

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
DISCUSSION	3
A. Kodak Has Not Been Trying To Gain Market Share By Underselling Fujifilm	3
1. Manufacturer's suggested retail prices	3
2. Kodak's export AUVs.....	6
3. Statements by Kodak officials	8
4. No evidence of concerted refusal to reduce retail prices	9
a. Kodak Japan "exit prices"	10
b. "Retailer B"	12
B. Price Competition Exists Throughout Japan	13
1. Price competition in urban areas	14
2. ISO 400 and multipacks.....	14
3. Discounting relative to MSRPs	16
4. Discounting relative to Fujifilm	18
C. Kodak's "Evidence" Of Price Collusion Does Not Support Its Allegations.....	19
1. Fujifilm's review of articles cited by Kodak is comprehensive	21
a. Omitted articles.....	21
b. Articles reviewed by Fujifilm.....	23
2. Most of the articles cited by Kodak are irrelevant.....	24
a. Photofinishing	24
b. Articles prior to 1980.....	26

3. Fujifilm's application of U.S. and Japanese legal standards is appropriate 27

4. Kodak's new "evidence" does not support its allegations of price collusion28

CONCLUSION 30

INTRODUCTION

In a submission dated April 16, 1996, Kodak expands on its claims that vertical and horizontal price collusion are impeding its ability to gain market share in the Japanese color film and paper markets. Specifically, Kodak attempts to rebut the countervailing evidence supplied by Fujifilm in its March 28, 1996 submission.

In that submission, Fujifilm responded to Kodak's allegations of price fixing with the following three major points:

- Price fixing is actionable under Section 301 only if it burdens or restricts U.S. exports. Although Kodak originally had no theory for how price fixing could impede its access to the Japanese market, it eventually came up with the argument that collusively set excessive markups on Kodak products at the retail level were preventing Kodak from gaining market share by underselling Fujifilm. However, the available data -- including Kodak's own suggested retail prices, the average unit values of Kodak's exports, and repeated public statements by Kodak officials -- show that Kodak has not been attempting to gain market share by underselling Fujifilm. Accordingly, price fixing -- even assuming it existed -- could not be harmful to Kodak.
- Actual conditions in the Japanese marketplace are inconsistent with the existence of the massive price fixing conspiracy alleged by Kodak. Low-priced film is widely available throughout Japan. In particular, low-priced multipacks now constitute some 40 percent of total film sales. Also, private and dual brand film at rock bottom prices are available in over 10,000 outlets in every prefecture of Japan. Both Fujifilm and Kodak are sold at steep discounts off of manufacturer's suggested retail prices, and Kodak is widely available at a discount relative to Fujifilm. These facts show that price competition is alive and well all over Japan.
- Kodak's main "evidence" of price collusion -- trade press articles that describe various industry group meetings -- does not support its allegations. Most of the articles cited by Kodak are irrelevant: they are either so old as to lack any current probative value, or they pertain to other products besides color film and paper. Of the remaining articles, none documents any actions or threats by Fujifilm to enforce resale prices, or any actual agreement by retailers on price levels. On the contrary, the articles cited by Kodak repeatedly document the absence of any collusive control over prices.

In its latest submission, Kodak takes various potshots at Fujifilm's arguments and evidence, and adds new arguments and evidence of its own. When claims and counterclaims are

sorted out, and conflicting data are sifted through, the three fundamental critiques of Kodak's price fixing allegations still hold. At least until very recently, Kodak has not been trying to gain market share in Japan by underselling Fujifilm. The widespread availability of low-priced film demonstrates conclusively that there is no master plan to fix prices at artificially high levels. And most of Fujifilm's analysis of Kodak's "evidence" has gone completely unchallenged. Accordingly, with respect to its price fixing charges, Kodak has failed to demonstrate "systematic anticompetitive activities" whose toleration would be actionable under Section 301.

DISCUSSION

A. Kodak Has Not Been Trying To Gain Market Share By Underselling Fujifilm

In its March 28, 1996 submission, Fujifilm showed that Kodak's manufacturer's suggested retail prices ("MSRPs"), export average unit values, and public statements all demonstrated its sustained lack of interest in gaining market share through underselling. In addition, Fujifilm pointed out that Kodak had not provided any real-life examples of retailers that had systematically refused to pass through Kodak's wholesale discounts in the form of lower retail prices.

Kodak's new submission responds to each of Fujifilm's points. We offer a point-by-point analysis of Kodak's response below.

1. Manufacturer's suggested retail prices

In its March 28, 1996 submission, Fujifilm revealed that Kodak's MSRPs for film have been generally identical to Fujifilm's for the past 10 years.¹ In other words, Kodak has been telling retailers for the past decade that it would like them to charge exactly the same price for Kodak as for Fujifilm.² This fact directly undermines Kodak's claim that it has been trying -- unsuccessfully -- to underprice Fujifilm.

Kodak responds that its MSRPs are not what they say they are -- i.e., they are not actually suggested retail prices. Instead, according to Kodak, they are "statements of quality" and

¹ See Fujifilm's March 28, 1996 submission at 7-8.

² Actually, in 1986 and 1987, Kodak's MSRP for ISO 400 film was higher than Fujifilm's. See id.

"benchmarks for discounts."³ Kodak maintains that it sets its MSRPs identical to Fujifilm's to convey to retailers that "Kodak film is just as good as Fuji film."⁴ To reduce its MSRPs, according to this line of argument, would "devalue the Kodak brand in the eyes of retailers and consumers."⁵

Kodak's current position on the significance of MSRPs raises more questions than it answers. Why does a lower MSRP suggest inferior quality to the retail trade, but not a lower wholesale price? Why does a lower MSRP suggest inferior quality to consumers, but not a lower retail price -- especially when consumers may not even be aware of the MSRP, but are certainly aware of the retail price?

Furthermore, if MSRPs are supposed to be irrelevant to pricing, why did Kodak abandon MSRPs for its Super Gold film as of March 1, 1996?⁶ A news report of Kodak's decision is particularly interesting in this regard:

Kodak announced on the 15th that it would abolish the MSRPs and introduce open pricing for some of its color photographic negative films on March 1. This decision was made reflecting the market situation that discounts at the retail level are so fierce and MSRPs have become meaningless. Among film manufacturers, Fuji Photo Film has already introduced open pricing for its multipack film since last December and Konica will follow suit. Kodak is now attempting to counter its competitors with open pricing. . . . Especially, retail prices of Kodak films have deteriorated more than other brands. Such a situation caused Kodak to decide to abolish the MSRPs and introduce open pricing for major products.⁷

³ Kodak's April 16, 1996 submission at 10.

⁴ Id.

⁵ Id.

⁶ See Fujifilm's March 28, 1996 submission at 21, n. 32.

⁷ Nihon Keizai Shimbun, February 16, 1996 (emphasis added).

This report makes clear that, contrary to Kodak's current position in this case, MSRPs do reflect Kodak's pricing policy, and changes in MSRPs are interpreted as competitive moves.

In addition, Kodak's current position is inconsistent with its own past statements. As reported in Fujifilm's March 28, 1996 submission, in 1987 Zenren members asked Kodak to reduce its prices to reflect the appreciation of the yen, and Kodak refused.⁸ Specifically, the Zenren members requested a reduction in MSRPs. In explaining Kodak's refusal, the Kodak officials said nothing about MSRPs as a symbol of quality; they said nothing about how reducing Kodak's MSRPs would be an admission that Kodak was inferior. Instead, Kodak-Nagase President Sawada said "I wonder if the demand grows if we lower the price," while Kodak Japan President Sieg said that "[c]ompared with cameras, the film price in Japan is too low."⁹ In other words, the published statements of Kodak officials make clear that Kodak's MSRPs do reflect its pricing policy.¹⁰

In light of the above, it is clear that Kodak's MSRPs are an important indicator of how aggressively priced it wants its products to be. The fact that MSRPs were set identical to Fujifilm's for a decade shows that Kodak has not been serious about trying to gain market share by underselling.

2. Kodak's export AUVs

⁸ See Fujifilm's March 28, 1996 submission at 12.

⁹ Id.

¹⁰ In addition, note that in a previous submission Kodak characterized MSRPs as recommended retail prices, not as "statements of quality" or "benchmarks for discounts." See "Privatizing Protection" at 49.

In its March 28, 1996 submission, Fujifilm showed that between 1985 and 1994, Kodak failed to pass through the full competitive advantage offered by the sharp appreciation of the yen. Specifically, the data show that the dollar-denominated per-roll AUV for Kodak film rose from \$1.22 to \$1.52 over that period.¹¹ Furthermore, the data show that within that decade, there were two sustained periods in which dollar-denominated AUVs rose sharply: 1985-1988 (a 27 percent increase) and 1990-1994 (a 32 percent increase).¹² These figures are flatly inconsistent with any kind of sustained effort by Kodak to price aggressively in the Japanese market.

Kodak does not contradict any of these facts in its April 16, 1996 submission.

Instead, it just focuses on different time periods. In particular, Kodak points out that in 1995 the AUV drop was sufficiently large to accomplish a more than complete pass-through of the cumulative yen appreciation over the 1985-1995 period. Kodak neglects to mention that Fujifilm recognized this fact in its submission, noting that the 1995 dollar-denominated AUV was lower than that for 1985. Specifically, Fujifilm commented: "Import statistics for 1995 show that Kodak may have decided to price more aggressively just as it filed its Section 301 petition."¹³

None of this, however, contradicts that fact that for the previous ten years, Kodak's AUVs failed to pass through the full extent of yen appreciation. In other words, Kodak's U.S.

¹¹ See Fujifilm's March 28, 1996 submission at Figure 2. Note that changes in dollar-denominated AUVs indicate the degree to which yen appreciation was passed through. A constant dollar-denominated AUV indicates 100 percent pass-through, a rising dollar-denominated AUV indicates less than complete pass-through, and a falling dollar-denominated AUV indicates more than complete pass-through. The fact that Kodak's dollar-denominated AUVs experienced a net increase between 1985 and 1994 indicates a failure to pass through all of the competitive benefits of the yen appreciation.

¹² See Fujifilm's March 28, 1996 submission at 9-10.

¹³ Fujifilm's March 28, 1996 submission at 10, n. 9.

headquarters were insufficiently committed to the Japanese market even to hold their unit sales revenues (which are in dollars) constant, much less actually cut them.

Kodak also stresses that a sharp AUV drop in 1989, followed by another small drop in 1990, resulted in a more than complete pass-through of yen appreciation from 1985 to 1990.¹⁴ Again, the data presented by Fujifilm show the same thing.¹⁵ One brief period of reduced prices hardly amounts to a sustained competitive challenge, though. After all, it took Kodak four years to reflect the first major burst of yen appreciation in its export prices; as the yen began appreciating again in 1990, it took Kodak five years to catch up again. In the meantime, Kodak kept the profits generated by the yen's appreciation rather than passing them on to Japanese consumers. This is not the record of a company committed to gaining market share by underselling the competition.

Finally, it should be noted that Fujifilm, in its March 28, 1996 submission, was making the limited point that the trends in Kodak's export AUVs are inconsistent with Kodak's claimed desire to gain market share through underselling. Fujifilm never claimed, nor does it now accept, that those export AUVs are in themselves a reliable indicator of Kodak's actual pricing in Japan. In the first place, those AUV figures are broad aggregates, and so the trends may simply reflect changes in product mix rather than changes in actual unit prices. Second, export AUV figures do not necessarily reflect the trends in prices to retailers -- which are the only prices relevant to judging the extent of Kodak's underselling of Fujifilm. This is particularly true in Kodak's case, since those export AUVs are transfer prices for transactions between related Kodak entities, not actual arm's-length market prices.

¹⁴ See Kodak's April 16, 1996 submission at 8.

¹⁵ See Fujifilm's March 28, 1996 submission at Figure 2.

3. Statements by Kodak officials

In its March 28, 1996 submission, Fujifilm highlighted the repeated statements by Kodak officials over the past decade that Kodak was not interested in trying to gain market share by underselling Fujifilm. Significantly, Kodak's response does not even try to deny those statements -- it simply ignores them and hopes they will go away. They will not.

To reiterate: published reports from 1986, 1987, and 1993 quote Kodak officials refusing to reduce prices in Japan. In 1986, a report stated that "[t]he President [then Kodak chairman Kay Whitmore] ruled out the possibility of the company passing on exchange rate gains from the yen's appreciation against the U.S. dollar to Japanese consumers, in the form of lower product prices." In 1987, Kodak Japan President Albert Sieg denied a Zenren request to reduce prices by saying that "[c]ompared with cameras, the film price in Japan is too low." And in 1993, an unnamed Kodak Japan official stated: "If we sell in Japan at prices lower than these, the products will be re-imported to the U.S. and other countries, and Kodak's international price system will fall apart." That last report concluded: "Fuji Film can rest assured that, with Kodak's current price strategy, it will be able to maintain its domestic prices."¹⁶

Furthermore, even after the Section 301 petition was filed, Kodak representatives continued to concede that Kodak has not been using price as a competitive weapon. Consider the following statements:

[Kodak lawyer Alan] Wolff defended Kodak for not trying to steal market share by undercutting Fuji's prices, saying, "Price competition is just not relevant if you can't get through the door."¹⁷

¹⁶ Fujifilm's March 28, 1996 submission at 11-13.

¹⁷ Dow Jones/Japanese Economic News, July 26, 1995.

Asked . . . whether Kodak, by lowering the price of its film in Japan, could have gained greater market share . . ., Mr. [Ira] Wolf once replied that even if the price of a roll of film were lowered to one yen, the lack of distribution would prevent any significant increase in film sales.¹⁸

Thus, earlier in this investigation Kodak representatives admitted that price competition was an irrelevant issue in this case. Only after Kodak's "distribution bottleneck" theory was systematically refuted did Kodak begin focusing on its alleged attempts to compete with Fujifilm on the basis of price.

In its most recent submission, Kodak does not even attempt to rebut its own prior statements. The explanation for this omission is simple: those prior statements are unanswerable. They show conclusively that Kodak has not been trying to gain market share in Japan by underselling Fujifilm. Accordingly, they show that price fixing -- even assuming it existed -- could not have burdened or restricted Kodak's exports.

4. No evidence of concerted refusal to reduce retail prices

In its March 28, 1996 submission, Fujifilm showed that Kodak concocted its theory of how price collusion impedes its exports -- i.e., by preventing low Kodak wholesale prices from being passed through to consumers in the form of low retail prices -- without providing any evidentiary support. Specifically, Kodak had not provided any real-life examples of actual retailers that refused to pass along wholesale-level discounts to consumers by reducing retail prices.¹⁹

¹⁸ Photofinishing News Letter, August 21, 1995, at 4.

¹⁹ See id. at 14-17.

Kodak's April 16, 1996 submission has now put forward some "evidence" to support its theory. A review of that "evidence," though, shows that it does not prove what Kodak would like it to. Contrary to Kodak's claims, retailers in Japan set their prices competitively according to their independent business judgment. Kodak's problem is that it has not been offering sufficiently attractive wholesale prices.²⁰

a. Kodak Japan "exit prices"

First, Kodak presents indices of Kodak Japan "exit" prices indicating a 20-30 percent drop in wholesale prices between 1992 and 1995.²¹ Kodak then assumes that these wholesale price declines were not matched by corresponding retail price drops. This, according to Kodak, is "proof" that some collusive activity is blocking price competition at the retail level.

This piece of Kodak "evidence" is full of holes. We assume that the price indices include both single packs and multipacks. Given that the percentage of Fuji brand film sold in multipack form has grown dramatically over this same period,²² we think it reasonable to assume that Kodak has had a similar experience. Since multipacks have substantially lower per-roll prices than single packs, the apparent wholesale price decline could in part be attributable merely to a shift in product mix toward multipack sales.²³

²⁰ See Fujifilm's March 28, 1996 submission at 16-17.

²¹ See Kodak's April 16, 1996 submission at Figure 2.

²² See Fujifilm's February 7, 1996 submission at 52.

²³ Furthermore, Kodak does not reveal whether these indices refer to weighted-average overall prices or simply to prices at (carefully) selected outlets. Also, it is not clear whether rebates have been factored into the Kodak Japan price indices. Prices should be net of all rebates to present an accurate picture of Kodak Japan's actual pricing policy. If the price indices are not true net prices, the trends presented may not be reliable.

Furthermore, Kodak's assumption that retail prices for its products have not dropped substantially is entirely unsubstantiated. Kodak has never provided any time series data on Kodak retail prices.

Figure 1 presents quarterly Kodak retail prices from December 1993 to December 1995, based on the monthly survey of 32 Tokyo- and Osaka-area outlets by Nippon Research Center Ltd. These data show that Kodak single pack prices have dropped between 4 percent (ISO 400) and 7 percent (ISO 100) over the period, while multipack prices have dropped between 17 percent (ISO 100) and 22 percent (ISO 400).²⁴ When a rising percentage of multipack sales in Kodak's overall product mix is factored in, it is clear that overall per-roll Kodak retail prices in the Tokyo and Osaka areas have dropped substantially in recent years. And since Kodak itself admits that its sales are concentrated in major cities, we believe these data are representative of overall Kodak retail price trends.²⁵ Accordingly, the Kodak Japan "exit" price indices do not substantiate Kodak's conspiracy theories.

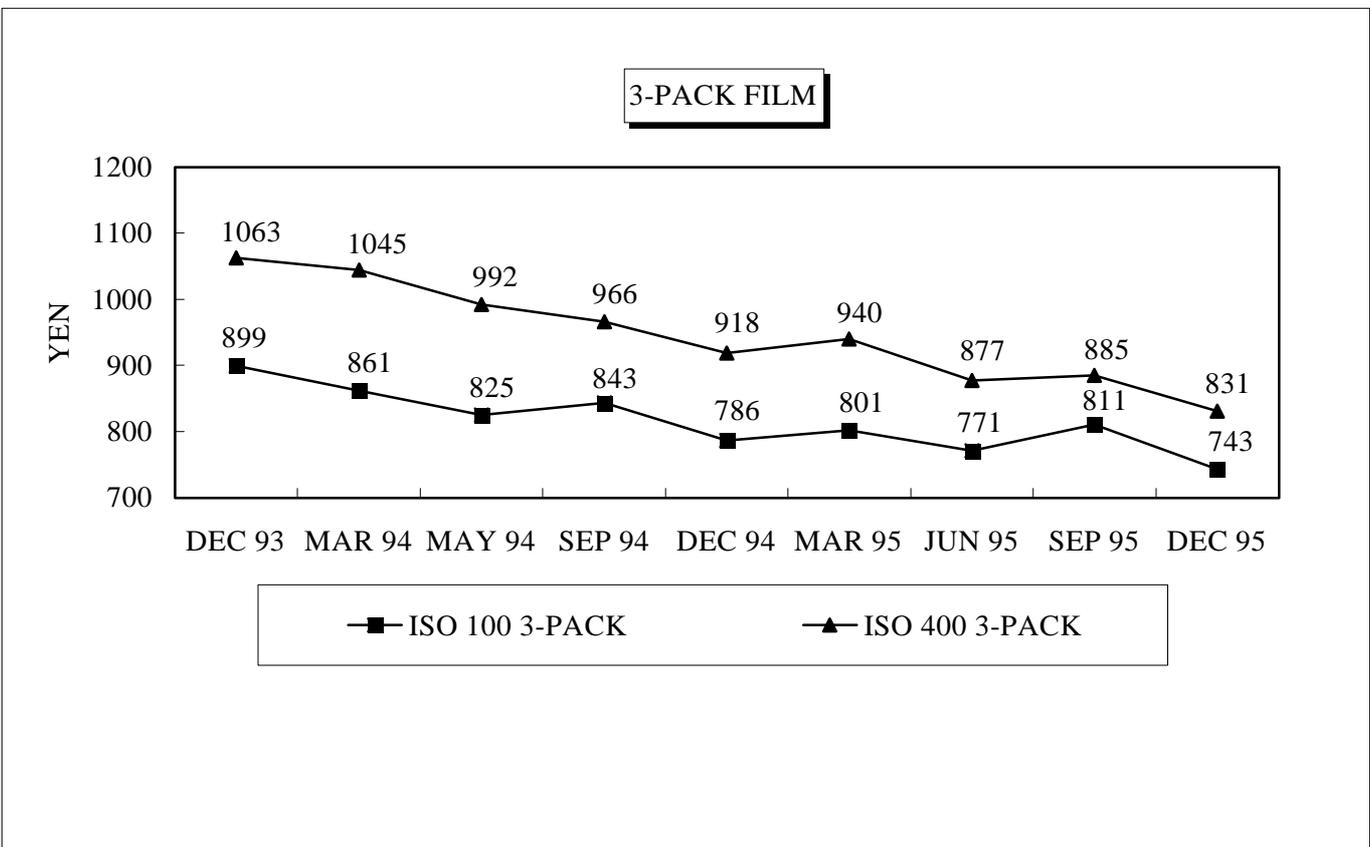
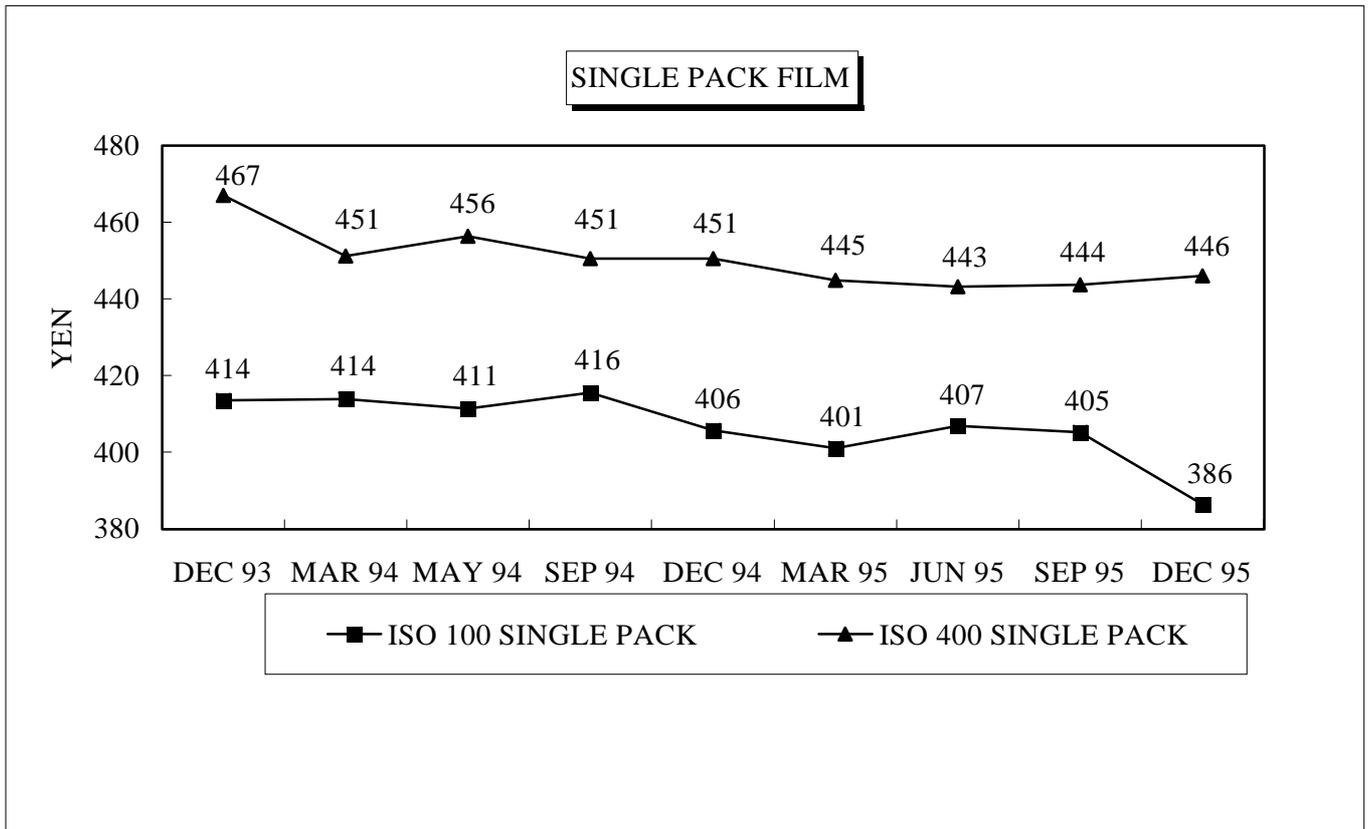
b. "Retailer B"

As further "evidence," Kodak presents 1994 wholesale and retail prices for two retail chains, labeled only "Retailer A" and "Retailer B." For "independent" Retailer A, wholesale price

²⁴ From January 1992 to December 1995 (the period covered by Figure 2 of Kodak's April 16, 1996 submission), Kodak single pack prices dropped between 3 percent (ISO 400) and 4 percent (ISO 100), and multipack prices dropped between 21 percent (ISO 100) and 29 percent (ISO 400). Figure 1 shows a shorter period because the survey was not conducted during the period May 1992 - April 1993.

²⁵ The data provided here are certainly more representative of overall Kodak retail price trends than the data provided by Kodak: namely, government survey data on Fujifilm and Konica prices of one product (ISO 100 single packs).

FIGURE 1



SOURCE: Nippon Research

declines from Kodak Japan are matched by falling retail prices; for "constrained" Retailer B, however, retail prices hold steady over the year despite wide fluctuations in wholesale prices.²⁶

The paucity of Kodak's "evidence" is striking. Not only does Kodak fail to identify Retailers A and B, but it also fails to indicate the (undoubtedly small) percentage of the total market accounted for by these two retailers. There is absolutely no reason to think that these retailers' pricing patterns are in any way representative.

With regard to Retailer B, one retailer does not a conspiracy make. Moreover, photo shops tend to set their prices based on what their competitors -- generally, other nearby photo shops -- are doing. If Retailer B's competitors were not offering lower prices for Kodak film (because Kodak was not offering lower prices to them), Retailer B would feel no competitive pressure to lower its prices. It might very well decide that, in the absence of such competitive pressure, any extra Kodak sales generated by cutting its retail prices would not offset the reduction in unit revenues. Finally, note that Kodak Japan's wholesale prices to Retailer B were highly erratic, subject to sharp drops and increases. It is unsurprising that a retailer would shy away from committing to a price reduction in the face of such unpredictable movements in wholesale prices.²⁷ In sum, if the isolated example of Retailer B is the best Kodak can do to prove its case, then Kodak's best is not nearly good enough.

B. Price Competition Exists Throughout Japan

²⁶ See Kodak's April 16, 1996 submission at Figures 3 and 4.

²⁷ Recall that Kodak has required four to five years to adjust its export prices to exchange rate shifts. By contrast, Kodak apparently expects retailers to fine-tune their prices monthly in response to the erratic jumps and dips in Kodak wholesale prices.

In its March 28, 1996 submission, Fujifilm reviewed the price data that show widespread price competition in the Japanese market. Kodak counters by attempting to poke holes in the data presented by Fujifilm, and by presenting apparently conflicting data of its own. Neither strategy works. The facts simply do not support Kodak's allegations of massive and widespread price collusion.

1. Price competition in urban areas

In its April 16, 1996 submission, Kodak again admits that its allegations do not apply to urban Japan: "Kodak has never alleged that its film is not available in major cities or that there is no competition in larger cities."²⁸ What Kodak fails to face up to, however, is how seriously this admission undermines its overall case. After all, Japan is a highly urbanized country: if Kodak's charges do not apply to the cities, they do not apply to the bulk of the film market.

Fujifilm has estimated that nearly 70 percent of total film sales in Japan occur in urban areas -- i.e., areas with a population density of 4,000 or more people per square kilometer.²⁹ Significantly, Kodak has not challenged this estimate. In these urban areas, one would fully expect there to be -- just like in Tokyo and Osaka -- outlets of large supermarkets and mass-merchandise chains whose economies of scale and marketing strategies allow them to sell film at low prices. These outlets, in turn, impose competitive discipline on the photo specialty stores, limiting the premium they can charge for their expertise and superior service. Thus, by apparently conceding that prices are competitive in urban areas, Kodak has conceded that its allegations of anticompetitive activity do not apply to some 70 percent of the film market.

²⁸ Id. at 13.

²⁹ See Fujifilm's February 7, 1996 submission at 49-50.

2. ISO 400 and multipacks

Fujifilm has identified numerous trends that show how price competition in Japan has been intensifying in recent years: the growth of ISO 400 film, the increased market share of multipacks, the advent of private and dual brand film, and the declining market share of traditional photo stores.³⁰ Kodak responds by minimizing the importance of private and dual brand film in the Japanese marketplace, and by arguing that the decline of photo stores has had no significant effect on pricing.³¹

Importantly, however, Kodak says nothing about either ISO 400 film or multipacks. ISO 400 film has grown from only 9.3 percent of the market in 1988 to 47.5 percent in 1994.³² It is now the leading film speed in Japan.³³ This film is very aggressively priced: Kodak has not even tried to deny that ISO 400 is generally less expensive in Japan than in the United States. When confronted with the fact that film products accounting for roughly half of the Japanese market are priced competitively -- at least by the standard of the allegedly open U.S. market -- Kodak's response is silence.

Kodak's silence regarding trends in multipack sales is perhaps even more damaging to its case. Here are the relevant and undenied facts about multipack film:

- The per-roll price of multipacks is substantially lower than the price of single pack film.

³⁰ See Fujifilm's March 28, 1996 submission at 19-20; Fujifilm's February 7, 1996 submission at 51-53.

³¹ See Kodak's April 16, 1996 submission at 12-13.

³² See Fujifilm's March 28, 1996 submission at 19.

³³ See Fujifilm's February 7, 1996 submission at 25.

- Multipack sales have been increasing rapidly in recent years.
- Multipacks now account for roughly 40 percent of total film sales in Japan.³⁴

These facts are completely inconsistent with Kodak's allegations of a widespread price fixing conspiracy. If retailers are collusively averse to selling low-priced film, why are they stocking low-priced multipacks right next to single packs in large and ever increasing numbers? If retailers are refusing to discount Kodak relative to Fujifilm in order to protect their inflated price levels, why are they offering multipack film of both Fujifilm and Kodak that deeply undercuts their single pack prices? Kodak's allegations that price competition is being suppressed throughout Japan are clearly untenable given the widespread availability and fast-growing market share of multipack film.

3. Discounting relative to MSRPs

In its March 28, 1996 submission, Fujifilm demonstrated that both Kodak and Fujifilm are widely sold at steep discounts off of manufacturer's suggested retail prices.³⁵ Kodak responds that Fujifilm is attacking a straw man. Kodak says that it never argued that collusive prices would be bunched around Fujifilm's MSRPs, but rather would fall in "a zone within which pricing can occur."³⁶ According to Kodak, this target zone runs from around 20 percent below to 5 percent above MSRPs.³⁷

³⁴ See id. at 26-28, 52.

³⁵ See Fujifilm's March 28, 1996 submission at 20-22.

³⁶ Kodak's April 16, 1996 submission at 14.

³⁷ See id.

The data presented by Fujifilm, however, show a significantly broader range than that conceded by Kodak. Prices of Fujifilm single packs range between 61 and 100 percent of MSRP; for Kodak, the range is 48 to 100 percent. For multipacks, the average Fujifilm price for ISO 100 is only 51 percent of MSRP, while Kodak's average price is only 44 percent of MSRP.³⁸

The wide variability in single pack pricing -- some 40 to 50 percent -- undermines the argument that prices are being controlled collusively. Likewise, the deepness of the discounting for multipacks -- which account for roughly 40 percent of film sales -- is completely inconsistent with any kind of vertical price fixing. Indeed, as of December 1995 Fujifilm actually abandoned the use of MSRPs for multipacks because of their total lack of correlation with market prices.³⁹ Thus, for 40 percent of the film market, Fujifilm is offering no guidance whatsoever regarding retail price levels.

Similarly, as mentioned above, Kodak has also abandoned the use of MSRPs for Super Gold film. According to the press report already cited above, this decision was made as a response to deep discounting at the retail level:

[Kodak's decision to abolish MSRPs] was made reflecting the market situation that discounts at the retail level are so fierce and MSRPs have become meaningless. . . . Especially, retail prices of Kodak films have deteriorated more than other brands. Such a situation caused Kodak to decide to abolish the MSRPs and introduce open pricing for major products.⁴⁰

³⁸ See Fujifilm's March 28, 1996 submission at 20, 22.

³⁹ See *id.* at 21.

⁴⁰ Nihon Keizai Shimbun, February 16, 1996 (emphasis added).

The validity of Fujifilm's point thus stands. A comparison of actual market prices with Fujifilm's and Kodak's MSRPs shows that MSRPs are not being used -- even as a general target -- to fix prices. Indeed, both Fujifilm and Kodak have been abandoning the use of MSRPs because of the ferocious competition at the retail level.

4. Discounting relative to Fujifilm

Kodak claims that, due to widespread price collusion, Kodak is generally prevented from underselling Fujifilm at the retail level. Specifically, Kodak commissioned a survey which shows that, when both Kodak and Fujifilm are available, Kodak is priced the same as or higher than Fujifilm in 60 to 66 percent of outlets.⁴¹

As Fujifilm has already demonstrated, though, Kodak's survey results are undermined with grave methodological errors. In the first place, Kodak's survey makes no attempt to control for relative sales volume within a given outlet type. Thus, a small photo store that sells a few hundred rolls of film per year and a large store that sells 1,000 times as much film receive equal weighting in Kodak's survey. Furthermore, Kodak's nationwide survey makes no apparent attempt to concentrate its survey sample in those geographic areas where film is concentrated.⁴² Accordingly, Kodak's 60 to 66 percent figures are worthless. Kodak's survey tells us nothing about the percentage of Kodak film sold at prices equal to or higher than Fujifilm prices.

⁴¹ See Kodak's April 16, 1996 submission at 14; Kodak's March 20, 1996 submission at tab 1, page 5.

⁴² See Fujifilm's April 29, 1996 submission at 5-9, 11.

By contrast, the price data presented by Fujifilm show that Kodak is frequently sold at a discount relative to Fujifilm.⁴³ Kodak attempts to dismiss the Fujifilm data on the ground that it provides only prices in larger cities;⁴⁴ since, however, Kodak admits that its sales are concentrated in major cities,⁴⁵ we believe these data are representative.

C. Kodak's "Evidence" Of Price Collusion Does Not Support Its Allegations

In its March 28, 1996 submission, Fujifilm provided a comprehensive review of the trade press articles cited by Kodak as documentation of vertical and horizontal price collusion.⁴⁶ Fujifilm reviewed not only 31 pricing-related articles included in the 948-page Evidentiary Appendix of Kodak's November 6, 1995 submission,⁴⁷ but also another 30 pricing-related articles

⁴³ See Fujifilm's March 28, 1996 submission at 22-23.

⁴⁴ See Kodak's April 16, 1996 submission at 11-13. In this regard, Kodak presents a number of charts showing that film prices in small cities are somewhat higher than those in large cities. We are not sure what Kodak's point is, but its data actually confirm our position that prices in Tokyo and Osaka are not much different from prices in the rest of Japan. Kodak's survey shows about a 5 percent average price spread between the largest and smallest cities; the Government of Japan survey shows only a 2-3 percent spread. See id. at Figure 10. These data compare to the approximately 3 percent spread between Tokyo/Osaka prices and prices elsewhere shown in the 1995 Camera Times data cited by Fujifilm. See Fujifilm's February 7, 1996 submission at 39-40. These small differences hardly support Kodak's attempted distinction between a competitive "shark tank" in major cities and a pervasive price-fixing conspiracy everywhere else.

⁴⁵ See Kodak's March 20, 1996 submission at tab 1, page 4.

⁴⁶ See Fujifilm's March 28, 1996 submission at 24-54.

⁴⁷ See id. at Figure 7.

cited in Kodak's "Privatizing Protection."⁴⁸ Fujifilm's analysis yielded the following basic conclusions:

- Over half of the articles are irrelevant to Kodak's claims, either because they are too old to be probative of current anticompetitive conduct or because they relate to products other than color film and paper (e.g., cameras, photofinishing).
- None of the articles documents any efforts by Fujifilm to maintain color film or paper prices through pressure or coercion.
- None of the articles documents any successful effort by Fujifilm, wholesalers, or retailers to prevent or limit discounting. Actually, many of the articles document the existence of unchecked price competition.

Kodak now responds that Fujifilm's review of these articles "is highly selective and full of holes."⁴⁹ Kodak argues that Fujifilm's analysis "altogether ignores the most damning articles and passages presented by Kodak."⁵⁰ Furthermore, Kodak disputes Fujifilm's assessment that articles prior to 1980 or dealing with photofinishing are irrelevant, and criticizes Fujifilm's legal analysis. Finally, Kodak offers new articles and publications that supposedly support its position.

Kodak's response is long on bluster and short on substance. The "omissions" in Fujifilm's review are trivial, and are easily remedied here. Indeed, with respect to those articles that Fujifilm deemed relevant and analyzed, it is striking how little Kodak finds to criticize. As to the many irrelevant articles, Kodak's efforts to restore them to relevance range from halfhearted to laughable. And the new materials cited by Kodak add nothing new. Fujifilm's conclusion stands: Kodak's attempt to prove price collusion through trade press articles is a total failure.

⁴⁸ See id. at Figure 8.

⁴⁹ Kodak's April 16, 1996 submission at 16.

⁵⁰ Id. at 17.

1. Fujifilm's review of articles cited by Kodak is comprehensive

Kodak carries on as if Fujifilm had failed to analyze major chunks of the trade press documentation it has presented. In fact, Fujifilm reviewed 61 articles cited by Kodak. In response, Kodak argues that Fujifilm ignored two articles, and one passage in another. Kodak's charge that Fujifilm's review is "highly selective" is clearly baseless.

a. Omitted articles

With respect to the two omitted articles, both offer general profiles of Fujifilm rather than documentation of specific incidents. Our review focused on the latter, which explains why an analysis of these articles was not included in the March 28, 1996 submission. An examination of the two articles here, however, shows that they are anything but "smoking guns."

First, the September 1995 Sentaku article alleges that the Japanese market is divided into a "metropolitan-area market" in which price competition is intense, and a "non-metropolitan-area market" dominated by Fujifilm in which price competition is limited.⁵¹ The report simply asserts this market segmentation as fact: it provides absolutely no substantiating evidence. By contrast, Fujifilm has provided ample evidence that: (1) price competition exists throughout Japan, as evidenced by the high market share of multipacks and the general availability of private and dual brand film; (2) there are not substantial price differences between major cities and the rest of Japan; and (3) film sales are concentrated in urban areas where even Kodak admits that price competition is thriving.⁵² Accordingly, Fujifilm has already rebutted the unsubstantiated assertion in the September 1995 Sentaku article.

⁵¹ See id.

⁵² See Fujifilm's February 7, 1996 submission at 36-50.

Second, the June 28, 1993 Nikkei Business article contains no support for Kodak's allegations. The passage cited by Kodak simply refers to Fujifilm's single-brand distribution system and alleges that this system helps to limit gray market reverse imports.⁵³ This passage is completely unexceptionable: all manufacturers of branded products strive to control international distribution so as to limit gray market imports.

It is ironic that Kodak cites this article as "damning," given that it contains the following passage:

According to the Nomura General Research Center, Kodak's headquarters in the United States "raises film prices 5%-6% every year." Kodak Japan states, "If we sell in Japan at prices any cheaper than these, the products will be re-imported to the U.S. and other countries, and Kodak's international price system will fall apart." Consequently, their price offensive has not come about. Fuji Film can rest assured that, with Kodak's current price strategy, it will be able to maintain its domestic prices.⁵⁴

It is Kodak's case that this article undermines, not Fujifilm's. The article quotes a Kodak official, who explains that fear of -- of all things -- gray market imports prevented Kodak from attempting to undercut Fujifilm on price. This article thus corroborates Fujifilm's position that Kodak has not been trying to gain market share by underselling Fujifilm, and therefore that price collusion -- even assuming it existed -- could not burden or restrict Kodak's exports.

b. Articles reviewed by Fujifilm

Fujifilm reviewed 61 articles in its March 28, 1996 submission. Of those, Fujifilm dismissed 33 as irrelevant, either because they were too old or because they did not relate to color

⁵³ See Kodak's April 16, 1996 submission at 17-18.

⁵⁴ Kodak's November 6, 1996 submission, Evidentiary Appendix at 32-33.

film or paper. As to the remaining 28 articles, Fujifilm found no evidence of vertical or horizontal price collusion.

Kodak responds to Fujifilm's analysis of those 28 articles by citing one passage supposedly ignored by Fujifilm. Specifically, Kodak argues that Fujifilm, in reviewing a March 1994 Jitsugyo Kai article, failed to address a passage that refers to "Japanese consumers who are buying products at prices four times higher than comparable U.S. products."⁵⁵

This reference is easily explicable: the article is simply reacting to the U.S. Department of Commerce's preliminary determination in the antidumping investigation of color paper. That finding -- based on a comparison of prices to very small customers in Japan⁵⁶ with prices to giant customers in the United States -- had absolutely nothing to do with anticompetitive conduct.

So much for the "omissions" in Fujifilm's review of Kodak's "evidence" -- two articles, neither of which contains anything damaging to Fujifilm (but one of which is extremely damaging to Kodak's case), and a brief reference to the color paper dumping case. The fact that Kodak could not come up with anything more is eloquent testimony to the weakness of its "evidence."

2. Most of the articles cited by Kodak are irrelevant

Of the 61 articles reviewed by Fujifilm in its March 28, 1996 submission, 12 pertain to either photofinishing or cameras but not color film or paper, 16 date back to before 1980, and five

⁵⁵ Kodak's April 16, 1996 submission at 18-19.

⁵⁶ Almost all of Fujifilm's home market sales of color paper were excluded from the antidumping analysis on the ground that they were sales to related parties. The only customers deemed to be unrelated bought in very small volumes at higher prices.

pertain to photofinishing and date back to before 1980. Fujifilm dismissed all of these articles as irrelevant to the Section 301 investigation. Kodak predictably disagrees, but its arguments are unconvincing.

a. Photofinishing

Kodak claims that Fujifilm "does not deny that price stabilization measures exist in Japan with respect to photofinishing."⁵⁷ This is flatly untrue. In "Rewriting History," Fujifilm provided detailed refutations of Kodak's claims of photofinishing-related price fixing.⁵⁸

In its March 28, 1996 submission, Fujifilm made the point that price fixing in photofinishing -- even assuming it existed -- could not prevent Kodak color paper from underselling Fujifilm and thereby gaining market share. This is because Kodak controls the price of its color paper all the way from the factory to the photofinisher, and therefore price fixing by other parties has no effect on Kodak's ability to price its color paper aggressively. At that time, Kodak's only announced theory of how price collusion impedes its exports was that retail price fixing prevents Kodak from being able to undersell Fujifilm at the retail level and thereby gain market share. Since that theory is inapplicable to photofinishing for the reasons described above, Fujifilm concluded that all of Kodak's "evidence" concerning photofinishing-related price fixing was irrelevant to this investigation.⁵⁹

Kodak does not dispute this analysis, but instead has concocted a new theory for how price fixing in photofinishing would impede Kodak's exports of color paper. This theory was

⁵⁷ Kodak's April 16, 1996 submission at 23.

⁵⁸ See, e.g., "Rewriting History," Appendix at 24, 27, 37, 39-41, 54-56, 87-91.

⁵⁹ See Fujifilm's March 28, 1996 submission at 25-26.

never mentioned in Kodak's original "Privatizing Protection." It was never mentioned in Kodak's November 6, 1995 submission, in which Kodak responded for the first time to Fujifilm's charge that Kodak had no theory for how price fixing -- assuming it existed -- could be injurious to Kodak. The theory has surfaced only now, in a submission eleven months after the filing of Kodak's Section 301 petition. Its timing alone suggests strongly that this theory is a post hoc lawyer's invention that has nothing to do with marketplace reality.

The new theory's logic is as unsound as its timing is suspect. Basically, Kodak argues that collusively inflated photofinishing prices give photofinishers inflated profits, thereby reducing cost pressures and making cheap Kodak color paper relatively less attractive.⁶⁰ But no matter how profitable photofinishers are, cheap color paper offers them the chance to be even more profitable. The economic incentive to buy less expensive paper exists no matter how profitable the customers are.

Kodak's new theory comes down to the assertion that price competition can only be effective if one's customers are financially strapped. This does not even pass the laugh test. Kodak has thus failed to give any credible reason why alleged price fixing on photofinishing has anything to do with this investigation.⁶¹

b. Articles prior to 1980

In its March 28, 1996 submission, Fujifilm dismissed all articles pertaining to possible price collusion prior to 1980 as irrelevant. This decision was made in light of the fact that

⁶⁰ See Kodak's April 16, 1996 submission at 23.

⁶¹ To its credit, Kodak does not even try to defend the relevance of articles relating to camera pricing.

Section 301 addresses only current unjustifiable, unreasonable, and discriminatory acts, policies, and practices. Toleration of long-ago price fixing -- even assuming it existed -- is not actionable under Section 301. Furthermore, even assuming that price fixing existed long ago, it does not follow -- given all the changes in the marketplace and economy since 1980 -- that such price fixing continues today.

Kodak tries to refute Fujifilm's analysis, but it does not try very hard. Kodak's only argument is that events in the 1970s pertaining to how Fujifilm's allegedly gained "control" over its tokuyakuten remain relevant today, since that control is still allegedly being exercised.⁶²

This has nothing to do with Fujifilm's point. Kodak does not attempt to argue that alleged toleration of price fixing in the 1960s and '70s would be actionable today, nor does it argue that "evidence" from 15-25 years ago is probative of what is happening in the marketplace today. Accordingly, Kodak offers no reason why articles that allegedly provide evidence of price fixing prior to 1980 are relevant to this case.

3. Fujifilm's application of U.S. and Japanese legal standards is appropriate

Kodak criticizes Fujifilm for referring to U.S. antitrust precedent in its analysis of Kodak's price collusion claims. Kodak argues that the existence of price collusion should be judged according to Japanese legal standards.

Fujifilm agrees that Section 301 is not meant to impose U.S. antitrust standards on other countries. We have stated and continue to believe that the existence or nonexistence of

⁶² See Kodak's April 16, 1996 submission at 24-25.

anticompetitive practices in Japan should be evaluated primarily by reference to Japanese law.⁶³ As Kodak recognizes, Fujifilm did cite Japanese law in its March 28, 1996 submission.⁶⁴

Nevertheless, we do believe that consideration of U.S. legal standards is also appropriate. With respect to price collusion, U.S. and Japanese standards are generally similar; it is therefore illuminating, when discussing the relevant Japanese legal provision, to show that U.S. law is substantively similar. Furthermore, in determining whether the alleged government toleration of anticompetitive activities is "unreasonable" under Section 301, USTR is required to consider "reciprocal opportunities in the United States for foreign nationals and firms."⁶⁵ Accordingly, in determining whether toleration of business practices under Japanese law is reasonable, it is directly relevant that those same practices would be tolerated under U.S. law as well.

4. Kodak's new "evidence" does not support its allegations of price collusion

Kodak has dredged up several additional articles and publications in support of its case. It should not have bothered. We offer below a quick review of this new "evidence":

- Kodak cites a book, Shishi no Honryo, which states that Fujifilm and its tokuyakuten sometimes use promotional expenses -- *i.e.*, the provision of free signs and banners to retailers -- as a competitive tool in lieu of price cutting.⁶⁶ What in the world is wrong with that?

⁶³ See Fujifilm's August 8, 1995 submission at 23-24.

⁶⁴ Kodak quibbles with Fujifilm's characterization of the Japanese standard governing the existence of resale price maintenance. See Kodak's April 16, 1996 submission at 26-27. We agree that "artificial means" to maintain prices include threatened as well as actual imposition of economic advantage; this is what we meant by "pressure or coercion." At any rate, Kodak has failed to provide any evidence that Fujifilm has employed "artificial means" -- however defined -- to maintain resale prices.

⁶⁵ 19 U.S.C. § 2411(d)(3)(D).

⁶⁶ See Kodak's April 16, 1996 submission at 15-16.

- Kodak cites a November 4, 1994 Shukan Shashin Sokuho article relating Zenren members' decision not to market their own private brand film.⁶⁷ Although Kodak tries to make this decision appear sinister, there is absolutely nothing anticompetitive about retailers dependent on sales of branded products deciding not to offer a nonbranded product line. Before its offer of private and dual brand film in Japan in 1994, Kodak itself had been strongly averse to diluting its brand image with low-priced, nonbranded merchandise.
- Kodak provides an April 1, 1995 Nihon Shashin Kogyo Tsushin article in which Zenren members are discussing the opening of a new large-scale store in Sapporo.⁶⁸ Although Kodak excerpts the discussion to make it appear to focus on pricing, a reading of the full article (supplied by Kodak) makes clear that the retailers' concern with the new store has to do with dispatched employees from camera manufacturers.
- Kodak cites yet another article dealing with the "VR trial pack" incident.⁶⁹ This June 20, 1983 Shashin Kogyo Junpo article relates retailers' concern over the low price of the trial pack. No one disputes this fact; what Kodak fails to grasp, though, is that retailers were also concerned with potentially deceptive aspects of Nagase's campaign. Furthermore, the only action ever taken with respect to the campaign had to do with addressing the potential for deceptive advertising, not with preventing Kodak and Nagase from offering low prices.⁷⁰

Kodak's new "evidence" suffers from the same basic defects as its old "evidence."

There is nothing here that substantiates Kodak's claims of widespread vertical and horizontal price fixing.

⁶⁷ See id. at 19, accompanying text box.

⁶⁸ See id. at 19-20, Attachment 1.

⁶⁹ See id. at 20-21.

⁷⁰ See Fujifilm's March 28, 1996 submission at 47-48 for a full discussion of this incident.

CONCLUSION

Recognizing the damage done to its case by Fujifilm's March 28, 1996 submission, Kodak has responded with an attempt to salvage its allegations of widespread price fixing. That attempt is a failure. As its own officials have repeatedly admitted, Kodak has not been trying to gain market share by underselling Fujifilm; therefore, the existence or nonexistence of price fixing has been irrelevant to Kodak's competitive position. Furthermore, undisputed facts about the Japanese marketplace show that price competition is vigorous throughout Japan. Finally, Kodak's "evidence" of trade press articles provides no proof of price collusion.

Kodak's April 16, 1996 submission does nothing to disturb these basic conclusions. These basic conclusions, in turn, leave Kodak's allegations of price fixing in ruins.