**Beer Distributors of Oklahoma**

VIA ELECTRONIC MAIL

October 4, 2016

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

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

Dear Mr. Mucchetti,

The Beer Distributors of Oklahoma ("BDO") was incorporated as the Oklahoma Malt Beverage Association in 1938 in Oklahoma City, Oklahoma as a not-for-profit business association. The association became the Beer Distributors of Oklahoma in 2010 to more precisely reflect the true mission of the association in advocating on behalf of Oklahoma beer distributors, the three-tier system and effective state-based alcohol regulation. BDO represents and advocates for independent beer distributors, serves as their unified voice on legislation and regulation, and encourages the safe and responsible consumption of beer.

The majority of Oklahoma beer distributors are second or third generation family-owned small businesses. The economic impact of Oklahoma's beer industry and Oklahoma's beer distributors is substantial as the industry creates jobs, contributes significant property, income and excise taxes to federal, state and local governments, and reinvests in local communities across the state. We are proud of our heritage, our state, our communities and the products we sell.

BDO would like to commend the Division for its work in investigating the merger of the two largest beer brewers in the world. BDO believes that the Complaint and Proposed Final Judgment (PFJ) identifies key issues and goes a long way towards providing necessary relief designed to protect the consumer by ensuring a more level playing field for brewers. However, BDO has significant remaining concerns where the PFJ fails to remedy identified competitive harm such as Anheuser-Busch InBev's (ABI) ownership of significant distribution assets in the two largest population centers in the state, Oklahoma City and Tulsa, and with the PFJ's definition of the United States as the Territory for purposes of the 10% threshold for sales volume going through distribution ABI owns or controls. The below comments seek to explain these concerns and recommend alternative solutions to protect independent and effective distribution, which "is important for a brewer to be competitive in the industry."[1]

## Large Brewer Owned Distribution is a Competitive Threat to the Oklahoma Beer Industry

ABI is a significant player in Oklahoma beer distribution. ABI currently owns distributors in Oklahoma's biggest population centers, Tulsa and Oklahoma City, as well as in Perry, Ardmore, Lawton, and Clinton. ABI serves almost the entire state through their warehouses in Tulsa and Oklahoma City. These ABI Owned Distributors either exclusively sell ABI beer or sell only a negligible amount of non-ABI beer, helping ABI achieve and maintain over a 50% share of total market volumes (Beer Institute presentation to BDO, 2011).

According to the most recent data available to BDO at the end of 2014, ABI sells **88%** of its volume in the state through the two wholly owned distributorships in Oklahoma City and Tulsa, reaching this dominant position primarily by acquiring Premium Beers of Oklahoma, an independent, family owned distributorship that carried non-ABI brands of beer, at the end of 2011.[2] It is our belief that ABI has an even greater market share than what DOJ calculates in its Complaint due to additional outlets not measures such as stadium and music venues.

## The DOJ use of IRI data does not properly define the beer market.

The DOJ Complaint defines the market using IRI data. In Appendix A attached to the Complaint it notes the very high market shares for Tulsa and Oklahoma City, both cities served by ABI owned distribution. However, IRI data actually under measures the stranglehold of ABI on these individual markets. IRIS data paints only a partial picture of the beer industry. The beer industry is a $111.1 billion industry. Sales of beer for on premise consumption (restaurants, bars) are 52 percent or $57.6 billion dollars vs sales of beer for off premise consumption (grocery, convenience) at 48 percent or $53.5 billion.[3] Only a percentage of off premise sales are in the IRI system. IRI is a measurement tool for the off premise channel concentrating on large stores. IRI does not measure on premise and therefore misses 20% of the volume and 52% of the dollar sales in beer by not measuring on premise. IRI does not measure high volume accounts such as stadiums, restaurants, bars and independent retail stores. IRI does not measure the majority of the beer industry and is not a good measurement for market share.

[1] Competitive Impact Statement, *United States v. Anheuser-Busch InBev et al*, Case no. 16-cv-1483 (2016).
[2] http://newsok.com/article/3639870.
[3] http://www.beerinstitute.org/assets/uploads/general-upload/BeerInstitute_AnnualReport_090316-pages.pdf

## The Complaint Shows that ABI should be forced to Divest ownership of distribution in Oklahoma

Appendix A shows that two of the top 4 concentrated markets are in Oklahoma. The post-acquisition HHI index for Tulsa is a tremendous 8094, an increase of 3000.
HHI means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The Complaint notes that DOJ own guidelines state that markets in which the HHI is in excess of 2,500 are considered to be highly concentrated. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* 5.3 (revised Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the guidelines issued by the U.S. Department of Justice and Federal Trade Commission. Despite the complaints and restatement of HHI policy, the PFJ does nothing to address the Tulsa and Oklahoma City markets.

The Oklahoma beer market is marked by a clear lack of craft presence. ABI's ownership of distributors is a significant contributing factor in the lack of craft availability for Oklahoma consumers.[4] The practical effect of brewer ownership of distribution can be found in the written testimony Iowa Minister of Beer J. Wilson submitted to the United States Senate.[5] Wilson described several situations in which craft beer was dropped from distributor portfolios after the distributor was acquired by ABI.[6] Wilson described situations in Oregon and Washington where craft brewers suffered significantly after ABI bought their distributors.[7]

## The Court Should Hold a Hearing on ABI Distribution Ownership and Require ABI to Divest All Distributor Branches

The DOJ is to be commended for recognizing, both in the PFJ and the Competitive Impact Statement (CIS), the harms related to distribution by ABI ownership. ABI has sent a clear signal to independent distributors that the growth of other brewers must be stopped. ABI has undertaken a series of efforts to harm market access and raise the costs of independent rival brewers. These efforts include everything from incentive programs to restrictions on how trucks are painted and other areas that penalize independent distributor's efforts to promote new brewers. What ABI cannot accomplish through incentives and restrictions; it accomplishes through distributor acquisitions that give ABI complete control over what beers are sold through key distributors in important territories.

However, the world's largest brewer does not need a stranglehold on important distribution access in the United States. In a Senate hearing, ABI CEO Carlos Brito stated that ABI's purpose in acquiring distributors is to "develop people within the company" that "understands distribution system, that understands the second tier, and therefore are able to talk to

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[4] Another primary contributing factor is an Oklahoma law restricting beer to 3.2% ABV.
[5] CITE https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Wilson%20Testimony.pdf
[6] *Id.*
[7] *Id.*

wholesalers on an equal basis."[8] This purpose does not explain nor justify ABI's control over Oklahoma distribution to the tune of 88% of its sales volume.

ABI has produced no evidence that there are pro-competitive effects of their ownership activity. There are no studies showing that their displacement of independent distributors increases other brewer market access. They do not allege statistically significant cost savings for the consumer from this practice. ABI is the fastest growing beer distributor in the country and now the largest. Their acquisitions and control of over 20 distributorships are not about learning a market or how to run a distributorship, it is about displacement. Although the CIS and PFJ recognize this problem, they do not go far enough to prevent this abuse. Deeper investigation into the entire spectrum of on and off premise retail beer channels will uncover on premise events that include concerts, festivals, fairs, and sporting events where ABI volume shares significantly over index compared to national and reported state market shares calculated using standard syndicated data services.

The Court should hold a hearing on this issue and look at it with fresh eyes. The PFJ allows ABI to significantly grow its distribution business. It is our understanding that the PFJ caps ABI owned distribution at 10 percent nationwide. However, Mr. Brito testified that there are only 15 states in which ABI is permitted to acquire distributors.[9] Because these acquisitions in 15 states will be averaged over 50 states, ABI can still substantially grow its control in states such as Oklahoma before reaching the 10 percent cap. The Court should ask why the 10 percent cap was chosen, what economic studies or theories the cap is based on, and how much growth the PFJ actually allows. The Court should also ask more generally whether, in a post-transaction world, ABI's ownership of distributors is too much of a threat to competition to continue. In other words, if ABI ownership over 10% raises concerns for the PFJ, 88% ownership warrants immediate review.

ABI is in the brewing business, not the wholesaler business. MillerCoors and countless other breweries have proven that brewer owned distribution is not necessary to compete in the beer industry. There will be no harm to ABI and it will realize billions from a court ordered sale. It will put them on the same level with its brewing competition. Because this merger will greatly reshape the beer industry, the Court should ask whether the justifications of brewer owned distribution outweigh the harms to competition in a post-merger world.

## If Divestiture of Distribution Is not Required, Then an Alternative Cap Analysis Should Be Used

If the Court is unable to call for complete divestiture, BDO recommends the following changes in the alternative:

[8] CITE Senate Hearing
[9] CITE Senate hearing.

### *Distribution Ownership Should Be Significantly Reduced or Capped at Current Levels Until More Facts Can Be Discovered*

As acknowledged by the DOJ and many state legislatures,[10] brewer owned distribution is a significant threat to competition and craft beer's access to consumers. The DOJ acknowledges that when ABI acquires distributors ABI can "cause the Distributors to cease to promote or to expel rival brands from the Distributors' portfolios—thus preventing or impeding a rival from selling its beer through a Distributor or forcing the rival to find a different and potentially less effective path to market."[11] The DOJ has imposed the restrictions in Section V.B to resolve this competitive problem. However, ABI can continue to purchase distributors under the ownership cap set by the PFJ. This remedy is insufficient, as it would permit the market to be further harmed before the cap is reached.

MillerCoors, the main rival to ABI, only has one owned distributor that it treats as a separate company and runs like an independent distributor carrying other brands. To enhance competition, the Court should force ABI to divest distributorship to one operation to compete on equal footing with its largest rival. Letting these brewers compete on brewing and marketing, as opposed to distribution games, would fulfill the intent of the PFJ and greatly enhance competition.

The need for robust remedies on ABI owned distribution is further underscored by the difficulties in determining and enforcing a 10 percent cap on distribution. There is already clear and substantial confusion over how this number is calculated. In December 2015, Brito stated in a Senate hearing that ABI's wholly owned distribution is 7% of volume.[12] A few months later, the PFJ and CIS state that the number is 9%. Who is measuring what? How can the public know?

Enforcement will also only be as good as the data used, and some of this data is under the control of ABI. The incentives to grow distribution ownership are clear, allowing the proverbial fox to guard the data hen house is clearly a recipe for disaster. No independent third party data is used to create a transparent and accountable oversight system. Rather it is ABI's own Budnet data that will be heavily relied upon in the enforcement of the PFJ. Tasking the Monitoring Trustee to chase data and ascertain percentages is a waste of resources. The more competitive solution, absent complete or partial divestiture in Oklahoma, is to cap ABI ownership at current levels and allow no more purchases of distribution until more facts are discovered.

### *Distribution Ownership Should Be Considered on a State by State Basis, Not a National Basis*

BDO reads Section V.B to set a nationwide cap on ABI ownership of distributors. However, beer distribution is conducted in local markets. Oklahoma is a great example of why a national threshold will perpetuate the status quo in states that are impacted the most. This

[10] Brewer owned distribution is barred by state law in roughly a dozen or more states.
[11] Competitive Impact Statement at 18-19, https://www.justice.gov/atr/file/877621/download.
[12] CITE Senate hearing

interpretation of the decree would enable ABI to completely control certain key markets while remaining within the cap as long as its total national share remains under 10 percent. As stated above, ABI could obtain substantial control over key markets in the 15 states it claims it is allowed to buy distributors before a 10 percent nationwide cap is reached. These states represent nearly 40% of the U.S. Beer market In addition, ABI could swap its distribution ownership with states that do not permit ownership in order to shore up control over key markets as long as it remained under the 10 percent nationwide cap allowable under the PFJ. This would implicate 100% of the beer marketplace. Any markets dominated by ABI distribution would simply fail to be protected by the PFJ and therefore this would not be in the public interest. Applying the cap statewide instead of nationwide would go a long way towards resolving this problem, and a statewide cap would not interfere with ABI's stated goal of developing people that understand distribution.

**The Record Should Be Developed as to Craft Access to Markets Where ABI Owns Distributors, Especially in Markets Where ABI Owned Distributors Comprise a Significant Portion of Local Markets**

The access of craft brewers to the market through effective distribution is perhaps the most important issue to be resolved through the PFJ. As such, it is vital that the record is fully developed concerning what effect ABI-owned distributorships have on the ability of craft to access retailers. Oklahoma ranks 48th among all the states for breweries per capita with less than 1 brewery per 100,000 residents.

It is especially important that the record reflect the impact of ABI-owned distribution on local markets where ABI-owned distributors serve a significant percentage of the retail market. As the PFJ is currently written, ABI can group its distributor purchases in any market it chooses as long as it stays under the cap nationally. Therefore, existing markets that are dominated by ABI-owned distributors should serve as the "canary in the coal mine" in terms of determining whether markets can be significantly harmed by ABI ownership. This information is vital in determining whether the PFJ is in the public interest. We ask that the Court focus on the Oklahoma market in particular in examining the effects of ABI owned distribution on beer markets.

BDO supports the entry of the Final Judgment and Consent Decree but urges DOJ and the Court to address the concerns outlined above in the manner suggested. Thanks for your consideration.

Brett Robinson

Brett Robinson

President
Beer Distributors of Oklahoma