STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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VIA FEDERAL EXPRESS AND EMAIL
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Re: *Proposed Final Judgment, United States v. Anheuser-Busch InBev SA/NV et al., No. 1:16-cv-01483 (D. D.C.)*

Dear Mr. Mucchetti:

Pursuant to Federal Register Vol. 81, No. 150 (Aug. 4, 2016) and the Antitrust Procedures and Penalties Act. 15 U.S.C. § 16(b)-(h), the North Carolina Department of Justice respectfully submits these comments on the Proposed Final Judgment in the above action. Pursuant to the procedures set forth in the Federal Register Notice, please ensure that these comments are filed with the Court.

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The North Carolina Attorney General is tasked with protecting North Carolina consumers and, among other things, has statutory authority to intervene in court proceedings that impact the consuming public. N.C. Gen. Stat. § 114-2 (8)(a). The North Carolina Attorney General's Office (NC AGO) has expertise on antitrust matters and has been involved in many significant antitrust cases over the years, sometimes in conjunction with the United States Department of Justice (US DOJ) and/or other state Attorneys General. The NC AGO is currently pursuing competition-related litigation with US DOJ against Carolinas HealthCare System (CHS) in federal court in the Western District of North Carolina, alleging that CHS acted unlawfully to preserve its dominance in the Charlotte health care market.

While the NC AGO respects US DOJ's work on antitrust matters and appreciates the working relationship we have with US DOJ, we respectfully disagree with US DOJ's approach in the matter at hand and believe the remedies contained in US DOJ's Proposed Final Judgment are inadequate. The proposed remedies in this matter, involving the merger of the largest and second largest beer brewers, are inadequate because, unlike the remedies required just three

years ago in another merger of beer companies, the present merger will actually result in a reduction in overall brewing capacity due to the premature closing of a brewery within days of the announcement of the merger. Required divestiture of the prematurely closed Eden, North Carolina brewery to a competitor would provide a common-sense and enhanced structural remedy that would better alleviate some of the negative and anticompetitive aspects of the merger. Lacking this remedy, US DOJ's approach is flawed and the Proposed Final Judgment as submitted is not in the public interest. The Court should exercise its latitude to take appropriate steps towards modifying the Proposed Final Judgment and requiring divestiture of the Eden brewery so as to protect consumers and to ensure that the Proposed Final Judgment is in the public interest.

Standard of Review:

Before entering the Proposed Final Judgment, the Court "shall determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e)(1). For purposes of this determination, the Court shall consider, among other things, "the competitive impact of such judgment . . . and any other competitive considerations bearing upon adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest . . . ." 15 U.S.C. § 16(e)(1) (A). The Court shall also consider the impact "upon the public generally." 15 U.S.C. § 16(e)(1) (B). As it makes this determination, the Court has broad authority to take "action in the public interest as the Court deems appropriate." 15 U.S.C. § 16(f). The Court has specific authority to, among other things, review and consider comments filed by other parties, to authorize full or limited participation in the proceeding by interested parties, and to appoint outside consultants, expert witnesses, or a special master to evaluate any aspect of the proposed consent judgment and provide guidance to the Court. *Id.* The Court may also require that witnesses be examined. *Id.* The legislative history also makes it clear that the Court's review and determination "provides an opportunity for a judge to act as a mediator, obtaining modifications to deficient settlements." 150 Cong. Rec. S3617 (April 2, 2004).

Background: Announcement of the Eden Brewery Closure Just Prior to the Announcement of the Merger and the NC AGO's Investigation of the Brewery Closure

ABInBev (ABI)'s acquisition of SABMiller was announced on September 16, 2015. Just two days earlier, on September 14, 2015, MillerCoors (over 50% owned by SABMiller) announced that it was closing the Eden, NC brewery, a brewery with a capacity of over 8.8 million barrels annually and approximately 4% of all beer production in the U.S. The brewery was large, efficient, profitable, and had won several awards in recent years. The decision to close the Eden brewery was made by the MillerCoors board (comprising executives of SABMiller and Molson Coors).

Over a year later, the brewery – plainly a valuable asset worth millions of dollars – has not been sold. It does not appear that there has been any meaningful effort to offer the brewery for sale, or to make plans for what will happen to the brewery in the future other than to just ensure that it is closed. Obviously, closing the brewery, rather than selling it, prevents it from falling into the hands of a competitor. In fact, according to union officials, MillerCoors management specifically stated that it would not sell the Eden brewery because it did not want the brewery to get into the hands of a competitor.

MillerCoors' public, purported justification for the closure is that it has excess capacity in its system and needed to eliminate a brewery. However, during the same general time period, it

was engaged in a contract dispute with Pabst Brewing Co. (regarding beer that Miller Coors brews at its facilities for Pabst), and allegedly told Pabst that it no longer had sufficient capacity in its breweries to continue to brew Pabst products on a contract basis. MillerCoors also allegedly rebuffed Pabst's offer to lease the Eden brewery from it, and at one point, turned down a reported offer by Pabst to purchase the Eden brewery for $100 million. *See Complaint, Pabst Brewing Co. et al v. MillerCoors, LLC*, 2016CV002536 (Milwaukee Cir. Ct., Mar. 30, 2016); https://www.biztimes.com/2016/05/20/battle-brewing-between-millercoors-and-pabst-over-cost-capacity/

Due to concerns regarding these circumstances, the NC AGO opened an investigation regarding, among other things, whether any competition-related laws have been violated in connection with the closure of the Eden brewery. In connection with the investigation, the office has served civil investigative demands, reviewed hundreds of documents, and taken a number of depositions. The investigation is ongoing, and the office continues to review documents and schedule depositions. The parties providing information to the NC AGO have designated much of the information provided to be confidential, so we are not currently in a position to share details of the information in a public filing. However, we can say generally that the information reviewed to date confirms our concerns that anticompetitive motives may have played a part regarding the closure of the Eden brewery and the accompanying lack of meaningful effort to sell it. If the Court is interested in reviewing the details of the information we have obtained in the course of our investigation, we are willing to engage in a dialogue with the parties regarding an appropriate way to get this information before the Court.

What follows below is a discussion of the anticompetitive impacts of the pending merger, why the proposed remedies are inadequate, and why required divestiture of the Eden Brewery is a logical, common-sense structural remedy that is needed under these circumstances to remedy some of the anticompetitive aspects of the merger.

Anticompetitive Impact of Merger:

In general, the U.S. beer industry is highly concentrated, even putting aside the proposed merger and its impact on competition. As US DOJ points out in its Complaint accompanying the Proposed Final Judgment, the largest brewer in the U.S. - ABI – alone accounts for almost half (approximately 47%) of all beer sales in the United States. *United States v. Anheuser-Busch InBev SA/NV et al*, 16-CV-014383 (D. D.C. July 20, 2016) (ABI/SAB Miller Complaint) at ¶ 3. "The relevant beer markets are highly concentrated and would become significantly more concentrated as a result of the proposed acquisition." *Id.* at ¶39.

In addition to being highly concentrated, the beer market is also characterized by complicated, intertwined, and unusual joint venture agreements between large brewers whereby the brewers do not operate as pure competitors with each other but instead work together within the particular parameters of the joint venture arrangement. For example, SABMiller, historically one of the largest brewers in the U.S., shares ownership in a joint venture – the MillerCoors joint venture, with Molson Coors, also historically one of the largest brewers in the U.S. The board of the MillerCoors joint venture comprises executives of both SABMiller and MolsonCoors. This joint venture is the second largest brewer in the U.S. It brews beer at its brewing facilities for a competitor, Pabst Brewing Co., via a contractual arrangement. Similarly, prior to ABI's merger with Modelo, Modelo participated in a joint venture - Crown Imports, LLC – with another beer company, Constellation Brands, Inc.

While craft breweries have emerged as potential alternatives for some consumers to the

large brewers that dominate this highly concentrated market, US DOJ has stated that "although new beer breweries open frequently, new brewers face significant barriers to achieving efficient scale. . . ." *United States v. Anheusher-Busch InBev SA/NV et al,* 16-CV-01483 (D. D.C. July 20, 2016 (ABI/SABMiller Competitive Impact Statement) at p. 13. "Building nationally-recognized and accepted brands, which retailers will support with feature and display activity, is difficult, expensive, and time consuming." *Id.* Thus, craft brewers, given their size and the fact that their beer is often priced as a premium product, do not serve as an effective constraint to restrain the prices of the major, well-established, lower-priced brands.

Against this backdrop, the record shows that there is simply no question that the pending merger raises anticompetitive concerns. Indeed, US DOJ outlines a host of anticompetitive concerns in its Complaint accompanying the Proposed Final Judgment, ultimately concluding that ABI's proposed acquisition of SABMiller violates Section 7 of the Clayton Act and should permanently be enjoined. ABI/SABMiller Complaint at ¶9. Thus, the question is not whether remedies are needed to address the anticompetitive impact of the merger at hand, but whether the proposed remedies in the consent judgment are appropriate and adequate to remedy these anticompetitive impacts.

Remedies Imposed in the ABI/ Modelo Merger of 2013

In order to determine whether the proposed remedies in the merger at hand are appropriate and adequate, it is instructive to examine the remedies that were put in place just three years ago in 2013 when ABI (the largest brewer) merged with Modelo (the third largest brewer at the time).

When US DOJ reviewed this merger, it noted that the beer industry was characterized by "barriers to entry" including "the time and cost of building new breweries." *United States v. Anheusher-Busch InBev SA/NV et al,* 13-CV-00127 (D. D.C. Jan. 31, 2013) (ABI/Modelo Complaint) at ¶50.

USDOJ was particularly concerned that the merger would have significant ramifications on competitive pricing in the beer market. US DOJ took specific note of ABI's "price leadership" and the "anticompetitive price coordination" between ABI and the MillerCoors joint venture. ABI "typically initiated annual price increases in various markets with the expectation that MillerCoors prices will follow. And they frequently do." *Id.* at ¶3. "The specifics of ABI's pricing strategy are governed by its 'Conduct Plan,' a strategic plan for pricing in the United States that reads like a how-to-manual for successful price coordination" whereby, among other things, ABI announces a price increase with the intent that its competitors "will get in line" (as opposed to undercutting the price). *Id.* at ¶¶ 44 and 45. US DOJ stated that, according to ABI, the Conduct Plan "'increases the probability of [ABI] sustaining a price increase.'" *Id.* at ¶46. "MillerCoors has followed ABI's price increases to a significant degree." *Id.* at ¶44. "ABI and MillerCoors often find it more profitable to follow each other's prices than to compete aggressively for market share by cutting price." *Id.* at ¶ 3.

Modelo, on the other hand, refused to follow ABI's lead and increase the prices for a number of its beers. As a result, a growing number of customers were turning away from ABI and MillerCoors and toward Modelo. In 2013, USDOJ had concerns that ABI's acquisition of Modelo would eliminate what had been the only effective check on ABI's ability to set and control prices in the beer market. US DOJ went so far to say that "Beer Prices in the United States Today are Largely Determined by the Strategic Interactions of ABI, MillerCoors, and Modelo." *Id.* at ¶ 44, Heading B.

Another concern noted by US DOJ when it reviewed this merger was that Constellation Brands, Inc. (50% owner of a joint venture with Modelo) "does not share Modelo's incentive to thwart ABI's price leadership" and, in fact, had consistently "urged following ABI's price leadership." *Id.* at ¶ 10. This concern was particularly acute because after the acquisition Constellation "would be fully dependent on ABI for its supply of beer." *Id.*

In an attempt to seek approval of the merger, ABI had proposed divesting Modelo of its 50% ownership in a joint venture to Constellation Brands, and providing Constellation exclusive rights to import Modelo products into the United States for ten years. USDOJ objected to this proposal, because, inter alia, Constellation would be virtually dependent on ABI for its supply of beer. *Id.* at ¶ 82.

Instead, US DOJ required other remedies of Defendants in the Modelo merger. *Namely, it not only required divestiture of a brewery – the Piedras Negras Brewery – to Constellation, it also required mandatory expansion of the Piedras Negras Brewery by Constellation so as to improve the asset and increase brewing capacity. United States v. Anheusher-Busch InBev SA/NV et al,* 13-CV-00127 (D. D.C. April 19, 2013) (ABI/Modelo Competitive Impact Statement) at p. 12.

US DOJ acknowledged that this was "an exceptional remedy" but appropriate under the specific circumstances. *Id.* at p. 13. "For the divestiture to be successful in replacing Modelo as a competitor, Constellation must expand the Piedras Negras Brewery's production capabilities. . . . No other combination of Modelo's brewing assets would have properly addressed the competitive harm caused by the proposed merger and allowed the acquirer of the Divestiture Assets to compete as effective and economically with ABI as Modelo does today." *Id.* In light of the importance of this remedy, US DOJ even arranged for a Monitoring Trustee to be appointed who had responsibility to observe the expansion and report to the Court on whether the expansion would be completed within the required timeframe. *Id.* at p. 16.

<u>The Proposed Remedies in the ABI/SABMiller Merger are in Stark Contrast to the Remedies Required in the Modelo Merger and are Inadequate Under the Circumstances</u>

The proposed remedies in the matter at hand are strikingly different from the remedies required in the Modelo merger, even though the potential for competitive harm is just as great, if not greater. In the present matter, the merger is between the largest and second largest brewing companies, as opposed to the largest and third largest. Like Modelo, SABMiller is also in a joint venture—MillerCoors. SABMiller owns 58% of MillerCoors, which is the second-largest brewer in the United States behind only ABI.

Unlike with the Modelo merger, there is no divestiture of a brewery to an appropriate competitor with an accompanying requirement that its production capacity be expanded. In fact, the opposite result, a reduction in overall brewing capacity, is occurring as a result of the premature closure of the Eden brewery in close proximity to the announcement of the ABI/SABMiller merger. Relying solely on behavioral conditions that apply to beer distribution issues, as opposed to also imposing a meaningful structural remedy that pertains to beer production, is inadequate under these circumstances and stands in stark contrast to the remedies applied in the Modelo merger.

Unlike the divestiture underlying the ABI and Modelo merger, the proposed divesture here does not "preserve[] the current structure of the beer market in the United States by

maintaining an independent brewer with an incentive to resist following ABI's price leadership in order to expand share." ABI/Modelo Competitive Impact Statement at p. 10. As noted above, ABI has long insisted on acting as the price leader in the U.S. beer market, and MillerCoors has acquiesced to these increases. There is no indication that Molson Coors has ever been assertive in countering or objecting to ABI's proposed price increases. Nor is there any indication that Molson Coors would even want to challenge ABI's price leadership. To the contrary, as US DOJ recognizes, Molson Coors' assumption of complete ownership and control of MillerCoors "will increase the number of highly concentrated markets across the world in which ABI competes directly against Molson Coors [which] could facilitate coordination between ABI and Molson Coors in the United States." ABI/SABMiller Competitive Impact Statement at p. 12.

US DOJ contends the proposed remedies will somehow preserve or enhance the viability of MillerCoors as a competitor in the national and local beer markets in the United States. This is in contract to the approach taken in 2013 with the Modelo merger where MillerCoors was not portrayed by US DOJ as a competitor at all, but simply a large brewer that followed in lock-step the price increases of ABI. In other words, as a result of the proposed remedies in the consent judgment, MillerCoors, the entity that US DOJ said just three years ago, followed ABI's prices and engaged in price coordination with ABI, will now be owned entirely by Molson Coors as opposed to being owned jointly by SABMiller and Molson Coors. It is difficult to see how this change in ownership stake of MillerCoors will meaningfully remedy the anticompetitive concerns that accompany this merger.

Furthermore, it appears that the interim supply agreements contemplated by the Proposed Final Judgment, which purportedly "will require ABI to supply beer such that Molson Coors can continue to import SABMiller brands of beer to the United States and can operate the Miller International Business," are very similar to agreements initially proposed that US DOJ rejected in the ABI and Modelo merger. Under this arrangement, Molson Coors—and MillerCoors—will be unlikely to operate as an independent firm willing to withstand increased sales prices or other pressures from ABI.

Therefore, the proposed remedies in the matter at hand are inadequate and the proposed Final Judgment is not in the public interest.

Further Engagement by the Court is Necessary in Order to Take Steps Towards Modifying the Final Judgment So That it is in the Public Interest.

In light of the anticompetitive concerns created by this merger, the highly concentrated nature of the beer industry in general, and the particular concerns created by the circumstances of the closure of the Eden brewery (and the lack of any effort to sell it), the Court should exercise its authority to explore all possible options for requiring the sale and divestiture of the Eden brewery as an additional remedy that will provide appropriate competitive benefits and protection for the public. The Court has the ability under 15 U.S.C. § 16(f) to, among other things: (1) Provide for a hearing and the examination of witnesses from ABI and MillerCoors to determine whether appropriate management officials are willing to sell the Eden brewery, and if not, why not; (2) Appoint outside, objective consultants or experts to determine the fair market value of the Eden brewery and provide advice to the Court and the parties on a fair, objective process for offering the brewery for sale to competitors.

Our office is willing to assist the Court and other parties in this regard to craft a modified Final Judgment that provides enhanced competition and protections for the public. We appreciate the opportunity to submit comments in this important matter.

Sincerely,

Kevin Anderson
Senior Deputy Attorney General
Director, Consumer Protection Division