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

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

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

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN EDSTROM, BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK M. NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE, *Plaintiffs*, v. ANHEUSER-BUSCH INBEV SA/NV, GRUPO MODELO S.A.B. de C.V., and CONSTELLATION BRANDS, INC. *Defendants*.	CASE NO. C-13-1309-MMC **NOTICE OF MOTION AND MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS ABI'S AND MODELO'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTAL COMPLAINT** Date: August 2, 2013 Time: 9:00 a.m. The Honorable Maxine M. Chesney

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Friday, August 2, 2013 at 9:00 a.m., or as soon thereafter as this motion may be heard, in the courtroom of the Honorable Maxine M. Chesney, in the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, Courtroom 7, 19th Floor, San Francisco, California 94102, Defendants Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V. will move to dismiss Plaintiffs' Second Amended and Supplemental Complaint in this action.

This motion is made pursuant to Federal Rules of Civil Procedure 8(a), 9(b) and 12(b)(6) on the ground that the Second Amended and Supplemental Complaint fails to state a claim upon which relief can be granted. This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice in Support of Defendants ABI's and Modelo's Motion to Dismiss Plaintiffs' Second Amended and Supplemental Complaint and the Declaration of Karen Hoffman Lent in Support Thereof, the record in this action and such further evidence and argument that the Court may consider.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs' Second Amended and Supplemental Complaint should be dismissed because it fails to state a claim under Section 7 of the Clayton Act, Section 1 of the Sherman Act, the Tunney Act or any state antitrust statute.

2. Whether Plaintiffs' Second Amended and Supplemental Complaint should be dismissed because it fails to plead the requisite elements and facts to establish that Plaintiffs are entitled to injunctive relief or monetary damages.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Defendants Anheuser-Busch InBev SA/NV ("ABI") and Grupo Modelo S.A.B. de C.V. ("Modelo") submit this memorandum in support of their motion to dismiss Plaintiffs' Second Amended and Supplemental Complaint ("SAC") with prejudice under Federal Rule of Civil Procedure 12(b)(6).

The SAC is Plaintiffs' third attempt to articulate a theory as to why ABI's $20.1 billion acquisition of Modelo, having been fully investigated and blessed by the United States Department of Justice ("DOJ"), should be prevented and, indeed, now undone. Their first attempt failed even to address the current set of transactions among ABI, Modelo and Constellation Brands, Inc. ("Constellation").[1] Their second effort was no better, as it and this third attempt expressly acknowledge that the transactions result in Constellation—not ABI—acquiring Modelo's U.S. business. Plaintiffs cannot escape this fact that disposes of their claim arising under Section 7 of the Clayton Act, 15 U.S.C. § 18. Indeed, at the hearing on Plaintiffs' motion for a temporary restraining order, the Court expressly informed Plaintiffs of these infirmities in their Section 7 claim:

> At this time we have what is on its face a legitimate transaction that does not result in ABI acquiring the U.S. distribution of competing beer. Thus, the plaintiff has a rather difficult hurdle to overcome; that plaintiffs would have to show that it is not a legitimate transaction, that it is a sham, that it is intended to cover up what would be then control of the Corona sales here in the U.S. by ABI.

(TRO Hr'g Tr. 56:18-24.) Yet despite the Court's indication that it "wanted to be sure that plaintiff had enough time to address" these deficiencies (*id.* 56:11-12), Plaintiffs have made no serious attempt to amend or supplement their allegations. Similarly, Plaintiffs still do not allege a single *fact* to support their wholly conclusory claim that ABI and Constellation have "conspired" to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs woefully fail to

[1] On March 25, 2013, ABI notified Plaintiffs' counsel via letter that their original complaint contained numerous factual representations that were without evidentiary support. Specifically, that complaint ignored the revisions to the Defendants' proposed transactions, which had been announced on February 14, and erroneously alleged an increase in market concentration.

satisfy the pleading requirements articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and they should not be given another opportunity to cure the insurmountable defects in their claims.

Plaintiffs' SAC continues to misrepresent Defendants' transactions. Even though the DOJ has entered into a detailed proposed Final Judgment recognizing that ABI and Modelo are *not* merging in the United States (Defs. Request for Judicial Notice, Lent Decl. Ex. 3, proposed Final Judgment), the SAC offers a tortured line of logic and conclusory assertions in an attempt to invoke Section 7 of the Clayton Act. Specifically, the SAC alleges that the DOJ-approved transactions are "fraudulent" and that, in truth, Constellation—which now solely owns Crown Imports LLC ("Crown"), the exclusive importer of Modelo beers in the United States—will become the mere "puppet" of ABI. Based on this outlandish and completely unsupportable premise, Plaintiffs blithely assert that because ABI will "control" Constellation, and therefore Crown, the proposed transactions should be considered a horizontal "merger" between ABI and Crown that will unduly increase concentration in the U.S. beer "market" in violation of Section 7.

As an initial matter, Plaintiffs' allegations that the transactions are "fraudulent" fail to satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). Further, their allegations are belied by the indisputable terms of the transaction agreements themselves, which are incorporated by reference in the SAC and applicable to this motion.[2] As described below, the proposed Final Judgment and related documents that memorialize the transaction agreements detail precisely why the transactions will result in *no merger* between ABI and Modelo in the United States and, further, how ABI will be in no position to influence Constellation's competitive behavior, let alone "control" it as a "puppet." As the DOJ has stated publicly,

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[2] As described more fully in ABI's and Modelo's concurrently-filed request for judicial notice, under the "incorporation by reference" doctrine, a court can consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (alteration in original) (citations omitted) (internal quotation marks omitted). Here, the SAC repeatedly references the revised transaction agreements by name. (*See, e.g.*, SAC ¶¶ 29, 30, 50, 95, 96, 98, 101, 107.) Alternatively, the relevant transaction documents have been publicly filed in the District Court for the District of Columbia and can be judicially noticed.

Constellation will be "an independent and economically viable competitor that will stand in the shoes of Modelo." (Defs. Request for Judicial Notice, Lent Decl. Ex. 2, Competitive Impact Statement ("CIS") at 10.) At bottom, Plaintiffs have not and cannot allege *facts* to establish that, as a result of the transactions, ABI will acquire Modelo's U.S. business or that ABI will otherwise control Constellation's or Crown's competitive activities. Thus, Plaintiffs' Section 7 claim should be dismissed as a matter of law.

In addition to their baseless Section 7 claim, Plaintiffs allege an equally deficient price-fixing claim under Section 1 of the Sherman Act. Though far from clearly stated, Plaintiffs appear to allege that ABI and Constellation have "conspired" to have Constellation "follow ABI's price increases" post-transactions. (SAC ¶¶ 32, 50, 98.) But the SAC is devoid of factual allegations supporting the existence of any such conspiracy. On the contrary, several paragraphs in the SAC state that ABI and Constellation *have not entered into any price-fixing conspiracy*, but that such an agreement *may* arise in the future (*id.* ¶¶ 10, 35, 36, 107, 119)—a similarly inadequate allegation as Section 1 only condemns *actual* agreements that unreasonably restrain trade.

Plaintiffs also tack onto their third complaint a legally unsupportable argument that the consummation of ABI's acquisition of Modelo violates the Tunney Act, 15 U.S.C. § 16. Even if Plaintiffs had standing to allege a violation of the Tunney Act— which they do not, because the statute does not provide for a private cause of action—contrary to Plaintiffs' assertions, the statute in no way prohibits parties to a transaction from closing while a judicial determination is pending regarding whether a proposed final judgment is in the public interest. In fact, a court order expressly permitted Defendants to close their transactions.

Finally, the SAC should be dismissed because Plaintiffs have failed to allege any facts establishing that they are entitled to their requested relief. First, Plaintiffs' request for injunctive relief prohibiting ABI's acquisition of Modelo is moot now that Defendants' transactions have closed, leaving divestiture as the only equitable relief Plaintiffs may seek. Because divestiture is a drastic remedy, courts routinely dismiss merger challenges after a transaction has closed when a plaintiff delayed filing suit or seeking injunctive relief. (In fact, ABI and Modelo are not aware of any decision awarding divestiture to a private party. *See Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d

1118, 1125 n.11 (N.D. Cal. 2011).) Further, Plaintiffs cannot establish that the alleged harm to nine beer drinkers would outweigh the significant financial and operational harm that ABI, Modelo and Constellation would suffer if their already-consummated transactions were unwound. Separately, Plaintiffs also fail to plead facts supporting their wholly speculative allegations of irreparable harm. Those allegations, which are grounded in concerns over higher beer prices, cannot establish that Plaintiffs will suffer *irreparable* injury.

Plaintiffs' requests for monetary damages are equally untenable. Because Plaintiffs are indirect purchasers—i.e., they do not purchase beer directly from ABI or Modelo—they do not have standing to sue for damages for a violation of federal antitrust laws. And Plaintiffs' bald assertion that they are entitled to money damages under "any State statutes allowing suit by both direct and indirect purchasers" (SAC Supplemental Complaint, Prayer for Relief at D), utterly fails to satisfy the pleading requirement that Defendants be given fair notice of the basis of Plaintiffs' claims.

In sum, the SAC should be seen for what it is: the latest in a line of shakedown attempts by Plaintiffs' counsel[3] premised on baseless assertions of fact and a complete disregard of controlling legal precedent. Accordingly, ABI and Modelo respectfully request that the Court dismiss the SAC with prejudice.

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

II. BACKGROUND

ABI's and Modelo's motion to dismiss the SAC is best understood in the context of: (1) the historical relationships among ABI, Modelo, Constellation and Crown; (2) the history of the transactions and settlement of the DOJ litigation; and (3) Plaintiffs' allegations in the SAC.

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

Beginning in 1998, ABI owned 50.3% of the economic interest of Modelo as a result of its 35.3% direct ownership interest in Modelo and its 23.3% ownership interest in Modelo's operating subsidiary Diblo, S.A. de C.V. ("Diblo"). (SAC ¶ 45.) ABI was entitled to appoint nine representatives to Modelo's nineteen-member Board of Directors and had voting rights subjecting significant Modelo operations to ABI's approval. (*Id.*) Through its interest in Modelo, ABI had an indirect interest in Crown, which was a 50/50 joint venture between Modelo and Constellation that sold and marketed Modelo's brands in the United States as the exclusive importer of its beers. (*Id.* ¶¶ 42, 45, 47.) Modelo supplied Crown with beer for sale in the United States, had approval rights over certain Crown operations—including general pricing parameters, capital investments and borrowing activities—and directional control over global strategies for Modelo brands. (*Id.* ¶ 47.) In addition, Modelo had a call option by which it could acquire Constellation's 50% interest in Crown in 2016 by exercising the option prior to the end of 2013. (*Id.*)

B. HISTORY OF THE TRANSACTIONS AND SETTLEMENT OF THE DOJ LAWSUIT

1. The Original Transactions and the DOJ's Challenge

In June 2012, ABI agreed to purchase the remaining interest in Modelo that it did not already own, while also entering into a simultaneous transaction through which Constellation would purchase the remaining 50% interest in Crown that it did not already own and become the exclusive importer, marketer and seller of Modelo brands in the United States for at least ten years. (SAC ¶ 48.) On January 31, 2013, the DOJ filed suit against ABI and Modelo, alleging those original transactions would violate Section 7 of the Clayton Act. (Defs. Request for Judicial Notice, Lent Decl. Ex. 1, DOJ Compl. ¶¶ 2, 8, 43.) According to the DOJ, the sale of Modelo's

50% interest in Crown to Constellation was not sufficient to eliminate its concern that ABI's acquisition of the remaining 49.7% of Modelo's economic interest was anticompetitive because, post-transactions, Constellation would not have a perpetual license to Modelo brands in the United States and would continue to depend on ABI for supply of Modelo beers. (*Id.* ¶¶ 8, 82.)

2. The Revised Transactions

On February 14, 2013, ABI, Modelo and Constellation announced a revised set of transactions that superseded the original transactions they entered into in June 2012. (SAC ¶ 28.) As before, ABI still would purchase the remaining interest in Modelo that it did not already own and would sell Modelo's 50% interest in Crown to Constellation. (*Id.* ¶ 29.) But instead of entering into a ten-year license and supply arrangement, ABI agreed to grant Constellation a fully paid-up, perpetual, exclusive license to Modelo brands in the United States. (*Id.*) In addition, ABI agreed to sell to Constellation Modelo's Piedras Negras brewery, which currently supplies approximately 60% of the annual demand for Modelo brands shipped to the United States. (*Id.* ¶¶ 29, 96.)

To ensure a smooth transition of brewery operations, ABI and Constellation entered into three-year agreements for transition services and incremental beer supply. (*Id.* ¶ 30.) Under the Transition Service Agreement, ABI provides Constellation with consulting services related to operating and expanding the brewery in Mexico and supplies Constellation with input products for that Mexican brewery, including bottles, cans, crowns, lids, corn starch, hops and malt, at contractually-set prices. (Defs. Request for Judicial Notice, Lent Decl. Ex. 4, at Transition Services Agreement §§ 2.01, 3.02 ("TSA").) The Interim Supply Agreement also requires ABI to fulfill Constellation's incremental beer supply needs at contractually-set prices. (*Id.* at Interim Supply Agreement §§ 2.2, 3.1-3.2 ("ISA").) But Constellation is not *obligated* to obtain supply from ABI and is free to contract with third-party suppliers. (*Id.* at §§ 2.1-2.2.)

Both the TSA and ISA establish firewalls to prevent ABI and Constellation from sharing competitively sensitive information. (TSA §2.12(d); ISA § 5.4.) In addition, Constellation has acquired Servicios Modelo de Coahuila, S.A. de C.V., the company that employs the personnel who operate the Piedras Negras brewery, thereby retaining all the necessary employees and

assuming control of their compensation. (CIS at 13-14; TSA § 3.01 (ABI responsible only for paying personnel that provide services to Constellation under the TSA).)

3. DOJ Review and Settlement

On April 19, 2013, after the DOJ reviewed and approved these revised transactions and agreements, the DOJ, ABI, Modelo and Constellation reached an agreement to settle their litigation and allow the parties to move forward with the proposed transactions. The proposed Final Judgment, which resolves all of the DOJ's claims, incorporates the key deal agreements between ABI and Constellation—including the sale of the brand license and Piedras Negras brewery to Constellation and the creation of the TSA and ISA—and requires the parties to comply with their contractual obligations. (*See* CIS at 13; proposed Final Judgment § IV(G)-(I).) In addition, the proposed Final Judgment prohibits any agreement that would provide ABI with the ability to unreasonably raise Constellation's costs or lower its efficiency. (Proposed Final Judgment § IV(J)(2).) Finally, the proposed Final Judgment requires Constellation to expand Piedras Negras to meet U.S. demand for Modelo beers and requires ABI to erect a firewall to prevent it from obtaining or using competitively sensitive Constellation information. (Proposed Final Judgment §§ V(A), XIII; CIS at 3, 18.) In summarizing the settlement, the DOJ concluded that Defendants' transactions will "*preserve[] the current structure of the beer market in the United States*" because they will make Constellation "*an independent and economically viable competitor that will stand in the shoes of Modelo*." (CIS at 10 (emphasis added).)

4. Closing of the Transactions

On June 4, 2013, ABI completed its acquisition of Modelo. (SAC Supplemental Complaint, ¶ 3 ("defendants have taken steps to consummate their merger"); Prayer for Relief at B (requesting divestiture "requiring defendants to unwind their merger"); TRO Hr'g Tr. 7:8-15 (acknowledging that ABI's acquisition of Modelo closed on June 4, 2013).) On June 7, 2013, ABI completed the sale to Constellation of Modelo's U.S. assets. (TRO Hr'g Tr. 7:8-15 (acknowledging ABI's sale of Modelo's U.S. assets would close on June 7, 2013).) Accordingly, Defendants' transactions have been fully consummated.

C. PLAINTIFFS' ALLEGATIONS IN THE SAC

In the SAC, Plaintiffs challenge the transactions that the DOJ extensively investigated and approved. According to Plaintiffs, "ABI has concocted a fraudulent scheme to attempt to make its takeover and control of the beer industry in the United States to appear to be benign and non-threatening." (SAC ¶ 26.) Plaintiffs claim that the agreement between ABI and Constellation, which also allegedly is "fraudulent," is part of this scheme, as is an alleged price-fixing conspiracy among ABI, Modelo and Constellation. (*Id.* ¶¶ 10, 26, 30, 50, 101.)

Plaintiffs allege that the transactions presumptively violate Section 7 of the Clayton Act because ABI, which purportedly has a 49% share of beer sales in the United States, effectively will acquire Modelo's 5% share (based on sales made by Crown). (*Id.* ¶¶ 73, 76, 78, 81-82.) Although Constellation is the sole owner of Crown post-transactions, Constellation allegedly will be ABI's "puppet" (*id.* ¶¶ 20, 31, 33) for a number of purported reasons, including that: (1) ABI will control the supply, and be able to increase prices, of beer provided to Constellation during the three-year transition supply period; (2) Constellation historically has urged Modelo to follow ABI's price increases and will be able to do so itself post-transactions; (3) Constellation is not a beer brewer and has no experience running a brewery; (4) Constellation cannot afford to purchase a 50% stake in Crown or a brewery, neither of which it sought to purchase until it was prompted by ABI; and (5) post-transactions, ABI (and not Constellation) will pay the employees working at Piedras Negras. (*Id.* ¶¶ 30, 101-09.)

In addition, Plaintiffs allege that ABI and Constellation have entered, or will enter into, a price-fixing conspiracy, under which Constellation already has agreed, or will agree, to follow ABI's price increases. (*Id.* ¶¶ 10, 22, 32, 35, 50, 98, 119.) According to the SAC, this conspiracy is a *per se* violation of Section 1 of the Sherman Act. (*Id.* ¶ 108.) Moreover, Plaintiffs allege that by consummating the ABI-Modelo transaction, Defendants have violated the Tunney Act. (*Id.* Supplemental Complaint ¶ 7.) Plaintiffs ask the Court to preliminarily and permanently enjoin ABI from acquiring Modelo, both during the pendency of this action and thereafter. (*Id.* Prayer for Relief at B, C.) Plaintiffs further ask the Court to require divestiture, unwinding the completed transaction and, based on conclusory allegations that the transaction will increase beer prices

(*id.* ¶¶ 105, 120), to award damages incurred until divestiture is ordered. (*Id.* Supplemental Complaint, Prayer for Relief at B, D.)

III. ARGUMENT

A. STANDARD FOR A MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Although a court must construe a complaint's allegations of material fact in the light most favorable to the plaintiff, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (alteration in original) (citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555. Courts "'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal*, 556 U.S. at 678 (citation omitted); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047-48 (9th Cir. 2008) (plaintiff that alleged "only ultimate facts" and "legal conclusions," rather than "evidentiary facts," failed to state a Sherman Act claim). And a complaint should be dismissed without leave to amend if the plaintiff is unable to cure the defects in the complaint. *See Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087-88 (9th Cir. 2002). Courts typically grant dismissal with prejudice where, as here, a plaintiff's amended complaint fails to cure defects of which the plaintiff was on notice.[4] *See, e.g.*, *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, No. 5:11-CV-04003-LHK, 2013 WL 2156358, at *10 (N.D. Cal. May 17, 2013) (dismissing case with prejudice because the court "set forth the deficiencies in

[4] As indicated above, the Court identified the deficiencies in Plaintiffs' First Amended Complaint during the hearing on Plaintiffs' motion for a temporary restraining order. (TRO Hr'g Tr. 56:18-57:1.) These same deficiencies also were identified in Defendants' motions to dismiss Plaintiffs' First Amended Complaint, which Plaintiffs had more than three weeks to consider before filing the SAC. And yet, the SAC suffers from the exact same deficiencies as Plaintiffs' prior complaint.

the amended complaint in great detail," but "Plaintiffs were unable to cure those deficiencies" in their second amended complaint); *Yagman v. Galipo*, No. CV 12-7908-GW(SHx), 2013 WL 141785, at *10 (C.D. Cal. Jan. 7, 2013) (dismissing claims "almost identical" to those in the previous complaint because plaintiff "failed to remedy any of the deficiencies identified in connection with the previous motion to dismiss").

As described below, Plaintiffs here have not and cannot state a claim under Section 7 of the Clayton Act, Section 1 of the Sherman Act, the Tunney Act or unspecified state statutes, and thus their claims should be dismissed.

B. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 7 OF THE CLAYTON ACT

Plaintiffs fail to state a Section 7 claim because they do not allege that ABI will acquire any of Modelo's *U.S.* business. In addition, they fail to provide any factual basis to support their novel theory that, post-transactions, ABI will "control" Constellation and its sale of Modelo beers such that Crown's market share in the United States should be imputed to ABI.

1. Legal Framework for Establishing a Violation of Section 7 of the Clayton Act

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

2. As the SAC Acknowledges, ABI Is Not Acquiring Modelo's U.S. Business

Defendants' transactions do not and cannot implicate any Section 7 concerns because, viewing the transactions together as required,[5] ABI is not acquiring "the whole or any part" of Modelo's U.S. business. Instead, as the SAC acknowledges, the transactions result in Constellation becoming the sole importer and distributor of Modelo beers in the United States. (SAC ¶¶ 10, 29, 95.) Constellation has acquired the remaining 50% interest in Crown that it did not already own, perpetual rights to the Modelo brands in the United States and the Piedras Negras brewery. (*Id.*) The result of the transactions in the United States is that any beer sales (and market share) previously attributable to Modelo (through its 50% interest in Crown) now are attributable to Constellation (through Crown as its wholly-owned subsidiary). Given that the transactions do not in any manner whatsoever "merge" ABI and Crown in the sale of beer in the United States (i.e., the relevant market alleged by Plaintiffs), there is no proffered factual basis to support Plaintiffs' allegation that the transactions will increase market concentration (*id.* ¶¶ 73, 76, 78, 81-82)—let alone that Plaintiffs can meet their burden to establish a presumptive Section 7 violation.[6]

3. There Is No Factual Basis for Plaintiffs' Theory That ABI Effectively Will Control Modelo's U.S. Business

In an effort to circumvent reality, Plaintiffs allege, without factual basis, that ABI effectively will acquire Modelo's U.S. business because Constellation's acquisition of these assets is "fraudulent." According to the SAC, the transaction between ABI and Constellation is "fraudulent" (and part of a "fraudulent scheme") because: (1) ABI will control the supply, and be able to increase prices, of beer provided to Constellation during the three-year transition supply

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[5] *See FTC v. Arch Coal, Inc.*, No. 04-0534 (JDB), slip op. at 7 (D.D.C. July 7, 2004) ("[The] Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the *entire* transaction in question."); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 44-47 (D.D.C. 2002) (court must consider the net effect of the acquisition of the target company and simultaneous sale of certain of the target's assets to a third party).

[6] On the contrary, based on the alleged facts, the transactions actually will *reduce* market concentration because they "will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." (CIS at 2.) These entanglements included ABI's indirect interest in Modelo's former 50% ownership stake in Crown. (*See supra* p. 7.)

period; (2) Constellation historically has urged Modelo to follow ABI's price increases and will be able to do so itself post-transactions; (3) Constellation is not a beer brewer and has no experience running a brewery; (4) Constellation cannot afford to purchase a 50% stake in Crown or a brewery, neither of which it sought to purchase until it was prompted by ABI; and (5) post-transactions, ABI (and not Constellation) will pay the employees working at Piedras Negras. (SAC ¶¶ 26, 30, 50, 101-09.)

As an initial matter, Plaintiffs' claims are deficient because they do not satisfy the heightened pleading requirements for fraud under Federal Rule of Civil Procedure 9(b). Plaintiffs' claims are premised on the allegation that "ABI has concocted a fraudulent scheme to attempt to make its takeover and control of the beer industry in the United States to appear to be benign and non-threatening." (*Id.* ¶ 26.) This "scheme" purportedly includes the "fraudulent" agreement between ABI and Constellation (*id.* ¶¶ 30, 101), which Plaintiffs allege is "a subterfuge to allow ABI to raise prices in the United States without any concern about Modelo's competition." (*Id.* ¶ 50.) Such allegations "sound in fraud" and, therefore, are subject to the heightened pleading requirements of Rule 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (even where fraud is not an essential element of a claim, "allegations . . . of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b)"). The express purpose of Rule 9(b)'s heightened requirements is to discourage baseless, harmful accusations like those included in the SAC. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (Rule 9(b) serves "to protect those whose reputation would be harmed as a result of being subject to fraud charges; and . . . to 'prohibit [] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.'") (second and third alteration in original).

Plaintiffs plainly have not satisfied the requirements of Rule 9(b), which requires that "[a]verments of fraud . . . be accompanied by the 'who, what, when, where, and how' of the misconduct charged." *Kearns*, 567 F.3d at 1124 (citation omitted). For example, with regard to the alleged "fraudulent" agreement between ABI and Constellation, Plaintiffs do not identify any Constellation employee who participated, or allege when and where the agreement supposedly was

executed. Indeed, far from meeting Rule 9(b)'s heightened standard, Plaintiffs' allegations fail to even satisfy the lesser pleading requirements of *Twombly*. *See Twombly*, 550 U.S. at 565 n.10 (dismissing claim that failed to allege facts such as a "specific time, place, or person involved in the alleged conspiracies"). Accordingly, Plaintiffs' allegations of a "fraudulent scheme" or "fraudulent agreement" between ABI and Constellation should be "'stripped' from [their] claim." *Kearns*, 567 F.3d at 1124 (quoting *Vess*, 317 F.3d at 1105).

Separate and apart from their failure to satisfy any minimum pleading requirements, Plaintiffs' conclusory allegations that ABI will control Crown are defective as a matter of law because the allegations are contrary to the Defendants' transaction agreements, which are incorporated by reference in the SAC.[7] (*See supra* p. 4 n. 2.) Under those agreements, ABI is contractually obligated to supply Constellation with beer and input products at Constellation's option at pre-determined prices during the transition supply period. (*See supra* pp. 8-9.) Further, the proposed Final Judgment also prohibits any contractual terms that would allow ABI to limit supply or unreasonably raise Constellation's costs, and Constellation—not ABI—will control operations and employee compensation at the Piedras Negras brewery. (*See supra* p. 9.) Plaintiffs simply do not allege any facts to support a conclusion that Constellation will be anything but an independent, self-sufficient competitor. Indeed, Plaintiffs point to the interim supply and transition services agreements to support their allegations of control—the very same agreements that the DOJ concluded would allow Crown and Constellation to operate *independently* in the near term. (CIS at 13 ("The proposed Final Judgment provides for or incorporates agreements protecting Constellation's ability to operate and expand the Piedras Negras Brewery while actively competing in the United States.").)

[7] Courts, of course, are "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

Finally, Plaintiffs' allegations regarding Constellation's alleged desire to increase prices and purported lack of expertise as a brewer are irrelevant to a Section 7 claim.[8] While Plaintiffs apparently would have preferred if Constellation had not acquired full ownership of Crown and that Modelo had retained its 50% interest (*see* SAC ¶¶ 19-20, 92-94, 99-100), Section 7 cannot be invoked where, as here, the alleged harm flows from a mere change in ownership rather than the merging of competitors. "In a challenge to a horizontal merger, a private plaintiff must show that it was injured because the acquiring and the acquired firms are competitors in a field of commerce." *Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1242 (3d Cir. 1987). Here, Constellation's acquisition of Modelo's 50% interest in Crown cannot violate Section 7 because the SAC does not (and cannot) allege that Constellation and Modelo were competitors.

Plaintiffs' purported concerns about Constellation's ownership of Crown simply cannot constitute antitrust injury. "In order to demonstrate that it has suffered 'antitrust injury,' [a plaintiff] must prove that its alleged injury 'flows from that which makes defendants' acts unlawful.'" *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1233 (9th Cir. 1998) (quoting *Cargill, Inc. v. Montefort of Colo. Inc.*, 479 U.S. 104, 113 (1986)). In the merger context, if the alleged injury would "occur regardless of whether the merger would substantially lessen competition—that is, the injury is not caused by anticompetitive effects"—that injury is not antitrust injury. *McCabe Hamilton & Renny Co. v. Matson Navigation Co.*, No. 08-00080, 2008 WL 2233740, at *5 (D. Haw. Apr. 9, 2008) (dismissing takeover target's Section 7 claim for failure to allege injury flowing from anticompetitive conduct). Plaintiffs' alleged concerns about Constellation assuming control of Crown amount to concerns about a change in management that

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[8] Plaintiffs attempt to support their allegations that Constellation will not compete as aggressively as Modelo by citing to a few pre-transaction documents. (SAC ¶¶ 23-25.) Aside from being taken completely out of context, Plaintiffs' allegations surrounding these documents fail to account for the change in incentives Constellation will undergo as a result of gaining a long-term brand interest and becoming a beer brewer—the very same changes that led the DOJ to approve the revised transactions. (CIS at 10 ("Specifically, the divestiture of the Piedras Negras Brewery and Modelo's interest in Crown, and the perpetual brand licenses required by the proposed Final Judgment, will vest in Constellation . . . the brewing capacity, the assets, and the other rights needed to produce, market, and sell Modelo Brand Beer in a manner similar to that which we see today."). Plaintiffs fail to allege any facts in support of the assumption that Constellation's incentives will be the same post-transactions as they were beforehand.

do not flow from any purported anticompetitive effect of the challenged transactions.[9] Thus, Plaintiffs' allegations are insufficient to establish antitrust injury and, therefore, cannot sustain a Section 7 claim as a matter of law.

C. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

Plaintiffs' claim under Section 1 of the Sherman Act should be dismissed because the SAC fails to plead facts supporting the existence of any price-fixing conspiracy between ABI and Constellation.

Section 1 "requires a 'contract, combination . . . , or conspiracy, in restraint of trade or commerce.'" *Twombly*, 550 U.S. at 548 (alteration in original) (quoting 15 U.S.C. § 1). To state a valid Section 1 claim, a plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. A "bare assertion of conspiracy will not suffice." *Id.*; *see also RealNetworks, Inc. v. DVD Copy Control Ass'n, Inc.*, Nos. C 08-4548 MHP, C 08-4719 MHP, 2010 WL 145098, at *7 (N.D. Cal. Jan. 8, 2010) ("Offering a conclusory assertion that a conspiracy existed is insufficient; a party must allege enough facts to nudge its claim across the line from conceivable to plausible."). As a result, the Ninth Circuit has held that a plaintiff is required to plead "not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove . . . a contract, combination or conspiracy among two or more persons or distinct business entities." *Kendall*, 518 F.3d at 1047. At a minimum, such allegations must include "facts such as a 'specific time, place, or person involved in the alleged conspiracies.'" *Id.* (quoting *Twombly*, 550 U.S. at 565 n.10).[10]

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[9] For example, if Constellation had simply purchased from Modelo the remaining 50% interest in Crown that it did not own previously, or a private investment firm had purchased Modelo and sold that 50% stake in Crown to Constellation, Plaintiffs would suffer the same alleged harms despite the fact that neither of these transactions could give rise to a Section 7 claim. *See Lucas*, 140 F.3d at 1233 (plaintiff failed to allege antitrust injury because alleged injury would have been the same regardless of who acquired the exclusive distribution rights at issue).

[10] *See In re Cal. Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 WL 1458025, at *5 (N.D. Cal. May 21, 2009) ("Plaintiffs do not set forth facts about where or when [the alleged conspiracy] took place . . . . Under *Twombly*, such vague allegations are insufficient."); *In re Late Fee and*

(cont'd)

The SAC utterly fails to satisfy these requirements.[11] Plaintiffs merely make bare allegations that ABI and Constellation have conspired, with Constellation agreeing to follow ABI's price increases. (SAC ¶¶ 32, 50, 98.) The SAC does not allege the time when, or place where, the parties entered into this price-fixing agreement; nor does it identify the persons participating in the conspiracy. Indeed, far from pleading these required facts, the SAC includes contradictory allegations indicating that ABI and Constellation *have not yet entered into any price-fixing conspiracy*, but that such an agreement *may* be reached in the future. (*See id.* ¶ 10 (the proposed transactions "may and probably will result in price fixing"); *id.* ¶ 35 (same); *id.* ¶ 108 (alleging a "substantial threat" that "Constellation will eagerly and tacitly agree with ABI to raise and follow ABI's price increases").)[12] To the extent Plaintiffs purport to allege a *prospective* price-fixing conspiracy between ABI and Constellation, such a claim is not cognizable under Section 1 of the Sherman Act, which requires allegations that "an agreement *was* made." *Twombly*, 550 U.S. at 556 (emphasis added); *see also Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976) (plaintiff must prove an "actual agreement or mutual consent" to establish a Section 1 violation).[13]

Accordingly, Plaintiffs' Section 1 claim is deficient as a matter of law and should be dismissed.

(cont'd from previous page)
Over-Limit Fee Litig., 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (dismissing complaint that provided "no details as to when, where, or by whom this alleged agreement was reached").

[11] In fact, Plaintiffs' Section 1 allegations are so devoid of factual support that they are sanctionable under Rule 11. *See, e.g., Fla. Monument Builders v. All Faiths Mem'l Gardens*, 605 F. Supp. 1324, 1326 (S.D. Fla. 1984) (sanctioning plaintiff's attorneys for alleging an antitrust conspiracy without an "objective basis for forming a good faith belief that a conspiracy existed . . . before the amended complaint was filed").

[12] *See also* SAC ¶ 36 (seeking relief "to prevent the probable price fixing by ABI and Constellation"); *id.* ¶ 119 (alleging a "significant threat that ABI and Constellation will fix prices").

[13] To the extent Plaintiffs allege that Modelo is involved in this imagined price-fixing conspiracy, their claim also fails because Modelo is now a wholly-owned subsidiary of ABI and, therefore, is legally incapable of conspiring with ABI in violation of Section 1. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (Parent corporations and their wholly-owned subsidiaries "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.").

D. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE TUNNEY ACT

Plaintiffs cannot state a claim based on alleged violations of the Tunney Act for a host of reasons. Most fundamentally, Plaintiffs lack standing to bring such a claim because there is no private cause of action under the Tunney Act. *See, e.g.*, *Am. Antitrust Inst., Inc. v. Microsoft Corp.*, No. 02-138 (CKK), 2002 U.S. Dist. LEXIS 26567, at *23-24 (D.D.C. Feb. 19, 2002) (dismissing claim because "there is no . . . private cause of action to enforce potential rights afforded by the Tunney Act").

In addition, Plaintiffs are wrong as a matter of law that Defendants are precluded from consummating their transactions until the Tunney Act process has concluded. The Tunney Act requires a judicial determination that a consent judgment is in the public interest, but it does not restrict merging parties' ability to close. *See* 15 U.S.C. § 16(e). Indeed, courts routinely allow consummation during the 60-day public comment period and prior to issuance of a final judgment. *See, e.g.*, *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 8 (D.D.C. 2007) (noting that transactions closed over a year prior to entry of final judgment "in keeping with [DOJ's] standard practice that neither the stipulations nor pending proposed final judgments prohibit the closing of the mergers"); *see also* 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 412 (7th ed. 2012) (explaining that "[t]he FTC (as well as the DOJ) generally will permit the underlying transaction to close during the notice and comment period"). Similarly here, Defendants were expressly permitted by court order, with the approval of the DOJ, to close their transactions prior to issuance of a final judgment. (Defs. Request for Judicial Notice, Lent Decl. Ex. 5, Stipulation and Order at IV(C) (permitting consummation after "the Court has signed this stipulation and Order").) This order not only allows for consummation, but affirmatively prohibits any action that would "delay" the sale of Modelo's U.S. assets or Piedras Negras to Constellation. (*Id.* at VI(I).)

E. THE SAC SHOULD BE DISMISSED BECAUSE PLAINTIFFS CANNOT ESTABLISH THEIR ENTITLEMENT TO ANY REQUESTED RELIEF

1. Plaintiffs Cannot Establish That They Are Entitled to Injunctive Relief

Plaintiffs seek relief to "preliminarily and permanently enjoin[] Defendants from consummating" ABI's acquisition of Modelo and "[a] final judgment of divestiture requiring

defendants to unwind their merger and permanently enjoining them from merging in the future." (SAC, Prayer for Relief at B, C; Supplemental Complaint, Prayer for Relief at B.) As a threshold matter, because ABI's acquisition of Modelo has closed, Plaintiffs' request to enjoin the transaction is moot and, therefore, should be dismissed. *See Sami v. Wells Fargo Bank*, No. C 12-00108 DMR, 2012 WL 967051, at *9 (N.D. Cal. Mar. 21, 2012) (dismissing as moot motion to enjoin property foreclosure, where the property already had been sold).

The only remaining injunctive relief Plaintiffs seek is the extraordinary remedy of divestiture,[14] which Plaintiffs cannot obtain. To obtain permanent injunctive relief such as divestiture,

> a plaintiff must meet four well-established requirements:
>
> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1184 (9th Cir. 2011) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Here, Plaintiffs do not and cannot allege facts supporting any of these essential elements.

(a) Plaintiffs Cannot Establish That the Balance of Hardships Weighs in Their Favor, or That Divestiture Would Serve the Public Interest

As to the third and fourth elements of a claim for permanent injunctive relief, Plaintiffs' own allegations and their unreasonable delay in filing suit and seeking injunctive relief demonstrate that the equities and balance of hardships weigh dispositively in favor of Defendants.

[14] It is unclear what assets or operations Plaintiffs claim should be divested. The SAC includes a puzzling reference to "divestiture of Modelo and Anheuser-Busch" and a cryptic demand that Defendants "unwind their merger." (SAC at p. 1; Supplemental Complaint, Prayer for Relief at B.) As part of Defendants' settlement with the DOJ, however, ABI already has sold Modelo's entire U.S. business to Constellation. The remaining assets and operations ABI acquired are located solely outside of the United States and are not relevant to Plaintiffs' claims alleging harm to the putative U.S. beer market.

In similar circumstances, courts have recognized that divestiture is an extreme remedy, and private plaintiffs—particularly indirect purchasers—shoulder a heavy burden in seeking to unwind a consummated merger. *See, e.g.*, *Ginsburg*, 623 F.3d at 1233; *Taleff*, 828 F. Supp. 2d at 1124-25. In *Ginsburg*, for example, the court considered a group of beer drinkers' challenge to InBev's acquisition of Anheuser-Busch. As is the case with regard to the current transaction between ABI and Modelo, the parties' intent to merge was "highly publicized." *Ginsburg*, 623 F.3d. at 1231. Nonetheless, the *Ginsburg* plaintiffs waited nearly two months after the announcement of the proposed merger to file their complaint for injunctive relief, and then waited almost two more months to file a motion for a preliminary injunction, nine days before the shareholders voted to approve the transaction. *Id.* Two weeks later, the day the merger closed, the court denied the plaintiffs' motion for a preliminary injunction, *id.*, and after several appeals and other motion practice, the court ultimately granted the defendants' motion for judgment on the pleadings. *Id.* at 1235.

The Eighth Circuit affirmed, explaining that because "Plaintiffs are private, indirect purchasers rather than a federal antitrust enforcement agency, divestiture's 'far reaching effects put it at the least accessible end of a spectrum of injunctive relief.'" *Id.* at 1234 (citation omitted). As a result, Plaintiffs' filing their complaint two months after the deal was announced—and moving for a preliminary injunction only nine days before the merger was approved—constituted "inexcusable delays" that barred divestiture *as a matter of law*. *Id.* at 1235; *see also Taleff*, 828 F. Supp. 2d at 1124 ("[T]he Court finds that because Plaintiffs delayed in filing their suit until after Defendants' merger had already been consummated, the remedy of divestiture is now unavailable to Plaintiffs.").

Likewise, in *Antoine L. Garabet, M.D., Inc. v. Autonomous Technologies Corp.*, plaintiffs challenged a merger between two eye surgery equipment companies on the day the transaction was consummated. 116 F. Supp. 2d 1159, 1173 (C.D. Cal. 2000). The court granted defendants' summary judgment motion, holding that laches barred the plaintiffs' request for divestiture because they waited to file suit despite being "aware of the impending merger . . . months before it was consummated." *Id.* at 1172. The court explained that "[e]ven if [plaintiffs] *had* filed suit . . . just

one to three days before the merger was consummated, it is quite possible that their failure to take *any* action for months after knowing about the merger may still have proven fatal to their claims for equitable relief." *Id.* at 1173.

Similarly here, despite the substantial media attention devoted to the transactions, Plaintiffs waited until March 22, 2013, nearly nine months after ABI's proposed acquisition of Modelo was announced, to file their original complaint. Plaintiffs then waited until June 3, 2013—more than two months later—to file their motion for a temporary restraining order, on the evening before the acquisition was scheduled to close. The transaction closed the next day, June 4, 2013, the same day on which this Court denied Plaintiffs' request for a temporary restraining order. (*See supra* p. 9.) Now, because Plaintiffs dragged their feet, granting them their requested relief would require ABI to divest Modelo despite the fact that the assets and operations of these companies already have been combined. ABI and Modelo cannot now be separated easily, if at all, and attempting such separation would significantly disrupt ABI's operations in Mexico and elsewhere, resulting in widespread harm to the brewer, its employees and its business partners. As the Eighth Circuit noted in an analogous context, "[n]ever has a federal court ordered divestiture at the request of a private party who was neither a customer nor a competitor of the merging parties." *Ginsburg*, 623 F.3d at 1234; *see also Taleff*, 828 F. Supp. at 1125 n.11 (noting the court was unaware of any cases in which "a federal court has ordered divestiture of a completed merger involving the integration of ongoing business activities in a suit brought by private plaintiffs under Section 7 of the Clayton Act"); *Glendora v. Gannett Co., Inc.*, 858 F. Supp. 369, 372 (S.D.N.Y. 1994) ("Potentially disruptive remedies such as divestiture of completed transactions involving integration of ongoing business activities have never been granted in private suits under Section 7."), *aff'd*, 40 F.3d 1238 (2d Cir. 1994).

In contrast to the substantial harm divestiture would cause Defendants, the sum total of Plaintiffs' alleged injury is that nine consumers purportedly are threatened with "higher beer prices, lesser quality, and diminished competitive options." (SAC ¶ 117.) The SAC contains no specific factual allegations regarding Plaintiffs' current or future levels of consumption of ABI or Modelo beers, or how they might personally be affected by the transactions. Accordingly, Plaintiffs'

alleged harms are wholly speculative and, at most, plainly *de minimis*. *See Ginsburg*, 623 F.3d at 1235 (speculative nature of alleged injury weighed against plaintiffs in balancing hardships); *Garabet*, 116 F. Supp. 2d at 1173 ("Defendants would suffer serious prejudice and hardship as a result of divestiture, while it is not clear what *direct* benefit Plaintiffs would gain from the break-up of these two companies.").

Moreover, Plaintiffs cannot establish that the public interest would be served by injunctive relief. There is a "strong interest in preserving free operation of the nation's markets and insuring that [the Court] does not unduly restrain free enterprise. . . . , where Plaintiffs have failed to demonstrate that there will be any real, palpable harm to Plaintiffs." *Ginsburg v. InBev SA/NV*, No. 4:08CV01375 JCH, 2008 WL 4965859, at *6 (E.D. Mo. Nov. 18, 2008) (citation omitted); *see also Delco LLC v. Giant of Md., LLC*, No. 07-3522 (JBS), 2007 WL 3307018, at *20 (D.N.J. Nov. 8, 2007) ("While the public certainly has a strong interest in the enforcement of the antitrust laws, it would not in any way serve those interests for the Court to enjoin activities that have not been shown to have anticompetitive tendencies."). Here, Plaintiffs offer only conclusory and speculative allegations—not facts that would demonstrate actual harm resulting from the proposed transactions. And their unsupported allegations are contrary to the reasoned conclusions of the DOJ, which exists to serve the public, that the transactions do not threaten to reduce competition. (CIS at 2.) In fact, injunctive relief would disserve the public interest because the transactions have eliminated ABI's prior interest in the U.S. sales of Modelo beer (*id.* at 10) and, therefore, likely will increase competition in the sale of beer in the United States.

(b) Plaintiffs Fail to Plead Facts Supporting Their Irreparable Injury Allegations

As to the first two elements of their claim for injunctive relief, Plaintiffs fail to plead facts sufficient to establish that they will suffer irreparable injury that would not be compensable through remedies available at law. Failure to meet these requirements, alone, requires dismissal of a claim for injunctive relief. *See, e.g., Katiki v. Taser Int'l, Inc.*, No. 12-cv-05519 NC, 2013 WL 163668, at *3 (N.D. Cal. Jan. 15, 2013) (dismissing claim for injunctive relief because plaintiff "only alleged a financial injury"); *Taleff*, 828 F. Supp. 2d at 1123 (dismissing private merger

challenge where "[p]laintiffs ha[d] not demonstrated that the remedies available at law, *such as monetary damages*, would be inadequate" (emphasis added)).

Plaintiffs have failed to meet their burden to plead irreparable injury for two reasons. First, the SAC repeatedly alleges that the proposed transactions will harm them through higher beer prices. (SAC ¶¶ 12, 16, 20, 32-33, 105-09, 114.) But such injury plainly is compensable in monetary damages and, therefore, would not be irreparable. *See L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("[M]onetary injury is not normally considered irreparable."); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2009 WL 3415680, at *1 (N.D. Cal. Oct. 22, 2009) ("[I]njuries resulting from higher prices would appear to be injuries fully compensable by an award of monetary damages.").

Second, while the SAC includes passing references to other types of harm,[15] Plaintiffs fail to allege any specific facts describing these harms or explaining how they would be realized. Accordingly, these allegations are insufficient to satisfy Plaintiffs' pleading burden. *See Katiki*, 2013 WL 163668, at *3 (dismissing claim for injunctive relief because of "the absence of facts indicating a likelihood of immediate and irreparable injury"); *Stevens v. Harper*, 213 F.R.D. 358, 370-72 (E.D. Cal. 2002) (recognizing that plaintiffs seeking injunctive relief "must clearly allege specific facts establishing an imminent risk of substantial and irreparable harm" and dismissing claims that did not meet this standard). Moreover, to the extent Plaintiffs allege injury in the form of diminished quality or selection, they fail to sufficiently allege that such injury is not compensable by an award of monetary damages.

2. Plaintiffs Cannot Establish That They Are Entitled to Monetary Damages

Plaintiffs also seek "damages, trebled, as provided by Section 4 of the Clayton Antritrust [sic] Act . . . and/or any State statutes allowing suit by both direct and indirect purchasers" for

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[15] In a single paragraph of the SAC, Plaintiffs claim that the proposed transactions will result in "fewer services, fewer competitive choices, deterioration of products, product quality, and product diversity; suppression and destruction of smaller actual competitors through exclusive distribution, full-line forcing, imitation beers, shelf space control in major chain store markets achieved by bribes and other gratuities, and the like." (SAC ¶ 16.)

harm sustained by Plaintiffs prior to an order of divestiture. But Plaintiffs have failed to adequately allege that they are entitled to monetary relief under either federal or state law.

First, under well-established Supreme Court precedent, indirect purchasers lack standing to pursue claims under Section 4 of the Clayton Act. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 734-35 (1977). Plaintiffs do not and cannot allege that they are direct purchasers, because brewers like ABI and Modelo sell beer to distributors, not to individual consumers like Plaintiffs. (SAC ¶ 63.) Thus, because Plaintiffs are indirect purchasers of Defendants' products, they lack standing to sue for damages under the Clayton Act.

In addition, Plaintiffs' cursory and vague request for damages pursuant to "any State statutes allowing suit by both direct and indirect purchasers" is wholly inadequate to satisfy Plaintiffs' pleading burden. To survive a motion to dismiss, a plaintiff must "provide the 'grounds' of his 'entitle[ment] to relief.'" *Twombly*, 550 U.S. at 555 (citation omitted) (alteration in original). Courts have held that a claim predicated on unnamed statutes does not provide defendants with fair notice of the grounds for plaintiff's requested relief. *See Gonzalez v. DHI Mortg. Co.*, No. C 09-1798 PJH, 2009 WL 4723362, at *5 (N.D. Cal. Dec. 4, 2009) (dismissing claim with prejudice because plaintiff's failure to identify a specific statute that allegedly was violated did not give defendant "fair notice of the claim and the grounds upon which it rests"); *Pyne v. Dist. of Columbia*, 298 F. Supp. 2d 7, 12 (D.D.C. 2002) (dismissing claim because plaintiff "failed to reference a specific law or statute, or even generally describe what law has been violated"). Here, Plaintiffs' failure to identify or describe *any* specific state statute under which they purportedly are entitled to relief requires dismissal of their state law claims.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' SAC should be dismissed with prejudice.

DATED: June 28, 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

BY:

/s/ Allen Ruby

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

ECF CERTIFICATION

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

/s/ Allen Ruby

Allen Ruby