DANIEL E. ALBERTI (SBN 68620)
dalberti@mwe.com
McDERMOTT WILL & EMERY LLP
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
Telephone: (650) 815-7400
Facsimile: (650) 815-7401

MARGARET H. WARNER (admitted *pro hac vice*)
mwarner@mwe.com
RAYMOND A. JACOBSEN, JR. (admitted *pro hac vice*)
rayjacobsen@mwe.com
JON B. DUBROW (admitted *pro hac vice*)
jdubrow@mwe.com
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, D.C. 20001
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

Attorneys for Defendant
CONSTELLATION BRANDS, INC.

Additional Counsel Listed on Next Page

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 C.V., and CONSTELLATION BRANDS, INC., Defendants.	Case No. C-13-1309 MMC **DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' 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**

ALLEN RUBY (SBN 47109)
allen.ruby@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue
Palo Alto, California 94301-1908
Telephone: (650) 470-4500
Facsimile: (650) 470-4570

STEVEN C. SUNSHINE (admitted *pro hac vice*)
steven.sunshine@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM llp
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

JAMES A. KEYTE (admitted *pro hac vice)*
james.keyte@skadden.com
KAREN HOFFMAN LENT (admitted *pro hac vice)*
karen.lent@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (917) 777-3000

Attorneys for ANHEUSER-BUSCH INBEV SA/NV and GRUPO MODELO S.A.B. DE C.V.

INTRODUCTION

In their Motion for Relief from Judgment ("Mot."), Plaintiffs continue their vexatious litigation pattern, filing yet another spurious motion to try to keep their untenable claims alive. Like their prior efforts, this one fails as well. Plaintiffs' motion seeks to alter or vacate the judgment in this case dismissing their Second Amended Complaint ("SAC") for failure to state a claim upon which relief may be granted. Plaintiffs' motion is premised on their unsupportable assertion that "Defendants have made misrepresentations to this Court which Plaintiffs only just recently discovered" by means of an August 19, 2013, article containing information that allegedly contradicts statements made by the parties during this proceeding. (Mot. at 1:5-6.)

Plaintiffs' argument fails for multiple reasons. Most fundamentally, even if Plaintiffs' allegation of false statements were true, which it is not, the Court's dismissal of Plaintiffs' SAC does not rest on any of the purported misrepresentations by Defendants, but rather assumes as true the facts alleged by the Plaintiffs. Plaintiffs simply fail to assert how the alleged misrepresentations bear on the issues central to the Court's decision to dismiss the SAC, specifically Plaintiffs' theories that Defendants' transactions violate Section 7 of the Clayton Act because they enable ABI to control Constellation and that ABI and Constellation agreed to raise prices in violation of Section 1 of the Sherman Act. The Court properly dismissed those claims based on the deficiencies in Plaintiffs' SAC and not Defendants' statements during the proceeding. Moreover, Plaintiffs have made no showing of any misrepresentation, much less one that meets the "clear and convincing" standard required under Rule 60(b)(3) of the Federal Rules of Civil Procedure. Plaintiffs do not, and cannot, point to a single fact that contradicts any statement made by Defendants. Finally, the critical information that supposedly "could not have been discovered" by Plaintiffs was in fact contained in a public article available to them while the parties were briefing the motions to dismiss, leaving ample opportunity for Plaintiffs to bring it to the Court's attention, well before the entry of final judgment in this case. Plaintiffs' motion should be denied summarily without oral argument.

STATEMENT OF FACTS

On March 22, 2013, Plaintiffs filed a Complaint alleging that the proposed acquisition of

Defendant Grupo Modelo S.A.B. de C.V. ("Modelo") by Defendant Anheuser Busch-InBev SA/NV ("ABI") violated Section 7 of the Clayton Act. (ECF No. 1.) On April 19, 2013, the Department of Justice ("DOJ") filed a Proposed Final Judgment in federal district court outlining the terms of a consent decree that resolved DOJ's competitive concerns regarding that transaction. *United States v. Anheuser-Busch InBEV SA/NV*, No. 13-127 (D.D.C. filed Apr. 19, 2013), ECF Nos. 29-2. The consent decree obligated ABI to divest the U.S. Modelo business to Constellation, or another approved buyer, and to enter into a Transition Services Agreement and Interim Supply Agreement with Constellation to ensure a smooth transition of ownership. *Id.*, ECF No.29-31 Plaintiffs eventually filed the SAC on June 25, 2013, which included Constellation as a defendant and alleged violations of Section 1 of the Sherman Act, the Tunney Act, and unspecified state laws. (ECF No. 63.)

On June 28, 2013, Defendants filed motions to dismiss the SAC for failure to state a claim upon which relief may be granted (ECF Nos. 64-67), on which the Court held a lengthy hearing on August 9, 2013 (ECF No. 87a). At the hearing, Plaintiffs insisted that they needed unredacted versions of Defendants' transaction agreements to support their theory that, as a result of the transactions, ABI controls Constellation. (ECF No. 104.) Defendants filed and served the unredacted agreements on August 22, 2013. (ECF No. 113.) Plaintiffs submitted their supplemental opposition brief on August 29, 2013 (ECF No. 117), and Defendants filed their supplemental reply on September 6, 2013 (ECF No. 120).

The Court granted Defendants' motions to dismiss on September 13, 2013. (ECF No. 128.) The Court held that the SAC, taken as true for purposes of Defendants' motions, failed to state a plausible claim that Defendants' transactions violated Section 7 of the Clayton Act. (Order at 5-10.) The Court found no basis for Plaintiffs' allegations that the agreements governing the transactions were fraudulent, or that they permit ABI to exert control over Constellation. (*Id.* at 5.) The Court also held that the SAC failed to state a claim under Section 1 of the Sherman Act because it "lacks any factual allegations supporting such a claim, and relies, instead, solely on conclusory allegations." (*Id.* at 10.) Judgment was entered by the Court on October 16, 2013. (ECF Nos. 133-34.)

LEGAL STANDARD

Plaintiffs bear an extremely high burden in seeking to overturn a final judgment under Rule 59(e) or Rule 60(b).[1] These rules provide for extraordinary relief and are not intended to allow a plaintiff to re-litigate or re-argue its case. Plaintiffs have not, and cannot, demonstrate any legitimate basis under these rules for the extreme relief they seek.

Motions to reconsider under Rule 59(e) present a "high hurdle" and are "not intended to permit 'a second bite at the apple.'" *Alperin v. Franciscan Order*, No. C-99-4941 MMC, 2009 U.S. Dist. LEXIS 106163, at *6 (N.D. Cal. Nov. 13, 2009) (quoting *Weeks v. Bayer*, 246 F.3d 1231, 1236-37 (9th Cir. 2001)). A court should not grant a Rule 59(e) motion absent highly unusual circumstances. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). The movant must demonstrate that the judgment was based on manifest errors of law or fact; present the court with newly discovered evidence; demonstrate that the motion prevents manifest injustice; or indicate an intervening change in controlling law. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (citing 11 Charles Alan Wright and Alan R. Miller, *Federal Practice and Procedure*, § 2810.1 (2d ed. 1995)). Generally, motions to reconsider are "avoided." *Reza v. IGT*, 3:06-cv-00211-BES (VPC), 2008 U.S. Dist. LEXIS 112244 (D. Nev. May 12, 2008) (citing *United States v. Mills*, 810 F.2d 907, 909 (9th Cir. 1987)); *see also McDowell*, 197 F.3d at 1255 n.1 (citing 11 Charles Alan Wright and Alan R. Miller, *Federal Practice and Procedure*, § 2810.1 (2d ed. 1995)) (explaining that such a motion is "an extraordinary remedy which should be used sparingly").

Only prevention of a "'grave miscarriage of justice'" warrants a Rule 60(b) action. *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) (internal citation omitted). Under Rule 60(b), a court may, on motion and just terms, relieve a party of a final

[1] Plaintiffs fail to make clear the authority on which their allegations are based. Plaintiffs cite Rules 59(e), 60(b), and 60(d) at various points in their argument as a basis for the relief they seek. However, because Plaintiffs' brief discusses only Rules 59(e), 60(b)(2), and 60(b)(3) in any significant way, this opposition restricts its discussion only to those rules. Plaintiffs do not articulate a basis for their motion under Rule 60(d) other than fraud, which Plaintiffs have failed to establish, as discussed below. (*See infra* p. 8.) Moreover, to make use of Rule 60(b)(6), the movant must articulate a reason for relief other than one found in the preceding clauses of Rule 60(b), which Plaintiffs have not done. *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981).

judgment, order, or proceeding for one of several enumerated reasons, including: (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); and (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party. *See Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1337-38 (9th Cir. 1986).

Rule 60(b)(2) applies to facts obtained following the disposition of a case. The movant must show new evidence that: (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 v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990). Under Rule 60(b)(2), the moving party has an "extremely difficult burden to overcome before the Court can grant relief." *Shoen v. Shoen*, 933 F. Supp. 871, 876 (D. Ariz. 1996) (quoting *Wilson v. Upjohn Co.*, 808 F. Supp. 1321, 1323 (S.D. Ohio 1992)) (internal quotation marks omitted).

To invalidate a judgment for fraud under Rule 60(b)(3), the movant must demonstrate by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and that the conduct complained of prevented the losing party from fully and fairly litigating its case or defense. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004). The movant cannot attempt to re-litigate the central issues of the previous decision simply because it believes the judgment to be incorrect. *In re M/V Peacock on Complaint of Edwards*, 809 F.2d 1403, 1405 (9th Cir. 1987).

ARGUMENT

Plaintiffs fail to meet the requirements for the extraordinary relief they seek. First and foremost, their allegation of misrepresentation is unrelated and irrelevant to the Court's bases for dismissing the SAC. Second, Plaintiffs have failed to show that any misrepresentation occurred. Third, Plaintiffs' "newly discovered" information was available to them during the motion to dismiss briefing period and well before entry of the judgment in this case.

I. Plaintiffs' Allegations Are Unrelated and Irrelevant to the Court's Judgment

Plaintiffs allege that Defendants' statements that they would "compete vigorously" and

that Crown Imports LLC ("Crown") would "actively grow" its market share were false and "substantially interfered" with Plaintiffs' ability to "fully and fairly litigate" its case. (Mot. at 8:21-22, 9:5.) Plaintiffs also argue that Defendants' "promise" that Constellation would remain independent of ABI somehow deceived the Court into dismissing the SAC. (*Id.* at 9:10.)[2] According to Plaintiffs, if Defendants had not made these purportedly false statements, then the Court "could have come to no other conclusion than but to let this case proceed." (*Id.* at 10:23-24.) It is telling, however, that Plaintiffs cite no portion of the Court's Order to support their assertions. The Court's dismissal of the SAC rests, as it must, on the allegations in the SAC and the specific transaction agreements referenced by Plaintiffs, not statements made outside the scope of the pleadings about future intended conduct. (Order at 5 ("After considering plaintiffs' allegations and the sections of the revised agreements cited in support thereof, the Court … finds plaintiffs' contentions unpersuasive.").)

The "new information" Plaintiffs cite is irrelevant to their claims. Plaintiffs' SAC asserts that Defendants' transactions violate Section 7 of the Clayton Act because they "are structured in such a way that ABI will be in a position of power over Constellation, will effectively run the Piedras Negras brewery, and will control Constellation's pricing and supply decisions in the United States." (*Id.* (citing SAC ¶ 30).) Plaintiffs claim that Crown would become ABI's "puppet," eliminating Crown's "competitive constraint on ABI's . . . ability to raise prices." (Order at 5.) The Court rejected Plaintiffs' contentions: "In sum, neither plaintiffs' allegations, nor the revised agreements on which they rely, show ABI's acquisition of Grupo Modelo will result in ABI's control of Constellation or otherwise increase its percentage share of the beer market in the United States." (*Id.* at 10.) The purportedly new information that Plaintiffs cite has no bearing on whether ABI will control Crown. Rather, it simply reports on Crown's independent business decisions with respect to the pricing of Modelo brands in the United States, which has nothing to do with Plaintiff's Section 7 claim or the basis for the dismissal of that

[2] Plaintiffs seek depositions of ABI's CEO Carlos Brito, Constellation's CEO Robert Sands, and executives at Crown responsible for pricing. However, Plaintiffs do not allege any misrepresentations by any of these executives. Thus, in addition to the other reasons stated herein why Plaintiffs' motion should be denied, there is no basis for depositions of these executives, and Plaintiffs' unreasonable request for such depositions should be denied.

claim by the Court.

Likewise, Plaintiffs fail to explain how Crown's decision to change prices is in any way relevant to Plaintiffs' allegation of a price-fixing conspiracy between Constellation and ABI. The Court dismissed Plaintiff's Section 1 claim for failure to plausibly allege any agreement between ABI and Constellation to fix prices. (*Id.*) Plaintiffs' supposedly new information about a pricing decision by Crown does not provide any factual support regarding the existence of an agreement between Constellation and ABI and, therefore, could not possibly have changed the disposition of Plaintiffs' Section 1 claim.

II. Plaintiffs Fail to Allege Any Misrepresentation By Constellation

Plaintiffs assert that information published about a Crown pricing decision contradicts Constellation's statements that Crown would continue "competing vigorously" and seek to grow its market share. (Mot. at 1:9-14.) Raising prices, by itself, is not inconsistent with vigorous competition, especially where the price mover continues to take market share from rivals.

Plaintiffs quote at length paragraphs 18-20 and 26 of the declaration of Paul Hetterich, but nowhere in those paragraphs does Mr. Hetterich state that Constellation and Crown will not raise prices. Plaintiffs have not offered any fact to contradict what Mr. Hetterich stated – that Constellation has not conspired with ABI to fix prices and that Crown intends to continue to try to take share from other suppliers, including ABI. (ECF No. 83-6 ¶ 19.) Plaintiffs, therefore, fall far short of their burden. *See Di Vito v. Fidelity & Deposit Co.*, 361 F.2d 936, 939 (7th Cir. 1966) (citations omitted) ("[C]onclusory averments of the existence of fraud…and unaccompanied by a statement of clear and convincing probative facts…do not serve to raise the issue of the existence of fraud, much less to carry the burden of resolving that issue.").

III. The Allegedly "New" Information Was Available To Plaintiffs During the Briefing Process

Not only do Plaintiffs fail to establish any misrepresentation, but the "newly discovered" information Plaintiffs cite was in fact available during the motion to dismiss briefing period and well before the entry of final judgment. Plaintiffs rely on an August 19, 2013 Beer Marketers

Insights article as the source of the information about Crown's price increase. Plaintiffs filed their supplemental opposition to the motions to dismiss on August 29, 2013, ten days after the article was published. Further, the article was available nearly four weeks prior to the Court's September 13, 2013 order granting the motions to dismiss, and more than eight weeks before the Court's October 16, 2013 entry of final judgment.

Typically, readily available information cannot constitute newly discovered evidence within the meaning of Rule 60. *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, No. 08cv335-IEG(NLS), 2010 U.S. Dist. LEXIS 113644, at *6 (S.D. Cal. Oct. 26, 2010). A plaintiff cannot simply classify evidence as newly discovered because it failed to exercise due diligence and seeks an explanation of that information only after the court entered its judgment. *Daghlian v. DeVry Univ., Inc.*, 582 F. Supp. 2d. 1231, 1253 (C.D. Cal. 2008) (declining to reconsider a 60(b)(2) motion). Further, evidence cannot be "newly discovered" if the information is in a party's possession before the court's entry of judgment or could have been discovered with reasonable diligence. *See Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d 208, 212 (9th Cir. 1987). In such a case, the party was on notice and waived an opportunity to argue the import of the evidence prior to entry of judgment. *Daghlian*, 582 F. Supp. 2d. at 1253 (C.D. Cal. 2008); *see also Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (affirming the denial of a 60(b)(2) motion because evidence in the possession of the petitioner eight days before the judgment was rendered was not "newly discovered").

Given the amount of time that passed between the availability of the information and the time the judgment was entered, Plaintiffs cannot claim it was "newly discovered" for purposes of supporting its motion.

CONCLUSION

Plaintiffs' latest attempt to resurrect this case should be summarily denied without oral argument. Plaintiffs have failed to meet the very high burden they bear in trying to overturn a final judgment. Plaintiffs' newly offered evidence is irrelevant to the Court's order dismissing the SAC and would not have altered the outcome even if it had been known to the Court earlier. In addition, Plaintiffs have not shown any misrepresentation, let alone established one by clear

and convincing evidence. Finally, the information that Plaintiffs now bring before the Court was available to them while motion to dismiss briefing was ongoing, before the Court entered its order, and before the subsequent order entering final judgment. For all of the foregoing reasons, Plaintiffs' motion should be denied summarily.

Dated: November 19, 2013

McDERMOTT WILL & EMERY LLP

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

Attorneys for Defendants
CONSTELLATION BRANDS, INC.

Dated: November 19, 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Allen Ruby
Allen Ruby

Attorneys for Defendants
ANHEUSER-BUSCH INBEV SA/NV
and Grupo Modelo S.A.B. DE C.V.

SIGNATURE ATTESTATION

Pursuant to General Order No. 45(X)(B), I hereby attest that I have obtained the concurrence in the filing of this document from all the signatories for whom a signature is indicated by a "conformed" signature (/s/) within this e-filed document and I have on file records to support this concurrence for subsequent production for the court if so ordered or for inspection upon request.

Dated: November 19, 2013

/s/ Daniel E. Alberti
Daniel E. Alberti

ECF CERTIFICATION

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this nineteenth day of November, 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