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CONSTELLATION BRANDS, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

ANHEUSER-BUSCH InBEV SA/NV, GRUPO MODELO S.A.B. de D.V., and CONSTELLATION BRANDS, INC.,

Defendants.

Case No. C-13-1309 MMC

Assigned to Hon. Maxine M. Chesney

DEFENDANT CONSTELLATION BRANDS, INC.'S OPPOSITION TO MOTION FOR INJUNCTION SEEKING "HOLD SEPARATE" ORDER

DATE: August 2, 2013
TIME: 9:00 a.m.
JUDGE: Hon. Maxine M. Chesney

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INTRODUCTION

Plaintiffs' requested hold separate is nonsensical in that it would require Anheuser-Busch InBev NV/SA ("ABI") to "hold separate" assets that it does not hold at all because it divested them. Further, it is moot because the hold separate it seeks to enforce expired upon that very same divestiture.

In response to a merger challenge from the Department of Justice Antitrust Division ("DOJ"), Defendants revised their agreements to enable Constellation Brands, Inc. ("Constellation") to acquire the entire U.S. business of Grupo Modelo S.A.B. de C.V. ("Modelo") and resolve DOJ's concerns. That settlement, once entered by the United States District Court for the District of Columbia ("D.D.C."), permitted ABI to complete its acquisition of Modelo but ordered that ABI "hold separate" the assets comprising the U.S. business of Modelo until they could be divested to Constellation. Now that the divestiture has occurred and Constellation owns the assets, there is nothing left to hold separate.

The Plaintiffs' Motion for Injunction Seeking "Hold Separate" Order ("Motion") further requests enforcement of the hold separate order entered by D.D.C. as part of the settlement to the DOJ challenge. That required relief is now moot. By its terms, that order's hold separate requirements remained in force only until the assets were sold to Constellation. That order's requirements operate in the same manner as all hold separate orders routinely entered in the context of merger challenges. Plaintiffs' failure to observe the plain reading of D.D.C.'s order, or to heed decades of merger enforcement practice, needlessly burdens this Court with a request that cannot be granted.

Plaintiffs fail to meet the legal standards to secure a hold separate. The Court repeatedly pointed to Plaintiffs' deficiencies at the hearing on Plaintiffs' Motion for a Temporary Restraining Order ("TRO"). As the Court stated, "At this time we have what is on its face a legitimate transaction that does not result in ABI acquiring the U.S. distribution of competing

beer" (Ex. 1, TRO Hr'g Tr.56:18-20, June 4, 2013) and that the Plaintiffs must overcome a "difficult hurdle" to show otherwise (Ex. 1, Hr'g Tr. 56:2.1). Plaintiffs did not make any showing that the divestiture transaction was a fraud or sham during the TRO hearing, and without such showing Plaintiffs' had no likelihood of success. Plaintiffs still do not offer any evidence showing they have met *any* of the elements required to obtain injunctive relief.

STATEMENT OF THE ISSUES TO BE DECIDED

Where the assets that are the subject of Plaintiffs' Motion for Injunction Seeking "Hold Separate" already have been divested and where that Motion fails to meet any of this Court's requirements for injunctive relief, should Plaintiffs' Motion be denied summarily?

STATEMENT OF FACTS

On June 29, 2012, Defendants announced a set of transactions whereby ABI would have acquired the remainder of Modelo that it did not own already, and Constellation would acquire Modelo's interest in the entity wholly and solely responsible for importation and sale of Modelo's beer in the United States, Crown Imports LLC ("Crown"). (Second Amended and Supplemental Compl. ("SAC"), ECF. No. 63, ¶ 27.) This set of transactions was investigated by DOJ for seven months. On January 31, 2013, DOJ sued to block ABI's acquisition of Modelo alleging the acquisition would violate Clayton Act § 7. (SAC ¶¶ 28 and 49.)

On February 14, 2013, ABI and Constellation announced a restructured transaction whereby Constellation would acquire not only Modelo's interest in Crown, but also a perpetual license to sell the Modelo brands in the United States and a brewery, Piedras Negras, (collectively the "Divestiture Assets") so that Constellation could self-supply. (SAC ¶¶ 28, 29.) After an additional two months of investigation, on April 19, 2013, DOJ, ABI, Modelo, and Constellation announced a settlement of DOJ's litigation, by which DOJ approved the restructured transaction documents in substantially the same form in which ABI and Constellation negotiated them.

United States v. Anheuser-Busch InBev SA/NV, No. 13-127 (D.D.C. filed Apr. 19, 2013), ECF Nos. 29-31.[1]

The settlement with DOJ aims to "preserve[] the current structure of the beer market in the United States by maintaining an independent brewer with an incentive to resist ABI's price leadership to expand share" through the creation of "an independent and economically viable competitor that will stand in the shoes of Modelo in the United States." (Ex. 2, Competitive Impact Statement ("CIS") 10.) To effectuate this purpose, the proposed Final Judgment ("PFJ") seeks, among other things, "the prompt and certain divestiture" of the U.S. Modelo business and obligates ABI "to use its best efforts to divest the Divestiture Assets as expeditiously as possible" (Ex. 3, PFJ Preamble and IV.B.) Further, the Stipulation and Order explicitly stated that Defendants' "Hold Separate and Asset Preservation," obligations, specified in Sections VI, VII, VIII, and IX, were to remain in effect until ABI completed the sale of the Divestiture Assets or until further order of D.D.C. (Ex. 4, Stipulation and Order ("S&O") Section X.)

ABI completed its acquisition of Modelo on June 4, 2013. (Ex. 5, Hetterich Decl. ¶ 8.) ABI sold the Divestiture Assets to Constellation on June 7 (Ex. 5, Hetterich Decl. ¶ 9), thereby terminating the Hold Separate and Asset Preservation obligations of the Stipulation and Order (Ex. 4, S&O X).

Since June 7, Constellation has begun integration of the newly acquired assets. (Ex. 5, Hetterich Decl. ¶¶ 12-17.) The former Modelo and Crown personnel are being transferred to

[1] The settlement documents, including the Competitive Impact Statement, proposed Final Judgment, Stipulation and Order, and Revised Agreements, filed in D.D.C., were attached as Exhibits 1 through 4 to the Alberti Declaration, which was included with Constellation's Request for Judicial Notice filed in connection with its Motion To Dismiss the SAC. (ECF No. 64.) As explained more fully in the Request for Judicial Notice, the Court may take judicial notice of these documents because they are official government documents of public record and are directly related to the allegations in the SAC. *See In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1108 (N.D. Cal. 2012); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *17-18 (N.D. Cal. Sept. 8, 2008). Constellation therefore respectfully asks this Court to take judicial notice of the settlement documents, including the revised transaction agreements.

Constellation's compensation and benefits plans. (*Id.* at ¶ 12.) Constellation has commenced integration of all back-office activities across the entire combined company, including information technology, financial reporting, cash management and other treasury functions, procurement, and other supply chain activities. (*Id.* at ¶ 14.) Constellation has established a new organizational structure, and has taken irreversible steps that affect its tax obligations going forward. (*Id.*) Constellation has begun operating the Piedras Negras brewery, including activities related to its expansion in compliance with the PFJ. (*Id.* at ¶¶ 16-17.) Moreover, Constellation is managing the Divestiture Assets free of influence from ABI to ensure their vigorous competition in the U.S. beer industry. (*Id.* at ¶¶ 18-24.)

Constellation's actions come as no surprise to Plaintiffs given the well-publicized nature of the ABI/Constellation transaction. Despite the months of press following the June 2012 announcement of the initial set of transactions, Plaintiffs delayed filing this case until March 2013, more than a month after the restructured transaction was announced. (ECF No. 1.) Plaintiffs delayed nearly five weeks more before filing the First Amended Complaint ("FAC") in which they first named Constellation as a Defendant. On June 3, 2013, Constellation and ABI/Modelo moved to dismiss the FAC; later that same evening Plaintiffs filed a Motion for a TRO. (ECF Nos. 40-43.)

By the time of the hearing on Plaintiffs' TRO ("TRO hearing") on June 4, the ABI/Modelo transaction had closed that morning and the parties were operating under the Hold Separate and Preservation obligations of the Stipulation and Order. (Ex. 5, Hetterich Decl. ¶ 9; Ex. 4, S&O VI-X.) Plaintiffs knew that the ABI/Modelo transaction had closed and noted during the hearing that the sale of the Divestiture Assets to Constellation was scheduled for June 7. (Ex. 1, Hr'g Tr. 7:8-15.) However, Plaintiffs waited to file this Motion until June 28, the same day that Defendants filed Motions to Dismiss the SAC, which had been filed three days earlier. (ECF Nos. 63-68.)

The hearing date for Plaintiffs' Motion is August 2, nearly two months after the completion of Constellation's acquisition of the Divestiture Assets and the termination of the Hold Separate and Preservation obligations from *United States v. Anheuser-Busch InBev SA/NV*. (ECF No. 60.)

ARGUMENT

Because of objections to ABI's acquisition of Modelo's U.S. business, DOJ required ABI to hold separate Modelo's U.S. business between the time of ABI's acquisition of Modelo and the divestiture of that business to Constellation. The purpose of D.D.C.'s hold separate was to isolate and preserve Modelo's U.S. business until the divestiture to Constellation could be accomplished. Ordering a hold separate allows a primary transaction to close while allowing for an efficient future divestiture. In situations where, as here, the assets already have been divested by the firm whose acquisition raised potential competitive concerns, a hold separate is nonsensical.

I. PLAINTIFFS' MOTION FOR A HOLD SEPARATE ORDER IS UNTIMELY AND AN INAPPROPRIATE FORM OF RELIEF.

As with their earlier TRO application, Plaintiffs seek relief to which they are not entitled. A hold separate has no operative effect when the contested assets have already been divested. Plaintiffs here ask the Court to impose an order requiring Defendants to comply with the hold separate provisions of the D.D.C. when Defendants have already completed their hold separate obligations under that order by completing the sale of the Divestiture Assets to Constellation. Even if a hold separate were an appropriate and available form of relief, Plaintiffs again fail to meet the standard for securing injunctive relief.

A. A Hold Separate Would Be Ineffectual.

A hold separate order is "in form and effect a *preliminary* restraint," that permits a challenged transaction to go forward while preserving certain acquired assets as a separate and

independent entity. *FTC v. Weyerhaeuser*, 665 F.2d 1072, 1075 n.7, 1084 (D.C. Cir. 1981) (emphasis added).

In a pending litigation, a hold separate allows a proposed transaction to close while maintaining certain acquired assets as a viable competitor managed independently from the acquirer's competing business, so that they may be divested effectively should the plaintiff ultimately prove that the buyer's acquisition and operation of the assets violates the law. *FTC v. Weyerhaeuser Co.*, 665 F.2d at 1075 n.7; *see e.g.*, *FTC v. Exxon Corp.*, 636 F.2d 1336, 1344 (D.C. Cir. 1980); *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 638 (C.D. Cal. 1976).

A hold separate is an appropriate form of relief where the challenged transaction has not yet been completed, the parties resist an antitrust challenge to their transaction, and the need for a divestiture of the overlapping assets creating the competitive areas of concern remains in question. ABI *already has sold* the entirety of that business to Constellation. Nothing remains to be "held" separate.

1. There is nothing for ABI to hold separate because it already divested Modelo's U.S. business.

Plaintiffs know that ABI completed its acquisition of Modelo and that Constellation completed its acquisition of Modelo's U.S. business. (Ex. 1, Hr'g Tr. 7:8-15 (Mr. Alioto: "We did receive and did see the news release that went out this morning [that the ABI/Modelo transaction settled.] However, in that very same news release it points out in the very last sentence that the related transaction with regards to Constellation, including the sale of the brewery, the 50 percent differential with Modelo, the stake in Crown, and the so-called perpetual rights are not expected to close until June the 7th, which would be in two or three days."); Ex. 5, Hetterich Decl. ¶¶ 8-9.) Yet, Plaintiffs' SAC and this Motion, both filed after the TRO hearing and the June 7 closing, fail to acknowledge Constellation's completed acquisition of Modelo's U.S. business. (SAC ¶ 3 at p. 30 ("the defendants have taken action to consummate their merger"); Motion 9:19-21

("Defendants have already taken steps to consummate their acquisition of Modelo and the Revised Agreement between ABI and Constellation.").) The Defendants have not just taken steps to consummate the merger—they have completed all of the steps: ABI acquired Modelo and sold the Divestiture Assets to Constellation.

In imprecisely recounting the facts, Plaintiffs hope to make available a hold separate as a form of relief by implying that ABI has not completed the divestiture to Constellation. Plaintiffs say that ABI *will sell* Crown to Constellation. (Motion 8:6-7.) The sale closed on June 7, 2013. Plaintiffs say that ABI *also will sell* Piedras Negras and the U.S. license to Constellation. (Motion 8:10-11.) This also closed on June 7. Plaintiffs say that ABI *will provide* services as required by the DOJ-approved Transition Services Agreement and Interim Supply Agreement. (Motion 8:12-21.) These services are underway. Despite these facts, Plaintiffs assert that a hold separate "would preserve the economic viability of [the Divestiture Assets] during the pendency of these proceedings" and "would make eventual divestiture a more feasible remedy." (Motion 12:10-14.) However, neither assertion holds because Plaintiffs omit the fundamental fact: ABI already has sold the Divestiture Assets to Constellation.

Perhaps recognizing that misstating the facts will not turn back the clock, Plaintiffs attempt to transform a hold separate into a time machine. Plaintiffs quote *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), in support of the proposition that a hold separate can "restore the *status quo ante*." (Motion 11:19-23.) However, the non-binding opinion in *Whole Foods* actually states that a hold separate is a means to preserve the *status quo nunc*. *Whole Foods*, 548 F.3d at 1034. The opinion recognized that courts "perhaps also [retain the power] to restore the *status quo ante*," through their *other* equity powers. *Id*.

Defendants agreed to divestiture to resolve DOJ's competitive concerns. The assets Plaintiffs seek to have held separate from ABI—Modelo's U.S. business—are permanently separate from ABI because they are now owned and controlled by Constellation. While it is

unclear what Plaintiffs are actually aiming to accomplish with the Motion, one legal principle is clear: given the procedural posture of the matter, a hold separate is not a form of relief available to Plaintiffs.

2. Plaintiffs Seek Compliance with Hold Separate Provisions That Are No Longer Operative.

Plaintiffs request that Defendants hold their assets separate and apart "as provided by" the obligations in Sections VI-X of the Stipulation and Order. (Motion 1:6-10.) Elsewhere, Plaintiffs request "a hold separate order as outlined in" the Stipulation and Order. (Motion 17:17-19.) Yet a plain reading of those sections shows Plaintiffs' fallacy: "Defendants' obligations under Section VI, VII, VIII and IX [the Hold Separate and Preservation Obligations] of this Stipulation and Order shall remain in effect until (1) consummation of the divestitures required by the proposed Final Judgment or (2) until further order of the Court." (Ex. 4, S&O X.) ABI and Constellation have fully consummated the sale of Modelo's U.S. business. (Ex. 5, Hetterich Decl. ¶ 9.) The provisions with which Plaintiffs are asking Defendants to comply are no longer operative, and the relief Plaintiffs seek is unavailable.[2]

B. Plaintiffs Once Again Fail to Meet the Standard for Injunctive Relief.

Plaintiffs already failed in their effort to secure a TRO because they did not meet their burden for injunctive relief. Even if a hold separate were an available form of relief at this point in time, Plaintiffs again fail to meet their burden.

As the Court stated at the TRO hearing, to obtain injunctive relief, Plaintiffs must make a "clear showing" that: (1) they are likely to succeed on the merits; (2) they are likely to suffer

[2] Any arguments by Plaintiffs suggesting that Defendants have not complied with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), otherwise known as the Tunney Act, are incorrect as a matter of law. Constellation explains the process of securing court approval of settlements in antitrust challenges to proposed transactions in more detail in its Motion to Dismiss the SAC. (ECF No. 64.) In short, the Tunney Act contains no prohibition to the consummation of the challenged transaction prior to entry of the Final Judgment.

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. *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008); (Ex. 1, Hr'g Tr. 56:3-8.) The Ninth Circuit follows a "sliding scale" approach that, while requiring that a plaintiff make a showing on all four *Winter* prongs, places emphasis on whether "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)); *see, e.g.*, *McCormack v. Hiedeman*, 694 F.3d 1004, 1016 n.7 (9th Cir. 2012); *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012); *AT&T Mobility LLC v. Bernardi*, Nos. C 11-03992 & C 11-04412, 2011 U.S. Dist. LEXIS 124084, at *10 (N.D. Cal. Oct. 26, 2011).

1. Plaintiffs mischaracterize the hold separate standard as something less than what is needed for preliminary injunctive relief.

Plaintiffs attempt to lower the standard for injunctive relief that they must meet by citing to three cases where hold separate orders issued "even when the plaintiff has failed to satisfy the standards for preliminary injunction." (Motion 10:17-19.) However, every case to which Plaintiffs cite predates the Supreme Court's decision in *Winter*. To obtain relief in the form of a hold separate, a plaintiff must satisfy the prerequisites for preliminary injunctive relief. *See California v. American Stores Co.*, 872 F.2d 837, 844 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990). If a plaintiff fails to meet the standard for injunctive relief as required by *Winter*, they cannot secure relief through a hold separate.

2. Plaintiffs have offered no new evidence that would entitle them to injunctive relief.

In denying the TRO, the Court found that Plaintiffs failed to show either a likelihood of success on the merits or that the balance of equities tipped in their favor. (Ex. 1, Hr'g Tr. 55:24-59:4.) Plaintiffs have not offered any new evidence to show that they would be successful on

either of those prongs. Moreover, Plaintiffs also fail to establish that denial of injunctive relief would result in irreparable harm and that a hold separate is in the public interest.

a. Plaintiffs have not shown a likelihood of success on the merits.

Plaintiffs fail to establish a likelihood of success on the merits of their Clayton Act § 7 claim. To establish a prima facie § 7 violation, Plaintiffs must show 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." *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) (citations and internal alterations omitted).

Plaintiffs' arguments that ABI's acquisition of Modelo shares violates § 7 is premised on the faulty conclusion that ABI—not Constellation—now controls Modelo's U.S. business. Furthermore, Plaintiffs' reliance on *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), is misguided. Far from being "on all fours," *Pabst* involved a completely different set of facts. There a beer brewer acquired a competitor resulting in a clear increase in concentration of beer suppliers in Wisconsin. *Id.* at 550-53. ABI did not acquire a U.S. beer business, so there has been no resulting increase in concentration.

Plaintiffs cannot meet their burden—and indeed are *unlikely* to succeed on the merits—as they have no evidence to support their allegation that ABI has acquired Modelo's U.S. business because Constellation's purchase of those assets was "fraudulent." During the TRO hearing, the Court readily observed Plaintiffs' inability to demonstrate a likelihood of success on the merits of their Complaint:

> I'm more concerned about the plaintiff's ability to show that [the ABI/Constellation transaction] is a sham transaction. If it is not, then the plaintiff would be hard-pressed to make the argument they're making as to the anti-competitive effect. And the plaintiff's entire case is based on a showing that the purchaser of the . . . U.S. distribution of Corona is a puppet, effectively, of Anheuser-Busch. And I'm not satisfied that that showing has been made to this point sufficient to meet the legal requirements for injunctive relief, which is what would be sought here.

(Ex. 1, Hr'g Tr. 10:21-11:7.) During an extended back-and-forth during which Plaintiffs continually failed to support their assertion of a "sham transaction," the Court summarized Plaintiffs' failure saying Defendants' "whole point is we unloaded this division so we wouldn't run into a problem and you are arguing it's not really unloading it. It just looks that way superficially. And then the question is: What facts do you have to show that?" (Ex. 1, Hr'g Tr. 35:17-20.)

Plaintiffs could not make their showing then and have not improved their showing since. Plaintiffs, instead, have filed the SAC and two additional motions. In none of the new papers have Plaintiffs offered any new facts in support of their assertions as to the validity of Constellation's ownership of Modelo's U.S. business.

What Plaintiffs have offered in support of their Motion does not bear on the question of whether Constellation is ABI's "puppet." Plaintiffs have cited to documents from a different litigation in support of the allegation that ABI waters down its beer. (Exs. D-G to Motion.) Plaintiffs have cited to a report from the American Antitrust Institute[3] (Ex. M to Motion) in support of a proposition regarding the cost and quality of ABI's beer over the last five years. (Motion 16:19-21.) Six of the Plaintiffs also offered declarations that, in addition to being substantively identical, consist of ultimate conclusions with no factual basis or demonstration that the declarants are competent to testify to their content. None of these offerings point to any facts showing that Constellation will be ABI's "puppet" or that Constellation will not operate Modelo's U.S. business independent of ABI.

Plaintiffs further weaken their likelihood of success through propositions that run contrary to the legal standard of their claims. The Motion directly undermines their Sherman Act § 1 claim

[3] At the TRO hearing, Plaintiffs pointed to the report's relaying of market share information for the U.S. beer industry. (Ex. 1, Hr'g Tr. 33:8-38:10.) The Court did not find the statistics informative, noting "The percentages themselves, in the absence of a showing of control of Constellation by ABI, again, is not necessarily problematic." (Ex. 1, Hr'g Tr. 35:14-16.)

when it seeks "to prohibit the anticipated price-fixing among Constellation, Modelo, and ABI." (Motion 6:3-4.) To properly assert a § 1 claim, a plaintiff must allege a preceding agreement to fix prices. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-47 (9th Cir. 2008) (quoting. *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 557 (2007)). Plaintiffs "are required to allege some 'further circumstance pointing toward a meeting of the minds'" to make their claim plausible. *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (citing *Twombly*, 550 U.S. at 557). Merely "anticipated" future conduct cannot form the basis for a § 1 violation. *Kendall*, 518 F.3d at 1047.

Plaintiffs continue to make no showing of likely success because they have not and cannot offer anything to show that the sale to Constellation was a sham.

b. Plaintiffs cannot show they will suffer irreparable harm if injunctive relief is denied.

Plaintiffs fail to meet the irreparable harm prong. Not only are Plaintiffs not able to identify any actual harm, but the vague harms to which they allude still do not merit injunctive relief.

After inexplicable delay in initiating this litigation and seeking relief from the Court and having already been denied injunctive relief in the form of a TRO, Plaintiffs' further delay in seeking preliminary injunctive relief undercuts their ability to satisfy their burden of showing irreparable harm. *See, e.g.*, *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("[A] long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Puruganan v. HSBC Bank USA, Nat'l Ass'n*, No. C 12-05168, 2012 U.S. Dist. LEXIS 162208, at *9–10 (N.D. Cal. Nov. 13, 2012) ("Plaintiffs' delay in seeking relief undermines their claim of irreparable harm. . . . While delay in seeking a TRO is not dispositive, it certainly militates against any claim of urgency . . . [and is] relevant in determining whether relief is truly necessary.") (citation and internal quotation marks omitted).

Plaintiffs make a baseless and unfounded assertion that the ABI/Modelo transaction will result in "hundreds of millions of dollars of additional cost to Plaintiffs and consumers of beer in the United States." (Motion 18:1-3.) The wholly deficient declarations of six Plaintiffs do not provide a factual basis for such an extreme allegation. Further, Plaintiffs can only assert harm for themselves and not for unknown consumers. *See Malaney v. UAL Corp.*, No. 3:10-CV-02858, 2010 WL 3790296, at *13 (N.D. Cal. Sept. 27, 2010) (citing *United States v. Borden Co.*, 347 U.S. 514, 518 (1954)). Even if Plaintiffs were able to show money damages, the appropriate relief would be monetary and not injunctive.

The Motion's first articulated harm is that "threat of irreparable harm arises from the difficulty in unscrambling an anticompetitive merger." (Motion 15:17-18.) This is not an actual harm but a *threat* of one. Moreover, a hold separate here would not remedy this claim. There is no threat of the "eggs"—Modelo's U.S. business—being "scrambled" with ABI. Those were transferred to Constellation.

c. The balance of equities tips in Constellation's favor.

The balance of equities favors Constellation even more now than it did over five weeks ago when the Court denied the TRO. After seven months of investigation into the initial transaction, and two additional months of investigation of the restructured transaction, DOJ approved Constellation as the buyer of the Divestiture Assets. Constellation "promptly" acquired those assets on June 7, 2013. (Ex. 4, S&O II.A; Ex. 3, PFJ Preamble and IV.B; (Ex. 5, Hetterich Decl. ¶ 9.)

Constellation has begun fully integrating Crown and the Piedras Negras brewery into its corporate structure. (Ex. 5, Hetterich Decl. ¶¶ 12-17.) It has commenced integration of all back-office activities across the entire combined company. (*Id.* at ¶ 14.) Constellation has established a new organizational structure, and has taken irreversible steps that affect its tax obligations going

forward. (*Id.*) In compliance with the PFJ, Constellation has begun operating the Piedras Negras brewery, including activities related to its expansion. (*Id.* at ¶¶ 16-17.)

Plaintiffs attempt to minimize the effect of an injunction on Defendants by saying they simply ask for compliance with the hold separate D.D.C. already has ordered. Defendants are not under any hold separate obligations from the D.D.C. because the divestiture was completed. Any other injunctive relief would create an extreme hardship. *California v. American Stores*, 492 U.S. 1301, 1306 (1989) ("To be sure, the cost of enjoining a merger before consummation is staggering, and the cost of enjoining an already completed transaction even greater.") (citation omitted). Constellation has completed its acquisition of Modelo's U.S. business and the balance of equities tips sharply in its favor.

Plaintiffs present nothing to suggest that equity favors the relief they seek.[4] Plaintiffs have continued to delay, pushing out the hearing calendar and willingly waiting two months for the Court to hear its motion for injunctive relief. The three sets of new papers Plaintiffs filed since losing their TRO only have rehashed their old, baseless arguments, offering no new evidence to support their meritless litigation. Plaintiffs cannot even identify an actual source or amount of money damages. Plaintiffs' unfounded claims of harm cannot tip the balance, sharply or otherwise, in their favor.

d. A hold separate does not serve the public interest.

Finally, Plaintiffs cannot make a clear showing by substantial proof that a hold separate would be in the public interest. DOJ already has conducted a careful investigation and analysis of the transactions, and ensured that the revised transactions make Constellation a vertically-integrated, fully independent, and highly capable producer and seller (through Crown) of beer in

[4] Plaintiffs also still have not posted any bond (or indicated the bond they would post) and, being nine individuals, are likely unable to post an adequate or proper bond. *See* Fed. R. Civ. P. 65(c); 15 U.S.C. § 26 (2006). Thus, Constellation will not be made whole for clear-cut and easily identifiable monetary damages from a hold separate in the event that a hold separate is wrongfully entered.

the United States, free from any indirect ownership, influence, or control by ABI. (Ex. 2, CIS VI.) DOJ has vindicated the public interest in Constellation's acquisition of Modelo's U.S. business. Although D.D.C. will be the final arbiter of the public interest of the PFJ, "a district court 'must accord deference to the government's predictions about the efficacy of its remedies.'" (Ex. 2, CIS VII at 23.) (quoting *United States v. SBC Commc'ns*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007)).

The public interest is best served by denying Plaintiffs' frivolous Motion and allowing Constellation to focus its energy on integrating its new business and competing vigorously in the U.S. beer marketplace.

II. DEFENDANTS ARE COMPLYING WITH THE PFJ, INCLUDING ITS FIREWALL PROVISIONS.

Plaintiffs additionally ask the Court to order Defendants to comply with the Firewall provisions found in Section XIII of the PFJ filed in D.D.C. on April 19, 2013. Those provisions require that Constellation's Confidential Information is used by ABI/Modelo only to facilitate services and supply under the Transition Services Agreement and the Interim Supply Agreement and that ABI/Modelo does not use that information to inform or shape its U.S. business. (Ex. 3, PFJ XIII.) Constellation has a vested interest in ABI/Modelo's compliance with this section of the PFJ and is actively engaged with DOJ as it monitors ABI/Modelo's compliance with the consent agreements. (Ex. 5, Hetterich Decl. ¶ 24.)

The appropriate forum for enforcement of compliance with the Stipulation and Order and PFJ is the D.D.C. This Court need not expend valuable judicial resources entering an order requiring Defendants to comply with an order already entered by another federal court.

CONCLUSION

Plaintiffs' Motion for Injunction Seeking "Hold Separate" Order should be denied. Due to the June 7 divestiture, Modelo's U.S. business assets are now wholly-owned by Constellation and

permanently separate from ABI. Even if the relief they seek were not unavailable, Plaintiffs once again fail to meet the standard for injunctive relief. Moreover, Defendants are complying with the Stipulation and Order and PFJ presently before the United States District Court for the District of Columbia. Plaintiffs' Motion should be denied.

Dated: July 12, 2013

McDERMOTT WILL & EMERY LLP

By: /s/ Daniel E. Alberti
Daniel E. Alberti

Attorneys for Defendant
CONSTELLATION BRANDS, INC.

ECF CERTIFICATION

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this 12th day of July, 2013. As of this date, all counsel of record, except for Plaintiffs' attorney Kenneth Schwartz, have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system.

/s/ Daniel E. Alberti
Daniel E. Alberti

PROOF OF SERVICE

I, Darlene Vanderbur, declare:

I am a citizen of the United States and employed in San Mateo County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 275 Middlefield Road, Suite 100, Menlo Park, California 94025. On, July 12, 2013, I served a copy of the within document(s):

DEFENDANT CONSTELLATION BRANDS, INC.'S OPPOSITION TO MOTION FOR INJUNCTION SEEKING "HOLD SEPARATE" ORDER

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Menlo Park, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery.

Kenneth R. Schwartz, Esq.
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7751 Carondelet, Suite 204
Clayton, MO 63105
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Attorney for Plaintiffs
STEVEN EDSTROM, BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK NAEGER, JOHN NYPL, DANIEL SAYLE, AND WILLIAM STAGE

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 12, 2013 at Menlo Park, California.

/s/ Darlene Vanderbur
Darlene Vanderbur

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