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

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

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

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

Plaintiff's brief in opposition ("BIO") demonstrates that the Court should dismiss the Complaint for a simple reason: assuming every fact alleged is true, Plaintiff has failed to state a claim for relief as a matter of law. It is not surprising that Plaintiff has failed to plead a violation of the Robinson-Patman Act, because Plaintiff concedes that it is asking the Court to adopt an interpretation of Section 2(e) of the Act, 15 U.S.C. § 13(e), that no court has ever endorsed in the statute's history. It is also not surprising because Plaintiff's Complaint is at odds with the fundamental purpose of modern antitrust law, which is to protect competition, not competitors.

Plaintiff's BIO narrowed the issues before the Court. Plaintiff is now pursuing a claim only under Section 2(e) and is not bringing claims under Sections 2(a) or 2(d) of the Act. *See* BIO at 4, 17. There are no facts in dispute for purposes of this motion. Consequently, the sole

issue before the Court is a straightforward question of statutory interpretation: are the products identified in Plaintiff's Complaint (*e.g.*, a 42-pound bag of Scoop Away Complete cat litter) "services or facilities" under Section 2(e) such that Clorox is required by law to offer to sell them to Plaintiff and every one of the tens of thousands of Clorox customers who purchase those items in smaller package sizes? Put differently, the question is whether *products* in larger or smaller packages are "*services or facilities* connected with the processing, handling, sale, or offering for sale" of commodities, so that a manufacturer is legally required to sell products of every size to any retailer who purchases even one size of that item. 15 U.S.C. § 13(e) (emphasis added).

Plaintiff's BIO does not directly contest that its reading of Section 2(e) is inconsistent with the ordinary meaning of the text of the statute, the federal courts' treatment of Section 2(e) since the Robinson-Patman Act was passed, and the Supreme Court's directions regarding the interpretation of the Act. Rather, the BIO explains that Plaintiff is hanging its case on the proposition that today's Federal Trade Commission would endorse two 50+ year-old administrative decisions that the FTC itself has not mentioned in decades. *See* BIO at 7–9. But Plaintiff's argument leads to a startling conclusion: thousands of manufacturers all across the United States are openly violating the Robinson-Patman Act (by refusing to offer products of every size to every retailer who purchases any size product for that brand), and the FTC has decided simply to ignore all of these violations. That conclusion is implausible on its face. And Plaintiff's prognostication that it brings this case with support from the modern FTC is all the more untenable because: (1) Plaintiff's argument is inconsistent with the FTC's recent statements and decisions interpreting Section 2(e); (2) the FTC has repeatedly passed on invitations to adopt the exact position that Plaintiff favors; and (3) the FTC has not brought any Section 2(e) cases in the last 25 years, including to challenge the ubiquitous conduct at issue here. The far more

logical conclusion is that, for *decades*, FTC Commissioners have realized that the two administrative rulings (*In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *In re Gen. Foods Corp.*, 52 F.T.C. 798 (1956)) were incorrect interpretations of Section 2(e) that are inconsistent with the plain language and the federal courts' interpretation of the Act.

I. Plaintiff's Complaint Fails To State A Claim Under Section 2(e) Of The Robinson-Patman Act Because This Case Is About Products, Not Services Or Facilities

The gaping holes in Plaintiff's BIO underscore the legal deficiency of its cause of action. First, Plaintiff cannot, and makes no attempt to, reconcile its legal position with the ordinary meaning of the words of the statute. It simply asserts, without explanation or citation, that "Clorox is furnishing a service or facility (in this case providing a commodity for resale within a special size package)[.]" BIO at 5. Plaintiff is wrong. Products in larger packages are just that—they are *products*. They are not "services" or "facilities" as a matter of ordinary English.

Second, Plaintiff does not dispute that every federal court that has interpreted "services or facilities" in Section 2(e) has done so in a way that is consistent with the ordinary meaning of those terms. Section 2(e) refers, for example, to providing cabinets to display products, catalogues, or paid transportation costs, *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 943 (9th Cir. 1998) (citing *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 60 (1959)); "traveling demonstrators, promotional posters, instructional brochures for merchants, and monthly publications," *id.* at 943 (citing *Simplicity Pattern*, 360 U.S. at 61 n.4); "window display services, newspaper lineage, billboard posters, and allowances to have clerks promote a manufacturer's products," *id.* at 945 (citing Remarks of Rep. Wright Patman Introducing H.R. 8442, 79 Cong. Rec. 9077, *reprinted in* The Legislative History of the Federal Antitrust Laws and Related Statutes 2928 (Earl W. Kintner, ed. 1980)); gifts to give away to customers, *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 520–21 (6th Cir. 2004) (per curiam); and marketing or

advertising services, *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 378–79 (4th Cir. 1992) (per curiam). These examples share a common feature—they are *promotional* services and facilities, unlike any of the Club-Store products at issue in this case. *See Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973) (noting that "Sections 2(d) and (e) of the Act deal with discrimination in the field of promotional services made available to purchasers who buy for resale"). "Congress . . . drafted §§ 2(d) and 2(e) to apply exclusively to promotional discriminations[.]" *Id.* at 910–11.

Plaintiff does acknowledge that no federal court has ever accepted its interpretation of the Robinson-Patman Act, BIO at 7, and replies only that no federal court has rejected its interpretation, either. The absence of any case law on the question cuts strongly against Plaintiff, not for it, given that the conduct challenged by Plaintiff is widespread in the modern economy. Plaintiff does not deny that manufacturers throughout the United States offer products of larger and smaller sizes to some but not all retailers. Yet Plaintiff would have the Court believe that these thousands of manufacturers have all been violating the Robinson-Patman Act, in plain sight, for decades, without anyone ever challenging their conduct.

Plaintiff also ignores Supreme Court precedent that directs courts not to do precisely what Plaintiff advocates—adopt an expansive interpretation of the Robinson-Patman Act that is inconsistent with the core objectives of the antitrust laws. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180–81 (2006) (because interbrand competition is the "primary concern of the antitrust law" and "[t]he Robinson-Patman Act signals no large departure from that main concern," courts should "resist [an] interpretation geared more to the protection of [an] existing *competitor*[ ] than to the stimulation of *competition*") (internal quotation marks omitted). The BIO attempts to distinguish *Volvo* as a case brought under

Section 2(a) of the Robinson-Patman Act, rather than Section 2(e). BIO at 16 n.2. That misses the point. The Supreme Court was clear that interbrand competition—*i.e.*, competition among brands provided by competing manufacturers, rather than intrabrand competition among retailers—is the concern of the *entire* Robinson-Patman Act. *Volvo*, 546 U.S. at 180–81.[1]

Plaintiff's failure to find any support for its claim in the language of Section 2(e) or the case law interpreting the statute should end the case.

II. The Federal Trade Commission In 2015 Would Not Agree With Plaintiff That Clorox's Products Are A Promotional Service Covered By Section 2(e)

The BIO makes clear that Plaintiff bases its entire case on the suggestion that the FTC still endorses two of its administrative decisions (*Luxor* and *General Foods*) that are more than 50 years old. *See* BIO at 7–8. In the first place, Plaintiff concedes that those decisions and FTC policy do not bind this Court. *See* BIO at 11. The Court, of course, cannot simply accept the FTC's word, but must satisfy itself that any proposed interpretation of the Robinson-Patman Act is consistent with the statutory text and authority interpreting it—sources from which Plaintiff has not drawn, and cannot draw, support. Courts regularly reject the Commission's interpretation of the antitrust laws when those interpretations overreach. *See, e.g.*, *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) (overturning the FTC's finding of monopolistic conduct in violation of the Sherman Act and the FTC Act).[2] Moreover, the objective evidence indicates that the current FTC Commissioners do not support *Luxor* or *General Foods*, and that FTC Commissioners have not done so for many years.

First, since at least 1980, the Commission has revised or rejected its earlier decisions in

[1] This case does not involve interbrand competition. Plaintiff's purported injuries relate exclusively to its competition with club stores—*i.e.*, intrabrand competition.

[2] Administrative adjudications of the FTC are appealable as a matter of right to the United States Courts of Appeals. 15 U.S.C. § 45(c).

order to bring its interpretation of the Robinson-Patman Act in line with federal court precedent. *See, e.g., In re Gibson*, 95 F.T.C. 553, 729 (1980), *aff'd* 682 F.2d 554 (5th Cir. 1982), *cert. denied* 460 U.S. 1068 (1983). The Commission's decision in *Gibson* emphasized that Congress intended Section 2(e) to have a "relatively narrow scope," and as a result, the courts "have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)." *Id.* at 726 (citing, among others, *Simplicity Pattern*, 360 U.S. at 68). Preserving Congress's intended narrow scope required the Commission to overrule some of its earlier decisions, whose "flawed" reasoning "would mean opening up Sections 2(d) and 2(e) to practices that Congress intended to be challenged solely under Section 2(a)." *Id.* at 728–29.

Indeed, the Commission's most recent administrative decisions interpreting Section 2(e)—following the lead of the federal courts—are at odds with *Luxor* and *General Foods*. In *Gibson*, the Commission explained that Congress intended Section 2(e) to apply only when "the service or payment at issue [is] *promotional in nature, such as for advertising*." 95 F.T.C. at 725 (citing *P. Lorillard Co. v. FTC*, 267 F.2d 439, 443 (3d Cir. 1959)) (emphasis added). Similarly, in 1984, the Commission ruled that "[a]lthough the semantic vagueness of the statutory terms 'services or facilities,' coupled with the stricter sanctions available under Sections 2(d) and 2(e), invites strained interpretations by FTC or private plaintiffs, the legislative purpose and governing judicial rulings confine these provisions to cooperative *promotional arrangements* between the supplier and customer[.]" *In re Gen. Motors Corp.*, 103 F.T.C. 641, 682 n.8 (1984) (emphasis added; some internal quotation marks omitted). Moreover, the FTC's decades-long refusal even to mention *Luxor* and *General Foods* is not what one would expect if the Commission still adhered to them, particularly given that the allegedly unlawful conduct here literally occurs thousands of times per day in plain sight.

Second, no matter how many times Plaintiff quotes the 2014 "Fred Meyer Guidelines," they do not support Plaintiff. *See* Guides for Advertising Allowances and Other Merchandising Payments and Services, 79 Fed. Reg. 58245 (Sept. 29, 2014). The Guidelines do not directly or indirectly mention *Luxor* or *General Foods*, even though the comment submitted to the FTC by the American Bar Association discussed *Luxor*. *See* Am. Bar Ass'n, Section of Antitrust Law, *Response to the Federal Trade Commission's Request for Public Comment Regarding its Guides for Advertising Allowance and Other Merchandising Payments and Services* 8 (2013), *available at* http://www.ftc.gov/policy/public-comments/comment-563686-00005. Nor did the FTC mention, much less endorse, the suggestion of the National Grocers Association to interpret Section 2(e) to prohibit manufacturers from offering one buyer "the same two boxes of the same product wrapped in plastic" while forcing other buyers "to buy two separate boxes" of the same item. Nat'l Grocers Ass'n., *Comments on Guides for Adverting Allowances and Other Merchandising Payments and Services* 6 (2013), *available at* http://www.ftc.gov/policy/public-comments/comment-563686-00011.

Rather, what the BIO neglects is that the 2014 Fred Meyer Guidelines—like the cases and the Commission's modern adjudicatory decisions—made clear that Section 2(e) is about *promotional* services or facilities. *See* 79 Fed. Reg. at 58246 ("[Section 2(e)'s] purpose is to prohibit disguised price discrimination in the form of promotional payments or services."); *id.* at 58248 ("only services and facilities 'used primarily *to promote* the resale of the seller's product by the customer' are covered") (emphasis added). Plaintiff struggles to explain how Clorox's Club-Store products could constitute promotional services, quoting Clorox's statement that the Club-Store products are sold "to increase both its own sales and those of its retail customers" and arguing that some customers prefer larger packages for their lower unit prices. BIO at 14

(quoting Clorox Mot. to Dismiss at 10) (emphasis omitted). But in fact, *every product* that Clorox (and every other manufacturer) sells is designed to increase sales by offering attractive combinations of price, quantity, and quality that consumers prefer. Plaintiff cannot escape that, under its reading of Section 2(e), every size of every product that any manufacturer sells constitutes a promotional service covered by the statute. That is not how the courts have interpreted Section 2(e) or the phrase "promotional service," *see* supra p. 3; nor would it be consistent with the ordinary meaning of "promotional" or "services," or with common sense.

Plaintiff gets no help from the 2014 Fred Meyer Guidelines' retention of "special packaging, or package sizes" on the list of items potentially covered by Section 2(e), because the FTC "underscore[d] that special packaging or package sizes are covered only insofar as" they are promotional. 79 Fed. Reg. at 58249. The FTC's illustrative example for this point—seasonal, Halloween-themed packaging, *id.*—is consistent with the ordinary meaning of "promotional." The example is totally unlike Clorox's sale of products in large packages all year long. Even if the size of a package could be covered by Section 2(e), which no court has ever said, it would be limited to examples that are consistent with the FTC's guidance—*e.g.*, a cake box in the shape of a Halloween pumpkin or a Christmas tree. There is nothing in the 2014 Fred Meyer Guidelines to suggest that the Commission regards the daily sale of a product in a particular size package as a promotional service or facility covered by Section 2(e).

Plaintiff also misreads the FTC's guidance in another significant way. The 2014 Fred Meyer Guidelines emphasized that Section 2(e) must be "reasonably, *and not expansively*, construed." 79 Fed. Reg. at 58246 (citing *Gibson*, 95 F.T.C. at 726) (emphasis added). Plaintiff suggests that this statement implies an endorsement of every one of the FTC's prior Robinson-Patman Act decisions (no matter how dated), and merely counsels against further expansion of

the Act. BIO at 14. The far more reasonable interpretation is that the FTC is following the Supreme Court's direction in *Volvo* that courts must not interpret the Robinson-Patman Act in ways that are inconsistent with the language of the Act and modern jurisprudence.[3]

Finally, Plaintiff ignores that its call for this Court to open the floodgates to an entirely new form of Robinson-Patman Act litigation is at odds with the FTC's enforcement record in this area. Since the Commission's 1984 decision in *General Motors*, the FTC has brought only a single Section 2(e) case, in 1988. *See In re Harper & Row Publishers Inc.*, Docket No. 9217, 1988 FTC LEXIS 114 (F.T.C. Dec. 20, 1988). That case involved activity that is consistent with the ordinary meaning of the statute—"payments for the display, stocking or promotion of [the defendant's products], including payments for advertising in various media, such as newspapers," *id.* at *5, all of which would be comfortably described as promotional activity. None of those alleged violations bears any resemblance to Plaintiff's argument that Section 2(e) applies to Clorox's year-round sales of products in large packages.[4]

It is no surprise that no federal court has ever accepted the interpretation of Section 2(e) that Plaintiff advances, and that the FTC only did so more than 50 years ago in a different era of antitrust enforcement. Plaintiff's BIO does not seriously address the fact that its interpretation of

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[3] *See also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Cont'l T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54–57 (1977). Plaintiff misses the mark in its attempt to distinguish these cases. Although they do not specifically involve the Robinson-Patman Act, they reflect the federal courts' determination that several early antitrust cases were wrongly decided because those cases had protected individual competitors at the expense of promoting interbrand competition. These are the same determinations that courts have used to scale back earlier decisions concerning the Robinson-Patman Act. *See* Thomas E. Kauper, *The Report of the Attorney General's Nat'l Cmte. to Study the Antitrust Laws: A Retrospective*, 100 Mich. L. Rev. 1867, 1874 (2002) ("While private Robinson-Patman cases continue to be brought, the Act has been significantly curtailed through judicial interpretations contracting expansionary decisions of the sixties.").

[4] Even in *Harper & Row Publishers*, the Commission later dismissed its own case, in part because of the impact of club stores on the market. *See* 122 F.T.C. 113, 125 (1996) (noting that "the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of 'superstores' and warehouse or 'club' stores").

the Robinson-Patman Act would reduce competition and harm consumers. For example, under Plaintiff's reading of Section 2(e), all of the following would likely become automatically illegal:

- A manufacturer decides to sell small sizes of an item to convenience stores and larger sizes of the item to traditional supermarkets, because the manufacturer has determined that doing so will enable it to sell more products to consumers at lower prices.
- A retailer offers to help invest in promoting a start-up manufacturer's new cereal if the start-up gives the retailer exclusive rights to large packages of the cereal, while selling other retailers smaller packages of the cereal.
- A manufacturer decides to reduce some, but not all, of the product sizes that it sells to a retailer because the retailer's level of customer service has deteriorated.

III. Plaintiff's Remedial Arguments Are Not Relevant To This Motion To Dismiss

Plaintiff's BIO argues that Clorox "fails to address" the majority of claims in the Complaint. BIO at 22–25. But these purported "claims" are issues of *remedies*. They concern the scope of a declaratory judgment or injunction that might be entered were Plaintiff ultimately to prevail on the merits. These issues have nothing to do with the motion presently before the Court. The entire case must be dismissed because Plaintiff has failed, as a matter of law, to plead a violation of Section 2(e). Fed. R. Civ. P. 8(a)(2).

CONCLUSION

For these reasons and those stated in Clorox's memorandum in support of its motion, Clorox respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

Dated: January 5, 2015

s/ Joshua H. Soven

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2015, I caused a copy of the foregoing REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
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