No. 09-2990

In the

United States Court of Appeals

for the Eighth Circuit

MARTY GINSBURG., *et al.*
Plaintiffs-Appellants,

v.

INBEV SA/NV, ANHEUSER-BUSCH COMPANIES, INC., and ANHEUSER-BUSCH, INC.
Defendants-Appellees.

On Appeal from Final Orders of the United States District Court for the Eastern District of Missouri, Eastern Division (Case No. 4:08-CV-01375-JCH)

APPELLANTS' BRIEF

JOSEPH M. ALIOTO, *pro hac vice*
THERESA D. MOORE, *pro hac vice*
JOSEPH M. ALIOTO, JR., *pro hac vice*
THOMAS P. PIER, *pro hac vice*
ALIOTO LAW FIRM
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TEL: (415) 434-8900
FAX: (415) 434-9200
ESEXTON@ALIOTOLAW.COM

[ADDITIONAL ATTORNEYS, LAST PAGE]

SUMMARY OF THE CASE

This is a private antitrust action brought by beer consumers seeking to enjoin defendant InBev (the largest brewer of beer in the world) from acquiring defendant Anheuser-Busch (the largest brewer of beer in the United States) as violative of Section 7 of the Clayton Antitrust Act. 15 U.S.C. § 18. Section 7 forbids any acquisition whose effect "may be substantially to lessen competition, or to tend to create a monopoly." *Id.*

Below, the district court granted defendants' Rule 12(c) motion for judgment on the pleadings, concluding that the complaint failed to state a "plausible" claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Through this appeal, plaintiffs challenge that decision, as well as a variety of other orders issued by the district court.

Thirty minutes of oral argument per side is merited in this case. At issue in this appeal is one of the largest acquisitions by a competitor in the history of the antitrust laws, impacting millions of consumers in this nation who, as a result of the diminution in competition between brewers, may be forced to pay higher prices for lower quality product. The issues on appeal are numerous and complex, involving multi-faceted antitrust doctrines, and their discussion with counsel at oral argument will likely assist in the Court's determination.

CORPORATE DISCLOSURE STATEMENT

No plaintiff in this case is a corporate entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiffs Marty Ginsburg, *et al.* are purchasers and consumers of beer. They commenced this action to obtain injunctive relief and prevent defendant InBev N.V./S.A. from acquiring defendant Anheuser-Busch, Inc. as a violation of Section 7 of the federal Clayton Antitrust Act, 15 U.S.C. §18. The District Court had subject matter jurisdiction under Section 16 of the Clayton Act, 15 U.S.C. §26 and 28 U.S.C. §§1331 (federal question) and 1337 (commerce and antitrust regulation).

The district court granted defendants' motion for judgment on the pleadings and entered a final judgment against plaintiffs on August 4, 2009. This is an appeal from final orders and judgment of the district court which dispose of all plaintiffs' claims. This Court has jurisdiction of this appeal under 28 U.S.C. §1291.

Plaintiffs timely filed their notice of appeal on August 19, 2009, within 30 days of the entry of final judgment.

STATEMENT OF ISSUES

1. Whether plaintiffs' complaint states a Section 7 claim under the "actual potential competition" doctrine where it alleges facts that (a) InBev "had available feasible means for entering the market," and (b) "those means offered a substantial likelihood of ultimately producing deconcentration of that market."

Yamaha Motor Co. v. F.T.C., 657 F.2d 971 (8th Cir. 1981)

United States v. Marine Bancorporation, 418 U.S. 602 (1973)

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973)

2. Whether plaintiffs' complaint states a Section 7 claim under the "perceived potential competition" doctrine, where it alleges facts that (a) the U.S. beer market is "substantially concentrated," (b) InBev has "the characteristics, capabilities, and economic incentive to render it a perceived potential entrant," and (c) InBev's presence on the fringe of the U.S. beer market "tempered oligopolistic behavior on the part of existing market participants."

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973)

United States v. Marine Bancorporation, 418 U.S. 602 (1973)

3. Whether the lower court improperly considered material outside the pleadings, failed to convert the motion to one for summary judgment, failed to notify the parties of its intent to do so, and failed to provide Plaintiffs' "a reasonable opportunity to present all the material that is pertinent to the motion," all in violation of FED.R.CIV.P. 12(d).

FED.R.CIV.P. 12(d)

Porous Media v. Pall Corp., 186 F.3d 1077 (8th Cir. 1999)

Gibb v. Scott, 958 F.2d 814 (8th Cir. 1992)

4. Whether the lower court abused its discretion in denying plaintiffs' request to amend the complaint, where the district court expressed no justifiable reason for the denial under *Foman v. Davis*, 371 U.S. 178 (1962).

FED.R.CIV.P. 15(a)

Foman v. Davis, 371 U.S. 178 (1962)

Sanders v. Clemco Indus., 823 F.2d 214 (8th Cir. 1987)

5. Whether the district court abused its discretion where it *sua sponte* entered a cursory protective order permanently preventing the deposition of defendants' most important employees and failed to offer any justification of its order, including the existence of "good cause."

FED.R.CIV.P. 26(c)

Gen. Dynamics v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973)

Verizon Commc'ns. v. Inverizon, 295 F.3d 870 (8th Cir. 2002)

STATEMENT OF THE CASE

A. Nature Of The Case

In their complaint, plaintiffs alleged that InBev's acquisition of Anheuser-Busch may substantially lessen competition and/or tend to create a monopoly in the production and sale of beer in the United States, the most profitable beer market in the world. I Appendix ("App.") 26.[1] This lessening of competition will threaten plaintiffs and other beer consumers with higher prices, fewer services, fewer competitive options, and other harms.

Plaintiffs have presented two theories of liability: the "actual potential competition" doctrine and the "perceived potential competition" doctrine.

The "actual potential competition" doctrine seeks to determine whether the defendant is a potential market entrant and, if so,

---

[1] Throughout this brief, citations to the appendix will be preceded by roman numeral "I" or "II," indicating the volume.

whether its eventual entry "would be likely to deconcentrate the market" or lead to other procompetitive affects, such as increased competition, lower prices, better service or higher quality standards.

The "perceived potential competition" doctrine looks at whether the defendant's presence on the periphery of the market, or "in the wings," exerts a present procompetitive impact on market participants.

InBev was only recently created by merger in 2004, becoming the single largest and most financially powerful beer manufacturer today. Since that time, InBev has anxiously anticipated entering the U.S. beer market, which is the most profitable beer market in the world. Plaintiffs contend that InBev, as a financial powerhouse, is well-suited and has ample incentive to enter the U.S. market. In fact, InBev has, since its creation, frequently announced precisely that intention. As the largest brewer entering an extraordinarily concentrated market, InBev's entry would undeniably deconcentrate the U.S. beer market to consumers' benefit. Furthermore, InBev's lurking presence on the edge of the market has actually exerted procompetitive influence on the current market participants, keeping prices lower, quality superior, and product choices prevalent. For these reasons, InBev's acquisition of Anheuser-Busch violates Section 7 of the Clayton Act.

Since the filing of the complaint, the defendants' acquisition has been consummated. Nevertheless, the challenged acquisition has become no less unlawful by virtue of its consummation, and

plaintiffs through their complaint seek the ultimate divestiture of Anheuser-Busch by InBev, as well as money damages resulting from the anticompetitive conduct that has occurred since the acquisition's finalization.

B. Course of Proceedings

Plaintiffs filed their complaint on September 10, 2008 seeking to preliminarily and then permanently enjoin the acquisition. I App. 25.

In light of the urgent nature in resolving plaintiffs' claims,[2] the parties agreed to an accelerated discovery schedule. On October 17, 2008 – the same day defendants answered the complaint – they voluntarily produced some 400,000 pages of Hart-Scott-Rodino documents.[3] I App. 58, 78, 209. Defendants agreed to produce their executive officers for deposition, including InBev's CEO, scheduled for the following week. I App. 209.

Meanwhile, on October 20, 2008, the district court issued an order setting the first scheduling conference for November 20, 2008 – eight days *after* the Anheuser-Busch shareholder vote. I

---

[2] The proposed acquisition was scheduled for a vote before the Anheuser-Busch shareholders on November 12, 2008. I App. 111. Antitrust regulatory determination of the acquisition could, plaintiffs believed, follow shortly thereafter. Plaintiffs therefore sought a determination on the merits of their claim before the government's determination. Ultimately, the courts approved the acquisition on August 11, 2009.

[3] Acquisitions of the type involved here require premerger notification to the government and the submission of documents under the Hart-Scott-Rodino Act. 15 U.S.C. §18a.

App. 105. The court also assigned the case to a standard "Track 2," rather than the expedited "Track 1" status this case merited. I App. 107; E.D.MO. L.R. 5.01.

Explaining the case's urgency, plaintiffs the next day filed an ex parte application for an order shortening time and moved the district court to immediately set a hearing date for plaintiffs' preliminary injunction motion. I App. 110. Plaintiffs' motion to schedule a hearing was ignored.[4]

On October 23, 2008, the court set the briefing schedule for plaintiffs' preliminary injunction motion for the first week of November. I App. 117, 206. Then – *sua sponte* – the court prohibited plaintiffs from taking the depositions of defendants' executives, which had already been noticed and scheduled. I App. 219.

On November 3, 2008, plaintiffs filed their motion for preliminary injunction, and defendants opposed it. I App.7, 9. Although the district court issued an order allowing plaintiffs to file a reply brief, the order denying preliminary injunction would eventually issue before the reply brief came due.

On November 10, 2008 defendants filed various documents and moved the court to file them under seal. I App. 8 (Doc. no. 46). Simultaneously, defendants moved the court to take judicial notice of some of the same, sealed documents. I App. 9 (Doc. no. 49). The court immediately granted both motions before plaintiffs

[4] The district court ultimately denied the motion, eight months later, on June 18, 2009. I App. 22.

could file opposition briefs pointing out the motions' inherent contradiction. I App. 8, 11.

On Wednesday November 12, 2008, Anheuser-Busch's shareholders voted to approve the transaction. I App. 129. The same day, advised of the shareholder vote, plaintiffs made another emergency application to the court for an order setting a hearing. I App. 123-124. The application would again be denied.

The following day, Friday, November 14, 2008, the Antitrust Division of the DOJ filed a Complaint, Proposed Final Judgment, and Hold Separate Stipulation and Order, which had been signed by defendants' counsel. *United States v. InBev N.V./S.A.*, No. 08-1965 (D.D.C. filed Nov. 14, 2008). At no time, however, had defendants notified the district court or plaintiffs that they had been negotiating a consent decree which would jeopardize the timing of plaintiffs' preliminary injunction hearing. Alerted to this new information, plaintiffs contacted the district court and requested an emergency telephonic conference, for the third time. Through the clerk, the court scheduled a conference for Monday, November 17 at 9:05 CST.

On Saturday November 15, 2008, defendants announced the shareholder vote approving the acquisition.

On Monday, November 17, 2008, plaintiffs contacted the district court, as instructed. The court declined to hear the conference. Defendants did not call in.

The following day, Tuesday, November 18, 2008 – before briefing was completed,[5] and without a hearing – the district court denied plaintiffs' motion for preliminary injunction. I App. 12. The district court vacated the Rule 16 conference on the same day. I App. 12. Thus, as the transaction was proceeding toward completion, forcing plaintiffs to make emergency motions to set a hearing, the court was vacating the only then-scheduled conference. The court would eventually vacate the Rule 16 conference three consecutive times, preventing plaintiffs access to the court until January, 2009 – two months after the Anheuser-Busch shareholder vote. I App. 132, 15 (Dec. 11, 2008 docket order).

At the January 5, 2009 teleconference, plaintiffs again advised the court for the need to proceed with celerity. I App. 236-240. The court nevertheless maintained the Track 2 discovery schedule. I App. 135, 244.

Fact discovery was ordered completed by May 1, 2009 (App. 136), and plaintiffs indicated the need for very few depositions, including Carlos Brito (the CEO of InBev) and August Busch IV (CEO of Anheuser-Busch). I App. 241.

Defendants had agreed to produce Mr. Brito just two months earlier. I App. 209. So, on February 13, 2009, plaintiffs noticed Mr. Brito's deposition for March 18, 2009. I App. 21, Doc. no. 148,

[5] On November 12, 2008, the district court ordered plaintiffs to file their reply brief on or before November 19, 2008. I App. 11.

Ex. A. On February 14, 2009, plaintiffs subpoenaed Mr. Busch to testify on March 18, 2009. I App. 20, Doc. No. 144.

On February 17, 2009, defendants moved the court to stay discovery. I App. 20. On February 27, 2009, they moved the court for a protective order preventing the depositions of Mssrs. Brito and Busch until the court could rule on the motion to stay discovery. I App. 21. On March 4, 2009, the court issued a cursory order granting the protective order, again before plaintiffs' opposition brief came due. I App. 21, 141; E.D.Mo. L.R. 4.01; FED.R.CIV.P. 6(a)(2). Five days later, without a motion and again without permitting plaintiffs to respond, the court *permanently* barred the depositions of Mssrs. Brito or Busch. I App. 142. The permanent prohibition was issued *sua sponte* – defendants never requested it – and no explanation for the drastic measure was provided in the court's cursory order. Compare I App. 142 and Motion for Protective Order (Doc. no. 147, p. 1, para. 2).

On February 17, 2009, defendants moved the court under Rule 12(c) for judgment on the pleadings, contending the complaint failed to state a claim. I App. 20. Plaintiffs opposed the motion, requested leave to amend the complaint in the alternative, and requested oral argument. I App. 144, 174.

On August 3, 2009 the district court granted defendants' motion for judgment on the pleadings, dismissed the complaint with prejudice, and issued a judgment the following day. I App. 176, 188.

On August 4, 2009 defendants moved the court for a protective order. I App. 22. The district court granted the motion the

following day, again preventing plaintiffs from opposing the motion. I App. 22, 189.

On August 11, 2009, the consent decree and final judgment in the government's case was entered, finalizing the acquisition. *United States v. InBev N.V./S.A.*, No. 08-1965 (D.D.C. Aug. 11, 2009).

Plaintiffs timely filed their notice of appeal on August 19, 2009. I App. 22, 101.

C. Disposition Below

Plaintiffs appeal from the judgment below as well as various final orders, as follows:

1. Order Granting Motion for Judgment on Pleadings (August 3, 2009)

The district court granted defendants' motion for judgment on the pleadings, holding that the complaint failed to state a claim for violation of Section 7. The court determined that both of plaintiffs' theories – the "actual potential competition" and "perceived potential competition" doctrines – failed to state a claim.

As to the "actual potential competition" theory, the district court determined that "Plaintiffs have not alleged sufficient facts to establish that InBev intended to enter the U.S. market…." Addendum[6] ("Add.") at 10; I App. 185.

[6] For the Court's convenience, citations to the order dismissing plaintiffs' claims are cited to both the Addendum (attached to this

As to the "perceived potential competition" theory, the court held Plaintiffs claim "is implausible based upon the facts alleged" because "[t]he facts show that InBev actively withdrew from, rather than pursued, the U.S. market." Add. 6; I App. 181.

Additionally, the court denied plaintiffs' request to file an amended complaint. Add. 12; I App. 187.

2. Order Granting Motion for Leave to Take Judicial Notice (November 12, 2008)

In its order granting defendants' motion for judgment on the pleadings, the district court relied extensively on material outside the four corners of the complaint. It justified the consideration of these documents on the ground they had been previously judicially noticed. Add. 6, n.7; I App. 181. The underlying order taking judicial notice of these documents is a "docket text order" issued on November 12, 2008. I App. 11 (Docket ref. to Doc. no. 49). The cursory order is devoid of explanation. Plaintiffs were not permitted to file a brief in opposition to the motion.

3. Orders Granting Protective Order regarding depositions of Carlos Brito and August Busch IV (March 4, 2009 and March 9, 2009)

The district court granted defendants' motion to temporarily prohibit the depositions of Mssrs. Brito and Busch on March 4, 2009. I App. 141. Days later, on March 9, 2009, the district court *sua sponte* permanently barred the depositions of Mssrs. Brito and Busch. I App. 142, n.1. Both orders are cursory and contain no

---

brief), and the separately filed excerpts of record contained in the Appendix.

explanation. Plaintiffs were not permitted to file a brief in opposition to the motion.

STATEMENT OF FACTS[7]

This case involves the acquisition by the largest brewer in the world, InBev, of the largest brewer in the United States, Anheuser-Busch, for $52 Billion. I App. 26. It is one of the largest acquisitions in the history of the United States antitrust laws. I App. 26.

InBev was created through the merger of Interbrew and AmBev in August 2004, becoming the largest brewer of beer in the world, and ranking first or second by volume in at least 20 geographic areas worldwide. I App. 27, 80. In 2007, it produced approximately 270 million hectoliters of beer and had revenues of over €14 billion (approximately $18.2 billion). *Id.* It employs close to 89,000 people worldwide. *Id.*

Anheuser-Busch has been the largest brewer of beer in the United States since 1957 and currently controls half that market. I App 27. Its Budweiser and Bud Light brands are the two largest selling brands of beer in the world and are sold in 80 different countries. *Id.* Anheuser-Busch employs over 30,000 people

[7] Since the filing of plaintiffs' complaint, defendants' acquisition has been finalized and defendants are now a single entity known as Anheuser-Busch/InBev. Nevertheless, the operative facts here are the allegations in the complaint. They will be repeated here as set forth in the complaint, in present tense and in reference to defendants as separate entities.

worldwide and in 2007 produced nearly 4 billion gallons of beer generating sales of $16.7 billion. I App. 27, 59.

The United States is the largest and most profitable beer market in the world. I App. 28. Anheuser-Busch is the undisputed United States leader with nearly 50% share of the market. I App. 28. No other competitor approximates its dominance. It is 2 ½ times as large as its closest United States competitor, SAB Miller, which has 19% of the market. *Id.* Anheuser-Busch is 4 ½ times larger than Molson Coors, which has 11% market share. *Id.* No other firm has more than 6% market share. *Id.*

The number of brewers operating plants in the United States has decreased markedly for decades, resulting in a highly concentrated market for the sale of beer. I App. 40. The U.S. beer market carries a Herfindahl-Hersch Index[8] ("HHI") of 3093, indicating its extraordinary concentration. I App. 29.

Recently, SABMiller and Molson Coors created a joint venture that combines their North America operations and now accounts for 30% of the United States market. I App. 28-29. As a consequence, over 80% of the United States beer market is controlled by only two companies: Anheuser-Busch and the SABMiller/MoslonCoors joint venture. *Id.*

---

[8] The Herfindahl-Hersch Index (HHI) is a commonly accepted measure of market concentration. Markets in which the HHI is between 1000 and 1800 point are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. *Horizontal Merger Guidelines* ¶1.51 (rev'd Apr. 9, 1997).

Since its creation in 2004, InBev has anxiously anticipated entering the U.S. market and has many times announced its intention to competitors and the public. I App. 30, 38. As a result, Anheuser-Busch and other U.S. brewers are well aware of InBev's intentions to enter the market. I App. 30, 38.

As the largest brewer in the world, InBev wields enormous financial strength, enabling it to readily enter the U.S. market by building breweries and establishing its own national distribution network. I App. 30, 38. Although InBev does not currently compete in the United States, its presence as an aggressive economic powerhouse on the "fringe" of the market – ready and able to enter – actually influences the pricing and marketing decisions of brewers competing in the U.S., including Anheuser-Busch. I App. 30, 31, 36, 38. Moreover, because Anheuser-Busch and InBev are potentially able to provide competing products against one another anywhere in the world, the pricing and marketing behavior of each is constrained by the pricing and marketing actions of the other. I App. 41.

On June 2, 2008, representatives of InBev met with the CEO of Anheuser-Busch, August Busch IV, to discuss the possible acquisition of Anheuser-Busch by InBev. I App. 42. On June 11, 2008, InBev made a proposal to purchase Anheuser-Busch. I App. 42.

Seeking to thwart the take-over, Anheuser-Busch began considering ways to block InBev's purchase. I App. 43. Days later, InBev sent a letter to the Anheuser-Busch board of directors advising them that any action attempting to thwart InBev's

purchase could result in "potential adverse consequences … [to] your shareholders." I App. 43. InBev then sent another letter to the Anheuser-Busch board claiming the acquisition would result in "synergies." I App. 43.

In late June, 2008, Anheuser-Busch unanimously rejected the InBev proposal, writing "[m]any of the suggested synergies seem not to be synergies at all, but are instead profit enhancements." I App. 44. On the same day, InBev responded by filing a lawsuit attempting to replace Anheuser-Busch's directors with its own. I App. 44.

A week later, Anheuser-Busch filed its own complaint in federal court attempting to stop InBev's takeover. I App. 44. Among other things, it alleged that "InBev's statements about cost cutting … are false and misleading." I App. 45.

Three days later, in an abrupt turnaround sparked by offers of personal remuneration to members of the Anheuser-Busch board, Mr. Busch met with InBev's CEO, Carlos Brito, and agreed in principal to the $52 billion acquisition. I App. 45. The deal was publicly announced on July 14, 2008. I App. 46.

One of the combined company's first orders of business was to increase prices. At a teleconference the next day, Mr. Brito stated that the new combined company would sell their beer "at higher prices." I App. 47. According to Anheuser-Busch's vice president, the two companies "talked about a very good … price increase" to be implemented after the acquisition. I App. 47. He said that "[w]e understand the consumer is getting pressure, especially the blue-collar consumer, but it is our belief that the pricing will

hold." I App. 47. Prices were increased the following week. I App. 48.

A number of public officials have announced their opposition to the acquisition. Missouri Governor Matt Blunt opposed the combination, saying it was "troubling to me because it potentially raises antitrust issues under existing law by putting significant market share of the U.S. in the hands of few companies." I App. 52. United States Senator Kit Bond likewise opposed the acquisition, calling it "a bad idea; it is broadly opposed by the community and I look forward to expressing strong opposition." I App. 54. United States Senator Claire McCaskill also opposed the acquisition, saying "I will do everything I can to stop this sale from going through." I App. 54.

If the acquisition is permitted to continue, consumers will be forced to pay more money in the form of higher beer prices. I App. 52.

SUMMARY OF ARGUMENT

Through the filing of this case in the federal court, plaintiffs sought, like so many others, judicial relief from an offense committed against them. But the plaintiffs here, unlike others, have been obstructed in their quest from the start. They have been denied basic requests for hearings. They have been prevented from opposing adverse motions. They have been unnecessarily delayed in a case where speed was essential. They have had discovery prohibited for no explained reason. In short,

plaintiffs have been denied the basic elements of a fair and full opportunity to litigate their case.

The predisposition which led to these inequities has apparently also crept into the district court's consideration of the sufficiency of plaintiffs' complaint. The complaint, as will be shown, speaks for itself and clearly. Every element of plaintiffs' theories is plainly and succinctly alleged. Each allegation is supported with specific factual detail. There is nothing implausible about any of plaintiffs' theories. Under proper application of the law, the complaint must survive.

Confronted with the strength of the pleading, the district court resorted to novel means in expelling it. The court determined, through extensive resort to extra-pleading materials, that the facts in plaintiffs' complaint were rebutted by judicially noticeable facts found in a press release and an unfiled, non-public annual report. But, rather than rely solely on facts that might be judicially noticeable in such documents, the court relied instead on the truth of the matters asserted in each, matters which are unquestionably in dispute. These hearsay statements, inadmissible, have been used here in replacement of discovery, cross-examination, and fact, to entirely strip the plaintiffs of their day in court.

Although the district court's reliance on these materials is legally improper, the court's error also lies in the illogical inferences drawn from the documents. In truth, none of them, even if properly considered, rebuts any of plaintiffs' allegations. The lower court's decision is effectively cobbled together by

ignoring the complaint's salient allegations. The allegations must be construed in the light most favorable to the plaintiffs, with inferences drawn in their favor. The opposite has occurred here.

The lower court also erred in denying plaintiffs' request to amend the complaint which, according to Rule 15 itself, must be "freely given." Leave to amend may only be denied in extreme circumstances, none of which is present here.

Finally, the lower court abused its discretion when, entirely on its own accord, it permanently prohibited plaintiffs from taking depositions of defendants' key employees. The court's order offers no explanation for this drastic measure, and it must be reversed.

ARGUMENT

I. PLAINTIFFS' COMPLAINT PROPERLY STATES A CLAIM FOR RELIEF UNDER SECTION 7

Section 7, in the words of the Supreme Court, "creates a relatively expansive definition of antitrust liability." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). Section 7 exists primarily to arrest, at their incipiency, mergers that *may* substantially lessen competition or *tend* to create A monopoly. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050 (8th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000). "For this purpose, the language of section 7 is structured such that a violation can occur when there is a *threat or possibility* of substantially lessening competition or creating a monopoly." *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 442 (8th Cir.

1999) (emphasis in original). "No restraints, monopolies, or substantial lessening of competition need actually occur to violate section 7." *Id.*

Because Section 7 is applied prospectively, "[t]he section can deal only with probabilities, not with certainties." *Fed. Trade Comm'n v. Procter & Gamble Co.* 386 U.S. 568, 577 (1967). The law "necessarily requires a prediction of the merger's impact, present and future." *Id.* Section 7 was designed to "arrest[] mergers at a time when the trend to a lessening of competition in a line of commerce is still in its incipiency." *Brown Shoe, Co. v. United States*, 370 U.S. 294, 317 (1962). Therefore, proof of the anticompetitive impact of an merger need not be shown with certainty:

> [T]here is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipience would be frustrated.

Procter & Gamble, supra, 386 U.S. at 577.

"To show that a merger is unlawful, a plaintiff need only prove that its effect 'may be substantially to lessen competition or to tend to create a monopoly." *Am. Stores, supra*, 495 U.S. at 284. To survive a motion to dismiss, therefore, a plaintiff need only properly allege that the merger may – in the future – substantially lessen competition.

The grant of a motion for judgment on the pleadings is reviewed *de novo*. *Porous Media v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

A Rule 12(c) motion for judgment on the pleadings is evaluated under the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

In evaluating the sufficiency of a complaint's allegations, Rule 8 of the Federal Rules of Civil Procedure sets forth the extent of a plaintiff's pleading obligations:

> **Claim for Relief**. A pleading that states a claim for relief must contain:
>
> * * *
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; ….

FED.R.CIV.P. 8(a).

On a motion to dismiss for failure to state a claim, as here, the Court is required to accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007) , citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (1989). A complaint attacked for failure to state a claim "does not need detailed factual allegations." *Twombly, supra*, 550 U.S. at 555. Instead, the plaintiff is required only to set forth factual allegations that "raise a right to relief above the speculative level." *Id.* "Specific facts are not necessary; the statement need only give the defendant fair notice of what the …

claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), citing *Twombly, supra*, 550 U.S. at 555 (quotation and other citation omitted). A pleading meeting these requirements must survive a Rule 12 motion to dismiss "even if it strikes a savvy judge that actual proof of th[e] facts is improbable and that a recovery is very remote and unlikely." *Id.* at 556.

The law in this Circuit "disfavor[s] the dismissal of antitrust actions before discovery begins because the proof of illegal conduct lies largely in the hands of the alleged [violators]." *Huelsman v. Civic Center Corp.*, 873 F.2d 1171, 1174 (8th Cir. 1989) (citations omitted). Moreover, "in reviewing a district court's dismissal of an antitrust case before the initiation of discovery, an appellate court must employ a 'concededly rigorous standard' of scrutiny." *Id.*

Section 7's "potential competition" doctrine has been analyzed under two theories, both of which plaintiffs have alleged here. The "actual potential competition" theory proscribes an acquisition of a large firm in an oligopolistic market if the acquiring firm would be expected to enter the market *de novo*, and it entry would *likely* have procompetitive effects on the market. The "actual" potential competition doctrine is concerned with the acquiring firm's ability to deconcentrate the market *in the future*.

The "perceived potential competition" theory forbids an acquisition where the presence of the acquiring firm "waiting in the wings" of the market, and perceived by market participants as a potential entrant, exerts a pro-competitive influence on the market. The "perceived" potential competition doctrine is

concerned with the *present* effect that a noncompetitor has on the market.

Under both theories, InBev's acquisition of Anheuser-Busch violates Section 7 of the Clayton Act.

A. Plaintiffs' Complaint States A Claim Under The "Actual Potential Competition" Theory

The "actual potential competition" doctrine was adopted by this Circuit in *Yamaha Motor Co. v. Federal Trade Commission*, 657 F.2d 971, 977-978 & 978, n. 7 (8th Cir. 1981); *reh'g denied*, No. 80-1913 (Sept. 11, 1981), *cert. denied*, *Brunswick Corp. v. Federal Trade Commission*, 456 U.S. 915 (1982). To prevail under the doctrine, plaintiffs are required to demonstrate two elements: (1) that InBev had "available feasible means for entering the relevant market" other than by acquiring Anheuser-Busch and (2) "that those means offered a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." *Yamaha, supra*, 657 F.2d at 977-978, *quoting, United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974).

The *Yamaha* case involved the production and sale of outboard motors into the United States and the facts there are strikingly similar to the facts of this case. Between 1971 and 1973, defendant Brunswick was the second largest seller of outboard motors in the U.S. with approximately 20% of the market. *Yamaha, supra*, 657 F.2d at 973. Defendant Yamaha was a Japanese company manufacturing outboard motors in Japan

through another company called Sanshin. Sanshin sold Yamaha motors throughout the world. Yamaha acquired 60% of Sanshin in 1969. *Id.* at 974. In 1972, Yamaha and Brunswick entered into a joint venture under which the companies jointly and equally owned Sanshin. *Id.*

Just as InBev and Anheuser-Busch have done, Yamaha and Brunswick had entered into an exclusive distribution agreement. This agreement effectively divided markets between Brunswick and Yamaha; Brunswick became the exclusive distributor of Sanshin motors in North America, while Yamaha became the exclusive distributor of Sanshin motors in Japan. *Yamaha, supra*, 657 F.2d at 974. Each firm was precluded from competing against the other in its designated areas. *Id.* Other ancillary agreements precluded the companies from developing products that competed against one another, among other restrictions. *Id.*

Striking down the joint venture, this Court held that Yamaha was an "actual potential competitor" for the United States market and that the venture eliminated Yamaha as a potential competitor and thereby violated Section 7. *Yamaha, supra*, 657 F.2d at 978. The exclusive distribution agreements dividing markets between the competitors were also struck, and Yamaha and Brunswick were prohibited "from making or enforcing any agreement preventing any person from … selling or distributing outboard motors in the United States." *Id.* at 975-976.

1. InBev Has The "Available Feasible Means" For Entering The United States Beer Market

In support of the first element – that the defendant has "available feasible means for entering the relevant market," the *Yamaha* Court relied on evidence that: (1) the U.S. market was the largest in the world, and entry was Yamaha's only alternative, lest it forego the market altogether, which was unlikely; (2) Yamaha was selling its products in every market in the world, except the United States; (3) Yamaha had the requisite managerial experience to enter the market; (4) Yamaha had the technology needed to be a viable entrant because it had developed products which could compete in the market; and (5) Yamaha had the financial resources to invest in entry. *Yamaha, supra*, 657 F.2d at 978. The Court also supported its conclusion with subjective evidence, including that Yamaha had previously expressed an interest in entering the market, had developed products aimed specifically at American consumers; and that a manager testified it was "about the time [to] go into a developed market like the United States or Canada." *Yamaha, supra*, 657 F.2d at 978-979.

Far from being mere conclusions of law, Plaintiffs have amply alleged facts that support a finding that InBev had "available feasible means" to enter the United States beer market. Almost mirroring the facts in *Yamaha*, Plaintiffs have alleged:

(1) The market is highly attractive. The United States beer market is the most profitable in the world. I App. 40 (¶ 81).

(2) InBev is a major international player selling products in practically every market in the world, except the United States. I App. 35 (¶ 47). It has operations worldwide. I App. 36 (¶¶ 51-54). It is the largest global brewer; and, with 123 breweries worldwide produces over 200 brands of beer. I App. 35, 39 (¶¶ 44, 47, 77). InBev sells the #1 or #2 top-selling beer in over 20 key beer markets globally. I App. 36-37, 39 (¶¶ 57-58, 74).

(3) InBev has the managerial expertise to compete in the United States. InBev is an aggressive, well-equipped and well-financed corporation (I App. 31 (¶ 19)), ready and able to enter the United States market. I App. 38 (¶ 63). Since InBev produces over 200 brands of beer and sells the #1 or #2 top-selling beer in over 20 key markets (I App. 35-37, 39 (¶¶ 44, 47, 57, 58, 74)), it clearly has the expertise necessary to compete in the United States.

(4) InBev has the technology necessary to compete in the United States and has developed products that can and do compete in this country. It already sells beers, distributed by Anheuser-Busch, which are some of the top-selling imports in the United States. I App. 35-37 (¶¶ 44, 47, 55, 56, 60).

(5) Finally, and above what *Yamaha* required, InBev has enormous economic capabilities sufficient to allow it to invest in and compete in the United States. It has a market capitalization in excess of $50 billion with net profits of $7.8 billion on revenues exceeding $21 billion. I App. 38 (¶ 65). Its economic power is evinced through its ability to pay $52 billion to acquire Anheuser-Busch – in cash. I App. 38 (¶ 66). It has sufficient capital to

build new breweries and establish its own distribution network. I App. 38 (¶ 67). As a result of its access to capital, it is able to enter the United States market *de novo*. I App. 38 (¶ 67). Were it forced to forego the acquisition, InBev will probably enter the market *de novo*, establish a distribution network in the United States, and build new breweries. I App. 48-49 (¶¶ 139-141).

As in *Yamaha*, there are also direct factual allegations showing InBev's subjective intent to enter the United States market, including, "InBev has announced its intention to enter the United States market" (I App. 30 (¶ 12)); and "InBev has announced to competitors and to the public alike that it intends to be an entrant into the United States market for the production and sale of beer." I App. 38 (¶69). Moreover, Anheuser-Busch admitted that it recognized InBev's intentions to enter the market. I App. 30, 45 (¶¶ 122(5), 13). Furthermore, InBev announced in 2007 that its "strategy" included "building significant positions in the world's major markets," which unquestionably include the United States. I App. 39 (¶ 73). These announcements were based on InBev's long-term goal of becoming a major player in the production and sale of beer in the United States. I App. 37, 39 (¶¶ 62, 71). Shortly after its creation in 2004, InBev's CEO even categorized entering the United States market as "our dream." I App. 38 (¶ 68).

In the face of these allegations, the district court inconceivably concluded that plaintiff's complaint failed to allege InBev's "available feasible means" for entering the market. Add. 11; I

App. 186. The court's simplistic conclusion hinged merely on ignoring specific allegations in the complaint.

To start with, the district court held that "Plaintiffs have not identified *any indicators* that other U.S. beer brewers believed that InBev was poised to enter the United States beer market." Add. 9; I App. 184. On the contrary, the complaint alleged that "InBev announced to competitors … that it intends to be an entrant into the United States market" (I App. 38 (¶69)), and that even the largest market participant admitted that "[InBev's] desire [is] to broaden its share of the U.S. beer market." I App. 45 (¶ 122(5)).

The district court also speciously concluded that "InBev was not 'admittedly interested' in entering the U.S. market." Add. 9; I App. 184. Ignoring the abundant allegations showing InBev's stated intent, the district court instead iinferred that InBev acted to "extricate" itself from the market. *Id*. But, there are *no* facts that any objective arbiter could use to conclude that InBev intended to "extricate" itself from the world's most profitable beer market.

To support this fallacious inference, the district court relied on two facts, both of which were impermissibly considered.[9] First, InBev sold the Rolling Rock brands and breweries to Anheuser-Busch in 2006, and second, InBev entered into an exclusive distribution agreement with Anheuser-Busch to sell InBev's beer in the United States. These facts, according to the district court,

[9] See *post* at pp. 44-49.

conclusively and beyond rebuttal "show that InBev *actively withdrew from*, rather than pursued, the U.S. market." Add. 6; I App. 181.

The court's logic in arriving at this inference – impermissibly drawn *against* plaintiffs – is logically flawed. The facts considered, even if true and properly before the court, do not support an inference that InBev withdrew from the market. For instance, without exploring the matter through discovery, how could the court know with sufficient certainty to deem the fact "undisputed," that InBev did not sell the Rolling Rock brand because it did not fit InBev's marketing portfolio, or because there were internal management problems with the brand, or because the occurrence of some event irreparably tarnished the brand's image, or because of any number of other reasons? And, how is the district court able to divine that InBev did not sell the Rolling Rock brewery because the land suffered a recent toxic spill, or because the equipment's need for replacement outweighed the brewery's value, or because the building had suffered a fire?

As it turns out, in arriving at this inferred conclusion, the district court relied on inadmissible hearsay evidence, an Annual Report (not filed with the SEC or any other public body) and a press release. Add. 6-7; I App. 181-182. But even InBev's stated purpose in selling the brand and brewery do not support the court's conclusion that InBev was "actively withdrawing" or "extricating" itself from the U.S. market. On the contrary, InBev's stated reason in selling Rolling Rock was part of its "strategic approach to the U.S. market, which is to focus on the high-growth

import brands in our portfolio." This statement –hearsay offered by the court for its truth – even itself indicates not a *withdrawl* from the market, but an intent to develop the U.S. market *further*.

The court's reliance on InBev's exclusive distribution agreement creates a similarly illogical conclusion. The court concluded that "[i]f InBev had contemplated a *de novo* entrance into the U.S. beer market, then it is unlikely (if not implausible) that it would have entered into an 'exclusive' import agreement." Add. 7-8; I App. 182-183. Other than what is alleged in the complaint, the district court knows *nothing* about this exclusive import agreement, and without discovery, the court's characterization of the agreement as a complete and total bar to InBev's entry is pure speculation. It is yet another impermissible inference drawn against plaintiffs. Without discovery, how does the district court know the distribution agreement would cover new brands created by InBev for the purpose of entering the market, or that InBev is unable to terminate the agreement on short notice? It simply does not follow that InBev *necessarily* was prohibited from entering the market because it had an exclusive distribution agreement.

In fact, in *Yamaha*, the defendants had similar exclusive distribution agreements, yet no assumption was made there that Yamaha would not have been entitled, under the agreement, to enter the market. In that case, Brunswick had the *exclusive* right to import and sell all Yamaha motors in the United States, and the agreements were used to illegally divide markets, just as here.

[10] *Yamaha, supra*, 657 F.2d at 975-976. This Court did not tolerate the perverse use of an illegal agreement in restraint of trade as a *shield* to Section 7 liability in *Yamaha*, and it should not countenance such conduct here.

Finally, the district court claimed that entering the market would be implausible for InBev since it "would have to build factories and develop a nationwide distribution system." Add. 11; I App. 186. As with most of plaintiffs' other allegations, this conclusion is simply based on impermissible speculation. Other than what is contained in the pleadings, the district court can offer little about what is required for a major international company to enter a billion dollar market. In any event, plaintiffs specifically alleged that as the largest, most profitable, most economically powerful brewer in the world, InBev, in fact, "has the ability … to enter into the United States beer market … including the construction of breweries and the development of its own independent distribution network." I App. 36 (¶ 50).

To bring the matter full circle, the district court ignored the complaint's allegations factually specifying InBev's ability and intent to enter the market, which taken as true, plainly demonstrate InBev had "available feasible means" for entering the United States market.

---

[10] The complaint in this case alleges that the exclusive import agreement between InBev and Anheuser-Busch is an unlawful allocation of markets. I App. 28 (¶ 7).

2. InBev's Entry Into The United States Beer Market Would Carry A "Substantial Likelihood Of Deconcentrating The Market"

Having found that the defendant in *Yamaha* had available feasible means for entering the market, this Court then inquired as to whether "those means offered a substantial likelihood of ultimately producing deconcentration of the United States market or other significant procompetitive effects." *Yamaha, supra*, 657 F.2d at 979. The lower court did not analyze whether InBev's entry into the United States market would carry a "substantial likelihood of deconcentrating the market." Nevertheless, it is plain from the allegations that InBev's entry would undoubtedly deconcentrate the otherwise highly concentrated U.S. beer market.

This Court "easily found" that Yamaha's entry would offer a substantial likelihood of deconcentrating the outboard motor market, supporting its conclusion with three pieces of evidence. *Yamaha, supra*, 657 F.2d at 979. First, the *Yamaha* market was substantially concentrated. *Id.* A much higher market concentration (HHI of 3092) has been alleged in this case. I App. 29 (¶¶ 10,11). Similar to *Yamaha*, the top two firms in the United States beer market control 78% of the market.[11] I App. 40-41 (¶¶

[11] Anheuser-Busch controls 48.2% of the market. I App. 40 (¶ 85). The number 2 firm, SABMiller, has a market share of 18.4%; and the number 3 firm, MolsonCoors, controls 11.1%. I App. 40 (¶¶ 86, 87). Recently, SABMiller and MolsonCoors entered into a joint venture that combines their United States productions. I

85, 97-98). The top four firms (including the SABMiller/MolsonCoors joint venture), control 87% of the market, and no other firm has more than 3% share. I App. 40-41 (¶¶ 85-90, 97-98).

Second, the *Yamaha* Court considered whether Yamaha's stature was such that its entry would likely deconcentrate the oligopolistic market. Answering that question in the affirmative, the Court relied on evidence that Yamaha was a "well-established international firm with considerable financial strength," that its "brand name was familiar to American consumers," and that it "had considerable marketing experience in the United States." *Yamaha, supra*, 657 F.2d at 979. *Yamaha* held that "[t]ypically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant procompetitive effects." *Yamaha, supra*, 657 F.2d at 979, n.10. And, on the evidence outlined above, the Court concluded that "[a]ny new entrant of Yamaha's stature would have had an *obvious* procompetitive effect leading to some deconcentration." *Id.* (italics added).

Each of these elements has been more than sufficiently pled in the complaint. InBev is a well-established international firm with considerable financial strength, as described above. Its brand name beers are well-recognized by American consumers. I App. 35 (¶ 47). And, it has considerable marketing experience in the

---

App. 41 (¶ 97). Thus, their combined market share of 29.5% is controlled by one company.

target market, having previously sold its beers through its own subsidiary, InBev USA. I App. 35 (¶ 47).

The allegations in Plaintiffs' complaint, if proven, demonstrate a patent violation of Section 7 under the law as applied in *Yamaha* and as such, the complaint states a cognizable claim under the actual potential competition doctrine.

B. Plaintiffs' Complaint States A Claim Under The "Perceived Potential Competition" Theory

The "perceived potential competition" doctrine has its foundation in the Supreme Court decision *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). In *Falstaff*, the relevant market was the production and sale of beer in six New England states. That market, decidedly less concentrated than the present one, consisted of 11 total brewers, the eight largest of which controlled 81% of the market. *Falstaff, supra*, 410 U.S. at 527-528. Also less offensive in *Falstaff* than the present case, Falstaff was only the 4th largest beer producer in the United States, with merely 6% of the national market. *Id.* at 528. Falstaff's acquisition target, Narragansett, was the largest producer in the New England market, but only had a 20% market share. *Id.* Falstaff had no presence in New England, but announced its desire for "national distribution" several years before attempting its acquisition of Narragansett. *Id.* at 529. The United States filed suit, alleging that Falstaff's acquisition of Narragansett violated Section 7. After a trial on the merits, the district court found in Falstaff's favor, concluding among other

things that "the geographic market was highly competitive," and that Falstaff's "management was committed against *de novo* entry." *Id.* at 530. The district court relied heavily on statements from Falstaff's management that it "had consistently decided not to attempt to enter said market," after having "carefully considered such possible alternatives as (1) acquisition of a small brewery on the east coast, (2) the shipping of beer from its existing breweries …, (3) the building of a new brewery on the east cost and other possible alternatives…." *Id.* at 530-531.

Reversing on direct appeal, the Supreme Court held that the district court erred as a matter of law, explaining: "[t]he error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market *de novo*, it could in no sense be considered a potential competitor." *Falstaff, supra*, 410 U.S. at 532.

> The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market.

Id. at 533. In providing guidance to the courts, the Supreme Court explained, "[t]he District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff *could* be said to be a potential competitor on the fringe of

the market with *likely* influence on existing competition." *Id.* at 533-534 (emphasis added).

The "perceived potential competition" doctrine was also the subject of the Supreme Court's decision in *United States v. Marine Bancorporation, supra*, 418 U.S. at 623-624. Summarizing the *Falstaff* decision, *Marine Bancorporation* held that a merger will be deemed unlawful "[(1)] if the target market is substantially concentrated, [(2)] if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant; and [(3)] if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market." *Marine Bancorporation, supra*, 418 U.S. at 625.

It cannot be disputed that Plaintiffs have sufficiently alleged that the United States beer market is highly concentrated, as outlined above, and that argument will not be repeated here. The second and third *Falstaff* elements will be discussed in turn.

1. InBev Has The Characteristics, Capabilities, And Economic Incentive To Render It A Perceived Potential *De Novo* Entrant.

At the outset of discussing the second element, two principles must be set forth. First, the standard of proof required for showing that InBev is a potential entrant is necessarily low, since "[u]nequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger is rarely available." *Marine Bancorporation, supra*, 418 U.S. at 624.

Second, the focus of the analysis should not rely on the subjective statements of market participants, but rather on the *objective economic* evidence describing the acquiring company and target market. To wit, *Falstaff* required district courts to "appraise[] the *economic facts* about Falstaff and the New England market." *Falstaff, supra*, 410 U.S. at 533 (emphasis added). And, *Marine Bancorporation* requires courts to look at the acquiring firm's "characteristics, capabilities, and economic incentive." *Marine Bancorporation*, 418 U.S. at 624. Moreover, in order to show InBev was "perceived" as a potential competitor, Plaintiffs need not allege that InBev ever attempted to enter the market or even *intended* to enter the market, as the Supreme Court held in *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (Defendant held to be perceived potential entrant even where there was no evidence defendant's management ever intended or attempted to enter market). Instead, the analysis depends on the objective economic evidence alleged in the complaint. *Id.* at 580-581.

The complaint sufficiently pleads that InBev had the "characteristics, capabilities, and economic incentive" to enter the United States beer market for the same reasons that InBev was properly alleged to have "available feasible means" for entering the market, described above. In brief, the complaint alleges that InBev has the proper "characteristics" – it is a major international player selling top-selling beers in practically every market except the United States. I App. 35-37, 39 (¶¶ 44, 47, 51-54, 57-58, 74, 77). InBev has the proper "capabilities" – it has managerial

expertise; is an aggressive, well-equipped and well-financed corporation; and is ready and able to enter the United States market. I App. 31, 35-38, 39 (¶¶ 19, 44, 47, 57-58, 63, 74). InBev possesses the technology necessary to enter the market *de novo* and has developed brands which are highly-recognizable to American consumers. I App. 35-37 (¶¶ 44, 47, 55, 56, 60). InBev has enormous economic capabilities, with a market capitalization in excess of $50 billion, net profits of $7.8 billion on $21 billion in annual revenues, and has agreed to purchase Anheuser-Busch for $52 billion in cash. I App. 38, 48 (¶¶ 65, 66, 67, 139-141). Finally, InBev certainly has the "economic incentive" to enter the United States; it is the most profitable beer market in the world. I App. 40 (¶ 81).

In addition to these objective economic-based allegations showing InBev's "characteristics, capability, and economic incentive" – which are most relevant to the analysis – the complaint nevertheless also alleges that Anheuser-Busch *actually perceived* InBev as a potential entrant. I App. 38 (¶ 64). As discussed above, InBev publicly communicated its desire to enter the market. I App. 38-39 (¶¶ 68, 69, 71, 73). Anheuser-Busch has itself admitted that it perceived InBev's "desire to broaden its share of the U.S. beer market." I App. 44, 30 (¶¶ 122(5), 13).

Given these allegations, it is difficult to understand how the district court could conclude that "Plaintiffs allege no facts to detail why InBev would be a perceived competitor …." Add. 6; I App. 181. The court "[found] it unreasonable for competitors to believe that InBev was poised to enter the U.S. market." Add. 7; I

App. 182. But, it is not the duty of the district court to *disbelieve* plain factual allegations in the complaint; if the complaint alleges that a competitor perceived InBev as a potential entrant, and the complaint supports that allegation with the competitor's *quoted statement* admitting that perception, then the fact must be taken as true: that competitor perceived InBev as a potential entrant.

The district court also made the unsupportable contention that plaintiffs' case was "solely based upon InBev's size and strength." Add. 6; I App. 181. While that is demonstrably untrue – as the allegations outlining InBev's announcements, plans, and competitors' perceptions make plain – the fact is the Supreme Court has admonished the courts to "appraise[] the *economic facts* about [the competitor] and the [market] in order to determine whether in any realistic sense [the competitor] could be said to be a potential competitor." *Falstaff, supra*, 410 U.S. at 534 (emphasis added). The alleged economic facts about InBev and the U.S. beer market undeniably support the allegation that InBev had the "characteristics, capabilities, and economic incentive" to be perceived as a potential competitor.

Moreover, the Supreme Court has made very clear that it is unnecessary to show the defendant *actually* intended to enter the market; the only factor is whether other firms *perceived* the defendant as a potential competitor. *Procter & Gamble, supra*, 386 U.S. at 580.

Finally, in attempting to distinguish this case from the facts in *Marine Bancorporation*, the district court found that "the factual allegations … indicate that InBev did not have 'long-range goals'

to enter the U.S. beer market." Add. 10; I App. 185. The court's conclusion simply ignores the complaint, which alleges, "[s]ince at least 2004, InBev, as led by former AmBev officers, has had a long-term goal of becoming a major player in the production and sale of beer in the United States." I App. 39 (¶71).

2. InBev's Presence On The Periphery Of The Market Tempers Oligopolistic Behavior Of Existing U.S. Beer Competitors

In describing the final requirement – that InBev's presence on the edge of the market tempers the oligopolistic behavior of present market players – the Supreme Court in *Falstaff* held that definitive proof is unnecessary; the plaintiff need only show, and therefore allege, the acquiring firm's presence on the periphery was "*likely* [to] exercise substantial influence on market behavior." *Falstaff, supra*, 410 U.S. at 531-532. Similarly, the Supreme Court in *Marine Bancorporation* held that to satisfy its burden, the plaintiff must show the acquiring firm's presence on the edge of the market "*probably*" had a procompetitive effect: "In other words, the Court has interpreted § 7 as encompassing what is commonly known as the 'wings effect' – the *probability* that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter *de novo*." *Marine Bancorporation*, 418 U.S. at 625 (emphasis added). Because the core question of Section 7 is whether an acquisition *may* substantially lessen competition, it "necessarily requires a prediction of the merger's

impact on competition, present and future." *Procter & Gamble, supra*, 386 U.S. at 577 (emphasis added).

The complaint alleges that InBev's presence on the edge of the market has exerted a procompetitive impact on the current market players. "InBev's presence on the periphery of the market … has been an important consideration in the pricing and marketing decisions of Anheuser-Busch and other American brewers or importers in the United States." I App. 30, 36 (¶¶ 15, 49). If InBev is allowed to purchase Anheuser-Busch, "there would no longer be any significant major potential competitor to influence pricing and marketing practices in the United States anywhere near the degree to which InBev, as the largest brewer in the world, is able to do." I App. 30 (¶ 16). InBev was alleged to be a "substantial incentive to competition in the United States," and that "[t]he constant threat of InBev … to enter the market has a direct and substantial effect and impact on the market behavior of Anheuser-Busch and other brewers in the United States beer market." I App. 31 (¶ 19).

Plaintiffs have alleged that InBev's presence on the periphery has resulted in competitive behavior in the market. For example, as a result of InBev's presence, in 2007, Anheuser-Busch spent approximately $378 million on advertising, which is "[t]he most influential factor in the sale of beer in the United States." I App. 34 (¶¶ 41, 42). Because Anheuser-Busch and InBev offer competing products, their direct competition would constrain the pricing of the other. I App. 41 (¶¶ 99-101).

Moreover, Plaintiffs have alleged that InBev's acquisition of Anheuser-Busch would make the market less competitive, allowing the combine to increase prices. I App. 47 (¶¶ 132, 135, 136). Thus, in discussions between Anhesuer-Busch and InBev, the former's vice president admitted that the two companies "talked about a very good fourth quarter price increase" which "will hold," even though "the consumer is getting pressure." I App. 47-48 (¶ 136). The alleged ability to raise prices as a result of the combination *is* an allegation that the elimination of InBev as a potential competitor will have anti-competitive effects on the market. Finally, Plaintiffs alleged that in the absence of the combination, "InBev will probably lower prices," and "InBev will increase … diversity of products for consumers, and create a new competition in the beer industry … for the benefit and welfare of consumers." I App. 49 (¶ 142).

The district court ruled that the complaint failed to sufficiently allege that InBev's presence on the periphery of the market was likely to have a tempering effect on the current market participants. It concluded plaintiffs' allegations were "mere legal conclusions" and therefore legally insufficient. Add. 5; I App. 180. But, in reaching its ruling, the district court cherry picked allegations to attack as "mere legal conclusions," like the opening paragraph of the complaint, which provides a general outline of the case (and was not cited as support in plaintiffs' opposition brief). *Id.* The only other allegation the district court cited was paragraph 19 of the complaint. *Id.* Although that paragraph does sufficiently allege that InBev's presence in the wings "has a direct

and substantial effect and impact on the market behavior" of other firms, the fact is the district court ignored every other allegation. The district court ignored, for instance, the allegation that InBev's presence in the wings has impacted "the pricing and marketing decisions of Anheuser-Busch and other … brewers." I App. 30 (¶ 15). It ignored the allegation that InBev's presence on the market's edge "influence[s] pricing and marketing practices in the United States." I App. 30 (¶ 16). The district court ignored the allegation that keeping InBev on the edge of the market (or requiring it to enter *de* novo), would probably result in "lower prices," as well as an increase in the "diversity of products for consumers." I App. 49 (¶ 142-143). It ignored the allegations of fact showing that InBev's acquisition of Anheuser-Busch would result in increased prices. I App. 47 (¶¶ 132-136). These are not legal conclusions, they are stated allegations of fact.

The district court tried to deflect some of these allegations by again offering "evidence" in rebuttal. It cites a document ("Doc. No. 57," II App. 520) to show that the defendants' new combination had no intention of raising prices (as alleged in ¶¶ 132-145 (I App. 47-49), and that the combined company's price-rise was decided "prior to the proposed acquisition." Add. 8; I App. 183. This is extremely improper. The consideration of an internal Anheuser-Busch memorandum, which was not incorporated by the complaint or judicially noticed, is undoubtedly outside the pleadings.

Additionally, the district court concluded that "Plaintiffs' claim that the merger will increase costs to consumers are [sic] mere

conclusory assertions regarding how the acquisition will affect consumers." Add. 8; I App. 183. An allegation that the combination will increase prices is a statement of fact, not a legal conclusion. In fact, plaintiffs' allegations have proven correct. Two months ago, as soon as defendants received final court approval of their merger, the newly formed combination increased prices.[12] As a result of the price hike, one article in the New York Times has called for an antitrust review of the U.S. beer market. *Rising Beer Prices Hint at Oligopoly*, New York Times, August 27, 2009, at B2.

In sum, plaintiffs' complaint clearly alleges, with reference to specific factual content, each of the elements necessary under both potential competition theories. The district court's decision is premised on a series of factual, legal, and logic errors. Rather than view the allegations in the light most favorable to the plaintiffs, the district court has done the opposite, relying on material outside the complaint, drawing inferences against plaintiffs at every opportunity, and making leaps of logic that cannot stand. The decision should be reversed and plaintiffs' complaint held legally sufficient.

---

[12] David Kesmodel, *Beer Makers Plan More Price Boosts*, Wall Street Journal, August 26, 2009, at B1 ("The nation's two largest brewers by sales are planning a new round of price increases this fall despite flat volumes, in a sign of their growing clout."); Ben Rooney, Catherine Clifford, *Brace Yourself: Beer Prices Are Going Up*, CNN Money.com, Aug. 27, 2009; *Anheuser-Busch, MillerCoors to Increase Beer Prices This Fall*, Associated Press, August 26, 2009.

II. THE LOWER COURT IMPROPERLY RELIED ON MATERIAL OUTSIDE THE PLEADINGS

"When considering a motion for judgment on the pleadings, the court generally must ignore materials outside the pleadings …." *Porous Media, supra,* 186 F.3d at 1079. "'Matters outside the pleading' [include] any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings." *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992). This Court's "broad interpretation" is intended to "necessarily restrict a district court's consideration of a motion [to dismiss] to matters contained in the pleading." *Id.*

If, on a motion under Rule 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment. FED.R.CIV.P. 12(d); *Martin v. Sargent*, 780 F.2d 1334, 1336 (8th Cir. 1985). In such a case, the district court must provide notice to the parties of its intent to convert the motion. *Jensen v. Klecker*, 599 F.2d 243, 245 (8th Cir. 1979) (requiring "strict compliance with the provisions of Rule 56" and holding that "notice may not be omitted.") After notice is effectuated, the non-moving party "must be given a reasonable opportunity to present all the material that is pertinent to the motion." FED.R.CIV.P. 12(d). A "reasonable opportunity" to present pertinent information "include[es], if necessary, conducting discovery." *Gibb, supra*, 958 F.2d at 817.

The court may consider "some materials that are part of the public record or do not contradict the complaint," as well as materials that are "necessarily embraced by the pleadings" without converting the motion to one for summary judgment. *Porous Media, supra*, 186 F.3d at 1079.

In this case, the lower court considered and relied extensively on essentially four extra-pleading documents: (1) an InBev press release (II App. 519), (2) InBev's 2006 Annual Report (II App. 260), (3) InBev's 2007 Annual Report (II App. 399), and (4) an internal Anheuser-Busch document labeled "confidential" (II App. 521). Add. 6-8; I App. 181-183.

The lower court specifically stated that its consideration of these documents was justified because it took judicial notice of them as documents in the public record. Add. 6, n. 7; I App. 181. The court's order taking judicial notice of these documents is a "docket text order" located in the docket sheet itself granting defendants' motion for leave to take judicial notice (Doc. No. 49). I App. 9 (motion); I App. 11 (order, Nov. 12, 2008). The order reads, in its entirety,[13] as follows:

> Docket text ORDER: Re: 49 MOTION for Leave to take Judicial Notice by Defendants Anheuser-Busch Companies, Inc.,

[13] The docket text order indicates that it has been signed by the district court. I App. 11 (Nov. 12, 2008). It is unclear whether an actual paper document granting the order exists. If it does, it is not accessible via the electronic filing docket sheet, there is no hyperlink to any document on the docket sheet, and no paper version has been served on plaintiffs.

> Anheuser-Busch, Inc.; ORDERED: SO ORDERED.[14]

I App. 11. The order was granted two days after the motion was filed, before plaintiffs could file a brief in opposition. Since the court's order offers no explanation for its reasons for granting judicial notice of the documents, resort is made to defendants' motion and memorandum itself. I App. 118. The arguments relied on in the motion do not justify judicial notice.

First, defendants sought judicial notice of InBev's 2006 and 2007 annual reports. I App. 120. Judicial notice of these documents is improper for two reasons. First, the documents have not been publicly filed and are therefore not publicly available. Second, and more substantively, public filings may be considered for undisputed facts such as time of filing, fact of filing, or corporate identity; they may not be considered for the truth of disputed assertions made in them, which is impermissible hearsay.

In 2006 and 2007, InBev's stock was traded on the European stock exchange; it therefore did not file its annual reports with the SEC. In fact, no foundation for these documents is provided in the declaration at all; there is no statement that they have been publicly filed anywhere, in Europe or the United States. II App. 255 (¶5, 6). In support of their argument to take judicial notice of these documents, defendants cite *Howard v. Gap, Inc.*, 2007 U.S. Dist. LEXIS 8510, *15-16 (N.D. Cal. Jan 19, 2007). I App. 119.

---

[14] Presumably, although it is not specific, this order grants the motion.

Howard is inapposite; that case took judicial notice of Gap's annual report because it was "publicly available," i.e., filed with a public agency, namely the SEC. *Id.* InBev's annual reports have not been publicly filed anywhere.

More importantly, even if the annual reports were publicly filed, only "easily verifiable information" may be considered, such as Gap's corporate structure. *Howard, supra*, 2007 U.S. Dist. LEXIS 8510 at *16. As seems axiomatic, this Court has held that "Courts have taken judicial notice of SEC filings if not offered for the truth of the matters asserted therein." *Kushner v. Beverly Enters.*, 317 F.3d 820, 830 (8th Cir. 2003). In this case, the district court plainly relied on InBev's annual reports for the *truth* of the matters asserted, inadmissible as hearsay, and certainly not subject to judicial notice. Specifically, the court relied on the 2006 and 2007 annual reports[15] for the following "facts": (1) InBev had a "plan to complete its exodus from the U.S. [market]" (Add. 7; I App. 182), (2) the exclusive distribution agreement was "long-term" (Add. 7; I App. 182); (3) "the advantage of the import agreement to InBev was its 'access to Anheuser-Busch's sales and distribution system'" (Add. 7; I App. 182); and (4) InBev had no intention to enter the U.S. market since "[n]otably absent from InBev's 2006 and 2007 annual reports is any mention of its purported desire or plans to expand *de novo* into the U.S. beer market." Add. 7, n. 8; I App. 182. Each of these facts is disputed,

[15] In citations in the district court's order, the 2006 annual report is identified as "Doc. No. 53." The 2007 annual report is identified as "Doc. No. 58" or "Doc. No. 60."

and both the judicial notice of and reliance on these documents at the motion to dismiss stage was improper.

Second, defendants sought judicial notice of a press release. I App. 120 (request); II App. 519 (press release). As with the annual reports, the district court considered this press release for much more than dates, notice, or other "easily verifiable information," undisputed information. Most objectionable is the court's reliance on the press release for the truth of InBev's "stated purpose in discontinuing its Rolling Rock brand." Add. 6-7; I App. 181-182. The court relied on the press release for *proof* of *why* InBev sold Rolling Rock, determining that it did so as part of a "plan to complete its exodus from the U.S. beer market." Add. 7; I App. 182. This plainly disputed fact – perhaps the central issue of the district court's opinion – cannot justifiably be resolved through reference to a press release. Any statement culled from the press release and used for the truth of any matter asserted is inadmissible as hearsay and beyond the scope of judicial notice.

Third, the court improperly considered and relied on a document referred to in the order as "Doc. No. 57." Add. 8; I App. 183. This document is an internal Anheuser-Busch memorandum, stamped "confidential," filed under seal, and not judicially noticed. There is no justification for its consideration; it falls within no legitimate category of documents a court may review on a motion to dismiss.

The court's order granting judicial notice should be reversed. The district court offered no explanation as to why it took notice of these documents; it failed to offer plaintiffs an opportunity to

respond to the judicial notice motion; and there is no legitimate reason to notice these documents for the purposes in which they were used.

Moreover, whether the documents themselves are the proper subject of judicial notice, the district court undeniably considered material outside the pleadings. It went beyond the consideration of the "easily verifiable information" of these documents, instead relying extensively on hearsay statements upon which it hinged its ultimate result. Because the district court improperly considered the documents, the motion for judgment on the pleadings should have been converted to one for summary judgment, plaintiffs should have been notified of the conversion, and permitted a reasonable opportunity to present information pertinent to the motion. For this independent reason, the lower court's decision dismissing plaintiffs' complaint must be reversed.

III. THE LOWER COURT IMPROPERLY DENIED PLAINTIFFS' REQUEST FOR LEAVE TO AMEND THE COMPLAINT

"Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Leave to amend should be denied only in extraordinary circumstances, none of which apply here. "In the absence of any apparent or declared reason – such as undue delay, bad faith or

dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Foman*, *supra*, 371 U.S. at 182.

The grant or denial of a party's request to amend is within the discretion of the trial court, "but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman, supra*, 371 U.S. at 182; *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987). As this passage from *Foman* makes plain, when a district court denies a motion to amend, it must do more than name a reason; it must explain its reason and that reason must be sufficient. See also, *Caribbean Broad. Sys., v. Cable & Wireless PLC*, 148 F.3d 1080, 1083 (D.C. Cir. 1998).

None of the permissible reasons cited in *Foman* for denying leave to amend a complaint are present here. The district court's cursory order fails to offer any justifiable reason for denying plaintiffs the opportunity to amend their complaint. Add. 12; I App. 187. Plaintiffs have never before amended their complaint; the operative complaint is the original filing. Therefore, plaintiffs' request was not denied for "repeated failure to cure deficiencies by amendments previously allowed." Neither has any suggestion been made that plaintiffs have been motivated by bad faith or that the amendment would result in undue delay. Defendants have never claimed that the filing of an amended complaint would

result in their prejudice. The filing of an amended complaint would not be futile, and no finding to the contrary was made below.

Plaintiffs contend that the operative complaint properly states a claim. Nevertheless, since the filing of the complaint, new information has come to plaintiffs' attention which could be used to bolster plaintiffs' allegations. There have been developments in the news; defendants have produced more than 400,000 pages of documents; and plaintiffs have uncovered greater factual detail in support of their claims.

For instance, since the filing of the complaint, plaintiffs have received a copy of defendants' exclusive distribution agreement, which has been produced under seal. Upon its review, plaintiffs have determined that the agreement is a facial *per se* illegal restraint of trade in violation of Section 1 of the Sherman Act. A Section 1 violation could therefore accurately be asserted in an amended pleading.

In addition, defendants' combination only recently received approval of the government and courts in August, 2009. One of the combination's first acts was to raise its prices, just as plaintiffs' alleged it would. This new evidence would be alleged as additional proof demonstrating the anti-competitive nature of what has become an incredibly concentrated U.S. beer market susceptible to price increases and a lowering of product quality.

Furthermore, since the filing of the complaint, defendants' acquisition has been completed, having received final regulatory approval. The suitable remedy under Section 7 is now divestiture

of the offending acquisition and monetary damages which have resulted from the anti-competitive effects of the illicit combine.

Plaintiffs contend that their original complaint adequately alleges a remedy of divestiture and money damages and respectfully request this Court to make such finding. Their prayer for relief states, in relevant part:

> WHEREFORE, plaintiffs demand the following relief from this Honorable Court:
>
> * * *
>
> E. Granting to plaintiffs such other and further relief to which they may be entitled and which the Court finds to be just and appropriate.

I App. 56. The district court has held that it did not reach the question of whether plaintiffs' complaint states a divestiture remedy. I App. 205. However, the issue was presented to the district court and fully briefed by the parties. I App. 171-173. "No authority need be cited for the rule that a reviewing court will consider an issue properly presented to a district court, even though not addressed by it." *Fin. Acquisition Ptnrs. v. Blackwell*, 440 F.3d 278, 284 (5th Cir. 2006).

Should this Court determine that the complaint fails to adequately request the remedy of divestiture, plaintiffs would pray for such remedy in an amended complaint.

IV. THE LOWER COURT ABUSED ITS DISCRETION BY ISSUING A PROTECTIVE ORDER PREVENTING DEPOSITIONS OF DEFENDANTS' EXECUTIVES

"Good cause" must be shown for a protective order to issue. FED.R.CIV.P. 26(c). "The burden is upon the movant to show the necessity of its issuance, which contemplates 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (citations omitted). "Such determination must also include a consideration of the relative hardship to the non-moving party should the protective order be granted." *Id.*

The district court's entry of a protective order is reviewed for abuse of discretion. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 955 (8th Cir. 1979). "When we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district court may do whatever pleases it." *Verizon Commc'ns v. Inverizon Int'l*, 295 F.3d 870, 872-873 (8th Cir. 2002). "An abuse of discretion [occurs] when a relevant factor that should have been given significant weight is not considered …." *Id.*

In the context of Rule 54(b) orders, which are also reviewed for abuse of discretion, this Court has held that the failure of the district court to explain the rationale for its ruling constitutes an abuse of discretion. *Hayden v. McDonald*, 719 F.2d 266, 268 (1983). In *Hayden*, the Court reasoned that "if, as in the present case, no reasons are furnished why that discretion was exercised,

our judgment as to the propriety of [granting the motion] is necessarily speculative both as to whether *any* consideration was given to the order, and if so, what factors were considered." *Id.* (emphasis in original). The Court in *Mooney v. Frierdich*, 784 F.2d 875, 876 (8th Cir. 1986) likewise held the district court abused its discretion where its Rule 54(b) order "provides [no] basis from which we may determine that the district court exercised any discretion."

The same approach has been applied to orders disposing of motions brought under Rule 59(e) (*Twin City Constr. Co. of Fargo v. Turtle Mountain Band of Chippewa Indians*, 911 F.2d 137, 139 (8th Cir. 1990) (court abused discretion where it failed to explain its denial of motion), as well as orders denying motions to amend the complaint under Rule 15. *Id.*, quoting *Foman, supra*, 371 U.S. 178, 182 ("[O]utright refusal to grant [the motion] without any justifying reason appearing for the denial is … merely abuse of … discretion"). Decisions of the Board of Immigration Appeals will be reversed for abuse of discretion where they fail to explain their underlying reasons. *Anderson v. McElroy*, 953 F.2d 803, 806 (2nd Cir. 1992) ("When faced with cursory, summary or conclusory statements from the BIA, we cannot presume anything other than abuse of discretion, since the [decision] can be affirmed only on the basis articulated in the decision").

In this case, the district court gave no explanation to support its finding of "good cause," nor any indication that it "considered the relative hardship to the non-moving party" as this Court has required. *Gen. Dynamics, supra*, 481 F.2d at 1212. The *totality* of

the order "permanently" prohibiting the depositions of defendants' executives reads as follows:

> **IT IS HEREBY FURTHER ORDERED** that Defendants' Motion for Protective Order Regarding the Deposition of Carlos Brito and August Busch IV is **GRANTED** in accordance with this order. [footnote:] On March 4, this Court ordered that Defendants' Motion for Protective Order Regarding the Depositions of Carlos Brito and August Busch IV was granted until Defendants' Motion to Stay Discovery was fully briefed and ruled upon (Doc. No. 150). This Court's temporary protective order (Doc. No. 150) is hereby made permanent.

I App. 142.

Without some indication that the "relevant factor[s]" of "good cause" and the "hardship to the non-moving party" have been considered, the district court has abused its discretion as a matter of law and reversal is mandated. *Verizon, supra*, 295 F.3d at 873.

But the district court's error runs deeper than its failure to explain its rulings. *Four* separate times since the filing of the complaint, the district court issued a ruling granting one of defendants' motions without allowing plaintiffs to file a brief in opposition.[16] In this case, defendants filed their motion for protective order, seeking to delay the depositions, on Friday

[16] One such instance involved plaintiffs' motion for preliminary injunction. The situation was as bizarre as it was prejudicial. The court issued an order permitting plaintiffs to file a reply brief on November 19, then issued a dispositive ruling on November 18. I App. 11 (Dkt. entry Nov. 12, 2008), 12.

February 27, 2009. I App. 21. The court granted the motion on Wednesday March 4, 2009 – three days after the motion was filed, and before plaintiffs' opposition came due on March 6. I App. 21; E.D.MO. L.R. 4.01; FED.R.CIV.P. 6(a)(2).

Where the filing of an opposition brief is mandated by local rule, rather than merely permitted, the district court's grant of a motion before the opposition comes due prejudices the non-moving party and constitutes an abuse of discretion. See, *Walter v. Morton*, 33 F.3d 1240, 1244 (10th Cir. 1994). Here, the local rules require the filing of an opposition brief, and plaintiffs were unquestionably prejudiced. E.D.Mo. L.R. 4.01(B) ("[E]ach party opposing a motion *shall* file … a memorandum ….").

Finally, the district court's order "permanently" barring the depositions was entirely *sua sponte* and unequivocally constitutes an abuse of discretion. No "good cause" has ever been shown for permanently preventing plaintiffs from taking the depositions of those who have the most personal knowledge about plaintiffs' case. Defendants' motion (Doc. no. 147) says nothing about requesting the "permanent" bar of any deposition.

The protective orders preventing the depositions of defendants' executives, who defendants agreed to produce in the first instance, should be reversed.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the Court reverse the order granting judgment on the pleadings, order the judgment below vacated, and remand with instructions to expedite discovery in preparation for speedy trial. Plaintiffs further request the Court hold that the complaint sufficiently prays for divestiture and money damages. If necessary, plaintiffs request they be granted leave to amend their complaint. Finally, plaintiffs request that the Court reverse the order permanently barring the depositions of defendants' executives.

October 5, 2009 Respectfully submitted,

ALIOTO LAW FIRM

By: _____
Joseph M. Alioto, Jr.

Joseph M. Alioto, *pro hac vice*
Theresa D. Moore, *pro hac vice*
Joseph M. Alioto, Jr., *pro hac vice*
Thomas P. Pier, *pro hac vice*
ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
TSlye@AliotoLaw.com

Theodore F. Schwartz (MO SBN 17995)
Kenneth R. Schwartz (MO SBN 44528)
LAW OFFICES OF THEODORE F. SCHWARTZ
230 South Bemiston, Suite 770
Clayton, Missouri 63105
Telephone: (314) 863-4654
Facsimile: (314) 862-4357
Theodore@Schwartz-Schwartz.com

Daniel R. Shulman, *pro hac vice*
GRAY, PLANT & MOOTY
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Tel: (612) 632-3335
Fax: (612) 632-4335
Daniel.Shulman@GPMLaw.com

Gilmur R. Murray, *pro hac vice*
Derek G. Howard, *pro hac vice*
MURRAY & HOWARD, LLP
900 Larkspur Landing Cir., Suite 103
Larkspur, California 94939
Telephone: (415) 461-3200
Facsimile: (415) 461-3208
DHoward@MurrayHowardLaw.com

Attorneys for Plaintiffs Marty Ginsburg, et al.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because it contains 13,747 words, as counted by the Microsoft Word version 2003 software used to prepare this brief, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

CERTIFICATE OF VIRUS SCAN

The undersigned certifies that the file on the enclosed CD Rom of the foregoing Appellants' Brief has been scanned for viruses and is virus free pursuant to 8th Cir.R. 28A(d)(2).

October 5, 2009

Respectfully submitted,

ALIOTO LAW FIRM

By: _____
Joseph M. Alioto, Jr.

Joseph M. Alioto, *pro hac vice*
Theresa D. Moore, *pro hac vice*
Joseph M. Alioto, Jr., *pro hac vice*
Thomas P. Pier, *pro hac vice*
ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
TSlye@AliotoLaw.com

Theodore F. Schwartz (MO SBN 17995)
Kenneth R. Schwartz (MO SBN 44528)
LAW OFFICES OF THEODORE F. SCHWARTZ
230 South Bemiston, Suite 770
Clayton, Missouri 63105
Telephone: (314) 863-4654
Facsimile: (314) 862-4357
Theodore@Schwartz-Schwartz.com

Daniel R. Shulman, *pro hac vice*
GRAY, PLANT & MOOTY
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Tel: (612) 632-3335
Fax: (612) 632-4335
Daniel.Shulman@GPMLaw.com

Gilmur R. Murray, *pro hac vice*
Derek G. Howard, *pro hac vice*
MURRAY & HOWARD, LLP
900 Larkspur Landing Cir., Suite 103
Larkspur, California 94939
Telephone: (415) 461-3200
Facsimile: (415) 461-3208
DHoward@MurrayHowardLaw.com

Attorneys for Plaintiffs Marty Ginsburg, et al.