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 Fed. Reg. 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.

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.

[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.

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 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

[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).

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
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> (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]

[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).

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.

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]

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[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,*

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

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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.

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 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

[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.

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 § 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 identify 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 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 26, 2009

Respectfully Submitted,

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