

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA

**U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures,
LLC**

U.S. Wholesale · No. 2:18-cv-01077-CBM-E · Decided May 28, 2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF
CALIFORNIA 10 11 U.S. WHOLESALE OUTLET & Case No.: 2:18-cv-01077-CBM-E
DISTRIBUTION, INC. et al, 12 COURT’S AMENDED FINDINGS Plaintiffs, 13 v. OF FACT
AND CONCLUSIONS OF LAW 14 LIVING ESSENTIALS, et al, 15 Defendants. 16 17 On
August 5, 2021, this Court entered Findings of Fact and Conclusions of 18 Law in this action
consistent with its adjudication of Plaintiffs’ claims under section 19 2(d) of the Robinson-Patman
Act and section 17200 of California’s Unfair 20 Competition Law (Dkt.

No. 617) and entered judgment consistent with its 21 adjudication of those claims and with the
jury’s verdict on Plaintiffs’ section 2(a) 22 claim under the Robinson-Patman Act (Dkt. No. 618).
Plaintiffs appealed the 23 judgment. (Dkt. No. 619.)

On January 2, 2024, the Ninth Circuit issued its mandate 24 in the appeal. (Dkt. No. 634.) The
mandate affirmed the Court’s jury instructions 25 regarding reasonably contemporaneous sales
and functional discounts, but vacated 26 the Court’s adjudication of the section 2(d) claim and
remanded for the Court to 27 “consider whether Costco and the Wholesalers purchased 5-hour
Energy from 28 1 Living Essentials ‘within approximately the same period of time’... or whether
the 2 Wholesalers have otherwise proved their section 2(d) claim.” U.S. Wholesale 3 Outlet &
Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1147–48 4 (9th Cir.

2023). On July 29, 2024, Plaintiffs filed a motion for entry of findings of 5 fact and conclusions of
law and a motion for permanent injunction after remand. 6 (Dkt. Nos. 652, 653.) The Court hereby
makes the below amended findings of fact 7 and conclusions of law pursuant to Fed. R. Civ. P.
52(a). 8 I. FINDINGS OF FACT 9 1.

The seven Plaintiffs are wholesale businesses that sell, among other 10 merchandise, 5-hour
ENERGY® in California. (Jury Instructions (Dkt. No. 498) 11 (“Inst.”) No. 3, ¶ 1; Final Pretrial
Conference Order (Dkt. No. 402) (“PTCO”) at 12 ¶ 5.1.) 13 2. Defendants Living Essentials, LLC
and Innovation Ventures, LLC are 14 Michigan limited-liability companies with their principal
place of business in 15 Oakland County, Michigan.

(Answer to Second Amended Complaint (Dkt. No. 39) 16 (“Answer”) ¶ 27.) 17 3. Living Essentials, LLC is the manufacturer and distributor of 5-hour 18 ENERGY®, and Innovation Ventures, LLC is its corporate parent. Both companies 19 are referred to together as “Living Essentials.” (Inst. No. 3, ¶ 2; PTCO at ¶ 5.2.) 20 4. Living Essentials has manufactured and sold 5-hour ENERGY® since 21 2004.

22 5. Living Essentials manufactures all bottles of 5-hour ENERGY® in 23 Wabash, Indiana, and then sells and distributes them around the country, including 24 California. 25 6. Living Essentials uses an independent broker to sell 5-hour 26 ENERGY® to Costco Wholesale Corporation (“Costco”). At different times during 27 the relevant period, those brokers were Level One Marketing, Advantage Sales & 28 Marketing, and Innovative Club Partners.

(Inst. No. 3, ¶ 6; PTCO at ¶ 5.6.) 1 7. Living Essentials also uses independent broker, Paramount Sales 2 Group, to sell 5-hour Energy to Plaintiffs and other wholesalers in California. 3 (PTCO at ¶ 5.5.) 4 8. Costco operates two types of stores: the “regular” Costco stores, which 5 cater to consumers, and a separate type called the Costco Business Centers 6 (“CBCs”), which cater primarily—but not exclusively—to small businesses.

(Inst. 7 No. 3, ¶ 7; PTCO at ¶ 5.7.) 8 9. From 2012 to December 2015 there were four CBCs in California 9 (Commerce, San Diego, Hawthorne, and Hayward). In December 2015, the 10 Westminster CBC was opened. In August 2017, Burbank and South San Francisco 11 CBCs were opened. (Inst. No. 3, ¶ 8; PTCO at ¶ 5.8.) 12 10. There was at least one CBC in close proximity to each of the Plaintiffs.

13 (Ex. 364-3 at 3 (maps showing locations of Plaintiffs’ businesses and CBCs) & 14 10/15/2019 Trial Tr. at 20:24-21:11; see also 10/3/2019 Trial Tr. at 122:12-17 15 (Mansour); 10/4/2019 Trial Tr. at 35:4-25 (Amini); id. at 96:5-97:15 (Rashid); id. 16 at 131:10-132:4 (Kohanim); 10/7 Trial Tr. at 157:12-19 (Ali); id. at 178:4-12, 17 259:17-260:3, 263:15-18 (Wahidi); 10/10 Trial Tr. at 220:15-221:16, 225:1-21 18 (Krishan); id. at 238:25-239:2 (Pae); 10/15 Trial Tr. at 69:17-70:6 (Paulus).)

19 11. Living Essentials sold 5-hour ENERGY® drinks in bottles of like 20 grade and quality. (PTCO at 8.) 21 12. Each of the Plaintiffs and the CBCs in close proximity to the respective 22 Plaintiffs purchased 5-hour ENERGY® drinks from Living Essentials within 23 approximately the same period time on several occasions. (Exs. 125, 126, 762-65, 24 767, 791-92.)

25 13. “[T]he evidence shows that Costco and the Wholesalers operated at the 26 same functional level in the same geographic area.” U.S. Wholesale, 89 F.4th at 27 1146. 28 14. Living Essentials’ “list price” to Plaintiffs was \$1.45 per bottle for 1 regular strength and \$1.60 per bottle for extra-strength 5-hour ENERGY® from 2 January 2012 through January 2019.

(Response to RFA (Dkt. No. 179-1) No. 7; 3 Exs. 872-878.) 4 15. Living Essentials’ “list price” to Costco was \$1.35 per bottle for 5 regular strength and \$1.50 per bottle for extra-strength 5-hour ENERGY® from 6 January 2012 through January 2019. (Response to RFA (Dkt. No. 179-1) No. 8; 7 Ex. 879.) 8 16.

On January 14, 2019, Living Essentials increased its “list price” to 9 Plaintiffs and Costco by \$.05 per bottle. (Exs. 872-879.) 10 17. The payments Living Essentials made to Costco for Instant Rebate 11 Coupons (“IRCs”) could be separated from payments made for “marketing items,” 12 which include “fences, endcaps, [and] advertising.” (10/17/2019 Trial Tr. at 78:3- 13 22, 82:10-13 (Living Essentials’ CFO, Mathew Dolmage, discussing Ex. 161-G, 14 which lists the various payments Defendants made to Costco).)

15 18. Approximately \$3,168,040 of the payments in Exhibit 161-G were 16 related to IRCs. (Id. at 82:9.) The total value of payments reflected in Exhibit 161- 17 G is \$9,740,954. (Ex. 161-G at 9.) Accordingly, subtracting the IRC-related 18 payments from the total value equals \$6,572,914 in payments related to non-IRC 19 promotional payments. 20 19.

The sum of promotional payments Living Essentials made to Plaintiffs 21 was “about \$161,000.” (10/17/2019 Trial Tr. at 83:10-20, 84:5-8.) 22 20. Costco received promotions of greater value than those Plaintiffs 23 received.

The promotions to Costco were worth 14.7 cents a bottle, while the 24 promotions to Plaintiffs were worth 0.5 to 2.7 cents a bottle. (Exs. 125, 126, 762- 25 65, 767, 791-92, 161-G, 171-G). 26 21. Living Essentials contends that \$860,000 in other promotions that 27 Plaintiffs received should also be considered under section 2(d). Even assuming 28 that such promotions are properly considered under section 2(d), Living Essentials’ 1 promotional payments to Plaintiffs were still disproportionate to the payments made 2 to Costco.

Including the \$860,000 in other promotions, the promotional value 3 Plaintiffs received was 9.4 cents a bottle, which is still lower than the 14.7 cents 4 promotional value Costco received. (Id.) 5 22. Therefore, Living Essentials made promotional allowances to Costco 6 that it did not make available to Plaintiffs on proportional terms. 7 23.

The non-IRC promotions were “fences, endcaps, and advertising” 8 promotions. The non-IRC promotions allowed Costco to experience a “sales lift” 9 in 5-hour ENERGY®, and Plaintiffs expected to receive a similar sales lift had 10 Defendant offered them the same promotions. (See Ex. 161-R; 10/3/2019 Trial Tr. 11 at 173:12-19; Meguiar Depo. at 89:01-11; 10/11/2019 Trial Tr. at 154:22-155:6.)

12 II. CONCLUSIONS OF LAW 13 24. Pursuant to the Ninth Circuit’s mandate, the Court now considers 14 whether Plaintiffs have proved their section 2(d) claim under the Robinson-Patman 15 Act. See U.S. Wholesale, 89 F.4th at 1147–48. 16 25.

The Robinson-Patman Act (“RPA”), 15 U.S.C. § 13(d) provides: “It shall be unlawful for any person engaged in commerce to pay... 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... by or through such customer in connection with the processing, handling, sale, or offering for sale of any products... 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.”

In order to prevail on a Section 2(d) claim, a plaintiff must prove: (1) sales made in interstate commerce; (2) sales of commodities of like grade and quality; (3) actual competition between the alleged favored and disfavored purchaser for the same customers and the same dollars; (4) that the seller paid the alleged favored purchaser for services or facilities (promotional allowances) to be used primarily to promote the resale of the product that were not available on proportionately equal terms and which also requires the purchasers to be operating at the same functional levels in the supply chain; and (5) damages which, in a private plaintiff antitrust case such as this, each plaintiff must prove antitrust injury, which means the type of injury the antitrust laws were designed to prevent, which was a material cause of each plaintiff’s injury.

See 15 U.S.C. § 13(d); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Woodman’s Food Market, Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016); *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191 (3d Cir. 2010); *England v. Chrysler Corp.*, 493 F.2d 269, 10 271-72 (9th Cir. 1974). 11 A. “In Competition” 12 27. “[T]o establish that two customers are in general competition, it is sufficient to prove that: (1) one customer has outlets in geographical proximity to 14 those of the other; (2) the two customers purchased goods of the same grade and 15 quality from the seller within approximately the same period of time; and (3) the 16 two customers are operating on a particular functional level such as wholesaling or 17 retailing.” *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC*, 18 89 F.4th 1126, 1142 (9th Cir.

2023). 19 28. Based on the evidence in the record and the Ninth Circuit’s mandate, 20 the Court finds that Plaintiffs proved they were in competition with the CBCs. 21 B. Disproportionate Promotional Allowances 22 29. Contrary to Living Essentials’ arguments (see Dkt. No. 659 at 17), 23 Plaintiffs are not judicially estopped from arguing that the non-IRC promotional 24 allowances in Exhibit 161-G are not part of the price of Living Essentials’ product.

25 Neither the Ninth Circuit decision nor this Court’s summary judgment order held 26 that the non-IRC promotions were part of price under section 2(a). In fact, the 27 summary judgment order denied summary judgment on the section 2(d) claim 28 because there was conflicting evidence “regarding whether Defendants made 1 promotional payments to Costco that were not available to Plaintiffs.” (Dkt.

No. 2 289 at 10.) “[C]ourts can construe the separate parts of a multi-part transaction 3 separately” and split the promotional allowance part of a transaction from the price 4 discount part. *Am. Booksellers Ass’n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 5 1031, 1066 (N.D. Cal. 2001). 6 30. *Living Essentials* cites 16 C.F.R. § 240.9 to argue that the promotions 7 were tailored to the different needs of Plaintiffs and Costco, and therefore, were still 8 proportionally equal.

(Dkt. No. 659 at 20.) 16 C.F.R. § 240.9(a) states that there is 9 “[n]o single way to” make promotions available on proportionally equal terms, but 10 that “[g]enerally, this can be done most easily by basing the payments made or the 11 services furnished on the dollar volume or on the quantity of the product purchased 12 during a specified period.” 16 C.F.R. § 240.9(b) provides further guidance that 13 when sellers offer more than one type of service or payments for more than one type 14 of service, they can offer such services and payments on proportionally equal terms 15 “by offering all the payments or services at the same rate per unit or amount 16 purchased.” 17 31.

16 C.F.R. § 240.9 does not support *Living Essentials*’ position that the 18 promotions can still be considered “proportionally equal” where the dollar per unit 19 value of the promotions to Plaintiffs fall far below the value of promotions to 20 Costco.

Moreover, *Living Essentials* fails to explain what benchmark other than 21 dollar value should be used to evaluate proportionality or how, under that 22 benchmark, the promotions were equal. 23 C. Threat of Antitrust Injury 24 32. “Robinson-Patman does not ban all price differences charged to 25 different purchasers of commodities of like grade and quality...; rather, the Act 26 proscribes price discrimination only to the extent that it threatens to injure 27 competition.” *Volvo*, 546 U.S. at 176.

The Supreme Court has identified “three 28 categories of competitive injury that may give rise to a Robinson-Patman Act claim: 1 primary line, secondary line, and tertiary line.” At issue here is secondary-line 2 injury, which “involve[s] price discrimination that injures competition among the 3 discriminating seller’s customers.” *Id.* 4 33.

The Ninth Circuit has “identified four requirements for antitrust injury: 5 (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that 6 which makes the conduct unlawful, and (4) that is of the type the antitrust laws were 7 intended to prevent.” *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 8 24 F.4th 1262, 1273 (9th Cir.

2022). 9 34. The “requisite injury and damages may not be presumed from a 10 showing of discrimination alone.” *Id.*; see also *Rutman Wine Co. v. E. & J. Gallo 11 Winery*, 829 F.2d 729, 737 (9th Cir. 1987) (concluding that a plaintiff may “not 12 maintain its claim for injury and damages based solely on its allegation that 13 discrimination in providing services occurred,” but must also show that “its failure 14 to receive certain services affected its ability to compete with

its allegedly favored 15 competitor.”). “A hallmark of the requisite competitive injury [in secondary-line 16 cases] is the diversion of sales or profits from a disfavored purchaser to a favored 17 purchaser.” *Volvo*, 546 U.S. at 177.

18 35. Therefore, to show the threat of antitrust injury, Plaintiffs must prove 19 that Living Essentials’ conduct threatened Plaintiffs’ ability to compete with Costco 20 for sales of 5-hour ENERGY® by offering evidence that their “failure to receive an 21 advertising allowance... enabled [Costco] to lower [its] prices and divert sales, or 22 that [Plaintiffs were] required to lower [their] prices to an unprofitable level in 23 response to such low prices.” *Rutman*, 829 F.2d at 737.

24 36. Plaintiffs have not met their burden by simply arguing that the 25 “depriv[ation] of hundreds of thousands of dollars in promotional payments”—i.e., 26 the discrimination itself—is sufficient to show antitrust injury. (Dkt. No. 652 at 27 20–21 (citing *L.A. Int’l Corp. et al. v. Prestige Consumer Healthcare, Inc.*, (C.D. 28 Cal. May 20, 2024)).) This alone is not sufficient under Ninth Circuit law to show 1 an injury “of the type the antitrust laws were intended to prevent.” *Ellis*, 24 F.4th 2 at 1273.

3 37. Plaintiffs cannot rely on evidence of injury caused by IRC promotions 4 to prove antitrust injury under section 2(d). See *U.S. Wholesale*, 89 F.4th at 1145 5 (“The Wholesalers do not challenge the district court’s holding that they are 6 judicially estopped from seeking an injunction on the ground that the IRCs are 7 promotional services in connection with resale under section 2(d).

Therefore, any 8 challenge to this finding is waived, and potential injunctive relief under section 2(d) 9 excludes relief related to IRCs.”). 10 38. Plaintiffs’ evidence that Costco received a sales lift from the non-IRC 11 allowances and that Plaintiffs expected to receive a similar sales lift had Defendant 12 offered them the same promotions does not establish that the sales lift caused or 13 threatened to cause Plaintiffs competitive harm—the evidence does not show “that 14 the allowance enabled [Costco] to lower [its] prices and divert sales [from 15 Plaintiffs], or that [Plaintiffs were] required to lower [their] prices to an unprofitable 16 level in response to such low prices.” *Rutman*, 829 F.2d at 737.

17 39. Testimony regarding antitrust injury from Plaintiffs’ expert, DeForest 18 McDuff, did not distinguish between injury resulting from IRC promotions and 19 injury resulting from non-IRC promotions. See *Perkins v. Standard Oil Co. of Cal.*, 20 395 U.S. 642, 648 (1969) (noting an injured party “must be able to show a causal 21 connection between the... discrimination in violation of the Act and the injury 22 suffered”).

23 40. Therefore, the evidence does not establish that the lack of 24 proportionally equal, non-IRC promotions caused or threatened to cause injury to 25 Plaintiffs’ ability to compete with Costco,

and Plaintiffs have not proved by a 26 preponderance of the evidence the threatened antitrust injury needed to prevail on 27 their section 2(d) claim. 28 1 D. California Unfair Competition Law (“UCL”) 2 41.

In order to succeed on a UCL claim, Plaintiffs must prove “unfair 3 competition,” which “shall mean and include any unlawful, unfair or fraudulent 4 business act or practice and unfair, deceptive, untrue or misleading advertising and 5 any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of 6 Division 7 of the Business and Professions Code.” Cal. Bus. & Prof.

Code § 17200. 7 42. The law is clear that where the same underlying conduct is alleged to 8 underlie a UCL claim and an RPA claim, the claims will rise and fall together. See 9 Consumer Def. Group v. Rental Hous. Indus Members, 137 Cal. App. 4th 1185, 10 1220 (2006) (dismissing UCL claim where predicate claims were dismissed); 11 LiveUniverse Inc. v MySpace, 304 Fed.

App’x. 554, 557–58 (9th Cir. 2008) (Where 12... the same conduct is alleged to support both a plaintiff’s federal antitrust claims 13 and state-law unfair competition claim [under the UCL], a finding that the conduct 14 is not an antitrust violation precludes a finding of unfair competition”); Chavez v. 15 Whirlpool Corp., 93 Cal. App. 4th 363, 375 (Cal. Ct.

App. 2001). 16 43. Plaintiffs have long maintained that the conduct underlying their UCL 17 claim is the same conduct that underlies their RPA claims. Because Plaintiffs’ 18 unfair competition claim under the UCL is predicated on the same conduct that 19 underlies Plaintiffs’ price discrimination claims under the RPA and Plaintiffs have 20 not prevailed on their RPA claims, Plaintiffs’ UCL claim similarly fails.

See 21 Petroleum Sales, Inc. v. Valero Ref. Co., 304 F. App’x. 615, 617 (9th Cir. 2008). 22 E. Injunctive Relief 23 44. Injunctive relief is an extraordinary remedy that is “never awarded as 24 of right” but is relief that should be carefully crafted and awarded only when 25 absolutely necessary. Winter v. NRDC, 555 U.S. 7, 24 (2008). 26 45.

The plaintiff bears “the heavy burden of establishing they are entitled 27 to injunctive relief.” Blizzard Ent. Inc. v. Ceiling Fan Software, LLC, 28 F. Supp. 28 3d 1006, 1018 (C.D. Cal. 2013). A plaintiff seeking a mandatory injunction has a 1 | doubly demanding burden because the relief “goes well beyond simply maintaining 2 | the status quo pendente lite [and] is particularly disfavored.” Garcia v. Google, 3 | Inc., 786 F.3d 733, 740 (9th Cir.

2015). - 46. Plaintiffs seek a permanent injunction requiring Living Essentials to 5 | allow Plaintiffs to participate, on proportionally equal terms, in all promotional 6 | programs and payments that Living Essentials offers to Costco in connection with 7 | the handling, sale, or offering for sale of 5-hour Energy. (Dkt. No. 653 at 18.) 8 47.

The Court can only grant a permanent injunction if Plaintiffs establish 9 | four elements: (1) irreparable injury; (2) inadequate legal remedies; (3) a balance of 10 | the hardships that weighs in their favor and against Living Essentials; and (4) a 11 | public interest that a permanent injunction will not disserve. *Blizzard Entert. Inc.* 12 | *v. Ceiling Fan Software, LLC*, 28 F.Supp.3d 1006, 1018 (C.D.

Cal. 2013); *eBay*, 13 | *Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006); see also *Monsanto Co. v.* 14 | *Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *Perfect 10 v. Google, Inc.*, 653 15 | F.3d 976, 979 (9th Cir. 2011). 16 48. Since Plaintiffs did not prevail on their Section 2(a) claim, 2(d) claim, 17 | or UCL claim, there is no evidence that would support the issuance of a permanent 18 | injunction.

19 49. Any finding of fact which constitutes a conclusion of law is hereby 20 | deemed as a conclusion of law. Any conclusion of law which constitutes a finding 21 | of fact is hereby deemed a finding of fact. 22 23 IT IS SO ORDERED. 24 25 | DATED: May 28, 2025 Ce 6 ee 26 UNITED STATES DISTRICT JUDGE 27 28 11