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August 14, 2020

Via E-Mail

Honorable Makan Delrahim, Esq.,
Assistant Attorney General, Antitrust Division,
Department of Justice,
Robert F. Kennedy Building, Room 3109,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530.

Dear Mr. Delrahim:

On behalf of the University Technology Licensing Program ("UTLP"), and its fifteen member universities ("Members"),[1] we respectfully submit this request, pursuant to 28 C.F.R. § 50.6, that the Antitrust Division of the U.S. Department of Justice (the "Division") issue a Business Review Letter regarding UTLP's proposed patent licensing program, as described below and in the attached agreements.[2]

The Members of UTLP collectively spend more than $12 billion per year on research. That academic research is vital to the Members' educational missions, but it also enables development of innovative products and services that have a tremendous real-world impact. As only a few examples, inventions created by UTLP Members enabled

[1] The fifteen members of UTLP are expected to be Brown University; California Institute of Technology ("Caltech"); Columbia University; Cornell University; Harvard University, Northwestern University; Princeton University; State University of New York at Binghamton; University of California, Berkeley ("Berkeley"); University of California, Los Angeles ("UCLA"); University of Illinois; University of Michigan; University of Pennsylvania; University of Southern California; and Yale University. UTLP provides that other non-profit organizations whose patents may add value to the UTLP portfolios may join UTLP at a later date. (*See* LLC Agreement (attached as Exhibit A) at §§ 1.1, 3.7(b)(1).)

[2] UTLP and its Members respectfully request confidential treatment of this letter and its attachments pursuant to 28 C.F.R. § 50.6(10)(c).

ARPANET (the foundation for the Internet), the Mosaic web browser, and MPEG-2 and other digital compression formats used daily by U.S. consumers. Although UTLP's Members contribute significantly to commercially relevant and societally beneficial innovation, Members historically have faced challenges regularly recouping costs and securing reasonable compensation from industry practitioners for their patented inventions, particularly in the physical sciences. Those challenges arise for many reasons, including (i) lack of industry awareness of university IP, and (ii) a belief held by some industry participants that universities are susceptible to budget, reputational, and institutional relationship constraints that make IP licensing and enforcement challenging. These challenges are exacerbated by the high costs associated with each individual university developing market expertise and engaging in the intensive licensing efforts required in industries that often are reluctant or unwilling to pay for university-patented technology even if they are using it. As a result, many universities do not routinely receive compensation for commercial use of their patented inventions, which they otherwise could invest into their non-profit educational and research missions, including further academic research that may also enhance consumer welfare.

UTLP is a pro-competitive solution to these and other challenges, which have a tendency to depress research, limit innovation related to new products and services, decrease the benefits to the public, and interfere with a level playing field (as some users of university IP appropriately take license while others do not). UTLP will centralize licensing expertise and administration, and provide a "one-stop shop" for licenses to many of the Members' physical science patents. Initially, UTLP will focus on three portfolio areas in which there is believed to be demand for innovations that Members have developed: (i) autonomous vehicles (*e.g.*, optical components, sensor hardware and software, cybersecurity); (ii) connectivity or "Internet of Things" (*e.g.*, millimeter-wave communication, power management, signal processing, location tracking); and (iii) "Big Data" (*i.e.*, technology for large-scale data storage, transmission, and analysis). In the future, depending on industry response to these programs, UTLP may license patent portfolios in other areas, including electronics fabrication, applied electronics, batteries, photovoltaics, and robotics.

By design, and as memorialized in the attached transaction agreements, each UTLP portfolio will (i) include complementary, and often disparate, patented technologies in a portfolio that nevertheless may, in its entirety, be of interest to a company developing a product or service in the portfolio area, (ii) present a "menu" that enables companies to choose freely among a license to combinations of individual patents, groups of patents that encompass specific technology areas, or the entire portfolio, and (iii) pass on to technology implementers—in the form of a royalty discount for a portfolio or sub-portfolio patent group license—a portion of the cost savings associated with centralized licensing administration. As outlined above and described in more detail below, UTLP

will create pro-competitive efficiencies of the type long recognized by the Division in the context of joint IP licensing, without any harm to the competitive process.

UTLP will create multiple benefits and enhance consumer welfare by, among other things: (i) publicizing potential commercial application and availability of technology that may otherwise be unknown to certain market participants; (ii) offering complementary technologies through one efficient vehicle, which will reduce transaction costs; (iii) making standard licensing terms widely available so that implementers can make informed decisions about deployment of capital; (iv) leveling the competitive playing field by providing license terms that do not discriminate among similarly situated implementers; (v) providing revenue to universities to fuel further research and development; and (vi) creating awareness of the work of university researchers, which could motivate additional research and technology transfer (*e.g.*, collaborations with implementers or research funding). UTLP will, of course, also benefit its Members by, among other things, furthering their educational mission.

For these and other reasons set out in this letter, UTLP and its Members—fifteen of the country's most innovative universities—therefore respectfully request that the Division issue a Business Review Letter concluding that UTLP's licensing program would not warrant investigation or enforcement action by the Division because the program, as proposed, does not raise U.S. antitrust law concerns.

The remainder of this letter is organized in three sections. *First*, we provide background information regarding selection of UTLP's portfolio areas and the process for identifying Member patents for inclusion in each portfolio. *Second*, we describe how UTLP will be organized, and describe the terms of the standard patent sublicense agreement UTLP expects to offer potential licensees. *Third*, we explain why UTLP's proposed licensing program does not raise competition concerns, focusing on three issues that may be of interest to the Division: (a) UTLP is adopting several measures to avoid combining competitive substitute patents in a portfolio, including contractual commitments designed to ensure that UTLP will not receive any benefit from inadvertent combination; (b) Members will grant UTLP an exclusive license—rather than retaining the ability to license patents independently—so the program can serve its pro-competitive goals (*i.e.*, generating efficiencies from centralized licensing expertise and administration, and curtailing free-riding) while remaining economically viable; and (c) UTLP will offer royalty discounts for portfolio and sub-portfolio patent group licenses to pass along cost savings to licensees as pro-competitive discounts.

I. Portfolio Selection and Patent Identification

Since the summer of 2018, Members of UTLP have worked with Sullivan & Cromwell and other advisers, including technical and licensing experts, to

identify technology areas in which UTLP might offer value to industry participants. The Members and those working with them sought to identify physical science applications in which (i) there is commercial activity and current demand for innovations the Members have developed, and (ii) many or all of the Members have valuable patents to contribute, increasing the efficiency of UTLP. In doing so, the group analyzed research activities of dozens of principal investigators (*i.e.*, lead-research professors) across the Members. That analysis identified three initial technology areas that would particularly benefit from the licensing program UTLP envisions: (i) autonomous vehicles; (ii) connectivity, or the "Internet of Things;" and (iii) "Big Data," as described above.

Stemming from this work, UTLP's advisers then analyzed the patents Members could contribute to these technology areas in light of existing encumbrances on the patents and other factors. In selecting proposed patents to include in each portfolio, the advisers sought to include complementary patented inventions that would be deemed valuable by implementers, and specifically excluded technologies that might be considered competitive substitutes.[3] The requirement to exclude competitive substitutes is memorialized in the attached Limited Liability Company ("LLC") Agreement of UTLP, which is Exhibit A to this letter:

> The Board shall, and shall cause the Company to, through Company Counsel, its advisors, consultants, agents and/or representatives, use commercially reasonable efforts to select for contribution, from the Patents that a Member offers to contribute to the Company, only those Patents that (i) will likely be useful to prospective sublicensees in carrying out anticipated activities as a sublicensee and (ii) are not Substitute Patents. (Ex. A, § 3.14.)
>
> "Substitute Patents" means any Patent that under applicable Law provides a different technical way of a licensee accomplishing the same task as another Patent contributed to the Company by any Member pursuant to such Member's Contribution Agreement. (Ex. A, § 1.1 at 6.)

As an example, the patented technologies included in the autonomous vehicles portfolio can broadly be divided into five complementary categories: (i) optical

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[3] Unlike a pool of standard essential patents, which may obtain certain value and related market power from the widespread adoption of the relevant standard, UTLP's value must be reflected in the value of its licensed IP. If the patents selected for UTLP's portfolios are not by themselves deemed valuable by implementers, they will not be used by implementers and UTLP will fail. Consequently, potential value to implementers was a key criterion in selecting patents for UTLP portfolios.

components; (ii) security and communication; (iii) control and navigation; (iv) "vision" (*i.e.*, giving the system the ability to interpret what it "sees"); and (v) millimeter-wave communication hardware. These technology categories complement each other as part of an autonomous vehicle—*i.e.*, one category of technology is not a substitute for the other—and potential licensees will have complete freedom to license all patents across all categories, license patents within only one category, or license only individual patents.

Moreover, even within a single technology sub-category, UTLP's advisers have endeavored—consistent with the LLC Agreement—to include patented technologies in each sub-category that are complementary, not competitively substitutable. For example, within the "millimeter wave hardware" category, (i) Caltech's U.S. Patent No. 7,812,775, titled "[Millimeter]-wave fully integrated phased array receiver and transmitter with on-chip antennas," is directed to a phased array antenna system in which the antennas are integrated with other components of the device on a single chip, while (ii) University of Michigan's U.S. Patent No. 7,907,100, titled "Phased-array antenna with extended resonance power divider/phase shifter circuit," is directed to the use of a novel type of phase shifter within a phased array receiver/transmitter that reduces the cost and size of the device. It is anticipated that implementers may want to use both technologies together to reduce the size and cost of phased array devices incorporated into, for example, an automotive collision avoidance radar system. Those patented technologies are not substitutable, nor does an implementer need to take a license to both of them; rather, an implementer may find the technologies to be useful complements and decide to license one or both of them.

It is important to the Members that UTLP serve only its procompetitive goals, and that the program avoid even the appearance of anti-competitiveness. Thus, from the outset, UTLP's advisers designed the program to avoid inclusion of substitutable patents in a UTLP portfolio. Moreover, as described in more detail below, even if substitute patents were included inadvertently, the UTLP agreements contain multiple safeguards to avoid any distortion of competition.

II. UTLP Organization and Standard Sublicense Agreement

UTLP's proposed licensing program is defined by three agreements, which are attached to this letter: the LLC Agreement (Exhibit A); the Contribution Agreement (Exhibit B); and the standard Sublicense Agreement (Exhibit C).

A. LLC Agreement

The LLC Agreement governs the relationship among Members and between Members and UTLP.[4] Members will collectively appoint a five-member Board of Managers (the "Board"). (Ex. A, § 3.2(a), (c).) The Board is charged with, among other things, making decisions related to sublicensing UTLP's patent portfolios and budget management. The LLC Agreement provides that licensing authority will be delegated to Officers and Company Counsel (the "License Administrator") (Ex. A, § 3.1),[5] and the Board will pre-approve standard license terms—*e.g.*, as set forth in the Sublicense Agreement (Exhibit C)—to which the License Administrator can agree without further approval. If the License Administrator seeks to depart materially from the standard Sublicense Agreement, Board approval will be required. (Ex. A, § 3.1.) For example, the standard Sublicense Agreement provides a non-exclusive license so that UTLP technologies can be utilized by a broad array of implementers. If a potential licensee were to seek a license outside of the standard terms, Board approval would be required to enter into the agreement.[6]

There are two additional qualifications to the Board's ability to approve sublicense agreements. First, in the event that a standard essential patent ("SEP"), which is subject to a licensing commitment to a standard setting or standard development organization, is included in a UTLP portfolio, the Board will approve a sublicense to the SEP on the same terms as the pre-existing commitment (*e.g.*, FRAND or RAND terms). (Ex. A, § 3.13.) At present, UTLP's advisers have not identified any SEPs in UTLP's proposed portfolios, so this qualification is forward-looking only. Second, the Board cannot approve a sublicense agreement that would "discriminate among similarly situated willing sublicensees" or have "the effect of putting one willing sublicensee at a competitive disadvantage in the relevant market to any other willing sublicensee." (Ex. A, § 3.1.) Although we do not expect these safeguards to be necessary—because licensing generally will be achieved via the standard Sublicense Agreement—they are included in an

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[4] A Delaware limited liability company called University Technology Licensing Program LLC will be formed contemporaneous with execution of the LLC Agreement.

[5] Except for cases where there is a conflict of interest, Sullivan & Cromwell will provide legal services to UTLP in connection with its licensing efforts.

[6] If a potential licensee sought an exclusive license or outright purchase of a UTLP patent—or a material change to the Sublicense Agreement that pertains to a particular patent or set of patents—the sale or material change requires approval of both the Board and the Member that owns the affected patent(s). (Ex. A, §§ 3.1, 3.7(d)(1).)

abundance of caution to ensure that UTLP will not distort a level playing field among similarly situated licensees.

UTLP is devoted to consensual licensing and its Members will pursue infringement litigation only after affording each licensee the full opportunity to learn about, negotiate, and conclude a consensual and mutually beneficial license.[7] In the event consensual licensing fails and litigation is considered, Members will make individual—not group—determinations about whether a Member will participate in litigation. Recognizing that a litigating Member creates a benefit for UTLP if litigation is resolved by the defendant taking a UTLP license or otherwise paying a reasonable royalty, the successful litigation Member may be entitled to certain increased revenue distribution as described in Section 8.1 of the LLC Agreement. (Ex. A, § 8.1(b)(5).)

B. Contribution Agreement

The Contribution Agreement (Exhibit B) will be the instrument by which Members provide an exclusive license—with the right to sublicense—to UTLP. (Ex. B, § 2.01.) A Member will retain the right, under its own patents, to conduct academic research and engage in educational activities and grant licenses to, among others, universities, non-profits, and governmental agencies to do the same, independently or jointly with the Member. (Ex. B, § 2.02(a).) By contributing a patent, Members grant UTLP the sole right to enforce the patent, as described above. (Ex. B, § 3.02(a).)

Relevant to the Division's analysis, Members also retain the right to grant a non-exclusive license for any patented technology that is deemed to be a competitive substitute to another patented technology in the portfolio. As stated in Section 2.02 of the Contribution Agreement:

> **Section 2.02 University Retained Rights**. University shall retain the non-exclusive right under the Licensed Patents to: . . . grant a non-exclusive license under the Specified Identified Patents (as defined below) to any Person (a "Potential Licensee") if and only if: (i) the Potential Licensee has stated in a prior written statement to UTLP or University that certain Licensed Patents (the "Identified Patents") cover technology that is a competitive substitute under applicable Law for technology covered by one or more Patents (the "Other Patents") Contributed by an Other University Participant to UTLP pursuant to the University Technology Licensing

[7] To further its goal of transparency, UTLP will maintain a website providing information about, among other things, its structure, process, license terms and the contents of the licensed portfolio.

> Program; (ii) UTLP does not separately make available for sublicensing to the Potential Licensee the Identified Patents and Other Patents under terms determined independently by University (for its Contributed Patent only) or the Other University Participant (for its Contributed Patent only), as applicable; and (iii) an independent expert appointed pursuant to the terms of the LLC Agreement agrees that one or more of the Identified Patents (the "Specified Identified Patents") cover technology that is a competitive substitute under applicable Law for technology covered by the Other Patents. (Ex. B, § 2.02(b).)

As described above, from inception, the goal of UTLP's advisers has been to avoid including competitive substitute patents in UTLP's portfolios. Accordingly, Section 2.02 of the Contribution Agreement is a "safety valve" in case substitute technologies inadvertently are included in a UTLP portfolio. For example, despite the best forward-looking efforts of UTLP's advisers, it is possible that the future application of patented technologies included in UTLP's portfolios reveal that the technologies are substitutable for an unforeseen purpose. Section 2.02 of the Contribution Agreement accounts for this scenario by providing that licensees can license substitute technologies from individual patent owners (*i.e.*, the relevant individual Members who own the patents) rather than UTLP.

C. Standard Sublicense Agreement

The standard Sublicense Agreement (Exhibit C) provides the terms under which UTLP expects to offer licenses to technology implementers. The standard sublicense will be non-exclusive, (Ex. C, § 2.01), and potential licensees will have freedom to license individual patents, sub-groups of patents, or the entire portfolio, (Ex. C, § 3.01(b)). Thus, in contrast to many SEP pools, UTLP will not offer *only* a portfolio-wide license; rather, the program will give licensees the option to freely negotiate for a license to certain numbers of individual patents or any combination of them.

The price UTLP will offer for any individual patent will depend on a number of factors commonly used to assess a reasonably royalty—*e.g.*, the nature of the particular patented technology, market value of the technology, and the extent and nature of the licensee's use or anticipated use of the technology. UTLP also expects to offer a standard royalty rate for a portfolio-wide license or sub-portfolio patent group license, and will set those standard rates to (i) pass on cost savings associated with the licensing program to counterparties that choose a portfolio option, and (ii) ensure that a licensee's decision to negotiate for a license to individual patents will remain economically viable (*i.e.*, the price differential between the portfolio and a single patent will not be so small that a licensee could only rationally choose the portfolio license). Although the rates the program charges will depend on a number of factors—including those noted above and the

efficiency with which the UTLP program operates—UTLP's standard royalty rates are expected to follow the format illustrated in Section 3.01 of the Sublicense Agreement:

> **Section 3.01 Royalties and Other Payments**. . . . Sublicensee will pay UTLP in accordance with Section 3.02 a royalty of (i) an entire portfolio for $X, (ii) one sub-technology bucket from a portfolio for ($X/number of buckets) x 1.75, (iii) fewer than four buckets for, per bucket, ($X/number of buckets) x 1.4, (iv) six or fewer buckets for, per bucket, ($X/number of buckets) x 1.25, (v) one patent for ($X/number of patents) x 3, (vi) fewer than four patents for, per patent, ($X/number of patents) x 2.5, or (vii) six or fewer patents for, per patent, ($X/number of patents) x 2. (Ex. C, § 3.01(b).)

As an example under this illustrative framework, if UTLP offered a portfolio of 100 patents for a standard portfolio-wide rate of $100, the per-patent rate under the portfolio option would be $1 and the individual per-patent rate would be $3, with a range of options and per-patent prices between the extremes. Although the actual rates and multipliers will be determined by market feedback and other factors, UTLP and its Members have committed—as set forth in the Sublicense Agreement—to a license structure that will preserve choice to economically license individual patents.

The Sublicense Agreement also addresses the issue of substitutability. As a further safeguard against inclusion of substitute patents in a UTLP portfolio, Section 3.01 of the standard Sublicense Agreement provides:

> For purposes of determining the applicable royalty rate, any Sublicensed Patents that are deemed to be substitutes for any other Sublicensed Patents shall be deemed a single Sublicensed Patent. The Sublicensed Patents shall be deemed substitutes for purposes of this provision upon Sublicensee providing to UTLP evidence which in UTLP's reasonable discretion establishes a reasonable probability that such Sublicensed Patents may be deemed substitutes. (Ex. C, § 3.01(a).)

Although this additional safeguard likely is not necessary, in the event a licensee chooses to license substitute patents directly from UTLP, the safeguard further ensures that UTLP will not benefit financially from substitute patents, and thus would have no incentive to include them in the first place.

III. UTLP Does Not Raise Competition Law Concerns

UTLP's proposed licensing program does not raise competition law concerns. In this section, we focus on three issues: (a) UTLP is adopting several measures

to avoid combining competitive substitute patents in a portfolio, including contractual commitments that ensure UTLP will not receive any benefit from inadvertent combination; (b) Members will grant UTLP an exclusive license—rather than retaining the ability to license patents independently—so the program can serve its pro-competitive goals (*i.e.*, generating efficiencies from centralized licensing expertise and administration and curtailing free-riding) while remaining economically viable; and (c) UTLP will offer royalty discounts for portfolio and sub-portfolio patent group licenses to pass along cost savings to licensees as pro-competitive discounts.

A. UTLP Reasonably Avoids Licensing Competitive Substitutes Together

The Division has long recognized that patent pools "consisting only of complementary patents are least likely to prove anticompetitive."[8] Indeed, the Division has stated that "combining complementary factors of production," including patented technology, "is generally procompetitive,"[9] and when "patents are not substitutable . . . . the evaluating Agency would be unlikely to challenge [the] arrangement."[10]

UTLP does not raise competition concerns because reasonable measures have been adopted to ensure that competitive substitutes are not included in a UTLP patent portfolio. As described above (Section I, *supra*), UTLP portfolios were deliberately constructed to avoid inclusion of substitute technologies, as required by the LLC Agreement. Moreover, in the unlikely event that these efforts fail—*e.g.*, because unforeseen future application of patented technology reveals that patents may be competitive substitutes—contractual safeguards prevent UTLP from taking advantage of substitute technologies that are included in a portfolio. As described above (Sections II(b) and II(c), *supra*), (i) prospective licensees have the contractual right to seek independent

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[8] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 77 (2007) [hereinafter IP2 REPORT]; s*ee also id.* ("[A] pool containing complementary patents, i.e., patents covering technologies that perform different functions but are used collectively to produce the licensed product, may have the pro-competitive effect of lowering the total royalty rate to licensees, thereby lowering the final product cost to consumers.").

[9] Letter from William J. Baer, Assistant Attorney Gen., U.S. Dep't of Justice, to Garrard R. Beeney, at 8 (Mar. 26, 2013), https://www.justice.gov/sites/default/files/atr/legacy/2013/03/28/295151.pdf.

[10] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 32 (2017).

negotiation with the university patent owner of any patents identified as competitive substitutes, and (ii) if the licensee decides to license competitive substitutes from UTLP, those patents will be treated as a single patent for the purpose of determining the royalty owed by the licensee.[11]

B. Members Grant UTLP an Exclusive License to Enable the Licensing Program to Achieve Procompetitive Goals While Remaining Viable

In the context of SEP pools, the Division previously found relevant—when issuing a favorable Business Review Letter—that members of the SEP pool provided only a non-exclusive license to the pool, and retained independent ability to license their SEPs. In that context, where the entire SEP pool was *only* offered on a "take-or-leave" basis, and the pool benefited from industry adoption of a technology standard (*see* footnote 2, *supra*), the Division found that "the independent availability of each [p]ortfolio patent is a valuable failsafe" to alleviate tying concerns.[12]

Here, in contrast to SEP pools, there is no tying concern that needs to be alleviated by the "independent availability of each [p]ortfolio patent." UTLP will not and cannot force licensees to accept a portfolio-wide license on "take-or-leave" terms in the way that many SEP pools conduct business. Rather, as described above (Section II(c), *supra*), UTLP will give potential licensees freedom to choose among a license to certain numbers of individual patents, sub-groups or patents, or the entire patent portfolio. Thus, as a threshold matter, UTLP does not raise the same "take-or-leave" concerns created by

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[11] As the Division stated in 2007: "[P]revious guidance should not be interpreted to exclude the possibility of including some substitute patents in the pool. The Agencies will consider the inclusion of some substitutes as one of the many factors in their rule of reason analysis of any pooling agreement." IP2 REPORT, *supra* note 7, at 78. *See also* Letter from Makan Delrahim, Assistant Attorney Gen., U.S. Dep't of Justice, to Mark Hamer, Esq. at 15 (July 28, 2020), https://www.justice.gov/atr/page/file/1298626/download [hereinafter Avanci Letter"] ("[T]he Department appreciates Avanci's position that such an extensive evaluation may be 'commercially impractical' . . . and this requirement could inhibit the proposed Platform's formation."). UTLP's formation documents also include safeguards similar to those the Division recently accepted in the July 28, 2020 Business Review Letter regarding the Avanci patent pool.

[12] Letter from Joel I. Klein, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Garrard R. Beeney, Esq. at 11 (June 26, 1997), https://www.justice.gov/sites/default/files/atr/legacy/2006/10/17/215742.pdf.

SEP pools, and there should be no competition concern about the fact that Members will not retain the ability to independently license patents contributed to UTLP.

In addition, the choice afforded to licensees by UTLP likely will be guided by a licensee's valuation of each UTLP patent individually. Unlike SEP pools where there may be a need to practice a standard to make marketable products conforming to a standardized technology, there is no such obligation for any licensee to take a license to any UTLP patent the licensee does not want or considers too costly. Thus, there is no forced licensing of any package that would need to be ameliorated by the availability of licenses from patent owners independently.

Furthermore, an exclusive license to UTLP is pro-competitive because it increases efficiency by having a single organization (rather than each of 15 individual universities) spend the substantial resources necessary for the licensing goals of the program, including understanding the various products and services that use the licensed technology, publicizing the availability of the portfolio, understanding the technology in the portfolio, and other costs necessary to a transparent licensing program.[13] These types of efficiencies gained by joint licensing have been recognized by the Department and by leading commentators, and they would not be economically achievable if Members do not grant UTLP an exclusive license.[14]

In addition, the exclusive license may further a level playing field for licensees, as implementers of the technology will be unable to rely on influential contacts, relationships and the like, or otherwise "hold out"[15] by taking advantage of an individual university as a licensor, which has happened from time to time historically. As described

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[13] While each university has a technology transfer office or its equivalent, these offices typically do not have the resources necessary for a program such as that offered by UTLP. On average, the Members employ approximately 10 licensing professionals in their respective technology transfer offices.

[14] IP2 REPORT, *supra* note 7, at 57. *See also* H. HOVENKAMP, ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW §§ 34.02(c), 34.04(c)(4) (3d ed., 2019 Supp.) [hereinafter HOVENKAMP] ("Patent pools can be particularly important in overcoming anticommons problems, especially because they offer a solution to the problem of high transaction costs. . . . Patent pools . . . [o]rdinarily serve to reduce the parties' transaction costs.").

[15] IP2 REPORT, *supra* note 7, at 64.

above (pp. 1-2, *supra*), this is one of the pro-competitive benefits of UTLP which is achieved by an exclusive license to UTLP.

C. UTLP Will Offer Procompetitive Royalty Discounts for Portfolio and Sub-Portfolio Patent Group Licenses

The Division has recognized that "the combined price of [] individual licenses may be more than the price of the pooled patents which benefits from lower transaction costs."[16] Leading antitrust practitioners have recognized the same, stating that (i) volume discounts in patent licensing are "commonly see[n]" and often occur in portfolio licenses, which are "almost always cheaper than the sum of the licensing price for each and every patent on an individual basis,"[17] and (ii) a patent "bundled discount is likely to be socially preferable because it permits buyers who do not wish to have the entire package to purchase a subset, although at a higher price. . . . [T]he optimal solution would be to offer the package to those who prefer it, passing on all or part of the cost reduction, but charging the separate prices to those who prefer only [individual patents]."[18]

Applying this principle, UTLP expects to offer a lower per-patent royalty rate to licensees choosing a portfolio-wide license or license to a sub-portfolio patent group, relative to a licensee choosing to license only individual patents. The lower per-patent rate reflects that a licensee selecting to license the entire patent portfolio or buckets of patents within the portfolio provides substantial cost savings to UTLP, and may obviate the need for UTLP to determine which of dozens of patents are used by any number of products and services of a particular licensee. While the precise royalty for each license will be informed by the value perceived by UTLP and licensees in the market, as described above (pp. 8-9, *supra*), UTLP is committed to ensuring that the rate structure, including certain lower per-patent rates, will provide realistic choice for licensees to select among the licensing options offered by UTLP—*i.e.*, certain individual patents, buckets of patents and the portfolio as a whole. We respectfully submit that this strikes an optimal pro-competitive balance, which passes on cost savings to licensees who choose a portfolio

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16 IP2 REPORT, *supra* note 7, at 84.

17 *See* JORGE L. CONTRERAS, NON-DISCRIMINATION AND FRAND COMMITMENTS, UTAH L. FAC. SCHOLARSHIP 192 (2018), https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1093&context=scholarship.

18 HOVENKAMP, *supra* note 13, § 22.06. *See also* Avanci Letter, *supra* note 10, at 8 n.55 (citing with approval *U.S. Philips Corp.* v. *ITC*, 424 F.3d 1179, 1192 (Fed. Cir. 2005), for the proposition that "negotiating individual licenses can be 'extremely expensive and time-consuming'").

license while meaningfully preserving the choice to license selected individual patents if that is what the licensee prefers.

IV. Conclusion

As described above, and in the attached transaction documents, we strongly believe that UTLP will be a pro-competitive patent licensing program that poses no risk to the competitive process. The program was designed, at the start, to avoid any competition concerns, and contractual mechanisms ensure that the UTLP licensing program will have no ability to distort competition. UTLP and its Members—fifteen of the country's leading universities—respectfully request a Business Review Letter from the Division concluding that UTLP is unlikely to raise competition law concerns.

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We appreciate the Division's attention to this matter and stand ready to provide any additional information the Division might find helpful.

Very truly yours,

/s/ Garrard R. Beeney

Garrard R. Beeney

cc: Renata B. Hesse
Marc De Leeuw
Dustin F. Guzior

(Attachments)