UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak
In the Matter of PepsiCo, Inc.
Commission File No. 2210158

January 17, 2025

The Biden Commission's deluge of cases in the final moments before President
inauguration has shattered norms.[1]

seller cannot avoid Robinson-Patman Act liability by giving all retailers the same price but then giving one retailer special favors unrelated to price in the form of services or side payments for promotions.[6]

In the decades following the passage of the Robinson-Patman Act, the Commission relied on Sections 2(c), (d), and (e) when it faced difficulties proving violations of Section 2(a). That is unsurprising since "contrary to Section 2(a), [Sections 2(c), (d), and (e)] do not require a showing of substantial lessening of competition or that the conduct injured, destroyed, or prevented competition—making them essentially per se violations."[7] Indeed, between 1937 and 1974, the Commission issued nearly 1,400 Robinson-Patman Act complaints. Seventy percent of the Commission's 1,400 Robinson-Patman Act cases between 1937 and 1974 were brought under Sections 2(c), (d), and (e), likely in an effort to limit "the scope of the evidentiary inquiry in Robinson-Patman litigation."[8] Unfortunately for consumers and competition, these enforcement efforts effectively prevented sellers from providing useful or beneficial services to downstream customers.[9]

Taking a page out of that very same playbook, the Majority brazenly attempt to disguise a theory of harm that should be evaluated under Section 2(a) of the Act as unlawful allowances and services under Sections 2(d) and 2(e). Even a superficial reading of the Complaint reveals that the price concessions in question are all properly understood as price discounts—quintessential Section 2(a) conduct.[10] But the Majority, in its mindless haste,[11] could not divine facts to support a Section 2(a) claim. So instead, it dusted off a 1950s era playbook and erroneously asserts violations of Sections 2(d) and 2(e)—by, among other poorly crafted framings that attempt to hide the true nature of the suit, renaming price discounts as "promotions."

Taken together, the Majority's Complaint does not provide reason to believe that Pepsi has violated the law,[12] nor does the Complaint even provide sufficient allegations to survive a motion to dismiss.[13] A claim can survive a motion to dismiss only if it is facially plausible where the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the

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(quoting 80 Cong. Rec. 9418 (1936)); *see also* Woodman's Food Mkt., Inc. v. Clorox, 833 F.3d 743, 747 (7th Cir. 2016) ("[T]he Robinson–Patman Act introduced a ban on one method that manufacturers had used to circumvent subsection 13(a): concealing price discrimination as a promotional service provided to the purchaser. Congress found that manufacturers had been providing valuable services, such as paying for the purchaser's advertisements, to preferred purchasers (usually large chain stores) as a way to provide a discount without running afoul of subsection 13(a).").

[6] Zoslaw v. MCA Distributing Corp., 693 F.2d 870, 881 (9th Cir. 1982) (explaining that Section 2(d) was "enacted to prevent sellers from circumventing Section 2(a) by discriminating between buyers in respects other than price").

[7] Holyoak SGWS Dissent at 7. Today's Complaint also asserts per se condemnation under Sections 2(d) and (e). Compl. ¶ 72.

[8] RICHARD A. POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES 30 (American Enterprise Institute 1976); *see also* Holyoak SGWS Dissent at 8 (discussing history of enforcement of Sections 2(c), (d), and (e)).

[9] Holyoak SGWS Dissent at 13 (discussing U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 92 (1977)).

[10] See, e.g., Compl. ¶¶ 5, 13, 14, 37.

[11]

defendant is liable for the misconduct alleged.[14] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[15] Here, the Complaint parrots some of the language of the statute, but fails to provide sufficient factual support to make a violation of the law plausible.

Under Section 2(d) of the Robinson-Patman Act, Pepsi is liable if it offers (1) a payment to a retailer (2) as compensation for services or facilities that the retailer provides (3) in connection with the sale of Pepsi's products.[16] However, if Pepsi's payment to the retailer is proportionally equal to that paid to customers competing with the retailer, then no liability can be found.[17] Section 2(e), rather than focusing on payments made by Pepsi to the retailer, focuses on services or facilities provided by Pepsi to the retailer in connection with the sale of Pepsi products.[18] Despite this "spate of semantic variation," courts view Sections 2(e) and 2(d) "as coterminous" and have "consistently resolved the two sections into [sic] an harmonious whole."[19]

The Complaint fails to meet any of these elements. *First*, it does not allege that Pepsi made a payment to the retailer for anything—the closest it gets is alleging that Pepsi agreed to give the retailer a lower price, but that is not a payment from Pepsi to the retailer, it is simply a favored price for one retailer (i.e., a discount more appropriately evaluated under Section 2(a)). Because Section 2(a) specifically addresses discounts to preferred retailers, the Majority is wrong to allege the same conduct can be condemned under Section 2(d). And the Complaint's efforts to rename a price discount as a "promotional payment" does not somehow change this reality. As the Commission has explained, "[C]ourts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)."[20] In fact, claims under Sections 2(d) and (e) "exclude claims that could fall within [Section 2(a)]."[21] This is because a contrary result would allow "the requirement of a substantial lessening of competition in subsection [2](a) [to] be avoided in every case that also fits the criteria hat 9o38epsi 8.1(to gmd(I6ca2pi 0[2)5.9(](R0825 T

Other Commission opinions illustrate the point well. In *New England Confectionery Co.*, the Commission faced an argument that nonproportional discounts were contributions to services or facilities that violate Sections 2(d) and (e).[23] But the Commission rejected this argument, explaining that "under such a construction substantially any price difference, including those which Congress clearly intended to be considered under 2(a) of the act, might be charged under section 2(e) and the standard of proportionality actually applied instead of the standards established in section 2(a)."[24] The Majority's Complaint attempts the same approach that the Commission rejected in the past—Pepsi's price discounts, even when labeled a promotion, cannot convert a deficient Section 2(a) claim into a successful Section 2(d) or 2(e) claim.

Second, even if a price discount somehow amounts to a payment from Pepsi to the retailer, the payment for the retailer's services or facilities was not "in connection with the processing, handling, sale, or offering for sale" of Pepsi's products.[25] Both the Commission and the courts have strictly interpreted this provision of Section 2(d)—and the similar language in Section 2(e)—to require that any payment or service provided by the seller to the retailer must facilitate the resale of the product, rather than facilitate the original sale from the seller to the retailer. As the Seventh Circuit explained, "a seller's payments as well as services in connection with the original sale to the purchaser rather than with regard to the purchaser's subsequent sale were not cognizable under [Sections] 2(d) or 2(e) but were challengeable only under [Section] 2(a) as indirect price discrimination."[26] Similarly, the Ninth Circuit observed that "practices related to the resale of commodities are cognizable under section 2(e), while practices related to the original sale of commodities are cognizable under section 2(a). Thus, section 2(e) applies only to services or facilities connected with the resale of the product by the purchaser."[27]

New England Confectionery is again instructive. There, candy suppliers gave rebates to certain customers in exchange for certain "different procedures followed in packing, selling, or delivering its products."[28] The Commission dismissed these claims, arguing that "the acceptance by purchasers of a discount in price in lieu of respondent following its usual procedures in packing,

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[23] In re New England Confectionery Co., 46 F.T.C. 1041, 1060 (1949).
[24] Id.; In re Champion Spark Plug Co., 50 F.T.C. 30, 50 (1953) (dismissing Section 2(d) claims where the challenged payments "were in fact reductions in the net prices paid by . . . distributors").
[25] 15 U.S.C. § 13(d); see also id.

selling, or delivering its products . . , all in connection with the original sale, do not charge the performance by the customer of a service or activity within the meaning of section 2(d).[29] Further, "mere acceptance by a purchaser of a promotional offer intended to facilitate the original sale does not constitute the rendering of a service or activity by the purchaser within the meaning of section 2(d)."[30]

Despite efforts at creative drafting, the promotions alleged in the Majority's Complaint are, in reality, Pepsi's effort to secure sales of its product to the retailer. That is, the promotions reflect Pepsi's best efforts to ensure that the original sale from Pepsi to the retailer occurs and continues in the future. The gravamen of all the conduct alleged in the Complaint is that Pepsi provides discounts—even if renamed promotions—to keep the retailer satisfied and continuing to purchase Pepsi products.[31] None of the allegations plausibly allege that Pepsi's discounts are provided to help the retailer facilitate the resale of Pepsi products. For this reason, the Complaint does not plausibly allege that the promotions are for the resale of the Pepsi products, and the Complaint fails to state a claim.

The Complaint's further efforts to allege that Pepsi provided services to the retailer do not fare any better than the alleged promotional payments. Again, the goal of Pepsi's services is to secure the original sale between Pepsi and the retailer.[32] Moreover, services provided by Pepsi appear meant to ensure that the retailer remains satisfied with the price advantages provided by Pepsi.[33] As the Commission has said previously, "while suppliers may even have discussed selling techniques with would-be buyers, plainly the suppliers' principal purpose in engaging in these acts was to induce retail store buyers to make original purchases, not to provide marketing or promotional assistance to them."[34] Here, the Complaint does not allege that the so-called services are there to help the retailer with the resale of Pepsi products—Pepsi provides the services to the retailer to preserve its relationship with the retailer and thereby facilitate original sale of products between Pepsi and the retailer.

Finally, for unlawful conduct under both Sections 2(d) and 2(e), any payments or services provided cannot be available on "proportionally equal terms" to the retailer's competitors.[35] The Complaint's allegations in this regard are entirely conclusory. I have seen no evidence that analyzes what level of promotions or other services the Pepsi provides to the "competitors" of the retailer, nor have I seen any evidence that robustly analyzes who competes with the retailer.[36] Such conclusory allegations do not make the claim plausible, nor do they provide reason to believe the law has been violated.

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[29] Id.
[30] Id. (emphasis added).
[31] See Compl. ¶¶ 3, 35.
[32] See id.
[33] See, e.g. Compl. § V.t6j7rionsmTiau0terms" to

When passing Sections 2(d) and 2(e) of the Robinson-Patman Act, Congress' objective was to enact a strict liability regime regarding competitive promotional arrangements that operate to confer concealed discriminatory benefits to favored buyers. As the Complaint plainly pleads, Pepsi's promotions to the retailer are not disguised discriminatory discounts but rather ordinary price concessions. Yet because the majority knows it is drawing dead with the facts it can credibly plead, they make one last bluff with today's Co