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18 *Co-Lead Counsel for Direct Purchaser Plaintiffs*

19
 20 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

21 IN RE: LITHIUM ION BATTERIES
 22 ANTITRUST LITIGATION

Case No. 13-MD-02420 (YGR)
 MDL No. 2420

23 **DECLARATION OF WILLIAM E.**
KOVACIC

24 This Document Relates To:

25 *All Direct Purchaser Actions*

Date: January 10, 2023
 Time: 2:00 p.m.
 Judge: Hon. Yvonne Gonzalez Rogers
 26 Courtroom: 1
 27

1 I, William E. Kovacic, declare as follows:

2 1. Since November 2011, I have served as Director of the George Washington
3 University Law School (“GW Law School” or “GW”) Competition Law Center (“CLC” or
4 “Center”). I am the Global Competition Professor of Law and Policy at the GW Law School, and
5 I have served as a member of the faculty there since 1999. I previously had served as a member of
6 the faculty of the George Mason University School of Law from 1986 to 1999. From 2001 through
7 2004, I was the General Counsel of the U.S. Federal Trade Commission (“Commission”). I served
8 as a member of the Commission from January 2006 through September 2011, and I chaired the
9 agency from March 2008 through March 2009. From August 2013 through March 2022, I was a
10 Non-Executive Director with the United Kingdom’s Competition & Markets Authority.

11 **The CLC’s Founding and Missions**

12 2. The GW Law School formed the CLC in 2007 to fill a major gap in the field of
13 competition law—to correct the tendency of academics, government officials, and practitioners to
14 overlook the role that institutional design and management play in shaping substantive results in a
15 competition law system. The creation of the CLC was made possible by a *cy pres* award authorized
16 by the United States District Court for the District of Columbia.

17 3. The CLC’s programs seek to improve our understanding about the links between
18 institutional arrangements and the performance of a competition law system. Greater understanding
19 of these connections can promote the effective design and implementation of competition law
20 systems in the United States and abroad. Without effective implementation, a jurisdiction cannot
21 realize the substantive aims of an antitrust law. To my knowledge, the CLC’s focus on policy
22 implementation is unique among the world’s academic institutions.

23 4. One of the CLC’s main functions, and a vital motivation for its formation, is to
24 improve the effectiveness of private rights of action as a tool for the enforcement of antitrust laws.
25 A major focus of the CLC’s work has been to strengthen the implementation of private rights of
26 action to combat price-fixing and other forms of collusion among competitors forbidden by
27 Section 1 of the Sherman Act.

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1 **The CLC’s Successful Programs**

2 5. The CLC’s work is national in its orientation. The Center’s conferences, workshops,
3 and webinars regularly engage academics, government officials, and practitioners from all regions
4 of the United States. The CLC’s research programs examine enforcement developments across the
5 country at the national and state levels. In my capacity as the Center’s Director, I regularly present
6 the results of the CLC’s research results at conferences hosted by academic institutions, professional
7 societies, think tanks, government bodies, and business organizations across the United States. In
8 addition, the Center participates actively in events outside the United States, particularly in
9 programs designed to enhance the institutional foundations for competition law enforcement.

10 6. CLC programs include: (1) conducting research on topics related to institutional
11 design and policy implementation; (2) providing advice for antitrust systems; (3) supplying a trusted
12 forum for discussion of antitrust topics; (4) encouraging student professional development related
13 to careers in competition law, and (5) enabling visiting scholars from outside the United States to
14 conduct research at the GW Law School.

15 7. Research: The CLC has sought to encourage research related to institutional design
16 and the implementation of competition laws. One means to that end was the creation in 2012 of the
17 Journal of Antitrust Enforcement (“JAE”). The CLC co-edits the JAE along with the Centre for
18 Competition Law and Policy at Pembroke College, Oxford University. Published by the Oxford
19 University Press, the JAE features articles on issues related to the design and operation of
20 competition laws, including the operation of public and private enforcement mechanisms. Since
21 2012, in cooperation with the Paris-based Institute of Competition Law and the journal
22 Concurrences, the CLC has sponsored an annual program of Antitrust Writing Awards (AWA) to
23 recognize important academic research and commentary by practitioners. The AWA program is the
24 first effort I know of to honor, on a regular basis, excellent writing in the field. The CLC also
25 conducts its own competition policy research. Since 2012, the CLC has performed an ongoing
26 benchmarking project to collect data on key institutional design features for over 120 national
27 competition law systems. To my knowledge, this is a first-of-its-kind endeavor. The CLC has
28 published papers reporting the initial results of the benchmarking project. In 2023, the CLC expects

1 to publish a comprehensive report on the benchmarking survey. The CLC places all of its
2 benchmarking data in the public domain for the benefit of researchers and competition agencies;
3 the CLC plans to conduct and publish annual updates of the survey. To improve access to the
4 benchmarking data set, the CLC is undertaking a major upgrade of its website. The benchmarking
5 project has been carried out in cooperation with the United Nations Conference on Trade &
6 Development Research Partnership Platform.

7 8. A major emphasis of our research program has been to explore enhancements in
8 public and private enforcement efforts to challenge collusive schemes, such as horizontal price-
9 fixing agreements, that violate Section 1 of the Sherman Act. As the Center's Director, I have
10 worked with experts with extensive experience in private antitrust enforcement to prepare papers
11 that document tactics that firms use to carry out tasks essential to the success of price-fixing
12 agreements. *E.g.*, William E. Kovacic, Robert C. Marshall & Michael J. Meurer, Serial Collusion
13 by Multi-Product Firms, 6 *Journal of Antitrust Enforcement* 296 (2018). An important aim of this
14 body of research has been to inform efforts by private plaintiffs to satisfy doctrinal standards that
15 govern proof of concerted action to satisfy the plurality requirement of Section 1 of the Sherman
16 Act. *See, e.g.*, William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, Plus
17 Factors and Agreement in Antitrust Law, 110 *Michigan Law Review* 393 (2011).

18 9. Advice and Education for Competition Systems: The CLC advises competition
19 agencies around the world on the design and implementation of competition law. Among other
20 topics, the Center provides advice on agency organization, management, strategy, and prioritization,
21 and project selection. Countries the CLC has advised include Brazil, the Dominican Republic,
22 French Polynesia, Georgia, the Netherlands, Thailand, and Ukraine. These advisory functions
23 benefit from the CLC's research and from lessons derived from intensive study of individual
24 competition systems.

25 10. Forum for Discussion: The CLC holds conferences, seminars, and workshops to join
26 academics, business managers, government officials, judges, and practitioners in discussions about
27 competition policy issues. These programs seek to build consensus on important policy issues, to
28 inform academic researchers about current enforcement developments, and to give public officials

1 the benefit of learning generated by academic scholarship. Since 2013, the CLC and Concurrences
2 have hosted an annual conference in Washington, D.C. on major developments in competition law
3 enforcement, and have hosted an annual program to recognize excellence in writing on competition
4 law topics. Since 2012, the CLC and Pembroke College have convened an annual research
5 seminar—sometimes in Oxford, England and sometimes in Washington, D.C.—on policy
6 implementation, with attendees including academics, business officials, government officials,
7 practitioners, and public interest groups.

8 11. One major subject of the CLC’s work has been the evaluation of the results of
9 antitrust enforcement. For example, with the American Bar Association Section of Antitrust Law
10 and the Organization for Economic Cooperation and Development, the CLC has hosted a
11 conference on ex post evaluation of merger enforcement. As a follow-on to this initiative and to
12 continuing CLC research projects, the CLC presented testimony at a Federal Trade Commission
13 hearing on ex post evaluation of merger control. The CLC also provides educational programs for
14 competition agencies and collateral institutions (such as courts and professional societies) whose
15 work is important to the successful implementation of a competition law. Among other matters, the
16 CLC has conducted seminars on competition law for judges in China and in Latin America.

17 12. A principal element of our participation in programs at home and abroad has been to
18 encourage the enhancement of mechanism to detect and deter price-fixing and similar collusive
19 schemes and to achieve compensation for victims. In particular, we have sought to draw attention
20 to how firms have adapted over time to devise new mechanisms to form and implement illegal
21 collusive schemes. *See, e.g.*, William E. Kovacic, Robert C. Marshall & Michael J. Meurer, Patents
22 and Price-Fixing by Serial Colluders, 10 New York University Journal of Intellectual Property &
23 Entertainment Law 152 (2021).

24 13. Student-Professional Development: The CLC engages GW Law School students in
25 all phases of its programs. CLC Student Fellows contribute to research projects, help organize
26 conferences, and assist in consultation and educational projects for competition policy systems.
27 These activities give students first-hand exposure to the process of policy implementation and
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1 provide a highly realistic sense of the challenges that confront competition policy agencies and
2 private litigants in pursuing antitrust cases. Students have made major contributions to CLC
3 research and advisory projects and, in a number of instances, have published papers based on their
4 CLC activities. By giving students a better understanding of the conceptual foundations of
5 competition law and a deeper appreciation of the practical demands of the enforcement process, I
6 believe we are giving the next generation of antitrust lawyers a superior foundation on which to
7 build careers in the field. I also am confident that the CLC's programs have had a very positive
8 impact on the placement of our students in government agencies and private law firms that are
9 engaged in the enforcement of the antitrust laws.

10 14. Visiting Scholar Program: Each year the CLC hosts foreign visitors to conduct
11 research, to attend GW classes at GW, to meet GW students, and to speak at CLC events. These
12 visits range from a few weeks to an entire year. In the current academic year, the GW Law School
13 is hosting two Fulbright scholar fellows from outside the United States.

14 15. With respect to future work, the CLC is engaged in several projects that have promise
15 to improve the private enforcement of antitrust law. One line of research is focused on how
16 competitors may cooperate to manipulate indices that are used to set the prices of a wide range of
17 commodities, including agricultural products and metals. This behavior has figured prominently in
18 a number of lawsuits over the past decade. A second line of work is to document how concerns
19 about potential overdeterrence in private challenges to anticompetitive behavior have led courts to
20 impose ever more demanding burdens on private plaintiffs seeking to plead and prove antitrust
21 claims. *E.g.*, William E. Kovacic, *The Chicago Obsession in the Interpretation of U.S. Antitrust*
22 *History*, 87 *University of Chicago Law Review* 459 (2020). We currently are conducting research
23 to document how these concerns have narrowed the range of antitrust enforcement, and we are
24 planning workshops to explore approaches to persuading courts to reconsider the factual
25 assumptions that have guided this development.

26 16. Furthermore, the CLC is working with international organizations such as the
27 Organization for Economic Development and the United Nations Conference on Trade and
28 Development to improve methodologies for conducting ex post evaluations of completed

1 competition policy initiatives. The CLC also is working with these organizations to improve
2 methods for competition agencies to report activity in order to provide a fuller view of what
3 individual agencies are doing and to permit better comparative study of competition law regimes.
4 Another CLC initiative is to complete an ongoing series of interviews with current and former
5 senior officials of competition agencies and prepare a report on management techniques that can
6 improve agency performance. Finally, we are preparing a project to examine the relationship
7 between competition agencies and the courts in the development of a competition policy regime.

8 **As a *Cy Pres* Recipient, the CLC Would Put Funds to Beneficial Use.**

9 17. A central rationale for the establishment of the CLC was to improve the effectiveness
10 of the institutional arrangements for antitrust enforcement—increasing awareness of how the
11 quality of institutions shapes substantive policy results. Within this overall objective, a key focus
12 of the Center has been to increase the capacity of private rights of action to challenge efforts by
13 competitors to engage in price-fixing and related forms of collusion. This emphasis in the CLC’s
14 program reflects our understanding that even small improvements in the nation’s capacity to detect
15 and deter such arrangements will confer large benefits on society.

16 18. An increase in resources would enable the CLC to strengthen its program in several
17 ways. We would use additional resources to continue the initiatives that have yielded promising
18 results to date: research that examines how cartels function and the countermeasures that can serve
19 to defeat them; conferences and workshops that convene academics, public officials, and
20 practitioners to discuss issues crucial to the development of effective private and public
21 enforcement initiatives; the engagement of students in projects to give them a superior grounding
22 in antitrust law and its practical implementation, and the participation in events in the United States
23 and overseas that enable us to share what we have learned from our own work and incorporate the
24 experience of others into our own work. A vital feature of an expanded program of research and
25 conferences would be to document the contributions of private enforcement to the larger system of
26 competition policy. This type of intensified ex post evaluation would yield, we believe, valuable
27 insights about the design of private rights of action and about the interaction of public and private
28 enforcement as complements in the delivery of effective competition policy.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2022 at Washington, D.C.

By: 
WILLIAM E. KOVACIC