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Mr. Scott Nova
Executive Director
Workers Rights Consortium
5 Thomas Circle, N.W.
Washington, D.C. 20005

Re: Designated Suppliers Program for University-Licensed Products

Dear Mr. Nova:

This responds to your request that Baker & Miller PLLC provide legal advice to the Worker Rights Consortium ("WRC") on U.S. antitrust law issues in connection with the proposed Designated Suppliers Program ('the Program") for university-licensed apparel and textile products.

The Program involves the efforts by participating universities to assure that workers producing apparel and textiles bearing their logos ("the Products") are "paid a livable wage" and are able to enforce their rights through independent labor organizations. A university participating in the Program ("University Licensor" or "UL") will require its licensee(s) to assure that the Products are being produced in factories that (a) meet factory-specific "livable wage" standards, (b) have legitimate trade unions or other representative worker bodies, and (c) produce products primarily for the university logo goods market or other buyers committed to equivalent standards (collectively "the Labor Standards"). It also requires that a UL's licensee ("Licensee") pays to each factory supplier ("Factory") a price for the Products sufficient to enable the Factory to meet the Labor Standards.

The key new addition in the Program is that the WRC will create a Designated Suppliers' List ("DSL") of Factories capable of meeting the foregoing standards; and each Licensee will then be required to source a set (and gradually increasing) percentage of the Products from Factories on the DSL ("DSL Factories"). The Program also provides that the WRC will monitor performance by Licensees and Factories, seek to correct infringements, report uncorrected infringements to University Licensors and Licensees, and drop non-complying Factories from the DSL. Licensees will be obliged to assure that, once the Program becomes operational, the required proportion of their

purchases of the Products are from DSL Factories. The required minimum will be 25% in the first year, 50% in the second, and 75% in the third. These new obligations to use factories on the DSL will be embodied in the ULs' individual licenses to their Licensees.

You have specifically requested that Baker & Miller

> "provide WRC initially with an opinion as to what changes in the proposed Program, if any, would be required in order to make the Program compliant with the U.S. antitrust laws. In other words, if we were to determine initially that the Program, as envisioned, would run a significant risk of being found to infringe the U.S. antitrust laws, the WRC requests that our opinion should describe how universities could design and implement a designated suppliers program that would achieve the essential goals of the Program, as currently proposed, without a significant risk of running afoul of the U.S. antitrust laws."[1]

Antitrust analysis tends to be highly fact-specific—with legal results often turning on careful analysis of market effects, business motives, efficiency justifications, the availability (or not) of less restrictive alternatives or other factors. Careful factual review appears to be particularly important for our antitrust analysis of the Program, because it does not easily fit into any conventional antitrust mold[2]. The Program is unusual in antitrust terms because it is not being spearheaded by conventional commercial entities seeking familiar commercial goals.

Executive Summary

As more fully explained in subsequent sections, we have reached the following conclusion based on our review of the Program:

1. The collective efforts by the ULs to enhance working conditions and terms at Factories producing the Products would not run a significant risk of being found to infringe the normal boycott rules in the U.S. antitrust laws, based on factual findings that (i) the ULs do not compete with each other in licensing what are distinct logos, (ii) do not compete

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[1] Retention letter from Donald I. Baker to Scott Nova dated December 16, 2005.

[2] In carrying out our mandate, we have relied on WRC to provide us with relevant information in response to our requests. We have also interviewed an experienced UL licensing officer. The documentary information that we have reviewed includes statements and press releases by various ULs; Collegiate Licensing Company materials (including a standard retail products license agreement and CLC Special Agreement Regarding Codes of Conduct); a UL's communication to a Licensee taking action in response to a determination of non-compliance by a particular Factory; numerous press stories on efforts by students to get universities to assure that the Products are produced under adequate labor conditions; and a recent press release from United Students Against Sweatshops outlining the "Designated Suppliers Program" ("USAS Release").

with Licensees or Factories that may be excluded from the market under the Program, and (iii) do not stand to profit economically from the collective undertaking.

2. A U.S. government antitrust enforcement agency (the Justice Department or the FTC) might investigate, based on complaints from Licensees, but it would be very unlikely to bring an enforcement action to enjoin the Program.

3. The Program is substantially more "regulatory" than anything the universities have previously tried in the "university logo" products area; and, as such, it is somewhat more likely to receive antitrust scrutiny at the behest of parties that feel disadvantaged by it than would have been the case in past university efforts.

4. To the extent that antitrust claims might be made, their most probable source would be a disgruntled Licensee or Factory, alleging that it had been improperly excluded from the DSL or terminated for failure to meet quotas or standards under the Program. Powerful incentives exist for a Licensee-plaintiff or Factory-plaintiff to try to convert its contract and tort claims into antitrust claims in order to be able to claim *treble damages* and *litigation costs* if successful.

5. A private plaintiff's chances of ultimately prevailing on an antitrust "boycott" claim are fairly low for reasons stated in Paragraph 1.

6. A private plaintiff generally has a somewhat improved chance of prevailing on a "boycott" claim when it can show that it has been the victim of an arbitrary or secretive process by the standards-setter or self-regulatory body. Such circumstances may generate judicial sympathy, which results in greater receptiveness to the underlying antitrust claim. Accordingly, the processes that the WRC uses in making DSL status determinations or license termination or renewal recommendations should be carefully reviewed to assure that they are as transparent and fair as reasonably possible.

7. It is important that a UL keep an accurate, contemporaneous record of communications with any Licensee over possible Program violation that could lead to termination or suspension of a license.

8. A UL's antitrust litigation risks could probably be further reduced by including in its licenses (i) a compulsory arbitration clause and/or (ii) a litigation cost-shifting clause (to require the losing party to pay the winner's litigation cost, or to require each party to bear its own litigation cost). These provisions would apply to contract and tort claims, as well as antitrust claims.

The Basic Elements in the Designated Suppliers Program

Universities have had a long history of trying to assure that products using their names, trademarks and logos are produced under labor conditions that are not regarded as abusive. In doing so, they have been responding at least in part to student political protests that are well-documented in press stories. Accordingly, numerous universities - acting alone or via the Collegiate Licensing Company ("CLC") or the Licensing Resource Group ("LRG") as their agent - have required their Licensees to abide by and require factories to abide by special "labor codes of conduct". CLC or LRG has enforced all the *commercial* terms of its licenses (e.g., royalties, technical performance, proper use of marks), but it has left investigation of compliance with the "labor codes of conduct" to the Fair Labor Association ("FLA") or the WRC. When an infringement of a labor code was found, the FLA or WRC would notify the Licensee and any UL whose products are being produced at the relevant factory; the FLA could also revoke a licensee's FLA membership; and the UL would then decide whether to instruct its Licensee to take corrective action and/or to terminate the particular Factory.

The Program differs from its predecessors because it provides an ex ante approach to the treatment of labor conditions, rather than a reactive one after violations have already occurred. It thus involves (i) more intrusive regulation of a Licensee's relations with the Factories that produce the Products than has been present in the prior programs involving the WRC or the FLA, and (ii) affirmative commitments by Licensees to purchase substantial set percentages of "university logo" products from DSL Factories and at prices sufficient to assure workers a "livable" wage.

The most critical difference is to require that the Factories eligible to produce the Products are designated in advance after appropriate WRC reviews. Basically, the new Program will start with a grace period in which potentially qualified factories will be reviewed by the WRC, and then the WRC and any relevant Licensee will work with a Factory to do anything necessary to bring it into compliance with the Labor Standards (governing pay, hours, child and prison labor,union representation, etc.). In addition, to become designated by the WRC under the Labor Standards, a Factory will have to show, by the end of the first 12 months after the grace period, that 2/3 of its products were made for Licensees and/or other buyers committed to the same Labor Standards that are in the Program.

Meanwhile, a Licensee will have to commit (in its license from a participating university) to (i) procuring the required percentage of its purchases from DSL Factories, and (ii) paying a price for the Products that is sufficient to assure that the Factory can pay its workers "a livable wage" (the "Floor Price")

and meet all other standards. This Price will be determined on a factory-by-factory basis by negotiation between the Licensee and the Factory owner. It is expected that a Licensee will try to work with a Factory to improve production efficiency in order to allow the labor cost-based Floor Price to be lower than it might otherwise.

The percentage purchase and Floor Price requirements are entirely new. Nothing like them has been part of the universities' prior licensing programs. It is estimated that the Program will result in price increases paid by the Licensees to Factories for the Products on the order of 10-12%. How these price increases might be flowed through the distribution chain, with or without additional wholesale and retail mark-ups, is apparently a subject on which there are divergent views among ULs.

The Universities' Reasons for Participating in the Program.

Humanitarian concerns about working conditions in many third world countries have clearly been the driving force that has encouraged universities to consider participating in the Program, as well as participating in various predecessor programs. Student protests about workers' rights have occurred on many campuses and are well documented in the press. These protests have apparently served as catalysts spurring university actions. It is interesting and relevant that these protests have been generated by a student constituency that includes many potential purchasers of the Products (i.e., those who will feel the economic effect of any price increases resulting from the Program). This economic reality underscores the "humanitarian" motives which clearly have been so important in creating the Program.

The universities do not appear to compete with each other in licensing or sale of the Products. This is because the Products are, by definition, marked with a particular university's trademarks or other indicia. These differentiated offerings are largely directed at an audience of students, alumni, or other supporters of the particular institution. Very few, if any, potential purchasers of an "Ohio State" sweatshirt would regard an identical-quality "Michigan" sweatshirt as a substitute—even if it were offered a 20% lower price for the "Michigan" shirt![3] Thus the situation with the Products licensing seems to be entirely different from the other university activities, where the universities actively compete for students, faculty, athletes, and externally-funded projects, among other things.[4]

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[3] If there were any cross-elasticity at all with this type of university merchandise, it seems to be more likely to be with the insignia-emblazoned merchandise of a professional sports team in the same geographic area as the relevant university. In other words, the potential Ohio State purchaser might be more likely to switch to a "Cleveland Indians" or "Cincinnati Bengals" sweatshirt than a "Michigan" one.

[4] For example, in *NCAA v. Board of Regents,* 468 U.S. 85 (1984), the NCAA member universities were potential competitors in generating television rights to football games. However, the NCAA-orchestrated boycott of other television outlets was treated under the Rule of Reason (where it was ultimately found illegal), rather than being subject to per se prohibition.

The ultimate economic impact of the Program on any particular UL may be uncertain. On one hand, if the demand for the Products bearing a particular university's insignia were entirely inelastic, then the UL would reap higher licensing revenues, since these are calculated on a percentage basis from wholesale selling prices. On the other hand, the demand almost surely is not entirely inelastic; and therefore retail price increases would cause at least some consumers to forego purchases of those Products. To the extent this occurs, the UL might face at least some potential diminution in its licensing revenues—a possibility that, we understand, has been recognized by some ULs which have been considering whether to participate in the Program. The prospect of ULs actually receiving increased licensing revenues based on higher product prices under the Program has apparently not been contemplated.

The Licensees and Their Roles

The Products are created and procured from Factories by the Licensees, which then resell them to wholesalers and retailers. These business corporations actively compete with each other in (i) procuring license arrangements from universities and other licensors (e.g., professional sports organizations), and (ii) creating and selling the Products and other products licensed by other licensors. It is they that choose potential Factories and negotiate production contracts with them for production of licensed products. While the Licensees are competitors, there is no apparent evidence that they have entered into any agreements among themselves on how to negotiate with the Factories that do or could participate in the Program.

A few large Licensees, which produce a high proportion of the "university logo" products, are major publicly-traded corporations with heavy commitments to the apparel industry and with their own brands. For such enterprises the "university logo" apparel segment covered by the Program will often be a relatively small part of their businesses. Meanwhile, there are many smaller Licensees that are predominately committed to the "university" market segment. There are numerous small Licensees in this category. Cooperation from the Licensees - however reluctant it may be - is likely to be very important to the Program because it is their business arrangements with the Factories that the ULs and the WRC would be seeking to upgrade.

We understand that the Licensees have had no role in creating the Program and, to the extent that they have expressed their views, they have generally indicated that they were opposed conceptually and because in their view the Program would be hard to administer.[5] We have been informed that an

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[5] For example, On October 31, 2005, in a public presentation at Georgetown University, Caitlin Morris, an employee of Nike, an important Licensee, responded to questions about the Program by telling the audience that Nike did not agree that apparel brands should increase the prices paid to their suppliers. She stated that Nike believes the USAS proposal is impractical and that its purpose is to save factories that are inefficient, rather than focusing on the capacity-building assistance that factories need.

antitrust plaintiff would be highly unlikely to find any evidentiary support for a claim that Licensees (i) supported or even played a role in the Program's conception and promotion, or (ii) viewed the program as a means to enhance profits. Many Licensees do, of course, have their own labor rights compliance programs, which were initiated by the licensees and other licensors out of concern about brand image. But the salient aspect of the Designated Suppliers Program cannot be found in any of the licensees own programs (i.e. price premium, explicit living wage requirement, requirement that a union be present, rather than just respect for the right of workers to join a union, etc.).

It is not entirely clear what the Licensees' interests and incentives would be vis-à-vis the Program. Because the ULs would be adopting the Program, any potential Licensee competing for a university license would have an incentive to promise to cooperate with the Program. At the same time, the required percentage purchases from DSL Factories are likely to reduce the Licensee's discretion in negotiating production arrangements. Also, the Program may well generate troublesome legal disputes between a Licensee and a Factory with respect to the latter's compliance. The Floor Price system, which would tend to increase the Licensee's per garment cost might or might not be a concern to the Licensee depending on whether it believed that the enhanced price could be passed on to the next level in the wholesale-retail distribution chain without substantially reducing margins or demand for the Products.[6]

The WRC and Its Role

The WRC is central to the operation of the Program. It will do the inspections and, based on the results of these, will create the list of DSL Factories eligible to participate in the Program. The WRC will also do ongoing monitoring of Factories' compliance with the Labor standards of the Program, and Licensees' compliance with the Floor Price standards and their obligations to meet percentage quotas of purchases of the products from DSL Factories.

Having been created in 2000, the WRC is a non-profit New York corporation governed by a Board of Directors with 15 members.[7] Five represent universities, five are labor rights experts selected from a WRC advisory council and five are from United Students Against Sweatshops ("USAS").[8] There is no

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[6] The possibility that the higher price for "university" garments under the Program would enable the Licensee to obtain incrementally higher prices for "pro sports" or "entertainment celebrity" garments of the same type is an issue that could be raised, and perhaps even regarded as relevant, in antitrust case challenging some aspects of the program. Needless to say the issue appears to be highly speculative, and ultimately to be persuasive unless confirmed by internal communications and documents generated by Licensees.

[7] WRC By-Law Sections 2.1 and 2.2.

[8] The 15 current members of the WRC Board of Directors are: *(1) five representatives of the University Caucus:* Jim Wilkerson *(Board Chairperson)*, Duke University; Jim Brudney, Ohio State University; John "Jay" Marano, Carnegie Mellon University; Marcella David, University of

labor representative from a union with substantial involvement in the apparel industry.[9]

The corporate purposes of the WRC include "to codify and promote compliance with ethical standards of conduct by college and university licensors, and by manufacturers who use the indicia of those universities and colleges, including but not limited to standards for living wages, child labor, women's' rights, the right to organize and bargain collectively, and health and safety...." (Section 1.3(c) of the WRC Bylaws)

The WRC and the CLC (or LRG) have different roles in the universities' licensing processes. The CLC (or LRG) is responsible for creating and enforcing the "traditional" licensing terms (royalties, trademark usage and infringement, etc), while the WRC is focused on creating and enforcing the special "labor" conditions that the participating universities wish to impose on Licensees and Factories via the licensing process.

Enforcement Mechanisms

The designated suppliers list ("DSL") is a new concept that is the cornerstone for the new sourcing requirements of the Program. To qualify for the DSL, a Factory will have to (i) be paying a living wage, (ii) demonstrate that employees have a freely-elected union or equivalent body, and (iii) have 2/3 of its production in the "university logo" market or with other buyers committed to equivalent standards. A six-month phase-in period will be allowed for a Factory to bring itself into compliance. The WRC will provide Licensees with lists of Factories that appear to be capable of meeting the standards for inclusion on the DSL, if they enjoyed sufficient stable orders at adequate prices for the "university logo" market segment; and Licensees may submit to the WRC Factories that they believe may be able to qualify for the DSL. Apparently, the WRC believes that no Factories, or virtually none, would qualify for DSL status today; and thus the Program is very much an effort to *upgrade* labor conditions and wages in Factories producing goods for the "university logo" market segment. The WRC will make DSL determinations for each Factory based on on-site inspections of

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Iowa;Douglas Shaw, Georgetown University; *(2) five independent labor rights experts representing the WRC Advisory Council:* Thea Lee (*Board Secretary*), Chief International Economist, AFL-CIO; Jill Esbenshade, Assistant Professor of Sociology, San Diego State University; Mark Barenberg, Professor of Law, Columbia Law School; Katie Quan, Director, John F. Henning Center for International Labor Relations, University of California; Alejandra Domenzain, Associate Director, Sweatshop Watch; and *(3) five representatives of United Students Against Sweatshops ("USAS"):* Emil Totonchi (*Board Treasurer*), Georgetown University; Liana Dalton, University of Wisconsin-Madison; Mark Iozzi, Western Washington University; Saamir Rahman, University of Michigan; Melanie Stratton, University of North Carolina-Chapel Hill

[9] However, the Communication Workers of America, CWA, which remains in the AFL-CIO after the split, does represent a small number of apparel workers through its graphic communications division. It is represented on the WRC Advisory Council, which elects five WRC Board members.

facilities and records. Its determinations will be embodied in written reports which will be available to ULs and Licensees.

The WRC is also expected to conduct ongoing monitoring of compliance with the Program by Licensees and Factories. It will monitor the performance of DSL Factories, prices paid by Licensees to DSL Factories, and Licensees' obligations to purchase a specified percentage of their Products from DSL Factories. When an infringement of the Labor Standards is found at a Factory, the WRC will seek to have it corrected, but, if the infringement persists, the Factory will be removed from the DSL. The WRC will then inform the Licensee(s) using the Factory, and the relevant ULs, that the Licensee can no longer count its purchases from that Factory toward its obligation to buy a required percentage of the Products from DSL Factories. If this places the Licensee in violation of the percentage requirement, or if the Licensee otherwise violates this requirement, the UL could instruct the Licensee to take corrective action or could terminate the Licensee. Also, under the Program, if the WRC finds, pursuant to a complaint or otherwise, that the negotiated prices for Products from a particular Factory are below the proper Floor Price, the WRC will ask the Licensee to renegotiate the price. If the problem is not corrected, the WRC will inform the relevant ULs, which could instruct the Licensee to take corrective action or could terminate the Licensee. In all infringement cases, the WRC will issue a formal public report, to be made available to all parties, at some point in the process.

This enforcement mechanism is similar to current methods used under the existing, more limited programs for the enforcement of UL codes of conduct. Today, termination or suspension is imposed on a particular Licensee by the UL, based on information provided by the WRC. Thus the UL is the key decision-maker and the WRC (or the FLA) is the key fact-finder. However, the new mechanism differs in that the Program creates a much broader basis for the UL invoking sanctions against a Licensee. Instead of being based solely on a finding that there are Labor Standards violations at a Factory being used by the Licensee, the sanction can be based on (i) the failure of the Licensee to purchase the applicable percentage of the Products from DSL Factories (which may, for example, occur as a result of a Factory failing to meet the requirement to commit 2/3 of its production to the "university logo" market segment or equivalent buyers) or (ii) the failure of the Licensee to pay appropriate Floor Prices to DSL Factories. Even if no specific Labor Standards or Floor Prices violation were found at a DSL Factory being used by the Licensee, the Licensee would be still in violation of its license obligations if it could not demonstrate that is has met the new percentage purchases requirement in the Program.

The WRC (unlike the CLC or LRG) has no contractual role in the licensing programs and (unlike a Licensee) has no contractual relationship with any Factory producing goods under the Program. Rather it serves as an advisor to each UL participating in the Program, while the ultimate enforcement of the

Specified *Labor Standards, purchase quota requirements, and Floor Price terms* rests with the UL and its Licensee(s). In the event of a legal dispute between (i) a UL and its Licensee, or (ii) a Licensee and a Factory, a knowledgeable WRC official might well be called to explain WRC's DSL determination or its finding of Labor Standards on Floor Price violations at any relevant Factory. Whether a court or arbitration tribunal would be likely to reject a WRC decision in such a contract dispute is uncertain at this stage.[10]

Antitrust Boycott Analysis

Any collective effort that raise prices and exclude some producers from a market inevitably raises some familiar antitrust issues. But this collective effort is different and unfamiliar because those that are making the collective effort (i) do not compete with each other (ii) do not compete with those that may be excluded from the market and (iii) do not stand to profit economically from the collective undertaking.

In these unusual circumstances, any antitrust threats appear much more likely to flow from private plaintiffs rather than from any government agency.[11] The risk of being sued is enhanced by the reality that the U.S. private antitrust plaintiff, if successful, receives automatic *treble* damages and reasonable litigation costs under Section 4 of the Clayton Act (15 U.S.C. Section 15); this unique bounty system strongly encourages a plaintiff to try to convert a contract or tort claim into an antitrust claim, whenever possible. The most likely source of such antitrust claims would be (i) a Factory that had failed to achieve "designated supplier" status or had been discontinued for failure to meet the Labor Standards; or (ii) a Licensee that had been terminated for failing to meet its quota requirements for purchases from DSL Factories or its Floor Price requirements.[12]

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[10] In other words, might the relevant court or tribunal find that the Licensee and the Factory had not breached their Labor Standards or Floor Price obligations (or that a Factory had been improperly dropped from the DSL), and therefore the UL was not entitled to terminate the license or obtain other relief against the Licensee?

[11] In fact, the the Antitrust Division of the U.S. Department of Justice has issued a Business Review Letter (i.e., essentially a "no action" letter to the Apparel Industry Partnership ("AIP")) in connection with its proposed "Workplace Code of Conduct and Compliance Monitoring Principles". Letter dated April 7, 2000 from Assistant Attorney General Joel I. Klein to AIP's counsel ("*AIP Business Review Letter*"). The Division noted AIP's representation that "the impetus for the Code was not typical of a cartel or other restrictive agreements, i.e., the desire of rivals to enhance profits by reducing competition, but rather was founded in 'concerns about public policy forcefully articulated by the President and echoes by the human rights, labor, consumer, and religious communities'." The letter is generally not dispositive for two reasons: it contains no analysis of boycott law and it was clearly driven by President Clinton's political agenda to promote humane labor conditions. Nevertheless, the result seems correct, on the facts recited, for reasons which we analyze in this opinion.

[12] This failure to meet the prescribed quota might be triggered by the Licensee failing to pay the appropriate Floor Price and/or failing to compel the factory to translate that price into a livable wage. Either would be grounds for the WRC to disallow the Licensee from counting the Products purchased from the Factory in question towards the Licensee's percentage requirement. However, the violation of the Floor Price obligation at one Factory would not in and of itself be a basis for termination. If for example, Licensees were required to purchase 50% of their products

Either type of plaintiff would likely claim that the universities, WRC, and perhaps even other Licensees were engaged in a per se illegal boycott.

A "boycott" is a *collective refusal* to deal with some supplier(s) or customer(s).[13] It is entirely distinct from a *unilateral refusal* to deal which is normally entirely legitimate. "Boycott" is also one of the most confusing of antitrust concepts, because "boycotts" fall along a spectrum—from per se illegality at one end, to fact-intensive analysis in the middle, to lack of antitrust jurisdiction at the far end. Everything depends on whether the participants are competitors, why they are boycotting, whether their targets are also competitors, and sometimes how much market power they possess. Purely "political" boycotts are generally exempt on First Amendment grounds.

What the universities and the WRC are proposing may arguably qualify as a "boycott" of non-complying Factories or Licensees, but this pejorative label does not convert their efforts into a U.S. antitrust violation. Rather we have to look at the facts described above in the context of the various "boycott" categories apparently developed by the courts over time. For reasons we shall explain, these risks appear fairly low for the ULs, but additional steps could be taken to reduce them even further.

The "boycott" categories[14] can be described as follows:

- Type A. Agreement among competitors to protect their market positions by compelling customers/suppliers targets not to deal with new entrants or other competitors: illegal per se, i.e., without regard to market power or justifications. E.g., *Eastern States Retail Lumber Dealers' Assn v. U.S., 234 U.S. 600 (1914); Fashion Originators Guild v. F.T.C., 312 U.S. 457 (1941).*

- Type B. Agreement among competitors to refuse to deal unless price or other commercial terms they receive are improved: illegal per se, even when some genuine political motives may be involved.

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from DSL Factories, and if the Licensee was exceeding this requirement by buying 60% from DSL Factories, and then the Licensee refused to pay a sufficient Floor Price for a new order to a DSL Factory that represented only 5% of the Licensee's logo production, the Licensee would still be at 55% and would not be subject to termination.

[13] Interestingly, the "boycott" concept originated in an Irish dispute over failure to pay living wages. As the Eighth Circuit Court of Appeals explained, "The term boycott was derived from a method of retaliation used against a land agent, Captain Boycott, who paid starvation wages to tenants and then evicted those who protested these wages. Tenants rallied the support of Boycott's servants, herders and drivers, and all agreed to cease relations with the Boycott family." *Missouri v. Nat. Organization of Women, Inc.*, 620 F.2d 1301, 1304 n.5 (8th.Cir. 1980) (citing Webster's Third New International Dictionary 264 (1971)),

[14] These categories are our attempt to analyze and segment the jurisprudence in a somewhat confusing area of antitrust law. They are not generally accepted categories that we have borrowed from treatise(s) or decision(s).

FTC v. Superior Court Trial Lawyers Assn, 493 U.S. 411 (1990) (mixture of political motives and economic self interest).

- Type C. Agreement among competitors not to deal with customers except on non-price terms agreed to by the defendants: normally illegal under the rule of reason if the defendants have market power and lack reasonable justification going beyond their narrow economic self-interests for imposing the terms. See *Paramount Famous Lasky Corp. v. U.S.,* 282 U.S. 30 (1930)

- Type D. Agreement among competitors to refuse to deal with those not complying with an industry self-regulation program: illegal under the rule of reason if the defendants have market power and lack reasonable justification for imposing the rules (e.g., necessity to avoid fraud or make a market work). Overly broad regulation that tends to serve the economic self-interests of established competitors will normally be illegal. Lack of due process in the self-regulatory system can be an important factor in finding antitrust liability in some such cases. See *Silver v. New York Stock Exchange, 373 U.S 341 (1963).*

- Type E. Agreement among competitors to establish an industry standard for particular products or services: whether it is legal or illegal will tend to turn on (i) the technical justification for the standard, and (ii) the fairness of the process by which it was adopted. A transparent effort to exclude new types of competition to dominant competitors will probably be found per se illegal, but otherwise the standards adopted and the adoption processes will be judged under the fact-based rule of reason. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492 (1988)

- Type F. Boycott by consumers and/or non-commercial entities of politically disfavored sources to achieve political goals: generally outside the antitrust jurisdiction altogether, if the perpetrators do not have a pecuniary or commercial interest in the "political" outcome that they are seeking. If the perpetrators have some, clearly secondary, economic motives then the boycott can be upheld under the balancing process used in a rule of reason case. See *NAACP v. Claiborne Hardware Co.,*458 U.S. 886 (1982); *Missouri v. Nat. Organization of Women, Inc.,* 620 F.2d 1301 (8th.Cir. 1980) .

Looking at the Program and the WRC role in administering it, we can see that it includes elements of some of these "boycott" categories and yet does not fall cleanly within any of them. In particular, it includes (a) ex ante certification of Factories with which Licensees could deal (a form of Type D self-regulation), (b) requiring DSL Factories to devote at least 2/3 of production to "university logo"

products or equivalent buyers (an example of Type E standards-setting), and (c) refusals by non-commercial entities (the ULs) to license those who would not accept their "humanitarian" goals (which echoes some of the Type F political boycotts).

A cornerstone of the Program is the *understanding* (or at least *expectation*) among the participating ULs that they will include all the new Program requirements (DSL, quotas, etc.) in their new licenses to their Licensees. This understanding would probably be found to be sufficient to create a horizontal "*agreement*" among the ULs so that the Program would be subject to the "unreasobale restraint of trade" rules in Section 1 of the Sherman Act (15 U.S.C. Section 1) or its counterparts under state antitrust laws. In turn, the ULs' understanding would be a Type C boycott (refusals by competitors to deal except on standard terms), but only if the universities were—contrary to our analysis—found to be (i) horizontal competitors in the licensing function and (ii) were likely to benefit economically from the Program.[15] Happily, the Program seems to have none of the elements of the Types A and B boycotts that raise the most serious antitrust risks, and are per se illegal.

In analyzing the Program, it is important to recognize the competitive relationships and realities:

- The universities are not competitors in the licensing function: each is offering Licensees differentiated rights (including some trademarks);

- The universities' motives are basically *humanitarian*, rather than *profit-maximizing*, and represent a political response to their students' concerns;

- The downstream products produced under these licenses are highly differentiated and intended for different market segments (i.e., different university communities);

- The Licensees are competitors in seeking to produce a UL's Products, but they have not had a hand in creating the Program; moreover, a Licensee has no apparent incentive or motive to (a) narrow the pool of DSL Factories, or (b) increase the prices it must pay to any DSL Factory; and

[15] While the Licensees will often be horizontal competitors vis-à-vis Factories, they are not the source of the Type C restrictions; rather it is the ULs that have created these restrictions and are compelling the Licensees to include them in their contractual relationships with Factories. We have neither found nor been informed of any horizontal agreements among Licensees on how they would deal with Factories (or the ULs).

- Domestic U.S. garment unions and manufacturers—which might well have an economic interest in Licensees having to pay higher prices for the Products—are not directly part of the Program.[16]

Thus the antitrust risks would seem relatively low so long as the essentially "humanitarian" motives for the program are not contradicted by internal evidence from ULs, Licensees, or even the WRC; and thus to the extent that antitrust risks exist, these risks would arise from the possibility of a court or jury taking a different view of the just-described relationships. As we have noted, the most probable source of such risks is a disgruntled Licensee or Factory, alleging that it has been boycotted (or refused DSL status or license renewal) as a result of a broad conspiracy orchestrated by the WRC or USAS. The fact that the affected UL will, after receiving a WRC compliance report, make its own decision on whether to terminate a Licensee or Factory may well not be enough to displace the inference of "agreement" given the collective genesis and nature of the overall Program.

The two types of mandatory quotas included in the Program are closely related to each other. These quotas clearly restrict the entrepreneurial discretion of Licensees and Factories with respect to their ability to deal freely with third parties; and therefore the WRC and ULs would have to be prepared to justify them as *ancillary restraints* necessary to operate the Program effectively. The justification for the 2/3 production requirement at DSL Factories is that only by limiting the amount of non "university logo" production at a Factory can the ULs assure that the benefit of the guaranteed higher Floor Price be passed on to workers as "livable wages". The justification for the requirement that Licensees ultimately procure a high proportion of the Products from DSL Factories is that it is necessary to assure that a reasonable number of DSL Factories can satisfy their 2/3 production requirement. Stated more broadly, the underlying economic theory of the Program is that only by fostering reasonably stable production and procurement arrangements can the ULs assure that the Products are regularly produced by workers earning livable wages, enjoying satisfactory working conditions, and being represented by an independent union. If proven, these justifications would more likely than not prevail in a "rule of reason" Sherman Act case challenging the quotas as unreasonable restraints of trade.

The Floor Price system is also a closely related part of this picture. It rests on the logical premise that a Factory will not be able to pay a "livable wage" if it does not receive an adequate price for the goods produced to cover the costs of producing them. For the WRC to tell a Licensee and its production Factory that they must agree to raise the price paid by the Licensee for certain Products is arguably a form of "price fixing" involving all three parties. However, it is a highly

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[16] However, UNITE-HERE was consulted on the development of the program by USAS and is supportive. UNITE-HERE is also represented on the WRC Advisory Council, which elects five WRC Board Members from its own ranks.

unusual form of "price fixing" in which the parties to the assumed "agreement" are not competitors and are not the economic beneficiaries of any price increase (which is supposed to be passed on to workers as above-market "livable wages"). It would almost certainly be subject to "rule of reason" treatment, rather than per se condemnation. See *Broadcast Music, Inc. v. Columbia Pictures Inc.* 441 U.S. 1 (1979) (rejecting per se treatment for a joint "price fixing" arrangement in a unique environment and explaining, "The Sherman Act has always been discriminatingly applied in the light of economic realities"). Under the "rule of reason", the Floor Price system should survive a Sherman Act challenge assuming that it can be shown to be an ancillary restraint necessary to achieve the Program's legitimate goals.

Possible Adjustments in the Program to Minimize any Antitrust Risks

The reality that there may well be an "agreement" among some or all of the ULs to create the Program and have WRC enforce puts great pressure on the *process* aspects of the Program. Quite often the outcome of "boycott" challenges to an industry self-regulatory system or a standardization process (Types E or F) turns on whether there was a fair process for determining that the plaintiff or its product should be excluded. See, e.g., *Silver, supra* and *Allied Tube, supra.* Arbitrary processes tend to generate judicial sympathy for an excluded plaintiff's antitrust "boycott" claims; moreover, some of the historic antitrust boycott decisions reflect real hostility to privately organized "regulatory" systems. See especially *Fashion Originators Guild, supra.*[17] Yet in all these cases the "regulators" were (i) competitors of those to whom the rules were directed, and (ii) stood to profit financially from the rules or standards being enforced. Meanwhile, the victims were current or would-be competitors being excluded from the market by the boycott.

Our case is clearly different, since the ULs are, we believe, neither competitors nor profit-maximizers in relation to the Program.This is important in the current circumstances, and yet the ULs may not want to have to rely totally on obtaining favorable determinations on these point. Stated alternatively, they may want to minimize the risks that a judge or jury might regard the Program as having been administered in a high handed or arbitrary way vis-à-vis the plaintiff victim (as was clearly present in *Silver* and *Allied Tube).*

Therefore we should look carefully at the procedural safeguards in the processes by which the WRC makes its initial DSL decisions or subsequent non-compliance decisions/recommendations.

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[17] "...the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate , and provides extra-judicial tribunals for the determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute'...[E]ven if [style] copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. 457 (1941).

The issue could be largely resolved by assuring that the WRC (i) gives the offending Factory (or Licensee) some written statement of findings of non-compliance, and (ii) gives the offending Factory (or Licensee) some opportunity to respond to adverse findings and even to be heard orally by a UL when termination is under consideration. Because the Program is substantially more "regulatory" than its predecessors (with the DSL, procurement quotas, and the Floor Price system), procedures that were adequate under the traditional, more limited university programs are somewhat more likely to be called into question now. Also, by increasing the economic stakes for Licensees and Factories, the Program increases the chances that rules and processes never challenged in the past might be challenged in the future.

Under the Program, as is the case now, Factories would be asked for their input in the course of WRC investigations and their position would be recorded in factory reports – though WRC might indicate that it disagrees with the Factory's position and explain why. The same is true for Licensees. Once conclusions have been drawn about a factory, whether or not they have yet been presented in a public report, WRC expects a UL to accept its conclusions about infringements at face value. Past experience shows that in some cases they do so, but in other cases the UL may want additional input, e.g. from the Licensee. It is not common for a UL to communicate directly with a Factory, though there is nothing to stop a Factory from initiating such communication. It is common for ULs to communicate with their Licensees and in a number of past cases Licensees have disputed WRC findings in direct and detailed communications with the relevant ULs. All that said, the process through which Licensees and Factories get an opportunity to present their views on the facts and, more importantly, the mechanisms through which those views get conveyed to ULs is not a very formal one. The WRC always solicits input from both the Factory and the Licensee, but it might report informally to ULs that a problem exists before it conveys that input to universities in the form of a public report.

It would probably be desirable for the new Program to formalize all of these types of processes to make sure that good records exist and the processes are reasonably transparent and fair vis-à-vis the Licensees and Factories that may be subject to adverse action by the WRC and ULs under the Program. For example, there could be a policy that the WRC would only remove a DSL Factory from the DSL after it had issued a public report of its findings that includes a summary of any non-confidential information provided by the Factory and the Licensee in the course of the investigation. Similarly, where the WRC has worked informally with a Factory (or Licensee) to try to bring it into compliance, the WRC should have its officials keep a log of their efforts with a brief summary of what had transpired; this should be a business record that could be admitted as evidence to show that a subsequent suspension recommendation to a UL was simply the last (and unfortunate) stage in a fair-minded process.

Additional Steps that University Licensors May Wish to Take to Minimize any Antitrust Risks

The universities are key players in the Program. They would be jointly creating the standards that are likely to be embodied in their licenses and thereby imposed on Licensees (and indirectly on Factories) as core parts of the Program. Universities are also represented on the WRC Board and more broadly, if universities decide to implement the Program, they will play an integral role in the implemention process, including determining the details of the Program's rules and procedures. Finally, it is an individual UL that will have to make the license termination (or suspension) decisions that are the ultimate enforcement mechanism in the Program and the most likely source of antitrust litigation.

Thus the universities' motives and perceptions are likely to be important to the antitrust defense of the Program should any antitrust challenge be made. It will be important that the basic humanitarian goals behind the Program be reflected in a university's internal records and communications. It will also be important that a key assumption on which this opinion rests—namely, that the ULs are not competitors in the licensing function—not be contradicted by extensive internal records and communications to the contrary. In the age of email, these "paper trail" concerns are more important than ever.

Accordingly, some modest level of antitrust compliance training ought to be provided for university officials who are engaged in the licensing functions. This could be done jointly, via the WRC or some other collective body, or individually by each university's counsel. Such a compliance program would include:

- Instruction on the hazards of document creation and retention (i.e., avoiding inflammatory, inaccurate or incriminating documents and emails);

- Avoiding agreements or understandings among ULs on the economic terms in their licenses;

- Making license termination or enforcement decisions on an individual UL basis, rather than based on consultation with other University Licensors;[18] and

- Creating a business record of the UL's reasons for taking particular enforcement action vis-à-vis a Licensee or Factory.

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[18] It would be appropriate, and probably necessary, for a UL to consult with any other UL whose goods were being manufactured at the same DSL Factory that was the focus of potential enforcement action vis-à-vis a Licensee or Factory. This is an important exception to recommended policy of entirely individual decision-making by each UL on license termination and enforcement decisions.

As we have explained, the most likely source of antitrust risk for a university comes from private cases brought by Licensees or perhaps even a Factory. This type of conflict is most likely where the Licensee is being terminated (or denied renewal) because of its failure to comply with the requirements of the Program. If the disgruntled Licensee can frame its case as an antitrust boycott case, rather than just a contract dispute, it would gain three important litigation advantages—access to the federal court, mandatory trebling of any proven damages, and an award of attorneys' fees and costs if it wins. This is why so many distribution and license agreement cases end up as federal antitrust cases (perhaps with pendant state law claims).

A university could also reduce the risks of such a claim somewhat by including in its licenses dispute resolution provisions that tend to make litigation less attractive to a licensee or its contingent fee counsel. Two particular types of clauses could be considered:

1. **An Arbitration Clause.** Ever since the Supreme Court's 1985 decision in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, the federal courts have held that an antitrust dispute between two parties that are subject to a general arbitration clause must be submitted to arbitration, if it arises out of or is related to the contract. This is true even where the plaintiff is alleging that the defendant has conspired with parties that are not subject to the contract. See, e.g., *JLM Industries, Inc. v. Stolt-Nielsen SA,* 387 F.3rd 163 (2nd Cir. 2004).

   Plaintiffs' lawyers generally dislike trying cases before arbitrators rather than jurors. The process is often confidential and discovery is generally less extensive (and hence less costly and burdensome for a defendant) than under the Federal Rules. The basis for judicial appeals after the arbitrators' decision is very limited. Moreover, it is not yet clear that the arbitrators are obliged to award *treble damages* (as opposed to compensatory damages) in an antitrust arbitration. Thus, in an antitrust conspiracy case, a plaintiff may sometimes choose to dismiss (or settle cheaply) its claim against the party with which it has an arbitration agreement and just proceed in federal court for treble damages against the other co-conspirators under joint and several liability.

2. **A Litigation Cost Clause.** Section 4 of the Clayton Act (15 U.S.C. Section 15) contains an unusual rule designed to encourage private antitrust enforcement. Under it, the successful plaintiff may recover "the cost of suit, including a reasonable attorney's fee". This departs from (a) the normal "American rule", under which each party pays its own costs; and (b) the "loser pays" or "English rule", under which the winning party can recover its attorneys fees and litigation costs from the loser. Needless to say, the latter especially serves as a strong deterrent to frivolous or even marginal litigation.

A UL might include a special litigation cost rule with its arbitration clause in its licenses. The clause could mandate either "American rule" cost allocation or, even more adventurously, the "loser pays" rule. In the context of an antitrust claim, the Licensee-plaintiff would probably claim that this clause was an impermissible departure from the pro-plaintiff policy of the Clayton Act, but it would not know whether this objection had prevailed until the end of the proceeding, after the arbitrators (and perhaps a reviewing court) had ruled on it. At the very least, the uncertainty associated with this type of clause would have a tempering effect on the Licensee's risk/reward calculations when it was deciding to bring a case. (The "loser pay" rule clause would probably have more chilling effect at the outset, but be more likely to be struck down on public policy grounds.)

Conclusion

In conducting this review, Baker & Miller PLLC has sought to answer two fundamental questions:

(1) Is the proposed Program likely to conflict with U.S. antitrust laws?; and

(2) If a Licensee or a Factory were to bring an antitrust challenge to the adoption or enforcement of the Program in Federal Court, would such a challenge be likely to prevail?

Our answer to both questions is "no". With respect to the first question, we conclude that the Program is consistent with the Sherman Antitrust Act. With respect to the second question, we conclude that, while any multiparty Program that imposes greater restrictions on Licensees and Factories will increase their incentives to bring antitrust claims in the event of a legal dispute, the probability of a Licensee or Factory mounting a successful legal challenge to the Program remains low.[19]

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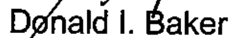
[19] We have not attempted to analyze the jurisdictional barriers that foreign plaintiffs (particularly foreign Factories) would be likely face in establishing the necessary nexus between their alleged injuries and U.S. commerce. See *F.Hoffman Laroche, Ltd. v. Empagran.S.A.*, 124 S.Ct. 2359 (2004), and on remand 417 F.3rd 1267 (D.C. Cir. 2005) cert. den. (2006) (rejecting U.S. antitrust standing of foreign purchasers from the international *Vitamins* cartel). These significant jurisdictional barriers could discourage some potential foreign plaintiffs from even attempting to sue under the Clayton Act, while giving ULs and the WRC some additional defenses in the event of such a U.S. antitrust suit were filed. Moreover, in U.S. court any antitrust plaintiff has to prove "antitrust injury"—namely, an injury to it that flowed from an injury to competition in the relevant U.S. market. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("It is *competition,* not *competitors* that the Act protects"). These jurisdictional and standing barriers should further reduce some plaintiffs' probability of success below the low probably that we have projected under Sherman Act boycott law.

These conclusions that the Program is consistent with U.S. antitrust law are based primarily on the fact that the universities making the collective effort to achieve improved labor practices (i) do not compete with each other economically in their licensing functions, (ii) do not compete with the Licensees or Factories that may be excluded from the market by virtue of the Program

and/or (iii) do not stand to profit economically from the Program. These conclusions hold true so long as the essentially "humanitarian" motives for the Program are not contradicted by internal evidence from the participants and so long as fair and transparent processes are used to carry it out.

Yours sincerely,



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