ALLEN J. RUBY (Bar No. 47109)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue
Palo Alto, California 94301-1908
Telephone: (650) 470-4500
Facsimile: (650) 470-4570
Email: Allen.Ruby@skadden.com

Attorney for Defendant ANHEUSER-BUSCH INBEV SA/NV

Additional Counsel Listed on Next Page

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN EDSTROM, BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK M. NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE, *Plaintiffs*, v. ANHEUSER-BUSCH INBEV SA/NV, GRUPO MODELO S.A.B. de C.V., and CONSTELLATION BRANDS, INC. *Defendants*.	CASE NO. C-13-1309-MMC **NOTICE OF MOTION AND MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS ABI'S AND MODELO'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** Date: July 12, 2013 Time: 9:00 a.m. The Honorable Maxine M. Chesney

STEVEN C. SUNSHINE (admitted *pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111
Telephone: (202) 371-7000
Facsimile: (202) 393-5760
Email: Steven.Sunshine@skadden.com

JAMES A. KEYTE (admitted *pro hac vice*)
KAREN HOFFMAN LENT (admitted *pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (917) 777-3000
Email: James.Keyte@skadden.com
Email: Karen.Lent@skadden.com

Attorneys for ANHEUSER-BUSCH INBEV SA/NV

ROWAN WILSON (Bar No. 118488)
YONATAN EVEN (*pro hac vice* pending)
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Facsimile: (212) 474-3700
Email: rwilson@cravath.com
Email: yeven@cravath.com

DEAN S. KRISTY (Bar No. 157646)
CHRISTOPHER J. STESKAL (Bar No. 212297)
MARIE C. BAFUS (Bar No. 258417)
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, California 94104
Telephone: (415) 875-2300
Facsimile: (415) 281-1350
Email: dkristy@fenwick.com
Email: csteskal@fenwick.com
Email: mbafus@fenwick.com

Attorneys for GRUPO MODELO S.A.B. DE C.V.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Friday, July 12 at 9:00 a.m., or as soon thereafter as this motion may be heard, in the courtroom of the Honorable Maxine M. Chesney, in the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, Courtroom 7, 19th Floor, San Francisco, California 94102, Defendants Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V. will move to dismiss Plaintiffs' First Amended Complaint in this action.

This motion is made pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6) on the ground that the First Amended Complaint fails to state a claim upon which relief can be granted. This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice in Support of Defendants ABI's and Modelo's Motion to Dismiss Plaintiffs' First Amended Complaint and the Declaration of Karen Hoffman Lent in Support Thereof, the record in this action and such further evidence and argument that the Court may consider.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs' First Amended Complaint should be dismissed because it fails to state a claim under either Section 7 of the Clayton Act or Section 1 of the Sherman Act.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Defendants Anheuser-Busch InBev SA/NV ("ABI") and Grupo Modelo S.A.B. de C.V. ("Modelo") submit this memorandum in support of their motion to dismiss Plaintiff's First Amended Complaint ("FAC") under Federal Rule of Civil Procedure 12(b)(6).

The Court should dismiss the FAC with prejudice because Plaintiffs do not (and cannot) allege any acquisition by ABI of Modelo's U.S. business; as Plaintiffs acknowledge, the transactions will result in that business being owned by Constellation Brands, Inc. ("Constellation"). Nor do Plaintiffs allege a single *fact* to support their wholly conclusory claim that ABI and Constellation have "conspired" to fix prices. Plaintiffs' claims woefully fail to satisfy the pleading requirements articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and are best understood as a transparent shakedown attempt designed to interfere with the completion of ABI's and Modelo's $20.1 billion transaction.

Plaintiffs' original complaint in this case was sanctionable for failing even to address the current set of proposed transactions among ABI, Modelo and Constellation.[1] Now, Plaintiffs have filed an amended complaint that again ignores the Defendants' current transactions—but this time by misrepresenting them. Thus, even though the Department of Justice ("DOJ") has entered into a detailed proposed Final Judgment recognizing that ABI and Modelo are *not* merging in the United States (Defs. Request for Judicial Notice, Lent Decl. Ex. 3, proposed Final Judgment), the FAC offers a tortured line of logic and conclusory assertions in an attempt to invoke Section 7 of the Clayton Act. Specifically, the FAC alleges that the DOJ-approved transactions are "fraudulent" and that, in truth, Constellation—which will solely own Crown Imports LLC ("Crown"), the exclusive importer of Modelo beers in the United States—will become the mere "puppet" of ABI.

[1] On March 25, 2013, ABI notified Plaintiffs' counsel via letter that their original complaint contained numerous factual representations that were without evidentiary support. Specifically, that complaint ignored the revisions to the Defendants' proposed transactions, which had been announced on February 14, and erroneously alleged an increase in market concentration. ABI explained that such objectively baseless factual contentions were sanctionable under Federal Rule of Civil Procedure 11.

Based on this outlandish and completely unsupportable premise, Plaintiffs blithely assert that because ABI will "control" Constellation, and therefore Crown, the proposed transactions should be considered a horizontal "merger" between ABI and Crown that will unduly increase concentration in the U.S. beer "market" in violation of Section 7.

As an initial matter, Plaintiffs' allegations that the transactions are "fraudulent" fail to satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). Further, their allegations are belied by the indisputable terms of the transaction agreements themselves, which are incorporated by reference in the FAC and applicable to this motion.[2] As described below, the proposed Final Judgment and related documents that memorialize the transaction agreements detail precisely why the transactions will result in *no merger* between ABI and Modelo in the United States and, further, how ABI will be in no position to influence Constellation's competitive behavior, let alone "control" it as a "puppet." As the DOJ has stated publicly, Constellation will be "an independent and economically viable competitor that will stand in the shoes of Modelo." (Defs. Request for Judicial Notice, Lent Decl. Ex. 2, Competitive Impact Statement ("CIS") at 10.) Hence, if there is any party engaged in "legerdemain" (FAC ¶ 26), it is Plaintiffs. At bottom, Plaintiffs have not and cannot allege *facts* to establish that, as a result of the transactions, ABI will acquire Modelo's U.S. business or that ABI will otherwise control Constellation's or Crown's competitive activities. Thus, Plaintiffs' Section 7 claim should be dismissed as a matter of law.

In addition to their baseless Section 7 claim, Plaintiffs allege an equally deficient price-fixing claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Though far from clearly stated, Plaintiffs appear to allege that ABI and Constellation have "conspired" to have Constellation

---

[2] As described more fully in ABI's and Modelo's concurrently-filed request for judicial notice, under the "incorporation by reference" doctrine, a court can consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (alteration in original) (citations omitted) (internal quotation marks omitted). Here, the FAC repeatedly references the revised transaction agreements by name. (*See, e.g.*, FAC ¶¶ 29, 30, 50, 95-97, 100, 106.) Alternatively, the relevant transaction documents have been publicly filed in the District Court for the District of Columbia and can be judicially noticed.

"follow ABI's price increases" post-transactions. (FAC ¶¶ 32, 50, 97.) But the FAC is devoid of factual allegations supporting the existence of any such conspiracy. On the contrary, several paragraphs in the FAC state that ABI and Constellation *have not entered into any price-fixing conspiracy*, but that such an agreement *may* arise in the future (*id.* ¶¶ 10, 35, 36, 107, 118)—an equally deficient allegation as Section 1 only condemns *actual* agreements that unreasonably restrain trade.

Finally, the FAC should be dismissed because Plaintiffs have failed to allege facts demonstrating that they are entitled to injunctive relief. First, Plaintiffs fail to plead facts supporting their wholly speculative allegations of irreparable harm. Those allegations, which are grounded in concerns over higher beer prices, cannot establish that Plaintiffs will suffer *irreparable* injury. In addition, Plaintiffs cannot establish that the alleged harm to nine beer drinkers outweighs the significant financial and operational harm that ABI and Modelo would suffer if their $20.1 billion transaction is enjoined. Finally, in light of the speculative nature of their harms and the DOJ's public determination that the transactions will preserve competition in the United States, Plaintiffs cannot demonstrate that injunctive relief would be in the public interest.

In sum, the FAC should be seen for what it is: the latest in a line of shakedown attempts by Plaintiffs' counsel[3] premised on baseless assertions of fact and a complete disregard of controlling

---

[3] In recent years, Plaintiffs' counsel has filed a series of unsuccessful, eleventh-hour challenges to high-profile mergers that either had closed or were about to close. *See, e.g.*, *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1125 (N.D. Cal. 2011) (dismissing antitrust challenge to merger of Southwest Airlines and AirTran); *Cassan Enters., Inc. v. Avis Budget Grp., Inc.*, No. C10-1934-JCC, slip. op. at 6 (W.D. Wash. Mar. 11, 2011) (dismissing antitrust challenge to Avis' proposed acquisition of Dollar Thrifty); *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at *15 (N.D. Cal. Sept. 27, 2010) (denying motion to enjoin merger of United Air Lines and Continental Airlines), *aff'd*, 434 F. App'x 620 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 855 (2011); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2009 WL 3320272, at *2 (N.D. Cal. Oct. 14, 2009) (dismissing antitrust challenge to merger of Pfizer and Wyeth); *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 952 (E.D. Mo. 2009) (dismissing antitrust challenge to InBev's acquisition of Anheuser-Busch), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); *Madani v. Shell Oil Co.*, No. CV 08-1283-GHK (JWJx), 2008 WL 7856015, at *4 (C.D. Cal. July 11, 2008) (dismissing antitrust challenge to joint ventures between Shell and Texaco), *aff'd*, 357 F.App'x 158 (9th Cir. 2009); *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175 (DWF/SRN), 2007 WL 1892227, at *7 (D. Minn. June 28, 2007) (dismissing antitrust challenge to Time Warner's acquisition of Adelphia).

legal precedent. Accordingly, ABI and Modelo respectfully request that the Court dismiss the FAC with prejudice.

II. BACKGROUND

ABI's and Modelo's motion to dismiss the FAC is best understood in the context of: (1) the historical relationships among ABI, Modelo, Constellation and Crown; (2) the history of the transactions and settlement of the DOJ litigation; and (3) Plaintiffs' allegations in the FAC.

A. THE HISTORICAL RELATIONSHIPS AMONG ABI, MODELO, CONSTELLATION AND CROWN

Since 1998, ABI has owned 50.3% of the economic interest of Modelo as a result of its 35.3% direct ownership interest in Modelo and its 23.3% ownership interest in Modelo's operating subsidiary Diblo, S.A. de C.V. ("Diblo"). (FAC ¶ 45.) ABI was entitled to appoint nine representatives to Modelo's nineteen-member Board of Directors and had voting rights subjecting significant Modelo operations to ABI's approval. (*Id.*) Through its interest in Modelo, ABI had an indirect interest in Crown, which is a 50/50 joint venture between Modelo and Constellation that sells and markets Modelo's brands in the United States as the exclusive importer of its beers. (*Id.* ¶¶ 42, 45, 47.) Modelo supplies Crown with beer for sale in the United States, has approval rights over certain Crown operations—including general pricing parameters, capital investments and borrowing activities—and directional control over global strategies for Modelo brands. (FAC ¶ 47.) In addition, Modelo has a call option by which it could acquire Constellation's 50% interest in Crown in 2016 by exercising the option prior to the end of 2013. (*Id.*)

B. HISTORY OF THE TRANSACTIONS AND SETTLEMENT OF THE DOJ LAWSUIT

1. The Original Transactions and the DOJ's Challenge

In June 2012, ABI agreed to purchase the remaining interest in Modelo that it did not already own, while also entering into a simultaneous transaction through which Constellation would purchase the remaining 50% interest in Crown that it does not already own and become the exclusive importer, marketer and seller of Modelo brands in the United States for at least ten years. (FAC ¶ 48.) On January 31, 2013, the DOJ filed suit against ABI and Modelo, alleging those

original transactions would violate Section 7 of the Clayton Act. (Defs. Request for Judicial Notice, Lent Decl. Ex. 1, DOJ Compl. ¶¶ 2, 8, 43.) According to the DOJ, the sale of Modelo's 50% interest in Crown to Constellation was not sufficient to eliminate its concern that ABI's acquisition of the remaining 49.7% of Modelo's economic interest was anticompetitive because, post-transactions, Constellation would not have a perpetual license to Modelo brands in the United States and would continue to depend on ABI for supply of Modelo beers. (*Id.* ¶¶ 8, 82.)

2. The Revised Transactions

On February 14, 2013, ABI, Modelo and Constellation announced a revised set of transactions that supersede the original transactions they entered into in June 2012. (FAC ¶ 28.) As before, ABI still will purchase the remaining interest in Modelo that it does not already own and will sell Modelo's existing 50% interest in Crown to Constellation. (*Id.* ¶ 29.) But instead of entering into a ten-year license and supply arrangement, ABI agreed to grant Constellation a fully paid-up, perpetual, exclusive license to Modelo brands in the United States. (*Id.*) In addition, ABI agreed to sell to Constellation Modelo's Piedras Negras brewery, which currently supplies approximately 60% of the annual demand for Modelo brands shipped to the United States. (*Id.* ¶¶ 29, 96.)

To ensure a smooth transition of brewery operations, ABI and Constellation will enter into three-year agreements for transition services and incremental beer supply. (*Id.* ¶ 30.) Under the Transition Service Agreement, ABI will provide Constellation with consulting services and will supply Constellation with input products, including bottles, cans, crowns, lids, corn starch, hops and malt, at contractually-fixed prices. (Defs. Request for Judicial Notice, Lent Decl. Ex. 4, at Transition Services Agreement §§ 2.01, 3.02 ("TSA").) The Interim Supply Agreement also will require ABI to fulfill Constellation's incremental beer supply needs at contractually-fixed prices. (*Id.* at Interim Supply Agreement §§ 2.2, 3.1-3.2 ("ISA").) But Constellation will not be *obligated* to obtain supply from ABI and is free to contract with third-party suppliers. (*Id.* at §§ 2.1-2.2.)

Both the TSA and ISA establish firewalls to prevent ABI and Constellation from sharing competitively sensitive information. (TSA §2.12(d); ISA § 5.4.) In addition, Constellation will acquire Servicios Modelo de Coahuila, S.A. de C.V., the company that employs the personnel who

operate the Piedras Negras brewery, thereby retaining all the necessary employees and assuming control of their compensation. (CIS at 13-14; TSA § 3.01 (ABI responsible only for paying personnel that provide services to Constellation under the TSA).)

3. DOJ Review and Settlement

On April 19, 2013, after the DOJ reviewed and approved these revised transactions and agreements, the DOJ, ABI, Modelo and Constellation reached an agreement to settle their litigation and allow the parties to move forward with the proposed transactions. The proposed Final Judgment, which resolves all of the DOJ's claims, incorporates the key deal agreements between ABI and Constellation—including the sale of the brand license and Piedras Negras brewery to Constellation and the creation of the TSA and ISA—and requires the parties to comply with their contractual obligations. (*See* CIS at 13; proposed Final Judgment § IV(G)-(I).) In addition, the proposed Final Judgment prohibits any agreement that would provide ABI with the ability to unreasonably raise Constellation's costs or lower its efficiency. (Proposed Final Judgment § IV(J)(2).) Finally, the proposed Final Judgment requires Constellation to expand Piedras Negras to meet U.S. demand for Modelo beers and requires ABI to erect a firewall to prevent it from obtaining or using competitively sensitive Constellation information. (Proposed Final Judgment §§ V(A), XIII; CIS at 3, 18.) In summarizing the settlement, the DOJ concluded that the revised transactions will "*preserve[] the current structure of the beer market in the United States*" because they will make Constellation "*an independent and economically viable competitor that will stand in the shoes of Modelo*." (CIS at 10 (emphasis added).)

C. PLAINTIFFS' ALLEGATIONS IN THE FAC

In the FAC, Plaintiffs challenge the revised transactions that the DOJ extensively investigated and approved. Yet according to the FAC, "ABI has concocted a fraudulent scheme to attempt to make its takeover and control of the beer industry in the United States to appear to be benign and non-threatening." (FAC ¶ 26.) The agreement between ABI and Constellation, which also allegedly is "fraudulent," is part of this scheme, as is an alleged price-fixing conspiracy between ABI and Constellation. (*Id.* ¶¶ 26, 30, 50, 100.)

Plaintiffs allege that the transactions presumptively violate Section 7 of the Clayton Act because ABI, which purportedly has a 49% share of beer sales in the United States, effectively will acquire Modelo's 5% share (based on sales made by Crown). (*Id.* ¶¶ 73, 76, 78, 81-82.) Although Constellation will be the sole owner of Crown post-transactions, Constellation allegedly will be ABI's "puppet" (*id.* ¶¶ 20, 31, 33) for a number of reasons, including that: (1) ABI will control the supply, and be able to increase prices, of beer provided to Constellation during the three-year transition supply period; (2) Constellation historically has urged Modelo to follow ABI's price increases and will be able to do so itself post-transactions; (3) Constellation is not a beer brewer and has no experience running a brewery; (4) Constellation cannot afford to purchase a 50% stake in Crown or a brewery, neither of which it sought to purchase until it was prompted by ABI; and (5) post-transactions, ABI (and not Constellation) will pay the employees working at Piedras Negras. (*Id.* ¶¶ 30, 100-07.)

In addition, Plaintiffs allege that ABI and Constellation have entered, or will enter into, a price-fixing conspiracy, under which Constellation already has agreed, or will agree, to follow ABI's price increases. (*Id.* ¶¶ 10, 22, 32, 35, 50, 97, 118.) According to the FAC, this conspiracy is a *per se* violation of Section 1 of the Sherman Act. (*Id.* ¶ 107.) Plaintiffs ask the Court to preliminarily and permanently enjoin ABI from acquiring Modelo, both during the pendency of this action and thereafter. (*Id.* Prayer for Relief at B, C.) While Plaintiffs allege in conclusory terms that beer prices will increase as a result of the transactions (*id.* ¶¶ 104, 119), they do *not* seek damages.

III. ARGUMENT

A. STANDARD FOR A MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Although a court must construe a complaint's allegations of material fact in the light most favorable to the plaintiff, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

Twombly, 550 U.S. at 555 (alteration in original) (citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555. Courts "'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal*, 556 U.S. at 678 (citation omitted); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047-48 (9th Cir. 2008) (plaintiff that alleged "only ultimate facts" and "legal conclusions," rather than "evidentiary facts," failed to state a Sherman Act claim). And a complaint should be dismissed without leave to amend if the plaintiff is unable to cure the defects in the complaint. *See Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087-88 (9th Cir. 2002).

As described below, Plaintiffs here have not and cannot state a claim under either Section 7 of the Clayton Act or Section 1 of the Sherman Act, and thus their claims should be dismissed.

B. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 7 OF THE CLAYTON ACT

Plaintiffs fail to state a Section 7 claim because they do not allege that ABI will acquire any of Modelo's *U.S.* business. In addition, they fail to provide any factual basis to support their novel theory that, post-transactions, ABI will "control" Constellation and its sale of Modelo beers such that Crown's market share in the United States should be imputed to ABI.

1. Legal Framework for Establishing a Violation of Section 7 of the Clayton Act

"Section 7 of the Clayton Act prohibits a person 'engaged in commerce or in any activity affecting commerce' from acquiring 'the whole or any part' of a business' stock or assets if the effect of the acquisition 'may be substantially to lessen competition, or to tend to create a monopoly.'" *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004) (quoting 15 U.S.C. § 18). "To establish a section 7 violation, plaintiffs must show that a pending acquisition is reasonably likely to cause anticompetitive effects." *Id.* "[P]laintiffs establish a prima facie case of a section 7 violation by 'show[ing] that the merger would produce "a firm controlling an undue

percentage share of the relevant market, and [would] result [ ] in a significant increase in the concentration of firms in that market."'" *Id.* at 1110 (second, third and fourth alterations in original) (citations omitted).

2. As the FAC Acknowledges, ABI Is Not Acquiring Modelo's U.S. Business

The proposed transactions do not and cannot implicate any Section 7 concerns because, viewing the transactions together as required,[4] ABI is not acquiring "the whole or any part" of Modelo's U.S. business. Instead, as the FAC acknowledges, the transactions will result in Constellation becoming the sole importer and distributor of Modelo beers in the United States. (FAC ¶¶ 10, 29, 95.) Constellation will acquire the remaining 50% interest in Crown that it does not already own, perpetual rights to the Modelo brands in the United States and the Piedras Negras brewery. (*Id.*) The result of the transactions in the United States is that any beer sales (and market share) previously attributable to Modelo (through its 50% interest in Crown) will now be attributable to Constellation (through Crown as its wholly-owned subsidiary). Given that the proposed transactions will not in any manner whatsoever "merge" ABI and Crown in the sale of beer in the United States (i.e., the relevant market alleged by Plaintiffs), there is no proffered factual basis to support Plaintiffs' allegation that the transactions will increase market concentration (*id.* ¶¶ 73, 76, 78, 81-82)—let alone that they can meet their burden to establish a presumptive Section 7 violation.[5]

---

[4] *See FTC v. Arch Coal, Inc.*, No. 04-0534 (JDB), slip op. at 7 (D.D.C. July 7, 2004) ("[The] Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the *entire* transaction in question."); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 46 (D.D.C. 2002) (court must consider the net effect of the acquisition of the target company and simultaneous sale of certain of the target's assets to a third party).

[5] On the contrary, based on the alleged facts, the transactions actually will *reduce* market concentration because they "will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." (CIS at 2.) These entanglements include ABI's 50.3% ownership interest in Modelo and, indirectly, its interest in Modelo's 50% ownership of Crown. (*See supra* p. 6.)

3. There Is No Factual Basis for Plaintiffs' Theory That ABI Effectively Will Control Modelo's U.S. Business

In an effort to circumvent reality, Plaintiffs allege, without factual basis, that ABI effectively will acquire Modelo's U.S. business because Constellation's acquisition of these assets is "fraudulent." According to the FAC, the transaction between ABI and Constellation is "fraudulent" (and part of a "fraudulent scheme") because: (1) ABI will control the supply, and be able to increase prices, of beer provided to Constellation during the three-year transition supply period; (2) Constellation historically has urged Modelo to follow ABI's price increases and will be able to do so itself post-transactions; (3) Constellation is not a beer brewer and has no experience running a brewery; (4) Constellation cannot afford to purchase a 50% stake in Crown or a brewery, neither of which it sought to purchase until it was prompted by ABI; and (5) post-transactions, ABI (and not Constellation) will pay the employees working at Piedras Negras. (FAC ¶¶ 26, 30, 50, 100-07.)

As an initial matter, Plaintiffs' claims are deficient because they do not satisfy the heightened pleading requirements for fraud under Federal Rule of Civil Procedure 9(b). Plaintiffs' claims are premised on the allegation that "ABI has concocted a fraudulent scheme to attempt to make its takeover and control of the beer industry in the United States to appear to be benign and non-threatening." (*Id.* ¶ 26.) This "scheme" purportedly includes the "fraudulent" agreement between ABI and Constellation (*id.* ¶¶ 30, 100), which Plaintiffs allege is "a subterfuge to allow ABI to raise prices in the United States without any concern about Modelo's competition." (*Id.* ¶ 50.) Such allegations "sound in fraud" and therefore are subject to the heightened pleading requirements of Rule 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (even where fraud is not an essential element of a claim, "allegations . . . of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b)").

Plaintiffs plainly have not satisfied the requirements of Rule 9(b), which requires that "[a]verments of fraud . . . be accompanied by the who, what, when, where, and how of the misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (internal quotation marks and citations omitted). For example, with regard to the alleged "fraudulent"

agreement between ABI and Constellation, Plaintiffs do not identify any Constellation employee who participated, or allege when and where the agreement supposedly was executed. Indeed, far from meeting Rule 9(b)'s heightened standard, Plaintiffs' allegations fail to even satisfy the lesser pleading requirements of *Twombly*. *See Twombly*, 550 U.S. at 565 n.10 (dismissing claim that failed to allege facts such as a "specific time, place, or person involved in the alleged conspiracies"). Accordingly, Plaintiffs' allegations of a "fraudulent scheme" or "fraudulent agreement" between ABI and Constellation should be "'stripped' from their claim." *Kearns*, 567 F.3d at 1124 (quoting *Vess*, 317 F.3d at 1105).

Separate and apart from their failure to satisfy any minimum pleading requirements, Plaintiffs' conclusory allegations that ABI will control Crown are defective as a matter of law because the allegations are contrary to the Defendants' transaction agreements, which are incorporated by reference in the FAC.[6] (*See supra* note 2.) Under those agreements, ABI is contractually obligated to supply Constellation with beer and input products at Constellation's option at pre-determined prices during the transition supply period. (*See supra* pp. 7-8.) Further, the proposed Final Judgment also prohibits any contractual terms that would allow ABI to limit supply or unreasonably raise Constellation's costs, and Constellation, not ABI, will control operations and employee compensation at the Piedras Negras brewery. (*See supra* pp. 7-8.) Plaintiffs simply do not allege any facts to support a conclusion that Constellation will be anything but an independent, self-sufficient competitor.

Finally, Plaintiffs' allegations regarding Constellation's alleged desire to increase prices and purported lack of expertise as a brewer are irrelevant to the Section 7 issue. While Plaintiffs apparently would prefer if Constellation did not acquire full ownership of Crown and that Modelo would retain its 50% interest (*see* FAC ¶¶ 19-20, 92-94, 98-99), Section 7 cannot be invoked where, as here, the alleged harm flows from a mere change in ownership rather than the merging of horizontal competitors. "In a challenge to a horizontal merger, a private plaintiff must show that it

---

[6] Courts, of course, are "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

was injured because the acquiring and the acquired firms are competitors in a field of commerce." *Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1242 (3d Cir. 1987). Here, Constellation's acquisition of Modelo's 50% interest in Crown cannot violate Section 7 because the FAC does not (and cannot) allege that Constellation and Modelo are competitors.

Plaintiffs' purported concerns about Constellation's ownership of Crown simply cannot constitute antitrust injury. "In order to demonstrate that it has suffered 'antitrust injury,' [a plaintiff] must prove that its alleged injury 'flows from that which makes defendants' acts unlawful.'" *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1128, 1233 (9th Cir. 1998) (citing *Cargill, Inc. v. Montefort of Colo.*, 479 U.S. 104, 113 (1986)). In the merger context, if the alleged injury would "occur regardless of whether the merger would substantially lessen competition—that is, the injury is not caused by anticompetitive effects"—that injury is not antitrust injury. *McCabe Hamilton & Renny Co., LTD. v. Matson Navigation Co., Inc.*, No. 08-00080, 2008 WL 2233740, at *5 (D. Haw. Apr. 9, 2008) (dismissing takeover target's Section 7 claim for failure to allege injury flowing from anticompetitive conduct). Here, Plaintiffs' alleged concerns about Constellation assuming control of Crown amount to concerns about a change in management that do not flow from any anticompetitive effect of the transaction challenged.[7] Therefore Plaintiffs' allegations in this regard are insufficient to demonstrate antitrust injury as a matter of law.

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

Plaintiffs' claim under Section 1 of the Sherman Act should be dismissed because the FAC fails to plead facts supporting the existence of any price-fixing conspiracy between ABI and Constellation.

---

[7] For example, if Constellation were simply to purchase the remainder of Crown, or a private investment firm were to purchase Modelo and sell Crown to Constellation, Plaintiffs would suffer the same alleged harms despite the fact that neither of these transactions could give rise to an antitrust challenge. *See Lucas*, 140 F.3d at 1233 (plaintiff failed to allege antitrust injury because alleged injury would have been the same regardless of who acquired the exclusive distribution rights at issue).

Section 1 "requires a 'contract, combination . . . , or conspiracy, in restraint of trade or commerce.'" *Twombly*, 550 U.S. at 548 (alteration in original) (quoting 15 U.S.C. § 1). To state a valid Section 1 claim, a plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. A "bare assertion of conspiracy will not suffice." *Id.*; *see also RealNetworks, Inc. v. DVD Copy Control Ass'n, Inc.*, Nos. C 08-4548 MHP, C 08-4719 MHP, 2010 WL 145098, at *7 (N.D. Cal. Jan. 8, 2010) ("Offering a conclusory assertion that a conspiracy existed is insufficient; a party must allege enough facts to nudge its claim across the line from conceivable to plausible."). As a result, the Ninth Circuit has held that a plaintiff is required to plead "not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove . . . a contract, combination or conspiracy among two or more persons or distinct business entities." *Kendall*, 518 F.3d at 1047. At a minimum, such allegations must include "facts such as a 'specific time, place, or person involved in the alleged conspiracies.'" *Id.* (quoting *Twombly*, 550 U.S. at 565 n.10).[8]

The FAC utterly fails to satisfy these requirements. Plaintiffs merely make bare allegations that ABI and Constellation have conspired, with Constellation agreeing to follow ABI's price increases. (FAC ¶¶ 32, 50, 97.) The FAC does not allege the time when, or place where, the parties entered into this price-fixing agreement; nor does it identify the persons participating in the conspiracy. Indeed, far from pleading these required facts, the FAC includes contradictory allegations indicating that ABI and Constellation *have not yet entered into any price-fixing conspiracy*, but that such an agreement *may* be reached in the future. (*See* FAC ¶ 10 (the proposed transactions "may and probably will result in price fixing"); *id.* ¶ 35 (same); *id.* ¶ 107 (alleging a "substantial threat" that "Constellation will eagerly and tacitly agree with ABI to raise and follow

[8] *See In re Cal. Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 WL 1458025, at *5 (N.D. Cal. May 21, 2009) ("Plaintiffs do not set forth facts about where or when [the alleged conspiracy] took place . . . . Under *Twombly*, such vague allegations are insufficient."); *In re Late Fee and Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (dismissing complaint that provided "no details as to when, where, or by whom this alleged agreement was reached").

ABI's price increases").)[9] To the extent Plaintiffs purport to allege a *prospective* price-fixing conspiracy between ABI and Constellation, such a claim is not cognizable under Section 1 of the Sherman Act, which requires allegations that "an agreement *was* made." *Twombly*, 550 U.S. at 556 (emphasis added); *see also Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976) (plaintiff must prove an "actual agreement or mutual consent" to establish a Section 1 violation).

Accordingly, Plaintiffs' Section 1 claim is deficient as a matter of law and should be dismissed.

D. THE FAC SHOULD BE DISMISSED BECAUSE PLAINTIFFS CANNOT ESTABLISH THEIR ENTITLEMENT TO PERMANENT INJUNCTIVE RELIEF

The only relief Plaintiffs seek is injunctive relief "[p]reliminarily and permanently enjoining Defendants from consummating" ABI's acquisition of Modelo. (FAC Prayer for Relief at B, C.) To obtain permanent injunctive relief, "a plaintiff must meet four well-established requirements: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Here, Plaintiffs do not and cannot allege facts supporting any of these essential elements.

1. Plaintiffs Fail to Plead Facts Supporting Their Irreparable Injury Allegations

As to the first two elements of their claim for injunctive relief, Plaintiffs fail to plead facts sufficient to establish that they will suffer irreparable injury that would not be compensable through remedies available at law. Failure to meet these requirements, alone, requires dismissal of a claim for injunctive relief. *See, e.g., Katiki v. Taser Int'l, Inc.*, No. 12-cv-05519 NC, 2013 WL 163668, at *3 (N.D. Cal. Jan. 15, 2013) (dismissing claim for injunctive relief because plaintiff

---

[9] *See also* FAC ¶ 36 (seeking relief "to prevent the probable price fixing by ABI and Constellation"); *id.* ¶ 118 (alleging a "significant threat that ABI and Constellation will fix prices" post-transactions).

"only alleged a financial injury"); *Taleff*, 828 F. Supp. 2d at 1123 (dismissing private merger challenge where "Plaintiffs ha[d] not demonstrated that the remedies available at law, *such as monetary damages*, would be inadequate" (emphasis added)).

Here, Plaintiffs have failed to meet their burden to plead irreparable injury for two reasons. First, the FAC repeatedly alleges that the proposed transactions will harm them through higher beer prices. (FAC ¶¶ 12, 16, 20, 32-33, 104-08, 113.) But such injury plainly is compensable in monetary damages, and therefore, would not be irreparable. *See L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("[M]onetary injury is not normally considered irreparable."); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2009 WL 3415680, at *1 (N.D. Cal. Oct. 22, 2009) ("[I]njuries resulting from higher prices would appear to be injuries fully compensable by an award of monetary damages." (citation omitted)).

Second, while the FAC includes passing references to other types of harm,[10] Plaintiffs fail to allege any specific facts describing these harms or explaining how they would be realized. Accordingly, these allegations are insufficient to satisfy Plaintiffs' pleading burden. *See Katiki*, 2013 WL 163668, at *3 (dismissing claim for injunctive relief because of "the absence of facts indicating a likelihood of immediate and irreparable injury"); *Stevens v. Harper*, 213 F.R.D. 358, 370-72 (E.D. Cal. 2002) (recognizing that plaintiffs seeking injunctive relief "must clearly allege specific facts establishing an imminent risk of substantial and irreparable harm" and dismissing claims that did not meet this standard). Moreover, to the extent Plaintiffs allege injury in the form of diminished quality or selection, they fail to sufficiently allege that such injury is not compensable by an award of monetary damages and not irreparable.

[10] In a single paragraph of the FAC, Plaintiffs claim that the proposed transactions will result in "fewer services, fewer competitive choices, deterioration of products, product quality, and product diversity; suppression and destruction of smaller actual competitors through exclusive distribution, full-line forcing, imitation beers, shelf space control in major chain store markets achieved by bribes and other gratuities, and the like." (FAC ¶ 16.)

2. Plaintiffs Cannot Establish That the Balance of Hardships Weighs in Their Favor, or That Injunctive Relief Would Serve the Public Interest

As to the third and fourth factors of their claim for injunctive relief, Plaintiffs have not and cannot allege facts that support a finding that equitable relief would be warranted considering the balance of hardships, or that injunctive relief would serve the public interest.

First, with regard to the balance of hardships, the sum total of Plaintiffs' alleged injury is that nine consumers purportedly are threatened with "higher beer prices and diminished competitive options." (FAC ¶ 116.) The FAC contains no specific factual allegations regarding Plaintiffs' current or future levels of consumption of ABI or Modelo beers, or how they might personally be affected by the transactions. Accordingly, Plaintiffs' alleged harms are wholly speculative and, at most, plainly *de minimis*. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010) (speculative nature of alleged injury weighed against plaintiffs in balancing hardships).

By contrast, ABI and Modelo would suffer substantial harms if the proposed transactions, totaling more than $24 billion, were enjoined. (FAC ¶¶ 29, 48 ($20.1 billion for ABI's acquisition of Modelo and approximately $4.75 billion for Constellation's acquisition of Crown, Piedras Negras and perpetual rights to Modelo brands in the United States).) Specifically, they would stand to "lose the benefit to be derived [from the transaction]," and the "[t]ime and money [that] have been expended by both corporations over the past year [to consummate the transaction] . . . will also be lost." *United States v. FMC Corp.*, 218 F. Supp. 817, 823 (N.D. Cal. 1963) (denying request for preliminary injunctive relief where the balance of equities weighed in favor of defendants).

In addition, ABI "is the largest brewer and marketer of beer sold in the United States," "operates 125 breweries worldwide, including 12 in the United States," "owns more than 200 beer brands" and "employs more than 116,000 worldwide." (FAC ¶ 38.) Modelo is the "third-largest brewer of beer sold in the United States," and Corona is "the top-selling import in the United States." (*Id.* ¶ 41.) Enjoining the transactions would disrupt these substantial operations resulting in widespread harm to each brewer, their employees and their business partners. *See W. Airlines*,

Inc. v. Int'l Bhd. of Teamsters, 480 U.S. 1301, 1309 (1987) (O'Connor, J., sitting as Circuit Justice) ("The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the 'status quo,' in the face of this upheaval, would be to blink at reality.").

Moreover, Plaintiffs cannot establish that the public interest would be served by injunctive relief. There is a "strong interest in preserving free operation of the nation's markets and insuring that [the Court] does not unduly restrain free enterprise . . . , where Plaintiffs have failed to demonstrate that there will be any real palpable harm to Plaintiffs." *Ginsburg v. InBev SA/NV*, No. 4:08CV01375 JCH, 2008 WL 4965859, at *6 (E.D. Mo. Nov. 18, 2008); *see also Delco LLC v. Giant of Md., LLC*, No. 07-3522 (JBS), 2007 WL 3307018, at *20 (D.N.J. Nov. 8, 2007) ("While the public certainly has a strong interest in the enforcement of the antitrust laws, it would not in any way serve those interests for the Court to enjoin activities that have not been shown to have anticompetitive tendencies."). Here, apart from conclusory and speculative allegations, Plaintiffs offer no facts that would demonstrate actual harm resulting from the proposed transactions. And their unsupported allegations are contrary to the reasoned conclusions of the DOJ, which exists to serve the public, that the transactions do not threaten to reduce competition. (CIS at 2.) In fact, an injunction would disserve the public interest because the transactions will eliminate ABI's existing interest in the U.S. sales of Modelo beer (*id.* at 10), and therefore likely will increase competition in the sale of beer in the United States.

IV. CONCLUSION

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

DATED: June 3, 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

BY:

/s/ Allen J. Ruby

Allen J. Ruby
Attorneys for Defendant
ANHEUSER-BUSCH INBEV SA/NV

DATED: June 3, 2013

FENWICK & WEST LLP

BY:

/s/ Dean S. Kristy

Dean S. Kristy
Attorneys for Defendant
GRUPO MODELO S.A.B. DE C.V.

SIGNATURE ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that I have obtained the concurrence in the filing of this document from all the signatories for whom a signature is indicated by a "conformed" signature (/s/) within this e-filed document and I have on file records to support this concurrence for subsequent production for the court if so order or for inspection upon request.

DATED: June 3, 2013

/s/ Allen J. Ruby

Allen J. Ruby

ECF CERTIFICATION

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

/s/ Allen J. Ruby
Allen J. Ruby