

No. 23A_____

IN THE
SUPREME COURT OF THE UNITED STATES

INNOVATION VENTURES, LLC AND LIVING ESSENTIALS, LLC,
Applicants,

v.

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC.;
TREPco IMPORTS AND DISTRIBUTION, LTD.; L.A. INTERNATIONAL CORPORATION;
CALIFORNIA WHOLESALE; YNY INTERNATIONAL, INC.; EASHOU, INC., DBA SAN DIEGO
CASH AND CARRY; AND SANoor, INC., DBA L.A. TOP DISTRIBUTOR,
Respondents.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Living Essentials, LLC

March 11, 2024

PARTIES TO THE PROCEEDINGS BELOW

Applicants Innovation Ventures, LLC and Living Essentials, LLC were the defendants in the district court and the appellees in the court of appeals.

Respondents U.S. Wholesale Outlet & Distribution, Inc.; Trepcu Imports and Distribution, Ltd.; L.A. International Corporation; California Wholesale; YNY International, Inc.; Eashou, Inc., dba San Diego Cash and Carry; and SaNoor, Inc., dba L.A. Top Distributor were the plaintiffs in the district court and the appellants in the court of appeals.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, applicants Innovation Ventures, LLC and Living Essentials, LLC state the following:

Innovation Ventures, LLC is the parent company of Living Essentials, LLC. There is no publicly held corporation that owns 10% or more of the stock in Innovation Ventures, LLC. There is no publicly held corporation that owns 10% or more of the stock in Living Essentials, LLC.

RELATED CASES

U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC, 89 F.4th 1126 (9th Cir. Dec. 22, 2023) (No. 21-55397)

U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC, 74 F.4th 960 (9th Cir. July 20, 2023) (No. 21-55397)

U.S. Wholesale Outlet & Distrib., Inc. v. Living Essentials, No. Cv 18-1077 CBM (Ex), ECF No. 617, 2021 WL 3418584 (C.D. Cal. Aug. 5, 2021)

U.S. Wholesale Outlet & Distrib., Inc. v. Living Essentials, No. Cv 18-1077 CBM (Ex), ECF No. 603 (C.D. Cal. Apr. 28, 2021)

U.S. Wholesale Outlet & Distrib., Inc. v. Living Essentials, No. Cv 18-1077 CBM (Ex), ECF No. 599 (C.D. Cal. Apr. 1, 2021)

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To the Honorable Elena Kagan, Associate Justice of the United States
Supreme Court and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules
of this Court, applicants Innovation Ventures, LLC and Living Essentials, LLC
respectfully request a 15-day extension of time, up to and including April 5, 2024,
within which to file a petition for a writ of certiorari to review the judgment of the
United States Court of Appeals for the Ninth Circuit.

The court of appeals entered its judgment and issued an opinion on July 20,
2023; it amended its opinion and denied rehearing on December 22, 2023. The
court of appeals' amended (and superseding) opinion and its order denying
rehearing (reported at 89 F.4th 1126) are attached hereto as Exhibit A. The court
of appeals' initial opinion (reported at 74 F.4th 960) is attached hereto as Exhibit B.
Relevant orders of the district court are attached hereto as Exhibits C through E.
The petition would be due on March 21, 2024, and this application is made at least
10 days before that date. This Court's jurisdiction would be invoked under
28 U.S.C. § 1254(1).

1. This case presents an important issue regarding the meaning of
“competition” under the Robinson-Patman Act (“RPA”), 15 U.S.C. § 13, which this
Court has held means competition “*for the same customer.*” *Volvo Trucks N. Am.,
Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 178 (2006). In *Volvo*, this Court

rejected an alternative test applied by the lower court – whether firms had “competed at the same functional level . . . and within the same geographic market.” *Id.* at 173-74 (ellipsis in original). Yet, in this case, the Ninth Circuit revived that rejected test and took it a step further, holding that evidence supporting its “functional level” test not merely is sufficient to support a finding that firms are “competing” under Section 2(d) of the RPA, but *requires* such a finding. The Ninth Circuit’s revival of that test conflicts with *Volvo* and with other circuits’ decisions, which have concluded that two firms are in competition only if they are competing for the same customer. The Ninth Circuit’s resurrection of the test rejected by *Volvo* warrants this Court’s review.

2. The Ninth Circuit’s ruling also raises an important issue regarding whether a private plaintiff can obtain an injunction under the RPA without establishing harm to competition. This Court’s cases establish that a private plaintiff seeking an injunction under Section 2(d) of the RPA must show threatened “*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added); *see Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986) (“It would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.”). In its amended opinion, the Ninth Circuit carried over its erroneous understanding of “competition” under the RPA into its analysis of antitrust injury, concluding that satisfying the

“functional level” test is sufficient for a private plaintiff to establish competition for purposes of antitrust injury. The Ninth Circuit’s judgment conflicts with a decision of the Second Circuit, *see Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202 (2d Cir. 2015), and the principle established by this Court that the RPA “should be construed consistently with broader policies of the antitrust laws,” *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 221 (1993) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).

3. The 15-day extension to file a certiorari petition is necessary because undersigned counsel needs the additional time to prepare the petition and appendix in light of other, previously engaged matters in this and other courts, including: (1) oral argument in this Court in *Truck Insurance Exchange v. Kaiser Gypsum Co., Inc., et al.*, No. 22-1079 (to be argued Mar. 19, 2024); and (2) oral argument in the Ohio Supreme Court in *In re National Prescription Opiate Litigation*, No. 2023-1155 (to be argued Mar. 26, 2024).

For all these reasons, there is good cause for a 15-day extension of time, up to and including April 5, 2024, within which to file a certiorari petition in this case to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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