



JAMES COYNE KING
Email: jck@hanify.com

January 15, 2009

BY HAND

Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
1401 H Street, N.W., 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

Professional Corporation
Counsellors at Law

www.hanify.com

One Beacon Street
Boston, Massachusetts 02108-3107
Tel: 617-423-0400
Fax: 617-423-0498

1875 K Street, N.W., Suite 707
Washington, D.C. 20006-1253
Tel: 202-403-2100
Fax: 202-429-4380



Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 2

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.



Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 3

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.



Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 4

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,



Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 5

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.



Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 6

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.



Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 7

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



Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 8

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.



Hanify&King

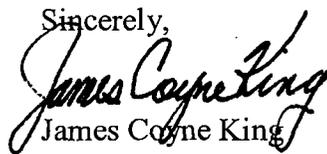
Joshua H. Soven, Esq.
Chief
Litigation I Section
Antitrust Division
U.S. Department of Justice
January 15, 2009
Page 9

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 Coyle King