



U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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December 16, 2011

Donald I. Baker
Baker & Miller PLLC
Suite 300
2401 Pennsylvania Ave., NW
Washington, DC 20037

Dear Mr. Baker:

This letter responds to your request on behalf of the Worker Rights Consortium (“WRC”) for the issuance of a business review letter pursuant to the Department of Justice’s Business Review Procedure, 28 C.F.R. § 50.6.¹ You requested a statement of the Department’s present enforcement intentions regarding the WRC’s proposal to implement the Designated Suppliers Program (“DSP”). For the reasons stated below, the Department has no present intention to challenge the DSP.

A. Background

The following is a description of your representations that are pertinent to the Department’s analysis.

1. WRC

The WRC is a nonprofit corporation formed “to promote socially responsible initiatives by universities and colleges . . . for the improvement of working conditions and labor standards.”² The core purpose of the WRC is to codify and promote compliance with fair labor standards by licensees and manufacturers of college and university-licensed apparel and textile products (collectively “collegiate apparel”).³

The WRC is governed by a board of five representatives of the United Students Against Sweatshops (“USAS”), five university representatives, and five labor rights experts. Universities are not formally “members” of the WRC. Instead, colleges and universities (collectively “schools”) “affiliate” with the WRC by paying 1% of their licensing revenues (with a minimum

¹ Letter from Donald I. Baker to Acting Assistant Attorney General Sharis A. Pozen (Dec. 15, 2011) (hereinafter “December 15, 2011 Letter”).

² Worker Rights Consortium Bylaws § 1.2(1), available at http://workersrights.org/about/wrc_bylaws.asp.

³ *Id.* at § 1.2(3).

of \$1,500 and a maximum of \$50,000 per school) to the WRC. The WRC has approximately 181 affiliated schools.

2. The Licensing of Collegiate Apparel Rights

Most schools license the rights to produce and sell collegiate apparel with their names and insignia to one or more licensees (“Licensees”). Royalty rates vary substantially depending on the school and the number of licenses entered into by the school. Licensees enter into production contracts with apparel manufacturing factories (“Factories”) and then resell the finished collegiate apparel to retailers. As you represent, Licensees “actively compete with each other in (i) determining what apparel to create bearing their own brands and the licensed names and insignia of the Schools and other licensors (e.g., professional sports organizations), and (ii) designing, manufacturing[,], purchasing, marketing and selling such garments.”⁴

3. The DSP

The purpose of the DSP is to increase the wages and improve the overall working conditions of individuals who work in Factories that produce collegiate apparel and to enable the WRC’s school affiliates to make available a wide range of collegiate apparel that is manufactured under fair labor conditions. It will seek to do this primarily by establishing a set of optional “Proposed Licensing Terms” that participating schools are encouraged to include in their licensing contracts.⁵

Accordingly, schools can participate in the DSP without incorporating the Proposed Licensing Terms into particular licensing contracts.⁶ But, if included, they will require the following (among other things):

a. Within six months of entering into the contract, the Licensee and its Designated Supplier List factories (“DSL Factories”) must achieve compliance with the labor codes of conduct of the participating schools and maintain compliance with these labor codes throughout the term of the contract.⁷

b. The Licensee must ensure that it pays the DSL Factory a “fair price” so that the Factory can pay its employees a country-specific “living wage” and ensure that this wage is paid to the Factory’s employees.⁸ The WRC will calculate the living wage “according to a market

⁴ December 15, 2011 Letter at 16.

⁵ *See id.* at 2-3.

⁶ *Id.* at 3.

⁷ You represent that the existing school labor codes for licensed apparel typically require that Licensees ensure that they and their factory suppliers adhere to the following standards: (1) compliance with the domestic labor laws of the country of manufacture; (2) payment of the legal minimum wage or prevailing industry wage of the country of manufacture, whichever is higher; (3) restriction of mandatory overtime to the lesser of twelve hours per week or the legal weekly limit in the country of manufacture; (4) no use of child labor or forced labor; (5) the provision of a safe and healthy workplace; (6) no discrimination on the basis of gender, race, religion, age, disability or pregnancy, sexual orientation, nationality, political opinion, or social or ethnic origin; (7) no verbal, physical or sexual abuse; (8) respect for freedom of association and collective bargaining; (9) provision of maternity leave and accommodation of pregnant workers; (10) protection from risks to reproductive health; and (11) disclosure of supplier factory locations. *Id.* at 8 n.17.

⁸ *Id.* at 8.

basket study and/or other research . . . concerning the cost of living in the locality where the Factory's workers reside."⁹ You estimate that the living wage will be on average three times the prevailing wage rate paid at comparable factories.¹⁰ The Licensee and the DSL Factory will resolve any disputes over the fair price through binding arbitration. The WRC will have the right to observe the proceedings and provide input to the arbitrator, but will not have decision-making power.

c. The Licensee must ensure that the DSL Factory "guarantee[s] respect for workers' rights to freedom of association and collective bargaining."¹¹ The WRC, in consultation with USAS and the participating schools will determine these requirements.¹²

d. The Licensee must commit to procure a set percentage of collegiate apparel from DSL Factories.¹³

e. The Licensee must enter into contracts of at least three years' duration with each DSL Factory.¹⁴

f. The Licensee will affix the collegiate apparel "with a label visible at [the] point-of-sale that contains information concerning the labor conditions under which it was made and the verification of these claims . . ."¹⁵ The purpose of this labeling requirement is to ensure that consumers will be well informed that collegiate apparel manufactured in DSL Factories has been produced under fair labor conditions.

You have represented that the WRC will engage in extensive monitoring of Licensee and Factory conduct. Both at the outset of any license agreement, and throughout the term of the license agreement, the WRC will verify that the DSL Factories and the Licensee are complying with the Proposed Licensing Terms with respect to contracts including those terms.¹⁶ After a participating school executes a license agreement that includes the Proposed Licensing Terms, the Licensee will independently select the Factories that it proposes to use in advance of starting to manufacture a school's collegiate apparel.¹⁷ The WRC will consult with the Licensee, the Factories, and any bona fide labor organization that represents the Factories' workers to ensure that all parties are fully aware of their obligations under the DSP.¹⁸ No later than six months into the term of the License agreement, the WRC will conduct a full compliance assessment of the Licensee's Factories to assess compliance with the Proposed Licensing Terms and the participating schools' codes of conduct.¹⁹ The WRC will place on the WRC's Designated Supplier List those Factories that the WRC determines are in compliance.²⁰ The WRC will report any DSL Factory's serious and persistent failures to meet these obligations to the relevant

⁹ *Id.*

¹⁰ *Id.* at 12.

¹¹ *Id.* at 7.

¹² *Id.* at 8.

¹³ *Id.* at 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 9, 18-21.

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 19.

²⁰ *Id.* at 9.

participating schools.²¹ Further, the WRC will prepare reports that describe the WRC's compliance assessment of each DSL Factory, which it will post on a public website and publicize to consumers at the points of sale for collegiate apparel.²²

In addition, the WRC will conduct ongoing monitoring of compliance with the DSP by Licensees and Factories, based on complaints or information that the WRC gathers through its own investigations. The WRC will seek to have any violations corrected, but if the infringement persists, the WRC will remove the Factory from its Designated Supplier List, and inform the Licensees that they can no longer affix labels advertising verification of manufacture under fair labor working conditions on collegiate apparel that the Factory produces.²³ Moreover, if the WRC receives a report from a third-party arbitrator that indicates that the negotiated prices for the collegiate apparel are below the required "fair price" and the Licensee does not subsequently agree to pay the fair price prescribed by the arbitrator, the WRC will report this infraction to any relevant participating school.²⁴

B. Analysis

Section 1 of the Sherman Act prohibits competitors from entering into contracts, combinations, and conspiracies that unreasonably restrain trade. 15 U.S.C. § 1. Section 1 is implicated in this case because the DSP involves collective action that potentially affects licensing and wage competition, and downstream competition in apparel sales.

In the circumstances in which the DSP would likely be implemented, it appears unlikely to lead to significant anticompetitive effects. Incorporation of the Proposed Licensing Terms is optional and up to each school and licensee, and is unlikely to have a substantial effect on licensing competition among potentially participating schools. It also is unlikely to have a substantial effect on downstream competition for apparel sales. Moreover, the factories affected by the Proposed Licensing Terms are likely to constitute only a tiny portion of the labor market, making significant anticompetitive effects in that market unlikely. Finally, the DSP can be viewed as procompetitive in that it may facilitate competition in a new area, by providing assurances that apparel was produced under conditions meeting the DSP's standards.

C. Conclusion

The Department has no present intention to challenge the formation or operation of the DSP under the antitrust laws. This letter expresses the Department's current enforcement intentions and is predicated on the accuracy of the information and assertions that you have presented to us in your December 15 letter and in oral communications to the Department.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. §50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within

²¹ *Id.* at 18.

²² *Id.* at 9-10.

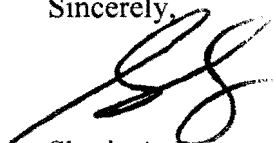
²³ *Id.* at 19.

²⁴ *Id.*

Donald I. Baker
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thirty (30) days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

A handwritten signature in black ink, appearing to read 'S.A. Pozen', written over a horizontal line.

Sharis A. Pozen