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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN EDSTROM, BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK M. NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE,

Plaintiffs,

v.

ANHEUSER-BUSCH InBEV SA/NV, and GRUPO MODELO S.A.B. de C.V.,

Defendants.

CASE NO.: 3:13-cv-1309-MMC

NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PREMLIMINARY INJUCTION SHOULD NOT ISSUE TO PROHIBIT THE ACQUISITION OF GRUPO MODELO BY ANHEUSER-BUSCH INBEV AS A VIOLATION OF SECTION 7 OF THE CLAYTON ANTITRUST ACT 15 U.S.C. §18, MEMORANDUM OF POINTS AND AUTHORITIES

TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June ___, 2013 at the hour of _____, or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, San Francisco Division, 450 Golden Gate Ave. San Francisco, California before the Hon. Maxine Chesney, Plaintiffs will move this Court for a Temporary Restraining Order and an Order to Show Cause why a preliminary injunction should not issue to prohibit the acquisition by Anheuser-Bush InBev ("ABI") of the remainder of Grupo Modelo S.A.B. de C.V. ("Modelo") that it does not already own. To enable them to prepare the motion for a preliminary injunction, plaintiffs also seek immediate discovery of defendants' Hart-Scott-Rodino documents and the depositions of key personnel.

This motion is made on the grounds that good cause exists for the granting of a Temporary Restraining Order and an order to show cause why a preliminary injunction should not issue and good cause for the granting of said preliminary injunction because defendants have entered into an agreement whereby ABI has agreed to purchase the remaining equity interest from Modelo's owners, thereby obtaining full ownership and control of Modelo, for almost $20.1 billion. Further, Defendants threaten to immediately close this acquisition on June 4, 2013, comingle assets, employees and pricing information and will thereafter raise the prices of beer.

The undersigned counsel for the plaintiffs at 3:40 p.m. on June 3, 2013 notified the defendants and their counsel, to the extent known, of plaintiffs intention to bring this Motion before this Court.

This motion is based on this notice, the memorandum of points and authorities set forth herein, the attached declaration of John H. Boone, the attached Amended Complaint, and the complete files and records in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

RELIEF REQUESTED

Plaintiffs seek Temporary Restraining Order and an order to show cause why a preliminary injunction should not issue restraining and enjoining the proposed acquisition by Anheuser-Bush InBev ("ABI") of the remainder of Grupo Modelo S.A.B. de C.V. ("Modelo") that it does not already own. To enable them to prepare the motion for preliminary injunction, plaintiffs also seek immediate discovery of defendants' Hart-Scott-Rodino documents and the depositions of key personnel.

STATUTORY BASIS FOR THE RELIEF REQUESTED

Section 16 of the Clayton Act, 15 U.S.C. Sec. 26, specifically provides for the relief requested in the following statutory language:

> "That any person, firm, corporation or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damages by a violation of the antitrust laws, including sections two, three, seven, and eight of this act, when and under the same conditions and principles as against threatened conduct under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue:"

ARGUMENT

Few cases present such a clear violation of Section 7 of the Clayton Act, as amended, and few cases present such a clear necessity for preliminary relief, as does this case.

STATEMENT OF FACTS

According to generally accepted economic and legal principles, fundamental to free markets is the principle that competition works best and consumers benefit most when independent firms battle hard to win business from each other. In industries characterized by a small number of substantial competitors and high barriers to entry, further concentration is especially dangerous and antithetical to the nation's antitrust laws.

The United States beer industry – which serves tens of millions; of consumers at all levels of income – is highly concentrated with just two firms accounting for 80% of all sales nationwide. Further this industry has been the subject of continuous mergers and acquisition in recent years and reduction in the number of competitors that has intensified this concentration. The transaction which is the subject of this action threatens competition by combining the largest and third largest brewers of beer in the United States. The market shares of the largest brewers in the United States is as follows: Anhauser Bush InBev = 49.3%; MillerCoors = 30.2%; Modelo = 5.3%; Heineken = 4%; Pabst = 2.7%; Diageo Guinness = 1.2%; other smaller brewers = 7.3%. Antitrust American Institute Report by Bernard Asher using National Beer Wholesalers Association 2010 fact sheet.

The relevant product market in which to test the ABI/Modelo combination is beer. There are no economic substitutes for beer in that other alcoholic beverages contain different levels of alcohol, different ingredients, different methods of manufacture, different capital investment, different distribution systems, and different prices.

The relevant sections of the country in which to test the ABI/Modelo combination is the United States as a whole.

Both ABI and Modelo are national brewers. National brewers possess competitive advantages since they are able to advertise on a nation-wide basis, their beers have greater prestige than regional or local beers, and they are less affected by the weather or labor problems in a particular region.

The United States market is substantially more than simply "highly concentrated," as measured by the objective standards of the generally accepted Herfindahl-Hersh Index ("HHI"). [The HHI measures and grades market concentration by adding the squared market share percentage of each of the competitors in the market.] The post-transaction HHI of the

United States beer market will be greater than 2800, plainly a market probable if not certain collusion and galloping tendency toward monopoly.

Defendants combined national market share actually understates the effect that eliminating Modelo would have on the beer industry, both because Model's market share is substantially higher in many local areas than its national market share, because of the interdependent pricing dynamic that already exists by the two largest brewers, and as the two largest brewers, ABI and MillerCoors often find it more profitable to follow each other's prices than to compete aggressively for market share by cutting price. Among other things, ABI typically initiates annual price increases in various markets with the expectation that MillerCoors prices will follow. And they generally do.

In contrast, Modelo has resisted ABI-led price increases. Modelo's pricing strategy – "The Momentum Plan" – seeks to narrow the price gap between Modelo beers and lower priced premium brands, such as Bud and Bud Light. ABI internal documents acknowledge that Modelo has put increasing pressure on ABI by pursuing a competitive policy directly at odds with ABI's well-established practice of leading prices upward.

Because Modelo's prices have not closely followed ABI's price increases, ABI; and MillerCoors have been forced to offer lower prices and discounts for their brands to discourage consumers from switching to Modelo brands. If ABI were to acquire or eliminate Modelo, this competitive restraint on ABI's and MillerCoors' ability to raise prices would be eliminated.

The acquisition would also eliminate the substantial head-to-head competition that currently exists between ABI and Modelo. This loss of head-to-head competition would enhance the ability of ABI to unilaterally raise the prices of the brands that it would own after the acquisition, and diminish ABI's incentive with respect to new brands, products, and packaging.

Based on past history, presently announced intentions, and anticipated future conduct, unless restrained and enjoined, defendants will consummate their combination and raise prices in clear violation of Section 7 of the Clayton Act, to the irreparable injury of plaintiffs and the public and contrary to the public welfare.

After the Department of Justice filed their complaint in January 2013, Defendant ABI and Constellation on February 14, 2013, announced another attempt to try to cover up their scheme and create a mirage of competition. Under the terms of the Revised Agreement, which is conditioned on the completion of the Modelo transaction, ABI, after buying all of Modelo, will then sell to Constellation the 50% of Crown owned by Modelo, thereby setting Constellation free to do as it always wanted to do; namely, increase prices with ABI and shelve the program that was leading consumers to "trade up." ABI will also sell the Modelo Piedras Negras brewery and grant so-called "perpetual rights" to Constellation for Corona and the Modelo brands in the United States. The prices for this, which Constellation cannot afford and never intended to buy, are $1.85 billion for the interest in Crown and $2.9 billion for the interest in the brewery.

The Revised Agreement is fraudulent for the following reasons among others: (1) ABI will be running the brewery and supplying the beer production for at least three years! During that time, ABI, as the supplier of its supposed competitor, will be free to increase prices and control Constellation; (2) Constellation has consistently urged Modelo to follow ABI's price increases and Constellation will do so; (3) Constellation is not a beer brewer but one of the world's largest wine companies; (4) Constellation has no experience running a brewery; (5) Constellation cannot afford the purchase of the brewery or the 50% interest in Crown; (6) Constellation did not seek to buy the additional interest in Crown nor to buy a brewery; and (7) Apparently, if ABI buys Modelo, the approximately 600 employees at the Piedras Negras brewery will be paid by ABI and not Constellation.

Constellation has already shown through its participation in the Crown joint venture that it does not share Modelo's incentive to thwart ABI's price leadership. Given that Constellation was inclined to follow ABI's price leadership *before* the acquisition, it is unlikely to reverse course after—when it would be fully dependent on ABI and will effectively be ABI's business partner. Constellation will need to preserve a strong relationship with ABI.

The new Constellation is under-capitalized and highly leveraged, having incurred billions of dollars in additional debt in order to make to acquisition. As such it will be in no position to maintain lower prices in the face of ABI constant pressure to increase prices. The CEO of ABI and the CEO of Constellation have met privately to effectuate this conspiracy to assure that Constellation follows ABI's price increases and will continue to operate as a puppet of ABI.

LEGAL STANDARD FOR PRELIMINARY RELIEF

> 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.

Donald C. Winter, Secretary Of The Navy, V. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008)

A. Plaintiffs are Likely to Succeed on the Merits

The law governing this case was established in 1966 by the United States Supreme Court in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) when the Supreme Court reversed the district court and remanded the case for further proceeding in conformity with the decision. Before the Court at that time was the acquisition of the 18th largest beer brewer (Blatz) in the United States by the 10th largest brewer (Pabst) in the United States.

The evidence demonstrated the market shares, power, and competition in the relevant areas, and the steady decline in the number of brewers. The Court held that "the probable

effect of the merger on competition in Wisconsin, the three state area, and the entire country was sufficient to show a violation of Sec. 7 in each and all three of these areas." *Id*. at 552.

The *Pabst* case was not as strong as this case and is on all fours with the present case. Clearly, the ABI/Modelo combination violates Section 7 of the Clayton Act, as amended.

Under established Supreme Court precedent, there are other reasons why the proposed transaction is anticompetitive. One is national advertising. In the words of the Supreme Court:

> "Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising. Large inventories of cigarettes, and large sums required for payment of federal taxes in advance of actual sales, further emphasize the effectiveness of a well financed monopoly in this field against potential competitors if there merely exists an intent to exclude such competitors. Prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion. 'Prevention' is cheaper and more effective than any amount of 'cure.'"
>
> *American Tobacco Co. v. US*, 328 U.S. 781, 797 (1946)

Another important factor lost in the ABI/Modelo merger is potential competition which will be lost if the transaction proceeds:

> "Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate s 7 because the entry eliminates a potential competitor exercising present influence on the market. Id., 386 U.S., at 580-581, 87 S.Ct., at 1231-1232; United States v. Penn-Olin Chemical Co., 378 U.S. 158, 173-174, 84 S.Ct. 1710, 1718-1719, 12 L.Ed.2d 775 (1964). As the Court stated in United States v. Penn-Olin Chemical Co., supra, at 174, 84 S.Ct., at 1719, 'The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.'" *US v. Falstaff Brewing Corp.,* 410 U.S. 526, 531 (1973).

B. Plaintiffs Will be Irreparably Injured by Defendants' Combination

Based on past history, presently announced intentions, and anticipated future conduct, unless restrained and enjoined, defendants will consummate their combination and raise prices in clear violation of Section 7 of the Clayton Act, to the irreparable injury of plaintiffs and the public. If defendants are allowed to continue with the acquisition, they will comingle their assets, personnel, and pricing strategies to the point where separation is impossible. In addition, they will immediately raise beer prices and extract illegal profits which is very difficult to rectify.

C. Balance of Equities Favors the Plaintiffs

As demonstrated above, plaintiffs will suffer irreparable injury if the threatened acquisition is allowed to proceed. On the other hand, defendants will suffer little or no harm. The defendants have already delayed the acquisition by twelve months with no harm and it does not appear that another few months, in which time this case can be tried, will do any further harm.

Plaintiffs need very little discovery. They ask for the Hart-Scott-Rodino documents already collected and delivered to the Government and six to eight depositions from the top executives of ABI, Modelo, and Constellation. With this evidence plaintiffs will be able to demonstrate conclusively that the proposed transactions violate Section 7.

Similar discovery has been granted to two other judges in this District, Judge Walker and Judge Illston, in private Section 7 cases where the Government has indicated that they will not proceed to prohibit the subject acquisitions. Indeed the Competitive Impact Statement filed by the Government states in part:

"REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

"Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal

court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants."

D. Public Interest is Served by Preliminary Relief

Economic and legal principles uniformly hold that competition best serves the public. As the Supreme Court has said, the antitrust laws are the charter of economic freedom. If the proposed acquisition is completed and prices rise the public will be damaged to an extent not subject to remediation.

CONCLUSION

The acquisition of Modelo by ABI and the partial spin-off to Constellation is a clear violation of the antitrust laws. Unless the requested relief is granted plaintiffs and the public will be irreparably injured and this Court will lose the ability to rectify the situation.

Dated: June 3, 2013

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By: */s/ Joseph M. Alioto*

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