ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of E. & J. Gallo Winery, Dry Creek Corporation, and Constellation Brands, Inc., File No. 191-0110, Docket No. C-4730

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Respondent E. & J. Gallo Winery ("Gallo"), a wholly owned subsidiary of Respondent Dry Creek Corporation ("Dry Creek"), and Respondent Constellation Brands, Inc. ("Constellation") (collectively, "Respondents"). The purpose of the Consent Agreement is to remedy the anticompetitive effects that would likely result from Gallo's acquisition of certain Constellation assets ("the Acquisition").

To resolve the Commission's concerns, Gallo and Constellation elected to remove J Roget, Cook's, Paul Masson brandy, high color concentrates ("HCCs"), and the Mission Bell winery from the asset purchase agreement. Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, Constellation is required to maintain the viability of the J Roget and Cook's assets. The Order also requires that (1) Constellation divest its Paul Masson brandy to the Sazerac Company, Inc. ("Sazerac"); (2) Gallo divest its Sheffield Cellars and Fairbanks low-priced port and sherry brands to Precept Brands LLC ("Precept"); and (3) Constellation divest its HCCs business to the Vie-Del Company ("Vie-Del").

The Commission and the Respondents have also agreed to an Order to Maintain Assets. This order requires Gallo and Constellation to retain and maintain the assets that the Consent Agreement requires them to divest, pending their divestiture. The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the United States in the product markets for: (1) entry-level on-premise sparkling wine, (2) low-priced sparkling wine, (3) low-priced brandy, (4) low-priced port, (5) low-priced sherry, and (6) HCCs.

The proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or finalize the Consent Agreement.

II. THE PARTIES

Gallo is a privately owned company headquartered in Modesto, California. Founded in 1933, Gallo is the largest family-owned winery in the world, with over 100 wine and spirit brands, and a portfolio that includes white wines, red wines, sparkling wines, dessert or fortified wines, brandy, and vodka. Gallo owns 15 wineries situated throughout California and

Washington, over 23,000 acres of vineyards across California, glass and bottling facilities, storage facilities, and distribution channels in states where legally permitted.

Headquartered in Victor, New York, Constellation is a publically traded alcoholic beverage company. Founded in 1945, Constellation is the third-largest producer of beer and one of the world's leading premium wine companies. Constellation is one of the three largest wine suppliers in the United States; in fiscal year 2018, it generated approximately $8.3 billion in gross revenue.

On April 3, 2019, Gallo entered into an Asset Purchase Agreement with Constellation. Pursuant to the agreement, Gallo would acquire more than 30 mostly low-priced wine, brandy, concentrate and additive brands along with several wine-making facilities from Constellation in a transaction originally valued at approximately $1.7 billion.

III. THE RELEVANT MARKETS

Gallo's proposed acquisition of certain Constellation assets would likely result in substantial competitive harm in the following product markets: entry-level on-premise sparkling wine, low-priced sparkling wine, low-priced brandy, low-priced port and low-priced sherry fortified wines, and HCCs. The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition.

A. Entry-Level On-Premise Sparkling Wine

Entry-level sparkling wine is often sold to on-premise retailers, such as restaurants, casinos, and hotels, for specific uses (*e.g.*, brunch mimosas, complimentary or "floor" pours, banquets, and catering). Sparkling wine outside of the entry-level tier is generally priced significantly higher than entry-level on-premise sparkling wine.

Gallo and Constellation are the two largest suppliers, by volume, of entry-level on-premise sparkling wine in the United States. Absent relief, Gallo would have acquired Constellation's J Roget brand, resulting in significant increases in concentration in a highly concentrated market, and giving rise to a presumption of increased market power under the Horizontal Merger Guidelines. Further, Gallo's Wycliff brand and Constellation's J Roget brand are close and vigorous competitors in the United States. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between Gallo and Constellation, and would likely have increased Gallo's ability and incentive to raise prices post-Acquisition. Entry into this market is difficult due to the specialized equipment and massive scale needed to produce sparkling wine at a low cost. In addition, the need for a nationwide distribution network and sales team to work with retailers present further obstacles to entry and expansion.

B. Low-Priced Sparkling Wine

Low-priced sparkling wine (generally described in the industry as "popular" sparkling wine) is predominately sold to off-premise retailers such as grocery stores, liquor stores, and convenience stores. Low-priced sparkling wine does not significantly compete with more expensive "premium" brands.

Gallo's André and Constellation's Cook's brands are the two largest low-priced sparkling wine brands in the United States, with other competitors being significantly smaller. Absent relief, Gallo would have acquired Constellation's Cook's brand, resulting in significant increases in concentration and a highly concentrated market, and giving rise to a presumption of increased market power under the Horizontal Merger Guidelines. André and Cook's directly compete for shelf space and sales in the off-premise retail channel. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between André and Cook's and would likely have increased Gallo's ability and incentive to raise prices post-Acquisition. Entry into this market is difficult due to the specialized equipment and massive scale needed to produce low-priced sparkling wine. The need for a national distribution network and sales force, and retail relationships sufficient to compete with established brands for retail shelf space, present additional hurdles to entry and expansion.

C. Low-Priced Brandy

Brandy is a distilled spirit made from fruit, typically wine grapes. After distillation, it must be aged for at least two years in order to be labeled and sold as "brandy" in the United States. There is a large price and quality difference between low-priced brandies, which are typically produced domestically, and high-end imported brandies (primarily cognacs). Further, low-priced brandies do not compete closely with other types of spirits such as whiskeys, rums, vodkas, tequilas, and gins, since brandy has a unique taste profile and is often consumed straight rather than as a mixer.

Gallo's E & J Brandy and Constellation's Paul Masson brandy are the two largest low-priced brandies. Absent relief, Gallo would have acquired Constellation's Paul Masson brand, resulting in significant increases in concentration and a highly concentrated market, and giving rise to a presumption of increased market power under the Horizontal Merger Guidelines. Gallo and Constellation consider each other's pricing when determining the price of their own low-priced brandy brands and compete to develop new products for these brands. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between E & J Brandy and Paul Masson, would likely result in lower quality, and would likely increase Gallo's ability and incentive to raise prices post-Acquisition. Entry is unlikely to deter or counteract the anticompetitive effects of the Acquisition due to the significant capital investment and distribution network required for large-scale brandy production. Further, the need for certain state and local environmental permits makes entry or expansion difficult.

D. Low-Priced Port and Low-Priced Sherry

Port and sherry are types of fortified wines (wines to which a distilled spirit has been added, giving them a higher alcohol by volume) that are used for both cooking and consumption. Due to their flavor profile, alcohol level, and use, port and sherry brands are distinct from table wines and generic cooking wines. Further, there is a significant price gap between low-priced, domestic brands of port and sherry and high-end imports.

Gallo, which owns both the Sheffield Cellars and Fairbanks brands, and Constellation, which owns the Taylor brand, are the two largest suppliers, by volume, of low-priced port and low-priced sherry fortified wines in the United States. Absent relief, Gallo would have owned three of the top four low-priced port and sherry brands. The Acquisition would have resulted in significant increases in concentration and lead to highly concentrated markets, resulting in a presumption of increased market power under the Horizontal Merger Guidelines. Gallo and Constellation are each other's closest competitors. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between Gallo and Constellation, and would likely increase Gallo's ability and incentive to raise prices post-Acquisition. Entry into these markets is unlikely to occur due to the low level of interest in low-priced port and sherry from retailers, distributors, and third-party producers. In addition, producers of high-end imports have cost structures that render them unable to introduce a product at a price similar to domestic brands'.

E. High Color Concentrates

HCCs are grape-based additives that have been concentrated using sophisticated filtration technologies into a thick, shelf-stable syrup. HCCs are made from a specific grape varietal, Rubired, and are used by winemakers to deepen the color and enhance the taste and texture of red wines. HCCs are also used by food and beverage manufacturers in jellies, juices, and other products. HCCs have unique qualities that are not replicable through the use of lower-level concentrates or other winemaking techniques.

Gallo and Constellation are the two largest HCC producers in the United States, and there is only one other domestic producer. Absent relief, the Acquisition would have resulted in significant increases in concentration and lead to a highly concentrated market, resulting in a presumption of increased market power under the Horizontal Merger Guidelines. Gallo and Constellation are each other's closest competitors. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between Gallo and Constellation, and would likely increase Gallo's ability and incentive to raise prices post-Acquisition. Entry into this market is difficult due to the need for technical expertise and significant capital investments in production equipment. In addition to potentially needing certain regulatory permits, firms making attempts at HCC production can only do so annually during a narrow harvest window, which results in a lengthy development process.

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the likely anticompetitive effects in the aforementioned product markets. The proposed Order requires that Constellation retain and maintain the assets of the J Roget and Cook's brands. The Order also requires the following divestitures: Constellation will divest its Paul Masson brandy to Sazerac; Gallo will divest its Sheffield Cellars and Fairbanks low-priced port and sherry brands to Precept; and Constellation will divest its HCCs business to Vie-Del, no later than 10 days after the closing of the Acquisition. The Order further prohibits Constellation from selling or leasing, and Gallo from buying, the Mission Bell production facility without prior Commission approval. Constellation produces Cook's and HCCs at the Mission Bell facility and will provide an interim supply of HCCs to the purchaser of the HCCs business.

The proposed Order and Order to Maintain Assets also appoint William Berlin as Monitor. The Monitor will ensure that the parties comply with their obligations under the proposed Orders and keep the Commission informed about the status of the transfer of the assets and rights to the approved acquirers.

Finally, the proposed Consent Agreement contains standard terms regarding each acquirer's access to employees, protection of material confidential information, and compliance reporting requirements, among other things, to ensure the viability of the divested businesses.

A. Entry-Level On-Premise Sparkling Wine

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the entry-level on-premise sparkling wine market by requiring that Constellation take all actions necessary to retain and maintain the full economic viability, marketability, and competitiveness of its J Roget brand until four years after entry of the Consent Agreement. This remedy will preserve the status quo in the entry-level on-premise sparkling wine market, resulting in no change in market concentration.

B. Low-Priced Sparkling Wine

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the low-priced sparkling wine market by requiring that Constellation take all actions necessary to retain and maintain the full economic viability, marketability, and competitiveness of its Cook's brand until four years after entry of the Consent Agreement. This remedy will preserve the status quo in the low-priced sparkling wine market, resulting in no change in market concentration.

C. Low-Priced Brandy

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the low-priced brandy market by requiring Constellation to divest the Paul Masson brandy to Sazerac, a spirits company based in New Orleans, Louisiana. This remedy would allow Sazerac to add a significant lower-priced brandy brand to its portfolio while otherwise preserving the status quo in the low-priced brandy market, resulting in no change in market concentration.

D. Low-Priced Port and Low-Priced Sherry

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the low-priced port and low-priced sherry markets by requiring Gallo to divest its Sheffield Cellars and Fairbanks brands to Precept, a winery based in Seattle, Washington. This remedy would launch Precept's entry into the dessert and cooking wine categories while otherwise preserving the status quo in the low-priced port and low-priced sherry markets, resulting in no change in market concentration.

E. High Color Concentrates

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the HCCs market by requiring Constellation to divest its HCCs business to Vie-Del, a producer of wine, spirits, and non-high-color grape concentrate products based in Fresno, California. Based on the Commission's due diligence of Vie-Del as a divestiture buyer, the Commission deems it necessary to include the following provisions in the proposed Consent Agreement to help ensure Vie-Del's success in the HCC business. Paragraph IV.B. of the proposed Order requires Constellation to provide assistance to Vie-Del in establishing production capacity equivalent to that of Constellation, and Paragraph IV.D. requires Constellation to produce concentrates to Vie-Del until Vie-Del is able to produce HCCs in commercial quantities and until transferring Constellation customers have qualified Vie-Del's HCCs to meet their specifications. These provisions will help ensure Vie-Del is able to expand its customer base while otherwise preserving the status quo of three independent HCCs producers, resulting in no change in market concentration.

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The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement to aid the Commission in determining whether it should make the proposed Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.