harm to competition, *Simplicity Pattern*, 360 U.S. at 68. But Section 2(e) applies only to *separate* benefits that manufacturers might provide to a retailer in "connect[ion] with" the *resale* of a package. *Id.* at 65. An alleged difference in price that Clorox charges for two different-sized packages is decidedly not a "service or facility" that is separate from the products themselves and "connected with" resale.

Moreover, the legislative history of Section 2(e) confirms that it "appl[ies] exclusively to *promotional*" services or facilities, not price differences, and does not cover benefits provided "in connection with the original sale to the purchaser." *Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 909, 910–11 (7th Cir. 1973) (emphasis added). Even if package size could be distinguished from the product itself, therefore, Section 2(e) would still be inapplicable because Clorox's large-size packages are not promotional and are provided as part of the *initial* sale to retailers, not in connection with *resale* to consumers. Simply put, the Act does not obligate manufacturers to make available to every retailer every package size and container of every good sold in America.

Before this case, no federal court had ever held that Section 2(e) applies to the actual *package itself* sold by a manufacturer, as opposed to distinct promotional services or facilities. Plaintiff relies on two nonbinding, 60-plus year-old administrative decisions of the Federal Trade Commission ("FTC") that have never previously been followed by any court, that the FTC has subsequently walked away from, and that have been superseded by modern antitrust jurisprudence. Plaintiff also attempts to support its Section 2(e) claim by arguing that some customers prefer the convenience of large-size packages. But that allegation has nothing to do with the discriminatory denial of a service or facility in connection with a package's resale. Instead, it amounts to an assertion that Clorox is denying Plaintiff access to a *distinct line* of products that appeal to some customers, which does not state a violation

of the Robinson-Patman Act under well-established law. *See Chi. Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863, 865–66 (7th Cir. 1949).

The district court's unprecedented holding would injure interbrand competition, rather than aid it, by disrupting manufacturers' efforts to operate more efficient distribution networks. Tailoring product offerings to particular retailers helps manufacturers compete more effectively against other brands in multiple retail channels, which has procompetitive benefits for consumers. The district court has thrown into question the legality of commonplace distribution policies employed by countless manufacturers across the nation. The statutory text, its legislative history, every federal case interpreting it, and the policies of the antitrust laws all require rejection of Plaintiff's interpretation of Section 2(e).

After the district court denied Clorox's motion to dismiss and Clorox's efforts to resolve this dispute with Plaintiff failed, Clorox elected not to do any further business with Plaintiff. The antitrust laws give Clorox the right to make that choice without liability, *see United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), even after litigation has begun, *see Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980). That should have ended this case, because only a "purchaser" of Clorox's commodities may bring suit under Section 2(e) of the Robinson-Patman Act, and Plaintiff ceased to be a purchaser when it was terminated by Clorox. *See id.* at 471 n.7 (a buyer "with whom a seller refuses to deal is denied the opportunity to purchase"). (Plaintiff has only sought prospective relief and has never sought damages for past violations.)

Plaintiff's response was to acquire some Clorox products through independent wholesalers that Clorox does not control. Thus, according to Plaintiff, the Supreme Court's decision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), makes Plaintiff a "purchaser" that may sue under Section 2(e)—even though *Fred Meyer* did not involve Section 2(e) and did not involve a terminated retailer.

That interpretation of Section 2(e) is also wrong. A retailer may not override a manufacturer's unfettered right to select its customers simply by filling an order with wholesalers that the manufacturer does not control. Were it otherwise, a manufacturer could never avoid a business relationship with a retailer short of ceasing sales altogether to wholesalers, which would have anticompetitive consequences for both small retailers and consumers.

This Court should reverse.

Statement of Jurisdiction

The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1337, as Plaintiff brought suit under 15 U.S.C. §§ 1, 13(d), and §13(e). *See* A.1 (¶1), A.3 (¶5). Each party consented in writing to the entry of final judgment by a magistrate judge.

On February 2, 2015, the district court denied Clorox's motion to dismiss the complaint for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6). S.A.10. On April 27, 2015, the district court denied Clorox's second motion to dismiss Plaintiff's Robinson-Patman Act claims as moot under Federal Rule of Civil Procedure 12(b)(1). S.A.18.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5. On July 17, 2015, the district court certified that its Orders denying Clorox's motions to dismiss meet the criteria for interlocutory review under § 1292(b). A.105. Clorox timely petitioned this Court on July 27, 2015 for permission to appeal. No. 15-8016, C.A. Dkt. 1. This Court granted the petition on September 8, 2015. C.A. Dkt. 12.

Pursuant to this Court's Rule 28(a)(3), Clorox states that Plaintiff has filed an Amended Complaint alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See* A.20 (¶¶82–83), A.24–25 (¶¶103–08). Those claims are not at issue in this appeal but will likely be affected by its outcome, and accordingly, the district court has stayed all proceedings pending this appeal. *See* A.107.

Statement of the Issues

1. Whether the district court erred by concluding that Clorox's sale of large-size products only to club stores constitutes "discrimination" in "furnishing ... services or facilities connected with the ... offering for sale of ... commodities" under Section 2(e) of the Robinson-Patman Act.

2. Whether the district court erred by concluding that Plaintiff is a "purchaser" that may sue Clorox under Section 2(e) of the Robinson-Patman Act for prospective relief even after Clorox exercised its right to terminate its business relationship with Plaintiff.

Statement of the Case

A. The Parties

Clorox manufactures consumer and professional goods including branded bleach, cat litter, plastic food storage bags, and salad dressings, among others. A.6 (¶19). Clorox sells its products to more than 30,000 supermarkets and other retailers in the United States, ranging from small convenience stores to large retailers (such as Wal-Mart and Target), club stores (such as Costco and Sam's Club), and e-retailers (such as Amazon). A.6 (¶19). Clorox manufactures more than 1,000 distinct stock-keeping units ("SKUs"). A.6 (¶19).

Plaintiff is a "grocery chain," A.11 (¶30), with 15 "grocery stores" in Illinois and Wisconsin, A.3 (¶6). Before this litigation began, Plaintiff purchased "over 480 different ... SKUs" from Clorox. A.10 (¶26). Among those SKUs were a handful of "large pack" products that are manufactured for the purpose of being sold on pallets in club stores. A.10 (¶27). Plaintiff alleges that the large-size packages "are typically 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." A.10 (¶27).

B. Clorox's Channel Distribution Strategy

In 2014, Clorox determined that it could compete more effectively in the marketplace by making available distinct sets of SKUs to various retail and distribution channels, including "General Market" and "Club" stores, among others. A.8 (¶19). Clorox categorized Plaintiff as a General Market retailer, similar to all other

grocery stores and mass-market retailers such as Wal-Mart and Target. A.8 (¶19). Clorox assigned many hundreds of SKUs to the General Market channel, including some SKUs of larger-than-typical packages (but not as large as the packages sold to club stores). A.8–9 (¶19). Clorox assigned fewer than 80 SKUs to the Club Store channel. A.8 (¶19). There is almost no overlap between the SKUs available in the General Market and Club Store channels. A.8 (¶19).

In September 2014, Clorox employees met with Plaintiff to discuss the new distribution strategy. A.8–9 (¶19). They explained that Clorox's goals included to "streamline [its] operations and deliver [its] best cost to serve by regulating the products [it] sell[s] to customers/channels," and "[m]eet[ ] customers' desire for differentiated products[.]" A.13 (¶46). Clorox informed Plaintiff that, beginning October 1, 2014, Clorox would not fill further orders from Plaintiff on eleven SKUs that were now sold on the Club Store list. A.14 (¶50). Those eleven products are:

- 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 lb. Fresh Step scoop cat litter
- 42 lb. Scoop Away Complete cat litter
- 2-pack of 64 oz. Kingsford lighter fluid

- 3-pack of 120 oz. Clorox regular concentrated bleach
- 2-pack of 40 oz. Hidden Valley Ranch dressing

A.11 (¶29).[1]

C. Plaintiff's Lawsuit

Plaintiff filed this lawsuit on October 28, 2014. Plaintiff alleged that it competes against club stores and that Clorox's sale of large-size packages only to club stores disadvantaged Plaintiff "because the unit price on these large pack items is significantly lower than the unit price charged for small packs of these same products," and thus club stores "are generally able to buy and ultimately sell these large pack items at significantly lower unit costs than [are] available to [Plaintiff.]" A.14–15 (¶53); *see also, e.g.*, A.16 (¶60) (alleging that Plaintiff pays "significantly higher" "unit prices" and thus must "charge higher unit prices … than its customers are accustomed to paying"). Plaintiff further contended that some customers prefer large-size packages because of these lower "unit prices," and because they find it convenient to purchase the products less frequently. A.15–17 (¶¶53, 59–66).

The Complaint asserted violations of Sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act. It sought a range of different equitable remedies including disclosure mandates, evidentiary presumptions, and an injunction compelling Clorox

[1] The Amended Complaint's list of the relevant SKUs includes a 2-pack of 20 lb. bags of charcoal, but Clorox continues to offer that SKU to Plaintiff. A.14 (¶48).

to offer for sale to Plaintiff, in perpetuity, every item in every package size that Clorox manufactures. A.29–32.

D. Clorox's Motion to Dismiss for Failure to State a Claim

Clorox moved to dismiss the Complaint for failure to state a claim. S.A.1. Clorox argued that Plaintiff had not pled a Section 2(a) violation because the alleged "per-unit" price difference was not price discrimination, and because Plaintiff had not alleged any harm to competition. Clorox argued that Plaintiff had not pled a Section 2(d) violation because it had not alleged that Clorox made any *payments* to club stores. As to Section 2(e), Clorox argued that the plain language of "services or facilities" does not include large-size packages, nor has any federal court interpreted that phrase in a way that would include large-size packages.

The district court denied Clorox's motion. S.A.10. The court first noted Plaintiff's concession that, notwithstanding the Complaint's references to Section 2(a), Plaintiff did not actually allege a violation of Section 2(a). S.A.1 n.1. The district court also stated that although Plaintiff had cited Section 2(d), Plaintiff had "advanced arguments only with respect to [Section 2(e)], which seems to fit the facts of this case more closely." S.A.6.

Turning to Plaintiff's Section 2(e) claim, the district court recognized that "no federal court has ever acknowledged whether a special package size constitutes a promotional service" under Section 2(e). S.A.6. The district court nevertheless concluded that two very old FTC decisions, *In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *In re General Foods Corp.*, 52 F.T.C. 798 (1956), supported Plaintiff's reading of Sec-

tion 2(e). S.A.7. The court further relied on the FTC's nonbinding guidance document regarding Section 2(e), known as the "Fred Meyer Guides." S.A.7–8 (citing Guides for Advertising Allowances and Other Merchandising Payments and Services, 79 Fed. Reg. 58245, 58254 (Sept. 29, 2014)). The Fred Meyer Guides are meant to list things that might potentially be covered by Section 2(e) based on a survey of the case law. The list includes (among other things) "[s]pecial packaging, or package sizes," pointing specifically to a multi-pack of candy bars in Halloween-themed packaging that is offered during the Halloween season. *Id.* The district court viewed Clorox's large-size products (which are neither seasonal nor themed) as somehow comparable to this example.

E. Clorox's Termination of its Relationship with Plaintiff

After its motion was denied, Clorox exercised its right to end its sale of all products to Plaintiff. S.A.11. Clorox then moved to dismiss this case as moot on the ground that Section 2(e) allows suit only by a "purchaser" of a manufacturer's commodities. Because Plaintiff had ceased to be a purchaser, it could no longer sue for prospective relief, and Plaintiff has never sought damages in this case. *See* A.29–32. Plaintiff responded that, since being terminated, it has started to purchase some Clorox products from independent wholesalers. A.13 (¶42).

The district court denied Clorox's motion. S.A.17. Without discussing *Colgate*, the court interpreted the Supreme Court's decision in *FTC v. Fred Meyer* to hold that acquiring Clorox-brand products from wholesalers is sufficient to make Plain-

tiff a "purchaser" of Clorox's products entitled to sue Clorox under Section 2(e). S.A.15–16.

F. Further Proceedings

The district court allowed Plaintiff to file an amended complaint, S.A.18, which reasserted that Clorox disadvantaged Plaintiff by offering lower unit prices to competitors in violation of the Robinson-Patman Act, A.14–16 (¶¶49–60), A.23 (¶97), A.28–29 (¶¶126–30). In addition, the Amended Complaint added allegations that Clorox had participated in a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. A.25 (¶108). Clorox has moved to dismiss those counts for failure to state a claim, but the district court has stayed further proceedings pending this appeal. A.103.

The district court certified its orders denying Clorox's motions to dismiss for interlocutory appeal under 28 U.S.C. § 1292(b), because the orders involved questions of law that "required the court to determine the scope and meaning of the price discrimination provisions in [Section 2(e)]." A.99. The district court noted that "no federal court has addressed whether a special package size constitutes a promotional service ... [and] the question is by no means settled in this circuit." A.101. And "[t]here is a similar dearth of case law related to the issue of whether purchasers include retailers who purchase from wholesalers." A.102.

This Court granted Clorox's petition for interlocutory review.

Summary of the Argument

This Court should reverse the district court's orders.

I. Section 2(e) of the Robinson-Patman Act prohibits a manufacturer from discriminating in "furnishing ... any services or facilities connected with the ... sale ... of [a] commodity." But the large-size packages that Clorox sells are just *products*, they are not "services or facilities" connected with the resale of products.

A. The Robinson-Patman Act distinguishes claims about discrimination in price, which are governed by Section 2(a), from claims about discrimination in promotional services or facilities, which are governed by Section 2(e). Plaintiff here contends again and again that Clorox is discriminating by selling to club stores large-size packages that allegedly carry a lower *unit price* for Clorox's goods. But if that allegation were actionable at all, it would be a claim for price discrimination under Section 2(a) of the Act, not a claim under Section 2(e). This Court has held that Section 2(e) applies only to challenges that are *unrelated to price*. Section 2(a), by contrast, governs a manufacturer's discount for buyers that purchase larger quantities. The Supreme Court has heard Robinson-Patman Act cases involving manufacturers that sold their goods at lower per-unit prices to larger-quantity buyers, but those cases *always* apply Section 2(a) and never Section 2(e).

B. Plaintiff's interpretation of Section 2(e) is contrary to the statutory text and entirely without support in the case law. Clorox's large-size packages are *products*; they are not something separate and apart from the product that is primarily promotional and connected with the product's resale. Plaintiff alleges only that Clorox refuses to sell it certain specialty lines of product, but this Court has repeatedly held that such a refusal is not a violation of Section 2(e). Clorox's large-size

packages also are not *promotional*: they are totally unlike advertising, display cases, or hired salespeople—the sorts of things that courts have held to be covered by Section 2(e). Even assuming arguendo that package size could be separated from the product at all, Clorox provides the package size only in connection with the *initial* sale to the retailer. Clorox is not involved at all in the *resale* of the package to the consumer, which means that Clorox's large-size packages cannot fall within Section 2(e) under this Court's precedent.

Plaintiff's view of Section 2(e) is that a "promotional" service is anything that makes a product more attractive to a customer. But literally every aspect of a product is designed to help the product sell to consumers. Plaintiff's interpretation therefore would require every manufacturer to make every product, of whatever size, available to any retailer. Plaintiff's contention that certain customers prefer the convenience of Clorox's large-size packages shows only that Plaintiff's focus is not promotional services but distinct products, and thus Section 2(e) cannot apply.

C. Plaintiff's interpretation of Section 2(e) would injure competition, rather than promote it. Clorox's channel distribution strategy helps Clorox compete more effectively against other brands, which is the primary purpose of the antitrust laws. Plaintiff would have the court enjoin that policy for no other reason than to protect an individual competitor at the expense of interbrand competition.

D. The FTC's "Fred Meyer Guides" do not help Plaintiff. The Guides only *describe* how the Robinson-Patman Act has been interpreted by the courts. They do not *interpret* the Act, do not have the force of law, and do not receive deference. The

FTC's list of things that might qualify as promotional "services or facilities" under Section 2(e) shows that, consistent with the case law, the FTC had in mind things separate from the product itself that are primarily intended to generate consumer awareness of or interest in the product. Plaintiff seizes on the FTC's mention of "[s]pecial packaging, or package sizes," but Clorox's large-size packages are totally unlike the example that the FTC provided in order to clarify that phrase: a package that includes a seasonal, Halloween-themed promotional wrapper.

E. Plaintiff also cannot prevail by relying on two 60-plus year-old administrative decisions from the FTC. The FTC itself had abandoned those decisions by 1964 after recognizing that their reasoning had been rejected by the federal courts. In any event, those administrative decisions are wrong and are not entitled to deference. They lead to the bizarre result that a manufacturer would be required to provide every size package of every good that it manufactures to any retailer that desires them. This Court's precedents do not permit such a reading of Section 2(e).

II. Only a "purchaser[ ] of a commodity bought for resale" may sue under Section 2(e) of the Robinson-Patman Act. When Clorox permanently terminated its business relationship with Plaintiff, Plaintiff ceased to be a "purchaser" of Clorox's products under the statute, and thus it may not sue Clorox for prospective relief.

A. For nearly a century, the Supreme Court has recognized that the antitrust laws protect a manufacturer's right to refuse to do business with any retailer. That right is essential to protecting competition, in part because courts are not suited to regulating all of the terms on which parties must deal. Because of this right,

and because the text of the Robinson-Patman Act applies only to a "purchaser," this Court has repeatedly recognized that a manufacturer cannot be sued under the Act when it refuses to do business with a retailer.

B. Plaintiff cannot circumvent Clorox's right to terminate it as a customer and re-enliven its Robinson-Patman Act suit merely by purchasing Clorox products from independent wholesalers that Clorox does not control. Were it otherwise, no manufacturer could exercise its right to terminate a customer without also abandoning all sales to wholesalers—an anticompetitive outcome that would injure smaller retailers. Plaintiff does not buy anything from Clorox, so it is not a "purchaser" entitled to sue Clorox under the plain meaning of the statute.

The Supreme Court's decision in *FTC v. Fred Meyer* does not require the contrary, atextual outcome. *Fred Meyer* involved a different subsection—Section 2(d) rather than Section 2(e)—so the Court had no occasion to opine on the issue here. *Fred Meyer* also did not involve a case, like this one, where a manufacturer had terminated a retailer, and the Court never said anything about diminishing a manufacturer's long-held right to terminate. Finally, *Fred Meyer* was decided at a time when the Supreme Court was suspicious of vertical arrangements like those at issue here, but the Court in more recent decades has rejected its prior approach and held that vertical agreements have procompetitive benefits.

Standard of Review

This Court reviews the district court's interpretation of the statute de novo. *Tradesman Int'l, Inc. v. Black*, 724 F.3d 1004, 1009 (7th Cir. 2013). The Court ac-

cepts as true all genuine factual allegations in the Complaint. *Thulin v. Shopko Stores Operating Co.*, 771 F.3d 994, 997 (7th Cir. 2014). But it will not accept mere legal conclusions or "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Argument

The Supreme Court has repeatedly held that "the 'primary concern of antitrust law,'" including the Robinson-Patman Act, is to enhance "[i]nterbrand competition." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180–81 (2006) (citation omitted). Federal antitrust law aims primarily to protect competition *among brands*, rather than *within* a given brand, *id.* at 181, and the Robinson-Patman Act "should be construed consistently with [these] broader policies of the antitrust laws," *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (internal quotation marks omitted). The Court has "warned against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953)).

Plaintiff's unprecedented interpretation of the Act would expand Section 2(e) far beyond its explicit prohibitions in order to protect a competitor (namely, Plaintiff) at the expense of the interbrand competition that is the goal of the antitrust laws. But as the Supreme Court has cautioned, courts must "resist interpretation

[of the Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo*, 546 U.S. at 180–81.

I. Large-Size Packages Are Not "Services or Facilities" Under Section 2(e) of the Robinson-Patman Act

The plain language of the Act, its legislative history, and every relevant case interpreting it all confirm that a large-size package of a good, offered year-round in the normal course of business, is a *commodity*, not a "service" or "facility" that is "connected with" the resale of a commodity under Section 2(e). A service or facility connected with the resale of a commodity simply cannot include an aspect of the commodity itself, such as its package size.

Plaintiff's fundamental complaint is that Clorox's distribution policy is allegedly causing Plaintiff to pay more per unit for Clorox goods than the per-unit prices paid by some of Plaintiff's competitors. But Section 2(e) does not apply to discrimination based on price. Thus, if Plaintiff's grievance were actionable at all, it would arise exclusively under Section 2(a) of the Act, not Section 2(e). Section 2(e) simply does not require—and until this case, had never been interpreted by any court to require—a manufacturer to provide every distinct good that it sells, in every distinct package size, to any retailer that would like them.

A. Plaintiff's Complaint Is About Purported Price Discrimination, Not Discrimination in Promotional Services or Facilities

1. Background of the Robinson-Patman Act

The Robinson-Patman Act was passed in 1936 to amend and update the Clayton Act. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959). The Clayton Act

originally included a ban on price discrimination—i.e., selling the same product to different retailers at different prices—that tended to injure competition or create a monopoly. *Id.* But the statute excepted "price discriminations based on 'differences in the ... quantity of the commodity sold,' regardless of whether the differences in quantity resulted in corresponding cost differentials." *Id.* at 68–69 (citation omitted).

In the 1930s, an FTC investigation concluded that several large chain-store buyers were avoiding the ban on price discrimination by taking advantage of gaps in the Clayton Act's coverage. *Id.* at 69. The chain stores had extracted significant price concessions from manufacturers, based on the quantity of product that they purchased, that exceeded any related cost savings to the sellers. *Id.* Other manufacturers gave chain stores "advertising allowances" that reimbursed the chain stores (but not their competitors) for promotional services. *Id.* These were seen as evasions of the ban on price discrimination because the recipient "could shift part of his advertising costs to his supplier while his disfavored competitor could not." *FTC v. Fred Meyer*, 390 U.S. 341, 351 (1968).

Additionally, "[s]ome sellers furnished special services or facilities to the chain buyers." *Simplicity Pattern*, 360 U.S. at 69. For example, Congressman Patman explained that it was necessary to reach "pseudo-advertising allowances" such as "window-display services, newspaper lineage, billboard posters," or "an allowance to have [the retailer's] clerks promote [a] manufacturer's products[.]" 79 Cong. Rec.

9077, 9079 (1935). Congress feared that these practices "threaten[ed] the continued existence of the independent merchant." *Fred Meyer*, 390 U.S. at 350.[2]

The Robinson-Patman Act was enacted to address these perceived problems. First, Congress strengthened the ban on price discrimination in Section 2(a) by allowing manufacturers to charge a different price based on "differing methods or quantities in which" commodities were sold to a retailer *only* when the price difference was justified by "due allowance for differences in ... cost." 15 U.S.C. § 13(a). Congress did, however, retain the requirement that price-discrimination plaintiffs prove harm to competition, and explicitly preserved manufacturers' *Colgate* right by specifying "[t]hat nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade[.]" *Id.*

Congress also added two new provisions to prevent circumvention of the ban on price discrimination. Section 2(d) "prohibits the payment by a seller to a customer for any services or facilities furnished by the [customer]" that are "connected with" the customer's resale of the commodity, except where those payments are offered to all competing customers "on proportionally equal terms." *Simplicity Pat-*

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[2] Subsequent scholarship has revealed "grave doubt that the charges of anticompetitive conduct leveled against the chain stores were true." Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 26 (1976). Ease of entry into these markets made it unlikely that any chain store could obtain monopoly power. *Id*.

tern, 360 U.S. at 65. And Section 2(e) applies when the seller itself provides such promotional services or facilities to the retailer. *Id.* Section 2(e) reads in full:

> 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.

15 U.S.C. § 13(e).

Unlike Section 2(a), Sections 2(d) and 2(e) do not require proof of harm to competition. *Simplicity Pattern*, 360 U.S. at 68; *see also Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973) ("[P]romotional discrimination is illegal per se, irrespective of competitive impact[.]"). Congress thus evinced its clear intention "to treat price and other discriminations differently," *Simplicity Pattern*, 360 U.S. at 67–68, with price-related practices covered by Section 2(a) and discrimination in resale-related promotional services covered by Sections 2(d) and 2(e). *Accord Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 587 (7th Cir. 1971) (Section 2(e) addresses practices "*other than* price discrimination") (emphasis added).

Courts have recognized that because Section 2(e) imposes a per se ban, it must be applied with caution, lest it invalidate procompetitive practices. *See Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 381 (4th Cir. 1992) (per curiam).

2. Plaintiff's Alleged Discrimination in Unit Price for Large-Size Packages Is a Section 2(a) Claim, Not a Section 2(e) Claim

Plaintiff's Amended Complaint repeatedly alleges "price discrimination" under Section 2(a). Plaintiff emphasizes again and again that Clorox's channel distri-

bution strategy has injured Plaintiff because Clorox purportedly provides club stores with products "of like grade and quality" that feature "significantly lower unit costs" than the products that Clorox provided to Plaintiff, thereby forcing Plaintiff to sell "the smaller, more expensive packs" and "raise its prices on those products due to the higher unit cost." A.14–17 (¶¶47–53, 59–66), A.20–21 (¶84). Even when using the rhetoric of "services or allowances," Plaintiff reveals the true substance of its argument by asserting that it has been "depriv[ed] ... of the opportunity to take advantage of those promotional services or allowances *in order to obtain the lowest prices possible for each of those products*." A.18 (¶71) (emphasis added). In other words, Plaintiff's core objection is that by selling (for example) the large, 2-pack of 40 oz. bottles of ranch dressing only to club stores, Clorox allegedly charges the club stores less per ounce of ranch dressing than it charges Plaintiff.

Because Plaintiff's central objection is a purported difference in *price*, this case is governed only by Section 2(a), not Section 2(e). Section 2(a) explicitly addresses the issue of quantity-based price differences by specifying that a discount for customers that purchase greater "quantities" of a good—the very practice purportedly at issue here—is lawful when it "make[s] only due allowance for differences in the [seller's] cost." 15 U.S.C. § 13(a). The terms of Section 2(a) that specifically cover quantity-based discounts must prevail over the more general terms of Section 2(e). *See generally RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070–71 (2012).

In sharp contrast, the "unlawful promotional arrangements" covered by Sections 2(d) and 2(e) are limited to "services *unrelated to price*." *Chi. Spring Prods. Co. v. U.S. Steel Corp.*, 254 F. Supp. 83, 84–85 (N.D. Ill.) (emphasis added), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966). This Court reaffirmed *Chicago Spring Products* in *Centex-Winston*, explaining that because indirect price differentials "come within the ban of Section 2(a) rather than Section 2(e)," it "would be incongruous to hold such price differentials also to be within Section 2(e)," since "Congress intended to strike down ... discriminations which are an element of 'price' only when those discriminations have an adverse effect on competition ...." 447 F.2d at 588 n.5. Section 2(e) instead covers practices "*other than* price discrimination." *Id.* at 587 (emphasis added). Thus, it is Section 2(a)—not Section 2(e)—that governs alleged discrimination in per-unit price among products that are alleged to be "of like grade and quality." 15 U.S.C. § 13(a).

This Court's decision in *Kirby* is to the same effect: "Congress ... imposed stricter standards of legality respecting promotional discriminations than price discriminations" and "drafted §§ 2(d) and 2(e) to apply *exclusively to promotional discriminations*." 489 F.2d at 910–11 (emphasis added); *see also Simplicity Pattern*, 360 U.S. at 67–68. The legislative history of the Robinson-Patman Act similarly drew a clear line between "volume allowances" that were a Section 2(a) issue and "promotional allowances" that were a Section 2(e) issue. Final Report on the Chain-Store Investigation, S. Doc. No. 74-4, at 60 (1934). Thus, any suggestion that "[Sec-

tion] 2(e) proscribe[s] acts which are themselves prohibited by § 2(a) is not supported by either legislative history or the scheme of the Act." *Kirby*, 489 F.2d at 910.

Supreme Court precedent confirms this conclusion. The Court has heard multiple challenges to manufacturers' discounts for larger-quantity buyers, but these cases *always* arise under Section 2(a) and never under Section 2(e). *See, e.g.*, *Brooke Group*, 509 U.S. at 216–17 (determining whether a cigarette manufacturer's "volume rebates" to wholesale customers "amounted to price discrimination that had a reasonable possibility of injuring competition, in violation of [Section] 2(a)"); *United States v. Borden Co.*, 370 U.S. 460, 463 (1962) (considering a Section 2(a) challenge to a manufacturer's practice of giving percentage discounts off the price of milk "which increased with the volume of their purchases").

In *FTC v. Morton Salt Co.*, 334 U.S. 37, 39–41 (1948), for example, the Court considered the legality of a salt manufacturer's practice of selling carloads of salt at lower per-unit prices than it sold less-than-carload lots. But far from suggesting that these lot-size variations brought Section 2(e) into play, the Court analyzed the practice as a traditional price-discrimination case, emphasizing that Section 2(a) was specifically addressed to the subject of "quantity price differentials." *Id*. at 43.

Other cases, as well, confirm what the statute makes plain: when a retailer challenges a manufacturer's practice of allegedly charging an unreasonable difference in unit price (based on quantity differences or otherwise), that challenge must be brought under Section 2(a). *See Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160,

167 (4th Cir. 1999); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 103 (6th Cir. 1981); *Hampton v. Graff Vending Co.*, 478 F.2d 527, 535 (5th Cir. 1973).

Plaintiff might have attempted to use these authorities to argue that Clorox's channel distribution strategy violates Section 2(a). That claim would fail, both because Plaintiff attempts to compare two different products and because it cannot show harm to competition, but at least the claim would have been brought under the right subsection. Instead Plaintiff quickly abandoned a Section 2(a) claim in favor of contending that Clorox's large-size packages are actually "services or facilities connected with" the resale of commodities. That will not work. The Amended Complaint is explicit that the size of Clorox's packages is not "unrelated to price," and thus *Chicago Spring*, *Centex-Winston*, and *Kirby* dictate that Section 2(e) simply has no application. By attempting to stretch Section 2(e) (and its rule of per se liability) to cover this case, Plaintiff impermissibly seeks to "collapse the distinction" between Sections 2(a) and 2(e), *Kirby*, 489 F.2d at 910, and thereby "make nugatory the defenses specifically outlined" in Section 2(a) with respect to price-related discriminations, *Chicago Spring Products*, 254 F. Supp. at 84–85. As the FTC has warned, however, Section 2(e) must be "confined to the sphere of cooperative promotional arrangements" lest it "cut across and confound the legal requirements of the separate price and brokerage provisions of the Act." *In re Gibson*, 95 F.T.C. 553, 726 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982).

Plaintiff is not the first purchaser to have "dropped [its] charges of Section 2(a) violations ... to avoid the necessity of proving competitive injury." *Chicago*

Spring Products, 254 F. Supp. at 85. But "courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)." *Gibson*, 95 F.T.C. at 726. This is just such a case.

B. Plaintiff's Interpretation of Section 2(e) Is Contrary to the Text and Without Precedent

Plaintiff's interpretation of Section 2(e) cannot be squared with the statutory text. By prohibiting discrimination in the provision of "services or facilities connected with" the resale of a commodity, the statute is limited to things that are *separate* from the product and that are *promotional* (i.e., "connected with" *resale* rather than the original sale).

1. The Robinson-Patman Act Does Not Prohibit a Manufacturer from Denying Particular Quantities or Lines of Product

Clorox's large-size packages *are* the product, not "services or facilities" that are independent of it. As the Fourth Circuit has recognized, it is "obvious" that providing one retailer with a smaller quantity of a good is "discriminating in the allocation of ... *the commodity itself*, as opposed to a service or facility connected with the resale of the commodity." *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 55 (4th Cir. 1974) (emphasis added). Accordingly, the Fourth Circuit reversed a district court's holding that offering "a short supply of [the good in question] to [the plaintiff] was a discriminatory allocation of services proscribed by § 2(e) of the Act." *Id.* at 54. Other courts have consistently held that offering different quantities of a good to different retailers does not violate Section 2(e). *See Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC*, 484 F.3d 865, 873 (6th

Cir. 2007) ("[T]he right to receive more [of a good] ... would not appear to be a discriminatory practice under" Section 2(e).).

Likewise, this Court and others have held that a manufacturer does not discriminate in the furnishing of services or facilities by denying particular lines of product to a retail customer. In *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976), this Court rejected a claim under Section 2(d) where the evidence "showed only that [the manufacturer] sold additional products, eggs, butter[,] and salads, to some of its customers." The Court explained that the defendant's "decision to furnish these *products*, as opposed to advertising or promotional *services*, is not actionable under Section 2(d)." *Id*. (emphases added).

This Court reached the same result in *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863 (7th Cir. 1949). There, the plaintiff purchased furniture from the defendant for resale, but was not permitted to purchase certain specially designed furniture offerings that were sold to other customers. *Id*. at 865–66. The plaintiff claimed that the defendant's "refus[al] to sell it certain specially designed items" violated Section 2(e), but this Court disagreed: "As to such items the plaintiff ... never became a purchaser," so "it follows that there can be no discrimination against plaintiff and in favor of other purchasers of such items." *Id*. at 866.

Other precedents are to the same effect. *See, e.g.*, *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317 (9th Cir. 1979) (rejecting Section 2(e) claim where the defendant sold some products to the plaintiff but refused to sell two other "nearly identical [product] lines"). Plaintiff alleges, at most, that Clorox

has refused to deal with it on a particular set of SKUs, which is not a violation of Section 2(e) under *Holleb*, *Chicago Seating*, and similar precedents. An extra-large size bag of cat litter is not a "service or facility"; it is just a *product*.

2. Clorox's Large-Size Packages Are Not Promotional

Clorox's large-size packages do not fall within Section 2(e) for the additional reason that they are not "promotional arrangements connected with resale." *Chicago Spring Products*, 254 F. Supp. at 85. As this Court reaffirmed in *Kirby*, "Congress ... drafted §§ 2(d) and 2(e) to apply *exclusively to promotional discriminations*[.]" 489 F.2d at 910–11 (emphasis added). *See also* 80 Cong. Rec. 9418 (1936) (Section 2(e) is aimed at "the grant of discrimination under the guise of payments for advertising and promotional services"). The size of each package is simply an aspect (one among many) of the product itself. It is not a service or facility connected with resale.

During the 80 years that the Robinson-Patman Act has been on the books, courts have had several occasions to explain what constitutes promotional services or facilities. The first Section 2(e) case to reach the Supreme Court, *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 743 (1945), involved a manufacturer of dextrose (corn sugar) where "[t]he alleged violation consisted of advertising expenditures made by" the defendant on behalf of one of its largest customers, a candy maker, "in order to promote the sale of dextrose or corn sugar for use in candy manufacture." Because the defendant provided this advertising to promote resales by its candy-maker customer, but not to promote resale for other purchasers of dextrose, the Supreme Court found a violation of Section 2(e). *Id.* at 743–44.

In *Simplicity Pattern*, the Supreme Court considered a manufacturer of dress patterns. Simplicity charged all of its customers the same price for its patterns. 360 U.S. at 55. But for its largest customers (primarily department stores), the manufacturer "requir[ed] payment only as and when patterns are sold," whereas it did not extend this privilege of paying only upon resale to its smaller customers (primarily fabric stores). *Id.* In addition, Simplicity provided the department stores, free of charge, with steel cabinets to store the patterns and catalogues reflecting the currently available designs, while charging the fabric stores for the same cabinets and catalogues. *Id.* at 59–60. Simplicity also paid all transportation costs for the department stores but paid nothing to the fabric stores. *Id.* The Supreme Court held that these practices constituted discrimination in the furnishing of promotional services or facilities in violation of Section 2(e).

In a footnote, the Court mentioned other examples of promotional "services or facilities" that Simplicity provided to fabric stores: "A staff of 12 young ladies [that] travels throughout the country giving fashion shows and sewing demonstrations[,] .... coordinated through the local fabric stores to assist the latter in pushing sales both of patterns and of fabrics"; "[l]arge promotional posters, portraying fabrics and fashion trends"; "'[f]lyers,' or brochures, designed, printed[,] and distributed by Simplicity solely for the small merchant, [that] tell him ... 'what the proper sources of supply are in New York, what the trends are, how to trim his windows, [and] how to run certain aspects of his department'"; and "[a] monthly publication called the 'Simplicity Pattern Book' [that] is sold through fabric stores at an annual loss to

Simplicity .... [and] is designed to 'glamorize and dramatize for the consumer and for the merchant the textiles and trends throughout the country.'" *Id.* at 61 n.4.

Applying these precedents, federal courts have consistently interpreted "services or facilities" to be things separate and apart from the product itself that drive up consumer awareness and promote sales. Courts have held that Section 2(e) refers to "window display services, newspaper lineage, billboard posters, and allowances to have clerks promote a manufacturer's products," *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 945 (9th Cir. 1998) (citing Remarks of Rep. Wright Patman Introducing H.R. 8442, 79 Cong. Rec. 9077 (1935), *reprinted in The Legislative History of the Fed. Antitrust Laws and Related Statutes* 2928 (Earl W. Kintner, ed. 1980)); marketing or advertising services, *Hinkleman*, 962 F.2d at 378–79; and product "demonstrators," *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 151–52 (2d Cir. 1949).

By contrast, the courts have rejected more imaginative conceptions of "services or facilities." They agree, for example, that the term does not include leased realty. *See, e.g.*, *Portland 76*, 153 F.3d at 943. This Court held in *Centex-Winston* that Section 2(e) applies to "discriminatory delivery services [furnished] to competing buyers," 447 F.2d 585, 587–88, but that result has been heavily criticized and is generally regarded as the outer limit of Section 2(e). *See L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1118 (5th Cir. 1982). And even in *Centex-Winston*, the service at issue (delivery) was something clearly *separate and distinct* from the product at issue (lumber). *See* 447 F.2d at 587.

Since *Centex-Winston*, this and other courts have made clear that services or facilities provided as part of the defendant's initial sale to the customer, as opposed to the customer's resale of the commodity, are not within the scope of Section 2(e). In *Kirby*, for example, this Court relied with approval on the principle that "a seller's payments as well as services *in connection with the original sale* to the purchaser rather than with regard to the purchaser's subsequent resale were not cognizable under §§ 2(d) or 2(e) but were challengeable only under § 2(a) as indirect price discrimination." 489 F.2d at 910 (emphasis added). *See also Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975) ("Section 2(d) does not refer to benefits to 'favored buyers' in connection with the original sale to the buyer ... ; rather it refers to payments in connection with the resale by the buyer of the goods, for advertising, promotion or other similar purposes."). In short, as the FTC has observed, "services in connection with the original sale ... are challengeable only under Section 2(a)." *Gibson*, 95 F.T.C at 728.

Even assuming arguendo that package sizes could somehow be separated from the product itself, they would not be "*exclusively … promotional*" in nature, and thus Section 2(e) does not apply. *Kirby*, 489 F.2d at 910–11 (emphasis added). Manufacturers provide packaging as an inherent part of the *initial* sale to the customer, not in connection with resale. Plaintiff's attempt to transform an integral aspect of the product originally sold by Clorox into a "service or facility" exclusively connected with the product's resale must be rejected.

3. Plaintiff's Suggested Interpretation of Section 2(e) Does Not Make Sense

No court has ever accepted Plaintiff's contention that package size—or any other aspect of a product itself—comes within the phrase "services or facilities" connected with resale. "The word 'discriminate' connotes treating *like objects* differently." *Portland 76*, 153 F.3d at 944 (emphasis added). But Plaintiff seeks to compare two products—a 16 oz. bottle of ranch dressing and a 2-pack of 40 oz. bottles of dressing—that are *not alike* in critical respects. Plaintiff attempts to circumvent this problem by arguing that *the ranch dressing* in each bottle is the same brand, and so Clorox "discriminates" in the dressing's "unit price." But the necessity for Plaintiff to invoke price simply confirms that this is a Section 2(a) case, and that Plaintiff has *not* stated a claim for discrimination in promotional "services or facilities." *See Chicago Spring Products*, 254 F. Supp. at 84–85 ("[U]nlawful promotional arrangements" are "services *unrelated to price*." (emphasis added)).

Plaintiff's Section 2(e) theory is that a service or facility is *anything* that has any impact at all on the ability of the retailer to sell the product to the ultimate consumer. That makes no sense and finds no support in the case law. Literally every aspect of a commodity is designed to boost its sale to consumers, so Plaintiff's interpretation would obliterate the statutory distinction between "commodities" and the "services or facilities connected with" the "offering for sale" of those "commodities." 15 U.S.C. § 13(e). A promotional service or facility must "*actively* promote the resale of [the product] to the retail customer"; it is not sufficient that the feature "merely facilitate[s] [the buyer's] resale." *Hinkleman*, 962 F.2d at 380 (emphasis

added); *see also L & L Oil*, 674 F.2d at 1119 (The Section 2(e) cases "show that in order to be sufficiently related to the purchaser's resale the supplier must become *active* in the resale of the product.") (emphasis added). Clorox is not "active" in the resale of these large-size packages, because its involvement with them ends at the moment of sale to the club stores. Unlike the defendant in *Simplicity Pattern* or any other Section 2(e) case, Clorox does not allegedly provide anything *else* to the club stores that is designed to promote the resale of these packages.

Plaintiff also argued below that Clorox's large-size packages are promotional services because they appeal to particular consumers who prefer the convenience of buying in bulk. A.16 (¶59). But that contention does not change the facts that the size of a package is not a separate service or facility and is not provided in connection with the product's resale. Even more fundamentally, however, Plaintiff's allegation about consumer preference establishes only that, for purposes of the Robinson-Patman Act, Clorox's large-size packages are *different products* from the standard packages that Clorox sells to general market retailers. Two products are not comparable under Section 2(e) "if there are substantial physical differences in products affecting consumer use, preference or marketability." *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 889 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir. 1969); *see also Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371 (2d Cir. 1958) (holding that cross-elasticity of demand between products is the *minimum* showing necessary for a violation of Section 2(d)).

In sum, Plaintiff's interpretation of Section 2(e) is contrary to its text, inconsistent with the Act's legislative history, and without support in any prior federal case that has interpreted the statute over the past 80 years.

C. Plaintiff's Interpretation of Section 2(e) Would Injure Competition, Rather Than Promote It

Plaintiff's interpretation of Section 2(e) is also contrary to the fundamental purpose of the Robinson-Patman Act (and all of federal antitrust law), which is to promote "[i]nterbrand competition." *Volvo*, 546 U.S. at 180–81. The Supreme Court has warned for decades against expansive interpretations that might "extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen*, 346 U.S. at 63. That caution is particularly important for cases brought under Section 2(e), which is a per se prohibition. Recent decades have seen the Supreme Court repeatedly eliminate or narrow the use of per se rules under the Sherman Act, in order to avoid categorically prohibiting distribution practices that might ultimately have procompetitive justifications. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 891, 895 (2007); *Cont'l T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977).

Both courts and the FTC have cautioned against expansive readings of Section 2(e). In *Hinkleman*, the Fourth Circuit stated that "[b]ecause application of a per se rule risks adverse consequences," it is necessary "to limit the scope of section 2(e) to that necessary to fulfill the section's purposes. Other [practices] should be judged under the more flexible standards of section 2(a) so that courts can protect

procompetitive behavior from prosecution." 962 F.2d at 381. And the FTC has similarly noted that "the *per se* unlawful characteristics of sections 2(d) and 2(e) impose an obligation on the FTC and the courts to ensure that the jurisdictional prerequisites of these sections are reasonably, and not expansively, construed." Fred Meyer Guides, 79 Fed. Reg. 58245, 58246 (Sept. 29, 2014) (quotation marks omitted).

Plaintiff's interpretation of Section 2(e) would ignore these admonitions and impose a per se prohibition for the benefit of a single competitor, while impeding interbrand competition. Vertical agreements between manufacturers and retailers often have procompetitive justifications. *See Leegin*, 551 U.S. at 878, 889. Among other things, differentiated distribution networks benefit manufacturers and, ultimately, consumers because they can achieve efficiencies that lower manufacturers' costs. As the Amended Complaint recognizes, Clorox explained that its new strategy would "streamline [its] operations and deliver [its] best cost[.]" S.A.13 (¶ 46). Those efficiencies will help Clorox's products compete more aggressively against other brands, to the benefit of consumers. And the Supreme Court has made clear that the Robinson-Patman Act does not prohibit Clorox "from restructuring its distribution networks to improve the efficiency of its operations." *Volvo*, 546 U.S. at 181 n.4.

Plaintiff, however, would have this Court declare Clorox's strategy per se illegal and enjoin it for no other reason than so that Plaintiff can (allegedly) sell more Clorox products at the expense of club stores. Plaintiff's interpretation does nothing to enhance interbrand competition, and instead is the essence of protecting "existing *competitors* [at the expense of] the stimulation of *competition*." *Id.* at 181.

The Supreme Court's two most recent decisions applying the Robinson-Patman Act have both rejected efforts to interpret the Act in a manner that would benefit individual competitors rather than interbrand competition. *See Volvo*, 546 U.S. at 178; *Brooke Group*, 509 U.S. at 231. The district court ignored these cases because they arose under a different subsection, and it ignored *Leegin* and *GTE Sylvania* because they arose under the Sherman Act. S.A.9. But the district court missed the essential reasoning of all of these cases, which applies with full force here: "Vertical restrictions," like those at issue in this case, "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *GTE Sylvania*, 433 U.S. at 54. And it is that "[i]nterbrand competition" that is the paramount focus of the Robinson-Patman Act, *Volvo*, 546 U.S. at 180–81, including Section 2(e).

D. The Federal Trade Commission's Fred Meyer Guides Do Not Help Plaintiff

Lacking any support in case law, Plaintiff contends that its interpretation of Section 2(e) is supported by the FTC's Fred Meyer Guides, 79 Fed. Reg. 58245. Plaintiff is wrong.

1. The Fred Meyer Guides Are Descriptive, Not Interpretive

In the first place, this Court does not defer to the Fred Meyer Guides under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). An agency's interpretation of a statute may receive *Chevron* deference *only* when it is promulgated in a manner "carrying the force of law." *United States v. Mead Corp.*,

533 U.S. 218, 226–27 (2001). But the Fred Meyer Guides explicitly "do not have the force of law." 79 Fed. Reg. at 58253.[3]

In fact, the Fred Meyer Guides were never intended to interpret the statute. The FTC itself describes the Guides' purpose as merely to "assist businesses in complying with the Act, *as interpreted by the courts*." 79 Fed. Reg. at 58252 (emphasis added). "There is ... no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of [judicial] opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002). The Guides *follow* the Article III courts, not the other way around, so they are useful only to the extent that they accurately report the courts' decisions.

Nor *could* the FTC promulgate legally binding rules on the meaning of "services or facilities." The FTC's rulemaking authority under the Robinson-Patman Act is strictly limited. *See* 15 U.S.C. § 13(a). And the FTC shares enforcement authority for the antitrust laws with the Department of Justice, *see id.* § 21, which means that no one agency has "the power authoritatively to interpret the statute." *Lieberman v. FTC*, 771 F.2d 32, 37–38 (2d Cir. 1985) (denying deference to an FTC interpretation of the Clayton Act). Courts do not defer to the FTC's interpretations of the Robinson-Patman Act because in antitrust law, it is courts, not agencies, that are "charged with filling the gaps[.]" *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 547

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[3] Some older decisions deferred to some degree to the Fred Meyer Guides. *See Portland 76*, 153 F.3d at 945; *Hinkleman*, 962 F.2d at 379–80. But their approach is no longer good law after *Mead*.

(7th Cir. 1989). Whether a large-size product is a "service[ ] or facilit[y]" is a question of statutory interpretation for this Court to resolve.

2. Plaintiff Overreads the Fred Meyer Guides

In any event, the Fred Meyer Guides do not support Plaintiff's interpretation of Section 2(e). The Guides list nine examples of "promotional services and facilities" that, in the Commission's view, have been held to fall within Section 2(e): "Cooperative advertising; Handbills; Demonstrators and demonstrations; Catalogues; Cabinets; Displays; Prizes or merchandise for conducting promotional contests; Special packaging, or package sizes; and Online advertising." 79 Fed. Reg. at 58254. The context of the full list makes clear that the Commission had in mind things that are separate and apart from the product itself, and that are primarily intended to generate consumer awareness of or interest in the product. Clorox's large-size products do not meet those criteria.

Plaintiff nevertheless seizes on "[s]pecial packaging, or package sizes" as though that phrase resolves this case. It does not. The FTC took pains to clarify that, consistent with the modifier "special," packaging might fall within Section 2(e) *only* when it primarily serves an advertising or promotional purpose for the product. *See* 79 Fed. Reg. at 58249 ("[T]he Commission has concluded that [it is necessary] to underscore that special packaging or package sizes are covered only insofar as they *primarily promote* a product's resale." (emphasis added)). To illustrate this limitation, the FTC provided an example: 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," then the packaging might be a promotional service covered by Section 2(e). *Id.*

Even assuming arguendo that mere packaging could be a promotional "service or facility" under Section 2(e) (*but see supra* Parts I.A–I.C), Clorox's large-size packages are not at all like Halloween-themed packaging: They are not a temporary mechanism to drive up business during a particular season, they are not a form of advertising, they are not "themed," and they are not promotional. Large-size packages are simply one type of product that Clorox sells year-round.

The district court reflexively relied on the Fred Meyer Guides by concluding that Clorox's large-size products have "special packaging," and therefore those products are "promotional services." S.A.7–8. But that interpretation of the Guides is wrong. This Court has previously held that a "special" characteristic of a product does not qualify it as a service under Section 2(e). *See Chicago Seating*, 177 F.2d at 865–66 ("[S]pecial products" and "specially designed items" are not a service under Section 2(e).). And the Guides merely report what is "consistent with the case law." 79 Fed. Reg. at 58253. Plaintiff's expansive reading of the Guides would mean that *every* package, of whatever size, is actually a service or facility—an outcome that is entirely without support in the federal cases.

E. Plaintiff's Reliance on Bygone Administrative Decisions Is Misplaced

Plaintiff also relies on two FTC administrative decisions, *In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *In re General Foods Corp.*, 52 F.T.C. 798 (1956), as controlling of the outcome. But those antiquated decisions are neither entitled to deference

nor persuasive: both are inconsistent with the language of the Act and have been superseded by subsequent precedent from the federal courts and the FTC itself.

Luxor involved a manufacturer of cosmetics that, in addition to its regular offerings, sold "junior" sizes of its products only to certain retailers: "novelty, variety, syndicate and 5- and 10-cent stores." 31 F.T.C. at 663. The Commission ruled that these junior size products were a "service or facility supplied in connection with the handling, sale, or offering for sale of such commodities," in violation of Section 2(e). *Id.* The Commission thought it important that there was "public demand for the 'junior' size" for reasons of convenience, waste-reduction, and product quality. *Id.* The Commission also mentioned that the "'junior' size facilities promote convenience in display and sale of [Luxor's] products." *Id.* at 664.

General Foods applied *Luxor*, without any further analysis, to conclude that a coffee manufacturer had violated Section 2(e) by offering "institution-packs"—larger size packages of its coffee brands that were meant to be resold to restaurants, rather than individual consumers—only to certain customers. *See* 52 F.T.C. at 826.

1. The FTC Has Abandoned *Luxor* and *General Foods*

Commentators have noted that the early period of enforcement of the Robinson-Patman Act, which included *Luxor*, was characterized by over-zealous enforcement at the expense of careful reasoning and sound economics. *See, e.g.*, Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 30–31 (1976). Not surprisingly, then, the FTC itself has retreated from the view expressed in *Luxor* and *General Foods*. In *In re Universal-Rundle Corp.*, 65 F.T.C. 924 (1964),

the Commission rejected a claim under Section 2(e) that arose when a manufacturer of bathroom fixtures charged more to some customers than it charged for another, very similar line of fixtures that it sold only to Sears. The Commission held that the two products were not alike because of "physical variations" that are "of such a nature as to create consumer preference for one over the other." *Id.* at 955. Because the Sears-only line of products had differences that "enhanced [the products'] marketability," those products could not be compared under Section 2(e) to the manufacturer's other products. *Id.* at 954. In reaching this conclusion, the Commission expressly recognized that its decision was inconsistent with *General Foods*, but that *General Foods* had been rejected by decisions of the federal courts, including *Atalanta Trading*. 65 F.T.C. at 942–44.

This case would come out in Clorox's favor under the rule of *Universal Rundle*. Plaintiff itself alleges that Clorox's large-size packages have "physical variations" from Clorox's standard packages that "create consumer preference for one over the other": Plaintiff contends that some of its customers buy Clorox's large-size packages in order to get "an affordable price," and others "prefer to purchase large packs because of the convenience of being able to purchase and carry those products home less frequently." A.16 (¶59).

More generally, the Commission has repudiated its earlier, expansive interpretations of Sections 2(d) and 2(e) by noting that Section 2(e) should be "confined to the sphere of cooperative promotional arrangements." *Gibson*, 95 F.T.C. at 726. And in *In re General Motors Corp.*, the FTC stated that "[t]he legislative history of [Sec-

tions 2(d) and 2(e)] makes clear that Congress intended these sections to have 'relatively narrow scope'" that should not be expanded beyond "cooperative promotional arrangements between the supplier and customer." 103 F.T.C. 641, 697 n.1, 699 (1984) (quoting *Gibson*, 95 F.T.C. at 726, 727)). The Commission today would not support Plaintiff's interpretation of Section 2(e).

2. *Luxor* and *General Foods* are Wrong and Entitled to No Deference

Even if the FTC had not already rejected the approach of *Luxor* and *General Foods*, those rulings would not be entitled to deference and are simply wrong. *Luxor* fails to respect the basic statutory distinction between the commodity itself and the separate services or facilities that are furnished alongside that commodity in order to aid its resale. Taken together, *Luxor* and *General Foods* produce a bizarre result: If small-size packages are actually "services or facilities," and large-size packages are also "services or facilities," then *every* product in *every* size would be a service or facility, and manufacturers would be required to provide every size of every product to any customer that wants it. But that interpretation would prevent manufacturers from differentiating their distribution networks, which is contrary to the promotion of interbrand competition. *See Volvo*, 546 U.S. at 180–81.

No federal court has ever endorsed *Luxor*'s reasoning. On the contrary, *Luxor*'s interpretation of the statute has been effectively rejected by this Court (and others), which has emphasized that a manufacturer may refuse to deal with certain customers on specialized product lines. *E.g.*, *Chicago Seating Co.*, 177 F.2d at 865–66 ("[S]pecial products" and "specially designed items" are not a service under

Section 2(e).). This Court should not hesitate to reject *Luxor*'s erroneous interpretations of the Robinson-Patman Act. *See supra* Part I.D.1.

* * *

Clorox's channel distribution strategy is the same one that thousands of manufacturers have used for decades, all over the country, in order to gain efficiencies in their distribution networks. It is implausible to believe that, as Plaintiff's interpretation would indicate, so many manufacturers have been openly flouting the Robinson-Patman Act for so long. This Court should reject that assertion and reverse the decision below.

II. Plaintiff Is Not a "Purchaser" of Clorox Products Because Clorox Does Not Do Business with Plaintiff

The Robinson-Patman Act bars a manufacturer from discriminating "in favor of one purchaser against another *purchaser* or purchasers of a commodity bought for resale." 15 U.S.C. § 13(e) (emphasis added). Thus, only a "purchaser" of Clorox's commodities may sue Clorox for discrimination under the Act. *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470–71 (7th Cir. 1980). And the antitrust laws guarantee to a manufacturer a near-absolute right to select unilaterally which retailers may purchase its products. *See Chicago Seating*, 177 F.2d at 867. Here, Plaintiff ceased to be a "purchaser" when, after Clorox's first motion to dismiss was denied, Clorox "unilaterally chose to end all business dealings" with Plaintiff. S.A.11. That should have ended this case, in which Plaintiff has never sought damages for any alleged past violations and has instead sought only prospective relief,

see S.A.1, S.A.13 n.1. Because Plaintiff is no longer a purchaser, it may not sue for an injunction that would redesign Clorox's distribution chain.

A. Manufacturers Have a Virtually Unqualified Right to Determine Which Retailers May Purchase Their Products

For nearly a century, the Supreme Court has recognized that the antitrust laws protect a manufacturer's right to refuse to do business with a retailer. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (holding that a manufacturer is "free[ ] to exercise his own independent discretion as to parties with whom he will deal"). "Part of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal," which is why "the *Colgate* right has received consistent support from the Supreme Court even for large firms[.]" *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000).

The law protects this right with vigor because if it did not—if a terminated retailer could sue a manufacturer for an injunction ordering that manufacturer to make a new deal—then seriously inefficient consequences would result. "Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" *Pac. Bell Tele. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (citation omitted); *id.* at 454 ("[H]ow is a judge or jury to determine a 'fair price?' ... And how should the court respond when costs or demands change over time, as they inevitably will?" (quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.))); *cf.* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 5 (1984) ("[L]awyers ... know less about the business-

es than the people they represent. ... The judge knows even less about the business than the lawyers.").

Congress explicitly built this right of manufacturers into the Robinson-Patman Act, in two ways. First, Congress provided that "nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. § 13(a). Second, Congress limited the right to sue under Section 2(e) to "purchasers" of a manufacturer's commodities that have experienced discrimination by the defendant "in favor of [another] purchaser." *Id.* § 13(e).

Courts have recognized that Section 2(e) unambiguously provides that when a manufacturer refuses to make particular sales to a retailer, that refusal to sell prevents a suit under the statute. In *Chicago Seating*, for example, this Court emphasized that "[a] trader engaged in private business may exercise his own discretion as to parties with whom he will deal." 177 F.2d at 867. The plaintiff in *Chicago Seating*, just like Plaintiff here, sued under Section 2(e) alleging that "it ha[d] been damaged because defendant refused to sell it certain specially designed items." *Id.* at 866. But this Court held that because the plaintiff was not a "purchaser" of those specific items (even though it purchased other, similar items from the defendant), "it follows that there can be no discrimination against plaintiff and in favor of other purchasers of such items." *Id.* The same result occurs here: Plaintiff is no longer a "purchaser" of any products from Clorox, so it cannot be an ongoing victim of discrimination under Section 2(e) that could seek prospective relief.

It makes no difference that Plaintiff purchased some products from Clorox in the past, because the Robinson-Patman Act "does not require a seller to create *or to maintain* a customer relationship with any buyer or prospective buyer." *Mullis v. Arco Petrol. Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (Stevens, J.) (emphasis added). And the law is also settled that the decision to terminate a customer—even in order to avoid antitrust litigation—is not itself a violation of the Act. *See id.* (rejecting the plaintiff's "position that the termination itself was discriminatory"); *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 859–60 (6th Cir. 2007) (rejecting the plaintiff's allegation of "wrongful[ ] terminat[ion] [of] direct purchasing status in retaliation for raising antitrust complaints").

When Clorox terminated its relationship with Plaintiff, Plaintiff lost the authority to sue Clorox under the Robinson-Patman Act for an injunction and a declaratory judgment. *See H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1022 (2d Cir. 1989) (Because the defendant "is no longer selling to [the plaintiff], as is its right, there is no danger that it will sell to [the plaintiff] on discriminatory terms in violation of 15 U.S.C. § 13, and accordingly no basis for a Robinson-Patman injunction.").

B. The *Fred Meyer* Decision Did Not Silently Overrule a Manufacturer's Right to Choose Its Purchasers

Plaintiff argued below that, after it was terminated by Clorox, it began purchasing Clorox-branded products from wholesalers, and thereby remained a "purchaser" under Section 2(e). A.12 (¶40–41). But these are independent wholesalers that Clorox does not control. If Plaintiff's understanding of the statute were accept-

ed, it would all but eviscerate a manufacturer's *Colgate* right to cut off business relations with any customer. A terminated retailer would virtually always be able to make purchases from independent wholesalers, and thereby (in Plaintiff's view) acquire all of the same rights to sue the manufacturer for purported Robinson-Patman violations as if the retailer had never been terminated. A manufacturer's right like the *Colgate* doctrine that is so well established, and so important to the proper functioning of the antitrust laws, cannot be so easily extinguished.

Plaintiff nevertheless argues that its interpretation of "purchaser" is compelled by the Supreme Court's decision in *Fred Meyer*. But that case did not construe Section 2(e), was decided in a very different era of antitrust jurisprudence, and did not involve a manufacturer that had terminated its retail customer.

Fred Meyer involved a retailer (Fred Meyer) that paid the cost of producing a coupon book that advertised various manufacturers' products sold at Fred Meyer. 390 U.S. at 344–45. Two manufacturers, Tri-Valley Packing Association and Idaho Canning Company, each paid Fred Meyer $350 to have their products featured in the book, and also gave Fred Meyer (but only Fred Meyer) discounts on the price of the products featured in the book. *Id.* The FTC concluded that the manufacturers' advertising reimbursements violated Section 2(d), and that the manufacturers' discounts on the products violated Section 2(a). *Id.* at 345–46.

The Supreme Court affirmed the Commission's conclusion under Section 2(d), though in doing so it adopted a counterintuitive interpretation of the term "customer." The Court held that Tri-Valley and Idaho Canning had violated Section 2(d) by

reimbursing Fred Meyer's advertising expenses without offering proportional reimbursement to small retailers that purchased their products from independent wholesalers. *Fred Meyer*, 390 U.S. at 348–52. The Court thought that if retailers that purchased from wholesalers did not constitute "customers" under Section 2(d), they would be left "for the most part unprotected from discriminatory promotional allowances granted their direct-buying competitors," an outcome that the Court feared would "frustrate the purpose of [Section] 2(d)," *id.* at 348, 352.

The district court here concluded that, under *Fred Meyer*, the term "customer" always includes buyers from wholesalers, and that the same rule must apply in construing the term "purchaser" in Section 2(e). A.14–15. But contrary to the district court's ruling, *Fred Meyer* is distinguishable from this case in several critical respects.

First, *Fred Meyer* construed Section 2(d), whereas this case concerns Section 2(e). That difference matters not only because of the distinct statutory terms at issue (Section 2(d) uses "customer" whereas Section 2(e) uses "purchaser," a term that was not at issue in *Fred Meyer*), but also because of the differing nature of the *conduct* that each subsection addresses. Section 2(d) applies when a manufacturer gives a *payment* to a retailer as compensation for promotional services or facilities, whereas Section 2(e) applies when a manufacturer provides promotional services directly. That difference arguably makes little difference when "services or facilities" is given its proper scope and limited to things like advertising (at issue in *Fred Meyer*) or display cases (at issue in *Simplicity Pattern*), because a retailer can ac-

quire those things and get reimbursed just as easily as a manufacturer can provide them to a retailer. But the symmetry of the statute breaks down when "services or facilities" is interpreted (erroneously) to mean *every product*, in every size package, that the manufacturer sells. Those packages can be provided *only* by the manufacturer and cannot be independently acquired by the retailer, subject to reimbursement. In other words, the conduct that is alleged in this case could *never* be evaluated under Section 2(d).[4]

This lack of symmetry is yet further proof that Plaintiff is wrong about whether Clorox's large-size packages are "services or facilities" under the Robinson-Patman Act. But in any event, the critical differences between the Section 2(e) claim that Plaintiff alleges here and the garden-variety Section 2(d) claim in *Fred Meyer* mean that the Supreme Court in that case had no occasion to decide the result in this one. *Fred Meyer* holds that when a manufacturer reimburses a direct-buying retailer for promotional services, Section 2(d) requires the manufacturer to ensure that equivalent reimbursements are available to retailers that buy the identical product through wholesalers. 390 U.S. at 358. *Fred Meyer* does not hold that Section 2(e) requires a manufacturer to guarantee that a retailer can purchase from a wholesaler any product that it desires.

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[4] This is why the district court was correct to conclude that Plaintiff's allegations do not fit Section 2(d). S.A.6. Plaintiff has not alleged that Clorox made a *payment* to any club store customer, as required to state a claim under Section 2(d).

Fred Meyer is distinguishable for the additional reason that it did not involve a manufacturer that had attempted to terminate its business relationship with a retailer. Thus, *Fred Meyer* said nothing about whether a terminated retailer could circumvent its termination simply by buying from independent wholesalers. The difference is critical, because Plaintiff's interpretation of Section 2(e) would virtually eliminate manufacturers' *Colgate* rights to terminate individual customers. The *Fred Meyer* Court cannot plausibly be understood to have eviscerated decades of precedent under the Sherman Act, without ever mentioning the issue, in a relatively straightforward case under the Robinson-Patman Act. *See United States v. U.S. Gypsum Co.*, 550 F.2d 115, 125 (3d Cir. 1977) ("[W]hen policies of the Sherman Act and Robinson-Patman Acts conflict, it is the Robinson-Patman Act that should give way."), *aff'd*, 438 U.S. 422 (1978). This Court can give effect to *both* Supreme Court precedents by holding that nothing in *Fred Meyer* affects the long-established right of manufacturers to eliminate any potential for future Robinson-Patman Act liability by selecting their own customers.

Fred Meyer should be confined to Section 2(d) because it represents a relic of a bygone era of antitrust law. (And for that matter, it was decided in a very different era of statutory interpretation.) The Court reached the atextual conclusion that the statutory term "customer" includes *noncustomers* if they buy from someone else. The Court deemed that interpretation necessary to serve the statute's purposes on the facts before it, but commentators have noted that *Fred Meyer* was poorly reasoned because it imposed a cumbersome and problematic obligation on manufactur-

ers that does not advance competition. *See, e.g.*, Posner, *supra* at 80. *Fred Meyer* was decided at a time when the Supreme Court was more suspicious of vertical agreements and more willing to declare them per se illegal under the antitrust laws. But such cases often rested on "formalistic legal doctrine rather than demonstrable economic effect," *Leegin*, 551 U.S. at 888 (internal quotation marks omitted), and many of them have been overruled. As described above, *supra* Part I.C, in more recent decades the Court has cut back on the scope of per se liability in recognition of the fact that "[v]ertical restrictions *promote* interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *GTE Sylvania*, 433 U.S. at 54 (emphasis added). Those holdings, in combination with the Supreme Court's recent emphasis that the Robinson-Patman Act should be interpreted to promote "[i]nterbrand competition," *Volvo*, 546 U.S. at 180–81, are more than sufficient reason for this Court not to extend *Fred Meyer* to this case.

The Fred Meyer Guides, which Plaintiff believes support its interpretation of "purchaser," S.A.14–15, are unhelpful for all of the same reasons. The Guides merely referred to the Supreme Court's *Fred Meyer* decision, so they are distinguishable in the same ways. And as explained above, the Guides are not entitled to deference. *Supra* Part I.D.

Ultimately, the oddity surrounding Plaintiff's argument that a retailer can be terminated by a manufacturer and then successfully "un-terminated" when the retailer purchases products from independent wholesalers is a function of Plaintiff's erroneous view that large-size packages are promotional services. If Plaintiff were

correct about the meaning of "services or facilities," and if its view of "purchaser" were also accepted—in other words, if every individual *product* were suddenly transformed into a promotional service—then every manufacturer would have to allocate every product to every wholesaler to avoid liability.

Plaintiff itself has acknowledged that its rule would require a manufacturer like Clorox, to avoid Robinson-Patman liability and successfully terminate a retailer, to stop selling altogether to wholesalers. But to construe the Act in that manner would create economic inefficiency and harm interbrand competition, which would be "counter to the broad goals which Congress intended [the Act] to effectuate." *Fred Meyer*, 390 U.S. at 349. Wholesale distribution is the only means by which smaller retailers can efficiently purchase products from most major manufacturers. *See id.* at 352 (discussing "smaller retailers whose only access to suppliers is through independent wholesalers"); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 729 (8th Cir. 2014) ("To stock the thousands of products Americans expect to find in their local grocery store, small retailers ... need one full-line wholesaler in addition to partial-line wholesalers and direct suppliers."). Nothing in *Fred Meyer* suggested that the Supreme Court wanted to discourage manufacturers from using wholesalers and realizing the market-wide efficiencies that a wholesale distribution system affords. To apply *Fred Meyer* and Section 2(e) in the manner advocated by Plaintiff would turn the Robinson-Patman Act on its head and weaken interbrand competition.

Conclusion

The Court should reverse the orders below and remand with directions to dismiss Plaintiff's Robinson-Patman Act claims.

Dated: October 26, 2015

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Certificate of Compliance

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,969 words, as determined by the word count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point New Century Schoolbook font.

Dated: October 26, 2015

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Circuit Rule 30(d) Statement

Pursuant to Circuit Rule 30(d), I hereby certify that all material required under Circuit Rule 30(a) and (b) is included in the Short Appendix and the Appendix submitted together with this brief.

Dated: October 26, 2015

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Statutory Addendum

Statutory Addendum:
Table of Contents

15 U.S.C. § 13. Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

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

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

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

(Oct. 15, 1914, ch. 323, §2, 38 Stat. 730; June 19, 1936, ch. 592, §1, 49 Stat. 1526.)

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing,

modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(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.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for

the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

79 Fed. Reg. 58245 (Sept. 29, 2014)

FEDERAL TRADE COMMISSION

16 CFR Part 240

Guides for Advertising Allowances and Other Merchandising Payments and Services

AGENCY: Federal Trade Commission.

ACTION: Final changes to guides.

SUMMARY: The Federal Trade Commission ("the Commission") previously published in the Federal Register a request for public comments on the overall costs and benefits of and the continuing need for its Guides for Advertising Allowances and Other Merchandising Payments and Services ("the Guides"). The Commission issued this request as part of its program for periodic review of its rules and guides to ensure they are up-to-date, effective, and not overly burdensome.

DATES: This action is effective as of November 10, 2014.

FOR FURTHER INFORMATION CONTACT:

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Federal Trade Commission,
Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Background

The Commission originally issued the Guides in 1969 to help businesses comply with sections 2(d) and 2(e) of the Robinson-Patman Act ("R–P Act" or "the Act"). The Guides were last revised in 1990, to bring them into conformity with then-current legal developments and to eliminate nonessential requirements. *See* 55 FR 33651 (Aug. 17, 1990). The changes published in this document reflect more recent legal developments as well as changes in technology and methods of marketing that have occurred since the Guides were last reviewed, such as the emergence of the Internet and widespread online marketing.[1]

As the name suggests, the Guides are not binding regulations, but are advisory interpretations providing assistance to businesses seeking to comply with sections 2(d) and 2(e) of the R–P Act.[2]

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[1] *See* 77 FR 71741 (Dec. 4, 2012) (request for public comments).

[2] 15 U.S.C. 13(d) (section 2(d) of the R–P Act) reads: "[I]t 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

These sections generally prohibit a seller from paying allowances or furnishing services to promote the resale of its products unless the allowances or services are offered to all competing customers on proportionally equal terms. Sections 2(d) and 2(e) relate to the resale of a firm's products, as opposed to section 2(a) of the Act, which relates to the original or first sale.

The R–P Act is the principal federal statute directed at price discrimination. The principal provision of the Act is section 2(a), which bans direct or indirect discrimination in price when competitive injury might result. Certain defenses are allowed, notably that the difference in price is justified by cost differences or that the lower price is given to meet an offer of a seller's competitor.

Sections 2(d) and 2(e) are complements to section 2(a). Their purpose is to prohibit disguised price discriminations in the form of promotional payments or services. Sections 2(d) and 2(e) thus attempt to prevent evasions of section 2(a). In contrast to section 2(a), sections 2(d) and 2(e) do not require proof of likely adverse competitive effects, nor do they permit a cost-justification defense. They do, however, permit a meeting- competition defense. The Commission has observed that the per se unlawful characteristics of sections 2(d) and 2(e) impose an obligation on the FTC and the courts "to ensure that the jurisdictional prerequisites of these sections are reasonably, and not expansively, construed." *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 726 (1980), *aff'd sub nom. Gibson v. F.T.C.*, 682 F.2d 554 (5th Cir. 1982), cert. denied, 460 U.S. 1068 (1983).

The Commission issued the Guides in 1969 at the invitation of the Supreme Court in *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). The Guides address the main issues of sections 2(d) and 2(e)— the measurement of proportionally equal treatment, the concept of availability of offers to competing customers, the notification of offers required to be given to customers, and other issues such as the interstate commerce requirements of section 2(d) and 2(e).

Developments in technology, methods of commerce, and the law since the last revision of the Guides suggest that certain provisions of the Guides might usefully be revised. As identified in the Commission's request for public comments, these developments include the emergence of the Internet as an important retail sales and communications channel. They also include a jurisprudential development: some courts have discussed the possibility that under some circumstances an apparent promotional allowance may constitute an indirect price discrimination, for which an action against the recipient for knowing inducement or receipt of a discrimination in price might lie under § 2(f) of the R–P Act. *See, e.g., American Booksellers Ass'n v. Barnes & Noble*, 135 F. Supp. 2d 1031 (N.D. Calif. 2001). These cases signal a heightened risk of liability in connection with promotional allowances and services of which

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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."

15 U.S.C. 13(e) (section 2(e) of the R–P Act) reads: "[I]t 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."

businesses and their counselors may wish to take account. These developments in technology, methods of commerce, and the law have influenced the changes to the Guides set forth here. The legislative history of the Act and the case law pertinent to each issue also have been considered.

In response to the Commission's request for public comments, the Commission received and considered seven submissions. These were submitted by the American Antitrust Institute ("AAI"); the Section of Antitrust Law of the American Bar Association ("the Antitrust Section"); the Food Marketing Institute ("FMI"); the National Automobile Dealers Association ("NADA"); the National Community Pharmacists Association ("NCPA"); Richard Steuer, Esq.[3]; and the National Grocers Association ("NGA"). The Commission has considered each of these comments in its entirety. The following discussion summarizes comments relating to the continuing need for and cost- effectiveness of the Guides. It then addresses certain specific recommendations of commenters, as well as the Commission's actions with respect to those recommendations.

Continuing Need for the Guides

The Guides are intended to assist businesses seeking to comply with sections 2(d) and 2(e) of the R–P Act. To determine whether the Guides continue to do so, the Commission asked about the continuing need for the Guides. In addition, the Commission asked about the benefits and costs of the Guides, and changes, if any, that might increase the Guides' benefits or reduce their costs.

Every comment that addressed the question concluded that there is a continuing need for the Guides. The Antitrust Section noted that "lawyers, industry, and the courts have generally relied on [the Guides] as accurate statements of the law." FMI stated that "the Guides serve a useful purpose and should be retained." NADA concluded that the Guides "provide a great deal of certainty for manufacturers and dealers alike." NGA reported that it "has strongly supported the Fred Meyer Guides because of the assistance and guidance they provide to buyers, sellers, and their counsel in assuring voluntary compliance with Sections 2(d) and (e) of the Act."

None of the comments identified a need for a major overhaul to the Guides to improve the balance between benefits and costs. Rather, some comments urged various changes to update the Guides in keeping with the commenters' view of legal, technological, and commercial developments. For example, the Antitrust Section recommended that "the Commission should revise the Guides to bring them into conformity with current case law and technology." NADA agreed, noting that "[s]ensible, limited changes to reflect modern market conditions" should be made, while urging the Commission "to reject calls to make significant changes to the Guides where there is no pressing need" to do so. FMI suggested that the Guides should be revised "to reflect developments in the law and changes in distribution and marketing practices."

For these reasons, the Commission will retain the Guides in their current form, making specific changes as discussed below. (Section numbers below starting with 240 refer to sections of the Guides.)

[3] Mr. Steuer's comment was in the form of an article published elsewhere and submitted for the Commission's consideration in connection with its review of the Guides.

Discussion of Public Comments and Changes to the Guides

Section 240.2—Applicability of the Law

Several comments are relevant to this section of the Guides, which identifies the essential elements of section 2(d) and 2(e) violations.

Three of the comments—those of the Antitrust Section, AAI, and FMI—urged the Commission to modify the 1990 Guides in ways that seemingly would add an "injury to competition" element to sections 2(d) and 2(e). For example, the Antitrust Section urged the Commission to "ma[ke] clear at the outset of the Guides" that sections 2(d) and 2(e) are "aimed at significant harm to competition." An FMI comment was to similar effect. And AAI noted its continued adherence to the proposition that a plaintiff "challenging favoritism in promotional allowances or services . . . should be required to prove that the discrimination is likely to cause competitive injury . . . " One of the seven comments received, that of NGA, opposed any change that would, in effect, engraft an "injury to competition" element onto sections 2(d) and 2(e).

The Commission noted in its 1990 review of the Guides that sections 2(d) and 2(e) are complements to section 2(a), which bans certain discriminations in price "when a specified competitive injury might result." Sections 2(d) and 2(e) are intended "to prohibit disguised price discriminations in the form of promotional payments or services"; they "attempt to prevent evasions of section 2(a)." 55 FR 33651. And "in contrast to section 2(a), they do not require proof of likely adverse competitive effects.* * *" *Id.* No comment pointed to any court decision calling these principles into question. *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (holding that a manufacturer may not be liable under the R–P Act without a showing that it discriminated between dealers competing to sell to the same customer), cited in the Antitrust Section comment and others, was decided under section 2(a) of the Act and did not address the standards for proving a violation of sections 2(d) or (e).

Revising the Guides to suggest that sections 2(d) and 2(e) plaintiffs must prove likely injury to competition therefore would not be supportable in the case law, even though requiring proof of likely injury to competition is sound enforcement policy. Accordingly, stating that sections 2(d) and 2(e) require such a showing might not provide accurate guidance to the business community about the risks of private litigation. Therefore, the Commission did not revise the Guides to suggest that a competitive injury element to section 2(d) or 2(e) of the Act can be fairly implied based on the current state of the law. However, consistent with the Supreme Court's expressed view in *Volvo Trucks*, 546 U.S. at 181, that the Robinson-Patman Act should be construed to be consistent with the antitrust laws generally, the Commission has modified section 240.13 of the Guides, which relates to Section 5 of the FTC Act, to reflect its own view that Section 5 should be used only in cases of likely harm to competition.

In another comment, Richard Steuer urged that the Act be interpreted such that it would be "lawful to charge different prices and provide different promotional assistance, if the combined value of the discounts and promotional assistance to each retailer is of equal value." Mr. Steuer asserted that this would resolve a quandary created by the Act as conventionally interpreted, because "[d]ealers more often treat money as fungible, whether it is in the form or a discount, a rebate, or a credit, and whether earmarked for advertising and promotion or not." The

Commission is unaware of any court that has so-interpreted the R–P Act, however, and such an interpretation seemingly conflicts with the explicit terms of the Act, in which Congress separately, and differently, addressed discrimination in price (in section 2(a)) and discrimination in the provision of promotional allowances and services (in sections 2(d) and 2(e)). Revision of the 1990 Guides to reflect Mr. Steuer's premise would be inconsistent with the purpose of the Guides, which is to assist businesses in complying with the Act as it is currently understood.

Section 240.4—Definition of Customer

A Note appended to the definition of "customer" in the 1990 Guides provides that, "a retailer or [sic] purchasing solely from other retailers . . . will not be considered a 'customer' of the seller unless the seller has been put on notice that such retailer is selling its product." The Antitrust Section urged the Commission to delete the limiting phrase, "unless the seller has been put on notice that such retailer is selling its product." According to the Antitrust Section, that revision would better conform to the congressional intent underlying the Act as reflected in *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983) and reduce "unnecessary" compliance costs.

The Commission believes that the Note as currently written is consistent with the intent underlying the Act and does not impose unreasonable compliance costs. The Commission does not read *Falls City*, which pre-dated the 1990 review of the Guides, to the contrary. Sections 2(d) and 2(e) of the Act require that competing purchasers be treated similarly. The Note already recognizes an exception to this principle when the seller is unable to identify the purchaser to provide it with promotional allowances or services. Where, however, the seller does know the identity of a purchaser, there is no appropriate basis for denying similar treatment. Therefore, the Note appended to section 240.4 remains substantively unchanged.[4]

Section 240.5—Definition of Competing Customers

In its request for public comments on the Guides, the Commission asked whether and how the 1990 Guides should be revised to take into account new methods of commerce associated with the growth of the Internet since 1990. Every commenter that addressed this question agreed that the growth of Internet commerce is an important development, and that the Guides should be understood to apply to Internet commerce. In response, the Commission has added references to the Internet to the lists of promotional media dispersed throughout the Guides.

AAI noted that online retail sales in the United States are expected to reach $155 billion by 2014, and that, "[f]or a particular brand, . . . Internet-based resellers may compete with their brick and mortar counterparts." AAI concluded that differences in reseller formats, consumer demand, and other things "will affect this determination." Similarly, the Antitrust Section observed that "Internet retailers . . . are potential competitors of every other retailer that sells the same or comparable products." More specifically, AAI observed that in the past two decades some reseller formats have increased in sophistication and others have newly emerged, including

[4] The Commission has corrected a nonsubstantive error in the text. In the phrase quoted at the beginning of this section, the word "or" appearing immediately before "purchasing" has been deleted.

"company-owned stores, interactive kiosks, vending machines, and home shopping networks." According to AAI, "[d]epending on the circumstances, these new formats may compete with one another and more traditional reseller formats and accordingly be considered competing customers" for purposes of the Robinson-Patman Act. These commenters requested that in reviewing and revising the 1990 Guides, the Commission consider the implications of retailers increasingly selling online and through these other formats.

The Commission agrees that retailers, whether operating through brick-and mortar stores, online, or through other formats, may be competing customers of a seller under the Act, and might therefore be entitled to proportionally equal promotional allowances and services. Such retailers are more likely to be deemed competing customers to the extent that they: purchase goods of like grade and quality from the same seller for resale; and contemporaneously market those goods to the same or similar prospective purchasers (among others). In determining whether retailers using different retail formats should be deemed "competing customers in the distribution of such products or commodities," it will be relevant to consider the particular characteristics of the retailers' formats, the location and characteristics of the retailers' target and actual customers, and other factors.

To the extent that retailers are competing customers of a seller, they may be entitled to proportionally equal promotional allowances and services. Neither the developed law nor commenters on the Guides have provided any detailed guidance as to how sellers should, or currently do, make their promotional allowances and services available on proportionally equal terms across reseller formats, such as brick-and-mortar and online sales. No single means of doing so is required, and a seller's application of common sense and good faith will be relevant in assaying efforts to proportionalize promotional allowances and services across different sales formats.

Section 240.6—Interstate Commerce

The 1990 Guides suggest that the "interstate commerce" requirement for application of sections 2(d) and 2(e) "may be" satisfied "if there is any part of a business which is not wholly within one state (for example, sales or deliveries of products, their subsequent distribution or purchase, or delivery of supplies or raw materials)." The Antitrust Section commented that the greater weight of judicial authorities supports a narrower "interstate commerce" requirement, and urged that the Commission revise the 1990 Guides to apply only to promotional allowances and services "relating to transactions as to which at least one of the sales crosses state lines." An FMI comment was to similar effect. The Commission considered and rejected similar suggestions in its 1990 review of the Guides, and none of the current commenters has provided new authority in support of a different conclusion now.

The Commission agrees that sections 2(d) and 2(e) may be interpreted to require sales that cross state lines, as described by the Antitrust Section and FMI. *See, e.g., Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870 (9th Cir. 1983), cert. denied 460 U.S. 1085 (1983). But the authorities are not of one mind. For example, in *Shreveport Macaroni Mfg. Co. v. FTC*, 321 F.2d 404, 408 (5th Cir. 1963), *cert denied*, 375 U.S. 971 (1964), the court held that the "interstate commerce" requirement of section 2(d) is satisfied where a promotional allowance moves in

interstate commerce, even if no sale crossed state lines.[5] The Guides do not purport to settle the question. Rather, they purposefully note that sections 2(d) and 2(e) "may be" applicable in certain circumstances in addition to those in which one of the sales was itself in interstate commerce. That is appropriate given the uncertain law and the fact that the Guides seek to demarcate a safe path for businesses seeking to navigate the Act.

Section 240.7—Services or Facilities

Section 240.7 of the Guides identifies the types of services and facilities covered by sections 2(d) and 2(e) of the Act. As section 240.7 currently explains, only services and facilities "used primarily to promote the resale of the seller's product by the customer" are covered, whereas services and facilities used primarily to promote a product's initial sale are covered by section 2(a) of the Act. Some commenters suggested that differentiating between a product's initial sale and its resale has at times been difficult in practice, and that the Commission should try to provide additional guidance. In particular, AAI suggested that further guidance be provided with respect to the classification of the diverse fees and allowances that have come to be referred to as slotting allowances.[6] FMI similarly urged that the Commission clarify the applicability of the Act to "shelf-space" allowances.

The Commission agrees that additional guidance would be helpful.[7] To that end, the Commission has added an Example following the list of examples of promotional services and facilities at the end of section 240.7 of the Guides. It provides: "*Example 1:* A seller offers a supermarket chain an allowance of $500 per store to stock a new packaged food product and find space for it on the supermarket's shelves and a further allowance of $300 per store for placement of the new product on prime display space, an aisle endcap. The $500 allowance relates primarily to the initial sale of the product to the supermarket chain, and therefore should be assessed under section 2(a) of the Act. In contrast, the $300 allowance for endcap display relates primarily to the resale of the product by the supermarket chain, and therefore should be assessed under section 2(d)."

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[5] There also are several decisions arising under section 2(c) of the Act finding the "commerce" requirement to be satisfied where both parties to an intrastate transaction are otherwise engaged in interstate commerce. *See, e.g., Fitch v. Kentucky- Tennessee Light & Power Co*., 136 F.2d 12 (6th Cir. 1943).

[6] "Slotting fees and allowances" initially referred to one-time payments made by a supplier to a retailer as a condition for the initial placement of the supplier's product on the retailer's store shelves or for initial access to the retailer's warehouse space. *See, e.g.*, "Slotting Allowances in the Retail Grocery Industry," FTC Staff Study (November 2003), *http://www.ftc.gov/os/2003/11/ slottingallowancerpt031114.pdf*. The use of the term has since broadened to include a variety of product placement arrangements. *See, e.g.*, AAI comment at 8.

[7] The Commission briefly discussed discriminatory purchase-of-shelf-space requirements in the **Federal Register** notice publishing the 1990 Guides: "Section 2(d) applies more readily" to payments for "a preferential position within the store that would enhance resale," than to "payments for admittance to a store." 55 FR 33662 (Aug. 17, 1990). The only reference to this subject in the Guides themselves is in footnote 1 to Example 5 following section 240.9. That footnote provided minimal guidance, stating only that, "[t]he discriminatory purchase of display or shelf space, whether directly or by means of allowances, may violate the Act . . . ." With the addition of the new example described in the text, footnote 1 becomes superfluous, and the Commission has deleted it.

Section 240.7 contains a list of "some examples . . . of promotional services and facilities covered by sections 2(d) and 2(e), such as cooperative advertising, catalogues, displays, and special packaging or package sizes." The Antitrust Section urged that "special packaging and package sizes" be deleted from the list because "the established law is now clear that partial refusals to deal with particular resellers, including refusals to sell them particular products in a product line, are not covered by the [R–P Act]." NGA opposed that suggestion, stating that the discriminatory provision of special packaging and package sizes continues to be used to advantage "power buyer[s]" when they are given the option to purchase special packaging or package sizes and competing customers are not, thereby creating "class of trade distinctions."

All of the decisions cited by the Antitrust Section predate the Commission's 1990 revision of the Guides, and none of them 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. For example, *Purdy Mobile Homes v. Champion Home Builders*, 594 F.2d 1313 (9th Cir. 1979), cited by the Antitrust Section, held that the refusal of a mobile home manufacturer (Champion) to sell two additional lines of mobile homes to a retailer (Purdy) to which it had sold another line did not constitute discrimination in the provision of services or facilities connected with the resale of the line of mobile homes that Champion did sell to Purdy. Champion's refusal to sell additional lines of products is quite different from a hypothetical seller's refusal to provide special packaging or package sizes of the same product. The other decisions cited by the Antitrust Section also are distinguishable.[8]

"Special packaging, or package sizes" are retained in the Guides' list of covered promotional services or facilities. However, the Commission has concluded that additional guidance may be helpful to users of the Guides, to underscore that special packaging or package sizes are covered only insofar as they primarily promote a product's resale. Accordingly, the Commission has added two Examples following the list of examples of promotional services and facilities. The first new Example states: "*Example 2:* During 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 primary purpose of the special packaging is to promote customers' resale of the candy bars.

Therefore, the special packaging is a promotional service or facility covered by section 2(d) or 2(e) of the Act." The second new Example states: "*Example 3:* A seller of liquid laundry detergent ordinarily packages its detergent in containers having a circular footprint. A customer asks the seller to furnish the detergent to it in special packaging having a square footprint, so that the customer can more efficiently warehouse and transship the detergent. Because the purpose of the special packaging is primarily to promote the original sale of the detergent to the customer

[8] *Black Gold, Ltd.* v. *Rockwool Indus. Inc.,* 729 F.2d 676 (10th Cir. 1984), *cert. denied* 469 U.S. 854 (1984), concluded that a refusal to deal in a different product line was not a discriminatory sale under section 2(a) of the R–P Act . *L&L Oil Co.* v. *Murphy Oil Corp.,* 674 F.2d 1113 (5th Cir. 1982), held that a fuel oil refiner's imposition on a customer of unfavorable allotments and delivery terms did not violate sections 2(a) and 2(e) of the R–P Act because delivery was neither a covered service nor one promoting the customer's resale of the fuel oil. Finally, *Mullis* v. *Arco Petroleum,* 502 F.2d 290 (7th Cir. 1974), addressed the question whether sections 2(a) and 2(d) of the R–P Act or the Sherman Act protected a local jobber from otherwise lawful termination, and concluded that neither did.

and not its resale by the customer, the special packaging is not a promotional service or facility covered by section 2(d) or 2(e) of the Act."

NADA suggested adding an example to the non-exhaustive list of covered promotional services or facilities in section 240.7 in recognition of the prevalence of Internet-based platforms in the advertising and sale of products. The Commission agrees that it may be useful to make explicit the application of the Guides to those platforms, and therefore has added "online advertising" to the list of examples in section 240.7.

Finally, the Commission declines to adopt the Antitrust Section's suggestion that section 240.7 be revised by deleting the word "primarily" from the definition of covered services or facilities, which states that a covered service or facility is one that is "used primarily to promote the resale of the seller's product." Deletion of the word "primarily" would imply that services or facilities are covered under sections 2(d) and 2(e) of the Act only if they do not promote, in any measure, the initial sale of the product. But a service or facility provided by a seller to its customers may somewhat promote the initial sale of a product, while its predominant effect is to promote the product's resale. Neither of the two judicial decisions cited in the comment addresses such a situation.[9] The Commission does not think it appropriate to adopt so-limited a construction of the scope of sections 2(d) and 2(e) in the Guides.

Section 240.8—Need for a Plan

Section 240.8 states that "[a]lternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of some of the plan's offerings." The Antitrust Section and FMI asserted that this language is overly restrictive, and that a plan should suffice so long as a customer can take advantage of any of the offerings. The Commission agrees, and has revised the section as follows: "Alternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of any of the plan's offerings."

Section 240.8 further states that "[t]he seller should inform competing customers of the plans available to them, in time for them to decide whether to participate." The Antitrust Section proposed that "it should be sufficient for the plan to contain a statement that a customer who cannot take advantage of any of the offerings should contact the seller so that something usable by the customer can be arranged." But, the Act requires the seller to take such actions as are necessary to provide proportional services and facilities to competing customers.[10] The Antitrust

[9] *Freightliner of Knoxville v. Daimler Chrysler Vans, LLC,* 484 F.3d 865 (6th Cir. 2007) (question of fact existed as to whether allegedly discriminatory promotion was paid for by seller or by customer); *Alan's of Atlanta, Inc.* v. *Minolta Corp.,* 903 F.2d 1414 (11th Cir. 1990), *reh'g denied,* 929 F.2d 704 (11th Cir. 1991) ("Generally, financing programs do not relate to the resale of the supplier's goods and therefore are not services and facilities within the meaning of sections 2(d) and (e).").

[10] *See Alterman Foods, Inc. v. F.T.C.*, 497 F.2d 993, 1001 (5th Cir. 1974) (holding that to avoid unlawful discrimination, "a supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs").

Section comment suggested, in effect, that the seller may shift a part of its statutory burden to the customer. The law does not permit such burden-shifting.[11]

Section 240.9—Proportionally Equal Terms

Section 240.9 states the core requirement of sections 2(d) and 2(e): that promotional services and allowances should be made available to competing customers on proportionally equal terms. It notes that "[n]o single way to do this is prescribed by law," and that "[a]ny method that treats competing customers on proportionally equal terms may be used." At the same time, the Guides explain, "[g]enerally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period." But again, the Guides note that "other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable."

The Antitrust Section and FMI both urged the Commission to adopt language in the Guides that would explicitly "endorse proportionalization based on the value to the seller of the promotional services rendered." NGA opposed any such revision and stated that "[t]he Commission is well aware of the numerous subjective factors that make a value standard a slippery slope to price discrimination by sellers for the advantage of power buyers."

In preparing for its 1990 review of the Guides, the Commission expressly invited comment on alternative standards of proportional equality, including a standard "based on the value to the seller of promotions in different media or by different groups of customers, called the 'seller's value standard,' or simply the value standard." *See* 55 FR 33655 (Aug. 17, 1990). In reply, the Commission received and carefully considered 210 comments on this issue. The "overwhelming majority" of comments opposed adoption of a seller's value standard, whereas they generally concluded that the cost-based standard identified in the Guides worked well. "While some [felt] that the adoption of the seller's value standard might promote the efficient allocation of promotional resources, many considered it contrary to the Act's purpose of fairness and [thought] it would result in unjustified favorable treatment for large buyers." 55 FR 33654–33657 (Aug. 17, 1990). The

Commission concluded then, as it does now, that "[t]he law may also permit use of the value standard, at least so far as recognizing the varying value of different media for the seller's promotional efforts." But the Commission declined to incorporate the seller's value standard in the 1990 Guides because, "unless carefully monitored, sellers may use elastic, expansive measurements of value which could help disguise persistent, systematic discrimination. . . . These concerns . . . counsel against including it in the Guides, which are intended to help businesses comply with the law." No subsequent changes in fact or law counsel differently now.

The Antitrust Section and FMI pointed to *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990), by way of suggesting that the Commission's concerns were unwarranted. In Hasbrouck, a majority of the Supreme Court opined that functional discounts "that merely accord due

[11] The Commission has corrected a non- substantive error in the text of section 240.8. The word "describe" has been changed to "described".

recognition and reimbursement for actual marketing functions" do not violate section 2(a) of the R–P Act, and that such reimbursement might be based on the actual value to the seller of those marketing functions. Hasbrouck does not clarify the circumstances under which use of a value standard would be lawful under sections 2(d) and 2(e).

Particularly given the fact that sections 2(d) and 2(e) of the R–P Act were enacted to inhibit evasion of section 2(a) by disguising price discriminations as promotional allowances or services,[12] concern remains that explicit endorsement of the value standard in the Guides might promote imprecision, subjectivity, and "elastic, expansive measurements of value" which might facilitate the concealment of price discrimination, contrary to the intent underlying the Act. Accordingly, the current language of section 240.9 with regard to the standard of proportional treatment is retained.

The Antitrust Section and FMI also urged the Commission to delete Example 4 of section 240.9, which provides that "[a] seller should not identify or feature one or a few customers in its own advertising without making the same service available on proportionally equal terms" to competing customers. The Antitrust Section stated that alternative offers of "useable and suitable" promotional services should be acceptable. The Commission believes that Example 4 is useful because it addresses a commonly furnished promotional service. At the same time, Example 4 may be unduly rigid and confining, especially insofar as proportionally identifying or featuring all competing customers in a seller's advertising may be impracticable under some circumstances, as where the seller has a few relatively large customers and many relatively small ones. For these reasons, the Commission has revised Example 4 to provide that the seller should "not identify or feature one or a few customers in its own advertising without making the same or if impracticable, alternative services available to competing customers on proportionally equal terms. . . ."[13]

Section 240.10—Availability to All Competing Customers

Section 240.10(a) of the Guides discusses the requirement that a seller take reasonable steps to ensure that offered promotional services and facilities are "useable in a practical sense" by competing customers; i.e., functionally available. Example 1 following section 240.10(a) currently states: "A manufacturer offers a plan for cooperative advertising on radio, TV, or in newspapers of general circulation.

Because the purchases of some of the manufacturer's customers are too small, this offer is not useable in a practical sense by them. The manufacturer should offer them alternative(s) on proportionally equal terms that are useable in a practical sense by them." Given the rapid development of online retailing, the Commission has revised Example 1 to encourage the making of online promotional alternatives available to online customers (and others) as appropriate. The example is amended by adding to the current text the following: "In addition, some competing

[12] *See, e.g., L & L Oil Co., Inc.* v. *Murphy Oil Corp.,* 674 F. 2d 1113 (5th Cir. 1982) ("[T]he intent of s 2(e) was to end disguised price discriminations in the form of advertising and promotional activities and cooperative merchandising") (citing Congressman Patman).

[13] The Commission has corrected a nonsubstantive error in the text of section 240.9. The word "lterms" has been replaced with "terms".

customers are online retailers that cannot make practical use of radio, TV, or newspaper advertising. The manufacturer should offer them proportionally equal alternatives, such as online advertising, that are useable by them in a practical sense."

Section 240.10(b) discusses the requirement that a seller take reasonable steps to provide competing customers with notice of available promotional services and facilities. The Antitrust Section suggested revisions pertaining to use of the Internet to provide customers with notice of the availability of promotional services or allowances. The Antitrust Section stated that the section should be revised "to state that it is sufficient for the notice to direct customers to the seller's Web site for details of the offer," and that "Web site postings" should be added to section 240.10's non-exhaustive list of acceptable methods of notifying customers about the availability of promotional services and allowances.

FMI made a similar suggestion. In addition, the Antitrust Section urged that a retailer be barred from claiming that it did not receive promotional services and allowances if it failed to look at the seller's Web site for posted promotional programs.

The R–P Act requires the seller to provide competing customers with proportionally equal promotional services and allowances. The dramatic increase in Internet use by sellers and customers does not justify shifting to customers the burden of learning about sellers' promotional programs in the first instance, which might require a merchant reselling the products of scores of manufacturers to regularly search scores of Web sites just to determine whether promotional services and allowances might be available. For that reason, the Guides will continue to provide that the seller must "take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances," as suggested by the non- exhaustive list of acceptable methods of notification contained in section 240.10(b). Acceptable methods listed include, for example, the provision of "information on shipping containers or product packages of the availability and essential features of an offer, identifying a specific source for further information." This last clause ensures that once customers are put on notice of the availability and essential features of an offer, the details of that offer can be efficiently conveyed without sacrifice of effectiveness. Given the general availability of the Internet to sellers and customers, the "specific source for further information" can be a Web site posting to which the customer has been directed.

Section 240.11—Wholesaler or Third Party Performance of Seller's Obligations

Section 240.11 of the Guides provides that a seller may contract with intermediaries to perform some or all of its obligations under sections 2(d) and 2(e) of the R–P Act, but that use of intermediaries does not relieve the seller of its responsibility for compliance with the Act. The Antitrust Section suggested that although a seller may be obliged to monitor and supervise its intermediaries, "it should not be held as a guarantor of its intermediaries' performance."

Section 240.11 is retained without change. A seller may work through intermediaries to comply with the R–P Act, but the seller's obligation to comply with the Act is not itself delegable—the seller remains responsible for compliance in fact.

The Antitrust Section also urged that a new sentence be added to section 240.11, informing intermediaries that they "may be held responsible under Section 5 of the FTC Act for failing to perform." The current regulatory review is not an appropriate vehicle for assessing or putting forward new theories of liability under section 5 of the FTC Act.

Section 240.13—Customer's and Third Party Liability

Current section 240.13 of the Guides notes that although sections 2(d) and 2(e) apply to a seller and not to its customer, a customer that knows or should know that it is receiving services or allowances not made proportionally available to competing customers may be liable under section 5 of the FTC Act.[14] FMI urged the Commission to modify section 240.13 "to make it clear that the Commission would not proceed against a buyer [under Section 5] . . . absent evidence of likely injury to competition."

Likely injury to competition is not an element of seller liability under section 2(d) or 2(e). Similarly, the Commission and some courts have held that a finding of likely injury to competition is not required to establish buyer liability under FTC Act section 5 for knowing inducement or receipt of promotional assistance prohibited by section 2(d) or 2(e).[15] FMI questions the soundness of those precedents and urges the Commission to "make it clear" that the Commission would not proceed against a buyer for knowing inducement or receipt "absent evidence of likely injury to competition."

The Supreme Court has instructed that the Robinson-Patman Act should be construed consistent with antitrust policy generally, which focuses on harm to competition.[16] Likewise, the Commission believes that a finding of an "unfair method of competition" under § 5 should be tethered to likely injury to competition. Accordingly, the Commission has revised section 240.13 of the Guides to state that "where there is likely injury to competition," the Commission may proceed under § 5 against a customer who knows, or should know, that it is receiving services or allowances not made proportionally available to competing customers.

Section 240.13(a) contains several illustrative Examples pertaining to a customer's and third-party liability. Example 1 discourages inducement or receipt of advertising allowances for promotion of the seller's product in connection with a customer's new store opening or anniversary sale when the customer knows or should know that proportionally equal allowances, or suitable alternatives, are not available to competing customers. Example 2 discourages inducement or receipt of in- store services—stocking of shelves, building of displays, and

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[14] Section 2(f) of the R–P Act condemns knowing inducement or receipt of a price discrimination prohibited by section 2(a). The Act does not have a similar provision condemning knowing inducement or receipt of promotional assistance prohibited by sections 2(d) and 2(e). The absence of such a provision has been held to be "more 'inadvertent' than 'studious,' . . . [t]he practices themselves [having been] declared contrary to the public interest and therefore unlawful." *Grand Union Co. v. F.T.C.*, 300 F.2d 92, 96–97 (2nd Cir. 1962).

[15] *See, e.g., Grand Union Co. v. F.T.C.*, 300 F.2d 92, 99 (2nd Cir. 1962), *aff'g In re Grand Union Co.*, 57 FTC 382 (August 12, 1960).

[16] *See, e.g., Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) ("[W]e . . . resist interpretation [of the R–P Act] geared more to the protection of existing competitors than to the stimulation of competition."); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962).

rotating of inventory, for example—under similar circumstances. FMI argued that the "suggestion[s] of liability" contained in these examples are unwarranted and discourage efficient competitive conduct. FMI asserted: that Example 1 discourages companies "from developing special or exclusive promotional programs . . ., where such promotions are part of the supplier's overall promotional program", and that Example 2 similarly discourages companies from seeking to make best use of in-store services by " 'fine-tuning' them to particular customers or channels," where alternative services are made available to competing customers as part of the supplier's overall promotional program. FMI's critique, however, does not recognize the fundamental requirement applicable both to sellers that grant and customers that knowingly induce or receive allowances, services, or facilities: as stated in the text of Guide 240.13(a), they must be "made available on proportionally equal terms" to "competitors engaged in the resale of a seller's product." Examples 1 and 2 do not discourage the development of specialized promotions or the fine- tuning of in-store service programs, where those programs are part of the supplier's overall promotional program and that program makes available to competing customers proportionally equal allowances, services, and facilities that are useable as a practical matter. And FMI has not demonstrated relevant changed facts or law since the Commission last reviewed the Guides. These Examples to section 240.13 remain valid and useful, and the Guides retain them.

With respect to Example 2, FMI also noted "the importance of in-store follow through," and then asserted that "[f]ew, if any, suppliers have the resources to provide or pay for personnel for [in- store services for] every customers' stores," and that doing so would not "be beneficial to retailers or ultimate consumers." This last point seems to be less directed at Example 2, which pertains to knowing inducement or receipt of prohibited services and facilities, as at the basic requirement of sections 2(d) and 2(e) that sellers provide services and facilities to competing customers proportionally.

As noted, section 240.13 of the Guides states that sections 2(d) and 2(e) are inapplicable to knowing inducement or receipt of greater-than-proportional promotional assistance, but that the Commission may, where there is likely injury to competition, challenge such conduct under section 5 of the FTC Act (which creates no private right of action). In so saying, section 240.13 may imply that there is no private right of action for knowing inducement or receipt of greater-than-proportional promotional assistance. Some judicial decisions published after the Commission's 1990 review of the Guides, however, have held that under some circumstances there may be a private right of action for knowing inducement or receipt of discriminatory pricing under § 2(f) of the R–P Act. *See, e.g., American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (N.D. Cal. 2001) (to extent promotional allowances "do not bear a reasonable relationship to [defendant '] actual advertising expenditures, . . . they can be challenged as indirect price discriminations under § 2(a) and § 2(f)"). In its recent request for public comments, the Commission asked whether the Guides should be revised in light of these decisions.

FMI replied that "the law on this subject is sufficiently clear that no additional discussion is needed in the Guides." But, FMI added, if the Commission were inclined to so-revise the Guides, it should explain that sections 2(a) and 2(f) of the R–P Act may apply to ostensible promotional allowances only where no services are performed in return, or where the payments are not reasonably related to the "customer's cost of performance or the value of the promotional

service to the supplier." (Emphasis in original.) The Antitrust Section appears to have derived a similar standard from its review of recent decisions, but did not comment on the utility of so-revising the Guides.

AAI did not specifically address this question, but stated that the Commission should take account of recent research findings in its review of the Guides. Specifically, AAI noted that researchers have documented that "[r]etailer's [sic] buying power has significantly increased in recent years . . . , " and that retailers "reportedly 'exert [discriminatory] buying power over manufacturers. . . .' " (Brackets in original; footnotes omitted.)

The Commission concludes that the Guides should be revised to acknowledge the possible applicability of sections 2(a) and 2(f) of the Act to promotional allowances, and the attendant risk of customer enforcement. Doing so is necessary to remedy the Guides' possible implication to the contrary, and to better assist businesses in complying with the Act, as interpreted by the courts. The Commission agrees with FMI and the Antitrust Section that sections 2(a) and 2(f) are applicable only in limited circumstances. Specifically, the Commission has revised the Guides by adding a new paragraph immediately prior to the Examples in section 240.13(a), as follows: "In addition, the giving or knowing inducement or receipt of proportionally unequal promotional allowances may be challenged under sections 2(a) and 2(f) of the Act, respectively, where no promotional services are performed in return for the payments, or where the payments are not reasonably related to the customer's cost of providing the promotional services. *See*, e.g., *American Booksellers Ass'n v. Barnes & Noble*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001); but *see United Magazine Co. v. Murdoch Magazines Distrib., Inc.* 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001). Sections 2(a) and 2(f) of the Act may be enforced by disfavored customers, among others."

The Commission declines to add a statement that sections 2(a) and 2(f) are inapplicable to promotional allowances where the payments are reasonably related to the value of the promotional service to the initial seller. Neither American Booksellers nor other decisions cited by the commenters support adoption of a "seller's value standard". *See* also the discussion of the "seller's value standard" in connection with section 240.9 of the Guides.

240.14—Meeting Competition

Section 240.14 of the Guides states that a seller may defend against charges that it has violated section 2(d) or 2(e) by showing that the promotional allowances or services in question were provided "in good faith to meet equally high payments or equivalent services offered or supplied by a competing seller. . . ." The Antitrust Section stated that the Commission should modify section 240.14 to "clarify that a supplier can meet the competition offered by a lower priced brand, including a private label brand, when the customer. . . informs the seller that unless the seller offers the allowance or service requested by the reseller, the customer will accept a competitive offer from the lower-priced brand . . . and either eliminate or reduce the promotional services provided to the seller refusing the request." The Commission does not believe that such a change is necessary or appropriate.

The Antitrust Section's comment does not indicate that the applicable law has changed since 1990 or that concrete difficulties have since arisen in the application of section 240.14.

Nevertheless, the Antitrust Section asks the Commission to conclude that sellers of higher-priced brands always may discriminate in the provision of promotional allowances or services based only on representations and threats made by buyers of lower-priced alternative goods, including store- brands. Such a sweeping summary disposition would be inconsistent with section 2(b) of the R–P Act, which limits the "meeting competition" defense to instances in which a seller acts "in good faith to meet . . . the services or facilities furnished by a competitor."[17]

Furthermore, the R–P Act "places the burden of establishing the defense on the [seller]."[18] Whether that burden is met depends on "the facts and circumstances of the particular case."[19] A seller must "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of [the discrimination] would in fact meet the equally [favorable terms] of a competitor."[20] Whether a seller has done so is a question best left for resolution on the totality of a developed record.[21] Further, because the question of the seller's good faith belief "lies at the core of the defense," issues of credibility "are inherently bound up" with claims of meeting competition.[22] Again, those issues are best resolved on the totality of a developed record. Amending section 240.14 of the Guides as urged by the Antitrust Section unnecessarily and unwisely would cut short the development of the record in an entire category of proceedings. Thus, the Guides will retain section 240.14 without change.

Conclusion

The Commission has concluded its review of the Guides by retaining the Guides with some amendments. The revised Guides should increase the use and confidence of use by the public in seeking to conduct business in accordance with sections 2(d) and 2(e) of the R–P Act.

List of Subjects in 16 CFR Part 240

Advertising, Promotional allowances and services, Robinson-Patman Act, Trade practices.

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[17] *See, e.g., Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 164 (4th Cir. 1999), in which the court noted that "courts have rarely granted the seller judgment as a matter of law on the basis of the [meeting competition] defense," citing with approval *Alan's of Atlanta Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990).

[18] *Falls City Industries v. Vanco Beverage*, 460 U.S. 428, 451 (1983).

[19] *Id*. at 441, quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

[20] *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 82 (1979), quoting *FTC v. A.E. Staley Mfg*., 324 U.S. 746, 759–60 (1945) (discussing the applicability of section 2(b) to discrimination in price).

[21] *See Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). *Compare Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971F.2d 37 (7th Cir. 1992), in which the court affirmed summary judgment based on the seller's meeting competition claim, which was supported by evidence of the seller's experience with and evaluation of the credibility of the buyer, the size and reputation of and the threats made by the buyer, pricing otherwise available in the market, etc. The evidence in Reserve Supply goes well beyond the predicate facts on which the Antitrust Section would have the Commission summarily authorize wholesale application of the defense.

[22] *Alan's of Atlanta, Inc.*, 903 F. 2d at 1425–26.

For the reasons stated above, the Federal Trade Commission revises 16 CFR part 240 to read as follows:

PART 240—GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES

Sec.

Authority: Secs. 5, 6, 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46; 49 Stat. 1526; 15 U.S.C. 13, as amended.

§ 240.1 Purpose of the Guides.

The purpose of these Guides is to provide assistance to businesses seeking to comply with sections 2(d) and (e) of the Robinson-Patman Act (the "Act"). The guides are based on the language of the statute, the legislative history, administrative and court decisions, and the purposes of the Act. Although the Guides are consistent with the case law, the Commission has sought to provide guidance in some areas where no definitive guidance is provided by the case law. The Guides are what their name implies—guidelines for compliance with the law. They do not have the force of law. They do not confer any rights on any person and do not operate to bind the FTC or the public.

§ 240.2 Applicability of the law.

(a) The substantive provisions of section 2(d) and (e) apply only under certain circumstances. Section 2(d) applies only to:

(1) A seller of products

(2) Engaged in interstate commerce

(3) That either directly or through an intermediary

(4) Pays a customer for promotional services or facilities provided by the customer

(5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(b) Section 2(e) applies only to:

(1) A seller of products

(2) Engaged in interstate commerce

(3) That either directly or through an intermediary

(4) Furnishes promotional services or facilities to a customer

(5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(c) Additionally, section 5 of the FTC Act may apply to buyers of products for resale or to third parties. *See* § 240.13 of these Guides.

§ 240.3 Definition of seller.

Seller includes any person (manufacturer, wholesaler, distributor, etc.) who sells products for resale, with or without further processing. For example, selling candy to a retailer is a sale for resale without processing. Selling corn syrup to a candy manufacturer is a sale for resale with processing.

§ 240.4 Definition of customer.

A *customer* is any person who buys for resale directly from the seller, or the seller's agent or broker. In addition, a "customer" is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller. The word "customer" which is used in section 2(d) of the Act includes "purchaser" which is used in section 2(e).

Note: There may be some exceptions to this general definition of "customer." For example, the purchaser of distress merchandise would not be considered a "customer" simply on the basis of such purchase. Similarly, a retailer purchasing solely from other retailers, or making sporadic purchases from the seller or one that does not regularly sell the seller's product, or that

is a type of retail outlet not usually selling such products (e.g., a hardware store stocking a few isolated food items) will not be considered a "customer" of the seller unless the seller has been put on notice that such retailer is selling its product.

Example 1: A manufacturer sells to some retailers directly and to others through wholesalers. Retailer A purchases the manufacturer's product from a wholesaler and resells some of it to Retailer B. Retailer A is a customer of the manufacturer. Retailer B is not a customer unless the fact that it purchases the manufacturer's product is known to the manufacturer.

Example 2: A manufacturer sells directly to some independent retailers, to the headquarters of chains and of retailer-owned cooperatives, and to wholesalers. The manufacturer offers promotional services or

allowances for promotional activity to be performed at the retail level. With respect to such services and allowances, the direct- buying independent retailers, the headquarters of the chains and retailer- owned cooperatives, and the wholesaler's independent retailer customers are customers of the manufacturer. Individual retail outlets of the chains and the members of the retailer- owned cooperatives are not customers of the manufacturer.

Example 3: A seller offers to pay wholesalers to advertise the seller's product in the wholesalers' order books or in the wholesalers' price lists directed to retailers purchasing from the wholesalers. The wholesalers and retailer-owned cooperative headquarters and headquarters of other bona- fide buying groups are customers. Retailers are not customers for purposes of this promotion.

§ 240.5 Definition of competing customers.

Competing customers are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary.

Example 1: Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three competing retailers that sell only in the Roanoke, Virginia area.

Manufacturer A has no other customers selling in Roanoke or its vicinity. If Manufacturer A offers its promotion to one Roanoke customer, it should include all three, but it can limit the promotion to them. The trade area should be drawn to include retailers who compete.

Example 2: A national seller has direct- buying retailing customers reselling exclusively within the Baltimore area, and other customers within the area purchasing through wholesalers. The seller may lawfully engage in a promotional campaign confined to the Baltimore area, provided that it affords all of its retailing customers within the area the opportunity to participate, including those that purchase through wholesalers.

Example 3: B manufactures and sells a brand of laundry detergent for home use. In one metropolitan area, B's detergent is sold by a grocery store and a discount department store. If these stores compete with each other, any allowance, service or facility that B makes available to

the grocery store should also be made available on proportionally equal terms to the discount department store.

§ 240.6 Interstate commerce.

The term "interstate commerce" has not been precisely defined in the statute. In general, if there is any part of a business which is not wholly within one state (for example, sales or deliveries of products, their subsequent distribution or purchase, or delivery of supplies or raw materials), the business may be subject to sections 2(d) and 2(e) of the Act. (The commerce standard for sections 2(d) and (e) is at least as inclusive as the commerce standard for section 2(a).) Sales or promotional offers within the District of Columbia and most United States possessions are also covered by the Act.

§ 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; and Online advertising.

Example 1: A seller offers a supermarket chain an allowance of $500 per store to stock a new packaged food product and find space for it on the supermarket's shelves and a further allowance of $300 per store for placement of the new product on prime display space, an aisle endcap. The $500 allowance relates primarily to the initial sale of the product to the supermarket chain, and therefore should be assessed under section 2(a) of the Act. In contrast, the $300 allowance for endcap display relates primarily to the resale of the product by the supermarket chain, and therefore should be assessed under section 2(d).

Example 2: During 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 primary purpose of the special packaging is to promote customers' resale of the candy bars. Therefore, the special packaging is a promotional service or facility covered by section 2(d) or 2(e) of the Act.

Example 3: A seller of liquid laundry detergent ordinarily packages its detergent in containers having a circular footprint. A customer asks the seller to furnish the detergent to it in special packaging having a square footprint, so that the customer can more efficiently warehouse

and transship the detergent. Because the purpose of the special packaging is primarily to promote the original sale of the detergent to the customer and not its resale by the customer, the special packaging is not a promotional service or facility covered by section 2(d) or 2(e) of the Act.

§ 240.8 Need for a plan.

A seller who makes payments or furnishes services that come under the Act should do so according to a plan. If there are many competing customers to be considered or if the plan is complex, the seller would be well advised to put the plan in writing. What the plan should include is described in more detail in the remainder of these Guides. Briefly, the plan should make payments or services functionally available to all competing customers on proportionally equal terms. (*See* § 240.9 of this part.) Alternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of any of the plan's offerings. The seller should inform competing customers of the plans available to them, in time for them to decide whether to participate. (*See* § 240.10 of this part.)

§ 240.9 Proportionally equal terms.

Promotional services and allowances should be made available to all competing customers on proportionally equal terms. No single way to do this is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period. However, other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable.

When a seller offers more than one type of service, or payments for more than one type of service, all the services or payments should be offered on proportionally equal terms. The seller may do this by offering all the payments or services at the same rate per unit or amount purchased. Thus, a seller might offer promotional allowances of up to 12 cents a case purchased for expenditures on either newspaper or Internet advertising or handbills.

Example 1: A seller may offer to pay a specified part (e.g., 50 percent) of the cost of local advertising up to an amount equal to a specified percentage (e.g., 5 percent) of the dollar volume of purchases during a specified period of time.

Example 2: A seller may place in reserve for each customer a specified amount of money for each unit purchased, and use it to reimburse these customers for the cost of advertising the seller's product.

Example 3: A seller should not provide an allowance or service on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1 percent of the first $1,000 purchased per month, 2 percent of the second $1,000 per month, and 3 percent of all over that.

Example 4: A seller should not identify or feature one or a few customers in its own advertising without making the same, or if impracticable, alternative services available on proportionally equal terms to customers competing with the identified customer or customers.

Example 5: A seller who makes employees available or arranges with a third party to furnish personnel for purposes of performing work for a customer should make the same offer available on proportionally equal terms to all other competing customers or offer useable and suitable services or allowances on proportionally equal terms to competing customers for whom such services are not useable and suitable.

Example 6: A seller should not offer to pay a straight line rate for advertising if such payment results in a discrimination between competing customers; e.g., the offer of $1.00 per line for advertising in a newspaper that charges competing customers different amounts for the same advertising space. The straight line rate is an acceptable method for allocating advertising funds if the seller offers small retailers that pay more than the lowest newspaper rate an alternative that enables them to obtain the same percentage of their advertising cost as large retailers. If the $1.00 per line allowance is based on 50 percent of the newspaper's lowest contract rate of $2.00 per line, the seller should offer to pay 50 percent of the newspaper advertising cost of smaller retailers that establish, by invoice or otherwise, that they paid more than that contract rate.

Example 7: A seller offers each customer promotional allowances at the rate of one dollar for each unit of its product purchased during a defined promotional period. If Buyer A purchases 100 units, Buyer B 50 units, and Buyer C 25 units, the seller maintains proportional equality by allowing $100 to Buyer A, $50 to Buyer B, and $25 to Buyer C, to be used for the Buyers' expenditures on promotion.

§ 240.10 Availability to all competing customers.

(a) *Functional availability*. (1) The seller should take reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers. This may require offering alternative terms and conditions under which customers can participate. When a seller provides alternatives in order to meet the availability requirement, it should take reasonable steps to ensure that the alternatives are proportionally equal, and the seller should inform competing customers of the various alternative plans.

(2) The seller should insure that promotional plans or alternatives offered to retailers do not bar any competing retailers from participation, whether they purchase directly from the seller or through a wholesaler or other intermediary.

(3) When a seller offers to competing customers alternative services or allowances that are proportionally equal a practical sense by all competing customers, and refrains from taking steps to prevent customers from participating, it has satisfied its obligation to make services and allowances "functionally available" to all customers. Therefore, the failure of any customer to participate in the program does not place the seller in violation of the Act.

Example 1: A manufacturer offers a plan for cooperative advertising on radio, TV, or in newspapers of general circulation. Because the purchases of some of the manufacturer's customers are too small this offer is not useable in a practical sense by them. The manufacturer should offer them alternative(s) on proportionally equal terms that are useable in a practical

sense by them. In addition, some competing customers are online retailers that cannot make practical use of radio, TV, or newspaper advertising. The manufacturer should offer them proportionally equal alternatives, such as online advertising, that are useable by them in a practical sense.

Example 2: A seller furnishes demonstrators to large department store customers. The seller should provide alternatives useable in a practical sense on proportionally equal terms to those competing customers who cannot use demonstrators. The alternatives may be services useable in a practical sense that are furnished by the seller, or payments by the seller to customers for their advertising or promotion of the seller's product.

Example 3: A seller offers to pay 75 percent of the cost of advertising in daily newspapers, which are the regular advertising media of the seller's large or chain store customers, but a lesser amount, such as only 50 percent of the cost, or even nothing at all, for advertising in semi-weekly, weekly, or other newspapers or media, such as the Internet, that may be used by small retail customers. Such a plan discriminates against particular customers or classes of customers. To avoid that discrimination, the seller in offering to pay allowances for newspaper advertising should offer to pay the same percent of the cost of newspaper advertising for all competing customers in a newspaper of the customer's choice, or at least in those newspapers that meet the requirements for second class mail privileges. While a small customer may be offered, as an alternative to advertising in daily newspapers, allowances for other media and services such as envelope stuffers, handbills, window banners, Web sites, and the like, the small customer should have the choice to use its promotional allowance for advertising similar to that available to the larger customers, if it can practicably do so.

Example 4: A seller offers short term displays of varying sizes, including some which are useable by each of its competing customers in a practical business sense. The seller requires uniform, reasonable certification of performance by each customer. Because they are reluctant to process the required paper work, some customers do not participate. This fact does not place the seller in violation of the functional availability requirement and it is under no obligation to provide additional alternatives.

(b) *Notice of available services and allowance.*: 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.

(c) A seller may contract with intermediaries or other third parties to provide notice. *See* § 240.11.

Example 1: A seller has a plan for the retail promotion of its product in Philadelphia. Some of its retailing customers purchase directly and it offers the plan to them. Other Philadelphia retailers purchase the seller's product through wholesalers. The seller may use the wholesalers to reach the retailing customers that buy through them, either by having the wholesalers notify these retailers, or by using the wholesalers' customer lists for direct notification by the seller.

Example 2: A seller that sells on a direct basis to some retailers in an area, and to other retailers in the area through wholesalers, has a plan for the promotion of its product at the retail level. If the seller directly notifies competing direct purchasing retailers, and competing retailers purchasing through the wholesalers, the seller is not required to notify its wholesalers.

Example 3: A seller regularly promotes its product at the retail level and during the year has various special promotional offers. The seller's competing customers include large direct-purchasing retailers and smaller retailers that purchase through wholesalers. The promotions offered can best be used by the smaller retailers if the funds to which they are entitled are pooled and used by the wholesalers on their behalf (newspaper advertisements, for example). If retailers purchasing through a wholesaler designate that wholesaler as their agent for receiving notice of, collecting, and using promotional allowances for them, the seller may assume that notice of, and payment under, a promotional plan to such wholesaler constitutes notice and payment to the retailer. The seller must have a reasonable basis for concluding that the retailers have designated the wholesaler as their agent.

§ 240.11 Wholesaler or third party performance of seller's obligations.

A seller may contract with intermediaries, such as wholesalers, distributors, or other third parties, to perform all or part of the seller's obligations under sections 2(d) and (e). The use of intermediaries does not relieve a seller of its responsibility to comply with the law. Therefore, in contracting with an intermediary, a seller should ensure that its obligations under the law are in fact fulfilled.

§ 240.12 Checking customer's use of payments.

The seller should take reasonable precautions to see that the services the seller is paying for are furnished and that the seller is not overpaying for them. The customer should expend the allowance solely for the purpose for which it was given. If the seller knows or should know that what the seller is paying for or furnishing is not being properly used by some customers, the improper payments or services should be discontinued.

§ 240.13 Customer's and third party liability.

(a) *Customer's liability*. Sections 2(d) and (e) apply to sellers and not to customers. However, where there is likely injury to competition, the Commission may proceed under section 5 of the Federal Trade Commission Act against a customer who knows, or should know, that it is receiving a discriminatory price through services or allowances not made available on proportionally equal terms to its competitors engaged in the resale of a seller's product. Liability for knowingly receiving such a discrimination may result whether the discrimination takes place directly through payments or services, or indirectly through deductions from purchase invoices or other similar means. In addition, the giving or knowing inducement or receipt of proportionally unequal promotional allowances may be challenged under sections 2(a) and 2(f) of the Act, respectively, where no promotional services are performed in return for the payments, or where the payments are not reasonably related to the customer's cost of providing the promotional services. *See, e.g., American Booksellers Ass'n v. Barnes & Noble*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001); but *see United Magazine Co. v. Murdoch Magazines Distrib., Inc.* 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001). Sections 2(a) and 2(f) of the Act may be enforced by disfavored customers, among others.

Example 1: A customer should not induce or receive advertising allowances for special promotion of the seller's product in connection with the customer's anniversary sale or new store opening when the customer knows or should know that such allowances, or suitable alternatives, are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 2: Frequently the employees of sellers or third parties, such as brokers, perform in-store services for their grocery retailer customers, such as stocking of shelves, building of displays and checking or rotating inventory, etc. A customer operating a retail grocery business should not induce or receive such services when the customer knows or should know that such services (or usable and suitable alternative services) are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 3: Where a customer has entered into a contract, understanding, or arrangement for the purchase of advertising with a newspaper or other advertising medium, such as the Internet, that provides for a deferred rebate or other reduction in the price of the advertising, the customer should advise any seller from whom reimbursement for the advertising is claimed that the claimed rate of reimbursement is subject to a deferred rebate or other reduction in price. In the event that any rebate or adjustment in the price is received, the customer should refund to the seller the amount of any excess payment or allowance.

Example 4: A customer should not induce or receive an allowance in excess of that offered in the seller's advertising plan by billing the seller at "vendor rates" or for any other amount in excess of that authorized in the seller's promotional program.

(b) *Third party liability*. Third parties, such as advertising media, may violate section 5 of the Federal Trade Commission Act through double or fictitious rates or billing. An advertising medium, such as the Internet, a newspaper, broadcast station, or printer of catalogues, that publishes a rate schedule containing fictitious rates (or rates that are not reasonably expected to be applicable to a representative number of advertisers), may violate section 5 if the customer uses such deceptive schedule or invoice for a claim for an advertising allowance, payment or credit greater than that to which it would be entitled under the seller's promotional offering. Similarly, an advertising medium that furnishes a customer with an invoice that does not reflect the customer's actual net advertising cost may violate section 5 if the customer uses the invoice to obtain larger payments than it is entitled to receive.

Example 1: A newspaper has a "national" rate and a lower "local" rate. A retailer places an advertisement with the newspaper at the local rate for a seller's product for which the retailer will seek reimbursement under the seller's cooperative advertising plan. The newspaper should not send the retailer two bills, one at the national rate and another at the local rate actually charged.

Example 2: A newspaper has several published rates. A large retailer has in the past earned the lowest rate available. The newspaper should not submit invoices to the retailer showing a high rate by agreement between them unless the invoice discloses that the retailer may receive a rebate and states the amount (or approximate amount) of the rebate, if known, and if not known, the amount of rebate the retailer could reasonably anticipate.

Example 3: A radio station has a flat rate for spot announcements, subject to volume discounts. A retailer buys enough spots to qualify for the discounts. The station should not submit an invoice to the retailer that does not show either the actual net cost or the discount rate.

Example 4: An advertising agent buys a large volume of newspaper advertising space at a low, unpublished negotiated rate. Retailers then buy the space from the agent at a rate lower than they could buy this space directly from the newspaper. The agent should not furnish the retailers invoices showing a rate higher than the retailers actually paid for the space.

§ 240.14 Meeting competition.

A seller charged with discrimination in violation of sections 2(d) and (e) may defend its actions by showing that particular payments were made or services furnished in good faith to meet equally high payments or equivalent services offered or supplied by a competing seller. This defense is available with respect to payments or services offered on an area-wide basis, to those offered to new as well as old customers, and regardless of whether the discrimination has been caused by a decrease or an increase in the payments or services offered. A seller must reasonably believe that its offers are necessary to meet a competitor's offer.

§ 240.15 Cost justification.

It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to show that such payment or service could be justified through savings in the cost of manufacture, sale or delivery.

By direction of the Commission.

Donald S. Clark,
Secretary.
[FR Doc. 2014–23137 Filed 9–26–14; 8:45 am]

Short Appendix

Short Appendix:
Table of Contents

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

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

THE CLOROX COMPANY and
THE CLOROX SALES COMPANY,

Defendants.

OPINION AND ORDER

14-cv-734-slc

In this civil action for declaratory and injunctive relief, plaintiff Woodman's Food Market, Inc. alleges that defendants The Clorox Company and The Clorox Sales Company have violated the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(d) and (e), by offering to sell "large pack" products only to "club" retailers such as Costco and Sam's Club but not to "general market" stores like Woodman's.[1] Clorox has moved to dismiss Woodman's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. I am denying this motion for the reasons stated below.

ALLEGATIONS OF FACT

I. The Parties

Plaintiff Woodman's Food Market, Inc. is an employee-owned corporation based in Janesville, Wisconsin. It operates 15 retail grocery stores in Wisconsin and Illinois and has approximately 3,200 employees, 2,600 of whom work in Wisconsin.

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[1] 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.

Defendants The Clorox Company and The Clorox Sales Company (hereafter referred to in the singular as "Clorox") are Delaware corporations with their corporate offices and headquarters in Oakland, California. Clorox manufactures and sells a variety of consumer and professional products, including bleach, cleaning supplies, charcoal, cat litter, sandwich bags, wraps, containers, water filtration products and personal care products.

Woodman's has been a customer of Clorox's for many years. Clorox purchases over 480 different items (known as "stock keeping units" or SKUs) from Clorox.

II. Clorox Changes the Products Offered to Woodman's

Historically, Woodman's purchased a number of "large pack" products from Clorox. These products are larger containers or packages of a product that typically are offered to customers at a cost savings per unit compared to the price per unit when the product is sold in smaller containers or packages. On September 9, 2014, Clorox's Director of Sales, Customer and Industry Affairs met with representatives from Woodman's to discuss Clorox's plan for a "Differentiated Products Offering." Clorox announced that as of October 1, Woodman's would be classified as a "general market retailer" and placed in a different "channel" than Sam's Club and Costco, two of Woodman's competitors. In a document presented to Woodman's at the meeting, Clorox explained its goals: "simplify its go to market strategy with Club and General Market packs"; "streamline [its] operations and deliver [its] best cost to serve by regulating the products we sell to customers/channels"; "[m]eet[] customer's desire for differentiated products from manufacturers"; and "[c]reate[] the right assortment of sizes and brands for

customers/channels based on their shoppers [to] maximize[] both the customer and Clorox sales." *See* Compl., dkt.1 at exh. 3.

Clorox announced that as of October 1, Woodman's no longer could purchase large packs of any Clorox product except for a Kingsford charcoal 20-lb double pack. Although Woodman's still could purchase smaller packages of all of Clorox's products, Clorox would not sell these products to Woodman's at the large-pack unit price that Woodman's had been paying; in many cases, the unit price would increase. Clorox would permit only Sam's Club, Costco and BJ's (a large scale retailer not active in Wisconsin) to purchase Clorox's large packs, which meant that these three retailers would be able to buy and resell the large-pack items at a lower unit cost than Woodman's could offer on smaller packs of these same products.

Woodman's believes that many of its large-pack customers are attracted to large packs not just because the unit price is lower, but also because they don't have to buy the product and tote it home as frequently. Further, many of Woodman's customers cannot afford to purchase memberships in retailers like Sam's Club and Costco. As a result of Clorox's decision, these customers will have no choice but to pay higher prices for those products when they buy them at Woodman's. On the flipside of this coin, Woodman's also expresses concern that when customers who *can* afford club memberships discover that Clorox large packs still are available at the club stores, these customers will stop shopping at Woodman's and start purchasing those products (and the other products they need) from the club stores.

OPINION

I. Legal Standards

Clorox has moved to dismiss each of Woodman's claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. In ruling on a Rule 12(b)(6) motion, the court accepts all well-pleaded allegations as true and draws all inferences in favor of the plaintiff. *Bielanski v. County of Kane*, 550 F.3d 632, 633 (7th Cir. 2008) (citations omitted). The complaint must include "enough facts to state a claim to relief that is plausible on its face." *Hecker v. Deere & Co.*, 556 F.3d 575,580 (7th Cir. 2009) (citations omitted). This means that the complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). As the Court of Appeals for the Seventh Circuit has explained, a complaint "must suggest that the plaintiff has a right to relief . . . by providing allegations that 'raise a right to relief above a speculative level.'" *Equal Employment Opportunity Commission v. Concentra Health Servs., Inc.*, 496 F.3d 773, 777 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007)).

In deciding a Rule 12(b)(6) motion, the court may consider documents attached to the complaint, including letters and contracts, without converting the motion into one for summary judgment. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012) (citing Rule 10(c)); *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452-53 (7th Cir. 1998). Further, where allegations in the complaint are contradicted by written exhibits attached to the complaint, the exhibits trump the allegations. *Abcarian v. McDonald*, 617 F.3d 931, 933 (7th Cir. 2010).

Woodman's has brought its claims under the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13, which state:

> **(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.

These sections generally prohibit a seller from paying allowances or furnishing services to promote the resale of its products unless the allowances or services are offered to all competing customers on proportionally equal terms. *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 79 FR 58245-01 at 58246, 16 C.F.R. Part 240 (FTC Sept. 29, 2014). Promotional services or facilities are those that "somehow aid the buyer in reselling the product, such as advertising, packaging, informational brochures, and the like." Areeda Hovenkamp, XIV *Antitrust Law* ¶ 2363e at p. 291 (3d ed. 2012). Only those services "necessary to facilitate the reseller's subsequent marketing" are covered by the two provisions. *Id.* at p. 292.

Subsection (d) covers situations in which the seller pays a favored buyer for promotional services performed by the buyer; subsection (e) covers situations where the seller provides such services directly to the buyer. Julian Von Kalinowski, 1 *Antitrust Laws and Trade Regulation: Desk Edition* § 5.10[2] (2d ed. 2014) (citing *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959)). The two subsections are similar in all other respects and have been interpreted virtually identically. *Id.* at § 5.10[1]. I note that Woodman's has alleged violations of both subsections but in opposition to dismissal has advanced arguments only with respect to subsection (e), which seems to fit the facts of this case more closely. Because Clorox has advanced the same arguments with respect to both subsections, it is unnecessary to distinguish between the two.

II. Analysis

The crux of the parties' dispute is whether the large packs offered by Clorox only to the club stores can be considered a promotional service under the act. Woodman's argues that the large packs constitute special packaging that helps Clorox's retail customers resell the product to the general public. Clorox argues that package size is not a service—a 42-pound bag of cat litter is just a product—so that Woodman's complaint fails because Clorox cannot be held liable for merely refusing to sell its products to a particular retailer. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 617 F.2d 468, 470 (7th Cir. 1980) (Section "2(e) 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").

Clorox points out that no federal court has addressed whether a special package size constitutes a promotional service under subsection (d) or (e) of the act. In the absence of case

law, Woodman's relies on a pair of old-but-never-revoked administrative decisions and a series of more recent FTC guidelines. *See In The Matter of General Foods Corporation*, 52 F.T.C. 798 (1956); *In the matter of Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Guides for Advertising*, 79 FR 58245-01. In *Luxor*, the FTC found that because the "junior" size cosmetic products offered by Luxor were more convenient to carry, reduced waste and promoted freshness, the special packaging size facilitated the resale of the products and constituted a promotional service or facility under subsection (e). 31 F.T.C. at 63. Similarly, in *General Foods*, the hearing examiner determined that the corporation's decision to offer an institutionalized size package of Maxwell House Coffee to only some of its customers violated subsection (e). 52 F.T.C. at 816-17. In both cases, the products at issue were of the same grade and quality irrespective of the size of the container in which they had been packaged.

Subsequent to these decisions, the FTC published guidelines in 1969 to help businesses comply with subsections (d) and (e). These guidelines were revised in 1990 and again in 2014. 79 FR at 58245. Section 240.7 of the guidelines recognizes that "'services' or 'facilities' have not been exactly defined by the statute or in decisions" and sets forth a non-exhaustive list of activities that the FTC considers to be promotional services under subsections (d) and (e); the list expressly includes "special packaging, or package sizes." 16 C.F.R. § 240.7. The guidelines explain that one example of "special packaging" is a seller providing its regularly offered multi-packs of individually wrapped candy bars to retailers in Halloween-themed packaging during the Halloween season. *Id.* In commentary to the 2014 guidelines, the FTC explained its decision to keep special packaging and package sizes on its list of covered promotional services:

> The Antitrust Section urged that "special packaging and package sizes" be deleted from the list because "the established law is now

> clear that partial refusals to deal with particular resellers, including refusals to sell them particular products in a product line, are not covered by the [R-P Act]." NGA opposed that suggestion, stating that the discriminatory provision of special packaging and package sizes continues to be used to advantage "power buyer[s]" when they are given the option to purchase special packaging or package sizes and competing customers are not, thereby creating "class of trade distinctions."
>
> All of the decisions cited by the Antitrust Section predate the Commission's 1990 revision of the Guides, and none of them 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.
>
> 79 FR at 58248.

Clorox argues that, unlike the Halloween-themed packaging described in the guidelines, its large-size products are not a temporary gimmick to drive up business during a particular season. That's true but unpersuasive. Nothing in the guidelines or the FTC decisions indicates that the statutory prohibitions on price discrimination apply only to seasonal or temporary promotions. In fact, both *Luxor* and *General Foods* involved specially-sized products that were offered on a year-round basis, just like Clorox's large-size products. As in *Luxor* and *General Foods*, it is reasonable to conclude that the special size of Clorox's large-packs is connected to the resale of those products. Woodman's has alleged that it is more convenient for customers to purchase and carry home large-pack products, and the large-packs can be (and are) offered to customers at a lower cost per unit than the smaller packs of the same product.

Although *Luxor* and *General Foods* seem dispositive, Clorox dismisses these decisions as non-binding and antiquated, asserting that they do "not provide a sound basis for asking this Court to adopt a sweeping expansion of the Robinson-Patman Act." Dkt. 21 at 8-9. According to Clorox, the FTC has been backing away from its decision in *Luxor* for decades. To illustrate

its point, Clorox cites *In re Gibson*, 95 F.T.C. 553 (1980), in which the commissioner stated: "Because of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed." *Id.* at *92.

In *Gibson*, however, the FTC was grappling generally with whether Gibson's actions in inducing their suppliers to offer payments and special pricing only to Gibson's family-owned and franchised stores at a trade show constituted violations of subsection (a) versus subsections (d) and (e). *See id.* at 93-4 (noting purpose of (d) and (e) is "prohibiting outright hard-to-detect, disguised [price] discrimination in the form of promotional allowances" to encourage resale and not initial purchase of product). Nothing in *Gibson* addresses *Luxor* or the question whether offering different sizes of the same product can be construed as special packaging. *Id.* at 94 (finding (d) and (e) did not apply because trade show perks benefitted Gibson stores with initial purchase and not ultimate consumers on resale).

Clorox also mentions in a footnote that the Supreme Court has overturned decisions similar to *Luxor* as inconsistent with the antitrust law's goal of protecting competition. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, (1997); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–57 (1977). However, as Woodman's points out, these decisions addressed whether various forms of vertical price restraints are *per se* violations of § 1 of the Sherman Act[2]; none involved any provision of the Robinson-Patman Act. *Id.*

[2] Section 1 of the Sherman Act generally prohibits agreements or contracts that restrain interstate trade or commerce. *Leegin*, 551 U.S. at 885.

In sum, 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. Further, the FTC has made clear in its recently revised guidelines that even though Clorox may refuse to deal with a particular retailer, Clorox cannot use special packaging and package sizes to benefit only certain customers. Woodman's allegations are sufficient to state a claim under the Robinson-Patman Act.

ORDER

IT IS ORDERED that defendants' motion to dismiss this lawsuit, dkt. 20, is DENIED.

Entered this 2nd day of February, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

THE CLOROX COMPANY and
THE CLOROX SALES COMPANY,

Defendants.

OPINION AND ORDER

14-cv-734-slc

In this civil action for declaratory and injunctive relief, plaintiff Woodman's Food Market, Inc. alleges that defendants The Clorox Company and The Clorox Sales Company ("Clorox") have violated the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a), (d) and (e), by offering to sell "large pack" products only to "club" retailers such as Costco and Sam's Club and not "general market" stores like Woodman's. In an order entered on February 2, 2015, I denied Clorox's motion to dismiss under Fed. R. Civ. P. 12(b)(6), finding that even though Clorox legally may refuse to deal with a particular retailer, the use of special packaging and package sizes to benefit only certain customers stated a claim sufficient to survive front-end dismissal. Dkt. 50. Since then, things have zigged and zagged a bit:

On February 24, 2015, Clorox unilaterally chose to end all business dealings with Woodman's. That same day, Clorox moved to dismiss Woodman's complaint as moot because Woodman's no longer was a purchaser of its products and therefore could not suffer any further alleged discrimination. Dkt. 63. Woodman's opposes that motion, arguing that it remains a "purchaser" under the act because now it will buy Clorox products through one or more wholesalers. Dkt. 69. In addition, Woodman's now seeks to amend its complaint to add claims under § 1 of the Sherman Act. Dkt. 68. Clorox rejoins that its decision to terminate its business

relationship with Woodman's has deprived this court of subject matter jurisdiction in this case, which in turn prevents the court from granting Woodman's leave to amend.

Because Woodman's has shown that it may still qualify as a purchaser with standing under the Act, I am denying Clorox's motion to dismiss and granting Woodman's motion for leave to file an amended complaint.

OPINION

I. Legal Standard

As an initial matter, the parties dispute how the court should characterize Clorox's pending motion to dismiss. Clorox contends that the complaint is moot, but it does not identify in its motion or brief which rule of civil procedure it is relying on. Woodman's apparently construed the motion as a Rule 12(b)(6) motion to dismiss for failure to state a claim and argues that the motion should be converted to a motion for summary judgment under Rule 12(d) because Clorox relies on matters outside the pleadings.

In its reply brief, Clorox states that it is moving for dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and may rely on affidavits and other materials supporting its motion. *See United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003); *Sapperstein v. Hager*, 188 F.3d 852, 855 (7th Cir. 1999) ("[W]here evidence pertinent to subject matter jurisdiction has been submitted . . . the district court may properly look beyond the jurisdictional allegations of the complaint . . . to determine whether in fact subject matter jurisdiction exists.") (internal quotation marks and citation omitted). The Court of Appeals for the Seventh Circuit has made clear that "[f]ederal courts lack subject matter jurisdiction when a case becomes moot." *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011).

Therefore, Clorox's motion is properly characterized as a motion brought pursuant to Rule 12(b)(1), and it is unnecessary to convert the motion to a motion for summary judgment under Rule 12(d).

II. Analysis

Clorox contends that Woodman's action for declaratory and injunctive relief[1] has become moot because Clorox has ended its customer relationship with Woodman's, a decision that Clorox says was within its rights under the Robinson-Patman Act, 15 U.S.C. § 13. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 617 F.2d 468, 470-71 (7th Cir. 1980) (agreeing with district court that the Act does not prohibit seller from choosing its customers or from refusing to deal with purchasers to whom it does not wish to sell); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (statute does not require seller to create or maintain customer relationship with any buyer). Therefore, contends Clorox, no live controversy remains in this lawsuit because Woodman's cannot claim protection under §§ 13(d) and (e) of the Act because only a "purchaser" may do so. *Harper Plastics*, 617 F.2d at 470-71; *see also Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 149 (7th Cir. 2011) ("A case must present a live controversy at the time of filing, contain a live dispute through all stages of litigation, and the parties must continue to have a personal stake in the outcome of the lawsuit throughout its duration."). Extending that reasoning, Clorox contends that without continuing jurisdiction, the court cannot even grant Woodman's leave to amend its complaint to add a separate claim under the Sherman Act.

[1] Woodman's does not seek monetary damages in this case.

Generally, a case may become moot where the defendant has completely discontinued the challenged activity, the discontinued activity has no present effects, and the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006); 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.5 (3d ed. 2013). Clorox points out that because it has ceased all sales to Woodman's, there no longer is any danger that it will sell to Woodman's on discriminatory terms. Woodman's responds that notwithstanding this freeze-out, Woodman's continues to be a purchaser within the meaning of the Act because it continues to purchase Clorox products through one or more wholesalers. Dkt. 71 (affidavit of Woodman's procurement director).

The two price discrimination provisions at issue in this case prohibit certain actions by sellers with respect to promotions offered to their buyers. Although § 13(d) refers to "customers" and § 13(e) refers to "purchasers" in describing who is protected by the Act, the two terms are used interchangeably. 16 C.F.R. § 240.4 ("The word 'customer' which is used in section 2(d) of the Act includes 'purchaser' which is used in section 2(e)."); Areeda Hovenkamp, XIV *Antitrust Law* ¶ 2363b (3d ed. 2012). Woodman's points out that in the *Guides for Advertising Allowances and Other Merchandising Payments and Services*, the Federal Trade Commission (FTC) has broadly defined a "customer" to include "any person who buys for resale directly from the seller, or the seller's agent or broker" and "any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller." 16 C.F.R. § 240.4. Clorox contends that the guidelines are not entitled to deference because the commission has stated that they "do not carry the force of law," 79 Fed. Reg. 58245, 58253 (Sept. 29,

2014); multiple agencies share responsibility for enforcing the Robinson-Patman Act, creating a risk that the same statutory provision will be interpreted differently by different agencies, *Rapaport v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995); and the courts and not federal agencies are charged with interpreting broadly worded statutes. But even though the *Guides* may not have the force of law, they are instructive in this case, particularly in light of Supreme Court precedent on this issue.

Shortly before the FTC issued the guidelines in 1969, the Supreme Court addressed the definition of "customer" in *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). There, the seller had paid preferential promotional allowances to a direct-buying retailer but did not make the same allowances available to retailers that purchased through wholesalers. The Court found that the seller's program should have made comparable allowances, presumably through the wholesalers, to the indirect purchasers:

> If we were to read "customer" as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of s 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class.
>
> *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 351 (1968).

Woodman's seeks–but does not obtain–additional support from a decision by the Court of Appeals for the Sixth Circuit in which the court discussed the reach of the *Fred Meyer* decision in a case where both the favored and disfavored parties purchased through intermediaries. *Lewis v. Philip Morris Inc.*, 355 F.3d 515 (6th Cir. 2004). In *Lewis*, cigarette vending machine operators, some of whom purchased indirectly through wholesalers, alleged that Phillip Morris offered promotions directly to convenience stores but did not offer any such promotions to the vending

machine operators, either directly or indirectly through the wholesaler. Although Woodman's cites language from *Lewis* that appears to grant standing to the cigarette vendors who purchased through wholesalers, this is not the court's actual holding. The opinion in *Lewis* was entered per curiam by a sharply divided panel. Although the majority confirmed *Fred Meyer*'s definition of the term "customer" in §§ 13(d) and (e), it actually refused to grant standing to the cigarette vendors who purchased through wholesalers. The majority found that an action cannot be maintained where both the favored and disfavored parties are indirect purchasers. *Id.* at 526-27. Thus the Sixth Circuit "would limit *Fred Meyer* to its actual situation—namely, where the defendant offered [promotions] to a large retailer who purchased directly but failed to offer them either to a wholesaler intermediary, or to the retailer customers of that intermediary." Hovenkamp ¶ 2363d2 at p. 291. That said, Woodman's overselling of *Lewis* is of no consequence to this court's analysis because the facts here align more tightly with the facts in *Fred Meyer*. Woodman's alleges that Clorox offers special packaging to large club stores that purchase directly from Clorox but fails to offer the same special packaging to general market stores like Woodman's, even when they purchase Clorox products through wholesalers.

Clorox posits without elaboration that *Fred Meyer* and *Lewis* are distinguishable because neither case involved a seller's refusal to deal directly with a customer. Without more, it is unclear how this distinction would have made a difference in either case. The Supreme Court explained in *Fred Meyer* that

> We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales. Nothing we have said bars a supplier, consistently with other provisions of the antitrust laws, from utilizing his wholesalers to distribute

> payments or administer a promotional program, so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product.

Fred Meyer, 390 U.S. at 358.

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 promotional 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.").

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.

III. Motion for Leave to Amend Complaint

Clorox opposes Woodman's motion for leave to amend solely on the ground that the case became moot when Clorox stopped selling to Woodman's on February 24, 2015, thereby depriving the court of subject matter jurisdiction. On March 17, 2015, Woodman's notified

Clorox that it intended to file an amended complaint, but Clorox asked Woodman's to delay filing the proposed amended complaint so that the parties could attempt settlement. In return, Clorox agreed not to challenge the motion to amend as untimely. Because I have found that the case is not moot and there is no other apparent reason for denying Woodman's leave to amend, I will grant leave. *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'"); Fed. R. Civ. P. 15(a)(2) ("court should freely give leave [to amend] when justice so requires").

ORDER

IT IS ORDERED that:

(1) Defendants' motion to dismiss this lawsuit for lack of subject matter jurisdiction, dkt. 63, is DENIED; and,

(2) Plaintiff's motion for leave to amend its complaint, dkt. 68, is GRANTED.

Entered this 27th day of April, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

Certificate of Service

I hereby certify that, on October 26, 2015, an electronic copy of the foregoing Brief of Defendants-Appellants The Clorox Company and The Clorox Sales Company was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Clerk's CM/ECF system and was served electronically on the following registered CM/ECF users:

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