UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

LIVING ESSENTIALS, LLC, *et al.*,

Defendants.

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

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

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

U.S. Wholesale Outlet & Distribution, Inc., et al.,

Plaintiff,

vs.

Living Essentials, LLC, et al.,

Defendant.

Case No.: CV 18-1077 CBM

ORDER RE: PLAINTIFFS' MOTION FOR RENEWED JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL. (DKT. 559.)

The matter before the Court is Plaintiffs' motion for renewed judgment as a matter of law or, in the alternative, motion for a new trial. (Dkt. No. 559 (Pls.' Motion for JMOL or New Trial).) The motions are opposed. (Dkt. No. 563 (Opp.).)

I. BACKGROUND

Plaintiffs are seven retailers located in California that purchase the energy drink "5-hour Energy" wholesale from Defendants, and then resell the drink to businesses. Defendants also sell the drink to Costco but offer additional "instant rebates" and promotional items to Costco that they allegedly do not offer to Plaintiffs. 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. The jury returned a verdict in favor of the Defendants, finding none of the Defendants violated Section 2(a).

II. JURISDICTION

The claims invoke the Robinson-Patman Act, 15 U.S.C. § 13. The Court thus has jurisdiction over the action under 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

III. LEGAL STANDARD

A. Rule 50

Federal Rule of Civil Procedure 50 provides: "If a party has been fully heard on an issue during the jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," the court may grant a motion for judgment as a matter of law. Fed. R. Civ. P. 50(a). A Rule 50 motion may be renewed after trial if the court does not grant the motion as a matter of law after the close of the evidence and instead submits the issues to the jury. Fed. R. Civ. P. 50(b).

In assessing a JMOL motion, a court "must view the evidence in the light most favorable to the nonmoving party … and draw all reasonable inferences in that party's favor." *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) (internal citation and quotation marks omitted). "In entertaining a motion for judgment as a matter of law, the court … may not make credibility determinations or weigh the evidence." *Id.* (internal citation, quotation marks, and brackets omitted); *see also Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001) (a district court "must accept the jury's credibility findings consistent with the verdict.") A court "must accept any reasonable interpretation of the jury's actions." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1038 (9th Cir. 2003).

"The test applied is whether the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Go Daddy*, 581

F.3d at 961. A court should deny a motion for JMOL where substantial evidence exists to support a jury verdict. *See Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007) ("A jury's verdict must be upheld if it is supported by substantial evidence.").

B. Rule 59

Federal Rule of Civil Procedure 59 provides that "[t]he court may, on motion, grant a new trial on all or some of the issues – and to any party – . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1). Rule 59 further provides that "the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order." Fed. R. Civ. P. 59(d).

Therefore, under Rule 59 "[t]he district court . . . is not limited to the grounds a party asserts to justify a new trial, but may sua sponte raise its own concerns," and the court "can grant a new trial under Rule 59 on any ground necessary to prevent a miscarriage of justice." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014). "Unlike with a Rule 50 determination, 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. Instead, the district court can weigh the evidence and assess the credibility of the witnesses." *Id.* (citation omitted).

The district court's grant of a new trial under Rule 59 is reviewed for an abuse of discretion, meaning a district court's decision to grant a new trial will be overturned "only when the district court reaches a result that is illogical, implausible, or without support in the inferences that may be drawn from the record." *Id.* "The district court's denial of a motion for a new trial" under Rule 59

"is reversible only if the record contains no evidence in support of the verdict or if the district court make a mistake of law." *Go Daddy*, 581 F.3d at 962 (internal quotations omitted).

IV. DISCUSSION

A. Plaintiffs' Motion for Renewed Judgment as a Matter of Law

Plaintiffs move for renewed judgment as a matter of law on their Section 2(a) claim. The 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).) Therefore, Plaintiffs' motion for judgment as a matter of law primarily focused on the elements below.

1. Reasonably Contemporaneous Sales

Plaintiffs argue Living Essentials' spreadsheets listing dates of sales of 5-hour Energy drink to Costco and Plaintiffs, along with testimony from expert witness Dr. McDuff, provide an evidentiary basis from which the jury could only conclude sales were made reasonably contemporaneously. Under Section 2(a) of the Robinson-Patman Act, Plaintiffs were required to prove "that the sales being compared were reasonably contemporaneous," meaning "that the sale to a Plaintiff and the sale to Costco occurred at about the same time." (Dkt. No. 498 (Court's Jury Instructions) at p. 16.) Factors to be considered included whether prices in the industry fluctuated, the length of time between the sales, and changing market conditions in the time between sales. (*Id.*)

Defendants presented evidence that the market for 5-hour Energy changed during the period at issue because Costco added three new CBC locations in 2015 and 2017. (Dkt. 564 at Exh. H (Trial Tr.) at p. 117:15-19.) Defendants offered testimony that the new CBCs resulted in increased sales of 5-hour Energy to Costco because those stores had to stock their shelves, resulting in inflated sales numbers in that period. (Dkt. 564 at Exh. C (Trial Tr.) at p. 125:9-19.) Defendants also presented evidence that overall sales of 5-hour Energy in California were declining. (*Id.*, Exh. C at 81:2-13; Exh. I at 55:16-19.)

Based on the evidence presented at trial, the jury could reasonably infer that Defendants' sales to Costco and Plaintiffs were not reasonably contemporaneous. Although Plaintiffs' evidence indicates some sales were made at or around the same dates, many sales were separated in time. In those periods, Defendants' evidence concerning changing market conditions and industry fluctuations could reasonably have led the jury to conclude that sales to Plaintiffs and Costco did not occur reasonably contemporaneously.

2. Discriminatory Prices

The Court's August 7 Order conclusively established the second element of Section 2(a) liability – the existence of a price difference in favor of one customer over another. (*See* Dkt. No. 289 (Order RE Motions for Summary Judgment) at p. 4.) The Court ruled that "there can be no dispute that Costco was offered a lower price by Defendants than the price offered to Plaintiffs" and found "Defendants discrimination against Plaintiffs in favor of Costco based on price." (Id.)

3. Whether the Price Discrimination May Have Caused Competitive Injury

Section 2(a) also requires Plaintiffs to prove it suffered competitive injury, which may be established by direct evidence of "diversion of sales or profits" or by evidence that a "favored competitor received a significant price reduction over a substantial period of time." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC,*

Inc., 546 U.S. 164, 177 (2006). In addition, Plaintiffs were required to prove "actual competition" between Costco and Plaintiffs to establish this element. *Id.*

a. Actual Competition

To permit the conclusion that there was competitive injury, there must be actual competition between Costco and Plaintiffs. *See id.* ("Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act."). To prove actual competition, Plaintiffs were required to show they competed with Costco for the same customers. *See id.* at 166.

Plaintiffs argue evidence proving Costco competed with Plaintiffs for sales to retailers was uncontradicted and unimpeached at trial. This evidence includes:

- Statements from each Plaintiff testifying they sell 5-hour Energy drinks to "mom and pop C-stores"[1] and compete with Costco for sales to those customers;
- Internal emails from Living Essentials in which Living Essentials employees identify Plaintiffs and Costco as competing for sales with the same retailers;
- The testimony of Sean Riffle, Director of Sales at Paramount,[2] identifying certain customers as competing with Costco Business Centers and stating those customers' sales fell when Costco ran IRC promotions; and
- The testimony of Kevin Riffle, President of Paramount, agreeing there was competition between Plaintiffs and Costco for sales of 5-hour Energy drinks to retailers.

[1] The term "Mom & Pop C-Stores" refers to convenience store retailers who were the primary customers of the Plaintiffs, and purportedly the primary customers of Costco.

[2] Paramount is the broker that managed Living Essentials' sales to wholesalers in California.

Defendants argue deficiencies in Plaintiffs' evidence, together with evidence it proffered at trial, provide an adequate evidentiary basis on which the jury could reasonably conclude Costco and Plaintiffs did not compete. Dr. Williams, an expert witness of the Defendants, opined that Costco and Plaintiffs are not "demand substitutes," meaning price differences between sellers did not result in changes to their customer base. (Dkt. No. 548 (Trial Transcript) at pp. 75:12-20, 86:18-87:2.) Because 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. Dr. Williams opined that a possible explanation for customers decision to purchase a product was the distance between retailers and wholesalers. (Id. at pp. 89:4-5.) This opinion was corroborated by testimony from Plaintiffs, which identified the CBCs closest to some or all its customers as anywhere from 15 miles away to out-of-state. (*See* Dkt. No. 564 (Olijnyk Decl.), Exh. B at 157:12-19; Exh. A at 119:18-19, 183:1-16; Exh. D at 35:17-25, 76:4-77:3; Exh. E at 259:17-19; Exh. F at 63:12-17.) Although Plaintiffs presented evidence comparing the distances between CBCs and wholesalers to show customers could travel to a CBC during an IRC promotion, the jury could reasonably conclude that the distance between some retailers and the nearest Costco contradicted Plaintiffs' evidence that Costco and Plaintiffs competed for the same customers.

Defendants also argue the testimony of individual Plaintiffs identifying Costco as a competitor was self-serving, premised on inadmissible hearsay, or otherwise unreliable. As finder of fact, the jury may discount a witness' testimony based on perceived bias. *United States v. Abel*, 469 U.S. 45, 49-50 (1984). Bias includes a witness' self-interest in the outcome of the litigation. *See United States v. Dees*, 34 F.3d 838, 844 (9th Cir. 1994). Here, the jury could permissibly discount the testimony of each Plaintiff due to their financial interest in the outcome of the litigation. Likewise, Defendants' experts criticized the

methodology of Dr. Frazier, Plaintiff's expert, due to his reliance on the emails of Living Essentials' employees identifying Costco and Plaintiffs as competitors and the small sample size of retailers Dr. Frazier surveyed to determine whether they were customers of both Plaintiffs and Costco. (Olijnyk Decl., Exh. C at pp. 24:3-24:9, 119:23-120:24.) Thus, evidence and argument at trial tended to discredit the reliability of Plaintiffs' lay and expert witness testimony, and the jury may give little or no weight to that evidence. The Court will not disturb the jury's credibility determinations on a renewed motion for judgment as a matter of law. *Go Daddy*, 581 F.3d at 961 (noting that the court may not make credibility determinations or weigh the evidence when considering a motion for judgment as a matter of law).

Because Defendants presented evidence at trial that Plaintiffs and Costco were not in actual competition, the jury could reasonably conclude Plaintiffs failed to prove their Section 2(a) claim. *See Volvo* 546, U.S. at 177.

b. Diverted Sales

Competitive injury may be proven through evidence of diverted sales or profits from the disfavored customer to the favored customer. *Id.* At trial, Plaintiffs testified that they lost customers of 5-hour Energy to Costco, they personally observed their customers purchase 5-hour Energy from Costco during IRC events, and that their sales of 5-hour Energy declined while Costco ran IRC events. Plaintiffs also presented testimony of a sample of their customers, who testified that they purchased 5-hour Energy from Costco instead of Plaintiffs during IRC promotions due to the lower price. Finally, Plaintiffs presented evidence from employees of Living Essentials and Paramount stating retailers purchased from Costco over other wholesalers due to price differences.

Defendants argue Plaintiffs failed to present any individualized evidence of diverted sales in the form of receipts or economic analysis. Rather, Defendants argue, Plaintiffs merely presented anecdotal evidence from interested witnesses which the jury was entitled to discount. In addition, Defendants argue Plaintiffs'

expert based his opinions on data showing Plaintiffs and Costco's *purchases* of 5-hour Energy from Defendants but failed to analyze *sales* data. Thus, Defendants argue Plaintiffs' expert opinion failed to exclude the possibility that customers purchasing less 5-hour Energy from Plaintiffs instead purchased it from outlets other than Costco, thereby contradicting the theory of diverted sales offered by Plaintiffs' expert.[3]

Because Plaintiffs' evidence of diverted sales was primarily premised on testimony from percipient witnesses, the majority of whom were Plaintiffs in this action, the jury was entitled to decide how much weight, if any, should be given to such evidence. Likewise, the jury could reasonably conclude that the conclusory statements of Living Essentials' employees regarding diverted sales were unreliable.

Thus, the jury could reasonably infer that Plaintiffs did not proffer sufficient evidence to satisfy this element. For this reason, the motion for renewed judgment as a matter of law is denied.

B. Plaintiffs' Motion for New Trial

Plaintiffs also move for a new trial on three grounds, arguing: (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.

1. The Verdict Is Contrary to the Clear Weight of the Evidence

Plaintiffs adopt the arguments made in support of their Rule 50 motion, arguing the more flexible standard under Rule 59 warrants a new trial because "[t]he verdict is at odds with the clear weight of the relevant and admissible

[3] Plaintiffs contend this argument misrepresents the record because Plaintiffs' expert did analyze sales data. (Dkt. No. 568-4 (Trial Tr.) at pp. 148-149.) In the portions of the record cited by Plaintiffs, the expert states he analyzed "[t]he sales data provided by Living Essentials in terms of the wholesale sales and the resale sales from the plaintiffs [and] Costco to their customers." (Id.) The expert also ran regressions analyzing sales of Costco and Plaintiffs to retailers. (Id. at 149.) Thus, the record indicates Plaintiffs' expert analyzed sales to retailers, which contradicts Defendants' assertion.

evidence proving that Living Essentials unlawfully discriminated in price against Plaintiffs in favor of Costco, to the Plaintiffs detriment." (Dkt. No. 559 (Pls.' Mot.) at pp. 14:18-15:10.) Under Rule 59, district courts have the duty to weigh evidence, assess the credibility of witnesses, and "to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the Court's] opinion, the verdict is contrary to the clear weigh of the evidence, or . . . to prevent . . . a miscarriage of justice." *Experience Hendrix*, 762 F.3d at 842.

Defendants presented persuasive evidence at trial both contradicting Plaintiffs' arguments and affirmatively disproving the elements of Plaintiffs' Section 2(a) claim. For example, Defendants presented expert testimony disproving the existence of competition between Plaintiffs and Costco, as well as impeaching the testimony of Plaintiffs' witnesses. Therefore, the jury's verdict is not contrary to the clear weight of the evidence.

2. Errors in Jury Instructions

Erroneous jury instructions are grounds for a new trial, unless the error is harmless. *See, e.g., Watson v. City of San Jose*, 800 F.3d 1135, 1140-1141 (9th Cir. 2015). Courts in the Ninth Circuit "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) (citation and internal quotations omitted).

Plaintiffs argue the Court erred by providing the jury with instructions related to functional discounts and competitive injury.

a. Functional Discounts (Dkt. No. 498 at 20 (Instruction No. 19).)

Plaintiffs argue instructing the jury regarding functional discounts was improper because that defense was inapplicable as a matter of law. Plaintiffs first argue the functional discounts defense only applies when the favored and disfavored purchasers "operate at different levels of trade, and thus do not

compete with each other." *See Hasbrouck v. Texaco, Inc.*, 496 U.S. 543, 564 (1990) (citing with approval *In re Boise Cascade Corp.*, 107 F.T.C. 76, 212, 214-215 (1986)). Throughout this litigation, the parties argued whether Costco and Plaintiffs operated at the same level of trade. Although Plaintiffs presented evidence from employees of Living Essentials and Paramount stating both Plaintiffs and Costco operate as wholesalers to convenience stores, Defendants' evidence that Plaintiffs purchased 5-hour Energy drinks at CBCs and profitably resold it to their customers indicates that CBC functioned as an upstream 5-hour Energy supplier. Plaintiffs' contention that the functional discounts instruction was given in error because Defendants did not make the purported discounts equally available to Plaintiffs again presumes Plaintiffs and Costco functioned as the same level of trade. *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1038 (9th Cir. 1987) (stating functional discounts must equally available to the entire class of buyers.)

Plaintiffs next argue the functional discounts defense was inapplicable because the amounts Defendants paid to Costco for promotional activities were not "a reasonable reimbursement for the actual functions performed." (Dkt. No. 498 at p. 20 (Jury Instruction No. 20).) *See also Hasbrouck*, 842 F.2d at 1038. Plaintiffs contend that Defendants proffered no evidence regarding the value of the promotional, marketing, and advertising services which Costco provided. Innovative Partners' Rule 30(b)(6) witness testified that Innovative Partners performed no analysis to determine the amount of the discount offered by Living Essentials to Costco. (Dkt. No. 473 at 75:18-76:5.) Defendants' CFO testified that he was unaware if Defendants had analyzed the value of certain promotional services provided by Costco. (Dkt. No. 599-11 at 177:22-120:6.) Plaintiffs contend the sole evidence of the services Costco provided was testimony from Mr. Scott Allen, the Vice President of Living Essentials responsible for sales to

Costco, stating his "feeling" is that Defendants get value from Costco's promotional programs. (Dkt. No. 559-8 at 173:14-174:1.)

In contrast, Defendants offered evidence that they performed analyses to determine the return on investment they received from Costco's promotional activities (*see* Dkt. No. 564 at Exh. O (Meguiar Dep. Tr.) at p. 84:13-85:6), and testimony from Mr. Allen stating that Costco's promotional services provided high value advertising for 5-hour Energy in a location with limited marketing opportunities, and that the price of such promotions is a fixed cost set by Costco that all competitors pay. (Dkt. No. 564-8, Exh. H at pp. 153-157, 172-173.)

Here, Defendants' evidence that it performed analyses to determine whether the promotional activities were profitable and that their competitors for this advertising space pay the same price as Defendants strongly indicates their reimbursement to Costco for such functions was reasonable and competitively negotiated. Although Plaintiffs' evidence to the contrary presented a question of fact on this issue, there was no error in providing instruction number nineteen to the jury. The jury was also instructed that they determined how much weight should be given to evidence.

b. Including the Term "Substantially" in the "Competitive Injury" Instructions

Plaintiffs argue the Court erred by instructing 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." (Dkt. No. 498 at p. 18 (Instruction No. 17) (emphasis added).) Plaintiffs also argue the term "substantially" or "substantial" was incorrectly added into two other jury instructions. (Id. at 14 (Instruction No. 13), 19 (No. 18).) Plaintiffs contend that the statutory language of Section 2(a) is to be read

disjunctively, with the modifier "substantially" operating only on the first clause related to lessening competition, and not the second clause related to injury.[4]

Under the series-qualifier canon of statutory interpretation, "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." *Series-Qualifier Canon*, Black's Law Dictionary (11th ed. 2019); *accord Lockhart v. United States*, 136 S. Ct. 958, 969-970 (2016) (Kagan, J. dissenting) (applying series-qualifier canon). Here, Section 2(a) provides a parallel construction for the verbs in the section of the provision at issue. Section 2(a) provides:

> It shall be unlawful for any person engaged in commerce … to discriminate in price between different purchasers … 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…

15 U.S.C. § 13(a). Each of the verbs following the word "where" form a parallel series outlining alternate conditions under which liability for violation of the Section 2(a) may be imposed. The word "substantially," a prepositive modifier, thus operates on each verb in the series. Accordingly, inclusion of the term "substantially" in the jury instruction was proper. *Accord Volvo*, 546 U.S. at 180 ("In short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition Reeder and the 'favored' Volvo dealer.").

[4] The relevant portion of Section 2(a) provides: "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 …" 15 U.S.C. § 13(a).

Therefore, the Court did not err by including "substantially" in the jury instructions at issue.

3. Exclusion of Charts Demonstrating Plaintiffs' Lost Sales

Plaintiffs argue the Court erroneously excluded from evidence summary charts, thereby warranting a new trial. *See 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."). Federal Rule of Evidence 1006 provides in part that a "proponent may use a summary, chart, or calculation to prove the content of voluminous writings, records, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006. "When considering the admissibility of exhibits of this nature, it is critical to distinguish between charts or summaries *as evidence* and charts or summaries as *pedagogical devices*." *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991) (internal citation omitted and emphasis in original). "[C]harts or summaries of testimony or documents already admitted into evidence are merely pedagogical devices, and are not evidence themselves." *Id.*

At trial, Plaintiffs offered into evidence Exhibits 370-1 to 370-8 and 869-14 to 869-20. Plaintiffs confirmed that "the majority of the underlying records were produced by Living Essentials *and already admitted into evidence*." (Dkt. No. 559 (Mot.) at p. 25:4-6 (emphasis added); *see also* Dkt. No. 466 (Pls.' Identification of the Voluminous Records Underlying Certain Expert Exhs.) at 1:10-17.) Both parties briefed the issue (*see* Dkt. Nos. 466, 467, and 468), and the Court sustained Defendants' objections, but permitted use of the exhibits as demonstratives during examination of Dr. McDuff. (Dkt. No. 476 (Order RE Objections Raised on October 11, 2019).)

The Court did not err in excluding Plaintiffs' summary charts from evidence. The charts at issue overwhelmingly summarized records already admitted into

evidence and were therefore merely pedagogical aids. Accordingly, the charts were "not evidence themselves." *Wood*, 943 F.2d at 1053. Plaintiffs argue they were specifically prejudiced because the jury could not reference the charts during deliberations, but the Ninth Circuit specifically prohibits the use of such charts during jury deliberations. *See id.* at 1053-54 ("We have long held that such pedagogical devices should be used only as a testimonial aid, and should not be admitted into evidence or otherwise be used by the jury during deliberations.")

V. CONCLUSION

Accordingly, Plaintiffs' motions are denied.

IT IS SO ORDERED.

DATED: April 20, 2021

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE