No. 04-905

IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Whether under the Robinson-Patman Act a jury may infer the reasonable possibility of competitive injury from massive price discrimination in favor of competitors in the same market on more than half of the disfavored purchaser's purchases for resale in the period, and in amounts far exceeding such purchaser's total gross annual profits.

Whether there was sufficient evidence to establish antitrust injury under section 4 of the Clayton Act.

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RESPONDENT'S BRIEF ON THE MERITS

Petitioner Volvo Trucks North America, Inc. ("Volvo") seeks a license to engage in blatant and debilitating price discrimination, advancing claims that mischaracterize the Robinson-Patman Act ("RPA") and the evidence in this case. Although unacknowledged by Volvo, respondent Reeder-Simco GMC, Inc. ("Reeder") proved extraordinary price discrimination by Volvo at trial, including discrimination of more than $280,000 on the *purchase* for resale of 102 trucks by Reeder from 1996 to 1998. That discrimination occurred on over 55% of Reeder's total purchases during that time span, and dwarfed Reeder's annual gross profits on heavy-truck sales. Volvo used such discrimination to implement a corporate policy of eliminating smaller dealers.

Volvo attempts to negate the jury verdict and judgment by positing that as a matter of law such massive discrimination cannot create a reasonable possibility of injury to Reeder's competition with favored Volvo dealers. Volvo's argument turns on a novel transactional theory of "competition" under the RPA, whereby the only competition that is protected from injury is limited to that between rivals bidding for a specific customer's business. But under the RPA, this Court, lower courts, and leading commentators have long defined "competition" as vying to serve customers in the same relevant market, and thus any substantial discrimination that has a probable future effect of injuring competition with favored purchasers in the market violates the Act. The evidence at trial supporting such an inference of competitive injury was overwhelming. Volvo's alternative argument that a jury may only infer competitive injury under *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), if the favored purchaser has market power against the seller sufficient to affect intrabrand competition is waived (both because Volvo never sought such a jury instruction at trial and because it did not raise the question in its petition for certiorari). Regardless, that argument, as well as its additional arguments on antitrust injury, are contrary to numerous precedents of this Court. In short, Volvo and its amici ask for nothing less than a judicial repeal of the Robinson-Patman Act. This Court has previously resisted calls "to amend the Robinson-Patman Act judicially," *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 78 (1979), and it should follow that course here.

STATEMENT OF THE CASE

A. *Statutory Background.*

The Robinson-Patman Act ("RPA") was enacted in 1936 to amend § 2 of the Clayton Act of 1914, which also prohibited price discrimination, but only in very limited ways. The Clayton Act made it "unlawful for any person" to "discriminate in price between different purchasers of commodities," "either directly or indirectly," where the "commodities are sold for use, consumption, or resale" and "the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Act of Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730, 730.

By 1936, the Clayton Act was seen as "'too restrictive[] in requiring a showing of general injury to competitive conditions.'" *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 (1948) (quoting S. Rep. No. 74-1502, at 4 (1936)); *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 350 (1968) (Clayton Act was "an inadequate deterrent against outright price discrimination"). Congress was presented with "overwhelming" evidence "that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary." H. R. Rep. No. 74-2287, pt. 1, at 3 (1936). Thus, Congress amended the Clayton Act to prohibit price discrimination not only where it may have the effect to "substantially . . . lessen competition or tend to create a monopoly," but also where it may have the effect to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a). "The new provision . . . was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49 (quoting S. Rep. No. 74-1502, at 4). Outlawing discrimination injurious to individualized competition supported the Clayton Act's purposes, for "'[o]nly through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.'" *Id.* at 50 n.18 (quoting S. Rep. No. 74-1502, at 4).

While congressional concern over the predatory practices of chain stores may have been "the immediate and generating cause of the Robinson-Patman amendments," *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963), "neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source." *Id.* (citing H. R. Rep. No. 74-2287, at 6) (the Act's "'guiding ideal'" is the "'preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production'"). In the words of this Court, "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *Id.*

Congress provided various defenses in the RPA to protect the competitive pricing flexibility of sellers. The Act is not violated if the price discrimination is attributable to "differences in the cost of manufacture, sale, or delivery," 15 U.S.C. § 13(a), or to "price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned," *id.*, or if the "lower price . . . was made in good faith to meet an equally low price of a competitor." *Id.* § 13(b).

Beyond those explicit exceptions, however, Congress sought to protect the equality of opportunity of merchants regardless of any countervailing economic arguments in favor of price discrimination. Such arguments by the Act's opponents, *e.g.*, H.R. Rep. No. 74-2287, pt. 2, at 4-5 (1936) (minority views), were rejected, and the House of Representatives defeated an amendment that would have prevented construing or applying the Act to "'increase the cost of goods . . . to the consumer,'" 80 Cong. Rec. 8223, 8238 (1936); Department of Justice, *Report on the Robinson-Patman Act* 150-51 (1976) (DOJ Report). There was strong sentiment in the Depression to protect the livelihood of the small merchant, "leading Congress to believe that . . . protection of the wholesaler and the retailer was consistent with the public interest in preserving time-honored values: independence, self-reliance, dispersion of power, and familiar social structures." DOJ Report at 137. Congress thus adopted a bright-line rule protecting price discrimination that it judged in the public interest – that responding to cost differences, market conditions, or competitive prices – while ensuring that independent merchants could compete on equal footing with their rivals.

B. *Industry Background*.

This case concerns the market for heavy-duty trucks, commonly referred to as Class 8 trucks (*i.e.*, trucks weighing over 33,000 pounds). Class 8 trucks include tractor trailers used for freight transportation, as well as vocational trucks like mixers or dump trucks. The principal manufacturers of Class 8 trucks include Freightliner, International, Peterbilt, Kenworth and Volvo. *See* Tr. 1004.

The interstate trucking industry that purchases class 8 trucks is an intensely competitive and highly cost-sensitive business, comprised of a mix of firms that include small to very large fleets, and owner-operators.[1] Truck manufacturers

[1] C. Engel, *Competition Drives The Trucking Industry*, 121 Monthly Lab. Rev. Online (1998), *available at* http://www.bls.gov/opub/mlr/1998/04/art3full.pdf.

generally offer base models with a fixed set of component options (such as engine type, transmissions, and rear axle packages). JA 327; see, *e.g.*, International Truck & Engine Corp., International® 9200i, http://www.internationaldelivers.com/site_layout/vehiclecenters/detail.asp?model=9200i (last visited July 25, 2005) (sample of competitive truck). Although dealers sell some trucks from inventory, it would be prohibitively costly for any dealer to maintain a full product line in inventory. Petr. Br. 2. Typically, the customer negotiates with a dealer to select the offered components appropriate for its business, and the truck is built to order. JA 14. Because each manufacturer offers similar commodities that perform the same essential function (*e.g.*, hauling a load from point A to B), Class 8 trucks are highly substitutable products, and competition is keen and profit margins are thin in the Class 8 market. JA 346, 407-08, 418.

C. *The Facts of this Case*.

Volvo recites its version of the evidence, in disregard of the jury verdict and judgment against Volvo, and of the rule that Reeder "must be given the benefit of every legitimate inference that can be drawn from the evidence." 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2528, at 288 (2d ed. 1995); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993). The evidence that the jury was entitled to credit tells a vastly different story.

1. *Reeder-Simco*. Reeder is a dealer of new and used commercial trucks in Fort Smith, Arkansas, which sits on a major interstate highway system. Tr. at 8. Reeder had a long track record of successfully selling Class 8 trucks for Volvo's predecessor companies, and indeed in 1992 was honored with Volvo GM Truck's "second to none" award for top dealers for performance in 1992. Tr. 10-11, 14-15; JA 120 (272 trucks sold in 1992). Reeder also exceeded its manufacturer-set Class 8 sales objectives by almost 50% in 1994. JA 50.

In 1995, after Volvo ended its joint venture with GM and assumed sole control of its heavy-truck business, Reeder entered into a new franchise agreement. Tr. 15-17. This agreement was for an automatically renewing five-year period, and Volvo could only terminate the agreement for cause. JA 436-37. The agreement assigned Reeder an area of responsibility around Fort Smith where Volvo would not locate another dealer, JA 432-33, 449, but this was not an exclusive sales territory. Volvo dealers are free to sell anywhere in the continental United States, and Reeder has sold trucks in many states. JA 13-14. Reeder was obliged to comply with a Portfolio of Criteria (which included annual sales objectives, part purchase objectives, working capital requirements, etc.). JA 10-12, 433, 440. Reeder had no franchise agreement with any other Class 8 manufacturer, see Tr. 8, and thus sold Volvo trucks exclusively in the Class 8 market.

During the time period relevant to this case, there were 146 authorized Volvo dealers in North America and 169 dealership points (since some dealers owned more than one dealership). JA 457. Reeder was in District 52 of Volvo's Southwest Region. CA8 JA 364-65.

2. *Dealer Competition For Class 8 Sales*. Dealer competition for Class 8 sales is a multi-stage process. The first stage is to "establish the relationship [with] the customer so that they would ask you to give them a price." JA 14. There are myriad ways in which dealers like Reeder compete to develop customer relationships and opportunities to pitch new truck sales. Dealers cultivate existing accounts to whom they previously had sold trucks. See, *e.g.*, JA 77, 104. As Reeder's experience attests, dealers also generate customer relationships from servicing Volvo trucks sold by other dealers. This competition is not limited to local customers. Larger trucking fleets often maintain terminals in different states, and dealers build relationships by servicing trucks in those terminals. JA 89, 104, 358, 477. Sales opportunities also arise when interstate truckers need road service. JA 174. Quality service requires investment. Tr. 11-12. Dealers also generate new opportunities from aggressive sales and marketing to potential

new accounts, which require investment in the sales force and in solicitations. See, *e.g.*, JA 42 (hiring of additional salesmen), 77, 104, 190, 208, 228, 239 (discussing sales efforts to new accounts by Reeder), 432-33 (franchise terms requiring vigorous and aggressive promotion and solicitation); Tr. 354 (Reeder "salesmen would go up to a truckstop [to] try to make some sales to individual owner-operators"), 791 (Class 8 sales require active selling). Dealers invest in attractive and well-located dealership locations and merchandising of Volvo trucks. Tr. 12, JA 42. "The evidence show[ed] that an end user's decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation and cold calling or other marketing strategies initiated by individual dealers." Pet. App. 28a-29a.

Once a relationship is formed and an opportunity to quote trucks is obtained, the next stage of the competitive process is to develop product specifications with the customer. JA 14. The dealer invests time and resources to determine customer needs, matching them with Volvo products, and convincing customers that Volvo trucks fit their business needs better than competitors' trucks. JA 14-15, 220, 244-45, 434-35.

The third stage in the process, once the initial product is specified, is to negotiate an effective wholesale price for the proposed truck order from Volvo, a process described in more depth below. JA 15. Once Volvo specifies the price it will charge the dealer for the desired trucks, the dealer then determines the retail price it will offer the customer, taking into account all costs and its own profit requirements. *Id.* This may be an iterative process, whereby the dealer works with the customer to reconfigure the order to cut the price. JA 126. If the customer accepts the deal, the dealer purchases the trucks from Volvo for resale (unless it sells all or part of the order from inventory).

3. *Competition Between Volvo Dealers*. The undisputed evidence from trial, from Reeder and Volvo witnesses alike,

is that Reeder Simco competes with other Volvo dealers in Volvo's multistate Southwest Region. All Volvo dealers offer the same products to the same customer base, and the customer is free to select any Volvo dealer. JA 175. Customers are mobile, interstate highways run throughout the region, and there are no physical or trade barriers to selling into other dealer's areas. JA 175-76. Success as a dealer does not depend principally on geographical location. Tr. 581, 587. Reeder sold and delivered trucks to every State in the Southwest region except for two. JA 175.

Volvo dealers compete at every stage of the sales process. William Heck, a co-owner of Reeder involved in Class 8 sales, testified that Reeder Simco competes with other Volvo dealers, noting that "[w]e operate on the same customers," and "many times" customers would check Reeder prices with other dealers. JA 174. A Volvo executive testified that "we frequently find ourselves in situations where customers, because these customers are very mobile, will go to two or three different dealerships" in seeking price quotes for a Volvo truck. JA 412. As a Volvo witness summed it up: "Q: Okay. So there's a competition among the Volvo dealers within various districts? A: Districts and Regions, yes, sir." Tr. 588.

4. *Volvo's Pricing Scheme.* Despite Volvo's rhetoric of pro-consumer "discounting" to meet competition, Petr. Br. 24, Volvo's pricing practices are simply a form of haggling designed to extract the *highest* possible price from a given retail truck customer and to control, on a case-by-case basis, the respective shares of any profit that Volvo and a particular dealer may receive on a transaction.

Volvo sets a retail list price for base model trucks and product options, and a dealer (wholesale) list price at 80% of the retail list price. JA 14. These are artificial prices; often, if not always, the *dealer* list price exceeds the market *retail* prices that the consumers actually pay. Volvo's true wholesale price to a dealer is determined by its practice of granting "concessions" (also known as retail sales allowances, or

RSA), in the form of an additional percentage reduction in price off the 80% dealer list price. JA 14-15. District managers may grant concessions within ranges set by truck type and order quantity according to a matrix; more senior regional executives may approve additional concessions. JA 83-84.

Those concessions are not generally granted to meet competitive "bids" to another customer, as Volvo implies; indeed, Volvo conceded at trial that it knew the actual prices competitors were offering to customers only in 10-15% of its transactions. JA 428. In most transactions, Volvo simply had a general sense of market prices for competitive trucks that the customer might be considering and factors (not protected by the RPA) that might allow Volvo to charge certain customers higher prices. JA 355-56. By its own admission, the purpose of the concession methodology is to "allow[] Volvo to sell at a higher profit to someone who will pay more." JA 343; *see also* JA 339 ("we've got customers we don't have to go as deeply to maintain"), 87 (Volvo admission that the concession methodology is designed to protect its gross profit); see NADA Br. 8, 25 (discussing switching costs of existing Volvo customers). This pricing scheme also allows Volvo (particularly in a boom market where it was operating at or near full capacity) to manipulate the profits its different dealers receive, and to determine which dealers would get the favorable prices necessary to close deals.

By its very nature, then, Volvo's pricing methodology envisions price discrimination among its dealers. Price discrimination under the RPA is defined as a difference in price to different purchasers for commodities of like kind and quality. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). Volvo witnesses repeatedly acknowledged that its concession methodology effectively resulted in such disparities. JA 411 (methodology "result[s] in a disparity in price between dealers in a substantially similar transaction"), 343 (Volvo does not equalize concessions on similar deals if end user is different). Volvo claimed to follow a policy of nondiscrimination in the narrow circumstance of two Volvo dealers seeking concessions at the same time to sell trucks to the same end-user, but the evidence (discussed below) showed that even that policy was not executed. JA 80-81.

5. *Volvo's Discrimination Against Reeder*. The evidence at trial showed that Volvo systematically practiced massive price discrimination against Reeder, and indeed did so pursuant to an express corporate policy to eliminate half the dealer force competing to sell Volvo trucks.

In the period relevant to this case, Volvo adopted a policy called "Volvo Vision" to eliminate smaller dealers. JA 457. Volvo's goal was to boost the number of dealership points to a slightly higher level, but to reduce the number of dealers by roughly 50% (from 146 to 75), with some dealers operating multiple dealerships over "larger markets." *Id.*; JA 33-39, 402-03, 452 ("50% of Volvo truck dealers would not be in business in the next few years.").

The jury was entitled to infer that price discrimination was a tool by which Volvo pursued its goal of driving half of its dealers out of the Volvo truck business. Pet. App. 16a. Volvo was constrained by its self-renewing franchise agreement, which prevented termination of the franchise except for cause, from simply refusing to deal with a targeted dealer. Moreover, even aside from Volvo's binding and voluntary contractual commitments, federal and state law both prohibit termination of dealerships without cause. 15 U.S.C. § 1222; Ark. Code Ann. § 4-72-204(a). Volvo, however, could terminate dealers for failing to make their sales and other objectives. JA 450-51. Moreover, Volvo admitted that its plan for executing "Volvo Vision" was for better-performing dealers to swallow lower-performing dealers. JA 403. Price discrimination that lowers the value of targeted dealerships by depriving the targeted dealers of sales, or reducing their profit on the sales they did make, makes them ripe for the plucking. Thus, price discrimination was a powerful way for Volvo to manufacture "cause" to terminate unwanted dealers, or to hasten their acquisition by preferred dealers.

Notwithstanding the jury verdict against it, Volvo asks this Court to infer that Volvo had no motivation to pursue such a plan because it could not "possibly benefit by reducing the competitiveness of its dealers," citing general economic nostrums that a manufacturer benefits from greater competition among its distributors. Petr. Br. 42. Even as a general proposition, this claim flies in the face of a long history of "abusive and oppressive acts by manufacturers" against dealers they deem "'expendable.'" *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 100-01 & n.4 (1978). "The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory." *Id.* at 100 n.4 (quoting S. Rep. No. 84-2073, at 2 (1956), establishing Automobile Dealer Day In Court law for auto and truck dealers, 15 U.S.C. §§ 1221-1225). But cases are decided on their facts, not abstract propositions. Here, the Volvo Vision was pursued during years of "banner," even "record," sales for Volvo and the Class 8 truck industry at large. JA 256-57, 378, 400-01. Volvo was operating at or near full capacity in this period, with long delays in building and delivering trucks. JA 256-57. In a boom market with an abundance of orders, Volvo could readily pursue longer-term profits from realigning its dealer network. Given its capacity constraints, Volvo could reach its sales objectives by steering sales to some dealers by giving them reasonable prices, while at times charging high prices to disfavored dealers that would either (1) prevent those dealers from making sales objectives, thus exposing them to termination or acquisition, or (2) result in sales at much higher profit margins for Volvo. It should be noted that while *retail* truck prices are set competitively, Volvo is a monopolist in the *wholesale* market in selling to dealers like

Reeder who have no other franchise that allows them to tap an alternative Class 8 supplier. When Volvo sets a high wholesale price at the concession stage, it has the dealer over a barrel. The dealer's expenditures in acquiring the customer and negotiating the purchase are largely sunk by the time a price is quoted, and a dealer may be willing to shave its profit margin to the bone to secure the sale (especially if its entire franchise investment is at risk if it fails to meet sales objectives). JA 55, 140, 194, 272-73, 423. A manufacturer who deems a dealer "'expendable,'" *New Motor*¸ 468 U.S. at 100 n.4, and controls dealer profit as Volvo does, has no incentive to insure that such a dealer earns a fair profit.

The evidence showed that Volvo pursued its Vision with a vengeance. Even in a boom market, Volvo issued 20 termination letters and placed another 20 or so on probation in 1999-2000 alone. Pet. App. 16a. That was more than a quarter of the existing Volvo dealer force, and about 60% of the 71 dealers targeted for elimination. See JA 457.

More particularly, this policy was pursued with a vengeance against Reeder. The evidence revealed that Volvo's Southwest Region Vice-President had marked Reeder as "not a long-term dealer." JA 359. After learning of the Volvo Vision, Reeder had resolved to "take whatever steps necessary to survive." JA 42. It invested in a new and more desirable dealership location for Class 8 truck sales and inventory, and hired additional salespeople. It aggressively sought sales from old and new accounts. JA 42, 77, 190, 208, 228, 239. Reeder steadily increased the number of customers that it brought to the point of a price quote, succeeding in quoting potential sales of 3,726 trucks from 1997 to 1999. JA 78-79. Volvo's rate of quotes to sales in Reeder's region is 3 to 1, JA 118, which would suggest such efforts would yield sales of many hundreds of trucks. Nonetheless, despite Reeder's historically strong performance as a Class 8 dealer (which continued as late as 1996), Tr. 10-11, 14-15; JA 50, 67, and its aggressive pursuit of sales in a boom market, Reeder's sales and profits nosedived. It sold only 34 trucks in 1998, 18 in 1999, and 8 in 2000, and by 2000 its annual gross profit dwindled to as low as $26,000. JA 473. Reeder was reduced from "second to none" top dealer status to one of the worst performing dealers in the Volvo system for 1997 to 1999, and was issued a termination letter in 1999. JA 373-79.

The jury was entitled to find that one reason was price discrimination. Tellingly, Volvo runs from the facts of the discrimination on Reeder's actual purchases, giving as an "example" only the facts of the smallest deal with a relatively small discrimination. Petr. Br. 5. In truth, Reeder proved massive discrimination just in the so-called "sales-to-sales" comparisons with other competing Southwest Region dealers: namely, that Volvo engaged in price discrimination on 102 trucks that Reeder purchased for resale from 1996 to 1998, and that the discrimination on those purchases amounted to $281,965.[2] The discrimination occurred on more than 55% of Reeder's purchases for resale during all of the 1996 to 1998 period, and far exceeded Reeder's total annual gross profits on Class 8 sales in any year during that period. JA 473.

Reeder also put on evidence of another 14 transactions (involving potential sales of another 1373 trucks) where Volvo discriminatorily denied Reeder the price at which it *sold* comparable trucks to other competing Southwest Region dealers, and Reeder was unable to close the deal with its cus-

[2] *See* JA 134 (20 trucks sold to Lane Freight with discrimination of $2,606 per unit, totaling $52,120); JA 141-43 (2 trucks sold to Fort Smith with discrimination of $1,275 per unit, amounting to $2,550); JA 156 (77 trucks sold to New Hi-way Express with discrimination of $2,499 per unit, amounting to $192,423); JA 160-61 (3 trucks sold to Sam Ludington with discrimination of $11,624 per unit, amounting to $34,872). The discrimination was actually greater because Reeder itself was forced to buy for inventory at a discriminatory price 4 of the 8 trucks that New Hi-way Express cancelled out of an original order of 85 trucks. Indeed, Volvo raised the final wholesale price on those 4 trucks when they were resold, even though it did not do that to other dealers. JA 383-90.

tomer in bidding retail prices above the discriminatory wholesale price. JA 19-26, 89-94, 189-251.

In one of those transactions, despite a stated policy to the contrary, Volvo discriminated against Reeder in a transaction (Hiland Dairy) when Reeder was competing head-to-head with another Volvo dealer for a sale to the exact same customer. Volvo and the Government try to spin the evidence in Volvo's favor, but the jury was entitled to reject Volvo's version of events. The evidence showed that in January 1999, Volvo granted another Volvo dealer, Southwest Missouri Truck Center (SMTC), a 7.5% concession, on a bid to sell trucks to Hiland Dairy (a large private carrier). JA 352. Hiland Dairy did not accept the bid, and subsequently asked Reeder (which services Hiland Dairy's trucks in Fort Smith) to bid on the deal. JA 89. Reeder asked for a price concession of 12%, but on July 21, 1999 was granted the same concession of 7.5% off the January list price granted to SMTC six months earlier. JA 90, 362. Even with the same concession, the dealer net price Volvo quoted to Reeder was actually higher than that quoted six months earlier to SMTC because there had been an intervening 1.3% price increase on that model of trucks. JA 477.

Less than a month later, SMTC reported that Hiland Dairy was willing to buy at the price SMTC had quoted in January 1999, but now SMTC sought a higher concession to maintain its profit in light of the intervening price rise. JA 353. On or prior to August 19, 2001, Volvo granted the higher concession of 8.5% to SMTC, but never offered the same concession to Reeder. JA 364. Two days later, on August 21, 2005, SMTC placed the order to purchase the trucks for resale to Hiland Dairy. JA 91. Contrary to the claims of Volvo (Br. 29) and the Government (Br. 5), there was no evidence that Hiland Dairy (which had a longstanding relationship with both dealers) preferred to buy from Reeder or SMTC on any basis other than price. A Volvo witness testified that he did not give the same concession to the Reeder because "the order had already come in" and "[i]t was a done deal." JA 353. But the jury heard evidence that the same District Manager did not grant concessions simply because the customer had agreed to a price, JA 19-26, 139-41, and his representations were refuted by the record (the concession was granted two days before the order). In any event the jury was entitled to disbelieve the Volvo's witness's characterization of events in favor of the plausible reason that Hiland Dairy chose SMTC because it was able (as a result of discrimination) to offer a better price. See *Reeves* v. *Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 151 (2000) (evidence supporting movant for JMOL considered only if "'from disinterested witnesses'"). The loss of the Hiland Dairy sale alone cost Reeder $30,000 in gross profit. JA 100.[3]

Moreover, the repeated claim by Volvo and the Government that Volvo never deviated from its policy of granting the same concession to each dealer bidding for the same customer is belied by other record evidence. In May 1998, Volvo granted a concession to Reeder that was much lower than a concession to another Volvo dealer (Volvo GMC Trucks) for an order to the exact same customer (TSL) just two weeks earlier. JA 212-19. Volvo and the Government wholly ignore this evidence of patent discrimination in head-to-head bids. Indeed, Volvo did not have a computerized system to check if concession requests from different dealers related to the same customer until 2000. JA 427-28. Before then, execution of the policy occurred only if the district manager knew of another dealer quote and adhered to the policy. JA 428. The jury was entitled to find that Volvo did not strictly follow even its limited nondiscrimination policy, and simply implemented its "Volvo Vision." JA 81.

[3] There is also no evidence supporting Volvo's claim that it was at risk of losing the deal if it had given Reeder the chance to bid for the sale with an 8.5% concession. Petr. Br. 28-29. Volvo could have notified Reeder on August 19 or at anytime before the order was placed two days later.

D. *Proceedings Below*.

Reeder sued Volvo for price discrimination under the RPA, as well as for violating the Arkansas Franchise Practices Act. After trial, the jury returned a verdict in favor of Reeder on both claims. On special interrogatories for the RPA claim, the jury answered affirmatively that it found (1) "that, when comparing the reasonably contemporaneous sales of trucks of like grade and quality, Defendant charged different prices to different purchasers in the sales transactions"; (2) "that there is a reasonable possibility that discriminatory pricing may harm competition between plaintiff and other retail dealers of Volvo trucks"; and (3) "that Plaintiff was injured in its business or property because of the Defendant's discriminatory pricing." Pet. App. 37a-38a. The jury awarded Reeder $1,358,000 in damages for the Robinson-Patman Act violations. Volvo's motion for judgment notwithstanding the verdict was denied by the district court.

The United States Court of Appeals for the Eighth Circuit affirmed that ruling. The court held that Reeder had shown that it had purchased commodities at a discriminatory price by presenting evidence of the sales-to-sales comparisons for the 102 trucks. Pet. App. 10a. Reeder further showed that it was in actual competition with the favored purchasers because they competed for sales at the same functional level in the same geographic market. *Id.* at 11a-12a.

The court also held that Reeder proved a reasonable possibility of competitive injury from Volvo's unlawful discrimination. Pet. App. 15a-16a. The court noted that, under *Morton Salt*, the jury could infer competitive injury if the "plaintiff [shows] that the favored competitor received a substantial price reduction over a substantial period of time." *Id.* at 15a (internal quotation marks omitted). The court noted that the jury had been shown ample evidence of lost profits and sales attributable to the discrimination at a time when the sales of Volvo and favored dealers were strong. *Id.* at 15a-16a. The court concluded that the *Morton Salt* inference was justified on Reeder's evidence because Volvo's discrimination lasted for several years, and, because Reeder showed that "dealer profit margins were narrow," the jury "could reasonably conclude even small differences in price concessions had a substantial impact on competition." *Id*. at 16a-17a.

The court also held that Reeder proved actual injury from Volvo's price discrimination. Pet. App. 17a. "Reeder presented evidence that its own sales and profits were substantially reduced during this boom in the heavy truck industry, despite an increase in its own sales efforts," and that the jury was entitled to infer that Volvo used discrimination as a means of reducing the number of dealers selling its trucks. *Id.* at 18a. Such evidence was "precisely the type of injury the antitrust laws were meant to prevent." *Id.* at 19a. Reeder was not required to show that Volvo's misconduct was the sole cause of its injury, nor was it required to limit its proof regarding antitrust injury to the sales-to-sales comparisons. *Id.* at 19a-20a. Judge Hansen dissented. *Id*. at 27a-32a.

SUMMARY OF THE ARGUMENT

Section 2(a) of the RPA prohibits price discrimination among different purchasers of commodities of like kind and quality where the effect of the discrimination may be to injure, destroy, or prevent competition with favored purchasers. Volvo engaged in massive price discrimination, exceeding $280,000, on the *purchase* for resale of 102 trucks by Reeder from 1996 to 1998, as well on a number of other transactions where the price discrimination prohibited Reeder from making such purchases. Volvo did so pursuant to an overt company policy to eliminate small dealers from its force. The jury found that Volvo's discrimination created both a reasonable possibility of injury to Reeder's competition with favored Volvo dealers and actual injury.

Volvo asks this Court to disregard the 102 discriminatory sales on a novel and unprecedented transactional theory of "competition" under the RPA. According to Volvo and its amici, adopting the position of the dissenting judge below, "[o]nce bidding begins, . . . the relevant market becomes limited to the needs and demands of a particular end user," and actual competition exists only among rivals bidding at that stage. Pet. App. 28a-29a. But "competition" under the RPA or any antitrust law is not defined on a transactional basis. This Court (along with the FTC, lower courts, and commentators) has long defined competition as the vying for customers in the same relevant market. The "relevant market," and the existence of competition within that market, do not shift or shrink with the vagaries of a specific customer's shopping choices. Thus, the RPA can be violated if there is a reasonable possibility of injury to competition with favored purchasers in the market, not just in specific transactions. Courts, the FTC, and scholars have universally recognized that not only price advantage but also significant impairment of profit margin (even in the absence of resale price competition) creates a reasonable possibility of competitive injury so defined. Accordingly, an RPA violation may be inferred merely from evidence that "manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948). The jury was instructed under *Morton Salt* and so found.

In the alternative, Volvo and its amici attack this Court's interpretations of the RPA as protecting the individual competition of merchants with their rivals from injury, arguing that the *Morton Salt* inference may be drawn only if discrimination favors a competing purchaser with buyer power (and thus threatens intrabrand competition). That argument is waived; Volvo did not object to (and indeed proposed) the *Morton Salt* jury instruction, and never sought an instruction regarding the buyer power of the favored purchaser. Regardless, this Court has repeatedly rejected Volvo's buyer power argument; *stare decisis* has particular force in statutory cases; and Volvo's arguments cannot be squared with the statutory text. The Act plainly outlaws discrimination that may injure the plaintiff's "competition with" favored customers of the seller, without limitation. The FTC has squarely rejected Volvo's theory that competitive injury must be shown in relation to knowing recipients of discrimination; even if such a scienter requirement existed (a claim Volvo did not preserve at trial), it would not support Volvo's buyer power limitation on *Morton Salt.* This Court should resist Volvo's call for a judicial rewrite of the RPA.

Volvo's second question – whether RPA antitrust injury may be based solely on "an unaccepted offer," Petr. Br. (i) – is not presented, because it falsely assumes that the discriminatory 102 truck *sales* to Reeder do not violate the Act. Reeder clearly proved antitrust injury from those violations (including the classic RPA proof sanctioned by this Court of lost sales and profits relative to estimates of sales and profits absent a violation). Reeder showed that Volvo's anticompetitive conduct in violation of the Act was a material cause in part of its losses, which is all the antitrust injury doctrine compels. Nor is Volvo correct that the jury was forbidden to consider transactions where Volvo's discriminations deprived Reeder of the ability to purchase, or that refuted Volvo's contentions that poor performance and bad luck rather than its violations of the Act caused Reeder's precipitous loss of sales and profits. The fact of injury was simply a question for the jury.

ARGUMENT

Section 2(a) of the RPA makes it unlawful to 1) "discriminate in price" between 2) "different purchasers" of 3) "commodities of like grade and quality" 4) sold in interstate commerce where 5) the effect of the discrimination "may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a); *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 556 (1990). Upon proof of these elements, a violation of § 2(a) exists unless the defendant establishes one of the RPA's affirmative defenses. *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). In a private damages action, a plaintiff must also make "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); 15 U.S.C. § 15.

Here, Reeder proved all the elements of an RPA damages action – including indisputably that it was a "purchaser" of 102 trucks where Volvo's price discrimination exceeded $280,000. Volvo does not contest in this Court the jury's verdict that Volvo discriminated in price on commodities of like grade and quality in all the transactions at issue, and did not prove the statutory defense of meeting competition. Pet. App. 37a-38a. Instead, Volvo claims that the evidence is insufficient to show a reasonable possibility of competitive injury from discrimination on the trucks Reeder purchased because (1) Reeder is not in competition with favored Volvo dealers unless another dealer bids on the same sale to the same customer, and (2) this Court should overrule *Morton Salt* and condition liability on findings of market power of favored competitors and harm to "intrabrand" competition. Volvo also contends that Reeder did not prove antitrust injury, and that transactions in which its price discrimination deprived Reeder-Simco of a sale must be excluded from the jury's calculus. None of those arguments has merit.

I. THE JURY WAS ENTITLED TO FIND A REASONABLE POSSIBILITY OF COMPETITIVE INJURY FROM VOLVO'S DISCRIMINATION.

A. Competition Under The RPA Is Defined By Whether Rivals Serve The Same Market, Not On A Transactional Basis.

In outlawing price discrimination the effect of which "may be . . . to injure, destroy, or prevent competition with" specified rivals, 15 U.S.C. § 13(a), the RPA is "designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected." *Corn Prods. Refining Co.* v. *FTC*, 324 U.S. 726, 738 (1945). "[T]he statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Id.* at 742. Thus, an RPA violation may be inferred merely from evidence that "manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948); *Falls City*, 460 U.S. at 435.

Volvo and the Government contend that the jury could not find a reasonable possibility of competitive injury as a matter of law from Volvo's massive price discrimination of $281,965 on the sales of 102 trucks to Reeder from 1996 to 1998 because such discrimination could not affect actual competition among Volvo dealers. According to their theory (shared by the dissenting judge below), the "relevant market" for purposes of defining competition shrinks according to the stages of the transaction with a specific customer:

> As Judge Hansen pointed out, although Volvo dealers may "have competed against each other" in a market to "receive the opportunity to bid on potential sales to customers" in a broad geographic area, "[o]nce bidding begins, *** the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale."

U.S. Br. 21 (alteration and omission in original) (quoting Pet. App. 28a-29a); Petr. Br. 10-11, 19 (arguing that Reeder "fail[ed] to prove *competition* – an essential element of Reeder's RPA claim" on the sales-to-sales comparisons "for the simple reason that Reeder did not compete *in any of these transactions* against another Volvo dealer") (second emphasis added); Petr. Br. 30 (injury must relate "to *the transactions* in which there is competition between favored and disfavored purchasers.") (emphasis added).

The definition of "competition" espoused by Volvo and the Government is contrary to the plain meaning of that term in the RPA and the antitrust laws generally (an irony, considering their repeated urgings elsewhere in their briefs to interpret the RPA consistently with other antitrust laws). This Court has long held that firms are in "competition" when they are vying for the same customers in the same relevant product and geographic market. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (Dealers are in "effective competition" if "the purchaser can practicably turn for supplies" to those dealers in "the market area in which the seller operates"); *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 359 (1963); *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 388 (1923) ("competition" is "the play of the contending forces ordinarily engendered by an honest desire for gain").

This Court has applied the same standard under the RPA, finding that favored and disfavored purchasers are in "competition" at the same functional level so long as they offer the same products to customers in the same geographical market. *Falls City*, 460 U.S. at 436 (beer wholesalers compete because they both sell the same products "in a single, interstate retail market"); *FTC* v. *Simplicity Pattern Co.*¸ 360 U.S. 55, 62 (1959) (agreeing with the court of appeals that variety and fabric stores compete because they "'retail[] the identical product to substantially the same segment of the public'"); *Texaco*, 496 U.S. at 548; *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 526-27 (1963). So has the FTC. *E.g.*, *Sun Oil*, 55 F.T.C. 955, 976 (1959) (finding competition among dealers "operating at a small margin of profit and *in an area which was a reservoir of potential customers* who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered") (emphasis added); *P&D Mfg.*, 52 F.T.C. 1155, 1169-70 (1956). Thus, as the court held below, "'The standard for showing actual competition is whether, 'as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" Pet. App. 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)); 3 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 39.02[2] (2d ed. 2004).

The "relevant market," and the existence of competition within that market, do not shift or shrink with the vagaries of a specific customer's shopping choices. "Competition" under the RPA and other antitrust laws is simply not defined on a transactional, or customer-specific, basis. As Professor Hovenkamp states, "[i]n determining that the favored and disfavored purchasers are 'competitors'" under the RPA, courts look to factors "for defining relevant geographic and product markets," and "[a]s a general matter, it need be shown only that the two sellers compete for the same customers." 14 H. Hovenkamp, *Antitrust Law* ¶ 2333b, at 89-90 (1999) (footnotes omitted).[4]

B. A Jury May Find An RPA Violation When The Probable Future Effect Of Price Discrimination Is To Injure, Destroy, Or Prevent Competition With Favored Purchasers In The Same Market.

Volvo and the Government advance their contrived transactional definition of "competition" to argue that *ipso facto* there can be no cognizable injury to competition except as to those competitors directly bidding against Reeder in the specific resale transaction. That claim cannot be squared with the language or history of the RPA. The predecessor § 2 of Clayton Act banned price discrimination the effects of which "*may be* to substantially lessen competition . . . in any line of commerce," a usage that was repeated in other parts of the

[4] The relevant market inquiry for secondary-line RPA claims (where the products are essentially the same) is simpler than under other antitrust laws because certain factors relevant to the definition of product markets – such as the ability of a competitor to set prices above competitive levels – are "unnecessary" to the RPA inquiry. 14 Hovenkamp, *supra*, ¶ 2333b, at 90.

Clayton Act. *See*, *e.g.*, 15 U.S.C. §§ 14 (agreements not to use or deal in competitors goods), 18 (mergers). This Court has interpreted this "may be to" language to involve a "prognosis of the probable *future* effect" of the proscribed activity on the entire process of competition in the relevant market. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 332 (1962).

The RPA broadened the Clayton Act's prophylaxis against price discrimination to encompass two different kinds of competitive injury. It retained the original protection against the reasonable possibility of a substantial lessening of competition "in any line of commerce," which requires analysis of "'general injury to competitive conditions'" in the relevant market as a whole. *Morton Salt*, 334 U.S. at 49. But it also outlawed price discrimination where the effect "may be . . . to injure, destroy, or prevent competition *with*" specified rivals. 15 U.S.C. § 13(a) (emphasis added). The RPA thus protects individualized competition of the victim of discrimination with favored rivals in the same geographical market, and a violation may be proven whenever the jury finds a "probable *future* effect" of injuring, destroying, or preventing the victim's competition in that market. *Brown Shoe*, 370 U.S. at 332. There is nothing in the text of the RPA that limits the reasonable possibility of injury to competition to a single resale transaction and only to those competitors who happen to be bidding for a specific customer's business.

To the contrary, the transactional definition of "competition" cannot be squared with the language of section 2(a) in any regard. First, if competition is defined by who is already competing in a specific transaction, then price discrimination could never "prevent" competition. The "prevent" prong of the second clause of section 2(a) is aimed at the future probable effect on competition in the market, where discrimination may drive the victim out of the business of selling the supplier's commodities. Second, Volvo's narrow theory of RPA competition is belied by the Act's broad, express prohibition of discrimination with regard to "commodities . . . sold for *use, consumption, or resale* within the United States." 15 U.S.C. § 13(a) (emphasis added). The RPA is concerned with any way in which price discrimination among competing purchasers may affect the terms of future competition in the market. See *Corn Prods.*, 324 U.S. at 739-42 (price discrimination in important raw material input violates the RPA).

In this respect, it is ironic that Volvo block-quotes a passage on competitive injury from the Hovenkamp treatise, Petr. Br. 16, which (as noted above) supports Reeder on this point. Professor Hovenkamp rightly states that "[t]he disfavored purchaser must be injured in its *ability to compete* with the favored purchaser," and then points out that such an inference cannot be made if two dealers do not compete *in the same market*, giving as an example Michigan and Georgia automobile dealers who "each operate in their own geographic areas and never compete with each other for sales to the same customers." 14 Hovenkamp, *supra* ¶ 2333b (emphasis added). The existence of actual competition depends on whether the favored and disfavored customers vie for customers in the same market, not on whether they do so in a single customer transaction.[5]

[5] Although based on a flawed legal interpretation of the "competition" protected by the RPA, the repeated claim by Volvo and the Government that Reeder competed head-to-head only two or three times with other Volvo dealers is based on a wholesale mischaracterization of the testimony of Reeder co-owner William Heck. Responding to questions about competing with Volvo dealers on concession quotes "that you have actually worked on that you've already testified about," Heck testified that there were "two [or] three" occasions "where I knew . . . at the same exact time" that another Volvo dealer was also competing for the same sale. JA 305. First, Heck (who specializes in fleet sales, JA 358), was not testifying as to the entirety of Reeder's Class 8 deals. His answer did not cover deals that were not the subject of his prior testimony (all of which dealt with specific cases where Volvo gave discriminatory prices), nor (because the questions pertained to quotes Heck had "actually worked on") did he testify about the quotes that other Reeder Simco salesmen had requested from Volvo. *See, e.g.*, JA 77, 228, 239, 364. Second, Heck was careful to limit his answer to instances where he had personal knowledge of another Volvo dealer "at the same exact time" he sought a quote be-

Accordingly, courts have long held that juries are entitled to infer an injury to competition under the Act whenever the discrimination causes one purchaser to suffer substantially lower profit margins than another. *See, e.g.*, *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674, 680 (5th Cir. 1965) ("[A] substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give[] him a substantial advantage over his competition."). A reasonable possibility of competitive injury is not limited to only that circumstance where a sale (and concomitant profits) may be diverted to the favored customer; "reduction in [profit] margin has also been found to be the kind of injury contemplated in the statute's conception of injury to competition with the favored purchaser," and thus, "simply making a lower markup than one's rivals is the kind of injury contemplated by the statute." 14 Hovenkamp, *supra* ¶ 2333c, at 104. As the conference manager of the RPA pointed out, price discrimination can affect not only competition to resell the goods purchased at discriminatory prices, but also may affect the victim's *future* competition for sales in the same market. Discrimination may be injurious where "the two are competing in the resale of the goods concerned," but "[w]here, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices *to his other customers*." 80 Cong.

cause there are many occasions where a dealer does not know with whom the customer is negotiating, unless the customer discloses it. Third, in addition to the three bids about which Heck testified, a Volvo witness testified that "[t]ypically [Reeder] would compete with the dealer in Springdale, Arkansas" on deals, implying many more than one with that dealer alone. JA 348. Construed in Reeder's favor, this testimony does not have the meaning Volvo and the Government assign it.

Rec. 9413, 9416 (1936) (remarks of Rep. Utterback) (emphasis added).[6]

There are myriad ways in which lower profit margins from substantial discrimination impair the victim's ability to compete with favored purchasers in the market. Relative deprivation of profits compromises the ability of the dealer to offer competitive *retail* prices (or inducements in trade or financing) in future competition. In some transactions, dealers will set low retail prices that forgo profits or even cause them losses in order, for example, to get a new customer account or maintain existing customer relationships so as to ensure future sales and longer-term profits. See JA 194, 423. A dealer who has suffered substantial price discrimination on prior purchases has less wherewithal to compete on retail price in future transactions. Moreover, a favored purchaser who receives higher profit margin can "offer customer-attracting services which will give him a substantial advantage over his competition." *Foremost Dairies*, 348 F.2d at 680; see, *e.g.*, *Alan's of Atlanta, Inc.* v. *Minolta Corp.*, 903 F.2d 1414, 1426 n.18, 1427 (11th Cir. 1990) (holding that competitive and antitrust injury under the Robinson-Patman Act occurs when a competitor invests its relative advantage in profit margin in "advertising," "marketing," "enhanced service," and "promotion[]"). These concerns are acute in the Class 8 market where customer acquisition, relationships, and retention are at a premium, and competitive success depends on substantial investment in sales forces, marketing, and aftermarket service. *Supra* at 6-7.

[6] *See also Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 386 (8th Cir. 1987) (finding "sufficient proof of competitive injury" where "Rose Confections did not lose a single sale" but its profit margins were lower than its competitors); *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.) (discrimination "diminished its profits and helped destroy its financial ability to withstand competition."), *opinion modified on denial of rehg*, 190 F.2d 73 (5th Cir. 1951); *Ingram* v. *Phillips Petroleum Co.*, 259 F. Supp. 176, 182 (D.N.M. 1966) ("the loss of profits rather than the loss of sales" can injure competitors).

In support of its transactional theory, the Government suggests that competitive injury under section 2(a) requires some form of retail price adjustment (whereby either the sales are diverted to a favored purchaser who charges a lower retail price, or the disfavored dealer must lower his price to fend off competitors). U.S. Br. 22 & n.12. But courts have also long held that "profit impairment of resellers paying more for the product [is] competitive injury *even in the absence of resale price competition*." F. Rowe, *Price Discrimination Under The Robinson-Patman Act* § 8.4, at 183 (1962) (emphasis added; emphasis in original omitted). For example, even when both the favored and disfavored purchasers *always* resell the good at the exact same price (such as at the manufacturer's suggested retail price), the fact that the manufacturer sold the good to one at a higher wholesale price than another causes a "profit difference" between the purchasers that may ultimately injure the ability of the disfavored one to compete with the favored one. *E.g.*, *E. Edlemann & Co.* v. *FTC*, 239 F.2d 152, 155 (7th Cir. 1956). "It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from nonfavored competitors. Sales are not the sole indicium that reflects the health of the competitive scene." *Id.*[7] Volvo's and the Government's preoccupation

[7] Indeed, the FTC itself (before its recent effective abdication of RPA enforcement) recognized this principle, especially in markets (like the Class 8 truck market) where competition is keen and profit margins are low. *See* 14 Hovenkamp, *supra* ¶ 2333c, at 105 & n.61 ("industrywide low profit margins may add to the inference of injury").

> Respondents contend that competition may not be adversely affected unless a price advantage to a buyer is reflected in the buyer's resale price, thus diverting business from non-favored buyers on the basis of price alone. This contention is not sound. Although there is no evidence in the record of any price-cutting by any of respondent's customers, the Commission and the courts have repeatedly pointed out that a price advantage may be used in many other ways to lessen competition.

American Ball Bearing Co., 57 F.T.C. 1259-60 (1960); *Joseph A. Kaplan & Sons, Inc.*, 63 F.T.C. 1308, 1342-43 (1963); *General Foods Corp.*, 52 with the fact that there was no evidence of price competition between Reeder and the other Volvo dealers in the bidding phase of Reeder's purchase of 102 trucks for resale is thus wholly irrelevant under section 2(a) to proof of a reasonable possibility of competitive injury from discrimination. Volvo's narrow transactional theory of competition offends not only the plain meaning of the RPA as interpreted by this Court, but also the rule that the RPA must be "construed liberally." *Abbott Labs.* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1, 11 (1976).[8]

F.T.C. 798, 821 (1956); *Namsco, Inc.*, 49 F.T.C. 1161, 1161, 1169 (1953) ("Price competition is but one form of competition. Additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, and proximity to customers – all aid respondent's customers to stay in business and to prosper. The institution or expansion of such competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased").

[8] As a factual matter, Volvo's claim that the 102 truck purchases by Reeder involved strictly "interbrand competition" is a false construct and unsupported by the record. First, there was no evidence one way or the other; it was simply not an element of Reeder's proof under section 2(a) to show whether another Volvo dealer was bidding for the same order. Reeder does not know if the customer is seeking bids from another Volvo dealer unless the customer (or the district manager, if he knows) discloses it, and Volvo successfully resisted Reeder's discovery into concession quotes to dealers where there was no sale to that dealer. Second, even if no other Volvo dealer has sought a concession quote at the same time, that does not mean that competition among Volvo dealers has been extinguished as to that transaction. The customer may at any time before purchase decide to turn to a second Volvo dealer – which is exactly what happened in the Hiland Dairy transaction. *Supra* at 14-15. Finally, despite Volvo's insistence that these sales involve "interbrand competition," there was no evidence as to any of the 102 sales that there was a dealer representing another manufacturer actively bidding for the deal. Although a customer may take competitive bids, sometimes the "competition" on a deal may mean nothing more than that the customer is aware of another company's price, or has previously bought from Navistar or Freightliner, and may turn to those companies if he decides against buying the Volvo truck. JA 19, 213. Under Volvo's definition of "competition" as limited to dealers engaged in the active bidding for a specific deal, in the common

C. Customer-Order Industries And Transactions Are Not Exempt From The RPA.

From the foregoing analysis, it should be clear that the distinctions that Volvo and the Government attempt to draw based on the *timing* of the wholesale purchase transaction in the heavy-duty truck industry (where the dealer typically purchases the truck for resale after the customer has placed an order), Petr. Br. 2; U.S. Br. 24, are irrelevant. Nothing in the text, history, or purpose of the RPA supports the distinction that Volvo and the Government would draw. The RPA looks to the "probable future effect" of discrimination on the victim's ongoing competition with favored purchasers in the market, and not solely to competition for a specific customer's business in a single resale transaction.

Their theory would also have the arbitrary effect of creating a blanket exemption from the RPA for all sales in any industry that are not from inventory. The Government is frank that this is the implication of its theory: (1) competition only exists among rivals bidding for a specific customer's order; (2) a dealer can purportedly only establish price discrimination by comparison to such a competitor, U.S. Br. 19-20 ("Because Reeder and the favored dealers were not competing for the same customers when they made their purchases, they were not 'different purchasers' in 'competition' with each other"); (3) where dealers are not attempting to sell to the customer from inventory, only one of those rivals will purchase the good to sell to the customer; (4) thus, there can never be an RPA violation, even where dealers are competing head to head. U.S. Br. 20 & n. 11.

The RPA does not privilege purchases for inventory. Heavy trucks are usually built to order, and not sold from in-

circumstance when a customer is only negotiating with a single Volvo dealer, the Volvo dealer would apparently be a monopolist in a market of one, Pet. App. 27a-28a, with neither intrabrand nor interbrand competition. That just further illustrates the absurdity of the conception of "competition" advanced by Volvo and the Government.

ventory, because it would be prohibitively expensive for dealers to maintain the full product line in inventory. Petr. Br. 2. But application of the RPA does not depend upon the business model an industry adopts. The Act simply requires that the plaintiff show a difference in price charged "between different purchasers of commodities of like grade and quality," and some reasonable possibility of injury to its competition with favored rivals. 15 U.S.C. § 13(a).

There are any number of industries that secure at least some of their retail customers before they make their purchases from suppliers, and it would be arbitrary to exempt all of them from the RPA on the happenstance of inventory economics. For example, furniture dealers, carpet and flooring vendors, and booksellers maintain a limited showroom inventory while offering broader product choices by order from a factory or distributor; the latter wholesale purchases are made only after the customer places its order. Yet it would be fallacious to maintain that they are not in competition with other dealers of the same products in the same geographic market, simply because the customer has not chosen to shop with the other dealers, confer with them about product options, or solicit prices from them in the particular transaction. Even if there is no active competition at the ordering stage of a particular transaction, those businesses compete in the pre-order stages of customer acquisition in their own way just as truck dealers do in their industry, by investing in marketing, advertising, sales staff, and storefronts. Discrimination has the same anticompetitive effect in purchases for order or for inventory. The same is true in business-to-business markets (of which truck dealerships are one kind). A food service company that orders and resells food and beverage products to a business client in performing its contract may have no competition whatsoever in the specific resale transaction. Yet it is still in competition with other vendors in the food services market, and if a supplier engages in substantial price discrimination, the company may be harmed competitively in its market (because it will have less capital to invest in quality service, client acquisition, or competitive pricing on future bids). Not surprisingly, Volvo's theory has been rejected on the rare occasion when it has been raised. *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 137 (9th Cir. 1997) (table), *available at* 1997 WL 175062, at **3; *Industrial Burner Sys., Inc.* v. *Maxon Corp.*, 275 F. Supp. 2d 878, 883 n.15 (E.D. Mich. 2003).

Not only is it absurd to read the Act in a way that exempts industries from its reach on the happenstance of inventory management, but inventory practices are rapidly changing across many industries. With the advent of just-in-time manufacturing and e-commerce, retailers in many industries where there is diversity in customer demand for product features – from automobiles to personal computers to windows to furniture – are minimizing inventories (and the expense and risk that go along with them) in favor of build-to-order business models in which commodities are manufactured only once a customer has ordered them and selected which standardized components it wants.[9] It would be anomalous if entire industries (or competitors within industries) could escape the RPA simply by changing inventory practices. The Act makes no distinctions on the basis of inventory, and Congress did not limit its application solely to traditional patterns akin to the purchase of "commodities . . . for the shelves of the chain store and independent store across the street." U.S. Br.

[9] *See, e.g.*, A. Sharma & P. LaPlaca, *Marketing in the Emerging Era of Build-to-Order Manufacturing*, 34 Indus. Mktg. Mgmt. 476 (2005); *Pyrotechnics In Technology: Retail Industry Top Ten Issues 2004-2005* (2005) *at* http://www.deloitte.com/dtt/article/0,1002,sid%253D2240%2526cid%253D36273.html; D. Neel, *HP Introduces Build-To-Order Program For Consumer Laptops* (2001), *available at* http://archives.cnn.com/2001/TECH/ptech/10/10/hp.laptops.idg; D. Marino-Nachison, *Different Directions In PC Retail* (2001) *available at* http://www.fool.com/news/foolplate/2001/foolplate011008.htm; M. McGee, *Wake Up Call* (2000) (for automobile sales, "GM is moving to online build-to-order," where "its entrenched dealer network will still deliver the vehicles, and provide after-sale services"), *available at* http://www.informationweek.com/804/gegm.htm.

13.[10] "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source." *Sun Oil Co.*, 371 U.S. at 520.

D. The Evidence Amply Supported The Jury Verdict Of Competitive Injury.

Because either significant pricing advantage *or* profit impairment from price discrimination may harm the victim's competition with favored purchasers in the same market, "[i]n *Morton Salt* this Court held that, for the purposes of § 2(a), [the] injury to competition is established . . . by proof of a substantial price discrimination between competing purchasers over time." *Falls City*, 460 U.S. at 435.

Here, the jury was instructed in accordance with *Morton Salt*. JA 480. If this Court rejects Volvo's transactional theory that there was no actual competition susceptible to injury as to the 102 truck sales as a matter of law, then this Court must affirm on the first question presented. The issue of competitive injury becomes one of fact, and Volvo raises no sufficiency challenge under the instructions as given.

The evidence amply supported the jury verdict. Each transaction involved discrimination in favor of other dealers in the Southwest Region. The testimony from both Reeder and Volvo witnesses was that all dealers in the Southwest region competed with each other for sales to the same customers. *Supra* at 7-8. Customers are mobile; there are no physical or trade barriers to selling into other dealer's areas; and dealers like Reeder sold trucks throughout the region. *Id.* at 8; 3 von

[10] Although Volvo did not seek certiorari on the question of whether Reeder's purchases involved "'commodities of like grade and quality,'" and the issue is not before the Court, the Government suggests that built-to-order products are unique and can never meet that standard. U.S. Br. 13 n.7. The determination of "like grade and quality" is based on the features of the final product sold and has nothing to do with whether it is factory-built after purchase. Reeder meticulously limited its proof to indistinguishable deals; often the dealer list price of the trucks compared were the same almost to the dollar. *See, e.g.*, JA 24, 92-93, 131, 143.

Kalinowski, *supra* § 39.02[2]. Other than its transactional theory of competition foreclosure, Petr. Br. 19-20, Volvo does not contest the sufficiency of this evidence on competition within the market, nor does it challenge the sufficiency of the findings that the jury was required to make under *Morton Salt*. Volvo does not contend that the different price concessions on Reeder's purchases of 102 trucks from 1996 to 1998 did not occur "over time" or that the differences in price were not "substantial." See, *e.g.*, *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1039, 1041 (9th Cir. 1987) (holding that price differences over many years of 2.5 cents to 5.75 cents were substantial), *aff'd*, 496 U.S. 543 (1990); 3 von Kalinowski, *supra* § 39.02[3]. Indeed, price discrimination on 55% of Reeder's purchases amounting to $281,965 – which dwarfed Reeder's total annual gross profits on Class 8 sales in any year during that period – is substantial by any measure. JA 473; *supra* at 13. There was testimony that competition was keen and dealer profit margins were thin and compressing, JA 346, 407-08, 418, which strengthens the inference of a reasonable possibility of competitive injury. 14 Hovenkamp, *supra* ¶ 2333c, at 105. Under *Morton Salt*, the jury was entitled to find in favor of Reeder.[11]

E. Arguments That The Jury Was Not Entitled To Draw The *Morton Salt* Inference Are Both Waived And Without Merit.

As an alternative to the no-competition argument, Volvo and the Government claim that the jury was not entitled to draw the *Morton Salt* inference absent a finding of market

[11] Volvo does contend that the *Morton Salt* inference can be "overcome by evidence breaking the causal connection between a price differential and lost sales or profits," *Falls City*, 460 U.S. at 435. But Volvo does not cite *any* evidence that could have wholly extinguished (*id.* at 437) the causal connection between the discrimination and Reeder's lost profits (much less any that compels judgment as a matter of law in its favor). Indeed, Volvo presented none. Volvo's only rejoinder is to once again offer the fallacious claim that the discrimination on Reeder's purchases did not involve intrabrand competition. Petr. Br. 20.

power. Even though it acknowledges that it did not raise this question in its petition for certiorari, Volvo claims that this Court should construe the second clause of section 2(a) to require injury to *intrabrand competition* as a whole (and not injury to the victim's individual competition with rivals), as a complement to the first clause of section 2(a), which requires findings of substantial lessening of *interbrand competition* as a whole. Petr. Br. 38-39. According to Volvo, the second clause of section 2(a) should be construed to prevent discrimination only when discrimination favors "'the very powerful buyer or dealer who is able to force a supplier to behave contrary to its independent best interest.'" *Id.* at 37. In the same vein, the Government contends that the *Morton Salt* inference is not available "unless either the seller has significant market power or the favored purchaser is significant enough to sellers to demand concessions unavailable to others." U.S. Br. 25-26.

First and foremost, this argument is waived. Not only did Volvo not raise it in the petition for certiorari, it did not object to the *Morton Salt* instruction at trial, and never objected to the jury instruction on the ground that the jury may infer competitive injury from substantial discrimination only if the favored purchaser had market power against the seller. Tr. 749-55, 1015-19. Indeed, *Volvo actually proposed a Morton Salt instruction prior to trial*. Resp. App. 1-2. Failure to object to (and, *a fortiori*, proposal of) a jury instruction forecloses relief on any claimed error in the instruction. In *City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257 (1987) (per curiam), the petitioner argued that "a heightened negligence standard does not suffice" for municipal liability under § 1983, but "in the District Court petitioner did not object to the jury instruction stating that gross negligence would suffice, and indeed proposed its own instruction to the same effect." *Id.* at 259 (alteration and omission in original). This Court held that the petitioner had waived this argument and dismissed the writ of certiorari as improvidently granted. *Id.* at 259-60. The Court noted that the waiver in that case had "special force" because "Rule 51 of the Federal Rules of Civil Procedure provides that '[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict.'" *Id.* at 259 (alteration and omission in original). Every word of this analysis applies with equal force to Volvo's failure to object to the *Morton Salt* instruction in this case.[12] This Court sits to review judgments, and the judgment cannot be reversed on this basis. If the *Morton Salt* issue is vital to this case, the Court should (as in *Kibbe*) dismiss the writ as improvidently granted.

Regardless, Volvo's arguments are unsound and would require overruling a slew of this Court's precedents. Volvo tries to wriggle around *Morton Salt* by characterizing as "dicta" this Court's quotation from the Senate Report that "a finding of injury to competition" under the second clause of section 2(a) could be made "by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49 (quoting S. Rep. No. 74-1502, at 4); Petr. Br. at 19-20. But Volvo fails to heed that the *test* that this Court announced based on that analysis – that substantial discrimination over time justifies an inference of competitive injury (without regard to buyer market power or effect on intrabrand competition) – was a holding of *Morton Salt* that has been repeatedly applied by this Court. *See Falls City*, 460 U.S. at 435 ("In *Morton Salt* this Court *held* that . . . [the] injury to competition is established . . . by proof of a substantial price discrimination between competing purchasers over time." (emphasis added)); *Texaco*, 496 U.S. at 559 ("'In *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 46-47 . . . (1948), we held that an injury to competition may be inferred from evidence that

[12] Because Volvo never raised this argument in its petition for certiorari, Reeder could not inform this Court of the waiver in its brief in opposition. As this Court held in *Kibbe*, "[i]t would be unreasonable to require a respondent on pain of waiver to object at the certiorari stage not only to the petitioner's failure to preserve the questions actually presented, but also to his failure to preserve any questions fairly included within the questions presented but uncontested earlier." 480 U.S. at 260.

some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay."'").

Not only does the *Morton Salt* test adopted by this Court permit a violation of section 2(a) to be found by substantial discrimination against the disfavored purchaser over time, without more, but this Court has expressly rejected the claim that the recipient of the discrimination must have buyer power. In *Falls City*, the petitioner argued that "the *Morton Salt* rule should be applied only in cases involving 'large buyer preference or seller predation.'" 460 U.S. at 436. This Court disagreed, noting that "[a]lthough concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act," the text of the Act "'is of general applicability and prohibits discriminations generally.'" *Id*. This Court noted that "[t]he determination whether to alter the scope of the Act must be made by Congress, not this Court." *Id*.

Moreover, Volvo's argument would require overruling *Sun Oil*, which expressly interprets the RPA as ensuring "to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." 371 U.S. at 520. This Court's prior "equality of opportunity" interpretation of the RPA is irreconcilable with Volvo's buyer power thesis. Significantly, in *Sun Oil*, the violation of section 2(a) was a supplier's discrimination in favor of a small retail gas station. This Court refused to relieve Sun Oil from having to prove the affirmative defense of "meeting competition" under section 2(b), even though arguably the discrimination promoted interbrand competition:

> The Act is of general applicability and prohibits discriminations generally, subject only to defenses not based upon size. Competitive ability or business size may properly be a measure of antitrust application in other contexts, but there is no basis for reading such a standard into § 2(b) of this statute.

Id. at 522.

There is no basis for overruling these precedents, especially when Congress has never seen fit to do so despite numerous appeals to undo *Morton Salt* (including from the Executive Branch).[13] "Considerations of *stare decisis* have special force in the area of statutory interpretation," for Congress is always "free to alter" this Court's rulings. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

Even aside from *stare decisis*, this Court's decisions should not be overruled because they are rightly decided. Volvo trumpets the proposition that the RPA should be interpreted to be consistent with other antitrust laws, Petr. Br. 36, but this Court must still give meaning to the unique language in the RPA that is not present in the Sherman and Clayton Acts: namely that the RPA forbids not only price discrimination the effect of which "may be substantially to lessen competition . . . *in* any line of commerce," but also that which may "injure, destroy, or prevent competition *with*" specific persons. 15 U.S.C. § 13(a) (emphases added).

The word "competition" has the same meaning in both the first and second clauses of section 2(a) – it means vying for customers in the same market. *Tampa Elec.*, 365 U.S. at 327; see *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) ("‘"‘identical words used in different parts of the same act are intended to have the same meaning’"’"). But the two clauses protect competition in two different respects. The first protects competition in the market as a whole – "in any line of commerce" – and whether such competition has been "lessened" may indeed be measured by equilibrium output. 1 P. Areeda & H.

[13] *See, e.g.*, White House Task Force Report on Antitrust Policy (Neal Report) (1968) (calling for repeal); DOJ Report (same); S. 1008, 81st Cong. (1950) (legislation to narrow Act that went unenacted); S. 719, 82nd Cong. (1952) (same); S. 11, 84th Cong. (1955) (same); S. 1211, 85th Cong. (1st Sess. 1957) (same). The Government has effectively abandoned enforcement of the RPA because of ideological opposition, 1 T. Banks, *Distribution Law* § 3.01, at 3-3 to 3-4 (2d ed. 2005), and its arguments in favor of restricting the RPA should be considered in that light.

Hovenkamp, *Antitrust Law* ¶ 100a, at 3 (2d ed. 2000). On the other hand, only an individual competitor can be in "competition *with*" another competitor, and thus (as this Court has held) the clause is violated simply "by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49. This straightforward interpretation is consistent with the maxim that the antitrust laws protect "*competition*, not *competitors*." *Brown Shoe*, 370 U.S. at 320. Not every harm to the competitor from price discrimination violates the Act; but if that discrimination may have the "probable *future* effect," *id.* at 332, of harming the disfavored purchaser's "competition with" the favored purchaser, a violation has been proven. "The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition." *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945).[14]

Notwithstanding Volvo's claims, the plain language of section 2(a) simply does not say that only discriminations that

[14] Finding no refuge in this Court's secondary-line cases for its arguments, Volvo turns instead to a primary-line case, *Brooke Group* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). But *Brooke Group* only directly addressed the first clause of § 13(a), not the language at issue here. *See id*. at 229 ("[T]he Robinson-Patman Act . . . prohibits price discrimination 'where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.'"). That language, as this Court itself noted in that case, "was part of the original Clayton Act § 2." *Id*. Moreover, primary line competitive injury (which is direct injury to interbrand competition) "is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act," *id.* at 221, and thus this Court undertook to reconcile the standards for liability under each, *id.* at 222-23. It is unsurprising that every court of appeals to consider Volvo's argument that *Brooke Group* should be applied to secondary-line cases has rejected it. *See George Haug Co.* v. *Rolls Royce Motors Cars Inc.*, 148 F.3d 136, 143 (2d Cir. 1998); *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 658 (9th Cir. 1997); *Coastal Fuels of P.R., Inc.* v. *Caribbean Petroleum Corp.*, 79 F.3d 182, 191-93 (1st Cir. 1996); A. Gavil, *Secondary Line Price Discrimination And The Fate Of Morton Salt: To Save It, Let It Go*, 48 Emory L.J. 1057, 1083 (1999).

injure competition with favored purchasers *with buyer power* are actionable. Volvo attempts to tether its theory to the text of section 2(a) by arguing that secondary-line discrimination is only actionable if there is injury to competition with a purchaser who "knowingly receives the benefit of such discrimination," 15 U.S.C. § 13(a), which Volvo argues necessarily means a purchaser with market power against the seller. Petr. Br. 37. But a competitor can "knowingly" receive the benefit of discrimination without having buyer power against the seller. In any event, as a matter of plain language, Volvo is wrong that a secondary-line violation requires injury to competition with the "knowing[]" beneficiary of discrimination. Injury may be shown to competition with the grantor, the knowing recipient, or "with customers of either of them," 15 U.S.C. § 13(a): *i.e.*, customers of "the grantor or grantee." 80 Cong. Rec. at 9417 (remarks of Rep. Utterback). As the FTC has held,

> [T]he words "customers of either of them" include customers of the person granting the discriminatory price. Under that interpretation, there is thus no requirement that the customer receiving the favorable price be a "knowing" recipient in order for the respondent to be held accountable for its discriminatory actions in charging competing customers higher prices.

Purolator Prods., 65 F.T.C. 8, 41 (1964). Thus, secondary-line competitive injury may be established with regard to either a knowing beneficiary or any customer of the grantor, and tertiary-line competition with any customer of the knowing beneficiary. See *Falls City*, 460 U.S. at 436 (tertiary line competition).[15]

[15] Customers must still receive the benefit of discrimination for there to be competitive injury, but they need not have scienter. The purpose of the scienter requirement is not to limit secondary-line claims, but to limit tertiary-line claims; the RPA only allows a claim for injury at that removed stage if the original beneficiary was a knowing participant in the discrimination. Volvo's unnatural reading of section 2(a) would create the anom-

At the end of the day, Volvo is simply arguing that a narrow liability rule (an action for discrimination against favored purchasers with market power against the seller) better serves the goals of the antitrust laws than the broader one that Congress chose.[16] But it is Congress's prerogative to make a different judgment. Having witnessed the underdeterrence of price discrimination under the Clayton Act because of high evidentiary hurdles, and having established certain statutory defenses to protect pro-competitive price discriminations, Congress was free to establish a bright-line rule against all others that may injure the merchant's competition with favored purchasers, given that "'[o]nly through such injuries, in fact, can the larger general injury result.'" *Morton Salt*, 334 U.S. at 50 n.18 (quoting S. Rep. No. 74-1502, at 4). And Congress was free to fashion the rule to promote political objectives besides strict economic efficiency, such as creating "'equality of opportunity'" for independent businessman. *Sun Oil*, 371 U.S. at 520. There are many forms of economic legislation (workplace safety, environmental, and minimum wage laws are just a few such examples) where Congress

aly that secondary-line plaintiffs would have to prove scienter and/or market power of their rivals, but more distant tertiary-line plaintiffs would not. None of this Court's cases has required scienter to prove secondary-line claims. In all events, Volvo never sought a jury instruction that competitive injury can only be measured against "knowing" beneficiaries, so this issue is likewise not before this Court.

[16] Price discrimination can be inefficient in any given market, depending on the relative shapes of the market's demand, marginal cost, and marginal revenue curves. *See* W. Viscusi et. al, *Economics of Regulation and Antitrust* 286 (3d ed. 2000). This Court has cast doubt on arguments similar to the ones Volvo makes here regarding the efficiency of wholesale price discrimination to meet retail competition. *Sun Oil*, 371 U.S. at 522-23. There are strong reasons to believe that price discrimination of the kind Volvo practices has a negative effect on consumer welfare. *Supra* at 8-9; NADA Br. 25-26. Finally, nothing in the judgment below impairs Volvo's right to refuse to do business with dealers. However, when Volvo binds itself contractually to a self-renewing franchise agreement that it can only terminate for cause, it cannot use price discrimination to manufacture cause so as to drive the dealer out of business.

chooses to pursue such independent goals.[17] This Court has long properly deferred to the expressed intent of Congress:

> The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is 'not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation . . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.'

Jefferson County Pharm. Ass'n v. *Abbott Labs.*, 460 U.S. 150, 170 (1983). This Court in the past has rejected "attempt[s] to amend the Robinson-Patman Act judicially." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 78-79 (1979). This Court should not change course now, especially when the Antitrust Modernization Commission created by Congress is studying RPA issues, including modifying the *Morton Salt* inference and adding buyer power requirements. 70 Fed. Reg. 28902, 28904 (May 19, 2005).

[17] The Government's arguments against permitting the jury to make the standard *Morton Salt* inference (likewise foreclosed by waiver) are even harder to fathom. First, the Government suggests that the *Morton Salt* inference is unavailable absent "concrete evidence of diversion of sales or profits to the favored dealers" and "a direct causal link" between the price discrimination and competitive injury. U.S. Br. 24-25. But the entire point of the *Morton Salt* presumption is to *relieve* a plaintiff of the burden of presenting direct evidence that it actually lost a sale to a competitor. *See, e.g.*, *Falls City*, 460 U.S. at 435, 437-38; 1 ABA, *Antitrust Law Development* 450-51 (4th ed. 1997) (ABA Treatise). Second, the Government oddly claims that the *Morton Salt* inference was not warranted because Reeder had "ample alternative suppliers" and did not show that Volvo "has significant market power." U.S. Br. 25. Seller power is no more an element of an RPA secondary-line claim than is buyer power. *See Falls City*, 460 U.S. at 436. Regardless, Reeder had no franchise agreement with any other Class 8 manufacturer, and no alternative suppliers from which to buy trucks.

II. THE JURY WAS ENTITLED TO FIND REEDER SUFFERED ANTITRUST INJURY FROM VOLVO'S PRICE DISCRIMINATION.

Volvo's second question presented – whether antitrust injury may be based solely on "an unaccepted offer," Petr. Br. (i) – is predicated on its winning the first question on its transactional competition theory, such that its extraordinary discrimination of $281,965 on Reeder's *purchases* of 102 trucks must be excluded from the jury's determination of Reeder's "injur[y] in [its] business or property by reason of anything forbidden in the antitrust laws" under § 4 of the Clayton Act, 15 U.S.C. § 15(a). Petr. Br. 31. Both the premise and the substance of its arguments are unsound.

A. Loss Of Profits And Sales From Anticompetitive Price Discrimination Is Antitrust Injury.

Volvo argues in two short paragraphs of its brief that Reeder failed to make "some showing of actual injury attributable to something the antitrust laws were designed to prevent," *J. Truett Payne*, 451 U.S. at 562, such that the injury "flows from that which makes [the] defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Petr. Br. at 30-31. Volvo misconceives the concept of antitrust injury under *Brunswick*. In *Brunswick*, the plaintiff based his claim of injury on the fact that competitive bowling centers would have failed absent an unlawful merger; it did not allege that any anticompetitive conduct injured it. Rather, it sought antitrust damages simply from "continu[ing] competition" from the bowling centers. *Cargill, Inc.* v. *Monfort of Colo., Inc.*¸ 479 U.S. 104, 109-10 (1986). Unlike the *Brunswick* plaintiff, however, Reeder did not seek recovery for "injury arising from the preservation or enhancement of competition," *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 483 n.19 (1982); rather, it proved actual injury from Volvo's unlawful anticompetitive acts of price discrimination. *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 529 n.19 (1983) (antitrust injury shown if plaintiff is "directly harmed by the defendants' unlawful conduct"). Reeder's evidence of actual profit loss from such discriminations constituted antitrust injury because it "flows from that which makes the defendants' acts unlawful," *Brunswick*, 429 U.S. at 489, and is "precisely "'the type of loss that the claimed violations . . . would be likely to cause."'" *McCready*, 457 U.S. at 479 (quoting *Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969))). Although Reeder additionally presented ample proof to the jury that it was injured in its competition with favored purchasers, that is not a prerequisite of proving antitrust injury; the "plaintiff need not 'prove an actual lessening of competition in order to recover.'" *Id.* at 482 (quoting *Brunswick*, 429 U.S. at 489 n.14); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979) (section 4 satisfied solely by injury from unlawful "anticompetitive conduct").[18]

It is important to note at the outset that Volvo does not challenge the amount of damages awarded by the jury, but, rather only whether Reeder "establish[ed] standing" under § 4 by showing *any actual injury at all*. Petr. Br. 30-31. Moreover, Volvo stakes its entire argument on antitrust injury regarding the 102 truck sales on its no-competition theory. It does not present (and has thus waived) any alternative argument from the evidence that the jury could not infer *any* actual injury from the 102 discriminatory truck sales – and for good reason. The evidence was overwhelming.

This Court has traditionally recognized proof of lost profits and sales as a form of antitrust injury under § 4 in RPA cases, see, *e.g.*, *J. Truett Payne*, 451 U.S. at 565-67; 14 Hovenkamp, *supra* ¶ 2371c3, at 277, and Reeder presented evidence from which the jury could infer that Volvo's price discrimination caused it to lose a great deal of each.

[18] Nor does this case present section 4 issues of "duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed." *Cargill*¸ 479 U.S. at 111 n.6.

On the 102 trucks it purchased for resale at a discriminatory price, Reeder indisputably showed the fact of actual profit loss directly attributable to Volvo's anticompetitive discrimination in violation of the act.[19] Second, Reeder put on the classic proof that this Court has recognized as showing antitrust injury under the RPA: the loss of sales and profits "on the basis of plaintiff's estimate of sales it could have made absent the violation." *J. Truett Payne*, 451 U.S. at 565. Reeder showed that during the period of the discrimination, its sales and profits declined dramatically – both in absolute terms and as against a baseline of sales objectives that Volvo set and conceded was a "reasonably" achievable target. *E.g.*, JA 324. For example, Reeder's sales declined from 72 trucks in 1995 to only 8 trucks in 2000, causing Reeder to miss its objectives by between 23 and 67 trucks in the years during that period. JA 473-74. Its gross profits ($181,166 in 1995)

[19] In *J. Truett Payne*, this Court held that a plaintiff is not entitled to "'automatic damages' in the amount of the price discrimination" merely "upon a showing of the violation of § 2(a)," since actual injury is not an element of section (2)(a), and thus "proof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4." 451 U.S. at 561-63. In many instances, a retailer will not suffer actual profit loss from price discrimination: for example, where the retailer prices goods at a fixed margin above wholesale price, or where the price charged to the victim is the legally required price, *see, e.g., Davis* v. *Portland Seed Co.*, 264 U.S. 403, 418-21 (1924). Here, however, Reeder seeks a concession quote based on the anticipated price its customer will pay, and then after the discrimination, negotiates and resells the trucks at the final resale price with the customer. Because there is a negotiated price after the concession is granted, the jury in determining fact of injury could find that Reeder suffered some actual loss of profit by reason of the higher cost of goods attributable to Volvo's discrimination. As noted above, Reeder need only prove some injury to "business or property" attributable to unlawful anticompetitive conduct, 15 U.S.C. § 15(a), not "'an actual lessening of competition in order to recover.'" *McCready*, 457 U.S. at 482 (quoting *Brunswick*, 429 U.S at 489 n.14); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) ("burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy").

sank to $26,327 in 2000, and its average gross profit margin was worse than competing Volvo dealers. *Id.*

"In light of [the] traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury," this Court has held that a jury may infer from a decline in sales and profits during the period of the discrimination that the decline was caused by the discrimination:

> "[D]amages issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure the plaintiffs' business, and from the evidence of the decline in prices, profits, and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'"

J. Truett Payne, 451 U.S. at 565-66 (alteration in original).

Given Volvo's liability under § 2(a), there is no question that Volvo committed "wrongful acts" in this case. Moreover, the jury could infer that Volvo's discrimination had a "tendency to injure plaintiffs' business." The jury was entitled to find that the discrimination furthered the "Volvo Vision" of eliminating its smaller dealers from its dealer force, and anticompetitive tendency may be inferred from the anticompetitive purpose of the wrongdoer. *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The jury had also heard ample evidence of the conditions for competitive success in selling Volvo trucks, *supra* at 6-7; it could infer that the sales and profit loss were at least in part attributable to the massive discrimination that diminished Reeder's reputation for competitiveness, its ability to compete for sales by sacrificing margin for certain desirable customers, and its ability to create and maintain customer relationships by investing in sales forces, advertising, marketing and service. *E.g.,* Tr.

791, 795, 828-32 ("On a class eight sale most of the time you've got to go to the customer," and Reeder lost salesmen during the period). The discrimination also enabled Volvo to issue a termination letter in 1999 (enmeshing Reeder in a legal battle to save its franchise) and thereby in 2000 strike Reeder from the dealer directory that Volvo publishes to customers. JA 253-54. In a boom market where Volvo is operating at full capacity, Reeder's sales declined to single digits from 1996 to 2000 at the same time when "favored dealer's sales and overall market sales stayed strong"; the jury could readily find that the sales Reeder would have made were diverted to favored Volvo dealers. Pet. App. 16a; CA8 JA 0577-79 (sealed volume) (detailing individual dealer sales, and showing strong sales by favored dealers).

Volvo argued to the jury that other causes contributed to the decline in Reeder's sales and profits, but the jury was not required to accept Volvo's alternative explanations. Indeed, that evidence – that Reeder lost its major customer and did not put sufficient effort into sales, JA 483 – was directly refuted by the extraordinary amount of potential deals Reeder quoted in the relevant time period (which at Volvo's average regional yield rates should have resulted in hundreds of sales). *Supra* at 12. Volvo does not argue – because it cannot – that its evidence of alternative explanations was so compelling that no reasonable jury could have rejected it. Indeed, even if other causes had played a role in Reeder's decline, Reeder could still establish actual injury so long as the jury could have reasonably concluded – as it was instructed (JA 483) – that Volvo's discrimination was simply *one* material cause of the decline. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); ABA Treatise at 489. This Court does not sit to second-guess the jury on these points. "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969).

B. The Jury Could Consider Discrimination That Prevented Reeder From Purchasing Trucks.

Volvo also argues that it was improper for the jury to consider evidence of discrimination which did not result in a sale in evaluating the fact of injury because allegedly Reeder was not a "purchaser" in relation to those transactions. Petr. Br. 29-31. As an initial matter, Volvo's transactional, on-and-off definition of the term "purchaser" was rejected long ago by this Court. In *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726 (1945), a petitioner sought to defend against an FTC judgment under section 2(e) of the Clayton Act, which bars discrimination "in favor of one purchaser against another purchaser" by "contributing to the furnishing of . . . services . . . upon terms not accorded to all purchasers," 15 U.S.C. § 13(e). It argued that the alleged discriminatory advertising allowances were not actionable because they were not part of a transaction in which "the Curtiss Candy Company [w]as a 'purchaser.'" *Corn Prods*., 324 U.S. at 743. This Court disagreed, holding that the discrimination was actionable because "during the period in question the Curtiss Company was in fact a purchaser of petitioners' commodity." *Id.* The term "purchaser" has the same meaning in the Clayton Act and the RPA. *Jefferson County*, 460 U.S. at 155 n.11; *see also* 15 U.S.C. § 13(b) (defenses for "purchaser" common to both claims). It is quixotic for Volvo to claim that Reeder, whose exclusive business as a Class 8 vendor was to purchase and resell Volvo trucks, was not a purchaser during this period of continual purchases. See also 80 Cong. Rec. at 9418 (remarks of Rep. Utterback) (the Act does not permit a supplier, "once he has accepted the customer, to refuse discriminatorily to sell to him . . . [commodities] which the seller has set aside for exclusive sale at more favorable prices to selected customers in evasion of the purposes of this bill").

Volvo's "purchaser" arguments are in any event a red herring. The Eighth Circuit rejected the proposition that a mere offer to purchase was actionable. Pet. App. 9a. Reeder did not have to rely on "mere offers" to establish actionable discrimination, and the jury did not find discrimination on that basis. *Id.* at 37a. Moreover, Reeder disclaimed that it was seeking damages for each of the discriminations. JA 283. But, as the Eighth Circuit held, that does not mean that these discriminations were excluded from consideration of antitrust injury in fact, which was also independently established as flowing from the 102 discriminatory truck sales. Pet. App. 17a. The evidence showed that even beyond the 102 truck sales Volvo engaged in systematic discrimination to cause Reeder to miss its sales objectives in order to terminate the franchise, and refuted Volvo's claim that the precipitous decline in Reeder's sales and profits from 1996 to 2000 were caused by its own alleged failings and bad luck rather than Volvo's violations of the Act.

Moreover, not only was the jury free to credit all such evidence in weighing the causes of antitrust injury and damages, but there were also a number of transactions that the jury was entitled to treat as purchases where Volvo's unlawful conduct prevented the purchase. This would not be true of every discriminatory price quote because the customer may have decided to purchase a different manufacturer's trucks regardless of the discrimination. However, price discrimination against a purchaser is actionable even in the absence of an actual purchase if the purchaser's "failure to [make the specific purchase] was directly attributable to defendant's own discriminatory practice." *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir. 1951); Rowe, *supra* § 4.1, at 48; *En Vogue* v. *UK Optical, Ltd.*, 843 F. Supp. 838 (E.D.N.Y. 1994) (discrimination in context of contractual relationship that requires purchases actionable). Any other rule would reward the wrongdoer for his wrong, and create the anomaly that anticompetitive price discrimination is actionable except when it is prohibitive.

In this case, constructive purchases were proved in those additional transactions where the retail customer had already agreed to buy Volvo trucks at a given price. Thus, Reeder proved that it would have sold ten trucks at the $70,000 price it had negotiated with a customer (Danmarr) if Volvo had not discriminated on the concession. JA 19-26. In another deal, Reeder had placed an order purchasing six trucks for resale to Lane Freight. Two months later, Reeder asked Volvo for the same concession on four trucks Lane Freight wished to add to the order. Volvo instead *raised it wholesale price* by reducing the concession (despite granting better concessions to others), forcing Reeder to raise the retail price for the add-on trucks. This not only cost Reeder the sales and profits on this order, but damaged the relationship and caused Lane Freight not to purchase Volvo trucks from Reeder in the future. JA 139-41. Surely Reeder was a purchaser in this transaction; Volvo's discrimination affected only the *size* of the purchase. Finally, in the Hiland Dairy case, Reeder was competing directly with another Volvo dealer, the customer had agreed to purchase the Volvo trucks at a specific price, and Volvo diverted the sale to the favored dealer by granting a discriminatory concession. *Supra* at 14-15. There could be no starker example of price discrimination as a weapon to injure a dealer competitively. The RPA does not permit Volvo to deny its dealers "equal competitive footing so far as price is concerned." *Sun Oil*, 371 U.S. at 520.

Thus, Volvo's arguments on antitrust injury and causation, predicated on its unsound transactional competition theory, fall apart. The jury heard overwhelming evidence that Reeder lost sales and profits and suffered actual and competitive injury as Volvo aggressively pursued its plan to drive Reeder out of competition for Volvo truck sales.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

DEFENDANT'S PROPOSED INSTRUCTION NO. _______

(Competitive Injury)

Plaintiff is also required to show that there is a reasonable possibility that the alleged price discrimination may harm competition. Plaintiff is not required to prove that the alleged price difference actually harmed competition.

To establish a reasonably possibility of harm to competition, plaintiff may prove a substantial difference in price between sales by defendant to plaintiff and sales by defendant to other competing purchasers over a significant period of time. This proof of a reasonable possibility of harm to competition can be overcome or rebutted if you find that defendant proved that any lost sales or profits were not caused by the price differential but were caused by some other factor or factors. Defendant claims that any loss of sales or profits by plaintiff resulted from things such as plaintiff's poor business practices, plaintiff's lack of effort to sell to customers other than large fleet customers, the disappearance of plaintiff's key customer, etc. If, however, you find that plaintiff actually lost some sales as a result of the alleged price discrimination, then harm to competition has been established to that extent. However, you are also instructed that it is not sufficient for plaintiff to show only loss of sales or other individual injury without also demonstrating a reasonable possibility of lessening of competition in the marketplace generally.

Also, you may consider whether Defendant's method of providing pricing to its dealers tends to promote, rather than inhibit, competition. Pricing methods such as discounts to new customers may well have the effect of increasing competition rather than decreasing it. Furthermore, defendant may defend against plaintiff's claim by showing that a lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.

If after considering the foregoing matters, you find that there is a reasonable possibility that defendant's alleged discriminatory pricing may harm competition, then you must find that plaintiff has established this element of its Robinson-Patman Act claim. If you find that there is not a reasonable possibility that the alleged discrimination may have such an effect or that defendant's method of pricing does not lessen competition or actually promotes competition, then you must find that defendant did not violate Section 2(a) and you must therefore find for defendant and against plaintiff on this claim.