March 15, 2022

Re: House Files 4142, 4143, 4144

Dear Chair Stephenson, Rep. Elkins and Members of the House Commerce Committee,

We write to express concern with House Files 4142, 4143 and 4144. The thousands of Minnesota businesses represented by our organizations believe in vigorous competition, free markets, and just and fair enforcement of antitrust laws.

However, these proposals would make sweeping changes to existing law that are not well understood, introduce legal concepts that are novel to both Minnesota and the United States, and will threaten businesses of every size in every industry in every corner of the state with uncertainty and litigation.

Collectively, we represent tens of thousands of Minnesota businesses – many of them smaller enterprises – that few would consider "dominant actors" but which could be treated as such under these proposals. These bills expose many types of businesses located in the state to serious new civil and criminal penalties.

First, these bills contain overly broad and undefined terminology that is a dream for litigators. The meaning of and evidence necessary to prove monopolistic conduct, monopsonist behavior, and abuse of dominance is often vague and left to the imagination of litigants, lawyers, and courts. The bill contains no guidance about geographic area, nature of industry, or underlying economic conditions which gave rise to conduct that would now be considered impermissible.

Second, the bills are a threat to innovation and growth in Minnesota. As far as we are aware, no other state has enacted similar measures. It is not clear that any American court has interpreted similar terms and standards before. As noted in the Business Council of New York State's review of similar legislation proposed there:

> *Because the "abuse of dominance" standard is new to the United States, no U.S. precedent exists to assist courts or companies in determining what types of conduct might be*

> *considered the "abuse" of a dominant position. And, since European antitrust law has developed under different economic and cultural conditions than U.S. law, defining an "abuse" is not as simple as importing European definitions. For example, European law sometimes aims to protect small businesses, even at the expense of the consumer.*

U.S. antitrust law has long been concerned with harm to competition as measured by the consumer welfare standard. Extensive case law shows that the consumer welfare standard considers a host of factors beyond price, including quality, variety, service, and innovation. Antitrust violations are only found when a plaintiff proves that consumer welfare is harmed as a result of procompetitive effects being outweighed by anticompetitive effects. Without such an economic balancing test the courts are left without a legal framework to determine violations, and any attempt to change the law to only measure one side of the ledger will result in government picking winners and losers in the market.

The burden to prove an antitrust violation should always be on the government or the plaintiff. This legislative proposal would flip the burden of proof on the defendant to justify every business decision related to price that is found to be objectionable. Not only would this lead to massive expansion in litigation, but the net effect of this sweeping legislation would also establish a 'government knows best' approach to price competition.

The bill's scope, vagueness and restrictions on defense undermine modes of business that serve communities well, rely on proprietary and established relationships, support good paying jobs, and encourage and protect product innovation. Ultimately, these proposals may have the opposite of their intended effect by stifling startups and small business growth.

Third, the reach of these proposed laws is unclear. States are limited in their ability to regulate interstate commerce under the U.S. Constitution. As explained in the BCNYS white paper:

> *Under the "dormant commerce clause" constitutional principles, federal courts have held, for instance, that a state cannot "impose[…] a burden on interstate commerce incommensurate with the local benefits"[1] or enforce a statute that has "the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question."[2] It would be ironic if legislation aimed at curbing the power of large national corporations instead was primarily used against local […] firms in markets where no competitive problem has been identified by the legislature.*

It is also uncertain how this would impact federally regulated industries and state-sanctioned business arrangements that permit varying degrees of cooperation and market dominance.

Finally, modifying antitrust laws has far reaching impacts that are not necessarily obvious or well understood to stakeholders. We encourage robust discussion and deliberation of these proposals that goes beyond the ordinary form of a legislative committee hearing.

Thank you for your consideration of our concerns.

[1] Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001).
[2] Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir. 2004)