UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. BROWN UNIVERSITY IN PROVIDENCE IN THE STATE OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS; THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; CORNELL UNIVERSITY; THE TRUSTEES OF DARTMOUTH COLLEGE; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, MASSACHUSETTS; MASSACHUSETTS INSTITUTE OF TECHNOLOGY; THE TRUSTEES OF PRINCETON UNIVERSITY; THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA; and YALE UNIVERSITY, Defendants.	Civil Action No. 91-CV-3274 GOVERNMENT'S TRIAL BRIEF Dated: 6/22/92

GOVERNMENT'S TRIAL BRIEF

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In this case, the Government challenges MIT's agreements with its closest competitors on the price paid by students and their families for a college education. These agreements included a common needs analysis methodology, called the "Ivy Agreements," specific student-by-student agreements on the discounted price (the "family contribution") paid by thousands of students receiving financial aid and their families, and a prohibition on merit aid. This case is not about the wisdom of need-blind admissions or need-based aid policies, athletic scholarships, or the "accuracy" or "fairness" of MIT's need determinations; instead, this case is about the agreements among these prestigious, wealthy institutions that substantially eliminated price competition.

I. FACTUAL SUMMARY

The Ivy Overlap Group consisted of the eight Ivy League schools and MIT. MIT has been a member of the Ivy Overlap Group since 1958.

The Ivy Overlap Group usually met four times a year. At their Fall and Winter meetings, the Ivy Group members agreed on the Ivy Needs Analysis Agreements ("Ivy Agreements"), which were then used to determine eligibility for financial aid and the discounted price charged to families offered aid. This price is called the "family contribution," the amount that a family is expected to pay for one year's college expenses. This was done pursuant to the Ivy Manual which provided that:

> . . . Ivy Group financial aid directors shall meet as necessary to agree on the basic principles of a financial needs analysis system. In particular they shall agree on a common system for measuring parental ability to pay and also seek to reduce differences in the other elements of needs analysis. . . .

Most of the Ivy Agreements were not part of, or differed from, the Congressional and Uniform Methodologies. The three most significant Ivy Agreements that differed from Congressional Methodology were: (1) the agreement to seek a contribution from non-custodial parents when parents were divorced or separated; (2) the agreement to apportion parent contributions when two or more children attended college based on the colleges' relative costs; and (3) the agreement to re-define or identify income.

While MIT's internal needs analysis formula differed from the other Ivy Group members' in some respects, it did not cause MIT's family contributions to differ significantly from other Overlap members'. If the family contribution proposed by MIT for any particular student "disadvantaged" the other Ivy Group members, MIT agreed to "join" the other schools' determination at the Spring Overlap Meeting.

Each spring, the Ivy Group aid officers met to agree on hundreds of applicants' family contributions. The Ivy Manual stated that at the Spring Meeting, "family contributions shall be compared and adjusted if necessary so that, as a general rule, families will be asked to pay approximately the same

amount regardless of the Ivy Group institution they choose to attend."

At the meeting, family contribution differences under $500 were usually considered insignificant and were not discussed. Differences of $500 or more were compared and adjusted so that, as stated in the Ivy Manual, families were asked "to pay approximately the same amount regardless of the Ivy Group institution they [chose] to attend." In some cases, the family contribution agreement was preceded by a discussion of underlying family financial data. In other cases, the schools simply "met in the middle" to resolve their differences since this was in the "spirit" of Overlap. Agreements to disagree on family contributions were rare.

After the meeting, the Ivy Group made subsequent agreements on family contributions for applicants who had been wait-listed, whose applications were incomplete at the Spring Meeting, or who had appealed their family contribution determinations.[1]

The Ivy Overlap Group members also agreed to ban merit scholarships. Merit scholarships are based on attributes such as academic achievement, talent, leadership qualities, and

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[1] The Ivy League schools also agreed on the packaging of financial aid by matching self-help levels. Self-help is the part of the financial aid package consisting of loans and school-year employment opportunities.

exemplary participation in extracurricular activities. MIT agreed with the other Ivy Group schools to ban such aid, thus precluding price competition to students not applying for financial aid and students deemed not eligible for need-based aid. Most colleges offer merit scholarships.

Cheating on the Overlap agreements was rare. When it did occur, it provoked strong complaints. When Princeton offered $1,000 "research" grants without regard to need to its best admittees, the other schools complained vigorously that Princeton was offering merit aid.

In 1986, MIT and other Ivy Group officials tried to recruit Stanford into Overlap because they believed they were losing too many common candidates to Stanford due to lower family contributions offered by Stanford. Stanford declined the invitation because Overlap appeared to be prenotification price-fixing, according to the report authored by the MIT and Yale financial aid officers who approached Stanford.

In addition to the agreements on family contributions and the ban on merit scholarships, prospective fee exchanges were a regular part of the Overlap mechanics. At the winter meetings, the Ivy Group schools exchanged their prospective self-help and student budget (tuition, room and board) information. MIT collected this data for use in its deliberations leading to the setting of its self-help level, standard student budget, and tuition for the following year. The full list price set by the Ivy-MIT group were usually close enough to remove cost

differences as a basis for choice for families paying the full list price.

The adverse and anticompetitive effects of the Overlap agreements were significant. First, price competition was substantially curtailed. As a result of the Overlap agreements, students and their families were less able to consider price differences when choosing among the Overlap schools. Second, MIT's participation in the Ivy Overlap Group generally raised the price to attend MIT for students receiving financial aid. This is amply demonstrated by the facts, including statements made by MIT's own financial aid officers and by quantitative studies. Finally, Overlap had adverse effects on output. Because the Overlap family contribution agreements raised the price to attend MIT for students applying for financial aid and because the Overlap agreement to ban merit aid deprived students of the opportunity to obtain discounts from the Overlap schools, some highly qualified students, while admitted to one or more Overlap Group schools, chose to enroll at non-Overlap schools which offered competitive pricing. Other students chose not to apply at all. Moreover, because price competition was substantially eliminated among the members of the Ivy Overlap Group, the member schools were unable to compete for students with competitive discounts. These effects are discussed in greater detail, infra, at section IV., and will be explained in detail by the Government's expert economist, Dr. Leffler.

II. THE IVY-MIT OVERLAP GROUP WAS AN AGREEMENT OR CONSPIRACY UNDER THE SHERMAN ACT

For conduct to violate Section 1 of the Sherman Act, there must be an agreement or conspiracy between at least two entities. See Fisher v. City of Berkeley, 475 U.S. 260 (1986). This concerted action requirement is established by showing that the defendants shared a "unity of purpose or a common design and understanding, or a meeting of minds" to engage in the conduct prohibited by the Sherman Act. American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). See Englert v. City of McKeesport, 872 F.2d 1144, 1149-50 (3d Cir.), cert. denied, 493 U.S. 851 (1989); Link v. Mercedes-Benz of North America, 788 F.2d 918, 922 (3d Cir. 1986); Halebian v. Roppe Rubber Corporation, 718 F. Supp. 348, 356 (D.N.J. 1989).

In this case, the documents and testimony offered at trial will conclusively establish that MIT and the Ivy schools participated in an agreement that substantially eliminated price competition. The Ivy Manual explicitly stated that the purpose of the Spring Meeting was to make family contributions comparable in order to eliminate financial consideration as a basis for choice by applicants and their families. (Gov. Exh. 3, at X-30). Indeed, MIT's president, Paul Gray, confirmed that MIT agreed to compare and adjust family contributions. (Gray Dep. at 124-25). The Ivy Manual also states that MIT and the Ivy schools agreed to award financial aid solely on the basis of need, that is, to ban merit scholarships. MIT's

president also confirmed that agreement. (Id.; Gray Dep. at 118). Additionally, documents captioned "Ivy Needs Analysis Agreements" or "Ivy Agreements" on their face show that the Ivy-MIT Overlap Group agreed on a pricing formula to determine family contributions.

The documents and testimony in this case demonstrate that MIT and the Ivy institutions clearly shared a common design, the elimination of price competition. The concerted action requirement for a Section 1 violation has been met.

III. THE OVERLAP AGREEMENTS AND ACTIVITIES CONSTITUTE PRICE-FIXING -- A PER SE VIOLATION OF SECTION ONE.

The express purpose of the MIT-Ivy Overlap Agreements, including the needs analysis agreements and the Spring Meeting, was to eliminate price competition for students applying for financial aid. This, in fact, was the effect of Overlap. Agreements such as Overlap that tamper with prices are per se unlawful under Section 1 of the Sherman Act.

A. Price Fixing Is A Per Se Violation Of The Sherman Act.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), provides in relevant part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." While some forms of restraints are analyzed under a Rule of Reason, the Supreme Court has recognized that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively

presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958). Horizontal agreements fixing price fit into this category and have traditionally been subject to the per se rule. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); see Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

In Socony, the Supreme Court set down the clear and unambiguous rule that is still in full force today: price fixing is per se unreasonable under Section 1 of the Sherman Act:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . .
>
> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

Socony, 310 U.S. at 221, 223. See Cernuto, Inc. v. United Cabinet Corporation, 595 F.2d 164 (3d Cir. 1979); United States v. Gillen, 599 F.2d 541, 545 (3d Cir.) (price fixing is "probably the clearest violation of the antitrust laws and the one most obnoxious to the underlying policy of free

competition") (citations omitted), cert. denied, 444 U.S. 866 (1979).

Price-fixing agreements found to violate Section 1 are not limited to agreements directly setting the ultimate price. See National Electric Contractors Association, Inc. v. National Constructors Association, 678 F.2d 492, 500 (4th Cir. 1982) ("To be guilty of price fixing, the conspirators do not have to adopt a rigid price"), cert. dismissed, 463 U.S. 1233 (1983); United States v. North Dakota Hospital Association, 640 F. Supp. 1028, 1037 (D.N.D. 1986) ("A restraint may be classified as per se unlawful price fixing even though there was no direct agreement on the actual prices to be maintained").

A variety of agreements have been condemned by the courts. Agreements to set minimum prices or to use a minimum fee schedule violate Section 1. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). Agreements to set maximum prices or to use a maximum fee schedule violate Section 1. Maricopa, 457 U.S. at 332; Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). Agreements to ban competitive bidding violate Section 1. National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). Agreements that a published price list will be adhered to violate Section 1. United States v. Container Corp. of America, 393 U.S. 333 (1969). Agreements to limit production or supply are illegal

under Section 1. Socony, 310 U.S. at 221-23. In addition, agreements to ban or limit discounts violate Section 1. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980). This list is not exhaustive but it illustrates the wide variety of agreements that courts have condemned as per se illegal price-fixing restraints under Section 1.

The pre-eminence of price considerations in antitrust law cannot be over-stated: "Price is the 'central nervous system of the economy,' and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." Professional Engineers, 435 U.S. at 692. Thus, while over 50 years has passed since the Socony decision, the Supreme Court remains committed to the clear and definitive rule that price fixing agreements are per se unlawful. As the Court noted in Maricopa, "We have not wavered in our enforcement of the per se rule against price fixing." 457 U.S. at 347.[2]

The rationale for the per se rules rests in part on administrative convenience. See Jefferson Parish Hospital

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[2] The Supreme Court's continued commitment to the use of clear and definite per se rules is demonstrated by the fact that on four separate occasions since 1980, the Court has reversed a lower court that did not find various price-fixing agreements to be per se violations. See Palmer v. BRG of Georgia, Inc., ___ U.S. ___, 111 S. Ct. 401 (1990); FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990); Maricopa, 457 U.S. at 332; Catalano, 446 U.S. at 643. See also Calkins, The 1990-91 Supreme Court Term and Antitrust: Toward Greater Certainty, 60 Antitrust L.J. 603, 609 (1991) ("The Court continues to be impressed by the perceived greater certainty of per se rules.").

District No. 2 v. Hyde, 466 U.S. 2, 15-16 n.25 (1984); Maricopa, 457 U.S. at 350-51. More importantly, the Supreme Court has reiterated on numerous occasions that "[t]he per se rules also reflect a longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" Trial Lawyers, 493 U.S. at 433 (quoting Jefferson Parish, 466 U.S. at 16). In Trial Lawyers, the Court explained the dangers of price-fixing cartels:

> In sum, price-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. Moreover, toleration implies a burden of continuous supervision for which the courts consider themselves ill-suited. And even if power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened. The key points are the first two. Without them, there is no justification for categorical condemnation.

Trial Lawyers, 493 U.S. at 434 n.16 (quoting 7 P. Areeda, Antitrust Law ¶ 1509, at 412-13 (1986)).

B. The Overlap Members Violated The Sherman Act By Fixing Family Contributions And By Banning Merit Scholarships.

A school's tuition represents the list price of attendance. Financial aid awards are discounts from this stated list price. (Gov. Exhs. 178, 195). Thus, for students applying for financial aid, the actual or net price of the service offered is the family contribution as calculated by the

school. The Overlap schools fixed this net price by agreeing on the essential elements of a "needs analysis" formula used for determining an individual student's family contribution. The MIT-Ivy Overlap schools then met each year to compare and match specific family contributions for those students who had been admitted to more than one institution. The use of an agreed-upon formula in determining price is per se unlawful. See Socony, 310 U.S. at 222 ("prices are fixed . . . if by various formulae they are related to the market prices"); In Re Wheat Rail Freight Rate Antitrust Litigation, 579 F. Supp. 517, 538 (N.D. Ill. 1984) (agreement on how rates are to be calculated constitutes price fixing), aff'd, 759 F.2d 1305 (7th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); United States v. Columbia Pictures Indus., 507 F. Supp. 412, 426-27 (S.D.N.Y. 1980) ("use by competitors . . . of a formula to establish or stabilize prices is per se illegal"), aff'd, 7 Media L. Rep. (BNA) 1342 (2d Cir. 1981).

From another point of view, because the Overlap schools fixed the net price for students applying for financial aid, they effectively fixed the discount. The Supreme Court has held that agreements among competitors to eliminate discounts given to a group of buyers are per se unlawful. See Catalano, 446 U.S. at 643. In Catalano, the Court condemned an agreement among wholesalers to refrain from offering interest-free credit to retail purchasers. The Court held that the defendants' agreement was "tantamount to an agreement to eliminate

discounts, and thus falls squarely within the traditional per se rule against price fixing." Id. at 648.[3]

The Overlap agreements also adversely affected students who did not apply for financial aid on the basis of need. Here, the defendants' agreed-upon ban on merit scholarships removed any potential for discounts based upon academic achievement, or some other individual attribute, at any of the conspiring schools. Catalano and the line of cases discussed above make it clear that this agreed-upon ban on selective discounts violates Section One. In addition, the ban on merit scholarships served as a complete ban on competitive bidding, thus effectively eliminating price competition for these students. The Supreme Court has held that such bans on

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[3] See also United States v. Kahan & Lessin Co., 695 F.2d 1122, 1123-25 (9th Cir. 1982) (defendants' convictions for illegal price-fixing sustained where Government established agreement to eliminate price competition by not offering discounts at trade shows, by terminating rebates, and by limiting other discounts); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 185-86 (3d Cir. 1970) (defendants convicted for agreeing to limit maximum discounts), cert. denied, 401 U.S 948 (1971); Energex Lighting Industries, Inc. v. North American Philips Lighting Corporation, 765 F. Supp. 93, 106-07 (S.D.N.Y. 1991) (agreement between manufacturer and competitor that manufacturer would adhere to its published price list and would not increase its discount violated § 1); United States v. Stop & Shop Cos., 1985-2 Trade Cas. (CCH) ¶ 66,689 (D. Conn. 1984) (agreement to discontinue double couponing is a per se violation of § 1); Vandervelde v. Put & Call Brokers & Dealers Association, 344 F. Supp. 118, 139 (S.D.N.Y. 1972) (association rule requiring members to grant discounts to members is per se illegal).

competitive bidding violate Section One. Professional Engineers, 435 U.S. at 679.

Given that MIT and the Ivy League institutions have engaged in a per se unlawful price-fix, the Government need not establish the defendants' unlawful intent or purpose. "[T]he mere existence of a price-fixing agreement establishes a defendant's illegal purpose." Gillen, 599 F.2d at 545. "'The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.'" Id. (quoting United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927)). In this case, however, the Government is not relying solely on what has been clear to the courts for over 60 years. Indeed, MIT and the Ivy schools themselves have stated their purpose: "to neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for non-financial reasons." (Gov. Exh. 3, at X-30).

C. Judicial Inexperience In A Particular Industry Does Not Preclude Application Of The Per Se Rule.

The critical issue in applying the per se rule is whether the court has had experience with the type of restraint in question, not whether it has had experience in a particular industry. In Maricopa, the Supreme Court had little difficulty in applying the per se rule against price fixing in the health care field, despite any alleged inexperience in the field. It distinguished between judicial inexperience with a particular type of restraint (where departure from the per se rule is

justified) versus a particular industry (where it is not). 457 U.S. at 349 n.19. The Court stated that it has been undisputed since Socony that "'the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.'" 457 U.S. at 349 (quoting Socony, 310 U.S. at 222). "[T]he argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for the per se rules." Id. at 351.[4]

In the present case, the terminology used in the higher education industry readily and accurately translates into standard economic terms. "Tuition, Room and Board" and other compulsory charges comprise the list price of college attendance; "financial aid" and "merit scholarships" are selective discounts offered to some students. The "family contribution" is the net price for college attendance, that is, the list price minus the discount. By agreeing to fix family contributions and to ban merit scholarships, MIT and the Ivy League institutions have engaged in a trade practice that the

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[4] See NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 100 n.21 (1984) (The Court noted that its decision not to apply the per se rule was not based on a lack of judicial experience: "While judicial inexperience with a particular arrangement counsels against extending the reach of per se rules, . . . the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the per se rules without inquiry into the special characteristics of a particular industry.").

courts have experience with and have prohibited time and time again - price fixing.

IV. THE OVERLAP AGREEMENTS AND ACTIVITIES CAUSED HARMFUL AND ANTICOMPETITIVE EFFECTS -- VIOLATING THE RULE OF REASON

The general contours of the Rule of Reason analysis were first articulated by Justice Brandeis in Chicago Board of Trade v. United States, 246 U.S. 231 (1918):

> The true test of legality is whether the restraint 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. See also Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977) (under the Rule of Reason "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").

In Professional Engineers, however, the Court emphasized that the Rule of Reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." 435 U.S. at 688. The basic inquiry is limited to whether the restraint in question "is one that promotes competition or one that suppresses competition." Id. at 691. Thus, because the inquiry is limited to determining the "market impact" on competition,

defenses "based on the assumption that competition itself is unreasonable" or upon considerations unrelated to the effect of the restraint on competition are irrelevant. Id. at 696.

A. The Supreme Court Has Applied A Truncated Rule Of Reason To Highly Suspect Restraints.

Courts applying the Rule of Reason have usually analyzed the market impact of an alleged illegal restraint, requiring plaintiffs to prove that the restraint produced adverse, anticompetitive effects in a relevant market. See, e.g., Arnold Pontiac-GMC, Inc. v. General Motors, Inc., 786 F.2d 564 (3d Cir. 1986). In its landmark NCAA decision, however, the Supreme Court stated that the competitive evaluation of a challenged arrangement could be based either on actual market analysis or, in appropriate cases, on presumptions drawn from the nature or character of the arrangement or from surrounding circumstances. 468 U.S. at 103, 111. Thus, for certain inherently suspect restraints, the Rule of Reason analysis may be truncated.

In analyzing the NCAA's television rights plan, the Court first analyzed the nature of the restraint in question, noting its qualitative seriousness: "price-fixing and output limitations are ordinarily condemned as a matter of law under an 'illegal per se' approach." 468 U.S. at 100. Second, the court took what has been called a "quick look" at potentially legitimate objectives and decided that it would be inappropriate to apply the per se rules because the case

involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all." Id. at 100-01. Third, the Court analyzed the effects of the restraint, noting that prices were higher and output had decreased. Fourth, while the Court found that the NCAA's complete control over broadcasts demonstrated market power, the court also held that proof of market power was not required where there was a naked restriction on price or output. Id. at 109-10. "[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" Id. at 109 (quoting Professional Engineers, 435 U.S. at 692). Finally, the Court rejected the justifications offered by the NCAA, including the argument that the plan created a marketable product. Here, the court held that the restraint simply was not necessary for the objectives offered or, at a minimum, there were less restrictive alternatives. Id. at 113-14.

Similarly, in FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), the Court applied a truncated analysis in finding that the defendant dentists' collective refusal to provide x-rays to third-party payers violated Section One. Specifically, the unanimous Court stated:

> Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire--the forwarding of

> x-rays to insurance companies along with claim forms. "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

Id. at 459 (quoting Professional Engineers, 435 U.S. at 692).

The focus of the inquiry is always the impact on competition. As Judge Posner wrote "if the elimination is apparent on a quick look, without undertaking the kind of searching inquiry that would make the case a Rule of Reason case in fact if not in name, the practice is illegal per se." General Leaseways, Inc. v. National Truck Leasing Association, 744 F.2d 588, 595 (7th Cir. 1984).

In the present case, the defendants have engaged in a highly suspect restraint on price. Indeed, as the preceeding section demonstrates, the defendants' use of an agreed-upon formula, their student-by-student agreements on family contributions and their complete ban on merit scholarships come well within the per se rule. The Government will, however, offer substantial evidence on the adverse and anticompetitive effects of Overlap in the relevant market. Moreover, a "quick" (or detailed) look at MIT's purported justifications will demonstrate that they are irrelevant and unpersuasive.

B. MIT, The Ivy League Institutions And Stanford Constitute The Relevant Market.

In the present case, the defendants entered into a structured price-fixing agreement with the express purpose of eliminating price competition. Recognizing that no elaborate industry analysis is required to demonstrate the

anticompetitive character of such an agreement, see NCAA, 468 U.S. at 109, and that the focus of this case, brought under Section One of the Sherman Act, is on the conduct of the parties rather than the structure of the market,[5] the Government will show that the competitive conditions within a relevant market were adversely affected by the Overlap agreements. The facts of this case demonstrate that MIT, the Ivy institutions and Stanford constitute a relevant market, in which the Overlap members have substantially curtailed competition.

The relevant product market is defined as 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); Tunis Brothers Company, Inc. v. Ford Motor Company, 952 F.2d 715, 722 (3d Cir. 1991). See also Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc., 516 F.2d 1092, 1094-95 (7th Cir.), cert. denied, 423 U.S. 986 (1975). If similar products or services can be substituted for the product in question, then

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[5] The Third Circuit has recognized that the function of the relevant market inquiries under §§ 1 and 2 are not identical: "The § 2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. § 1, in contrast, is concerned with patterns of competition as a means of judging whether a restraint of trade is unreasonable." Columbia Metal Culvert Company v. Kaiser Aluminum & Chemical Corporation, 579 F.2d 20, 27 n.11 (3d Cir.), cert. denied, 439 U.S. 876 (1978).

the products are in the same relevant market. See Tunis, 952 F.2d at 722; SmithKline Corporation v. Eli Lilly and Company, 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838 (1978). The essential goal is to find the producers which constrain the price-increasing ability of the producer(s) in question, together they comprise the relevant market. See P. Areeda & H. Hovenkamp, Antitrust Law ¶ 518.1b, at 492 (Supp. 1991).

The court may consider a number of factors including the price, use and qualities of the services in question. Du Pont, 351 U.S. at 404; Tunis, 952 F.2d at 722. In addition, the Supreme Court has held that well-defined submarkets may exist, whose boundaries are determined by practical factors such as industry or public recognition, the product's peculiar characteristics and uses, and distinct customers and prices. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); Tunis, 952 F.2d at 723; Miller v. Indiana Hospital, 1992-1 Trade Cas. (CCH) ¶ 69,797 (W.D. Pa. 1992). Such a submarket constitutes the relevant market for antitrust purposes. See Brown Shoe, 370 U.S. at 325.[6]

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[6] The "submarket" terminology has added some confusion to antitrust analysis. As Judge Bork has stated, however, "submarket indicia" are best viewed as "proxies for cross-elasticities [of supply and demand], and thus the identification of a submarket is in principle no different than the identification of a relevant market." Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). See P. Areeda & H. Hovenkamp, Antitrust Law ¶ 518.1b, at 495 (Supp. 1991).

In the present case, the Court should consider practical indicators such as student-consumer choices and the prices and price-setting activities of the relevant institutions to determine the relevant market. First, to identify its principal competitors, MIT has regularly conducted Cancellation (or Reply) Studies based on information provided by admitted students. Each of these studies, in a section entitled "The Competition," analyzes MIT's yield (that is, the percentage of admitted students who ultimately enrolled at MIT) against schools with the highest number of cross-admitted students. These studies show that MIT's primary competitors are the other Ivy Overlap schools and Stanford. For example, a recent study shows that a very large percentage (roughly 82%) of the students admitted to MIT ultimately enrolled at MIT, an Ivy institution or Stanford. The percentage was even higher (roughly 88%) for those students deemed "highest achievers" by MIT. Thus, student-consumers admitted to MIT viewed the Ivy institutions and Stanford as their primary alternative options.

Second, as did the students enrolling at the Overlap institutions, MIT and the other Overlap members clearly saw themselves as each others' primary competition. In addition to regular exchanges in other forums, such as the Council of Ivy Presidents, tuition and other budget information exchanges were a regular part of the Ivy Overlap Group's mechanics. At the annual Winter meeting, MIT and the Ivy League schools exchanged tuition, room and board, and other fee information for the

upcoming academic year. See infra 30 to 33. In addition, James Culliton, MIT's vice president for financial operations, also participated in analyzing fee information from MIT's "principal competitors." In January 1987, Culliton prepared a memorandum regarding "Self-Help Levels at MIT's Principal Competition." Culliton stated that "MIT's principal competitors at the freshman level are CalTech, Harvard, Princeton, Stanford and Yale. No other school attracts away a significant number of our admitted class. (And CalTech's success is declining steadily -- it is probably no longer accurate to include them)." (Gov. Exh. 26).[7]

Finally, the Overlap agreements themselves show that MIT and the Ivy League institutions formed a market. As Judge Bork has recognized, "[v]ery few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market." R. Bork, The Antitrust Paradox 269 (1978) (emphasis added).[8] This is certainly the case for an

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[7] In February 1987, Culliton circulated a table of "Tuition and Self-Help Levels at MIT and Comparable Universities," including tuition and self-help figures from Brown, CalTech., Columbia, Cornell, Dartmouth, Harvard, Penn, Princeton, Stanford, Yale and MIT. (Gov. Exh. 27).

[8] "Market power is the ability to raise prices above those that would be charged in a competitive market." NCAA, 468 U.S. at 109 n.38 (citing Jefferson Parish Hospital Dist. No. 2 v Hyde, 466 U.S. at 27 n.46).

agreement that has lasted for more than a quarter of a century. The only serious competitive threat to the Overlap institutions was Stanford, and the Overlap members tried to recruit Stanford into Overlap, but Stanford declined.

Together, the practical indicators discussed above demonstrate that MIT, Stanford and the Ivy institutions constitute a relevant market for purposes of Section One of the Sherman Act. Moreover, the fact that the yields at the Overlap schools remained very high despite the fact that the Overlap members consistently raised tuition prices at a rate well above the rate of inflation, that the Overlap agreements raised on average the family contributions of enrolling students, and that many students who enrolled at the Overlap group schools may have been eligible for merit scholarships at non-Overlap institutions, demonstrates the market power of the Ivy Overlap Group.

C. The Purpose Of Overlap Was Plainly Anticompetitive.

While not determinative, the anticompetitive purpose of an activity "may help the court to interpret facts and to predict consequences." Chicago Board of Trade, 246 U.S. 231, 239 (1918). The anticompetitive purpose of Overlap is demonstrated by the express language in the Ivy Manual, by the Overlap members' failed attempt to recruit Stanford, their only significant competitor, and by their reaction to criticism of Overlap.

First, the express purpose of Overlap was to eliminate price competition. Each spring, the Ivy Overlap Group financial aid officers met in the Wellesley area to fix hundreds of applicants' family contributions -- the price each would pay to attend college. The purpose of the Spring Meeting agreements was to eliminate financial considerations as a basis for choice, a purpose clearly stated in the Manual of the Council of Ivy Group Presidents:

> Moreover, in order to insure that financial awards to commonly admitted candidates are reasonably comparable, all Ivy Group institutions will share financial information concerning admitted candidates in an annual "Ivy Overlap" meeting just prior to the mid-April common notification date. The purpose of the overlap agreement is to neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for non-financial reasons.
>
> a. Family contributions shall be compared and adjusted if necessary so that, as a general rule, families will be asked to pay approximately the same amount regardless of the Ivy Group institution they choose to attend.

(Gov. Exh. 3, at X-30).

MIT Aid Director Len Gallagher admitted that the Ivy Manual describes what happened at the Spring Meeting. (Gallagher Dep. at 96). Similarly, MIT President Gray testified that a purpose of the Spring Meeting was to reach comparable family contributions for common aid applicants. (Gray Dep. at 145).

Another Ivy Overlap member stated that the "main purpose" of the Spring Overlap Meeting was to agree on family contributions:

> Yale participates in the Ivy Overlap meeting where the Ivy (and MIT) financial aid officers share information about commonly admitted aid applicants. The main purpose of the meeting is to agree on the family contributions for those students and, to the extent that each school's budget and policy permit, to agree on their self-help levels. Thus, self-help levels may be reduced at Overlap to assure that Yale's aid package is competitive with the packages of other schools that admitted the student. The result for a student admitted to more than one of the participating schools is that the cost to the family is essentially the same at each school. The student's decision can then be based on factors other than cost, consistent with the principle adopted by the Council of Ivy Group Presidents in 1979.

(Gov. Exh. 208) (emphasis added).

Second, the Overlap members' anticompetitive purpose was demonstrated by their attempt to recruit Stanford. By 1986, the Ivy Group members were aware that they were losing more cross-admits to Stanford than to any other non-Overlap school. Thus, the Ivy Overlap Group attempted to recruit Stanford to join. In August, 1986, an Ivy Group committee comprised of MIT's Sam Jones, Yale's "Skip" Routh, and Cornell's Don Saleh began planning a September visit to California to meet with Stanford Aid Director Bob Huff, Dean of Admissions Jean Fetter, and Associate Provost Tim Warner. The goals of the visit, wrote Jones, included "need analysis convergence" and "comparing awards prior to and as a condition for more or less similar offers." (Gov. Exh. 200). Jones followed up stating

that: "We want them to get enough on our wavelength in need analysis to look like one of the Ivies, meaning not off the reservation too often, for one." (Id.). This meant having Stanford "agree on enough points of policy" that the resulting family contributions "would converge." (Jones Dep. at 2:56). The group's second objective was for Stanford to "exchange information, at least after the fact but preferably before" with "the compare modality" as a goal, a reference to the Spring Overlap meeting. (Gov. Exh. 200).

Later, Jones warned that Harvard's dean of admissions and financial aid, Bill Fitzsimmons, and its provost, Michael Spence, reported that:

> the legal implications of overlap continue to bother Stanford (not just Huff and Fetter), and that probably a Stanford overlap is not going to happen soon. He suggests that we concentrate on exchange of information, and charm the hell out of everybody. He agrees with me however that there are back channels and informal ways to handle rough differences. If we can get a clear picture from Huff as to how he deals with various kinds of cases, and maybe bring him into line (broadly speaking), so that we can have some confidence that statistically Stanford will look more or less like the rest of us in terms of deriving FC's, we will have done a good day's work.

(Gov. Exh. 78) (emphasis added).

On September 25 and 26, Routh and Jones met with the Stanford officials. On October 1, a disappointed Jones wrote Routh about the failure to reach an agreement with Stanford: "Your eyes only . . . I believe not a lot came of our visit in any material sense." (Gov. Exh. 80). On October 2, more hopefully, Jones wrote again, "Do you agree that the rock we

are building on is Stanford's concern for the fraction of its admits which go to us?" (Id.). Routh responded:

> As for the Stanford rock, I suppose you could be right (I try not to be cynical) but, ironically, if they go along with us on div/sep, we would presumably end up with a larger share of those students. Indeed, except for the fact that they are spending so much on div/sep (and, maybe, a sense of fair play), I don't see that Stanford gains anything (except dignity) by cooperating with the Ivy Group. Maybe that's why I'm inclined to settle for half a loaf.//Skip.

(Id.)

Two weeks later, Jones sent Routh the draft report of their visit, noting:

> As you will see, I have included a final, subtle (I suppose) warning that we must come out of this with some assurance that Stanford is on a common mogical [methodological] wavelength, elsperhaps [sic] conclude that they are taking advantage of us via financial means. Privately I will say to you that Harvard, as I read Fitz, won't take a whole lot of that.

(Gov. Exh. 81).

Asked what this meant, Jones testified that he and Routh wanted Stanford's assurances that: "they were doing things pretty much as we were doing them with the two exceptions that I have alluded to." (Jones Dep. at 3:45).[9]

After Jones and Routh sent Huff the draft report on October 20, Huff replied that Stanford wanted to remove all

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[9] These two exceptions were Stanford's treatment of divorced/separated parents and multiple siblings in college, where Stanford applied the Uniform Methodology - the Congressional Methodology's predecessor - instead of the harsher methodology of the Ivy Agreements.

references to a "common" agreement from it. After receiving comments from Jones, Routh responded: "Sam, I share your concern. . . . I guess they are just too paranoid of the subject of collusion.... they are clearly getting more than their market share of div/sep (and possibly multiple sibs) by virtue of the systemmatic differences in our procedures." (Gov. Exh. 83).

The report on the Ivy/MIT-Stanford meeting that Jones and Routh submitted at the October 26, 1986 Ivy Overlap meeting concluded:

> 8) Stanford, and particularly the Provost (James Rosse, an economist who specializes in anti-trust matters), continues to be troubled by the possible analogy of Overlap (pre-notification price-fixing, as it were), and restraint of trade. Accordingly, and despite our arguments to the contrary, we doubt very much that Stanford would entertain an invitation from the Ivy Group in the near term for anything like full-scale "Overlap." Nevertheless, we believe that post-notification comparison, combined with joint technical discussions, will serve to reduce the concern that the Ivy Group may be losing common candidates to Stanford because of methodological differences in need analysis and packaging policies.
>
> 9) On the other hand, it is well to keep in mind that, without that assurance and given Stanford's significant portion of the common pool, serious perturbations and consequent disequilibrium are clearly a potential.

(Gov. Exh. 134) (emphasis added).[10]

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[10] Jones' earlier draft of ¶8 referred to "common methodological understandings" rather than "joint technical discussions." (Gov. Exh. 150).

MIT has argued that the purpose of Overlap was to enable the members' financial aid officers to share information, wisdom and experience in an effort to more accurately determine "need." While this argument must be rejected on numerous grounds, the Overlap members' attempted recruitment of Stanford clearly demonstrates that their intent was anticompetitive. Did the Stanford financial aid office have some information or experience which MIT and the Ivy League institutions lacked? The answer is clearly "no." Stanford was a strong competitor that applied its own financial aid policies which were on average more generous. The Overlap institutions were losing commonly-admitted students to Stanford and they sought to bring Stanford into line. Stanford, however, would not agree.

Finally, in addition to demonstrating the relevant market, see supra at 22 to 23, the prospective fee exchanges among the members of the Ivy Overlap Group also show their purpose to eliminate price competition. At the Overlap Group's annual Winter meeting, MIT and the Ivy League schools exchanged tuition, room and board, and other fee information for the upcoming academic year. (See, e.g., Gov. Exh. 40 [1982]; Gov. Exh. 99 [1985]; Gov. Exh. 133 [1986]; Gov. Exhs. 97, 98, 115 [1987]).

MIT was a major participant in the fee exchange process. MIT's Gallagher had been participating in the January round-robins since the late 1960's. (Gallagher Dep. at 2:20-21). He collected the information to forward it to his

supervisor for use in the annual discussions leading to the setting of MIT's self-help level, standard student budgets, and tuition for the following year. (Gallagher Dep. at 2:24-27). In the late 1980s, MIT's president had decided that MIT's self-help should be closer to that of Harvard, Yale, Princeton, and Stanford, MIT's "principal competition." (Gallagher Dep. at 2:43-46). The prospective information obtained by Gallagher was forwarded to MIT's president and Executive Committee, who set MIT's self-help and tuition, room and board charges, and showed how close MIT was to competing schools. (Gallagher Dep. at 2:40-51; Gov. Exhs. 42, 43).

The exchanges were curtailed in 1987 after Yale became concerned about the antitrust ramifications. Despite Yale's reluctance, however, a February 1988 Bitnet message from MIT's Len Gallagher to the financial aid directors at Harvard, Cornell, Penn, Brown demonstrates that MIT remained interested in the fee exchanges:

> At Bradley Field [Hartford's Airport], we did a round-robin on self-help; but the reluctance of Columbia, Stanford and Yale to share in tuition & budget estimates seemed to put the kibosh on any systematic discussion.
>
> Are any of you able to give estimates, or actuals, for that matter, for:
>
> a. Tuition and required fees
> b. Tuition, fees, room and board (excluding books & personal)
> c. Total budget
>
> * * *
>
> I can use these any time, but they would be most helpful if you could respond By 4:00 pm ON MONDAY FEB 8th.

> MIT is considering tuition rising from $12,500 by $800-1000; R&B up $150; total budget up 5.5-7.5%. My hope for holding our self-help under $5000 is waning.

(Gov. Exh. 41).

Paul Gray, MIT's president, also participated in "round-robin" exchanges with the presidents of the Ivy League universities in which he disclosed MIT's prospective self-help and exchanged prospective tuition and room and board increases. (Gray Dep. at 2:114-19; Gov. Exhs. 53, 54, 55). A memorandum discussing the Ivy League Presidents meeting held on December 9, 1981 states:

> - Tuition Increases plus Room and Board:
>
> Based on a "round robin" expression by the Presidents:

Princeton	14-15%	Brown	11-13%
Yale	13-14%	Columbia	13-14%
Harvard	12-13%	MIT	14+%
Penn	10-11%	Dartmouth	12-13%

(Gov. Exhs. 53). Similarly, at the Presidents meeting of December 7, 1983, MIT's Gray noted the expected percentage increases in tuition at Brown, Princeton, Yale, Harvard, Dartmouth, Penn, Cornell, and MIT, while expressing concern that the proposed supra-inflationary increases by the Ivy-MIT group "will bring public criticism." (Gov. Exh. 55).[11]

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[11] Gray noted some concerns that were expressed about the 7+ percent increases that most of the schools were suggesting: "1) Are we pricing ourselves out of the market? 2) Increase at 7-8% level will bring public criticism." (Gov. Exh. 55). The concern was that the proposed increases in tuition by MIT and the Ivy League schools were at least two times the 1983 inflation rate of 3.2%. (Gray Dep. at 2:124-26). Indeed, the increases throughout the 1980's outstripped inflation. (Gray Dep. at 2:182).

In addition, as did MIT's President Gray, former Princeton President William Bowen participated in numerous meetings of the Ivy League presidents where prospective tuition and student budget figures were exchanged. While recommending large increases in tuition charges during the 1980's, Dr. Bowen saw the need to keep tuition fees within the range of Princeton's closest competitors.[12] The prospective fee exchanges show the Overlap Group's purpose to eliminate price competition. Moreover, the large tuition increases throughout the 1980's that exceeded the inflation rate and the growth of disposable family income refute MIT's characterization of its pricing policies as "charity."[13]

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[12] See, e.g., Gov. Exh. 11, at 2 (Recommendation: "An increase in total student charges of $938 (5.9%) . . . this increase will bring total student charges to $16,918 for 1987-88. . . . [W]e believe that this increase will leave our relative position vis-a-vis other major universities very much as it has been, with Princeton's charges close to the middle of the range for the Ivy Group."). See also Gov. Exh. 22 (Table: "Princeton Charges vs Those of Major Competitors").

[13] MIT's announced basic Tuition, Room and Board charges for 1992-93 are $23,565.

D. Overlap Produced Adverse, Anticompetitive Effects.

1. Price Competition Was Substantially Eliminated -- Consumer Choice Was Curtailed.

The Overlap agreements substantially eliminated price competition between member institutions. While MIT admits that the determination of "need" is an "imprecise and subjective endeavor," see MIT's Brief in Opposition to the Government's Motion for Summary Judgment, at 35, it is clear that the Ivy Needs Analysis Agreements produced more uniform family contributions than if each member of the Ivy Overlap Group had independently determined its own needs analysis. Indeed, MIT's financial aid director testified that there was frequently no "discrepancy" between MIT's family contribution at the Spring Overlap Meeting and another Overlap school's family contribution because "generally we are following a similar methodology." (Gallagher Dep. at 2:145-46; Gov. Exh. 47, at 11499).

This elimination of price competition meant that many families were unable to consider price in deciding where to enroll. This elimination of choice was made especially apparent by the Spring meeting. The MIT/Harvard "Bilaterial Roster," for example, shows how student-by-student agreements were reached at the Spring meeting. The seventh student listed on page 376 had two offers before the Spring meeting: MIT admitted the student and required a family contribution of $4,580; Harvard admitted the student and required a family

contribution of $10,700. (Gov. Exh. 233, at 376). At the Spring meeting, however, both schools agreed to require a family contribution of $9,530. Thus, a choice was eliminated. Before the meeting the student could have considered price and may have opted for the best offer, MIT at $4,580. After the meeting, price considerations were not available -- the net price at either school would be $9,530.

2. Family Contributions Were Increased.

The Overlap agreements and activities had the effect of increasing on average family contributions. This is shown by the Ivy Needs Analysis agreements themselves, by contemporaneous statements made by MIT and Ivy financial aid officials, and by a number of quantitative studies.

First, the plain import of each of the Ivy Agreements is to increase the family income or assets that can be considered in determining the family contribution. The Ivy Overlap Agreements that produce the biggest differences from the Congressional Methodology - divorced/separated parents, multiple siblings in college, and the disallowing of certain losses - nearly always raise the family contribution determination. William Bowen, Princeton's former president, expected that the different elements of the Ivy Group needs analysis policy would result in a higher family contribution than the College Scholarship Service's determination, using the Congressional Methodology. (Bowen Dep. at 180-82).

Second, the increased family contributions are evidenced by contemporaneous statements. MIT's associate director of financial aid estimated that MIT saved $2,000 per needy applicant in 1985 by applying its "more sophisticated approach" instead of the Uniform Methodology applied by the College Scholarship Service. (Gov. Exh. 74, at 101582). In addition, Harvard's associate director of financial aid indicated that while Harvard's involvement in Overlap saved $250,000, it hurt Harvard's yield against non-Overlap schools:

> Continue with Overlap but "agree to disagree" more often: The Ivy group could still meet several times a year to discuss and agree on aid policies as much as possible, but decide that schools would not change their in-house policies for specific cases merely to match another school's award. For example, if Harvard felt strongly that asking for a parent contribution of more than 20% of a family's income was too tough, we could go ahead and offer a better aid award. Other schools in the group could decide to match or not. As a result of this plan we might have a slightly better yield against the Ivy group (except maybe Princeton which is the only school consistently softer in need analysis than we are), and should have a slightly better yield against the private/ state schools and maybe even against Stanford. A brief study of 10% of the entering freshman class financial aid awards would indicate that it would cost us about $250,000 for the freshman class to do need analysis the way we would really like to.

(Gov. Exh. 136, at 1187).

Similarly, Yale's university director of financial aid, in explaining why "savings" in the financial aid budget had been achieved in 1982-83, stated that:

> . . . as we continue to dig deeper for non-taxable income and to deviate from the so-called Uniform Methodology of need analysis (in concert with the Ivy Group) in such areas as divorced and separated parents, IRA/Keogh funds and the treatment of siblings in less expensive colleges,

> we are generating larger parental contributions than in previous years.

(Gov. Exh. 206).

Third, the increased family contributions due to Overlap are demonstrated by a number of quantitative studies. In 1987, MIT compared its calculation of expected parental contributions for needy minorities and needy non-minorities with College Scholarship Services' determination of parental contributions using the Uniform Methodology. (Gov. Exh. 158, at 100095). For needy minorities that enrolled at MIT, parental contributions were, on average, $946 higher as determined by MIT than under the Uniform Methodology. For needy minorities that were admitted to MIT that decided to attend another school, MIT's parental contributions were, on average, $1,549 higher. The results for needy non-minorities were similar: MIT's parental contributions averaged $1,200-1,300 higher than College Scholarship Services' determination applying the Uniform Methodology (Id.).

The increased family contributions are also demonstrated by contemporaneous studies done between Stanford and four Overlap members, MIT, Harvard, Princeton and Yale. Stanford University had refused to participate in the Ivy Needs Analysis Agreements and the differences between Stanford's needs analysis methodology and MIT's caused significantly disparate family contributions. (Gallagher Dep. at 3:24). MIT participated in post-award studies of financial aid decisions

MIT and Stanford made for common admits. (Gallagher Dep. at 3:23). Of the aid applicants who were admitted to MIT and Stanford in 1988, 33 chose to enroll at MIT while 66 chose to enroll at Stanford. (Gov. Exh. 48b [Table C]). For the 33 students who enrolled at MIT, the mean MIT family contribution was $713 higher than Stanford's. For the 66 students who chose to enroll at Stanford, the difference was even more significant -- the mean MIT family contribution was $3,423 higher than Stanford's. (Id. [Table E]) (See Gov. Exh. 226).[14] The results for the Stanford comparison with Harvard, Princeton and Yale were similar, Stanford's average family contribution was significantly less. (Gov. Exhs. 188, 189, 190) (See Gov. Exh. 227).

The higher family contributions generated by Overlap are also demonstrated by studies performed during this litigation. In response to an interrogatory request from the Government asking for family contribution figures for students applying for financial aid in 1987 and 1988, MIT provided a table including the family contribution as determined under the Congressional Methodology by the College Scholarship Service

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[14] The study for 1988 cross-admits had "richer data" in that it compared the entire cross-admit pool and also compared family contributions, not just parental contributions. (Gov. Exh. 48b [cover page]). Stanford, which conducted the study, believed it provided a more complete basis for analysis for understanding the study's results than did a briefer study for the preceding year. (Id.).

(CSS) and the family contribution as calculated by MIT under its version of the Ivy needs analysis. An analysis of this data shows that MIT's average family contribution was $609 higher than the average CSS family contribution in 1988 and $1,361 higher in 1987. (Gov. Exh. 225).[15]

Finally, the agreements reached at the Spring meeting also show that family contributions were increased. According to an MIT study of agreements reached at the 1988 Spring Meeting, the aggregated family contributions of admitted applicants to MIT slightly increased. MIT's study concluded that because of changes agreed to at the Overlap meeting, aggregated family contributions of MIT's admitted applicants increased by $13,000 and MIT's grants to admitted applicants decreased by $52,000. (Hudson Dep. at 2:134, 140-41, 148; Gov. Exh. 68).[16]

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[15] The data supplied for 1988 was for students who enrolled at MIT while the 1987 data was for students who were admitted to MIT but enrolled elsewhere. MIT claimed that it could not provide the Government with a complete set of data for either year. Nor would MIT provide the Government with a complete set of underlying documents so that the Government could verify the data supplied. While the 1988 results show a significant increase, it is highly likely that the number is artificially low and would be higher had the data included all admitted aid applicants, not just those that chose to enroll at MIT.

[16] MIT claimed just the opposite, according to an article published by its news office. After the United States sued MIT, Stan Hudson, MIT's associate director of financial aid represented in the Tech Talk that as a result of the Overlap Spring Meeting, MIT's financial aid increased. (Gov. Exh. 72). However, the basis of Hudson's statement was the study at Gov. Exh. 68 which shows the opposite, that aid decreased. (Hudson Dep. at 2:186-88).

The documents discussed above are not all-inclusive. The Government will offer these documents and additional evidence, including expert economic testimony, at trial to demonstrate the adverse effects of Overlap. Given the overwhelming evidence that Overlap increased family contributions, MIT admits that some students paid more. MIT attempts to argue that the additional money was redistributed to more needy students. The evidence, however, does not support MIT's argument. The evidence shows that family contributions <u>on average</u> increased and that needy minorities were affected by increased family contributions as well.[17] Thus, MIT's argument that Overlap merely involved a consumer-to-consumer wealth transfer is simply not supported by the facts. The evidence shows that the producers -- that is, the Overlap institutions -- clearly benefitted financially to the detriment of their student-consumers.

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[17] The evidence shows that the increased family contributions due to the Overlap agreements drove away minorities and low-income students:

> The difficulty [with declining minority yields] seems to be with financial aid packages, as many students in the lower- and middle-income brackets are choosing colleges which offer more generous financial aid packages and/or lower tuition . . . many colleges outside the Ivy League may determine financial need differently, often to the student's benefit, and many also offer athletic and merit scholarships.

(Gov. Exh. 107, at 339).

That the Overlap institutions benefitted economically from Overlap is further established by an analysis of average net revenues per student. For the five most recent years where sufficient data is available, the analysis shows that the average net revenue per student at MIT and the Ivy League schools is at least $1,300 larger than that of comparable institutions. (Gov. Exh. 231).

3. As a Result of Overlap, Output Has Been Adversely Effected.

In the present case, output effects will be demonstrated by analysis of the student-consumers. As well as being purchasers of the services offered by the defendants in this case, the student-consumers are also viewed as a valuable inputs. Colleges care intensely about who "consumes" their product because the quality of the student body directly affects the quality of each college. Former Princeton President Bowen testified that "[c]olleges care enormously about who it is that comes, about the character of their clientele and their student body." (Bowen Dep. at 197). This valuable input was effected in two ways. First, because the Overlap family contribution agreements raised the price to attend MIT for students applying for financial aid and because the Overlap agreement to ban merit aid deprived students of the opportunity to obtain discounts from the Overlap schools, some highly qualified students, while admitted to one or more Overlap Group schools, chose to enroll at non-Overlap schools

which offered competitive pricing. Second, other students likely chose not to apply at all. Thus, just as other businesses may lose desired customers when they enter price-fixing conspiracies, so too have the Overlap institutions lost valuable student-consumers.

In addition, there has been a misallocation of students within the Ivy Overlap Group schools. This consequence follows from one of the primary anticompetitive effects of Overlap -- that is, that price competition was substantially reduced. Absent price-fixing agreements, businesses are normally able to attract and compete for desired consumers with competitive prices. In the present case, the Overlap schools were unable to do this. Thus, some students who enrolled at Overlap schools may not have enrolled at the school that was truly the best school for them.[18]

The adverse effects on output discussed above can be conceptually difficult to analyze and are difficult to quantify. This is in part because the demand for the services offered by the defendants is so high. While this in itself

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[18] A simple example illustrates the harm. Assume, for example, that MIT expands its student computer facilities, enabling it to support additional students interested in pursuing a computer sciences curriculum. In a competitive system, MIT could attract and compete for those students with competitive prices. The Overlap agreements curtailed this ability. Thus, some students interested in that particular academic program may choose a school that does not have the same resource availability. This is a misallocation.

tends to show that the defendants possessed market power (a surrogate for showing actual effects on price or output), it also makes it difficult to analyze output effects. This difficulty, however, is not new to antitrust litigation.

Professor Areeda has recognized that output is not always a clear concept. P. Areeda, Antitrust Law, ¶ 1503, at 376 (1986). "Even when we define it readily, it is difficult to observe. . . . [T]he longer a restraint has been in effect, the greater is the impact of changes in supply, demand, and other market forces." Id. Thus, "[w]e are often unable to disentangle the effects of challenged conduct." Id. This is, of course, no reason to abandon well-developed antitrust precedent. Indeed, the Court of Appeals for the Ninth Circuit made that mistake in Maricopa. In that case, the Ninth Circuit refused to apply the per se rule against price-fixing, in part because the court found the health care industry to be so far removed from the competitive model. The Supreme Court reversed, however, condemning the Ninth Circuit's analysis and rejecting the argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation. Maricopa, 457 U.S. at 350-51.

In the present case, the defendants have engaged in a restraint that substanstially eliminated price competition for a long period of time. Moreover, the restaint had the effect of significantly raising family contributions for students choosing to attend an Ivy Overlap Group school. An analysis of

this conduct, its effect on price, and the industry involved in this case, leads to the conclusion that output was adversely effected.

V. THE ACTIVITIES INVOLVED IN OVERLAP ARE IN OR HAVE A SUBSTANTIAL EFFECT ON INTERSTATE TRADE OR COMMERCE.

A. MIT Enjoys No Exemption Or Immunity From The Jurisdiction Of The Sherman Act.

MIT and the Ivy League institutions sell a service for a price and hence are not immune from the antitrust laws. The defendant's price-fixing activities are not entitled to any special treatment. "[T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." United States v. Socony Vacuum Oil Co., 310 U.S. 150, 222 (1940). Indeed, MIT has conceded that institutions of higher education have no antitrust immunity: "MIT does not claim an exemption from the antitrust laws based on its status as an educational institution or member of the learned professions." MIT's Memorandum in Opposition to the Government's Motion for Summary Judgment, at 49 n.26.

While some restrictive language can be found in earlier decisions,[19] in recent years, the Supreme Court has

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[19] See, e.g., Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959) ("The 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").

emphasized the expansive breadth of Section One of the Sherman Act. The Court has applied the Sherman Act to lawyers, FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); to dentists, FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); to physicians, Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); and to engineers, National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). As the Court noted in Goldfarb, "Congress intended to strike as broadly as it could in § 1 of the Sherman Act, ... And our cases have repeatedly established that there is a heavy presumption against implicit exemptions." 421 U.S. at 787 (citations omitted).

B. MIT's Activities Constitute Trade Or Commerce Within The Meaning Of The Sherman Act.

Section One of the Sherman Act applies to contracts, combinations or conspiracies which restrain "trade or commerce." 15 U.S.C. § 1. The "trade or commerce" requirement ensures that the Sherman Act only applies to commercial conduct. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940). MIT's activity at issue, namely, the selling of higher education and the price it sets for this "product," readily satisfies the "trade or commerce" requirement as a distinctly commercial activity.

MIT's status as a nonprofit corporation does not shield its anticompetitive commercial conduct from the Sherman Act. The Supreme Court has on numerous occasions dispelled any doubt as to the applicability of the Sherman Act to nonprofit entities. "It is beyond debate that nonprofit organizations can be held liable under the antitrust laws." American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556, 576 (1982). See also NCAA v. Board of Regents of the University of Oklahoma, et. al., 468 U.S. 85, 100 n. 22 (1983): "There is no doubt that the sweeping language of § 1 applies to nonprofit entities ... and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct." (citations omitted).

MIT has an annual budget of nearly $1.1 billion, an endowment of $1.5 billion, and tuition and room and board revenues totalling approximately $200 million. (Gov. Exh. 23, at 15). MIT is an economically significant entity, motivated by similar economic concerns as are for-profit corporations. In Hospital Corporation of America v. FTC, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987), Judge Posner wrote:

> Non-profit status affects the method of financing the enterprise (substituting a combination of gift and debt financing for equity and debt financing) and the form in which profits (in the sense of the difference between revenues and costs) are distributed, and it may make management somewhat less beady-eyed in trying to control costs ... But no one has shown that it makes the enterprise unwilling to cooperate in reducing competition ....

Id. at 1390. Professors Areeda and Hovenkamp have also observed that for-profit and non-profit firms possess similar incentives and are subject to the same market pressures:

> In one sense, a firm's non-profit status is merely one form of organization that actors voluntarily choose from among the menu of organizational modes offered by state law. Antitrust law is ordinarily indifferent to which form of organization the parties choose, generally applying equally to corporations, partnerships, and sole proprietorships. The organizational type usually does not matter at all.
>
> Furthermore, the absence of "profit" is no guarantee of eleemosynary intent or practice. Profit can appear not only in the form of dividends, but also in the form of salaries and perquisites. Moreover, non-profit organizations may be subject to the same incentives and temptations that for-profit firms are. They must pay employers, suppliers, and bondholders. They must hire good managers and reward their performance while meeting a budget. Their managers may have the same urges as those of for-profit firms -- sometimes to suppress rivalry in order to live the quiet life or, at other times, to expand their domain through competition or even predation. Except for the payment of dividends, many business incentives, including most incentives to engage in anticompetitive activity, can motivate profit and non-profit firms alike.

P. Areeda & H. Hovenkamp, Antitrust Law ¶ 232.2 (Supp. 1991) (emphasis added).

Caselaw demonstrates that the "trade or commerce" inquiry must focus on the conduct in question, not on the nature of the industry involved or the organizational form of the actors. If the actor's conduct at issue can be characterized as commercial, then the "trade or commerce" requirement is satisfied. "[C]ourts have focused not so much on whether the entity itself was non-commercial, but on whether the entity's

activity was non-commercial." Livezy v. American Contract Bridge League, et. al., 1985-2 Trade Cas. (CCH) ¶ 66,875 (E.D. Pa. 1985), aff'd without op., 800 F.2d 1135 (3d Cir. 1986).

When non-commercial activities are involved, courts are less likely to characterize the conduct as "trade or commerce."[20] When defendants engage in commercial conduct, however, the Sherman Act applies with full force. See NCAA, 468 U.S. at 117 (recognizing the commercial aspects of NCAA's television rights plan); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (sale of legal services not exempt from the Sherman Act); Sunshine Books Ltd. v. Temple University, 697 F.2d 90 (3d Cir. 1982) (university bookstore subject to Sherman Act liability for predatory pricing).

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[20] See NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (non-commercial political boycott not subject to the Sherman Act and protected by the First Amendment); Selman v. Harvard Medical School, 494 F. Supp. 603, 621 (S.D.N.Y. 1980), aff'd, 636 F.2d 1204 (2d Cir. 1980) (plaintiff challenged "a distinctly non-commercial aspect of the practice of the 'learned professions,' to wit: admissions criteria."); Marjorie Webster Jr. College v. Middle States Assn. of Colleges & Secondary Schools, 432 F.2d 650, 654 (D.C. Cir. 1970), cert. denied, 400 U.S. 965 (1970) (educational accreditation is non-commercial and thus not subject to the Sherman Act; Sherman Act held inapplicable to "the non-commercial aspects of the liberal arts and the learned professions."). See also Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990) (Sherman Act does not apply to NCAA eligibility rules because they are non-commercial, distinguishing the commercial television rights plan at issue in NCAA). But see Banks v. NCAA, 746 F. Supp. 850, 857 (N.D. Ind. 1990) (rejecting broad argument that the antitrust laws have no application to NCAA eligibility regulations).

As a university, MIT is an enterprise offering educational services as its primary output. Salop & White, Policy Watch: Antitrust Goes to College, 5 J. Econ. Persp. 193, 195 (1991). Tuition is the price MIT offers to sell its educational services. Financial aid, in the form of scholarships, low interest loans, and subsidized employment, is a discount from this price. The selling and discounting of educational services involves a fundamentally commercial aspect of the higher education industry; indeed, perhaps no other activity is more commercial in nature than the setting of price. See United States v. Oregon State Bar, 385 F. Supp. 507, 517 (D. Or. 1974) ("[T]here is no more commercial element to the practice of law than the setting of fees," distinguishing Marjorie Webster, cited supra at note 20).

MIT's characterization of financial aid as "charity" disguises its true nature. As with any other business that grants discounts, universities grant financial aid in their own self-interest. Colleges care intensely about who "consumes" their "product" because the quality of the student body directly affects the quality and reputation of each college. One method of attracting highly desirable students is, of course, by offering competitive financial aid awards. A Yale report on the relationship between tuition and financial aid states, "The University wishes to attract the best students possible to all of its academic programs. ... [T]he objective is to find the combination of tuition and student aid levels

that will produce the most income while maintaining the quality and diversity of the student body." (Gov. Exh. 195, at 5036002, emphasis added) (See also Gray Dep. at 174).[21]

At trial, MIT might assert that because it was "motivated by non-commercial, educational objectives," its conduct cannot be "trade or commerce" within the meaning of the Sherman Act. See MIT's Memorandum in Opposition to the Government Motion for Summary Judgment, at 44. MIT apparently takes the position that motive or purpose is an element of the "trade or commerce" requirement. It is true that some earlier cases seemed to analyze the "trade or commerce" requirement by examining the actor's motive or purpose. For example, in Marjorie Webster, 432 F.2d at 654-55, the D.C. Circuit wrote, "[A]n 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. ... Absent such

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[21] MIT repeatedly argues that it has purely charitable motives and that all students are subsidized, that is, that tuition is set below cost. Assuming that this is true, it merely shows that in some ways MIT may have acted like a traditional nonprofit entity. As discussed above, however, nonprofits are equally motivated to increase revenues and are subject to the Sherman Act. MIT's position is also refuted by the evidence which shows that MIT usually turned to tuition increases when additional revenues were sought, see Gov. Exh. 24, and that throughout the 1980's, the tuition increases at MIT far outpaced the inflation rate. (Gray Dep. at 2:124-26, 2:182; Gov. Exh. 23, at 19 [showing huge tuition increases at MIT]). With a $1.5 billion endowment, it is reasonable to assume that MIT could have been able to curb these increases.

[commercial] motives, the process of accreditation is distinct from the sphere of commerce." Even assuming this standard controls the "trade or commerce" element, MIT clearly possessed an "intent or purpose to affect the commercial aspects of the profession" when it conspired with the other Ivy League schools to fix a formula for calculating financial aid, to match other schools' financial aid calculations, and to agree to ban merit-based scholarships.

More importantly, while purpose or intent may be relevant in a rule of reason analysis, they have no bearing on whether the Sherman Act applies in the first place.[22] Accordingly, the D.C. Circuit has since clarified that examining intent or motive in order to determine whether the Sherman Act applies at all is inappropriate. In Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984), the district court, relying on Marjorie Webster, concluded that the plaintiff must demonstrate intent or motive as an independent element of antitrust liability. Id. at 583 n.6. The D.C.

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[22] MIT relies heavily on College Athletic Placement Service, Inc. v. NCAA, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), aff'd without op., 506 F.2d 1050 (3d Cir. 1974), where the court held that absent an anticompetitive purpose, the NCAA's rule rendering ineligible a student who utilized plaintiff's services did not violate the Sherman Act. Id. at 65,266. Apparently, however, the court considered anticompetitive purpose only for resolving the issue of whether to apply the rule of reason or the per se rule, and did not consider purpose for the "trade or commerce" issue. Id. at 65,266-267.

Circuit rejected this flawed analysis: "We reject the district court's position that intent is a separate and essential prerequisite to civil antitrust liability of organizations such as NCAA." Id. at 583. The court held that intent was relevant only to assess the competitive impact of the defendant's conduct. Id. The court continued:

> Accordingly, practices by non-profit organizations that economically disadvantage consumers are generally prohibited even though such practices may be designed to advance independent social or political values.

Id. at 583-84 (emphasis added).

Therefore, the argument that MIT possessed an educational motive or purpose when it conspired to fix prices is no bar to application of the Sherman Act. This analysis is consistent with the Supreme Court's repeated assertion that "good motives will not validate an otherwise anticompetitive practice." NCAA, 468 U.S. at 101 n.23 (citations omitted). To the extent that MIT construes Marjorie Webster as requiring an evaluation of motive to determine the Sherman Act's applicability, this construction has been precluded.

In addition, as discussed above, the higher education industry has no antitrust immunity, as discussed supra. To the extent MIT relies on Marjorie Webster to suggest a "liberal arts" or "learned professions" exemption from the antitrust laws, that argument has been rejected by more recent Supreme Court decisions such as Goldfarb, Professional Engineers, and Maricopa. As stated in Welch v. American Psychoanalytic

Association, No. 85 Civ. 1651, slip op. (S.D.N.Y. April 4, 1986) (Lexis, Genfed library, Dist. file), "Marjorie Webster is of questionable vitality after Goldfarb, to the extent that it draws a bright line between education and business, or accreditation policy and commerce." Accord, Hennessey v. NCAA, 564 F.2d 1136, 1148-49 (5th Cir. 1977).

In summary, the "trade or commerce" inquiry must focus on the conduct in question, not on the nature of the industry involved or the organizational form of the actors. Therefore, MIT's non-profit status does not place its activities outside the scope of the "trade or commerce" requirement. By agreeing with the other Ivy League schools on matters of tuition and financial aid, MIT's conduct bore directly on price and discount policies--commercial activities beyond dispute, regardless of MIT's motive or intent.

C. The Sale Of Higher Education Operates In And Affects "Interstate" Commerce.

In this case, an effect on interstate commerce is presumed since the Government has established that MIT and Ivy schools entered into an agreement to fix prices in order to eliminate price competition.[23] The Government, however, does not rely

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[23] In cases involving horizontal agreements to fix prices or allocate territories within a state, the Supreme Court has "based jurisdiction on a general conclusion that the defendants' agreement 'almost surely' had a market-wide impact and therefore an effect on interstate commerce." Summit Health v. Pinhas, ___ U.S. ___, 111 S. Ct. 1842, 1848 (1991) (quoting Burke v. Ford, 389 U.S. 320, 322 (1967) (per curiam)).

solely on this presumption. The evidence demonstrates that the commerce in question, that is, the sale of educational services, was in and affected interstate commerce. Both the general activities of MIT and the Ivy League institutions, and the particular conspiracy established here, substantially affect interstate commerce. The conspiring institutions are located in seven different states and each recruited and enrolled students from across the country. Sixty-five to 70 percent of the incoming students apply for financial aid and approximately 50 percent receive grants administered by MIT (Gallagher Dep. at 14-15). The commercial interest of these students and their families were affected because their applications for financial aid (discounts) were subject to the agreed-upon formula and, in some cases, the Spring Meeting.

Indeed, MIT acknowledges that its financial aid activities are interstate in nature. Specifically, MIT states that:

> (1) each year it receives applications from a number of students who are not Massachusetts residents, some of whom matriculate at MIT; (2) many of MIT's admissions applications are transported to MIT from other states; and (3) MIT receives money, including charitable donations, term bill payments and non-refundable application fees from out-of-state residents. Thus, MIT does not dispute that at least some of its activities, including financial aid activities, are "interstate" in nature.

(MIT Interrogatory Answer No. 8.)

Generally, the "interstate" requirement may be satisfied under either the "in commerce" or the "effect on commerce" theories. See McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 241 (1980); Cardio-Medical Associates v. Crozer-Chester Medical Center, 721 F.2d 68, 71 (3d Cir. 1983). To establish jurisdiction under the "in commerce" theory, the Government must demonstrate that the defendants' activities are an integral part of an interstate transaction. See Goldfarb, 421 U.S. at 784. See also McLain, 444 U.S. at 244. In view of MIT's Answer to Interrogatory No. 8, the fact that the overwhelming majority of its students and aid applicants come from outside of Massachusetts and that the Ivy Overlap agreements involved nine major universities located in seven states and directly affected thousands of students from throughout the United States and abroad, the Government has demonstrated that "the defendants' activities are an integral part of interstate transactions." The Government is not required to quantify the adverse impact of defendants' activities or to prove that they resulted in legally cognizable damages. McLain, 444 U.S. at 243. In addition, the effect need not be a reduction in commerce. Cardio-Medical Associates, 721 F.2d at 72. "[T]he effect need not be of any particular magnitude as long as it is substantial, and in fact the requirement may be satisfied 'even if interstate commerce is increased by the anticompetitive conduct.'" Id. (quoting Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127,

132 (3d Cir. 1978)). Finally, the Government is not required to demonstrate a net change in the volume of interstate commerce, the effect is sufficient where a not insubstantial amount of commerce is shifted from one party to another. Id. at 75.

The Supreme Court has again recently addressed the "interstate" requirement of the Sherman Act. See Summit Health, Ltd. v. Pinhas, ___ U.S. ___, 111 S. Ct. 1842 (1991). In Summit Health, the Court reaffirmed that an antitrust plaintiff need not establish a "quantification" of interstate commerce. Because a Sherman Act violation can be established even absent proof of an anticompetitive effect where an unlawful purpose is proven, the Court reasoned that Sherman Act jurisdiction could not require an actual effect on interstate commerce. The "proper analysis focuses, not upon actual consequences, but rather on the potential harm that would ensue if the conspiracy were successful." 111 S. Ct. at 1847.[24]

The interstate commerce requirement of Section 1 of the Sherman Act has been satisfied in this case.

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[24] The Third Circuit has interpreted Summit Health as being consistent with the broad jurisdictional approach taken by the Third Circuit in previous cases. See Fuentes v. South Hills Cardiology, 946 F.2d 196, 200 (3d Cir. 1991).

VI. THE JUSTIFICATIONS AND DEFENSES ASSERTED BY MIT ARE IRRELEVANT AND UNPERSUASIVE.

A. The Social Policy Justifications Asserted By MIT Are Irrelevant Under The Antitrust Laws And Are Not Supported By The Facts.

MIT's primary defense is comprised of numerous social-policy justifications. The Supreme Court has repeatedly held, however, that social policy justifications are irrelevant under the Sherman Act. "Social policy" justifications are legally irrelevant under both the per se rule against price-fixing and the Rule of Reason. Under the per se rule, no justification for price-fixing is allowed and no analysis of the specific factors involved in a particular industry is required:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . .
>
> Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22 (1940). See also Arizona v. Maricopa County Medical Society, 457 U.S. 332, 351 (1982) (rejecting "procompetitive"

justifications for the defendant physicians' fee schedule which was held to be a per se violation of § 1).

The Court has also rejected social or quality-based justifications under the Rule of Reason. In National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978), the defendants argued that their ban on competitive bidding should survive antitrust challenge because it was adopted by members of a learned profession for the purpose of minimizing the risk that unfettered competition would produce inferior engineering work and, thus, endanger the public safety. The Court rejected the defendants' argument, stating that it rested "on a fundamental misunderstanding of the Rule of Reason." 435 U.S. at 681. Antitrust analysis is "confined to a consideration of impact on competitive conditions." Id. at 690. The purpose of the inquiry is to evaluate the competitive significance of challenged activity, not to decide whether the standard of competition "is in the public interest, or in the interest of the members of an industry." Id. at 692. That standard has been mandated by Congress:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition."

Id. at 695 (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951)).

The Supreme Court's most recent antitrust cases adhere to the principles set forth in Socony, Maricopa and Professional Engineers. In FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990), the Court rejected the defendant's "quality of legal advocacy" justification as irrelevant under the Sherman Act. The defense lawyers association sought to justify its group boycott arguing that higher prices would improve the quality of legal representation for indigent criminal defendants. While accepting the fact that legal representation might improve with increased hourly rates, the Court rejected this purported justification for conduct which otherwise violated the Sherman Act:

> As we have remarked before, the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." This judgment "recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." That is equally so when the quality of legal advocacy, rather than engineering design is at issue.
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> The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful. The statutory policy underlying the Sherman Act "precludes inquiry into the question whether competition is good or bad."

Id. at 423-24 (quoting Professional Engineers, 435 U.S. at 695). See also FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) (Court applied a truncated Rule of Reason and rejected defendants' quality of care justification as irrelevant under the Sherman Act).

MIT is essentially arguing that "competition is bad" and will erode its admissions and financial aid policies. The Supreme Court's consistent rejection of social and quality-based justifications demonstrates that MIT's policy arguments must be disregarded as irrelevant under the Sherman Act.

MIT's "competition is bad" argument is also not supported by the facts. MIT's warning about schools abandoning need-blind admissions in the wake of this case ignores the fact that there is simply no causal link between Overlap and need-blind admissions. Brown University, which participated in Overlap, moved away from need-blind admissions at least nine years before signing the consent decree in the present case. Conversely, the University of Chicago, which did not participate in Overlap, grants merit scholarships and adheres to a need-blind admissions policy. MIT is a major research university, with a 1991-92 operating budget of $1.1 billion, an endowment of about $1.5 billion, and annual revenues from tuition, room and board of nearly $200 million in its most recent fiscal year. (Gray Dep. at 208, 223; Gov. Exh. 23, at 15). MIT is free, of course, to allocate those resources where it chooses. At the present time, MIT only dedicates about 1.5 percent of its annual operating budget to student aid. Indeed, former President Gray testified that the agreement not to offer merit aid has not been necessary to maintain MIT's "need-blind" admissions and financial aid policies, although he said he does

not know what will happen in the future, (Gray Dep. at 119), and MIT's financial aid director testified that he thought MIT could maintain its current policies without the Overlap agreements. (Gallagher Dep. at 3:73; see also Gallagher Dep. at 2:152-55).[25]

The Government has never questioned whether need-blind admissions or need-based aid are appropriate educational philosophies. It does not seek to compel any school to grant merit scholarships. MIT is free to adopt unilaterally whatever financial aid policies it desires, as have hundreds of colleges outside the Overlap Group. MIT cannot, however, agree with its closest competitors on the types of financial aid that will and will not be offered or the amount of aid particular students will receive. These restraints can no more be justified on "social policy" grounds than a restraint on competitive bidding that is defended as necessary to protect the public from unsafe buildings. Such social or quality-based justifications are properly addressed to Congress, not to the courts. Professional Engineers, 435 U.S. at 689-90.

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[25] In a subsequent seven-page "errata" sheet, containing numerous "corrections" and "clarifications," this testimony was "clarified" to state that MIT could maintain its policies in the "short term" only.

B. Price-Fixing Agreements Are Per Se Illegal Regardless Of The Purported Reasonableness Of The Agreement Or The Prices Ultimately Charged.

In addition to its social policy arguments, MIT also claims that the Ivy Agreements and the family contribution agreements at the Spring Meeting enabled the Overlap members to more accurately determine need. This justification is also irrelevant.

MIT determines need by calculating the family contribution and subtracting that figure from its student budget figure for that year. While MIT attempts to argue that it colluded with the Ivy League schools in a effort to "get it right," MIT admits that the determination is an "imprecise and subjective endeavor." See MIT's Brief in Opposition to the Antitrust Division's Motion for Summary Judgment, at 35. In addition, when MIT speaks of "family contribution" and "need" it is referring, of course, to those concepts as defined by and calculated under the Overlap Group's agreed-upon formula. Thus, MIT's argument that Overlap was necessary to get it right is really no more than an argument that the prices fixed were reasonable. The Supreme Court has made it clear time and time again that price-fixing agreements are unlawful under Section 1 of the Sherman Act regardless of the purported reasonableness of the agreement or the prices ultimately charged: "It is no excuse that the prices fixed are themselves reasonable." Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980). See Trial Lawyers, 493 U.S. at 423; Maricopa, 457 U.S.

at 341; Socony, 310 U.S. at 226 n.59. Even under the rule of reason, inquiry into the reasonableness of the prices is foreclosed. Professional Engineers, 435 U.S. at 689.

Even assuming for the purpose of argument that MIT's approach to calculating family contributions is in some sense reasonable, the Supreme Court has explained the danger in allowing such a justification:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition.

United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

C. The Overlap Agreements Were Not Required For The Offering Of A New Product Or Service.

Recognizing that its social policy justifications are irrelevant under the Sherman Act, MIT may try to assert that Overlap enables the participating institutions to offer a new product that would not otherwise be available. That is, MIT may try to somehow analogize its price-fixing activity to a joint venture similar to that found in Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) ("BMI"). This argument must be rejected.

In BMI, the Court held that the blanket licenses derived from the membership of the American Society of Composers, Authors and Publishers (ASCAP) and issued to television and

radio stations, granting broadcast rights to thousands of musical compositions at a price not dependent on the amount or type of music used, did not violate the Sherman Act. The Court found that the blanket licenses were an entirely different product from the product that any one composer was able to sell by himself and that a "necessary consequence" of the creation of the blanket license was that its price had to be set. 441 U.S. at 21. Moreover, the Court held that ASCAP was not a joint sales agency offering the goods of many sellers, but rather was "a separate seller offering its blanket license, of which the individual compositions are raw material." Id. at 22. Thus, as Judge Posner later noted, because BMI involved a new and distinctive product, it was really not a cartel case:

> Access to a repertoire of thousands of songs is not something the individual composer can give, so what the performing-rights associations are engaged in is not (or not just) the suppression of price competition among composers. It is the provision of a distinctive product -- access to a vast musical repertoire. Each Association is the "producer," and is entitled to price its "product" as it wants as long as it does not collude with the other association. So viewed, Broadcast Music was not a cartel case.

General Leaseways, Inc. v. National Truck Leasing Association, 744 F.2d 588, 593-94 (7th Cir. 1984).

In the present case, MIT and the other Overlap members have not formed a joint venture or otherwise combined in a way that enables them to offer some new product or service. Rather, the Overlap members are competitors, each offering its own service to consumers. What they gain through Overlap is a

lessening of competition by agreeing on how they will price their product. The Court rejected similar "new-product" arguments in Maricopa and NCAA.

In Maricopa, the defendant physicians argued that their price-setting agreement promoted competition by offering an alternative to closed panel prepaid medical plans. The Court rejected this argument, agreeing with the United States Government that "[i]t is the medical insurance coverage provided by insurers, not the price-fixing activities of doctors, that offers this competitive alternative." Brief for the United States as Amicus Curiae at 25, Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982). Specifically, the Court stated:

> This case is fundamentally different [from BMI]. Each of the foundations is composed of individual practitioners who compete with one another for patients. Neither the foundations nor the doctors sell insurance . . . . The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product. Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect to the prevailing market price of medical care.

457 U.S. at 356.

Similarly, in NCAA, the Supreme Court rejected the NCAA's new-product argument, finding that the selection of games and the negotiation of particular agreements were left to the individual networks and schools. 468 U.S. at 113. Thus, the Court distinguished Broadcast Music:

> [T]he effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike Broadcast Music's blanket license covering broadcast rights to a large number of individual composers, here the same rights are still sold on an individual basis, only in a non-competitive market.

Id. at 113-114.

MIT's argument that Overlap enabled each member institution to sell educational services at a college with a distinctively high-quality and diverse student body is not consistent with Broadcast Music. While the Overlap agreements defined certain aspects (most notably price) as to how educational services would be sold, the member institutions still sold their own services on an individual basis. Overlap did not make some new product or service available.

D. The Overlap Agreements And Activities Were Not Required By The Higher Education Act.

MIT has asserted that its needs analysis agreements and the Overlap Spring meeting "are consistent with and required by federal law." (Answer, Fourth Affirmative Defense). To the extent that MIT is arguing that the Sherman Act has been impliedly repealed by the Higher Education Act, MIT cannot meet its heavy legal burden.

"The general principles applicable to [claims of antitrust immunity] are well established. The antitrust laws represent a 'fundamental national economic policy.'" National Gerimedical Hospital v. Blue Cross, 452 U.S. 378, 388 (1981) (quoting Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966)). "'Implied antitrust immunity is not favored, and

can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.'" Id. (quoting United Stated v. National Association of Securities Dealers, 422 U.S. 694, 719-20 (1975)). "'Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary.'" Id. at 389 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)).

In the present case, the Overlap agreements were not required by federal law. Under the Higher Education Act, colleges are not required to agree on family contributions for commonly-admitted students or to agree to ban merit scholarships. Indeed, MIT's President Gray testified that federal law did not require MIT's participation in Overlap. (Gray Dep. at 2:192). Although federal regulations prohibit colleges from awarding aid in excess of need to any student that receives money from certain federal programs, see 34 C.F.R. §§ 674.14, 675.14 and 676.14, colleges are not prohibited from granting merit scholarships in combination with aid from other federal programs (such as Pell grants), or solely with their own institutional funds. In fact, many colleges grant merit scholarships, including the University of Chicago, Rice University, Washington University, and Johns Hopkins. (MIT Admission No. 24). Moreover, these regulations do not require or suggest that institutions should agree on how

to exercise professional judgment or on the family contributions of individual students.

Recognizing that the Higher Education Act and the Department of Education regulations do not require the Overlap agreements and activities, MIT also argues that the Overlap agreements are consistent with the federal statutes. This argument is completely irrelevant to this action brought under the Sherman Act. The Supreme Court rejected a similar argument in Socony:

> The fact that the buying programs may have been consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act is likewise irrelevant to the legality under the Sherman Act . . .. For as we have seen, price-fixing combinations which lack Congressional sanction are illegal per se; they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils. Only in the event they that they were, would such considerations have been relevant.

Socony, 310 U.S. at 227-28.

Moreover, in several respects, the Overlap agreements were inconsistent with federal financial aid policies. First, the Overlap agreements totally banned merit scholarships, whereas the federal government sponsors at least three merit scholarship programs. Second, the Ivy Overlap schools agreed not to follow the federally-approved Uniform Methodology, and later the federally-mandated Congressional Methodology, in determining financial need. Finally, the facts suggest that the defendants applied their agreed-upon formula in a systematic manner that is prohibited by federal statute.

The professional judgment provision of the Higher Education Act provides that:

> Nothing in this subchapter shall be interpreted as limiting the authority of the financial aid administrator, on the basis of adequate documentation, to make adjustments on a case-by-case basis to the cost of attendance or the data required to calculate the expected student or parent contribution (or both) to allow for treatment of an individual eligible applicant with special circumstances. . . . Special circumstances shall be conditions that differentiate an individual student from a class of students rather than conditions that exist across a class of students.

20 U.S.C. § 1087tt(a) (1990) (emphasis added).

The "case-by-case" language in the professional judgment provision was added by the 1989 amendments to the Higher Education Act, contained in the Omnibus Budget Reconciliation Act of 1989.[26] This revision was made because Congress had intended the professional judgment provision to be used to evaluate students on a case-by-case basis but had learned that some institutions exercised professional judgment improperly.

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[26] The amendment changed the wording of subsection (a):

> Nothing in this subchapter shall be interpreted as limiting the authority of the financial aid administrator, on the basis of adequate documentation, to [make necessary adjustments to the cost of attendance and expected] make adjustments on a case-by-case basis to the cost of attendance or the data required to calculate the expected student or parent contribution (or both) to allow for treatment of an individual eligible applicant with special circumstances.

20 U.S.C. § 1087tt(a) (1990) (deleted text in brackets, new statutory language underlined).

> The Conferees have recently become aware of an inappropriate use of financial aid officer discretion on the part of certain institutions. . . . Congress clearly intended that such discretion would be used on a case-by-case basis only, to either lower or raise an individual student's expected contribution. In no way had Congress intended that financial aid officer discretion be used by an institution to replace certain aspects of the Congressional or Pell Grant methodology for everyone. Yet Congress has learned that this is being done on certain campuses.

H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 428-29 (1989).

The Conference Report also stated that it was an "inappropriate practice" for schools to substitute certain variables in the Congressional Methodology. The Amendment "prohibit[s] financial aid officers from using financial aid officer discretion to substitute data elements for whole classes of students. The provision also clarifies that financial aid officer discretion is only to be used on a case-by-case basis." Id. at 429. The 1989 Amendment was clearly targeted at the abuse of the professional judgment provisions by schools whose financial aid administrators were adjusting requirements for entire classes of students.[27]

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[27] The legislative history of the original 1986 Act also demonstrates that the professional judgment provision was intended to enable administrators to adjust financial aid and family contributions on an individual basis only. See H.R. Conf. Rep. No. 861, 99th Cong., 2d Sess. 416 (1986) (While the original House version would have allowed financial aid administrators to exercise this discretion to alter financial aid for "groups of students," the House ultimately receded, adopting the Senate version which "limit[ed] the exercise of such discretion to individual students."). The 1989 amendments simply make this more explicit.

The statutory language and legislative history demonstrate that changes to Congressional Methodology were to be made on a case-by-case basis where special circumstances existed. The Overlap schools agreed upon systematic alterations to the Congressional Methodology and were thus not in conformity with the professional judgment provision. MIT's Sam Jones recognized this in January, 1988 when he wrote "No one was prepared to say specifically what systematic 'professional judgment' calls would be made. I certainly didn't feel comfortable in addressing this with the two feds present" (Gov. Exh. 75, at 3).

MIT's suggestion that the Government should be barred from bringing this action because the Department of Education knew about Overlap's financial aid policies and failed to act is completely irrelevant to this case brought under the Sherman Act, seeking to enjoin a significant restraint on commerce. See Socony, 301 U.S. at 225-228. The issue is whether the defendants actions were specifically required or sanctioned by Congress. That is, whether there is a clear repugnancy between the Sherman Act and the Higher Education Act such that repeal of the Sherman Act is necessary to make the Higher Education Act effective. The discussion above demonstrates that the answer to this question is clearly "no."

E. The Government's Decision Not To Challenge The Ivy-MIT Ban On Athletic Scholarships Is Not Inconsistent With Its Approach Towards The Ivy-MIT Agreement to Ban Merit-Based Scholarships.

The consent decree signed by the Ivy League institutions does not apply to their ban on athletic scholarships. This is not inconsistent with the Government's challenge to the Ivy-MIT agreement to ban merit scholarships. Recent Supreme Court precedent suggests that agreements directly relating to athletic competition are more likely to be upheld as reasonable restraints under the Sherman Act because some degree of cooperation is necessary. In NCAA, the Supreme Court declined to apply the per se rule to the NCAA's television rights plan. The Court applied a truncated rule of reason analysis because it found that some cooperation among schools participating in intercollegiate athletics is necessary if the "product," amateur athletic competition, is to be available at all. 468 U.S. at 101.[28] While there is commentary supporting the argument that the NCAA's eligibility rules violate the Sherman Act,[29] some lower courts have upheld the eligibility

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[28] Indeed, MIT's "expert" witness, former Princeton President Bowen, noted that his basketball coach had to operate "more or less cheerfully" on the basis of league constraints in order to maintain a level playing field in athletic competition. (Bowen Dep. at 163-64).

[29] See, e.g., Note, Sherman Act Invalidation of the NCAA Amateurism Rules, 105 Harv. L. Rev. 1299 (1992).

requirements. See, e.g., McCormack v. NCAA, 845 F.2d 1338, 1344-45 (5th Cir. 1988). While NCAA cases do not address agreements among schools to ban athletic scholarships, the cases do suggest that such agreements may be afforded somewhat different treatment.

The Overlap agreements, and particularly the agreement to ban merit-based scholarships, are clearly distinguishable. Unlike athletic competition, the decisions a college makes about setting fees and discounts do not require cooperation among competing institutions. Put another way, these agreements were not necessary to market the "product" MIT offers--higher education. See supra at Section VI.C.

The government does not sanction or condone the MIT-Ivy ban on athletic scholarships. However, because recent cases suggest that agreements directly ancillary to athletic competition may be afforded somewhat different treatment by the courts, the Government exercised its discretion and declined to charge the ban on athletic scholarships.

VII. EVIDENTIARY MATTERS

A. The Deposition Testimony And Other Statements Of MIT's Agents And Employees Are Admissible As Non-Hearsay Party Admissions Under Fed. R. Evid. 801(d)(2)(D).

The government seeks to admit deposition testimony of various MIT agents or employees for substantive purposes at trial, as permitted by Fed. R. Civ. P. 32(a)(1). Rule 32(a)(1) provides that: "Any deposition may be used by any party for [impeachment purposes], or for any other purpose permitted by the Federal Rules of Evidence."[30] These statements are non-hearsay admissions under Fed. R. Evid. 801(d)(2)(D), which provides: "A statement is not hearsay if ... the statement is offered against a party and is ... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

The proponent of the evidence must show that the statements relate to a matter within the scope of the agent's employment. Riley v. K Mart Corp., 864 F.2d 1049, 1055 n.8 (3d

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[30] The 1980 amendment to Rule 32(a)(1) enlarged the permissible uses of depositions at trial to correspond with the Federal Rules of Evidence. See Fed. R. Civ. P. 32(a)(1) advisory committee's note (recognizing use of depositions as vicarious party admissions under Fed. R. Evid. 801(d)(2)(D)); See Budden v. United States, 748 F. Supp. 1374, 1379 (D. Neb. 1990) (same). See also 4a J. Moore et. al., Moore's Federal Practice ¶ 32.02[1] (1990) ("[I]t is clear that Rule 32 does not limit the admissibility of depositions that are otherwise admissible under the Federal Rules of Evidence.").

Cir. 1988). Because the Court undertakes this preliminary inquiry under Fed. R. Evid. 104(a), the Court may consider the statements themselves in evaluating the proponent's prima facie showing. Bourjaily v. United States, 483 U.S. 171, 175-176 (1987); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1238 (E.D. Pa. 1980), aff'd in part and rev'd in part on other grounds, 723 F.2d 238 (3d Cir. 1983), rev'd, 475 U.S. 574 (1986).[31]

"The trend is toward the broad admissibility of agent's statements." Rollins v. Board of Governors, 761 F. Supp. 939, 942 (D.R.I. 1991). The agent need not be acting within the scope of his agency when making the statements, nor need the agent possess express authorization or managerial authority to make such statements. United States v. Vito, 1988 U.S. Dist. LEXIS 7584, *5 (E.D. Pa. 1988); Zenith, 505 F. Supp. at 1246-47. Moreover, vicarious admissions are admissible without a showing that the declarant had personal knowledge of the matter asserted. Zipf v. American Tel. & Tel. Co., 799 F.2d

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[31] In addition, the witness unavailability requirement does not apply in this context. Unlike Fed. R. Evid. 804(b)(1), regarding the former testimony hearsay exception, depositions containing vicarious admissions may be admitted under Fed. R. Evid. 801(d)(2)(D) without a showing that the declarant is unavailable. Rule v. International Ass'n of Bridge, etc. Workers, 568 F.2d 558, 569 n. 17 (8th Cir. 1977).

889, 895 n.8 (3d Cir. 1986); Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626, 630-31 (8th Cir. 1978).

The deposition testimony the government seeks to introduce falls squarely within Rule 801(d)(2)(D). The following deponents are currently employees or agents of MIT and were so at the time their depositions were taken: James J. Culliton, MIT Vice President of Financial Operations; Leonard V. Gallagher, MIT Director of Financial Aid; Paul E. Gray, MIT Corporation Chairman; Stanley G. Hudson, MIT Associate Director and Executive Officer of Financial Aid; and J. Samuel Jones and Lois B. Levine, both Associate Directors of Financial Aid at MIT.[32] Furthermore, the designated excerpts all concern matters within the scope of each deponent's authority or employment. Therefore, these depositions are admissible at trial.

B. Statements By Ivy Overlap Members Are Admissible As Co-Conspirator Non-Hearsay Statements Under Fed. R. Evid. 801(d)(2)(E).

The government intends to introduce into evidence various statements made by MIT and other Overlap schools, including statements in minutes of Ivy League meetings and other

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[32] William G. Bowen has been retained by MIT as an expert witness. Expert witnesses are considered agents of the party that retained them for purposes of Fed. R. Evid. 801(d)(2)(D). Collins v. Wayne Corp., 621 F.2d 777, 781-82 (5th Cir. 1980); Budden v. United States, 748 F. Supp. 1374, 1378-79 (D. Neb. 1990).

documents. These statements are admissible under the co-conspirator hearsay exemption of Fed. R. Evid. 801(d)(2)(E), which provides: "A statement is not hearsay if ... the statement is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

The co-conspirator exemption applies in both civil and criminal trials. United States v. Trowery, 542 F.2d 623, 626 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977). The proponent of such statements must establish the existence of a conspiracy, the defendant's membership in the conspiracy, and that the co-conspirator's statements were made during the course and in furtherance of the conspiracy. Bourjaily v. United States, 483 U.S. 171, 175-76 (1987); United States v. Gambino, 926 F.2d 1355, 1360 (3d Cir.), cert. denied, 112 S. Ct. 415 (1991). In determining whether the prima facie showing has been made, the Court is permitted to admit the statements subject to later connection to the requisite conspiracy; the government need not conclusively establish the conspiracy or MIT's connection to it before the Court admits the statements. Gambino, 926 F.2d at 1360-61.[33] In addition, the Court is

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[33] Cf. United States v. Continental Group, Inc., 603 F.2d 444, 456-57 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980). In Continental Group, the Third Circuit noted that while the practice of admitting such statements "subject to later connection" in criminal jury trials should be "fully considered and sparingly utilized," alternative approaches in complex conspiracy cases may be confusing and unduly complex. Therefore, the trial judge has broad discretion to
(Footnote continued on next page.)

allowed to consider the statements themselves, in addition to any independent evidence corroborating the existence of the conspiracy. Bourjaily, 483 U.S. at 178-79; United States v. Cruz, 910 F.2d 1072, 1081 (3d Cir. 1990), cert. denied, 111 S. Ct. 709 (1991).[34]

The existence of a price-fixing conspiracy and MIT's participation in it are, of course, essential elements of this case, brought under Section 1 of the Sherman Act. See Fisher v. City of Berkeley, 475 U.S. 260 (1986). The government will offer substantial evidence which proves the existence of this conspiracy. Extensive documentary evidence and deposition testimony conclusively establish that MIT and the Ivy schools participated in an agreement that substantially eliminated price competition. See supra at Section II.

(Footnote continued from previous page.)
conditionally admit co-conspirator statements. Id. Accord, United States v. De Peri, 778 F.2d 963, 981 (3d Cir. 1985), cert. denied, 475 U.S. 1110 (1986); United States v. Ammar, 714 F.2d 238, 246-47 (3d Cir.), cert. denied, 464 U.S. 936 (1983). As this is a civil case to be tried without a jury, conditional admission of co-conspirator statements would be well within the Court's discretion.

[34] The Supreme Court ruled that this approach is permissible because courts may consider otherwise inadmissible evidence, including potential hearsay, when resolving preliminary questions of admissibility under Fed. R. Evid. 104(a). See Bourjaily, 483 U.S. at 178.

Additionally, the government will also show that the statements were made during the course of and in furtherance of the conspiracy. MIT has participated in the Ivy Overlap Group since 1958 and the conspiracy continued at least until the eight Ivy schools consented to abandonment of the conspiracy on May 22, 1991. Hence, all of the offered statements were made during the course of the conspiracy.

The Third Circuit has held on numerous occasions that "the 'in furtherance' requirement of Rule 801(d)(2)(E) is generally given a broad interpretation." De Peri, 778 F.2d at 981. Accord, United States v. Gibbs, 739 F.2d 838, 845 (3d Cir. 1984), cert. denied, 469 U.S. 1106 (1985); United States v. Provenzano, 620 F.2d 985, 1001 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Trotter, 529 F.2d 806, 813 (3d Cir. 1976). Statements directed to the objectives of the conspiratorial agreement satisfy this requirement, Ammar, 714 F.2d at 253, as do statements of conspirators "which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy ..." United States v. Traitz, 871 F.2d 368, 399 (3d Cir.), cert. denied, 493 U.S. 821 (1989) (quoting Ammar, 714 F.2d at 252). Moreover, the declarant need not possess personal knowledge of the subject matter of the statements. Ammar, 714 F.2d at 254 (ruling that the personal knowledge requirement of Fed. R. Evid. 602 does not apply to Fed. R. Evid. 801(d)(2)(E) -- declarant may base statements on

second-hand knowledge). The co-conspirator statements the government seeks to admit clearly satisfy the "in furtherance" requirement.[35]

C. Records Kept By The Overlap Members Regarding Overlap Meetings And Agreements Are Admissible Under The Business Records Exception.

Many of the government's documentary exhibits are also admissible under the business records exception to the hearsay rule. The Third Circuit has set forth the essential requirements of Fed. R. Evid. 803(6) in United States v. Casoni, 950 F.2d 893 (3d Cir. 1991). As conditions to admissibility, the government must show that (1) the preparer of the document had personal knowledge or obtained information from one with personal knowledge; (2) the preparer recorded the statements contemporaneously with the event described; (3) the record was made in the regular course of business; and (4) such records were regularly kept by the business.[36] Id. at 909

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[35] While the Government is permitted to use the Overlap members' statements under Fed. R. Evid. 801(d)(2)(E), MIT cannot. The rule is designed to admit co-conspirator statements only against parties who participated in a conspiracy. See United States v. Kapp, 781 F.2d 1008, 1014 (3d Cir.), cert. denied, 479 U.S. 821 (1986) ("The rule is intended to allow for introduction of co-conspirators' statements as evidence against them as defendants. It cannot be stretched ...") (emphasis added).

[36] The term "business" includes "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Fed. R. Evid. 803(6). Hence, MIT and the other Ivy schools constitute "businesses" within the meaning of the rule.

(citing United States v. Furst, 886 F.2d 558 (3d Cir. 1989), cert. denied, 493 U.S. 1062 (1990)). In addition, the documents must not lack indicia of trustworthiness. Casoni, 950 F.2d at 910 (noting, however, that these four requirements "seem designed to insure some degree of reliability").[37]

Because the Court is not bound by the rules of evidence in making admissibility determinations, the Court may consider the document itself during this preliminary inquiry. See Bourjaily v. United States, 483 U.S. 171, 175-76 (1987). In addition, while Rule 803(6) usually requires that the elements of the business records exception be shown by the testimony of a "custodian or other qualified witness," the Third Circuit has held that circumstantial evidence, such as other documents or party admissions, may provide the necessary foundation in lieu of a testifying witness. Furst, 886 F.2d at 572; In re Japanese Elec. Prod. Antitrust Lit., 723 F.2d 238, 287-88 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986).

Regarding the regularity requirement of Rule 803(6), the Third Circuit advocates liberal construction. "[W]e think the regular practice requirement should be generously construed to favor admission. Thus, for example, it may well be that a

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[37] The burden of showing untrustworthiness is on the party opposing admission. In re Japanese Elec. Prod. Antitrust Lit., 723 F.2d 238, 288 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986).

record of a single meeting satisfied the regular practice requirement if the business in question routinely records other important meetings." Japanese Products, 723 F.2d at 288-89 (overruling the lower court's decision to require the proponent to show that they were "created by routine practices where careful checking and habits of precision and regularity assure their accuracy"). The rule does not require the Court to independently analyze the business procedures employed. Id. at 289.

Many of the documents the government will introduce, including records of the schools' budget, admissions, and financial aid offices, clearly meet the requirements of Fed. R. Evid. 803(6).

D. The Government May Use Leading Questions When Interrogating Co-Conspirator Witnesses.

The government intends to call Mr. Gallagher, MIT's Director of Student Financial Aid and Mr. Routh, Yale's Director of Financial Aid. Because these witnesses are "hostile," the government should be permitted to conduct direct examination by using leading questions.

Ordinarily, leading questions are permitted only during cross examination. Fed. R. Evid. 611(c). However, Fed. R. Evid. 611(c) recognizes an exception where the witnesses to be examined are hostile or adverse to the party calling them: "When a Party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be

by leading questions." The questioner in such a situation proceeds as if on cross examination. Reber v. General Motors Corp., 669 F. Supp. 717, 721 (E.D. Pa. 1987).

In addition to adverse parties, the rule covers witnesses who fall into the categories of: (1) "hostile," or (2) "identified with an adverse party." The latter provision of Rule 611(c) dispenses with the common law requirement that a party must first demonstrate hostility before leading a witness on direct. The rule is "designed to enlarge the categories of witnesses automatically regarded as adverse, and therefore subject to interrogation by leading questions without a further showing of actual hostility." Ellis v. City of Chicago, 667 F.2d 606, 612-13 (7th Cir. 1981). See also Haney v. Mizzell Memorial Hospital, 744 F.2d 1467, 1478 (11th Cir. 1984) (error for trial court to require proof of hostility before permitting leading questions of a witness identified with opposing party); Fed. R. Evid. 611(c) advisory committee's note.

Mssrs. Gallagher and Routh fall within the ambit of Rule 611(c). Mr. Gallagher, as an employee or agent of MIT, is clearly "identified with an adverse party." See Haney, 744 F.2d at 1477-78 (ruling that employee of party falls within the scope of 611(c)); Ellis, 667 F.2d at 613 (employee of defendant covered by Rule 611(c)). See also Perkins v. Volkswagen of America, Inc., 596 F.2d 681, 682 (5th Cir. 1979) (trial court erred in holding that employee of defendant would be plaintiff's witness if plaintiff called him). Mr. Routh is an

employee of Yale, a co-conspirator defendant. Because Yale participated in the Ivy Overlap cartel with MIT, its agents can also be characterized as "identified" with MIT under Rule 611(c). Indeed, MIT's counsel has raised a "joint defense" privilege with respect to communications with counsel for the other Overlap schools.

In addition, Yale and its agents have a substantial interest in the outcome of this trial. Factual findings in this case could be used in subsequent private treble-damage litigation concerning the Ivy Overlap Group. Indeed, Yale has already been named in a parallel private action in New York. Kingsepp v. Wesleyan University, et. al., No. 89-6121 (S.D.N.Y. 1992). This fact alone is sufficient to render Mr. Routh, as an agent of Yale, a hostile witnesses. Courts consistently employ a broad definition of hostility. See, e.g., United States v. Brown, 603 F.2d 1022, 1026 (1st. Cir. 1979) (affirming hostile status to a witness who appeared evasive, confused, and potentially biased); Fed. R. Evid. 611(c) advisory committee's notes (rule encompasses the "hostile, unwilling, or biased" witness). As such, the government should be given permission to lead these witnesses. See United States v. Karnes, 531 F.2d 214, 217 (4th Cir. 1976) (where witness is hostile to or surprises government, court may afford wide latitude to the government to lead, cross-examine, and impeach).

Therefore, leading questions should be permitted under Rule 611(c) when the government calls Mr. Gallagher or Mr. Routh.

E. MIT Should Be Prohibited From Asking Leading Questions Of Co-conspirator Witnesses.

Because these witnesses are hostile or adverse to the government and favorably inclined towards MIT, counsel for MIT should not be allowed to lead Mr. Gallagher or Mr. Routh during cross examination.

The general rule prohibiting leading questions is "designed to guard against the risk of improper suggestion inherent in examining friendly witnesses through the use of leading questions." Ellis, 667 F.2d at 612. This risk exists if MIT questions witnesses who are identified with or share common interests with MIT, regardless of the order in which they are examined. "Generally, when a witness identified with an adverse party is called, the roles of the parties are reversed. Leading questions would be appropriate on direct-examination but not on cross-examination." Alpha Display Paging, Inc. v. Motorola Comm. & Elec., Inc., 867 F.2d 1168, 1171 (8th Cir. 1989). See also Ardoin v. J. Ray McDermott & Co., Inc., 684 F.2d 335, 336 (5th Cir. 1982) (court has power to require a party cross-examining a friendly witness to employ non-leading questions); United States v. Bensinger Co., 430 F.2d 584, 591 (8th Cir. 1970) (in antitrust prosecution, allowing use of leading questions on direct

examination of defendant's employee and barring defendant from doing the same on cross); Fed. R. Evid. 611(c) advisory committee's note (explaining that where a party is "cross-examined by his counsel after having been called by his opponent," prohibition on leading questions is permissible).

Because Gallagher and Routh are essentially defense witnesses, the Court should therefore exercise its discretion to bar defendants from using leading questions during cross examination.

VIII. CONCLUSION

For the reasons set forth above and at trial, the Government requests that the Court enter judgment in its favor, holding that the Overlap agreements and activities constituted an unreasonable restraint of trade under the Sherman Act.

DATED: June 22, 1992

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