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 MOTION TO DISMISS PLAINTIFFS' SHERMAN ACT SECTION 1 CLAIM FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM IN SUPPORT

DATE: **July 12, 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 July 12, 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' First Amended Complaint in this action.

Constellation moves to dismiss the claim asserted against it in the First Amended Complaint ("FAC") for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). Constellation seeks an order dismissing Plaintiffs' Sherman Act § 1 claim, and dismissing Constellation from this case, because Plaintiffs' only claim asserted against Constellation is the Sherman Act § 1 claim.

STATEMENT OF THE ISSUE 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 Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

STATEMENT OF FACTS

The FAC 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.

Modelo, a Mexican firm, produces several beer brands, including Corona Extra®. (FAC ¶ 41.) ABI holds a fifty-percent economic interest in Modelo. (FAC ¶¶ 45 and 95.) Constellation and Modelo are the parents of a fifty-fifty joint venture, Crown Imports LLC ("Crown"), which imports and sells the Modelo brands in the United States. (FAC ¶ 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"). (FAC ¶ 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 (FAC ¶¶ 28 and 49.) Constellation was not joined in that lawsuit.

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. (FAC ¶ 29.) On April 19, 2013, the DOJ, ABI, Modelo, and Constellation announced a settlement to 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] As a result of the February Agreements, Constellation will be the sole supplier and, following the expansion of the Piedras Negras plant, sole manufacturer of Modelo-brand beers for the U.S.

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 reflected in Plaintiffs' Complaint.

On April 17, 2013, Plaintiffs filed the FAC, which continues to rely heavily on the DOJ's

[1] The settlement agreements, including the Competitive Impact Statement, filed in the U.S. District Court for the District of Columbia, attached as Exhibits 1 through 7 to the Alberti Declaration, are official government documents of public record. It is thus "generally known" within this Court's jurisdiction and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Constellation therefore respectfully asks this Court to take judicial notice of the settlement agreements. *See 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) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web. This is particularly true of information on government agency websites, which have often been treated as proper subjects for judicial notice.") (citation and internal quotation marks omitted). Further, in a motion to dismiss, a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue. . . . A court may also take judicial notice of the existence of matters of public record, such as a prior order or decision, but not the truth of the facts cited therein." *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1108 (N.D. Cal. 2012) (internal citations omitted).

January complaint. While not styled as two separate counts, it is clear that Plaintiffs allege two different claims. They allege a Clayton Act § 7 claim against ABI and Grupo Modelo. Separately, the FAC also purports to allege a Sherman Act § 1 claim against ABI and Constellation. Plaintiffs' unsupported hypothesis is that there may, in the future, be price fixing that may be manifested by Constellation, through Crown, following ABI's future price increases thereby raising the price of the Modelo beers that Crown sells. The FAC does not allege that there has been any price fixing to date. Rather, the FAC alleges in various places that Crown historically has not followed ABI's price increases. (FAC ¶¶ 6, 19, 85, and 88.) Thus, without the ability to allege that price fixing has occurred, the FAC makes various speculative allegations that it may occur in the future. The FAC alternatively characterizes its speculation as: "the planned price fixing by ABI and Constellation" (FAC ¶ 10); Constellation's acquisition "may and probably will result in price fixing" (FAC ¶¶ 10 and 35); that it is "probable that Constellation has agreed with ABI, either tacitly or expressly, to fix prices" (FAC ¶ 26); the transaction threatens violation of Section 1 of the Sherman Act (FAC ¶¶ 12, 22, 107, and 118).

The FAC 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 pleading deficiencies warrant dismissal of the FAC's Sherman Act § 1 claim and the dismissal of Constellation from this case.

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." 550 U.S. 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 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). 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.")[2]

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

[2] *See also, In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1115 (N.D. Cal. 2008) ("The complaint must contain sufficient factual allegations 'to raise a right to relief above the speculative level.'") (quoting *Twombly*, 550 U.S. at 555).

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

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

Plaintiffs have failed to allege a cognizable § 1 claim, much less alleged 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." *Id.* 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.

While the FAC, at various places, uses words such as "conspired," the mere recitation of conclusions without further allegations providing supporting background utterly fails to meet the *Twombly* standard. The FAC 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.* at 558. 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 Allege That Prices Have Been Altered as a Result of an Unlawful Agreement

Section 1 of the Sherman Act requires "the existence of a contract, combination or conspiracy among two or more separate entities." 15 U.S.C. § 1 (2012); *see 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 Enterprises 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 FAC is clear that, to date, there has been no price fixing between ABI and Crown or Constellation. The FAC 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* FAC ¶¶ 9, 88, and 107.) 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 FAC 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…." (FAC ¶¶ 10 and 35) (emphasis added)
- "[The ABI/Modelo transaction]…will also **threaten** price fixing between ABI and Constellation…." (FAC ¶ 22) (emphasis added)
- "This action is brought . . . to prevent **probable** price fixing by ABI and Constellation. . . ." (FAC ¶ 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…." (FAC ¶ 118 (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." (FAC ¶ 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 § 1. *See Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n.*, 884 F.2d 504, 507 (9th Cir. 1989) (noting that a § 1 claim requires proof of an agreement or conspiracy as the first element).

B. Plaintiffs' Conclusory Assertions Regarding a Potential Agreement on Future Prices Fail 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."[3] This one paragraph, repeated several times, cannot save the FAC, however. The first two "terms" of the so-called conspiracy do summarize

[3] This set of "terms" are repeated in paragraphs 50 and 97 of the FAC.

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." (FAC ¶¶ 26, 32, 50, and 97.) Simply using those words is 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 citations 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 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "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 1103, 1113-14 (N.D. Cal. 2012) (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996)).

In the Ninth Circuit, to meet the *Twombly* standard, the FAC must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" when alleging that there was 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 the 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 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 1109, 1116 (N.D. Cal. 2008). 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 merely parallel conduct that could just as well be independent action." *Id*. at 1116 (quoting *Twombly*, 550 U.S. at 557).

The FAC does not come close to the level of detail the plaintiffs in *In re TFT-LCD* alleged.[4] 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

[4] 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 plaintiff's § 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." *America 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).

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 FAC 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 FAC 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 FAC 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 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 give any 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 have successfully 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 at 1143-46; *In re TFT-LCD*, 586 F. Supp. 2d at 1115-16. Plaintiffs here offer nothing other than naked conclusions and speculation, which is insufficient under *Twombly*.

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. 537, 540-41 (1954); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 962; *see also*, *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 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. (FAC ¶¶ 19, 20, 88, and 89.) Thus, the FAC 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' speculation that Constellation may follow ABI's price leads in the future is merely an assumption that Plaintiffs make based on statements Plaintiffs attribute to Constellation in the past. (FAC ¶¶ 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 ABI's price increases falls short of what is needed under *Twombly*. (FAC ¶ 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."[5] *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)).

Moreover, the fundamental change in the relationship between and among ABI, Modelo, Crown and Constellation following the February Transactions 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

[5] 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 that it does not already own." (FAC ¶ 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.

agreement that parallel pricing will occur in the future. (FAC ¶¶ 12, 18, and 105.) Constellation does not agree with those allegations, but even if the allegations are taken as true, despite those factors, there has not been an agreement on price in the past. The FAC stresses that Constellation, through Crown, has not coordinated with or followed ABI. (FAC ¶¶ 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.

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 owns half of Crown and participated in its management through the board of directors. (FAC ¶¶ 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. (FAC ¶¶ 45 and 47.) 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. (FAC ¶¶ 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.

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

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from the realm of "conceivable" to "plausible." Consequently, Plaintiffs have failed to meet the pleading standards required under 12(b)(6) and *Twombly*. The Court should grant this Motion to Dismiss.

Dated: June 3, 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 third 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.

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 3, 2013, I served a copy of the within document(s):

1. **DEFENDANT CONSTELLATION BRANDS, INC.'S MOTION TO DISMISS PLAINTIFFS' SHERMAN ACT SECTION 1 CLAIM FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM IN SUPPORT;**

2. **DECLARATION OF DANIEL E. ALBERTI IN SUPPORT OF DEFENDANT CONSTELLATION BRANDS, INC.'S MOTION TO DISMISS PLAINTIFFS' SHERMAN ACT SECTION 1 CLAIM FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM IN SUPPORT; AND**

3. **[PROPOSED] ORDER GRANTING DEFENDANT CONSTELLATION BRANDS, INC.'S MOTION TO DISMISS**

☐ 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 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 3, 2013 at Menlo Park, California.

/s/ Cheryl Lovdahl
Cheryl Lovdahl