UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. ANHEUSER-BUSCH INBEV SA/NV, ANHEUSER-BUSCH COMPANIES, LLC, and CRAFT BREW ALLIANCE, INC., *Defendants*.	Civil Action No.: 4:20-cv-01282-SRC

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. §§ 16(b)–(h), the United States hereby responds to the two public comments received regarding the proposed Final Judgment in this case. After careful consideration of the submitted comments, the United States continues to believe that the divestiture required by the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this response have been published as required by 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On November 11, 2019, Defendant Anheuser-Busch Companies, LLC ("AB Companies"), a minority shareholder in Defendant Craft Brew Alliance, Inc. ("CBA"), agreed to acquire all of CBA's remaining shares in a transaction valued at approximately $220 million.

AB Companies is a wholly-owned subsidiary of Defendant Anheuser-Busch InBev SA/NV ("ABI"). After a thorough and comprehensive investigation, the United States filed a civil antitrust Complaint on September 18, 2020, seeking to enjoin the proposed transaction because it would substantially lessen competition for beer sold in the state of Hawaii, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Dkt. No. 1.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order") in which the United States and Defendants consented to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. *See* Dkt. No. 2–1. On September 25, 2020, the Court entered the Stipulation and Order. *See* Dkt. No. 14. On October 6, 2020, the divestiture contemplated by the proposed Final Judgment was effectuated to PV Brewing Partners, LLC ("PV Brewing"). On October 26, 2020, the United States filed a Competitive Impact Statement, describing the transaction and the proposed Final Judgment. *See* Dkt. No. 17.

On October 30, 2020, the United States published the proposed Final Judgment and the Competitive Impact Statement in the *Federal* Register, *see* 85 Fed. Reg. 68918 (October 30, 2020), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in the *Washington Post* from October 30, 2020, through November 5, 2020; the *St. Louis Post-Dispatch* from October 30, 2020, through November 7, 2020; and the *Honolulu Star-Advertiser* from October 30, 2020, through November 9, 2020. The 60-day public comment period ended on January 8, 2021. The United States received two public comments. *See* Tunney Act Comment of the

Attorney General of Hawaii on the Proposed Final Judgment, attached as Exhibit A; Tunney Act Comment of Maui Brewing Co., attached as Exhibit B.

II. THE COMPLAINT AND THE PROPOSED FINAL JUDGMENT

The Complaint alleges that ABI's proposed acquisition of CBA would likely eliminate important existing head-to-head competition in the state of Hawaii between ABI's beer brands and CBA's beer brands, particularly CBA's Kona brand. Specifically, CBA's Kona brand competes closely with ABI's Stella Artois and Michelob Ultra brands, and also competes with ABI's Bud Light and Budweiser brands. The Complaint also alleges that, but for the merger, the competition between ABI and CBA in Hawaii likely would have grown significantly because CBA was investing in its business in Hawaii, had plans to significantly grow its share of beer volume sold in Hawaii, and planned to open a new brewery in 2021. The Complaint also alleges that the transaction would likely facilitate price coordination between ABI and Molson Coors Beverage Company in Hawaii. This likely reduction in existing and future competition would result in higher prices and reduced innovation for consumers in Hawaii, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The proposed Final Judgment remedies the harm to competition alleged in the Complaint by requiring a divestiture that will establish an independent, economically viable competitor in the state. It requires Defendants to divest Kona Brewery, LLC ("Kona Hawaii"), which includes CBA's entire Kona brand business in the state of Hawaii, as well as other related tangible and intangible assets, to an acquirer approved by the United States. ABI proposed PV Brewing as the acquirer. After a rigorous and independent evaluation, the United States approved PV Brewing as the acquirer. PV Brewing is a well-financed company, backed by private equity, that is incentivized to compete aggressively in the Hawaii beer market. In addition, the operational

leadership of PV Brewing has extensive experience in the brewing, developing, packaging, importing, distributing, marketing, promoting, and selling of beer.

The proposed Final Judgment also allows the acquirer, at its option, to enter into a supply contract, distribution agreement, and transition services agreement with ABI. These divestiture assets and optional supply, distribution, and transition services agreements—which are similar to agreements that CBA had with ABI prior to the transaction—will enable the acquirer to compete effectively from day one in the market for beer in the state of Hawaii, thereby restoring the competition that would otherwise likely be lost as a result of the transaction. PV Brewing has elected to exercise its options and entered into supply, distribution, and transition services agreements with ABI, as permitted by the proposed Final Judgment.

III. STANDARD OF JUDICIAL REVIEW

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is

necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976) ("It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest."); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "'make de novo determination of facts and issues.'" *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quoting *United States v. Mid-Am. Dairymen, Inc.*, No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977)); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust

consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted).

"The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*; *see also United States v. Mid-Am. Dairymen, Inc.*, No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977) ("It was the intention of Congress in enacting [the] APPA to preserve consent decrees as a viable enforcement option in antitrust cases.").

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d

1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"); *see also Mid-Am. Dairymen*, 1977 WL 4352, at *9 ("The APPA codifies the case law which established that the Department of Justice has a range of discretion in deciding the terms upon which an antitrust case will be settled"). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust

enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

IV. SUMMARY OF COMMENTS AND THE UNITED STATES' RESPONSE

The United States received two public comments in response to the proposed Final Judgment. One comment is from the State of Hawaii through its Office of the Attorney General ("Hawaii AG"). The other comment is from Maui Brewing Co. ("Maui Brewing"), which describes itself as Hawaii's "largest craft brewer." Exhibit B at 1. Maui Brewing sought to purchase the divestiture assets by submitting an "Indication of Interest" to ABI, but was not selected by ABI as the proposed acquirer. *Id.* at 2.

The overarching concern raised by both the Hawaii AG and Maui Brewing is that the acquirer, PV Brewing, will continue to significantly rely on ABI such that it will not compete independently with, nor constrain, ABI. More specifically, the concerns raised by the Hawaii AG and Maui Brewing can be grouped into five categories: (1) ABI will retain the rights to the

Kona brand outside of Hawaii; (2) the acquirer may enter into a distribution agreement with ABI's wholly-owned distributor, as CBA did prior to the transaction; (3) the acquirer may enter into a supply contract with ABI to brew and package at least some of its beer, as CBA did prior to the transaction; (4) the acquirer may enter into a temporary transition services agreement with ABI; and (5) the process by which ABI selected the proposed acquirer was unfair.[1]

For these reasons, the Hawaii AG asserts that the proposed Final Judgment fails to protect competition, although the Hawaii AG chose not to exercise its own independent authority to challenge the transaction under the antitrust laws. For its part, Maui Brewing contends that, due to the concerns above, it should be the acquirer of the divestiture assets instead of PV Brewing.

A. The Remedy Creates an Independent, Robust Competitor in Hawaii Where the Competitive Harm Was Likely to Occur

The Hawaii AG and Maui Brewing express concern that ABI retains the rights to sell Kona-branded beer outside of Hawaii following the divestiture. *See* Exhibit A at 2–3; Exhibit B at 2. In their view, ABI's ability to sell Kona-branded beer outside of Hawaii could impede the acquirer's ability to compete effectively in the market for beer in Hawaii. There is no basis for this concern; the proposed Final Judgment grants the acquirer the assets, rights, and personnel it needs to be a robust competitor in Hawaii, the only state in which the transaction would have otherwise harmed competition.

In this case, the Complaint alleges harm to competition in a geographic market "no larger than the state of Hawaii." *See* Dkt. No. 1 (Complaint ¶ 19). The overarching purpose of a

[1] The Hawaii AG also raises an issue regarding the labels that it believes should be affixed to beer products brewed outside of the state of Hawaii. S*ee* Exhibit A at 10 n.23. To the extent the State of Hawaii wishes to require brewers to disclose the source of beer sold in the state of Hawaii, that is a matter unrelated to the antitrust violation alleged in the Complaint and, as such, is outside the purview of the Court's review under the Tunney Act. *See Microsoft*, 56 F.3d at 1459–60.

merger remedy is to restore the competition lost by the transaction. *See Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'") (quoting *United States v. E. I. Du Pont De Nemours & Co.*, 366 U.S. 316, 326 (1961)); *see also* U.S. Dep't of Justice, Merger Remedies Manual (2020) ("DOJ Merger Remedies Manual") at 3, *available at* https://www.justice.gov/atr/page/file/1312416/download.[2] Therefore, it is appropriate for the merger remedy here to focus on restoring competition in the state of Hawaii.

Consistent with this principle, when a license for a product "covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the [Antitrust] Division will insist only on the sale or license of rights necessary to maintain competition in the affected markets." DOJ Merger Remedies Manual at 7 n.25; *see also United States v. Iron Mountain*, *Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (rejecting complaining competitor's request that the Final Judgment be broadened to allow all customers—regardless of their location—to terminate their contracts with the parties without incurring fees because that would far exceed what is necessary to remedy the harm alleged in the complaint limited to 15 geographic markets).

The divestiture assets encompass Kona Hawaii, CBA's entire Kona brand business unit in the state, including a restaurant, a brewery, a brewpub, a new brewery that is currently under construction, and an exclusive, irrevocable, perpetual, and fully paid-up license to Kona-branded products in Hawaii, which gives the acquirer the sole right to sell Kona-branded products in Hawaii. *See* Dkt. No. 2–1, Exhibit A (Proposed Final Judgment, Para. II.I., M.–O.). The license grants the acquirer the sole right to innovate and develop new products using the Kona brand

[2] "The purpose of this manual is to provide [Antitrust] Division attorneys and economists with a framework for structuring and implementing appropriate relief short of a full-stop injunction in merger cases." *Id*. at 2.

name and sell them in Hawaii. This right is important as beer brewers increasingly compete with one another by developing innovative products that are marketed using established beer brand names. Similarly, the license grants the acquirer the sole right to develop Hawaii-specific marketing promotions or Hawaii-specific packaging for the beer brewed at the new brewery, once it is operational.

Paragraph IV.I. of the proposed Final Judgment establishes mechanisms by which the acquirer can hire personnel formerly employed by Kona Hawaii. Indeed, the United States understands that the Kona Hawaii leadership team has already joined PV Brewing. Those personnel will further enhance PV Brewing's ability to compete effectively in Hawaii. And the divestiture will enhance Kona Hawaii's independence from ABI. Before the transaction, ABI held an approximate 31% stake in CBA and, by extension, in Kona Hawaii. *See* Complaint ¶ 13. Following the divestiture, ABI will no longer own any stake in Kona Hawaii.

Regardless of ABI's rights to the Kona brand in other geographies more than 2,000 miles away, the acquirer will be the sole owner of the rights to sell Kona-branded products in Hawaii—the state where the competitive harm is alleged to occur. As such, the acquirer will be fully empowered and incentivized to compete and grow its sales in Hawaii, thereby preserving the competition that would otherwise be lost as a result of the transaction.

B. The Distribution Relationship with ABI is Optional and Terminable

The Hawaii AG and Maui Brewing express concern that the proposed Final Judgment permits the acquirer to enter into a distribution agreement with ABI's wholly-owned distributor. *See* Exhibit A at 3–7; Exhibit B at 2. More specifically, the Hawaii AG asserts that the distribution agreement gives ABI "control and authority" over the price of the acquirer's Kona-branded beer, Exhibit A at 3, "pav[ing] the way for Molson Coors to follow any price increases

announced by [ABI] in Hawaii," *id*. at 4, and giving ABI the "ability to prevent PV [Brewing] from competing against other beers sold by ABI," *id*. at 5. These assertions are incorrect.

Brewers must have access to distribution channels to compete effectively in the beer industry. To give the acquirer access to distribution channels from day one, the proposed Final Judgment provides for a distribution agreement with ABI's wholly-owned subsidiary in the state. The distribution arrangement set forth in the proposed Final Judgment merely affords the acquirer the option to continue a distribution relationship that existed between CBA and ABI prior to the transaction. *See* Exhibit A at 3 (acknowledging that ABI distributed CBA's beer in Hawaii prior to the transaction). As the Complaint alleges, during the time when ABI and CBA had a distribution relationship, CBA competed head to head with ABI and constrained ABI's ability to coordinate higher prices in Hawaii. For example, the Complaint states that "ABI and CBA compete directly against each other in Hawaii," Complaint ¶ 25; that "Molson Coors's willingness to follow ABI's announced price increases is constrained" by "CBA and its Kona brand," Complaint ¶ 30; and that "the competition provided by CBA's Kona in the premium segment serves as an important constraint on the ability of ABI to raise its beer prices," Complaint ¶ 16.[3] After the divestiture, the acquirer will have the ability and incentive to continue to offer at least this same level of competition, even if it chooses to contract with ABI for distribution services, just as CBA did before the transaction.

Here, the proposed Final Judgment requires that the distribution agreement be sufficient to meet the acquirer's needs, as the acquirer determines, and last for a period of time as determined by the acquirer. *See* Dkt. No. 2–1, Exhibit A (Proposed Final Judgment, Para.

[3] The Complaint is taken as true for purposes of evaluating whether a remedy is adequate in a Tunney Act Proceeding. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995). Commenters are not permitted to construct their "own hypothetical case and then evaluate the decree against that case." *Id*.

IV.O.). The distribution agreement with ABI's wholly-owned distributor is optional, which provides the acquirer with the ability to choose its own preferred method of distribution, whether that is ABI's wholly-owned distributor or another distributor in the state of Hawaii. In making this decision, the acquirer's incentive will be to employ the distributor that most effectively sells its beer in competition with ABI and other rivals. The approved acquirer, PV Brewing, has the expertise necessary to make this choice for itself. PV Brewing's operational leadership has extensive experience in the beer industry, including negotiating distribution agreements.

Even after entering into a distribution agreement with ABI's wholly-owned distributor, the acquirer will be able to terminate the agreement without cause, beginning one year after the agreement's effective date. *See id*. Thus, if ABI's wholly-owned distributor prices the Kona-branded products too high or too low to retailers or otherwise fails to market the Kona-branded products effectively, the acquirer will be able to shift its Kona-branded products to another distributor. The threat of termination without cause will incentivize ABI's wholly-owned distributor to promote and sell the Kona-branded products to the acquirer's satisfaction in order to retain the popular Kona brand in its portfolio.[4] Further, as noted above, the proposed Final Judgment establishes mechanisms by which PV Brewing can hire personnel formerly employed by Kona Hawaii. *See id*. at Para. IV.I. The Kona Hawaii leadership team's experience in the Hawaii beer industry further enhances PV Brewing's ability to select the distribution channels that allow it to compete most effectively in the state.

[4] The Hawaii AG asserts, based on an excerpt from CBA's 2018 10-K filing, *see* Exhibit A at 6, that it would be costly and "daunting" for PV Brewing to terminate its distribution contract with ABI's wholly-owned distributor and switch the Kona-branded products to a new distributor. But the quoted language relates to CBA's former contract with ABI covering distribution throughout the United States, not the contract between PV Brewing and ABI's wholly-owned distributor covering distribution of Kona-branded products in Hawaii. As discussed above, in the distribution agreement permitted by the proposed Final Judgment, the acquirer holds the threat of termination without cause, which will incentivize ABI's wholly-owned distributor to promote and sell the Kona-branded products to the acquirer's satisfaction. In addition, in the beer industry, rival distributors typically pay the costs of switching a brand to their portfolios.

C. The Contract Brewing Relationship with ABI Is Optional, Non-Exclusive, and Temporary

The Hawaii AG and Maui Brewing express concern about allowing the acquirer, at its option, to engage ABI to brew and package Kona beer for the acquirer to sell in Hawaii. *See* Exhibit A at 8–10; Exhibit B at 2. The Hawaii AG contends that PV Brewing "will remain reliant on ABI for the production, packaging, and delivery of beer" sufficient to meet PV Brewing's needs until the new brewery is operational, and so long as PV Brewing sells bottled beer in Hawaii. Exhibit A at 9–10.

The United States agrees that until the new brewery in Hawaii is operational, the acquirer will need to arrange for another brewer to brew its canned and kegged beer in order to compete in Hawaii. Similarly, so long as the acquirer wishes to sell bottled beer in Hawaii, the acquirer will need to arrange for another brewer to brew and ship the acquirer's bottled beer to Hawaii.[5] To ensure the uninterrupted supply of Kona-branded beer to sell in Hawaii, the proposed Final Judgment requires ABI to enter into a non-exclusive supply contract for the production, packaging, and delivery of beer sufficient to meet the acquirer's needs, as the acquirer determines and at the acquirer's option.

As set forth in Paragraph IV.N. of the proposed Final Judgment, the contract brewing relationship with ABI does not impose any constraints on the acquirer. The contract has no minimum or maximum volume requirements, and it is non-exclusive. The acquirer is free to engage companies other than ABI to brew its beer for sale in Hawaii, either to supplement ABI's production or to replace ABI. This optional supply contract is limited to five years maximum to

[5] As noted in the Competitive Impact Statement (Dkt. No. 17 at pg. 15), very little beer brewed in Hawaii is bottled in Hawaii because there is no large-scale production of glass beer bottles on the islands and importing empty glass bottles is prohibitively expensive for most brewers.

ensure that the acquirer will become a fully independent competitor to ABI. The supply contract cannot be extended, amended, or otherwise modified without the approval of the United States.

The proposed Final Judgment provides the acquirer with the flexibility to choose its own preferred supplier, whether that is ABI or another brewer on the mainland. In making this decision, the acquirer's incentive will be to employ the contract brewer that most effectively brews and ships its beer. The approved acquirer, PV Brewing, has the expertise necessary to make this choice for itself.

The Hawaii AG lists various factors that it contends could make it less than "viable" for PV Brewing to switch to a new contract brewer. Exhibit A at 10. The Hawaii AG, however, does not offer any reason to conclude that non-ABI contract brewers are incapable of managing "the intricacies of switching," maintaining "quality control and consistency," or ensuring "sufficient production quantities" for PV Brewing's needs. *Id*.

The Hawaii AG also expresses concern that ABI does not have adequate motivation to complete construction of the new brewery and that a delay in completing the brewery may lengthen the time the acquirer needs a supply contract. *See* Exhibit A at 8–9. The proposed Final Judgment establishes strong incentives for ABI to complete the new brewery promptly. It requires ABI to continue construction of the new brewery and to achieve an average production capacity of 1,500 barrels of saleable beer each calendar week for three consecutive calendar weeks at the new brewery, within 180 days of the Court's entry of the Stipulation and Order (that is, by March 24, 2021). *See* Dkt. No. 2–1, Exhibit A (Proposed Final Judgment, Para. IV.B.). If ABI fails to reach that production metric by the deadline, it is required to pay the United States $25,000 per day until it achieves the metric. *See id*. at Para. IV.C. Once the new brewery is

operational, the acquirer will be able to brew and package canned and kegged beer for sale in Hawaii.

The Hawaii AG and Maui Brewing express doubt that the new brewery will be capable of supplying all of PV Brewing's beer, even once it is built. *See* Exhibit A at 9; Exhibit B at 2–3. When fully operational, however, the new brewery is expected to produce enough beer to meet present demand for canned and kegged Kona beer in Hawaii. And there are contract brewers, other than ABI, on the mainland with available brewing capacity to whom PV Brewing can turn to supply beer—bottled beer or otherwise—as needed.

Lastly, CBA had a brewing contract with ABI prior to the transaction. *See* Complaint ¶ 13 ("ABI . . . has a contract with CBA to brew some CBA brands of beer at ABI breweries"). The contract brewing provision in the proposed Final Judgment preserves for the acquirer the option to continue a brewing relationship that allowed CBA to compete effectively in the relevant market, including against ABI.

D. The Transition Services Agreement with ABI Is Optional, Limited, Temporary, and Terminable

The Hawaii AG expresses concern that the proposed Final Judgment makes available to PV Brewing a transition services agreement with ABI, thereby giving ABI "influence" over PV Brewing's operations. Exhibit A at 7–8. The Hawaii AG is incorrect. The provision of transition services will not give ABI the ability to influence PV Brewing's operations because the services are narrow in scope and temporary. The provision of transition services helps ensure that the acquirer seamlessly steps into the helm of Kona Hawaii to compete with ABI.

Transition services provisions, such as the one included in the proposed Final Judgment, are commonplace in connection with divestitures and serve an important role in ensuring the success of a divestiture. *See, e.g.*, Final Judgment at 12–13, *United States v. United*

Technologies Corp., No. 1:18-cv-02279 (D.D.C. 2018) (requiring Defendants to supply transition services such as facility management and upkeep, government compliance, and accounting and finance, at the purchaser's option); *see also* Competitive Impact Statement at 17, *United States v. Bayer AG*, No. 1:18-cv-01241 (D.D.C. 2018) (noting that transition services agreements are "aimed at ensuring that the [divestiture] assets are handed off in a seamless and efficient manner. . . [and that divestiture buyer] can continue to serve customers immediately upon completion of the divestitures.").

Transition services agreements, such as the one contemplated by the proposed Final Judgment, are purposefully limited in scope. For example, the transition services provision here requires ABI to provide the acquirer with transition services for finance and accounting services, human resources services, supply and procurement services, brewpub consulting, on-island merchandising, brewing engineering, and information technology services and support—only if the acquirer chooses. *See* Dkt. No. 2–1, Exhibit A (Proposed Final Judgment, Para. IV.P.).

The transition services agreement permitted by the proposed Final Judgment is also temporary, lasting up to a maximum of 18 months. The acquirer has the right under the proposed Final Judgment to terminate any transition services agreement (or any portion of one), without cost or penalty, at any time upon notice to ABI. To the extent either the acquirer or ABI seeks to extend, or otherwise amend or modify a transition services agreement, those extensions, amendments, and modifications must be approved by the United States.

The Hawaii AG asserts that PV Brewing may need to rely on ABI for transition services for more than 18 months, on the basis that it may take PV Brewing time to acquire knowledgeable local employees, s*ee* Exhibit A at 8. As noted above, however, the proposed Final Judgment puts in place mechanisms by which PV Brewing can hire personnel formerly

employed by Kona Hawaii, and the local leadership team of Kona Hawaii has already joined PV Brewing.

E. The United States Rigorously and Independently Assessed the Approved Acquirer

Finally, Maui Brewing contends that the process by which ABI selected PV Brewing as the proposed acquirer was "unfairly administered," *see* Exhibit B at 1, and believes it instead should be approved as the acquirer of the divestiture assets. In support of that contention, Maui Brewing states that PV Brewing offered a price "below fair market value"; Maui Brewing is more qualified than PV Brewing to be the acquirer; and ABI selected PV Brewing as the proposed acquirer due to its "clear ties to ABI." Exhibit B at 1–3 (internal citations omitted).

The goal of a divestiture is to "ensure that the purchaser possesses both the means and the incentive to maintain the level of premerger competition in the market of concern." DOJ Merger Remedies Manual at 6. The United States is not "to pick winners and losers" or to "protect or favor particular competitors." *Id*. at 4–5. In vetting a potential acquirer, the United States' "appropriate remedial goal is to ensure that the selected purchaser will effectively preserve competition according to the requirements in the consent decree, not that [the acquirer] will necessarily be the best possible competitor." *Id.* at 24. The United States has done so here.

In accordance with Paragraph IV.A. of the proposed Final Judgment, the United States has found PV Brewing to be an appropriate acquirer. Paragraph IV.E. of the proposed Final Judgment requires divestiture to an acquirer that "has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the brewing, developing, packaging, importing, distributing, marketing, promoting, and selling of Beer in the State of Hawaii." Regardless of the process by which ABI selected PV Brewing as the proposed acquirer, the United States rigorously and independently evaluated PV Brewing

as the proposed acquirer, including the qualifications, experience, incentives, business plans, finances, and professional and financial ties of PV Brewing and its operational team. Based on that evaluation, the United States concluded that PV Brewing is capable, willing, and incentivized to compete effectively and will preserve competition in the state of Hawaii, and approved PV Brewing as the purchaser.

Further, the price offered by PV Brewing for the divestiture assets, which Maui Brewing characterizes as "quite low," Exhibit B at 2, does not cast doubt on PV Brewing's ability or intentions to compete. It is common for divestiture assets to be sold at below-market prices, because the "divesting firm is being forced to dispose of assets within a limited period. Potential purchasers know this." DOJ Merger Remedies Manual at 25. Moreover, considerations other than price, such as the ability to close quickly and the likelihood of receiving approval from the United States, may result in the selection of a proposed acquirer who offers less than the highest price. In some cases, a low purchase price may raise concerns as to whether a proposed purchaser will be a successful competitor. *See, e.g.*, *United States v. Aetna*, *Inc*., 240 F. Supp. 3d 1, 72 (D.D.C. 2017) (citing an "extremely low purchase price" as evidence that the divestiture buyer was not likely to be able to replace the competition lost by the merger).

The key inquiry is whether "the purchase price and other evidence indicate that the purchaser is unable or unwilling to compete in the relevant market." *See* DOJ Merger Remedies Manual at 25. In its investigation here, the United States did not find evidence that PV Brewing was unwilling or unable to compete in the relevant market, nor has Maui Brewing pointed to any such evidence.

Lastly, Maui Brewing's concern about PV Brewing's "clear ties to ABI" ignores the fact that the divestiture will not only preserve the competition likely to be lost by the transaction, but

will enhance Kona Hawaii's independence from ABI. As noted previously, before this transaction, ABI held an approximate 31% stake in CBA and, by extension, in Kona Hawaii. ABI also had the right to appoint two of the eight seats on CBA's Board of Directors. *See* Complaint ¶ 13. Following the divestiture, ABI will no longer own *any* stake in Kona Hawaii.

V. CONCLUSION

After careful consideration of the public comments, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the Final Judgment after the comments and this response are published as required by 15 U.S.C. § 16(d).

Dated: March 17, 2021

Respectfully Submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I, Jill C. Maguire, hereby certify that on March 17, 2021, I caused a copy of the Response of Plaintiff United States to Public Comments on the Proposed Final Judgment to be served on Defendants Anheuser-Busch InBev SA/NV, Anheuser-Busch Companies, LLC, and Craft Brew Alliance, Inc., by mailing the documents electronically to their duly authorized legal representative as follows:

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