



October 4, 2016

Peter J. Mucchetti
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United States Department of Justice
450 Fifth Street, N.W.
Suite 4100
Washington, DC 20530

Re: Comments from Consumer Watchdog Concerning the
Proposed Final Judgment in United States v. Anheuser-Busch InBev SA/NV and
SABMiller plc

Dear Mr. Mucchetti,

Consumer Watchdog, a non-profit nonpartisan consumer advocacy organization, applauds the Department of Justice Antitrust Division (“DOJ”) for conducting a thorough investigation of Anheuser-Busch In Bev’s (“ABI”) acquisition of SAB Miller and obtaining a comprehensive remedy to resolve wide-ranging competitive concerns resulting from the combination of the two largest global beer producers. The transaction threatened to reduce competition, stifle the growth of craft and import beer and restrain independent distribution, which if allowed without conditions would have resulted in higher prices and less choices for consumers.

The comprehensive remedy demonstrates the DOJ’s newfound willingness to impose meaningful remedies to protect consumers and preserve competition when industry megaliths seek to merge. The Proposed Final Judgment (“PFJ”) includes not only structural (a divestiture of SABMiller’s 58% ownership interest in the MillerCoors Joint Venture to Molson Coors) but also behavioral (restrictions and prohibitions of ABI’s conduct going forward) remedies.¹ Far too many times, the DOJ has simply required divestitures to resolve horizontal competitive overlaps posed by mergers. Divestiture as a stand-alone remedy has repeatedly failed to protect consumers. Therefore, it is encouraging to see that the DOJ is willing to craft alternative remedies in addition to the divestiture of a competitive overlap to ensure consumers are fully protected. As industries seek to further consolidate and become more concentrated, the DOJ must not only consider structural and behavioral remedies, but also consider outright rejections when necessary.

The DOJ does not simply rely on a divestiture that prevents increased concentration in the brewing industry. Rather, the PFJ goes further in terms of strengthening the DOJ’s power to police future anticompetitive practices by ABI. If the PFJ is successful, ABI’s tools for limiting distribution freedom will be carefully policed and craft and import brewers will maintain access

¹ The DOJ noted in its Competitive Impact Statement (“CIS”) that the proposed divestiture to Molson Coors would not eliminate the anticompetitive effects of the transaction on beer distribution. CIS, at 11.

to open and independent distributors resulting in U.S. beer consumers seeing benefits to price, choice and quality.

Consumer Watchdog submits these comments to assist the DOJ and the Court in its review of whether the PFJ is sufficiently complete, concise and clear to remedy the wide range of anticompetitive concerns presented by the merger.

I. Open and Independent Distribution Protects Consumer Choice

The DOJ recognizes in its Competitive Impact Statement (“CIS”) that “effective distribution is important for a brewer to be competitive in the U.S. beer industry.”² In many states, a three tiered system exists, where independent distributors stand between brewers and retailers. The three-tiered system was put in place to prevent large brewers from having too much control over what consumers purchase. At a Senate hearing on this merger, Senator Amy Klobuchar stated that: “Craft brewers have succeeded in part because of the three-tier distribution system.” ABI and MillerCoors, however, have each established beer distributor networks that provide efficient and effective distribution for brewers to get their products to consumers. ABI works with 500 distributors as well as ABI-owned distributors. MillerCoors does not own any distributors. Most other brewers do not have their own distribution network so they must distribute beer through ABI affiliated and MillerCoors affiliated distributors. In 2014, 85% of the beer sold in the United States was through ABI or MillerCoors affiliated distributors or through an ABI-owned distributor.³

Open and independent distribution is important for the health of the beer industry. It helps ensure beer sales are driven by consumer demand, not the financial imperatives of the largest brewers, protecting competition as well as customer choice. The emergence of import, craft, and independent brewers provides important competition in product diversity, quality, and pricing. As Senator Klobuchar stated, “Unless craft brewers have access to wholesalers, they will wither on the vine.” For smaller brewers and importers to successfully compete with ABI and MillerCoors, they need access to distributors, and ultimately retailers, in order to sell their products to consumers.

A competitive market results in new innovations and entry of craft brewers and imports. Innovation and entry is responsible for the breadth of product diversity of remarkable beers available in the United States. If ABI and Molson Coors are allowed to control distribution in any geographic market, consumers will pay the cost in reduced choices and increased prices.

II. The Beer Industry is Fragile

Past consolidation in the beer market in the United States has already harmed consumers. In 2008, the DOJ permitted the joint venture between SABMiller and Molson Coors in large part because the DOJ believed it would create a stronger more efficient competitor to ABI. However,

² CIS, at 8.

³ CIS, at 10.

an economic study by former DOJ economists found that consumers got a bad deal.⁴ Even though the joint venture produced cost savings, those benefits were not passed down to consumers in lower prices. In fact, according to the study, the joint venture led to higher prices – with MillerCoors following ABI’s regular price increases. The study discovered that prices were stable leading up to the consummation of the joint venture but the prices of ABI and MillerCoors sharply increased after the merger. The study concluded that tacit collusion best explained the price data. The DOJ acknowledges this point as its Complaint alleges “for many years, MillerCoors has followed ABI’s price increases to a significant degree.”⁵ The DOJ further recognizes that coordination between ABI and Molson Coors is likely to increase in the United States now that Molson Coors will take ownership of MillerCoors.⁶

Besides increased prices to consumers, it is clear from a review of the Complaint, CIS, and PFJ that ABI engages in a multi-pronged strategy to cut off craft brewers’ access to distribution by acquiring craft beers and distributors, implementing distributor “incentive programs” and imposing restrictions that restrain independent distributors from promoting rival beers.

A. ABI’s Acquisitions of Brewers and Distributors

ABI’s anticompetitive plan to purchase craft breweries is significant when viewed in consideration of its thinly veiled distributor incentive program, described below. Having a variety of craft beer in its portfolio makes it easier to implement ABI’s requirement of its aligned distributors to focus on ABI products rather than competing craft products. Since 2011, ABI purchased eight craft brewers of significant size, including: Goose Island in 2011; Blue Point Brewing and 10 Barrel Brewing in 2014; Elysian Brewing, Golden Road Brewing, Four Peaks, and Breckenridge in 2015; and Devil’s Backbone in April 2016.⁷ Consumers value the choice of craft and ABI acquisitions of craft breweries threaten to create effective “puppet state” craft beers. ABI’s implementation of this plan combined with its focus on providing incentives to ABI affiliated distributors to distribute only its products significantly lessens choice to consumers in the marketplace.

In addition to acquiring craft brewers, ABI implemented an anticompetitive strategy of acquiring distributors in an effort to reduce distribution competition in key geographic markets within the United States. ABI is the fastest growing distributor in the United States. Since 2012, ABI strategically purchased and swapped at least 12 independent distributors in nine states (i.e., California, Colorado, Ohio, Oregon, Oklahoma, Hawaii, New York, Massachusetts, and Washington) to curb rival brewers distribution options.⁸ ABI-owned distributors are in states

⁴ Nathan H. Miller & Matthew Weinberg, *Mergers Facilitate Tacit Collusion: An Empirical Investigation of the Miller/Coors Joint Venture* (2015), available at <http://www.nathanhmilller.org/miller-weinberg-2015.03.25.pdf>.

⁵ Complaint at ¶ 22.

⁶ The DOJ actually claims that the divestiture to Molson Coors may facilitate coordination between ABI and Molson Coors in the United States. As a result, ABI may have a greater incentive to impede the growth and reduce the competitiveness of high-end rivals by limiting their access to effective and efficient distribution. CIS, p. 12.

⁷ Ashlee, Keiler, *Here Are The 8 U.S. Craft Brewers Bought By Anheuser-Busch Since 2011*, April 13, 2016. <https://consumerist.com/2016/04/13/here-are-the-8-u-s-craft-brewers-bought-by-anheuser-busch-since-2011/>

⁸ See J. Wilson, Testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Dec. 8, 2015 at 2; *Wholesaler Operations*, Anheuser-Busch, <http://anheuser-busch.com/index.php/our-company/operations/wholesale-operations/> (last visited Sept. 28, 2016).

that currently represent more than thirty percent (30%) of the American beer market.⁹ As recently as the end of 2015, ABI acquired five distributors in three different states.¹⁰

Swaps or trades to friendly buyers are also problematic. Those distributorships take on the same aggressive tactics as ABI-owned distributors. For example, in March of 2013, Krey Distributing, which has 72% market share in Missouri's St. Charles and Lincoln counties, dropped six craft breweries from its portfolio after taking over Grey Eagle and Lohr distributorships in a so-called "alignment deal."¹¹ As the DOJ alleged in its Complaint, ABI's acquisitions of distributors is significant because ABI-owned distributors "typically distribute only brands that are owned by or affiliated with ABI."¹²

On December 8, 2015, Mr. Wilson of the Iowa Brewers Guild testified before the Senate noting some real life examples of how ABI's distribution strategy hurts brewers. When ABI took over two distributors in Eugene, Oregon, Ninkasi Brewing Company saw its sales plummet. Wilson Testimony, at 3. After ABI acquired Anheuser-Busch Sales of Washington ("ABSW"), ABSW got rid of its vibrant non-ABI craft portfolio. Heather McClung, the Washington Brewers Guild board president, said that "ABSW is alleged to have shut out competition through (an illegal) paid "alliance" with a major entertainment group to ensure that only ABI beers or ABI-sanctioned beers be served at the majority of concert venues in greater Seattle." *Id.* Accordingly, ABI-owned distributors sever ties with rival brewers making it extremely difficult to distribute their beer causing them to lose sales or go out of business resulting in less choice for consumers.

B. ABI's Distributor Incentive Program And Other Tactics Promote Exclusivity

In 2015, ABI implemented a distributor incentive program known as Voluntary Anheuser-Busch Incentive For Performance Program ("VAIP"), whereby ABI pays ABI affiliated distributors based on the amount of ABI beer sold versus rival beer in an effort to promote exclusivity. The "incentive program" is in fact a thinly veiled effort to prevent distributors from selling competitors' beer. The reward is based on the percentage of ABI beer sold as compared to rival beer. The VAIP is offered to ABI-affiliated distributors if their ABI sales are 90% or more of its volume.¹³ According to the American Antitrust Institute's ("AAI") letter to the DOJ, ABI constrains distributors by conditioning incentive programs on carrying craft brewers that produce a relatively small volume per year, or sell in only one state. This restriction effectively limits the size of any of ABI's competitors in the wholesale system because distributors must decide whether to keep craft products or lose incentives under the incentive program.¹⁴ AAI also notes that ABI has a history of pressuring independent distributors into distributing only ABI products, and that in the past it has been reported that ABI will either personally visit or publicly criticize distributors that choose to sell rival beer. These strong-arm tactics to promote exclusivity with ABI's distributors harm consumer choice.

⁹ See Craig Purser, Testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Dec. 8, 2015 at 6.

¹⁰ See *Craft Brewers Take Issue*, WSJ, Dec. 7, 2015.

¹¹ See J. Wilson, Testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Dec. 8, 2015 at 3.

¹² DOJ Complaint at ¶ 25.

¹³ DOJ Complaint at ¶ 8 and 29.

¹⁴ Letter from Diana Moss, President of AAI, to the Department of Justice (April 25, 2016).

C. ABI Imposes Other Restrictions On Distributors That Discourage The Promotion And Sale Of Rival Beer¹⁵

ABI exerts significant influence over an ABI-affiliated distributor through practices that limit or even eliminate a rival's ability to distribute its products to consumers. Indeed, ABI requires ABI-affiliated distributors to enter into Wholesaler Equity Agreements ("WEA") that function as non-compete clauses. The WEA encourages the sales of ABI beer at the expense of rivals. For example, the WEA prohibits ABI-affiliated distributors from requesting that a bar replace an ABI tap handle with a rival's tap handle or that a retailer replace ABI shelf space with a rival's beer. The WEA also prohibits ABI-affiliated distributors from compensating its sales people for the sales of rival brands unless it provides the same incentives for ABI brands, which in effect limits the distributors' ability to promote rival brands.¹⁶ Furthermore, ABI punishes distributors who increase sales of all beer, ABI and rival produced, while rewarding distributors who keep ABI sales the same but cut rival sales. ABI requires distributors to provide information related to rival sales and exercises its rights over distributor management based on those sales. These restrictions are part of a calculated and direct effort to harm rival brewers, and, thereby, reduce consumer choice.

III. The Behavioral Remedies Are Essential to Protecting Competition and Consumers.

The DOJ makes clear that the divestiture to Molson Coors may facilitate coordination between ABI and Molson Coors in the United States because of their cooperative arrangements and their increased multi-market contacts in other countries.¹⁷ As the DOJ states in the CIS, "following the divestiture to Molson Coors, ABI may have a greater incentive to impede the growth and reduce the competitiveness of high-end rivals by limiting their access to effective and efficient distribution."¹⁸ To be successful and grow, brewers need cost effective access to retail outlets through independent and open distribution networks. Thus, the PFJ provides for long term oversight of ABI's conduct to prevent post-merger mischief. Accordingly, numerous behavioral remedies are necessary to protect competition and consumer choice.

IV. Recommendations

The DOJ's inclusion of behavioral remedies to police ABI's conduct going forward is crucial to protect consumer choice and prevent price hikes. However, strong oversight by the monitor trustee is needed to ensure that ABI does not devise new strategies that slip through the cracks of the agreement to harm competition and consumer choice. Consumer Watchdog provides the following recommendations.

¹⁵ The DOJ notes in the CIS that "unlike ABI, MillerCoors does not include in its agreements with MillerCoors-Affiliated Wholesalers any provisions that discourage or impede the promotion and sales of the brands of Third-Party Brewers." CIS, at 11.

¹⁶ DOJ CIS, at 9.

¹⁷ CIS, at 11-12.

¹⁸ CIS, at 12.

A. ABI Should Be Prohibited From Acquiring Any More Distributors.

ABI is currently the fastest growing distributor in the United States. While the PFJ caps ABI's ability to acquire distributors on a nationwide basis at 10%, anything short of a bar on acquisitions is insufficient to protect consumers. DOJ acknowledges in the Complaint and CIS that beer markets are local. Though ABI and the DOJ agreed to a nationwide cap, ABI ownership of distributors far exceeds 10% in certain local geographic markets. Given that the PFJ allows ABI to continue to acquire majority and minority interests in distributors, the potential remains for ABI to test the limits of the PFJ in an effort to harm rival brewers in certain geographic markets. As an example: ABI could swap or trade a currently owned distributor to an ABI-affiliated distributor in order to purchase distributors and beef up its concentration in a different geographic market. This practice could be difficult to monitor and assess. The best way to protect competition and consumer choice is to simply prohibit ABI from acquiring any more distributors for the entire period of the Final Judgment.

B. ABI Should Be Prohibited From Acquiring Any More Craft Brewers

The PFJ contains a notice provision requiring ABI to provide DOJ with the ability to review ABI's future acquisitions of craft beers that might not be reportable under the Hart-Scott-Rodino Act. This provision is critically important to maintaining competition as all ABI acquisitions should be thoroughly vetted. ABI has demonstrated that it intends to continue to grow through acquisitions of high-end brewers to harm rival brewers and alcoholic beverages in an effort to control pricing. The DOJ acknowledges that ABI engaged in this anticompetitive plan. Indeed, during the public comment period, ABI acquired high end craft brewer, Devil's Backbone; high-end flavored alcoholic beverage, SpikedSeltzer; and Belgian craft brewer, Bosteels.¹⁹ Such acquisitions, even small acquisitions, can result in competitive harm. Consumers value the choice of craft and ABI acquisitions threaten to create effective "puppet state" craft beers. It is disconcerting that the DOJ approved ABI's acquisition of Devils Backbone during the public comment period "in light of the distribution relief secured in the ABI/SABMiller settlement" when the PFJ has yet to be determined in the public interest.²⁰ The DOJ's statement regarding Devil's Backbone indicates just how important it is to scrutinize the details of the PFJ. The easiest way to protect consumer choice is to prohibit ABI from acquiring any brewers for the entire period of the Final Judgment.

C. PFJ Should Include Broader Prohibitions Against Attempts To Curb The Promotion of Rival Beer.

The PFJ contains numerous provisions prohibiting ABI from engaging in specific conduct that limit distributor freedom to promote rival brands. Because many of the provisions are so specific, it allows ABI the opportunity to create new distributor incentive programs and

¹⁹ DOJ Press Release, *Justice Department Statement on the Decision to Close Investigation of ABI's Acquisition of Devils Backbone in Light of Distribution Relief Obtained in ABI/SABMiller Settlement*, September 6, 2016; Chris Furnari, *Anheuser Busch to Acquire SpikedSeltzer*, September 9, 2016; Diana Barr, *AB InBev to Buy Belgian Craft Brewer*, September 8, 2016.

²⁰ DOJ Press Release, *Justice Department Statement on the Decision to Close Investigation of ABI's Acquisition of Devils Backbone in Light of Distribution Relief Obtained in ABI/SABMiller Settlement*, September 6, 2016.

contractual provisions in its distributor agreements structured in a way that may follow the letter of the PFJ but violate the spirit of the PFJ. The most striking example is the carve outs in Section V of the PFJ, which allows ABI to reward distributors based on “ABI’s percentage of beer industry sales in a geographical area”. The language allows ABI to tweak the VAIP to obtain the same results. This language should be eliminated, and demonstrates that strong oversight is necessary to ensure ABI does not circumvent the PFJ to consumers’ detriment. To make the monitor trustee’s and DOJ’s job easier, a broader prohibition should be added to the PFJ to: expressly prohibit ABI from implementing distributor incentive programs or entering into any other contracts or agreements with ABI affiliated distributors that create economic disadvantages or make it financially unattractive for them to distribute or promote rival brewers’ beer; from engaging in any promotional programs that are designed to make it unattractive for distributors to carry rival products; and from engaging in any conduct that would foreclose rival brewers’ ability to distribute their products through independent distributors to retailers.

D. ABI Should Be Required To Adopt A Compliance Program That Includes The Final Judgment.

The DOJ acknowledges that comprehensive distribution relief was necessary to protect consumers, however, ABI’s compliance with the terms of the Final Judgment (“FJ”) is vital. It is imperative that board members, executives, management, sales representatives and all other relevant personnel know and understand the contents of the FJ. The FJ must be taken seriously. Accordingly, ABI should be required to create an updated antitrust compliance program and policy that includes the provisions of the FJ. ABI should submit the updated antitrust compliance program to the DOJ for its approval. All relevant ABI employees must receive training regarding the new compliance program and policy. ABI should also be required to submit annual employee certifications that each employee has received training regarding the policy. This provision should exist for the life of the Final Judgment.

E. Molson Coors Should Be Included In the Final Judgment

The PFJ currently does not include Molson Coors. Given the DOJ’s concern that the divestiture of MillerCoors to Molson Coors may facilitate coordination between ABI and Molson Coors in the United States because of increased multi-market contacts and certain cooperative arrangements between ABI and Molson Coors, perhaps Molson Coors should be included so that the DOJ can enforce the same conditions on Molson Coors.²¹ While the DOJ states that Molson Coors has not used the same anticompetitive strategies as ABI in terms of acquiring brewers and distributors and engaging in practices to curb distributor freedom, the DOJ alleges in the Complaint that MillerCoors followed ABI’s lead in price increases indicating that there is already evidence of coordination on prices before the divestiture and it appears that there is even more of a concern regarding coordination after the divestiture. The way the PFJ is currently drafted, Molson Coors is free to engage in practices that stifle rival brewers’ growth such as acquiring brewers and distributors and handcuffing distributors’ ability to carry and promote rival beer. Accordingly, Molson Coors, which through the divestiture is becoming the second largest brewer in the United States with control of the second largest distribution network, should

²¹ CIS, at 11-12.

be included in the Final Judgment so that Molson Coors is operating under the same conditions as ABI.

F. The Monitor Trustee Should Have the Ability to Interpret the Final Judgment Broadly to Prevent ABI From “Getting Around” its Terms

The stated goal of the PFJ is “to ensure that Third-Party Brewers whose beer is sold by ABI-Affiliated Wholesalers have the opportunity to compete with ABI on a level playing field not on a playing field in which ABI has used its influence over the distributor to favor ABI's beers at the expense of other beers in the distributor's portfolio.”²² However, a major weakness in behavioral remedies is swift enforcement of any questionable conduct that violates the FJ. As discussed above, there are a number of ways in which ABI can structure its activities to prevent a level playing field while *arguably* remaining within the confines of the FJ. Regardless, if the suggested language changes to the PFJ are made, the Monitor Trustee should have the power to interpret the FJ broadly in instances where ABI is violating the agreed goals of the FJ while *arguably* remaining within the letter of certain language in the FJ. For example, if the suggested changes to the PFJ are not made and if ABI were to buy a minority interest in every distributor in a state and install loyal managers in those distributors with a mandatory 25% equity position, which is arguably allowed under a reasonable interpretation of certain language of the PFJ but clearly not allowed when considering the agreed goals of the PFJ, then the Monitor Trustee should be able to interpret these acquisitions as counting against the 10 percent cap because the conduct violates the stated goals and purpose of the FJ. Giving the Monitor Trustee such powers to interpret the FJ is not unduly burdensome to ABI because it is limited by the stated goals and language of the FJ and CIS, which are agreed to by ABI and the DOJ.

V. Concluding Thoughts

Consumer Watchdog believes that antitrust enforcement is crucial to protecting consumers and that the Court should carefully review the PFJ to determine whether it is in the public interest. The PFJ needs to be as thorough as possible to prevent post-merger harm. The DOJ is taking a risk when it accepts remedies to resolve anticompetitive concerns posed by mergers so the Court must be comfortable that the proposed remedies are sufficiently clear and concise to avoid any enforcement problems in the future.

Sincerely,



Carmen Balber
Executive Director
Consumer Watchdog

²² CIS, at 12.