



January 18, 2022

The Honorable David Cicilline  
Chairman  
Antitrust, Commercial and Administrative Law  
Subcommittee of the  
House Judiciary Committee  
U.S. House of Representatives  
2138 Rayburn House Office Building  
Washington, DC 20515

The Honorable Ken Buck  
Ranking Member  
Antitrust, Commercial and Administrative Law  
Subcommittee of the  
House Judiciary Committee  
U.S. House of Representatives  
2138 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Buck:

Thank you for holding a hearing on “Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America’s Food Supply.” The National Association of Convenience Stores (NACS) and its members have strong concerns about the state of competition policy and appreciate the opportunity to raise some of these issues with you.

NACS is an international trade association representing the convenience industry with more than 1,500 retail and another 1,500 supplier companies as members, the majority of whom are based in the United States. The industry employed about 2.34 million workers and generated more than \$548.2 billion in total sales in 2020, representing nearly 3 percent of U.S. gross domestic product. The industry processes more than 160 million transactions every single day. That means about half of the U.S. population visits our members on a daily basis. In fact, ninety-three percent of Americans live within 10 minutes of one of our locations. The average time a customer spends in one of our stores is about three and one-half minutes and the industry is focused on ensuring that the customer’s needs are met as efficiently as possible – saving them time and money.

More than 60 percent of the 150,000 convenience stores in the United States are single store operators. These are very small businesses, but they compete with a range of businesses in other retail channels for sales including grocery stores, restaurants, drug stores, big box stores and more. The success of these small, entrepreneurial businesses is a central pillar of the success of the American free-market system – and depends upon the proper functioning and enforcement of laws ensuring robust competition.

While most of the industry is made up of small businesses, there are a number of large national and regional businesses in the convenience industry that have the need and ability to purchase large volumes of product just like some of the larger grocery and big box chain stores.

Regardless of size and purchasing power, however, the convenience industry suffers from price discrimination imposed by some of its major suppliers. We would like to provide you with some background on what is happening, why it raises serious antitrust concerns, and why it adds to supply chain disruptions.<sup>1</sup>

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<sup>1</sup> I would note that this letter will not spend time addressing the antitrust problems created by the actions of the major credit card networks and banks that exact swipe fees from the convenience industry – and, indeed, all  
[1600 Duke Street | Alexandria VA 22314-3436 | 703.684.3600 office | 703.836.4564 fax](https://convenience.org)

## Price and Product Discrimination Among Retail Channels

For many years, manufacturers and suppliers of a number of goods have separated retailers who sell their products into different channel categories and discriminated among them with respect to both prices and the availability of certain products (in particular, by not making certain product packaging sizes available). The companies making and distributing non-alcoholic beverages, sodas, sports drinks, and the like, have been the most aggressive and consistent at enforcing these distinctions along the lines of retail channels.

This means that a local convenience store must pay more for a bottle or can of a soda than its competitor down the street that operates a grocery store or big box store. These price differentials are so large that convenience stores often pay more to buy these products at wholesale than their competitors sell them at retail. I have attached to this letter testimony that Tom Collins, President of Luke Family of Brands, delivered to the Indiana House of Representatives when it was considering legislation to ensure that retailers in different channels were treated fairly. His testimony demonstrates how pernicious this problem is as he was able to buy sodas for far less money through a small orchard he owned – even though the orchard bought a far smaller volume of sodas than his convenience stores. Specifically, his convenience stores bought 20 times as much of the product as his orchard but still paid a price that was 2.3 times higher than the orchard.

And, when he tried to use the orchard to purchase product for his store in order to get a better price, he was met with threats that his supply of product would be cut-off entirely unless he stopped doing that. Tom's story may be surprising and shocking to you. It was to us - the first time we heard it. But, we have heard similar stories from convenience retailers in every region of the country. They routinely must pay higher prices for sodas and sports drinks even compared to retailers in other channels that purchase smaller volumes of those products. When they try to find workarounds (including by getting their supply of sodas from a local club or warehouse store), they are met with aggressive objections from the soda manufacturers and suppliers including cease-and-desist letters and threats to entirely cut-off supplies of product.

The problems do not stop with pricing. Convenience retailers also report to us that there are many sizes of soda, sports drink, iced tea and other products that manufacturers and suppliers simply refuse to sell them. That is true even though the same sizes of those products are sold by the same manufacturers and suppliers to grocers and others that compete with convenience stores. This problem was summarized well by Alex Olympidis of Family Express Corp in testimony he provided to the Federal Trade Commission last summer. That testimony can be viewed [here](#).

It should be noted that these problems stem from the practices of manufacturers and suppliers – not retailers. Retailers should try to obtain the best products at the best prices they can. That helps them compete and allows them to pass along those benefits to their customers. But, manufacturers and suppliers should comply with the antitrust laws in dealing with competitors. In this situation, that means that those manufacturers and suppliers should not make arbitrary distinctions based on retail “channel” and should not provide pricing or product advantages that are not related to differential costs or legitimate business considerations such as purchase volume. Unfortunately, as described below, the law is being ignored on a routine basis today.

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merchant verticals. Those problems are profound and result in costs of nearly \$100 billion per year. Given the routine price-fixing and other anticompetitive practices that are hallmarks of the swipe fee system, we will separately address those issues with the Committee.

## Negative Effects of Price/Product Discrimination

Price discrimination against the convenience channel hurts competition in the market and hurts consumers in a number of ways. For example, convenience store customers pay more for their beverages than they otherwise would due to this behavior. This has a particularly negative effect on consumers in underserved communities – both rural and urban. In many of these communities, convenience stores are a primary source of food and beverages for residents because those communities have few (if any) grocery stores. Convenience stores fill this gap but, due to price discrimination among channels, they cannot do so at the same price points that are available through other retail channels.

It should be noted, however, that price discrimination also causes customers of other retail channels to pay more for their beverages. If convenience stores were able to obtain beverages at comparable price points to their competitors in other channels, that would increase price competition across all of retail and keep margins – and consumer prices – lower. But, because other channels do not have that element of price competition from the convenience channel, they are able to charge higher prices and increase their own margins without concern about losing customers to the convenience channel.

These impacts demonstrate the value of price competition that runs through the U.S. economy. Because price discrimination undermines that competition, it is destructive of the foundations of the competitive market system and results in overall higher prices. Retailers, consumers, and the economy overall would be aided by ending discrimination and instead letting more retail businesses compete for customers on a level playing field.

It should also be noted that discrimination among the products offered contributes to supply chain problems and sporadic shortages. The distinctions among product sizes based on retail channel make products less fungible across the country and mean that relatively small disturbances in one part of the supply chain can quickly lead to shortages – even if those shortages only relate to certain sizes of a product that is otherwise freely available. Those artificial shortages can add to consumer frustration and lead to higher prices.

## Legal Restrictions on Price Discrimination Should Prevent These Practices

On its face, the law looks clear that soda companies should not be able to discriminate against the convenience channel on price. The Robinson-Patman Act, 15 U.S.C. §13 *et seq.*, was added as an amendment to the Clayton Antitrust Act in 1936. It outlaws price discrimination among retailers by suppliers and prevents the refusal to do business with certain retailers. There should be no question that the Robinson-Patman Act prohibits the price discrimination and refusal to sell certain product sizes that I have described above. Unfortunately, the difficulty of litigating these cases and the lack of enforcement of the law over time have led many to ignore the law.

While there are exceptions to the Act's prohibition on price discrimination due to things like different distribution costs, none of those factors explain the routine business practice of discriminating among retail channels on pricing. Many convenience companies are willing to purchase large volumes of beverages and have them delivered to a central point in order to redistribute the products themselves and save their suppliers on delivery costs. But, those offers have typically been refused or, even if they occur, they have not made up for the differences in pricing among channels.

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What is needed at this time is vigorous enforcement of the Robinson-Patman Act. All retail channels should have to compete and do their best to win business based on price and service. No channel should get a free pass due to an advantage that is bestowed based on the arbitrary assignment of a “channel” designation rather than on costs or business fundamentals – regardless of the fact that manufacturers and suppliers may want that to happen.

We hope the Committee will look into these issues and work with the enforcement agencies to ensure that channel price discrimination is no longer tolerated. That would send a clear signal to business and help end that discrimination.

Sincerely,

A handwritten signature in black ink, appearing to read 'Doug Kantor', with a long horizontal flourish extending to the right.

Doug Kantor  
NACS General Counsel

Attachment

Testimony before the House Commerce Committee  
House Bill 1221  
Thomas M. Collins, II  
President, Luke Family of Brands

Thank you for the opportunity to present my testimony.

My name is Tom Collins, I am here to support House Bill 1221, and to express my gratitude to this Committee for defending free enterprise in our great state by taking this Bill under consideration for passage.

I am a third generation business owner and President of Luke Family of Brands. My grandfather started Luke Oil in 1967, and two years ago we received our half-century award in this same building.

In total, we employ over 1,000 Hoosiers. Our business holdings are diverse and unique in a way that is by coincidence, relevant to House Bill 1221.

Currently Luke Brands owns and operates 30 convenience stores, 15 liquor stores, a variety of Quick Service Restaurants like Subway, and a local Landmark in Northwest Indiana, a u-pick apple orchard, named County Line Orchard.

Last fall 400,000 visitors made their way to County Line Orchard. We also welcomed 35,000 kids for our educational school tours. In addition to growing 300 acres of apples, our large barn houses many events like weddings receptions, graduations, and retirement parties. There are countless stories each year on how we touch the lives of both customers and associates at the Orchard. More important however, is the sense of community our C-stores establish in the markets we serve. A first job, a second job, a tuition reimbursement program, a career choice with competitive pay, full benefits and 401k, or maybe simply a safe place to go during a time of need. Too often our industry is not recognized for the positive influences we have in our communities.

As you would imagine, we sell beverages at our C-stores, our Liquor stores, our restaurants and even our Orchard. For example, we sell Coca-Cola products at our C-stores and we sell Coca-Cola products at our Orchard. With 400,000 guests we sell a lot of Coca-Cola at the Orchard, but not nearly as much as we sell in our stores. In fact, we sell at minimum 25 times more Coca-Cola products annually in our stores than we do at the Orchard. We offer the same products to guests at the orchard as we do at the stores. Same brand, same size, same case size, yet we pay two distinctly different prices.

**For Example**

The cost for a case of Coca-Cola at the Orchard in 2019 was: \$16.76  
The cost for that same case of Coca-Cola for our C-store division was: \$39.12

That is correct, the C-stores were charged a 2.3x higher cost per item for the same item though they sell 20 times more volume. Why you may ask, well I've been asking this for the past 10-years. The explanation, we are a different channel of trade. Different than tourism at the Orchard, or a quick service restaurant, or a big box retailer, or a grocery store, or a pharmacy. Basically we are a sitting duck, with a captive audience who "can pay more for convenience." The distributors take advantage of our vulnerability and charge us more simply because they can. However, the true victim in this business practice is the consumer, and many times people

in poor and rural communities living in food deserts. No grocery store, no pharmacy, no other choices, taken advantage of and paying in upwards of 2.3x more for the same product than a more affluent consumer with multiple trade channels in their market.

You will hear arguments about deliveries, quantities, marketing dollars, lots of smoke and mirrors, same products, same trucks, same drivers, same point of origin, two different prices. Then you will hear stories about how the list price is \$39.12 but the net price could be as low as \$25.88, still 53% more than the Orchard. All you have to do is give us more market share and punish other smaller distributors. Often times these distributors sell healthier choices or alternatives to soda and energy drinks. In 2020, Coca-Cola raised the price to Luke stores from \$25.88 to \$39.12 unless we promised to give them retail facings that were 2x their market share. We finally said no, and two things happen: 1) our price was increased, and 2) we were told that we would probably go out of business.

Now Mr. Collins you might ask, do you have the same testimony in regards to pricing practices in your liquor stores? Are operators being charged different prices for beer based on size or channel of trade?

And my testimony is simply NO.

In the liquor stores, we sell beverages similar to those sold in the c-stores: they are about the same size, they come in can or bottle, they are delivered to us on a truck, many similarities to the Coke products previously mentioned. Despite the logistical similarities, we do not experience discriminatory beer pricing between different channels of trade. The law creates a fair, consistent and transparent pricing platform across all channels of trade. There is pricing parity across the different channels of trade.

On a regular, consistent basis beer distributors publish a Deal Sheet. Every retailer receives the same deal sheet. Obviously, prices vary based on promotion or how much you buy, but everyone selling alcoholic beverages in Indiana gets the same deal sheet from their distributor, with the same purchasing and cost opportunities. No pricing discrimination amongst channels of trade. The store owner decides which deal to take. We have access to all the products and all the packages and nobody is priced unfairly.

Back to the convenience stores. Non-alcoholic beverages and their marketing to us is a free-for-all.

We are consistently and without reason, discriminated against on price, on package preferences, and often PUNISHED by some packaged beverage distributors. Often, we feel intimidated and disrespected, and in our 50 years in business, we have not been exposed to a reasonable explanation for this abuse.

THEY SIMPLY DO THIS, BECAUSE THEY CAN!

The testimony I have provided is similar and consistent with two previous testimonies before this committee. After in an initial hearing in Winter of 2020 I placed a large order of Coke to be delivered to County Line Orchard. The product I received was \$20 less per case than what I was being charged at the convenience stores. I then self-distributed the Orchard product to the C-stores. When I went to place a second order, I was informed by my account representative Kendra Smith that I was no longer permitted to order product to the Orchard since Coke was aware that I distributed this product to the convenience stores.

I continued to request Coke deliveries to the Orchard and my requests were escalated to John

Reda who communicated to me via phone and email in late April of 2020 that despite me paying for the product and collecting and submitting all sales tax to the state of Indiana, Coke would no longer deliver product to the Orchard due to our self-distributing to our c-stores.

My communication with Mr. Reda was professional and in June of 2020 we decided to terminate purchasing Coke products from Great Lakes Distributing at our c-stores. This decision caught the attention of both John Tortorello, Account Executive and Don Ongena, Director of the Chicago Marketing Unit. It was communicated that they were now aware of Luke's support and testimony in favor of House Bill 1221 and they would hope to meet and work towards a rebate program that would make it advantageous to Luke to receive products from Coke and curtail our interest in House Bill 1221.

I inquired if this "program" would allow me to dictate marketing space in my stores and distribute products across multiple trade channels. I was informed that the structure of the program would be consistent as those in the past, but that Luke could probably get an aggressive price due to changes in the local market through a rebate structure. We ultimately decided to pass on discussions in regards to a new marketing agreement with Coke for 2021 due to the consistent lack of transparency in their offer.

Lastly, Luke sells many products produced by Monster Energy. Monster Energy is currently the #1 SKU sold at Luke c-stores in the beverage category. Monster is distributed by Coke, in my case the Great Lakes division. Due to our unwillingness to enter into a marketing agreement with Coke, we also pay an inflated price for Monster Energy and we do not have access to their rebate and marketing programs. In late 2020 we discovered that it was possible to contract directly with Monster exclusive of Coke. We made the decision to do this and entered into discussions in regards to Monster programs starting in 2021. We were then informed by our Monster Energy rep that she would have to get the blessing of Coke in regards to our program and pricing since Monster had a distribution agreement with Coke, but that this was a formality and it had been approved with other retailers in my market. Two weeks later we were informed that Coke denied Monster's request and the proposed Luke program because Luke had involvement in support of House Bill 1221. We feel this was another blatant action taken to punish our company and divert our participation in supporting the consumer fairness act.

I appreciate your time and the willingness to hear my testimony.