IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ANHEUSER-BUSCH InBEV and SABMILLER plc, Defendants, Brewers Association 1327 Spruce Street Boulder, CO 80302	Civil Action No. 1:16-cv-01483 (EGS)

BRIEF OF BREWERS ASSOCIATION AS *AMICUS CURIAE*

CORPORATE DISCLOSURE STATEMENT

The Brewers Association is a corporation and no corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Brewers Association ("BA") is an organization of brewers consisting of more than 4,100 United States brewery members and 46,000 members of the American Homebrewers Association, as well as members of the allied trade, beer distributors, individuals, and other associate members and staff. BA's purpose is to promote and protect American craft brewers, their beers, and the community of brewing enthusiasts. BA supports a 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.

BA submitted comments to the Department of Justice ("DOJ") outlining certain concerns and deficiencies regarding the Proposed Final Judgment ("PFJ")[1] pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("Tunney Act"). BA's Tunney Act comments ("BA Comments") are attached as Exhibit A. BA reemphasizes the concerns that were raised in its Tunney Act submission and seeks to file this *amicus curiae* brief to provide information to the Court to inform its review of the Final Judgment in this action proposed by the United States Department of Justice. BA believes the PFJ does not adequately protect the public from anticompetitive practices by Anheuser-Busch InBEV ("ABI") in the distribution of beer. As currently written, the subjective and ambiguous language in the PFJ allows ABI to retain control over distributors to the detriment of distributor freedom and free competition in the market.

BA, whose members compete with ABI, is directly affected by the anticompetitive practices of ABI and can provide the Court with suggested changes to the PFJ that will address ABI's anticompetitive practices that prevent its distributors from providing full sales and

[1] Proposed Final Judgment, Case No. 16-cv-01483, ECF No. 2-2 (July 20, 2016) (hereinafter "PFJ").

marketing support for beer brands brewed by ABI's rivals. BA's members compete with ABI's brands on price and product placement, which are often determined by independent beer distributors in each U.S. market. BA is, therefore, in an important position to address the anticompetitive impact that defendant ABI's control of distributors has on the public. BA is uniquely positioned to provide insightful, relevant facts to the Court, which will help shape the final relief to best protect the public interest.

The resolution of this case should only occur when the public's interest is protected by addressing ABI's anticompetitive control over its independent distributors. BA asks that the Court hold a hearing, at which BA can participate, to: (a) determine if the PFJ fulfills the statutory obligation of fully restoring competition; (b) resolve ambiguities; and (c) clarify the parameters of the PFJ and receive assurances of strict enforcement of the PFJ.

INTRODUCTION

The ABI-SAB Miller deal created a colossal brewer with a dominant market share in the United States and an enormous share of the volume and profit in the global beer market. In the United States beer market, distributors are critical to the circulation of brewers' products in the market. Competitive Impact Statement ("CIS") at 8.[2] Indeed, "[e]ffective distribution is important for a brewer to be competitive in the U.S. beer industry." *Id*. In many states, brewers cannot sell their beer directly to retailers, but must use distributors to dispense their product. *Id.* The United States currently has two main distribution channels which have formed around the two major brewers, ABI and MillerCoors. *Id.* at 10. According to DOJ's Competitive Impact Statement, ABI-owned distributors and ABI or MillerCoors affiliated distributors handled 85% of the beer sold in the United States as of 2014. *Id.* A brewer entering a territory in a given state

[2] Competitive Impact Statement, 16-cv-01483-EGS, ECF No. 3 (July 20, 2016).

has to grant distribution rights to an existing distributor. Once the brewer selects a distributor, it is very difficult to change distributors due to state franchise laws that were intended to protect local distributors from large brewers such as ABI and MillerCoors, but impose substantial restraints on brewers regardless of size. The Federal Trade Commission ("FTC") recognized the general harm to competition created by franchise laws and cited specific effects on small brewers in comments on proposed California legislation addressing special protections for beer distributors. The FTC noted that, "The Proposed Franchise Act also may lessen competition among brewers. Its provisions may affect smaller brewers to a greater extent than larger brewers, because larger brewers may be in a better position to incur the legal costs of termination and thus have a greater ability to exercise control over [distributors]."[3]

A craft brewer whose product is sold through an ABI distributor is effectively stuck with that distributor. The FTC's analysis outlines exactly the set of foreseeable competitive harms that are likely on a national level because (1) ABI has unique control over its distribution network; and (2) the brands of much smaller craft brewers are also sold in that distributor network. Even if a craft brewer has cause for terminating a distributor, protracted litigation and large compensation payments or settlements are generally required to successfully terminate a beer distributor. Few craft brewers can afford the costs associated with such a process, not to mention the marketplace damage that can occur when a manufacturer is locked in contentious litigation with its exclusive channel to a particular territory.

[3] Federal Trade Commission Office of Policy Planning, Bureau of Economics, and Bureau of Competition, Comment of Proposed Beer Franchise Act at 8 (August 24, 2005), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-wesley-chesbro-concerning-proposed-california-franchise-act-govern/050826beerfranchiseact.pdf (last visited Oct. 9, 2017).

DOJ recognized the problem of ABI's control over its distribution network, and therefore a fundamental premise of the PFJ is to take steps to ensure that this network remains open for other brewers. CIS at 21 ("[The PFJ] is designed to ensure that Third-Party Brewers whose beer is sold by ABI-Affiliated [distributors] have the opportunity to compete with ABI on a level playing field—not on a playing field in which ABI has used its influence over the distributor to favor ABI's beers at the expense of other beers in the distributor's portfolio."). The ever-increasing desire by consumers for craft beer has grown the craft beer segment of the beer industry. Compl. at ¶ 20 ("[O]ver the last five years, the high-end beer segment's market share in the United States has increased from 21% to 31%" while the other segments have decreased.). The "high-end" segment includes craft beer brands. The competition in this segment of the beer industry, as driven by consumer demand, must be preserved if the needs of the public interest are to be met.

The DOJ's complaint[4] recognizes that ABI distributors need to remain independent so that they can support craft and other brewers and not only ABI. Compl. at ¶ 7 ("[The proposed acquisition] would increase ABI's incentive and ability to disadvantage its remaining rivals by limiting or impeding the distribution of their beers, thereby restricting their ability to serve the millions of Americans who spend over $100 billion on beer every year.").[5] The PFJ accordingly seeks to limit ABI's ability to engage in anticompetitive conduct, and to allow ABI distributors to serve all brewers they represent without interference. But as currently written the PFJ does not solve this issue and must be revised to accomplish the goals intended by the Complaint.

[4] Complaint, 16-cv-01483-EGS, ECF No. 1 (July 20, 2016).
[5] *See also* CIS at 12 ("As a result, following a divestiture to Molson Coors, ABI may have a greater incentive to impede the growth and reduce the competitiveness of its high-end rivals by limiting their access to effective and efficient distribution."); and 14 ("[T]he remedy seeks to prevent ABI from using its relationship with ABI-Affiliated [distributors] to disadvantage, or maintain or erect barriers to scale for, ABI's high-end rivals.").

The changes to the PFJ proposed by BA are in the public interest. For the reasons addressed below, the Court should not act simply as a rubber stamp. The Court and consumers need to be confident that the PFJ addresses the concerns raised in the Complaint and the CIS. Specifically, the ambiguities in the PFJ, as described specifically below, allow ABI to continue its dominance and must be avoided.

ARGUMENT

The PFJ has ambiguities and shortcomings that will prevent it from adequately resolving the competitive concerns in the complaint.

I. Background

A. Beer distribution, barriers to entry, and the prevention of new networks

As the CIS describes well, beer brewers typically cannot sell beer directly to retailers. *See* CIS at 8-11. Though limited exceptions exist, state licensing and beer franchise laws generally require brewers to sell their beer to distributors who sell the beer to licensed retailers. *Id.* at 8. There are two networks of beer distributors in the United States that provide efficient and effective paths for brewers to move their products through the regulated distribution system to consumers, and those two networks are formed around the two dominant U.S. brewers: ABI and MillerCoors. *Id.* at 10. ABI owns distributors in ten states, including New York, California, and other large states. The ABI-owned distributors focus almost exclusively on ABI brands and a few local brands. *Id.* at 9. In all other U.S. locations, representing approximately 90% of ABI's total volume, ABI's products are distributed by independent distributors (each defined in the PFJ as an "Independent Distributor"). PFJ, Part II.P. at 8. Those Independent Distributors also handle products from brewers other than ABI (each defined as a "Third-Party Brewer" in the PFJ). *Id.*, Part II.Y. at 10; *see also* CIS at 9 ("ABI beer brands account for approximately 90% of the volume of the beer sold by ABI-Affiliated [distributors]."), 19, n. 7. Third-Party

Brewers, such as craft and other brewers, rely on the same Independent Distributors in the ABI and MillerCoors networks for sales to retailers and access to the ultimate consumer. *See* CIS at 10 ("Although some brewers use alternative means to sell their beer to retailers, their only alternatives to an ABI-Affiliated [distributor] or MillerCoors-Affiliated [distributor] tend to be narrow self-distribution privileges or considerably smaller and significantly less efficient distributors [some of whom] are not even primarily focused on selling beer.").

The so-called Independent ABI Distributors are not truly independent. ABI's distributors rely almost entirely on ABI's business because ABI products make up the overwhelming majority of their sales. If an ABI distributor loses its ABI franchise, around which the entire business is built, that distributor will soon be out of business. If a distributor is terminated for cause, it is not entitled to any compensation. *See, e.g.,* Ala. Code § 28-9-6(a)(3); Fla. Stats. § 563.022; Idaho Code § 23-1107(3); 815 Ill. Comp. Stat. § 720/9(1); Mich. Comp. Laws § 436.1403(7), (9); N.Y. Alco. Bev. Cont. Law § 55-c; Ohio Rev. Code Ann. § 1333.84(A); Tex. Alco. Bev. Code Ann. §§ 102.73, 102.74; Wash. Rev. Code § 19.126.040(4). As such, these distributors need to do everything they can to retain the ABI business, and are loathe to take actions that could threaten their continued right to serve as an ABI distributor.

B. ABI's methods to prevent distribution of Third-Party Brewers' beer

ABI has used a number of tools to exert control over or influence its distributors so that they restrict their handling of beer brewed by third parties, such as BA's members. Compl. at ¶¶ 27-29. These tools seriously undermine distributor independence. One tactic ABI has employed is to provide strong financial incentives to a distributor if the distributor affirmatively limits its sales of beer brewed by parties other than ABI. *Id.* at 29. A recent example of ABI's tactics was the 2015 Voluntary Anheuser-Busch Incentive for Performance program ("VAIP"). The VAIP provided incentive payments based upon the distributor's "alignment" with ABI's brands.

Id. It rewarded distributors financially if they limited their sales of non-ABI (i.e., Third-Party Brewers' beer) as a group, and it penalized distributors financially if they handled more than a minor amount of Third-Party beer. *Id.; see also* CIS at 9-10. The PFJ intended to prohibit tactics such as the VAIP, but initiatives are difficult to monitor across hundreds of distributors, allowing ABI to apply pressure to independent distributors in ways that are often difficult to detect until permanent damage to competition has already occurred. ABI is likely to push the margins of permissible conduct and develop programs to avoid the specific prohibitions of the order. For example, BA members have reported that they have heard ABI may be providing incentives to employees of distributors rather than to the distributors themselves. The Court should do what it can to prevent ABI's circumventing the overall intent of the order by clever tactics.

In addition to incentive programs, other aspects of ABI's relationships with distributors provide great leverage for ABI over the distributors. ABI's distributors operate under a standard contract granting distribution rights and exclusive territories, as required under the laws of most states. ABI calls those contracts Wholesaler Equity Agreements ("WEA").[6] The WEA imposes extensive obligations on each distributor, including a level of effort requirement.[7] If a distributor fails to satisfy the level of effort requirement, ABI can initiate a termination of the distributor for cause. A distributor cannot afford to risk violating the WEA.

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[6] WEAs are contracts that impact ABI-affiliated distributors' relationships with ABI. *See* CIS at 9 ("In spite of many state laws requiring that beer distributors be independent of brewers, ABI exerts considerable influence over ABI-Affiliated [distributors], in part by requiring them to enter into a Wholesaler Equity Agreement . . . with ABI."); Compl. at ¶ 27 (same).

[7] *See e.g.*, Jim Morrill, *Craft brewers say this document shows the distribution system is 'rigged'*, The Charlotte Observer (May 25, 2017), *available at* http://www.charlotteobserver.com/news/politics-government/article152689119.html (quoting a distributor agreement containing a level of effort requirement in which distributor "agrees that its primary effort will be to sell [ABI] Products").

II. The PFJ Still Allows ABI to Exercise Substantial Control Over Its Distributors, and Therefore Fails to Remedy the Issues Raised in DOJ's Complaint

A. The provision allowing ABI to insist on distributors' "best efforts" creates ambiguity that will dissuade distributors from handling third-party beer

The Tunney Act directs the Court to determine whether the PFJ is in the public interest. 15 U.S.C. § 16(e)(1) ("Before entering any consent judgment proposed by the United States . . . the Court shall determine that the entry of such judgment is in the public interest.").[8] The Act specifies that a Court shall consider "whether its terms are ambiguous" in examining whether the terms of an order are in the public interest. *Id.* at § 16(e)(1)(A). Here, the PFJ's provision allowing ABI to insist on distributors' "best efforts" creates ambiguity that will dissuade distributors from handling third-party brewers' beer for fear that their actions could cause them to lose their ABI distributorship. Therefore, the PFJ—as written—is not in the public interest.

Section V of the PFJ lays out a variety of conduct that ABI is prohibited from engaging in, including "Preventing an Independent Distributor from using its best efforts to sell, market, advertise, or promote any Third-Party Brewer's Beer . . . ." PFJ, Part V.D.(5), at 17. The provision, however, also includes a carve-out paragraph in section V.D. that creates room for ABI to continue to exercise substantial control over independent distributors. V.D. states:

> 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.

[8] *See also United States v. SBC Commc'ns, Inc.*, 489 F. Supp.2d 1, 12 (D.D.C. 2007) ("[C]ourts must undertake meaningful review of antitrust consent decrees to assure that they are in the public interest and analytically sound [and a Court must be] preclude[ed] from engaging in 'rubber stamping' of antitrust consent decrees, but instead [ ] seriously and deliberately consider these factors in the course of determining whether the proposed decree is in the public interest.").

PFJ, Part V.D., at 17. This "best efforts" loophole creates tremendous ambiguity and leaves distributors at great risk if they actively market and promote competing brands.

In its Memorandum in Support of Entering the PFJ,[9] the DOJ revealed just how ambiguous this best efforts clause is and how compliance with it will be difficult or impossible to monitor across the ABI network of over five hundred distributors. Despite DOJ's good intentions, the clause continues to allow ABI to act in ways that cement its control over independent distributors and that will dampen those distributors' efforts to sell the beer of ABI's competitors, in particular BA's members.

> Section V.I. of the proposed Final Judgment requires that within ten business days of the entry of the Final Judgment, ABI must provide to the United States a proposed written notification to Independent Distributors describing changes ABI is making to comply with Section V of the Final Judgment. The United States did not move to enter the proposed Final Judgment before now 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. For example, ABI and the United States have agreed that, once the Final Judgment has been entered, ABI will include in the notification to Independent Distributors the following language: '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 recommendation 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.'

Memorandum in Support, at 3-4, n. 1 (emphasis added).

This provision will cause distributors to hold back their competitive efforts for deserving craft beer products, which are products consumers greatly desire. DOJ's language makes clear

[9] Plaintiff United States' Motion and Memorandum in Support of Entering the Proposed Final Judgment, 16-cv-01483-EGS, ECF No. 26 (Sept. 15, 2017) (hereinafter "Memorandum in Support").

that an Independent Distributor's replacing an ABI brand at retail (*e.g.*, shelf placements at grocery and convenience stores, beer tap handles at bars, or other retail placements) with a popular craft beer is not *per se* inconsistent with the distributor's best efforts obligations to ABI. Left entirely unclear is how much of this retail placement change-out can occur before those placements allow ABI to assert a violation of the best efforts obligation under the WEA. No objective measure defines what would be a de minimis reduction in sales in a territory. Dictionary.com defines de minimis as: "Pertaining to minimal or trivial things; small, minor or insignificant; negligible,"[10] and Black's Law Dictionary defines de minimis as: "Trifling; negligible; so insignificant that a court may overlook it in deciding an issue or case."[11] Complicating matters further, "best efforts" standards may vary from state to state.

If a distributor replaces a tap handle in a single bar in Georgetown, will that have more than a de minimis effect? Presumably everyone would agree that change would have a de minimis impact on the sales of ABI beer in Washington, D.C. What if the distributor replaces ten tap handles? Or one hundred tap handles? What if one of the tap handles is in a bar or venue that handles a very high volume of beer? What if the distributor does not specifically recommend an ABI tap handle be substituted out for a craft beer it is promoting, but the retailer makes the decision to switch out an ABI tap rather than a MillerCoors tap? What if the retail placement is a prominent location for brands in a supermarket chain that sells a lot of beer? The point remains, no distributor can afford to cross that de minimis threshold, because if it does, it risks a claim that it has failed to exercise best efforts to sell ABI beer, and faces revocation of its entire ABI franchise. A business worth tens or hundreds of millions of dollars can be lost

[10] *De minimis Definition*, DICTIONARY.COM, http://www.dictionary.com/browse/de-minimis?s=t (last visited Oct. 2, 2017).
[11] De minimis, BLACK'S LAW DICTIONARY (10th ed. 2014).

without compensation. Distributors will not venture near that ambiguous de minimis line because the implications of crossing it are so severe.

If ABI believes the distributor's activities lead to "more than a de minimis decrease"[12] in ABI's sales in the distributor's territory, under the PFJ, ABI can claim a violation of the best efforts obligations to ABI and terminate the distributor. Termination would destroy that distributor's business. If the termination is for cause, ABI would not owe any termination payment to the distributor. *See* statutes cited *infra* at 6. A distributor faced with the draconian punishment of losing its distributorship by selling non-ABI beers will invariably pull back on efforts to move competing beers into retailers. As a result, where consumer demand may indicate a Third-Party Brewer should generate a specific market share in a geographic area—given consumer trends and demand for its product—the Third-Party Brewer will face enormous challenges in reaching this share due to ABI's continued control over distributors. There can be nothing more than a "de minimis decrease in the sales volume or retail placement of ABI Beer" in any given Independent Distributor's assigned geographic area. Memorandum in Support, at n. 1. A distributor can only make a recommendation of a rival Third-Party Brewer's beer if it does not result in ABI losing more than de minimis sales or product placement. This understandably has a detrimental effect on Third Party Brewers, including BA's members, and an anticompetitive effect on the market as a whole.

Other aspects of the DOJ- and ABI-negotiated best efforts language raise similar concerns and significantly limit distributor's ability to exercise its own best judgment on how to maximize its business and beer sales. A distributor could handle an ABI brand that clearly is not resonating with consumers even though it has extremely broad distribution. Put another way, the

[12] Memorandum in Support, at 3-4, n. 1.

ABI product may have retail placement in almost all retailers, but sell much lower volumes than other comparable products, termed "lower velocity" in the industry.[13] A distributor might come to the conclusion that another Third-Party Beer it handles would have a higher velocity if it replaced the languishing ABI brand. The distributor could conclude that if it convinced retailers to replace the languishing ABI product's retail placements with the growing Third-Party Beer, then the retailers and the distributor would sell more beer.

Yet under the language ABI and DOJ negotiated, a distributor would risk violating its best efforts obligation to ABI if it undertook a campaign to increase retailers' sales by making that product switch. The language ABI and DOJ negotiated allows a distributor to make recommendations that could displace ABI retail placements "to individual retailers, specific to each such individual retailer's location(s)." Memorandum in Support at 4, n. 1. This limits the distributor's business judgment. ABI might assert that the distributor's effort was not "specific to each such individual retailer's location(s)" and was not "to convert a particular ABI retail placement." Memorandum in Support at 4, n. 1. Again, the consequences to a distributor of getting it wrong are catastrophic. The distributor risks a fault-based termination by ABI for not providing "best efforts" to ABI. ABI has deep pockets and will likely litigate any for cause terminations.[14] This is why the Court must address the best efforts ambiguity in the PFJ now,

[13] *See, Velocity*, CPG for the MBA (Dec. 20, 2014), *available at* https://cpgforthemba.wordpress.com/2014/12/20/velocity/, last accessed Oct. 9, 2017.

[14] ABI has a history of forcefully exerting its control through various means. The WEA between ABI and each ABI independent distributor provides ABI with various rights to approve or disapprove the transfer of an ownership interest by an independent distributor. Under certain circumstances, ABI can step in and purchase the interest from the selling distributor or assign it to another distributor. *See, e.g., Rex Distributing Company v. Anheuser-Busch*, Civ. No. A 2401-17-33 (filed Feb. 21, 2017); *see also* Complaint, *Anheuser-Busch v. Eagle Brands*, S.D. Fla., No. 07-cv-21510, ECF No. 1 (Jun. 12, 2007). ABI is litigious, with deep pockets, and has terminated distributors for cause, placing their entire business at risk. Even before introducing its equity agreement ABI's predecessor utilized its substantial financial resources to engage in protracted

and must put in place adequate control features for monitoring ABI's interactions with distributors in the future. In contrast to ABI's ability to exercise substantial control over its Independent Distributors, the brewers selling competing brands have little or no leverage due to their small market shares. As noted above, state franchise laws provide distributors with substantial protections against termination.

The PFJ, as further clarified by DOJ's explication of language that allows ABI to stay in compliance with V.D. of the PFJ, shows just how untenable the "best efforts" carve-out in V.D. is. It creates a very broad field for ABI claim that its conduct only seeks best efforts from a distributor, when in reality the provision interferes with the distributor's right to sell Third Party Beers without interference. DOJ was well-intentioned and truly has tried to rein in ABI's unbridled power over Independent Distributors. But it has not effectively done so, and the carve-out allowing ABI to enforce "best efforts" obligations under the threat of termination of the distributor reinforces ABI's dominance over the distributor tier.

B. The Court should revise, or order the parties to revise, the PFJ so it can accomplish the DOJ's original intentions to ensure that the merger is not anticompetitive

In the Complaint, the DOJ expressed that this acquisition can fundamentally transform the industry by combining the two largest brewers in the world into a dominant brewer who can eliminate competition, increase prices, reduce choices and discourage innovation in the beer market. Compl. at ¶¶ 45-47. The Complaint alleges that the beer industry is highly concentrated and has high barriers to entry. *Id.* at ¶¶ 44, 48. The Complaint further alleges that the merger could increase "ABI's incentive and ability to engage in anticompetitive conduct that limits and

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and highly publicized litigation to force independent distributors to accede to ABI's pressure to sell to a different ABI distributor. *Maris Distrib. Co. v. Anheuser-Busch*, 710 So. 2d 1022 (Fla. Dist. Ct. App. 1998); *Bama Budweiser of Montgomery v. Anheuser-Busch*, 611 So. 2d 238, 241 (Ala. 1992), *see* ABI's litigation in Mississippi with Rex Distributing, as described in BA's comments filed with the DOJ and attached as Exhibit A, at page 6.

impedes the distribution" of its rivals' beer. *Id.* at ¶ 45. It expresses concern that the merger is anticompetitive because ABI threatens independent distribution through its restrictions imposed on distributors and its acquisition of distributors and craft brewers. *Id.* at ¶¶ 27-28. These concerns by the DOJ are the concerns of the public interest and of ABI's rivals. But the PFJ does not adequately address these concerns.

Rather than entering the final judgment with the best efforts proviso in its current form, the Court should revise, or order the parties to revise, the PFJ so that it accomplishes what DOJ intended from the outset.[15] DOJ was rightfully concerned about ABI's control over the Independent Distributors. The Court should modify, or order the parties to modify, the final judgment to include language that would affirmatively authorize an Independent Distributor to support the brands of brewers other than ABI. The Court should further modify, or order the parties to modify, the language such that a distributor's handling of a Third-Party Beer brand in its portfolio does not violate its best efforts obligation to ABI even if it may reduce the sales of an ABI brand.

State lawmakers grapple with this issue, as beer distributors hold unique obligations to maintain competition in each state's heavily-regulated distribution system. The Commonwealth of Pennsylvania licensing statute mandates that each beer distribution agreement include language to ensure independence of beer distributors:

> The manufacturer recognizes that the importing distributor and distributor are free to manage their business in the manner the importing distributor and distributor deem best and that this prerogative vests in the importing distributor and distributor the exclusive right to establish a selling price, to select the brands of malt or brewed beverages they wish to handle and to determine the efforts and

[15] The CIS acknowledges that the Court has an ability to modify the PFJ: "Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof." CIS at 4.

> resources which the importing distributor and distributor will exert to develop and promote the same of the manufacturer's products handled by the importing distributor and distributor. However, the manufacturer expects that the importing distributor and distributor will price competitively the products handled by them, devote reasonable effort and resources to the sale of such products and maintain a reasonable sales level.

47 Pa. Stat. Ann. § 4-431. This language creates distributor independence by allowing the distributor, and not the dominant brewer, to determine how to best promote its overall portfolio of brands.

Proposed language using a similar approach could be added to V.D. as follows: "An Independent Distributor's ongoing promotional activities and sales of the Beers it deems most appropriate for a retailer and Beers that a retailer orders or expresses interest in ordering shall not be deemed a violation of any best efforts obligation owed to ABI."

C. Other issues with the PFJ

BA raised several other issues with the PFJ in the comments it filed with the DOJ. *See* Exhibit A. BA does not believe that the DOJ's responses to the comments resolved the particular concerns that BA raised.[16] In particular, BA believes that the Court should:

1. Eliminate the language in V.D. that allows ABI to reward distributors for their loyalty to ABI's products in a geographic area, because those provisions create incentives for distributors not to fully support rival brands. *See* Ex. A, BA Comments at 2-3; DOJ Response at 14.
2. Bar ABI from acquiring any further distributors. *See* Ex. A, BA Comments at 5-6; DOJ Response at 23.

BA laid out its issues with those provisions in its comments on the PFJ, and so refers the Court to those comments.

[16] Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, 16-cv-01483-EGS, ECF No. 16 (Jan. 13, 2017).

CONCLUSION

Before entering the DOJ's Motion, the Court should hold a hearing to examine the potential consequences and shortcomings of the PFJ in resolving ABI's control over distributors.[17] The Court should strive to reduce the ambiguity in the PFJ and ensure adequate protections for consumers and competition—protections that the PFJ does not currently have.

Dated: October 13, 2017

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[17] This Court and others have held such hearings. *See e.g., SBC Commc'ns, Inc.*, 489 F. Supp.2d 1, 9 (D.D.C. 2007); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1454 (D.C. Cir. 1995).