UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 91-CV-3274

UNITED STATES OF AMERICA,
Plaintiff,

v.

BROWN UNIVERSITY IN PROVIDENCE IN THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS;

THE TRUSTESS OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK;

CORNELL UNIVERSITY;

THE TRUSTEES OF DARTMOUTH COLLEGE;

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, MA;

MASSACHUSETTS INSTITUTE OF TECHNOLOGY;

THE TRUSTEES OF PRINCETON UNIVERSITY;

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA; AND

YALE UNIVERSITY,
Defendants.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY'S POST-TRIAL MEMORANDUM

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I. INTRODUCTION.

This Post-Trial Memorandum is submitted on behalf of the Massachusetts Institute of Technology ("MIT"). It addresses the legal and factual issues presented in the non-jury trial held from June 25, 1992 through July 9, 1992, and focuses principally upon the rule of reason claims made against MIT by the Antitrust Division.[1]

In addition to this memorandum, MIT also relies on its Brief in Opposition to the Antitrust Division's Motion for Summary Judgment, filed May 1, 1992, particularly with respect to (1) whether the antitrust laws apply to non-commercial conduct such as the cooperative distribution of charitable subsidies and, if so, (2) whether such conduct should be condemned outright under the per se rule. For the Court's convenience, MIT has attached to this Post-Trial Memorandum those portions of its earlier brief most relevant to these two issues.

If the antitrust laws do extend to charitable cooperation intended to achieve non-commercial objectives, then the Court must decide whether the Antitrust Division has established that the cooperative activities it challenges in this case are either per se unlawful or are unreasonable. To assist the Court in addressing these issues, this memorandum briefly reviews the facts proven at trial, with particular emphasis on the conflicting testimony of the economic experts. It then establishes that MIT's

[1] The Memorandum is submitted with MIT's Supplemental Proposed Findings of Fact and Conclusions of Law, and is intended to be read in conjunction with the supplemental findings and conclusions. Citations to the trial transcript are contained primarily in the supplemental proposed findings.

cooperative charitable activities were in fact lawful and reasonable, whether afforded an appropriate evaluation taking into account both their economic and non-economic goals and objectives, or even if evaluated solely with respect to their overall effects on competition and consumer welfare.

II. OVERLAP IN CONTEXT: THE DEVELOPMENT OF OUR NATIONAL GOAL OF MAKING AN EDUCATION AVAILABLE TO ANY ABLE STUDENT, AND THE ROLE OF NEED-BASED FINANCIAL AID IN IMPLEMENTING THAT GOAL.

It is beyond dispute that equality of educational access and opportunity is of vital concern to the future of this Nation. Indeed, there was significant — and essentially undisputed — testimony at trial by a number of leading educators concerning the nature and history of financial aid, and its role in the educational policies that have been jointly developed and implemented by Congress, educators and financial aid professionals over the last several decades. This evidence provides an important context within which the reasonableness of Overlap must be assessed. It demonstrates that higher education has long been viewed in our society as a "social good" that should be made available to all qualified individuals to the extent possible.

The testimony at trial established that society as a whole benefits when educational access and opportunity is enhanced; that leaving educational opportunity to the vagaries of the commercial marketplace would hurt society and be unfair to individuals; that financial aid is crucial to the creation and preservation of educational opportunity; that educational opportunity is maximized when aid is dispensed on the basis of need; and that cooperation among educational institutions charged with

enhancing access and opportunity advances this important goal. Acting on these values, every branch of government has adopted the goal of enhancing educational access and opportunity as a national policy. For decades, this Nation has dedicated government resources to providing financial aid to its needy students, and has encouraged private institutions and individual benefactors to do the same. Following is a brief survey of the evidence on these issues.

Prior to World War II educational access and opportunity were determined largely by individuals' ability to pay, as there was very little public or private financial aid available. Since World War II, the federal government has increased the number and scope of financial aid programs in order to enhance educational opportunity throughout society. For nearly three decades, with only narrow and limited exceptions, the federal financial aid programs have been entirely need-based, providing federal aid only on the basis of demonstrated need and prohibiting private aid in excess of need to any student receiving federal aid.

Colleges and universities also have expanded their efforts to provide educational access and opportunity by greatly increasing the availability of private financial aid. They have done so by soliciting private charitable funds for use by students whose needs are unmet by federal financial aid. At the forefront of private efforts to enhance educational access and opportunity are schools that admit students based solely upon merit — without any regard to their ability to pay — and make the extraordinary financial commitment of meeting all of the demonstrated need of all admitted students. The number of schools able to make such a commitment has

Stanford's average net revenues per student, which in 1990-91 were nearly $2,000 higher than MIT's. If, as the Division suggests, MIT would (and should) act like Stanford in the absence of Overlap, it would have to drastically reduce its financial aid budget and increase the average price it charges its students. Thus, if Stanford were an appropriate benchmark, then it would serve to support the conclusion that Overlap significantly lowered average price.

In short, both the CSS and Stanford benchmarks represent a futile stab by Dr. Leffler at replicating his pre-determined, premature and erroneous theoretical results. Neither one approaches the level of reliable scientific evidence that should be required of an expert witness, and both should be discarded as lacking any probative value.

(iii) The empirical stage: "Reverse engineering."

Finally, confronted with Dr. Carlton's rigorous scientific analysis, Dr. Leffler was forced to roll up his sleeves and examine real empirical data to see if the facts could support the theoretical conclusions he had reached nearly a year before trial. The process undertaken by Dr. Leffler is nearly as intriguing as the results he eventually produced. Dr. Leffler's approach following his deposition and his receipt of Dr. Carlton's study is fairly characterized as a methodical effort to manipulate the analysis in order to reverse-engineer his predicted results. Even so, he failed to produce any persuasive results that dislodge Dr. Carlton's conclusion.

Dr. Leffler attempted to narrow considerably the group of subject schools used by Dr. Carlton in his regression analysis, despite the fact that a narrower sample group increases the risk of error, and Dr. Carlton's subject group was proven appropriate under standard statistical principles. First, Dr. Leffler narrowed his subject group to private schools in the Research 1 and Research 2 classifications

dwindled as the demands on private resources have increased. At trial, the Overlap schools were the only schools to appear and testify to their need-blind admissions and need-based aid programs.

The viability and success of need-based aid programs has always depended upon the ability of schools to assess accurately the financial need of their students. When aid is under-awarded, students will be foreclosed from attending for financial reasons. When aid is over-awarded, scarce resources will be wasted on those who do not need them. Consequently, those who do need aid may be denied the ability to attend. Because need is by its nature a subjective and amorphous concept, financial aid professionals in both the private and public sector historically have collaborated and attempted to reach consensus on need analysis issues. These cooperative efforts have been fueled by: (1) a desire to pool expertise and share experience in an effort to arrive at the most accurate need assessments; (2) a desire to achieve horizontal and vertical equity, so that aid awards accurately reflect both the similarities and differences in the financial circumstances of different students, in order to enhance the actual and perceived fairness of the system; and (3) a fundamental belief that differential assessments of need should not affect student choice and, in effect, inappropriately insert a competitive element into the financial aid system.

These collaborative efforts began with the College Scholarship Service in the 1950's, became more formalized with the promulgation of the Uniform Methodology by the Keppel Commission in the early 1970's, and became law with the adoption of the Congressional Methodology in 1986. Throughout this entire period, members of

the financial aid community have collaborated on need analysis both generally, and with respect to specific students. Such collaboration has been endorsed and encouraged by the College Scholarship Service and the National Association of Student Financial Aid Administrators. Moreover, the Department of Education has long been aware of such collaboration generally, and Overlap specifically, and has never objected to the cooperative exercise of professional judgment in need analysis.

The national policy of enhancing educational access and opportunity, implemented generally through federal and institutional need-based aid programs, and at the extreme by need-blind admissions/full-need aid programs, has changed the character of American education dramatically. These programs have enabled large numbers of needy students to obtain a high quality college education despite their inability to pay for it. Minority groups, which are disproportionately represented among the class of high need students, have experienced greatly improved educational access. Providing educational opportunity to these students benefits the individual student by providing him or her with the skills to compete and succeed in the labor market, benefits society by increasing the educational level of its members and enhancing the ranks of productive, tax-paying citizens, and provides hope to similarly situated students who see their predecessors succeed. It also improves the educational experience of classmates of needy students, who are exposed to a greater diversity of viewpoints and ideas.

Prior to this litigation, decisions about the use of limited financial aid funds to advance the national policy of creating educational access and opportunity have been

left in the able and experienced hands of educators, under the oversight of the Department of Education. This practice reflects a sound judgment that educators are in the best position to make these complex, difficult and important judgments. These judgments should not now be superintended by the Antitrust Division, which goes so far as to claim that any issues beyond its own notions of competition policy are "irrelevant."[2]

III. OVERLAP DOES NOT CONSTITUTE TRADE OR COMMERCE AND THEREFORE IS NOT SUBJECT TO ANTITRUST SCRUTINY.

Simply stated, Overlap involved coordination among nonprofit organizations, which sought to achieve the fairest allocation of limited private charitable funds, in order to most effectively attain charitable goals embraced by the government — in a "market" in which the final "product" is subsidized and provided below cost for all "buyers," given outright to some who cannot afford it, and withheld from others who could and would pay a great deal for it if only the "sellers" would sell to them. No antitrust decision has ever held such conduct to constitute commercial behavior to which the antitrust laws would apply. Indeed, no commercial firm could engage in such practices and remain in business beyond the time it took to exhaust its bank account.

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[2] It is worth noting that the same government agency which claims that MIT's goals of equal educational access and opportunity are "irrelevant" to the antitrust inquiry, recently concluded seventeen years of litigation against the state of Mississippi for obstructing equal access to state colleges. In that case, the Department of Justice claimed that Mississippi was obligated to "ensur[e] that each of its young people be free to choose among all that the State has to offer, limited only by ability and not by race." Here, however, the Department of Justice maintains that it is illegal for private colleges to work cooperatively toward the same result. *Brief for the United States* at 33, *United States v. Fordice*, 1992 WL 141124 (U.S. June 26, 1992).

At trial, the Antitrust Division mischaracterized MIT's position and claimed that MIT is seeking an "exemption" from the antitrust laws. However, MIT does not stand before the Court asking to be "exempted" from any law; MIT asks only that the Court acknowledge that the Sherman Act applies only to "trade or commerce," and that the cooperative distribution of charitable handouts to needy students does not constitute "trade or commerce." The Antitrust Division uses the term "exemption" to gloss over the fact that it is the Division's burden to establish that the Sherman Act applies, and the Division cannot carry this burden.

These issues were briefed extensively in MIT's Brief in Opposition to the Antitrust Division's Motion for Summary Judgment, submitted to the Court less than three months ago. Rather than repeat its earlier analysis here, MIT has attached as Appendix A the relevant portions of its earlier brief (pages 39 through 50). One additional case, however, was decided after submission of the summary judgment brief and should be raised here.

In support of its motion for summary judgment the Antitrust Division claimed that MIT erroneously relied on *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). "*Marjorie Webster,*" said the Antitrust Division, "is of questionable vitality after more recent Supreme Court precedent . . ." *Memorandum of Law in Support of Government's Motion for Summary Judgment*, at 87 n.70.

On June 29, 1992 — the third day of the trial in this case — the Seventh Circuit decided *National Organization for Women, Inc. v. Scheidler*, 1992 WL

145233 (7th Cir. June 29, 1992). Relying on *Marjorie Webster* and on other cases cited by MIT in its opposition to summary judgment, the Seventh Circuit held that the antitrust laws do not apply to a conspiracy to close women's health centers that perform abortions, even where some of the co-conspirators had established competing pregnancy testing and counseling facilities.

Upholding the dismissal of NOW's complaint under Rule 12 (b)(6), the Seventh Circuit noted that "the [Sherman] Act was not intended to reach the activities of organizations espousing social causes" but rather "was intended to prevent business competitors from making restraining arrangements for their own economic advantage." *National Org. for Women* at *4, *7. The Court extensively analyzed the same legislative history of the Sherman Act as MIT does in its summary judgment brief, and the Court reached the same conclusion as does MIT: the Sherman Act reaches those who reap commercial rewards from commercial conduct; it does not reach those who engage in collective conduct to advance political or social goals. The Court cites with approval *Marjorie Webster's* holding that the antitrust laws do not extend to collective action to advance educational goals. *Id.* at *7.

The Seventh Circuit repeated a common sense observation it had made in an earlier case: "it is hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction." *Id.* at *7. In the present case, too, it is hard to ignore the suspicion that what gives rise to this litigation is a dispute over social goals, and that this dispute has been awkwardly forced into the antitrust mold by regulators who, because of their limited authority, have no more appropriate tool.

Like the Seventh Circuit, however, this Court should not permit the antitrust laws to be misused either to intervene in a dispute over social goals, or to expand the jurisdiction of an agency reaching to explore new horizons.

IV. OVERLAP IS NOT A PER SE VIOLATION OF THE SHERMAN ACT.

In its opposition to the Division's Motion for Summary Judgment, MIT extensively briefed its position that Overlap is not appropriately analyzed under the per se rule.[3] In doing so, MIT cited the myriad cases which hold unequivocally that the per se rule is to be used sparingly, and should be applied only in cases of blatantly anticompetitive conduct with which courts have had extensive experience. *See MIT Brief, at* 58-59. MIT then demonstrated that activities such as Overlap, involving cooperation among non-profit organizations concerning distribution of scarce charitable resources, do not constitute blatantly anticompetitive behavior subject to the per se rule either as a matter of economic theory, or as a matter of educational policy.

MIT supported its position at the summary judgment stage with a number of affidavits. The evidence adduced at trial confirmed, and indeed strengthened, MIT's argument that the per se rule does not apply to Overlap. First and foremost, the evidence confirmed that basic economic theory rejects a presumption that bona fide non-profit organizations that act cooperatively will necessarily do so in a way that harms the constituents they are intended to serve. Dr. Dennis Carlton, MIT's expert

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[3] Rather than repeat its earlier analysis here, MIT has attached as Appendix B the relevant portions of its Brief (pages 51-75).

economist, explained how the principles of economics are used to predict the economic behavior of an organization based upon the motivations and incentives it faces. He further observed that it is critical to understand the organizational characteristics of an institution, including whether or not it is a for-profit entity, in order to understand its incentives and thereby predict behavior. Thus, while economic theory generally can predict the behavior of a for-profit firm, since by definition its primary motivation is profit-maximization, economic theory cannot predict the consequences of cooperative behavior among non-profit institutions such as colleges, since non-profit educational institutions have diverse interests, some of which may conflict with the goal of profit-maximization.

Even the Division's witness, Dr. Keith Leffler, acknowledged at trial that the goals of a non-profit university are "much more amorphous than it is for a for-profit institution. It includes the various things that the administrators and the board of trustees and the donors find of value, such as research, diverse student body, all the various things." (Tr. 780:12-21). Dr. Leffler's implicit acknowledgment of the incongruity of applying the per se rule to activity such as Overlap was illustrated at trial in Exhibit G-224. While the Division offered this exhibit purportedly to show the similarities between for-profit and non-profit institutions, in fact its title reveals the obvious distinction — that while non-profits can act in an anticompetitive manner, it is improper to presume that they will do so.[4]

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[4] It clearly would be improper to condemn conduct under Section One of the Sherman Act merely because it has the potential for causing anticompetitive effects. It is well-established that by its terms, Section One of the Sherman Act does not apply to potential or incipient anticompetitive effects. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 124 (1986). If it did, all cooperative behavior would be outlawed because such cooperation

In addition to the evidence concerning economic theory, a number of trial witnesses who are familiar with the operations of non-profit educational institutions, as well as for-profit firms, testified about the fundamental differences between the two. Based upon nearly a half century of experience in higher education, including as President of two major public research universities and the two major associations of colleges and universities, and his experience as a director of both Chrysler Corporation and John Deere, two major for-profit corporations, Robben Fleming testified to the "striking differences" between non-profit universities and for-profit corporations. He described in detail the unique "culture" that characterizes higher education, observing that a primary value held by educators is the opportunity to work with "the best young minds that you can find." (Tr. 819:9-15). He noted that "[i]f faculties could have their way, they would educate everybody free of charge because that's [sic] — they want access to these best minds. When you are developing a university budget, you are never making a profit, designed to make money. You are developing a budget, which in the best of all worlds will break even for you." (Tr. 820:3-8).

Mr. Fleming also traced the historical underpinnings of a national educational policy designed to open college doors for all students through the use of need-based aid. Finally, based upon his experience as a director of Chrysler Corporation and John Deere Co., Mr. Fleming observed that the culture of major universities and the

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always carries with it the potential for anticompetitive collusive behavior. Having failed to identify anticompetitive effects after more than thirty years of Overlap, it cannot attack Overlap on the grounds that it may in the future give rise to some speculative anticompetitive effect.

traditional role of educators in promoting access and opportunity stand in stark contrast to the incentives, motivations and behavior of commercial enterprises.

Both Dr. Nannerl Keohane, President of Wellesley College and a director of IBM, and Dr. William G. Bowen, President of the Andrew W. Mellon Foundation, former President of Princeton and a director of American Express, Merck Pharmaceuticals and other for-profit corporations, echoed Mr. Fleming in their testimony. Dr. Keohane described as "crucially important" to Wellesley College the need to provide educational opportunities for a richly diverse group of academically talented students. (Tr. 959:19-24). Thus, a top priority for Wellesley is ensuring access to a Wellesley education for top scholars from all walks of life. Dr. Keohane quoted Wellesley's founder as stating that "he wanted to have a college made up of at least as many calico girls as velvet girls, and he wanted to make sure this was true by paying as little as possible attention to their financial circumstances." (Tr. 964: 10-14).

Similarly, Dr. Bowen drew upon his knowledge as a renowned economist specializing in the economics of higher education, as well as his broad-based service in higher education, the for-profit sector and the charitable community, in addressing the substantial differences in the objectives of non-profit educational institutions and those of for-profit organizations. Dr. Bowen observed that while for-profit organizations clearly are focused on profits and earnings, non-profit educational institutions are driven by a complex set of objectives dictated by their educational mission. (Tr. 1026:17 through 1027:4). Dr. Bowen testified that an educational

institution's concerns will likely center on the profile of the students who attend the university and their educational experiences, and properly may extend to the broad social consequences of its actions. This differs sharply from the for-profit entity's limited focus on profit-maximization for the shareholder. (Tr. 1027:5-19; 1033:9 through 1034:11).

Finally, Dr. Paul Gray, Chairman of the MIT Corporation, described how the characteristics of higher education articulated by Fleming, Keohane, Bowen and others are fundamental to MIT's educational mission. Dr. Gray testified at length about the culture of merit that pervades MIT, and how that culture is reflected in both its admissions and educational philosophies. He described MIT's historic commitment to admitting students based solely upon merit, its policy of meeting all need, but not providing aid beyond need, and the importance of these policies to MIT's educational mission.

In addition, Drs. Gray, Keohane and Bowen testified that the purpose of Overlap was to advance the goal of enhancing educational opportunity by improving the schools' ability to allocate scarce aid resources fairly and responsibly on the basis of need, thereby enabling them to commit to need-blind admissions and full-need aid to all applicants. Finally, each of these witnesses articulated the fact, long recognized by the Supreme Court, that the diversity promoted by these policies enhances the educational experience of all.

Taken together, the evidence at trial unequivocally demonstrates that under the clearly defined principles established by the case law, the conduct at issue in this case cannot be condemned per se.

V. OVERLAP PASSES MUSTER UNDER THE RULE OF REASON.

A. The Antitrust Division Has The Burden Of Establishing That Overlap Was, On Balance, Harmful to Competition.

As MIT established in its opposition to the Division's Motion for Summary Judgment, it is a fundamental precept of antitrust analysis that, except in cases involving the most extreme and unjustified restraints, a court must apply the rule of reason in evaluating the reasonableness of the challenged conduct. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). Under the rule of reason, the "plaintiff bears the burden of proving that any concerted action taking place caused an anti-trust injury by imposing an unreasonable restraint on trade; the defendants are not required to prove that the practices are reasonable." *Miller v. Indiana Hosp.*, 1992 WL 133917, at *5 (W.D. Pa. March 9, 1992) (emphasis added). *See Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991), *cert. denied*, 1992 WL 104713 (U.S. June 29, 1992).

Congress designed the Sherman Act as a consumer welfare prescription. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 107 (1984). Therefore, in evaluating the reasonableness of conduct under the rule of reason, a court must examine all of the

effects, purposes and justifications of the challenged conduct to determine whether it is, on balance, harmful to competition and consumers.[5] *See Balaco, Inc. v. Upjohn Co.*, 1992 WL 131150, at *1 (E.D. Pa. June 3, 1992) (under rule of reason court must balance various factors to determine if practice is "unreasonable"). This inquiry, in turn, requires "a consideration of [the] impact on competitive conditions," accomplished through analyzing the impact of the restraint on the relevant market. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *See Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 716 (3d Cir 1991), *cert. denied*, 1992 WL 104713 (1992).

The primary tool for assessing the impact of challenged behavior in a rule of reason case is empirical economic analysis. *Professional Eng'rs.* 435 U.S. at 690-91 nn.16 & 17. The traditional "vital signs" of the health of the competitive system and the welfare of consumers are price, output and quality. Thus, the purpose of economic analysis in a rule of reason case is to determine the actual effects of the challenged conduct on price, quantity and product quality. *Tunis Bros. Co.*, 952 F.2d at 728. *See, e.g., NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 110 (1984); *Professional Eng'rs*, 435 U.S. at 693-94; *Sitkin Smelting & Ref. Co.*

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[5] The Supreme Court established the framework for conducting a rule of reason analysis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are relevant facts.

v. F.M.C. Corp., 575 F.2d 440, 447 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978).[6] As set forth in detail below, the economic evidence clearly demonstrates that Overlap did not affect the average price of an education or output at the Overlap schools, and therefore the Division has failed to meet its prima facie burden of establishing that Overlap, on balance, harmed competition. Moreover, Overlap produced competitive benefits. It enhanced the quality of education at the institutions that participated in Overlap, and enhanced competition by increasing the educational choices available to students. Thus, the evidence shows that Overlap enhanced competition and benefitted consumers, and therefore is reasonable under the rule of reason.

In addition, the sort of cooperative activity involved in Overlap can also be justified under a rule of reason analysis for non-economic reasons. As Justices White and Rehnquist recognized in their dissent in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 135 (1984):

> The primarily non-economic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen, and neither *Professional Engineers* nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive

[6] Under standard economic analysis, given a product of constant quality, if the effect of the challenged conduct is to increase price and reduce output, then consumer welfare has been harmed. If the plaintiff fails to show that price has been increased or that the output or quality of the product has been decreased, the plaintiff has failed to meet its burden of proving that the challenged conduct harmed consumers. *See Tunis Bros. Co.* 952 F.2d at 715, 728.

> impact, without regard for the legitimate noneconomic values they promote.[7]

The "non-economic values" that Overlap promoted over its 30 year history were well established at trial. The evidence clearly demonstrated that Overlap served to advance the public policy objectives that have been the hallmark of federal financial aid policy for almost three decades — that of providing educational access to the most qualified students regardless of their financial means. In addition, Overlap promoted socioeconomic diversity within the student body which, as is well recognized,[8] plays a crucial role in the educational process. These noncommercial, educational values that Overlap served to advance must also be considered in evaluating the reasonableness of the conduct.

B. The Economic Justifications For Overlap.

1. Overlap did not increase price or otherwise harm competition.

The focus of the economic testimony at trial properly came to rest on the issue of the effect of Overlap on the "price" charged by the Overlap schools.[9] The evidence adduced at trial leads inexorably to the conclusion that Overlap did not

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[7] The dissent's view that *Professional Engineers* should be read as applying only to standard, profit-motivated commercial activity and not to nonprofit educational institutions did not conflict with the majority opinion. The dissent recognized the absurdity of interpreting *Professional Engineers* as positing a test in which, once challenged, noncommercial educational behavior can only be justified by demonstrating its commercial benefits. Having found that the NCAA was in fact a commercial enterprise, organized to maximize revenues, the majority's application of the principles set out in *Professional Engineers* to the facts of NCAA was not inconsistent with the dissent's view.

[8] *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978).

[9] "Price" was defined by both expert economists as "average net revenue per student." *See* Tr. 1598:12-18; 1624:3-21, Carlton; 1809:6 through 1810:5, Leffler.

increase average net revenues, and therefore neither harmed competition nor constituted "trade or commerce." Because of the central nature of this issue, and the contrary views of the economists, it is instructive to analyze the very different approaches taken by the economists in their analyses of Overlap, in the context of the appropriate role of economic analysis in a rule of reason case.

The role of an economist in a rule of reason analysis is a narrow and precise one — to determine the economic effects of the challenged conduct and the net impact of those effects upon competition and consumer welfare. It is not the economist's place to make value judgments based upon isolated economic events, or to convey his personal views about how he would like to see the world work.

Dr. Carlton's approach to this case was consistent with this role. He undertook an objective, methodical and principled analysis to determine the actual effects of Overlap. He did not form his conclusions about the actual effects of Overlap prior to or independent of empirical analysis. Rather, he determined the economically appropriate measure of those effects, constructed a model based upon well-established and sound econometric and statistical techniques, applied this model to the best available data, and then subjected his model, the data, and his conclusions to a number of statistical tests. His conclusion that Overlap did not increase revenues is unambiguous, consistent, and unimpaired by any pre-conceived outcome.

Dr. Leffler, on the other hand, invested very heavily at the outset of his "analysis" in extending into the world of charities the presumption against cooperative behavior that generally applies in the commercial sector. Dr. Leffler concluded at the outset of this case that no analysis of the actual effects of Overlap was necessary. Upon realizing after his deposition and shortly before trial that the Division would

have to present a rule of reason case, and that his broad, theoretical approach would be insufficient, Dr. Leffler attempted to develop empirical data that would support his theoretical conclusions about the effects of Overlap. First, he attempted to construct benchmarks representing how the Overlap schools would have behaved in the absence of Overlap. These benchmarks, however, are overly simplistic and fail as a matter of logic. Dr. Leffler then attempted multiple approaches to using Dr. Carlton's analysis to show a positive effect of Overlap on price. In order to produce a result supportive of his economic theory, he had to manipulate and contort the analysis to such an extent that his model is statistically improper, and his results meaningless.

The analyses and conclusions of each of the economic experts are discussed below.

a. Dr. Carlton employed an econometrically correct and reliable analysis in determining that Overlap did not increase price.

As discussed above at page 10, Dr. Carlton determined early in his analysis that it would be improper, as a matter of basic economic theory, to presume that bona fide non-profit institutions acting cooperatively to determine the appropriate financial aid awards for needy students would do so only for the purpose of extracting supracompetitive revenues from the primary constituency they are designed to serve: students.

Dr. Carlton then concluded that he needed to measure the effect of Overlap on price[10] in order to determine whether Overlap had any anticompetitive effects. He

[10] As discussed above, at page 15, a rule of reason analysis generally measures the effect of the challenged behavior on both price and output. The focus of the analysis in this case was on price independent of output, primarily because the Overlap schools, as non-profit institutions, have a multi-dimensional output which is difficult to measure, unlike the output of a typical commercial enterprise. However, because price and output are generally associated, that is, output generally falls as price increases, *see F.T.C. v. Superior Court Trial*

then determined that the appropriate measure of price effect in this case is average net revenue per student. Dr. Leffler agreed at his deposition that average net revenue is the appropriate measure of price effect, and confirmed this conclusion at trial.

Defining "price" in terms of average net revenues incorporates two very basic principles of economics and antitrust. First, it recognizes that anticompetitive behavior engaged in by rational economic actors invariably will increase their net revenues. The second, and related, principle is that a rule of reason analysis must measure the aggregate impact of the challenged conduct on competition. As Dr. Carlton testified, and as the case law clearly holds, it is inappropriate as a matter of economic and antitrust analysis to focus only on the effects of challenged conduct on particular individuals or isolated groups without considering the overall economic impact.[11] While Dr. Leffler implicitly recognizes this principle in his acknowledgement of average net revenues as the appropriate measure of price, he

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Lawyers Ass'n, 493 U.S. 411, 423 (1990); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 107 (1984), it is sufficient to measure price effects independent of output. Finally, while the Division produced no evidence that output was affected by Overlap, Dr. Carlton determined that one proxy for output, class size, was unaffected by Overlap. Thus the only issues in this rule of reason analysis are effects on price and quality. The fact that Overlap enhanced quality, and that the Antitrust Division produced no witnesses to dispute the conclusion of MIT's witnesses that Overlap enhanced educational quality, are discussed below in Section V.B.3.

[11] It has long been established that in evaluating the reasonableness of conduct under the rule of reason, courts must consider the effects of the challenged conduct on the relevant market in general and not on specific individuals. *See Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied*, 1992 WL 104713 (1992). It is for this reason that the well-accepted test under the rule of reason is to examine the overall effects of a challenged practice to determine whether it is, on balance, harmful to competition and consumers. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Balaco, Inc. v. Upjohn Co.*, 1992 WL 131150, at *1 (E.D. Pa. June 3, 1992). It follows, therefore, that evaluating the economic effect of challenged conduct requires an analysis of its overall effects on the market rather than of its effect on particular individuals. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539 n.40 (1983) (to demonstrate an antitrust injury plaintiff must show effect on entire competitive market rather than on certain individuals); *Fine v. Barry & Enright Prods.*, 731 F.2d 1394, 1399 (9th Cir.) *cert. denied*, 469 U.S. 881 (1984) (under rule of reason, "[p]laintiff must show injury to market or to competition in general, not merely injury to individuals"). *See also Blaine v. Meineke Discount Muffler Shops, Inc.*, 670 F. Supp. 1107, 1114 (D. Conn. 1987).

ignores it in his conclusions, which focus only on the fact that one group of students may have received less aid as a result of Overlap.

In order to determine the effect of Overlap on average net revenues, it is necessary to determine what the average net revenues of the Overlap schools would have been had they not participated in Overlap. This analysis cannot be performed by looking only at the Overlap schools and doing a "before and after" Overlap comparison, because there is no useful data available concerning their average net revenues independent of Overlap before Overlap began in the 1950's, or after Overlap was suspended for the 1991 entering class. Similarly, there exists no group of non-Overlap schools that are identical or sufficiently similar to the Overlap schools that would provide a reliable benchmark for the average net revenues of the Overlap schools in the absence of Overlap, without controlling for the different characteristics that may affect average net revenues.

Faced with this situation, Dr. Carlton determined that the only appropriate approach to ascertaining the effects of Overlap on average net revenues was to construct an economic model, using standard and well-established econometric and statistical techniques,[12] to predict the average net revenues of the Overlap schools in the absence of Overlap, and then to see if the actual average net revenues of the schools differed from those predicted by his model. If the actual revenues were

[12] The record clearly reveals that Dr. Carlton is highly qualified in the field of analyzing economic effects through the application of econometric and statistical principles to empirical data. Empirical economic analysis is the cornerstone of ascertaining economic effects under the rule of reason. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690-91 nn.16 & 17 (1978).

different from the predicted revenues by a statistically significant amount,[13] then the data would support the conclusion that Overlap did affect price.

Dr. Carlton constructed a model to predict the average net revenues of the Overlap schools absent Overlap using a multiple regression analysis. A multiple regression analysis is a standard statistical technique used to isolate the effects of various factors on a single characteristic — in this case, average net revenue. Dr. Carlton selected a sample group of over 220 schools for which data was available for use in his model. The goal in selecting a sample group is to obtain as much useful data as possible in constructing a model. In determining whether a sample group is appropriate to use in predicting the behavior of a subset of that group, in this case the Overlap schools, an economist must determine whether he can adequately control for the differences between the members of the sample group. That question can be answered using a standard statistical test (known as an "F Test"). Dr. Carlton applied that test to his sample group, and the results unambiguously confirmed that it was an appropriate sample group that produced reliable results.[14]

The data used by Dr. Carlton in his regression analysis came from Peterson's, a well-established publisher of college guidebooks. Peterson's has been given highly favorable ratings concerning the accuracy of its data by independent reviewers.[15]

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[13] The concept of statistical significance was much discussed at trial. Both experts agreed that it would be an error as a matter of statistics to conclude that a price effect existed without a statistically significant result. This is a well accepted economic principle that has been relied on by courts. *See Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) and *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 947, 954-57 (3d Cir. 1990), which provide a helpful overview of the importance of statistical significance.

[14] While Dr. Leffler criticized Dr. Carlton's sample group, he did not testify that he performed the appropriate statistical test.

[15] A January 22, 1991 article in *USA Today* reported that "Peterson's Guide to Four-Year Colleges ... was the most accurate and included the most statistics." *See* Exhibit D-58. A December, 1988 article in *Changing Times* magazine observed that "some publishers strive harder for accuracy than others. For instance, the

The Peterson's data was the best data available, and is of a quality comparable to data that is commonly used and relied upon by economists performing empirical studies. It was also used by Dr. Leffler when he performed his empirical analysis after his deposition, and was the basis for exhibits G-231, G-461 and G-462 as well as a number of regression analyses referred to by Dr. Leffler in his testimony and produced to MIT and Dr. Carlton.[16] While the Peterson data contained the amount and type of data errors to be expected in such a compilation, Dr. Carlton performed a number of statistical tests to determine whether possible data errors affected his results, and found that they did not.[17]

The results of Dr. Carlton's analysis reveal that Overlap had no statistically significant effect on average net revenues.[18] This conclusion is unambiguous, having withstood a number of rigorous statistical tests designed to reveal any flaws in the model and/or the data. It is also untainted by any predictions or conclusions about the effects of Overlap prior to his analysis. Dr. Carlton has consistently stood by his analysis and conclusions since before his deposition in February of 1992.

Peterson's staff contact the college if they find a discrepancy or a big change from the previous year. Not all staffs are as scrupulous." *See* Exhibit D-57.

[16] Dr. Leffler never claimed that data insufficiency or poor quality of data undermined his conclusions, and indeed never disclosed any complaints as part of the Division's case. It was only when Dr. Carlton testified that Dr. Leffler criticized the quality of the data.

[17] During its cross-examination of Dr. Carlton, the Division questioned him about several apparent data errors concerning the wealth of the student body at several schools in the sample, indicated by the percentage of students receiving financial aid. Dr. Carlton pointed out that he corrected for these errors (as well as others), first by calculating averages over the period at issue, and second by removing this variable entirely from his analysis to see if it affected his conclusions. It did not.

[18] In fact, the analysis of the average over the five years, and of four of the five years taken individually, tend to suggest that Overlap reduced average net revenues, although the effect is not statistically significant.

b. Dr. Leffler initially relied upon misplaced and unfounded assumptions to predict the effects of Overlap, and then failed to find support for his predicted effects in the empirical data.

Dr. Leffler's approach to this case is most kindly characterized as an "evolving" analysis, which at each stage was designed primarily to buttress his initial theoretical reactions concerning the effects of a "garden variety price fix." There are significant flaws with each stage of Dr. Leffler's analysis. For convenience, Dr. Leffler's analysis can be categorized in three stages: first, the "theoretical" stage, in which he relied upon the presumption against cooperative behavior among commercial firms in issuing a blanket condemnation of Overlap; second, his "benchmark" stage, in which he attempted to develop proxies with which to compare the Overlap schools; and third, his "empirical" stage, in which he attempted to address Dr. Carlton's analysis. Each of these stages, and its inherent flaws, is addressed, in turn, below.

(i) The theoretical stage: "No data necessary."

From the time of his engagement by the Division in the summer of 1991 through at least the completion of his two-day deposition in February of 1992, Dr. Leffler had performed no empirical studies or tests to determine the effects of Overlap. He instead relied on a review of selected documents in the case, and application of a presumption, generally applied in the commercial sector, against cooperation among profit-maximizing competitors in setting price. There are four fundamental flaws in Dr. Leffler's initial theoretical approach and in the conclusions it generated.

First, the most fundamental flaw in Dr. Leffler's theory is his utter failure to recognize and account for the basic, and very obvious, differences between typical

collusive behavior between run-of-the-mill commercial actors, and the activities of Overlap, virtually all of which run directly counter to the behavior of rational price-fixers.[19] Perhaps the most revealing insight into Dr. Leffler's erroneous mindset at the outset of his analysis is his conclusion, early in his analysis, that Overlap was simply "garden variety price fixing." Once Dr. Leffler had committed himself to this position, his subsequent efforts were aimed solely at defending his premature and erroneous theoretical conclusion.

The second flaw in Dr. Leffler's theoretical approach, closely related to the first, is his failure to distinguish between the different requirements of a per se and a rule of reason analysis. That is, while his early theoretical conclusions purport to support a per se approach, and reject the need for an empirical analysis of the actual effects of Overlap normally associated with a rule of reason analysis, his theoretical analysis is internally inconsistent on this point. While espousing his theoretical approach at his deposition, he repeatedly acknowledged that it is "possible" that Overlap was revenue-neutral and had no deleterious economic impact, and confirmed this view at the trial. This acknowledgment implicitly recognizes the propriety of applying the rule of reason standard, and requires an empirical analysis of the actual effects of Overlap.

The third flaw in Dr. Leffler's theoretical approach is his conclusion that Overlap "misallocated" students. This conclusion betrays a fundamental misunderstanding of the financial aid system, is rife with value judgments that are

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[19] Dr. Carlton identified a number of characteristics of the Overlap schools which are inconsistent with an intention of maximizing revenues from students, including: their practice of rejecting full-paying students in favor of high-need students who will have to be significantly subsidized; the common practice of setting tuition below cost, and below the price that many students would be willing to pay; not allowing seats to be traded; and their failure to auction off some percentage of their seats to the highest bidder.

inappropriate for an economist to make, and ultimately begs the question of whether or not Overlap increased average net revenues. Dr. Leffler apparently believes that his notions of the "free market" should be the appropriate determinant of student allocation. The "market" for financial aid, however, does not operate "freely" even without Overlap. The federal aid system, through which billions of dollars of grants and loans are dispensed, and which governs the distribution of private aid, is need-based and prohibits the awarding of merit aid, public or private, to any student receiving federal aid. Each recipient of federal need-based aid automatically becomes "off limits" to Dr. Leffler's "free market." While Dr. Leffler may prefer that the law of the jungle determine who will be granted or denied educational access, for over three decades every President, every Congress, and every federal educational agency has concluded otherwise.[20]

At bottom, the determination of the "proper" allocation of students is a value judgment that economists are ill-suited to make.[21] While Dr. Leffler's personal preference would be an allocation system based upon ability to pay, the evidence demonstrated that Congress, educators and others have made a policy judgment that optimal allocation is achieved by providing access and choice to all students with the

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[20] Indeed, under economic theory the fundamental justification for the existence of the non-profit structure is the failure of the free market to satisfy demand and properly allocate resources. Henry B. Hansmann, *The Role of Nonprofit Enterprises*, 89 Yale L.J. 835, 845 (1990). Not only does Dr. Leffler ignore three decades of federal need-based aid programs; he also is apparently unaware that for more than three centuries this country's institutions of higher education have played a role that the "market" has been incapable of fulfilling.

[21] Dr. Carlton readily admitted the limits of the economist's role in determining the proper allocation of limited social goods. Dr. Leffler, on the other hand, was seemingly willing to let money dictate the "proper" allocation in every circumstance. The extremity of Dr. Leffler's views was best illustrated in his condemnation of an agreement between competing hospitals to allocate scarce transplant organs based solely upon medical need, and to refuse to allow wealthier patients to bid for them. Presumably Dr. Leffler views this, too, as a "misallocation".

requisite talent, irrespective of their ability to pay. As such, Overlap undeniably improved the allocation of students. Indeed, given the revenue-neutrality of Overlap, it is the abolition of Overlap that will result in a misallocation of students by foreclosing access and choice to some needy students, while funneling more aid to non-needy students who already are fortunate enough to enjoy educational access even without charitable handouts.

Finally, Dr. Leffler's limited and narrow focus on that group of students who would have received no-need aid in the absence of Overlap was erroneous. As discussed in detail above at page 20, a rule of reason analysis must take account of the net competitive impact of the challenged conduct, and cannot be based only upon an analysis of the effects on particular isolated individuals or groups. Under Dr. Leffler's approach, proof of an adverse effect upon a single individual would always end the antitrust inquiry and always result in the plaintiff prevailing.

(ii) The benchmark stage: "Faulty comparisons."

After having testified at his deposition that he had performed no empirical analyses of the effects of Overlap, had no intention of doing so, did not know how such a study would be performed, and believed that none was necessary under his theoretical approach to the case, Dr. Leffler realized that he had to produce some evidence at trial to support his theoretical conclusions about the effects of Overlap. He selected two benchmarks from information provided by MIT and other schools, and in his direct examination claimed that these benchmarks constituted an approximation of what the financial aid practices of the Overlap schools would have been in the absence of Overlap. These benchmarks, however, have no basis in logic

or reality, but are merely one more attempt by Dr. Leffler to support his premature and erroneous theoretical conclusion.

(a) **The CSS benchmark.**

The first benchmark used by Dr. Leffler was the initial family contribution figure generated by CSS. This comparison was illustrated in trial exhibit G-225. Dr. Leffler determined that, on average, the family contributions of the Overlap schools were higher than those generated by the CSS computer. Dr. Leffler concluded from this comparison that the difference, or at least a portion of it, is attributable to Overlap.

This comparison is simplistic in the extreme, and borders on the disingenuous. It assumes that (1) in the absence of Overlap, the Overlap schools simply would have adopted the family contribution calculated by CSS; and (2) these increased aid awards would in fact be fully funded by the schools. The undisputed evidence flatly rejects these naive and unsupported assumptions. It is undisputed that the CSS figure constitutes only the first part of need analysis under Congressional Methodology, the second part being the application of professional judgment. It is further undisputed that the vast majority of colleges and universities apply professional judgment in need analysis, particularly those schools, like the Overlap schools, that commit a large amount of privately donated charitable resources to promoting educational access, opportunity and diversity. Finally, the undisputed testimony of several financial aid directors from Overlap schools reveals that the financial aid offices at these schools are well staffed with experienced and sophisticated financial aid professionals who meticulously examine each student's file, applying their professional judgment in innumerable ways in a constant effort to "get it right."

MIT's financial aid program, which employs a rigorous need analysis system that routinely utilizes professional judgment, recently has been commended by the Department of Education. There is absolutely no factual basis for Dr. Leffler's suggestion that had these schools not participated in Overlap, the sole function of their financial aid offices would be to rubber-stamp the family contributions spewed out by the CSS computer. To the contrary, the evidence shows there is not a single school anywhere that acts as Dr. Leffler suggests.

As Dr. Carlton pointed out, Dr. Leffler's CSS comparison also fails because it begs the ultimate question in the case. That is, even assuming that the Overlap schools would use the CSS family contribution in the absence of Overlap, and that this system consistently produced lower family contributions, there is absolutely no support for Dr. Leffler's implicit assumption that the schools would be able to fund the increased aid that would result. Indeed, the fact that Overlap was revenue neutral, and the abundant evidence of the ever-increasing pressure on financial aid budgets and need-blind admissions programs, require a contrary conclusion: higher awards to some would result in lower awards — or no awards — to others.

Finally, Dr. Leffler's and the Division's efforts to employ the CSS comparison to present a distorted picture of the impact of Overlap on minorities cannot go unaddressed. The Division proffered exhibit G-229 ostensibly to show that Overlap harmed minorities by increasing family contributions above those calculated by CSS. There are three basic problems with this analysis. First, any comparison using the CSS family contribution contains all of the problems discussed above. Second, and more fundamentally, G-229 fails to account for a major aspect of MIT's need analysis

system for the most needy students, a group that contains a disproportionate share of minorities.

Dr. Leffler's conclusions, as reflected in G-229, are based upon a fundamental misinterpretation of the data contained in Exhibit G-158. As Mr. Hudson testified, the data in Exhibit G-158 considers only the parental contribution portion of the family contribution, and is not capable of carrying negative numbers. It therefore fails to account for the fact that for the poorest families — whose parent contribution will be negative as a result of lost income from the absence of a previously-employed student — MIT reduces the student contribution, thereby lowering the overall family contribution. Finally, the Division's analysis fails to consider the final family contribution for the large number of poor students, many of whom are minorities, who participate in MIT's summer "Interface" program, which further reduces the family contribution by $1,000.[22]

In short, the historical evidence supports Mr. Hudson's testimony, based upon his 13 years of experience in MIT's financial aid office and his familiarity with MIT's professional judgment standards, that family contributions of poor students, where a disproportionate percentage of minorities fall, are generally reduced under MIT's approach to need analysis.

[22] Much of the benchmark data was taken from MIT's answer to Interrogatory 19, Exhibit G-236, which did not ask for actual payment data, but rather sought interim steps in the need calculation.

(b) The Stanford benchmark.

Dr. Leffler also relied on Stanford University[23] as a benchmark for determining the financial aid practices of the Overlap schools in the absence of Overlap. Dr. Leffler's comparison was derived from what Dr. Leffler calls the "Stanford Studies" (Exhibits G-169 and G-187 through G-189), which compared certain aspects of the financial aid awards to students admitted to both Stanford and one or more of the Ivy Overlap schools in 1988. The results are illustrated in exhibits G-217, 226 and 227. There are two fundamental problems with these comparisons. First, the historical evidence reveals that the Overlap schools' financial aid programs did not have a tendency to duplicate Stanford's. In fact, the opposite was true. Indeed, after the suspension of Overlap, it was Stanford that migrated toward the practices of Overlap schools by seeking a contribution from the non-custodial natural parent in cases of divorce or separation.

The second problem with using Stanford as a benchmark is the structure of its financial aid program, which differs markedly from those of the Overlap schools. Specifically, while in 1990-1991 MIT provided institutional grants to 52% of its students, Stanford provided institutional aid to only 39% of its students. Thus, while Stanford on average may have provided more aid to some students, in the aggregate it provided much less aid than does MIT.[24] This difference is strikingly reflected in

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[23] While Stanford did not appear in Dr. Leffler's "relevant market" of the Ivy Overlap group at his deposition, shortly before trial it migrated into his relevant market, and was then adopted as a "cousin" of the Ivy Overlap schools.

[24] To state the comparison at its most extreme, if Stanford aided only one student but gave that single student $15,000 in institutional aid, and MIT aided two thousand students by awarding each one $10,000 in institutional aid, on average Stanford would award more than MIT. That is what is shown in G-217, 226 and 227. What is not shown is the fact that the average Stanford student pays $2,000 more to attend Stanford than the average MIT student pays to attend MIT.

comprising less than 30 schools. While he testified on cross-examination that he "believed" that he produced a statistically significant effect of Overlap on average net revenues using this sample, in fact he produced no such result, as confirmed by the analyses he produced to MIT, and by the independent calculations of Dr. Carlton.

Next, Dr. Leffler further narrowed his sample group in his efforts to produce a favorable result, this time by restricting his sample to those private Research 1 and Research 2 institutions that accept 55% or fewer of their applicants. While he was able to produce a statistically significant result using this sample, it cannot be relied upon, for two reasons. First, there is no statistical basis for arbitrarily cutting off the sample at 55% accepted. Dr. Carlton confirmed this with a statistical test. Second, Dr. Leffler's results disappear when only one school, Cal Tech, is removed from the sample. The fact that Dr. Leffler's results are driven by one school confirms the fact that his sample is too small, and that his results are overly sensitive and unreliable.

During his rebuttal testimony Dr. Leffler changed his sample group yet again in order to find support for an Overlap effect. He presented three different sample groups, each of which was infected with flaws similar to those in his other sample groups. First, he claimed to find a significant Overlap effect using all private schools accepting 50% or fewer of their applicants.[25] Again, there is no statistical basis for arbitrarily cutting off the sample at a 50% acceptance rate.[26] Moreover, Dr. Leffler's results disappear if the arbitrary cut-off of a 50% acceptance rate is changed or if the study is controlled for endowment, a variable that Dr. Leffler elsewhere

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[25] Dr. Leffler's second sample on rebuttal simply added five public schools to his first sample. Both samples share the same flaws.

[26] At the 55% level he had previously used, Dr. Leffler found no effect. Rather than acknowledge that there was no effect, Dr. Leffler again changed his sample criteria, this time to the 50% acceptance level.

concluded had a significant impact on average net revenues. Once again, this last-minute model is overly narrow, producing hypersensitive and meaningless results.

Dr. Leffler's final sample uses only fifteen "highly selective" schools and controls for only three factors affecting average net revenues. Dr. Leffler purports to find a $2,900 Overlap effect using this sample.[27] However, when this study is controlled for percentage of students completing a degree and endowment per student, both of which Dr. Leffler confirmed were significant variables, his positive $2,900 effect become negative $100.

The crowning glory of Dr. Leffler's search for an Overlap effect lies in Exhibit G-231. This Exhibit cannot be characterized any more charitably than as a blatant misrepresentation of data. Entitled "Overlap Increases Universities' Revenue From Students," Exhibit G-231 is an uncontrolled comparison of the average net revenues of the Overlap schools and a group of Research 1 and 2 institutions, including: Boston University, Brandeis, California Institute of Technology, Carnegie-Mellon, Case Western Reserve, Duke, Emory, Georgetown, George Washington, Johns Hopkins, NYU, Rennsalear Polytechnic Institute, Syracuse, Tulane, Chicago, Rochester, USC, Vanderbilt, Washington, and Yeshiva. This comparison shows nothing more than the fact that the average net revenues of the Overlap schools were, on average, more than $1,000 higher than the average net revenues of the comparison group in each of the five years represented. The caption of G-231 states that this

[27] Interestingly, this comparison purports to show a larger effect of Overlap on revenues than does Exhibit G-231, which does not control for any characteristic affecting average net revenues.

difference is attributable solely to Overlap.[28] This conclusion is utterly unsupported by the data presented.

Unlike Dr. Carlton's work, Exhibit G-231 is an uncontrolled comparison which does not attempt to account for the many differences between the comparison groups that may effect average net revenues, despite the fact that Dr. Leffler readily admits that these differences exist. In essence, it states that, for example, MIT's average net revenues are higher than those of Boston University as a result of Overlap. An apt analogy would be to compare the prices of big screen televisions and 19" televisions, and conclude that manufacturers of big screen televisions were fixing prices because their models are more expensive. In short, G-231 can only be interpreted as an irresponsible attempt to find some basis in the data to support Dr. Leffler's premature and erroneous theoretical conclusions.

Dr. Leffler's reliance on such obviously flawed comparisons as G-231 and the CSS and Stanford benchmarks are a direct function of where he began — and ended — his analysis. Dr. Leffler's mission at the outset of this case was to convince the Court that economic analysis of data, and indeed economists, are unnecessary in deciding this case.[29] To accomplish this mission, he labeled Overlap as a "garden variety" price fix that should be condemned out of hand. Having placed himself at the outset of this case in the garden of commonplace price-fixing schemes, and having committed to this position at his deposition, he eventually realized that he needed to

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[28] Even Dr. Leffler ultimately admitted, when pressed on cross-examination, that not all of the difference in average net revenues in G-231 is attributable to Overlap, and that he could not quantify how much of the difference was.

[29] In fact, in its Summary Judgment papers the Division did not file an affidavit from Dr. Leffler or any other economist, and did not rely on testimony of any economic expert in advancing its per se theory.

dig for some real world support for his hastily drawn conclusions. The more he dug fruitlessly for support, however, the deeper became the hole he found himself in. In the end, Dr. Leffler failed to undermine Dr. Carlton's conclusions and failed to provide any meaningful, reliable support for the Division's claim that Overlap produced any cognizable competitive harm. As such, the Division's rule of reason case fails.

2. Overlap Enhanced Competition.

a. Overlap increased consumer choice.

Overlap was a mechanism used by MIT and the Ivy League schools for coordinating certain aspects of their financial aid programs in order to pursue common goals of admitting students on the basis of merit, irrespective of ability to pay, and providing charitable subsidies to meet the full need of admitted students. Overlap advanced these practices by improving the accuracy of need analysis and by ensuring that scarce charitable resources would not be given to students who did not need them. In doing so, MIT and most of the Ivy League schools were able to maintain their commitment to both need-blind admissions and full-need aid.[30] These programs increased access to the Overlap institutions and enhanced educational choice among students by providing opportunities for needy students that otherwise would not have been available. While enhancing educational access and consumer choice among needy students, Overlap did not limit the choices available to non-needy students. By definition, non-needy students did not require financial assistance to

[30] Brown University has the lowest endowment of any of the Ivy schools. As such, Brown had difficulty remaining need-blind even during the last years of Overlap. This does not show that Overlap is not necessary to preserving need-blind admissions. What it does show is that even with Overlap the financial commitments involved in meeting the full need of a class admitted without regard to ability to pay are enough to stagger even a school such as Brown University.

attend the Overlap institutions. Thus, their ability to attend these universities was not taken from them by Overlap.

In addition, by self-regulation of the system for allocating limited, charitable aid dollars, the Overlap schools increased competition in their admissions offices. Overlap enabled schools to admit the most qualified students regardless of their financial means. By removing the financial barrier to admissions for poor students, the effect of Overlap was to increase the number of students able to compete for a seat at the Overlap schools.[31] In addition, Overlap enhanced competition among schools in other areas such as the curriculum, campus life, vocational opportunities and reputation of the institution. Given that Overlap increased educational choice among needy students while having no effect on the choice of wealthy students, and enhanced competition among all student applicants, Overlap was not an unreasonable restraint of trade.

b. Enjoining Overlap will undermine private efforts to maintain educational access and opportunity.

The Division attempted at trial to separate Overlap from policies of need-blind admissions and full-need aid. It failed miserably. After two years of a nationwide investigation, more than one year of trial preparation, dozens of depositions and unlimited national subpoena power, the Division did not produce a single live witness at trial to testify that his or her college does not participate in Overlap and yet maintains policies of true need-blind admissions, need-based aid, and a real

[31] As a result of increased competition among students, some students of greater wealth but lesser talents may have been denied the seats that they would have inherited had Overlap not enfranchised the poor. This is not a benefit of competition that the antitrust laws seek to promote. As a matter of law, competitors that are "harmed" as a result of increased competition have suffered no antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

commitment to meeting the full need of every admitted student. MIT, on the other hand produced several witnesses, including Dr. Paul Gray, Dr. William Bowen and Dr. Nannerl Keohane, all of whom testified eloquently to the necessity of Overlap in maintaining these programs. Each of these witnesses testified that the elimination of Overlap will, over time, undermine the principles of merit admission and need-based aid. All of these witnesses agreed that preventing schools from working together to develop standards and procedures for measuring need, sharing information and making assessments concerning the determination of need will make it more difficult to assess need accurately, and will make it more difficult to allocate financial aid resources based upon actual need, ultimately forcing schools away from a purely need-based system.

Dr. Bowen, an expert in the economics of higher education, testified that need-based aid will deteriorate in the absence of Overlap because of the internal pressures that schools face to divert scarce aid resources by awarding no-need aid to particularly desirable students. Drs. Bowen and Keohane confirmed that while schools independently may resolve not to give merit aid, it will be difficult to maintain that resolve in the absence of a consistent definition of need, and in the face of constant pressure from various segments of the university to use school resources to attract the most desirable students. Once no-need aid is available, or is perceived to be available, other schools will respond. Dr. Gray explained that an institution like MIT could not idly sit by and watch significant numbers of the best and brightest students attend other institutions due to large scholarship awards. Dr. Gray acknowledged that faced with this situation, MIT would be forced to respond.

As schools move — or are perceived to move — toward granting merit aid, it is inevitable that limited charitable financial aid funds will be diverted from those who need them to those who do not. This diversion will increase the already intense financial pressure on schools to reduce their commitment to needy students and thereby limit the choices available to needy students. For some, the choice will be eliminated because the financial aid resources will not be available to meet their need. For others, the choice will be eliminated because their financial need will cause them to be denied admission. As a result, merit competition among students will decrease and the more able but poor students will be excluded in favor of wealthier students.

Dr. Eric Widmer, Dean of Admissions and Financial aid at Brown University, aptly explained the consequences of need-conscious admission. Dr. Widmer testified that due to limited financial aid resources, Brown admits most but not all of each class on a need-blind basis. However, once the financial aid budget has been expended, Brown must consider each subsequent applicant's ability to pay in making its admissions decisions. That is, once the financial aid funds run out, regardless of how qualified a needy student may be, that student will be passed over in favor of a less qualified applicant who has the ability to pay. The consequence of this system is that poor students are denied educational access and both the institution as well as the student body suffer.

Brown University provides only one example of the financial pressures faced by universities and the unfortunate consequences of having limited financial aid resources. The Division's obstruction of the ability of schools to coordinate their efforts to use scarce resources to sustain needy students will increase the already intense pressure on need-blind admissions and full need aid. As these programs

disappear, years of progress in creating educational opportunity will be lost and, in Dr. Bowen's words, the consequence will be a giant step backward toward the "economic segregation" of the past.

c. Those students who are harmed by the enhanced merit competition provided by Overlap retain educational choice.

The Division can only assert that Overlap curtailed student choice if the Division ignores the evidence at trial that Overlap enhanced consumer choice and educational access for richer and less meritorious students. To bolster its conclusion, the Division proposes a very narrow "relevant market" in which to search for the alleged anticompetitive effects, attempting to raise the clearly erroneous inference that economically advantaged students who are displaced by poorer but more meritorious students as a result of Overlap are left with no alternative choices. In addition to having no antitrust relevance, this argument ignores both the legal definition of relevant market, and the factual evidence concerning the contours of the relevant market established at trial.

It is well-established that the relevant market includes those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Thus, as the Division recognizes, "if similar products or services can be substituted for the product in question, then the products are in the same relevant market." *Division's Trial Brief*, at 20-21.

The evidence at trial makes it abundantly clear that there exists outside the Division's narrowly proposed relevant market a broad range of institutions that

provide reasonable educational alternatives to students admitted to MIT or the Ivy League schools. As Michael Behnke, Director of Admissions at MIT testified, because of the superior qualifications of the students who are admitted to MIT, these students can and do gain admission to virtually every other institution of higher education to which they apply. While most students who apply to and attend MIT do so because of MIT's strong programs in engineering and the sciences, Mr. Behnke noted that there are a number of other schools that offer high quality programs in these fields such as Georgia Tech, Duke, Rice, University of Texas, Stanford, CalTech, UC Berkeley, University of Michigan, University of Illinois, Purdue, Northwestern, Penn State, and Rennsalear Polytechnic Institute. In contrast, many schools within the Ivy League do not have strong programs in these academic areas.

For those students interested in programs other than engineering and the sciences, Mr. Behnke testified that there are many schools outside of the Ivy League that offer reasonable alternatives to those offered at MIT. There are more than 2,000 four-year schools throughout the United States. In 1989, of the approximately 2,250,000 college applicants, only 1.7% applied to either MIT or one of the Ivy League schools. (.3% to MIT and 1.4% to the Ivy League schools). Of the 1.2 million students who enrolled in a four year college or university during the 1991-92 academic year, only 1% enrolled in MIT or one of the Ivy League schools.

Given that there were reasonable alternative institutions of higher education that students could have chosen to attend outside of the Ivy Overlap Group, the challenged conduct did not foreclose educational access or consumer student choice. In addition, given the number and range of educational institutions available to students other than MIT, Stanford or the Ivy League schools, the Division belatedly

and incorrectly defined the relevant market as consisting exclusively of these institutions.[32]

3. Overlap enhanced quality.

It is well recognized that in an educational institution, the diversity of the student body plays an important role in the educational process and in the quality of a student's education. The importance of student diversity in furthering the goals of higher education has been recognized by both educators and students, and was prominent in the Supreme Court's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that case the Court noted that "[t]he atmosphere of 'speculation, experimentation and creation' — so essential to the quality of higher education — is widely believed to be promoted by a diverse student body." *Id.* at 312. In support of this finding, the Court cited a statement made by one of MIT's expert witnesses, Dr. William Bowen:

> The president of Princeton University has described some of the benefits derived from a diverse student body:
>
> "[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and background; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn

[32] Until two weeks before trial, the Antitrust Division maintained that Stanford was outside of the relevant market. Dr. Leffler testified to this at his deposition. However, when Dr. Leffler realized that MIT lost more students to schools outside the relevant market than inside the relevant market, on the eve of trial he moved Stanford into the relevant market.

> very much when they are surrounded only by the likes of themselves.'
>
> "In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.

Id. at 312 n.48 (quoting Bowen, *Admissions and the Relevance of Race, Princeton Alumni Weekly*, 7, 9 (Sept. 26, 1977)).

It cannot be disputed that the distribution of financial aid plays a crucial role in enhancing diversity within a student body. Need-based financial aid programs have been influential in altering the composition of the student bodies at both public and private colleges and universities to include a mix of students with a greater diversity of socioeconomic backgrounds. The conduct challenged in this case served to effectuate this legitimate and well-recognized objective.

First, the full-need commitment, need-based aid, and need-blind admissions policies that were made possible by the Overlap agreements helped to dispel the perception among many low income students that they would be unable to attend these institutions because of financial considerations. The policies that were advanced by the Overlap agreements were important factors in encouraging economically disadvantaged but meritorious students who otherwise may not have applied to MIT or other Overlap institutions to "reach for the stars" and submit an application. Second, once students were admitted to an Overlap school on the basis of merit, the full need policy enabled poor students to attend the Overlap schools regardless of their

financial circumstances. As a result of these policies, the socioeconomic diversity of the students who attended the Overlap schools was extended considerably, which in turn enhanced the quality of education within these institutions for all students.

C. Non-Economic Justifications Are Relevant To Determining The Reasonableness Of Overlap Under The Rule Of Reason.

As discussed above at page 16, non-commercial justifications appropriately are considered when determining whether conduct is reasonable under the rule of reason. *See NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 135 (1984) (White, Rehnquist, JJ., dissenting). The Supreme Court specifically has recognized that the "primarily non-economic values pursued by educational institutions differ fundamentally" from commercial purposes and thus are pertinent to evaluating the reasonableness of conduct challenged under the Sherman Act.[33]

The recognition by Justices White and Rehnquist of the importance of non-economic values in evaluating the conduct of non-profit educational institutions under the Sherman Act echoes a long-standing principle under which courts have given wide latitude to educational institutions in light of the important and unique position they hold in our society. As the United States Supreme Court recognized in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957):

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[33] Even the Division's home court has acknowledged that:

> some practices by non-profit organizations may produce anticompetitive effects but still be essential to the organization's achieving its legitimate noncommercial objectives. In such a case, we do not foreclose the possibility that achieving the essential noncommercial objective may justify some anticompetitive impact.

Ass'n for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 584 n.8 (D.C. Cir. 1984) (citations omitted).

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250. In his concurring opinion in *Sweezy*, Justice Frankfurter summarized the 'four essential freedoms' of colleges and universities:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university--to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study.

Id. at 263 (Frankfurter, J., concurring) (citation omitted). These freedoms are illusory freedoms if schools are denied the practical ability to develop systems to effectuate the ideas of academic freedom.

As discussed in Section III, Overlap served to effectuate legitimate and well recognized educational objectives. By providing educational access to the most qualified students, regardless of their financial means, MIT advanced a policy directly affecting "who may be admitted to study" at MIT. The policy promoted socioeconomic diversity in the student body which plays an important role in the educational process.[34]

The Division's interference with this activity, and its efforts to persuade this Court to ignore the educational values that Overlap served to promote when

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[34] Awarding merit scholarships to a select group of students may adversely affect the morale of the student body. As Dr. Keohane explained, if a school awards merit aid to some students beyond their need, "there will be a sense of second-class citizenry for those students [who are not recipients of the merit award]. They will feel that Wellesley didn't want them as much as they wanted the other student . . . [which] would be an inaccurate reflection of our attitude toward our students." (Tr. 970:8-22).

evaluating the reasonableness of the challenged conduct, are inappropriate and unsupported by legal precedent.[35] As a non-profit, charitable, educational organization, MIT is fundamentally different from business enterprises or professional and trade organizations that are motivated by commercial interests. These differences must be considered when evaluating the reasonableness of challenged conduct under the rule of reason. It is only in assessing all of the relevant facts that a court may determine whether challenged conduct is, on balance, harmful to competition and consumers and thus effectuate the intent of the Sherman Act. The non-economic, educational values that Overlap served to promote are particularly relevant to this determination and therefore must be considered in evaluating the reasonableness of the challenged conduct.

VI. CONCLUSION.

No society can long endure by establishing the aggressive pursuit of financial self-interest as the supreme guiding principle for each of its members. No community in this country has yet deified "the market" and left its poor to starve in ignorance. No teacher has ever taught, no philosopher has ever thought, and no court has ever held that charity must take a back seat to commerce. To the contrary, courts have recognized that the Sherman Act is a consumer welfare prescription, not a societal suicide pact.

Even so, the Antitrust Division here maintains that if charities cannot explain how their charitable practices have enhanced commercial competition, then they have

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[35] An analysis of the caselaw on which the Division erroneously relies may be found in *MIT's Brief in Opposition to the Antitrust Division's Motion to Exclude Evidence Based on Social Policy Justifications*, that was filed on June 19, 1992.

nothing to say to the Court. Senator Sherman, however, disagreed; in his view, unless an enterprise were conducted for commercial reasons, the Sherman Act had nothing to say to it.

Whatever standard is used to assess Overlap — whether evaluated as cooperative charitable behavior intended to advance social and educational goals, or as a program to enhance educational quality, increase the number of able "buyers," and promote merit competition — no antitrust violation has occurred. Price and output were unaffected, and quality was enhanced. This is what the antitrust laws are intended to achieve.

No other country enjoys the wide variey and high quality of colleges and universities to be found in the United States. These institutions are our national treasure. In their preservation lies our future. Whether this future is one of economic segregation resulting from the independent pursuit of self-interest, or is instead one of equality of access and opportunity achieved through cooperative charitable efforts, has yet to be decided.

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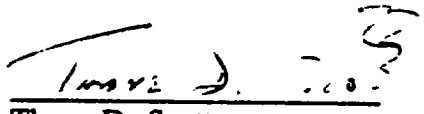
By its attorneys:



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APPENDIX A

ARGUMENT

VI. THE CONDUCT AT ISSUE DOES NOT CONSTITUTE "TRADE OR COMMERCE" WITHIN THE MEANING OF THE SHERMAN ACT.

The Division attempts to short circuit this Court's analysis of the "trade or commerce" requirement under Section One of the Sherman Act by seeking partial summary judgment on the ground that Overlap affects interstate commerce. In doing so, the Division confuses two very distinct issues — the constitutional authority of Congress to regulate the conduct at issue, and the question of whether that conduct constitutes "trade or commerce," a prerequisite to the application of the Sherman Act. MIT does not dispute that certain of the activities challenged in this case are sufficiently interstate in nature to trigger Congressional authority under the Commerce Clause. As this Section demonstrates, however, the challenged conduct is not "trade or commerce" within the meaning of the Sherman Act.

A. The Proscriptions of the Sherman Act Do Not Extend to Non-Commercial Conduct Like Overlap.

Section One of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (Supp. II 1990). Thus by its express terms, Section One applies only to restraints "of trade or commerce."

The conduct at issue in this case involved the coordinated distribution of private, charitable funds to qualified but needy students to help them defray the expenses of an education at MIT — an education which is offered to all undergraduate students at a price significantly below cost. MIT's participation in the Overlap process was not intended to, nor did it, enhance its revenues. Viewed in any reasonable light, such activity does not constitute "trade or commerce" within the meaning of the Sherman Act.

The legislative history reveals that Congress did not intend to subject the charitable functions of nonprofit entities to the proscriptions of the Sherman Act. In response to a proposed amendment that would have explicitly exempted temperance unions, Senator Sherman stated:

> I do not see any reason for putting in [an exclusion for] temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce . . . . I do not think it is worth while to adopt the amendment [relating to] temperance societies. You might as well include churches and Sunday schools.

E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 252 (1978) (quoting 21 Cong. Rec. 2658-59 (1890) (emphasis added)). This history explains the intention of Congress, embodied in the "trade or commerce" requirement, to limit the Act's reach to conduct with a significant commercial component.

Drawing upon the legislative history, the Supreme Court repeatedly has recognized that the "trade or commerce" requirement does not extend to conduct which is non-commercial in nature. In *Apex Hosiery Co. v. Leader*, 310 U.S. 469

(1940), for example, the Court explained that the purpose of the Sherman Act was "the prevention of restraints to free competition in business and commercial transactions." *Id.* at 493 (emphasis added). Indeed, the Court specifically has stated that the Sherman Act is "aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959).

Applying this long-settled principle, in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools., Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), the Antitrust Division's home court held that an educational association's non-commercial conduct was not susceptible to antitrust scrutiny because it did not constitute commerce within the meaning of the Sherman Act. In that case, Marjorie Webster Junior College challenged the educational association's refusal to evaluate or accredit Marjorie Webster's educational program because it was a for-profit institution. The defendant was a nonprofit accrediting organization whose membership included colleges with whom Marjorie Webster competed for students. *See Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools., Inc.*, 302 F. Supp. 459, 461 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). The defendant's refusal to evaluate or accredit Marjorie Webster significantly impaired its ability to recruit students and allegedly impaired its ability to compete in the marketplace with other institutions of higher education. *Marjorie Webster*, 432 F.2d at 656-57.

While the court recognized that the defendant's actions substantially impaired Marjorie Webster's ability to compete, it refused to apply the Sherman Act, holding that because the defendant's accreditation program was intended to promote educational quality, it was non-commercial in nature and did not constitute commerce within the meaning of the Sherman Act. *Id.* at 653, 654, 656. The court explained that the Sherman Act must be applied "in light of its legislative history and of the particular evils at which the legislation was aimed," and noted that the Act was aimed at conduct having commercial objectives. *Id.* at 654. It then stated:

> [The] proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the non-commercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.
>
> We are fortified in this conclusion by the historic reluctance of Congress to exercise control in educational matters. We need not suggest that this reluctance is of such depth as to immunize any conceivable activity of appellant from regulation under the antitrust laws. It is possible to conceive of restrictions on eligibility for accreditation that could have little other than a commercial motive; and as such, antitrust policy would presumably be applicable. Absent such motives, however, the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act.

Id. at 654-55 (emphasis added, footnotes omitted).

Subsequent cases citing *Marjorie Webster* have similarly held that conduct which is primarily non-commercial is not covered by the Act. *See, e.g., Donnelly v. Boston College*, 558 F.2d 634 (1st Cir.), *cert. denied*, 434 U.S. 987 (1977) (law

school admissions activities are non-commercial and not covered by the Act); *Proctor v. General Conference of Seventh-Day Adventists*, 651 F. Supp. 1505 (N.D. Ill. 1986) (distribution of religious literature is non-commercial and not within the purview of the Act); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975) (NCAA eligibility rules are non-commercial and not within the Act's coverage).

The Third Circuit applied the principles articulated in *Marjorie Webster* in *College Athletic Placement Service, Inc. v. NCAA*, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), *aff'd*, 506 F.2d 1050 (3d Cir. 1974). In that case, the Third Circuit affirmed the district court's ruling that an NCAA eligibility rule that rendered ineligible any student who utilized the College Athletic Placement Service (CAPS), a private business that located college athletic scholarships for high school students, did not affect "trade or commerce" and therefore was not actionable under the Sherman Act. The court reasoned that the rule had an educational purpose of insuring that "the admission standards of member colleges . . . would not be compromised by a party with a financial stake in the admission of a student athlete." *Id.* ¶ 60,117, at 65,267.

Significantly, like the D.C. Circuit in *Marjorie Webster*, the Third Circuit affirmed the district court's finding that the challenged conduct did not affect trade or commerce despite the fact that it had a significant incidental effect on commercial activities. Indeed, the NCAA rule at issue in *College Athletic Placement Service* was explicitly targeted at the plaintiff's business, which was destroyed as a result. In both cases, the fact that the challenged conduct was motivated by non-commercial,

educational objectives removed it from the reach of the Sherman Act notwithstanding the incidental effects on commercial activities.[25]

Like the NCAA in *College Athletic Placement Service* and the Association in *Marjorie Webster*, the Overlap schools were motivated by non-commercial educational objectives. They engaged in Overlap to advance educational access and socioeconomic diversity and to maximize the effective use of private charitable funds. In so doing, they neither sought nor obtained any financial or commercial benefit. Thus, like the activity in *Marjorie Webster* and in *College Athletic Placement Service*, Overlap was distinct from the "sphere of commerce," and therefore is not subject to attack under the Sherman Act.

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[25] The Supreme Court consistently has demonstrated its reluctance to apply the antitrust laws to behavior motivated by non-commercial objectives, particularly where the actors do not stand to benefit economically from the challenged activity. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), for example, the Supreme Court refused to apply the Sherman Act to a boycott motivated by social rather than commercial goals, despite the fact that the boycott was intended to have an adverse economic effect. In that case, several hundred black customers boycotted white merchants of Claiborne County, Mississippi in an effort to compel the merchants to support racial justice. Given that the boycott involved political speech protected by the First Amendment and that the boycott was aimed at the social goal of eliminating racial discrimination in the town, rather than having been organized for economic ends, the Court concluded that the Sherman Act did not prohibit the boycott and that the nonviolent elements of the boycott were entitled to First Amendment protection. *See id.* at 914-15.

Similarly, in *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), the Eighth Circuit found that conduct entered into to advance non-commercial goals may survive antitrust scrutiny even where the conduct has adverse economic consequences. In that case, the National Organization for Women boycotted convention facilities in states that had not ratified the ERA. The court held that the Organization's efforts to influence the legislature's action on the ERA were beyond the scope and intent of the Sherman Act. Examining the legislative history of the Act, the court found that the Act was meant to cover "competitive activities by competitors with some self-enhancement motivation," *id.* at 1309, and not social or political activities. The court made clear that the issue of whether conduct is non-commercially motivated plays a significant role in evaluating whether conduct will be subjected to scrutiny under the Sherman Act. *See id.* at 1312.

B. Courts Afford Broad Deference To Educational Policy Decisions Of Colleges And Universities.

The decision in *Marjorie Webster* echoes a long-standing principle under which courts have given wide latitude to educational institutions in light of the important and unique position they hold in our society. As the United States Supreme Court recognized in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250. The 'four essential freedoms' of colleges and universities were summarized by Justice Frankfurter in a concurring opinion:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study.

Id. at 263 (Frankfurter, J., concurring) (emphasis added, citation omitted).

The Court in several decisions has since reiterated its commitment to safeguarding academic freedom. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), for example, the Court explained:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust

> exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Id. at 603 (citation omitted, alteration in original). This recognition of the importance of student diversity in furthering the goals of higher education was prominent in the Court's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that case the Court stated:

> [The goal of] attain[ing] . . . a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

Id. at 312-13. The Court also noted that "[t]he atmosphere of 'speculation, experiment and creation'— so essential to the quality of higher education — is widely believed to be promoted by a diverse student body." *Id.* at 312. In support of this assertion, the Court cited a statement made by one of MIT's expert witnesses, Dr. William Bowen:

> The president of Princeton University has described some of the benefits derived from a diverse student body:
>
> "[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

> "In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth."

Id. at 312 n.48 (quoting Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)).

Relying on the principles of academic freedom, courts have refused to interfere with policies and decisions concerning admissions. In *Martin v. Helstad*, 699 F.2d 387 (7th Cir. 1983), Judge Coffey explained:

> [A]cademic institutions, not federal judges, are more qualified to make sensitive academic judgments as to . . . who should be admitted to study and upon what conditions they shall be admitted. If we were to impose the guiding hand of the federal judiciary into such decisions, we would diminish the vital precept of academic freedom to an oft-recited but empty cliche; one without meaning or substance. Basic academic decisions, such as the determination as to . . . who may be a student on the first day of classes, have long been regarded as among the essential prerogatives and freedoms of the university administration. Should we ever conclude otherwise, we would overstep our bounds into an area of academia in which we are ill-prepared to act and would ill-advisedly impinge upon the right of the administration to make fundamental and basic decisions as to the composition of their . . . student body.

Id. at 397 (Coffey, J., concurring).

In this case, the Division chooses to ignore what the judiciary has long recognized — that educational institutions play a critical role in society, and that to the extent that conduct of a college or university involves decisions clearly connected

to its educational mission, it must be allowed to function without interference. Overlap is a classic case in which to apply these principles.

The conduct challenged in this case served to effectuate legitimate and well-recognized educational objectives. By providing educational access to the most qualified students, regardless of their financial means, MIT advanced a policy directly affecting "who may be admitted to study" at MIT. *See Sweezy*, 354 U.S. at 263. The policy promoted socioeconomic diversity in the student body which, as the Supreme Court has recognized, plays an important role in the educational process. *See Bakke*, 438 U.S. at 312-13 & n.48. The Division's interference with this activity, and its efforts to persuade this Court to intervene despite the litany of cases counseling against intervention in such matters, are inappropriate. This is especially so because the weapon being used against MIT — the Sherman Act — is expressly intended to combat commercial evils in the business world, and does not extend beyond the sphere of "trade or commerce."

C. Summary Judgment Is Inappropriate When There Is A Dispute As To Whether Conduct Is Non-Commercial.

Recognizing that the important principles advanced by *Marjorie Webster* and similar cases strike at the heart of its claims, the Division attempts to undermine them and thus to avoid their application in this case. The Division cites the unpublished district court opinion in *Welch v. American Psychoanalytic Ass'n*, 1986-1 Trade Cas. (CCH) ¶ 67,037 (S.D.N.Y. 1986) in an effort to attack the continuing validity of

Marjorie Webster.[26] The holding in *Welch*, however, reaffirms the principles established in *Marjorie Webster* — that non-commercial conduct is not trade or commerce within the meaning of the Act — and indeed provides support for the principle that summary judgment in an antitrust case is inappropriate where there is a substantial question as to whether the conduct is commercially motivated.

Welch involved a challenge to privately developed standards of psychoanalytic training that effectively excluded licensed psychologists from the practice of psychoanalysis. The psychologists claimed that competing health care professionals had established the standards in order to deny an important competitive benefit — professional credentials — to their rivals. In determining whether the defendant's motion for summary judgment should be granted, the court focused on whether the defendant's conduct was driven by a commercial motive, as the plaintiff claimed, or whether the commercial effect was merely incidental to a primarily educational purpose, as the defendant claimed. Because there was a question of fact regarding the defendant's motives, the court denied summary judgment. In doing so, the court explicitly recognized that if activities are shown to be distinct from the "sphere of commerce," and any commercial ramifications are merely "incidental to a primarily educational purpose," then the activities will not fall within the purview of the Act. *Welch*, 1986-1 Trade Cas. ¶ 67,037, at 63,372.

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[26] The Division cites *Welch* for the rather unremarkable proposition that neither the learned professions nor educational institutions enjoy a blanket immunity from the antitrust laws. MIT does not claim an exemption from the antitrust laws based on its status as an educational institution or member of the learned professions, nor does MIT claim blanket immunity for any other reason. Rather, MIT asserts that the specific activities challenged by the Division do not constitute "trade or commerce" within the meaning of the Sherman Act.

Thus, even the case cited by the Division provides strong support for MIT's position that the Sherman Act does not apply to conduct motivated purely by non-commercial objectives, and that summary judgment must be denied where the non-moving party presents a material issue concerning the motivation of challenged conduct, as MIT has done in this case.

APPENDIX B

VII. APPLICATION OF THE PER SE RULE WOULD BE INCONSISTENT WITH ANTITRUST PRECEDENT AND ITS UNDERLYING PRINCIPLES.

A. The Purpose And Application Of Section One Of The Sherman Act.

1. The Sherman Act is intended to protect consumers from the harmful effects produced by certain anticompetitive behavior.

While the provisions of Section One of the Sherman Act render illegal every contract, combination and agreement in restraint of trade, the Supreme Court determined long ago that Congress could not have intended such an expansive reading of this language, because every business contract or agreement restrains trade to some

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[27] The provision in Rule 56 that is commonly referred to as "partial summary judgment" has no application to this case. Although that rule authorizes a claimant to move for summary judgment "upon all or any part" of its claims, "partial summary judgment" may not be invoked to dispose of only one part of a single claim, let alone a hypothetical part, as the Division invites the Court to do. *See Haffer v. Temple Univ.*, 678 F. Supp. 517, 541 (E.D. Pa. 1987); *Westinghouse Elec. Corp. v. Fidelity and Deposit Co. of Md.*, 63 B.R. 18, 22 (E.D. Pa. 1986); *see also RePass v. Vreeland*, 357 F.2d 801, 805 (3d Cir. 1966) (partial summary judgment may not enter where there is only a single claim).

degree. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 567 (1898). Thus, almost since its inception, courts uniformly have interpreted Section One of the Sherman Act to prohibit only those restraints that "unreasonably" restrain trade. *See Standard Oil Co.*, 221 U.S. at 59-60.

"Reasonableness" is a term of art that has taken on meaning as a result of nearly a century of judicial decisions evaluating conduct in light of the Act's purpose. At its core, the Sherman Act is a statute of economic regulation that reflects our society's fundamental belief in the virtue of a free market system, and its basic distrust of conduct that impedes unfettered competition between business rivals. Enacted in 1890, the Sherman Act was a product of an:

> era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940). As explained by Justice White in the landmark decision *Standard Oil Co. v. United States*, 221 U.S. 1 (1911):

> The evils which led to the public outcry against monopolies . . . [were]: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.

Id. at 52 (emphasis added). These three measures of anticompetitive impact — effect on price, output, or quality — continue to provide the test today, and it is on these three elements that the Division must make its case.

Flowing inexorably from this history is the axiomatic principle, universally accepted in antitrust analysis, that the purpose of the Sherman Act is to punish and deter business conduct which harms consumers by impeding competition. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690 (1978). In short, Congress designed the Sherman Act as a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 107 (1984). As Judge Bork has observed:

> the clear and exclusive policy intention of [the Act was to] promot[e] consumer welfare. Both in the bills introduced and in the debates, there are a number of explicit statements that the purpose of the legislation was the protection of consumers.

Robert Bork, *The Antitrust Paradox* 61 (1978).

2. To determine whether conduct unreasonably restrains trade, a court must evaluate its impact on consumer welfare.

In evaluating the legality of conduct challenged under the Sherman Act, the relevant inquiry is whether the challenged conduct "restrict[s] production, raise[es] prices or otherwise control[s] the market to the detriment of purchasers or consumers of goods and services . . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940). Courts traditionally have employed economic analysis to evaluate the effect of challenged conduct on consumer welfare. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735 (1988); *National Society of Professional Eng'rs v. United States*, 435 U.S. 679, 690-91 n.16 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50-51 (1977). The purpose of such analysis is to determine the effect of the challenged conduct on price, output and quality. *See, e.g.*,

NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 110 (1984); *Professional Eng'rs*, 435 U.S. at 693-94; *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1109-10 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Sitkin Smelting & Ref. Co. v. F.M.C. Corp.*, 575 F.2d 440, 447 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978).[28]

"Competition" is frequently used as a benchmark in antitrust analysis for evaluating effects on consumer welfare. Thus, it is commonly stated that the purpose of the antitrust laws is to protect competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). This focus on competition stems from the presumption that unfettered rivalry among competitors forces them to keep their prices down and to be efficient and innovative, and that any interference with such rivalry produces negative economic effects on consumers. *See Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958); *Professional Eng'rs*, 435 U.S. at 695.

It has long been recognized, however, that some restraints on business rivalry do not harm consumers and therefore do not result in antitrust injury.[29] Thus, many

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[28] Under economic analysis, given a product of constant quality, if the effect of the challenged conduct is to increase price and reduce output, then consumer welfare has been harmed. If, on the other hand, the effect is to reduce price, or to increase quality or produce a new product that would not otherwise have been produced, then consumer welfare may be enhanced. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 21-22 (1979). Needless to say, such analysis does not lend itself to per se treatment.

[29] Judge Bork has articulated the important distinction between competition, as that term is used in antitrust analysis, and the concept of atomistic rivalry:

> 'Competition' may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree.

Bork, *supra*, at 61. Thus, at trial the Division will be required to show precisely how dismantling Overlap improves consumer welfare, not just for isolated or individual consumers but for consumers as a group.

arrangements that restrain or regulate rivalry, including price rivalry, have been found by courts not to violate the Sherman Act. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (cooperative arrangements may be "designed to increase economic efficiency and render markets more, rather than less, competitive"); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (horizontal price fixing plan may be justified under rule of reason); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (blanket licensing joint venture may be justified if necessary to give participants cost-effective outlet for artistic composition).

Courts have recognized that where companies combine capital, assets or knowledge, this combination may increase output, create new or higher quality products, or result in cost savings that would not exist if the companies acted alone. *See In re Brunswick Corp.*, 94 F.T.C. 1174, 1175 (1979), *aff'd sub nom. Yamaha Motor Co. v. F.T.C.*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1768 (1982); *Northwest Wholesale Stationers*, 472 U.S. at 295; *Broadcast Music*, 441 U.S. at 21-22; *NCAA*, 468 U.S. at 103. While such an arrangement will inevitably reduce rivalry, "these . . . reductions are often necessary to make a joint venture operate efficiently" and, in turn, promote the welfare of the consumer. *In re Brunswick Corp.*, 94 F.T.C. at 1175.

In sum, a court must assess the actual impact of challenged conduct on consumer welfare in order to effectuate the intent of the Sherman Act. *See NCAA*, 468 U.S. at 107. Contrary to this well-established principle of antitrust analysis, the Division's approach to this case is simply to make the unremarkable and unenlightening observation that the so-called "market" for financial aid would have

functioned differently in the absence of Overlap, and to ignore any harmful effects on consumer welfare. The Division cannot merely assert that the "market" would have functioned differently, and then ask the Court to take over from there. The Division must, but cannot, prove that Overlap caused a net loss in consumer welfare.

3. Conduct challenged under Section One of the Sherman Act is presumptively tested under the rule of reason.

Evaluating the reasonableness of conduct under Section One of the Sherman Act requires an assessment of all of the effects of that conduct on consumer welfare. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Thus, it has been a fundamental precept of antitrust analysis that, except in cases involving the most extreme and unjustified restraints, a court must apply the so-called "rule of reason" in evaluating the reasonableness of the conduct at issue. *Northwest Wholesale Stationers*, 472 U.S. at 289.

The rule of reason requires an examination of all of the effects, purposes and justifications of the challenged conduct to determine whether it is, on balance, harmful to competition and consumers. The Supreme Court first established the framework for conducting a rule of reason analysis in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the

> reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

In decisions since *Chicago Board of Trade*, the Court has further elaborated on the rule of reason, focusing on the competitive impacts of the challenged restraint on price, output and elimination of competitors in the relevant market. For example, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), involved a challenge to an industry-wide canon of ethics prohibiting engineers from participation in certain types of competitive bids. Relying on *Chicago Board of Trade*, the Court ruled that the appropriate inquiry is "whether the challenged agreement is one that promotes competition or one that suppresses competition." *Professional Eng'rs*, 435 U.S. at 691. This inquiry, in turn, requires "a consideration of impact on competitive conditions," accomplished through economic analysis of the impact on the relevant market. *Id.* at 690-91 & nn.16-17.

Similarly, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Court ruled that in determining whether a restraint has violated Section One of the Sherman Act, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 49. *See also Northwest Wholesale Stationers*, 472 U.S. at 295-97 (assessment of legality of agreement to expel competitor from a purchasing cooperative requires analysis of market structure and power).

In applying the rule of reason, the Court has recognized that the analytical approach embodied in the rule of reason is essential to effectuating the purpose and goals of the Sherman Act. In *Professional Engineers*, it stated that:

> [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant.

Professional Eng'rs, 435 U.S. at 688.

4. The per se rule is a narrow and limited exception to the rule of reason.

While the rule of reason is "the prevailing standard of analysis" used to evaluate the legality of most restraints of trade, *Continental T.V.*, 433 U.S. at 49, there are certain types of pernicious conduct that are inevitably harmful to consumer welfare, and therefore do not require a rule of reason analysis. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). When presented with such conduct, courts have determined that, as a matter of judicial economy, it is unnecessary to analyze the effects of or justifications for the proven conduct. The Supreme Court has characterized such restraints as illegal per se. The Court has made clear, however, that the per se rule is a limited exception to the rule of reason that applies only when a court can look back upon unambiguous judicial experience demonstrating that the challenged practice is a "naked restraint of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). As the Third Circuit has emphasized, "[s]uch determinations of per se illegality are not casually made." *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 428 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982).

The Court has "been slow . . . to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (citation omitted). It has applied the per se rule only to those circumstances where courts have found agreements or practices to be "manifestly anticompetitive," *Continental T.V.*, 433 U.S. at 50, or "[having a] pernicious effect on competition and lack[ing] . . . any redeeming virtue . . . ." *Northern Pac. Ry.*, 356 U.S. at 5. "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 607-08 (1972). Such experience arises only after a history of cases involving a certain type of conduct in which application of the rule of reason has almost always resulted in a finding of anticompetitive effect. *See Larry V. Muko*, 670 F.2d at 426.

In short, "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V.*, 433 U.S. at 58-59 (emphasis added). Formalistic line drawing is exactly what the Division urges upon the Court here, seeking to obscure with commercial labels and sweeping presumptions the Division's inability to prove any "demonstrable economic effect."

B. The Per Se Rule Does Not Apply In This Case.

1. The per se rule was intended to apply to commercial conduct.

The unifying characteristic of the cases in which the Court has applied the per se rule is that they have generally involved profit-making business enterprises whose

commercial motivation is presumptively anticompetitive. *See United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966) ("where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct") (emphasis added); *Larry V. Muko*, 670 F.2d at 429 (per se rule limited to "boycotts in which group of business competitors seek to benefit economically") (emphasis added).

In the few cases in which the Supreme Court has applied the per se rule in the face of a proffered non-business justification, the conduct in question unequivocally produced a direct commercial benefit to the defendants. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (challenged boycott by lawyers had undisputed effect of increasing legal fees); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (maximum fee agreement entered into by physicians increased their competitive advantage).[30]

2. The Supreme Court has refused to apply the per se rule to conduct having a bona fide public service component.

Recognizing that the Sherman Act is intended and designed to address anticompetitive business conduct that is harmful to consumers, the Supreme Court consistently has held that where bona fide non-commercial conduct of members of the professions has been involved, the public service aspect of the challenged conduct

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[30] While the conduct at issue in *Maricopa County* concerned a maximum price-fixing agreement, the Court recognized that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely . . . the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Maricopa County*, 457 U.S. at 347.

must be considered in evaluating the legality of the conduct, and a blanket prohibition of such conduct under the per se rule is inappropriate. The Court's recognition that certain practices by members of a learned profession should be evaluated under the rule of reason rather than under the per se rule had its genesis in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In that case, the Court stated:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Id. at 788-89 n.17.

The Court has reiterated this principle in several subsequent decisions. *See, e.g., F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) ("we have been slow to condemn rules adopted by professional associations as unreasonable per se"); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978) ("by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary").

The Court reaffirmed the continuing validity of the *Goldfarb* footnote in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), a case in which it applied the per se rule to an agreement among physicians that established maximum fees. Even though the Court applied the per se rule in *Maricopa County*, it emphasized that it was doing so because the physicians had not proffered any public

service justification for the conduct at issue, and because the fee agreement clearly would produce a direct commercial benefit. *See id.* at 348-49.

The D.C. Circuit aptly explained the reason for refusing to apply the per se rule to the charitable conduct of learned professionals:

> When a conspiracy . . . is alleged in the context of one of the learned professions, the nature and extent of its anticompetitive effect are often too uncertain to be amenable to per se treatment . . . [I]f a serious argument is made that the questioned practice amounts to a public service, sufficient questions of competitive effect are raised to allow release from per se treatment.

Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1492 (D.C. Cir. 1984) (citations omitted). *See also Weiss v. York Hosp.*, 745 F.2d 786, 820 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) (recognizing the Supreme Court's "exception to apply[ing] . . . the per se rule of illegality where the case involves a learned profession and where the restriction is justified on 'public service or ethical norm grounds'").

The driving principle behind the "learned professions" cases — the Court's recognition that conduct having bona fide public service aspects must be analyzed under the rule of reason — requires application of the rule of reason in this case. MIT's participation in Overlap was motivated by bona fide, non-commercial objectives. Overlap's objectives are well-recognized as promoting important social and public policy goals, and indeed form the basis for the federal government's own financial aid policies.[31]

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[31] As will be discussed further in Sections VII.B.2 and 4, while members of the professions and professional associations may, at times, be motivated to engage in conduct based on public service concerns, it is clear that much of their conduct is motivated by commercial interests. Despite this fact, the Court has continually distinguished the conduct of professionals and professional organizations from that of purely for-profit commercial entities. The charitable conduct being challenged in this case,

Moreover, there has been no judicial experience in applying the antitrust laws in cases even remotely like the present case. Coordination among nonprofit organizations, to achieve the fairest allocation of private charitable funds, in order to most effectively attain charitable goals embraced by the government — in a "market" in which the final "product" is subsidized below cost for all "buyers," given outright to some who cannot afford it, and withheld from others who could and would pay a great deal for it if only the "sellers" would sell to them — is hardly grist for the antitrust mill. Application of the per se rule in such novel, unprecedented circumstances would contravene the judicial and economic principles that have driven the careful development of the per se rule. *See Topco Assocs.*, 405 U.S. at 607-08; *Northwest Wholesale Stationers*, 472 U.S. at 289-90.

Finally, there is every reason to test the Division's assumption that the conduct at issue produces harmful economic consequences. Not only would it be improper as a matter of economic principle to assume that this type of conduct will harm consumers, *see infra,* Section VII.B.4, but the unambiguous evidence demonstrates that consumer welfare has not been injured by the challenged practice. In the absence of certainty that the challenged conduct will almost always produce harmful consequences, the per se rule will produce erroneous results. *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986).

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however, is wholly distinct from the conduct engaged in by for-profit enterprises. In the instant case, MIT 's conduct was motivated by purely charitable concerns — to promote educational access for talented but economically disadvantaged students. The conduct was not engaged in for the purpose of increasing revenues, nor did it result in any such increase. Thus, whether as a result of the Sherman Act's not extending to this conduct or as a result of the conduct being found to be reasonable, Overlap has not violated the Sherman Act.

3. Overlap is not price fixing subject to the per se rule.

The linchpin of the Division's motion is its characterization of Overlap as a garden variety price-fixing scheme.[32] Persuading the Court to adopt its price-fixing label is essential to the Division's efforts to avoid scrutiny of its case on the merits under the rule of reason. No reasoned interpretation of the record, however, could justify pigeonholing Overlap as a per se illegal price-fixing scheme.

In antitrust parlance, "price-fixing" is associated with an attempt to maximize revenues by charging a supracompetitive price. *Carlton Aff.* ¶¶ 12-13 (App. at 44). In this case, MIT will establish at trial that: (1) it did not enhance its revenues as a result of Overlap; (2) it charged its students "prices" that were always below cost; and (3) its average net revenues per student were indistinguishable from those of non-Overlap schools. There exists no reported case in which conduct bearing any resemblance to the conduct challenged in this case was found to be subject to the Sherman Act, or to violate the Sherman Act under either the per se rule or the rule of reason. The Division's over-creative attempt to avoid the facts of this case by resorting to ill-fitting and misleading labels indicates the weakness of the Division's case on the merits.

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[32] The Division's characterization of Overlap as price-fixing rests on the Division's attempt to analogize the Overlap process to commercial discounting. This analogy is specious. It is well-established economic policy that, in the business world, discounts are not granted unless they increase volume and enhance revenues. The evidence in this case is clear that neither effect was intended or resulted from the Overlap process. Rather, Overlap affected only the amount of money that MIT gave away to students out of its own funds to assist students in paying for tuition and fees, and even this effect is visible only with respect to some individual students. For students in the aggregate, there was no effect. Furthermore, contrary to conventional business practices, the "price" of the product in question — education at MIT — is set significantly below cost for all students irrespective of whether they receive additional charitable subsidies from the Institute. The commercial principles on which "discounts" are based in the for-profit setting bear no rational relationship to the conduct at issue in this case. See *Affidavit of Eric G. Widmer* ¶ 2 (App. at 136-37).

The fact that Overlap may have affected the family contributions that some students made to MIT does not dictate per se treatment. Even if the Division's analogy of family contribution to "price" were accurate, courts have repeatedly refused to evaluate agreements under the per se rule merely because they technically affect price.[33] *See, e.g., F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

In *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), for example, the Court refused to apply the per se rule despite the fact that it found a literal "price fixing" arrangement. *Broadcast Music* involved the blanket licensing of copyrighted musical compositions by two copyright clearinghouses, BMI and ASCAP, that had the exclusive rights to license the music of their members. Under the blanket-license arrangements, BMI and ASCAP sold performance rights to all of the compositions owned by them for a stated price. Although the Court recognized that the blanket

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[33] In fact, in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), the Division itself argued strenuously against application of the per se rule to blatantly anticompetitive conduct. In that case, the Division asserted that:

> the availability of [a price fixing] label does not obviate the task of determining whether particular practices that may affect price or exclude competitors should be viewed as conduct of the type, subject to automatic condemnation.

Brief for the United States as Amicus Curiae in Support of Affirmance at 5, *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984). The Division also acknowledged that "not all concerted conduct that may affect price has been deemed price fixing." *Id.* (citation omitted). Apparently, for the Antitrust Division the critical factor in determining whether the per se rule should apply is whether the Division is itself a party. As has been observed, "characterization of a practice as subject to the per se rule means that the plaintiff is more likely to win the case." Denis, *Focusing on the Characterization of Per Se Unlawful Restraints*, 36 Antitrust Bull. 641, 644 (1991).

licensing arrangement was a "literal" price-fix, the Court held that the conduct was not a per se violation of the Sherman Act. *Id.* at 24. The Court explained that the inquiry in an antitrust case is not simply one of:

> determining whether two or more potential competitors have literally "fixed" a "price.". . . [This] literal approach does not . . . establish that [a] particular practice is one of those types that is "plainly anticompetitive" and very likely "without redeeming virtue."

Id. at 9. To determine whether the challenged product is properly characterized as per se price fixing:

> [the] inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy — that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."

Id. at 19-20 (footnote omitted; citation omitted; emphasis added).

The Supreme Court once again declined to apply the per se rule in determining whether an agreement to "fix prices" was illegal in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). In that case, the NCAA formulated a plan for televising the college football games of its member schools, limiting the number of televised games that any one school could play. The NCAA also entered into contracts with two television networks in which it granted each the right to broadcast a certain number of games for a specific price. The NCAA threatened to discipline any institution that negotiated the sale of television rights that were inconsistent with the NCAA plan.

Despite the fact that the NCAA agreement restrained member institutions from competing in terms of price and output, the Court declined to apply the per se rule at the urging of the Antitrust Division. The Court reasoned that in the college football industry, horizontal restraints were essential to the availability of the product. *Id.* at 101. Thus, the Court concluded it was necessary to look beyond the conduct and to determine the actual effect of the restraint on competition, which could only be evaluated under the rule of reason.[34] *Id.* at 100, 104.

These cases demonstrate that the Supreme Court will not blindly apply the per se rule on the basis of a simplistic price fixing label. In every case in which the Court has applied per se treatment to agreements affecting price, either the challenged agreement was made within the context of a traditional for-profit commercial setting, see cases cited in the Division's Brief at 69-73, or the conduct involved was clearly commercial in nature. *See, e.g., F.T.C. v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990); *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332 (1982). The per se analysis, however, has never been applied to the bona fide, non-commercial, charitable activities of nonprofits — not even where, unlike here, the economic consequences of the agreement were not disputed.

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[34] While the Court eventually concluded that the restraint was unreasonable under the rule of reason, the Court also stated that intercollegiate agreements limiting financial aid awards for student athletes are reasonable. As will be discussed further in Section VII.C., because the Court has deemed intercollegiate agreements limiting financial aid to student athletes reasonable, it would be wrong to hold the parallel Overlap agreement to be indefensible.

4. Application of the per se rule to Overlap is contrary to sound economic theory and its application in the case law.

a. The per se rule is predicated upon economic predictions of the consequences of cooperation between profit-making firms seeking to maximize profits.

One principle upon which the expert economists on each side of this case agree is that profit-maximizing business entities and nonprofit entities are fundamentally different as a matter of basic economic theory. *Carlton Aff.* ¶¶ 6, 11, 16, 18, 33 and 35 (App. at 41, 43, 46-48 and 54-55); *Leffler Dep.* at 58-59, 186-87, 191 and 193 (App. at 147-48, 167-68 and 170-71). The vast majority of firms in the United States are traditional, profit-maximizing business entities. *Carlton Aff.* ¶ 13 (App. at 44). By definition, the primary goal of such firms is to maximize net revenues on behalf of "owners" of the business, generally the stockholders, partners or proprietors. *Carlton Aff.* ¶ 13 (App. at 44); *see Leffler Dep.* at 225-26 (App. at 175-76). Profit-maximizing firms have an incentive to charge consumers the highest possible price for their products or services, up to the point at which increased revenues resulting from price increases are offset by declining market share caused by price increases. *Carlton Aff.* ¶¶ 12-13 (App. at 44).

As a result of these characteristics, it is presumed that when competing, profit-maximizing firms act collectively to set or otherwise affect the price of their competing products or services, the result will be a price increase above competitive levels, which by definition is harmful to consumer welfare. *Carlton Aff.* ¶¶ 6, 12-13 and 33 (App. at 41, 44 and 54-55). Adam Smith predicted such harm when he observed that "[p]eople of the same trade seldom meet together, even for merriment

and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." *The Wealth of Nations*, vol. I, bk I, ch. 10, pt. 2 (1776). The Division relies on nothing more than intuition in urging the Court to extend into the charitable community Adam Smith's marketplace presumption.

Generally speaking, among profit-maximizers cooperative activity will produce supracompetitive prices, except when the participants lack market power to sustain an elevated price. While economists recognize special circumstances in which cooperative price-setting by profit-maximizing firms can benefit consumers through increased efficiency (for example, when it is necessary to fix the price in order to have any product or market at all), the conditions necessary to justify price-fixing among profit maximizers rarely exist. *Carlton Aff.* ¶ 14-15 (App. at 44-46).

The standard economic model of the behavior of profit-maximizing firms is the foundation upon which the per se rule is founded. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726-27 (1988) (refusing to apply per se rule to vertical restraint because no showing that such restraints "almost always tends to restrict competition and reduce output"); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (refusing to "extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) ("th[e] per se approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive"); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 103-04 (1984) ("[p]er se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render

unjustified further examination of the challenged conduct"); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) (per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output"); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (agreements are per se illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

As the Third Circuit observed in *Tose v. First Pa. Bank*, 648 F.2d 879, 891 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981): "[w]here judicial experience teaches that a particular business practice 'blatantly restricts competition' . . . it is not necessary to set forth an expansive explanation . . . because the laws of economics persuasively predict how the balance will come out." The laws of economics referred to in *Tose*, however, can only "persuasively predict how the balance will come out" where profit-maximizing firms are involved For non-profits there is no shortcut to a correct result; only a detailed analysis of the facts will provide enlightenment as to the economic effects of the practice.

b. Cooperation among non-profit firms does not always, or even usually, increase price.

The goals and incentives of firms organized on a nonprofit basis are fundamentally different from those of profit-maximizing firms. Nonprofit status is a legal status which confers certain benefits on the firm, such as exemption from federal and/or state income taxes, as well as certain restrictions on its behavior. 1 Marilyn Phelon, *Nonprofit Enterprises: Law and Taxation* § 1:02 (1991). The most basic

restriction on nonprofit firms is that they are prohibited from distributing excess revenues to their "owners." *See id.* § 1:01.

Because of this prohibition, nonprofit firms do not generally have profit-maximization as a primary goal or, conversely, firms that seek to maximize profits do not seek nonprofit status. Rather, nonprofit firms may have multiple goals unrelated to profit maximization, many of which may in fact be inconsistent with profit maximization. *Carlton Aff.* ¶¶ 6, 11, 16, 18, 26, 28, 33 and 35 (App. at 41, 43-44, 46-48 and 51-55); *Leffler Dep.* at 130-33 and 187-88 (App. at 160-63 and 168-69). Since the economic presumptions underlying the per se rule are inextricably linked to the assumption that the challenged conduct will always produce effects that are consistent with the goals of profit maximization, those presumptions do not apply to nonprofit firms. *Carlton Aff.* ¶¶ 6, 11, 16, 18, 28, 33 and 35 (App. at 41, 43-44, 46-48 and 52-55). Hence, the Division may not rely on those presumptions to predict harm to consumer welfare — especially where, as here, MIT can prove that such harm did not, in fact, occur.

c. Charitable non-profit organizations like MIT must operate to serve the public, and do not pose a substantial threat to consumer welfare.

There are many different kinds of nonprofit firms. The goals and incentives of a nonprofit firm depend upon the purposes underlying its formation and operation. The purposes for obtaining nonprofit status vary greatly across the spectrum of nonprofit firms. On one extreme are organizations which, while technically possessing nonprofit legal status, have as their principal mission the advancement of the interests, including the commercial interests, of their for-profit constituents.

Trade and professional organizations are examples of this type of nonprofit entity.[35] In evaluating the conduct of such organizations under the antitrust laws, courts have scrutinized the conduct to determine whether it advanced a commercial objective. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (group boycott by lawyers designed to increase fees paid to lawyers representing indigent criminal defendants deemed illegal per se); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (refusal by a group of dentists to submit x-rays to insurers held unreasonable under rule of reason where conduct was motivated by dentists' concern for their own economic well-being); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (maximum price-fixing agreement that improved commercial viability of practice among physicians was found to be illegal per se where the conduct was not motivated by public service interests); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (engineers' agreement to ban competitive bidding not justified under rule of reason where conduct eliminated price competition); .

On the other extreme of the nonprofit spectrum are entities that are organized exclusively for a charitable purpose. Such organizations are afforded special treatment under the federal tax laws. Specifically, Section 501(c)(3) of the Internal Revenue Code provides that qualifying organizations are exempt from federal tax. In

[35] Although trade and professional associations are afforded nonprofit status because the organizations are designed to further the commercial interests of their for-profit constituents, they are not entitled to the tax benefits bestowed on organizations — like MIT — that are devoted strictly to charitable purposes.

addition, it provides that donations made to 501(c)(3) organizations are deductible as charitable contributions.[36]

The special status given to such private charitable organizations reflects a policy judgment that charitable organizations serve an important function in society which should be sanctioned and encouraged. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). As the Supreme Court has stated:

> Charitable exemptions are justified on the basis that the exempt entity confers a public benefit — a benefit which the society or the community may not itself choose or be able to provide . . . .

Id. The favorable treatment bestowed on charities also recognizes that in the absence of private charitable organizations, the government and the taxpayers would have to shoulder the burden of fulfilling the social functions which are now served by these organizations. As explained in a report of the House Committee on Ways and Means:

> The exemption is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.

H.R. Rep. No. 1860, 75th Cong., 3d Sess., *reprinted in* 1939-1 C.B. 772 (Part II).

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[36] In order to qualify for this special tax treatment, an entity must be organized and operated for charitable purposes. The Supreme Court has held that the Internal Revenue Code imposes a general charitable requirement on all organizations qualifying for tax exempt status under Section 501(c)(3), including "educational" institutions. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding revocation of Section 501(c)(3) status on grounds that university was not "charitable").

In order to maintain 501(c)(3) status, no part of the net earnings of an organization may inure to the benefit of "private shareholders or individuals." Thus, a 501(c)(3) organization cannot provide employees with excessive salaries or fringe benefits and may not engage in below-market transactions with an "insider." In addition, to maintain tax exemption under 501(c)(3), organizations must be "operated exclusively" for one or more qualifying purposes.

MIT is a fully-qualified 501(c)(3) organization. *Gray Aff.* ¶ 7 (App. at 87). As such, it is constrained by law, other than the antitrust laws, to promote, and not to act inconsistent with, its charitable educational mission. In the more than thirty years that MIT publicly participated in Overlap, no arm of the government ever suggested that Overlap was inconsistent with MIT's charitable mission.

The unsuitability of the antitrust laws for regulating the activities of charities is illustrated by the fact that there exist no reported decisions in which a nonprofit, charitable organization has been found to have violated the antitrust laws when the organization was merely pursuing its charitable purpose. In fact, no court has ever applied the per se rule to intercollegiate agreements that were motivated by a charitable, educational purpose. In almost every antitrust suit brought against universities as the result of interschool agreements, courts have found that the joint conduct was either exempt from antitrust scrutiny or was lawful under the rule of reason.[37] The only intercollegiate agreement that the Supreme Court has found to violate the Sherman Act was that in *NCAA v. Board of Regents of the University of Oklahoma*, where the Court found the challenged conduct was strictly commercial and intended to restrict output and raise prices. Even so, the Court evaluated it under the rule of reason.

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[37] *See, e.g., McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577 (D.C. Cir. 1984); *Donnelly v. Boston College*, 558 F.2d 634 (1st Cir.), *cert. denied*, 434 U.S. 987 (1977); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schs.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983); *Selman v. Harvard Medical Sch.*, 494 F. Supp. 603 (S.D.N.Y.), *aff'd*, 638 F.2d 1204 (2d Cir. 1980); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975); *College Athletic Placement Serv. v. NCAA*, 1975-1 Trade Cas. ¶ 60,117 (D.N.J. 1974), *aff'd*, 506 F.2d 1050 (3d Cir. 1975).

In sum, the Division's claim to per se treatment in this case flies in the face of decades of carefully reasoned precedent and the important economic principles underlying that precedent. Blanket application of the per se rule to nonprofit organizations, particularly charitable nonprofits like MIT, would be inappropriate economic antitrust policy, and inconsistent with the carefully developed rationale underlying the per se rule. This Court should not be the first to follow the path erroneously urged upon it by the Division.