

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANHEUSER-BUSCH InBEV SA/NV, et al.,

Defendants.

Civil Action No. 13-127 (RWR)

**UNITED STATES’S UNOPPOSED MOTION AND SUPPORTING MEMORANDUM
FOR AUTHORIZATION TO EXCUSE *FEDERAL REGISTER* PUBLICATION OF
COMMENTS AND ATTACHMENTS**

The United States hereby moves this Court, pursuant to 15 U.S.C. § 16(d)(2), for authorization to excuse *Federal Register* publication of the comments and their respective attachments received in this case and instead authorize electronic publication for good cause, pursuant to 15 U.S.C. § 16(d). The United States proposes to meet its statutory obligations by posting the public comments and attachments on the Antitrust Division’s website, and publishing the relevant internet address for those comments and attachments in the *Federal Register*.

Defendants Anheuser-Busch InBev SA/NV, Grupo Modelo, S.A.B. de C.V., and Constellation Brands, Inc. do not object to this motion.

On April 19, 2013, the United States filed a proposed Final Judgment. As required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § (b)-(h) (the “Tunney Act”), the United States published the proposed Final Judgment in the *Federal Register* on May 22, 2013, *see* 78 Fed.

Reg. 30399-30660, and had summaries of the terms of the proposed Final Judgment, together with directions for the submission of written comments relating to the proposed Final Judgment, published in *The Washington Post* on April 28, 29, and 30, and May 1, 2, 3, and 4, 2013. Five individuals or entities submitted public comments on the proposed Final Judgment. In compliance with the Tunney Act, the United States will shortly file with the Court and serve on all parties to this action a Response to Comments, which will include the public comments and their attachments. The Response to Comments will be published in the *Federal Register* and will appear, along with electronic versions of the public comments and their respective attachments, on the Antitrust Division's website.

I. Argument

The Tunney Act requires the United States to publish the comments it received in this matter and its Response in the *Federal Register* prior to moving the Court for entry of the proposed Final Judgment. 15 U.S.C. § 16(d)(2). In 2004, the Tunney Act was amended in light of the benefits of electronic publication and the costs of publication in the *Federal Register*. The amendment authorizes the Court to order an alternative publication method when the expense involved exceeds the public interest benefits to be gained:

Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.

15 U.S.C. § 16(d)(2).

In connection with the proposed Final Judgment, the five commenters submitted, in total, 387 pages of public comments and attachments. The United States would incur expenses of

more than \$202,000 to publish these documents in the *Federal Register*; in order to reproduce the public comments and attachments in the manner in which they were filed with the Department of Justice, the *Federal Register* must individually photograph each of the 387 pages, at a cost to the United States of \$522 per page.¹ The attachments to the public comments include: a copy of a complaint filed in California by one of the commenters (an attorney) on behalf of his clients; a petition listing by name more than 1400 members of one of the commenters (an organization); links to videos and presentations posted on the internet; articles and press releases; correspondence with government representatives unrelated to the issues in the Complaint; a presentation made to the Responsible Retailing Forum; and multiple reports and presentations prepared by the Responsible Hospitality Institute regarding hospitality issues in various U.S. cities.

The available alternative means of publication of these public comments and attachments makes unwarranted this significant expenditure of taxpayer funds. Publication in the *Federal Register* does not confer any significant public interest benefit that cannot be better served by electronic publication. Indeed, at the time of passage of the 2004 Tunney Act amendment authorizing alternative publication, Senator Leahy of the Judiciary Committee noted that *Federal Register* publication can offer “little benefit, because those materials are, if anything, more accessible on the Web than in a library.” 150 CONG. REC. 6,328 (2004). Likewise, Senator Kohl opined that alternatives such as “posting the proposed decrees electronically, [] are sufficient to inform interested persons of the proposed consent decree.” 150 CONG. REC. 6,332 (2004).

¹ See Government Printing Office Circular Letter No. 851 (June 8, 2012), available at: <http://www.gpo.gov/pdfs/customers/cir851.pdf>.

Several courts, including two courts in this district, have recognized the benefits of electronic publication when they have excused *Federal Register* publication of comments submitted in connection with the Tunney Act process.² The United States proposes to post the five public comments and their attachments on the Antitrust Division's website and publish in the *Federal Register* the internet address at which the comments and attachments can be read and downloaded. This alternative would save the expense of full *Federal Register* publication while preserving the public interest benefits associated with public access to the materials.

II. Conclusion

The United States respectfully requests that the Court enter the Proposed Order authorizing the publication in the *Federal Register* of a link to the United States Department of Justice website, where the comments and attachments can be viewed and downloaded.

Dated: August 1, 2013

Respectfully submitted,

/s/ Michelle R. Seltzer
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² See, e.g., *United States v. United Techs. Corp., et al.*, No. 1:12-cv-1230-RC (D.D.C. Mar. 25, 2013) (attached as Exhibit 1); *United States v. American Express Co., et al.*, No. 10-CV-4496-NGG (E.D.N.Y. Jun. 20, 2011) (attached as Exhibit 2); *United States v. KeySpan Corp.*, No. 1:10-cv-01415-WHP (S.D.N.Y. Jun. 28, 2010) (attached as Exhibit 3); *United States, et al. v. Ticketmaster Entertainment, Inc., et al.*, No. 1:10-cv-00139-RMC (D.D.C. Jun. 15, 2010) (attached as Exhibit 4).

CERTIFICATE OF SERVICE

I, Michelle R. Seltzer, hereby certify that on August 1, 2013, I caused a copy of the United States's Unopposed Motion and Supporting Memorandum for Authorization to Excuse *Federal Register* Publication of Comments and Attachments, and a Proposed Order, to be filed and served upon all counsel of record by operation of the CM/ECF system for the United States District Court for the District of Columbia. Additionally, a copy of the foregoing was delivered via e-mail to the duly authorized legal representatives of the defendants, as follows:

Counsel for Defendant Anheuser-Busch InBev SA/NV and Grupo Modelo, S.A.B., de C.V.:

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EXHIBIT 1

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:12-cv-01230-RC**

UNITED STATES OF AMERICA v. UNITED
TECHNOLOGIES CORPORATION et al
Assigned to: Judge Rudolph Contreras
Cause: 15:1 Antitrust Litigation

Date Filed: 07/26/2012
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: U.S. Government Plaintiff

Date Filed	#	Docket Text
03/25/2013		MINUTE ORDER Upon consideration of the plaintiff's consent motion to be excused from publishing in the Federal Register the attachments to the Comment of Mr. Jefferis <u>33</u> , it is hereby ORDERED that the motion is GRANTED. SO ORDERED. Signed by Judge Rudolph Contreras on 3/25/13. (TA) (Entered: 03/25/2013)
03/25/2013		MINUTE ORDER Upon consideration of the plaintiff's consent motion to file the public comments regarding the proposed final judgment in this matter under seal <u>34</u> , it is hereby ORDERED that the motion is GRANTED. It is FURTHER ORDERED that the redacted version of the public comments shall remain on the public docket. SO ORDERED. Signed by Judge Rudolph Contreras on 3/25/13. (TA) (Entered: 03/25/2013)

D/F
FILED

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ JUN 22 2011 ★

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BROOKLYN OFFICE

ORDER

10-CV-4496 (NGG) (RER)

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UNITED STATES OF AMERICA, STATE OF
CONNECTICUT, STATE OF IOWA, STATE OF
MARYLAND, STATE OF MICHIGAN, STATE OF
MISSOURI, STATE OF OHIO, STATE OF TEXAS,
STATE OF ILLINOIS, STATE OF TENNESSEE,
STATE OF MONTANA, STATE OF NEBRASKA,
STATE OF IDAHO, STATE OF VERMONT,
STATE OF UTAH, STATE OF ARIZONA, STATE
OF RHODE ISLAND, STATE OF HAWAII, and
STATE OF NEW HAMPSHIRE,

Plaintiffs,

-against-

AMERICAN EXPRESS COMPANY, AMERICAN
EXPRESS TRAVEL RELATED SERVICES
COMPANY, INC., MASTERCARD
INTERNATIONAL INCORPORATED, and VISA
INC.,

Defendants.

-----X
NICHOLAS G. GARAUFIS, United States District Judge.

On October 4, 2010, the United States of America and several states (the “State Plaintiffs”) filed a Complaint against Defendants, alleging various violations of antitrust law under the Sherman Act, 15 U.S.C. § 1. (Compl. (Docket Entry # 1).) The same day, the United States and several State Plaintiffs filed a Notice of Settlement with respect to Defendants MasterCard International Incorporated and Visa Inc. (“MasterCard and Visa”), proposing a consent judgment. (Docket Entry # 4.) Pursuant to 15 U.S.C. § 16(d), the United States then solicited public comments regarding the proposed consent judgment against MasterCard and Visa. During this comment period, the United States received six comments, some with voluminous attachments, totaling over 400 pages. (Docket Entry # 119-1.) Under 15 U.S.C.

EXHIBIT 2

§ 16(d)(2), the United States is required to publish these comments in the Federal Register unless, “[u]pon application by the United States, the district court . . . find[s] that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication.”

The United States now seeks to excuse publication of the public comments in the Federal Register. (Docket Entry # 120.) The United States claims that it “would incur expenses of approximately \$200,000 to publish” all of the public comments in the Federal Register. (Id. at 2-3.) The United States has also stated that it “has filed all public comments, including the exhibits at issue, with this Court [and that the] United States will also post all comments and exhibits on the public website of the Antitrust Division of the United States Department of Justice.” (Id. at 2.) No party has objected to the United States’ request. (Id. at 1.)

Nonetheless, given the relative permanence of the Federal Register, it is desirable for the United States to at least identify the electronic location of the public comments by a notice in the Federal Register. Accordingly, the United States is excused from publishing the substance of the public comments in the Federal Register, see 15 U.S.C. § 16(d)(2), except for a notice stating that it received six public comments in this case, and that the comments and the United States’ responses are available on the DOJ’s website. In mentioning that this material is available on the DOJ’s website, the United States should also include an appropriate, permanent website address pointing to those comments online. The United States shall also certify to the court that it has published such notice by proof of publication filed on the court’s docket.

SO ORDERED.

Dated: Brooklyn, New York
June 20, 2011

NICHOLAS G. GARAUFI
United States District Judge

EXHIBIT 3

**USDC SDNY
DOCUMENT
ELECTRONICALLY FILED**
DOC #:
DATE FILED: 6/28/10

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
)
Plaintiff,)
)
v.)
)
KEYSPAN CORPORATION,)
)
Defendant.)

Civil Action No.: 1:10-cv-01415-WHP
Hon. William H. Pauley III

ORDER

The Court, having considered the application of the United States, finds that good cause exists pursuant to 15 U.S.C. § 16(d)(2) to excuse the publication of the attachments to the Comments of Mr. Nelson M. Stewart in the *Federal Register*,

GRANTS the United States's Unopposed Motion to Excuse *Federal Register* Publication of Attachments to the Stewart Comments, and

AUTHORIZES, as an alternative method of public dissemination, the publication in the *Federal Register* of the Stewart Comments with a link to the United States Department of Justice website where the attachments to those comments can be viewed and downloaded.

IT IS SO ORDERED by the Court, this 28 day of June 2010.


Hon. William H. Pauley, III

EXHIBIT 4

CLOSED,TYPE-A

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:10-cv-00139-RMC**

UNITED STATES OF AMERICA et al v. TICKETMASTER
ENTERTAINMENT, INC. et al
Assigned to: Judge Rosemary M. Collyer
Cause: 15:25 Clayton Act

Date Filed: 01/25/2010
Date Terminated: 08/20/2010
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: U.S. Government Plaintiff

Date Filed	#	Docket Text
06/15/2010	<u>12</u>	Unopposed MOTION for Order <i>Excusing the Publication of the Attachments to the Comments in the Federal Register</i> by UNITED STATES OF AMERICA (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Certificate of Service)(Hoag, Aaron) (Entered: 06/15/2010)
06/15/2010		MINUTE ORDER granting <u>12</u> Unopposed Motion for Order Excusing the Publication of the Attachments to the Comments in the Federal Register. The United States shall ensure that the Federal Register indicate that these attachments are available, specifying the website address where these attachments can be located. Signed by Judge Rosemary M. Collyer on 6/15/10. (lcrmc1) (Entered: 06/15/2010)