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Senator Herb Kohl
Chairman of the Senate Judiciary Subcommittee
on Antitrust, Competition Policy and Consumer Rights
330 Hart Senate Office Building
Washington, DC 20510

Senator Orrin G. Hatch
Ranking Member of the Senate Judiciary Subcommittee
on Antitrust, Competition Policy and Consumer Rights
104 Hart Office Building
Washington, DC 20510

Dear Senators Kohl and Hatch:

The Mountain West Conference ("MWC") consists of nine public and/or non-profit universities, the United States Air Force Academy, Brigham Young University, Colorado State University, University of New Mexico, San Diego State University, Texas Christian University, University of Nevada, Las Vegas, University of Utah and University of Wyoming. On its behalf, we appreciate the opportunity to present these comments which reflect concerns of the MWC as well as views we have expressed to the MWC as antitrust lawyers with respect to issues relating to actions by the controlling group of the Bowl Championship Series ("BCS"). The MWC and others are severely, adversely and unfairly impacted by the exclusionary system by which the BCS and others have limited the opportunities to share in the hundreds of millions of dollars in

revenues of major post-season college football bowl games, consisting of the Rose, Orange, Sugar and Fiesta Bowls (the "Major Bowls") and the related National Championship Game (collectively, the "BCS Bowls"), a system which has deprived the public of a true college football national championship competition.

The timeline of the consideration of these matters by your Subcommittee and the economic significance of the issues here raised are further evidenced by the pressures arising from an agreement negotiated between the BCS and ESPN to televise all of the BCS Bowls (other than the Rose Bowl) for the next several years in exchange for a payment of about half a billion dollars ($500,000.00). This proposed agreement was negotiated by the BCS without separate negotiations by individual bowls, schools or conferences. The MWC and others face a July 9, 2009 deadline to sign the Agreement or risk loss of any share in those revenues which are so critical to their strained budgets.

This submission will address the facts and legal principles which demonstrate that the structure and operation of the BCS are not consistent with applicable antitrust principles.

The Public Interest Would Be Served By Remedial Action To Address The Exclusionary BCS System

A. The BCS Combination

In all college athletics other than what was formally called Division I football, and is now called the Football Bowl Subdivision ("Division I Football"), the national collegiate champion is selected by a playoff system in which all eligible teams have a realistic opportunity to qualify for post-season tournaments, compete for the title, and earn the revenues which flow from

competitive success. The National College Athletic Association ("NCAA"), as the governing body of most college sports other than post-season football, sponsors 88 championship competitions. In all of those tournaments the schools are able to accommodate class schedules and the needs of the student athletes in order to participate in playoffs which may run over several weeks; eligibility and selection rules are established by the neutral umbrella organization; no elite group of schools or conferences have usurped for themselves unique advantages and control over access to any other competition. In no other collegiate sport has a discrete group been able to decide the rules which govern which teams will compete in lucrative post-season events, and how the proceeds of these games will be distributed. Similarly, in no other collegiate sport does a group of schools or conferences control and protect for themselves the dominant or exclusive share of the lucrative revenues and ancillary benefits which flow from participation in the post-season competitions. In Division I Football, however, the sport which generates the most revenue and interest, the NCAA has discussed but not acted to set up a playoff or other means to determine a champion of the Football Bowl Subdivision (*see* Oversight Hearing Before House Commerce, Trade and Consumer Protection Subcommittee, May 1, 2009 ("Oversight Hearing"), Statement by Gene Bleymaier. The five Statements submitted for the Hearing are annexed as Appendix C). Instead the NCAA has remained silent as the BCS is allowed to control the key post-season college football games.

The BCS was formed in 1998 by agreement among six ostensibly competing conferences (The Big Ten, Big East, Pac-10, Southeastern Conference ("SEC"), Atlantic Coast Conference ("ACC") and Big XII) and The University of Notre Dame. The conference champion from each

of these conferences automatically qualifies for one of the BCS Bowls without regard to the quality of its teams. They are referenced here as the "AQs" but sports journalists routinely refer to these conferences as the BCS Conferences.

The BCS claims no formal legal status, and seems committed to avoid any classification. It was agreed among this group, and the four Major Bowls, that the champion of each of the six conferences which are parties to this agreement, and Notre Dame if it met certain criteria, would each be guaranteed an invitation to one of the eight spots in the Major Bowls with their large economic rewards. There are no other teams or conferences with similar guarantees, and there are few slots left for teams from the non-AQs to seek. In addition, since 2006, it was agreed that the two schools which were denominated first and second in the complex formula created by the BCS would compete in a fifth game, played one week later, which would be explicitly denominated as the "National Championship Game." It was further agreed by this group that the National Championship Game would rotate among the venues of the Major Bowls. By the BCS's own admission this is not a "playoff" system. According to the BCS's Coordinator, its stated purpose is to preserve the Major Bowls. Its impact is to control division of the enormous BCS revenues, and ensure that the AQs control this revenue and access to the prized and valuable bowl invitations.

Not surprisingly, there are only a handful of non-AQ-teams which have appeared in the Major Bowls, and none in the National Championship Game despite their great competitive success. For the 2006-2007 season, representatives of five additional conferences (Conference

USA, the Mid-American Conference, the Sun Belt Conference, the Western Athletic Conference and the MWC), were added to the governing body of the BCS with a single collective vote for all five representatives as a group. The Major Bowls, however, continued on the same basis, *i.e.*, the AQ conferences continue to have automatic berths. No more than one team from a non-AQ conference can earn an automatic berth in any given year. Moreover, each added conference was granted revenue of roughly ten percent of that of the original six conferences. Attached as Appendix A are the BCS's own publicly available materials discussing membership and governance of the BCS selection criteria.

B. Exclusionary and Economic Impact of the BCS

The rules adopted by this group of ostensible competing entities place significant barriers to the ability of a team which is not a member of one of the AQ conferences to participate in a BCS Bowl, and this exclusion has significant economic repercussions. Only one team from the five non-AQ conferences will earn a bid under the BCS procedures if either: (a) the team ranks in the top 12 of the final BCS standings, or (b) the team ranks in the top 16 of the final BCS standings and its ranking is higher than that of the champion of one of the AQ conferences. The BCS has effectively precluded a playoff system which would reflect greater consensus and reward competitive success. Further, the added games in a playoff system which would bring enormous broadcasting, attendance, and ancillary revenues have been precluded.

Price competition among the Major Bowls for teams, or television revenues, has been negated by the agreement and is non-existent. A single television contract with the BCS exists for all the BCS Bowls except the Rose Bowl. The ability to negotiate separate revenue or

television agreements with the BCS Bowls is foreclosed. The pay outs by the BCS Bowls are currently estimated at $175 million of which the BCS ensures that the overwhelming majority is guaranteed to go to the six AQ conferences. *See* Appendix D. The gross revenues of a proposed playoff system have been estimated to be in excess of $375 Million, more than double the current system.

Under the current system, the BCS Bowls are not only the most prestigious, but they are the most lucrative. We are attaching as Appendix B a recent article by Professor Andrew Zimbalist, an economist at Smith College, titled, *Assessing Antitrust Case Against the Bowl Championship Series*, Global Competition Policy (May 2009), which includes key statistics demonstrating the inequality, foreclosure and anticompetitive effects of the current BCS system. Illustratively, the AQ conferences with 54.6% of the Football Subdivision teams receive approximately 87% of the BCS revenues. (Appendix B, p. 4). During the first eleven years of the BCS system, there have been ninety appearances by AQ conference teams and only four appearances by non-AQ conference teams. *Id.* Every contestant in the National Championship Game has been from one of the AQ conferences. BCS revenues are distributed in greater proportion to teams that make the BCS Bowls. Teams that appeared in one of the five BCS Bowls in 2008-09 each provided $18 million to their conference. The impact also extends into broadcasting revenues, recruiting and other aspects of athletic programs.

Broadcasting rights for BCS Bowls have been worth hundreds of millions of dollars. ABC paid approximately $700 million to broadcast the four Major Bowl games for seven years beginning with the 1998-1999 season. The BCS has a $320 million contract with FOX through

2010, except for the Rose Bowl. As discussed above, ESPN has negotiated with the BCS and presented a proposed broadcasting contract for almost $500 million covering the Sugar, Orange and Fiesta Bowls and three National Championship Games in the next several years. Thus, AQ conference teams stand to gain from the new contract over non-AQ conference teams because the AQ conferences automatically qualify for the Major Bowls.

The selections and outcomes of the Major Bowls have been vigorously criticized as to both process and result. The BCS is admittedly not a playoff system. President Obama has publicly advocated a playoff. In May of this year the House Energy and Commerce Subcommittee on Commerce Trade and Consumer Protection held a hearing on "The Bowl Championship Series: Money and Issues of Fairness at Publicly Funded Universities." The record of those proceedings and other illustrative statements are collected in Appendices C - E.

The competitive success of teams from the non-AQ conferences has not enabled them to move into the status of AQ conferences in either revenues or access to the National Championship Game. Objective criteria establish that the exclusionary effects are not reflective of success of teams involved, *i.e.*, better teams were excluded in favor of members of the six AQ conferences. (*See* Appendix F). Illustratively, from 2005-2008, MWC members had a .475% winning percentage against AQ members. The winning percentage against equivalent competition during that period of ACC institutions was .464 and for Big Ten members it was .439. Just last year undefeated Utah and Boise State teams were unable to compete for the National Championship. The BCS system has persisted with minor "tweaks" which did not alter the exclusionary effects or the economic impact of the system. A playoff system or other less

anticompetitive alternatives to achieve all reasonable objectives (including a detailed proposal presented by the MWC in March 2009, Appendix G) were not seriously considered. On June 15, 2009, the USA Today reported that it was not on the BCS Agenda and press reports of June 24, 2009 confirm its rejection without analysis.

This memorandum will demonstrate the clarity of the application of relevant antitrust precedent to establish the illegality of the BCS. In appendices we present illustrative data which confirm the dramatic and indefensible economic effects of the exclusionary BCS structure, the absence of any correlation between outstanding teams and access to the BCS Bowls, and in particular its adverse impact on the public and private schools which are the victims of the cartel. (*See also* Appendix H).

The BCS is a naked restraint imposed by a self-appointed cartel which has exercised its power to limit games and prevent a playoff in order to preserve for its members access to participation in the five BCS Bowl games and the related revenues, while creating high barriers to others. Output of more games by a playoff is prevented. Price competition by the BCS Bowls for teams or broadcasting revenues is eliminated by BCS joint agreement. Non-AQ teams have been completely foreclosed from the ability to compete for the championship. The BCS is inconsistent with the goals and principles of the Sherman Act.

C. Antitrust Division Enforcement

Action by the Antitrust Division of the Department of Justice (the "Division") to remedy this illegality is a particularly appropriate use of its resources and would serve the public interest. The subject is of great public concern as demonstrated by the outspoken criticism noted above

and illustrated in Appendices E and I and the recent congressional hearings (Appendix C). We urge the Committee to forward the matter to Assistant Attorney General Varney.

There have been several Bills proposed regarding the BCS and the method by which a Football Bowl Subdivision college football champion is determined. *See* H. RESOLUTIONS 68, 390 and 599 (www.thomas.gov). H. RES. 68 seeks to repudiate the current BCS system as a violation of the Sherman Act, require the Division to investigate the current system and support the establishment of a playoff system. H. RES. 390 would prohibit as an unfair trade practice the promotion "of any post-season NCAA Division I football game as a national championship game unless such game is the culmination of a fair and equitable playoff system." This is to be enforced by the FTC. H. RES. 599 would "prohibit the receipt of Federal funds by any institution of higher education with a football team that participates in the NCAA Division I Football Bowl Subdivision, unless the national championship game of such subdivision is the culmination of a playoff system." Congressional action to create an industry-specific solution is an option which may be better reserved until the Division has addressed the issue.

Action by the Division without legislation is consistent with traditional enforcement protocols and is clearly justified by the public interest. The games available to the public are limited to those decreed by the BCS, and the public is denied access to playoff games as well as the desirable result of a true competition determining a national champion. Public and private colleges and universities which desperately need equal access to the enormous revenues of post-season college football are suffering, and the absence of those revenues contribute to the curtailment of many other athletic programs in an already strained system. Neither other

conferences nor individual schools are in nearly as good a position to initiate a lawsuit as is the Division. These institutions are all severely strained financially and none can devote the resources or attention needed to support such an effort. These schools are dependant on the revenue they earn from the BCS or broadcasting contracts involving the BCS. Suits by other conferences would also get bogged down on ancillary issues not present in a Division action.

Threatened action by state Attorneys General does not hold the prospect of the expertise, resources and national view which is present in an action by the Division, which is the historically most desirable means to address such violations. In fact, Utah's Attorney General has publicly acknowledged the difficulty of obtaining BCS cooperation with such a state investigation in view of his stated intent of initiating a suit against the BCS with the support of the NAAG, which is not a certainty.

All Of The Elements Of A Sherman Act Violation Are Presented By The BCS

A. Relevant College Sports Antitrust Litigation

The key precedent in reviewing the BCS or any other similar cartel is the seminal opinion of Justice Stevens in *NCAA v. Board of Regents*, 468 U.S. 85 (1984). The Supreme Court opinion established that federal antitrust laws apply to rules governing economic aspects of intercollegiate athletics (specifically college football) and articulated the standard of review that should be used for reviewing challenged agreements, *i.e.*, the arrangement is likely to be subject to a rule of reason analysis. The conduct challenged in that case was an NCAA television plan that limited the total number of televised intercollegiate football games and the number of games that any one college could televise. It did not allow NCAA-member institutions to sell any

television rights, except in accordance with the NCAA plan. A number of universities joined to form the College Football Association, which negotiated a television contract with NBC. The NCAA, in turn, threatened sanctions against participating members for violating the NCAA rules.

The Universities of Oklahoma and Georgia filed suit in the Western District of Oklahoma and alleged that the NCAA restrained their right to enter into their own television contracts in violation of §1 and §2 of the Sherman Act. The District Court held that "NCAA controls over college football make [the] NCAA a classic cartel" and the plaintiffs were entitled to injunctive and declaratory relief because the NCAA television plan constituted price fixing and a group boycott under §1, and that the NCAA monopolized the college football broadcasting market in violation of §2. The Tenth Circuit Court of Appeals affirmed the finding that the NCAA restrictions were *per se* illegal under §1 but did not address the monopolization claim under § 2.

In affirming the finding of illegality the Supreme Court held that the NCAA television plan limited output and restrained the ability of any institution to make a sale of television rights outside of the plan. In finding that rule of reason analysis controls, the Opinion observed, *inter alia*, that:

> It would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

Applying a rule of reason analysis, the Court held that the NCAA's arrangement limited output and fixed prices, leaving the college football industry unresponsive to consumer preference in exactly the manner the BCS system prevents a playoff or the true consensus national champion desired by the public. The Court found several anticompetitive consequences of the arrangement, *i.e.*, the NCAA's television plan placed a ceiling on the number of games member institutions could televise, and artificially limited the quantity of televised college football available to broadcasters and consumers. Recognizing the price fixing and output restrictions, the Court eschewed a detailed market analysis and directly addressed the NCAA's asserted procompetitive justifications, which Justice Stevens characterized as a cooperative "joint venture" that assisted in the marketing of broadcast rights, protecting gate attendance, and maintaining a competitive balance within the college football structure. The Court rejected these justifications and found that they violated Oklahoma's and Georgia's inherent freedom to compete. The Court therefore affirmed the appellate court decision.

Subsequent antitrust opinions have used the rule of reason standard to analyze other combinations in college athletics under the Sherman Act. In *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), the Tenth Circuit Court of Appeals held that an NCAA rule that limited the annual compensation of entry-level coaches violated Section 1. Like *Board of Regents*, the Court applied a "quick look" rule of reason test that did not undertake a detailed market analysis.

In *Law*, the NCAA articulated three procompetitive justifications for imposing salary limits. It first suggested that limiting one of the coaching positions to an entry-level position

"will create more balanced competition by barring" wealthier teams from hiring another experienced coach. The Court rejected this defense because the NCAA failed to offer evidence that entry-level applicants held the job, and that "the rules will be effective over time in accomplishing this goal." Second, the NCAA indicated that the bylaw would help member schools cut costs. This argument was similarly rejected because the Court found no substantiated proof that such measures would be successful in reducing deficits reported by many colleges. Third, the NCAA reasoned that the bylaw helped "maintain competitive equity" among competing schools by "preventing wealthier schools from placing a more experienced and higher-priced coach in the position." The Court also rejected this latter assertion because the NCAA offered no proof "that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities."

The Tenth Circuit also rejected the NCAA's argument that the plaintiffs failed to fully establish a relevant product market and found that the "NCAA misapprehends the purpose in antitrust law of market definition which is not an end unto itself but rather exists to illuminate a practice's effect on competition." *Id.* at 1020. The Court found that, like in *Board of Regents*, there was no need for elaborate industry analysis where there is "an agreement not to compete on price or output." *Id.* The Court of Appeals thus affirmed the district court's order granting a permanent injunction barring the NCAA from reenacting such compensation limits. *Id.* at 1024.

In *Metropolitan Intercollegiate Basketball Association v. NCAA*, 339 F. Supp.2d 545 (S.D.N.Y. 2004) ("*MIBA II*"), MIBA, an association of five New York area colleges that

organized the National Invitation Tournament (the "NIT"), sued the NCAA over several current NCAA rules that allegedly violated Sections 1 and 2 of the Sherman Act. The thrust of the plaintiff's argument was that the Commitment to Participate Rule, along with the other rules, was a violation of the Sherman Act in that the rules operated to prevent the NIT from competing with the NCAA tournament to attract a competitive field of teams.

In denying the NCAA's motion for summary judgment on the antitrust claims, the District Court found that the plaintiff had made a sufficient showing that the relevant market was Division I men's college basketball postseason tournaments and that the NCAA earns monopoly profits and has the power to exclude. The Court also noted that the Commitment to Participate Rule adversely affected competition by depriving colleges and fans of a potentially attractive postseason tournament choice, and the possibility of participation in an additional tournament. It was left for trial, however, to determine if the plaintiff could prove anticompetitive effects or if the NCAA could prove pro-competitive justifications under the rule of reason analysis. The case was then settled without further opinions.

Unsuccessful antitrust claims in intercollegiate athletics typically involve individual student-athlete conduct or matters without significant commercial implications. For example, in *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992), a college football player brought an action alleging that the NCAA's no-draft, no-agent rules violated the Sherman Act. The Seventh Circuit affirmed the district court's dismissal of the plaintiff's complaint, finding that although the plaintiff cited examples of antitrust law violations, such as group boycott, price fixing, and

restriction of output, the plaintiff failed to allege the anticompetitive effects of the NCAA rules. In *Smith v. NCAA*, 139 F.3d 180, 184-85 (3d Cir. 1998), *vacated on other grounds by NCAA v. Smith*, 525 U.S. 459 (1999), the Third Circuit held that NCAA rules governing eligibility for participating in collegiate sports are not commercial.

B. The Presence of Monopoly Power In The "Invisible" BCS

The BCS is not a corporation or other entity formalized by filing in any jurisdiction. It is not a party to the proposed ESPN Television Agreement, although BCS Properties, LLC, a Delaware limited liability company, is a party. The ESPN Agreement states that the BCS is not a joint venture (*i.e.*, "ESPN recognizes that there is no Bowl Championship Series entity or BCS entity," § 11.2). The BCS has refused to give the Attorney General of Utah its internal organizational materials which are claimed to be confidential. There are, however, BCS rules, meetings, membership and voting rules, structures, etc. (*See* Appendix A). The BCS does have, and has exercised, every indicia of monopoly power in the relevant markets described below. It controls access to all of the BCS Bowls and its television rights and revenues. By rule, the AQs will have at least 60% of the slots in these Bowls and in practice they have at least 80%. It secured that power by virtue of agreements among ostensibly competing conferences and Bowls. The BCS has in turn negotiated contracts with television networks providing for a single contract without price competition among the BCS Bowls. The BCS established the rules for entry into BCS Bowls, effectively excluding (all or in part) the non-AQ conferences from the market. Its intent to acquire and maintain its monopoly power is manifest.

Every element of monopolization is here present. Every element of attempt to monopolize and conspiracy to monopolize is present. Clearly antitrust lawyers have sought to create a structure in which the monopolizing entity somehow lacks legal capacity in an effort to avoid Sherman Act liability. It seems appropriate to pierce that fiction and establish the principle that a dominant cartel cannot avoid liability by obfuscating its legal status.

C. The Relevant Markets

Board of Regents and *Law* provide strong support for a contention that market definition is not critical for maintenance of an action against the BCS. If necessary, however, there are two relevant product markets that would be germane to a Section 1 or 2 analysis. Under well-settled precedent, the National Championship Game would be a separate market for antitrust purposes because there are no reasonable interchangeable substitutes. It is a single game that determines college football's national champion, and the other bowl games are not reasonable substitutes for the National Championship Game. Sports fans' interest in seeing this game will not be satisfied elsewhere and all schedules of sports games are adjusted to avoid competing. In fact, the stated purpose of the BCS is to determine the national champion of college football.

Another possible relevant market is the five BCS Bowls together, Rose, Fiesta, Sugar and Orange, including the National Championship Game. The amounts of money involved dwarf all other post-season bowls by many orders of magnitude. Television contracts including the currently proposed ESPN contract focus separately on those games. Eligibility rules and benefits of participation are different from other bowls. In *International Boxing v. United States*, 358

U.S. 242, 250-51 (1959), the Supreme Court held that championship fights are a separate market from non-championship fights because of the huge payout differential. Since that is also the case regarding the BCS Bowls, the five BCS games constitute a market separate and apart from all other bowl games.

The impact of the control and the monopolization of any of these markets by the BCS is apparent and the market effects are manifest. We note that this is not a market created by the BCS and it is not a market defined by its own product. Rather, it is the subject of the restraint which is probative of its treatment as a market, if necessary. *See MIBA II*, 339 F. Supp.2d 545. Post-season college football existed long before the BCS and the BCS is a combination that was created to control the vast revenues flowing from this market.

D. The Participants In The BCS Represent Entities With Competing Economic Self-Interests.

The BCS, Big Ten, Big East, Pac-10, SEC, ACC and Big XII, each of their member universities, the University of Notre Dame, the NCAA, the Major Bowls and the television broadcasters are separate entities for antitrust purposes and are not a single actor under *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) and its progeny.

A prior effort by the NCAA to treat itself and its member institutions as a single actor in connection with a post-season tournament was rejected. *See, e.g., Metropolitan Intercollegiate Basketball Association v. NCAA*, 337 F. Supp.2d 563 (S.D.N.Y. 2004) ("*MIBA I*"). The NCAA there claimed that because the NCAA membership has a unified interest in the success of the NCAA college basketball tournament, it is a single actor when it regulates the tournament and

should be exempt from Sherman Act § 1 scrutiny. The District Court rejected this argument and held, *inter alia*, that:

> The NCAA members are separate entities who clearly exist as independent institutions of higher education. These institutions each agree to abide by the rules of the NCAA on an annual basis. If a member institution violates a rule, it is faced with the prospect of NCAA sanctions. The fact that these individual members participate in the NCAA Tournament does not turn the membership into a single actor. Therefore, the NCAA's argument that it should be treated as a single entity under a *Copperweld* analysis is unpersuasive. *Id.* at 570.

Board of Regents, decided eight days after *Copperweld*, held that while "a certain degree of cooperation is necessary" to preserve "the type of competition that [the NCAA] and its member institutions seek to market," a plan that "prevents member institutions from competing against each other" does not escape antitrust scrutiny even though all of the institutions were members of the NCAA and the NCAA asserted that it was acting with the unified goal of marketing broadcast rights, protecting gate attendance, and maintaining a competitive balance within the college football structure. 468 U.S. at 99, 117.

The same logic applies here. The BCS is comprised of the six original member conferences and its goal is to guarantee a championship game for the Football Bowl Subdivision by protecting the traditional bowl system without a playoff. The individual member institutions formed the conferences to provide a program of intercollegiate football, and the conferences are devoted to maximizing football-related revenue for their members (*i.e.*, the Big Ten states that its mission is the "collection of revenue from various sources and remission to member schools

athletic departments"). The conferences recognize that they are "independent." *See* Oversight Hearing, Appendix C, Statement by John Swofford, Commissioner of ACC and BCS Coordinator, p. 3). In the proposed ESPN contract, there is a provision that each conference is a separate entity. Similarly, the schools that comprise each of the six conferences act independently. Like in the *MIBA I* case, the fact that the six conferences and their member institutions participate in the BCS does not make them a single actor under the antitrust laws. Further, each Bowl and the television broadcasters are clearly independent actors.

The recent decision in *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008) related to a marketing arrangement of the National Football League is not comparable to the BCS in purpose or effect of operation. The skepticism expressed in the Division / FTC *amicus curiae* brief to the Supreme Court opposing *certiorari* further militates against consideration of that decision on the issue of a possible single entity claim here. *Certiorari* was granted by the Supreme Court on June 30, 2009.

E. The BCS Power To Exclude Has Been Used To Create Significant And Intolerable Anticompetitive Effects And Consumer Harm.

The usurpation by the BCS of the National Championship Game which was added in 2006 has served to preclude the widely supported playoff system. Even BCS member schools are denied opportunities, as illustrated by the bizarre use of a Big XII rule to select Oklahoma over Texas in this year's National Championship Game despite Texas's decisive victory over Oklahoma. The public is denied the benefits of a college football champion selected by the competition used to choose champions in all other collegiate sports. The number of post-season

games and the related attendance and broadcasting revenues of such a competition are thereby limited, with no corresponding benefit from these artificial limitations on output.

It is likely that this curious system is the result of the historical anomaly of the football bowls being in existence and gaining importance before college playoffs began to gain popularity in 1938. The BCS began with the assumptions that agreement of the Major Bowls was a key part of the system, and the agreement of the Bowls was more important than a playoff system, which could diminish their significance. The BCS Bowls benefit further from the absence of price competition. In fact, a playoff system could easily preserve the bowls and increase choices for the public and opportunities for participants. (*See* March 4, 2009 MWC Proposal, Appendix G).

The six AQ conferences which are members of the BCS cartel have guaranteed to themselves six of the eight original, and now, in practice, eight of the ten, spaces in the most lucrative post-season games. The opportunities for non-BCS schools to participate are therefore severely limited. The data in Appendices D and F show that in practice, the effect of the structure and agreements has been to prevent any non-BCS school from an opportunity to qualify for the National Championship Game and to dramatically limit access to these lucrative bowls so that appearances by non-BCS teams occur only in the most extreme circumstances. Undefeated non-BCS teams were not able to compete for a national championship, contested between teams with lesser records.

The direct economic impacts on the MWC and other conferences are dramatic. Illustratively, despite outstanding on-field performance by its members, MWC post-season revenues were a small fraction of those of BCS conferences, *i.e.,* despite having a higher inter-conference record than the ACC and the Big Ten, the MWC received approximately $18.1 million of BCS distributions from 2005-2008, while the ACC received approximately $71.7 million and the Big Ten approximately $89.7 million during that period. Those numbers do not reflect ancillary economic and other benefits of being in a BCS conference.

Teams in the six AQ conferences know that every year that they will participate in the most prestigious bowl games, guaranteeing revenue, and conference exposure. This permits the conferences to make economic decisions with great certainty. Coaches from BCS conferences have the leverage of guaranteed revenues and bowl access to out-recruit non-BCS coaches, attain blue-chip athletes and, thus, attain a competitive edge over non-BCS teams. Michael Dumond, "*An Economic Model of College Football Recruiting Process*," The Journal of Sports Economics (2007) ("Teams that consistently win but are not members of the BCS are still not able to attract the quality of recruits as does a team that is a perennial loser but is also a member of a BCS conference."). Coaches, like blue-chip athletes, also want to retain positions at schools where they can perform consistently at the top level of competition and exposure. Thus, once a talented football coach achieves success at a non-BCS school, a coach is likely to take the first opportunity and migrate to a BCS school.

BCS schools are able to build stadiums, create state-of-the art practice facilities, purchase top-of-the-line equipment, and fund upgrades to existing facilities. Chad McEvoy, "*Predicting Fund Raising Revenues in NCAA Division I-A Intercollegiate Athletics*," The Sport Journal (2009) (a BCS conference school is able to raise at least $2.5 million more than a non-BCS school in athletic funding).

F. The Justifications Asserted For The BCS System Do Not Meet The Burdens Imposed By *Board Of Regents* And *Law*.

The Statement of BCS Coordinator Swofford and other statements provide insight into the arguments likely to be asserted by the BCS in defense of any antitrust claim. None are tenable, much less persuasive.

The BCS has claimed that a playoff system would cut into the classroom time of student athletes, particularly into the second semester. The facts are that: (i) playoffs are held at every other level of NCAA competition and would likely occur during the holidays when class is not in session; (ii) the NCAA recently added a twelfth game to the college football schedule; (iii) the NCAA basketball tournament involves more schools over a longer period of time; and (iv) the number of students impacted is small. We also note that there was no problem in extending the traditional New Year's Bowls well into January to accommodate the National Championship Game and the playoff could be completed in a relatively comparable period.

The BCS's advocates also contend that a playoff format would undercut the premium on success over the entire course of the regular season, *i.e.*, the motivation to win as many games as possible would be replaced with a sense of complacency because a team's only incentive would

be to remain eligible for the playoffs. This argument does not, however, carry weight because a playoff limited to eight or sixteen teams would ensure that institutions win as many games as possible in order to qualify for such playoffs and have the best seeding possible in such a playoff.

The BCS's advocates contend that a playoff system would undermine the tradition and revenues of bowl games which benefit their communities. Under the MWC proposal, for example, the Major Bowl games will have national championship ramifications every year and act as the first round of a playoff. The non-BCS-bowls, which are generally played in December, should not be affected because the playoffs would be played in January the following year.

G. There Are Less Restrictive Alternatives Than The BCS Which Can Produce An Actual National Champion And Reduce Foreclosure.

The final rule of reason step considers whether the ostensibly desirable objectives can be achieved through less restrictive means than were used by the cartel. *Law*, 134 F.3d at 1019. This analysis does not require the least restrictive restraint available, but instead turns on whether the conduct is reasonably necessary to realize the justifications.

As is clear from the recent Oversight Hearing and proposed legislation, the most popular alternative is to replace the bowl system with a playoff system consisting of an eight, twelve or sixteen team playoff format. This would present non-BCS schools with opportunities that could never happen under the current BCS arrangement.

In fact, in its March 4, 2009 proposal (Appendix G), the MWC proposed reforms to the BCS in order to make the system more equitable in terms of revenues received by universities, provide an equal opportunity for institutions outside of the six AQ conferences to compete for the national championship and establish a playoff system that will better select a national champion. Below is a chart comparing the proposed reforms to the current system:

What Needs to be Determined	Current BCS System	BCS Reform Proposal
Revenue Distribution among the Conferences	Six Conferences Each Receive Millions More than the Other Five Conferences Each Year, Regardless of Performance	Calls for Equitable Revenue Distribution, Based on Performance of Conferences
Which Conferences Automatically Qualify for BCS Bowl Games Every Year	Non-Performance-Based Standard Bowl Tie-Ins and Agreements	Performance-Based Standard Results of Inter-Conference Games Against Automatic-Qualifying Conferences
The National Champion (Once the Regular Season is Completed)	Selects 2 Teams to Compete for the National Championship More than 50 Teams Are Effectively Eliminated Before the Season Begins Numerous Outstanding Conference Champions are Eliminated at the End of the Season Because Only Two Teams are Permitted to Compete for the National Championship	Selects Top 2 Teams to Compete for the National Championship No Teams are Eliminated Before the Season Begins Allows the National Champion to be Determined On the Field by the Players, Rather than Off the Field by Computers and Pollsters
The BCS Standings (Which Universities Receive BCS Bowl Berths)	Pollsters -- Some Admit they Rarely Watch the Teams they are Evaluating Computers -- Complex,	Committee --Tasked with Gathering and Analyzing All Pertinent Data Before Making Decisions

	Confusing Formulas	
Composition of the ECS Presidential Oversight Committee	Six Conferences and Notre Dame Each Have a Separate Vote Other Five Conferences Share Only One Vote	Each Conference has its Own Vote, as does Notre Dame

It is not the only way to achieve the salutary goals of designating a national champion and increasing output without the exclusionary effects of the BCS but this proposal does demonstrate the availability of less anticompetitive means to achieve the desired ends. The proposal has been ignored.

Conclusion

This is not simply a sports issue but it involves a significant commercial enterprise controlling hundreds of millions of dollars in annual revenue which is vital to the schools. All of the programs need these revenues to fund football, but also to help fund the many other men's and women's athletic programs that are so much part of the fabric and experience of college life. And this funding comes at a time when universities are strapped for cash needed for these programs and many other educational initiatives. These universities are constrained from asserting these claims.

The greed of some has also clouded the message of sportsmanship, competition and interests of the student-athletes. Rather than give the salutary message of equal opportunity, competitive reward and fair play, the competition has become all about the money. Great

academic institutions have abandoned their fundamental goals and ideals and concern for law in order to maximize their share of this enormous revenue stream. Fair play should be returned to college football.

List of Appendices

In the attached appendices, and consistent with our intent that we not waive any rights or privilege, we present materials which supplement the earlier statements and dramatically establish the anticompetitive effects of the exclusionary structure of the BCS.

1. Membership and Governance of the BCS, Selection Criteria of the BCS and History of the BCS -- Appendix A.

2. Article by Professor Andrew Zimbalist of Smith University, *Assessing Antitrust Case Against the Bowl Championship Series*, Global Competition Policy (May 2009) -- Appendix B.

3. Prepared Statements submitted to U.S. House of Representatives Energy and Commerce Committee Subcommittee on Commerce, Trade and Consumer Protection for May 1, 2009 Hearing titled "The Bowl Championship Series: Money and Issues of Fairness at Publicly Funded Universities," including Statement by Craig Thompson, Commissioner of the MWC, and defense of the BCS system by John Swofford, Commissioner of the ACC and BCS Coordinator -- Appendix C.

4. Data which illustrate the amounts of money involved and the adverse economic impact of the BCS system on the MWC -- Appendix D.

5. Letter from Senators Hatch and Bennett to BCS leaders regarding inequality of the current BCS system -- Appendix E.

6. Data illustrating the lack of correlation between success in competition and benefits of the revenues and prestige controlled by the BCS -- Appendix F.

7. March 4, 2009 MWC alternative proposal with supporting data -- Appendix G.

8. Data on the financial impact of the current BCS system -- Appendix H.

9. Articles criticizing the current BCS system -- Appendix I.

Sincerely,

Barry J. Brett
Roy Morrow Bell

Enclosures