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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, GRUPO MODELO S.A.B. de C.V., and CONSTELLATION BRANDS, INC. *Defendants*.	CASE NO. C-13-1309-MMC **DEFENDANTS ABI'S AND MODELO'S OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION SEEKING "HOLD SEPARATE" ORDER** Date: August 2, 2013 Time: 9:00 a.m. The Honorable Maxine M. Chesney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

STATEMENT OF THE ISSUES TO BE DECIDED

1. Whether the Court should deny as moot Plaintiffs' request for a hold separate order.

2. Whether the Court should deny Plaintiffs' request for a hold separate order because Plaintiffs fail to meet one or more of the requirements necessary to obtain such relief.

3. The amount of security Plaintiffs should be required to post if they are entitled to a hold separate order.

PRELIMINARY STATEMENT

Defendants Anheuser-Busch InBev SA/NV ("ABI") and Grupo Modelo S.A.B. de C.V. ("Modelo") submit this memorandum in opposition to Plaintiffs' Motion for Injunction Seeking "Hold Separate" Order (the "Motion").

Having lost a last-minute motion for a temporary restraining order to prohibit ABI from acquiring Modelo, Plaintiffs now seek to copy an order from the case filed by the Department of Justice ("DOJ") requiring ABI, Modelo and Constellation Brands, Inc. ("Constellation") to "hold their assets separate and apart during the pendency of these proceedings as provided by the 'Hold Separate and Preservation Obligations' . . . of the Stipulation and Order" entered by the United States District Court for the District of Columbia nearly three months ago, purportedly in order to "maintain the *status quo* while the Court considers and finally rules upon the merits of this matter." (Motion at 3.) Plaintiffs' Motion defies all logic because: (1) the Hold Separate and Preservation Obligations that Plaintiffs seek to enforce *expired by their own terms more than one month ago* when ABI completed its sale of Modelo's U.S. business to Constellation; and (2) the assets covered by Plaintiffs' request now are wholly owned by Constellation and, therefore, already are held separate (i.e., completely "unscrambled") from ABI and Modelo. Accordingly, Plaintiffs' request for relief should be summarily rejected as moot.

But even if Plaintiffs' Motion was not moot, Plaintiffs have not offered any basis to revisit the Court's conclusion at the June 4 TRO hearing that they are not entitled to provisional relief. Most significantly, Plaintiffs cannot demonstrate a likelihood of success on the merits. As the Court recognized, ABI's acquisition of Modelo is a "legitimate transaction that does not result in ABI acquiring the U.S. distribution of competing beer." (TRO Hr'g Tr. at 56:18-20.) Rather, as

the DOJ concluded, the transactions result in Constellation becoming "an independent and economically viable competitor that will stand in the shoes of Modelo." (Golden Decl., Ex. 3, Competitive Impact Statement ("CIS"), at 10.) As such, the transactions do not increase concentration in the alleged "U.S. beer market" and cannot violate Section 7 of the Clayton Act, 15 U.S.C. § 18.

Plaintiffs also still have not provided any evidence to establish that the transactions are likely to cause them immediate, irreparable harm, that any purported harm would outweigh the harm suffered by Defendants were a hold separate of some sort to issue, or that a hold separate would be in the public interest. Plaintiffs' repeated delays cut against any argument that they face immediate harm. Further, the only "evidence" of harm to themselves that Plaintiffs offer are six identical, non-expert declarations claiming that "if proposed merger between [ABI] and [Modelo] is consummated, the result will be price increases and less innovation . . . and a reduced quality of beers in the market." (*See, e.g.*, Stage Decl. ¶¶ 3-4.) But the declarants do not even assert that they *personally* would suffer harm, or, given that the transactions have closed, have suffered harm, absent the requested relief. Moreover, Plaintiffs' speculative, unsupported concerns regarding higher beer prices cannot establish *irreparable* injury. And there is no basis for their claim that innovation and quality will be irreparably reduced during the pendency of this proceeding because Constellation—not ABI—now controls the recipes and formulas for Modelo beer for sale in the United States. Thus, Plaintiffs' allegations that the quality of ABI beer has decreased since InBev purchased Anheuser-Busch are irrelevant to the current dispute. In addition, because ABI has taken significant steps to integrate Modelo's non-U.S. business into its own, if any relief impeding that process were granted, the harm to ABI and Modelo would outweigh any possible harm to Plaintiffs. A hold separate also would not be in the public interest because the sale of Modelo's U.S. assets to Constellation results in a decrease in concentration in the sale of beer in the United States.

Finally, a hold separate may not be granted without a very substantial bond, which Plaintiffs have neither offered nor possibly could afford.

BACKGROUND

I. HISTORY OF THE DEFENDANTS' TRANSACTIONS LEADING TO THEIR APPROVAL BY THE DOJ

A. The Defendants' Original Transactions and the DOJ's Challenge

In June 2012, ABI agreed to purchase the remaining 49.7% 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 Imports LLC ("Crown"), which was a 50/50 joint venture between Modelo and Constellation, that it did not already own and become the exclusive importer, marketer and seller of Modelo brands in the United States for at least ten years. (Second Amended and Supplemental Complaint, ECF 63, ¶ 48 ("SAC".) On January 31, 2013, the DOJ filed suit against ABI and Modelo, alleging those original transactions would violate Section 7 of the Clayton Act. (Golden Decl., Ex. 1, DOJ Compl. ¶¶ 2, 8, 43.)

B. The Defendants' Revised Transactions

On February 14, 2013, ABI, Modelo and Constellation announced a revised set of transactions that superseded the original transactions they entered into in June 2012. (SAC ¶ 28.) As before, ABI still would purchase the remaining interest in Modelo that it did not already own and would sell Modelo's 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 in Mexico, 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 entered into three-year agreements for transition services and incremental beer supply. (*Id.* ¶ 30.) Under the Transition Services Agreement ("TSA"), ABI provides Constellation with consulting services related to operating and expanding the brewery in Mexico and supplies Constellation with input products for that Mexican brewery, including bottles, cans, crowns, lids, corn starch, hops and malt, at contractually-set prices. (Golden Decl., Ex. 2, at TSA §§ 2.01, 3.02.) The Interim Supply

Agreement ("ISA") requires ABI to fulfill Constellation's incremental beer supply needs at contractually-set prices. (Golden Decl., Ex. 2, at ISA §§ 2.2, 3.1-3.2.) But Constellation is not *obligated* to obtain supply from ABI and is free to contract with third-party suppliers. (*Id.* §§ 2.1-2.2.)

Both the TSA and ISA establish firewalls to prevent ABI and Constellation from sharing competitively sensitive information. (Golden Decl., Ex. 2, at TSA § 2.12(d); Golden Decl., Ex. 2, at ISA § 5.4.) In addition, Constellation has acquired 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; Golden Decl., Ex. 2, at TSA § 3.01 (ABI only pays personnel that provide services to Constellation under the TSA).)

C. The DOJ's Approval of the Transactions and Litigation Settlement

On April 19, 2013, after the DOJ reviewed and approved Defendants' revised transactions, the DOJ and Defendants reached an agreement to settle their litigation and allow the parties to move forward with their transactions. The proposed Final Judgment, which resolves all of the DOJ's claims, incorporates the key deal agreements between ABI and Constellation—including the divestitures to Constellation of the brand license, Piedras Negras brewery and Crown, and the creation of the TSA and ISA—and requires the parties to comply with their contractual obligations. (*See* CIS at 13; Alioto Decl., Ex. B, proposed Final Judgment § IV(G)-(I) ("proposed Final Judgment").) 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 Defendants' 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).)

The DOJ and Defendants also negotiated a hold separate agreement that governed the operation of the assets to be divested to Constellation (i.e., the brand license, Piedras Negras brewery and Crown). The hold separate agreement is part of the Stipulation and Order entered by Judge Roberts of the United States District Court for the District of Columbia on April 22, 2013. (Alioto Decl., Ex. A, Stipulation and Order at VI-X ("Stipulation and Order").) The Stipulation and Order required the Defendants to hold separate the divestiture assets and abide by certain obligations "[u]ntil the divestitures required by the proposed Final Judgment have been accomplished." (Stipulation and Order at VI.) Specifically, the Stipulation and Order required that:

> (i) Modelo, without influence from ABI, shall continue to manage and operate the Brewery Assets and Divested IP Assets in accordance with past practice and shall do nothing that would impair, delay, or prevent their sale, or the build-out and capacity expansion of the Piedras Negras Brewery by Constellation . . . and (ii) Modelo and Constellation, each without influence by ABI, shall continue to manage Crown in accordance with past practice, and shall do nothing that would impair, delay, or prevent the sale of Crown in accordance with the proposed Final Judgment.

(*Id.*)[1]

II. THE CLOSING OF THE TRANSACTIONS AND THIS COURT'S DENIAL OF PLAINTIFFS' TRO MOTION

On June 3, 2013, the evening before ABI's acquisition of Modelo was scheduled to close, Plaintiffs moved for a temporary restraining order seeking to enjoin that transaction. (Notice of Motion and Motion for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue to Prohibit the Acquisition of Grupo Modelo by Anheuser-Busch InBev as a Violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, Memorandum of Points and Authorities, ECF No. 42 ("TRO Motion").) As scheduled, the transaction closed the following day,

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[1] "Brewery Assets," defined as "the assets, rights and interests to be transferred by the Stock Purchase Agreement," means the Piedras Negras brewery and its operating and service companies, Compañia Cervecera de Coahuila, S.A. de C.V. and Servicios Modelo de Coahuila, S.A. de C.V. (Stipulation and Order at I(E); Golden Decl., Ex. 2, at Stock Purchase Agreement 1.) "Divested IP Assets," defined as "the assets, rights, and interests to be transferred by the Amended and Restated Sub-License Agreement Sub-License Agreement between Marcas Modelo, S.A. de C.V. and Constellation," means the U.S. brand rights to Modelo beers. (Stipulation and Order at I(K); Golden Decl., Ex. 2, at Amended and Restated Sub-License Agreement § 2.1.)

June 4, 2013. (Motion at 1.) Hours later, this Court held a hearing and denied Plaintiffs' TRO Motion. (TRO Hr'g Tr. at 59:1-4.)

The Court held that Plaintiffs did not establish a likelihood of success on the merits because they failed to show that the ABI-Constellation transaction "is a sham, that it is intended to cover up what would be then control of the [Modelo] sales here in the U.S. by ABI." (*Id.* at 56:22-57:1.) The Court observed that Plaintiffs have "a rather difficult hurdle [to] overcome" because "on its face" the transaction is "legitimate" and "does not result in ABI acquiring the U.S. distribution of [Modelo] beer." (*Id.* at 56:18-21.) In addition, the Court remarked that, even assuming Plaintiffs could prove harm to themselves, "[w]hether that harm is irreparable . . . is another question because the type of loss they would suffer would be primarily economic." (*Id.* at 57:25-58:2.) Further, the Court concluded that the balance of equities "tip[ped] in favor of the defendants and not the plaintiff because of the fact that [the transaction] is not something that just affects the company's officers and directors, but also the shareholding and buying public. It would be awkward and difficult at this time to start setting aside the transaction." (*Id.* at 58:7-12.) Finally, the Court stated that Plaintiffs had "knowledge that this merger was in the offing for quite some time and even some time since the filing of the complaint in this matter," and that Plaintiffs' delay left the Court and the Defendants dealing with a "last-minute situation . . . that might have been avoided." (*Id.* at 58:20-24.)

On June 7, 2013, three days after the hearing on Plaintiffs' TRO Motion, ABI completed the sale to Constellation of Modelo's U.S. assets. (Golden Decl. ¶ 10.) With ABI's sale to Constellation, the obligations to hold the Modelo assets separate terminated. (Stipulation and Order at VI.) Accordingly, Defendants' transactions have been fully consummated.

III. PLAINTIFFS' ALLEGATIONS AND HOLD SEPARATE MOTION

Plaintiffs challenge transactions that the DOJ has extensively investigated and fully approved. They allege 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." (SAC ¶ 26.) Plaintiffs claim that the agreement between ABI and Constellation,

which also allegedly is "fraudulent" (*id.* ¶¶ 30, 50, 101), is part of this scheme and is intended "to create a mirage of competition." (Motion at 8.)

Plaintiffs allege that the transactions presumptively violate Section 7 of the Clayton Act because ABI, which supposedly has a 49% share of beer sales in the United States, effectively will acquire Modelo's 5% share (based on sales made by Crown). (SAC ¶¶ 73, 76, 78, 81-82.) Although Constellation is now the sole owner of Crown post-transactions, Constellation allegedly "will not be and cannot be operating independently of ABI" (Motion at 8) for a number of purported 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 significant brewery; (4) Constellation could not 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. (Motion at 8, 13; SAC ¶¶ 30, 101-09.)

Plaintiffs further allege that "under the terms of the three-year Transitions Services Agreement and the Interim Supply Agreement . . . Constellation will **not** be an immediate independent brewer of Modelo-branded beer." (Motion at 13.) Instead, Constellation "will be ABI's puppet during at least the three-year 'transition' period." (*Id.* at 8 (citing SAC ¶ 33).) Plaintiffs assert that "ABI can and will impose on Constellation the same cost-cutting, quality deteriorating measures instituted when [InBev] acquired Anheuser-Busch in 2008, including cheaper, low-quality ingredients and watered down beer." (*Id.* at 13-14.) They allege "ABI will 'teach' Constellation how to do what it does best—increase beer prices and diminish beer quality" (*id.* at 8) and that "Modelo-branded beer will be reduced in quality and innovation." (*Id.* at 16.)

As a result, Plaintiffs claim that they are "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." (*Id.* at 9.) Plaintiffs now request that Defendants be required "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' provision outlined in the Proposed Final Judgment, filed in the United States District Court, District of Columbia . . . until a final adjudication on the merits." (*Id.* at 3-4.)

ARGUMENT

I. PLAINTIFFS' MOTION IS MOOT BECAUSE THE RELIEF THEY SEEK ALREADY HAS BEEN ACCOMPLISHED

Plaintiffs' Motion should be denied as moot because the relief Plaintiffs request already has been fully achieved. *See, e.g., Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986) (claim for injunctive relief moot when the requested relief, production of rules and regulations under FOIA, already had occurred); *O'Dowd v. UNUM Life Ins. Co. of Am.*, No. 05–722 TUC GEE, 2006 WL 2872425, at *3 (D. Ariz. Oct. 6, 2006) (plaintiff's claim for damages was moot after plaintiff received the damages requested).

First, Defendants already have fully complied with the provisions of the Stipulation and Order that Plaintiffs ask this Court to adopt. (*See* Motion at 3.) Those provisions required Defendants to abide by hold separate obligations *only* "[u]ntil the divestitures required by the proposed Final Judgment have been accomplished," or, for certain provisions, "prior to the completion of the [ABI-Modelo] Transaction." (Stipulation and Order at VI-X.) Pursuant to the very same Stipulation and Order (*id.* at IV (allowing consummation after "the Court has signed this Stipulation and Order")), ABI and Modelo closed their transaction on June 4, and ABI completed the divestitures to Constellation on June 7. (*See supra* p. 6.) Thus, the hold separate provisions Plaintiffs now request expired by their own terms on June 7, rendering Plaintiffs' Motion moot.

Further, the hold separate Plaintiffs seek plainly has been achieved with regard to ABI and Modelo because they do not own any of the assets covered by Plaintiffs' request. Rather, the hold separate provisions of the Stipulation and Order that Plaintiffs cite apply exclusively to assets now owned by Constellation, including the Piedras Negras brewery, brand rights to Modelo products in the United States and Crown. (*See supra* p. 5.) As a result, there is nothing for ABI and Modelo to hold separate under Plaintiffs' request.

Finally, Plaintiffs' request that the Court impose the same firewall requirements contained in the proposed Final Judgment is moot because Defendants already are bound to follow those requirements under their settlement with the DOJ. The firewall provision of the proposed Final Judgment, which is monitored by a DOJ appointee and overseen by Judge Roberts, extends through the terms of the TSA and the ISA, which is at least three years and will last well beyond the duration of this litigation. (Proposed Final Judgment at XIII.) Plaintiffs fail to offer any basis for their entitlement to, or need for, an order imposing firewalls, let alone any justification for this Court to issue such an order when the requested relief already exists and is being monitored for at least three years by the DOJ, which can seek recourse from Judge Roberts in the event Defendants do not comply with the firewall provision. (*See id.*)

For all of these reasons, Plaintiffs' Motion should be denied as moot.

II. PLAINTIFFS HAVE NOT ESTABLISHED ANY OF THE ELEMENTS NECESSARY TO OBTAIN PRELIMINARY INJUNCTIVE RELIEF IN THE FORM OF A HOLD SEPARATE ORDER

A hold separate order is a form of preliminary injunctive relief that a plaintiff can obtain only by establishing the usual requirements for such relief. *See California v. Am. Stores Co.*, 872 F.2d 837, 845 (9th Cir. 1989) (a hold separate order is an "injunction [that] requires indirect divestiture"), *rev'd on other grounds*, 495 U.S. 271 (1990). Preliminary injunctive relief in any form "'is an extraordinary and drastic remedy, [and] one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted); *see also Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) ("A preliminary injunction is an 'extraordinary and drastic remedy'. . . [that] is never awarded as of right . . . ." (citation omitted)).

To meet their heavy burden, Plaintiffs must provide "substantial evidence" that makes a "clear showing" that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also EIG Global Energy Partners, LLC v. TCW Asset Mgmt. Co.*, No. CV 12-7173, 2012 U.S. Dist. LEXIS 171412, at *39 (C.D. Cal. Nov. 30, 2012) (finding hold separate

"form of injunction should issue" after determining all four *Winter* factors were satisfied).[2] "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987)). Failure to establish any one of these elements is fatal to Plaintiffs' motion. *See Dish Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011) (Plaintiff "must demonstrate that it meets all four of the elements" of the *Winter* test), *cert denied*, 132 S. Ct. 1162 (2012).[3]

Because Plaintiffs cannot establish any of the four requirements for preliminary injunctive relief, their Motion should be denied.

A. Plaintiffs Have Not Established a Likelihood of Success on the Merits Because They Cannot Possibly Succeed on Their Section 7 Claim

As described in ABI's and Modelo's motion to dismiss, Plaintiffs have no hope of succeeding on their claim for injunctive relief.[4] Plaintiffs' claim under Section 7 of the Clayton

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[2] Plaintiffs concede that a hold separate order is "a form of preliminary relief," but contend that they need not satisfy the four elements necessary to obtain a preliminary injunction. (Motion at 9-12.) Plaintiffs cite no authority that supports their position. First, the decisions Plaintiffs cite pre-date the Supreme Court's decision in *Winter*, which held that a federal court may not award interim injunctive relief to a private plaintiff unless that plaintiff establishes that all four elements have been satisfied. *See Winter*, 555 U.S. at 20. Second, the cited decisions each involved suits brought by the federal government, which faces a lesser burden than a private plaintiff to obtain injunctive relief because it need not establish irreparable harm. *See, e.g., FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984); *New York v. Kraft Gen. Foods, Inc.*, 862 F. Supp. 1035, 1037 (S.D.N.Y. 1994). Third, none of the decisions Plaintiffs cite imposed a hold separate following the consummation of a transaction, let alone in circumstances like the present case where the Defendants have been engaged in post-closing integration for more than one month. (*See infra* pp. 19-20.)

[3] Under the Ninth Circuit's "serious questions" formulation of the preliminary injunction standard, a preliminary injunction may issue when there are "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). While this test allows a court to apply a limited "sliding scale" approach, it does not absolve a plaintiff of the burden to make an adequate showing regarding *each* element of the *Winter* test. *See id.* at 1134-35; *Dish Network*, 653 F.3d at 776.

[4] *See* Notice of Motion and Motion, and Memorandum of Points and Authorities in Support of Defendants ABI's and Modelo's Motion to Dismiss Plaintiffs' Second Amended and Supplemental Complaint, ECF No. 66, at 12-24 ("MTD Brief").

Act must fail for the simple reason that ABI *is not acquiring Modelo's U.S. business*.[5] In fact, the transactions decrease concentration in the alleged U.S. beer market and, therefore, if anything, are procompetitive. In a futile attempt to circumvent this reality, Plaintiffs contend that Constellation's acquisition of Modelo's U.S. business is "fraudulent" because ABI will control both Constellation and that business. But as the Court previously recognized in denying Plaintiffs' TRO Motion, Plaintiffs have no evidence to sustain this untenable allegation.

1. Legal Standard Under 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.* And where, as here, the alleged violation relates to a purported horizontal merger between competitors, establishing a prima facie Section 7 violation requires "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 (alterations in original) (citations omitted) (internal quotation marks omitted).

[5] Plaintiffs' SAC also alleges that ABI and Constellation have entered, or will enter into, a price-fixing conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (SAC ¶¶ 10, 22, 32, 35, 50, 98, 108, 119.) While it does not appear that Plaintiffs rely on their Section 1 claim for purposes of this Motion, they plainly cannot obtain their requested relief on the basis of this meritless claim. Plaintiffs have failed to meet their burden to *plead* any evidentiary facts—let alone provide *actual evidence*—supporting the existence of the alleged price-fixing conspiracy, including the time when, or place where, the parties entered into this agreement. Accordingly, Plaintiffs' Section 1 claim cannot survive a motion to dismiss. (*See* MTD Brief at 17-18.) Similarly, Plaintiffs' allegations that Defendants have violated the Tunney Act—under which there is no private cause of action—and certain unnamed "State statutes allowing suit by both direct and indirect purchasers" cannot provide a basis for any relief. (*See id.* at 19, 25.)

2. ABI Has Not Acquired Modelo's U.S. Business, and the Transactions Decrease Concentration in the Alleged U.S. Beer Market

Plaintiffs' Section 7 claim necessarily fails because ABI has not acquired "the whole or any part" of Modelo's U.S. business. Instead, post-transactions, Constellation controls Modelo's brands and the supply of Modelo beer in the United States. As the DOJ explained, the ABI-Constellation transaction "preserves the current structure of the beer market in the United States" because Constellation will be "an independent and economically viable competitor that will stand in the shoes of Modelo." (CIS at 10.) Given that the transactions do not even combine competitors in the sale of beer in the United States, there is no basis for Plaintiffs' claim that the transactions increase market concentration (SAC ¶¶ 73, 76, 78, 81-82)—let alone that they can establish a presumptive Section 7 violation.[6]

Indeed, the transactions *decrease concentration* in the U.S. beer industry. ABI—through its ownership interest in Modelo—historically held an indirect financial interest in Crown and an overall 34% interest in the profits received from the sale of Modelo beers in the United States. (Rubinfeld Decl. ¶ 9 n.3.) Post-transactions, ABI no longer has any financial interest in Crown, nor does it have any board representation, voting rights or other governance involvement in Crown. Instead, Crown (under the sole ownership of Constellation) is completely independent from ABI. As the DOJ recognized, the transactions "eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." (CIS at 2.) Basic economic analysis confirms that the transactions are competitively neutral or procompetitive. For example, the transactions have *lowered* the U.S. beer industry HHI[7] by nearly 90 points. (Rubinfeld Decl. ¶ 16.)

[6] Plaintiffs' argument that the Supreme Court's decision in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), established "[t]he law governing this case" (Motion at 14) plainly is wrong because in that case—unlike here—the transaction combined "two very large brewers" and resulted in an increase in market concentration. *Pabst*, 384 U.S. at 551.

[7] The Herfindahl-Hirschman Index, or HHI, is a measure of market concentration calculated by summing the squares of individual competitors' market shares within a market. Measuring concentration in this manner gives proportionally greater weight to competitors with larger shares. A post-transaction increase in HHI indicates that a transaction will increase a market's concentration, while a decrease in HHI indicates a decrease in concentration. (Rubinfeld Decl. ¶ 14.)

Thus, by eliminating ABI's interest in Crown and creating a significant, independent competitor in Constellation, the transactions, if anything, *increase competition* in the sale of beer in the United States.

3. Plaintiffs' Allegations That ABI Will Control Constellation Are Baseless

In an effort to overcome the insurmountable defects in their Section 7 claim, Plaintiffs allege that ABI effectively will acquire Modelo's U.S. business because Constellation's acquisition of these assets is "fraudulent." (SAC ¶¶ 30, 50, 101.) They claim that Constellation "will be ABI's puppet during at least the three-year 'transition' period" and that ABI will force Constellation to increase beer prices and diminish beer quality.[8] (Motion at 8, 13.)

Plaintiffs' Motion provides no explanation—let alone evidence—explaining how ABI will control Constellation, or compel it to raise prices or reduce quality of Modelo-branded beers. Nor do Plaintiffs even purport to offer any new arguments in support of this theory that they did not present at the TRO hearing, where this Court held that they failed to establish that the sale of Modelo's U.S. business to Constellation was a sham transaction. (TRO Hr'g Tr. at 56:22-57:1.)

Plaintiffs repeatedly cite the TSA and the ISA as alleged support for their claim that ABI will control Constellation. (Motion at 8, 13, 14, 16.)[9] But these are the very same agreements that the DOJ concluded would allow Constellation and Crown to operate *independently* in the near term. (CIS at 13 ("The proposed Final Judgment provides for or incorporates agreements protecting Constellation's ability to operate and expand the Piedras Negras Brewery while actively competing in the United States.").) There is no mechanism in these agreements that would enable ABI to control Constellation's beer prices or quality. In fact, the agreements require ABI, at Constellation's option, to supply Constellation with beer and input products at pre-determined prices during the transition supply period. (*See supra* pp. 3-4.) Further, the proposed Final

[8] Constellation, the alleged "puppet," is a major, worldwide beer and alcohol producer that has considerable industry experience and financial resources. (Hetterich Decl. in Support of Constellation's Opposition to Plaintiffs' TRO Motion, ECF 47-3, ¶¶ 10-14.)

[9] Plaintiffs also relied heavily on the existence of these agreements in support of their unsuccessful TRO Motion and they were discussed at length at the TRO hearing. (TRO Hr'g Tr. at 19:24-21:7; 22:9-13; 23:16-20; 27:3-15; 43:23-44:18; 51:11-51:25.)

Judgment prohibits any contractual terms that would allow ABI to limit supply or unreasonably raise Constellation's costs. (*See supra* p. 4.)[10] Plaintiffs simply do not (and cannot) offer any evidence to support their claim that ABI will control Constellation, or cause it to raise prices or reduce quality of Modelo-branded beers.

Plaintiffs' Motion makes clear that, at bottom, they simply would have preferred if Constellation had not acquired full ownership of Crown and that Modelo had retained its 50% interest. (Motion at 13, 16-17; *see also* SAC ¶¶ 19-20, 30, 92-94, 99-100, 102-03.) But 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.[11] "In a challenge to a horizontal merger, a private plaintiff must show that it 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); *see also* MTD Brief at 16-17. Here, Constellation's acquisition of Modelo's 50% interest in Crown cannot violate Section 7 because Constellation and Modelo were not competitors.[12]

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[10] In this motion, Plaintiffs do not contend—as they do in the SAC—or purport to offer evidence that ABI will pay the employees of Piedras Negras. In any event, under the terms of the proposed Final Judgment, Constellation—not ABI—will control operations and employee compensation at the Piedras Negras brewery. (*See supra* p. 4.)

[11] In any event, Plaintiffs do not even purport to offer evidence supporting their allegations that Constellation lacks the financial wherewithal or experience to be a successful brewer. (Motion at 8, 13.) Similarly, Plaintiffs have no evidentiary support for their claim that Constellation will follow price increases by ABI; instead, Plaintiffs only point to their own allegations in the SAC and the DOJ's complaint challenging Defendants' *original, superseded transactions*. (*Id.* at 16.) To the extent Plaintiffs seek to rely on pre-transactions documents cited in the DOJ complaint (*id.* at 7), they fail to account for the obvious change in incentives Constellation has experienced as a result of its acquisition of a long-term interest in the Modelo brands and a beer brewery. (CIS at 10 (DOJ concluded that, post-transactions, Constellation will have the "incentive to resist following ABI's price leadership in order to expand share.").)

[12] Plaintiffs' suggestion—relying on *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973)—that the transactions will eliminate Constellation as a potential competitor in the U.S. beer market (Motion at 14-15) appears nowhere in the SAC, is unsupported by any evidence and is contrary to Plaintiffs' allegations that "Constellation is not a beer brewer," "has no experience running a significant brewery" and "lacks the financial wherewithal" to purchase the assets it acquired through its transaction with ABI. (SAC ¶¶ 30, 102-03.) Accordingly, this theory cannot provide a basis for Plaintiffs' requested relief. *See Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 950-51 (E.D. Mo. 2009) (dismissing potential competition claim, and distinguishing *Falstaff*,

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B. Plaintiffs Cannot Establish Any Likelihood of Immediate, Irreparable Harm

In order to obtain preliminary injunctive relief, including a hold separate, "a plaintiff must *demonstrate* immediate threatened injury as a prerequisite." *Caribbean Marine Servs., Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiffs cannot make this showing for at least three independent reasons. First, Plaintiffs have not provided any evidence of specific harm to the nine individual plaintiffs. Second, Plaintiffs fail to provide evidence of any harm that would not be compensable in monetary damages. Third, Plaintiffs' substantial delay in moving for their requested relief weighs heavily against any finding of immediate, irreparable harm.

1. Plaintiffs Have No Evidence of Specific Irreparable Harm to Themselves

Plaintiffs cannot meet their burden to demonstrate irreparable harm because they have failed to present any evidence of injury specific to the nine individual plaintiffs. In order to obtain injunctive relief, it is well-established that plaintiffs must prove a likelihood of harm to *themselves*. *See Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir. 1985) ("To the extent that irreparable injury is required for the issuance of a preliminary injunction, that injury must be suffered by a party seeking relief."); *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at *13 (N.D. Cal. Sept. 27, 2010) ("In evaluating plaintiffs' purported irreparable harm . . . , the Court must only consider those injuries plaintiffs advance that are personal to them were defendants to merge, and cannot consider any injuries that plaintiffs allege would be suffered by the general . . . public as a whole."), *aff'd*, 434 F. App'x 620 (9th Cir. 2011).

The decision in *Malaney* is instructive. In that case, forty-nine individual plaintiffs sought to enjoin an airline merger. *See Malaney*, 2010 WL 3790296, at *1. The plaintiffs submitted identical affidavits stating that they had purchased air travel in the past and anticipated doing so in the future, and that they further anticipated that the proposed merger would result in, *inter alia*, higher prices and reduced consumer choice and quality of service. *See id.* at *2. The court held

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where plaintiffs failed to allege any facts regarding brewer's likelihood of entry into the U.S. beer market), *aff'd*, 623 F.3d 1229 (8th Cir. 2010).

that plaintiffs' evidence was insufficient to meet their burden to demonstrate irreparable harm. *See id.* at *13-14. As the court explained:

> While each plaintiff provided an affidavit stating an unformed hope of future air travel, this speculative and *de minim[i]s* injury . . . is insufficient to establish irreparable harm or tip the scale in plaintiffs' favor. Although plaintiffs allege . . . that this merger will adversely affect consumer choice and purchasing power by resulting in increased airfares, decreased capacity, poorer service, and a constraint on the ability of other network carriers to compete . . . , they still must establish that these alleged effects will be personal to them. They have not done so. Simply put, plaintiffs have not demonstrated in any way that they themselves will suffer any specific harm were preliminary relief denied.

Id. at *14 (citations omitted).

Similarly here, Plaintiffs have not met their burden to provide evidence that the nine individual plaintiffs will suffer harm absent the requested relief. Plaintiffs claim that they face irreparable harm because of (1) "the difficulty in unscrambling an anticompetitive merger" and (2) that the Defendants' transactions "will result in a lessening of competition." (Motion at 15-16.) But these wholly conclusory allegations do not provide evidence of any specific harm to the individual plaintiffs themselves.[13]

In their only apparent attempt to present evidence of harm to themselves, Plaintiffs have submitted identical declarations signed by six of the nine plaintiffs. (*Id.* at 15.) Each declaration states—in a purely conclusory manner—that the declarant "anticipates" (1) purchasing ABI and Modelo brands in the future and (2) that the ABI-Modelo transaction will result in price increases, less innovation and reduced beer quality. (Decl. of William Stage ¶¶ 3-4; Decl. of Sharon Martin ¶¶ 3-4; Decl. of Martin Ginsburg ¶¶ 3-4; Decl. of Barry Ginsburg ¶¶ 3-4; Decl. of Mark Naeger ¶¶ 3-4; Decl. of Dan Sayle ¶¶ 3-4.) But the declarants do not even assert that they expect to

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[13] Citing Justice O'Connor's opinion in *California v. Am. Stores Co.*, 492 U.S. 1301, 1305 (1989), Plaintiffs wrongly contend that "an adequate showing of . . . lessening of competition" would be sufficient to meet their burden to establish irreparable harm. (Motion at 16.) That decision did not jettison the well-recognized requirement that plaintiffs seeking injunctive relief must demonstrate threatened harm to themselves. Indeed, Justice O'Connor expressly relied on the State of California's evidence "that permitting the merger would cost the State's consumers $400 million a year." *Am. Stores*, 492 U.S. at 1307; *see also California v. Am. Stores Co.*, 495 U.S. 271, 296 (1990) (recognizing that a private litigant "must prove 'threatened loss or damage' to his own interests in order to obtain relief" under Section 16 of the Clayton Act).

suffer injury as a result of the merger, or explain how the alleged effects of the transaction would impact them personally. Further, the declarants have no expertise to opine on the competitive effects of the transaction, and their testimony on this subject—which also has no factual basis—carries no weight. Thus, Plaintiffs' declarations cannot satisfy their burden to demonstrate specific threatened harm to themselves that would result if their requested relief were denied.[14]

2. Plaintiffs Provide No Evidence of Any Alleged Harm That Would Not Be Compensable in Monetary Damages

Plaintiffs also cannot establish irreparable harm because they present no evidence of any injury that would not be compensable in monetary damages. Plaintiffs repeatedly allege that the transactions will result in higher beer prices. (*See, e.g.*, Motion at 8 (alleging that "ABI will 'teach' Constellation how to . . . increase beer prices"); *id.* at 9 (alleging that Plaintiffs "are significantly threatened with loss or damage in the form of higher beer prices").) Such injury—which Plaintiffs do not have any evidence to establish—plainly would be compensable in monetary damages and, therefore, not irreparable. *See 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.").

Plaintiffs' Motion also alleges that "[u]nder the direction of ABI . . . , Modelo-branded beer will be reduced in quality and innovation." (Motion at 16.) To support this allegation, Plaintiffs offer purported evidence relating to claims that the quality of ABI's products has diminished in recent years. (*Id.*) But Plaintiffs' "evidence" is irrelevant because Constellation—not ABI—controls the brewing and distribution of Modelo-branded beer sold in the United States, and Plaintiffs have no evidence to support their allegation that ABI will control Constellation.[15] (*See*

[14] In any event, the declarants' speculation regarding the effects of the *ABI-Modelo merger* cannot justify the hold separate order Plaintiffs seek, as that requested relief would not affect the already-consummated ABI-Modelo transaction.

[15] Plaintiffs' "evidence" of diminished quality principally consists of *allegations* in ongoing litigation accusing ABI of "water[ing] down its products." (Motion at 5.) Plaintiffs falsely assert that ABI does not dispute these claims (*id.*), citing an ABI court filing that merely explained that, consistent with federal law, the alcohol content of ABI's products may vary within certain limits. (*See* Alioto Decl., Ex. G, Anheuser-Busch Companies LLC's Opposition to Plaintiffs' Motion for *(cont'd)*

supra pp. 13-14.) Accordingly, the purported harms to beer quality and innovation are too speculative to satisfy Plaintiffs' burden to establish irreparable injury.[16] *See, e.g., Caribbean Marine Servs.*, 844 F.2d at 674 ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."); *Bell Atl. Bus. Sys., Inc. v. Storage Tech. Corp.*, No. C-94-0235 MHP, 1994 WL 125173, at *3 (N.D. Cal. Mar. 31, 1994) ("[A] showing of irreparable harm to competition requires the production of probative evidence.").

3. Plaintiffs' Delay in Seeking Their Requested Relief Weighs Heavily Against a Finding of Immediate, Irreparable Harm

Finally, the Ninth Circuit has recognized that a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (citing *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("'A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action.'" (citation omitted)). District courts in this Circuit routinely deny requests for injunctive relief when the plaintiff has delayed filing suit or seeking provisional relief. *See, e.g., Aniel v. GMAC Mortg., LLC*, No. C 12-04201 SBA, 2012 U.S. Dist. LEXIS 138555, at *22-23 (N.D. Cal. Sep. 26, 2012) (plaintiffs' delay of over three months in filing TRO weighed against granting relief); *Baker v. Ark. Blue Cross*, No. CV 08–3974 SBA, 2009 WL 764885, at *2 (N.D. Cal. Mar. 19, 2009) (same).

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Transfer Pursuant to 28 U.S.C. § 1407, at 8 ("A-B acknowledges that many of the products identified by Plaintiffs do not have the precise ABV stated on the label to the last decimal point. Some have more; most have less. But all are within the legally allowed variance of 0.3% over or under the ABV stated on the label.")).)

[16] Plaintiffs' reliance on *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), to argue that the transaction will harm "national advertising" is inapposite. (Motion at 14.) That decision involved conspiracy and monopolization claims brought under Sections 1 and 2 of the Sherman Act and is irrelevant to Plaintiffs' claim under Section 7 of the Clayton Act. *See Am. Tobacco*, 328 U.S. at 783. In any event, Plaintiffs do not even purport to provide evidence of threatened harm to competition in national advertising; nor do they explain how such harm would impact the nine individual plaintiffs.

Here, Plaintiffs filed this Motion a *full year* after Defendants first publicly announced their original transactions, and more than three months after Plaintiffs filed their initial complaint. When the Court denied Plaintiffs' TRO Motion on June 4, it noted that Plaintiffs had "knowledge that this merger was in the offing for quite some time" and that the "last-minute situation here . . . might have been avoided." (TRO Hr'g Tr. at 58:20-24.) Yet, once again, Plaintiffs have delayed seeking relief. Despite knowledge that Defendants' transactions would be fully consummated by June 7 (*id.* at 7:8-15), Plaintiffs still waited three weeks—during which time integration has been ongoing (*see infra* § II.C)—after the transactions closed to file this Motion. Plaintiffs offer no justification for their repeated delays, which clearly "impl[y] a lack of urgency and irreparable harm." *See Oakland Tribune*, 762 F.2d at 1377.

For each of these reasons, Plaintiffs cannot demonstrate that they will suffer immediate, irreparable harm.

C. <u>The Balance of Equities Does Not Tip in Plaintiffs' Favor</u>

As stated above, Plaintiffs' Motion does not seek relief that would affect ABI or Modelo because the hold separate provisions of the Stipulation and Order have expired, and the assets already are "held separate" from ABI and Modelo. (*See supra* pp. 8-9.) Since the transactions closed, ABI has taken significant steps to integrate Modelo's non-U.S. business into its own. For example, ABI has announced a new management team to run the acquired Modelo assets and renegotiated procurement and supply contracts based on the new requirements of the combined company. (*See* Golden Decl. ¶¶ 12-13, 15.) ABI has started to update and conform Modelo's operations to its own and has engaged in marketing and sales initiatives with respect to Modelo products outside the United States. (*Id.* ¶¶ 15-20.) As a result, any relief impeding ABI's integration with Modelo would cause significant harm to ABI and Modelo of the types courts consider when evaluating whether to issue injunctive relief.[17] *See Ginsburg v. InBev SA/NV*, No.

[17] If Plaintiffs later sought such relief, though not requested here, ABI and Modelo reserve all rights to respond. Of course, a request for that relief would be contrary to Plaintiffs' current claim that they only seek to "maintain the status quo" and "avoid the well-recognized problem of 'unscrambling the assets.'" (Motion at 3, 11.) ABI's acquisition of Modelo closed more than one *(cont'd)*

4:08CV01375 JCH, 2008 WL 4965859, at *5 (E.D. Mo. Nov. 18, 2008) (discussing harm to shareholders that would result from granting injunctive relief); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1173 (C.D. Cal. 2000) (evidence of $45 million already spent on integration weighed against injunctive relief).

In contrast, as discussed above, Plaintiffs have failed to offer any evidence of specific harm that they would suffer absent their requested relief. (*See supra* pp. 15-17.) And Plaintiffs' allegations regarding harm to other "consumers of beer in the United States" are irrelevant. (Motion at 18.)[18] Only harm specific to the nine individual plaintiffs is relevant to the balance of the equities. *See Malaney*, 2010 WL 3790296, at *13. The balance of equities therefore weighs decidedly in favor of Defendants.

D. Injunctive Relief Would Not Be in the Public Interest

Any injunctive relief disrupting Defendants' transactions would be counter to the public interest. As previously explained, Defendants' transactions, if anything, will *increase* competition in the U.S. beer industry. (*See supra* pp. 12-13.) Because, as Plaintiffs themselves note, "competition best serves the public" (Motion at 19), any relief that would deprive the public of this increased competition should be denied.

Moreover, given Plaintiffs' failure to demonstrate any plausible harm to themselves (*see supra* pp. 15-17), the public interest further militates against granting them relief. *See Ginsburg*, 2008 WL 4965859, at *6 (recognizing the Court's "strong interest in preserving free operation of the nation's markets and insuring that it does not unduly restrain free enterprise . . . where Plaintiffs have failed to demonstrate that there will be any real, palpable harm to Plaintiffs").

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month ago and significant integration already has occurred and is ongoing. ABI's assets have been "scrambled" with the acquired Modelo non-U.S. assets.

[18] Plaintiffs misleadingly cite Justice O'Connor's opinion in *American Stores* to suggest that purported harms to consumers other than the nine individual plaintiffs are relevant to balancing the equities in this case. (Motion at 18.) In *American Stores*, Justice O'Connor considered the estimated harm of $400 million a year to California's consumers because the State itself had filed a *parens patriae* action on behalf of its citizens. *See Am. Stores*, 492 U.S. at 1302, 1307. Here, Plaintiffs have sued solely on behalf of the nine individual plaintiffs and, therefore, cannot rely on alleged injury to any other consumers.

E. Plaintiffs Must Post a Bond To Obtain Injunctive Relief

Finally, Plaintiffs should be required to post a bond to receive any injunctive relief that would impede integration of Modelo's U.S. business into ABI. The "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c); *see also Momento, Inc. v. Seccion Amarilla USA*, No. C 09-1223 SBA, 2009 WL 1974798, at *5 (N.D. Cal. July 8, 2009). In addition, the Clayton Act requires "the execution of proper bond against damages for an injunction improvidently granted" when a private plaintiff is granted injunctive relief in an antitrust suit. 15 U.S.C. § 26. The amount of the bond should be "'what the court deems sufficient to cover losses and damages incurred or suffered by the party enjoined if it turns out that the injunction should not have been granted.'" *AT&T Commc'ns of Cal. v. Pac. Bell*, No. C 96-1691 SBA, 1996 WL 940836, at *11 (N.D. Cal. July 3, 1996) (citation omitted), *aff'd sub nom. AT&T Commc'ns, Inc. v. Pac. Bell*, 108 F.3d 1384 (9th Cir. 1997).

ABI and Modelo have spent over one year and millions of dollars working toward the closing of their merger and inevitably would incur substantial losses if their global integration were delayed by any form of injunctive relief. (Golden Decl. ¶¶ 21-25.) In light of the significant harm that ABI and Modelo would incur, this Court should require Plaintiffs to post a bond of at least $250 million if it were to grant relief disrupting ABI's completed acquisition of Modelo.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

DATED: July 12, 2013

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BY:

/s/ Allen Ruby

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ECF CERTIFICATION

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this 12th day of July, 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 Ruby
Allen Ruby