IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KRIST OIL CO., INC.,

Plaintiff,

v.

BERNICK'S PEPSI-COLA OF DULUTH,

Defendant.

OPINION AND ORDER

04-C-187-C

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Plaintiff Krist Oil Co., Inc. brought this suit against defendant Bernick's Pepsi-Cola of Duluth, Inc., contending that defendant had violated Wis. Stat. § 133.04, Wis. Admin. Code § ATCP 102.12 and the Robinson-Patman Act, 15 U.S.C. § 13, by implementing a pricing structure under which the wholesale prices it charged retailers varied depending on their retail prices and by failing to tell plaintiff prior to April 2003 about the lowest wholesale cost available under the pricing structure. In addition, plaintiff contended that defendant had wrongfully terminated plaintiff's dealership in violation of the Wisconsin Fair Dealership Act and failed to reimburse plaintiff for promotional giveaways, in violation of Wis. Admin. Code § ATCP 131.02.

I dismissed plaintiff's fair dealership claim and its claim that defendant's pricing structure was illegal in response to defendant's motion under Fed. R. Civ. p. 12(b)(6). At the same time, I denied defendant's motion with respect to plaintiff's claim that defendant failed to notify it before April 2003 of the lowest wholesale price available under the pricing structure and its claim that defendant had not entered a written agreement with plaintiff over the institution of a promotional bottle cap coupon program. Now before the court is defendant's motion for summary judgment on these two remaining claims. Jurisdiction is present. 28 U.S.C. §§ 1331, 1332 and 1367.

Before setting out the undisputed facts, a word seems warranted regarding plaintiff's responses to defendant's proposed findings of fact. This court's procedures to be followed on motions for summary judgment require a party wishing to dispute a proposed finding of fact to state its version of the fact and refer to evidence listed in section I.C.1.a. through f. that supports that version. Procedure to be Followed on Motions for Summary Judgment II.D.2. Very few of plaintiff's responses meet this requirement. Many are not responsive to defendant's proposed findings, see Plt.'s Resp. to Dft.'s PFOF, dkt. #46, at 3-4, ¶¶ 9, 17, 18, and 19, and others contain citations to evidence that do not provide support for plaintiff's assertion, see id. at ¶¶ 8, 9, 11, 15, 23-25, 27, and 28. Additionally, the procedures make clear that factual statements made only in a brief have no evidentiary weight, Procedures, I.B.4.; I.C.1., yet three of plaintiff's responses are supported by nothing

but a citation to its summary judgment memo. Plt.'s Resp., dkt. #46 at 4, ¶¶ 29-31. These flawed responses do not put defendant's proposed findings of fact into dispute. In these instances, I have accepted defendant's proposals as undisputed.

Plaintiff's proposed finding of fact ¶ 7 will be disregarded; the only citation plaintiff provided in support of this proposed finding is to a declaration that is not notarized and does not satisfy 28 U.S.C. § 1746's requirements for unsworn statements.

Finally, plaintiff's brief contains factual assertions and corresponding references to documents plaintiff stapled to its responses to defendant's proposed findings of fact. Aside from plaintiff's failure to make these assertions in its proposed findings of fact, the documents to which plaintiff refers have not been authenticated and for that reason are not admissible. Fed. R. Evid. 901; Procedures, I.C.1.f. (documentary evidence must be shown to be true and correct by affidavit or stipulation of parties). I have disregarded these assertions.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Krist Oil Co., Inc. is a Michigan corporation with its principal place of business in Iron River, Michigan. Plaintiff operates two retail stores in Superior, Wisconsin;

it opened the first store in December 1999 and the second in September 2000. Defendant Bernick's Pepsi-Cola of Duluth is a Minnesota corporation with its principal place of business in Waite Park, Minnesota. Defendant is the exclusive wholesale supplier of Pepsi® products in the Duluth-Superior region and beginning in 1999, supplied plaintiff's Superior stores with Pepsi® products.

A. Pricing Schedule

At all relevant times, defendant utilized a pricing program under which the price it charged for each case of Pepsi® products varied depending on the retail price the customer charged consumers. Defendant charged its customers $15.60 for each case of Pepsi® products if each bottle was retailed at $.99 or less, $17.25 if the retail price charged was between $1.00 and $1.16 and $19.20 if each bottle was sold for $1.17 or more. Any time defendant learned that one of its customers lowered or raised its retail prices, defendant would raise or lower the customer's case purchase price automatically. Defendant's purpose was to encourage retailers to lower the price of Pepsi® products. It made its pricing program available to all of its customers. Ordinarily, defendant provides its customers with pricing sheets at their retail locations but plaintiff's general manager, beverage manager, area supervisor and at least one of its Superior store managers did not know until April 2003 that defendant offered a case price of $15.60 to retailers selling 20-ounce bottles of Pepsi®

products for $.99 or less.

From 1999 until April 2003, plaintiff sold 20-ounce Pepsi® products at the retail price of $1.09; accordingly, defendant charged plaintiff $17.25 for each case. In April 2003, plaintiff increased its retail price to $1.25. When defendant learned of the increase, it began charging plaintiff $19.20 for each case. Plaintiff objected to the price increase and refused to pay defendant.

B. Bottle Cap Program

At various times since 1999, defendant received from its supplier 20-ounce bottles of Pepsi® products with special promotional caps, some of which had "winner" printed on their undersides. The labels on these special promotional bottles indicated that winning caps could be exchanged for Pepsi® products at "participating retailers"; none of the caps or labels identified plaintiff as a participating retailer. Defendant does not manufacture, print, create or control these bottle cap promotions. The promotional caps are not sold separately from the bottles but the bottle labels indicate that consumers may obtain a free game piece cap by sending a request to a specified address. Defendant does not require any of its customers to participate in the bottle cap promotions but plaintiff would risk losing customers if it refused to redeem the game pieces. Defendant replaced the bottles plaintiff gave away in redeeming the promotional caps but did not compensate plaintiff in any other way for

participating in the program.

DISCUSSION

A. Price Discrimination

Plaintiff's price discrimination claims arise under the Robinson-Patman Act, 15 U.S.C. § 13; Wis. Stat. § 133.04; and Wis. Admin. Code § ATCP 102.12. The relevant portion of the Robinson-Patman Act provides as follows:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

15 U.S.C. § 13. Wis. Stat. § 133.04 provides the following similar prohibition:

> No person may discriminate, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, for the purpose or intent of injuring or destroying competition in any level of competition or any person engaged therein.

Finally, Wis. Admin. Code § ATCP 102.12 bars soda water beverage wholesalers from

> Discriminat[ing], directly or indirectly, in the price at which soda water beverages are sold to customers by selling or offering to sell such beverages at a special price or discount, or with special allowances, rebates, or commissions, or under other price or credit terms or conditions not offered or made available to all customers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or otherwise injure, destroy or prevent competition between

wholesalers of soda water beverages or any of their customers.

As I noted in the January 25, 2005 opinion and order, these laws do not bar a distributor from offering lower prices or discounts; instead, they prohibit distributors from discriminating among purchasers in doing so. FTC v. Borden Co., 383 U.S. 637, 646 (1966) (price differential not necessarily discriminatory within meaning of Robinson-Patman Act); see also Conley Pub. Group Ltd. v. Journal Communications, Inc., 2003 WI 119, ¶ 17, 265 Wis. 2d 128, 665 N.W.2d 879 (Wisconsin courts follow federal interpretation of corresponding federal antitrust laws). Thus, I dismissed plaintiff's claim that defendant's pricing structure violated these statutes simply because it provided varying case prices depending on a customers' retail prices.

However, I denied defendant's motion to dismiss with respect to plaintiff's claim that defendant did not tell plaintiff until April 2003 about the lower case price available to retailers that drop their 20-ounce bottle prices under $1.00. It is not enough that certain prices or discounts be theoretically available to all; they must be functionally available equally. Mueller Co. v. FTC, 323 F.2d 44, 46 (7th Cir. 1963) (citing FTC v. Morton Salt Co., 334 U.S. 37, 42 (1948)). Price discounts are not functionally available equally if only some customers are apprised of them. Century Hardware Corp. v. Acme United Corp., 467 F. Supp. 350, 355-56 (E.D. Wis. 1979).

On this motion for summary judgment, plaintiff's claim fails because plaintiff has not

made any showing of injury. Proving an actual injury is a requirement in private price discrimination suits arising under both federal and Wisconsin state law. Although the Robinson-Patman Act does not itself create a private cause of action, § 4 of the Clayton Act, 15 U.S.C. § 15(a), authorizes private suits by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The Supreme Court has recognized that this language requires a showing of actual injury; it is not enough simply to prove that defendant violated the Robinson-Patman Act. J. Truett Payne Co. v. Chrysler Motors, 451 U.S. 557, 562 (1981). State law price discrimination claims also require a plaintiff to show that it has been injured. Jauquet Lumber Co., Inc. v. Kolbe & Kolbe Millwork Co., Inc., 164 Wis. 2d 689, 704, 476 N.W.2d 305, 310 (Ct. App. 1991). Private actions for violations of Wis. Stat. § 133.04 must be brought under Wis. Stat. § 133.18, which provides that "any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefore and shall recover threefold the damages sustained by the person . . . ." Similarly, private suits for violations of Wis. Admin. Code § ATCP 102.12 are brought under Wis. Stat, § 100.20, which limits suit to persons "suffering pecuniary loss *because of* [the] violation." (Emphasis added).

In its brief, plaintiff adopts a lost market share theory of injury, suggesting that it lost customers to other retailers who were purchasing Pepsi® products at the reduced case rate. The first problem with this approach is that plaintiff has not proposed any facts to support

its suggestion that it has lost part of the market share because of the presumably higher retail prices it charged for Pepsi® products. In fact, plaintiff has not cited any evidence that would suggest that any other Superior area gas stations were selling 20-ounce Pepsi® products for less than $1.00. Even more problematic, there is no suggestion in plaintiff's brief or proposed findings of fact that it would have taken advantage of the $15.60 case price by lowering its retail price had it known before April 2003 that defendant was offering this price. As defendant points out, plaintiff was profiting more by selling each bottle for $1.09 rather than $.99 and it chose not to take advantage of the offer when plaintiff learned of the lower case price in April 2003. Plaintiff cannot possibly establish that it suffered any economic damage from not knowing about an offer it would not have accepted.

Alternatively, plaintiff might have been able to prove injury by showing that the customers it did have would have purchased more 20-ounce bottles had it lowered its retail price in order to obtain the lower wholesale price. (Plaintiff would have needed a sales increase of approximately 9% to make up for the diminished per bottle profit). Again, plaintiff has not suggested that it would have taken advantage of the lower price offered or submitted any evidence to substantiate this theory of injury. In the absence of any evidence from which a jury could infer reasonably that plaintiff suffered actual injury, plaintiff's price discrimination claims under the Robinson-Patman Act, 15 U.S.C. § 13; Wis. Stat. § 133.04; and Wis. Admin. Code § ATCP 102.12 cannot succeed. Accordingly, defendant's motion

will be granted as to these claims.

B. Bottle Cap Program

Wis. Admin. Code § ATCP 131.02 provides in relevant part that "[n]o promoter shall sell, offer for sale or otherwise publish or distribute any coupon without a prior contract or agreement in writing with the coupon sponsor . . . [that sets forth] [t]he amount or percentage of funds, if any, to be returned to the sponsor for the sale of coupons." Plaintiff contends that defendant failed to enter into a written agreement with plaintiff before implementing the coupon bottle cap program in violation of this regulation. In moving to dismiss, defendant argued that plaintiff did not allege that defendant had not replaced the Pepsi® products that plaintiff gave away in exchange for the promotional bottle caps. Instead, plaintiff was claiming that defendant had not compensated it for administration costs (refrigeration, shelving, record keeping, etc.). Because the regulation anticipates that the reimbursement a sponsor receives for its participation in the coupon program will be dictated by an agreement between the parties, I reasoned that although it was unlikely, plaintiff might be able to show that it would have been able to arrange for reimbursement of administrative costs had it been given an opportunity to negotiate the formation of the contract or agreement.

However, in being put to the task of submitting evidence to support its claim, plaintiff

does not even make it over the first hurdle: it has not proposed as fact that it had no written agreement with defendant. Although both parties seem to take the lack of any such writing for granted, plaintiff bears a burden of proving its claims with evidentiary submissions. Even without this apparent oversight, plaintiff did not point to any evidence suggesting that it would have been able to arrange for reimbursement of its administrative costs.

Plaintiff blames defendant for its failure to submit evidence of an injury, stating that defendant "refused to supply [plaintiff] with proper accountings of the redemption volume information." Plt.'s Br., dkt. # 45, at 5. (I note that the unauthenticated invoices plaintiff has submitted list the bottle cap redemption credits defendant gave plaintiff.) Plaintiff misunderstands its burden. Wis. Stat. § ATCP 131.02 does not guarantee a right to be redeemed for any amount, much less every conceivable cost; instead it provides a right to a written agreement and by implication, to negotiate for compensation. It is not enough that plaintiff show it incurred costs for which defendant has not provided compensation. Instead, plaintiff must adduce evidence showing that defendant would have agreed to compensate plaintiff for administrative costs in exchange for participating in the promotion had it had an opportunity to negotiate such an arrangement. This is a showing that plaintiff has not even attempted to make.

Moreover, upon further development of the factual record, it has become clear that Wis. Stat. § ATCP ch. 131 is not applicable in this case. Defendant contends that the bottle

caps do not qualify as "coupons" under the regulation because they come free of charge with the purchase of a Pepsi® product and because consumers can obtain a free cap without purchasing any Pepsi® products by mailing a request. In addition, defendant argues that plaintiff is not a "sponsor" because it is not represented as being obligated to redeem winning bottle caps. Although I conclude that the bottle caps are "coupons" under the regulations, I agree that plaintiff is not a sponsor.

A "coupon" is defined as "any writing, form, ticket, certificate, token or similar device designed or intended to be sold or offered for sale which is represented as entitling the purchaser or holder to purchase or procure goods or services at a reduced rate or free of charge upon presentation thereof to the seller or supplier of such goods or services." Wis. Admin. Code § ATCP 131.01(1). "Coupons" do not include the following:

> (a) Coupons sold or offered for sale directly by the coupon sponsor where all proceeds from the sale are returned to the sponsor;
> (b) Coupons redeemable only for motor vehicle parking or urban mass transit privileges;
> (c) Coupons published by or distributed through newspapers or other periodicals, in advertisements other than their own;
> (d) Coupons within, attached to, or a part of any package or container as packed by the original manufacturer and which are directly redeemed by such manufacturer;
> (e) Trading stamps or coupons regulated by s. 100.15, Stats.

Wis. Admin. Code § ATCP 131.01(1)(a-e).

Defendant's argument that the coupons are not for sale, but given away with a purchase is not persuasive; so long as consumers are not free to walk away with a cap without

buying the bottle to which it is attached, the caps are being sold. As for defendant's suggestion that it makes bottle caps available to consumers for free upon written request, the regulation defines coupons only as something "designed or intended to be sold"; this statutory language does not mandate a sale of every coupon. Defendant's construction would read into the regulatory language limitations that are not plain on its face. Moreover, it runs afoul of the interpretive canon *expressio unius est exclusio alterius* — "to express or include one thing implies the exclusion of the other." Black's Law Dictionary 602 (7th ed. 1999). Wis. Admin. Code § ATCP 131.01(1)(d) excludes explicitly "[c]oupons within, attached to, or a part of any package or container as packed by the original manufacturer and *which are directly redeemed by such manufacturer*." (Emphasis added). By implication, coupons are subject to the regulations if they are attached to packaging and are *not* directly redeemed by the manufacturer.

Defendant is correct that plaintiff is not a "sponsor." A "sponsor" is an entity "represented as being obligated to provide goods, services, or discount privileges to the purchaser or holder of a coupon." Wis. Admin. Code § ATCP 131.01. Plaintiff argues vigorously that it was economically coerced to participate in the bottle cap promotion by the risk of losing customers, but the regulation does not define sponsors as those businesses actually or constructively obligated to provide goods or services, but those *represented* as being obligated. It is undisputed that the promotional bottle labels indicated that winning caps

could be redeemed only at *participating* retailers and that none of the caps or labels identified plaintiff as a participating retailer. The situation might be different had the labels indicated that caps could be redeemed "wherever Pepsi® products are sold," but that is not the case. Wis. Admin. Code § ATCP ch. 131 is not applicable. Even if it were, plaintiff failed to adduce evidence suggesting a violation. Defendant is entitled to summary judgment.

ORDER

IT IS ORDERED that defendant Bernick's Pepsi-Cola of Duluth, Inc. motion for summary judgment is GRANTED as to plaintiff Krist Oil Co.'s claims that defendant violated the Robinson-Patman Act, 15 U.S.C.. § 13; Wis. Stat. § 133.04; and Wis. Admin. Code § ATCP 102.12 by failing to inform it of a pricing discount and that defendant violated Wis. Admin. Code § ATCP 131.02 by failing to enter a written agreement covering plaintiff's reimbursement for participation in defendant's bottle cap promotions. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 28th day of April, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge