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October 3, 2016

VIA FEDERAL EXPRESS

Peter J. Mucchetti, Esquire
Chief, Litigation I Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W., Suite 4100
Washington, D.C. 20530

Re: United States v. Anheuser-Busch InBev SA/NV and SABMiller plc
Case No. 1:16-cv-001483

Dear Chief Attorney Mucchetti:

A. Preliminary Statement

These comments are respectfully submitted on behalf of D.G. Yuengling & Son, Inc. ("Yuengling") in response to the proposed Final Judgment in this matter and, more generally, on the state of Third Party Brewers' barriers to competition in the marketplace that must be considered at this time.¹ For the reasons that follow, we have serious concerns about the scope of this investigation and we believe that the proposed Final Judgment is inadequate with respect to the current and future practices of defendant Anheuser-Busch InBev SA/NV and its affiliates ("ABI") vis-à-vis its distributors in the United States. Notwithstanding the substantial deference generally owed to the Department with respect to antitrust settlements,² the public interest does not support adoption of the proposed Final Judgment in its present form because the proposed

¹ Capitalized terms not otherwise defined herein have the meaning ascribed to them in the proposed Final Judgment.

² See, e.g., *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir 1995).



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remedies will not cure the alleged violations and other threats to healthy competition, and the mechanisms to enforce the proposed Final Judgment are neither clear nor manageable.

B. Yuengling History

D.G. Yuengling & Son, Inc. of Pottsville, Pennsylvania is America's Oldest Brewery. Yuengling is proud to also be recognized as the largest American owned brewery and the largest craft brewery in the United States. Family-owned and operated by the Yuengling family since 1829, the fifth generation privately-held brewery manufactures ten varieties of lagers, porters, and ales from three breweries in Pennsylvania and Florida. Yuengling has grown rapidly over the past few decades by meeting the evolving needs of consumers, retailers and wholesalers. The brewery now has over 300 employees and sells its portfolio of brands to over one hundred and eighty wholesalers in a footprint comprised of nineteen states and the District of Columbia. As Yuengling looks to the future and its third century of brewing in the United States, the company is a vocal supporter of fellow craft brewers and the independent three-tier system established with the repeal of Prohibition. It is also an active member of the Brewers of Pennsylvania, Brewers Association and the National Beer Wholesalers Association.

Over the years, Yuengling has certainly seen its share of good and bad times. It flourished as a local brewery supporting the community of Pottsville, Pennsylvania in the town's economic emergence only to see it decline like many small towns in the rural slate and coal belt of Pennsylvania. It persevered through Prohibition and resisted the tide of brewery consolidations that began to occur approximately 35 years ago. Throughout its history, whether by local outlet or wholesaling distributor, Yuengling had options with getting its products to market. Of its 180 wholesalers, approximately half are ABI wholesalers. Over the last ten years, however, the industry has seen the erosion of the independent middle tier because of brewery consolidations and, more specifically, the influence of two global brewers, ABI and Miller/Coors, which represent approximately 70% of the total volume of beer distributed in the United States. Yuengling considers recent events and the proposed merger as one of the biggest threats to its existence, short of a second round of Prohibition. Throughout its history, Yuengling

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has proven to be a manufacturer of quality products at competitive prices and has survived and flourished with an independent middle tier so any effect on its continued existence must be attributed to adverse conditions caused by the new marketplace.³

C. The Birth of a Super Power

In its Competitive Impact Statement (at p. 8), the Department asserts that “[e]ffective distribution is important for a brewer to be competitive in the U.S. beer industry.” This is a gross understatement – effective distribution is *essential* for a brewer to be competitive, for both economic and state regulatory reasons. Without effective distribution in a relevant geographic market, a Third Party Brewer that could otherwise be competitive with ABI will simply cease to exist in that geographic market. Unlike ABI, no Third Party Brewer, even Yuengling, has enough scale to drive distribution in a particular market. Moreover, the joint venture of Miller/Coors and the merger of Anheuser-Busch with InBev is driving the distributor market to a duopoly whereby these two systems now control 90% of total beer sales. This duopoly has impacted the distribution market in many ways which need to be fully considered when reviewing the proposed transaction.⁴

For the first time in the beer industry, beer distributors have become true franchises. Because ABI and Miller/Coors have acquired so many breweries, forced wholesaler consolidation was inevitable and will continue. This has resulted in a duopoly in many markets where any one particular wholesaler in a market will be dominated by either one of the global superpowers. It is not uncommon for ABI products to represent 80%-90% of a distributor’s total volume and gross profit. While the emergence of crafts has made relatively slow gains in market

³ Unlike other breweries considered craft breweries, Yuengling competes directly with ABI’s and Miller/Coors’ core brands; namely, Budweiser, Miller and Coors. Yuengling’s efficiency allows them to compete on price, but now barriers are being built to keep Yuengling from obtaining such market share realized by the global powers’ core brands.

⁴ See more commentary from Steven Pearlstein, “Beer Merger Would Worsen Existing Duopoly by AB InBev, SAB Miller”, Washington Post, Feb. 2, 2013. https://www.washingtonpost.com/business/beer-merger-would-worsen-existing-duopoly-by-ab-inbev-sabmiller/2013/02/01/efa78ce8-6b1c-11e2-af53-7b2b2a7510a8_story.html

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share, wholesalers remain subservient to a supplier which is 80%-90% of their business. Like McDonald's selling Hershey's chocolate milk; one simple e-mail from corporate and Hershey's chocolate milk will no longer be available. In addition, ABI has strategically begun to buy out small craft brewers, leading to inevitable goals and even greater control within their distribution system. Obviously, ABI seeks continued growth for profits, but also to deliver expanded portfolios to its franchise wholesalers, called "Anchor Distributors," that will stretch the representation of its products to 100% of a wholesaler's product line.⁵

The new duopoly has translated into fewer but more powerful wholesalers. According to the Brewers Association, the number of beer wholesalers has been reduced by more than half since 1990 from over 3,000 to less than 1,500. Many of these wholesalers boast larger annual revenue and gross profits than their suppliers, other than ABI and Miller/Coors. This applies

⁵ On September 6, 2016, the Department of Justice announced that it had closed its investigation into ABI's acquisition of Devil's Backbone. The press release has caused concern at Yuengling that the Department of Justice has not considered the strategic consolidations achieved by ABI in acquiring a brand like Devil's Backbone and its flagship lager brand. Yuengling believes that this acquisition was designed to compete with its flagship lager brand and even Boston Beer's Sam Adams Lager. While the Department of Justice, in its press release, seemed to recognize that Third Party Brewers "cannot grow in scale and effectively compete in the U.S. beer industry without meaningful access to efficient beer distribution networks, such as the network that distributes ABI beer", the Department fails to recognize how ABI's strategic acquisitions and dominance of the middle tier affect other Third Party Brewers. The press release goes on to state, "[a]fter careful consideration, the Division has determined that, in light of the distribution relief secured in the ABI/SAB Miller settlement, the competitive implications of ABI's acquisition of Devil's Backbone are too uncertain at this time to warrant further investigation." This is alarming since the press release further states that the Division will be carefully monitoring ABI's compliance and could reopen investigation into ABI's acquisition of Devil's Backbone. It is submitted that Third Party Brewers, including Yuengling, would welcome further investigation in light of the contents of this submission and further erosion of the middle tier.

As a side note, we would be remiss if we failed to point out the fact that ABI's acquisition of small craft brands should be analyzed as part of this investigation. We are curious as to why ABI is acquiring small crafts with limited production when typical brewery locations for ABI produce 10 million barrels. Are they trying to control the craft beer market, eliminate it, or use it as a vehicle to deconstruct the tier system by granting direct access to its products into retail locations owned by these smaller craft breweries? Certainly, there are many questions about violations of "tied house" laws through ABI's use of category management support employees at large chain retailers and whether those are legal; however, what ABI cannot do directly should be carefully scrutinized when they are accomplishing the same goals indirectly by acquiring these retail locations. We doubt that it is an admission on the part of ABI that they lack innovation to create their own beer, so assessing the natural bounty of this activity leads to an appropriate analysis of their anti-competitive conduct.

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even to Yuengling which is the largest domestically-owned beer manufacturer in the United States yet only represents less than 1% of the total market. Some of its wholesalers are larger than Yuengling. While there are third party wholesalers in the marketplace (representing only 10% of total beer volume), these are usually small companies which cannot provide full service in the marketplace because of their relatively small scale. Brewery and wholesaler consolidation has effectively limited supplier options to the ABI and Miller/Coors systems. This duopoly at the distributor level has eroded the independent middle tier. Once ABI achieves its complete franchise objective, Third Party Brewers, especially ones with any kind of scale, can only look to the Miller/Coors network for an alternative source of distribution leaving. As a result, only Miller/Coors distributors are left to consider independent lines of suppliers. This leaves little leverage for the Third Party Brewer.

Further, in states permitting brewery-owned wholesalers or branches, Miller/Coors distributors essentially enjoy a monopoly over independent lines of business. It also results in a greater competition internally within the Miller/Coors wholesaler for the resources necessary to compete effectively in a branch market – to the disadvantage of every Third Party Brewer and the advantage of ABI. What if Miller/Coors then follows the same path of ABI and Miller/Coors and its Tenth and Blake subsidiary continues to acquire small craft brewers as did ABI? Tenth and Blake's acquisition initiative and the proposed merger of Miller/Coors and ABI, despite the divestiture, will seal the fate of any independence at the middle tier and that is alarming. As mentioned in the press release issued by the Department of Justice in the Devil's Backbone transaction, Third Party Brewers require the distribution abilities of an efficient wholesaler network, like wholesalers in the ABI network. The creation of these larger, mega wholesalers also has the effect of restricting small, new entrants into the marketplace since smaller wholesalers cannot achieve sufficient scale to effectively distribute and thereby compete at retail with these global super powers and their distributors.

Similarly, the Department grossly understates the existing situation when it says (at p. 9) that ABI exerts "considerable influence" over ABI-Affiliated ABI Wholesalers. A more

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accurate description would be “complete domination” over some of its wholesalers. This extraordinary control is especially troubling with regard to ABI-Affiliated Wholesalers, also known as Anchor Distributors, which are monitored and policed by ABI as effectively as would a wholly-owned subsidiary.⁶ Simply put, this level of control is routinely exercised to make life miserable for Third Party Brewers. The ABI Sales and Marketing Standards incorporated as Exhibit 9 of the ABI Wholesaler Equity Agreement are intended to minimize and even eliminate the application of a distributor’s resources to the Third Party Brewers’ brands. As discussed below, ABI (under Exhibit 9) can and does exercise its “match and redirect” policy when a distributor is selling to another distributor and thereby control the identity of the Third Party Brewer’s distribution partner or, in the alternative, make it extremely costly for the Third Party Brewer to find a new distribution partner.

D. Super Power Comes of Age

While we understand that ABI has agreed to be bound by the proposed Final Order, it is submitted that ABI continues to demonstrate anti-competitive behavior. Yuengling has experienced this barrier to compete historically and continues to experience it even after ABI’s agreement to be bound by the proposed Judgment.

In states permitting suppliers to own “branches”, ABI has specifically targeted Yuengling in order to cause disruption to Yuengling’s distribution system and options in the marketplace. On June 12, 2013, C&G Distributing, a wholesaler in Ohio, entered into an Asset Purchase Agreement with ABI to acquire its Ohio operation. Ohio permitted suppliers like ABI to own

⁶ See additional illustrations of ABI’s exertion of controlling conduct over wholesalers by John Conlin, “Bitch Slapped in Dallas”, November 15, 2011, http://johnconlin.typepad.com/conlin_beverage/2011/11/bitch-slapped-in-dallas.html and The Beer Business Daily, “Truth Squad Speak: ‘Alignment’ Dominates Post-Meeting Buzz”, November 11, 2011, [BBD-11-11-11-Truth-Squad-After-Dallas-Meeting.docx](#). While Mr. Conlin’s column “Bitch Slapped in Dallas” speaks for itself, the Beer Business Daily reports also are startling. Beer Business Daily reported that one ABI wholesaler questioned ABI and whether their Anchor Distributors were going to be chosen by their degree of “insidiousness”. This question was prompted by ABI’s Chief, Carlos Brito’s rebuke of ABI wholesalers in taking on Yuengling brands in the State of Ohio. Clearly, ABI’s attempts to control its wholesalers transcends financial and other considerations and delve into personal attacks and threats.

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wholesaler branches. C&G Distributing had been distributing Yuengling beer for just two years after Yuengling granted C&G Distributing and other Ohio wholesalers distribution rights in the summer of 2011. As in most transactions, Yuengling's portfolio tends to be the largest brand in a wholesaler's house other than ABI, Miller/Coors or Constellation products. The new ABI branch operation did not even request to continue the distribution in the territory assigned to C&G and Yuengling was left scrambling to find another wholesaler. Eventually, Yuengling was able to cobble together distribution in the territory by appointing three other wholesalers which was not without cost and negatively affected the new wholesalers' ability to effectively market Yuengling products in the territory. Also, Miller/Coors and ABI wholesaler footprints do not align so the new wholesalers may compete with Yuengling in other markets the wholesaler services. This is just one example of Yuengling being a target and there are other mechanisms employed by ABI to specifically target Yuengling's place in the market.

While we are sure that the DOJ investigated several incentive programs offered by ABI, Yuengling does not have subpoena powers and is not sure of the details of the investigation and what was uncovered. Some concerns are centered around the following:

1. A couple of years ago, both Miller/Coors and ABI changed a long standing industry standard by separating product charges, tax and freight (which in the industry is referred to as FOB) and instead just simply offered a "delivered price" to a wholesaler. Since tax is easily calculated and freight a function of location, the pricing of the products should be easily measurable. There are legitimate reasons why certain states regulate FOB pricing. Has the DOJ reviewed comparable delivered prices to similarly situated wholesalers to uncover financial incentives that ABI may offer distributors who follow the ABI dictate to only carry ABI brands? ABI's conduct in the marketplace is not limited to incentives and causes other anti-competitive issues in the consumer beer market.

2. Has the DOJ carefully reviewed ABI's Mobility system and whether that system exposes Third Party Brewers' confidential sales information to ABI? ABI has recently responded saying that Mobility is monitored by a third party and that ABI has no access to the

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information. That simple statement does not provide relief to Third Party Brewers of ABI's ability to access their information. Has anyone investigated this alleged third party company and truly analyzed ABI's proprietary system to see if ABI can access confidential sales information of other Third Party Brewers?

3. Has the DOJ reviewed whether ABI's control of distributors includes employment practices and, potentially, offering higher salaries, bonuses or incentives to individuals employed to market and sell the ABI brands as opposed to other Third Party Brewers?

4. Has the DOJ reviewed ABI's equity agreement and related documents, including its sales and marketing standards, to analyze whether they minimize or even eliminate the application of a distributor's resources to other Third Party Brewers' brands? Is such language even legal under various state laws?

ABI can effectively control pricing of Third Party Brewers in the marketplace. Often, when ABI takes a price increase to its "delivered price" to a distributor, ABI distributors will increase prices to retailers for other Third Party Brewers' similar products. This makes it difficult for Third Party Brewers like Yuengling to compete on better pricing which would be a benefit to the consumer. While, admittedly, wholesalers have independence in pricing to retailers, certainly, the global brewers control industry pricing at the retail level because of their scale. This happened to Yuengling in Florida several years ago when Mr. Yuengling refused to take a price increase in line with ABI and Miller/Coors, yet our products/prices in retail were raised.

Also, it is respectfully submitted that there has been no consideration given to the supply chain issues and the power that ABI wields over suppliers, specifically ABI's ability to contract for all of a suppliers' output and thereby driving additional cost to Third Party Brewers like Yuengling to buy supplies at more remote locations. This situation occurred at Yuengling's Tampa facility when Anheuser-Busch controlled the entire output of an Anchor Glass facility and Yuengling was forced to source glass from another supplier at a higher cost. Many Third

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Party Brewers source hops internationally where the proposed transaction will not be subject to divestiture requirements. What will ABI do now with even more purchasing power to limit resources for Third Party Brewers?

E. Super Power Targets Third Party Brewers

ABI's anti-competitive behavior in the marketplace is a reality, even after it agreed to be bound by the proposed Final Judgment. The recent experience of Yuengling in trying to arrange for distribution in the State of Mississippi is a compelling example.

For many years, Mitchell Distributing, LLC, actively sought appointment as a Yuengling distributor in Mississippi. Last year, Yuengling agreed to enter Mississippi for the first time, and actively worked with Mitchell Beverage, LLC and Mitchell Distributing Company, Inc., to develop a distribution plan and exerted substantial efforts including development of a business plan and marketing budget. After months of investigation by Yuengling into the best market fit for distribution and after appointing a cohesive and seamless territory footprint, these Mitchell companies backed out of the appointment. Yuengling believes that they did so because of opposition by ABI. Yuengling had appointed all ABI wholesalers in the State which allowed for a cohesive footprint and prepared and negotiated distributor agreements. It was not until Yuengling had negotiated all of the other distributor agreements in the State when Mitchell informed Yuengling it was rejecting the appointment without explanation. This sudden change delayed Yuengling's entry into the relevant territories by at least two months, significantly increased its costs, affected the roll out of the brands in other territories with key chain buyers (Walmart, Circle K, and Kroger) and weakened its overall statewide distribution plan. Moreover, Yuengling was forced to find multiple wholesalers to fill the territory gap with little leverage since these wholesalers only had partial territory footprints and were the same wholesalers that Yuengling may have jilted by appointing the ABI network.

In the opening of the State, Yuengling also worked with another Mississippi distributor during the expansion initiative, Rex Distributing Company, Inc. ("Rex"), for another territory in

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Mississippi.⁷ Within several months after distribution of Yuengling products had commenced under the Rex agreement, Rex informed Yuengling that it was selling and transferring its distribution rights, including Yuengling, to Adams Beverages (“Adams”). Three days before the scheduled closing of this transfer, however, Rex informed Yuengling that ABI had exercised its “match and redirect” right under its Equity Agreement to assign the transfer away from Adams and to Mitchell Rex Distributing, LLC (“Mitchell Rex” – the affiliate of the very distributor who had courted Yuengling for many years and then whose affiliates had broken off the relationship at the altar. The “match and redirect” of the ABI brands make it impossible to complete the transaction for the remaining Rex business because there is insufficient remaining scale to support a viable business. More recently, posed with specific questions as to why it previously rejected the Yuengling brands, Mitchell has stated that it “could not afford to assume the responsibilities of introducing Yuengling as an additional brand”. Now, a mere nine months later, Mitchell has shed those financial considerations to gleefully accept the “match and redirect” transaction from ABI and can now afford the transaction in the tens of millions of dollars.

It is interesting to note the dynamics of both transactions, *i.e.*, the appointment of Mitchell in November of 2015 and the “match and redirect” transaction from ABI. As in all expansion appointments, Yuengling did not sell distribution rights to Mitchell and simply requires its wholesalers to be financially committed to the brands with certain market investments (which more than pay for themselves by the sale of the products in the Territory). Appointment of these distribution rights is immediate equity to the wholesaler and, in fact, this is demonstrated by the Rex transaction where the purchase price for Yuengling distribution rights, after a mere nine months of sales, was valued at \$3.1 million. That is the amount of money allocated to the transaction that Adams was going to pay Rex for Yuengling distribution rights and not one dollar of that inures to the benefit of Yuengling. Contrary to expansion appointments, the sale of rights between wholesalers affects the financial commitments the

⁷ Rex has no known affiliation with Mitchell Rex Distributing, LLC.

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successor wholesaler is willing to make to Third Party Brewers like Yuengling in the marketplace. To further complicate the problem and demonstrate ABI's market power, "match and redirect" transactions usually only occur to ABI's "Anchor Distributors" who are no longer independent wholesalers but quasi-branch operations, who despite financial issues are able to complete transactions in the tens of millions of dollars. This certainly begs the question as to how ABI is empowering these Anchor Distributors to complete these transactions.

The State franchise laws further complicate the issue and prevent a Third Party Brewer from simply taking their brands elsewhere when the "match and redirect" decision is made. State law requires brewers to consent to such a transaction unless the subsequent wholesaler does not meet material qualifications similar to its other wholesalers. Clearly, the "match and redirect" provisions allow ABI to completely disrupt the market distribution of Third Party Brewers like Yuengling, whether those brands are kept in house by the Anchor Distributor controlled by ABI or they are forced to cobble together a footprint to cover the territory with wholesalers which may only cover portions of the territory footprint available and are not willing to invest in the brands consistent with the original commitments duly negotiated by Yuengling and the original wholesaler in the State.

As a result, as Yuengling has tried to enter relevant territories in Mississippi and has continued its efforts to find strategic independent distributor partners, Yuengling has been bounced around a daisy-chain of distributors, with only one apparent purpose – to delay and perhaps even ultimately thwart its entry into new or emerging geographic territories, where it would have provided a significant competitive alternative to ABI's brands. Yet there is nothing in the proposed Final Judgment which places any significant limitation on ABI's ability to continue to exercise the "match and redirect" provisions in its Equity Agreements to instigate chaos within the world of distribution arrangements between Third Party Brewers and

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Independent Distributors.⁸

F. Additional Issues with Big Beer Getting Bigger

Further, Yuengling believes additional investigation is warranted regarding whether ABI directly or indirectly finances distributors who are benefactors of a “redirect” and whether compensation is remitted to the losers of the “redirect”. In this instance in Mississippi, it is believed that Adams had spent several hundred thousand dollars in costs after freely negotiating for the purchase of Rex, only to lose that investment a couple of days before the scheduled closing on the “match and redirect”. It is the financial considerations which need to be closely investigated and any Final Judgment should consider expanded investigative powers of the monitoring trustees to review conduct in which ABI may provide financial incentives to distributors through the exercise of its “match and redirect” which creates chaos to Third Party Brewers in these territories. This is especially important in states like Mississippi which do not require equal FOB pricing. Perhaps this is exactly why ABI chose Mississippi to deliver this blow to Yuengling in ABI’s largest market share state in the country.

Given ABI’s size and history, consideration should be given to eliminating ABI’s right to “match and redirect” considering the adverse, negative impacts it has on a Third Party Brewers’ distribution footprint and competitive option. Alternatively, remaining Third Party Brewers must be free to vote with their feet and try to find an independent distributor. Otherwise, it will remain a tool used by ABI to manipulate the market and erode an independent distributor tier. Further, it allows ABI to dictate “winners” and “losers” in the wholesaler consolidation game with this “carrot” and “stick” activity, all to the detriment of the particular Third Party Brewer they may target.

⁸ Section V(F) directs ABI not to give weight to or base any decision in this regard on the affected Distributors’ relationships with Third-Party Brewers, but there is no affirmative requirement for ABI to state a positive case for any decision it makes regarding any particular “match and redirect,” nor is there any procedure for review of such decisions. “Trust us” is a peculiar way to police ABI’s conduct when the Department knows (or should know) how ABI can interfere with the business decisions of Distributors, especially its Anchor Distributors, who are often “Independent” in name only.

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The Department's Competitive Impact Statement (at pp. 9-10) notes many other anti-competitive effects of the Equity Agreements that ABI has with ABI-Affiliated Wholesalers. The proposed Final Judgment, however, does little to address these effects, because the most important pro-competitive requirements in the proposed Final Judgment are subject to a gaping loophole that will allow ABI to continue to exploit its ability to dominate its ABI-Affiliated Wholesalers.

Specifically, Section V(D)(5) of the proposed Final Judgment would prohibit ABI from preventing an Independent Distributor from using "best efforts" to sell, market, advertise, or promote any Third Party Brewer's Beer. "Best efforts" may be defined⁹ as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of the Third Party Brewer's Beer in a geographic area.

While this sounds promising, it is completely gutted by the paragraph immediately following, which says that "[n]otwithstanding the foregoing, nothing in this Final Judgment shall prohibit Defendant ABI from entering into or enforcing an agreement with any Independent Distributor requiring the Independent Distributor to use best efforts to sell, market, advertise, or promote Defendant ABI's Beer..." While this right to demand best efforts is not supposed to require or encourage an Independent Distributor to provide less than best efforts, left unsaid and unexplained is how does a distributor simultaneously provide "best efforts" to both the 800 pound gorilla and the other denizens of the beer jungle. If it commits to best efforts on behalf of ABI, anything it does on behalf of any other brewer will inevitably be secondary and subservient to ABI.

Another area of concern for Yuengling is that while the proposed Final Judgment contains limitations on ABI's ability to acquire additional ABI-Owned Distributors, it contains no limitations on ABI's ability to provide financial support in the form of indebtedness to ABI-Affiliated Distributors, which is a far larger and more important universe of distributors. It is not

⁹ But maybe not? Another example of the ambiguity that permeates the proposed Final Judgment.

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reasonable to suppose that ABI extends such financial support merely because it is interested in the financial returns it can earn as a lender. Rather, such relationships strengthen the ties between ABI and the so-called Independent Distributors, and give ABI additional leverage to influence such Distributors' application of resources to distribution activities.

Finally, favorable pricing has historically been used to create distributor dependence on suppliers to the exclusion of Third Party Brewers which cannot afford the methodology. Therefore, pricing to similarly situated Distributors should be transparent and is easily measurable to avoid this practice. Again, there are legitimate reasons why states regulate "FOBs".

G. Proposed Remedies

In sum, the commitments that ABI has made with regard to its ability to influence the conduct of Independent Distributors are vague and easily evaded. We also believe additional investigation is warranted as set forth above. Yuengling has no confidence that the barriers it has attempted to overcome over the years with respect to the distribution of its products will be any less formidable as a result of the proposed Final Judgment. Unless the entire, proposed transaction approval is reconsidered, the Department should seek amendments to the proposed Final Judgment as follows:

- Barring ABI from exercising any "match and redirect" rights in its Equity Agreements that give it the ability to foist ineffective Independent Distributors on Third Party Brewers.
- Alternatively, if ABI "matches and redirects" rights in its Equity Agreement, it should be required to pay the full purchase price to the selling distributor in consideration of the selling distributor releasing all the other brand rights for Third Party Brewers without any additional consideration.

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- Barring ABI from insisting on any particular level of promotion expense by an Independent Distributor or otherwise limiting its distributors' investments in Third Party Brewers.
- Barring ABI from financing the operations of any Independent Distributors, directly or indirectly.
- Barring ABI from manipulating "delivered price" amounts to similarly situated wholesalers as a way of incentivizing wholesalers to carry only ABI brands or otherwise rewarding them from winning or losing out in a "match and redirect" transaction.

Thank you for your time and consideration in this matter. If you have any questions about any of the comments in this letter, please do not hesitate to contact me.

Respectfully,

Norris, McLaughlin & Marcus, P.A.

A handwritten signature in black ink, appearing to read "Theodore J. Zeller III", with a stylized flourish at the end.

Theodore J. Zeller III, Esquire
Attorneys for D.G. Yuengling & Son, Inc.