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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 National Beer Wholesalers Association Concerning the Proposed Final Judgment in *United States v. Anheuser-Busch InBev SA/NV and SABMiller plc*

Dear Mr. Mucchetti:

These comments are submitted on behalf of the National Beer Wholesalers Association (NBWA), a trade association that represents the interests of over 3,300 licensed, independent beer distribution permittees in the United States. NBWA's purpose is to provide leadership and support to its independent beer distributor members that operate in all 50 states and employ over 135,000 individuals. NBWA works to support the state-based, transparent and accountable system of alcohol distribution that protects American consumers, by promoting both competition and responsibility in the manufacture, distribution, sale and consumption of beer.

NBWA appreciates the dedication of the Antitrust Division of the Department of Justice (DOJ) in investigating the merger of the two largest beer brewers in the world. NBWA agrees with the stated mission of the Proposed Final Judgment (PFJ), which 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."[1] NBWA believes that the PFJ contains potential significant relief, which, if clarified and properly enforced, offers to preserve competition resulting in American consumers' continued access and choice to a variety of beer.

However, despite the significant protections afforded by the PFJ, ambiguities in language and gaps in the PFJ could permit Anheuser-Busch InBev (ABI) to continue raising barriers to access for rival brewers, exerting undue control over independent distribution, and using alternative means to diminish the ability of distributors to carry non-ABI beer. These comments identify some of the ambiguous language, seek clarification from the Division on its intent of some provisions in the PFJ, and where appropriate make recommendations for improving the PFJ to

[1] Competitive Impact Statement, *United States v. Anheuser-Busch InBev et al*, Case no. 16-cv-1483 at 21 (2016).

ensure adequate protections and to fulfill its stated purpose. Specifically, NBWA provides the following suggestions to address the concerns identified in its review of the PFJ:

- **The PFJ should specifically include Molson Coors.** Section V of the PFJ should be applicable to and enforceable against Molson Coors. The Division and major consumer groups have recognized the significant threat of post-merger coordination between ABI and Molson Coors. As the DOJ noticed, there is a substantial threat that Molson Coors will mirror ABI's distribution practices post-merger, especially since there is evidence of ongoing tacit collusion between ABI and Molson Coors. While the DOJ has this matter open, it should address both parties.

- **Ten percent cap on ABI's distribution ownership should be reviewed and clarified because it is insufficient to remedy competitive concerns.** DOJ has sought to appropriately limit ABI's ownership of distribution, however, the PFJ will not prevent ABI from engaging in harmful conduct related to the abusive ownership of distribution assets. This could occur through acquisitions of additional independent distributors or swapping of distribution assets in an effort to control distribution in specific geographic markets. In addition, NBWA has concerns that the calculation of the 10 percent cap is solely reliant on ABI's self-reported data. Without additional data from independent sources, NBWA remains concerned that the DOJ's finding that ABI-Owned Distributors currently distribute only 9 percent of ABI's volume of U.S. sales is potentially incorrect. NBWA recommends that ABI be prevented from making any additional distribution acquisitions.

- **Definition of "ABI-Owned Distributor" is narrow and should be revised to recognize the competitive impact of partial ownership interests.** The PFJ provides that ABI cannot acquire a distributor if ABI would obtain more than 50 percent of the distribution assets and the purchase exceeds the 10 percent nationwide cap. The PFJ's definition of an ABI-owned distributor does not factor in and could understate the control ABI has over distributors where ABI has a minority ownership stake. Undoubtedly, a distributor that is partially owned by ABI will have an incentive and ability to harm non-ABI brewers. Consistent with antitrust law, corporate law and Justice Department precedent, the definition of "ABI-Owned Distributor" should include partial ownership interests in the distributor.

- **The PFJ language should be interpreted to include prohibiting ABI from engaging in related practices that impede an independent distributor from carrying rival brewers' beer.** Section V.D. of the PFJ prohibits conduct that inhibits independent distributors' ability to carry non-ABI beer. While the protections are helpful, the provisions of the section are silent on certain related conduct that would permit ABI to condition independent distributors' ability to carry non-ABI beers through important chain of custody factors which may go beyond "the amount of sales…or the marketing, advertising, promotion, or retail placement of" non-ABI beers. Moreover, the PFJ allows ABI to require independent distributor's market spend to be equivalent to the distributor's revenue from the sale of ABI beer, but is silent on the situation in which a distributor acquires new brands. This can result in a disincentive for a distributor to acquire new brands or actively support new brands as much as it otherwise would, absent this allowance. NBWA recommends that Section V.D. be clarified to include related conduct such as storage, warehousing, transportation or administration of beer. NBWA also recommends the marketing spend provision be clarified to facilitate a distributor's acceptance of new entrants to the market.

- **The PFJ should be included as an amendment to ABI's Distributor Agreements**. Section V.I. of the PFJ requires ABI to prepare a written notification explaining the practices prohibited by Section V of the PFJ as well as any changes ABI is making to its programs or distributor agreements. Because greater clarity and protections are needed for independent distributors beyond a mere explanation of any changes to ABI's programs or distributor agreements, the PFJ should be clarified to require ABI to incorporate the provisions of Section V. into its distributor agreements.

- **Inconsistent language in the PFJ can hamper the goals of the PFJ.** The PFJ provides inconsistent language among provisions that have the same goal – prohibiting ABI's undue influence over independent distributors' management operations. This language should be clarified to be consistent and reduce ambiguities.

- **The ongoing Monitor Trustee of the market through the order should be strengthened.** Because of the significant competitive problems in the market and the substantial concentration the Division appropriately secured a Monitor Trustee to police the ongoing compliance with the judgment. As described below, ABI has engaged in a wide variety of tactics that threaten competition and consumer choice in the market. The Monitor Trustee can be a vital tool to ensure compliance with the order. To strengthen compliance with the judgment the DOJ should clarify that the term of the trustee is for the ten-year period of the order, permit public comment of the ABI compliance plan, and create a process for evaluating compliance with the judgment and considering extending the order.

- **The DOJ should require ABI to update its antitrust compliance policy.** Consistent with past DOJ enforcement actions where significant competitive concerns were raised, the DOJ has required an updating of defendants' antitrust compliance policies, coupled with employee training. In order to ensure the provisions of the PFJ protecting against harmful anticompetitive conduct toward distributors and rival third-party brewers, DOJ should require ABI to update its antitrust compliance policy with mandated employee training. The Monitor Trustee should be tasked with this responsibility.

- **Protection against termination of Independent distributors should be clarified.** The PFJ protects independent distributors from being terminated by ABI and Molson Coors as a result of this transaction. NBWA believes, however, that a termination of a distributor for carrying a rival, non-ABI beer would violate V.A. of the PFJ, but seek confirmation

The independence of beer distribution helps generate competition and consumer choice in the United States.

America's independent beer distributors play a unique and important role in the beer industry – they provide the world's best beer product variety to consumers; facilitate healthy competition; help brewers and importers of all sizes grow; balance a robust marketplace with public safety; and ensure local accountability to state and federal authorities. As the Chairman and Ranking Member of the Senate Judiciary Antitrust Subcommittee stated, "[t]he current strong and independent distribution system offers opportunities to craft beers, not just the large brewer, and has helped create the most diverse beer market in the world."[2] NBWA members take particular pride in their efforts to ensure that American consumers enjoy the greatest choice, variety and selection of beer. In that regard, America's independent beer distributors are uniquely positioned and incentivized to facilitate access to the market for new and innovative producers and products.

Competition and the benefits of competition – robust choice and fair pricing – depends upon the system of scaled independent distribution that reduces barriers to entry, reduces brewer and consumer costs, and fosters the explosion of choice and variety desired by consumers. With independent distribution a brewer has ready access to retailers and other outlets and has a ready-made efficient system of distribution. As the Division notes in the Competitive Impact Statement (CIS), "[e]ffective distribution is important for a brewer to be competitive in the industry."[3] In the most general terms, independent beer distributors purchase beer from a variety of breweries and then sell and deliver products to local, licensed retail accounts.[4]

Independent beer distributors provide access to capital and scale for brewers and importers as they can purchase larger quantities of product and also offer warehousing, marketing, promotion, sales and delivery of a heavy, climate-sensitive, perishable regulated product. In addition to these economies of scale, independent beer distributors also invest in labor, transportation, energy, regulatory compliance, product integrity and take on other relevant responsibilities related to the selling and transporting of beer. Independent beer distributors also invest considerable time, energy and resources in developing relationships with both large and small "on-premise" retailers (like restaurants and entertainment venues) and "off-premise" retailers (like grocery stores and convenience stores) in their markets. These distributor investments and relationships are an intangible value to brewers of all sizes by allowing them to receive the market attention that is necessary to compete, prosper and grow. The independence of distribution is important to remain free from the controls and influence of any one brewer in order to meet consumer demand of choice, variety and access.

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[2] Letter from Sens. Mike Lee and Amy Klobuchar to Renata Hesse, Principal Deputy Assistant Attorney General, U.S. Department of Justice (April 21, 2016).

[3] Competitive Impact Statement at 8

[4] Alcohol is regulated by the states under the 21st Amendment. As a result of this regulation most states have set up a three tier distribution of beer where the brewery sells to a local beer distributors who sells it to local, state licensed alcohol retailers. The United States Supreme Court has repeatedly upheld this system: "*States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is unquestionably legitimate*." *Granholm v. Heald*, 544 U.S. 460 (2005)

Under the Tunney Act standards, the Court should carefully scrutinize the PFJ.

Congress intended judicial review under the Tunney Act to be meaningful. The Tunney Act requires that "[b]efore entering any consent judgment proposed by the United States..., the court shall determine that the entry of such judgment is in the public interest."[5] In applying this "public interest" standard, the burden is on the government to "provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms."[6] And the reviewing Court has broad discretion to determine whether the judgment is in the "public interest." For example, the Court may hold hearings, take testimony of government officials or experts, appoint special masters, consultants or expert witnesses, admit amicus curiae or intervenors, review written comments, responses and objections, and "take other such action in the public interest as the court may deem appropriate."[7]

The 2004 Congressional amendments to this Act specifically overruled District of Columbia Circuit Court of Appeals and District Court precedent that was deemed overly deferential to Antitrust Division consent decrees.[8] In response to those decisions, Congress reemphasized its intention that courts reviewing consent decrees "make an independent, objective, and active determination without deference to the DOJ."[9] Courts are to provide an "independent safeguard" against "inadequate settlements"[10] Specifically, the Act was amended to compel reviewing courts to consider both "ambiguity" in the terms of the proposed remedy, as well as the "impact" of the proposed settlements on "competitors in the relevant market or markets."[11] Moreover, Congress adopted these 2004 amendments to highlight the expectation that an independent judiciary would oversee proposed settlements to ensure that those settlements met the needs of consumers.

Indeed, courts have made full use of these investigatory powers in the wake of the 2004 Tunney Act revisions to fully develop the record on important issues in Tunney Act proceedings. In the *United States v. SBC Communications, Inc.* proceeding, Judge Emmet Sullivan held several hearings to solicit information necessary for the court to "satisfy its judicial and statutory function."[12] These hearings resulted in substantial additional submissions by the DOJ and amici that clarified the order and developed important facts and analysis that was necessary in resolving the proceedings.

In *United States and Plaintiff States v. Comcast Corp., et al*, Judge Richard J. Leon held an evidentiary hearing before it entered the final judgment.[13] Additionally, Judge Leon required the DOJ to file two annual reports on the market impact of the consent decree. Judge Leon also

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[5] 16 U.S.C. §15(e)(1).
[6] *United States v. SBC*, 489 F.Supp. 2d 1, 16, (D.D.C. 2007), citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995).
[7] 15 U.S.C. § 16(f).
[8] For criticism of the overly deferential standard see Darren Bush and John J. Flynn, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"*, 34 Loy. U. Chi. L.J. 749 (2002-2003).
[9] *See* 150 Cong. Rec., S 3617 (April 2, 2004) (Statement of Sen. Kohl).
[10] *Id.*
[11] *Id.*; *see also* Pub. L. 108-327, § 221(b)(2) rewriting 15 U.S.C. § 16(e).
[12] *United States v. SBC Communications, Inc.*, 2007 WL 1020746, *8 (D.D.C. Mar. 29, 2007).
[13] Case No. 11-cv-00106 (2011).

retained jurisdiction for an annual hearing at which he could make a determination if the consent was still in the public interest.

The Tunney Act's public interest mandate requires that, at a minimum, the Court should fully understand the nature of competitive problems that exist and how the merger can impact those problems before reaching a decision on whether to accept or reject the PFJ as written, require modifications, or make other information requests from the parties. This merger and the PFJ are not like a typical merger enforcement actions. First, this merger and the ongoing competitive problems in the market were the subject of two Congressional hearings and significant analysis by public interest groups. [14] Second, the Division recognized the significance of the competitive problems by securing a Monitor Trustee to assist the Division and this Court with the enforcement of the judgment. Third, the PFJ goes beyond the typical remedy in a merger – divestiture – to restrict various types of anticompetitive conduct that could undermine the goals of the judgment and prevent the restoration of competition. Finally, the PFJ places the Court in the important position of facing potentially resolving future enforcement actions under the PFJ. Accordingly, NBWA provides background on the market to assist the Court in its public interest determination and its future interpretation and enforcement of the PFJ. This background will be helpful for the Court's public interest determination and any future enforcement actions under the order.

Comprehensive review by the Court is imperative given ABI's market conduct.

As the Division recognized, this merger would pose substantial competitive problems. Absent the divestiture, combining ABI's 45 percent market share with MillerCoors 27 percent market share would be a clear violation of the law in the national beer market and 58 metropolitan markets.[15] Appropriately the Division secured an entire divestiture of MillerCoors to Molson Coors. The Division recognized that a simple divestiture was inadequate to full remedy the competitive problems posed by the merger, so the PFJ "prohibits ABI from instituting or continuing practices and programs that" limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI's rivals, including high-end craft and import beers. Moreover, the settlement precludes ABI from acquiring beer distributors or brewers –

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[14] For additional information on competitive problems please see *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry: Hearing Before the S. Subcommittee on Antitrust, Competition Policy and Consumer Rights* (2015) (Testimonies of Diana Moss, Craig Purser, and Bob Pease) *available at* http://www.judiciary.senate.gov/meetings/ensuring-competition-remains-on-tap-the-ab-inbev/sabmiller-merger-and-the-state-of-competition-in-the-beer-industry; Letter from Diana Moss, President of the American Antitrust Institute to Renata Hesse, Competitive Concerns and Remedy in the Proposed Merger of AB InBev and SABMiller, *available at* http://www.antitrustinstitute.org/sites/default/files/AAI_ABInBev_SABMIller_4.25.16.pdf.

[15] DOJ's recognition of ABI's competitive problems goes well beyond its market share calculations which has the combined ABI and SABMiller in some metropolitan markets as high as 90 percent. And DOJ's market share determination was determined relying on IRI data. IRI data measures only one subset of off-premise sales, which are those sales to business that have reportable, synchronized scan data, such as big box stores. To date, IRI data fails to capture large segments of off-premise retail such as convenience stores and independent liquor stores; nor does the IRI data measure any on-premise sales, including bars, restaurants, stadiums or concert venues. As a result, the DOJ numbers miss nearly 50 percent of the beer sales in the U.S. meaning the combined ABI/SABMiller market shares are likely higher in numerous geographic markets.

including non-HSR reportable craft brewer acquisitions – without allowing for department review of the acquisition's likely competitive effects.[16]

To assist the Court in its public interest determination we provide this analysis of the competitive problems in the market.

Ongoing consolidation has led to higher prices and threatens competition.

Significant consolidation over the last decade has tremendously changed the landscape of the U.S. beer market. In 2002, the Miller Brewing Company was acquired by SAB (South African Brewery) forming SABMiller. In 2005, Coors and Molson merged into the Molson-Coors Brewing Company. Three years later, SABMiller and Molson-Coors formed the MillerCoors joint venture (MillerCoors JV) in the United States. The MillerCoors JV created the second largest beer supplier in the U.S., behind Anheuser-Busch, which resulted in a duopoly of major beer suppliers and beer distribution networks. In 2008, InBev acquired Anheuser-Busch to create ABI. In 2012-13, ABI purchased Grupo Modelo. There have also been significant acquisitions of regional, craft and imported beers by ABI, Molson Coors and SABMiller, as well as many acquisitions of independent distributorships by ABI.[17]

This consolidation has led to significant competitive problems in the market. Economic studies have demonstrated that the market consolidation has led to close coordination between ABI and MillerCoors, including claims of tacit coordination that has led to higher prices.[18] As the American Antitrust Institute (AAI) observed:

> There are a number of factors that complicate the business of crafting an acceptable remedy here. One is direct evidence of tacit coordination on price increases in the wake of the 2008 MillerCoors JV. Second, both AB InBev and Molson Coors have already taken, or signaled their intentions to engage in strategic maneuvering that could further restrain competition. For example, AB InBev has recently acquired more distribution (i.e., wholesale) capacity, increased their control of independent distributors (potentially to the detriment of smaller competitors), and purchased rival craft brewers. And Molson Coors has attempted to influence MillerCoors' capacity decisions before any divestiture has been approved.[19]
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> As the Division acknowledged in its complaint "for many years MillerCoors followed ABI price increases to a significant degree."[20]

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[16] *See generally*, CIS.
[17] Appended to this comment is a list of ABI and MillerCoors acquisitions of regional craft brewers and distributors (Appendix A).
[18] Nathan H. Miller & Matthew C. Weinberg, *Mergers Facilitate Tacit Collusion: Empirical Evidence from the U.S. Brewing Industry* (Mar. 25, 2015) (finding that while the MillerCoors joint venture resulted in merger-specific cost reductions, average retail prices increased post-consummation, likely because of tacit collusion).
[19] Letter from Diana Moss, President of AAI, to the Department of Justice (April 25, 2016) (Appended to this comment as Appendix B).
[20] Complaint at 22.

Acquisitions of distribution and craft brewers threaten competition.

The distribution tier has been constructed over the past 80 years and enables breweries of all sizes open and free access to market.[21] Within beer distribution there are generally two or three "legacy" brand networks within a local market. These legacy brand networks provide access to scale as the vast majority of the beer volume moves from brewery to retailers via these networks of distribution. Fifty years ago these distribution networks were dominated by brands like Anheuser-Busch, Schlitz and Falstaff; today, these legacy distributors typically sell ABI, Miller and/or Coors products, as well as numerous other brands, creating a rich, diverse portfolio. Other brewers and importers also use these distributors as they provide efficient access to retailers including the concentrated retail markets of chain grocery stores, convenience stores and restaurants. The other type of distributor are non-scaled distributors who carry beer but generally do not visit every account and concentrate more specifically on certain types of craft or import specialty markets. For purposes of competitive concern, the ability of this proposed merger's impact on scaled distribution is significant.

ABI is the fastest growing beer distributor and the largest beer distributor in the country. ABI's acquisition of distributors, including acquisitions of majority and minority interests threaten competition. Owning distribution can pose significant competitive problems because ABI-owned distributors rarely provide access for rival brewers. ABI has increasingly acquired distribution in order to foreclose access to rival brewers. The DOJ specifically recognizes this concern in its Complaint, stating "ABI has also purchased distributors in states in which those purchases are legal, allowing ABI directly to limit sales of ABI's high-end rivals."[22] ABI owns 23 distributorships in 10 states, acquiring 10 of them in the last three years.[23] In a letter to the DOJ, the AAI points out that ABI "has significant market power in the wholesale tier, directly owning over 50 percent of distribution in many geographic markets where it has direct or indirect ownership of a wholesaler."[24] ABI-owned distributors dominate many states, including California, Colorado and Oklahoma.

ABI-owned distributors essentially only sell ABI owned or controlled products.[25] When ABI purchases a distributor, the ABI-owned distributor restricts access for rival craft beers, increase costs for those rivals and reduce consumer choice. Among many other examples, this was demonstrated when ABI "acquired the distributors of an Oregon craft brewer in 2011 and 2012, [and] previously healthy growth in sales stalled until the brewer found alternative distributors."[26]

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[21] Neil Houghton, Jr. and Marin Gjaja, *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group Perspectives, *available at* https://www.bcgperspectives.com/content/articles/consumer_products_for_small_large_brewers_us_market_open/.

[22] Complaint at 12, *United States v. Anheuser-Busch InBev et al*, Case no. 16-cv-1483 (2016).

[23] According to published reports, ABI's attempts to acquire distributorships in California were under investigation by both California and U.S. antitrust authorities. *See AB InBev Says Talking to DOJ, California AG About Two Planned Distributor Deals*, Reuters (Oct. 12, 2015).

[24] Letter from Diana Moss, supra n. 19.

[25] CIS at 18.

[26] Letter from Diana Moss, supra n. 19 at 7.

J. Wilson, Minister of Iowa Beer, testifying before the United States Senate described how craft distribution in Iowa was reduced because of ABI acquisitions of distributors.[27]

ABI has suggested that distributor acquisitions are necessary for them to gain knowledge of the economics of distribution, but those efficiencies - if any - could be achieved with a far smaller level of ownership.[28]

Similarly, ABI is the largest owner of craft beers in the country and has made numerous acquisitions. Since 2011, ABI has acquired 11 craft brewers including some of the largest and fastest growing craft brewers such as Breckenridge, Devil's Backbone, Elysian and Goose Island. Collectively, ABI's craft brewer acquisitions combine to be one of the largest "craft brewers" in the country. ABI's intention is to replace rival third-party brewers with its acquired craft brands in its affiliated independent distributors. ABI's purchase of competitors, combined with its exclusive distributor ownership, allows ABI to favor its own brands which significantly compromises competition.

ABI restrictions on distributor independence threaten competition.

ABI's problematic competitive conduct however goes well beyond acquisitions of independent distributors and craft brewers. In the Complaint, CIS, and through the proposed remedies in the PFJ, DOJ highlights ABI's engagement in certain distribution related practices that impact rival brewers' ability to get their products to retailers. ABI employs "financial incentive programs that reward distributors based on the percentage of ABI beer that a distributor sells as compared to the beer of ABI competitors."[29]

In fact, in November 2015, while the DOJ was investigating this transaction, ABI imposed even more strenuous restrictions by modifying such a financial incentive program for its independent distributors designed to discourage distributors from carrying rival beers by withholding marketing dollars to those distributors. These programs were not based on providing incentives to sell more ABI beer, rather they were based on incentives to sell less non-ABI beer. As the CIS explains, "under a program known as the Voluntary Anheuser-Busch Incentive for Performance Program, ABI offers ABI-Affiliated Wholesalers that are 90 percent or more 'aligned' a payment for each case-equivalent of ABI beer they sell….this incentive program has the effect of impeding rival craft breweries from growing large enough to have the scale to better compete

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[27] J. Wilson, testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (December 8, 2015), *available at* https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Wilson%20Testimony.pdf.

[28] Statement of Carlos Brito, Chief Executive Officer of ABI, before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (December 8, 2015). Mr. Brito further stated that ABI self-distributes roughly 7 percent of its U.S. beer volume through owned wholesalers. Such a high level of self-distribution ownership is not necessary to simply understand the market. Moreover, it puts ABI at a competitively significant advantage over its rival brewers since it is able to exert its influence to often exclude non-ABI beers from distributorships.

[29] Complaint at 3.

with ABI."[30] Such percentage based incentive programs of ABI effectively penalize independent distributors who fail to cut or limit sales from ABI's rivals.[31]

ABI takes additional actions to limit access for rival beers. ABI encourages distributors to drop rival beers and replace it with an ABI owned "craft" to replace any lost sales. ABI may threaten the ability of a distributor to transfer its business. The pressure to drop rival beers does not end there. ABI executives have frequently visited distributors that choose to sell non-ABI products to encourage them otherwise, and publicly criticize distributors that carry non-ABI brands at trade meetings.[32]

Moreover, as the Division recognized ABI employs "contractual terms that limit a distributor's ability to promote and sell a competitor's beer."[33] For example, the CIS highlights that ABI's "Equity Agreement contains a number of provisions that are designed to encourage ABI-Affiliated Wholesalers to sell and promote ABI's beer brands instead of the beer brands of ABI's competitors…[such conduct] effectively limits an ABI-Affiliated Wholesaler's ability to promote brands of Third-Party Brewers through targeted sales incentives."[34] "ABI also promotes distributor exclusivity by providing payments to ABI-Affiliated Wholesalers based on…the amount of ABI beer that they sell relative to the beer of ABI's competitors."[35]

Specifically, ABI uses extensive contractual provisions allowing for control over independent distributor businesses. For example, ABI's equity agreement addresses the approval and disapproval of successor managers of its independent distributors. In an effort to influence the conduct of an independent distributor, ABI purports to have the right to require an independent distributor to sell a 10-25 percent equity interest in that independent distributor to an "approved" equity manager. Such ability effectively gives ABI management control over a distributor's entire business, not just ABI beer. ABI purports the right of last refusal over an independent distributor's sale of his business. In addition, ABI claims control over the marketing and branding of distributors' trucks and vehicle fleet; ABI seeks control over the printing of marketing material for rival brands on printers comingled with its funds; ABI claims that any employee compensation for sales for sales of ABI brands must be equal to or greater than the compensation for sales of any non-ABI brands; and distributors are prevented from providing advertising that features ABI to include any reference to any non-ABI products. Each of these practices may effectively handcuff a distributor from giving its best efforts to a rival beer. While any one of these practices standing alone may not rise to the level of an antitrust violation, these practices combined with other conduct greatly restrict non-ABI brewers' ability to engage and participate in the market on a level playing field, may significantly increase the costs of those rivals and may ultimately harm consumers.

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[30] CIS at 9-10.

[31] *See e.g.*, Tripp Mickle, *Craft Brewers Take Issue With AB InBev Distribution Plan*, THE WALL STREET JOURNAL (Dec. 7, 2015), *available at* http://www.wsj.com/articles/craft-brewers-take-issue-with-ab-inbev-distribution-plan-1449227668.

[32] *See* Steven Pearlstein, *Beer Merger Would Worsen Existing Duopoly by AB InBev, SABMiller*, WASH. POST (Feb. 2, 2013), https://www.washingtonpost.com/business/beer-merger-would-worsen-existing-duopoly-by-ab-inbevsabmiller/2013/02/01/efa78ce8-6b1c-11e2-af53-7b2b2a7510a8_story.html.

[33] Complaint at 3.

[34] CIS at 9.

[35] Id.

Third parties such as the AAI have underscored ABI's problematic market conduct. For example, AAI has discussed ABI's strategy to "unilaterally exercise market power by directly raising prices or reducing quality" and their ability to do so by "[foreclosing] rival brewers from access to distribution."[36] AAI notes that such "strategy has reportedly adversely affected craft brewers."[37]

The Division recognized and stated that the proposed merger would increase ABI's incentive and ability to further engage in such potentially anticompetitive practices. As a result, the Division appropriately sought to remedy such conduct through Section V of the PFJ. NBWA views the need for the PFJ to create a stronger enforcement framework to prohibit and prevent ABI from engaging in ongoing and future anticompetitive conduct. Therefore, it is necessary for the Court to carefully consider the PFJ; not just to address the proposed merger, but to address the potential cascading competitive concerns stemming from ABI's current market conduct.

Here are the specific areas of the PFJ that should be addressed:

Section V of the PFJ should be applicable to and enforceable against Molson Coors.

The Complaint notes the entire U.S. beer industry is impacted by this merger and proposes remedies to prevent potential competitive harm. The Complaint documents findings of actual and potential coordinated effects between ABI and MillerCoors/Molson Coors. In the CIS, the DOJ states that the divestiture of MillerCoors to Molson Coors "could facilitate coordination between ABI and Molson Coors in the United States."[38] The proposed merger and acquisition by Molson Coors of MillerCoors "will increase the number of highly concentrated markets across the world in which ABI competes directly against Molson Coors."[39] The DOJ states that "this multimarket contact could lead Molson Coors and ABI to be more accommodating to each other in the United States in order to avoid provoking a competitive response outside the United States or disrupting their cooperative business arrangements in other countries."[40]

There is a significant threat of coordination post-merger. To give one example MillerCoors decided to close a significant brewery while this merger was being investigated. Even after the PFJ was announced, MillerCoors appears to be copying ABI practices on purchasing rival brewers. MillerCoors has brought control of three additional craft breweries in Georgia, Oregon and Texas.[41] The DOJ also states that the likelihood of unilateral and coordinated effects depends on the "extent to which craft and other brewers in the United States are able to compete with ABI and Molson Coors."[42]

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[36] Letter from Diana Moss, supra n. 19 at 5.
[37] Id. at 7.
[38] CIS at 12.
[39] *Id.*
[40] *Id.*
[41] John Kell, MillerCoors Inks Third Craft Brewer Deal This Summer, Fortune (August 11, 2016), *available at* http://fortune.com/2016/08/11/millercoors-craft-brewer-deal/.
[42] *Id.* (emphasis added).

NBWA also agrees with the DOJ's stated reasoning behind including distribution related relief in the PFJ. The DOJ states that "[b]y removing obstacles to effective distribution, competition in the high-end beer segment can continue to serve as an important constraint on the ability of ABI and MillerCoors (Molson Coors) to raise—either unilaterally or through coordination—beer prices in the United States."[43] The risk of collusion post-merger is significant, as recognized by the AAI in its letter to Acting Assistant Attorney General Renata Hesse. The AAI states that "both AB InBev and Molson Coors have already taken, or signaled their intentions to engage in strategic maneuvering that could further restrain competition."[44] The AAI also states that "taking an independent SABMiller out of the competitive mix may strengthen incentives for Molson Coors to coordinate with ABI after the merger."[45] This risk is not merely theoretical. A study by Nathan Miller and Matthew Weinberg found that prices increased abruptly by 6 percent in the wake of the MillerCoors joint venture, and that this price increase was best explained by tacit collusion.[46] The competitive threats recognized by the DOJ are real and have a substantial likelihood of occurring.

Extending the order to Molson Coors is vital for several reasons. First, Section V.A. of the PFJ requires ABI to require Molson Coors to agree "that they will not cite the Transaction or the divestiture required by Section IV or VI of this Final Judgment as a basis for modifying, renegotiating, or terminating any contract with any Distributor."[47] NBWA agrees with the terms of this provision, but does not agree that the manner the provision is enforced will be effective. Requiring ABI, a defendant, to require a third-party to do anything is not as strong as requiring both largest participants in the US market to comply. First, how can ABI require Molson Coors, an independent company to agree to do something? Second, the DOJ cannot reasonably enforce this provision against ABI because ABI has no control over Molson Coors. Third, there must be a direct relationship between the DOJ and the ultimate target of enforcement to hold Molson Coors responsible so Molson Coors must be part of the PFJ. Like in the game of telephone, the intended language of such a requirement might be morphed and its purpose frustrated by the time it is enshrined in this secondary agreement.

The Division has recognized the need to extend merger orders to the acquirer of divested assets in several cases. For example, in *U.S. v. ABI and Grupo Modelo* ("*Modelo*"),[48] the DOJ recognized that it was necessary to join the firm acquiring the divestiture assets ("Constellation") as a defendant in order to enforce provisions against the acquiring firm.[49] Constellation is a much smaller player in the US beer market compared to Molson Coors/MillerCoors. The DOJ joined Constellation because, under the terms of the proposed final judgment, it was required to expand the Piedras Negras Brewery to serve current and future U.S. demand.[50] This was an important

[43] *Id.* at 15 (emphasis added).
[44] Letter from Diana Moss, supra n. 19 at 2.
[45] *Id.*
[46] *See* Nathan Miller, supra n. 18.
[47] PFJ at 15.
[48] Case No. 13-cv-00127 (Oct. 24, 2013).
[49] Final Judgment, *Anheuser-Busch InBev and Grupo Modelo*, Case No. 13-cv-00127 (Oct. 24, 2013), *available at* https://www.justice.gov/atr/case-document/file/486311/download.
[50] Competitive Impact Statement, *Anheuser-Busch InBev and Grupo Modelo* Case No. 13-cv-00127 at 3 (April 19, 2013), *available at* https://www.justice.gov/atr/case-document/file/486551/download.

provision to the final judgment, and the DOJ needed to be able to directly hold Constellation responsible to the terms of this provision.

Second, the DOJ has recognized in the instant case that Molson Coors' conduct must be limited in some fashion in order to prevent follow-on anticompetitive behavior by Molson Coors.[51] However, the DOJ does not appear to have direct authority over Molson Coors under the terms of the PFJ unless it includes Molson Coors as part of the PFJ. In addition, the DOJ has only sought to limit Molson Coors post-transaction conduct as to modifying, renegotiating, or terminating distributor contracts but has not required Molson Coors to agree to some of the same conduct remedies that ABI did. Through the acquisition of the divested assets, Molson Coors will become the second largest brewer in the United States. As demonstrated in the DOJ's Complaint and CIS, the DOJ discovered evidence that indicated the potential for coordinated conduct going forward so there appears to be sufficient support for including Molson Coors in the PFJ.[52]

Recommendation: *The DOJ should have the same authority to directly enforce the PFJ directly against Molson Coors. Molson Coors should be bound by all the provisions of Section V.*

The proposed 10 percent cap on ABI's distribution ownership should be reviewed and clarified because it is insufficient to remedy competitive concerns related to ABI's ownership of distribution.

Since 2008, ABI has acquired 12 independent distributors across 9 states. Because of this activity, it is the fastest growing and largest beer distributor in the United States. These acquisitions are part of ABI's plan to curb competition by limiting rival brewers' distribution options. ABI-owned distributors do not solicit third-party brewers, which ultimately raises rival brewers' costs and limits their options to market their products. Scaled distribution options for rival brewers are removed by ABI ownership of distribution. Indeed, ABI's owned distributors sell nearly 100 percent ABI-owned or partially owned products,[53] and in geographic markets in which ABI owns distribution, it has the influence to limit independent distributor's carrying of other non-ABI beers by scuttling seamless distribution networks sought by rival brewers.

Moreover, an ongoing strategy of ABI is to engage in "horse-trading" (or distributor swaps) to expand its influence over distribution. Such horse-trading has harmful competitive impacts on the market as it raises rival brewers' cost to distribute their products. Horse trading occurs when ABI sells off assets in one state to a friendly buyer, and purchases distributors in another state

[51] The concern of follow on behavior to ABI by Molson Coors is real. Molson Coors has previously moved to terminate large swaths of distributors based on consolidation in the brewer tier. *See* David Kesmodel, MillerCoors Distributors Sue Over Cancelled Deals, Wall St. J. (Sept. 4, 2008), available at http://www.wsj.com/articles/SB122048149730296651.

[52] The AAI appropriately recommended the DOJ include Molson Coors in any remedy (1) preventing ABI or Molson Coors "from foreclosing rivals through enhanced control over independent distribution… [(2) requiring] enforceable nondiscrimination provisions that prevent AB InBev or Molson Coors from pressuring any independent distributor from favoring their brands over rival brands." The AAI also called for provisions requiring the "governing [of] an open and transparent process by which former MillerCoors distributors transition to Molson Coors." Letter from Diana Moss, supra n. 19 at 12.

[53] CIS at 18.

where it can develop a strong footprint. The acquisition of additional assets could give ABI substantial control over distribution in a certain geographic market, such as California. For example, in 2014, ABI purchased an additional independent distributor in Kentucky. In 2015, Kentucky passed a law banning brewer ownership of distributors. ABI then sold the Kentucky operations to an ABI distributor, which in turn agreed to sell its Colorado distributors to ABI.[54] As noted by the AAI, such swaps can significantly reduce competition as a way of expanding and consolidating regional footprints and accruing market power.[55]

The amount of ABI ownership of distribution seems unclear based on the public record. (A subject addressed in more detail below). Before Congress, ABI CEO Carlos Brito testified that 7 percent of ABI beer was self-distributed, but the CIS states that ownership is 9 percent. The PFJ's 10 percent cap on ABI's ownership of distribution is crucial to the independent distributors' ability to meet market demands, and not the demands of ABI.

Limiting ABI ownership is essential to protecting competition in the market. This is even more so in the wake of Mr. Brito's admission that there are no significant vertical integration efficiencies for ABI's distribution ownership.[56] At the December 2015 hearing before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, when asked the reasons why ABI acquired distributors, Brito responded that it was a means to "understand" the market and develop people who understand the distribution system.[57] Mr. Brito failed to provide any procompetitive justification for owning or acquiring distributors and none for being the largest distributor in the country.

Despite the DOJ's attempt to remedy the competitive problems posed by ABI's control by capping ownership of distributors at an elusive and hard to measure 10 percent of ABI's nationwide volume, that remedy falls far short on what is actually required to resolve the competitive concerns because (1) the PFJ allows for ABI to continue to acquire distributors and it can use the potential growth opportunity and distributor trading to dominate individual markets; (2) the calculations of ABI's volume figures rely on ABI's own data; and (3) it is unclear if the Craft Brew Alliance is counted as part of the calculation of ABI's self-distributed volume.

First, despite the DOJ's acknowledgement that ABI is engaging in harmful conduct, the PFJ provides ABI the green light to purchase and swap additional distribution assets which would further impact rivals' ability to compete in various geographic markets. The DOJ states in its Complaint that ABI is currently distributing 9 percent of its nationwide volume though ABI-Owned distributors. Thus, the additional 1 percent could be equivalent to approximately 15 million cases of beer. The average beer distributor carries around 2.5 million cases in a given year.[58]

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[54] These series of transaction gave ABI ownership of two additional distributorships in two major Colorado metropolitan markets – Loveland/Ft. Collins and Colorado Springs – adding to its current ownership of distribution in Metro Denver.

[55] *See* Letter from Diana Moss, supra n. 19.

[56] *See* statement of Carlos Brito, supra n. 28.

[57] Id.

[58] Distributor Productivity Report, National Beer Wholesalers Association (2015).

Distribution markets are local, not national. ABI could use the 1 percent cushion and distributor "horse-trading" to expand and dominate new local markets contrary to the spirit of the PFJ. Furthermore, there is nothing magic or scientific about the 10 percent nationwide cap because it does not represent anything related to ABI's anticompetitive conduct or strategy with respect to controlling distribution in various geographic markets.

Recommendation: *ABI should be prohibited from acquiring any additional distribution volume than what it held as of the date of the PFJ for the length of the PFJ. Accordingly, the PFJ should be modified to reflect this.*

Second, the PFJ provides a specific calculation for how the 10 percent cap is derived at for purposes of future acquisitions.[59] The PFJ states that the volume calculation is reliant on ABI's data of a "twelve month trailing average as used in Defendant ABI's ordinary course" which is derived through ABI's internal data collection system known as BudNet.[60] Currently, there is no method for independently verifying the accuracy of ABI's self-reporting BudNet data and the accuracy of its reporting to the DOJ. As a case in point, Mr. Brito testified before the Senate Antitrust Subcommittee that ABI sells approximately 7 percent of its volume through ABI-Owned distributors, whereas the DOJ's complaint alleges that it is 9 percent. This lack of transparency and public confirmation could lead to the selective manipulation of data by ABI to demonstrate lower sales volumes to retailers.

This confusion in measurement of ABI volume coupled with the competitive harm imposed by ABI owned distribution, the lack of cognizable procompetitive benefit stated by ABI and the competitive concerns of disruptive horse trading strongly suggests that the status quo be maintained as opposed to the expansion of this anticompetitive activity by ABI.

Recommendation: *ABI should provide periodic publication of BudNet data to the public, as well as clarification on what specific oversight the DOJ will have of any necessary calculations of ABI's percentage based on future transactions to ensure it does not exceed the 10 percent ownership cap. Again, the fairest, most transparent, and easiest solution is to prohibit ABI from making <u>any</u> additional acquisitions of distributors going forward for the length of the PFJ.*

Third, the PFJ does not indicate whether sales made by the Craft Brew Alliance (CBA) is calculated as part of the 10 percent sales volume cap, which NBWA believes it should be. CBA is the consolidated company of Redhook, Widmer, Kona Brewing and other brands. While ABI retains a 31.6 percent share of the company, the company's unique business relationships with ABI provide for such a substantial degree of control that CBA sales should be designated as ABI sales for the purposes of the final judgment. ABI's ownership share may represent the largest equity ownership block in the hands of a single entity. By special agreement, this equity ownership guarantees ABI unique control over CBA, including: (1) two seats on CBA's Board of Directors; (2) a guaranteed seat on almost all CBA Board Committees; and (3) authority to control major actions of CBA, such as acquisition or sale of asset agreements with affiliates, and distribution of CBA brands through channels other than the ABI national distribution network.[61]

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[59] *See* Attachment C to PFJ.
[60] Id.
[61] CBA 10-K at 7-8 (December 31, 2015).

Further, CBA has entered into a unique and exclusive mast distribution agreement with ABI. The agreement effectively makes ABI the purchaser of over 90 percent of the beer produced by CBA. ABI is paid a premium by CBA on each case of beer sold through this agreement. This beer is then sold only though the ABI distributor network by both independent and ABI-owned distributors. CBA does not have the ability to sell its beer to an independent distributor without the consent of ABI.[62] This unique agreement was recently renewed by CBA and ABI and will not potentially expire until 2028.[63]

Recommendation: *CBA should be calculated as ABI sales for the purposes of Section V.B. of the final judgment.*

The definition of "ABI-Owned Distributor" is overly narrow and should be revised to reflect a partial ownership interest.

As previously noted, the DOJ discovered through its investigation that ABI harmed beer markets through its strategy to vertically integrate with its acquisitions of distributors.[64] However, the PFJ and CIS fail to recognize and acknowledge that even a partial ownership of a distributor by ABI can also harm competition. ABI has a minority ownership interest in a number of independent distributors and substantial influence and control over those distributors. These distributors are hampered in their efforts to bring third-party brewers' beer to market. Many distributors receive various forms of compensation from ABI either in forms of financing for purchase or operating expenses. Presumably, these transactions are governed by shareholder or financial agreements that give ABI control over the operation. By not acknowledging that ABI exerts influence over the distributor in these situations, the DOJ understates the competitive problems that exist in the distribution markets by ABI ownership and control.

Section V.B. pf the PFJ states that "ABI shall not acquire any equity interests in, or any ownership or control of the assets of, a Distributor if (i) such acquisition would transform said Distributor into an ABI-Owned Distributor…" ABI-Owned Distributor is defined as "any Distributor in which ABI owns more than 50 percent of the outstanding equity interests or more than 50 percent of the assets." Only applying the PFJ to distributors where ABI owns a majority share is insufficient to protect the market. As drafted, the PFJ does not include situations where ABI owns a 50 percent ownership interest or less.[65] Thus, the PFJ understates the control that ABI has over independent distributors. Failure to clarify this provision could allow ABI to subvert the will of this PFJ with a series of 49 percent ownership interests.

Antitrust law and DOJ enforcement actions recognize that "even a minority interest, can raise antitrust concerns."[66] And as a general matter, cases in which a court has held an acquisition of a

[62] Id.
[63] CBA Master Distribution Agreement with ABI, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=95666&p=irol-newsArticle&ID=2196965.
[64] *See, e.g.*, Complaint at 12.
[65] Federal alcohol law recognizes the importance of tracking ownership interests. See 27 CFR 6..152 (c) "*Ownership by an industry member of less than a 100 percent interest in a retailer…*":
[66] Mike Moiseyev, *What's the interest in partial interests?*, Bureau of Competition, Federal Trade Commission (May 9, 2016). (Moiseyev is an Assistant Director of the Bureau of Competition in the FTC). Indeed, numerous

minority interest to be in violation of Section 7 of the Clayton Act have involved acquisitions resulting in holdings of at least 15 percent.[67] In fact, the Horizontal Merger Guidelines explain that even a partial interest in an entity may change a competitor's incentives in a way that substantially lessens competition.[68] In other words, even absent a majority interest ownership in a distributor, ABI still has the ability to influence distributors to impede the carrying of third-party brewers' beers contrary to the goals of the PFJ.

The case law recognizes that minority control can result in competitive harm. In 1957, the Supreme Court agreed with the DOJ that the acquisition of 23 percent of a company could raise competition concerns when it conferred influence over vertical supply issues.[69] In *E.I. du Pont de Nemours & Co.*, du Pont made substantial investments in General Motors with the intention and result of increasing General Motors purchase of du Pont products over rival products, and du Pont used its influence to gather intelligence on General Motors purchases of competitor products.[70] The Supreme Court found that this was sufficient to find that "there [was] a reasonable probability that the acquisition [was] likely to result in the condemned [section 7] restraints" even though the acquisition was of a minority interest.[71]

Not only has the Supreme Court and the DOJ recognized that partial ownership interests can result in anticompetitive effects, but so has the Federal Trade Commission (FTC). In 2007, the FTC brought an enforcement action involving partial acquisitions by two private equity firms where such minority ownership interest was deemed likely to lead to potential anticompetitive conduct. In the *Matter of TC Group, LLC*.[72] the FTC challenged a 22.6 percent equity interest in Kinder Morgan Inc. (KMI) by two private equity funds. The FTC alleged that that the private equity funds would hold interest in both KMI and a major competitor of KMI, and that the funds would be in a position to reduce competition between KMI and its competitor through its ability to appoint board members at both companies and by exchanging competitively sensitive non-public information between the competitors.[73]

Additionally, corporate law recognizes minority control as a practical matter. For example, it is established in Delaware law that control of a corporation by a minority shareholder can be shown "through actual control of corporation conduct."[74] In Delaware, it was successfully shown that a minority owner controlled a corporation when it influenced non-controlled directors "because of its position as a significant stockholder and not because they decided in the exercise of their own business judgment that [the minority shareholder's] position was correct."[75]

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studies have shown that horizontal shareholding, which is when the same investors own significant – although minority – shares of a number of industry competitors, results in higher prices and consumer harm. Einer Elhauge, Horizontal Shareholding, 109 Harvard Law Review 1267 (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632024.

[67] Samuel R. Miller, Antitrust Concerns From Partial Ownership Interest Acquisitions: New Developments in the European Union and the United States, CPI Antitrust Chronicle (January 2012).

[68] 2010 Horizontal Merger Guidelines §13.

[69] *United States v. E.I. du Pont de Nemours & Co*., 353 U.S. 586, 597–606 (1957).

[70] *Id.* at 603.

[71] *Id.* at 607.

[72] In the Matter of TC Group, LLC, FTC File No., 061-0197 (January 25, 2007) (Decision and Order).

[73] *Id*.

[74] *Citron v. Fairchild Camera & Instrument Corp*., 569 A.2d 53, 70 (Del. 1989) (quotations and citation omitted).

[75] *Kahn v. Lynch Communication Systems*, 638 A. 2d 1110, 1115 (Del. 1994) (quotations and citations omitted).

Holding a minority partial ownership interest can result in competitive concerns in a number of ways.[76] *First, a minority or partial ownership interest can still give ABI substantial influence over the competitive decisions of a distributor through board representation or having veto power over significant issues such as budget or strategy*.[77] Wherever ABI has a minority interest, ABI presumably requires a shareholder agreement that provides ABI with veto power over key decisions within the distributorship business, including whether to carry and sell non-ABI beer.[78] For example, the current contractual guidelines require the appointment of an ABI-approved successor equity manager in all ABI-affiliated distributorships. In certain instances, ABI has refused to approve the independent distributor's choice for successor manager and instead suggests its own hand-picked equity manager to join the independent distributor's business. ABI's ability to put in place ABI exclusive professionals and former company employees in key decision making positions can strengthen its control and influence over the distributor's business and harms other brewers' access to that distribution outlet. NBWA applauds the provision found in Section V.E. of the PFJ, which prohibits ABI from disapproving an independent distributor's selection of a general or successor manager based on the distributor's sales or retail placement of a third-party brewer's beer, however this provision will not necessarily curb ABI's control and influence through ABI-appointed managers.

Second, a minority interest of a vertical company can provide a competitor with non-public, competitively sensitive information, which can increase the risk of anticompetitive unilateral or competitive behavior.[79] In 2006, the FTC brought an enforcement action against Boston Scientific's acquisition of Guidant.[80] At the time of the proposed acquisition, Boston Scientific held a 10-15 percent equity interest in Cameron Healthcare, a competitor of Guidant. The Commission was concerned that the combined Boston Scientific-Guidant would have access to non-public information about Cameron's operations, and the ability to therefore exercise control over Cameron's decision making. There is a similar concern with ABI when it acquires even partial ownership interests in distributors. To the extent that ABI has even a minority ownership in an independent distributor, it has the ability to gain access to sales data for third-party brewer's beer and can use that competitively sensitive, non-public information to impede decisions of distributors with respect to third-party brewers' beer. This result would directly conflict with the Section V.G. of the PFJ which seeks to remove ABI's ability to have access to data of third-party brewers.

Third, it is well established that corporations can have separate voting and non-voting classes of stock. ABI can purchase less than 50 percent of a distributor as measured by equity or assets but still have control over a distributor through a separate voting class of stock. This ownership structure would allow ABI to have control over any number of distributors without counting

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[76] The recognition of the power of ABI control is not a matter of first impression. In the previous DOJ order allowed Constellation to remove its brands from ABI Owned distributors. That was interpreted by Constellation to allow them to remove their brands from an ABI distributor that was 49 percent owned by ABI.
[77] Mike Moiseyev, supra n. 66.
[78] *See, e.g.*, Letter from Diana Moss, supra n. 19 ("[Even] in instances where AB InBev does not own distribution, it still exerts significant control over distributors through practices that limit or even eliminate a rivals' ability to distribute their products to customers.").
[79] Mike Moiseyev, supra n. 66.
[80] In the Matter of Boston Scientific Corporation, et al., FTC File No. 061-0046 (July 25, 2006).

towards the cap in the PFJ. The language of the PFJ incentivizes ABI to acquire less than 50 percent ownership of distributorships going forward and still structure the deal so ABI has significant control over the distributor's decision making authority. If the provision is left unchanged there could be nothing in the PFJ to regulate or stop ABI from seeking to acquire 49 percent equity interest or 49 percent of the assets in every independent distributor in the United States, giving ABI effective control of more independent distribution contrary to the state goals of the PFJ.

Another way that ABI seeks to expand its direct control over scaled ABI distribution is the exercise of its purported right to match and redirect a contract for sale of a distributorship. While the PFJ notes that ABI shall not use an independent distributors' decision to carry third-party brewers as a reason to prevent the sale, it is silent on the ABI actions of redirecting the sale. The volume of any transaction that is under this match and redirect should be included in the ABI volume as it is direct control over the independent beer distribution system. While there are myriad legal issues in this action by ABI under its contract, the overlaying issue is it is exercising direct involvement in distribution and for purposes of the PFJ that action should be counted against its 10 percent.

Finally, ABI can gain control over a distributor when its share is combined with an ABI-exclusive partisan equity manager, including those installed through its minority influence described above. Under many current agreements, ABI purports to require an equity manager be permitted to purchase at least 25 percent ownership in the distributor over a specified period of time. There are many situations in which ABI will be able to be co-owners with an ABI-exclusive partisan that always votes according to ABI's interests. This use of these partisan parties could give ABI control of any number of distributors without counting these distributors as ABI-Owned Distributors if ABI itself does not own the requisite 51 percent equity or asset share. Such a strategy would be against the spirit of the PFJ but would not be unusual under already existing industry practices.

Recommendation: *The PFJ should be modified to define the volume of "ABI-Owned Distributor" as any distributor in which ABI owns any interest in a distributor including the exercise of its purported right to "match and redirect." In the alternative, an "ABI-Owned Distributor" shall be defined as any distributor in which ABI owns more than 10 percent of the outstanding equity interests, more than 20 percent of the assets or as shown through control over business conduct.*[81]

In order to meet consumer demand effectively, independent distributors must be free from practices that impede their ability to promote and sell third-party beer.

Through incentive programs to promote ABI beers at the expense of rival brands, influence over distribution management, substantial control through the equity agreement and by other means to control independent distributors, the DOJ has found that ABI can inhibit craft and rival brewers' access to the market through ABI's distribution partners. NBWA welcomes the provisions in Section V.D. which are intended to "prohibit ABI from instituting or continuing any practices or

[81] "Actual control of business conduct" mirrors the standard found in Delaware law. *See Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989).

programs that impede or dis-incentivize ABI-Affiliated Wholesalers from selling, marketing, advertising, promoting or maximizing the retail placement of the beers of Third-Party Brewers, including the beers of high-end brewers."[82] In order for the PFJ to be effective, independent distributors need to be free from such practices that impede their ability to meet consumer demand and sell into the market the products that consumers want. NBWA recommends clarifications or changes in the following provisions which are necessary to accomplish this goal.

A. The Language of section V.D. should be amended or clarified.

Section V.D. limits ABI's conditioning of practices or programs specifically based upon "the amount of sales…or the marketing, advertising, promotion, or retail placement of" third-party brewers' beer. In addition to sales, marketing, advertising, promotion and retail placement, all brewers require specific conditions of its independent distributors in the chain of custody of their beer. In other words, ABI contractually requires specific storage, warehousing, transportation and administration of its beer that could conflict with the contractual or business operations of third-party beers at independent distributors. As a result, NBWA has concerns that the limiting language in the PFJ may still allow ABI to condition its relationship with an independent distributor based on the chain of custody factors related to third-party brewers' beer. For example, ABI may seek to penalize an independent distributor for storing third-party beers in the same space or on the same pallet in its warehouse, or transporting a certain percentage of third-party beers on the same truck as ABI beers.

Recommendations: *Section V.D. of the PFJ should be modified as follows:*

> *Defendant ABI shall not unilaterally, or pursuant to the terms of any contract or agreement, provide any reward or penalty to, or in any other way condition its relationship with, an Independent Distributor or any employees or agents of that Independent Distributor based upon the amount of sales the Independent Distributor makes of a Third-Party Brewer's Beers or the marketing, advertising, promotion, retail placement, storage, warehousing, transportation or administration of such Beer….*[83]
>
> *Or in the alternative the DOJ should clarify that the terms "sales, marketing, advertising, promotion and retail placement" activities of an independent beer distribution company include its activities to warehouse, manage, transport and administer its operations.*

B. The marketing spend proportional to ABI revenue could serve as a disincentive for a distributor to acquire new brands.

In addition to the prohibitions enumerated in Section V.D. of the PFJ, the section also contains allowance of certain ABI practices. One such allowance states that:

> Defendant ABI may require an Independent Distributor to allocate to Defendant ABI's Beer a proportion of the Independent Distributor's annual spending on Beer promotions

[82] CIS at 19.
[83] NBWA further requests that the broader language suggested also be included in Section V.E and V. F. for the same reasoning explained above.

> and incentives not to exceed the proportion of revenues that Defendant ABI's Beer constitutes in the Independent Distributor's overall revenue for Beer sales in the preceding year.

While there may have been a basis for this provision, this carve out is so expansive that it may undermine the purposes of the order and further restrict the ability of a distributor to handle and promote rival beers. Marketing is necessarily a forward-looking investment, while the provision sets marketing spend on backward looking sales data. This creates a major issue specifically in the instance of when a distributor seeks to acquire a new brand or a brewery they serve wishes to launch a new brand. In this instance, the new brand is not reflected in the preceding year's data and therefore cannot be fairly accounted for in calculating allowable forward looking marketing spend. This can be highly problematic because distributors often wish to allocate marketing spend to a new product based on projected future demand. This marketing spend is necessary to inform the public of the existence of a new product and is generally procompetitive.

As an example, a theoretical independent distributor spent 100 percent of its revenue on ABI products in 2015 because it is an ABI exclusive distributor at the time. This distributor then acquired the rights to Yuengling in 2016. The distributor wanted to spend a portion of its marketing budget to support the Yuengling line of products in 2016 based on projected demand. However, Yuengling products were not reflected in 2015 revenue for beer sales because the distributor did not have the rights to distribute Yuengling at that time. The PFJ is unclear on how the distributor is to resolve this situation, and this confusion could cause the distributor to allocate no marketing spend to Yuengling products.

Resolving this situation is important because ABI is exclusive in roughly thirty-eight 38 percent of the independent distributors through which it distributes, meaning those distributors only carry ABI products.[84] These exclusive distributors need to be independent when it comes to running their business to calculate their marketing spend in the event that they are interested in taking on third-party brewers' beers. Because the PFJ is silent, ABI could theoretically require the independent distributor devote 100 percent of its marketing spend on ABI beer in the year these distributors acquire the rights to new brands, greatly handicapping the launch of these new brands. In such a situation, this ABI imposed interpretation of the PFJ would be a substantial deterrent for an independent distributor to take on a third-party brewer's brand and contrary to the stated intent of the Complaint, CIS and PFJ.

This same issue exists even in non-exclusive distributors, because a distributor must allocate new marketing spend for new products regardless of its prior year's sales data in order for these new products to be successful. The only difference is that a non-exclusive distributor has the option of greatly increasing its marketing spend of ABI products in order to maintain the appropriate proportion under the previous year's sales data. This is inefficient for distributors and would likely lead to wasteful marketing spend at diminishing returns. These non-exclusive distributors would also find new brands unattractive if ABI seeks to impose this interpretation of the PFJ.

Moreover, this ABI imposed interpretation would also inhibit new brands from turning to ABI-affiliated distributors in their attempts to gain to access to the consumer market through scaled

[84] Tripp Mickle, supra n. 31.

distribution. As a result of this ABI interpretation, third-party brewers may be turned off by ABI-affiliated distributors who cannot spend an appropriate amount of money marketing their brands.

Recommendation: *The PFJ should be clarified in such a way that new brands do not count toward this calculation until they are fairly reflected in a full year's sales data*.

In addition, NBWA seeks clarification on issues related to the information ABI is permitted to receive under Section V.D. of the PFJ. Section V.G. of the PFJ explicitly bars ABI from receiving information concerning "revenues, profits, margins, costs, sales volumes, or other financial information associated with the purchase, sale, or distribution of a Third-Party Brewer's Beer." The DOJ states that this provision is "designed to ensure that ABI-Affiliated Wholesalers are free to carry and promote rival brands without concern that ABI will use its control over management and ownership changes to punish the wholesaler."[85] NBWA agrees with the DOJ that this provision is necessary to accomplish this goal.

However, Section V.G. has a carve out that allows ABI to request information on the percentage of total beer revenues received by the wholesaler attributable to the sale of ABI' s beer. This information allows ABI to infer the aggregated revenue attributable to non-ABI beer. This information is sufficient to enable ABI to continue to target distributors that carry and promote rival brands. In fact, the incentive programs that the DOJ barred in the PFJ for discouraging the sale of non-ABI beer only required information on the proportion of ABI sales to non-ABI sales in order to be enforced. This is the same information available to ABI under the PFJ.

Recommendation: *NBWA asks that the DOJ and the Monitor Trustee recognize that this information could enable ABI to seek out and punish distributors they perceive as disloyal or non-aligned due to their sale of non-ABI beer. NBWA also asks for clarification that any actions taken against distributors based on this information or any difference in treatment between distributors with a high proportion of ABI sales and those with a low proportion of ABI sales be seen as a violation of the PFJ.*

ABI's required written notification to independent distributors should be incorporated as a unilateral amendment to the ABI Equity Agreement.

Section V.I. of the PFJ requires ABI to prepare a written notification to any independent distributor that distributes ABI's beer in the United States. The notification is required to explain the practices prohibited by Section V of the final judgment; describe the changes ABI is making to any programs, agreement, or any interpretations of agreement required to comply with Section V of the final judgment; and inform the independent distributor of its right, without fear of retaliation, to bring to the attention of the Monitor Trustee any perceived or actual violations of the final judgment. This is an important provision to universally alert all independent distributors of the protections afforded under the final judgment. However, it implies that ABI could implement widespread contractual changes, which require state level approval or review and could include new problems for independent distributors, which may not be contemplated by or governed by the final judgment.

[85] CIS at 21.

Recommendation: *In order to clarify the protections for independent distribution intended in the PFJ, the PFJ should be included as a unilateral amendment to ABI's Wholesaler Equity Agreement. Specifically, the amendment should state: "This Agreement is hereby amended and the provisions of Section V of the Final Judgment in the matter of United States v. Anheuser-Busch InBev and SABMiller plc, Case No. 16-cv-1483 (2016) are incorporated into this Agreement with the full force and effect of the law. If there is any conflict between a provision in this Agreement and a provision in the Final Judgment, the Final Judgment shall govern." The required notice to independent distributors should reflect this.*

Inconsistent language in the PFJ can hamper the goals of the PFJ.

The DOJ filings are to be applauded for highlighting some of the competitive concern with the parties' efforts to use distribution to harm third-party brewers. However, whether by accident or design various provisions of the PFJ have inconsistent standards that hamper the goals of the PFJ and ultimately can have the effect of interference with the independence of distributors.

Specifically, Sections V. E. and V.F. of the PFJ deal with the exercise of ABI's rights to control management within an independent distributor. Section V. E. requires that ABI shall not disapprove an independent distributor's selection of a general manager or successor general manager based on the distributor's sale, marketing, advertising, promotion, or retail placement of a third-party brewer's beer. Section V.F. prohibits ABI giving weight to any decision to exercise a right related to transfer of control or ownership based on the distributor's relationship with a third-party brewer. The language in Section V.F. is broader than Section V.E., containing additional qualifiers such as "exercising any right" or "not give any weight to" missing from Section V.E. As the language is currently drafted, under V.E. ABI can simply disapprove an independent distributor's pick of a successor manager for any reason other than the fact that the distributor carries third-party beer. However, under V.F. ABI simply cannot disapprove of a transfer of control to a selected equity manager based on the fact that the distributor carries third-party beer, but rather that fact is only one factor in the determination made by ABI.

This inconsistent treatment is important as ABI controlled management, regardless of whether through ABI's approval of a successor manager, or ABI exercising its right of first refusal to a transfer of control to a new equity manager, can significantly interfere with the independence of the distributor.

Recommendation: *NBWA recommends that the DOJ make a clearer statement of intent of the remedies so there are no subsequent battles of interpretation over language differences. In the alternative, DOJ should modify the PFJ to merge Sections V.E. and V.F. using the term "management, transfer of control, ownership or equity."*

The Monitor Trustee is vital to ensure compliance with the Final Judgment.

Given ABI's past and current conduct with respect to impeding independent distributors in selling and promoting third-party brewers' beer, with respect to its discriminatory treatment of rival third-party brewers, as well as the complex nature of the PFJ, NBWA supports DOJ's decision to appoint a Monitor Trustee to oversee compliance with the PFJ and ultimately the Final Judgment, should it be entered by the Court.

Recommendation: *The Monitor Trustee's appointment should be for the full 10 years of the Final Judgment.*

NBWA is further concerned about the ability of the DOJ or Monitor Trustee to understand the specific nuances of ABI's compliance under the final judgment. A transparent and accountable system of oversight with public input on any ABI proposal would well-serve the intent of the PFJ.

Recommendation: *The DOJ should provide the opportunity for limited public comment on ABI's proposed compliance plans, required to be approved by the DOJ, to help effectuate a better and workable plan to implement this important order.*

Finally, NBWA is concerned with the likely recidivist nature of ABI. Even if ABI abides by the requirements of Section V for the 10-year period prescribed by the PFJ, the likelihood of engaging in anticompetitive conduct post consent decree is high. In addition, the PFJ should not expire unless it has been effective in preventing anticompetitive conduct.

Recommendation: The PFJ should not expire of its own accord, but should be terminated only after a determination by the Court that the PFJ has been effective. NBWA recommends that DOJ with the assistance of the Monitor Trustee evaluate the competitive conditions in the U.S. beer market six months before the expiration of the final judgment to determine if the final judgment, or specific sections of the final judgment, should in fact expire. That report should be submitted to the Court for its evaluation and determination of whether the judgment should be extended.

Consistent with past actions, the DOJ should require ABI to update its antitrust compliance policy.

In previous enforcement actions dealing with antitrust conduct issues, the DOJ has required parties to update antitrust compliance policies, and for a third-party or a designated individual to monitor and ensure employee training on the policies. Such a requirement is often necessary because the parties violated the antitrust law. A sound antitrust compliance policy minimizes the chances that ABI will violate the final judgment. The DOJ's Complaint and CIS in this matter detail the competitive concerns related to ABI's practices that impede of rival third-party brewers' access to effective and efficient distribution and limited distributor freedom.

The additional responsibility of updating or crafting an ABI antitrust policy, consistent with past DOJ merger precedent, is key to strengthening the position of the Monitor Trustee's oversight as well as ABI's compliance with the final judgment. As Bill Bear, associate attorney general, stated in a recent speech, "corporate compliance starts at the top. The board of directors and senior officers must set the tone for compliance to ensure that the company's entire managerial workforce not only understand the compliance program but also has the incentive to actively participate in its enforcement."[86] The fact of such comprehensive relief for distribution practices is included in the PFJ signals the DOJ's recognition of anticompetitive concerns over ABI's conduct. Such a provision would be consistent with those in previous DOJ consent decrees, including *United States v. Apple*,[87] and *United States v. Bazaarvoice*.[88]

Recommendation: *NBWA recommends that the Monitor Trustee be tasked with drafting and overseeing an updated ABI antitrust compliance policy, its implementation and employee training.*

Protection against termination of independent distributors should be expanded to include that an independent distributor should not be terminated for carrying a rival brewer's beer.

This transaction event offers the opportunity for ABI and Molson Coors to terminate certain distributors. Both entities have attempted to terminate independent distributors based on change in ownership control in the past. Terminations based on change of control could significantly lessen competition. The DOJ appropriately secured relief to prevent ABI and Molson Coors to cite this transaction as a basis for terminating an independent distributor. While Section V.A. of the PFJ prevents such terminations stemming from this transaction event, both ABI and Molson Coors still may have the ability to base distributor termination on other parameters not considered in the PFJ but still contrary to the goals of the PFJ.

Recommendation: *NBWA requests clarification that termination of an independent distributor is also prohibited based on the independent distributor's sales, promotion, advertising, marketing, or retail placement of third-party brewers' beer.*

Conclusion: NBWA applauds the extensive investigation and comprehensive reforms incorporated in the PFJ. NBWA urges DOJ and the Court to consider and address the concerns and recommendations and requests for clarifications discussed above to comprehensively best serve American consumers and to best resolve the issues raised in the DOJ Complaint.

Sincerely,

/s/
David A. Balto
Bradley Wasser
Matthew Lane

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[86] Bill Baer, "Prosecuting Antitrust Crimes," Speech before the Georgetown University Law Center, Global Antitrust Enforcement Symposium (Sept. 10, 2014).
[87] Final Judgment, *United States v. Apple*, Case No. 12-cv-2826 (Sept. 5, 2015) (Final Judgment granted the Monitor trustee power to review and evaluate Apple's existing internal antitrust compliance policies and procedures and the training program required by the Final Judgment, and to recommend to Apple changes to address any perceived deficiencies in those policies, procedures and training.)
[88] Third Amended Final Judgment, *United States v. Bazaarvoice, Inc.*, Case no. 13-cv-00133 (Dec. 2, 2014) (Final Judgment required a designee for administering Bazaarvoice's antitrust compliance program as part of ensuring compliance with the Final Judgment).

APPENDIX A:
AB InBev-Owned Distribution Locations and ABI and MillerCoors Brewery Acquisitions

Since 2008 ABI Branch Locations:

Massachusetts:	(metro Boston) - existing
	Tewksbury - 2008
New York:	(Bronx) - existing
	Staten Island - July 2015
New Jersey:	**Jersey City - 2012**
Kentucky:	Louisville - existing
	Owensboro - 2014
Oklahoma:	Tulsa - existing
	Oklahoma City - 2012
Colorado:	Metro Denver - existing
	Loveland/Ft. Collins - August 2015
	Colorado Spring/So Colorado - August 2015
Ohio:	Canton - existing
	Lima - 2013
Washington:	**Metro Seattle-Renton - 2014**
Oregon:	**Eugene - 2013**
	Portland - 2014
California:	Los Angeles area - existing (Carson, Sylmar)
	San Diego - existing
	Pomona - existing
	Riverside - existing
	Oakland - September 2015
	San Jose- September 2015
Hawaii:	Oahu - existing

Since 2011 ABI Brewery Acquisitions:

September 2016:	Boathouse Beverage LLC. (CT)
September 2016:	Bosteels (Belgium)
April 2016:	Devils Backbone (VA)
December 2015:	Breckenridge (CO)
December 2015:	Four Peaks (AZ)
September 2015:	Golden Road Brewing (CA)
September 2015:	Virtue Cider (to Goose Island)
January 2015:	Elysian Brewing Co. (WA)
November 2014:	10 Barrel Brewing Co. (OR)
February 2014:	Blue Point Brewing Co. (NY)
March 2011:	Goose Island (IL)

Post-PFJ MillerCoors Brewery Acquisitions

July 2016:	Terrapin Beer Co. (GA)
July 2016:	Hop Valley Brewing Co. (OR)
August 2016:	Revolver Brewing (TX)

The American Antitrust Institute

April 25, 2016

The Honorable Renata B. Hesse
Acting Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Competitive Concerns and Remedy in the Proposed Merger of AB InBev and SABMiller

Dear Acting Assistant Attorney General Hesse:

The American Antitrust Institute (AAI) has a substantial record of commentary on competition and consumer concerns in the U.S. beer industry. We therefore respectfully offer the AAI's perspective and analysis on the proposed merger of AB InBev-SABMiller.[1] This letter outlines what the AAI believes to be the vital elements of a competitive analysis and effective remedy, should the U.S. Department of Justice (DOJ) decide not to seek to block the merger altogether. In order to ascertain the contours of an effective remedy, the DOJ must first consider the full range of potential competitive effects of the AB InBev-SABMiller transaction itself, as well as those resulting from Molson Coors' acquisition of SABMiller's interest in the MillerCoors joint venture (JV).

[1] The American Antitrust Institute is an independent and nonprofit education, research, and advocacy organization devoted to promoting competition that protects consumers, businesses, and society. Many thanks to Kyle Virtue, AAI Research Fellow, for legal and economic research and support. For more information, see antitrustinstiute.org. The analysis contained in this letter is based on publicly available information and on discussions with market participants. Because the AAI does not have access to the confidential and proprietary information that is revealed in the course of a DOJ investigation, our analysis and recommendations are limited accordingly. In November 2014, we urged the Department of Justice to closely scrutinize any forthcoming merger proposal from AB InBev and SABMiller. *See* Letter from Am. Antitrust Inst., to Assistant Att'y Gen. William Baer in re: Anheuser-Busch InBev's Rumored Acquisition of SABMiller (Nov. 19, 2014), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI-%20Beer%20merger%2C%20to%20DOJ%2011-19.14.pdf. In December 2015, AAI's President Diana Moss testified before the Senate Judiciary Committee in a hearing on the proposed merger of AB InBev and SABMiller. *See Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (Dec. 8, 2015) (testimony of Diana L. Moss, President, Am. Antitrust Inst.), *available at* http://www.antitrustinstitute.org/sites/default/files/Moss%20SJC%20Testimony%20re%20ABInBev_SABMiller%20copy.pdf.

I. Overview

The proposed merger of AB InBev and SABMiller would place a dominant share of the U.S. beer market in the hands of one vertically integrated company, a transaction that would be likely to substantially lessen competition and be presumptively illegal under Section 7 of the Clayton Act. Putting aside any proposed remedy, the merger, if allowed to proceed, would incent AB InBev to exercise market power both unilaterally and in coordination with rivals. Such effects would likely stifle important competition from smaller market participants such as craft brewers, raise beer prices, reduce quality and choice, and jeopardize innovation in this important sector. Indeed, the timing of the proposed merger highlights the rapid growth of innovative, diverse, high quality craft beers.[2] Outside the brewpub or the microbrewery, craft beer makers depend on independent distribution to get products onto retail shelves and into the hands of the consumer.[3]

In a pre-emptive move to make the proposal more palatable for U.S. antitrust enforcers, the merging parties have proposed an up-front remedy to simultaneously divest SABMiller's interests in the MillerCoors JV to Molson Coors.[4] While the divestiture proposal may seem at first blush to be an easy fix, simply changing the name on the door from "MillerCoors" to "Molson Coors" is unlikely to neutralize significant anti-competitive and anti-consumer effects of the proposed merger. The loss of SABMiller, to be replaced by the full ownership and operation of the SABMiller assets by Molson Coors, introduces a different entity to the market, with potentially different incentives and abilities to compete.

There are a number of factors that complicate the business of crafting an acceptable remedy here. One is direct evidence of tacit coordination on price increases in the wake of the 2008 MillerCoors JV.[5] Second, both AB InBev and Molson Coors have already taken, or signaled their intentions to engage in strategic maneuvering that could further restrain competition. For example, AB InBev has recently acquired more distribution (i.e., wholesale) capacity, increased their control of independent distributors (potentially to the detriment of smaller competitors), and purchased rival craft brewers. And Molson Coors has attempted to influ-

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[2] *See* Bernard Ascher, Am. Antitrust Inst., *Global Beer: The Road to Monopoly* 6–7 (2012). *See also* Trefis Team, *Does the Declining U.S. Beer Trend Spell Doom for Brewers?*, Forbes (June 29, 2015, 8:34 AM), http://www.forbes.com/sites/greatspeculations/2015/06/29/does-the-declining-u-s-beer-trend-spell-doom-for-brewers/.

[3] The three-tiered system of beer distribution in the U.S. separates manufacturing, wholesale distribution, and retailing. However, there are material variations in how this system is implemented from state to state. This is particularly important for how brewers such as AB InBev can (or cannot) vertically integrate into distribution.

[4] Press Release, Anheuser-Busch InBev, Anheuser-Busch InBev Announces Agreement with Molson Coors for Complete Divestiture of SABMiller's Interest in MillerCoors (Nov. 11, 2015), *available at* http://www.ab-inbev.com/content/dam/universaltemplate/abinbev/pdf/investors/11November2015/Press%20Release%20-%20Anheuser-Busch%20InBev%20Announces%20Agreement%20with%20Molson%20Coors%20for%20Complete%20Divestiture%20of%20SABMiller%E2%80%99s%20Interest%20in%20MillerCoors.pdf.

[5] *See* Competitive Impact Statement at 7, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Apr. 19, 2013). *See also* Complaint at 18, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Jan. 31, 2013). *See also* Nathan H. Miller & Matthew C. Weinberg, *Mergers Facilitate Tacit Collusion: Empirical Evidence from the U.S. Brewing Industry* 2 (Working Paper, Mar. 25, 2015) (finding that while the MillerCoors joint venture resulted in merger-specific cost reductions, average retail prices increased post-consummation, likely because of tacit collusion).

ence MillerCoors' capacity decisions before any divestiture has been approved.[6]

Given these facts, the AAI suggests that the paramount objective in crafting any remedy should be to ensure that incentives for AB InBev to exercise market power unilaterally, or for AB InBev and Molson Coors to tacitly collude, are not enhanced post-merger. In considering a possible remedy, the DOJ's charge is to "preserve competition," which the agency interprets in its MERGER REMEDIES GUIDE as "restoring competition or enhancing consumer welfare, depending on the specific facts of the transaction and its proposed remedy."[7] Indeed, the AAI suggests that given the difficult and troubled landscape in the U.S. beer industry, together with the strategic steps taken by AB InBev and Molson Coors in recent months, an effective remedy should enhance consumer welfare by improving competitive conditions generally. This implies that eliminating the anticompetitive risks of the proposed merger may involve moving "levers" that are not entirely co-extensive with the changes caused by the combination.

Accordingly, DOJ should not simply accept the proffered divestiture of SABMiller's interest in the MillerCoors JV to Molson Coors. All options should remain on the table, including divestiture of SABMiller's assets to smaller, more disruptive players in the relevant market.

II. Background to the Proposed Merger, AB InBev and SABMiller

A. Background to AB InBev and SABMiller

Five major mergers in the last 10 years have fundamentally altered the U.S. beer market.[8] In 2005, Coors and Molson merged to form Molson Coors Brewing Company. In 2007, SAB-Miller and MolsonCoors formed the MillerCoors JV, combining SABMiller's 18% U.S. market share and Molson Coors' 11% share to place the MillerCoors JV in second place in the U.S. beer market.[9] In 2008, InBev acquired Anheuser-Busch to form AB InBev,[10] one of the

[6] *See Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (Dec. 8, 2015) (Reponses to Questions for the Record by Mark Hunter, President & CEO, Molson Coors) (responding to questions about the closure of MillerCoors' Eden, North Carolina facility); *see also* Press Release, Teamsters, Hoffa to MillerCoors: Keep Eden Brewery Open (Jan. 20, 2016), https://teamster.org/news/2016/01/hoffa-millercoors-keep-eden-brewery-open (suggesting that the closure of the Eden facility is merger-related).
[7] Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* 1 n.2 (2011).
[8] *See* Ascher, *supra* note 2 at 6-7.
[9] Theresa Howard, *Molson Coors, SABMiller Set Joint Venture*, ABC News, http://abcnews.go.com/Business/story?id=3710263&page=1(last visited Apr. 19, 2016); David Kesmodel & Deborah Ball, *Miller, Coors to Shake Up U.S. Beer Market*, Wall St. J. (Oct. 10, 2007), http://www.wsj.com/articles/SB119192982900853292.
[10] David Kesmodel et al., *Anheuser, Inbev Reach a Deal for $52 Billion*, Wall St. J. (July 14, 2008), http://www.wsj.com/articles/SB121598077288249131.

top five consumer products companies in the world.[11] In 2012, AB InBev acquired Grupo Modelo.[12] The consent decree in that case remains in force today.[13]

Since then, AB InBev has expanded its footprint by acquiring distribution and regional craft brewers, such as Chicago's Goose Island Brewery (2011), Oregon's 10 Barrel Brewing (2014) and New York's Blue Point Brewing Company (2014). In 2015, the company acquired three craft breweries in a five-day period. SABMiller's expansion strategy has also involved acquiring both international and domestic craft brewers, including a minority stake in Georgia's Terrapin Beer Company (2011), Crispin Cider (2012), and San Diego-based St. Archer Brewing Co. (2015).

B. The Merger of AB InBev and SABMiller

The merging parties note that the proposed merger is part of a broader strategy to form a "truly global brewer."[14] By combining the "complementary" geographical footprints, brand portfolios, and distribution networks of AB InBev and SABMiller, the merger would allow the company to access growing markets for beer in Asia, South America, and Africa.[15] Company documents suggest that projected efficiencies will come primarily from the SABMiller-side of integrated supply-chain operations, "with approximately 70% of the additional savings . . . coming from procurement and 30% from manufacturing and distribution."[16]

To pave the way for this global expansion, and to assuage antitrust concerns in the U.S., the parties have offered to divest SABMiller's U.S. assets engaged in the MillerCoors JV to Molson Coors. The closing of the AB InBev-SAB Miller merger and Molson Coors' acquisition of SABMiller's 50% voting interest in the MillerCoors JV would occur at the same time. Of course, without any integration of brewing capacity or distribution in the U.S., AB InBev's acquisition of SABMiller would provide no material economies of scale, scope, or coordination in this country. While this seems obvious, it is important to highlight because without any merger-related cost savings or consumer benefits, the adverse effects of the merger are magnified.[17]

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[11] Press Release, AB InBev, InBev Completes Acquisition of Anheuser-Busch (Nov. 18, 2008), http://www.ab-inbev.com/content/dam/universaltemplate/AB InBev/pdf/press-releases/public/2008/11/20081118_1_e.pdf.

[12] *See* Ascher, *supra* note 2, at 56 (2012); *Beeropoly: This is What the Family Tree of Beer Companies will Look Like if AB InBev Acquires SABMiller*, Quartz, http://qz.com/503392/this-is-what-the-family-tree-of-beer-companies-will-look-like-if-ab-inbev-acquires-sabmiller/ (last visited Apr. 19, 2015).

[13] *See* Final Judgment at 12, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Oct. 24, 2013) (stating that part of the consent decree requires AB InBev and Constellation Brands to enter into a Transition Services Agreement for a period of up to three years).

[14] *See* Press Release, SABMiller, Recommended Acquisition of SABMiller PLC by Anheuser-Busch InBev SA/NV 93–105 app. 5 (Nov. 11 2015), http://sabmiller.com/docs/default-source/investor-documents/ab-inbev-offer/11-november-2015---recommended-acquisition-of-sabmiller-plc-by-anheuser-busch-inbev-sa-nv.pdf?sfvrsn=10.

[15] *See, e.g.*, *id.* at 25–26 ("Given the largely complementary geographical footprints and brand portfolios of AB InBev and SABMiller, the Combined Group would have operations in virtually every major beer market, including key emerging regions with strong growth prospects such as Africa, Asia, and Central and South America.").

[16] *Id.* at 102.

[17] *Cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 10 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("The greater the poten-

III. The Proposed Merger is Presumptively Illegal Under U.S. Antitrust Law

Data show that since 2007, prices for beer have increased in the U.S. above the rate of inflation and against the backdrop of declining output.[18] Moreover, recent economic analysis indicates that following the formation of the MillerCoors JV, prices increased as a result of tacit coordination between AB InBev and MillerCoors.[19] The AAI suggests that this evidence should be the starting point for evaluating the likely adverse effects of the proposed AB InBev-SABMiller merger.

Based on the most recent publicly available shipment data, AB InBev has 45% of the U.S. beer market, the MillerCoors JV has 26% of that market, and there is a smattering of smaller fringe players.[20] These include Constellation (7.0%), Heineken (4.0%), Pabst (2.5%), Boston Beer (2.0%), Yeungling (1.4%), North American Breweries (1.1%), and Diageo Guinness USA (1.1%).[21] Putting aside the proposed divestiture, a merged AB InBev and SABMiller would control about 60% of the domestic market, creating a dominant firm by any measure. Pre-merger U.S. market concentration, as measured by the HHI, is about 2,850 points. The merger would increase concentration by about 1,200 points, for post-merger concentration of about 4,000. Under the HORIZONTAL MERGER GUIDELINES, such an increase is "presumed to be likely to enhance market power."[22] This further concentration would enhance the likelihood of the exercise of both unilateral and coordinated market power.

For example, AB InBev, as a larger player, would have stronger incentives to unilaterally exercise market power by directly raising prices or reducing quality. The proposed deal would also combine the brewing capacity of the merging firms with AB InBev's current network of wholly owned distribution centers. The proposed merger could thus enhance AB InBev's unilateral incentives to foreclose rival brewers from access to distribution. The revenues lost by either restricting or wholly cutting off rivals' access to distribution would likely be recouped by additional sales of AB InBev products at supracompetitive prices. If such conduct were to flow from the merger, rivals would find it more difficult to get their products onto retail shelves and into the hands of the consumer.

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tial adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.").

[18] *See* Ascher, *supra* note 2, at ii, app. II-6.

[19] *See* Competitive Impact Statement at 7, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Apr. 19, 2013); *see also* Nathan H. Miller & Matthew C. Weinberg, *Mergers Facilitate Tacit Collusion: Empirical Evidence from the U.S. Brewing Industry* 2 (Working Paper, Mar. 25, 2015) (finding that while the MillerCoors joint venture resulted in merger-specific cost reductions, average retail prices increased post-consummation, likely because of tacit collusion).

[20] Market shares are based on the number of gallons shipped to beer wholesalers in 2014. *See* Beer Marketer's Insights, *Key Industry Data*, *Major Supplier Shipments and Share: 2014 vs 2013*, http://www.craftbrewnews.net/index.php?option=com_k2&view=item&id=19559:major-supplier-shipments-and-share-2012-vs-2011&Itemid=201 (last visited Apr. 19, 2016).

[21] *Id.*

[22] *Horizontal Merger Guidelines*, *supra* note 17, at § 2.1.

Combining AB InBev and SABMiller would also significantly enhance incentives for anti-competitive coordination—conduct that has been observed in the beer market since the MillerCoors JV was formed.[23] Tacit coordination could further lessen incentives or pressure for AB InBev-SAB Miller and Molson Coors to compete on price, quality, or innovation. Further, the loss of SABMiller, which has pursued relatively friendly policies toward independent distributors in their decisions to carry rival products, could lead Molson Coors to mimic AB InBev's more adversarial policies toward independent distribution. Collectively, the likely unilateral and coordinated effects of the proposed merger could raise prices, reduce quality, limit choice and slow innovation, to the detriment of consumers.

IV. AB InBev's Push Into Distribution is Important in an Analysis of Competitive Effects and Remedy

A. Expansion of Wholly Owned Distribution

AB InBev is estimated to own distribution capacity for over 10% of its own brewing volume, which includes distributors located in eight states: California, Colorado, Ohio, Oregon, Oklahoma, Hawaii, New York, and Massachusetts.[24] AB InBev has also engaged in a recent spree of acquisitions and swaps involving independent distributors, generating concern over perceived attempts to curb competition by limiting craft brewers' distribution options.

In 2014, for example, AB InBev purchased one independent distributorship in Oregon and one in Kentucky.[25] A year later in 2015, Kentucky passed a statutory prohibition on brewer ownership of wholesalers.[26] AB InBev sold those recently acquired Kentucky operations to an AB InBev distributor in Texas which, in turn, agreed to sell its Colorado distributors to AB InBev.[27] This "swap" agreement, while leaving many questions about AB InBev's ability to continue to control distribution in Kentucky unanswered, consolidated the company's control over wholesale operations in Colorado. We note that such swaps are not unique to brewing; they have occurred in the cable industry as a way of expanding and consolidating regional footprints and accruing market power.[28]

A month after the Colorado acquisitions, AB InBev announced the purchase of two other

[23] *Supra* note 5.
[24] *Wholesaler Operations*, Anheuser-Busch, http://anheuser-busch.com/index.php/our-company/operations/wholesale-operations/ (last visited Apr. 19, 2016).
[25] Anheuser-Busch InBev SA/NV, Annual Report (Form 20-F), at 44 (Dec. 31, 2014), http://www.ab-inbev.com/content/dam/universaltemplate/AB InBev/pdf/investors/sec-filings/20F_24032015.pdf; Lisa Brown, *A-B Buying Portland Distributor*, St. Louis Dispatch (Jan. 8, 2014), http://www.stltoday.com/entertainment/dining/bars-and-clubs-other/hip-hops/a-b-buying-portland-distributor/article_46fefe23-42e8-546a-974c-8b7840699e25.html.
[26] H.B. 168, 2015 Leg., Reg. Sess. (Ky. 2015), *available at* https://legiscan.com/KY/bill/HB168/2015.
[27] However, it decided to sell its Kentucky operations to Standard Sales Company, which is an AB InBev distributor based in Odessa, Texas. David A. Mann, *Budweiser to sell Louisville and Owensboro distributorships*, Louisville Bus. First (Aug. 4, 2015), http://www.bizjournals.com/louisville/news/2015/08/04/budweiser-sells-louisville-and-owensboro.html.
[28] *See, e.g.*, Reinhardt Krause, *Comcast, Charter, Atlice, Cable Swaps After Deal Approvals*, Investor's Bus. Daily (Mar. 26, 2016), http://www.investors.com/news/technology/comcast-charter-altice-cable-swaps-eyed-post-deal-approvals/ (discussing asset swaps after cable mergers).

distributors in California.[29] In that connection, AB InBev did not purchase the rights for rival brands, forcing those brands into the remaining MillerCoors wholesalers. Several reports indicate that state regulators in California are looking into these transactions, but the California Attorney General has not released a statement about them.[30]

The Craft Brewers Association reports that AB InBev has significant market power in the wholesale tier, controlling over 50% of distribution in many geographic markets where it has direct or indirect ownership of a wholesaler.[31] In many areas, one MillerCoors wholesaler and one AB InBev wholesaler are the only wholesalers serving the market. In the states where AB InBev has most recently purchased craft brewers (California, Oregon, Washington, and Colorado), it is also one of the largest wholesalers, giving AB InBev enhanced control over both brewing and distribution.[32]

With an already dominant market share in brewing and successful moves toward vertical integration, AB InBev has both the ability and incentive to frustrate the ability of rivals to reach the retail consumer. Indeed, this strategy has reportedly adversely affected craft brewers. Reports indicate, for example, that when AB InBev acquired the distributors of an Oregon craft brewer in 2011 and 2012, previously healthy growth in sales stalled until the brewer found alternative distributors. Other craft brewers indicated to the media that distributors' divestment of non-AB InBev brands put the "last-to-go" craft brewers at the mercy of the big players, given their limited options for alternative distribution. These experiences deserve close scrutiny in evaluating the AB InBev-SABMiller transaction. Moreover, high distribution switching costs and state laws limiting the ability of craft brewers to terminate a distribution agreement[33] make it difficult for these smaller rivals to stay in business.

B. AB InBev's Ability to Control Independent Distribution

In instances where AB InBev does not own distribution, it still exerts significant control over distributors through practices that limit or even eliminate rivals' ability to distribute their products to customers. AB InBev distributes its products through about 500 independ-

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[29] Bob Tallett, AB InBev's Vice President of Business and Wholesaler Development, announced that the company would purchase the rights to its own brands from the Oakland, Calif.-based Horizon Beverage Company. In a second transaction, AB repurchased its brand rights from M.E. Fox & Company Inc., a beer and non-alcoholic beverage distributor based in San Jose, California. Chris Furnari, *Consolidation Continues as A-B Invests 2 California Wholesalers*, Brewbound (Sept. 2, 2015), http://www.brewbound.com/news/consolidation-continues-as-a-b-invests-in-california-wholesalers.

[30] *See, e.g.*, Diane Bartz, *Exclusive: U.S. probes allegations AB InBev seeking to curb craft beer distribution*, Reuters (Oct. 12, 2015), http://www.reuters.com/article/us-AB InBev-doj-antitrust-exclusive-idUSKCN0S623R20151012.

[31] *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 3 (Dec. 8, 2015) (Responses to Questions for the Record by Bob Pease, CEO, Brewers Ass'n), *available at* http://www.judiciary.senate.gov/meetings/ensuring-competition-remains-on-tap-the-ab-inbev/sabmiller-merger-and-the-state-of-competition-in-the-beer-industry.

[32] *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 2–3 (Dec. 8, 2015) (testimony of Bob Pease, CEO, Brewers Ass'n), *available at* https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Pease%20Testimony.pdf.

[33] In 48 states, brewers can only terminate a distribution agreement for cause if it determines the wholesaler is not using its best efforts to distribute its products. *See* Pease Responses, *supra* note 31, at 1–2.

ent distributors in the U.S.,[34] including through approximately one half of the top 30 distributors by volume, while MillerCoors distributes through the other half. AB InBev is, in turn, exclusive in about one half of the independents through which it distributes, while MillerCoors has no exclusivity.[35] AB InBev recently developed a new incentive program for its independent wholesalers where eligibility is based on volume-share requirements. While no public statements are available from AB InBev on this program, details have made their way into the public domain.

In the new incentive program, AB InBev's distributors are divided into classes based on the percentage of sales of AB InBev products.[36] The AB InBev contracts constrain higher-level 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 AB InBev's competitors in the wholesale system because distributors must decide whether to keep craft products or lose incentives under the incentive program.[37] Anecdotal evidence indicates that AB InBev has a history of pressuring independent wholesalers into distributing only AB InBev products. For example, in 2013, the Washington Post reported that distributors who chose to sell other companies' products were frequently visited by ABI staff and sometimes publicly criticized at trade meetings.[38]

V. Divestiture of the SABMiller JV Assets to Molson Coors May Not be a Sufficient Remedy

A. Accumulating Evidence on Failed Remedies Suggests Caution in this Case

There is mounting evidence of remedies in previous merger consent decrees that have failed to fully restore competition, either because of the nonviability of the buyer of the divested assets or inadequacy of related relief.[39] These failures have been particularly apparent in highly concentrated markets, as is the case in AB InBev-SABMiller. For example, in the 2008 merger of UnitedHealth Group and Sierra, the DOJ required UnitedHealth to divest its individual Secure Horizons Medicare Advantage HMO plans in certain Nevada counties to Hu-

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[34] *Wholesaler Operations*, *supra* note 24.
[35] In cases where AB InBev is non-exclusive, they distribute in the same distributorships as do Crown, Heineken USA, NAB, and Boston Beer brands.
[36] The "A+ Class" consists of distributors whose sales are comprised of 98% or more of AB branded products. For this class, the company will offer an annual reimbursement covering up to 75% of the distributor's contractual marketing support. Distributors whose sales are comprised 95% or more of AB InBev brands can have half of the contractual marketing support covered by AB InBev (A Class). Those that are 90% aligned would get a 10% reimbursement. There are also financial incentives for distributors that are below 90%. *See* Tripp Mickle, *Craft Brewers Take Issue with AB InBev Distribution Plan*, Wall St. J. (Dec. 7, 2015, 2:16 PM), http://www.wsj.com/articles/craft-brewers-take-issue-with-ab-inbev-distribution-plan-1449227668. Bob Pease's written testimony provides detailed notes of the meeting. Pease Testimony, *supra* note 32, at 20–22.
[37] Ashlee Kieler, *Anheuser-Busch Distributor Incentive Program Raises More Concerns Of A Stifled Craft Beer Market*, Consumerist (Dec. 10, 2015), https://consumerist.com/2015/12/10/anheuser-busch-distributor-incentive-program-raises-more-concerns-of-a-stifled-craft-beer-market/.
[38] Steven Pearlstein, *Beer Merger Would Worsen Existing Duopoly by AB InBev, SABMiller*, Wash. 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.
[39] *See generally* John Kwoka, *Mergers, Merger Control, and Remedies: A Restrospective Analysis of U.S. Policy* (2015).

mana. The deal went through, but economic evidence gathered since the merger suggests that the combined UnitedHealth-Sierra was nonetheless able to exercise market power, as demonstrated by the increase in premium prices, up to 13.7% in Nevada markets.[40]

In two other instances, failed remedies are also apparent. The FTC's complaint in Safeway-Albertsons, for example, alleged that the proposed transaction would likely be anticompetitive in 130 local markets.[41] A consent decree required the grocers to divest the bulk of stores to Haggen, a regional grocery chain.[42] Soon after the merger was consummated and the divestiture completed, Haggen filed for bankruptcy, and in late 2015 a federal bankruptcy judge allowed Haggen to sell about 25% of its stores back to Albertsons.[43] A similar outcome was observed in Hertz's acquisition of Dollar Thrifty in 2012, a proposed transaction that combined two of the four largest rental car companies in the U.S. The FTC alleged that the deal would have harmed competition at 72 airports around the U.S. Among other provisions, the FTC required Hertz to sell its Advantage Rent-a-Car business.[44] But in late 2012, four months after the FTC closed its investigation, Advantage filed for bankruptcy.[45]

This expanding record on failed remedies should bear importantly on future decisions taken by the agencies in determining whether to block a proposed merger under Section 7 of the Clayton Act or to negotiate for a remedy that involves structural and/or behavioral relief.

B. Removal of SABMiller From the Competitive Mix May Exacerbate Post-Merger Coordination

Any remedy should be evaluated in light of the concern that the merger will likely exacerbate incentives for continued tacit coordination between AB InBev and its major rival. A number of factors are particularly relevant. First, taking an independent SABMiller out of the com-

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[40] Premium increases were observed relative to a control group. José R. Guardado et al., *The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra*, 1 Health Mgmt., Pol'y & Innov. 16 (2013), http://www.hmpi.org/pdf/HMPI%20-%20Guardado,%20Emmons,%20Kane,%20Price%20Effects%20of%20a%20Larger%20Merger%20of%20Health%20Insurers.pdf. *See also* Press Release, UnitedHealth Grp., UnitedHealth Group Completes Acquisition of Sierra Health Services (Feb. 25, 2008), http://www.reuters.com/article/idUS17532+26-Feb-2008+BW20080226. *See also* Shannon Firth, *Health Policy Experts Fear the Worst with Payer Mergers*, MedPage Today (Oct. 9, 2015), http://healthleadersmedia.com/content/HEP-321488/Health-Policy-Experts-Fear-the-Worst-With-Payer-Mergers.

[41] Complaint at 4, *In re Cerberus Institutional Partners V et al.*, Dkt. No. C-4504 (F.T.C. Jan. 27, 2015).

[42] Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger.

[43] The FTC allowed such a return in cases where there were no competing buyers for the particular store. Brent Kendall & Peg Brickley, *Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway*, Wall St. J. (Nov. 24, 2015), http://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193. *See also* Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, Wall St. J. (Oct. 9, 2015, 1:06 PM), http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394 (reporting that soon after Haggen acquired 164 stores because of the merger, it filed for bankruptcy and closed 26 stores).

[44] Press Release, Fed. Trade Comm'n, FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets (Nov. 15, 2012), https://www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertzs-proposed-23-billion-acquisition.

[45] Press Release, FSNA, Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC (Nov. 4, 2013), http://www.fsna-inc.com/newspdfs/115201391920.PDF.

petitive mix may strengthen incentives for Molson Coors to coordinate with AB InBev after the merger. Molson Coors is arguably a different market player than MillerCoors, with potentially different competitive incentives and abilities.

The AAI suggests that the DOJ should assess how the loss of SABMiller's independent decision-making in the transfer of Miller's interest to Molson Coors could adversely affect the competitive landscape post-merger. While AB InBev and MillerCoors have engaged in tacit coordination as to pricing, their approaches to distribution have been different. As noted above, for example, MillerCoors has reportedly taken a less adversarial approach than AB InBev to independent distributors that carry rival brands. With the elimination of SABMiller from the mix and total ownership and control of those assets by Molson Coors, that dynamic may disappear.

Any change in competitive dynamic through the loss of an independent SABMiller is also concerning because of a lack of explanation or clarity regarding how Molson Coors would approach any renegotiation of contracts with former MillerCoors independent distributors. It would be risky to assume that existing contracts transfer seamlessly to Molson Coors with the same MillerCoors terms and conditions in place. When the MillerCoors JV was formed in 2008, for example, there were disputes over the disposition of independent distribution contracts. What happens to the MillerCoors distribution contracts must be resolved as part of a remedy that aims to keep independent distribution open and nondiscriminatory.

Second, SABMiller is a global company while Molson Coors has only a smaller, North American footprint. The potential for importing additional, innovative products into the U.S. that were part of the SABMiller global portfolio provided an additional source for competition on product positioning, price, diversity, and quality. This may be lost with a smaller Molson Coors, strengthening incentives to coordinate rather than compete independently.

Collectively, these factors raise the risk that an already troubled landscape in beer could be made worse by a divestiture that creates a market player in Molson Coors with more incentives to more closely coordinate with AB InBev generally, and more specifically to mimic AB InBev's distribution policies than before the merger. In light of the foregoing, the DOJ should keep open other possible options for divestiture of the SABMiller assets. A more effective remedy may be to dissolve the joint venture and thereupon divest the SABMiller assets, not to Molson Coors but to one or more smaller players in the domestic market such as Heineken or Constellation.[46]

C. Strategic Conduct by AB InBev and Molson Coors Raises Questions

Other factors complicate the question of whether the proposed divestiture of SABMiller's U.S. assets to Molson Coors will fully restore competition and enhance consumer welfare. One is AB InBev's recent acquisition of craft brewers, further integration into distribution, and attempts to influence independent distribution in ways that could adversely affect rival brewers. Such activity signals an intention to continue to strategically limit competition.

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[46] To be sure, the competitive benefits of such an option would have to be weighed against efficiency losses from breaking up the joint venture, and Molson Coors may have contractual objections that would have to be overcome.

Aside from unilateral effects resulting from this stepwise accretion of market power, Molson Coors could find it harder to oppose strategic anticompetitive policies established by a more powerful AB InBev (that has valuable SABMiller assets at its disposal), choosing to "go along" rather than to compete.

MillerCoors' announcement on September 14, 2015 (two days before the announcement of merger talks) that it would be closing its brewery in Eden, North Carolina also raises fundamental questions about strategic intent.[47] Citing the objective of "optimizing" their brewery footprint, "streamlining" operations to enhance efficiency across the remaining several MillerCoors breweries, and distribution overlaps with a nearby plant,[48] the brewery is slated to be shuttered by September 2016. It has a capacity of nine million barrels per year, just over 10% of total MillerCoors brewing capacity.[49] The facility has won numerous awards.[50] Whether this announcement could be viewed as a merger-related, anticompetitive, gun-jumping reduction in capacity, or as part of a larger "unilateral" strategy to keep industry capacity tight, it does not inspire confidence that merely swapping out MillerCoors for Molson Coors will leave consumers whole.

VI. An Effective Remedy Requires a Number of Strong Prescriptive and Proscriptive Conditions

Holding aside any proposed remedy, the foregoing analysis demonstrates that an AB InBev-SABMiller merger would be likely to substantially lessen competition by enhancing incentives for both unilateral and coordinated exercise of market power. This picture is complicated by direct evidence of pre-existing anticompetitive coordination in the U.S. beer market and AB InBev and Molson Coors strategies for altering competition. These factors significantly raise the bar on a showing that a divestiture of the SABMiller assets to Molson Coors will not exacerbate anticompetitive incentives or abilities after the merger and will instead improve the state of competition in the market. This fact pattern provides a compelling reason for why the DOJ should seek a remedy that restores competition *and* enhances consumer welfare.

The AAI therefore suggests that there are a number of conditions that should be considered in devising a remedy that involves the divestiture of the SABMiller JV assets to Molson Coors, if DOJ does not move to block the merger outright. First, as in AB InBev-Grupo Modelo, the DOJ should give high priority to creating an "independent" market player. Second, there should be prohibitions on further acquisitions of distribution or craft brewers by AB InBev or Molson Coors. Third, steps should be taken to preserve a truly "open access," independent distribution channel.

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[47] Press Release, MillerCoors, MillerCoors to Close Eden, N.C. Brewery in September 2016 (Sept. 14, 2015), http://brookstonbeerbulletin.com/millercoors-to-close-north-carolina-brewery/.
[48] *Id.*
[49] *See Brewing Locations*, MillerCoors, http://www.millercoors.com/breweries/brewing-locations (last visited Apr. 19, 2016).
[50] *See* Press Release, AME, MillerCoors' Eden Brewery Receives 2013 AME Manufacturing Excellence Award (Oct. 15, 2013), http://www.ame.org/sites/default/files/MillerCoors%20Eden%20to%20Receive%20AME%20Manufacturing%20Excellence%20Award.pdf.

- **Creation of an independent market entity in Molson Coors.** A consent decree should ensure that AB InBev and Molson Coors do not control any economic resources that are necessary for rivals to compete. The prohibition would cover input materials such as cans and glass products, agricultural inputs such as hops and barley, and brewing capacity. An independent Molson Coors would be free of any involvement with AB InBev or other rivals. This condition thus requires termination of existing connections and prohibition on any future contract or supply agreements involving AB InBev (and rivals) and Molson Coors (and rivals). Such a prohibition would apply to Molson Coors contract brewing of former Miller brands (e.g., Pabst).

- **Prohibitions on acquisitions by AB InBev or Molson Coors.** A consent decree should ensure that post-merger AB InBev and Molson Coors do not have the enhanced incentive or ability to exercise market power through further horizontal or vertical integration. AB InBev and Molson Coors should thus be prohibited from acquiring additional brewing or distribution capacity. A consent decree should state a time frame for periodic evaluation of competitive conditions in the U.S. beer market in order to determine if and when such a provision should expire.

- **Preserving an open and independent distribution channel.** A consent decree should include requirements that prevent AB InBev or Molson Coors from foreclosing rivals through enhanced control over independent distribution. A remedy should extend the nondiscrimination provisions in the AB InBev-Grupo Modelo consent decree. More important, a remedy should frame out and require the use of a pro forma, "open access" independent distribution contract. Such a contract would include enforceable nondiscrimination provisions that prevent AB InBev or Molson Coors from pressuring any independent distributor from favoring their brands over rival brands. While the specifics are best left to the DOJ, the contract would restrain or prohibit the use of incentive programs that set requirements based on: volume shares; employee or managerial compensation; "maximum efforts," display, shelf space, and placement; and marketing programs. Preserving an open and independent distribution channel would also require provisions governing an open and transparent process by which former MillerCoors distributors transition to Molson Coors.

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The AAI appreciates the opportunity to share the foregoing analysis and commentary with the DOJ.

Sincerely,

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