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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

JAMES DEHOOG, BRIAN BOUTELLER, SHONNA BOUTELLER, CARLY BOWEN, TOM BUTTERBAUGH, ERICA I. CORONA, MARIA G. CORONA, CHRIS DENNETT, JOHN DESBIENS, MATTHEW JOHNSON, CYNTHIA A. KREITZBERG, EDWARD LAWRENCE, JERUSHA MALAER, ROBERT MALAER, MICHAEL MARTIN, MICHAEL MCATEE, DAVID MILLIGAN, JEFF REEDER, RALPH REEDER, WADE SCAGLIONE, BETH H. SILVERS, BRADLEY O. SILVERS, and PATRICE WADE,

Plaintiffs,

v.

ANHEUSER-BUSCH INBEV, SA/NV and SABMILLER PLC,

Defendants.

CV No.: 1:15-cv-02250-CL

DEFENDANT ANHEUSER-BUSCH INBEV SA/NV'S MOTION TO DISMISS COMPLAINT AND MEMORANDUM IN SUPPORT

Pursuant to Fed. R. Civ. P. 12(b)(6)

Request for Oral Argument

DEFENDANT ANHEUSER-BUSCH INBEV SA/NV'S MOTION TO DISMISS COMPLAINT AND MEMORANDUM IN SUPPORT

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L.R. 7-1 COMPLIANCE

Pursuant to L.R. 7-1, counsel for defendant Anheuser-Busch InBev, SA/NV ("ABI") certifies that the parties made a good-faith effort to resolve the dispute by conferring by telephone, but have been unable to resolve it.

MOTION

Pursuant to Fed. R. Civ. P. 12(b)(6), ABI moves for dismissal of Plaintiffs' Complaint for failure to plead facts sufficient to state a claim upon which relief can be granted.

This Motion is supported by the following points and authorities and the supporting Declaration of Yonatan Even ("Even Decl.") filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

ABI respectfully submits this memorandum of law in support of its motion to dismiss Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Plaintiffs' Complaint is the latest in a long line of attempts by Plaintiffs' lead counsel, the Alioto Law Firm, to obstruct pending mergers by filing baseless challenges to high-profile transactions.[1] Most specifically, the present lawsuit is the Alioto Law Firm's third challenge to an ABI-related transaction in recent years. Both prior lawsuits were dismissed for failure to state a claim. *Edstrom v. Anheuser-Busch InBev SA/NV*, No. C 13-1309, 2013 WL 5124149, at *9 (N.D. Cal. Sept. 13, 2013) (denying Plaintiffs' motion for preliminary injunction and dismissing Plaintiffs' challenge to ABI's acquisition of Grupo Modelo); *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 952 (E.D. Mo. 2009) (granting motion for judgment on the pleadings in antitrust

[1] *See, e.g.*, *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's 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), *cert. denied*, 132 S. Ct. 855 (2011); *Golden Gate Pharmacy Sers., 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); *Madani v. Shell Oil Co.*, No. CV 08-1283-GHK, 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 15 (9th Cir. 2009); *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175, 2007 WL 1892227, at *7 (D. Minn. June 28, 2007) (dismissing antitrust challenge to Time Warner's acquisition of Adelphia); *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1125 (N.D. Cal. 2001) (dismissing antitrust challenge to merger of Southwest Airlines and AirTran).

challenge to InBev's acquisition of Anheuser-Busch), *aff'd*, 623 F.3d 1229 (8th Cir. 2010). The present lawsuit should meet the same fate.[2]

As was the case in *Edstrom* and *Ginsburg*, the Complaint here grossly mischaracterizes the proposed transaction, misstating publicly available information of which Plaintiffs are well aware. In particular, Plaintiffs concede in their Complaint that the proposed transaction contemplates a complete divestiture of SAB Miller plc's ("SAB") entire U.S. business—contained exclusively in SAB's interest in its joint venture with the Molson Coors Brewing Company ("Molson"), known as MillerCoors LLC ("MillerCoors")—to SAB's joint-venturer, Molson; ABI will not come to own any part of it. (Compl. ¶¶ 21, 33.) Thus, the proposed transaction will not result in *any increase in concentration in the alleged U.S. beer market or in any sub-market Plaintiffs allege.* Yet, despite this concession, Plaintiffs curiously allege the exact opposite in several sections of their Complaint. Specifically, Plaintiffs allege repeatedly that the proposed transaction will result in ABI having a 71 percent share in the alleged U.S. beer market and that the post-transaction HHI will increase by nearly 3,000 points. (*See, e.g.*, Compl. ¶ 3) (alleging that ABI post-transaction will have "71 percent of the beer market in the United States"); (*id.* ¶ 78) (alleging that "ABI, post-acquisition, will have a combined market share of approximately 71 percent" and that the "post-transaction HHI of the United States beer market

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[2] Indeed, almost half of the paragraphs in the current Complaint rehash the dismissed allegations in the *Edstrom* complaint. Compare, for example:

> "ABI and SAB have typically announced annual price increases in late summer for execution in early fall. The increases vary by region, but typically cover a broad range of beer brands. In most local markets, ABI is the market share leader and issues its price announcement first, purposely making its price increases transparent to the market so its competitors will fall into line. In the past several years, SAB has followed ABI's price increases to a significant degree." (Compl. ¶ 82); with
>
> "ABI and MillerCoors typically announce annual price increases in late summer for execution in early fall. The increases vary by region, but typically cover a broad range of beer brands and packs. In most local markets, ABI is the market share leader and issues its price announcement first, purposely making its price increases transparent to the market so its competitors will get in line. In the past several years, MillerCoors has followed ABI's price increases to a significant degree." (Edstrom Compl., ECF 1, ¶ 67.)

Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995) (finding that a "court may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into a motion for summary judgment) (citation omitted).

has been estimated to increase by reason of the acquisition by nearly 3,000 points").) These allegations are patently false, and must be disregarded.[3]

When Plaintiffs' mischaracterizations and misstatements are disregarded, as the law requires,[4] Plaintiffs' Complaint does not (and cannot) state a cause of action. Plaintiffs' principal claim is that the proposed transaction violates Section 7 because a combined ABI-SAB will enjoy enhanced market power. (Compl. ¶¶ 35-39, 81-89.) That claim should be dismissed, with prejudice, because ABI's market position in the United States will not change as a result of the proposed transaction. (*See infra* Section I.A.)

Recognizing that the proposed transaction will not have any effect on the alleged U.S. beer market, Plaintiffs throw in two theories that are entirely speculative and deficiently pled. *First*, Plaintiffs claim that once Molson obtains 100 percent ownership of MillerCoors, MillerCoors "likely" will change its business strategy and begin pressuring its distributors not to carry competitive products. (Compl. ¶¶ 32-33.) But Plaintiffs do not allege any facts explaining why MillerCoors could or would change its business strategy post-transaction, or how or why the transaction would trigger such a change. Plaintiffs' speculative and conclusory assertions concerning MillerCoors' future conduct, which has nothing to do with the proposed transaction, cannot support a Section 7 claim. (*See infra* Section I.B.)

Second, Plaintiffs claim the combined ABI-SAB will have monopsony power with respect to the purchase of two of the commodities used in beer production: the hops used to brew beer and the cans used to package beer. (Compl. ¶¶ 53-58.) Plaintiffs' monopsony claim is pled in conclusory fashion, with Plaintiffs failing to allege the scope of the alleged market for either hops or cans, the effect of the combination of ABI and SAB on those alleged markets, or

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[3] Plaintiffs cite a letter from the American Antitrust Institute ("AAI") to the Department of Justice ("DOJ") for the propositions that a combined ABI-SAB "will have more power over distributors and more to gain from excluding rivals" (Compl. ¶ 37) and "would control a greater number of beer aisles and have more power to manipulate retail shelves to promote its own brands and hurt rivals" (*id.* ¶ 81). But, as Plaintiffs acknowledge, the AAI letter was submitted in "November 2014" (*id.* ¶ 35)—*almost a year before* the announcement of the deal terms on November 11, 2015 (*id.* ¶ 17), which made clear that Molson, not ABI, would acquire SAB's U.S. business. The AAI letter and its stated concerns are therefore irrelevant.

[4] *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1024 (N.D. Cal. 2014) ("a court need not accept as true allegations contradicted by judicially noticeable facts") (citing *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000)).

any injury to Plaintiffs as beer consumers, much less a cognizable antitrust injury. Moreover, the claim is internally inconsistent and relies on a theory of harm—the so-called "waterbed theory"—that has not been accepted by any court and that makes no economic sense. (*See infra* Section I.C.)

Finally, Plaintiffs' Complaint should be dismissed for the independent reason that Plaintiffs seek injunctive relief, but have not alleged any irreparable harm that could arise as a result of the transaction. Specifically, Plaintiffs make no allegation explaining why their alleged injuries would not be compensable through monetary damages. Plaintiffs' claim for injunctive relief therefore should be dismissed. (*See infra* Section II.)

BACKGROUND

In view of the Complaint's blatant mischaracterization of the currently proposed transaction as well as prior transactions in the industry, ABI sets forth herein a brief background of the historical relationships among the brewers referenced in the Complaint and the terms of the proposed transaction.

In 2008, Molson, a U.S. company, and SAB, a U.K. company, combined the entirety of their respective U.S. businesses in a joint venture called MillerCoors. (Compl. ¶ 14.) Molson and SAB each hold 50 percent governance rights in MillerCoors. The Department of Justice ("DOJ") approved the joint venture on June 5, 2008.[5]

In 2013, ABI completed an acquisition that closely mirrors the proposed transaction. Specifically, ABI acquired full ownership of Grupo Modelo, S.A.B. de C.V. ("Modelo"), of which it had previously owned 50 percent. *Edstrom*, 2013 WL 5124149, at *1. At the same time, ABI sold Modelo's U.S. business (including the right to brew, distribute and sell the Modelo brands then sold in the U.S.) and Modelo's largest and newest brewery, located just a few miles south of the U.S./Mexico border, to Constellation Brands, Inc. ("Constellation"). *Id.* As a result of that transaction, Constellation became an independent brewer and the exclusive

[5] Press Release, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Joint Venture Between SABMiller plc and Molson Coors Brewing Company (June 5, 2008), www.justice.gov/archive/atr/public/press_releases/2008/233845.htm. As cited *supra*, a "court may look beyond the plaintiff's complaint to matters of public record" in deciding a motion to dismiss. *Shaw*, 56 F.3d at 1129 n.1.

seller of the Modelo beer brands sold in the United States at that time. *Id.* The DOJ approved the transaction on April 19, 2013. *Id.*

According to the Complaint, ABI currently has approximately 45 percent of the alleged U.S. beer market. (Compl. ¶¶ 34, 74.) This represents a decrease from the 50 percent market share alleged in *Edstrom v. Anheuser-Busch InBev SA/NV* in 2013. (Edstrom Compl., ECF No. 1, ¶ 4, Mar. 22, 2013.) MillerCoors has either 25 or 26 percent of the market (Compl. ¶¶ 34, 75), a similar decrease from the 30 percent market share alleged in 2013. (Edstrom Compl., ECF No. 1, ¶ 4.) Following its acquisition of the U.S. business of Modelo, Constellation became the third largest beer brewer in the alleged U.S. beer market. (*See* Compl. ¶ 24.)

Notwithstanding Plaintiffs' allegations that prior acquisitions have harmed small brewers and consumers alike, Plaintiffs concede that craft brewers continue to thrive, such that "[w]hile overall beer sales rose 0.5 percent in 2014, craft beer sales rose by 17.6 percent to capture 11 percent of the U.S. market." (Compl. ¶ 41.) Moreover, "[t]here were approximately 4,000 craft beer companies as of September, 2015". (*Id.* ¶ 40.)

On November 11, 2015, ABI and SAB announced that ABI will purchase SAB. (*Id.* ¶ 17.) Concurrent with that announcement, ABI announced that Molson Coors, not ABI, will acquire SAB's interest in the MillerCoors joint venture, such that "AB InBev will not own SAB's U.S. business".[6]

LEGAL STANDARD

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

[6] Press Release, Anheuser-Busch InBev Announces Agreement with Molson Coors for Complete Divestiture of SABMiller's Interest in MillerCoors (Nov. 11, 2015), http://www.ab-inbev.com/content/dam/universaltemplate/abinbev/pdf/investors/11November2015/Press%20Release%20-%20Anheuser-Busch%20InBev%20Announces%20Agreement%20with%20Molson%20Coors%20for%20Complete%20Divestiture%20of%20SABMiller%E2%80%99s%20Interest%20in%20MillerCoors.pdf.; Press Release, Recommended Acquisition of SABMiller plc by Anheuser-Busch InBev SA/NV (Nov. 11, 2015), http://www.ab-inbev.com/content/dam/universaltemplate/abinbev/pdf/investors/11November2015/Press%20Release%20-%20Recommended%20Acquisition%20of%20SABMiller%20PLC%20by%20Anheuser-Bus.pdf. As described more fully in ABI'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).

must construe a complaint's allegations of material facts 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." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alterations in original) (citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (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. Moreover, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 129 S. Ct. at 1950 (internal quotation and citation omitted). 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).

As set forth below, Plaintiffs have not stated and cannot state a claim under Section 7 of the Clayton Act and thus their claims should be dismissed without leave to amend. Plaintiffs' Complaint, which requests only injunctive relief, also should be dismissed because Plaintiffs will not suffer irreparable harm if the proposed transaction is permitted to proceed.

ARGUMENT

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

To prevail under Section 7 of the Clayton Act, Plaintiffs must demonstrate that ABI's acquisition of SAB will "substantially lessen competition" or "tend to create a monopoly". 15 U.S.C. § 18. Because Plaintiffs seek injunctive relief as private plaintiffs under Section 16 of the Clayton Act, they also must demonstrate that they are threatened with loss or damages as a result of the alleged Section 7 violation, 15 U.S.C. § 26, and must satisfy all of the requirements necessary to obtain injunctive relief. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

Plaintiffs fail to state a Section 7 claim because, as Plaintiffs admit, ABI will not acquire any of SAB's U.S. business. ABI's market share therefore will not be affected by the proposed transaction. Plaintiffs' alternative theories of competitive harm—that Molson will change MillerCoors' business strategy after it acquires SAB's ownership interest or that ABI will exercise monopsony power post-transaction—cannot save their claim because Plaintiffs do not allege any facts supporting them, do not allege a coherent market or market impact, and do not allege an antitrust injury.

A. Plaintiffs Cannot State a Claim Because ABI's Market Share and Purported Market Power in the U.S. Will Be Unaffected by the Transaction.

To establish a Section 7 violation, a party "must show[ ] 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'". *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) (emphasis added) (internal citations omitted). Here, Plaintiffs allege that ABI's acquisition of SAB will increase its market power, allowing it to increase prices (Compl. ¶¶ 82-89), control distribution (*id.* ¶¶ 35-39) and influence retail shelving choices (*id.* ¶ 81). Plaintiffs theorize, for example, that "[t]he proposed acquisition will increase the ability of ABI and the remaining beer firms to coordinate by eliminating another competitor with the potential to thwart ABI's price increase leadership." (*Id.* ¶ 89.)

Plaintiffs' claim fails for the simple reason that the proposed transaction does not contemplate the acquisition by ABI of any portion of SAB's U.S. business. Instead, as set forth above—and as Plaintiffs must and do concede—"the proposed acquisition contemplates SAB selling its interest in the MillerCoors joint venture [representing the entirety of SAB's U.S. business] to its co-joint venturer, Molson Coors . . . ." (*Id.* ¶ 33.) Plaintiffs' allegations concerning post-transaction increases in market share and market concentration (as measured by

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the HHI index) therefore fall flat, as they are predicated on the false premise that ABI would come to own SAB's U.S. business. (*Id.* ¶¶ 3, 21.)

Under the actual (and undisputed) deal contemplated here, ABI's market share in the alleged U.S. beer market will not change. ABI's ability to increase prices, control distribution or influence retail shelving likewise will not change as a result of the transaction. The transaction also will not eliminate any competitors in the alleged U.S. beer market, because SAB only operated in the United States through MillerCoors, which will continue to compete with ABI post-transaction, under Molson's 100 percent ownership. Finally, Plaintiffs' allegation that HHI will increase by nearly 3,000 points post-transaction (*id.* ¶¶ 21, 72) is patently false, and the Court need not accept it as true even for present purposes. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1024 ("a court need not accept as true allegations contradicted by judicially noticeable facts"). And Plaintiffs' inexplicable allegation that HHI will increase by at least 200 points "even assuming a complete divestiture of SAB's U.S.-marketed beers" (*id.* ¶ 21) is wholly unsupported, defies logic and likewise should be rejected. Simply put, the number of competitors in the alleged U.S. beer market, and those competitors' shares of that alleged market, will not change as a result of the proposed transaction.

A directly analogous situation was addressed by the District Court for the Northern District of California in *Edstrom v. Anheuser-Busch InBev SA/NV*. In that case, as part of its acquisition of Modelo, ABI agreed to sell Modelo's U.S. business to an independent third party (Constellation). *Edstrom*, 2013 WL 5124149, at *1-2. Plaintiffs—including one of the Plaintiffs here—sued to block the transaction, alleging similar violations of the antitrust laws and similar harms to those alleged here. In dismissing the Complaint, the Court found that given the lack of a U.S. acquisition, "ABI's percentage share of the United States market was not increased as a result of the merger". *Edstrom,* 2013 WL 5124149, at *3. The court dismissed the complaint for that reason. *Id.* at *6. ABI respectfully submits that the Court should do the same here.

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B. Plaintiffs' Allegations with Respect to the Purported Future Conduct of MillerCoors Are Entirely Speculative.

Almost as an afterthought, Plaintiffs also allege that the proposed transaction will harm competition because once Molson becomes the sole owner of MillerCoors, MillerCoors purportedly is "likely" to adopt more restrictive distribution practices than those it currently employs.[7] (Compl. ¶ 33.) Plaintiffs' theory is predicated on speculation and conjecture, is contrary to the facts—including facts Plaintiffs readily acknowledge—and is entirely unrelated to the transaction being challenged.

Specifically, Plaintiffs do not allege any facts to support a reasonable inference that MillerCoors will change its distribution practices one way or another post-transaction. "[T]he test of legality of a [merger] under § 7 is whether, at the time of suit, there is a *reasonable probability* that the acquisition may lead to a restraint or a monopoly." *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1261 (C.D. Cal. 1973) (citing *United States v. du Pont & Co.*, 353 U.S. 586, 589 (1957)) (emphasis added). "[A]lthough § 16 of the Clayton Act protects 'against threatened loss or damage by a violation of the antitrust laws,' 15 U.S.C. § 26, and although § 7 'was intended to arrest the anticompetitive effects of market power in their incipiency,' the Act does not authorize suits by those whose allegations of threatened injury amount to little more than conjecture." *Sprint Nextel Corp. v. AT & T Inc.*, 821 F. Supp. 2d 308, 317 (D.D.C. 2011) (citations omitted).

Plaintiffs' theory requires three degrees of speculation—about MillerCoors' past, current and future conduct, and about the reasons driving each. Plaintiffs fail to plead facts supporting that theory. Specifically, Plaintiffs assert conclusorily that MillerCoors currently employs a less restrictive distribution strategy from that employed by ABI "likely" because Molson and SAB "each had relatively small market share compared to ABI" before forming the MillerCoors joint venture. (Compl. ¶ 33.) As a threshold matter, that allegation is deficient because Plaintiffs

[7] Plaintiffs' allegations concerning a purported DOJ investigation into ABI's distribution practices are irrelevant. (*See* Compl. ¶ 36.) As the Complaint acknowledges, any such investigation would concern only ABI's independent conduct and would be unrelated to the transaction.

offer no fact or theory explaining the relationship between market share and distribution practices. But even if Plaintiffs could come up with such fact or theory, as Plaintiffs concede, Molson's and SAB's share of the purported market ceased being "relatively small" in 2008—when they formed the MillerCoors joint venture; under Plaintiffs' theory, any change in incentives should have occurred back then, not now. Moreover, any theory of harm predicated on an alleged relationship between market share to distribution practices must fail here because Plaintiffs acknowledge—as they must—that the proposed transaction *will not affect MillerCoors' current market share*. (*Id.* ¶ 34.) Plaintiffs' bald assertion that MillerCoors will have changed incentives post-transaction because of a purported change in market share is thus outright contradicted by the facts alleged by Plaintiffs. Such assertion cannot "raise a right to relief above the speculative level".[8] *Twombly*, 550 U.S. at 555.

C. Plaintiffs' Undeveloped and Flawed Monopsony Allegations Do Not Plead a Monopsony Claim or an Antitrust Injury.

As a last-ditch effort, Plaintiffs also include in their Complaint a grossly deficient monopsony claim, baldly asserting that a combined ABI-SAB will have "monopsony power over the commodities used in brewing beer". (Compl. ¶ 53.) Interpreting Plaintiffs' vague and tangled allegations in the best possible light, it appears they claim ABI will have monopsony power with respect to two different inputs related to beer production: the hops used in brewing beer and the cans used in packaging beer.

"Monopsony power is market power on the buy side of the market." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007); *see United States v. Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990) ("Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side."). The

[8] Plaintiffs attempt to support their theory of changed incentives by drawing a comparison with Constellation, which matched ABI's pricing practices after the ABI-Modelo transaction. (Compl. ¶ 33.) That comparison fails. A single price increase by Constellation, coupled with the bald assertion that such price increase "would likely not have occurred had ABI not acquired 100 percent of Modelo" (*id.* ¶ 87), cannot even support an allegation of changed incentives at Constellation, let alone at MillerCoors. Moreover, there is simply no link between Constellation's incentives with respect to *pricing* and MillerCoors' incentives with respect to *distribution*—nor do Plaintiffs allege any such link.

requirements for alleging monopsony under Section 7 mirror those for a monopoly claim: Plaintiffs must demonstrate that an acquisition will substantially lessen competition or tend to create a monopsony in some defined product and geographic market and that they are, as a result, threatened with loss or damages. *See Weyerhaeuser Co.*, 549 U.S. at 320 ("The kinship between monopoly and monopsony suggest that similar legal standards should apply to claims of monopolization and to claims of monopsonization."); Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 12 (Apr. 19, 2010) ("To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market.").

Plaintiffs fail to allege even the most basic contours of this claim, and their Complaint should be dismissed with prejudice for the following reasons: (1) Plaintiffs do not identify the scope of the relevant product or geographic market or markets in which ABI purportedly would have monopsony power, the relevant market shares of ABI or any other buyers in such markets, or the relevant market concentrations pre- and post-transaction; (2) Plaintiffs' "waterbed" theory of harm is not supported by case law and simply makes no economic sense; and (3) Plaintiffs do not allege a cognizable antitrust injury, as they fail to explain how ABI's purported monopsony power threatens to injure Plaintiffs in their capacity as beer consumers, who by definition do not participate in any purported market for "commodities used in brewing beer".

Plaintiffs' Hops Allegations

With respect to hops, Plaintiffs' allegations are defective in three ways. *First*, Plaintiffs allege that ABI "is a powerful buyer in the bitter hops market" and that post-acquisition ABI could "depress prices in the bitter hops market due to ABI's buyer power and other purchasers who put pressure on their suppliers to compete with ABI's lower costs". (Compl. ¶ 56.) But Plaintiffs do not allege the scope of the purported market for the purchase of hops in which they appear to claim ABI will have monopsony power. In a monopsony, "the market is not the market of competing sellers but of competing buyers", and it is therefore "comprised of buyers

who are seen by sellers as being reasonably good substitutes". *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001). Plaintiffs do not attempt to define the relevant product market, the geographic scope of the purported market, or the competitors active within it. Plaintiffs likewise do not allege how concentrated the purported hops market is, what percentage of the market ABI or SAB currently enjoy, or how the transaction would affect either market concentration or the combined entity's market share. Plaintiffs' failure to define the market and the relevant impact of the merger on that market is fatal to their monopsony claim.

Second, Plaintiffs allege that "small buyers like craft brewers" are vulnerable to the purported "waterbed effect" (Compl. ¶ 55), whereby "a powerful buyer demands lower prices or other concessions from its suppliers, causing the supplier to, in turn, increase prices to smaller buyers" (*id.*). But the alleged "waterbed effect" is contrary to established antitrust principles and to basic economic principles. Monopsony cases typically concern alleged harm to sellers of the relevant commodity, not to competitors of the monopsonist.[9] In fact, just like a monopolist cannot harm its competitors by raising the price of the products it sells, so a monopsonist cannot harm its competitors by lowering the price of the products it buys. To the contrary, basic economics would suggest that if ABI demanded its suppliers to provide hops at depressed prices, that demand would encourage those suppliers to sell as much of their hops as they could to ABI's competitors. Thus, monopsony pricing, just like monopoly pricing, attracts expansion and entry. *See Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995) ("a predator charging supracompetitive prices will quickly lose market share (as well as any chance of reaping monopoly profits) as new rivals enter the market and undercut its high price"). Plaintiffs' theory of harm simply makes no economic sense.

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[9] *See Telcor Comm. v. S.W. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002) (noting that a monopsony claim can be based on injury to a seller); *Dyer v. Conoco*, No. 93-2801, 1995 WL 103233, at *5 (5th Cir. Feb. 21, 1995) ("[S]ellers to a monopsony or oligopsony can establish antitrust injury . . . ."); *New Mexico Oncology and Hematology Consultants v. Presbyterian Healthcare Servs.*, 54 F. Supp. 3d 1189, 1205-06 (2014) ("Just as consumers can be injured by a monopolist-seller's practices, so too can a seller suffer antitrust injury by a monopsonist-buyer's power in a particular market.").

Plaintiffs' allegation that craft brewers will be harmed by the waterbed effect is flatly inconsistent with their simultaneous allegation that efforts by ABI to decrease the price of bitter hops will "cause U.S. farmers to abandon the bitter hops market in favor of more profitable aroma hops," which are the very type of hops used "predominantly by craft brewers". (Compl. ¶ 56.) And Plaintiffs' further allegation that producers may abandon bitter hops in favor of producing aroma hops "due to ABI's buyer power and other purchasers who put pressure on their suppliers to compete with ABI's lower costs" (*id.*) is likewise inconsistent with any monopsony theory. To the contrary, it suggests that hops producers have the ability to avoid lower prices by switching to more profitable aroma hops, and that competing buyers of bitter hops could prevent such switching by refraining unilaterally from following ABI in putting pressure on their hops suppliers to reduce their prices.

Third, even if Plaintiffs' hops allegations were coherent, they do not plead any threatened injury *to Plaintiffs*, as consumers of beer. At best, Plaintiffs allege that certain small hops buyers, like certain craft brewers and certain lager style beer producers, will face higher prices of aroma hops and shortages of bitter hops. But neither is a threatened injury *to Plaintiffs*. Plaintiffs therefore have not pleaded a cognizable antitrust injury. *See Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1232-34 (9th Cir. 1998) (setting forth standing requirements for antitrust plaintiffs, including that a "threatened antitrust injury [is] a prerequisite to equitable relief") (citing *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 107 (1986)).

Plaintiffs' Cans Allegations

Plaintiffs' allegations regarding ABI's purported monopsony power with respect to cans are even less developed than their hops allegations. Plaintiffs' only allegation with respect to cans is that a single can-maker, Crown Holdings,[10] "*reportedly* dropped both new and existing

[10] Plaintiffs' assertion that large can-maker Crown Holdings, Inc. was "formerly a partner with Constellation in the joint venture that distributed Modelo's products in the U.S. before ABI acquired Modelo" (Compl. ¶ 57) is incorrect, as Plaintiffs' counsel knows from the *Edstrom* lawsuit. The joint venture through which Grupo Modelo and Constellation imported Modelo to the United States before Constellation became sole owner of that business in 2013 is Crown Imports LLC. *Edstrom*, 2013 WL 5124149, at *1 (discussing Crown joint venture and sale of Grupo Modelo's interest in Crown to Constellation). Crown Imports is wholly unrelated to can-maker Crown Holdings.

small craft customers and lengthened lead times, *suggesting* capacities are becoming limited in the industry". (Compl. ¶ 57 (emphasis added).) Based on this concededly unsubstantiated and indefinite allegation, Plaintiffs claim that "[s]maller buyers are likely to experience delays, poorer terms, and even unavailability" of cans needed for packaging beer post-transaction. (*Id.* ¶ 58.) Plaintiffs' speculation that a combined ABI-SAB will exercise monopsony power in a completely undefined market for the purchase of cans, based on the purported current capacity constraints of a single can manufacturer and without any real theory of harm *to Plaintiffs*, is insufficient as a matter of law and should be dismissed.

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

Plaintiffs' Complaint fails to state a claim upon which any relief may be granted, and should be dismissed for that reason. But even if Plaintiffs could cross that bar—which they cannot—their Complaint still should be dismissed because it states no facts that could warrant the injunctive relief Plaintiffs seek.

Plaintiffs seek injunctive relief "enjoining ABI from consummating the acquisition of SAB". (Compl. ¶ 101.) To obtain permanent injunctive relief, a plaintiff must show, *inter alia*: "(1) that it has suffered an irreparable injury; [and] (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury". *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)). Plaintiffs have not pleaded facts sufficient to establish that they will suffer an "irreparable" injury that could not be compensated through remedies available at law. Plaintiffs' Complaint for injunctive relief therefore should be dismissed. *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 "Plaintiffs ha[d] not demonstrated that the remedies available at law, such as monetary damages, would be inadequate".

Plaintiffs have failed to meet their burden to plead irreparable injury for two reasons. *First*, Plaintiffs have alleged that the proposed transaction will harm them by resulting in higher beer prices. (*See* Compl. ¶¶ 3, 25, 45, 58, 100.) But Plaintiffs have alleged no facts explaining why such an injury is not 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.").

Second, while the Complaint includes passing references to diminution in consumer choice,[11] Plaintiffs fail to allege any specific facts describing this type of harm or explaining how it would be realized—much less explaining how that harm would be irreparable and not compensable by an award of monetary damages. That omission is particularly glaring in this case, given the facts alleged in the Complaint as to the current state of consumer choice in the alleged market. Specifically, Plaintiffs allege that consumers currently can choose among more than 4000 (!) brands of beer. (Compl. ¶ 40.) Plaintiffs have pled no facts, nor even a theory, that could support a reasonable inference that this astronomical number of beer brands would fall so dramatically post-transaction so as to materially constrain consumer choice. Accordingly, Plaintiffs' allegations of irreparable harm are grossly deficient and the Complaint should be dismissed, with prejudice, also for that reason. *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").

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[11] Plaintiffs allege, without elaboration, that the proposed transaction would result in "fewer services, fewer competitive choices, diminished product quality and product diversity, suppression and destruction of smaller actual competitors through exclusive distribution arrangements, full-line forcing, and the like, and other anticompetitive effects and consequences". (Compl. ¶ 25.)

CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint in its entirety with prejudice.

DATED this 3rd day of February, 2016.

MARKOWITZ HERBOLD PC

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