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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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF 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

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INTRODUCTION

Plaintiffs Steven Edstrom, *et al*. hereby submit this Reply Memorandum in support of their Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 59(e) or 60(b), or in the alternative Rule 60(d).

Plaintiffs' Second Amended and Supplemental Complaint, alleged the following:

5. Since 2008, when the combinations of Anheuser-Busch and InBev and Miller and Coors were formed, the profits of the combinations have dramatically increased by reason of increase in prices. From 2008 to 2011, the profits of ABI have increased from $1.9 billion to $5.8 billion, a threefold increase over only four years; and for MillerCoors from $2.9 billion to $5.6 billion, a twofold increase over only four years. Together, these companies control approximately 80-85% of the beer market in the United States. ABI and MillerCoors have steadily increased prices for their beers.

6. In the last few years, Modelo has instituted a competitive program in order to secure more market share by refusing to increase its prices when ABI, generally followed by MillerCoors, raised its prices. As a consequence, Modelo has constrained the planned price increases by ABI. Although MillerCoors has consistently followed the price increases of ABI, Modelo has not.

7. In addition to acting as a cap on ABI increases in price, the price differentials between the Modelo beers and the ABI beers have narrowed to such an extent that many consumers have "traded up" from the ABI lower-quality beers to the Modelo higher-quality beers.

8. Because of the competitive program by Modelo, the following competitive effects have taken place: (1) ABI cannot raise its prices at will to the height that it wants to; (2) The narrowing of the price differential between ABI's lesser-quality beers and Modelo's higher-quality beers increases the likelihood of consumers "trading up" to the Modelo brand; and (3) The narrowing price differential requires ABI to lower its price or grant discounts and/or attempt to improve the quality of its beers so that ABI can stop the flow of consumers trading up to the Modelo brands.

9. The Modelo importer Crown is owned 50% by Modelo and 50% by Constellation, a wine company. Contrary to the Modelo competitive program, which has prevented the unbridled increase of ABI beer price increases, Constellation has consistently urged Crown to follow the price increases by ABI. Crown has become very concerned that if Constellation were to take control of Crown that the Modelo competitive program would be shut down.

***

18. An interdependent pricing dynamic exists between the largest brewers, ABI and MillerCoors. These brewers find it more profitable to follow each others' price increases than to compete aggressively for market share by cutting price. Their competition is generally confined to advertising, rather than price or quality. ABI typically initiates annual price increases with the expectation that MillerCoors will follow. And most often, they do. Furthermore, by reason of this coordination of price increases by these two behemoths, which control 80% of the beer produced, distributed, and sold in the United States, there has been no need in the past for them to increase the quality of their beers, which have become dull and tasteless, with no perceptible taste differences between their brands.

19. Modelo has resisted ABI-led price hikes. Modelo's pricing strategy—"The Momentum Plan" – seeks to narrow the "price gap" between the higher-priced Modelo beers and lower-priced premium domestic brands, such as Bud and Bud Light (ABI brands). Modelo has put "increasing pressure" on ABI by pursuing a competitive strategy directly at odds with ABI's well-established practice of leading prices upward. In effect, Modelo has created a price war, which places a significant cap on the ability of ABI to increase its prices. Internal ABI documents concede Modelo's strategy was "eating [Budweiser's] lunch."

20. Because of Modelo's resistance to ABI price hikes, ABI and MillerCoors have been forced to offer lower prices and discounts for their brands to discourage consumers from "trad[ing] up" to Modelo brands. If ABI were to acquire the remainder of Modelo and puts its "puppet" Constellation in charge of the pricing of Modelo beers in the United States, this competitive constraint on ABI's and MillerCoors' ability to raise prices would be eliminated.

21. In addition, the proposed acquisition will eliminate the substantial head-to-head competition that currently exists between ABI and Modelo. The loss of this head-to-head competition will enhance the ability of ABI to unilaterally raise prices and diminish ABI's incentive to innovate with respect to new brands, products, and packaging and ABI's incentive to lower prices and innovate.

22. ABI's acquisition of the remainder of Modelo will substantially lessen competition and is therefore illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18. It will also threaten price fixing between ABI and Constellation in that according to the Department of Justice, "Constellation has already shown through its participation in the Crown joint venture that it does not share Modelo's incentive to thwart ABI's price leadership; and that, in fact, Constellation consistently has urged Crown to follow ABI's price increases."

23. For example, in 2011, Constellation's managing director wrote to Crown's CEO:

> "Since ABI has already announced an October general price increase, I was wondering if you are considering price increases for the Modelo

> portfolio….from a positioning and image perspective, I believe it would be a mistake to allow the gaps to be narrowed. I think ABI's announcement gives you the opportunity to increase profitability without having to sacrifice significant volume."

24. Moreover, in December 2011, Constellation's CFO wrote to his counterpart at Crown that he thought price increases on Modelo brands were viable "if domestic (i.e., Bud and Bud Light) keep going up." Modelo refused.

25. Furthermore, a Crown executive stated unequivocally that Constellation's plan for annual price increases "put at risk the relative success" of the Momentum Plan. (Second Amended and Supplemental Complaint, Dkt. No. 63, ¶¶ 5-9; 18-25.)

It is undisputed that the threat of price increases has been an issue from the beginning of this litigation---that Plaintiffs alleged that Constellation, through Crown, would increases prices in line with ABI's and that Modelo's "Momentum Plan" would be discarded as an intended anticompetitive consequence of this transaction. That threat has now been realized.

In an article dated August 19, 2013, the trade publication, Beer Marketer's Insights reported that: "But more price hikes coming this fall from importers. Crown is more aggressive on price than it has been in years. So much for its status as pricing 'maverick' as per DoJ. Crown already told distribs of sizable price hikes in Calif, Fla (about 1/3 of its volume)…Crown also stated publicly that its price gaps are now good. That means when AB goes up, it is much more likely to go up to maintain those gaps." (Decl. of Joseph M. Alioto, Dkt. 135-1, Exhibit A.) As alleged by Plaintiffs, the Beer Marketer's report demonstrates that Constellation and Crown are increasing prices, raising prices in line with ABI , and abandoning the Momentum Plan.

In opposition to Plaintiffs' Motion, Defendants argue that they never made a misrepresentation to this Court. This argument, however, is belied by the record. For example, Defendants represented that, "**Plaintiffs cannot even allege that parallel pricing conduct has occurred… It is illogical to believe that Crown's prices will be coordinated**

with ABI's in the future, when they have not been in the past, and when those entanglements are removed by the transactions." (Constellation Motion at 18:2-4; 18:12-14.) The intended inference here is that Constellation does not intend to raise prices and will not raise prices in line with ABI's. But that statement was false at the time it was made, as demonstrated by the Beer Marketer Insights Article, which reported that Crown implemented "sizable" price hikes and intended to follow ABI price leads, a mere ten days after the hearing on August 19. (Decl. of Joseph M. Alioto, Dkt. 135-1, Exhibit A.) Defendants' misrepresentations, including the statements in the Declaration of Paul Hetterich, among others, were made on the record in this Court *at the same time* Defendants were planning to implement the price increases they were arguing would be "illogical" and "implausible." Defendants do not dispute that these price increases were being planned and implemented at the same time the representations were made.

Moreover, Defendants' briefing on the record concedes that evidence of Constellation/Crown price increases and following ABI price leads, in fact, supports a "plausible" claim under *Twombly*. This is the evidence which Plaintiffs now bring before this Court. The Court held that "Here, as discussed above, the revised agreements make clear that plaintiffs are unable to allege any facts showing the merger and accompanying agreements result in a violation of the Clayton Act, and after twice attempting to allege a Sherman Act violation, plaintiffs have demonstrated their inability to marshal any facts to support such a claim…Consequently, such claims will be dismissed without leave to amend." (Order at 14:16:21.) The evidence of Defendants' plan to increase prices and the clear abandonment of the Momentum Plan, not only demonstrates that Plaintiffs did allege sufficient facts in support of their claims, but had the true facts been available to Plaintiffs at the time, the complaint could have been amended to allege these additional facts. If Defendants had been truthful on the record about the price increases, rather than misleading

this Court and Plaintiffs, Plaintiffs case should have and would have been permitted to proceed. Accordingly, this Court should grant the Plaintiffs' Motion for Relief from Judgment and order that discovery be taken with regard to the price increases, including documents related to the price increases and the requested depositions[1] of Carlos Brito, Rob Sands, and the executives at Crown responsible for the price increases.

ARGUMENT

I. Defendants Misled the Court by Representing that Constellation Would Not Increase Prices In Line with ABI, While Planning To Do the Same

In their Opposition, Defendants argue that, "Plaintiffs have made no showing of any misrepresentation…Plaintiffs do not, and cannot, point to a single fact that contradicts any statement made by Defendants." (Opp. at 1:19-22.) This argument is proven false by the record. In support of their Motion to Dismiss Defendant Constellation Brands, Inc. ("Constellation") argued the following:

> In most cases, plaintiffs are able to allege that parallel pricing conduct has occurred, and then seek to allege facts to explain why that conduct resulted from an unlawful agreement rather than non-actionable, independent decisions. **Here, Plaintiffs cannot even allege that parallel pricing conduct has occurred. Rather, they hypothesize that it "may" occur in the future…**The SAC hypothesizes that future parallel conduct will occur. [Emphasis added.] (Constellation Motion to Dismiss "Constellation Motion," Dkt. No. 64 at 13:5-8; 13:17-18.)
>
> ***
>
> **However, the universal starting point in these parallel conduct cases is the allegation of the existence of observed parallel conduct—an allegation that Plaintiffs cannot, and do not, make here… Plaintiffs allegation that Constellation may follow ABI's price leads in the future is merely speculation that Plaintiffs make based on statements Plaintiffs**

[1] Defendants argue that there is "no basis" for the requested depositions because Plaintiffs do not allege, specifically, that these executives made misrepresentations. If depositions were limited to those who made the misrepresentations, in addition to Paul Hetterich, Plaintiffs would also be required to depose counsel for Defendants, who included these misrepresentations in the briefing. Depositions of these executives are required to discover the facts underlying the reported price increases.

> **attribute to Constellation in the past** (SAC ¶¶ 22-25, and 31.) (Constellation Motion at 15:13-15; 15:25-27.)
>
> ***
>
> **It is implausible to believe that there is an increased likelihood of coordination between ABI and Crown when those entanglements are removed by transaction…It is illogical to believe that Crown's prices will be coordinated with ABI's in the future, when they have not been in the past, and when those entanglements are removed by the transactions**. (Constellation Motion at 18:2-4; 18:12-14.) [Emphasis added.]

First, Constellation argued that, "Here, Plaintiffs cannot even allege that parallel pricing conduct has occurred. Rather, [Plaintiffs] hypothesize that it "may" occur in the future." The intended inference to be drawn from this statement is that Constellation/Crown is not going to raise prices in line with ABI. However, those statements about price increases are contradicted clearly by the information contained in the Beer Marketer's Insights article—Crown was already implementing price increases and planning to raise prices in line with ABI.

Second, Constellation represented that, "the existence of observed parallel conduct—an allegation that Plaintiffs cannot, and do not, make here… Plaintiffs allegation that Constellation may follow ABI's price leads in the future is merely speculation that Plaintiffs make based on statements Plaintiffs attribute to Constellation in the past." Like the statement above, the intended conclusion to be drawn from the statement that Plaintiffs "cannot" allege "observed parallel conduct" and that it is "merely speculation" is, of course, that parallel pricing is not taking place. And yet, it is clear that increasing prices in line with ABI was a plan that was already being implemented when those representations were made to the Court by Constellation.

Third, Constellation represented that, "It is implausible to believe that there is an increased likelihood of coordination between ABI and Crown when those entanglements are

removed by transaction…It is illogical to believe that Crown's prices will be coordinated with ABI's in the future, when they have not been in the past, and when those entanglements are removed by the transactions." Constellation's representations that it is "implausible" and "illogical" that there would be price increases and coordination are refuted by the reports of price increases and Crown's stated intention to raise prices in line with ABI. It is not disputed by Defendants that these coordinated price increases were planned when these representations were made.

Fourth, as discussed in the Plaintiffs' Motion (Dkt. No. 135 at 4-5), Constellation represented in the Declaration of Paul Hetterich, that 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." (Decl. of Paul Hetterich, Dkt. No. 83-6, 8:18-21.) Again, the intended conclusion to be drawn from the representations that Constellation, "has every intention to continue Crown's history of competing vigorously against all beer brands," and that it "affirms its dedicated commitment to grow Crown's market share…much of which will come at the expense of ABI" is that does not intend to increase prices along with ABI, because Crown's previous "commitment" to growing market share came about through resistance to ABI-led price increases. It is clear from the incipiency of this action that Plaintiffs alleged that if the transaction was permitted, Constellation through Crown would (1) increase prices; (2) abandon the Momentum plan; and (3) follow ABI price leads. (SAC, Dkt. No. 63, ¶¶ 5-9, 15, 18-25.) Defendants' representations were clearly intended to lead the Court to believe that the threatened anticompetitive effects of the transaction, which Plaintiffs raised, would not occur, though they were being implemented at the same time.

ABI made similar representations to this Court regarding Constellation's post-transaction incentives to compete:

> Finally, Plaintiffs allegations regarding Constellation's alleged desire to increase prices and purported lack of experience as a brewer are irrelevant to a Section 7 claim…**Plaintiffs attempt to support their allegations that Constellation will not compete as aggressively as Modelo by citing a few pre-transaction documents. (SAC ¶¶ 23-25.) Aside from being taken completely out of context, Plaintiffs' allegations surrounding these documents fail to account for the change in incentives Constellation will undergo as a result of gaining a long-term brand interest and becoming a beer brewer—the very same changes that led the DOJ to approve the revised transactions**. (CIS at 10 ("Specifically, the divestiture of the Piedras Negras Brewery and Modelo's interest in Crown, and the perpetual brand licenses required by the proposed Final Judgment, will vest in Constellation…the brewing capacity, the assets, and the other rights needed to produce, market, and sell Modelo Branded Beer in a manner similar to that which we see today.") Plaintiffs fail to allege any facts in support of the assumption that Constellation's incentives will be the same post-transactions as they were beforehand. (ABI Motion to Dismiss "ABI Motion", Dkt. No. 66, at 16:1-2; 16:23-28.)

ABI's representations are misleading for the same reason that Constellation's are. The intended conclusion is that price increases in line with ABI are not occurring and that Constellation was not planning price increases, though it was already planning to do so.

Defendants represented to this Court that they would "compet[e] vigorously" and not raise prices in line with ABI. The "fact" that "contradicts" these statements is that while these misrepresentations were being made to the Court, Crown and Constellation, were already planning price increases in line with ABI. As the Beer Marketer's Insights Article reports, "Crown is more aggressive on price than it has been in years. So much for its pricing "maverick" as per DOJ…Crown has also stated publicly that its price gaps are now good. That means when AB goes up, it is much more likely to go up to maintain those gaps." (Decl. of Joseph M. Alioto, Dkt. No. 135-1, Exhibit A.)

II. Defendants Have Conceded That Facts in Support of the Reported Price Increases State a "Plausible" Claim

In the briefing on the Motions to Dismiss, Defendants argued that:

> In most cases, plaintiffs are able to allege that parallel pricing conduct has occurred, and then seek to allege facts to explain why that conduct resulted from an unlawful agreement rather than non-actionable, independent decisions. (Constellation Motion at 13:5-8.)
>
> ***
>
> **However, the universal starting point in these parallel conduct cases is the allegation of the existence of observed parallel conduct—an allegation that Plaintiffs cannot, and do not, make here… (**Constellation Motion at 15:13-15.)
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> ***
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> The plaintiffs in those cases also then pled supporting evidentiary facts regarding the alleged agreement, such as emails or communications between defendants or defendants' employees discussing prices, the details of when the communications took place, the content of the agreement, **public announcements of successful coordinated conduct** and unexplained price stability that pushed their allegation of price fixing from "conceivable" to "plausible. *See, e.g., In re High-Tech Emp. Antitrust Litig.*, 856 F.Supp.2d at 1115-17; *In re Flash Memory Antitrust Litig.*, 643 F.Supp.2d at 1143-46; *In re TFT-LCD*, 586 F.Supp.2d 1115-16. Plaintiffs offer nothing other than naked conclusions and speculations. [Emphasis added.] (Constellation Motion at 14:21-27; 15:1-2.)

Defendants' arguments about "parallel pricing," "parallel conduct, and "coordinated conduct" demonstrate that the facts contained Beer Marketers Insights Article support Plaintiffs' claim as a "plausible" one. Defendants misrepresentations were material and affected the outcome of this case because this Court dismissed Plaintiffs' claims and denied Plaintiffs an opportunity to amend its Clayton Act § 7 claim and Sherman Act § 1 claim, holding that "the revised agreements make clear plaintiffs are unable to allege any facts showing the merger and accompanying agreements result in a violation of the Clayton Act, and after twice attempting to allege a Sherman Act violation, plaintiffs have demonstrated their ability to marshal any facts in support of such a claim." (Order at 14:16-21.) It is now clear that Plaintiffs allegations were not at all "speculative," as Defendants argued, and should

not have been dismissed[2]. Defendants above misrepresentations about price increases were material, as even Defendants acknowledge that the facts in support of the reported price increases state a plausible claim.

III. Plaintiffs Did Not Discover Evidence of the Price Increases Until After Judgment Was Entered

Defendants also argue in their opposition that the Beer Marketers Insights article was "readily available." The article was not discovered by Plaintiffs until after the entry of Judgment on October 16. At no point before the entry of Judgment were Plaintiffs in possession of that article nor aware of the reported price increases by Crown. Further, the cases cited by Defendants regarding "reasonable diligence" are inapposite[3]. These cases involve situations where the party was in possession of the information before judgment was entered. That is not the case here. (Decl. of Joseph M. Alioto ISO Reply, ¶ 2.)

Moreover, this information was not "readily available," as Defendants contend. Though the article was dated on August 19, 2013, it is not clear if it was actually posted to the website on that date. Further, it is unclear how long it took for that posting to become available via search engine after it was posted. Even if a person visits the Beer Marketers Insights website, the posting is not readily accessible, unless a person conducting a search of the site is aware of the title or date of the article and uses the search tool on the page. The Beer Marketers Insights article, which is a trade publication, is not readily available

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[2] *See Hosp. Corp. of Am. v. F.T.C.*, 807 F.2d 1381, 1389 (7th Cir. 1986), in which the court stated: ". . . Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable (see *United States v. Philadelphia Nat' l Bank*, 374 U.S. 321, 362 (1963), is called for.")

[3] Defendant cites, *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., Inc.,* 833 F.2d 208, 212 (9th Cir. 1987); *Daghlian v. DeVry Univ., Inc.,* 582 F. Supp. 2d 1231, 1253 (C.D. Cal. 2008); and *Feature Realty, Inc., v. City of Spokane,* 331 F.3d 1082, 1093 (9th Cir. 2003). Each involves a situation where the evidence was in possession of the party before judgment was entered. These are inapplicable because this is not the situation here.

information in the same way that an article published in the New York Times or another major news publication is available. "Reasonable diligence" cannot require a party to be aware immediately of every article published among the vast array of data available on the internet. The fact that Plaintiffs brought this motion within the time provided by Rule 59(e) and soon after discovery of the article demonstrates, presumptively, that they exercised reasonable diligence with regard to this newly discovered evidence.

IV. Relief is Also Proper Under Rule 60(b)(6)

Under Fed. R. Civ. P. 60(b)(6), the Court may, "set aside a judgment for fraud on the court." In *Phelps v. Alameida,* 569 F.3d 1120 (9th Cir. 2009), the Ninth Circuit considered the purpose of Rule 60(b):

> The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish justice." Given that directive, we agree that "the decision to grant Rule 60(b)(6) relief" must be measured by "the incessant command of the court's conscience that justice be done in light of all the facts." *Id.* at 1141 (footnotes omitted).

In light of the purpose of Rule 60(b)(6) and Defendants misrepresentations, it is in the interests of justice for the Court to vacate the Judgment and order the requested discovery related to Defendants' price increases.

CONCLUSION

In light of the foregoing, 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), (1) vacate the Judgment; (2) enter an order granting Plaintiffs' discovery request including all documents related to the announced price increases and the depositions of Carlos Brito, Rob Sands, and the executives at Crown responsible for pricing and price increases, and (3) hold a one-day hearing on this matter.

Dated: December 1, 2013

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By: */s/ Joseph M. Alioto*

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