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July 11, 2006

Andrew J. Heimert, Esq.  
Executive Director & General Council  
Antitrust Modernization Commission  
1120 G Street, N.W.  
Suite 810  
Washington, D.C. 20005

RECEIVED  
JUL 12 2006

BY:.....

Re: Comments for the “statutory immunities and exemptions” portion of the Commission’s deliberation on July 13, 2006.

Dear Mr. Heimert:

I represent the Student Book Exchange (“SBX”) of Bowling Green, Ohio, a private college bookstore that has served the students of Bowling Green State University (“BGSU”) for the past 50 years. SBX competes with the University’s owned and operated bookstore in the Student Union, called the University Bookstore.

In about 2000 BGSU instituted a credit card for students called the B!G Card. The B!G Card was originally designed for students to use for access to dining plans in University residence halls. Over time the card was expanded for use in on-campus stores, including the University Bookstore.

At about the same time the University significantly expanded the Student Union, called the Bowen-Thompson Center. The expansion was funded, in part, through a \$30 million bond issue. The University’s financial projections supporting the bond issue anticipated growing revenue from the Bookstore. In fact, since 2001, the University’s Bookstore revenue has increased at a rate far in excess of the growth of the student population. Over the same time period the revenue for the two off-campus bookstores has fallen. Indeed, one of the off-campus bookstores, which was affiliated with my client’s store, closed in early 2005 because of the decline in sales.

The University has not permitted the B!G Card to be used at any off-campus retailer. The University has, however, permitted the card to be used at private retailers, such as a Wendy’s and a Starbucks, that do business in the Bowen-Thompson Center.

The BIG card provides interest-free credit to students, financed by the University's Bursar Office. The University also sponsors a debit card for students to use at participating off-campus merchants. As you might expect, however, participation in the debit card program is negligible. Students make full use of the credit card provided by the University. The director of the University Bookstore has been quoted in the local media saying that half of the sales at the store are on the BIG card. Those are sales that my client cannot participate in or compete for. In fact, use of the BIG card is not restricted to books and school supplies. Students can use the credit card to purchase all of the goods sold at the University Bookstore, including University "spirit" items, X-Boxes and iPods.

By using the cards, the bills are sent, in most cases, to their parents. Students have learned to misuse and abuse the credit by purchasing new books from the University Bookstore and immediately bringing them to my client's store for re-sale as used books. The student gets the cash and the bill goes to the parents. The University has been alerted to this abuse, but has taken no steps to discontinue it.

When your primary customer is a hardworking, but cash poor college student, the competitive advantage of accepting the University credit card is obvious. Therefore, the private bookstore has repeatedly requested that the University also allow it to accept the University credit card. The University has steadfastly refused to allow the private bookstore to participate in its credit card program.

Over the past year BGSU has implemented a new program under which students would be provided a new card for use on campus. Through several discussions, my client was led to believe that the new system would be an all-encompassing debit card rather than the on-campus credit card currently in use. In fact, the new card will continue to be a credit card for the University Bookstore and a debit card for use at some on-campus facilities, such as university dining. BGSU was considering an all-encompassing debit card system, but rejected it in order to maintain a credit card system for the University Bookstore. According to the minutes of the University committee studying the implementation of the new card, the decision to maintain a credit card system for the University Bookstore was made unilaterally by the University's Vice President of Finance.

As we have pointed out to the BGSU administration, an all-encompassing debit card system is in place at other Ohio universities, such as Ohio State, University of Toledo, University of Cincinnati and Kent State. Rather than implement the all-encompassing debit card system, however, BGSU decided to maintain its "credit on campus – debit off campus" system for the coming academic year.

In addition to the situation at BGSU, the administration at Central Michigan University ("CMU") in Mount Pleasant, Michigan has implemented the same credit system for on-campus purchases. The privately-owned Student Book Exchange in Mount Pleasant, an affiliate of the Bowling Green SBX, cannot accept the credit card

and must compete with the University-owned store without the benefit of the credit provided to students to shop at the University store. Like BGSU, CMU has refused to change the system to an all-encompassing debit system and has refused to permit the SBX store to accept the credit card.

In both cases, the refusal of the universities to change the “credit on campus – debit off campus” system constitutes several violations of the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act.

Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade. 15 U.S.C.A. §1. The credit arrangement allowing students to purchase products at the University-owned bookstores with their credit card while excluding the private bookstore from the same right constitutes a refusal to deal, a boycott and/or a tying arrangement. The agreement is thereby in restraint of trade and violates Section 1 of the Sherman Act because it impedes the competitive process and denies consumers the benefit of full competition. See, *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999); *U.S. v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001).

The actions of BGSU and CMU further violate Section 2 of the Sherman Act. That section prohibits parties with monopoly power from using their position to exclude competitors. 15 U.S.C.A. §2. The universities and their bookstores have monopoly power over the credit accounts. They also have a monopoly in the education markets in their respective communities. They use that power to exclude competition and to create a monopoly in the market for student books and in the market for other retail sales to the student-consumers. The use of their power in excluding the private bookstores is harmful to competition, harmful to the student-consumers and harmful to the private bookstore. See, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847 (1985); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

Both universities are using their monopoly positions in both the education market and in the credit card market in order to create a monopoly in the retail market in their respective areas. In the retail markets they will establish monopolies not only in the new and used textbook markets, but also in the school supply markets, the school “spirit” markets and, in the case of BGSU, the retail market for electronics. All of these markets will be monopolized by the Bookstores owned and operated by BGSU and CMU.

Consequently, the University’s anti-competitive practices have a direct effect on sales at the private bookstore and other local businesses. The practice has already caused one bookstore in Bowling Green to close its doors and if the universities continue their actions, they will force the remaining private bookstores to shut down. Absent any local competition, the universities’ own bookstores will be free to raise their prices, just as any monopolist does, thereby subjecting students to unjustly higher education related costs.

Further, given that tuition increases have been continuing to grow at double-digit rates, it would seem to be especially unsound as public policy to encourage, permit and defend the attempt by universities to obtain monopoly power in the market for student books. Books are a significant expense to anyone enrolled in college. The availability of used books and competitively-priced new books can reduce that expense. For the State to approve tuition increases while, at the same time granting *carte blanche* to a university to exploit its monopoly position in order to keep competition out of the book market is unconscionable.

The SBX stores in both Bowling Green, Ohio and Mount Pleasant, Michigan have merely sought a level playing field so that they could compete with the university-owned and operated stores at their respective campuses. Neither university has specified a legitimate competitive reason for the current system. In fact, many universities in Ohio, Michigan and around the country have gotten out of the business of providing their students with credit cards and have adopted an all-encompassing debit card system which is available to on and off-campus merchants on an equal basis. The debit card systems at Ohio State, Toledo, Cincinnati and Kent State are quite common.

Further, we have reviewed public records at BGSU and determined that credit controls are not even applied in a normal, business-like manner. The University does not charge interest. It does not keep track of the age of its receivables. It has no means to charge back bad debts to the organization or facility for which it they were incurred. Rather, BGSU relies on withholding student registration and transcripts as the only means of collection. The credit facility provided by CMU is similarly run in a non-business-like manner.

In spite of the examples of other, comparable universities and in spite of the lack of a business-like approach to extending credit, both BGSU and CMU have steadfastly refused to change their anti-competitive practices. The effect of this conduct is actually injurious to students. Students dependent on free credit provided by BGSU and CMU may be unable to purchase products at the private bookstore even if the prices are lower or the selection greater. Moreover, even students not dependent on the account are injured because the minimization of competition from the private bookstores allows the university-owned bookstores to charge higher prices and provide lesser service.

In the textbook market, students are in a particularly vulnerable position because they are not as well-funded as consumers in the larger society. They are, to a large extent, dependent on financial support from others. Students are also vulnerable because their academic well-being is dependent on the very University that is attempting to monopolize the market. Students have no choice as to which books they buy. Those books are assigned by their professors. Further, many students are limited to retailers on or near campus by a lack of transportation. In both Bowling Green, Ohio, and Mount Pleasant, Michigan, the SBX stores are within easy walking distance from campus.

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In the event the universities succeed in driving the private competitors out of business in both markets, the bookstores owned by the universities will be the only shows in their respective towns. Since book prices are set by the retailer, not the publishers, monopolies at BGSU and CMU will have a significant effect on the price of books in those markets at the very time that the U.S. House of Representatives Advisory Committee on Student Financial Assistance is investigating the increase in the price of college textbooks, following the General Accounting Office report that textbook costs have grown at twice the rate of inflation since 1986.

When confronted with our anti-competitive charges neither BGSU, the State of Ohio, CMU, nor the State of Michigan disputed the anti-competitive nature of their action. However, both Michigan and Ohio claimed the university's charge account is exempt from antitrust violations under the concept of state action immunity. (See correspondence, enclosed).

In response to the assertion that the practices of the universities were immune from the antitrust laws, we have pointed out that the requirements of the exemption are not present. First, the extension of credit to students by the state universities were not undertaken pursuant to "a clearly articulated and affirmatively expressed state policy", and, second, that the practice was not "actively supervised" by the State, as required by *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 455 U.S. 97, 104, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). Moreover, we pointed out that in this situation the State was acting as a "market participant" and not as a regulator, and so the state action exemption should not apply, citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379, 111 S.Ct. 1344, 1353, 113 L.Ed.2d 382 (1991). (Copies of our letter to the General Counsel of BGSU, the response of the Attorney General of the State of Ohio and our reply to the Attorney General are enclosed.)

It has also come to our attention that an *FTC State Action Report* has proposed the specific standards for establishing a market participant exception if the state is acting "as a commercial participant in the relevant market" and when its conduct is not actively supervised by the state. In that situation, as in the two markets my client competes in, the State cannot show that the action of the universities, engaging in anti-competitive behavior in the textbook sales market, is being supervised at all.

Other areas of law have recognized the necessity of a market participant exception. In *Jefferson County Pharmaceutical Assn., Inc. v. Abbott Lab.*, 460 U.S. 150, 154, 103 S.Ct. 1011, 1015, 74 L.Ed.2d 882 (1983) the Court held that a state university's participation in private retail markets renders it subject to the Robinson-Patman Act. In *Reeves, Inc. v. Stake*, 447, 429, 436, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980) the Supreme Court stated that the distinction between the state acting as a market participant and the state acting as a market regulator "makes good sense and sound law" in Commerce Clause cases. In *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948-49 (9<sup>th</sup> Cir. 1993), reh.den. (1993) the Court applied those principles to an antitrust claim against the University of California.

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A market participant exception under the Robinson-Patman Act and under the Commerce Clause is well accepted and established. The time has come for the creation of a market participant exception to state action immunity under antitrust law. The principle that the state can enter any business it wants and use its market power to eliminate private competition is unsound, unwise and unfair, especially when it tends to confer the powers of a monopoly at the expense of relatively weak consumers, such as students and their parents.

The practice of the state acting as a monopolist to attempt to take advantage of vulnerable consumers should not be permitted. Rather, it should be the position of the state to promote and defend free market activity that will benefit the vulnerable consumers. This is especially true where taxpayer funds are supporting the monopolist to the detriment of students, their parents and the independent merchants of the state.

Therefore, in light of the misuse of the state action immunity by the States of Ohio and Michigan, and the harm it can cause the students of the university, the local businesses and the retail markets in both communities, we see the need for the Commission to establish rules for the application of the Market Participant exception to state action immunity. The rules should spell out the circumstances under which a state's actions will and will not be immune. The rules should recognize an initial distinction between the state acting as a market participant and the state acting as a market regulator. Where the state is actively participating as a competitor in a market, immunity should not be available. Where the state is participating in a market, but there is no competition, in other words, where the state is filling a void, then immunity could be available if other conditions are met, which would include a clear expression of state policy and active state supervision. Where the state is acting as a regulator of private market activity, then the standards of a clearly expressed state policy and active state supervision would apply.

Thank you for your consideration. I would appreciate if you would make this part of the Commission's record.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel V. Kinsella". The signature is fluid and cursive, with a large initial "D" and "K".

Daniel V. Kinsella

DVK/rs  
Enclosure  
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