DANIEL E. ALBERTI (SBN 68620)
dalberti@mwe.com
McDERMOTT WILL & EMERY LLP
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
Telephone: (650) 815-7400
Facsimile: (650) 815-7401

MARGARET H. WARNER (admitted *pro hac vice*)
mwarner@mwe.com
RAYMOND A. JACOBSEN, JR. (admitted *pro hac vice*)
rayjacobsen@mwe.com
JON B. DUBROW (admitted *pro hac vice*)
jdubrow@mwe.com
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, D.C. 20001
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

Attorneys for Defendant
CONSTELLATION BRANDS, INC.

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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** **DATE:** **August 9, 2013** **TIME:** **9:00 a.m.** **JUDGE:** **Hon. Maxine M. Chesney**

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs' opposition to the motions to dismiss reveals yet again the hopelessness of their Second Amended and Supplemental Complaint ("SAC"). They premise their Section 7 claim on a deal that is not occurring—ABI's acquisition of Modelo's U.S. business. To try to plead around that problem, Plaintiffs make conclusory allegations that Constellation will be ABI's "puppet," resulting in ABI effectively acquiring the Modelo U.S. business despite Constellation's acquisition of perpetual control over the Modelo brands in the United States and the Piedras Negras plant. Because they cannot, under *Twombly*¸ rely on naked, speculative and conclusory allegations, Plaintiffs now attempt to fill in the holes in the SAC by referring to the transaction documents, but in doing so they mischaracterize those agreements. A plain reading of the transaction documents demonstrates the fallacy of Plaintiffs' gambit. The agreements are arm's length arrangements and neither contain nor imply anything to indicate that ABI, and not Constellation, will control the Modelo U.S. business. Plaintiffs also have done nothing to try to defend the only Section 1 claim stated in the SAC, namely that ABI and Constellation would, in the future, fix prices. As Constellation demonstrated in its Motion to Dismiss, Plaintiffs can muster no supporting factual allegations for that naked conclusion. Plaintiffs now scramble to offer other purported Section 1 theories that appear nowhere in the SAC. Of course, that is improper.

Plaintiffs have now had three chances to file a properly pled complaint, and they have proved their inability to do so. They have imposed substantial costs and burdens on Defendants through their serial complaints. They are seeking to attack a transaction that was subjected to a lengthy DOJ review that was resolved by a consent agreement. Plaintiffs have cited no precedent for a successful private challenge to an acquisition that was subject to a DOJ consent agreement, because there is none. The time has come to end Plaintiffs' tactics. The SAC should be dismissed with prejudice.

LEGAL STANDARD

The standard for a motion to dismiss is well-known. "Well-pled allegations in the complaint are assumed true, but a court is not required to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable inferences." *Terminalift LLC v. Int'l Longshore & Warehouse Union Local 29*, No. 11-cv-1999, 2013 U.S. Dist. LEXIS 70545, at *6 (S.D. Cal. May 17, 2013) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) and *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)); *see also, In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Further, "allegations that contradict matters properly subject to judicial notice" or that contradict "material attached to or incorporated by reference into the complaint" are not required to be taken as true for purposes of deciding a motion to dismiss. *Sprewell*, 266 F.3d at 988; *Irving v. Lennar Corp.*, No. CIV S-12-290, 2013 U.S. Dist. LEXIS 47206, at *22 (E.D. Cal. Apr. 1, 2013).

To move beyond insufficient legal conclusions, unwarranted deductions or unreasonable inferences, Plaintiffs must offer *fact-based* allegations, not just possible, speculative or hypothetical conclusions. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047-48 (9th Cir. 2008) (holding that plaintiffs must allege facts to answer the basic questions, who, what, where and when); *Cascades Computer Innovation LLC v. RPX Corp.*, No. 12-CV-01143, 2013 U.S. Dist. LEXIS 10526, at *15 (N.D. Cal. Jan. 24, 2013) (re-iterating that plaintiffs must plead evidentiary facts in their complaint). To survive a motion to dismiss, Plaintiffs must plead facts with enough specificity to move a claim from one that is possible to one that is plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that plausibility is more than sheer possibility); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2008) (holding that the need for allegations plausibly suggesting an agreement "reflects the threshold requirement of [Federal] Rule [of Civil Procedure] 8(a)(2)").

ARGUMENT

I. Plaintiffs Have Not Provided Any Support for Their Section One Price Fixing Claim, Which Should Be Dismissed with Prejudice

Plaintiffs premised their Sherman Act Section 1 claim on allegations stated in various places that they feared that Constellation and ABI would agree, in the future, to fix prices on beer. Even the caption to the Plaintiffs' SAC stated that their Section 1 claim was "to prevent price fixing."[1] The violation alleged under Section 1 was that "there is a significant threat that ABI and Constellation will fix prices in that Constellation will follow ABI price increases by agreement and understanding." (SAC ¶ 119.) Constellation's Motion to Dismiss explained how those allegations were woefully inadequate to meet the pleading requirements under *Twombly*. In particular, Plaintiffs failed to allege that a pricing *agreement* was formed. Plaintiffs make no effort in their Opposition to support their price fixing allegation.[2] They do not rebut any of the cases showing how they failed to plead a price fixing agreement.

Plaintiffs mischaracterize their SAC to attempt to concoct a Section 1 allegation of an agreement on *something*, even if unrelated to the price fixing claim alleged in the SAC, stating "the SAC also alleges that Defendants have violated Section 1 of the Sherman Act by agreeing to enter into 'the Revised Agreement' and Constellation's agreement to follow ABI's price leads. (SAC ¶ 98)." (Opp. 22.) Paragraph 98 states further that "Constellation has conspired with ABI

[1] "Second Amended and Supplemental Complaint for Injunctive Relief to Prohibit the Acquisition of Grupo Modelo by Anheuser-Busch InBev as a Violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, *to Prevent Price Fixing in Violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1*, and in the Alternative, for Divestiture and Damages," Doc. 62, June 25, 2013 (emphasis added).

[2] Plaintiffs assert that there are potential information flows between Constellation and ABI, and that the "so-called 'firewalls'" are illusory. (Opp. 15-16.) First, even if it were to occur, information exchange alone is not sufficient to demonstrate an agreement to fix prices. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n. 16 (1978); *In re Coordinated Pre-trial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447 n. 13 (9th Cir. 1990). Second, Plaintiffs ignore that the proposed Final Judgment ("PFJ") in the settlement of the DOJ action includes firewall provisions that expressly limit the use of Constellation information that ABI may acquire. (Alberti Decl., Doc. 65-3, Ex. 3, PFJ § XIII.) Violation of that order is punishable as contempt. In fact, Plaintiffs themselves have requested this Court to enter an order enforcing those same firewalls. (Mot. for Injunction Seeking "Hold Separate" Order, Doc. 68.) In any event, regardless of the strength of the firewalls, Plaintiffs still would need to allege a current agreement, a meeting of the minds to fix prices, to support the Section 1 claim they have attempted to plead in the SAC, which they simply have not done.

the terms of which include those in the Revised Agreement and Constellation's agreement to follow ABI's price leads." (SAC ¶ 98.) The SAC alleges that the purported agreement to follow ABI's price leads is separate from the terms of the transaction agreements. In their Opposition, Plaintiffs attempt to parse the "Revised Agreement," albeit incorrectly, as discussed below. Importantly, they point to no provision in the Revised Agreement that calls for, or even intimates, price fixing. Plaintiffs must allege an agreement, a meeting of the minds, to fix prices to support their Section 1 claim, but they make no such allegation. *See Twombly*, 550 U.S. at 557; *Kendall*, 518 F.3d at 1048.

Because there are no allegations indicating a current agreement to fix prices, Plaintiffs in their Opposition attempt to revise their claim and theory. Rather than focusing on "price fixing," which they use to describe their Section 1 claim not only in the SAC's caption, but also in the SAC's claim for relief, Plaintiffs now describe their allegations as supporting a "conspiracy to fix prices and otherwise restrain trade." (Opp. 23.) Plaintiffs cannot amend the claims in their SAC by introducing new claims, theories or facts in their Opposition. *See Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998); *Session v. PLM Lender Servs., Inc.*, No. C 10-04942, 2011 WL 6748510, at *5 (N.D. Cal. Dec. 22, 2011) (citing *Schneider*, 151 F.3d at 1197 n.1); *see also, Bishop v. Air Line Pilots Ass'n. Int'l*, No. C-98-359 (MMC), 1998 WL 474076, at *10 (N.D. Cal. Aug. 4, 1998) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984)). Plaintiffs have filed three complaints; none states a valid Section 1 claim. That claim should now be dismissed with prejudice. *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).

II. The Court Should Dismiss Plaintiffs' Section 7 Claim Because They Have Not Alleged Any Facts to Support Their Conclusory Allegation That Constellation Will Be ABI's "Puppet" or That the Transactions Will Increase Concentration

Plaintiffs' Section 7 claim is premised on their incorrect assertion that the transactions somehow increase concentration in the alleged U.S. beer market. Plaintiffs first argue that the beer industry is highly concentrated, and that concentration will increase as a result of the transactions. (Opp. 10-11; SAC ¶¶ 73, 76, 78, 81-82.) Relying on that supposed increase in concentration levels, Plaintiffs continue to cite cases that are inapplicable to the facts here. Plaintiffs build their arguments off of cases involving challenges to acquisitions of beer businesses in the United States that increased concentration levels in the United States, and local regions, above that which would have existed if the acquisition had not occurred.

Plaintiffs rely primarily on *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) and *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973)). In *Pabst*, the largest and fourth largest beer sellers in Wisconsin combined, increasing their leading share in the state. *Pabst*, 384 U.S. at 550-51. In *Falstaff*, a large brewer that was considering entering, and likely was perceived as a potential entrant into the market for the sale of beer in New England and therefore may have influenced competition even if it did not have sales there, acquired the largest brewer in New England. *Falstaff*, 410 U.S. at 531-33. Those cases involved the combination of assets that were actual or likely potential competitors in the sale of beer in the United States. Here, however, ABI, the firm that Plaintiffs insist is increasing its market share, is not acquiring any business in the United States. The Modelo U.S. business has been transferred to Constellation, not ABI, per the DOJ consent decree. Unlike *Pabst* and *Falstaff*, there is no combining of two beer businesses that were actual or potential competitors in the United States.

Plaintiffs do not address, or attempt to distinguish in any way, the cases that are relevant under the circumstances here. *See Fed. Trade Comm'n. v. Arch Coal, Inc.*, No. 04-0534, slip op. at 7 (D.D.C. July 7, 2004); *Fed. Trade Comm'n. v. Libbey, Inc.*, 211 F. Supp. 2d 34, 44-47 (D.D.C. 2002). Those cases demonstrate that when an acquiring firm resells assets or a business to another buyer, as ABI has done here in selling the Modelo U.S. business to Constellation, the

portion that it sells and does not operate is not treated as being combined with that acquiring firm's business for purposes of Section 7 analysis.[3] Here, because Constellation and not ABI owns and operates the Modelo U.S. business, there is no basis for any allegations that the transactions have increased concentration in the United States. Yet, that is what Plaintiffs attempt to do here, through their conclusory assertion that Constellation is ABI's puppet. (Opp. 10-11; SAC ¶¶ 73, 76, 78, 81-82.)

Plaintiffs offer no factual allegations to support their assertion that ABI will effectively control Constellation and Crown after the acquisition. In the SAC and in their Opposition, Plaintiffs employ various words to convey what is the lynchpin to their entire argument—that the share of the Modelo U.S. business that Constellation acquired should somehow be attributed to ABI, and not to Constellation. Plaintiffs allege in various places that Constellation's acquisition of the Modelo U.S. business is "fraudulent," because ABI will "control" Constellation, who will merely be ABI's "puppet." (Opp. 8 ("puppet"), 9, 21-22 ("control"); SAC ¶¶ 26, 30, 50, 101 ("fraud"); SAC ¶¶ 30-32, 97, 109 ("control"); SAC ¶ 33 ("puppet.").) Those types of conclusory allegations without any specific underlying facts are deficient under *Twombly*. 550 U.S. at 556-57. The Court understood that Plaintiffs' conclusory allegations did not offer support for this key premise at the TRO hearing:

> At this time we have what is on its face a legitimate transaction that does not result in ABI acquiring the U.S. distribution of competing beer. Thus, the plaintiff has a rather difficult hurdle to overcome; that plaintiff[s] would have to show that it is not a legitimate transaction, that it is a sham, that it is intended to cover up what would be then control of the Corona sales here in the U.S. by ABI.

[3] In *Arch Coal*, mining company Arch Coal proposed to acquire two mines from competitor Triton, then in a "concurrent divestiture," sell one of the mines to a third company, Kiewit. *Arch Coal*, No. 04-0534, slip op. at 2-3. The FTC argued that the divestiture to Kiewit should be ignored and the competitive effects should be analyzed as if Arch Coal acquired permanently both mines. *Id.* The court held that in considering the effects of the transaction, the divestiture to Kiewit must be analyzed, and not ignored. *Id*. at 7.

In *Libbey*, glassware manufacturer Libbey acquired a portion of another manufacturer's (Anchor) glassware business. Anchor transferred the remaining glassware business to a subsidiary. *Libbey*, 211 F. Supp. 2d at 45. When considering the competitive effects of the transactions, the court, and the FTC, analyzed the Anchor subsidiary as a separate competitor for glassware than Libbey. *Id*. at 47-48.

(TRO Hr'g Tr. 56:18-24, June 4, 2013, Doc. 57.)[4]

Plaintiffs' Opposition offers up a variety of arguments attempting to support their contention that Constellation's acquisition of the Modelo U.S. business is not a legitimate transaction. But none is supported by specific and plausible facts.

A. Defendants Have Not Stipulated That Plaintiffs Have Stated a Claim

Plaintiffs' argument that they have stated a claim because the DOJ's January complaint stated a claim is false. Plaintiffs contend that their SAC states a claim because "the Defendants have stipulated" that the complaint filed by DOJ in January "states a valid claim against ABI and Modelo for violating Section 7 of the Clayton Act." (Opp. 12, 16, 21-22.) Judicial estoppel is not applicable here. When determining whether to apply the doctrine, courts consider "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position, and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). However, when there are new facts involved, "[e]stoppel is defeated." *Gagne v. Zodiac Maritime Agencies, Ltd.*, 274 F. Supp. 2d 1144, 1148 (S.D. Cal. 2003) (citing *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1147 (9th Cir. 1998)). There is no estoppel here because there have been significant changes in facts—namely, an entirely new transaction.

Plaintiffs base their argument on a deal that is not occurring, and ignore the fact that the transaction that ABI, Modelo, and Constellation have completed is fundamentally different than the transactions challenged in the DOJ's January complaint. The DOJ filed its January complaint before Constellation agreed to acquire the Modelo U.S. business from ABI. Many features of the transactions as they existed at the time of the DOJ complaint were changed by the parties' February Revised Agreements. For example, at the time of the January complaint, Constellation

[4] While the Court discussed this in the context of a motion for a temporary restraining order, it does not change the statement that the agreements are, on their face, legitimate. In that vein, Plaintiffs have not made *fact-based* allegations that the agreements are anything but legitimate.

would have had only a limited, ten-year license for the sale of the Modelo brands in the United States, would acquire no production assets and would be permanently, wholly dependent on ABI for the supply of beer. With the February Revised Agreements and subsequent DOJ settlement, Constellation acquired a perpetual, fully-paid up license to the Modelo brands in the United States, acquired the Piedras Negras plant supplying the majority of Modelo beer imported into the United States, and committed to expand Piedras Negras within three years so it will not require any supply from ABI following a relatively short transition period. The DOJ agreed that the restructured transaction resolved the competitive concerns raised in its January complaint. Plaintiffs' SAC challenges the transactions as restructured by the February Revised Agreements. Those transactions differ fundamentally from the ones the DOJ challenged in its January complaint. DOJ approved the Revised transactions. It is misleading for Plaintiffs to assert that because a complaint challenging a different set of transactions stated a claim, their SAC states a claim.

B. The Transaction Documents Do Not Support Plaintiffs' Theory That the Modelo U.S. Business Market Share Should Be Attributed to ABI

Plaintiffs' primary argument is that Constellation should not be viewed as an independent competitor but instead as ABI's puppet because, Plaintiffs incorrectly assert, the transaction agreements leave ABI employees in charge of Constellation's brewery, allow ABI to raise prices for incremental beer supplies to Constellation, and require ongoing distribution relations between the firms. Plaintiffs fundamentally misread the transaction documents.[5] These documents are

[5] Preliminarily, Plaintiffs' arguments relating to the transaction documents introduce a host of issues not raised in the SAC. The transaction documents, also referred to as the February Revised Agreements, were filed on April 24, 2013, shortly after the April 19th settlement with the DOJ, and thus were available to Plaintiffs approximately two months before their SAC, filed June 25. *See United States v. Anheuser-Busch InBev SA/NV*, No. 13-127 (D.D.C. filed Apr. 24, 2013), Doc. 35. The public versions of the transaction agreements, to the extent they are relevant to Plaintiffs' claims, contain all the information necessary to refute Plaintiffs' mischaracterizations of those documents. (*See generally*, Alberti Decl., Doc. 65-4 at p. 2, PFJ.) Far from hiding "critical information," these agreements thoroughly describe, among other things, Constellation's acquisition of the Piedras Negras brewery, including Servicios Modelo de Coahuila, S.A. de C.V. ("SMC") that employs the brewery workers, and the terms under which Constellation will receive transition services and supply from ABI for a limited period of time. It appears Plaintiffs did not choose to read these documents, at least in any detail, until after Defendants moved to dismiss the

part of the proposed Final Judgment ("PFJ"), and compliance is subject to review by the District Court for the District of Columbia and DOJ's monitoring trustee.

1. ABI will not control the supply and pricing of beer for the Modelo U.S. business.

Plaintiffs make several misguided arguments that incorrectly attempt to portray ABI as continuing to control the beer supply to the Modelo U.S. business that Constellation acquired. Plaintiffs argue that "ABI will control 100% of the supply to Crown, supplying 40% of Crown's needs to the U.S. and in controlling the Piedras Negras brewery." (Opp. 9; *see also* Opp. 22 (ABI will "control the price and supply to Constellation of up to 40% of its requirements" for several years.).) This argument, which is Plaintiffs' leading argument for its "puppet" theory, is not accurate. First, Constellation alone controls and operates the Piedras Negras brewery. [6] Second, ABI cannot withhold supply from, or change the price charged to, Constellation for the remaining roughly 40% of its beer needs that ABI/Modelo will supply prior to the completion of the Piedras Negras expansion.

Plaintiffs argue that ABI employees will operate the Piedras Negras facility producing the majority of the beer for the Modelo U.S. business. Here, Plaintiffs simply misread the Transition Services Agreement ("TSA"). (Alberti Decl., Doc. 65-4, Ex. 4 at p. 121, TSA.) The employees who operate Piedras Negras are employed by SMC, an entity Constellation acquired in early

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SAC.

Plaintiffs' half-hearted request to convert this to a summary judgment under Rule 56 based on Plaintiffs' reliance on the transaction documents is not supportable. (Opp. 10.) As laid out in Constellation's opening brief, the Court can consider documents referenced in, but not attached to, a complaint when evaluating a motion to dismiss without converting it to a summary judgment motion. *See* Constellation Mot. to Dismiss n. 1, Doc. 64; *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (holding that matters properly subject to judicial notice may be considered by a court without converting a motion to dismiss into one for summary judgment). The Court need not take as true allegations that are contradicted by those referenced documents. *See Sprewell*, 266 F.3d at 988-89.

[6] Specifically, Constellation purchased the Piedras Negras brewery by acquiring control of two separate companies: Compañia Cervecera de Coahuila, S.A. de C.V. ("CCC Company"), which owns the brewery land, plant, property and permits but has no employees (*see* Alberti Decl., Doc. 65-4, Ex. 4 at p. 2, SPA §§ 3.15, 3.17), and SMC, which employs all the workers needed to operate the brewery (*see* Alberti Decl., Doc. 65-4, Ex. 4 at p. 2, SPA § 3.21).

June. (*See* Alberti Decl., Doc. 65-4, Ex. 4 at p. 2, Stock Purchase Agreement ("SPA") §§ 1.1, 3.21.) The TSA is a separate agreement under which ABI agreed that Constellation can contract for support for its newly-acquired operations from the portions of the Modelo organization that Constellation has not acquired. (*See* Alberti Decl., Doc. 65-4, Ex. 4 at p. 121, TSA § 2.01.) There is nothing unusual or suspect about having a TSA—they are commonplace in merger and acquisition transactions. Because the individuals providing those transition services are not SMC personnel who became Constellation employees as a result of the transaction, they remain ABI / Modelo employees. (*see* Alberti Decl., Doc 65-4, Ex. 4 at p. 121, TSA § 3.01.) ABI / Modelo employees may provide transition services to Piedras Negras, but they do not operate the brewery and any argument to the contrary is demonstrably false, and shows a fundamental misunderstanding of the business arrangements in the transaction agreements. As stated in the agreement, and quoted by plaintiffs, "Notwithstanding anything to the contrary, under no circumstances shall [ABI] have the authority to make any decisions with respect to the operation and expansion of the Piedras Negras Plant or the [CCC Company]." (Alberti Decl., Doc. 65-4, Ex. 4 at p. 128, TSA § 2.01(e); Opp. 13.) Nor do the agreements give ABI the opportunity to approve or interfere with Constellation's sales and marketing efforts. (See Alberti Decl., Doc. 65-4, Ex. 4 at p. 90, Amended and Restated Sub-License Agreement ("SLA") § 2.7.) Plaintiffs' selective reading of the TSA also ignores the temporary nature of the services provided. For example, the TSA places a deadline of six months on the provision of brewery operations services for the Piedras Negras brewery. (Alberti Decl., Doc. 65-4, Ex. 4 at p. 121, TSA § 2.04(a).)

Second, the beer supplied by ABI / Modelo to supplement Constellation's production at Piedras Negras is supplied under a contract that specifies the price to be paid, which cannot be changed by ABI.[7] Sections 3.1 and 3.2 set the price at a DOJ-approved "initial price" that is adjusted once within 60 days according to a pre-set formula and thereafter in accordance with inflation. (Alberti Decl., Doc. 65-4, Ex. 4 at p. 210, Interim Supply Agreement ("ISA") §§ 3.1,

[7] While this publicly-filed agreement is redacted, it still shows clearly that the price is pre-determined, and not subject to change by ABI. (*See* Alberti Decl., Doc. 65-4, Ex. 4 at p. 210, ISA §§ 3.1, 3.2.)

3.2.) The price of supply Constellation receives from ABI is determined for the life of the contract, and that price cannot be altered by ABI or Constellation (or both) without DOJ's approval. (*See* Alberti Decl., Doc. 65-3, Ex. 3, PFJ IV.G.)

Plaintiffs assertion that ABI will be able to "withhold product and production innovation from Constellation" (Opp. 22) again mischaracterizes the facts in the documents on which Plaintiffs rely. The TSA precludes ABI from providing innovation services to Constellation, (Alberti Decl., Doc. 65-4, Ex. 4 at p. 121, TSA § 2.01(e)), but it does not prevent or prohibit innovations in the Modelo U.S. business. Constellation may adopt, at no charge, any Modelo brand extensions or recipe changes ABI makes in Mexico or Canada. (Alberti Decl., Doc. 65-4, Ex. 4 at 86, 95 SLA § 2.2, 2.15(b).) Constellation retains full rights to innovate at its Piedras Negras brewery or through the Crown organization, which has been and is responsible for sales, marketing, and other activities for the Modelo brands in the United States. (See Alberti Decl., Doc. 65-4, Ex. 4 at 95-96, SLA § 2.15(a), 2.17, granting Constellation the right to create new Modelo brand extensions and product changes for use in the United States.)

Plaintiffs also now argue that because Crown may continue to use some ABI-owned distributors to distribute the Modelo products, ABI will somehow obtain additional power to increase the price of the Modelo products. Plaintiffs make no allegations or arguments that Constellation's acquisition of the Modelo U.S. business changes the amount of Modelo beer handled by the ABI distributors (other than providing Crown with new termination rights), or that it will change the pricing dynamics between Crown and its distributors.[8] In short, Crown sold through ABI-owned distributors before Constellation bought the Modelo U.S. business, and it does so after the acquisition. The transaction has not changed this relationship. ABI does not control Constellation's production, supply, pricing, or distribution of beer.

[8] By a plain reading of the Paragraph V.C. of the PFJ and the Notice Regarding Filing of Sealed Material (Doc. No. 29-6.) referenced in footnote 11 of Plaintiffs' Opposition, Exhibit D describes the specific terms of sale of distribution rights of ABI-owned distributors pursuant to Constellation's directive in Paragraph V.C. of the PFJ. Exhibit D does not relate to the terms of sale of any beer sold by Constellation.

2. Plaintiffs' arguments that Constellation and ABI might potentially engage in some hypothetical future transactions does not support their fundamental contention that Constellation is ABI's puppet

Plaintiffs point out a few areas in which there exists a potential for future business arrangements between Constellation and ABI. Those hypothetical situations do not provide factual, non-speculative support for Plaintiffs' premise that Constellation is ABI's puppet. *See Kendall*, 518 F.3d at 1048 (requiring evidentiary facts to support conclusions). First, Plaintiffs argue that the "Proposed Final Judgment and reconfigured transaction" gives "ABI the power to . . . reacquire the 'divestiture assets' in 10 years when the Final Judgment expires." (Opp. 22.)[9] This cannot save their SAC. First, the SAC does not make allegations that ABI's supposed "power" to later acquire the Modelo U.S. business renders Constellation ABI's puppet. *See Schneider*, 151 F.3d at 1197 n. 1 (citing *Harrell v. United States*, 13 F.3d 232, 236 (7th Cir. 1993)) (new claims cannot be added to a complaint through an opposition to a motion to dismiss). The expiration of a ban after ten years does not provide any affirmative "power" or right for ABI to make an acquisition of the assets constituting the Modelo U.S. business. Plaintiffs do not argue, because they cannot, that the transaction agreements provide any right for ABI to re-acquire any of Modelo's U.S. business. Thus, Plaintiffs' argument boils down to a fear that, after ten years, "ABI-Modelo could cut a deal with Constellation to 'reacquire any part of the Divestiture Assets.'" (Opp. 17.) Of course, that is wholly speculative, and premised on the occurrence of some hypothetical future transaction. *See Twombly*, 550 U.S. at 555 (requiring allegations that "raise a right to relief above a speculative level"); *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) (holding that without sufficient allegations, a conclusion that defendants actions are illegal would be speculative). If any transaction did arise later, it would be subject to review and potential challenge by the DOJ and by private litigants.

[9] As a variant of this "reacquisition" argument, Plaintiffs also state that Constellation might assign the sub-license it obtained from Marcas Modelo to ABI. (Opp. 14-15.) Of course, under the PFJ, that could not happen during the ten-year term of the PFJ, which prevents ABI's acquisition of any part of the Divested Assets during the term of the Final Judgment. (*See* Alberti Decl., Doc. 65-3, PFJ §XV.)

None of those hypothetical events provides any support for Plaintiffs' overarching premise that, under the existing agreements, Constellation will not compete independently but will instead be ABI's "puppet."

Plaintiffs' next argument relates to the potential, hypothetical future business arrangement for ABI-Modelo to handle Constellation beer products, other than the Modelo products, that Constellation might, in the future, introduce into Mexico. This is a total red herring argument. First, there simply is no right of first offer. That provision was eliminated by the First Amendment to Stock Purchase Agreement filed publicly in the District of Columbia proceeding, and filed in connection with Constellation's Motion to Dismiss. (*See* Alberti Decl., Doc. 65-4, Ex. 4 at pp. 67-68 (noting that Section 5.7 of the agreement is "deleted in its entirety" and replaced with "Intentionally Omitted.").) Second, the argument is purely hypothetical.[10] Plaintiffs have not alleged that Constellation controls any beer products that it would be interested in introducing into the Mexican market. In fact, Plaintiffs' position is that Constellation is not even a beer company, but for its acquisition of the Modelo U.S. business. (Opp. 8-9; SAC ¶¶ 26, 30, 102-03, 108.) Third, if there were a Mexican right of first offer, it would provide no support for the fundamental contention underlying Plaintiffs' entire position—namely that Constellation, in operating the Modelo U.S. business, will be controlled by ABI such that it will be ABI's "puppet" and the sales and activities of the Modelo U.S. business should be attributed to ABI for purposes of analyzing Plaintiffs' Section 7 claim.

[10] Plaintiffs' argument that any right of first offer, if one did exist, is somehow "tantamount to a division of markets" is laughable. (Opp. 18.) Plaintiffs have not alleged that Constellation and ABI have agreed that Constellation will have the right to sell beer to some customers or locations, while ABI will have the right to sell in other territories or states. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) is simply inapplicable. There BRG and HBJ agreed that BRG would serve customers in Georgia, and only Georgia, and that HBJ would not serve Georgia but could serve customers outside of Georgia. *Id*. at 49-50. Here, under the transaction agreements, Constellation has the unfettered right to sell the Modelo brand beers throughout the United States. Of course, those sales efforts will be in competition with ABI's, because ABI is the largest beer seller in the United States. There is no territorial or customer allocation impacting the United States in any way in those agreements other than ABI's providing the exclusive U.S. license to Constellation. That license prevents ABI from competing with Constellation in the United States using the Modelo-brand products that it has sold to Constellation for over $4 billion. There is nothing unusual in that arrangement, and it is simply not a market allocation. ABI can sell any of its products in the United States.

3. The Defendants have not violated the Tunney Act by closing on their transactions

Plaintiffs argue that the Defendants violated the Tunney Act by closing on their transactions prior to the expiration of the sixty-day public comment period and the entry of the final judgment in the District of Columbia litigation. Plaintiffs' argument here misses the point. Plaintiffs state there "is nothing in the Act that permits Defendants to close their transactions . . . before Final Judgment has been entered." (Opp. 26.) It is also true that there is nothing in the Tunney Act that *prohibits* a transaction from closing. If Plaintiffs were correct that the Tunney Act prohibited closing, one certainly would expect that those many so-called Tunney Act "violations" would have resulted in some findings that the Act was violated. Plaintiffs can point to no such case, while there are many examples of transactions closing during the Tunney Act period, with full knowledge of the DOJ and of the Courts overseeing those matters. *See, e.g.*, *United States v. Ecolab, Inc.*, No. 1:13-cv-00444, Doc. 2-2 (D.D.C. Apr. 8, 2013); *United States v. Standard Parking Corp.*, No. 1:12-cv-01598, Doc. 2-1 (D.D.C. Sept. 26, 2012); *United States v. InBev, N.V./S.A.*, No. 08-cv-1965, Doc. 9 (D.D.C. Nov. 14, 2008). The Tunney Act does impose a public comment period, but the Tunney Act does not impose any waiting period that prohibits a transaction from closing during the Tunney Act review. While the court may modify the PFJ in some way rather than simply acting as a "rubber stamp," that does not impose any obligation on the parties to await that court action when there is no legal bar to closing. Plaintiffs have not pointed the Court to any statutory provision imposing a waiting period, nor have they pointed to any case adopting their Tunney Act argument. The Defendants have not violated the Tunney Act.

CONCLUSION

The Plaintiffs have taken three swings at filing a properly pled complaint. Their latest effort, the SAC, still fails to state a claim on which relief can be granted. Plaintiffs can point to no supportable allegations that Defendants have agreed to fix the prices of beer, which they would need in order to proceed with the Section 1 claim stated in their last two complaints. On the Section 7 claims, Plaintiffs make much noise, but none of their arguments support the

underlying premise on which they have built their theory—namely, that Constellation will be ABI's "puppet" so that ABI and not Constellation should be viewed as acquiring the Modelo U.S. business. With this third strike, the Court should call them out, and dismiss the case with prejudice.

Dated: July 22, 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-second day of July, 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.

/s/ Daniel E. Alberti
Daniel E. Alberti

PROOF OF SERVICE

I, Darlene Vanderbur, 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, July 22, 2013, I served a copy of the within document(s):

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

☐ 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.
Law Offices of Theodore F. Schwartz
7751 Carondelet, Suite 204
Clayton, MO 63105
Telephone: (314) 863-4654
Facsimile: (314) 862-4357

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 this affidavit.

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

Executed on July 22, 2013 at Menlo Park, California.

/s/ Darlene Vanderbur
Darlene Vanderbur