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Washington, D.C. 20530

By email: Peter.J.Mucchetti@usdoj.gov

Re: United States v. Anheuser Busch InBEV SA/NV; Comments of Professor Stephen Calkins

Dear Mr. Mucchetti:

With considerable reluctance, I hereby submit this comment on the proposed remedy for the Anheuser-Busch InBev/SABMiller merger. I am reluctant because I am a huge fan of the good work the Antitrust Division is doing and I am not keen to criticize that work. Moreover, I fully understand that the Division was severely stretched – heck, you are currently in litigation on three substantial mergers – and must have felt extreme pressure to clear the decks by settling this potentially massive case. There is no question but that you understand the serious distribution issue and your heart is in the right place. I know that the Division doesn't want unnecessarily to aid and abet AB InBev's campaign to disrupt the craft beer movement. (And, of course, there would be nothing wrong (and everything right) with AB InBev winning this war by making better beer and offering it at lower prices.)

I also am reluctant because I was not born yesterday. As a former FTC General Counsel, I know how government agencies work. This matter is already history – the merger is moving forward. There is virtually no chance that the Division will try to revise this proposed final judgment significantly or that it would succeed if it did. Consent decrees are often compromises, and in the words of the Rolling Stones "you can't always get what you want". But since you are all such good people and your heart *is* in the right place, well, I didn't want to have this proposed remedy disappoint and then wonder whether I should have tried to prevent that disappointment.

I begin with a small procedural note. Comments are due 60 after publication in the Federal Register. I'm in time, I'm confident, because I checked with someone who checked with the Division. But why doesn't that Division web site just state the due date? Why make people call? Or try to figure out when there was publication in the Federal Register? Or how to count

holidays and weekends? At a minimum, the Division's website should conveniently list the date of publication, and explain how to count the 60 days. But there's really no reason, in 2016, not to list a specific due date.

On to the merits. This is a terribly important proposed Judgment because the future of American craft beer may depend on it. Just think where American beer drinkers would be had we had to rely on Budweiser, Miller, and Coors! Craft beers prove that competition, entry, and distribution options really are important. Yet AB InBev ("ABI") and MillerCoors are (a) gradually buying up craft brewers (see https://consumerist.com/2016/04/13/here-are-the-8-u-s-craft-brewers-bought-by-anheuser-busch-since-2011/); (b) trying to fool consumers into thinking that several of their brands (Blue Moon, Shocktop, etc.) are really craft beers; and then (c) trying to make it hard for real craft beers to compete. The Division approved AB InBev's latest step in this campaign, its acquisition of Devils Backbone, because according to the Division press release the ABI-SABMiller remedy will force ABI "to cease business practices and programs that restrict the ability and incentive of independent beer distributors to sell and promote the beers of ABI's rivals." (press release) The Devils Backbone press release stressed that an effective ABI/SABMiller remedy was essential because small 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." (Id.)

To those sentiments I say Amen. Unfortunately, it is not at all clear that the ABI/SABMiller remedy *is* an effective remedy. The proposed Judgment raises a series of questions, some of which I set out below:

Section V.B prevents certain acquisitions of distributors, and that's fine. But as I read it, it would do nothing to prevent ABI from identifying a distributor that specializes in craft beers, buying it, then forcing it to replace half or more of its true craft beers with Devils Backbone, Shocktop, Goose Island, Elysian, Four Peaks, Blue Point, 10 Barrel, Golden Road, Breckenridge Brewing, and other ABI brands that pretend to be craft beers–and, indeed from forcing the distributor to pressure pubs to devote increased numbers of taps to those and other ABI brands. Because the craft-specialist distributor in my hypo carried no ABI brands before being acquired, the acquisition would not be affected by Section V.B. Maybe there are no such distributors, but I doubt it. At this point about all one can ask is that the Division make clear that normal antitrust and FTC laws apply to ABI, and the failure of the Judgment to ban a practice does not imply that said practice is lawful.

Section V.D.1 prevents conditioning the availability of ABI beer on a distributor's "sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer." The Competitive Impact Statement ("CIS") describes the provision as banning conditioning of ABI beer on sales etc. "of Third-Party Brewers' beers." The Judgment should read the same. The point is to prevent interference with rival beers, not one single brand. (Even better: "of Third-Party Brewers' beers or one or more of any particular Third-Party Brewer's beers.") Of course,

ABI can achieve much of its purposes simply by conditioning availability of its beers on a certain share of a distributor's sales or retail placement, especially taps – the limited number of taps means that every one given to an ABI beer means one less opportunity for a craft beer. Again, the Division should at least make clear that the Judgment's failure to prohibit something does not make it legal.

Section V.D.2 conditions discounts and such on a distributor's sales, placement, etc. "of a Third-Party Brewer's Beer". The CIS seems to be inconsistent with this, and the Judgment should be corrected as discussed above.

Section V.D.3: Same issue.

Section V.D.4: Same issue.

Section V.D.5: Same issue. In addition, note the tension between this provision and the language that follows it. This bars ABI from preventing any independent distributor from using its "best efforts to sell, market, advertise, or promote any Third-Party Brewer's Beer, which may be defined 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." But "[n]otwithstanding the forgoing" nothing in the judgment prohibits ABI from requiring the distributor "to use best efforts to sell, market, advertise, or promote any Defendant ABI's Beer, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of Defendant ABI's Beer in a geographic area." Does the latter mean that ABI can require a distributor to devote its primary effort to promoting ABI beer? Can it require a distributor to increase the number of taps devoted to ABI beers? To increase the share of its sales enjoyed by ABI beers? In short, does this blessing undo much of what appears before it? This blessing of ABI applies "notwithstanding the foregoing," so presumably it trumps all that precedes it.

The above is particularly worrisome since there were reports of an ABI program to condition rebates on a distributor's ensuring that ABI beers represented 98% of its sales, or 95%, or 90%, etc. See AAI letter (April 25, 2016), at 8 n.36, available at http://www.antitrustinstitute.org/sites/default/files/AAI_ABInBev_SABMIller_4.25.16.pdf Would ABI be allowed, "notwithstanding" the rest of the Judgment, to continue or embark on such a program? A distributor giving 98% of its business to ABI is hardly going to meet the Judgment's "objective of ensuring that Third-Party Brewers have access to the distribution networks necessary to effectively compete with ABI and meet consumer demand" (CIS at 21).

ABI is then given a blessing to condition incentives, etc., on an independent distributor's "volume of sales of Defendant ABI's Beer, the retail placement of Defendant ABI's Beer, or on Defendant ABI's percentage of Beer industry sales in a geographic area . . . ." Is this an explicit blessing (or a blessing as a practical matter) of the 98% program discussed in the previous paragraph? If nothing else, this language simply must be changed to clarify that normal

antitrust and FTC rules apply and this does not provide perpetual immunity for all possible ABI exclusionary practices. (The wording doesn't say that the Judgment does not prohibit – it says "ABI may condition . . . .")

A separate question is whether this provision, too, trumps preceding provisions. The "notwithstanding" language is only on the previous sentence. I suspect it applies here, too, but one might as well be clear.

This language includes a proviso that any such ABI program may not "require or encourage" a distributor to give "less then best efforts" to selling "any Third-Party Brewer's Beer or to discontinue the distribution of a Third-Party Brewer's Beer." How would this apply to a distributor incentivized to give ABI 98% of its business? How can you use your "best efforts" while still trying to suppress sales? Or assume that ABI beers represent 60% of sales in a region, and ABI provides a massive incentive to increase them to 70%. That would "encourage" a distributor to favor ABI beers over craft beers, and thus would seem to "encourage" a distributor to discontinue or otherwise give less than best efforts to one or more craft beers. Would the Judgment permit it? (Again, the Division must make clear that the Judgment does not provide antitrust/FTC immunity.)

Section V.E: ABE can't disapprove of an appointment "based on the Independent Distributor's sales, marketing, . . . or retail placement of a Third-Party Brewer's Beer." What about based on sales of craft beers in general? That would seem just as harmful. What about failure to get ABI a certain percentage of taps, or a failure have ABI represent 90% of the distributor's sales?

Section V.G: This prohibits ABI's requiring the reporting of revenues, margins, sales volumes, etc. associated with the sale "of a Third-Party Brewer's Beer." This impliedly allows ABI to demand all this information with respect to craft beers as a class. Isn't that also potentially problematic? If nothing else, again the Judgment should make clear that normal antitrust and FTC rules apply to all of ABI's conduct.

* * * *

The CIS states that it "is designed 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" (p. 21). That is a noble aspiration. Given the way ABI and MillerCoors have been aggressively buying up craft beers and then using their distribution clout to push those beers into stores and onto taps, I fear it has only a limited chance of being realized. At this late date, probably the best for which one can hope is a resolution of some of the inconsistencies and ambiguities, a little clarification, and, if nothing else, a ringing declaration that nothing in this Judgment provides any justification or defense for conduct being challenged as violative of the antitrust laws or the Federal Trade Commission Act.

I fear that despite the Division's best intentions, it will not be long before DOJ or FTC employees — employees who, like current Division employees, are talented and well-meaning — will have to explore whether the antitrust laws and/or the FTC Act offer any hope of arresting the decline of American craft brewing, a decline that will have been caused not by high prices or low quality but by the ability of ABI and MillerCoors to use their clout anticompetitively to deny access to distribution and to the taps so essential to effective competition today. If nothing else, please make sure that when the agencies embark on that effort, ABI cannot respond by using this Judgment as a shield.

Yours truly,

Stephen Calkins