Case 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
The Honorable Magistrate Judge Stephen L. Crocker

RESPONSE BRIEF OF PLAINTIFF-APPELLEE WOODMAN'S FOOD MARKET, INC.

Dated at Madison, Wisconsin, this 25th day of November, 2015.

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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 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.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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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):

Woodman's Food Market, Inc.

(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:

von Briesen & Roper, S.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Woodman's Food Market, Inc. has no parent corporation.

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

No Publically held company holds 10% or more stock in Woodman's Food Market, Inc.

Attorney's Signature: s/ John A. Kassner Date: November 25, 2015

Attorney's Printed Name: John A. Kassner

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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No Publically held company holds 10% or more stock in Woodman's Food Market, Inc.

Attorney's Signature: s/ Kraig A. Byron Date: November 25, 2015

Attorney's Printed Name: Kraig A. Byron

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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Statement of Jurisdiction

The Defendants-Appellants The Clorox Company and The Clorox Sales Company's Statement of Jurisdiction is complete and correct.

Overview

An affidavit filed by Clorox in this litigation confirmed what Woodman's had surmised over the preceding several years. Woodman's largest competitors, the club stores, were pressuring their suppliers to stop selling large packs of popular products to Woodman's. Sales representatives for suppliers had, with increasing frequency, told Woodman's that they could not sell large packs of their most popular products to Woodman's.

In September, 2014, Clorox called a meeting at Woodman's to announce that, as of October 1, 2014, Woodman's would no longer be able to purchase the large packs it had been buying for years. Woodman's large pack purchases from Clorox exceeded $1,600,000 in the year preceding that meeting.

From that point forward, Clorox announced, it would only sell large packs to three club store customers, Costco, Sam's Club and B.J's. Woodman's would still be a customer of Clorox, and would still be free to buy any quantity of any of the products offered by Clorox, but Woodman's would not be allowed to buy those products in large packs.

Woodman's offers large packs in its stores because they are attractive to many of its consumer customers. As a general proposition, large packs of products are targeted to satisfy consumer demand for a lower unit price than is available on

smaller packs of the same product. That lower unit price makes large packs attractive to some consumers. Similarly, Woodman's has customers who prefer buying large packs for other reasons, such as the convenience of having to purchase only one large package versus several smaller ones, or because they do not have to buy the product as frequently.

Woodman's filed this suit seeking, among other things not yet relevant to this appeal, a declaratory judgment establishing that those large packs constitute a "service or facility" under section 2(e) of the Robinson-Patman Act.[1] To date, the only claim that has come before the District Court is Woodman's claim seeking a declaration that large packs of Clorox products constitute a "service or facility" under 2(e) of the Robinson-Patman Act, 15 U.S.C. §13(2)(e), which states:

> "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."

Clorox products are fungible, in that the commodity within any size package of that product is commercially interchangeable with the commodity in any other size package of that same product. Woodman's contends that because large packs are

[1] We note that the other claims set forth in the Complaint are not yet relevant to this appeal because, even though this litigation has been pending for over a year, Clorox has not yet filed an Answer to the Complaint. Until such time as Clorox files an Answer, however, issue will not be joined on those other claims.

targeted to satisfy consumer demands, they represent a promotional service provided by Clorox to help retailers sell the commodity to the ultimate consumer.

Clorox provided these special large packs to help its customers, Woodman's and other retailers including club stores, resell Clorox products to their consumer customers, who like the convenience that purchasing Clorox products in larger packs makes possible, or because those consumers are accustomed to paying a lower unit price when they purchase a larger pack of a commodity for which they have a use. If there was no consumer demand for these larger packages, none of these retailers would buy them. It has not been suggested that Woodman's or any of the other retailers have been buying large packs of Clorox products because they are more convenient to stack on shelves or because they satisfy any need that these competing retailers have other than that they have customers who want the product in large packs.

Woodman's has not alleged that the price it was paying for these large packs of Clorox products is different than the price that Clorox was charging the club stores for the same package. Woodman's could not bring such a claim because it had no idea what price the club stores are paying for the large packs they were obtaining. Unless and until Woodman's receives information indicating that there has been price discrimination in the past, it must operate on the assumption that the price it has been paying is non-discriminatory.

Woodman's has not alleged, nor is it seeking damages for losses it claims to have sustained by paying a discriminatorily higher price than is being paid by competing

club stores. While it has reserved the right to do so in the future, as supplemental relief following a declaratory ruling, Woodman's has not and is not raising a claim under section 2(a) of Robinson-Patman. All Woodman's is asking is that it be allowed to continue buying and selling the large packs of Clorox products that its competitors are selling because its customers want and expect to be able to buy those packs from Woodman's.

Sellers like Clorox typically offer a product in a number of different size packages. Each size is targeted at a different segment of the population. Typically, as the size of the package in which a product is offered increases, the unit price charged by the seller decreases. The lower unit prices that Woodman's has referred to in its complaint are inherent in the prices that sellers, such as Clorox, typically charge all retailers for large packs of their commodities.

Woodman's assumes that the price Clorox charges to all of its customers for each particular size package of a commodity is the same. Woodman's does not assume that the difference in unit price charged for each size package reflects discrimination by Clorox between favored and disfavored customers.

Clorox brought a 12(b)(6) motion to dismiss Woodman's complaint for failure to state a claim for which relief could be granted. Clorox contended that package size can never be a promotional service covered by §2(e) of Robinson-Patman. The District Court denied that motion. S.A.10

Citing to *Guides for Advertising Allowances and Other Merchandising Payments and Services,* 79 FR 58245-01 at 58246, 16 CFR Part 240, (FTC Sept. 29, 2014),

(hereinafter the "*Guides*") and to Areeda Hovenkamp, XIV *Antitrust Law* ¶2363e at p.291 (3d ed. 2012), the District Court concluded that "[p]romotional services or facilities are those that 'somehow aid the buyer in reselling the product, such as advertising, packaging, informational brochures, and the like.' Only those services 'necessary to facilitate the reseller's subsequent marketing' are covered by the two provisions. *Id.,* at p. 292." S.A.5.

The District Court also relied upon two Federal Trade Commission (hereinafter the "Commission") decisions, *In re Luxor, 31 F.T.C. 658 (1940)* and *In re General Foods Corp.,* 52 F.T.C. 798 (1956), which held that the offer of special size packages of a product constituted a promotional service covered by §2(e). The District Court further noted that the Commission had recently revised its guidelines making clear that even though Clorox may refuse to do business with Woodman's, it could not use special package sizes to benefit only certain customers. S.A.10.

Clorox now asks this Court to overturn the District Court's order denying its 12(b)(6) motion. It argues that no federal court has ever ruled that package size is a promotional service. It argues that *Luxor* and *General Foods* are old cases. It argues that the *Guidelines* are not binding upon the Court. What Clorox does not do is provide any authority compelling a different outcome.

The absence of supporting judicial authority is not surprising. Woodman's has been buying large packs of Clorox and other products for years. Only in the last several years have sellers started to refuse to sell large packs to Woodman's because, they claim, Woodman's is not in "the club channel." Since 1969, sellers

have been told by the *Guides* published by the Commission that special package size is a promotional service that has to be made available to competing retailers on proportionally equal terms.

The absence of litigation would suggest that sellers have, until recently, complied with this directive. Numerous court decisions, noting the absence of a precise definition of "services and facilities" in §2(d) and §2(e) of Robinson-Patman, have relied upon and set forth verbatim the list of covered services in the *Guides*, including its reference to "[S]pecial packages or package sizes."

To succeed on appeal, Clorox must persuade this Court that the offer of large packs can *never* be a service or facility covered by §2(d) or §2(e) of Robinson-Patman. The Commission has filed an *Amicus Curiae* brief in this appeal. It expressly disagrees with Clorox's assertion that "package sizes can *never* be a promotional service," concluding, instead, that "when a seller offers the same product in special and standard packages, the court must ask whether the special package is offered primarily to convey a promotional message (in which case Section 2(e) applies) ..." [Doc.14:FN14] (Emphasis by Commission).

It maintains that "whether a package-related practice actually falls within the ambit of Section 2(e) very much *depends on the facts and circumstances of each case*" indicating that it "will look realistically at transactions as a whole before deciding to apply sections 2(d) and 2(e)." [Doc.14:24] (Emphasis supplied). If courts must make a case by case analysis of the facts of each transaction, as the Commission asserts, Clorox's 12(b)(6) motion must be denied as premature.

After the District Court denied Clorox's 12(b)(6) motion, Clorox announced its intention to terminate all business dealings with Woodman's.[2] After terminating Woodman's as a customer, Clorox filed a motion asking the District Court to dismiss this action as moot. Clorox argued it has a right to choose its customers.

Woodman's opposed that motion, citing to the U.S. Supreme Court decision in *F.T.C v Fred Meyer, Inc.*, 390 U.S. 341, 358, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968), which held that, for purposes of Robinson-Patman analysis, a seller that "gives allowances to a direct-buying retailer must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyers in resales." Woodman's points out that Clorox does not get to choose who will purchase its products when it sells them to a wholesaler.

The District Court, relying upon *Fred Meyer*, ruled that "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." S.A.17. It rejected Clorox's unsupported assertion that its termination of Woodman's as a customer distinguished the case from the ruling in *Fred Meyer*. [Id.]. Clorox cites nothing new on appeal to refute this ruling.

The District Court also rejected Clorox's attempt to distinguish the two cases based upon the fact that *Fred Meyer* involved the application of Section 2(d) of the

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[2] Whether that decision constitutes an action in furtherance of a conspiracy to exclude Woodman's and other retailers from competition in the sale of large packs of Clorox products, is the subject of claims raised in Woodman's Amended Complaint, which will be addressed by the District Court only after this appeal is completed.

Act, which refers to "customers" while the present case involved 2(e), which refers to "purchasers," noting that numerous authorities had previously ruled that the two terms should be used interchangeably under Robinson-Patman. [S.A.14]. Again, Clorox cites nothing new on appeal to refute this ruling.

Statement of the Case

I. The Parties

The Plaintiff-Appellee in this litigation is Woodman's Food Market, Inc. (hereinafter "Woodman's"). A.2:¶2[3]. The Defendants-Appellants in this litigation are The Clorox Company and The Clorox Sales Company (hereinafter collectively "Clorox"). A.2:¶¶3-4. Clorox otherwise adequately identifies the parties to the litigation at p.8.

II. Procedural Posture of the Case

Woodman's filed its Complaint on October 28, 2014. [WD-Doc.1:1-23][RSA:108-186]. Clorox has not included a copy of the original complaint in its appendices. Woodman's has included a copy of the original Complaint in its Supplemental Appendix. [RSA.108-186] Clorox instead has included a copy of the First Amended Complaint. A.1-89. All of Clorox's references to the pleadings are to the First Amended Complaint, but that pleading was not filed until after the District Court had issued the two orders which are the subject of this appeal.

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[3] Please see Plaintiff-Appellee Woodman's Food Market, Inc.'s Key to Citations in this Brief, which appears at p. iii, for an explanation of the methodology used by Woodman's for citations to District Court documents, 7th Circuit documents, Clorox's brief and the respective addenda used by the parties.

Woodman's notes that, for the most part, each of the allegations found in the First Amended Complaint are also present in the original Complaint. Many of the allegations in the amended complaint have different numbers than in the original. Some paragraphs were modified. The modified paragraphs are not believed to have significance in this appeal.

We will cite to the original Complaint because that is the document that the District Court refers to in its Orders. In order to avoid subjecting the Court to confusion arising from a second presentation of the facts simply because they are numbered differently in the two versions of the complaint, we will also provide a parallel citation to the corresponding paragraph of the First Amended Complaint. The parallel citation will immediately follow the citation to the original Complaint, and will be in the following form: [FAC ¶X] in which X will be the paragraph number from the First Amended Complaint.

Woodman's is concerned that Clorox has incorporated a number of facts in its Statement of the Case that are found only in the First Amended Complaint, which were not before the Court as it made the Orders appealed from, and which should not be considered by this Court on an appeal from denial of a 12(b)(6) motion. To the extent this becomes significant to an argument, we will call attention to it as part of brief.

In particular, however, Woodman's notes that Clorox has cited frequently to ¶19 of the First Amended Complaint. A.6-9. This paragraph was not part of the original

complaint, and all such references should be disregarded as beyond the record before the District Court as it decided the two Clorox motions.

Except as noted above, we agree with the Statement of the Case as presented in the Clorox brief [Doc.19-13], but would ask the Court to disregard argument inappropriately presented by Clorox therein.

Summary of the Argument

This Court should affirm the District Court's orders.

I. Congress enacted the Robinson-Patman Act in order to target the perceived harm to competition occasioned by powerful buyers, rather than sellers, who use their clout to obtain lower prices for goods than smaller buyers could demand. Such concerns arise in secondary line injury claims under §2(d) and §2(e) of Robinson-Patman, where Congress clearly sought to protect competitors engaged in intrabrand competition.

II. The first claim raised by Clorox on appeal arises out of the District Court's denial of Clorox's 12(b)(6) motion, in which Clorox asserts that large packs of Clorox products can *never* constitute a promotional service under §2(d) and §2(e). The Commission filed an *Amicus Curiae* brief in which it expressly disagrees with this contention, stating that whether this is true must be determined on a case by case analysis of the transactions involved. Woodman's has alleged sufficient facts to state a claim for relief. Specifically, Woodman's has alleged that it has customers who prefer large packs because of the low price that larger packs customarily make available and because of the convenience of being able to purchase and carry those products home less frequently.

III. Customers are ingrained with the understanding that it is cheaper to buy products in volume. Large packs are specifically targeted at the segment of the population that seek

that value and at that segment of the population that seeks the convenience of buying that product less frequently. Clorox tries to argue that large packs are a different product. Customers purchase large packs to get the fungible commodity that is in those packages, and not the packages in which the commodity is delivered. Large packs serve to promote the resale of the commodity by the retailer rather than the initial sale to the retailer. §2(d) or §2(e), exist to provide a remedy for price discrimination disguised in the form of services and facilities. Telling all but three powerful retailers that they cannot have the largest packs, that carry the lowest unit price, is precisely the type of disguised price discrimination that Congress sought to prevent when it adopted §2(d) and §2(e).

IV. Woodman's responds to seemingly unrelated arguments.

A. Woodman's points out that Clorox repeatedly misinterprets recent authority in its effort to argue that this Court should not protect intrabrand competition between competing retailers.

B. Woodman's responds to Clorox's numerous attempts to misdirect the Court at pages 33-39, by reminding the Court this is a secondary line injury claim which should not be analyzed by resort to Sherman Act and primary line cases. Woodman's next responds to Clorox's attempt to conflate the packages that Clorox provides with the commodity it puts into them. Woodman's next responds to Clorox's misreading of examples provided in the *Guides* adopted by the Commission by clarifying that there is no authority holding that a promotional service must temporarily promote the product to qualify.

C. Woodman's responds to Clorox's attempt to argue that Woodman's complaint should be brought as a price discrimination claim under §2(a). Woodman's points out that it has not alleged price discrimination, because it does not know what price Clorox is charging its competitors for the large packs. Consequently, Woodman's states that it has assumed that the prices it was charged are the same as those charged to its competitors.

D. Clorox argues that no court has ever endorsed Commission rulings in *Luxor* or *General Foods* holding that package size is a promotional service covered by §2(d) or §2(e). Woodman's argues that Clorox has cited no authority to the contrary. Woodman's responds to Clorox arguments that courts are not bound by the *Guides*, by noting that numerous courts have affirmatively relied upon the list of services and facilities published by the Commission in its *Guides*.

V. Woodman's *Fred Meyer* right to receive promotional services offered by Clorox to competing retailers does not conflict with Clorox's right to choose its customers.

A. Woodman's argues that a seller's right to terminate a customer is irrelevant because that right does not give a seller the right to control to whom a wholesaler can sell its products. Sellers do not do business with the retailers who purchase their products at wholesale. *Fred Meyer* does not compel a seller to "do business" with a retailer who buys products at wholesale. It merely provides that a seller must also make all promotional services its provides to a direct purchasing retailer available to retailers that purchase those products at wholesale. This can be accomplished by the seller providing

the service to the wholesaler for delivery to retailers without the seller ever entering into a contract with that retailer.

B. Woodman's responds to Clorox's attempt to distinguish between a customer under §2(d) and a "purchaser" under §2(e) by noting that numerous authorities have ruled that the two terms are to be considered interchangeably.

C. Woodman's responds to Clorox's contention that there is significance to the fact that it terminated Woodman's as a customer by pointing out that Clorox has offered no relevant authority for this proposition. There is no logical distinction between a retailer who has always purchased Clorox products at wholesale and a retailer who, having been terminated as a direct buyer, now purchases Clorox products at wholesale.

Argument

I. Congress Intended to Protect Smaller Businesses From Larger Chain Stores Seeking to Use Their Greater Market Power to Obtain Competitive Advantages.

Woodman's filed this lawsuit seeking declaratory and injunctive relief under the Robinson-Patman Act, 15 U.S.C. §13. More particularly, this appeal addresses itself to the application of §§2(d) and 2(e) of Robinson-Patman, as it applies to a secondary line injury. Secondary line injuries involve price discrimination that injures competition among the discriminating seller's customers and typically refer to "favored" and "disfavored" purchasers. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.,* 546 U.S. 164, 176, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006):

Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. Robinson-Patman sought to deprive large buyers such advantages. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 43, 68 S.Ct. 822, 826-27, 92 L.Ed. 1196 (1948). See also *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349-51, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968).

Representative Hubert Utterback, Chairman of the Senate-House Conferees on the Robinson-Patman Bill, in presenting the Conference Report on Robinson-Patman to Congress in 1936 discussed §2(a), "Price-selection of customers." He noted first that it permits sellers to select their own customers in bona-fide transactions and not in restraint of trade. He went on to observe that this section did not permit sellers to select what shall be sold to customers. Noting that the section was intended to protect sellers against customers who are troublesome or insecure in their credit, he noted that having accepted a customer, the seller did not have the right to *"refuse discriminatorily to sell to him particular distinctions of quality, grade, or brand which the seller has set aside for exclusive sale at more favorable prices to selected customers in evasion of the purposes of this bill."* 80 Cong. Rec. 9418 (1936). (Emphasis supplied).

Volvo is the most recent Supreme Court decision addressing secondary line injury claims under Robinson-Patman. The *Volvo* majority went to great lengths, on multiple occasions, to point out that Robinson-Patman was adopted by Congress "to target the perceived harm to competition occasioned by powerful buyers, rather

than sellers; specifically, Congress responded to the advent of large chainstores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand." *Id., at* 175,178,180-181.

II. To Win, Clorox Must Prove that Large Packs Can Never be a Promotional Service, But the Commission Agrees that Large Packages Can Constitute a Promotional Service Under Robinson-Patman.

Woodman's seeks declaratory relief under 28 U.S.C.A. §2201 and Federal Rule of Civil Procedure 57, and injunctive relief under Section 16 of the Clayton Act to enjoin and remedy violations of 15 U.S.C.A. §2(e). The Complaint seeks a declaration that furnishing large packs of a product constitutes a promotional service covered by §2(e) of the Robinson-Patman Act ("Robinson-Patman").

Clorox filed a 12(b)(6) motion seeking dismissal for failure to state a claim. [WD-Doc.20]. The District Court denied that motion in its Opinion and Order of February 2, 2015. S.A.1-10.

This appeal seeks review, in part, of that Opinion and Order. The District Court correctly identified the issue on appeal– "whether the large packs offered by Clorox only to the club stores *can* be considered a promotional service under [§2(e)] of the act." S.A.6 (Emphasis supplied). To win, Clorox must persuade this Court that large packages can never be a promotional service or facility.

The Clorox 12(b)(6) motion argued that large packs *cannot* be a promotional service under §2(e). The Commission disagrees. It acknowledges that large packs can be a promotional service subject to the provisions of §2(e). It contends that whether such packs are such a service depends upon the facts and circumstances of

each case. [Doc.14:24]. That should be sufficient to affirm the District Court's decision that the complaint states a claim upon which relief can be granted.

In September, 2014, the Commission published its updated *Guides*. It has published the *Guides* since 1969. The *Guides* are commonly referred to as the Fred Meyer *Guides* because they were created in response to an invitation from the U.S. Supreme Court in its decision in *Fred Meyer,* 390 U.S. at 358. A copy of the *Guides* is included in Appellant's Statutory Addendum. Add.1-31. §240.7 of the *Guides* contains a non-exclusive list of promotional services and facilities covered by §2(e) of Robinson-Patman. That list expressly includes "special packaging, or package sizes." Add.24.

In notes accompanying its revisions to the *Guides*, the Commission references its decision rejecting the proposal of the ABA's Antitrust Section to delete "special packaging, or package sizes" from the list. Add.12. The Commission's Amicus Brief rejects Clorox's contention that a special package or package size can never by a promotional service or facility, stating that "a special package or package size for a product *may* amount to a promotional service under Section 2(e)." [Doc14:23].

In Footnote 14, the Commission stated that "Clorox is mistaken in suggesting (at 4,-14,-19,-29,-33,-40,-42) that special packaging and package sizes can *never* be a promotional service because the packaging is always part of the product. Like Section 2(a), Section 2(e) applies to discrimination in promotional services when selling products of like grade and quality." [Doc.14:23:FN14].

The Commission concluded that "whether a package-related practice actually falls within the ambit of Section 2(e) very much depends on the facts and circumstances of each case." The *Guides* expressly state that they do not provide a comprehensive definition of a promotional service or facility, See 16 C.F.R. §240.7. The Commission's brief states its intention to "look realistically at transactions as a whole before deciding to apply Sections 2(d) and 2(e)." [Doc.14:24].

There have been no evidentiary hearings or findings of facts and circumstances to date. The District Court has not looked "realistically at transactions as a whole" in order to conclusively determine whether §§2(d) and 2(e) apply. The only determination by the District Court is that Woodman's has stated a claim for relief under §2(e).

To satisfy FRCP 12(b)(6), the factual allegations in the complaint must raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true (even if doubtful in fact). *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The complaint must include sufficient facts to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). The burden is on the moving party to prove that no legally cognizable claim for relief exists. *Mediacom S.E. LLC v. BellSouth Telecomm., Inc.*, 672 F.3d 396, 399 (6th Cir. 2012); *Gould Elecs., Inc. v. United States,* 220 F.3d 169, 178 (3d Cir.2000).

Thus, to state a claim for relief, Woodman's is required to allege that:

- Clorox is furnishing a service or facility (in this case providing a commodity for resale within a special size package) connected with the processing, handling, sale or offering for sale of a commodity bought from Clorox for resale to competitors of Woodman's.
- Clorox is refusing to provide that service or facility to all customers on proportionally equal terms.

Woodman's alleged, at ¶14 of its Complaint, that until October 1, 2014, Clorox sold it large packs of products identified at Exhibit 1 to the Complaint. [WD-Doc.1:¶14][RSA.112][FAC¶27][A.10]. Woodman's asserted at ¶32 of its Complaint that it had also been purchasing smaller packs of those same products from Clorox, as described on Exhibit 1 to the Complaint. [WD-Doc.1:¶32][RSA.115][FAC¶39][A.12]. Woodman's also alleged in ¶14 that the product contained in these large packs is of the same grade and quality of the product contained in the smaller packs of those same products. [WD-Doc.1:¶14][RSA.112][FAC¶27][A.10]. In fact, the commodity inside the packaging was exactly the same. It was only the packaging that was different.

At ¶15 of its Complaint, Woodman's alleged that "providing a customer with a large pack of a particular product constitutes the provision of a promotional service that helps the customer sell a product at retail." [WD-Doc.1:¶15][RSA.112][FAC¶28][A.10].

Woodman's asserted at ¶33 that Clorox notified Woodman's that it would stop selling large packs of its products to Woodman's as of October 1, 2014, and that as of that date, it would only sell those large packs to three retailers, two of which, Sam's Club and Costco, are competitors of Woodman's. [WD-Doc.1:¶33][RSA.115]. Clorox informed Woodman's that it would continue to sell to Woodman's smaller packs of the same grade and quality of those same products. [WD-Doc.1:¶32][RSA.115] [FAC¶49][A.14].

¶38 alleges that its customers rely upon Woodman's for large pack products at an affordable price, and that some customers prefer large packs because of the convenience of being able to purchase and carry those products home less frequently than would be the case if they are forced to purchase smaller packs. [WD-Doc.1:¶38] [RSA.116][FAC¶59][A.15-16].

These allegations do not constitute a mere formulaic recitation of the elements of a cause of action under §2(e) of the Act. The complaint includes sufficient facts to state a claim for relief that is plausible on its face. See *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

To reverse the District Court Order denying Clorox's Motion to Dismiss for failure to state a claim, this Court would have to determine, as a matter of law, that package size can *never* constitute a promotional service under Section 2(e) of the Act. Given the Commission's acknowledgement [Doc.14:24] that package sizes can be such a service, and its conclusion that whether a package-related practice is a §2(e) promotional service depends upon the facts and circumstances of each case, it

would be premature to conclude, as Clorox asserts, that package size can *never* be a promotional service.

Neither party has had an opportunity to present any evidence in support of its claims or defenses. Clorox has not even filed an Answer. The only "facts and circumstances" before the Court are those set forth in Woodman's Complaint. On the basis of the facts of record, "it is reasonable to conclude that the special size of Clorox's large-packs is connected to the resale of those products." S.A.10. There are no facts upon which the District Court could have concluded otherwise. The Court will have an opportunity to do so once Clorox joins issue and the parties have an opportunity to conduct discovery and present expert opinions. Until such time, Clorox's challenge is premature.

III. Package Size Can Constitute a Service or Facility Within the Meaning of the Robinson-Patman Act. For Every Package Size, There is a Customer.

There is a customer for every package size of a commodity. For every retail customer who prefers small packages, there is another who prefers large. Each size of a package is targeted at a segment of the population that has a need that is satisfied by that particular package size. If there were no customer preference for large packs, club stores would not insist that vendors sell them exclusively in the "club channel." Absent retail customer demand for large packs, club stores would not exist.

The association of volume purchasing with value has become ingrained in our communal consumer psyche. While a "baker's dozen" may have its origins in the

heavy hand of King Henry III[4], it has since become nomenclature for the common understanding that consumables are cheaper when purchased in volume. That is one of the primary reasons why consumers like to purchase large pack items at club stores. That is why manufacturers create package sizes targeted at particular market segments. That is why resellers, like Woodman's, seek out various package sizes that target different parts of their customer base. Such packages promote the sale of the contents of each package size to the needs of a particular market subset.

According to a 2005 survey by the American Dietetic Association and the ConAgra Foods Foundation, the driving force behind club store purchases is two-fold. Many consumers report that value is what causes them to shop at club stores. More than half simply like stocking up on food.[5] Regardless of the reason, a majority of all U.S. consumers prefer large packs.

In this case, the fungible §2(e) "commodity" is the product inside the packaging; i.e., the Hidden Valley ranch dressing, the Glad plastic bags, and the Scoop Away kitty litter, among others. These fungible commodities are of identical grade and quality across package sizes. [WD-Doc.1:¶32][RSA.115][FAC¶49][A.14].

According to the Complaint, Woodman's customers prefer large packs because of the lower per-unit price they carry and the convenience of being able to purchase

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[4] In 1266, Henry III revived an ancient statute that regulated the price of bread according to the price of wheat. Bakers or brewers who gave short measure could be fined, pilloried or flogged. Thus began the practice of English bakers giving an extra loaf when selling a dozen in order to avoid being penalized for selling short weight.

[5] http://www.conagrafoods.com/news-room/news-New-Survey-Reveals-Warehouse-Shoppers-Need-to-Bulk-Up-on-Home-Food-Safety-1008538.

and carry those products home less frequently [WD-Doc.1:¶¶14,38][RSA.112,116] [FAC¶59][A.16]. On a 12(b)(6) motion, these facts are presumed to be true. These facts establish that package size promotes the resale of the commodity inside the package to retail customers.

That's why retailers like Woodman's buy them from sellers like Clorox. That's why sellers like Clorox put their product in large packs. Large packs are targeted towards satisfying the desire of certain consumers for convenience and value. Large packs enhance the likelihood that the consumer will purchase Clorox instead of some other brand.

Clorox stated, in Defendant's Brief in Support of Their Motion to Dismiss Plaintiff's Complaint, that "*Club-size products* are simply one type of product, which Clorox sells year-round through one channel in order to *increase both its own sales and those of its retail customers*." [WD-Doc.21:9](Emphasis supplied). If large packages are intended to increase sales by Clorox's customers, they constitute a "service[] or facilit[y] connected with the processing, handling, sale, or offering for sale of such commodity." 15 U.S.C. §13(e).

As noted above, the *Guides* (Add.1-31) published by the Commission provide a non-inclusive list of promotional services and facilities, at §240.7 that would satisfy §§2(d) and 2(e). That list has been cited favorably by a number of courts when called upon to identify the types of services that would satisfy those sections of

Robinson-Patman.[6] First published in 1969, the *Guides* were revised in 1990, and again on September 29, 2014. From its inception, the *Guides* have identified package size as a covered service or facility.

Clorox argues that large packs are not promotional, citing to the Congressional Record at p.29 for the proposition that §2(e) was aimed at discrimination under the guise of payments for advertising and promotional services. As noted earlier, however, Representative Utterbeck, in presenting the Robinson-Patman Conference Committee report on Robinson-Patman, stated that a seller gets to choose its customers, but further stated that once a seller chooses a customer, the seller does not have the right to discriminate with regards to the products it will offer to that customer. 80 Cong. Rec. 9418 (1936).

In *Federal Trade v. Simplicity Pattern Co.*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959), the Court found that Simplicity violated §2(e) because it (1) furnished dress patterns to variety stores on a consignment basis, requiring payment only as and when patterns are sold—thus affording them an investment-free inventory, but made fabric stores pay in advance, (2) provided free cabinets and catalogs to variety stores but charged the fabric stores for both and (3) provided free shipping to variety stores but charged fabric stores for shipping. *Simplicity*, 360 U.S. at 60. Based on these findings, the Supreme Court affirmed the Commission ruling that

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[6] See *Major Mart, Inc. v. Mitchell Distrib. Co.*, 2014 WL 4723599, at 19 (S.D. Miss. Aug. 14, 2014); *Atl. Futon v. Tempur-Pedic, Inc.*, 67 Va. Cir. 269 (2005); *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of California*, 153 F.3d 938, 945 (9th Cir. 1998); and *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 379 (4th Cir. 1992), as amended (July 21, 1992).

Simplicity had "discriminated in favor of its larger customers by furnishing to them services and facilities not accorded to competing smaller customers on proportionally equal terms." *Simplicity*, 360 U.S. at 57-58.

Simplicity did not require that a covered service or facility be primarily promotional to be covered under §2(d) or §2(e). Neither interest-free consignment sales nor free shipping constitute primarily promotional services. One class of purchaser was placed at a competitive disadvantage as a result of the discriminatory provision of facilities and services connected with the processing, handling, and sale of the commodity at issue.

Twelve years later, this Court addressed the meaning of "services and facilities" in *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971); *cert* denied, 405 U.S. 921 (1972). The Court found that §2(e) should not be limited to the conventional type of promotional services such as window displays, demonstrators, exhibits and prizes, because §2(d) and §2(e), were not limited to just advertising and promotional services. It noted that §2(e) covered not only sales, but also processing and handling, which are not typically sales promotional in nature. *Centex*, 447 F.2d at 587.

Simplicity and *Centex* are both consistent with the plain language of §2(e). §2(e) contains no requirement that services or facilities be promotional in nature. The statute prohibits discrimination in the provision of services or facilities regardless of whether they actively promote the sale of the product to the end consumer. The

Supreme Court applied §2(e) as written in *Simplicity*. This Court did likewise in *Centex*. Decades later, both remain good law.

There are authorities suggesting that, in order to qualify under Section 2(e), services must be "promotional." However, the phrase "promotional services" is a legal term of art. It is not limited to services "of a typically sales promotional nature." *Centex*, 447 F.2d at 588.

Clorox cites *Kirby v. Mallory*, 489 F.2d 904, 910-911 (7th Cir. 1973) for the proposition that services must be "exclusively promotional." [Doc.19:32]. Clorox infers that *Kirby* considered and then held that only services that are "exclusively promotional *in nature*" would be covered by Section 2(e)." Clorox misstates the holding of this Court.

The words "in nature" do not appear in *Kirby*. Nor is their presence suggested or inferred by anything in that decision. This Court did use the words, "exclusively" and "promotional" at pages 910-911, but in an entirely different context. It did so in response to arguments by Kirby, a wholesaler complaining of unequal treatment given to a retailer by a seller. As a wholesaler, Kirby was ineligible to bring a §2(d) or §2(e) claim alleging discriminatory treatment by a seller to a retail customer with whom he was not in competition. To get around this problem, Kirby argued that indirect price discriminations in the form of promotional payments and services should be proscribed by §2(a), rather than under §2(d) or §2(e).

Rejecting this argument, the Court wrote:

> "Kirby's argument would have us collapse the distinction in schemes and standards and would have us find that the two sections are mere surplusage.

> This we decline to do. In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price discrimination in the supplier-customer sale and drafted §§ 2(d) and 2(e*) to apply exclusively to promotional discriminations* like those alleged in this case." *Kirby,* 489 F.2d at 910-911 (Emphasis supplied.)

It cannot rationally be argued that the Court was addressing a need to demonstrate that a service being offered by a seller must be solely promotional in nature, and would not be a covered service if it also provided some benefit to the retailer. This Court did not mandate "promotional purity" as a *sine qua non,* which, if not met, would disqualify a service or facility for coverage. It is, at a minimum, misleading for Clorox to have suggested otherwise. The use of the word "exclusively" was intended to convey only that Kirby's complaints, if at all cognizable, were exclusively cognizable under Sections 2(d) and 2(e).

Clorox asks this Court to do the same – to "collapse the distinction in schemes and standards" and have this Court "find that the two sections, §2(d) and §2(e), are mere surplusage." *Kirby*, *Centex* and *Simplicity* all recognize the reason that Sections 2(d) and 2(e) were enacted in the first place – to provide a remedy for price discrimination disguised in the form of unequal provision of services and facilities.

Kirby relied on testimony by Senator Logan in support of the Robinson-Patman amendments in which he noted that the Report of the House Judiciary Committee stated that the amendment aimed "to suppress more effectually discriminations between customers of the same seller ... sometimes effected directly in prices ... and sometimes by separate allowances to favored customers ...' H.R.Rep.No.2287, 74

Cong., 2d Sess. 7 (1936)." *Kirby,* 489 F.2d at 910-911. As it did in *Kirby*, this Court must distinguish and maintain Congress' protections against this "second scheme."

Kirby does state that to be covered under §2(d) or §2(e), a service or facility must promote resale by the customer rather than the initial sale to that retailer. *Id.,* at 910. That, however, does not limit services or facilities to promotional services.

The *Guides* do state that a covered service or facility under §2(d) or §2(e) must primarily promote resale by the customer rather than the initial sale to the customer. Add.24.

As previously noted, the Commission's *Amicus Curiae* brief properly acknowledged that package size can be a promotional service under Robinson-Patman. [Doc.14:23] However, the Commission's brief takes a new position not previously set forth in the *Guides.* It now argues that "to trigger Section 2(e), the seller must offer the special package size primarily *to convey a promotional message*, not simply to meet demand from retailers or consumers for desirable product attributes or a lower unit price." [Doc.14:23;FN14] (Emphasis supplied). The Commission does not cite any authorities to support the creation of this newly established requirement. There is nothing in the Guides published by the Commission just last year. Nor does the Commission explain in its brief what would be required in order to "convey a promotional message."

None of the twenty-nine published judicial opinions cited by the Commission brief contain the phrase "promotional message" or any semblance thereof. Likewise, the phrase cannot be found in any of the seven Commission decisions cited by the

Commission. The Commission stated on page 4 of its amicus brief that its "*Guides* neither have the force of law nor advocate changes in the law." [Doc.14:4].

While its *Guides* may not advocate changes in the law, that is exactly what the agency does when it instructs this Court that in order "to trigger Section 2(e), the seller must offer the special package size primarily to *convey a promotional message*." [Doc.14:24] (Emphasis supplied). As stated by the U.S. Supreme Court, "[t]he determination whether to alter the scope of the [Robinson-Patman] Act must be made by Congress." *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436, 103 S. Ct. 1282, 1289, 75 L. Ed. 2d 174 (1983). The Commission is barking up the wrong tree. In the interim, it is the Commission's obligation to provide the business community with a roadmap of the Robinson-Patman race course, not to sneak unmapped hurdles onto the track.

A *promotional message* is not required as a matter of law. Neither is it required as a matter of common sense. As discussed at the outset of this section, the interrelationship between volume purchasing and value is an unstated given in modern consumerism. Consumers do not need a message splashed across a package identifying it as a "better value." Nor do they need one telling them that it is "more convenient" for them to carry one large package instead of four smaller ones. Consumers know these things. These are the reasons some prefer to buy commodities in large packages. These are the reasons club stores exist.

Large packs, by their very nature, carry the lowest unit price. Limiting their availability to only three powerful retailers, is precisely the type of disguised form of

price discrimination that Congress sought to prevent when it adopted §2(d) and §2(e).

IV. Response to Arguments Raised by Clorox

Complicating the process of responding to Clorox is the scattershot and repetitive manner in which Clorox presents some of its arguments. If Woodman's responds to those arguments in the order in which they are presented, all semblance of order will be absent. There are, however, several recurring themes within the Clorox brief, and Woodman's shall attempt to present its response by responding to those themes.

A. Clorox Misrepresents the Holding of the U.S. Supreme Court in *Volvo*.

The most prominent theme employed by Clorox throughout its brief seeks to persuade this Court to abandon the Robinson-Patman goal of targeting the harm to competition caused by powerful buyers with the clout to obtain discriminatory treatment that smaller buyers cannot demand. To do this, Clorox repeatedly misinterprets two lines found in the U.S. Supreme Court's most recent Robinson-Patman decision, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S.Ct. 860, L.Ed.2d 663 (2006).

The first statement, found at page 180, reads as follows: "Interbrand competition ... is the 'primary concern of antitrust law.' "

The second statement, found two sentences later, on page 181, reads as follows: "[W]e would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." (Emphasis in original.)

In citing to this language, Clorox repeatedly infers that this case should be reversed, first because it deals with *intrabrand*, rather than *interbrand* competition, and second because it deals with the protection of existing competitors. Clorox incorrectly implies that these two lines indicate that the *Volvo* Court has determined that secondary line discrimination cases are no longer viable because they would injure competition rather than promote it.

To the contrary, the Supreme Court went to great lengths in *Volvo* to indicate that it would still enforce the Act when confronted with discrimination favoring purchasers with market power. *Volvo*, 546 U.S. at 175, and at 178 and again at 181. In the present case, Clorox announced that it would no longer sell large packs of Clorox products to any of its customers except for three favored national club store chains. Those club stores compete with Woodman's and all of the other grocers nationally who were denied access to large packs by Clorox's decision to limit competition in the sale of large packs.

Needless to say, it is, at a minimum, ironic that Clorox is accusing Woodman's of acting to injure competition by seeking to preserve its ability to compete after Clorox has cut off all but three national powerhouse retailers from competing in the sale of large packs of its products.

The *Volvo* court noted that "secondary-line" cases involve alleged discrimination by a seller that injures competition between a seller's purchasers. Such cases typically refer to "favored" and "disfavored" purchasers. *Id.,* at 176. This case involves a secondary line Robinson-Patman claim. Here, Clorox is the seller, Costco

and Sam's Club are the favored purchasers with market power, and Woodman's is the disfavored purchaser. Secondary line cases, by definition, necessarily deal with intrabrand competition between competitors.

Primary line cases, on the other hand, such as cases in which a seller complains that a different seller is engaged in predatory pricing, necessarily involve injury to interbrand competition. Unlike this case, primary line cases do not involve claims that buyers with market power are obtaining favorable treatment over that given to competing buyers.

The *Volvo* majority went to great lengths, on multiple occasions, to point out that Robinson-Patman was adopted by Congress "to target the perceived harm to competition occasioned by powerful buyers, rather than sellers[.] ... Congress responded to the advent of large chainstores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand." *Id., at* 175. See also Id., pp. 178, 180-181. Such claims are secondary line claims.

Volvo is a factual hybrid. In *Volvo,* there was no "favored customer." *Id.,* at 177. The allegedly favored purchasers were not large independent department stores or chain operations. *Id.* ,at 181. The seller did not discriminate in pricing when two Volvo dealers were competing for the same customer. *Id.,* at 180. The seller did, however, give better prices to favored dealers when they were not competing with the plaintiff. *Id.,* at 180.

These unique facts, which distinguish the present case from the facts in *Volvo,* underlie the *Volvo* Court's conclusion that "the suppliers selective price discounting

fosters competition among suppliers of different brands." *Id.,* at 181. In *Volvo*, the seller provided preferential pricing to one of its customers, but not when two of its customers were competing for the same sale. This practice, the Court found, fostered competition among suppliers of different brands.

At no time, however, did the *Volvo* court infer in any way that it was retreating from the statutorily-established protection to less powerful buyers afforded by Robinson-Patman in conventional secondary line cases such as this. To the contrary, the only message that can be taken from *Volvo* relative to the viability of secondary line Robinson-Patman cases is that the Supreme Court stands ready and willing to apply that law when buyers with market power are using that power to secure discriminatory treatment to the detriment of disfavored buyers.

B. Clorox improperly relies upon Sherman Act and primary line Robinson-Patman Act cases as part of its effort to steer this Court away from the fundamental objective of the Robinson-Patman Act when it is dealing with true secondary line cases.

Clorox cites to a number of Sherman Act and primary line Robinson Act cases as part of its effort to steer this Court away from the protection of smaller buyers contemplated by Robinson-Patman when dealing with secondary line cases. Clorox consistently fails to disclose to this Court that the authorities it relies upon do not involve secondary line Robinson-Patman cases.

Clorox's reliance upon *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 886, 891, 895 (2007) ; *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 54 (1977); *Hinkelman v. Shell Oil Co.*, 962 F.2d 29 (4th Cir., 1999); and *Brooke*

Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), is misplaced. [See Doc.19:35-37].

Leegin and *GTE Sylvania* were Sherman Act §1 claims in which the Supreme Court overruled earlier opinions applying a "*per se*" analysis in favor of a "rule of reason" analysis when ruling upon those Sherman Act claims. Neither case involved a secondary line claim under Robinson-Patman. They are further distinguishable from the present case because, unlike the statutorily imposed *per* se analysis mandated by §2(e) of Robinson-Patman, the *per se* analyses overruled in *Leegin* and *GTE Sylvania* had been created, not by Congress, but rather, by prior court opinions.

Brooke Group addressed a predatory pricing primary line Robinson-Patman claim. It did not involve a secondary line Robinson-Patman Act claim, which is necessarily concerned with intrabrand competition. Consequently, its reasoning is not relevant to this litigation.

Only one of those cases, *Hinkelman*, involved a secondary line Robinson-Patman claim under §2(e). In that case, *Hinkelman* argued that Shell Oil violated §2(e) by leasing a gas station to a competitor on more favorable terms. *Hinkelman* found that a real estate lease did not constitute a promotional service. It did this by identifying and limiting the applicability of §2(e) to the list of promotional services covered by §2(e) set forth in the Commission's *Guides.*, *Hinkleman,* 962 F.2d at 379. It then expressly set forth at footnote 9 each of the promotional services contained in the *Guide's* list, including "special packaging or package sizes." Having favorably

and expressly listed "special packaging or package sizes" in its opinion, it cannot rationally be argued that *Hinkelman* stands for the proposition that large packs cannot constitute a promotional service.

Because this is a secondary line Robinson-Patman claim, none of the Sherman Act or primary line cases cited by Clorox are relevant here. Woodman's freely acknowledges that its claim seeks to protect Woodman's from two competitors favored by Clorox, Costco and Sam's Club. Clorox has offered no authority saying that Robinson-Patman now precludes such a claim.

The question posed by this litigation is whether or not the provision of large packs of a product constitutes a promotional service under §2(e) of Robinson-Patman. While Clorox [Doc.19:35] and the Commission [Doc.14:1] both argue that the statutorily mandated *per se* analysis of such claims dictates that courts should carefully limit the applicability of §2(e) to the type of cases that the statute intended, they offer no authority to show that the provision of large packs is not precisely the type of promotional service contemplated by the statute.

As noted above, the District Court based its decision to deny the Clorox 12(b)(6) motion, in part, upon the recently revised *Guides*. S.A.10. The District Court stated that "[p]romotional 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 (3e ed. 2012)." S.A.5.

The *Guides* expressly state, at §240.7, that special packaging or package sizes constitute covered promotional services. Add.12,24. Clorox correctly points out [Doc.19:37-39] that the *Guides* are not binding upon the courts. Clorox fails to point out that, while not binding upon courts, numerous court decisions have expressly relied upon and favorably quoted the *Guides,* including the provision including "special packaging or package sizes." See *Major Mart, Inc. v. Mitchell Distrib. Co.*, 2014 WL 4723599, at 19 (S.D. Miss. Aug. 14, 2014); *Atl. Futon v. Tempur-Pedic, Inc.*, 67 Va. Cir. 269 (2005); *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of California*, 153 F.3d 938, 945 (9th Cir. 1998); and *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 379 (4th Cir. 1992), as amended (July 21, 1992).

Clorox acknowledges the inclusion of "special packaging, or package sizes" within the list of covered services, and observes 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." [Doc.19:39]. Woodman's would not disagree with this characterization of the contents of the list provided in the *Guides.*

Clorox goes on to state, however, that "Clorox's large-size products do not meet those criteria." [Doc.19:39]. Clorox is conflating the package with the product it contains. Consumers buy the 42 pound bag of kitty litter to get the kitty litter, not the bag it comes in. The bag is not the product. It is, in Clorox's words, "separate and apart from the product itself."

Clorox notes that the "Commission has concluded that . . . special packaging or package sizes are covered only insofar as they *primarily promote* a product's resale." [Doc.19:39] (Emphasis by Clorox). Clorox cites two examples set forth at §240.7 of the Commission's *Guides* in which the Commission distinguishes between special Halloween packaging that promotes resale to the consumer, as opposed to special shaped packages requested by a retailer because they facilitate more efficient use of the retailer's shelf space. The Commission states that the former is covered by 2(e) while the latter is not. [Doc.19:39].

From the foregoing, Clorox mysteriously deduces that, to be considered promotional, packaging must primarily promote a product's resale, but only if it does so *temporarily*. [Doc.19:39]. In the leading §2(e) Robinson-Patman case, *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed. 1079 (1959), Simplicity provided favored retailers with free permanent display cases in which retailers would store dress patterns. Contrary to Clorox's contention, the long term promotional benefit provided by those display cases did not prevent the Supreme Court from concluding that they constituted a promotional service covered by §2(e).

Large packs are offered because consumers want them. They promote resale to consumers. Clorox offers nothing to show that they serve some internal need of the retailer unrelated to resale to the consumer.

C. Woodman's Has Not Pled a Claim for Price Discrimination Under §2(a) of the Robinson-Patman Act.

Clorox argues that Woodman's has pled, and then abandoned, a claim of price discrimination under §2(a) of Robinson-Patman Act. [Doc.19:22-27]. Clorox knew, when it made this argument, that it was not true.

Woodman's expressly disavowed that it had brought a price discrimination claim under §2(a) in its Brief in Opposition to Defendant's Motion to Dismiss, stating: "To 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. That said, Woodman's reserves the right to pursue a claim under Subsection 2(a) as a claim for supplemental relief." [WD-Doc.37:17]. Because Woodman's has never brought a §2(a) claim, it could not have abandoned such a claim.

Woodman's made clear in the first paragraph of its Complaint that it was bringing this action for declaratory and injunctive relief pursuant to §2(d) and §2(e) of the Robinson-Patman Act, 15 U.S.C. §§13(d) and (e). The initial paragraph of the Complaint states:

> 1. *This is an action for declaratory relief* pursuant to 28 U.S.C.A. § 2201 and Federal Rule of Civil Procedure 57, *and for injunctive relief pursuant* to Section 16 of the Clayton *Act to enjoin and remedy violations of 15 U.S.C.A. §§ 13(d) and 13(e).* This Court has jurisdiction pursuant to 15 U.S.C.A. §§ 22 and 26 and 28 U.S.C.A. § 1391. [WD-Doc.1:1][RSA.108](Emphasis supplied).

While Woodman's Complaint makes several references to §2(a) of Robinson-Patman, it does not allege, nor does it seek relief as a consequence of, an alleged violation of that section. [See WD-Doc.1:¶¶30,57,59,68&78 (Complaint) and

¶¶1,3&5 (Prayer for Relief)][RSA.115,120,122,124,127,128] [FAC¶¶47,81,83,84,93, 112,114 (Complaint) and 1,3,7,8,9 (Prayer for Relief)][A.14,20,23,25,26,30,31,32].

Analysis of those paragraphs of the Complaint reveals that Woodman's is asserting only that Clorox has placed Woodman's into a separate "channel" from the club stores with which it competes. Woodman's seeks declaratory and injunctive relief because it is concerned that Clorox intends to use that invalid classification as a justification for discrimination in violation of 15 U.S.C. §§13(a)(d) and (e).

§2(a) of Robinson-Patman reads, in relevant part, as follows:

> (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* . . . *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 . . . (Emphasis supplied.)

Analysis of the entire complaint will reveal that Woodman's has not alleged that its competitors are paying a lower price for any particular package of a Clorox product. In fact, Woodman's expressly alleges at ¶48, that it wrote to Clorox requesting that Clorox provide Woodman's with a copy of its plan prepared in accordance with §240.8 of the *Guides*. A copy of the 1990 version of the *Guides* was attached to the September 15, 2014, letter. A copy of that correspondence is attached as Exhibit 5 to the Complaint [WD-Doc.1:¶48][RSA.118,165-185][FAC¶89][A.22,66-88]. At ¶49, Woodman's alleges that Clorox has failed and refused to provide that information. [WD-Doc.1:¶49][RSA.118][FAC¶90][A.22]. At

¶83 Woodman's alleges that without disclosure of the discounts, allowances and promotional services being offered by Clorox to Woodman's competitors, in violation of §2(d) and §2(e), Woodman's will not be able to take advantage of such programs in order to purchase products of comparable grade and quality to those being sold to its competitors at comparable prices and on comparable terms. [WD-Doc.1:¶83] [RSA.125][FAC¶121][A.27].

Woodman's is asserting there that it does not know what price the club stores are paying for comparable products because Clorox, in violation of §2(d) and §(e), is refusing to disclose the functional discounts, allowances and promotional services being given to its competitors. The functional "price" of a product is the nominal price, as modified by the discounts, promotions and allowances offered by a seller to customers who perform services that would otherwise be performed or provided by the seller. See *Boise Cascade Corp. v. FTC,* 837 F.2d 1127, 1132 (D.C.Cir.1988). "The pure functional discount operates independently of the purchaser's level of trade.... [A]ny purchaser that performs the required functions would be eligible for the discount regardless of whether it is nominally a wholesaler or retailer." *Coalition For A Level Playing Field, L.L.C. v. AutoZone, Inc.*, 737 F. Supp. 2d 194, 212, (S.D.N.Y. 2010).

Clorox refuses to disclose the existence of the functional discount programs it offers to other customers. Without that information, Woodman's cannot know what functional price its competitors are paying. Until such time as Woodman's knows that price, it cannot plead a claim of price discrimination, leaving it no alternative

but to assume that the price it pays is the price paid by its competitors. *AutoZone*, 737 F. Supp. 2d at 215.

Clorox argues that because Woodman's repeatedly discusses the unit prices applicable to Clorox products in large packs, this case must be governed only by §2(a) as a price discrimination case and not by §2(e). [Doc.19:22-27]. Glaringly absent from the Clorox brief is any reference to an argument or allegation by Woodman's that, when it was able to buy large packs, it was paying a different price for them than Clorox was charging to any other buyer.

Nor does Clorox point out any contention by Woodman's that the price it paid for smaller packs of Clorox products was different from the price that any competitor was paying for the same size package of that product. Woodman's does call attention to the fact that unit prices on small packs of a product are typically higher than unit prices on large packs of the same product. That, however, is not an allegation of price discrimination. As noted earlier in this brief, American consumers are culturally attuned to assume and expect that things are "cheaper by the dozen." Woodman's accepts that reality. Common sense compels it.

As this Court stated in *Kirby,* "§§ 2(d) and 2(e) were devised to specifically cover a 'second scheme' designed to evade the price discrimination outlawed in the original Clayton Act. 80 Cong.Rec. 6282 (1936). The Report of the House Judiciary Committee stated that the aims of the amendment were 'to suppress more effectually discriminations between customers of the same seller[.] ... sometimes effected directly in prices ... and sometimes by separate allowances to favored

customers ... ' H.R.Rep.No.2287, 74 Cong., 2d Sess. 7 (1936)." *Kirby*, 489 F.2d at 910-911 (7th Cir. 1973):

Here, the disguised price discrimination is found in Clorox's decision, first, to deprive some customers of the special packaging of fungible Clorox products in large packs, which like most large packs, carry a lower unit price, and, second, to limit the availability of this promotional service to just three customers nationwide.

In another strawman argument, Clorox erroneously contends that Woodman's is making a "quantity-based price difference argument" which it notes is a claim that must be brought under §2(a) per *Hoover Color Corp. v. Bayer Corp.,* 199 F.3d 160, 167 (4th Cir.,1999). [Doc.19:23-25]. Such claims may need to be brought under §2(a), but Woodman's has not raised a "quantity-based price difference argument."

Analysis of the Complaint reveals that Woodman's has not alleged that the prices it has paid were "quantity based" as that term was used in *Hoover.* In *Hoover*, a seller offered percentage discounts that increased as the quantity purchased grew. *Id.,* at 161-162. Woodman's has not alleged quantity discounts were offered or that it was a victim of such a practice.

Finally, we would note that, at least for the time being, Clorox has terminated Woodman's as a direct purchaser of Clorox products. Consequently, Woodman's has been purchasing Clorox products at wholesale. Because Woodman's is currently purchasing at a different functional level than the club stores, which purchase directly from the manufacturer, Woodman's cannot bring a claim under §2(a). *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 530-31 (6th Cir. 2004),

D. The Federal Trade Commission Has Not Abandoned *Luxor* and *General Foods.*

Clorox cites to the Commission's decision in *In re Universal-Rundle Corp.* for the proposition that the Commission has retreated from its holdings in *Luxor* and *General Foods*. [Doc.19:41-44]. The Commission expressly disagrees with this assertion in footnote 10 of its *Amicus Curiae* brief. [Doc.14:FN10].

Similarly, Clorox incorrectly notes that no federal court has ever endorsed *Luxor's* reasoning. [Doc.19:43]. Woodman's would first point out that Clorox offers no federal decision rejecting Luxor's conclusion that special package sizes constitute a promotional service covered by §2(e) of Robinson-Patman. Woodman's would further point out that the absence of authority endorsing or criticizing *Luxor* or *General Foods* may demonstrate only that the business community, until recently, has been complying with the *Guides'* directive, and the holdings in *Luxor* and *General Foods* and the holding in the numerous cases that have cited favorably to the list of covered services and facilities in the *Guides,* all of which provide that package sizes must be made available to all competing retailers on proportionally equal terms.

Clorox concludes this particular argument with a reference to a distribution strategy it asserts has been used for decades all over the country. [Doc.19:44]. We would note that this appeal deals with a 12(b)(6) motion. The factual representations made by Clorox on p.44 do not appear in the original Complaint, are not properly raised in the Clorox brief and may not be considered by the Court in ruling upon a 12(b)(6) motion.

V. To Overturn the District Court's Ruling on the Second Motion to Dismiss, Clorox Must Convince this Court, as a Matter of Law, that a Retailer Who Purchases at Wholesale to Compete with Other Retailers is No Longer Entitled to be Treated as a "Purchaser" Under Robinson-Patman §2(e).

Shortly after the denial of its 12(b)(6) motion, Clorox ceased doing business with Woodman's altogether. [WD-Doc.64-1]. Clorox moved to dismiss Woodman's complaint as "moot." Clorox alleged that its permanent discontinuation of all sales to Plaintiff means that the alleged discriminatory provision of services has ceased and, accordingly, there is no injunctive relief that the Court can award. [WD-Doc.63-1].

Woodman's has purchased Clorox products through one or more wholesalers since Clorox issued its February 24, 2015 termination letter filed with the Court as Document 64-1. [WD-Doc.71:¶6][RSA.188]. The Affidavit of Andy Anundson, Woodman's procurement director, establishes that Woodman's buys Clorox products at wholesale. [Id.]. Woodman's intends to continue buying Clorox products at wholesale so as long as there remains a consumer demand for Clorox products. [WD-Doc.71:¶8][RSA.188].

As a purchaser of Clorox products at wholesale, Woodman's is a "purchaser" of Clorox's products entitled to the protections of §§2(d) and (e) of the Act. See *Fred Meyer*, 390 U.S. at 352, 88 S.Ct. at 904. Any effort by Clorox to prohibit wholesalers from selling to Woodman's would constitute an unreasonable restraint of trade in violation of §1 of the Sherman Act. See *Fed. Trade Comm'n v. Beech-Nut Packing Co.*, 257 U.S. 441, 452-53, 42 S. Ct. 150, 154, 66 L.Ed. 307 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723, 64 S.Ct. 805 (1944).

Clorox's argument that Woodman's "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" [Doc.19:44] is inconsistent with the policies underlying enactment of the Robinson-Patman Act, as detailed by the Supreme Court in *Fred Meyer*.

Fred Meyer held that retailers purchasing commodities through a wholesaler remained "customers" of the vendor for the purposes of §2(d), reasoning that to exclude such retailers would frustrate the purpose of §2(d). *Fred Meyer*, 390 U.S. at 352. The *Fred Meyer* Court rejected the position advanced by Clorox here, under which powerful direct buyers would be protected by §2(e) from competition by other powerful direct buyers, while small buyers who bought from wholesalers would not be protected. See *Id.*.

Woodman's argued to the District Court that *Fred Meyer* requires 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." *Id.,* at 358. The District Court concurred, concluding that "[b]ecause 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." S.A.17. Nothing offered by Clorox establishes that this conclusion was erroneous.

A. *Colgate* Does Not Allow a Seller to Control who Buys its Products From a Wholesaler.

Clorox argues first that *United States v. Colgate & Co.,* 250 U.S. 300, 39 S. Ct. 465 (1919) provides it with a "virtually unqualified right" to choose its customers. [Doc.19:45]. It offers citations to numerous cases that all establish that such a right exists, and why the cases so hold. None of them are relevant.

Regardless of whether this is true, *Colgate* does not provide a basis upon which a seller can choose who can purchase its products from a wholesaler. Clorox concedes as much, acknowledging that it cannot control independent wholesalers. [Doc.19:47]. Clorox argues that allowing retailers purchasing at wholesale to remain a purchaser for purposes of §2(e) would eviscerate a manufacturer's right to cut off business relations with any customer. [Doc.19:47-48].

Woodman's is not contending, for purposes of this appeal, that it would have "business relations" with Clorox by virtue of its purchase of Clorox products from wholesalers.[7] Obviously, Woodman's would only have business relations with the wholesalers from which it purchases those products. This argument ignores the fact

[7] The Court is reminded that Woodman's has a pending Sherman Act claim asserting that Clorox stopped selling to Woodman's in furtherance of a conspiracy to limit competition in the sale of large packs of Clorox products. §2(a) of Robinson-Patman and *Colgate* permit sellers to refuse to sell to a customer, provided that such action is not in restraint of trade. Woodman's reserves its right and intends to pursue that claim following the completion of this appeal, but, for purposes of this appeal only, is operating on the assumption that Clorox has the right to terminate its dealings with Woodman's.

that a seller, such as Clorox, has no business relations with retailers purchasing its products at wholesale. Because this is so, there are no relations to "cut off."

Fred Meyer does not require a seller to "do business" with a retailer who buys at wholesale. It protects resellers, like Woodman's, who buy at wholesale by requiring sellers, like Clorox, to make promotional services available on comparable terms to resellers competing with a favored buyer.

The decision places upon sellers the responsibility for making promotional allowances available to those resellers who compete directly with the favored buyer. It does not, however, compel the supplier to "do business" with the reseller buying at wholesale. It expressly provides that "[n]othing we have said bars a supplier ... 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 357-358. Thus, Clorox would satisfy this requirement by simply supplying large packs of its products to wholesalers that wish to purchase them. There would be no reason for Clorox to know who was purchasing them from the wholesaler.

Clorox seeks to ignore or pretend that *Fred Meyer* does not exist. *Fred Meyer* ruled that retailers who purchase at wholesale have the right, under Robinson-Patman, to receive all promotional services or facilities provided to competing retailers available on proportionally equal terms. The sellers in *Fred Meyer*, like

Clorox here, had no business relations with the retailers who were buying their products at wholesale.

Clorox attempts to distinguish *Fred Meyer,* first, because "(Section §2(d) uses 'customer' whereas §2(e) uses 'purchaser,' a term that was not at issue in *Fred Meyer*)" [Doc.19:49]; and second, because Clorox had terminated Woodman's as a customer. [Doc.19:51]. As we shall demonstrate, Clorox cites no relevant authority to support either contention.

B. Clorox Offers No Relevant Authority or Policy to Overcome the Abundant Authority Holding That There is No Substantive Distinction Between a "Customer" under §2(d) and a "Purchaser" Under §2(e).

Clorox argues, without citation to relevant authority, that *Fred Meyer* is distinguishable because it construed §2(d) to be "customers" for Robinson-Patman purposes, while this case construes §2(e) as "purchasers." [Doc.19:49]. Nor does Clorox identify any policies underlying *Fred Meyer* that support its arguments.

Numerous courts have ruled that the "customer" and "purchaser" are to be used interchangeably. This Court distinguished between §2(d) and §2(e) claims in *Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973), by observing that where the seller pays the buyer to perform a service or acquire a facility, §2(d) applies, and where the seller provides the service to the buyer, §2(e) applies.

Recognizing semantic variations between the two subsections, *Kirby* observed the two sections have been viewed as "coterminous," and that courts have "consistently resolved the two sections into an harmonious whole." Finally, it held that "there is no meaningful difference between the terms "customer" and

"purchaser." The two terms may be used interchangeably. *See Id.*, and *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 522 (6th Cir. 2004), finding that "[a]lthough §2(d) refers to "customers" and §2(e) deals with "purchasers," the words in those two subsections have been interpreted to have the same meaning. Hovenkamp ¶ 2363b."

The Commission's *Guides* also support Woodman's position.

§ 240.4 of the *Guides* (*Definition of customer*) reads, in relevant part, as follows:

> ... The word "customer" which is used in section 2(d) of the Act includes "purchaser" which is used in section 2(e).

C. It is Irrelevant that Clorox Terminated Direct Sales to Woodman's.

Clorox argues that *Fred Meyer* should not apply when a vendor has terminated direct sales to the retailer because that would "eliminate manufacturers' *Colgate* right to terminate individual customers." [Doc.19:51]. Sellers like Clorox may have a long-established right to terminate direct sales to a customer, but they have no right to deprive those customers of the right to buy their products at wholesale.

Under *Fred Meyer,* retailers buying at wholesale have rights protected by §§2(d) and 2(e). Clorox argues that it somehow makes a difference that a purchaser at wholesale had been previously terminated as a direct purchaser, but Clorox offers no authority for this proposition other than repeating its previous arguments based upon the right to terminate a customer under *Colgate.* [Doc.39:51]. As noted above, a §2(e) retailer does not need to have a business relationship with a seller to have a right to receive all promotional services offered by the seller to competing retailers which are protected by *Fred Meyer.* Clearly, this is the case for a retailer who has always bought at wholesale. Clorox offers nothing to show how such a buyer would

be distinguishable from a terminated retailer that used to buy direct, but who now buys at wholesale.

Clorox offers no tenable legal or policy-based argument to support the outcome pursued by Clorox. To the contrary, the Court in *Fred Meyer* explained in detail why public policy compels a different outcome than the one sought by Clorox. The Court observed that under the reading endorsed by Clorox, powerful direct buyers would be protected by §2(e) from competition by other powerful direct buyers, while small buyers who bought from wholesalers would not be protected. *Fred Meyer,* 390 U.S. at 352.

Such a result, *Fred Meyer* concluded, would be diametrically opposed to Congress' clearly stated intent to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. It concluded that reading 'customer' as excluding retailers who buy through wholesalers and compete with direct buyers would frustrate the purpose of §2(d). It ruled that §2(d) includes such competing retailers within the protected class." *Id.,* at 352.

The Supreme Court makes clear that a failure to allow purchasers at wholesale to secure proportionally equal access to services or facilities provided by a seller such as Clorox to direct-buying competitors like the club stores, would frustrate the very purpose of 2(d) or 2(e). *Id.* As noted in Section III(A) above, the Supreme Court, in *Volvo,* 546 U.S. at 175, 178 and 181, recently expressed its continued willingness to protect small retailers from powerful buyers in secondary line cases.

Clorox further argues that a distinction between §§2(d) and 2(e) lies in a lack of symmetry regarding the delivery of large packs. [Doc.19:50]. Clorox first observes that a seller can provide advertising directly to a customer under §2(e) or it can be purchased by the customer and reimbursed by the seller under §2(d). Clorox then points out that large packs can only be provided by a seller. Clorox contends that this lack of symmetry precludes large packs from constituting a qualified "service or facility."

Clorox points to nothing in Robinson-Patman that requires such symmetry between §§2(d) and 2(e). To the contrary, Clorox concedes that candy provided in special Halloween-themed packaging constitutes a promotional service that can be provided under §2(e). [Doc.19:39-40]. It is equally clear, however, that a retailer has no ability to provide its own Halloween-themed packaging for which it could seek reimbursement under 2(d). Clorox is not troubled by the apparent lack of symmetry in this instance.

Citing to *United States v. U.S. Gypsum Co.*, 550 F.2d 115, 125 (3rd Cir. 1977), Clorox argues that the Court should disregard *Fred Meyer* because it conflicts with *Colgate*. Clorox observes that *U.S. Gypsum* requires that conflicts between Robinson-Patman and the Sherman Act be resolved in favor of the Sherman Act. The problem with this argument is that there is no conflict between *Fred Meyer* and *Colgate*. Clorox has terminated Woodman's, but that does not mean that Woodman's cannot buy Clorox products at wholesale. *Fred Meyer* only compels Clorox to sell large packs of products it already sells to wholesalers. If it doesn't sell

a particular product to a particular wholesaler, Clorox is free to refuse to sell large packs of that product to that wholesaler.

Clorox argues, citing *Volvo*, that its termination of Woodman's is somehow significant as a matter of policy. [Doc.19:52]. It is yet another variant on its intrabrand versus interbrand competition based upon its reading of *Volvo.* As noted in Section III(A) above, the *Volvo* Court stands ready and willing to protect intrabrand competition in secondary line cases between powerful and weak buyers under Subsections 2(d) and (e). *Volvo*, 546 U.S. at 175, 178 and 181. Clorox offers nothing new in this iteration of that argument.

The consequences of a decision affirming the District Court are not as daunting as the picture painted by Clorox. If affirmed, Clorox will not have to deal with Woodman's.[8] All retailers who compete with club stores will have the right to buy large packs of Clorox products from wholesalers that sell other sizes. Woodman's is not the only retailer affected by Clorox's decision to limit sales of large packs to club stores.

Some retailers will want to buy large packs. Some won't. Once Clorox determines what the market is for large packs, it will adjust production to meet demand. More importantly, as club stores demand exclusive access to large packs, all sellers will be able to tell them that Robinson-Patman does not permit them to do so.

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[8] See footnote 6.

Clorox complains that affirming the District Court would require manufacturers to guarantee that a retailer can purchase at wholesale any product it desires. [Doc.19:50]. Woodman's has never argued that it is entitled to purchase from a wholesaler any product that it desires. Clearly Clorox could limit sales of a particular product to certain customers. If it offers a product to a purchaser, however, it must make all size packages of that product available. In *FTC v. Simplicity*, 360 U.S. at 67-68, the Court rejected a seller's arguments about the merits or economics of §2(e), noting that it was not in a position to review the economic wisdom of Congress.

None of Woodman's claims against Clorox are moot. All claims have the same vitality as the day upon which they were filed. The fact that Woodman's is now compelled to purchase Clorox's products through a wholesaler does nothing to change the fact that Woodman's is a "purchaser" of Clorox products entitled to receive any services or facilities connected with the processing, handling, sale, or offering for sale of Clorox products upon proportionally equal terms as those accorded to any other purchaser of Clorox products.

In 1948, the Supreme Court explained that Robinson-Patman was passed out of a concern that large buyers could secure a competitive advantage over small buyers. Congress sought "to deprive large buyers of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Morton Salt Co.*, 334 U.S. at 43.

The recent ruling of the Supreme Court in *Volvo* demonstrates that, contrary to Clorox's repeated assertions, the Supreme Court remains prepared to protect against the evils the Robinson-Patman Act was passed to address.

Conclusion

For all of the reasons set forth herein, the Court of Appeals should affirm the rulings of the District Court, and remand this matter to that court for further proceedings.

Dated at Madison, Wisconsin, this 25th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2015, I electronically filed the document described as RESPONSE BRIEF OF PLAINTIFF-APPELLEE WOODMAN'S FOOD MARKET, INC. with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system to the participants in the case registered as CM/ECF users, and that service will be accomplished by the CM/ECF system, to:

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I further certify that some of the participants in the case are not CM/ECF users in the Seventh Circuit. I have transmitted the foregoing document via e-mail and hand-delivery within three days to the following non-CM/ECF participants:

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CERTIFICATE OF COMPLIANCE

1. This Response Brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,634 words, as determined by the word count function of Microsoft Word 2010, excluding the parts of the Response Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This Response 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 Response Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Century.

Dated: November 25, 2015

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