AMERICAN ECONOMIC LIBERTIES PROJECT

TAKING ON POWER BUYERS:

Expedient, High-Impact Enforcement of Federal and California Price Discrimination Laws**

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FOREWORD BY LINA KHAN

FORMER CHAIR, FEDERAL TRADE COMMISSION, 2021-2025

As Chair of the Federal Trade Commission under President Biden, I heard directly from independent grocery stores and community pharmacies about the many ways in which the deck is stacked against them. Price discrimination by major suppliers can dramatically tilt the playing field, making it impossible to fairly compete. Under my leadership, the Federal Trade Commission launched its first two Robinson-Patman Act cases in decades, charging Southern Glazer's Wine & Spirits and PepsiCo with illegally discriminating in favor of big-box stores. Disturbingly, the current Republican Chair and Commissioners recently dismissed the PepsiCo case, handing a big gift to the global food behemoth and the giant big-box retailer that PepsiCo was alleged to illegally favor.

Small businesses, working families, and communities cannot count on the Trump administration to protect them from illegal price discrimination. We will need state attorneys general and private parties to step into the void and hold power buyers accountable for demanding and enriching themselves with payments and benefits that their smaller rivals never see.

The American Economic Liberties Project's practice guide to taking on power buyers provides a rigorous and practical overview of how private parties can take up the mantle and continue revitalizing enforcement against illegal price discrimination. This practice guide is laser-focused on some of the fastest, most straightforward claims available to businesses seeking to vindicate their rights and bring much-needed accountability to the market.

INTRODUCTION

In 1936, Congress passed the Robinson-Patman Act (RPA) following "[a] lengthy investigation" by the Federal Trade Commission (FTC), which found that large chain stores were exercising their buyer power to circumvent the spirit and intent of the Clayton Act.[1] According to the FTC's now near-century-old findings, "Because of their enormous purchasing power, these chains were able to exact price concessions ... which far exceeded any related cost savings to the seller."[2] As a result, "small independent stores were at a hopeless competitive disadvantage."[3] Three years earlier, and to combat the same problem, the California legislature enacted a prohibition on the provision of certain secret rebates, unearned discounts, and services to favored purchasers under the Unfair Practices Act (UPA).[4]

The RPA and UPA are powerful but underutilized laws in the antimonopoly toolkit that target suppliers and power buyers who distort the supply chains of entire industries to the disadvantage of small businesses. But following rigorous enforcement throughout the 1940s-1960s, enforcement of these laws fell off precipitously. The laws were, in effect, repealed through neglect and abandonment, and the unfair and discriminatory conduct outlawed by the RPA and UPA has only flourished as a result.

Under the Biden administration, the FTC began to dust off this important legal tool and once again started investigating and bringing cases against large distributors for allegedly favoring large, big-box retailers with unfair price advantages, while raising prices for competing retailers and consumers.[5] Meanwhile, private litigators have recently demonstrated the ability of disfavored small businesses to take matters into their own hands, bringing price discrimination claims against Living Essentials, the maker of 5-Hour Energy;[6] Prestige Brands, parent company to the maker of Clear Eyes Pocket Pals;[7] PepsiCo and Frito-Lay;[8] and Costco.[9] In December 2023, counsel for various convenience store wholesalers based in California, New York, and New Jersey obtained a seven-figure jury verdict against Prestige Brands for violations of the RPA and UPA.[10]

1 *Fed. Trade Comm'n v. Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959).
2 *Id.*
3 *Id.*
4 *See* Cal. Bus. & Prof. Code § 17045; *ABC Int'l Traders, Inc. v. Matsushita Elec. Corp.*, 14 Cal. 4th 1247, 1260 (1997); *see id.* at 1263 ("[T]he chain stores' solicitation and receipt of secret favoritism from producers hurt consumers in two ways: In the short term, ... the producers recouped the losses in sales to chains by charging higher prices to the independent wholesalers and retailers, who passed them on to consumers; in the long term, the secret rebates helped chains move toward monopoly or dominance in some markets, allowing them ultimately to raise consumer prices.").
5 *See Fed. Trade Comm'n v. Southern Glazer's Wine and Spirits*, No. 8:24-cv-02684 (C.D. Cal. Dec. 12, 2024); *Fed. Trade Comm'n v. PepsiCo Inc.*, No. 1:25-cv-00664 (S.D.N.Y. Jan. 23, 2025).
6 *U.S. Wholesale Outlet & Distrib., Inc., et al. v. Innovation Ventures, LLC, et al.*, No. 2:18-cv-01077 (C.D. Cal. Feb. 8, 2018), on remand from *U.S. Wholesale Outlet & Distrib., Inc., et al. v. Innovation Ventures, LLC, et al.*, 74 F.4th 960 (9th Cir. July 20, 2023).
7 *L.A. Int'l Corp., et al. v. Prestige Brands Holdings, Inc., et al.*, No. 2:18-06809 (C.D. Cal. Aug. 8, 2018).
8 *Alqosh Enters., Inc., et al. v. PepsiCo, Inc., et al.*, No. 2:25-cv-01327 (C.D. Cal. Feb. 17, 2025).
9 *A.K. Rashidzada Corp., et al. v. Costco Wholesale Corp., et al.*, No. 25STCV16539 (Cal. Superior Ct. June 6, 2025).
10 *Gaw | Poe LLP Obtains Seven-Figure Robinson-Patman Act Jury Verdict Against Manufacturer of Clear Eyes; Wins Third of Three Jury Trials Held in 2023,* Gaw Poe LLP, https://www.gawpoe.com/gaw-poe-llp-obtains-seven-figure-robinson-patman-act-jury-verdict-against-manufacturer-of-clear-eyes-wins-third-of-three-jury-trials-held-in-2023/ (Dec. 15, 2023).

Acknowledging that antitrust litigation can be time-consuming and expensive, this document outlines potential expedient, high-impact paths for legal action by a disfavored retailer or retailer association against a favored buyer for certain forms of price discrimination under federal and California law. In other words, this document is not intended as a comprehensive guide to enforcement under the RPA or California law and focuses instead on more straightforward actions against power buyers. This practice guide also explains how private litigants can use California's Unfair Competition Law (UCL) to bring an action against a power buyer for a per se violation of the RPA—a cause of action that may not be directly available under the RPA itself. Examples of actionable conduct include:

» Promotional allowances provided to a favored retailer—whether in the form of after-the-fact rebates or upfront discounts to the purchase price—not made available to competing retailers on proportionally equal terms;

» Secret price discounts given exclusively to the favored retailer; and

» Promotional signs, displays, or ads that benefit the favored retailer but are paid for or subsidized by the supplier and not offered on proportionally equal terms to competing retailers.

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BACKGROUND

ROBINSON-PATMAN ACT § 2: CIVIL PRICE DISCRIMINATION PROVISION

The federal Robinson-Patman Act amendments to the Clayton Act, passed in 1936, outlaw price discrimination (§ 2(a)), price discrimination disguised as commissions or brokerage payments (§ 2(c)), price discrimination disguised as promotional allowances or services (§§ 2(d)-(e)), and knowing inducement or receipt of a discrimination in price (§ 2(f)).[11] This practice guide focuses on disproportional promotional payments and services outlawed by §§ 2(d) and 2(e).

Congress passed the RPA in 1936 after "[a] lengthy investigation conducted in the 1930s by the Federal Trade Commission disclosed that several large chain buyers were effectively avoiding [the price discrimination prohibitions in Clayton Act § 2] by taking advantage of gaps in its coverage. Because of their enormous purchasing power, these chains were able to exact price concessions, based on differences in quantity, which far exceeded any related cost savings to the seller. … Comparable competitive advantages were obtained by the large purchasers in several ways other than direct price concessions. … 'Advertising allowances' were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers. Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage."[12]

"[T]o eliminate these inequities," Congress "banned outright" "the paying for or furnishing of nonproportional services or facilities," under RPA sections 2(d) and (e).[13] RPA § 2(d) ("Payment for services or facilities for processing or sale") provides:

> **It shall be unlawful for any person engaged in commerce to pay or contact for the payment of anything of value to or for the benefit of a customer** of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, **unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities** [emphasis added].

11 15 U.S.C. § 13.

12 *Simplicity Pattern*, 360 U.S. at 69; *see Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (implying that the paradigmatic "favored purchasers" under the RPA "are … large independent department stores or chain operations").

13 *Simplicity Pattern,* 360 U.S. at 69.

Section 2(e) ("Furnishing services or facilities for processing, handling, etc.") provides:

> **It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale**, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms [emphases added].

"Section 2(d) [and (e)] define[] an offense which is illegal per se."[14] "[T]he only escape [i.e., defense] Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) proviso."[15] This is in contrast to § 2(a), covering direct price discrimination, which generally requires much more elaborate proof, including a showing that the discrimination may substantially lessen competition, and allow for several defenses (e.g., cost justification).[16]

ELEMENTS

To prove a violation of § 2(d) or 2(e), the plaintiff must show that the favored and disfavored customer-purchasers were in competition with each other, i.e., "(1) one customer has outlets in geographical proximity to those of the other; (2) the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time; and (3) the two customers are operating on a particular functional level such as wholesaling or retailing."[17]

To satisfy the "in commerce" requirement, it is sufficient that the defendant is "engaged in interstate commerce" and the promotional allowances or services "were paid [or provided] in the course of such commerce."[18]

Sections 2(d) and 2(e) do not require mathematically equivalent treatment; rather, "[a]ny method that treats competing customers on proportionally equal terms may be used. Generally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period."[19] "[A] supplier must

14 *Grand Union Company v. Fed. Trade Comm'n*, 300 F.2d 92, 99 (1962) (citing *Simplicity Pattern,* 360 U.S. 55); *see* Statement of Chair Lina M. Khan and Commissioner Alvaro M. Bedoya at 4, *In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation*, File No. 221-0158 (Jan. 17, 2025), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/statement-khan-bedoya-non-alcoholic-beverages-price-discrimination-investigation.pdf.

15 *Simplicity Pattern*, 360 U.S. at 67; *see* 15 U.S.C. § 13(b) ("[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.").

16 *See Simplicity Pattern*, 360 U.S. at 64; 15 U.S.C. § 13(a).

17 *U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126, 1142 (9th Cir. 2023) (quotation marks omitted), cert. denied, 145 S. Ct. 141 (2024); *see Alterman Foods, Inc. v. Fed. Trade Comm'n*, 497 F.2d 993, 1000 (5th Cir. 1974) ("The dispositive criterion … is the functional level at which the activities take place.").

18 *Am. News Co. v. Fed. Trade Comm'n*, 300 F.2d 104, 108 (1962).

19 16 C.F.R. § 240.9(a). Once the plaintiff proves that special payments were made only to the favored buyer, "the burden of coming forward with evidence that similar payments were available to [the favored buyer's] competitors … [i]s on [the defendant]." *R. H. Macy & Co. v. Fed. Trade Comm'n*, 326 F.2d 445, 450 (2d Cir. 1964) (citing *Vanity Fair Paper Mills, Inc. v. Fed. Trade Comm'n*, 311 F.2d 480, 486 (2d Cir. 1962)).

not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs."[20] "[T]he promotional payments or services in question must be useful and suitable to competing customers or useable and appropriate alternatives must be offered."[21]

Finally, the plaintiff must show that the disproportionate payment or service provided to the favored customer-purchaser was in connection with resale, e.g., a promotional allowance or sign, as opposed to in connection with the original sale, e.g., a stocking discount.[22] As long as the payment was in connection with resale, it qualifies for scrutiny under § 2(d), regardless of the form of the payment (e.g., as a discount to the purchase price or a rebate).

For example, in *American News*, the court of appeals affirmed the FTC's finding that Union News Company, the nation's largest retail newsstand operator, knowingly induced § 2(d)-unlawful payments from magazine publishers, including "a 10 per cent sales rebate on the retail price of the magazine."[23] The court rejected Union's argument that "the payments made by the publishers did not contravene § 2(d), because ... the allowances paid were price adjustments, not true promotional allowances." This contention "lack[ed] any merit" because the evidence showed the rebates were in connection with resale: "special display rights were indeed often given to publishers who paid the promotional allowances," "[t]he publishers who acquiesced in [Union's] demands for promotional rebates expressed the hope that they would get better display service as a result," and Union "frequently referred to these payments as 'promotional allowances.'"[24] In other words, the rebates were in connection with resale because they were promotional payments; that they operated as reductions to the purchase price did not negate their promotional nature and did not exempt them from per se treatment under § 2(d).

As another example, *in R. H. Macy & Co. v. Federal Trade Commission*, the court of appeals explained that while "a payment by a vendor to a buyer who did nothing but put the money in his pocket" is likely subject to scrutiny only under § 2(a) and not 2(d), where the buyer "used the payments for institutional advertising and promotions to get more people into its store to buy the goods of all its vendors," those payments would qualify as payments in connection with resale eligible for scrutiny under § 2(d), regardless of whether they could also violate § 2(a).[25]

As yet another example, in *Alterman Foods, Inc. v. Federal Trade Commission*, the court of appeals affirmed the FTC's finding that supplier booths at the favored retailer's (Alterman Foods) food show, paid for and furnished by the suppliers, were "in connection with Alterman's retail resales of the participating suppliers' products" because "the suppliers' promotional services at food shows benefited Alterman at the retail level," including that "th[e] additional source of profit enabled the Company to maintain a given overall profit level while charging less in its other

20 *Alterman Foods*, 497 F.2d at 1001 (collecting cases).
21 *Id.* at 1001 n.6 (collecting cases).
22 *See O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117, 120-21 (E.D.N.Y. 1983) (collecting cases).
23 *Am. News*, 300 F.2d at 107.
24 *Id.* at 108-09.
25 *R. H. Macy*, 326 F.2d at 449–50.

operations, an advantage denied to Alterman's competitors."[26] That Alterman's "profits on booth rentals were, in effect, price reductions on suppliers' products" did not remove them from the ambit of §§ 2(d) and 2(e).[27]

Accordingly, price reductions in connection with resale may violate §§ 2(a) and 2(d).[28] Rather than pleading violations of both, disfavored retailers should consider pursuing only a § 2(d) (or (e)) claim, and not also a § 2(a) claim, to take advantage of the per se standard of illegality and avoid the more exacting standard of proof required under § 2(a). The time and expense associated with the latter are potentially enormous, including millions of dollars in lawyer and expert costs to prove reasonably contemporaneous sales at different prices, at least one of which crossed state lines; the resulting diversion of sales from the disfavored to the favored retailer; that the discounts given to the favored retailer were not "functional discounts," e.g., were not bona fide payments for services rendered by the favored retailer; and that the discounts were not cost justified, i.e., did not correspond to a lower cost to serve the favored retailer.[29]

Some courts have held that the RPA does not provide for a right of action against the favored retailer that receives (as distinct from the supplier that provides) a disproportionate promotional allowance or service in violation § 2(d) or (e); only the supplier may be sued, under § 2(d) and (e). The courts have recognized a right of action by the Federal Trade Commission (FTC) against the favored retailer under § 5 of the FTC Act as an "unfair method[] of competition," on the grounds that "[t]he buyer's receipt of payments is an integral part of the very transaction § 2(d) forbids, and represents the very evil the Robinson-Patman Act was designed to cure."[30] As discussed below, this test for unfairness under FTC Act § 5 parallels the test for unfairness under the California Unfair Competition Law, which private plaintiffs do have standing to enforce. Knowing inducement of a § 2(d)- or 2(e)-unlawful payment or service, like violations of §§ 2(d) and 2(e) by suppliers, is a per se offense under FTC Act § 5.[31]

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26 *Alterman Foods*, 497 F.2d at 999.

27 *Id.* (citing *Grand Union*, 300 F.2d at 99).

28 *See Fred Meyer, Inc. v. Fed. Trade Comm'n*, 359 F. 2d 351, 362 (9th Cir. 1966) (describing FTC's position that "sections 2(a) and 2(d) are not mutually exclusive, that in fact they overlap in such a manner as to bring the payments here under the prohibition of both sections"), *rev'd in part on other grounds, Fed. Trade Comm'n v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *O'Connell*, 99 F.R.D. at 120-21 ("Since section 2(a) by its very terms applies to both direct and indirect forms of price discrimination, to the extent that the provision of or payment for services or facilities can be construed as indirect price discrimination, its proscription overlaps with those provided by sections 2(d) and 2(e)."); *see, e.g., Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (N.D. Cal. 2001) (rejecting defendant buyer's argument that "excessive promotional allowances" fell exclusively within the ambit of § 2(d); "[a] promotional allowance provided by a seller to a buyer that bears little relationship to the buyer's actual advertising costs provides a cash windfall to the favored buyer and, thus, can only be viewed as a reduction in the buyer's cost of goods," and therefore "can be challenged as indirect price discrimination under § 2(a) and § 2(f)"). *But see Woodman's Food Mkt., Inc. v. Clorox Co.*, 833 F.3d 743, 747 (7th Cir. 2016) (stating in dicta that "[s]ubsections 13(d) and (e) exclude claims that could fall within subsection 13(a). … If that were not the case, the requirement of a substantial lessening of competition in subsection 13(a) could be avoided in every case that also fits the criteria of subsections 13(d) and (e).").

29 *See generally, e.g., U.S. Wholesale Outlet & Distrib.*, 89 F.4th at 1136-41.

30 *Am. News*, 300 F.2d at 108; *see id.* (noting that Congress's omission of an action against the buyer for receipt of such payments was "not purposeful"); *Grand Union*, 300 F.2d at 96-99 (same); *Alterman Foods*, 497 F.2d at 996 ("The courts have uniformly accepted this use of section 5 to reach buyer conduct not directly proscribed by the prohibitions on sellers established by sections 2(d) and 2(e) of the amended Clayton Act.") (collecting cases); *see, e.g., R. H. Macy*, 326 F.2d at 450 ("We hold that Macy's violated Section 5 of the Federal Trade Commission Act by inducing its vendors to violate Section 2(d) of the Robinson-Patman Act."); *Fred Meyer*, 390 U.S. at 345-46 ("The Commission held that … by inducing the[] [suppliers] to grant discriminatory promotional allowances, respondent[] [buyers] had engaged in an unfair method of competition in violation of § 5(a) of the Federal Trade Commission Act.") (footnotes omitted).

31 *Grand Union*, 300 F. 2d at 99; see *Alterman Foods*, 497 F.2d at 997 ("The basic factual elements of the unfair method of competition of inducing discriminatory payments or services violative of the Clayton Act are:

1. that a respondent in commerce knowingly solicited or induced and received from a supplier promotional allowances, services, or facilities;

2. that the solicited promotional considerations were received in connection with the resale of the supplier's product;

DEFENSES

The only permitted defense to a § 2(d) or 2(e) claim is the "meeting competition" defense.[32] To prevail under this defense, the defendant must show that the seller's "lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."[33]

STANDING; REMEDIES AND ATTORNEYS' FEES AND COSTS

Under Clayton Act § 16, "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief … against threatened loss or damage by a violation of [RPA § 2]."[34] Equitable monetary relief (e.g., restitution or disgorgement) is not available under Clayton Act § 16; that section authorizes only "injunctive relief."[35] In addition, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" (i.e., "antitrust injury") may sue for damages, automatically trebled, under Clayton Act § 4.[36] Prevailing plaintiffs in an action for an injunction or damages may obtain an award of attorneys' fees and costs.[37]

3. that the respondent had competitors at the same functional level; and

4. that the respondent knew or should have known that its competitors were not offered the promotional considerations in question on proportionally equal terms.").

32 *Simplicity Pattern*, 360 U.S. at 67.

33 15 U.S.C. § 13(b).

34 15 U.S.C. § 26.

35 15 U.S.C. § 26; *see In Re: Generic Pharm. Pricing Antitrust Litig.*, 605 F. Supp. 3d 672, 677-78 (E.D. Pa. 2022); *Fed. Trade Comm'n v. AbbVie Inc.*, 976 F. 3d 327, 375-76 (3d Cir. 2020) ("[D]isgorgement … is a form of restitution, … not injunctive relief.") (citing *Liu v. Sec. & Exch. Comm'n*, 591 U.S. 71, 75 (2020), and *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996)); *Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc.*, 622 F.3d 1307, 1324 (11th Cir. 2010) ("Injunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or disgorgement.").

36 15 U.S.C. § 15(a); *see Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 219 (2d Cir. 2004) ("[T]he focus of 'antitrust injury' is on whether the challenged conduct has actually caused harm to the plaintiff. … To establish antitrust injury, a private litigant … must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335 (1990), *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *see, e.g., Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042-43 (9th Cir. 1987), (disfavored retailer-plaintiffs' injuries, including "diverted sales and lost profits," "were precisely the type that would result from unlawful price discrimination and … flowed from the anti-competitive conduct"), *aff'd*, 496 U.S. 543 (1990).

37 *See* 15 U.S.C. §§ 26, 15(a).

ROBINSON-PATMAN ACT § 3: CRIMINAL PRICE DISCRIMINATION PROVISION

The RPA also criminalizes being a party to certain "[d]iscrimination[s] in rebates, discounts, or advertising service charges" (§ 3).[38] Section 3 provides in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity.... Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.[39]

Thus, unlike RPA § 2, RPA § 3 outlaws "be[ing] a party to" (e.g., soliciting or receiving as the favored purchaser) a disproportional promotional allowance. However, RPA § 3 outlaws discrimination between competing buyers only "in respect of a sale of goods of like ... quantity," i.e., § 3 appears not to outlaw discrimination between competing buyers purchasing different amounts of the same good.[40] The U.S. Department of Justice has not actively enforced the criminal § 3 and has never successfully convicted anyone of violating the statute.

CALIFORNIA UNFAIR PRACTICES ACT

The California Unfair Practices Act provides at Cal. Bus. & Prof. Code § 17045, enacted in 1933:

> 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, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.[41]

38 15 U.S.C. § 13a; *see Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 377 (1958).
39 *Id.*
40 *See* Richard E. Day, *Regulation of Business-Civil Actions Under Section 3 of the Robinson-Patman Act*, Michigan Law Review, Vol. 55, Issue 6 (1957) at 851 ("In contrast to section 1, clause I of section 3 apparently allows unlimited quantity discounts. This clause does not prohibit different prices or quantity discounts, rebates, or allowances, so long as the same allowances are granted competing purchasers of like quantity of the same grade or quality.").
41 Cal. Bus. & Prof. Code § 17045.

Section 17045 is "focused patently on discrimination among purchasers.... [It] protect[s] purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain."[42] Indeed, "the statute's prohibitions on secret discriminatory prices and rebates appear to have been intended mainly to restrain the quickly growing chain stores from certain well-documented abuses of their buying power, abuses that, together with other factors, were thought to have a highly destructive effect on wholesale and retail competition in the food industry and other trades."[43] These abuses of buying power in many instances took the form of advertising allowances and services paid or provided by sellers to big-box and chain stores, putting "the small independent stores" that were denied equivalent allowances and services "at a hopeless competitive disadvantage."[44]

As a California court of appeal has explained, "[n]one of the[] [Chicago School] precepts" that "'interbrand competition' is the sole proper end of antitrust legislation, that 'vertical restrictions' on trade are per se unobjectionable, and that fair and open competition among wholesalers and retailers could not, therefore, possibly be considered worthy of legislative protection ... are reflected in the language, stated purposes, or history of the UPA. ... Whether economists, [or] professors of law ... believe today that the use of secret, discriminatory rebates and discounts is an efficient 'vertical restriction,' is immaterial, because it is clear that in 1933 the California Legislature considered such hidden discrimination to be a 'dishonest, deceptive ... and discriminatory practice' destructive of 'fair and honest competition.'"[45]

This explication of the UPA stands in stark contrast to the U.S. Supreme Court's stated "resist[ance]" to an "interpretation" of the federal RPA "geared more to the protection of existing competitors than to the stimulation of competition," and its admonition that "[i]nterbrand competition ... is the 'primary concern of antitrust law'" and "[t]he Robinson-Patman Act signals no large departure from that main concern."[46] And whereas the U.S. Supreme Court has rejected an "expansive interpretation" of the federal RPA, instead ostensibly "construe[ing]" it "'consistently with broader policies of the antitrust laws,'"[47] under California law, "[s]ection 17045, like the other provisions of the [UPA], must be 'liberally construed' to serve its purposes."[48]

42 *ABC Int'l Traders, Inc. v. Matsushita Elec. Corp.*, 14 Cal. 4th 1247, 1254 (1997) (emphasis added).
43 *Id.* at 1258; *see id.* at 1267-68 ("During the period of section 17045's enactment, the chain stores' receipt of secret rebates, unearned discounts and allowances was widely understood as a threat to vigorous and fair competition at the retail and wholesale levels, and the potential loss of independent merchants engaged in such competition was regarded as an economic and social problem requiring legislative redress.").
44 *Simplicity Pattern*, 360 U.S. at 69.
45 *ABC Int'l Traders*, 14 Cal. 4th at 1267 (quoting Cal. Bus. & Prof. Code § 17001).
46 *Volvo Trucks*, 546 U.S. at 180-81 (quoting *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 n.19 (1977)).
47 *Id.* at 181 & n.5 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)).
48 *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.*, 16 Cal. App. 4th 202, 212 (1993) (quoting Cal. Bus. & Prof. Code § 17002).

ELEMENTS

Applying this liberal construction of UPA § 17045, courts have held that:

» Both a seller who provides a secret discriminatory payment or service and a buyer who receives it may be held liable under § 17045,[49] and there is no requirement of "knowing or intentional receipt" on the part of the buyer.[50]

» While the plaintiff alleging "special services or privileges" must show that the favored and disfavored purchasers "purchas[e] upon like terms and conditions," no such showing is required for the plaintiff alleging "[t]he secret payment or allowance of rebates, refunds, commissions, or unearned discounts."[51]

» While "tends to destroy competition" is an element of a § 17045 violation, no "proof of an 'intent' to destroy competition" is required.[52]

» In contrast to the RPA, there is no "meeting competition" defense to a § 17045 claim.[53]

"Violation [of § 17045 for secret discriminatory payments] requires proof that payments were, in fact, secret and discriminated among customers of the entity granting the rebates."[54] The "secret" element may be met with proof that the plaintiff and public did not know "the 'essential terms of a rebate or unearned discount,'" even if the plaintiff had an "inkling" of them based on, e.g., customers asking the plaintiff to meet the lower prices of competing, favored purchasers and shifting business to such competitors.[55]

The statute also requires that the discriminatory treatment be "to the injury of a competitor" and "tend[] to destroy competition,"[56] but one court explained, "where one competitor is given a major pricing advantage over another competitor, such pricing discrimination has an

49 *Id.*at 214-15 & n.4; *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 271 (1983). In addition to Section 17045's prohibition of provision or receipt of secret discriminatory payments or services, the UPA also makes it unlawful "for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to solicit" secret discriminatory payments or services, Cal. Bus. & Prof. Code § 17047, or "jointly to participate or collude with any other such person in" their provision, *id.* § 17048, and for "[a]ny person, ... either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this chapter, [to] assist[] or aid[], directly or indirectly, in such violation." *Id.* § 17095.

50 *Diesel Elec. Sales*, 16 Cal. App. 4th at 214-15 & n.4. *But see Eddins v. Redstone*, 134 Cal. App. 4th 290, 344 n.43 (2005) ("We express no opinion on whether evidence of a 'knowing' inducement of an unearned discount is required to establish a violation of section 17045 by the recipient.").

51 *Diesel Elec. Sales*, 16 Cal. App. 4th at 216 n.5 ("[T]he phrase 'purchasing upon like terms and conditions' does not apply to or otherwise qualify secret allowances of unearned discounts. Rather, the proper reading of that phrase and the entirety of section 17045 results in its application only to secret extensions of 'special services or privileges not extended to all purchasers' who are 'purchasing upon like terms and conditions.'"); *see Eddins*, 134 Cal. App. 4th at 332-33 (same). *But see, e.g., Overturf v. Rocky Mountain Chocolate Factory, Inc.*, No. C 08-0356 AG, 2008 U.S. Dist. LEXIS 91135, at *21-22 (C.D. Cal. July 21, 2008) (implicitly holding that the modifier "purchasing upon like terms and conditions" applies to the entire statute).

52 *Diesel Elec. Sales*, 16 Cal. App. 4th at 215 (emphasis added).

53 *Id.* at 217.

54 *Fisherman's Wharf Bay Cruise Corp. v. Superior Ct. of San Francisco*, 114 Cal. App. 4th 309, 331 (2003) (citing *Harris v. Capitol Records etc. Corp.* 64 Cal. 2d 454, 463 (1966)); *see Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305, 323 (1968).

55 *W. Pac. Kraft, Inc. v. Duro Bag Mfg. Co.*, 794 F. Supp. 2d 1087, 1090 (C.D. Cal. 2011) (quoting *Eddins*, 134 Cal. App. 4th at 335); *see also, e.g., Eddins*, 134 Cal. App. 4th at 297 ("The fact that the 'general parameters' of Blockbuster's revenue-sharing agreements with the studios were widely reported in the media does not establish lack of secrecy as a matter of law, because other evidence indicated that several key economic factors in the agreements were not known to plaintiffs or to the general public."); *id.* at 335-36.

56 Cal. Bus. & Prof. Code § 17045.

inherent tendency to destroy competition."[57] In one case, the court held the jury could find both the "injury of a competitor" and "tends to destroy competition" elements based on evidence that after the favored purchaser entered the market and began competing with the plaintiff disfavored purchaser, the plaintiff's gross sales and profits drastically declined and it was forced out of the market.[58] To be clear, the "[p]laintiff need not allege that [the] secret discounts have already destroyed competition; [the] [p]laintiff need only show that the discounts 'tend' to destroy competition."[59]

DEFENSES

The "functional classifications" affirmative defense, codified at Cal. Bus. & Prof. Code § 17042(c), applies to § 17045 claims.[60] "[T]o succeed with an affirmative defense that secret rebates are lawful because they apply to different classes of customers, the defendant must prove (1) that [the seller] 'created different classes of customers,' such as wholesaler/retailer; (2) that 'customers in the different classes performed different functions and assumed the risk, investment, and costs involved;' (3) that the difference in the rebate or discount 'was given only in those sales where the favored buyer performed the function on which the claim of a different class is based;' and (4) that 'the difference in price was reasonably related to the value of such function.'"[61]

STANDING

"Any person or trade association may bring an action to enjoin and restrain any violation of [the UPA]."[62] "[I]t is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff," to have standing to enforce the UPA.[63]

57 *Fisherman's Wharf*, 114 Cal. App. 4th at 331 (quoting *Diesel Elec. Sales*, 16 Cal. App. 4th at 213–214); *see, e.g., W. Pac. Kraft*, 794 F. Supp. 2d at 1091 (holding plaintiff had adequately alleged the "tends to harm competition" element by pleading that the favored customer "enjoyed a major pricing advantage") (citing *Diesel Elec.*, 16 Cal. App. 4th at 213-14); *Packaging Sys., Inc. v. PRC-Desoto Int'l, Inc.*, 268 F. Supp. 3d 1071, 1087 (C.D. Cal. 2017) (denying motion to dismiss; "Here, Plaintiff alleges that it was PPG's biggest competitor in the retail distribution market. Offering discounts to Plaintiff's competitors and customers not offered to Plaintiff has a tendency to substantially reduce Plaintiff's customer base" and thus "a tendency to harm competition."); *First Class Vending, Inc. v. Hershey Co.,* No. CV1501188-MWF-FFMx, 2015 U.S. Dist. LEXIS 181038, at *17–18, 2015 WL 12426155, at *6 (C.D. Cal. July 28, 2015) (holding "a substantial pricing advantage" combined with "claims that independent operators are becoming … franchisees so that they can also avail themselves of the favorable pricing" is sufficient to allege a set of rebating practices has a tendency to destroy competition).

58 *Diesel Elec. Sales*, 16 Cal. App. 4th at 213-14.

59 *Packaging Sys., Inc.*, 268 F. Supp. 3d at 1087 (quoting *Diesel Elec. Sales*, 16 Cal. App. 4th at 213).

60 Cal. Bus. & Prof. Code § 17042(c).

61 *Eddins*, 134 Cal. App. 4th at 337 n.40 (quoting CACI No. 3332).

62 Cal. Bus. & Prof. Code § 17070 (emphasis added).

63 Cal. Bus. & Prof. Code § 17082.

REMEDIES AND ATTORNEYS' FEES AND COSTS

Section 17070 authorizes courts to "enjoin and restrain" violations of the UPA.[64] Section 17079 further provides, "The court may, in its discretion, include in any injunction against a violation of [the UPA] such other restraint as it may deem expedient in order to deter the defendant from, and insure against, his committing a future violation of this chapter."[65] In addition to an action enjoining and restraining the conduct, "[a]ny person or trade association may bring an action ... for the recovery of damages,"[66] automatically trebled.[67] The prevailing plaintiff "shall be awarded a reasonable attorney's fee together with the costs of suit."[68]

It is unclear whether a private plaintiff can obtain monetary equitable relief—i.e., restitution or non-restitutionary disgorgement—under UPA §§ 17070 and 17079. (Monetary equitable relief such as disgorgement of the secret rebates may be preferable to damages because proving the former may be considerably more cost- and time-efficient than proving the latter, and the former may be a much larger number than the latter.) Arguably, monetary equitable relief is authorized by the "restrain" language in § 17070 and serves to deter future violations, and thus is authorized by § 17079. Indeed, the federal courts have interpreted nearly identical language in Clayton Act § 15—under which the U.S. Attorney General may institute proceedings "to prevent and restrain violations of th[e] [Clayton] Act"[69]—to include not just "enjoining continuance of the unlawful restraints" but also "undoing what the conspiracy achieved."[70] In some cases, this has included disgorgement of ill-gotten gains, in order to "deprive[] the antitrust defendants of the benefits" of their violation.[71]

However, the same due process concerns animating the line of cases disallowing non-restitutionary disgorgement to private plaintiffs under the UCL (see infra, page 18) are equally present under the UPA.[72] Accordingly, a court could hold that non-restitutionary disgorgement of ill-gotten gains (such as secret rebates received by the favored retailer) is available under the UPA only into a fluid recovery fund (not directly to the plaintiff) and only in an action certified as a class action (presumably on behalf of all injured competitors of the favored retailer).[73]

64 Cal. Bus. & Prof. Code § 17070.
65 Cal. Bus. & Prof. Code § 17079.
66 Cal. Bus. & Prof. Code § 17070.
67 Cal. Bus. & Prof. Code § 17082. Although a claim for damages under § 17070 is subject to the three-year statute of limitations in California Code of Civil Procedure § 338, recovery of trebled damages under § 17082 is subject to the one-year statute of limitations in California Code of Civil Procedure § 340. *See G.H.I.I.*, 147 Cal. App. 3d at 278-79.
68 Cal. Bus. & Prof. Code § 17082.
69 15 U.S.C. § 25.
70 *United States v. Paramount Pictures,* 334 U.S 131, 171 (1948).
71 *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948) (explaining that without disgorgement, the defendants "could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors."); *see United States v. Microsoft*, 253 F.3d 34, 103 (D.C. Cir. 2001) ("deny to the defendant the fruits of its statutory violation"); *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 486 (9th Cir. 2021).
72 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1151-52 (2003) ("While restitution is limited to restoring money or property to direct victims of an unfair practice, a potentially unlimited number of individual plaintiffs could recover nonrestitutionary disgorgement. Allowing such a remedy would expose defendants to multiple suits and the risk of duplicative liability without the traditional limitations on standing. ... There is a risk of unfairness not only to defendants but also to direct victims of the unfair practice. If [the defendant] were forced to disgorge its profits to [its competitor], there might be little left for [other victims] to recover, even though [they are] ostensibly entitled to restitutionary relief.").
73 *See Corbett v. Superior Court*, 101 Cal. App.4th 649, 663 (2002).

CALIFORNIA UNFAIR COMPETITION LAW

The California Unfair Competition Law, as amended in 1933, outlaws, inter alia, "any unlawful, unfair or fraudulent business act or practice."[74] "Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'"[75]

"UNLAWFUL" PRONG

"By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable"[76] "when [they are] committed pursuant to business activity."[77] The "unlawful" practices that can form the basis of a UCL action are "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made," regardless of whether "the predicate law provide[s] for private civil enforcement."[78]

As one court put it, the UCL "allows nearly any law or regulation to serve as its basis unless the predicate statute explicitly bars a private right of action, or the defendant is otherwise privileged or immune."[79] For example, in *Korea Supply Co. v. Lockheed Martin Corp.*, the court held that the plaintiff, a private business, could predicate its UCL claim against a competing business on the defendant's violations of the federal Foreign Corrupt Practices Act.[80]

"UNFAIR" PRONG

The UCL "does more than just borrow. … [A] practice may be deemed unfair even if not specifically proscribed by some other law."[81] The test for unfairness under the UCL tracks and is informed by the test for unfairness under FTC Act § 5 given "the similarity of language and obvious identity of purpose of the two statutes," and "decisions of the federal court on the subject [of unfairness under FTC Act § 5] are more than ordinarily persuasive."[82] In the context of "a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice … , the word 'unfair' in that section means," and the plaintiff must show, "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those

74 Cal. Bus. & Prof. Code § 17200.
75 *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 320 (2011) (quoting *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 949 (2002)).
76 *Cel-Tech Comm'cns, Inc. v. L.A. Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999) (quotation and alteration marks omitted).
77 *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 566-67 (1998) (quotation and alteration marks omitted).
78 *Saunders v. Superior Ct.*, 27 Cal. App. 4th 832, 838-39 (1994) (quoting *People v. McKale*, 25 Cal.3d 626, 632 (1979)).
79 *Stevens v. Superior Ct.*, 75 Cal. App. 4th 594, 606 (1999).
80 *See Korea Supply*, 29 Cal. 4th at 1143-44 & n.5; *Korea Supply Co. v. Lockheed Martin Corp.*, 109 Cal. Rptr. 2d 417, 422-23 (Ct. App. 2001), *review granted and opinion superseded*, 36 P.3d 1 (Cal. 2001), and *aff'd in part, rev'd in part*, 29 Cal. 4th 1134.
81 *Cel-Tech*, 20 Cal. 4th at 179.
82 *People ex rel. Mosk v. Nat'l Rsch. Co. of California*, 201 Cal. App. 2d 765, 773 (1962); *see Cel-Tech*, 20 Cal. 4th at 185-86 (test for unfairness under California UCL is "guid[ed]" by "the jurisprudence arising under the 'parallel' … section 5 of the Federal Trade Commission Act") (*quoting Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 110 (1972)).

laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."[83]

This test for unfairness aligns with standards federal courts have used for deeming an act or practice unfair under the FTC Act.[84] Conduct can be found to violate the UCL "unfair" prong even if the plaintiff fails to prove that the defendant violated a state or federal antitrust law, so long as the failure of proof was due to a "proof deficiency" as opposed to a "categorical legal bar," such as immunity.[85]

STANDING

Any "person who has suffered injury in fact and has lost money or property as a result of ... unfair competition" under the UCL may bring an action for relief from the conduct.[86] This standing requirement was added in 2004 by Ballot Proposition 64. "To satisfy the narrower standing requirements imposed by Proposition 64, a party must ... (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim."[87] The "injury in fact" required for UCL private-plaintiff standing is synonymous with the federal test for standing under article III, § 2 of the U.S. Constitution—that is, "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'"[88] Regarding the second prong, causation, "a 'plaintiff is not required to allege that the challenged [conduct was] the sole or even the decisive cause of the injury.'"[89]

The California Supreme Court has held that "Proposition 64 should be read in light of its apparent purposes, i.e., to eliminate standing for those who have not engaged in any business dealings with would-be defendants and thereby strip such unaffected parties of the ability to file 'shakedown lawsuits,' while preserving for actual victims of deception and other acts of unfair competition the ability to sue and enjoin such practices."[90] For example, in *Kwikset*, the court held that "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue."[91]

83 *Cel-Tech*, 20 Cal. 4th at 187.
84 *See, e.g., Grand Union*, 300 F.2d at 98-99 ("Activity which 'runs counter to the public policy declared in the Sherman and Clayton Acts' is an unfair method of competition. Moreover, the Act was intended to be prophylactic: to stop in their incipiency acts which when full-blown would lead to monopoly or undue hindrance of competition.") (quoting *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 463 (1941)), and collecting cases); *see generally* Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, File No. P221202 (November 10, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf, and authorities cited therein.
85 *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1001 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024), and *cert. denied*, 144 S. Ct. 682 (2024).
86 Cal. Bus. & Prof. Code § 17204.
87 *Kwikset*, 51 Cal. 4th at 322.
88 *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).
89 *Kwikset*, 51 Cal. 4th at 327 (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009)).
90 *Id.* at 317.
91 *Id.*

Analogously, a grocery store that plausibly alleges it lost sales due to price discrimination in favor of a larger competitor would have standing to challenge the discrimination under the UCL.[92] Failure to plead or prove damages, e.g., loss of the benefit of the bargain or a quantified amount of lost sales, does not deprive the plaintiff who otherwise establishes economic loss of standing to seek injunctive relief under the UCL.[93]

In 2023, the California Supreme Court clarified the requirements for organizational standing under the UCL. In *California Medical Association v. Aetna Health of California Inc.*, the Court held that "the UCL's standing requirements are satisfied when an organization, in furtherance of a bona fide, preexisting mission, incurs costs to respond to perceived unfair competition that threatens that mission, so long as those expenditures are independent of costs incurred in UCL litigation or preparations for such litigation."[94] The Court determined that "diversion of salaried staff time and other office resources can constitute the loss of 'money or property' within the meaning of section 17204."[95]

REMEDIES AND ATTORNEYS' FEES AND COSTS

California Business & Professions Code § 17203 authorizes the courts to "enjoin[]" "[a]ny person who engages, has engaged, or proposes to engage in unfair competition," and "make such orders or judgments … as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, … or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."[96] Private plaintiffs may not obtain damages or non-restitutionary disgorgement (i.e., ill-gotten gains not taken from the plaintiff and in which the plaintiff does not have an ownership interest); in other words, they "are generally limited to injunctive relief and restitution."[97]

92 *See id.* at 323 (plaintiff may show economic injury from unfair competition by showing diminishment of a present or future property interest).

93 *See id.* at 334-35 (purchasing a product in reliance on an alleged misrepresentation confers standing, regardless of whether "the product received was worth less than the money paid for it"); *id.* at 324 ("[T]he quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact."); *Cal. Med. Ass'n v. Aetna Health of California Inc.*, 14 Cal. 5th 1075, 1088 (2023) ("[B]ecause the issue is one of standing, rather than the amount of restitution due, 'a specific measure of the amount of this loss is not required. It suffices that a plaintiff can allege an "identifiable trifle" of economic injury.'") (quoting *Kwikset*, 51 Cal. 4th at 330 n.15).

94 *Cal. Med. Ass'n*, 14 Cal. 5th at 1082.

95 *Id.* at 1088; see also *Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1283-84 (2015) (finding UCL standing for ALDF because it diverted significant resources to investigate and combat defendant's conduct in serving foie gras in violation of statute prohibiting that sale).

96 Cal. Bus. & Prof. Code § 17203.

97 *Zhang v. Superior Ct.*, 57 Cal. 4th 364, 371 (2013) (quoting and citing Cel-Tech, 20 Cal. 4th at 179); *see Korea Supply*, 29 Cal. 4th 1134; *Kraus v. Trinity Management Servs.*, 23 Cal. 4th 116 (2000). Note that a private plaintiff in an action certified as a class action may, under certain circumstances, seek non-restitutionary disgorgement of unlawful profits into a fluid recovery fund. *See Corbett*, 101 Cal. App. 4th at 663.

An injunction under state law may reach activities of the defendant outside the state.[98] For example, in *Epic Games, Inc. v. Apple Inc.*, the district court issued a nationwide injunction prohibiting Apple from preventing application software developers from informing consumers that they could make payments outside of Apple's iOS mobile device platform.[99] In so ruling, the district court rejected Apple's argument that injunctive relief under § 17200 should be limited to California, given, inter alia, "the commerce affected by the conduct that the Court has found to be unfair takes place at least in part in California."[100]

The UCL does not provide for an automatic award of attorneys' fees and costs, but the court may award attorneys' fees to a prevailing plaintiff "in any action which has resulted in the enforcement of an important right affecting the public interest" where a "significant benefit" was conferred on the general public and other equitable factors are met.[101]

DISCUSSION

Synthesizing the laws, authorities, and remedies discussed above, the following actions are available to the disfavored retailer or retailer association seeking to restrain and hold accountable power buyers unfairly advantaged by favorable prices and terms under federal and California law while avoiding complex, expensive, and time-consuming processes and proofs:

CALIFORNIA UCL "UNFAIR" PRONG CLAIM PREDICATED ON VIOLATION OF POLICY AND SPIRIT OF RPA

A disfavored retailer or retailer association can use the California UCL "unfair" prong to sue a buyer who knowingly induces an RPA § 2(d)- or 2(e)-unlawful promotional allowance or service, just as the FTC can use the FTC Act § 5 "unfair methods of competition" prong to do so.[102] We expect the court to apply the same per se test for liability (subject only to the "meeting

98 *See RLH Indus., Inc. v. SBC Commc'ns, Inc.*, 133 Cal. App. 4th 1277, 1291-93 (2005) (holding that "the commerce clause … does not necessarily prohibit state antitrust and unfair competition law from reaching out-of-state anticompetitive practices injuring state residents"); *see, e.g., Pines v. Tomson*, 160 Cal. App. 3d 370, 399–400 (1984) (enjoining the defendants' practice of barring non-born-again Christians from advertising in their publications, either inside or outside California, because "a court of equity having jurisdiction of the person of defendant may render any appropriate decree acting directly on the person, even though the subject matter affected is outside the jurisdiction.") (citations omitted) (quoting *Allied Artists Pictures Corp. v. Friedman*, 68 Cal. App. 3d 127, 137 (1977)).

99 *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1058 (N.D. Cal. 2021), *rev'd in part on other grounds*, 67 F.4th 946 (9th Cir. 2023).

100 *Id.* The Ninth Circuit affirmed the district court's injunction. 67 F.4th at 1002–03.

101 Cal. Civ. Proc. Code § 1021.5.

102 Indeed, a California court of appeal cited the federal authorities recognizing a cause of action under FTC Act section 5 against the buyer for receipt of disproportional promotional allowances and services, as authority supporting its decision to recognize a cause of action against the buyer who receives secret discriminatory payments and services in violation of Cal. Bus. & Prof. Code § 17045. *See G.H.I.I.*, 147 Cal. App. 3d at 271.

competition" defense) that applies to analysis of §§ 2(d) and 2(e), with the additional element of "knowing inducement" on the part of the defendant customer.

Using the RPA (in contrast to the California UPA) requires the plaintiff to show knowing inducement and that the payment or service was in interstate commerce and in connection with resale, and allows the defendant to rebut a prima facie case if it satisfies the meeting competition defense. But using the RPA avoids the UPA requirements that the payment or service be "secret" and, in the case of discounts, "unearned." The RPA also technically avoids the UPA requirements that the secret discriminatory payment or service be "to the injury of a competitor" and "tend[] to destroy competition,"[103] but in practice those elements of a UPA claim do not appear to create a meaningfully different or higher burden than the requirement under RPA §§ 2(d) and (e) that the favored and disfavored purchasers be "in competition."[104]

Using the UCL (in contrast to the California UPA) requires the plaintiff to meet the § 17204 standing requirement of lost money or property as a result of the violation, but we expect (1) a competing retailer that was denied promotional allowances or services afforded to the favored retailer to easily satisfy this standard and (2) a retailer association to satisfy the standing test under California Medical Association.[105]

A plaintiff who brings a successful UCL claim can obtain an injunction against further violations of the law, but likely not restitution. Restitution is likely not available because the unlawful payments or services provided by the discriminating supplier to the favored buyer were never in the hands of a competing retailer or retailer association, so ordering them to be paid over to such a competitor or association of competitors would not constitute a restoration of lost money or property.[106] Non-restitutionary disgorgement (i.e., disgorgement of the unlawful payments received by the favored buyer and/or the resulting ill-gotten profits) is potentially available if the plaintiff certifies the action as a class action on behalf of all injured competitors, but this may not be advised if quick relief and efficiency of time and resources are priorities.[107]

103 Cal. Bus. & Prof. Code § 17045.
104 *See U.S. Wholesale Outlet & Distrib.*, 89 F.4th at 1142 (quotation marks omitted).
105 14 Cal. 5th 1075.
106 *See Zhang*, 57 Cal. 4th at 371 ("A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other.") (quoting *Kwikset*, 51 Cal.4th at 336).
107 *See supra*, page 18.

CALIFORNIA UCL "UNLAWFUL" PRONG CLAIM PREDICATED ON VIOLATION OF RPA § 3

A disfavored retailer or retailer association can use the California UCL "unlawful" prong to sue a buyer who violated RPA § 3 by "be[ing] a party to" a sale that "discriminate[d] to his knowledge against [his] competitors" by involving an allowance "over and above" that made available to his competitors purchasing in like quantities."[108] If the plaintiff chose to bring a UCL "unfair" prong claim based on a violation of the policy and spirit of the RPA, there would be little downside to tacking on an "unlawful" prong claim based on violation of the letter of RPA § 3, if the plaintiff can meet the requirements.[109] The same potential remedies would apply to this UCL "unlawful" prong claim.

CALIFORNIA UPA § 17045 CLAIM

A disfavored retailer or retailer association can bring a claim against the favored retailer for violation of California UPA § 17045 for receipt of secret discriminatory payments or services. Using the California UPA (in contrast to the federal RPA) requires the plaintiff to show that the payment or service was "secret" and, in the case of discounts, "unearned"; in the case of a service, that the favored and disfavored retailer were "purchasing upon like terms and conditions"; and that the secret discriminatory payment or service was "to the injury of a competitor" and "tend[ed] to destroy competition."[110] But a UPA § 17045 claim avoids the RPA requirements of knowing inducement, that the favored and disfavored retailers were "in competition," and that the payment or service was in interstate commerce and in connection with resale, as well as the RPA "meeting competition" defense. Using the UPA (in contrast to the California UCL) also allows the plaintiff to avoid UCL § 17204's standing requirement, but as discussed, we do not expect this to be a meaningful obstacle to suit.

Similar to the potential UCL claims, the plaintiff can obtain an injunction against further violations of the law and potentially non-restitutionary disgorgement if it certifies the action as a class action, but likely not restitution.

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108 *Id.*

109 The defendant would likely argue that RPA § 3 is unconstitutional. S*ee, e.g., United States v. Bowman Dairy Co.*, 89 F. Supp. 112, 114 (N.D. Ill. 1949) (expressing "doubts as to the constitutionality of the statute"). But that argument is weak given § 3 allows for quantity discounts and requires that the defendant participated in a transaction or contract that, "to his knowledge," "discriminate[d] … against competitors of the [favored] purchaser." 15 U.S.C. § 13a. The "to his knowledge" element tracks the requirement that "a buyer's … inducement and receipt of disproportionate payments for advertising services rendered for its suppliers" be "knowing" to violate § 5 of the FTC Act, *Am. News*, 300 F.2d at 108, and the "discriminates … against competitors of the purchaser" element appears to parallel the "in competition" and proportionally-unequal-payment requirements of § 2(d). That said, the plaintiff could avoid this likely sideshow about § 3's constitutionality by omitting this claim.

110 Cal. Bus. & Prof. Code § 17045.

In addition, the plaintiff can seek damages. In the case of a disfavored retailer plaintiff, damages would take the form of lost profits from lost sales resulting from the discriminatory treatment. In the case of an association plaintiff, we expect damages to take the form of costs the association incurred in furtherance of a preexisting mission (e.g., to champion the independent grocery industry and advocate for the rights of small and independent grocers) in responding to the favored retailer's perceived violations of the UPA that threatened the association's mission and that were independent of costs incurred in litigation or preparations for such litigation.[111]

CALIFORNIA UCL "UNLAWFUL" PRONG CLAIM PREDICATED ON VIOLATION OF UPA § 17045

It is common for plaintiffs asserting the violation of a California antitrust law to tack on a UCL "unlawful" prong claim predicated on a violation of that California law. There is little downside to doing so here, though the UCL would not appear to provide any different or additional relief than the UPA.

CALIFORNIA UCL "UNFAIR" PRONG CLAIM PREDICATED ON VIOLATION OF POLICY AND SPIRIT OF UPA § 17045

Even if the disfavored retailer or retailer association fails to prove a violation of UPA § 17045 (for example, due to a proof deficiency as to one of the elements), it may still prevail on a UCL "unfair" prong claim predicated on violating the policy and spirit of the UPA. For example, in *Epic Games, Inc. v. Apple, Inc.*, the court held that Epic failed to meet its burden to prove a violation of the federal Sherman Act, but went on to find that Apple's anti-steering provisions violated the UCL in that they "threaten[ed] an incipient violation of an antitrust law" and "violat[ed] the 'policy and spirit' of the[] [antitrust] laws."[112] If the plaintiff makes a strong showing that the defendant favored retailer was given preferential treatment that created an uneven playing field and unfairly disadvantaged competitors, the plaintiff may succeed in proving a violation of the UCL "unfair" prong irrespective of a technical violation of UPA § 17045.

111 *Cf. Cal. Med. Ass'n*, 14 Cal. 5th at 1082 ("[W]hen an organization, in furtherance of a bona fide, preexisting mission, incurs costs to respond to perceived unfair competition that threatens that mission, so long as those expenditures are independent of costs incurred in UCL litigation or preparations for such litigation … , it has suffered injury in fact and lost money or property as a result of the unfair competition.") (quotation marks omitted). In *California Medical Association*, the court held the following California Medical Association expenditures and diverted resources could constitute economic injury sufficient to give it standing under UCL § 17204: "200-250 hours of staff time to respond to [Aetna Health of California's] policy" against out-of-network referrals, including advising physicians and the public on how to address the policy, preparing and publicizing a resource guide, engaging with physicians affected by the policy, and preparing a letter to various California departments requesting that they take action to address the policy," where the diverted time allegedly "'would otherwise have been devoted to serving CMA's membership' in other respects." Id. at 1084 (alteration marks omitted).

112 *Epic Games*, 559 F. Supp. 3d at 1055–56 (quoting Cel-Tech, 20 Cal. 4th at 187).

REMOVAL TO FEDERAL COURT

In any UCL action filed in California state court that is premised on a violation of the letter or policy and spirit of the federal RPA, the defendant will likely seek removal to federal court,[113] in which case, if there is no diversity of citizenship, it is possible the federal court may decline to exercise supplemental jurisdiction over the state-law UPA and UCL claims.[114] If the defendant cannot remove on diversity jurisdiction grounds and the plaintiff wishes to avoid a removal battle and the risk of the court declining to exercise supplemental jurisdiction, it can consider omitting from its state-court complaint claims premised on violations of the letter or policy and spirit of the federal RPA.

113 *See Grable & Sons Metal Prod., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005) (where "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," it is removable); *see, e.g., Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519, 521-22 (8th Cir. 2020) (vacating district court's remand order, holding court had federal question jurisdiction because the plaintiff's state-law antitrust claims were "premise[d] … on violations and interpretations of federal law"). The plaintiff could move to remand on the grounds that the UCL "unlawful" and "unfair" prong claims are "supported by alternative and independent theories, one of which is a state law theory [violation of California UPA § 17045] and one of which is a federal law theory [violation of the federal RPA]," and therefore "federal question jurisdiction does not attach because federal law is not a necessary element of [each] claim." *People of the State of California v. Pinnacle Security CA. LP*, 746 F. Supp. 2d 1129, 1131-32 (2010) (quoting *Rains v. Criterion Sys. Inc.*, 80 F.3d 339, 346 (9th Cir. 1996)). But litigating the jurisdictional issue would delay resolution of the case, and the likelihood of remand would be low given the distinguishability of the cases that have granted remand. For example, in *Pinnacle*, the plaintiff alleged the defendant "violated a number of state laws only one of which partially reference[d] any federal law." *Id.* at 1131; *see also, e.g., People of State of California v. H&R Block, Inc.*, No. C 06-2058 SC, 2006 WL 2669045, at *4 (N.D. Cal. Sept. 18, 2006) (remanding where the alleged violation of a federal law was "but one of eight basic predicate violations (many containing sub-violations)" and therefore the federal-law violation predicate "[wa]s not, and c[ould] not be characterized as, an essential part of that cause of action"). The odds of remand would be particularly low for a private (as opposed to government) plaintiff. For example, in *H&R Block*, the federal court held that exercising jurisdiction over a case "brought by the state of California in a California state court to enforce California laws for conduct which occurred in California and which allegedly victimized California citizens" would disrupt the balance of federal and state judicial responsibilities because "[a] sovereign's interest in enforcement encompasses defining the laws or rules that govern society, seeing that those laws and rules are obeyed, and punishing those who transgress them.") (quoting Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts,* 104 Colum. L. Rev. 1211, 1242 (2004)) (alteration marks omitted). No such state sovereignty concerns are implicated by a private lawsuit.

114 *See* 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if … (1) the claim raises a novel or complex issue of State law").

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