DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—U.S. Photovoltaic Manufacturing Consortium, Inc.

Notice is hereby given that, on August 20, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), U.S. Photovoltaic Manufacturing Consortium, Inc. (''USPVMC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Ultrasonic Technologies, Wesley Chapel, FL; Polaritek Systems, Inc., Atlanta, GA; Spire Solar, Bedford, MA; Process Research, Trenton, NJ; and Sinton Instruments, Boulder, CO, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and USPVMC intends to file additional written notifications disclosing all changes in membership.

On November 14, 2011, USPVMC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 21, 2011 (76 FR 79218).

The last notification was filed with the Department on

May 21, 2013. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 21, 2013 (78 FR 37572).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–23162 Filed 9–23–13; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cable Television Laboratories, Inc.

Notice is hereby given that, on August 26, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Cable Television Laboratories, Inc. (''CableLabs'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Cablevision S.A., Buenos Aires, ARGENTINA, has been added as a party to this venture.

Also, Buford Media Group, Tyler, TX, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CableLabs intends to file additional written notifications disclosing all changes in membership.

On August 8, 1988, CableLabs filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 7, 1988 (53 FR 34593).

The last notification was filed with the Department on August 1, 2013. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 3, 2013 (78 FR 54277).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–23161 Filed 9–23–13; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. *Anheuser-Busch Inbev SA/NV, et al.* Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the United States's Response to Public Comments on the proposed Final Judgment in *United States* v. *Anheuser-Busch InBev SA/NV, et al.,* Civil Action No. 1:13–cv–00127–RWR, which was filed in the United States District Court for the District of Columbia on September 13, 2013. Copies of the five comments received by the United States from the public were also filed with the court.

Copies of the comments and the response are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: (202) 514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr/cases/abimodelo.html*, and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of any of these materials may also be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

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)

Plaintiff United States's Response To Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''APPA'' or ''Tunney Act''), the United States hereby files the public comments concerning the proposed Final Judgment in this case and the United States's response to those comments. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court, pursuant to 15 U.S.C. 16(b)–(h), to enter the proposed Final Judgment after the United States has posted all public comments and this response on the Antitrust Division Web site and published in the **Federal Register** this response and the Web site address at which the public comments may be viewed and downloaded, as set forth in the Court's order dated August 2, 2013.[1] (Doc. 42).

[1] Commenter Steven Uhr has submitted 18 exhibits in support of his Tunney Act comment. Two of those exhibits are videos for which he provided only written internet links. Another two are videos which he provided on a DVD and for which he also provided internet links. The Tunney Act requires the Department to ''receive and consider any *written* comments relating to the proposal for the consent judgment,'' 15 U.S.C 16(d) (emphasis added). However, the Department considered the entirety of Mr. Uhr's submission and will publish the written links he provided. It has informed Mr. Uhr that it does not intend to post the videos themselves on the Department's public Web site, and publication in the **Federal Register** would be impossible.

I. Procedural History

On January 31, 2013, the United States filed a Complaint in this matter, alleging that Defendant Anheuser-Busch InBev SA/NV's (''ABI'') proposed purchase of the remaining equity interest in Defendant Grupo Modelo, S.A.B. de C.V. (''Modelo'') would lessen competition substantially for the sale of beer in the United States and specifically in 26 local markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

On April 19, 2013, the United States filed a Competitive Impact Statement (''CIS''), a proposed Final Judgment, and a Stipulation and Order signed by the parties consenting to entry of the proposed Final Judgment after compliance with the requirements of the APPA. Under the terms of the Stipulation and Order, Constellation Brands, Inc. (''Constellation'') was added as a Defendant for purposes of settlement. Pursuant to the requirements of the APPA, the United States published the proposed Final Judgment and CIS in the **Federal Register** on May 22, 2013, *see* 78 FR 30399–30660, and had 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, published in *The Washington Post* for seven days beginning on April 28, 2013, and ending on May 4, 2013. The Defendants filed the statement required by 15 U.S.C. 16(g) on May 3, 2013. The 60-day period for public comments ended on July 22, 2013. The United States received five comments, as described below and attached hereto.

II. The Investigation and the Proposed Resolution

A. Investigation

As of June 28, 2012, ABI held a 35.3% direct interest in Modelo, and a 23.3% direct interest in Modelo's operating subsidiary Diblo S.A. de C.V. That ownership interest gave ABI certain minority voting rights and the right to appoint nine members of Modelo's 19-member Board of Directors. On June 28, 2012, ABI agreed to purchase the remaining equity interest from Modelo's owners, thereby obtaining full ownership and control of Modelo, for approximately $20.1 billion (the ''ABI/Modelo transaction''). At the time, Defendants ABI and Modelo also proposed to sell Modelo's stake in Crown Imports, LLC (''Crown'') to Constellation. Crown was the joint venture established by Modelo and Constellation to import, market, and sell certain Modelo beers into the United States. In an attempt to address harm to competition that the ABI/Modelo transaction likely would cause, ABI also proposed to enter into a ten-year supply agreement to provide Constellation with Modelo beer to import into the United States.

The Antitrust Division of the United States Department of Justice (''Department'') investigated the likely effect of the ABI/Modelo transaction and the vertical ''fix'' proposed by the parties. As part of its investigation, the Department conducted dozens of interviews with the parties' distributor customers, beer brewer competitors, and other interested third parties. The Department obtained testimony from the Defendants' officers and employees and required the Defendants to respond to interrogatories and produce large quantities of documents. The Department carefully analyzed the information obtained and thoroughly considered all of the relevant issues.

As a result of the investigation, the Department filed a Complaint on January 31, 2013, alleging that ABI's acquisition of the remainder of Modelo likely would substantially lessen competition for the sale of beer in the United States market as a whole and specifically in 26 local markets in violation of Section 7 of Clayton Act, 15 U.S.C. 18. This loss of competition would likely result in higher beer prices and less innovation. Defendants' proposed sale of Modelo's interest in Crown and ten-year supply agreement would not have alleviated the potential harm to competition that the proposed ABI/Modelo transaction created: it did not create an independent, fully-integrated brewer with permanent control of Modelo brand beer in the United States. On April 19, 2013, the Department filed a proposed Final Judgment that, if entered by the Court, would resolve the litigation by remedying the violation alleged in the Complaint.

B. The Proposed Final Judgment

The proposed Final Judgment is designed to preserve competition in the United States and 26 local beer markets. As explained more fully in the CIS, the beer industry in the United States is highly concentrated and would become more so if ABI acquired all of the remaining Modelo assets, as the ABI/Modelo transaction originally proposed.

The Department determined through its investigation that large brewers engage in significant levels of tacit coordination, and that coordination has reduced competition and increased prices. In most regions of the United States, ABI and MillerCoors LLC, the second largest beer brewer in the United States, do not substantially constrain each other's annual price increases. The third largest brewer, Modelo, had increasingly constrained ABI's and MillerCoors's ability to raise prices. Therefore, ABI's acquisition of Modelo, as originally proposed, likely would have led to higher beer prices in the United States by eliminating a competitor that resisted coordinated price increases initiated by the market share leader, ABI.

Further, competition from Modelo had spurred significant product innovation and price concessions from ABI. The merger of the two firms, as originally proposed, likely would have reduced ABI's incentive to innovate, bring new products to market, make price concessions, and otherwise invest in attracting consumers away from the unique Modelo brands.

The proposed Final Judgment will accomplish the complete divestiture of Modelo's U.S. business to Constellation.[2] This structural fix will maintain Modelo Brand Beers [3] as independent competitors to ABI's flagship brands in the United States. Specifically, the proposed Final Judgment required ABI and Modelo [4] to divest and/or license to Constellation certain tangible and intangible assets, including: a perpetual and exclusive license to ten Modelo Brand Beers, including Corona Extra, this country's bestselling imported beer and fifth-bestselling brand overall; Modelo's newest, most technologically advanced brewery (the ''Piedras Negras Brewery''), which is located in Mexico near the Texas border, and the assets and companies associated with it; Modelo's limited liability membership interest in Crown; and other assets, rights, and interests necessary to ensure that Constellation is able to compete in the beer market in the United States using the Modelo Brand Beers, independent of a relationship with ABI.

To guarantee that Constellation will be able to supply Modelo Brand Beer to the United States market independent of ABI, Section V.A of the proposed Final Judgment requires Constellation to

[2] The proposed Final Judgment required ABI, if the divestiture to Constellation failed to close, to divest Modelo's U.S. business to another acquirer capable of replacing the competition that Modelo brought to the United States market. But the divestiture to Constellation closed on June 7, 2013. Accordingly, this response refers only to Constellation, not to another potential acquirer.

[3] Capitalized terms not defined in this response are defined in the proposed Final Judgment.

[4] On June 4, 2013, ABI completed its acquisition of Modelo. Accordingly, this response refers to ABI's and Modelo's obligations under the proposed Final Judgment as ABI's obligations.

expand the Piedras Negras Brewery to be able to produce 20 million hectoliters of packaged beer annually by December 31, 2016. Such expansion will allow Constellation to produce, independently from ABI, enough Modelo Brand Beer to replicate Modelo's competitive role in the United States. This expansion assures Constellation's future independence as a self-supplied brewer and seller in the United States beer market.

Sections IV.G–I of the proposed Final Judgment also require ABI and Constellation to enter into transition services and interim supply agreements. The Transition Services Agreement (Section IV.G) requires ABI to provide consulting services with respect to topics such as the management of the Piedras Negras Brewery, logistics, material resource planning, and other general administrative services that Modelo had provided to the Piedras Negras Brewery. It also requires ABI to supply certain key inputs (such as aluminum cans, glass, malt, yeast, and corn starch) to Constellation for a limited time. The Interim Supply Agreement (Section IV.H–I) requires ABI to supply Constellation with sufficient Modelo Brand Beer each year to make up for any difference between the demand for such beers in the United States and the Piedras Negras Brewery's capacity to fulfill that demand. The transition services and interim supply agreements are necessary to allow Constellation to continue to compete in the United States during the time it takes to expand the Piedras Negras Brewery's capacity to brew and bottle beer, but are time-limited to assure that Constellation will become a fully independent competitor to ABI as soon as practicable.

The proposed Final Judgment imposes two requirements on ABI regarding its distribution network that are designed to limit ABI's ability to interfere with Constellation's effective distribution of Modelo Brand Beer. First, Section V.C of the proposed Final Judgment provides that, for ABI's majority-owned distributors (''ABI-Owned Distributors'') that distribute Modelo Brand Beer, Constellation will have a window of opportunity to terminate that distribution relationship and direct the ABI-Owned Distributor to sell the distribution rights to another distributor. Similarly, should ABI subsequently acquire any distributors that have contractual rights to distribute Modelo Brand Beer, Constellation may require ABI to sell those rights. Second, Section V.B of the proposed Final Judgment prevents ABI for 36 months from downgrading a distributor's ranking in any ABI distributor incentive program by virtue of the distributor's decision to carry Modelo Brand Beer. The 36-month time period tracks the initial term of the transition service and interim supply agreements, and thus allows Constellation to maintain a status quo position for the Modelo Brand Beer in ABI's distribution incentive programs until Constellation can operate independently of ABI.

Finally, Section XIII of the proposed Final Judgment requires ABI to implement firewall procedures to prevent Constellation's confidential business information from being used within ABI for any purpose that could harm competition or provide an unfair competitive advantage to ABI based on its role as a temporary supplier to Constellation under either the transition services or interim supply agreements.

III. Standard of Judicial Review

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see also United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''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.'').

As the United States Court of Appeals for the District of Columbia 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 United States's Complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. 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; *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001). 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).[5] In determining whether a proposed settlement is in the public interest, 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*

[5] *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'''').

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's ''prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case'').

As courts have noted, ''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, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''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''). 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. *Microsoft,* 56 F.3d at 1459–60. As the United States District Court for the District of Columbia 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,[6] Congress made clear its intent to preserve the practical benefits of using 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). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney 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.[7]

IV. Summary of Public Comments and the United States's Response

During the 60-day public comment period, the United States received comments from the following individuals and entities:

- Steven Uhr, a Minnesota resident;
- Joseph M. Alioto, an attorney practicing in California who represents a group of private plaintiffs challenging the ABI/Modelo transaction;
- National Beer Wholesalers Association, a trade association representing more than 3,300 licensed, independent U.S. beer distributors;
- Food & Water Watch, a non-profit consumer advocacy organization; and
- Alcohol Justice, a self-described alcohol ''industry watchdog.''

This section summarizes the issues raised by the commenters and provides the United States's responses to those issues. Part A addresses issues raised by more than one commenter; Part B addresses issues raised by individual commenters.

A. Response to Issues Raised by Multiple Commenters

1. Comments Concerning the Effectiveness of Constellation as a Competitor

a. Summary of Comments

Two commenters argue that Constellation will not be an effective competitor. Commenter Food & Water Watch argues that it ''has little confidence'' that requiring ABI to grant a perpetual license to Modelo Brand Beer and divest the Piedras Negras Brewery and Modelo's interest in Crown to Constellation will maintain Modelo's role as a price competitor with ABI and MillerCoors LLC. Food & Water Watch Comment at 1. Specifically, Food & Water Watch argues that Constellation lacks experience in the brewery industry and will depend on ABI for essential inputs and 40 percent of its beer production until Constellation expands the Piedras Negras Brewery, and that Constellation likely will not be a dynamic price competitor because it is a ''novice market entrant'' that ''depends on the benevolence'' of ABI. *Id.* at 2. Similarly, commenter Joseph M. Alioto argues that Constellation will source its total supply of beer products from ABI, and that ''it is naïve to believe that Crown will not be controlled by ABI'' because ''Constellation has neither the experience, the money nor the will to compete vigorously against ABI.'' Alioto Comment at 2.

b. Response: The Proposed Final Judgment and Constellation's Experience and Assets Will Enable Constellation to Compete Effectively

As described in section II.B of this response and in the CIS, the proposed Final Judgment contains multiple provisions that will enable Constellation to compete effectively with Modelo Brand Beer in the United States. Most significantly, the proposed Final Judgment required ABI to divest Modelo's entire U.S. business. Furthermore, the proposed Final Judgment has provided Constellation with Modelo's newest and most advanced brewery, the Piedras Negras Brewery. With the required expansion of this facility, Constellation will

[6] 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); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

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

become a fully independent and self-supplied beer brewer.

The proposed Final Judgment also gives Constellation the incentive and ability to price Modelo Brand Beer independently of ABI. Prior to acquiring Modelo's U.S. business, Constellation, through its 50-percent interest in Crown, shared with Modelo the responsibility for importing, marketing, and selling Modelo-brand beers in the United States. The divestiture of Modelo's U.S. business has given Constellation full and permanent control of Modelo Brand Beer in the United States and made Constellation an independent beer brewer. These changes give Constellation an incentive to resist following ABI's price leadership in order to expand Constellation's market share.

Before approving Constellation as the purchaser of Modelo's U.S. beer business, the Department conducted an extensive two-month investigation into the proposed transaction and Constellation's suitability as the buyer. As part of this investigation, the Department considered Constellation's financial resources and business plans to ensure that Constellation will maintain Modelo's U.S. beer business as a long-term independent competitive force in the U.S. beer market. The Department carefully reviewed the proposed transactional and transitional agreements between ABI and Constellation, which agreements have been incorporated into the proposed Final Judgment,[8] and interviewed representatives of the Defendants to ensure that Constellation would receive what it needed to be an effective competitor with Modelo Brand Beer in the United States.

Furthermore, the proposed Final Judgment ensures that Constellation will have a reliable source of beer supply that does not depend on ABI's ''benevolence'' and that is not subject to ABI's control. The proposed Final Judgment has already resulted in Constellation's owning the Piedras Negras Brewery, which produces 60 percent of Modelo Brand Beer's U.S. sales. Furthermore, while Constellation expands the Piedras Negras Brewery, the proposed Final Judgment requires ABI to meet Constellation's remaining beer demands on pre-established terms that ABI may not change. These agreements are time-limited, however, to assure that Constellation will become a fully independent brewer as soon as practicable.[9]

The proposed Final Judgment also seeks to minimize the potential competitive risks of Constellation's interactions with ABI by including time limits on the expansion of the Piedras Negras Brewery (Section V) and by requiring ABI to implement firewall procedures to prevent Constellation's confidential business information from being used within ABI for any purpose that could harm competition or provide an unfair competitive advantage to ABI (Section XIII).

Finally, the proposed Final Judgment provides Constellation with the assets necessary to be a successful beer brewer. In addition to acquiring the Piedras Negras Brewery, Constellation has acquired Servicios Modelo de Coahuila, S.A. de C.V. (''Servicios Modelo''), a Modelo entity that employed Piedras Negras Brewery employees. Constellation's counsel has informed the Department that all individuals employed by Servicios Modelo on the closing date of the ABI/Constellation transaction remain Constellation employees as of the filing of this response. Together with the transition services provided by ABI and monitored by the Monitoring Trustee, these employees provide Constellation with the specific knowledge necessary to operate the Piedras Negras Brewery.

In addition, from 1993 to 2002, Constellation owned and operated a beer brewery in Stevens Point, Wisconsin.[10] While it owned the brewery, Constellation expanded brewing and warehousing capacity, added new beer products to its portfolio, and acted as a contract brewer for third parties.[11] Thus, Constellation has experience owning and expanding a brewery in the U.S. beer market, and creating innovative beer products. Constellation additionally has significant experience in the production of alcoholic beverages through its past and present ownership of cider breweries, wineries, and spirits distilleries around the world.[12]

2. Arguments Concerning ABI's Market Power

a. Summary of Comments

Two commenters argue that the proposed Final Judgment does not adequately address ABI's market power in the beer industry. Commenter Food & Water Watch argues that the proposed settlement is inadequate to ''address the increased and overwhelming market power'' of ABI and ''to prevent the growing consolidation and increased market power inside the supermarket.'' Similarly, Commenter Alcohol Justice argues that the proposed settlement increases ABI's market share and profits in the United States, thus increasing ABI's political and marketing influence in the United States.

b. Response: The Proposed Final Judgment Prevents ABI From Obtaining Additional Market Power in the United States

The proposed Final Judgment requires ABI to divest Modelo's entire U.S. beer business, which ABI did on June 7, 2013. Accordingly, the proposed Final Judgment prevents ABI from obtaining any additional market power or market share in the United States, and prevents the U.S. beer market from becoming further consolidated, as a result of the ABI/Modelo transaction.

B. Responses to Comments Made by Individual Commenters

1. Comments from Joseph M. Alioto

a. Summary of Comments

Commenter Joseph M. Alioto argues that the Court should reject the proposed Final Judgment because it embodies a ''sham,'' and that the effect of the ABI/Modelo transaction ''will be the very same as what it would have been'' absent the remedies contained therein. Specifically, Mr. Alioto argues

[8] Section IV.G of the proposed Final Judgment requires the Department to approve any amendments or modifications to the agreements incorporated into the proposed Final Judgment. The proposed Final Judgment subjects these agreements, including any extensions, to monitoring by a Monitoring Trustee, whose appointment by the Department was approved by the Court on June 24, 2013. (Doc. 40).

[9] ABI and Constellation have informed the Department that Constellation already has ceased purchasing certain transitional services from ABI under the Transitional Services Agreement.

[10] *See* Constellation Brands, Inc., Annual Report (Form 10–K) at 15 (Nov. 29, 1994) (Barton acquired the Stevens Point Brewery in September 1992); Constellation Brands, Inc., Annual Report (Form 10–K) at 47 (May 21, 2002) (Constellation sold the Stevens Point Brewery in March 2002).

[11] *See* Constellation Brands, Inc., Annual Report (Form 10–K) at 16 (May 29, 1997) (at the Stevens Point Brewery, Constellation brews and packages beer on a contract basis for third parties); Eric Decker, *Point Beverage sale part of brand strategy,* BizTimes.com (Mar. 15, 2002), *http://www.biztimes.com/article/20020315/MAGAZINE03/303159984/0/SEARCH* (describing introduction of Point Classic Amber in 1994, Point Pale Ale in 1995, a Maple Wheat brew in 1996, and a light beer in 1997); Stevens Point Brewery, *http://www.pointbeer.com/history/* (describing 40 percent expansion of Steven Point Brewery in 1994 and construction of a 15,000 square foot warehouse for finished goods in 1997).

[12] According to its 2013 Annual Report, Constellation operates 18 wineries in the United States, nine in Canada, four in New Zealand, and five in Italy. It also operates a whisky distillery in Canada. *See* Constellation Brands, Inc., Annual Report (Form 10–K) at 6 (Apr. 29, 2013). According to earlier SE.C. filings, Constellation previously owned and operated the second-largest cider brewery in the United Kingdom. *See* Constellation Brands, Inc., Annual Report (Form 10–K) at 5 (Apr. 29, 2009). Constellation sold its U.K. cider business in January 2010. *See* Constellation Brands, Inc., Annual Report (Form 10–K) at 2 (Apr. 29, 2010).

that the proposed Final Judgment ''is not sufficient to prevent Constellation from opening the floodgates and allowing ABI to collect profits that it would not otherwise receive because of the former competition on Crown.'' Alioto Comment at 2.

b. Response: The Proposed Final Judgment Is Not a Sham But Rather Requires ABI to Divest Modelo's Entire U.S. Beer Business

The proposed Final Judgment is not a sham because it creates an independent competitor to ABI. Constellation has paid approximately $4.75 billion to purchase Modelo's entire U.S. beer business, and it has announced plans to invest an additional $500-$600 million during the next three years to expand the Piedras Negras Brewery.[13] Pursuant to the proposed Final Judgment, Constellation will become an independent and economically viable brewer that replaces Modelo as a competitor in the United States.

ABI's divestiture to Constellation of the Piedras Negras Brewery, Modelo's interest in Crown, and the perpetual brand licenses required by the proposed Final Judgment, have vested in Constellation the brewing capacity, assets, and other rights needed to produce, market, and sell Modelo Brand Beer in a manner similar to that of Modelo before ABI acquired Modelo.

2. Comments from Food & Water Watch

a. Comments Regarding Markets Outside of the United States

Commenter Food & Water Watch argues that the proposed settlement should be rejected because it does not prevent ABI from acquiring Modelo's business outside of the United States. Food & Water Watch argues that the proposed settlement effectively gives ABI greater control over the world's beer markets, especially the Latin American marketplace, and ensures that ABI ''keeps the Modelo brands outside of the U.S. market.''

b. Response: The Harms Alleged in the Complaint Do Not Justify Food & Water Watch's Desired Remedies Outside of the United States

Food & Water Watch's desire for remedies outside of the United States is not a valid basis for the Court to reject a proposed remedy during a Tunney Act review. As discussed above, in a Tunney Act proceeding, the task before 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); *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''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'').

In this case, the Department did not allege that ABI's acquisition of the remainder of Modelo would result in anticompetitive harm outside of the United States. Absent such allegation, there is no justification for a remedy relating to non-U.S. beer markets. Furthermore, if the ABI-Modelo transaction were to result in anticompetitive harm outside of the United States, it would be up to the competition authority in the relevant jurisdiction—not the Department—to remedy such harm.

c. Comments Regarding Distribution and Retail Issues

Commenter Food & Water Watch also argues that the proposed settlement should be rejected because (1) it ''does nothing to constrain the collusive vertical control'' that ABI exerts through its beer distribution networks, and (2) ABI prevents new market entrants from obtaining retail space and constrains consumer choice.

d. Response: Additional Remedies Concerning Distribution and Retail Issues Are Not Justified Based on the Harms Alleged in the Complaint

The Department alleged in the Complaint that the proposed ABI/Modelo transaction would likely substantially lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and that it would have the following anticompetitive effects:

(a) eliminate Modelo as a substantial, independent, and competitive force in the relevant markets;

(b) raise beer prices to levels above those that would prevail absent the transaction;

(c) lower quality and innovation to less than levels that would prevail absent the transaction;

(d) promote and facilitate pricing coordination in the relevant markets; and

(e) provide ABI with a greater incentive and ability to increase its pricing unilaterally.

See Complaint ¶86.

As described in Section II.B above, the proposed Final Judgment requires ABI to divest Modelo's entire U.S. business. ABI must divest and/or license to Constellation tangible and intangible assets, including: a perpetual and exclusive license to ten Modelo Brand Beers, the Piedras Negras Brewery and the assets and companies associated with it; Modelo's limited liability membership interest in Crown; and other assets, rights, and interests necessary to ensure that Constellation is able to compete in the beer market in the United States using the Modelo Brand Beers, independent of a relationship with ABI. The proposed Final Judgment thus eliminates the anticompetitive effects of the ABI/Modelo transaction and positions Constellation to compete vigorously as a brewer of beer sold in the United States.

In addition, Sections V.B and V.C of the proposed Final Judgment limit ABI's ability to interfere with Constellation's distribution of Modelo Brand Beer to improve Constellation's ability to compete with ABI and other brewers. Section V.C provides that, for ABI-Owned Distributors that distribute Modelo Brand Beer, Constellation will have a window of opportunity to terminate that distribution relationship and direct the ABI-Owned Distributor to sell the distribution rights to another distributor. Similarly, should ABI subsequently acquire any distributors that have contractual rights to distribute Modelo Brand Beer, Constellation may require ABI to sell those rights. Section V.B of the proposed Final Judgment prevents ABI for 36 months from downgrading a distributor's ranking in any ABI distributor incentive program by virtue of the distributor's decision to carry Modelo Brand Beer. The 36-month time period allows Constellation to maintain a status quo position for the Modelo Brand Beer in ABI's distribution incentive programs until Constellation can operate independently of ABI.

Commenter Food & Water Watch's desire for additional remedies relating to beer distribution and retail sales is

[13] *See* June 7, 2013, Constellation press release, available at http://www.cbrands.com/news-media/constellation-brands-completes-acquisition-grupo-modelos-us-beer-business.

not a valid basis for rejecting the proposed Final Judgment because those additional remedies are not needed to remedy the antitrust violations alleged in the Complaint. Rather, the proposed Final Judgment is in the public interest because it is properly designed to eliminate the anticompetitive effects alleged in the Complaint. As discussed in Section III of this response, the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *Microsoft,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see also SBC Commc'ns,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *InBev,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''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.'').

In short, the additional remedies Food & Water Watch proposes concerning distribution and allocation of retail shelf space are not needed to remedy the violations alleged in the Complaint, and thus are not needed to preserve the public interest. The Department has determined that the remedies in the proposed Final Judgment are sufficient to allow Constellation to be an effective competitor and maintain competition in the U.S. beer market and the local markets alleged in the Complaint.

3. Comments from Steven Uhr

a. Summary of Comments

Commenter Steven Uhr argues that ''there is an ongoing conspiracy to fix retail alcohol prices in scores of communities in North America and elsewhere,'' in which ABI and its beer distributors are ''active conspirators.'' Uhr Comment at 1. Mr. Uhr argues that the proposed Final Judgment is contrary to the interest of U.S. beer consumers because allowing ABI to acquire Modelo's beer business outside of the United States enhances the conspiracy's efficiency by substantially increasing concentration in the world beer market. *Id.* at 3. Finally, Mr. Uhr states that the impartiality of the Department is in question,[14] and urges the Court to ''carefully scrutinize the [Department's] claims that the [U.S. beer] market presently is competitive, the proposed fix is in the public interest, and further litigation is a waste of resources.'' *Id.* In essence, Mr. Uhr asserts that the Department should have pleaded and remedied anticompetitive effects related to an alleged worldwide alcohol price-fixing conspiracy.

b. Response: The Harms Alleged in the Complaint Do Not Justify Mr. Uhr's Desired Remedies Outside of the United States

Mr. Uhr's assertion that the Department should have alleged a worldwide alcohol price-fixing conspiracy concerns matters that are outside the scope of this APPA proceeding because the harm that he claims—making the conspiracy more efficient—does not relate to the harms alleged in the Department's Complaint. Because the United States did not allege the existence of a worldwide alcohol price-fixing conspiracy, the Court need not and should not examine the effect of the proposed Final Judgment on such an alleged conspiracy. Moreover, the Department does not have evidence of a world-wide conspiracy to fix alcohol prices. If the Department had evidence that such a conspiracy existed and affected consumers in the United States, it would take appropriate action.

4. Comments from Alcohol Justice

a. Comment Concerning Lower Beer Prices

Commenter Alcohol Justice acknowledges that the proposed Final Judgment is ''intended to protect consumers by maintaining competitiveness in the U.S. beer market and ensuring lower prices,'' but argues that low beer prices are ''contrary to the public interest'' because beer is a drug that is widely used and commonly abused. Alcohol Justice Comment at 1. Alcohol Justice argues that a ''deal to keep beer prices low may address anti-competitive concerns, but will likely make excessive consumption and related harm even worse.'' *Id.*

b. Response: The Effect of Lower Beer Prices on Beer Consumption Is Not A Valid Basis For Rejecting the Proposed Final Judgment

Alcohol Justice's argument against lower beer prices is not a valid basis for rejecting the proposed Final Judgment. The Tunney Act requires the Court to evaluate the effect of the proposed Final Judgment ''upon competition'' as alleged in the Complaint. Alcohol Justice's argument does not criticize the efficacy of the relief contained in the proposed Final Judgment to remedy the competitive harm alleged in the Complaint. Accordingly, Alcohol Justice's comment does not provide an appropriate rationale for rejecting the proposed Final Judgment.

c. Comment Concerning the Distribution Tier

Commenter Alcohol Justice also argues that ''the divestiture of the Piedras Negras brewery and Crown Imports eliminates Modelo and concentrates the distribution of Modelo brands solely in the hands of'' Constellation, that the proposed Final Judgment ''requires'' the elimination of the distribution tier, and that under the proposed Final Judgment, ''Constellation will produce and distribute Modelo brands.'' Alcohol Justice Comment at 2.

d. Response: The Proposed Final Judgment Does Not Eliminate the Beer Distribution Tier in the United States

Contrary to Alcohol Justice's assertions, the proposed Final Judgment does not eliminate the beer distribution tier in the United States, and Constellation will not distribute Modelo Brand Beer directly to retailers. Constellation will sell Modelo Brand Beer to distributors in the U.S. beer market just as Crown, Constellation's prior joint venture with Modelo, sold Modelo brands of beer to U.S. distributors pre-divestiture.

5. National Beer Wholesalers Association's Request for Clarification

a. Summary of Request

Commenter National Beer Wholesalers Association has requested clarification that the 60-day notification requirements of Section XII.A of the proposed Final Judgment apply when ABI acquires, directly or indirectly, a beer distributor (1) that is licensed to distribute a non-ABI beer brand from a brewer, importer, or brand owner—other than ABI—that derives more than $7.5 million in annual gross revenue from beer sales in the United States, and (2) whose license to distribute the non-ABI beer brand generates at least $3 million in actual gross revenue in the United States.

b. Response: The Notice Provision Contained in Section XII.A of the Proposed Final Judgment Applies to Certain Acquisitions by ABI of Beer Distributors

The Department confirms Commenter National Beer Wholesalers Association's reading of Section XII.A, which is clear when Section XII.A is read in conjunction with the defined terms Covered Interest and Covered Entity.

[14] The Department disagrees with Mr. Uhr's assertion that the Department ''contends that unambiguous per se price fixing agreements'' ''raise no antitrust issues.'' *See* Uhr Comment at 3.

Section XII.A of the proposed Final Judgment states:

> Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), ABI, without providing at least sixty (60) calendar days advance notification to the United States, shall not directly or indirectly acquire or license a Covered Interest in or from a Covered Entity; provided, however, that advance notification shall not be required for acquisitions of the type addressed in 16 CFR 802.1 and 802.9.

As defined in Section II.I of the proposed Final Judgment, a Covered Interest ''means any non-ABI Beer brewing assets or any non-ABI Beer brand assets of, or any interest in (including any financial, security, loan, equity, intellectual property, or management interest), a Covered Entity; except that a Covered Interest shall not include (i) a Beer brewery or Beer brand located outside the United States that does not generate at least $7.5 million in annual gross revenue from Beer sold for resale in the United States; or (ii) a license to distribute a non-ABI Beer brand where said distribution license does not generate at least $3 million in annual gross revenue in the United States.'' As defined in Section II.H of the proposed Final Judgment, a Covered Entity ''means any Beer brewer, importer, or brand owner (other than ABI) that derives more than $7.5 million in annual gross revenue from Beer sold for further resale in the United States, or from license fees generated by such Beer sales.''

Accordingly, if by acquiring a beer distributor, (1) ABI were to acquire a license to distribute a non-ABI beer brand from a brewer, importer, or brand owner that derives more than $7.5 million in annual gross revenue from beer sales (sold for further resale) in the United States, and (2) the license to distribute the non-ABI beer brand generates at least $3 million in actual gross revenue in the United States, ABI will have acquired a Covered Interest in a Covered Entity, thus triggering the notice provisions of Section XII.

The Department notes that Commenter National Beer Wholesalers Association has requested that the Department provide its requested clarification in this response to public comments and has not requested that the proposed Final Judgment be modified in any respect. The Department agrees that modification of the proposed Final Judgment is unnecessary.

V. Conclusion

After reviewing the public comments, the United States continues to believe 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 it has posted all public comments and this response on the Antitrust Division Web site and published in the **Federal Register** this response and the Web site address at which the public comments will be posted.

Dated: September 13, 2013

Respectfully submitted,

/s/Michelle R. Seltzer

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Certificate of Service

I, Michelle R. Seltzer, hereby certify that on September 13, 2013, I caused a copy of Plaintiff United States's Response to Public Comments 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 email to the duly authorized legal representatives of the defendants, as follows:

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DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Securing Financial Obligations Under the Longshore and Harbor Workers' Compensation Act and its Extensions

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, ''Securing Financial Obligations Under the Longshore and Harbor Workers' Compensation Act and its Extensions,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before October 24, 2013.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201306-1240-003* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Information Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210, email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).