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IN THE UNITED STATES DISTRICT COURT

FOR THE 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,

vs.

ANHEUSER-BUSCH InBEV SA/NV, GRUPO MODELO S.A.B. de D.V., and CONSTELLATION BRANDS, INC.,

Defendants.

Case No. C-13-1309 MMC

Assigned to Hon. Maxine M. Chesney

DEFENDANT CONSTELLATION BRANDS, INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM IN SUPPORT

DATE: **August 2, 2013**
TIME: **9:00 a.m.**
JUDGE: **Hon. Maxine M. Chesney**

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NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES

PLEASE TAKE NOTICE that on Friday August 2, 2013 at 9:00 a.m., or as soon thereafter as this motion may be heard, in the courtroom of the Honorable Maxine Chesney, in the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California 94102, Defendant Constellation Brands, Inc. ("Constellation") will move to dismiss Plaintiffs' Second Amended and Supplemental Complaint**.**

Constellation moves to dismiss the claim asserted against it in the Second Amended and Supplemental Complaint ("SAC") for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). This is Plaintiffs' third bite at the apple to bring a properly pled complaint and they failed yet again. Even though Plaintiffs had the benefit of having reviewed Defendants' initial Motions to Dismiss that identified the many deficiencies in Plaintiffs' First Amended Complaint ("FAC"), they chose to ignore those deficiencies because their Second Amended and Supplemental Complaint contains the same deficiencies as the FAC. Plaintiffs simply have not and cannot state a cognizable claim. Thus, Constellation seeks an order dismissing Plaintiffs' Sherman Act § 1 claim, including Plaintiffs' allegations based on the Tunney Act and their request for damages. Constellation further requests that the order dismiss Constellation from this case, because Plaintiffs' only actual claim asserted against Constellation is the Sherman Act § 1 claim.

STATEMENT OF THE ISSUES TO BE DECIDED

Whether Plaintiffs have alleged the existence of an agreement and provided sufficient supporting factual allegations to state a claim cognizable under Sherman Act § 1 and the Supreme Court's *Twombly* standard (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)), or adequately stated any other claim.

STATEMENT OF FACTS

The SAC concerns a set of transactions entered into by three firms in the beer industry:

Anheuser-Busch InBev SA/NV ("ABI"), Grupo Modelo S.A.B. de C.V. ("Modelo"), and Constellation.

Prior to the transactions, Modelo, a Mexican firm, produced several beer brands, including Corona Extra®. (SAC ¶ 41.) ABI held a fifty-percent economic interest in Modelo. (SAC ¶¶ 45 and 95.) Constellation and Modelo were the parents of a fifty-fifty joint venture, Crown Imports LLC ("Crown"), which imports and sells the Modelo brands in the United States. (SAC ¶ 3).

In June 2012, Defendants entered into a set of transactions whereby ABI would have acquired the remainder of Modelo that it did not own already, and Constellation would acquire Modelo's interest in Crown, transforming the importer into a wholly-owned Constellation subsidiary ("June Agreements"). (SAC ¶ 27.) Under the June Agreements, ABI would have retained a ten-year call option whereby it could terminate Constellation and Crown's rights to the Modelo brands, including its license to sell the Modelo brands in the United States. (*Id.*) In January 2013, the Antitrust Division of the U.S. Department of Justice ("DOJ") sued to block ABI's acquisition of Modelo alleging the acquisition violated Clayton Act § 7 (SAC ¶¶ 28 and 49.) Constellation was not joined in that lawsuit, but moved to intervene to protect its interests in the sale of its assets in the U.S.

In February 2013, ABI and Constellation entered into revised agreements ("February Agreements") under which Constellation would acquire not only Modelo's interest in Crown, but also a perpetual license to sell the Modelo brands in the United States and a brewery, Piedras Negras, so that Constellation could self-supply. (SAC ¶¶ 28, 29.) On April 19, 2013, the DOJ, ABI, Modelo, and Constellation announced a settlement of the DOJ's litigation, by which DOJ approved the February Agreements in substantially the same form in which ABI and Constellation negotiated them. *United States v. Anheuser-Busch InBev SA/NV*, No. 13-127 (D.D.C. filed Apr. 19, 2013), ECF Nos. 29-31.[1] ABI has completed its acquisition of Modelo and

[1] The settlement agreements, including the Competitive Impact Statement, proposed Final Judgment,

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divested Modelo's U.S. business to Constellation. (SAC ¶¶ 3, 7 at p. 30-31.)

On March 22, 2013, Plaintiffs filed their initial Complaint purporting to allege violations of Clayton Act § 7 by ABI and Modelo. Constellation was not named as a defendant. Although the initial Complaint in this matter was filed more than five weeks after the February Agreements were announced, none of the transactional changes embodied in the February Agreements were acknowledged in Plaintiffs' Complaint.

On April 17, 2013, Plaintiffs filed their First Amended Complaint ("FAC"), which continued to rely heavily on the DOJ's January complaint. While not styled as two separate counts, Plaintiffs alleged two different claims. They alleged a Clayton Act § 7 claint against ABI and Grupo Modelo; and separately, purported to allege a Sherman Act § 1 claim against ABI and Constellation. Constellation and ABI both filed motions to dismiss, which detailed all the deficiencies in the FAC.

On June 25, 2013, Plaintiffs filed their SAC, which is largely the same as the FAC. Plaintiffs continue to base their allegations on the DOJ's January complaint, without attempting to describe the Revised Transaction accurately. They continue to allege a Clayton Act § 7 claim against ABI and Grupo Modelo and a Sherman Act § 1 claim against ABI and Constellation. (SAC ¶120.) Plaintiffs add allegations that "Defendants" violated the Tunney Act because they have closed the relevant transactions. Plaintiffs also add a vague request for damages under federal law and unspecified state laws.

Stipulation and Order, and Revised Agreements, filed in the U.S. District Court for the District of Columbia, are attached as Exhibits 1 through 4 to the Alberti Declaration, which was included with Constellation's concurrently filed Request for Judicial Notice. As explained more fully in the Request for Judicial Notice the Court may take judicial notice of these documents because they are official government documents of public record and are directly related to the allegations in the SAC. *See In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1108 (N.D. Cal. 2012); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670 SBA, 2008 U.S. Dist. LEXIS 69542, at *17-18 (N.D. Cal. Sept. 9, 2008). The Court may also consider these documents without converting the motion to dismiss into a motion for summary judgment because they are incorporated by reference in the SAC. *See In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1108. Constellation therefore respectfully asks this Court to take judicial notice of the settlement agreements.

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With regard to their Sherman Act § 1 claim, Plaintiffs' unsupported hypothesis is that, in the future, Constellation, through Crown, may follow ABI's future price increases, thereby raising the price of the Modelo beers that Crown sells. The SAC alleges no price fixing to date. Rather, it alleges in various places that Crown historically has not followed ABI's price increases. (SAC ¶¶ 6, 19, 85, and 88.) Thus, without the ability to allege that price fixing has occurred, the SAC makes various speculative allegations that it may occur in the future. The SAC alternatively characterizes its speculation as: "the planned price fixing by ABI, Modelo and Constellation" (SAC ¶ 10); Constellation's acquisition "may, and probably will, result in price fixing" (SAC ¶¶ 10 and 35); that it is "probable that Constellation has agreed with ABI, either tacitly or expressly, to fix prices" (SAC ¶ 26); the transaction threatens violation of Section 1 of the Sherman Act (SAC ¶¶ 12, 22, 108, and 119).

The SAC asserts that the supposed price fixing conspiracy is part and parcel of Constellation's agreement to acquire complete ownership of Crown and the Piedras Negras brewery. However, Plaintiffs do not allege that the transaction agreements to accomplish those acquisitions contain any terms that call for Constellation to follow ABI's price increases. Rather, Plaintiffs make wholly conclusory, unsupported assertions of an alleged conspiracy without specific reference to who, what, how, or when such a conspiracy has been agreed.

The SAC adds new unsupported, and incorrect, allegations that "defendants" violated the Tunney Act because "defendants have taken steps to consummate the merger" even though the 60-day public comment period has not expired and a final judgment has not been entered by the District Court for the District of Columbia. (SAC ¶ 7 at 31.) Plaintiffs allege that this purported violation has injured their business or property without further factual explanation or support. These allegations reflect a fundamental misunderstanding of the Tunney Act process. These pleading deficiencies warrant dismissal of the SAC's Sherman Act § 1 claim, including any allegations pertaining to the Tunney Act, and the dismissal of Constellation from this case.

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LEGAL STANDARDS

Constellation moves to dismiss the Sherman Act § 1 claim for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim under a cognizable legal theory or for failing to allege facts sufficient to support a claim under a cognizable legal theory. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854, 2010 WL 1541257, at *1 (N.D. Cal. Apr. 16, 2010).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. *Twombly*, the landmark case involving a Sherman Act § 1 claim, changed the pleading standards by heightening the requirements for plaintiffs to allege enough underlying facts, and not just ultimate conclusions, to raise their claims from speculative to "plausible."[2] *Id.* at 555-56. "[A] formulaic recitation of the elements of a cause of action will not do." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-47 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Golden Gate Pharmacy Servs.*, 2010 WL 1541257 at *1 (quoting *Twombly*, 550 U.S. at 555). "Courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Golden Gate Pharmacy Servs.*, 2010 WL 1541257 at *1 (citing *Kendall v. Visa U.S. A. Inc.*, 518 F.3d 1042, 1047-48 (9th Cir 2008)). Rather, enough facts must be alleged to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *see also, In re Nat'l Ass'n. of Music Merchs., Musical Instruments, and Equip. Antitrust Litig.*, MDL No. 2121, 2012 U.S. Dist. LEXIS 118827, at *33 (S.D. Cal. Aug. 17, 2012) ("Without sufficient allegations of a conspiracy, the Court's analysis of the various possible types of conspiracies and whether they would restrain trade and thus be illegal would be speculative.")[3]

[2] The requirements of *Twombly* have been expanded to other, non-antitrust claims in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009).

[3] *See also, In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1115 (N.D. Cal. 2008)

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In the context of antitrust claims, pleading a conspiracy under *Twombly* requires more than allegations of "parallel conduct and a bare assertion of conspiracy." *Kendall*, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S. at 556). Allegations of parallel conduct "must be placed in a context that raises a suggestion of a *preceding* agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557 (emphasis added). Thus, to survive a motion to dismiss, Plaintiffs "are required to allege some 'further circumstance pointing toward a meeting of the minds'" to make their claim plausible. *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (citing *Twombly*, 550 U.S. at 557). Here, as described further *infra*, Plaintiffs speculate that ABI and Constellation will conspire by having Constellation follow ABI's price increases. However, they allege *no facts* to move that allegation beyond rank speculation that would justify allowing a case to proceed to discovery, which can be extremely burdensome and expensive in antitrust cases. *See Twombly*, 550 U.S. at 558-59.

ARGUMENT

This is Plaintiffs' third try to bring a complaint that sufficiently states a claim upon which relief could be granted; and their third failure. Even with the benefit of having reviewed Defendants' initial Motions to Dismiss that identified the many deficiencies in Plaintiffs' First Amended Complaint, Plaintiffs filed a Second Amended and Supplemental Complaint containing the same deficiencies as the FAC. With respect to Constellation, Plaintiffs still did not provide sufficient factual support to properly allege a § 1 Sherman Act violation. Indeed, Plaintiffs did not provide *any* additional or different allegations relating to their § 1 claim because they cannot. In the "supplemental" portion of the SAC, Plaintiffs add unfounded, unsupported, and incorrect allegations that defendants consummated the merger in violation of the Tunney Act. Plaintiffs completely misconstrue the Tunney Act, which does not prohibit consummation of a merger prior to the expiration of the 60-day comment period and entry of final judgment. Accordingly, the

("The complaint must contain sufficient factual allegations 'to raise a right to relief above the speculative level.'") (quoting *Twombly*, 550 U.S. at 555).

Court should dismiss this SAC with prejudice because after a third try, Plaintiffs still have not, because they cannot, sufficiently stated any claim upon which relief can be granted. *See Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002) (affirming dismissal of a complaint whose defects could not be cured because "any amendment would be futile"); *Yagman v. Galipo*, No. 12-7908, 2013 U.S. Dist. LEXIS 6978, at *32-33 (C.D. Cal. Jan. 7, 2013) (dismissing with prejudice certain claims in an amended complaint that were identical to those in the original complaint despite being advised of the deficiencies in the original complaint). Any further attempts to rehabilitate Plaintiffs' claims would be futile. Constellation should not be required to bear the financial burden of groundless continuing litigation.

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I. PLAINTIFFS HAVE NOT MADE SUFFICIENT ALLEGATIONS TO STATE A SHERMAN ACT § 1 CLAIM UNDER 12(B)(6) AND *TWOMBLY*

Plaintiffs fail to allege a cognizable § 1 claim, much less allege enough evidentiary facts to raise their claims beyond mere speculation as required under *Twombly*. The allegations of conspiracy do not allege that price fixing has occurred, but rather speculate or hypothesize that it might occur in the future. Such rank speculation and blunderbuss hypotheticals do not support a Sherman Act §1 claim. The nub of Plaintiffs' theory appears to be a hypothesis that, in the future, Constellation will make Crown follow ABI's price increases. In other words, Plaintiffs allege that they *anticipate* that there *may be* parallel pricing conduct in the future; that is not sufficient to state a claim. In order to plausibly state a § 1 claim, Plaintiffs must allege something more than hypothetical future parallel conduct and a conclusory allegation of agreement at some unidentified point. Because "lawful parallel conduct fails to bespeak unlawful agreement," a plaintiff that can allege actual parallel conduct must offer further allegations "tending to exclude the possibility of independent action." *Twombly*, 550 U.S. at 554, 556. Specifically, Plaintiffs must allege "who, did what, to whom (or with whom), where and, when." *Kendall*, 518 F.3d at 1048, *see also*, *Twombly*, 550 U.S. at 565 n.10.

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While the SAC, at various places, dishes words such as "conspired," the mere recitation of conclusions without further allegations providing supporting background utterly fails to meet the *Twombly* standard. The SAC does not lay out the who, what, when and where type of allegations about the formation of the hypothesized price fixing agreement that are necessary to move from a naked, insufficient allegation of conspiracy to a factually-based allegation sufficient to state a claim. As the Supreme Court has counseled, antitrust discovery is fact intensive, burdensome, and expensive. *Twombly*, 550 U.S. at 558. A plaintiff needs to do more than make bare, conclusory assertions before a defendant should be required to incur those burdens. *Id.* Plaintiffs have not done so here, and Constellation should not be required to defend wholly speculative claims. Consequently, Constellation asks the Court to dismiss the Sherman Act §1 claim and Constellation from this case.

A. Plaintiffs Have Failed to Make the Requisite Allegation of an "Agreement"

Section 1 of the Sherman Act requires the existence of a contract, combination or conspiracy among two or more separate entities. *See* 15 U.S.C. § 1 (2012); *Am. Ad Mgmt. v. GTE Corp*., 92 F.3d 781, 784 (9th Cir. 1996); *see also*, *Kendall*, 518 F.3d at 1047 (citing *Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989)). To adequately allege a conspiracy for purposes of § 1, Plaintiffs must allege more than speculation that Constellation and ABI will, in the future, act in parallel; they must allege that they did so *pursuant to an agreement*. *See Kline v. Coldwell, Banker & Co*., 508 F.2d 226, 232 (9th Cir. 1974) ("Nor will proof of parallel business behavior alone conclusively establish agreement.") (citing *Theatre Enters. v. Paramount*, 346 U.S. 537, 541 (1954)). Even discussions or other opportunities soliciting a price fixing agreement are not sufficient to state a claim. *See United States v. Am. Airlines, Inc*., 743 F.2d 1114, 1122 (5th Cir. 1984) (holding that a naked solicitation to fix prices that was declined could not be a violation of Sherman Act § 1). For there to be an agreement under § 1, the parties must share a "conscious commitment to a common scheme designed to achieve an unlawful

objective," including pricing in parallel. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *Toscano v. PGA*, 258 F.3d 978, 983 (9th Cir. 2001).

Here, the alleged unlawful objective is price fixing, but the SAC is clear that, to date, there has been no price fixing between ABI and Crown or Constellation. The SAC asserts the opposite, highlighting that Crown, which is the entity selling the Modelo beer in the United States, has not followed ABI's price increases. (*See* SAC ¶¶ 9, 88, and 108.) With no ability to allege that any price has been fixed by agreement, Plaintiffs then make a series of half-hearted and tentative allegations that there will, in the future, be price fixing. Plaintiffs state repeatedly throughout the SAC that Constellation and ABI "may" at some point in the undefined future conspire to have Constellation "follow" any ABI price increases. For example, Plaintiffs allege:

- "The acquisition…**may and probably will** result in price fixing between ABI and Constellation…." (SAC ¶¶ 10 and 35) (emphasis added)
- "[The ABI/Modelo transaction]…will also **threaten** price fixing between ABI and Constellation…." (SAC ¶ 22) (emphasis added)
- "This action is brought . . . to prevent the **probable** price fixing by ABI and Constellation. . . ." (SAC ¶ 36) (emphasis added)
- "[T]here is a **significant threat** that ABI and Constellation will fix prices in that Constellation will follow ABI price increases by agreement…." (SAC ¶ 119 (Violations Alleged)) (emphasis added)
- "In conjunction with this scheme, **it is probable that** Constellation has agreed with ABI, either tacitly or expressly, to fix prices by following any and all ABI price increases." (SAC ¶ 26) (emphasis added).

Plaintiffs' own allegations reveal that they cannot, consistent with their obligations to the Court, assert that any price has been altered by their hypothesized "agreement." As exemplified by the paragraphs described above, Plaintiffs' express concern about a supposed "agreement" that they can only allege is "probable." Without an actual agreement, there is no violation of Sherman Act

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§ 1. *See Les Shockley Racing*, 884 F.2d at 507 (noting that a § 1 claim requires proof of an agreement or conspiracy as the first element).

B. Plaintiffs' Conclusory Assertions Regarding a Potential Agreement in the Future Fails to State a Claim Under *Twombly*

Plaintiffs assert that Constellation "has conspired with ABI the terms of which are": (1) Constellation will purchase a brewery and perpetual rights for Corona® and Modelo brands in the U.S.; (2) Constellation will purchase the remaining 50 percent of Crown; and (3) "Constellation will follow ABI's price leads."[4] (SAC ¶ 32.) This one paragraph, though repeated, cannot save the SAC. The first two "terms" of the so-called conspiracy do summarize an agreement between Constellation and ABI, but not to an unlawful price fixing scheme, and thus are not an agreement to support a price fixing claim. *See Monsanto*, 465 U.S. at 764 (holding that to prove a § 1 violation, there must be evidence of a "conscious commitment to a common scheme designed to achieve an unlawful objective"); *Toscano*, 258 F.3d at 983 ("For an agreement to constitute a violation of section 1 of the Sherman Act, a 'conscious commitment to a common scheme designed to achieve an unlawful objective' must be established.") (citation omitted). The third "term" does not allege that there is an "agreement" between Constellation and ABI for Constellation to follow ABI's pricing leads, but rather is a declarative statement of Plaintiffs' speculation about Constellation's anticipated future conduct. Nevertheless, even if Plaintiffs' allegations were offered as an assertion of the existence of an agreement to fix prices, that naked conclusion fails to meet *Twombly's* requirement to plead evidentiary facts. *See Kendall*, 518 F.3d at 1047 (holding plaintiffs must allege more than conclusory statements, but must allege "evidentiary facts" such as who was involved and when and where the agreement took place).

Plaintiffs cannot state a valid claim under § 1 by merely using the words "agreed," "agreement," and "conspired." (SAC ¶¶ 26, 32, 50, and 96.) Simply deploying those words is

[4] This set of "terms" is repeated in paragraphs 50 and 97 of the SAC.

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not enough under *Twombly*. *Twombly*, 550 U.S. at 554. "[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation--for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint." *Kendall*, 518 F.3d at 1047 (internal citation omitted). While "detailed factual allegations" are not required, a complaint must include sufficient facts to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570; *see also*, *Golden Gate Pharmacy Servs*., 2010 WL 1541257, at *1 (quoting *Iqbal*, 556 U.S. at 678). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "Mere 'conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.'" *In re High-Tech Emp. Antitrust Litig*., 856 F. Supp. 2d at 1113-14 (quoting *Epstein v. Wash. Energy Co*., 83 F.3d 1136, 1140 (9th Cir. 1996)).

In the Ninth Circuit, the SAC must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" when alleging a conspiracy. *Kendall*, 518 F.3d at 1048, *see also*, *Twombly*, 550 U.S. at 565 n.10; *In re Late Fee & Over-Limit Fee Litig*,, 528 F. Supp. 2d at 962 (dismissing a complaint that included only conclusory allegations, but "provide[d] no details as to when, where, or by whom this alleged agreement was reached"). Where plaintiffs alleged an agreement was made but did not allege which persons from defendants attended meetings and gave no details on the alleged agreements, California courts have held that plaintiffs did not meet the *Twombly* standard. *See In re Graphics Processing Units Antitrust Litig*., 527 F. Supp. 2d 1011, 1021 (N.D. Cal. 2007); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 963-65.

The Northern District of California in *In re Graphics Processing* granted defendants' motion to dismiss a complaint that alleged parallel pricing conduct. The plaintiffs alleged several instances of parallel pricing and parallel releases of products, including price points, product

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names and the month and year of the release. 527 F. Supp. 2d at 1021. The court criticized the plaintiffs, stating that all plaintiffs alleged was that the defendants released several products over a four-year period with similar prices. *Id.* at 1022. The court also admonished that the complaint was "less than clear about when the products were actually released." *Id*. The court held that "competitive market forces will tend to drive the prices of like goods to the same level, so like prices on like products are not, standing alone, sufficient to implicate price-fixing." *Id*. Plaintiffs had further alleged that executives from defendant companies attended conferences and trade show meetings giving them the opportunity to discuss pricing. *Id*. at 1023-24. But, the court noted that plaintiffs did not allege which persons from the companies attended the meetings and did not even allege that representatives from the defendants actually met or spoke with one another at those meetings. *Id*. at 1024. Further, plaintiffs gave no details concerning the alleged agreement. "Missing, however, [was] any specific allegation that defendants' representatives actually met to fix prices." *Id*. at 1023; *see also, In re Nat'l Ass'n of Music Merchs.*, 2012 U.S. Dist. LEXIS 118827 at *22-23 (granting motion to dismiss because plaintiffs did not allege "even a single meeting or communication where an illegal agreement was reached"). The court held that at most "defendants engaged in parallel behavior that could be explained by each firm acting in their own self-interest." *In re Graphics Processing*, 527 F. Supp. 2d at 1024.

In contrast, in *In re TFT-LCD (Flat Panel) Antitrust Litig*., the plaintiffs alleged parallel conduct, but bolstered that allegation with specifics that defendants "exchanged numerous types of sensitive competitive information, including pricing information, through trade association meetings, private communications and published data." 586 F. Supp. 2d at 1116. The plaintiffs also alleged that one defendant boasted in public that it had "succeeded in convincing its competitors to cut capacity." *Id*. The complaint also contained allegations supported by details of unusual pricing practices inconsistent with "natural market forces." *Id.* at 1115-16. The Northern District of California found that the plaintiffs properly stated a claim under § 1 because taking all of these allegations together "raise[d] a suggestion of a preceding agreement, not

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merely parallel conduct that could just as well be independent action." *Id*. at 1116 (quoting *Twombly*, 550 U.S. at 557).

The SAC does not come close to the level of detail the plaintiffs in *In re TFT-LCD* alleged.[5] In most cases, plaintiffs are able to allege that parallel pricing conduct has occurred, and then seek to allege facts to explain why that conduct resulted from an unlawful agreement rather than non-actionable, independent decisions. Here, Plaintiffs cannot even allege that parallel pricing conduct has occurred. Rather, they hypothesize that it "may" occur in the future. In addition, in terms of supposed explanatory facts supporting the allegations of conspiracy, the SAC does not even allege as much as the complaint that was rejected in *In re Graphics Processing*. Most importantly, just as in *In re Graphics Processing*, there is no allegation that anyone from ABI and Constellation met to fix prices, or where, when or how that occurred. The SAC alleges agreements were made for Constellation to buy the Modelo U.S. business, which Constellation does not contest. The Plaintiffs go further and blithely assert, with no supporting evidentiary facts, a wholly separate agreement between Constellation and ABI to fix prices. Yet, Plaintiffs do not identify a single meeting, telephone call or document in which anyone from ABI or Constellation discussed that Constellation will follow ABI prices after the acquisition. The SAC hypothesizes that future parallel conduct will occur. Where a complaint expresses "no real certainty whether [d]efendants entered into a conspiracy or agreement, or whether they merely

[5] Indeed, in several other cases brought by Plaintiffs' counsel involving eleventh hour challenges to large merger and acquisition transactions, courts have granted motions to dismiss under Fed. R. Civ. P. 12(b)(6) because of plaintiffs' conclusory allegations. For example, the District Court of Minnesota dismissed the plaintiffs' § 1 claim challenging an acquisition because none of the allegations of parallel conduct or opportunity to collude sufficiently alleged a conspiracy because "they fail to indicate a common schedule designed to achieve an unlawful motive and /or exclude the possibility of independent action." *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175, 2007 U.S. Dist. LEXIS 47966 at *13-14 (D. Minn. June. 28, 2007). This Court also dismissed § 7 and § 1 claims by Plaintiffs' counsel for failing to adequately plead a relevant product market. *See Golden Gate Pharmacy Servs., Inc*., 2010 WL 1541257, at *5; *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc*., No. C-09-3854, 2009 WL 4723739 (N.D. Cal., Dec. 2, 2009) (dismissing first amended complaint for failure to plead relevant product market); *Malaney v. UAL Corp*., No. C 10-02858, 2011 U.S. Dist. LEXIS 150386, at *14-15 (N.D. Cal. Dec. 29, 2011). Other courts also dismissed § 7 claims brought by Plaintiffs' counsel. *See, e.g., Cassan Enter. Inc. v. Avis Budget Group, Inc*., No. C 10-1934-JCC (W.D. Wash. March 11, 2011), ECF No. 39 (dismissing § 7 claims for lack of standing); *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943 (E.D. Mo. 2009) (granting defendants' motion for judgment on the pleadings on plaintiffs' § 7 claims).

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knew or expected that other [d]efendants would engage in parallel action," it does not meet the standard set out in *Twombly*. *In re Nat'l Ass'n of Music Merchs.*, 2012 U.S. Dist. LEXIS 118827 at *31-32.

Furthermore, Plaintiffs give no indication of whom at ABI or Constellation would have been involved in the purported scheme. Plaintiffs do not even hint as to when or where such an agreement was formed. In other words, the Complaint does not tell the Court who agreed that Crown, when owned by Constellation, will follow ABI's price leads, and when such an agreement was made. *Kendall*, 518 F.3d at 1048. Plaintiffs are "[m]issing . . . any specific allegation that defendants' representatives actually met to fix prices." *In re Graphics Processing*, 527 F. Supp. 2d at 1023*; see also, In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 961 (granting motion to dismiss because plaintiffs did not identify any actual agreement but only alleged that some of the defendants, at some times during the last decade had late fee terms on some credit card accounts that were in part parallel behavior). Indeed, Plaintiffs *cannot* allege any of these elements because they do not exist.

In cases where plaintiffs successfully have alleged a § 1 violation following *Twombly* there have been allegations of evidentiary facts, with some detail, explaining the terms of the alleged agreement and with whom and how it was reached. *See, e.g., In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1115-17; *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1143-46, (N.D. Cal. 2009); *In re TFT-LCD*, 586 F. Supp. 2d at 1115-16. The plaintiffs in those cases also then pled supporting evidentiary facts regarding the alleged agreement, such as emails or communications between defendants or defendants' employees discussing prices, the details of when the communications took place, the content of the agreement, public announcements of successful coordinated conduct and unexplained price stability that pushed their allegation of price fixing from "conceivable" to "plausible." *See, e.g., In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1115-17; *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d

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at 1143-46; *In re TFT-LCD*, 586 F. Supp. 2d at 1115-16. Plaintiffs here offer nothing other than naked conclusions and speculation.

C. Plaintiffs' Allegations of Hypothesized Future Parallel Pricing Conduct Are Not Sufficient to State a Claim

Courts, including those in the Ninth Circuit, have long held that parallel conduct alone does not violate the Sherman Act; nor does it establish an "agreement" that violates the Sherman Act. *See Theatre Enters., Inc., v. Paramount Film Distrib. Corp.*, 346 U.S. at 540-41; *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 962; *see also, Kline v. Coldwell, Banker & Co.*, 508 F.2d at 232 ("Nor will proof of parallel business behavior alone conclusively establish agreement.") (citing *Theatre Enterprises v. Paramount*, 346 U.S. 537 (1954)). Where plaintiffs rely on an allegation of past parallel conduct to infer an agreement, *Twombly*, and the Ninth Circuit, require the additional pleading in some detail of "plus factors" to push the allegations from "conceivable" to "plausible." *See Twombly*, 550 U.S. at 547. However, the universal starting point in these parallel conduct cases is the allegation of the existence of observed parallel conduct—an allegation that Plaintiffs cannot, and do not, make here.

Plaintiffs readily admit that Crown has not followed ABI's price leads. (SAC ¶¶ 19, 20, 88, and 89.) Thus, the SAC does not even allege that there has been parallel conduct on pricing from which the Court might hope to infer an agreement, only that parallel conduct might occur in the future. An inference of an agreement from parallel conduct that has not yet occurred but has only been hypothesized is not enough to satisfy *Twombly*. *See Twombly*, 550 U.S. at 557 ("[W]ithout that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory.").

Plaintiffs' allegation that Constellation may follow ABI's price leads in the future is merely speculation that Plaintiffs make based on statements Plaintiffs attribute to Constellation in the past. (SAC ¶¶ 22-25, and 31.) But, Plaintiffs' allegation that at some point in the past during the Crown joint venture, Constellation's managing director urged Crown executives to follow

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ABI's price increases falls short of what is needed under *Twombly*. (SAC ¶ 23.) That statement is merely a discussion of potential unilateral conduct by Constellation and is not asserted to have resulted from an agreement with ABI. As a potentially short-term owner in a distribution joint venture, Constellation's historical views on pricing can "be explained by [it] acting in [its] own self-interest."[6] *In re Graphics Processing*, 527 F. Supp. 2d at 1024. Furthermore, any allegations regarding a possible motive to conspire does not "rationally support an inference of an illegal agreement." *Prime Healthcare Servs. v. SEIU*, No. 11-cv-02652, 2012 U.S. Dist. LEXIS 123865, at *17 (S.D. Cal. Aug. 30, 2012). "[I]f 'a motive to achieve higher prices' were sufficient, every company in every industry could be accused of conspiracy because they all 'would have such a 'motive'.'" *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 964 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 133 (3d Cir. 1999)). Of course, the DOJ was aware of these statements, which Plaintiffs quote from the DOJ's complaint, and yet the DOJ approved the Revised Agreements with Constellation as the purchaser of Modelo's U.S. business.

Further, Plaintiffs' allegations of "fraudulent" transactions by well-known public corporations are belied by the indisputable terms of the revised transactions themselves and therefore cannot act as a plus factor. (SAC ¶¶ 50, 101.) As an initial matter, Plaintiffs do not provide the particularity needed to properly allege that the Revised Transaction is fraudulent. Federal Rule of Civil Procedure 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003) ("allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements"). Similar to the pleading standard required by *Twombly*, a plaintiff must allege particular facts explaining the circumstances of the

[6] Also, those statements were made when Constellation held a partial, potentially short-term interest in the Crown joint venture because Modelo had an option to buy out Constellation's Crown interest. Modelo has "an option at the end of 2013, to acquire in 2016, the half of Crown it does not already own." (SAC ¶ 47.) Unlike then, Constellation will, going forward, hold complete and permanent ownership of the Modelo U.S. business, and stands in a different posture than it did in prior years. The statements on which Plaintiffs focus do not provide factual support for Plaintiffs' implication that Constellation will make Crown follow ABI's pricing leads when it is the sole owner of the Modelo U.S. business. This speculation cannot push Plaintiffs' allegations of conspiracy from conceivable to plausible. *See Twombly*, 550 U.S. at 557; *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 962.

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fraud, "including time, place, persons, statements made[,] and an explanation of how or why such statements are false or misleading." *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1265 (C.D. Cal. 2007); *see also, Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citation and internal quotations omitted). In addition, the Court is not required to accept as true conclusory allegations that are contradicted by documents referenced in a complaint. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998); *see also, Sogbandi v. Markham*, No. C 02-2675, 2002 U.S. Dist. LEXIS 24442, at *4 (N.D. Cal. Dec. 17, 2002). The agreements Plaintiffs reference in the SAC are commercial agreements between public companies and were analyzed and approved by the DOJ. Plaintiffs make unfounded and conclusory statements about the ability of Constellation to purchase and operate Modelo's U.S. business but there is no evidence on the face of the operative agreements that they might be fraudulent. (*See* Constellation Request for Judicial Notice, Alberti Decl. Exs. 1-4.) Thus, any allegations that these agreements are fraudulent should be given no weight.

Moreover, the fundamental change in the relationship between and among ABI, Modelo, Crown and Constellation following the February Agreements makes any allegation regarding hypothesized future parallel conduct resulting from industry structure irrelevant. The Complaint suggests that alleged factors such as commodity products, a concentrated industry, and opportunities to discuss pricing are a sufficient basis on which to assume that there is an agreement that parallel pricing will occur in the future. (SAC ¶¶ 12, 18, and 106.) Constellation disputes those allegations strenuously, but even if the allegations are taken as true, despite those factors, there has not been an agreement on price in the past. The SAC stresses that Constellation, through Crown, has not coordinated with or followed ABI. (SAC ¶¶ 19, 20, 88, and 89.) Plaintiffs cannot use factors like industry structure to infer an agreement from hypothesized future parallel conduct when they have not and cannot allege that there has been any actual parallel conduct among ABI and Crown or Constellation operating in that industry structure.

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In addition, the proposed transactions will decrease the interactions between ABI and Crown or its owners compared to the status quo. It is implausible to believe that there is an increased likelihood of coordination between ABI and Crown when those entanglements are removed by transaction. Prior to the transactions ABI owned approximately half of Modelo and appointed nine of nineteen members of the Modelo board, and Modelo owned half of Crown and participated in its management through the board of directors. (SAC ¶¶ 45 and 47.) Thus, ABI has had a long-term economic interest in Crown, and has made up almost half of Modelo's board when Modelo owned half of Crown and had board level oversight over Crown. (*Id.*) Following the transactions, ABI will have no ownership or profit interest in Crown or the Modelo United States business. Despite the historical entanglements of ABI's interest in Modelo and its U.S. operations, Plaintiffs agree that Crown's pricing has not followed ABI's pricing in the past. (SAC ¶¶ 19, 20, 88, and 89.) It is illogical to believe that Crown's prices will be coordinated with ABI's in the future, when they have not been in the past, and when those entanglements are removed by the transactions.

II. PLAINTIFFS ALLEGATIONS RELATING TO THE TUNNEY ACT ARE INCORRECT

In their latest futile attempt to state a claim, Plaintiffs add four paragraphs purporting to allege that "defendants" have violated the Tunney Act because the "defendants have taken steps to consummate the merger" prior to the end of the 60-day public comment period. Plaintiffs either utterly misunderstand or grossly misconstrue the Tunney Act. (SAC ¶ 7 at p. 31.) There has been no violation of the Tunney Act and Plaintiffs allegations stating as much are wrong.

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), otherwise known as the Tunney Act, sets forth procedures governing judicial review of the terms of settlement resolving the DOJ's concerns with respect to a proposed merger. Under the Tunney Act, after a proposed settlement is entered by the court, binding the merging parties to its terms, the DOJ receives public comment on the settlement for at least 60 days and files a response to those

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comments with the court. 15 U.S.C. § 16(b), (d). The court then makes a determination whether the settlement aligns with the public interest and, if so, enters a final judgment. 15 U.S.C. § 16(e); *see also, United States v. InBev N.V./SA*, No. 08-1965, 2009 U.S. Dist. LEXIS 84787, at *3-4 (D.D.C. Aug. 11, 2009) (noting that in its review of alignment with public interest, "[p]otential antitrust violations beyond those alleged in the [DOJ's] complaint are beyond the scope of Tunney Act review"). Contrary to Plaintiffs' allegation, the Tunney Act in no way prohibits the consummation of a merger prior to the expiration of the 60-day public comment period or prior to the court entering final judgment.[7]

The parties are allowed to consummate their merger once the reviewing court enters a stipulation and proposed final judgment specifying the terms of the settlement. *See United States v. SBC Comm'ns., Inc.*, 489 F. Supp. 2d 1, 8 (D.D.C. 2007) (summarizing that several telecommunications companies closed their mergers prior to the expiration of the 60 day comment period and entry of final judgment and stating "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"). In keeping with this standard practice, the Stipulation and Order entered by the District Court for the District of Columbia related to the Revised Transactions only prohibited consummation of the transactions until the court signed the Stipulation and Order, which it did on April 22, 2013. (*See* Constellation Request for Judicial Notice, Alberti Decl. Ex. 2, Stipulation and Order at § IV.C ("Defendants shall not consummate the Transaction sought to be enjoined by the Complaint herein before the Court has signed *this* Stipulation and Order.") (emphasis added).) The Stipulation and Order also requires that the parties abide by the proposed Final Judgment, which similarly places no restriction on consummation of the transactions prior to the expiration of the 60-day comment period and entry of the Final Judgment. (*See* Constellation Request for Judicial Notice, Alberti Decl. Ex. 2, Stipulation and Order at § IV.B ("Defendants shall abide by and comply with the provisions of

[7] Only the documents and terms pertaining to the merger are governed by the Tunney Act. As the purchaser of divested assets, Constellation is therefore not a party to the transaction that is subject to the Tunney Act.

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the proposed Final Judgment, pending the proposed Final Judgment's entry by the Court.").) Most relevantly, the proposed Final Judgment requires the parties to act quickly to divest Modelo's U.S. business to Constellation. (*See* Constellation Request for Judicial Notice, Alberti Decl. Ex. 3, proposed Final Judgment at 2 ("[T]he essence of this Final Judgment is . . . the prompt and certain divestiture of certain rights and assets held by Defendants . . . ."); Constellation Request for Judicial Notice, Alberti Decl. Ex. 3, proposed Final Judgment at § IV.B (requiring ABI to divest Modelo's U.S. business to Constellation by completion of the merger or within 90 days after the filing of the proposed Final Judgment).)

Plaintiffs raise these futile and frivolous allegations despite numerous examples of transactions closing prior to the expiration of the public comment period and entry of final judgment. In InBev's acquisition of Anheuser-Busch, challenged by several Plaintiffs in this action represented by the same counsel, the court signed the hold separate stipulation and order on November 14, 2008, and the parties closed the transaction four days later.[8] *See United States v. InBev, N.V./S.A.*, No. 08-cv-1965, Dkt. 9 (D.D.C. Nov. 14, 2008); Press release, Anheuser-Busch InBev, Nov. 18, 2008, *available at*, http://www.ab-inbev.com/press_releases/20081118_1_e.pdf). Most recently, a district court entered a proposed final judgment resolving DOJ's concerns regarding a merger between Ecolab Inc. and Permian Mud Service Inc. on April 8, 2013. *See United States v. Ecolab, Inc.*, No. 1:13-cv-00444, Dkt. 2-2 (D.D.C. Apr. 8, 2013). The parties closed their transaction just two days later. Press release, Ecolab Inc., Apr. 10, 2008, *available at*, http://www.ecolab.com/media-center/news-releases/news-release?id=98F0ACC099AE4A5E9D19881D9BEF7392. These examples, among many others, provide further evidence that the Tunney Act is no prohibition on parties to a merger or acquisition consummating their transactions prior to the expiration of the 60-day comment period and entry of final judgment.

[8] Notably, Plaintiffs participated in the Tunney Act hearing in *United States v. InBev, S.A./NV* as amici. *InBev N.V./SA*, 2009 U.S. Dist. LEXIS 84787, at *9. The court there held that the Plaintiffs raised allegations outside of the DOJ's complaint and therefore the allegations were not proper for the court to review under the Tunney Act. *Id*. at *19-21.

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Plaintiffs' counsel, experienced in national antitrust litigations, surely is well aware that parties to a merger may consummate their transactions prior to the expiration of the public comment period and entry of final judgment; thus these Tunney Act allegations are frivolous.

III. PLAINTIFFS REQUEST FOR INJUNCTION IS MOOT AND PLAINTIFFS HAVE NOT ADEQUATELY STATED A CLAIM FOR DAMAGES

Further evidencing how little thought and effort Plaintiffs put into this SAC, Plaintiffs continue to request that the Court enjoin the transactions even as they admit that the Defendants have consummated the merger. (SAC ¶ B at 29, ¶¶ 3, 7 at 30-31.) Accordingly, Plaintiffs' request for an injunction is moot. *See Already LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013) (explaining that case becomes moot when the issues presented are no longer live); *Numrich v. Gleason*, 700 F. Supp. 512, 516 (D. Or. 1988) (holding that consummation of a merger rendered moot a preliminary injunction).

Plaintiffs' new request for damages is no more successful. (SAC ¶ D at 31-32.) As an initial matter, Plaintiffs have not alleged that they are direct purchasers. In the SAC, Plaintiffs allege that "ABI sells nearly 70 percent of the company's volume in the United States through wholesalers." (SAC ¶ 53.) The SAC further alleges that "[m]ost brewers use distributors to merchandise, sell, and deliver beer to retailers . . . which, in turn, sell beer to the consumer." (SAC ¶ 63.) Plaintiffs are beer consumers, not direct purchasers. (SAC ¶ 16.) As indirect purchasers, Plaintiffs are not entitled to damages under § 4 of the Clayton Act. The Supreme Court in *Illinois Brick Co. v. Illinois*, ruled that indirect purchasers are not proper plaintiffs and that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers." 431 U.S. 720, 734-35 (1977); *see Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1177, 1180 (N.D. Cal. 2009) (following *Illinois Brick* in holding that plaintiff was an indirect purchaser and therefore was not entitled to relief for alleged violations of federal antitrust laws).

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In an attempt to cover their bases, Plaintiffs also request "damages, trebled, as provided by . . . any State statutes allowing suit by both direct and indirect purchasers . . . ." (SAC ¶ D at 31-32.) Remarkably, however, Plaintiffs do not specify under *which* state statute they seek damages. Plaintiffs do not even allege that Constellation has violated any state statute at all. At a minimum, the identification of a specific state statute is necessary for the Court to properly consider Plaintiffs' request for damages and to "give the [Constellation] fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (internal quotations omitted). Consistent with the lack of particularity throughout the SAC, Plaintiffs also fail to make any effort to propose the amount of damages they purportedly should be awarded. This further prevents the Defendants from being able to adequately defend against Plaintiffs' request for damages. Moreover, should the federal antitrust claims be dismissed, it is unclear how Plaintiffs would meet the amount in controversy requirement without further information. 28 U.S.C. § 1332. Thus, Plaintiffs are not entitled to damages under federal law, and have not stated a claim that they are entitled to pursue damages under a specific state law.

CONCLUSION

Plaintiffs have not alleged any facts to allow them to proceed with their wholly speculative claims of hypothesized potential price fixing at some undefined point in the future. Moreover, Plaintiffs have not alleged any supporting facts to move their conclusory allegations from the realm of "conceivable" to "plausible." Plaintiffs frivolous allegations of a Tunney Act violation are incorrect and utterly fail to understand the scope of the Act. Finally, Plaintiffs cannot receive damages under federal antitrust laws and they have not identified any state law under which they could be awarded damages. Consequently, Plaintiffs have failed to meet the pleading standards required under 12(b)(6) and *Twombly*. The Court should dismiss this SAC with prejudice because after a third try, Plaintiffs still have not sufficiently stated any claim upon which relief can be granted. It is now futile.

Dated: June 28, 2013

McDERMOTT WILL & EMERY LLP

By: /s/ Daniel E. Alberti
Daniel E. Alberti

Attorneys for Defendant
CONSTELLATION BRANDS, INC.

ECF CERTIFICATION

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

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PROOF OF SERVICE

I, Cheryl A. Lovdahl, declare:

I am a citizen of the United States and employed in San Mateo County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 275 Middlefield Road, Suite 100, Menlo Park, California 94025. On, June 28, 2013, I served a copy of the within document(s):

1. DEFENDANT CONSTELLATION BRANDS, INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM IN SUPPORT.

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Menlo Park, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by transmitting via electronic mail the document(s) listed above to the electronic mail addresses as set forth below on this date for 5:00 p.m.

Kenneth R. Schwartz, Esq.
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7751 Carondelet, Suite 204
Clayton, MO 63105
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Attorney for Plaintiffs
STEVEN EDSTROM AND BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 28, 2013 at Menlo Park, California.

/s/ Cheryl Lovdahl
Cheryl Lovdahl

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