No. 15-3001

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WOODMAN'S FOOD MARKET, INC.,
Plaintiff-Appellee,

v.

THE CLOROX CO. AND THE CLOROX SALES CO.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin
No. 14-cv-00734-slc
Honorable Stephen L. Crocker

CORRECTED BRIEF FOR AMICUS CURIAE NATIONAL GROCERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE AND FOR AFFIRMANCE

THOMAS F. WENNING
WENNING LLC
20208 Darlington Drive
Montgomery Village, MD 20886
(301) 943-1527

Counsel for Amicus Curiae

December 2, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1 and Cir. R. 26.1, the National Grocers Association states that it is a nonprofit corporation and, as such, no entity has any ownership in it. No law firm or attorney other than the undersigned has appeared or is expected to appear for amicus curiae in this matter.

/s/ Thomas F. Wenning

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Amicus the National Grocers Association (NGA) is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. Independent grocers operate 21,000 stores out of the more than 30,000 supermarkets nationwide and generate more than $131 billion in annual sales in the United States. NGA's members operate stores using a variety of business models, with store sizes ranging from 15,000 square feet to over 200,000 square feet, and may market more than 40,000 products in a variety of package sizes for resale to consumers in as few as one store to over 100. Many independent retailers purchase through wholesalers, and some are partially or fully self-distributing through their own distribution centers. NGA and its predecessor organizations have a long history of support for the Robinson-Patman Act and its goals and objectives, including testifying before the Antitrust Modernization Commission in support of the Robinson-Patman Act, and providing comments on the Federal Trade Commission's 2014 updates to its guide on compliance with Sections 2(d) and (e) of the Robinson-Patman Act. NGA believes

[1] Pursuant to Federal Rule of Appellate Procedure 29, amicus states that no party or party's counsel authored this brief in whole or in part. Amicus further states that no party, party's counsel, or any other person other than amicus and amicus's counsel contributed money that was intended to fund preparing or submitting this brief.

that Sections 2(d) and (e) are critical to preserving a competitive playing field in the grocery and retail sectors.

INTRODUCTION AND SUMMARY

This case presents a simple question: whether Woodman's has pled sufficient facts to suggest—at the motion to dismiss stage—that discrimination in "large pack" packaging by Clorox states a claim under Section 2(e) of the Robinson-Patman Act, which prohibits discrimination over resale promotional benefits provided by suppliers to their retailers. The District Court held that it did. In seeking reversal, Clorox urges the Court to adopt two categorical rules that no court has ever endorsed. Amicus writes to explain, based on its experience with the grocery sector and decades of experience with the Robinson-Patman Act, why this Court should adopt a different approach.

The first new rule Clorox proposes is that special packaging or package sizes for a particular product can *never* be promotional in nature because a product and its packaging are *always* one and the same. As the FTC observed in its Amicus brief, that is not the law. According to Clorox, large pack packaging transforms Clorox's products into entirely different products from the identical item contained in smaller packaging. As Clorox admits, however, under this theory there can be no violation under *any* provision of the Robinson-Patman Act because the statute covers discrimination over like products. Accordingly, adoption of this proposed

rule would have far-reaching implications beyond the claims at issue in this appeal. For example, Clorox's insistence that Woodman's allegations about price make this a 2(a) case are entirely inconsistent with its proposed packaging-equals-product rule; Section 2(a) would not apply either. In any event, this rule founders on common sense. As the name implies, Clorox "large packs" are simply ordinary Clorox products packaged to contain more of the product than other sizes of packaging—*e.g.*, 150 trash bags instead of 50 often with a volume-based or other promotional message—not different products.

The FTC proposes an alternative categorical rule—that only differences in advertising on packaging but no other differences are promotional—but it too is over-narrow. Amicus submit that categorical rules are not the answer. Instead, this Court should do what other courts have consistently done when presented with an alleged promotional benefit: apply a functional test to assess whether the benefit promotes the *initial sale* of the product to a wholesaler or retailer, or whether it promotes *resale* of the product to the ultimate consumer. Only if the plaintiff adequately alleges the latter can the claim proceed under Sections 2(d) or (e). Here, the plaintiff has adequately alleged that the Clorox large packs are intended to promote resale, not the initial sale.

The second proposed rule is that Woodman's has no standing to complain about the discrimination because it is now only an indirect purchaser of Clorox

products after Clorox terminated its direct relationship. The U.S. Supreme Court addressed precisely this issue in its *Fred Meyer* decision, and rejected Clorox's view. As the Court there observed, many independent businesses purchase through wholesalers, as opposed to directly from suppliers. Clorox's proposed rule would eliminate standing for precisely the businesses that Congress was trying to ensure could compete. And the law is clear that indirect purchasers have standing under the antitrust laws, including the Robinson-Patman Act, especially when the plaintiff is seeking only injunctive relief as Woodman's is doing here.

STATEMENT

The Robinson-Patman Act

Congress passed the Robinson-Patman Act to "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Fred Myer, Inc.*, 390 U.S. 341, 349 (1968). Leading up to passage of the statute, Congress found that in certain cases large retail chains used their size to coerce suppliers to sell products to them at significantly lower prices, or on better terms, than those provided to their smaller competitors. The advantages the chains received were not necessarily based on their greater efficiency, but were sometimes due to the chains' ability to leverage buyer-side market power—*i.e.*, their power as must-have purchasers for consumer goods. The discriminatory advantages demanded and obtained by these

buyers included not only demands that suppliers sell to smaller, independent rivals only at higher prices, but also that such competitors be denied promotional benefits that enhanced the large stores sales. Congress determined that these practices should be prohibited, but that the then-existing provisions of the Sherman Act and the Clayton Act were inadequate to do so.

To accomplish these "broad goals," Congress passed the Robinson-Patman Act (15 U.S.C. § 13). *Fred Meyer*, 390 U.S. at 349. Across its multiple subsections, the Act prohibits different methods by which suppliers can discriminate among their competing customers. Although there are a number of differences between the text and application of these provisions, as relevant here, Section 2(a) of the Act prohibits certain discrimination over terms connected to the initial sale of a product to a wholesaler or retailer (*e.g.*, discrimination in prices charged, terms of credit, etc.), while Sections 2(d) and (e) prohibit discrimination over terms promoting resale of the product to the end consumer (*e.g.*, discrimination in advertising allowances, provision of in-store displays, etc.). *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959). Congress intended these sections, taken together, to be a comprehensive framework to "eliminate these inequities" that put "independent stores … at a hopeless competitive disadvantage" against large "chain buyers." *Id.*

This Case

Plaintiff Woodman's is a regional chain of large, warehouse-style grocery stores. Compl. A.3-11 (¶¶ 6, 31). Like other warehouse retailers, such as club stores, Woodman's uses industrial shelving in its retail area and displays products on their shipping pallets. A.11 (¶ 31). Defendant Clorox is a consumer product company that distributes its products for sale to consumers through direct sales to retailers and indirect sales through wholesalers. A.3 (¶ 7). Woodman's purchases products from Clorox indirectly through wholesalers and, until recently, directly from Clorox. A.3-5 (¶¶ 7, 13).

Until October 2014, Woodman's purchased some of its Clorox products in "large pack" packaging. A.10 (¶ 27). As the name implies, large packs contain greater volumes of Clorox's products than other sized packaging. *Id.* For example, a large pack of Hidden Valley Ranch salad dressing contains two 40 oz bottles of dressing, while the largest regular-sized packaging contains one 36 oz bottle. A.11 (¶ 29). This packaging makes Clorox products more attractive to consumers for various reasons, including cost and perceived value and convenience. Indeed, Clorox specifically introduced large pack packaging to maximize its retail-customers' sales, and in response to consumer demand. A.6-9 (¶ 19). Woodman's sold over $1 million in Clorox products in large pack packaging in the twelve months prior to October 2014. A.11 (¶ 29).

In October 2014, Clorox informed Woodman's that it and other "General Market retailers" would no longer have access to Clorox products in large pack packaging. A.13-14 (¶¶ 45, 48). Going forward, only club store chains, with whom Woodman's competes, would have access to Clorox products in this format. A.14 (¶ 50). According to Woodman's, Clorox stopped providing it with products in large pack packaging due to a conspiracy with three club chains, pursuant to which it agreed not to provide large packs to independent stores like Woodman's. A.18-19 (¶¶ 73-74). Woodman's believes it will sell fewer Clorox products without the large packs. A.17 (¶¶ 66-68).

In its complaint, Woodman's quotes a Clorox affidavit stating that 20% of Clorox's U.S. sales were to these three club chains (who were Clorox's second largest, third largest, and seventh largest customers respectively), while only 0.2% of Clorox U.S. sales were to Woodman's. Accordingly, Clorox had no choice but to stop providing Woodman's with large pack packaging after the club chains demanded it do so. A.6-9 (¶ 19).

In October 2014, Woodman's filed this lawsuit, asserting violations of Section 2(e) of the Robinson-Patman Act and seeking declaratory and injunctive relief. In response, Clorox terminated all direct sales to Woodman's. A.19 (¶ 74). Woodman's continues to purchase Clorox products indirectly through wholesalers (but not in large pack packaging). A.12-13 (¶¶ 40-42). Clorox moved to dismiss

the lawsuit on the grounds that, among other things, (i) large pack packaging is not a "service or facility" covered under Section 2(e); and (ii) that Woodman's has no standing post-termination to assert a 2(e) claim because it is no longer a direct purchaser from Clorox. The District Court denied the motion to dismiss. This appeal followed.

ARGUMENT

The conduct Woodman's alleges falls squarely within the discriminatory practices against independent businesses that Congress sought to prohibit through 2(e) of the Robinson-Patman Act. Accordingly, much of Clorox's argument is directed to wrestling with the statute and its goals. But those sentiments are misdirected to this Court. Although amicus believes the Robinson-Patman Act remains a vital part of U.S. law, the questions here are not about whether Congress made the right policy choices or whether the Act is in tension with the antitrust laws. The questions are simply whether "large pack" packaging can be a promotional service under 2(e), and whether this plaintiff can assert such a claim. The District Court correctly held that large packs could be promotional, and that Woodman's claim can go forward. The Court should affirm that decision.

I. THE DISTRICT COURT CORRECTLY HELD THAT "LARGE PACK" PACKAGING COULD BE A PROMOTIONAL SERVICE OR FACILITY WITHIN THE MEANING OF SECTION 2(e)

Woodman's alleges that Clorox refuses to provide it with Clorox products contained in "large pack" packaging, which Clorox used to provide to Woodman's but now provides only to the national club store chains with whom Woodman's competes. Woodman's contends that this disparate treatment violates Section 2(e) of the Robinson-Patman Act because large pack packaging constitutes a promotional "service or facility" that the law requires be provided to all competing purchasers. Clorox's main argument in response is that special packaging or package sizes for a particular product can *never* be a promotional service because packaging is part of the product, and different packaging transforms identical commodities into different products. Clorox Br. 4, 14, 19, 29, 40, 42. As the FTC observed in its Amicus brief, "Clorox is mistaken" about the law. FTC Br. 23 n.14. There is no basis for such a categorical rule about product packaging, no other court has ever adopted it, and this Court should not be the first.

Indeed, the Court does not need to decide whether differences in packaging or package size are always promotional. Amicus agree with the FTC 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." FTC Br. 24. But Amicus part ways with the FTC's approach to the particular allegations here, which is

apparently to adopt a slightly different, but equally rigid, categorical rule that only differences in the promotional messages on packaging—*i.e.*, on-package advertising—can be actionable discrimination under 2(e). There is no basis in the law for that rule either (and it arguably conflicts with the FTC's own guidance to businesses issued over the past four decades).

Instead, courts should apply the traditional functional test that asks whether the benefit provided by the manufacturer relates to the initial sale of the product, or is intended to promote resale to the consumer. Amicus believe that under this standard, Woodman's complaint states a viable claim under Section 2(e) and the District Court's decision should be affirmed.[2]

A. A Supplier Benefit That Promotes Resale Of The Product Is A Promotional Service Subject To 2(e) Of The Robinson-Patman Act

Section 2(e) of the Robinson-Patman Act prohibits discrimination among competing resellers in "any services or facilities" provided by a supplier that promote resale of the supplier's goods. *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 587 (7th Cir. 1971). This prohibition is "not [] confined to the conventional type of promotional services such as window

[2] Amicus does not address whether the facts alleged state a violation of 2(a) of the Robinson-Patman Act, which is not a question before the Court. The District Court construed the Complaint to assert a claim under 2(e) of the Act, but not 2(d) (which prohibits promotional payments rather than services or facilities). Op. 6. No party appears to dispute that construction, and Amicus accordingly limits its argument to whether Woodman's can state a claim under Section 2(e).

displays, demonstrators, exhibits and prizes," but is written "intentionally broader" to cover any benefit a supplier provides to resellers to facilitate sales to consumers. *Id.* at 587-588. For example, in *Simplicity Pattern*, the promotional services provided to a favored "variety store" retail category (and denied to the fabric store category) in violation of 2(e) included furnishing patterns on a consignment basis (rather than cash payment up front), free catalogs listing its products, free display cabinets, and "transportation costs in connection with [the favored resellers'] business." *Simplicity Pattern*, 360 U.S. at 60. In *Fred Meyer*, suppliers were induced to provide promotional payments as well as free cans of peaches and corn as well as per unit discounts on paper towels to support a powerful retailer's consumer promotions (which were challenged under the analogous Section 2(d) as promotional payments as well as under Section 2(a)).[3] *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 358-359 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

Benefits that promote the *initial* sale of the product to the reseller are not covered under 2(e). Discrimination in such benefits, such as providing one

[3] *See also Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC*, 484 F.3d 865, 872 (6th Cir. 2007) (collecting as examples of resale promotions covered under 2(e) including "any kind of advertising, catalogs, demonstrators, display and storage cabinets, display materials, hand bills, special packaging or package sizes, warehouse facilities, accepting returns for credit, prizes or merchandise for conducting promotional contests" as well as bonuses paid by the supplier to the reseller's sales staff).

customer more favorable pricing than another, may be prohibited by 2(a). Thus, to determine whether differential treatment by a supplier could be a violation of 2(e), the fact-finder must determine whether the benefit was primarily intended to encourage the supplier's customer to buy the products, or whether the benefit was intended to promote the customer's ability to sell products to the end consumer. *Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC*, 484 F.3d 865, 872 (6th Cir. 2007).

For example, in *Freightliner*, the Sixth Circuit considered two incentives allegedly provided to favored truck dealers, but not the plaintiff, by the manufacturer: (i) the ability to receive more heavy-duty trucks in return for purchasing certain vans; and (ii) allowing the dealer's customers to participate in a special maintenance and repair service program. The court determined that the first incentive was designed to encourage the dealers to purchase vans, and therefore was not covered by 2(e), but the second incentive was designed to make the vans more attractive to the ultimate consumer, and therefore did fall under 2(e). *Freightliner*, 484 F.3d at 873-874.

Here, the District Court considered, for purposes of ruling on a motion to dismiss, whether the complaint contained sufficient allegations to suggest that provision of large pack packaging was a service intended to promote resale of Clorox products. Op. 8. The District Court therefore applied the correct analysis

to determine whether Woodman's allegations over large pack packaging *could* state a claim under 2(e). Finding that Clorox had alleged that large packs were intended to appeal to consumers as more convenient and a better value than the same products in other packaging, the District Court held that Woodman's adequately alleged discrimination over a promotional service and denied the motion to dismiss. *Id.* As discussed below, at this stage of the case the District Court's ruling was correct.

B. Differences In Packaging, Including Package Size, Are A Common Promotional Device Introduced To Increase Retail Sales

Research into the role that packaging plays in product promotion strongly supports the idea that differences in packaging, including package size, can be a promotional service under Section 2(e). Although packaging can play a number of different functions in product distribution—including facilitating transportation or product protection—the relevant literature demonstrates that product packaging is also a key element of marketing products to end consumers. This is because "[e]ven a small change in sales can mean the difference between profit and loss for many products, and packaging can influence consumer purchase decisions …. It is the one aspect of marketing that is present at the moment of choice and reaches nearly all consumers who are purchasing from a given product category." Institute of Medicine, *Front-of-Package Nutrition Rating Systems and Symbols* 15-16 (The National Academy Press 2012) (citations omitted).

This consumer-orientated promotional purpose includes differences in package size. For example, there is a well-documented perception that large package sizes promote resale and usage of products, and that manufacturers introduce large pack product versions for that reason. *See, e.g.*, Brian Wansink, *Can Package Size Accelerate Usage Volume?*, 60 J. Marketing 1, 2 (July 1996). Marketing and consumer psychology research have verified these effects.[4] *Id*. at 9-11 (describing studies). For example, studies show consumers perceive large pack versions of a product to have lower per unit costs than regular versions, whether or not they actually are lower cost. *See, e.g.*, Hoyer, Wayne D. et al., *Consumer Behavior* 90 (6th ed. 2013) ("a consumer who encounters a large, multipack item may use prior knowledge about correlation between price and package size to infer that the large-sized brand is also a good buy"); Wansik, 60 J. Marketing at 2 n.2 ("[a]lthough a perfect inverse relationship between package size and unit cost may not be consistent across all sizes of packaged goods … segments of consumers have this perception in the United States").

[4] *See also* Rachel Griffith et al., *Consumer Shopping Behavior: How Much Do Consumers Save?*, 23 J. Econ. Persp. 99, 118 (Spring 2009) (larger package sizes are particularly popular in the United States where homes are larger and more shopping is done by car); Samreenlodhi, Misbah, *Brand Packaging and Consumer Buying Behavior: A Case of FMCG Products*, 5 Int'l J. Scientific & Res. Pub. 590, 596 (2015) ("package size [which] is one of the utmost accessible and easy-to-process product cues to which customer[s] are exposed, can have a significant impact on consumer buying pattern").

Other observed consumer effects due to larger package sizes include: consumers are more likely to finish products contained in large packages more quickly than products in smaller ones; that larger sizes suggest fewer trips to the store, and therefore imply convenience; and that changes in package size can stimulate consumer interest in a particular brand at point of sale, increasing sales. *See, e.g.*, Wansik, 60 J. Marketing at 2; Hoyer, *Consumer Behavior* 80-81. Indeed, large pack packaging—including the Clorox packaging at issue here—is often used in combination with promotional messages not included in smaller packaging such as "value size!," the product volume listed in substantially larger or highlighted text ("200 ct"), or statements that some volume of the product is included "free," which are intended to reinforce these consumer perceptions.[5]

As the complaint here demonstrates, manufacturers like Clorox introduce larger sizes in order to take advantage of these effects. For example, Woodman's alleges that large pack packaging is more convenient (at least for certain consumers) because they have to be purchased less frequently and are easier to carry than multiple smaller sized packages of the same product. A.15-16 (¶ 59).

---

[5] *See, e.g.*, A.11 (¶ 29) (42 lb Fresh Step cat litter; 3 pack of Clorox bleach) http://www.samsclub.com/sams/fresh-step-scoopable-cat-litter-42-lbs/prod2920037.ip (42 lb Fresh Step cat litter packaging states "42 LB!" and "Value Size!" in large font on top and top front of packaging); http://www.samsclub.com/sams/clorox-concentrated-regular-liquid-bleach-121-fl-oz-3-ct/prod7350080.ip (3 pack of Clorox bleach states "3 Value Size Bottles" in a prominent red box on the package).

Consumers also demand large packs because they are associated with value, in particular a lower per unit cost because they contain a higher volume in a single package.[6] A.14-16 (¶¶ 53, 59-60).

Indeed, a Clorox document quoted in the complaint explains that a key reason Clorox packages identical products in different size packaging is that doing so "creates the right assortment of sizes and brands for customers/channels *based on their shoppers*" in order to "maximizes both *the customer* [*i.e.*, the retailer] and Clorox sales" to the consumer. A.13 (¶ 46) (emphases added). A supplier service, driven by consumer characteristics and intended to "maximize" retail sales is plainly directed to resale of the product. Woodman's specifically holds itself out as having "the lowest price on the products it sells," and sought to be included in

---

[6] Clorox argues that Woodman's allegations about per unit pricing of products contained in large pack packaging necessarily relate to price discrimination under Section 2(a), and therefore preclude a claim under 2(e). Clorox Br. 22-27. However, providing large packs at lower per unit prices is no different than a manufacturer providing product discounts, or free product, in order to support volume-based retail promotions, which are promotional payments or services under Sections 2(d) and (e). *See, e.g.*, *Fred Meyer, Inc. v. FTC*, 359 F.2d at 358-59 (reversed on other grounds) (manufacturer provided free cans of tuna and corn to support buy-two-get-three promotion and per unit discounts on paper towels to support seven for $1.00 promotion violated 2(d)). Furthermore, although somewhat unclear, arguably Woodman's allegations about per unit prices can be read to assert not that it is injured by paying higher prices than its competitors (i.e., in the sense that its rivals are raising its costs making it unable to compete), but rather that it passes-through higher per unit prices on smaller packages (just as it passed through lower per unit prices on the large packs) and therefore smaller packaging is less attractive to its customers than large packs. *See, e.g.*, A.16 (¶ 60).

the promotional program because its "shoppers" have the same characteristics as the club stores' customers. A.11-17 (¶¶ 32, 65). And Woodman's fears it will lose sales of Clorox products to the club store chains that are able to access large pack packaged products (A.17 (¶¶ 66-67)), which further suggests that access to such packaging drives retail sales.

By contrast, the complaint does not allege that Clorox *introduced* the large packs as an incentive to generate more sales to stores or wholesalers—*e.g.*, in the way that a volume discount would—except as a by-product of greater consumer demand driven by the promotional package size. Nor are there allegations that large pack packaging makes storage or handling of the product efficient for the *wholesaler* or *retailer* itself, as opposed to the consumer. *See, e.g.*, Federal Trade Commission, *Guides for Advertising Allowances and Other Merchandising Payments and Services* ("Fred Meyer Guides"), 79 Fed. Reg. 58,245, 58,249 (Sept. 29, 2014) (packaging designed to facilitate storage and transshipment by retailer would be a service or facility related to initial sale not resale).

Accordingly, there is ample basis to find that Clorox's large pack program is well within the scope of promotional services protected by 2(d) and (e).

C. The Categorical Rules Regarding Product Packaging Proposed By Clorox and the FTC are Not Correct

1. Differences in product packaging do not make identical commodities different products

Clorox's primary argument is that differences in product packaging can never be a promotional service because packaging is not separate from the product, and, relatedly, that differently packaged commodities are entirely different products. *See, e.g.*, Clorox Br. 4, 14, 27-36, 40-42.

As an initial matter, the FTC correctly rejects Clorox's bright line rule because it conflates the package with the product. FTC Br. 23 n.14. Packaging commodities that are of "like quantity and grade" (much less identical commodities) in different packaging generally does not make the commodities different products.[7] *See, e.g.*, *FTC v. The Borden Co.*, 383 U.S. 637 (1966) (physically and chemically identical commodities are not different products merely because their packaging contains different labeling). And it does not in this case.

Clorox is correct that packaging the same commodity differently *could* transform the commodity into two different products if the packaging itself was sufficiently different and integral to the product that it transformed the functional

[7] For this reason, and contrary to the Clorox and the FTC's assertions, the District Court's decision does not require a supplier to provide all of its products, or different versions of a product, to all retailers. Rather, the opinion stands for the idea that when a supplier provides like quality and grade products to competing retailers, it may not favor one retailer with different packaging that makes the product more attractive to consumers than other packaging—whether the difference relates to size or something else. *See supra* Part I. In the FTC's case, its concern seems based on the District Court's reference to the FTC's decisions in General Foods and Luxor, with which the FTC now apparently disagrees. FTC Br. 15-21. This Court does not need to rely on either decision to find that discrimination in packaging can be a violation of Section 2(e).

use of the product. *Utah Foam Prod. v. Upjohn Co.*, 154 F.3d 1212, 1217-1218 (10th Cir. 1998). For example, a 5 gallon plastic bottle of water with a valve at one end for use with a water cooler may be a different product than a 16 ounce plastic bottle of the same water; consumers may use the two types of packages very differently such that they are not interchangeable. But it does not follow that product and packaging are *always* intertwined and that differences always create *functional* differences.

In particular, that is not the type of difference in packaging or package size at issue here. To continue the water bottle analogy, this case is about the difference between a 12-pack case of 16 ounce water bottles (regular-sized packaging) versus a 24-pack case of the same water bottles presented to consumer as a "bulk" size package (the "large pack" packaging). Those are not different products, but rather different volumes of the same product in different packaging. For the same reason, a box of 150 Glad tall kitchen trash bags is not a different "product" than a box of 120 identical Glad trash bags, and a 36 oz bottle of Hidden Valley Ranch salad dressing is not a different product than two 40 oz bottles of the same salad dressing wrapped together; consumers do not use the trash bags or salad dressing for different purposes when one comes in a larger package. *DeLong Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1517 (11th Cir. 1989) (abrasive media contained in special and stock packaging was identical and

therefore not different products). Consumers may use more, and they simply associate the large pack with greater convenience and value, but that is why the larger sized packaging is promotional.[8] *See, e.g.*, *Centex-Winston*, 447 F.2d at 587.

Clorox's related argument that a promotional service under 2(e) has to be "separate" from the product is simply a variation of the theme. Here again, the packaging is not the product, except in very specific cases not present here. *Utah Foam*, 154 F.3d at 1217-1218. But Clorox is also wrong for a more fundamental reason; the *manner* in which the supplier provides the product can amount to a promotional service. For example, in *Simplicity Pattern*, providing patterns on a consignment basis only to certain channels of trade was a violation of 2(e). *Simplicity Pattern*, 360 U.S. at 60. And in *Fred Meyer*, compensating a favored retailer through free cans of the peaches for every third can of peaches sold through the retailer's "buy two, get one free" promotion, and free merchandise to pay for coupon book promotions, was determined to be a manufacturer allowance prohibited by Section 2(d) because it was not provided to all competing retailers.

[8] The allegations that certain consumers prefer bulk package items describe how that packaging is intended to promote consumer convenience, and therefore resale. Contrary to Clorox's assertion (Clorox Br. 34), the fact that certain consumers are more attracted to larger package sizes than other consumers does not suggest that large packs are a separate product. Under Clorox's logic, any targeted promotion supported by a supplier would fall outside of 2(d) and (e).

Fred Meyer, Inc. v. FTC, 359 F.2d 351, 358-359 (9th Cir. 1966) (reversed on other grounds).[9]

Finally, Clorox's new rule would mean that discrimination over packaging would not violate *any* provision of the Robinson-Patman Act. This would have far-reaching implications beyond the claims at issue in this appeal. For example, although Clorox argues on the one hand that Woodman's should have brought this case under 2(a), its argument would preclude any claim over price differences between identical commodities in different sized packaging; Section 2(a) would not apply either. Amicus agrees with the FTC that there is no basis to so hold. FTC Br. 21 n.13 ("[w]e disagree with Clorox's assertion that a buyer can never bring a Section 2(a) claim based on a manufacturer's sale of an identical substance in different-sized packages").

---

[9] The authority Clorox cites (Clorox Br. 28-29) is not to the contrary. None of these cases involve product packaging, much less hold that different volumes of identical commodities in differently-sized packaging are different products. *See Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976) (no evidence defendant had provided the "advertising display materials and gifts" that constituted the alleged benefit); *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863, 865-866 (7th Cir. 1949) (refusal to sell "special [furniture] designed for public institutions" not a violation of Robinson-Patman); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317-1318 (9th Cir. 1979) (refusal to sell certain mobile home lines was not discrimination in "delivery" under Section 2(e)); *see also* Fred Meyer Guides, 79 Fed. Reg. at 58,248-58,249 (rejecting ABA antitrust section argument citing Purdy that discrimination in packaging is simply a refusal to deal and therefore not a 2(e) violation).

2. Promotional packaging is not limited to express advertising on the packaging

The FTC's acknowledges that "providing a special package or package size for a product *may* amount to a promotional service under Section 2(e)." FTC Br. 23 (emphasis in original). It nevertheless argues that the "special packaging or package size must convey a promotional message to consumers." *Id.* at 22. Although this is a less narrow rule than Clorox's, it is confusing and read literally it would be no less rigid and incorrect.

As an initial matter, like Clorox, the FTC does not identify a single case that adopts the apparent rule it proposes—that packaging must contain express advertising to be a promotional service. FTC Br. 21-25. In any event, the proposal conflicts with *Simplicity Pattern*, and decisions of this court, which have found that Congress made 2(e) "intentionally broader" than advertising to cover "nonadvertising and nonpromotional services" that promote resale of the product to consumers. *Centext-Winston*, 447 F.2d at 587; *see also Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909-910 (7th Cir. 1973) (discussing advertising allowances as an example of a promotional service, not the definition of the field); *Simplicity Pattern*, 360 U.S. at 60. Even Clorox acknowledges that covered services is broader than advertising allowances. Clorox Br. 15 (citing advertising, display cases, and hired sales people as examples of promotional services). To the extent that the FTC is arguing that special packaging should be held to a different

standard than other types of promotional services, it fails to explain why. For example, amicus sees no reason why, under the FTC's rule, discrimination over display cases or providing sewing patterns on a consignment basis should fall under 2(e) when neither benefit conveys an express message to consumers, and yet they plainly do. *Simplicity Pattern*, 360 U.S. at 60, 62-64.

Finally, as discussed above, there is ample basis to find that larger-sized packaging inherently conveys promotional messages to consumers (often combined with express advertising such as "value size" or "10 bags free"). *See infra* Part II.B. Accordingly, Amicus submits that the FTC is too quick to dismiss Woodman's claims here—especially at the motion to dismiss stage—even under the new rule for packaging they propose.

II. CLOROX'S ARGUMENT THAT WOODMAN'S IS NOT A PURCHASER CONFLICTS WITH *FRED MEYER* AND HAS NO OTHER BASIS IN LAW

Clorox, but not the FTC, urges the Court to hold that Woodman's does not have standing to complain about promotional discrimination under Section 2(e) because it is now only an indirect purchaser of Clorox products after Clorox terminated its direct relationship. Clorox Br. 49-53. Such a rule conflicts with the Supreme Court's decision in *Fred Meyer*, and it would do grave harm to indirect purchaser standing in cases far beyond promotional discrimination cases like this one. The Court should reject it.

Sections 2(d) and (e) of the Robinson-Patman Act prohibit suppliers from discriminating in promotional benefits between competing resellers. In *Fred Meyer*, the Supreme Court held that Section 2(d) protects an indirect purchaser (through a wholesaler) from such discrimination that favors a competing direct-purchasing retailer. 390 U.S. at 358. Here, Clorox terminated direct sales to Woodman's after Woodman's filed this lawsuit. According to the Complaint, however, Woodman's continues to purchase Clorox's products through wholesalers, and it competes with the club store chains that also purchase from Clorox. In other words, Clorox has severed its direct relationship with Woodman's, but it continues to earn income from Woodman's purchases indirectly, through wholesalers. And it continues to discriminate against Woodman's by preventing its wholesalers from reselling the promotional packaging to Woodman's that it makes available to Woodman's competitors. Clorox therefore has not ended the supplier-reseller relationship between it and Woodman's in any relevant sense under Robinson-Patman, and it continues to discriminate in a manner prohibited by the Act. *Id.* at 357-358.

Clorox's contrary arguments are novel, but they are not correct. It primarily argues that Woodman's does not have standing because, under *Colgate*, a manufacturer has an unqualified right to unilaterally decide what products to sell to whom. Clorox Br. 44-47. But as Clorox concedes, this argument completely

depends on finding that its large pack packaging constitute entirely different products, rather than a promotional benefit to aid resale of the product contained in the packaging (as Woodman's alleges). *See, e.g.*, *id.* at 46 (discussing a suppliers' right to decide which "items" to sell to customers); *see also United States v. Colgate & Co.*, 250 U.S. 300 (1919). As discussed above, that premise is wrong, and Clorox's standing argument is therefore beside the point. As far as promotional benefits such as differences in product packaging are concerned, although manufacturers have "the right to choose their customers," "[w]hen they do deal, they may not discriminate." *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863, 867 (7th Cir. 1949). That is the rule that controls here, whether the supplier deals directly or indirectly. *Fred Meyer*, 390 U.S. at 358.

Clorox also tries to distinguish *Fred Meyer*. In particular, it argues that *Fred Meyer* involved claims under 2(d)—not 2(e) as in this case—and the text of these provisions are different. Clorox Br. 49-53. But contrary to Clorox's argument, as this Court has held, the relevant text in Section 2(d) and (e) are the same; the fact that one uses "customer" (Section 2(d)) and the other "purchaser" (Section 2(e)) is not meaningful. *See, e.g.*, *Kirby*, 489 F.2d at 909-910 (recognizing that the two provisions are interpreted consistently and that holding in *Fred Meyer* applies to 2(d) and 2(e)). The other difference Clorox identifies is that Section 2(d) covers payments while Section 2(e) covers promotional services or facilities. That

distinction was not germane to the holding in *Fred Meyer*, however, and it therefore provides no basis to distinguish it here.[10] *See id.*

At bottom, however, Clorox's real argument is not that *Fred Meyer* is distinguishable, but that it is wrong. *See, e.g.*, Clorox Br. 48, 51 (calling *Fred Meyer* "counterintuitive" and a "relic of a bygone era"). This Court is the wrong place for that debate. *See, e.g., Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002) (criticizing, but applying the Supreme Court's *per se* bar on post-expiration royalties because "we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"); *cf. Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015) (upholding *per se* bar on post-expiration patent royalties). But in any event, Clorox is on the wrong side of it.

---

[10] Clorox's argument that providing promotional packaging is different from providing advertising or display cases in the sense that only the manufacturer can provide different packaging is irrelevant and foreclosed by *Fred Meyer* itself. There, the Supreme Court held not only that discrimination in promotional payments was actionable, but also providing free cans of tuna to support a "buy one, get one free" promotion on a discriminatory basis. 390 U.S. at 346-347. Clorox also contends that allowing indirect purchaser standing under Section 2(e) would invite unnecessary conflict between *Fred Meyer* and *Colgate*. Clorox Br. 51. But this argument is simply a retread of its argument that a "large pack" is a different product than other sizes, and it fails for the same reason. Finally Clorox argues that this case is different because Woodman's direct relationship was terminated. To be sure, that specific fact was not present in *Fred Meyer*, but Clorox does not meaningfully explain why it would have made a difference in the outcome. *Cf. Fred Meyer*, 390 U.S. at 349 (determining that the Court needed to interpret the statute to effectuate the "broad goals" Congress set).

Fred Meyer (and the District Court's decision below) are perfectly consistent with the long-established rule that indirect purchasers have standing under the antitrust laws, including the Robinson-Patman Act, especially where the plaintiff is seeking only injunctive relief as Woodman's is doing here. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003) (indirect purchaser has standing to pursue injunctive relief for antitrust violation).

Moreover, Clorox's argument turns the Robinson-Patman Act and *Fred Meyer* on their heads: The Robinson-Patman act was enacted to protect small, independent businesses from anticompetitive discrimination that benefits larger competitors. Many independent businesses purchase through wholesalers, as opposed to directly from suppliers. As the Supreme Court recognized in *Fred Meyer*, Clorox's proposed rule would eliminate standing for precisely the businesses that Congress was trying to ensure could compete. 390 U.S. at 352, 358.

CONCLUSION

The District Court's February 2, 2015 Order denying Clorox's Motion to Dismiss Woodman's Section 2(e) claims should be affirmed.

Respectfully submitted,

/s/ Thomas F. Wenning
THOMAS F. WENNING
WENNING LLC
20208 Darlington Drive
Montgomery Village, MD 20886
(301) 943-1527

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 6,686 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Thomas F. Wenning
THOMAS F. WENNING
WENNING LLC
20208 Darlington Drive
Montgomery Village, MD 20886
(301) 943-1527

Counsel for Amicus Curiae

December 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Thomas F. Wenning
THOMAS F. WENNING
WENNING LLC
20208 Darlington Drive
Montgomery Village, MD 20886
(301) 943-1527

Counsel for Amicus Curiae