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Antitrust

## Robinson-Patman Act Claim Survives Summary Judgment in Price Discrimination Suit Against Maker of 5-Hour Energy

A price discrimination suit against the maker of 5-hour Energy is heading to trial after a federal court in California denied cross-motions for summary judgment. In *ABC Distributing, Inc. v. Living Essentials, LLC*, 2017 WL 3838443 (N.D. Cal. Sept. 1, 2017), several Los Angeles area wholesalers brought suit against Living Essentials for allegedly offering 5-hour Energy drinks to Costco at lower prices than it did to the plaintiffs, in violation of the Robinson-Patman Act and California's unfair competition laws. Because a price discrimination claim requires competitive injury, Living Essentials argued that the case should be dismissed on the grounds that Costco was a club store that was never in actual competition with the wholesaler plaintiffs for the same customers. Conversely, the plaintiffs argued that they operated at the same level of the distribution chain as Costco, and that their geographic proximity demonstrated competition as a matter of law. The court rejected both arguments. Although Living Essentials differentiated Costco's business model from that of the plaintiffs, circumstantial evidence demonstrated that at least some Living Essentials employees actually did believe that Costco was in direct competition with the plaintiffs for the same customer dollars, and this dispute of fact precluded summary judgment for either side.

The court also ruled that summary judgment was improper because of disputed facts regarding the price difference paid by the plaintiffs and Costco. Although the plaintiffs (for the most part) did not attempt to show that they actually lost sales to Costco, case law permits an inference of competitive injury where a favored purchaser has received a significant price reduction for a substantial period of time. It was undisputed that Costco received some level of price reduction over the relevant time period, but Living Essentials argued that this was in part because of functional discounts that related to Costco's different status in the supply chain. Because of the dispute as to whether Costco held a distinct or overlapping status in the supply chain, the court could not determine on summary judgment whether Costco's service provided functional benefits to Living Essentials that would justify such discounts. The court did note, however, that rebates offered to Costco customers and payments for Costco advertising promotions, to the extent they exceeded the actual promotional value enjoyed by Living Essentials, should be factored into the net price calculation for Costco. Whether that difference in net price was "significant" or *de minimis*, and whether it was otherwise justified by functional benefits provided by Costco, will ultimately be determined by a jury.

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