investigation are claims 1 and 12 of the '582 patent; claim 1 of the '649 patent; and claims 1, 12, and 17 of the '735 patent.

On August 27, 2020, M–I filed a motion for summary determination that the Defaulting Respondents violated section 337 and that M–I satisfies the domestic industry requirement of section 337. The motion sought issuance of a general exclusion order (''GEO'') and imposition of a one hundred percent (100%) bond on accused products imported during the Presidential review period. On September 16, 2020, OUII filed a response supporting M–I's motion, including the remedial relief requested therein.

On November 19, 2020, the ALJ issued the subject ID granting M–I's motion and recommending issuance of a GEO and imposition of a bond in the amount of 100 percent of the entered value of infringing products. Specifically, the ID found that (1) the Commission has jurisdiction over the products, the parties, and the investigation; (2) the importation requirement is satisfied; (3) M–I has standing to bring this investigation; (4) all of the remaining asserted claims are infringed by one or more of the Defaulting Respondents' products; and (5) M–I has satisfied the domestic industry requirement of section 337. Additionally, the ALJ recommended that the Commission issue a GEO and impose a bond in the amount of one hundred percent (100%) of the entered value of infringing articles imported during the period of Presidential review.

On January 4, 2021, the Commission determined to review the ID's finding that M–I's investments in plant and equipment and M–I's employment of labor and capital are significant under section 337(a)(3)(A) and (B). Notice (Jan. 4, 2021). The Commission also sought briefing on remedy, bonding, and the public interest. M–I filed a submission in response on January 19, 2021 and filed a corrected version of that response on January 22, 2021. OUII filed a submission in response on January 19, 2021 and filed a reply submission on January 26, 2021. No submissions were received from the public.

Having reviewed the written submissions and the evidentiary record, the Commission has determined to affirm the ID's finding that M–I satisfied the economic prong of the domestic industry requirement on the basis that M–I made significant investments in plant and equipment and significant employment of labor under section 337(a)(3)(A) & (B), 19 U.S.C. 1337(a)(3)(A) & (B), but to vacate the ID's value-added analysis (ID at 65–66).

The Commission has determined that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed importation of certain shaker screens for drilling fluids and components thereof that infringe claims 1 and 12 of the '582 patent; claim 1 of the '649 patent; and claims 1, 12, and 17 of the '735 patent. The Commission has further determined that the public interest factors enumerated in section 337(d), 19 U.S.C. 1337(d), do not preclude issuance of the GEO. Finally, the Commission has determined that a bond in the amount of one hundred (100) percent of the entered value of the imported articles that are subject to the GEO is required to permit temporary importation of the articles in question during the period of Presidential review, 19 U.S.C. 1337(j). The investigation is hereby terminated in its entirety.

The Commission's order and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance. The Commission has also notified the Secretary of the Treasury and Customs and Border Protection of the order.

The Commission vote for these determinations took place on March 18, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

While temporary remote operating procedures are in place in response to COVID–19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant(s) complete service for any party/parties without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

By order of the Commission.

Issued: March 18, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–06016 Filed 3–23–21; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Anheuser-Busch InBev SA/NV, et al.; Response to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the Response to Public Comments on the Proposed Final Judgment in *United States* v. *Anheuser-Busch InBev SA/NV, et al.,* Civil Action No. 4:20–cv–01282–SRC, which was filed in the United States District Court for the Eastern District of Missouri on March 17, 2021, together with a copy of the two comments received by the United States.

A copy of the comments and the United States' response to the comments is available at *https://www.justice.gov/atr/case/us-v-anheuser-busch-inbev-sanv-et-al.* Copies of the comments and the United States' response are available for inspection at the Office of the Clerk of the United States District Court for the Eastern District of Missouri. Copies of these materials may also be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

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 FR 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
>
> (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, Public Law 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 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 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

[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.

[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.

[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

Continued

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. 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.

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 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*

''own hypothetical case and then evaluate the decree against that case.'' *Id.*

[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.

[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.

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

/s/

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Exhibit A

Tunney Act Comment of the Attorney General of Hawaii on the Proposed Final Judgment Filed in United States of America v. Anheuser-Busch InBev SA/NV, Et Al.

Civil Action No. 4:20–cv–01282

Definitions

The following terms are used in this comment:

- *PV*—means PV Brewing Partners, LLC, the acquirer of the divestiture assets, and includes Kona Brewing LLC.
- *PV Kona Brew*—means Kona Brew products believed to be sold by PV in Hawaii.
- *ABI Kona Brew*—means Kona Brew products made by ABI and sold outside of Hawaii.
- *ABI*—means Defendants Anheuser-Busch InBev SA/NV), Anheuser-Busch Companies, LLC, and Craft Brew Alliance, Inc. (''CBA''), unless otherwise specifically noted.
- *CIS*—means the Competitive Impact Statement.
- *PFJ*—means the proposed Final Judgment.

Introduction

The PFJ provides that the intent of the divestiture remedy is:

> [That the] Divestiture Assets can and will be used by Acquirer as part of a viable, ongoing business of the brewing, developing, packaging, importing, distributing, marketing, promoting, and selling of Beer in the State of Hawaii, and that the divestiture to Acquirer will remedy the competitive harm alleged in the Complaint.[1]

The CIS provides additional insight on the intent of the divestiture remedy as follows:

> The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by *establishing* an *independent* and economically viable *competitor* in the market for beer in the [S]tate of Hawaii.[2] (Emphasis added.)

Respectfully, we are concerned that the PFJ does not meet the ''public interest'' standard. While the PFJ contemplates PV, a newly-formed entity, owning the divestiture assets, ongoing entanglements between ABI and PV raise concerns that: (i) The divestiture remedy will not establish PV to be truly independent of ABI; nor (ii) establish PV to be able to effectively compete with ABI in Hawaii.

We summarize our concerns as follows:

- PV and ABI will be intertwined as they both will be selling the same branded product in their respective sales territories.
- PV's entanglement with and reliance on ABI's wholly-owned distributor (''WOD'') may well mean that ABI will have pricing control and authority over the price-to-retailer (PTR) of PV Kona Brew which could foster:
  - ABI's price leadership and Molson Coors's willingness to follow ABI's announced price increases in Hawaii; and
  - Anticompetitive pricing of the PTR of PV Kona Brew in comparison to other beers sold by ABI in Hawaii.[3]
- PV's entanglement with and reliance on ABI for the performance of critical business functions through the Transition Services Agreement will give ABI influence and if not a measure of control over these business functions.
- By reason of the non-exclusive supply contract, PV will be entangled with ABI for production, packaging and delivery of PV Kona Brew to meet PV's needs:
  - We expect PV to be close to 100% reliant on ABI as its contract brewer until the new brewery is fully operational;
  - We expect PV to be reliant on ABI as long as PV chooses to sell bottled beer;
  - We expect PV to be reliant on ABI if the new brewery is not able to produce PV's entire requirements of PV Kona Brew cans and draught beer of sufficient quality and quantity after 5 years.

Discussion

Entanglement No. 1: The Common Product

Post divestiture, PV and ABI will each be parts of a whole and intricately intertwined with the other. The ''whole'' is the universe of Kona Brew products where *ideally,* ABI and PV will be selling the same product—Kona Brew beer—as follows:

> (i) Kona Brew products are to be brewed and packaged in different locations:
> a. PV Kona Brew being brewed and packaged in Hawaii; and
> b. ABI Kona Brew being brewed and packaged on the U.S. mainland; and
> (ii) Kona Brew products are to be sold in different locations:
> a. PV Kona Brew will be sold in Hawaii; and
> b. ABI Kona Brew will be sold outside of Hawaii throughout the rest of the world.[4]

ABI Kona Brew and PV Kona Brew are both tied to a common ''story'' of the beer's origins in Hawaii and the advertising and lifestyle niche reflected in the marketing of the beer, *e.g.,* the marketing of the products as ''Liquid Aloha'' and other Hawaii-themed campaigns. It would not make sense for ABI to disavow the Hawaii-connection nor for PV to now claim a non-Hawaii origin.

Since Defendants and PV are selling the same products in concept as well as in taste and marketing, each will be intricately intertwined with the other which may call for each to be moving with the other in a highly coordinated manner.

Entanglement No. 2: The Role of ABI's Wholly Owned Distributor

Per the PFJ, at the option of PV, ABI's WOD in Hawaii is required to enter into a distribution agreement with PV.[5] Thus, PV will logistically continue with the pre-transaction arrangement that CBA had where the WOD distributed all of CBA's Kona Brew products in Hawaii.[6] This WOD has distributed

[1] PFJ at ¶ III.D. at p. 8.

[2] CIS at p. 11.

[3] The PTR is the price at which the beer is sold by the distributor to retailers who set the retail price for customers. In this matter, the distributor is ABI's wholly-owned distributor.

[4] This ideal world is not what will occur because initially, portions of PV Kona Brew will be produced and packaged on the U.S. mainland and delivered to Hawaii for distribution by ABI's WOD to Hawaii retailers.

[5] See, PFJ at ¶ IV(O) on p. 13.

[6] CIS at p. 16.

other ABI beers in Hawaii in the past.[7] We expect the WOD to continue to distribute other ABI beers post-divestiture.

Since the WOD is wholly-owned by ABI, we are concerned that ABI will have the control and authority over the PTR of PV Kona Brew. Such control by ABI over the PTR is strongly suggested by ¶ 29 of the Complaint which alleges that ABI has a ''price leadership'' strategy, that ABI seeks to generate ''industry-wide price increases,'' that ABI implements this strategy by pre-announcing its own price increases and purposefully making those price increases, and that ABI tracks its primary competitors:

29. Historically, ABI has employed a ''price leadership'' strategy throughout the United States, including in Hawaii. According to this strategy, ABI, with the largest beer sales in the United States and Hawaii, seeks to generate industry-wide price increases by pre-announcing its own price increases and purposefully making those price increases transparent to the market so its primary competitors will follow its lead. These announced price increases, which can vary by geography because of different competitive conditions, typically cover a broad range of beer brands and packages (*e.g.,* container and size). After announcing price increases, ABI tracks the degree to which its primary competitors match its price increases. Depending on the competitive response, ABI will either maintain, adjust, or rescind an announced price increase.

The allegations do not mention the authority of the WOD to set the PTR or the WOD's discretion on implementation of the price leadership strategy. In fact, the allegations read as if the WOD does not have any role or involvement with ABI's industry-wide price increases, and in particular, as to price increases applicable to Hawaii.

We are therefore concerned that the entanglement of PV with ABI's WOD will pose at least two (2) anticompetitive pricing problems:

Problem No. 1: Facilitating ABI's Price Leadership viz. Molson Coors

The CIS at p. 10 describes a concern that through the proposed transaction, ''ABI would gain control over Kona's pricing and would likely increase Kona's price, thereby eliminating a significant constraint on Molson Coors's willingness to follow ABI's announced price increases in Hawaii.'' The Complaint describes the dynamics as follows:

30. For many years, Molson Coors Beverage Company (''Molson Coors''), the brewer with the second-largest beer sales in the United States and owner of many brands sold in Hawaii such as Miller Lite, Coors Light, and Blue Moon, has followed ABI's announced price increases in Hawaii to a significant degree. Molson Coors's willingness to follow ABI's announced price increases is constrained, however, by the diversion of sales to other competitors who are seeking to gain share, including CBA and its Kona brand.

31. *By acquiring CBA, ABI would gain control over Kona's pricing and would likely increase Kona's price, thereby eliminating a significant constraint on Molson Coors's willingness to follow ABI's announced price increases in Hawaii.* By reducing Kona's constraint on Molson Coors's willingness to increase prices, the acquisition likely increases the ability of ABI to facilitate price coordination, thereby resulting in higher prices for beer sold in Hawaii. For this reason, ABI's acquisition of CBA likely would substantially lessen competition in Hawaii in violation of Section 7 of the Clayton Act. (Emphasis added.)

The divestiture remedy does not remove nor lessen the prospect of a violation of Section 7 of the Clayton Act. Due to ABI's control and authority over the PTR, ABI will still possess the ability to remove any pricing constraint associated with the PTR of PV Kona Brew and thereby pave the way for Molson Coors to follow any price increases announced by ABI in Hawaii.

Problem No. 2: Anticompetitive Pricing of PV Kona Brew Versus Other Beers Sold by ABI in Hawaii

The entanglement between PV and ABI's WOD may negatively impact price competition between PV Kona Brew and other ABI beers sold in Hawaii.

ABI groups beers into five segments and sells beers in each segment in Hawaii:

1. Value (Busch Light and Natural Light);
2. Core (Bud Light and Budweiser);
3. Core-plus (Michelob Ultra and Bud Light Lime);
4. Premium (Michelob Ultra Pure Gold); and
5. Super-premium (Stella Artois and Golden Road).[8]

Importantly, as noted earlier, the WOD has distributed other ABI beers in Hawaii, and we expect it will continue to do so post-divestiture.

We are not aware of any prohibition that would prevent PV from seeking to have PV Kona Brew priced sufficiently low by a distributor independent of ABI to effectively compete with ABI's beers in other segments, such as: (i) The Value segment; (ii) the Core segment; or (iii) the Core-plus segment.[9]

But with the divestiture remedy, through its control and authority over the WOD and the PTR of PV Kona Brew, ABI will have the ability to prevent PV Kona Brew from competing against other beers sold by ABI and substantially lessen competition between PV and ABI to benefit the sales of ABI's other beers. Consider the following:

- ABI has positioned one of its beers in the premium segment—Michelob Ultra Pure Gold. ABI has the motivation to suppress competition from PV Kona Brew to protect its own premium beer in Hawaii and could cause the PTR of PV Kona Brew to be above the PTR of Michelob Ultra Pure Gold.
- ABI, through its control and authority, could increase the PTR of PV Kona Brew to remove a constraint on ABI's ability to raise prices in other segments. The Complaint contains an implicit acknowledgement that the level of PV Kona Brew's price could constrain ABI's ability to raise its beer prices not only in the premium segment but also in core-plus and other beer segments:

. . . [T]he competition provided by CBA's Kona in the premium segment [has served] as an *important constraint* on the ability of ABI to raise its beer prices not only in the premium segment, but also in core-plus and other beer segments.[10] (Emphasis added.)

In addition, ABI would likely prevent PV Kona Brew from being priced lower to compete against ABI's value, core, or core-plus beers to avoid eroding sales in Hawaii of ABI's beers in these segments.

ABI and PV may assert that a premium beer such as PV Kona Brew would not be priced to compete with other beers sold by ABI in Hawaii because the other ABI beers appeal to different tastes and customers. That said, the pricing is under the control of ABI. Also, consumers are not strictly prohibited from buying other than their favorite beer, especially if another beer is a premium beer sold at a competitive price. As noted earlier, the Complaint acknowledges that price can cause consumers switch beers or ''trade up'' or ''trade down'' in response to changes in price.

* * * * *

While PV has the option to arrange for a new distributor, pursuit of this option will likely be a daunting task that could

[7] See, *e.g., https://www.yellowpages.com/aiea-hi/mip/anheuser-busch-sales-of-hawaii-inc-11728049.*

[8] CIS at p.4.

[9] The Complaint at ¶ 16 acknowledges the importance of changes in price in prompting consumers to switch beers or ''trade up'' or ''trade down'' between segments:

Consumers may ''trade up'' or ''trade down'' between segments in response to changes in price. For example, as the prices of core-plus brands approach the prices of premium brands, consumers are increasingly willing to ''trade up'' from core-plus brands to premium brands.

[10] Complaint at ¶ 16.

impair distribution of PV Kona Brew. As CBA has noted in the past, changing the distribution network is a challenging task:

> *We have a continuing relationship with Anheuser-Busch, LLC and the current distribution network that would be difficult to replace.* Most of our products are sold and distributed through A–B's distribution network. If the A–B Distributor Agreement were terminated, we would be faced with a number of operational tasks, including establishing and maintaining direct contracts with the existing wholesaler network or negotiating agreements with replacement wholesalers on an individual basis, and enhancing our credit evaluation, billing and accounts receivable processes. Such an undertaking would require significant effort and substantial time to complete, during which the distribution of our products could be impaired. *We are dependent on our wholesalers for the sale of our products.*[11] (Emphasis added.)

Furthermore, the challenge could be far greater because we are not aware of any publicly available information showing that the principals of PV have: (i) Experience in running a Hawaii-based hands-on beer brewing operation; (ii) experience with doing business in Hawaii; or (iii) experience with servicing all the retail connections that purchased Kona Brew beer from the WOD.

Thus, we remain concerned that the entanglement of PV with ABI's WOD poses anticompetitive pricing problems.

Entanglement No. 3: ABI's Provisioning of Transition Services.

Per the PFJ, at the option of PV, Defendants are required to enter into a contract to provide transition services to PV.[12] PV will be entangled with and reliant upon ABI for the performance of critical business functions through the Transition Services Agreement which will give ABI influence if not a measure of control over these functions. These functions are:

- Finance and accounting services;
- Human resources services;
- Supply and procurement services;
- Brewpub consulting;
- On-island merchandising;
- Brewing engineering; and
- Information technology services and support.[13]

The CIS describes the brewing engineering function as ''particularly important to PV Brewing to ensure that it can run the new brewery and produce saleable Beer—which is critical to PV Brewing competing effectively in Hawaii.'' [14]

Per the CIS:

- ''Any transition Services agreement may last for a period of up to 18 months;''
- The transition services agreement contemplates ''employees of Defendants'' being ''tasked with supporting the transition services agreement;'' and
- ''Any transition services agreement must be time-limited to incentivize [PV] to become a fully independent competitor of [ABI].'' [15]

But consider that a complete termination of services via the Transition Services Agreement will likely occur only if PV has acquired employees sufficient and capable of substantially performing the myriad functions *without* the assistance of Defendants. While there is an intent to limit the term of the agreement to 18 months, we are not aware of an absolute prohibition on an amendment to extend the term beyond 18 months to address any employment shortcomings experienced by PV. We also note that the CIS contemplates changes and provides on p. 18 that ''to the extent PV Brewing or Defendants seek to amend or modify any transition services agreement, the United States must approve any changes.''

Thus, we remain concerned that PV will remain entangled with ABI for critical services beyond 18 months.

Entanglement No. 4: Contract Brewing of PV Kona Brew by ABI

Per the PFJ, at the option of PV, Defendants are required to enter into a non-exclusive supply contract for the production, packaging, and delivery of beer.[16]

We understand the logic of the contract brewing arrangement given: (i) The history of ABI brewing Kona Brew beer for years due to the absence of a fully operational brewery in Hawaii capable of handling CBA's production requirements; and (ii) the fact that ABI and PV will both selling a common product such that the quality of PV Kona Brew must be commensurate with ABI Kona Brew.

PV will be acquiring a new brewery that has been under construction since as far back as 2018 if not earlier.[17] The exact timing of when the brewery will be certified as being fully operational is unknown. But we do know that Defendants will be deemed to have complied with their PFJ obligation on the new brewery if:

(i) The new brewery achieves an average production capacity of 1,500 barrels of saleable Beer each calendar week for three consecutive calendar weeks within 180 calendar days after the Court's entry of the Stipulation and Order; [18] and

(ii) If Defendants warrant to PV that the new brewery is operational and without material defect.[19]

If these metrics are not met, then Defendants will be required to pay $25,000 per day until they achieve compliance per the PFJ.[20]

At the moment, until the brewery is fully operational, there is uncertainty as to the true capability of the new brewery to produce the entire product spectrum and quantity of PV Kona Brew cans and draught beer. We therefore expect PV will remain reliant on ABI for the production, packaging, and delivery of beer sufficient to meet PV's immediate needs via the non-exclusive supply contract with ABI.

This entanglement of PV with ABI through the non-exclusive supply contract should provide the products needed by PV and promote consistency between PV Kona Brew and ABI Kona Brew until the new brewery is fully operational. The supply agreement may be for a period of five (5) years as contemplated by the PFJ—an initial three year period plus two one-year periods.

We remain concerned, however, that PV's entanglement with ABI via the non-exclusive supply contract will continue beyond five (5) years for three reasons. First, it is unclear whether and to what extent the new brewery will be able to brew all the canned beer and draught beer needed by PV.

Second, we are not aware of an absolute prohibition on an amendment to extend the term of the non-exclusive supply contract beyond five (5) years months to address production

[11] See, Risk Factors'' section of CBA's 2018 10–K at pp. 16–17.

[12] See, PFJ at ¶ IV(P) on pp. 13–14.

[13] CIS at p. 17.

[14] CIS at p. 17.

[15] CIS at pp. 17 & 18. Interestingly, the CIS does not express the sentiment that PV be incentivized to become a ''fully independent competitor'' with respect to the distributor agreement with the WOD nor the non-exclusive supply contract with Defendants discussed later.

[16] See, PFJ at ¶ IV(N) on pp. 12–13. The movement of PV Kona Brew from the mainland brewery to the WOD appears to be a continuous flow with title to the beer remaining with ABI.

[17] The CBA 2017 10–K report at p. 23 stated that ''In 2016, we held a groundbreaking ceremony for a new brewery near our existing brewery and pub in Kona. The new brewery, which is being built with sustainability in mind, is scheduled to go online in the first quarter of 2019.'' The CBA 2018 10–K report at p. 7 stated that that the brewery was scheduled to go online in the latter half of 2019.

[18] It is not clear what ''1,500 barrels of saleable beer'' represents in terms of PV's production requirements nor clear as to the extent 1,500 barrels will free PV from ABI's contract brewing role.

[19] CIS at p. 13 referring to PFJ at ¶ IV.B and J.

[20] CIS at p. 13.

shortcomings experienced by PV. Here, we note that the CIS contemplates changes and provides on p. 16 that ''to the extent PV Brewing or Defendants seek to amend or modify any supply agreement, the United States must approve any changes.''

Third, PV does not have the facilities in Hawaii to brew bottled beer.[21] PV will therefore be reliant on the non-exclusive supply contract with ABI as long as PV decides to sell PV Kona Brew in bottles.

Admittedly, PV will have the option to contract with other brewers to brew its PV Kona Brew in bottles as well as in cans and draught. But the fact that PV may pursue a non-ABI brewing option does not mean the option is viable due to: (i) The intricacies of switching to a new brewery; (ii) the need to ensure quality control and consistency between the multiple PV Kona Brew products and ABI Kona Brew products; and (iii) the need to ensure sufficient production quantities. That ''Defendants are already familiar with the recipes and brewing processes for Kona brands'' and have the brewing capacity provides much comfort if not inertia against pursuing a non-ABI brewing option.[22] We are concerned that this entanglement between PV and ABI via the non-exclusive supply contract with ABI will continue *beyond* 5 years as long as PV chooses to sell bottled beer *and/or* if the new brewery is not able to produce PV's entire requirements of PV Kona Brew cans and draught beer of sufficient quality and quantity after 5 years.[23]

Summary

Based on the above, we are concerned that the PFJ does not meet the ''public interest'' standard. Ongoing entanglements between ABI and PV raise concerns that the divestiture remedy will not establish PV to be: (i) Truly independent of ABI; and (ii) able to effectively compete with ABI in Hawaii:

- PV and ABI will be intertwined as they both will be selling the same branded product in their respective sales territories.
- PV's entanglement with and reliance on ABI's wholly-owned distributor may well mean that ABI will have pricing control and authority over the price-to-retailer of PV Kona Brew which could foster:
  - ABI's price leadership and Molson Coors's willingness to follow ABI's announced price increases in Hawaii; and
  - Anticompetitive pricing of the PTR of PV Kona Brew in comparison to other beers sold by ABI in Hawaii.
- PV's entanglement with and reliance on ABI for the performance of critical business functions through the Transition Services Agreement will give ABI influence and if not a measure of control over these business functions.
- By reason of the non-exclusive supply contract, PV will be entangled with ABI for production, packaging and delivery of PV Kona Brew:
  - We expect PV to be close to 100% reliant on ABI as its contract brewer until the new brewery is fully operational;
  - We expect PV to be reliant on ABI as long as PV chooses to sell bottled beer; and
  - We expect PV to be reliant on ABI if the new brewery is not able to produce PV's entire requirements of PV Kona Brew cans and draught beer of sufficient quality and quantity after 5 years.

EXHIBIT B

KUPU — SPIRITS —

MAUI BREWING Co

MAUI HARD SELTZER

7 December 2020

Robert A. Lepore, Chief,

Transportation, Energy, and Agriculture Section Antitrust Division,

Department of Justice, 450 5th Street NW, Suite 8000, Washington, DC 20530

Re: Testimony; United States of America, Plaintiff, v. Anheuser-Busch INBEV SA/NV, Anheuser-Busch Companies, LLC, and Craft Brew Alliance, Inc.

Aloha Mr. Lepore,

I would like to provide comment on the proposed sale of the Craft Brewers Alliance (CBA) assets in Hawaii to PV Brewing of Kansas as we feel that the divestiture process was unfairly administered, and a buyer was selected for their clear ties to Anheuser Busch InBev (ABI) and at a price substantially below ''fair market value''. In the currently proposed structure, there is

[21] CIS at p. 15.

[22] CIS at p. 15.

[23] We also remain concerned over the potential customer confusion that could be caused by: (i) ''locally-made'' PV Kona Brew cans being comingled with cans and bottles produced and packaged for PV by ABI on the U.S. mainland under contract; and/or (ii) mainland-brewed beer being poured in bars and restaurants in Hawaii without any signage. One solution is packaging and notice to clearly and conspicuously inform consumers of where the particular PV Kona Brew was brewed. The notice provided by ABI on packaging used to date has not been as clear and conspicuous to inform consumers of where the beer was brewed.

simply no separation in the short or long term from ABI.

For a bit of background our company is 100% locally owned in Hawai'i and is a small closely held family business. We began brewing in 2005 with the simple idea that or State needed an authentic craft beer that was truly made in Hawai'i. At the time there were very few brewing operations and Kona was the only widely sold offering, and even then was not made in Hawai'i. Even back then, all the packaged product (cans did not exist at the time) and much of the draft was being brewed on the mainland, shipped to Hawai'i and sold as supposedly ''local'' and being from Hawaii. We saw an opportunity to bring authenticity and a sense of place to craft beer in Hawai'i and from that simple idea Maui Brewing Co. (MBC) was born.

Maui Brewing Co. is Hawai'i's largest craft brewer, and brewery for that matter. No one brews as much beer in the State as we do. We have a 16-year history of brewing in the islands with volumes that far surpass those of our competitors by at least 4-fold. We also operate 4 restaurant locations; two on Maui and two on Oahu. Our craft beer is synonymous with authenticity, quality, innovation and sense of place. We are local and every drop of beer brewed to date has been brewed in Hawai'i.

When we learned of the proposed divestiture of the Kona brands in State, along with the sale of the new brewery and retail locations we were intrigued at the opportunity to combine the two brands into a truly authentic Hawai'i organization leveraging the strengths of both. Most importantly I saw a vision of two brands coming together for the betterment of Hawai'i and to finally bring legitimacy to the Kona brands across the State, meaning that this would then be truly brewed in Hawai'i. In my eyes this was something to be celebrated and bringing the Kona brand *back* to Hawai'i would be my honor. We followed this transaction closely and were part of one offer through another group. This offer was not accepted and was likely ignored. The reason I say 'ignored' is that when we learned to whom the sale was awarded, we were all shocked at the extremely low price and only I was not surprised by the fact that a former ABI executive was going to be purchasing the assets of Kona. I truly did not believe that the Department of Justice (DOJ) would approve this structure as a buyer as it does not in any way fully disconnect ABI from Kona.

I look at the published information on the new brewing facility in Kona. A 30,000 square foot facility is simply not capable of producing 100,000 barrels a year. There are many ways to evaluate this. By comparison we operate an 82,000 facility approximately 65,000 of which is dedicated to brewing and have a true 100,000-barrel capacity facility. The shipping and logistics challenges in Hawai'i alone do not allow for this to be achieved. I have done a comprehensive analysis on all the publicly available data for the new brewery in Kona and suffice to say it is not nearly capable of brewing all of Kona's beer for Hawai'i. Their own marketing materials when looking to sell the Hawai'i assets state that the ''new brewery will allow for the majority of its Hawaiian consumed products to be locally brewed''. This by definition means that any ''transitional brewing agreement'' is not meant to be temporary and in fact be a long-term reliance and as soon as no one is watching it is unlikely to believe PV will attempt to brew 100% of the beer in Hawai'i. Therefore, by allowing PV Brewing (backed by a private equity firm) to purchase Kona's assets with a former ABI executive with a full-time position as President/Chief Operating Officer of a larger grocer managing from afar, a brand that is owned in the rest of the world by ABI, selling beer brewed by ABI, to an ABI Wholly Owned Distributor (WOD). Where exactly is the disconnect from ABI?

I subsequently placed a direct and unsolicited Indication of Interest for a significant premium over the PV Brewing offer for our company to acquire the Kona assets in Hawai'i. I was clear that this Indication of Interest (IOI) could be swiftly converted to Letter of Intent (LOI) and provide the basis for a Sale Agreement and close quickly to meet to needs of all parties. Prior to this direct offer, I was a consultant on an offer that was nearly a 3X premium above what was ultimately paid. I would think that the shareholders of CBA would have wanted their company to accept a qualified buyer and the highest bid.

From an enterprise value viewpoint, the purchase price awarded to PV Brewing seems quite low. What was advertised as a 24MM+ new brewery, with 2 successful restaurants grossing north of 15MM, on top of over a million case equivalents of beer sold in State, could certainly not be sold for 16MM as a legitimate enterprise value. To me, and many others, it seems this process was not conducted fairly and there clearly were motives at play to keep Kona as much under ABI influence as possible. A reasonable person can see this for what it is. It is unlikely to believe that a former ABI executive, with a separate successful career decides to start a brewery in Hawai'i with no plans to move here to operate it, begins his career as a brewer with a brand like Kona. Furthermore, that the assets are sold at a price that could only be described as a ''sweetheart deal'' awarded to former ABI company men to ensure long-term influence over the Kona brand in Hawai'i and across the world.

I then begin to look at the term ''qualified buyer''. It would seem to me that a company such as ours, with a dedicated, local, top-tier team operating 4 restaurants and the largest brewing operation in the State offering more money should at least be considered. From an experience standpoint, no one in Hawai'i and no one outside of Hawai'i has more experience brewing in the islands than we do. To say that it's a challenge to brew in Hawai'i is an understatement and we have proven our capabilities of brewing nearly 60,000 barrels of beer each year. I am also a founding member of the Hawaiian Craft Brewers Guild, Vice-Chair of the Brewers Association, and have been led more than a dozen legislative actions in Hawai'i making a profound impact on the brewing community and access to beer. Additionally, our restaurant operations group has the capability to handle additional locations. I believe our company is not only a qualified buyer, but the most qualified buyer due to our experience and capabilities.

It would seem that if the sale was meant to be a legitimate divestiture of the Kona Brewing assets in Hawai'i, the sale would have been awarded to a buyer exhibiting a history of brewing in Hawai'i at the annual volumes needed to meet demand, willing to pay a higher price, maximize shareholder value, has existing restaurant operations in Hawai'i capable of operating the two Kona pubs, and has a brewery with additional capacity to handle it's volume and augment the shortfall of the new Kona facility to meet demand without long term reliance on ABI for brewing. Again, it is inconceivable that PV Brewing can meet the Hawai'i demand for the various beers and packaging configurations without long-term reliance on ABI. Without true capabilities to brew 100% of the KBC demand in Hawai'i, ABI WOD in Hawai'i will simply be ordering and receiving direct containers of KBC brand beer from ABI facilities on the mainland, these containers would never even touch the loading dock at ''PV Brewing'' on the Big Island. With an integration of Maui Brewing Co. and Kona Brewing Co. operating as two separate ''partner'' brands we would be 100% self-sufficient after a short

transition brewing agreement. Between the two facilities MBC and KBC, we would have capacity, redundancy and true economies of scale to execute this plan completely free from ABI influence.

I have prepared a spreadsheet with data from my analysis of the publicly available information from the new brewery construction along with valuation metrics for the company. I can share this at the appropriate time in our discussion.

In closing we feel that the divestiture process was unfairly administered, and a buyer was selected for their clear ties to ABI and the desire to maintain influence. We are still an interested party and would like the opportunity to be considered as a buyer for the Kona Brewing assets within Hawai'i.

Sincerely,

/s/

Garrett W. Marrero

CEO, Founder,

Maui Brewing Co.

[FR Doc. 2021–05988 Filed 3–23–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–813]

Importer of Controlled Substances Application: Shertech Laboratories, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Shertech Laboratories, LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before April 23, 2021. Such persons may also file a written request for a hearing on the application on or before April 23, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on March 1, 2021, Shertech Laboratories, LLC, 1185 Woods Chapel Road, Duncan, South Carolina 29334, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Cocaine	9041	II

The company plans to import synthetic derivatives of the listed controlled substance in bulk form to conduct clinical trials. No other activity for this drug code is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2021–06031 Filed 3–23–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–812]

Importer of Controlled Substances Application: Medi-Physics Inc dba GE Healthcare

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Medi-Physics Inc dba GE Healthcare has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before April 23, 2021. Such persons may also file a written request for a hearing on the application on or before April 23, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on February 26, 2021, Medi-Physics Inc dba GE Healthcare, 3350 North Ridge Avenue, Arlington Heights, Illinois 60004–1412, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Ecgonine	9180	II

The company plans to import derivatives of the controlled substance to be used for the manufacture a diagnostic product and reference standards. No other activity for this drug code is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2021–06030 Filed 3–23–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–811]

Importer of Controlled Substances Application: Perkinelmer, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.