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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC., et al.

Plaintiffs,

v.

LIVING ESSENTIALS, LLC and INNOVATION VENTURES, LLC

Defendants.

Case No. 2:18-cv-1077-CBM-E

**PLAINTIFFS' NOTICE OF MOTION AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL**

[Memorandum of Points and Authorities and Proposed Order filed concurrently herewith]

Date: January 14, 2020
Time: 10:00 a.m.
Courtroom: 8B, 8th Floor

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**NOTICE OF MOTION AND MOTION**

**TO DEFENDANTS AND THEIR COUNSEL OF RECORD:**

PLEASE TAKE NOTICE THAT on January 14, 2020, at 10:00 a.m., in the courtroom of the Honorable Consuelo B. Marshall, located at Courtroom 8B of the Central District of California courthouse, 350 W. 1st Street, Los Angeles, California, 90012, plaintiffs U.S. Wholesale Outlet & Distribution, Inc., Trepco Imports & Distribution, Ltd.; YnY International, Inc.; Eashou, Inc. (d/b/a San Diego Cash & Carry); California Wholesale; Sanoor, Inc. (d/b/a L.A. Top Distributor); and L.A. International Corporation (collectively, "Plaintiffs") will and hereby do move the Court for an order of Judgment as a Matter of Law ("JMOL") pursuant to Federal Rule of Civil Procedure 50(b) or, in the alternative, a new trial pursuant to Rule 59(a).

Plaintiffs request JMOL on the grounds that the evidence presented at trial "permits only one reasonable conclusion"—that Living Essentials *is* liable under Section 2(a) of the Robinson-Patman Act. Upon entering JMOL, a new trial is needed only to determine the damages suffered by Plaintiffs as a result of Living Essentials' violation.

Alternatively, Plaintiffs seek a new trial under Rule 59(a) on the grounds that (1) the jury's verdict is contrary to the clear weight of the evidence; (2) it was prejudicial error to instruct the jury on "functional discounts" (ECF No. 498 at 20 (Instruction No. 19)) and to include the terms "substantial" and "substantially" in instructions concerning the "competitive injury" element of the Section 2(a) claim (ECF No. 498 at 14, 18, 19 (Instruction Nos. 13, 17, 18)); and (3) it was erroneous for the Court to exclude Dr. McDuff's charts showing Plaintiffs' decline in sales.

This motion is based upon the following memorandum, the accompanying declarations and exhibits, the papers and pleadings on file with the Court, and such other argument and materials as may be presented before the Court takes this motion under submission.

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on December 3, 2019.

Dated: December 11, 2019

GAW | POE LLP

By: 

Mark Poe
Attorneys for Plaintiffs

## INTRODUCTION

The Court should grant JMOL for Plaintiffs because the evidence presented at trial "permits a reasonable jury to reach only one conclusion," *Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 755 (9th Cir. 2006)—that Plaintiffs have satisfied all elements to establish Living Essentials' liability for unlawful price discrimination under Section 2(a) of the RPA.

The first element—the "[s]ales being compared were made by LE at about the same time," (ECF No. 498 at 14 (Instruction No. 13))—is established by Living Essentials' transactional-level spreadsheets showing that it sold 5-hour Energy to Costco, on the one hand, and to Plaintiffs, on the other, "at about the same time."

The Court has already found the second element satisfied—that "LE charged discriminatory… prices to different purchasers." (*Id.*) Two months before trial, the Court determined that "there can be no dispute that Costco was offered a lower price by Defendants than the price offered to Plaintiffs," and held as a matter of law that "Defendants discriminated against Plaintiffs in favor of Costco based on price." (Order re Motions for Summary Judgment (ECF No. 289) at 4.)

The final "competitive injury" element to establish Living Essentials' liability is to show that "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 (2006). Plaintiffs presented ***unrefuted*** evidence satisfying both alternative forms of proving "competitive injury": indirectly, through the *Morton Salt* inference, and directly, through evidence of diverted sales.

Per the Supreme Court, the "inference of competitive injury under *Morton Salt* arises from 'proof of a substantial price discrimination between competing purchasers over time.'" *Volvo*, 546 U.S. at 179. Plaintiffs presented ***unrebutted*** evidence through their expert Dr. DeForest McDuff, who calculated a ***persistent 12-23% net price favoritism to Costco throughout the entire relevant period***—more

than double the amount found sufficient to establish the inference in *Morton Salt*. Notably, Living Essentials failed to present any evidence refuting Plaintiffs' evidence on this issue, and will not identify any in its opposition brief.

The evidence was similarly one-sided as to diverted sales. Each Plaintiff testified that it lost sales of 5-hour Energy to Costco during Costco's IRC promotions, and a representative sampling of Plaintiffs' customers confirmed that they bought 5-hour Energy from Costco instead of Plaintiffs during the IRC promotions because of price. Living Essentials' broker Paramount Sales Group confirmed the same—that convenience store ("C-Store") wholesalers lost sales to Costco during the IRC promotions. Contemporaneous emails from Living Essentials' own employees further confirmed the diversion of sales of 5-hour Energy from Plaintiffs to Costco because of price. And Living Essentials' expert witness admitted that Plaintiffs lost sales to Costco. Again, Living Essentials will not be able to identify any refuting evidence.

Finally, unrefuted evidence established that Plaintiffs and Costco "were directly competing for resales among the same group of customers," *George Haug Co. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 141-42 (2d Cir. 1998) (citing *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968)), targeting their sales of 5-hour Energy to the same C-Store retailers. For these reasons, the Court should set aside the verdict and grant JMOL.

Alternatively, a new trial is warranted because the clear weight of the evidence showed that Living Essentials is liable for unlawful price discrimination under Section 2(a). A new trial is independently warranted because Plaintiffs were substantially prejudiced (1) by errors in jury instructions—giving the "functional discounts" instruction when it is inapplicable as a matter of law, and including the term "substantially" in the instructions for the "competitive injury" element, and (2) by the critical evidentiary error of excluding charts illustrating Plaintiffs' sales declines compared to Costco's increases.

## I. LEGAL STANDARD

"Judgment as a matter of law is proper when the evidence permits a reasonable jury to reach only one conclusion." *Quiksilver, Inc.*, 466 F.3d at 755. The trial court "must review the record taken as a whole," and must give credence to "evidence supporting the moving party that is uncontradicted and unimpeached." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (citations omitted).

Under Rule 59, a court may grant a new trial on any issue. Fed. R. Civ. P. 59(a)(1)(A). "[E]ven if substantial evidence supports the jury's verdict, a trial court may grant a new trial if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (citation omitted).

## II. PLAINTIFFS ARE ENTITLED TO JMOL AS TO LIVING ESSENTIALS' LIABILITY UNDER SECTION 2(a).

The Court previously held that, to establish Section 2(a) liability, "Plaintiffs must prove four elements (1) five-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.'" (ECF No. 289 at 3-4 (citing *Volvo*, 546 U.S. at 176).) Of the remaining elements that remained in dispute per Instruction No. 13, liability under Section 2(a) requires Plaintiffs to show that "(1) [the s]ales being compared were made by LE at about the same time; (2) LE charged discriminatory—that is, different—prices to different purchasers; [and] (3) [t]here is a reasonable possibility that the discriminatory pricing may substantially harm competition." (ECF No. 498 at 14.)

The Supreme Court has continuously described the RPA as a "prophylactic"

statute. *See*, *e.g.*, *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981). Thus, Section 2(a)'s prohibition is against price discrimination that "may" harm competition. 15 U.S.C. § 13(a). "[T]he statute does not require that the discriminations must in fact have harmed competition." *J. Truett Payne*, 451 U.S. at 562. Instead, "all that is required to establish illegal price discrimination is proof that competitive injury ***may*** result." *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1987) (emphasis in original).

As shown below, Plaintiffs presented a mountain of evidence at trial "permit[ting] a reasonable jury to reach only one conclusion"—that Plaintiffs have satisfied all elements to establish Living Essentials' liability under Section 2(a). A new trial is needed only to determine Plaintiffs' entitlement to damages.[1]

**A. The Evidence Presented At Trial Shows That The Compared Sales Were Reasonably Contemporaneous.**

While there must be two sales made by the same seller to at least two different purchasers at two different prices, "there is no requirement that the two sales be made at precisely the same time or place." *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 710-11 (8th Cir. 2004), *rev'd and remanded sub nom. Volvo*, 546 U.S. 164.

The first element of section 2(a) liability is easily satisfied by spreadsheets Living Essentials produced in discovery evidencing its sales to Plaintiffs, on the

[1] The Court's modification of the jury instructions regarding competitive injury was erroneous as described *infra*, but even so, the unrefuted evidence at trial establishes that, as a matter of law, Plaintiffs showed both through *Morton Salt* and by direct evidence of diverted sales there was a reasonable possibility that Living Essentials' discriminatory pricing may "substantially" harm competition.

one hand, and its sales to Costco, on the other. (*Cf.* Poe Decl. Ex.[2] 125, Ex. 847[3].) Exhibit 125 evidences each of Living Essentials' sales transactions to Costco between January 2012 through September 2018 (*id.* Ex. 125; Ex. 9 (10/17 Tr.) 66:14-16), while Exhibit 847 evidences Living Essentials' sales transactions to each of the seven individual Plaintiffs (*id.* Ex. 847). Comparing the transactions within those exhibits establishes that the sales being compared "were made by [Living Essentials] at about the same time." (Instruction No. 13 (ECF No. 498 at 14); *Cf.* Ex. 125, Ex. 847.) Dr. McDuff also confirmed that Living Essentials' sales to Plaintiffs and Costco were all taking place contemporaneously based upon his review of its records. (Ex. 7 (10/15 Tr.) 107:12-22.) Thus, the evidence "permits only one reasonable conclusion"—that Plaintiffs have satisfied the first element.

### B. The Court's August 7 Order Already Established That Living Essentials Charged Discriminatory Prices to Plaintiffs

The Court's August 7 order conclusively established as a matter of law the second element of Section 2(a) liability, as the Court held that "there can be no dispute that Costco was offered a lower price by Defendants than the price offered to Plaintiffs" and found that "Defendants discriminated against Plaintiffs in favor of Costco based on price." (Order (ECF No. 289) at 4.) That is thus the only reasonable conclusion.

### C. The Evidence Presented At Trial Permits Only One Reasonable Conclusion: That Living Essentials' Price Discrimination "May" Have Caused Competitive Injury to the Plaintiffs.

The final element of "competitive injury" can be established either through direct evidence of "diversion of sales or profits," or through evidence that a

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[2] All references to Exhibits will be to those attached to the Declaration of Mark Poe filed concurrently herewith.

[3] Exhibits 125 and 847 were produced by Living Essentials and admitted at trial as native Excel spreadsheets. For ease of review, Plaintiffs have submitted abbreviated (filtered) versions of the spreadsheets that show only transactions to Costco and to the Plaintiffs. (Poe Decl. ¶¶ 17, 39.)

"favored competitor received a significant price reduction over a substantial period of time [*i.e.*, the *Morton Salt* inference]." *Volvo*, 546 U.S. at 177 (citing *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 49-51 (1948). Plaintiffs satisfied both alternative forms of proving "competitive injury" as a matter of law.

1. The Evidence Establishes That Plaintiffs Are Entitled to the *Morton Salt* Inference of Competitive Injury.

The leading case of *FTC v. Morton Salt Co.* established the "self-evident" proposition that "competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of those customers." 334 U.S. at 50. Per the Supreme Court, the "inference of competitive injury under *Morton Salt* arises from 'proof of a substantial price discrimination between competing purchasers over time.'" *Volvo*, 546 U.S. at 179.

Importantly, the Court has already found "as a matter of law that the instant rebates [Living Essentials paid to Costco] constitute price discrimination." (Order (ECF No. 289) at 9.) With the value of the IRCs included in calculating the net price Costco paid for 5-hour Energy, Plaintiffs' expert Dr. McDuff testified that ***Costco received, throughout the entire limitations period, a persistent 12% to 23% "price advantage on a per-bottle basis" compared to the Plaintiffs***. (Ex.7 (10/15 Tr.) 122:22-123:9; *see* ECF No. 478-2 at 7). Specifically, Dr. McDuff calculated Costco's favoritism to be "12.2 percent to 14 percent in 2012," "22.3 percent to 23.1 percent in 2013," "20.2 to 20.9 percent in 2014," "14.2 to 15 percent in 2015," "14.8 in 2016," "21 percent in 2017," and "18.6 to 18.8 percent in 2018." (*Id.*) Living Essentials did not offer ***any*** evidence to rebut Dr. McDuff's calculations of Costco's favoritism, nor did Living Essentials' expert Dr. Darrell Williams dispute their accuracy. Indeed, Dr. Williams admitted that Costco held "74 different IRC promotions" throughout the limitations period, that the IRCs are "worth typically 17 to $0.25 per bottle," and that "I don't think there is any dispute that when the

IRCs -- when there is an IRC on sale, the price is lower." (Ex. 8 (10/16 Tr.) 175:5-8, 177:10-12, 178:14-16, Ex. 9 (10/17 Tr.) 11:19-22.)

While the *Morton Salt* opinion did not establish a specific percentage as the threshold for "substantiality," the degree of price discrimination Dr. McDuff testified to greatly exceeds that which satisfied the Supreme Court as a matter of law in *Morton Salt*. There, the Court's analysis "singled out" the "ten-cent [ ] price differential" between the "carload" price of $1.50 per case, and the "less-than-carload" price of $1.60. 334 U.S. at 41, 47-48. That difference is 6.6%, which the Court held established competitive injury as a matter of law. *Id.* at 48 ("a ten-cent carload price differential against a merchant would injure him competitively just as much as a ten-cent differential under any other name."). Here, the degree of discrimination is at least ***double*** that amount, has persisted over the entire limitations period, and is ongoing through today. Moreover, at trial, all sides agreed that a difference of a few cents per bottle had a material impact on sales. (Ex. 1 (10/3 Tr.) 94:5-7, 136:8-15 (Mansour); Ex. 2 (10/4 Tr.) 127:21-128:10, 134:15-21 (Kohanim); (Eaves) (ECF No. 452 at 43:6-10); Ex. 7 (10/15 Tr.) 17:6-22 (Frazier); 125:4-126:12) (McDuff)). Indeed, Living Essentials' internal records showed that it expected the IRCs to "lift" Costco's sales of 5-hour Energy by "3x." (ECF No. 453 (Meguiar) at 87:01-88:04; Ex. 35.)

Plaintiffs anticipate Living Essentials will contend that, according to Dr. Williams, Plaintiffs did not suffer any competitive harm. But in the Ninth Circuit, the *Morton Salt* inference "may not be overcome by proof of no harm to competition." *Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 658 (9th Cir. 1997). Accordingly, the unrebutted evidence of Costco's persistent and substantial price advantage "permits only one reasonable conclusion"—that Plaintiffs are entitled to the *Morton Salt* inference of competitive injury.

2. Plaintiffs Also Established Competitive Injury Through Direct Evidence of Diverted Sales.

The record also contains extensive evidence of diverted sales from Plaintiffs to Costco. Each of the Plaintiffs testified as to how they lost customers of 5-hour Energy to Costco, and as to their personal observations of customers refusing to buy from them when the CBCs were receiving an IRC on 5-hour Energy.

| Testimony | Evidence |
|---|---|
| **L.A. International**<br>Q: Have any of your retail customers ever told you that they bought 5-hour ENERGY from Costco instead of L.A. International because of Costco's lower price?<br>[Objection overruled]<br>A: Yes, they do.<br>Q: How many have told you this?<br>A: I'd say hundreds.<br>Q: And generally speaking, what were they telling you?<br>A: They would first -- at first would come by and say, This is a price, can you match it? What can you do? There is always a deal there. We would call the Riffles, and we wouldn't be able to do anything. So we would kind of let them buy the merchandise from over there. | Ex. 2 (10/4 Tr.) 46:10-47:1 |
| **San Diego Cash and Carry**<br>Q: Have you ever asked your retail store customers why they weren't buying 5-hour ENERGY from you when Costco Business Center was running a sale on it?<br>A: Yes. They won't buy it from me because -- [objection overruled] -- it's cheaper. It's just obvious. It's cheaper. | Ex. 1 (10/3 Tr.) 142:6-22 |
| **California Wholesale**<br>Q: And have you had any conversations with your customers about their purchases of 5-hour ENERGY from Costco?<br>A: Yes, sir.<br>Q: And what have those customers told you in that regard?<br>[Objection overruled]<br>A: When I talk to customer, and I visit few customers, and I ask them, you know, what is happening? Why it is going down? Why not | Ex. 3 (10/7 Tr.) 140:19-141:6 |

| | |
|---|---|
| buy from California Wholesale? And very straight answer: Because we get it cheaper in Costco. | |
| **LA Top**<br>Q. Have you noticed any impact that those IRCs, we've been calling them, have had on L.A. Top sales of 5-Hour ENERGY?<br>A. Yes.<br>Q. Can you describe that for the jury?<br>A. Basically, in simple words, it kills our business.<br>Q: And how about to elaborate a little bit on that. How does it kill L.A. Top's business?<br>A: Customers, in our line of business, look for every penny to save, and you're not talking about pennies here, you're talking about dollars. And for that, I mean, there's no way that the customers would come buy from us. | Ex. 2 (10/4 Tr.) 134:8-21 |
| **U.S. Wholesale**<br>Q: Have any of U.S. Wholesale customers told you the reason they were buying 5-hour ENERGY at Costco Business Center instead of from U.S. Wholesale when it was on promotion at Costco?<br>A: Yes.<br>Q: What did they tell you?<br>A: That if we were able to match the price they would buy it from us; if we didn't, they would shop there.<br>Q: They told you the reason was the price, correct?<br>A: Yes.<br>Q: Did they ever tell you any other reason why they were buying 5-hour ENERGY from Costco instead of from U.S. Wholesale?<br>A: No. | Ex. 3 (10/7 Tr.) 180:2-16 |
| **YNY International**<br>Q: Have your customers -- again, Mr. Pae, have your customers ever told you that they buy 5-Hour ENERGY from Costco because they are cheaper at Costco?<br>A: Yes.<br>***<br>Q: What happens to YnY's 5-Hour ENERGY sales when Costco runs these promotions?<br>A: Usually it's slower. | Ex. 4 (10/10 Tr.) 243:12-15; 245:18-246:4 |

| | |
|---|---|
| Q: And how would you know that?<br>A: Because I look through QuickBooks data. Usually it's -- it's a slower selling during Costco's promo.<br>Q: And the question was how would you know that?<br>A: Our customers will tell us. | |
| **Trepco**<br>Q: When Costco Business Center was running a sale on 5-hour ENERGY, did any of your customers tell you that they were buying it from Costco instead of from Trepco because of its lower price?<br>A: Yes.<br>Q: Have any of your 5-hour ENERGY customers ever told you that they bought 5-hour ENERGY from Costco Business Center instead of from Trepco for any reason other than the price?<br>[objection overruled]<br>A: No, they never mentioned any other reason. | Ex. 7 (10/15 Tr.) 71:17-72:5 |

Plaintiffs also testified as to personally witnessing their customers purchase 5-hour Energy from Costco during an IRC event, or observing their sales of 5-hour dramatically slow down when an IRC event was taking place, or how their sales of 5-hour have materially declined in the years since Costco began running IRC events whereas their business itself has, at the very least, held steady. (Ex. 1 (10/3 Tr.) 120:13-25, 136:8-15, 138:14-139:24, 140:4-24, 141:3-146:6 (Mansour); Ex. 2 (10/4 Tr.) 37:14-21, 44:10-47:1, 47:22-48:10 (Amini); 122:21-123:11, 123:18-23, 127:15-129:10, 130:3-12, 134:1-21 (Kohanim); Ex. 3 (10/7 Tr.) 139:8-18, 140:1-4, 140:15-141:8, 142:11-18, 145:22-146:5, 146:19-147:6 (Ali); 178:13-180:24, 182:4-13, 182:21-183:17, 183:25-184:8, 184:24-185:8 (Wahidi); Ex. 4 (10/10 Tr.) 246:5-18 (Pae); Ex. 7 (10/15 Tr.) 72:7-73:16 (Paulus).).

Also, a sample of Plaintiffs' customers also testified that they bought 5-hour Energy from Costco—instead of Plaintiffs—because of Costco's lower pricing.

- Frank Younan of Santee Market, a customer of both San Diego Cash and Carry and Trepco: "I don't want to drive all the way to [the CBC in] San Diego just to get it down to that price, you know. But, of course, if it comes down to the money, I have to. I've got no choice, you know." (Ex. 1 (10/3

Tr.) 225:18-225:9, 225:17-23, 232:14-233:2.)

- Gopal Krishnan of Green Tobacco, a customer of L.A. International: "The reason, price. Big difference. Every second month Costco give promotion, which is when I buy to L.A. International, I make per box one dollar. And when I buy to Costco, when on the sale promotion, then I make a three dollar per box, same item." (Ex. 4 (10/10 Tr.) 219:13-220:14, 221:18-25.)
- Mamun Rashid of Panorama Trading, testified that he purchased 5-hour Energy from Costco during IRC promotions instead of L.A. Top and L.A. International because of price: "Because before, Costco had a higher price than our market so we didn't buy from Costco before. So now Costco has a cheaper price than the -- even the -- the -- if I order directly to Living Essentials, Costco price is cheaper. So I go to Costco now. Whenever they have a sale, I go Costco. (Ex. 2 (10/4 Tr.) 90:21-91:12, 96:5-25.)

Even Living Essentials' own expert, Dr. Anthony Dukes, admitted that "at least some of [the] plaintiffs customers bought 5-Hour Energy from Costco Business Center when the promotions were being run[.]" (Ex. 8 (10/16 Tr.) 48:2-15.)

There is also a wealth of evidence of diverted sales in contemporaneous emails from Living Essentials' employees and its broker Paramount:

- Clark Eaves, Living Essentials' National Account Manager for 5-hour Energy sales to California wholesalers reported internally to Sue LeBeau, Director of Sales Operations, that "The wholesalers' customers will not buy from them since they can get it cheaper at Costco," which was accepted and replied to by Ms. LeBeau without refute. (Ex. 117 at 1.)
- Mr. Eaves forwards comments from Paramount to Steve Ramsey, Living Essentials' Vice President of Sales, C-Stores, explaining that the Costco IRC promotions "hits the CA numbers for 2 reasons. The first is this drives retailers to the business centers where they are able to stock up on each of the flavors at big saves vs. what they pay from a wholesaler." (*Id*. Ex. 44.)
- Vince Sullivan, Living Essentials' Director of Sales responsible for its sales to Plaintiffs and other wholesalers, writing to his superior, Mr. Ramsey, "we are trading a lot of this business at a very hot price to Costco business centers at the expense of the traditional deals we offer Wholesalers … are we robbing Peter to pay Paul?" (Exs. 156, 159.) Mr. Sullivan confirmed that "Peter in this instance would be the wholesalers and cash and carries," and "Paul would be the club class of trade which would be considered Costco." (Ex. 4 (10/10 Tr.) 161:16-162:4 (Sullivan).)
- Paramount President Kevin Riffle further described: "What I have learned from talking to various retailers is that we are losing business to Costco and

Sam's Club. We all know how these retailers work. They shop around for items and try and buy at the best price." (Ex. 164R.)

Living Essentials failed to refute any of this evidence of diverted sales. On this record, the evidence "permits only one reasonable conclusion"—that Living Essentials' price discrimination caused diversion of sales from Plaintiffs to Costco.

3. The Evidence Presented At Trial Establishes That Plaintiffs Compete With Costco For Sales of 5-hour Energy.

Plaintiffs established that they were "engaged in actual competition with [Costco] as of the time of the price differential." *Best Brands Beverage, Inc.*, 842 F.2d at 584; *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."). This inquiry "is simply a factual process which focuses on whether these purchasers were directly competing for resales among the same group of customers." *George Haug*, 148 F.3d at 141-42.

The evidence presented at trial on this issue was uncontradicted, unimpeached, and overwhelmingly one-sided, and permits only one reasonable conclusion that Plaintiffs and Costco "directly compet[e] for resales [of 5-hour Energy] among the same group of customers." *Id.*

For starters, the overwhelming evidence of diverted sales discussed above "by their nature … show competition for customers" with Costco *See ABC Distrib., Inc. v. Living Essentials, LLC*, No. 15-CV-02064-NC, 2017 WL 3838443, at *7 (N.D. Cal. Sept. 1, 2017). Moreover, each Plaintiff testified that it sells 5-hour Energy to retailers such as mom and pop C-Stores, and that it competes with Costco for sales to those same customers. (Ex. 1 (10/3 Tr.) 89:19-90:8, 118:11-119:1 (Mansour); Ex. 2 (10/4 Tr.) 24:24-25:4, 33:24-34:25 (Amini); 121:6-12, 130:18-132:7 (Kohanim); Ex. 3 (10/7 Tr.) 137:8-16, 143:25-144:14, 145:13-21 (Ali); 170:22-171:1, 171:14-19, 179:12-180:16 (Wahidi); Ex. 4 (10/10 Tr.) 236:3-7, 243:12-15 (Pae); Ex. 7 (10/15 Tr.) 61:15-62:8, 70:25-71:10, 71:17-72:5 (Paulus).)

Costco's Rule 30(b)(6) representative Larry Fell, a buyer for CBC for 17 years, testified that the CBCs' "target customers" are "the Mom & Pop C-store and the small grocery store." (ECF No. 474 at 16:19-23.)

Contemporaneous emails by Living Essentials' employees repeatedly and uniformly acknowledged that Plaintiffs and Costco compete for sales of 5-hour Energy to the same group of customers. Examples include:

- Mr. Eaves, who had managed 5-hour Energy sales in California for eight years, acknowledged that 90% of Costco's sales of 5-hour Energy are to C-Stores. (Ex. 135 at 2 ("wholesalers, cash and carry's and clubs all sell +90% of 5-hour Energy Shots to the C-stores").)
- Mr. Sullivan, Director of Sales for C-Stores, specifically identified six of the Plaintiffs as "wholesalers that cater to jobbers and independent retailers. ***The same group that Costco Business Center and Sams sell to***." (Ex. 25 at 1.)
- Mr. Eaves acknowledging to his superior Mr. Sullivan "Vince, I think this is very obvious as to the cause of the Wholesaler decline . . . . Costco," and Mr. Sullivan responding, "You are absolutely right. This is a run away train!!!!!!!!!!!!!!!!!!!!!" (Ex. 141 (emphasis in original).)
- Mr. Ramsey, Vice President of Sales, C-Stores, agreed that Costco Business Centers were a competitor to Plaintiffs. (Ex. 6 (10/11 Tr.) 68:20-69:8.)
- Scott Allen, the Vice President responsible for sales to Costco, testified and wrote that the 24-pack of 5-hour Energy is meant primarily for the business member, because most consumers will not buy 24 bottles of 5-hour Energy. (Ex. 6 (10/11 Tr.) 93:19-95:9; (ECF No. 472) at 40:13-41:07; Ex. 154 at 1.)
- Mr. Eaves drew a "Supplier to Retail Flow Chart" to illustrate the understanding within Living Essentials that both the "Wholesalers" and "Costco" sell to the same "Retailer." (Ex. 132 (Mr. Eaves "explain[ing] the flow of product from wholesalers and Costco to retailers").)

Living Essentials' brokers who have managed Living Essentials' sales to wholesalers in California since the product's inception also confirmed that Costco competes with Plaintiffs for sales of 5-hour Energy. For example, Paramount's Director of Sales Sean Riffle observed that "these customers directly compete with Costco Business Centers and have seen sales plummet as Costco runs 5-hour at [IRC prices]," listing Plaintiffs "LA International Corp.," "LA Top Distributor," "U.S. Wholesale Outlet, Inc." and "YNY International." (Ex. 25 at 3.) Likewise, Paramount's President Kevin Riffle testified as follows:

> Q: [Was it] your understanding that there was competition between the C-store wholesalers, including these plaintiffs, and the Costco Business Centers for sales of 5-hour Energy to retailers?
>
> A: Yes. There was competition.
>
> ***
>
> Q: Was it your understanding that the regular Costcos similarly were selling 5-hour Energy to businesses for resale?
>
> A: Yes. It was my understanding that businesses were purchasing from regular Costco.

(Ex. 4 (10/10 Tr.) 26:8-13; 29:12-16.) In short, all of the record evidence uniformly established that Plaintiffs and Costco "directly compet[e] for resales [of 5-hour Energy] among the same group of customers." *George Haug Co.*, 148 F.3d 141-42. For these reasons, the Court should grant JMOL and find Living Essentials liable under Section 2(a) of the RPA.

## III. PLAINTIFFS ARE ENTITLED TO A NEW TRIAL

Alternatively, a new trial is warranted on three independent grounds: (1) the verdict is contrary to the clear weight of the evidence; (2) errors in the jury instructions; and (3) Plaintiffs were substantially prejudiced by evidentiary errors.

### A. The Verdict Is Contrary to The Clear Weight of The Evidence

Unlike a JMOL motion, "the district court, in considering a Rule 59 motion for new trial, is not required to view the trial evidence in the light most favorable to the verdict." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). Indeed, district courts have "the right, and indeed the duty, to weigh the evidence," "assess the credibility of the witnesses," and "to set aside the verdict of the jury, ***even though supported by substantial evidence***, where, in [the Court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence, or … to prevent … a miscarriage of justice." *Id.*; *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) (emphasis added); *see IP Glob. Investments Am., Inc. v. Body Glove IP Holdings, LP*, No. 17-CV-06189-

ODW-AGRX, 2019 WL 3934928, at *1 (C.D. Cal. Aug. 20, 2019).

The Court should exercise its broad discretion and grant Plaintiffs a new trial on their Section 2(a) claim for each of the reasons discussed above with respect to Plaintiffs' JMOL motion. The verdict is at odds with the clear weight of the relevant and admissible evidence proving that Living Essentials unlawfully discriminated in price against Plaintiffs in favor of Costco, to the Plaintiffs' detriment. The Court's independent review of the wealth of unrebutted evidence supporting Plaintiffs' Section 2(a) claim will lead only to one conclusion: the non-liability verdict is against the clear weight of the evidence, and therefore Plaintiffs are entitled to a new trial.

**B. Errors in The Jury Instructions Require A New Trial.**

Erroneous jury instructions and the failure to give adequate instructions are grounds for a new trial unless the error is harmless. *Watson v. City of San Jose*, 800 F.3d 1135, 1140-41 (9th Cir. 2015); *Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 985 n.24 (9th Cir. 2002). In the Ninth Circuit, courts "presume prejudice where civil trial error is concerned, and the burden shifts to the [non-moving party] to demonstrate 'that it is more probable than not that the jury would have reached the same verdict' had it been properly instructed." *Galdamez v. Potter*, 415 F.3d 1015, 1025 (9th Cir. 2005).

Two errors in the jury instructions here plainly caused such prejudice.

1. Giving the functional discounts instruction was reversible error.

The functional discount defense is inapplicable as a matter of law, for two independent reasons. (ECF No. 498 at 20 (Instruction No. 19).)

***First***, that defense is available only when the favored and disfavored purchasers operate at ***different levels*** in the distributive chain, and the same discounts must be made available to all competing purchasers operating at the same level. "Manufacturers are permitted to use price differentials, commonly known as wholesale or functional discounts, to compensate certain ***classes of buyers*** for

the distributional services they perform." *Hasbrouck*, 842 F.2d at 1038 (emphasis added). The Supreme Court's latest word on functional discounts affirmed the Ninth Circuit's construction: "'functional discounts may usually be granted to customers who operate at ***different levels of trade***, and thus do not compete with each other.'" *Texaco,* 496 U.S. at 564 (emphasis added) (quoting *In re Boise Cascade Corp.*, 107 F.T.C. 76, 212, 214-15 (1986). The Supreme Court further quoted with approval the preeminent treatise on the Robinson-Patman Act, Frederick Rowe's *Price Discrimination Under the Robinson-Patman Act* (1962): "'In practice, the competitive effects requirement permits a supplier to quote different prices between ***different distributor classes***—so long as those who are higher up (nearer the supplier) on the distribution ladder pay less than those who are further down (nearer the consumer).'" 496 U.S. at 569 n.38 (emphasis added). Likewise, the treatise *Corporate Counsel's Guide to the Robinson-Patman Act*, *West Services, Inc.* (2010-11 ed.) sets forth:

> [T]he concept refers to a pricing technique whereby a seller (usually a manufacturer) sells at ***different prices to different levels*** of distribution (e.g., wholesalers and retailers) because of the difference in the marketing functions performed by the two levels. . . They are generally considered legal ***as long as they are available to all competing customers within a particular category***.

*Id.* Sec. 16.1, *Functional Discounts*, p. 533 (emphasis added).

Here, Living Essentials' own documents and those of its broker Paramount unequivocally show Plaintiffs and Costco operate at the same level of trade with respect to sales of 5-hour Energy, as C-Store wholesalers. For example:

- An August 2015 presentation exchanged between Living Essentials and Paramount identifies Costco Business Center as "the only C-Store wholesaler that receives and promotes deals on open stock 5-hour Energy." (Ex. 133.)
- Paramount President Kevin Riffle referring to Costco as "this C-store wholesaler is buying 5-hour Energy . . . about $0.04 per bottle cheaper than all other C-store Wholesalers." (Ex. 5.) At trial, Mr. Riffle testified as follows: "Q. [A]nd so there when you were writing 'this C-store wholesaler,' you were referring to the Costco Business Centers, correct? A. Yes. Q. And then down below that, 'about 4 cents per bottle cheaper than all other C-store

> wholesalers,' including the seven plaintiffs in this case; am I right? A. Yes. (Ex. 4 (10/10 Tr.) 21:10-19.)[4]

And as noted above, Plaintiffs and their customers testified that C-Store retailers purchased 5-hour Energy from Costco instead of Plaintiffs during Costco's IRC promotions. (*Supra* Section C.I at 8-10.)

Furthermore, there is no dispute that the "functional discounts" supposedly justifying Living Essentials' lower prices to Costco identified in Instruction No. 19—"promotional, marketing, and advertising services"—were not made available to Plaintiffs. (*See*, *e.g.*, Ex. 165R (Paramount proposing an advertising allowance for wholesalers like Plaintiffs); Ex. 166R (Living Essentials denying proposed advertising allowance to Plaintiffs); Ex. 1 (10/3 Tr.) 97:16-18, 98:11-13, 100:2-4, 101:2-7, 127:12-14, 135:11-19 (Mansour); Ex. 173R; Ex. 2 (10/4 Tr.) 40:20-23, 41:6-16, 43:3-16 (Amini); Ex. 3 (10/7 Tr.) 176:19-178:3 (Wahidi); Ex. 4 (10/10 Tr.) 240:11-20 (Pae); Ex. 7 (10/15 Tr.) 65:8-12, 68:4-7, 71:11-16 (Paulus).) Living Essentials also admitted it did not offer IRCs to any Plaintiff. (ECF 452 (Eaves) at 27 (152:02-10); ECF 453 (Meguiar) at 19-20 (73:10-76:11, 77:09-19).).

***Second***, the functional discounts defense is also not applicable because the amounts Living Essentials paid to Costco were not "a reasonable reimbursement for

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[4] There is a wealth of additional unrebutted evidence that Plaintiffs and Costco operate at the same distribution level and sell 5-hour Energy to C-store retailers. (*See* Ex. 135 (Mr. Eaves estimating that both the wholesalers and Costco sell 90% of their 5-hour Energy to C-stores); Ex. 25 (Mr. Sullivan stating in June 2015 that hot deals on 5HE at Costco were negatively impacting C-store wholesalers, listing six of the seven Plaintiffs); Ex. 91 (Mr. Sullivan stating to his superior Mr. Ramsey: "If I was an Independent retailer I would buy my 5 Hour Energy at Costco."); Ex. 117 (Mr. Eaves reporting internally: "The wholesalers' customers will not buy from them since they can get it cheaper at Costco."); Ex. 44 (Mr. Eaves forwarding comments from Paramount to Mr. Ramsey, complaining of the IRCs and explaining that it "drives retailers to the business centers where they are able to stock up on each of the flavors at big saves vs. what they pay from a wholesaler."); ECF No. 474 at 16:19-23 (Costco's 30(b)(6) witness testifying that CBCs' "target customers" are "the Mom & Pop C-store and the small grocery store.").)

the actual functions performed." *See Hasbrouck*, 842 F.2d at 1038 (functional discounts compensate certain classes of buyers for the distributional services they perform); *Texaco,* 496 U.S. at 563 (describing "functional discount[s]" as needing to be "[]tethered to either the supplier's savings or the wholesaler's costs."). The unrebutted evidence established that neither Living Essentials nor its broker to Costco, Innovative Partners, conducted ***any*** analysis regarding the value of the purported "promotional, marketing, and advertising services" Costco provided.[5] Innovative Partners' Rule 30(b)(6) designee unequivocally testified as follows:

> Q: What analysis did Innovative perform for Living Essentials to determine how much discount to offer Costco?
>
> A: None.
>
> Q: To your knowledge what analysis did Living Essentials do to determine how much discount to offer to Costco?
>
> A: None.

(ECF 473 at 75:19-76:5.) Living Essentials' CFO, Matthew Dolmage, also admitted that he was unaware if the company ever did any analysis of the value of any "services" provided by Costco, and also had testified as a 30(b)(6) witness that he did not know what functions Costco provided that Plaintiffs did not. (Ex. 9 (10/17 Tr.) 117:22-120:6.) All Living Essentials could offer was to have its Vice President responsible for sales to Costco (Scott Allen) testify about his "feeling" of getting value for Costco's promotions:

> Q: Have you ever looked at the amounts of sales that Living Essentials achieved after an endcap or fence program has run?

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[5] Moreover, these "services" are not the type contemplated as functional discounts. *See* American Bar Association, *Model Jury Instructions in Civil Antitrust Cases*, Instruction 11 at 264 (2016 ed.) (listing services that qualify for a functional discount as "warehousing, stocking, wholesaling," etc.). Were it otherwise, liability under Section 2(d) would be written out of the RPA. *See Texaco*, 496 U.S. at 564 ("[t]o hold that the rendering of special services ipso facto [creates] a separate functional classification would be to read Section 2(d) out of the Act") (quoting *In re General Foods Corp.*, 52 F.T.C. 798, 824-25 (1956)) (alterations in original).

A: Yeah, we evaluate every promotion.

Q: And does Living Essentials -- what's its feeling of whether or not it's getting value for those promotions?

A: What's its feeling?

Q: What's its feeling? Does it think it's getting a value for these programs or doesn't it?

A: Absolutely.

Q: So absolutely it is?

A: Yes. I'm sorry.

(Ex. 6 (10/11 Tr.) 173:14-174:1.) Whatever "feeling" Mr. Allen may have had "of whether or not [Living Essentials is] getting value for those promotions" is not ***evidence*** of whether Living Essentials' payments were a "reasonable reimbursement for the actual functions [Costco] performed." *Hasbrouck*, 842 F.2d at 1038. Indeed, Mr. Allen's testimony was contradicted by a contemporaneous email he wrote on the topic, where he stated to his Costco broker "I know what [Costco's] revenue stream is now. Sales and ads" and the broker responding "Completely. The Endcaps are a revenue stream for them as well!" (Ex. 138.)

Moreover, all of the "functions" that Living Essentials contends Costco performed to entitle it to "discounts" were actually ***separately compensated*** by Living Essentials to Costco. (Ex. 161G (Customer Spend Spreadsheet itemizing payments to Costco).) In *Texaco*, the Supreme Court rejected defendant's invocation of the functional discounts doctrine in part because "[the favored purchaser] was separately compensated for its hauling function"—it couldn't be both separately paid for performing the function ***and*** be given discounts on top of that for the same "function." 496 U.S. at 562. As *Texaco* recognized: "[T]he Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, ***assuming all the risks and costs involved***, should he qualify for a compensating discount. The amount of the discount should be reasonably related ***to the expenses assumed by the buyer***." *Id.* at 564 (quoting *In*

*re Doubleday & Co.*, 52 F.T.C. 169, 209 (1955)) (emphasis added).

Here, Living Essentials compensated Costco for every "promotional, marketing, and advertising service" (Ex. 161G), and then gave Costco a $.10/bottle list price advantage[6] and millions of dollars of IRCs for those exact same services. Similarly, it is undisputed that Living Essentials reimbursed Costco for the ***entire value*** of the IRCs—*i.e.*, Costco assumed no risk and assumed no costs. *Texaco*, 496 U.S. at 564. Accordingly, Living Essentials' payments to Costco are not functional discounts as a matter of law. *See*, *e.g.*, *ABC Distrib., Inc.*, 2017 WL 3838443, at *11 ("Because the rebates here are not payment for a promotional or other service, they must be included as part of Costco's net price.").

The prejudice to Plaintiffs from the erroneous instruction on functional discount cannot be overstated. Instruction No. 19 explicitly states, "If you find that the lower prices granted by Defendants to Costco were justified as a functional discount, then you must return a verdict on defendant on the Section 2(a) claim." (ECF No. 498 at 20.) Living Essentials' counsel seized on this error in closing, pointing to Instruction No. 19 and arguing that "This is an absolute defense for the entire case. …This one defense proves there's no 2(a) claim at all." (Ex. 10 (10/18 Tr.) 74:2-4, 76:14-15; *see also id.* 74:4-76:15.) Per the Ninth Circuit, it is Living Essentials' burden "to demonstrate 'that it is more probable than not that the jury would have reached the same verdict' had it been properly instructed." *Galdamez*, 415 F.3d at 1025. Living Essentials cannot meet this burden.[7] A new trial is warranted on this ground alone.

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[6] Had Living Essentials ***not*** separately compensated Costco, then the list price advantage itself could conceivably be eligible for the functional discounts defense.

[7] This jury instruction was especially prejudicial because, as phrased, the jury could be misled into believing it should negate Living Essentials' liability entirely if it found that even a single marketing/advertising/promotional payment satisfied the functional discounts defense, even though millions of dollars in IRCs plainly did not, and were the cause of much of Costco's price advantage.

2. Including the term "substantially" in the "competitive injury" instructions was reversible error.

Over Plaintiffs' repeated objections, the Court instructed the jury that proving "competitive injury" required Plaintiffs to show that "there is a reasonable possibility that the alleged price discrimination may ***substantially*** harm competition." (ECF 498 at 18 (Instruction No. 17) (emphasis added).) The Court included this same "substantially" or "substantial" language in two additional jury instructions. (*Id.* at 14 (No. 13), 19 (No. 18).) These instructions misstate the law and constitute reversible error.

The relevant portion of Section 2(a) is phrased ***disjunctively***, and prohibits price discrimination:

> where the effect of such discrimination may be [A] substantially to lessen competition or tend to create a monopoly in any line of commerce, ***or*** [B] to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

15 U.S.C. § 13(a) (emphasis added). As the Ninth Circuit held, "[t]he Supreme Court has interpreted this portion of the statute as requiring an antitrust plaintiff to show only "'a reasonable possibility that a price differential may harm competition,'" and does not include the "substantially" modifier. *See Hasbrouck*, 842 F.2d at 1040-41 (quoting *Falls City Indus., Inc.*, 460 U.S. at 434-35). That is, Section 2(a) uses the word "substantially" only when a plaintiff seeks to prove that the effect of the discrimination may be "substantially to lessen competition or tend to create a monopoly," *i.e.*, to demonstrate primary-line injury, *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1399 (7th Cir. 1989)—***not*** when proving that the effect may be "to injure, destroy, or prevent competition" with the favored purchasers, as Plaintiffs allege here. *See* 15 U.S.C. § 13(a). Indeed, it is deliberate that the language in the first part of the disjunctive is identical to the anti-monopoly strictures found in Section 7 of the Clayton Act, which prohibits mergers

"whose effect 'may be substantially to lessen competition, or tend to create a monopoly.'" *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.* 778 F.3d 775, 783 (9th Cir. 2015) (quoting 15 U.S.C. § 18).

The heightened "substantially" modifier is also not found in the ABA Model Instruction regarding competitive injury under Section 2(a). That instruction describes the competitive injury element as requiring a plaintiff to show "that there is a reasonable possibility that the discriminatory pricing may harm competition." American Bar Association, Model Jury Instructions in Civil Antitrust Cases, 2016 Edition; *RPA Seller Liability—Section 2(a)*, Instruction 2. The ABA's manual is an authoritative treatise that has distilled approximately 80 years of RPA jurisprudence at the time of its publication, and cannot be ignored.[8] This is especially true when a different model instruction—the Rule of Reason instruction concerning claims brought under Section 1 of the Sherman Act—expressly states that proof of competitive harm under a Section 1 claim requires the plaintiff to "demonstrate that the restraint has resulted, or is likely to result, in a ***substantial harm to competition***." *Id.*; *Sherman Act—General*, Instruction 3B. Simply put, the learned authors of the model instructions knew how to include language about "substantial harm to competition" whenever such language was warranted. It was not here.

And, of course, the Supreme Court's most recent RPA case recited the element as follows: "'the effect of such discrimination may be . . . to injure, destroy, or prevent competition,'" without any "substantially" requirement. *Volvo*, 546 U.S. at 176-77 (quoting 15 U.S.C. § 13(a)) (ellipses in original). The addition of a "substantially" hurdle is also contrary to the Ninth Circuit's holding in *Chroma*

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[8] Nor can it be reasonably argued that *Volvo* suggests the addition of a heightened "substantiality" requirement onto the prophylactic "may harm" standard. The Notes to the pertinent instructions extensively discuss *Volvo*, and yet the antitrust experts who sit on the ABA's Antitrust Committee have not read a "substantiality" hurdle into the law. *See*, *e.g.*, Notes to Inst. 10 *Competitive Injury—Secondary and Tertiary Line*.

*Lighting* that the "may harm" standard was meant to "'relieve secondary-line plaintiffs … from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects to individual competitors.'" 111 F.3d at 657 (quoting *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 n.18 (9th Cir. 1995)).

Because these jury instructions misstate the law, it is Living Essentials' burden to demonstrate "that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005). Living Essentials cannot do so. Indeed, its counsel repeatedly seized on this incorrect legal standard during closing argument, and misled the jury into thinking that Plaintiffs had to prove competitive injury in an overwhelming, quantifiable amount:

- "As to competition, they can't and didn't prove a reasonable possibility of ***substantial*** harm to competition, because Costco and the plaintiffs are not competitors." (Ex. 10 (10/18 Tr.) 54:5-12 (emphasis added));
- "It's just a word between salespersons, not based upon economics competition at all. And the plaintiffs failed to prove a reasonable possibility of ***substantial*** harm to competition." (*Id.* 65:17-20 (emphasis added));
- "In fact, the standard that you will see in the instructions, is it's no reasonable possibility of ***substantial*** harm to competition." (*Id.* 66:19-25 (emphasis added));
- "And Dr. Williams' tests were based on actual data and confirmed that lost sales are not ***substantial*** and pose no threat to competition. … The instructions require proof of a reasonable possibility of ***substantial*** harm to competition, …." (*Id.* 70:5-14 (emphasis added));
- "Did any of the plaintiffs prove defendants violated 2(a), without proving a reasonable possibility of ***substantial*** harm to competition? The answer should be no." (*Id.* 70:21-24 (emphasis added)).

The inclusion of the "substantially" requirement (and Living Essentials' emphasis on it) misled the jury into believing that Plaintiffs had to prove a higher degree of harm to competition than required under RPA precedent. Indeed, the jury specifically requested the evidence summarizing Plaintiffs' evidence of competitive harm—charts prepared by Plaintiffs' expert showing dramatic declines in Plaintiffs'

sales of 5-hour Energy while Costco's increased—the exclusion of which only compounded this instructional error.[9] (ECF 513 (Jury Note No. 7) (requesting Plaintiffs' sales of 5-hour Energy "before and after" Costco began selling it).)

The inclusion of the terms "substantially" and "substantial" in Instruction Nos. 13, 17, and 18 substantially prejudiced Plaintiffs and separately warrants a new trial.

### C. A New Trial is Necessary Because of the Prejudicial Exclusion of Charts Demonstrating Plaintiffs' Lost Sales.

Finally, the Court should grant Plaintiffs a new trial on their Section 2(a) claim based on the prejudicial evidentiary rulings. *See Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995) (evidentiary rulings that "substantially prejudice" one party may warrant a new trial); *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005) (a new trial is warranted when the "erroneous inclusion or exclusion of evidence in the underlying proceeding prejudices a party's right to a fair trial.").

The exclusion of the summary charts prepared by Plaintiffs' expert Dr. McDuff—identified as Exhibits 370-1 to 370-8, and 869-14 to 869-20—substantially prejudiced Plaintiffs' ability to prove that they had suffered competitive injury, particularly after instructing the jury that it was required to find "substantial" harm to competition. (*See* ECF No. 449.) As detailed in Plaintiffs' briefing and argument on the issue (ECF Nos. 466, 468), each of those exhibits is admissible under Federal Rule of Evidence 1006. The purpose of Rule 1006 "is to allow the use of summaries when the documents are unmanageable or when the summaries would be useful to the judge and jury." *United States v. Rizk*, 660 F.3d 1125, 1130 (9th Cir. 2011). The party offering the summary into evidence must only establish that the underlying materials upon which the summary is based (1) are admissible in evidence, and (2) were made available to the opposing party

[9] *See supra* Section III.A.2.

for inspection. *Id*. (citation omitted).

Each of these excluded charts were admissible evidence because they were based on, and are Dr. McDuff's analysis and summary of, admissible voluminous records of sales data that were made available to Living Essentials. Indeed, the majority of the underlying records were produced by Living Essentials and already admitted in evidence. (*Id.*) Accordingly, Dr. McDuff's charts should have been admitted as evidence to prove the content of voluminous sales records, particularly to show Plaintiffs' decline in sales of 5-hour Energy and Costco's contemporaneous ***increase*** in sales. (*See* Exs. 869-14 to 869-20; Ex. 1 (10/3 Tr.) 77:6-82:14.)

The substantial prejudice to Plaintiffs from this exclusion is acute. While the three jurors' post-trial comments in the courtroom cannot be used to *impeach* the verdict, those comments—criticizing Plaintiffs for the unwieldiness of the spreadsheet evidence, and explicitly for the absence of "charts" reflecting their sales trends—keenly illustrate how important this ruling was to outcome of the case. The jury's final mid-deliberation note further illustrates the prejudice from excluding summaries of the evidence. (*See* ECF No. 513 (asking for the Plaintiffs' "before & after" purchases and sales of 5-hour Energy).)

## CONCLUSION

For the reasons above, Plaintiffs respectfully request JMOL in their favor or, in the alternative, a new trial.

Dated: December 11, 2019

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