UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WOODMAN'S FOOD MARKET, INC.,

Plaintiff,

v.

Case No. 14-CV-734

THE CLOROX COMPANY,
-and-
THE CLOROX SALES COMPANY,

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Woodman's Food Market, Inc. ("Woodman's") has moved the Court for issuance of a Preliminary Injunction pursuant to 15 U.S.C. § 26, 15 U.S.C. § 13(e), and F.R.C.P. 65(a). 15 U.S.C. § 13(e) is a subsection of what is commonly known as the Robinson-Patman Act. Per the Federal Trade Commission, "sections 2(d) and 2(e) are complements to section 2(a). Their purpose is to prohibit disguised price discriminations in the form of promotional payments or services. Sections 2(d) and 2(e) thus attempt to prevent evasions of section 2(a). In contrast to section 2(a), sections 2(d) and 2(e) do not require proof of likely adverse competitive effects, nor do they permit a cost-justification defense." Federal Register, Vol. 79, No. 188, p. 58246 (2014).

Woodman's seeks issuance of a Preliminary Injunction ordering the Defendants, The Clorox Company and The Clorox Sales Company (collectively "Clorox"), to maintain the status quo by making available for purchase by Woodman's all "large pack" products which Clorox sold to Woodman's until September 30, 2014, and which, since October 1, 2014, Clorox

continues to sell, but only to three favored retailers (Sam's Club, Costco and B.J.'s) competing with Woodman's in the distribution of Clorox's products. [Woodman Aff, ¶¶ 6, 18, 22, 26, 44]. Clorox's refusal to sell large packs of the products at issue to Woodman's violates 15 U.S.C. § 13(e). If Clorox is not required to maintain the status quo by making available to Woodman's those large packs of products which Clorox sold to Woodman's until September 30, 2014, irreparable loss or damages will result to Woodman's.

FACTS

Until October 1, 2014, Woodman's purchased from Clorox and Clorox Sales a number of "large pack" products. Large pack products are just that, larger containers or packages of a particular product that are typically offered to customers at a cost savings per unit of contents over the prices that would typically be paid per unit of that same product when sold in smaller containers or packs. The product within a "large pack" is of the same quality and grade as the product contained within a smaller pack of that same product. [Woodman Aff, ¶ 4].

At a meeting of Woodman's and Clorox representatives conducted on September 9, 2014, Woodman's was informed that, as of October 1, 2014, it would no longer be permitted to purchase the large packs of Clorox products it had been purchasing from Clorox for years. Woodman's was further informed that, as of October 1, 2014, only three retailers in Clorox's so-called "club channel" (Sam's Club, Costco and B.J.'s) would now be permitted to purchase the large packs of Clorox products that Woodman's had been purchasing. [Woodman Aff, ¶¶ 19, 20, 24, 26].

Additional, relevant facts are set forth in the Complaint and supporting Affidavit filed contemporaneously herewith, and are incorporated herein by reference.

INTRODUCTION

The 7th Circuit standard for issuing a preliminary injunction has evolved in form over the years, but the substance has remained the same. The Court used to refer to its standard as consisting of five prongs. Under that standard, the party seeking to obtain a preliminary injunction bears the burden of establishing the five elements necessary for the issuance of a preliminary injunction: (1) that it has no adequate remedy at law; (2) that it will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm it will suffer if the preliminary injunction is not granted is greater than the irreparable harm the defendant will suffer if the injunction is granted; (4) that it has a reasonable likelihood of prevailing on the merits; and (5) that the injunction will not harm the public interest. ***Brunswick Corp. v. Jones***, 784 F.2d 271, 273 -274 (C.A.7 (Wis.) 1986); citing ***Lawson Products, Inc. v. Avnet, Inc.***, 782 F.2d 1429, 1432 (7th Cir.1986); ***Roland Machinery Co. v. Dresser Industries***, 749 F.2d 380, 382–88 (7th Cir.1984).

More recent decisions describe a three-pronged approach, lower the threshold for demonstrating likelihood of success on the merits, and describe a balancing test employed by the court. Despite characterizing the test as consisting of only three prongs, these decisions also address the other two elements described in ***Brunswick.*** In ***Ty, Inc. v. Jones Group, Inc.***, 237 F.3d 891, (C.A.7 (Ill.) 2001), the 7th Circuit described the three prongs as follows:

> A party seeking to obtain a preliminary injunction must demonstrate: (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted. See *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir.1992). If the court is satisfied that these three conditions have been met, then it must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied. See *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir.1994). Finally, the court must consider the public interest (non-

> parties) in denying or granting the injunction. *Id.* The court then weighs all of these factors, "sitting as would a chancellor in equity," when it decides whether to grant the injunction. *Abbott Labs.*, 971 F.2d at 12.
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> ***Ty, Inc. v. Jones Group, Inc.***, 237 F.3d 891, 895-896 (C.A.7 (Ill.) 2001).

When considering the elements described above, the 7th circuit has described its analysis in the following manner:

> This circuit employs a "sliding scale" approach in deciding whether to grant or deny preliminary relief; so that even though a plaintiff has less than a 50 percent chance of prevailing on the merits, he may nonetheless be entitled to the injunction if he can demonstrate that the balance of harms would weigh heavily against him if the relief were not granted, *see Illinois Psychological Association v. Falk,* 818 F.2d 1337, 1340 (7th Cir.1987)—still, the "sliding scale" approach is limited by the "likelihood of success" prong of the test. In all cases, the plaintiff must be able to demonstrate at least a "negligible" chance of success to justify injunctive relief. *Brunswick Corp.,* 784 F.2d at 275 ("Although the plaintiff must demonstrate some probability of success on the merits, 'the threshold is low. It is enough that the plaintiff's chances *are better than negligible* ...' ") (quoting *Roland Machinery,* 749 F.2d at 387) (emphasis added). In other words, where the plaintiff is unable to establish this minimum threshold, the harm to the plaintiff will never override his failure to establish a likelihood of success.
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> ***Curtis v. Thompson***, 840 F.2d 1291, 1296 (C.A.7 (Ill.) 1988); citing ***Chicago Board of Realtors,*** 819 F.2d 732, 741 (7th Cir.1987).

LEGAL ANALYSIS

I. ELEMENTS OF INJUNCTIVE RELIEF.

As discussed above, the Court in ***Ty*** presented a three-pronged analysis followed by consideration of potential irreparable harm to the defendant and the public interest in relation to the requested injunctive relief. Plaintiff will address the elements in the following order:

a) Plaintiff's case has some likelihood of success on the merits;

b) Plaintiff has no adequate remedy of law;

c) Plaintiff will suffer irreparable harm if the injunction is not granted;

d) Defendant will not suffer irreparable harm if the injunction is granted; and,

e) The public interest weighs in favor of granting the injunction

See ***Ty, Inc. v. Jones Group, Inc.***, 237 F.3d 891, 895-896 (C.A.7 (Ill.) 2001).

A. PLAINTIFF HAS SOME LIKELIHOOD OF SUCCESS ON THE MERITS.

In ***Calumet Breweries, Inc. v. G. Heileman Brewing Co., Inc.***, 951 F.Supp. 749 (N.D. Ind. 1994), the 7th Circuit was presented with an alleged violation of § 2(a) of the Robinson–Patman Act. The Court addressed the first prong of the preliminary injunction test as follows:

> The first threshold to cross is demonstration of a reasonable likelihood of success on the merits. This threshold is low, satisfied if a "plaintiff's chances are better than negligible...." *Calumet Breweries, Inc. v. G. Heileman Brewing Co., Inc.*, 951 F.Supp. 749, 752 (N.D. Ind. 1994); citing *Roland Machinery,* 749 F.2d 380, 387 (7th Cir.1984) (quoting *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 123 (7th Cir.1982)).

The Court then assessed whether plaintiff's chances were better than negligible that it would be able to prove the elements of its claim under the Robinson–Patman Act . ***Id.*** Here, Plaintiff's primary claim, and the only claim at issue here, is for Defendant's violation of § 2(e) of the Robinson–Patman Act. That subsection reads as follows:

> 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.

The U.S. Supreme Court and the 7th Circuit have long broadly interpreted the scope of Subsection 2(e). In ***Centex-Winston Corp. v. Edward Hines Lumber Co.***, 447 F.2d 585 (C.A. Ill. 1971), the 7th Circuit found that Subsection 2(e) . . .

> . . . covers the furnishing of 'any services or facilities.' We must not construe this Section in a manner that strains its language and runs counter to the broad goals which Congress intended to effectuate. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 515, 83 S.Ct. 358, 9 L.Ed.2d 466; *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349, 88 S.Ct. 904, 19 L.Ed.2d 1222. As pointed out by Representative Patman, one of the authors of the legislation, Section 2(e) 'is directed against discriminatory treatment of purchasers engaged in the resale

> of the seller's goods.' Patman, Complete Guide to the Robinson-Patman Act, p. 140 (1963). It unqualifiedly makes unlawful business practices other than price discriminations. *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 79 S.Ct. 1005, 3 L.Ed.2d 1079. The House Conferees' Report states that Section 2(e) prohibits 'the furnishing of any services or facilities by a seller to a buyer upon terms not accorded to all buyers on proportionally equal terms.' H.R.Rep.No.2951, 74th Cong., 2d sess. (1963), p. 7.
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> ***Centex-Winston Corp. v. Edward Hines Lumber Co.***, 447 F.2d 585, 587 (C.A. Ill. 1971).

Subsection 2(e) has consistently been construed as proscribing promotional payments or the furnishing of services or facilities related to retail sales which would give to one retailer a competitive advantage over another. See ***David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc.*** [1974-2 TRADE CASES P 75,257], 504 F. 2d 52, 54-55 (4th Cir. 1974); ***Cecil Corley Motor Co., Inc. v. General Motors Corp.*** [1974-2 TRADE CASES P 75,175], 380 F. Supp. 819, 848-849 (M. D. Tenn. 1974); ***New Amsterdam Cheese Corp. v. Kraftco Corp.*** [1973-2 TRADE CASES P 74,669], 363 F. Supp. 135, 142 (S. D. N. Y. 1973); ***P. Lorillard Co. v. F. T. C.*** [1959 TRADE CASES P 69,368], 267 F. 2d 439, 443 (3d Cir. 1959), cert. denied, 361 U. S. 923.

"Promotional discrimination [under Subsection 2(e)] is illegal *per se*, irrespective of competitive impact and without resort to statutory justification." ***Kirby v. P. R. Mallory & Co., Inc.***, 489 F.2d 904, 910-911 (C.A. Ind. 1973). As such, Clorox's violation of Subsection 2(e) is unlawful, regardless of its impact on competition. Notwithstanding, Woodman's can and will demonstrate a negative impact on competition.

In the Matter of Luxor, Ltd, 31 F.T.C. 658 (1940), the Federal Trade Commission ("FTC") found that the practice of Luxor providing a small size of one of its products to only one

class of retailers (5¢ & 10¢ stores) to be in violation of Subsection 2(e) of the Robinson-Patman Act. ***Id.***, at 664. The FTC ordered:

> the respondent Luxor, Ltd., and its officers, representatives, agents, and employees, in connection with the sale and distribution of toilet articles and cosmetics in commerce among the several States and in the District of Columbia, cease and desist from furnishing any such commodity packaged in containers of a certain size and style unless all purchasers competing in the resale of such commodities are accorded the facility of packaging in containers of like size and style, on proportionally equal terms.
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> ***In the Matter of Luxor, Ltd***, 31 F.T.C. 658, 665 (1940).

The FTC has periodically issued guidelines for interpreting the provisions of the Robinson-Patman Act. The agency most recently did so on September 29, 2014. In those Guidelines the FTC offered clarification of the terms ''services'' and ''facilities," and cited examples of promotional services and facilities covered by sections 2(d) and (e):

> The terms ''services'' and ''facilities'' have not been exactly defined by the statute or in decisions. One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer. Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples--the list is not exhaustive-of promotional services and facilities covered by sections 2(d) and (e):
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> Cooperative advertising;
> Handbills;
> Demonstrators and demonstrations;
> Catalogues;
> Cabinets;
> Displays;
> Prizes or merchandise for conducting promotional contests;
> **Special packaging, or package sizes**; and
> Online advertising.
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> Federal Register, Vol. 79, No. 188, p. 58254, § 240.7 (2014).

Presented to the Court is a clear statutory violation. And even though it is not necessary to do so, Woodman's has demonstrated that Clorox's sales policy poses a risk of having a negative impact on competition. [Woodman Aff, ¶¶ 23, 29, 32, 33, 37, 38, 45, 46]. Clorox has

instituted a sales policy, under the terms of which, only a certain class of retailers is permitted to purchase large packs of their products. [Woodman Aff, ¶¶ 21, 22, 27, 28, 29]. This policy provides these preferred retailers with a competitive advantage over Woodman's. [Woodman Aff, ¶¶ 29, 37, 38]. This is exactly the type of discriminatory practice that Subsection 2(e) was enacted to prohibit. Woodman's has more than a negligible chance of succeeding on the merits of its claim. There is a substantial likelihood that the Court will permanently enjoin this practice.

B. PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW.

In the event injunctive relief is not issued, Woodman's will be at a competitive disadvantage vis-à-vis Sam's Club and Costco. [Woodman Aff, ¶¶ 29, 37, 38]. Woodman's will no longer be able to sell the products its customers have become accustomed to purchasing. [Woodman Aff, ¶¶ 29, 30, 36]. Woodman's faces the further threatened harm that its customers will turn to Sam's Club and Costco, not only for the items that Woodman's is no longer able to sell, but for their overall grocery needs as well. [Woodman Aff, ¶ 38].

In ***S&S Sales Corp. v. Marvin Lumber & Cedar Co.***, 435 F.Supp.2d 879, (E.D. Wis. 2006), the Court found that "[b]ecause S&S is seeking equitable relief at trial—namely, prohibiting defendant from terminating the two-step distribution system, it has an inadequate remedy at law." *Id.*, at 883-884; citing ***Roland Mach. Co.***, 749 F.2d at 386. Because Woodman's is seeking only equitable relief at trial (See Complaint, pp. 12-22)—namely declaratory relief pursuant to 28 U.S.C.A. §2201 and Federal Rule of Civil Procedure 57, and 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), it, like the plaintiff in ***S&S Sales***, has an inadequate remedy at law.

While Woodman's could request compensation for damages as supplemental relief in the event the Court grants the declaratory relief requested, Woodman's will not be able to measure

with any reasonable degree of certainty the amount of Clorox sales or overall sales lost during the pendency of this action in the event it is unable to sell Clorox large pack items. As such, it will be impossible for Woodman's to accurately calculate any damages it may suffer as a result of Clorox's violation of Subsection 2(e). Such makes damages an inadequate remedy at law. See ***Youngstown Sheet & Tube Co. v. Sawyer***, 343 U.S. 579, 585, 72 S.Ct. 863, 866 (U.S.1952), finding damages to be an inadequate remedy when "present and future damages [were] of such nature as to be difficult, if not incapable, of measurement."

Similarly, the 7th Circuit has found that "[i]n saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered. See ***Semmes Motors, Inc. v. Ford Motor Co.***, 429 F.2d 1197, 1205 (2d Cir.1970) (Friendly, J.); 11 Wright & Miller, ***supra***, § 2944, at p. 396. A damages remedy can be inadequate for any of four reasons: . . .

> (d) The nature of the plaintiff's loss may make damages very difficult to calculate. Consider a loss, but not a crippling loss (that would be case (a)), of business profits. In principle, any profits lost by Roland as a result of being terminated for breach of an implied exclusive-dealing contract can be monetized, and awarded as damages; but in practice it may be very difficult to distinguish the effect of the termination from the effect of other things happening at the same time, and to project that effect into the distant future." *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (C.A. Ill. 1984). (Emphasis added).

In ***Abbott Laboratories v. Mead Johnson & Co.***, 971 F.2d 6 (C.A.7 (Ind.) 1992), the 7th Circuit found that the Plaintiff's "difficulty [calculating damages] would appear to render monetary relief inadequate, and hence Abbott's injury irreparable." ***Abbott Laboratories v. Mead Johnson & Co.***, 971 F.2d 6, 18 (C.A.7 (Ind.) 1992); **citing** ***American Hosp. Supply***, 780 F.2d at 597. The difficulty in calculating Woodman's damages renders monetary relief inadequate and Woodman's injury irreparable.

C. PLAINTIFF WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED.

As suggested by the finding in ***Abbot Laboratories***, the elements of inadequate remedy at law and irreparable damages are closely related. In ***Milwaukee County Pavers Ass'n v. Fiedler***, 707 F.Supp. 1016 (W.D. Wis. 1989), the Court noted that "[t]he requirement that a preliminary injunction may not issue unless plaintiffs have no adequate remedy at law is closely related to the requirement of irreparable harm. Many courts fuse them into a single requirement. ***Milwaukee County Pavers Ass'n v. Fiedler***, 707 F.Supp. 1016, 1033 (. 1989); citing ***Roland Machinery Co.***, 749 F.2d at 383–83, 386 and cases cited therein. The court defined irreparable harm as that "harm that cannot be prevented or fully rectified by the final judgment after trial." ***Id.***, at 1031, citing ***Roland,*** 749 F.2d at 386. In ***Roland***, the Court distilled the element of irreparable harm down to one simple question: "whether the plaintiff will be made whole if he prevails on the merits and is awarded damages." ***Roland***, 749 F.2d at 386. Since Woodman's still has a stock of large pack items on hand [Woodman Aff, ¶ 35], it will not experience any damages in the event a preliminary injunction is granted within a reasonable time after filing. [Woodman Aff, ¶ 36]. Woodman's brings its action for declaratory and injunctive relief in order to avoid and mitigate against damages, reserving the right to request compensation for damages as supplemental relief in the event the Court grants the declaratory relief requested and damages are sustained. However, this action is brought with the goal of avoiding damages altogether. By the very nature of the relief requested, "monetary relief [is] inadequate, and hence [Woodman's] injury irreparable." See ***Abbott Laboratories v. Mead Johnson & Co.***, 971 F.2d 6, 18 (C.A.7 (Ind.) 1992).

Where monetary damages are not sought by a plaintiff, the element of irreparable harm or injury is regarded differently. In ***Rio Grande Community Health Center, Inc. v. Rullan***, 397

F.3d 56 (C.A.1 (Puerto Rico) 2005), the court found that "'Irreparable injury' in the preliminary injunction context means an injury that cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." ***Rio Grande Community Health Center, Inc. v. Rullan***, 397 F.3d 56, 76 (C.A.1 (Puerto Rico) 2005); citing Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 11A *Federal Practice & Procedure* § 2948.1, at 149 (2d ed. 1995) ("[I]f a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief."); D. Dobbs, 1 *Law of Remedies* § 2.11(2), at 260 (2d ed.1993).

Here, "a trial on the merits can[not] be conducted before the injury would occur," and a "later-issued permanent injunction" will not compensate Woodman's for sales and customers lost during the pendency of this action if a preliminary injunction is not issued. Harm for which a final remedy will not compensate the plaintiff is by definition irreparable. See *Id.*

Finally, even if the damages suffered by Woodman's during the pendency of this action is recoverable and could be measured, an award of such damages still would not adequately compensate Woodman's for its losses. If Woodman's loses customers because of the inability to sell large packs of Clorox products, it may well lose those customers for life. An award of damages at the conclusion of these proceedings would not and could not compensate Woodman's for such losses.

D. DEFENDANT WILL NOT SUFFER IRREPARABLE HARM IF THE INJUNCTION IS GRANTED.

The "purpose of a preliminary injunction is to preserve the status quo pending a final hearing on the merits." ***Dos Santos v. Columbus-Cuneo-Cabrini Medical Center,*** 684 F.2d 1346, 1350-1351 (C.A. Ill. 1982); citing ***American Hospital Association v. Harris***, 625 F.2d 1328, 1330 (7th Cir. 1980). The *status quo* has been defined as "the last uncontested status

which preceded the pending controversy." ***Westinghouse Elec. Corp. v. Free Sewing Mach. Co.***, 256 F.2d 806, 808 (C.A.7 (Ill.) 1958); citing ***Warner Bros. Pictures, Inc., v. Gittone***, 3 Cir., 110 F.2d 292.

Here, Woodman's is requesting nothing more than preservation of the *status quo*. Woodman's has been purchasing large packs from Clorox for years. [Woodman Aff, ¶ 34]. Woodman's asks the Court to do nothing more than to preserve the parties' last uncontested trading status preceding Clorox's unilateral proclamation that it would no longer sell large packs to Woodman's. Clorox will in no way be harmed by simply requiring it to do what it has been voluntarily doing for years.

Clorox may claim that it will be denied the increased profits it would receive from sales to Woodman's if it were permitted to require Woodman's to purchase smaller packages of the same goods. However, the loss of anticipated, additional profits is a harm that may be remedied through an award of damages. Payment of any such damages may be guaranteed by requiring Woodman's to post a bond under 15 U.S.C. § 26. Whereas any monetary damages that Clorox may suffer will be remedied by monetary damages, the payment of which is guaranteed, any harm that may be suffered by Clorox may not be considered irreparable.

Consideration of the potential harm to be experienced by Clorox if the injunction is issued is often referred to as consideration of the "balance of harms." "Even when irreparable harm to a plaintiff is shown, the harm to the defendant must be weighed. ***Roland,*** 749 F.2d at 387; ***American Hospital,*** 780 F.2d at 593–594. This requires a comparison of the harm to Canfield from the wrongful denial of a preliminary injunction with any harm that Vess may suffer that would not be cured by prevailing on the merits and Federal Rule of Civil Procedure

65(c)'s injunction bond." ***A.J. Canfield Co. v. Vess Beverages, Inc.***, 796 F.2d 903, 908 (C.A.7 (Ill.) 1986). (Emphasis added).

Only that harm that will be experienced by a defendant that will not be cured by prevailing on the merits and the injunction bond is to be considered by the Court. ***Id.*** Here, an award of damages guaranteed by the injunction bond will fully compensate Clorox for any harm that it may experience as a result of entry of a preliminary injunction. Conversely, as demonstrated above, an award of damages cannot adequately address the harm experienced by Woodman's in the event preliminary injunctive relief is denied.

E. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING THE INJUNCTION.

"We start with the proposition that '(t)he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.'" ***F.T.C. v. Fred Meyer, Inc.***, 390 U.S. 341, 349, 88 S.Ct. 904, 908 (U.S. 1968); citing ***FTC v. Henry Broch & Co.***, 363 U.S. 166, 168, 80 S.Ct. 1158, 1160, 4 L.Ed.2d 1124 (1960).

Further, "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition,* not *competitors.*'" ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.***, 509 U.S. 209, 224-225, 113 S.Ct. 2578, 2588-2589 (U.S. 1993); citing ***Brown Shoe Co. v. United States***, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962).

Robinson-Patman is concerned with competition because it promotes consumer welfare. As stated by the U.S. Supreme Court, "[t]he public policy of the United States fosters the free-enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense."

Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 253-254, 71 S.Ct. 240, 251-252 (U.S. 1951). (Emphasis added).

Clorox's sales policy of selling large packs only to club stores stands in the way of unfettered competition. It also impairs the ability of all consumers to obtain Clorox's products at the least expense.

Clorox's sales policy creates not only a favored class of retailer - it also creates a favored class of consumer. Not every consumer can afford to pay the membership fee required in order to purchase goods at a club store. [Woodman Aff, ¶ 33]. Sam's Club memberships cost between $45 and $100 per year. [Woodman Aff, ¶ 14]. Costco memberships cost between $55 and $110 per year. [Woodman Aff, ¶ 14].

Clorox's sales policy has the effect of allowing only those persons with the financial means to purchase a club membership to obtain its goods at the lowest prices. In other words, Clorox's sales policy prohibits the poor from obtaining the company's goods at the least expense. Such is contrary to the public policy of the United States.

It is in the public's interest to promote unfettered competition between all retailers so that all consumers, not just the privileged few, can obtain Clorox's products at the least expense. Consideration of the public's interest supports the entry of injunctive relief.

CONCLUSION

"The Robinson–Patman Act was designed to reach discriminations 'in their incipiency, before the harm to competition is effected. It is enough that they 'may' have the prescribed effect.'" ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.***, 509 U.S. 209, 252, 113 S.Ct. 2578, 2603 (U.S. 1993); citing ***Corn Products Refining Co. v. FTC***, 324 U.S. 726, 738, 65 S.Ct. 961, 967, 89 L.Ed. 1320 (1945). (Emphasis added).

Woodman's has demonstrated that Clorox's sales policy threatens harm to competition. It has demonstrated that its case has some likelihood of success on the merits; that no adequate remedy of law exists; and that it will suffer irreparable harm if the injunction is not granted. Further, an award of damages guaranteed by the injunction bond will fully compensate Clorox for any harm that it may experience as a result of entry of a preliminary injunction. As a result, any harm that Clorox may suffer may not be considered irreparable. Finally, consideration of the public's interest supports the entry of injunctive relief.

Based on the foregoing, Woodman's respectfully requests that the Court enter a preliminary injunction ordering Clorox to maintain the status quo by making available for purchase by Woodman's all large pack products which Clorox sold to Woodman's until September 30, 2014, and which Clorox continues to sell to other retailer customers competing with Woodman's in the distribution of Clorox's products.

Dated this 27th day of October, 2014.

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