

DISCUSSION

Kodak's Section 301 case against Fujifilm boils down to two basic charges. First, Kodak argues that Fujifilm's control of its primary distributors -- the tokuyakuten -- has created a "distribution bottleneck" that prevents Kodak from getting on the Japanese retail store shelf. Second, it alleges that Fujifilm has masterminded a massive vertical and horizontal price fixing conspiracy that inhibits Kodak's efforts to get off the retail shelf by offering lower prices to Japanese consumers.

In its December 21, 1995 submission, Fujifilm demonstrated conclusively that Kodak's "distribution bottleneck" does not exist. It showed that Kodak is widely available throughout Japan, and that the overwhelming majority of the tokuyakuten's customers already carry Kodak or else have an existing relationship with a Kodak supplier.¹

In its October 24, 1995 and February 7, 1996 submissions, Fujifilm addressed what according to Kodak is a major symptom of widespread price fixing: price levels in Japan that are supposedly far higher than U.S. price levels. Fujifilm showed that in fact, price levels in Japan and the U.S. are very similar. Kodak's allegations of inflated prices in Japan are based on

¹ On March 20, 1996, Kodak filed with USTR a new submission providing the results of a survey it commissioned regarding the availability of Kodak in Japanese retail outlets. The submission is discussed in greater detail in section B.3. below, and we intend to file a more thorough rebuttal of Kodak's survey results in the near future. With respect to the "distribution bottleneck" issue, though, the most important thing about Kodak's new submission is what it does not include. Specifically, this submission makes no attempt to challenge Fujifilm's finding that the overwhelming majority of the tokuyakuten's customers either carry Kodak or else have an existing Kodak supplier. This single unrebutted fact shows that the whole "distribution bottleneck" is a fantasy. Kodak's theory is based on the charge that Fujifilm's relationships with its main distributors deny Kodak access to retailers; the fact that most of those distributors' customers already carry Kodak shows that there is no bottleneck.

egregiously incomplete and mismatched data. Furthermore, Fujifilm showed that price levels in Japan are low not only in the major cities of Tokyo and Osaka, but throughout Japan as well.

Now, in this submission, Fujifilm shows that the symptoms of price fixing do not exist for the very simple reason that there is no underlying illness. Under sustained scrutiny, Kodak's conspiracy theories fail at every turn. First and most fundamentally, Kodak cannot show that price fixing -- even assuming it exists -- has impeded its exports to Japan. Without this showing, there is no burden or restriction on U.S. commerce, and thus nothing actionable under Section 301. Furthermore, the facts of the marketplace -- many of which Kodak itself has conceded -- demonstrate that there is not and cannot be any widespread vertical or horizontal price collusion. Finally, Kodak's "evidence" of widespread price fixing in Japan proves upon critical analysis to be nothing of the sort. Much of Kodak's vaunted documentation is irrelevant to its claim; the rest fails to substantiate -- and often directly under mines -- Kodak's charge of price fixing.

A. Kodak's Theory Of How Price Collusion Injures Its Exports To Japan Is Demonstrably Untrue

In proving its case, Kodak must demonstrate that price collusion has interfered with its ability to export to Japan. In other words, there must be some causal connection between the alleged price collusion and reduced export performance. Otherwise, the alleged anticompetitive conduct -- even assuming it has occurred -- does not burden or restrict U.S. commerce and thus is not actionable under Section 301.²

USTR should recall that it took Kodak a long time to come up with any kind of theory of how price collusion injures its exports. In "Privatizing Protection," Kodak offered no theory at

² 19 U.S.C. § 2411(a)(1)(B)(ii) and § 2411 (b)(1). See H.R. Rep. No. 100-40, 100th Cong., 1st Sess., pt. 1, at 58 (1987).

all: it simply made its allegations of vertical and horizontal price fixing without bothering to explain why higher prices in Japan did not provide Kodak with competitive opportunities.

In "Rewriting History" and its August 8, 1995 legal brief, Fujifilm jumped on this omission. Fujifilm made the obvious point: under normal circumstances, inflated prices in Japan -- assuming they existed -- should present Kodak with a competitive opportunity, not a market barrier. Excessively high prices should make it that much easier for Kodak to underprice the competition and thereby pick up market share.³

Under the pressure of Fujifilm's attack, Kodak has now -- albeit belatedly -- come up with at least a theoretically possible (but utterly unsubstantiated) explanation of how price collusion could injure its exports. In its November 6, 1995 submission, Kodak charged that Fujifilm not only controls the retail pricing of its own brand, but also uses coercion to prevent retailers from discounting Kodak. In addition, retailers' horizontal fixing of prices allegedly applies across the board to all brands, including Kodak.⁴

According to Kodak's new theory, these impediments to retail-level discounting of its own brand have frustrated Kodak in its efforts to undersell Fujifilm and thereby pick up market share. Kodak argues that, despite what Fujifilm has said on the subject, it has been competing aggressively on price; unfortunately, because of vertical and horizontal price fixing, its wholesale-level price reductions are not reflected in lower retail prices, and so are not passed through to the Japanese consumer. Retailers, acting pursuant to both vertical and horizontal collusion, are imposing excessive markups on Kodak products, thus robbing Kodak of the competitive

³ "Rewriting History" at 96; Fujifilm's August 8, 1995 Comments on Legal Issues at 21.

⁴ Kodak's November 6, 1995 submission at 72-73.

advantage that otherwise would result from its low wholesale prices. Kodak's attempt to compete on price is thereby undermined and its exports consequently injured.⁵

From Kodak's perspective, there is good news and bad news about its new theory. The good news is that the theory is internally consistent and coherent: a concerted refusal by retailers to discount Kodak would indeed be a problem. The bad news is that Kodak's theory has nothing to do with reality.

The facts show that price fixing cannot have impeded Kodak's efforts to gain market share through underselling, for the very simple reason that Kodak has not made any efforts to gain market share through underselling. Kodak has sets its own manufacturer's suggested retail prices at exactly the same level as Fujifilm's, thus showing that it has no interest in lower retail prices for its products. Furthermore, a review of Kodak's export prices shows that Kodak has failed to take advantage of the competitive opportunities created by the yen's massive appreciation over the past decade. Finally, Kodak officials have stated publicly that Kodak has no intention of competing aggressively on price. Unsurprisingly, in light of these facts, Kodak has failed to provide a shred of evidence either that it has tried to be a price-cutter, or that retailers have colluded to foil its price-cutting initiatives.

1. Kodak's own manufacturer's suggested retail prices for its film show that it has not been trying to undersell Fujifilm

The core of Kodak's new price collusion theory is that retailers are charging higher prices for Kodak film than Kodak thinks is appropriate. Retailers, acting pursuant to both vertical and horizontal price fixing arrangements, are supposedly frustrating Kodak's efforts to compete with Fujifilm on price:

⁵ Id.

Kodak sets the price it charges to secondary wholesalers and retailers. Kodak does not set the retail price on which the consumer chooses which film to purchase, thereby determining market share. Regardless of how low prices are for Kodak products that the retailers purchase, if the retailer does not pass on these low prices to consumers because they are adhering to price maintenance pressures, then consumers will choose among products offered based on the high price the retailer charges for all of the products available. If a consumer is forced to pay a higher price regardless of which brand is purchased, then the consumer is more likely to choose the product with higher name-brand recognition.⁶

Kodak's new theory thus hinges on an alleged conflict between Kodak's desired retail prices for its products and the retail prices actually charged in the marketplace. Accordingly, a fundamental test for Kodak's theory is to compare Kodak's manufacturer's suggested retail prices ("MSRPs") to Fujifilm's MSRPs. If there is any substance to Kodak's theory, Kodak's MSRPs should be substantially lower than the levels at which Fujifilm is allegedly trying to set retail prices for its products.

In fact, however, Kodak's MSRPs are generally identical to Fujifilm's for the past 10 years. Figure 1 shows Fujifilm's and Kodak's MSRPs for both ISO 100 and ISO 400 single packs from 1986 to 1995. These figures are publicly available information and are taken from the Japanese periodical Camera Times. The data show that Kodak has been telling retailers for the past decade that it would like Kodak film to have exactly the same retail price as Fuji brand film. Actually, in 1986 and 1987, Kodak's MSRP for ISO 400 film was higher than Fujifilm's.

This arresting fact completely demolishes Kodak's argument. Contrary to its latest rewrite of history, Kodak has not been attempting to undersell Fujifilm -- at least not until its recent introduction of private brand and dual brand products. Rather, Kodak has been playing

⁶ Id. at 72.

the game of follow the national price leader, and has done so with slavish consistency year in and year out.⁷

Given that Kodak has been telling retailers for the past decade to charge the same for Kodak as for Fujifilm, the relevance of alleged price collusion vanishes. Kodak has not been trying to undersell Fujifilm; accordingly, even if vertical and horizontal price fixing were rampant, Kodak cannot claim any injury. Rather, assuming for the sake of argument that such price fixing has been occurring, the MSRP data show that Kodak has been a willing participant in and beneficiary of the resulting inflated price levels. Since there is no burden or restriction on U.S. exports, there is nothing actionable under Section 301.

2. Kodak's pricing show that it has not taken advantage of the devaluation in the dollar versus the yen

Kodak's assertion that it has been trying to compete aggressively on price is further undermined by an examination of the average unit values ("AUVs") of its imports into Japan. These AUVs show the prices being charged by Kodak U.S. to Kodak Japan, and indeed are cited by Kodak as evidence of how low its prices have been in Japan.⁸

Actually, these data, properly analyzed, are anything but helpful to Kodak's case. Figure 2 shows U.S. import AUVs from 1985 to 1994, expressed both in yen and dollar terms, along with the average yen-dollar exchange rate.

⁷ Changes in MSRPs over the past decade have generally been initiated by Fujifilm, not Kodak.

⁸ Kodak's November 6, 1995 submission at 103-104. The import AUVs cited by Kodak, however, include imports from all sources, not just the United States. This overinclusiveness leads to distortions in recent years, when private brand film from Agfa in Germany and other low-priced imports have been growing rapidly.

These data make clear that Kodak has not been trying to gain market share in Japan through aggressive pricing. If Kodak had really wanted to do so, the tremendous appreciation of the yen over the past decade (from 239 yen to the dollar in 1985 to 102 in 1994 -- a climb of 234 percent) would have given it the perfect opportunity. Given the falling value of the dollar, Kodak could have continually slashed its yen-denominated prices while keeping unit revenues constant in dollar terms.

The AUV data in Figure 2 show that Kodak did no such thing. From 1985 to 1988, while the yen fell from 239 to 128, Kodak did cut its yen-denominated prices: from 291 per roll to 199. The real story, though, is that its dollar-denominated prices continued to rise: from \$1.22 to \$1.55 (a 27 percent increase). In other words, when Kodak was presented with the massive free lunch of the soaring yen, it decided to eat a big portion itself rather than pass it along to Japanese consumers.

Between 1988 and 1989, price levels in Japan dropped sharply because of the elimination of the 15 percent commodity tax. But starting in 1990, as the yen began another cycle of appreciation, Kodak once again opted for higher unit profits over lower prices for Japanese consumers. While Kodak's yen-denominated AUVs fluctuated between 1990 and 1994, the yen appreciated another 42 percent: from 145 to the dollar to 102. The upshot was that in dollar terms, Kodak's AUV rose from \$1.15 per roll in 1990 to \$1.52 in 1994 -- a further 32 percent increase.⁹

This is decidedly not the picture of a hard-charging challenger trying to buy market share with lowball prices. Far from cutting prices aggressively, Kodak would not even pass along the

enormous pricing advantage that the yen's appreciation conferred upon it. Figure 2 shows a company that spent the past decade coasting: choosing higher unit profits over higher market share.

Thus, the AUV data confirm the message delivered by the MSRP figures discussed above: Kodak has not been trying to gain market share from Fujifilm with low prices. Accordingly, all of Kodak's allegations about price fixing are irrelevant: collusively inflated prices would only be actionable under Section 301 if they had interfered with Kodak's efforts to undersell Fujifilm. Since Kodak was making no such efforts, price fixing -- even assuming it existed -- could not burden or restrict U.S. exports.

3. Kodak officials have publicly stated that Kodak does not intend to seek market share through price cutting

As if the MSRP and AUV data were not enough, additional evidence disproving Kodak's new theory comes right from the horse's mouth: public statements by Kodak officials. Repeatedly over the past decade, Kodak officials have declared on the record that Kodak had no intention of trying to compete with Fujifilm in Japan on the basis of price. These statements help to place the pricing decisions described above in an overall strategic context.

In 1986, then Kodak chairman Kay Whitmore stated unambiguously that Kodak was not interested in trying to undersell Fujifilm. One report reads as follows:

The President ruled out the possibility of the company passing on exchange gains from the yen's appreciation against the U.S. dollar to Japanese consumers, in the

(..continued)

⁹ Import statistics for 1995 show that Kodak may have decided to price more aggressively just as it filed its Section 301 petition. Average AUVs for 1995 show a steep drop to 99 yen (\$1.06) per roll.

term of lower product prices. He said Kodak is not a price leader in Japan and has no intention of lowering its prices to win in competition with its Japanese rivals.¹⁰

Kodak twists itself into a pretzel trying to get around Whitmore's statement. It tries to argue that Whitmore's statement that "Kodak is not the price leader" is really a coded recognition of the presence of market barriers in Japan, and that the real meaning of Whitmore's declaration was that Kodak "could not compete on the basis of price in Japan."¹¹

Come on. There is no doubt what Whitmore was actually saying: it fits in perfectly with what the AUV data show. When faced with the yen's rapid appreciation, Kodak made a conscious choice: higher unit margins over higher volumes. There is nothing in Whitmore's statement about how market barriers in Japan make price-cutting futile; what comes across instead is the rather huffy attitude that Kodak is above trying to gain market share through underselling competitors.

Kodak reiterated the choice it had made the following year, when Kodak Japan rejected calls by retailers for Kodak to lower its prices in light of the stronger yen. Mr. Sawada, the president of what was then Kodak-Nagase, responded as follows:

I heard the request from Zenren. I will examine the situation. . . . Although the film market grows slightly, the market is near saturation. I wonder if the demand grows if we lower the price. I think there are other things to do than just price.¹²

Kodak Japan President Albert Sieg then added:

¹⁰ "Kodak Intends to Establish Stronghold in Japan," Jiji Press Ticker Service, August 26, 1986; see "Rewriting History" at 186-187.

¹¹ Kodak's November 6, 1995 submission at 102-103.

¹² "Kodak -- Response to Zenren's Request to Feed Back Yen Appreciation Benefits; Urged to Be Cautious Considering the Situation," Nihon Shashin Kogyo Tsushin, January 1, 1987 (emphasis added). A copy of the Japanese original of the article as well as a full English translation is provided in Exhibit 1.

Compared with cameras, the film price in Japan is too low. . . . Film is sold in Japan at bargains. In the Japanese market, the price leader is Fujifilm, and not Kodak. . . . I think we should devote more efforts to develop better products which will serve consumers better in the long run.¹³

This exchange between Kodak Japan and Zenren members delivers Kodak's new theory a double blow. First, it reaffirms that Kodak was not interested in underselling Fujifilm; this alone renders all of Kodak's allegations of price collusion irrelevant. Furthermore, it shows retailers -- members of the supposedly conspiratorial Zenren, no less -- asking Kodak (in vain) to lower its prices. If retailers truly were engaged in a massive price fixing conspiracy, why on earth would they be asking a manufacturer to compete more aggressively on price?

According to a press report included in Kodak's own Evidentiary Appendix, in 1993 Kodak again restated its refusal to lower its prices, and this time stated a very interesting reason:

According to the Nomura General Research Center, Kodak's headquarters in the United States "raises film prices 5%-6% every year." Kodak Japan states that, "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.¹⁴

Kodak, when confronted with this passage, is once again forced to put forward a tortured reinterpretation:

[A]ssume for the moment, however, that Fuji's market share is maintained by market-access barriers -- would it make sense for Kodak to cut prices (ultimately to zero) when this does not result in an increased volume of shipments? Logically, this was Kodak's concern when it noted that it might not be able to cut prices further in Japan for fear of re-exports out of Japan.¹⁵

¹³ Id. (emphasis added).

¹⁴ Nikkei Business, June 28, 1993, 16-19; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 29, 32-33.

¹⁵ Kodak's November 6, 1995 submission at 107 (emphasis added).

This is really too much. There is no hint in the passage above about any concern by Kodak that lowering its own prices would not be reflected at the retail level because of price fixing. The unnamed Kodak Japan official could have said that reducing prices was futile because of retail-level markups, but he did not. Despite Kodak's desperate efforts to put words in his mouth retroactively, he said nothing of the kind. Indeed, the article very clearly assumes that lower Kodak prices would force Fujifilm to reduce its own prices.

The meaning of the Kodak official's statement is clear: Japanese price levels for Kodak film are already low -- at least by comparison with Kodak prices in the U.S. and other markets -- and therefore price cuts would be counterproductive. This quotation not only shows Kodak's unwillingness to try to undersell Fujifilm, but also demolishes Kodak's contention that price levels in Japan are collusively inflated.

MSRPs, AUVs, and Kodak's own public statements all support the same conclusion: Kodak has not been trying to gain market share at the expense of Fujifilm through aggressive pricing. The available evidence -- all objective and on the public record -- therefore shows that Kodak's new theory of how price collusion has injured its exports is pure bunk. Since it is clear that Kodak has not even tried to gain market share through underselling Fujifilm, it cannot be the case that price collusion has impeded Kodak's (nonexistent) attempts. Price collusion, even assuming it existed, could not have burdened or restricted U.S. exports, and thus the whole issue is moot for Section 301 purposes.

4. Kodak presents no evidence of retailer refusal to pass through Kodak price cuts

The available evidence shows that Kodak's new theory is untrue. This conclusion is strengthened by considering the evidence that is not available -- the evidence that Kodak has not put forward.

Specifically, Kodak has not cited any real-life examples of retailers that have refused to pass along wholesale-level discounts to consumers. Surely, if this phenomenon were widespread, Kodak Japan would have some record of its own attempts to convince retailers to reduce their prices of Kodak products; surely, Kodak Japan would also have records of the rebuffs it had received from price-fixing retailers. If any such evidence existed, Kodak would have it.

But what kind of documentation has Kodak provided to support its claims? Absolutely nothing. The inference to be drawn is clear: Kodak has not provided any documentation of concerted refusals by retailers to pass through wholesale discounts because no such evidence exists, and no such evidence exists because these alleged concerted refusals were concocted out of thin air.

Kodak does refer to Fujifilm's discussion of Camera no Kimura, a major camera store chain. In "Rewriting History," Fujifilm reported that Camera no Kimura not only sells Kodak film, but displays it with equal prominence and roughly equal shelf space alongside Fujifilm and Konica.¹⁶ Despite this prominent display, Fujifilm outsells Kodak by 7 to 1, mirroring national trends. When asked why Kodak is displayed so prominently given its poor sales, Mr. Michio

¹⁶ "Rewriting History" at 87. Photographs of Camera no Kimura's main store are provided in "Rewriting History" at Exhibit 5.

Kimura, Chairman of Camera no Kimura, explained that he gets a larger gross margin on Kodak and therefore is willing to push it.¹⁷

Kodak seizes upon this example as evidence that its products are marked up excessively by colluding retailers. Significantly, though, Kodak has provided no documentation whatsoever to show that it has tried to get Camera no Kimura to lower its prices, nor has it provided any affirmative evidence that the chain's pricing is based on collusion rather than independent business decisions.

Beyond these characteristic omissions, Kodak's argument is just plain silly. First, the store in question is located in Tokyo, which even Kodak admits is a competitive "shark tank" where price competition is vigorous.¹⁸

Second, the major reason an import challenger (like Kodak) undersells an entrenched domestic competitor (like Fujifilm) is to allow retailers to earn a bigger gross margin, as well as attract customers with lower prices. The bigger margin gives retailers an incentive to carry more of the less well-known, slower selling product at prices closer to those of the domestic competitor's. Some retailers will not be interested in this option, but instead prefer to maximize volume by further underselling the domestic competitor. Camera no Kimura, though, seems to have decided to charge somewhat higher prices and earn a larger gross markup.¹⁹ Common sense makes clear, though, that this is a rational business strategy to maximize revenue, not a collusive plot. After all, if Mr. Kimura thought that the prices he was charging for Kodak were

¹⁷ Id.

¹⁸ Kodak's November 6, 1995 submission at 31.

¹⁹ Nippon Research data indicate that Camera no Kimura charges roughly equivalent prices for Fujifilm and Kodak products.

significantly hampering sales volume, why would he devote so much shelf space to a product whose sales he was deliberately subverting?

Although information about Kodak's wholesale prices is unavailable, Fujifilm believes that Kodak Japan's wholesale prices to retailers are generally somewhat lower (though not dramatically lower) than the tokuyakuten's wholesale prices for Fuji brand film. This gives retailers the following options: (1) reduce Kodak prices to the level that gives the same margin as that earned on sales of Fujifilm products, thereby maximizing Kodak sales volume; (2) mark up Kodak until prices are roughly equivalent to prices for Fuji brand film, and earn higher unit margins on Kodak sales; or (3) do something in between. As shown below, retailers -- following independent, competitive business strategies -- are pricing Kodak all along this continuum.²⁰

There is one option, though, that Kodak has failed to give retailers: Kodak could significantly lower its wholesale prices, thus allowing retailers to earn bigger unit margins and still undersell Fujifilm substantially enough to encourage consumers to start switching brands. Kodak has not done this. As discussed above, Kodak has not attempted to gain market share through aggressive price competition. Rather, it has been content to remain comfortably in the shade of Fujifilm's premium price umbrella. Kodak's refusal to assert price leadership, though, cannot be confused with widespread price collusion.

B. Pricing Patterns In Japan Disprove Kodak's Claim Of Widespread Price Collusion

The previous section demonstrated that Kodak's price collusion allegations flunk the most basic threshold test: even if they are true, such collusion has no causal connection to any loss of exports by Kodak, and thus is not actionable under Section 301. USTR's inquiry should simply end here.

The problems with Kodak's allegations do not end here, however. Beyond their dispositive analytical infirmity, Kodak's charges suffer from an equally dispositive factual infirmity: the assertion that price collusion is widespread in Japan is belied by the obvious presence of vigorous and intensifying price competition throughout the country.

1. Price competition exists throughout Japan, and has been intensifying over time

In its October 24, 1995 and February 7, 1996 submissions, Fujifilm presented detailed documentation of pricing patterns in the Japanese market. The data presented by Fujifilm show that film prices in Japan are very similar to film prices in the United States. In particular, Fujifilm showed that:

- In 1995, ISO 400 film -- which is the biggest selling film speed in Japan and accounts for roughly 50 percent of total film sales -- was cheaper in high-priced photo stores in Japan than in low-priced discount stores in the United States.²¹
- In 1995, multipack prices for both ISO 100 and ISO 400 film were lower in high-priced Japanese photo stores than in low-priced U.S. discount stores. Multipack film now accounts for roughly 40 percent of Japanese film sales. Fuji brand multipack prices average around 250 yen per roll -- a very low price.²²
- Private and dual brand film is carried in over 10,000 outlets located in every prefecture of Japan.²³ This film is priced at the bottom of the market: the Daiei supermarket chain's ISO 100 private brand film is sold for 149 yen per roll.²⁴

(..continued)

²⁰ See section B.4. below.

²¹ Fujifilm's February 7, 1996 submission at 26.

²² Id. at 28, 45.

²³ Id. at 47-48 and Exhibit 13.

²⁴ Id. at 46.

These low prices, the result of vigorous competition, are completely inconsistent with Kodak's allegations of price fixing. Furthermore, Fujifilm has demonstrated that these low prices are available all over Japan, not just in Tokyo and Osaka. The Japanese price data presented by Fujifilm in its October 24, 1995 submission came from a survey of outlets located mostly in Tokyo and Osaka. Faced with this evidence, Kodak admitted that price competition is vigorous "in a few big cities (notably Tokyo and Osaka)."²⁵ It charged, however, that the rest of Japan is very different.

In its February 7, 1996 submission, Fujifilm showed that Kodak's new fallback position -- prices are competitive in the major cities, but fixed everywhere else -- is as baseless as its original allegation of a nationwide price fixing conspiracy. By several measures, including even the data cited by Kodak, there is no substantial difference between price levels in Tokyo and Osaka and price levels elsewhere in Japan.²⁶ Kodak's price conspiracy has been shoved into the sea.

Price competition not only is alive and well in Japan, but it has been growing progressively more intense over time. In its February 7, 1996 submission, Fujifilm cited the following notable trends in the marketplace:

- ISO 400 film jumped from 9.3 percent of the market in 1988 to 47.5 percent in 1994. This film speed generally sells for less in Japan than in the United States.²⁷
- Multipack sales have grown rapidly, now accounting for roughly 40 percent of total film sales in Japan. The percentage of ISO 100 film sold in multipack form grew from 3 percent in 1989 to 47 percent in 1995; multipacks have accounted for roughly half of ISO 400 sales throughout the 1990s, and have ridden the surging popularity of that film speed throughout

²⁵ Kodak's November 6, 1995 submission at 31.

²⁶ Fujifilm's February 7, 1996 submission at 31-43.

²⁷ Id. at 25.

the period. Multipacks are generally cheaper in Japan than in the United States.²⁸

- Private and dual brand film has experienced explosive growth since its introduction in 1994. Agfa, the leading supplier of private brand film, saw its market share jump from basically zero to 5 percent in a single year on the strength of its private brand sales. Private and dual brand film is sold at rock-bottom prices.²⁹
- Photo stores, the specialty outlets with higher prices, have dropped 10 percentage points of relative total sales volume over the past decade: from 60 percent in 1985 to 50 percent in 1994. Discount stores and supermarkets -- the outlets with the lowest prices -- have grown from 19 percent of the market to 23 percent over the same period.³⁰

All of these trends fly in the face of Kodak's claim that Fujifilm has successfully masterminded a widespread suppression of price competition. Here again, the evidence shows that Kodak's conspiracy theories are baseless.

2. Fuji brand film is discounted all over Japan

If Fujifilm were truly the ringleader of a price fixing conspiracy as Kodak alleges, one would expect to see prices in the marketplace bunched around Fujifilm's manufacturer's suggested retail prices. In fact, however, Japanese price data -- including the data cited by Kodak -- show widespread and often dramatic discounting off of MSRPs.

Figure 3 compares prices in the 10-city survey conducted by Fujifilm salespeople in December 1995 with MSRPs.³¹ For ISO 100 single packs, prices range from 65 to 100 percent of MSRP; the average price is 84 percent of MSRP. For ISO 400 single packs, the average price

²⁸ Id. at 26 and Exhibit 7.

²⁹ Id. at 44, 46-47, and Exhibit 14.

³⁰ Id. at 52.

³¹ Complete price data are presented in tabular form in Exhibit 2.

is also 84 percent of MSRP; prices range from 61 to 100 percent of MSRP. For multipacks -- which account for roughly 40 percent of total film sales -- there is no relation whatsoever between actual and suggested prices. The average ISO 100 3-pack price is only 51 percent of MSRP, while the average ISO 400 3-pack is only 63 percent of MSRP.

Indeed, discounting of multipacks has grown so fierce that Fujifilm decided as of December 1995 to abandon the use of suggested prices for these products. Exhibit 3 contains the Japanese original and an English translation of the notice.³² Thus, for products accounting for roughly 40 percent of its sales, Fujifilm has given up giving any guidance whatsoever regarding retail prices. This is a far cry indeed from Kodak's portrayal of Fujifilm as the hub of a massive price fixing conspiracy.

Even the price information used by Kodak confirms Fujifilm's point. The Government of Japan price survey data cited by Kodak shows only the least aggressively priced product in the market (ISO 100) at higher priced outlets (photo stores); moreover, the survey purposefully excludes all "low prices due to bargain, clearance, discount sales, etc."³³ Despite all of these limitations, the Government of Japan data show widespread and often deep discounting of Fuji brand film. Figure 4 compares surveyed prices from 59 cities to Fujifilm's MSRP for ISO 100 single packs.³⁴ The prices range from 406 yen (77 percent of MSRP) to 534 yen (101 percent of MSRP) -- a 32 percent spread.

³² As of March 1, 1996, Kodak Japan also has abandoned MSRPs for Super Gold film for both single packs and multipacks.

³³ Fujifilm's February 7, 1996 submission at 8-10.

³⁴ Complete price data are presented in tabular form in Exhibit 4.

In short, the data show that Fujifilm's suggested retail prices are only that -- suggestions. While some retailers do base their prices on MSRPs, others do not; indeed, for multipacks MSRPs have now been scrapped altogether. The price data, by documenting often deep discounting and a large spread between high and low prices, confirm that prices are determined independently by retailers, not according to some grand collusive scheme.

3. Kodak film is discounted all over Japan

Contrary to Kodak's allegations, Japanese price data show that there is no concerted refusal not to discount Kodak film. Kodak is widely discounted in Japan -- both relative to its own suggested retail prices, and relative to Fujifilm. Kodak's problem is not that retailers refuse to discount; its problem is that it has not cut prices sufficiently so that retailers, with a normal range of markups, can sell more of the product.

Figure 5 shows Kodak prices from Fujifilm's December 1995 10-city survey compared to its own MSRPs as well as prices for Fuji brand film at the same outlets. Kodak is uniformly sold for far less than its MSRPs. In other words, while Kodak alleges that retailers are selling its film at higher prices than it would like, in fact retailers are selling Kodak film at far lower prices than Kodak has recommended. ISO 100 single packs are sold at between 51 and 100 percent of MSRP, while ISO 400 single packs range from 48 to 100 percent of MSRP. For multipacks, retailers are completely ignoring Kodak's suggested prices: on average, ISO 100 3-packs are selling at 44 percent of MSRP, and ISO 400 3-packs are selling at 58 percent of MSRP.³⁵

The comparison of Kodak and Fujifilm prices disproves Kodak's allegation of a retailer conspiracy to charge excessive prices for Kodak film. Figure 6 provides price data for Fuji brand

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Complete price data are presented in tabular form in Exhibit 2.

and Kodak ISO 100 and 400 single rolls.³⁶ As Figure 6 shows, Kodak is generally sold for less than Fujifilm; sometimes the two brands are offered at the same price; on occasion, the Kodak product is more expensive. The data reveal a normal competitive market, in which retailers with different costs and different business strategies set prices freely and independently. Kodak's conspiracy theory once again runs aground on the facts.³⁷

³⁶ Complete price data are presented in tabular form in Exhibit 2.

³⁷ On March 20, 1996, Kodak submitted to USTR the results of a survey it commissioned on retail availability and pricing levels in the Japanese market. The submission purports to show that Kodak is not available in stores accounting for most of the total film sales volume in Japan, and that even when available it is rarely "competitively" priced (i.e., sold at a significant discount relative to Fujifilm).

As mentioned above in note 1, this new submission fails even to address Fujifilm's demonstration in its December 21, 1996 submission that the overwhelming majority of the customers of Fujifilm's tokuyakuten already carry Kodak or have an existing Kodak supplier. This un rebutted fact singlehandedly demolishes Kodak's whole "distribution bottleneck" theory.

Kodak's conclusions about both retail availability and -- of particular relevance here -- "competitive" pricing are undermined by irreparable methodological flaws in its survey. Most glaringly, the survey purports to control for volume by allocating survey samples by outlet type in accordance with the outlet type's percentage of total sales volume (i.e., 50 percent of the samples were allocated to photo stores because photo stores account for 50 percent of total film sales volume); however, the survey fails to take into account differences in store size within a given outlet type. See Kodak's March 20, 1996 submission, Methodology Appendix at endnote 2. As the data presented in Fujifilm's December 21, 1996 submission demonstrate, though, different stores within the same outlet type vary enormously in sales volume; furthermore, within a given outlet type the data show that Kodak is strongly concentrated in the highest volume outlets. By failing to take these factors into account, Kodak's survey results are completely useless in estimating the percentage of sales volume accounted for by those stores in which Kodak is available and priced "competitively."

Finally, with regard to "competitive" pricing, Kodak's new submission presents no evidence whatsoever that retail prices for Kodak products are set collusively. At most they show that in many outlets retailers have chosen to sell Kodak and Fujifilm at roughly equivalent prices. Although the data presented in this section show that Kodak is frequently sold at a discount to Fujifilm, the fact that the two brands are often sold at equivalent prices is certainly not evidence of anticompetitive conduct. As explained above, it simply means that retailers are choosing to earn a slightly higher unit margin on sales of Kodak. This higher markup compensates the retailer for its decision to devote shelf space to a slow moving product.

C. Kodak's "Evidence" Of Vertical And Horizontal Price Collusion Cannot Withstand Critical Scrutiny

Kodak's primary "evidence" of price collusion in Japan -- in addition to its flawed analysis of Japanese price levels rebutted in Fujifilm's October 24, 1995 and February 7, 1996 submissions -- consists of trade press articles over the past 25 years, most of which relate to discussions of pricing issues held at various trade association meetings. In "Rewriting History," Fujifilm showed that this "evidence" consisted of selective quotations either taken out of context or egregiously misinterpreted.³⁸

In its November 6, 1995 submission, Kodak stuck to its guns. It repeated old quotations, offered some new ones, and provided full translations of some of the articles cited in "Privatizing Protection" as well as full translations of other articles not previously cited. Kodak continues to claim that these clippings provide "clear evidence of pervasive vertical resale price maintenance and horizontal price coordination tolerated by the Japanese government."³⁹

Kodak is wrong. We offer here a comprehensive review of Kodak's "evidence" of vertical and horizontal price collusion. The bottom line of this analysis: Kodak's clippings do not prove the existence of any vertical or horizontal collusion that would interfere with Kodak's own pricing strategies.

Before reviewing Kodak's "evidence" of price fixing in detail, it is necessary to clarify the relevant standards for judging Kodak's purported proof. First and most fundamentally, any supposed documentation of price collusion, to be probative in this investigation, must relate

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We intend to file a more detailed response to Kodak's new submission in the near future.

³⁸ "Rewriting History" at 101-104 and Appendix.

³⁹ Kodak's November 6, 1995 submission at 72.

somehow to Kodak's theory of how price fixing interferes with its exports to Japan. Any "evidence" that does not meet this fundamental test is not evidence at all; it is an irrelevant diversion.

This fundamental consideration results in the exclusion of much of Kodak's "evidence" as flatly irrelevant. Many of Kodak's clippings concern photofinishing prices, while others concern camera prices. None of this "evidence" is relevant to this investigation. Neither photofinishing services nor cameras are included in this investigation. The scope of this investigation is restricted to color film and color paper; photofinishing and cameras fall outside of Kodak's petition⁴⁰ and USTR's initiation notice.⁴¹

Moreover, there is no conceivable way in which price fixing of photofinishing or cameras could fit into Kodak's theory. Kodak argues that retailers impose excessive markups on its film, thereby interfering with Kodak's ability to compete with Fujifilm on price. Price fixing of photofinishing or cameras, even assuming it existed and indeed were rampant, would in no way interfere with Kodak's ability to pass through low wholesale film prices at the retail level.⁴²

⁴⁰ Petition of Eastman Kodak Company, May 18, 1995 at 4 and Appendix C.

⁴¹ Initiation of Investigation Pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 60 Fed. Reg. 35447 (July 7, 1995).

⁴² Likewise, price fixing of photofinishing could not affect Kodak's ability to compete on price in the market for color paper. With inflated print prices, retailers or labs would simply be able to earn even larger profits if they purchased low-priced Kodak paper.

For that matter, even price fixing by other manufacturers or dealers with respect to color paper would not interfere with Kodak's ability to price its color paper aggressively. Kodak only sells a trivial amount of paper -- less than 5 percent of its sales -- through independent secondary dealers. All the rest is sold to Kodak affiliated labs, which either consume the paper in their own photofinishing operations or resell to minilabs. Thus, Kodak is in total control of its color paper pricing all the way from the factory to the photofinisher. Notwithstanding the above, we examine

Accordingly, allegations of anticompetitive conduct relating to these products have nothing to do with this case.

Second, evidence of price collusion must be relatively contemporaneous if it is to be relevant. Section 301 is designed to secure the elimination of current unjustifiable, unreasonable, or discriminatory acts, policies, and practices.⁴³ If the Japanese government tolerated price fixing many years ago, but there is no evidence that it does so today, there is no current act, policy, or practice that can be eliminated. Accordingly, long-ago price fixing is not itself actionable. Furthermore, given all the changes in the Japanese market that have occurred in recent years, evidence that price fixing occurred long ago lends no credible support to the charge that such price fixing continues today.

Although the cutoff could easily be drawn much more recently, we believe that the many articles from the 1970s cited by Kodak are patently stale and should be disregarded. As demonstrated in "Rewriting History," we by no means admit that Kodak's documentation from the 1970s has merit: Kodak's grasp of ancient history is as bad as its reading of current events.⁴⁴ At this stage of the investigation, however, and in light of all the papers already filed with USTR, we do not think it worth the effort to disprove again allegations that have no bearing on the real issues in this case.

Third, with regard to resale price maintenance, the key issue is whether retailers are making pricing decisions independently of Fujifilm. Under U.S. law, in the absence of an explicit

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below the very few articles cited by Kodak that relate to color paper pricing. See below at section C.1.c.iii.

⁴³ "Rewriting History" at 204-207 (explaining that Section 301 applies only to current violations).

agreement between Fujifilm and retailers to maintain prices,⁴⁵ there needs to be evidence that somehow clearly establishes that Fujifilm and retailers are acting according to a common plan (e.g., by showing pressure or coercion by Fujifilm of retailers regarding their pricing).⁴⁶ General statements by a manufacturer in support of price stability, or retailers' complaints about a competitor's price cuts, do not by themselves prove resale price maintenance.

Similarly, the existence of manufacturer's suggested retail prices does not prove resale price maintenance. The use of MSRPs is legal, and it is equally legal for retailers to follow them if they so choose. What must be proved is that retailers, in so following them, are not acting independently, but rather -- under U.S. law -- pursuant to an agreement with the manufacturer.⁴⁷

Fourth, with regard to horizontal price fixing, the same point regarding general price discussions holds true. Standing alone, statements in favor of high, profitable prices or complaints about discounting by competitors do not suffice to show that a pricing conspiracy

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⁴⁴ See, e.g., "Rewriting History," Appendix at 87-91.

⁴⁵ As discussed in "Rewriting History," in 1981 Fujifilm eliminated from its contracts with the tokuyakuten provisions requiring them to make efforts to maintain orderly prices. Fujifilm made this change in the aftermath of the JFTC's investigation of x-ray film. "Rewriting History" at 141. Whether or not these provisions were ever invoked or enforced, they have been gone for 15 years. There have never been any agreements relating to pricing policies between Fujifilm and retailers.

⁴⁶ Under U.S. law, there must be "evidence that tends to exclude the possibility of independent action by the [parties]." Monsanto Company v. Spray-Rite Service Corp., 465 U.S. 752, 768 (U.S. 1984). In this regard, evidence of coercion or pressure by Fujifilm would help to establish that retailers were not setting their prices independently. Under Japanese law, the standard is whether the manufacturer has used "artificial means" to secure pricing in accordance with MSRP. Evidence of pressure or coercion by Fujifilm would help here to establish the use of "artificial means".

⁴⁷ Under Japanese law, the relevant issue is whether the manufacturer has used "artificial means" (e.g., pressure or coercion) to get retailers to follow its MSRPs.

exists. Here Kodak betrays a fundamental analytical confusion. In its November 6, 1995 submission it states:

Whether or not such trade association activities are or are not effective, at any given moment, in restraining discounting by a particular firm (like Nihon Jumbo) is beside the point.

These articles reveal that direct competitors are openly engaging in horizontal discussions of price, and that their common concern is price erosion caused by a maverick.⁴⁸

But the effectiveness of retailers' complaints about discounters, far from being "beside the point," is the entire point. The mere exchange of price information among competitors, without proof that it has resulted in any agreement on price, is not illegal.⁴⁹ If Kodak is to prove horizontal price collusion, it must offer evidence that any exchanges of price information were followed by concerted pricing action.⁵⁰

⁴⁸ Kodak's November 6, 1995 submission, Evidentiary Appendix at 855.

⁴⁹ See United States v. Citizens & So. Nat'l Bank, 422 U.S. 86, 113 (1975) (noting that "the dissemination of price information is not itself a per se violation of the Sherman Act"); Wilcox v. First Interstate Bank, 815 F.2d 522, 527 (9th Cir. 1987) ("disclosure of the prime rate does not enable competitors to conspire to fix prices and does not necessarily constitute a violation of the antitrust laws"); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505 (11th Cir. 1985), cert. denied, 475 U.S. 1107 (1986) (exchange of price information lawful absent agreement to fix prices); Zoslaw v. MCA Distrib. Corp., 693 F.2d 870 (9th Cir. 1982), cert. denied, 460 U.S. 1085 (1983) (exchange of retailer credit histories and credit balance information not price fixing absent an agreement to fix credit terms); Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053, 1061 (D.N.J. 1988) (exchange of price information alone insufficient to establish conspiracy unless the circumstances make it the most rational choice); United States v. Berger Indus., Inc. et al., 1985-1 Trade Cas. (CCH) P 66,587 at 65,919-65,920 (E.D. Pa. 1983) (exchange of price information, without more, insufficient to establish criminal violation).

⁵⁰ The Japanese Antimonopoly Act imposes the same requirements as U.S. law in this respect. Thus, according to a leading treatise on the Antimonopoly Act:

Ordinary cartel cases (sec. 3 or sec. 8(1)(i) cases) contain the following fact finding by the FTC.

The review of Kodak's "evidence" provided below will raise these four points again and again. The bulk of the articles cited by Kodak relate to products that have nothing to do with its supposed efforts to undersell Fujifilm. The remaining articles do not show any pressure exerted by Fujifilm against discounting, or any success by retailers in agreeing on what prices to charge. Kodak's "evidence" of vertical and horizontal price collusion vanishes under careful scrutiny.

1. Kodak has provided no evidence that Fujifilm has engaged in resale price maintenance

In the text of its November 6, 1995 submission, Kodak reviewed its "[e]vidence of vertical resale price maintenance."⁵¹ In addition, Kodak provided in the "Evidentiary Appendix" of that submission Japanese originals and English translations of a wide variety of trade press articles relating generally to pricing in the Japanese photographic industry -- some of which were originally cited in "Privatizing Protection," others of which are newly offered. Finally, there are a number of other citations in "Privatizing Protection" to articles that supposedly substantiate Fujifilm's involvement in vertical price fixing.

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- (A) Communication of wills by way of meetings or telephone conversation among competitors.
- (B) The fact that some discussion took place on such matters as prices at such meetings, using memos at such meetings, facsimile messages, desk diaries, notebooks, reports, or any other such kinds of documents that can be used as evidence.
- (C) Parallel activities among competitors thereafter indicating that such mutual understanding was actually reached.

H. Iyori and A. Uesugi, The Antimonopoly Laws and Policies of Japan (1994) at 79 (emphasis added).

⁵¹ Kodak's November 6, 1995 submission at 65-67.

We comprehensively review below all of these sources of Kodak "evidence." This review reaches an unambiguous conclusion: Kodak has provided absolutely zero documentation that Fujifilm has ever interfered with retailers' pricing decisions -- whether regarding Fuji brand film or Kodak. Accordingly, Kodak's charge of resale price maintenance is dead in the water.

a. Text of November 6 submission

Kodak cites five pieces of "evidence" allegedly showing Fujifilm's complicity in resale price maintenance. Presumably these represent Kodak's best evidence -- the documentation selected for special emphasis and attention. We address each item in turn.

First, Kodak cites the following passage from an article in Zenren Tsuho previously cited in "Privatizing Protection":

As our readers know, film uses the suggested retail prices set by the manufacturers for film. Thus, [Nihon Keizai Shimbun article, "Retailers Have the Right to Determine Prices"] is false.⁵²

Kodak alleges that in its previous submissions "Fuji does not attempt to explain" this supposedly damaging article.

In fact, however, Fujifilm has already explained this article.⁵³ This Zenren Tsuho article is objecting to an incorrect newspaper article in Nihon Keizai Shimbun that stated, among other things, that manufacturers had already abandoned the practice of providing MSRPs for film, and consideration was now being given to abandoning MSRPs for cameras as well. The Zenren

⁵² Kodak's November 6, 1995 submission at 66, citing Zenren Tsuho, July 1990, 18 (originally cited in "Privatizing Protection" at 51, n. 75). For a further discussion of this article, see section C.1.c.iv. below.

⁵³ "Rewriting History," Appendix at 48-49. A copy of that explanation, as well as the Japanese original and English translation of the cited article (which Kodak has not provided), are included in Exhibit 5.

Tsuho article simply sets the record straight: contrary to the article, film manufacturers (including Kodak as well as Fujifilm) do continue to provide MSRPs for their film products.⁵⁴

There is absolutely nothing anticompetitive about manufacturers' offering suggested retail prices. There is nothing in the article that suggests that Fujifilm has taken any steps to enforce its suggested prices. Kodak is engaging in purposeful distortion of the facts.

Second, Kodak cites another Zenren Tsuho article and argues: "Nor does Fuji explain the report that "union [Zenren] stores are controlled" to maintain suggested manufacturers retail price."⁵⁵ Interestingly, Kodak has not provided a copy of this article, and a reading of it shows why. (To clarify the record, Fujifilm provides the Japanese original and English translation of the article in Exhibit 6.)

The article reports a survey of retailers supporting and opposing the adoption of "open pricing" (i.e., the cessation of the practice of manufacturers' providing MSRPs) for cameras -- not color film, not color paper, but cameras.⁵⁶ The article therefore has absolutely nothing to do with this investigation. Even if it did, however, what Kodak misses is that Zenren members were merely discussing whether to continue an industry practice of announcing suggested retail prices. Whether or not such a practice is continued, though, says nothing about the possible presence of anticompetitive conduct.⁵⁷

⁵⁴ As mentioned above, though, Fujifilm has now abandoned the use of MSRPs for multipack film. See section B.3.

⁵⁵ Kodak's November 6, 1995 submission at 66, citing Zenren Tsuho, March 1994, 8-11 (originally cited in "Privatizing Protection" at 52, n. 77).

⁵⁶ Passages in the article that make clear that the article relates to camera pricing are emphasized in Exhibit 6.

⁵⁷ By the way, the passage from the article cited by Kodak, when read in context, gives no indication that Zenren camera stores are not free to set camera prices. One of the main

Third, Kodak claims that Fujifilm's internal memoranda state that "no business transactions are allowed . . . with any discounters."⁵⁸ In fact, however, Kodak is not quoting a Fujifilm document; instead, it is quoting from its own mysterious "consultant's report."⁵⁹ Kodak offers nothing to document this unsubstantiated assertion by its consultant: it fails to offer the name of a single so-called discounter with which Fujifilm refuses to deal on account of disagreement over pricing policies. Repeating baseless charges and mislabelling them as Fujifilm documents does not count as evidence.

Fourth, Kodak quotes from a previously uncited article which says that Fujifilm will threaten to cut advertising and promotional support "if camera stores say 'Let's lower printing charges.'"⁶⁰ Once again, Kodak quotes material that is irrelevant to this investigation. This article appears to implicate Fujifilm in maintaining photofinishing prices; it says nothing about any actions taken by Fujifilm that might interfere with Kodak's ability to price its film or paper

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criticisms of camera MSRPs enunciated in the survey was that MSRPs "are nothing more than a way for large stores, supermarkets, grocery stores and so on to display their margins of discount. Essentially, makers are just cooperating with a tactic large retailers employ to have consumers buy cameras of questionable quality." Exhibit 6. In this regard, the next survey respondent stated that "[u]nder the current setup, only our union member stores face tougher restrictions. Clearly, discount stores seem to be abusing the market by confusing the consumers by just emphasizing their discount rates." Id. Thus, the point is that specialty stores cannot afford to offer prices as low as those given by mass-merchandise discounters, and MSRPs exacerbate that problem by allowing discounters to brag about their discount rate. Nothing in the article suggests that Zenren camera stores are being constrained by camera manufacturers not to lower their prices.

⁵⁸ Kodak's November 6, 1995 submission at 66.

⁵⁹ See "Privatizing Protection" at 50.

⁶⁰ Kodak's November 6, 1995 submission at 66, citing Jitsugyo Kai, March 1994. The Japanese original and an English translation are provided in Kodak's November 6, 1995 submission, Evidentiary Appendix at 19.

aggressively. It therefore has nothing to do with Kodak's theory of how price collusion supposedly injures it in the Japanese market for film or paper.

Fifth, Kodak quotes from a "declaration by a high-level Fuji executive in 1982."⁶¹ Since Kodak fails to provide a source for its quotation, we are unable to check its accuracy; even taking the passage at face value, though, the quotation lends no support to Kodak's case. The passage provides a lengthy quotation from Fujifilm Director Motohiko Nakamura, who expresses concern at the disparity between MSRPs (the "set price") and actual market prices. In the first place, the existence of this gap shows that retailers were not following MSRPs and that therefore, contrary to Kodak, resale prices were not being maintained.

Furthermore, nothing in Mr. Nakamura's statement indicates that the promised efforts by Fujifilm to close the gap between suggested and actual prices would involve any attempt by Fujifilm to collude or use coercion to raise prices. In this regard, Mr. Nakamura states that "it is a problem if the current price of film (standard retail price) is viewed as too high."⁶² This does not sound like an effort to increase prices further.

b. Evidentiary Appendix of November 6, 1995 submission

The 948-page Evidentiary Appendix of Kodak's November 6, 1995 submission contains 32 trade press articles that have something to do with pricing in the Japanese photographic industry.⁶³ As summarized in Figure 7, though, most of these articles are irrelevant to this investigation, either

⁶¹ Kodak's November 6, 1995 submission at 66-67.

⁶² Id.

⁶³ Some of these articles are included more than once in the Evidentiary Appendix. Specifically, five articles appear twice, and two articles appear three times. See Kodak's November 6, 1995 submission, Evidentiary Appendix at 221 and 827; 231 and 589; 269 and 607; 277 and 639; 881 and 891; 335, 859, and 927; 345, 869, and 943.

because they pertain to photofinishing or cameras rather than film, or because they are too old to be of any probative value. Once this irrelevant "evidence" is tossed out, there are only 10 articles that could possibly lend support to Kodak's claim that price collusion is interfering with its attempts to undersell Fujifilm.

None of these 10 articles, however, contains any mention of efforts by Fujifilm to pressure retailers not to discount film prices or otherwise to interfere with their pricing decisions. Indeed, manufacturers' pricing policies only come up three times in these articles.⁶⁴ None of these three articles, though, lends any support to Kodak's case.

The first article dates back to 1980, and relates retailer dissatisfaction with Fujifilm's (and others') price increases in the wake of the "silver shock."⁶⁵ Raising prices when costs go up is totally unexceptionable; there is no mention of Fujifilm's pressuring retailers to price at any level. Indeed, the only interesting thing about the article is the vehemence with which retailers complain about the price hikes.⁶⁶ The retailers' pleas against price increases are jarringly inconsistent with Kodak's characterization of retailers as always encouraging higher prices.

⁶⁴ The other seven articles relate to wholesaler or retailer activity, not to Fujifilm.

⁶⁵ Nihon Shashin Kogyo Tsushin, April 1, 1980, 14; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 277.

⁶⁶ The article records various angry responses by retailers to the price increases:

Isn't there a need for stronger criticism against the manufacturers in order to increase demand? (Id., Evidentiary Appendix at 277.)

* * *

I'm troubled over the fact film prices rise and fall depending on the fluctuations in silver prices. In order not to decrease demand, I would like, as much as possible, to have the manufacturers refrain from increasing prices. (Id., Evidentiary Appendix at 278.)

The second article⁶⁷ dates back to 1983, and deals with Kodak's "VR campaign." In this special promotional effort, Nagase offered four packs of Kodak VR100, 200, 400, and 1,000 film at special low prices. It is true that some retailers complained about Kodak's prices, as well as aspects of Kodak's marketing effort that were thought to be deceptive. We address the retailers' reaction below;⁶⁸ here the issue is what Fujifilm did or did not do. The article describes Fujifilm's and Konica's response to Kodak's campaign as follows: "It appears that the two companies are handling this issue by employing regular attack tactics of aggressively promoting their customary summer campaign."⁶⁹

In other words, Fujifilm responded to Kodak's low prices in a normal, pro-competitive way: by stepping up its own promotional efforts. There is nothing here about any threats or pressure tactics designed to foil Kodak's marketing initiative.

The third article⁷⁰ addresses Daiei's 1994 announcement of its own private brand film at very low prices.⁷¹ Kodak's translation of the article contains the following passage regarding

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I will meet with Fuji Film's Managing Director, Mr. Onishi, on the 31st and request an end to the scheduled secondary price increase. (Id., Evidentiary Appendix at 282.)

⁶⁷ Nihon Shashin Kogyo Tsushin, July 20, 1983, 8; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 621.

⁶⁸ See section C.2.a.i. below.

⁶⁹ Nihon Shashin Kogyo Tsushin, July 20, 1983; 8; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 621.

⁷⁰ Nihon Shashin Kogyo Tsushin, March 20, 1994, 12; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 331. For a further discussion of this article, see section C.2.a.iii. below.

⁷¹ This private label film is manufactured by Agfa.

other manufacturers' (presumably Fujifilm's and Konica's) reaction to the announcement: "I learned from other makers of their ideas that they are inclined to fight back such discounted price while keeping an eye on this issue and providing services backed by consistent quality and technology."⁷² It is not clear what "fight back such discounted price" is supposed to mean, though of course Kodak would like to leave the impression that Fujifilm and Konica are plotting some nefarious "countermeasures" to thwart discount pricing in the market.

The only problem is that Kodak's translation is wrong. The passage actually says: "I asked other manufacturers what they think about this matter. They replied that (1) they are interested in the matter and are monitoring the situation, but (2) they do not intend to counter the discount price when they are providing a total service that includes high quality and technology" (emphasis added).⁷³

Thus, Kodak left a key "not" out of the sentence and thereby changed its whole meaning. What really happened was that the manufacturers indicated that they did not feel the need to cut their own prices immediately in response to Daiei's private brand.⁷⁴ Once again, there is no mention of pressure tactics, coercion, or dark plots -- just a normal business reaction to a competitor's move.

As far as resale price maintenance is concerned, Kodak's massive Evidentiary Appendix boils down to these three articles, and these three articles boil down to precisely nothing. The

⁷² Nihon Shashin Kogyo Tsushin, March 20, 1994, 12; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 331 (translation) and 333 (original).

⁷³ Id., Evidentiary Appendix at 333 (original Japanese version).

⁷⁴ Ultimately, however, prices have fallen because of competitive pressure from private brand film.

Evidentiary Appendix may serve as an excellent paperweight or doorstop, but it is totally worthless when it comes to implicating Fujifilm in price collusion.

c. Other articles cited by Kodak

In addition to poring through the Evidentiary Appendix, we have exhaustively reviewed all articles cited by Kodak in "Privatizing Protection" in support of its claims of price collusion. As summarized in Figure 8, Kodak's "evidence" of vertical price fixing is either irrelevant for reasons discussed above, or can be broken down into one of several basic categories. We analyze those general categories below. Again, not a single article cited contains any mention of efforts by Fujifilm to interfere with the independent pricing decisions of retailers.

(i) Statements supporting price stability

Two articles cited by Kodak include statements by Fujifilm officials in favor of stable prices. As discussed above, such statements alone do not even begin to meet Kodak's burden of proof. To document resale price maintenance, Kodak must show that after such statements were made, retailers acted in accordance with such statements, and moreover did so not unilaterally but pursuant to a common plan with Fujifilm. At bottom, without some documentation of coercion or pressure by Fujifilm, Kodak's allegations never get off the ground.

The first article contains a passage, quoted in "Privatizing Protection," in which Fujifilm Director Motohiko Nakamura expresses his support in 1982 for "stable" and "reasonable" prices.⁷⁵ The passage sounds the same themes as those in another 1982 statement by Mr. Nakamura quoted by Kodak in its November 6, 1995 submission.⁷⁶ All Mr. Nakamura is saying is that he hopes

⁷⁵ Nihon Shashin Kogyo Tsushin, January 1, 1982, 8-11 (cited in "Privatizing Protection" at 42-43, n. 49).

⁷⁶ Kodak's November 6, 1995 submission at 66-67. In that statement, Mr. Nakamura noted that the silver shock taught the lesson that prices should be stable "rather than

prices will settle down after their roller coaster ups and downs in 1980-81 caused by the "silver shock." There is nothing wrong with expressing such a sentiment; indeed, such comments are particularly understandable in light of the criticism Fujifilm took from retailers because of its big 1980 and 1981 price increases.⁷⁷ Nothing in Mr. Nakamura's comments indicates that Fujifilm planned to take any steps to interfere with pricing freedom down the distribution chain.

The second article contains a 1995 comment, quoted in "Privatizing Protection," by a Fujifilm official regarding private brand film. The official complains about the "price breakdowns" caused by private brand film, and then states that in the coming year "we must foster a market that seeks to establish prices and move away from price breakdowns."⁷⁸

It should come as no surprise that a manufacturer of a branded product is less than thrilled about growth in the sales of unbranded products. In the same vein, American manufacturers of branded products have certainly had their hands full over the past decade defending their pricing structures against generic and private label competition.⁷⁹ What is yet again missing from

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high or low." He added further that "it is a problem if the current price of film (standard retail price) is viewed as too high." Criticism of high prices does not sound very much like resale price maintenance. See section C.1.a. above.

⁷⁷ See section C.1.b. above.

⁷⁸ Shukan Shashin Sokuho, March 3, 1995, 5 (cited in "Privatizing Protection" at 43, n. 50).

⁷⁹ For example, consider this exchange in a recent interview with Kodak CEO George Fisher:

Q: Today's consumers seem to be leaning toward cheaper, private-label brands in almost every sector. Has this affected your market share and pricing strategy?

A: I suspect private-label film around the world has taken its toll, both on us and Fuji.

Kodak's "evidence", though, is any indication that Fujifilm would seek to defend its pricing by other than normal, pro-competitive means (e.g., R&D in superior technology, strengthening brand image through advertising, greater promotional efforts, etc.). Without that, Kodak's "evidence" is worthless.

(ii) Strong relationships with distributors

Kodak quotes from a 1994 profile of Fujifilm in Far Eastern Economic Review in the wake of Daiei's announcement of its own Agfa-manufactured private brand of color film.⁸⁰ A copy of the article is provided in Exhibit 7.

The article recognizes Fujifilm's strong "distribution network" of 300,000 sales outlets (the article apparently includes all outlets that carry Fuji brand film in Fujifilm's distribution network). "Fuji has built up this formidable network," according to the article, "through hard work and plentiful sweeteners to loyal retailers." One analyst argues that "this huge, closely knit network of labs and sales outlets has allowed Fuji to maintain" high prices for its film for decades.

While some facts in the article are open to dispute, the basic thrust of the article -- that Fujifilm is able to command a premium price for its goods thanks to its hard work in building close business relationships with retailers -- is unexceptionable. Nothing in the article suggests that Fujifilm has interfered with retailers' pricing decisions or taken punitive action against discounters. Thus, once again, there is no support for Kodak's claim of anticompetitive conduct.

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Chief Executive, November 1995, 34.

⁸⁰ Far Eastern Economic Review, April 14, 1994, 63-64 (cited in "Privatizing Protection" at 49, n. 66).

(iii) Responding to competitor's price cuts

In "Privatizing Protection," in a section entitled "Blocking Kodak's Discount Initiatives," Kodak relates how Nagase instituted a 20 percent price cut on color paper in July 1980.⁸¹ Kodak quotes an article in which Mr. Kamigori of Fuji Color Sales labelled the price cut "incomprehensible," and stated that from Fujifilm's perspective "there is no margin left for price reductions."⁸² However, as Kodak itself notes, Fujifilm did soon relent, dropping its color paper price by 16.9 percent, while stating its commitment to more stable pricing in the future.⁸³

So much for "blocking Kodak's discount initiatives" -- Fujifilm responded to a Kodak price cut with a price cut of its own. As a matter of logic, it would be impossible for Fujifilm to interfere with Kodak's pricing of color paper even if it wanted to, since Kodak controls that price all the way to the photofinisher. Kodak's citation of this 1980 episode does nothing to disturb that logic: it merely documents a (rare) instance in which Kodak decided to price aggressively, and Fujifilm's normal, pro-competitive reaction.

⁸¹ "Privatizing Protection" at 135-136.

⁸² Nihon Shashin Kogyo Tsushin, July 20, 1980, 10 (cited in "Privatizing Protection" at 135-136, n. 299).

⁸³ Nihon Shashin Kogyo Tsushin, August 1, 1980, 10 (cited in "Privatizing Protection" at 136, n. 300). Fujifilm's price cut effectively reversed an earlier price increase in January; see Nihon Shashin Kogyo Tsushin, January 20, 1980, 10 (cited in "Privatizing Protection" at 135, n. 297).

(iv) Existence of MSRPs

In the section of "Privatizing Protection" entitled "Tatane: Retail (and Resale) Price Maintenance," Kodak cites four articles in which camera store retailers are discussing the possible elimination of manufacturer's suggested retail prices in the photo industry.⁸⁴ Indeed, these articles represent the only Japanese trade press documentation cited by Kodak in that section of "Privatizing Protection."⁸⁵

These articles do nothing to advance Kodak's cause. They generally address the pricing of cameras, not film, and to that extent have nothing to do with this case.⁸⁶ Nowhere in these articles is there any suggestion that Fujifilm or other manufacturers were attempting to force retailers to base their prices on MSRPs. Indeed, the issue of dropping MSRPs altogether arose because of "the 'gutting' of recommended retail prices" -- i.e., rampant discounting that was severing all connections between MSRPs and market reality.⁸⁷ Such a situation is hardly consistent with vertical price fixing.

⁸⁴ Zenren Tsuho, September 1990, 6-7 (cited in "Privatizing Protection" at 49, n. 69); Zenren Tsuho, October 1990, 13 (cited in "Privatizing Protection" at 51, n. 74); Zenren Tsuho, July 1990, 18 (cited in "Privatizing Protection" at 51, n. 75); Zenren Tsuho, March 1994, 8-11 (cited in "Privatizing Protection" at 52, n. 77).

⁸⁵ In addition, Kodak cites an English language article that documents the widespread collapse of resale price maintenance throughout Japan, but which does not mention film. Financial World, January 4, 1992, 22 (cited in "Privatizing Protection" at 49, n. 68). Finally, Kodak cites the Far Eastern Economic Review article discussed above in section C.1.c.ii.

⁸⁶ See section C.1.a. above.

⁸⁷ As discussed above, such "price gutting" has finally caused Fujifilm to abandon the use of MSRPs for multipack film. See section B.3. above.

All Kodak has succeeded in showing is that film manufacturers do offer MSRPs in the Japanese market. This is a perfectly legal practice and is not evidence of resale price maintenance.

(v) Fair Trade Promotion Council

Kodak also tries to implicate Fujifilm by reason of its membership in trade associations -- most notably, the Fair Trade Promotion Council.⁸⁸ The FTPC was formed by six constituent trade associations, representing manufacturers, wholesalers, labs and retailers in the photographic industry; its function is to coordinate industry self-regulation of unfair trade practices.⁸⁹

Kodak seizes upon the fact that an article describing the establishment of the FTPC expresses the hope that the organization will help to curb "excessive competition."⁹⁰ It is

⁸⁸ The only other trade association cited by Kodak in which Fujifilm is a member is the Kanzai Kogyokai, or Photosensitive Materials Manufacturers Association (referred to by Kodak -- no doubt in an attempt at wit -- as the "KKK"). The only "evidence" Kodak produces of Kanzai Kogyokai's involvement in anticompetitive conduct is a 1974 article describing a meeting at which retailers asked manufacturers not to engage in a price war. Kodak's November 6, 1995 submission, Evidentiary Appendix at 839. As discussed above, we do not regard "evidence" from over 20 years ago as probative of whether price fixing is currently occurring.

⁸⁹ In "Privatizing Protection" Kodak frequently confuses the FTPC with the camera retailers' Fair Trade Council. The latter organization was established to enforce a Fair Trade Code for cameras pursuant to the Premiums Law. This Code has nothing to do with film.

⁹⁰ Nihon Shashin Kogyo Tsushin, December 20, 1982, 8 (cited in "Privatizing Protection" at 45, n. 55). In a passage not quoted by Kodak, the article reads: "If the so-called 'excessive' competition among wholesalers can be somewhat adjusted in a voluntary and legal manner, it may also provide a breakthrough for photosensitive wholesalers. This is because one major factor which is thought to be a cause of decline in wholesalers' performance is the discount sales from excessive competition (in the old days this was dump sale competition)" (emphasis added).

The passage is interesting in two respects. First, the article specifically anticipates that the organization would be limited to pro-competitive (*i.e.*, legal) activities. In addition, the article ascribes wholesalers' poor performance to vigorous discounting -- hardly consistent with Kodak's claim that price competition has been effectively suppressed through collusion.

irrelevant, though, what journalists or others hoped the organization would do; all that matters is what the organization has actually done.⁹¹ Unfortunately for Kodak, the FTPC's actual track record is unexceptionable.

The FTPC's activities are documented in articles cited by Kodak. The FTPC developed a self-regulatory code under the approval of the JFTC relating to camera sales. Specifically, the code addresses only two issues: (1) the practice by camera retailers of forcing camera manufacturers to dispatch sales personnel to retail outlets; and (2) excessive demands by retailers for promotional money from camera manufacturers and wholesalers.⁹² Beyond this code, the FTPC has only addressed issues relating to protection of consumers from misleading trade practices. Thus, the FTPC proposed a standard practice for ensuring that both developing and printing charges are disclosed properly to consumers. This proposal was intended to rectify retailers' practice of luring customers with low print prices without ever disclosing high accompanying developing prices.⁹³ The FTPC has not developed any codes or standards that have anything to do with this investigation of color film and color paper, or for that matter with anticompetitive conduct in any industry.

⁹¹ Kodak also mistakenly ascribes to the FTPC a set of "Fundamental Policies" including the following pledge: "We will continue our untiring efforts to deepen cooperation among our members . . . and to stabilize market prices while ensuring reasonable profits." Nihon Shashin Kogyo Tsushin, May 1, 1982, 10 (cited in "Privatizing Protection" at 45-46). This article, which appears in Kodak's November 6, 1995 submission, Evidentiary Appendix at 285, makes clear that the "Fundamental Policies" in question are those not of the FTPC, but the Shashoren, or Federation of Photo Distributors. We discuss the Shashoren below in section C.2.b.

⁹² Zenren Tsuho, September 1990, 6-7 (cited in "Privatizing Protection" at 49, n. 69).

⁹³ Nihon Shashin Kogyo Tsushin, May 20, 1984, 10 (cited in "Privatizing Protection" at 137, n. 308). The article specifically states: "This is not designed to curb advertisement of low prices, but will prevent consumers from being misled or unduly enticed into a deal." See "Rewriting History," Appendix at 30.

2. Kodak provides no evidence of horizontal price fixing

Figure 7 lists all the pricing-related articles included by Kodak in its Evidentiary Appendix, and Figure 8 shows all other pricing-related articles cited by Kodak in "Privatizing Protection." As shown in these figures, much of Kodak's cited material is irrelevant to this case. Once all of the irrelevant material has been weeded out, Kodak's "evidence" of horizontal price collusion focuses on the activities of three organizations: Zenren, an association of photo store retailers; Shashoren, an association of photographic products distributors; and Fujicolor Tomono-kai, or "Friends of Fuji Color," a sales promotion program aimed at providing a stable customer base for member retailers and labs.

A review of the articles included by Kodak in its Evidentiary Appendix or otherwise cited in "Privatizing Protection" shows that Kodak has failed to prove its allegation of widespread horizontal price fixing. Indeed, Kodak's press clippings help to disprove its claim. Although Zenren and Shashoren and some of their members have on occasion indicated a desire to control prices, Kodak's own documentation demonstrates that they have lacked the ability to do so. Talk about limiting competition is meaningless unless it is followed up by successful concerted action. Kodak's "evidence" fails to document any such action, and even highlights the absence of such action.

a. Zenren

As "proof" of Zenren's involvement in "[a]nticompetitive [t]rade [a]ssociation [a]ctivity",⁹⁴ Kodak cites the following statement from the association's 1986 "action plan": "We support countermeasures to fight the conspicuous gap between standard prices and actual sales prices [in

⁹⁴ "Privatizing Protection" at 130.

photographic materials]."⁹⁵ In the absence of evidence of subsequent successful countermeasures, however, this statement proves the opposite of Kodak's point: what it shows is that there was in 1985 a "conspicuous gap" between manufacturer's suggested retail prices ("standard prices") and actual prices in the marketplace. In other words, price competition is unchecked and retail prices are not being fixed.

Going back to 1980, Kodak's "evidence" shows that price competition was alive and well back then, too. Kodak cites an article in which a Zenren director proposes a meeting among manufacturers', wholesalers', and retailers' groups to discuss market conditions.⁹⁶ Elsewhere in the article, under a subheading entitled "The Retail Sector Will Take The Initiative With Regard To Price Without Being Controlled By Manufacturers", one Zenren member states:

We have doubts about the very establishment of a standard price for color film. It is established by elements outside our control. The problem is the nature of the industry, which leads us, despite our mutual awareness of the fact that the standard price is not adhered to in the marketplace, to want to just carry on.⁹⁷

Thus, back in 1980, not only were manufacturer's suggested prices still being ignored by retailers, but some retailers were even proposing that the whole system of MSRPs be scrapped and that retailers set their prices without any input from manufacturers.

Moving forward to 1990, nothing had changed. In a series of articles cited by Kodak, retailers were again debating the elimination of MSRPs in light of "the 'gutting' of recommended

⁹⁵ Nihon Shashin Kogyo Tsushin, October 20, 1985, 10 (cited in "Privatizing Protection" at 131, n. 286).

⁹⁶ Nihon Shashin Kogyo Tsushin, August 1, 1980, 12 (cited in "Privatizing Protection" at 46, n. 58); see "Rewriting History", Appendix at 34 for a discussion of this article.

⁹⁷ Id. (emphasis added)

retail prices."⁹⁸ And, as discussed above, in December 1995 Fujifilm finally did announce the elimination of MSRPs for multipacks because of their total lack of relationship to actual market prices.⁹⁹

Thus, Kodak's own "evidence" documents widespread discounting or "price gutting" by retailers over the past 15 years. This documentation confirms Fujifilm's position: retailers, not Fujifilm, set prices at the retail level, and they do so in competition with each other. Kodak thus contributes helpfully to disproving its own allegations of both vertical and horizontal price fixing.

Against this backdrop of unfettered competition, Kodak does attempt to document specific isolated instances in which retailers allegedly colluded to limit price competition. We now examine each of these instances in turn.

(i) 1983 VR campaign

First, Kodak alleges that Zenren members, with the help of the JFTC, sought to block a low-priced 1983 "VR campaign" by Kodak and Nagase.¹⁰⁰ As Fujifilm explained in "Rewriting History," Zenren members complained about low prices and potential deceptive advertising -- specifically, the inclusion in the pack of VR-1000 film that was unusable in most Japanese cameras of the time.¹⁰¹

Kodak has responded that "Fuji's account is inaccurate," and that "Zenren's sole concern about the VR 'trial pack' was the low prices." In the very next paragraph, though, Kodak admits

⁹⁸ See section C.1.c.iv. above.

⁹⁹ See section B.3. above.

¹⁰⁰ Kodak's and Nagase's 1983 price initiative is mentioned in Nihon Shashin Kogyo Tsushin, May 20, 1983, 8 (cited in "Privatizing Protection" at 137, n. 305).

¹⁰¹ "Rewriting History," Appendix at 101-103.

that "[t]he issue of incompatibility of VR-1000 film was raised."¹⁰² Furthermore, Kodak does not contest that Nagase apparently recognized there were problems with its campaign, since Nagase agreed to withdraw its television advertising (its newspaper ads, though, continued).¹⁰³

Thus, though clearly some retailers were upset about the low prices for the VR trial pack, the only action taken was with respect to the manner of advertising. There are regulations in the United States as well as Japan about deceptive advertising; in neither country do these regulations prevent companies from setting prices wherever they like.

Indeed, the upshot of the whole affair was the recognition that retailers' only option was to fight back with price competition of their own:

Following this special sale, these [large-scale] retailers become somehow stable, but the other stores, which are embroiled in these sales, will undertake any measures to counteract this situation; they have no alternative but to run the same kind of bargain sales. At present, gigantic Eastman Kodak is planning to hold such a commemorative sale. We cannot blame the retailers in any way for being concerned about Eastman Kodak's plan. However, no matter how much anyone worries, there is nothing they can possibly do if we are to uphold the principle of "free competition."¹⁰⁴

This hardly sounds like a concerted attack on price competition. Once again, Kodak's own "evidence" belies its allegations.

(ii) Reverse-imported Lotte film

Kodak harps upon an instance in 1988 in which retailers complained to the JFTC regarding the advertising of Fujifilm-produced reverse-imported Lotte brand film. Kodak terms the episode

¹⁰² Kodak's November 6, 1995 submission, Evidentiary Appendix at 617.

¹⁰³ Nagase's reaction is discussed in Nihon Shashin Kogyo Tsushin, June 20, 1983, 21; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 625, 626.

¹⁰⁴ Kodak's November 6, 1995 submission, Evidentiary Appendix at 621, 621-622 (emphasis added).

"a clear instance in which the JFTC -- the national competition authority -- applied pressure to a retailer at the behest of an organized group of that retailer's direct competitors . . . to cause that retailer to desist from effectively marketing film at a discount."¹⁰⁵

Kodak's "evidence" again disproves its argument. It is clear in the article cited by Kodak that retailers were concerned not with pricing, but with deceptive advertising. "But isn't this clearly deceptive advertising?" complained a retailer quoted in the article.¹⁰⁶ What the retailers were upset about is that the film was being advertised as 60 percent off of the suggested retail price of 620 yen -- implying that this film had a suggested retail price in the Japanese market.¹⁰⁷ But Lotte film had no Japanese suggested retail price, because it was designed solely for marketing in Korea. The advertising was claiming a discount off of a nonexistent suggested price (or rather, the suggested price of another product), and thus was misleading.

There is nothing in Kodak's documentation which shows that anyone tried to stop or succeeded in stopping the retailer in question from selling this reverse-imported film at 250 yen (the advertised price). Kodak once more confuses regulation of deceptive advertising with price fixing.¹⁰⁸

(iii) Free film with cameras

¹⁰⁵ Id. at 567.

¹⁰⁶ Zenren Tsuho, March 1988, 8-9; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 573.

¹⁰⁷ For a copy of the advertisement in question, see Kodak's November 6, 1995 submission, Evidentiary Appendix at 575.

¹⁰⁸ Another article cited by Kodak mentions this incident as an example of "representing Korean Lotte film as Fuji Color HR." Zenren Tsuho, May 1988, 13 (cited in "Privatizing Protection" at 46, n. 57, 134, n. 296). Here again, the discussion is about deceptive advertising, not low prices.

As "evidence" of Zenren interference with discounting by retailers, Kodak cites an article in which a Zenren official objects to a 1994 offer by Shashinya-san 45 -- a large camera store chain -- of free film forever upon the purchase of certain promoted cameras.¹⁰⁹ "We have questioned Photoshop 45 about its supplying of something for free forever -- that it may be questionable practices," the Zenren official is quoted as saying, "and are currently consulting with the Fair Trade Commission."¹¹⁰

First of all, Shashinya-san 45's offer had nothing to do with discounting film; rather, it involved promoting the sale of cameras and photofinishing.¹¹¹ Furthermore, it is completely lawful under the Japanese Antimonopoly Act to report to the JFTC promotional activity that could be considered an unfair trade practice. There is no indication that anything ever happened other than this one objection being voiced. This episode has nothing whatsoever to do with price fixing of color film or color paper.

(iv) Private brand film

In discussing Zenren as an "instrument of market control,"¹¹² Kodak cites as evidence the fact that "[i]n 1995, when Kodak began selling film under private brand label with the Cooperative Stores the Zenren decided that 'we will ask them to consider our position.'"¹¹³

¹⁰⁹ Nihon Shashin Kogyo Tsushin, March 20, 1994, 12 (cited in "Privatizing Protection" at 57, n. 93); see Kodak's November 6, 1995 submission, Evidentiary Appendix at 331.

¹¹⁰ Id.

¹¹¹ Under the promotional offer, a customer that bought a promoted camera would be entitled to free film whenever he got his film developed at that shop.

¹¹² "Privatizing Protection" at 42.

¹¹³ "Privatizing Protection" at 45; see Shashin Kogyo Junpo, April 10, 1995, 6 (cited in "Privatizing Protection" at 45, n. 53).

Nothing in the article indicates any move by any Zenren member to interfere with Kodak's initiative to sell film on a private brand basis. Since Kodak's deal with Coop continues, and it has also struck dual brand deals with Seiyu, Family Mart, and Nichiryu -- all major chains -- it is clear that nobody is stopping Kodak from selling cheap film now that it finally seems to want to.¹¹⁴

¹¹⁴ Kodak also cites another article in which Zenren members are discussing the growth of private brand film. One official stated that "[w]e have to take some course of action," while another suggested that "a special committee should then be set up to formulate our position." Zenren Tsuho, April 1994, 11-13 (cited in "Privatizing Protection at 147, n. 334); see Kodak's November 6, 1995 submission, Evidentiary Appendix at 335, 337. Kodak nowhere provides any documentation that a committee was actually established or any other action taken; clearly private brand film's explosive growth in Japan has not been affected by a few retailers' grumbling. Indeed, as one of the Zenren officials quoted in the article recognized: "Private brand film costs half as much as ours. The popularity of this film will continue to spread." Kodak's November 6, 1995 submission, Evidentiary Appendix at 335, 337.

b. Shashoren

As with Zenren, Kodak provides documentation that Shashoren -- a trade association of photographic products wholesalers and distributors -- has made official pronouncements in favor of limiting competition. Thus, Shashoren's 1982 declaration of "fundamental policies" includes the following statement: "We will continue our untiring efforts to deepen cooperation among our members, to promote normalization of trade on the local level around the activities of our branches, and to stabilize market prices while ensuring reasonable profits."¹¹⁵ Similarly, Shashoren's "action plan" for 1985 contains the statement that "we should eradicate the excessive competition."¹¹⁶

Here again, though, as with Zenren, Kodak's own "evidence" shows the disconnect between rhetoric and reality. As documented in the Evidentiary Appendix, back in 1982 -- at the same time Shashoren was issuing its "fundamental policies" -- the following analysis was delivered on the issue of marketplace trends:

The sales outlets that deal with these firms [the film manufacturers and wholesalers] are also different. The so-called "large retailers" in particular are different from the typical retailer. Because of this, the "wholesale price" received by the retailer could be any price depending on who the wholesaler is; this is in adherence to the principle "free trade," and no matter where one looks it is difficult to find a standard price. . . .

Facing this, one might say that the situation is difficult, and that because of this, at least in the case of sensitive materials, there would be no hope for any enduring

¹¹⁵ Nihon Shashin Kogyo Tsushin, May 1, 1982, 10; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 285, 287. Kodak mistakenly attributes this statement to the Fair Trade Promotion Council. See "Privatizing Protection" at 45-46; Kodak's November 6, 1995 submission at 67.

¹¹⁶ Nihon Shashin Kogyo Tsushin, May 1, 1985, 12; see Kodak's November 6, 1995 submission, Evidentiary Appendix at 299, 300-301.

trade normalization if firms attempt to perform some type of regulation on their own.¹¹⁷

Also, contained in Shashoren's 1985 "action plan" is the following lament: "Prices are chaotic in the distribution market, due to standard pricing being stripped of all its contents."

Again, Kodak has succeeded in showing that a trade association wanted to limit competition. What it has manifestly failed to do, however, is to show that a trade association or any of its members actually did limit competition. On the contrary, Kodak's "evidence" buttresses the conclusion that Japanese wholesalers, even if in spite of themselves, compete vigorously with one another on price.

c. Fujicolor Tomo-no Kai (Friends of Fujicolor)

In "Privatizing Protection" Kodak characterized Tomo-no Kai -- a sales promotion program to attract customers for member retailers and labs -- as an "instrument of market control": "it has also served as a forum for preventing market chaos and for identifying alternatives to price wars. In at least one instance Tomo-no Kai was credited with facilitating price increases for film and paper."¹¹⁸

¹¹⁷ Nihon Shashin Kogyo Tsushin, May 20, 1982, 8 (emphasis added); see Kodak's November 6, 1995 submission, Evidentiary Appendix at 291, 291-292. Furthermore, as quoted above in section C.1.c.v., another article from 1982, also cited by Kodak as "evidence" of price collusion, indicates in similar fashion that "one major factor which is thought to be a cause of decline in wholesalers' performance is the discount sales from excessive competition." Nihon Shashin Kogyo Tsushin, December 20, 1982, 8 (cited in "Privatizing Protection" at 45, n. 55).

¹¹⁸ "Privatizing Protection" at 46. Kodak cites another article in which the reporter characterizes Tomono-Kai as "an attempt to search for an alternate route to engaging only in price wars." Nihon Shashin Kogyo Tsushin, May 10, 1983, 8 (cited in "Privatizing Protection" at 132, n. 288). The article makes clear that the "alternate route" is not collusion, as Kodak implies, but rather creating a "stable product demand network" -- i.e., strengthening demand through pro-competitive promotional activities.

Fujifilm responded to Kodak's allegation in "Rewriting History."¹¹⁹ Kodak has now countered by including supposed documentation of its claim in the Evidentiary Appendix. Of the many examples of Kodak's twisting of facts in support of its case, this particular one may take the cake.

The article, which dates back to 1980, describes the "confrontational and competitive relationships" affecting labs and retailers (so much for Fujifilm's "market control"). After expressing the hope that such "conflicting interests" could be resolved, the article continues:

It is evident that Tomo-no Kai, which could possibly bring about a swift resolution of the issue, was not organized in anticipation of such merits. Danger will accompany us if we are conscious about this fact even in terms of future operations. Movements, which can be looked upon with concern as a violation of the AML referred to as a 'restriction of competition,' must by all means be avoided.¹²⁰

Thus, the article explicitly says that the organization was not designed to limit competition in the industry. Furthermore, it says that any such efforts by the organization would risk violating the Antimonopoly Act and should therefore be avoided. This is evidence of Tomo-no Kai's complicity?

As a final note, the organization was abolished in 1993, and thus its prior -- completely innocuous -- activities have no bearing on this investigation of current Japanese market conditions.

¹¹⁹ "Rewriting History," Appendix at 35-36.

¹²⁰ Nihon Shashin Kogyo Tsushin, July 10, 1980, 8 (emphasis added); see Kodak's November 6, 1995 submission, Evidentiary Appendix at 817 (emphasis added).

CONCLUSION

Five years ago, General Colin Powell explained the United States' plan for defeating its Iraqi adversary in the Gulf War: "Our strategy in going after this army is very simple: first we're going to cut it off, then we're going to kill it."¹²¹

Fujifilm has pursued a similar strategy in rebutting Kodak's allegations. In our submissions of July 31, 1995, October 24, 1995, December 21, 1995, February 7, 1996, March 13, 1996, and today, we have identified the essential elements of Kodak's position, the analytical underpinnings of those elements, and the facts and evidence that supposedly support them. Then we have systematically demolished the whole lot.

We have shown that the "distribution bottleneck" is a lawyer's fantasy that has nothing to do with actual conditions in the Japanese marketplace. We have shown that the mechanisms by which Fujifilm supposedly controls its distributors are not anticompetitive, and are nothing more than normal business practices. We have shown that Japanese film prices are not suspiciously high, but in fact are comparable to U.S. price levels. We have shown that our analysis of prices applies to the whole of Japan, and not just Tokyo and Osaka. Finally, today, we have shown that Kodak's allegations of widespread price fixing are analytically incoherent and factually baseless.

As far as Kodak's case is concerned, there is nothing left standing.

¹²¹ Associated Press, January 23, 1991.