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 Trump's inauguration has shattered norms.[1] Among those cases is the Majority's Complaint against PepsiCo, Inc. ("Pepsi")—the worst case I have seen in my time at the Commission. Today's Complaint against Pepsi is wholly deficient, not only because the pleadings fail to state a claim, but because the Majority rushed the case out the door before it had evidence to support the allegations. I am astounded that the Majority has such little regard for our staff that it is willing to send them to court like a lamb to the slaughter. And if by some chance the Complaint survives a motion to dismiss, the gaping holes in the supporting evidence will quickly become manifest. The Commission is not a plaintiffs' law firm whose goal is to survive a motion to dismiss to get a quick settlement payout. We are an agency of the United States of America. And we must have "reason to believe" the law has been violated.[2] We must do better than this. I dissent.

Just last month, in the Commission's first Robinson-Patman Act case in decades, I warned that "[t]hose who do not learn from history too often repeat it."[3] Having not learned any relevant Robinson-Patman Act 2(a) history, the Majority now wishes to show off its ignorance as it relates to other provisions of the Act. The Majority's Complaint alleges Pepsi violated Sections 2(d) and (e) of the Robinson-Patman Act "[b]y providing discriminatory promotional payments, allowances, and services to [a retailer customer] while failing to make those benefits available to [the retailer's] competitors in the retail sale of Pepsi soft drinks on proportionally equal terms."[4]

Sections 2(d) and 2(e) reflect Congress' aim in 1936 to proscribe evasions of Section 2(a)'s ban on price discrimination by arrangements which disguise discriminatory favoritism to large buyers via cooperative promotional arrangements. "As the Supreme Court pointed out, the 'absolute' prohibitions of these sections were designed to create a legal incentive to formulate business transactions in terms of price, so as to facilitate ready comparison and judgment under the flexible criteria governing price discrimination."[5] Thus because of Sections 2(d) and (e), a

[1] *See* Dissenting Statement of Commissioner Melissa Holyoak, *Regarding Closed Commission Meeting Held on January 16, 2025* (Jan. 16, 2025).
[2] 15 U.S.C. § 53(b).
[3] Holyoak SGWS Dissent at 1.
[4] Compl. ¶ 72.
[5] FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, at 365 (1962) (quoting *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 68 (1959)); *see also In re Herbert R. Gibson, Sr.*, 95 F.T.C. 553 (1980).

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 (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 Co.*, 833 F.3d 743, 747 (7th Cir. 2016) ("[T]he Robinson–Patman Act introduced a *per se* 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] Staff, on the other hand, have been thoughtful and thorough during the course of this investigation.

[12] *See* 15 U.S.C. § 53(b).

[13] *See, e.g.*, Fed. R. Civ. P. 12(b)(6).

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 of subsections [2](d) and (e)."[22]

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[14] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added).
[15] *Id.*
[16] *See* 15 U.S.C. § 13(d) ("It shall be unlawful for any person engaged in commerce to pay or contact for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.").
[17] *Id.*
[18] 15 U.S.C. § 13(e) ("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.").
[19] *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973).
[20] *In re Herbert R. Gibson, Sr.*, 95 F.T.C. 553 (1980).
[21] *Woodman's Food Mkt., Inc. v. Clorox Co.*, 833 F.3d 743, 747 (7th Cir. 2016); *In re Fred Meyer, Inc.*, 63 F.T.C. 1, 35 (1963) ("When the supplier pays for his customer's advertisements, it is a promotional allowance within the meaning of Section 2(d). But when the supplier gives the customer a lower price—whether in the form of an outright reduction from the unit price being charged other purchasers . . . —it is a price discrimination within the meaning of Sections 2 (a) and 2(f).").
[22] *Woodman's*, 833 F.3d at 747.

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 proportionally equal terms 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 *resale* 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.* at § 13(e) (containing *similar* language under (e) that is provided under (d)).

[26] *Kirby,* 489 F.2d at 910 (emphasis added); *see* PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, CCH ¶ 2363e1 ("In considering the provision of or payment for the services or facilities covered by §§2(d) and 2(e), the courts generally distinguish between those services or payments necessary to facilitate the original transaction from the seller to the reseller and those necessary to facilitate the reseller's subsequent marketing. Only the second set of sales are covered by these two provisions. For example, suppose a manufacturer sells processed foods to various retailers, who in turn sell to consumers. In order to sell to retailers, the manufacturer engages in various promotions designed to convince retailers to purchase its brands and may employ brokers, promoters, or others in making these promotions. But these are not the promotional services or facilities that §§2(d) and 2(e) contemplate. Rather, the statutes concern the provision of services, facilities, or payments that aid the first purchaser in making its own subsequent resale.").

[27] *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 546 (9th Cir. 1983) (emphasis added) (citations and internal quotation marks omitted); *see also Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975) ("Section 2(d) does not refer to benefits to 'favored buyers' in connection with the original sale to the buyer, such as discounts."); *Chicago Spring Prods. Co. v. United States Steel Corp.*, 254 F. Supp. 83, 84-85 (N.D. Ill. 1966), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966) ("Sections 2(d) and 2(e) [are] applicable only to unlawful promotional arrangements connected with resale, i.e. services unrelated to price.").

[28] 46 F.T.C. 1041, 1059 (1949).

selling, or delivering its products . . . , all in connection with the *original sale*, do not charge the performance by the customer of a service or facility 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 facility 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 the *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 the *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 that 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 claims 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.B.1., ¶¶ 39-46.
[34] *In re Herbert R. Gibson, Sr.*, 95 F.T.C. 553 (1980).
[35] 15 U.S.C. § 13(d), (e).
[36] The Complaint, in conclusory fashion, lists a wide variety of stores that allegedly compete with the retailer. Compl. ¶¶ 63. Such allegations are much broader than past markets alleged by the Commission. But I guess when a complaint is rushed out the door, peculiarities will abound.

When passing Sections 2(d) and 2(e) of the Robinson-Patman Act, Congress' objective was to enact a strict liability regime regarding cooperative 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 Complaint by circumventing the requirements of Section 2(a) and dressing up preferential pricing as violations of Sections 2(d) and (e). I dissent.