

No. 25-3460

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC.; TREPCO
IMPORTS AND DISTRIBUTION, LTD.; L.A. INTERNATIONAL
CORPORATION; CALIFORNIA WHOLESALE; YNY
INTERNATIONAL, INC.; EASHOU, INC., DBA San Diego Cash
and Carry; SANOOR, INC., DBA L.A. Top Distributor,

Plaintiffs-Appellants,

v.

INNOVATION VENTURES, LLC; and LIVING
ESSENTIALS, LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Congress enacted the Robinson-Patman Act (RPA) to protect small businesses by barring suppliers from engaging in certain types of discrimination in favor of large chain stores. Section 2(d) of the RPA furthers that purpose by prohibiting manufacturers from providing a purchaser of a product with promotional or advertising support that is not available on proportionally equal terms to other purchasers competing in that product’s distribution. 15 U.S.C. § 13(d). A soda company, for instance, could not provide millions of dollars in promotional and advertising support to help Wal-Mart sell the company’s soda while not providing promotional support to corner stores that compete with Wal-Mart. Because giving disproportionate support to larger entities places “small independent stores . . . at a hopeless competitive disadvantage,” section 2(d) banned such disproportionate support “outright.” *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959). As the Supreme Court has recognized for more than half a century, section 2(d) does not require any additional showing that the challenged conduct “had an injurious or destructive effect on competition.” *Id.* at 65.

This case presents a classic example of the type of discrimination against smaller, independent businesses that section 2(d) of the RPA is meant to prevent. *See U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126 (9th Cir. 2023) *cert. denied*, 145 S. Ct. 141 (2024). Defendants—the

manufacturers of 5-hour Energy—paid Costco Business Centers over \$6.5 million in promotional support for 5-hour Energy over a five-year period, while offering plaintiffs—seven family-owned wholesalers—roughly \$160,000 in promotional support. ER-9 (¶¶ 18-19). The district court found that Costco and plaintiffs are “customers competing” for purposes of section 2(d) and that these greater promotional payments “allowed Costco to experience a ‘sales lift’ in 5-hour Energy,” which plaintiffs would likewise have “expected to receive . . . had Defendant[s] offered them the same promotions.” ER-10 (¶ 23).

Those findings suffice to establish a violation of section 2(d) under the standard articulated by this Court. *See Tri-Valley Packing Ass’n v. FTC*, 329 F.2d 694, 707-08 (9th Cir. 1964) (establishing the “three essential elements” of a section 2(d) claim). The district court’s further finding that defendants’ conduct deprived plaintiffs of a “sales lift” also demonstrates that the violation caused “threatened loss or damage” to plaintiffs so as to support an injunction. 15 U.S.C. § 26.

Rather than issue the required injunction, however, the district court improperly added a requirement to the statute: It held that, to establish a violation of section 2(d), plaintiffs also needed to show that defendants’ “conduct threatened Plaintiffs’ ability to compete with Costco for sales of 5-hour ENERGY®” by enabling Costco “to lower [its] prices and divert sales” or by requiring plaintiffs “to lower [their] prices to an unprofitable level in response to such low prices.”

ER-13 (§ 35) (alterations in original) (quoting *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 737 (9th Cir. 1987)). That requirement conflicts with the Supreme Court’s holding in *Simplicity Pattern*, which makes clear that section 2(d) requires no such showing. It also conflicts with this Court’s prior decision *in this case*, which recognized *Simplicity Pattern*’s holding that section 2(d) is an outright ban on discriminatory conduct and does not separately require an “injurious or destructive effect on competition.” *U.S. Wholesale*, 89 F.4th at 1134 (quoting *Simplicity Pattern*, 360 U.S. at 65). The district court nevertheless imposed this competitive-harm requirement based on cases interpreting section 2(a). But, as *Simplicity Pattern* and this Court recognized, section 2(a) explicitly requires the potential for harm to competition, while section 2(d) does not. *See U.S. Wholesale*, 89 F.4th at 1134.

Absent the district court’s legally erroneous competitive-harm requirement, the factual findings in this case establish a section 2(d) violation that resulted in a threatened or actual antitrust injury. This Court should thus reverse the district court’s judgment and direct the court to enter injunctive relief.

The district court also erred in rejecting plaintiffs’ claim under California’s Unfair Competition Law (UCL) on the ground that UCL and antitrust claims necessarily rise or fall together. That provides another basis to reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this claim under 15 U.S.C. § 26 and 28 U.S.C. § 1331. The court issued its amended findings of fact and conclusions of law on May 28, 2025, ER-6–16, and it entered final judgment on June 27, 2025, ER-4. Plaintiffs timely noticed this appeal on July 17, 2025. ER-77; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the addendum to this brief. Cir. R. 28-2.7.

ISSUES PRESENTED

1. Whether the district court’s holding that plaintiffs must prove harm to competition to establish a violation of section 2(d) of the Robinson-Patman Act erroneously imported a standard applicable only to claims under section 2(a).

2. Whether, consistent with *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1001 (9th Cir. 2023), a plaintiff can demonstrate “unfair” conduct under the UCL without showing that the defendant violated antitrust law.

STATEMENT OF THE CASE

A. Legal Background

1. The Robinson-Patman Act “responded to the advent of large chainstores . . . with the clout to obtain lower prices for goods than smaller buyers could

demand,” and it “sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers.” *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006). In enacting the RPA, “Congress meant to prevent an economically powerful customer like a chain store from extracting a better deal from a seller at the expense of smaller businesses,” *U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126, 1141 (9th Cir. 2023) *cert. denied*, 145 S. Ct. 141 (2024), and “to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price” and other benefits are concerned, *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963). The Act reflects “a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions.” *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 132-33 (1978).

The RPA contains several related provisions. Section 2(a) is focused on price discrimination—*e.g.*, a manufacturer charging its small retailer customers higher prices for a given product than it charges its large retailer customers for the same product. Section 2(a) generally prohibits price discrimination among buyers “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.” *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 64 (1959)

(quoting 15 U.S.C. § 13(d)). As the Supreme Court has observed, section 2(a) is “hedged with qualifications.” *Id.* For example, “[a]n exception” to the prohibition “is made for price differentials ‘which make only due allowance for differences in the cost of manufacture, sale, or delivery.’” *Id.* Accordingly, a seller may offer a product to buyers at different prices as long as the difference relates to one of these considerations. Section 2(a) imposes a further limitation in that a plaintiff can establish a violation only by showing “a reasonable possibility that a price difference may harm competition,” *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983)—as by allowing a favored buyer to draw sales away from disfavored businesses, potentially forcing them out of the market. Plaintiffs’ claim under section 2(a) is not at issue in this appeal.

Unlike subsection (a), “[s]ubsections (c), (d), and (e) . . . *unqualifiedly* make unlawful certain business practices other than price discriminations.” *Simplicity Pattern*, 360 U.S. at 65 (emphasis added). Section 2(c) prohibits the payment or receipt of commissions or brokerage allowances “except for services rendered.” *Id.* Section 2(e) makes it unlawful for a seller to discriminate in favor of one purchaser of a commodity bought for resale by furnishing any related services or facilities on terms not accorded to all purchasers on proportionally equal terms. *Id.* And, as particularly relevant here, section 2(d) “prohibits the payment by a seller to a customer for any services or facilities furnished by the latter, unless ‘such

payment . . . is available on proportionally equal terms to all other [competing] customers.”” *Id.* (alteration in original).

Section 2(d) has “three essential elements”: “Where (a) two or more customers of a particular seller compete with each other in the distribution of the products of that seller, (b) the latter shall not pay or contract for the payment of anything of value to or for the benefit of such a customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the sale, or offering for sale of any products sold or offered for sale by the seller, (c) unless the allowance is available on proportionally equal terms to the competing customers.” *Tri-Valley Packing Ass’n v. FTC*, 329 F.2d 694, 707-08 (9th Cir. 1964). This provision categorically bars a seller from advantaging a buyer relative to its competitors by providing discriminatory resources to that buyer to support its advertising and marketing activities.

In contrast to the price discrimination prohibition in subsection (a), “the proscriptions of [subsections (c), (d), and (e)] are absolute.” *Simplicity Pattern*, 360 U.S. at 65. Unlike subsection (a), “none has any built-in defensive matter.” *Id.* And they do not require, “as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.” *Id.* In describing these provisions, the Supreme Court has explained that the RPA is a “prophylactic statute” that “does not ‘require that the discriminations must in fact

have harmed competition” to establish a violation. *J. Truett Payne Co. v.*

Chrysler Motors Corp., 451 U.S. 557, 561-62 (1981) (citations omitted).

Accordingly, a plaintiff need not prove that the discrimination resulted in harm to competition to demonstrate a violation of subsection (d). *Simplicity Pattern*, 360 U.S. at 65. It needs to prove only the three elements this Court identified in *Tri-Valley Packing*.

A plaintiff who proves a violation of section 2(d) then has to make the required showing for the particular form of relief the plaintiff seeks. For example, a plaintiff seeking to “recover treble damages” under section 4 of the Clayton Act “must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.” *J. Truett Payne*, 451 U.S. at 562. But “[t]o prevail on a claim for injunctive relief, the plaintiff” need only “show a threat of antitrust injury.” *U.S. Wholesale*, 89 F.4th at 1134 (emphasis added) (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986)); see also 15 U.S.C. § 26 (“Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws.”).

The particular type of harm a plaintiff must show flows from the particular antitrust provision that was violated. Because section 2(d) of the RPA is meant to protect individual competitors rather than the market as a whole, a plaintiff seeking

relief for a section 2(d) violation need not show a threat of injury to the *competitive landscape*; instead, injury to the *competitor itself*—*i.e.*, the plaintiff—will suffice. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948) (explaining the Act’s intention to provide a remedy for “injury to the competitor victimized by the discrimination” (quotation marks omitted)); *see also Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 657 (9th Cir. 1997) (emphasizing that the RPA was enacted to protect individual competitors).

2. California’s Unfair Competition Law prohibits “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. As the text of the statute makes clear, “a business practice may be ‘unfair,’ and therefore illegal under the UCL, ‘even if not specifically proscribed by some other law’” so as to fall under the “unlawful” prong of that prohibition. *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1000 (9th Cir. 2023) (quoting *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999)). “The unfair prong is intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable ‘new schemes which the fertility of man’s invention would contrive.’” *Id.* (quotation marks omitted). In cases alleging unfairness to competitors, courts use “the ‘tethering’ test, which asks whether the defendant’s conduct ‘threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the

same as a violation of the law, or otherwise significantly threatens or harms competition.’’ *Id.* (quoting *Cel-Tech*, 20 Cal. 4th at 186-87).

B. Factual Background

Defendant Living Essentials, LLC, manufactures the drink 5-hour Energy, and defendant Innovation Ventures, LLC, is its corporate parent. These entities are collectively referred to as Living Essentials. Plaintiffs are seven independently owned wholesale businesses (hereafter, “Wholesalers”) that sell 5-hour Energy, among other merchandise, to convenience stores in California, which in turn sell 5-hour Energy to consumers. ER-7 (¶ 1). Wholesalers are in competition with the Costco Business Centers (hereafter, “Costco” or “CBCs”)—a division of Costco Wholesale Corporation—which sell 5-hour Energy to convenience stores in the same areas of California. ER-8, 11 (¶¶ 8-10, 28).

When Costco first began purchasing 5-hour Energy from Living Essentials in 2011, there were four CBCs in California. ER-8 (¶ 9). That number had grown to seven by the time of trial. *Id.* The California CBCs are located in the Bay Area, Los Angeles, and San Diego, placing “at least one CBC in close proximity to each of the Plaintiffs.” *Id.* (¶ 10). The record shows that Costco’s sales of 5-hour Energy were made almost exclusively by CBCs to convenience-store customers; there is “no evidence that Costco sold 5-hour Energy to consumers.” *U.S. Wholesale*, 89 F.4th at 1145-46.

Both Costco and the Wholesalers sell 5-hour Energy to retailers from physical establishments that retailers can visit to purchase 5-hour Energy (and other products) that they will then resell to consumers. *See U.S. Wholesale*, 89 F.4th at 1144-46. Living Essentials gave Costco substantial payments to advertise and promote sales of 5-hour Energy in those establishments while withholding similar payments from Wholesalers.¹ The payments to Costco were made to support prominent promotional displays in those establishments as well as other measures to promote sales. ER-9 (¶¶ 17-18). The district court determined that Living Essentials paid \$6,572,914 in relevant “promotional payments” to Costco over the five years at issue, in contrast to the roughly \$161,000 in combined payments it made to Wholesalers. *Id.* Because Costco had purchased approximately four times as much 5-hour Energy as Wholesalers had over that period, *see* ER-26, the court calculated the respective value of the promotional payments on a per-bottle basis, finding that, “[t]he promotions to Costco were worth 14.7 cents a bottle, while the promotions to Wholesalers were worth 0.5 to 2.7 cents a bottle.” *Id.* (¶ 20). Living Essentials’ promotional payments to Costco were thus 5-to-29 times greater per bottle than its payments to Wholesalers.

¹ The promotional payments referenced throughout this brief do not include the payments Living Essentials made to Costco for instant rebate coupons. *See* ER-9–10 (¶¶ 17-18, 23).

The promotions funded by these payments “allowed Costco to experience a ‘sales lift’ in 5-hour ENERGY®, and Plaintiffs expected to receive a similar sales lift had Defendant offered them the same promotions.” ER-10 (¶ 23). The term “lift” refers to the sales increase that results from a given promotion. ER-56–57. The evidence also showed that if Wholesalers had received even a small amount of promotional support from Living Essentials, they could likely increase their sales volume. *See* ER-61.

C. Procedural Background

Wholesalers filed suit under the RPA asserting a claim for damages under section 2(a) that was tried to a jury, and a claim for injunctive relief under section 2(d) that was tried to the court. *U.S. Wholesale*, 89 F.4th at 1135.² To remedy the section 2(d) violation, Wholesalers sought an injunction requiring Living Essentials to allow them to participate, on proportionally equal terms, in all promotional programs that Living Essentials offers to Costco in connection with 5-hour energy. *See* D. Ct. Dkt. No. 582, at 18. The jury found for Living Essentials on the section 2(a) claim. *U.S. Wholesale*, 89 F.4th at 1136. And the district court found for Living Essentials under section 2(d) based on its view that,

² In contrast to the promotional payments covered by Section 2(d), Section 2(a) addresses the basic form of price discrimination—charging disfavored customers higher net acquisition prices than favored customers. *See Volvo*, 546 U.S. at 173, 176-77 (quoting 15 U.S.C. § 13(a)).

“by answering ‘No’ to the question of liability under Section 2(a), the jury implicitly found there was no competition between Costco and Plaintiffs,” D. Ct. Dkt. No. 603, at 6, and based on its independent conclusion that “Plaintiffs failed to prove by a preponderance of evidence that they competed with Costco for resale” of 5-hour Energy, *id.* at 7.

In the prior appeal, this Court reversed and remanded as to the section 2(d) claim. The “key issue” in that appeal was “whether Costco and the Wholesalers (both customers of Living Essentials) are ‘customers competing’ with each other as to resales of 5-hour Energy for purposes of section 2(d).” *U.S. Wholesale*, 89 F.4th at 1142. This Court held that the district court had applied the wrong standard in resolving that issue. *Id.* at 1141-47. The Court explained that, under this Court’s test from *Tri-Valley Packing*, a plaintiff establishes competition under the RPA where the plaintiff proves that “(1) one customer has outlets in ‘geographical proximity’ to those of the other; (2) the two customers ‘purchased goods of the same grade and quality from the seller within approximately the same period of time’; and (3) the two customers are operating ‘on a particular functional level such as wholesaling or retailing.’” *U.S. Wholesale*, 89 F.4th at 1142 (quoting *Tri-Valley Packing*, 329 F.2d at 708).

Applying that test, the Court first held that “the district court erred as a matter of law in concluding that, because the jury found in favor of Living

Essentials on the section 2(a) claim, the jury made an implicit factual finding that there was no competition between Costco and the Wholesalers.” *U.S. Wholesale*, 89 F.4th at 1145. The Court explained that, “to prevail on a section 2(a) claim, the Wholesalers had to show that the Wholesalers and Costco were in competition with each other, *and* that discriminatory price concessions or discounts caused a potential injury to competition.” *Id.* (emphasis added). “Therefore, in rejecting the Wholesalers’ claim, the jury could have determined that the Wholesalers and Costco were competing, but there was no potential harm to competition.” *Id.*

The Court held that the district court also “erred in holding” that “Costco was a retailer and made the vast majority of its sales to the ultimate consumer” and that “Costco and the Wholesalers did not operate at the same functional level.” *U.S. Wholesale*, 89 F.4th at 1145. The evidence shows that the vast majority of Costco Business Centers’ customers are businesses—as is true of the Wholesalers. *Id.* at 1145-46. The Court explained that, “[b]ecause the evidence shows that Costco and the Wholesalers operated at the same functional level in the same geographic area”—satisfying the first and third prongs of the *Tri-Valley Packing* inquiry—if Wholesalers also showed that they and Costco “purchased 5-hour Energy within approximately the same period of time, this confluence of facts [would be] sufficient to establish that Costco and the Wholesalers are in actual

competition with each other in the distribution of 5-hour Energy.” *Id.* at 1146 (citing *Tri-Valley Packing*, 329 F.2d at 708).

The Court therefore remanded for the district court to address “whether Costco and the Wholesalers purchased 5-hour Energy from Living Essentials ‘within approximately the same period of time’ in light of the record (the only remaining *Tri-Valley Packing* requirement), or whether the Wholesalers have otherwise proved their section 2(d) claim.” *U.S. Wholesale*, 89 F.4th at 1147-48 (quoting *Tri-Valley Packing*, 329 F.2d at 709). The Court also directed the district court to consider, if Wholesalers proved a section 2(d) violation, whether it “threatens loss or damage” so as to make them eligible for injunctive relief. *Id.* at 1147 n.7 (citing 15 U.S.C. § 26). The Supreme Court denied Living Essentials’ petition for certiorari. *Innovation Ventures, LLC v. U.S. Wholesale Outlet & Dist., Inc.*, 145 S. Ct. 141 (2024).

D. Proceedings on Remand

The district court agreed with Wholesalers concerning the primary question on remand, finding that Wholesalers and Costco had both purchased 5-hour Energy “within approximately the same period [of] time” and that Wholesalers had thus “proved they were in competition with the CBCs.” ER-8, 11 (¶¶ 12, 28). The court also found that Living Essentials “made promotional allowances to Costco that it did not make available to Plaintiffs on proportional terms.” ER-10 (¶ 22).

That conclusion was supported by findings that Living Essentials had provided Costco with \$6,572,914 in “promotional payments” while making combined payments of about \$161,000 to all seven Wholesalers. ER-9 (¶¶ 18, 19).

Adjusting for the purchasers’ respective volumes, the court determined that “[t]he promotions to Costco were worth 14.7 cents a bottle, while the promotions to Plaintiffs were worth 0.5 to 2.7 cents a bottle.” *Id.* (¶ 20). The court additionally found that Living Essentials’ payments “allowed Costco to experience a ‘sales lift’ in 5-hour Energy, and [that] Plaintiffs expected to receive a similar sales lift had Defendant[s] offered them the same promotions.” ER-10 (¶ 23).

Notwithstanding these factual findings, the district court held that Wholesalers had not established a violation of section 2(d) because they had not met an additional requirement that appears nowhere in the statute’s text, the elements of section 2(d) this Court identified in *Tri-Valley*, or this Court’s prior opinion in this case: that Wholesalers’ “‘failure to receive an advertising allowance . . . enabled [Costco] to lower [its] prices and divert sales, or that [Plaintiffs were] required to lower [their] prices to an unprofitable level in response to such low prices.’” ER-13 (¶ 35) (alterations in original) (quoting *Rutman*, 829 F.2d at 737). The district court held that demonstrating this type of injury to competition is necessary to establish a section 2(d) violation. ER-14 (¶ 40). The district court also dismissed Wholesalers’ UCL claim, holding that “where the same underlying

conduct is alleged” as the basis for antitrust and UCL violations, “the claims will rise and fall together.” ER-15 (¶ 42).

SUMMARY OF THE ARGUMENT

I. Section 2(d) of the Robinson-Patman Act seeks to protect small, independent stores from the “hopeless competitive disadvantage” they face when their chainstore competitors receive disproportionate payments from a manufacturer to support the promotion of a product. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959). The Supreme Court has made clear that, to establish a violation of section 2(d), a plaintiff need not show that the disproportionate payments had an injurious or destructive effect on competition. *Id.* at 65. Instead, a plaintiff establishes a violation by showing that two buyers of a product are in competition and that the manufacturer provided promotional support to one buyer that it did not make available on proportionally equal terms to its competitor. *Tri-Valley Packing Ass’n v. FTC*, 329 F.2d 694, 707-08 (9th Cir. 1964). A plaintiff seeking injunctive relief must further show that the violation threatened an antitrust injury of the type section 2(d) is meant to prevent. 15 U.S.C. § 26.

The district court’s unchallenged findings of fact show that Living Essentials violated section 2(d) of the RPA and threatened an antitrust injury by paying Costco Business Centers millions of dollars in promotional support for 5-hour Energy while offering vastly less support to Wholesalers. These facts show that

Living Essentials’ promotional payments to Costco were, on a per-bottle basis, 5-to-29 times greater than its payments to Wholesalers. *See* ER-9 (¶ 20). And the district court found that those payments “allowed Costco to experience a ‘sales lift’ in 5-hour Energy, and Plaintiffs expected to receive a similar sales lift had Defendant offered them the same promotions.” ER-10 (¶ 23). Because the evidence also shows that Wholesalers sold 5-hour Energy at a profit, ER-59, ER-74, the loss of the sales lift that likely resulted from the disproportionate promotional support likely resulted in lost profits—a quintessential antitrust harm. *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1296 (9th Cir. 1984) (holding that lost profits resulting from a defendant’s anti-competitive acts constitutes antitrust injury); *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 395 (8th Cir. 1987) (holding, in an RPA case, that the jury could “infer antitrust injury in the form of lost profits”). Those findings establish Wholesalers’ entitlement to injunctive relief under 15 U.S.C. § 26.

After correctly finding the facts, the district court erred as a matter of law in holding that Wholesalers *also* needed to show that Living Essentials’ “conduct threatened Plaintiffs’ ability to compete with Costco for sales of 5-hour ENERGY®” by enabling Costco “to lower [its] prices and divert sales” or by requiring Wholesalers “to lower [their] prices to an unprofitable level in response to such low prices.” ER-13 (¶ 35) (quoting *Rutman*, 829 F.2d at 737). That

conclusion conflicts with the statute’s text, this Court’s prior decision in this case, and the Supreme Court’s holding in *Simplicity Pattern*. It also improperly imports an inapposite standard from cases involving claims for damages under section 2(a).

II. The district court also erred in asserting that a claim under California’s Unfair Competition Law necessarily fails if a plaintiff fails to prove an antitrust violation. It is well established that “a business practice may be ‘unfair,’ and therefore illegal under the UCL, ‘even if not specifically proscribed by some other law.’” *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1000 (9th Cir. 2023) (quoting *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999)). Because Wholesalers in fact established a section 2(d) violation, they would prevail even under the standard articulated by the district court. But *Epic Games* makes clear that the district court should have separately assessed whether Living Essentials’ course of conduct was “unfair” even if it did not violate section 2(d).

STANDARD OF REVIEW

Wholesalers do not dispute the “Findings of Fact” in the district court’s order (paragraphs 1-23). The district court’s “Conclusions of Law,” however, are erroneous, and this Court reviews them de novo. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1136 (9th Cir. 2011). Under that standard, “Rule 52(a) does not inhibit an appellate court’s power to correct errors of law, including those that

may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.” *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). The Court likewise “review[s] de novo the legal conclusions underlying the district court’s decision” to grant or deny a permanent injunction. *Rhode v. Bonta*, 145 F.4th 1090, 1103 (9th Cir. 2025). The Court otherwise reviews that decision for abuse of discretion. *Id.*

ARGUMENT

I. The District Court’s Conclusions of Law Were Erroneous Because Its Unchallenged Factual Findings Demonstrate a Violation of Section 2(d) and Support Injunctive Relief.

A. The district court’s factual findings support an injunction prohibiting Living Essentials’ unlawful discrimination.

To prove their entitlement to an injunction, Wholesalers were required to prove the three elements of a section 2(d) violation identified in *Tri-Valley Packing* (and recently echoed in *U.S. Wholesale*), and the requirements for an injunction under 15 U.S.C. § 26. The district court’s factual findings confirm that Wholesalers satisfied their burden of proof as to both showings.

1. The facts found by the district court establish a violation of section 2(d) of the Robinson-Patman Act. As discussed above, this Court has long held that section 2(d) has “three essential elements”: it requires a showing that “(a) two or more customers of a particular seller compete with each other in the distribution of the products of that seller,” (b) the seller paid “[some]thing of value to or for the

benefit of such a customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the sale, or offering for sale,” of any of the seller’s products, and (c) the allowance was not “available on proportionally equal terms to the competing customers.” *Tri-Valley Packing Ass’n v. FTC*, 329 F.2d 694, 707-08 (9th Cir. 1964). *Tri-Valley Packing* establishes that these are section 2(d)’s *only* elements and that they, on their own, identify the discriminatory conduct that section 2(d) is meant to prevent. It is well established, including by this Court’s prior decision in this case, that section 2(d) does not additionally require a showing that the misconduct caused competitive harm. *See U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126, 1134 (9th Cir. 2023) (citing *FTC v. Simplicity Pattern*, 360 U.S. 55, 65 (1959)).

The district court’s factual findings show that Wholesalers have satisfied each of the three elements that this Court identified in *Tri-Valley*. The district court found that “Plaintiffs proved they were in competition with the [Costco Business Centers]” for the sale of 5-hour Energy. ER-11 (¶ 28). It found that Living Essentials made promotional payments to Costco of \$6,572,914 in connection with its sales of 5-hour Energy. ER-9 (¶ 18). And it found that those payments were not even remotely proportional to the substantially smaller payments, totaling roughly \$160,000, that Living Essentials made to Wholesalers

in connection with that product. *Id.* (§ 20). These findings establish precisely the type of discrimination that section 2(d) was intended to prevent: a large chainstore seller leveraging its size to obtain advantages relative to smaller sellers at the same level of distribution. The facts found by the district court thus suffice to establish a violation of section 2(d). *See U.S. Wholesale*, 89 F.4th at 1134; *Tri-Valley*, 329 F.2d at 707-08.

In elucidating the scope of the RPA, the Supreme Court has made clear that section 2(d)'s prohibition on discrimination is "absolute." *Simplicity Pattern*, 360 U.S. at 65. "The purpose of the Robinson-Patman Act was to strike down all discriminatory promotional schemes of this sort." *Clairol Inc. v. FTC*, 410 F.2d 647, 650 (9th Cir. 1969). Accordingly, proof of discriminatory conduct among competitors with respect to promotional payments suffices to establish a violation. *See Simplicity Pattern*, 360 U.S. at 65. "Unlike [section] 2(a)" claims of price discrimination, section 2(d) does not additionally "require[], as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition." *Id.* This Court's prior opinion emphasized that, while section 2(a) requires a "show[ing] that the Wholesalers and Costco were in competition with each other, *and* that the discriminatory price concessions or discounts caused a potential injury to competition," section 2(d) requires only the former showing. *U.S. Wholesale*, 89 F.4th at 1145 (emphasis added).

2. In addition to proving the elements of section 2(d), a plaintiff must demonstrate threatened or actual antitrust injury to obtain relief from the violation. Section 4 of the Clayton Act authorizes treble damages upon a showing that the plaintiff was “injured in his business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15(a). And “[i]n order to obtain injunctive relief, [a plaintiff] must prove ‘threatened loss or damage by a violation of the antitrust laws.’” *U.S. Wholesale*, 89 F.4th at 1147 n.7 (quoting 15 U.S.C. § 26). But neither of these provisions require that the injury at issue take the form of competitive harm.

Here, Wholesalers seek injunctive relief requiring Living Essentials to allow them to participate, on proportionally equal terms, in all promotional programs and payments for 5-hour Energy that Living Essentials offers to Costco—as section 2(d) requires. Accordingly, this Court in the prior appeal directed the district court on remand to “consider whether there is any violation of the antitrust laws that threatens loss or damage to the Wholesalers in light of our ruling here.” *Id.*

An antitrust injury is “an injury of the type the antitrust laws were designed to prevent.” *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). A plaintiff seeking to make such a showing must demonstrate: “(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to

prevent.” *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 456 (9th Cir. 2021) (quotation marks omitted).

The district court’s factual findings establish each of these requirements. As discussed, the “unlawful conduct” under section 2(d) is established by the court’s findings that Wholesalers and Costco are in competition and that Living Essentials made disproportionate promotional payments to Costco. *Supra*, pp. 21-22. The court’s findings also show that Wholesalers suffered harm as a result of the violation because Living Essentials’ failure to offer them proportional support likely deprived them of the “sales lift” that the CBCs enjoyed. ER-10 (§ 23). Because the evidence shows that Wholesalers sell 5-hour Energy at a profit, ER-59 & ER-74, the loss of increased sales caused them lost profits—a quintessential antitrust injury. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) (discussing lost profits as a form of damages in antitrust cases); *Los Angeles Mem’l Coliseum Comm’n v. National Football League*, 791 F.2d 1356, 1374 (9th Cir. 1986) (recognizing “lost profits caused by the antitrust violation” as a basis for damages).

Additionally, Wholesalers’ injury flows from precisely the thing that makes Living Essentials’ conduct unlawful—the “hopeless competitive disadvantage” that smaller competitors face when a supplier subsidizes the advertising costs of their larger peer, while the smaller competitors must bear their own promotional

costs. *Simplicity Pattern*, 360 U.S. at 69. Costco used its greater size to leverage disproportionate promotional support that in turn boosted its sales relative to Wholesalers'. And Living Essentials' own witness asserted that if Wholesalers had received even a small amount of additional payments from Living Essentials, they likely could increase their sales volume. *See* ER-61. The competitive disadvantage that resulted from these disproportionate payments is precisely the harm that section 2(d) was "enacted to eliminate." *Simplicity Pattern*, 360 U.S. at 69; *see Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962) ("Section 2(d) represents a Congressional determination that payments such as those made by the participating advertisers to or for the benefit of [Costco] give a firm in [Costco's] position an advantage over its competitors, especially over smaller retail firms."). The district court's findings thus demonstrate that Living Essentials' conduct threatened—and ultimately caused—precisely the type of antitrust injury that section 2(d) is meant to prevent.

The same findings confirm that traditional equitable considerations also support relief in these circumstances. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (a plaintiff seeking an injunction must demonstrate an irreparable injury without adequate remedy available at law and show that the public interest and the balance of hardships between the parties favor such relief). As discussed, the district court's findings show that Wholesalers have suffered lost

sales and profits as a result of the unlawful discrimination, and there is no suggestion that those losses can be ascertained so as to make an award of monetary damages adequate in these circumstances. *Cf., e.g., J. Truett Payne Co., Inc. v. Chrysler Motor Corp.*, 451 U.S. 557, 562-63 (1981) (explaining that damages under section 2(a) cannot simply be the amount of the price discrimination). Moreover, it is necessarily the case in the context of an established antitrust violation that the balance of hardships and the public interest strongly favor plaintiffs as an injunction requires defendants to do only what the RPA requires them to do in any event. *See Marshall v. Chala Enters., Inc.*, 645 F.2d 799, 804 (9th Cir. 1981) (“The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway to comply with the law[.]”). And such relief is needed to prevent further harm and to avoid the “evil” that Congress intended the RPA to address. *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

B. The district court legally erred by adding an additional element to section 2(d) that appears nowhere in this Court’s prior decision.

Despite making these findings, the district court refused to enjoin Living Essentials’ conduct by adding to section 2(d) an element that appears nowhere in this Court’s prior decision in this case or in any other decision. Specifically, the district court erroneously required Wholesalers to show that Living Essentials’

conduct “enabled [Costco] to lower [its] prices and divert sales [from Plaintiffs], or that [Plaintiffs were] required to lower [their] prices to an unprofitable level in response to such low prices.” ER-14 (¶ 38) (alterations in original).

The district court erred as a matter of law in adding that requirement to section 2(d). As discussed, the Supreme Court in *Simplicity Pattern* expressly held that section 2(d) “unqualifiedly” prohibits discriminatory promotional payments among competing buyers and does *not* require “a showing that the illicit practice has had an injurious or destructive effect on competition.” 360 U.S. at 65. Like *Simplicity Pattern*, this Court’s decision in *Tri-Valley Packing* sets out section 2(d)’s “three essential elements” without including any competitive harm. 329 F.2d at 707. And this Court’s prior opinion in this case nowhere suggested that Wholesalers needed to prove the type of harm the district court required. To the contrary, the Court emphasized that, while section 2(a) requires a “show[ing] that the Wholesalers and Costco were in competition with each other, *and* that the discriminatory price concessions or discounts caused a potential injury to competition,” section 2(d) requires only the former showing. *U.S. Wholesale*, 89 F.4th at 1145 (emphasis added).

Consistent with *Simplicity Pattern*, *Tri-Valley Packing*, and this Court’s prior opinion in this case, Wholesalers established a violation of section 2(d) by showing that Living Essentials made disproportionate promotional payments to

Costco, with whom Wholesalers compete. *Supra*, pp. 21-22. And Wholesalers demonstrated a threatened (or actual) antitrust injury by showing that the lack of proportional payments likely deprived them of a sales lift of the type that Costco enjoyed. *Supra*, pp. 24-25. That is enough.

The district court's error seems to arise from its apparent conflation of the showing required by section 2(d) and the distinct showing required by section 2(a). By its terms, section 2(a) of the RPA prohibits price discrimination among buyers only "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." *Simplicity Pattern*, 360 U.S. at 64 (quoting 15 U.S.C. § 13(a)). Accordingly, "one of the elements a [section 2(a)] plaintiff must show is a reasonable possibility that a price difference may harm competition." *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). "Subsections (c), (d), and (e), on the other hand," do not include similar language regarding effects on competition, and therefore "*unqualifiedly* make unlawful certain business practices other than price discriminations." *Simplicity Pattern*, 360 U.S. at 65 (emphasis added). "Unlike [section] 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition." *Id.*

Despite the clear textual difference between these provisions, the district court relied principally on *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006)—a price discrimination case brought under section 2(a). In repeating the statement from *Volvo Trucks* that “Robinson-Patman does not ban all price differences charged to different purchasers of commodities of like grade and quality” but rather “proscribes price discrimination only to the extent that it threatens to injure competition,” ER-12 (¶ 32) (quoting *Volvo*, 546 U.S. at 176), the district court applied a standard for section 2(a) price-discrimination claims that is expressly inapplicable in these circumstances. The section 2(d) claim on appeal does not involve allegations of price discrimination. And, unlike section 2(a), section 2(d) does not require proof of competitive injury—much less the “diversion of sales or profits from a disfavored purchaser to a favored purchaser” that the *Volvo* Court cited as “[a] hallmark of the requisite competitive injury” under section 2(a). ER-13 (¶ 34) (quoting *Volvo*, 546 U.S. at 177).

The district court compounded this error by taking language out of context from *Rutman*, 829 F.2d at 737. The court first cited *Rutman* for the idea that “requisite injury and damages may not be presumed from a showing of discrimination alone.” ER-13 (¶ 34). That is true to the extent that a plaintiff seeking an injunction or damages must also prove a threatened or actual injury.

Supra, p. 8. But, as the district court’s findings confirm, Wholesalers *did* prove threatened or actual injury: Living Essentials’ section 2(d) violation deprived Wholesalers of the “sales lift” from which they would have benefited had Living Essentials provided promotional support that was proportional to what Living Essentials provided to Costco. ER-10 (¶ 23). Indeed, the evidence further shows that Living Essentials’ discriminatory conduct caused potential harm to competition, as their own witness indicated that the disproportionate promotions led to a diversion of sales and that, with even a small amount of additional payments, Wholesalers likely “could get the majority of the Costco business volume back.” ER-61.³

The district court also read *Rutman* to require that Wholesalers “show ‘that the allowance enabled [Costco] to lower [its] prices and divert sales [from Plaintiffs], or that [Plaintiffs were] required to lower [their] prices to an unprofitable level in response to such low prices.’” ER-14 (¶ 38) (quoting *Rutman*, 829 F.2d at 737). *Rutman* requires no such showing. That language comes from *Rutman*’s description of *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1479-80 (10th Cir. 1985), in which the Tenth Circuit identified those

³ Had Wholesalers been required to prove potential competitive harm, it would have been clear error for the district court not to acknowledge this evidence. Section 2(d) does not require such a showing, however, and the district court did not make any finding with respect to the diversion of sales.

showings as *examples* of the type of injury that would entitle the plaintiff to damages. But neither *World of Sleep* nor *Rutman* required that the plaintiff make those specific showings.

The court’s holding in *World of Sleep* ultimately turned instead on the fact that, despite not receiving the same advertising allowance for La-Z-Boy chairs that was provided to its competitor, World of Sleep “had a dramatic success story with La-Z-Boy chairs,” including “a dramatic surge in sales” that led it to become “the second largest independent retailer of La-Z-Boy chairs in the country,” and “close to being the largest.” 756 F.2d at 1480. The court thus found that the plaintiff was not entitled to damages in that case because it had demonstrated *no injury whatsoever*, not because it failed to demonstrate the particular injury required by the district court in this case. *See id.* Indeed, requiring that specific showing in connection with a section 2(d) claim would be flatly inconsistent with *Simplicity Pattern*, *Tri-Valley*, and *U.S. Wholesale*.

To the extent the district court read *Rutman* and *World of Sleep* to require harm to competition, as opposed to harm to Wholesalers like lost sales, that is also wrong. In both cases, the plaintiffs sought damages (not injunctive relief) based entirely on the discrimination itself—not any lost sales. In *World of Sleep*, for instance, there was “no evidence that the higher price that World of Sleep paid for La-Z-Boy chairs had *any* . . . adverse impact on its activity in the marketplace.”

756 F.2d at 1480. In *Rutman*, too, the court merely rejected the plaintiff’s position that it could establish “the requisite injury and damages . . . from a showing of discrimination alone.” 829 F.3d at 737. Unlike in those cases, the district court here found that Living Essentials’ conduct deprived Wholesalers of a “sales lift” of the type Costco received. ER-20 (¶ 23).⁴

In sum, as this Court explained in the first appeal in this case, “[t]o prevail on a claim for injunctive relief under section 2(d), the plaintiff must establish that it is in competition with the favored buyer, and ‘must show a threat of antitrust injury,’ but it need not make ‘a showing that the illicit practice has had an injurious or destructive effect on competition.’” *U.S. Wholesale*, 89 F.4th at 1134 (first quoting *Cargill*, 479 U.S. at 122, and then quoting *Simplicity Pattern*, 360 U.S. at

⁴ *World of Sleep* and *Rutman* do at times refer to the need to show “competitive injury,” *World of Sleep*, 756 F.2d at 1480, or harm to the plaintiff’s “ability to compete,” *Rutman*, 829 F.2d at 737. Again, though, plaintiffs in those cases did not identify *any* harm beyond the discrimination itself. And nothing in *World of Sleep* or *Rutman* suggests that the type of lost sales—and hence lost market share—that Wholesalers proved here would not have satisfied whatever those courts meant by competitive harm. For the reasons explained above, reading those cases in a way that would make the lost “sales lift” at issue in this case insufficient would conflict with *Simplicity Pattern* and *Tri-Valley*, and also with this Court’s prior decision in this case, which emphasized that a section 2(d) plaintiff “need not make ‘a showing that the illicit practice has had an injurious or destructive effect on competition.’” *U.S. Wholesale*, 89 F.4th at 1134 (quoting *Simplicity Pattern*, 360 U.S. at 65). In any event, *Rutman*’s passing reference to harm to competition is not binding authority. See *United States v. Kirilyuk*, 29 F.4th 1128, 1134 (9th Cir. 2022) (“Prior precedent that does not ‘squarely address’ a particular issue does not bind later panels on the question.”).

65). The district court erred in requiring a different showing than the one this Court identified. Once the facts found by the district court are considered under the correct standard, there is no question that Wholesalers demonstrated both Living Essentials’ section 2(d) violation and Wholesalers’ entitlement to injunctive relief. Indeed, as discussed above, the evidence here demonstrates not only a threatened injury, but actual harm to Wholesalers in the form of lost sales and resulting profits. Living Essentials’ witness acknowledged that even minimal promotional support would likely enable Wholesalers to increase their sales volume,” *see* ER-61, thus confirming that the lack of proportional support caused—and will continue to cause—Wholesalers a direct harm.

II. The Findings of Fact Also Demonstrate a Violation of California’s UCL, Contrary to the District Court’s Conclusion of Law.

The record also shows that Living Essentials violated California’s Unfair Competition Law, which prohibits “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. Each of these three “prongs” “captures a separate and distinct theory of liability,” *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1177 (9th Cir. 2016) (quotation marks omitted), and it is well established that “a business practice may be ‘unfair,’ and therefore illegal under the UCL, ‘even if not specifically proscribed by some other law.’” *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1000 (9th Cir. 2023) (quoting *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999)).

Epic Games is dispositive here as it established that UCL liability is not foreclosed by a plaintiff's failure to prove a federal antitrust claim. 67 F.4th at 1001. Indeed, this Court has observed that “[t]he unfair prong is intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man’s invention would contrive.” *Id.* at 1000 (quotation marks omitted). In cases alleging unfairness to competitors, courts use the “‘tethering’ test, which asks whether the defendant’s conduct ‘threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.’” *Id.* (quoting *Cel-Tech*, 20 Cal. 4th at 186-87). Applying that test, the *Epic Games* Court affirmed the district court’s grant of injunctive relief under the UCL even though Epic had failed to prove any of its several theories of antitrust liability. *See id.* at 1000-02. The Court also emphasized the “California courts’ repeated instruction that no inflexible rule can be laid down as to what conduct will constitute unfair competition.” *Id.* at 1002 (alteration and quotation marks omitted).

As the foregoing shows, a plaintiff in these circumstances need not establish an antitrust violation to prove a violation of the UCL. The district court held to the contrary, asserting that “[t]he law is clear that where the same underlying conduct

is alleged to underlie a UCL claim and an RPA claim, the claims will rise and fall together.” ER-15 (¶ 42) (citing *Consumer Def. Group v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1220 (2006), and *LiveUniverse Inc. v. MySpace*, 304 Fed. App’x. 554, 557-58 (9th Cir. 2008)). Even if one ignored *Epic Games*, these cited cases involved very different allegations of harm and are inapposite here. And the facts found by the district court in any event establish a section 2(d) violation, and thus support a UCL claim, even under the district court’s erroneous standard. *See supra*, pp. 21-22.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed as to the section 2(d) and UCL claims, and the case should be remanded with directions for the district court to enter injunctive relief.

Date: October 20, 2025

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STATEMENT OF RELATED CASES

The undersigned counsel hereby states that they are unaware of any related cases currently pending in this Court.

s/ Mark Poe
Mark Poe

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the page-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 28.1-1 because it contains 8,360 words, exclusive of the parts of the brief exempted by Rule 32(f). Counsel further certifies that this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word.

s/ Mark Poe
Mark Poe

ADDENDUM

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15 U.S.C.A. § 13 – Discrimination in price, services, or facilities**(a) Price; selection of customers**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, 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, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, 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: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be

affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract 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.

(e) Furnishing services or facilities for processing, handling, etc.

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.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C.A. § 26 – Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.