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# ABI/SAB Miller Deal: DOJ Clarifies Best Efforts Clause in Proposed Final Judgment

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As most members of the alcohol and beverage industry are aware, Anheuser-Busch InBev (ABI) acquired the global holdings of SABMiller in a more than $100 billion merger in October 2016. The Department of Justice (DOJ) required ABI to divest SABMiller's United States business, including its ownership interest in MillerCoors. Since November 2016, the parties have engaged in ongoing briefing seeking approval of a Proposed Final Judgment (PFJ) in the US District Court for the District of Columbia.


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A key question in the latest round of briefing was the meaning of "best efforts" language in the PFJ.

- The PFJ states that "nothing in this Final Judgment shall prohibit Defendant ABI from entering into or enforcing an agreement with any Independent Distributor requiring the Independent Distributor to use best efforts to sell, market, advertise, or promote Defendant ABI's Beer, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of Defendant ABI's Beer in a geographic area."
- Additionally, a footnote in DOJ's motion to enter the PFJ stated that an independent distributor may make unsolicited recommendations to individual retailers to convert an ABI retail placement to a third-party brewer's beer "so long as such unsolicited recommendation does not result in more than a de minimis decrease in the sales volume or retail placement of ABI Beer in the Independent Distributor's assigned geographic area."

DOJ added a number of provisions into its orders since the confirmation of the new United States Assistant Attorney General for the Antitrust Division, Makan Delrahim. In its recent briefing, DOJ brought those changes to the PFJ. DOJ modified the PFJ as follows:

1. Lowered the standard of proof from a "clear and convincing evidence" standard to a "preponderance of the evidence" standard. DOJ explained that while the former is needed to prove a decree violation in a civil contempt action, the latter is needed to prove a civil antitrust violation in the first instance.
2. Added a provision relating to fee-shifting, requiring ABI to reimburse the United States for attorneys' fees, expert fees and costs incurred in connection with a successful consent decree enforcement effort. The United States has historically born the costs of decree enforcement investigations and proceedings.
3. Added a provision that allows the United States to apply for a one-time extension of the term of the decree if the Court finds a violation of the PFJ.
4. Added a provision permitting the United States to terminate the PFJ after five years, upon notice to the Court and parties.
5. Revised the date from which the ten-year term of the PFJ runs. The order was to run for ten years after entry of a Final Judgment, because entry normally follows shortly after the PFJ is filed. The DOJ revised this clause to allow the date to be July 20, 2016, the date the PFJ was filed. DOJ explained that ABI has been complying with the provisions of the PFJ since July 20, 2016 so DOJ agreed that the ten-year term should start on that date.

The court received public comments and briefs from multiple *amicus curiae* (friends of the court). National Beer

Wholesalers Association (NBWA) and Brewers Association (BA), who filed *amicus* briefs, worried that the best efforts language did not adequately protect the public from anticompetitive practices by ABI because the language was too ambiguous and would dissuade distributors from handling third-party beer. NBWA and BA argued that the vagueness of a "de minimis decrease" in ABI sales would force distributors to steer clear of any conduct that ABI could reasonably claim would violate the best efforts provision for fear of risking the loss of ABI business, and that third-party brewers would suffer as a result.

Responding to the *amicus* briefs, the DOJ on March 15 clarified somewhat the meaning of the best efforts clause. DOJ stated that:

1. "A duty of best efforts is generally not interpreted to require exclusive efforts. And it is commonplace in the beer industry for distributors to owe best efforts to more than one brewer."
2. The de minimis standard applies to unsolicited product placements that affect "the entirety of the distributor's assigned geographic area" and "even a product replacement that decreases ABI sales volume significantly at a particular retailer is unlikely to result in a more-than-de-minimis decrease in sales volume or retail placement of ABI Beer in the distributor's assigned geographic area."
3. "[U]nsolicited product replacement is consistent with best efforts to ABI under some circumstances. Independent distributors remain free, for example, to sell Beers that compete with ABI's Beers by:
    1. replacing shelf space or tap handles currently occupied by ABI beers in response to the request of a retailer;
    2. promoting Third-Party Brewers' Beers without making specific recommendations as to which beers the retailer should remove from its shelf space or tap handles; or
    3. providing information to the retailer about changing consumer preferences for ABI and rival Beers."

It appears from DOJ's position that the above actions are measured against a best efforts standard and not hindered by the de minimis language in the PFJ and the ABI equity agreement. DOJ's clarifications to the PFJ give beer wholesalers more authority to promote third-party brands than many had feared. Brewers distributed by distributors that also distribute ABI's portfolio and distributors of ABI need to understand DOJ's clarifications to the language of the PFJ and equity agreement changes in order to protect their independence and continue to prosper in the face of ABI's best efforts contractual obligation. Judge Sullivan of the US District Court for the District of Columbia may now approve the Modified PFJ, or order a hearing on the matter, as requested by *amicus curiae*.