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] AMICUS BRIEF OF CONSUMER ACTION AND CONSUMER WATCHDOG

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CORPORATE DISCLOSURE STATEMENT

Consumer Action is not a corporation and no corporations own 10% or more of its stock.

Consumer Watchdog is not a corporation and no corporations owns 10% or more of its stock.

INTEREST OF AMICUS CURIAE

Consumer Action is a national non-profit organization that has worked to advance consumer literacy and protect consumer rights in many areas for over forty years. The organization achieves its mission through several channels, from direct consumer education to issue-focused advocacy.

Consumer Watchdog is a non-profit nonpartisan consumer advocacy organization dedicated to providing an effective voice for taxpayers and consumers in an era when special interests dominate public discourse, government and politics. It deploys an in-house team of public interest lawyers, policy experts, strategists, and grassroots activists to expose, confront, and change corporate and political injustice every day, saving Americans billions of dollars and improving countless lives.

Consumer Watchdog submitted Comments pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("Tunney Act"), providing recommendations to the Plaintiff United States Department of Justice ("DOJ" or "Justice Department") for modification of the Proposed Final Judgment ("PFJ") regarding Anheuser-Busch InBev's ("ABI") acquisition of SABMiller plc ("SABMiller") in order to strengthen protections for consumers.

Millions of consumers drink beer every day. Those consumers value the benefits of competition, including lower prices and greater choice. As representatives of the public interest and national advocacy groups, Consumer Action and Consumer Watchdog are concerned about the impact of this merger on beer competition and submit this amicus brief to reply to the DOJ's Response to Public Comments and to provide further background and information regarding competitive concerns that exist in the beer market to this Court as it determines whether the PFJ serves the public interest.

INTRODUCTION

Competition in the U.S. beer industry is fragile at best. Economic studies have demonstrated that the beer market is an effective duopoly, and consumers suffer from lock step price increases and reduced choice and innovation. As the DOJ found in its investigation, the merger between ABI and SABMiller posed a significant threat to competition. The DOJ was right. At issue before this Court is whether the remedy secured (the "proposed final judgment" or "PFJ") adequately prevents anticompetitive conduct. We believe it fails to do so and request this Court to conduct a hearing to examine whether the PFJ is in the public interest.

This matter is clearly distinguishable from typical Tunney Act proceedings in merger enforcement cases. Those matters are typically ones without extensive public comments in which competitive concerns are resolved through straightforward divestitures. The analysis is simple – is the divestiture adequate?. In this case, there were twelve comments submitted to the Justice Department in response to the PFJ from every segment of the industry – craft brewers, distributors, consumers, employees, and antitrust experts – raising significant concerns about whether the PFJ will truly fix the competitive problems raised in the Complaint. And the DOJ responded in a 55 page response, one of the longest in history.

This is no ordinary Tunney Act proceeding because, as described below, the Justice Department determined that a divestiture was necessary but inadequate to resolve the substantial competitive problems raised from the acquisition. The DOJ appropriately secured behavioral remedies that seek to prevent further anticompetitive conduct over the 10-year term of the PFJ. To assist the Court, the PFJ includes the use of a Monitor Trustee to evaluate compliance with the order. Because of the behavioral remedy and the Court's substantial enforcement responsibilities under the order, we respectfully submit that this Court must carefully evaluate

the nature of competition in the market by holding a hearing to fully explore the potential remedies, and determine whether those remedies are sufficient.[1]

This merger is a turning point for the future of the U.S. beer market. Because of its enormous consequences for millions of beer drinkers, craft brewers, independent distributors and hundreds of thousands of employees, the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights held a hearing to examine the merger and the weaknesses in competition in the beer marker. It heard testimony from the parties, representatives of the craft brewing and distributing industries, and consumer advocates.[2] The Chairman and ranking member of the subcommittee – Senators Mike Lee and Amy Klobuchar – also sent a letter to the DOJ Antitrust Division expressing concern that the merger might impact craft brewers' ability to access consumers.

> We are concerned about any consolidation in the beer market that would make it harder for small brewers to make their products available to consumers, and in particular any significant increases in the acquisition or control of distributors by large brewers…The Department of Justice must be confident that the merger does not alter the incentives or abilities of ABI or MillerCoors to foreclose craft or import brewers' access to distribution. [3]

The wide range of parties expressing concern over this merger show the fragility of competition in the market.

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[1] This Court and others have held such hearings. *See e.g*., *United States v. SBC Commc'ns, Inc. et al.*, 489 F.Supp.2d 1 (D.D.C. 2007); *United States v. Microsoft Corp*., 56 F.3d 1448, 1454 (D.C. Cir. 1995); *United States v. Westinghouse Elec. Corp*., 1998 WL 47346 (D.D.C. 1998); *United States v. Bechtel Corp*., 1979 U.S. Dist. LEXIS 15256 (N.D. Cal. 1979), *aff'd,* 648 F.2d 660 (9th Cir. 1981); *United States v. ARA Servs*., 1979 U.S. Dist. LEXIS 10414 (E.D. Mo. 1979); *United States v. Mid-Am. Dairymen*, 1977 U.S. Dist. LEXIS 15858 (W.D. Mo. 1977).

[2] U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights. *Hearing on Ensuring Competition Remains on Tap: The ABI InBev/SABMiller merger and the State of Competition in the Beer Industry. December 8, 2015*. 114th Cong., *available at* http://www.judiciary.senate.gov/meetings/ensuring-competition-remains-on-tap-the-abinbev/sabmiller-merger-and-the-state-of-competition-in-the-beer-industry.

[3] Letter from Sens. Mike Lee and Amy Klobuchar to Renata Hesse, Principal Deputy Assistant Attorney General, U.S. Department of Justice (April 21, 2016), *available at* https://www.klobuchar.senate.gov/public/2016/4/klobuchar-lee-urge-careful-consideration-of-proposed-sabmiller-anheuser-busch-inbev-merger.

The Hearing demonstrated that consumers are already paying a high price from massive consolidation in the beer industry over the past twelve years. Starting in 2005, five major mergers have fundamentally altered the U.S. beer market.[4] In 2005, Coors and Molson merged to form Molson Coors Brewing Company. In 2007, the second and third largest beer companies in the United States- SABMiller and MolsonCoors - formed the MillerCoors Joint Venture ("MillerCoors JV"). In 2008, InBev acquired Anheuser-Busch to form AB InBev. In 2012, AB InBev acquired Grupo Modelo. These mergers were not without consequences to consumer welfare. A study of the market after the formation of the MillerCoors JV found that tacit coordination led to a sudden six percent price increase four months after the consummation of the joint venture.[5] The price increase occurred in the wake of a seven-year trend of stable to slightly decreasing prices.[6] These price increases (and attendant job losses) have continued. According to Boston Beer Company founder Jim Koch:

> The immediate result [of the consolidation] was a 6 percent increase in beer prices and the end of a decades-long decline in real beer prices. Drinkers began paying almost $2 billion a year more for their beer. At least 5,000 Americans lost their jobs, and cost cutting followed, saving the new owners an estimate $2 billion. That money goes to those two conglomerates that have been able to reduce their tax bills and move much of their profits offshore.[7]

And, now, the DOJ is permitting the merger of the two largest global brewers, which by DOJ's own admission threatens to reduce competition, stifle the growth of craft and import beer and restrain independent distribution, which will result in higher prices and fewer choices for consumers.

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[4] *See* Bernard Ascher, Am. Antitrust Inst., Global Beer: The Road to Monopoly (2012).
[5] Nathan H. Miller & Matthew C. Weinberg, Mergers Facilitate Tacit Collusion: Empirical Evidence from the U.S. Brewing Industry (Working Paper, Mar. 25, 2015).
[6] The DOJ's Complaint and CIS in this merger matter confirms that the industry is subject to tacit coordination and that the proposed divestiture may result in coordinated action in the future. *See, e.g.*, Complaint at ¶ 22 ("for many years, MillerCoors has followed ABI's price increases to a significant degree.").
[7] Jim Koch, Is It Last Call for Craft Beer? The New York Times (April 7, 2017), https://www.nytimes.com/2017/04/07/opinion/is-it-last-call-for-craft-beer.html?src=me&_r=1.

In some respects, there are promising aspects of the beer market. New entry from craft brewers has led to increased innovation and consumer choice. Craft beer startups have resulted in the introduction of beers with a wide range of unique styles and tastes. Today, in many instances, consumers can buy beer supplied and produced from a number of local breweries. Central to the growth of craft beers is the availability of independent distribution which enables craft beers to achieve efficient distribution and overcome barriers to entry.[8] The bottom line is that choice leads to lower prices and greater innovation.

However, the ability of craft brewers to compete, faced with the arsenal of anticompetitive conduct by ABI is daunting. In an April 7, 2017 Op Ed in the New York Times, Mr. Koch, founder of Boston Beer, perhaps the most successful U.S. craft beer rival, demonstrated the fragile state of competition for craft beers.[9] Mr. Koch documents how consolidation and market power enable ABI to handicap rivals by limiting craft brewers' access to distribution and retail space. This fear is justified, as the parties in this merger already engage in activity to stifle craft competition through exerting pressure on the distributor and retail tiers as well as purchasing successful craft breweries and brands.[10] The parties' continued acquisition of craft beers poses a substantial threat. Again, according to Mr. Koch:

> The Department of Justice is allowing the damage to continue by greenlighting these two big brewers to extend their duopoly into craft beer by acquiring craft brewers. For example, in December the department approved AB InBev's acquisition of Karbach, one of the largest craft brewers in Texas, a state where AB InBev already controls 52 percent of the beer market. Drinkers buying cute-

[8] *See* U.S. Senate Subcommittee 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. (statement of Craig Purser, National Beer Wholesalers Association), *available at* http://www.judiciary.senate.gov/meetings/ensuring-competition-remains-on-tap-the-abinbev/sabmiller-merger-and-the-state-of-competition-in-the-beer-industry.

[9] Koch, supra n. 8.

[10] *See* 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.

> sounding brands like Goose Island or Terrapin or Ten Barrel are often unaware that these brands, some of them once independent, are now just subsidiaries of AB InBev or Molson Coors, which are not transparent about disclosing their true ownership anywhere on the bottle.[11]

While the global brewers buying up the smaller crafts may raise some confusion among beer consumers, the smaller acquisitions of craft brewers are part of a much larger competitive problem related to the distribution of beer.

The merger, along with the proposed divestiture of SABMiller's JV interest to Molson Coors, will lead to ABI and MillerCoors securing a duopoly on the supplier level and the distribution level as they will together exert control over approximately 85-90% of the distributors in the United States, who are either owned by or affiliated with ABI and MillerCoors or heavily influenced through onerous take-it-or-leave-it equity agreements and market power.[12] As the DOJ acknowledges, ABI's acquisition of SABMiller along with the proposed divestiture increases ABI's incentive and ability to impede rival brewers' distribution.[13] The DOJ secured remedies to attempt to protect independent distribution, but we believe many of the proposed remedies are inadequate as described below.

The Court now must determine whether the PFJ is in the public interest, as mandated by the Antitrust Administrative and Procedures Act ("Tunney Act"). While the DOJ attempts to remedy the harm addressed in its Complaint, as it is currently positioned and without the following three modifications, the PFJ if entered as a Final Judgment will fail to remedy the harm and consumers will pay the cost in reduced choices and increased prices.

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[11] Koch, supra n. 8.

[12] Competitive Impact Statement at 10. According to the DOJ, 85% of the beer sold in the United States was through ABI or MillerCoors affiliated distributors or through ABI-owned distributors.

[13] Competitive Impact Statement at 11-12. The DOJ noted in its CIS that ABI and Molson Coors, the new 100% owner of MillerCoors, have business arrangements and contacts throughout the world so the divestiture would actually facilitate coordination between the two global beer suppliers. Because of the increased likelihood of coordinated anticompetitive effects, the DOJ alleged that the merger "would increase ABI's incentive and ability to disadvantage its beer rivals by impeding the distribution of its beers." Complaint at ¶ 7, 45-47.

First, ABI should be prohibited from acquiring any more distributors. ABI's use of distributor acquisitions in an effort to reduce distribution competition in key markets is an anticompetitive strategy, and despite the ten percent (10%) cap remedy in the PFJ, ABI will continue to implement this strategy in certain geographic markets.

Second, ABI should be prevented from acquiring any more craft brewers. Similar to its acquisitions strategy of distributors, ABI buys craft brewers in order to replace rival brewer brands with its newly acquired crafts (which, but for these acquisitions, were offered the potential for price and innovation competition), thereby, limiting competition and the distribution opportunities for rival crafts brewers, particularly those with the scale necessary to compete.

Third, the PFJ should include broader prohibitions against ABI's attempts to curb the promotion and distribution of rival beer. For example, the PFJ allows ABI to reward distributors based on "ABI's percentage of beer industry sales in a geographic area." Such language allows ABI to tweak incentive programs offered to aligned distributors to diminish attention distributors give to non-ABI beers.

ARGUMENT

I. The Court Must Determine Whether the Proposed Final Judgment is in the Public Interest

The Tunney Act directs the Court to determine whether the proposed final judgment is "in the public interest." 15 U.S.C. §16(e)(1). "The inquiry must be formed 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.'" *United States v. AT&T Inc.*, 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)).

The PFJ provides for a remedy that includes structural (divestiture of SABMiller's interest in the MillerCoors Joint Venture ("MillerCoors JV")) and behavioral conditions (restrictions and prohibitions on ABI's future conduct). The PFJ establishes a framework to protect the ability of rival brewers to compete, protect distributor freedom and ultimately protect consumers. It ultimately seeks to protect competition which should lead to greater choice, innovation and lower prices. The DOJ's job of crafting the remedy was no small task and this Court similarly has the overwhelming responsibility of reviewing the PFJ to determine if it is in the public interest.

Here, the DOJ alleged that the beer industry is highly concentrated, that the beer industry has high barriers to entry, and that the beer industry is subject to tacit collusion. Unless remedied, the transaction would also eliminate head to head competition between ABI and MillerCoors JV, which jointly account for 72% of the national beer market and dominate local markets throughout the United States, likely resulting in increased prices and fewer choices for

beer consumers.[14] To resolve these concerns, the PFJ requires the divestiture of SABMiller's ownership interest in the MillerCoors JV to Molson Coors in the United States, which addressed the direct competitive overlap at the supplier level.

Yet, the DOJ also recognized that the divestiture was not sufficient to eliminate the competitive effects the transaction would have on distribution of beer.[15] The DOJ noted in its Competitive Impact Statement ("CIS") that ABI and Molson Coors, the new 100% owner of MillerCoors, have cooperative business arrangements and contacts throughout the world so the divestiture required in the PFJ would actually facilitate coordination between the two largest beer suppliers in the United States.[16] The DOJ was concerned that the ABI/SABMiller transaction would have increased concentration in an already highly concentrated industry resulting in unilateral anticompetitive effects and the proposed divestiture to resolve that concern would result in coordinated anticompetitive effects going forward.[17] In other words, but for additional remedies, ABI and SABMiller would have an even greater ability and incentive to engage in conduct that would further restrict competition. As a result, the DOJ included behavioral remedies designed as "a meaningful restriction on ABI's ability to restrict the sale of Third-Party Brewer's Beer."[18] We believe those remedies are inadequate.

Because the PFJ enacts behavioral concerns that require a Monitor Trustee, the Final Judgment must be absolutely clear to avoid any confusion or ambiguities. As part of the Tunney Act process, in October 2016, consumer groups, industry participants, academia and experts weighed in to identify and raise concerns regarding ambiguities in the PFJ that could be

[14] Complaint at ¶¶ 5-6, 21-23, 39-44, 48.
[15] CIS at 11-12.
[16] *Id.*
[17] *Id.*
[18] DOJ Response at 24.

exploited by ABI whereby ABI could potentially break the spirit of the agreement without violating its terms and to suggest recommendations. The DOJ issued cursory responses to all filed comments defending its position without recognizing the need for any modifications to the PFJ.

In general, the DOJ responded to public comments by stating either that the PFJ is sufficient or that the PFJ is already an improvement on the status quo. This Court, however, needs to determine whether the PFJ is in the public interest and in other words, adequate to, at the very least, resolve the anticompetitive concerns identified by the DOJ in its Complaint and CIS and by consumer groups and industry participants in their public comments. Through its 2004 amendment, Congress intended for courts to ensure that the Antitrust Division did not "settle[] antitrust cases for injunctive decrees that were less demanding than Congress believed appropriate." *United States v. Blavatnik*, No. CV 15-1631 (RDM), 2016 WL 593449, at *7 (D.D.C. Feb. 12, 2016).

Under the Tunney Act, this Court is both statutorily empowered and required to take into account the competitive landscape to determine whether the PFJ is adequate. Indeed, given the Court's ability to consider any "competitive considerations bearing upon the adequacy of such judgment[,]"[19] this Court should educate itself about the U.S. beer market to make sure it is aware of the full range of competitive problems that exist in the highly-concentrated beer industry, distribution of beer, the ambiguity in the PFJ and the need for strong enforcement powers to ensure the settlement is as effective as possible. This is particularly necessary in this case where the parties have agreed to extensive behavioral remedies with a Monitor Trustee to assist the Court in ensuring compliance with the order. Since the Court must interpret and

[19] 15 U.S.C. § 16(e)(1)(A).

enforce the extensive behavioral remedy, it is helpful for the Court to have a greater understanding of the nature of competition in the beer market, the need for the behavioral provisions and how those provisions can be interpreted.

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.'" *AT&T Inc*., 541 F. Supp. 2d at 6. In this case, that evaluation is crucial to protecting competition in the market.

II. Consumers Will be Harmed if the PFJ is Entered as Drafted

The DOJ has acknowledged this merger, ranked as the largest beer merger in global history[20] and one of the top five biggest acquisitions of all time,[21] significantly increases the likelihood of coordinated anticompetitive effects among ABI and MillerCoors.[22] The DOJ alleged that the merger "would increase ABI's incentive and ability to disadvantage its beer rivals by impeding the distribution of its beers."[23] This allegation is significant because "effective distribution is important for a brewer to be competitive."[24] Not only is the supplier level of the beer industry concentrated, but ABI and MillerCoors also control the two primary beer distribution networks in the United States. Several public comments suggested that ABI has already engaged in a multi-pronged strategy to disadvantage rival brewers by impeding their ability to distribute their beers through the acquisition of craft brewers and distributors and

[20] Tara Nurin, DOJ Approves the Largest Beer Merger in Global History, With Significant Conditions, Forbes (July 20, 2016), *available at* https://www.forbes.com/sites/taranurin/2016/07/20/doj-approves-largest-beer-merger-in-global-history/#6f18576913df.
[21] Charles Riley, Anheuser-Busch InBev Agrees to Buy SABMiller in Biggest Beer Deal Ever, CNN Money (Oct. 13, 2015), *available at* http://money.cnn.com/2015/10/13/investing/ab-inbev-sabmiller-beer-merger/.
[22] Complaint at ¶ 7, 45-47.
[23] Complaint at ¶ 7, 45-47.
[24] CIS at p. 8.

through various other tactics.[25] Moreover, the DOJ alleged in its Complaint and acknowledged in its CIS that ABI engaged in a wide variety of anticompetitive conduct designed to stifle the opportunities of rival brewers from distributing their beer resulting in increased prices and reduced choices.[26]

After an extensive investigation, DOJ concluded that ABI engaged in behavior that hand-cuffed distributors' ability to promote rival beer.[27] ABI used "incentive programs" to prevent distributors from promoting rival beer and giving consumers the beers they desire.[28] ABI's "incentive programs" actually punished distributors who increased sales of all beer, while rewarding distributors who kept ABI sales the same but cut rival sales.[29] To monitor their compliance, ABI required distributors to provide information related to rival sales and exercised rights over distributor management based on those sales.[30] The PFJ attempts to protect distributors from these forms of coercion.

We respectfully submit that this Court must carefully examine whether the PFJ will prevent these forms of anticompetitive conduct. As currently drafted, the PFJ does not necessarily remedy the harm alleged in the Complaint with respect to ABI's ability to continue distributor and craft brewer acquisitions, nor with respect to its ability to implement incentive programs or other activities for aligned-distributors which have the design to stifle competition.

A. ABI Should be Prohibited from Acquiring Additional Distributors

[25] Comments of Beer Distributors of Oklahoma at 3, Comments of Brewers Association at 2, Comments of Consumer Watchdog at 3, Comments of National Beer Wholesalers Association at 9, Comments of Ninkasi Brewing Company, and Comments of Yuengling & Sons, Inc. at 9.
[26] Complaint at ¶8, 27-29.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

ABI has implemented a plan to acquire distributors in key geographic markets so it can control what beers are distributed in those markets. Since 2012, ABI purchased and swapped at least twelve independent distributors in nine states (i.e., California, Colorado, Ohio, Oregon, Oklahoma, Hawaii, New York, Massachusetts, and Washington) to limit rival brewers distribution options.[31] Sales to friendly buyers are also problematic. For example, the Busch family owns or has acquired distributors from ABI. Those distributorships take on the same aggressive tactics as ABI-owned distributors. Indeed, in March of 2013, Krey Distributing, a distributor owned by the Busch family, which had 72% market share in Missouri's St. Charles and Lincoln counties, dropped six craft breweries from its portfolio after taking over Grey Eagle and Lohr distributorships.[32]

As a remedy, DOJ implemented a cap on ABI's ownership of distribution at ten percent (10%) of ABI distribution volume across the United States.[33] As the DOJ alleged in its Complaint, ABI's acquisitions of distributors are significant because ABI-owned distributors "typically distribute only brands that are owned by or affiliated with ABI."[34] DOJ explained the remedy stating "[t]his provision limits ABI's ability to acquire Distributors and then cause Distributors to cease to promote or to expel rival brands from the Distributors' portfolios—thus preventing or impeding a rival from selling its beer through a Distributor or forcing the rival to find a different and potentially less effective path to market."[35]

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[31] U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights. *Hearing on Ensuring Competition Remains on Tap: The ABI InBev/SABMiller merger and the State of Competition in the Beer Industry. December 8, 2015*. 114th Cong. (statement of J. Wilson, Iowa Brewers Guild) at 2; *Wholesaler Operations,* Anheuser-Busch, http://anheuser-busch.com/index.php/our-company/operations/wholesale-operations.
[32] *See* J. Wilson, Testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Dec. 8, 2015 at 3.
[33] PFJ at 16.
[34] DOJ Complaint at ¶ 25.
[35] CIS at 18-19.

Six parties, including *amicus* Consumer Watchdog provided specific comments to the DOJ on concerns with ABI's ownership of any further distributorships.[36] Particularly, Consumer Watchdog provided comments informing DOJ that anything short of a bar on all future acquisitions is insufficient to protect consumers. ABI is currently the fastest growing distributor in the United States. While the PFJ cap's ABI's ability to acquire distributors on a nationwide basis at ten percent, ABI ownership and influence of its wholly owned distributorships in certain states far exceeds what the ten percent of volume cap implies. Further acquisition of any interest in distribution harms competition in two ways: 1) acquisition of a minority interest, which is allowed under the PFJ, still grants significant control over the distributor; and 2) "swaps" of distributors made to friendly parties allow ABI to increase its control even if its ownership under the PFJ remains under ten percent.

ABI's purchase of minority interests in distributors is especially concerning as ABI has the ability to exert substantial control over independent distributors' business operations. As the Wholesale Beer Association Executives ("WBAE") stated in its Tunney Act Comment to the DOJ:

> ABI effectively controls distributorships where it owns less than 50% of its stock by virtue of their veto power over the selection of a manager and the requirement that their approved manager must own 25% of the distributor's stock… ABI has, from time to time, loaned money to its distributors for the purpose of acquiring another distributor. In those circumstances, it is highly likely that ABI has collateralized its loan with a security interest in the stock or assets of the acquiring distributor. It is also highly likely that the loan documents will include typical loan covenants which would require the acquiring distributor to obtain ABI's consent to certain actions, like for instance, borrowing over a set amount or acquiring assets over a set amount. Under these circumstances, WBAE submits that it is reasonable to either redefine "ABI-Owned Distributor" as one in which ABI owns 25% or more of the outstanding equity interests or assets of a

[36] Comments of Consumer Watchdog at 6, Comments of Beer Distributors of Oklahoma at 4, Comments of Brewers Association at 5, Comments of National Beer Wholesalers Association at 13, Comments of Wholesale Beer Association Executives at 7, Comments of Stephen Calkins at 2.

> distributor or interpret the PFJ in that manner in light of the ABI Equity Agreement requirement that the manager they approve must own 25% of a distributor's stock.[37]

Further, as noted by the National Beer Wholesalers Association, antitrust law and DOJ enforcement actions recognize that "even a minority interest, can raise antitrust concerns."[38] The Supreme Court recognizes that minority control can result in competitive harm as well.[39] In *E.I. du Pont de Nemours & Co*., the DOJ enjoined the acquisition of a 23 percent stake in a company arguing that it could raise competition concerns when it conferred influence over vertical supply issues. The Supreme Court agreed with DOJ's judgment finding that "there [was] a reasonable probability the acquisition [was] likely to result in the condemned [Section 7 of the Clayton Act] restraints" even though the acquisition was of a minority interest.[40]

Another concern is that, under the PFJ, ABI would be free to swap or trade a currently owned distributor to an ABI affiliated distributors in order to buy other distributors and increase its concentration in new markets. This practice would be difficult to monitor. As explained by the Brewer's Association:

> [the PFJ] leaves significant room for ABI to continue to tilt the table in its favor because the ten percent cap leaves room for ABI to move additional distribution territories to its favored and strongly aligned distributors while remaining below the ten percent cap. ABI's past conduct shows a pattern of treating distributors as a fungible group of businesses that can be purchased and resold to achieve ABI's

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[37] Comment of WBAE at 8-9.

[38] Comments of National Beer Wholesalers Association at 16, citing Mike Moiseyev, *What's the interest in partial interests?*, Bureau of Competition, Federal Trade Commission (May 9, 2016); see also Einer Elhauge, Horizontal Shareholding, 109 HARV. L. REV. 1267 (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632024 (noting studies have shown that horizontal shareholding, which is when the same investors own significant – although minority – shares of a number of industry competitors, result in higher prices and consumer harm).

[39] *United States v. E.I. du Pont de Nemours & Co*., 353 U.S. 586, 597–606 (1957).

[40] *Id*. at 603; see also In the Matter of TC Group, LLC, FTC File No., 061-0197 (Decision and Order, January 25, 2007) (FTC challenge of a 22.6 percent equity interest purchase of Kinder Morgan Inc. by two private equity firms who held interests in a competitor of Kinder Morgan. The FTC alleged that the private equity firms would be in a position to reduce competition between Kinder Morgan and its competitor through its ability to appoint board members at both companies and by exchanging competitively sensitive non-public information between the competitors.).

> strategic goal of reducing the number of ABI Independent Distributors by consolidation into ABI-Owned Distributors or a select group of favored distributors with longstanding financial ties to ABI. In the third and fourth quarters of 2015 alone, ABI traded, purchased, or resold distribution rights for millions of cases of beer in four states.[41]

DOJ's response to the Tunney Act comments provide relatively little to explain DOJ's reasoning as to why a ten percent cap remedies the harm alleged in the Complaint. It simply states that prohibiting further acquisitions "is not necessary to remedy harms alleged in the Complaint or identified in the CIS."[42] DOJ further notes that the reporting requirements of Section XII of the PFJ, which require "ABI to notify the Department about certain Distributor acquisitions that are not otherwise reportable under [HSR]…ensure that the Department will have the opportunity to evaluate the likely competitive effects of such Distributor acquisitions before they are completed—even if the acquisitions would keep ABI under the 10% cap."[43]

The DOJ's response is not sufficient to address this concern, nor sufficient to prevent competitive harm by ABI which will ultimately harm consumers. ABI's acquisitions of distributors have a direct and immediate effect on the sale of third party beers. For example, J. Wilson, head of the Iowa Brewers Guild, testified before the Senate Judiciary Committee that when ABI took over two distributors in Eugene, Oregon, independent craft brewer Ninkasi Brewing Company saw its sales plunge.[44] The point of Mr. Wilson's example is that ABI-owned distributors routinely sever ties with rival brewers, or give the brands less attention than they deserve, making it extremely difficult for them to effectively distribute their beer. This can result in less choice and often increased prices for consumers. The holes in the PFJ – allowing

[41] Comments of Brewers' Association at 5.
[42] Response at 23.
[43] *Id.*
[44] J. Wilson, Testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Dec. 8, 2015 at 3.

minority ownership and distributor swaps – are especially concerning in light of the fact that ABI acquisitions of distributors have demonstrably harmed third party beers.[45]

B. ABI Should be Prohibited from Acquiring Additional Craft Brewers

Similar to distributor acquisitions, ABI has engaged and currently engages in a scheme to reduce competition by acquiring craft brewers, particularly those craft brands on a path to sufficient competitive scale. ABI's purchase of craft breweries is significant because having a variety of craft beer in its portfolio makes it easier to implement its practice of requiring its distributors to focus on ABI products rather than rival beer. Since 2011, ABI has purchased at least nine regionally-significant craft brewers including Goose Island, Blue Point Brewing, 10 Barrel Brewing, Elysian Brewing, Golden Road Brewing, Four Peaks, Breckenridge, Devil's Backbone, and Karbach Brewing Company.[46] It also recently announced its acquisition of Wicked Weed. Devils Backbone and Karbach were acquired during the time the PFJ was executed but before being approved by this Court. On September 6, 2016, the DOJ allowed ABI to acquire Devil's Backbone "in light of the distribution relief secured in the ABI/SABMiller settlement."[47]

In response to consumer comments submitted, the DOJ issued a cursory statement that "[r]estricting ABI from acquiring craft breweries…is not necessary for the proposed divestiture to be effective in remedying the harms alleged in the Complaint."[48] In the same vein, DOJ recognizes ABI's acquisition of "multiple craft breweries over the past several years" but states that "the Complaint does not contain any allegations related to those acquisitions."[49] DOJ may

[45] *See* Comments of Ninkasi Brewing Company.
[46] John Kell**,** *Anheuser-Busch InBev Purchased its Ninth Craft Brewer,* November 3, 2016. https://consumerist.com/2016/04/13/here-are-the-8-u-s-craft-brewers-bought-by-anheuser-busch-since-2011/
[47] *Justice Dep't Statement on the Decision to Close Investigation of ABI's Acquisition of Devils Backbone in Light of Distribution Relief Obtained in ABI/SABMiller Settlement*, US. Dep't of Justice, Antitrust Division Press Release, September 6, 2016.
[48] DOJ Response at 32.
[49] *Id.*

be correct that this remedy is not necessary "for the proposed divestiture to be effective," but the DOJ also explicitly recognizes that the proposed divestiture in itself is not sufficient to remedy the harm alleged in the Complaint. "[F]ollowing 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. The extent to which craft and other brewers in the United States are able to compete with ABI and Molson Coors will thus affect the likelihood of the divestiture to Molson Coors leading to unilateral or coordinated anticompetitive effects."[50] Through this statement, DOJ appears to recognize the need for craft competition to remain viable in the market; further the Complaint generally recognizes ABI's use of "a variety of practices…to promote exclusivity" which one can certainly read to include its strategy of acquiring rival craft brewers.

Specifically, acquisition of craft brands increases ABI's incentive and ability to exclude rival brewers from distribution channels.[51] With ABI-owned craft beers, ABI has a greater incentive and ability to prevent distributors from distributing rival craft beers. ABI will have a stronger incentive and ability to penalize distributors for providing access to independent craft beers. This will lead to less innovation and choice.

The way ABI disadvantages third party brands through craft acquisitions is through a replacement strategy. There is clearly increasing demand for craft beers. Distributors are motivated to respond to this demand by offering a broad range of choice to the retailers they serve. However, ABI acquisition of craft brands gives ABI the incentive and ability to pressure distributors to push ABI owned craft brands on retailers over third party rival brands. Craft ownership also gives ABI the ability to force greater distributor loyalty without as much concern

[50] CIS at 12; DOJ Response at 11-12.
[51] *See also* Comments of Brewers Association at 7-8.

that retailers will dump independent distributors for not carrying the selection retailers need. The more craft ABI acquires, the more it can pressure independent craft out of ABI-aligned distributors. This puts independent craft at risk, forcing them to find other and potentially less attractive distribution solutions.[52] This was the fear expressed by Jim Koch when he warned that "we are headed for a time when independent breweries can't afford to compete, can't afford the best ingredients, can't get wholesalers to support them, and can't get shelf space and draft lines."[53]

ABI is at no loss in demonstrating that it intends to continue to grow through acquisitions of high-end brewers to harm rival brewers and potentially replace them on shelves and taps. These acquisitions, including those of Devil's Backbone and Karbach, can result in competitive and innovative harm. Consumers value the choice of craft, and enjoy the new products that independent craft brewers have created. ABI acquisitions threaten to create effective "puppet state" craft beers, giving consumers a false sense of choice. DOJ's statement regarding ABI's purchase of Devil's Backbone, which showed no cause for concern, indicates just how important it is for the Court to scrutinize the details of the PFJ.

C. The PFJ Should Include Broader Protections Against ABI Attempts to Curb the Promotion and Distribution of Rival Beer

The DOJ's Complaint explicitly recognized ABI's engagement in tactics to exert "considerable influence over ABI-Affiliated Wholesalers."[54] Indeed, ABI requires ABI-affiliated distributors to enter into Wholesaler Equity Agreements ("WEA") that function as non-compete clauses. The WEA encourages the sales of ABI beer at the expense of rivals. For example, the WEA prohibits ABI-affiliated distributors from requesting that a bar replace an

[52] *See* Comments of Ninkasi Brewing.
[53] Koch, *supra* n. 8.
[54] Complaint at ¶ 27.

ABI tap handle with a rival's tap handle or that a retailer replace ABI shelf space with a rival's beer.[55] The WEA also prohibits ABI-affiliated distributors from compensating its sales people for the sales of rival brands unless it provides the same incentives for ABI brands, which in effect limits the distributors' ability to promote rival brands.[56] Furthermore, ABI has punished distributors who increase sales of all beer, ABI and rival-produced, while rewarding distributors who kept ABI sales the same but cut rival sales. ABI has required distributors to provide it information related to sales of rival beer and exercises its rights over distributor management based on those sales.[57] These restrictions are part of a calculated and direct effort to harm rival brewers, and, thereby, reduce consumer choice.

In addition to these contractually mandated practices, ABI has used incentive programs based on decreasing a distributor's sale of rival brands and exert other pressures on independent distributors. Besides the acquisition strategy, ABI's distributor incentive programs and other campaigns are designed to promote exclusivity at the expense of its competition. For example, in 2015, ABI implemented a distributor incentive program known as Voluntary Anheuser-Busch Incentive For Performance Program ("VAIP"), whereby ABI paid ABI affiliated distributors a bonus if their ABI sales were 90% or more of its volume.[58] According to the American Antitrust Institute's ("AAI") letter to the DOJ, ABI constrains distributors by conditioning incentive programs on carrying rival brewers that produce a relatively small volume per year, or sell in only one state.[59] This restriction effectively limits the size of any of ABI's competitors because

[55] CIS at 9.
[56] *Id.*
[57] ABI's WEA provides ABI the right to approve or disapprove a distributor manager (often disapproving non-ABI loyalists), and requiring the approved manager to own 25% of the distributorship.
[58] DOJ Complaint at ¶ 8 and 29.
[59] Letter from Diana Moss, President of AAI, to the Department of Justice (April 25, 2016).

distributors must decide whether to keep rival beer products or lose ABI incentives.[60] The AAI letter also states that ABI has a history of pressuring independent distributors into distributing only ABI products and that ABI would either personally visit or publicly criticize distributors that chose to sell rival beer.[61] This type of conduct limits opportunities for rival brewers to distribute their products, which reduces choices for consumers.

As noted in the DOJ's Response to comments, these incentive programs, such as VAIP, have ceased since being barred by the PFJ. Nonetheless, the PFJ, allows for carve-outs permitting ABI to continue engaging in conduct that significantly disadvantages rivals to the ultimately detriment of consumers. The most striking example is the carve-out in Section V.D of the PFJ, which allows ABI to reward distributors based on "ABI's percentage of beer industry sales in a geographical area." The DOJ's response to these concerns simply recognize that "ABI has a legitimate interest in Independent Distributors growing ABI's percentage of all Beer industry sales in the areas in which the Distributors sell ABI's Beers."[62] While some of the previous practices described above may be explicitly prohibited by the PFJ, the narrow reading of the PFJ provides significant room for ABI to circumvent the intendent protections of the PFJ by instituting a policy, for example, that distributors must achieve a high percentage of sales of ABI products to be rewarded, whether through price incentives or other means, to the detriment of rivals and consumers. ABI could condition, similar to VAIP, rewards to a distributor based on 95% sales. Such a remedy does little to prevent the problematic "considerable influence" ABI can exert over its ABI-affiliated distributors.

[60] *Id.*
[61] *Id.*
[62] Response at 14.

While the Court cannot require the parties to agree to any specific remedy, it can suggest the parties consider modification that would result in the following:

- expressly prohibit ABI from implementing distributor incentive programs or entering into any other contracts or agreements with ABI-affiliated distributors that create economic disadvantages or make it financially unattractive for them to distribute or promote rival brewers' beer;

- expressly prohibit ABI from engaging in any promotional programs that are designed to make it unattractive for distributors to carry rival products; and

- expressly prohibit ABI from engaging in any conduct that would foreclose rival brewers' ability to distribute their products through independent distributors to retailers.

CONCLUSION

This Court should not simply rubber stamp an approval of the PFJ as drafted. Indeed, this Court has the authority and responsibility to conduct a thorough review of the PFJ to determine whether it is in the public interest and fully restores competition for the millions of beer consumers who value diversity and choice. Accordingly, this Court should require an open and public hearing so it can conduct additional fact-finding necessary to carefully consider the PFJ in light of the number of concerns raised by numerous comments that the DOJ summarily dismissed. Such a hearing would fully develop the record regarding the potential areas of failure in the PFJ before the Court makes its decision on whether the PFJ adequately resolves the competitive harm raised by the merger and the proposed divestiture to Molson Coors.

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Respectfully submitted,

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