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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

L.A. INTERNATIONAL CORP., et al.,

Plaintiffs,

v.

PRESTIGE BRANDS HOLDINGS, INC., et al.,

Defendants.

Case No. 2:18-cv-06809-MWF-MRW

PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

Date: March 4, 2024
Time: 10:00 a.m.
Courtroom: 5A

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 4, 2024, at 10:00 a.m., in the courtroom of the Honorable Michael W. Fitzgerald, located at Courtroom 5A of the Central District of California courthouse, 350 W. 1st Street, Los Angeles, California, 90012, Plaintiffs L.A. International Corp., Manhattan Wholesalers Inc., Excel Wholesale Distributors Inc., Value Distributor, Inc., Border Cash & Carry, Inc., AKR Corporation, U.S. Wholesale Outlet & Distribution, Inc., Sanoor, Inc. (d/b/a L.A. Top Distributor), Pittsburg Wholesale Grocers, Inc., and Pacific Groservice, Inc. (Pittsburg together with Pacific, "Pitco") will and hereby do bring this Motion for Permanent Injunction to require Prestige Brand Holdings, Inc. and Medtech Products Inc. (together, "Prestige" or "Defendants") to stop discriminating against them in price and promotional payments.

This motion is based upon the following memorandum, the accompanying Declarations of Mark Poe, Mohammad Amini, and David Luttway and their attached 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 January 18, 2024.

Dated: January 29, 2024

GAW | POE LLP

By: s/ *Mark Poe*
Mark Poe
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

The jury found that Defendants' pricing of Clear Eyes to Plaintiffs violates both section 2(a) of the Robinson Patman Act ("RPA"), 15 U.S.C. § 13(a), and section 17045 of the California Unfair Practices Act ("UPA"), Cal. Bus. & Prof. Code § 17045. ECF No. 329 (verdict). Plaintiffs now move for a permanent injunction under 15 U.S.C. § 26, Cal. Bus. & Prof. Code § 17078, and Cal. Bus. & Prof. Code § 17203, to prohibit Prestige from further violations of the Robinson-Patman Act—both sections 2(a) ***and*** 2(d)—as well as the Unfair Practices Act and California's Unfair Competition Law. To all appearances, Prestige will continue to violate the statutes unless it is enjoined from doing so.

Plaintiffs submit a proposed order setting forth the details of the injunction they seek, but its broad outlines are simple: Prestige should be required to (1) extend to Plaintiffs the same net prices that it extends to the Costco and Sam's Club, and (2) offer promotional payments to Plaintiffs that are reasonably proportional to the value of the DOW allowance Prestige pays to Costco.

FACTUAL AND PROCEDURAL BACKGROUND

In the amended complaint filed August 20, 2018, Plaintiffs asserted four causes of action: (1) violation of section 2(a) of the RPA, (2) violation of section 2(d) of the RPA, (3) violation of section 17045 of the UPA, and (4) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq. ECF No. 10. Plaintiffs' section 2(a) claim was based on their allegations that they compete with the Costco Business Center division of Costco Wholesale Corporation ("Costco"), and the Sam's Club division of Walmart, Inc., for sales of the .2-oz "Pocket Pal" version of Clear Eyes eye drops (hereafter, "Clear Eyes"), but that Prestige charges Plaintiffs a far higher net price for that product than it charges to Costco and Sam's Club, thereby harming Plaintiffs' ability to compete. *Id.* ¶¶ 37-45. Their section 2(d) claim was based on the allegation that Prestige provides promotional payments to Costco that it fails to provide to Plaintiffs on proportionally

equal terms. *Id.* ¶¶ 57-58. For their UPA claim, Plaintiffs alleged that the discounts, rebates, and promotional allowances that Prestige extended to Costco and Sam's were kept secret from Plaintiffs, and that those favored prices caused competitive injury to Plaintiffs. *Id.* ¶¶ 60-62. Finally, Plaintiffs alleged that the forgoing conduct is unlawful and unfair, in violation of the UCL. *Id.* ¶¶ 65. In their *Prayer*, Plaintiffs requested damages as well as "permanent injunctive relief against the price discrimination alleged herein." *Id. Prayer* ¶ 4.

The evidence adduced at trial confirmed the truth of Plaintiffs' allegations. With respect to Plaintiffs' core claim of discrimination in net price, Prestige did not even attempt to dispute Dr. McDuff's calculations showing that it charged Plaintiffs a higher net price than Costco in every year at issue. Dr. McDuff testified that, depending on the year, Prestige charged Plaintiffs from 7% to 30.6% more for Clear Eyes than it charged to Costco for the same product. Poe Decl. Ex. D (12/12 Tr. 1084:13-1085:7; *see also* Demonstrative Ex. 229 at 16 (ECF No. 315-3). Dr. McDuff's calculations included only those discounts he classified as "direct discounts," meaning "discounts [that] directly impact the price . . . just reductions in the price that reduce the amount that is paid." *Id.* 1078:23-1079:4. As for Sam's Club, Dr. McDuff calculated that its net price per 12-pack ranged from $13.21 to $15.72 over the period at issue, which for example in 2018 amounted to an 8.8% favoritism over Border. Ex. 229 at 15-16. *Id.* 1083:11-16; 1089:16-21.

With respect to the section 2(d) claim, Jacob Grehn (Prestige's Senior Director of Sales responsible for sales to Costco) testified that going back to 2014 or 2015, Prestige had made various types of payments to Costco in conjunction with its sales of Clear Eyes, including advertising payments, payments to participate in Costco's periodic "Instant Redeemable Coupon" ("IRC") events, payments to appear in the "Business Savings Event" flier that advertised the IRCs, and payments for advantageous product placement. Poe Decl. Ex. C (12/8 Tr. 859:6-12). Mr. Grehn further testified that Prestige would pay Costco for "e-mail blasts," "ad space," and

to appear on Costco's website. *Id.* at 12/8 Tr. 859:16-25. Mr. Grehn referred to these as "promotional and advertising" payments. *Id.* at 12/8 Tr. 860:1-4.

Mr. Grehn testified that at some point in 2015, Costco rolled out what it called the "DOW" program, which stands for "delivery, operations, and web services." *Id.* at 12/8 Tr. 860:5-10. He explained that the "DOW allowance" was intended to eliminate the piecemeal payments that Prestige had previously made for advertising and promotional services. *Id.* at 12/8 Tr. 860:8-17. Referencing trial Exhibit 61 as an example of a DOW contract, Mr. Grehn explained that under the DOW program, Prestige makes quarterly payments to Costco for its various advertising and promotional services, and that the current amount of the payment is 3.95% of Costco's acquisition cost for Clear Eyes. *Id.* at 12/8 Tr. 860:23-861:9; 861:21-23; Poe Decl. Ex. 61 at 2 (percentage based on acquisition cost). In contrast, Prestige never offered to Plaintiffs promotional payments for advertising or other services to facilitate their sales of Clear Eyes, and never offered them anything akin to a DOW allowance. Poe Decl. Ex. A (12/6 Tr. 269:1-7 (Pitco); 461:23-25; 462:7-11; 465:1-6; 465:12-15 (LA Int'l. and Value)); Ex. B (12/7 Tr. 561:14-20; 563:17-24; 565:2-7 (U.S. Wholesale); 631:14-15 (AKR)); Ex. C (12/8 Tr. 711:12-14; 712:10-12 (LA Top); 771:3-5 (Border)); Ex. D (12/12 Tr. 967:21-23 (Excel); 1017:18-22 (Manhattan)). Prestige did not rebut that testimony, or otherwise identify any payments it had ever made (or offered to make) to any of the Plaintiffs in connection with their sales of Clear Eyes.

Finally, with respect to the UPA claim, the jury necessarily found that Prestige's pricing to Costco was "secret" within the meaning of section 17045. Jury Inst. No. 33; *see also U.S. Sec. & Exch. Comm'n v. Jensen*, 835 F.3d 1100, 1112 (9th Cir. 2016) (holding that in making equitable rulings, "the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations in deciding the legal claim.") (citation omitted). And Prestige's own witnesses testified that those terms are kept "confidential" even within Prestige. 12/6 Tr. 345:1-

7 (Burnett testifying that after he moved from the Costco account to the wholesalers' account, he was no longer privy to Costco's pricing).

Plaintiffs' section 2(a) and UPA claims were tried to the jury, while their section 2(d) and UCL claims (which sought only equitable relief), were tried to the Court. The jury returned its verdict in favor of all Plaintiffs on their section 2(a) claim, and in favor of all five of the California-based Plaintiffs on their UPA claim. ECF No. 329. Although the Court has not yet entered its Rule 52(a) findings on the section 2(d) and UCL claims,[1] given the undisputed evidence of the promotional payments that were made only to Costco, and the fact that the jury's verdict establishes that Prestige's conduct was "unlawful" under the UCL, this motion is drafted on the assumption that the Court's findings on those equitable causes of action will likewise be in Plaintiffs' favor.[2]

One wrinkle in Plaintiffs' request for permanent injunctive relief concerns Border Cash & Carry. Given that there is not an outlet of Costco Business Center in the San Antonio area, Plaintiffs did not contend that Border competes with Costco, but only with Sam's Club, of which there are six in the San Antonio area. Pretrial Conference Order at V.11 (ECF No. 301). Nor is there any evidence in the trial record that Prestige provided Sam's Club with promotional payments that it withheld from Border. Accordingly, Border seeks only an injunction requiring that it be offered pricing on Clear Eyes that is equivalent to the pricing extended to Sam's Club. Sam's Club, for example, received its own "instant savings" of $5.28 per case (48-pack) 2-3 times per year, whereas Border got nothing. Poe Decl. Ex. D (12/12 Tr. at 1075:18-1076:4); *see also* Demonstrative Ex. 229 at 8.

Importantly, Prestige's discriminatory conduct is ongoing. Indeed, as shown

[1] Per Plaintiffs' request, the Court permitted them to file a proposed set of Rule 52(a) filings on the same date this motion is filed.

[2] Should the Court rule otherwise, Plaintiffs' arguments with respect to 2(d) and the UCL can be disregarded.

by Prestige's post-trial sales to at least Pitco, it continues to charge Plaintiffs the same price it charged them before the trial began. *See* Decl. of David Luttway ¶ 2, Ex. A (Pitco order); Decl. of Mohammad Amini ¶ 2, Ex. A (Value order). Likewise, Prestige continues to reimburse Costco $3.20 for every 12-pack it sells under the discriminatory IRC program. Luttway Decl. ¶ 3, Ex. B at 14 (offering a $3.20 IRC for every box of Clear Eyes Costco sells between February 5 and March 3, 2024). Nor has Prestige begun giving Plaintiffs any kind of promotional funds, let alone funding that is reasonably proportional to the DOW allowance that it provides to Costco. Luttway Decl. ¶ 4; Amini Decl. ¶ 4.

In addition, it appears that Prestige is laying the groundwork to retaliate against Plaintiffs for having brought this lawsuit. As described in Mr. Amini's declaration, after he placed an order on behalf of Value Distributor for ten pallets of Clear Eyes on January 24, 2024 (even at the discriminatory price), Prestige's broker Synergy Sales responded with a forwarded email from Prestige, stating that the order would not be delivered until June 3, 2024. Amini Decl. ¶ 3, Ex. B. As Mr. Amini further states, he is "100% confident that the product will not be 'out of stock' when ordered by any of the four Costco Business Centers in the Los Angeles area with whom LA International and Value Distributor compete for sales." *Id.* As noted below, the rule is that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (quoting *United States v. E. I. Du Pont De Nemours & Co.*, 366 U.S. 316, 326 (1961)). Plaintiffs' ability to engage in "competition" with Costco will not be "restored" if Prestige is merely ordered to extend to them equal pricing, but permitted to discriminatorily supply Clear Eyes only to Costco and Sam's Club.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO AN INJUNCTION AGAINST PRESTIGE'S VIOLATIONS OF THE ROBINSON-PATMAN ACT.

Section 16 of the Clayton Act is titled "Injunctive relief for private parties;

exceptions; costs." 15 U.S.C. § 26. It provides that an antitrust plaintiff:

> *shall be entitled to sue for and have* injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including sections 13 [the RPA], 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . .

Id. (emphasis added).

Under Ninth Circuit precedent, proof of section 2(a) liability "entitle[s]" a plaintiff to injunctive relief: "Once such a showing is made, the plaintiff is entitled to an injunction preventing defendant from engaging in the anti-competitive conduct." *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1987). This follows from *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, where the Supreme Court held that "[u]nless rebutted by one of the Robinson-Patman Act's affirmative defenses,[3] a showing of competitive injury as part of a prima facie case is sufficient to support injunctive relief." 460 U.S. 428, 435 (1983). Unsurprisingly, at least one recent district court in this Circuit has repeated the same principle. *Mathew Enter., Inc. v. Chrysler Grp. LLC*, 2016 WL 4269998, at *3 (N.D. Cal. Aug. 15, 2016) ("For an injunction, 'all that is required... is proof that competitive injury may result.'") (quoting *Hasbrouck*, 842 F.2d at 1042). And most recently, the Ninth Circuit has flatly stated: "In order to obtain injunctive relief, the Wholesalers must prove 'threatened loss or damage by a violation of the antitrust laws.'" *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126, 1147 n.7 (9th Cir. Dec. 22, 2023). These Plaintiff wholesalers all proved "damage by a violation

[3] Here, the jury was charged with both of the affirmative defenses to the RPA, and necessarily rejected them.

of the antitrust laws,"[4] which is all they need to prove "[i]n order to obtain injunctive relief." *Id.*

The essentially automatic nature of an RPA injunction follows both from the nature of an RPA claim, and from the core principle that an antitrust plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws *or* from a contemporary violation likely to continue or recur," to obtain an injunction under 15 U.S.C. § 26. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 US 100, 130 (1969) (emphasis added). The Ninth Circuit and Supreme Court have continually described the RPA as a "prophylactic statute, *designed to* prevent the occurrence of price discrimination rather than to provide a remedy for its effects." *Hasbrouck*, 842 F.2d at 1040 (emphasis added) (citing *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981) ("a prophylactic statute") and *Falls City*, 460 U.S. at 434-35 (noting "the Robinson-Patman Act's prophylactic *purpose*") (emphasis added)).

Where the "purpose" and "design[]" of the entire statute is to prophylactically prevent price discrimination, it is no surprise that both the Ninth Circuit and Supreme Court have indicated that where liability is proven, an injunction should follow as a matter of course.

II. THE TRADITIONAL EQUITABLE FACTORS FULLY SUPPORT INJUNCTIVE RELIEF.

While the precedent suggests that injunctions for violation of the RPA are essentially automatic, it is worth noting that section 16 suggests that while an injunction "shall" issue, it is to be "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26. To the extent that the phrase "same conditions and principles" was meant to invoke the traditional equitable

[4] Border Cash & Carry did not prove "damage" per se, but the section 2(a) liability verdict necessarily means that it proved "threatened loss." *Id.*

factors, all four of those weigh in favor of injunctive relief.

Under that standard, a plaintiff seeking a permanent injunction must "demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay*, 547 U.S. at 391; *see also Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 2020 WL 1812257, at *2 (N.D. Cal. Apr. 9, 2020), *aff'd*, 20 F.4th 466 (9th Cir. 2021) (granting a permanent injunction based on Sherman Act violations after analyzing the four traditional factors).

In arguing that the four factors *also* support injunctive relief, Plaintiffs specifically reserve the argument that the Clayton Act's use of the word "shall" distinguishes section 26 from section 283 of the Patent Act, which the Supreme Court expressly noted uses the discretionary term "'may.'" *eBay*, 547 U.S. at 392 (quoting 35 U.S.C. § 283).[5] At a minimum, the caselaw cited in *Part I* and Congress's use of the word "shall" in the Clayton Act suggests that injunctive relief is the usual remedy for RPA violations. This is consistent with the Supreme Court's emphasis that in antitrust cases "the purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith*, 395 U.S. at 130-31. The Court in *Zenith* accordingly instructed that "Section 16 should be construed and applied with this purpose in mind." *Id.* at 131.

[5] The Ninth Circuit's most recent published precedent affirming a permanent antitrust injunction did not mention the four traditional factors, nor did the district court order that granted that relief. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955 (N.D. Cal. 2014). Nevertheless, since the four factors are plainly relevant to Plaintiffs' California claims, Plaintiffs respectfully suggest that they be addressed with respect to both sets of claims.

In all events, the four *eBay* factors are readily satisfied here.

A. Plaintiffs and the Public Will Suffer Irreparable Injury that Monetary Damages are Inadequate to Remedy.

"The first two elements are significantly interrelated." *Optronic*, 2020 WL 1812257, at *2. This is because "'to say that the harm is irreparable is simply another way of saying that pecuniary compensation would not afford adequate relief or that it would be extremely difficult to ascertain the amount that would afford appropriate relief.'" *Id.* (quoting *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 722 (2009)). Under that language, "[t]he Clayton Act 'tweaks the first factor by authorizing equitable relief where a plaintiff shows a significant threat of irreparable antitrust injury, even if the injury hasn't happened yet.'" *Williams v. Ests. LLC*, 2022 WL 1809464, at *5 (M.D.N.C. June 2, 2022) (quoting *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 705 (4th Cir. 2021) (cleaned up)).

Here, even assuming that monetary damages suffice to compensate Plaintiffs' losses on Clear Eyes *itself*, that is not the only injury that flows from Prestige's discrimination. Multiple witnesses testified that Clear Eyes is a "must have," or "must sell" item of inventory for convenience store wholesalers. Poe Decl. Ex. A (12/6 Tr. 457:18-458:1 (Mr. Amini testifying that "if you had a great price in Pocket Pack, [customers] would come in and purchase other products as well")); Ex. B (12/7 Tr. 555:18-24 (Ms. Wahidi testifying, "[i]t's what every customer asks for, every customer."); 603:17-21 (Mr. Farooq of Jadi Enterprises testifying "Clear Eyes is one of the product that all the convenience store carries. I mean, all of them."); Ex. C (12/8 Tr. 811:7-16 (Jeff Mansour of San Diego Cash & Carry)); Ex. E (12/13 Tr. 1324:10-16 (testimony of U.S. Wholesale from 5-hour Energy litigation)).

A consequence of that is that when Plaintiffs cannot afford to sell Clear Eyes at a competitive price, their customers will shop elsewhere for that item, such that the wholesaler is likely to lose out on sales of other items as well. Poe Decl. Ex. C (12/8 Tr. 731:21-732:6 (Mr. Kohanim testifying "when people go to Costco, for

example, for purchasing Pocket Pals, they also pick up other products, too. So we are not only losing sales on Pocket Pals, we are losing sale on other items, too.")); Ex. D (12/12 Tr. 1021:25-1022:10 (Mr. Sharifi testifying that when Manhattan's customers "go visit the Costco Business Center," they "pick up the Clear Eyes from them, pick up other items.")).

It was not only Plaintiffs and their customers who testified to this. This aspect of the wholesale industry was clearly explained by Hector Garcia, Prestige's former broker to several of the Plaintiffs:

> Q. Now, I've heard in this industry wholesalers describe things with the term a must-sell item. Is that something you've heard of?
>
> A. Yes, it's a must-sell, must-have.
>
> Q. Must-have.
>
> A. Yeah.
>
> Q. And what does that mean to you? I mean, if you could explain that to me.
>
> A. It's an item that all of my customers are going to be looking for so I need to have this in order to have them buy -- well, if I tell them I don't have this product, then they're not going to buy anything else. They'll go --
>
> Q. From -- and when you say I, you're saying from the wholesaler's --
>
> A. The wholesaler.
>
> Q. -- perspective?
>
> A. The wholesaler's perspective, right. If they don't have the one must-have item, because they know it's a regular item that's sold, *every retailer is going to come looking for it, they might just go somewhere else and buy everything else.*
>
> Q. *And take all the rest of their business?*
>
> A. *And take all the rest of the business.*

Garcia Tr. Testimony at 18:25-82:23 (emphasis added) (ECF No. 310-1). Critically, this practical reality of the wholesale marketplace was nowhere rebutted by any Prestige witness. Nor did Dr. Meitzen or any other Prestige witness suggest that this form of injury could be accurately or reliably quantified, such that Plaintiffs could be "adequately" compensated for it with a monetary award.

Moreover, injury to the public at large must also be considered when evaluating the propriety of injunctive relief under the antitrust laws. *Williams*, 2022 WL 1809464, at *5 (citing *Zenith* for the proposition that "a permanent injunction may be issued to protect the moving party and the public from the impact of future antitrust violations."). Here, Dr. McDuff's original damages calculations sought to account for "consumer harm" as well, under the familiar antitrust damages rule established in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977). But the Court held that Plaintiffs could not recover for the harm that was passed on to their customers, and in turn end consumers. Order Re: Summary Judgment and Mot. to Exclude Expert Testimony at 10-11 (ECF No. 176). Thus, absent an injunction, not only will Plaintiffs themselves continue to suffer unquantifiable injuries from lost sales of other items, but both Plaintiffs' customers and consumers at large will continue to pay more for Clear Eyes than the law requires. And this harm to consumers is obviously irreparable, with no adequate remedy at law for Plaintiffs' customers or the public, due to the "bright line rule" from *Illinois Brick* that "only direct purchasers have standing under § 4 of the Clayton Act[6] to seek damages for antitrust violations." *Delaware Valley Surgical v. Johnson & Johnson*, 523 F.3d 1116, 1120-21 (9th Cir. 2008); *see also Coal. For a Level Playing Field L.L.C. v. Autozone, Inc.*, 2001 WL 1763440, at *7 (E.D.N.Y. Oct. 18, 2001) (holding that "indirect purchasers" lack standing to sue for monetary relief under the RPA).

[6] Section 4 of the Clayton Act, 15 U.S.C. § 15, is the exclusive means by which RPA plaintiffs recover damages. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

Plaintiffs will also suffer an irreparable injury without a means for adequate monetary relief if Prestige is permitted to continue violating section 2(d). Decades ago, courts had permitted RPA Plaintiffs to recover section 2(d) damages measured by the difference between the dollar value in promotional payments given to the favored purchaser and the value given to the disfavored purchaser. *See Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 990 (8th Cir. 1945). That had also been an acceptable means of calculating section 2(a) damages (*i.e.*, the delta between prices, multiplied by the number of units purchased). *See, e.g.*, *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248, 1251-52 (9th Cir. 1969). But in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), the Supreme Court described such methodologies as "automatic damages," and squarely held that they are not a permissible measure of RPA damages. *Id.* at 561-63. While *J. Truett Payne* specifically dealt only with section 2(a), it put *Elizabeth Arden* under the same disapproved umbrella of "automatic damages." *Id.* at 561 n.2. And the only post-*J. Truett Payne* case to have dealt with damages under section 2(d) holds that it prohibits "automatic" 2(d) damages. *Stevens v. Zenith Distrib. Corp. of Kansas*, 1983 WL 21367, at *1 (W.D. Mo. Dec. 7, 1983).

Under the modern damages formulation, an RPA plaintiff is entitled to recover damages only in the amount of what its "sales and profits would have been in the absence of [the violation]." *Hasbrouck*, 842 F.2d at 1034. To Plaintiffs' knowledge, no RPA plaintiff has successfully made out a claim for section 2(d) damages since *J. Truett Payne* issued more than four decades ago. This is no surprise. After all, under *Hasbrouck* such a plaintiff would need to be able to develop a reliable model to show how many additional units it would have sold had it received a certain amount of advertising or other promotional funds, proportionally equal to those given the favored purchaser. Given that decades of intervening RPA caselaw have failed to produce *any* permissible model for such damages, it is safe to say "by a preponderance of the evidence," that Plaintiffs lack an adequate monetary remedy

for Prestige's section 2(d) violation. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) (holding that "'the right to and necessity for injunctive relief'" is governed by the preponderance standard) (quoting *Orantes–Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990)).

B. The Balance of Hardships Weighs in Favor of Injunctive Relief.

In the context of an established antitrust violation, the "balance of hardships" tilts strongly in favor of the prevailing plaintiff. After all, on Plaintiffs' side of the ledger is the hardship they will continue to endure from (1) paying an illegally high price for Clear Eyes, (2) not being able to sell a "must have" convenience store product at a competitive price, and (3) the deprivation of promotional funds that are larded upon their competitor Costco. On the other side of the ledger, the only "hardship" Prestige will face is being required to comply with federal antitrust law. Complying with the law is not a cognizable "hardship." *See Marshall v. Chala Enterprises, Inc.*, 645 F.2d 799, 804 (9th Cir. 1981) ("The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway to comply with the law.") (citation omitted); *see also WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 287 (2d Cir. 2012) (holding that it is "axiomatic" that a copyright infringer cannot complain about an injunction requiring it to stop infringing); *In re Vitamin C Antitrust Litig.*, 2013 WL 6191945, at *6 (S.D.N.Y. Nov. 26, 2013) ("Mandating compliance with the law can hardly be considered burdensome.").

C. The Public Interest Always Lies in Favor of Promoting Competition.

Finally, as the Ninth Circuit has recently emphasized: "'[T]he central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition . . . that these statutes recognize as *vital to the public interest*.'" *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023-24 (9th Cir. 2016) (quoting *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000)). With specific respect to the

RPA, the Supreme Court has explained that "[t]he legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948). An injunction requiring Prestige to extend the same pricing and promotional support to Plaintiffs that it gives to Costco and Sam's Club would deprive those large buyers of their unearned "competitive advantage," by placing Plaintiffs on a level playing field when it comes to price.

As another court in this District has observed with respect to the anti-merger provisions of the Clayton Act, "'the preservation of competition is always in the public interest.'" *United States v. Trib. Publ'g Co.*, No. 16-CV-01822-ABP-JWX, 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016) (quoting *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989)). Even setting aside the "public interest" as prescribed by Congress, it is axiomatic that lower prices are in the public interest. *See Calvin Klein Cosms. Corp. v. Lenox Lab'ys, Inc.*, 815 F.2d 500, 505 (8th Cir. 1987) (noting the "strong public interest in lowest possible prices"). While there was no specific trial testimony as to how giving Plaintiffs access to Costco and Sam's lower pricing would be expected to affect the prices paid by *end* consumers, per a recent article by an economics professor at the Carey Business School of John Hopkins University, "[t]here is no shortage of studies detailing the harmful consumer effects of price discrimination." Christina DePasquale, *The Robinson-Patman Act and the Consumer Effects of Price Discrimination*, 60 Antitrust Bulletin 402, 411 (2015). And it is generally accepted that "more competition often serves the public interest in low prices." *Alliance 3PL Corp. v. New Prime, Inc.*, 614 F.3d 703, 706 (7th Cir. 2010).

III. THE CALIFORNIA PLAINTIFFS ARE ALSO ENTITLED TO AN INJUNCTION UNDER THE UPA AND UCL.

The five California Plaintiffs (L.A. International, Value Distributor, U.S.

Wholesale, L.A. Top, and Pitco) prevailed at trial on their UPA claim. And by winning that claim and the RPA claims, those Plaintiffs necessarily prevail on their UCL claim. *Optronic*, 2020 WL 1812257, at *5 ("The jury's findings as to Defendant's violations of law are sufficient to demonstrate that Defendant's conduct was "unlawful" under the UCL.").

Under section 17078 of the UPA, upon finding a violation, a trial court "'*shall* enjoin the defendant from doing all acts which are prohibited by the' Unfair Practices Act." *E&H Wholesale, Inc. v. Glaser Bros.*, 158 Cal. App. 3d 728, 733 (1984). As *E&H Wholesale* explained, "[t]he use of the word 'shall' in section 17078 has been construed by our courts to require the mandatory grant of an injunction." *Id.* (citing *California Assn. of Dispensing Opticians v. Pearle Vision Center, Inc.*, 143 Cal. App. 3d 419, 433 (1983); *Kofsky v. Smart & Final Iris Co.*, 131 Cal. App. 2d 530, 532 (1955)). Thus, at least in state courts, "an injunction must issue if the evidence is sufficient to establish that defendants violated section [17045]." *Id.*

The central teaching of *Erie v. Tompkins*, 304 U.S. 64 (1938), is that where state claims are tried in federal court based on diversity jurisdiction, "the outcome of a case in federal court should generally be 'substantially the same'" as if the case were tried in federal court. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 839 (9th Cir. 2020). Nevertheless, the Ninth Circuit held in *Sonner* that "a federal court's equitable authority remains cabined to the traditional powers exercised by English courts of equity, even for claims arising under state law." *Id.* at 840 (citing *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945)). Accordingly, while the issue has not been specifically decided with respect to the UPA, it seems likely that the same four-factor test noted above applies to injunctive relief under the UPA and UCL claims.

The California plaintiffs are entitled to an injunction based on Prestige's established UPA and UCL violations for the same reasons given above. Under the UPA, Plaintiffs face the same irreparable injury without an adequate legal remedy

that will flow from their customers going elsewhere to obtain a favorable price on Clear Eyes—those customers are likely to buy other merchandise on that same trip, even if they do not cease their patronage of the Plaintiff altogether, from having lost "faith in their supplier." Poe Decl. Ex. F (Tr. Ex. 22). Likewise, Prestige can hardly claim that the "hardship" it faces from being required to comply with California law exceeds the hardship Plaintiffs will face from lost sales of merchandise other than Clear Eyes, and reputational injury with their customers. And the "public interest" embodied in these California statutes is no less significant than the public interest embodied in the RPA. *See* Cal. Bus. & Prof. Code § 17001 ("The Legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented."). Indeed, the Legislature's strong view of the weight of the public interest in UPA compliance is shown by its directive that where a violation is shown, a remedial injunction "shall" issue. *Id.* § 17078.

IV. SCOPE OF THE INJUNCTION

Plaintiffs submit with this motion a proposed form for the injunction, requiring Prestige to comply with sections 2(a) and 2(d) of the RPA, and with section 17045 of the UPA. For every Plaintiff other than Border Cash & Carry, it requires Prestige to extend to Plaintiffs the same pricing terms for Clear Eyes that Prestige extends to Costco, including Costco's current list price, and the equivalent of an IRC program, in the same frequency and duration as what Prestige runs through Costco. Likewise, with respect to promotional payments under section 2(d), it requires Prestige to offer promotional funding that is equivalent to the DOW allowance paid to Costco, which is currently 3.95% of Costco's acquisition cost for Clear Eyes. *Supra* at 3. Notably, because the DOW allowance is set as a percentage of Costco's purchases, extending the same DOW allowance to Plaintiffs would automatically be "proportionally

equal" as required by section 2(d).

The proposed injunction is slightly different for Border Cash & Carry, given that there is not presently a Costco Business Center near San Antonio, and since—as far as the trial evidence shows—Prestige did not make discriminatory promotional payments to Sam's Club. Accordingly, the injunction for Border concerns only section 2(a) discrimination, and would thus require Prestige to extend to Border only the same net prices and terms that it extends to Sam's Club, which would necessarily include the $5.28/case billback that Prestige periodically gave to Sam's Club.

There is also a need to ensure compliance with section 17045 of the UPA, which prohibits the "secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions." Cal. Bus. & Prof. Code § 17045. Plaintiffs propose that for the next five years, Prestige be required to semi-annually report to Plaintiffs' counsel (on a "confidential" basis under the terms of the existing protective order) the list price it is then-charging to Costco and to Sam's Club for Clear Eyes and the effective date of any price increase or decrease, along with an itemization and summary of any discounts, rebates, promotional terms, or other payments that it makes to Costco and Sam's Club in conjunction with sales of Clear Eyes. To ensure their accuracy, the reports should be attested to under oath by an officer of one of the defendant companies.

Finally, "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (quoting *United States v. E. I. Du Pont De Nemours & Co.*, 366 U.S. 316, 326 (1961)). Requiring Prestige to obey sections 2(a) and (d) of the RPA and section 17045 of the UPA should be effective to "redress the violations." *Id.* But it will not "restore competition" if Prestige is permitted to achieve the same result merely by refusing to fulfill Plaintiffs' orders, as Mr. Amini describes with respect to the order

placed by Value. Amini Decl. ¶ 3, Ex. B. After all, not having Clear Eyes in inventory to begin with is just as limiting to Plaintiffs' ability to compete with Costco and Sam's Club as paying a 20% higher price for it. Accordingly—and whether Prestige's "out of stock" claim is genuine or pretextual—the injunction should also require Prestige to proportionally allocate Clear Eyes between Plaintiffs and the favored purchasers on a "most-favored nations" basis.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this motion be granted, and that a permanent injunction substantially in the form of the one proposed herewith be entered.

Dated: January 29, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs L.A. International Corp., et al., certifies that this brief contains 5,970 words which complies with the word limit of L.R. 11-6.1.

Dated: January 29, 2024

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