notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: March 5, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–5016 Filed 3–9–09; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. InBev NV/SA, InBev USA LLC, and Anheuser-Busch Companies, Inc.; Response to Public Comments on the Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes the public comments received on the proposed Final Judgment in *United States* v. *InBev NV/SA, InBev USA LLC, and Anheuser-Busch Companies, Inc.*, Civil Action No. 1:08–cv–1965 and the response to the comments. On November 14, 2008, the United States filed a Complaint alleging that the proposed merger between InBev NV/SA (''InBev'') and Anheuser-Busch Companies, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18 by substantially reducing competition for the sale of beer in the Buffalo, Rochester, and Syracuse, New York, metropolitan areas. The proposed Final Judgment, filed at the same time as the Complaint, requires InBev to divest InBev USA LLC d/b/a Labatt USA and grant a perpetual license to the acquirer to brew and sell Labatt brand beer for consumption throughout the United States. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), public comment was invited within the statutory 60-day comment period. Copies of the Complaint, proposed Final Judgment, Competitive Impact Statement, Public Comments, the United States' Response to the Comments, and other materials are currently available for inspection in Suite 1010 of the Antitrust Division, Department of Justice, 450 5th Street, NW., Washington, DC 20530, telephone: (202) 514–2481, on the Department of Justice's website (*http://www.usdoj.gov/atr*), and the Office of the Clerk of the United States District Court for the District of the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee set by Department of Justice Regulations.

J. Robert Kramer II,

Director of Operations, Antitrust Division.

The United States District Court for the District of Columbia

United States of America, Plaintiff, v. *InBev N.V./S.A., InBev USA LLC, and Anheuser-Busch Companies, Inc.* Defendants.

CASE NO: 1:08–cv–01965 (JR)
JUDGE: Robertson, James

Response of Plaintiff United States To *Public Comments On the Proposed Final Judgment*

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), the United States hereby files comments received from members of the public concerning the proposed Final Judgment in this case and the responses by the United States to these comments. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. 25, on November 14, 2008, alleging that the proposed merger of InBev N.V./S.A. (''InBev'') and Anheuser-Busch Companies, Inc. (''Anheuser-Busch'') would violate Section 7 of the Clayton Act, 15 U.S.C. 18. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Hold Separate Stipulation and Order (''Stipulation'') signed by the United States and Defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act.[1] Pursuant to those requirements, the United States filed a Competitive Impact Statement (''CIS'') in this Court on November 14, 2008; published the proposed Final Judgment and CIS in the **Federal Register** on November 25, 2008, *see* 73 FR 71682 (2008); and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on December 7, 2008, and ending on December 13, 2008. The 60-day period for public comments ended on February 11, 2009, and the United States received four comments as described below and attached hereto.

[1] The merger closed on November 14, 2008. In keeping with the United States' standard practice, neither the Stipulation nor the proposed Final Judgment prohibited the closing of the merger. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 406 (6th ed. 2007) (noting that ''[t]he Federal Trade Commission (as well as the Department of Justice) generally will permit the underlying transaction to close during the notice and comment period''). Such a prohibition could interfere with many time-sensitive deals and prevent or delay the realization of substantial efficiencies.

I. The United States' Investigation And The Proposed Final Judgment

On July 13, 2008, InBev and Anheuser-Busch entered into an agreement, whereby InBev agreed to acquire all of the voting securities of Anheuser-Busch. The United States Department of Justice (the ''Department'') conducted an extensive, detailed investigation into the competitive effects of the proposed transaction. As part of this investigation, the Department obtained and considered more than 500,000 pages of material. The Department deposed officials of Anheuser-Busch and Inbev and interviewed beer wholesalers, retail customers, brewers, and other individuals with knowledge of the industry.

After conducting a detailed analysis of the acquisition, the Department concluded that the combination of InBev and Anheuser-Busch likely would substantially lessen competition for the sale of beer in the Buffalo, Rochester, and Syracuse, New York, areas. In contrast to InBev's small (less than 2 percent) share in most parts of the country, InBev's Labatt brand accounts for a significant portion of beer sales in the Buffalo, Rochester, and Syracuse areas. Anheuser-Busch beers and InBev's Labatt brand beers collectively account for over 40 percent of the total beer sales in the Buffalo, Rochester, and Syracuse areas.

As more fully explained in the CIS, the Stipulation and proposed Final Judgment in this case are designed to preserve competition in the sale of beer in the Buffalo, Rochester, and Syracuse areas by requiring InBev to divest InBev USA d/b/a Labatt USA (''IUSA'')[2] and all of the real and intellectual property rights required to brew, promote, market, distribute, and sell Labatt brand beer for consumption in the United

[2] The Divestiture Assets do not include certain assets of IUSA (e.g., books, records, and data) that relate solely to the sale of non-Labatt brand beer. *See* Proposed Final Judgment II.F(iii), (iv).

States (''Divestiture Assets''). *See* Proposed Final Judgment II.F. The Stipulation and proposed Final Judgment also require InBev to take several steps to assist the acquirer in providing prompt and effective competition in the Buffalo, Rochester, and Syracuse areas, including offering a transitional supply agreement to the acquirer. *Id.* at J. InBev must also provide transition support services as are reasonably necessary for the acquirer to operate the Divestiture Assets. *Id.* at H.

In the Department's judgment, the divestiture of InBev USA and the right to brew and sell Labatt brand beer for consumption in the United States, along with the other requirements contained in the Stipulation and proposed Final Judgment, are sufficient to remedy the anticompetitive effects identified in the Complaint.

II. Standard of Judicial Review

Upon the publication of the Comments and this Response, the United States will have fully complied with the Tunney Act and will move for entry of the proposed Final Judgment as being ''in the public interest.'' 15 U.S.C. 16(e)(1), as amended.

The Tunney Act states that, in making that determination, the Court shall 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); *see generally United States* v. *AT&T Inc.*, 541 F. Supp. 2d 2, 6 n.3 (D.D.C. 2008) (listing factors that the Court must consider when making the public-interest determination); *United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments to the Tunney Act ''effected minimal changes'' to scope of review under Tunney Act, leaving review ''sharply proscribed by precedent and the nature of Tunney Act proceedings'').[3]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995). With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest*.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted); *cf. BNS*, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

The government is entitled to broad discretion to settle with defendants within the reaches of the public interest. *AT&T Inc.*, 541 F. Supp. 2d at 6. In making its public-interest determination, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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, rather than to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft*, 56 F.3d at 1459. 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. *Id.* at 1459–60. As this Court recently confirmed in *SBC Communications*, courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns*, 489 F. Supp. 2d at 15.

[3] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006).

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The amendments codified what Congress intended when it passed the Tunney Act in 1974, as Senator Tunney then 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 Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4]

III. Summary of Public Comments and the United States' Response

During the 60-day comment period, the United States received comments from (1) ten individuals who filed a complaint in the United States District Court for the Eastern District of Missouri asking the court to enjoin InBev's acquisition of Anheuser-Busch (''Missouri Plaintiffs'') [5]; (2) Esber Beverage Company, RL Lipton Co., and Tri-County Distributing Co. (''Ohio Distributors''); (3) Onondaga Beverage Corporation, Rochester Beer & Beverage Corp., McCraith Beverages, Owasco Beverage Inc., Seneca Beverage Corp, and Rocco J. Testani Inc. (''New York Distributors''); and (4) Tri-County Beverage Company. The comments are attached to this Response.

The commenters raise two main concerns: (A) That the United States should have alleged and remedied harm to competition in a nationwide geographic market, rather than the Buffalo, Rochester, and Syracuse, New York, markets alleged in the United States' Complaint; and (B) that the proposed Final Judgment should contain additional requirements to ensure that competition is preserved in the Buffalo, Rochester, and Syracuse, New York, markets. After reviewing the comments, the United States has determined that the proposed Final Judgment remains in the public interest.

A. Missouri Plaintiffs' Comment that the United States Should Have Alleged and Remedied Additional Competitive Concerns

1. Summary of Comment

The Missouri Plaintiffs argue that ''the Complaint is too narrow [and] the proposed remedies inadequate,'' because the United States did not challenge the merger under a ''potential competition'' theory and did not challenge the legality of a November 2006 import agreement between InBev and Anheuser-Busch. Missouri Plaintiffs Comment at 3–4. In other words, they assert that the United States should have pled and remedied anticompetitive effects asserted by the Missouri Plaintiffs that are neither alleged nor related to the competitive harms identified in the United States' Complaint. Missouri Plaintiffs also assert that this Court should ''inquire'' about why the United States did not produce any ''determinative'' documents, as defined by the Tunney Act, 15 U.S.C. 16(b), and suggest that an import agreement between InBev and Anheuser-Busch is in fact such a determinative document. Missouri Plaintiffs Comment at 15–16.

2. The United States' Response

a. Competitive Concerns Not Addressed in the Complaint

Missouri Plaintiffs' comment that the United States should have alleged harm to competition for the sale of beer in a nationwide market concerns matters that are outside the scope of this APPA proceeding because neither claimed harm relates to the harms alleged in the United States' Complaint. As explained by this Court, in a Tunney Act proceeding, the district court should not second-guess the prosecutorial decisions of the Department regarding the nature of the claims brought in the first instance; ''rather, the court is to compare the complaint filed by the United States with the proposed consent decree and determine whether the proposed decree clearly and effectively addresses the anticompetitive harms initially identified.'' *United States* v. *Thomson Corp.*, 949 F. Supp. 907, 913 (D.D.C. 1996); *accord Microsoft*, 56 F.3d at 1459 (in APPA proceeding, ''district court is not empowered to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself''); *BNS*, 858 F.2d at 462–63 (''the APPA does not authorize a district court to base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint''). This Court has held that ''a district court is not permitted to 'reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made.' '' *SBC Commc'ns*, 489 F. Supp. 2d at 14 (quoting *Microsoft*, 56 F.3d at 1459).

Further, the Missouri Plaintiffs' suggestion that the 2004 Amendments to the Tunney Act require a more extensive review of the United States' exercise of its prosecutorial judgment, Missouri Plaintiffs Comment at 6–7, conflicts with this Court's holding in *SBC Communications*. In *SBC Communications*, this Court held that ''a close reading of the law demonstrates that the 2004 amendments effected minimal changes, and that this Court's scope of review remains sharply proscribed by precedent and the nature of [APPA] proceedings.'' *SBC Commc'ns*, 489 F. Supp. 2d at 11. This Court continued that because ''review [under the 2004 amendments] is focused on the 'judgment,' it again appears that the Court cannot go beyond the scope of the complaint.'' *Id*.

In short, the Tunney Act, as amended in 2004, requires the Court to evaluate the effect of the ''judgment upon competition'' as alleged in the

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

[5] The Missouri Plaintiffs filed their complaint on September 10, 2008, alleging that the merger would eliminate InBev as a potential competitor to Anheuser-Busch and thereby lessen competition in a relevant market consisting of the entire United States. Nearly two months later, Missouri Plaintiffs filed a motion for a preliminary injunction. *See Ginsberg* v. *InBev SA/NV*, No. 4:08CV01375, 2008 WL 4965859, at *1 (E.D. Mo. Nov. 18, 2008). The Missouri District Court denied the motion, holding that Missouri Plaintiffs' ''characterization [of InBev] as a perceived potential or actual potential competitor in the U.S. beer market [is] purely speculative and the evidence presented is insufficient to warrant granting [Missouri] Plaintiffs' Motion for Preliminary Injunction or holding a hearing regarding their Motion.'' *Id.* at *4. The court held further that ''the evidence presented demonstrates that it is overwhelmingly likely that Plaintiffs cannot succeed on the merits of their case * * *. '' *Id.*

In addition to filing a complaint in the Eastern District of Missouri, Missouri Plaintiffs sought to intervene in these Tunney Act proceedings ''for the purpose of challenging the merger.'' Missouri United States District Court Plaintiffs' Motion to Intervene, filed Jan. 14, 2009, 1. The Court denied their motion to intervene. Order, dated Feb. 3, 2009.

Complaint, in this case, competition in the market for beer in the Buffalo, Rochester, and Syracuse, New York, areas. *See* 15 U.S.C. 16(e)(1)(b). Because the United States did not allege that InBev's acquisition of Anheuser-Busch would cause harm in additional markets, it is not appropriate for the Court to seek to determine whether the acquisition will cause anticompetitive harms in other regions of the country.[6]

b. Determinative Documents

In its CIS, the United States certified that there were no determinative documents within the meaning of the Tunney Act, 15 U.S.C. 16(b). CIS at 16. Missouri Plaintiffs appear to argue that this certification is wrong, suggesting that the United States failed to submit determinative documents including ''the Import Agreement entered into by the Defendants in November 2006,'' Missouri Plaintiffs Comment at 16–17, which, in their view, is an illegal agreement or somehow relates to the theory of harm they alleged in their case against Defendants that is pending before the United States District Court for the Eastern District of Missouri.

There is no support for Missouri Plaintiffs' argument. The Tunney Act's notice and comment provision requires the government to make available to the public copies of the proposed consent decree, and ''any other materials and documents which the United States considered determinative in formulating such proposal.'' 15 U.S.C. 16(b). In *Massachusetts School of Law of Andover* v. *United States*, 118 F.3d 776, 785 (D.C. Cir. 1997) (''*MSL*''), the court held that ''the Tunney Act does not require that the government give access to evidentiary documents gathered in the course of an investigation culminating in settlement.'' The United States had argued that the statute referred to documents ''that individually had a significant impact on the government's formulation of relief— i.e., on its decision to propose or accept a particular settlement.'' *Id.* at 784 (quoting brief of the United States). The Court concluded that the statutory language ''seems to point toward the government's view * * * and confines section 16(b) at the most to documents that are either 'smoking guns' or the exculpatory opposite.'' *Id.; accord United States* v. *Microsoft*, 215 F. Supp. 2d 1, 11 (D.D.C. 2002) (holding that the Tunney Act ''makes clear that the calculus by which documents are to be deemed 'determinative' is left entirely to the United States'' and calls only for ''documents 'which the United States considered determinative,' not documents which the Court or other parties would consider determinative''). The court added that ''[t]he legislative history in fact supports the government's still narrower reading.'' *MSL*, 118 F.3d at 784.

As stated, the United States certified to the Court in the CIS that there were no determinative documents. CIS at 16. It did so because there was no document, including the InBev/Anheuser-Busch import agreement, that was a ''smoking gun or its exculpatory opposite,'' or of similar nature, and because no document individually had a significant effect on the United States' formulation of the proposed Final Judgment. Accordingly, the Court should reject Missouri Plaintiffs' unsupported suggestion that the United States failed to submit determinative documents.

B. Comments That the Proposed Final Judgment Be Modified To Contain Additional Requirements for Defendants and the Acquirer

1. Summary of Comments

New York Distributors, Ohio Distributors, and Tri-County Beverage state that the proposed Final Judgment should be modified to require that Labatt brand beer sold in the United States be brewed in Canada, to preserve its identity as a Canadian import. New York Distributors Comment at 5; Ohio Distributors Comment at 5; Tri-County Beverage Comment at 2. Ohio Distributors state that the proposed Final Judgment should be modified further to require the purchaser of the Divestiture Assets to maintain the current distributor network for a ''commercially reasonable time period'' and to give them the option to purchase Labatt brand beer from InBev beyond the three-year period provided for in the proposed Final Judgment. Ohio Distributors Comment at 2, 5. Finally, Ohio Distributors and Tri-County Beverage state that to be a viable competitor, the purchaser of the Divestiture Assets must remain priced at domestic beer levels, maintain brand (e.g., Labatt Blue Light) and packaging offerings (e.g., thirty packs), and continue to invest in marketing and promotion. Ohio Distributors Comment at 6; Tri-County Beverage Comment at 2 (concurring with Ohio Distributors' comments).

2. The United States' Response

a. The Proposed Final Judgment Is Sufficient To Eliminate the Alleged Anticompetitive Effects

The modifications proposed by Ohio Distributors, New York Distributors, and Tri-County Beverage are not necessary to ensure that competition will remain in the market alleged in the Complaint. The proposed Final Judgment imposes extensive requirements on Defendants that are sufficient to eliminate the alleged anticompetitive effects. First, the proposed Final Judgment requires Defendants to divest all of the assets of IUSA (except for a narrow class of assets unrelated to the brewing, promotion, marketing or distribution of Labatt brand beers) and all of the real and intellectual property rights required to brew, promote, market, distribute, and sell Labatt brand beer for consumption in the United States. Proposed Final Judgment II.F. These rights include an exclusive, perpetual, assignable, transferable, and fully paid-up license that grants the acquirer the rights to (a) brew Labatt brand beer in Canada and/or the United States, (b) promote, market, distribute, and sell Labatt brand beer for consumption in the United States, and (c) use all of the intellectual property rights associated with the marketing, sale, and distribution of Labatt brand beer for consumption in the United States, including the trade dress, the advertising, the licensed marks, and such molds and designs as are used in the manufacturing process of bottles for the Labatt brand beer. *Id.*

Second, to ensure that the Acquirer can brew Labatt beer without any loss of quality or consistency, the proposed Final Judgment requires Defendants to sell to the Acquirer all production know-how for Labatt brand beer, including recipes, packaging and marketing and distribution know-how and documentation. *Id.* The recipes required to be divested include all ''formulae, recipes, processes and specifications specified * * * for use in connection with the production and packaging of Labatt Brand Beer in the United States, including * * * yeast, brewing processes, equipment and material specifications, trade and manufacturing secrets, know-how and scientific and technical information. * * *'' *Id.* at II.M.

Third, the proposed Final Judgment ensures the uninterrupted sale of Labatt brand beer in the United States by requiring Defendants to divest all rights pursuant to distributor contracts and, at

[6] Missouri Plaintiffs also assert that ''the result of the [proposed Final Judgment] would be to eliminate InBev, and its LaBatt brands, from competing head to head with Anheuser Busch Budweiser brands,'' Missouri Plaintiffs Comment at 4, but make no attempt to explain why the proposed divestiture, which requires the divestiture of all of InBev's assets related to the sale of Labatt brand beers in the United States, would not preserve head-to-head competition between Labatt brands and Budweiser brands.

the option of the Acquirer, to negotiate a transition services agreement of up to one year in length, and to enter into a supply contract for Labatt brand beer sufficient to meet all or part of the Acquirer's needs for a period of up to three years. *Id.* at II.F, IV.H, IV.J.

Fourth, to ensure that the Acquirer can continue to develop, grow, and improve the Labatt brand over time, the proposed Final Judgment requires Defendants to grant to the Acquirer a perpetual license that will allow the Acquirer to brew, distribute, market, and sell ''extensions'' of Labatt brand beer (e.g., a ''Light'' or ''Ice'' version). *Id.* at II.J.

Fifth, Defendants are required to satisfy the United States in its sole discretion that the proposed Acquirer of the Divestiture Assets will operate them as a viable, ongoing business that will compete effectively in the relevant markets, and that the divestiture will successfully remedy the otherwise anticipated anticompetitive effects of the proposed merger. *Id.* at IV.I. In approving the Acquirer, the United States may appropriately consider the issues raised by the distributors' comments.

b. The Proposed Modifications Could Reduce Competition

Not only are the additions to the proposed Final Judgment recommended by the New York Distributors, Ohio Distributors, and Tri-County Beverage not needed to supplement the already extensive requirements and safeguards in the proposed Final Judgment, as the United States now explains, they could in fact reduce the ability of the Acquirer of the Divestiture Assets to compete.

i. Requirement To Brew Labatt in Canada

The distributor groups argue that the proposed Final Judgment should be modified to require the purchaser of the divested assets to maintain Labatt as a Canadian import. They allege that ''[t]he Labatt Brand derives much of its cachet from its status as a Canadian import,'' Ohio Distributors Comment at 2, and that brewing Labatt in the United States ''would make it impossible to maintain the Labatt Brand as a competitive brand,'' New York Distributors Comment at 4.

The proposed Final Judgment allows the Acquirer of the Divestiture Assets to brew Labatt brand beer in Canada, but also gives the Acquirer the flexibility to brew the beer in the United States, Proposed Final Judgment II.F(i)(A), so as not to limit the Acquirer's ability to adopt the most cost-effective strategies. Brewing Labatt brand beer in the United States may enable the Acquirer to offer lower prices. Beer can be segmented by price into four categories: sub-premium (e.g., Busch); premium (e.g., Budweiser); super-premium (e.g., Michelob); crafts/import (e.g., Sam Adams, Heineken). Imports generally are priced significantly higher than premium. Labatt brands, however, are priced at premium levels. The distributor commenters recognize that premium pricing is an important part of Labatt's success. *See, e.g.*, Ohio Distributors Comment at 6. Modifying the Final Judgment to require the Acquirer of the Divestiture Assets to brew Labatt brand beer in Canada, could impair the Acquirer's ability to maintain premium-level prices over time. In contrast, the proposed Final Judgment gives the Acquirer the option to choose a brewing location that will maximize its ability to compete with other premium beers.

ii. Requirement To Maintain Existing Distributor Network

The Ohio Distributors argue that the Final Judgment should ''require the Acquirer [of the Divestiture Assets] to keep the Labatt Distributors for a commercially reasonable period of time.'' Ohio Distributor Comment at 8. Without such a requirement, they claim, the divestiture could precipitate consolidation among beer distributors, resulting in higher prices to consumers. *Id.* at 2.

Such a requirement is not necessary to preserve the current level of competition and could inhibit the Acquirer's ability to compete. The requirement in the proposed Final Judgment that InBev sell to the Acquirer all of its existing U.S. wholesaler and distributor agreements for Labatt brand beer (along with the supply agreement), Proposed Final Judgment II.F(iii)(B), IV.J, will prevent interruptions in the distribution of Labatt beer in the United States. If these wholesaler and distributor agreements are the most efficient mechanism to distribute Labatt brand beer, then the Acquirer of the Divestiture Assets will have a strong incentive to keep them. If they are not, or if market conditions change, then the proposal of the commentators may reduce the ability of the Acquirer to sell Labatt brand beer at competitive prices. Moreover, limiting the Acquirer's ability to change distributors could prevent the deconcentration of the distributor market if, for example, the Acquirer desires to switch from a joint Labatt/Anheuser-Busch distributor to a distributor with no other major brands.

iii. Other Competitive Practices

The Ohio Distributors identify additional business practices that they believe contribute to the competitiveness of the Labatt brand, but do not appear to specifically recommend that the proposed Final Judgment include requirements that the Acquirer adhere to these practices. Rather, they state that the Division should consider the Acquirer's product mix and sales and marketing plans to determine that the Acquirer will maintain competitive pricing, an attractive brand and packaging mix, and sufficient spending on promotion. Ohio Distributors Comment at 6. The requirements of the proposed Final Judgment adequately ensure that the Acquirer of the Divestiture Assets will have the ability and means to aggressively market and sell Labatt brand beer and to continue to develop and grow the brand. As described above, the proposed Final Judgment allows the Acquirer the flexibility to brew Labatt brand beer in the most cost-effective location, giving it the ability to maintain competitive levels of marketing and prices. In addition, the Divestiture Assets contains the Labatt brand portfolio, which includes ''extensions of any one or more of [the Labatt brands] * * * as may be developed from time to time by the Acquirer.'' Proposed Final Judgment II.J. The proposed Final Judgment also requires that Defendants demonstrate ''to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint.'' Proposed Final Judgment IV.I. Finally, before approving the divestiture, the United States may properly consider the Acquirer's plans for packaging, marketing, and promotion.

IV. Conclusion

The issues raised in the four public comments were among the many considered during the United States' extensive and thorough investigation. The United States has determined that the proposed Final Judgment as drafted provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published in the **Federal Register**.

Dated: February 25, 2009.

Respectfully Submitted,

Mitchell H. Glende,

Trial Attorney, Litigation I Section—Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 4000, Washington, DC 20530, (202) 353–3106, (202) 307–5802 (facsimile).

The United States District Court for the District of Columbia

United States of America, Plaintiff, v. *InBev N.V./S.A., InBev USA LLC, and Anheuser-Busch Companies, Inc.*, Defendants.

CASE NO: 1:08–cv–01965 (JR)
JUDGE: Robertson, James

Notice Regarding Video Exhibit Attachment

New York Distributors Comment Exhibit O (''Exhibit O''), which is an attachment to the United States' Response to Public Comments on the Proposed Final Judgment, is a compact disc consisting of nine (9) movies in MPEG format. Exhibit O is being maintained in the case file in the Clerk's Office. The exhibit will be available for public viewing and copying between the hours of 9 a.m. to 4 p.m., Monday through Friday.

Dated: February 25, 2009.

Mitchell H. Glende,

Trial Attorney, Litigation I Section—Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 4000, Washington, DC 20530, (202) 353–3106, (202) 307–5802 (facsimile).

January 23, 2009

Via FedEx Express:

Joshua H. Soven, Chief, Litigation I Section, Antitrust Division,
Department of Justice, 1404 H Street, NW., Suite 4000, Washington, DC 20530, Re: Public Comment on *United States of America* v. *InBev NV/SA, et al.*, Case No. 08–cv–1965–JR.

Dear Mr. Soven: Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h)(''APPA'' or ''Tunney Act''), this Public Comment is respectfully submitted by the following individuals, all citizens of the State of Missouri: Marty Ginsburg, Patricia Odenbach, Daniel Sayle, Joseph Lott, Terri Lott, Ariel Young, Ronald Martin, Sharon Martin, William Stage and Barry Ginsburg.[1] These individuals (''Missouri Plaintiffs'') request that the Court not enter the Proposed Final Judgment, as it is not within the public interest. 15 U.S.C. 16(e)(1).[2]

I. Summary of Public Comment

Notably, this is the largest cash acquisition in the history of the antitrust laws. If InBev is allowed to purchase the United States' largest brewer, Anheuser-Busch, there no longer would be any significant major potential competitor to influence pricing and marketing practices in the United States anywhere near the degree to which InBev, as the largest brewer in the world, is able to do; the beer market in the United States would be controlled by absentee foreign owners; consumer welfare and choice and the benefits of competition would be substantially lessened and tend toward the creation of a monopoly; and prices would be artificially enhanced and raised and extracted without regard to supply, demand and competition on the merits.

These Missouri Plaintiffs also respectfully submit that under the ''actual potential competition'' doctrine and the ''perceived potential competition'' doctrine, this Court as part of its review under the Tunney Act, must conduct an analysis of the Defendant InBev's objective ability to enter the target market, either *de novo,* or through a ''toe-hold'' acquisition. After doing so, the Court should reject the Proposed Final Judgment.

The ''actual potential competition'' doctrine seeks to determine whether the defendant is a potential market entrant and, if so, whether its eventual entry would be likely to de-concentrate the market or lead to other pro-competitive affects, such as increased competition, lower prices, better service or higher quality standards.

The ''perceived potential competition'' doctrine looks at whether the defendant's presence on the periphery of the market, or ''in the wings'' exerts a present pro-competitive impact on the market participants. The reasoning underlying this doctrine is the current market participants will compete hard against one another, seeking to prevent the would-be competitor from entering. In both cases, the doctrines lead to increased competition which inures to consumers' benefit.

In this regard, the position of InBev, the largest beer manufacturer in the world, is mentioned in the Government's Complaint, but there is no mention, much less analysis of the fact that InBev has waited in the wings of the U.S. beer market. The focus of the DOJ's Complaint is on but one region, in New York State where InBev's Labatt brand is in heated competition with Anheuser-Busch and MillerCoors. Missouri Plaintiffs contend that InBev is well-situated as an ''actual potential competitor,'' because the market economics are attractive and InBev is well-suited to take advantage of them. Its entry, Missouri Plaintiffs contend, would likely eventually de-concentrate the market to consumers' benefit. Missouri Plaintiffs also contend that InBev is a ''perceived potential competitor,'' whose presence on the periphery of the market currently exerts pro-competitive influence on the market.

Nor is there any analysis in the Government's filings about the Import Agreement between InBev and Anheuser-Busch signed in November 2006. While mentioned almost in passing, there has been no explanation about the Import Agreement's impact on the public interest and how it is an integral component of the Court's mandatory independent analysis of the Complaint, the requested relief, and the PFJ. Missouri Plaintiffs submit that this is at the genesis of why the Complaint is too narrow, the proposed remedies inadequate, and the PFJ is inimical to the public interest. As we explain below, under APPA's standards of review, the Court may properly consider the Import Agreement, and its impact, and its relationship to the suggested remedies in this case. Such evidence is in fact part and parcel of an appropriate inquiry into the purpose, meaning and efficacy of the PFJ.

As an overview, this Public Comment submits the following issues are germane to the Court's consideration of whether this Proposed Final Judgment falls outside of the public interest. First, as noted above, that the Court must deny entry of the PFJ under the ''actual potential competition'' doctrine and the ''perceived potential competition'' doctrine. Notably, in this void of any discussion of these doctrines, there are also no ''determinative documents'' which have been made available to the public as required under the Tunney Act, 15 U.S.C. 16(b).

In conjunction with this, there is a corresponding failure of the DOJ to address the legality and impact of the November 2006 Import Agreement between the Defendants, and whether or

[1] These individuals are consumers and purchasers of Anheuser-Busch's beers who in the four years prior to the filing of this action by the United States Department of Justice, have purchased beer produced by one or both of the defendants, and each individual expects to continue to purchase beer produced by one or both of the defendants in the future.

These individuals have also filed a private antitrust action in United States District Court for the Eastern District for Missouri, contending that the acquisition by InBev NV/SA (''InBev'') of Anheuser-Busch Companies, Inc. (''Anheuser-Busch'') violates Section 7 of the Clayton Act, and that they are threatened with loss and damage in the form of higher prices, fewer services, fewer competitive choices, deterioration of products and product diversity, suppression and destruction of smaller actual competitors through exclusive distribution, full-line forcing, and the like, and other anticompetitive effects and consequences that may, and most probably will, result from the elimination of the actual and potential competition of InBev as a result of the acquisition.

[2] Additionally, on January 14, 2009, the Missouri Plaintiffs filed a Motion for Intervention in this case, requesting this Court to allow intervention by the Missouri Plaintiffs for the purpose of challenging the acquisition as being against the public interest and illegal.

not the terms and effects of the Import Agreement have an anticompetitive impact upon the relevant market or markets. Third, even in the three separate geographic areas which are the subject of the proposed remedy, the result of the PFJ would be to eliminate InBev, and its LaBatt brands, from competing head to head with Anheuser Busch Budweiser brands, thereby reducing the number of strong market competitors while at the same time eliminating InBev—the wealthiest and most viable potential entrant into those markets.[3]

The record in this action also has shed a light on the Government and the Defendants' procedural gamesmanship with regard to representations and omissions to the District Courts in connection with the two-track litigation in Missouri District Court and this Court, in order to lead these Courts into prematurely approving the acquisition. In this context, the Court must consider the bi-partisan comments of high-ranking elected officials of the State of Missouri condemning the transaction as anticompetitive and otherwise against the public interest. The Court should also exercise its independent evaluation of this controversial acquisition in the context of the public comments of Congress encouraging independent determination by the reviewing court and the 2008 concerns of the Chairman of the House Judiciary Committee Task Force on Competition Policy and Antitrust Laws questioning the ''hands off approach'' of the Antitrust Division concerning mergers.

II. Procedural History

1. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), a Proposed Final Judgment, Hold Separate Stipulation and Order and Competitive Impact Statement were all filed with this Court on November 14, 2008.

2. Also on November 14, 2008, the United States Department of Justice, Antitrust Division, filed a civil antitrust Complaint seeking to enjoin the proposed acquisition of Anheuser-Busch Companies (''Anheuser-Busch'') by InBev N.V./S.A. (''InBev''). See Competitive Impact Statement, Docket No. 2 at 1.

3. The Complaint alleges, *inter alia,* that certain aspects of the proposed acquisition by Inbev NV/SA of Anheuser-Busch Companies, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18, in that ''the likely effect of the merger would be to lessen competition substantially in the market for beer in the metropolitan areas of Buffalo, Rochester and Syracuse, New York.'' See DOJ Complaint, ¶¶ 1–7. The DOJ also filed a Proposed Final Judgment (''PFJ''), Hold Separate Stipulation and Order, Plaintiff United States' Explanation of Consent Decree Procedures, and Competitive Impact Statement in this Court. (See Docket Nos. 1, 2.)

4. On the evening of November 14, 2008, this Court signed the DOJ's Hold Separate Stipulation and Order. (Docket No. 9.) This Court has not signed the Proposed Final Judgment.

5. Pursuant to 15 U.S.C. 16(b), the revised Proposed Final Judgment and Competitive Impact Statement were published in the **Federal Register** on November 25, 2008, at 73 FR 71682 (Nov. 25, 2008).

6. The 60-day comment period specified in 15 U.S.C. 16(b) commenced on November 25, 2008, 73 FR 71682 (Nov. 25, 2008), and ends no earlier than January 24, 2009.

III. Summary of Standard of Review

The Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, directs this Court to determine whether entry of the Proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1); *United States* v. *SBC Communications,* 489 F.Supp.2d 1, 10 (D. D.C. 2007). In amending the Tunney Act in 2004, Congress was clear that a court should be careful to independently weigh the statutory factors. See 150 Cong.Rec. S3616–14, S3619 (Apr.2, 2004)(Statements of Senators Hatch and Devine), 150 Cong.Rec. H3659–60 (June 2, 2004)(Statements of Representatives Scott and Conyers).

In making that determination, in accordance with 2004 Amendments, pursuant to 15 U.S.C. 16(e)(1)(A), the Court must consider a number of factors including:

> The competitive impact of such judgment * * * anticipated effects of alternative remedies actually considered * * * 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.''

Under section (B), this Court must also consider:

> ''The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally * * * and * * * consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

This grants the court wide discretion to assure that the judgment is in the public interest. The Court is not required, as the DOJ has claimed in its Competitive Impact Statement, to ''accord deference to the government's predictions about the efficacy of its remedies * * *'' Competitive Impact Statement, Docket No. 2 at 14. To the contrary, the Tunney Act is designed to constrain the Department of Justice from entering into settlements that provide DOJ with an exit from an antitrust case but do not provide the public with a remedy commensurate with the defendant's antitrust violations. Indeed, the Court is empowered to ''take testimony of government officials[4] or expert witnesses, appoint a special master or expert consultant, authorize participation by other parties as *amici* or intervenors, or 'take such other action in the public interest as the court may deem appropriate.' '' *United States* v. *SBC Communications, supra*, 489 F.Supp.2d 1, 10–11.

As we explain below, while the Complaint seeks to enjoin the entire acquisition, the Proposed Final Judgment and Competitive Impact Statement focuses only on three metropolitan areas in New York State (the Buffalo, Rochester, and Syracuse areas) and does not provide any relief for any other antitrust violations which arise from the acquisition.

At bottom, it appears that while the Court must not engage in an unrestricted evaluation of what relief is appropriate, nor can it act as a ''judicial rubber stamp of proposed consent decrees.'' As explained by Senator Kohl at the time of the amendments to the Tunney Act, there are ''concerns with the political influence of large companies in these matters.'' And, as stated in *United States* v. *SBC Communications*, the 2004 amendments were intended to ''assure that courts undertake meaningful review of antitrust consent decrees to assure that they are in the public interest and analytically sound.'' 489 F.Supp.2d at 10.

It is also noteworthy that while a Court may not require that remedies ''perfectly match the alleged violations'' a Court is also not obligated to accept on its face everything that is or is not in the Complaint. Nor must the Court bless a proposed settlement that as some cases have noted, makes a ''mockery of

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[3] Here there has been no showing at all that any ''independent, viable acquirer'' can step into the shoes of InBev, who the Government claims had market shares of 21 percent in Buffalo and Rochester and 13 percent in Syracuse market. See Competitive Impact Statement at 6, noting that ''Entry of a new competitor into the marketplace is particularly unlikely because a new entrant would not possess the highly important brand acceptance necessary to succeed.''

[4] The Tunney Act authorizes the district judge to ''take testimony of Government officials as the court may deem appropriate * * *'' *U.S.* v. *Microsoft*, 56 F.3d 1448, 1459 (D.C. Cir. 2001), *citing* 15 U.S.C. § 16(f)(1). Under certain conditions, a Court can consider whether the DOJ's approach is in fact suggestive of either ''bad faith or malfeasance.'' *United States* v. *Microsoft* supra, 56 F.3d at 1458; 15 U.S.C. 16(e)(2) (1988).

judicial power.'' Here, the DOJ antitrust Complaint seeks to enjoin the entire InBev/Anheuser-Busch acquisition, but the proposed settlement addresses the sale and distribution of beer in only three discreet metropolitan regions in New York State—Rochester, Buffalo and Syracuse. There is no remedy for the rest of the entire country, no consideration of the elimination of InBev as a potential entrant into the relevant market or markets, and under applicable standards for the Tunney Act, this Court may properly consider if the Government's Complaint is too narrowly drawn.

Further, the Court must also consider if the Government's action is so limited and the remedy so unsatisfactory as to amount to a virtual sham, thereby making it both against the public interest as well as a mockery of judicial power. Further, were obvious anticompetitive injury to occur under this settlement in relevant markets or upon the public generally, or the enforcement mechanism appears to be inadequate or otherwise ineffective, then the Court may reject the Proposed Final Judgment.

IV. The Pending Missouri Action

On September 10, 2008, these Missouri Plaintiffs filed a private antitrust suit in the District Court for the Eastern District of Missouri, brought under Section 16 of the Clayton Antitrust Act (15 U.S.C. 26) alleging a violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. 18. See Missouri Plaintiffs' Motion for Intervention filed January 14, 2009, Docket No. 13, (hereinafter the ''Motion for Intervention''), Schwartz Decl., Docket No. 13–3, Exh. 1, Complaint, *Ginsburg, et al.*, v. *InBev NV/SA, and Anheuser-Busch Companies, Inc.,* Case No.: 08–cv–01375–JCH. The Missouri Plaintiffs' Complaint was filed two months before the Department of Justice filed its action in the present case. To our knowledge, neither the DOJ nor the Defendants in this action advised this Court of the pendency of that Missouri action, the alleged market definition, the pricing impact immediately following the announcement of the decision and, more generally, the underlying legal and factual basis for the claims asserted.

In the Missouri Action, the Missouri Plaintiffs seek a permanent injunction to prohibit the acquisition of Anheuser-Busch, the largest brewer in the United States, by InBev, the largest brewer in the world, for $52 billion, the largest cash payment ever offered to purchase a competitor. Following a Rule 16 conference held on January 5, 2009, the Missouri District Court has set a trial date for February 1, 2010, also leaving open the possibility for an earlier trial. As noted above, on January 20, 2009 filed under seal, an Emergency Motion for Injunction Pending Appeal in the United States Court of Appeals for the Eighth Circuit.

V. Statement of Facts and Specific Comments on the Complaint, Relief Requested and Proposed Final Judgment

A. The U.S. Beer Market

Beer is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act. Docket No. 1, Complaint, ¶ 14. Beer is sold to consumers through a three-tier market system throughout the United States. Complaint, ¶ 15. In the United States, the largest and the most profitable beer selling market in the world and InBev's most targeted market, Anheuser-Busch, with 50% of the market, is the undisputed United States leader, with more than 2½ times as large as its closest United States competitor, SABMiller (formed from the combine of South Africa Brewing and Miller), which has 18% of the market; 4½ times as large as the third largest competitor in the United States, MolsonCoors (formed from the combine of Canadian Molson and Coors), which has 11% of the market; 3½ times as large as all imported beers, which have a total of 14.5% of the market; and 7 times as large as all domestic craft or microbrewery beers, which have a total of 7% of the market.

Recently, the number two and number three competitors in the United States, SABMiller and MolsonCoors, combined their American businesses, and now account for 30% of the market. Consequently, with Anheuser-Busch's 50% of the United States market, more than 80% (some analysts say 90%) of the production and sale of beer in the United States is controlled by only two companies. The United States market is substantially more than simply ''highly concentrated,'' as measured by the objective standards of the universally accepted Herfindahl-Hersch Index (''HHI''). (HHI measures and grades market concentration by adding the squared market share percentages of each of the competitors in the market.) The threshold for ''highly concentrated'' is under Department of Justice Guidelines, a value of 1800. An additional 100 points causes great concern among antitrust enforcers. Here, the market substantially exceeds that number, especially since the recent marketing combination of SABMiller and MolsonCoors in the United States. In 2007, the U.S. Beer Market carried an HHI of 3251, indicating its extraordinary concentration.

1. Anheuser-Busch

Anheuser-Busch has the country's largest network of independent distributors/wholesalers, numbering approximately 600. Almost all of the distributors are independent, and operate under exclusive agreements with Anheuser-Busch in which they agree not to deal with any products of any competitor of Anheuser-Busch and not to distribute any products outside of their own designated territories. Anheuser-Busch sells nearly 70 percent of the company's volume through wholesalers. Anheuser-Busch also owns 13 company-owned distributors/wholesale operations. Anheuser-Busch sold 104.4 million barrels of beer to United States wholesalers in 2007. The most influential factor in the sale of beer in the United States is advertising. Anheuser-Busch is a substantial advertiser, spending approximately $378 million last year alone, more than the combined spending of its main actual competitors in the United States.

2. The Creation of InBev and Its Position Relative to the Market

InBev sells the number one (#1) or number two (#2) beers in over 20 key beer markets throughout the world. InBev is the number one (#1) seller in the following countries: Canada, Brazil, Bolivia, Paraguay, Uruguay, Argentina, Belgium, Luxembourg, Croatia, Serbia, Montenegro, and the Ukraine; and the Number Two seller in Cuba, the Dominican Republic, Guatemala, Ecuador, Peru, Chile, Netherlands, Germany, Bulgaria, the Czech Republic, Russia and South Korea.

By way of background, prior to forming InBev in the merger of Belgium's Interbrew and Brazil's AmBev in 2004, the world's largest brewers were: (#1) Anheuser-Busch; (#2) SABMiller; (#3) Interbrew; (#4) Heineken, and (#5) AmBev. After the combination of Interbrew and AmBev, InBev became the largest brewer in the world.

As the world's largest brewer, InBev has enormous economic capabilities. Its 2007 market capitalization was in excess of $50 Billion, with net profits of $7.8 Billion from revenues exceeding $21 Billion. These capabilities have also been demonstrated by its ability to raise, and then pay, the $52 Billion in cash to acquire Anheuser-Busch.

Prior to this attempt to acquire Anheuser-Busch, InBev stated unequivocally that it intended to become a ''player'' in the production

and sale of beer in the United States. Only eight months after the merger of AmBev and Interbrew, forming InBev, Mr. Brito stated his intention to shortly ''complete our dream of becoming a pan-America player.''

InBev also announced to competitors and to the public alike that it intended to be an entrant into the United States market for the production and sale of beer. InBev even stated in press releases as recent as 2007 that its ''strategy is to strengthen its local platforms by building significant positions in the world's major beer markets.'' InBev's strategy began with the Interbrew-AmBev merger and in November 2006 InBev executed a distribution contract with Anheuser-Busch for the distribution of InBev premium brands Stella Artois, Beck's and Bass in the United States. It is this November 2006 Import Agreement which is described in the DOJ's Complaint in this case.

InBev has operations around the world and internally divides its operations into six regions: North America, Western Europe, Central and Eastern Europe, Asia Pacific, Latin America North and Latin America South. One if its regions is North America, where it sells Labatt Blue, the number one Canadian brand in the world.

The North American region includes both Canada and the United States. InBev has eight breweries in Canada. As explained below, immediately prior to the acquisition, InBev was not operating any breweries in the United States. InBev traded in the United States through its exclusive distribution agreement with Anheuser-Busch. InBev has also owned Labatt USA, and the Labatt brand is described in detail in the Complaint filed in this case.

3. The Reaction to the Creation of InBev

Once InBev was created in 2004, competition in the United States increased dramatically. The industry fell into a protracted price war in 2004 that lasted between a year and 18 months. During this same period, Anheuser-Busch further cut its prices by offering greater promotional discounts. Its share of volume sold through promotional discount increased from 57% in the first quarter of 2004 to 64% by the first quarter of 2006. Compared to other years, it spent millions more discounting its products the year after InBev's creation: [5]

ANHEUSER-BUSCH PROMOTIONAL DISCOUNTING ($ MILLIONS)

2002	2003	2004	2005	2006	2007
543.5	511.8	535.7	716.7	675.3	688.6
% Change	−6%	4%	25%	−6%	2%

Anheuser-Busch also markedly increased its advertising expenditures the year after InBev was created. While advertising expenditures were flat from 2002 through 2004, they increased by $45 Million in 2005, falling again after InBev and Anheuser-Busch executed the 2006 ''Import Agreement.''

ANHEUSER-BUSCH ADVERTISING EXPENDITURES ($ MILLIONS)

2002	2003	2004		2005	2006	2007
Anheuser	821.7	806.7	806.7	849.5	771.2	782.7
% Change	−2%		0%	5%	−10%	1%

Further evidence of InBev's competitive threat, Anheuser-Busch and Miller responded by investing to protect their market shares: ''InBev is coming into a market that is like a hornet's nest that has been disturbed * * * Anheuser and Miller aren't willing to lose a single case, and they're spending money to ensure that nobody else gains share.''

In addition, there is already substantial evidence in the record from the Government that InBev's presence in the market actually increases competition. InBev's Labatt beer competes vigorously against both Anheuser-Busch and MillerCoors in the northeast United States. In those markets, and as the Complaint in this case generally agrees through its analysis of the three areas (Rochester, Buffalo and Syracuse), Labatt enjoys a 21% share of the market, while Anheuser-Busch and MillerCoors (the MolsonCoors/SABMiller joint venture) have 24% and 26%, respectively. As a result of this competition, prices have been kept at competitive levels.

In 2006, InBev began discussions with Anheuser-Busch that contemplated InBev's agreed withdrawal from competing in the United States market. In May 2006 InBev sold its only U.S. brewery, Rolling Rock, to Anheuser-Busch. Eventually, the firms began discussing what would become the ''Import Agreement,'' a twenty-year agreement which authorized Anheuser-Busch as the exclusive importer of InBev's brands: Stella Artois, Beck's, Bass Ale, Boddington's, and others. The agreement was signed in November 2006 and was the subject of press releases announcing it.

After InBev's sale of Rolling Rock and the consummation of the Import Agreement, Anheuser-Busch stopped competing as vigorously as it had the previous year, cutting both its advertising expenditures and promotional discounts in 2006.

B. Specific Comments on the Proposed Final Judgment

1. Despite the Huge Size of the Acquisition, There Are No Determinative Documents

Missouri Plaintiffs have reviewed the Court's docket and the **Federal Register** and believe that there are not ''any other materials and documents which the United States considered determinative in formulating [a consent decree] * * *'' 15 U.S.C. 16(b); *United States* v. *Alex Brown & Sons, Inc.* 169 F.R.D. 532, 541 (S.D.N.Y. 1996), citing *United States* v. *General Contracting Co.* 531 F.Supp. 133, 537 F.Supp. 571 (E.D. Va. 1982) (affirming that Government must make available to the public all

[5] These figures derive from Anheuser-Busch's annual reports, which are filed with Securities Exchange Commission, and therefore subject to judicial notice.

''determinative documents'' in formulating a proposed consent decree).

In the absence of any such documents being made available, Missouri Plaintiffs respectfully submit that the Court first inquire as to why there are no such documents in an acquisition of this size.

2. The DOJ Has Provided No Information or Analysis About the Highly Publicized and Material November 2006 Import Agreement Between the Defendants

One of the determinative documents that has not been put in the record is the Import Agreement[6] entered into by the Defendants in November 2006.

The DOJ Complaint states that under this agreement, Anheuser-Busch became the exclusive distributor of InBev products in the United States. Missouri Plaintiffs contend that before approving the PFJ, this Court must determine if the Import Agreement is in and of itself, anti-competitive as a matter of law. Indeed, the Complaint in this case clearly seeks to enjoin the acquisition as a whole. This Import Agreement provides for Anheuser Busch to be the exclusive distributor of InBev products in the United States. As a whole, the remedy proposed by the DOJ cannot be independently evaluated absent consideration of the terms of that agreement, nor can the Court determine whether the settlement of the United States' lawsuit on the proposed terms is in the public interest. (The Import Agreement is described at 73 FR 71683, Complaint at ¶ 9. There, the United States' Complaint does not explain any aspect of the agreement other than to mention the exclusion of the distribution of certain InBev brands.) The absence of any discussion about the single most significant agreement between the InBev and Anheuser Busch is glaring and should raise a red flag to this reviewing Court; this Court also cannot properly evaluate the extent of the Defendants' head-to-head competition without this Import Agreement.

Here, the DOJ has stated that Anheuser-Busch accounts for approximately 50% of the beer sales nationwide and that beer is sold to consumers through a three-tier system in New York and the United States; but the United States has provided information to the Court only on the three areas in New York—where the United States claims the parties were in fact competing head-to-head. The public and the Court have not been provided with any explanation of the InBev's position as a perceived potential competitor, or an actual potential competitor, the effect of the Import Agreement on those doctrines, whether or not the industry viewed InBev as a competitive threat in the United States, and what impact occurred as a result of the November 2006 Import Agreement.

Missouri Plaintiffs also submit that due to the Import Agreement, as even the United States impliedly concedes, this Court must consider whether or not this Import Agreement served to prevent entry into the marketplace of the world's largest brewer, and what InBev received in return for entering into that Import Agreement.

These inquiries are clearly germane to whether or not the PFJ is in the public interest. 15 U.S.C. 16(e)(1)(A) & (B).

3. Potential Entry and the Potential Competition Doctrine

As noted above, InBev has been ready, willing and able to enter the United States market. Anheuser-Busch perceived and understood and believed that InBev was ready, willing and able to enter the United States market, and so represented to the United States District Court.

Section 7's ''potential competition'' theory has been split by the courts into two doctrines, both of which Missouri Plaintiffs allege are present here. The ''actual potential competition'' doctrine proscribes an acquisition of a large firm in an oligopolistic market if the acquiring firm would be expected to enter the market *de novo* or through a ''toe-hold'' acquisition, which would likely lead to eventual deconcentration of the target market. *United States* v. *Siemens Corp.*, 621 F.2d 499, 504 (2nd Cir. 1980) (''*Siemens*''). The ''actual potential competition'' doctrine, on the other hand, is concerned with the acquiring firm's ability to deconcentrate the market in the future. The ''perceived potential competition'' doctrine forbids an acquisition where the presence of the acquiring firm ''waiting in the wings'' of the market, and perceived by market participants as a potential entrant, exerts a pro-competitive influence on the market. *Id.* The ''perceived'' potential competition doctrine is concerned with the present effect that a noncompetitor has on the market. *Id.*

InBev's presence on the periphery of the market—as a perceived potential and actual entrant as well as a potential and actual dominant entrant—has been an important consideration in the pricing and marketing decisions of Anheuser-Busch and other American brewers or importers in the United States. InBev (party to the Import Agreement with Anheuser-Busch) is so situated as to be a potential competitor and likely to exercise substantial influence on the market behavior of those brewers in the market. Entry into the United States beer market by InBev through the acquisition of Anheuser-Busch—although its competitive conduct may be the mirror image of that of Anheuser-Busch—completely eliminates the potential major competitor exercising present influence on the market.

The facts also show that InBev is an aggressive, well-equipped and well-financed corporation engaged in the same line of commerce as Anheuser-Busch and intended to enter the oligopolistic market in the United States. As the world's largest brewer, InBev has enormous economic capabilities. Its 2007 market capitalization was in excess of $50 Billion, with net profits of $7.8 Billion from revenues exceeding $21 Billion. By reason of its economic capabilities, InBev has been more than able to enter the United States market *de novo* and build new breweries, create new jobs, and establish its own and new distributors to market its products, which already have a market presence in the United States by reason of its agreements with Anheuser-Busch to divide markets.

InBev possesses more resources than any other brewer in the world. It has the technical expertise to enter the market, producing over 200 brands of beer in 123 breweries worldwide. The ''imported beer'' segment of the U.S. beer market—the segment on which InBev has directed its focus—is highly attractive, growing at a rapidly expanding rate of 8% annually. Even InBev admits that it is easy to turn a profit in this market, since American consumers pay higher premiums for imported beers. The costs associated with InBev's entry are relatively very small: It does not need to construct breweries, develop a distribution network, or sink costs into launching new brands. In addition, there is a substantial likelihood that InBev's entry into the U.S. beer market would lead to future deconcentration of that market or other procompetitive effects.

The need to address these potential competition issues is consistent with the DOJ's own 1984 Merger Guidelines which specifically addresses situations where: (1) The acquired firm's market is highly concentrated (HHI above 1800); (2) entry barriers in that market are high so that firms without specific entry advantages cannot be expected to enter;

[6] *http://www.inbev.com/go/media/global_press_releases/press_release.cfm?theID=27&theLang=EN.* See also 73 FR.71683 (noting that Labette brands are excluded from the Import Agreement).

and (3) the acquiring firm's entry advantage is possessed by fewer than three firms. See *Antitrust Law Developments (Fifth)* (2002), American Bar Association Section of Antitrust Law at 356, citing *United States* v. *Falstaff Brewing Corp.* 410 U.S. 526, 532–537 (1973). There is no explanation before the Court as to how, in this case, the DOJ's analysis confirms to the established policies in its own Merger Guidelines.

Indeed, in seeking approval of the PFJ, the DOJ expressly stated that it was the perceived lack of entry into the marketplace by a new competitor that justified a conclusion of a lack of anticompetitive effect. 73 FR 71690. If it turns out that that InBev is a potential entrant that is being eliminated thereby harming competition and the Import Agreement was also designed to keep out the well-financed competitor InBev from competing with Anheuser brands in the United States (as well as fix prices and the like)[7]—then the DOJ's and Defendants' rationale for the Complaint and PFJ completely collapses. Further, the DOJ and the Defendants would be judicially estopped from using an anticompetitive agreement to defend the purported competitive benefit of their merger.

Moreover, Missouri Plaintiffs contend that the DOJ's action fails to adequately protect the public interest because the Import Agreement (and other evidence) will show Anheuser-Busch knew that outside of New York areas, InBev fell within the potential doctrine and under its own internal guidelines was obligated to act, thus making the Complaint in this case a sham and a mockery of judicial power. InBev had, and continues to have, the ability to compete against Anheuser-Busch by importing and distributing beer in the United States. InBev's competition has, in fact, constrained prices in the beer market in areas outside of the New York state which are singled out in the Competitive Impact Statement; and the facts show that it would be economically feasible and profitable for the behemoth InBev to enter the market.

4. The Defendants' Failure To Advise the Two Courts of Proceedings in Each Action

Defendants in this case failed to inform the Missouri District Court of the true facts of the status of its communications with the DOJ, subsequently used this Court's signature (late on November 14, 2008) on the Hold Separate Stipulation and Order to attempt to pre-empt and moot the Injunction hearing in the Missouri Action, have informed the Missouri District Court that the deal is now closed, thereby making the Missouri Injunction Complaint now ''moot,'' and informed the Missouri District Court that the shareholders have been paid in an irreversible change to the pre-merger status quo.

The Defendants also failed to tell the Missouri District Court that the DOJ could still change its mind and withdrawal, failed to adequately explain to the Missouri District Court that the Tunney Act public comment period was still open until at least 60 days after publication in the **Federal Register** and that with public comments still potentially in the offing that the Department of Justice had not yet filed a response to any public comments. Most importantly, the Defendants failed to tell the Missouri District Court that this Honorable Court had not yet signed the Final Judgment.

In this action, the Government and the DOJ also failed to tell this Court, when seeking the Court's signature on the afternoon of November 14, 2008, of the pendency not just of the litigation initiated by the Missouri Plaintiffs, but also that there had been extensive briefing on a Motion for Preliminary Injunction which also sought to enjoin the acquisition. After obtaining the signature from this Court on the Hold Separate Stipulation and Order, the Defendants then proceeded to announce the closing of the acquisition.

5. The Recognized Breaches of the Department of Justice's Duty To Protect the Public Interest When It Comes to Mergers and the Actions of the DOJ and Defendants In Not Advising the Court of the Clayton Act Claims in the Missouri Action

In considering whether to approve the Proposed Final Judgment, one of the Court's role in protecting the public interest is to exercise independent discretion and is ''* * * [i]nsuring that the government has not breached its duty to the public in consenting to the decree.'' *United States* v. *Bechtel,* 648 F.2d 660,666 (9th Cir. 1991). Therefore, as part if its analysis of this acquisition, this Court should take into account the virtual ''blank check'' that the DOJ has afforded controversial mergers among even direct competitors.

Here, the acquisition involves that of a large firm in an oligopoly. Anheuser-Busch is the undisputed leader in the United States beer market with almost 50% market share. There are only two additional significant rivals, SABMiller and MolsonCoors, as noted above. No other competitor has more than 6% market share. Furthermore, the number 2 and 3 rivals have combined their United States operations, further consolidating the industry. Finally, the HHI of the market is an astounding 3000+, well above the Department of Justice's threshold value of 1800 which indicates a ''highly concentrated'' market.

As we noted above, in April 2008—just a few months before this merger was announced—the Chairman of the Judiciary Committee Task Force on Competition Policy and Antitrust Laws, Representative John Conyers (D. Mich.) made the following comment about the present Antitrust Division of the Department of Justice when it comes to controversial mergers:

> ''We have an Antitrust Division that approved mergers left and right frequently overturning judgments of the career staff of the Department of Justice. The Department has not attempted to block or modify any major merger over the past seven years, including some of the largest, controversial mergers among direct competitors. * * * The Department hands-off approach has even encouraged companies with questionable merger justifications to give it a try. And some analysts have stated that the government has nearly stepped out of the antitrust enforcement business leaving companies to mate with whom they wish.''

Introductory remarks, April 24, 2008, hearings on the ''Northwest/Delta Airlines merger.'' Given the circumstances of this acquisition, and the manner in which the Antitrust Division has proceeded, these remarks appear not just particularly apt, but very disconcerting. In filing this action on November 14, 2008, the Government was well aware that there was Clayton Act litigation pending in the Eastern District of Missouri, that the Missouri Plaintiffs had requested a Motion for Preliminary Injunction and that the Defendants had filed an opposition to the request for injunctive relief. Rather than advise this Court of such material facts, the DOJ stood silent while the Defendants sought this Court's signature on the Hold Separate Stipulation and Order.

Any meaningful review of this transaction requires that this Court

[7] InBev's press release stated in relevant part that Anheuser had become the exclusive U.S. importer and controlled pricing and distribution of InBev import brands in the United States:

Effective February 1, 2007, Anheuser-Busch will import these premium brands and be responsible for their sales, promotion and distribution in the United States. These InBev brands, which had sales volumes of about 1.9 million hectoliters (or about 1.5 million barrels) in 2005, will be available to Anheuser-Busch's U.S. wholesaler network where possible.

consider whether the DOJ conducted a sufficient inquiry into the total competitive relationship between the parties, the effect of the transaction on the public as a whole, including the limited relief requested in just three geographic areas, and any need for additional relief, why the DOJ focused simply on the one area excluded by the Import Agreement between the Defendants and if the relief directed in these metropolitan areas is in the public interest.

6. The Bi-Partisan Statements by Public Officials

The public interest in this case is substantial. This case, before the Court during extraordinary economic struggles, has an extreme and overriding importance to not just the citizens of St. Louis, Missouri, but all of America. The public has a legitimate public interest in free and functioning markets. This interest is particularly significant to the American public in light of the recent nationwide and global history of huge multinational corporations engaging in unscrupulous and economically dangerous conduct that harm many citizens of Missouri and the United States. This is the largest all cash acquisition in the history of the antitrust laws.

The extreme public interest in this case is perhaps most evident in the bi-partisan statements of its elected representatives, charged with the responsibility of advancing the interests of their constituents. Missouri Governor Matt Blunt opposed the combination of InBev and Anheuser-Busch and [was] ''deeply troubled'' by the proposed merger. In a letter to William Kovacic, Chairman of the Federal Trade Commission, Governor Blunt affirmed his concerns that the sale ''would have destabilizing impacts on our nation and [Missouri]'s long-term economic interests.'' (Motion for Intervention, Schwartz Decl., Docket No. 13–3, Exh. 4, Blunt letter, June 16, 2008.) Governor Blunt has also directed Missouri's Department of Economic Development to ''explore every option and any opportunity we may have at the state level to help keep Anheuser-Busch where it belongs—in St. Louis.''

Senator Kit Bond (R.-Mo.) stated his opposition to the merger and the ''yielding of control and threatening of operations that have been beneficial to consumers, workers, American communities, and shareholders alike.'' Senator Bond also sought scrutiny to protect the interest of Missourians and all Americans, stating that ''Anheuser-Busch is a major driver in the local, state, and national economy up and down the supply chain.'' In a letter to Attorney General Mukasey and FTC Chairman William Kovacic, Senator Bond wrote, ''The proposed foreign acquisition of Anheuser-Busch is troubling to me because it potentially raises antitrust issues under existing law by putting significant market share of the U.S. in the hands of few competitors.'' (Motion for Intervention, Schwartz Decl., Docket No. 13–3, Exh. 5, Bond letter, June 12, 2008.)

Missouri Senator McCaskill (D. Mo.) expressed similar views, stating in June 2008 that ''this is not a company that is in stress * * * [a]nd has provided good middle class jobs.'' (Motion for Intervention, Schwartz Decl., Docket No. 13–3, Exh. 6, McCaskill letter, June 2008.) Senator McCaskill later stated in a letter dated November 12, 2008:

> ''Moreover, it is a company that has built its brand on the tremendous pride from a dedicated workforce and firm commitment to the community. *It is also clear that dramatic changes to Anheuser-Busch's marketing, workforce, and culture, will be needed to make the deal work, and these will have a big negative impact on the community.*''

(italics added) (Motion for Intervention, Schwartz Decl., Docket No. 13–3, Exh. 7, McCaskill letter, November 2008.) The public interest in the issues at bar should not be ignored.

VII. Conclusion

For the foregoing reasons, the Court should not enter the Proposed Final Judgment and after discovery, conduct a trial on the issue of whether or not the transaction is in the public interest.

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January 15, 2009

By Hand

Joshua H. Soven, Esq., Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, NW., Suite 4000, Washington, D.C. 20530

Re: Written Comments on Proposed Final Judgment/*United States of America* v. *InBev N.V./S.A., et al.,* U.S.D.C. for D.C., Case: 1:08–cv–01965

Dear Mr. Soven:

I and this firm represent Esber Beverage Company of Canton and Mansfield, Ohio, the RL Lipton Co. of Cleveland, Ohio, and the Tri County Distributing, Co. of Youngstown, Ohio (collectively ''Labatt Distributors''). The Tri It Beverage Company of Buffalo, New York and the Onondaga Beverage Corporation of Syracuse, New York share some of the concerns expressed in this letter. We understand that those distributors and Tri County Distributing, Inc. of Detroit, Michigan will file additional comments. We provide this letter on the Proposed Final Judgment in the above-referenced action which requires InBev to divest all assets associated with the Labatt Brand (''Labatt Brand'') consistent with the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)–(c).

These comments outline the views of our clients relating to the Complaint, the Competitive Impact Statement and the Proposed Final Judgment in the above-referenced action relating to the acquisition by InBev N.V./S.A. (''InBev'') of the Anheuser-Busch Companies, Inc. (''Anheuser-Busch''). Our clients are available to you and are prepared to supplement and expand upon the comments set forth herein.

PURPOSE

At the outset, let me be clear that the Labatt Distributors concur with the Division's goal in the Proposed Final Judgment of preserving the Labatt Brand as a viable brand and as a competitor of the products of Anheuser-Busch and other competitive products in the relevant markets. The primary purpose of these comments is to ensure that the goals of the Proposed Final Judgment are achieved at all market levels to maximize the positive competitive impact of the divestiture.

The comments bear on two principal areas of concern. The initial concern goes to the identity of the eventual Acquirer (as defined in the Proposed Final Judgment as the entity or entities to whom Defendants divest the Divested Assets) and the actual terms of the divestiture. The second concern relates to preserve and enhance the maintenance of Labatt's existing distribution network as a means to more competitive markets.

First, the Acquirer must be well-positioned to support and market the Labatt Brand so that the position of the Labatt Brand is maintained and enhanced. The Labatt Brand

is a niche product, with a specific set of characteristics that make the Brand appealing. The Labatt Brand derives much of its cachet from its status as a Canadian import, and is most popular in those U.S. states closest to the Canadian border. The Labatt Brand products also have a price point more akin to domestic premium beer brands, such as Budweiser, Miller and Coors than most imported beers. That market positioning, as a Canadian import for the price of a domestic, has been the lynchpin the Labatt Brand's success. Any significant change in this price point will adversely affect competition in the relevant geographic markets. It is no accident that the Division's investigation concluded that InBev's acquisition of Anheuser-Busch could lead to unlawful market concentration in Buffalo, Rochester and Syracuse, which are just down the road (or across a lake) from Canada.

Second, another condition essential to the Division's goal of maintaining the Labatt Brand as a competitive brand is for the Acquirer to maintain the existing distribution network for a commercially reasonable period of time, especially where the alternative network would concentrate the distribution of the Labatt Brand and the Anheuser-Busch products. Such a requirement is clearly consistent with the intent of the Proposed Final Judgment and relates solely to the distribution system for the Labatt Brand products. The language of the Proposed Final Judgment leaves open the possibility that competition at the distributor level will be suppressed because the Acquirer may terminate existing distributors and consolidate the Labatt Brand with other brands at the distributor level. The most likely result of brand consolidation is unwanted market concentration and likely price increases. Consequently, the Final Judgment should require any Acquirer to maintain the existing distribution network for the Labatt Brand for a commercially reasonable time period.

Background

As proposed, InBev's acquisition of Anheuser-Busch would eliminate substantial, direct competition between InBev and Anheuser-Busch in Buffalo, Rochester and Syracuse, New York, as well as in other regions where the Labatt Brand is a significant player. For the reasons set forth in the Competitive Impact Statement, the proposed Final Judgment requires InBev USA LLC (''IUSA'') to divest the Labatt Brand, along with a license to brew, market, promote and sell Labatt Brand products for consumption in the United States as a condition for InBev proceeding with its $52 billion acquisition of Anheuser-Busch. The essential reason for requiring the divestiture is that the transaction, absent divestiture, would likely lead to higher prices for beer in the Buffalo, Rochester and Syracuse, New York metropolitan areas and possibly in other areas where the Labatt Brand has significant market share because the Labatt Brand's and Anheuser-Busch's offerings collectively constitute a substantial percentage of those markets.

As alleged in the Complaint, the Buffalo, Rochester and Syracuse beer markets are highly concentrated. The top three brewers—Anheuser-Busch, Miller-Coors and IUSA, respectively possess approximately 24%, 26% and 21% of the Buffalo and Rochester beer markets. In the Syracuse geographic market, the same three brewers respectively possess approximately 28%, 28% and 13% of the beer market. According to the Complaint, the supply responses from competitors or potential competitors would not likely prevent the anticompetitive effects of the proposed acquisition. Competition from other competitors is insufficient to prevent a small but significant and non-transitory price increase implemented by the combined entities in those markets from being profitable. Entry of a significant new competitor into the marketplace is particularly unlikely because a new entrant would not possess the highly-important brand acceptance necessary to proceed.

The remedy set forth in the Proposed Final Judgment for this anticompetitive aspect of the InBev acquisition of Anheuser-Busch is to require InBev to divest the Labatt Brand and grant a perpetual license to the Acquirer to sell Labatt Brand products for consumption throughout the United States, as well as to assign additional rights and contracts necessary to maintain the viability of the Labatt Brand. These rights include an exclusive, perpetual, assignable, transferable, and fully-paid-up license that grants the Acquirer the rights to (a) brew Labatt Brand products in Canada and/or the United States, (b) promote, market, distribute and sell Labatt Brand products for consumption in the United States, and (c) use all the intellectual property rights associated with the marketing, sale, and distribution of Labatt Brand products for consumption in the United States.

The Proposed Final Judgment ensures the uninterrupted sale of Labatt Brand products in the United States by ''requiring defendants to divest *all rights pursuant to distributor contracts*, and at the option of the Acquirer, to negotiate a Transition Service Agreement of up to one year in length, and to enter into a supply contract for Labatt Brand products sufficient to meet all or part of the Acquirer's needs for a period of up to three years.'' Competitive Impact Statement at 8 [emphasis added].

Comments and Rationale

As the Proposed Final Judgment and Competitive Impact Statement make clear, the goal of the Labatt Brand divestiture will only be realized if the Acquirer of the Labatt Brand assets maintains the brand as a viable competitor for Anheuser-Busch products in the relevant markets. If the Labatt Brand does not remain a viable competitor, the beer markets could fall victim to the concentration and anticompetitive price increases the Division is seeking to avoid through the divestiture ordered by the Proposed Final Judgment. Similarly, while not the focus of the Complaint or the remedy provided in the Proposed Final Judgment, the Labatt Brand has a significant market share in Ohio, Michigan, Indiana and Wisconsin, and the weakening of the Labatt Brand overall, including in those states, would have a similarly negative impact on competition in those regional beer markets.

Divestiture Only Remedies Antitrust Violations If the Divested Business Remains Viable Thereafter

In considering remedies for antitrust violations, the Courts, the Division and the FTC have uniformly recognized that the viability of a divested business line as a competitor is crucial to the usefulness of divestiture as a cure for an antitrust violation. *See, e.g., Utah Public Service Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969) (''The purpose of our mandate was to restore competition in the California market * * * [t]he object of the allocation of gas reserves must be to place New Company in the same relative competitive position vis-à-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger.''). Indeed, post-transaction viability is the *sine qua non* of a curative divestiture. *See, e.g., White Consol. Indus.* v. *Whirlpool Corp.*, 612 F.Supp. 1009, 1028 (N.D. Ohio 1985) *vacated after compliance* by 619 F.Supp. 1022 (holding that company acquiring divested assets must (1) have capacity to compete effectively and (2) be free to operate divested business absent control by seller). The Courts, the Division, and the FTC have fashioned hold separate orders, like the Stipulation in the above-referenced action, to maintain the viability of the business which is the subject of a divestiture as a competitor in the relevant markets.

To Maintain the Labatt Brand as a Viable Brand, the Eventual Acquirer Will Need to Adopt Specific Strategies

The Labatt Distributors are concerned that certain potential Acquirers of the Labatt Brand are not good fits, and could diminish the Labatt Brand as a competitor for Anheuser-Busch in the relevant markets. While the Order correctly leaves to the Acquirer to decide the brand promotion and strategy to pursue, the Labatt Distributors wish to alert the Division and the Court to certain characteristics of the Labatt Brand that any Acquirer should attend to if the goal is to maintain the Labatt Brand as a viable competitor in the relevant markets. InBev, of course, has no incentive to sell the divested assets to the strongest competitor. To the contrary, after the divestiture, its financial interest will be to increase the sales of Anheuser-Busch products at the expense of the Labatt Brand. In this regard, the Labatt Distributors' list their strategic concerns.

The Acquirer of the Divested Assets Must Maintain the Labatt Brand as a Canadian Import

Under the Proposed Final Judgment, the Acquirer can purchase the Labatt Brand brewed by InBev in Canada for three years. After that time, the Acquirer must find a new brewery. As set forth in the Proposed Final Judgment, the Acquirer could even elect to brew the Labatt Brand on its own, in the United States, from the outset. Such a decision would be antithetical to maintaining the Labatt Brand as a competitive brand.

Much of the Labatt Brand's panache comes from its status as an import. With the sales volume and other relevant factors specific to the Labatt Brand products, the Acquirer's

options are limited. The Labatt Distributors are not aware of breweries with substantial capacity in Canada other than the breweries of InBev and Molson/Coors. Neither InBev nor Molson/Coors will have an incentive to assist the Acquirer in maintaining the Labatt Brand. The other breweries of which the Labatt Distributors are aware are too small to replace the approximately 20 million cases of the Labatt Brand products sold in the United States each year. The Labatt Distributors request that the Proposed Final Judgment be modified to give the Acquirer the option to extend its right to purchase the Labatt Brand brewed by InBev (which, after all, will presumably still be brewing it for sale in Canada and elsewhere) in Canada beyond the three-year period, or otherwise ensure that the Acquirer maintains the Labatt Brand as a Canadian import.

The Acquirer Must Maintain Competitive Pricing

The Labatt Distributors are concerned that an Acquirer, potentially saddled with debt from the cost of the acquisition, will raise prices in an effort to generate additional cash. Beer sales are elastic and greatly impacted by pricing. Such a move would be devastating to the Labatt Brand. The Labatt Brand is successful as an import at its current competitive price point. At higher prices (such as those charged by other imported beers), the Labatt Brand will be less competitive and sales will go down as Labatt Brand's consumers often choose the Labatt Brand over domestic beers like Budweiser and Coors but would likely opt for a cheaper domestic beer over a more-expensive Labatt Brand product.

The Acquirer Must Maintain an Attractive Portfolio/Brand Mix

The Labatt Distributors are concerned that the Acquirer will reduce the numbers of skus in the portfolio, thus weakening the Labatt Brand equity. The Acquirer must continue to offer the standard items including six, twelve, eighteen, twenty-four and thirty pack bottles and cans as well as the Seasonal Packages such as the Heritage packs, Sport packs as well as various brand extensions such as Light, Ale, Porter, Kokanee, Ice, etc. Beer sales in the United States are dependent on consumer factors, including packaging and convenience. In this way, beer sales are similar to most food products. Beer, in particular, is an extreme example of this phenomenon because of widespread situational use and the wide demographic range of consumers. Reduction in brand extensions for packages would further diminish the competitive level of Labatt Brand, decreasing competition in the relevant market.

The Acquirer Must Provide Sufficient Marketing and Promotional Resources to Maintain and Develop the Labatt Brand

As the Division recognizes, only an Acquirer who intends to continue investing in the Labatt Brand will succeed in fulfilling the pro-competitive goals of the Proposed Final Judgment. The Labatt Distributors urge the Division to consider both the product mix of the Acquirer as well as its sales and marketing plans to ensure that the Acquirer has both the incentive to invest in the Labatt Brand and to provide sufficient resources for marketing the Labatt Brand going forward. Beer is not a commodity, but rather an ingested product that connotes a particular image and level of reward. Without proper advertising and image support, the Labatt Brand will suffer and decrease its competitive heft.

The Likely Acquirer of the Labatt Brand Could Promote Further Concentration at the Distributor Level

The Labatt Distributors believe that maintaining the present distributor network is crucial to maintaining the Labatt Brand as a viable competitor in the relevant markets. The Labatt Distributors wholeheartedly concur with the Division's assessment of impact on competition caused by the InBev acquisition of Anheuser Busch. In fashioning its remedy for the anticompetitive impact, the Proposed Final Judgment included among the Divested Assets, ''all contracts and agreements of IUSA * * * including, without limitation, wholesaler and distributor agreements into which InBev or IUSA have entered for the sale or distribution of the Labatt Brand within the United States * * *;'' Proposed Final Judgment, § II (F)(iii)(B).

The Division's clear intention is to preserve the existing distribution network for the Labatt Brand. As the Division has recognized, distributors play an important role in the market for beer. *See* Competitive Impact Statement (''CIS'') at 4–6. Keeping the present network of Labatt Distributors in place for a commercially reasonable time period—the existing Distributors collectively have invested substantial sums in building the brand strength of the Labatt Brand—is essential to maintaining the Labatt Brand as a viable competitor. Because of a quirk in the regulation of distributors in some states, however, the Proposed Final Judgment may have an unintended consequence of promoting further consolidation at the distributor level and weakening Labatt Brand's distribution network.

An immediate change in the distribution network will result in the loss of a significant number of jobs and the elimination of certain businesses. Certainly, the Division does not want its actions to directly result in the loss of jobs and the consequent increase in market concentration. In addition, the Labatt Distributors have a very real and monetary interest in the success of the Acquirer and the Labatt Brand. For example, the Labatt Distributors in Ohio have invested hundreds of thousands of dollars in the success of the Labatt Brand.

On the contrary, the requirement set forth in the Proposed Final Judgment that the Divested Assets included all rights pursuant to distributor contracts may not prevent the Acquirer from terminating the Labatt Distributors. This issue is especially pronounced for distributors in Ohio and is likely to impact Labatt Distributors in other states as well. Certain state laws which protect distributors permit termination upon the sale of assets. Because of these laws, and the restrictions placed on the power of suppliers/manufacturers to terminate distributors, brand acquirers often terminate distribution contracts as a matter of course after an acquisition. Under normal circumstances, where the sale is part of the ordinary operation of the marketplace, such reflexive terminations do not raise competitive concerns. Here, however, where the sale is a remedy for an antitrust violation, such a termination would have the effect of lessening competition between the Labatt Brand and the remaining Anheuser-Busch brands. The replacement of some or all of the present Labatt Brand distribution network with a new set of distributors, possibly tied to the Acquirer but without longstanding commitment to, and appreciation of, the Labatt Brand creates a risk of weakening Labatt Brand as a brand to the detriment of competition in the relevant markets. The simple solution is to require the Acquirer to keep the Labatt Distributors for a commercially reasonable period of time.

The Acquirer Needs To Maintain the Existing Distribution Network for the Labatt Brands To Enhance the Competitive Results of Divestiture

The likely Acquirers of the Labatt Brand are Diageo-Guinness, USA (''Guinness''), High Falls-Genesee of New York, Heineken USA or certain investment groups not presently active in the beer market in the relevant geographic area. Many of the most likely Acquirers each sell brands competitive to the Labatt Brand in the relevant markets. While not exhaustive, the following discussion highlights the concern that the Labatt Distributors have around post-divestiture consolidation. The Labatt Distributors can expand on this information and likely scenarios.

One potential Acquirer is Guinness. If, as a result of the acquisition, Guinness decides to discontinue the distribution arrangements with the current distributors of the Labatt Brand beer in Canton, Cleveland, Youngstown and Mansfield, Ohio, Guinness likely will consolidate the actual distribution of the Labatt Brand beer with distributors who presently also distribute other brands currently sold by Guinness. This result will shift the share of the imported beer market among the distributors for the Labatt Brand products and its competitive brands from 20% to 40% and, in a certain market, one distributor will have 60% to 90% of the market. For example, in the Ohio markets of Canton, Cleveland, Youngstown and Mansfield, the purchase of the Labatt Brand by Guinness and a change of the distribution of the Labatt Brand products from current distributors to the existing distributors of Guinness products would likely increase the market share for imported beers in those respective markets by 32%, 30%, 23% and 26%, respectively. Again, this consolidation of market share would give the current distributors of the Acquirer market power sufficient to increase price for the Labatt Brand products to consumers independent of the fact that Guinness owned the brand instead of the combining companies.

Other potential Acquirers are independent investor groups with little or no experience in the relevant markets. If this Acquirer terminates the Labatt Distributors and

attempts to distribute the Labatt Brand through distributors which also sell products competitive to the Labatt Brand products, the results will likely be, similar to the example with Guinness as the Acquirer, a lessening of competition and an increase in prices. Such results are likely compounded by the specific strategy needs of the independent investor group/Acquirer.

CONCLUSION

For the foregoing reasons, the comments of the Labatt Distributors are limited and only bear on issues ''around the edges'' of the Proposed Final Judgment. Indeed, the Labatt Distributors believe that their comments are consistent with the Division's intent as expressed in the Proposed Final Judgment. In short, the Acquirer of the Divested Assets must maintain the Labatt Brand as a Canadian import and must adopt and continue specific strategies for the Division to achieve its goal. One material risk presented by the current language of the Proposed Final Judgment is that the Acquirer will terminate some or all of the existing distributors of the Labatt Brand products. This is likely to lead to increased consolidation at the distributor level and weaken the Labatt Brand as a viable competitor. Such a result will increase concentration in the relevant market and likely result in higher and less-competitive pricing. The simple solution is to require the Acquirer to maintain the existing distribution network for the Labatt Brand products for a commercially reasonable period of time. Implementation of changes consistent with these comments will increase the likely success of the divestiture.

Thank you.

Sincerely,

James Coyne King.

JCK/kjb—518505

January 22, 2009

By Hand

Joshua H. Soven, Esq.,

Chief, Antitrust Division, Litigation I Section, U.S. Department of Justice, 1401 H Street, NW., Suite 4000, Washington, D.C. 20530.

Re: Written Comments on Proposed Final Judgment/*United States of America* v. *InBev N.V./S.A.*, *et al.* , U.S.D.C. for D.C., Case: 1:08–cv–01965/

Dear Mr. Soven:

I represent Onondaga Beverage Corporation (''Onondaga''), a wholesale beer distributor based in Syracuse, New York, which distributes the Labatt brands of beer (the ''Labatt Brand'') in its upstate New York territory. As indicated in the January 15, 2009 letter from James C. King on behalf of certain Labatt Distributors, Onondaga shares some of the concerns expressed in Mr. King's letter. In addition, I represent Rochester Beer & Beverage Corp. of Rochester, New York, McCraith Beverages, Inc. of Utica, New York, and Owasco Beverage, Inc. of Auburn, New York, who join in this letter as well. I am further authorized to state that Seneca Beverage Corp. of Elmira, New York and Rocco J. Testani, Inc. of Binghamton, New York also join in these comments. All of these firms distribute the Labatt Brand in their respective territories.

We provide this letter to discuss, in greater detail, our concerns on the Proposed Final Judgment in the above-referenced action, which requires InBev to divest all assets associated with the Labatt Brand (''Labatt Brand'') consistent with the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)–(c).

These comments outline the views of our clients relating to the Complaint, the Competitive Impact Statement and the Proposed Final Judgment in the above-referenced action relating to the acquisition by InBev N.V./S.A. (''InBev'') of the Anheuser-Busch Companies, Inc. (''Anheuser-Busch''). Our clients are available to meet with you and are prepared to supplement and expand upon the comments set forth in this letter if that would be helpful to the Division.

Purpose

Let me emphasize first that our clients, as Labatt distributors, share the Division's goal, as set forth in the Proposed Final Judgment, of preserving the Labatt Brand as a viable brand and as a competitor of the products of Anheuser-Busch and other brewers in the relevant markets. The primary purpose of these comments is to ensure that the goals of the Proposed Final Judgment are achieved, so as to maximize the positive competitive impact of the divestiture. Our comments focus on one principal area of concern, which we view as critical to the Labatt Brand continuing as a viable competitive force in the upstate New York market area: the need to maintain the Labatt Brand as a Canadian imported beer.

The Labatt Brand is a unique product, with a specific set of characteristics that have made the brand appealing and enabled it to compete effectively with other beers in the upstate New York market area, particularly those areas near the Canadian border. The Labatt Brand derives brand equity and successful market position from its status as a high-quality Canadian import, as its greater popularity along the Canadian border demonstrates. Indeed, as we show below, the Labatt Brand has consistently advertised so as to emphasize its Canadian origin.

The Labatt Brand also is sold at prices closer to that of domestic premium beer brands, such as Budweiser, Miller and Coors, than most imported beers, which are generally higher-priced. That market positioning, as a Canadian import for the price of a domestic, has been the linchpin to the Labatt Brand's success. Any significant change in this brand identity will harm the Labatt Brand as a competitor and adversely affect competition in the relevant geographic markets.

Background

As proposed, InBev's acquisition of Anheuser-Busch would eliminate substantial, direct competition between InBev and Anheuser-Busch in Buffalo, Rochester and Syracuse, New York, as well as in other regions where the Labatt Brand is a significant competitive force. For the reasons set forth in the Competitive Impact Statement, the proposed Final Judgment requires InBev USA LLC (''IUSA'') to divest the Labatt Brand, and grant the Acquirer a license to brew, market, promote and sell Labatt Brand products for consumption in the United States as a condition for InBev proceeding with its $52 billion acquisition of Anheuser-Busch. The essential reason for requiring the divestiture is that the transaction, absent divestiture, would likely lead to higher prices for beer in the Buffalo, Rochester and Syracuse, New York metropolitan areas and possibly in other areas where the Labatt Brand has significant market share, because the Labatt Brand's and Anheuser-Busch's offerings collectively constitute a substantial percentage of those markets.

As alleged in the Complaint, the Buffalo, Rochester and Syracuse beer markets are highly concentrated. We estimate market shares in the Syracuse, Rochester and Buffalo markets as follows:

	Anheuser-Busch (percent)	MillerCoors (percent)	Labatt USA (percent)
Syracuse	28.0	32.0	21.0
Rochester	29.0	24.0	24.0
Buffalo	30.0	23.0	27.0

According to the Complaint, the supply responses from competitors or potential competitors would not likely prevent the anticompetitive effects of the proposed acquisition. Competition from other competitors is insufficient to prevent a small but significant and non-transitory price increase implemented by the combined entities in those markets from being profitable. Both the Competitive Impact Statement and the Complaint noted that ''[e]ntry of a significant new competitor into the marketplace is particularly unlikely because a new entrant would not possess the highly-important brand acceptance necessary to proceed.'' Statement at 6; Complaint at para. 25. Furthermore, even if a new competitor *did* enter the marketplace, the Complaint emphasized that such a ''new entry is not likely to prevent the likely anticompetitive effects of the proposed acquisition.'' (Complaint at para. 25).

The remedy set forth in the Proposed Final Judgment for this anticompetitive aspect of

the InBev acquisition of Anheuser-Busch is to require InBev to divest the Labatt Brand and grant a perpetual license to the Acquirer to sell Labatt Brand products for consumption throughout the United States, as well as to assign additional rights and contracts necessary to maintain the viability of the Labatt Brand. These rights include an exclusive, perpetual, assignable, transferable, and fully-paid-up license that grants the Acquirer the rights to (a) brew Labatt Brand products in Canada and/or the United States, (b) promote, market, distribute and sell Labatt Brand products for consumption in the United States, and (c) use all the intellectual property rights associated with the marketing, sale, and distribution of Labatt Brand products for consumption in the United States.

The Proposed Final Judgment ensures the uninterrupted sale of Labatt Brand products in the United States by ''requiring defendants to divest all rights pursuant to distributor contracts, and at the option of the Acquirer, to negotiate a Transition Service Agreement of up to one year in length, and to enter into a supply contract for Labatt Brand products sufficient to meet all or part of the Acquirer's needs for a period of up to three years.'' Competitive Impact Statement at 8 [Emphasis added]. As we discuss below, however, the three-year time limit on the supply agreement, the resulting shift in the brewer of the Labatt Brand after three years if not sooner, and the possibility that the Labatt Brand might be brewed in the United States contain the seeds of destruction of the Labatt Brand as a viable competitor in the upstate New York markets that were the Division's principal concern.

Comments and Rationale

As the Proposed Final Judgment and Competitive Impact Statement make clear, the goal of the Labatt Brand divestiture will only be realized if the Acquirer of the Labatt Brand assets maintains the brand as a viable competitor for Anheuser-Busch products in the relevant markets. If the Labatt Brand does not remain a viable competitor, the relevant upstate New York beer markets will fall victim to the concentration and anticompetitive price increases the Division is seeking to avoid through the divestiture ordered by the Proposed Final Judgment.

Under the Proposed Final Judgment, the Acquirer can purchase the Labatt Brand brewed by InBev in Canada for three years. After that time, the Acquirer must find a new brewery. As set forth in the Proposed Final Judgment, the Acquirer could change brewers or even elect to brew the Labatt Brand in the United States, from the outset. As set forth below, such a decision would make it impossible to maintain the Labatt Brand as a competitive brand.

We attach to this letter a letter from Michael J. Mazzoni, an expert consultant in the beer industry with in-depth experience in the sales, marketing and distribution of imported and domestic beers at both the brewer-importer and the wholesale distributor tiers of the industry (the ''Mazzoni Letter''). Mr. Mazzoni describes the disastrous effect on the Labatt Brand from the loss of authenticity that will result if the brewing of the brand shifts to another brewer, and especially if the Canadian identity that is the core of its brand equity is lost by shifting production to the United States.

Divestiture Only Remedies Antitrust Violations If the Divested Business Remains Viable Thereafter

In considering remedies for antitrust violations, the Courts, the Division and the FTC have uniformly recognized that the viability of a divested business line as a competitor is crucial to the usefulness of divestiture as a cure for an antitrust violation. *See, e.g., Utah Public Service Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969) (''The purpose of our mandate was to restore competition in the California market. * * * [t]he object of the allocation of gas reserves must be to place New Company in the same relative competitive position vis-à-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger.''). Indeed, post-transaction viability is the *sine qua non* of a curative divestiture. *See, e.g., White Consol. Indus.* v. *Whirlpool Corp.*, 612 F.Supp. 1009, 1028 (N.D. Ohio 1985) *vacated after compliance* by 619 F.Supp. 1022 (holding that company acquiring divested assets must (1) have capacity to compete effectively and (2) be free to operate divested business absent control by seller). The Courts, the Division, and the FTC have fashioned hold separate orders, like the Stipulation in the above-referenced action, to maintain the viability of the business which is the subject of a divestiture as a competitor in the relevant markets.

The Acquirer of the Divested Assets Must Maintain the Labatt Brand as a Canadian Import

Our clients are concerned that certain potential Acquirers of the Labatt Brand are not good fits, and could diminish the Labatt Brand as a competitor for Anheuser-Busch and MillerCoors in the relevant markets for reasons that may suit the potential Acquirers' economic interests but will not preserve the competitive viability of the Labatt Brand in the long term. While the Order correctly leaves to the Acquirer to decide the brand promotion and strategy to pursue, we wish to make certain that the Division and the Court understand that the Labatt Brand garners its brand equity, and, in turn, much of its market strength, from the fact that it is a high-quality Canadian import sold at the price of domestic premium beers.[1] This Canadian import status is the defining characteristic of the Labatt Brand (see advertising examples below) that any Acquirer must preserve if the goal is to maintain the Labatt Brand as a viable competitor in the relevant markets.

We request that the Proposed Final Judgment be modified to give the Acquirer the right to extend its right to purchase the Labatt Brand brewed by InBev (which, after all, will still be brewing it for sale in Canada and elsewhere) in Canada beyond the three-year period, and in any case to ensure that the Acquirer brews the Labatt Brand in Canada and so maintains the Labatt Brand as a Canadian import.

[1] See also Mazzoni Letter at 1.

Short-Term Economic Incentives of Purchasers May Be at Odds with the Long-Term Competitive Viability of the Labatt Brand

Certain potential acquirers [2] with excess U.S. brewing capacity have economic incentives to shift the brewing of the Labatt Brand to their United States facilities that are unrelated to maintaining the Labatt Brand as an effective competitor. Because unused brewing capacity is extremely costly to any U.S. brewer, and filling unused brewing capacity is economically efficient in the short term, such a brewer can reduce the costs of its existing domestic products by brewing the Labatt Brand in its unused U.S. brewery capacity. This will help the brewer to get through difficult economic times, and to improve the competitiveness of its domestic brands, but these smaller brands cannot replace the Labatt Brand as a major competitive force in the key upstate New York markets. The disastrous long-term consequences of such a move for the Labatt Brand may be outweighed for the brewer by the benefits for its other products, but the resulting loss of the Labatt Brand as a viable competitor will have precisely the anticompetitive effects divestiture was intended to prevent. While such a step might benefit the Acquirer, it would not fulfill the Division's purpose of preserving the Labatt Brand as a viable competitor in the markets in which it is a strong competitor today.

The Labatt Brand's market position is based on its identification as a high-quality Canadian import brand, and its brand equity has been developed over many years by advertising emphasizing its Canadian origin. Losing that brand equity would destroy the identity of the Labatt Brand, insulting brand loyalists [3] and rendering it a domestic brand with no distinguishing characteristics. Additionally, it is likely that MillerCoors Brewing Company would use advertising to inform U.S. Consumers that its own Molson brands were the only authentic Canadian beers brewed in Canada and sold in the U.S. Labatt could not remain a viable competitor were this to occur. If the Labatt Brand fails, the market share data and economics of distribution indicate that its distributors will likely fail as well in the key upstate New York markets.[4]

Löwenbräu Failed as a Competitive Import When Miller Acquired It and Shifted Production to the U.S.

The decline of the Löwenbräu Brand is an example of a Purchaser with unused U.S. brewing capacity acting on its economic incentive at the expense of the long-term viability of the brand. In the 1970s, the image and authenticity of Löwenbräu beer, then one of the nation's leading imported beers, was severely damaged after it was bought by the Miller Brewing Company, which moved production from Munich to its American

[2] Currently, there are potential Purchasers with unused U.S. brewing capacity. One example of such a potential purchaser is High Falls/Genessee. See Mazzoni Letter at 3.

[3] See Mazzoni Letter at 2.

[4] See market share data at page 2 above and Mazzoni Letter at 1.

breweries. See, New York Times, ''With Some Risk To Its Image, Altoids Is Moving to the U.S., Bosman, J., October 5, 2005.[5] The Löwenbräu Brand, once an effective competitor in the import space, effectively disappeared when it began being brewed in the U.S. and never recovered, even after the brand was taken over in 1999 by Labatt Breweries of Canada. As the New York Times noted, ''[a]ny whiff of inauthenticity can damage a brand in the case of finicky beer drinkers, *for whom the line between domestic and imported brands is sacrosanct.*'' *Id.* (emphasis added). As Mr. Mazzoni notes, the loss of authenticity vastly outweighed the lowered cost, and the brand disappeared as an effective competitor. The result was similar for Wurzburger Hofbrau, another German beer, when Anheuser-Busch began to import it in bulk for repackaging in the U.S. If Labatt is permitted to be brewed in the U.S., its demise as a viable competitor will be assured. (Mazzoni Letter at 2–3.)

Canadian-Origin Emphasis in the Marketing of Labatt

The Labatt Brand has deep roots as a Canadian-brewed beer, starting with its founder John Kinder Labatt, who purchased the Simcoe Street brewery in London, Canada in 1847. During the Canadian prohibition from 1915 through 1927, the Labatt brewery survived by exporting its product and by producing ''temperance ales'' (brews with less than two per cent alcohol) for sale in Ontario. In 1979, Labatt Blue claimed the top spot in the Canadian beer market, a position it has held ever since.

The Labatt Brand has continuously and emphatically emphasized its deep Canadian roots in its advertising and product placement. Labels of Labatt Blue, Labatt Blue Light and other Labatt products prominently feature a distinctive red maple leaf design synonymous with the Canadian national flag, with the words ''IMPORTED,'' ''IMPORTED DAILY FROM CANADA'' or ''CANADA'S PILSNER'' in block print on the face of the label. (See Exh. A.). Print advertisements and bar decorations for Labatt, such as branded mirrors and neon signs, also prominently feature the Canadian maple leaf and the words ''Imported,'' ''Imported from Canada'' or ''IMPORTED DAILY FROM CANADA.'' (See Exh. B.). Commemorative bottles of Labatt have featured the actual Canadian national flag (See Exh. C.). Labatt has also had a long history of support for ice hockey, the national winter sport of Canada, by sponsoring the 1972 Summit Series as well as four Canada Cup international ice hockey tournaments. (See Exh. D.).

Several television commercials for Labatt Blue in the United States feature a popular character in a bear costume, involved with Labatt Blue in various ways (on the golf course, in a bar, on a date, etc). In one commercial, the announcer proclaims ''Today, Labatt announced the extension of Labatt Blue into the U.S. market,'' to which the bear character reacts with surprise, departs the woods of Canada, and proceeds to tour the United States talking to people about Labatt Blue. The bear tells one American citizen, ''I love Canada; it's my home'' but proclaims that he can ''get the best part of Canada and live in the States.'' The commercial closes with a glass of beer in front of a waving Labatt Blue flag featuring the red Canadian maple leaf, as the announcer states ''Labatt Blue. Pure Canada.'' (See Exh. E.).[6]

In another television commercial, the bear character receives a gift of a red and white necktie covered with the distinctive Canadian maple leaves. (See Exh. F.).[7] In another commercial, the bear character gulps down a Labatt Blue immediately after the beer is introduced to the viewers as ''The clean, crisp lager imported daily from Canada.''[8] In another, the bear character serves Labatt Blue in a bar, calling it ''Canada's finest.''[9] Another, not involving the bear character, prominently displays an entire refrigerator full of the product with the caption ''IMPORTED DAILY FROM CANADA.'' (See Exh. G.).[10] In another commercial, the bear character carries a six-pack of Labatt Blue to a party and is introduced as being ''from Canada.'' The advertisement asks ''want your own taste of Canada?'' and states ''you can win your own lodge in the Labatt Blue Lodge Sweepstakes.'' (See Exh. H.).[11]

Other television commercials feature realistic talking animals (fish, deer) who plead with humans to enjoy themselves outside, as the voiceover urges, ''imported daily from Canada * * * come on up'' (See Exh. I.).[12] In a 1994 television commercial not involving any animal characters, a Canadian man sits in his back yard imagining the U.S./Canada border crossing station (pictured in Exh. J.)[13] thinking the following thought, which is read as a voiceover:

Sometimes I wish my back yard stretched right up to the U.S.-Canadian border. I'd sit on my lawn chair with a cold Labatt Blue. I'd watch some tourists, flash a smile at our customs agents, and taunt and tease the Americans with perhaps the finest example of a true Canadian lager. And if that doesn't rile them, I'll just stick in a tape of last year's World Series. Or, maybe the one before that.

Labatt's international advertisements[14] focus on Canadians doing a hard day's work (or a fun night of partying) in actual Canadian cities, as stated in the advertisements, including a helicopter rescue of a bear cub in ''Wawa, Ont.'' (See Exh. K.), a sunset campfire on the beach in ''Point Prim, P.E.I.'' (See Exh L.), at ''Expo '86, Vancouver'' (See Exh. M.), and roadies setting up a concert in ''Vancouver, B.C.'' (See Exh. N.), among other Canadian locations.

The ''Free Market'' Will Not Protect the Labatt Brand

The Department and the Court should not rely on the ''free market'' to address the significant possibility that the Acquirer will not maintain the Labatt Brand as a Canadian import. With the sale volume and other relevant factors specific to the Labatt Brand products, the Acquirer's options are limited. Our clients are not aware of breweries with substantial capacity in Canada other than InBev's Labatt Brand brewery and Molson/Coors' breweries. Neither InBev nor Molson/Coors will have an incentive to assist the Acquirer in maintaining the Labatt Brand. Other Canadian breweries are likely too small to replace the approximately 20 million cases of the Labatt Brand products sold in the United States each year. Even if another Canadian brewer could be found, the loss of the economies of scale resulting from InBev's production of the same beer for the Canadian market will result in higher prices for the Labatt Brand in the U.S. (See Mazzoni Letter at 3.)

Conclusion

The comments of our clients are limited and only bear on issues concerning one specific aspect of the Proposed Final Judgment. We believe that our comments are consistent with the Division's intent as expressed in the Proposed Final Judgment. In short, the Acquirer of the Divested Assets must maintain the Labatt Brand as a Canadian import, and ideally continue to have the Labatt Brand continue to be brewed by InBev's Canadian Labatt brewery, if the Division is to achieve its goal.

One material risk presented by the Proposed Final Judgment is that an Acquirer with excess U.S. brewing capacity will use the Labatt Brand to fill that capacity in order to obtain short-term economic benefits at the long-term expense of the Labatt Brand. This will weaken—and likely cripple—the Labatt Brand as a viable competitor. Such a result will increase concentration in the relevant market and likely result in higher and less-competitive pricing.

The simple solution is to give the Acquirer the right to extend its right to purchase the Labatt Brand brewed by InBev (which, after all, will still be brewing it for sale in Canada and elsewhere) in Canada beyond the present three-year period, and, in any event, to ensure that the Acquirer maintains the Labatt Brand as a Canadian import. Implementation of changes consistent with these comments will increase the likely success of the divestiture.

[5] Available at: *http://www.nytimes.com/2005/10/05/business/media/05adco.html?_r=1&scp=1&sq=altoids%20bosman&st=cse*.

[6] Copies of these commercials are included in the DVD–ROM marked as ''Exhibit O,'' and are also available on the Internet at Youtube.com. See Exhibit O, Folder 1. Also available at: *http://www.youtube.com/watch?v=rmb8NK3oZZQ*.

[7] See Exhibit O, Folder 2. Also available at: *http://www.youtube.com/watch?v=xK01QWA27H8&NR=1*.

[8] See Exhibit O, Folder 3. Also available at: *http://www.youtube.com/watch?v=cKQ3Fnkdplg&feature=related*.

[9] See Exhibit O, Folder 4. Also available at: *http://www.youtube.com/watch?v=llgGjoTL7TI&feature=related*.

[10] See Exhibit O, Folder 5. Also available at: *http://www.youtube.com/watch?v=HntrObODHqQ&feature=related*.

[11] See Exhibit O, Folder 6. Also available at: *http://www.youtube.com/watch?v=IQ9IsiZqkGg*.

[12] See Exhibit O, Folder 7. Also available at: *http://www.youtube.com/watch?v=fPrS5USJ4VM*.

[13] See Exhibit O, Folder 8. Also available at: *http://www.youtube.com/watch?v=HjGYbGe1VwE*.

[14] See Exhibit O, Folder 9. Also available at: *http://www.youtube.com/watch?v=miTfUrJ6VKA*.

Thank you for your consideration.

Sincerely,

Andre R. Jaglom.

M.J. Mazzoni, Inc.

2637 Northwind Road, Lexington KY 40511, Phone: (859) 294–6888, Fax: (859) 294–0336, e-mail: mazzco@windstream.net.

January 22, 2009

Andre R. Jaglom

Tannenbaum, Helpern, Syracuse & Hirschtritt, LLP, 900 Third Avenue, New York, NY 10022.

Dear Mr. Jaglom:

As you requested, I have reviewed the potential impact of the Department of Justice's required divestiture of Labatt U.S.A. (LUSA) by INBEV N.V./S.A. (INBEV) as a condition to the INBEV acquisition of Anheuser-Busch, Inc. My qualifications regarding this assignment are described in the attached curriculum vitae.

Specific to the Department of Justice ruling, the required divestiture of LUSA by INBEV, as presently constructed, will have two unintended consequences. These will result from the fact that the divestiture order contemplates that the acquirer must find alternative brewing arrangements for the Labatt brands within three years, and may do so immediately. The first unintended consequence will be the loss of authenticity as a true Labatt product and, if brewed in the U.S., as a Canadian imported beer. It is important to emphasize that ''Canadian Import'' is the core of the Labatt brand identity. The second unintended consequence, ironically contrary to the intent of the divestiture order, will be an increase in the price of the Labatt brands for consumers, not only in New York and the northern tier markets, but throughout the U.S. Combined, the loss of authenticity and higher prices will prevent the Labatt brands from continuing as viable competitors in those U.S. markets in which they are now a strong competitive force. The result will be a reduction in competition in these markets and a substantial negative economic impact on all current Labatt distributors (regardless of whether they also distribute for Anheuser-Busch, Miller/Coors, or any other suppliers). This will ultimately result in the elimination of jobs, decreased profitability, loss of equity value and, in some cases, distributor failure. These consequences will be the result of two dynamics: a significant loss of volume and the higher cost of goods sold to distributors—both of which are inevitable if the acquirer shifts production away from the current Labatt brewery, whether after three years or sooner. The result will be even more extreme if production is shifted out of Canada and into the United States.

Having the Labatt brands brewed by anyone other than the Labatt Brewing Company Limited (''Labatt Canada''), and especially by a brewery in the U.S., will raise the very real issue of authenticity. Labatt Canada is an iconic company. Sourcing the Labatt brands from any other brewer, and particularly any brewer outside of Canada, would negate the authenticity of the beer sold in the U.S. and it should be expected that significant numbers of Labatt drinkers would reject the product on that basis. It can also be assumed that if Labatt is brewed in the U.S., the MillerCoors Brewing Company would use advertising to inform U.S. consumers that its own Molson brands were the only authentic Canadian beers brewed in Canada and sold in the U.S. This would be a powerful message which would certainly drive consumers that prefer Canadian beers from the Labatt brands.

The worst possible scenario for the Labatt brands and U.S. distributors would be contract brewing the Labatt brands from a U.S. supplier or having a brewer acquirer brew the Labatt brands in its own U.S. brewery. Simply stated, the overwhelming majority of Labatt consumers drink Labatt because the brands are Canadian. While any Canadian contract brewer other than Labatt Canada would create problems for the brands regarding authenticity, Labatt brewed in the U.S. would be insulting to the Labatt brands' loyalists. All of the Labatt brands' packaging, promotion, and advertising prominently uses the word ''Canada'' and emphasizes their Canadian origin. Indeed, the Labatt advertising slogan is ''imported daily from Canada''. It is important to note that the consumer has been constantly and consistently presented with Canada as the country of origin; and, Canada is also a concept in itself which is reinforced in Labatt advertising by imagery including blue skies, water, crispness, bears, cold, and the bigness of the country. Canada is the primary marketing component of the Labatt equity which has been promoted by LUSA, its importer predecessors and the U.S. distributors for decades.

The situation is reminiscent of the demise of the Lowenbrau brand in the 1970s. Lowenbrau, an authentic German beer, was among the leading imported beers in the United States at that time. After Lowenbrau was acquired by the Miller Brewing Company (Miller), production was shifted from Germany to Miller breweries in the U.S. Miller's objective was to reposition the brand at domestic super premium levels based on their assumption that reducing prices for this well-respected brand would result in a consumer buying frenzy. While this initiative did allow Miller to lower production costs and save freight, therefore, effectively reducing the price of the beer, its authenticity as a German imported beer was demolished. U.S. brewed Lowenbrau rapidly lost volume and market share, going from one of the leading and most respected imported beers to an insignificant market presence in a matter of a few years. The failure of Lowenbrau was the unintended consequence of Miller Brewing Company's sacrificing authenticity for cost and convenience. It should also be noted that Anheuser-Busch, Inc. had a similar experience and result when it tried to import Wurzburger Hofbrau (another German beer) in concentrated bulk for repackaging at its U.S. breweries. Consumers flatly rejected Wurzburger Hofbrau as unauthentic. The same consequences can be expected for the Labatt brands on a much larger scale because of their higher volume and margin contribution if production is shifted to the United States.

In view of this not-so-distant beer industry history regarding Lowenbrau and Wurzburger Hofbrau, one would expect any acquirer of the Labatt brands to recognize the need to keep production in Canada. Dynamics beyond marketing and sales implications, however, create the possibility that a small U.S. brewer could realize short term operating benefits to the brewer which would likely be far less than the long term harm to the many U.S. Labatt distributors and to viable competition from the Labatt brands. It is rumored that the High Falls Brewing Company/Genessee Brewing Company of Rochester, New York is among the potential acquirers and other small brewers have also been mentioned. Their sole interest would be to increase production to create economies and efficiencies which would lower cost for their domestic brands. The tradeoff between short term brewing profits for a small U.S. brewer and Labatt brand authenticity would be a poor bargain for the U.S. Labatt distributors and consumers.

In addition to the concern about brand authenticity, without question, Labatt Canada is the lowest cost producer for the Labatt brands. The scale advantages from the Labatt volume sold in Canada ensure that all packaging and raw materials will always be cheaper for Labatt Canada than for any other contract brewer. In this case, the cost advantage is magnified because Labatt Canada's transfer price to LUSA was essentially at cost which allowed LUSA to spend more for advertising and sales promotion in the U.S. Any contract brewer to the Labatt licensee (including Labatt Canada) will include a brewing profit margin (estimated at 15–20%) which will be passed through to distributors. Further, the licensee will still have advertising and sales promotion expenses to support the brands, as would any brewer or importer. If brewing is shifted to another Canadian brewer, the cost of freight will also increase to most U.S. distributors because the likely contract brewers in Canada are located further from the majority of the Labatt volume than is Labatt Canada. Finally, it must be assumed that the acquirer of LUSA will have significant debt service which could also result in higher prices to distributors (or lower marketing support). Regardless of the contributing factors, a higher cost of goods for the Labatt U.S. distributors will create higher prices to consumers which will, in turn, cause volume declines for the Labatt brands. The likely (and most serious) scenario for distributors as a result of higher product cost will be lower margins and declining sales volume.

The impact of higher consumer prices for the Labatt brands must also be considered in the context of historical price positioning in northern tier markets. The Labatt brands have always been positioned at the price point of the leading domestic (U.S.) premium beers which include Budweiser, Bud Light, Miller Genuine Draft, Lite, Coors, and Coors Light and Labatts' primary Canadian competition, the Molson Canadian brands. Forcing the Labatt brands to price points above historical competition would create a price value anomaly for Labatt drinkers and many will choose other premium priced beers instead of their customary Labatt brand. This would have an immediate and permanent negative

impact on brand volume and competiveness and, therefore, distributor profitability and viability.

While some price increase is unavoidable given the divestiture, permitting the acquirer to continue to have the Labatt brands brewed by Labatt Canada, and requiring Labatt Canada to continue to brew them, beyond the current three year horizon will minimize that increase, because of the economies of scale provided by Labatt Canada's production for the Canadian market.

Conclusions:

If the Labatt brands are brewed by any brewer other than Labatt Canada, the volume and margin in the northern tier markets will likely decline by 30–50% within three years. The decline will be steeper if the Labatt brands are brewed in the U.S. The result will be the demise of an effective competitor—precisely the opposite of the intended purpose of the divestiture. The implications for the northern tier Labatt distributors are obvious. The Department of Justice must recognize that most of the northern tier distributors have sold the Labatt brands for many years and that volume and margin contribution is critical to each independent business. In fact, for many distributors, the Labatt portfolio contributes more than 50% of total gross margin (in the case of Rochester, which has no other major supplier, the Labatt brands are more than 80% of total gross margin) and the loss of 30–50% of gross margin would severely impact profitability, jobs, competitiveness and the value of the business(es). The potential for this to become reality is a virtual certainty if the licensee contracts any brewer except Labatt Canada, especially if production is shifted to the U.S.

Therefore, if the divestiture is enforced, the licensee should be permitted to contract the brewing for the Labatt brands from Labatt Canada well beyond the present three year period, and Labatt Canada should be required to continue to brew the Labatt brands for the acquirer. This is the only way to ensure the lowest possible transfer price to distributors, maintain brand authenticity, promote healthy competition, ensure each current distributor's business viability, preserve distributor equity, and protect consumers from higher prices.

Michael J. Mazzoni

MJM/nm

M.J. MAZZONI C.V.

M.J. MAZZONI is an independent broker specializing in the valuation, purchase and/or sale of U.S. malt beverage distributors. Additionally, Mazzoni works with brewers in North America and Asia advising on sales organization and strategy, distributor relations, and long-range planning. Brewer/Importer clients include Heineken, U.S.A.; Cerveceria Cuauhtemoc Moctezuma S.A. de C.V., and D.G. Yuengling and Son, Inc. Mazzoni is also an active and founding partner of SEEMA International, Ltd., a Hong Kong consultancy specializing in strategic planning for multi-national brewers doing business in China and other Asian countries.

After receiving a Masters Degree in Business Administration in 1973, Mazzoni joined the beer industry and held a variety of sales, marketing and general management positions with Anheuser-Busch, Inc. (1973–80), The Pabst Brewing Company (1980–82) and Barton Beers, Ltd. which he established in 1983. Under his direction, Barton Beers, Ltd. became the second largest beer importer (Corona) in the U.S. within four years. The success of Barton Beers, Ltd. led to a management buyout of the company's parent, Barton Brands, Ltd. (a distilled spirits and wine company) in 1987 and Mazzoni participated in the buyout as a principal in the transaction.

Since selling his interest in Barton, Inc. in 1991, Mazzoni has been an investor-partner in AFP, Inc., an Ohio beer distributorship (1992–2000); worked as a consultant assisting the Miller Brewing Company (1993–2002) with its distribution system reorganization, sales strategies, and distributor reconfiguration wherein he negotiated and facilitated the purchase and/or sale of independent Miller beer distributorships (including Miller-owned branch operations) and the sale or exchange of individual brand rights between distributors throughout the U.S. Mazzoni thus has in-depth experience in the sales and marketing of domestic and imported beers at both the supplier and wholesale distributor tiers of the industry.

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January 16, 2009

Via Hand Delivery and U.S. Mail

Mr. Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
1401 H Street, NW
Suite 4000
Washington, DC 20530

RE: Written Comments on Proposed Final Judgment United States of America v InBev N.V./S.A., et al. U.S.D.C. for D.C., Case: 1:08-cv-01965

Dear Mr. Soven:

This letter is submitted on the Proposed Final Judgment in the above-referenced action which requires InBev N.V./S.A. to divest all assets associated with the Labatt Brand consistent with the Antitrust Procedures and Penalties Act, 15 U.S.C. Sec. 16 (b)–(c).

This office represents Tri-County Beverage Company, a Labatt USA wholesaler headquartered in Dearborn and Warren, Michigan. Tri-County Beverage services the Detroit, Michigan, metropolitan area which is an important market for the Labatt Brand. The Labatt Brand is a critical and integral component of Tri-County Beverage's portfolio, with the Labatt Brand accounting for about 50% of Tri-County Beverage's annual sales (approximately 2.5 million cases out of 5.5 million cases of total sales).

We are in receipt of a copy of the January 15, 2008 letter sent to you by Mr. James Coyne King on behalf of his clients, Esber Beverage Company, RL Lipton Co, and Tri County Distributing, Co. We write because we share many of the concerns raised by Mr. King in his letter.

We agree with the observation that the Acquirer of the Labatt Brand must be well-positioned to support and market the Labatt Brand ''so that the position of the Labatt Brand is maintained and enhanced.'' The Labatt Brand is a niche product with a specific set of characteristics that make the Brand appealing in particular markets, such as Michigan. Much of the Labatt's Brand competitive position derives from its status as a Canadian import. As such, it is particularly popular in states (such as Michigan) which border or are in close proximity to Canada. We agree that the ''Labatt Brand products also have a price point more akin to domestic premium brands * * * than most imported beers''. The Labatt Brand market position, as a Canadian import for the price of a domestic, has been the ''lynchpin'' of the Labatt's Brand success. (See page 2 of Mr. King's letter). We concur in the comments made on pages 4 through 6 of Mr. King's January 15th letter which support the concept ''that the viability of a divested business line as a competitor is crucial to the usefulness of divestiture as a cure for an antitrust violation'' and his comments concerning the need to have a viable Acquirer to effectuate that principle and reach that goal of divestiture.

Wholesalers have spent many years—with a commensurate expenditure of time, money and effort—nurturing and building the Labatt Brand to make it the success it is today in states like Michigan. For example, Tri-County Beverage spent approximately $400,000 to advertise and promote the Labatt Brand in 2008 to complement the approximately $2 million dollars spent by Labatt to advertise and promote the Labatt Brand in metropolitan Detroit during that same period. Similar sums were expended by Tri-County Beverage and Labatt in previous years. To maintain the Labatt's Brand competitive viability it is critical that it continue as a Canadian import and that the Acquiring entity continue the strategies and pricing which have made the Labatt Brand a success. Should an inappropriate Acquirer obtain the Labatt Brand and not follow the strategies and pricing that have heretofore made the Brand successful (through the efforts of the existing wholesaler network), it will have a devastating effect on the Labatt Brand market share and competition in the industry.

Given the well thought out submission presented by Mr. King we have kept our comments to a minimum. We urge that the referenced comments be considered to help guide the decision making process.

Tri-County Beverage stands ready and willing to meet with you or to supplement this letter with other information you may deem useful.

Thank you for your attention to this matter.

Very truly yours,

Willingham & Coté, P.C.

/s/

Anthony S. Kogut

ASK/nlh
cc: Mr. James Coyne King
Mr. Ron Feldman

[FR Doc. E9–5018 Filed 3–9–09; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Institute of Electrical and Electronics Engineers

Notice is hereby given that, on February 9, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Institute of Electrical and Electronics Engineers (''IEEE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 34 new standards have been initiated and 9 existing standards are being revised. More detail regarding these changes can be found at *http://standards.ieee.org/standardswire/sba/12–10–08.html* and *http://standards.ieee.org/standardswire/sba/01–30–09.html*.

On September 17, 2004, IEEE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 3, 2004 (69 FR 64105).

The last notification was filed with the Department on November 17, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 11, 2008 (73 FR 75469).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E9–4853 Filed 3–9–09; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,422]

Springs Global U.S., Inc., Springs Direct Division, Springmaid Wamsutta Factory Store, Lancaster, SC; Notice of Revised Determination on Remand

On February 6, 2009, the U.S. Court of International Trade (USCIT) remanded to the U.S. Department of Labor (Department) for further review *Former Employees of Springs Global, Inc., Springs Global Direct Division, Springmaid-Wamsutta Factory Store, Lancaster, South Carolina (FEO Springs Global)* v. *United States,* Court No. 08–00255.

On May 19, 2008, an official of Springs Global U.S. Inc. (subject firm) filed a petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) on behalf of workers of Springs Global U.S. Inc., Springs Global Direct Division, Springmaid-Wamsutta Factory Store, Lancaster, South Carolina (subject facility).

The subject facility closed during February 2008. Prior to the closure, workers at the subject facility managed Springs Global, U.S., Inc. (subject firm) retail operations, sold linen products manufactured by the subject firm to the public and other subject firm employees, and handled special orders for linen products placed by other subject firm employees.

The negative determination, issued on May 30, 2008, stated that in order to be considered eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, the subject worker group must work for a ''firm'' or appropriate subdivision that produces an article domestically and there must be a relationship between the workers' work and the article produced by the workers' firm or appropriate subdivision. The determination also stated that although the subject firm produced an article, the subject workers did not support that production. The Department determined that the subject worker group cannot be considered import impacted or affected by a shift in production of an article. The Department's Notice of determination was published in the **Federal Register** on June 16, 2008 (73 FR 34044).

The Department did not receive a request for administrative reconsideration.

In the complaint, Plaintiffs allege that workers at the subject facility, who ''provided the means by which Springs Global dispensed of manufactured goods that were not able to be sold otherwise * * * thereby enabling the company's production operations * * * to reduce their per-unit overhead and operate more efficiently,'' should be treated like the workers covered by TA–W–62,768 (Springs Global U.S., Inc., Springs Direct Division, Corporate Support Group, Lancaster, South Carolina; certified February 14, 2008). Workers covered by TA–W–63,422 are located in the same building as workers covered by TA–W–62,786.

Workers covered by TA–W–62,786 are engaged in production estimation, production scheduling, distribution, logistics, and operational services. The determination for TA–W–62,786 stated that the workers supported production at a TAA-certified facility (Springs Global U.S., Inc., Grace Complex, Bedding Division, Lancaster, South Carolina; TA–W–61,258) and that the worker separations are ''related to a shift of production and increased imports of textile products.''

The group eligibility requirements for directly-impacted workers under Section 222(a) the Trade Act of 1974, as amended, based on a shift of production are satisfied if the criteria set forth under Section 222(a)(2)(B) have been met:

A. a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; *and*

B. there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision, and one of the following must be satisfied:

1. the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

On remand, the Department carefully reviewed the language of the statute, the Department's policy, Plaintiffs' submissions, and the administrative record.

The intent of the Department is for a certification to cover all workers of the subject firm or appropriate subdivision who were adversely affected by increased imports of the article