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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, *et al,*

Defendants.

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

NOTICE OF MOTION AND MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 59(e) OR 60(b), OR IN THE ALTERNATIVE RULE 60(d)

Date: December 20, 2013
Time: 9:00 a.m.
Judge Maxine Chesney
Courtroom 7, 19th Floor

TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 20, 2013, at the hour of 9:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, San Francisco Division, 450 Golden Gate Ave. San Francisco, California before the Hon. Maxine Chesney, Plaintiffs will move this Court for an order seeking relief from judgment under Fed. R. Civ. P. 59(e) or 60(b), or in the alternative 60(d), vacating the Judgment entered on October 16, 2013, and ordering discovery related to this motion.

This motion is made on the grounds that good cause exists for the granting relief under Rules 59(e), 60(b), or in the alternative Rule 60(d).

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

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs Steven Edstrom, *et al*. hereby submit this Memorandum in support of their Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 59(e), or 60(b), or in the alternative 60(d). This Court should vacate the Judgment in this action because Defendants made misrepresentations to this Court which Plaintiffs only just recently discovered. At the same time that Defendants submitted documents to this Court, signed under the penalty of perjury, stating that Constellation intended to "compet[e] vigorously" at "the expense of ABI," Crown Imports, owned by Defendant Constellation, had already not only planned "aggressive" price increases, but had also planned to follow Defendant Anheuser-Busch InBev ("ABI") price leads. A mere ten days after the hearing on Defendants' Motions to Dismiss, Crown's sizable price hikes were reported, as was Crown's plan to raise prices in line with ABI. (Decl. of Joseph M. Alioto, Exhibit A.) In effect, the Momentum Plan, which Plaintiffs alleged would be abandoned by Constellation as one of the anticompetitive effects of Defendants' transaction, had already been discarded at the time of the hearing on August 9, 2013. Alternatively, Crown's price increases constitute newly discovered evidence, upon which relief should be granted under Rules 59(e) or 60(b)(3).

Accordingly, Plaintiffs respectfully request that this Court: (1) vacate the Judgment entered in this matter; (2) grant Plaintiffs' discovery including all documents related to the announced price increases, and the depositions of Carlos Brito, CEO of Anheuser-Busch InBev, Robert Sands, CEO of Constellation Brands, Inc., and the executives at Crown responsible for the pricing and price increases; and (3) hold a one-day evidentiary hearing on this matter.

STATEMENT OF RELEVANT FACTS

This Court entered an Order granting Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint ("SAC") on September 13, 2013. (Dkt. No. 128.) An Order of Dismissal and Judgment were entered on October 16, 2013. (Dkt. Nos. 133 and 134.)

In the SAC, Plaintiffs "allege[d] that they will be harmed by ABI's acquisition of Grupo Modelo because…ABI wishes to raise prices of its beer and has been prevented from doing so by Grupo Modelo's past unwillingness to raise prices. (See Compl. ¶¶ 6-8.) Plaintiffs further allege[d] the result of the above-described agreements in that Constellation will be ABI's "puppet" and will raise prices according to ABI's wishes, thus eliminating the "competitive constraint on ABI's…ability to raise prices." (Order on Mot. to Dismiss, Dkt. No. 128, at 5:3-9.)

In opposing Defendants' Motions to Dismiss, Plaintiffs pointed to numerous defects with respect to Defendants' transaction, which would result in anticompetitive effects, including higher beer prices:

- ABI will remain Constellation's supplier of as much as 40% of Modelo products for the 3 – and perhaps up to 5 – year term of the Interim Supply Agreement (ABI Request for Judicial Notice "RJN," Dkt. No. 65, Exhibit 2, Competitive Impact Statement pp.3, 14; ABI RJN Exhibit 4, Interim Supply Agreement Art. 2.1(a) p.7);

- ABI will supply Constellation "key inputs" for at least three years during the term of the Transition Service Agreement, including "aluminum cans, glass, malt, crowns and caps, hops, corn starch, can lids, Cartons and Yeast. (ABI RJN Exhibit 4, Transition Services Agreement § 2.01(e).

- ABI will continue to employ and compensate ABI-Modelo's employees during the 3-5 year transition period, despite the fact that Constellation will own the Modelo affiliate that employs them (ABI RJN Exhibit 4, Transition Services Agreement §§ 2.01 and 3.01);

- The supposed "firewall" between ABI and Constellation, which is supposed to prevent the exchange of competitively sensitive information, is, by its terms, so porous as to be a conduit for such information (ABI RJN Exhibit 4, Transition Services Agreement § 2.12 (a); Interim Supply Agreement § 5.4(a);

- The Proposed Final Judgment, like the original licensing agreement between Modelo and Constellation which the DOJ found to be objectionable because of its limited term, has the same 10 year term, after which the Final Judgment will not operate to prevent ABI from reacquiring the "divestiture assets" (ABI RJN Exhibit 3, Proposed Final Judgment Arts. XV and XVIII, pp.28, 29);

- The new, so-called "perpetual," sub-license agreement runs from Marcas Modelo to Constellation. The ownership of Marcas Modelo is a mystery and it is not a party or subject to the Final Judgment. Similarly, the "sub-license" is apparently an arrangement that is subordinate and likely subject to another primary license, the parties to, and terms of which, are entirely undisclosed.

- 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" (ABI RJN Exhibit 4, Transition Services Agreement § 2.01(e));

- Constellation has the right, but not the obligation, to require that ABI-owned distributors selling Modelo products in the U.S. be terminated. Those ABI-owned distributors who are not terminated will continue to carry Modelo brands and be free to increase prices, as per ABI's preference to maintain higher prices for Modelo brands versus ABI's brands, in any of the 26 regional markets identified by the DOJ in which ABI-owned Modelo distributors will continue to operate (ABI RJN Exhibit 3, Proposed Final Judgment V.C. p.15; ABI RJN Exhibit 1, Government's Complaint ¶ 32 and Appendix A);

(Opp. to Motion to Dismiss, Dkt. No. 87 at 2-3.)

Plaintiffs warned that Modelo's Momentum Plan would be abandoned should the transaction be permitted, and that Crown, now wholly owed by Constellation, would raise prices in line with ABI:

> First, there is no gainsaying that ABI and MillerCoors control the lion's share of the U.S. market and, by agreement or otherwise raise prices in lockstep. In the face of coordinated price increases that smack of conscious parallelism at best, only Modelo's Momentum Plan stands are a bulwark, maintaining not only consistent pricing but enhancing quality, choice and innovation in the U.S. beer market. Given discovery, Plaintiffs can and will prove that Constellation's acquisition of Modelo aims to dismantle the Momentum Plan—which Constellation has always opposed—essentially by dismantling Modelo itself. Apart from Constellation's longstanding opposition to the Momentum Plan, ABI's and Modelo's choice of suitor is more than suspect: Constellation has little experience in the beer business and in brewing beer. Even if Constellation could overcome its lack of experience, and even if it wanted to perpetuate the Momentum Plan, burdened with another $4.75 billion in post-acquisition debt at sub-prime rates, sheer economics will compel the company to do what it has always wanted: raise Modelo prices along with ABI and Miller Coors, sounding a virtual death-knell for competition in the U.S. beer market.

(Motion for Hold Separate Order, Dkt. No. 68. at 13:5-21.)

At the hearing on the Motion to Dismiss on August 9, 2013, counsel for Defendants argued that the competition between Modelo and ABI would not be lost, even though historically Constellation had advocated following ABI price increases:

> **MR. SUNSHINE:** Well, what -- I think what -- and this is, you know, where DOJ, you know, really came out is that the important part is who owns all of the assets, and what incentive do they have. **If you own the factory that you've invested hundreds of millions of dollars in, you want to run that factory. So you want to set the profit-maximizing price. You want to sell as much beer as you can.** Constellation not only owned 50 percent, but Constellation also was the subject of a buy-out, a mandatory buyout in 2016. This is in Paragraph 21 of the DOJ complaint. So, Constellation's interest was a very short-term interest in the business.

(Decl. of Joseph M. Alioto Exhibit C, p. 32:11-23.) [Emphasis added.]

A representation about Constellation's intention to continue to grow Crown's market share and to "compet[e] vigorously" in the United States beer market, was also sworn to in the Declaration of Paul Hetterich, Executive Vice President, Business Development and Corporate Strategy, for Constellation Brands, Inc.:

> 18. Constellation at all times has operated, and will continue to operate, independent from any influence by ABI. The transactions that are the subject of this lawsuit do not change that fact.
>
> 19. I have read the allegations in the SAC and the assertions in the Motion in which they contend that Constellation and ABI will agree to fix prices. Those assertions are without merit. At no time during the negotiations of either set of agreements did Constellation tacitly or explicitly agree with ABI to raise or fix prices. Constellation has not promised to enter into a future agreement with ABI to raise or fix prices. Constellation's acquisition of Modelo's interest in Crown was not contingent upon an agreement or promise to agree with ABI to raise or fix prices. Constellation's acquisition of the Piedras Negras brewery was not contingent upon an agreement or promise to agree with ABI to raise or fix prices. Constellation has no intention to enter into an agreement or promise to agree with ABI to raise or fix prices.
>
> 20. **Constellation has every intention to continue Crown's history of competing vigorously against all beer brands sold in the United States. Constellation affirms its dedicated commitment to actively grow Crown's**

> **market share, embodied in Crown's stated aspiration to achieve a twenty percent market share by revenue, much of which will come at the expense of ABI.** Constellation's support of that vision includes its support for Crown's current and future plans to innovate and to introduce new brands to the market, even beyond the initial brands included in the Divestiture Assets.
>
> ***
>
> 26. **As stated above, Constellation has every intention to continue Crown's history of competing vigorously in the U.S. beer marketplace.** Constellation affirms its commitment to actively grow Crown's market share and introduce new brands and other innovations to the market.

(Decl. of Paul Hetterich, Dkt. No. 83-6, pp. 6:10-28; 8:18-21.) [Emphasis added.]

At the same time that counsel for Defendants and the Defendants themselves represented to this Court that Constellation and thereby Crown had every intention of competing head-to-head with ABI to increase market share of Modelo-branded beers in the United States, Crown was *already* implementing substantial price increases in markets, including the susceptible markets listed in the DOJ complaint. (Decl. of Joseph M. Alioto, Exhibit A.) On August 19 2013, it was reported that Crown had instituted substantial price hikes and that it was "more aggressive on price than it ha[s] been in years." *Id.* "This means that when AB goes up, [Crown is] much more likely to go up..." "So much for its status as pricing 'maverick' as per DOJ." *Id.* Unbeknownst to Plaintiffs and this Court, Crown's "Momentum Plan" had been killed well before the hearing on August 9, 2013, contrary to the representations of Defendants.

Notwithstanding Plaintiffs' allegations that Defendants' transaction is anticompetitive and is likely to substantially lessen competition in the United States beer market, after supplemental briefing, this Court granted Defendants' Motions to Dismiss on September 13, 2013.

STANDARD OF REVIEW

I. Standard of Review Under Rule 59(e)

Fed. R. Civ. P. 59(e) provides that, "A motion to alter or amend a judgment must be filed no later than 28 days after entry of the judgment."

This rule has been interpreted as permitting a motion to vacate a judgment rather than merely to amend it. 11 C. Wright and Miller, Fed. Prac. & Proc. (3d ed. Updated 2013) § 2810.1. Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion. *McDowell v. Calderon,* 197 F.3d 1253, 1255 n. 1 (9th Cir.1999). There are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law. *Id.*

II. Standard of Review Under Rule 60

Fed. R. Civ. P. 60(b) provides in pertinent part that, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

***

> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party
>
> ***
>
> (6) any other reason that justifies relief.

A motion for relief from a judgment under Rule 60(b) is generally addressed to the discretion of the court. *Brandt v. American Bankers Ins. Co. of Florida,* 653 F.3d 1108 (9th Cir. 2011). Equitable principles may be taken into account by a court in the exercise of discretion under Rule 60(b), and a number of Courts have held that discretion "ordinarily should incline toward granting rather than denying relief." 11 C. Wright and Miller, Fed. Prac. & Proc. (3d ed. Updated 2013) § 2857.

Fed. R. Civ. Proc. 60(d) also provides that a court may, "set aside a judgment for fraud on the court."

ARGUMENT

I. Defendants' Misrepresentations to This Court Justify Granting the Requested Relief Pursuant to 60(b)(3) or 59(e)

Fed. R. Civ. P. 60(b)(3) permits this Court to set aside the Judgment if there is "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." In the Ninth Circuit, a movant under Rule 60(b)(3) must[1]:

(1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct; and

(2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense.

Jones v. Aero/Chem Corp., 921 F.2d 875, 878-79 (9th Cir. 1990) (internal quotations and citations omitted); *See also Wharf v. Burlington N. Ry. Co.,* 60 F.3d 631, 637 (9th Cir. 1995).

[1] Rule 59(e) also authorizes motions to alter or amend a judgment if the movant, "demonstrates that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based…or "to prevent manifest injustice." *McDowell,* 197 F.3d at 1255 n1. Defendants' misrepresentations to this Court also constitute grounds upon which relief should be granted pursuant to Rule 59(e).

As the *Jones* test indicates, the purpose of Rule 60(b)(3) is to ensure that each party has an opportunity to fully and fairly litigate its case. Therefore, Rule 60(b)(3) focuses more on principles of equity and fairness in litigation than any strict legal definitions. 11 C. Wright and Miller, Fed. Prac. & Proc. (3d ed. Updated 2013), § 2860 ("The proceeding by motion to vacate a judgment is not an independent suit in equity but a legal remedy in a court of law; yet the relief is equitable in character and must be administered upon equitable principles." (citing *Assmann v. Fleming,* 159 F.2d 332, 336 (8th Cir. 1947)); *Di Vito v. Fidelity and Deposit Co. of Md.,* 361 F.2d 936, 939 (7th Cir. 1966) ("Rule 60(b) is equitable in character and to be administered upon equitable principles."

"Fraud," "misrepresentation" and "misconduct" under rule 60(b)(3) apply to a wide array of conduct and statements. The Ninth Circuit and other courts have ruled that Rule 60(b)(3) even applies to unintentional misrepresentations and misconduct. *In re M/V Peacock on Complaint of Edwards,* 809 F.2d 1403, 1405 (9th Cir. 1987) (negligent misrepresentation qualified as misrepresentation under Rule 60(b)(3)); *Anderson v. Cryovac, Inc.,* 862 F.2d 910, 923, (1st Cir. 1988) ("'misconduct' can cover even accidental omissions-elsewhere it would be pleonastic, because 'fraud' and 'misrepresentation' would likely subsume it.")

Both prongs of the *Jones* test are met here. First, Defendants' statements and assurances to this Court that they intended to "compet[e] vigorously" and to "actively grow Crown's market share, embodied in Crown's stated aspiration to achieve a twenty percent market share by revenue, much of which will come at the expense of ABI" are plain misrepresentations to this Court. The misrepresentation is evidenced by the fact that at the same time Defendants made these sworn statements to the Court, they had planned on imminently instituting "aggressive" price increases, which will be increased again when ABI institutes price hikes. (Decl. of Joseph M. Alioto, Exhibit A.) Crown and Constellation

never had any intention of maintaining the "Momentum Plan" and it is clear that now, as Plaintiffs previously warned, Crown's new plan, under the direction of Constellation, is to follow ABI price hikes, thereby lessening competition.

With respect to the second prong, Plaintiffs must show that Defendants' conduct "substantially interfered" with its ability to fully and fairly litigate this case. *Jones,* 921 F.2d at 879. Plaintiffs' SAC alleged that Defendants would abandon the "Momentum Plan," that beer prices in the US would increase, and that the transaction would substantially lessen competition in the United States market for beer in violation of § 7 of the Clayton Act. Throughout these proceedings, Defendants promised that Constellation would be entirely independent of ABI and would "compet[e] vigorously" now that it had the incentive do so, and this Court granted Defendants' Motions to Dismiss on the basis that "plaintiffs have failed to state a claim upon which relief can be granted." (Order at 15: 18-21.) Now, the very anticompetitive effects warned of have developed. Had Defendants been truthful about their intentions to increase prices and follow ABI price leads, this case would have and should have been permitted to proceed. Accordingly, granting Plaintiffs' relief under Rule 60(b)(3) is not only appropriate, but also in the interests of justice.

II. The Evidence of Price Increases and Crowns' Intentions to Raise Prices in line with ABI Constitutes Newly Discovered Evidence Entitling Plaintiffs to Relief under Rule 60(b)(2) or Rule 59.

Rule 60(b)(2) permits a movant to seek relief from a judgment based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). The same standard applies to motions on the ground of newly discovered evidence whether they are made under Rule 59 or Rule 60(b)(2). 11 C. Wright and Miller, Fed. Prac. & Proc. (3d ed. Updated 2013) § 2859. The movant must show that the "evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude

that production of it earlier would have been likely to change the disposition of the case." *Jones,* 921 F.2d at 878.

A. The Price Increases Instituted by Defendants were Planned Before the August 9, 2013, Hearing

The Crown price increases were reported on August 19, 2013, by Beer Marketer's Insights, a mere 10 days after the hearing on the motions to dismiss. (Decl. of Joseph M. Alioto, Exhibit A.) That report indicates that, "Crown has already told distribs of sizable price hikes in Calif. Fla (about 1/3 of its volume). Going up $1.20 on cans of ultra hot Modelo Especial in key Cal. 75 cents on bottles and Corona." *Id.* Since news of the price hikes came out on August 19 and were communicated to distributors before that, they were planned by Defendants before the August 9, 2013, hearing date. Evidence of Defendants' planned price hikes existed before the August 9, 2013 hearing date, but could not have been discovered by Plaintiffs until later, since the news of Crown's price hikes was not reported until August 19, 2013, 10 days after the hearing.

B. Information Concerning Crown's "Aggressive" Price Increases And Intention to Raise Prices in Line with ABI Would Likely Have Changed the Disposition of the Case

Earlier discovery of the Crown price increases "would have been likely to change the disposition of the case." *Jones,* 921 F.2d at 878. Indeed, had Defendants been truthful about their intentions to "aggressively" raise prices and to raise prices in line with ABI price hikes, which, in effect, abandons Crown's "Momentum Plan," and its intention to compete against ABI for market share, this Court could have come to no other conclusion than but to let this case proceed. Had information concerning Crown's stated intentions increase prices in line with ABI been available, Plaintiffs could have alleged additional facts in the complaint and/or filed a supplemental complaint, if necessary. Further, information concerning these price increases could have and would have been used to controvert the

facts stated in the Declaration of Paul Hetterich, in which the Constellation Executive misrepresents that Constellation has every intention of "compet[ing] vigorously…at the expense of ABI."

This Court should vacate the judgment and authorize discovery concerning the issues raised by the Crown price increases. More specifically, Plaintiffs request the opportunity to obtain discovery from Defendants concerning the price increases, which will allow the Court to fully understand the true circumstances surrounding the Crown price increases and intention to follow ABI price hikes. Plaintiffs would need at a minimum the following discovery: (1) all documents related to the announced price increases; and (2) depositions of of Carlos Brito, CEO of Anheuser-Busch InBev, Robert Sands, CEO of Constellation Brands, Inc., and the executives at Crown responsible for pricing and price increases.

Moreover, if discovery exposes evidence that Defendants knew of the price increases and the intention to raise prices in line with ABI's price increases at the same time they were making representations to the contrary to this Court, such evidence would support not only a finding of fraud under Rule 60(b) but also of fraud on the court, which constitutes a separate ground for granting relief from the Judgment under Rule 60(d). *Dixon v. Comm'r of Internal Revenue,* 316 F.3d 1041, 1046 (9th Cir. 2003) ("Fraud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced." (citing *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989)).

CONCLUSION

On the basis of the arguments and the authorities set forth above, Plaintiffs respectfully ask this Court to grant Plaintiffs' Motion for Relief from Judgment under Rule 59(e) or 60(b), or in the alternative Rule 60(d), vacate the Judgment, and enter an order granting Plaintiffs' discovery request, including all documents related to the announced price increases, and the depositions of Carlos Brito, CEO of Anheuser-Busch InBev, Robert Sands, CEO of

Constellation Brands, Inc., and the executives at Crown responsible for the pricing and price increases; and (3) hold a one-day evidentiary hearing on this matter.

Dated: November 11, 2013

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By: */s/ Joseph M. Alioto*

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