UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. ANHEUSER-BUSCH INBEV SA/NV, ANHEUSER-BUSCH COMPANIES, LLC, and CRAFT BREW ALLIANCE, INC., *Defendants*.	Civil Action No.: 4:20-cv-01282-SRC

COMPETITIVE IMPACT STATEMENT

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On November 11, 2019, Defendant Anheuser-Busch Companies, LLC ("AB Companies"), a minority shareholder in Defendant Craft Brew Alliance, Inc. ("CBA"), agreed to acquire all of CBA's remaining shares in a transaction valued at approximately $220 million. AB Companies is a wholly-owned subsidiary of Defendant Anheuser-Busch InBev SA/NV ("ABI").

The United States filed a civil antitrust Complaint on September 18, 2020, seeking to enjoin the proposed acquisition. *See* Dkt. No. 1. The Complaint alleges that the proposed acquisition would likely eliminate important head-to-head competition in the state of Hawaii between ABI's beer brands and CBA's beer brands, particularly CBA's Kona brand. The Complaint alleges that the acquisition would also likely facilitate price coordination. This likely reduction in competition would result in increased prices and reduced innovation for beer consumers in Hawaii. The Complaint thus alleges that the likely effect of this acquisition would be to substantially lessen competition for beer in the state of Hawaii in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order") and proposed Final Judgment, which are designed to address the anticompetitive effects alleged in the Complaint. *See* Dkt. No. 2. On September 25, 2020, the Court entered the Stipulation and Order. *See* Dkt. No. 14.

Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest Kona Brewery, LLC ("Kona Hawaii"), which houses CBA's entire Kona brand business in the state of Hawaii, as well as other related tangible and intangible assets. Kona Hawaii competes in the brewing, developing, packaging, importing, distributing, marketing, promoting, and selling of Beer[1] in the state of Hawaii. Its assets include a restaurant, brewery and brewpub, and a new brewery that is currently under construction and scheduled to become operational in the next few months. As part of the divestiture, Defendants are required to provide an exclusive and perpetual license to all intellectual property used or held for use in connection with the brewing, developing, packaging, importing, distributing, marketing, promoting, or selling of Kona products in Hawaii, including the "Kona" brand name. Because

[1] In this Competitive Impact Statement, the term "Beer," when capitalized within a sentence, has the same definition as set forth in the proposed Final Judgment at Paragraph II.J. Section III, *infra*, at pgs. 11-12, explains the difference between the terms beer and "Beer."

the competitive harm alleged in the Complaint is centered in the state of Hawaii, the proposed remedy is also centered in the state of Hawaii. The United States has approved PV Brewing Partners, LLC ("PV Brewing"), as the acquirer.

Under the terms of the Stipulation and Order, until the divestiture required by the proposed Final Judgment was accomplished, Defendants were required to take certain steps to ensure that Kona Hawaii was operated as a competitively independent, economically viable, and ongoing business concern, that remained independent and uninfluenced by Defendants, and that competition was maintained during the pendency of the required divestiture. The required divestiture to PV Brewing occurred on October 6, 2020, as permitted under the terms of the Stipulation and Order, which was entered by the Court on September 25, 2020 (*see* Dkt. No. 14).

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

ABI is a corporation organized and existing under the laws of Belgium, with its headquarters in Leuven, Belgium. ABI owns numerous major beer brands sold in the United States, including in Hawaii. These brands include Bud Light, Budweiser, Busch Light, Natural Light, Michelob Ultra, Stella Artois, and Golden Road. AB Companies is a wholly-owned subsidiary of ABI and a Delaware limited liability company with its headquarters in St. Louis, Missouri.

CBA is a corporation organized and existing under the laws of Washington, with its headquarters in Portland, Oregon. CBA owns several beer brands sold in the United States, including Widmer Brothers, Omission, Redhook, and Kona, a brand that originated in Hawaii and is especially popular in that state.

ABI, through its wholly-owned subsidiary AB Companies, currently holds approximately 31% of CBA's outstanding shares, delivers CBA beer brands to wholesalers throughout the United States, and has a contract with CBA to brew some CBA beer brands at ABI breweries. ABI also has the right to appoint two of the eight seats on CBA's Board of Directors.

On November 11, 2019, AB Companies agreed to acquire all of CBA's outstanding shares in a transaction valued at approximately $220 million.

B. Beer Segments and Pricing

Beer brands sold in Hawaii, like those sold in the United States in general, are often segmented based on price and quality. ABI currently groups beer into five segments: value, core, core-plus, premium, and super-premium (listed in order of increasing price and quality). ABI owns beer brands in each beer segment in Hawaii: value (where its brands include Busch Light and Natural Light), core (where its brands include Bud Light and Budweiser), core-plus (where its brands include Michelob Ultra and Bud Light Lime), premium (where its brands include Michelob Ultra Pure Gold), and super-premium (where its brands include Stella Artois and Golden Road). CBA's Kona brand is generally considered a premium beer.

As the Complaint alleges, beer consumers may "trade up" or "trade down" between segments in response to changes in price. For example, as the prices of core-plus brands approach the prices of premium brands, consumers are increasingly willing to "trade up" from core-plus brands to premium brands. Therefore, the Complaint alleges that the competition provided by CBA's Kona in the premium segment serves as an important constraint on the ability of ABI to raise its beer prices not only in the premium segment, but also in core-plus and other beer segments.

C. The Competitive Effects of the Transaction on the Market for Beer in the State of Hawaii

ABI is a global brewing company with the largest beer sales worldwide and in the United States, including in the state of Hawaii. CBA is a national brewing company with the fifth-largest beer sales in Hawaii. As measured by 2019 revenue, ABI accounts for approximately 28% of all beer sales in Hawaii, and CBA accounts for approximately 13% of all beer sales in Hawaii, of which its Kona brand constitutes the vast majority.[2]

ABI's proposed acquisition of CBA would give ABI 100% ownership of CBA, resulting in ABI's total control over all aspects of CBA's competitive decision-making, including pricing, marketing, and promotions. As a result, the Complaint alleges that the transaction would likely eliminate important head-to-head competition between ABI and CBA in Hawaii, and would likely facilitate price coordination following the transaction. The Complaint alleges that this likely reduction in competition would result in increased prices and reduced innovation for beer consumers in Hawaii.

1. The Relevant Market

The Complaint alleges that the relevant product market for analyzing the effects of the proposed acquisition is beer. Beer is usually made from a malted cereal grain, flavored with hops, and brewed via a fermentation process. It is packaged in cans, bottles, and kegs (draft

[2] Market share calculations are based on distributor sales in Hawaii.

beer). Beer's taste, alcohol content, image (*e.g.*, marketing and consumer perception), price, and other factors make it substantially different from other alcoholic beverages.

The Complaint alleges that other alcoholic beverages, such as wine and distilled spirits, are not reasonable substitutes for beer that would discipline a small but significant and non-transitory increase in the price of beer (*e.g.*, five percent), and relatively few consumers would substantially reduce their beer purchases or turn to alternatives in the event of such a price increase. Therefore, the Complaint alleges that a hypothetical monopolist producer of beer likely would increase its prices by at least a small but significant and non-transitory amount. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4.1.1 (revised Aug. 19, 2010) ("Merger Guidelines"), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

The Complaint alleges that the relevant geographic market for analyzing the effects of the proposed acquisition is no larger than the state of Hawaii. The relevant geographic market is best defined by the locations of the customers who purchase beer, rather than by the locations of breweries that produce beer. Brewers develop pricing and promotional strategies based on an assessment of local demand for their beer, local competitive conditions, and the local strength of different beer brands. Consumers buy beer near their homes and typically do not travel great distances to buy beer even when prices rise. Consumers in Hawaii are particularly unlikely to travel outside the state to buy beer.

For these reasons, the Complaint alleges that a hypothetical monopolist producer of beer sold in Hawaii likely would find it profitable to increase its prices in that market by at least a small but significant and non-transitory amount because customers could not economically purchase their beer in more distant locations. Therefore, Hawaii is a relevant geographic market and "section of the country" within the meaning of Section 7 of the Clayton Act. Thus, the relevant market is beer in the state of Hawaii.

2. The Transaction Would Increase Market Concentration Significantly

The proposed acquisition would increase market concentration significantly for beer in the state of Hawaii. The Complaint alleges that ABI and CBA would have a combined share of approximately 41% in the relevant market following the transaction. Market concentration is often one useful indicator of the level of competitive vigor in a market and the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that the transaction would result in harm to consumers by meaningfully reducing competition.

Concentration in relevant markets is typically measured by the Herfindahl-Hirschman Index ("HHI"). Markets in which the HHI is between 1,500 and 2,500 are considered moderately concentrated. Mergers that increase the HHI by more than 100 points and result in a moderately concentrated market potentially raise significant competitive concerns. *See* Merger Guidelines § 5.3.

ABI's proposed acquisition of CBA would result in a moderately concentrated market with a post-acquisition HHI of nearly 2,500 points, just below the threshold denoting a highly concentrated market. Moreover, the HHI would increase as a result of the transaction by more than 700 points. These HHI measures potentially raise significant competitive concerns. *See* Merger Guidelines § 5.3.

As the Complaint alleges, these concentration measures likely understate the extent to which the transaction would result in anticompetitive effects such as higher prices and less innovation in the relevant market. As explained in Section II.C.4. below, the Complaint alleges that the market for beer in Hawaii shows signs of vulnerability to coordinated conduct, and the transaction is likely to enhance that vulnerability. Those conditions make the transaction more likely to raise significant competitive concerns than the measures of concentration alone would indicate. *See* Merger Guidelines § 7.1.

3. ABI's Acquisition of CBA Would Eliminate Head-to-Head Competition Between ABI and CBA

The Complaint alleges that ABI and CBA compete directly against each other in Hawaii. In that state, CBA's Kona brand competes closely with ABI's Stella Artois and Michelob Ultra brands, and also competes with ABI's Bud Light and Budweiser brands. Recent developments and product innovations have further enhanced the degree of competition between ABI and CBA. For example, CBA recently introduced Kona Light, a lower calorie brand similar to ABI's low-calorie offerings like Michelob Ultra and Bud Light. CBA's share of the beer market in Hawaii has been among the fastest growing in the state over the past seven years. The Complaint thus alleges that ABI's proposed acquisition of CBA likely would substantially lessen this current head-to-head competition between ABI and CBA in Hawaii, in violation of Section 7 of the Clayton Act.

Moreover, competition between ABI and CBA in Hawaii is poised to increase in the future. The Complaint alleges that CBA is investing in its business in Hawaii, and it has plans to grow its share of beer volume sold in Hawaii by about 25% by 2021. CBA is also constructing a new brewery in Hawaii that is scheduled to become operational in the next few months.

As the Complaint alleges, ABI has plans to grow its share of beer in the premium segment. In recent years, consumer preferences have shifted toward the premium and super-premium segments. Because ABI's positions in the value, core, and core-plus segments are stronger than its positions in the premium and super-premium segments, this trend toward the premium and super-premium segments has threatened ABI's overall market share of beer and made ABI's plans to expand its share of beer in the premium segment more urgent. These plans include the introduction of new premium brands and other brand innovations. CBA's Kona brand is positioned as a premium beer in Hawaii. Therefore, ABI's increased focus on the premium segment would increase competition with CBA's Kona brand.

For these reasons, the Complaint alleges that competition between ABI and CBA in Hawaii likely would grow significantly in the absence of the proposed acquisition. ABI's acquisition of CBA, therefore, is likely to substantially lessen this future potential competition between ABI and CBA, also in violation of Section 7 of the Clayton Act.

4. ABI's Acquisition of CBA Would Facilitate Price Coordination

The Complaint alleges that ABI has historically employed a "price leadership" strategy throughout the United States, including in Hawaii. According to this strategy, ABI, with the largest beer sales in the United States and Hawaii, seeks to generate industry-wide price increases by pre-announcing its own price increases and purposefully making those price increases transparent to the market so its primary competitors are more likely to follow its lead. These announced price increases, which can vary by geography because of different competitive conditions, typically cover a broad range of beer brands and packages (*e.g.*, container and size). After announcing price increases, ABI tracks the degree to which its primary competitors follow its price increases. Depending on the competitive response, ABI will either maintain, adjust, or rescind an announced price increase.

The Complaint alleges that, for many years, Molson Coors Beverage Company ("Molson Coors"), the brewer with the second-largest beer sales in the United States and owner of many brands sold in Hawaii such as Miller Lite, Coors Light, and Blue Moon, has followed ABI's announced price increases in Hawaii to a significant degree. Molson Coors's willingness to follow ABI's announced price increases is constrained, however, by the diversion of sales to other competitors who are seeking to gain share, including CBA and its Kona brand.

As alleged in the Complaint, by acquiring CBA, ABI would gain control over Kona's pricing and would likely increase Kona's price, thereby eliminating a significant constraint on Molson Coors's willingness to follow ABI's announced price increases in Hawaii. By reducing Kona's constraint on Molson Coors's willingness to increase prices, the acquisition likely increases the ability of ABI to facilitate price coordination, thereby resulting in higher prices for beer sold in Hawaii. For these reasons, the Complaint alleges that ABI's acquisition of CBA likely would substantially lessen competition in Hawaii in violation of Section 7 of the Clayton Act.

D. Difficulty of Entry or Expansion

As alleged in the Complaint, new entry and expansion by competitors likely will neither be timely nor sufficient in scope to prevent the acquisition's likely anticompetitive effects. Barriers to entry and expansion within the state of Hawaii include: (i) the significant time and expense required to build a brand's reputation; (ii) the substantial sunk costs for promotional and advertising activity needed to secure the distribution and placement of a new entrant's beer in retail outlets; (iii) the considerable time and cost of building new breweries and other facilities; and (iv) the difficulty of developing an effective network of beer distributors with incentives to promote and expand a new entrant's sales.

The Complaint also alleges that the anticompetitive effects of the proposed acquisition are not likely to be eliminated or mitigated by any efficiencies the proposed acquisition may achieve.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the market for beer in the state of Hawaii. As described in more detail below, the proposed Final Judgment requires Defendants, within 10 calendar days after the entry of the Stipulation and Order by the Court (to which the United States granted an extension of seven calendar days, *see* Dkt. No. 15), to divest Kona Hawaii, and all tangible and intangible assets related to or used in connection with the brewing, developing, packaging, importing, distributing, marketing, promoting, and selling of Beer in the state of Hawaii. The Stipulation and Order was entered by the Court on September 25, 2020 (*see* Dkt. No. 14), and the required divestiture to PV Brewing occurred on October 6, 2020. The divestiture assets also include an exclusive and perpetual license to Kona intellectual property, including the "Kona" brand name. The divestiture will transfer to PV Brewing the brewing capacity, assets, and rights necessary to compete with ABI brands in Hawaii.

In the proposed Final Judgment, "Beer" is defined to include not only brewed products made from malted cereal grain as beer is described in the Complaint, but also "fermented beverages, brewed or produced from malt, wholly or in part, or from rice, grain of any kind, bran, glucose, sugar, and molasses when such items are used as a substitute for malt, or from honey, fruit, fruit juice, fruit concentrate, herbs, spices, or other food materials" (excluding distilled alcoholic beverages and wine). This definition in the proposed Final Judgment is necessary because Kona Hawaii currently produces hard seltzer. To the extent PV Brewing produces hard seltzer or innovates other products that fall within the proposed Final Judgment's definition of "Beer," this broader definition will ensure that Defendants' obligations under the proposed Final Judgment extend to those products (*e.g.*, such products would be subject to a distribution agreement per Paragraph IV.O. of the proposed Final Judgment), thus further establishing PV Brewing as an independent and economically viable competitor in the state of Hawaii.

A. Divestiture Assets

Paragraph IV.A. of the proposed Final Judgment requires Defendants to divest to PV Brewing the Divestiture Assets as defined in Paragraphs II.I.1–8 of the proposed Final Judgment. The Divestiture Assets will provide PV Brewing with the facilities, equipment, materials, and legal rights it needs to compete against Defendants and other brewers in Hawaii.

1. Kona Hawaii and the New Brewery

The Divestiture Assets include Kona Hawaii (including its restaurant located in Honolulu, Hawaii, a brewery (with brewing capacity of 10,000 barrels) and brewpub located in Kailua-Kona, Hawaii, and a new brewery also located in Kailua-Kona, Hawaii, that is currently under construction), and all tangible and intangible assets, as described in Paragraphs II.I.1–8 of the proposed Final Judgment, related to or used in connection with Kona Hawaii. Kona Hawaii comprises CBA’s entire Kona brand business in the state of Hawaii.

Kona Hawaii’s new brewery encompasses 30,000 square feet and is expected to have a brewing capacity of 100,000 barrels, along with canning operations. Once the new brewery is operational, PV Brewing will be able to brew beer and package beer in both kegs and cans for sale in Hawaii. Although ownership of the new brewery transferred to PV Brewing at the time of the divestiture, the new brewery is not yet fully constructed or capable of producing saleable beer. When fully operational, it is expected that the new brewery will produce enough beer to meet present demand for Kona beer packaged in cans and kegs for sale in Hawaii.

Since the new brewery is not yet operational, the proposed Final Judgment requires Defendants to continue construction of the new brewery and to achieve a specific production milestone within 180 calendar days after the Court's entry of the Stipulation and Order. Specifically, under Paragraph IV.B. of the proposed Final Judgment, Defendants must achieve an average production capacity of 1,500 barrels of saleable Beer each calendar week for three consecutive calendar weeks at the new brewery within 180 calendar days after the Court's entry of the Stipulation and Order. In addition, upon achieving this production milestone, under Paragraph IV.J. of the proposed Final Judgment, Defendants must warrant to PV Brewing that the new brewery is operational and without material defect.

If Defendants fail to achieve this production milestone within the 180-day period, beginning on calendar day 181, Defendants shall pay to the United States $25,000 per day until they achieve the proposed Final Judgment's production milestone. The payments beginning on day 181 are designed to incentivize Defendants to promptly satisfy this metric so that PV Brewing can start using the new brewery to brew Kona products for sale in Hawaii.

Requiring Defendants to make incentive payments if they do not meet the proposed Final Judgment's production milestone is appropriate under the specific set of facts presented here because, in order for PV Brewing to successfully replace CBA as a competitor independent of ABI, the new brewery must be operational soon after the divestiture so that PV Brewing can brew Kona products for sale in Hawaii. At PV Brewing's option, the proposed Final Judgment requires Defendants to brew Kona-branded products for PV Brewing while the new brewery is under construction.

2. Kona IP and Brand License

The Divestiture Assets, as defined in Paragraphs II.I.1–8 of the proposed Final Judgment, also include an exclusive, irrevocable, fully paid-up, royalty-free, perpetual license to all intellectual property used or held for use in connection with the brewing, developing, packaging, importing, distributing, marketing, promoting, or selling of Kona products in Hawaii. This Kona license includes intellectual property connected to the "Kona" brand name (and all associated trademarks, service marks, and services names). The license applies to all products produced by Defendants using the "Kona" brand name at any time after November 11, 2019, and all products produced by PV Brewing using the "Kona" brand name at any time in the future. The proposed Final Judgment requires Defendants to license—rather than divest—the Kona intellectual property and brand name because Defendants retain the right to brew, market, and sell Kona-branded products outside of the state of Hawaii.

With this license, PV Brewing will have the exclusive rights to brew, market, and sell Kona products in Hawaii, while Defendants will have those rights outside of Hawaii. For example, with this license, PV Brewing may innovate and develop new beer brand extensions or packages using the Kona brand name and sell them in Hawaii. In addition, at its option, PV Brewing may adopt and sell in Hawaii Kona-branded products that Defendants produce and sell outside of Hawaii. Under the proposed Final Judgment, the license extends beyond Beer. If, for example, PV Brewing wants to sell Kona-branded T-shirts (as CBA does now) to help market and promote its new brewery (or sell Kona-branded salad dressing at its brewpub), it could do so using the license required by the proposed Final Judgment.

The license thus allows PV Brewing to innovate and to adapt to changing market conditions in Hawaii to compete effectively against Defendants in the state of Hawaii.

B. Supply, Distribution, and Transition Services Agreements

As explained below, the proposed Final Judgment also contemplates PV Brewing, at its option, entering into a supply agreement, distribution agreement, and transition services agreement with Defendants to enable it to become an independent and economically viable competitor in the market for beer in the state of Hawaii.

1. Supply Agreement

Until the new brewery in Hawaii is operational, PV Brewing will need to arrange for another brewer to brew its canned and keg beer in order to compete in Hawaii. In addition, CBA does not have the facilities in Hawaii to brew bottled beer; CBA currently brews, or ABI contract brews for CBA, bottled beer outside of Hawaii and ships it to Hawaii. Similarly, post-divestiture, PV Brewing will not have the facilities in Hawaii to brew bottled beer and will need to source bottled beer from outside of Hawaii, to the extent it continues selling bottled beer in Hawaii. Very little beer brewed in Hawaii is bottled in Hawaii because there are no glass beer bottles produced on the islands and importing empty glass bottles is prohibitively expensive.

As a result, at PV Brewing's option, Paragraph IV.N. of the proposed Final Judgment requires Defendants to enter into a non-exclusive supply contract for the production, packaging, and delivery of Beer sufficient to meet PV Brewing's needs, as PV Brewing determines. The supply agreement may be for a period of up to three years and PV Brewing, in its sole discretion, may renew any such supply contract for two one-year periods.

As described in the Complaint, ABI currently contract brews some CBA beer brands, including Kona beer (kegs, cans, and bottles) for CBA to sell in Hawaii. Defendants are thus already familiar with the recipes and brewing processes for Kona brands. Defendants can provide brewing capacity for canned and keg beer until the new brewery in Hawaii is able to produce saleable Beer, and can provide brewing capacity for bottled beer while PV Brewing considers other options.

PV Brewing may contract with other brewers to brew its Beer for sale in Hawaii—in addition to or in lieu of a supply agreement with Defendants. PV Brewing need not purchase minimum or maximum volumes under the supply agreement with Defendants, meaning it can have Defendants brew as little or as much Beer as PV Brewing requires. These provisions give PV Brewing flexibility to source its Kona-branded products from Defendants or from one of several other mainland brewers that offer contract brewing services.

This supply agreement is also time-limited to ensure that PV Brewing will become a fully independent competitor to Defendants. Lastly, to the extent PV Brewing or Defendants seek to amend or modify any supply agreement, the United States must approve any changes.

2. Distribution Agreement

Beer distributors play an important role in marketing and promoting beer with retailers to help grow beer sales. Thus, effective distribution is important for a brewer to be competitive in the beer industry. As described in the Complaint, ABI currently delivers CBA beer brands to distributors throughout the United States. Anheuser-Busch Sales of Hawaii, Inc., which is AB Companies' wholly-owned distributor in the state of Hawaii ("Hawaii WOD"), currently distributes Kona products, in addition to other CBA products, throughout the state of Hawaii. The Hawaii WOD is the second-largest beer distributor in Hawaii.

At PV Brewing's option, Paragraph IV.O. of the proposed Final Judgment requires the Hawaii WOD to enter into a distribution agreement for distribution of PV Brewing's Beer in the state of Hawaii sufficient to meet PV Brewing's needs, as PV Brewing determines, and for a period of time as determined by PV Brewing. The proposed Final Judgment further requires that under such a distribution agreement, beginning one year after the agreement's effective date, PV Brewing shall have the right, upon 60 days' written notice to the Hawaii WOD, to terminate without cause the distribution agreement.

The proposed Final Judgment thus enables PV Brewing, at its option, to remain with the Hawaii WOD, which has been distributing Kona products throughout the state of Hawaii for some time. It also provides a mechanism by which PV Brewing can terminate the distribution agreement without cause and move to another distributor in Hawaii. With the no-cause-termination provision, the Hawaii WOD will have the incentive to promote and sell Kona products in order to retain the profitable and popular Kona brands in its portfolio. If it fails to perform to PV Brewing's satisfaction, PV Brewing can move its popular Kona products to another distributor in Hawaii.

Lastly, as with the supply agreement, to the extent PV Brewing or Defendants seek to amend or modify any distribution agreement, the United States must approve any changes.

3. Transition Services Agreement

At PV Brewing's option, Paragraph IV.P. of the proposed Final Judgment requires Defendants to enter into a transition services agreement. Under such an agreement, Defendants will provide to PV Brewing transition services for finance and accounting services, human resources services, supply and procurement services, brewpub consulting, on-island merchandising, brewing engineering, and information technology services and support. Transition services as to brewing engineering are particularly important to PV Brewing to ensure that it can run the new brewery and produce saleable Beer—which is critical to PV Brewing competing effectively in Hawaii. Any transition services agreement may last for a period of up to 18 months. PV Brewing may terminate such a transition services agreement (or any portion), without cost or penalty, at any time upon notice to Defendants. This paragraph further provides that employees of Defendants tasked with supporting any transition services agreement must not share any competitively sensitive information of PV Brewing with any other employees of Defendants. Any transition services agreement must be time-limited to incentivize PV Brewing to become a fully independent competitor of Defendants.

Lastly, as with the supply and distribution agreements, to the extent PV Brewing or Defendants seek to amend or modify any transition services agreement, the United States must approve any changes.

C. Other Provisions

In order to preserve competition and facilitate the success of PV Brewing, the proposed Final Judgment contains additional obligations for Defendants.

With the divestiture, PV Brewing will become the owner of Kona Hawaii, which employs personnel that currently operate Kona Hawaii's restaurant and brewery and brewpub, and will also operate the new brewery that is currently under construction. Paragraph IV.I. of the proposed Final Judgment requires Defendants to cooperate with and assist PV Brewing to identify and hire all full-time, part-time, or contract employees of Kona Hawaii, wherever located, whose job responsibilities relate in any way to the brewing, developing, packaging, importing, distributing, marketing, promoting, or selling of Kona products in the state of Hawaii.

In particular, the proposed Final Judgment requires that Defendants provide PV Brewing and the United States with organization charts and information relating to the employees and make employees available for interviews. It also provides that Defendants must not interfere with PV Brewing's retention of those employees. For employees who elect to continue employment with Kona Hawaii, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, and provide all benefits that the employees would generally have been provided if the employees had continued employment with Defendants. In addition, Paragraph IV.I.6. further provides that the Defendants may not solicit to rehire any employee of Kona Hawaii who was hired by PV Brewing within six months of the divestiture, unless that individual is terminated or laid off by PV Brewing or PV Brewing agrees in writing that the Defendants may solicit to rehire that individual. The non-solicitation period runs for 12 months from the date of the divestiture. These provisions will help ensure that PV Brewing will be able to retain qualified employees for Kona Hawaii.

Section XI of the proposed Final Judgment requires Defendants to notify the United States in advance of executing certain transactions that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a ("HSR Act"). The transactions covered by these provisions include the acquisition or license of any interest in non-ABI Beer brewing or distribution assets or brands, excluding acquisitions of: (1) a Beer brewery or brand located outside of the state of Hawaii that does not generate at least $3.75 million in annual gross revenue from Beer sold for resale in the state of Hawaii; (2) distribution licenses for non-ABI Beer brands that do not generate at least $1 million in annual gross revenue in the state of Hawaii; and (3) Beer distributors that do not generate at least $1 million in annual gross revenue in the state of Hawaii. This provision significantly broadens Defendants' pre-merger reporting requirements because the $1 million and $3.75 million threshold amounts are significantly lower than the HSR Act's "size of the transaction" reporting threshold. Section XI will provide the United States with advance notice of, and an opportunity to evaluate, Defendants' acquisition of both Beer distributors and Beer brewers in the state of Hawaii.

Notification of distributor acquisitions in Hawaii allows the United States to evaluate changes to the Hawaii beer market, including potential implications for PV Brewing's distribution agreement with Defendants. Similarly, notification of brewer acquisitions in Hawaii allows the United States to evaluate any acquisition by ABI of, among other things, craft breweries. ABI has acquired multiple craft breweries over the past several years; some of these acquisitions were not reportable under the HSR Act. Acquisitions of this nature, individually or collectively, have the potential to substantially lessen competition, and the proposed Final Judgment gives the United States an opportunity to evaluate such transactions in advance of their closing even if the purchase price is below the HSR Act's thresholds.[3]

Paragraph XI.B. of the proposed Final Judgment requires Defendants to provide such notification to the Antitrust Division of the United States Department of Justice ("Antitrust Division") in the same format as, and in accordance with the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended. Pursuant to Paragraph XI.C. of the proposed Final Judgment, Defendants must provide such notification at least 30 calendar days prior to acquiring any such interest. If, within the 30-day period after notification, the Antitrust Division makes a written request for additional information, Defendants shall be precluded from consummating the proposed transaction or agreement until 30 calendar days after submitting all requested additional information. Early termination of these waiting periods may be requested and, where

[3] The Division notes that similar notification obligations apply to ABI by virtue of the Modified Final Judgment in *United States v. Anheuser-Busch InBev SA/NV*, No. 1:16-cv-01483-EGS (D.D.C. 2016), which involved ABI's prior transaction with brewer SABMiller. Under the ABI-SABMiller consent decree, ABI must provide notice of certain distributor and brewer transactions in the United States. The monetary thresholds are higher in the ABI-SABMiller consent decree than in the instant proposed Final Judgment, and the ABI-SABMiller consent decree is set to expire in 2026.

appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

Section XII of the proposed Final Judgment prevents Defendants from reacquiring any part of or interest in the Divestiture Assets during the term of the Final Judgment. Thus, ABI may not seek to reacquire the Kona brand in the state of Hawaii.

Additionally, the proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph XIV.A. provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIV.B. provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore competition the United States alleged would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV.C. of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV.C. provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XIV.D. states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Robert A. Lepore,
Chief, Transportation, Energy, and Agriculture Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against AB Companies' acquisition of all of CBA's remaining shares. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for beer in the state of Hawaii. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976) ("It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest."); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "'make de novo determination of facts and issues.'" *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quoting *United States v. Mid-Am. Dairymen, Inc*., No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977)); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted).

"The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*; *see also United States v. Mid-Am. Dairymen, Inc*., No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977) ("It was the intention of Congress in enacting [the] APPA to preserve consent decrees as a viable enforcement option in antitrust cases.").

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he 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.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"); *see also Mid-Am. Dairymen*, 1977 WL 4352, at *9 ("The APPA codifies the case law which established that the Department of Justice has a range of discretion in deciding the terms upon which an antitrust case will be settled"). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: October 26, 2020

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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*/s/*______________________

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CERTIFICATE OF SERVICE

I, Jill C. Maguire, hereby certify that on October 26, 2020, I caused a copy of the Competitive Impact Statement to be served on Defendants Anheuser-Busch InBev SA/NV, Anheuser-Busch Companies, LLC, and Craft Brew Alliance, Inc., by mailing the documents electronically to their duly authorized legal representatives as follows:

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