**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>ANHEUSER-BUSCH InBEV SA/NV, *et al.*,<br><br>Defendants. | Civil Action No. 13-127 (RWR)<br>Judge Richard W. Roberts |

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), Plaintiff United States of America ("United States") files this Competitive Impact Statement relating to the proposed Final Judgment submitted on April 19, 2013, for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On June 28, 2012, Defendant Anheuser-Busch InBev SA/NV ("ABI") agreed to purchase the remaining equity interest in Defendant Grupo Modelo, S.A.B. de C.V. ("Modelo") for approximately $20.1 billion. The United States filed a civil antitrust Complaint against ABI and Modelo on January 31, 2013, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for beer in the United States and specifically in twenty-six local markets in violation of Section 7 of the

Clayton Act, 15 U.S.C. § 18. This loss of competition would likely result in higher beer prices and less innovation.

On April 19, 2013, the United States filed an Explanation of Consent Decree Procedures, which included a Stipulation and Order and a proposed Final Judgment as exhibits that are collectively designed to eliminate the anticompetitive effects that the acquisition would have otherwise caused. The proposed Final Judgment, which is explained more fully below, will accomplish the complete divestiture of Modelo's U.S. business to Modelo's current joint venture partner, Constellation Brands, Inc. ("Constellation"), or, if that transaction fails to close, to another acquirer capable of replacing the competition that Modelo currently brings to the United States market. This structural fix will maintain Modelo Brand Beers[1] as independent competitors to ABI's flagship brands in the United States and will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States.

Specifically, under the proposed Final Judgment, ABI is required to divest and/or license to Constellation (or to an alternative purchaser if the sale to Constellation for some reason does not close) certain tangible and intangible assets (hereafter the "Divestiture Assets"), including:

- A perpetual and exclusive United States license to Corona Extra, this country's best-selling imported beer and #5 brand overall, and to nine other Modelo Brand Beers including Corona Light, Modelo Especial, Negra Modelo, and Pacifico;

- Modelo's newest, most technologically advanced brewery (the "Piedras Negras Brewery"), which is located in Mexico near the Texas border, and the assets and companies associated with it;[2]

[1] Capitalized terms in this Competitive Impact Statement are defined in the proposed Final Judgment.

[2] The Piedras Negras Brewery is owned by a subsidiary of Modelo - Compañia Cervecera de Coahuila S.A. de C.V., which will be transferred as part of the divestiture.

- Modelo's limited liability membership interest in Crown Imports, LLC ("Crown"), the joint venture established by Modelo and Constellation to import, market, and sell certain Modelo beers into the United States; and

- Other assets, rights, and interests necessary to ensure that Constellation (or an alternative purchaser) is able to compete in the beer market in the United States using the Modelo Brand Beers, independent of a relationship with ABI and Modelo.

Under the terms of the Stipulation and Order, Constellation will be added as a Defendant for purposes of settlement,[3] and ABI, Modelo, and Constellation will take certain steps to operate Crown, the Piedras Negras Brewery, and the other Divestiture Assets as competitively independent, economically viable, and ongoing assets whose commercial activities will remain uninfluenced by ABI until the sale to Constellation has closed.

In order to guarantee that the acquirer of the Divestiture Assets will be able to supply Modelo Brand Beer to the United States market independent of ABI, the proposed Final Judgment contains provisions designed to ensure that Constellation (or an alternative acquirer) will have sufficient brewing capacity to meet current and future demand for Modelo Brand Beer in the United States. Because the Piedras Negras Brewery currently produces enough Modelo Brand Beer to serve only approximately 60% of present U.S. demand, Constellation has committed to build out and expand the Piedras Negras Brewery to brew and package sufficient quantities of Corona, Modelo Especial, and other Modelo Brand Beer to meet the large and growing demand for these beers in the United States. This expansion is included as a direct requirement under the proposed Final Judgment and will assure Constellation's future independence as a self-supplied brewer and seller in the United States beer market.

[3] As discussed further below and in Section III.B herein, Constellation will be joined as a settling Defendant because it will be required, as a condition of acquiring the Divestiture Assets, to complete an expansion of the Piedras Negras Brewery to serve current and future United States demand.

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 would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE 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 headquarters in Leuven, Belgium. ABI brews and markets more beer sold in the United States than any other firm, with a 39% market share nationally. ABI owns and operates 125 breweries worldwide, including 12 in the United States. It owns more than 200 different beer brands, including Bud Light, the highest selling brand in the United States, and other popular brands such as Budweiser, Busch, Michelob, Natural Light, Stella Artois, Goose Island, and Beck's.

Modelo is a corporation organized and existing under the laws of Mexico, with headquarters in Mexico City, Mexico. Modelo is the third-largest brewer of beer sold in the United States, with a 7% market share nationally. Modelo owns the top-selling beer imported into the United States, Corona Extra. Its other popular brands sold in the United States include Corona Light, Modelo Especial, Negra Modelo, Victoria, and Pacifico. Crown, the joint venture established by Modelo and Constellation, imports, markets, and sells certain Modelo's brands into the United States.

Constellation, headquartered in Victor, New York, is a beer, wine, and spirits company with a portfolio of more than 100 products, including Robert Mondavi, Clos du Bois, Ruffino,

and SVEDKA Vodka. It produces wine and distilled spirits, with more than forty facilities worldwide. Constellation is not currently a beer brewer; Constellation's only involvement in the beer market in the United States is through its interest in Crown, although it actively participates in the management of that joint venture. Constellation is a Defendant to this action for the purpose of assuring the satisfaction of the objectives of the proposed Final Judgment, including the expansion of the Piedras Negras Brewery.

ABI currently holds a 35.3% direct interest in Modelo, and a 23.3% direct interest in Modelo's operating subsidiary Diblo S.A. de C.V ("Diblo"). ABI's current stake in Modelo gives ABI certain minority voting rights and the right to appoint nine members of Modelo's 19-member Board of Directors.[4]

On June 28, 2012, ABI agreed to purchase, through an Agreement and Plan of Merger, along with a Transaction Agreement between ABI, Modelo and Diblo, the remaining equity interest from Modelo's owners, thereby obtaining full ownership and control of Modelo, for approximately $20.1 billion.

At the time, Defendants also proposed to sell Modelo's stake in Crown to Constellation and enter into a ten-year supply agreement to provide Modelo beer to Constellation to import into the United States. The United States rejected this proposed vertical "fix" to a horizontal merger as inadequate to address the likely harm to competition that would result from the proposed transaction. Most importantly, the proposed supply agreement would not have alleviated the potential harm to competition that the proposed transaction created: It did not create an independent, fully-integrated brewer with permanent control of Modelo Brand Beer in

[4] The sale of the Divestiture Assets to Constellation (or another acquirer) will eliminate ABI's minority right and sharing of profits in Modelo's U.S. business.

the United States. The United States therefore filed a Complaint to enjoin this proposed acquisition on January 31, 2013.

*B. The Competitive Effects of the Transaction on the Market for Beer in the United States*

1. Relevant Markets

Beer is a relevant product market under Section 7. Wine, distilled liquor, and other alcoholic or non-alcoholic beverages do not substantially constrain the prices of beer, and a hypothetical monopolist in the beer market could profitably raise prices. ABI and other brewers generally categorize beers internally into different tiers based primarily on price, including sub-premium, premium, premium plus, and high-end. However, beers in different categories compete with each other, particularly when in adjacent tiers. For example, Modelo's Corona Extra—usually considered a high-end beer—regularly targets ABI's Bud Light, a premium light beer, as its primary competitor.

Both national and local geographic markets exist in this industry. The proposed merger would likely result in increased prices for beer in the United States market as a whole and in at least 26 Metropolitan Statistical Areas ("MSAs"). Large beer companies make competitive decisions and develop strategies regarding product development, marketing, and brand-building on a national level. Further, large beer brewers typically create and implement national pricing strategies.

However, beer brewers make many pricing and promotional decisions at the local level, reflecting local brand preferences, demographics, and other factors, which can vary significantly from one local market to another. The 26 MSAs alleged in the Complaint are areas in which beer purchasers are particularly vulnerable to targeted price increases.

2. Competitive Effects

The beer industry in the United States is highly concentrated and would become more so if ABI were allowed to acquire all of the remaining Modelo assets required to compete in the United States, as the transaction was originally proposed. ABI and MillerCoors, the two largest beer brewers in the United States, account for more than 65% of beer sold in the United States. Modelo is the third largest beer brewer, constituting approximately 7% of national sales, and in certain MSAs its market share approaches 20%. Heineken and hundreds of smaller fringe competitors comprise the remainder of the beer market. In the 26 MSAs alleged in the Complaint, ABI and Modelo control an even larger share of the market, creating a presumption under the Clayton Act that the merger of the two firms would result in harm to competition in those markets.

Even so, the market shares of ABI and Modelo understate the potential anticompetitive effect of the proposed merger. The United States determined through its investigation that large brewers engage in significant levels of tacit coordination and that coordination has reduced competition and increased prices. In most regions of the United States, major brewers implement price increases on an annual basis in the fall. ABI is usually first to announce its annual price increases, setting forth recommended wholesale price increases designed to be transparent and to encourage others to follow. MillerCoors typically announces its price increases after ABI has publicized its price increases, and largely matches ABI's price increases. As a result, although ABI and MillerCoors have highly visible competing advertising and product innovation programs, they do not substantially constrain each other's annual price increases.

The third largest brewer, Modelo, has increasingly constrained ABI's and MillerCoors's ability to raise prices. To build its market share, Modelo (through its importer Crown) has tended not to follow the announced price increases of ABI and MillerCoors. This competitive strategy narrowed the price gap between Modelo's high-end brands and ABI's and MillerCoors's premium and premium plus brands, allowing Modelo to build market share at the expense of ABI and MillerCoors. By compressing the price gap between high-end and premium brands, Modelo's actions have increasingly limited ABI's ability to lead beer prices higher. Therefore, ABI's acquisition of Modelo, as originally proposed, would have been likely to lead to higher beer prices in the United States by eliminating a competitor that resisted coordinated price increases initiated by the market share leader, ABI.

ABI and Modelo compete aggressively. Modelo brands compete with ABI brands in numerous venues and occasions, appealing to similar sets of consumers in terms of taste, quality, consumer perception, and value. As a result, Modelo (through its importer Crown) often sets its prices in particular markets with reference to the price of the leading ABI products, and engages in price competition through promotional activity designed to take share from the market leaders. Because a significant number of consumers regard the ABI brands and Modelo brands as substitutes, the merger, absent the divestiture, would create an incentive for ABI to raise the prices of some or all of the merged firm's brands and profitably recapture sales that result from consumers switching between the ABI brands and Modelo brands.

Further, competition from Modelo has spurred additional significant product innovation from ABI, including the introduction of Bud Light Lime, the introduction of new packages such

as "Azulitas,"[5] and the expansion of Landshark Lager. The merger of the two firms, as originally proposed, would have been likely to negatively affect ABI's incentive to innovate, bring new products to market, and otherwise invest in attracting consumers away from the unique Modelo brands.

3. Entry and Expansion

Neither entry into the beer market, nor any repositioning of existing brewers, would undo the anticompetitive harm from ABI's acquisition of Modelo, as originally proposed. Modelo's brands compete well against ABI due to their brand positioning and reputation, their well-established marketing and broad acceptance by a wide range of consumers, and their robust distribution network resulting in the near-ubiquity of Corona Extra in the establishments where consumers purchase and consume beer. Any entrant would face enormous costs in attempting to replicate these assets, and would take many years to succeed. Building nationally recognized and accepted brands, which retailers will support with feature and display activity, is difficult, expensive, and time consuming. While consumers have undoubtedly benefited from the launch of many individual craft and specialty beers in the United States, the multiplicity of such brands does not replace the nature, scale, and scope of competition that Modelo provides today, and that would otherwise be eliminated by the proposed transaction.

## III.

## EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment contains a clean, structural remedy that eliminates the likely anticompetitive effects of the acquisition in the market for beer in the United States and

[5] Azulitas are 8 ounce cans of Bud Light that compete directly with Modelo's "Coronitas."

the 26 local markets identified in the Complaint. The divestitures required by the proposed Final Judgment will create an independent and economically viable competitor that will stand in the shoes of Modelo in the United States. Specifically, the divestiture of the Piedras Negras Brewery and Modelo's interest in Crown, and the perpetual brand licenses required by the proposed Final Judgment, will vest in Constellation (or an alternative purchaser, should ABI's divestiture to Constellation not be completed) the brewing capacity, the assets, and the other rights needed to produce, market, and sell Modelo Brand Beer in a manner similar to that which we see today. In short, the divestiture preserves the current structure of the beer market in the United States by maintaining an independent brewer with an incentive to resist following ABI's price leadership in order to expand share. Furthermore, the proposed Final Judgment puts an end to the existing entanglements between ABI and Modelo with respect to the United States beer market. Finally, the proposed Final Judgment also provides for supervision by this Court and the United States of the transition services necessary to allow Constellation or another acquirer to compete effectively while the divestiture and expansion of the Piedras Negras Brewery are completed.

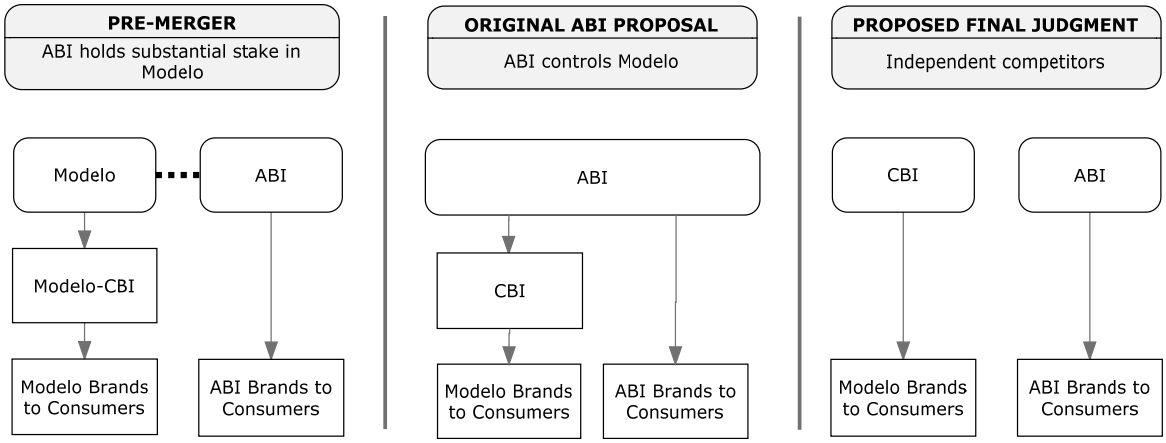
A. *The Divestiture*

The proposed Final Judgment requires ABI, within 90 days after entry of the Stipulation and Order by the Court, to (1) divest to Constellation Modelo's current interest in Crown, along with the Piedras Negras Brewery and associated assets, and (2) grant to Constellation a perpetual, assignable license to ten of the most popular Modelo Brand Beers, including Corona and Modelo Especial, for sale in the United States.[6] The rights, assets, and interests to be

[6] The licensed brands include all the brands that Modelo currently offers (through its

divested to Constellation are set forth in the transaction agreements that are attached as exhibits to the proposed Final Judgment. If the divestiture to Constellation should fail to close, ABI would be required to make those same divestitures, and grant the same licenses, to another acquirer acceptable to the United States for the purpose of enabling that alternative acquirer to brew Modelo Brand Beer, and to market and distribute them in the United States market.

The proposed Final Judgment differs significantly from the deal that ABI sought unilaterally to impose and that is described in the Complaint. It vertically integrates the production and sale of Modelo Brand Beer in the United States and eliminates ABI's control of Modelo Brand Beer in the United States, as illustrated below:




The proposed Final Judgment requires ABI to license rather than divest the brands because ABI retains the right to brew and market Modelo's brands throughout the rest of the world. The structure of the licenses provides Constellation all the rights and abilities it needs to compete in the United States as Modelo did before the merger, including the opportunity to

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distributor Crown) in the United States: Corona, Corona Light, Modelo Especial, Negra Modelo, Modelo Light, Pacifico, and Victoria. The license also includes certain brands not yet offered in the United States, but that Constellation would be free to launch here: Pacifico Light, Barrilito, and León.

introduce new brands in the United States that Modelo already markets in Mexico, such as León. The licenses are perpetual and assignable and cannot be terminated by ABI for any reason. They include the right to develop and launch new brand extensions and packages, to update brand recipes in response to consumer demand, and to adopt, or decline to adopt, any updated recipes for any of the licensed brands that ABI may choose to use outside the United States. This flexibility allows Constellation to adapt to changing market conditions in the United States to compete effectively in the future, and reduces ABI's ability to interfere with those adaptations.

The assets must be divested and/or licensed in such a way as to satisfy the United States, in its sole discretion, that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants ABI and Modelo must take all reasonable steps necessary to accomplish the divestiture quickly. In the event that ABI does not accomplish the divestiture within 90 days as prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to complete the divestiture.[7]

B. *Mandatory Expansion of the Piedras Negras Brewery*

For the divestiture to be successful in replacing Modelo as a competitor, Constellation must expand the Piedras Negras Brewery's production capabilities. Section V.A of the proposed Final Judgment requires Constellation (or an alternative purchaser) to expand the Piedras Negras Brewery to be able to produce 20 million hectoliters of packaged beer annually by December 31, 2016. Such expansion will allow Constellation to produce, independently from ABI, enough Modelo Brand Beer to replicate Modelo's current competitive role in the United States. The

[7] The proposed Final Judgment also provides that the United States may extend the time for ABI to accomplish the divestiture by up to 60 days, in its sole discretion.

required expansion also allows for expected future growth in sales of the licensed brands. In carrying out the expansion, Constellation is required to use its best efforts to adhere to specific construction milestones delineated in Sections V.A.1-8 of the proposed Final Judgment. A Monitoring Trustee will be appointed who will have the responsibility to observe the expansion and to report to the United States and the Court on whether the expansion is on track to be completed in the required timeframe.

Requiring the buyer of divested assets to improve those assets for the purposes of competing against the seller is an exceptional remedy that the United States found appropriate under the specific set of facts presented here. The recently constructed Piedras Negras Brewery is an ideal brewery for divestiture because it is near the United States border, is highly efficient, and features modular construction that was designed and equipped specifically to allow for economical expansion. No other combination of Modelo's brewing assets would have properly addressed the competitive harm caused by the proposed merger and allowed the acquirer of the Divestiture Assets to compete as effectively and economically with ABI as Modelo does today.

C. *Employee Retention Provisions; Transitional Support and Supply Agreements*

The proposed Final Judgment provides for or incorporates agreements protecting Constellation's ability to operate and expand the Piedras Negras Brewery while actively competing in the United States.

As part of the asset purchase, Constellation (or an alternative purchaser) will become the owner of the company that employs personnel who currently operate the Piedras Negras

Brewery.[8] Section IV.D of the proposed Final Judgment prevents ABI or Modelo from interfering with Constellation's retention of those employees as part of the asset transfer. Together with the transition services, this provides Constellation with the specific knowledge necessary to operate the Piedras Negras Brewery.

Sections IV.G-I of the proposed Final Judgment require the parties to enter into transition services and interim supply agreements. The transition services agreement (Section IV.G) requires ABI to provide consulting services with respect to topics such as the management of the Piedras Negras Brewery, logistics, material resource planning, and other general administrative services that Modelo currently provides to the Piedras Negras Brewery. The transition services agreement also requires ABI to supply certain key inputs (such as aluminum cans, glass, malt, yeast, and corn starch) for a limited time. The interim supply agreement (Section IV.H-I) requires ABI to supply Constellation with sufficient Modelo Brand Beer each year to make up for any difference between the demand for such beers in the United States and the Piedras Negras Brewery's capacity to fulfill that demand.

The transition services and interim supply agreements are necessary to allow Constellation (or an alternative purchaser) to continue to compete in the United States during the time it takes to expand the Piedras Negras Brewery's capacity to brew and bottle beer, but are time-limited to assure that Constellation will become a fully independent competitor to ABI as soon as practicable. As such, in conjunction with the firewall provisions described below, they prevent the vertical supply arrangement from causing competitive harm in the near term. The proposed Final Judgment subjects these agreements, including any extensions, to monitoring by

[8] The company is Servicios Modelo de Coahuila, S.A. de C.V., a subsidiary of Grupo Modelo with its headquarters in Coahuila, Mexico.

a court-appointed trustee and, in the event that a firm other than Constellation acquires the assets, the acquisition requires approval by the United States.

D. *Distribution of Modelo Brand Beer*

Effective distribution is important for a brewer to be competitive in the beer industry. The proposed Final Judgment imposes two requirements on ABI regarding its distribution network that are designed to limit ABI's ability to interfere with Constellation's effective distribution of Modelo Brand Beer. These requirements ensure that Constellation can reduce the threat of discrimination in distribution at the hands of ABI-owned distributors or ABI-sponsored distributor incentive programs, in recognition of the influence ABI already exercises in the concentrated beer distribution markets.

First, Section V.C of the proposed Final Judgment provides that, for ABI's majority-owned distributors ("ABI-Owned Distributors") that distribute Modelo Brand Beer, Constellation will have a window of opportunity to terminate that distribution relationship and direct the ABI-owned distributor to sell the distribution rights to another distributor. Similarly, should ABI subsequently acquire any distributors that have contractual rights to distribute Modelo Brand Beer, Constellation may require ABI to sell those rights.

Second, the proposed Final Judgment prevents ABI for 36 months from downgrading a distributor's ranking in ABI's distributor incentive programs by virtue of the distributor's decision to carry Modelo Brand Beer. The 36-month time period tracks the initial term of the transition service and interim supply agreements, and thus allows Constellation to maintain a status quo position for the Modelo Brand Beer in ABI's distribution incentive programs until Constellation can operate independently of ABI.

E. *Divestiture Trustee*

In the event that Defendants do not accomplish the divestiture as prescribed in the proposed Final Judgment, either to Constellation or to an alternative buyer, Section VI of the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee selected by the United States to complete the divestiture. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that ABI will pay all costs and expenses of the Divestiture Trustee. Under the proposed Final Judgment, the Divestiture Trustee shall have the ability to modify the package of assets to be divested, should such modification become necessary to enable an acquirer to expand and operate the Piedras Negras Brewery or if there has been a breach in the representations made by ABI and Modelo regarding the completeness of the assets. After his or her appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture.

F. *Monitoring Trustee*

Section VIII of the proposed Final Judgment permits the appointment of a Monitoring Trustee by the United States in its sole discretion and the United States intends to appoint one and seek the Court's approval. The Monitoring Trustee will ensure that Defendants expeditiously comply with all of their obligations and perform all of their responsibilities under the proposed Final Judgment and the Stipulation and Order; that the Divestiture Assets remain economically viable, competitive, and ongoing assets; and that competition in the sale of beer in the United States in the relevant markets is maintained until the required divestitures and other requirements of the proposed Final Judgment have been accomplished. The Monitoring Trustee will have the power and authority to monitor Defendants' compliance with the terms of the Final

Judgment and attendant interim supply and services contracts. The Monitoring Trustee will have access to all personnel, books, records, and information necessary to monitor such compliance, and will serve at the cost and expense of ABI. The Monitoring Trustee will file reports every 90 days with the United States and the Court setting forth Defendants' efforts to comply with their obligations under the proposed Final Judgment and the Stipulation and Order.

G. *Stipulation and Order Provisions*

Defendants have entered into the Stipulation and Order attached as an exhibit to the Explanation of Consent Decree Procedures, which was filed simultaneously with the Court, to ensure that, pending the divestitures, the Divestiture Assets are maintained as an ongoing, economically viable, and active business. The Stipulation and Order ensures that the Divestiture Assets are preserved and maintained in a condition that allows the divestitures to be effective. The Stipulation and Order also adds Constellation as a Defendant for purposes of entering the Final Judgment.

H. *Notification Provisions*

Section XII of the proposed Final Judgment requires ABI 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. The transactions covered by these provisions include the acquisition or license of any interest in non-ABI brewing assets or brands, excluding acquisitions of: (1) foreign-located assets that do not generate at least $7.5 million in annual gross revenue from beer sold for resale in the United States; (2) certain ordinary-course asset purchases and passive investments; and (3) distribution licenses that do not generate at least $3 million in annual gross revenue in the United States. This provision ensures that the United

States will have the ability to take action in advance of any transactions that could potentially impact competition in the United States beer market.

I. *Firewall*

Section XIII of the proposed Final Judgment requires ABI and Modelo to implement firewall procedures to prevent Constellation's (or an alternative acquirer's) confidential business information from being used within ABI or Modelo for any purpose that could harm competition or provide an unfair competitive advantage to ABI based on its role as a temporary supplier to Constellation under either the transition services or interim supply agreements. Within ten days of the Court approving the Stipulation and Order described above, ABI and Modelo must submit their planned procedures for maintaining a firewall. Additionally, ABI and Modelo must brief certain officers of the company and business personnel who have responsibility for commercial interactions with Constellation as to their required treatment of Constellation's confidential business information. This provision ensures that ABI and Modelo cannot improperly use any confidential information they receive from Constellation in ways that would harm competition in the beer industry or impair Constellation's competitive prospects.

## 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 will neither impair nor assist 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 sixty (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 sixty (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 United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of 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 published in the Federal Register.

Written comments should be submitted to:

James Tierney
Chief, Networks and Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 5th Street NW; Suite 7100
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

The United States considered, before initiating this lawsuit to enjoin the proposed merger, the Defendants' proposal of selling Modelo's stake in Crown to Constellation and entering into a ten-year supply agreement. The United States ultimately rejected this proposal as inadequate to address the merger's likely anticompetitive effects. The settlement embodied within the proposed Final Judgment differs significantly from the Defendants' original solution. Most importantly, the proposed Final Judgment ensures that Modelo Brand Beer sold in the United States will be brewed, imported, and sold by a firm that is vertically integrated and completely independent from ABI. Unlike the Defendants' original proposal, which left Constellation with no brewing assets, beholden to ABI for the supply of beer, and was terminable after ten years, the proposed Final Judgment ensures Constellation will have independent brewing assets and the ownership of the Modelo Brand Beer for sale in the United States in perpetuity.

The United States also considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants ABI and Modelo. The United States could have

continued the litigation and sought preliminary and permanent injunctions against ABI's acquisition of Modelo. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment, and concomitant expansion of the brewery assets, will preserve competition for the provision of beer in the relevant market identified by the United States. Thus, the proposed Final Judgment would achieve 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 sixty-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); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the 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.").[9]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA 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 is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981));

[9] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

*see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [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. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[10] In determining whether a proposed settlement is in the public interest, a district 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." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long

[10] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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 *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the '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. As this court confirmed in *SBC Communications*, 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." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding 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). The language wrote into the statute what Congress intended when it 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 Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[11]

VIII.

DETERMINATIVE DOCUMENTS

The following determinative materials or documents within the meaning of the APPA were considered by the United States in formulating the proposed Final Judgment:

[11] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

- The Stock Purchase Agreement attached and labeled as Exhibit A to the proposed Final Judgment;
- The Amended and Restated Membership Interest Purchase Agreement attached and labeled as Exhibit A to the proposed Final Judgment;
- The Amended and Restated Sub-License Agreement attached and labeled as Exhibit A to the Stock Purchase Agreement;
- The Transition Services Agreement attached and labeled as Exhibit B to the Stock Purchase Agreement; and
- The Interim Supply Agreement attached and labeled as Exhibit A to the Amended and Restated Membership Interest Purchase Agreement.

Dated: April 19, 2013

Respectfully submitted,

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