



The American Antitrust Institute

HALTING BEER'S MARCH TO MONOPOLY: THE LIKELY ANTICOMPETITIVE EFFECTS OF ANHEUSER-BUSCH INBEV'S PROPOSED ACQUISITION OF GRUPO MODELO

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EXECUTIVE SUMMARY

In late June, Anheuser-Busch InBev (ABInBev), the world's largest beer maker, announced its intention to acquire the remaining 50 percent interest in Grupo Modelo (Modelo), Mexico's largest brewer, that it does not currently own (hereafter "the proposed acquisition"). ABInBev's products include popular brands like Budweiser, Bud Light, Beck's, and Stella Artois. Likewise, Modelo produces a number of well-known brands, including Corona Extra (Corona) and Modelo Especial. As part of the proposed acquisition, Modelo will sell its 50 percent interest in Crown Imports, the exclusive U.S. importer of Corona and other Modelo brands, to Constellation Brands, which currently owns the other 50 percent. Crown Imports will continue to be supplied with Corona and other Modelo brands from ABInBev (hereafter collectively "the proposed transactions").

Before examining the competitive effects, the Department of Justice (DOJ) needs to understand whether ABInBev will possess a greater strategic interest in Modelo's brands and retain significant control over their point-of-sale marketing following the proposed acquisition. In other words, will allowing the proposed transactions enable ABInBev to capture a larger fraction of the profit from every bottle of Corona and Modelo Especial sold in the United States? And will ABInBev have control over how to stock and price Corona at a sizable fraction of retail outlets?

If the proposed transactions amount to a de facto merger between ABInBev's and Modelo's product portfolios in the United States, it is likely to create serious anticompetitive effects. Concentration levels are already high and would increase significantly in the national beer market. In local markets with large Latino populations, current concentration levels and the post-merger increases may be even higher than they are nationally. The proposed acquisition would likely lead to a further reduction in price and non-price competition, resulting in higher prices and a loss of product variety.

¹ This white paper was written by AAI Special Counsel Sandeep Vaheesan, svaheesan@antitrustinstitute.org. The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. It is supported by voluntary donations into its general treasury and has no financial interest in this matter. The AAI is managed by its Board of Directors, which alone has approved of this white paper. The Advisory Board of the AAI, which serves in a consultative capacity, consists of more than 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* www.antitrustinstitute.org. The individual views of members of the Advisory Board may differ from the positions taken by the AAI.

Modelo's Corona has been one of the fastest growing brands over the past decade. In response to its popularity, ABInBev and SABMiller (parent of MillerCoors and Molsons) have expanded their own product portfolios and established brands that can compete against Corona. Modelo is also in the process of building the world's largest brewery in Mexico, close to the Texas-Mexico border. This significant addition to North American brewing capacity would likely translate to increased output and lower prices. The proposed acquisition would weaken this competitive dynamic. ABInBev would purchase a "competitive truce" and remove a vigorous rival from the marketplace.

Furthermore, the proposed acquisition increases the risk that both craft brewers and regional brewers will be foreclosed from the beer market. While still small compared to ABInBev and SABMiller, these companies have established a solid foothold in the U.S. beer market. If it is permitted to acquire Modelo, ABInBev could have a greater ability and incentive to foreclose craft and regional brewers from distribution channels through exclusive dealing. Such arrangements could prevent these smaller brewers from selling to bars and retailers and ultimately reaching final consumers.

Empirical evidence raises serious doubts about whether recent beer company mergers have benefited consumers. ABInBev claims that the transaction will lead to lower prices for consumers through the creation of significant efficiencies. The mergers between Anheuser-Busch and InBev and Miller and Coors, however, do not appear to have yielded pro-consumer efficiencies. In fact, beer prices and gross margins for the big brewers have risen in recent years, despite the weak economy and falling demand for beer. These facts suggest that merger-specific efficiencies, however large, have not been sufficient to offset the enhanced market power from these transactions. This evidence calls for skepticism toward ABInBev's pro-consumer justifications for the proposed acquisition.

The proposed acquisition presents a fact pattern that highlights the importance of the incipency standard in Section 7 of the Clayton Act. Although this standard has fallen out of favor in recent decades, the DOJ and Federal Trade Commission recognized in the 2010 Horizontal Merger Guidelines that incipency remains the relevant statutory standard for merger enforcement. Incipency can and should be applied in a manner consistent with the consumer welfare goal of modern antitrust. Given the recent mega-mergers in beer, the industry is well past the incipency stage. Rumors that ABInBev will seek to acquire SABMiller following its purchase of Modelo suggest that beer is on the threshold of domestic monopoly.² A consent decree with structural remedies, while better than no relief at all, carries the serious risk of creating a competitor that replaces Modelo in name only. If the proposed transactions amount to a functional merger between ABInBev's and Modelo's beer portfolios and are likely to create the described anticompetitive effects, the DOJ should seek to enjoin the proposed acquisition in court to maintain a competitive beer market that both delivers affordably-priced beer and caters to different palates.

² Along with this white paper, the AAI is releasing a monograph by its Research Fellow Bernard Ascher. *See* BERNARD ASCHER, GLOBAL BEER: THE ROAD TO MONOPOLY (2012).

I. INTRODUCTION

On June 29, 2012, ABInBev, the world's largest beer maker, announced its intention to acquire the remaining 50 percent interest in Modelo that it does not currently own.³ The proposed acquisition is valued at \$20.1 billion.⁴ ABInBev's portfolio of products includes popular brands such as Budweiser, Bud Light, and Stella Artois.⁵ Modelo produces, among others, Corona and Modelo Especial.⁶ If the proposed acquisition is consummated, ABInBev will have annual revenue of \$47 billion and employ 150,000 people in 24 countries.⁷ Along with being acquired by ABInBev, Modelo will sell its 50 percent interest in Crown Imports, the exclusive U.S. importer of Corona and other Modelo brands, to Constellation Brands, which currently owns the other 50 percent of Crown Imports, for \$1.85 billion.⁸ The proposed acquisition is the latest in a series of transactions that have left the U.S. beer market with two dominant players. ABInBev and SABMiller together account for approximately 80 percent of beer sales by volume in the United States today,⁹ and ABInBev's proposed acquisition of Modelo could raise that share to 85 percent.¹⁰

The proposed transactions, though establishing some separation between ABInBev's brands and Modelo's brands in the United States, may still amount to a functional merger between the two companies' portfolios. Even if Crown Imports has a dedicated supply of Modelo brands and remains a strong competitor, the proposed transactions may give ABInBev a larger strategic interest in the success of Modelo's brands. That is, by swapping its 25 percent indirect stake in Crown Imports for an additional 50 percent and full interest in Modelo, ABInBev may capture a larger fraction of the profits on every liter of Corona and Modelo Especial sold in the U.S. In addition, ABInBev's role as a category captain at many retail locations may give it the ability to make important marketing and pricing decisions for the Modelo brands. The key questions for the DOJ to resolve are whether ABInBev will possess a greater strategic interest in Modelo's brands following the merger and whether ABInBev will exercise significant control over the point-of-sale marketing of Modelo's brands. The DOJ will have to answer these two questions before it can assess the competitive effects of the proposed transactions.

If the proposed acquisition is effectively a de facto merger between ABInBev's and Modelo's product portfolios, it threatens to further reduce horizontal competition in the beer industry. The combination of ABInBev's and Modelo's portfolios in the United States would likely lead to diminished price and non-price competition between the large beer makers. Modelo's Corona has been one of the fastest growing beer brands over the past ten years. On account of Modelo's success, ABInBev and SABMiller have expanded their own product portfolios and established brands that compete against Corona, leading to increased product variety for consumers. As an

³ Mark Scott, *Brewer to Buy Remaining Stake in Grupo Modelo*, DEALBOOK, June 29, 2012, *available at* <http://dealbook.nytimes.com/2012/06/29/anheuser-busch-inbev-to-buy-remaining-stake-in-grupo-modelo-for-20-1-billion/>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ ASCHER, *supra* note 2, at 4.

¹⁰ *Id.*

independently controlled company, Modelo, with its scale and proven ability to challenge ABInBev and SABMiller directly, would likely remain a dynamic competitive force for years to come.¹¹

The proposed acquisition would also increase the risk that craft and regional brewers¹² will be foreclosed from the market. This group, consisting of hundreds of small-and medium-sized brewers, has established a solid foothold in the U.S. beer market. The proposed acquisition, by increasing ABInBev's share in the national and many local markets, could strengthen the company's ability and incentive to seek exclusivity with distributors of ABInBev and Modelo brands. Exclusive dealing could prevent craft brewers from selling their beers to bars and retailers or force them to use less effective distributors.

The wave of beer mergers in recent years does not appear to have benefited consumers. The proposed acquisition is justified partly on the basis of creating cost savings. Efficiencies from past deals, however, have not been passed along to consumers. In fact, beer prices and margins for the big brewers have risen in recent years, despite the weak economy and falling demand for beer. In other words, beer mergers appear to have harmed consumers. This history calls for a high degree of skepticism toward the proposed acquisition's proffered consumer benefits.

The proposed acquisition underscores the continuing relevance of the incipency doctrine in Section 7 of the Clayton Act. Although this standard has fallen out of favor in recent decades, the DOJ and Federal Trade Commission recognized in the 2010 Horizontal Merger Guidelines that incipency remains the statutory standard for merger enforcement. Given the recent mega-mergers in beer, the industry is well past the incipency stage. Rumors that ABInBev will seek to acquire SABMiller suggests that beer is on the threshold of a domestic monopoly. If the DOJ finds that the proposed acquisition will amount to a functional merger between ABInBev's and Modelo's brands and reduce competition in the U.S. beer market, it should seek to enjoin this transaction in court to preserve a market that both delivers affordably priced beers and caters to different palates.

II. HOW THE PROPOSED TRANSACTIONS AFFECT THE FUNCTIONAL RELATIONSHIPS BETWEEN ABINBEV, MODELO, AND CROWN IMPORTS

The proposed transactions would convert Modelo into a wholly owned subsidiary of ABInBev and Crown Imports into a wholly owned subsidiary of Constellation Brands. Today, ABInBev has a 50 percent non-voting interest in Modelo.¹³ Following the proposed acquisition, ABInBev would hold 100 percent of the equity interest in Modelo.¹⁴ Modelo's brands are currently imported and marketed in the United States by Crown Imports.¹⁵ Modelo owns a 50 percent interest in Crown Imports, and Constellation Brands owns the remaining 50 percent.¹⁶ Although Crown Imports is sometimes

¹¹ *Grupo Model Brewery, Coahuila, Mexico*, FOOD PROCESSING TECH., available at <http://www.foodprocessing-technology.com/projects/grupo-brewery/>.

¹² See ASCHER, *supra* note 2, at 7 ("Microbrewery: A brewery that produces less than 15,000 barrels (17,600 hectoliters) of beer per year with 75 percent or more of its beer sold off site."); *id.* at 8 ("Regional Brewery: A brewery with an annual beer production of between 15,000 and 6,000,000 barrels.")

¹³ Miriam Marcus, *This Bud's Not for InBev*, FORBES, June 20, 2008, available at http://www.forbes.com/2008/06/20/anheuser-inbev-modelo-markets-equity-cx_mlm_0620markets33.html.

¹⁴ Scott, *supra* note 3.

¹⁵ Emily Bryson York, *How CEO of Third-Largest Beer Seller in U.S. Found His Beach*, CHICAGO TRIB., Sep. 12, 2011, available at http://articles.chicagotribune.com/2011-09-12/business/ct-biz-0912-executive-profile-hackett-20110912_1_mike-mazzoni-corona-extra-crown-imports.

¹⁶ *Id.*

described as a “distributor,” it does not distribute beer directly to bars and supermarkets.¹⁷ Instead, Crown Imports obtains beer from Modelo’s breweries in Mexico and supplies it to state and local distributors, who in turn resell the product to bars and retailers.¹⁸

Modelo, as part of becoming wholly owned by ABInBev, will sell its 50 percent interest in Crown Imports to Constellation Brands.¹⁹ Crown Imports will continue sell Modelo brands to distributors in the United States and to market them through print and television outlets.²⁰ Because Crown Imports does not own any breweries, it will receive beer under a supply agreement with ABInBev.²¹ The parties claim that these arrangements will ensure that Crown Imports enjoys “continuity of supply, quality of the products and ability to introduce innovations.”²² Along with this supply agreement, ABInBev will have a perpetual call option to purchase Constellation Brands’s entire interest in Crown Imports every ten years, at a price equal to thirteen times Crown Imports’ operating earnings, subject to regulatory approval.²³

If Crown Imports is to be an effective independent entity in the U.S. beer market, the terms of the supply agreement must ensure that Crown Imports has reliable access to ABInBev brewing capacity and that it can obtain Modelo brands at a competitive price. In addition, Crown Imports must be allowed to use ABInBev’s brewing capacity to increase its market share and launch new products. Merely allowing Crown Imports to sell existing brands at current volumes would not prevent the future loss of price and non-price competition. The DOJ must scrutinize the terms of the supply agreement carefully and ensure that Crown Imports can remain a successful player in the beer industry.

After the proposed transactions, one basic, problematic fact will remain: ABInBev will profit from the success of Modelo’s brands. Crown Imports will compete against ABInBev in its mass marketing campaigns. The two companies, however, will continue to have a symbiotic relationship that undermines any claims of Crown Imports’ independence. Crown Imports will be dependent on ABInBev’s breweries to supply the U.S. market and will thus not be a full-fledged horizontal competitor. If Crown Imports, for instance, sells more bottles of Corona in the U.S., ABInBev sells more beer, from its existing or newly acquired breweries. This would give ABInBev a strong incentive not to target Corona in its marketing and pricing decisions. The companies would be ostensible competitors because of their formal independence but they would remain functional partners.

Furthermore, while the deal between Crown Imports and Constellation Brands is intended to deprive ABInBev of control over the marketing of Modelo brands in the United States, ABInBev will continue to play a key role in the marketing of Corona (and all beer brands for that matter) at

¹⁷ See *id.* (“[Crown Imports] also faced an uphill battle to reach peaceful relations with East Coast distributors[.]”).

¹⁸ *Id.*

¹⁹ *Anheuser-Busch InBev and Grupo Modelo to Combine: Next Step in Long and Successful Partnership*, ABINBEV, June 29, 2012.

²⁰ *Constellation Brands Inc. to Acquire Remaining 50 Percent Interest in Crown Imports Joint Venture*, CONSTELLATION BRANDS, June 29, 2012, available at <http://www.cbrands.com/news-media/constellation-brands-inc-acquire-remaining-50-percent-interest-crown-imports-joint-ventur>.

²¹ ABINBEV, *supra* 19.

²² *Id.*

²³ *Id.*; If this option is exercised, the parties will have to file another Hart-Scott-Rodino notification. ABInBev’s acquisition of Crown Imports would raise serious competitive risks because it would result in the complete integration of ABInBev’s and Modelo’s brands in the United States.

many retail locations. Through “category management,” many convenience stores and supermarkets have, in effect, outsourced entire product categories to a category captain.²⁴ The largest manufacturer in a segment often serves as the category captain.²⁵ Smaller firms generally do not have the means to serve as category captains.²⁶ The category captain decides what brands to carry, how to allocate shelf space between brands, and how to price each item.²⁷ Because a product manufacturer has much greater knowledge of demand dynamics in its category than retailers, category management is seen as a way to reduce distribution and marketing costs and increase profits for retailers.²⁸ Through category management, Safeway, for example, can use ABInBev’s expertise to improve its beer sales. The degree of retailer control over category captains varies; some retailers defer entirely to the category captain while others retain veto power over the choices of the category captain.²⁹

Due to ABInBev’s status as a leading category captain in beer,³⁰ it will continue to exercise a significant degree of control over the marketing of Corona and other Modelo brands in the United States. At many convenience stores and supermarkets, it decides how to allocate shelf space between beer brands and how to price each product. Although Crown Imports will be responsible for mass marketing of Modelo brands, ABInBev will remain responsible for point-of-sale marketing at many retail locations. Since many beer drinkers make purchasing decisions based on impulse,³¹ point-of-sale marketing can play a big role in the success of brands. ABInBev will have the power to price and market Modelo’s brands at many retail locations and could, for instance, try to limit direct competition between Bud Light Lime and Corona on store shelves.

The functional consequences of the proposed transactions are an empirical question. The AAI has relied entirely on public reports on the proposed transactions and has neither the proprietary information nor the access to industry stakeholders necessary to resolve the key factual questions at hand. The DOJ should focus on the following issues because they will determine the degree to which competition may be reduced between ABInBev’s brands and Modelo’s brands due to the proposed acquisition. At present, ABInBev has a 50 percent interest in Modelo and, by extension, a 25 percent interest in Crown Imports. Following the proposed transactions, ABInBev will have a 100 percent interest in Modelo and no interest in Crown Imports. Whether ABInBev will have a greater strategic interest in the success of Modelo brands in the United States depends on the profit margins of Crown Imports and Modelo. If margins on Modelo brands are higher at the brewery level than at the importer level, ABInBev’s strategic interest in them increases as a result of the

²⁴ Robert L. Steiner, *Category Management—A Pervasive, New Vertical/Horizontal Format*, ANTITRUST, Spring 2001, at 79.

²⁵ Debra M. Desrochers, Gregory T. Gundlach & Albert A. Foer, *Analysis of Antitrust Challenges to Category Captain Arrangements*, J. PUB. POL’Y & MKTG. 201, 201 (2003).

²⁶ Steiner, *supra* note 24, at 79.

²⁷ Desrochers, Gundlach & Foer, *supra* note 25, at 204. Former FTC Commissioner Thomas Leary noted his amazement, from an antitrust perspective, at how category captains are entrusted to price their own products, as well as those of rivals. See Thomas B. Leary, *A Second Look at Category Management*, available at <http://www.ftc.gov/speeches/leary/040519categorymgmt.pdf>.

²⁸ *Id.* at 202.

²⁹ *Id.* at 204.

³⁰ See Jeremiah McWilliams, *Trade Publication Calls Anheuser-Busch a “Category Captain”*, ST. LOUIS POST-DISPATCH, Nov. 5, 2008, available at http://www.stltoday.com/business/columns/lager-heads/trade-publication-calls-anheuser-busch-a-category-captain/article_5740a610-f145-5664-9ffb-1028b902b3ef.html (“The country’s biggest beer maker got kudos for its ability to help retailers reduce the times they are caught out of stock, as well as to help customers stock a consistent mix of beers to meet their shoppers’ unique needs.”).

³¹ ASCHER, *supra* note 2, at 33.

transactions. In more concrete terms, will ABInBev capture a larger fraction of the total profits on, for example, each bottle of Corona sold in the United States following the proposed transactions? The degree of ABInBev's continued control of point-of-sale marketing of Modelo's brands depends on multiple questions. How prevalent is category management in beer? How does category management operate in this segment – do retailers generally defer to the decisions of category captains or maintain an active oversight role? What is ABInBev's share of category captaincies in beer? How easily can retailers switch to alternative category captains (or abandon category management entirely) in the event of dissatisfaction with ABInBev's pricing and shelving practices? Although ABInBev's proposed acquisition of Modelo is more than a partial acquisition, the strategic interest and control questions examined in partial acquisitions are relevant here and will illuminate how the competitive dynamic between ABInBev's and Modelo's brands will change following the proposed transactions.³²

III. POTENTIAL EFFECTS ON PRICE AND NON-PRICE COMPETITION

As described in the previous section, the AAI does not have the information necessary to answer the questions on whether ABInBev will have an increased strategic interest in Modelo's brands and maintain substantial control of their point-of-sale marketing following the proposed transactions. In this section, we examine competitive effects that could arise if the proposed acquisition amounts to a de facto merger of ABInBev's and Modelo's product portfolios in the United States.

a. Loss of Horizontal Price and Non-Price Competition

If the proposed acquisition is consummated, the share of the two leading brewers in the U.S. beer market – ABInBev and SABMiller – will increase further.³³ At present, the two companies have a combined share of approximately 80 percent by volume sold, with ABInBev having a share of 50 percent and SABMiller having a share of 30 percent.³⁴ Modelo has a current market share of roughly 5 percent.³⁵ If half of Modelo's share is attributed to ABInBev to reflect ABInBev's present 50 percent interest in the Mexican brewer, the two leaders have a current market share of 82.5 percent. Either way, following the merger, ABInBev and SABMiller will have a joint share of approximately 85 percent.³⁶ Large brewers like Heineken and countless small craft brewers comprise the remaining 15 percent share.³⁷ As high as the shares of the ABInBev and SABMiller are, they are still likely understated. Because smaller brewers like Sierra Nevada and Pabst lack their own brewing capacity and contract with the big brewers to produce their beers,³⁸ brand-volume share numbers may not

³² See Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559, 562 (1999) (“The competitive effects of partial ownership depend critically on two separate and distinct elements: financial interest and corporate control. This distinction is absent in merger analysis, which assumes that the acquiring firm (or person) automatically controls the acquired entity after the merger. With partial ownership interests, however, these elements are separable. They also can occur in ways that result in greater or lower harm to competition than a complete merger.”); *id.* at 563 (“[U]nlike most merger analysis, a central part of the analysis of partial ownership is an assessment of which owners have what type of control over the corporation and how this control translates into management decisions.”).

³³ See Competitive Impact Statement at 4, *United States v. InBev N.V.*, No. 1:08-cv-01965 (D.D.C. filed Nov. 14, 2008) (“Neither the price of wine nor the price of spirits significantly influences or constrains the price of beer. Purchasers of beer are unlikely to reduce their purchases of beer in response to a small but significant and non-transitory increase in the price of beer to an extent that would make such a price increase unprofitable.”).

³⁴ ASCHER, *supra* note 2, at 4.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 8.

reflect the true market power of ABInBev and SABMiller. Their shares based on manufactured volumes are likely even higher, suggesting even greater dominance.

Under the 2010 Horizontal Merger Guidelines (“the Guidelines”), the proposed acquisition is presumptively anticompetitive. The Guidelines deem a market with a Herfindahl-Hirschman Index (“HHI”) in excess of 2,500 to be “highly concentrated.”³⁹ They further add that a transaction in a highly concentrated market that raises the HHI by more than 200 points “will presume to be likely to enhance market power.”⁴⁰ This presumption “may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.”⁴¹ Following the proposed acquisition, the HHI in the national beer market, using brand volume shares, will increase approximately 500 points from 3,400 to 3,900. If fifty percent of Modelo’s share today is attributed to ABInBev,⁴² the HHI numbers are still problematic. Under this approach, the HHI in the national beer market will rise nearly 300 points from approximately 3,600 to 3,900. In other words, concentration in an already highly concentrated market will increase substantially.

Using the analytical approach the DOJ applied in InBev’s acquisition of Anheuser-Busch, the proposed acquisition appears to create serious anticompetitive effects. In the consent decree in that merger, the DOJ stated that the relevant geographic market is local – metropolitan areas.⁴³ Both Bud Light and Corona are particularly strong among Latino beer drinkers and appear to be head-to-head competitors in this segment of the population.⁴⁴ Therefore, ABInBev and Modelo likely thus have higher shares in cities with large Hispanic populations, like Los Angeles, Miami, and New York City. As a result, in many of these local markets, current concentration levels and post-merger increases in concentration are probably even higher than they are at the national level.

Although representing just 5 percent of national beer sales, Modelo has been a dynamic participant in the market. Prior to the recession, which has induced many beer drinkers to switch to discount beers,⁴⁵ Corona was one of the fastest growing brands and still remains the most popular imported beer in the United States.⁴⁶ Modelo’s flagship brand in the United States has done well at a time when overall U.S. beer sales have stagnated.⁴⁷ Due to Modelo’s sustained marketing campaign, Corona has acquired a strong presence in the U.S. beer market and carved out a niche of its own.⁴⁸ Modelo has also developed Corona Light with the aim of stealing market share from established light beers like Bud Light and Miller Lite.⁴⁹

³⁹ HORIZONTAL MERGER GUIDELINES § 5.3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² O’Brien & Salop, *supra* note 32, at 595-96.

⁴³ Competitive Impact Statement at 4-5, *United States v. InBev N.V.*, No. 1:08-cv-01965 (D.D.C. filed Nov. 14, 2008).

⁴⁴ See Elizabeth Blair, *The Subtleties of Marketing Beer to Latinos*, NPR, Oct. 11, 2011, available at <http://www.npr.org/2011/10/11/141152273/the-subtleties-of-marketing-beer-to-latinos> (“Mexican brands would seem to have a leg up with the Latino market. But Bud Light is the No. 1 beer of choice. Corona is No. 2.”).

⁴⁵ *When Is Beer an Inferior Good?*, THE ECONOMIST, Jul. 27, 2009.

⁴⁶ ASCHER, *supra* note 2, at 58.

⁴⁷ *Sell Foam Like Soap*, THE ECONOMIST, May 5, 2011; *Prohibition Hangover*, THE ECONOMIST, Sep. 8, 2012.

⁴⁸ Stuart Elliott, *How Do You Say “Lazy, Hazy, Crazy Days of Summer” in Spanish?*, N.Y. TIMES, May 14, 2010, available at <http://mediadecoder.blogs.nytimes.com/2010/05/14/how-do-you-say-lazy-hazy-crazy-days-of-summer-in-spanish/>.

⁴⁹ Elizabeth Olson, *Corona Light Sets Sights on a Younger Party Crowd*, N.Y. TIMES, Aug. 1, 2010.

Modelo's success has prompted the two big brewers to broaden and improve their product portfolios to satisfy consumer demands. In 2007, Miller launched Miller Chill, a "Mexican-style"⁵⁰ beer, which captured sales from Corona initially.⁵¹ Sales of this new brand, however, fell off quickly, forcing SABMiller to launch a reformulated, lower-calorie version.⁵² Anheuser-Busch in 2008 launched Bud Light Lime, a beer that appears to target Corona even more directly than Miller Chill does.⁵³ With an expensive advertising campaign and substantial investment, Bud Light Lime has captured some share from Corona and has done very well against Corona Light.⁵⁴ These product introductions illustrate how Modelo has spurred ABInBev and SABMiller to innovate and improve their portfolio of offerings.

Modelo is building significant new brewing capacity to serve the U.S. market. In 2010, it completed the first phase of construction on a new brewery in Coahuila, Mexico, which is located near Mexico's border with Texas.⁵⁵ Its second phase is slated for completion later this year, and the third phase is expected to be finished in 2013.⁵⁶ When all three phases are completed, this brewery will be the largest in the world, with an annual capacity to produce 30 million hectoliters of beer.⁵⁷ This facility is being built primarily to export Modelo brands to the United States and Europe.⁵⁸ The construction of this massive brewery bodes well for American beer drinkers. In most industries, new capacity typically translates to increased output and lower prices.

The proposed acquisition would allow ABInBev to "buy off" the competitive pressure it currently faces from Modelo. Bud Light and Corona appear to be direct competitors, especially among Latinos.⁵⁹ The proposed acquisition would lead to a loss of head-to-head competition between the two brands.⁶⁰ With ABInBev controlling Modelo's brands, the beer giant would not have to contend with an independently controlled brewer that has introduced popular new brands and thrived at a time when beer sales are otherwise languishing. By bringing Modelo brands under the ABInBev umbrella, the proposed acquisition would weaken ABInBev's incentive to continue developing Bud Light Lime and other brands that compete with Corona and Corona Light. Following the proposed acquisition, ABInBev could have a strong incentive to scale back its investment in Bud Light Lime or even drop it entirely because increased sales of Bud Light Lime would likely cannibalize sales of Corona.⁶¹ The result would be reduced product variety for beer drinkers.

⁵⁰ David Kesmodel, *Sales Clouds Brewing for 'Vacation in a Bottle'*, WALL ST. J., Apr. 3, 2008, available at <http://online.wsj.com/article/SB120719277853685603.html>.

⁵¹ *Id.*

⁵² Todd Wasserman, *MillerCoors Tweaks Miller Chill*, ADWEEK, Apr. 21, 2009, available at <http://www.adweek.com/news/advertising-branding/millercoors-tweaks-miller-chill-105646>.

⁵³ *Have a Happy Fiesta*, N.Y. TIMES, May 5, 2008, available at http://travel.nytimes.com/2008/05/05/opinion/05mon4.html?partner=rssnyt&emc=rss&_r=0 ("Cinco de Mayo is probably Corona's biggest day. . . . Anheuser-Busch picked Cinco de Mayo to launch its new Bud Light Lime.").

⁵⁴ Mike Hughlett, *Corona's Sales Are Losing Fizz*, LA TIMES, Apr. 10, 2009; Jeremy Mullman, *Thanks to Bud, Corona Has a Bummer of a Summer*, ADVERTISING AGE, Sep. 15, 2008, available at <http://adage.com/article/news/bud-corona-a-bummer-a-summer/130962/>.

⁵⁵ *Grupo Model Brewery*, *supra* note 11.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Blair, *supra* note 44.

⁶⁰ See HORIZONTAL MERGER GUIDELINES § 6.1 ("The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice.").

⁶¹ Mullman, *supra* note 54.

Furthermore, the proposed acquisition could increase the likelihood of tacit collusion in certain segments. Empirical and theoretical evidence reveals that markets with fewer players are more vulnerable to collusion.⁶² A concentrated market is more favorable to tacit collusion because fewer independent economic actors simplifies the mechanics of coordination and gives each participant a larger fraction of the gains from collusion.⁶³ In addition, the beer market has characteristics that are conducive to price coordination: the transparency of pricing at the retail level and the prevalence of category management.⁶⁴

In a segment like light beer, the acquisition could increase the likelihood of tacit collusion. ABInBev, with Bud Light, and SABMiller, with Miller Lite and Coors Light, are the two dominant players.⁶⁵ Corona Light, although not as popular as the light beers of the big two, has been surging in popularity in recent years.⁶⁶ Not only would the proposed acquisition leave segments like light beer with fewer companies, it would remove the player most likely to disrupt collusive pricing. Modelo has many of the hallmarks of a “maverick” firm.⁶⁷ It has aggressively marketed new products and expanded its production capacity. With the completion of the Coahuila brewery, Modelo will likely increase both its ability and its incentive to disrupt any price coordination. If ABInBev acquires Modelo, product segments like light beer will lose a dynamic competitor and be left with two dominant firms: favorable conditions for future tacit collusion. Because Section 1 of the Sherman Act does not proscribe “conscious parallelism” alone,⁶⁸ the increased threat of tacit collusion needs to be addressed in merger enforcement.⁶⁹

b. Increased Threat of Exclusionary Conduct toward Craft and Regional Brewers

Craft beers have experienced strong growth in recent years, despite the stagnant sales in the beer industry on the whole. These beers typically command a price premium and generally offer a more distinctive taste than the mass-market lagers produced by ABInBev and SABMiller. They have filled a consumer niche and are said to have sparked a “renaissance” in the American beer industry.⁷⁰ In general, craft brewers have smaller brewing capacities and lack the scale needed to maintain large marketing budgets. Although still representing a small fraction of total beer sales, several craft brewers have acquired national renown. Boston Beer Company, the maker of Samuel Adams, is the

⁶² Marc Ivaldi, et al., *The Economics of Tacit Collusion: Implications for Merger Control*, in *THE POLITICAL ECONOMY OF ANITRUST* 217, 220 (Vivek Ghosal & Johan Stennek eds., 2007)

⁶³ *Id.*

⁶⁴ *Id.*; Desrochers, Gundlach & Foer, *supra* note 27, at 206.

⁶⁵ See Eric Asimov, *Bud Light, Coors Light, Miller Lite: Is There Any Difference?*, N.Y. TIMES, Oct. 2, 2011, available at <http://query.nytimes.com/gst/fullpage.html?res=9B03E7D61E31F931A35753C1A9679D8B63> (“Six of the 10 best-selling beers in the United States are light beers, including Bud Light at No. 1 (it outsells No. 2 Budweiser by more than 2 to 1), Coors Light at No. 3 and Miller Lite at No. 4.”).

⁶⁶ See Olson, *supra* note 49 (“Last year, Corona Light weathered the recession well with a 4.8 percent increase in sales to retailers, after a 3.6 percent increase in 2008. Those followed double-digit sales increases in the previous eight years. It is the eighth-largest-selling light-beer brand, according to SymphonyIRI.”)

⁶⁷ HORIZONTAL MERGER GUIDELINES § 2.1.5 (“The Agencies consider whether a merger may lessen competition by eliminating a ‘maverick’ firm, i.e., a firm that plays a disruptive role in the market to the benefit of consumers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.”).

⁶⁸ *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

⁶⁹ Ivaldi, et al., *supra* note 62, at 236.

⁷⁰ *Prohibition Hangover*, THE ECONOMIST, Sep. 8, 2012.

largest craft brewer.⁷¹ Other prominent craft brewers include Allagash of Maine and Dogfish Head of Delaware.⁷² Yuengling, a regional brewer based in Pennsylvania, is in a similar position as many craft brewers.⁷³

Due to the mandatory three-tier distribution system in most states, craft beers are vulnerable to being excluded from the market by larger brewers. Most jurisdictions require structural separation between brewers, distributors, and retailers and prohibit brewers from selling directly to retailers.⁷⁴ A large brewer like ABInBev can use exclusive dealing with distributors to exclude rivals or force them to use higher-cost channels. Given the large share of ABInBev, distributors often cannot afford to lose ABInBev brands and would have little choice but to accept exclusive dealing, even if they would prefer to carry the products of multiple brewers.

Although ABInBev has not officially demanded exclusivity from its distributors, the public comments of top executives suggest a strong preference for distributors to carry only its brands. Yuengling's successful entry into the Ohio market in 2012 revealed the beer giant's conception of an "ideal" distributor.⁷⁵ On learning that Yuengling used an ABInBev distributor to enter Ohio, ABInBev CEO Carlos Brito said that he was "offended" that an ABInBev distributor facilitated a rival's expansion.⁷⁶ Consistent with Brito's comments, Dave Peacock, the former head of the Anheuser-Busch operations, called for greater "alignment" between distributors and the brewer in 2011.⁷⁷ He stated that "aligned" distributors "only bring in brands that compete in segments underserved by our current portfolio."⁷⁸ Although this language might offer an escape clause for distributors seeking to carry craft brands, the number of segments "underserved" by ABInBev is steadily shrinking. Notably, ABInBev has expanded into craft segments in recent years through its acquisition of Goose Island Brewery of Chicago and the launch of the Shock Top line.⁷⁹

By increasing ABInBev's share, the proposed acquisition increases ABInBev's ability and incentive to impose exclusive dealing on its distributors.⁸⁰ While exclusive dealing can sometimes have procompetitive effects, it can prevent competitors from accessing distribution and reduce choice to

⁷¹ ASCHER, *supra* note 2, at A-3.

⁷² *Prohibition Hangover*, THE ECONOMIST, Sep. 8, 2012.

⁷³ ASCHER, *supra* note 2, at A-3.

⁷⁴ *Id.* at 38-39.

⁷⁵ Rick Armon, *Yuengling Fans Rejoice; Beer Enters Ohio Markets*, BEACON J., Oct. 4, 2011, available at <http://www.ohio.com/news/local/yuengling-fans-rejoice-beer-enters-ohio-markets-1.238424>.

⁷⁶ *Truth Squad Speaks: "Alignment" Dominates Post-Meeting Buzz*, BEER BUS. DAILY, Nov. 11, 2011.

⁷⁷ *AB Prexy Dave Peacock on "Alignment," "Anchor Wholesaler" Consolidation Guide, SOTs*, BEER MARKETER'S INSIGHT, Nov. 8, 2011.

⁷⁸ *Id.*

⁷⁹ Paul Schneider, *The Honk Heard Round the World: Goose Island One Year After the Sale*, CHICAGOIST, Apr. 16, 2012, available at http://chicagoist.com/2012/04/16/the_honk_heard_round_the_world_goos.php#photo-1; Renee Schultes, *Small Beer a Headache for Big Brewers*, WALL ST. J., Oct. 1, 2012, available at <http://online.wsj.com/article/SB10000872396390443862604578030640082560194.html>.

⁸⁰ See HORIZONTAL MERGER GUIDELINES § 1 ("Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct."). In *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, the District Court for the Eastern District of Michigan granted the plaintiffs a preliminary injunction against Heileman Brewing Company's acquisition of Pabst Brewing Company, citing how, *inter alia*, "the combined firm would be able to dominate wholesale distribution and limit access of smaller brewers to additional distributors." 600 F. Sup. 1326, 1331 (E.D. Mich. 1985), *aff'd*, 753 F.2d 1354 (6th Cir. 1985).

final consumers.⁸¹ If ABInBev demands de facto exclusivity from the distributors of Budweiser, Bud Light and Corona, it could tie up the most efficient distribution channels and force rivals to use inferior alternatives.

A simple hypothetical illustrates how AB InBev could use exclusive dealing in an anticompetitive manner. In a city with a large Latino population, like Los Angeles, AB InBev, following the proposed acquisition, may own two of the most popular local brands – Bud Light and Corona.⁸² After the merger, AB InBev, with its greater strategic interest in Modelo’s brands, could have an increased ability and incentive to require contractually or pressure its Los Angeles-area distributor to carry only AB InBev and Modelo brands. AB InBev makes money on both Bud Light and Corona sales, even though Crown Imports supplies distributors with the latter brand. The distributor, recognizing the popularity of Bud Light and Corona and not wanting to give up either beer to a rival, would likely comply with AB InBev’s demand. If AB InBev ties up the most efficient distributor this way, other brewers would have to use less effective distribution channels,⁸³ limiting their ability to reach final consumers.⁸⁴ Considering the growing popularity of alternatives to mass-market lagers, the harm to consumers from reduced product diversity may be especially high. Importantly, AB InBev could achieve this result without any overt cooperation from Crown Imports.

To understand fully the threat of foreclosure through exclusive dealing, the DOJ needs to determine AB InBev’s and Modelo’s shares in local markets. In markets, in which the brands of both are popular, AB InBev’s ability and incentive to seek exclusivity with distributors may be particularly strong. Also, the DOJ needs to review the operations of AB InBev’s distributors and examine whether they possess cost and other functional advantages over other distributors. A lack of equally efficient non-AB InBev distributors heightens concerns about the foreclosure effects of exclusive dealing.

IV. RECENT BEER MERGERS APPEAR TO HAVE HARMED CONSUMERS

As in other recent mergers in the beer industry, executives at ABInBev have stated that the proposed transaction will create significant cost savings to the benefit of consumers. They have stated that the deal would create \$600 million in annual savings.⁸⁵ When Miller and Coors agreed to merge their U.S. operations in 2007, top officials predicted \$500 million in eventual per-annum savings.⁸⁶ Similarly, InBev’s acquisition of Anheuser-Busch in 2008 was justified partly on the grounds of substantial cost savings. Through the elimination of over 1,000 jobs at Anheuser-Busch and the streamlining of its supply chain, executives projected annual savings of \$1.5 billion by 2011.⁸⁷

⁸¹ See *United States v. Dentsply Int’l Inc.*, 399 F.3d 181, 190 (3d Cir. 2005) (“The evidence in this case demonstrates that for a considerable time, . . . Dentsply has been able to exclude competitors from the dealers’ network, a narrow, but heavily traveled channel to the dental laboratories.”); Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311, 352 (2002).

⁸² Blair, *supra* note 44.

⁸³ See *Dentsply*, 399 F.3d at 196 (“The mere existence of other avenues of distribution is insufficient without an assessment of their overall significance to the market.”); Jacobson, *supra* note 81, at 352.

⁸⁴ Martinne Geller & Diane Bartz, *U.S. Craft Brewers Fear Modelo Deal Will Limit Their Route to Pubs*, REUTERS, Nov. 2, 2012, available at <http://in.reuters.com/article/2012/11/02/us-modelo-abinbev-antitrust-idINBRE8A11DJ20121102>.

⁸⁵ Scott, *supra* note 3.

⁸⁶ Andrew Martin, *Merger for SABMiller and Molson Coors*, N.Y. TIMES, Oct. 10, 2007, available at <http://www.nytimes.com/2007/10/10/business/worldbusiness/10beer.html>.

⁸⁷ Mark Landler, *InBev Looks to Expand Budweiser’s Reach*, N.Y. TIMES, July 15, 2008.

Empirical evidence casts doubt on whether the Miller/Coors and Anheuser-Busch/InBev transactions have benefited consumers. The skeptics of these transactions appear to have been vindicated.⁸⁸ Beer prices have risen in recent years,⁸⁹ a time when beer sales have declined on account of the weak economy.⁹⁰ In contrast to beer, prices of wine and spirits have been declining during this same time period.⁹¹ Moreover, profits at ABInBev and SABMiller have risen during this period.⁹² Although the increase in beer prices cannot be definitively attributed to the mega-mergers in 2007 and 2008, the evidence – rising prices and profit margins, coinciding with a period of consolidation and falling sales – does circumstantially suggest that reduced competition is one of the drivers.⁹³

Given this history, the efficiencies claim presented by ABInBev and Modelo should be treated with skepticism.⁹⁴ Recent beer mergers have failed to create benefits for consumers and appear to have left them worse off. The merging parties should demonstrate to a skeptical public why their transaction is different. The Horizontal Merger Guidelines do not merely examine whether the projected cost savings will be realized and increase the merging parties' profitability; instead they take a consumer-centric approach to efficiencies and determine whether they would offset enhanced market power arising from the merger.⁹⁵ They state that “efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great” and “efficiency claims substantiated by analogous past experience are those most likely to be credited.”⁹⁶ In the proposed acquisition, neither condition is met: the transaction likely creates

⁸⁸ See Martin, *supra* note 86 (“What does the consumer get out of [the Miller-Coors deal]? Less selection and probably higher prices,” Mr. Pirko said, adding that the pricing dynamic in beer has been driven by ‘hellacious’ competition among the three competitors. “People are sailing along blindly, thinking that this is going to be easy.”).

⁸⁹ Jerry Hirsch, *Is Beer Price Increase Justified?*, LA TIMES, Aug. 27, 2009, available at http://latimesblogs.latimes.com/money_co/2009/08/is-beer-price-increase-justified.html; Aliza Rosenbaum, Rob Cox & Pierre Briancon, *Rising Beer Prices Hint at Oligopoly*, N.Y. TIMES, Aug. 27, 2009, available at <http://www.nytimes.com/2009/08/27/business/27views.html>; ASCHER, *supra* note 2, at 33-34.

⁹⁰ *Sell Foam Like Soap*, THE ECONOMIST, May 5, 2011; *Prohibition Hangover*, THE ECONOMIST, Sep. 8, 2012.

⁹¹ ASCHER, *supra* note 2, at 33-34.

⁹² *Profit Rises at Molson Coors, Beating Wall St. Expectations*, N.Y. TIMES, Feb. 16, 2012, available at http://www.nytimes.com/2012/02/17/business/profits-and-sales-rise-at-molson-coors.html?_r=0; Tim Logan, *3 Key Brands Sent A-B InBev Profits Surging*, ST. LOUIS POST-DISPATCH, Mar. 8, 2012, available at http://www.stltoday.com/business/local/key-brands-sent-a-b-inbev-profits-surging/article_d9230c58-691b-11e1-a15e-0019bb30f31a.html.

⁹³ See Devin Leonard, *The Plot to Destroy America's Beer*, BLOOMBERG BUSINESSWEEK, Oct. 29, 2012 (“[ABInBev CEO Carlos Brito] has increased revenue and profit, but he has done so almost entirely by raising prices and cutting the cost of making the product.”); David Kesmodel, *Falling Beer Sales Have Brewery Mergers Over a Barrel*, WALL ST. J., Jan. 21, 2010, available at <http://online.wsj.com/article/SB10001424052748703405704575015331523775638.html> (“The two giants increased prices by about 5 percent last year, fresh off InBev NV's acquisition of Anheuser-Busch Cos. and the move by SABMiller PLC and Molson Coors Brewing Co. to combine U.S. operations. Those increases, along with a weak job market and lackluster advertising, contributed to the sales drop, industry analysts said.”).

⁹⁴ See HORIZONTAL MERGER GUIDELINES § 2.1.2 (“The Agencies also look for historical events, or ‘natural experiments,’ that are informative regarding the competitive effects of the merger. For example, *the Agencies may examine the impact of recent mergers*, entry, expansion, or exit in the relevant market.”) (emphasis added).

⁹⁵ See *id.* at § 10 (“[T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market. . . . The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.”).

⁹⁶ *Id.*

serious adverse competitive effects and recent mergers in the industry have failed to produce the projected pro-consumer efficiencies.

V. THE PROPOSED ACQUISITION DEMONSTRATES THE RELEVANCE OF THE INCIPIENCY STANDARD IN MERGER ENFORCEMENT

The proposed acquisition reveals a fact pattern that underscores the importance of the incipency standard in merger enforcement. This transaction is the latest in a series of large beer mergers that have created an effective duopoly today.⁹⁷ Some press reports indicate that the merger wave has been driven, to some degree, by the copycat phenomenon – large brewers fear being left out of the merger wave.⁹⁸ The media have speculated that ABInBev will seek to acquire SABMiller in the near future.⁹⁹ This rumored transaction would be the culmination of a wave of consolidations and would leave the U.S. beer market with a single dominant player. The likely results would be both higher prices and reduced choice. If the DOJ through its investigation finds that the proposed acquisition would result in a functional combination of ABInBev’s and Modelo’s brands, the incipency standard should be revived to put a (delayed) halt to this trend and preserve competition and diversity in the market for beer.

Although the incipency standard in merger enforcement has fallen out of favor in recent decades, it remains the relevant statutory standard in Section 7 of the Clayton Act. This statute prohibits acquisitions and mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”¹⁰⁰ In other words, mergers and acquisitions are to be stopped preemptively before they can reduce competition or unleash a consolidation wave trending toward monopoly. The 2010 Horizontal Merger Guidelines recognize the incipency standard in merger enforcement. They state “merger enforcement should interdict competitive problems in their incipency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.”¹⁰¹ They add that the Agencies, pursuant to the incipency standard, “may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.”¹⁰²

Two Supreme Court cases from the 1960s illustrate how the incipency standard should – and should not – be applied to protect consumer welfare. In *United States v. Philadelphia National Bank*, the DOJ sought to enjoin the merger between two of the four largest banks in the Philadelphia metropolitan area.¹⁰³ In blocking the transaction, the Supreme Court applied an incipency framework to protect consumers. The merger would have resulted in the two largest banks having a market share of 59 percent in Philadelphia.¹⁰⁴ Although the Court acknowledged that many small banks would remain following the merger, it rejected this as a reason to permit the transaction. The Court stated that Section 7 was intended to “arrest the trend toward concentration, the tendency to monopoly before the customer’s alternatives disappeared through merger that purpose would be ill-

⁹⁷ ASCHER, *supra* note 2, at A-11.

⁹⁸ See *SABMiller’s Tale*, THE ECONOMIST, Sep. 24, 2011 (“SABMiller, which has not done a big deal since 2005, may simply want to join the global trend towards consolidation. It has low debts and lots of cash, so why not?”).

⁹⁹ Philip Blenkinsop, *AB InBev Buys Out Corona Maker Modelo for \$20 Billion*, REUTERS, available at <http://www.reuters.com/article/2012/06/29/us-modelo-abinbev-idUSBRE85S0B420120629>.

¹⁰⁰ 15 U.S.C. § 18.

¹⁰¹ HORIZONTAL MERGER GUIDELINES § 1.

¹⁰² *Id.* at § 7.1.

¹⁰³ 374 U.S. 321 (1963).

¹⁰⁴ *Id.* at 365.

served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed.”¹⁰⁵ The Court added that this rising concentration was not mere speculation “in view of the strong trend toward mergers in this area.”¹⁰⁶ The Court wanted to preserve the competitive market in banking services in Philadelphia to benefit consumers – a market that catered to consumers on the basis of “price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, [and] miscellaneous and special services.”¹⁰⁷

In contrast to its decision in *Philadelphia National Bank*, the Supreme Court in *United States v. Von’s Grocery* applied the incipency standard incorrectly. The DOJ sought to block the merger of two of the largest grocery stores in Los Angeles.¹⁰⁸ These chains, however, had a combined share of less than 8 percent and were just two out of 150 supermarket chains in the Los Angeles area.¹⁰⁹ Citing the decline in the number of independent grocery stores, the Court ruled in favor of the DOJ, holding that it was statutorily obliged to arrest “a long and continuous trend toward fewer and fewer owner-competitors.”¹¹⁰ In the long run, the Court’s prediction was correct. The Los Angeles food retailing market, which featured hundreds of chains in the 1960s, has three dominant chains today.¹¹¹ The Court in *Von’s*, however, intervened prematurely: it blocked a merger that increased concentration only marginally, at a time when the threat of oligopoly was a distant and uncertain prospect. And unfortunately for antitrust enforcement, the Court, through its unduly strict application of the incipency standard, brought the “doctrine into disrepute.”¹¹²

Although many craft and regional brewers have expanded and increased their shares in recent years, their success must be viewed in relation to the overall beer market. The two large producers still have a combined share of around 80 percent, which could rise to 85 percent following the proposed acquisition. ABInBev and SABMiller, along with a handful of others like Modelo and Heineken, undertake national marketing campaigns that their smaller rivals cannot hope to match. And given the power of ABInBev and SABMiller over distributors and retailers, the continued success of craft and regional brewers is dependent on the two giants keeping these channels (comparatively) open.

A consent decree that includes divestitures of certain ABInBev brands and breweries is unlikely to address the competitive risks created by the proposed acquisition. Modelo has both the proven ability and scale to compete head-to-head against ABInBev and SABMiller. Although a divestiture could preserve pre-merger market concentration levels, it is unlikely to create a competitor to replace Modelo in full measure. The identity of competitors in this instance matters as much as the number of competitors in the market. Modelo, through its success with Corona and Corona Light, has spurred ABInBev and SABMiller to improve their portfolios. It is far from certain that any purchaser of divested ABInBev brands would have the capability and scale to continue applying similar competitive pressure on the two giants. The result of a consent decree could be a competitor that, in theory, replaces the loss of Modelo but is, in practice, a shadow of the Mexican brewer’s market presence.

¹⁰⁵ *Id.* at 367.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 368.

¹⁰⁸ 384 U.S. 270 (1966).

¹⁰⁹ *Id.* at 272-73.

¹¹⁰ *Id.* at 278.

¹¹¹ Robert H. Lande, *Resurrecting Incipency: From Von’s Grocery to Consumer Choice*, 68 ANTITRUST L.J. 875, 896 (2001).

¹¹² *Id.* at 894.

VI. CONCLUSION

The AAI does not have access to either the proprietary data or the industry stakeholders necessary for a thorough review of the proposed transactions. As a result, it cannot offer a fully informed opinion on the proposed transactions. Instead using public sources, the AAI has identified central questions and described possible anticompetitive effects and hopes this white paper will assist the DOJ in its analysis of the proposed transactions.

The proposed transactions, though establishing some separation between ABInBev's brands and Modelo's brands in the United States, may still amount to a functional merger between the two portfolios. Even if Crown Imports has a dedicated supply of Modelo brands and remains a strong competitor, the proposed transactions may give ABInBev a larger strategic interest in the success of Modelo's brands. That is, by swapping its 25 percent indirect stake in Crown Imports for an additional 50 percent interest in Modelo, ABInBev may capture a larger fraction of the profits on every bottle of Corona or Modelo Especial sold in the U.S. In addition, ABInBev, as a category captain, may have the ability to make retail marketing and pricing decisions for the Modelo brands at many outlets. The DOJ needs to answer the following questions before it can understand the competitive effects of the proposed transactions:

- Whether ABInBev will possess a greater strategic interest in Modelo's brands following the merger.
- Whether ABInBev will exercise significant control over point-of-sale marketing for these brands through the examination of the following points.
 - How prevalent is category management in beer retailing at convenience stores and supermarkets?
 - How does category management function in this segment – do retailers generally defer to the decisions of category captains or do they maintain an active oversight role?
 - What is ABInBev's share of category captaincies in beer in national and local markets?
 - How easily can retailers switch to alternate category captains (or abandon category management entirely in beer) in the event of dissatisfaction with ABInBev's pricing and shelving practices?

A de facto merger between ABInBev's and Modelo's brands would raise several competitive risks. By acquiring a 100 percent stake in Modelo, ABInBev would absorb an independently controlled brewer that has been an important source of price and non-price competition in recent years.

- Reduction in horizontal competition
 - Concentration in the national beer market, which is already highly concentrated as defined in the Horizontal Merger Guidelines, will increase significantly.
 - Current concentration and post-merger increases in concentration are likely even greater in local markets with large Latino populations.
 - Without the competitive pressure from Modelo, ABInBev may not have the same incentive to improve and broaden its product portfolio.
 - The threat of tacit collusion in segments like light beer could increase because Modelo would not play the role of industry maverick.
- Increased threat of exclusionary conduct toward craft and regional brewers

- ABInBev, with its larger share following the proposed transactions, may have an enhanced ability and incentive to use exclusive dealing to foreclose craft and regional rivals from ABInBev and Modelo distribution channels.
- Exclusive dealing is most likely to arise in local markets in which AB InBev and Modelo beers are among the leading brands.
- Exclusivity is most problematic if AB InBev distributors have lower costs than non-ABInBev distributors and represent the most efficient route to bars and retailers.

ABInBev's proposed acquisition of Modelo may present the DOJ the perfect opportunity to stem a trend that should have arguably been arrested earlier: the steady and unmistakable march toward a U.S. beer monopoly. This transaction comes in the wake of several large mergers in the industry. Although these mergers were justified on the basis of generating consumer benefits, empirical evidence over the past several years – rising prices and gross margins at a time when beer sales are slumping – suggests that the transactions benefited the merging parties at the expense of American beer drinkers. If the DOJ finds through its investigation that the proposed transactions result in a functional combination between ABInBev's and Modelo's portfolios and that the described anticompetitive consequences are likely to come to fruition, it should heed the prescient words of Justice Hugo Black in *United States v. Pabst Brewing Co.*: “If not stopped, this decline in the number of separate competitors and this rise in the share of the market controlled by the larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands.”¹¹³

¹¹³ 384 U.S. 546, 551 (1966).