IT'S ALWAYS A GOOD TIME FOR BEER, BUT WHAT ABOUT THE HOPS?

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I. INTRODUCTION

The world is becoming a smaller place, especially if you like beer. In March of 2011, Graham Mackay, the Chief Executive Officer of SABMiller PLC, spoke to a brewer conference about why brewers were discovering "'[i]t's

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harder to make the numbers work.'"[1] Mackay was discussing the increased concentration within world beer markets and, as a result, surge in global brewer acquisitions.[2] As a backdrop to Mackay's comments, SABMiller was rumored to be interested in acquiring Australian brewer Foster's.[3] In September of 2011, SABMiller announced the hostile takeover of Foster's, ending a four-month battle between the two brewers,[4] and further increasing global beer market concentration.

In the United States, nearly eighty percent of the beer market is controlled by two brewers: (1) MillerCoors, a joint venture between SABMiller and Molson Coors, and (2) Anheuser-Busch InBev.[5] Even after SABMiller announced the purchase of Foster's, rumors began flying of a possible merger in the works between Anheuser-Busch InBev and SABMiller.[6] The possibility of a merger between the world's number one and two brewers, respectively, screams of monopolization concerns within the brewing industry and a need for antitrust review. Although that merger was only a rumor, more recently Anheuser-Busch InBev announced their desire to acquire Mexico's largest brewer, Grupo Modelo (the maker of Corona).[7] After years of acquiescence in beer industry consolidation, the Department of Justice (DOJ) moved to block the proposed acquisition between the number one and number three largest beer makers in the United States due to antitrust and anti-competitiveness concerns.[8] Reports suggest the

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1. Clementine Fletcher, *SABMiller Chief Mackay Foresees More Consolidation in Global Beer Industry*, BLOOMBERG (Mar. 29, 2011), http://www.bloomberg.com/news/2011-03-29/sabmiller-chief-mackay-foresees-more-consolidation-in-global-beer-industry.html.

2. *Id.*

3. *Id.*; David Jones & Victoria Thieberger, *Exclusive: SABMiller Preparing New Assault on Foster's*, REUTERS (Aug. 10, 2011), http://www.reuters.com/article/2011/08/10/us-fosters-sabmiller-idUSTRE77938120110810.

4. Julia Werdigier, *SABMiller to Buy Foster's for $10.15 Billion*, N.Y. TIMES, Sept. 21, 2011, http://dealbook.nytimes.com/2011/09/21/sabmiller-to-buy-fosters-for-10-15-billion/.

5. MARIN INST., BIG BEER DUOPOLY: A PRIMER FOR POLICYMAKERS AND REGULATORS 3 (2009), http://alcoholjustice.org/images/stories/pdfs/big_beer_duopoly.pdf; *see also* Stephen Pearlstein, *Beer Merger Would Worsen Existing Duopoly by AB InBev, SAB Miller*, WASH. POST, Feb. 2, 2013, http://www.washingtonpost.com (search "Beer Merger"; then follow "Beer merger would worsen existing duopoly"); ANHEUSER-BUSCH, http://anheuser-busch.com (last visited Apr. 12, 2013) (advertising their 47.6% U.S. market share on homepage).

6. Clementine Fletcher, *SABMiller Shares Surge on Takeover Report*, BLOOMBERG (Oct. 6, 2011), http://www.bloomberg.com/news/2011-10-06/sabmiller-shares-surge-on-report-of-ab-inbev-takeover-talks.html.

7. Jia Lynn Yang, *Justice Department Sues to Block Anheuser-Busch InBev Merger with Grupo Modelo*, WASH. POST, Jan. 31, 2013, http://www.washingtonpost.com (search "block Anheuser-Busch"; then follow "Justice Department Sues to Bock Anheuser-Busch InBev Merger" link).

8. *Id.*

brewers expect to resolve the antitrust issues raised by DOJ in the consent decree currently being crafted.[9] This challenge by DOJ should be welcomed news for those concerned about consolidation in the brewing industry, however, whether brewing industry agricultural suppliers have reason to raise a glass in celebration remains to be seen.

Logically, any DOJ analysis will consider effects of an acquisition upon competition within the beer market. Acquisitions, however, affect not only beer enthusiasts; they also affect agricultural producers, and thus these producers also have a stake in brewer acquisitions.[10] Agriculture and brewers are intrinsically linked because brewers rely on agriculture to produce the grains needed for the malting process.[11]

This Note discusses brewer monopolization concerns. Specifically, it argues that traditional antitrust review of the beer industry does not take into account the effect on agriculture and why a change in policy is necessary. Part II gives an overview of the beer industry and the connection between agriculture and brewers. Part III discusses antitrust procedures, specifically, analyzing how DOJ and the courts, through 15 U.S.C section 16, could consider an acquisition's effect on agriculture. Part IV centers on DOJ and the courts' failure to take into consideration agricultural third-party harm, in part because of the precedent set in *United States v. Microsoft Corp.*,[12] and why such a failure creates a negative impact for future antitrust reviews. To conclude, this Note reiterates the importance of agriculture to brewers and recommends why courts should consider affects upon agriculture when determining harm to third parties under subsections (e) through (f) of 15 U.S.C. section 16, if DOJ chooses not to.

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9. Mark Scott, *Anheuser-Busch InBev Revises $20.1 Billion Takeover Plan*, N.Y. TIMES, Feb. 14, 2013, http://dealbook.nytimes.com/2013/02/14/anheuser-busch-inbev-revises-deal-for-grupo-modelo/?ref=anheuserbuschinbevnv (describing revised terms of proposed takeover to persuade authorities to permit the deal).

10. *See* JOHN DUNHAM & ASSOCS., THE BEER INSTITUTE ECONOMIC CONTRIBUTION STUDY: METHODOLOGY AND DOCUMENTATION 4–5 (2011), http://beer.guerrillaeconomics.net/assets/site/res/2012%20BSA%20Economic%20Impact%20Methodology.pdf (explaining the "ripple effect" one activity has on the industry). For example, "[t]he activities required to produce a six-pack of beer from malting barley, to packaging, to shipping generate the direct effects on the economy." *Id.* at 5.

11. *See Brewing Industry Needs a Diverse Supply of Malting Barley*, FARM & RANCH GUIDE, Nov. 3, 2012, http://www.farmandranchguide.com/news/regional/brewing-industry-needs-a-diverse-supply-of-malting-barley-article-05d65e8e-2376-11e2-8f39-001a4bcf887a.html.

12. 56 F.3d 1448, 1452 (D.C. Cir. 1995).

II. THE BEER INDUSTRY AND AGRICULTURAL INPUTS

To understand brewery monopolization concerns, one first must understand the current beer market, and second, the current environment for litigating antitrust or uncompetitive business practices. Finally, the nexus between agriculture and beer provides the explanation for why agricultural concerns are an important factor to take into account when analyzing brewer acquisitions.

A. *Beer Industry*

Traditionally, beer was brewed locally to keep with the traditions and tastes of local consumers.[13] Localized production also allowed brewers to carefully manage volume with consumption.[14] While breweries continue to produce locally, ownership of these breweries has become increasingly globalized.[15]

Three international breweries control more than forty percent of the world beer market.[16] Anheuser-Busch InBev (ABI) is the largest followed by SABMiller (SAB), and finally Heineken.[17] Within North America eighty percent of the beer market is dominated by two firms: SAB and ABI.[18] In Central and South America, ABI, SAB, and Heineken have a combined market share of sixty-two percent, not including their stakes in other regional brewers.[19] ABI, SAB, and Heineken's dominion over the beer market is a consequence of mergers and acquisitions.[20] As the big three brewers acquire smaller regional and local brewers, they create even more concentrated markets, requiring brewers to undertake further mergers or acquisitions to gain additional market share.[21]

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13. INT'L CTR. FOR ALCOHOL POLICIES, ICAP REPORT NO. 17, THE STRUCTURE OF THE BEVERAGE ALCOHOL INDUSTRY 3 (2006), *available at* http://www.icap.org/LinkClick.aspx ?fileticket=DZ9ittvJ/Zs=.

14. *See id.* at 5.

15. *See id.*

16. *See id.* at 4 fig.4 (taking into account the combined market shares of the acquisition of Anheuser-Busch by Inbev, Inbev's majority stake in Modelo, and the joint venture MillerCoors—a joint venture between MolsonCoors and SABMiller).

17. *See id.*

18. MARIN INST., *supra* note 5, at 3; Pearlstein, *supra* note 5.

19. *See Latin America Beer: What Are Next Targets?*, LATIN BUS. CHRON., Jan. 12, 2010, http://www.latinbusinesschronicle.com/app/article.aspx?id=3906 [hereinafter *Latin America Beer*].

20. *See* MARIN INST., *supra* note 5, at 4–5; Pearlstein, *supra* note 5; *see also Latin America Beer*, *supra* note 19 (outlining the most recent mergers: SABMiller's joint venture with MolsonCoors, Anheuser-Busch's merger with InBev, and Heineken's merger with FEMSA).

21. *See Latin America Beer*, *supra* note 19.

Concentration within the American beer market is nothing new, nor is the concept of brewers using mergers and acquisitions to gain access into new beer markets or the antitrust reviews of such acquisitions.[22] Prior to the World War II, the U.S. beer market generally consisted of a few large regional brewers and many smaller local brewers within that region.[23] After the World War II, large regional brewers—Anheuser-Busch, Schlitz, and Pabst being the best known—became national breweries that supplied beer outside their respective regions.[24] It was not until 1966, in *United States v. Pabst Brewing Co.*, that antitrust concerns within the beer industry were considered and decided by the Supreme Court.[25]

After *Pabst*, a series of antitrust litigation and settlements occurred concerning brewery acquisitions.[26] Most recently, antitrust litigation occurred over the acquisition of Anheuser-Busch by InBev.[27] The case of *Ginsburg v. InBev NV/SA* is particularly informative, not only because the court and DOJ decided against contesting the acquisition,[28] but also because it was the largest acquisition in the beer industry—a $52 billion deal.[29]

In its review of *Ginsburg*, the Eighth Circuit Court of Appeals was content to dismiss the consumer complaint under the Clayton Act[30] on procedural grounds.[31] The Eighth Circuit accepted the district court's decision dismissing

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22. *See generally* A.M. McGahan, *The Emergence of the National Brewing Oligopoly: Competition in the American Market, 1933–1958*, 65 BUS. HIST. REV. 229, 229–33 (1991) (discussing historical trends of brewer acquisitions).

23. CHARLES F. KEITHAHN, FED. TRADE COMM'N, THE BREWING INDUSTRY 16 (1978), *available at* http://www.ftc.gov/be/econrpt/197812brewingindustry.pdf.

24. *Id.* at 16–17.

25. *See* 384 U.S. 546, 551–52 (1966) (holding the acquisition of Blatz by Pabst violated statute prohibiting acquisitions that may substantially lessen competition).

26. *See, e.g.*, Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943, 945 (E.D. Mo. 2009) (unsuccessful challenge to proposed merger by Anheuser-Busch and InBev), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394 (D. Colo. 1995) (unsuccessful antitrust litigation regarding the "North American Strategic Brewing Alliance"); Pearl Brewing Co. v. Miller Brewing Co., 1993 WL 424236, at *1 (W.D. Tex. 1993) (unsuccessful challenge to Miller's acquisition of ownership interest in Molson), *aff'd*, 52 F.3d 1066 (5th Cir. 1995).

27. *Ginsburg*, 649 F. Supp. 2d 943.

28. *Id.* at 949 n.7, 950, 952; *see also* United States v. Inbev NV/SA; Proposed Final Judgment and Competitive Impact Statement, 73 Fed. Reg. 71,682 (Nov. 25, 2008).

29. *Ginsburg*, 623 F.3d at 1231.

30. *See* Clayton Act, Pub. L. 63-212, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53 (2006)).

31. *Ginsburg*, 623 F.3d at 1233, 1236. While the court discusses an independent rationale for its decision, the plaintiffs were left with only the remedy of divesture after the merger was completed between the initial lawsuit and this case on appeal, a remedy not appropriate under the Clayton Act in these circumstances. *See id.*

the plaintiff's concerns about reducing competition because the plaintiffs had failed to produce evidence beyond legal allegations.[32] The Eighth Circuit refused to review the plaintiff's substantive competition concerns and further explained that divesture, or splitting the assets, would have been too severe a remedy after Anheuser-Busch and InBev had consummated their merger.[33] Yet post-merger beer prices began to increase—exactly as the plaintiffs had argued they would.[34]

Concentration within the beer market and failure by the courts to review recent brewer mergers has created an atmosphere ripe for another large merger or acquisition that will affect the American beer industry. When such a merger or acquisition occurs, it will necessarily affect supporting industries with a strong nexus to beer—such as agriculture.

B. *Agriculture*

To produce beer, brewers use four main ingredients: water, hops, barley, and yeast.[35] Of these ingredients, brewers primarily rely on agriculture to produce the hops and barley. Europe, the largest beer producer in the world, is also the largest producer of hops and barley, growing fifty-three percent of hops worldwide and fifty-five percent of barley.[36] By comparison, the United States produces roughly thirty percent of the world's hops.[37] Beer production's overall impact upon U.S. agriculture is approximately $850 million in raw materials, including 4.8 billion pounds of barley, 15 million pounds of hops, and another 1.8 billion pounds in other grains.[38] The following subsections describe barley and hops, the two primary agricultural ingredients in beer, and detail the influence brewers have upon agricultural producers of these crops.

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32. *Id.* at 1235.

33. *Id.* at 1235–36.

34. ESTHER Y. KWON, STANDARD & POOR, S&P CURRENT ENVIRONMENT REPORT: ALCOHOLIC BEVERAGES & TOBACCO, ALCOHOLIC BEVERAGES: BEER FALLS FLAT AGAIN IN 2010, at 3 (2011).

35. FOREIGN AGRIC. SERV., USDA, PROSPECTS IN THE GLOBAL BEER MARKET 21 app. A (2004).

36. BRAM BERKHOUT ET AL., ERNST & YOUNG, THE CONTRIBUTION MADE BY BEER TO THE EUROPEAN ECONOMY 8 (2d ed. 2009).

37. *See* BARTH-HAAS GRP., THE BARTH REPORT: HOPS 2011/2012, at 2, 25 (Heinrich Meier ed., 2012), *available at* http://www.barthhaasgroup.com/images/pdfs/Barth_Bericht_2012_Englisch.pdf (showing U.S. production of hops in 2011 at 29,384.5 metric tons compared to worldwide totals of 100,604 metric tons); *see also* BERKHOUT ET AL., *supra* note 36, at 8.

38. *Raw Material Purchases: Agriculture*, BEERSERVESAMERICA, http://beerservesamerica.org/materials/default.aspx (last visited Apr. 12, 2013).

1. *Barley*

Barley is a highly adaptable cereal grain that can be produced in a variety of climates.[39] Barley comes in two varieties—two-row and six-row.[40] Because of its consistent use in malt beverages, barley is grown on contracts to "offer[] malting companies a secure supply of high-quality barley."[41] For quality reasons, farmers are given price premiums for production of malt barley instead of higher-yielding feed barley.[42]

"Malting companies contract for both two-row and six-row barley varieties [depending upon] . . . several factors including brewing techniques, price, and style or flavor" desired in the beer.[43] Most contracts are very specific as to their quality requirements of the barley.[44] "Most of these characteristics directly affect brewing processes," making contract specifications necessary for high-quality beer production.[45]

2. *Hops*

Almost all U.S. hops are grown in Washington, Oregon, and Idaho, with a small amount grown in the Upper Midwest for local markets.[46] Beer production utilizes ninety-eight percent of the hops produced worldwide.[47] The United States mainly grows three types of hops: Old World, American, and High Alpha.[48]

Each hop adds a different characteristic to the brewing process. Old World hops are grown for their aroma, American hops provide a high-yielding crop well adapted to mechanical harvesting, and High-Alpha hops provide a medium- to late-maturing crop containing high concentrations of essential oils and alpha acid that affect beer flavor.[49] Like barley, hops are generally bought on contract, which allows brewers to specify hop choices based on the characteris-

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39. Mykel Taylor et al., *Barley Profile*, AGRIC. MKTG. RES. CTR., http://www.agmrc.org/commodities__products/grains__oilseeds/barley-profile/ (last updated Apr., 2012).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. P.R. Carter et al., *Alternative Field Crops Manual: Hop*, PURDUE UNIV. (Nov. 1990), http://www.hort.purdue.edu/newcrop/afcm/hop.html; *Hop Industry Overview*, USAHOPS, http://www.usahops.org/index.cfm?fuseaction=hop_info (last visited Apr. 12, 2013).
47. Carter et al., *supra* note 46.
48. *Id.*
49. *Id.*

tics that brewers desire from the hops for their specific beer.[50] Large breweries generally rely upon contracts to insulate themselves from market fluctuations.[51] Recent mergers have caused large firms to abandon contracts and instead use hop extracts to provide cost savings.[52] Hop extract is created "from a relatively complex process that removes the solvent [and creates] 'pure' resin extract."[53]

Movement by large breweries away from traditional hops toward hop extracts could place further downward pressure on the hop market, which saw hop production drop thirty-one percent between 2009 and 2010 and hop prices decline by twenty percent from 2008 levels.[54] This stands in contrast to the ninety-four percent increase in hop prices between 2006 and 2008.[55] In 2011 and 2012 hop production and prices have remained relatively steady.[56] Unlike large breweries, changes in hop prices unduly affect "craft brewers."[57]

3. *Agricultural Nexus*

Production of both barley and hops has become heavily dependent upon brewers' needs.[58] Brewers rely on farmers to produce certain grains—barley and hops—to specifications based on desired characteristics in the beer.[59] Hence, the

50. *See id.*; *see also* Taylor et al., *supra* note 39.

51. William A. Knudson & Hamish Gow, *Hopping Mad: The Impact of Hops Market Turmoil on the Specialty Beer Industry* 6 (Mich. State Univ., The Strategic Mktg. Inst., Working Paper No. 01-1209, 2009).

52. Jim Cohen, *Big Beer Shakes Up Local Hop Farms*, BEER UNIVERSE (Sept. 20, 2011), http://www.beer-universe.com/beer-education-article/2011-09-20/Big-Beer-Shakes-Up-Local-Hop-Farms/.

53. *Id.*

54. NAT'L AGRIC. STATISTICS SERV., USDA, NATIONAL HOP REPORT 1 (2010) [hereinafter 2010 HOP REPORT], *available at* http://www.nass.usda.gov/Statistics_by_State/Washington/Publications/Hops/hops12_17_2010.pdf.

55. NAT'L AGRIC. STATISTICS SERV., USDA, NATIONAL HOP REPORT 1 (2008) [hereinafter 2008 HOP REPORT], *available at* http://usda01.library.cornell.edu/usda/nass/hops//2000s/2008/hops-12-18-2008.pdf; *see also* Knudson & Gow, *supra* note 51, at 2–4 (explaining recent fluctuations in the hops market).

56. NAT'L AGRIC. STATISTICS SERV., USDA, NATIONAL HOP REPORT 1 (2012) [hereinafter 2012 HOP REPORT], *available at* http://www.usahops.org/userfiles/file/Statistics/National%20Hop%20 Report-NASS%2012-12.pdf.

57. Knudson & Gow, *supra* note 51, at 2.

58. *See* Louis Arnold, *Chairman's Corner*, BARLEY BULL. (N.D. Barley Council, Fargo, N.D.), Winter 2010, at 3–4, http://www.ndbarley.net/image/cache/Barley_Bulletin_2010Feb_Winter.pdf.

59. *Id. See generally Varieties*, OR. HOP COMM'N, http://oregonhops.org/varieties.html (last visited Apr. 12, 2013) (interactive webpage describing characteristics of hop varieties).

relationship between brewers and agricultural producers creates a relationship that is perhaps as important as the nexus between brewer and beer enthusiast.[60]

Agricultural production of barley and hops is governed by basic economic principles. These principles predict that when supply decreases, prices generally increase. As a corollary, when demand for a certain crop increases, the amount of that crop planted will increase under market signals, increasing supply.[61] This principle is most important for hops, which has few uses outside the brewing industry, and therefore rises and falls with brewer demand.[62]

Hops are an international crop, with Europe and the United States being the primary growers.[63] Fluctuations in supply by either country have an impact on worldwide prices.[64] Similarly, as demand for hops decreases or increases, the amount of hops planted likewise decreases or increases. Severe changes, such as shortages or poor crops can drastically alter prices. This was the case for hops in 2007 and 2009. A poor harvest in Germany, the world's primary hop producer,[65] spiked prices.[66] As a result of a fire in Washington in 2006, a large portion of the United States' hop surplus was destroyed, causing a price spike.[67] In each case, hop supply decreased.[68] As hop prices increase during times of high demand or short supply, brewers see an increase in their production costs.[69] Large breweries with stronger buying power and long-term contracts with growers are able to better manage these costs, whereas craft brewers making purchase in the marketplace are more sensitive to hop price fluctuations.[70]

Sudden price spikes cause producers, eager to cash in on high prices, to produce even greater quantities of hops. The result is an over production and subsequent fall in prices, which can inspire a decrease in production again. Large brewers have attempted to insulate themselves from these cyclical fluctua-

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60. *See* Arnold, *supra* note 58, at 3–4. *See generally* Ginsburg v. InBev NV/SA., 649 F. Supp. 2d 943 (E.D. Mo. 2009), *aff'd*, 623 F.3d 1229 (8th Cir. 2010) (describing antitrust action brought by *beer consumers and purchasers*).

61. *See* Knudson & Gow, *supra* note 51, at 13; *Beer Research & Insights*, CRAFT BEER ANALYTICS, 11 (Mar. 2012), http://www.craftbeeranalytics.com/uploads/3/3/8/9/3389428/bri_issue_1.doc.pdf.

62. Carter et al., *supra* note 46.

63. BARTH-HAAS GRP., *supra* note 37, at 11; *see also* Knudson & Gow, *supra* note 51, at 3.

64. Ann Luisa Cortissoz, *With Fewer Hops, Prices Jump*, BOSTON.COM (Jan. 9, 2008), http://www.boston.com/lifestyle/food/articles/2008/01/09/with_fewer_hops_prices_jump/.

65. BERKHOUT ET AL., *supra* note 36, at 8.

66. Cortissoz, *supra* note 64.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

tions by either purchasing hops on contract at set prices or taking over the production of hops themselves.[71] ABI is a good example of a brewery producing hops. ABI, in addition to owning several hop farms, has begun to also experiment with hop extracts.[72] Hop extracts act to further decrease demand for hops ultimately causing further decline in needed supply.[73] If large brewers decrease their demand for hops, it follows that hop prices will diminish due to a surplus of hops in the marketplace. Like we have historically seen, a fall in prices will result in hop farmers reducing their planting, decreasing the hop supply available to brewers of all sizes.[74]

Barley has witnessed these fluctuations in supply and demand to some extent. Because barley has several uses beyond brewing[75]—something hops generally do not possess—the primary discussion on beer consolidation and price increases centers upon hops. As a result of brewer consolidation, however, barley has begun to see an increase in brewer demands upon quality and characteristics of barley sold.[76]

Brewer demands upon agricultural producers have changed the relationship between producer and brewer.[77] Brewers are increasingly purchasing directly from the producer on contract[78] or taking over the production process.[79] Agricultural producers have recognized that as breweries consolidate the available number of buyers decrease, and producers recognize the increased need in this buyer's market to meet brewer's preferred crop characteristics.[80]

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71. Knudson & Gow, *supra* note 51, at 6; *see also* Jason D.B. Kauffman, *49th Parallel: Idaho's Panhandle Crop*, SUN VALLEY MAG. (Summer 2010), http://www.sunvalleymag.com/Sun-Valley-Magazine/Summer-2010/49th-Parallel/index.php?cparticle=2&siarticle=1 (describing Anheuser-Busch's Elk Mountain Ranch in Northern Idaho, a 1700 acre hop farm).

72. Cohen, *supra* note 52.

73. *See id.*

74. Knudson & Gow, *supra* note 51, at 4.

75. *Barley Facts*, NAT'L BARLEY FOODS COUNCIL, 1, http://www.barleyfoods.org/Barley Facts-Industry.pdf (last visited Apr. 12, 2013). Barley is also used for animal feed, seed, and human consumption. *Id.*

76. Arnold, *supra* note 58, at 3.

77. *See id.*

78. Michael Boland & Gary Brester, *Vertical Coordination in the Malting Barley Industry: A "Silver Bullet" for Coors?*, AGRIC. MKTG. RES. CTR., 1, 7–8, http://www.agmrc.org/media/cms/coors_6C217F1EDB6E5.pdf (last visited Apr. 12, 2013) (describing Coors Brewing Company as an example of a large brewer utilizing direct producer contracts for ingredients).

79. Kauffman, *supra* note 71.

80. *See* Arnold, *supra* note 58, at 3–4.

III. THE ANTITRUST PROCESS

Brewery mergers and acquisitions are subject to several antitrust laws. This section provides a brief overview of, and the brewing industry's history with, these laws. After understanding the law and its history with brewers, an overview of how the government and the courts are involved in the antitrust review process assists with understanding how agricultural third parties can address their concerns during a brewery merger or acquisition.

A. *Antitrust Overview*

Antitrust review derives primarily from two statutes, the Sherman Antitrust Act[81] and section 7 of the Clayton Act.[82] The Sherman Antitrust Act codifies the common law on antitrust.[83] The Supreme Court's adoption of a less stringent "rule of reason" test in *Standard Oil Co. v. United States*[84] deprived the Sherman Antitrust Act of much of its bite, and it became more of a paper tiger for antitrust enforcement.

In response to the Court's decision in *Standard Oil*, Congress passed the Clayton Act.[85] Section 7 of the Clayton Act describes antitrust definitions with more specificity than the Sherman Act, explicitly illegalizing a corporate merger between competing companies if such a merger substantially lessened competition.[86] Most DOJ suits are brought under section 7 of the Clayton Act, examining

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81. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006 & Supp. V 2011).

82. Clayton Act, ch. 323 § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18 (2006)).

83. Debra A. Valentine, Assistant Dir. for Int'l Antitrust, Fed. Trade Comm'n, Remarks at the INDECOPI Conference (Aug. 13, 1996), http://www.ftc.gov/speeches/other/dvperumerg.shtm#N_1_149; *see also* Sherman Act §§ 1–7.

84. 221 U.S. 1, 62 (1911) ("[B]y the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly . . . .").

85. *See* Clayton Act, Pub. L. 63-212, 38 Stat. 730 (codified at 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53 (2006)). *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) (providing a historical overview of the political, legal, and economic influences leading to the adoption of the Clayton Act).

86. Clayton Act § 7, 38 Stat. at 731–32; *see also* Nathan Chubb, Comment, *Agency Draw: How Serious Questions in Merger Review Could Lead to Enhanced Merger Enforcement*, 18 GEO. MASON L. REV. 533, 536 (2011) (discussing horizontal mergers, or mergers among competing companies).

the probable anticompetitive effect of a merger based on the "context of its particular industry."[87]

The Sherman Act and Clayton Act delegate authority to DOJ to review and halt anticompetitive activity.[88] The Hart-Scott-Rodino (HSR) Antitrust Improvements Act requires premerger notification if the acquired party has voting securities and assets exceeding $50 million (or so adjusted) and, if still below the $200 million mark, "voting securities or assets of a person with annual net sales or total assets of $100,000,000 . . . or more are being acquired by any person with total assets or annual net sales of $10,000,000 . . . or more."[89] Other thresholds are also outlined.[90] Failure to comply can result in steep civil penalties.[91] Review of most mergers and acquisitions arises under HSR and it provides the starting point for most DOJ antitrust decisions.[92] DOJ antitrust division manual states:

> Once an HSR filing has been assessed for completeness and substantively reviewed, staff should determine whether the proposed transaction poses no likely competitive harm or whether it raises questions sufficiently serious to warrant a preliminary investigation. All decisions to recommend the opening of a preliminary investigation and all close decisions not to do so should be discussed with the appropriate section chief or assistant chief before the recommendation is made.[93]

In addition to the HSR's requirements, DOJ, if it chooses to go forward with a review, may require the parties to produce documents, or DOJ may review public sources to further assess whether the proposed merger would substantially lessen competition.[94]

To contest a merger, DOJ brings a motion for a preliminary injunction.[95] DOJ uses the courts' "fundamental four-part preliminary injunction standard" to determine whether an injunction should be brought.[96] The four factors are: "(1) the likelihood of the plaintiff's success on the merits; (2) the threat of irreparable injury to the plaintiff in the absence of an injunction; (3) the possibility of substantial harm to other interested parties from a grant of injunctive relief; and (4)

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87. United States v. Gen. Dynamics Corp., 415 U.S. 486, 488, 498 (1974) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 321–22 (1962)).

88. 15 U.S.C. §§ 1–2, 18.

89. *Id.* § 18a.

90. *Id.*

91. *Id.* § 18a(g)(1). Possible sanctions include a $10,000 fine per day. *Id.*

92. *See* U.S. DEP'T. OF JUSTICE, ANTITRUST DIVISION MANUAL III-22 (5th ed. 2012) [hereinafter ANTITRUST DIVISION MANUAL], *available at* http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf.

93. *Id.* at III-35.

94. *Id.* at III-17.

95. 15 U.S.C. § 18a(f); *see also* Chubb, *supra* note 86, at 538.

96. United States v. Gillette Co., 828 F. Supp. 78, 80 (D.D.C. 1993).

the interests of the public."[97] Once an injunction is sought, courts review the likelihood of success in obtaining a permanent injunction as a threshold issue, and then attempt to balance the equities.[98] After obtaining a preliminary injunction, DOJ seeks a permanent injunction in the district court.[99] Generally DOJ will simply combine the preliminary and permanent injunction into a single trial.[100]

Increasingly, DOJ negotiates a decree with the parties instead of litigating an antitrust violation.[101] Antitrust consent decrees are settlements between the government and merging parties.[102] In general, the decrees are meant to provide an opportunity for the merging parties and the government to avoid litigation because the merging parties agree to government stipulations regarding the government's concerns upon competition, in exchange for the government promising not to pursue an antitrust case.[103] Because decrees are settlements, DOJ is given great deference in its policy decisions by courts entering the decree.[104]

Consent decrees are subject to the statutory requirements of the Antitrust Procedures and Penalties Act or Tunney Act.[105] The Tunney Act provides a process for consent decrees that resembles administrative rulemaking. There is a required public notice and comment session and a competitive impact statement (CIS).[106] Both the consent decree and competitive impact statement must be published in the Federal Register sixty days prior to the decrees effective date.[107] As

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97. *Id.*

98. AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 573 (7th Cir. 1999) (citations omitted).

99. Chubb, *supra* note 86, at 538; *see also, e.g.*, *Gillette*, 828 F. Supp. at 80.

100. FED. R. CIV. P. 65(a)(2); s*ee* Chubb, *supra* note 86, at 538 (explaining how Federal Rule 65(a)(2) complicates the process by permitting the combination of the preliminary and permanent injunctions so DOJ can have a full trial on the merits).

101. *See* United States v. Microsoft Corp., 56 F.3d 1448, 1452 (D.C. Cir. 1995). *See generally* Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 ANTITRUST L.J. 549 (2008) (describing and critiquing DOJ process of forming and entering into an antitrust consent decree under the Tunney Act).

102. *See generally* Frankel, *supra* note 101, at 549; Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163 (discussing the consent decree process in light of public and private interests served by the process).

103. *See, e.g.*, United States v. AT&T Inc., 541 F. Supp. 2d 2, 5 (D.D.C. 2008); *see also* Press Release, Anheuser-Busch InBev, Anheuser-Busch InBev Statement Regarding Discussions with DOJ (Mar. 15, 2013), *available at* http://www.ab-inbev.com/press_releases/hugin_pdf%5C552429.pdf (requesting extension of stay on current antitrust litigation initiated because of potential purchase of Grupo Modelo, as ABI discusses possible consent decree with DOJ).

104. *Microsoft Corp.*, 56 F.3d at 1461–62.

105. 15 U.S.C. § 16 (2006).

106. *Id.* § 16(b)–(d).

107. *Id.* § 16(b).

a final requirement courts review a consent decree to ensure the consent decree is in the "public interest."[108] After the appellate court's decision in *Microsoft*,[109] Congress amended the Tunney Act to clarify the Act's purpose.[110]

B. *DOJ Antitrust Review Process*

When DOJ begins its review process it utilizes several analytical criteria to determine if a merger will result in a "substantial lessening of competition."[111] One criterion is a direct comparison based on experience, whereby DOJ analyzes impacts of recent mergers in a relevant market, taking into consideration analogous events in similar markets.[112] Another criterion is variations among similar markets, analyzing the differences in price in markets where the merging parties compete versus markets where the firms do not compete.[113] The last major criterion considers market share and concentration—this criterion looks at the level of market concentration and changes to the market caused by the potential merger.[114] Other factors in DOJ's review are whether the merging firms are substantial head-to-head competitors, and whether a merger eliminates a "maverick" firm thereby lessening competition.[115]

To obtain the evidence needed for review, DOJ relies upon the merging parties to self-report during the premerger notification procedure required by HSR.[116] If the reports are insufficient, however, a second request may be made upon the merging parties.[117] Other sources of information can be the customers and industry participants or observers.[118] These sources generally provide DOJ with customers' purchasing behavior or choices, and occasionally articulate opinions about a merger and its effects.[119] Most important to this Note's discussion is

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108. *Id.* § 16(e).

109. *Microsoft Corp.*, 56 F.3d 1448.

110. 150 CONG. REC. S3610, S3613, S3615–16 (daily ed. Apr. 2, 2004) (statements of Sen. Hatch and Sen. Kohl).

111. 15 U.S.C. § 18.

112. U.S. DEP'T. OF JUSTICE & FED. TRADE COMM'N., HORIZONTAL MERGER GUIDELINES 3 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

113. *Id.*

114. *Id.* ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power . . . .").

115. *Id.*

116. 15 U.S.C. § 18a.

117. ANTITRUST DIVISION MANUAL, *supra* note 92, at III-38.

118. HORIZONTAL MERGER GUIDELINES, *supra* note 112, at 5.

119. *Id.*

the information provided by industry participants, including industry suppliers, but exactly how much consideration is given to this source is questionable.[120]

After DOJ is satisfied it has enough information, a review is commenced based on the criteria mentioned before to determine whether a merger will "lessen competition, or [] tend to create a monopoly" in violation of the Sherman Antitrust Act or the Clayton Act.[121] If a review determines there is a violation of either Act, the Justice Department can pursue either a consent decree or an injunction.[122]

C. *Role of Courts in Antitrust Proceedings and Under the Tunney Act*

Whether DOJ pursues a consent decree or injunction determines to a large extent what role a court will take. In general, the role of a court in an injunction proceeding is limited to its traditional role as impartial decision maker; DOJ attempts to demonstrate the guilt of the merging parties.[123] If guilt is found, the court orders a remedy dependent upon the statutory language and principles of equity.

Pursuit of a consent decree alters the role of the court from observer to a participant in the antitrust review. Under the Tunney Act, courts are obligated to review a consent decree to ensure a decree is in the "public interest" before entering a judgment.[124] When reviewing a consent decree, courts are deferential to DOJ and other executive branch agencies—meaning courts are not allowed to impose their own policy choices in place of an executive agency entering into the decree.[125] The delicate interplay between the courts and DOJ is exemplified in the *Microsoft* case.[126]

In *Microsoft*, the Court of Appeals clarified the role of a judge was to "'make an independent determination as to whether or not entry of a proposed consent decree [was] in the public interest.'"[127] Public interest is a flexible standard, but the court clarified that the analysis of a consent decree is meant to de-

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120. *See id.* The manual gives this description about suppliers: "The interests of firms selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable." *Id.*

121. *Id.* at 1; *see* 15 U.S.C. §§ 1–2, 18, 45.

122. *See generally* United States v. Microsoft Corp., 56 F.3d 1448, 1452 (D.C. Cir. 1995) (consent decree filed with complaint); Chubb, *supra* note 86, at 538–39 (discussing injunctions); Frankel, *supra* note 101 (discussing consent decrees).

123. *See* Chubb, *supra* note 86, at 538–39 (describing pressures to have a trial on the preliminary and permanent injunction to obtain a full trial on the merits).

124. 15 U.S.C. § 16(e).

125. *Microsoft Corp.*, 56 F.3d at 1459.

126. *Id.*

127. *Id.* at 1458 (quoting S. REP. NO. 93-298, at 5 (1973)) (alteration in source).

termine if the result is "'within the *reaches* of the public interest,'" not if a decree's result "'is the one that will *best* serve society.'"[128] The court further explained the Justice Department was to be given broad discretion, but a district judge should not accept a decree if it "appear[ed] to make a mockery of judicial power."[129] In the wake of this decision, Congress reacted by amending the Tunney Act to specify "mockery of the judicial power" was not the standard by which district courts should review antitrust decrees under the Tunney Act.[130]

Courts today wrestle with the scope and meaning of "public interest," certain only that the Tunney Act provides factors that create the contours for the analysis.[131] What can be deciphered is that the Tunney Act provides criteria for courts to utilize in analyzing decrees against the "public interest." Courts cannot explore beyond the complaint for antitrust concerns, and courts cannot use "mockery of justice" as a general standard.[132] Courts should therefore strive to determine whether the decree is an adequate antitrust remedy and will avoid unnecessary harm to third parties. "The overall standard for the Court is deciding whether entry of the proposed settlements is 'in the public interest.'"[133]

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128. *Id.* at 1460 (quoting United States v. Bechtel Co., 648 F.2d 660, 666 (9th Cir. 1981)) (emphasis in original).

129. *Id.* at 1462.

130. S. 1797, 108th Cong. § 201(2) (2003) (amending the Clayton Act by stating "[t]he Court shall not enter any consent judgment . . . unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest"); 149 CONG. REC. S13,520 (daily ed. Oct. 29, 2003) (statement of Sen. Dewine) (expressing Congress' fear that the district courts would be "rubber stamps" for antitrust decrees).

131. 15 U.S.C. § 16(e)(1) (2006).

> (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.

Id.

132. United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 13–15 (D.D.C. 2007) (citing *Microsoft Corp.*, 56 F.3d at 1462).

133. *Id.* at 15. The actual powers to decide are broad; a district judge can

> (1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

IV. COURTS' CONSIDERATION OF AGRICULTURE IN THE MERGER "PUBLIC INTEREST" ANALYSIS

With the focus of an antitrust suit being on anticompetitive behavior, it would be assumed that all parties having some connections to the anticompetitive behavior would be subject to review to help ensure there will not be adverse consequences arising from the merger or acquisition. While DOJ's guidelines articulate the importance of comprehensive review,[134] recent brewery antitrust consent decrees have lacked meaningful review of the merger and acquisition's agricultural effects, despite a strong nexus between brewers and agriculture.[135] DOJ's failure to fully review the nexus between agricultural producers and brewers is one example of DOJ's failure to consider an agricultural nexus in merger cases.[136] The failure to analyze harm to agricultural third parties fails to meet the public interest requirements of the Tunney Act. A change is necessary when reviewing mergers and acquisitions between brewers to more fully consider the potential harm to agricultural third parties.

> (2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;
>
> (3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;
>
> (4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and
>
> (5) take such other action in the public interest as the court may deem appropriate.

15 U.S.C. § 16(f).

134. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 112, at 3–6.

135. *See, e.g.*, Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943, 947 (E.D. Mo. 2009) (focusing analysis on competition claim), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); Pearl Brewing Co. v. Miller Brewing Co., 1993 WL 424236, *4–5 (W.D. Tex. 1993) (focusing analysis on economic effects asserted by plaintiff), *aff'd*, 52 F.3d 1066 (5th Cir. 1995).

136. Courts instead focus their analysis on the competitive impact of the merger, public interest, and the dangers of concentrating a product in the market. *See, e.g.*, United States v. Archer-Daniels-Midland Co., 272 F. Supp. 2d 1 (D.D.C. 2003); United States v. Agri-Mark, Inc., 512 F. Supp. 737, 738–39 (D. Vt. 1981).

A. *Historical Discounting of Agricultural Third Parties by Executive Agencies*

Two agricultural cases demonstrate how government agencies, upon which the courts rely, fail to consider agricultural third party harm. In the first case, the court restricted the ability of third parties to bring forth concerns during a merger or acquisition review.[137] The second case provides an analogous agricultural nexus, high fructose corn syrup and ethanol, to that of the brewer-agricultural producer nexus.[138]

In *United States v. Agri-Mark, Inc.*, the government challenged a merger between New England's largest dairy cooperative and supply cooperative, over fears of a monopoly in fluid milk marketing in the region.[139] The National Association for Milk Marketing Reform filed an amicus curiae brief requesting the court grant further proceedings to demonstrate the government's concerns were accurate.[140] The court refused in part because the court was satisfied "absent even a minimal showing that market projections, statistical compilations and financial analyses would demonstrate significant flaws in the reasoning . . . an evidentiary hearing . . . would simply delay the entry of final judgment without any commensurate benefit to the court or public."[141] Such a standard reiterates the courts' deference to the government in its analysis, but also necessitates demonstrative economic analysis of a merger before an affected agricultural third party may challenge a merger.

Another agricultural case involved antitrust concerns surrounding Archer-Daniels-Midland's (ADM) acquisition of a rival in the high fructose corn syrup market.[142] High fructose corn syrup acquisitions provide an analogous set of concerns to those in brewer acquisitions.[143]

ADM is a producer of high fructose corn syrup as one of only five firms manufacturing or selling high fructose corn syrup in the United States and Canada—making it a highly concentrated market.[144] The government was concerned that ADM's acquisition of a rival high fructose corn syrup producer would create an even further concentrated market, causing decreasing production and greater

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137. *Agri-Mark, Inc.*, 512 F. Supp. at 739–40.
138. *Archer Daniels Midland Co.*, 272 F. Supp. 2d 1.
139. 512 F. Supp. at 738.
140. *Id.* at 739.
141. *Id.* at 740.
142. *Archer Daniels Midland Co.*, 272 F. Supp. 2d at 3.
143. *E.g.*, *id.* at 4. High fructose corn syrup comes in several different grades. *See id.* In this case the relevant grades were HFCS42 and HFCS55, with ADM controlling thirty-three percent and twenty-five percent respectively of each grade market. *Id.*
144. *Id.*

costs to consumers.[145] In response to the requirements of the Tunney Act, several concerns were raised about the adequacy of the competitive impact statement and review by the government.[146]

The reviewing court addressed each concern relying upon *Microsoft* in their analysis.[147] The court granted the government deference in its decision-making and the government's determinations to create the confines of the competitive impact statement.[148] Further, the court held some concerns were outside the scope of high fructose markets and, therefore, beyond the restraints of court review.[149] By giving great deference to the government, the court undervalued the agricultural nexus concerns raised and used in *Microsoft* as a shield to the Tunney Act's public interest analysis requirement.[150]

What these cases demonstrate are a continual discounting of agricultural third party concerns. Courts use *Microsoft*'s strict construction of the Tunney Act and give great deference to the government's analysis of antitrust concerns, which has the effect of avoiding consideration of agricultural third party concerns.[151] This pattern of discounting agricultural third party harm has also found its way into brewer acquisition and merger cases. Cases such as *Ginsburg* and its progeny rarely consider harm to agricultural producers and microbrewers that may result from large brewer acquisitions and mergers. [152] Government agencies may have more expertise in analyzing antitrust concerns,[153] but the continual exclusion of agricultural third parties in deciding consent decrees creates an interesting conundrum as to whether the public interest is actually being served. For

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145. *Id.*

146. *Id.* at 6–7. Specifically, Professor C. Carstensen of the University of Wisconsin wrote on behalf of himself and other professors, the National Farmers Union, and the Organization for Competitive Markets. *Id.* at 6. He raised concerns about the adequacy of the competitive impact statement, the consideration of the dangers to competition in the ethanol market, and contended the proposed remedies failed to address all anticompetitive concerns. *Id.* at 6–7.

147. *Id.* at 7–9.

148. *Id.* at 7–8. The court was satisfied with the government's market share analysis; Professor Carstensen wanted to include partial ownership by ADM in other high fructose corn syrup producers, but the court stated, "there is no legal requirement that a CIS set forth this data," nor is the government required to include information "concerning every potential antitrust concern that is has discarded as baseless after investigation." *Id.*

149. *Id.* at 9. Professor Carstensen's concerns regarding the ethanol market were beyond the scope of high fructose corn syrup; the court is not allowed under *Microsoft* to go beyond high fructose corn syrup and "construct a 'hypothetical case' relating to the ethanol market 'and then evaluate the decree against that case.'" *Id.*

150. *See id.* at 10.

151. *See, e.g.*, *id.* at 9; United States v. Agri-Mark, Inc., 512 F. Supp. 737 (D. Vt. 1981).

152. *See generally* Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943 (E.D. Mo. 2009), *aff'd*, 623 F.3d 1229 (8th Cir. 2010).

153. *See* United States v. Microsoft Corp., 56 F.3d 1448, 1461–62 (D.C. Cir. 1995).

brewer acquisitions, DOJ states it considers the concerns of all interested parties, yet its focus is on immediate consumer markets.[154] Because they discount agricultural concerns, government agencies cannot be relied upon to protect agricultural producers.

For example, when the merger between Anheuser-Busch and InBev took place, when responding to public comments, as required under Tunney Act, DOJ did not mention agricultural suppliers as a source of its decision, stating, "The Department deposed officials of Anheuser-Busch and InBev and interviewed beer wholesalers, retail customers, brewers, and other individuals with knowledge of the industry."[155] This is an unfortunate omission since post-merger debt required ABI to install cost savings measures, including the use of hop extracts, negatively affecting hop producers and craft brewers.[156]

B. *Agency Consideration of Agricultural Third Parties Is Important When Creating Consent Decrees for Brewer Mergers and Acquisitions*

To alleviate this discounting, a government agency must expand their notion of important criteria to more completely create decrees in the best interest of the entire public, not just the consuming public. Agencies such as DOJ have expansive expertise to determine antitrust concerns, greater expertise than courts.[157] Therefore, it becomes more imperative agencies consider the entire public interest, including agricultural third party producers, since courts are less likely to do so. DOJ's review of a brewer merger and acquisitions is meant to determine whether a "substantial lessening of competition" will occur by applying the following criteria: "direct comparisons based on experience," "variations among similar markets," "market shares and concentration," whether a "substantial head-to-head" competitor exists, and whether the merger will eliminate a "maverick" firm.[158] Each criterion is broad[159] enough to allow DOJ some latitude in their application for reviewing whether barley and hop markets or, in the alter-

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154. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 112, at 3.

155. United States v. InBev NV/SA, InBev USA LLC, and Anheuser-Busch Companies, Inc.; Response to Public Comments on the Proposed Final Judgment, 74 Fed. Reg. 10,279, 10,279 (Mar. 10, 2009); *see generally* United States v. InBev NV/SA et al., No. 08-cv-1965, 2009 WL 2778025 (D.D.C. Aug. 11, 2009) (memorandum order).

156. Cohen, *supra* note 52 (discussing an individual farm that lost sixty-five percent in sales to ABI as a consequence of the merger); *see* Knudson & Gow, *supra* note 51, at 2 (discussing negative effects upon craft brewers by increased prices of hops).

157. *Microsoft Corp.*, 56 F.3d at 1461–62; Frankel, *supra* note 101, at 585.

158. HORIZONTAL MERGER GUIDELINES, *supra* note 112, at 2–3.

159. *See id.* at 3–4.

native, microbrewer markets, will experience a lessening of competition by major brewer mergers and acquisitions.

Cases such as *Ginsburg* and *Agri-Mark* demonstrate DOJ does not take into consideration agricultural producers when creating the antitrust decrees.[160] The consideration DOJ is directed to give to third party suppliers during the merger analysis, as outlined in the antitrust manual, amounts to little more than lip service.[161] Perhaps such limited credence is given to agricultural producers because of DOJ's heavy reliance upon significant economic statistical evidence of uncompetitive markets.[162] Specific evidence is likely difficult to obtain because the international marketplace for barley and hops results in highly salient changes dependent upon worldwide supply and demand.[163] Consumer markets are perhaps less difficult to analyze for changes, because consumer markets are slightly more insulated against international supply and demand fluctuations. Regardless of the difficulty, DOJ has a responsibility to include agricultural third parties in their analysis in order to provide a comprehensive review when creating antitrust decrees.

The reduction in the number of different brewers purchasing hop and barley places more downward pressure hop and barley markets causing a decrease in production levels and potentially an increase to hop prices.[164] Hop production in the United States decreased thirty-one percent between 2009 and 2010,[165] and since then production and price has remained relatively steady.[166] At the same time, demand for hops among brewers, especially craft brewers, is increasing.[167] The confluence of these forces will likely increase the cost of hops, which creates higher raw material cost for brewers.[168] Unlike large breweries, increasing hop prices have unduly affected craft brewers.[169] Because of how easily market composition can affect hop and barley prices, agricultural third parties are in as much need of protection as consumers are from the hyper-concentrated beer market mergers and acquisitions. Additionally, protecting brewers from the

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160. *See* Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943 (E.D. Mo. 2009), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); United States v. Agri-Mark, Inc., 512 F. Supp. 737, 738, 740 (D. Vt. 1981).

161. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 112, at 5.

162. *See Agri-Mark, Inc.*, 512 F. Supp. at 740.

163. *See generally* 2010 HOP REPORT, *supra* note 54 (showing hop production in the United States decreased thirty-one percent from 2009 to 2010); *see also* Knudson & Gow, *supra* note 51, at 5.

164. *See id.* at 3, 4 fig.1.

165. 2010 HOP REPORT, *supra* note 54.

166. 2012 HOP REPORT, *supra* note 56.

167. *Beer Research & Insights*, *supra* note 61, at 9.

168. *Id.*; *see also* Knudson & Gow, *supra* note 51, at 5.

169. Knudson & Gow, *supra* note 51, at 2, 6.

effects of concentrated markets will indirectly affect the expenses passed on from brewers to consumers. When DOJ fails to act, courts become the final resort for agricultural third parties.

C. *Courts Can Be a Solution to Protect Agricultural Third Parties from Brewer Mergers and Acquisitions*

Courts do not have to, and should not be, sucked into the *Microsoft* eddy when reviewing brewer mergers and acquisitions under the Tunney Act.[170] Based on the precedent set forth, the government seldom considers agricultural third party harm.[171] Under the Tunney Act, however, judges are given discretion over public interest considerations, including agricultural third parties.[172] Even under the *Microsoft* precedent, judges may use "such other action in the public interest as the court may deem appropriate" to determine whether a decree avoids unnecessary harm to third parties.[173] Yet judges seem reluctant to utilize such discretion, instead depending upon the government's analysis, an inconsistency with Congress' intent under the Tunney Act.[174] Courts should engage in an independent review and not simply "rubber stamp" the government's decisions.[175] A more effective scheme would be for courts to engage in a more searching analysis of brewer consent decrees.

The Tunney act allows courts to review decrees and ensure the decree is an adequate antitrust remedy that avoids unnecessary harm to third parties with the language, "such other action in the public interest as the court may deem appropriate."[176] Possible actions by the court include: taking the testimony of Government officials or experts, appointing a special master or outside consultants or expert witnesses, allowing interested persons or agencies to intervene, review the comments made under the Tunney Act, or any other actions as necessary.[177] Using any of the above-mentioned actions, a court would be able to more fully un-

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170. *See generally* United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995).

171. *See, e.g.*, Ginsburg v. InBev NV/SA., 649 F. Supp. 2d 943 (E.D. Mo. 2009), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); United States v. Archer Daniels Midland Co., 272 F. Supp. 2d 1, 9 (D.D.C. 2003); United States v. Agri-Mark, Inc., 512 F. Supp. 737, 740 (D. Vt. 1981).

172. *See* United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 10–11 (D.D.C. 2007) (citing 15 U.S.C. § 16(f) (2006)).

173. 15 U.S.C. § 16(f)(5); *see Microsoft*, 56 F.3d at 1460.

174. 149 CONG. REC. S13,520 (daily ed. Oct. 29, 2003) (statement of Sen. Dewine).

175. *Id.*

176. 15 U.S.C. § 16(f)(5).

177. *Id.* § 16(f).

derstand brewer mergers and acquisitions affects upon agriculture. Courts should be mindful that the nexus between agriculture and brewers is strong.[178]

As explained earlier, to produce beer, brewers require four ingredients: water, hops, barley, and yeast.[179] Agricultural production amounts to approximately $850 million in raw materials, or 4.8 billion pounds of barley, 15 million pounds of hops, and another 1.8 billion pounds in other grains.[180] Between 2006 and 2008, hop production was down, which caused hop prices to nearly double during the same time period.[181] Subsequently, hop production increased in 2009 causing prices to decline, but even after production leveled out between 2010 and 2012 prices still remain approximately seventy-five percent higher than price averages before the spike.[182] Craft brewers have been disproportionally affected by hop price increases, because the large brewers have either employed contracts or hop extracts to satisfy the need for cost savings.[183] As this information strongly suggests, brewer mergers and acquisitions also affect agricultural producers. Recent cases have demonstrated a complete disregard by DOJ and judges.[184]

A court's reluctance to examine the brewer-agriculture nexus likely stems from *Microsoft's* central holding on the Tunney Act. *Microsoft* provides criteria for courts to utilize in analyzing decrees for the "public interest"; courts cannot explore beyond the complaint for antitrust concerns, and courts cannot use "mockery of justice" for a general standard.[185] This concept is exemplified by *United States v. Archer Daniels Midland Co.*, where the court found that complaints about a merger and acquisition's affect upon the ethanol market was outside the scope of high fructose markets and, therefore, the court was unwilling to "construct a 'hypothetical case' relating to the ethanol market 'and then evaluate the decree against that case'" because such a review would be beyond the re-

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178. *See Raw Material Purchases: Agriculture*, *supra* note 38.

179. FOREIGN AGRIC. SERV., *supra* note 35, at 21 app. A.

180. *Raw Material Purchases: Agriculture*, *supra* note 38.

181. *See* 2008 HOP REPORT, *supra* note 55, at 1; Knudson & Gow, *supra* note 51, at 5.

182. 2012 HOP REPORT, *supra* note 56, at 1; 2010 HOP REPORT, *supra* note 54, at 1; 2008 HOP REPORT, *supra* note 55, at 1; NAT'L AGRIC. STATISTICS SERV., USDA, NATIONAL HOP REPORT 3 (2006) [hereinafter 2006 HOP REPORT], *available at* http://usda01.library.cornell.edu/usda/nass/hops//2000s/2006/hops-12-15-2006.pdf.

183. Cohen, *supra* note 52; Knudson & Gow, *supra* note 51, at 6.

184. *See* Ginsburg v. InBev NV/SA., 649 F. Supp. 2d 943 (E.D. Mo. 2009) (limiting scope of analysis to competition issue), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); United States v. Archer Daniels Midland Co., 272 F. Supp. 2d 1, 9 (D.D.C. 2003) (limiting scope of analysis to exclude impact to ethanol market); United States v. Agri-Mark, Inc., 512 F. Supp. 737, 738 (D. Vt. 1981) (focusing on the competition complaint).

185. United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 13 (D.D.C. 2007).

straints of court review.[186] Because a court is unable to explore beyond the complaint *sua sponte*, agricultural producers are required to intervene, or at the very least, comment upon consent decrees to have their voices heard.[187] Otherwise, a court is unable to consider the agricultural nexus in its antitrust review of brewer mergers.

V. CONCLUSION AND RECOMMENDATIONS

Agricultural producers and their allies should be encouraged to voice their concerns about brewer mergers and acquisitions. Once agricultural concerns are voiced, courts are no longer able to shield themselves, using *Microsoft*, from analyzing whether a proposed brewer antitrust decree will negatively affect agricultural third parties. Courts can then examine how the concentration within brewer markets has impacted agricultural markets upon which brewers rely. Courts should not so easily defer to government agencies such as DOJ if the agencies fail to consider or fully appreciate the brewer-agricultural nexus. Public policy considerations require judges to consider the brewer-agricultural nexus, because agricultural harm caused by brewer mergers creates a ripple effect reaching more than just the immediate parties. As noted, agriculture is an international market, meaning an effect in one location will have repercussions elsewhere. Moreover, crops used by everyone in the industry, such as hops, connect most brewers. If brewer mergers and acquisitions affect hop prices, the merger and acquisition necessarily affects competing brewers.

When DOJ fails to consider the brewer-agricultural nexus, it fails to consider a significant injury to society. Therefore, traditional notions of deference to DOJ or other government agencies would be inconsistent with antitrust public policy concerns of creating decrees in the best interest of society. When the executive branch fails to provide a decree that is in the best interest of society, it is imperative that courts take remedial measures to protect the law—as a decree is a court order. The remedial measures a court may take are limited by the controversy at hand. Still, the court is able to take such action necessary to help create a decree more consistent with the best interest of society.[188]

The Tunney Act provides the necessary tools for a court to take on the role of investigator.[189] Once courts have found the consent decree to be lacking

186. 272 F. Supp. 2d at 9 (citing United States v. Microsoft Corp., 56 F.3d 1448, 1459 (D.C. Cir. 1995)).

187. *See SBC Commc'ns, Inc.*, 489 F. Supp. 2d at 13; *Microsoft Corp.*, 56 F.3d at 1462 (stating a court may withhold approval of a decree if "third parties contend that they would be positively injured by the decree").

188. *See Microsoft Corp.*, 56 F.3d at 1461–62.

189. 15 U.S.C. § 16(e)–(f) (2006).

in its consideration of agricultural third parties, the courts need to begin the analysis on their own. Courts should particularly utilize the Act's proposed mechanisms of expert testimony or participation by interested agricultural third parties, either by testimony or a review of comments filed during the notice period.[190] If necessary, courts should appoint a special master to review the agricultural nexus, although this option should not be necessary if DOJ has conducted its review carefully or if enough information is gathered during the notice and comment period.[191]

Using these mechanisms, the court can focus on the relationship between beer and agriculture, with emphasis being placed on those crops most significant to the brewing process. An examination would detail how a particular merger would affect not only the producers, but also the crop values and the necessary affect a rise or fall in price may have on other brewers, particularly microbrewers, whose size makes them more susceptible to raw material price fluctuations. Of particular importance is the hop crop, prices of which recently spiked and remains relatively high on average.[192]

With eighty percent of the United States beer market shared between only two brewers,[193] further mergers or acquisitions will undoubtedly create renewed antitrust review of the brewing industry. Agricultural producers, upon which brewers rely for their grains, will also have a stake in any further brewer mergers and acquisitions and any antitrust review created from these mergers and acquisitions.[194] The world is truly becoming smaller, and for beer it is becoming even smaller yet, but beer continues to be intrinsically linked with agriculture through production of the grains needed for the malting process. As long as the beer-agricultural nexus exists, courts and DOJ need to consider agricultural third parties when reviewing brewer mergers and acquisitions to ensure the public interest is ultimately being served with their next glass of beer.

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190. *Id.*

191. *Id.*

192. 2012 HOP REPORT, *supra* note 56, at 1; 2010 HOP REPORT, *supra* note 54, at 1; 2008 HOP REPORT, *supra* note 55, at 1; 2006 HOP REPORT, *supra* note 182, at 3; Knudson & Gow, *supra* note 51, at 4 fig.1.

193. MARIN INST., *supra* note 5, at 3; Pearlstein, *supra* note 5.

194. *See* JOHN DUNHAM & ASSOCS., *supra* note 10, at 4–5.