WILLIG, WILLIAMS & DAVIDSON
MEMORANDUM

TO: Derek Clarke,
Assistant Executive Director of
CHLPA

DATE: September 20, 2012

FROM: Willig, Williams and Davidson

FILE NO: 088000-000001

RE: Antitrust Suit Against Canadian Hockey League

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You requested that our firm provide an analysis of a potential antitrust suit under American law against teams of the Canadian Hockey League ("CHL") located in the United States. This memorandum provides this analysis. In brief, and as discussed at length below, we find that that individual players of the CHL have legal grounds to file such a suit.

A. RELEVANT FACTS

The CHL is a junior hockey league consisting of 60 teams in 3 different hockey leagues: the Western Hockey League, the Ontario Hockey League, and the Quebec Major Junior Hockey League. Fifty-two of the teams are located in Canadian cities, while 8 teams are in the United States. Those teams are as follows: the Everett Silvertips (in Washington state), the Portland Winterhawks, the Seattle Thunderbirds, Spokane Chiefs (in Washington state), the Tri-State Americans (in Washington state), the Erie Otters (in Pennsylvania), the Plymouth Whalers (in Michigan), and the Saginaw Spirit (in Michigan). The first 5 are in the Western Hockey League and the latter 3 are in the Ontario Hockey League. There are no American teams in the Quebec Major Junior Hockey League.

Players in the CHL range generally from 16 to 20 years of age although there are a few who are older. There are approximately 25 players per team—for a total of around 1,500 players in the CHL. All of these players sign Standard Player Agreements with their respective team. Under CHL rules, these player agreements contain identical terms and conditions of employment for every player regardless of that player's level of skill or experience or the team with which he signs.

Under these agreements, the teams retain the rights of their players for the life of the contract. Generally, these contracts cover all ages of eligibility in the CHL, i.e., a player who signs at age 16 signs a 4 year contract with the team. Specifically, the agreement states that team has the "right to enjoin the Player from playing hockey for any amateur or professional club; provided that the Club recognizes the right of the Player to play in the National Hockey League ("NHL") pursuant to the NHL/CHL Agreement." The team also retains the right to sign the player for an "overage" year—a year beyond age 20. Teams may terminate these agreements if the player violates his terms of the agreement. However, even if terminated, the player "may not enter into a hockey player agreement with a CHL team other than the [team he played for] as long as the Player is included on the protected list of [that team] in accordance with the OHL

By-Laws."

The player agreements set a fixed "fee for the Player's services." These fees are $35 per week for players 16 and 17 years old; $50 per week for players 18 years old; $60 a week for players 19 years old; and $125 per week for players 20 years old. The player agreement lists these amounts not by dollars, but by stating that they will receive the "league maximum." These amounts are subject to an escalator clause of 4% a year for the years of the contract.

The players receive additional compensation. They are paid bonuses depending on their team's success in the CHL playoffs: $100 if his team wins the first round of playoffs; $150 if his team wins the second round of playoffs; $300 if his team wins the third round of playoffs; and $450 if his team wins the fourth round of playoffs. Players also receive a travel allowance of $100 per month if they do not have a car, and $200 a month if they do.

The players' compensation includes an "education package." This package provides approximately $7,000 a year for payment of tuition, books and compulsory fees, subject to numerous qualifications. First, the player must play a "complete season" with the team. A "complete season" means the player appears in a CHL game on or after January 10th of that hockey season, with the CHL season beginning in September. Second, a player "must qualify academically for the institution in question and must remain academically qualified throughout the period of enrollment." Third, the player must be enrolled on a full-time basis over consecutive terms and semesters to remain eligible for the education benefit.

The time invested in practice, playing, and travelling to games averages around 50 hours a week. Consequently, the vast majority of the players do not receive any of these education funds as they are unable to be both full-time students and players in the CHL. Much of the travel to away games exceeds 5 hours and, in some instances, as much as 11 hours. The combination of travel, practice, and playing makes it exceedingly difficult to meet the requirements of the education package, and, in fact, the teams on average pay approximately $30,000 a year in total towards the education benefit.

B. LEGAL ANALYSIS

Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. 15 U.S.C. § 1. "As is obvious from the language and purpose of the Sherman Act, the unilateral actions of a solitary actor cannot violate Section 1, and therefore a threshold issue in all Sherman Act cases is whether more than one actor is implicated in the challenged restraint." *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005) (citations omitted).

"Because nearly every contract that binds parties to an agreed course of conduct 'is a restraint of trade' of some sort, the Supreme Court has limited the restrictions contained in Section 1 to bar only 'unreasonable restraints of trade." *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 325 F3d 712, 718 (6th Cir. 2003) (citing *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98, 82 L.Ed. 2d 70, 104 S.Ct. 2948 (1984) (hereinafter "Bd. of Regents"). In order to establish an antitrust claim, a plaintiff must prove that the other parties (1) participated in an agreement that (2) unreasonably retrained trade in the relevant market. See *Nat'l Hockey League Players Ass'n*, 325 F.3d at 718 (citing *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016 (10th Cir. 1998)) (these two appellate cases are hereinafter referred to as *NHLPA*).

In determining if a defendant has violated Section 1 of the Sherman Act, federal courts apply one of two different analytical approaches: the *per se* rule or the rule of reason. *Id*. at 718. "The per se rule identifies certain practices that 'are entirely devoid of redeeming competitive rationales.'" *Id*. (citing Law v. *Nat'l Collegiate Athletic Ass'n*, 134 F.3d at 1016). The rule of reason follows a different analytical tract.

> Under the rule of reason, a plaintiff has the burden of demonstrating significant anti-competitive effects within a relevant market. If the plaintiff meets this burden, the defendant is required to proffer evidence of pro-competitive injuries. Assuming the defendant succeeds in doing so, the burden shifts back to the plaintiff to "show that any legitimate objectives can be achieved in a substantially less restrictive manner."

NHLPA, 419 F.3d at 469.

Any analysis of a possible antitrust suit against the CHL must begin with an examination of a prior suit filed against the Ontario Hockey Leage ("OHL") by the National Hockey League Players Association ("NHLPA") The NHLPA and an individual hockey player, Anthony Aquino ("Aquino"), sued the OHL and its member teams for an antitrust violation. *Id*. at 466. In that case, the suit alleged that the OHL violated the Sherman Act for adopting in 2002 a rule, known as the Van Ryn Rule, which required any player who is 20 years old (known as "overage" players) to have been on a Canadian Hockey Association or USA Hockey Player's Registration Certificate the previous season. *NHLPA*, 325 F.3d at 715. This rule effectively prevented OHL teams from signing any 20 year old United States college hockey players because the National Collegiate Athletic Association ("NCAA") does not allow individuals holding a CHA or USA Hockey Player's Registration Certificate to play hockey at an NCAA school. *Id*.

The facts of the case are as follows. At age 16, Aquino was drafted by the Owen Sound Attack, a team of the OHL. *Id*. Instead of playing for the Attack, he chose to attend Merrimack College in Massachusetts beginning in the fall of 1999, and played with for that school for 3 years. *Id*. In June, 2001, he was drafted by the Dallas Stars, a National Hockey League ("NHL") team. During the 2001-2002 season, the Attack

traded its rights to Aquino to the Oshawa Generals, another OHL team. *Id*. While attending Merrimack College, Aquino was placed on the General's "protected list," which prevented Aquino from negotiating or signing with any other team in the CHL. *Id*. Aquino decided not to return to Merrimack College for a fourth season, believing that he could either play for the Dallas Stars as an restricted free agent for the next 11 years, or, alternatively, play for the Generals. *Id*. at 715-16. However, with the adoption of the Van Ryn Rule in 2002, he was prevented from playing for the Generals. *Id*. at 716. Therefore, the NHLPA and Aquino sued the OHL for antitrust violations. *Id*.

Based on the NHLPA case, there is no doubt that the CHL and its member teams are not a single entity and, therefore, are subject to Section 1 of the Sherman Act. In considering the NHLPA's appeal of the lower court's denial of their claim, the United States Court of Appeals of the Sixth Circuit declared that "[w]e therefore conclude that when they adopt eligibility rules, the member teams of the OHL constitute multiple actors who act in concert." *NHLPA*, 419 F.3d at 470. Given that the CHL, in tandem with the OHL, Western Hockey League, and Quebec Major Junior Hockey League, as well as their member teams have agreed and adopted the fee structure, travel allowance, bonus payments, education packages it imposes on its players, as well as restrictions on player movement, it is likely a federal court would find they act in concert, but are not a single entity.

In fact, "[o]ther courts considering the actions of professional sports leagues have found the leagues to be joint ventures whose members act in concert (*i.e.*, agree) to promulgate league rules, rather than one solitary acting unit." *Id*. at 469 (citing *North Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982); *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002); *Bd. of Regents*, 468 U.S. at 100-101)). In fact, recently, the National Football League unsuccessfully argued to the Supreme Court that its sports league of 32 teams constituted a single entity and, therefore, was not subject to America's nation's antitrust laws. *American Needle, Inc. v. National Football League*, 130 S.Ct. 2201, 176 L.Ed. 2d 947 (2010). The Supreme Court rejected that argument and held that the NFL was not a single entity for antitrust purposes. 130 S.Ct. at 2217, 176 L.Ed. 2d at 965.

The next question becomes whether a court would apply the *per se* rule or the rule of reason to the CHL. The NHLPA case makes clear that the rule of reason should apply to the CHL:

> The Supreme Court has stated that the *per se* rule is a "demanding" standard that should be applied only in clear cut cases. *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *accord Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 178, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)* (finding that "the area of *per se* illegality is carefully limited."). Therefore, "courts

> consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product" such as sports leagues. *Law, 134 F.3d at 1019*. Moreover, the Supreme Court has recognized that in cases involving industries "in which horizontal restraints on competition are essential if the product is to be available at all," the rule of reason analysis should apply. *See Board of Regents, 468 U.S. at 100-01*; *Banks v. NCAA, 977 F.2d 1081, 1088 (7th Cir. 1992)* (finding that "under the Supreme Court's ruling in [*Board of Regents*], allegations that the NCAA rules restrain trade or commerce may not be viewed as *per se* violations of the *Sherman Act*"); *see also* Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, *30 Cap. U. L. Rev. 125, 149 (2002)* (noting that "it is now well established through the myriad of case law that rules and regulations normally employed by professional sports leagues and other organizations are not subject to the *per se* rule, but rather will be analyzed under the rule of reason."); Robert E. Freitas, *Overview: Looking Ahead at Sports and the Antitrust Law*, 14 Antitrust 15, 16 (Spring 2000) (stating that "it is now settled that the practices typically associated with the organization of professional sports leagues and other organizations such as the NCAA are not subject to the *per se* rule.").

Nat'l Hockey League Players Ass'n, 325 F.3d at 718-19.

Applying the rule of reason to the facts of this matter, it is clear that the CHL, its member leagues, and member teams have restricted trade with respect to its players and has done so unreasonably in a relevant market. As an initial matter, it appears undisputed that the terms and conditions outlined in every player's agreement are enforced league-wide pursuant to the consent of all the teams. So clearly there is an agreement restraining trade.

The next issue is whether there is a relevant market. The NHLPA case establishes what constitutes a relevant market for the OHL, and, thus, for the Canadian Hockey League as well. The Court of Appeals for the Sixth Circuit stated:

> We conclude that the relevant market in this case is the pool of players from which the OHL draws its players, *i.e.*, the market for sixteen- to twenty-year-old hockey players in North America. This market includes the NHL, the OHL, and other North American leagues. This market meets the requirements of reasonable inter-changeability of employees with Defendants' employees, as there is significant substitution between the market for player services in the NHL and that for sixteen-to twenty-year old players in other North American leagues, including the OHL.

419 F.3d at 472.

The only remaining issue is whether the restraints of trade imposed on the players are unreasonable, *i.e.*, that they impose significant anti-competitive effects within a relevant market. It seems abundantly clear that league-wide restrictions which set compensation scales, bonuses, and other remuneration without any reliance on the market constitutes an unreasonable restraint on trade. Any comparison with other sports leagues would demonstrate the unfairness and illegality of such rules. Furthermore, the restriction on player movement within and without the OHL supports a finding that it, its member leagues, and its member teams engaged in restraint of trade. *See Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (finding Rozelle Rule which undermined a player's ability to be signed by another team upon reaching 'free agency' was a violation of antitrust law).

To the extent that the CHL argued that any or all of these rules are necessary to maintain competitive balance, such an argument fails. Based on the multitude of examples of other sports leagues, there are plenty of examples of leagues permitting greater rights of players to negotiate their compensation and enforce less restriction on their movement to other teams and leagues.[1]

The final issue in any antitrust suit would be damages. In order to prove damages the putative plaintiffs would need to show that the CHL's antitrust violations caused them to suffer economic damages. To make that assertion, they will need economic experts who understand both the CHL rules as well as the business side of professional and semi-professional hockey both in Canada, Europe, and the United States. Those experts will need to be able to testify that CHL players would earn more compensation in a more competitive market if the CHL had not violated Section 1 of the Sherman Antitrust Act. If the players are able to do so, they will be entitled to treble damages, i.e., three times the actual damages. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 587, 127 S.Ct. 1955, 1983, 167 L.Ed. 2d. 929, 959. However, damages are often the hardest element of an antitrust claim to prove.

For all these reasons, the players of the CHL have valid grounds to file an antitrust suit against the CHL, its member leagues, and its member teams. If you wish to discuss this matter in more detail, feel free to contact our firm.

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[1] It should be noted that the NHLPA, after two appeals to the Sixth Circuit of the U.S. Court of Appeals, resulted in a finding that the OHL did not violate the Sherman Antitrust Act. NHLPA, 419 F.3d at 475. While the Sixth Circuit found that the Sherman Antitrust Act applied to the OHL, that the OHL is not a single entity, and that there was a relevant market, it found that the Van Ryn Rule did not constitute an antitrust violation because the NHLPA and the NHL had agreed to the rules for whom could be a free agent in the NHL in the parties' collective bargaining agreement. *Id.* at 469-475. The court saw the suit as a challenge to Aquino's ability to be a free agent in the NHL, which were set by the collective bargaining agreement. *Id.* at 475. There is no evidence that the terms and conditions of employment by the CHL players have been agreed to by the NHLPA and the NHL in their collective bargaining agreement. Even if there was, there is no agreement between the CHL players and the NHL regarding those terms and conditions of employment within the CHL.