UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. ANHEUSER-BUSCH InBEV SA/NV, and SABMILLER plc, *Defendants.*	Civil Action No.

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b), Plaintiff United States of America ("United States") files this Competitive Impact Statement relating to the proposed Final Judgment submitted on July 20, 2016, for entry in this civil antitrust proceeding.[1]

I.

NATURE AND PURPOSE OF THE PROCEEDING

On November 11, 2015, Defendant Anheuser-Busch InBev SA/NV ("ABI") agreed to acquire Defendant SABMiller plc ("SABMiller") in a transaction valued at $107 billion. The United States filed a civil antitrust Complaint against ABI and SABMiller (collectively, "Defendants") on July 20, 2016, seeking to enjoin the proposed acquisition. The Complaint alleges that this proposed transaction will likely lessen competition substantially in the U.S. beer

[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the proposed Final Judgment.

industry—an industry in which millions of U.S. consumers spend over $100 billion per year—in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Specifically, the Complaint alleges that this proposed transaction will reduce competition by eliminating head-to-head competition between the two largest beer brewers in the United States—ABI and MillerCoors LLC ("MillerCoors")—both nationally and in every local market in the United States. The Complaint also alleges that the elimination of competition between ABI and MillerCoors will increase ABI's incentive and ability to disadvantage its remaining rivals—in particular, brewers of high-end beers that serve as an important constraint on ABI's ability to raise its beer prices—by limiting or impeding the distribution of their beers. As detailed in the Complaint, these anticompetitive effects likely would result in higher beer prices and fewer choices for U.S. beer consumers.

Simultaneously with the filing of the Complaint, the United States filed a Hold Separate Stipulation and Order ("Hold Separate Stipulation and Order") and a proposed Final Judgment, which seek to prevent the transaction's likely anticompetitive effects.

As detailed below, the proposed Final Judgment requires ABI to divest SABMiller's equity and ownership stake in MillerCoors, which is the joint venture through which SABMiller conducts substantially all of its operations in the United States, as well as certain other assets related to MillerCoors' business and the Miller-branded beer business outside of the United States. The divestiture will not only maintain MillerCoors as an independent competitor, but will protect MillerCoors' competitiveness by giving MillerCoors (or its majority owner) (i) perpetual, royalty-free licenses to products for which it currently must pay royalties, and (ii) ownership of the international rights to the Miller brands of beer.

To further help preserve and promote competition in the U.S. beer industry, the proposed Final Judgment (i) imposes certain restrictions on ABI's distribution practices and ownership of distributors, and (ii) requires ABI to provide the United States with notice of future acquisitions, including acquisitions of beer distributors and craft brewers, prior to their consummation. Among other things, the proposed Final Judgment prohibits ABI from:

- Acquiring a distributor if the acquisition would cause more than 10% of ABI's beer in the United States to be sold through ABI-owned distributors;
- Prohibiting or impeding a distributor that sells ABI's beer from using its best efforts to sell, market, advertise, promote, or secure retail placement for rivals' beers, including the beers of high-end brewers;
- Providing incentives or rewards to a distributor who sells ABI's beer based on the percentage of ABI beer the distributor sells as compared to the distributor's sales of the beers of ABI's rivals;
- Conditioning any agreement or program with a distributor that sells ABI's beer on the fact that it sells ABI's rivals' beer outside of the geographic area in which it sells ABI's beer;
- Exercising its rights over distributor management and ownership based on a distributor's sales of ABI's rivals' beers;
- Requiring a distributor to report financial information associated with the sale of ABI's rivals' beers;
- Requiring that a distributor who sells ABI's beer offer its sales force the same incentives for selling ABI's beer when the distributor promotes the beers of ABI's rivals with sales incentives; and

- Consummating non-reportable acquisitions of beer brewers—including craft brewers—without providing the United States with advance notice and an opportunity to assess the transaction's likely competitive effects.

These provisions will help ensure that U.S. beer consumers receive the products they want at competitive prices and that ABI is not able to disadvantage its rivals in their efforts to compete for consumer demand.

Finally, under the terms of the Hold Separate Stipulation and Order, Defendants will take certain steps to ensure that, pending the ordered divestiture, MillerCoors will continue to be operated as an economically viable, ongoing business concern and that all divestiture assets will be preserved and will be independent from, and not influenced by, ABI.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. *The Defendants and the Proposed Transaction*

ABI is a corporation organized and existing under the laws of Belgium, with headquarters in Leuven, Belgium. ABI brews and markets more beer sold in the United States than any other company, accounting for approximately 47% of beer sales nationally.[2] ABI owns and operates 19 breweries in the United States and over 40 major beer brands sold in the United States,

[2] National market shares are based on dollar-sales data from IRI, a market research firm, whose data are commonly used by industry participants. The shares reflect only off-premise sales. ABI accounts for approximately 35% of dollar sales of beer made only through grocery stores.

including Bud Light (the highest-selling brand in the United States) and other popular brands, such as Budweiser, Busch, Michelob, Natural Light, Stella Artois, Shock Top, and Beck's.

SABMiller is a corporation organized and existing under the laws of the United Kingdom, with its headquarters in London, England. In the United States, SABMiller operates through its ownership interest in MillerCoors. MillerCoors is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in Chicago, Illinois. MillerCoors is a joint venture between SABMiller and Molson Coors Brewing Company ("Molson Coors"). SABMiller and Molson Coors have, respectively, a 58% and 42% ownership interest in and equal governance rights over MillerCoors.

MillerCoors is the second-largest brewing company in the United States, accounting for 25% of beer sales nationally. MillerCoors owns and operates 12 breweries in the United States, and has the sole right to produce and sell in the United States more than 40 brands of beer, including Coors Light and Miller Lite, the second- and fourth-highest selling beer brands in the United States. MillerCoors also has the right to produce and sell in the United States other popular brands of beer, such as Miller Genuine Draft, Coors Banquet, and Blue Moon. In addition, MillerCoors has the exclusive right to import into and sell in the United States certain beer brands owned by SABMiller, including Peroni, Grolsch, and Pilsner Urquell.

At the same time that ABI agreed to acquire complete ownership of SABMiller, ABI also agreed to divest to Molson Coors (1) SABMiller's equity and ownership stake in MillerCoors; (2) perpetual, royalty-free licenses to import, manufacture, distribute, market, and sell the Import Products, which are SABMiller brands that are imported by MillerCoors for sale in the United States;[3] (3) perpetual, royalty-free licenses to manufacture, distribute, market, and sell the

[3] For purposes of this Competitive Impact Statement, the United States includes the fifty states of the United States of America, the District of Columbia, Puerto Rico, and all United States military bases located therein.

Licensed Products, which are brands currently manufactured under contract in the United States by MillerCoors under royalty-bearing licenses with SABMiller; (4) all rights, title, and interests in Miller-Branded Products outside the United States; and (5) certain tangible and intangible assets related to the manufacture, distribution, marketing, and sale of Miller-Branded Products outside of the United States. The transaction between ABI and Molson Coors is contingent upon ABI completing its acquisition of SABMiller.

B. *The Competitive Effects of the Transaction on the Market for Beer in the United States*

1. Relevant Markets

Beer is a relevant product market under Section 7 of the Clayton Act. Beer is usually made from malted cereal grain, flavored with hops, and brewed via a fermentation process. Wine, distilled liquor, and other alcoholic or non-alcoholic beverages do not substantially constrain the prices of beer, and a hypothetical monopolist in the beer market could profitably raise prices.

Beer brewers generally categorize beer into different segments based primarily on price. Beers in the United States can generally be grouped into three segments: sub-premium, premium, and high-end.[4] However, beers in different segments—particularly those in adjacent segments—can compete with each other under certain circumstances. For example, the prices of high-end beers can constrain the prices of premium beers because some consumers of premium beers may trade up to high-end beers when the prices of premium beers approach the prices of high-end beers.

[4] The high-end segment is composed of imports and craft brands. ABI also identifies a "premium plus" segment that consists largely of American beers that are priced somewhat higher than Budweiser and Bud Light. Examples of beers that ABI identifies as "premium plus" beers include Bud Light Lime, Bud Light Platinum, Bud Light Lime-a-Rita, and Michelob Ultra.

Most sales of beer in the United States are of premium and sub-premium brands. The vast majority of premium and sub-premium beer sold in the United States is brewed by ABI and MillerCoors, which own most of the popular premium and sub-premium brands. But high-end brands—in particular, Mexican imports and craft brands—are increasingly gaining market share. This market trend is increasing the competition faced by ABI and MillerCoors and the choices available to consumers.

Both national and local geographic markets exist in the beer industry. At the local level, demand for beer is driven by the locations of the customers who purchase beer, rather than by the locations of the breweries that brew it. Beer brewers also make many pricing and promotional decisions at the local level, reflecting local brand preferences and demand, demographics, and other competitive conditions and factors, which can vary significantly from one local market to another. This is sustainable in part because arbitrage across local markets is unlikely to occur.

Important competitive decisions, however, are also made at the national level. At the national level, large beer companies, such as ABI and MillerCoors, make competitive decisions and develop strategies regarding product development, marketing, and brand building. Moreover, large beer brewers typically create and implement national pricing strategies, place a significant portion of beer advertising on national television, and compete for national retail accounts.

2. Competitive Effects of Increased Concentration in the Relevant Markets

The beer industry in the United States is highly concentrated and would become significantly more so if ABI were allowed to acquire SABMiller, including its ownership interest in MillerCoors. As a majority owner with equal governance rights over MillerCoors, ABI would be able to direct the competitive behavior of MillerCoors, leading to a loss of competition

between the firms both nationally and in every local market in the United States. Although Molson Coors would continue to own a minority equity interest in MillerCoors and have equal governance rights, Molson Coors' interest in MillerCoors would not eliminate the anticompetitive effects that would result from the acquisition. After the acquisition, ABI would have the right to appoint half of the board members of MillerCoors, who would have the same governance rights as other board members over MillerCoors' business. Given that ABI would have significant influence over MillerCoors, ABI and MillerCoors would be able to coordinate their competitive behavior, possibly to the extent where they behaved as a single, profit-maximizing entity.

The result would be a combination of the two largest beer brewers in the United States, leaving only a fringe of competitors with substantially smaller market shares than ABI and MillerCoors. ABI and MillerCoors account for more than 70% of beer sold in the United States. After the proposed acquisition, ABI would have a commanding market share ranging from 37% to 94% in every local U.S. market for which reliable data are available.[5] In 18 local markets, ABI and MillerCoors would have a combined share of 70% or more.

3. Beer Distribution in the United States

Effective distribution is important for a brewer to be competitive in the U.S. beer industry. Many states require large brewers to use independent distributors, and these distributors typically have exclusive and perpetual rights to sell the brands they carry within a particular territory. Most brewers use distributors to merchandise, sell, and deliver beer to retailers. Those retailers are primarily grocery stores, large retailers (such as Target and

[5] The Complaint identifies 58 metropolitan statistical areas ("MSAs"), as defined by IRI, for which reliable data are available. The market shares for these MSAs are based on dollar-sales data from IRI and reflect sales of beer only through grocery stores.

Walmart), convenience stores, liquor stores, restaurants, and bars. Retailers, in turn, sell beer to consumers.

ABI beers are distributed both through ABI-owned distributors and through distributors that are not owned by ABI but who sell large volumes of ABI beer, including the Budweiser and Bud Light brands ("ABI-Affiliated Wholesalers"). ABI beer brands account for approximately 90% of the volume of the beer sold by ABI-Affiliated Wholesalers. In spite of many state laws requiring that beer distributors be independent of brewers, ABI exerts considerable influence over ABI-Affiliated Wholesalers, in part by requiring them to enter into a Wholesaler Equity Agreement ("Equity Agreement") with ABI.

The 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. For example, the Equity Agreement prohibits an ABI-Affiliated Wholesaler from requesting that a bar replace an ABI tap handle with a competitor's tap handle or that a retailer replace ABI shelf space with a competitor's beer. Further, the Equity Agreement prohibits an ABI-Affiliated Wholesaler from compensating its salespeople for their sales of competing beer brands (such as a dollar-per-case incentive) unless it provides the same incentives for sales of certain ABI beer brands. The expense of extending a per-case sales incentive to the large volume of ABI brands effectively limits an ABI-Affiliated Wholesaler's ability to promote brands of Third-Party Brewers through targeted sales incentives.

ABI also promotes distributor exclusivity by providing payments to ABI-Affiliated Wholesalers based on their ABI "alignment," that is, the amount of ABI beer that they sell relative to the beer of ABI's competitors. For example, under a program known as the Voluntary Anheuser-Busch Incentive for Performance Program, ABI offers ABI-Affiliated Wholesalers

that are 90% or more "aligned" a payment for each case-equivalent of ABI beer they sell. The size of the payment increases based on the ABI-Affiliated Wholesaler's level of alignment. Only the sales of very small, local craft beers are excluded from the calculation of an ABI-Affiliated Wholesaler's level of alignment. This allows ABI-Affiliated Wholesalers to carry small, local craft beers but decreases or eliminates the payments to ABI-Affiliated Wholesalers that add craft beers that grow above a certain size or expand outside of a certain geographic area. Thus, this incentive program has the effect of impeding rival craft brewers from growing large enough to have the scale to better compete with ABI.

MillerCoors beers are distributed almost exclusively through distributors that are not owned by MillerCoors but who sell large volumes of MillerCoors beer ("MillerCoors-Affiliated Wholesalers"). MillerCoors brands account for approximately 65% of the volume of the beer sold by MillerCoors-Affiliated Wholesalers.

Other than MillerCoors and ABI, most brewers do not have a distribution network affiliated with their brands. Consequently, the majority of other brewers' beers are distributed either by the ABI-Affiliated Wholesaler or the MillerCoors-Affiliated Wholesaler in a given geographic area. For example, in 2014, 85% or more of the beer sold in the United States was distributed by a Miller-Coors Affiliated Wholesaler, an ABI-Affiliated Wholesaler, or a distributor owned by ABI.

Although some brewers use alternative means to sell their beer to retailers, their only alternatives to an ABI-Affiliated Wholesaler or MillerCoors-Affiliated Wholesaler tend to be considerably smaller and significantly less efficient distributors. Indeed, some of these alternative distributors are not even primarily focused on selling beer. For instance, these distributors may be more focused on selling a broad range of wine and liquor while only offering

a small selection of beers. Moreover, beer distributors who are not affiliated with ABI or MillerCoors typically service fewer retail establishments (or exclude entire classes of retailers), visit the establishments that they do service less frequently, and provide fewer resources (such as financial support and sales associates) than the ABI-Affiliated Wholesaler or the MillerCoors-Affiliated Wholesaler that operates in the same territory.

Unlike ABI, MillerCoors does not include in its agreements with MillerCoors-Affiliated Wholesalers any provisions that discourage or impede the promotion and sales of the brands of Third-Party Brewers. There is, however, a practical limit to the number of brands that any distributor can effectively carry and promote to its retail accounts. As the number of brands carried by a distributor increases, the distributor may incur costs to manage the resulting complexities, and the distributor may become less focused on promoting the smaller brands that it carries. Consequently, the presence of a MillerCoors-Affiliated Wholesaler or a small distributor in a market does not eliminate the advantages that many independent craft brewers would receive from having access to ABI-Affiliated Wholesalers.

4. The Proposed Divestiture Alone Would Not Eliminate the Likely Competitive Effects of the Transaction on Beer Distribution

Even though ABI has proposed to divest SABMiller's interest in MillerCoors to Molson Coors, the divestiture to Molson Coors likely would not eliminate the anticompetitive effects of the transaction on beer distribution, which, as noted above, plays an important role in a brewer's ability to effectively compete in the U.S. beer industry.

Presently, MillerCoors competes against ABI only in the United States. Molson Coors, however, competes with ABI in multiple countries throughout the world—most significantly in Canada, where ABI and Molson Coors are the two largest brewers and together account for a large share of beer sales. ABI and Molson Coors also have certain cooperative arrangements in

Eastern Europe. For example, ABI brews and distributes Molson Coors' beers in certain countries while Molson Coors provides such services to ABI in other countries. ABI and MillerCoors have no comparable business arrangements.

The change in ownership of MillerCoors—from a joint venture between SABMiller and Molson Coors to a wholly owned subsidiary of Molson Coors—will increase the number of highly concentrated markets across the world in which ABI competes directly against Molson Coors. By increasing the number of markets in which ABI and Molson Coors compete, the divestiture of SABMiller's interest in MillerCoors to Molson Coors could facilitate coordination between ABI and Molson Coors in the United States. For example, this multi-market 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. Coordination could also be facilitated by the existing and newly-created cooperative agreements between ABI and Molson Coors around the world.

If the divestiture facilitates coordination between ABI and Molson Coors, it would also increase ABI's incentive to limit competition from its high-end rivals. This is because competition from high-end rivals would become an even more important constraint on the ability of ABI and Molson Coors to increase the prices of their beers across all segments. As a result, following a divestiture to Molson Coors, ABI may have a greater incentive to impede the growth and reduce the competitiveness of its high-end rivals by limiting their access to effective and efficient distribution. The extent to which craft and other brewers in the United States are able to compete with ABI and Molson Coors will thus affect the likelihood of the divestiture to Molson Coors leading to unilateral or coordinated anticompetitive effects.

5. Entry and Expansion

Neither entry into the national or local beer markets in the United States, nor any repositioning of existing brewers, would undo the likely anticompetitive harm from ABI's acquisition of SABMiller. Many MillerCoors brands compete directly against ABI brands in terms of their brand position, reputation, taste profile, well-established marketing, acceptance by a wide range of consumers, and robust distribution networks. ABI and MillerCoors brands of beer are available in almost every establishment in which consumers can purchase or consume beer. ABI and MillerCoors also compete directly on a national level for advertising and promotions, such as sports sponsorships. Any entrant would face enormous costs attempting to replicate these assets and would, at best, take many years to succeed.

Building nationally-recognized and accepted brands, which retailers will support with feature and display activity, is difficult, expensive, and time consuming. Although new beer breweries open frequently, new brewers face significant barriers to achieving efficient scale. In addition, ABI's distribution practices hinder new entrants from accessing effective and efficient distribution, which prevents them from growing to a scale that allows significant economies in production. While consumers have undoubtedly benefited from the launch of many individual craft and specialty beers in the United States, the multiplicity of such brands does not replace the nature, scale, and scope of the existing competition between ABI and MillerCoors, which would be eliminated by the proposed transaction.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment contains a remedy designed to eliminate the likely anticompetitive effects of the acquisition in the national market for beer in the United States and

local markets throughout the United States. The proposed Final Judgment contemplates that the divested assets will be sold to Molson Coors, which, on November 11, 2015, entered into an agreement with ABI to acquire the divested assets. If the divestiture to Molson Coors should fail to close, ABI would be required to make the same divestiture to another acquirer acceptable to the United States, in its sole discretion, for the purpose of enabling that alternative acquirer to assume SABMiller's role with respect to the ownership and governance of MillerCoors.[6]

The divestiture required by the proposed Final Judgment will preserve MillerCoors as an independent and economically viable competitor and will strengthen MillerCoors by giving it valuable rights that it does not currently have. The divestiture includes assets that are necessary to preserve or enhance the viability of MillerCoors as a competitor in the national and local beer markets in the United States. Those assets include SABMiller's full interest in MillerCoors and the intangible assets necessary to permit Molson Coors to brew and import the Import Products for sale in the United States. The proposed divestiture also gives Molson Coors full rights to the Miller-Branded Products, as well as the tangible and intangible assets that are primarily related to the manufacture, distribution, marketing, and sale of the Miller-Branded Products outside the United States.

The distribution-related relief seeks to prohibit ABI from rewarding, penalizing, or otherwise conditioning its relationships with ABI-Affiliated Wholesalers, or any employees or agents of the wholesalers, based on the wholesalers' sale, marketing, advertising, promotion, or retail placement of rivals' beers—including ABI's high-end rivals. For example, the remedy seeks to prevent ABI from using its relationship with ABI-Affiliated Wholesalers to disadvantage, or maintain or erect barriers to scale for, ABI's high-end rivals. Under the

[6] The remainder of the explanation of the proposed Final Judgment refers to the proposed acquirer as Molson Coors. If Molson Coors does not acquire the Divestiture Assets, the proposed Final Judgment will apply to another Acquirer in the same manner as described with respect to Molson Coors.

proposed Final Judgment, ABI-Affiliated Wholesalers should be free to make independent decisions regarding their sale of ABI's high-end rivals' beers. By 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.

In short, the remedy seeks to preserve and promote competition in the U.S. beer industry by maintaining MillerCoors as an independent competitor and by reducing the influence of ABI on the distribution of beer in the United States. In addition, the proposed Final Judgment also provides for supervision by this Court and the United States of the transition services and supply arrangements between ABI and Molson Coors. Those arrangements will allow Molson Coors time to establish the ability to brew the Import Products and Miller-Branded Products independently of ABI. The remedy also provides for supervision of ABI's compliance with the restrictions on its distribution practices.

A. *The Divestiture*

The proposed Final Judgment requires ABI, within 90 days after entry of the Hold Separate Stipulation and Order by the Court, to divest (1) SABMiller's equity and ownership stake in MillerCoors; (2) all raw material inventory exclusively related to the manufacture, distribution, marketing, and sale of Miller-Branded Products outside of the United States; (3) all other tangible and intangible assets of SABMiller and its subsidiaries (other than MillerCoors and its subsidiaries) that are primarily related to the Miller-Branded Products, both inside and outside the United States; and (4) perpetual, fully paid-up, royalty-free licenses to any intellectual property and any other intangible assets required to permit the acquirer of the divested assets to manufacture, import, distribute, market, or sell the Import Products and

Licensed Products in the United States. Molson Coors will also have a one-year period in which to negotiate to hire employees of SABMiller whose primary responsibility is the production, manufacture, importation, distribution, marketing, or sale of Miller-Branded Products.

The proposed divestiture will permit MillerCoors to continue as a viable competitor in the relevant beer markets independent of ABI. After the divestiture, Molson Coors will own all assets in the United States that are used in the production, marketing, and sale of the MillerCoors brands of beer that are brewed in the United States. Under the proposed divestiture, Molson Coors will also obtain the international rights to brew and export the Miller-Branded Products. With respect to two beer brands, Redd's and Foster's, MillerCoors now produces those brands for sale in the United States under royalty-bearing licenses from SABMiller. The divestiture provides that Molson Coors will have perpetual, fully paid-up, royalty-free licenses and any other intangible assets required to manufacture and sell those brands in the United States. MillerCoors now has the right to import and sell in the United States certain SABMiller brands that are brewed internationally. The proposed divestiture provides that Molson Coors will have perpetual, royalty-free licenses to brew those brands and import them into the United States.

The European Commission also investigated the effects of ABI's proposed acquisition of SABMiller. To resolve concerns raised by the European Commission, ABI is divesting essentially all of the European business that it would have acquired from SABMiller. ABI has already agreed to sell to Asahi Group, a Japanese brewer, the Peroni, Grolsch, and Meantime brands of beer. ABI has also agreed to divest SABMiller's business in the Czech Republic, Hungary, Poland, and Romania, including the Pilsner Urquell brand of beer. The proposed Final Judgment, however, requires that ABI divest the U.S. rights to the Import Brands—including

Peroni, Grolsch, and Pilsner Urquell—to Molson Coors, notwithstanding the divestiture of the ex-U.S. rights to those brands to other buyers.

B. *Transition Services and Interim Supply Agreements*

Sections IV.I and IV.J of the Final Judgment require ABI to enter into one or more transition services agreements and interim supply agreements with Molson Coors. The transition services agreements require ABI to provide Molson Coors with services with respect to the development, production, servicing, importing, distributing, marketing, and selling of Miller-Branded Products outside of the United States. The transition services agreements will allow Molson Coors to operate the business of selling Miller-Branded Products outside of the United States in a manner that is consistent with SABMiller's current operation of that business. The interim supply agreements 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.

The transition services and interim supply agreements are time-limited to assure that Molson Coors will become fully independent of ABI with respect to the supply of the Import Products and the Miller International Business as soon as practicable. As such, in conjunction with the nondisclosure of information provisions in the proposed Final Judgment, the terms of the transition services and interim supply agreements are intended to prevent the vertical supply arrangements from causing competitive harm in the near term. The proposed Final Judgment subjects these agreements, including any extensions, to monitoring by a trustee appointed by the United States and requires that the agreements be approved by the United States. Section V.C of the proposed Final Judgment further provides that if ABI and Molson Coors enter any new agreements with each other with respect to the brewing, packaging, production, marketing,

importing, distribution, or sale of beer in the United States, ABI must notify the United States of the new agreements at least 60 calendar days in advance of such agreements becoming effective, and the United States must approve the agreements. To the extent that ABI has divested the worldwide rights to a brand, however, the provisions of the proposed Final Judgment relating to transition services and interim supply agreements do not apply to arrangements, if any, between Molson Coors and the new owner of the brand outside of the United States.

C. *Limits on ABI's Distribution Practices*

Section V.A of the proposed Final Judgment requires ABI and SABMiller to agree—and for ABI to further require Molson Coors to agree—not to cite the transaction or the required divestiture as a basis for modifying, renegotiating, or terminating any contract with any Distributor. This language prevents ABI, SABMiller, and Molson Coors from claiming that either the transaction or the divestiture is a change of ownership or control that would otherwise enable ABI or Molson Coors to make changes to their distribution contracts, potentially limiting their rival brewers' path to market.

Section V.B prevents ABI from acquiring any equity interests in, or ownership or control of the assets of, a Distributor if such acquisition would transform the Distributor into an ABI-Owned Distributor, and if more than 10% of ABI's beer sold in the United States, measured by volume, would be sold through ABI-Owned Distributors after such acquisition. The United States' investigation revealed that ABI-Owned Distributors typically distribute only brands owned by or affiliated with ABI, and that ABI-Owned Distributors currently sell approximately 9% of ABI's beer in the United States. This provision limits ABI's ability to acquire Distributors and then cause the Distributors to cease to promote or to expel rival brands from the

Distributors' portfolios—thus preventing or impeding a rival from selling its beer through a Distributor or forcing the rival to find a different and potentially less effective path to market.

Section V.D prohibits ABI from instituting or continuing any practices or programs that impede or disincentivize ABI-Affiliated Wholesalers from selling, marketing, advertising, promoting, or maximizing the retail placement of the beers of Third-Party Brewers,[7] including the beers of high-end brewers.[8] In particular, Section V.D precludes ABI from, among other things:

- Conditioning the availability of ABI's beer to an ABI-Affiliated Wholesaler on the wholesaler's sales, marketing, advertising, promotion, or retail placement of Third-Party Brewers' beers;
- Conditioning the prices, services, product support, rebates, discounts, buy backs, or other terms and conditions of sale of ABI's beer that are offered to an ABI-Affiliated Wholesaler based on its sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewers' beers;
- Conditioning any agreement or program with an ABI-Affiliated Wholesaler on the fact that it sells Third-Party Brewers' beers outside of the geographic area in which it sells ABI beer;
- Requiring an ABI-Affiliated Wholesaler to offer any incentive for selling ABI beer in connection with or in response to any incentive that the wholesaler offers for selling a Third-Party Brewers' beers; and

[7] Third-Party Brewers include any brewer, contract-brewer, or importer of beer for sale in the United States other than ABI, SABMiller, Molson Coors, or MillerCoors.

[8] In the proposed Final Judgment, "Beer" includes not only products made from malted barley, but also flavored malt beverages, alcoholic root beers, and hard ciders. This definition is necessary because ABI-Affiliated Wholesalers who sell a Third-Party Brewer's beer typically also sell any flavored malt beverages, alcoholic root beers, and hard ciders made by the Third-Party Brewer.

- Preventing an ABI-Affiliated Wholesaler from using best efforts to sell, market, advertise, or promote any Third-Party Brewer's beers, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of the Third Party Brewer's beers in a geographic area.

In sum, Section V.D seeks to ensure that ABI cannot use distribution-related practices and incentives to prevent or limit Third-Party Brewers from securing the distribution necessary to effectively compete with ABI. This is especially important with respect to brewers of high-end beers, which, as detailed above and in the Complaint, have served as an important constraint on ABI's ability to raise prices of its beers.

It should be noted, however, that the proposed Final Judgment—including Section V.D—does not prevent ABI from requiring that an ABI-Affiliated Wholesaler use its best efforts to sell, market, advertise, or promote ABI's beers. The proposed Final Judgment also does not prohibit ABI from conditioning incentives, programs, or contractual terms based on an ABI-Affiliated Wholesaler's volume of sales of ABI beer,[9] the retail placement of ABI beer, or ABI's percentage of beer sales in a geographic area, provided that any such incentives, programs, or contractual terms do not require or encourage an ABI-Affiliated Wholesaler to provide less than best efforts to the sale, marketing, advertising, retail placement, or promotion of Third-Party Brewers' beers or to stop distributing Third-Party Brewers' beers.

The proposed Final Judgment also does not prevent ABI from requiring an ABI-Affiliated Wholesaler to allocate to ABI's beers a proportion of the ABI-Affiliated Wholesaler's annual spending on beer promotions and incentives as long as the allocation does not exceed the proportion of revenues that ABI's beers constituted in the ABI-Affiliated Wholesaler's overall

[9] ABI, however, may not define the percentage of its beer sales in a geographic area by reference to or derived from information obtained from ABI-Affiliated Wholesalers concerning their sales of any Third-Party Brewer's beers.

revenue for beer sales in the preceding year. The proposed Final Judgment permits this practice because, in any given geographic area, the ABI-Affiliated Wholesaler provides the exclusive path to market for ABI's beers, and therefore ABI may be reluctant to invest in its distributors without some assurance that those investments will not be used primarily to benefit its rivals. ABI therefore may require an ABI-Affiliated Wholesaler to promote ABI's beers in proportion to the revenues it earns on ABI's beers.

The proposed Final Judgment does not prohibit ABI from taking the above actions, because such actions can be undertaken in a way that does not undermine the proposed Final Judgment's objective of ensuring that Third-Party Brewers have access to the distribution networks necessary to effectively compete with ABI and meet consumer demand. The proposed Final Judgment is not designed to prevent ABI from competing. Rather, it is designed to ensure that Third-Party Brewers whose beer is sold by ABI-Affiliated Wholesalers have the opportunity to compete with ABI on a level playing field—not on a playing field in which ABI has used its influence over the distributor to favor ABI's beers at the expense of other beers in the distributor's portfolio.

The proposed Final Judgment contains provisions 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. Section V.E prohibits ABI from disapproving an ABI-Affiliated Wholesaler's selection of its own general manager, or a successor general manager, based on the ABI-Affiliated Wholesaler's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's beer. Similarly, Section V.F requires that when ABI exercises any right related to the transfer of control, ownership, or equity in any Distributor to any other Distributor, ABI shall not give weight to or

base any decision upon either Distributor's business relationship with a Third-Party Brewer—including, but not limited to, such Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's beer. These provisions are intended to prevent ABI from using its rights over management or ownership changes to promote alignment by selecting new owners because they have demonstrated a willingness not to carry or promote rival brands.

Section V.G prevents ABI from requesting or requiring an ABI-Affiliated Wholesaler to report to ABI the wholesaler's revenues, profits, margins, costs, sales, volumes, or other financial information associated with the purchase, sale, or distribution of a Third-Party Brewer's beer. ABI, however, is not prohibited from requesting the reporting of general financial information by an ABI-Affiliated Wholesaler to assess the overall financial condition and financial viability of such wholesaler, the percentage of total beer revenues received by the wholesaler associated with ABI's beer, or from conducting ordinary course due diligence in connection with any potential acquisition of an ABI-Affiliated Wholesaler.

Section V.I directs ABI to notify ABI-Affiliated Wholesalers of the changes to ABI's programs or agreements required by the proposed Final Judgment and the ABI-Affiliated Wholesalers' rights to bring to the attention of the Monitoring Trustee or the United States any actions by ABI which the distributor believes may violate Section V of the proposed Final Judgment. ABI must also provide ABI-Affiliated Wholesalers with a copy of the proposed Final Judgment. Further, under Section V.H, ABI may not discriminate against, penalize, or retaliate against a Distributor that brings to the attention of the Monitoring Trustee or the United States a potential violation by ABI of Section V of the Final Judgment.

D. *Divestiture Trustee*

In the event that ABI does not accomplish the divestiture as prescribed in the proposed Final Judgment, Section VI provides that, upon application of the United States, the Court will appoint a Divestiture Trustee selected by the United States to complete the divestiture. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that ABI will pay all costs and expenses of the Divestiture Trustee. After his or her appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture.

E. *Monitoring Trustee*

Section VIII of the proposed Final Judgment permits the appointment of a Monitoring Trustee by the United States in its sole discretion. The United States intends to appoint a Monitoring Trustee and to seek the Court's approval of such appointment. The Monitoring Trustee will ensure that Defendants expeditiously comply with all of their obligations and perform all of their responsibilities under the proposed Final Judgment and the Hold Separate Stipulation and Order; that the Divestiture Assets remain economically viable, competitive, and ongoing assets; and that competition in the sale of beer in the United States and in all local markets within the United States is maintained. The Monitoring Trustee will have the power and authority to monitor Defendants' compliance with the terms of the proposed Final Judgment and attendant interim supply and transition services agreements. The Monitoring Trustee will also have the authority to investigate complaints that ABI has violated the restrictions related to its distribution practices. The Monitoring Trustee will have access to all personnel, books, records, and information necessary to monitor Defendants' compliance with the proposed Final Judgment, and will serve at the cost and expense of ABI. The Monitoring Trustee will file

reports every 90 days with the United States and, as appropriate, the Court setting forth Defendants' efforts to comply with their obligations under the proposed Final Judgment and the Hold Separate Stipulation and Order.

F. *Hold Separate Stipulation and Order Provisions*

Defendants have entered into the Hold Separate Stipulation and Order attached as an exhibit to the Explanation of Consent Decree Procedures, which was filed simultaneously with the Court, to ensure that, pending the divestiture, the Divestiture Assets are maintained as an ongoing, economically viable, and active business. The Hold Separate Stipulation and Order ensures that the Divestiture Assets are preserved and maintained in a condition that allows the divestiture to be effective.

The Hold Separate Stipulation and Order requires that the Defendants take all steps that are within their power and consistent with the agreements that govern the operations of MillerCoors to ensure that MillerCoors will be maintained as a completely independent competitor in the brewing and sale of beer in the same manner that it is today. Moreover, SABMiller and ABI will not prevent or interfere with MillerCoors' achieving its ordinary course, previously agreed upon business plan and budget.

The Hold Separate Stipulation and Order further requires the Defendants to maintain and operate the Import Products and business of selling Miller-Branded Products outside of the United States—which are not today standalone businesses—in the same manner as they are currently operated. Defendants are required to use all reasonable efforts to achieve the sales and revenues targets for the Import Products and Miller-Branded Products in accordance with previously agreed upon business plans and budgets and are prohibited from sharing any competitively sensitive information regarding these products with any employee that is not

currently involved in their operations or does not have a reasonable need to know such information.

G. *Notification Provisions*

Section XII of the proposed Final Judgment requires ABI to notify the United States in advance of executing certain transactions that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). The transactions covered by these provisions include the acquisition or license of any interest in non-ABI beer brewing or distribution assets or brands, excluding acquisitions of: (1) assets that do not generate at least $7.5 million in annual gross revenue from beer sold for resale in the United States; (2) distribution licenses that do not generate at least $3 million in annual gross revenue in the United States; and (3) beer distributors that do not generate at least $3 million in annual gross revenue in the United States. This provision significantly broadens ABI's pre-merger reporting requirements because the $3 million and $7.5 million threshold amounts are significantly less than the HSR Act's "size of the transaction" reporting threshold.

Section XII will provide the United States with advance notice of, and an opportunity to evaluate, ABI's acquisition of both beer distributors and craft brewers. Notification of distributor acquisitions allows the United States to evaluate whether ABI's acquisition of a distributor implicates the prohibitions in Section V or is otherwise likely to substantially lessen competition by hindering the effective distribution of the beers of ABI's rivals. Notification of brewer acquisitions allows the United States to evaluate any acquisition by ABI of, among other things, craft breweries. ABI has acquired multiple craft breweries over the past several years, some of which were not reportable under the HSR Act. Acquisitions of this nature, individually or collectively, have the potential to substantially lessen competition, and the proposed Final

Judgment gives the United States an opportunity to evaluate such transactions in advance of their closing even if the purchase price is below the HSR Act's thresholds.

The proposed Final Judgment requires ABI to provide such notification to the Antitrust Division of the United States Department of Justice (the "Antitrust Division") in the same format as, and in accordance with the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended. ABI must provide such notification at least 30 calendar days prior to acquiring any such interest. If within the 30-day period after notification the Antitrust Division makes a written request for additional information, ABI shall be precluded from consummating the proposed transaction or agreement until 30 calendar days after submitting all requested additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

H. *Nondisclosure of Information*

Section XIII of the proposed Final Judgment requires Defendants to implement and maintain procedures to prevent the disclosure of the confidential commercial information of MillerCoors and Molson Coors by Defendants to any of Defendants' affiliates who are involved in the marketing, distribution, or sale of beer in the United States. Within 10 days of the Court approving the Hold Separate Stipulation and Order described above, Defendants must submit to the United States their planned procedures to effect compliance with their nondisclosure obligations. Additionally, Defendants must provide a briefing as to the obligations required under Section XIII of the proposed Final Judgment to certain of Defendants' officers and employees who will (i) receive the confidential commercial information of MillerCoors or

Molson Coors; (ii) be responsible for the transition services and interim supply agreements described above; or (iii) be responsible for making decisions regarding ABI's relationships with, agreements with, or policies regarding distributors. This provision ensures that Defendants cannot improperly use any confidential information that they receive from Molson Coors or from SABMiller concerning MillerCoors in ways that would harm competition in the U.S. beer industry.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damages action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent lawsuit that may be brought against Defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written

comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the Antitrust Division's internet website and, in certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Peter J. Mucchetti
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 4100
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any necessary or appropriate modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking preliminary and permanent injunctions against Defendants' proposed transaction and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition in the national market and in each local market for beer in the United States. Thus, the proposed Final Judgment will protect competition

as effectively as, and will achieve all or substantially all of the relief the United States would have obtained through, litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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 such a 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
>
> (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); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 15-17 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, 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), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting

that the 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").[10]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [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. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[11] In determining whether a proposed settlement is in the public interest, a court "must accord deference to the government's

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[10] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[11] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that,

predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

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. As a court in this district confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding 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). The language wrote into the statute what Congress intended when it 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). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[12] 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.

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 20, 2016

Respectfully Submitted,

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[12] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").