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 AS MOOT

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 as Moot. This Court lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

This case became moot—thereby depriving the Court of subject matter jurisdiction—when Clorox unilaterally decided not to conduct any further business with Plaintiff. In order to state a claim under Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e), Plaintiff must be a "purchaser" of Clorox products. On February 24, 2015, however, Clorox terminated its sales to Plaintiff, which means that Plaintiff is not a purchaser. *See Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 471 n.7 (7th Cir. 1980) (a buyer "with whom a seller refuses to deal is denied the opportunity to purchase").

Plaintiff nonetheless contends that it remains a "purchaser" because it is now buying some Clorox products via resale from wholesalers that Clorox does not control. But if Plaintiff's interpretation of the statute were correct, then, notwithstanding a century of antitrust precedent, it

would be impossible for a manufacturer to terminate its relationship with a retailer, unless the manufacturer also ceased to do business with every wholesaler from which the retailer might conceivably buy.[1] Plaintiff maintains that, so long as *any wholesaler* will sell a Clorox product to it, Plaintiff remains a "purchaser" under the Robinson-Patman Act, and therefore Clorox must still make every size of that product available to Plaintiff in perpetuity.

Plaintiff's limitless reading of the Robinson-Patman Act is not correct. None of the authorities that Plaintiff invokes for this argument address a supplier's unilateral decision not to deal with a particular customer; neither do they support the sweeping re-write of the antitrust laws that Plaintiff's construction would require. For nearly a century, the Supreme Court has held that a company may refuse to deal with another company. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (a supplier is "free[ ] to exercise his own independent discretion as to parties with whom he will deal"). Other authorities have confirmed the same principle. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000) ("Part of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal. . . . [T]he *Colgate* right has received consistent support from the Supreme Court even for large firms[.]"); VII Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1441b, at 34 (3d ed. 2012) ("[T]o ask a court to create a duty [for a manufacturer] to name new deals [for its former dealer] interferes significantly with the manufacturer's prerogative to name those terms as well as to determine the optimal number, spacing, and location of [its] dealers.").

In the specific context of the Robinson-Patman Act, the Seventh Circuit (like other circuits) has held that Section 2(e) does not apply when a manufacturer refuses to conduct

[1] Plaintiff also contends that any attempt by a manufacturer to prevent a wholesaler from selling to a particular retailer would *itself* violate the federal antitrust laws. *See* Pl.'s Opp'n to Defs.' Second Mot. to Dismiss 10 ("Clorox cannot prevent a wholesaler that purchases products from Clorox from reselling those products to Woodman's. Any effort by Clorox to [do so] would" violate the Sherman Act).

business with a retailer. *See Harper Plastics*, 617 F.2d at 470 (affirming the district court's dismissal of the plaintiff's Section 2(e) claim and noting that "[Section] 2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell"); *see also Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1318 (9th Cir. 1979) ("It has long been recognized that the [Robinson-Patman Act] does not require a seller to sell to, or maintain a customer relationship with, any buyer or prospective buyer.").

This Court recognized Clorox's right to refuse to deal with Plaintiff in its February 2, 2015, Order denying Clorox's motion to dismiss. The Court's Order explained that the Federal Trade Commission ("FTC") has "made clear" that, although it may not discriminate, Clorox "may refuse to deal with a particular retailer." Op. & Order Denying Defs.' Mot. to Dismiss 10. Plaintiff itself also conceded, as far back as December 19, 2014, that Plaintiff would have no Section 2(e) claim if Clorox stopped selling products to it. *See* Pl.'s Opp'n to Defs.' Mot. to Dismiss 15 ("Clorox could refuse to do business with Woodman's altogether, but it has not done so.").

In short, Plaintiff's proposed rule would effectively require the Court to invalidate the *Colgate* doctrine in the retail sector, undermine the Seventh Circuit's case law concerning the Robinson-Patman Act, and ignore four decades of antitrust cases that have encouraged manufacturers to differentiate in their distribution and retail channels in order to "promote interbrand competition." *See Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977). In other words, Plaintiff asks the Court to turn the objectives of the antitrust laws on their head by adopting a rule that would cause distribution costs to soar and raise prices for consumers. Such a result is flatly inconsistent with the Supreme Court's most recent holding on the Robinson-

Patman Act, which is that lower courts must construe the Act "consistently with broader policies of the antitrust laws," especially the laws' primary concern for *interbrand* competition. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180–81 (2006).

I. This Is A Motion To Dismiss, Not For Summary Judgment

Plaintiff argues that Clorox's motion to dismiss is actually a motion for summary judgment because the motion introduces matter outside the pleadings. Pl.'s Opp'n to Defs.' Second Mot. to Dismiss 4. Plaintiff is wrong. This is a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. And contrary to Plaintiff's assertion, a defendant may rely on "affidavits and other material" beyond the pleadings to support a motion to dismiss for lack of jurisdiction. *See United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (en banc), *overruled on other grounds by Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc). Even when the defendant introduces materials outside the pleadings, "[t]he burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction." *Id.* Moreover, the Rules allow a defendant to make a "renewed motion[ ] to dismiss for lack of subject matter jurisdiction," even where the Court previously denied a prior Rule 12(b) motion. *See id.* at 944–45.

This Court lacks subject matter jurisdiction because the case is moot. "To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Absent a live controversy, a court loses subject matter jurisdiction and "cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). *See also Genesis*

Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 (2013) ("If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.") (internal quotation marks omitted). Clorox's motion to dismiss is thus not only procedurally proper, it is procedurally essential.

II. Plaintiff Is Not A "Purchaser" Or "Customer" Under the Robinson-Patman Act Because Clorox Refuses To Deal With Plaintiff

Plaintiff contends that it remains a "purchaser" under Section 2(e) because it bought—from *independent* wholesalers—products manufactured by Clorox. *See* Pl.'s Opp'n to Defs.' Second Mot. to Dismiss 10. Plaintiff relies on *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 352 (1968), which held that the term "customer" in Section 2(d) can include "retailers who buy through wholesalers." *Fred Meyer*, however, did not involve a seller that terminated a customer, and the Court had no occasion to comment on how such a termination would impact a Robinson-Patman Act claim.

Plaintiff's reliance on *Lewis v. Philip Morris Inc.*, 355 F.3d 515 (6th Cir. 2004), is also misplaced, because the case did not involve a refusal to deal. The FTC's Fred Meyer Guidelines, like the *Fred Meyer* and *Lewis* decisions, similarly do not address the application of Section 2(e) when a manufacturer has ceased to do business with a customer. The bottom line is that neither the Supreme Court, nor the Sixth Circuit, nor the FTC, nor any other court has ever held that a terminated customer can remain a "purchaser" simply by finding an independent wholesaler from which to buy.

Indeed, the Seventh Circuit case law indicates the opposite: The customer is not (and cannot be) a "purchaser," as a matter of law, when terminated by a manufacturer. *See Harper Plastics*, 617 F.2d at 471 n.7 ("One with whom a seller refuses to deal is denied the opportunity

to purchase[.]"); *id.* at 470; *Fresh N' Pure Distribs., Inc. v. Foremost Farms USA*, No. 11-C-470, 2011 U.S. Dist. LEXIS 136307 (E.D. Wis. Nov. 28, 2011) (dismissing complaint because a refusal to do business cannot give rise to a Robinson-Patman claim). In fact, the law is clear that even after the customer has complained, the seller may terminate the customer without liability. *See Mullis v. Arco Petrol. Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (holding that although the "plaintiff apparently took the position that the termination itself was discriminatory[,] . . . such discrimination does not violate the Robinson-Patman Act" because "th[e] statute does not require a seller to create or to maintain a customer relationship with any buyer or prospective buyer").

Notwithstanding these authorities, Plaintiff urges the Court to hold that, while Clorox may lawfully stop selling products directly to Plaintiff, if Plaintiff buys even a single size of any Clorox product from a wholesaler, Clorox then becomes obligated to sell every other size of that product either to any wholesaler who could conceivably ever re-sell to Plaintiff or to Plaintiff directly. Such a legal rule is nonsensical. Given the ubiquity of wholesalers in the retail sector, Plaintiff's approach to the Robinson-Patman Act would effectively end manufacturers' ability to select their customers.

III. The Federal Trade Commission's Guidelines Cannot Save Plaintiff's Claim From Mootness

To the extent that the FTC's Fred Meyer Guidelines would—contrary to Seventh Circuit precedent—allow a retailer to plead a Section 2(e) claim even after termination, those Guidelines are entitled to no deference, for at least three reasons. First, the Supreme Court has held that an administrative interpretation of a statute qualifies for deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), only when it is promulgated in a manner "carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). But the Commission itself made clear that the Guidelines "do not have the force of law." 79 Fed.

Reg. 58245, 58253 (Sept. 29, 2014). Rather, the purpose of the Guidelines is to "assist businesses in complying with the Act, *as interpreted by the courts*." *Id.* at 58252 (emphasis added). That is, the Guidelines follow Article III courts, not the other way around.[2]

Second, the FTC's interpretations of the Robinson-Patman Act do not warrant deference because the Commission shares concurrent enforcement authority for the statute with the United States Department of Justice. *See* 15 U.S.C. § 21. Courts do not defer to an administrative interpretation of a statute where multiple agencies share responsibility for enforcing that statute. *See Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212, 216–17 (D.C. Cir. 1995); *1185 Ave. of the Ams. Assocs. v. Resolution Trust Corp.*, 22 F.3d 494, 497 (2d Cir. 1994) (quoting *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985)); *Wachtel v. Office of Thrift Supervision*, 982 F.2d 581, 585 (D.C. Cir. 1993).[3]

Finally, the FTC is not entitled to deference for its interpretations of the Clayton Act (of which the Robinson-Patman Act is a part) because those broadly worded statutes, like the Sherman Act, are delegations of interpretive authority *to the courts*, not to federal agencies. The FTC (and the Department of Justice) are *enforcers* of the antitrust laws, but they do not *establish* what constitutes a violation of the law. That is why Article III courts routinely reverse the FTC on questions of antitrust law construction. *See, e.g.*, *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 769–81 (1999) (holding that the FTC's legal analysis was inadequate); *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) (overturning the FTC's finding of monopolistic conduct in violation of

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[2] The Ninth Circuit stated in *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938, 945 (9th Cir. 1998), that the Fred Meyer Guidelines should receive deference. But *Portland 76* is no longer good law after *Mead*, and no court since *Mead* has deferred to the Guidelines.

[3] For the same reason, the FTC's interpretations of the Robinson-Patman Act in adjudications such as *In re General Foods Corp.*, 52 F.T.C. 798 (1956), and *In re Luxor, Ltd.*, 31 F.T.C. 658 (1940), are not entitled to deference in Article III courts. *See Rapaport*, 59 F.3d at 216–17 (refusing to defer to an agency's interpretation that had been promulgated in an adjudication).

the Sherman Act and the FTC Act); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577–81 (9th Cir. 1980); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 157–60 (D.D.C. 2004).

* * *

Plaintiff's Robinson-Patman Act claim is moot because Clorox has ceased to do business with Plaintiff. To hold otherwise would require this Court to invalidate every Robinson-Patman Act case holding that a manufacturer may lawfully refuse to deal with a particular customer. More broadly, it would effectively require the Court to eliminate a manufacturer's ability to decide with whom it wants to do business in the retail sector, *see Colgate*, 250 U.S. at 307, and make it impossible for manufacturers to engage in procompetitive differentiation through their distribution systems, *see GTE Sylvania*, 433 U.S. at 54–55. Consequently, accepting Plaintiff's construction would contravene the Supreme Court's holding in *Volvo* that courts should interpret the Robinson-Patman Act consistent with the broader principles of the antitrust laws. 546 U.S. at 180–81.

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: March 30, 2015

s/ Joshua H. Soven

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2015, I caused a copy of the foregoing REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT AS MOOT to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
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