ALLEN RUBY (Bar No. 47109)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue
Palo Alto, California 94301-1908
Telephone: (650) 470-4500
Facsimile: (650) 470-4570
Email: Allen.Ruby@skadden.com

Attorney for Defendant ANHEUSER-BUSCH INBEV SA/NV

Additional Counsel Listed on Next 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, GRUPO MODELO S.A.B. de C.V., and CONSTELLATION BRANDS, INC. *Defendants*.	CASE NO. C-13-1309-MMC **DEFENDANTS ABI'S AND MODELO'S OPPOSITION TO PLAINTIFFS' MOTION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE** Date: Time: Courtroom: 7, 19th Floor Before: Hon. Maxine Chesney

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

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

Attorneys for ANHEUSER-BUSCH InBEV SA/NV

ROWAN WILSON (Bar No. 118488)
YONATAN EVEN (admitted *pro hac vice*)
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Facsimile: (212) 474-3700
Email: rwilson@cravath.com
Email: yeven@cravath.com

DEAN S. KRISTY (Bar No. 157646)
CHRISTOPHER J. STESKAL (Bar No. 212297)
MARIE C. BAFUS (Bar No. 258417)
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, California 94104
Telephone: (415) 875-2300
Facsimile: (415) 281-1350
Email: dkristy@fenwick.com
Email: csteskal@fenwick.com
Email: mbafus@fenwick.com

Attorneys for GRUPO MODELO S.A.B. DE C.V.

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STATEMENT OF THE ISSUES TO BE DECIDED

1. Whether the Court should deny as moot Plaintiffs' request for the extraordinary remedy of preliminary injunctive relief.

2. Whether the Court should deny Plaintiffs' request for preliminary injunctive relief because Plaintiffs fail to meet one or more of the Ninth Circuit's requirements for such relief.

3. The amount of security Plaintiffs should be required to post if they are entitled to a temporary restraining order.

PRELIMINARY STATEMENT

Defendants Anheuser-Busch InBev SA/NV ("ABI") and Grupo Modelo S.A.B. de C.V. ("Modelo") respectfully submit this memorandum in opposition to Plaintiffs' motion for a temporary restraining order and an order to show cause why a preliminary injunction should not issue (the "Motion").

Plaintiffs come to this Court seeking extraordinary preliminary relief to halt ABI's $20.1 billion acquisition of the remainder of Modelo "that it does not already own." (Motion at 3.) Plaintiffs' request should be denied for several independent reasons.

First, as a threshold matter, Plaintiffs' request is moot because ABI already has purchased the remaining shares of Modelo. As this is the only relief requested, there is no reason to entertain Plaintiffs' Motion. Indeed, the Motion seeks to *alter* rather than maintain the status quo, coming more than eleven months after ABI and Modelo first announced their intent to merge, more than three and a half months after they announced their revised transactions, and more than two months after they sent Plaintiffs a letter alerting them that their initial complaint (filed more than a month after the parties' transactions were revised) attacked transactions that had been superseded. While Plaintiffs delayed, the United States Department of Justice Antitrust Division ("DOJ") completed its nine-month investigation of the transactions and entered into a proposed Final Judgment with ABI, Modelo and Constellation Brands, Inc. ("Constellation") through which they settled the lawsuit filed by the DOJ regarding the originally proposed transactions. The DOJ concluded that the merger of ABI and Modelo, along with ABI's "complete divestiture of Modelo's U.S. business" to Constellation (making Constellation an independent brewer completely separate from

ABI), "will maintain Modelo Brand Beers as independent competitors to ABI's flagship brands in the United States and will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States"—i.e., the transactions will *increase, rather than decrease*, competition in the U.S. beer market. (West Decl. Ex. 3(b), Competitive Impact Statement ("CIS") at 2.) Thus, while the Motion is fatally defective for many reasons—including the absence of *any evidentiary support*—the most glaring deficiency is that the challenged transactions do not even result in a merger between ABI and Modelo in the United States.

Second, Plaintiffs have no likelihood of success on the merits and offer nothing but conclusory assertions to suggest otherwise. The relevant facts are in the public domain and are well-known. More than eleven months ago, ABI announced a global deal in which it proposed to acquire the remaining 49.7% economic stake in Modelo that ABI did not already own. ABI did not seek to acquire Modelo's U.S. business, and therefore entered into a simultaneous transaction through which Constellation would become the sole importer of Modelo beers in the United States. After that announcement, the DOJ investigated the transactions and, in late January 2013, filed suit to enjoin the ABI-Modelo merger as an alleged violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. At the time, the DOJ alleged that Constellation, as the post-transactions seller of Modelo beer in the United States, would not be a sufficiently independent competitor because it would continue to depend on ABI for supply and did not have long-term brand rights.

On February 14, 2013, ABI publicly announced a revised set of transactions that eliminated the DOJ's concerns by also selling Constellation both a state-of-the-art brewery, which will fully satisfy U.S. demand for Modelo beers for the foreseeable future, and a perpetual and irrevocable exclusive license to the Modelo brands in the United States. As Plaintiffs' First Amended Complaint ("FAC") itself acknowledges, the state of play is as follows:

- Constellation will wholly own Crown Imports LLC ("Crown"), the exclusive seller of Modelo beers in the United States;
- Constellation will receive a *fully paid-up, perpetual, exclusive license* to the Modelo brands in the United States;
- ABI will sell Constellation the *state-of-the-art Piedras Negras brewery* with three-year agreements for transition services and incremental supply; and

- Constellation will pay *$4.75 billion* to obtain these assets, and—counting its existing investment in Crown—will hold competitive assets conservatively valued at $6.6 billion, giving Constellation *every incentive to compete aggressively* against ABI in the United States.

(FAC ¶ 29.) In short, the revised transactions give full ownership of Modelo's U.S. business to Constellation.

On April 19, 2013, the DOJ entered into a settlement with Defendants, recognizing that "[u]nder the parties' proposed settlement and Final Judgment, Constellation would acquire from [ABI a]ssets designed to allow Constellation to compete in the United States market as an integrated brewer, importer, and distributor of Modelo Brand Beers." (West Decl. Ex. 4, Stipulation and Order at 7.) According to the DOJ, the transactions "preserve[] the current structure of the beer market in the United States" because Constellation will be "an independent and economically viable competitor that will stand in the shoes of Modelo." (West Decl. Ex. 3(b), at 10.)

On these indisputable facts, Plaintiffs cannot possibly establish a Section 7 violation, as ABI is not acquiring Modelo's U.S. business. Instead, post-transactions, Constellation will be the sole seller of Modelo beer in the United States and become a vertically-integrated producer, fully independent of ABI. As a result, the revised transactions eliminate any basis to allege the existence of a horizontal merger in the alleged U.S. beer market—let alone one that would violate the antitrust laws. Simply stated, Constellation, not ABI, is acquiring Modelo's business in the United States. And, in fact, the transactions actually will *decrease* concentration in the U.S. beer industry, and therefore likely are procompetitive, because they remove the substantial indirect financial interest that ABI had in Crown and Modelo's U.S. business through its 50.3% economic stake in Modelo. (Rubinfeld Decl. ¶¶ 12, 14-18.)

In addition, Plaintiffs provide no factual support for their allegations that Constellation's acquisition of Modelo's U.S. business is "fraudulent," or that Constellation will be ABI's "puppet." On the contrary, Constellation is well equipped to be an effective competitor post-transactions. Constellation is a long-standing, publicly traded U.S. corporation with billions in total assets and market capitalization. Its acquisition of the brewery and brands license is fully financed with

commitments from major financial institutions. While Plaintiffs apparently would prefer if Constellation did not acquire Modelo's interest in and operate Crown, Constellation and Modelo *are not competitors*, and Section 7 is not implicated by that event even if it is precipitated by ABI's acquisition of Modelo's non-U.S. assets.

Third, Plaintiffs cannot establish the other requirements necessary to obtain a TRO. Specifically, Plaintiffs cannot establish that they will suffer immediate, irreparable injury if the TRO is not granted. To start, they have failed to submit any evidence of likely harms specific to the nine individual consumer plaintiffs. In addition, the only injury detailed in the Motion is speculative financial harm—resulting from an alleged increase in beer prices—that would be compensable in monetary damages, and therefore, not irreparable. And Plaintiffs' extensive delay in filing suit and seeking a TRO weighs heavily against any finding of immediate, irreparable harm.

Further, the balance of equities tips decidedly in favor of denying the requested relief. Defendants face significant harm should the Motion be improperly granted, including losing more than $1 billion in transaction costs, as well as an average of $19 million *per week* in lost synergy values. Defendants' employees, shareholders and business partners also would be harmed by any delay and uncertainty. In comparison, the nine individual plaintiffs only have offered conclusory allegations of higher beer prices and diminished competitive options from a transaction which, again, removes no beer brands from the market and actually de-concentrates the U.S. beer industry.

The granting of a TRO also is not in the public interest. In fact, a TRO would harm the public interest both by denying the public the increased competition that likely will result from the proposed transactions and interfering in the capital markets and the free sale of stock. The DOJ's conclusion that the transactions in fact improve the competitiveness of the beer industry in the United States is strong evidence that the transactions are in the public interest.

Finally, Plaintiffs have completely ignored their obligation to post a bond to compensate Defendants for damages in the event of a wrongly granted injunction, as required by Section 16 of the Clayton Act, 15 U.S.C. § 26, and Federal Rule of Civil Procedure 65(c). Given the significant losses that Defendants would suffer if the transactions were prevented or delayed, it is likely that

Plaintiffs lack the means to post such a bond, which weighs heavily against granting the provisional relief they seek.

For all of these reasons, the Motion should be recognized—and rejected—for what it is: a last minute shakedown, consistent with Plaintiffs' counsel's long string of unsuccessful attempts to enjoin high-profile mergers, filed with the misguided hope of extracting a settlement from Defendants.[1]

BACKGROUND

Defendants ABI's and Modelo's opposition to the Motion is best understood in the context of: (1) the historical relationships among ABI, Modelo, Constellation and Crown; (2) the history of the proposed transactions and settlement of the DOJ litigation; (3) ABI's current ownership of and control over Modelo as it relates to the status quo; and (4) Plaintiffs' allegations.

I. THE HISTORICAL RELATIONSHIPS AMONG ABI, MODELO, CONSTELLATION AND CROWN

A. ABI's Past Relationship with Modelo

Since 1998, ABI has owned a 50.3% economic interest in Modelo as a result of its 35.3% direct ownership interest in Modelo and its 23.3% ownership interest in Modelo's operating subsidiary Diblo, S.A. de C.V ("Diblo"). (FAC ¶ 45.) ABI was entitled to appoint nine representatives to Modelo's nineteen-member Board of Directors and had voting rights subjecting significant Modelo operations to ABI's approval. (*Id.*)

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[1] *See, e.g., Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1125 (N.D. Cal. 2011) (dismissing antitrust challenge to merger of Southwest Airlines and AirTran); *Cassan Enters., Inc. v. Avis Budget Grp., Inc.*, No. C10-1934-JCC, slip. op. at 6 (W.D. Wash. Mar. 11, 2011) (dismissing antitrust challenge to Avis' proposed acquisition of Dollar Thrifty); *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at *15 (N.D. Cal. Sept. 27, 2010) (denying motion to enjoin merger of United Air Lines and Continental Airlines), *aff'd*, 434 F. App'x 620 (9th Cir.), *cert. denied*, 132 S. Ct. 855 (2011); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2009 WL 3320272, at *2 (N.D. Cal. Oct. 14, 2009) (dismissing antitrust challenge to merger of Pfizer and Wyeth); *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 952 (E.D. Mo. 2009) (dismissing antitrust challenge to InBev's acquisition of Anheuser-Busch), *aff'd*, 623 F.3d 1229 (8th Cir. 2010); *Madani v. Shell Oil Co.*, No. CV 08-1283-GHK (JWJx), 2008 WL 7856015, at *4 (C.D. Cal. July 11, 2008) (dismissing antitrust challenge to joint ventures between Shell and Texaco), *aff'd*, 357 F. App'x 158 (9th Cir. 2009); *Am. Channel, LLC v. Time Warner Cable, Inc.*, Civ. No. 06-2175 (DWF/SRN), 2007 WL 1892227, at *7 (D. Minn. June 28, 2007) (dismissing antitrust challenge to Time Warner's acquisition of Adelphia).

B. Modelo's Past Relationship with Crown

Crown, originally a 50/50 joint venture between Modelo and Constellation, sells and markets Modelo's brands in the United States as the exclusive importer of its beers. (*Id.* ¶ 27.) Modelo had approval rights over certain Crown operations—including general pricing parameters, capital investments and borrowing activities—and directional control over global strategies for Modelo brands. (*Id.* ¶ 47.) In addition, Modelo had the right to acquire Constellation's 50% interest in Crown in 2016 by exercising a call option prior to the end of 2013. (*Id.*) Finally, Modelo supplied Crown with beer for sale in the United States pursuant to an importation agreement entered into in 2007. (West Decl. ¶ 4.)

C. ABI's Past Relationship with Crown

Through its 50.3% economic interest in Modelo, which is a 50% owner of Crown, ABI had a roughly one-quarter interest in Crown's gross profits from the U.S. distribution of the Modelo brands. (Rubinfeld Decl. ¶ 11.) In addition, ABI's stake in Modelo entitled it to 50.3% of the profit Modelo received from sales to Crown under the importation agreement. (*Id.*) This means that its ownership in Modelo gave ABI an overall 34% interest in the profits received from the sale of Modelo beers in the United States. (*Id.*)

II. HISTORY OF THE PROPOSED TRANSACTIONS AND SETTLEMENT OF THE DOJ LITIGATION

A. The Original Transactions and the DOJ's Challenge

In June 2012, ABI agreed to purchase the remaining equity interest in Modelo that it did not already own, while also entering into a simultaneous transaction through which Constellation would become the exclusive importer, marketer and seller of Modelo brands in the United States for at least ten years. (FAC ¶¶ 27, 48.) On January 31, 2013, the DOJ filed suit against ABI and Modelo, alleging that those original transactions would violate Section 7 of the Clayton Act. (West Decl. Ex. 1, DOJ Complaint ¶¶ 2, 7.) According to the DOJ, the sale of Modelo's 50% interest in Crown to Constellation was not sufficient to satisfy its concerns because, post-transactions, Constellation would continue to depend on ABI for importer rights and supply of Modelo beers. (*Id.* ¶¶ 8, 82.)

B. The Revised Transactions

On February 14, 2013, ABI, Modelo and Constellation announced that they had entered into a revised set of transactions superseding the original transactions entered into in June 2012. (FAC ¶ 28.) As before, ABI still would purchase the remaining interest in Modelo that it did not already own and sell Modelo's existing 50% interest in Crown to Constellation. (*Id*. ¶ 29.) But instead of entering into a ten-year license and supply arrangement, ABI will grant Constellation a fully paid-up, perpetual, exclusive license to Modelo brands in the United States. (*Id*.) The license will give Constellation control over brand recipes and brand extensions in the United States and will not include any non-compete provisions in the United States, including for Mexican-style beers. (West Decl. Ex. 2, at Amended and Restated Sub-License Agreement §§ 2.2, 2.15 ("SLA").) ABI will be unable to terminate the agreement or to reassume control over any Modelo brands in the United States. (*Id*. at SLA § 4.1.)

In addition, Constellation will acquire Modelo's Piedras Negras brewery, located only nine miles from the Texas border. (FAC ¶ 29.) The state-of-the-art facility is self-sufficient, and it benefits from a continuous, high quality water supply. (*See* Declaration of John H. Boone ("Boone Decl."), Ex. F, at 3.) Piedras Negras—which produces Corona, Corona Light and Modelo Especial—currently supplies approximately 60% of the annual demand for Modelo brands shipped to the United States (FAC ¶ 96), and was designed to be expanded to three times its current production capacity without interrupting operations. (*See* Boone Decl., Ex. F at 3.) To ensure a smooth transition of brewery operations, ABI and Constellation will enter into a three-year agreement for transition services. (West Decl. Ex. 2, at Transition Services Agreement (the "Transition Services Agreement" or "TSA").) Under this agreement, ABI will assume a consulting role post-transaction with Constellation immediately taking control over all brewery operations.[2] (*Id*. at TSA § 2.01(e) ("[U]nder no circumstances shall [ABI] have the authority to make any

[2] As part of the transactions, Constellation will acquire Servicios Modelo de Coahuila, S.A. de C.V., the company that employs the personnel who currently operate the Piedras Negras brewery, thereby retaining all the necessary employees and assuming control of their compensation. (CIS at 13-14.) ABI will be responsible only for paying personnel that provide services to Constellation under the TSA. (West Decl. Ex. 2, at TSA § 3.01.)

decisions with respect to the operation and expansion of the Piedras Negras Plant . . . .").) The TSA will require ABI to supply Constellation with input products, including aluminum cans, glass, malt, crowns and caps, hops, corn starch, can lids, cartons and yeast. (*Id*.) ABI will be required to provide these inputs at prices contractually set by the terms of the TSA. (*Id*. at TSA § 3.02.)

ABI and Constellation also will enter into an agreement for incremental beer supply while Piedras Negras undergoes expansion. (*Id*. at Interim Supply Agreement (the "Interim Supply Agreement" or "ISA").) The agreement will require ABI to fulfill Constellation orders for Modelo brand beers (*id*. at ISA § 2.2), but Constellation will not be dependent upon ABI for incremental supply. The volume of beer ABI supplies will be limited to Crown's requirements not supplied from Piedras Negras or from third parties with whom Crown may contract for supply. (*Id*. at ISA § 2.1.) The ISA will require ABI to supply beer to Constellation at contractually-set prices. (*Id*. at ISA §§ 3.1-3.2.) In addition, the ISA prohibits ABI from making adverse changes to the beer recipe or packaging. (*Id*. at ISA §§ 2.9(a-b).)

C. DOJ Review and Settlement

On April 19, 2013, after the DOJ reviewed and approved these revised transactions and agreements, the DOJ, ABI, Modelo and Constellation reached an agreement to settle the litigation and allow the parties to move forward with the transactions. The proposed Final Judgment, which resolves all of the DOJ's claims, incorporates the key deal agreements between ABI and Constellation—including the sale of the brand license and Piedras Negras to Constellation and the creation of the TSA and ISA—and requires the parties to comply with their contractual obligations. (*See* West Decl. Ex. 3(b), at 13; *id.* Ex. 3(a), proposed Final Judgment § IV(G)-(I).) Further, the proposed Final Judgment prohibits any agreement that would provide ABI with the ability to unreasonably raise Constellation's costs or lower its efficiency. (Proposed Final Judgment § IV(J)(2).) In addition, "Constellation has committed to build out and expand the Piedras Negras Brewery to brew and package sufficient [Modelo brand beers] to meet the large and growing demand for these beers in the United States" and to at least double the brewery's capacity by December 31, 2016. (West Decl. Ex. 3(b), at 3; *id.* Ex. 3(a), § V(A).)

The proposed Final Judgment also requires the erection of information firewalls to prevent ABI from obtaining or using competitively sensitive Constellation information, as ABI fulfills its obligations under the TSA and ISA.[3] (*Id.* Ex. 3(a), § XIII; *id.* Ex. 3(b), at 18.) The DOJ, at its sole discretion, is permitted to appoint a monitoring trustee to oversee the parties' compliance with the obligations of the proposed Final Judgment. (*Id.* Ex. 3(a), § VIII.) Finally, the proposed Final Judgment prohibits ABI from financing Constellation's purchase of Piedras Negras or the irrevocable brands license, or from reacquiring any divested assets within the ten-year term of the Final Judgment. (*Id*. §§ IX, XV.)

As the DOJ has explained, "[t]he proposed Final Judgment contains a clean, structural remedy that eliminates the likely anticompetitive effects of the acquisition in the market for beer in the United States . . . ." (West Decl. Ex. 3(b), at 9.) By requiring "the complete divestiture of Modelo's U.S. business," the proposed Final Judgment "will maintain Modelo Brand Beers as independent competitors to ABI's flagship brands in the United States." (*Id*. at 2.)

In sum, post-transactions, Constellation effectively will own Modelo's brands in the United States, operate its own Modelo brewery and completely control its supply chain. As the DOJ made clear, the transaction with Constellation "preserves the current structure of the beer market in the United States" because Constellation will be "an independent and economically viable competitor that will stand in the shoes of Modelo." (*Id*. at 10.) Further, the transactions "will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." (*Id*. at 2.) As the graphic in Appendix A attached hereto illustrates, the transactions "vertically integrate[] the production and sale of Modelo Brand Beer in the United States and eliminate[] ABI's control of Modelo Brand Beer in the United States." (*Id*. at 11.)

III. ABI's ACQUISITION OF MODELO AND THE STATUS QUO

Over a month ago, on April 25, 2013, ABI announced that it completed the mergers of Diblo and Dirección de Fábricas, S.A. de C.V. ("Dirección de Fábricas"), a subsidiary of Modelo,

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[3] To ensure there can be no coordination between ABI and Constellation during the interim supply period, the ISA and TSA contain firewall provisions prohibiting the sharing of competitively sensitive information. (West Decl. Ex. 2, at ISA § 5.4; *id.* Ex. 2, at TSA § 2.12.)

with and into Modelo. (West Decl. ¶ 14.) As a result of these mergers, ABI gained control of Modelo's board of directors, which effectively gave it control over Modelo. (*Id.*) Both ABI and Modelo issued press releases on April 25, 2013 announcing the mergers and the upcoming commencement of ABI's tender offer for the remaining shares of Modelo. (*Id*. ¶ 14, Exs. 7-8.) Modelo's press release also announced that its board of directors had accepted the resignation of its Chief Executive Officer, Carlos Fernández González. (*Id*. ¶ 14, Ex. 8.) On May 1, 2013, ABI launched its tender offer to purchase the remaining shares of Modelo. (*Id*. ¶ 14, Ex. 9.) On May 31, 2013, the tender offer expired as scheduled. (*Id*. ¶ 14, Ex. 10.) And this morning, June 4, 2013, the tender offer settled—i.e., ABI purchased the remaining shares of Modelo that it did not already own. (*Id*. ¶ 14.)

IV. PLAINTIFFS' ALLEGATIONS

Plaintiffs challenge transactions that the DOJ has extensively investigated and fully approved. Plaintiffs claim that the revised agreement between ABI and Constellation is part of a "fraudulent scheme" to allow ABI to control the beer industry in the United States, and that the Revised Agreement is itself "fraudulent." (Motion at 6; FAC ¶¶ 26, 30, 50, 100.) According to the FAC, the Revised Agreement is "a subterfuge to allow ABI to raise prices" (FAC ¶ 50) because it removes Modelo—allegedly an aggressive competitor that has thwarted ABI's attempts to raise prices—and gives full control of Crown to Constellation, which is alleged to be ABI's "puppet." (*Id*. ¶¶ 19-20.) Plaintiffs allege that the current transactions are presumptively anticompetitive because ABI, which they claim has a 49% share of beer sales in the United States, would acquire Modelo's 5% share (based on sales made by Crown). (*Id*. ¶¶ 73, 76, 78, 81-82.) Plaintiffs claim that ABI effectively would acquire Crown's U.S. share from the sale of Modelo beer in the United States for a number of reasons, including that: (1) ABI will be able to control Constellation during the three-year transition supply period because it will control Constellation's supply of beer; (2) Constellation historically has urged Modelo to follow ABI's price increases and will be able to do so itself post-transactions; (3) Constellation has conspired with ABI to follow its price leads post-transactions; and (4) post-transactions, ABI (and not Constellation) will pay the employees working at Piedras Negras. (Motion at 6; FAC ¶¶ 30, 104-07.) And, finally, Plaintiffs allege that,

post-transactions during the three-year "transition" period, "Constellation will be effectively ABI's surrogate, stand-in, and puppet" (FAC ¶ 31), because Constellation did not seek to buy the additional interest in Crown nor to buy a brewery, is not a beer brewer, has no experience running a brewery, and cannot afford to purchase a brewery. (Motion at 6; FAC ¶¶ 30, 101-03.)

ARGUMENT

I. PLAINTIFFS' MOTION IS MOOT BECAUSE ABI ALREADY HAS CLOSED ITS ACQUISITION OF MODELO, AND THEREFORE, PLAINTIFFS CANNOT OBTAIN THEIR REQUESTED RELIEF

Plaintiffs' Motion should be denied as moot because their requested relief no longer is available. Specifically, Plaintiffs seek to enjoin ABI from acquiring the remainder of Modelo that it does not already own. (Motion at 3.) But as of today, June 4, 2013, ABI's acquisition of Modelo has closed, and ABI already has acquired the shares of Modelo that it did not already own following the settlement of its tender offer. Plaintiffs plainly cannot obtain their requested relief to prevent an acquisition that now has occurred. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 (8th Cir. 2010). Accordingly, their Motion is moot and should be denied. *See, e.g., Sami v. Wells Fargo Bank*, No. C 12-00108 DMR, 2012 WL 967051, at *9 (N.D. Cal. Mar. 21, 2012) (dismissing as moot motion to enjoin property foreclosure, where the property already had been sold).

II. PLAINTIFFS HAVE NOT ESTABLISHED ANY OF THE ELEMENTS NECESSARY TO OBTAIN A TEMPORARY RESTRAINING ORDER

Preliminary relief, whether a temporary restraining order or preliminary injunction, "'is an extraordinary and drastic remedy, [and] one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted); *see also Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) ("A preliminary injunction is an 'extraordinary and drastic remedy'. . . [that] is never awarded as of right . . . ." (citation omitted)). To meet their high burden, Plaintiffs must produce "substantial evidence" supporting each of the elements of an application for a preliminary injunction or temporary restraining order. *Mazurek*, 520 U.S. at 972 (preliminary injunctive relief requires more than just "some evidence"). Preliminary injunctions and temporary restraining orders are governed by the same standard. *See Beats Elecs., LLC v. Fanny Wang Headphone Co.*, No. C-10-5680 MMC, 2011

WL 31198, at *1 n.1 (N.D. Cal. Jan. 5, 2011) (Chesney, J.) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977)); *Trachsel v. Buchholz*, No. C-08-02248 RMW, 2008 WL 2383080, at *2 (N.D. Cal. June 8, 2008).

Plaintiffs must provide "substantial evidence" that makes a "clear showing" that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Beats Elecs.*, 2011 WL 31198, at *1 (applying the four *Winter* factors in denying plaintiffs' request for a TRO). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987)). Failure to establish any one of these elements is fatal to Plaintiffs' motion. *See Dish Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011) (Plaintiff "must demonstrate that it meets all four elements" of the *Winter* test). Plaintiffs here have not carried their burden on any one of the four elements.

A. Plaintiffs Have Not Established a Likelihood of Success on the Merits Because They Cannot Possibly Succeed on Their Section 7 Claim

As also described in Defendants ABI's and Modelo's motion to dismiss, Plaintiffs have no hope of succeeding on their claim for injunctive relief.[4] Plaintiffs' claim under Section 7 of the Clayton Act must fail for the simple reason that ABI *is not acquiring Modelo's U.S. business*.[5] In

[4] With Defendants' motions to dismiss pending, Plaintiffs' attempt to seek discovery is improper. Parties are "generally prohibit[ed]" from seeking discovery before their conference under Federal Rule of Civil Procedure 26(f), absent a "showing [of] good cause for the requested departure from usual discovery procedures." *Rovio Entm't Ltd v. Royal Plush Toys, Inc.*, No. C 12-5543 SBA, 2012 WL 5425584, at *10 (N.D. Cal. Nov. 6, 2012) (denying TRO and request for expedited discovery). Plaintiffs contend that they are entitled to expedited discovery to help them demonstrate "that the proposed transactions violate Section 7." (Motion at 9.) "The problem with Plaintiffs' argument, however, is that it applies to nearly every case. . . . [And] the federal rules, adopted after much study and thought, dictate a different procedure." *Megaupload, Ltd. v. Universal Music Group, Inc.*, No. 11-cv-6216 CW (JSC), 2012 WL 243687, at *3 (N.D. Cal. Jan. 25, 2012) (denying request for expedited discovery).

[5] While the FAC asserts a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, Plaintiffs do not invoke Section 1 as a basis for relief in their motion. (*See* Motion at 3.) Nor could they. Plaintiffs fail to meet their burden to *plead* any evidentiary facts—let alone provide *actual evidence*—supporting the existence of the alleged price-fixing conspiracy between ABI and Constellation, including the time when, or place where, the parties entered into this agreement.

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fact, the revised transactions will decrease concentration in the alleged U.S. beer market, and therefore, if anything, are procompetitive. While Plaintiffs attempt to circumvent this reality by claiming that ABI effectively will acquire Modelo's U.S. business because Constellation's acquisition of those assets is "fraudulent," their allegations are utterly devoid of evidentiary support and are contrary to the terms of the parties' agreements themselves.

1. Legal Standard Under Section 7 of the Clayton Act

"Section 7 of the Clayton Act prohibits a person 'engaged in commerce or in any activity affecting commerce' from acquiring 'the whole or any part' of a business' stock or assets if the effect of the acquisition 'may be substantially to lessen competition, or to tend to create a monopoly.'" *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004) (quoting 15 U.S.C. § 18). "To establish a section 7 violation, plaintiffs must show that a pending acquisition is reasonably likely to cause anticompetitive effects." *Id.* And where, as here, the alleged violation relates to a purported horizontal merger between competitors, a prima facie Section 7 violation requires "show[ing] that the merger would produce a firm controlling an undue percentage share of the relevant market, and [would] result [ ] in a significant increase in the concentration of firms in that market." *Id.* at 1110 (alterations in original) (citations omitted) (internal quotation marks omitted).

Here, the revised transactions do not and cannot implicate any Section 7 concerns.

2. ABI Is Not Acquiring Modelo's U.S. Business, and the Transactions Will Decrease Concentration in the Alleged U.S. Beer Market

Most fundamentally, Plaintiffs' Section 7 claim necessarily will fail because ABI is not acquiring "the whole or any part" of Modelo's U.S. business. Instead, post-transactions, Constellation will fully control Modelo's brands and the supply of Modelo beer in the United States. As the DOJ explained, the transaction with Constellation "preserves the current structure of the beer market in the United States" because Constellation will be "an independent and

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Indeed, Plaintiffs' reckless and unsupported assertion that the CEOs of ABI and Constellation "have met privately to effectuate" the alleged conspiracy (Motion at 7) is sanctionable for its absolute baselessness. Accordingly, Plaintiffs' Section 1 claim cannot even survive a motion to dismiss. *See* Notice of Motion and Motion by Defendants ABI and Modelo to Dismiss Plaintiffs' First Amended Complaint ("MTD Brief"), Dkt. 41, at 14-16.

economically viable competitor that will stand in the shoes of Modelo." (West Decl. Ex. 3(b), at 10.) Specifically, Constellation will have a royalty-free, perpetual license that will give it the exclusive right to develop, market and sell (through Crown) Modelo beers in the United States. In addition, Constellation will acquire Piedras Negras, a state-of-the-art brewery perfectly positioned to meet and supply U.S. demand for Modelo brands. Given that the proposed transactions will not even combine competitors in the sale of beer in the United States, there is no basis for Plaintiffs' claim that the transactions will increase market concentration as alleged—let alone that they can establish a presumptive Section 7 violation. (Motion at 4-5; FAC ¶¶ 73, 76, 78, 81-82.)[6]

Indeed, if anything, the proposed transactions will *decrease concentration* in the U.S. beer industry. ABI—through its ownership interest in Modelo—historically has held an indirect financial interest in Crown and an overall 34% interest in the profits received from the sale of Modelo beers in the United States. (Rubinfeld Decl. ¶ 11.) Post-transactions, ABI will no longer have any financial interest in Crown, nor will it retain any board representation, voting rights or other governance involvement that Modelo had in Crown. Instead, Crown (under the sole ownership of Constellation) will be completely independent from ABI. As the DOJ recognized, the transactions "will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." (West Decl. Ex. 3(b), at 2.) Moreover, the transactions establish Constellation as the third largest producer and marketer of beer in the United States, with independent brewing operations, the full profit stream from all U.S. sales of Modelo beer and rights in perpetuity to the Modelo brands distributed by Crown in the United States.

Accordingly, basic economic analysis confirms that the transactions are competitively neutral or procompetitive. For example, contrary to Plaintiffs' claims (Motion at 5), the transactions will *lower* the U.S. beer industry HHI[7] by nearly 90 points. (Rubinfeld Decl. ¶ 18.)[8]

[6] Plaintiffs' invocation of *United States v. Pabst*, 384 U.S. 546 (1966), as the "law governing this case" (Motion at 7) plainly is wrong because in that case—unlike here—the transaction combined "two very large brewers" and resulted in an increase in market concentration. *Id.* at 551.

[7] The Herfindahl-Hirschman Index, or HHI, is a measure of market concentration calculated by summing the squares of individual competitor's market shares within a market. Measuring concentration in this manner gives proportionally greater weight to competitors with larger shares. A post-transaction increase in HHI indicates that a transaction will increase a market's concentration, while a decrease in HHI indicates a decrease in concentration.

Thus, by eliminating ABI's financial interest in Crown, increasing Crown's independence and creating a significant competitor in Constellation, the transactions, if anything, will *increase competition* in the sale of beer in the United States

3. Plaintiffs' Allegations That ABI Will Control Constellation Are Baseless

In an effort to circumvent reality, Plaintiffs claim that ABI effectively will acquire Modelo's U.S. business because Constellation's acquisition of those assets is "fraudulent" (Motion at 6; FAC ¶¶ 30, 50, 100) and part of a "fraudulent scheme" designed to conceal a Section 7 violation from the public (FAC ¶ 26) and, apparently, the DOJ.[9] Yet Plaintiffs fail to provide *any factual support* for their theory. Further, their conclusory allegations that ABI will control, or coordinate with, Constellation during the transition period (*id*. ¶¶ 30, 105) are refuted by the terms of the actual transaction agreements. Specifically, ABI is contractually prohibited from limiting the supply or raising the prices of the beer provided to Constellation during the transition supply period and, in accordance with the proposed Final Judgment, firewalls will be imposed to prevent the exchange of competitively sensitive information between ABI and Constellation. In addition, Constellation, not ABI, will pay the employees of the Piedras Negras brewery. (*See supra* pp. 7-8.)

Plaintiffs also fail to provide any evidence supporting their allegations concerning Constellation's purported lack of financial wherewithal and inexperience as a brewer. (Motion at 6; FAC ¶¶ 30, 101-06.) Contrary to Plaintiffs' allegations, the evidence illustrates that Constellation is eager to own and operate the Piedras Negras brewery, has significant experience manufacturing alcoholic beverages (including beer and cider) and has more than sufficient financial resources to

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[8] Plaintiffs' Motion cites no evidence to the contrary. Nor could Plaintiffs rely on the declaration of Mr. Boone, who is one of Plaintiffs' attorneys in this case, for this or any other point. (Boone Decl. ¶ 1). The declaration, which is not even cited in the Motion, is rife with improper legal conclusions and based upon unfounded and rank speculation. *See A&M Records, Inc. v. Napster, Inc.*, No. C 9905183 MHP, 2000 WL 1170106, at *8 (N.D. Cal. Aug. 10, 2000) (striking declaration of a law professor that "merely offer[ed] a combination of legal opinion and editorial comment" because "[t]he Ninth Circuit does not allow attorneys to testify about the applicable law"), *aff'd in relevant part*, 239 F.3d 1004 (9th Cir. 2001).

[9] Indeed, Plaintiffs' fraud-based claims are subject to the heightened pleading requirements under Federal Rule of Civil Procedure 9(b), *see Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-04 (9th Cir. 2003), and the FAC fails to state a claim under this standard. (*See* MTD Brief at 12-13.)

complete the transaction. While Plaintiffs apparently would prefer if Constellation did not assume control of Crown and Modelo were to continue to act as a co-owner (*see* FAC ¶¶ 19-20, 92-94, 98-99), Section 7 cannot be invoked where, as here, the alleged harm flows from a mere change in ownership (Constellation replacing Modelo) rather than the merging of horizontal competitors. Indeed, "[i]n a challenge to a horizontal merger, a private plaintiff must show that it was injured because the acquiring and the acquired firms are competitors in a field of commerce." *Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1242 (3d Cir. 1987). Here, Constellation's acquisition of Modelo's 50% interest in Crown does not violate Section 7 because Constellation and Modelo are not competitors.[10]

B. Plaintiffs Cannot Establish Any Likelihood of Immediate, Irreparable Harm

In order to obtain a temporary restraining order, "a plaintiff must demonstrate immediate threatened injury as a prerequisite." *Caribbean Marine Servs., Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiffs cannot make this showing for at least three reasons. First, Plaintiffs have not provided any evidence of specific harm to the nine individual plaintiffs. Second, the only injury Plaintiffs identify is financial and therefore compensable in monetary damages. Third, Plaintiffs substantial delay in moving for injunctive relief weighs heavily against any finding of immediate, irreparable harm.

1. Plaintiffs Have No Evidence of Specific Irreparable Harm to Themselves That Would Result from the Transactions

Plaintiffs cannot meet their burden to demonstrate irreparable harm because they have failed to present any evidence of injury specific to the nine individual plaintiffs. In order to obtain injunctive relief, it is well-established that plaintiffs must establish a likelihood of harm to themselves. *See Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir. 1985)

[10] Plaintiffs' suggestion—relying on *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973)—that the transactions will eliminate Constellation as a potential competitor in the U.S. beer market (Motion at 8) appears nowhere in the FAC, is unsupported by any evidence and is contrary to Plaintiffs' allegations that "Constellation is not a beer brewer," "has no experience running a brewery" and cannot afford to purchase a brewery. (Motion at 6; FAC ¶¶ 30, 101-02.) Accordingly, this theory does not provide a basis for injunctive relief. *See Ginsburg*, 649 F. Supp. 2d at 950-51 (dismissing potential competition claim, and distinguishing *Falstaff*, where plaintiffs failed to allege any facts regarding brewer's likelihood of entry into the U.S. beer market).

("To the extent that irreparable injury is required for the issuance of a preliminary injunction, that injury must be suffered by a party seeking relief."); *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at *13 (N.D. Cal. Sept. 27, 2010) ("In evaluating plaintiffs' purported irreparable harm . . . , the Court must only consider those injuries plaintiffs advance that are personal to them were defendants to merge, and cannot consider any injuries that plaintiffs allege would be suffered by the general . . . public as a whole."*), aff'd*, 434 F. App'x 620 (9th Cir.), *cert. denied*, 132 S. Ct. 855 (2011).

The decision in *Malaney* is instructive. In that case, forty-nine individual plaintiffs sought to enjoin an airline merger. *See Malaney*, 2010 WL 3790296, at *1. The court held that plaintiffs failed to establish irreparable harm because, *inter alia*, "[n]one of the plaintiffs testified to having flown regularly." *Id.* at *13. Although the plaintiffs alleged various harms in their briefing—including loss of consumer choice and decreased quality—they failed to meet their burden to "establish that these alleged effects will be personal to them." *Id.* at *14.

Here, Plaintiffs' failure to provide evidence of irreparable harm to themselves is particularly egregious. While each individual plaintiff in *Malaney* "provided an affidavit stating an unformed hope of future air travel" *id.*, Plaintiffs have submitted *no evidence* regarding the alleged effects the transactions will have on the nine individual plaintiffs. There is no evidence that Plaintiffs currently drink Defendants' beers or plan to drink them in the future—let alone evidence demonstrating how they would suffer specific harm absent injunctive relief.

2. In Any Event, Plaintiffs Only Allege Financial Injury, Which Cannot Constitute Irreparable Harm

Plaintiffs also cannot establish irreparable harm because they only allege financial injury in the form of higher prices. It is well-recognized that this type of injury plainly is compensable in monetary damages, and therefore, would not be irreparable. S*ee L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("[M]onetary injury is not normally considered irreparable."); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2009 WL 3415680, at *1 (N.D. Cal. Oct. 22, 2009) ("[I]njuries resulting from higher prices would appear to be injuries fully compensable by an award of monetary damages.").

Plaintiffs repeatedly allege that the transactions will result in higher beer prices. (*See, e.g.*, Motion at 6 ("[D]efendants will consummate their combination and raise prices . . . to the irreparable injury of plaintiffs."); *id.* at 9 ("If the proposed acquisition is completed and prices rise the public will be damaged to an extent not subject to remediation.").) Such injury plainly is compensable in monetary damages and not irreparable. While the FAC includes passing references to other types of harm,[11] Plaintiffs fail to describe these harms in any detail, explain how they would be realized or provide any evidence that they are likely to occur.[12] Accordingly, these allegations are too speculative to satisfy Plaintiffs' burden. *See, e.g.*, *Caribbean Marine Servs.*, 844 F.2d at 674 ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." (citation omitted)); *Bell Atl. Bus. Sys., Inc. v. Storage Tech. Corp.*, No. C-94-0235 MHP, 1994 WL 125173, at *3 (N.D. Cal. Mar. 31, 1994) ("[A] showing of irreparable harm to competition requires the production of probative evidence.").

3. Plaintiffs' Delay in Seeking Injunctive Relief Weighs Heavily Against a Finding of Immediate, Irreparable Harm

Finally, the Ninth Circuit has recognized that a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (citing *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("'A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action.'"). Accordingly, district courts in this Circuit

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[11] In a single paragraph of the FAC—but nowhere in the Motion—Plaintiffs claim that the proposed transactions will result in "fewer services, fewer competitive choices, deterioration of products, product quality, and product diversity; suppression and destruction of smaller actual competitors through exclusive distribution, full-line forcing, imitation beers, shelf space control in major chain store markets achieved by bribes and other gratuities, and the like." (FAC ¶ 16.) Even if the Motion were based on alleged injury in the form of diminished quality or selection, such harm is not irreparable as it is quantifiable and, therefore, compensable by monetary damages.

[12] Plaintiffs' reliance on *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), to argue—without reference to a single fact—that the transaction will harm "national advertising" is completely inappropriate. (Motion at 8.) That decision involved conspiracy and monopolization claims brought under Sections 1 and 2 of the Sherman Act and is irrelevant to Plaintiffs' Section 7 claim. *See Am. Tobacco*, 328 U.S. at 783.

routinely deny requests for injunctive relief when the plaintiff has delayed filing suit or seeking provisional relief. *See, e.g.*, *Aniel v. GMAC Mortg., LLC*, No: C 12-04201 SBA, 2012 U.S. Dist. LEXIS 138555, at *22-23 (N.D. Cal. Sep. 26, 2012) (plaintiffs' delay of over three months in filing TRO weighed against granting relief); *Baker v. Ark. Blue Cross*, No. CV 08–3974 SBA, 2009 WL 764885, at *2 (N.D. Cal. Mar. 19, 2009) (same).

In an analogous case challenging the high-profile merger of Pfizer and Wyeth, this Court similarly determined that the plaintiffs' delay in seeking injunctive relief militated against a finding of irreparable harm. In *Golden Gate Pharmacy Services*, the plaintiffs filed a motion to enjoin a $68 billion transaction and sought to have their motion heard on an abbreviated schedule. 2009 WL 3415680, at *1. This Court declined to shorten the hearing schedule because, *inter alia*, "plaintiffs did not file their initial complaint until seven months after the proposed merger was publicly announced, and thereafter waited approximately two additional months before seeking injunctive relief. Such delay 'implies a lack of urgency and irreparable harm.'" *Id.* (quoting *Oakland Tribune*, 762 F.2d at 1377).

Similarly, in *Taleff*, plaintiffs waited until the day after the transaction closed to move for an *ex parte* TRO. *See* Order Denying Plaintiffs' *Ex Parte* Motion for a Temporary Restraining Order, NO. C 11-02179 JW, at 2 (N.D. Cal. filed May 4, 2011). The court denied the plaintiffs' motion because they failed to establish that they would be subject to immediate irreparable harm because, "by Plaintiffs' own reports," the defendants completed their acquisition a day before the TRO motion was filed. *Id.*

Here, Plaintiffs waited *almost nine months* after Defendants publicly announced ABI's acquisition of Modelo on June 29, 2012 to file their original complaint. Over the course of those nine months, ABI issued a total of six press releases related to the progress of the ABI-Modelo transaction. (West Decl. ¶¶ 6, 11-12.) Yet Plaintiffs took no action. Then, Plaintiffs waited *more than six weeks* after filing the FAC before filing this Motion. During Plaintiffs' delay, ABI issued multiple press releases setting forth the transaction's schedule and announcing milestones. (*Id.* ¶¶ 13-14.) For example, on April 19, 2013, Defendants announced the settlement of their lawsuit with the DOJ and that "[t]he transaction is expected to close in June 2013." (*Id.* ¶ 13, Ex. 5.) Despite

Defendants' publicly-announced intent "to move swiftly to complete the pending transactions," Plaintiffs still took no action. (*Id.*) On April 22, 2013, ABI reiterated in another press release that it "expect[ed] to complete the transaction in June 2013." (*Id.* ¶ 13, Ex. 6.) Again, Plaintiffs failed to act.

Moreover, on April 25, 2013, more than a month before Plaintiffs filed this Motion, Defendants announced the completion of the mergers of Diblo and Dirección de Fábricas with and into Grupo Modelo, providing ABI with control of Modelo's board. (*Id.* ¶ 14, Exs. 7-8.) Defendants concurrently announced that the commencement of the tender offer was imminent, and an ABI press release reiterated that the transaction was expected to close in June 2013. (*Id.*) On May 1, 2013, the Defendants announced the commencement of ABI's tender offer for the remaining outstanding shares of Modelo, and clearly stated that "[t]he tender offer is scheduled to expire on 2:00 p.m., Mexico City time, on May 31, 2013, unless the offer is extended." (*Id.* ¶ 14, Ex. 9.) If all Defendants' press releases and the resulting media coverage[13]—which Plaintiffs were undeniably following[14]—was not enough to capture Plaintiffs' attention, ABI's counsel sent an email to Plaintiffs' counsel on May 28, 2013, reminding them that the tender offer would expire on May 31. (*See* Boone Decl., Ex. C.) Still, on May 31, 2013, as Defendants announced the expiration of the tender offer (West Decl. ¶ 14, Ex. 10), Plaintiffs continued to sit on their hands. Plaintiffs offer no explanation for their failure to seek injunctive relief until this late date, and their delay clearly "implies a lack of urgency and irreparable harm." *Oakland Tribune*, 762 F.2d at 1377.

For each of these reasons, Plaintiffs cannot demonstrate that they will suffer immediate, irreparable harm.

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[13] Each transaction milestone was the subject of numerous news reports. For example, ABI's April 22, 2013 press release was reprinted by Reuters, while its April 25, 2013 and May 1, 2013 press releases were reprinted by the Wall Street Journal. (West Decl. ¶¶ 13-14.) Moreover, ABI created a website, www.globalbeerleader.com, designed specifically to keep interested parties abreast of the progress of the transactions. (*Id.* ¶ 6.)

[14] Indeed, Plaintiffs even include Defendants' February 14, 2013 press release as an exhibit to the Boone Declaration. (*See* Boone Decl., Ex. F.)

C. The Balance of Equities Does Not Tip in Plaintiffs' Favor

The harm to Defendants should the court improvidently issue injunctive relief is substantially greater than the alleged harm to the Plaintiffs if their motion were denied. If ABI were somehow forced to abandon its acquired interest in Modelo, it would lose an estimated $1.3 billion in transaction costs, which include the loss of resources expended on the evaluation, negotiation and financing of the transactions and on the planning for the integration of the Modelo business. (West Decl. ¶ 16.) ABI also would incur reputational damage and lose the transaction benefits it negotiated carefully and at great expense, including an average of more than $19 million per week in lost synergy values. (*Id.* ¶¶ 16-17.) Moreover, in the time since the week prior to the announcement of the original transactions, ABI's share value has increased roughly 35% based in part on investor expectations of a successful deal. (*Id.* ¶ 18.) Should the deal be derailed, even a relatively modest resulting share price drop could result in billions of dollars in lost shareholder value. (*Id.*) Constellation also would be harmed as its motion to dismiss papers demonstrate. Finally, any injunctive relief would impose uncertainty that would be disruptive and harmful to Defendants' operations, employees and business partners. (*Id.* ¶ 19) These are precisely the types of injuries that courts consider when evaluating whether to enjoin a merger. *See Ginsburg*, No. 4:08CV01375 JCH, 2008 WL 4965859, at *5 (E.D. Mo. Nov. 18, 2008) (acquired firm's "shareholders would be harmed by any delay in receiving the premium payment" offered by acquirer); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1163, 1173 (C.D. Cal. 2000) (evidence of $45 million already spent on integration weighed against injunctive relief).

In stark contrast, Plaintiffs are nine consumers who have failed to present any evidence of specific harms they would suffer absent injunctive relief. (*See supra* pp. 16-18.) Even if these nine plaintiffs were prodigious beer drinkers, their future threatened financial injury would be *de minimis*. These wholly-speculative harms are insignificant when compared to the drastic and certain harm faced by Defendants and their shareholders. *See Ginsburg*, 2008 WL 4965859, at *5.

D. Injunctive Relief Would Not Be in the Public Interest

Granting injunctive relief in this case would not be in the public interest. The DOJ concluded as much when it approved the transactions and noted that they "will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." (West Decl. Ex. 3(b), at 2, 10.) Indeed, post-transactions, Constellation will be a fully independent, vertically-integrated producer and seller (through Crown) of Modelo brand beer in the United States, free from any indirect ownership interest of ABI. (*Id*.) Constellation will be the third largest producer and distributor in the U.S. beer industry, representing a significant competitive presence. (Rubinfeld Decl. ¶¶ 13, 17.) Economic models illustrate that competition in the U.S. beer industry, if anything, is likely to *increase* as a result of the transactions. (*Id*. at 18.) Any disruption to the transactions would deprive the public of this increased competition, which plainly is against the public interest. Moreover, given Plaintiffs' failure to establish any plausible harm to themselves, the public interest further militates against granting injunctive relief. *See Ginsburg*, 2008 WL 4965859, at *6 (recognizing the Court's "strong interest in preserving free operation of the nation's markets and insuring that it does not unduly restrain free enterprise . . . where Plaintiffs have failed to demonstrate that there will be any real, palpable harm to Plaintiffs").

E. Plaintiffs Must Post a Bond To Support Their Claim

Finally, the "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c); *see also Momento, Inc. v. Seccion Amarilla USA*, No. C 09-1223 SBA, 2009 WL 1974798, at *5 (N.D. Cal. July 8, 2009). Moreover, the Clayton Act requires "the execution of proper bond against damages for an injunction improvidently granted" when a private plaintiff is granted injunctive relief in an antitrust suit. 15 U.S.C. § 26.

Rule 65(c) "grants district courts wide discretion in setting the amount of a security bond." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 733 (9th Cir. 1999). The amount of the bond should be "'what the court deems sufficient to cover losses and damages incurred or suffered by the party enjoined if it turns out that the injunction should not have been granted.'" *AT&T Commc'ns of Cal.*

v. Pac. Bell, No. C 96-1691 SBA, 1996 WL 940836, at *11 (N.D. Cal. July 3, 1996) (citation omitted), *aff'd sub nom. AT&T Commc'ns, Inc. v. Pac. Bell*, 108 F.3d 1384 (9th Cir. 1997). Notably, when setting the amount of the bond, "district courts should err on the high side." *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000) (Easterbrook, J.). While "[a]n error in setting the bond too high . . . is not serious," a bond set too low could create an "irreparable injury" on the defendant because the bond sets the outer limit on an unjustly enjoined defendant's potential recovery. *Id*. (where the district court refused to set bond at $50 million as requested by defendant, "Abbott now must swallow substantial losses as a result of the district court's decision").

Courts in other jurisdictions have required plaintiffs to post significant bonds if granted injunctive relief when the adverse impact on the defendants' businesses was potentially very high. *See, e.g.*, *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1385 (Fed. Cir. 2006) (affirming decision to set bond at $400 million where injunction could result in, *inter alia*, a need to re-launch defendant's pharmaceutical product); *Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 429 F.3d 1364, 1372 (Fed. Cir. 2005) (pharmaceutical company plaintiff required to post $200 million bond to enjoin defendant from launching generic drug).

In the context of the $20.1 billion merger at issue here, the stakes are even higher. *Cf. W. Airlines, Inc. v. Int'l Bhd. Of Teamsters*, 480 U.S. 1301, 1309 (1987) ("The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the 'status quo,' in the face of this upheaval, would be to blink at reality.") ABI and Modelo have spent months and millions of dollars working toward the closing of these proposed transactions and would inevitably incur substantial losses if their global integration were halted by an injunction. (West Decl. ¶¶ 15-16.)

In light of the significant harm and damages that Defendants would incur, this Court should require Plaintiffs to post a bond of at least $250 million if it grants the requested injunctive relief.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

DATED: June 4, 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

BY:

/s/ Allen J. Ruby

Allen J. Ruby
Attorneys for Defendant
ANHEUSER-BUSCH INBEV SA/NV

DATED: June 4, 2013

FENWICK & WEST LLP

BY:

/s/ Dean S. Kristy

Dean S. Kristy
Attorneys for Defendant
GRUPO MODELO S.A.B. DE C.V.

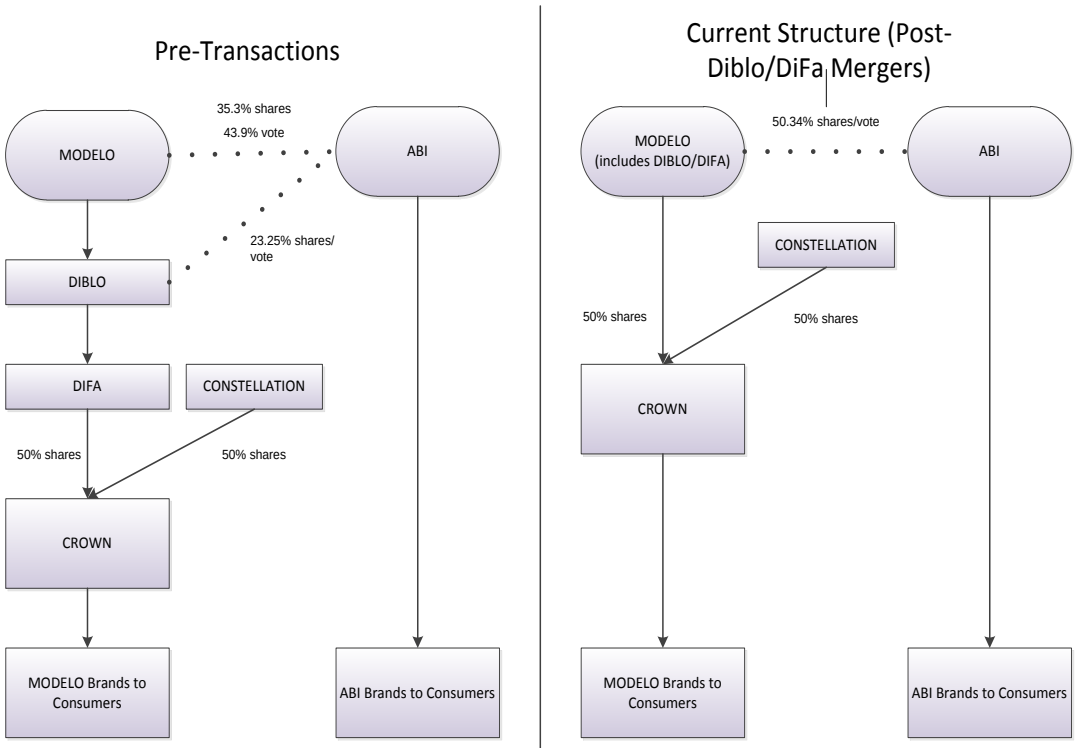
Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that I have obtained the concurrence in the filing of this document from all the signatories for whom a signature is indicated by a "conformed" signature (/s/) within this e-filed document, and I have on file records to support this concurrence for subsequent production for the court if so order or for inspection upon request.

DATED: June 4, 2013

/s/ Allen J. Ruby

Allen J. Ruby

APPENDIX A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DIBLO
DIFA
CONSTELLATION
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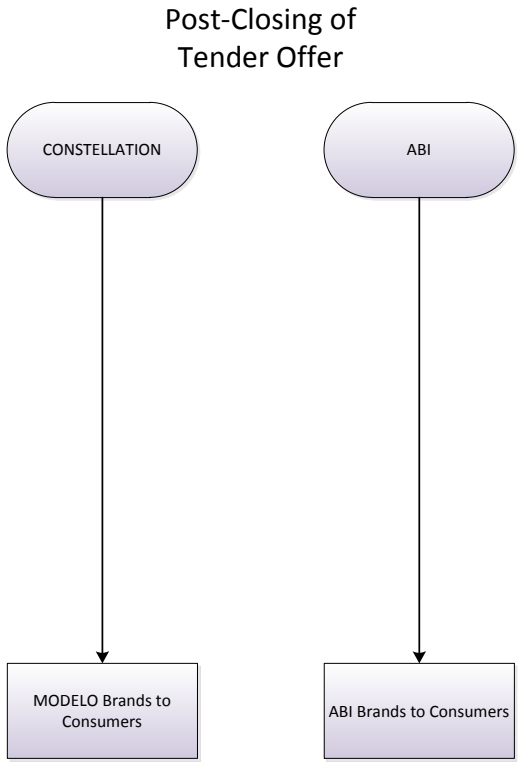
50% shares
CROWN
MODELO Brands to Consumers
ABI Brands to Consumers
Current Structure (Post-Diblo/DiFa Mergers)
MODELO (includes DIBLO/DIFA)
ABI
50.34% shares/vote
CONSTELLATION
50% shares
50% shares
CROWN
MODELO Brands to Consumers
ABI Brands to Consumers


Post-Closing of Tender Offer
CONSTELLATION
ABI
MODELO Brands to Consumers
ABI Brands to Consumers

ECF CERTIFICATION

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

/s/ Allen J. Ruby

Allen J. Ruby