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' Response to Briefs Filed by Amici Curiae

The United States respectfully submits this response to the amicus curiae briefs submitted in this Tunney Act proceeding.

I. The divestiture and other relief in the proposed Final Judgment effectively remedy the harm alleged in the Complaint

The proposed Final Judgment[1] provides comprehensive relief to prevent the Anheuser-Busch InBev/SABMiller merger from harming competition.[2] Without the relief obtained by the United States, ABI's acquisition of SABMiller would have harmed consumers because ABI would have controlled 72 percent of the U.S. beer market and had high shares in local markets throughout the country. The merger likely would have resulted in higher beer prices and fewer choices for U.S. beer consumers.

The proposed Final Judgment directly addressed this harm by requiring ABI to divest SABMiller's entire U.S. beer holdings. ABI made the divestiture required by Section IV of the proposed Final Judgment to Molson Coors on October 11, 2016. The $12 billion divestiture included SABMiller's equity and ownership stake in MillerCoors, the worldwide rights to the Miller brands, and perpetual, royalty free licenses to certain products for which MillerCoors previously had to pay royalties.[3] Because of the divestiture, ABI did not increase its market share in the United States at all, and the merger did not cause the U.S. beer industry to become

[1] Concurrently with this response to the briefs of amicus curiae, the United States is filing a motion for the entry of a modified proposed Final Judgment that contains four new provisions designed to improve the enforceability of consent decrees, and to modify the term of the proposed Final Judgment such that the ten-year term commences as of July 20, 2016.
[2] *See* Competitive Impact Statement (Dkt. 3) and Response to Public Comments (Dkt. 16).
[3] *See* PFJ § II.M, IV; https://www.sec.gov/Archives/edgar/data/24545/000002454516000106/form8kmicronclosing.htm (Molson Coors Form 8-K filed October 11, 2016, describing the purchase price as $12.0 billion in cash, subject to downward adjustment as described in the purchase agreement).

more concentrated. The divestiture ensured that MillerCoors (now solely owned by Molson Coors) would remain an independent and economically viable competitor.

However, the divestiture also introduced the possibility for international interactions between Molson Coors and ABI to affect competition in the U.S. beer market. Prior to the proposed Final Judgment, MillerCoors competed against ABI only in the United States. Molson Coors, however, competed with ABI in multiple countries throughout the world. ABI and Molson Coors also had certain cooperative arrangements in Eastern Europe. ABI and MillerCoors had no comparable business arrangements. The change in ownership of MillerCoors—from a joint venture between SABMiller and Molson Coors to a wholly owned subsidiary of Molson Coors—increased the number of highly concentrated markets across the world in which ABI competes directly against Molson Coors.

By increasing the number of markets in which ABI and Molson Coors compete, the divestiture of SABMiller's interest in MillerCoors to Molson Coors could facilitate coordination between ABI and Molson Coors in the United States.[4] As the United States explained in the Competitive Impact Statement ("CIS"),[5] the proposed Final Judgment mitigates that risk. The proposed Final Judgment does so by restricting ABI from using distribution practices that unduly interfere with independent distributors' decisions about selling and promoting beers that compete with ABI and MillerCoors.

Many competing brewers use the same distributors ABI uses. Although these distributors are independent, ABI beers frequently account for the vast majority of their beer sales. Because ABI is their largest supplier, ABI often has been able to influence independent distributors to

[4] *See* CIS at 11-12.
[5] *See id*. at 14-15.

favor its beer at the expense of imports, craft beers, and other competing beers. ABI's using its influence in this way can interfere with the ability of smaller brewers to effectively get their products to market because they cannot easily switch to a different distributor.

Even so, craft and imported beers have been gaining market share and have become increasingly competitive with the "premium" beers that constitute the bulk of ABI and MillerCoors' sales. Although crafts and imports are typically priced higher than premium beers, crafts and imports can constrain the prices of premium beers because some consumers of premium beers will "trade up" when the prices of premium beers approach the prices of crafts and imports.[6] The proposed Final Judgment removes restraints that ABI previously placed on the distribution of crafts, imports, and other competing beers, and thereby unfetters the competition from those smaller rivals. This increased competition allows rival brewers to better constrain the price of ABI and MillerCoors' beers—and any new opportunities for ABI and MillerCoors to engage in coordinated price increases.

The amici focus on the provisions of the proposed Final Judgment that restrict ABI's distribution practices and largely repeat arguments made in their public comments.[7] The amici generally contend that these provisions should be clarified and expanded. The Teamsters argue that these provisions are insufficient to mitigate the risk of coordinated action between ABI and Molson Coors, and that the proposed Final Judgment instead should have required ABI to divest the MillerCoors brewery in Eden, North Carolina (the "Eden brewery"), or another large

[6] *See* CIS at 6-7.

[7] Consumer Action—which filed its amicus brief jointly with Consumer Watchdog—is the only amicus that did not provide public comments on the proposed Final Judgment. Two amici also address language that the United States has agreed ABI will use when informing independent distributors of changes ABI is making to its distributor contracts to comply with the Final Judgment.

brewery, to an acquirer other than Molson Coors. As discussed below, the amici do not raise any issues demonstrating that the proposed Final Judgment fails to effectively remedy the antitrust violation alleged in the Complaint. Contrary to the amici's assertions, the divestiture and other relief in the proposed Final Judgment effectively remedy the harms alleged in the Complaint, and the Court can find that the proposed Final Judgment falls "'within the reaches of the public interest.'"[8]

II. The public interest determination under the Tunney Act is a limited inquiry

The Tunney Act provides that, when determining whether a proposed Final Judgment is in the public interest, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[9]

The Court's public interest determination is necessarily a limited inquiry because the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest."[10] A court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree

[8] *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted).
[9] 15 U.S.C. §§ 16(e)(1)(A),(B).
[10] *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995). The United States' CIS more fully sets forth the Tunney Act's public interest standard. Those statements are incorporated herein by reference. *See* CIS at 29-33.

is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may harm third parties.[11] As this Court has recognized, in determining whether a proposed settlement is in the public interest, a court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations."[12] Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power."[13] And room must be made for the government to grant concessions in the negotiation process.[14]

III. The proposed Final Judgment is in the public interest

The Court should find that the proposed Final Judgment is within the reaches of the public interest. The distribution-related provisions—some of which the amici challenge—increase the ability of distributors of popular ABI products to promote and sell the products of brewers that compete with ABI. And the provisions clearly inform ABI and third parties what the proposed Final Judgment requires and prohibits. With the required divestiture and these provisions, the proposed Final Judgment effectively remedies the harm alleged in the Complaint.

A. The proposed Final Judgment prevents ABI from interfering with independent distributors' providing best efforts to rival brewers

Under the proposed Final Judgment, ABI cannot prevent an Independent Distributor[15] from providing every Third-Party Brewer for whom the distributor sells Beer with the

[11] *See Microsoft*, 56 F.3d at 1458-62.
[12] *United States v. SBC Commc'ns*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007).
[13] *SBC Commc'ns*, 489 F. Supp. 2d at 15.
[14] *United States v. US Airways Group, Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (citing *Microsoft*, 56 F.3d at 1461).
[15] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the proposed Final Judgment.

distributor's "best efforts to sell, market, advertise, or promote any Third-Party Brewer's Beer, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of the Third Party Brewer's Beer in a geographic area."[16] ABI can, however, require an Independent Distributor to provide ABI with those same best efforts.[17] D.G. Yuengling & Son, Inc. ("Yuengling"), National Beer Wholesalers Association ("NBWA"), and Brewers Association contend that the latter provision undermines, conflicts with, or creates ambiguity regarding the former.[18] Yuengling and one other commenter raised these same concerns in their public comments.[19] As the United States explained in the Response to Public Comments, the two provisions are not in conflict.[20]

A duty of best efforts is generally not interpreted to require exclusive efforts.[21] And it is commonplace in the beer industry for distributors to owe best efforts to more than one brewer.[22] Although applying a "best efforts" standard depends on the facts of the case, pervasive beer industry usage shows that, contrary to the suggestion of the Brewers Association (Brewers Association Brief at 8), permitting ABI—like all other brewers—to require Independent

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[16] PFJ § V.D.5.
[17] PFJ § V.D.
[18] *See* Yuengling Brief (Dkt. 22) at 4-5; NBWA Brief (Dkt. 29) at 6-7; Brewers Association Brief (Dkt. 30) at 8-9.
[19] *See* Yuengling comment (Dkt. 16-9) at 13; Professor Calkins comment (Dkt. 16-7) at 3.
[20] *See* Response to Public Comments (Dkt. 16) at 18-19.
[21] *See, e.g., Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co.*, 30 N.Y.2d 34, 45 (1972); *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 249 F.R.D. 530, 533-34 (N.D. Ill. 2008); *Gilson v. Rainin Instrument, LLC*, No. 04-C-852-S, 2005 WL 955251, at *8-*9 (W.D. Wis. Apr. 25, 2005); *First Union Nat. Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 140 (2003); II E. Allen Farnsworth, Farnsworth on Contracts, § 7.17c, at 409 (3d Ed. 2004) ("One point on which courts agree is that a duty of best efforts does not of itself impose a duty of exclusive dealing . . . .").
[22] *See* NBWA Brief at 8 ("All distribution agreements require distributors to use their 'best efforts' marketing and promoting a supplier's products."). Indeed, some states require beer distributors to provide best efforts to all suppliers. *See, e.g.*, Colo Rev. Stat. § 12-47-406(4)(a); Mass. Gen. Laws ch. 138, § 25E; Wash. Rev. Code Ann. § 19.126.030(4).

Distributors to provide it with best efforts does not render the proposed Final Judgment ambiguous for purposes of the Tunney Act.

Amici NBWA and Brewers Association also take issue with the best efforts language that ABI and the United States agreed ABI will include in the notification to Independent Distributors required under Section V.I of the proposed Final Judgment (the "best efforts notice"). The purpose of the notification, including the best efforts notice, is to make Independent Distributors aware of changes that ABI has made to its distribution contracts and programs to comply with the Final Judgment. The best efforts notice, which was included as footnote 1 in the United States' motion to enter the proposed Final Judgment (Dkt. 26), states:

> Independent Distributors are required to provide best efforts to achieve and maintain the highest practicable sales volume and retail placement of ABI's Beer. Consistent with this requirement, an Independent Distributor may on occasion, and without violating best efforts to ABI, make unsolicited recommendations to individual retailers, specific to each such individual retailer's location(s), to convert a particular ABI retail placement to that Independent Distributor's Third-Party Brewer's Beer when such recommendations are made for the express purpose of increasing such retailer's sales of Beer, including Third-Party Brewers' Beer or ABI's Beer, so long as such unsolicited recommendation does not result in more than a de minimis decrease in the sales volume or retail placement of ABI Beer in the Independent Distributor's assigned geographic area.[23]

NBWA and Brewers Association contend that the best efforts notice will exacerbate the ambiguity of the best efforts standard and deter Independent Distributors from undertaking competitive efforts on behalf of Third-Party Brewers who compete with ABI. To the contrary, the best efforts notice will enhance competition among brewers by making clear that ABI can no longer impose certain restrictions that ABI had previously imposed on Independent Distributors.

Prior to the proposed Final Judgment, ABI's contracts with Independent Distributors prohibited the distributors from requesting—under any circumstances—that a bar replace an ABI

[23] (Dkt. 26) at 3-4 n.1.

tap handle with a competitor's tap handle or that a retailer replace ABI shelf space with a competitor's beer.[24] The best efforts notice will inform Independent Distributors that this absolute prohibition is not consistent with the Final Judgment and has been replaced by a best efforts requirement that allows unsolicited product replacement under certain circumstances. With this change, Independent Distributors will be more free to use their business judgment to determine how, and to what degree, to promote the Beers that they sell—whether those Beers are brewed by ABI or a Third-Party Brewer.

Under the proposed Final Judgment, an Independent Distributor is permitted to make unsolicited product replacements that result in a more-than-de-minimis decrease in sales volume or retail placement of ABI Beer at a particular retailer, so long as the product replacements do not result in a more-than-de-minimis decrease in sales volume or retail placement of ABI Beer in the entirety of the distributor's assigned geographic area. Because an Independent Distributor's assigned geographic area typically encompasses a large number of retailers, even a product replacement that decreases ABI sales volume significantly at a particular retailer is unlikely to result in a more-than-de-minimis decrease in sales volume or retail placement of ABI Beer in the distributor's assigned geographic area.

As with a best efforts standard, determining what is a "de minimis" effect in the distributor's geographic area will depend on the facts.[25] Thus, the series of hypothetical questions posed by the Brewers Association[26] about the circumstances in which the effect on the sales volume or retail placement of ABI Beer in the Independent Distributor's assigned

[24] *See* Complaint ¶ 28.
[25] *Cf. Gilson*, 2005 WL 955251, at *9 ("The application of the best efforts standard to the particular circumstances of this case presents a question of fact . . . .").
[26] *See* Brewers Association Brief at 10.

geographic area will be "de minimis" will depend on the circumstances in the distributor's territory and the conduct at issue—and does not indicate that modifications to the proposed Final Judgment are needed.

The amici also misinterpret the scope of the best efforts notice. The best efforts notice does not "suggest[] that a distributor may only make a retail recommendation of [a] third-party brewer's beer to a retailer if it grows a retailer's volume."[27] The notice addresses only unsolicited requests by an Independent Distributor that a retailer replace an ABI product with the product of one of ABI's competitors and makes clear that unsolicited product replacement is consistent with best efforts to ABI under some circumstances. Independent Distributors remain free, for example, to sell Beers that compete with ABI's Beers by: (a) replacing shelf space or tap handles currently occupied by ABI Beers in response to the request of a retailer; (b) promoting Third-Party Brewers' Beers without making specific recommendations as to which Beers the retailer should remove from its shelf space or tap handles; or (c) providing information to the retailer about changing consumer preferences for ABI and rival Beers. The amici are thus incorrect to suggest that the best efforts notice or proposed Final Judgment somehow limits an Independent Distributor's right to carry competing products.[28] As a result, neither the best efforts notice nor the provisions allowing ABI to require best efforts from Independent Distributors takes the proposed Final Judgment outside the reaches of the public interest.

B. The definition of ABI-Owned Distributor is appropriate to ensure that ABI does not self-distribute more than ten percent of its Beer in the United States

Under the proposed Final Judgment, an ABI-Owned Distributor is "any Distributor in which ABI owns more than 50% of the outstanding equity interests or more than 50% of the

[27] NBWA Brief at 8.
[28] *See id.*

assets."[29] The defined term is relevant only to Section V.B of the proposed Final Judgment—which prohibits ABI from acquiring any equity interests in, or any ownership or control of the assets of, a Distributor if more than 10% of ABI's Beer in the United States would be sold by ABI-Owned Distributors after the acquisition.

NBWA argues that "gaps in the definition of 'ABI-Owned Distributor' and other tactics ABI might engage in significantly undermine the proposed remedy," making Section V.B "largely illusory for protecting the market."[30] Specifically, NBWA argues that the definition fails to provide transparency to the United States or the Monitoring Trustee and fails to recognize the control that ABI exerts[31] when it owns a less-than-50% interest (hereafter, a "minority interest") in a distributor.[32]

As the United States explained in its Response to Public Comments, the definition of ABI-Owned Distributors—with its 50% ownership threshold—is appropriate because it provides certainty for determining which Distributors are ABI-Owned Distributors, and it is consistent with how the United States defined ABI-Owned Distributors in the 2013 *ABI/Grupo Modelo*

[29] PFJ § II.C.
[30] NBWA Brief at 16-17.
[31] NBWA and Consumer Action and Consumer Watchdog point to ABI's right to approve an Independent Distributor's general manager, ABI's approval rights with respect to the sale of a Distributor, and ABI's requirement that an Independent Distributor's general manager own 25% of the distributorship as levers ABI can use to control Independent Distributors in which ABI owns a minority interest. *See* NBWA Brief at 16-17; Consumer Action and Consumer Watchdog ("Consumer Watchdog") Brief (Dkt. 25) at 15-18. We discuss ABI's approval rights below. As the United States explained in the Response to Public Comments, a remedy directed to ABI's requirement that a general manager purchase an equity stake in an Independent Distributor is beyond the scope of this Tunney Act proceeding and the absence of such a remedy does not provide a basis for rejecting the proposed Final Judgment. *See* Response to Public Comments at 19-20.
[32] NBWA Brief at 16.

consent decree.[33] Contrary to NBWA's assertion, the definition of ABI-Owned Distributor provides complete transparency to both the United States and the Monitoring Trustee as to which Distributors' Beer must be calculated as part of the 10% self-distribution cap. In addition, other safeguards throughout Section V reduce ABI's influence and control of Independent Distributors—including the very few Independent Distributors in which ABI holds a minority interest.[34]

NBWA further expresses concern that ABI could use a minority interest in an Independent Distributor to obtain competitively-sensitive sales data on Third-Party Brewers' Beer.[35] That concern is also misplaced. Section V.G of the proposed Final Judgment expressly limits the information that ABI can obtain from Independent Distributors—which includes distributors in which ABI has a minority interest. Nor is NBWA's prediction (echoed by Consumer Watchdog)[36] that ABI may acquire minority interests in Independent Distributors to circumvent the 10% cap a reason to modify the proposed Final Judgment. The Monitoring Trustee reports that ABI now has a minority interest in even fewer Independent Distributors than it did when the proposed Final Judgment was filed. And if ABI were to purchase minority interests in Independent Distributors, that acquisition would be subject to the notice provisions in

[33] *See* Response to Public Comments at 26-27; Final Judgment at 3, *United States v. Anheuser-Busch InBev SA/NV*, No. 13-0127 (Oct. 24, 2013) (Mehta, J.).
[34] For example, Section V.D prevents ABI from rewarding, penalizing, or otherwise conditioning its relationship with an Independent Distributor based on the distributor's sales of a Third-Party Brewer's Beer or the marketing, advertising, promotion, or retail placement of such Beer. Sections V.E and V.F restrict ABI from exercising certain approval rights based on an Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer. Section V.G limits the information ABI can require or request an Independent Distributor to provide about its purchase, sale, or distribution of Third-Party Brewers' Beer.
[35] NBWA Brief at 19.
[36] Consumer Watchdog Brief at 15, 18.

Section XII of the proposed Final Judgment and review under the antitrust laws. Accordingly, the manner in which the proposed Final Judgment defines "ABI-Owned Distributors" does not take it outside the reaches of the public interest.

C. The proposed Final Judgment sets an effective limit on the amount of Beer that ABI can self-distribute

At the time the United States filed the Complaint, ABI-Owned Distributors sold about 9% of ABI's beer in the United States.[37] As discussed above, Section V.B of the proposed Final Judgment caps at 10% the volume of Beer that ABI can self-distribute in the United States. The imposition of a 10% cap—where ABI was already self-distributing approximately 9% of its beer and where no nationwide restriction existed before—meaningfully curbs ABI's ability to restrict the sale of Third-Party Brewers' Beer by acquiring distributors.

Consumer Watchdog and Brewers Association reiterate their arguments that rather than imposing a cap on the volume of Beer that ABI can self-distribute, the proposed Final Judgment should bar ABI from acquiring any additional distributors.[38] As the United States explained in the Response to Public Comments, the cap on ABI's self-distribution of Beer is adequate to prevent ABI from using the acquisition of Distributors as a mechanism to reduce competition from its high end rivals. The United States' predictions about the efficacy of its remedies is entitled to deference.[39] And the fact that the proposed Final Judgment allows ABI to slightly increase the amount of Beer that ABI self-distributes does not take the proposed Final Judgment out of the reaches of the public interest.[40]

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[37] Complaint ¶ 25.
[38] Consumer Watchdog Brief at 15-18; Brewers Association Brief at 15; *see* Consumer Watchdog comment (Dkt. 16-4) at 6; Brewers Association comment (Dkt. 16-6) at 5-6.
[39] *See US Airways*, 38 F. Supp. 3d at 76 (quoting *SBC Commc'ns*, 489 F. Supp. at 17).
[40] *See* Response to Public Comments at 23-27.

Moreover, the proposed Final Judgment requires ABI to provide the United States with advance notice of future Distributor acquisitions. As the United States noted in the Response to Public Comments, the proposed Final Judgment does not convey antitrust immunity upon ABI for any future Distributor acquisitions. Should a future proposed Distributor acquisition implicate competitive concerns during the term of the proposed Final Judgment, the United States will have both notice and the opportunity to review such acquisition.[41] The United States can challenge the transaction if it believes that the acquisition would violate the antitrust laws.

D. The proposed Final Judgment appropriately limits ABI's right to disapprove general managers of Independent Distributors

Section V.E of the proposed Final Judgment prohibits ABI from disapproving "an Independent Distributor's selection of a general manager or successor general manager based on the Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer." This restriction is intended to enable an Independent Distributor to sell and promote Third-Party Brewers' Beer without fear that ABI will retaliate by disapproving the distributor's general manager (or the general manager's successor).

NBWA argues that ABI's remaining right to approve an Independent Distributor's general manager and the general manager's successor provides ABI with control over the distributor.[42] NBWA contends that in the past, ABI often has mandated the appointment of general managers who are devoted to the promotion of ABI products to the exclusion of competing products, and that the general managers that ABI approves effectively control the allocation of resources in the promotion, marketing, and pricing of rival products.[43] NBWA

[41] *Id*. at 24.
[42] NBWA Brief at 20. NBWA refers to the general manager that ABI has the right to approve under its Equity Agreement with an Independent Distributor as an "equity manager."
[43] NBWA Brief at 20-21.

further contends that the proposed Final Judgment must be revised to prohibit the ABI-approved general manager from making decisions that affect non-ABI products.[44] Consumer Watchdog repeats verbatim another public commenter's concern that ABI effectively controls Independent Distributors through, among other things, ABI's veto power over an Independent Distributor's general manager.[45]

The concerns expressed by the amici already have been addressed by the proposed Final Judgment. Although ABI's contracts with Independent Distributors do provide ABI with the right to approve an Independent Distributor's general manager, as described above, Section V.E restricts this right by prohibiting ABI from disapproving a general manager (or the general manager's successor) based on the Independent Distributor's "sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer." In addition, the proposed Final Judgment appropriately addresses concerns that ABI may attempt to circumvent the restrictions placed on ABI's approval rights. First, the language of the prohibition, as noted above, clearly specifies what ABI may not do. Second, the changes to ABI's approval rights work in conjunction with other provisions in the proposed Final Judgment that ensure that Independent Distributors are free to carry and promote rival brands without concern that ABI will use its contractual rights to punish the distributor. For example, the Monitoring Trustee has the authority to monitor ABI's compliance with the requirement that ABI not disapprove an Independent Distributor's choice of general manager based on any factor enumerated in V.E. An Independent Distributor who is concerned that ABI improperly exercised its approval right can report its concerns to the Monitoring Trustee without fear of retaliation, and the Monitoring

[44] *Id*. at 21-22.
[45] Consumer Watchdog Brief at 15-16, quoting Wholesaler Beer Association Executives' comment (Dkt. 16-5) at 8-9.

Trustee and the United States can determine whether the Final Judgment has been violated.

Finally, the scope of responsibilities of the general manager of an Independent Distributor was not at issue in the ABI/SABMiller transaction. For that reason, the Complaint does not allege and the CIS does not identify any harm to competition resulting from the scope of an Independent Distributor's general manager's duties. Accordingly, a remedy directed to limiting the scope of responsibilities of a general manager is beyond the scope of this Tunney Act proceeding, and the absence of such a remedy does not provide a basis for rejecting the proposed Final Judgment.[46]

The United States believes that the restriction placed on ABI by Section V.E of the proposed Final Judgment, in conjunction with other provisions, appropriately restricts ABI's ability to reward or punish an Independent Distributor based on the distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer. Accordingly, giving deference to the United States' assessment, the restrictions placed on ABI's ability to disapprove the general manger and successor manager of Independent Distributors are within the reaches of the public interest.

E. The proposed Final Judgment appropriately limits ABI's rights related to the transfer of control of Distributors

Section V.F of the proposed Final Judgment states that when "exercising any right related to the transfer of control, ownership, or equity in any Distributor to any other Distributor, Defendant ABI shall not give weight to or base any decision to exercise such right upon either Distributor's business relationship with a Third-Party Brewer – including, but not limited to,

[46] *See US Airways*, 38 F. Supp. 3d at 76 ("'Moreover, the Court's rule under the [Tunney Act] is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint. . . .'") (quoting *United States v. Graftech Int'l*, No. 10-cv-2039, 2011 WL 1566781, at *13 (D.D.C. Mar. 24, 2011)).

such Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer." As the United States explained in the Response to Public Comments, the Section V.F restrictions prevent ABI from using its rights over ownership changes to select new owners based on their history of not carrying or promoting rival brands. The restrictions therefore help ensure that ABI cannot exercise its rights related to the ownership or control of Distributors in a manner that harms competition or disadvantages ABI's rivals.[47]

Yuengling repeats the concerns that it expressed in its public comment that Section V.F does not adequately restrict ABI's rights to approve an Independent Distributor's sale of its business.[48] NBWA claims that the public interest would be "better served by restricting ABI approvals of purchasers to a transparent and accountable system that only looks at the ability to sell ABI beer and does not allow any consideration of any other competitor's products."[49] But, as described above, the proposed Final Judgment already prohibits ABI from giving weight to or basing any decision to exercise such approval right upon a Distributor's business relationship with a Third-Party Brewer. The fact that the proposed Final Judgment does not impose additional restrictions or require ABI to look only at a Distributor's ability to sell ABI Beer does not take the proposed Final Judgment out of the reaches of the public interest.[50]

Yuengling also claims that ABI violated the proposed Final Judgment when it redirected the sale of an Independent Distributor in Mississippi.[51] The United States and the Monitoring

[47] *See* Response to Public Comments at 21.
[48] Yuengling Brief at 3-4; see Yuengling comment at 9-12, 14.
[49] NBWA Brief at 21-22.
[50] *See SBC Commc'ns*, 489 F. Supp. 2d at 16 (citing Microsoft, 56 F.3d at 1460-61) ("The government need not prove that the settlements will perfectly remedy the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.").
[51] Yuengling Brief at 3-4.

Trustee conducted an extensive investigation into whether ABI's conduct violated the proposed Final Judgment (as made applicable to ABI through the Hold Separate Stipulation and Order, Dkt. 9), and the United States declined to bring an enforcement action against ABI.

F. The proposed Final Judgment appropriately limits ABI from requiring Independent Distributors to spend money on ABI's Beers in response to promotions and incentives for Third-Party Brewers' Beers

Section V.D of the proposed Final Judgment prohibits ABI from requiring proportional spending with respect to any particular incentive or promotion that an Independent Distributor runs with respect to a Third-Party Brewer's Beer. Under the proposed Final Judgment, ABI can require only that the distributor allocate to ABI's Beer a proportion of the distributor's annual spending on promotions and incentives, in the aggregate, that does not exceed the proportion of revenues that ABI's Beer constitutes in the distributor's overall revenue for Beer sales in the preceding year. Prior to the proposed Final Judgment, ABI's contracts with Independent Distributors required the distributors to allocate to ABI a percentage of the distributor's spending on promotions and incentives that was "no less than" the percentage of ABI beer—as compared to rival beer—in the distributor's portfolio. In addition, prior to the proposed Final Judgment, Independent Distributors were prohibited from providing incentives to their salespeople for the sale of Third-Party Brewers' beers (such as a dollar-per-case incentive) unless they provided the same incentives for certain ABI beers.[52] With this change, ABI can no longer influence or control how Independent Distributors spend promotional and incentive dollars on behalf of Third-Party Brewers. Rather, Independent Distributors can now invest in promotions and incentives that are appropriate for Third-Party Brewers without concern for replicating the same expenditures over ABI's portfolio of Beers. And ABI will have no insight (except at an annual,

[52] *See* CIS at 9.

aggregate level) into Independent Distributors' spending on promotions and incentives for Third-Party Brewers' Beers.

In its amicus brief, Yuengling requests that the proposed Final Judgment go further and bar ABI from insisting on a particular level of promotional expense from Independent Distributors.[53] The bar that Yuengling requests is not necessary to keep the proposed Final Judgment within the reaches of the public interest. The allocation provision contained in Section V.D protects competition while also recognizing that ABI has a legitimate competitive interest in encouraging Independent Distributors to allocate to ABI an appropriate proportion of their annual spending on Beer promotions and incentives. As the United States explained in the CIS, in any geographic area, an Independent Distributor "provides the exclusive path to market for ABI's beers, and therefore ABI may be reluctant to invest in its distributors without some assurance that those investments will not be used primarily to benefit its rivals."[54] As a result, the proposed Final Judgment allows ABI to require a proportional allocation of an Independent Distributor's spending on Beer promotions and incentives based on the Independent Distributor's previous-year overall revenues.[55]

NBWA repeats its earlier request that any allocation of promotion and incentive spending should rely on current-year revenue.[56] As the United States has explained, the primary reason that prior-year data were chosen as the measure was to promote accuracy and certainty for the calculations—something that would not be possible if, as proposed by NBWA, the allocation were based on projections for current-year revenues.[57] NBWA additionally characterizes the

[53] *See* Yuengling Brief at 5; *see also* Yuengling comment at 15.
[54] CIS at 21.
[55] Response to Public Comments at 17.
[56] NBWA Brief at 7, 22-23; *see* NBWA comment (Dkt. 16-8) at 20-22.
[57] *See* Response to Public Comments at 16.

allocation language in Section V.D as an ambiguous loophole that will lead to future disputes.[58] But the allocation language is unambiguous and provides clear and enforceable rules for ABI to follow. A plain reading of the proposed Final Judgment informs ABI, competing brewers, and Independent Distributors precisely of the allocation that ABI is allowed to require, and how it will be calculated.

G. The proposed Final Judgment appropriately restricts ABI from conditioning incentives, programs, and contractual terms on an Independent Distributor's sales of Third-Party Brewers' Beers

Prior to the proposed Final Judgment, ABI conditioned distributor incentives, programs, and contractual terms on the percentage of ABI beer in the particular distributor's portfolio. For example, ABI promoted distributor exclusivity by providing payments to Independent Distributors based on their ABI "alignment," that is, the amount of ABI beer that they sold relative to the beer of ABI's competitors. Section V of the proposed Final Judgment prohibits ABI from continuing these practices—which encouraged Independent Distributors to favor ABI beer over competing beers in their portfolios.

Under a program known as the Voluntary Anheuser-Busch Incentive for Performance Program ("VAIP"), ABI offered Independent Distributors that were 90% or more "aligned" a payment for each case-equivalent of ABI beer they sold. The size of the payment increased based on the distributor's level of alignment. Only the sales of very small, local craft beers were excluded from the calculation of the distributor's level of alignment. ABI decreased or eliminated payments to Independent Distributors that added craft beers that grew above a certain size or expanded outside of a certain geographic area. VAIP therefore had the effect of impeding

[58] NBWA Brief at 22.

rival craft brewers from growing large enough to have the scale to better compete with ABI.[59]

Because the proposed Final Judgment prohibits ABI from continuing VAIP and other practices conditioned on the percentage of ABI Beer in an Independent Distributor's portfolio, it advances competition by incentivizing Independent Distributors to grow their sales of Third-Party Brewers' Beer. At the same time, the proposed Final Judgment recognizes that ABI has a legitimate competitive interest in Independent Distributors growing ABI's percentage of all Beer industry sales in the areas in which the Distributors sell ABI's Beer.[60]

Amici Brewers Association and Consumer Watchdog reiterate their requests that Section V.D be revised to eliminate ABI's ability to condition incentives, programs, or contractual terms based on ABI's percentage of Beer industry sales in a geographic area.[61] But allowing ABI to condition incentives, programs, or contractual terms based on ABI's percentage of *all* Beer industry sales in a geographic area—but not on ABI's percentage of Beer sales in the distributor's portfolio—does not take the proposed Final Judgment out of the reaches of the public interest. Incentives, programs, or contractual terms based on ABI's percentage of all Beer industry sales in a geographic area encourage Independent Distributors to gain ABI Beer sales by competing against rival distributors—and the Beer brands the rival distributors sell—rather than

[59] *See* CIS at 9-10.

[60] So long as ABI does not "require or encourage an Independent Distributor to provide less than best efforts to the sale, marketing, advertising, retail placement, or promotion of any Third-Party Brewer's Beer or to discontinue the distribution of a Third-Party Brewer's Beer," Section V.D of the proposed Final Judgment permits ABI to "condition incentives, programs, or contractual terms based on an Independent Distributor's volume of sales of Defendant ABI's Beer, the retail placement of Defendant ABI's Beer, or on Defendant ABI's percentage of Beer industry sales in a geographic area (such percentage not to be defined by reference to or derived from information obtained from Independent Distributors concerning their sales of any Third-Party Brewer's Beer)."

[61] Brewers Association Brief at 15; Consumer Watchdog Brief at 22; *see* Brewers Association comment at 4-5; Consumer Watchdog comment at 6-7.

by favoring ABI over the Third-Party Brewers represented in an Independent Distributor's own portfolio.

Consumer Watchdog also suggests that ABI could rely on Section V.D. to institute a policy similar to VAIP, which ABI discontinued when the proposed Final Judgment was entered.[62] Section V.D of the proposed Final Judgment prohibits ABI from continuing certain practices—like its discontinued VAIP program—that encouraged Independent Distributors to favor ABI beer over competing beers in the distributors' portfolios.[63] Contrary to Consumer Watchdog's suggestion, Section V.D of the proposed Final Judgment prohibits ABI from implementing a new VAIP-like program that rewards Independent Distributors for their sale of ABI Beer relative to their sale of Third-Party-Brewers' Beer.

H. The proposed Final Judgment properly requires ABI to give the United States advance notification before acquiring smaller brewers

Section XII of the proposed Final Judgment provides that ABI must give the United States 30 days advance notification before acquisitions of smaller brewers that would fall below the filing threshold. This section ensures that the United States will have the opportunity to investigate future craft brewer acquisitions by ABI during the term of the decree. This advance notification requirement will aid the United States in preparing to challenge any transaction that it believes is likely to substantially lessen competition in the U.S. beer industry.[64]

Consumer Watchdog repeats the argument it made in its public comment that the proposed Final Judgment should instead prohibit ABI from acquiring additional craft brewers.[65]

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[62] *See* Consumer Watchdog Brief at 22. Consumer Watchdog recognizes, however, that the proposed Final Judgment prohibited VAIP. *See id.*
[63] *See* Response to Public Comments at 14.
[64] *See* Response to Public Comments at 32-33.
[65] Consumer Watchdog Brief at 18-20; Consumer Watchdog comment at 3-4, 6.

The fact that the proposed Final Judgment does not bar future craft brewer acquisitions, but rather enhances the United States' ability to review and challenge them, does not take the proposed Final Judgment outside the reaches of the public interest.[66]

I. A divestiture of the Eden brewery to an acquirer other than Molson Coors is not necessary or appropriate

As the United States has explained in the CIS, the Response to Public Comments, and above, the distribution-related and other provisions of the proposed Final Judgment effectively preserve and promote competition in the U.S. beer industry. The restrictions on ABI are designed to ensure that Independent Distributors can promote competition among the brewers that they serve and that Third-Party Brewers can secure the distribution they need to compete effectively against ABI. The Teamsters argue, however, that the supplemental relief contained in Section V of the proposed Final Judgment does not adequately remedy the heightened risk of coordinated action between ABI and MillerCoors that the CIS identifies.[67]

The Teamsters argue that to address the risk of coordinated action, ABI should be required to divest the Eden brewery (or another large brewery) to someone other than Molson Coors.[68] But the fact that the proposed Final Judgment does not require the divestiture of the Eden brewery (or another large brewery) to an acquirer other than Molson Coors does not take the proposed Final Judgment out of the reaches of the public interest.

The Teamsters incorrectly claim that the United States' requiring a brewery divestiture in the *Grupo Modelo* case supports a brewery divestiture here. As the United States explained in

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[66] *See U.S. Airways*, 38 F. Supp. 3d at 76 (the court "must accord deference to the government's predictions about the efficacy of its remedies") (quoting *SBC Commc'ns*, 489 F. Supp. at 17).
[67] Brief of the International Brotherhood of Teamsters as Amicus Curiae in Reply to Response of Plaintiff United States to Public Comments on the Proposed Final Judgment ("Teamsters Brief") (Dkt. 20) at 4-5.
[68] Teamsters Brief at 16-20.

the Response to Public Comments, the ABI/SABMiller transaction is readily distinguishable from ABI's previous acquisition of the interest it did not already own in Grupo Modelo—which required an extraordinary remedy due to its unique circumstances.[69] In ABI/Grupo Modelo, the United States required the divestiture buyer, Constellation, to purchase and expand the brewery in question because, in order for the divestiture to be effective, Constellation needed to be able to produce all Modelo-branded beer in Mexico but did not have its own Mexican brewery.[70] By contrast, in this case, the ABI/SABMiller transaction and divestiture to Molson Coors does not affect the brewing capacity of MillerCoors—which was and remains the second-largest beer brewer in the United States.

For the reasons explained herein and in the Response to Public Comments, the Teamsters do not provide a basis for questioning the United States' determination—which is entitled to deference—that the proposed Final Judgment with its required divestiture and additional relief provides an effective and appropriate remedy for the likely anticompetitive harm arising out of ABI's proposed acquisition of SABMiller.

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[69] *See* Response to Public Comments at 34-35. The Teamsters additionally argue that the United States advocates for an incorrect and overly deferential Tunney Act standard, but that contention is without merit. Teamsters Brief at 7-9. In the CIS, the United States articulated the standard of review of a proposed Final Judgment in a Tunney Act proceeding. *See* CIS at 29-33. As this Court held in *SBC Communications*, the 2004 amendments to the Tunney Act do not undermine the Circuit court's holding in *Microsoft* that district courts should be deferential to the government's predictions as to the effects of the proposed remedies. *SBC Commc'ns*, 489 F. Supp. 2d at 15 (citing *Microsoft*, 56 F.3d at 1460). As this Court stated, "it is improper for a court to require a proposed settlement to perfectly remedy antitrust violations when those violations have not yet been proven at trial, and when the government needs room to negotiate a settlement." *SBC Commc'ns*, 489 F. Supp. 2d at 16.

[70] *See* Competitive Impact Statement at 13, United States v. Anheuser-Busch InBev SA/NV, No. 13-0127 (April 19, 2013).

IV. The amici do not question whether the proposed Final Judgment satisfies many of the Tunney Act factors

The amici do not question whether the proposed Final Judgment satisfies many of the Tunney Act factors. With respect to "provisions for enforcement and modification," the proposed Final Judgment contains standard provisions that maintain the Court's jurisdiction and describe the circumstances in which modifications may be made (Section XVII).[71] The proposed Final Judgment includes provisions that ensure the parties' compliance, including providing for a Monitoring Trustee,[72] requiring defendants to submit affidavits to the United States describing their efforts to comply with the proposed Final Judgment,[73] and empowering the United States to investigate compliance with the proposed Final Judgment through inspection of documents, interviews, and other means.[74] With respect to the "anticipated effects of alternative remedies actually considered," the proposed Final Judgment avoids the time, expense, and in particular the uncertainty of a full trial on the merits in which the United States would have sought an injunction against the parties' merger.[75] And none of the amici raises concerns about the requirement that ABI divest all of SABMiller's interest in MillerCoors.

V. Conclusion

For the reasons explained here, in Plaintiff's Motion and Memorandum in Support of Entering the Proposed Final Judgment, the CIS, and the Response to Public Comments, the

[71] *See US Airways*, 38 F. Supp. 3d at 80 (citing *SBC Commc'ns*, 489 F. Supp. 2d at 24).
[72] Section VIII. The Court approved the United States' appointment of William E. Berlin as Monitoring Trustee on August 12, 2016. *See* Dkt. 13.
[73] Section XI. ABI and SABMiller submitted affidavits pursuant to Section XI of the proposed Final Judgment on July 29, 2016.
[74] Section XIV. *See US Airways*, 38 F. Supp. 3d at 80 (citing *SBC Commc'ns*, 489 F. Supp. 2d at 24).
[75] S*ee* CIS at 28-29; *see also SBC Commc'ns*, 489 F. Supp. 2d at 23 ("Success at trial was surely not assured, so pursuit of that alternative may have resulted in no remedy at all.").

Court can find that the proposed Final Judgment—as modified by agreement between the United States and ABI—is in the public interest. The required divestiture and the supplemental relief appropriately address the competitive effects of the transaction that are alleged in the Complaint and described in the CIS. The proposed Final Judgment will increase Third-Party Brewers' access to effective distribution to the substantial benefit of millions of consumers nationwide. The absence of the additional restrictions or requirements suggested by the amici does not move the proposed Final Judgment outside the reaches of the public interest.

The United States has evaluated and addressed the concerns raised by the public commenters and the amici and has articulated why the proposed Final Judgment is in the reaches of the public interest. The United States respectfully request that the Court enter the modified proposed Final Judgment at this time and without a hearing.[76]

Dated: March 15, 2018

Respectfully submitted,

/s/ Michelle R. Seltzer
Michelle R. Seltzer (D.C. Bar No. 475482)
David M. Stoltzfus
U.S. Department of Justice
Antitrust Division
Healthcare and Consumer Products Section
450 Fifth Street, N.W., Suite 4100
Washington, DC 20530
Telephone: (202) 353-3865
Facsimile: (202) 307-5802
Email: michelle.seltzer@usdoj.gov

Attorneys for the United States

[76] The Tunney Act does not require a hearing. 15 U.S.C. § 16(e)(2). In *US Airways*, the United States received 14 public comments and 15 emails outside of the public comment process expressing concerns about competition, and the Court received an additional email objecting to the proposed settlement and two amicus briefs. The court (Kollar-Kotelly, J.) entered the final judgment without holding a hearing. *See US Airways*, 38 F. Supp. 3d at 73-74, 85.

CERTIFICATE OF SERVICE

I, Michelle R. Seltzer, hereby certify that on March 15, 2018, I caused a copy of Plaintiff United States' Response to Briefs Filed by Amici Curiae 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.

/s/ Michelle R. Seltzer
Michelle R. Seltzer (D.C. Bar No. 475482)
U.S. Department of Justice
Antitrust Division
Healthcare and Consumer Products Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Telephone: (202) 353-3865
Email: michelle.seltzer@usdoj.gov