Joseph M. Alioto (SBN 42680)
Theresa D. Moore (SBN 99978)
Thomas P. Pier (SBN 235740)
Jamie L. Miller (SBN 271452)
ALIOTO LAW FIRM
One Sansome Street, 35h Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
Email: jmalioto@aliotolaw.com

[ADDITIONAL COUNSEL LISTED ON LAST PAGE]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION SEEKING "HOLD SEPARATE" ORDER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

Plaintiffs, through their undersigned counsel, submit this Consolidated Reply Memorandum in Support of Plaintiffs' Motion for Injunction Seeking "Hold Separate" Order and hereby request that this Court grant Plaintiffs' Motion (Motion at Doc. No. 68, Oppositions at Doc. Nos. 79 and 83.)

INTRODUCTION

At the hearing on the Motion for Temporary Restraining Order, Defendants adopted the bogus position that Plaintiffs' motion was "moot." (Decl. of Alberti, Exhibit 1 at 7:3-5.) Defendants failed to disclose that proceedings in the action in the United States District Court for the District of Columbia, Case No. 1:13-cv-00127-RWR, are still ongoing, that the public comment period under the Tunney Act, 15 U.S.C. §16(e), has not yet expired, that no public interest determination has been made in the DC action, that no final judgment has been entered, and that the DOJ can withdraw its consent to the transaction at any time.

Defendants again argue that Plaintiffs' motion is mooted because the transactions have closed. Likewise, this representation is false. If a "partial remedy" is available, then Plaintiffs' motion is not mooted. A "Hold Separate" Order can and should be ordered in this action.

Plaintiffs have raised serious questions going to the merits of this transaction. The questions raised involve questionable "firewall" provisions, the expiration of the final judgment in the DC action in 10 years, after which ABI can reacquire the divested assets, that ABI will still be paying employees at the Piedras Negras Brewery, and the 3-5 year Transition Services Agreement under which ABI will provide consulting services to Constellation, among others. Defendants counter by restating the same legal fiction that ABI and Constellation will be "separate" entities. This is simply not supported by the transaction documents themselves.

The sole basis for Defendants' opposition to this Motion is that their own actions in racing to close the transaction before final judgment has been entered in the DC action shield them from injunctive relief because of the purported hardship of undoing those actions. Defendants cannot be permitted to rush to violate § 7 and then later reap the benefit. Accordingly, Plaintiffs respectfully request that this Court grant Plaintiffs' request for a "Hold Separate" Order.

ARGUMENT

I. PLAINTIFFS' REQUEST FOR A "HOLD SEPARATE" ORDER IS NOT MOOT BECAUSE "A PARTIAL REMEDY IS AVAILABLE"

Plaintiffs argue that the Hold Separate Motion is moot because "[ABI and Modelo] do not own any of the assets covered by Plaintiffs' request." (ABI Opp. at 8; Constellation Opp at 6.)

A similar issue was addressed as a threshold matter in *Federal Trade Commission v. Whole Foods Market, Inc.,* 548 F.3d 1028, 1033-1034 (2008). There defendant Whole Foods argued that since the merger "had already closed" the court of appeal lacked jurisdiction to hear the appeal, because "the transaction is irreversible and the…request for an injunction blocking it is moot." *Id.* The United States Court of Appeals, District of Columbia Circuit saw it differently and its opinion is instructive[1]:

> Only in a rare case would we agree a transaction is truly irreversible, for the courts are 'clothed with large discretion' to create remedies 'effective to redress [antitrust] violations and to restore competition.' (citation omitted)…Even remedies which "entail harsh consequences" would be appropriate to ameliorate the harm to competition from an antitrust violation.
>
> ***

[1] To the extent Defendants argue that the *Whole Foods* decision is distinguishable because the action was brought by the FTC, the court's decision in *Whole Foods*, which noted that the court had power to grant relief to "ameliorate the harm to competition from an antitrust violation," did not turn on that fact and did not factor into its analysis that the issue was not moot.

> Thus, the courts have the power to grant relief…despite the merger's having taken place, and this case is therefore not moot. *See Byrd v. EPA,* 174 F.3d 239, 244 (D.C. 1999) ('The availability of a partial remedy is sufficient to prevent [a] case from being moot.') The fact that Whole Foods has sold some of Wild Oat's assets does not change our conclusion. To be sure, we have 'no authority to command return to the status quo,' *Weyerhaeuser,* 665 F.2d at 1077, in a lateral way by forcing absent parties to sell those assets back to Whole Foods, but there is no reason to think that inability prevents us from mitigating the merger's alleged harm to competition. The stores Whole Foods has sold are only those under the Harvey's and Sun Harvest labels, which were never relevant to the anticompetitive harm... Our inability to command their return does not limit the relief available... As to the distribution facilities, neither party has described what they are, suggested Wild Oats would not be a viable competitor without them, or explained why the district court could not order some provisional substitute. Moreover, the FTC is concerned about eighteen different local markets. If, as appears to be the situation, it remains possible to reopen or preserve a Wild Oats store in just one of those markets, such a result would at least give the FTC a chance to prevent a § 7 violation in that market.

Whole Foods Market, Inc., 548 F.3d at 1033-1034.

Here, as was the case in *Whole Foods,* the Court possesses broad power to create remedies effective to "redress [antitrust] violations." The remedy need not be immediate and injunctive relief could be ordered in phases to assuage real or imagined short-term harm. For example, Defendants acknowledge steps they have taken to "begin" integration. (Decl. of Paul Hetterich at 4; Decl. of Robert Golden at 4.) These include changes in "organizational structure," "personnel changes" and "operational synergies" (Decl. of Golden ¶¶ 12,14,15.) The integration has only started, and is in no way complete. A partial remedy exists. Certain interim injunctive relief (including, but not limited to, requiring Defendants to comply with the applicable hold separate obligations in the Stipulation and Order during the pendency of these proceedings) could still be ordered.

Furthermore, under the Tunney Act, 15 U.S.C. §16(d) and (e), Final Judgment cannot be entered in the DC action until the 60-day comment period has expired, the Government has responded to the comments, and the Court has determined that the settlement is in the public interest. The DOJ can and could reinstitute its action at any time, and in that event, the fact that the transaction has closed would not prevent the DOJ from seeking preliminary relief or divestiture.

Nothing in § 16 of the Clayton Act limits the relief a private plaintiff may seek, including requesting a hold separate order or divestiture. "§ 16 'states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order." *California v. American Stores, Co.,* 495 U.S. 271, 282 (1990). This includes the hold separate order requested here.

II. PLAINTIFFS' MOTION HAS DEMONSTRATED THAT THERE ARE GROUNDS TO ISSUE A "HOLD SEPARATE" ORDER

A. Standard for Injunctive Relief

As a preliminary matter, Defendants raise a false argument and misstate the applicable test as articulated in *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011). The United States Court of Appeals for the Ninth Circuit in *Alliance for Wild Rockies,* recognized the "serious questions" test, which held that "serious questions going to the merits" and a "balance of hardships that tips sharply toward 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.* This test is applicable here.

B. Supreme Court Precedent Mandates Divestiture in this Case

Under a long line of cases, the Defendants' acquisition constitutes a clear and egregious violation of § 7 of the Clayton Act. Section 7 prohibits acquisitions if their effect may be a substantial lessening of competition, or a tendency to create a monopoly. Since the thrust of the statute is prospective, designed "primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil…," a transaction which *may* have the proscribed anticompetitive effects is prohibited. *United States v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 597 (1957); *see also Brown Shoe Co. v. United States,* 370 U.S. 294, 317 (1962). Thus, if there is a "reasonable probability" that the acquisition will substantially lessen competition or tend to create a monopoly, it is prohibited under the Act. *Brown Shoe Co,* 370 U.S. at 323. By using these terms in Section 7, "which look not merely to the actual present effect upon future competition, Congress sought to preserve competition among many small businesses by arresting the trend toward concentration in its incipiency

before that trend developed to the point that a market was left in the grip of a few big companies." *United States v. Von's Grocery Co.,* 384 U.S. 270, 277 (1966).

In determining whether an acquisition such as that proposed here may "substantially" lessen competition, the acquisition must be "functionally viewed, in the context of its particular industry." Thus, the court is to examine factors such as market share, degree of market foreclosure, barriers to entry, extent of concentration in the industry, and trend towards concentration in the industry. *See, e.g., United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963); *Brown Shoe Co. v. United States, supra.*

Under this line of Supreme Court precedent, which has never been overruled and which ultimately mandates divestiture in this case, the facts and circumstances are far less outrageous violations of § 7 than the facts here.

In *United States v. Alcoa,* 377 U.S. 271 (1964), the Court required divestiture where nine firms controlled 95% of all aluminum created in the United States. In the narrower submarket for insulated aluminum conductor, Alcoa was the third with only 11.6% of the market and Rome Cable Corporation was the eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. The Supreme Court deemed both markets "highly concentrated."

Later in *Vons, supra,* 384 U.S. 270, the Supreme Court considered concentration in an industry alone sufficient to hold that an acquisition violates § 7 (the acquisition by Von's, which had a 4.7% share of the market, of Shopping Bag, with 4.2% of the market, together with the growing number of grocery market chains and the shrinking number of independently-owned stores resulted in the Court holding "these facts alone are enough to cause us to conclude…that the Von's Shopping Bag merger did violation § 7.")

That same year in *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966), the Supreme Court ordered divestiture of a merged entity which had combined the 10th and the 18th largest brewers in the United States, but which, when combined, resulted in just the 5th largest brewer with only 4.49% of all domestic beer sales.

Similarly, in *United States v. Falstaff Brewing Corp*., 410 U.S. 526 (1973), the Supreme Court reversed the District Court in order to prohibit a merger of brewers and remand the case where the effect of the merger would have eliminated the acquiring company – which had never been in, and professed to have no intention to enter into, the acquired company's market – as a potential entrant and competitor with the ability to influence competitive conditions in the market.

Here, the beer industry in the United States is highly concentrated, with ABI controlling over 50% of the market for beer in the United States, and just three companies controlling 80-85% of the market. (Decl. of JMA, Exhibit M at 4-5.) Though Defendants argue that the transaction results in the separate operation of ABI and Constellation, the details of the transaction demonstrate otherwise (*infra* at IIC). The circumstances and levels of concentration here exceed those in any of the Supreme Court cases discussed above. This transaction is presumptively illegal.

These Supreme Court cases have not been overruled or even diminished by later opinions and they determine beyond peradventure that the transaction is unlawful. In *Hospital Corp. of America v. Federal Trade Commission,* 807 F.2d 1381, 1385 (7th Cir. 1986), Judge Posner of the Seventh Circuit observed the above line of Supreme Court precedent, taken together, prohibited "any nontrivial acquisition of a competitor." And so here as set forth by the Supreme Court, Defendants' transaction violates § 7.

C. Plaintiffs Have Raised Serious Questions Going to the Merits Because The Revised Transaction Does not Resolve the Issues Which Defendants Admit "State[] a Claim Upon Which Relief Can be Granted"

Defendants admitted that the complaint filed by the Department of Justice stated a cause of action under Fed. R. Civ. P. 12(b)(6) in the Stipulation and Order entered by the District Court in *United States v. Anheuser-Busch InBEV SA/NV,* Civil No. 13-cv-00127 (Dkt. #34 at p. 8), "The Complaint states a claim upon which relief may be granted against Defendants ABI and Modelo under Section 7 of the Clayton Act, as amended (15 U.S.C. §

18.)" However, the Revised Agreement does not resolve the issues which Defendants admit state a claim upon which relief can be granted[2].

First, under the original agreement, ABI had the right to purchase Constellation or its interest in Crown in 10 years at a substantial premium above its actual value. The DOJ found initial agreement unacceptable because it left Constellation incentivized to abandon Modelo's Momentum Plan and increase prices of Modelo-branded beers the U.S. along with ABI, in order to eliminate ABI's desire to terminate Constellation's license at the end of the 10 year period. Now, Constellation is to be given a sub-license in *perpetuity* to import and sell Modelo products in the U.S. However, under the Proposed Final Judgment "perpetuity" amounts to the same 10 year term as the original agreement, after which the Final Judgment will not operate to prevent ABI from reacquiring the "divestiture assets." (Decl. of JMA, Exhibit B, Proposed Final Judgment Arts. XV and XVIII, pp. 28, 29). And so despite the conclusory statements that Constellation's incentives will have changed under the Revised Transaction[3], after a relatively short period time (the 10 year period), ABI will have the very same ability to reacquire the license to import Modelo- branded beer into the United States and the Piedras Negras Brewery.

Second, ABI will remain Constellation's supplier of as much as 40% of Modelo products in the United States for the 3 and perhaps up to 5 year term of the Interim Supply Agreement. (Decl. of JMA Exhibit I, pp. 3, 14; Exhibit L, Art 2.1(a) p. 7.) The fact that ABI and Constellation agree on the price of the beer supplied by contract (which section of the agreement is redacted), does not remedy the fact that for up to 5 years, ABI will through its supply to Constellation, exert control and influence over 40% of the Modelo-branded beer sold in the United States.

---

[2] Defendants hereby incorporate the arguments raised in the Opposition to the Motion to Dismiss (Doc. No. 87) at pp. 2-5 and 12-20.

[3] According to the Decl. of Paul Hetterick (Doc. 83-6) ¶ 21, because Modelo intended to exercise its "call option" at the end of 10-years, it had colored Constellation's view of its investment in Crown as a "relatively short-term interest" and had less incentive to invest in "long-term growth." The same 10-year period can be found here by the terms of the Proposed Final Judgment. Constellation's incentive to follow ABI price increases has not changed.

Third, ABI will continue to employ and compensate ABI-Modelo employees during the 3-5 year transition period, despite the fact that Constellation will own the Modelo affiliate that employs them. (Decl. of JMA Exhibit K, Transition Services Agreement §§ 2.01 and 3.01.)

Fourth, during the 3-5 year transition period, while ABI's employees are running the Piedras Negras brewery, one of the services which Constellation is prohibited from acquiring is production and product "innovation." (Decl. of JMA Exhibit K, § 2.01(e).)

Fifth, ABI has the right of first refusal to negotiate with Constellation to acquire the exclusive marketing rights in Mexico, regardless of whether Constellation even desires to grant exclusive rights. Only if ABI and Constellation fail to reach an agreement, can Constellation then offer a deal on no less favorable terms to another party. (ABI RJN Exhibit 4, Stock Purchase Agreement Art. 5.7, p. 25).

Sixth, the purported "firewalls" contemplate the sharing of confidential information between ABI and Constellation, which provides fertile ground for sharing of confidential information by ABI and Constellation. (Decl. JMA Exhibit K, TSA § 2.12(d).)

In support of their opposition, Defendants submit the Declaration of Daniel Rubinfeld. Mr. Rubinfeld completely omits reference to which documents he reviewed, providing any basis for his opinion in the declaration[4]. Mr. Rubinfeld's declaration fails to address the three-year Transition Services Agreement, under which ABI will supply Constellation with 40% of its needs in the U.S. market for up to 5 years. Mr. Rubinfeld's declaration fails to address the impact of the expiration of the final judgment after 10 years, at which time, ABI is able to reacquire the divestiture assets. Mr. Rubinfeld's declaration fails to address the fact that ABI will continue to employ and compensate ABI-Modelo employees during the term of the three-year Transition Services Agreement. Mr. Rubinfeld's declaration fails to address the flaws in the purported "firewall," the sharing of confidential information and the obvious threat of breaches thereof. Mr. Rubinfeld's declaration is based on a hypothetical situation (assuming

[4] The vague representation, "based on the materials provided to me..." (Decl. of Rubinfeld ¶ 11.)

ABI and Constellation are operating independently of each other), and is not grounded in the reality of this transaction. Indeed, Mr. Rubinfeld's declaration does nothing more than perpetuate the legal fiction that Constellation and ABI will be operating as separate entities.

D. Lessening of Competition is Precisely the Type of Irreparable Harm the Antitrust Laws Are Intended to Prevent

As it pertains to the irreparable harm element required for injunctive relief, "reasonable apprehension of threatened injury will suffice." 15 U.S.C. § 26, *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130 (1969). As noted by Justice O'Connor in *California v. American Stores Company,* 492 U.S. 1301, 1305 (1989) lessening of competition is "precisely the type of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent."

Plaintiffs have demonstrated a threat of irreparable harm in the form of lessening of competition. (MM in Support at 16) and *supra* at IIC. A *threat* of irreparable harm is all that is required under § 16 of the Clayton Act.

Defendants argue that Plaintiffs have not set forth evidence of irreparable harm to themselves. Defendants discount the declarations submitted by six of the Plaintiffs which indicate that that they are "regular consumer[s] and purchaser[s] of…beer," and "that [they] will purchase beer products of both companies in the future," and that the anticipated effect of the acquisition is that there will be "prices increases and less innovation." As consumers of beer, Plaintiffs are threatened with the anticompetitive effects of this merger, which *is* personal to them.

In reality, Defendants' argument is tantamount to a challenge of Plaintiffs' standing, not irreparable harm. But Plaintiffs standing to bring this action is clear beyond question, having been settled in two cases in the Northern District of California, *Reilly v. Hearst Corp.,* 107 F. Supp 2d 1192, 1194-95 (N.D. Cal. 2000), and *Reilly v. MediaNews Group, Inc.,* 2007 WL 1068202 (N.D. Cal. Apr. 10, 2007). Both of the cited cases hold that a consumer who purchases from a merging defendant has standing to challenge the acquisition under Sections 16 and 7 of the Clayton Act. Although the decision in *Hearst* addressed the issue in the

specific context of the Newspaper Preservation Act, the court in *MediaNews* found the *Hearst* reasoning valid and persuasive in the broader context of Sections 16 and 7. *MediaNews,* at *3 ("Even under the traditional antitrust analysis, independent of the newspaper context, plaintiff has standing as a consumer.) *See , also: Lucas Automotive Engineering, Inc., v. Bridgestone/Firestone, Inc.,* 140 F.3d 1228, 1237 (9th Cir. 1998); *Glen Holly Entertainment, Inc. v. Tektronix, Inc.,* 352 F.3d 367, 372 (9th Cir. 2003) ("Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury."); *Nelson v. Monroe Reg'l Med. Ctr.,* 925 F.2d 1555, 1562-65, 1568 (7th Cir. 1991) (consumers accorded standing under Clayton Act § 7 to challenge a hospital merger); *see, Reiter v. Sonotone Corp.,* 442 U.S. 330 (1979) (consumers have standing to enforce the antitrust laws when violations cause them monetary injury); *California v. American Stores Co.,* 495 U.S. 271 (1990) (action by State as *parens patriae* to redress harm to its citizens as consumers resulting from a merger); *see, also, Blue Shield of Virginia v. McCready,* 457 U.S. 465, 473-74 (1982) (injury to the "general economy" of a state "is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves…").

It also must be noted that Defendants argue that Plaintiffs have "provided no evidence of any alleged harm not compensable in money damages." Again, Plaintiffs have provided evidence of threatened lessening of competition, including Constellation's abandonment of the Momentum Plan, reduction in quality of beer and innovation. (See Memorandum in Support at 16; and *supra* at IIC.)

Defendants also argue that Plaintiffs' purported delay weighs heavily against a finding of irreparable harm. However, none of the cases cited by Defendants involve any action brought under § 16 of the Clayton Act, against a *threat* of harm from violation of § 7 of the Clayton Act. Moreover, the Tunney Act, 15 U.S.C. § 16(i) provides for a tolling of the statute of limitations (which is relevant to the defense of laches) for a private action when the government has filed an action. As the Supreme Court noted in *Leh v. General Petroleum Corporation,* 382 U.S. 54, 58 (1966) the Government's action may *aid* a private litigant:

> The Government's initial action may aid the private litigant in a number of ways. The pleadings, transcripts of testimony, exhibits and documents are availability to him in most instances…The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties.

By all accounts, Plaintiffs filed their action early, while the DC action is still pending. The 8th Circuit has warned of the dangers of encouraging corporations to swiftly close mergers to cut off § 7 claims:

> As noted, after the merger is completed, Republic's stock was turned in and extinguished. Northwest views this action as significant for the purposes of section 7. If extinguishing stock eliminated section 7 claims, corporations could seek to use this approach as an antitrust shelter and the speed at which it is accomplished would control the existence of a claim. The plain language of section 7 does not support such a result.

Midwestern Machinery v. Northwest Airlines, 167 F.3d 439, 442 (8th Cir. 1999).

E. Defendants Erroneously Balance the Equities

§ 16 of the Clayton Act authorizes plaintiffs to bring this private action for injunctive relief. Under Defendants' faulty balancing approach, the harms could never weigh in favor of a group of private plaintiff consumers, no matter how egregious the violation of § 7, since the pecuniary losses of a few individuals would not be greater than those suffered by a corporate defendant. The balancing of harms must take into account the threatened harm to all beer consumers in the United States[5]. This position is supported by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

> Section 16 of the Clayton Act, 15 U.S.C. s 26, . . . was enacted by the Congress to make available equitable remedies previously denied private parties, . . . and authorizes injunctive relief upon the demonstration of "threatened" injury . . . (for which one) need only demonstrate a significant threat of injury from an impending violation of the antitrust laws . . . .
>
> *Moreover, 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*

[5] Defendants request for a $250 million bond, which is requested without any providing any basis, documentary or otherwise and is to be an estimate of their damages in the event an injunction issues (Fed. R. Civ. P. 65(c)), does not exceed the threatened loss to consumers throughout the United States in the hundreds of millions of dollars in increased prices, if this transaction proceeds.

> *enforcing the antitrust laws*. (Citations omitted) (Emphasis added) 395 U.S. at 130-131, 89 S.Ct. at 1580.

Furthermore, Defendants proceeded with the transaction at their own risk before Final Judgment was entered in the DC Action. It is expressly noted in the Stipulation and Order that the United States may "withdraw[] consent" "at any time before the entry of the Proposed Final Judgment. (Decl. of JMA Exhibit A at 8.) The public comment period has not expired yet, the DOJ has not responded to the public comment, and the court in the DC action has not entered final judgment. Defendants cite only their own actions (in consolidating operations, etc) in proceeding with this transaction as the threatened harm[6].

Furthermore, economic hardship alone cannot tip the balance of equities in Defendants' favor in the face of a violation of § 7:

> *Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience*. If the Court concludes that the other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the later remedy because of economic hardship, however severe, may result. *Economic hardship can influence choice only as among two or more remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences*.

United States v. E.I. Du Pont de Nemours and Company, supra, U.S. 316, 330. [Emphasis added.]

Defendants cite the *Ginsburg* and *Garabet*[7] cases for the proposition

---

[6] Defendant submitted the Declarations of Paul Hetterich (Doc. No. 83-6) and Robert Golden (Doc. No. 79-5). Defendants cite only their own actions in "integrating" to support of the balance of harms. (Decl. of Golden ¶¶ 11, 12, 14, 15, 16-19; Decl. of Hetterich ¶¶ 12-17.) Defendants cannot and should not benefit from rushing to take steps to consummate a merger before final judgment has been entered in the DC action.

[7] Plaintiffs also cite *Taleff, et al. v. Southwest Airlines*, *et al*., 828 F. Supp. 2d 1118 (N.D.Cal. 2011), in support of *Ginsburg* and *Garabet*. Counsel for Defendants ABI and Modelo, Skadden Arps, who also represent the defendants in *Taleff*, fail to bring to this Court's attention that the same issues raised here have been raised in that case, which is on appeal to the United States Court of Appeals for the Ninth Circuit, Case No. 11-17995, and that matter is still pending.

that Plaintiffs bear some sort of special burden because of purported "inexcusable delays" in bringing this action. This is nothing more than a hidden laches defense.

First, no special burden is imposed on a private plaintiff seeking injunctive relief, preliminary or permanent, by § 16 of the Clayton Act. This point was made plain by the Supreme Court in *California v. American Stores, Co. Second,* Plaintiffs' action is not barred by laches or a purported "unreasonable delay." The cases upon which Defendants rely, *Ginsburg* and *Garabet,* ignore the law of Ninth Circuit which applies a presumption *against* laches when an action for injunctive relief has been filed within the analogous statute of limitations period:

> While laches and the statute of limitations are distinct defenses, a laches determination is made with reference to the limitations period for the analogous action at law. If the plaintiff filed suit within the analogous limitations period, *the strong presumption is that laches is inapplicable. E*.g., *Shouse v. Pierce County,* 559 F.2d 1142, 1147 (9th Cir. 1977) ('*It is extremely rare for laches to be effectively invoked when a plaintiff has filed his action before limitations in an analogous action at law has run.*')

Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 836 (9th Cir. 2002). [Emphasis added.]

The presumption against laches has been expressly applied in the antitrust context. *Aurora Enterprises, Inc. v. National Broadcasting Company, Inc.* 688 F.2d 689, 694 (9th Cir. 1982), (Holding that, "The four-year statute of limitations period in the Clayton Act furnishes a guideline for computation of the laches period in antitrust suits"); See *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.,* 392 F.2d 265 (8th Cir. 2004).

The cases cited by Defendants, *Ginsburg* and *Garabet*, do not follow the authority of the Ninth Circuit set forth in *Aurora* and *Jarrow Formulas, Inc.* These cases fail to consider the analogous statute of limitations and apply the mandatory presumption against laches. For example, *Garabet* involves a case from the United States District Court for the Central District of California where plaintiffs, alleging a violation of § 7 of the Clayton Act, filed suit the day a merger closed. The court in *Garabet* held that laches barred plaintiffs' equitable remedies.

Garabet v. Autonomous Technologies Corporation, 116 F.Supp.2d 1159, 1174 (C.D. Cal. 2000). The court in *Garabet* failed to apply the presumption against laches. The court in *Ginsburg v. InBev NV/SA,* 623 F.3d 1229 (8th Cir. 2010) repeated and exacerbated the error made in *Garabet* (and relied upon the court's ruling in *Garabet)*, by also failing to apply the analogous statute of limitations.

F. Public Injury Results Whenever There is an Assault Upon the Principle of Free and Unhampered Competition

Forty-percent of Americans consume beer in the United States. (SAC at 6.) It is in the public interest to remedy and prevent the anticompetitive effects associated with a lessening of competition, which have been discussed above. Public injury necessarily results from any act the effect of which is "substantially to lessen competition or tend to create a monopoly" under § 7 of the Clayton Act, and it has long been recognized that the public interest is served by enforcement of the antitrust laws:

> In principle, any practice that impedes or otherwise interferes with the natural flow of interstate commerce, even if there is no evident harm to the economy as a whole, because the victim's business is so minimal that its destruction made little impression on the economy, is nonetheless injurious to the public interest. *Accordingly, public interest necessarily results whenever there is an assault upon the principle of free and unhampered competition, as expressed in the antitrust laws…Therefore, the complaint need not allege injury to the public; the allegation is superfluous.*

1 Callman on Unfair Compl, Tr. & Mono. § 4.24 (4th Ed.) [Emphasis added.]

G. When Plaintiffs Bring Suit to Protect a Public Interest, as is Applicable Here, Bond May be Waived or Set at a Nominal Amount

The Ninth Circuit recognizes an exception to the bond requirement when an action is brought in the public interest. See *Friends of the Earth, Inc., Brinegar,* 518 F.2d 322 (9th Cir. 1975); *People of State of Cal. Ex rel. Van De Kamp v. Tahoe Regional Planning Agency,* 766 F.2d 1319 (1985). As discussed in further detail above, this action is in the public interest, *supra* at IIF. Where, as is the case here, Plaintiffs would be precluded from meaningful review by the requirement of posting a bond (and in effect precluded from private enforcement of the antitrust laws), it is appropriate for a bond to be waived or to be set at a

nominal amount. A bond requirement would *ipso facto* eliminate a private action by consumers[8]. Therefore, bond in this case should be waived or set at a nominal amount.

CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for a "Hold Separate" Order.

Dated: July 19, 2013

ALIOTO LAW FIRM

By: */s/ Joseph M. Alioto*

Joseph M. Alioto
Theresa D. Moore
Thomas P. Pier
Jamie L. Miller
ALIOTO LAW FIRM
One Sansome Street, 35th Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
Email: jmalioto@aliotolaw.com

[8] Defendants request a $250 million bond (ABI Opp. at 21.) However, they have provided no documentation to support the request that $250 million is an approximation of the damages they would incur in the event they would be required to comply with a hold separate order. Fed. R. Civ. P. 65(c). Moreover, this request is contradicted by Defendants' argument that Plaintiffs' request for injunctive relief is "moot." (ABI Opp. at 21.)

PLAINTIFFS' COUNSEL

Joseph M. Alioto (SBN 42680) Theresa D. Moore (SBN 99978) Thomas P. Pier (SBN 235740) Jamie L. Miller (SBN 271452) **ALIOTO LAW FIRM** One Sansome Street, 35th Floor San Francisco, CA 94104 Telephone: (415) 434-8900 Facsimile: (415) 434-9200 Email: jmalioto@aliotolaw.com tmoore@aliotolaw.com jmiller@aliotolaw.com	Jeffery K. Perkins (SBN 57996) **LAW OFFICES OF JEFFERY K. PERKINS** 1550-G Tiburon Blvd #344 Tiburon, CA 94920 Telephone: (415) 302-1115 Facsimile: (415) 435-4053 Email: jefferykperkins@aol.com
Theodore F. Schwartz (SBN 58946) Kenneth R. Schwartz *(Pending Pro Hac Vice)* **Law Offices of Theodore F. Schwartz** 7751 Carondelet, Ste 204 Clayton, MO 63105 Telephone: (314) 863-4654 Facsimile: (314) 862-4357 Email: Theodore@schwartz-schwartz.com	John H. Boone (SBN 44876) **LAW OFFICES OF JOHN H. BOONE** 4319 Sequoia Drive Oakley, CA 94561 Telephone: (415) 317-3001 Facsimile: (415) 434-9200 Email: deacon38@gmail.com
Jack Lee (SBN 71616) Derek Howard (SBN 118082) Sean Tamura-Sato (SBN 254092) **MINAMI TAMAKI LLP** 360 Post St. 8th floor San Francisco, CA 94108 Tel: (415) 788-9000 Email: jlee@MinamiTamaki.com dhoward@minamitamaki.com seant@minamitamaki.com	Gil Messina (NJ SBN 029661978) Timothy A.C. May (NJ SBN 035462007) *Pending Pro Hac Vice* **MESSINA LAW FIRM, P.C.** 961 Holmdel Road Holmdel, New Jersey 07733 Ph. (732) 332-9300 Fax (732) 332-9301 Email: gmessina@messinalawfirm.com
Peter C. Sullivan *Pending Pro Hac Vice* 7751 Carondelet, Ste 204 Clayton, MO 63105 Telephone: (314) 863-4654 Facsimile: (314) 862-4357 Email: peter@petercsullivan.com	