UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	Civil Action No. 08-1965 (JR)
	:	
INBEV N.V./S.A., *et al.*,	:	
	:	
Defendants.	:	

MEMORANDUM ORDER

On July 13, 2008, InBev N.V./S.A. entered into an agreement to acquire Anheuser-Busch Companies, Inc. for $52 billion, a merger that would create the world's largest brewing company. On November 14, 2008, the Department of Justice filed a civil antitrust complaint alleging that the proposed merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by reducing competition in the Rochester, Buffalo, and Syracuse regions of New York, where InBev's Labatt brand competes directly with Anheuser-Busch beers.

Filed with the complaint was a proposed Final Judgment under which InBev would, in essence, divest itself of all its assets concerning the sale of Labatt beer in the United States. Along with a few other conditions designed to facilitate the continued viability of these assets, the proposal allows the government to vet their purchaser and the terms of the sale, and approve or reject either in its discretion. Before the court is the parties' motion for entry of that proposal as the Court's Final Judgment. My review of the agreement is controlled by the

Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §§ 16(b)-(h) (as amended), a/k/a the Tunney Act.

Four groups submitted comments on the proposal, all offering suggestions for the amendment of the Final Judgment to further guarantee Labatt's continued viability as a meaningful competitor. One of the commentators, a group of Missouri beer drinkers who had filed a separate action in the Eastern District of Missouri seeking to enjoin the merger,[1] also urged that the entire proposal be rejected because the merger would have anticompetitive effects nationwide and cause antitrust violations beyond those alleged in the complaint.

Under the Tunney Act, my review of the consented-to judgment is limited. The "public interest" examination prescribed by 15 U.S.C. § 16(e) can be described generally as inquiries into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable. *See*, 15 U.S.C. § 16(e); *U.S. v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp.2d 1 (D.D.C. 2007). It is not for this court to order the parties to

[1]On August 3, 2009, the District Court in Missouri granted the defendants' motion for judgment on the pleadings and dismissed the Missouri beer drinkers' lawsuit. *Ginsburg v. InBev NV/SA*, 2009 WL 2391960 (E.D.Mo. 2009).

adopt extra measures that I think might help guarantee a divestiture's success. Potential antitrust violations beyond those alleged in the complaint are beyond the scope of Tunney Act review, unless the complaint is narrow in the extreme.

With these limitations in mind, and after reviewing the whole record and considering the factors laid out in § 16(e), I find that entry of the proposed final judgment is in the public interest, and I will grant the parties' motion.

Background

When the complaint was filed, Anheuser-Busch was the largest brewer in the United States with a 50 percent share of the U.S. market.[2] Compl. ¶ 9. InBev, a Belgian company created in 2004 by the merger of Interbrew and AmBev -- then the largest European and South American brewing companies, respectively -- was the second largest brewer in the world. Compl. ¶ 1. InBev's brands, among them Bass, Stella, Labatt, and Becks, collectively accounted for about 2 percent of all beer sales in the U.S. Compl. ¶ 10. Since 2006, most of InBev's brands had been imported, marketed, and sold in the United by Anheuser-Busch pursuant to an import agreement. Compl. ¶ 10. One prominent exception to this agreement was InBev's Labatt brand, which was brewed in Canada by InBev subsidiary Labatt Brewing Company

[2]AB's closest competitor, MillerCoors, had a 30 percent share of the U.S. market.

Limited, and imported and sold in the U.S. by a different InBev subsidiary, InBev USA d/b/a Labatt USA (IUSA). Compl. ¶ 10.

Sales of InBev's Labatt brand comprised some 21 percent of the Rochester and Buffalo beer markets and 13 percent of the Syracuse market, while Anheuser-Busch owned about 24 percent of the Rochester and Buffalo markets, and 28 percent of the Syracuse market. Compl. ¶ 11. The resulting company, Anheuser-Busch InBev (AB/InBev), would therefore have approximately 45 percent of the Rochester and Buffalo markets and 41 percent of the Syracuse market. Compl. ¶¶ 21, 22. Sales of brands owned by the MillerCoors company comprised about 26 percent of those markets, and no other company had a market share greater than 5 percent. Compl. ¶ 3.

According to the government, the geographic markets for the pricing and promotion of beer are local in nature because of an industry-wide, three-tiered distribution system in which wholesalers are limited to certain territories by their contracts. Compl. ¶¶ 15-17. The system allows "brewers to charge different prices in different locales for the same package and brand of beer, and prevents individual distributors (and retailers) from defeating such price differences through arbitrage." Compl. ¶¶ 15-17. The government therefore believes that Rochester, Syracuse, and Buffalo are distinct geographic beer markets in which the consolidation resulting from the merger

would violate Section 7 of the Clayton Act, 15 U.S.C.A. § 18, by substantially lessening competition and generating non-negligible and long-term increases in consumer prices. Compl. ¶ 28. The government also dismisses the possibilities that entry into these markets by a meaningful competitor, supply responses by existing competitors, or the market efficiencies that might be achieved by the merger would mitigate the merger's anticompetitive effects. Compl. ¶¶ 25, 26.

A. The Proposed Final Judgment

The government filed a proposed Final Judgment along with the complaint. At its core, the proposal is for InBev to divest its Labatt assets in the U.S., while retaining its Labatt assets in Canada. CIS pg. 2; PFJ at 3-4. More specifically, InBev would sell IUSA and all of the real and intellectual property required to brew and sell Labatt beer in the U.S., including recipes and marketing and packaging information for Labatt and its extensions (e.g. Labatt Ice), and a "perpetual, assignable, transferable, and fully-paid-up license" giving the purchaser rights to brew Labatt in Canada or the U.S., to promote, sell, market and distribute the brand and all future brand extensions in the U.S., and to use intellectual property rights such as trade dress, advertising, and licensed marks. CIS pgs. 7-8. The acquirer would also obtain all rights to existing contracts for the distribution of Labatt in the U.S., and, at the

acquirer's option, AB/InBev would both negotiate a "transition services agreement" of up to one year with the acquirer, and agree to supply the acquirer with Labatt beer for a period of up to three years -- the terms of both of these agreements, including the prices for and quantities of beer that would be sold, being subject to approval by the government at its sole discretion. CIS pg. 8; PFJ at 9, 10.

If a supply agreement is entered into, the proposed Final Judgment would prevent AB/InBev from sharing "competitively sensitive information," such as the amount of beer ordered by the acquirer and the price paid for it, with those AB/InBev employees responsible for marketing, selling, or distributing other brands of beer that compete with Labatt in the U.S. CIS pg. 8. The Final Judgment further requires that the acquirer be independent and capable of continuing the assets as a viable enterprise, provides a detailed explanation of how an appropriate acquirer can be located, and gives the government sole discretion to approve both the acquirer and the terms of the acquisition. CIS pgs. 8-9. The defendants are forbidden to finance any part of the divestiture, PFJ at pg. 14, and cannot reacquire the U.S. Labatt assets while the Final Judgment is in effect, CIS pg. 17.

Consistent with asserted Department of Justice policy, Gov. Res. pg. 2, fn. 1, the merger was allowed to close on November 18, 2008, after I signed a Hold Separate Stipulation and

Order on November 14, 2008, that obligates the defendants to operate IUSA as an independent and economically viable competitor to AB/InBev while approval of the proposed Final Judgment is pending. HSA pg. 7.

B. Public Comments

The government properly published the documents enumerated in 15 U.S.C. § 16(c) in *The Washington Post* for seven days and, consistent with 15 U.S.C. §§ 16(b) and (d), published the proposed Final Judgment and the Competitive Impact Statement in the Federal Register, 73 Fed. Reg. 71682 (2008). After publication, the government received public comments for the statutorily mandated sixty days, during which four groups of commentators responded: (1) the aforesaid Missouri beer drinkers; (2) Labatt distributors from Ohio; (3) Labatt distributors from Michigan; and (4) and Labatt distributors from upstate New York.

On April 16, 2009, I held a hearing to explore the merits of the Tunney Act "public interest" determination. Leave was granted for the commentators from Missouri to participate as amici. Before the hearing, but after the statutory comment period had expired, the name of a government-approved acquirer was announced: KPS Capital Partners, LP, a private equity firm which, through its portfolio company North American Breweries, Inc., owns a variety of modest assets in the beer and malt brewing industries, including High Falls Brewing Company, LLC, a

brewery with capacity sufficient to meet the demand for Labatt beer in the U.S.

Two major arguments emerged from the sum of these contributions. First, that the proposed Final Judgment should do more to ensure that the Labatt brand will continue to compete viably in the U.S. (amici arguing that the government's approval of KPS should be rejected). Second, in essence, that the complaint was too narrow. The government has rejected these criticisms and concluded that the proposed final judgment does not require amendment.

1. The Distributors

The distributors are not opposed to the merger as a general matter, but they express deep concern with the acquirer's ability to preserve the competitiveness of the U.S. Labatt assets. Failure to do so, they argue, would not only frustrate the purposes of the Final Judgment by lessening competition and raising prices in the relevant geographic areas, but would also cause job losses and harm to distributors that are dependant on Labatt's business and that have invested substantial sums in promoting the brand over the years.

Their strongest argument is that the proposal should be amended to guarantee that U.S. distributed Labatt will continue to be brewed in Canada. The key to Labatt's ability to compete, they argue, is the brand's market placement as an "authentic"

Canadian import sold in a price range comparable to domestic premium beers. This status is especially important in markets close to the Canadian border, like those named in the complaint. Distributors invoke the case of Lowenbrau, a once popular German import purchased by Anheuser-Busch in the 1970s that lost "authenticity" and market position when Anheuser-Busch began brewing it domestically to cut costs. U.S.-brewed Labatt, the commentators argue, would suffer the same fate.

Some of the distributors also argue that the proposed Final Judgment's term giving the acquirer the option to contract brew with AB/InBev's Canadian Labatt breweries for three years is an insufficient stop-gap measure because it is both temporary and purely voluntary. Even if the acquirer exercises the option, the distributors argue, after three years the acquirer will have no viable means to maintain Labatt as Canadian brewed beer because the only breweries with sufficient capacity are owned by either InBev/AB or Molson (which is owned by MillerCoors), both direct competitors that would presumably refuse to give the acquirer competitive terms.

In a report filed by the New York commentators, Michael J. Mazzoni -- according to his curriculum vitae an "independent broker specializing in the valuation, purchase and/or sale of U.S. malt beverage distributors" -- opines that purchase by the acquirer of a Canadian brewery would not solve

the problem, as it too would lead to increases in the price of Labatt because of lost economies of scale and increased freight costs. In Mr. Mazzoni's view, contract brewing with several smaller breweries would result in similar costs and perhaps even "authenticity" problems. The solution to all these difficulties, the distributors propose, is to expand the time frame in which the acquirer can opt to brew in AB/InBev's Canadian breweries from three years to ten years.

A few of the distributors argue further that the Final Judgment should include a term obligating the acquirer to maintain the current network of distributors for a commercially reasonable time. Their point is that cancellation of current distributor contracts could lead to consolidation at the distributor level and/or the introduction of distributors unfamiliar with promoting Labatt, either or both of which results would increase the price of Labatt for consumers. Also, cancellation of these contracts would harm both distributors that depend on their association with Labatt and those that have invested significant funds in Labatt's success.

The last argument of any significance made by these commentators is that the acquirer should be obligated to maintain current levels of investment in advertising and marketing, and the present diversity of packaging options.

2. The Missouri Commentators

The Missouri commentators ask this court to reject the proposed Final Judgment in its entirety, making four arguments. First, they argue that the government dropped the ball by ignoring serious, nationwide antitrust violations caused by the merger. Second, they criticize the choice of KPS as the acquirer. Third, they argue that the merger is antithetical to the public interest as a general matter, regardless of any potential antitrust problems, because it will result in job losses and increased consumer prices. Last, they argue that the 2006 import agreement between InBev and Anheuser-Busch is a "determinative document" within the meaning of 15 U.S.C. § 16(b), and should therefore have been published to the public.

In support of the first argument, the Missouri commentators argue that, aside from the alleged effects on competition in the geographic regions named in the complaint, the merger would create nationwide antitrust violations by further consolidating market share in a company that owned about 50 percent of the U.S. beer market before the merger. In other words, given the existing market concentration, virtually any addition to AB's holdings would be an antitrust violation.

They also posit that because of InBev's expertise in selling beer and financial resources, the company was one of few in the world that could have entered the otherwise oligopolistic

U.S. beer market as a major player either *de novo* by building breweries or by obtaining a "toe hold" acquisition. Because of this, the Missouri commentators assert that the merger has decreased the competition in the U.S. beer market (as well as the local markets specified in the complaint), both by eliminating InBev as a perceived competitor -- a business that could enter the market and whose very existence places competitive pressure on the actual participants to prevent this eventuality -- and/or by eliminating InBev as a source of future competition. They argue that these effects constitute antitrust violations under theories propounded by the Supreme Court in *U.S. v. Flagstaff Brewing Corp.*, 410 U.S. 526 (1973).

The commentators point to the effects of the 2006 import agreement between InBev and Anheuser-Busch on the U.S. market as evidence for this theory. They assert that, after InBev was created in 2004, the company announced its intent to enter the U.S. market, which in turn resulted in Anheuser-Busch significantly discounting its prices through promotions and increased advertising expenditures. According to the Missouri commentators, these trends ended only when InBev sold its sole U.S. brewery, Rolling Rock, to Anheuser-Busch, and the two companies then entered into their import agreement in 2006. The merger would make the anticompetative effects of these acts

permanent, and would forever dissolve any possibility that InBev would enter the U.S. market as an actual competitor.

As to their concern about KPS as the government-approved acquirer, the Missouri commentators first criticize KPS's lack of experience in the beer industry, pointing out that the company is only a recent entrant, and that the person apparently chosen to run their brewing operations has worked mostly in the paper industry. The commentators also allege that KPS will be willing to sacrifice the long term viability of the U.S. Labatt assets for short term gain because KPS's business model is to purchase companies, do whatever it takes to make them look profitable, and then sell them in whole or in parts, whichever is more lucrative. They even posit (without an inkling of actual evidence) that there might be a secret agreement between InBev/AB and KPS, because, in the commentators' opinion, no company without significant industry experience would attempt to compete head to head with AB/InBev. Also, they assert that, even if KPS opts to contract brew with AB/InBev (at the hearing the government asserted that KPS will do so), it would still be possible for InBev to manipulate supply covertly. In sum, they characterize the proposed sale to KPS as a "sham" transaction.

The Missouri commentators expend some effort arguing that the merger is not in the public interest as a general matter, citing to statements by politicians and others who oppose

the transaction on the grounds that it will cost jobs and have a detrimental affect on the beer market. They filed news articles stating that the merger has caused job losses and increased beer prices already.

Last, these commentators argue the more technical point that the 2006 import agreement is a "determinative document" within the meaning of 15 U.S.C. § 16(b), even though the government did not consider it so. Their argument appears to be that the document was determinative because it suppressed competition and therefore reduces significantly the effects that the merger could have and has had on the beer market -- and that this by default narrowed the government's attention to only the head-to-head competition between Anheuser-Busch beers and the Labatt brand.

Analysis

The government moved for entry of final judgment on March 11, 2009.

> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such 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).

The exact contours of a standard by which to apply these criteria and make a "public interest" determination is, however, elusive. The case law and the legislative history of the Act make it abundantly clear that this court's review is not to be a "rubber stamp" - but that is a singularly unhelpful guideline. Other than overruling the general "mockery of judicial power" standard of review created by *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776 (D.C. Cir. 1997) (*MSLA*), the 2004 amendments shed little additional light on the subject. *See*, Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub.L. No. 108-237, § 221(a)(1)(B); *U.S. v. SBC Communications, Inc.*, 489 F.Supp.2d 1, at 13-14 (D.D.C. 2007). For substantially the same reasons explained in Judge Sullivan's excellent decision *U.S. v. SBC Communications, Inc.*, 489 F.Supp.2d at 15-16, I therefore turn for guidance to our Circuit's decision in *U.S. v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).

The *Microsoft* panel explained that a district court cannot reject a consent judgment based merely on the judge's

belief that a different remedy is preferable, and must instead approve proposals that fall within the "reaches of the public interest." *SBC Communications*, 489 F.Supp.2d at 15-16 (*citing*, *Microsoft*, 56 F.3d at 1458-61). The "government's predictions as to the effect of the proposed remedies" are given deference, and reviewed primarily for whether they have a factual basis and are reasonable. *See, id.*; *Microsoft*, 56 F.3d at 1460. Review of the adequacy of a consent decree is even more deferential than review of an agreed-upon modification to an already approved final judgment, which itself should not be rejected "unless [the court] has exceptional confidence that adverse antitrust consequences will result-perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." *Microsoft*, 56 F.3d at 1459 (internal quotation omitted).

A. Violations Beyond Those Alleged in the Complaint

A relatively concrete and easily applied rule of Tunney Act review is that the "public interest" is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged. This court cannot "inquire beyond the complaint" unless it is drawn so narrowly that it makes a "mockery of judicial power." *SBC Communications*, 489 F.Supp.2d at 14 (*citing*, *Microsoft*, 56 F.3d at 1462). In other words, speculation that the merger at

bar will cause or has caused antitrust violations beyond those in the complaint is irrelevant to whether entry of a proposed Final Judgment is in the public interest, except in the most extreme circumstances. The Missouri commentators argue that the 2004 amendments to the Tunney Act overruled the *Microsoft* panel's holding in this regard. But I once again agree with Judge Sullivan that neither the text of those amendments nor their legislative history provides adequate support for that position. *SBC Communications*, 489 F.Supp.2d at 14-15.

The Missouri commentators' *Falstaff* theory, and their other theories about the possible nationwide anticompetitive effects of the merger, fall well outside the scope of the complaint, the allegations of which are limited to specific geographical locals, *i.e.* Rochester, Syracuse, and Buffalo. They attempt to revive these claims by arguing that the phrase "potential competition" in ¶ 28(a) of the complaint somehow expands the complaint's breadth, but this is not so. At the merits hearing the government explained that the phrase referred only to future head-to-head competition between Anheuser-Busch brands and Labatt and its current and not yet developed extensions -- an interpretation fully supported by the language of the complaint as a whole.

B. The § 16(e)(1) Factors

The proposed judgment, the terms of which are not "ambiguous," directly "terminat[es] . . . the alleged violations." 15 U.S.C. § 16(e)(1)(A). Sale of the U.S. Labatt assets to an independent third party that receives no funding from the defendants and that will attempt to maintain the assets as a viable, competitive force is perhaps the simplest and most effective means of preserving "competition in the relevant . . . markets," with the effect on the "public generally" of preventing potential increases in beer prices that might other result from the consolidation of the Syracuse, Buffalo, and Rochester beer markets. 15 U.S.C. § 16(e)(1)(B).

A meaningful "duration of the relief sought" is adequately provided for because the acquirer is given the proper tools to sell and brew Labatt in perpetuity, and because AB/InBev cannot repurchase the assets while the Final Judgment is in place. 15 U.S.C. § 16(e)(1)(A). "[O]ther competitive considerations bearing on the adequacy of such judgment," such as the commentators' expressed, and perhaps legitimate, concerns over whether the U.S. Labatt assets will remain a viable entity, have also been adequately addressed. 15 U.S.C. § 16(e)(1)(A). The government believes that it is unnecessary, and that it might even create counter-productive inefficiencies to require that the acquirer brew its Labatt in Canada, that the existent distributor

network be maintained, and/or that the acquirer maintain current pricing models, packaging diversity, and levels of investment in promoting the brand are. These predictions, to which deference must be given, are not unreasonable. They are also the kinds of ordinary business decisions that the government and the acquirer are far better positioned to make than the court. Nor do the distributors' proposed modifications, which are largely self-serving, meaningfully improve on the Final Judgment's terms. And the "specific injur[ies]" alleged by the distributors -- that they may lose their contracts or past investments in marketing Labatt -- are best characterized as the normal risks of doing business, insufficient to raise actionable doubt into this public interest analysis. 15 U.S.C. § 16(e)(1)(B). Other specific injuries alleged, such as job losses at AB/InBev, are regrettable, but, under the facts here, do not appear significantly different from those that follow many large mergers.

It is not clear that this court has any role in monitoring the reasonableness of the government's approval of KPS as the acquirer. Assuming that there is such a role, however, I find that that approval, too, is consistent with the public interest. There is no evidence of any secret agreement or that the sale is in any way a sham. At the merits hearing the government represented that it had determined that KPS has the

intent and capability to compete effectively in the relevant markets and to maintain a level of competition similar to that which existed pre-merger. The government also noted that when KPS acquired the High Falls brewery, it not only obtained sufficient brewing capacity to supply the U.S. markets for Labatt, but also retained personnel experienced in the beer market. According to the government, KPS also hired a number of former IUSA employees with significant experience marketing and selling Labatt.

The "provisions for enforcement and modification" of the Final Judgment are clear. 15 U.S.C. § 16(e)(1)(A). The government can force the defendants to submit written reports, and can perform compliance inspections on reasonable notice in order to inspect copies of all of defendants' "books, ledgers, accounts, records, data, and documents," and to interview defendants' "officers, employees, or agents." PFJ at 16. This court retains jurisdiction to enable any party to apply for modification of or compliance with the Final Judgment, as well as to punish violations of its terms. PFJ at 17.

The government asserts that the only "alternative remed[y] actually considered," 15 U.S.C. § 16(e)(1)(A), was a full trial on the merits, CIS pg. 11. This option was rejected because the government believed that divestiture would preserve competition in the relevant markets and achieve all or

substantially all of the relief that could have been obtained through litigation. *Id.* In contrast, a trial would have cost the parties time and expense, while its outcome, and *any* relief that might have been obtained, would have been uncertain. *Id.* Given the straightforward violations alleged, it is difficult to take issue with the assessment that little, if any, additional "public benefit" could have been "derived from the determination of the issues at trial." 15 U.S.C. § 16(e)(1)(B).

C. Determinative Documents

Last, the Missouri commentators claim that the 2006 import agreement between AB and InBev was a "determinative document" which should have been published pursuant to 15 U.S.C. § 16(b) fails. Section 16(b) only mandates publication of documents "which the United States considered determinative in formulating [a] proposal." 15 U.S.C. § 16(b). The word "determinative" has been taken to mean documents that are "smoking guns" or the "exculpatory opposite." *MSLA*, 118 F.3d at 784-85. Exactly how much deference is given to the government's determination of what is or is not determinative is not entirely clear from the case law, but a significant amount is surely due. In any event, the question here is not a particularly close one.

The government's explanation at the merits hearing -- that although review of the import agreement may have played some role in understanding the landscape of the national beer market,

the document did not have a large effect formulating their proposal -- makes sense. At bottom, the Missouri commentators' argument invokes matters well beyond the violations alleged in the complaint, and therefore could not have played much of a role in determining the particulars of the proposed settlement. *See*, *Id.* at 784-85. Unaccompanied by credible allegations of bad faith, the government's determination in this case, which involves rather direct and uncomplicated alleged violations and proposed remedies, is reasonable.

Conclusion

For the reasons stated above, the parties' motion for entry of the proposed Final Judgment, Dkt. #23, is granted. It is **SO ORDERED.**

JAMES ROBERTSON
United States District Judge