APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55397

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC., et al.,
Plaintiffs-Appellants,
v.

INNOVATION VENTURES, LLC, et al.,
Defendants-Appellees.

Argued and Submitted June 7, 2022

Filed July 20, 2023

Amended December 22, 2023

Before: Ronald Lee Gilman,* Sandra S. Ikuta, and Eric D. Miller, Circuit Judges.

Order;

Opinion by Judges Miller and Ikuta**

Partial Concurrence and Partial Dissent by Judge Gilman;

Partial Dissent by Judge Miller

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* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** Judge Ikuta authored Part III.

ORDER

The Opinion filed on July 20, 2023, and published at 74 F.4th 960 (9th Cir. 2023), is amended by the opinion filed concurrently with this order. Further petitions for rehearing or rehearing en banc will not be allowed.

The panel has unanimously voted to deny appellants' petition for rehearing. Judge Ikuta and Judge Miller have voted to deny the petition for rehearing en banc, and Judge Gilman so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing or rehearing en banc is DENIED.

The majority of the panel has voted to deny appellees' petition for rehearing. Judge Miller would grant the petition for rehearing. Judge Ikuta and Judge Miller have voted to deny the petition for rehearing en banc, and Judge Gilman so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for rehearing and rehearing en banc is DENIED.

AMENDED OPINION

MILLER, Circuit Judge, as to Parts I and II:

This appeal arises out of an action under the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13b, 21a. The jury returned a verdict for the defendants, and the district court denied the plaintiffs' requested injunctive relief. The plaintiffs challenge various jury instructions as well as the denial

of injunctive relief. We affirm in part and vacate, reverse, and remand in part.

I

Living Essentials, LLC, produces 5-hour Energy, a caffeinated drink sold in 1.93-ounce bottles. Living Essentials sells 5-hour Energy to various purchasers, including wholesalers, retailers, and individual consumers.

This case concerns Living Essentials' sales of 5-hour Energy to two sets of purchasers. One purchaser is the Costco Wholesale Corporation, which purchases 5-hour Energy for resale at its Costco Business Centers—stores geared toward "Costco business members," such as restaurants, small businesses, and other retailers, but open to any person with a Costco membership. The other purchasers, whom we will refer to as "the Wholesalers," are seven California wholesale businesses that buy 5-hour Energy for resale to convenience stores and grocery stores, among other retailers. The Wholesalers allege that Living Essentials has offered them less favorable pricing, discounts, and reimbursements than it has offered Costco.

During the time period at issue here, Living Essentials charged the Wholesalers a list price of $1.45 per bottle of "regular" and $1.60 per bottle of "extra-strength" 5-hour Energy, while Costco paid a list price of ten cents per bottle less: $1.35 and $1.50, respectively. Living Essentials also provided the Wholesalers and Costco with varying rebates, allowances, and discounts affecting the net price of each bottle. For example, the Wholesalers received a 7-cent per bottle "everyday discount," a 2 percent discount for prompt payment, and discounts for bottles sold from 5-hour Energy display racks. Meanwhile, Costco

received a 1 percent prompt-pay discount; a spoilage discount to cover returned, damaged, and stolen goods; a 2 percent rebate on total sales for each year from 2015 to 2018; payments for displaying 5-hour Energy at the highly visible endcaps of aisles and fences of the store; and various advertising payments.

Living Essentials also participated in Costco's Instant Rebate Coupon (IRC) program. Under that program, Costco sent monthly mailers to its members with redeemable coupons for various products. About every other month, Costco would offer its members an IRC worth $3.60 to $7.20 per 24-pack of 5-hour Energy—a price reduction of 15 to 30 cents per bottle. The customer would redeem the IRC from Costco at the register when buying the 24-pack, and Living Essentials would reimburse Costco for the face value of the 5-hour Energy IRCs redeemed that month. Over the course of the seven-year period at issue here, Living Essentials reimbursed Costco for about $3 million in redeemed IRCs.

In February 2018, the Wholesalers brought this action against Living Essentials and its parent company, Innovation Ventures, LLC, in the Central District of California, alleging that by offering more favorable prices, discounts, and reimbursements to Costco, Living Essentials had violated the Robinson-Patman Act, which prohibits sellers of goods from discriminating among competing buyers in certain circumstances. The Wholesalers sought damages under section 2(a) of the Act and an injunction under section 2(d).

Section 2(a)—referred to as such because of its original place in the Clayton Act, *see Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006)—bars a seller from discriminating in price between competing

purchasers of commodities of like grade and quality. 15 U.S.C. § 13(a). One form of prohibited discrimination under section 2(a) is secondary-line price discrimination, "which means a seller gives one purchaser a more favorable price than another." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1187 (9th Cir. 2016). To establish secondary-line discrimination, a plaintiff must show that (1) the challenged sales were made in interstate commerce; (2) the items sold were of like grade and quality; (3) the seller discriminated in price between the disfavored and the favored buyer; and (4) "'the effect of such discrimination may be . . . to injure, destroy, or prevent competition' to the advantage of a favored purchaser." *Volvo*, 546 U.S. at 176-77, 126 S.Ct. 860 (quoting 15 U.S.C. § 13(a)). The fourth component of that test, the element at issue in this case, ensures that section 2(a) "does not ban all price differences," but rather "proscribes 'price discrimination only to the extent that it threatens to injure competition.'" *Id.* at 176, 126 S.Ct. 860 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)).

Section 2(d) makes it unlawful for a manufacturer to discriminate in favor of one purchaser by making "payment[s]" to that purchaser "in connection with the . . . sale, or offering for sale of any products . . . unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products." 15 U.S.C. § 13(d). To 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," *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986), but it need not make "a

showing that the illicit practice has had an injurious or destructive effect on competition." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959).

On summary judgment, the district court found that the Wholesalers had proved the first three elements of their section 2(a) claim—that the products were distributed in interstate commerce, of like grade and quality, and sold at different prices to Costco and to the Wholesalers. The parties proceeded to try to a jury the fourth element of section 2(a), whether there was a competitive injury, and to try to the court the section 2(d) claim for injunctive relief.

At trial, the parties focused on whether the Wholesalers and Costco were in competition. The Wholesalers introduced numerous emails from Living Essentials employees discussing the impact of Costco's pricing on the Wholesalers' sales. Additionally, they presented the testimony of a marketing expert who opined that the Wholesalers and the Costco Business Centers were in competition. The expert based that opinion on the companies' geographic proximity and on interviews he conducted in which the Wholesalers' proprietors stated that they lost sales due to Costco's lower prices. Living Essentials primarily relied on the testimony of an expert who reviewed sales data and opined that buyers of 5-hour Energy are not price sensitive and do not treat the Wholesalers and Costco Business Centers as substitutes; for that reason, he concluded that the Wholesalers and Costco Business Centers were not competitors.

The district court instructed the jury that section 2(a) required the Wholesalers to show that Living Essentials made "reasonably contemporaneous" sales to them and to Costco at different prices. The Whole-

salers objected. They agreed that the instruction correctly stated the law but argued that "[t]here is literally no evidence to suggest that Living Essentials' sales of 5-Hour Energy to Costco and Plaintiffs occurred at anything other than the same time over the entire 7-year period." The court nevertheless gave the proposed instruction, telling the jury that "[e]ach Plaintiff must prove that the sales being compared were reasonably contemporaneous." The instruction directed the jury to find for Living Essentials if it determined "that the sales compared are sufficiently isolated in time or circumstances that they cannot be said to have occurred at approximately the same time for a Plaintiff." The instruction also listed a number of factors for the jury to consider in its evaluation, such as "[w]hether market conditions changed during the time between the sales."

The district court further instructed the jury that the Wholesalers had to prove that any difference in prices could not be justified as "functional discounts" to compensate Costco for marketing or promotional functions that it performed. The Wholesalers again objected. As with the instruction on reasonably contemporaneous sales, the Wholesalers agreed that the instruction was a correct statement of the law, but they argued that there was "a complete absence of evidence" of any savings for Living Essentials or costs for Costco in performing the alleged functions justifying the discount. Rejecting that argument, the court instructed the jury that Living Essentials claimed that "its lower prices to Costco are justified as functional discounts," which the court defined as discounts "given by a seller to a buyer based on the buyer's performance of certain functions for the seller's product." The instructions explained that while the Wholesalers had "the ultimate burden to

prove that defendant's lower prices were not justified as a functional discount," Living Essentials had the burden of production and so "must present proof" that "(1) Costco actually performed the promotional, marketing, and advertising services" it claimed to perform and "(2) the amount of the discount was a reasonable reimbursement for the actual functions performed by Costco." The instructions told the jury to find for Living Essentials if it found that the price discrimination was "justified as a functional discount."

The jury returned a verdict for Living Essentials on the section 2(a) claim. The court then denied the Wholesalers' request for injunctive relief under section 2(d). The court reasoned that "the jury implicitly found no competition existed between [the Wholesalers] and Costco, and the Court is bound by that finding." In addition, the court concluded, based on its own independent review of the evidence, that the Wholesalers had "failed to prove by a preponderance of the evidence that they competed with Costco for resale" of 5-hour Energy.

II

We begin by considering the jury instructions on reasonably contemporaneous sales and functional discounts. Our standard of review of a district court's decision to give a jury instruction depends on the error that is alleged. *Yan Fang Du v. Allstate Ins. Co.*, 697 F.3d 753, 757 (9th Cir. 2012). We review legal issues de novo, including "[w]hether a district court's jury instructions accurately state the law." *Coston v. Nangalama*, 13 F.4th 729, 732 (9th Cir. 2021) (quoting *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017)). Here, however, the Wholesalers do not argue that the challenged instructions misstated the law. Instead, they argue

that the evidence did not support giving them. "Whether there is sufficient evidence to support an instruction is reviewed for abuse of discretion." *Yan Fang Du*, 697 F.3d at 757. In conducting that review, we give "considerable deference" to the district court because we recognize the "district judge's proximity to the trial and intimate knowledge of the record." *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc).

Sufficient evidence necessarily requires *some* evidence, and it has long been "settled law that it is error in the court to give an instruction when there is no evidence in the case to support the theory of fact which it assumes." *Tweed's Case*, 16 Wall. (83 U.S.) 504, 518, 21 L.Ed. 389 (1872); *see Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1101 (9th Cir. 2014). But sufficient evidence does not require convincing evidence, or even strong evidence; rather, "a party is entitled to have his theory of the case presented to the jury by proper instructions, if there be any evidence to support it." *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367, 368 (9th Cir. 1964) (emphasis added) (internal quotation marks and footnote omitted). "The district court could not have abused its discretion unless there was no factual foundation to support . . . an instruction." *Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952, 959 (9th Cir. 1998).

The question before us is whether the district court abused its wide discretion in finding that there was any foundation for giving the instructions. We conclude that it did not.

A

The Wholesalers argue that the district court abused its discretion in instructing the jury on reasonably contemporaneous sales because "there

was no legitimate dispute" that the Wholesalers carried their burden on that requirement.

To establish a prima facie case under section 2(a), a plaintiff must show that the discriminating seller made one sale to the disfavored purchaser and one sale to the favored purchaser "within approximately the same period of time." *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 807 (9th Cir. 1969) (quoting *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 709 (9th Cir. 1964)). In other words, it must establish "[t]wo or more contemporaneous sales by the same seller." *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975). That requirement ensures that the challenged price discrimination is not the result of a seller's lawful response to a change in economic conditions between the sales to the favored and disfavored purchasers. *Texas Gulf Sulphur Co.*, 418 F.2d at 806.

As we have explained, the Wholesalers do not argue that the district court's instructions on reasonably contemporaneous sales misstated the law. Instead, they contend that they so clearly carried their burden on this element that the district court should have found the element satisfied rather than asking the jury to decide it. In the Wholesalers' view, "there was no dispute . . . that [Living Essentials] had made *thousands* of contemporaneous sales to Costco and to all seven Plaintiffs."

The Wholesalers' position appears to be that when the plaintiff has the burden of proving an element of its case, a district court should decline to instruct the jury on that element if the court determines the plaintiff has proved it too convincingly. We are unaware of any authority for that proposition. To the contrary, our cases that have rejected proposed jury

instructions have done so because the party bearing the burden presented too little evidence to justify the instruction, not too much. *See*, *e.g.*, *Avila*, 758 F.3d at 1101 (affirming the denial of an instruction on a defense for which the defendant lacked evidence); *Yan Fang Du*, 697 F.3d at 758 (affirming the denial of an instruction on a theory of liability for which the plaintiff lacked evidence). If the Wholesalers believed that their evidence conclusively established liability, the appropriate course of action would have been to move for judgment as a matter of law. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 396, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006). But although the Wholesalers did move for judgment as a matter of law, they have not challenged the denial of that motion on appeal. The Wholesalers may not bypass that procedure by challenging a jury instruction on an element of their prima facie case.

Even if it could be error to instruct the jury on an element that a plaintiff obviously proved, the proof here was far from obvious. The Wholesalers might be right that the evidence established reasonably contemporaneous sales, but during the trial, they did not explain how it did so. In their written objection to the instructions, the Wholesalers stated that "[t]here is literally no evidence to suggest" that the compared sales were not contemporaneous, and in their oral objection, they similarly declared that there was "no dispute" on the issue. The first and last time the Wholesalers mentioned the requirement to the jury was during closing argument, when they said that the "[t]he sales were made continuously to Costco and to plaintiffs over the entire seven years." Despite those confident assertions, the Wholesalers did not direct the district court to any evidence to substantiate their claim.

The Wholesalers did not point to any evidence of reasonably contemporaneous sales until their post-trial motion for judgment as a matter of law. Because that motion was not available to the district court when the court instructed the jury, it cannot be a basis for concluding that the court abused its discretion. In any event, the motion did not clearly identify any reasonably contemporaneous sales. Instead, the Wholesalers merely referred to Exhibit 847, a series of spreadsheets introduced by Living Essentials that spans more than 100,000 cells cataloguing seven years' worth of Living Essentials' sales to all purchasers, including Costco and the Wholesalers. The motion presented a modified version of that exhibit that included only Living Essentials' sales to Costco and the Wholesalers, omitting sales to other purchasers. But that (relatively) pared-down version—itself more than 200 pages long—was never presented to the jury. Even that version is hardly self-explanatory, and the Wholesalers made little effort to explain it: They did not point to any specific pair of sales that were reasonably contemporaneous.

Indeed, even on appeal, the Wholesalers have not identified any pair of sales that would satisfy their burden. The most they have argued is that the column entitled "Document Date" reflects the date of the invoice, so in their view the spreadsheets speak for themselves in showing "thousands of spot sales to Costco and Plaintiffs." At no time have the Wholesalers shown that there were two or more sales between Living Essentials and both Costco and *each* plaintiff that were reasonably contemporaneous such that changing market conditions or other factors did not affect the pricing. *See Rutledge*, 511 F.2d at 677; *Texas Gulf Sulphur Co.*, 418 F.2d at 806.

The Wholesalers complain that they are being unfairly faulted for not more thoroughly arguing "the incorrectly instructed point to the jury." That complaint reflects a misunderstanding of their burden. To take the issue away from the jury, it was the Wholesalers' burden to make—and support—the argument that the sales were reasonably contemporaneous. Perhaps, when it developed the jury instructions, the district court could have reviewed all of the evidence, located Exhibit 847 (the full version, not the more focused one the Wholesalers submitted later), and then identified paired transactions for each Wholesaler from the thousands upon thousands of cells it contained. But "a district court is not required to comb the record" to make a party's argument for it. *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting *Forsberg v. Pacific Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)). There may have been a needle—or even many needles—in the haystack of sales data. It was not the district court's job to hunt for them.

Significantly, the district court identified factors that might have influenced the pricing between sales, including that "the overall sales of 5-hour Energy in California were declining." That trend could potentially explain why two differently priced sales resulted from "diverse market conditions rather than from an intent to discriminate." *Texas Gulf Sulphur Co.*, 418 F.2d at 806. The timing of the disputed sales is unclear, so it could be that the Wholesalers bought the product during periods of higher market pricing that Costco avoided. The possibility that sales were not reasonably contemporaneous has "some foundation in the evidence," and that is enough. *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 210 (9th

Cir. 1994). With only the Wholesalers' conclusory assertions, an unexplained mass of spreadsheets, and Living Essentials' evidence of changing market conditions before it, the district court did not abuse its discretion in instructing the jury on this disputed element of the Wholesalers' prima facie case.

B

The Wholesalers next argue that the district court abused its discretion in giving the functional-discount instruction.

The Supreme Court has held that when a purchaser performs a service for a supplier, the supplier may lawfully provide that purchaser with a "reasonable" reimbursement, or a "functional discount," to compensate the purchaser for "its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier." *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 562, 571 n.11, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990). For example, the Court has held that a "discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act." *Id.* at 571, 110 S.Ct. 2535.

Separately, the Robinson-Patman Act contains a statutory affirmative defense for cost-justified price differences, or "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery." 15 U.S.C. § 13(a). The functional-discount doctrine is different because it requires only a "reasonable," not an exact, relationship between the services performed and the discounts given. *Hasbrouck*, 496 U.S. at 561 & n.18, 110 S.Ct. 2535. Also, in contrast to the cost-justification defense, it is the plaintiff's burden to prove that the price discrimination was not the result of a lawful functional

discount. *Id.* at 561, 110 S.Ct. 2535 n.18. But the doctrine applies "[o]nly to the extent that a buyer *actually* performs certain functions, assuming all the risk, investment, and costs involved." *Id.* at 560-61, 110 S.Ct. 2535. And it does not "countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs." *Id.* at 563, 110 S.Ct. 2535.

The Wholesalers do not dispute that the jury instructions accurately stated the law governing functional discounts. Instead, they argue that the district court should not have given a functional-discount instruction because the doctrine does not apply "as between favored and disfavored wholesalers" and because the discounts given to Costco bore no relationship to Living Essentials' savings or Costco's costs in performing the alleged functions. We find neither argument persuasive.

The Wholesalers are correct that selective reimbursements may create liability for the supplier under section 2(d) if the supplier fails to offer them "on proportionally equal terms to all other" competing purchasers. 15 U.S.C. § 13(d). Nevertheless, purchasers at the same level of trade may receive different functional discounts if they perform different functions. A functional discount may compensate a purchaser for "assuming all the risk, investment, and costs involved" with "perform[ing] certain functions," *Hasbrouck*, 496 U.S. at 560-61, 110 S.Ct. 2535, and "[*e*]*ither* because of this additional cost *or* because competing buyers do not function at the same level," James F. Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 934 (1985) (emphasis added), a functional discount "negates the probability of competitive injury, an

element of a prima facie case of violation," *Hasbrouck*, 496 U.S. at 561 n.18, 110 S.Ct. 2535 (quoting Rill, *supra*, at 935). Conversely, even where customers do operate at different levels of trade, a discount may violate the Robinson-Patman Act if it does not reflect the cost of performing an actual function. *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1987) ("Where . . . the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function, ... a plaintiff may assert a cause of action against the seller even though he and the favored customer operate at different market levels."), *aff'd*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990).

In all section 2(a) cases, a plaintiff "ha[s] the burden of proving . . . that the discrimination had a prohibited effect on competition." *Hasbrouck*, 496 U.S. at 556, 110 S.Ct. 2535. To the extent that a "legitimate functional discount," *id.* at 561, 110 S.Ct. 2535 n.18, compensates a buyer for "*actually* perform[ing] certain functions, assuming all the risk, investment, and costs involved," *id.* at 560, 110 S.Ct. 2535 (citation omitted), no such effect can be shown.

Here, the competitive-injury element was the subject of dispute at trial. Because Living Essentials offered evidence that it compensated Costco for performing certain functions and assuming certain risks (which would eliminate a competitive injury), the Wholesalers had the burden of showing that those functions and risks did not justify the discounted price that Costco received—whether or not Costco and the Wholesalers were at the same level of trade.

The Wholesalers also argue that even if the functional-discount instruction was legally available

to Living Essentials, the district court still abused its discretion in giving the instruction because there was no foundation in the evidence to support it. In fact, Living Essentials presented evidence that Costco performed several marketing and other functions that could have been compensated for by a functional discount. For example, Costco promoted 5-hour Energy by giving the product prime placement in aisle endcaps and along the fence by the stores' entrances; it created and circulated advertisements and mailers; it provided delivery and online sales for 5-hour Energy; and it contracted for a flat "spoilage allowance" rather than requiring Living Essentials to deal with spoilage issues as they arose. In addition to providing those services, Costco allowed Living Essentials to participate in its IRC program, in which Costco sent out bi-monthly mailers with coupons for 5-hour Energy, among other products, to its members. The member would redeem the coupon at the register, and Costco would advance the discount to the buyer on behalf of Living Essentials, record the transaction, and then collect the total discount from Living Essentials at the end of each period.

Living Essentials testified that Costco received "allowance[s]" in relation to its placement services because Costco was "performing a service for us." As to Costco's advertising and IRC services, Living Essentials testified that they allowed it to reach some 40 million Costco members, whom it could not otherwise reach "with one payment." Finally, in the case of the spoilage discount, Living Essentials explained that by providing a flat, upfront discount in exchange for Costco's assumption of the risk of loss and spoilage, Living Essentials avoided having to negotiate case-by-case with Costco over product loss.

The Wholesalers argue that the functional discount defense is unavailable because Living Essentials separately compensated Costco for promotional, marketing, and advertising services, so "the entirety of the price-gap cannot be chalked up to a unitary 'functional discount.'" They cite spreadsheets showing that Costco was paid for endcap promotions, advertising, and IRCs. But those spreadsheets do not show that Living Essentials' separate payments to Costco fully compensated it for those services. They therefore do not foreclose the possibility that some additional discount might have reflected reasonable compensation for the services.

More generally, the Wholesalers argue that even if Costco's services were valuable, "Living Essentials introduced zero evidence that its lower prices to Costco bore any relationship to either" Living Essentials' savings or Costco's costs. In fact, there is evidence in the record from which it is possible to infer such a relationship. For instance, Living Essentials presented testimony that Costco's performance of advertising functions—especially the 40-million-member mailers as well as endcap and fence placement programs—gave it "a tremendous amount of reach and awareness," which Living Essentials would otherwise have had to purchase separately. The record thus supported the conclusion that Living Essentials provided Costco "a functional discount that constitutes a reasonable reimbursement for [its] actual marketing functions." *Hasbrouck*, 496 U.S. at 571, 110 S.Ct. 2535.

To be sure, the evidence did not establish a particularly precise relationship between the discounts and Costco's services, and it was open to the Wholesalers to argue that the discounts were so "untethered to either the supplier's savings or the wholesaler's

costs" as not to qualify as functional discounts. *Hasbrouck*, 496 U.S. at 563, 110 S.Ct. 2535. But it was the jury's role, not ours, to decide which party had the better interpretation of the evidence. The only question before us is whether the district court abused its discretion in determining that there was enough evidence to justify giving an instruction on functional discounts. Because at least some evidence supported the instruction, we conclude that there was no abuse of discretion.

The Wholesalers separately argue that the district court erred in denying their pre-verdict motion for judgment as a matter of law to exclude the functional-discount defense. Because the Wholesalers did not renew that argument in their post-verdict motion under Federal Rule of Civil Procedure 50(b), they failed to preserve the issue for appeal. *See Crowley v. Epicept Corp.*, 883 F.3d 739, 751 (9th Cir. 2018) (per curiam).

III

Finally, the Wholesalers challenge the district court's denial of injunctive relief under section 2(d). We review the district court's legal conclusions de novo and its factual findings under the clear-error standard. *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1212 (9th Cir. 2019). We review the denial of a permanent injunction under the abuse-of-discretion standard. *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016).

A

Under section 2(d), it is unlawful for a seller to pay "anything of value to or for the benefit of a customer" for "any services or facilities furnished by or through such customer in connection with the . . . sale" of the products unless the payment "is available on propor-

tionally equal terms to all other customers competing in the distribution of such products." 15 U.S.C. § 13(d); *Tri-Valley Packing Ass'n*, 329 F.2d at 707-08. In enacting the Robinson-Patman Act, "Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chainstores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand." *Volvo*, 546 U.S. at 175, 126 S.Ct. 860 (citing 14 HERBERT HOVENKAMP, Antitrust Law ¶ 2302 (2d ed. 2006)). In other words, 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.[1]

The key issue in this case is 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). The FTC has interpreted the statutory language in section 2(d) to mean that customers are in competition with each other when they "compete in the resale of the seller's products of like grade and quality at the same functional level of distribution." 16 C.F.R. § 240.5.[2]

Our interpretation of "customers competing," as used in 15 U.S.C. § 13(d), is consistent with the FTC's.

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[1] To avoid confusion, we refer to the seller or supplier of a product as the "seller," the seller's customers as "customers," and those who buy from the seller's customers as "buyers."

[2] Although the FTC Guides that "provide assistance to businesses seeking to comply with sections 2(d) and 2(e)," 16 C.F.R. § 240.1, do not have the force of law, "we approach the [Guides] with the deference due the agency charged with day-to-day administration of the Act," *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968).

We have held that, to establish that "two customers are in general competition," it is "sufficient" to prove 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." *Tri-Valley Packing Ass'n*, 329 F.2d at 708. Under these circumstances, "[a]ctual competition in the sale of the seller's goods may then be inferred." *Id.*; *see also Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692-93 (5th Cir. 2003) (holding that "[t]he competitive nexus is established if the disfavored purchaser and favored purchaser compete at the same functional level and within the same geographic market at the time of the price discrimination," which indicates that each customer is "directly after the same dollar") (citing *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975) (internal quotation marks omitted)). We reasoned that this interpretation was consistent with "the underlying purpose of section 2(d)," which is to "require sellers to deal fairly with their customers who are in competition with each other, by refraining from making allowances to one such customer unless making it available on proportionally equal terms to the others." *Tri-Valley Packing Ass'n*, 329 F.2d at 708. Because sellers, in order to avoid violating section 2(d), must "assume that all of their direct customers who are in functional competition in the same geographical area, and who buy the seller's products of like grade and quality within approximately the same period of time, are in actual competition with each other in the distribution of these products," courts must make the same assumption

of competition "in determining whether there has been a violation." *Id.* at 709.[3] Applying this rule, *Tri-Valley* held that two wholesalers that received canned goods from the same supplier and sold them in the same geographical area would be in "actual competition" if the wholesalers had purchased the canned goods at approximately the same time. If this final criterion were met, then "a section 2(d) violation would be established" because the canned-good supplier gave one wholesaler a promotional allowance, but did not offer the same allowance to the other wholesaler. *Id.*

In considering the third prong of the *Tri-Valley* test—whether the two customers are operating "on a particular functional level such as wholesaling or retailing," *id.* at 708—we ask whether customers are actually functioning as wholesalers or retailers with respect to resales of a particular product to buyers, regardless of how they describe themselves or their activities. *See Alterman Foods, Inc. v. FTC*, 497 F.2d 993, 999 (5th Cir. 1974) (upholding the FTC's determination that two customers were "functional competitor[s]" on the wholesale level based on market realities); *see also Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 214 (3d Cir. 2007) ("[T]he relevant question is whether two companies are in 'economic

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[3] The "direct customer" requirement in *Tri-Valley* no longer remains good law after *Fred Meyer*, in which the Supreme Court held that a seller's duty to provide proportionately equal promotional services or facilities, or payment thereof, extends downstream to buyers competing with each other at the same functional level, even if one set of buyers purchases directly from the defendant while another set purchases through intermediaries. *See* 390 U.S. at 352-53, 88 S.Ct. 904; *see also Tri Valley Growers v. FTC*, 411 F.2d 985, 986 (9th Cir. 1969) (per curiam).

reality acting on the same distribution level,' rather than whether they are both labeled as 'wholesalers' or 'retailers.'") (citation omitted).

In listing the factors to consider in determining whether customers are competing, *Tri-Valley* did not include the manner in which customers operate. It makes sense that operational differences are not significant in making this determination, given that the Robinson-Patman Act was enacted to protect small businesses from the harm to competition caused by the large chain stores, notwithstanding the well-understood operational differences between the two. *See*, *e.g.*, *Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148, 160 (2d Cir. 2004) (explaining that chain stores have a more integrated distribution apparatus than smaller businesses and are able to "undersell their more traditional competitors"). Thus, courts have indicated that potential operational differences are not relevant to determining whether two customers compete for resales to the same group of buyers. In *Simplicity Pattern Co.*, the Supreme Court held that competition in the sale of dress patterns existed between variety stores that "handle and sell a multitude of relatively low-priced articles," and the more specialized fabric stores, which "are primarily interested in selling yard goods" and handled "patterns at no profit or even at a loss as an accommodation to their fabric customers and for the purpose of stimulating fabric sales." 360 U.S. at 59-60, 79 S.Ct. 1005. The Court noted that the manner in which these businesses offered the merchandise to buyers was different, because the variety stores "devote the minimum amount of display space consistent with adequate merchandising—consisting usually of nothing more than a place on the counter for the catalogues, with the patterns themselves stored underneath the

counter," while "the fabric stores usually provide tables and chairs where the customers may peruse the catalogues in comfort and at their leisure." *Id.* at 60, 79 S.Ct. 1005. Nevertheless, the Court held there was no question that there was "actual competition between the variety stores and fabric stores," given that they were selling an "identical product [patterns] to substantially the same segment of the public." *Id.* at 62, 79 S.Ct. 1005.

Similarly, in *Feesers*, the "different character" of two businesses that bought egg and potato products from a food supplier did not affect the analysis of whether they were in actual competition. 498 F.3d at 214 n.9. Although the businesses operated and interacted with their clients in different ways—one was a "full line distributor of food and food related products" while the other was a "food service management company"—the court held that "[t]he threshold question is whether a reasonable factfinder could conclude [the two customers] directly compete for resales [of the food supplier's] products among the same group of [buyers]." *Id.*; *see also Lewis v. Philip Morris Inc.*, 355 F.3d 515, 531-32 (6th Cir. 2004) (noting that there was a genuine dispute of material fact as to whether companies that use vending machines to resell cigarettes were in actual competition with convenience stores for the resale of cigarettes to smokers under the Robinson-Patman Act).

An assumption underlying the *Tri-Valley* framework is that two customers in the same geographic area are competing for resales to the same buyer or group of buyers. However, the Supreme Court has identified an unusual circumstance when that assumption does not hold true and customers who resell the same product at the same functional level in the same geographic area are not in competition

because they are not reselling to the same buyer. *See Volvo*, 546 U.S. at 175, 126 S.Ct. 860; *see also* 14 PHILLIP E. AREEDA & HERBERT HOVENKAMP, Antitrust Law ¶ 2333 (4th ed. 2019) (noting that the holding in *Volvo* regarding the same buyer is "quite narrow," and would "appear not to apply in the typical 'chain store' situation where dealers [ ] actually purchase and carry substantial inventories" for sale to all comers).

In *Volvo*, Volvo dealers (customers of Volvo, the car manufacturer and seller) resold trucks through a competitive bidding process, where retail buyers described their specific product requirements and invited bids from selected dealers of different manufacturers. 546 U.S. at 170, 126 S.Ct. 860. Only after a Volvo dealer was invited to bid did it request discounts or concessions from Volvo as part of preparing the bid. *Id.* Volvo dealers typically did not compete with each other in this situation.[4] Because the plaintiff in *Volvo* (a Volvo dealer) could not show that it and another Volvo dealer were invited by the same buyer to submit bids, there was no competition between Volvo dealers, and therefore no section 2(a) violation (which requires competition and potential competitive injury). *Id.* Moreover, because the plaintiff did not ask for price concessions from Volvo until after the buyer invited it to bid, *id.*, (and no other Volvo dealer had been invited to bid, *id.* at 172, 126 S.Ct. 860) there could be no section 2(a) violation, *id.* at 177, 126 S.Ct. 860. Recognizing that the fact pattern in *Volvo* was different from a traditional Robinson-Patman Act "chainstore paradigm" case,

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[4] In the rare occasions when the same buyer solicited a bid from more than one Volvo dealer, Volvo's policy was "to provide the same price concession to each dealer competing head-to-head for the same sale." *Id.* at 171, 126 S.Ct. 860.

where large chain stores were competing with small businesses for buyers, *id.* at 178, 126 S.Ct. 860, the Court "declin[ed] to extend Robinson-Patman's governance" to cases with facts like those in *Volvo*, *id.* at 181, 126 S.Ct. 860; *see also Feesers*, 498 F.3d at 214 (suggesting that there may be no actual competition where customers are selling to "two separate and discrete groups" of buyers).

B

We now turn to the question whether Costco and the Wholesalers were in actual competition.

It is undisputed that Costco and the Wholesalers were customers of Living Essentials and purchased goods of the same grade and quality. Further, the district court found that the Wholesalers' businesses were in geographic proximity to the Costco Business Centers, the only outlets that sold 5-hour Energy. It held that there "was at least one Costco Business Center in close proximity to each of the [Wholesalers] or their customers." Living Essentials and Judge Miller's dissent seemingly argue that this finding is clearly erroneous, because the maps in the record are ambiguous and the Wholesalers' expert, Dr. Frazier, is unreliable, because he "did not calculate the distance or drive time[s] between the stores" and did not conduct customer surveys. We disagree. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Therefore, we defer to the district court's fact-finding notwithstanding the alleged ambiguity in the evidence. Further, the district court could reasonably reject Living Essentials' critique of Dr. Frazier's methodology.

We next consider whether Costco and the Wholesalers operated at different functional levels with respect to resales of 5-hour Energy. The district court found that they did operate at different functional levels, and therefore competed for different customers of 5-hour Energy. In so holding, the district court abused its discretion because its ruling was based on both legal and factual errors.[5]

First, 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. As we have explained, 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. 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. Because the jury did not necessarily find that the Wholesalers and Costco were not competing, the district court erred by holding that the jury had made an implicit finding of no competition.[6]

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[5] The Wholesalers do not challenge the district court's holding that they are judicially estopped from seeking an injunction on the ground that the IRCs are promotional services in connection with resale under section 2(d). Therefore, any challenge to this finding is waived, and potential injunctive relief under section 2(d) excludes relief related to IRCs. *See Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992).

[6] Contrary to Living Essentials' assertion, the Wholesalers did not waive this argument. Although a party that agrees to the use of a general verdict form waives a future challenge

Second, the district court erred in holding that Costco and the Wholesalers did not operate at the same functional level. The district court stated that Costco was a retailer and made the vast majority of its sales to the ultimate consumer. This finding is unsupported by the record, which contains no evidence that Costco sold 5-hour Energy to consumers. Rather, the evidence supports the conclusion that Costco sold 5-hour Energy to retailers. First, Living Essentials' Vice President of Sales, Scott Allen, testified that from 2013 to 2016, only Costco Business Centers, which target retailers, and not regular Costco stores, which target consumers, carried 5-hour Energy. Another Living Essentials employee, Larry Fell, testified that 90 percent of all Costco Business Center clients were businesses, and that Costco Business Centers targeted mom-and-pop convenience stores and small grocery stores. Allen also testified that Costco Business Centers sold 5-hour Energy in 24-packs, which Living Essentials packages for sale to businesses rather than to consumers. This evidence supports the conclusion that Costco sold 24-packs of 5-hour Energy to retailers, and there is no evidence supporting the district court's conclusion that Costco sold 5-hour Energy to consumers. Therefore, as a matter of "economic reality," both Costco and the Wholesalers were wholesalers of 5-hour Energy. The district court clearly erred by holding otherwise.

Because the evidence shows that Costco and the Wholesalers operated at the same functional level in

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to the verdict as insufficiently specific, *see*, *e.g.*, *McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir.), *opinion amended on other grounds on denial of reh'g*, 885 F.2d 650 (9th Cir. 1989), the Wholesalers do not raise such a challenge. Rather, the Wholesalers argue that the district court made a legal error in interpreting the verdict, and that argument is not waived.

the same geographic area, if the Wholesalers and Costco purchased 5-hour Energy within approximately the same period of time, this confluence of facts is sufficient to establish that Costco and the Wholesalers are in actual competition with each other in the distribution of 5-hour Energy. *See Tri-Valley Packing Ass'n*, 329 F.2d at 708.

C

Judge Miller's dissent argues that Costco and the Wholesalers are not in actual competition because they did not compete in the resales of 5-hour Energy to the same buyers. The dissent bases this argument on evidence in the record that Costco and the Wholesalers had "substantial differences in operations" and that buyers did not treat Costco and the Wholesalers as substitute supply sources of 5-hour Energy. We disagree with both arguments.

First, the differences in operations that Judge Miller's dissent cites, such as differences in the availability of in-store credit, negotiated prices, or different retail-oriented accessories such as 5-hour Energy display racks, are not relevant to determining whether Costco and the Wholesalers are "customers competing" under 15 U.S.C. § 13(d). As explained above, customers may compete for purposes of section 2(d) even if they operate in different manners. *Cf. Simplicity Pattern Co.*, 360 U.S. at 59-62, 79 S.Ct. 1005 (holding that a variety store and a specialized fabric store were in competition for the sale of clothing patterns even though they carried different inventories and presented the merchandise in different manners). Our sister circuits have taken a similar approach. *See Feesers*, 498 F.3d at 214 n.9 (holding that, for purposes of determining whether two businesses were in competition, it was irrelevant

that one was "a full line distributor of food and food related products" and the other was a "food service management company," with very different operations); *see also Lewis*, 355 F.3d at 531-32 (holding that companies using vending machines to resell cigarettes can be in competition with convenience stores that resell cigarettes); *Innomed Labs*, 368 F.3d at 160 (holding that chain stores in competition with smaller businesses often offer lower prices than smaller businesses).

In addition to precedent, FTC guidance indicates that customers are in competition with each other when they "compete in the resale of the seller's products of like grade and quality at the same functional level of distribution," regardless of the manner of operation. 16 C.F.R. § 240.5. For example, a discount department store may be competing with a grocery store for distribution of laundry detergent. *See id.* (Example 3).

Second, Judge Miller's dissent argues that Costco and the Wholesalers may not be in actual competition because it is not clear they sold to the same buyers. In making this argument, the dissent and Living Essentials primarily rely on Living Essentials' economic expert, Dr. Darrel Williams, who testified that Costco and the Wholesalers were not in competition because their buyers did not treat Costco and the Wholesalers as substitute supply sources. Dr. Williams based this conclusion on evidence that the Wholesalers' buyers continued to purchase 5-hour Energy from the Wholesalers regardless of changes in relative prices between the Wholesalers and Costco. This argument fails, however, because the question whether one business lost buyers to another does not shed light on whether the businesses are in competition, but only

on whether there has been an injury to competition. *See Lewis*, 355 F.3d at 531-32 (holding that to establish that two businesses are in competition, the plaintiff is not required to show that the seller's discrimination between the businesses caused buyers to switch to the favored business, because evidence of customer switching "goes to injury, and the element at issue on this appeal is the existence, not the amount of damage to, competition"); *see also Volvo*, 546 U.S. at 177, 126 S.Ct. 860 (determining that the "hallmark" of competitive injury is the diversion of sales). Therefore, Dr. Williams's testimony about a lack of switching between Costco and the Wholesalers does not undermine the Wholesalers' claim that they are in competition with Costco for resales of 5-hour Energy.

Finally, Judge Miller's dissent relies on *Volvo* for the argument that even when the criteria in *Tri-Valley* are met for actual competition, a seller can show that the two customers are not in actual competition because "markets can be segmented by more than simply functional level, geography, and grade and quality of goods." But *Volvo* is inapposite. In *Volvo*, the customers (Volvo dealers) did not offer the same product to buyers in the same geographical area (*i.e.*, the *Tri-Valley* scenario). Rather, it was the buyer who chose the customers from whom it solicited bids for a possible purchase. Since the buyer at issue in *Volvo* did not solicit bids from competing Volvo dealers, they were not in competition, and so a section 2(a) violation was not possible. In short, *Volvo* tells us that there may be circumstances where the evidence shows that each customer is selling to a "separate and discrete" buyer, as in *Volvo*, or to a separate and discrete group of buyers, eliminating

the possibility of competition between customers. But there is no evidence supporting such a conclusion here. Instead, this case is a typical chainstore-paradigm case where the Wholesalers and Costco carried and resold an inventory of 5-hour Energy to all comers.

Because the district court erred by finding that Costco and the Wholesalers operated at different functional levels and competed for different customers with respect to 5-hour Energy, it abused its discretion in denying injunctive relief to the Wholesalers on that basis.[7] *See Or. Coast Scenic R.R.*, 841 F.3d at 1072. We therefore vacate the district court's holding as to section 2(d) and reverse and remand for the district court to consider 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* requirement), *Tri-Valley Packing Ass'n*, 329 F.2d at 709, or whether the Wholesalers have otherwise proved their section 2(d) claim.

AFFIRMED IN PART; VACATED, REVERSED, AND REMANDED IN PART.[8]

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[7] In order to obtain injunctive relief, the Wholesalers must prove "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. Because the district court concluded that the Wholesalers could not prove they were in competition with Costco, it held that they could not prove an antitrust injury. On remand, the district court should consider whether there is any violation of the antitrust laws that threatens loss or damage to the Wholesalers in light of our ruling here.

[8] Each party to bear its own costs on appeal.

GILMAN, Circuit Judge, concurring in part and dissenting in part:

Contrary to the majority's decision, I am of the opinion that the district court abused its discretion in giving the "reasonably contemporaneous" instruction to the jury. I would therefore reverse the judgment of the court and remand for a new trial on the Wholesalers' Section 2(a) claim with a properly instructed jury. On the other hand, I agree with the majority that the court did not abuse its discretion in giving the "functional discount" jury instruction. Finally, I agree with the majority that the court abused its discretion in finding that Costco and the Wholesalers operated at different functional levels. In sum, I concur in vacating the court's denial of the Wholesalers' Section 2(d) claim for injunctive relief and would go further in granting a new trial on the Wholesalers' Section 2(a) claim.

The Wholesalers' secondary-line price-discrimination claim under Section 2(a) requires them to show that: (1) the challenged sales were made in interstate commerce; (2) the items sold were of like grade and quality; (3) the defendant-seller discriminated in price between favored and disfavored purchasers; and (4) "'the effect of such discrimination may be . . . to injure, destroy, or prevent competition' to the advantage of a favored purchaser." *Volvo Trucks N. Am, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176-77, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006) (quoting 15 U.S.C. § 13(a)).

Secondary-line price discrimination is unlawful "only to the extent that the differentially priced product or commodity is sold in a 'reasonably comparable' transaction." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1188 (9th Cir. 2016) (citing *Tex. Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d

793, 807 (9th Cir. 1969)). To be reasonably comparable, the transactions in question must, among other things, occur "within approximately the same period of time," such that the challenged price discrimination is not a lawful response to changing economic conditions. *Tex. Gulf Sulphur*, 418 F.2d at 807 (quoting *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 709 (9th Cir. 1964)); *see also England v. Chrysler Corp.*, 493 F.2d 269, 272 (9th Cir. 1974) (observing that the "reasonably contemporaneous" requirement "serves the purposes of the [Robinson-Patman] Act" by helping to ensure that price differentials "have some potential for injuring competition"). A plaintiff must show at least two contemporaneous sales by the same seller to a favored purchaser and a disfavored purchaser to make a Section 2(a) claim. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1191 (9th Cir. 1984) (citing, *inter alia*, *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 547 (9th Cir. 1983), *overruled on other grounds as recognized in Chrona Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 657 (9th Cir. 1997)).

The Wholesalers challenge as discriminatory thousands of sales of 5-Hour Energy that Living Essentials made to Costco over the course of seven years. Living Essentials also made thousands of sales to the Wholesalers over the same time period, many of which occurred on the very same day as sales to Costco. Trial Exhibit 847, a spreadsheet of all of Living Essentials' sales during the relevant time period, documents each of these transactions (approximately 95,000 transactions in total).

Although the spreadsheet is extensive, it is fairly self-explanatory, not an "unexplained mass" as it is characterized by the majority. Each transaction appears on a separate line, with the date, the name of the buyer, the type of buyer ("wholesaler" or "Costco,"

for example), the number of bottles purchased, and the price all clearly indicated. This evidence establishes that thousands of sales to Costco and to the Wholesalers occurred in close proximity over the course of the entire seven-year period, which more than satisfies the Robinson-Patman Act's requirement that the challenged sales be reasonably contemporaneous. *Cf. Airweld*, 742 F.2d at 1192 ("Airweld never proved when the sales actually occurred and therefore that they were contemporaneous to its purchases.").

Yet the majority concludes that the Wholesalers failed to meet their burden to establish contemporaneous sales because they "did not direct the district court to any evidence to substantiate their claim" until their post-trial motion for judgment as a matter of law, and even then the Wholesalers failed to "clearly identify any reasonably contemporaneous sales." The majority concedes that "[t]here may have been a needle—or even many needles—in the haystack of sales data." But the majority concludes that "[i]t was not the district court's job to hunt for them." In fact, however, there were many thousands of needles (contemporaneous sales data) in the evidentiary haystack of Trial Exhibit 847, so the court did not have to "hunt for them"—the data was staring the court in the face for all to see.

Moreover, by focusing only on whether the Wholesalers "identified any pair of sales that would satisfy their burden," the majority fails to account for the full record in the trial court. The comprehensive sales data was referenced frequently at trial—indeed it was the centerpiece of much of the proceedings. To offer just one example, Living Essentials' expert witness, Dr. Williams, engaged in an extensive analysis of the "sales data" by "look[ing] at every single day between 2012 and 2018."

In light of this evidence, I see no justification to characterize the transactions in this case as anything other than reasonably contemporaneous. And I am not aware of any authority supporting the proposition that the sufficiency of the evidence for a jury instruction turns on how thoroughly counsel discussed certain evidence at trial, so long as it is properly admitted (which is the case here). Nor did Living Essentials offer any contrary evidence to place the issue back in dispute. In other words, giving the contemporaneous-sales instruction was unwarranted because the Wholesalers introduced unrefuted evidence that the sales were in fact contemporaneous. *Cf. Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952, 959 (9th Cir. 1998) ("The district court could not have abused its discretion unless there was no factual foundation to support . . . an instruction."). As the Wholesalers rightly pointed out, "[t]here is literally no evidence to suggest that Living Essentials' sales of 5-Hour Energy to Costco and Plaintiffs occurred at anything other than the same time."

The majority disagrees, holding that the district court properly ruled that the price differential could be explained (and therefore rendered lawful) by the fact that sales of 5-Hour Energy were declining overall. They further speculate that the Wholesalers might have "bought the product during periods of higher market pricing that Costco avoided." But declining overall sales is a market condition that would have affected all purchasers for resale and, more importantly, the price differential remained consistent throughout the seven-year period over which the Wholesalers and Costco bought 5-Hour Energy from Living Essentials. The record provides no basis to support the proposition that fluctuations in demand could account for price differentials between transactions that occurred on the same day.

Parties are "entitled to an instruction about [their] theory of the case if it is supported by law and has foundation in the evidence." *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009) (quoting *Dang v. Cross*, 422 F.3d 800, 804-05 (9th Cir. 2005)); *see also Mayflower Ins. Exch. v. Gilmont*, 280 F.2d 13, 16 (9th Cir. 1960) (holding that when "no evidence warrant[s] the giving of the instruction in question[,] the giving of that instruction must be held to be error"). Faced with the evidence outlined above, no reasonable juror could conclude that the transactions in this case were other than contemporaneous. No separation in time between transactions can account for the difference between the higher price offered to the Wholesalers and the lower price offered to Costco. That is what matters for the purposes of the Robinson-Patman Act, which targets price discrimination between "competing customers," *England v. Chrysler Corp.*, 493 F.2d 269, 272 (9th Cir. 1974), in "*comparable transactions*," *Tex. Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 806 (9th Cir. 1969) (emphasis in original) (quoting *FTC v. Borden Co.*, 383 U.S. 637, 643 (1966)), in order to combat "the perceived harm to competition occasioned by powerful buyers," *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006).

The Wholesalers clearly objected to the "reasonably contemporaneous" instruction, and I find no evidence to support giving that instruction. I am therefore of the opinion that so instructing the jury was an abuse of the district court's discretion. *See Clem*, 566 F.3d at 1181. And the Wholesalers need not have challenged the district court's denial of their entire post-trial renewed motion for judgment as a matter of law in order for us to remand for a new trial on the basis of this instructional error; the very fact that they

"objected at the time of trial on grounds that were sufficiently precise to alert the district court to the specific nature of the defect" is sufficient. *See Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1015 (9th Cir. 2007) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 51.

Nor was the district court's error harmless. In the event of instructional error, prejudice is presumed, and "the burden shifts to [the prevailing party] to demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 20 F.4th 1231, 1243 (9th Cir. 2021) (quoting *Clem*, 566 F.3d at 1182). In this case, the jury was told to "find for the Defendants" if it determined that Living Essentials' sales to the Wholesalers and to Costco were not reasonably contemporaneous. And Living Essentials highlighted these instructions in their closing argument, calling the Wholesalers' failure to present evidence of contemporaneous sales "fatal to their claim." There is "no way to know whether the jury would [have] return[ed] the same [verdict] if the district court" had not given the "reasonably contemporaneous" instruction. *See id.* at 1244-45. I would therefore reverse the judgment of the court and remand for a new trial on the Wholesalers' Section 2(a) claim with a properly instructed jury.

MILLER, Circuit Judge, dissenting in part:

I agree that the district court did not abuse its discretion in instructing the jury on the section 2(a) claims, but I do not agree that the district court erred in rejecting the section 2(d) claims. I would affirm the judgment in its entirety.

Under section 2(d), if two or more customers of a seller compete with each other to distribute that seller's products, the seller may not pay either customer "for any services or facilities furnished by or through such customer in connection with the . . . sale" of the products unless the payment "is available on proportionally equal terms to all other customers competing in the distribution of such products." 15 U.S.C. § 13(d); *see Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 707-08 (9th Cir. 1964). Unlike section 2(a), section 2(d) does not require "a showing that the illicit practice has had an injurious or destructive effect on competition." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959). But it does demand that the favored and the disfavored customer be "competing" with each other. 15 U.S.C. § 13(d).

The district court did not clearly err in finding that the Wholesalers failed to establish by a preponderance of the evidence that they were competing with Costco. (The district court was wrong to suggest that the jury's verdict compelled this conclusion, but the court expressly stated that its finding also rested on an "independent review of the evidence," and we may uphold it on that basis.) We have previously held that "customers who are in functional competition in the same geographical area, and who buy the seller's products of like grade and quality within approximately the same period of time, are in actual competition with each other in the distribution of these products." *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 807 (9th Cir. 1969) (quoting *Tri-Valley Packing Ass'n*, 329 F.2d at 709). We have not set out a definitive definition of "functional competition," and the Wholesalers argue that they need only show a "'competitive nexus,' whereby 'as of the

time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, *i.e.*, all wholesalers or all retailers, and within the same geographic market.'" (quoting *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)).

Such a capacious understanding of competition is foreclosed by the Supreme Court's decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006). There, the Court clarified that a common position in the supply chain in a shared geographical market is not sufficient, by itself, to establish actual competition. *Id.* at 179, 126 S.Ct. 860 ("That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales."). Thus, it is not enough to point to evidence of "sales in the same geographic area." *Id.* Instead, the evidence must show that the disfavored buyer "compete[d] with beneficiaries of the alleged discrimination *for the same customer*." *Id.* at 178, 126 S.Ct. 860. Consistent with *Volvo*, other circuits have held that "two parties are in competition only where, after a 'careful analysis of each party's customers,' we determine that the parties are 'each directly after the same dollar.'" *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191, 197 (3d Cir. 2010) (quoting *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 214 (3d Cir. 2007)); *see also M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975) ("Competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.") (quoting *Ag-Chem Equip. Co., v. Hahn, Inc.*, 350 F. Supp. 1044, 1051 (D. Minn. 1972), *aff'd in part, vacated in part*, 480 F.2d 482 (8th Cir. 1973)).

In this case, Living Essentials presented evidence of substantial differences in operations that suggests that the Wholesalers and Costco were not competing "*for the same customer*." *Volvo*, 546 U.S. at 178, 126 S.Ct. 860. For example, unlike Costco, most of the Wholesalers sold 5-hour Energy only in store, negotiated pricing with their customers—offering in-house credit and different prices for 5-hour Energy—and sold only to retailers, not to end-consumers. Meanwhile, Costco Business Centers sold both in store and online at set prices to any consumer with a Costco membership, some of whom were end-consumers; in addition, they carried fewer than half of the 5-hour Energy flavors carried by the Wholesalers, and they did not sell 5-hour Energy display racks or other retailer-oriented accessories for Living Essentials. It is true that Costco Business Centers sold most of their 5-hour Energy to retailers. But it is far from clear that Costco sold to the *same* retailers as the Wholesalers. The Wholesalers' distinct features, such as their credit and wider inventory, may well have appealed to different customers.

Expert testimony corroborated that evidence. The parties offered dueling experts on the issue of competition. For the Wholesalers, Dr. Gary Frazier, a marketing expert, opined that the purchasers did compete based on his review of emails sent by Living Essentials' employees discussing sales, the testimony of six of the seven Wholesalers, and maps showing the locations of the Wholesalers, their customers, and the seven Costco Business Centers. But on cross-examination, Dr. Frazier acknowledged that he did not speak with any of the Wholesalers' customers, and that the maps on which he relied included all of the Wholesalers' customers in a cluster of unlabeled dots without regard to whether the customer ever

purchased 5-hour Energy or the actual travel time for the customer to get to a Wholesaler versus one of the seven Costco Business Centers. The district court found that the Costco Business Centers and the Wholesalers were in close proximity to each other, and I do not question that finding. But the court was not required to accept Dr. Frazier's inference that their 5-hour Energy customers were the same.

For Living Essentials, Dr. Darrel Williams, an expert in industrial organization and economics, testified that a "necessary condition for competition is that the buyers consider the two sellers substitute[s]," and he opined that this "necessary condition" was absent. After analyzing Living Essentials' sales records, the sales data provided by four of the Wholesalers, and the Wholesalers' customer data, Dr. Williams concluded that the Wholesalers did not compete with Costco for sales of 5-hour Energy. His analysis showed that even though some Wholesalers priced 5-hour Energy above the prices of other Wholesalers and Costco, the Wholesalers' customers did not switch to the seller with the cheapest product; from the lack of any economically significant customer loss, he inferred that the Wholesalers' customers did not treat Costco as a substitute supplier of 5-hour Energy. He determined that the maximum level of customer switching across the Wholesalers and Costco was ten times lower than the switching attributable to ordinary customer "churn," and that even the opening of three new Costco Business Centers had no statistically significant effect on the Wholesalers' 5-hour Energy sales. Dr. Williams posited that operating differences between the Wholesalers and Costco might explain why their customers differed. He reasoned that the Wholesalers might draw customers interested in buying on credit or

in the unique products the Wholesalers offer. In its ruling on the Wholesalers' motion for judgment as a matter of law, the district court summarized this testimony by explaining that "[b]ecause customers are presumed to purchase a product at the lowest available price, the jury could reasonably conclude this evidence tended to show Costco and Plaintiffs did not compete for the same customers."

The Wholesalers respond that Dr. Williams's testimony goes only to whether there was competitive injury, not whether there was competition in the first place. But that is a misreading of the testimony. Based on his conclusion that the Wholesalers' customers were not sensitive to the price of 5-hour Energy, Dr. Williams opined that the Wholesalers and Costco did not compete "*for the same customer*." *Volvo*, 546 U.S. at 178, 126 S.Ct. 860; *see Lewis v. Philip Morris Inc.*, 355 F.3d 515, 531 (6th Cir. 2004) (explaining that studies of price sensitivity are helpful for assessing competition).

To be sure, the district court was not required to credit Living Essentials' evidence and Dr. Williams's economic analysis of the sales data over the Wholesalers' evidence and Dr. Frazier's examination of emails and maps. But it did not clearly err in doing so and in finding that the Wholesalers failed to carry their burden. *See United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991) ("Clear error is not demonstrated by pointing to conflicting evidence in the record.").

In reversing the denial of an injunction, the court deems all of the evidence of lack of actual competition—and the district court's findings based on that evidence—to be irrelevant. It relies on our decision in *Tri-Valley Packing*, in which we said that where two direct customers of a seller both "operat[e] solely

on the same functional level," if "one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and . . . the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time," then it is not necessary to trace the seller's goods "to the shelves of competing outlets of the two in order to establish competition." 329 F.2d at 708. Instead, "[a]ctual competition in the sale of the seller's goods may then be inferred." *Id.*

As the court reads *Tri-Valley Packing*, the "confluence of facts" of operating on the same functional level, being in geographic proximity, and reselling goods of like grade and quality is sufficient to conclusively establish competition, making any other evidence irrelevant. But what we said in *Tri-Valley Packing* is that actual competition "may . . . be inferred," 329 F.2d at 708, not that it "shall be irrebuttably presumed."

Nowhere in *Tri-Valley Packing* did we say that a defendant is barred from rebutting the inference of competition by presenting evidence that two resellers at the same functional level and in the same geographic area are not, in fact, in actual competition with each other. If we had, our insistence in *Tri-Valley Packing* on a showing of "functional competition," which I have already discussed, would have been superfluous. 329 F.2d at 709. Reading *Tri-Valley Packing* in that way is contrary to the economic reality that markets can be segmented by more than simply functional level, geography, and grade and quality of goods. Some differences in operations may not matter to customers, but others are undoubtedly significant. (In the New York geographic market, you can order a

Coke both at Le Bernardin and at McDonald's, but no one thinks they are engaged in actual competition.)

The court's approach is also contrary to *Volvo*, which says that section 2(d) requires competition "*for the same customer*." 546 U.S. at 178, 126 S.Ct. 860. It is contrary to the decisions of other circuits that have recognized that finding competition requires "a careful analysis of each party's customers," not the application of a categorical rule. *Feesers, Inc.*, 591 F.3d at 197 (internal quotation marks omitted). And it is unsupported by the Federal Trade Commission's interpretation of section 2(d). In regulations defining "competing customers," the FTC gives the following illustrative example: "B manufactures and sells a brand of laundry detergent for home use. In one metropolitan area, B's detergent is sold by a grocery store and a discount department store." 16 C.F.R. § 240.5. Under the court's reading of *Tri-Valley Packing*, the grocery store and the discount department store would necessarily be in competition with each other. But that is not how the FTC sees it. Instead, the agency says, "*If* these stores compete with each other, any allowance, service or facility that B makes available to the grocery store should also be made available on proportionally equal terms to the discount department store." *Id.* (emphasis added); *see also FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 62, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959) (emphasizing the FTC's factual finding that the putative competitors were indeed "retailing the identical product to substantially the same segment of the public" (quoting *Simplicity Pattern Co. v. FTC*, 258 F.2d 673, 677 (D.C. Cir. 1958), *aff'd in part, rev'd in part*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959))). The presence or absence of competition must be assessed based on the facts.

The district court appropriately reviewed all of the evidence in making a finding that Living Essentials had not established competition. Because that finding was not clearly erroneous, I would affirm the judgment in its entirety.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55397

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC., et al.,
Plaintiffs-Appellants,
v.

INNOVATION VENTURES, LLC, et al.,
Defendants-Appellees.

Argued and Submitted June 7, 2022

Filed July 20, 2023

Before: Ronald Lee Gilman,* Sandra S. Ikuta, and Eric D. Miller, Circuit Judges.

Opinion by Judges Miller and Ikuta;**

Partial Concurrence and Partial Dissent by Judge Gilman;

Partial Dissent by Judge Miller

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* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** Judge Ikuta authored Part III.

OPINION

MILLER, Circuit Judge, as to Parts I and II:

This appeal arises out of an action under the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13b, 21a. The jury returned a verdict for the defendants, and the district court denied the plaintiffs' requested injunctive relief. The plaintiffs challenge various jury instructions as well as the denial of injunctive relief. We affirm in part and vacate, reverse, and remand in part.

I

Living Essentials, LLC, produces 5-hour Energy, a caffeinated drink sold in 1.93-ounce bottles. Living Essentials sells 5-hour Energy to various purchasers, including wholesalers, retailers, and individual consumers.

This case concerns Living Essentials' sales of 5-hour Energy to two sets of purchasers. One purchaser is the Costco Wholesale Corporation, which purchases 5-hour Energy for resale at its Costco Business Centers—stores geared toward "Costco business members," such as restaurants, small businesses, and other retailers, but open to any person with a Costco membership. The other purchasers, whom we will refer to as "the Wholesalers," are seven California wholesale businesses that buy 5-hour Energy for resale to convenience stores and grocery stores, among other retailers. The Wholesalers allege that Living Essentials has offered them less favorable pricing, discounts, and reimbursements than it has offered Costco.

During the time period at issue here, Living Essentials charged the Wholesalers a list price of $1.45 per bottle of "regular" and $1.60 per bottle of "extra-strength" 5-hour Energy, while Costco paid a list

price of ten cents per bottle less: $1.35 and $1.50, respectively. Living Essentials also provided the Wholesalers and Costco with varying rebates, allowances, and discounts affecting the net price of each bottle. For example, the Wholesalers received a 7-cent per bottle "everyday discount," a 2 percent discount for prompt payment, and discounts for bottles sold from 5-hour Energy display racks. Meanwhile, Costco received a 1 percent prompt-pay discount; a spoilage discount to cover returned, damaged, and stolen goods; a 2 percent rebate on total sales for each year from 2015 to 2018; payments for displaying 5-hour Energy at the highly visible endcaps of aisles and fences of the store; and various advertising payments.

Living Essentials also participated in Costco's Instant Rebate Coupon (IRC) program. Under that program, Costco sent monthly mailers to its members with redeemable coupons for various products. About every other month, Costco would offer its members an IRC worth $3.60 to $7.20 per 24-pack of 5-hour Energy—a price reduction of 15 to 30 cents per bottle. The customer would redeem the IRC from Costco at the register when buying the 24-pack, and Living Essentials would reimburse Costco for the face value of the 5-hour Energy IRCs redeemed that month. Over the course of the seven-year period at issue here, Living Essentials reimbursed Costco for about $3 million in redeemed IRCs.

In February 2018, the Wholesalers brought this action against Living Essentials and its parent company, Innovation Ventures, LLC, in the Central District of California, alleging that by offering more favorable prices, discounts, and reimbursements to Costco, Living Essentials had violated the Robinson-Patman Act, which prohibits sellers of goods from discriminating among competing buyers in certain

circumstances. The Wholesalers sought damages under section 2(a) of the Act and an injunction under section 2(d).

Section 2(a)—referred to as such because of its original place in the Clayton Act, *see Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006)—bars a seller from discriminating in price between competing purchasers of commodities of like grade and quality. 15 U.S.C. § 13(a). One form of prohibited discrimination under section 2(a) is secondary-line price discrimination, "which means a seller gives one purchaser a more favorable price than another." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1187 (9th Cir. 2016). To establish secondary-line discrimination, a plaintiff must show that (1) the challenged sales were made in interstate commerce; (2) the items sold were of like grade and quality; (3) the seller discriminated in price between the disfavored and the favored buyer; and (4) "'the effect of such discrimination may be . . . to injure, destroy, or prevent competition' to the advantage of a favored purchaser." *Volvo*, 546 U.S. at 176-77, 126 S.Ct. 860 (quoting 15 U.S.C. § 13(a)). The fourth component of that test, the element at issue in this case, ensures that section 2(a) "does not ban all price differences," but rather "proscribes 'price discrimination only to the extent that it threatens to injure competition.'" *Id.* at 176, 126 S.Ct. 860 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)).

Section 2(d) makes it unlawful for a manufacturer to discriminate in favor of one purchaser by making "payment[s]" to that purchaser "in connection with the . . . sale, or offering for sale of any products . . . unless such payment or consideration is available on

proportionally equal terms to all other customers competing in the distribution of such products." 15 U.S.C. § 13(d). To prevail on a claim for injunctive relief under section 2(d), the plaintiff must establish that it is in competition with the favored buyer, but it need not establish an "injurious or destructive effect on competition." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959).

On summary judgment, the district court found that the Wholesalers had proved the first three elements of their section 2(a) claim—that the products were distributed in interstate commerce, of like grade and quality, and sold at different prices to Costco and to the Wholesalers. The parties proceeded to try to a jury the fourth element of section 2(a), whether there was a competitive injury, and to try to the court the section 2(d) claim for injunctive relief.

At trial, the parties focused on whether the Wholesalers and Costco were in competition. The Wholesalers introduced numerous emails from Living Essentials employees discussing the impact of Costco's pricing on the Wholesalers' sales. Additionally, they presented the testimony of a marketing expert who opined that the Wholesalers and the Costco Business Centers were in competition. The expert based that opinion on the companies' geographic proximity and on interviews he conducted in which the Wholesalers' proprietors stated that they lost sales due to Costco's lower prices. Living Essentials primarily relied on the testimony of an expert who reviewed sales data and opined that buyers of 5-hour Energy are not price sensitive and do not treat the Wholesalers and Costco Business Centers as substitutes; for that reason, he concluded that the Wholesalers and Costco Business Centers were not competitors.

The district court instructed the jury that section 2(a) required the Wholesalers to show that Living Essentials made "reasonably contemporaneous" sales to them and to Costco at different prices. The Wholesalers objected. They agreed that the instruction correctly stated the law but argued that "[t]here is literally no evidence to suggest that Living Essentials' sales of 5-Hour Energy to Costco and Plaintiffs occurred at anything other than the same time over the entire 7-year period." The court nevertheless gave the proposed instruction, telling the jury that "[e]ach Plaintiff must prove that the sales being compared were reasonably contemporaneous." The instruction directed the jury to find for Living Essentials if it determined "that the sales compared are sufficiently isolated in time or circumstances that they cannot be said to have occurred at approximately the same time for a Plaintiff." The instruction also listed a number of factors for the jury to consider in its evaluation, such as "[w]hether market conditions changed during the time between the sales."

The district court further instructed the jury that the Wholesalers had to prove that any difference in prices could not be justified as "functional discounts" to compensate Costco for marketing or promotional functions that it performed. The Wholesalers again objected. As with the instruction on reasonably contemporaneous sales, the Wholesalers agreed that the instruction was a correct statement of the law, but they argued that there was "a complete absence of evidence" of any savings for Living Essentials or costs for Costco in performing the alleged functions justifying the discount. Rejecting that argument, the court instructed the jury that Living Essentials claimed that "its lower prices to Costco are justified as functional discounts," which the court defined as

discounts "given by a seller to a buyer based on the buyer's performance of certain functions for the seller's product." The instructions explained that while the Wholesalers had "the ultimate burden to prove that defendant's lower prices were not justified as a functional discount," Living Essentials had the burden of production and so "must present proof" that "(1) Costco actually performed the promotional, marketing, and advertising services" it claimed to perform and "(2) the amount of the discount was a reasonable reimbursement for the actual functions performed by Costco." The instructions told the jury to find for Living Essentials if it found that the price discrimination was "justified as a functional discount."

The jury returned a verdict for Living Essentials on the section 2(a) claim. The court then denied the Wholesalers' request for injunctive relief under section 2(d). The court reasoned that "the jury implicitly found no competition existed between [the Wholesalers] and Costco, and the Court is bound by that finding." In addition, the court concluded, based on its own independent review of the evidence, that the Wholesalers had "failed to prove by a preponderance of the evidence that they competed with Costco for resale" of 5-hour Energy.

II

We begin by considering the jury instructions on reasonably contemporaneous sales and functional discounts. Our standard of review of a district court's decision to give a jury instruction depends on the error that is alleged. *Yan Fang Du v. Allstate Ins. Co.*, 697 F.3d 753, 757 (9th Cir. 2012). We review legal issues de novo, including "[w]hether a district court's jury instructions accurately state the law." *Coston v. Nangalama*, 13 F.4th 729, 732 (9th Cir.

2021) (quoting *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017)). Here, however, the Wholesalers do not argue that the challenged instructions misstated the law. Instead, they argue that the evidence did not support giving them. "Whether there is sufficient evidence to support an instruction is reviewed for abuse of discretion." *Yan Fang Du*, 697 F.3d at 757. In conducting that review, we give "considerable deference" to the district court because we recognize the "district judge's proximity to the trial and intimate knowledge of the record." *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc).

Sufficient evidence necessarily requires *some* evidence, and it has long been "settled law that it is error in the court to give an instruction when there is no evidence in the case to support the theory of fact which it assumes." *Tweed's Case*, 16 Wall. (83 U.S.) 504, 518, 21 L.Ed. 389 (1872); *see Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1101 (9th Cir. 2014). But sufficient evidence does not require convincing evidence, or even strong evidence; rather, "a party is entitled to have his theory of the case presented to the jury by proper instructions, if there be any evidence to support it." *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367, 368 (9th Cir. 1964) (emphasis added) (internal quotation marks and footnote omitted). "The district court could not have abused its discretion unless there was no factual foundation to support . . . an instruction." *Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952, 959 (9th Cir. 1998).

The question before us is whether the district court abused its wide discretion in finding that there was any foundation for giving the instructions. We conclude that it did not.

A

The Wholesalers argue that the district court abused its discretion in instructing the jury on reasonably contemporaneous sales because "there was no legitimate dispute" that the Wholesalers carried their burden on that requirement.

To establish a prima facie case under section 2(a), a plaintiff must show that the discriminating seller made one sale to the disfavored purchaser and one sale to the favored purchaser "within approximately the same period of time." *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 807 (9th Cir. 1969) (quoting *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 709 (9th Cir. 1964)). In other words, it must establish "[t]wo or more contemporaneous sales by the same seller." *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975). That requirement ensures that the challenged price discrimination is not the result of a seller's lawful response to a change in economic conditions between the sales to the favored and disfavored purchasers. *Texas Gulf Sulphur Co.*, 418 F.2d at 806.

As we have explained, the Wholesalers do not argue that the district court's instructions on reasonably contemporaneous sales misstated the law. Instead, they contend that they so clearly carried their burden on this element that the district court should have found the element satisfied rather than asking the jury to decide it. In the Wholesalers' view, "there was no dispute . . . that [Living Essentials] had made *thousands* of contemporaneous sales to Costco and to all seven Plaintiffs."

The Wholesalers' position appears to be that when the plaintiff has the burden of proving an element of its case, a district court should decline to instruct the

jury on that element if the court determines the plaintiff has proved it too convincingly. We are unaware of any authority for that proposition. To the contrary, our cases that have rejected proposed jury instructions have done so because the party bearing the burden presented too little evidence to justify the instruction, not too much. *See*, *e.g.*, *Avila*, 758 F.3d at 1101 (affirming the denial of an instruction on a defense for which the defendant lacked evidence); *Yan Fang Du*, 697 F.3d at 758 (affirming the denial of an instruction on a theory of liability for which the plaintiff lacked evidence). If the Wholesalers believed that their evidence conclusively established liability, the appropriate course of action would have been to move for judgment as a matter of law. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 396, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006). But although the Wholesalers did move for judgment as a matter of law, they have not challenged the denial of that motion on appeal. The Wholesalers may not bypass that procedure by challenging a jury instruction on an element of their prima facie case.

Even if it could be error to instruct the jury on an element that a plaintiff obviously proved, the proof here was far from obvious. The Wholesalers might be right that the evidence established reasonably contemporaneous sales, but during the trial, they did not explain how it did so. In their written objection to the instructions, the Wholesalers stated that "[t]here is literally no evidence to suggest" that the compared sales were not contemporaneous, and in their oral objection, they similarly declared that there was "no dispute" on the issue. The first and last time the Wholesalers mentioned the requirement to the jury was during closing argument, when they said that the "[t]he sales were made continuously to Costco

and to plaintiffs over the entire seven years." Despite those confident assertions, the Wholesalers did not direct the district court to any evidence to substantiate their claim.

The Wholesalers did not point to any evidence of reasonably contemporaneous sales until their post-trial motion for judgment as a matter of law. Because that motion was not available to the district court when the court instructed the jury, it cannot be a basis for concluding that the court abused its discretion. In any event, the motion did not clearly identify any reasonably contemporaneous sales. Instead, the Wholesalers merely referred to Exhibit 847, a series of spreadsheets introduced by Living Essentials that spans more than 100,000 cells cataloguing seven years' worth of Living Essentials' sales to all purchasers, including Costco and the Wholesalers. The motion presented a modified version of that exhibit that included only Living Essentials' sales to Costco and the Wholesalers, omitting sales to other purchasers. But that (relatively) pared-down version—itself more than 200 pages long—was never presented to the jury. Even that version is hardly self-explanatory, and the Wholesalers made little effort to explain it: They did not point to any specific pair of sales that were reasonably contemporaneous.

Indeed, even on appeal, the Wholesalers have not identified any pair of sales that would satisfy their burden. The most they have argued is that the column entitled "Document Date" reflects the date of the invoice, so in their view the spreadsheets speak for themselves in showing "thousands of spot sales to Costco and Plaintiffs." At no time have the Wholesalers shown that there were two or more sales between Living Essentials and both Costco and *each*

plaintiff that were reasonably contemporaneous such that changing market conditions or other factors did not affect the pricing. *See Rutledge*, 511 F.2d at 677; *Texas Gulf Sulphur Co.*, 418 F.2d at 806.

The Wholesalers complain that they are being unfairly faulted for not more thoroughly arguing "the incorrectly instructed point to the jury." That complaint reflects a misunderstanding of their burden. To take the issue away from the jury, it was the Wholesalers' burden to make—and support—the argument that the sales were reasonably contemporaneous. Perhaps, when it developed the jury instructions, the district court could have reviewed all of the evidence, located Exhibit 847 (the full version, not the more focused one the Wholesalers submitted later), and then identified paired transactions for each Wholesaler from the thousands upon thousands of cells it contained. But "a district court is not required to comb the record" to make a party's argument for it. *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting *Forsberg v. Pacific Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)). There may have been a needle—or even many needles—in the haystack of sales data. It was not the district court's job to hunt for them.

Significantly, the district court identified factors that might have influenced the pricing between sales, including that "the overall sales of 5-hour Energy in California were declining." That trend could potentially explain why two differently priced sales resulted from "diverse market conditions rather than from an intent to discriminate." *Texas Gulf Sulphur Co.*, 418 F.2d at 806. The timing of the disputed sales is unclear, so it could be that the Wholesalers bought the product during periods of higher

market pricing that Costco avoided. The possibility that sales were not reasonably contemporaneous has "some foundation in the evidence," and that is enough. *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 210 (9th Cir. 1994). With only the Wholesalers' conclusory assertions, an unexplained mass of spreadsheets, and Living Essentials' evidence of changing market conditions before it, the district court did not abuse its discretion in instructing the jury on this disputed element of the Wholesalers' prima facie case.

B

The Wholesalers next argue that the district court abused its discretion in giving the functional-discount instruction.

The Supreme Court has held that when a purchaser performs a service for a supplier, the supplier may lawfully provide that purchaser with a "reasonable" reimbursement, or a "functional discount," to compensate the purchaser for "its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier." *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 562, 571 n.11, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990). For example, the Court has held that a "discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act." *Id.* at 571, 110 S.Ct. 2535.

Separately, the Robinson-Patman Act contains a statutory affirmative defense for cost-justified price differences, or "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery." 15 U.S.C. § 13(a). The functional-discount doctrine is different because it requires only a "reasonable," not an exact, relationship between the services performed and the discounts given.

Hasbrouck, 496 U.S. at 561 & n.18, 110 S.Ct. 2535. Also, in contrast to the cost-justification defense, it is the plaintiff's burden to prove that the price discrimination was not the result of a lawful functional discount. *Id.* at 561, 110 S.Ct. 2535 n.18. But the doctrine applies "[o]nly to the extent that a buyer *actually* performs certain functions, assuming all the risk, investment, and costs involved." *Id.* at 560-61, 110 S.Ct. 2535. And it does not "countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs." *Id.* at 563, 110 S.Ct. 2535.

The Wholesalers do not dispute that the jury instructions accurately stated the law governing functional discounts. Instead, they argue that the district court should not have given a functional-discount instruction because the doctrine does not apply "as between favored and disfavored wholesalers" and because the discounts given to Costco bore no relationship to Living Essentials' savings or Costco's costs in performing the alleged functions. We find neither argument persuasive.

The Wholesalers provide no support for their assertion that purchasers at the same level may not receive different functional discounts if they perform different functions. If Costco performed marketing functions and the Wholesalers did not, then Living Essentials could provide Costco with "a reasonable reimbursement for [its] actual marketing functions." *Hasbrouck*, 496 U.S. at 571, 110 S.Ct. 2535. The Wholesalers are correct that selective reimbursements may create liability for the supplier under section 2(d) if the supplier fails to offer them "to all purchasers on proportionally equal terms." 15 U.S.C. § 13(d). But for purposes of section 2(a), we see no reason why the doctrine would be unavailable solely

because the allegedly disfavored purchaser, who did not perform the additional services, and favored purchaser, who did perform those services, are at the same level in the distribution chain.

The Wholesalers also argue that even if the functional-discount instruction was legally available to Living Essentials, the district court still abused its discretion in giving the instruction because there was no foundation in the evidence to support it. In fact, Costco performed a number of marketing and other functions that no Wholesaler appears to have performed. For example, Costco promoted 5-hour Energy by giving the product prime placement in aisle endcaps and along the fence by the stores' entrances; it created and circulated advertisements and mailers; it provided delivery and online sales for 5-hour Energy; and it contracted for a flat "spoilage allowance" rather than requiring Living Essentials to deal with spoilage issues as they arose. In addition to providing those services, Costco allowed Living Essentials to participate in its IRC program, in which Costco sent out bi-monthly mailers with coupons for 5-hour Energy, among other products, to its members. The member would redeem the coupon at the register, and Costco would advance the discount to the buyer on behalf of Living Essentials, record the transaction, and then collect the total discount from Living Essentials at the end of each period.

Living Essentials testified to the value of Costco's placement services, explaining that Costco received "allowance[s]" because Costco was "performing a service for us, which is worth a value to us to get the product out in front of the consumer." As to Costco's advertising and IRC services, Living Essentials testified that they allowed it to reach some 40 million Costco members, whom it could not otherwise reach

"with one payment." Living Essentials further testified that it "evaluate[s] every promotion," and, although it did not memorialize the evaluation, it "[a]bsolutely" thought it was "getting a value for these programs." Finally, in the case of the spoilage discount, Living Essentials explained that by providing a flat, upfront discount in exchange for Costco's assumption of the risk of loss and spoilage, Living Essentials avoided having to negotiate case-by-case with Costco over product loss.

The Wholesalers argue that the functional discount defense is unavailable because Living Essentials separately compensated Costco for promotional, marketing, and advertising services, so "the entirety of the price-gap cannot be chalked up to a unitary 'functional discount.'" They cite spreadsheets showing that Costco was paid for endcap promotions, advertising, and IRCs. But those spreadsheets do not show that Living Essentials' separate payments to Costco fully compensated it for those services. They therefore do not foreclose the possibility that some additional discount might have reflected reasonable compensation for the services.

More generally, the Wholesalers argue that even if Costco's services were valuable, "Living Essentials introduced zero evidence that its lower prices to Costco bore any relationship to either" Living Essentials' savings or Costco's costs. In fact, there is evidence in the record from which it is possible to infer such a relationship. For instance, Living Essentials presented testimony that Costco's performance of advertising functions—especially the 40-million-member mailers as well as endcap and fence placement programs—gave it "a tremendous amount of reach and awareness," which Living Essentials would otherwise have had to purchase separately.

The record thus supported the conclusion that Living Essentials provided Costco "a functional discount that constitutes a reasonable reimbursement for [its] actual marketing functions." *Hasbrouck*, 496 U.S. at 571, 110 S.Ct. 2535.

To be sure, the evidence did not establish a particularly precise relationship between the discounts and Costco's services, and it was open to the Wholesalers to argue that the discounts were so "untethered to either the supplier's savings or the wholesaler's costs" as not to qualify as functional discounts. *Hasbrouck*, 496 U.S. at 563, 110 S.Ct. 2535. But it was the jury's role, not ours, to decide which party had the better interpretation of the evidence. The only question before us is whether the district court abused its discretion in determining that there was enough evidence to justify giving an instruction on functional discounts. Because at least some evidence supported the instruction, we conclude that there was no abuse of discretion.

The Wholesalers separately argue that the district court erred in denying their pre-verdict motion for judgment as a matter of law to exclude the functional-discount defense. Because the Wholesalers did not renew that argument in their post-verdict motion under Federal Rule of Civil Procedure 50(b), they failed to preserve the issue for appeal. *See Crowley v. Epicept Corp.*, 883 F.3d 739, 751 (9th Cir. 2018) (per curiam).

III

Finally, the Wholesalers challenge the district court's denial of injunctive relief under section 2(d). We review the district court's legal conclusions de novo and its factual findings under the clear-error standard. *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1212 (9th Cir. 2019). We review the denial of a

permanent injunction under the abuse-of-discretion standard. *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016).

A

Under section 2(d), it is unlawful for a seller to pay "anything of value to or for the benefit of a customer" for "any services or facilities furnished by or through such customer in connection with the . . . sale" of the products unless the payment "is available on proportionally equal terms to all other customers competing in the distribution of such products." 15 U.S.C. § 13(d); *Tri-Valley Packing Ass'n*, 329 F.2d at 707-08. In enacting the Robinson-Patman Act, "Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chainstores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand." *Volvo*, 546 U.S. at 175, 126 S.Ct. 860 (citing 14 HERBERT HOVENKAMP, Antitrust Law ¶ 2302 (2d ed. 2006)). In other words, 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.[1]

The key issue in this case is 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). The FTC has interpreted the statutory language in section 2(d) to mean that customers are in competition with each other when they "compete in the resale of the seller's products of like grade and quality at

[1] To avoid confusion, we refer to the seller or supplier of a product as the "seller," the seller's customers as "customers," and those who buy from the seller's customers as "buyers."

the same functional level of distribution." 16 C.F.R. § 240.5.[2]

Our interpretation of "customers competing," as used in 15 U.S.C. § 13(d), is consistent with the FTC's. We have held that, to establish that "two customers are in general competition," it is "sufficient" to prove 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." *Tri-Valley Packing Ass'n*, 329 F.2d at 708. Under these circumstances, "[a]ctual competition in the sale of the seller's goods may then be inferred." *Id.*; *see also Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692-93 (5th Cir. 2003) (holding that "[t]he competitive nexus is established if the disfavored purchaser and favored purchaser compete at the same functional level and within the same geographic market at the time of the price discrimination," which indicates that each customer is "directly after the same dollar") (citing *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975) (internal quotation marks omitted)). We reasoned that this interpretation was consistent with "the underlying purpose of section 2(d)," which is to "require sellers to deal fairly with their customers who are in competition with each other, by refraining from making allowances to one such customer unless

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[2] Although the FTC Guides that "provide assistance to businesses seeking to comply with sections 2(d) and 2(e)," 16 C.F.R. § 240.1, do not have the force of law, "we approach the [Guides] with the deference due the agency charged with day-to-day administration of the Act," *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968).

making it available on proportionally equal terms to the others." *Tri-Valley Packing Ass'n*, 329 F.2d at 708. Because sellers, in order to avoid violating section 2(d), must "assume that all of their direct customers who are in functional competition in the same geographical area, and who buy the seller's products of like grade and quality within approximately the same period of time, are in actual competition with each other in the distribution of these products," courts must make the same assumption of competition "in determining whether there has been a violation." *Id.* at 709.[3] Applying this rule, *Tri-Valley* held that two wholesalers that received canned goods from the same supplier and sold them in the same geographical area would be in "actual competition" if the wholesalers had purchased the canned goods at approximately the same time. If this final criterion were met, then "a section 2(d) violation would be established" because the canned-good supplier gave one wholesaler a promotional allowance, but did not offer the same allowance to the other wholesaler. *Id.*

In considering the third prong of the *Tri-Valley* test—whether the two customers are operating "on a particular functional level such as wholesaling or retailing," *id.* at 708—we ask whether customers are

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[3] The "direct customer" requirement in *Tri-Valley* no longer remains good law after *Fred Meyer*, in which the Supreme Court held that a seller's duty to provide proportionately equal promotional services or facilities, or payment thereof, extends downstream to buyers competing with each other at the same functional level, even if one set of buyers purchases directly from the defendant while another set purchases through intermediaries. *See* 390 U.S. at 352-53, 88 S.Ct. 904; *see also Tri Valley Growers v. FTC*, 411 F.2d 985, 986 (9th Cir. 1969) (per curiam).

actually functioning as wholesalers or retailers with respect to resales of a particular product to buyers, regardless of how they describe themselves or their activities. *See Alterman Foods, Inc. v. FTC*, 497 F.2d 993, 999 (5th Cir. 1974) (upholding the FTC's determination that two customers were "functional competitor[s]" on the wholesale level based on market realities); *see also Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 214 (3d Cir. 2007) ("[T]he relevant question is whether two companies are in 'economic reality acting on the same distribution level,' rather than whether they are both labeled as 'wholesalers' or 'retailers.'") (citation omitted).

In listing the factors to consider in determining whether customers are competing, *Tri-Valley* did not include the manner in which customers operate. It makes sense that operational differences are not significant in making this determination, given that the Robinson-Patman Act was enacted to protect small businesses from the harm to competition caused by the large chain stores, notwithstanding the well-understood operational differences between the two. *See*, *e.g.*, *Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148, 160 (2d Cir. 2004) (explaining that chain stores have a more integrated distribution apparatus than smaller businesses and are able to "undersell their more traditional competitors"). Thus, courts have indicated that potential operational differences are not relevant to determining whether two customers compete for resales to the same group of buyers. In *Simplicity Pattern Co.*, the Supreme Court held that competition in the sale of dress patterns existed between variety stores that "handle and sell a multitude of relatively low-priced articles," and the more specialized fabric stores, which "are primarily interested in selling yard goods" and handled "patterns at

no profit or even at a loss as an accommodation to their fabric customers and for the purpose of stimulating fabric sales." 360 U.S. at 59-60, 79 S.Ct. 1005. The Court noted that the manner in which these businesses offered the merchandise to buyers was different, because the variety stores "devote the minimum amount of display space consistent with adequate merchandising—consisting usually of nothing more than a place on the counter for the catalogues, with the patterns themselves stored underneath the counter," while "the fabric stores usually provide tables and chairs where the customers may peruse the catalogues in comfort and at their leisure." *Id.* at 60, 79 S.Ct. 1005. Nevertheless, the Court held there was no question that there was "actual competition between the variety stores and fabric stores," given that they were selling an "identical product [patterns] to substantially the same segment of the public." *Id.* at 62, 79 S.Ct. 1005.

Similarly, in *Feesers*, the "different character" of two businesses that bought egg and potato products from a food supplier did not affect the analysis of whether they were in actual competition. 498 F.3d at 214 n.9. Although the businesses operated and interacted with their clients in different ways—one was a "full line distributor of food and food related products" while the other was a "food service management company"—the court held that "[t]he threshold question is whether a reasonable factfinder could conclude [the two customers] directly compete for resales [of the food supplier's] products among the same group of [buyers]." *Id.*; *see also Lewis v. Philip Morris Inc.*, 355 F.3d 515, 531-32 (6th Cir. 2004) (noting that there was a genuine dispute of material fact as to whether companies that use vending machines to resell cigarettes were in actual competi-

tion with convenience stores for the resale of cigarettes to smokers under the Robinson-Patman Act).

An assumption underlying the *Tri-Valley* framework is that two customers in the same geographic area are competing for resales to the same buyer or group of buyers. However, the Supreme Court has identified an unusual circumstance when that assumption does not hold true and customers who resell the same product at the same functional level in the same geographic area are not in competition because they are not reselling to the same buyer. *See Volvo*, 546 U.S. at 175, 126 S.Ct. 860; *see also* 14 PHILLIP E. AREEDA & HERBERT HOVENKAMP, Antitrust Law ¶ 2333 (4th ed. 2019) (noting that the holding in *Volvo* regarding the same buyer is "quite narrow," and would "appear not to apply in the typical 'chain store' situation where dealers [ ] actually purchase and carry substantial inventories" for sale to all comers).

In *Volvo*, Volvo dealers (customers of Volvo, the car manufacturer and seller) resold trucks through a competitive bidding process, where retail buyers described their specific product requirements and invited bids from selected dealers of different manufacturers. 546 U.S. at 170, 126 S.Ct. 860. Only after a Volvo dealer was invited to bid did it request discounts or concessions from Volvo as part of preparing the bid. *Id.* Volvo dealers typically did not compete with each other in this situation.[4] Because the plaintiff in *Volvo* (a Volvo dealer) could not show that it and another Volvo dealer were invited by the same

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[4] In the rare occasions when the same buyer solicited a bid from more than one Volvo dealer, Volvo's policy was "to provide the same price concession to each dealer competing head-to-head for the same sale." *Id.* at 171, 126 S.Ct. 860.

buyer to submit bids, there was no competition between Volvo dealers, and therefore no section 2(a) violation (which requires competition and potential competitive injury). *Id.* Moreover, because the plaintiff did not ask for price concessions from Volvo until after the buyer invited it to bid, *id.*, (and no other Volvo dealer had been invited to bid, *id.* at 172, 126 S.Ct. 860) there could be no section 2(a) violation, *id.* at 177, 126 S.Ct. 860. Recognizing that the fact pattern in *Volvo* was different from a traditional Robinson-Patman Act "chainstore paradigm" case, where large chain stores were competing with small businesses for buyers, *id.* at 178, 126 S.Ct. 860, the Court "declin[ed] to extend Robinson-Patman's governance" to cases with facts like those in *Volvo*, *id.* at 181, 126 S.Ct. 860; *see also Feesers*, 498 F.3d at 214 (suggesting that there may be no actual competition where customers are selling to "two separate and discrete groups" of buyers).

B

We now turn to the question whether Costco and the Wholesalers were in actual competition.

It is undisputed that Costco and the Wholesalers were customers of Living Essentials and purchased goods of the same grade and quality. Further, the district court found that the Wholesalers' businesses were in geographic proximity to the Costco Business Centers, the only outlets that sold 5-hour Energy. It held that there "was at least one Costco Business Center in close proximity to each of the [Wholesalers] or their customers." Living Essentials and Judge Miller's dissent seemingly argue that this finding is clearly erroneous, because the maps in the record are ambiguous and the Wholesalers' expert, Dr. Frazier, is unreliable, because he "did not calculate the

distance or drive time[s] between the stores" and did not conduct customer surveys. We disagree. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Therefore, we defer to the district court's fact-finding notwithstanding the alleged ambiguity in the evidence. Further, the district court could reasonably reject Living Essentials' critique of Dr. Frazier's methodology.

We next consider whether Costco and the Wholesalers operated at different functional levels with respect to resales of 5-hour Energy. The district court found that they did operate at different functional levels, and therefore competed for different customers of 5-hour Energy. In so holding, the district court abused its discretion because its ruling was based on both legal and factual errors.[5]

First, 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. As we have explained, 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

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[5] The Wholesalers do not challenge the district court's holding that they are judicially estopped from seeking an injunction on the ground that the IRCs are promotional services in connection with resale under section 2(d). Therefore, any challenge to this finding is waived, and potential injunctive relief under section 2(d) excludes relief related to IRCs. *See Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992).

caused a potential injury to competition. 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. Because the jury did not necessarily find that the Wholesalers and Costco were not competing, the district court erred by holding that the jury had made an implicit finding of no competition.[6]

Second, the district court erred in holding that Costco and the Wholesalers did not operate at the same functional level. The district court stated that Costco was a retailer and made the vast majority of its sales to the ultimate consumer. This finding is unsupported by the record, which contains no evidence that Costco sold 5-hour Energy to consumers. Rather, the evidence supports the conclusion that Costco sold 5-hour Energy to retailers. First, Living Essentials' Vice President of Sales, Scott Allen, testified that from 2013 to 2016, only Costco Business Centers, which target retailers, and not regular Costco stores, which target consumers, carried 5-hour Energy. Another Living Essentials employee, Larry Fell, testified that 90 percent of all Costco Business Center clients were businesses, and that Costco Business Centers targeted mom-and-pop convenience stores and small grocery stores. Allen also testified that Costco Business Centers sold 5-hour Energy in

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[6] Contrary to Living Essentials' assertion, the Wholesalers did not waive this argument. Although a party that agrees to the use of a general verdict form waives a future challenge to the verdict as insufficiently specific, *see*, *e.g.*, *McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir.), *opinion amended on other grounds on denial of reh'g*, 885 F.2d 650 (9th Cir. 1989), the Wholesalers do not raise such a challenge. Rather, the Wholesalers argue that the district court made a legal error in interpreting the verdict, and that argument is not waived.

24-packs, which Living Essentials packages for sale to businesses rather than to consumers. This evidence supports the conclusion that Costco sold 24-packs of 5-hour Energy to retailers, and there is no evidence supporting the district court's conclusion that Costco sold 5-hour Energy to consumers. Therefore, as a matter of "economic reality," both Costco and the Wholesalers were wholesalers of 5-hour Energy. The district court clearly erred by holding otherwise.

Because the evidence shows that Costco and the Wholesalers operated at the same functional level in the same geographic area, if the Wholesalers and Costco purchased 5-hour Energy within approximately the same period of time, this confluence of facts is sufficient to establish that Costco and the Wholesalers are in actual competition with each other in the distribution of 5-hour Energy. *See Tri-Valley Packing Ass'n*, 329 F.2d at 708.

C

Judge Miller's dissent argues that Costco and the Wholesalers are not in actual competition because they did not compete in the resales of 5-hour Energy to the same buyers. The dissent bases this argument on evidence in the record that Costco and the Wholesalers had "substantial differences in operations" and that buyers did not treat Costco and the Wholesalers as substitute supply sources of 5-hour Energy. We disagree with both arguments.

First, the differences in operations that Judge Miller's dissent cites, such as differences in the availability of in-store credit, negotiated prices, or different retail-oriented accessories such as 5-hour Energy display racks, are not relevant to determining whether Costco and the Wholesalers are "customers competing" under 15 U.S.C. § 13(d). As explained

above, customers may compete for purposes of section 2(d) even if they operate in different manners. *Cf. Simplicity Pattern Co.*, 360 U.S. at 59-62, 79 S.Ct. 1005 (holding that a variety store and a specialized fabric store were in competition for the sale of clothing patterns even though they carried different inventories and presented the merchandise in different manners). Our sister circuits have taken a similar approach. *See Feesers*, 498 F.3d at 214 n.9 (holding that, for purposes of determining whether two businesses were in competition, it was irrelevant that one was "a full line distributor of food and food related products" and the other was a "food service management company," with very different operations); *see also Lewis*, 355 F.3d at 531-32 (holding that companies using vending machines to resell cigarettes can be in competition with convenience stores that resell cigarettes); *Innomed Labs*, 368 F.3d at 160 (holding that chain stores in competition with smaller businesses often offer lower prices than smaller businesses).

In addition to precedent, FTC guidance indicates that customers are in competition with each other when they "compete in the resale of the seller's products of like grade and quality at the same functional level of distribution," regardless of the manner of operation. 16 C.F.R. § 240.5. For example, a discount department store may be competing with a grocery store for distribution of laundry detergent. *See id.* (Example 3).

Second, Judge Miller's dissent argues that Costco and the Wholesalers may not be in actual competition because it is not clear they sold to the same buyers. In making this argument, the dissent and Living Essentials primarily rely on Living Essentials' economic

expert, Dr. Darrel Williams, who testified that Costco and the Wholesalers were not in competition because their buyers did not treat Costco and the Wholesalers as substitute supply sources. Dr. Williams based this conclusion on evidence that the Wholesalers' buyers continued to purchase 5-hour Energy from the Wholesalers regardless of changes in relative prices between the Wholesalers and Costco. This argument fails, however, because the question whether one business lost buyers to another does not shed light on whether the businesses are in competition, but only on whether there has been an injury to competition, meaning that the seller's price concessions caused buyers to switch from one business to another. Although a plaintiff must show potential injury to competition to make a claim under Section 2(a) of the Robinson-Patman Act, *see supra* at 966, such a showing is not necessary to make a claim under section 2(d). *See Lewis*, 355 F.3d at 531-32 (holding that to establish that two businesses are in competition, the plaintiff is not required to show that the seller's discrimination between the businesses caused buyers to switch to the favored business, because evidence of customer switching "goes to injury, and the element at issue on this appeal is the existence, not the amount of damage to, competition"); *see also Volvo*, 546 U.S. at 177, 126 S.Ct. 860 (determining that the "hallmark" of competitive injury is the diversion of sales). Therefore, Dr. Williams's testimony about a lack of switching between Costco and the Wholesalers does not undermine the Wholesalers' claim that they are in competition with Costco for resales of 5-hour Energy.

Finally, Judge Miller's dissent relies on *Volvo* for the argument that even when the criteria in

Tri-Valley are met for actual competition, a seller can show that the two customers are not in actual competition because "markets can be segmented by more than simply functional level, geography, and grade and quality of goods." But *Volvo* is inapposite. In *Volvo*, the customers (Volvo dealers) did not offer the same product to buyers in the same geographical area (*i.e.*, the *Tri-Valley* scenario). Rather, it was the buyer who chose the customers from whom it solicited bids for a possible purchase. Since the buyer at issue in *Volvo* did not solicit bids from competing Volvo dealers, they were not in competition, and so a section 2(a) violation was not possible. In short, *Volvo* tells us that there may be circumstances where the evidence shows that each customer is selling to a "separate and discrete" buyer, as in *Volvo*, or to a separate and discrete group of buyers, eliminating the possibility of competition between customers. But there is no evidence supporting such a conclusion here. Instead, this case is a typical chainstore-paradigm case where the Wholesalers and Costco carried and resold an inventory of 5-hour Energy to all comers.

Because the district court erred by finding that Costco and the Wholesalers operated at different functional levels and competed for different customers with respect to 5-hour Energy, it abused its discretion in denying injunctive relief to the Wholesalers on that basis. *See Or. Coast Scenic R.R.*, 841 F.3d at 1072. We therefore vacate the district court's holding as to section 2(d) and reverse and remand for the district court to consider 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 requirement), *Tri-Valley Packing Ass'n*, 329 F.2d at 709, or whether the Wholesalers have otherwise proved competition.

AFFIRMED IN PART; VACATED, REVERSED, AND REMANDED IN PART.[7]

GILMAN, Circuit Judge, concurring in part and dissenting in part:

Contrary to the majority's decision, I am of the opinion that the district court abused its discretion in giving the "reasonably contemporaneous" instruction to the jury. I would therefore reverse the judgment of the court and remand for a new trial on the Wholesalers' Section 2(a) claim with a properly instructed jury. On the other hand, I agree with the majority that the court did not abuse its discretion in giving the "functional discount" jury instruction. Finally, I agree with the majority that the court abused its discretion in finding that Costco and the Wholesalers operated at different functional levels. In sum, I concur in vacating the court's denial of the Wholesalers' Section 2(d) claim for injunctive relief and would go further in granting a new trial on the Wholesalers' Section 2(a) claim.

The Wholesalers' secondary-line price-discrimination claim under Section 2(a) requires them to show that: (1) the challenged sales were made in interstate commerce; (2) the items sold were of like grade and quality; (3) the defendant-seller discriminated in price between favored and disfavored purchasers; and (4) "'the effect of such discrimination may be . . . to injure, destroy, or prevent competition' to the

[7] Each party to bear its own costs on appeal.

advantage of a favored purchaser." *Volvo Trucks N. Am, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176-77, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006) (quoting 15 U.S.C. § 13(a)).

Secondary-line price discrimination is unlawful "only to the extent that the differentially priced product or commodity is sold in a 'reasonably comparable' transaction." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1188 (9th Cir. 2016) (citing *Tex. Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 807 (9th Cir. 1969)). To be reasonably comparable, the transactions in question must, among other things, occur "within approximately the same period of time," such that the challenged price discrimination is not a lawful response to changing economic conditions. *Tex. Gulf Sulphur*, 418 F.2d at 807 (quoting *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 709 (9th Cir. 1964)); *see also England v. Chrysler Corp.*, 493 F.2d 269, 272 (9th Cir. 1974) (observing that the "reasonably contemporaneous" requirement "serves the purposes of the [Robinson-Patman] Act" by helping to ensure that price differentials "have some potential for injuring competition"). A plaintiff must show at least two contemporaneous sales by the same seller to a favored purchaser and a disfavored purchaser to make a Section 2(a) claim. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1191 (9th Cir. 1984) (citing, *inter alia*, *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 547 (9th Cir. 1983), *overruled on other grounds as recognized in Chrona Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 657 (9th Cir. 1997)).

The Wholesalers challenge as discriminatory thousands of sales of 5-Hour Energy that Living Essentials made to Costco over the course of seven years. Living Essentials also made thousands of sales to the Wholesalers over the same time period,

many of which occurred on the very same day as sales to Costco. Trial Exhibit 847, a spreadsheet of all of Living Essentials' sales during the relevant time period, documents each of these transactions (approximately 95,000 transactions in total).

Although the spreadsheet is extensive, it is fairly self-explanatory, not an "unexplained mass" as it is characterized by the majority. Each transaction appears on a separate line, with the date, the name of the buyer, the type of buyer ("wholesaler" or "Costco," for example), the number of bottles purchased, and the price all clearly indicated. This evidence establishes that thousands of sales to Costco and to the Wholesalers occurred in close proximity over the course of the entire seven-year period, which more than satisfies the Robinson-Patman Act's requirement that the challenged sales be reasonably contemporaneous. *Cf. Airweld*, 742 F.2d at 1192 ("Airweld never proved when the sales actually occurred and therefore that they were contemporaneous to its purchases.").

Yet the majority concludes that the Wholesalers failed to meet their burden to establish contemporaneous sales because they "did not direct the district court to any evidence to substantiate their claim" until their post-trial motion for judgment as a matter of law, and even then the Wholesalers failed to "clearly identify any reasonably contemporaneous sales." The majority concedes that "[t]here may have been a needle—or even many needles—in the haystack of sales data." But the majority concludes that "[i]t was not the district court's job to hunt for them." In fact, however, there were many thousands of needles (contemporaneous sales data) in the evidentiary haystack of Trial Exhibit 847, so the court did not have to "hunt for them"—the data was staring the court in the face for all to see.

Moreover, by focusing only on whether the Wholesalers "identified any pair of sales that would satisfy their burden," the majority fails to account for the full record in the trial court. The comprehensive sales data was referenced frequently at trial—indeed it was the centerpiece of much of the proceedings. To offer just one example, Living Essentials' expert witness, Dr. Williams, engaged in an extensive analysis of the "sales data" by "look[ing] at every single day between 2012 and 2018."

In light of this evidence, I see no justification to characterize the transactions in this case as anything other than reasonably contemporaneous. And I am not aware of any authority supporting the proposition that the sufficiency of the evidence for a jury instruction turns on how thoroughly counsel discussed certain evidence at trial, so long as it is properly admitted (which is the case here). Nor did Living Essentials offer any contrary evidence to place the issue back in dispute. In other words, giving the contemporaneous-sales instruction was unwarranted because the Wholesalers introduced unrefuted evidence that the sales were in fact contemporaneous. *Cf. Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952, 959 (9th Cir. 1998) ("The district court could not have abused its discretion unless there was no factual foundation to support . . . an instruction."). As the Wholesalers rightly pointed out, "[t]here is literally no evidence to suggest that Living Essentials' sales of 5-Hour Energy to Costco and Plaintiffs occurred at anything other than the same time."

The majority disagrees, holding that the district court properly ruled that the price differential could be explained (and therefore rendered lawful) by the fact that sales of 5-Hour Energy were declining overall. They further speculate that the Wholesalers

might have "bought the product during periods of higher market pricing that Costco avoided." But declining overall sales is a market condition that would have affected all purchasers for resale and, more importantly, the price differential remained consistent throughout the seven-year period over which the Wholesalers and Costco bought 5-Hour Energy from Living Essentials. The record provides no basis to support the proposition that fluctuations in demand could account for price differentials between transactions that occurred on the same day.

Parties are "entitled to an instruction about [their] theory of the case if it is supported by law and has foundation in the evidence." *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009) (quoting *Dang v. Cross*, 422 F.3d 800, 804-05 (9th Cir. 2005)); *see also Mayflower Ins. Exch. v. Gilmont*, 280 F.2d 13, 16 (9th Cir. 1960) (holding that when "no evidence warrant[s] the giving of the instruction in question[,] the giving of that instruction must be held to be error"). Faced with the evidence outlined above, no reasonable juror could conclude that the transactions in this case were other than contemporaneous. No separation in time between transactions can account for the difference between the higher price offered to the Wholesalers and the lower price offered to Costco. That is what matters for the purposes of the Robinson-Patman Act, which targets price discrimination between "competing customers," *England v. Chrysler Corp.*, 493 F.2d 269, 272 (9th Cir. 1974), in "*comparable transactions*," *Tex. Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 806 (9th Cir. 1969) (emphasis in original) (quoting *FTC v. Borden Co.*, 383 U.S. 637, 643, 86 S.Ct. 1092, 16 L.Ed.2d 153 (1966)), in order to combat "the perceived harm to competition occasioned by powerful buyers," *Volvo Trucks N. Am., Inc. v. Reeder-*

Simco GMC, Inc., 546 U.S. 164, 175, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006).

The Wholesalers clearly objected to the "reasonably contemporaneous" instruction, and I find no evidence to support giving that instruction. I am therefore of the opinion that so instructing the jury was an abuse of the district court's discretion. *See Clem*, 566 F.3d at 1181. And the Wholesalers need not have challenged the district court's denial of their entire post-trial renewed motion for judgment as a matter of law in order for us to remand for a new trial on the basis of this instructional error; the very fact that they "objected at the time of trial on grounds that were sufficiently precise to alert the district court to the specific nature of the defect" is sufficient. *See Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1015 (9th Cir. 2007) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 51.

Nor was the district court's error harmless. In the event of instructional error, prejudice is presumed, and "the burden shifts to [the prevailing party] to demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 20 F.4th 1231, 1243 (9th Cir. 2021) (quoting *Clem*, 566 F.3d at 1182). In this case, the jury was told to "find for the Defendants" if it determined that Living Essentials' sales to the Wholesalers and to Costco were not reasonably contemporaneous. And Living Essentials highlighted these instructions in their closing argument, calling the Wholesalers' failure to present evidence of contemporaneous sales "fatal to their claim." There is "no way to know whether the jury would [have] return[ed] the same [verdict] if the district court" had not given the "reasonably contemporaneous" instruc-

tion. *See id.* at 1244-45. I would therefore reverse the judgment of the court and remand for a new trial on the Wholesalers' Section 2(a) claim with a properly instructed jury.

MILLER, Circuit Judge, dissenting in part:

I agree that the district court did not abuse its discretion in instructing the jury on the section 2(a) claims, but I do not agree that the district court erred in rejecting the section 2(d) claims. I would affirm the judgment in its entirety.

Under section 2(d), if two or more customers of a seller compete with each other to distribute that seller's products, the seller may not pay either customer "for any services or facilities furnished by or through such customer in connection with the . . . sale" of the products unless the payment "is available on proportionally equal terms to all other customers competing in the distribution of such products." 15 U.S.C. § 13(d); *see Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 707-08 (9th Cir. 1964). Unlike section 2(a), section 2(d) does not require "a showing that the illicit practice has had an injurious or destructive effect on competition." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959). But it does demand that the favored and the disfavored customer be "competing" with each other. 15 U.S.C. § 13(d).

The district court did not clearly err in finding that the Wholesalers failed to establish by a preponderance of the evidence that they were competing with Costco. (The district court was wrong to suggest that the jury's verdict compelled this conclusion, but the court expressly stated that its finding also rested on an "independent review of the evidence," and we may uphold it on that basis.) We have previously held

that "customers who are in functional competition in the same geographical area, and who buy the seller's products of like grade and quality within approximately the same period of time, are in actual competition with each other in the distribution of these products." *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 807 (9th Cir. 1969) (quoting *Tri-Valley Packing Ass'n*, 329 F.2d at 709). We have not set out a definitive definition of "functional competition," and the Wholesalers argue that they need only show a "'competitive nexus,' whereby 'as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, *i.e.*, all wholesalers or all retailers, and within the same geographic market.'" (quoting *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)).

Such a capacious understanding of competition is foreclosed by the Supreme Court's decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006). There, the Court clarified that a common position in the supply chain in a shared geographical market is not sufficient, by itself, to establish actual competition. *Id.* at 179, 126 S.Ct. 860 ("That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales."). Thus, it is not enough to point to evidence of "sales in the same geographic area." *Id.* Instead, the evidence must show that the disfavored buyer "compete[d] with beneficiaries of the alleged discrimination *for the same customer*." *Id.* at 178, 126 S.Ct. 860. Consistent with *Volvo*, other circuits have held that "two parties are in competition only where, after a 'careful analysis of each party's customers,' we determine that the parties are 'each directly after the same dollar.'"

Feesers, Inc. v. Michael Foods, Inc., 591 F.3d 191, 197 (3d Cir. 2010) (quoting *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 214 (3d Cir. 2007)); *see also M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975) ("Competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.") (quoting *Ag-Chem Equip. Co., v. Hahn, Inc.*, 350 F. Supp. 1044, 1051 (D. Minn. 1972), *aff'd in part, vacated in part*, 480 F.2d 482 (8th Cir. 1973)).

In this case, Living Essentials presented evidence of substantial differences in operations that suggests that the Wholesalers and Costco were not competing "*for the same customer*." *Volvo*, 546 U.S. at 178, 126 S.Ct. 860. For example, unlike Costco, most of the Wholesalers sold 5-hour Energy only in store, negotiated pricing with their customers—offering in-house credit and different prices for 5-hour Energy—and sold only to retailers, not to end-consumers. Meanwhile, Costco Business Centers sold both in store and online at set prices to any consumer with a Costco membership, some of whom were end-consumers; in addition, they carried fewer than half of the 5-hour Energy flavors carried by the Wholesalers, and they did not sell 5-hour Energy display racks or other retailer-oriented accessories for Living Essentials. It is true that Costco Business Centers sold most of their 5-hour Energy to retailers. But it is far from clear that Costco sold to the *same* retailers as the Wholesalers. The Wholesalers' distinct features, such as their credit and wider inventory, may well have appealed to different customers.

Expert testimony corroborated that evidence. The parties offered dueling experts on the issue of competition. For the Wholesalers, Dr. Gary Frazier,

a marketing expert, opined that the purchasers did compete based on his review of emails sent by Living Essentials' employees discussing sales, the testimony of six of the seven Wholesalers, and maps showing the locations of the Wholesalers, their customers, and the seven Costco Business Centers. But on cross-examination, Dr. Frazier acknowledged that he did not speak with any of the Wholesalers' customers, and that the maps on which he relied included all of the Wholesalers' customers in a cluster of unlabeled dots without regard to whether the customer ever purchased 5-hour Energy or the actual travel time for the customer to get to a Wholesaler versus one of the seven Costco Business Centers. The district court found that the Costco Business Centers and the Wholesalers were in close proximity to each other, and I do not question that finding. But the court was not required to accept Dr. Frazier's inference that their 5-hour Energy customers were the same.

For Living Essentials, Dr. Darrel Williams, an expert in industrial organization and economics, testified that a "necessary condition for competition is that the buyers consider the two sellers substitute[s]," and he opined that this "necessary condition" was absent. After analyzing Living Essentials' sales records, the sales data provided by four of the Wholesalers, and the Wholesalers' customer data, Dr. Williams concluded that the Wholesalers did not compete with Costco for sales of 5-hour Energy. His analysis showed that even though some Wholesalers priced 5-hour Energy above the prices of other Wholesalers and Costco, the Wholesalers' customers did not switch to the seller with the cheapest product; from the lack of any economically significant customer loss, he inferred that the Wholesalers' customers did not treat Costco as a substitute supplier

of 5-hour Energy. He determined that the maximum level of customer switching across the Wholesalers and Costco was ten times lower than the switching attributable to ordinary customer "churn," and that even the opening of three new Costco Business Centers had no statistically significant effect on the Wholesalers' 5-hour Energy sales. Dr. Williams posited that operating differences between the Wholesalers and Costco might explain why their customers differed. He reasoned that the Wholesalers might draw customers interested in buying on credit or in the unique products the Wholesalers offer. In its ruling on the Wholesalers' motion for judgment as a matter of law, the district court summarized this testimony by explaining that "[b]ecause customers are presumed to purchase a product at the lowest available price, the jury could reasonably conclude this evidence tended to show Costco and Plaintiffs did not compete for the same customers."

The Wholesalers respond that Dr. Williams's testimony goes only to whether there was competitive injury, not whether there was competition in the first place. But that is a misreading of the testimony. Based on his conclusion that the Wholesalers' customers were not sensitive to the price of 5-hour Energy, Dr. Williams opined that the Wholesalers and Costco did not compete "*for the same customer*." *Volvo*, 546 U.S. at 178, 126 S.Ct. 860; *see Lewis v. Philip Morris Inc.*, 355 F.3d 515, 531 (6th Cir. 2004) (explaining that studies of price sensitivity are helpful for assessing competition).

To be sure, the district court was not required to credit Living Essentials' evidence and Dr. Williams's economic analysis of the sales data over the Wholesalers' evidence and Dr. Frazier's examination of emails and maps. But it did not clearly err in doing so and

in finding that the Wholesalers failed to carry their burden. *See United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991) ("Clear error is not demonstrated by pointing to conflicting evidence in the record.").

In reversing the denial of an injunction, the court deems all of the evidence of lack of actual competition—and the district court's findings based on that evidence—to be irrelevant. It relies on our decision in *Tri-Valley Packing*, in which we said that where two direct customers of a seller both "operat[e] solely on the same functional level," if "one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and . . . the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time," then it is not necessary to trace the seller's goods "to the shelves of competing outlets of the two in order to establish competition." 329 F.2d at 708. Instead, "[a]ctual competition in the sale of the seller's goods may then be inferred." *Id.*

As the court reads *Tri-Valley Packing*, the "confluence of facts" of operating on the same functional level, being in geographic proximity, and reselling goods of like grade and quality is sufficient to conclusively establish competition, making any other evidence irrelevant. But what we said in *Tri-Valley Packing* is that actual competition "may . . . be inferred," 329 F.2d at 708, not that it "shall be irrebuttably presumed."

Nowhere in *Tri-Valley Packing* did we say that a defendant is barred from rebutting the inference of competition by presenting evidence that two resellers at the same functional level and in the same geographic area are not, in fact, in actual competition with each other. If we had, our insistence in *Tri-Valley Packing*

on a showing of "functional competition," which I have already discussed, would have been superfluous. 329 F.2d at 709. Reading *Tri-Valley Packing* in that way is contrary to the economic reality that markets can be segmented by more than simply functional level, geography, and grade and quality of goods. Some differences in operations may not matter to customers, but others are undoubtedly significant. (In the New York geographic market, you can order a Coke both at Le Bernardin and at McDonald's, but no one thinks they are engaged in actual competition.)

The court's approach is also contrary to *Volvo*, which says that section 2(d) requires competition "*for the same customer*." 546 U.S. at 178, 126 S.Ct. 860. It is contrary to the decisions of other circuits that have recognized that finding competition requires "a careful analysis of each party's customers," not the application of a categorical rule. *Feesers, Inc.*, 591 F.3d at 197 (internal quotation marks omitted). And it is unsupported by the Federal Trade Commission's interpretation of section 2(d). In regulations defining "competing customers," the FTC gives the following illustrative example: "B manufactures and sells a brand of laundry detergent for home use. In one metropolitan area, B's detergent is sold by a grocery store and a discount department store." 16 C.F.R. § 240.5. Under the court's reading of *Tri-Valley Packing*, the grocery store and the discount department store would necessarily be in competition with each other. But that is not how the FTC sees it. Instead, the agency says, "*If* these stores compete with each other, any allowance, service or facility that B makes available to the grocery store should also be made available on proportionally equal terms to the discount department store." *Id.* (emphasis added); *see also FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 62,

79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959) (emphasizing the FTC's factual finding that the putative competitors were indeed "retailing the identical product to substantially the same segment of the public" (quoting *Simplicity Pattern Co. v. FTC*, 258 F.2d 673, 677 (D.C. Cir. 1958), *aff'd in part, rev'd in part*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959))). The presence or absence of competition must be assessed based on the facts.

The district court appropriately reviewed all of the evidence in making a finding that Living Essentials had not established competition. Because that finding was not clearly erroneous, I would affirm the judgment in its entirety.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 18-1077-CBM (Ex)

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC., *et al.*,
Plaintiffs,
v.

LIVING ESSENTIALS, *et al.*,
Defendants.

[Filed August 5, 2021]

ORDER RE: COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Order constitutes findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

FINDINGS OF FACT

1. The seven Plaintiffs are wholesale businesses that sell, among other merchandise, 5-hour ENERGY® in California. (Jury Instructions (ECF No. 498)1 ("Inst.") No. 3, ¶ 1; Amended Pretrial Conference Order (ECF No. 386) ("Am. PTCO") at ¶ 5.1.)

2. Defendants Living Essentials, LLC and Innovation Ventures, LLC are Michigan limited-liability companies with their principal place of business in Oakland County, Michigan. (Answer to Second Amended Complaint (ECF No. 39) ("Answer") ¶ 27.)

3. Living Essentials, LLC is the manufacturer and distributor of 5-hour ENERGY®, and Innovation

Ventures, LLC is its corporate parent. Both companies are referred to together as "Living Essentials." (Inst. No. 3, ¶ 2; Am. PTCO at ¶ 5.2.)

4. Living Essentials has manufactured and sold 5-hour ENERGY® since 2004.

5. Living Essentials manufactures all bottles of 5-hour ENERGY® in Wabash, Indiana, and then sells and distributes them around the country, including California.

10. Living Essentials uses an independent broker to sell 5-hour ENERGY to Costco Wholesale Corporation. At different times during the relevant period, those brokers were Level One Marketing, Advantage Sales & Marketing, and Innovative Club Partners. (Inst. No. 3, ¶ 6; Am. PTCO at ¶ 5.6.)

#*. Living Essential also uses independent broker, Paramount Sales Group, to sell 5-hour Energy to Plaintiffs and other wholesalers in California.

11. Costco operates two types of stores, the "regular" Costco stores, which cater to consumers, and a separate type called the Costco Business Centers, which cater primarily—but not exclusively—to small businesses. (Inst. No. 3, ¶ 7; Am. PTCO at ¶ 5.7.)

12. From 2012 to December 2015 there were four Costco Business Centers in California (Commerce, San Diego, Hawthorne, and Hayward). In December 2015, the Westminster Costco Business Center was opened. In August 2017, Burbank and South San Francisco Costco Business Centers were opened. (Inst. No. 3, ¶ 8; Am. PTCO at ¶ 5.8.)

13. There was at least one Costco Business Center in close proximity to each of the Plaintiffs or their customers. (Ex. 364-3 3 (maps showing locations of Plaintiffs' businesses and Costco Business Centers) & 10/15 Tr. 20:24-21:11; see also 10/3 Tr. 122:12-17

(Mansour); 10/4 Tr. 35:4-25 (Amini); 10/4 Tr. 96:5-97:15 (Rashid); 10/4 Tr. 131:10-132:4 (Kohanim); 10/7 Tr. 157:12-19 (Ali); 10/7 Tr. 178:4-12, 259:17-260:3, 263:15-18 (Wahidi); 10/10 Tr. 220:15-221:16, 225:1-21 (Krishan); 10/10 Tr. 238:25-239:2 (Pae); 10/15 Tr. 69:17-70:6 (Paulus).)

14. Living Essentials' "list price" to Plaintiffs was $1.45 per bottle for regular strength and $1.60 per bottle for extra-strength 5-hour ENERGY® from January 2012 through January 2019. (Answer ¶ 41; Response to RFA (ECF No. 179-1) No. 7; Exs. 872-878.)

15. Living Essentials' "list price" to Costco was $1.35 per bottle for regular strength and $1.50 per bottle for extra-strength 5-hour ENERGY® from January 2012 through January 2019. (Answer ¶ 41; Response to RFA (ECF No. 179-1) No. 8; Ex. 879.)

16. On January 14, 2019, Living Essentials increased its "list price" to Plaintiffs and Costco by $.05 per bottle. (Exs. 872-879.)

18. Living Essentials sold 5-hour ENERGY® drinks in bottles of like grade and quantity. (Proposed PTCO at 5 ("Defendants do not dispute that 5-hour ENERGY® are sold in bottles of like grade and quantity."); Order re Motions for Summary Judgment (ECF No. 289) at 4; Answer ¶ 30.)

CONCLUSIONS OF LAW

I. Robinson-Patman Act

315. Under the Clayton Act as amended by the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13(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."

316. 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. 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, 271-72 (9th Cir. 1974).

318. The RPA protects competition between specific firms competing for the same retail customers for the same product. *Volvo*, 546 U.S. at 177-79; *see also M.C. Mfg. Co. v. Tex. Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975) ("Competition is determined

by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.")

319. One of the foundational analyses in antitrust is the definition of a market, which is based in part on analysis of cross-elasticity of demand between various firms that might potentially compete. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956) (cross-elasticity of demand is indicated by "responsiveness of the sales of one product to price changes of the other"); *Eastman Kodak Co. v. Image Tech.*, 504 U.S. 451, 469 (1992) (analysis of competition based on "cross-elasticity of demand," meaning "extent to which consumers will change their consumption of one product in response to a price change in another"). "[W]hen demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market." *Forsyth v. Humana*, 114 F.3d 1467, 1477 (9th Cir. 1997), overruled on other grounds, 693 F.3d 896, 927 (9th Cir. 2012).

320. [T]he disfavored purchaser and the favored purchaser must be in the same geographic market." *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 521 (6th Cir. 2004); accord *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 708-09 (9th Cir. 1964).

323. A proper analysis of the existence of competition involves a systematic study of sales and pricing – a determination of consumer price sensitivity and demand substitution – to show actual linkage between the two firms in terms of whether they are competing for the same dollar. *Volvo*, supra at 179-81; *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987).

A. Implicit Findings by the Jury

324. To state a claim, Plaintiffs have the burden to prove that Plaintiffs competed with Costco. Whether Plaintiffs and Costco are competing with each other is an overlapping factual determination for both the claims under 15 U.S.C. § 13(a) and 13(d) (the Section 2(a) and 2(d) claims) of the RPA. *Volvo Trucks N.Am., Inc., v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *England v. Chrysler Corp.*, 493 F.2d 269, 271-72 (9th Cir. 1974); *Tri-Valley Packing Ass'n v. F.T.C.*, 329 F.2d 694, 707 (9th Cir. 1964).

325. The dominant issue addressed in one form or another by almost every witness was the issue of whether Plaintiffs compete with Costco.

326. The Jury's rejection of liability in Question 1 of the Verdict on the 2(a) claim implicitly rejected Plaintiffs' theory that Plaintiffs and Costco are competing with each other. In cases where legal claims are tried by a jury, equitable claims are tried by a judge, and the claims are based on the same facts, the "Seventh Amendment requires the Court to follow the jury's implicit or explicit factual determinations" in deciding the equitable claims. *Los Angeles Police League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993).

327. Therefore, this Court will follow the jury's implicit finding of a lack of competition and hold that Plaintiffs did not prove, as they must, that they were in competition with Costco.

328. This Court has also twice denied Plaintiffs' motion for judgment as a matter of law [ECF No. 550 at 144:7-14 and ECF No. 589 (Minutes of Telephone Status Conference)] and denied Plaintiffs' motion for a new trial on the Section 2(a) claims. [ECF No. 589 (Minutes of Telephone Status Conference)] Since liability was not established, Plaintiffs are not

entitled to any relief, whether legal or equitable, under Section 2(a).

B. The Court's Independent Review of the Evidence on the Question of Competition Results in a Finding that Plaintiffs Have Not Proven the Existence of Competition and Defendants Have Proven the Lack of Competition

350. This Court finds that Defendants proved that Plaintiffs and Costco were not in competition with each other.

C. Plaintiffs Did Not Prove Antitrust Injury

352. "Absent actual competition with a favored dealer ...[Plaintiffs] cannot establish the competitive injury required under the" RPA. *See Volvo*, 546 U.S. at 177. Having concluded that Plaintiffs have not proven they competed with Defendants, it follows that Plaintiffs likewise cannot prove an antitrust injury.

D. Plaintiffs and Costco Do Not Operate on the Same Functional Level

367. In order to prevail, Plaintiffs must show that promotional allowances are not available on proportionally equal terms to competing customers. 15 U.S.C. § 13(d). The trial record shows that Defendants made promotional allowances available on proportionally equal terms here. The evidence was unrebutted at trial that Defendants treated participants within the relevant distribution channels (the C-Store channel on the one hand and the Club channel on the other) the same, offering the same pricing, discounts, and promotions within each channel.

368. If Plaintiffs and Costco occupy different places in the channels of distribution, they do not operate at

the same functional level. If they do not operate at the same functional level, Plaintiffs cannot prevail on their claim. Plaintiffs must show that they and Costco "are operating solely on a particular functional level such as wholesaler or retailing." *Tri-Valley*, supra, at 708 (bold added) (competitors at issue were both wholesalers).

369. The evidence showed that Plaintiffs and Costco do not occupy the same functional level. Unlike Costco, Plaintiffs are not retailers. Plaintiffs are wholesalers that resell to convenience stores, jobbers, and other wholesalers, rather than to the ultimate consumer. On the other hand, the vast majority of Costco's sales were made to ultimate consumers. Because Plaintiffs and Costco are on different functional levels, Plaintiffs have not met the requirements under § 2(d). *See also, Bryant Corp.*, 1994 WL 745159 at *5 granting summary judgment to defendant on RPA claim, in part, because the plaintiff "failed to show that . . . an Oregon retail dealer selling to consumers, and . . .a Washington wholesale distributor selling to retail dealers, were in actual, functional competition with one another as required to establish price discrimination under the Robinson-Patman Act.").

II. California Unfair Competition Law ("UCL") Cal. Bus. & Prof. Code § 17200 and § 17205

382. In order to succeed on a UCL claim, Plaintiffs must prove "unfair competition," which "shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." Cal. Bus. & Prof. Code § 17200.

383. "An action for unfair trade practices under [Cal. Bus. & Prof. Code] § 17200, arises when a business practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Wolfe v. State Farm Fire & Casualty Ins. Co.*, 46 Cal. App. 4th 554, 562 (Cal. App. 1996).

386. Plaintiffs have long maintained that the conduct underlying their UCL claim is the same conduct that underlies their RPA claims. Since the jury already returned a verdict against Plaintiffs as to their Section 2(a) claim, and Plaintiffs similarly failed to establish liability on their Section 2(d) claim, they are therefore not entitled to any relief on their UCL claim. The 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. *See Consumer Def. Group v. Rental Hous. Indus Members*, 137 Cal. App. 4th 1185, 1220 (2006) (dismissing UCL claim where predicate claims were dismissed); *LiveUniverse*, 304 Fed. App'x. at 557-58 (2008); *Chavez*, Cal. App. 4th at 375.

389. The Court therefore concludes that, because Plaintiffs' unfair competition claim under the UCL is predicated on the same conduct that underlies Plaintiffs' price discrimination claims under the RPA, Plaintiffs' UCL claim fails if their price discrimination claims fail. *Petroleum Sales, Inc. v. Valero Ref. Co.*, 304 F. App'x. 615, 617 (9th Cir. 2008).

393. Conduct determined not to violate antitrust laws cannot be considered unfair under the UCL where the same underlying conduct underlies both claims. "If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the

determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers." *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (Cal. Ct. App. 2001). California courts have noted that permitting a separate inquiry into conduct that was held not to violate federal antitrust prohibitions but that presents essentially the same question under the UCL only invites conflict and uncertainty and could lead to enjoining procompetitive conduct. *See id.* (citing *Cel-Tech Comms. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (1999)).

394. Plaintiffs argue that a "court's finding under the 'unfair' prong can be based merely on conduct that 'violates the policy or spirit of one of th[e] [antitrust] laws," and that the Court is therefore free to find Defendants liable under the UCL even if Defendants are not liable under Plaintiffs' federal antitrust claims and therefore are not liable under the UCL's "unlawful" prong. [Pls' Reply Br. in Supp. of Relief Mot. at 9:2-7 (citation omitted).] This is not correct. "Where . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim [under the UCL], a finding that the conduct is not an antitrust violation precludes a finding of unfair competition." *LiveUniverse Inc. v MySpace*, 304 Fed. App'x. 554, 557-58 (9th Cir. 2008); *see also Chavez*, Cal. App. 4th at 375. There, the UCL claim failed because the federal claim failed where both were predicated on the same allegations. *LiveUniverse*, 304 Fed. App'x at 558.

395. The Court further finds that Plaintiffs waived this claim based on the UCL's unfairness prong by their previous repeated pronouncements that their UCL claim asserts the same liability theory as their RPA claim and covers no additional ground. [See

Pls.' Br. in Opp. to Defs.' Mot. for Sum. J., ECF No. 200, at 25:12-13; Pls.' Post-Trial Br., ECF No. 495, at 12:21-13:1 & n. 6; Pls.' Mot. for Perm. Injunction, ECF No. 582, at 25:12-13].

396. Moreover, Plaintiffs' rely on the same factual pattern of conduct to support their liability claims under the UCL's unfairness prong as they point to on their RPA claims. [See Pls' Mot. for Perm. Injunction, ECF No. 582, at 17:10-22.

III. Plaintiffs Fail to Establish Entitlement to Any Relief

398. Plaintiffs seek injunctive relief under both Section 2(d) and the UCL.

399. Injunctive relief is an extraordinary remedy that is "never awarded as of right" but is relief that should be carefully crafted and awarded only when absolutely necessary. *Winter v. NRDC*, 555 U.S. 7, 24 (2008).

400. The plaintiff bears "the heavy burden of establishing they are entitled to injunctive relief." *Blizzard Ent. Inc. v. Ceiling Fan Software, LLC*, 28 F. Supp. 3d 1006, 1018 (C.D. Cal. 2013). A plaintiff seeking a mandatory injunction has a doubly demanding burden because the relief "goes well beyond simply maintaining the status quo pendente lite [and] is particularly disfavored." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Plaintiffs here seek a "mandatory injunction," which is "injunction that orders an affirmative act or mandates a specified course of conduct." Black's Law Dictionary (11th ed. 2019), "Injunction." Mandatory injunctions should be avoided "unless the facts and law clearly favor the moving party." *Id.*

403. Although an injunction is an available remedy under the RPA, *see Hasbrouck v. Texaco, Inc.*, 842

F.2d 1034, 1042 (9th Cir. 1987), injunctive relief must still be analyzed through the framework of equitable principles governing equitable relief. *See Ingram v. Phillips Petroleum Co.*, 259 F. Supp. 176, 183 (D.N.M. 1966) ("General equitable principles governing the granting of relief in other equity cases apply to the so-called trade cases," including an action for injunction under the RPA)).

405. Before the Court can grant a permanent injunction, Plaintiffs must meet their burden to establish four elements: (1) irreparable injury; (2) inadequate legal remedies; (3) a balance of the hardships that weighs in their favor and against Defendants; and (4) a public interest that a permanent injunction will not disserve. *Blizzard Entert. Inc. v. Ceiling Fan Software, LLC*, 28 F.Supp.3d 1006, 1018 (C.D. Cal. 2013); *eBay, Inc. v. Merc-Exchange, LLC*, 547 U.S. 388, 391 (2006); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *Perfect 10 v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011).

Since Plaintiffs did not prevail on either the Section 2(a) claim, the 2(d) claim or the § 17200, there is no evidence that would support the issuance of a permanent injunction.

IT IS SO ORDERED.

DATED: August 5, 2021

/s/ Consuelo B. Marshall

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 18-1077-CBM (Ex)

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC., *et al.*,
Plaintiffs,
v.

LIVING ESSENTIALS, *et al.*,
Defendants.

[Filed April 28, 2021]

ORDER RE: ADJUDICATION OF PLAINTIFFS' SECTION 2(D) CLAIM, § 17200 AND PLAINTIFFS' REQUEST FOR PERMANENT INJUNCTION

The matters before the Court are Plaintiffs' equitable claims pursuant to Section 2(d) of the Robinson-Patman Act, California Unfair Competition Law § 17200 and Plaintiffs' request for issuance of a permanent injunction. Plaintiffs filed a post-trial brief regarding the Court's impending findings of fact and conclusions of law. (Dkt. No. 496-1.) Defendants filed an opposing brief. (Dkt. No. 530.) Both parties filed proposed findings of fact and conclusions of law and post-trial briefs in response thereto.

I. BACKGROUND

Plaintiffs are seven retailers located in California that purchase the energy drink "5-hour Energy" wholesale from Defendants, and then resell 5-hour

Energy on a wholesale basis to other retail outlets and wholesalers.

Defendants Living Essentials, LLC and Innovation Ventures, LLC are Michigan limited-liability companies with their principal place of business in Oakland County, Michigan. Living Essentials, LLC is the manufacturer and distributor of 5-hour ENERGY®, and Innovation Ventures, LLC is its corporate parent. Both companies are referred to together as "Living Essentials."

Defendants also sell the drink to Costco to whom they offer additional "instant rebates" and promotional items to Costco that they allegedly do not offer to Plaintiffs.

Costco operates two types of stores, the "regular" Costco stores, which cater to consumers, and a separate type called the Costco Business Centers ("CBCs"), which sell to various customers, including small businesses.

Living Essentials' "list price" to Plaintiffs was $1.45 per bottle for regular strength and $1.60 per bottle for extra-strength 5-hour ENERGY® from January 2012 through January 2019. Living Essentials' "list price" to Costco was $1.35 per bottle for regular strength and $1.50 per bottle for extra-strength 5-hour ENERGY® from January 2012 through January 2019. On January 14, 2019, Living Essentials increased its "list price" to Plaintiffs and Costco by $.05 per bottle.

Plaintiffs allege that this price discrimination resulted in Plaintiffs selling less 5-hour energy due to a competitive disadvantage. Plaintiffs brought three claims under the Federal antitrust laws and two claims under California state law. Plaintiffs' claim under Section 2(a) of the Robinson-Patman Act was

tried to a jury, while its claim under Section 2(d) and the UCL was tried to the Court. The jury returned a verdict in favor of the Defendants, finding Defendants did not violate Section 2(a). The Court adjudicated the Section 2(d) claim based on the same evidence tried by the jury in support of Section 2(a) claim.

II. JURISDICTION

The claims invoke the Robinson-Patman Act, 15 U.S.C. § 13.

III. DISCUSSION

A. Robinson-Patman Act § 2(d)

Section 2(d) of the Robinson-Patman Act prohibits the payment or provision of "anything of value" to a customer "as compensation or in consideration for any services or facilities furnished" by the customer in connection with the sale of products or commodities of the seller, "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." 15 U.S.C. § 13(d). The elements of Section 2(d) are:

> (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] shall not pay or contract for the payment of anything of value to or for the benefit of such a customer as compensation or 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. F.T.C., 329 F.2d 694, 707-08 (9th Cir. 1964).

1. Actual Competition

The Robinson-Patman protects competition between specific firms competing for the same retail customers for the same product. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177-79 (2006). One of the foundational analyses in antitrust is the definition of a market, which is based in part on analysis of cross-elasticity of demand between various firms that might potentially compete. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956). "[W]hen demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market." *Forsyth v. Humana*, 114 F.3d 1467, 1477 (9th Cir. 1997), overruled on other grounds, 693 F.3d 896, 927 (9th Cir. 2012). A proper analysis of the existence of competition involves a systematic study of sales and pricing – a determination of consumer price sensitivity and demand substitution – to show actual linkage between the two firms in terms of whether they are competing for the same dollar. *Volvo*, supra at 179-81; *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987).

The parties dispute whether Plaintiffs competed with Costco, including Costco Business Center ("CBC" or "CBCs"), for resale of 5-hour Energy drinks to wholesalers, jobbers, and retailers. Plaintiffs argue the trial testimony of their fact and expert witnesses is sufficient to prove that Plaintiffs competed with Costco. At trial, Plaintiffs testified that their customers told them they purchased 5-hour Energy from nearby CBCs when Instant Redeemable Coupon ("IRC") promotions were in effect, that they personally observed their customers in a CBC purchasing 5-hour Energy during an IRC promotion event, and that

they observed their sales of 5-hour Energy declining when an IRC promotion was in effect and would only recover those sales when the promotional period ended. (Dkt. No. 496-1 (Pls.' Post-Trial Brief) at 3:21-4:3.) Plaintiffs' customers testified that they purchased 5-hour Energy from CBCs instead of Plaintiffs solely because of IRC promotions. (Id. at 4:3-5.) Additionally, Plaintiffs presented testimony from expert witnesses Dr. Gary Frazier, an expert in the field of marketing and distribution management, and Dr. DeForest McDuff, an expert in the field of economics, concluding that Plaintiffs and CBC competed to re-sell 5-hour Energy to the same customers. (Id. at 4:6-11.) Finally, Plaintiffs argue witnesses and documents proffered by Living Essentials admitted that competition existed between Costco and Plaintiffs. Defendants presented expert testimony from Dr. Darrell Williams, an industrial organization economist, who explained that competition is measured by determining if customers of 5 hour energy viewed Plaintiffs and Costco as substitute sellers and opined that Plaintiffs and Costco were not competitors because "none of the plaintiffs had an economically significant loss of customers associated with the Costco promotions of 5 hour energy." (Tr. 107:17-110:20.)

Defendants argue the Court must follow the jury's implicit factual finding that competition between Plaintiffs and Costco did not exist. Defendants also dispute the credibility and substance of Plaintiffs' expert and lay witnesses. "[I]n a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are 'based on the same facts,' in deciding the equitable claims 'the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations.'"

Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1473 (9th Cir. 1993) (quoting *Miller v. Fairchild Indus.*, 885 F.2d 498, 507 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990)). In the absence of an express jury finding, the Court must look at the jury instructions to determine whether the jury made an implicit finding of fact. *Id.*

Here, Plaintiffs' Section 2(a) claim required proof of four elements: (1) 5-hour energy drinks were sold in interstate commerce, (2) the drinks were of like grade and quality, (3) Defendants price discriminated between Plaintiffs and Costco, and (4) "the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of a favored purchaser, *i.e.*, one who received the benefit of such discrimination." *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006). In its order regarding the parties' motions for summary judgment, the Court found the first three elements were satisfied. (*See* Dkt. No. 289 (Order RE Motions for Summary Judgment).) Thus, only the issue left for the jury was competitive injury.

To establish a competitive injury under the Robinson-Patman Act, Plaintiffs were required to prove they were in actual competition with Costco. *See Volvo*, 546 U.S. at 177 ("Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act.") Actual competition for purposes of Section 2(a) presents an identical factual issue to the competition element of Section 2(d). *See England v. Chrysler Corp.*, 493 F.2d 269, 271-72 (9th Cir. 1974).

The jury was not given an interrogatory which required them to answer yes or no as to whether Plaintiffs and Costco were competitors, but answered "No" to the question whether each Plaintiff proved

Defendants violated Section 2(a) of the Robinson-Patman Act. (*See* Dkt. No. 517 (Redacted Court's Jury Verdict Form).) Because of the Court's findings of fact in the summary judgment order, however, the jury was only required to determine whether competitive injury existed in order to find liability for violation of Section 2(a). The jury was instructed:

> To establish a reasonable possibility of substantial harm to competition, each Plaintiff must show that sales or profits were diverted from it to competing purchasers because of discrimination. Plaintiffs can show that sales or profits were diverted either by showing a substantial difference in price between sales by Defendants to a Plaintiff and sales by Defendants to other competing purchasers over a significant period of time or by offering direct evidence of lost sales or profits caused by discrimination. Each Plaintiff must show that it and favored purchasers competed to resell the relevant products to the same customers or buyers.

(Dkt. No. 498 (Court's Jury Instructions) at 19.) Thus, by answering "No" to the question of liability under Section 2(a), the jury implicitly found there was no competition between Costco and Plaintiffs.

Plaintiffs argue it cannot be inferred that the jury found no competition existed because the jury was additionally instructed "that Living Essentials could negate liability entirely if it established that its price differences were due to legitimate functional discounts, or if Living Essentials' sales to both sets of purchasers were not reasonably contemporaneous in time," both of which Plaintiffs argue are irrelevant to the Section 2(d) claim. However, if the jury verdict was based on the functional discount doctrine or the contemporaneousness of sales, the result does not

change. If the jury determined the sales were not made contemporaneously, then actual competition cannot be inferred. *See Tri-Valley Packing Ass'n*, 329 F.2d at 708 (ruling actual competition may be inferred by showing that "one has outlets in such geographical proximately to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller *within approximately the same period of time*.") (emphasis added). Likewise, if the jury verdict was premised on the functional discount doctrine, then this would implicitly establish Costco and Plaintiffs did not compete. (*See* Dkt. No. 498 (Court's Jury Instructions) at p. 20 ("Functional discounts may usually be granted to customers who operate at different levels of trade (for example, wholesalers versus retailers), *and thus do not compete with each other*, without risk of violation Section 2(a) of the Robinson Patman Act.") (emphasis added).)

Thus, the jury implicitly found no competition existed between Plaintiffs and Costco, and the Court is bound by that finding. *See Gates*, 995 F.2d at 1473. Because a claim under Section 2(d) requires demonstrating that "two or more customers of a particular seller compete with each other in the distribution of the products of that seller," *Tri-Valley Packing Ass'n*, 329 F.2d at 707-08, Plaintiffs do not succeed on a Section 2(d) claim.

2. The Court's Independent Review of the Evidence

The Court having considered all admissible evidence, judged credibility of witnesses and given their testimony the weight it deserves, including the opinions of expert witness, finds that Plaintiffs failed to prove

by a preponderance of evidence that they competed with Costco for resale of the 5 hour energy drink.

3. Judicial Estoppel

Defendants argue that judicial estoppel bars Plaintiffs from pursuing Section 2(d) claims. Under the doctrine of judicial estoppel, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal citation omitted). When applying judicial estoppel, courts typically look at factors including: (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) "whether the party has succeeded in persuading a court to accept that party's early position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled;" and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51.

Here, Plaintiffs successfully argued at summary judgment that the IRC promotions were price concessions. (Dkt. No. 172-1, at 12:23-15:9.) Plaintiffs argued Defendants' calculation of the difference in price between Costco and Plaintiffs was erroneous because it failed to include rebates, also called "bill backs." (Id. at 12:12-13:5.) Plaintiffs argued that "[c]hief among the bill backs [ ] exclude[d] are the $3.00-$7.20 IRC rebates that Costco paid to Living Essentials for each 24-pack it sold[.]" (Id. at 13:6-8.)

Plaintiffs' argument thus makes clear that the IRC payments were price concessions in connection with the original sale of 5-hour Energy from Living Essentials to Costco actionable under Section 2(a), and not reimbursement for promotional services in connection with resale actionable under 2(d). *See Lewis v. Philip Morris Inc.*, 355 F.3d 515, 524-25 (6th Cir. 2004). Thus, Plaintiffs' characterization of the IRC promotions under Section 2(a) is inconsistent with its position on the same promotions under Section 2(d). *See id.* at 125 ("Economists might observe that the ultimate economic effect of the different types of discrimination (i.e., price discrimination and discrimination in providing services that increase resales) is the same . . . [b]ut Congress saw fit to distinguish between the two. . ."). At the summary judgment phase, the Court held the IRC payments "constitute price discrimination and no expert may testify to the contrary at trial." (Dkt. No. 289 (Order RE Motions for Summary Judgment) at p. 9.) Thereafter, Defendants were barred at trial from offering expert testimony that IRC promotions should be excluded from the price differential, even though the substantiality of such price discrimination was central to the Section 2(a) claim. Thus, Plaintiffs would be unfairly advantaged if they were permitted to take on the contrary position after having lost at trial.

B. Cal. Bus. & Prof. Code § 17200

In order to succeed on a § 17200 UCL claim, Plaintiffs must prove "unfair competition," which "shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Cal. Bus. & Prof. Code § 17200. The "unlawful" prong of the UCL "borrows violations of other laws and treats them as unlawful practices that [the UCL] makes independently actionable." *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 520 (2013.)

The merits of Plaintiffs' claim under the "unlawful" prong and the "unfair" prong of the UCL is premised on its claim under Section 2(d) of the Robinson-Patman Act. Because Plaintiffs are unable to prove their Section 2(d) claim under the Robinson-Patman Act, their state law claim also fails.

C. Request for Permanent Injunction

Having not prevailed on any of its causes of action, there is no evidence supporting the issuance of a permanent injunction. Therefore, the request is denied. *See Blizzard Ent. Inc. v. Ceiling Fan Software, LLC*, 28 F. Supp. 3d 1006, 1018 (C.D. Cal. 2013) (plaintiff bears "the heavy burden of establishing they are entitled to injunctive relief.").

IV. CONCLUSION

The Court finds in favor of Defendants on Plaintiffs' Section 2(d) claim and UCL state claim.

IT IS SO ORDERED.

DATED: April 28, 2021

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 18-CV-1077-CBM-Ex Date: April 1, 2021

Title: *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC et al*

Present: The Honorable CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

YOLANDA SKIPPER	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
NONE PRESENT	NONE PRESENT

Proceedings: IN CHAMBERS – ORDER RE ADJUDICATION OF PLAINTIFFS' SECOND AND FIFTH CAUSE OF ACTION AND PLAINTIFFS' REQUEST FOR PERMANENT INJUNCTION. (DKT 582.)

The matters before the Court are Plaintiffs' second cause of action, violation of Section 2(d) of the Robinson-Patman Act, and fifth cause of action, violation of California's Unfair Competition Law Cal. Bus. & Prof. Code § 17200, and Plaintiffs' request for the issuance of a permanent injunction for adjudication by the Court.

The Court finds in favor of Defendants on Plaintiffs' second cause of action, as well as Plaintiffs' fifth cause of action, and the Court denies Plaintiffs' request for a permanent injunction.

IT IS SO ORDERED.

STATUTORY PROVISIONS INVOLVED

1. Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, provides:

§ 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 contact for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(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.

2. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In

determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28.

3. Section 11 of the Clayton Act, 15 U.S.C. § 21, provides:

§ 21. Enforcement provisions

(a) Commission, Board, or Secretary authorized to enforce compliance

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable

to air carriers and foreign air carriers subject to part A of subtitle VII of title 49; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders

Whenever the Commission, Board, or Secretary vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, Board, or Secretary requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission, Board, or Secretary, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission, Board, or Secretary. If upon such hearing the Commission, Board, or Secretary, as the case

may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission, Board, or Secretary may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission, Board, or Secretary may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission, Board, or Secretary conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however*, That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modification of findings; finality of judgment and decree

Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission, board, or Secretary be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission, board, or Secretary, and thereupon the commission, board, or Secretary shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission, board, or Secretary until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission, board, or Secretary, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission, board, or Secretary as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission, board, or Secretary is affirmed, the court shall issue its own order

commanding obedience to the terms of such order of the commission, board, or Secretary. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, board, or Secretary, the court may order such additional evidence to be taken before the commission, board, or Secretary, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, board, or Secretary may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) Exclusive jurisdiction of Court of Appeals

Upon the filing of the record with its jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission, board, or Secretary shall be exclusive.

(e) Liability under antitrust laws

No order of the commission, board, or Secretary or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

(f) Service of complaints, orders and other processes

Complaints, orders, and other processes of the commission, board, or Secretary under this section may be served by anyone duly authorized by the commission, board, or Secretary, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of orders generally

Any order issued under subsection (b) shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission, board, or Secretary may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission, board, or Secretary has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the commission, board, or Secretary has been affirmed or the petition for review has been dismissed by the court of appeals; or

(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission, board, or Secretary be affirmed or the petition for review be dismissed.

(h) Finality of orders modified by Supreme Court

If the Supreme Court directs that the order of the commission, board, or Secretary be modified or set aside, the order of the commission, board, or Secretary rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission, board, or Secretary shall become final when so corrected.

(i) Finality of orders modified by Court of Appeals

If the order of the commission, board, or Secretary is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court then the order of the commission, board, or Secretary rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission, board, or Secretary was rendered,

unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission, board, or Secretary shall become final when so corrected.

(j) Finality of orders issued on rehearing ordered by Court of Appeals or Supreme Court

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission, board, or Secretary for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission, board, or Secretary rendered upon such rehearing shall become final in the same manner as though no prior order of the commission, board, or Secretary had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(*l*) Penalties

Any person who violates any order issued by the commission, board, or Secretary under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any

such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission, board, or Secretary each day of continuance of such failure or neglect shall be deemed a separate offense.

4. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

§ 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.