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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, GRUPO MODELO S.A.B. de C.V., and CONSTELLATION BRANDS, INC. *Defendants*.	CASE NO. C-13-1309-MMC **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS ABI'S AND MODELO'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTAL COMPLAINT** Date: August 9, 2013 Time: 9:00 a.m. The Honorable Maxine M. Chesney

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs' Second Amended and Supplemental Complaint should be dismissed because it fails to state a claim under Section 7 of the Clayton Act, Section 1 of the Sherman Act, the Tunney Act or any state antitrust statute.

2. Whether Plaintiffs' Second Amended and Supplemental Complaint should be dismissed because it fails to plead the requisite elements and facts to establish that Plaintiffs are entitled to injunctive relief or monetary damages.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Defendants Anheuser-Busch InBev SA/NV ("ABI") and Grupo Modelo S.A.B. de C.V. ("Modelo") submit this reply memorandum in support of their motion (the "Motion") to dismiss Plaintiffs' Second Amended and Supplemental Complaint ("SAC") with prejudice under Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs' opposition brief ("Opp.") confirms that the Motion should be granted, and the SAC should be dismissed. Plaintiffs have not pleaded the requisite elements of a claim under Section 7 of the Clayton Act, 15 U.S.C. § 18—namely, a combination of competitors that will lessen competition in the United States. Their theory hinges on a futile attempt to show that ABI's sale of Modelo's U.S. business to Constellation Brands, Inc. ("Constellation") is "fraudulent" because ABI will control Constellation. But Plaintiffs' claim completely distorts and misrepresents a few limited and specific provisions in the transaction documents and ignores the inescapable fact that those same documents referenced in the SAC show that Constellation—not ABI—controls the U.S. Modelo business. Not surprisingly, reviewing the same transaction documents, the United States Department of Justice ("DOJ") concluded—after a lengthy and thorough investigation—that Constellation will be "an independent and economically viable competitor that will stand in the shoes of Modelo." (Defs. Request for Judicial Notice, Lent Decl. Ex. 2, Competitive Impact Statement ("CIS") at 10.) Without any basis, Plaintiffs essentially claim that Defendants either completely duped the DOJ, or that the DOJ was complicit in the alleged fraud. The Court had it right at the TRO hearing: this is "a legitimate transaction that does not result in ABI acquiring the U.S. distribution of competing beer." (TRO Hr'g Tr. at 56:18-20.)

The SAC also fails to state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, because Plaintiffs have not pleaded any facts supporting the existence of an unlawful conspiracy between ABI and Constellation. In addition, Plaintiffs' Tunney Act claim fails because, as they concede, there is no private cause of action under the statute, and, in any event, the Tunney Act does not prohibit parties from consummating their transactions pending a judicial determination of

whether the DOJ's settlement (and not the merger) is in the public interest. Indeed, Defendants closed their transactions *pursuant to a court order*.

Finally, Plaintiffs have failed to adequately plead entitlement to the relief they seek. Their request for preliminary relief enjoining ABI's acquisition of Modelo is moot because Defendants' transactions have closed. In addition, Plaintiffs have not pleaded facts sufficient to demonstrate their entitlement to the drastic remedy of divestiture, nor cited any case where a court has awarded divestiture to a private party. As to their claims for damages, Plaintiffs concede that they are precluded from pursuing such a claim under federal law, and they fail to identify any specific state statute under which they seek damages, let alone one under which they would be entitled to them.

For all of these reasons, Plaintiffs' SAC should be dismissed with prejudice.

II. ARGUMENT

In order to survive a motion to dismiss, Plaintiffs' "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In *Twombly*, the Supreme Court articulated a pleading standard for antitrust cases that requires a complaint to contain "[f]actual allegations . . . enough to raise a right to relief above the speculative level." 550 U.S. at 555. The Supreme Court criticized the lower court's holding—adopting essentially the same standard Plaintiffs suggest here—that "the prospect of unearthing direct evidence of conspiracy [is] sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement." *Id.* at 561-62.[1] Similarly here, Plaintiffs' SAC does not plausibly allege that ABI will control Constellation such that the

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[1] Contrary to Plaintiffs' assertion, the Supreme Court in *Erickson v. Pardus*, 551 U.S. 89 (2007), did not purport to change the pleading standard it had adopted only weeks before in *Twombly*. *See Erickson*, 551 U.S. at 94 (noting that complaints by *pro se* litigants, "however inartfully pleaded, must be held to less stringent standards than formal pleadings," like those here, which have been "drafted by lawyers"). *Erickson* only held that a *pro se* litigant's allegations of harm were not "too conclusory to put these matters in issue"; the Court expressly disclaimed any finding on the "proper application of the controlling legal principles to the facts" or whether plaintiff's complaint was "sufficient in all respects" to survive a motion to dismiss. *Id.*; *see also Starr v. Baca*, 652 F.3d 1202, 1213 (9th Cir. 2011) (discussing *Erickson* and noting that "[t]he Court made clear in *Twombly* that it was concerned that lenient pleading standards facilitated abusive antitrust litigation").

transactions can be considered a merger of competitors in the United States. Nor does the SAC allege sufficient facts to support the allegation that ABI and Constellation have entered into any unlawful conspiracy.

A. PLAINTIFFS FAIL TO STATE A SECTION 7 CLAIM BECAUSE THEY HAVE NOT ADEQUATELY ALLEGED THAT ABI WILL CONTROL CONSTELLATION

Plaintiffs do not dispute that the transactions did not result in ABI owning Modelo's U.S. business. Instead, Plaintiffs claim, without any support, that ABI's sale of Modelo's U.S. business to Constellation is "fraudulent" or a "façade," and that ABI effectively will control Constellation as its "puppet" for at least three and up to five years. (SAC ¶¶ 20, 26, 27, 30, 31, 33, 50, 101; *see also* Opp. at 7, 8, 22.) Plaintiffs have not pleaded any facts to back up these bald assertions, let alone pleaded facts with particularity to support their allegations that "sound in fraud."[2]

Plaintiffs do not contest the inadequacy of their fraud allegations under Federal Rule of Civil Procedure 9(b). Rather, Plaintiffs incorrectly claim that their antitrust claims do not sound in fraud and, therefore, are not subject to the pleading requirements of Rule 9(b). (Opp. at 5 n.5.) As the Ninth Circuit has held, however, "in a case where fraud is not an essential element of a claim, . . . allegations . . . of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104-05 (9th Cir. 2003) (applying Rule 9(b) to allegations of "fraudulent conspiracy" under California's unfair business practices act). Thus, "[a]lthough antitrust claims generally are not subject to the heightened pleading requirement of Rule 9(b), fraud must be pled with particularity in *all* claims based on fraud." *Lum*

[2] Plaintiffs claim that Defendants are collaterally estopped from arguing that the DOJ complaint did not state a claim upon which relief may be granted because they admitted as much in the Stipulation and Order. (Opp. at 2, 21.) The sufficiency of that complaint, however, is irrelevant to whether the SAC should be dismissed. The DOJ complaint challenged Defendants' original transactions, not the revised transactions that have been consummated and which Plaintiffs seek to unwind. Indeed, as to the transactions that are the subject of this dispute, the DOJ concluded that they will "preserve[] the current structure of the beer market in the United States" because they will make Constellation "an independent and economically viable competitor that will stand in the shoes of Modelo." (CIS at 10.) The DOJ found significant the change in incentives Constellation will undergo as a result of "the divestiture of the Piedras Negras Brewery and Modelo's interest in Crown, and the perpetual brand licenses." (*Id.*) Specifically, the DOJ concluded that Constellation will have the "incentive to resist following ABI's price leadership in order to expand share." (*Id.*)

v. Bank of Am., 361 F.3d 217, 220, 228 (3d Cir. 2004) (subjecting Sherman Act Section 1 claim to Rule 9(b)), *abrogated in part on other grounds*, *Twombly*, 550 U.S. 544.

Here, the SAC repeatedly alleges a "fraudulent scheme," which includes the "fraudulent" transaction agreements between ABI and Constellation. (*E.g.*, SAC ¶¶ 26, 30, 50, 101.) Because Plaintiffs do not dispute that these allegations are not pled with particularity, they should be "'stripped' from [Plaintiffs'] claim[s] for failure to satisfy Rule 9(b)." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citation omitted).

In addition, Plaintiffs' conclusory allegations that ABI will control Constellation cannot satisfy Federal Rule of Civil Procedure 8 because they are belied by Defendants' transaction agreements and filings in the DOJ action, which Plaintiffs do not dispute were incorporated by reference into their SAC or are the proper subject of judicial notice.[3] In their opposition brief, Plaintiffs attempt to overcome this deficiency by distorting and, in some cases misrepresenting, the transaction agreements and filings in the DOJ action. (Opp. at 2-3, 12-17.) But those documents and pleadings do not provide any support for Plaintiffs' concocted theory.

- ABI does not have a right of first refusal if Constellation seeks to distribute non-Modelo beer in Mexico. Although the original Stock Purchase Agreement ("SPA") between ABI and Constellation provided for a right of first offer, that provision was removed in the First Amendment to the SPA, which was filed publicly in the DOJ action and included in ABI's Request for Judicial Notice. (Defs. Request for Judicial Notice, Lent Decl. Ex. 4, at First Amendment to SPA ¶ 5.)

- ABI is not paying "virtually all" of the employees that are running the Piedras Negras brewery. (Opp. at 13.) The brewery has approximately 600 employees (SAC ¶¶ 30, 32) who are employed by Servicios Modelo de Coahuila, S.A. de C.V., which Constellation owns pursuant to the SPA. (SPA § 1.1; CIS at 13-14; *see also* Proposed Final Judgment § IV.D (prohibiting ABI's interference with Constellation's retention of brewery employees).) ABI, by contrast, employs and compensates only individuals providing services under the Transition Services Agreement ("TSA"). (TSA § 3.01.) The TSA provides that ABI will provide *up to*

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[3] Plaintiffs are wrong that Defendants' motions to dismiss must be converted to motions for summary judgment, and discovery granted, because Plaintiffs rely on documents submitted in Defendants' requests for judicial notice. *See, e.g.*, *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (documents incorporated by reference in the complaint or subject to judicial notice may be considered without converting a motion to dismiss into one for summary judgment). Plaintiffs do not contest the authenticity of any of the documents and, indeed, reference them in the SAC, making them precisely the kinds of documents that courts properly consider on a motion to dismiss. *See, e.g., id.* (documents referenced in the complaint may be considered on 12(b)(6) when their authenticity and relevance is not questioned).

eleven employees (and only three of them full time), *for a period of six months*, to consult on brewery operations at Constellation's request. (Blood Decl. Ex. 1, TSA Schedule 3.02(ii); Defs. Request for Judicial Notice, Lent Decl. Ex. 4, at TSA § 2.04(a).)

- ABI does not have the right to reacquire the U.S. Modelo business upon the expiration of the 10-year proposed Final Judgment. If ABI sought to reacquire the assets after that time, the proposed acquisition would be subject to the DOJ's review under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"), as its value surely would exceed the filing threshold under that Act (now set at $70.9 million). (Defs. Request for Judicial Notice, Lent Decl. Ex. 3, proposed Final Judgment § XV.) *See* 16 C.F.R. Parts 801-803 (2013). And of course Plaintiffs would be free to challenge such a transaction in 2023 if the parties were to come to such an agreement.

- Similarly, Constellation cannot simply assign its license for Modelo's U.S. intellectual property rights to ABI or any of its affiliates. It is expressly prohibited from doing so during the 10-year term of the proposed Final Judgment, and thereafter any such acquisition by ABI would be subject to DOJ review under the HSR Act. (Proposed Final Judgment § XV.)[4]

- The ABI wholly-owned distributors that distributed products imported by Crown prior to the transaction may continue to do so, but Constellation may terminate those distribution rights for a period of two years beginning one year after the filing of the proposed Final Judgment. (Proposed Final Judgment § V.C.) The transactions did not affect these distribution relationships, except to provide Constellation the right to terminate them.

- ABI cannot "control 100% of the supply to Crown" for the next three to five years. (Opp. at 9.) Rather, if Constellation—at its option—seeks to obtain from ABI an amount of Modelo-branded beer required to meet demand in the United States that cannot be satisfied by the Piedras Negras brewery, ABI is required to supply the beer at prices that are set by contract and essentially at cost. (Defs. Request for Judicial Notice, Lent Decl. Ex. 4, at Interim Supply Agreement ("ISA") §§ 2.1-2.2, 3.1-3.2.) This agreement will be enforced by the DOJ and monitored by the court-appointed Monitor Trustee. Because Constellation is required to double the brewery's capacity within three years, its need for additional supply (which currently is no more than 40%) will decrease over that time period. (Proposed Final Judgment § V.A.)

- Constellation has the right to use any of ABI's Modelo brand extensions or recipe changes sold in Mexico or Canada. (SLA §§ 2.2, 2.15(b).) In addition, Constellation may engage in its own innovation, as it has the right to change recipes and introduce brand extensions. (SLA §§ 2.2, 2.15(a).) And certainly nothing

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[4] Marcas Modelo, S.A. de C.V. ("Marcas Modelo"), the licensor of Modelo's U.S. intellectual property rights, is not a "mystery" entity that is not subject to the proposed Final Judgment. (Opp. at 3.) The proposed Final Judgment plainly applies to ABI and all of its affiliates and subsidiaries. (Proposed Final Judgment § II.A.) Marcas Modelo is a subsidiary of ABI that represented and warranted that it "has full authority and right to grant the sublicenses to Constellation . . . as set forth in [the Sub-License Agreement]" (Defs. Request for Judicial Notice, Lent Decl. Ex. 4, at Sub-License Agreement ("SLA") § 2.1(a)), and ABI guaranteed Marcas Modelo's performance under the SLA. (*Id.* at Membership Interest Purchase Agreement § 6.1.)

prohibits Constellation from improving production because it owns and operates the Piedras Negras brewery.

- The firewalls between ABI and Constellation are not illusory. Rather, they strictly prevent the sharing of Constellation's confidential information with ABI's "affiliates who are involved in the marketing, distribution, or sale of Beer in the United States, or to any other person who does not have a need to know the information." (Proposed Final Judgment § XIII.A.) The parties' compliance with these firewalls is subject to ongoing monitoring by the court-appointed Monitor Trustee. (*Id.* § VIII.B.)

Rather than support Plaintiffs' speculative allegations, these documents demonstrate that Constellation will be an independent, self-sufficient competitor. In fact, these are the same documents that the DOJ concluded would allow Constellation and Crown to operate independently of ABI. (CIS at 13 ("The proposed Final Judgment provides for or incorporates agreements protecting Constellation's ability to operate and expand the Piedras Negras Brewery while actively competing in the United States.").)

Because Plaintiffs plead no facts to support their allegations that the transaction is a sham, we are left with "what is on its face a legitimate transaction that does not result in ABI acquiring the U.S. distribution of competing beer." (TRO Hr'g Tr. at 56:18-20.) Thus, the cases Plaintiffs cite regarding mergers which were enjoined or unwound are irrelevant to this dispute, as they involved transactions between *competitors* that would increase concentration in a relevant market in the United States. *See United States v. Pabst Brewing Co.*, 384 U.S. 546, 550 (1966) (transaction combined the 10th and 18th largest brewers in the United States).[5]

Finally, Plaintiffs do not dispute that, without the merging of competitors, a mere change in management—regardless of whether it results in increased prices, diminished quality or

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[5] *See also United States v. Von's Grocery Co.*, 384 U.S. 270, 271 (1966) (action to enjoin the "acquisition by Von's Grocery Company of its direct competitor"); *United States v. Alcoa*, 377 U.S. 271, 281 (1964) (Alcoa's acquisition of its "aggressive competitor" in the market for wire and cable products and accessories); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 330 (1963) (merger between the "second and third largest" commercial banks in the Philadelphia metropolitan area); *Hosp. Corp. of Am. v. Fed. Trade Comm'n*, 807 F.2d 1381, 1384, 1387 (7th Cir. 1986) (acquisition by the largest hospital chain in the United States of "competing hospitals"). Plaintiffs' reliance on *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), is similarly misplaced. Unlike in *Falstaff*, Plaintiffs here do not allege that the transactions eliminated a potential competitor that would have entered the relevant market.

innovation—cannot violate Section 7 because it does not cause antitrust injury. *See Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1242 (3d Cir. 1987); *McCabe Hamilton & Renny Co. v. Matson Navigation Co.*, No. 08-00080 JMS/BMK, 2008 WL 2233740, at *5 (D. Haw. Apr. 9, 2008). (*See also* Defendants ABI's and Modelo's Motion to Dismiss Memorandum, ECF No. 66 ("Mem.") at 16-17.) As Plaintiffs repeatedly have made clear, at base, their concerns about ABI's sale of Modelo's U.S. business to Constellation (including Constellation assuming control of Crown) amount to concerns about a change in management that do not flow from any anticompetitive effect of the challenged transactions. As such, the SAC does not sufficiently allege antitrust injury.

For all of these reasons, Plaintiffs' allegations are insufficient to establish a violation of Section 7.

B. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

Plaintiffs' claim under Section 1 of the Sherman Act should be dismissed because they fail to plead facts supporting the existence of any unlawful conspiracy between ABI and Constellation.

In their moving brief (Mem. at 17-18), ABI and Modelo explained that Plaintiffs failed to state a Section 1 claim because the SAC does not plead any "evidentiary facts" supporting the existence of the alleged price-fixing conspiracy between ABI and Constellation. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) ("complaint must allege facts . . . [such as a] 'specific time, place, or person involved in the alleged conspiracies'") (quoting *Twombly*, 550 U.S. at 565 nn. 8, 10).[6] Defendants highlighted allegations in the SAC indicating that the purported conspiracy did not exist, but was expected to arise in the future, and explained that an allegedly *prospective* conspiracy is not actionable under Section 1. *See Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976) (plaintiff must prove an "actual agreement or mutual consent" to establish a Section 1 violation).

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[6] *See also In re Cal. Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 WL 1458025, at *5 (N.D. Cal. May 21, 2009) ("Plaintiffs do not set forth facts about where or when [the alleged conspiracy] took place . . . . Under *Twombly*, such vague allegations are insufficient.").

In their opposition, Plaintiffs make no effort to address these fatal deficiencies in their price-fixing claim. Specifically, they still do not (and cannot) allege the time or place when the purported conspiracy was hatched, or identify the persons who participated.[7] And Plaintiffs' description of the "conspiracy" continues to suggest that the alleged price-fixing between ABI and Constellation is prospective and not the subject of an existing agreement. (*See* Opp. at 22-23 (alleging "'a substantial *threat* that . . . Constellation *will eagerly and tacitly agree* with ABI to raise and follow ABI's price increases'" (quoting SAC ¶ 108) (emphases added)).)[8]

Perhaps recognizing the insurmountable defects in their price-fixing allegations, Plaintiffs shift gears in their opposition and claim—for the first time—that ABI and Constellation are engaged in a *per se* illegal market allocation conspiracy. (Opp. at 17-19.) Plaintiffs assert that the SPA between ABI and Constellation gives ABI a right of first refusal regarding Constellation's ability to enter the Mexican market to sell non-Modelo beers. (*Id.* at 17-18.) They allege that "if Constellation intends to enter the Mexican market, . . . it must first negotiate to give ABI the exclusive right to market its products there." (*Id.*) Plaintiffs contend that this arrangement "is tantamount to a division of markets by competitors which is condemned as a per se violation of the antitrust laws." (*Id.* at 18.)

Not only is this newly alleged market allocation conspiracy outside the scope of the SAC, it fails to state a Section 1 claim in its own right for at least two reasons. First, the "right of first refusal" on which Plaintiffs' claim is premised *simply does not exist*. (*See supra* p. 5.) Second,

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[7] Plaintiffs argue that their price-fixing claim is "directly supported by the words, history and intentions of ABI's and Constellation's executives." (Opp. at 23 (citing SAC ¶¶ 90, 91, 100).) But the "words" they cite relate solely to Constellation's alleged historic desire to raise the price of Modelo-branded beer, not to *fix* prices with ABI. Thus, *American Tobacco Co. v. United States*, where the defendants' "clear course of dealing" evidenced an elaborate four-year price-fixing conspiracy, 328 U.S. 781, 793, 798-804 (1946), provides no support for Plaintiffs' argument.

[8] Plaintiffs contend 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." (Opp. at 23.) But the authorities Plaintiffs cite merely stand for the proposition that both Section 1 and Section 7 may be applicable to cases involving merging competitors. *See United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 668 (1964) (applying Section 1 to merger between "close competitors"); *Phila. Nat'l Bank*, 374 U.S. at 330 (applying Section 1 to bank merger). Here, Plaintiffs' Section 7 allegations cannot further their Section 1 claim in this manner because ABI and Constellation are not merging.

according to Plaintiffs' description, the alleged conspiracy implicates the sale of beer in Mexico, not the United States. There is no suggestion that competition in the alleged U.S. beer market would be affected.[9]

Thus, Plaintiffs fail to state a claim under Section 1 of the Sherman Act.

C. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE TUNNEY ACT

Plaintiffs cannot state a claim based on Defendants' alleged violations of the Tunney Act. Indeed, Plaintiffs' concession that "that the Tunney Act does not provide a private cause of action" is dispositive. (Opp. at 25.)[10]

Plaintiffs' Tunney Act claim also fails because they are wrong as a matter of law that the statute prohibited Defendants from closing their transactions until the entry of a final judgment. (Opp. at 25-27.)[11] The Tunney Act requires judicial review of the settlement agreement between Defendants and the DOJ; no review of the underlying transactions takes place. *See* 15 U.S.C. § 16(e)(1) (court's role is to determine whether settlement agreement "is in the public interest"). (*See also* proposed Final Judgment at 1 (settlement agreement entered "without trial or adjudication of any issue of fact or law").) There is no provision in the statute restricting merging parties' ability to close, and courts routinely allow consummation prior to issuance of a final judgment. (Mem. at 19.) Indeed, Defendants closed their transactions *pursuant to a court order*, which expressly prohibited any delay in the sale of Modelo's U.S. assets or Piedras Negras to

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[9] To the extent Plaintiffs imply that ABI has allocated the putative U.S. beer market to Constellation, such a claim is unsupportable and absurd. The SAC alleges that ABI accounts for 49% of U.S. beer sales (SAC ¶ 76), and Plaintiffs have never suggested that ABI would cease or limit its U.S. sales as part of an alleged conspiracy to allocate the U.S. market to Constellation.

[10] *See also Am. Antitrust Inst., Inc. v. Microsoft Corp.*, No. 02-138 (CKK), 2002 U.S. Dist. LEXIS 26567, at *23-24 (D.D.C. Feb. 19, 2002) (dismissing claim because "there is no . . . private cause of action to enforce potential rights afforded by the Tunney Act").

[11] Plaintiffs offer no authority supporting their interpretation of the Tunney Act, which is contrary to the antitrust agencies' practice of permitting transactions to close prior to entry of a final judgment. (Mem. at 19.) Despite Plaintiffs' insinuations (Opp. at 26), the law review article they cite does not address the propriety of this practice. *See* Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 Antitrust L. J. 549 (2008).

Constellation. (*Id.* (citing Defs. Request for Judicial Notice, Lent Decl. Ex. 5, Stipulation and Order at IV(C)).)

D. THE SAC SHOULD BE DISMISSED BECAUSE PLAINTIFFS CANNOT ESTABLISH THEIR ENTITLEMENT TO ANY REQUESTED RELIEF

1. Plaintiffs Cannot Establish That They Are Entitled to Injunctive Relief

Plaintiffs offer no response to Defendants' argument (Mem. at 20) that their request for preliminary relief enjoining ABI's acquisition of Modelo is moot. The only remaining injunctive relief requested in the SAC is the extreme remedy of divestiture. (Supplemental Complaint, Prayer for Relief at B.) Defendants are unaware of any case in which a private plaintiff was awarded divestiture, and Plaintiffs cite none.[12] Further, Plaintiffs do not (and cannot) allege facts sufficient to meet their burden to plead any of the elements they must establish to obtain permanent injunctive relief. Accordingly, they cannot obtain divestiture as a matter of law.

(a) Plaintiffs Cannot Establish That the Balance of Hardships Weighs in Their Favor

As explained in ABI's and Modelo's moving brief, because of Plaintiffs' unreasonable delays in filing suit and seeking injunctive relief, the equities and balance of hardships weigh dispositively in favor of Defendants and preclude divestiture as a matter of law. (Mem. at 20-23.)

Plaintiffs argue that Defendants are invoking a "hidden laches defense" that is contrary to Ninth Circuit authority. (Opp. at 31.) Not so. Defendants rely on decisions recognizing that divestiture is an extreme remedy, and private parties—particularly indirect purchasers like Plaintiffs—must overcome a heavy burden to unwind a consummated merger. As the Eighth Circuit stated when these plaintiffs sought to undo the merger of Anheuser-Busch and InBev, because "[p]laintiffs are private, indirect purchasers rather than a federal antitrust enforcement agency, divestiture's 'far reaching effects put it at the least accessible end of a spectrum of

[12] *See Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1125 n.11 (N.D. Cal. 2011) (noting the court was unaware of any cases in which "a federal court has ordered divestiture of a completed merger involving the integration of ongoing business activities in a suit brought by private plaintiffs under Section 7 of the Clayton Act") (appeal before Ninth Circuit pending). (*See also* Mem. at 22.)

injunctive relief.'" *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1234 (8th Cir. 2010) (citation omitted). Where, as here, private plaintiffs delayed seeking injunctive relief to prevent a challenged transaction from closing, those courts held that such delays barred divestiture as a matter of law. *See id.* at 1235 (holding that Plaintiffs' filing of their complaint two months after the deal was announced, and moving for a preliminary injunction only nine days before the merger was approved, constituted "inexcusable delays" that barred divestiture as a matter of law).[13] Tellingly, Plaintiffs do not even attempt to distinguish these authorities—nor could they, because their delay is more egregious than existed in any of those cases—but merely contend that they were wrongly decided.[14] (Opp. at 31-33 & n.15.)

Plaintiffs do not dispute that Defendants would suffer significant hardship if divestiture were granted because such relief would disrupt ABI's operations in Mexico and elsewhere, adversely impacting the brewer, its employees and its business partners. (Mem. at 22.) Instead, Plaintiffs assert that Defendants "made a strategic business decision to try to 'beat the clock' by consummating their deal before they were permitted to do so" under the Tunney Act and that Defendants must "live with" that decision. (Opp. at 28 n.14.) As explained above (*see supra* pp. 10-11), however, the Tunney Act did not prohibit the parties from consummating their transactions, and Defendants closed *pursuant to a court order* that prohibited any delay in the sale of Modelo's U.S. assets or Piedras Negras to Constellation.

Plaintiffs contend that weighing the significant harm Defendants would incur if divestiture were granted against the *de minimis*, speculative harms the nine individual Plaintiffs allegedly would suffer is an improper approach to balancing the equities. (Opp. at 29-30.) Plaintiffs claim

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[13] *See also Taleff*, 828 F. Supp. 2d at 1124 ("[T]he Court finds that because Plaintiffs delayed in filing their suit until after Defendants' merger had already been consummated, the remedy of divestiture is now unavailable to Plaintiffs.").

[14] Plaintiffs' suggestion that their delay would not be "inexcusable" provided they filed suit within the Clayton Act's four-year statute of limitations period is absurd. (Opp. at 31-33.) It is also inconsistent with the Supreme Court's decision in *California v. American Stores Co.*, 495 U.S. 271 (1990), which Plaintiffs repeatedly invoke. (Opp. at 1, 28-29, 31.) In that case, the Supreme Court recognized that while private plaintiffs may seek divestiture, "equitable defenses such as laches . . . may protect consummated transactions from belated attacks by private parties." *Id.* at 296.

that balancing the equities requires considering harm to "all beer consumers in the United States." (*Id.* at 29.) Once again, the law is plainly to the contrary. *See, e.g.*, *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at *13 (N.D. Cal. Sept. 27, 2010) ("In evaluating plaintiffs' purported irreparable harm . . . , the Court must only consider those injuries plaintiffs advance that are personal to them were defendants to merge, and cannot consider any injuries that plaintiffs allege would be suffered by the general . . . public as a whole."), *aff'd*, 434 F. App'x 620 (9th Cir. 2011).[15]

Accordingly, the balance of the equities weighs dispositively in Defendants' favor, and Plaintiffs cannot obtain divestiture as a matter of law.

(b) Plaintiffs Fail to Plead Facts Demonstrating That They Will Suffer Harm to Themselves

Plaintiffs' failure to plead facts sufficient to establish that they will suffer irreparable injury also requires dismissal of their claims for injunctive relief. In their moving brief, ABI and Modelo explained that Plaintiffs' repeated allegations of higher beer prices could not meet their burden because such injury would be compensable in monetary damages, and therefore, not irreparable. (Mem. at 24.) Defendants also highlighted that Plaintiffs' passing references to other types of harm were unsupported by factual allegations describing how these harms would be realized or how they would impact Plaintiffs. (*Id.*)

In their opposition brief, Plaintiffs do not dispute that the alleged increase in beer prices cannot be a source of irreparable injury, nor do they make any effort to explain how any other harm referenced in the SAC would transpire or personally impact Plaintiffs. Rather, Plaintiffs contend that they "have made an adequate showing of irreparable injury in the form of lessening of competition." (Opp. at 33.) Even if Plaintiffs had adequately pleaded harm to competition—which

[15] Plaintiffs inappropriately cite *California v. American Stores Co.*, 492 U.S. 1301 (1989), in support of their argument that purported harms to consumers other than the nine individual plaintiffs are relevant to balancing the equities in this case. (Opp. at 30.) In *American Stores*, the Court considered the estimated harm of $400 million a year to California's consumers because the State itself had filed a *parens patriae* action on behalf of its citizens. *See Am. Stores*, 492 U.S. at 1302, 1307. Here, Plaintiffs have sued solely on behalf of the nine individual plaintiffs and, therefore, cannot rely on alleged injury to any other consumers.

they have not—such purported injury would not satisfy their burden to allege harm specific to *themselves. See Am. Stores Co.*, 495 U.S. at 296 ("A private litigant . . . must prove 'threatened loss or damage' to his own interests in order to obtain relief" under Section 16 of the Clayton Act.); *Malaney*, 2010 WL 3790296, at *13 (same).[16]

Accordingly, Plaintiffs have not satisfied their burden to plead irreparable harm.

(c) Plaintiffs Cannot Establish That Divestiture Would Serve the Public Interest

Finally, Plaintiffs cannot establish that granting divestiture would serve the public interest. There is a "strong interest in preserving free operation of the nation's markets and insuring that [the Court] does not unduly restrain free enterprise. . . . , where Plaintiffs have failed to demonstrate that there will be any real, palpable harm to Plaintiffs." *Ginsburg v. InBev SA/NV*, No. 4:08CV01375 JCH, 2008 WL 4965859, at *6 (E.D. Mo. Nov. 18, 2008) (citation omitted). Here, Plaintiffs' unsupported allegations are contrary to the reasoned conclusions of the DOJ, which exists to serve the public. (CIS at 2.) Moreover, as Defendants explained in their moving brief, their transactions likely will increase competition in the sale of beer in the United States and, therefore, serve the public interest. (Mem. at 23.)

2. Plaintiffs Cannot Establish That They Are Entitled to Damages

Plaintiffs also have failed to adequately allege that they are entitled to damages under either federal or state law. First, Plaintiffs concede that the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), precludes indirect purchasers, like Plaintiffs, from seeking damages under federal antitrust law. (Opp. at 35.) Second, with regard to Plaintiffs' request for damages under "any State statutes allowing suit by both direct and indirect purchasers" (Supplemental Complaint, Prayer for Relief at D), their continued failure to identify *any* specific

[16] Contrary to Plaintiffs' suggestion (Opp. at 33), Justice O'Connor's decision in *California v. American Stores* did not dispense with the well-recognized requirement that plaintiffs seeking injunctive relief must demonstrate threatened harm to themselves. Indeed, Justice O'Connor expressly relied on the plaintiff State of California's evidence "that permitting the merger would cost the State's consumers $400 million a year." *Am. Stores*, 492 U.S. at 1307.

state law, or a basis for relief under that statute, is fatal to their claim.[17] *See Gonzalez v. DHI Mortg. Co.*, No. C 09-1798 PJH, 2009 WL 4723362, at *5 (N.D. Cal. Dec. 4, 2009) (dismissing claim with prejudice because of plaintiff's failure to identify a specific statute that allegedly was violated). (*See also* Mem. at 25.)

III. CONCLUSION

For the foregoing reasons, Plaintiffs' SAC should be dismissed with prejudice.

DATED: July 22, 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

BY:

/s/ Allen Ruby

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[17] Plaintiffs' reference to the existence of "*Illinois Brick* repealers" (Opp. at 35) does not satisfy their pleading burden and ignores the fact that many state antitrust regimes do not allow indirect purchasers to seek damages. For example, in Missouri, where six of the nine individual plaintiffs reside (SAC ¶ 37), indirect purchasers cannot sue for damages under the state's antitrust laws. *See Ireland v. Microsoft Corp.*, No. 00CV-201515, 2001 WL 1868946, at *1 (Mo. Cir. Jan. 24, 2001).

ECF CERTIFICATION

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this twenty-second day of July, 2013. As of this date, all counsel of record except Kenneth R. Schwartz have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system.

/s/ Allen Ruby

Allen Ruby