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Kickbacks and Corporate Concentration: How Exclusionary Discounts Limit Market Access for Community-Based Food Businesses

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ABSTRACT

Dominant food manufacturers and similarly dominant retailers abuse their market power to corner food retail markets and marginalize new and community-based producers. This paper will examine the effects of one of these unfair tactics: exclusionary payments. Dominant food vendors can offer retailers powerful incentives for not dealing with rivals or limiting business with them, such as offering rebates tied to reaching a set sales volume or a portion of all purchases. Using qualitative data from interviews with food retail professionals, industry studies, and academic research, we will analyze both the prevalence of exclusionary discounts in food retailing and the barriers they may pose to market access for new, small, or community-based food businesses.

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Our research suggests that exclusionary payments do exist in the grocery and institutional cafeteria industry but are more widespread in the latter. These payments have become an important revenue stream to retailers since the 1990s. As exclusionary payments become a greater part of the food retail business model, dominant firms can corner the lion's share of retailers' food spending and shelf space, excluding rivals and limiting growth for new and community-based businesses. Policymakers have several legislative and administrative options to contain exclusive arrangements.

INTRODUCTION

Nearly every step along the food supply chain has become more concentrated since the 1950s, including food retail. As recently as 1997, American consumers bought only 21% of their groceries from the then-largest four retailers.[1] By 2019, the top four grocery retailers sold 43% of all groceries in the United States, with Walmart alone commanding more than a quarter of all sales.[2] Estimates that factor in wholesale and buying clubs put grocery consolidation even higher, with the top four firms commanding 69% of sales.[3]

A handful of large food manufacturers increasingly control store shelves. A 2021 analysis by Food & Water Watch of 55 grocery categories found that more than 60% were controlled by "tight oligopolies," meaning the top four firms claimed more than 60% of all sales.[4] Their analysis also found that many top conglomerates such as Kraft Heinz, General Mills, PepsiCo, and Unilever were among the top four leaders in more than five

1. FOOD & WATER WATCH, GROCERY GOLIATHS: HOW FOOD MONOPOLIES IMPACT CONSUMERS 3 (Dec. 2013), https://foodandwaterwatch.org/wp-content/uploads/2021/03/Grocery-Goliaths-Report-Dec-2013.pdf [https://perma.cc/7XD9-JAS7].

2. Alexander Bitter & Katie Arcieri, *Independent Grocers Could Lose Share to Kroger, Amazon Amid Coronavirus Crisis*, S&P GLOB. MKT. INTELLIGENCE (May 7, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/independent-grocers-could-lose-share-to-kroger-amazon-amid-coronavirus-crisis-58359752 [https://perma.cc/7ZHE-B49Y].

3. FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES: THE GROCERY CARTELS 2 (Nov. 2021), https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf [https://perma.cc/C9VZ-F6PU].

4. *Id.* at 5-7.

different categories. A wide array of brands conceals the fact that dominant consumer packaged good (CPG) corporations may own many brands and buy up emerging competitors as a growth strategy.[5] Large upfront capital requirements for food businesses also perpetuate systemic inequalities. Many founders rely on their family and social networks for seed capital, privileging wealthy and thus disproportionately white founders.[6]

Such consolidation not only concentrates wealth in the nearly trillion-dollar packaged food and food retail industries, but as the COVID-19 pandemic made clear, concentrated food production, distribution, and retailing systems are vulnerable to disruption.[7] For decades, scholars and activists have touted the benefits of more regional, democratic, and community-driven food systems for the environment, rural economies, and communities excluded from or exploited by the current U.S. food system.[8] This means vesting more food production and provision in entities that have greater community ties and values-driven structures, such as cooperatives, nonprofit food providers, local or regional food producers, businesses owned by Black people, Indigenous people, and other people of color (BIPOC), and worker-owned or directed businesses.

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5. Peri Edelstein, Krishnakumar (KK) S. Davey, Aman Gupta, Seth Marcus & Cara Loeys, *How CPG Leaders are Using M&A to Bolster Growth*, BOS. CONSULTING GRP. (Apr.17, 2019), https://www.bcg.com/en-us/publications/2019/cpg-leaders-using-m-and-a-bolster-growth [https://perma.cc/5A2F-H2FV].

6. Lynnise E. Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS UNIV. L.J. 419 (2018); Telephone Interview with Errol Schweizer, former Vice President of Grocery, Whole Foods Mkt. (Jan. 7, 2022) [hereinafter Schweizer Interview].

7. *U.S. Packaged Food Market Size, Share & Trends Analysis Report By Product (Bakery & Confectionary Products, Snacks & Nutritional Bars, Beverages, Sauces, Dressings, & Condiments), By Distribution Channel, and Segment Forecasts, 2022 - 2030*, GRAND VIEW RSCH. (Feb. 2021), https://www.grandviewresearch.com/industry-analysis/us-packaged-food-market [https://perma.cc/SN97-QFH4]; *Food Service Industry Market Segments*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., https://www.ers.usda.gov/topics/food-markets-prices/food-service-industry/market-segments/ (last visited Feb. 7, 2022) [https://perma.cc/H4CZ-7ZLT].

8. Emma Brinkmeyer, Hannah Dankbar & J. Dara Bloom, *Local Food Systems: Clarifying Current Research*, N.C. STATE EXTENSION PUBL'NS: LOC. FOODS (Nov. 14, 2014), https://content.ces.ncsu.edu/local-food-systems-clarifying-current-research [https://perma.cc/XD65-6V59]; Patricia Allen, *Realizing Justice in Local Food Systems,* 3 CAMBRIDGE J. REGIONS, ECON. & SOC'Y 295 (2010).

These food producers face numerous economic and social barriers, including restricted market access due to corporate consolidation. Despite growth in direct-to-consumer food sales, such as farmers' markets or community-supported agriculture, these channels remain marginal, accounting for just 0.7% of all food sales in 2017.[9] In order to grow and attain the scale needed to be cost-competitive, new, BIPOC-owned, and community-based food businesses need greater market access to the outlets where most people buy and consume food: grocery stores, restaurants, and institutional cafeterias.

There are many methods that the largest retailers and dominant food brands use to lock up these markets and exclude new entrants. Our paper focuses specifically on exclusive dealing and other forms of exclusionary payments or arrangements. Dominant food vendors can offer retailers incentives for not dealing with rivals or substantially limiting business with them, such as offering rebates tied to reaching a set sales volume or a portion of all purchases. Withholding these incentives can also be deemed a penalty for doing business with rivals. Using qualitative data from interviews with ten food retail professionals and experts, industry studies, and academic research, we analyze both the prevalence of exclusionary payments in food retailing and how they increase barriers to entry for small and community-based businesses and favor dominant players.[10]

Our research suggests that the use of rebates, slotting or promotional fees, and category captain arrangements in food retail has grown since the

9. *2018 Farm Bill Primer: Support for Local Food Systems*, CONG. RSCH. SERV. (June 18, 2019), https://sgp.fas.org/crs/misc/IF11252.pdf [https://perma.cc/YT2D-KYLR].

10. Schweizer Interview, *supra* note 6; Telephone Interview with Anonymous former Food Serv. Dir. for Compass Grp. (Jan. 12, 2021) [hereinafter Compass Group Interview]; Telephone Interview with anonymous former Chef for Aramark (Mar. 17, 2021) [hereinafter Aramark Interview]; Telephone Interview with Andrew Cox, Dir. of Auxiliary Serv., Smith Coll. (Mar. 19, 2021) [hereinafter Cox Interview]; Telephone Interview with John Carroll, former Assistant Att'y Gen., N.Y. State (Mar. 19, 2021) [hereinafter Carroll Interview]; Telephone Interview with Zachary DeAngelo, CEO & Founder, Rodeo CPG (Jan. 21, 2022) [hereinafter DeAngelo Interview]; Telephone Interview with Joel Henry, Founder & CEO, Fig Food Co. (Jan. 25, 2022) [hereinafter Henry Interview]; Telephone Interview with Pierre Jamet, Chief Sales Officer, Petit Pot (Jan. 27, 2022) [hereinafter Jamet Interview]; Telephone Interview with Karina Crain, former Senior Brand Mktg. Manager, Chobani (Feb. 7, 2022) [hereinafter Crain Interview]; Telephone Interview with Diane Roy, Partner & Vice President of Grocery, Go Ventures (Feb. 10, 2022) [hereinafter Roy Interview].

1990s and that these payments and services have become an integral revenue stream or source of savings for some grocery stores and all major food service management companies.[11] When vendors tie these payments or services to exclusivity, by offering larger payments in exchange for a greater portion of all sales or a certain amount of shelf space, they significantly limit competitors' market access, and their practices may constitute effective exclusive dealing. By some accounts, exclusionary payments and agreements can leave less than 25% of a given food retail category open to competitors and new entrants.[12] As revenue or savings from fees and services from dominant vendors becomes part of food retailers' profit model, vendors do not need to strike explicit exclusive agreements to have a substantial exclusionary effect—limiting business to dominant vendors can be in both the vendors' and retailers' best interest at consumers' and competitors' expense.[13]

Policymakers have several tools to challenge exclusionary payments and deals in food retail markets, through antitrust law or otherwise. The Federal Trade Commission can use its Section 5 rulemaking authority to ban exclusive dealing and other exclusionary contracting by dominant firms as *per se* illegal. The U.S. Department of Agriculture can similarly ban exclusionary marketing conduct by meatpackers under the Packers & Stockyards Act. Legislators at the national, state, and municipal level can

11. Puanani Apoliona-Brown, Emily Dunn-Wilder, Lindsay Guthrie, Patrick Robbins, Anim Steel & Kristen Strader, *Be-Trayed: How Kickbacks in the Cafeteria Industry Harm Our Communities—and What to Do About It*, REAL FOOD GENERATION 12 (May 2020), https://static1.squarespace.com/static/5c87f97e16b640312ba8b707/t/5ed18cefe080e33f63771371/1590791411431/Be-Trayed-+Kickbacks+Report+2020-5-29.pdf [https://perma.cc/BUZ3-WRND] ("One source that requested to remain anonymous . . . suggested that rebates account for 40 to 50 percent of [Aramark, Sodexo, and Compass Group's] net profits in their North American operations.").

12. *Id.* at 11; Roy Interview, *supra* note 10; Complaint, In re McCormick & Co., Inc., No. C-3939, (F.T.C. Apr. 27, 2000).

13. John Asker & Heski Bar-Isaac, *Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals,* 104 AM. ECON. REV. 672, 681 (2014); Paul W. Dobson, *Competing, Countervailing, and Coalescing Forces: The Economics of Intra- and Inter-Business System Competition*, 51 ANTITRUST BULL. 175, 191-93 (Spring 2006) (theorizing how dominant retailers and vendors can develop mutual incentives to "coalesce" their market power, working together to restrict choice and protect incumbents).

also ban exclusive deals in food markets and within government food procurement.

I. Background on Exclusive Dealing

An exclusive deal is an arrangement between a buyer and seller for a good or service that forbids or restricts the buyer from purchasing from any other seller or the seller from selling to any other buyer. When a dominant firm uses an exclusive dealing arrangement, it can exert power over a firm to shut out, or "foreclose," rivals from access to consumers or inputs. Aside from exclusivity provisions, companies can also secure exclusivity with rebates or other payments like slotting fees to effectively exclude competitors, also called *de facto* exclusive dealing.[14] In these cases, dominant companies do not explicitly require a counterparty to transact with them exclusively but establish pricing or other business structures that penalize or strongly discourage counterparties from transacting with other firms.[15] These arrangements do not need to secure 100% exclusivity to be unlawful; courts have upheld that *de facto* partial exclusive dealing arrangements can violate antitrust law.[16]

The primary harm from all these types of exclusive deals comes from, as its name would suggest, their ability to exclude competitors and control

14. *See* Petition for Rulemaking to Prohibit Exclusionary Contracts by Open Mkts. Inst. et al. at 6-7, Re: Petition for Rulemaking to Prohibit Exclusionary Contracts, FTC-2021-0036-0002 (F.T.C., July 21, 2021) https://www.regulations.gov/document/FTC-2021-0036-0002 [https://perma.cc/TRR9-XLXH] (offering a hypothetical example illustrating how market share discounts can act as penalties for switching to rivals) [hereinafter Exclusive Dealing Petition].

15. *See* Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615, 621-630 (2000); *see* LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc).

16. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 282-83 (3d Cir. 2012) ("First, the law is clear that an express exclusivity requirement is not necessary because *de facto* exclusive dealing may be unlawful . . . . Second, an agreement does not need to be 100% exclusive in order to meet the legal requirements of exclusive dealing."); *see also* United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) ("A monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

independent businesses. Dominant corporations can abuse their position to coerce or demand concessions from trading partners that exclude rivals from accessing consumers, either fully or in part, which deters the entry of new competitors and prevents competitors from achieving minimum efficient scale given the dominant firms' foreclosure. Leveraging dominance to maintain dominance is an unfair method of competition that hurts consumers, competitors, and communities.[17]

There are at least four primary justifications for exclusive arrangements on productive efficiency grounds.[18] First, exclusive deals can push dealers to focus only on the excluding party's brand. Second, exclusive deals can prevent dealers from using producers' investments to sell higher-margin rivals' products or from "free riding" on producers' investments. Third, exclusive deals can prevent "passing off" or mislabeling other brands as the excluding party's brand. And fourth, exclusive dealing can help achieve economies of scale.

Many of the justifications for exclusive deals have limits, however. Legitimate contractual arrangements between firms of relatively equal bargaining power can be consistent with a principle of nondomination. But instead of requiring exclusivity, corporations could encourage loyalty by offering better terms.[19] Dealers may not be able to free ride on promotional services for a specific brand unless the excluding party's promotional efforts also stimulate demand for competing products.[20] Other laws, such as consumer protection and tort law, address deception like passing off more precisely.[21] And businesses can achieve economies of scale through fair competition or volume discounts that reflect genuine lower costs of producing or distributing large orders (otherwise, some volume discounts can be structured to unfairly exclude competitors).[22] Alternatives to

17. Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM. & MARY L. REV. ONLINE 119 (2022).

18. *See* Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 357-60 (2002) (listing the conventional justifications for exclusive dealing).

19. *See* Exclusive Dealing Petition, 53-61 (raising issues with the conventional justifications of exclusive dealing petitions).

20. Exclusive Dealing Petition, 56-58.

21. Exclusive Dealing Petition, 58-59.

22. *Id.* at 60; *see* Tom et al., *supra* note 15, at 629 n.39 (explaining how the Justice Department argued in the *Microsoft* case that monopolists can structure volume discounts as to become *de facto* exclusivity arrangements, by coercing

exclusive arrangements also lower the risk of dominant producers coercing dealers and retailers and prevent them from exercising their independent business judgment.

Regardless of exclusive dealings' justifications, exclusive deals raise the most concerns when the excluding party is a dominant firm. A private plaintiff suing a defendant for an exclusive arrangement can plead violations of Section 3 of the Clayton Act, Section 1 of the Sherman Act, or Section 2 of the Sherman Act, depending on the facts.[23] The Federal Trade Commission may sue under Section 5 of the FTC Act.[24] A public or private enforcer suing an exclusive deal must generally establish a relevant market where the exclusion occurred, the percentage of that market excluded from competitors, as well as other features like barriers to entry or less restrictive alternatives.[25]

II. Evidence of Effective Exclusive Dealing in Food Retail Markets

A. Exclusionary Slotting and Promotional Fees

Slotting fees can be one way for dominant producers to exclude rival producers from reaching retailers and customers. A slotting fee is a payment from the producer to a retailer to access that retailer's shelf space.[26] Slotting fees help cover the cost of restocking shelves, which can be labor-intensive and offset retailers' risks in giving limited shelf space to unproven products.[27] When done by a nondominant or emerging firm, slotting fees can theoretically convey a manufacturer's confidence in a

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buyers with the pricing structure to buy all or much of their needs from the monopolist); *see also* Brian Callaci & Sandeep Vaheesan, *How an Old U.S. Antitrust Law Could Foster a Fairer Retail Sector*, HARV. BUS. REV. (Feb. 9, 2022), https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector [https://perma.cc/TV8K-JXRU] (discussing the Robinson-Patman Act's ability to address buyer power).

23. 15 U.S.C. §§ 1, 2, 14.

24. *See, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015).

25. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1820b, at 188, 193 (4th ed. 2018) [hereinafter Areeda-Hovenkamp Treatise].

26. *Id.* ¶ 1807c, 157-59.

27. Crain Interview, *supra* note 10; Henry Interview, *supra* note 10 ("There's labor the retailer is taking on to take [new] product on in addition to the risk.").

product's success.[28] However, when done by a dominant firm, slotting fees can allow leading firms to use their market power unfairly to exclude competitors and raise rivals' costs.[29] These financial transfers benefit dominant manufacturers and retailers, but not necessarily consumers.[30]

All six people interviewed, who either worked in the grocery sector or sold into the grocery sector, acknowledged that slotting fees posed significant barriers to entry for new firms.[31] To launch new products in several stores can cost anywhere from $10,000 to well over $100,000, depending on the retailer and region.[32] A national rollout can cost over $1.5 million.[33] Slotting fees for refrigerated or frozen shelf space are generally higher.[34] With such high entry costs, it can be risky, if not impossible, for new brands to pay to get into larger chains, especially without any guarantee that they will stay on the shelf long enough to make a return on investment. When asked how slotting fees compare to other barriers new food companies face, Pierre Jamet, the chief sales officer for Petit Pot, said, "[I]t's probably at the top . . . I think the biggest problem is you want growth and you want expansion, but you also know that is coming at a cost." In other words, new brands have limited avenues to grow and reach efficient scales without paying hefty slotting fees.

Not all slotting fees are exclusive, but some can be. In 2000, the FTC found instances in which McCormick used slotting fees, along with other payments or discounts, to demand 90% of all spice and seasoning shelf

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28. *See* FED. TRADE COMM'N, SLOTTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY: SELECTED CASE STUDIES IN FIVE PRODUCT CATEGORIES 1-3 (Nov. 2003), https://www.ftc.gov/sites/default/files/documents/reports/use-slotting-allowances-retail-grocery-industry/slottingallowancerpt031114.pdf [https://perma.cc/S77Z-RFBT].

29. Areeda-Hovenkamp Treatise, *supra* note 25, ¶ 1807c, 157-60; Complaint, *supra* note 12.

30. Asker & Bar-Isaac *supra* note 13.

31. Schweizer Interview, *supra* note 6; DeAngelo Interview, *supra* note 10; Henry Interview, *supra* note 10; Jamet Interview, *supra* note 10; Crain Interview, *supra* note 10; Roy Interview, *supra* note 10.

32. Schweizer Interview, *supra* note 6; Roy Interview, *supra* note 10; Crain Interview, *supra* note 10; DeAngelo Interview, *supra* note 10.

33. Fed. Trade Comm'n, *supra* note 28, at 56.

34. *Id.*; Crain Interview, *supra* note 10; Roy Interview, *supra* note 10.

space.[35] When a dominant producer uses slotting fees to take up enough shelf space to prevent competitors from reaching shelves, courts and enforcers can treat slotting fees like exclusive arrangements.[36] Plaintiffs have challenged retail agreements, including slotting fees, as violations of antitrust laws.[37] The courts have tended to accept that the antitrust laws *could* reach slotting fees and other shelf space arrangements.[38]

Slotting fee practices vary considerably between retail chains. Our interviews and existing literature confirm that the practice began in the 1980s and has grown since.[39] Local independent retailers, for instance, may ask for a few free cases of a product instead of slotting fees from new suppliers.[40] Interviewees said that chains with a better reputation of supporting new brands, such as Wegman's, will waive slotting fees and instead run new products at a lower everyday price.[41] Chains that rely on private labels and a limited assortment, such as Aldi and Trader Joe's, rarely charge slotting fees. The largest food retailer, Walmart, also does not charge slotting fees (though it has started charging other types of stocking fees).[42] Four interviewees said that slotting fees were most common and more

35. Complaint, *supra* note 12.

36. Areeda-Hovenkamp Treatise, *supra* note 25, ¶ 1807c, 159.

37. *See, e.g.*, Dial Corp. v. News Corp., 165 F.Supp.3d 25 (S.D.N.Y. 2016) (challenging exclusive deals for in-store promotions); Church & Dwight Co., Inc. v. Mayer Laboratories, Inc., 868 F.Supp.2d 876 (N.D. Cal. 2012) (challenging discounts based on percentage of shelf space); El Aguila Food Products, Inc. v. Gruma Corp., 131 F. App'x 450 (5th Cir. 2005) (challenging category captaincy and slotting fees of Gruma for grocery retail space); R.J. Reynolds Tobacco Co. v. Philip Morris, 199 F.Supp.2d 362 (M.D.N.C. 2002) (challenging retail marketing program); Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671 (Tex. 2006) (challenging calendar marketing agreements under Texas antitrust law).

38. *See, e.g.*, *Dial Corp.*, 165 F. Supp. 3d at 25.

39. *See* Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Roy Interview, *supra* note 10.

40. Henry Interview, *supra* note 10.

41. DeAngelo Interview, *supra* note 10.

42. Nathan Layne, *Wal-Mart to Impose Charges on Suppliers as Its Costs Mount*, REUTERS (June 23, 2015, 8:20 PM), https://www.reuters.com/article/us-wal-mart-stores-suppliers/wal-mart-to-impose-charges-on-suppliers-as-its-costs-mount-idUSKBN0P400K20150624 [https://perma.cc/J3GB-V9ET].

expensive at large national "high-low" grocers, including Kroger, Albertson's, and Ahold Delhaize.[43]

In addition to slotting fees, producers offer other explicitly or effectively exclusive promotional payments to claim the best shelf space and keep rivals out.[44] These include payments for product displays at the end of an aisle that can rotate monthly or seasonally, called end caps. According to Errol Schweizer, a former vice president of grocery for Whole Foods, the retailer charged anywhere from $10,000 to $100,000 per brand per month for end cap space. Temporary off-shelf promotional displays also cost tens of thousands of dollars, according to two interviewees.[45] Beyond their prohibitive cost to access, retailers and brands can enter into exclusive arrangements such that promotional displays and end caps do not include rival products.[46] These exclusionary promotions make a big difference for brand growth. Zach DeAngelo, founder of Rodeo CPG consultants, said that "only well-financed companies are able to [buy end caps and off-shelf promotions], and that creates strong velocity, which creates more cash flow which creates more brand awareness . . . from that perspective it [becomes] really hard for new brands to get a fair shake on shelf."[47]

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43. "High-low" refers to grocers that rely more on pricing changes, promotions, and periodic discounting rather than consistent lower pricing (called "everyday low price"). *See* DeAngelo Interview, *supra* note 10; Crain Interview, *supra* note 10; Roy Interview, *supra* note 10; Schweizer Interview, *supra* note 6.

44. DeAngelo Interview, *supra* note 10 ("I know that big CPGs pay huge amounts of money to almost guarantee the best shelf space, so Doritos will have six feet of space across two aisles all the time, because they pay $1 million to the grocery stores for that space.").

45. DeAngelo Interview, *supra* note 10; Schweizer Interview, *supra* note 6.

46. *See* Kevin M. Murphy & Benjamin Klein, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433, 434 (2008).

47. The importance of prime or default placements arise in other industries as well. The U.S. and European Commission have challenged Google's use of defaults in iPhones and Android mobile devices in part on the understanding that users tend to stick with defaults. The same could be said about shoppers' tendency to buy the most visible and accessible products. *See* Complaint at 3, United States v. Google, No. 1:20-cv-03010 (D.D.C. October 20, 2020), https://storage.courtlistener.com/recap/gov.uscourts.dcd.223205/gov.uscourts.dcd.223205.1.0_6.pdf [https://perma.cc/SE4R-TLU4]; European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to

B. Producers Use Category Captain Agreements to Exclude

Larger producers also offer retailers free services, such as market research and category management, that smaller producers struggle to provide, limiting entry opportunities for new upstarts and giving larger producers a competitive advantage. For certain categories, retailers will designate one producer as the "category captain" in exchange for marketing insights, performance metrics, and shelf layout advice.

These arrangements can also include exclusivity provisions. Diane Roy, who co-founded the consultancy Go Ventures and previously worked for Heinz, Nestle, and PepsiCo (which owns Frito Lay), told us that "[Frito Lay] had agreements that [in exchange for] being category managers and running the category for them and . . . all the trade spend . . . we always had to have at least 75% of the shelf across all Albertson's."[48] Roy noted that this exclusive category captain agreement was more informal, saying "retailers typically do not sign contracts, they will have agreements, but they're very risk-averse . . . they don't want anything in writing."[49]

Additionally, Roy said the Frito Lay's market insights were biased towards their products. "There was always a way to make the data show that somehow it was in your favor because you're getting paid to do that because you work for Frito Lay, you don't work for the retailer," she said. "I could spin the data to keep someone out, and these little guys . . . they don't even know what's happening . . . the big guys are trained to keep the competition out."[50]

Given these data biases, category captain arrangements do not need to be explicitly exclusive to have an exclusionary effect. Schweizer, DeAngelo, and Jamet concurred that category captains offer data that favors the captain's products, claims a large portion of the category for that vendor, and improves their sales.[51] This practice creates a positive feedback loop of

Strengthen Dominance of Google's Search Engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 [https://perma.cc/7BYW-QMGU].

48. Roy Interview, *supra* note 10.

49. *Id.*

50. *Id.*

51. DeAngelo Interview, *supra* note 10; Schweizer Interview, *supra* note 6; Jamet Interview, *supra* note 10.

favorable sales data for retailers to justify giving category captains more shelf space, promotions, and prime placement in the future.[52]

When category captains leave limited open shelf space for new entrants, this can also increase retailers' market power over startups to charge additional slotting fees. Interviewees referred to this abuse of market power as "money grabbing," "grift," and a "toll."[53] After taking shelving advice from category captains, retailers "have maybe three shelves of space for a new brand and [they] take meetings with probably 50 to 100 brands that want that space, all ready to pay slotting and promotions . . . because you have so much competition in any given category to get that space among all the small brands, you know that if you don't take that offer . . . someone else will," Jamet said.[54]

It is difficult to assess how common explicitly exclusionary promotional payments, slotting fees, or category captain arrangements are. Our interviews and past research confirm that vendors and retailers strike agreements in which vendors pay fees or offer services in exchange for a guaranteed portion of shelf space or the exclusion of a rival. The instances we identified were only requested by very large and dominant brands. In 2003, the Federal Trade Commission found only one of seven retailers surveyed admitted to striking an exclusive agreement with a supplier to guarantee them approximately 50% of the shelf space for one product, though the agency cautioned against "extrapolat[ing] our findings to the entire grocery industry."[55] Roy also indicated that exclusive arrangements between vendors and retailers may be reached informally.

Nonetheless, our research suggests that promotional payments and category captain arrangements can have exclusionary effects absent an explicit agreement by using favorable data or high fees to secure a large portion of prime shelf space for dominant vendors offering these payments and services. Such exclusion may be widespread as more retailers rely on promotional and slotting fees as a revenue stream. Four interviewees said

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52. Schweizer Interview, *supra* note 6 ("It's tautology. If Oreo had that end cap last year . . . and they sold really well, why would the retailer want to take their end cap away and give it to Country Choice who is an unproven organic product?").

53. DeAngelo Interview, *supra* note 10; Schweizer Interview, *supra* note 6; Roy Interview, *supra* note 10.

54. Jamet Interview, *supra* note 10.

55. Fed. Trade Comm'n, *supra* note 28, at 8.

that some retailers rely more on these fees than others.[56] "The major change to the business model now is [retailers see] that those fees are a good, fixed revenue stream," Schweizer said. "The problem is that these different types of retailer revenue generating programs . . . hurt the competition because it makes it really hard for smaller brands to compete with the incumbents," he added.[57]

Put together, category captains, costly promotions, and slotting make it harder for new brands to compete with dominant food companies in the store and raise barriers to entry into retail markets. These harms are magnified when payments or category captain agreements are explicitly or *de facto* exclusionary. "The slotting, the ad fees, the high-lows, the promotions, it really limits the ability for small startups to compete in almost every level, at any retailer," Roy said. "The system is geared to support the big companies. They're the ones that can afford the slotting, they have the clout to get into retailers' [warehouses], and they have the clout to make sure their product stays on the shelves."[58]

C. Exclusionary or Volume-Based Rebates

In the grocery and food service sectors, food manufacturers and distributors sometimes offer buyers cash back or rebate incentives to buy their products. Vendor and distributor rebates can be explicitly or effectively exclusionary when buyers need to reach a very high sales volume to obtain the rebate, ensuring retailers purchase most of their goods from one vendor. Rebates can also be exclusionary when offered in exchange for a guaranteed portion of all purchases, for example, if a yogurt vendor offered 15% cash back on all sales if a retailer agreed to buy 90% of their yogurt from them. In these cases, retailers face an implicit price penalty for buying rivals' products and missing rebate targets.

As grocery stores and food service outlets become more dependent on rebate revenues, they have a greater incentive to guarantee a growing share of their shelf space or purchasing to the largest and most powerful vendors that offer rebates. The result is an effective cap on the portion of shelves or funds that go to new or community-based vendors that cannot afford to offer high rebates.

56. Schweizer Interview, *supra* note 6; Roy Interview, *supra* note 10; Crain Interview, *supra* note 10; DeAngelo Interview, *supra* note 10.

57. Schweizer Interview, *supra* note 6.

58. Roy Interview, *supra* note 10.

In grocery, for example, Roy said rebate programs were "pretty prevalent amongst big brands, not amongst small brands," and some rebates were "tier-based," meaning retailers unlocked larger rebates as they hit increasing sales targets.[59] Karina Crain, a former marketing manager at Giant Eagle, remembered one rebate program with Frito Lay that generated $1 million for reaching a certain sales goal by the end of the year.[60]

Volume-based rebates are even more fundamental to an often overlooked but important part of the food retail sector: food service management. Colleges and universities, business headquarters, and cultural venues increasingly hire management companies to run their food services. This industry is quite concentrated—in 2019, the top three companies, Compass Group, Sodexo, and Aramark, controlled 77.5% of the food service management industry, according to IBISWorld.[61]

These management companies centralize their purchasing, and unless an institution explicitly requests otherwise in their contract, all three leading food service management companies (FSMC) have internal policies requiring their thousands of locations to purchase 80% to 100% of their food from vendors approved by the management company.[62] Typically approved vendors offer food service management companies rebates that range from 5% to 50% cash back on sales.[63] One 2011 investigation estimated that the average rebate is around 14%.[64] By one vendor's

59. *Id.*

60. Crain Interview, *supra* note 10.

61. *Food Service Contractors Industry in the US - Market Research Report*, IBISWORLD (October 2023), https://www.ibisworld.com/united-states/market-research-reports/food-service-contractors-industry/ [https://perma.cc/NM8S-RLUS].

62. CLAIRE FITCH & RAYCHEL SANTO, JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, INSTITUTING CHANGE: AN OVERVIEW OF INSTITUTIONAL FOOD PROCUREMENT AND RECOMMENDATIONS FOR IMPROVEMENT 24 (Feb. 2016), https://clf.jhsph.edu/sites/default/files/2019-01/Instituting-change.pdf [https://perma.cc/ZAK6-G7L3].

63. *Food Service Management Contracts: Are Contractors Overcharging the Government: Hearing Before the Ad Hoc Subcomm. on Contracting Oversight of the S. Comm. on Homeland Sec. & Gov't Affs.,* 112th Cong. (2011) (statement of John F. Carroll, Assistant Att'y Gen. of N.Y.).

64. Apoliona-Brown et al., *supra* note 11, at 9; Lucy Komisar, *How the Food Industry Eats Your Kid's Lunch,* N.Y TIMES (Dec. 3, 2011), https://

account, food businesses that offer higher rebates are more heavily promoted by the FSMCs' buying division.[65]

FSMCs theoretically could receive rebates from many competing vendors, but because FSMCs negotiate larger rebates by promising vendors high purchasing volumes, the FSMCs have an incentive to limit the number of approved vendors.[66] The fewer competing vendors an FSMC enrolls in any given category, the more *de facto*-exclusive these purchasing policies are. "To the extent some food item, for example chicken, can be purchased from one source, instead of from myriad local sources, this is more desirable for the food service company which will thereby maximize a rebate payment," said New York assistant attorney general, John Carroll, in a 2011 Senate hearing.[67]

According to an investigation by Carrol for the New York State Attorney General's office, income from vendor rebates has become an increasingly important revenue stream for food service management companies since the early 2000s.[68] "That's the dirty secret . . . more than half the money that Sodexo was making off of Hotchkiss was not actually on the management fee. It was all on spending Hotchkiss's money on these vendors that would essentially give them kickbacks, which is how most the industry works," said Andrew Cox, current director of dining services for Smith College and former general dining services manager for Sodexo at the Hotchkiss School.[69] A report by the Real Food Challenge cited another anonymous former FSMC employee who estimated rebate revenue accounts for 40% to

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www.nytimes.com/2011/12/04/opinion/sunday/school-lunches-and-the-food-industry.html [https://perma.cc/HN9E-46YH].

65. Apoliona-Brown et al., *supra* note 11, at 17.

66. See Fitch & Santo, *supra* note 62; Jennifer Obadia et al., *Setting the Table for Success: A Toolkit for Increasing Local Food Purchasing by Institutional Food Service Management*, FARM TO INST. NEW ENGLAND, https://www.farmtoinstitution.org/food-service-toolkit (last visited Feb. 7, 2022) [https://perma.cc/8FSZ-RYS4].

67. Carroll, *supra* note 63, at 36.

68. Carroll, *supra* note 63, at 33 ("[R]ebates were not a significant revenue source or economic factor prior to 2000. However, from 2002 onward, earnings from rebates have become an increasingly important revenue source for food service companies.").

69. Cox Interview, *supra* note 10.

50% of Aramark, Sodexo, and Compass Group's net profits for their North America operations.[70]

Current research and our interviews with three food service chefs or dining managers reveal that food service management companies enforce this exclusionary purchasing by rewarding or penalizing employees based on how much they purchase from "on-contract" or approved vendors.[71] All of the chefs and dining managers we spoke to, each of whom had worked for a different one of the three top FSMCs, said that their performance reviews, promotions, and bonuses were based in part on their levels of compliant purchasing.[72] "My incentive structure was tied specifically to compliance," Cox said.[73] Cox compared requirements to "hit your compliance numbers" to "handcuffs."[74]

These purchasing systems greatly limit chefs' ability to purchase from local and community-based vendors. "I went to a little college in upstate New York, and there was an apple orchard up the road, but even though you could walk there and bring a box of apples back to the campus, a food service company would be unlikely to enter into that kind of an arrangement," Carroll told us. "They would rather buy their apples from a giant agribusiness in California because then the total purchases of apples for all their operations in the United States would be accumulated, and they would earn a payment, which in my opinion was a kind of a kickback."[75]

The chefs and dining managers we spoke to also experienced this phenomenon. "You know that these small farmers are not going to pay back something to the company, and that's why the companies make it very difficult to do any business with local vendors," said one food service management director, who wished to remain anonymous.[76]

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70. Apoliona-Brown et al., *supra* note 11, at 12.
71. *Id.* ("Food service companies endeavor to create lists of the companies which site managers buy from, and site managers are evaluated based on compliance, that is, the degree they adhere to purchasing from the company's list of vendors.").
72. Aramark Interview, *supra* note 10; Compass Group Interview, *supra* note 10; Cox Interview, *supra* note 10.
73. Cox Interview, *supra* note 10.
74. *Id.*
75. Carroll Interview, *supra* note 10.
76. Compass Group Interview, *supra* note 10.

These rebate systems do not necessarily prohibit smaller or local vendors from applying to become approved vendors, but chefs and general managers said it is challenging for local vendors to get approved. FSMCs have little incentive to enroll new vendors that will decrease the purchasing volumes they need to maximize rebates with existing vendors. "It is definitely a barrier. I've talked to many people . . . who have tried to get in the system and failed," Cox said.[77]

D. Solutions

Policymakers should translate the values motivating the antitrust laws—fairness, nondomination, and cooperation between small players among them—into clear, bright-line rules of conduct for the food retail industry, including rules outlawing exclusive arrangements by dominant firms.[78] Looking to address the pernicious consequences of concentrated corporate power, one cannot overlook exclusive arrangements and the potential for administrative agencies and legislation to address them.[79]

Current law gives exclusive arrangements an effective presumption of legality because they are judged under the rule of reason.[80] The rule of reason standard's burden-shifting framework and ultimate balancing of

77. Cox Interview, *supra* note 10.

78. *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 180, 250-52 (2021) (interpreting the legislative history of the Sherman Act to reveal a fundamental logic in the statute of dispersing economic coordination rights, operationalized through nondomination, democratic coordination, and fair competition).

79. *See* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1677-81 (2020) (emphasizing the importance of reorienting institutional arrangements in antitrust to democratically-responsive actors and away from courts and recounting the original understanding of the Federal Trade Commission as an administrative agency with a broadly defined mission to address unfair competition by gathering information about markets and updating laws to reflect standards of fairness).

80. *See* AM. ECON. LIBERTIES PROJ., THE COURAGE TO LEARN: A RETROSPECTIVE ON ANTITRUST AND COMPETITION POLICY DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW, STRUCTURALIST APPROACH 15-16 (Jan. 2021), http://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf [https://perma.cc/9H4X-3AWM] (situating the increasing adoption of rule of reason approaches within the recent history of antitrust law).

consumer welfare effects favors well-heeled corporate defendants.[81] For instance, Michael Carrier and Chris Sagers have found that in the 897 antitrust cases decided from 1977 to February 2021, 809, or 90%, failed to show an anticompetitive harm.[82]

The Federal Trade Commission, however, has the power to address exclusive arrangements under Section 5 of the FTC Act, which outlaws "unfair methods of competition."[83] In enacting Section 5, Congress sought to give the FTC the power to help define what an unfair method of competition is.[84] The Supreme Court has affirmed that Section 5 of the FTC Act should stop unfair practices in their incipiency and thus covers more than the other provisions of the antitrust law.[85] Using its Section 5 rulemaking authority, the FTC could issue a new rule to ban formal and *de facto* exclusive dealing by dominant firms as *per se* illegal, as outlined in the Open Markets Institute's petition to the agency.[86] Congress or state legislatures could also pass new laws or bolster existing prohibitions on exclusive dealing, preferably with a bright-line rule rather than adjusting the rule of reason standard.[87]

The U.S. Department of Agriculture also can issue fair competition rules regarding meat producers' marketing practices under the Packers & Stockyards Act (PSA). The PSA prohibits meatpackers from "giv[ing] any undue or unreasonable preference or advantage to any particular person or locality," which could be applied to meatpackers' marketing practices to ban preferential payments to buyers in exchange for exclusivity. Exclusionary rebates and payments could also be seen as a "course of business . . . with

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81. *Id.*

82. Michael A. Carrier & Christopher L. Sagers, *The* Alston *Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed Under a Rule-of-Reason Analysis*, 28 GEO. MASON L. REV. 1461, 1476, 1476 n.114 (2021).

83. 15 U.S.C. § 45.

84. Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 656 (2018).

85. *Id.* at 661-63; F.T.C. v. Brown Shoe Co., 384 U.S. 316, 322 (1966) ("[T]he Commission has power under § 5 to arrest trade restraints in their incipiency, without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.").

86. *See* Exclusive Dealing Petition at 71-81 (articulating three tests for illegality centering on market shares and numbers of significant competitors).

87. *Id.*

the effect of manipulating or controlling prices, or of creating a monopoly in the . . . selling" of meat.[88] The USDA could issue rules making clear that exclusive marketing practices, such as loyalty rebates and exclusionary kickbacks, violate the PSA.

Food retail markets would benefit from restructuring to the extent that the harms of exclusionary payments are a byproduct of coalescing market power between dominant food retailers and dominant suppliers. As the DOJ and FTC update their merger guidelines, we'd recommend stronger structural presumptions and bright-line prohibitions on mergers of a certain size and market share. Antitrust enforcers should also study past CPG or food retail mergers to identify deals to unwind.

Additionally, government procurement officials could enact purchasing policies that discourage exclusionary payments. As purchasers of goods and services, public officials have significant power to mandate disclosures and changes to business practices and could use this leverage to structure markets for fair goals.[89] Municipal food purchasing standards could also include provisions requiring institutions to negotiate contracts with food service management companies that privilege community-based vendors above those with whom FSMCs have national purchasing contracts.[90]

Further research and investigations by antitrust enforcers, the Government Accountability Office, or academic institutions could illuminate the prevalence of explicitly exclusionary arrangements in food retail and other steps along the supply chain, such as food distribution.[91]

Grocery stores, schools, and other social institutions should have healthful, fresh food provided by diverse community-based businesses.

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88. 7 U.S.C. § 192(e).

89. For example, several school districts have adopted Good Food Purchasing Programs, setting goals to direct food procurement towards providers the support local economies, environmental sustainability, fair wages, animal welfare, and nutrition. *See Cities – Good Food Purchasing Program*, GOOD FOOD CITIES (last visited Nov. 22, 2023), https://goodfoodcities.org/cities/ [https://perma.cc/F4XN-S2AZ].

90. Cox Interview, *supra* note 10 ("Having contract language around purchasing metrics or purchasing vendors or any language that gives you the flexibility to blame the client and save yourself from the wrath of the contractor, it will be a lot more successful than if you decide mid-contract that you like to support the local farm down the road, there's very little chance you'll get them approved.").

91. *See infra* Appendix: Area for Further Research—Exclusive Distribution Agreements.

Enforcing antitrust law against exclusive arrangements could help secure food retail market access for new, BIPOC-owned, and local food producers and foster more resilient and equitable food supply chains in the process. Other policies that look at capping slotting fees, creating equitable access to capital and land, and diversifying food chain infrastructure would also help grow community-based food providers. But strengthening and policing the use of exclusivity by dominant firms could help open concentrated food retail markets to new competitors.

APPENDIX: AREA FOR FURTHER RESEARCH—EXCLUSIVE DISTRIBUTION AGREEMENTS

Our paper did not set out to study exclusionary distribution relationships. However, competition issues and extractive fees in distribution emerged as a common theme in our interviews. While businesses can sometimes self-distribute to smaller, independent stores or local institutions, they typically cannot deliver directly to larger grocery and restaurant chains. The largest retailers manage much of their own distribution and prioritize stocking fast-moving items. This makes carving out a space in internal distribution centers for an unproven brand risky and expensive.[92] As such, interviewees said that new brands typically strike agreements with third-party distribution companies to get into more mid- to large-sized grocery store networks. Just two distributors, KeHE and United Natural Foods (UNFI), dominate the "specialty" or "natural organic" channel.[93]

Four interviewees said stores typically have a "primary" or "preferred" distributor, which retailers direct new brands to work with.[94] "Typically . . . you don't have a lot of choices. It's either you use distributor A or if you don't want to . . . [the retailer] just can't put your items on shelf," Jamet said.[95] "[Retailers] probably have negotiated a contract based on the volume of

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92. Crain Interview, *supra* note 10 ("Why would [a retailer] waste a whole warehouse slot, like a whole pallet space, just for a new brand that they don't know how it's going to turn. They want proven items in the warehouse that can make their warehouses more efficient. In order to reduce risk, they use KeHE or UNFI . . . to manage that [new brand] inventory for them.").

93. DeAngelo Interview, *supra* note 10 ("Distributors are particularly predatory, that's as close to a monopoly as we have . . . UNFI and KeHE.").

94. Schweizer Interview, *supra* note 6; Crain Interview, *supra* note 10; Jamet Interview, *supra* note 10; Henry Interview, *supra* note 10.

95. Jamet Interview, *supra* note 10.

total dollars, and that's how they're able to get a better margin" working with their primary distributor, Jamet added.[96]

Primary distribution agreements also exist in food service, where Sysco and US Foods lead the market. Like food manufacturers, these distributors offer their food service clients exclusionary volume-based rebates to induce sales or primary distribution relationships. For instance, one former master contract between Aramark and Sysco revealed Sysco provided a "produce incentive allowance" or rebate on all produce that Aramark purchased through Sysco.[97]

More research is necessary to understand primary distribution arrangements and the degree to which they are exclusionary. Based on our interviews, primary distribution relationships appear to limit competition for distribution and give distributors more market power to extract fines, further raising barriers to entry. They may also increase retailers' market power over distributors, pressuring them to lower distribution fees below their cost of doing business and rely on fees charged to brands to eke out a thin profit margin.[98] Jamet, Schweizer, and DeAngelo shared several anecdotes of poor service and deceptive fees from distributors, from charging fees to the wrong company to requiring startups to buy into sales programs they did not want.[99] "It never ends with those entities. I can give you 75 examples of them skimming and making it really difficult [for small brands]," DeAngelo said.[100]

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96. *Id.*

97. Master Distribution Agreement between Sysco Co. and Aramark Food and Support Services Grp. Inc. (2011), *in* SEC Archives, https://www.sec.gov/Archives/edgar/data/7032/000119312511137265/dex101.htm [https://perma.cc/8WK8-W3JK].

98. Jamet Interview, *supra* note 10 ("It's kind of a squeeze game. A lot of the distributors because they are getting squeezed by the retailers to give them the best prices possible, they don't make enough margin by actually distributing their products, so they go back to the brands and try to sell the brands on a lot of different programs . . . they tell you 'This is our policy, it's non-negotiable.'").

99. Schweizer Interview, *supra* note 6; DeAngelo Interview, *supra* note 10; Jamet Interview, *supra* note 10.

100. DeAngelo Interview, *supra* note 10.