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On behalf of the Committee to Support the Antitrust Laws

Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

For a Hearing on: "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers"

Thursday, November 14, 2013
Dirksen Senate Office Building, Room 226
2:30 p.m.

Chairman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Hollis Salzman, and I am a partner in the law firm of Robins, Kaplan, Miller & Ciresi L.L.P., appearing today on behalf of the Committee to Support the Antitrust Laws ("COSAL"). In 1986, COSAL was established to support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. It is the only organization in Washington, D.C. that is dedicated to lobbying for strong antitrust laws and effective private enforcement.

COSAL is pleased that the Subcommittee is examining a particularly important aspect of the enforcement of the antitrust laws – protecting consumers from the serious financial harm caused by price-fixing cartels.

More than a century ago, Congress passed a landmark United States antitrust statute, the Sherman Antitrust Act of 1890. The legislative history of the Act demonstrates that its main objective is to protect consumers from cartels or monopolies which destroy competition, thereby raising prices.[1] In order to do so, the Sherman Act has two main provisions, Section 1, restricting the formation of cartels and prohibiting other collusive practices regarded as being in restraint of trade, and Section 2, prohibiting the creation of a monopoly and the abuse of monopoly power.

The antitrust laws are vital to the health of our economy because price-fixing directly harms small businesses and consumers. In recent years, a number of large-scale empirical studies have examined the impact of cartel activity on prices and determined that cartel overcharges substantially raise prices. Antitrust scholars John M. Connor and Robert H. Lande conducted a meta-analysis of 1,517 estimates of cartel overcharges (or undercharges) in over 200 publications

[1] *See* 21 CONG. REC. 2460 (1980) (statement of Sen. Sherman) (arguing that trusts' cost savings "goes to the pockets of the producer"); *id.* at 2457 (statement of Sen. Sherman) ("[Trusts tend to] advance the price to the consumer."); *id.* at 2558 (statement of Sen. Pugh) ("Trusts . . . [destroy] competition . . . and thereby increase prices to consumers . . . .").

that analyzed cartels operating in 381 markets.[2] The median average cartel overcharge for all types of cartels and time periods was 23.3%.

I am here today to make three recommendations for the enhanced enforcement of the United States antitrust laws. First, it would greatly benefit consumers bringing private follow-on antitrust actions if Congress were to give more direction on the timing of cooperation with civil litigants needed for cartel defendants to receive leniency under the Division's Corporate Leniency Program. Second, Congress should pass legislation approving a recovery mechanism for antitrust whistleblowers to complement the recently passed Criminal Antitrust Anti-Retaliation Act of 2013, which provides anti-retaliatory protections for such whistleblowers. Third, it is imperative that the government adequately fund the Department of Justice's Antitrust Division so that it may continue to aggressively prosecute cartel conduct.

As to the first point, for decades, the Division and private litigants have worked together to prevent anticompetitive conduct that harms consumers by bringing criminal and civil actions against members of price-fixing cartels. Private damages actions are the primary means by which consumers obtain restitution for the damages they suffer because of anticompetitive cartel activity and courts have noted that such actions are in fact the superior method for consumers to obtain restitution. [3] While the courts express a preference for civil litigants to seek restitution, attempts by private plaintiffs to do so are often thwarted by the current ambiguity in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), which does not define the type of timely cooperation that is needed by cartel defendants to qualify for corporate leniency.

Cartelists are incentivized to apply for leniency because, through ACPERA, they have the potential to significantly limit their liability in private damages actions. Specifically, ACPERA allows an amnesty applicant to limit its liability in follow-on civil actions to actual damages, but only if the applicant provides "satisfactory cooperation" to civil plaintiffs. [4] Unfortunately – even with the 2010 amendments – ACPERA only provides vague guidance on the timeliness of satisfactory cooperation. And as we near ACPERA's tenth anniversary, there is an absence of caselaw interpreting how timely an amnesty applicant's cooperation must be to be considered satisfactory under ACPERA. Amnesty applicants have at times taken advantage of this uncertainty to delay cooperating with plaintiffs in follow-on civil litigation until a point in time at which their cooperation is no longer helpful.[5] For the statute to provide meaningful assistance to private enforcement of the antitrust laws, we request that the statute be amended to require satisfactory cooperation at the earliest possible opportunity. More direction from Congress as to

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[2] John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 456-57 (2012).

[3] *See, e.g.*, Guilty Plea and Sentencing Hearing at 22:4-9, *United States v. TRW Deutschland Holding GMBH*, Case No. 2:12-cr-20491-GCS-PJK (E.D. Mich. Sept. 25, 2012) ("As it relates to the question of restitution, the Court is satisfied, given the considerable civil litigation that has already begun in relation to these violations and will likely continue, that the . . . civil forum is a better place to establish the amount of the recovery to be had by way of restitution . . .").

[4] ACPERA, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

[5] *See, e.g., In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWx), 2013 U.S. Dist. LEXIS 125287 (C.D. Cal. Aug. 26, 2013) (finding defendants not entitled to the damages-limiting benefits of ACPERA because they did not disclose all relevant information to civil class action plaintiffs in a timely fashion).

what constitutes timely cooperation would greatly assist private litigants who need this information in order to obtain appropriate restitution.

As to the second point - we commend the Senate for unanimously passing the Criminal Antitrust Anti-Retaliation Act, which extends whistleblower protection to employees who provide information to the Division related to criminal antitrust violations. However, we respectfully request that the Senate revisit its decision to omit the availability of a financial recovery to whistleblowers in antitrust actions. As you are undoubtedly aware, the current statute does not offer financial incentives to employees who report cartel activity. Although the Government Accountability Office ("GAO") recently examined this issue and declined to recommend the addition of a financial recovery to antitrust whistleblowers, many of its reasons for doing so would apply equally to all of our whistleblower statutes that include similar provisions. For example, the GAO was persuaded by the Division's concern that jurors in its criminal cases might question the credibility of a witness who stands to benefit financially from a successful enforcement action. However, the same concern would apply to other whistleblower statutes that in other areas of the law are already considered valuable tools in the government's efforts to uncover unlawful conduct. And contrary to the position of some critics, who argued a recovery mechanism could hinder government enforcement of the antitrust laws, a recovery mechanism is likely to complement, not hinder, the Division's Corporate Leniency Program. A rewards program would motivate employees to report illegal cartel conduct, and consequently, further incentivize companies to implement rigorous compliance programs to avoid being the subject of a whistleblower claim and related government enforcement proceeding.

Finally, we applaud the Division's continued and ongoing efforts to prevent and prosecute cartels that harm consumers through anticompetitive overcharges. Even during this recession, we've seen unprecedented cartel enforcement by the Division. This year has been a banner year for the Division, collecting for the US Treasury over $1 billion in criminal antitrust fines. For example, in the ongoing international auto parts investigation, described by the Division as the "largest criminal investigation [it] has ever pursued, both in terms of its scope and the potential volume of commerce affected," the Division has criminally charged twenty-one companies and twenty-one executives and levied over $1.6 billion in fines. And in the recent investigation into the liquid crystal display panel ("LCD") price-fixing cartel, the Division obtained convictions against ten companies and criminal fines totalling $1.39 billion.

The Division's efforts to detect and prosecute the cartels in the global automotive parts and LCD industries exemplify how vigorous enforcement of the antitrust laws protects consumers; for most Americans, cars, computers and televisions are essential purchases and necessities of everyday life. In these tough financial times, the Division needs more, not less funding, to support its efforts to protect consumers, who may already be struggling from antitrust violations and other financial constraints. Increased funding for the Division should garner bipartisan support not only because the Division's enforcement of the antitrust laws protects consumers from unlawfully inflated cartel prices, but because the investment pays for itself by allowing the Division to collect enhanced fines from price-fixers.

In conclusion, we believe implementation of these three recommendations could substantially increase the effectiveness of the current antitrust regime in protecting consumers from the

harmful effects of price-fixing. Clarification on the timeliness of an amnesty applicant's obligation to cooperate with civil plaintiffs in follow-on antitrust actions, a recovery mechanism for antitrust whistleblowers, and increased funding for the Department of Justice's Antitrust Division are all measures which will increase the government's and private plaintiffs' ability to detect, deter, and obtain restitution for, cartel activity.

Thank you again for the chance to appear before you today. COSAL welcomes your interest in these matters, and looks forward to working with members of the Subcommittee and others in Congress to address the issue of how to best enforce the United States antitrust laws to protect consumers from the substantial financial injury caused by price-fixing.