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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN EDSTROM, BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK M. NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE,

Plaintiffs,

v.

ANHEUSER-BUSCH InBEV SA/NV, and GRUPO MODELO S.A.B. de C.V.,

Defendants.

CASE NO.: 3:13-cv-1309-MMC

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR INJUNCTION SEEKING "HOLD SEPARATE" ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES

Date: August 2, 2013
Time: 9:00 a.m.
Judge: Hon. Maxine Chesney
Courtroom: 7, 19th Floor

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TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 2, 2013 at the hour of 9:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, San Francisco Division, 450 Golden Gate Ave. San Francisco, California before the Hon. Maxine Chesney, Plaintiffs will move this Court for an injunction seeking a "hold separate" order, requiring defendants to hold their assets separate and apart during the pendency of the these proceedings, in accordance with the hold separate provisions of the Stipulation and Order filed on April 22, 2013 (Doc. No. 34) and the "Firewall" provisions in the Proposed Final Judgment on April 19, 2013, in the United States District Court for the District of Columbia, Case No. 13-cv-00127-RWR. (Decl. of Joseph M. Alioto (hereinafter "JMA"), Exhibit A, pp. 10-18 and Exhibit B, pp., 24-26.)

This motion is made on the grounds that good cause exists for the granting of a "hold separate" order during the pendency of these proceedings. Even where a District Court denies a motion for preliminary injunction, the Court has the discretion to order, as an alternative remedy, that assets be held separately until the matter is fully adjudicated. After consummating the transaction on June 4, 2013, Defendants threaten to commingle assets, employees, pricing information, to deteriorate the quality of Modelo-branded beers, and will raise the prices of beer.

This motion is based on this notice, the memorandum of points and authorities set forth herein, the attached declaration of Joseph M. Alioto and its attached exhibits, the declarations of the Plaintiffs, and the complete files and records in this action.

Dated: June 28, 2013

ALIOTO LAW FIRM

By: */s/ Joseph M. Alioto*

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs, by and through their undersigned attorneys, hereby apply to this Honorable Court, through this Motion, for an order requiring Defendants Anheuser-Busch InBev SA/NV (hereinafter "ABI"), Grupo Modelo S.A.B. de C.V. (hereinafter "Modelo"), and Constellation Brands, Inc. (hereinafter "Constellation") to hold their assets separate and apart during the pendency of these proceedings as provided by the "Hold Separate and Preservation Obligations" outlined on pages 10-18, sections VI-X, of the Stipulation and Order and the "Firewall" provision outlined in the Proposed Final Judgment on page 24, filed in the United States District Court, District of Columbia, Case No. 13-cv-00127 (Decl. of JMA, Exhibit A, pp. 10-18; Exhibit B, p. 24-26.) The grounds for this Motion for Injunction to Hold Separate are that Plaintiffs have made the necessary showing for such relief and that it is necessary for the Court to maintain the *status quo* while the Court considers and finally rules upon the merits of this matter. Further, the Motion to Hold Separate is made on the grounds that: (1) Defendants are required to comply with Hold Separate obligations in the ongoing litigation in the District of Columbia which should also apply to these proceedings; (2) That such an order is squarely within the equitable discretion of the Court; and (3) That such an order is recognized under the antitrust law as an appropriate and effective manner in which to protect competition and divestiture as an eventual remedy while the merits of the final equitable relief are being considered.

Accordingly, Plaintiffs bring this Motion in order to obtain, at the earliest opportunity, an order requiring Defendants to hold their assets separately to maintain the *status quo* as provided by the "Hold Separate and Preservation Obligations" outlined on pages 10-18, sections VI-X, of the Stipulation and Order and the "Firewall" provisions outlined in the Proposed Final Judgment, filed in the United States District Court, District of

Columbia, Case No. 13-cv-00127 (Declaration of JMA, Exhibit A, pp. 10-18, Exhibit B, pp. 24-26), until a final adjudication on the merits.

STATEMENT OF FACTS

Defendant ABI is the 2008 combine of Belgium-based InBev, the largest brewer in the world, with Anheuser-Busch, the then largest brewer in the United States. The transaction at the time was the largest in the history of the antitrust laws and the largest cash payment ever offered to purchase a competitor. The United States Department of Justice allowed the transaction to proceed with a comparatively minor divestiture similar to the one contemplated here. Now, ABI controls approximately 50% of the manufacture, distribution, and sale of beer in the United States. (Second Amended and Supplemental Complaint "SAC" ¶ 1.)

In September 2008, before the acquisition by InBev of Anheuser-Busch (sometimes hereinafter "A-B"), a group of private plaintiffs filed a complaint in the United States District Court, Eastern District of Missouri, to enjoin the proposed merger on the grounds that the transaction violated Section 7 of the Clayton Act, 15 U.S.C. § 18. Plaintiffs alleged that the merger threatened to reduce competition, reduce the quality of beer, and increase beer prices in the United States because it eliminated InBev, the largest brewer and seller of imported beers, as an actual and perceived potential competitor in the U.S. market. *Ginsburg v. InBev NV/SA, et al.,* 623 F.3d 1229, 1230 (8th Cir. 2010). Prior to acquiring Anheuser-Busch, InBev competed in the U.S. market by selling imported brands brewed *in other countries*. At the time of the acquisition, it owned no breweries in the United States. *Id.* at 1231. In the district court's order denying the motion for preliminary injunction filed by the plaintiffs, a stated basis for the decision was that "Plaintiffs cannot succeed on the merits because InBev's actions demonstrate that it does not intend to enter the U.S. beer market *de novo*, and because InBev's presence as a perceived potential competitor does not

affect A-B's competitive presence." *Id.* at 1232. InBev claimed that it was not a potential competitor of A-B, as an importer of beer, not a brewer. The court noted that InBev did not own any brewery in the United States, had an existing agreement with Anheuser-Busch to distribute its imports, and that it "lack[ed] assets and relationships needed for effective *de novo* entry." *Id.*

Despite its previous assurances to the contrary, in 2012, ABI began brewing Beck's, the German beer formerly imported by InBev, in the United States, diminishing the Beck's brand. Consumers have noted that the taste of the beer is no longer the same as the German-brewed version and is more watered down. (Decl. of JMA, Exhibit C.)

In 2013, a number of class action lawsuits were filed across the United States and consolidated recently in the United States District Court for the Northern District of Ohio, MDL No. 2448, Case No. 13-cv-2448, (Decl. of JMA, Exhibit D), alleging that since 2008, when A-B and InBev merged that, "During the 'finishing adjustment process,' the last process the malt beverage undergoes before it is bottled, AB waters down its products, 'shaving' the total alcohol content to well below the percentage stated on its labels. Specifically, AB uses its technological prowess to produce malt beverages in which the alcohol content is consistently lower than the level it promises on its labels." (Declaration of JMA, Exhibit E at p. 5 ¶ 15.) These allegations are supported by James A. Clark, a former A-B Director of Operations Support and former A-B Quality Assurance Analyst, Supervisor, Group Manager, Manager, and Operations Manager. From 2008-2012, Mr. Clark in his various roles in operations and quality assurance at A-B complained to the company about watering down of beer and the other problems raised in the complaint. (Declaration of JMA, Exhibit F at p. 2, ¶ 5.) Defendants do not and cannot argue that these allegations are false. Rather, they argue that these actions are not illegal. (Declaration of JMA, Exhibit G, pp. 2-3.)

Plaintiffs in the action currently before this Court, bring their Complaint against Defendants to prohibit another acquisition by ABI of its significant competitor in the United States, Modelo, to prohibit the anticipated price-fixing among Constellation, Modelo and ABI; and to require compliance with the Tunney Act. In the alternative, Plaintiffs request, should the combine be finalized, divestiture and damages. (SAC at 2.)

In the United States, ABI is threatened by intense competition from Modelo, the largest brewer in Mexico, which imports and sells Modelo-branded beer, including Corona, in the United States through Crown. Crown is an importer, distributor, and wholesaler, which was owned 50% by Modelo and 50% by Constellation, a beer importer, spirits, and winemaker. Modelo's market share in the United States is approximately 5%. (SAC at 3.)

Since the InBev-Anheuser-Busch combine, ABI profits have increased, but sales have declined. Product quality has deteriorated and innovation is stagnant. ABI stopped using the German Hallertauer Mittelfruh variety of hops in its Budweiser brand, substituting cheaper, less flavorful hops. ABI halted Anheuser-Busch's practice of only using whole grains of rice in its beer, now using the "broken kind." ABI's profits have soared solely by cutting costs, quality, and raising prices. (Declaration of JMA, Exhibit C, pp. 4-6.)

In the last few years, Modelo (through its U.S. importer Crown) threatened ABI's cost-cutting and price-increasing strategy by instituting a competitive program called the "Momentum Plan" to secure more market share. Through the Momentum Plan, Modelo refused to increase its prices when ABI, generally followed by MillerCoors, raised its prices. Although MillerCoors consistently followed the prices of ABI, Modelo did not. (SAC ¶ 6.) Modelo products, principally Corona, are considered to be "high end" beers, commanding higher prices than so-called premium and/or premium-plus beers, such as Bud Light and Budweiser. (SAC ¶ 4.) In addition to acting as a cap on ABI increases in price, the price differentials between Modelo beers and ABI beers have narrowed to such an extent that

many consumers have "traded up" from ABI's lower-quality beers to Modelo's high-quality beers. (SAC at 3.) Because of Modelo's resistance to ABI price hikes, ABI and MillerCoors have been forced to offer lower prices and discounts for their brands to discourage customers from "trad[ing] up" to Modelo brands. (SAC ¶ 20.)

Constellation (the former 50% owner of the Modelo importer, Crown), however, shares the same cost-cutting, price increasing philosophy as ABI and has encouraged Crown to abandon its Momentum Plan strategy and fall in line with ABI price increases. According to the Department of Justice, "Constellation has already shown through its participation in the Crown joint venture that it does not share Modelo's incentive to thwart ABI's price leadership; and that, in fact, Constellation consistently has urged Crown to follow ABI's price increases." For example, in 2011, Constellation's managing director wrote to Crown's CEO that: "Since ABI has already announced an October general price increase, I was wondering if you are considering prices increases for the Modelo portfolio…from a positioning and image perspective, I believe it would be a mistake to allow the gaps to be narrowed. I think ABI's announcement gives you the opportunity to increase profitability without having to sacrifice significant volume." (SAC ¶¶ 22-23.)

In another step to further ABI's march toward global beer monopoly and to thwart competition by Modelo in 2012, ABI entered into an agreement to acquire the remainder of Modelo it did not already own. In June of that year, ABI entered into an agreement with Constellation, contingent on the approval of the acquisition of Modelo. This agreement was geared to create a façade of competition between ABI and Modelo's importer Crown. The agreement provided that ABI would sell Modelo's existing 50% interest in Crown Imports LLC to Crown's other owner, Constellation. Under this agreement, Constellation would remain an importer and would be dependent upon ABI for its supply of Modelo- branded beer. (SAC ¶ 27.)

After the Department of Justice filed its complaint in January 2013, to prevent the acquisition, in the United States District Court, District of Columbia (Decl. of JMA, Exhibit H), Defendants announced a second attempt to create a mirage of competition. (SAC ¶ 28.) Under the terms of the Revised Agreement, which is conditioned on the completion of the Modelo transaction, Constellation will not be and cannot be operating independently of ABI. ABI, after acquiring all of Modelo, will then sell to Constellation the 50% of Crown owned by Modelo. Constellation, under the Revised Agreement, would be free to do as it always wanted to do; namely, increase prices with ABI and shelve the program that was leading consumers to "trade up." ABI will also sell the Modelo Piedras Negras brewery and grant "perpetual rights" to Constellation for Corona and the Modelo brands in the United States. (SAC ¶ 29.) Under the Transition Services Agreement, for three years ABI will be providing "consulting services" with respect to topics such as the management of the Piedras Negras Brewery, logistics, material resource planning, and other general administrative services. The Transition Services Agreement also requires ABI to supply certain key inputs (such as aluminum, cans, glass, malt, yeast, and corn starch.) Under the Interim Supply Agreement, ABI will supply Constellation with sufficient Modelo branded-beer each year to make up for any difference between demand and capacity at the Brewery. For at least three years, ABI will be a direct supplier of Modelo-branded beer to Constellation. (Declaration of JMA, Exhibit I, p. 14; Exhibit K; Exhibit L; Exhibit N, pp. 1-3.)

In reality, Defendants' proposed "remedy" eliminates from the market Modelo, a particularly aggressive competitor, and replaces it with an entity with little to no beer brewing experience, an entity which has shown prior willingness to follow ABI price hikes, and which will be ABI's puppet during at least the three-year "transition" period. (SAC ¶ 33.) During the three year "transition" period, ABI will "teach" Constellation how to do what it does best--increase beer prices and diminish beer quality.

As a result, Plaintiffs and the 40% of the United States beer-consuming population, of ABI-branded beers, Modelo-branded beers and others, and who expect to continue to do so in the future, are significantly threatened with loss or damage in the form of higher beer prices, diminished quality (including cheaper hops and watered-down beer), reduced product innovation, and other diminished competitive options. Plaintiffs and the beer-consuming public will sustain irreparable harm for which damages are not compensable, in that quality, innovation, and choice cannot be easily restored once lost. (SAC ¶ 117.)

On April 22, 2013, the United States District Court, District of Columbia, entered a Stipulation and Order requiring certain Hold Separate and Preservation Obligations of Defendants. (Declaration of JMA, Exhibit A, pp. 10-18.) On April 19, 2012, in the DC action, a Proposed Final Judgment was filed including certain Firewall requirements during the term of the Transition Services Agreement and the Interim Supply Agreement. (Declaration of JMA, Exhibit B, pp. 24-26). The Department of Justice published its Tunney Act Notice in the Federal Register on May 22, 2013. The public comment period is not set to expire until July 22, 2013. Final judgment cannot be entered in the DC action before that date and a public interest determination is made. (Declaration of JMA, Exhibit Exhibit J.) Defendants have already taken steps to consummate their acquisition of Modelo and the Revised Agreement between ABI and Constellation, before the entry of the final judgment in the DC action. (SAC p. 30-31 ¶¶ 3-8.)

ARGUMENT

I. LEGAL STANDARD FOR PRELIMINARY RELIEF

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir.

2011) (citing, *Winter v. Natural Res. Def. Counsel,* 129 S. Ct. 365, 376 (2008)). In *Alliance for the Wild Rockies,* the 9th Circuit adopted a version of this standard referred to as the "serious questions" test, which posits that "serious questions going to the merits" and a "balance of hardships that tips sharply towards the plaintiff" can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1135.

II. A HOLD SEPARATE ORDER IS A FORM OF PRELIMINARY RELIEF WHICH PERMITS A TRANSACTION TO PROCEED BUT PRESERVES THE ASSETS AS SEPARATE UNTIL FINAL DISPOSITION

In *F.T.C. v. Weyerhaeuser Co.* 665 F.2d 1072, 1085-86 (D.C. Cir. 1981), the Court of Appeals defined a hold separate order as a "preliminary restraint, albeit less drastic than a full stop order," (*Id.* at 1085), and "a form of preliminary relief which permits the challenged transaction to go forward, but requires the acquiring company to preserve the acquired company (or certain of the acquired assets) as a separate and independent entity during the course of antitrust proceedings." *Id.,* 665 F.2d at 1075.

Hold separate orders may be issued at the Court's discretion, "even when the plaintiff has failed to satisfy the standards for preliminary injunction." *United States v. United Technologies Corp.,* 466 F.Supp. 196, 200 (N.D.N.Y. 1979). Such orders have issued where the plaintiff's motion for preliminary injunction has been denied. *Id.* at 198, 205; *United States v. Wachovia Corp.,* 313 F.Supp. 632, 640 (W.D.N.C. 1970); *United States v. Hughes Tool Co.,* 415 F.Supp. 637, 638 (C.D.Cal. 1976). Moreover, hold separate orders may issue where the plaintiff has failed to demonstrate a likelihood of success on the merits. *United Technologies, supra,* 466 F.Supp. at 200.

There are significant benefits to such an order in antitrust actions. As the *Weyerhaeuser* Court stated, it aims to "preserve a transaction that may after all, turn out to be legal." In addition, a hold separate order "shifts the risk of decline in value of the

challenged assets from the acquired company to the acquiring company." 665 F.2d at 1087. Further, it allows the purchased entity to maintain its competitive position in the relevant market. Second, this allows for a safeguard of adequate eventual relief if the transaction is ultimately found unlawful. Third, it seeks to check interim anticompetitive harm. *See generally, F.T.C. v. PPG Industries,* 798 F.2d 1500, 1506 (1986), citing *Weyerhauser, supra.*

Established antitrust law holds that these orders avoid the well-recognized problem of "unscrambling the assets," which would be required if this Court or an appellate court later determines that this transaction violates § 7 of the Clayton Act, § 1 of the Sherman Act, or was otherwise not in the public interest. *See F.T.C. v. Whole Foods Market, Inc.,* 548 F.3d 1028, 1034 (C.A.D.C. 2008); *F.T.C. v. Exxon Corporation* (C.A.D.C. 1980) 636 F.2d 1336, 1344 and n.27; *F.T.C. v. Weyerhaeuser Co., supra,* 665 F.2d at 1085-86.

By issuing this type of interim order, the Court is in a far better position to safeguard assets and allow for effective divestment. *Id.,* 665 F.2d 1075, n.7. *F.T.C. v. Whole Foods Market Inc., supra,* instructive. The Circuit Court of Appeals concluded that, among other things, the District Court had underestimated the likelihood of success on the merits in denying the motion for preliminary injunction. *Whole Foods, supra,* 548 F.3d at 1034. In reversing the district court, the D.C. Circuit Court stated that "hold separate" requirements are a valid and useful tool which—even though other more complicated remedies are available to address antitrust violations—"preserve[s] the *status quo nunc"* and "perhaps also to restore the *status quo ante." Whole Foods,* 548 F.3d at 1034.

Courts have issued hold separate orders where, in addition to a showing of likelihood of success on the merits, "(1) strong equities favor consummation of the transaction; (2) a hold separate order will check interim competitive harm [at least as effectively as a preliminary injunction]; and (3) such an order will permit adequate ultimate relief."

Weyerhaeuser, supra, 664 F.2d 1072, 1087; *accord F.T.C. v. PPG Industries, Inc.* (D.C. Cir. 1986) 798 F.2d 1500, 1506-1507.

Plaintiffs have met the *Weyerhaeuser* requirements. With respect to the first prong, the transaction has technically closed, in that ABI has acquired the portion of Modelo it did not already own. Second, a hold separate order will better check interim anticompetitive harm than if no order at all is issued. Defendants are already required to abide by a long list of hold separate obligations outlined in the Stipulation and Order from the DC action, aimed at preserving the economic viability of the assets. However, those hold separate obligations in the DC action may be dissolved during the course of this case. An order in this Court would preserve the economic viability of those assets during the pendency of these proceedings. (Decl. of JMA, Exhibit A, pp. 10-18.) Under the third prong of *Weyerhaeuser,* a hold separate order would make eventual divestiture a more feasible remedy than if no order were to issue at all. Maintaining the assets separately would assist in full divestiture after a trial on the merits. In short, if required to do so, Defendants could sell the highly attractive and self-supporting assets after a final adjudication in Plaintiffs' favor.

III. PLAINTIFFS HAVE RAISED AT LEAST A "SERIOUS QUESTION GOING TO THE MERITS"

Mergers and acquisitions that threaten the competitive viability of United States markets are so vilified that Congress specifically wrote the statute to reach mergers whose anticompetitive effects were not *actually known.* Section 7 of the Clayton Act makes any merger illegal if its effect "*may* be substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). Congress used the word "may" in formulating its "expansive definition of antitrust liability" (*California v. Am. Stores Co.,* 495 U.S. 271 284 (1990)), to "indicate

that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States,* 370 U.S. 294, 323 (1962).

The Court must decide if Plaintiffs have raised serious questions going to the merits of whether the acquisition violates § 7 of the Clayton Act and/or § 1 of the Sherman Act. The facts here amply fulfill all four *Wild Rockies* criteria. First, there is no gainsaying that ABI and MillerCoors control the lion's share of the U.S. market and, by agreement or otherwise they raise prices in lockstep. In the face of coordinated price increases that smack of conscious parallelism at best, only Modelo's Momentum Plan stands as a bulwark, maintaining not only consistent pricing but enhancing quality, choice and innovation in the U.S. beer market. Once given discovery, Plaintiffs can and will prove that Constellation's acquisition of Modelo aims to dismantle the Momentum Plan—which Constellation has always opposed—essentially by dismantling Modelo itself. Apart from Constellation's longstanding opposition to the Momentum Plan, ABI's and Modelo's choice of suitor is more than suspect: Constellation has little experience in the beer brewing business. Even if Constellation could overcome its lack of experience, and even if it wanted to perpetuate the Momentum Plan, burdened with another $4.75 billion in post-acquisition debt at sub-prime rates, sheer economics will compel the company to do what it has always wanted: raise Modelo prices along with ABI and Miller Coors, sounding a virtual death-knell for competition in the U.S. beer market.

Moreover, under the terms of the three-year Transition Services Agreement and the Interim Supply Agreement (Declaration of JMA, Exhibit I, p. 14; Exhibit K; Exhibit L; Exhibit N, pp. 1-3), Constellation will **not** be an immediate independent brewer of Modelo-branded beer. Constellation's dependence on ABI will last 3+ years. ABI can and will impose on Constellation the same cost-cutting, quality deteriorating measures instituted

when it acquired Anheuser-Busch in 2008, including cheaper, low-quality ingredients and watered down beer. (See Decl. of JMA, Exhibits C, E & F.)

The law governing this case was established in 1966 by the United States Supreme Court in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) when the Supreme Court reversed the district court and remanded the case for further proceedings in conformity with the decision. Before the Court at that time was the acquisition of the 18th largest beer brewer (Blatz) in the United States by the 10th largest U.S. brewer (Pabst).

The evidence demonstrated the market shares, power, and competition in the relevant areas, and the steady decline in the number of brewers. The Court held that "the probable effect of the merger on competition in Wisconsin, the three state area, and the entire country was sufficient to show a violation of Sec. 7 in each and all three of these areas." *Id.* at 552. *Pabst* is on all fours with the present case.

Under established Supreme Court precedent, there are other reasons why the proposed transaction is anticompetitive. One is national advertising. Defendants do not compete on price or quality of beer, rather, they compete in advertising. In the words of the Supreme Court:

> "Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising. Large inventories of cigarettes, and large sums required for payment of federal taxes in advance of actual sales, further emphasize the effectiveness of a well financed monopoly in this field against potential competitors if there merely exists an intent to exclude such competitors. Prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion. 'Prevention' is cheaper and more effective than any amount of 'cure.'"
>
> *American Tobacco Co. v. US*, 328 U.S. 781, 797 (1946)

Further, without a hold separate order, potential competition will be irretrievably lost:

> "Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate s 7 because the entry eliminates a potential competitor exercising present influence on the market. Id., 386 U.S., at 580-581, 87 S.Ct., at 1231-1232; United States v. Penn-Olin Chemical Co., 378 U.S. 158, 173-174, 84 S.Ct. 1710, 1718-1719, 12 L.Ed.2d 775 (1964). As the Court stated in United States v. Penn-Olin Chemical Co., supra, at 174, 84 S.Ct., at 1719, 'The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.' "

United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 (1973).

IV. PLAINTIFFS WILL BE IRREPARABLY INJURED

Plaintiffs are consumers of beer, including those of Defendants' beers, and anticipate purchasing beer in the future. As a result of the unlawful acquisition by ABI of Modelo and ABI's agreement with Constellation, Plaintiffs are threatened with not only price increases, but less innovation and diminished quality of beers. (Decl. of William Stage; Decl. of Sharon Martin; Decl. of Martin Ginsburg; Decl. of Barry Ginsburg; Decl. of Mark Naeger; Decl. of Dan Sayle.)

First, threat of irreparable harm to Plaintiffs arises from the difficulty in unscrambling an anticompetitive merger. Congress has recognized the importance of injunctive relief in these instances:

> Often the only effective and realistic remedy against large illegal mergers – before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act.

H.R. Rep. No. 1373, 94th Cong., 2d Sess.5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News, 2637, 2627. Once the eggs have been scrambled, it is very difficult to restore the *status quo ante*.

Second, Plaintiffs have made an adequate showing of irreparable injury in the form of lessening of competition, which as Justice O'Connor noted in *California v. American Stores Company,* 492 U.S. 1301, 1305 (1989), is "precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent."

Plaintiffs have offered the following, among others, in support of the proposition that the acquisition will result in a lessening of competition:

- Modelo's competitive strategy, the Momentum Plan will be abandoned as a result of the acquisition. (SAC ¶¶ 29-32, 89-91; Decl. of JMA, Exhibit H, ¶¶ 2-5, 10, 44, 48-53, 61-65, 72-81.)

- Under the Transition Services Agreement and the Interim Supply Agreement, ABI will be assisting Constellation's operations of the Piedras Negras brewery and will be a direct supplier to Constellation for at least three years. (SAC ¶ 96-98; Declaration of JMA, Exhibit I, p. 14; Exhibit K; Exhibit L; Exhibit N, pp. 1-3)

- Constellation will not be independent of ABI for at least three years, allowing for coordination of pricing between ABI, Constellation, and Modelo. (SAC ¶ 96-99; (Declaration of JMA, Exhibit I, p. 14; Exhibit K; Exhibit L; Exhibit N, pp. 1-3)

- Constellation has encouraged following ABI's price increases, and will do so in the future. (SAC ¶¶ 22-23; Decl. of JMA, Exhibit H ¶¶ 10, 48-53, 72-81.)

- ABI has increased beer prices, cut costs and diminished beer quality, since the acquisition of Anheuser-Busch by InBev in 2008. (Decl. of JMA, Exhibit H ¶¶ 3; Exhibit C; Exhibit M pp. 3-4; 6, 8-9, 22-23, 46-47, 53, 55, 64-66, A-14.)

- Under the direction of ABI (since, under this transaction, Constellation is not independent of ABI), Modelo-branded beer will be reduced in quality and innovation, as has happened since the merger of Anheuser-Busch and InBev. (Decl. of JMA; Exhibit C; Exhibit E; Exhibit F.)

- The Declarations of Plaintiffs William Stage; Sharon Martin; Martin Ginsburg; Barry Ginsburg; Mark Naeger; and Dan Sayle in support of this motion.

Based on past history, presently announced intentions, and anticipated future

conduct, Defendants' transaction violates § 7 of the Clayton Act, to the irreparable injury of plaintiffs and the public. If Defendants are not required to hold their assets separate and apart, they will commingle their assets, personnel, and pricing strategies to the point where separation is impossible. Competition, innovation and quality, once lost, cannot be easily, if ever, fully restored.

V. THE BALANCE OF EQUITIES TIPS SHARPLY IN FAVOR OF PLAINITFFS

The balance of harms or hardships here unquestionably favors Plaintiffs. Plaintiffs will suffer irreparable injury if the hold separate order is not granted, as demonstrated above. It is very difficult to unscramble the eggs once assets and operations have been merged. Moreover, competition will be lessened throughout the United States, as the Momentum Plan, which was instituted by Crown and caused substantial head-to-head competition between ABI and Modelo, will be abandoned. Beer product innovation and quality will diminish if the transaction is permitted to proceed without a hold separate requirement. That harm, that lessening of competition, is not compensable by money damages.

On the Defendants' side, Plaintiffs request a hold separate order as outlined in the "Hold Separate and Preservation Obligations" listed in the Stipulation and Order entered on April 22, 2013, and the "Firewall" provision in the Proposed Final Judgment. (Decl. of JMA, Exhibit A, pp. 10-18; Exhibit B, pp. 24-26.) These obligations are already outlined by the DC court and there is not substantial prejudice to the Defendants in requiring them to abide by those provisions in these proceedings, in order to preserve the economic viability of these assets. Plaintiffs request that Defendants maintain those obligations to hold separate and the firewall obligations during the pendency of these proceedings. The harm to Defendants is not substantial.

Moreover, the hundreds of millions of dollars of additional cost to Plaintiffs and consumers of beer in the United States, which will result from this transaction and this violation of section 7, far exceeds any cost Defendants may incur by complying with hold separate obligations. In *California v. American Stores,* 492, U.S. 1301, 1307, (1989), Justice O'Connor took a similar approach in balancing the harms: "…the harm to applicant if the stay is denied in the form of a substantial lessening of competition in the relevant market, outweighs the harm respondents may suffer…Applicant alleges, for example, that permitting the merger would cost the State's consumers $400 million a year in higher prices. Respondents contend that they are incurring costs of over $1 million a week by reason of the District Court's injunction and the applicant's decision to file suit after the merger had been consummated…Under the circumstances…it appears the equities favor the applicant." And so they do here. Plaintiffs and consumers stand to lose millions more for years to come, than Defendants may incur in costs by complying with a hold separate order. Accordingly, the balance of harms tips sharply in favor of Plaintiffs.

VI. THE PUBLIC INTEREST IS SERVED BY GRANTING A HOLD SEPARATE ORDER

The public interest is strongly in favor of effective enforcement of the antitrust laws and the preservation of competition whenever and wherever possible. In the oft-cited words of Justice Thurgood Marshall in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom as our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

The public interest also favors use of private antitrust cases as a crucial means of ensuring that the antitrust laws are enforced. As the Supreme Court made clear in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969), "…the purpose of

giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws…Section 16 should be construed and applied with this purpose in mind…" Accord: *American Society of Engineers, Inc. v. Hydrolevel Corporation,* 456 U.S. 556, 569 (1982):

> In the past, the Court has refused to permit broad common-law barriers to relief to constrict the antitrust private right of action. *Perma Life Mufflers, Inc., v. International Parts Corp.,* 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968). It stated there that "the private action will be an ever-present threat" to deter antitrust violations.

Economic and legal principles uniformly hold that competition best serves the public. As the Supreme Court has said, the antitrust laws are the charter of economic freedom. If the hold separate order is not granted during these proceedings, prices will rise, competition will be lessened, and the public will be damaged to an extent not subject to remediation.

CONCLUSION

On the basis of the arguments and the authorities set forth above, Plaintiffs respectfully ask this Court to grant a Hold Separate Order, requiring the Defendants to comply with the hold separate obligations outlined in the Stipulation and Order entered in the DC action on April 22, 2013, and the Firewall provisions in the Proposed Final Judgment, filed on April 19, 2013, during the pendency of these proceedings.

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