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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN EDSTROM, BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK M. NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE,

Plaintiffs,

v.

ANHEUSER-BUSCH InBEV SA/NV, and GRUPO MODELO S.A.B. de C.V.,

Defendants.

CASE NO.: 3:13-cv-1309-MMC

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Date: August 2, 2013
Time: 9:00 a.m.
Judge: Hon. Maxine Chesney
Courtroom: 7, 19th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

Plaintiffs, through their undersigned counsel, submit this Consolidated Opposition to Defendants' Motions to Dismiss and Memorandum Support[1], and hereby request that this Court deny Defendants' Motions to Dismiss under Rule 12(b)(6) (Documents 64 and 66.)

INTRODUCTION

Plaintiffs bring this action under § 16 of the Clayton Act for injunctive relief against the acquisition of Modelo by ABI and the anticipated price fixing, division of markets, and division of customers, which will result. Plaintiffs allege that Defendants' transaction, which takes places within the highly-concentrated beer market in the United States, violates § 7 of the Clayton Act, which prohibits acquisitions "the effect [of which] *may* be substantially to lessen competition." Congress was so concerned with arresting trends in concentration at their incipiency, that a transaction violates § 7 if ***may*** lessen competition, not when it decidedly does so. Plaintiffs seek relief pursuant to § 16 of the Clayton Act, which authorizes private plaintiffs to seek injunctive relief against "***threatened"*** loss or damage. In this instance, Plaintiffs allege not only increases in prices of beer, but also diminished quality, fewer choices and other anticompetitive effects associated with lessening of competition. In the event the merger is finally consummated, Plaintiffs request divestiture of the acquisition and damages. Defendants' insinuation that divestiture is not a remedy available to private plaintiffs is contrary to the settled authority of the United States Supreme Court in *California v. American Stores, Co.* It is within this context that Defendants' Motions to Dismiss must be viewed.

[1] Defendants raise a number of cases in which counsel for Plaintiffs have been involved alleging violations of § 7 on behalf of private plaintiffs (ABI Motion at 6, fn. 3). First, those cases are wholly irrelevant to the issue of whether Defendants' transaction violates § 7 of the Clayton Act. Second, in each of those cases, the anticompetitive effects alleged by plaintiffs came to pass, including air fare increases and decreased capacity. Defendants' resort to such tactics is an excellent illustration of the quote by Marcus Tullius Cicero, "We must make a personal attack when there is no argumentative basis for our speech."

It is undisputed that the complaint filed by the DOJ, which was intended to stop the ABI-Modelo merger for violation of the antitrust laws, was well-grounded in facts and law and stated a cause of action under Fed. R. Civ. P. 12(b)(6). This Defendants admitted in the Stipulation and Order entered by the District Court in *United States v. Anheuser-Busch InBEV SA/NV*, Civil Action No. 1:13-cv-00127 (Dkt. #34) on April 22, 2013: "The Complaint states a claim upon which relief may be granted against Defendants ABI and Modelo under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18)." *Id*. at p.8. Defendants are estopped to argue otherwise[2]. See, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The Revised Transaction does not resolve the salient issues raised in the Government's complaint. This conclusion is borne out by the very settlement/transaction documents that are referred to in the SAC and of which Defendants have requested the Court take judicial notice, which include the following glaring defects:

- ABI will remain Constellation's supplier of as much as 40% of Modelo products for the 3 – and perhaps up to 5 – year term of the Interim Supply Agreement (ABI Request for Judicial Notice "RJN", Exhibit 2, Competitive Impact Statement pp.3, 14; ABI RJN Exhibit 4, Interim Supply Agreement Art. 2.1(a) p.7);

- ABI will continue to employ and compensate ABI-Modelo's employees during the 3-5 year transition period, despite the fact that Constellation will own the Modelo affiliate that employs them (ABI RJN Exhibit 4, Transition Services Agreement §§ 2.01 and 3.01);

- The supposed "firewall" between ABI and Constellation, which is supposed to prevent the exchange of competitively sensitive information, is, by its terms, so porous as to be a conduit for such information (ABI RJN Exhibit 4, Transition Services Agreement § 2.12 (a); Interim Supply Agreement § 5.4(a);

- The Proposed Final Judgment, like the original licensing agreement between Modelo and Constellation which the DOJ found to be objectionable because of its limited term, has the same 10 year term, after which the Final Judgment will not operate to prevent ABI from reacquiring the "divestiture assets" (ABI RJN Exhibit 3, Proposed Final Judgment Arts. XV and XVIII, pp.28, 29);

[2] The other, later-added-defendant in that case, Constellation Brands, Inc., also signed on to the Stipulation and Order. *Id.*

- The new, so-called "perpetual," sub-license agreement runs from Marcas Modelo to Constellation. The ownership of Marcas Modelo is a mystery and it is not a party or subject to the Final Judgment. Similarly, the "sub-license" is apparently an arrangement that is subordinate and likely subject to another primary license, the parties to, and terms of which, are entirely undisclosed;

- During the 3-5 year transition period, while ABI's employees are running the Piedras Negras brewery, one of the services which Constellation is prohibited from acquiring is production and product "innovation" (ABI RJN Exhibit 4, Transition Services Agreement § 2.01(e));

- If Constellation decides to enter the Mexican market with non-Modelo beer, ABI has the right of first refusal to negotiate with Constellation to acquire the exclusive marketing rights in Mexico, regardless of whether Constellation even desires to grant exclusive rights. Only if ABI and Constellation fail to reach an exclusive marketing agreement, can Constellation then offer a deal on no less favorable terms to another party (ABI RJN Exhibit 4, Stock Purchase Agreement Art. 5.7, p.25);

- Constellation has the right, but not the obligation, to require that ABI-owned distributors selling Modelo products in the U.S. be terminated. Those ABI-owned distributors who are not terminated will continue to carry Modelo brands and be free to increase prices, as per ABI's preference to maintain higher prices for Modelo brands versus ABI's brands, in any of the 26 regional markets identified by the DOJ in which ABI-owned Modelo distributors will continue to operate (ABI RJN Exhibit 3, Proposed Final Judgment V.C. p.15; ABI RJN Exhibit 1, Government's Complaint ¶ 32 and Appendix A).

Under the original agreement, ABI had the right to purchase Constellation or its interest in Crown in 10 years at a substantial premium above its actual value. Now, Constellation is to be given a [sub-]license in perpetuity by Marcus Modelo, S.A. de C.V. to import and sell Modelo products in the U.S.[3]/ The initial arrangement, which was initially intended to be for a term of 10 years after which ABI could reacquire Constellation/Crown, the DOJ found unacceptable because it left Constellation incentivized to curry favor with ABI by eschewing Modelo's Momentum Plan and allowing the price of Modelo's brands to increase along with ABI's, so that consumers would not trade up to the better quality

[3] It is unclear from the transaction documents who the *primary* licensor and licensee are or what the terms of the *primary* license are upon which the viability of the sub- license may well hinge. Marcas Modelo, S.A. de C.V., the sub-licensor, is an entity whose structure and corporate relationships are undisclosed and it is not a party to the Proposed Final Judgment.

Modelo beers at the expense of ABI's market share. If Constellation followed ABI's price increases, it would then reduce or eliminate ABI's desire to terminate Constellation's exclusive import and distribution agreement at the end of the 10 year period. The DOJ concluded that the sale of Modelo's interest in Crown to Constellation was nothing more than a pretextual attempt to avoid obvious antitrust concerns.

The DOJ was assuaged only when ABI proposed that Constellation's sub-license to sell Modelo's products in the U.S. would be perpetual and not limited to 10 years and Constellation would acquire from ABI the ownership of Modelo's Piedras Negras brewery so as to ensure an independent source of Modelo product free of ABI's control. Yet, the Proposed Final Judgment winks at the proposed solution which achieves only half the critical result. Whereas, the Final Judgment approves the transfer of exclusive U.S. marketing rights to Constellation of Modelo's products in perpetuity, it does not prohibit ABI from reacquiring the means of production or the right to market in the U.S. from Constellation after the Final Judgment expires in 10 years. Thus, the very eventuality the perpetual sub-license is meant to avoid is negated by ABI's ability after 10 years to reacquire the divestiture assets and thereby make Constellation again dependent upon ABI for Modelo products. Whether or not ABI were to reacquire Modelo assets after 10 years, ABI's future ability to do so will continue to exert pressure on Constellation to match ABI's future price increases, just as Constellation's management has always wanted.[4]/ The new arrangement does nothing to cure the section 7 Clayton Act violations the DOJ sought to eliminate by filing suit. In fact, it creates worse competitive conditions by giving the

[4] Further, since Marcus Modelo, the sub-licensor's, corporate identity is not disclosed, it is unknown whether it is an "Affiliate" post-merger or whether it is a "Third Party." If it is a Third Party, Constellation can assign the sub-license to ABI-Modelo under the terms of Art. 9.1.

violations the false cover of DOJ and court approval. This is, incidentally, the type of result the Tunney Act was intended to prevent by not permitting the DOJ to use the courts as "rubber stamps" for agreements that are not in the public interest. Plaintiffs have alleged sufficient facts in support of their claims[5]. Accordingly, Plaintiffs respectfully request that this Court deny Defendants' Motions to Dismiss.

STATEMENT OF FACTS

Defendant Anheuser-Busch InBev (hereinafter "ABI") is the 2008 combine of Belgium-based InBev, the largest brewer in the world, with Anheuser-Busch, the then largest brewer of beer in the United States. The transaction at the time was the largest in the history of the antitrust laws and the largest cash payment ever offered to purchase a competitor. Now, ABI controls approximately 50% of the manufacture, distribution, and sale of beer in the United States. (Second Amended and Supplemental Complaint "SAC" ¶ 1.) Defendant Grupo Modelo (hereinafter "Modelo") controls approximately 5% of market for beer in the United States and Miller Coors approximately 30%. (SAC ¶¶ 2,3.) Together, just three companies control 80-85% of the market for beer in the United States. (SAC ¶ 5.) Since 2008, when the combinations of Anheuser-Busch and InBev and Miller and Coors were formed, the profits have dramatically increased by reason of increase in prices[6]. (SAC ¶ 5.) ABI and MillerCoors consider beer to be a commodity and the only competition between them is with regard to advertising[7]. (SAC ¶ 83.) It is undisputed that the relevant

[5] Defendants also raise Fed. R. Civ. P. 9(b). However, in *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1103-1104 (9th Cir. 2003), the Ninth Circuit held that for the requirements of Rule 9(b) applies to claims "sound[ing] in fraud." Here, Plaintiffs allege a substantial lessening of competition in the United States market for beer in violation of § 7 of the Clayton Act and a threatened violation of § 1 of the Sherman Act, neither of which sound in fraud. The requirements of 9(b) are inapplicable.

[6] *American Tobacco Co. v. U.S.,* 328 U.S. 781, 805-806 (1946).

[7] *American Tobacco Co. v. U.S.*, 328 U.S. 781, 797 (1946).

product market in this case is the production and sale of beer. It is also undisputed at the relevant geographic market in this case is the United States. (SAC ¶¶ 67-68.)

Plaintiffs in the action currently before this Court, bring their Complaint against Defendants to prohibit another acquisition by ABI of its significant competitor in the United States, Modelo, to prohibit the anticipated price-fixing, division of markets and division of customers, among Constellation, Modelo and ABI; and to require compliance with the Tunney Act. In the alternative, Plaintiffs request, should the combine be finalized, divestiture and damages. (SAC at 2.)

In the United States, ABI is threatened by intense competition from Modelo, the largest brewer in Mexico, which imports and sells Modelo-branded beer, including Corona, in the United States through Crown. Crown is an importer, distributor, and wholesaler, which was owned 50% by Modelo and 50% by Constellation, a beer importer, spirits, and winemaker.

In the last few years, Modelo (through its U.S. importer Crown) threatened ABI's cost-cutting and price-increasing strategy by instituting a competitive program called the "Momentum Plan" to secure more market share. Through the Momentum Plan, Modelo refused to increase its prices when ABI, generally followed by MillerCoors, raised its prices. Although MillerCoors consistently followed the prices of ABI, Modelo did not. (SAC ¶ 6.) Modelo products, principally Corona, are considered to be "high end" beers, commanding higher prices than so-called premium and/or premium-plus beers, such as Bud Light and Budweiser. (SAC ¶ 4.) In addition to acting as a cap on ABI increases in price, the price differentials between Modelo beers and ABI beers have narrowed to such an extent that many consumers have "traded up" from ABI's lower-quality beers to Modelo's high-quality beers. (SAC at 3.) Because of Modelo's resistance to ABI price hikes, ABI and

MillerCoors have been forced to offer lower prices and discounts for their brands to discourage customers from "trad[ing] up" to Modelo brands. (SAC ¶ 20.)

Constellation (the former 50% owner of the Modelo importer, Crown), however, shares the same cost-cutting, price increasing philosophy as ABI and has encouraged Crown to abandon its Momentum Plan strategy and fall in line with ABI price increases. According to the Department of Justice, "Constellation has already shown through its participation in the Crown joint venture that it does not share Modelo's incentive to thwart ABI's price leadership; and that, in fact, Constellation consistently has urged Crown to follow ABI's price increases." For example, in 2011, Constellation's managing director wrote to Crown's CEO that: "Since ABI has already announced an October general price increase, I was wondering if you are considering prices increases for the Modelo portfolio…from a positioning and image perspective, I believe it would be a mistake to allow the gaps to be narrowed. I think ABI's announcement gives you the opportunity to increase profitability without having to sacrifice significant volume." (SAC ¶¶ 22-23.)

In another step to further ABI's march toward global beer monopoly and to thwart competition by Modelo in 2012, ABI entered into an agreement to acquire the remainder of Modelo it did not already own. In June of that year, ABI entered into an agreement with Constellation, contingent on the approval of the acquisition of Modelo. This agreement was geared to create a façade of competition between ABI and Modelo's importer Crown. The agreement provided that ABI would sell Modelo's existing 50% interest in Crown Imports LLC to Crown's other owner, Constellation. Under this agreement, Constellation would remain an importer and would be dependent upon ABI for its supply of Modelo- branded beer. (SAC ¶ 27.)

After the Department of Justice filed its complaint in January 2013, to prevent the acquisition, in the United States District Court, District of Columbia (ABI RJN Exhibit 1), Defendants announced a second attempt to create a mirage of competition. (SAC ¶ 28.) Under the terms of the Revised Agreement, which is conditioned on the completion of the Modelo transaction, Constellation will not be and cannot be operating independently of ABI. ABI, after acquiring all of Modelo, will then sell to Constellation the 50% of Crown owned by Modelo. Constellation, under the Revised Agreement, would be free to do as it always wanted to do; namely, increase prices with ABI and shelve the program that was leading consumers to "trade up." ABI will also sell the Modelo Piedras Negras brewery and grant "perpetual rights" to Constellation for Corona and the Modelo brands in the United States. (SAC ¶ 29.) Under the Transition Services Agreement, for three years ABI will be providing "consulting services" with respect to topics such as the management of the Piedras Negras Brewery, logistics, material resource planning, and other general administrative services. The Transition Services Agreement also requires ABI to supply certain key inputs (such as aluminum, cans, glass, malt, yeast, and corn starch.) Under the Interim Supply Agreement, ABI will supply Constellation with sufficient Modelo branded-beer each year to make up for any difference between demand and capacity at the Brewery. For at least three years, ABI will be a direct supplier of Modelo-branded beer to Constellation. (ABI RJN Exhibit 5/Decl. of JMA in Support of Motion for Hold Separate Order Doc. 68, Exhibit I, p. 14; Exhibit K; Exhibit L; Exhibit N, pp. 1-3.)

In reality, Defendants' proposed "remedy" eliminates from the market Modelo, a particularly aggressive competitor, and replaces it with an entity with little to no beer brewing experience, an entity which has shown prior willingness to follow ABI price hikes, and which will be ABI's puppet during at least the three-year "transition" period. (SAC ¶

33.) During the three year "transition" period, ABI will "teach" Constellation how to do what it does best--increase beer prices and diminish beer quality. Ultimately during the three-year transition period, ABI will control 100% of the supply to Crown, supplying 40% of Crown's needs in the U.S. and in controlling the Piedras Negras brewery.

As a result, Plaintiffs and the 40% of the United States beer-consuming population, of ABI-branded beers, Modelo-branded beers and others, and who expect to continue to do so in the future, are significantly threatened with loss or damage in the form of higher beer prices, diminished quality (including cheaper hops and watered-down beer), reduced product innovation, and other diminished competitive options. Plaintiffs and the beer-consuming public will sustain irreparable harm for which damages are not compensable, in that quality, innovation, and choice cannot be easily restored once lost. (SAC ¶ 117.)

STANDARD OF REVIEW

On a motion to dismiss for failure to state a claim, as here, the Court is **required** to accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007), citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n. 1(1989). [Emphasis added] A complaint attacked for failure to state a claim "does not need detailed factual allegations." *Twombly*, 550 U.S. at 555. Instead, the plaintiff is required only to set forth factual allegations that "raise a right to relief above the speculative level." *Id.* "**Specific facts are not necessary**; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), citing *Twombly*, 550 U.S. at 555 (quotation and other citation omitted; emphasis added). A pleading meeting these requirements defeats a Rule 12 motion to dismiss "even if it strikes a savvy judge that actual proof of th[e] facts is improbable and that a recovery is very remote and unlikely." *Twombly*, at 556.

Under Fed. R. Civ. P. 12(d):

> If, on a motion under Rule 12(b)(6) or12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Here, Plaintiffs have presented matters outside the SAC, including the exhibits and documents attached to Defendants Requests for Judicial Notice. Accordingly, Defendants' 12(b)(6) motions should be converted to a Rule 56 motion and discovery granted. Plaintiffs, in accordance with their motion to compel, request production of the Hart-Scott Rodino documents submitted to the Department of Justice and depositions of the top executives who negotiated the transaction, all of which could be completed in one month's time.

ARGUMENT

I. THE BINDING AUTHORITY OF THE UNITED STATES SUPREME COURT MANDATES DIVESTITURE IN THIS ACTION

A. Congress sought to arrest trends towards concentration at their incipiency.

In enacting and amending § 7 of the Clayton Act, "Congress sought to preserve competition among many small businesses by *arresting a trend toward concentration in its incipiency* before that trend developed to the point that a market was left in the grip of a few big companies." *United States v. Von's Grocery Co.,* 384 U.S. 270, 277 (1966). [Emphasis added.] The Supreme Court has held that:

> "'The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.' To arrest this 'rising tide' towards concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers…Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers." *Vons,* 384 U.S. at 276-277. "If ever such a merger would not violate § 7, certainly it does so when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with the power to do so, declared must be arrested." *Id.* at 278.

The United States market for beer is highly concentrated, with just three companies controlling 80-85% of the market. Mergers and acquisitions under these highly concentrated conditions are suspect, the very circumstances Congress sought to protect against in enacting and amending § 7. Indeed, where market "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States v. Philadelphia Nat'l Bank,* 372 U.S. 321 362 n. 42 (1963). Because of the high market concentration of the beer industry in the United States, this acquisition should and must be subject to greater scrutiny.

B. Supreme Court precedent mandates divestiture in this case.

A line of Supreme Court precedent which has never been overruled, mandates divestiture in this case. The facts and circumstances of these Supreme Court cases, where divestiture was ultimately ordered, are far less outrageous violations of § 7 than the facts alleged here. These cases mandate divestiture in the action currently before this Court.

In *United States v. Alcoa,* 377 U.S. 271 (1964), the Court required divestiture where nine firms controlled 95% of all aluminum created in the United States. In the narrower submarket for insulated aluminum conductor, Alcoa was the third with only 11.6% of the market and Rome Cable Corporation was the eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. The Supreme Court deemed both markets "highly concentrated."

Later in *Vons, supra,* 384 U.S. 270, the Supreme Court considered concentration in an industry alone sufficient to hold that an acquisition violates § 7 (the acquisition by Von's, which had a 4.7% share of the market, of Shopping Bag, with 4.2% of the market, together with the growing number of grocery market chains and the shrinking number of independently-owned stores resulted in the Court holding "these facts alone are enough to cause us to conclude…that the Von's Shopping Bag merger did violation § 7.")

That same year in *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966), the Supreme Court ordered divestiture of a merged entity which had combined the 10th and the

18th largest brewers in the United States, but which, when combined, resulted in just the 5th largest brewer with only 4.49% of all domestic beer sales.

Similarly, in *United States v. Falstaff Brewing Corp*., 410 U.S. 526 (1973), the Supreme Court reversed the District Court in order to prohibit a merger of brewers and remand the case where the effect of the merger would have eliminated the acquiring company – which had never been in, and professed to have no intention to enter into, the acquired company's market – as a potential entrant and competitor with the ability to influence competitive conditions in the market.

These Supreme Court cases have not been overruled or even diminished by later opinions and they determine beyond peradventure that the transaction is unlawful. In *Hospital Corp. of America v. Federal Trade Commission,* 807 F.2d 1381, 1385 (7th Cir. 1986), Judge Posner of the Seventh Circuit observed the above line of Supreme Court precedent, taken together, prohibited "any nontrivial acquisition of a competitor." And so here as set forth by the Supreme Court, Defendants' transaction violates § 7.

II. THE REVISED TRANSACTION DOES NOT RESOLVE THE ISSUES RAISED IN THE DOJ'S COMPLAINT, WHICH DEFENDANTS ADMIT "STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER SECTION 7 OF THE CLAYTON ACT"

A. The Defendants' Agreements do not remedy the antitrust violations.

The Transition Services Agreement states in Section 2.02 (ABI RJN Exhibit 4):

> Seller will provide any additional services "other than Excluded Services[8]/ for the operation of the Company upon Purchaser's reasonable request and at a price to be agreed upon after good faith negotiations between the Parties [ABI and Constellation] provided that any such additional services shall be no greater than the services that were provided by any Grupo Modelo Entity to the Company in the ordinary course of business during the 12 months immediately prior to the Settlement Date.

[8] "Excluded Services" are defined in § 2.01(e) as "services related to or connected with (i) capital expenditures ..., [and] (ii) innovation (such services in clauses (i) and (ii), together, the 'Excluded Services') and ... (iii) supply...."

> [U]nder no circumstances shall Seller [ABI] have the authority to make any decisions with respect to the operation and expansion of the Piedras Negras Plant or the Company.

Yet, the agreement effectively keeps the "Company's" employees in ABI's employ during the entire transition period, thereby directly influencing them in much the same way ABI would have influenced Constellation's pricing decisions during the 10 year period of the originally proposed sub-license agreement; an arrangement the DOJ found to violate the antitrust laws.

ABI argues that "Constellation has acquired Servicios Modelo de Coahuila, S.A. de C.V. ["SMC"], the company that employs the personnel who operate the Piedras Negras brewery, thereby retaining all the necessary employees and assuming control of their compensation. ... (ABI responsible only for paying personnel that provide services to Constellation under the TSA.)" ABI Br. 8-9 [Emphasis added.] However, the Transition Services Agreement is clear and unequivocal that virtually all such employees will, for the duration of the TSA, be and remain ABI employees because those who are slated to "provide services to Constellation under the TSA" are those who already provide the myriad services listed in section 2.01 that are needed to operate the Piedras Negras brewery:

> (a) consulting services with respect to the management of the Piedras Negras Plant ... ;
>
> (b) consulting services in logistical matters, materials resource planning and advisory services on procurement matters ... ;
>
> (c) general administrative services currently provided at the Piedras Negras Plant or to Servicios, including information technology (IT Service), finance and regulatory compliance, services related to the testing of products and packaging in Crown's current development pipeline ...at Grupo Modelo's Mexico City test brewery, human resources and promotional, retail and licensing services performed by GModelo Corporation as of the date of the Stock Purchase Agreement ... [Emphasis added];
>
> (d) services relating to the Brewery Expansion Plan ... ;
>
> (e) the supply of aluminum cans, glass, malt, crowns and caps, hops, corn starch, can lids, Cartons and Yeast (the 'Supply Services', and together with the Brewery Operations Services, the Other G&A Services, the Procurement and Logistics Transition Services and the Brewery Expansion Services, the 'Services')[.]

ABI RJN Exhibit 4, TSA Section 2.01 pp.7-8.

Consequently, those performing these services are, and will remain, employees of ABI for the duration of the TSA (ABJ RJN Exhibit 4):

> Section 3.01 *Responsibility for Wages and Fees*. For such time as *any* employees of Seller [ABI] or any of its Affiliates are providing the Services to Purchaser under this Agreement, (a) *such employees will remain employees of Seller or such Affiliate*, as applicable, and *shall not be deemed to be employees of Purchaser for any purpose*, and
> (b) Seller or such Affiliate, as applicable, shall be solely responsible for the payment and provision of all wages, bonuses and commissions, employee benefits, including severance and worker's compensation, and the withholding and payment of applicable Taxes relating to such employment. (Emphases added.)

ABI's assertion that "Constellation has acquired Servicios Modelo de Coahuila, S.A. de C.V., the company that employs the personnel who operate the Piedras Negras brewery, thereby retaining all the necessary employees and assuming control of their compensation" (ABI Br. 8-9) [emphasis added]) is demonstrably false. Although the amended TSA does provide for the sale of SMC's shares to Constellation, section 3.01 makes clear that for as long as ABI or any Affiliate provides "Services" to Constellation under the TSA, "such employees will remain employees of [ABI or its affiliate]" without regard to who owns SMC's shares.

It is misleading, therefore, to suggest, as ABI does, that because Constellation acquired SMC's shares it acquired its employees for the 3-5 year transition period during which Services will be performed. To the contrary, those personnel are and will remain ABI employees for all intents and purposes, and they will be paid by and continue to receive their benefits from ABI.

B. The "perpetual" Sub-license Agreement involves a sub-licensor whose corporate make-up is undisclosed and unknown and the primary license, to which the sub-license is subordinate, is also undisclosed and unknown.

The all important Sub-license Agreement is an agreement between Constellation and Marcas Modelo, the latter of which is not a party to any of the other agreements or the

Proposed Final Judgment. What significance is there in the fact that the agreement is a sub-license? Is Marcas Modelo the primary licensee? If so, who is the primary licensor? What happens if Marcas Modelo's – or whoever's – primary license should fall or expire? Will not the sub- license go down with it? In short, why is Constellation not receiving a primary, as opposed to a sub-, license, from ABI-Modelo directly?

These questions are unanswered by the transaction documents and the Proposed Final Judgment. They are important because whether Marcas Modelo is an "affiliate" of ABI-Modelo may well determine whether Constellation can assign the sub-license to ABI-Modelo or some other affiliated firm.

C. The so-called "firewalls" are illusory.

ABI also argues that "the TSA and ISA establish firewalls to prevent ABI and Constellation from sharing competitively sensitive information. (TSA §2.12(d); ISA § 5.4.)" ABI Br. 8. But this, too, is misleading and does not reflect the terms of ABI's and Constellation's agreements. Section 2.12 (a) clearly contemplates the sharing of confidential information between ABI and Constellation:

> (a) During the term of this Agreement and thereafter, the Parties shall, and shall instruct their respective representatives to, maintain in confidence and not disclose the *other Party's* financial, technical, sales, marketing, development, personnel, and other information, records or data, including, without limitation, customer lists, supplier lists, trade secrets, designs, product formulations, product specifications or any other proprietary or confidential information, however recorded or preserved, whether written or oral (any such information, "Confidential Information"). ... Unless otherwise authorized in any Contract between the Parties, *any Party receiving any Confidential Information of the other Party (the "Receiving Party") may use Confidential Information only for the purposes of fulfilling its obligations under this Agreement* (the "Permitted Purpose"). Any Receiving Party may disclose such Confidential Information only to its Representatives who have a need to know such information for the Permitted Purpose .... (ABI RJN Exhibit 4.) (Emphases added.)

This clause is fertile ground for sharing confidential information by ABI and Constellation under the guise of "fulfilling ... obligations under this Agreement." Section 2.12 (a) is no more a "firewall" than gasoline is a fire retardant.

It is equally ludicrous for Defendants to suggest that Section 5.4 of the Interim Supply Agreement erects a "firewall" to prevent ABI and Constellation from sharing confidential information:

> (a) Unless otherwise agreed to in writing by Crown, Supplier [Grupo Modelo] agrees (and Supplier agrees to cause its Affiliates) (a) to keep confidential all Confidential Information of Crown and not to disclose or reveal any of such Confidential Information to any Person other than (i) those directors, officers, employees, stockholders, legal counsel, accountants, and other agents of Supplier or its Affiliates who are *actively participating in the performance of the obligations and exercise of the rights of Supplier under this Agreement*, and (b) not to use Confidential Information of Crown for any purpose other than in connection with the performance of the obligations and exercise and enforcement of the *rights of Supplier* hereunder. (ABI RJN Exhibit 4.) [Emphasis added.]

D. The transaction endorsed by the Proposed Final Judgment is a farce which leaves in place the very antitrust violations DOJ's lawsuit and the settlement were supposed to remedy.

The merger between ABI and Modelo as originally proposed was sufficiently deficient that the DOJ deemed it to be a violation of Section 7 of the Clayton Antitrust Act and the Defendants agreed that DOJ's complaint stated such a cause of action. The DOJ filed suit to enjoin it. To understand why the suddenly-acceptable-merger-agreement also violates the Clayton Act, it is useful to recount DOJ's objections to the original agreement and explicate how the reconstituted agreement equally fails to address antitrust concerns.

> 1) "The U.S. beer industry – which serves tens of millions of consumers at all levels of income – is highly concentrated with just two firms accounting for approximately 65% of all sales nationwide." (ABI RJN Exhibit 1, DOJ Complaint ¶ 1.)
>
> - This fact is unchanged by the new agreement.
>
> 2) "... Modelo has resisted ABI-led price hikes. Modelo's pricing strategy – 'The Momentum Plan' – seeks to narrow the 'price gap' between Modelo beers and lower-priced premium domestic brands, such as Bud and Bud Light." (ABI RJN Exhibit 1, DOJ Complaint ¶ 4.)
>
> and
>
> "Constellation has already shown through its participation in the Crown joint venture that it does not share Modelo's incentive to thwart ABI's price leadership. In fact, Constellation consistently has urged following ABI's price leadership. Given that

Constellation was inclined to follow ABI's price leadership before the acquisition, it is unlikely to reverse course after – when it would be fully dependent on ABI for its supply of beer, and will effectively be ABI's business partner. In addition, Constellation would need to preserve a strong relationship with ABI to encourage ABI from exercising its option to terminate the agreement after 10 years." (ABI RJN Exhibit 1, DOJ Complaint ¶ 10.) (Emphases in original.)

- Like the original merger scheme, which had a sunset date of 10 years, after which ABI could have reacquired the rights to Modelo in the U.S., the Proposed Final Judgment also has a 10 year sunset provision after which ABI-Modelo could cut a deal with Constellation to "reacquire any part of the Divestiture Assets." (ABI RJN Exhibit 3, Proposed Final Judgment Articles XV and XVIII.)[9]/

- ABI-owned Modelo distributors in the U.S. who are not ordered by Constellation to be terminated, will be subjected to ABI's regular practice – historically supported by Constellation – of regularly raising beer prices, but without the countervailing influence formerly provided by Crown. (ABI RJN Exhibit 3, Proposed Final Judgment V.C. p.15.)

- Constellation's desire to expand its marketing of beer into Mexico will be subject to its competitor ABI's veto. (ABI RJN Exhibit 4, Stock Purchase Agreement Art. 5.7, p.25.)

E. The Stock Purchase Agreement gives ABI a right of first refusal if Constellation should choose to "directly or indirectly" seek to distribute or sell Non-GM Beer in Mexico.

The Stock Purchase Agreement ("SPA"), in section 5.7, gives ABI a right of first refusal if Constellation wishes to enter the Mexican market to sell "Non-G[rupo] M[odelo] Beer."[10] (ABI RJN Exhibit 4.)/ In that eventuality, ABI and Constellation must negotiate in good faith "the possibility of ABI or an Affiliate thereof serving as the exclusive distributor of such Non-GM Beer in Mexico." Thus, if Constellation intends to enter the Mexican market, either directly or indirectly, and whether on an exclusive or non-exclusive basis, it

[9] "'Divestiture Assets' means all tangible and intangible assets, rights and interests necessary to effectuate the purposes of this Final Judgment, as specified by the ... Stock Purchase Agreement (including the exhibits thereto) and the MIPA [Membership Interest Purchase Agreement] (including the exhibits thereto)." Proposed Final Judgment Article II.N. In short, after 10 years, the Final Judgment will expire and no longer prevent ABI-Modelo from reacquiring from Constellation the Piedras Negras brewery and the Modelo marks sub-licensed to Constellation.

[10] The SPA refers to this as a "Right of First Offer," which is, perhaps, thought to be less of a red flag, although not different in kind from a Right of First Refusal.

must first negotiate to give ABI the exclusive right to market its products there. If, after 60 days, an exclusive agreement is not reached between ABI and Constellation, then, for a period of 90 days, Constellation can negotiate with others "on terms and conditions that are no more favorable to such other Person (taken as a whole) than the last set (if any) of terms and conditions that were offered by Constellation to ABI and rejected by ABI ..."

This is tantamount to a division of markets by competitors which is condemned as a per se violation of the antitrust laws. *Palmer v. BRG of Georgia*, Inc., 498 U.S. 46, 49 (1990). The Supreme Court in *Palmer* relied upon *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) when it held:

> The defendants in Topco had never competed in the same market, but had simply agreed to allocate markets. Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other. Thus, the 1980 agreement between HRJ and BRG was unlawful on its face.

Palmer, 498 U.S. 49-50.

Here, the ABI-Constellation agreement endorsed by the Government gives Constellation the exclusive right to market Modelo products in the U.S. and gives to ABI the right to set the terms under which Constellation will be permitted to market non-Modelo beer, including that of ABI's competitors, such as Miller-Coors, Carlsberg, craft brewers, etc., in Mexico. This is a per se violation of the antitrust laws under Palmer, which decision was recently reaffirmed by the Court in *FTC v. Actavis, Inc.*, 570 U.S.____, 2013 U.S. LEXIS 4545 (June 17, 2013) ("agreement to divide territorial markets held 'unlawful on its face.'" (quoting Palmer, supra at 50)).

As shown above, contrary to Defendants' assertions, the proposed settlement does not "prohibit[] any agreement that would provide ABI with the ability to unreasonably raise Constellation's costs or lower its efficiency," it also does not "erect a firewall to prevent [ABI] from obtaining or using competitively sensitive Constellation information," [ABI Br.

9], it specifically denies Constellation the benefit of any product or production innovations that would otherwise become available to it during the period that ABI's employees continue to operate the Piedras Negras brewery, and, finally, it permits ABI-owned U.S. distributors of Modelo products to remain in place (except to the extent Constellation may demand their termination during a limited window in which to do so) and allows ABI to continue to exert the upward pressure on beer prices, now including Modelo products, that Constellation has historically supported, but which Crown thwarted. Crown's salutary effect on such egregious conduct will now be gone.[11]/

F. The DOJ's endorsement of the reconstituted merger has no legal significance and should not influence this Court.

The Government's Competitive Impact Statement specifically acknowledges plaintiffs' right to maintain this action notwithstanding any proposed settlement between the United States and the Defendants. On page 18, under the heading for Article IV, REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS, it states "Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action." (ABI RJN Exhibit 2.)

> The agencies' opinion of a merger is not binding on this Court, and their enforcement decisions do not necessarily reflect the current state of antitrust law. See, United States v. American Cyanamid Co., 719 F.2d 558 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984); Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984); Monfort of Colorado, Inc. v. Cargill, Inc., 591 F. Supp. 683 (D.Colo. 1983), [rev'd on other grounds, Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)] (the guidelines "are primarily a statement of . . . enforcement intentions" and "a tool to assist Justice Department attorneys in determining which mergers to challenge"; they "do not represent legal precedent to determine

[11] Significantly, critical information necessary to assess the full impact of this merger has been deliberately withheld from the plaintiffs and public because Exhibit D to the Proposed Final Judgment has been redacted. According to the Notice Regarding Filing of Redacted Documents filed in the Government's case (Dkt. # 35), Exhibit D "set[s] forth the terms of sale of certain beer distribution rights held by beer distributors owned by Defendant Anheuser-Busch InBEV SA/NV." Similarly, Exhibit A to the Proposed Proposed Final Judgment has been redacted. That "describe[s] the terms of the transactions and supply agreements that are the subject of the proposed Final Judgment." Unredacted versions were filed under seal and have not been reviewed by plaintiffs or the public.

> illegality." Id. In affirming, the Tenth Circuit stated that the Department of Justice "guidelines are more useful for setting prosecutorial policy than delineating judicial standards." 761 F.2d at 579.)
>
> However, perhaps the best response to the argument that the Attorney General, rather than the Supreme Court, is the final authority on the meaning of the antitrust laws, is set out in the appendix to the concurring opinion of Mr. Justice Douglas in [United States v. Pabst Brewing Co., 384 U.S. 546, 553 (1966)]. We suggest that it should be required reading for every judge who wants to put his own gloss on the simple language of § 7.[12]/

Laidlaw Acquisition Corp. v. Mayflower Group, Inc., 636 F. Supp. 1513, 1521 (S.D. Ind. 1986).

The Hart Scott Rodino Antitrust Improvement Act of 1976 also provides that the failure by the FTC or DOJ to enjoin a transaction "shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any provision of law." In fact, DOJ's approvals of mergers, far from being persuasive to courts in private actions, have sometimes been the object of severe criticism, including by Judge Walker of this Court:

> The undersigned is astonished and disappointed that DOJ would allow itself to be put in a position where the inference can be so easily drawn that its action or inaction in this case was political favoritism masquerading as law enforcement.

Reilly v. Hearst Corp., 107 F. Supp. 2d 1192, 1211 (N.D. CA. 2000).

There is nothing in the Proposed Final Judgment to which this Court is required to defer except for the judicial estoppel arising from Defendants' admission that the Government's Complaint stated a cause of action.

III. THE RECONFIGURED MERGER VIOLATES SECTION 1 OF THE SHERMAN ACT

As stated above, Defendants' agreement to divide markets and customers is a per se violation of Section 1 of the Sherman Act. See e.g., *Palmer v. BRG of Georgia, Inc., supra*. Section 1 of the Sherman Act (15 U.S.C. § 1) makes illegal "[e]very contract, combination

in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations ...." [Emphasis added].

The Complaint filed by the DOJ was predicated on many compelling facts, including that (ABI RJN Exhibit 1):

> 61. Competition spurred by Modelo has benefitted consumers through lower beer prices and increased innovation. It has also thwarted ABI's vision of leading industry prices upward with MillerCoors and others following. As one ABI executive stated in June 2011, '[t]he impact of Crown Imports not increasing price has a significant influence on our volume and share. The case could be made that Crown's lack of increases has a bigger influence on our elasticity than MillerCoors does.' ABI's acquisition of full ownership and control of Modelo's brands and brewing assets will facilitate future pricing coordination.
>
> 62. ABI is intent on moderating price competition. As it explained internally: 'We must defend from value-destroying pricing by: [1] Ensuring competition does not believe they can take share through pricing[,] [and] [2] Building discipline in our teams to prevent unintended initiation or acceleration of value-destroying actions.' ABI documents show that it is increasingly worried about the threat of high-end brands, such as Modelo's, constraining its ability to increase premium and sub-premium pricing. In general, ABI, as the price leader, would prefer a merket not characterized by aggressive pricing actions to take share because '[t]aking market share this way is unsustainable and results in lower total industry profitability which damages all players long-term.' (Brackets and emphases in original.)
>
> 63. ABI would have strong incentives to raise the prices of its beers were it to acquire Modelo. First, lifting the price of Modelo beers would allow ABI to further increase the prices of its existing brands across all beer segments. Second, as the market leader in the premium and premium-plus segments, and as a brewer with an approximate overall national share of approximately 46% of beer sales post-acquisition, coupled with its newly expanded portfolio of brands, ABI stands to recapture a significant portion of any sales lost due to such a price increase, because a significant percentage of those lost sales will go to other ABI-owned brands.
>
> 64. Therefore, ABI likely would raise prices on the brands of beer that it owns as a result of the acquisition.

It is this very Complaint by the United States that the Defendants have stipulated states a valid claim against ABI and Modelo for violating Section 7 of the Clayton Act. (ABI RJN Exhibit 5, Stipulation and Order, Art. III.) Yet, the Proposed Final Judgment and reconfigured transaction, in fact, poses more serious and sinister difficulties because it gives the illusion of fostering competition between ABI and Modelo in the U.S., while giving ABI

the power to: (1) preclude Constellation's entry into the Mexican market as a competitor of ABI or Modelo except upon terms dictated by ABI; (2) retain control over its company-owned U.S. distributors and their pricing who are not terminated by Constellation; (3) reacquire the "divestiture assets" in 10 years when the Final Judgment expires; (4) control the price and supply to Constellation of up to 40% of its requirements for Modelo beer products for the next 3 to 5 years; (5) withhold product and production innovation from Constellation for the next 3 to 5 years; and (6) gain access to Constellation's sensitive commercial information without the protection of the effective "firewall" that the Government considers to be essential to the Proposed Final Judgment. Each of the deficiencies in the proposed plan is discussed above, with references to the applicable transaction terms that identify them.

The SAC echoes these same, still-viable allegations in the Government's Complaint, but in even greater detail. If they were sufficient to state a cause of action for violations of Section of 7 of the Clayton Act in the Government's Complaint, they do so with greater force in Plaintiffs' SAC. (SAC ¶¶ 90-117).

Although there can be no serious doubt that the SAC states a claim for violations of Section 7 of the Clayton Act, the SAC also alleges that Defendants have conspired to violate Section 1 of the Sherman Act by agreeing to enter into "the Revised Agreement and Constellation's agreement to follow ABI's price leads" (SAC ¶ 98) and the proposed agreements will "facilitate price fixing." (SAC ¶ 106). Further, "ABI and Constellation will have every incentive to act together on pricing because of the vast profits each would stand to make if beer prices were to increase" and "[i]f the proposed acquisition is permitted, ABI and Constellation will immediately raise beer prices." (SAC ¶ 106). Based upon all the alleged facts, and the reasonable inferences to be drawn from them, "[t]here is a substantial threat that if ABI is allowed to buy Modelo and then spin off its interest in Crown to Constellation," and Constellation buys Modelo's brewery which will be run and supplied by ABI for at least 3 years, "Constellation will eagerly and tacitly agree with ABI to raise and

follow ABI's price increases." (SAC ¶ 108). These facts and the reasonable inferences they suggest are directly supported by the words, history and intentions of ABI's and Constellation's executives. (SAC ¶¶ 90, 91, 100). "The essential combination of conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words." *American Tobacco Co. v. United States*, 328 U.S. at 809-10 (citing, *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920)). These alleged facts, as manifested by the terms of the proposed merger agreement, amount to a conspiracy to fix prices and otherwise restrain trade. This is the essence of plaintiffs' Section 1 claim.

It is important to keep in mind that the threatened violation of Section 1 as alleged in the SAC must be read together and in context with the Section 7 Clayton Act violation. "[T]he tests of illegality under the Sherman and Clayton Acts are complementary." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963). The Clayton Act prohibits mergers and other acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. ¶ 18 [Emphasis added.] And the Clayton and Sherman Acts have been read together precisely to prevent these results. In fact, the Supreme Court has endorsed the use of Section 1 of the Sherman Act as a proper tool to prevent a merger that will restrain trade:

> [W]here merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act. That standard was met in the present case in view of the fact that the two banks in question had such a large share of the relevant market.

United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665, 672 (1964). See also, *United States v. Grinnell Corp*., 384 U.S. 563, 573 (1966) ("We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act") (citing First National Bank & Trust Co.).

The particular merger proposed here is important to competition in the United States. It should not become the latest in a series mergers by major competitors in a highly concentrated industry which have received DOJ endorsement in a process where even lip-

service is barely paid to the [still]-controlling decisions of the U.S. Supreme Court, such as *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964):

> '[O]nce a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.'

Id. at 279 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. at 365).

There are two cases of particular importance here because they arise from the same industry that is in issue here. They exemplify how far afield the DOJ has drifted from the holdings in the controlling decisions of the Supreme Court in merger cases.

In *United States v. Pabst Brewing Co*., 384 U.S. 546 (1966) the Court mandated that, when bringing an action under § 7, the DOJ "must ... prove no more than that there has been a merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition ... in any line of commerce 'in any section of the country.'" Id. at 549. Rather than uphold this charge to enforce the law, the DOJ has endeavored to find excuses to allow ABI and Modelo to skirt it. For the reasons shown above, that effort fails. Similarly, in *United States v. Falstaff Brewing Corp*., 410 U.S. 526 (1973), the Court reversed the District Court in order to prohibit a merger of brewers and remand the case where the effect of the merger would have eliminated the acquiring company – which had never been in, and professed to have no intention to enter into, the acquired company's market – as a potential entrant and competitor with the ability to influence competitive conditions in the market.

At the time *Pabst* and *Falstaff* were decided the brewery industry was not even close to the concentration that now exists and in neither *Pabst* nor *Falstaff* were the companies' market shares – pre- or post-merger – or the geographic markets anywhere near the size of those involved in the ABI-Modelo merger. One cannot read *Pabst* or *Falstaff* and reasonably conclude that the ABI-Modelo merger could possible pass muster under the controlling principles of law enunciated there.

The SAC states valid claims for violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

IV. DEFENDANTS HAVE VIOLATED THE TUNNEY ACT

"Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). This rule should have even greater force where, as here, the Defendants assert that their willful disregard of the Tunney Act's requirements is the usual practice. ABI Br. 19; Const. Br. 19. This indefensible argument is based upon a single passing reference to something DOJ supposedly stated in one case where this was not an issue before the court: "The government states that this is in keeping with its standard practice that neither the stipulations nor pending proposed final judgments prohibit the closing of the mergers." *United States v. SBC Communications, Inc.*, 489 F. Supp.2d 1, 8 (D.D.C. 2007). That the Government does not usually include in its stipulations or proposed final judgments a prohibition against closing mergers during the Tunney Act comment period and before the judgment is entered, does not mean that the Act permits such closings.

It is immaterial that the Tunney Act does not provide a private cause of action. What is important is that the Act does not permit closing the transaction before the 60 day comment period has run and until the Government has responded to the comments and the Court has determined that the settlement is in the public interest. None of those requirements, much less all of them, have been met to date. Choosing to proceed with any transaction in the face of the Act's requirements was a risk Defendants unjustifiably chose to run and their deliberate failure to comply with the Act is relevant because any complications or alleged prejudice that Defendants argue would result from divestiture is self-caused. The Tunney Act was enacted to provide transparency and accountability for DOJ settlements of government antitrust actions. The Act had its genesis in the controversy that arose out of the Government's settlement of its complaint against ITT during the Watergate

era. At the time it appeared as if the DOJ's agreement to settle had been influenced by ITT's offer of political contributions to the Nixon administration. The Act was passed to require the publication of proposed settlements and to afford the public 60 days within which to present written comments to the Court and to elicit responses from the Government *before* the final judgment effectuating the settlement was entered. While the Act is not intended to confer authority upon the Court to inquire into the minutiae of the terms of the settlement, it is meant ensure that the Court's approval is not merely a rubber stamp and that the settlement is in the public interest. Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 ANTITRUST L. J. 549 (2008).[13]/ There is nothing in *Rethinking the Tunney Act* that remotely suggests pre-judgment mergers are permissible. Indeed, when discussing the SBC case upon which Defendants rely, the author stated:

> But *SBC* only goes so far to resolve the issues the Tunney Act raises: The opinion is that of a single district court and it is unclear whether it will be widely followed. Neither the *SBC* ruling nor existing precedent clarify the precise scope of the court's review or state under what circumstances a court should 'condition' or reject a decree. Most importantly, the *SBC* court employed a unique procedural approach to the Tunney Act[.] ... As a result, the consent decrees were not entered – and the remedy was not implemented – until well over a year had passed, and long after the parties had closed the underlying transaction.

Id. at 574.

There is nothing in the Act that permits Defendants to close their transactions during the 60 day review period and before Final Judgment has been entered. The Act states that "such 60 day period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest." 15 U.S.C. § 16(d). If the 60 period can simply be ignored and Defendants allowed to "consummate" their merger during the period, the Act would not contain this stricture forbidding a truncated term except where compelling

[13] The author was an attorney in the DOJ's Antitrust Division at the time.

circumstances and the public interest allow. This conclusion is also supported by the following language in the Act:

> (e) Public interest determination.
> (1) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest.

15 U.S.C. § 16(e)(1).

Finally, the Tunney Act states the requirement concisely:

> Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days *prior to the effective date of such judgment*.

15 U.S.C. § 16(b) [Emphasis added.]

The defendants' arguments that they were free to consummate their merger before the consent judgment was entered by the Court would render the above provisions of the Act mere surplusage and evidences an attitude on the part of the defendants about the Tunney Court's role which suggests it is nothing more than a rubber stamp, a notion which has been rejected by the courts. See, *United States v. Western Elec. Co., Inc*., 767 F. Supp. 308 (D.D.C. 1991), *aff'd* 993 F.2d 1572, *cert. den*. 510 U.S. 984 (1993); *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984). As the DOJ correctly stated in its Competitive Impact Statement at page 19 (ABI RJN Exhibit 2):

> The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. ... All comments received during this period will be considered by the United States Department of Justice, which remains free to *withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment*. [Emphasis added.]

In short, the defendants' consummation of their business deal was an ill-advised rush to [the] judgment the Court itself cannot by law enter yet. Defendants cannot rely upon their own actions to claim that divestiture is now an inappropriate or troublesome remedy or that

plaintiffs are barred by laches or that the issue is moot. See, *Gasser Chair Co., Inc. v. Infanti Chair Mfg. Corp*., 60 F.3d 770, 774 (Fed. Cir. 1995) (change of position must be because of and as a result of the delay, not simply a business decision to capitalize on a market opportunity); *accord, Motorvac Technologies, Inc. v. Noren Industries, Inc*., 2004 U.S. Dist. LEXIS 4216, *7-8 (C.D. Cal. January 12, 2004). Defendants should not be allowed to use the supposed prejudice they themselves have created as a shield behind which to hide to avoid answering for what the antitrust laws forbid.[14]/

V. PLAINTIFFS HAVE SUFFICIENTLY PLED THEIR CLAIMS FOR RELIEF

A. Divestiture is a remedy available to private plaintiffs under § 16 of the Clayton Act.

Defendants are well aware that divestiture is a remedy available to a private plaintiff, contrary to any misguided suggestion otherwise. (ABI Memorandum in Support at 5: 25-28.)

Section 16 of the Clayton Act, 15 U.S.C. §26, provides that:

> ***Any person***, firm, corporation, or association ***shall be entitled to sue for and have injunctive relief,*** in any court of the United States having jurisdiction over the parties, ***against threatened loss or damage*** by a violation of the antitrust laws… ***under the same conditions and principles as injunctive relief*** against threatened conduct that will cause loss or damage. [Emphasis added.]

Section 16 lists no special requirements or barriers for a private plaintiff to obtain injunctive relief, even permanent injunctive relief. In *California v. American Stores, Co.,* 495

[14] The defendants' contention that plaintiffs sat on their rights is belied by the facts. The complaint was filed on March 22, 2013, barely one month after ABI and Constellation reached their revised agreement, one month *before* ABI, Modelo, Constellation and the DOJ announced a settlement, two months *before* the terms were published under the Tunney Act and four months before the public comment period expires on July 22, 2013. Similarly, the plaintiffs moved for a TRO in early June, also well before the 60 day comment period is due to expire. ABI Br. 22 and Constellation Br. 2-3. The defendants made a strategic business decision to try to "beat the clock" by consummating their deal before they were permitted to do so. That is a decision they must live with.

U.S. 271, 282 (1990), the United States Supreme Court upheld a private plaintiffs' right to the remedy of divestiture:

> ***§ 16 'states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek***, or that a court may order…Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief.' (citation omitted) ***We agree that the plain text of § 16 authorizes divestiture decrees to remedy § 7 violations.*** [Emphasis added.]

The Supreme Court went on to underscore the importance of the private right of action, "The Act's provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers." *American Stores,* 495 U.S. 271, quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 323 (1962). Any suggestion that private plaintiffs somehow carry a special, heavier burden in seeking injunctive relief flies in the face of the intent of Congress, the express language of §16 itself, and the holding of the United States Supreme Court in *California v. American Stores Co.*

B. The balance of harms weigh heavily in favor of Plaintiffs.

Defendants argue that since Plaintiffs are only "nine beer consumers," the "sum total" of their injury could in no event outweigh the substantial harm that these large corporate Defendants would sustain from divestiture. (ABI Br. at 22.) Defendants' approach to balancing the harms is erroneous.

First, § 16 of the Clayton Act authorizes plaintiffs to bring this private action for injunctive relief. Under Defendants' faulty balancing approach, the harms could never weigh in favor of a group private plaintiff consumers, no matter how egregious the violation of § 7, since the pecuniary losses of a few individuals would not be greater than those suffered by a corporate defendant. The balancing of harms must take into account the threatened harm to all beer consumers in the United States.

Plaintiffs have alleged that competition will be lessened throughout the United States, as the Momentum Plan, which was instituted by Crown and caused substantial head-to-head competition between ABI and Modelo, will be abandoned. Plaintiffs have alleged that beer product innovation and quality will diminish. Plaintiffs have also alleged that beer prices will increase. (SAC ¶ 117.)

The hundreds of millions of dollars of additional cost to Plaintiffs and consumers of beer in the United States which will result from this transaction and this violation of section 7 far exceeds any cost Defendants may incur as a result of divestiture. Justice O'Connor in *California v. American Stores, Co.,* 492 U.S. 1301, 1307 (1989), took a similar approach to balancing the harms: "…the harm to applicant if the stay is denied in the form of a substantial lessening of competition in the relevant market, outweighs the harm respondents may suffer…Applicant alleges, for example that permitting the merger would cost the State's consumers $400 million a year in higher prices. Respondents contend that they are incurring costs of over $1 million a week by reason of the District Court's injunction and that the applicant's decision to file suit after the merger had been consummated…Under the circumstances…it appears the equities favor the applicant." And here the equities favor Plaintiffs, as they did in *American Stores.*

Plaintiffs and beer consumers in the United States stand to lose millions more for years to come than Defendants may incur in costs if divestiture is ultimately ordered. It is not only clear but commonsensical that the balance of harms should be weighed accordingly.

Second, this court has broad discretion to tailor injunctive relief. See *United States v. E.I. Du Pont de Nemours and Company,* 366 U.S. 316, 322 (1961). It cannot be determined that the balance of harms tips in Defendants' favor without analyzing the precise remedy or threat of harm to Defendants. Divestiture need not be immediate. The court could order

divestiture in phases, subject to certain interim injunctive relief, to assuage real or imagined short-term harm. That discretion must be factored into balancing the harms.

C. Defendants' reliance on *Ginsburg* and *Garabet* is nothing more than a backdoor laches defense aimed at avoiding the contrary authority of this Circuit.

Defendants cite the *Ginsburg* and *Garabet*[15] cases for the proposition that Plaintiffs bear some sort of special burden because of purported "inexcusable delays" in bringing this action. This is nothing more than a hidden laches defense. Defendants don't call it such in order to avoid the contrary authority of the Ninth Circuit.

First, no special burden is imposed on a private plaintiff seeking injunctive relief, preliminary or permanent, by § 16 of the Clayton Act. This point was made plain by the Supreme Court in *California v. American Stores, Co. Second,* Plaintiffs' action is not barred by laches or a purported "unreasonable delay." The cases upon which Defendants rely, *Ginsburg* and *Garabet,* ignore the law of Ninth Circuit which applies a presumption *against* laches when an action for injunctive relief has been filed within the analogous statute of limitations period.

Section 7 of the Clayton Act prohibits acquisitions that may tend "substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18, and is subject to a four-year statute of limitations for private actions, 15 U.S.C. § 15b. Generally, a § 7 action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or acquisition. *Concord Boat Corp. v. Brunswick Corp.,* 207 F.3d 1039, 1050 (8th

[15] Plaintiffs also cite *Taleff, et al. v. Southwest Airlines*, *et al*., 828 F. Supp. 2d 1118 (N.D.Cal. 2011), in support of *Ginsburg* and *Garabet*. Counsel for Defendants ABI and Modelo, Skadden Arps, who also represent the defendants in *Taleff*, fail to bring to this Court's attention that the same issues raised here have been raised in that case, which is on appeal to the United States Court of Appeals for the Ninth Circuit, Case No. 11-17995, and that matter is still pending.

Cir. 2000). Plaintiffs' action was filed well within the analogous four-year statute of limitations.

"While laches and the statute of limitations are distinct defenses, a laches determination is made with reference to the limitations period for the analogous action at law. If the plaintiff filed suit within the analogous limitations period, *the strong presumption is that laches is inapplicable.* *E.*g., *Shouse v. Pierce County,* 559 F.2d 1142, 1147 (9th Cir. 1977) ('*It is extremely rare for laches to be effectively invoked when a plaintiff has filed his action before limitations in an analogous action at law has run.*')" *Jarrow Formulas, Inc. v. Nutrition Now, Inc.,* 304 F.3d 829, 836 (9th Cir. 2002). [Emphasis added.] The presumption against laches has been expressly applied in the antitrust context. *Aurora Enterprises, Inc. v. National Broadcasting Company, Inc.* 688 F.2d 689, 694 (9th Cir. 1982), (Holding that, "The four-year statute of limitations period in the Clayton Act furnishes a guideline for computation of the laches period in antitrust suits"); See *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.,* 392 F.2d 265 (8th Cir. 2004).

The cases cited by Defendants, *Ginsburg* and *Garabet*, do not follow the authority of the Ninth Circuit set forth in *Aurora* and *Jarrow Formulas, Inc.* These cases fail to consider the analogous statute of limitations and apply a presumption against laches. For example, *Garabet* involves a case from the United States District Court for the Central District of California where plaintiffs, alleging a violation of § 7 of the Clayton Act, filed suit the day a merger closed. The court in *Garabet* held that laches barred plaintiffs' equitable remedies. *Garabet v. Autonomous Technologies Corporation*, 116 F.Supp.2d 1159, 1174 (D.C. Cal. 2000). The court in *Garabet* failed to apply the presumption against laches. The court in *Ginsburg v. InBev NV/SA,* 623 F.3d 1229 (8th Cir. 2010) repeated and exacerbated the error

made in *Garabet* (and relied upon the court's ruling in *Garabet)*, by also failing to apply the analogous statute of limitations.

Further, it should be noted that the Tunney Act, 15 U.S.C. § 16(i) tolls the statute of limitations for private rights of action "whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws" during "the pendency thereof and for one year thereafter." As the action by the Department of Justice is still pending in the United States District Court for the District of Columbia, the analogous statute of limitations period has not even commenced.

D. Plaintiffs have alleged a lessening of competition, which is precisely the type of irreparable injury the antitrust laws are intended to prevent.

As consumers of beer (including Defendants' beers) who anticipate purchasing beer in the future, Plaintiffs are threatened with not only price increases but less innovation and diminished quality of beer as a result of the acquisition. Plaintiffs have made an adequate showing of irreparable injury in the form of lessening of competition, which as Justice O'Connor noted in *American Stores Company*, 492 U.S. at 1305, is "precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent."

Plaintiffs have alleged the following in support of the proposition that the acquisition will result in a lessening of competition:

- Modelo's competitive strategy, the Momentum Plan will be abandoned as a result of the acquisition. The existing head-to-head competition between ABI and Modelo will be eliminated, and will enhance the ability of ABI to unilaterally raise prices, and diminish ABI's incentive to innovate with respect to new brands, products, and packaging. (SAC ¶¶ 21, 29-32, 89-91.)

- Under the Transition Services Agreement and the Interim Supply Agreement, ABI will be assisting Constellation's operations of the Piedras Negras brewery and will be a direct supplier to Constellation for at least three years. Constellation will not be independent of ABI for at least three years, allowing for coordination of

pricing between ABI, Constellation, and Modelo. For some of all of the three-year transition period, ABI will supply 40% of Crown's needs in the U.S. market. (SAC ¶ 96-99, 106-108) Constellation has encouraged following ABI's price increases, and will do so in the future. (SAC ¶¶ 22-23, 90, 94, 100, 105, 109.)

- Plaintiffs are consumers and purchasers of beer threatened with loss and damages in the form of higher prices, fewer services, fewer competitive choices, deterioration of products, product quality, and product diversity; suppression and destruction of smaller actual competitors, among others. (SAC ¶ 16.)

Plaintiffs have alleged sufficient facts in support of their claim that Defendants' transaction violates § 7 of the Clayton Act, to the irreparable injury of Plaintiffs and the public. Once lost, competition, innovation, and quality cannot be restored easily, if ever.

E. Enforcement of the antitrust laws and preserving competition is in the public interest

Forty-percent of Americans consume beer in the United States. (SAC 6.) Plaintiffs and the rest of the beer-consuming public are threatened with not only higher prices (causing consumers hundreds of millions of dollars in additional cost), but diminished quality, fewer choices, and less innovation. It is in the public interest to remedy and prevent the anticompetitive effects associated with a lessening of competition. Indeed, "Divestiture itself is an equitable remedy designed to protect the public interest." *E.I. Du Pont De Nemours and Company,* 366 U.S. at 326.

Public injury necessarily results from any act the effect of which is "substantially to lessen competition or tend to create a monopoly" under § 7 of the Clayton Act, and it has long been recognized that the public interest is served by enforcement of the antitrust laws:

> In principle, any practice that impedes or otherwise interferes with the natural flow of interstate commerce, even if there is no evident harm to the economy as a whole, because the victim's business is so minimal that its destruction made little impression upon the economy, is nonetheless injurious to the public interest. ***Accordingly, public injury necessarily results whenever there is an assault upon the principle of free and unhampered competition, as expressed in the antitrust laws…Therefore, the complaint need not alleged injury to the public; the allegation is superfluous***.

1 Callman on Unfair Comp., Tr. & Mono. § 4:24 (4th Ed.) [Emphasis added.]

The public's interest in enforcement of the antitrust laws has been recognized by the Supreme Court, as noted by Justice Thurgood Marshall in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the magna Carta of free enterprise. They are as important to the preservation of economic freedom as our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

F. Plaintiffs Are Entitled to Damages.

Defendants argue that Plaintiffs have not sufficiently alleged that they are entitled to monetary relief under federal or state law because of the United States Supreme Court decision in *Illinois Brick Co., v. Illinois,* 431 U.S. 720, 734-35 (1977). As any antitrust attorney is or should be aware, that decision, now referred to as the *Illinois Brick* doctrine, has been systematically rejected (or repealed) by a majority of the states through statutes or case law (known as *Illinois Brick* repealers). The Supreme Court ruled in *California v. ARC America* that *Illinois Brick* repealers are not preempted by federal law (490 U.S. 93, 101 (1989)). Any suggestion that Defendants are not aware of these *Illinois Brick* repealer states is disingenuous.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this court deny Defendants' Motions to Dismiss.

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