IN THE 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
Hon. Stephen L. Crocker

BRIEF OF AMICUS CURIAE THE FEDERAL TRADE COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE

The Federal Trade Commission, an agency of the United States, files this brief under Federal Rule of Appellate Procedure 29(a). The Commission seeks to assist the Court in interpreting Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e).

The FTC has authority to enforce the Robinson-Patman Act, *see* 15 U.S.C. §§ 21, 45, and publishes nonbinding, interpretive guidance to help businesses comply with Section 2(e), *see* 16 C.F.R. §§ 240.1-240.15. The district court's February 2, 2015, order relied heavily on FTC administrative decisions and guidance. The Commission is concerned that an overbroad interpretation of this provision could contradict other settled antitrust policies.

INTRODUCTION AND SUMMARY

The Robinson-Patman Act forbids sellers of goods from discriminating between competing buyers. Section 2(a) of the Act prohibits direct or indirect price discrimination, and Section 2(e) of the Act prohibits indirect price discrimination masked as promotional services or facilities. 15 U.S.C. § 13(a), (e). Because Congress understood that price discrimination is often procompetitive, Section 2(a) prohibits price discrimination only if it would "substantially … lessen competition." In contrast, Section 2(e) categorically bans all discrimination within its ambit, whether it harms or promotes competition. Because an overbroad application of that categorical ban would reduce consumer welfare, courts today narrowly construe Section 2(e) to reach only obviously promotional activities, thereby requiring plaintiffs to rely on Section 2(a) instead for most claims of price discrimination.

The question in this case is whether offering a specific package size qualifies as a promotional "service" under Section 2(e). Woodman's Food Market alleges that Clorox violated Section 2(e) by refusing to sell large-sized packages of various consumer items to Woodman's while selling them to its competitors. Relying on two FTC administrative decisions from 1940 and 1956, the district court agreed that large-sized packages are a promotional service subject to Section 2(e)'s categorical ban. But those decisions contradict modern antitrust doctrine and should no longer be followed. Properly understood, Section 2(e) does not generally require manufacturers to sell the same package sizes to all buyers who demand them;

instead, it prohibits discrimination only in genuinely promotional services or facilities distinct from the product itself.

Here, Woodman's allegations do not state a plausible claim that Clorox violated that narrow prohibition. Woodman's first claims that it is losing sales because consumers want large-sized packages. A.15-17 (¶¶ 59, 66-67). But this is not the sort of discrimination covered by the Robinson-Patman Act. For decades, courts have recognized that manufacturers may decide with whom they will deal and that such choice benefits consumers. Although the district court held that Section 2(e) requires equal distribution of package sizes because size "is connected to" resale (S.A.8), this logic would apply not just to size, but to any desirable product attribute. That rule would radically expand the scope of Section 2(e), subvert efficient manufacturer-retailer relationships throughout the economy, and contradict the central principles of modern antitrust law.

Woodman's also claims that it must now pay, at wholesale, a higher per-unit price for Clorox products than some of its rivals, placing it at a disadvantage in the retail marketplace. A.14-16 (¶¶ 53, 60). This is the exact sort of contention for which Section 2(a)—and its competitive harm test—were designed. But Woodman's is not pursuing a Section 2(a) violation; it invokes only Section 2(e)'s categorical prohibition. In allowing Woodman's suit to proceed, the district court opened the door for plaintiffs to invoke Section 2(e) to circumvent the limiting principles that Congress deemed necessary for price discrimination claims properly brought under Section 2(a).

To be sure, there may be special circumstances where package size can be a promotional "service" within the meaning of Section 2(e). One potential example is when a seller offers free "sample size" packs of a product for retailers to give away to their customers. But to trigger Section 2(e), the seller must offer the special package size primarily to convey a promotional message, not simply to meet demand from retailers or consumers for desirable product attributes or a lower unit price. Because Woodman's does not allege that Clorox offers its packages in large sizes primarily to convey a promotional message, it does not raise a proper Section 2(e) claim.

STATEMENT

A. FTC Implementation Of The Robinson-Patman Act

The Robinson-Patman Act prohibits direct or indirect price discrimination, including discrimination disguised as a promotional service. Section 2(a) outlaws unjustified price discrimination that causes competitive injury. 15 U.S.C. § 13(a). Section 2(d) bars a seller from making payments to promote the resale of its products unless it offers such payments to all competing customers on proportionally equal terms. 15 U.S.C. § 13(d). Section 2(e) contains a similar prohibition, but for promotional services or facilities. 15 U.S.C. § 13(e); *see* pp. 7-10, *infra*.[1] Unlike the discriminatory prices prohibited by Section 2(a), discriminatory

[1] As this Court noted, "[a]lthough the text of the two sections contains a spate of semantic variation, § 2(e) has long been viewed as coterminous with § 2(d), and courts have consistently resolved the two sections into an harmonious whole." *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973).

promotional payments, services, and facilities are unlawful whether or not they injure competition or have a cost justification. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 70-71 (1959).

The FTC historically played a central role in enforcing the Robinson-Patman Act. *See FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355 (1968). But the FTC has not brought an action to enforce Sections 2(d) or 2(e) since 1988.[2] Beginning in 1960, the FTC has issued and periodically revised nonbinding interpretive guides to help businesses comply with Sections 2(d) and 2(e). *See* 16 C.F.R. §§ 240.1-240.15. These guides became known as the *Fred Meyer* Guides after the Commission amended them following the Supreme Court's decision in *Fred Meyer*. The Guides reflect the Commission's understanding of the Act's language and purpose, legislative history, and administrative and court decisions. 16 C.F.R. § 240.1. The Guides neither have the force of law nor advocate changes in the law.

The Guides note that although Sections 2(d) and 2(e) prohibit discrimination in promotional "services" or "facilities," these terms "have not been exactly defined by the statute or in decisions." 16 C.F.R. § 240.7. They explain that the services or facilities, however defined, must "be used primarily to promote the resale of the seller's product by the customer," as opposed to the original sale of the product to

[2] The Commission dismissed its 1988 complaint several years later because of significant industry changes. *See Harper & Row Publishers, Inc.*, 122 F.T.C. 113 (1996). Although the FTC shares enforcement authority with the Department of Justice, *see* 15 U.S.C. § 25, DOJ "has left civil enforcement of the Act to the FTC and has not enforced the criminal provisions since the 1960s." Antitrust Modernization Commission, *Report and Recommendations* 316 (2007).

the customer. *Id.* The Guides go on to offer several examples of a service or facility that could be covered by Sections 2(d) and 2(e) if they primarily promoted resale, including cooperative advertising, demonstrations, catalogues, displays, prizes, and—of particular relevance here—"[s]pecial packaging, or package sizes." *Id.*

B. Facts And Procedural History

In 2014, Clorox stopped selling "large pack" versions of several products—including food storage bags, kitty litter, lighter fluid, bleach, and salad dressing—to Woodman's, a grocery chain with 15 stores in Wisconsin and Illinois. Clorox notified Woodman's that it would sell these large packs only to membership-based "club" retailers such as Sam's Club and Costco, and no longer to "General Market" retailers such as Woodman's. Clorox continued to offer smaller-sized packages to Woodman's.

Woodman's sued Clorox in the Western District of Wisconsin, alleging that Clorox's decision violated Sections 2(d) and 2(e) of the Robinson-Patman Act. Woodman's claimed that Clorox's actions harmed it in two ways: First, because the large packs have a lower wholesale price-per-unit, Woodman's must pay higher prices than Sam's Club or Costco for Clorox products. A.14-16 (¶¶ 53, 60). Second, Woodman's has lost sales from retail customers who prefer large packs due to their lower unit price and superior convenience. A.15-17 (¶¶ 59, 66-67).

Clorox moved to dismiss the Complaint on the ground that these allegations failed to state a claim under Sections 2(d) and 2(e) because the sale of packages in large sizes is not a promotional service. On February 2, 2015, the district court denied Clorox's motion and ruled that package size is a promotional service. No

court had ever addressed the question, but the district court relied on "a pair of old-but-never-revoked" FTC administrative decisions finding that sellers violated Section 2(e) when they declined to supply certain buyers with product sizes that retail customers found desirable. S.A.7 (discussing *Luxor Ltd.*, 31 F.T.C. 658 (1940), and *General Foods Corp.*, 52 F.T.C. 798 (1956)). The court also observed that the FTC's *Fred Meyer* Guides still list "special packaging, or package sizes" as examples of a promotional service. *Id.* at 7-8. Deeming *Luxor* and *General Foods* "dispositive," the court concluded that Clorox's large packs were a promotional service because their "special size … is connected to the resale of those products."[3] *Id.* at 8.

ARGUMENT

Although Woodman's contends that "providing a customer with a large pack of a particular product constitutes the provision of a promotional service," A.10 (¶ 28), Woodman's alleges no facts to support that contention. Woodman's does not allege that Clorox deprived it of advertising or any similar promotional service; it claims only that Clorox refused to sell it products in sizes that have lower wholesale unit prices and are preferred by some of its customers. But Section 2(e) does not require sellers to distribute their products on equal terms to every buyer.[4] Rather,

[3] We do not address the district court's related Order of April 27, 2015, denying Clorox's motion to dismiss Woodman's complaint as moot in light of Clorox's termination of its customer relationship with Woodman's.

[4] Woodman's also alleges that Clorox violated Section 2(d), but it does not claim that Clorox made any discriminatory promotional payments to or for the benefit of retailers, as that section requires. The FTC therefore confines its analysis to

Section 2(e) applies only to discrimination in genuinely *promotional* services or facilities, "such as for advertising." *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 725 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982). Any claim of price discrimination that Woodman's might bring under the facts pleaded is cognizable, if at all, only under Section 2(a) and the pro-competitive limiting principles that Congress included in that provision.

I. SECTION 2(e) APPLIES ONLY TO ADVERTISING AND OTHER PROMOTIONAL SERVICES

Section 2(e) prohibits sellers from discriminating among purchasers "of a commodity bought for resale" by providing "services or facilities connected with the processing, handling, sale, or offering for sale of such commodity" that are "not accorded to all purchasers on proportionally equal terms." 15 U.S.C. § 13(e). In part because that language is not "an exemplar of legislative clarity," *Fred Meyer*, 390 U.S. at 350, courts have interpreted it by examining its objectives and its relationship with other antitrust laws.[5] The FTC and courts—including this one—have concluded that Section 2(e) prohibits discrimination only in "*promotional services* made available to purchasers who buy for resale." *Kirby v. P.R. Mallory &*

Section 2(e). *See* S.A.6 (Section 2(e) "seems to fit the facts of this case more closely").

[5] *See Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 73 (1953) (reading "ambiguous language" from the statute in light of "other antitrust legislation"); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1138 (D.C. Cir. 1988) ("The imprecision infecting the statutory language has frequently led courts construing the measure to repair to the backdrop against which the Robinson-Patman amendments were crafted in 193[6].").

Co., 489 F.2d 904, 909 (7th Cir. 1973) (emphasis added);[6] *see also Gibson*, 95 F.T.C. at 725-26. Section 2(e) does not prevent a seller from offering services other than promotional ones, or from distributing products in different types, quantities, or styles, to particular buyers.

A. The FTC And Courts Have Properly Confined Section 2(e) To Its Original Purpose Of Preventing Covert Price Discrimination Through Promotional Services

Congress enacted Sections 2(d) and 2(e) to prohibit manufacturers from engaging in disguised price discrimination through promotional allowances and services. Before the Robinson-Patman Act was passed, Section 2 of the Clayton Act (into which the Robinson-Patman Act was incorporated) already contained a price discrimination ban. An FTC study revealed that large chain stores nevertheless used their purchasing power to evade that ban by securing non-price advantages not available to independent merchants. *Fred Meyer*, 390 U.S. at 349-50; *Simplicity*, 360 U.S. at 69. In particular, large retailers would "induc[e] concessions from suppliers in the form of advertising and other sales promotional allowances." *Fred Meyer*, 390 U.S. at 350-51. Congress considered these allowances a form of "indirect price discrimination" because their beneficiary could "shift part of his advertising costs to his supplier while his disfavored competitor could not." *Id.* (discussing S. Rep. No. 74-1502, at 7 (1936)). Congress enacted Sections 2(d) and

[6] *Kirby* appears to retreat from the Court's earlier decision that Section 2(e) prohibits discrimination in the timeliness of deliveries. *See Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 588 (7th Cir. 1971). Other courts likewise have declined to follow *Centex-Winston*. *See, e.g.*, *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1119 (5th Cir. 1982).

2(e) to "eliminate these inequities." *Simplicity*, 360 U.S. at 69; *see Fred Meyer*, 390 U.S. at 352.

Because discriminatory promotional assistance can be difficult to detect, *see Simplicity*, 360 U.S. at 68 & n.12, Congress drafted Sections 2(d) and 2(e) to impose a flat ban on such practices. Unlike Section 2(a), which prohibits price discrimination only if it injures competition, Sections 2(d) and 2(e) require no evidence of competitive injury, nor do they allow a seller to defend itself by showing that it had a cost justification for treating buyers unequally. *Simplicity*, 360 U.S. at 70-71; *compare* 15 U.S.C. § 13(a) (permitting price "differentials which make only due allowance for differences in the cost, manufacture, sale, or delivery….").[7] Sections 2(d) and 2(e) thus induce sellers "to confine their discriminatory practices to price differentials, where they could be more readily detected …." *Simplicity*, 360 U.S. at 68.

Because Sections 2(d) and 2(e) impose categorical liability irrespective of competitive harm, courts have properly confined them to their original purpose: prohibiting hidden price discrimination through promotional services. As this Court has explained, "[i]n view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress … drafted §§ 2(d) and 2(e) to apply exclusively to promotional discriminations." *Kirby*, 489 F.2d at 910-11. In

[7] Sections 2(d) and 2(e) do permit one affirmative defense: a seller can argue that it provided the discriminatory payment or service in good faith to meet the discriminatory practices of a competing seller. *See Simplicity*, 360 U.S. at 67; 16 C.F.R. § 240.14. This is known as the "meeting competition" defense.

particular, Section 2(e) requires a showing that (1) the defendant provided advertising or other promotional services on disproportionate terms, and (2) the services promoted the product's resale. *See, e.g.*, *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 379 (4th Cir. 1992); *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1119 (5th Cir. 1982); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317 (9th Cir. 1979); *Gibson*, 95 F.T.C. at 725.

B. Applying Section 2(e) To Require That Sellers Distribute Products Uniformly To All Customers Would Contradict Settled Antitrust Policies And Deter Procompetitive Behavior

Courts read Section 2(e) narrowly for a simple reason: Because the statute requires no evidence of competitive harm, it may deter conduct that *benefits* competition and consumers, undercutting the basic purpose of antitrust law. The "primary concern" of antitrust law is to promote consumer welfare through competition between brands, and "[t]he Robinson-Patman Act signals no large departure from that main concern." *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180-81 (2006). Courts thus "construe the [Robinson-Patman] Act consistently with the broader policies of the antitrust laws." *Id.* at 181 (quotation omitted); *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 74 (1953). The Supreme Court has warned against interpreting the Act in ways "geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo*, 546 U.S. at 181.[8] An expansive interpretation of Section 2(e)

[8] The FTC has likewise noted that "[b]ecause of the easier threshold of proof" in Sections 2(d) and 2(e), those sections must be "reasonably, and not expansively, construed." *Gibson*, 95 F.T.C. at 726; *accord General Motors Corp.*, 103 F.T.C. 641,

would ignore that warning and undercut longstanding antitrust principles to the detriment of consumer welfare.

Under bedrock antitrust principles, manufacturers ordinarily may choose the retailers with whom they do business or to whom they sell specific products. Absent monopoly or collusion, a seller is free to "exercise his own independent discretion as to parties with whom he will deal" and "announce in advance the circumstances under which he will refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The Robinson-Patman Act expressly adopts this principle: Section 2(a) provides that "nothing herein shall prevent persons engaged in selling goods … in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. § 13(a). This Court has recognized that Section 2(e) similarly allows a seller to choose its customers. *See Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980).

By generally entitling manufacturers to choose the terms on which they will do business, modern antitrust doctrine reflects sound economic principles. In competing against other products, a manufacturer must decide whether to sell to many dealers that meet only a minimum "quality" threshold or instead to only a few dealers that meet "highly selective" standards. VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1441c1 (3d ed. 2010). A manufacturer may decide to

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696 (1984). *See also Hinkleman*, 962 F.2d at 380-81 ("Because application of a *per se* rule risks adverse consequences, we prefer to limit the scope of section 2(e) to that necessary to fulfill the section's purposes.").

limit the number of dealers "to allow each a sales volume sufficient for efficient operation." *Id.* A manufacturer's decision to sell products only to specific dealers may "induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977).

Antitrust law permits these "selective distribution" policies because prohibiting them "would deprive suppliers of efficient distribution options; would eliminate the supplier's ability to avoid inefficient, inattentive, or untrustworthy dealers; and would eliminate the great variety of distribution mechanisms that characterize American franchising." *Areeda & Hovenkamp* ¶ 1441c1. Although a manufacturer's decision to restrict distributors may reduce competition for a *particular* product by limiting the number of sellers of that product, such a restriction often promotes competition between *rival* products by allowing manufacturers to distribute their products more efficiently. *GTE Sylvania*, 433 U.S. at 54. Since *per se* rules of illegality are reserved for "manifestly anticompetitive" practices, *see id.* at 49-50, it is inappropriate, absent clear statutory direction, to apply them to selective distribution policies, which may benefit competition by allowing manufacturers to determine how they can best distribute and sell their products.

Thus, courts unanimously hold that Section 2(e)—and its sister provision, Section 2(d)—do not prevent a manufacturer from selling certain product lines to only a subset of its customers, or from providing those customers with a more

desirable product mix than other customers. *See Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976) (supplier's sale of "additional products … to some of its customers … as opposed to advertising or promotional services, is not actionable" under the Robinson-Patman Act); *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 55 (4th Cir. 1974) (discrimination in "the commodity itself, as opposed to a service or facility connected with the resale of the commodity … places this case beyond the pale of Robinson-Patman").[9]

Because Section 2(e) does not bar discrimination in the sale of products, a plaintiff alleging a violation of that provision must show discrimination in an advertising or other promotional service distinct from the product itself. For example, "the supplier must become active in the resale of the product, by … providing display materials or free advertising." *L & L Oil*, 674 F.2d at 1119 (citations omitted); *see also Hinkleman*, 962 F.2d at 380 (Section 2(e) only covers services that "actively promote" resale).

If a charge of discrimination does not involve advertising or similar services promoting resale, a plaintiff must bring its claim under Section 2(a) and not Section 2(e). The drafters of the Robinson-Patman Act made clear that "the bill should be inapplicable to the terms of sale except as they amount in effect to indirect

[9] *See also Purdy Mobile Homes*, 594 F.2d at 1318 ("refusal to sell a line of products to a prospective customer while maintaining sales of the product to other customers is … not the type of discrimination prohibited by the Robinson-Patman Act"); *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819, 848 (M.D. Tenn. 1974) (the Act does not cover a "claim that a manufacturer has discriminated in the allocation of available supplies of its product").

discriminations in price" under Section 2(a). H.R. Rep. No. 74-2951, at 5 (1936). As the Fourth Circuit explained in *Hinkleman*, "nonpromotional forms of direct or indirect discrimination should be judged under the more flexible standards of section 2(a) so that the courts can protect procompetitive behavior from prosecution." 962 F.2d at 380-81. This Court has similarly rejected attempts "to include within the provisions of §§ 2(d) and (e) such activity or conduct, clearly covered by § 2(a)." *Chicago Spring Prods. Co. v. U.S. Steel Corp.*, 371 F.2d 428, 429 (7th Cir. 1966); *see also Kirby*, 489 F.2d at 910 (rejecting "the theory that §§ 2(d) and 2(e) proscribe acts which are themselves prohibited by § 2(a)"); *Gibson*, 95 F.T.C. at 726 ("courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)").

Under Section 2(a), once a retailer shows that it had to pay a higher wholesale price for a product, it does not necessarily prevail; instead, liability arises only if the practice caused competitive harm and the defendant does not establish that the price differential is justified by differences in certain costs incurred in serving different customers. *See, e.g.*, *Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 224-25 (5th Cir. 1973) (denying Section 2(a) claim where differential price reflected cost differences). Except in the narrow promotional circumstances to which Section 2(e) applies, invocation of that provision's categorical ban would improperly circumvent these economically sound limiting principles, which Congress included in Section 2(a) precisely to keep the Robinson-Patman Act from harming consumers rather than helping them.

II. THE FTC'S 1940 *LUXOR* DECISION IS AT ODDS WITH THE MODERN UNDERSTANDING OF SECTION 2(e) AND SUBSEQUENT FTC GUIDANCE

Woodman's alleges that Clorox's exclusive sale of large packages to "club" retailers violates Section 2(e) because (1) Woodman's customers "prefer to purchase large packs," and (2) Woodman's is now forced to pay a higher wholesale unit cost for smaller packs. A.14-17 (¶¶ 53, 59-60, 66-67). Woodman's does *not* claim that the large packs convey an advertising message or identify how large packs, in and of themselves, provide a promotional service, much less that they *primarily* provide a promotional service. The district court nevertheless denied Clorox's motion to dismiss the Section 2(e) claim, concluding that consumer preference for large package size is "connected to the resale of those products." S.A.8. To reach that conclusion, the district court relied on two FTC administrative decisions: *Luxor, Ltd.*, 31 F.T.C. 658 (1940), and *General Foods Corp.*, 52 F.T.C. 798 (1956). But those dated decisions should not be followed because they are inconsistent with antitrust jurisprudence as it has developed in the last 60 years.

The 75-year-old *Luxor* decision ruled that a manufacturer violated Section 2(e) by selling its cosmetics in "junior"-sized packages to novelty and variety stores but not to competing drug stores. 31 F.T.C. at 663. The Commission found that the small packages were a "service or facility" protected by Section 2(e) because the package size stimulated "public demand" for resale. *Id.* Certain consumers preferred the smaller packages because they were more "convenient to carry," "reduce[d] the element of waste," and "add[ed] to the retention of fragrance and freshness." *Id.* The packages thus "promote[d] convenience in display and sale of

respondent's products." *Id.* at 664. The Commission ordered Luxor not to "furnish[] any … commodity packaged in containers of a certain size and style unless all purchasers competing in the resale of such commodity are accorded the facility of packaging in containers of like size and style, on proportionally equal terms." *Id.* at 665.

The Commission reaffirmed *Luxor* without explanation in the 60-year-old *General Foods* case, ruling that a manufacturer violated Section 2(e) by failing to sell coffee in "institution"-size packaging on equal terms to competing wholesalers, who were able to buy only smaller, "grocery"-size coffee packages. 52 F.T.C. at 826. Citing *Luxor*, the Commission rejected the manufacturer's argument that "varied packaging is not included within … [Section 2(e)]." *Id.*

The FTC is unaware of any cases concerning differential package size in the nearly 60 years since *General Foods*. Indeed, despite *Luxor* and *General Foods*, differential package sizes sold to varying retailers are now commonplace. The FTC does not consider *Luxor* and *General Foods* good law.

A. Post-*Luxor* Decisions Have Confined Section 2(e)'s Scope To Discrimination In Advertising And Similar Promotional Services

The Commission decided *Luxor* during the infancy of the Robinson-Patman Act, before the courts made clear that Section 2(e) applies only to discrimination in promotional services. *See, e.g.*, *Kirby*, 489 F.2d at 909; *Skinner v. U.S. Steel Corp.*, 233 F.2d 762, 765-66 (5th Cir. 1956); *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819, 851 (M.D. Tenn. 1974). By 1980 at the latest, the Commission had embraced these holdings and concluded that Section 2(e) has a "narrow

scope."[10] *Gibson*, 95 F.T.C. at 725-26; *see also General Motors Corp.*, 103 F.T.C. 641, 696 (1984). *Luxor* recognized no such limiting principles. It instead effectively mandated that manufacturers treat retailers equally in all respects that could result in "the loss of a sale" or "the loss of a … customer." *See* 31 F.T.C. at 664. *Luxor* also did not consider the legislative history of Section 2(e), which reveals that Congress's purpose was to prohibit "special [promotional] allowances" that enable a favored retailer "to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." *Fred Meyer*, 390 U.S. at 351 (quoting S. Rep. No. 74-1502, at 7 (1936)).

True to this history, almost all cases finding a valid Section 2(d) or 2(e) claim since *Luxor* have involved (1) subsidized advertising or other promotional services, which (2) relieved the buyer of costs it otherwise would have incurred, and thus (3) amounted to indirect price discrimination.[11] Consider the following examples:

- *Fred Meyer*, 390 U.S. at 345-46: Suppliers paid for their products to appear in coupon books distributed by a grocery chain.
- *Simplicity*, 360 U.S. at 60: A dress pattern manufacturer provided certain buyers with free display cabinets and catalogues.

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[10] Clorox is wrong, however, to assert (at 16, 41-42), that the Commission "abandoned" *Luxor* and *General Foods* in *Universal-Rundle Corp.*, 65 F.T.C. 924, 954-55 (1964). That decision addressed the Robinson-Patman Act's "like grade and quality" requirement, *see infra* note 13, and did not consider whether package sizes are a promotional service.

[11] *But see supra* note 6 (discussing *Centex-Winston*, 447 F.2d at 588); *see also L & L Oil*, 674 F.2d at 1119 ("Except for *Centex-Winston* and the cases adopting its holding [that Section 2(e) covers product delivery], the only arrangements courts have found to be services or facilities are those relating to promotional favors.").

- *Corn Products Ref. Co. v. FTC*, 324 U.S. 726, 743-44 (1945): A dextrose seller paid to advertise a buyer's candy as "rich in dextrose."
- *P. Lorillard Co. v. FTC*, 267 F.2d 439, 445 (3d Cir. 1959): Sellers purchased TV broadcast time for their grocery chain store customers.
- *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 994 (8th Cir. 1945): A seller paid for sales clerks to promote its perfumes in a buyer's department stores.

A supplier's sale of packages in multiple sizes does not resemble these examples of promotional services. Except in the special cases discussed below, the size of a package conveys no advertising or other promotional message. Nor does the size of the product relieve the buyer of promotional costs it otherwise would have incurred, thereby masking indirect price discrimination. *Luxor* and *General Foods* thus cannot be squared with the modern understanding of Section 2(e).

B. *Luxor* Would Unreasonably Deter Procompetitive Distribution Practices

Luxor's conclusion that a seller must provide all of its products in packages of the same size and style to all competing buyers on proportionally equal terms also ignores antitrust's modern focus on sound economic policy. *Luxor* predated (and *General Foods* ignored) the Supreme Court's 1953 admonition that an overbroad reading of the Robinson-Patman Act could "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen*, 346 U.S. at 63. Courts now interpret the Act in a manner consistent with "the broader antitrust policies that have been laid down by Congress." *Id.* at 74; *see also Volvo*, 564 U.S. at 181. *Luxor* contradicts these principles by requiring—as a

per se rule—that manufacturers distribute their products uniformly to all buyers, whether or not doing so is efficient or good for consumers.

Luxor's failure to consider economic consequences is especially troublesome because its logic goes far beyond package size alone. *Luxor* rests on two premises: (1) there is "public demand" for different-sized packages, and (2) the inability of a retailer to sell each size may result in lost sales and lost customers. 31 F.T.C. at 663-64. But innumerable attributes of a product and its packaging might conceivably attract "public demand." Carried to its logical conclusion, that reasoning would thwart efficient manufacturer-retailer relationships in countless settings throughout the economy. Manufacturers would be required to sell *all* popular types, styles, and sizes of a given product to every buyer for resale on proportionally equal terms—without any showing of harm to competition. That result would contradict the established antitrust principle that, absent monopoly, a seller may choose the parties with which it will deal. *Colgate*, 250 U.S. at 307.[12]

Luxor's reasoning also would deter conduct that benefits competition and consumers. Since Section 2(e) applies *per se*, *Luxor* would require manufacturers to uniformly make available their package sizes (and potentially other product attributes) to all retailers, thereby impeding product and package innovation,

[12] More than fifty years ago, a leading commentator called the *Luxor* and *General Foods* rulings "aberrational" and "esoteric," and observed that the premise of these cases has been "repudiated" by appellate decisions holding that the Robinson-Patman Act does not impose a duty to sell specific products. Frederick M. Rowe, *Price Discrimination under the Robinson-Patman Act* 381-82 (1962) (citing *Chicago Seating Co. v. S. Karpen & Bros*, 177 F.2d 863, 866 (7th Cir. 1948)).

channel differentiation, and other forms of interbrand competition that may enhance consumer welfare. As discussed, antitrust serves consumer interests by giving manufacturers wide latitude in deciding how to allocate their products among potential dealers. *See Areeda & Hovenkamp* ¶ 1441c; *GTE Sylvania*, 433 U.S. at 54. "Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations." *Volvo*, 546 U.S. at 181 n.4. Because *Luxor* elevates intrabrand competition above interbrand competition—and individual competitors above the competitive process—it does not reflect an antitrust-grounded interpretation of the Robinson-Patman Act. *See id.* at 181.

Thus, Section 2(e) should be read not as *Luxor* read it, but instead to require a plaintiff to demonstrate that a seller provided a promotional *service* distinct from the product itself. On that reading, Woodman's cannot state a plausible claim under Section 2(e) on the theory that it was deprived of products that customers desire. *See* A.15-17 (¶¶ 59, 66-67).

Nor does Section 2(e) provide a basis for Woodman's grievance that "because the unit price on these large pack items is significantly lower than … for small packs … Sam's Club and Costco are generally able to buy and ultimately sell these large pack items at significantly lower unit costs." A.15 (¶ 53). That is a claim of overt price discrimination covered by Section 2(a), which requires evidence of competitive injury. Section 2(a) is the exclusive remedy when, as here, a buyer alleges that discrimination in the "original sale" of products has increased the

buyer's "cost of doing business." *O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117, 121 (E.D.N.Y. 1983); *see also FTC v. Borden Co.*, 383 U.S. 637, 639-47 (1966) (Section 2(a) provides a remedy against a manufacturer that engages in price discrimination when selling milk of "like grade and quality" to different retailers under different packaging); *Chicago Spring*, 371 F.2d at 429 (Section 2(e) does not apply to claims "clearly covered" by Section 2(a)).[13]

In sum, Woodman's does *not* allege the type of hidden, promotional discrimination that Section 2(e) was meant to combat. *See Simplicity*, 360 U.S. at 68 & n.12 (Sections 2(d) and 2(e) induce sellers "to confine their discriminatory practices to price differentials, where they could be more readily detected").

III. SECTION 2(e) PROHIBITS DISCRIMINATION IN PACKAGE SIZES ONLY WHEN THE SIZE PRIMARILY SERVES A PROMOTIONAL FUNCTION

The FTC's *Fred Meyer* Guides state that Section 2(e) covers only services or facilities that are "used primarily to promote resale of the seller's product by the customer." 16 C.F.R. § 240.7. The Guides list several examples of promotional

[13] We disagree with Clorox's assertion (at 3, 26) 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. Section 2(a) applies to price discrimination in the sale of products of "like grade and quality." 15 U.S.C. § 13(a). *Borden* held that identical products sold in different packages are of like grade and quality. *See* 383 U.S. at 639-41. Clorox is correct that when products have *different* physical properties, courts evaluate "consumer use, preference, or marketability" in deciding whether the products are of like grade and quality. *See* Clorox Br. 34, quoting *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 889 (S.D.N.Y. 1968). But when different packages contain an identical substance, *Borden* controls. *See also DeLong Equip. Co v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1517 (11th Cir. 1989) (products labeled as "special" and "stock" were of like grade and quality because they were "physically identical," despite consumer preference for the "special" product).

services, including, as the district court noted, "[*s*]*pecial* packaging, or package sizes." S.A.7, quoting 16 C.F.R. § 240.7 (emphasis added). The district court, reading the Guides in light of *Luxor*, concluded that the term "special packaging, or package sizes" means that Section 2(e) applies even to "specially-sized products that [are] offered on a year-round basis." *Id.* at 8.

In issuing the 2014 version of the Guides, however, the Commission "underscore[d] that special packaging or package sizes are covered only insofar as they primarily promote a product's resale." *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 79 Fed. Reg. 58,245, 58,249 (Sept. 29, 2014). In other words, the special packaging or package size must convey a promotional message to consumers, rather than merely satisfy market demand for lower unit prices or desirable product attributes like larger quantities.

The Guides do not adopt *Luxor* or *General Foods* and never have. In fact, in 1988, when the Commission considered deleting "special packaging, or package sizes" from the Guides' list of examples of promotional services, it noted the questionable validity of *Luxor* and *General Foods* in light of more recent decisions interpreting Sections 2(d) and 2(e) "more strictly." *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 53 Fed. Reg. 43,233, 43,235 (Oct. 26, 1988) (citing, *e.g.*, *Kirby*, 489 F.2d at 910; *Gibson*, 95 F.T.C. at 724-30). Although the Commission ultimately decided to retain "special packaging, or package sizes" among its list of examples in the 1990 version of the Guides, it characterized this as a "close" decision, and ultimately kept the example to address

the scenario in which "*special packaging*" has "appeal to [resale] customers." *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 55 Fed. Reg. 33,651, 33,654 (Aug. 17, 1990) (emphasis added). That scenario is markedly different from that addressed in *Luxor* and *General Foods*, which required sellers to provide their entire range of package *sizes* for a given product to customers in *all* circumstances, regardless of whether the size serves a promotional function.

In updating the Guides in 2014, the Commission rejected a proposal from the ABA's Antitrust Section to delete "special packaging, or package sizes" from the list of examples of promotional services. 79 Fed. Reg. at 58,248. In so doing, the Commission maintained the view that providing a special package or package size for a product *may* amount to a promotional service under Section 2(e). The Commission illustrated this scenario with the example, "[d]uring the Halloween season, [of] a seller of multi-packs of individually wrapped candy bars offer[ing] to provide those multi-packs to retailers in Halloween-themed packaging." 16 C.F.R. § 240.7. The primary purpose of adding a Halloween theme to the packaging is "to promote customers' resale of the candy bars," based on the premise that such a theme would appeal to consumers during the Halloween season. *Id.*[14]

[14] Clorox is mistaken in suggesting (at 4, 14, 19, 29, 33, 40, 42) that special packaging and package sizes can *never* be a promotional service because the packaging is always part of the product. Like Section 2(a), Section 2(e) applies to discrimination in promotional services when selling products of like grade and quality. *See Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371 (2d Cir. 1958). As discussed, products with different packages containing an identical substance are of like grade and quality. *See supra* note 13. When a seller offers the same substance

The Guides also provided a contrasting scenario in which a customer asks a seller to package its liquid laundry detergent in special packaging having a square footprint instead of a circular footprint. *Id.* Because the primary purpose of the packaging is to assist that customer in warehousing and shipping the product—and not in promoting its resale to consumers—the packaging is not a promotional service covered by Section 2(e). *Id.*

As these scenarios make clear, 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. For this reason, the Commission, like the courts, has not attempted to provide a comprehensive definition of a promotional service or facility. *See* 16 C.F.R. § 240.7 ("The terms 'services' and 'facilities' have not been exactly defined by the statute or in decisions."); *L & L Oil*, 674 F.2d at 1117. Rather, the FTC "will look realistically at transactions as a whole before deciding to apply Sections 2(d) and 2(e)." *Gibson*, 95 F.T.C. at 729.

Thus, a package size could be primarily promotional if the manufacturer specifically develops it to convey a promotional message, rather than merely to meet market demand for, say, larger quantities or lower unit prices. For example, a manufacturer might offer a promotional service by providing retailers with "sample size" versions of its product to give away to customers for free. *See Diaperwite, Inc.*,

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in special and standard packages, the court must ask whether the special package is offered primarily to convey a promotional message (in which case Section 2(e) applies) or instead to meet market demand for desirable product attributes or a lower price.

61 F.T.C. 504, 508 (1962). In that scenario, the manufacturer's primary purpose is to advertise the product, and by doing so, it has relieved retailers of promotional expenses they would have incurred by opening up standard-sized packages and dividing their contents to give away as samples.

Likewise, a manufacturer might offer a promotional service by supplying retailers with chocolates in large, football-shaped packages featuring the statements "Super Bowl Size" and "Official Chocolate of the National Football League." The promotional nature of the packaging would be even more apparent if the manufacturer supplemented the special packages with in-store display materials or advertisements in other media promoting the chocolates in these special sizes and shapes.

By contrast, the products at issue here—such as large bags of kitty litter, 120-ounce containers of bleach, and big bottles of salad dressing—are not, without more, promotional services under Section 2(e). Indeed, Woodman's does not even contend that the large-sized packages convey a promotional message: as noted, its grievances concern unit pricing and its inability to obtain desirable products. In the absence of any allegation that Clorox is offering the large packs primarily to convey a promotional message, Woodman's cannot state a plausible claim under Section 2(e), and the district court should have granted Clorox's motion to dismiss.

CONCLUSION

The district court's February 2, 2015 Order denying Clorox's motion to dismiss Woodman's Section 2(e) claims should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7) in that it contains 6,949 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point New Century Schoolbook.

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CERTIFICATE OF SERVICE

I hereby certify that November 2, 2015, I filed and served the foregoing with the Court's appellate CM/ECF system. I certify that the following counsel of record are registered as ECF filers and that they will be served by the CM/ECF system:

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