Virginia Beer Wholesalers Association, Inc.
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September 30, 2016

Peter J. Mucchetti,
Chief, Litigation I Section, Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW., Suite 4100
Washington, DC 20530

Re: Comments in Response to Proposed Final Judgment

Dear Mr. Mucchetti:

As its President and Chief Executive Officer, I am writing you on behalf of the Virginia Beer Wholesalers Association ("VBWA") and its 24 beer distributor members. Founded in 1937, the VBWA is the trade association for Virginia's independent, family-owned and operated beer distributors. Our membership distribute every major domestic, import and craft brand across the Commonwealth, as well as countless other smaller imports, regional and local brands.

Overall, the Virginia Beer Wholesalers Association ("VBWA") believes that the proposed Final Judgment addresses the most egregious anticompetitive aspects of the prospective merger between ABI and SABMiller. There remain, however, a few troubling issues as to the procedural timeline to be followed in implementing the Final Judgment and one or two substantive features of the proposed settlement.

I. Procedural Matters

A. The Public Comment Period Should Be Extended or Periodically Re-Opened. The VBWA is greatly concerned by the limited period allowed for public comment proposed by the Final Judgment. The VBWA notes that the Antitrust Procedures and Penalties Act provides for a comment period of at least 60 days prior to the effective date of the Final Judgment. 15 U.S.C. § 16(b). However, pursuant to Section V (I) of the proposed Final Judgment ABI is not required to submit its proposed form of written notification to distributors to the Department of Justice ("Department") until ten days after the entry of the Final Judgment. Consequently, interested parties will not be afforded an opportunity to review and comment on the description of changes that ABI intends to make to its programs and agreements. Moreover, as the Final Judgment only requires that ABI "describe" the changes in its Notice, distributors will have no opportunity to review and comment on the actual amendments that ABI is to propose at some unspecified later date.

The closing of public comments prior to both the issuance of the Notice and the amendments themselves is particularly problematic for Virginia distributors. The Virginia Beer Franchise Act requires that a brewery notice its intent to amend a distributor agreement at least 90 days prior to the amendment's effective date. The brewery must not only provide that notice to the affected distributors but also to the Virginia Alcoholic Beverage Control Board. See, Va. Code §4.1-506(A). The closing of the public comments period prior to the issuance by ABI of the proposed amendments would severely limit the ability of distributors and regulators in Virginia, and in those states with similar franchise laws, to determine whether the proposed amendments would comply with state law prior to their being imposed by the brewery.

For these reasons, the VBWA urges that the comment period be extended beyond the proposed 60 days, and until such time as the Department has reviewed and approved both the Notice and any proposed amendments to the ABI distributor agreements. In the alternative, the Final Judgment should provide for the re-opening of public comments for a reasonable period following ABI's submission of its proposed Notice, and again following the brewery's submission of its proposed amendments.

B. The Final Judgment Should Establish Procedural Deadlines for Violations. The VBWA is concerned by the proposed Final Judgment's lack of any procedural timetable for the resolution of complaints or violations of its terms. In the event of a violation of the Final Judgment or a breach of any related agreement, the Monitoring Trustee is to recommend an appropriate remedy to the Department. The Department has the sole discretion to accept, modify, or reject the Monitoring Trustee's recommendation to pursue a remedy before the court. Although the proposed Final Judgment does provide that the Monitoring Trustee report at least every 90 days on ABI's "efforts" to comply with its obligations under the Final Judgment, it does not establish a similar deadline for either the submission of the Monitoring Trustee's recommendations regarding breaches or violations of its terms. Neither does the Final Judgment establish any timeframe in which the Department is to take action on such recommendations. The lack of any clear deadline for the conclusion of these preliminary processes means that anti-competitive behavior in violation of the Final Judgment might continue unchecked for many months before the issue is ripe for resolution before the court. This is a critical issue as the disparity of power between ABI and its $70 billion in revenue and a local business is so acute.

The VBWA urges that the Final Judgment include specific timelines for both the submission of recommendations by the Monitoring Trustee and acceptance, modification, or rejection of those recommendations by the Department. In addition, provision should be made in the Final Judgment for the timely publication of both the Monitoring Trustee's recommendations to the Department, and the ultimate disposition of those recommendations. In this manner private parties will be afforded the opportunity to reasonably determine whether to pursue

a private remedy for any breaches and/or violations in the event the Department declines to do so itself.

II. Substantive Issues.

A. The Restrictions Placed Upon ABI Should Apply Equally to the Acquirer. The VBWA is concerned by the proposed Final Judgment's general inapplicability to the Acquirer of the Divestiture assets, presumably, but not definitively, Molson Coors. The VBWA believes that the Department has conclusively demonstrated the anticompetitive nature of the proposed ABI-SABMiller merger, and has sought to blunt those effects through the imposition of certain restrictions on ABI. Specifically, Section V of the Proposed Final Judgment restricts ABI's ability to discriminate against its distributors that also distribute Third Party Brewer's beer products by means of pricing, promotions, discounts, product availability, management approval, or other means. The propose Final Judgment does not, however, propose any similar such restrictions on the activities of the Acquirer, although both ABI and the Acquirer are prohibited by Section V (A), from "citing" the transaction as basis for modifying, renegotiating, or terminating distributor agreements.

The anticompetitive effects of Molson Coors' acquisition of virtually all of SABMiller's U.S. assets could be nearly identical to those created by the ABI-SABMiller merger, yet the distribution restrictions catalogued in Section V apply only to ABI. VBWA believes that as a condition of its acquisition of the Divestiture Assets, the Acquirer should be required to accept the same anti-discriminatory restrictions that the Department has wisely imposed upon ABI.

B. Manager Approval Should not be Conditioned on the Forced Transfer of Equity in the Business of the Independent Distributor. The VBWA is concerned that, as drafted, Section V (E) of the proposed Final Judgment fails to address adequately the considerable influence that ABI exerts over Independent Distributors through the requirements of the ABI Wholesaler Equity Agreement, as noted in the Competitive Impact Statement. ABI has long engaged in the practice of conditioning its approval of an Independent Distributor's choice of a general manager or successor general manager on the Distributor's sale of an equity interest to such general manager or successor general manager. That practice is at odds with the principle that the Independent Distributor should be free to make independent decisions regarding the operation and management of its business, including those bearing on the selection of which Third Party Brewers, if any, to represent.

It is foreseeable that by conditioning its approval of an Independent Distributor's manager by means of a forced transfer of equity in that business will cause the manager to be unduly obligated to ABI and, therefore less interested in representing Third Party Brewers. The VBWA recommends that Section V (E) of the Proposed Final Judgment be revised as follows:

E. Defendant ABI shall not require an Independent Distributor to sell to its general manager or successor general manager an equity interest in the Distributor as a condition of ABI's approval of the general manager or successor general manager. Nor shall ABI disapprove an Independent Distributor's selection of a general manager or successor general manager based on the Independent Distributor's relationship with a Third Party Brewer, including, but not limited to, the Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer.

C. The Provisions of the Final Judgment May Further Limit an Independent Distributor's Ability to Market the Products of Third Party Brewers. VBWA is concerned that the provisions of Section V (D) of the proposed Final Judgment, and the related provisions of the Competitive Impact Statement, may produce results entirely at odds with the Department's intended purposes of fostering competition by allowing Independent Distributors to market and distribute the products of Third Party Brewers. As currently drafted, Section V (D) would expose an Independent Distributor to demands that it spend 100% of its promotion funds on ABI products in the current year if that distributor derived 100% its revenues from the sale of ABI products in the prior year. In such case, ABI could block the distributor from spending any of its own budget dollars towards the marketing of newly acquired Third Party Brewer's products for an entire year. Such a result would directly contradict the plain intent of the remedies proposed by the Final Judgment.

Consequently, the terms of the Final Judgement should be modified to make clear that a distributor shall not be prevented from spending anticipated revenues from the sale of newly acquired brands to promote those newly acquired brands, irrespective of the proportion of the distributor's revenue that was derived from the sale of ABI products in the preceding year.

On behalf of the VBWA, I wish to thank the Department for providing our association and its members an opportunity to comment on the proposed Final Judgment. We look forward to reading the Department's recommendations. Should you have any questions, or require any additional information, please do not hesitate to contact me.

Sincerely,

Philip H. Boykin
President/CEO