IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ANHEUSER BUSCH InBEV SA/NV, and SABMILLER plc, Defendants.	Civil Action No. 1:16-cv-1483 Judge: Emmet G. Sullivan

[PROPOSED] BRIEF OF THE NATIONAL BEER WHOLESALERS ASSOCIATION AS AMICUS CURIAE

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CORPORATE DISCLOSURE STATEMENT

The National Beer Wholesalers Association is not a corporation and no corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The National Beer Wholesalers Association ("NBWA") is a trade association representing the interests of over 3,000 licensed, independent beer distribution permittees in the United States. NBWA's purpose is to provide leadership and support to its independent beer distributor members that operate in all 50 states and employ over 135,000 individuals. NBWA supports the state-based, transparent and accountable system of independent alcohol distribution that serves American consumers by balancing competition and responsibility in the manufacture, distribution, sale and consumption of beer.

NBWA submitted comments to the Department of Justice ("DOJ") outlining certain concerns and deficiencies regarding the Proposed Final Judgment ("PFJ") pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("Tunney Act"). Given that much of the purported behavioral relief in the PFJ is focused upon distributors, distributor related issues and protecting the independence of distributors and their ability to market and promote competing brands, NBWA, its members, its customers, and consumers have a significant interest in the outcome of the Court's determination on the government's Motion and Memorandum in Support of Entering the Proposed Final Judgment. NBWA's Tunney Act comments are attached as Exhibit A. NBWA reemphasizes the concerns that were raised in its Tunney Act submission and submits this amicus brief to inform the Court of its concerns and the ambiguities and deficiencies in the PFJ, and how those ambiguities and deficiencies impair the enforcement of the PFJ and practically affect independent beer distributors, breweries and ultimately consumers across the United States. We ask that the Court hold a hearing to determine if the PFJ fulfills the statutory obligation of fully restoring competition, to resolve ambiguities, to clarify the parameters of this PFJ, and to receive assurances of strict enforcement of the PFJ.

INTRODUCTION

The United States beer market is the envy of the world. It is a market that is characterized by "consumer pull" as contrasted with "supplier push" and the future of this distinction is the core undercurrent of the present matter. Independent beer distributors throughout the United States play a critically important and unique role in the regulated beer industry. They provide American consumers with the world's greatest beer product variety. The consumer demand for variety via independent retailers working with independent distributors provide the "pull" for the products of thousands of brewers in the United States and abroad. Beer distributors are a critical part of a system that ensures that beer sold at retail in this country is not counterfeit and safe for human consumption as they only sell beer to duly licensed retailers. By investing in warehouses and rolling stock and providing delivery and a comprehensive sales and marketing system, they ensure market access for brewers and importers of all sizes. The independent distribution system balances a robust marketplace with public safety, collects taxes, and ensures local accountability to state and federal authorities. Moreover, independent distributors facilitate healthy competition in the beer market. As the Chairman and Ranking Member of the Senate Judiciary Antitrust Subcommittee stated, "[t]he current strong and independent distribution system offers opportunities to craft beers, not just the large brewer, and has helped create the most diverse beer market in the world."[1]

In the beer industry, competition and the benefits of competition – robust choice and fair pricing – depend upon the system of scaled independent distribution that reduces barriers to entry, reduces brewer and consumer costs, and fosters choice and variety desired by consumers.

[1] Letter from Sens. Mike Lee and Amy Klobuchar to Renata Hesse, Principal Deputy Assistant Attorney General, U.S. Department of Justice (April 21, 2016).

With independent distribution, a brewer has ready access to the nation's 600,000 licensed beer retailers and has a ready-made efficient system of distribution. Rather than brewers of any size having to create individual business relationships with scores, perhaps thousands, of retail outlets, independent distribution provides ready, efficient access to retail. As the DOJ noted in the Competitive Impact Statement ("CIS"), "[e]ffective distribution is important for a brewer to be competitive in the industry." CIS at 8. In the most general terms, independent beer distributors purchase beer from a variety of breweries and then sell and deliver products to local, licensed retail accounts.[2]

As the DOJ recognized in its Complaint, this acquisition fundamentally can transform the industry by combining the two largest brewers in the world to create a dominant brewer resulting in the elimination of competition, increased price, reduced choices and less innovative beer products. Complaint at ¶¶ 1-8. Appropriately, the Senate Judiciary Committee held an extensive hearing on the competitive effects of the merger, which resulted in the expression of strong bipartisan concerns.[3] The DOJ conducted an extensive investigation and ultimately issued the Proposed Final Judgment. The PFJ received substantial public comments from craft brewers, retailers, distributors, consumers and the state of North Carolina – 12 comments in all – raising substantial concerns on the workability and interpretation of the PFJ.

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[2] Alcohol is regulated by the states under the 21st Amendment. As a result, most states have set up a three-tier distribution of beer where the brewery sells to a local beer distributor who sells it to local, state licensed alcohol retailers. The United States Supreme Court has repeatedly upheld this system. *Granholm v. Heald*, 544 U.S. 460, 489 (2005) ("States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is unquestionably legitimate.").

[3] U.S. Senate Subcomm. on Antitrust, Competition Policy and Consumer Rights. *Hearing on Ensuring Competition Remains on Tap: The AB InBev/SABMiller Merger and the State of Competition in the Beer Industry*. December 8, 2015. 114th Cong.

A core concern from the Senate hearing and documented in the DOJ Complaint is that Anheuser Busch InBev ("ABI") has threatened independent distribution through various types of conduct including restrictions on distribution and acquisitions of distributors and craft brewers. Complaint at ¶¶ 45-47. The PFJ includes numerous important provisions that attempt to deter such conduct and creates a court-approved monitor to assure compliance with the order. *See generally*, PFJ at Sections V and VIII. Distributor independence is a key concern of the PFJ. The goal of the PFJ is to limit ABI's ability to engage in anticompetitive conduct and to allow independent distributors to serve all brewers without interference.

Although the PFJ encompasses important provisions seeking to restrict anticompetitive conduct post-merger, NBWA is concerned that ABI, and to a lesser extent Molson Coors Brewing Company ("Molson Coors"), will be able to subvert the intent of the PFJ and pursue indirectly the identified behaviors the PFJ bars directly.

Specifically, the PFJ is at times ambiguous and internally contradictory. The Tunney Act process including the decision to hold a hearing by this court is essential to identify and resolve ambiguities and prevent latent confusion in the terms of the PFJ.[4]

[4] As noted by the DOJ in its Motion and Memorandum in Support of Entering the Proposed Final Judgment ("Motion"), 15 U.S.C. § 16(e)(1) determines factors a court should use in making the public interest determination. The Court shall consider: (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. 15 U.S.C. §§ 16(e)(l)(A), (B).

Moreover, the PFJ falls short in protecting independent distributors through its definition of "ABI-Owned Distributor." The PFJ's definition is too narrow and does not prevent ABI from effectively controlling "independent" distribution because the PFJ allows ABI to hold minority or partial ownership interests in distributors as long as it is less than a 51% interest. The definition of "ABI-Owned Distributor" should not be narrowly restricted to "more than 50% of the outstanding equity interests or…assets" of the distributor, but should include minority and partial ownership interests and assets.

ABI has a variety of tactics it can use to coerce independent distributors and some of these tactics are not fully addressed in the PFJ. The PFJ fails to protect independent distributors by not adequately restricting ABI's significant influence over independent distributors' businesses through the required approval of general and successor managers within an independent distributor as well as the sale of distributorships. Indeed, ABI may use its ability to approve not just the sale, but who is allowed to buy an independent beer distributor. ABI often uses its ability to put in place as general equity managers ABI employees fiercely loyal to ABI, not to the well-being of the independent distributor. General equity managers, under ABI's wholesaler agreement, have the authority to run all aspects of the distributorship and every product the distributor sells, including non-ABI brands. Accordingly, the PFJ should limit the authority of the ABI-approved general equity manager to decisions that affect ABI products only and limit any review of sales of independent distributors to ABI products only.

The PFJ presently has an internal conflict built into it that requires this Courts' review. On one hand, the CIS recognizes and Section V of the PFJ purports to prevent ABI from using various practices to threaten the independence of independent ABI distributors to bring competitive beer to the marketplace. These restrictions were a substantial focus of the DOJ

during its investigation and were raised in the Senate hearing that was held during the merger review. As a result, Section V. D of the PFJ contains purported prohibitions on ABI activities on pricing, marketing and other relationships between ABI and its independent distributors.[5] However, for some reason at the end of section V. D the PFJ contains language that undermines the protections offered.

> Notwithstanding the foregoing, nothing in this Final Judgment shall prohibit Defendant ABI from entering into or enforcing an agreement with any Independent Distributor requiring the Independent Distributor to use best efforts to sell, market, advertise, or promote Defendant ABI's Beer, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of Defendant ABI's Beer in a geographic area. Defendant ABI may condition incentives, programs, or contractual terms based on an Independent Distributor's volume of sales of Defendant ABI's Beer, the retail placement of Defendant ABI's Beer, or on Defendant ABI's percentage of Beer industry sales in a geographic area (such percentage not to be defined by reference to or derived from information obtained from Independent Distributors concerning their sales of any Third-Party Brewer's Beer), provided, however, that any such incentives, programs, or contractual terms may not require or encourage an Independent Distributor to provide less than best efforts to the sale, marketing, advertising, retail placement, or promotion of any Third-Party Brewer's Beer or to discontinue the

[5] D. Defendant ABI shall not unilaterally, or pursuant to the terms of any contract or agreement, provide any reward or penalty to, or in any other way condition its relationship with, an Independent Distributor or any employees or agents of that Independent Distributor based upon the amount of sales the Independent Distributor makes of a Third-Party Brewer's Beer or the marketing, advertising, promotion, or retail placement of such Beer. Actions prohibited by this Sub-section include, but are not limited to: 1. Conditioning the availability of Defendant ABI's Beer on an Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer; 2. Conditioning the prices, services, product support, rebates, discounts, buy backs, or other terms and conditions of sale of Defendant ABI's Beer that are offered to an Independent Distributor based on an Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer; 3. Conditioning any agreement or program with an Independent Distributor on the fact that an Independent Distributor sells a Third-Party Brewer's Beer outside of the geographic area in which the Independent Distributor sells Defendant ABI's Beer; 4. Requiring an Independent Distributor to offer any incentive for selling Defendant ABI's Beer in connection with or in response to any incentive that the Independent Distributor offers for selling a Third-Party Brewer's Beer; and 5. Preventing an Independent Distributor from using best efforts to sell, market, advertise, or promote any Third-Party Brewer's Beer, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of the Third Party Brewer's Beer in a geographic area.

> distribution of a Third-Party Brewer's Beer. Defendant ABI may require an Independent Distributor to allocate to Defendant ABI's Beer a proportion of the Independent Distributor's annual spending on Beer promotions and incentives not to exceed the proportion of revenues that Defendant ABI's Beer constitutes in the Independent Distributor's overall revenue for Beer sales in the preceding year.

This language undermines the goals provided earlier in Section V. D and does not serve the public interest. What is the public interest in allowing ABI access to or review of any competitor information? Or from restricting ABI distributor efforts to bring other competing beers to market? Despite the PFJ, ABI continues to push forward programs and data requests that can be used by ABI to know what other competing brands and sales are made by an ABI distributor.

Section V.D. of the PFJ purports to allow ABI to require independent distributors' marketing spend to be equivalent to the distributor's revenue from its prior year's sale of ABI beer. However, this provision is problematic as marketing is a forward-looking investment. This provision inhibits distributors from having sufficient marketing funds to promote new brands, and the inability to expand marketing funds to attract new brands will deter competition.

In addition to these problems with the PFJ, the DOJ creates an additional conflict in footnote 1 on page 3 of its Motion. The DOJ stated that it delayed filing the Motion "because it was discussing with ABI modifications to ABI's policies governing Independent Distributors that will be necessary for ABI to comply with the Final Judgment." DOJ explains that ABI and the government have agreed that ABI will include the following language in its notification to Independent Distributors following the entry of the Final Judgment:

> Independent Distributors are required to provide best efforts to achieve and maintain the highest practicable sales volume and retail placement of ABI's beer. Consistent with this requirement an Independent Distributor may on occasion, and without violating best efforts to ABI, make unsolicited recommendations to individual retailers, specific to each such individual retailer's location(s), to convert a particular ABI retail placement to that Independent Distributor's Third Party

> Brewer's Beer when such recommendations are made for the express purpose of increasing such retailer's sales of Beer, including Third-Party Brewers' Beer or ABI's Beer, so long as such unsolicited recommendation does not result in more than a de minimis decrease in the sales volume or retail placement of ABI Beer in the Independent Distributor's assigned geographic area."

The above-quoted language is inconsistent with the law and the goals of the PFJ for several reasons. First, it runs afoul of provisions in 30 state beer franchise laws which prohibit a brewer from limiting a distributor's right to carry competing products. All distribution agreements require distributors to use their "best efforts" marketing and promoting a supplier's products. The distributor must use its independent judgment in determining how to best meet the needs of its retail customers, provide consumers in its territory with the products they desire, and utilize its best efforts in promoting the products of each of its suppliers in this market environment. The above-quoted language inappropriately limits the judgment and independent discretion of distributors by requiring that the exercise of that judgment and discretion cannot "result in more than a de minimis decrease in [ABI's] sales volume or retail placement." Motion at fn. 1. In essence, such a standard would serve to lock in market share and ignore consumer and retailer demand, increase barriers to entry, and harm competition contrary to the intent of the PFJ.

Second, this language also suggests that a distributor may only make a retail recommendation of third-party brewer's beer to a retailer if it grows a retailer's volume. This language would effectively restricts a distributor's ability to promote rival third-party brewer's beer unless a retailer is expanding its sales. In other words, a distributor can only recommend a rival third-party brewer's beer so long as ABI does not lose more than a de minimis amount of sales or its product placement as a result of the distributor's recommendation.

Third, the language in the notification to distributors appears to provide ABI full access to sell its brand/packages at retail through their key account teams. As a result, distributors will

have to place these products regardless if distributors believe that they are a good fit for their market and/or retailer accounts based on practicable sales volume and retail placement. This notification language restricts a distributor's ability to make independent decisions that are in the best interest of the customers.

This language raises more questions than it resolves. Is it the role of the PFJ to define best efforts? What is meant by the term "on occasion?" What is a "de minimis decrease" in ABI's sales volume, why is that the definitive standard of "best efforts," and who makes that determination? These questions need to be clarified for the PFJ to be effective. Undoubtedly, this language will discourage the promotion of third party beer, allow ABI to retain the same level of control over distributors as it did prior to the acquisition, and guarantee ABI's ability to sell its products through distributors to retailers without concern for competition. This language can ultimately enable ABI to limit distribution of its competitors' beer. Anything more than an undefined "de minimis" product conversation at the retail level, despite what is best for an individual retailer or an individual market place, will leave a distributor susceptible to for cause termination from ABI's network. The Court should hold a hearing to determine whether this PFJ satisfies the public's interest.

This is anything but a routine Tunney Act matter. There were substantial concerns raised about the PFJ by 12 public commenters, which represented every segment of the market including craft brewers, retailers, wholesalers, major competitors, the state of North Carolina and most importantly, consumers. Those groups raised concerns of how ABI could repeat the patterns of anticompetitive conduct under the PFJ. The DOJ took 14 months, an unusually long period of time, to move to make the order final because it was negotiating the notice to distributors, which ultimately undermines important aspects of the PFJ. The Tunney Act directs

the Court to determine whether the PFJ is in the public interest. 15 U.S.C. § 16(e)(1). Due to the complexity of the beer industry, the potential for harm resulting from this transformative merger, the fact that the merged entity will be so large as to control one out of three beers in the world, the ambiguity surrounding a number of PFJ provisions, and the extensive remedy in the PFJ, including the use of a monitor trustee, NBWA urges the Court to hold a hearing to fully consider all arguments, seek clarity on the ambiguous PFJ provisions, demand robust enforcement of the PFJ throughout the ten year period and seek further modification of the PFJ to prevent the competitive harm that will likely result from the acquisition.

ARGUMENT

I. The Court is Required to Make an Independent Determination on Whether the Proposed Final Judgment is in the Public Interest

Congress intended judicial review under the Tunney Act to be meaningful. The Tunney Act requires that "[b]efore entering any consent judgment proposed by the United States ... the court shall determine that the entry of such judgment is in the public interest." 16 U.S.C. §15(e)(1). For example, sections 16(e)(1)(A) & (B) of the Tunney Act provide that in making the "public interest" determination, the Court must consider the competitive impact of the proposal and "the impact of the entry of the proposal upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefits, if any, to be derived from a determination of the issues at trial." *Id.* In making its public interest determination the Court may "*authorize full or limited participation in proceeding before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party...[and] review any comments including any objections* filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and

objections…." 15 U.S.C. § 16(f) (emphasis added). Because of the substantial competitive concerns raised by the merger, the substantial concerns raised by several parties in every industry segment, the potential for anticompetitive conduct, and the extensive proposed relief, we respectfully ask this court to accept the participation of amici and hold a hearing on the PFJ.

This Court, in *United States v. AT&T Inc. et al.*, deemed public interest to be determined by consideration of the factors enumerated in the statute, which require the Court to evaluate both "'the competitive impact of the proposed remedies, *i.e.*, how well the settlement remedies the harms alleged in the complaint[],' as well as 'issues unrelated to the competitive impact of the settlement.'" 541 F. Supp. 2d 2, 6 (D.D.C. 2008) (quoting *United States v. SBC Commc'ns, Inc. et al.*, 489 F.Supp.2d 1, 17) (D.D.C. 2007). In applying this "public interest" standard, the burden is on the government to "provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns, Inc.*, 489 F. Supp. 2d at 16 (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995)).

The DOJ's Response to Public Comments on the PFJ ("Response") argues that the Court should provide full deference to DOJ's proposed remedies. Response at 4. And the DOJ's Motion simply puts forth conclusory statements that the entry of the PFJ is in the public interest without any further support. Motion at 5. The 2004 amendment to the Tunney Act made clear that the Court should have a more pronounced and searching role then the previous standard of only rejecting a proposed consent decree if it made "a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 12. In 2004, Congress reemphasized its intention that courts reviewing consent decrees "make an independent, objective, and active determination without deference to the DOJ." *See* 150 CONG. REC., S 3617 (April 2, 2004) (Statement of Sen. Kohl). Courts are to provide an "independent safeguard" against "inadequate settlements." *Id.*

Specifically, the Act was amended to compel reviewing courts to consider both "ambiguity" in the terms of the proposed remedy, as well as the "impact" of the proposed settlements on "competitors in the relevant market or markets." *Id.*; *see also* Pub. L. 108-327, § 221(b)(2) rewriting 15 U.S.C. § 16(e). Accordingly, "[i]n making its determination the Court may not simply 'rubberstamp' the government's proposal, but rather it must engage in an 'independent determination of whether a proposed settlement is in the public interest.'" *SBC Commc'ns*, 489 F. Supp. 2d at 6. *See also, United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1983) (The Court is not required to "unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the 'rubber stamp' role which was at the crux of the congressional concerns when the Tunney Act became law.").

NBWA and eleven other parties including craft brewers, other wholesaler associations, competitors, consumers, retailers, the state of North Carolina, academia, unions and several other industry stakeholders provided comprehensive comments to the DOJ as part of the Tunney Act process. The Comments expressed substantial and wide-ranging concerns about the ambiguities of the PFJ and the ability of the PFJ to adequately remedy the harms alleged in the Complaint. The Comments outlined specific real world situations that will arise, and indeed are arising, in the course of ABI business. The Comments went largely ignored, with DOJ's responses being boilerplate and cursory, often responding to specific concerns with repeated explanations from the CIS or statements that requested relief goes beyond the scope of the Tunney Act proceedings.[6] The DOJ's Motion does nothing to elaborate on solutions to any concerns raised in the public comments or subsequent amicus briefs filed in this matter by concerned parties.

[6] *See, generally*, Response.

This Court has on numerous occasions held evidentiary hearings to aide in the determination of the public interest. *See, e.g., SBC Communicatio*ns, 489 F. Supp. 2d 1; *United States v. Comcast Corp. et al.*, Case No. 11-cv-00106 (2011) (D.D.C. 2011); *United States v. Westinghouse Elec. Corp.*, 1998 WL 47346 (D.D.C. 1988); and *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.D.C. 1995). Similar to those cases, a hearing here is more than warranted in order for the Court to exercise its responsibilities under the Tunney Act. Because of the complicated nature and profound influence the merged entity has over beer distribution across the United States, a hearing will help the Court to determine whether enforcement of the PFJ is workable, whether there are adequate plans for enforcement of the various provisions in the PFJ, and ultimately whether the PFJ is in the public interest.

II. The Proposed Final Judgment Falls Short in Adequately Addressing Certain Anticompetitive Concerns Raised by this Merger

As the DOJ recognized, independent distribution is crucial to effective competition in the beer market. Increased concentration in the beer market has enabled ABI to further restrict independent beer distribution. Due to its recent acquisition activities, ABI has been the fastest growing beer distributor and is currently the largest ABI brand beer distributor in the country. ABI owns 23 distributorships in 10 states, acquiring 10 of them in the last four years.[7] Since 2012, ABI has purchased 12 independent distributors in nine states, and ABI-owned distributors are in states that currently represent more than 30% of the American beer market.[8] ABI's

[7] According to published reports, ABI's attempts to acquire distributorships in California were under investigation by both California and U.S. antitrust authorities. *See* Diane Bartz, *AB InBev Says Talking to DOJ, California AG About Two Planned Distributor Deals*, Reuters (Oct. 12, 2015), *available at* http://www.reuters.com/article/abinbev-distribution-talks-idUSL1N12C1GM20151012.

[8] U.S. Sen. Subcomm. on Antitrust, Competition Policy and Consumer Rights. *Hearing on Ensuring Competition Remains on Tap: The AB InBev/SABMiller Merger and the State of Competition in the Beer Industry*. December 8, 2015. 114th Cong.

acquisitions of independent distributors, including acquisitions of majority and minority interests in independent distributors lead to reducing access to market for rival brewers. The DOJ recognized this problem in its Complaint stating that ABI's acquisition of independent distributors has allowed "ABI directly to limit sales of ABI's high-end rivals." Complaint at ¶ 46. ABI-owned distributors essentially only sell ABI-owned or controlled products. CIS at 18. The American Antitrust Institute has noted that ABI "has significant market power in the wholesale tier, directly owning over 50 percent of distribution in many geographic markets where it has direct or indirect ownership of a wholesaler."[9] When ABI purchases a distributor, the ABI-owned distributor restricts scaled market access for rival beers, including craft beers, increases costs for those rivals and reduces consumer choice. Other distribution options raise costs for rivals and diminish competition.

DOJ recognized ABI's incentive and ability to restrict independent distribution. In its Complaint, DOJ specifically alleged that this merger would increase "ABI's incentive and ability to engage in anticompetitive conduct that limits and impedes the distribution" of its rivals' beer. Complaint at ¶ 45. Central to protecting competition is preserving distributor independence, which is pivotal to competition in the beer market. The DOJ specifically recognizes that "effective distribution is important for a brewer to be competitive." CIS at 8. In many cases, under state laws and for scaled distribution, a brewer is required to use a distributor. Any limitation on a distributor's ability to make determinations of which products are best in his particular market, limits effective distribution. The PFJ properly holds as a condition that both

[9] Letter from Diana Moss, President of the Am. Antitrust Institute, to Renata Hesse, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice (April 25, 2016), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI_ABInBev_SABMIller_ 4.25.16.pdf.

ABI and Molson Coors could not use the transaction as an attempt to reduce competitors' distribution options. *See* PFJ Section V. A.

Yet, the PFJ does not adequately protect distributor independence. Twelve public comments were filed documenting how certain aspects of the PFJ fall short of adequate protection for industry participants and consumers, and prevent future competitively problematic conduct which ABI or Molson Coors can engage in as a result of the merger. The comments presented realistic scenarios in which the PFJ, if not clearly interpreted or adequately enforced, could simply fail to provide its intended protections.

Despite the potential for harm described in the Complaint, gaps in the PFJ could permit ABI to continue raising barriers to access for rival brewers, exerting undue control over independent distribution, and using alternative means to diminish the ability of distributors to carry non-ABI beer. Specifically, even when ABI may not own a distributor it can effectively control it through levers that impact:

- a minority ownership,
- approval of equity managers,
- ABI's ability to direct transfer and control of ownership of an independent distributor, and,
- its ability to influence advertising and promotion of rival beers. [10]

[10] The PFJ also leaves open the potential for Molson Coors to attempt to replicate the practices the PFJ seeks to bar ABI from doing. As both the Complaint and CIS allege, ABI and MillerCoors have engaged in coordinated pricing strategies and the potential for coordinated actions in markets beyond the United States. Moreover, since Molson Coors effectuated the acquisition of SABMiller in the United States, Molson Coors has copied ABI behavior by purchasing three independent craft breweries in Georgia, Oregon and Texas as well as changing promotional spending activities with distributors to match ABI distributor practice. The Court should require both ABI and Molson Coors to have the same PFJ conditions especially as it relates to distributor relations to preserve competition.

Furthermore, the PFJ does not require incorporation of its provisions into ABI's equity agreements with distributors. Such a provision would strengthen the ability of distributors to protect their independence by exercising their rights under the equity agreements.[11]

A. The Proposed Definition of "ABI-Owned Distributor" Does Not Adequately Capture All Instances in Which ABI Has Significant Control Over an Independent Distributor

The DOJ recognized that ABI ownership of distribution significantly threatened independent distribution and had the concomitant effect of reducing beer competition. During the consideration of the merger, ABI recognized these concerns and made a public commitment to limit distribution ownership to 10% of the market. DOJ made that commitment as part of the PFJ, *see* PFJ at V. B, but gaps in the definition of "ABI-Owned Distributor" and other tactics ABI might engage in significantly undermine the proposed remedy.

Several comments submitted to DOJ as part of the Tunney Act process, including NBWA's, raised issues with ABI's ownership of distributors.[12] The DOJ defines "ABI-Owned Distributors" as "any Distributor in which ABI owns more than 50% of the outstanding equity interests or more than 50% of the assets[.]" PFJ at 3. This definition fails to provide transparency for the DOJ, Monitoring Trustee, nor is it in the public interest. This definition also fails to recognize the control exercised by ABI when it owns an interest less than 50%, which may give it effective control. Moreover, ABI can additionally control a distributor through its requirement that it chooses the distributor's general equity manager and, as discussed below, that general equity manager must own 25% of the distributorship.[13]

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[11] *See* NBWA Tunney Act Comments at 22; Wholesale Beer Association Executives ("WBAE") Tunney Act Comments at 10.
[12] *See* NBWA Tunney Act Comments; WBAE Tunney Act Comments.
[13] This concept is not theoretical. For example, a high profiled use by ABI of partial ownership is ABI's 31% interest ownership of Craft Brew Alliance. Chris Furnari, *New CBA Agreements Indicate Potential A-B InBev Buyout*, Brewbound (Aug. 26, 2016), *available at*

The PFJ's narrow definition of "ABI-Owned Distributor" fails sufficiently to prohibit the merged entity from controlling distribution to the detriment of rival brewers. There are many ways ABI may seek to exert control over a distributor without meeting the DOJ's PFJ definition of ABI owned distributor, thus making this provision largely illusory for protecting the market.

Beer distributorships are independent businesses that predate the ABI Wholesaler Equity Agreement ("Equity Agreement") (the contract every ABI-affiliated distributor must enter into before selling ABI branded beer). When a beer distributor, or any business, decides to retire and sell their business, they, like most businesses, ordinarily seek to maximize the sale price and preserve their legacy by sale to a family member or a like-minded small business owner. Under the auspices of the Equity Agreement provisions which require ABI's consent to a sale and provides ABI with a right of first refusal, ABI often seeks to control that sale in a manner that serves its business goals of expanding ABI-owned or controlled distribution and restricting competition in the marketplace. Indeed, the Equity Agreement claims the right to allow ABI to redirect sales it cannot outright purchase. With the 10% cap on distributor ownership, as found in the PFJ, it is likely ABI will redirect sales of distributorships to other distributors in which ABI has a minority or partial ownership interest in. This could allow ABI to continue consolidation and control of distributorships without running afoul of the definition of "ABI-Owned Distributor."

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https://www.brewbound.com/news/new-cba-agreements-indicate-potential-b-inbev-buyout (last checked June 1, 20177); *see also*, Mike Moiseyev, *What's the interest in partial interests?*, Federal Trade Commission (May 9, 2016) ("sometimes companies acquire only a partial interest in a competitor – and such an interest, even a minority interest…raise[s] antitrust concerns.").

Federal case law and the antitrust agencies recognize that partial or minority ownership by a competitor or a vertical supplier can result in competitive harm.[14] Even this court filing recognizes concerns with local rule 26.1 mandated disclosure of interests in a party over 10%. In *E.I. du Pont*, du Pont's 23% acquisition of General Motors raised competitive concerns when it conferred influence over vertical supply issues. Du Pont made several substantial investments in General Motors with the intention and result of increasing General Motors' purchase of du Pont products over rival products, and du Pont used its influence to gather intelligence on General Motors' purchase of competitor products. The Supreme Court found that this was sufficient to hold that "there [was] a reasonable probability that the acquisition [was] likely to result in the condemned [Section 7] restraints" even though the acquisition was of a minority interest.[15] Moreover, in 2007, the Federal Trade Commission ("FTC") brought an enforcement action involving partial acquisitions by two private equity firms where such minority ownership interest was deemed likely to lead to potential anticompetitive conduct. In the *Matter of TC Group, LLC*, the FTC challenged a 22.6% equity interest in Kinder Morgan Inc. ("KMI") by two private equity funds. The FTC alleged that that the private equity funds would hold interest in both KMI and a major competitor of KMI, and that the funds would be in a position to reduce competition between KMI and its competitor through its ability to appoint board members at both companies and by exchanging competitively sensitive nonpublic information between the competitors.[16]

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[14] *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597-606 (1957); see also *In the Matter of Hikma Pharmaceuticals PCL*, FTC Matter No. 151-0198 (May 5, 2016) (FTC order requiring divestiture of 23% interest stake in a competing company in order to resolve concerns over such ownership stake adversely impacting future competition of a particular drug.).

[15] *E.I. de Pont de Nemours & Co.*, 353 U.S. at 607.

[16] In the Matter of TC Group, LLC, FTC File No., 061-0197 (January 25, 2007).

Such a result here, in which ABI is permitted to own a less than 50% stake in an independent distributor would harm the beer competition in three ways.

First, ABI could exert more control over independent distribution then intended under the PFJ through partial ownership structures that fall just shy of the defined 50% ownership interest. The language of the PFJ incentivizes ABI to acquire less than 50% ownership of distributorships going forward and still structure their deals so ABI has significant control over the distributor's decision making authority. In other words, ABI could theoretically seek to acquire 49% interest or assets in every independent ABI distributor, giving ABI effective control of more independent distribution contrary to the goals of the PFJ.

Second, minority interest of a vertical company can provide ABI with the means to obtain information used to harm rivals. In the instances in which ABI has effective control of a distributorship it has the ability to gain access to sales data for third-party brewer's beer and ABI could attempt to use that competitively sensitive data to harm, restrict or prevent the sales of third party beer.

Third, this line drawing can create significant incentives for ABI to structure unusual, and potentially inefficient, partial ownership arrangements so that a partially owned distributor does not meet the PFJ definition for ABI-owned distributor. For example, ABI could structure an ownership arrangement in combination with an ABI-exclusive partisan equity manager who is required to have a 25% ownership in the distributor.[17]

[17] ABI cannot plausibly reconcile any claim that its ownership of less than 50% of an independent distributorship has no impact on operations or decision-making while at the same time mandating that independent distributorships give an equity stake (less than 50%) to Equity Managers in order to influence the distributorship operations.

Accordingly, a hearing will enable the court to clarify these issues and allow the Court to determine whether the proposed definition of "ABI-Owned Distributor" provides adequate protection to competition and to examine the public interest in allowing ABI to further expand its ownership of distributors through partial ownership acquisitions. The Court has a number of questions to ask. Given the impossibility for the Monitor Trustee or the DOJ to provide appropriate oversight without clarity and the clear ability of ABI to grow even further, which is not the DOJ's stated goal, the Court should require the government to amend the PFJ to freeze all growth by ABI in distribution ownership.

B. ABI's Control Over a Distributor's Choice of Managers or Sale of Its Business Has Potentially Harmful Effects on Competition

The Equity Agreement provides ABI tremendous control over an independent distributor's business. First, the Equity Agreement purports to require a distributor to have an "equity" manager approved by ABI, who owns 25% of the distributorship, and a "successor" manager, also approved by ABI. The equity manager has day-to-day operating control over the distributor's business including control of promoting, marketing, pricing, selling, advertising, merchandising, delivering and servicing the distributor's products. The successor manager is one who is prepared to assume the management of the distributor's business should the equity manager become unavailable or unable to continue managing the business. ABI requires ABI approval of both equity and successor managers. Failure to have an approved equity or successor manager is allegedly grounds for termination by ABI. ABI often mandates the appointment of equity and successor managers to run an independent beer distributor who are often former employees of ABI or otherwise devoted to the promotion of ABI products to the exclusion of other products in the distributor's portfolio. ABI requires that the equity manager have authority not only over ABI products but rather all products in the distributor's portfolio,

effectively giving the equity manager control over the allocation of resources in the promotion, marketing and pricing of rival products. This provides ABI with significant control over an independent distributor through its loyal equity manager.

The PFJ will not adequately protect competition unless it limits the authority of the ABI equity manager to decisions affecting ABI products only. This would balance the interests of ABI with the interests of the distributor in remaining independent and selling third-party brands while enhancing consumer welfare and competition.

DOJ properly recognizes the problem of the misuse of equity managers in the PFJ, but the relief is inadequate to remedy the problem. While Section V.E. of the PFJ prevents ABI from rejecting an equity manager selected by the independent distributor based on the distributor's sale of third-party brands, ABI still may seek to reject equity managers for any other subjective reason, which may lead to the same effect of deterring the distributor from fully promoting third-party brands. ABI stonewalling of the selection of an equity manager is still a significant enough of a threat to force distributors to select an ABI loyal equity manager. In addition, if ABI does not like an equity manager candidate because of her relationship to third-party brands or because ABI wants to "place" an ABI favored person into the distributorship, ABI can create a reason to reject that candidate without referencing third-party brands.

Second, the Equity Agreement gives the right of first refusal to ABI for a distributor's sale of its business. This right effectively gives ABI veto power who can purchase a distributor's business. ABI's control over the sale of a distributorship is not in the public interest. There is no auction. A willing buyer must not only find a willing seller, the buyer must navigate an opaque approval process that leads itself to concerns and pressures to harm access to markets for non-ABI beers. The public interest is better served by restricting ABI approvals of purchasers to a

transparent and accountable system that only looks at the ability to sell ABI beer and does not allow any consideration of any other competitor's products.

C. The Proposed Final Judgment Unduly Disadvantages New Brands, May Permit ABI to Discourage the Introduction of Rival Beers into a Marketplace, and Will Not Fully Protect Independent Distribution

Section V.D of the PFJ provides a very broad carve out provision, which will have the effect of undermining the goals of the PFJ. Specifically, the Section V.D carve out allows ABI to require independent distributors to allocate marketing spend proportional to ABI revenues for sales of ABI beer in the preceding year. The DOJ concedes that the PFJ could limit a distributor's discretion from allocating its own promotional spending to a new brand in certain circumstances. The DOJ argued that this problem does not warrant modification of the PFJ. The DOJ gave three reasons why: 1) many independent distributors already receive some revenue from third party beer; 2) third party brewers can give distributors money to market their beer; and 3) the PFJ is an improvement on the status quo. Response at 16-17.

This response, standing alone, is insufficient to address this problem with the PFJ. This loophole is so expansive and ambiguous that it will lead to future disputes interpreting the PFJ, likely undermine the purpose of the PFJ, further restrict the ability of a distributor to handle and promote rival beers, and lead to more confusion among distributors and brewers and possibly more litigation. Because it is inherently vague and subjective, the provision will increase ABI's power and ability to challenge independent distributors' efforts to bring craft and imported beers to market.

Marketing is necessarily a forward-looking investment, while the-carve out provision in V.D sets marketing spend on backward looking sales data. This can significantly hamper the ability of a distributor to promote a new brand and in turn will increase barriers to entry. In this

instance, the new brand is not reflected in the preceding year's data and therefore cannot be fairly accounted for in calculating allowable forward-looking marketing spend. This can be highly problematic because distributors typically allocate marketing spend to a new product based on projected future demand. This marketing spend is necessary to inform the public of the existence of a new product and is generally procompetitive. Without a doubt, this provision adversely affects new brands' abilities to gain distribution and marketing support.

The DOJ's Motion indicated that it has agreed to notification language with ABI that will be provided to all independent distributors that distribute ABI's beer. Motion at fn 1. Unfortunately, the agreed-to language in the notification parrots the ambiguous language in the PFJ and provides ABI with too much power over distributors' abilities to promote third party brewers' beer. The language puts distributors in a position where they must defend themselves for every decision that is made to promote third party beer unless it has a "de minimis" effect on ABI's sales and product placement. Does "de minimis" account for falling market share of brewers such as ABI or MillerCoors and the changing tastes of the consumer or does it not? Vague, ambiguous and undefined terms such as "de minimis," "unsolicited communication," and "on occasion" are introduced to this comprehensive remedy as recently as the filing of the DOJ's Motion. This subjective language, like the language in the PFJ, provides sufficient ambiguity that will provide ABI with the ability to retain the same level of control over distributors as before the acquisition to the detriment of distributor freedom, third party brewers' ability to obtain access to retailers, and consumer choice. The court should provide more objectivity for the industry, and less subjectivity. It should question any effort to keep ABI in the business of knowing or caring what other brands a distributor carries.

New craft brewers and importers and expansion of craft and imported beer into new territories are a primary source of innovation and price competition in the beer market. Past actions by ABI show that they consider craft beer to be a major competitive threat – and with this PFJ and the notification language identified by the DOJ in its Motion, ABI will continue to have the ability to make it difficult for new brands to enter a market.

It is vital for the Court to ensure that provisions like Section V.D do not specifically enable strategies that will cancel out the protections the PFJ strives for and lead to a less competitive marketplace for ABI's rivals.

CONCLUSION

President Ronald Reagan's favorite proverb – "trust, but verify" – is applicable to the situation that the Court finds itself in. The beer market is a complex regulated industry, with 50 different state markets, a large and complex international merger, and a complex PFJ formulated to address competitive problems caused by the merger. It is essential for the Court to have answers to the concerns NBWA and others have outlined to fully evaluate whether the PFJ as proposed is unambiguous, is in the public interest for the next ten years, and whether the DOJ will be able and willing to enforce the PFJ. Accordingly, NBWA submits this amicus, including its Tunney Act comments attached as Exhibit A, and asks that this Court hold a hearing as part of the Tunney Act process. Before simply entering the DOJ's Motion, the Court should hold a hearing to examine the real-world compliance possibilities of the PFJ, and to reduce the ambiguities in the PFJ to ensure adequate protections for consumers and competition.

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Respectfully Submitted,

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