UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ANHEUSER-BUSCH InBEV SA/NV, et al., *Defendants.*	Civil Action No. 16-1483 (EGS)

PLAINTIFF UNITED STATES' AND DEFENDANT ABI'S
JOINT MOTION AND MEMORANDUM
FOR ENTRY OF MODIFIED PROPOSED FINAL JUDGMENT

In its March 15, 2018 response to the briefs filed by amicus curiae, the United States reported that the United States and Defendant Anheuser-Busch InBev SA/NV ("ABI") have agreed to modify the Proposed Final Judgment to incorporate four new procedural provisions designed to improve the Proposed Final Judgment's enforceability.[1] The United States is seeking to include these four new provisions in all newly proposed final judgments in antitrust matters, and it has already included them by agreement with the parties in four of its most recent proposed consent decrees in civil merger and civil non-merger cases.[2]

[1] Plaintiff United States' Response to Briefs Filed by Amicus Curiae at 1.
[2] *See* proposed final judgments filed in the United States District Court for the District of Columbia in *United States v. Vulcan Materials Co.*, No. 17-2761 (D.D.C. filed Dec. 22, 2017); *United States v. Parker-Hannifin Corp.*, No. 17-1354 (D.D.C. filed Dec. 18, 2017); and *United States v. TransDigm Grp. Inc.*, No. 17-2735 (D.D.C. filed Dec. 21, 2017). *See also* final

In addition, because ABI began complying with the Proposed Final Judgment on July 20, 2016, the date the Complaint was filed in this matter, and because ABI has agreed to the new provisions, the parties have agreed to modify the term of the Proposed Final Judgment such that the ten-year term commences as of July 20, 2016.

Accordingly, the United States and ABI hereby jointly move for the entry of the Modified Proposed Final Judgment, attached as Exhibit 1, which incorporates the new agreed-upon provisions and maintains the substantive provisions in the Proposed Final Judgment filed with the Court on July 20, 2016.[3]

I. Proposed modifications

A. New antitrust consent decree enforcement provisions

As noted, the United States and ABI have agreed upon the inclusion of four new provisions in the Modified Proposed Final Judgment, which are intended by the United States to improve the enforceability of antitrust consent decrees generally. To be clear, the proposal to modify the Proposed Final Judgment in this matter to include these provisions does not (and should not be interpreted to) reflect concerns regarding ABI's compliance with the proposed decree thus far or its commitment to comply with the decree in the future.

The first new provision in the Modified Proposed Final Judgment relates to the burden of proof that would apply if the United States were to bring a motion to enforce the consent decree to seek a finding of civil contempt based on a violation of the consent decree. Under prevailing case law, the standard for proving a decree violation in a civil contempt action is clear and

judgment entered in *United States v. Entercom Commc'ns Corp.*, No. 17-2268-JEB (D.D.C. Jan. 31, 2018) (incorporating two of the four new procedural provisions).

[3] *See* Dkt. 2-2. The United States and ABI attach as Exhibit 2 a redline reflecting the changes in the Modified Proposed Final Judgment compared to the Proposed Final Judgment.

convincing evidence.[4] Proving a civil antitrust violation in the first instance, however, requires the government to meet a lesser preponderance-of-the-evidence standard. The proposed new burden of proof provision, which is contained in Section XVIII.A of the Modified Proposed Final Judgment, aligns the applicable standards of proof by imposing the same preponderance standard for decree violations as for the underlying offense.[5]

The United States' goal for the new burden of proof provision is to make the investigation and enforcement of antitrust consent decrees more efficient, and thereby encourage greater compliance with antitrust consent decrees generally. The clear and convincing evidence standard creates a dynamic where the United States, needing to meet the heightened standard, must engage in extensive investigative efforts to prove a decree violation. This subjects the parties to a consent decree to onerous and resource-intensive investigations so that the United States can build a complete record and carry its heightened burden. The party being investigated for a potential consent decree violation, knowing it will benefit from a favorable evidentiary standard, has a parallel incentive to challenge the government's evidence to the greatest extent possible, delaying the investigation rather than resolving the matter, thereby increasing the cost of the investigation to itself and the United States. In this way, the clear and convincing standard adds unnecessary burden and delay to antitrust decree violation investigations—to the detriment of all sides. Applying a preponderance standard to potential civil contempt proceedings will

[4] *See United States v. Microsoft Corp.*, 147 F.3d 935, 940 (D.C. Cir. 1998) ("A party seeking to hold another in contempt faces a heavy burden, needing to show by 'clear and convincing evidence' that the alleged contemnor has violated a 'clear and unambiguous' provision of the consent decree.")

[5] *See id.* at 946 ("The court's task [in a decree enforcement action] is to discern the bargain that the parties struck. . . ."). This change is not intended, and cannot be construed, to suggest that a decree violation, in and of itself, constitutes a violation of the Sherman Act or Clayton Act.

significantly increase the efficacy and efficiency of enforcing the Modified Proposed Final Judgment.

The second new provision relates to fee-shifting. The United States has historically borne the costs of decree enforcement investigations and proceedings, even when a party has committed a serious decree violation. Under the proposed new fee-shifting provision, which is contained in Section XVIII.B of the Modified Proposed Final Judgment, ABI agrees to reimburse the United States for attorneys' fees, expert fees, and costs incurred in connection with any successful consent decree enforcement effort should the United States seek such reimbursement given the circumstances of a particular matter. This type of fee-shifting provision is commonplace in commercial contracts in the private sector and should be familiar to many parties (and their counsel) that settle United States antitrust enforcement actions. The goal of the fee shifting is to encourage speedy resolution of antitrust consent decree violation investigations, and to compensate taxpayers for the costs associated with investigation and enforcement necessitated by the violation.

The third and fourth new provisions relate to the term of the decree. The third provision is contained in Section XVIII.B of the Modified Proposed Final Judgment and provides that, if the Court finds that ABI has violated the Modified Proposed Final Judgment, the United States may apply for a one-time extension of the term of the decree. Acknowledging explicitly that the United States may seek an extension of the term of a consent decree is intended to encourage compliance with the decree during its initial term, making the relief in a decree more meaningful and discouraging decree violations. The fourth new provision, contained in Section XIX of the Modified Proposed Final Judgment, would permit the United States to terminate the Modified Final Judgment after five years upon notice to the Court and ABI. This provision recognizes that

market circumstances can change in ways that obviate the need for a consent decree or make its continuation counterproductive—and provides the United States with the flexibility to terminate the decree under those circumstances.

B. Ten-year term

Pursuant to Section IV.B of the Hold Separate Stipulation and Order, ABI has been complying with the Proposed Final Judgment since July 20, 2016, the date the United States filed the Complaint and Proposed Final Judgment.[6] The Proposed Final Judgment, however, provides that the ten-year term of the Proposed Final Judgment would begin on the date that the Court enters the Final Judgment. Both the United States and ABI envisioned that the ten-year term would commence fewer than nineteen months after the filing of the Proposed Final Judgment. Accordingly, and in recognition of ABI's good faith efforts to comply with the Proposed Final Judgment since July 20, 2016, the parties propose modifying Section XIX to provide that the ten-year term of the decree commence on July 20, 2016. The United States believes that the goals of the Proposed Final Judgment can be achieved, and the public interest served, if the ten-year term were to begin on July 20, 2016—the date on which ABI began complying with the Proposed Final Judgment.

II. Conclusion

It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Modified Proposed Final Judgment. As the United States has explained in the CIS, the Response to Public Comments, and the Response to Briefs filed by Amicus Curiae, and as the United States and ABI have explained in this Memorandum, entry of the Modified Proposed Final Judgment is in the public interest. All of the requirements of the

[6] *See* Dkt. 9 at § IV.B.

APPA have been satisfied.[7] Accordingly, the Court can enter the Modified Proposed Final Judgment at this time.

Dated: March 15, 2018

Respectfully submitted,

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[7] The changes in the Modified Proposed Final Judgment do not require an additional notice and comment period under the Tunney Act, 15 U.S.C. § 16. The modifications do not alter the structure or substance of the remedy and will not materially affect ABI's obligations. This Court has previously entered modified final judgments without requiring additional notice and comment. *See United States v. Gen. Elec. Co.*, No. 17-1146-BAH (Oct. 16, 2017) (entering final judgment modified to extend defendant's time to divest certain assets, include a monetary incentive for defendant to timely divest the assets, and reserve to the United States the right to seek civil contempt sanctions if defendant failed to timely divest the assets and attorneys' fees and costs incurred during an investigation of further delay); *United States v. Star Atl. Waste Holdings, L.P.*, No. 12-1847-RWR (D.D.C. Jun. 13, 2013) (modifying final judgment to extend term for required divestitures to enable defendants and acquirers to obtain required state regulatory approvals); *United States v. Grupo Bimbo, S.A.B. de C.V.*, No. 11-1857-EGS (D.D.C. Oct. 3, 2012) (modifying final judgment to allow for the sale of a closed, rather than an operational, commercial bakery plant); *United States v. Verizon Commcn's, Inc.*, No. 08-1878, 2011 WL 1882488, at *1, *9 (D.D.C. Apr. 8, 2011) (modifying final judgment to extend the term of transition services agreements); *United States v. Cemex, S.A.B. de C.V.*, No. 07-0640, 2007 WL 7315362, at *1, *4 (D.D.C. Nov. 28, 2007) (modifying final judgment to substitute a 40-year lease of real property for a sale of that property); *United States v. Halliburton*, No. 98-2340 (D.D.C. Mar. 13, 2000) (modifying final judgment to substitute access to one test well for access to a different test well).

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CERTIFICATE OF SERVICE

I, Michelle R. Seltzer, hereby certify that on March 15, 2018, I caused a copy of Plaintiff United States' and Defendant ABI's Joint Motion and Memorandum for Entry of Modified Proposed Final Judgment to be filed and served upon all counsel of record by operation of the CM/ECF system for the United States District Court for the District of Columbia.

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