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
ORAL ARGUMENT REQUESTED

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

Defendants The Clorox Company and The Clorox Sales Company (collectively, "Clorox") respectfully submit this Supplemental Brief in support of their Motion to Dismiss the Sherman Act claims in the Amended Complaint of Plaintiff Woodman's Food Market, Inc. At the invitation of the Court, Dkt. 132, Clorox submits this brief to advise the Court of cases issued since the completion of briefing that further demonstrate that Plaintiff has failed to plead any antitrust injury. Consequently, as a matter of law, the Court must dismiss the Amended Complaint.

A plaintiff must plead facts that demonstrate antitrust injury in order to survive a motion to dismiss in a Sherman Act case. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341−42 (1990). This requirement exists regardless of whether the allegations are reviewed under the *per se* rule or the rule of reason. *Id*. Here, even assuming every fact in the Amended Complaint is true, Plaintiff has not pleaded facts that show any antitrust injury as matter of law, because Plaintiff has failed to allege injuries resulting from a market-wide loss of interbrand competition in the sale of any product. Instead, the harms that Plaintiff alleges concern only the sale of *one* size of *Clorox*

products and projected injuries to *Plaintiff*, both of which are legally insufficient to constitute antitrust injury. Accordingly, as Clorox explained in its prior briefs in support of this Motion to Dismiss, and as further discussed below, Plaintiff's Sherman Act claim is deficient as a matter of law and must be dismissed.[1]

I. Status of the Case

Plaintiff's objective for this litigation was to obtain a bright-line legal rule that would require Clorox to sell Plaintiff every size of Clorox's products. Plaintiff has failed to achieve that objective. The Court of Appeals rejected Plaintiff's interpretation of Section 2(e) of the Robinson-Patman Act. *See Woodman's Food Market, Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016).

What remains is Plaintiff's fallback claim under the Sherman Act, which Plaintiff filed in March 2015, five months after it originally filed its Robinson-Patman Act case. Dkt. 68. Plaintiff cannot accomplish its objective through its Sherman Act claim because Clorox has the right to not do business with Plaintiff. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); Op. & Order Denying Defs.' First Mot. to Dismiss, Dkt. 50, at 10 ("Clorox may refuse to deal with a particular retailer.").

II. Plaintiff's Amended Complaint

Plaintiff contends that two of Clorox's distribution decisions were made pursuant to an alleged conspiracy with unnamed club stores. First, Plaintiff alleges that on October 1, 2014,

[1] Clorox moved to dismiss Plaintiff's Sherman Act claim on the grounds that (1) it is reviewable under the rule of reason, not the *per se* rule, and Plaintiff did not plead sufficient facts about the relevant antitrust product markets to support a rule of reason claim; and (2) Plaintiff has failed to plead the facts necessary to establish antitrust injury. With respect to the first ground for dismissal, Clorox respectfully refers the Court to its prior briefs, where Clorox explained that it has been settled law for forty years that the *per se* standard applies only to manifestly anticompetitive horizontal agreements. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–51 (1977). The alleged conspiracy is vertical (between supplier and retailer); therefore, it is subject to the rule of reason. As the prior briefs explain, however, Plaintiff has not pleaded any facts to support a rule of reason claim: it has not pleaded a relevant antitrust product and it has not pleaded anything about market power in such a market. *See Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 337 (7th Cir. 2012); *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987).

Clorox stopped selling it twelve particular club-size SKUs. Am. Compl. ¶¶ 27, 38. Second, Plaintiff alleges that on February 24, 2015, Clorox terminated all direct sales to Plaintiff. *Id.* ¶¶ 39−40.[2]

A. Alleged Harm From Clorox's Refusal to Sell Clorox Club-Size Products to Plaintiff

Plaintiff alleges two harms from Clorox's decision not to sell it *Clorox* club-size products. First, Plaintiff alleges that in the market areas served by Plaintiff, the alleged unlawful agreement will enable "Sam's Club and Costco [to] be able to raise their prices on *large pack* [Clorox] items." Am. Compl. ¶ 61 (emphasis added).

Second, Plaintiff alleges that *it* may be harmed by Clorox's decision to not sell it Clorox club-size products because: (a) consumers will stop buying Clorox products from Plaintiff because Plaintiff will not have access to Clorox club-size products and will only have access to smaller, allegedly more expensive Clorox products; and (b) consumers may stop shopping at Woodman's and purchase more products from other retailers. Am. Compl. ¶¶ 66−67. Plaintiff further alleges that these decisions by consumers "will irreparably harm" it, but that "it will be impossible for Woodman's to determine and prove what additional products those customers will purchase from Sam's Club and Costco that, until now, they have purchased at Woodman's." *Id.* ¶ 68.

B. Alleged Harm from Clorox's Refusal to Sell Clorox Products Directly to Plaintiff

Plaintiff alleges only one harm due to Clorox's decision to terminate direct sales of all Clorox products to Plaintiff. The Amended Complaint states that "*Woodman's* has been injured"

[2] Plaintiff's allegation that Clorox's February 2015 decision to sever the parties' direct business relationship was the product of an agreement is frivolous. On February 2, 2015, the Court issued an order stating that "Clorox may refuse to deal with a particular retailer," Dkt. 50 at 10, consistent with a century of case law holding that a seller is free to deal or not to deal with whomever it pleases. *See Colgate*, 250 U.S. at 307. Three weeks later, on February 24, 2015, Clorox discontinued direct sales of all products to Plaintiff. Am. Compl. ¶ 54. Clorox did so in order to end Plaintiff's Robinson-Patman Act claim. *See* Defs.' Br. in Supp. of Mot. to Dismiss, Dkt. 64; *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980). Plaintiff agrees: "Clorox terminated direct selling to Woodman's because it believed that doing so would render this lawsuit moot." Pl. Opp., Dkt. 96, at 33. Thus, the record is plain that Clorox ceased to do all business with Plaintiff to avoid years of costly Robinson-Patman Act litigation, not as part of any alleged conspiracy.

because it has been "restricted from participation in the sale of *Clorox* products" and "will suffer incalculable sales and lost profits as a consequence." Am. Compl. ¶ 25 (emphases added).

C. Lack of Allegations Concerning Interbrand Competition

Plaintiff does not make any allegations concerning any size of any branded or private-label products that compete with Clorox products, any manufacturer that produces these competing products, what competing products (of any size) Plaintiff stocks in its stores, or which competing products other retailers stock in their stores. The Amended Complaint also does not allege that any of the alleged conduct has caused a reduction in interbrand competition (*i.e.*, competition between Clorox's products and products of other brands and private-label products) for the sale of any product.

III. Plaintiff's Amended Complaint Must Allege Antitrust Injury, But Fails To Do So

In order to survive a motion to dismiss in a Sherman Act case, Plaintiff must plead facts that show antitrust injury. *See Atlantic Richfield*, 495 U.S. at 335; *Phillips Getschow Co. v. Green Bay Brown Cty. Prof'l Football Stadium Dist.*, 270 F. Supp. 2d 1043, 1050 (E.D. Wisc. 2003) ("[N]o antitrust injury can be found in this case. The federal antitrust claim must therefore be dismissed.").[3] Establishing antitrust injury is mandatory even when a defendant's conduct is *per se* illegal: "The antitrust injury requirement . . . is at least as great under the *per se* rule as under the rule of reason." *Atlantic Richfield*, 495 U.S. at 344; *see also Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) ("The requirement of proving antitrust injury is not waived in *per se* cases."), *vacated on other grounds*, 522 U.S. 3 (1997).

District courts, including a number in the last two years, routinely dismiss putative *per se* Sherman Act claims that fail to adequately plead antitrust injury. *See Bristow Endeavor*

[3] "[T]he 'antitrust injury' rule applies to requests for damages and injunctions alike." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins.*, 784 F.2d 1325, 1334 (7th Cir. 1986).

Healthcare, LLC v. Blue Cross & Blue Shield Ass'n, No. 16-cv-0057, 2016 WL 3199520, at *3, *7 (N.D. Okla. June 8, 2016) (dismissing Section 1 case even though the plaintiff "argue[d] that the alleged conspiracy is illegal *per se*" and because the plaintiff failed "to plausibly allege with non-speculative facts that the exclusion of [a service provider] actually has an anti-competitive effect, such as higher prices for consumers"); *Greater San Diego Cty. Ass'n of Realtors, Inc. v. Sandicor Inc.*, No. 16-cv-96-MMA, 2016 WL 4597536, at *9 (S.D. Cal. May 25, 2016) (dismissing a Section 1 claim for failure to sufficiently demonstrate an antitrust injury, holding that a "[p]laintiff is required to show it has suffered an antitrust injury regardless of whether it alleges a *per se* violation"); *Greencycle Paint, Inc., v. Paintcare, Inc.*, No. 15-cv-4059, 2016 WL 1402845, at *6 (N.D. Cal. Apr. 8, 2016) (dismissing a Section 1 claim because "[e]ven if Plaintiff were able to make out a group boycott claim . . . the antitrust injury requirement applies").

Antitrust injury is harm to competition itself, not merely harm to one competitor. *See Atlantic Richfield*, 495 U.S. at 338. Establishing an injury in satisfaction of Article III's standing requirements is not enough in an antitrust case because "[a]ntitrust injury is a different beast." *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 669 (7th Cir. 1992) (Easterbrook, J.). As a result, the law "requires every [antitrust] plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers." *Id.* at 670 (citations omitted). Demonstrating that conduct will raise prices or reduce output requires showing a loss of interbrand competition because "so long as interbrand competition exist[s], that would provide a 'significant check' on any attempt to exploit intrabrand market power [because] in order to meet that interbrand competition, a manufacturer's dominant incentive is to lower resale prices." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725 (1988) (citation omitted).

Accordingly, allegations that consumers paid higher prices for one manufacturer's products

are not sufficient to establish antitrust injury. Rather, a plaintiff must show *market-wide* effects to survive a motion to dismiss. *See Suture Express, Inc. v. Owens & Minor Distrib., Inc.*, 851 F.3d 1029, 1045 (10th Cir. 2017).[4] In *Suture Express*, the Tenth Circuit held that "simply comparing the average price and mark-ups between . . . three competitors fails to show that competition itself was harmed *across the market*," as is required to establish antitrust injury. *Id.* (emphasis added). For this reason, district courts dismiss Sherman Act claims for failure to plead antitrust injury when a plaintiff alleges increased prices without describing market-wide effects. *See Sell It Social, LLC v. Acumen Brands, Inc.*, No. 14-cv-3491, 2015 WL 1345927, at *4 (S.D.N.Y., Mar. 20, 2015) (showing "increased prices and reduced innovation and consumer choice" was insufficient to establish antitrust injury because the "[p]laintiff fail[ed] plausibly to allege 'an adverse effect on competition market-wide'") (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 213 (2d Cir. 2001)); *E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 360 F. Supp. 2d 465, 476 (E.D.N.Y. 2005) (dismissing a Sherman Act claim when the plaintiff's "only allegation regarding market-wide harm is the vague, repeated assertion that [the defendant] has raised prices [for lumber], without any indication of the type of harm this has had on the market or the ability (or lack thereof) of end-users to find substitute [lumber] products").

Consequently, it is not a "violation of the antitrust laws, without a showing of an actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . and to appoint an exclusive distributor." *Elecs. Commc'ns. Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 244 (2d Cir. 1997) (affirming dismissal of a Sherman Act claim). Even the most restrictive type of vertical agreement—an exclusive-distributorship agreement—is not illegal

[4] This is equally true for putative *per se* cases. *See Greencycle Paint*, 2016 WL 1402845, at *6 ("Plaintiff suggests that because it alleges a group boycott claim, it does not need to allege market-wide injury to competition. This is not the case.") (citations omitted).

unless the plaintiff pleads harm to interbrand competition: Even when the "acknowledged purpose of the [exclusive distributorship] [i]s to decrease the number of competing [brand] retailers," the Supreme Court recognized that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *GTE Sylvania*, 433 U.S. at 54.

A. Refusing to Sell Clorox Club-Size Products to Plaintiff Cannot Cause Antitrust Injury

Plaintiff alleges two harms resulting from Clorox's decision not to sell Plaintiff Clorox club-size products. Neither constitutes antitrust injury as a matter of law. First, Plaintiff's claim that club stores will be able to charge higher prices for *Clorox* club-size products, even if true, is not sufficient as a matter of law. *See Suture Express*, 851 F.3d at 1045. Moreover, Clorox is aware of no case that remotely supports the proposition that a price increase on only *one* size of *one* manufacturer's products could ever constitute antitrust injury. This is unsurprising because such a narrow focus on *intra*brand sales is contrary to the last forty years of antitrust jurisprudence since *GTE Sylvania*.

Even if it were proper to focus only on Clorox's products, which it is not, Plaintiff's allegation that prices for one size of Clorox products will increase is conclusory and thus deficient as a matter of law. Plaintiff's allegation about retailers' price increases on Clorox club-size products is purely conclusory, and conclusory assertions are not taken as true on a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007); *Tamburo v. Dworkin*, 601 F. 3d 693, 699 (7th Cir. 2010) (citing *Twombly* and affirming dismissal because the plaintiff's "antitrust claims [we]re pleaded in a wholly conclusory fashion").

The Amended Complaint contains none of the factual allegations needed to demonstrate that any retailer would be able to increase the price of Clorox club-size products. For example, it

contains no facts about competition between brands and sizes, such as: (1) branded and private-label products that compete with Clorox products; (2) which of those competing products Plaintiff currently stocks; (3) the degree to which consumers switch between club-size and other-size products; or (4) competition between retailers who sell Clorox club-size products and club-size products produced by competing manufacturers. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) (Sherman Act plaintiffs must consider "market alternatives that buyers may readily use for their purposes"); *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC*, 136 F. Supp. 3d 911, 917 (N.D. Ill. 2015) (dismissing a Sherman Act case because "a single brand product . . . cannot be a relevant market"). As the Court previously held, Plaintiff "failed to adduce any evidence to support its 'concerns'" regarding harm to consumers because Plaintiff failed to address inter-brand competition. Op. & Order Denying Pl.'s Mot. for Prelim. Inj., Dkt. 91, at 8. Plaintiff, which is an active retailer in the regions at issue, failed because "[i]t is unclear what large-pack products would be available to customers, what these products would cost, whether there would be acceptable substitutes for these products available at Woodman's for similar prices and how consumers would calculate, weigh and implement their shopping options." *Id.* These deficiencies in Plaintiff's allegations remain.

Plaintiff's conclusory and implausible allegation that club stores will be able to increase the prices of Clorox club-size products is further undermined by the fact that the Amended Complaint contains facts directly inconsistent with that allegation. The Amended Complaint states that Plaintiff "is threatened with the loss of its customers to Sam's Club and Costco because they will be able to offer Clorox products at *lower* prices than [Plaintiff] can offer." Am. Compl. ¶¶ 115, 122 (emphasis added). Either consumers will pay "more for Clorox [club-size] products," *id.* ¶ 24, or they will get "Clorox [club-size] products at lower prices." Both cannot be true.

Finally, Plaintiff's allegation that it will be harmed by Clorox's refusal to sell it Clorox

club-size products is legally insufficient to establish antitrust injury. As a matter of law, a "decline in sales" and "a producer's loss [are] no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other." *Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) (Easterbrook, J.). This is because the antitrust injury doctrine "requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers." *Chicago Professional Sports*, 961 F.2d at 670; *see also Atlantic Richfield*, 495 U.S. at 338 (the "antitrust laws were enacted for the protection of competition, not competitors").

B. Refusing to Sell Clorox Products Directly to Plaintiff Cannot Cause Antitrust Injury

As described above, the only injury that Plaintiff alleges from Clorox's decision not to directly sell any Clorox products to it is that Plaintiff "must pay higher prices for Clorox products when purchasing them through wholesalers than it does when it is allowed to purchase those products directly from Clorox." Am. Compl. ¶ 75. This will allegedly cause Plaintiff to "suffer incalculable sales and lost profits as a consequence of the" alleged conspiracy between Clorox and club stores. *Id.* ¶ 25. Again, however, Plaintiff's claim that it will be harmed does not constitute antitrust injury as a matter of law because the Amended Complaint contains no facts about harm to competition across the market. *See Suture Express*, 851 F.3d at 1045; *Toshiba*, 129 F.3d at 244; *Anheuser-Busch, Inc. v. G.T. Britts Distrib., Inc.*, 44 F. Supp. 2d 172, 175 (N.D.N.Y. 1999) (dismissing Sherman Act claim because of "insufficient allegations of a reduction in market-wide competition and, thus, no antitrust injury," even where a terminated distributor "clearly alleged injury to [its] own business interests").

Last, Plaintiff's attack on Clorox's decision not to sell directly to Plaintiff runs headlong into Clorox's right to choose its own customers. *Colgate*, 250 U.S. at 307. The Seventh Circuit's opinion in this case, citing *Colgate*, cautions against "wip[ing] out [Clorox's] discretion to choose

which products to sell to whom." *Woodman's*, 833 F.3d at 750.

CONCLUSION

For these reasons and those stated in its prior briefs in support of its motion to dismiss, Clorox respectfully requests that the Court dismiss Plaintiff's Sherman Act claims with prejudice.

Respectfully submitted,

Dated: April 28, 2017

s/ Joshua H. Soven

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2017, I caused a copy of the foregoing DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT to be served upon Plaintiff Woodman's Food Market, Inc., via the electronic filing system.

s/ Joshua H. Soven
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