IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-2990

MARTY GINSBURG, *et al.*
Plaintiffs-Appellants

v.

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

Appeal from the United States District Court
For the Eastern District of Missouri
Hon. Jean C. Hamilton
(Case No. 4:08-CV-01375-JCH)

BRIEF FOR APPELLEES

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SUMMARY OF THE CASE

Appellants sought to enjoin the merger between Anheuser-Busch and InBev under Section 7 of the Clayton Act. The Complaint acknowledges that Anheuser-Busch and InBev are "not competing directly in the United States beer market" and that concentration of the market "remains the same if InBev acquires Anheuser-Busch."

The district court denied appellants' motion for a preliminary injunction, concluding that it was "overwhelmingly likely that Plaintiffs cannot succeed on the merits of their case" and that appellants' "potential competition" theories were "purely speculative." Subsequent motions for reconsideration and to hold the companies' assets separate were also denied. This Court denied the interlocutory appeal of the three district court orders as either untimely or by affirming the decision below. On remand, the district court granted appellees' motion for judgment on the pleadings and dismissed the case for failing to state a plausible claim under *Bell Atl. Corp. v. Twombly*.

The merger of Anheuser-Busch and InBev was completed one year ago. Regardless of the $52 billion size of the merger, the issues on appeal are not complex. The decision dismissing the Complaint is based on the allegations contained therein and certain indisputable facts in the public record, all of which are before this Court on appeal. Accordingly, no oral argument is necessary.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, defendants InBev NV/SA, Anheuser-Busch, Inc. and Anheuser-Busch Companies, Inc. make the following disclosures:

Defendants Anheuser-Busch, Inc. ("ABI") is a wholly-owned subsidiary of Anheuser-Busch Companies, Inc. ("ABCI"). ABCI is a wholly-owned subsidiary of Anheuser-Busch InBev Worldwide, Inc.

Defendant InBev NV/SA has renamed itself Anheuser-Busch InBev NV/SA, and is a publicly traded corporation.

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STATEMENT OF THE CASE

A. Nature of the Case

Appellants, claiming to be a group of ten Missouri beer drinkers, sought to enjoin the $52 billion merger between Anheuser-Busch and InBev under Section 7 of the Clayton Act. The Complaint acknowledges that the merger does not alter the competitive structure of the United States beer market, since concentration of the market "remains the same if InBev acquires Anheuser-Busch." (I App. 29 (¶ 11).) The Complaint also concedes that Anheuser-Busch and InBev are "not competing directly in the United States beer market. . . ." (I App. 30 (¶ 17).) For this reason, appellants eschew traditional merger analysis, which focuses on undue increases in industry concentration and whether such increases would lead to a substantial decrease in competition. Instead, appellants resort to rarely invoked, moribund theories of elimination of "potential competition."

Specifically, appellants' case is premised on two separate, but related theories: the "**perceived** potential competition" doctrine and the "**actual** potential competition" doctrine. (*See, e.g.*, I App. 30-31, 41, 48-49 (¶¶ 12-19; 99-101; 139-143); Appellants' Brief (hereinafter "Br.") at 3-4 (emphasis added).) Under the former, appellants claim that InBev is "perceived" by Anheuser-Busch and other market participants as a potential entrant into the U.S. beer market, and that this perception alone ensured that the participants in this market conducted themselves

in a competitive manner. (See Br. at 4.) Under the latter, appellants claim that, absent the merger, InBev would have entered the U.S. market *de novo* by constructing new breweries and developing a nationwide distribution network from scratch.[1] (I App. 36, 38, 49 (¶¶ 50, 67, 140, 141).)

The relevant market is "the production and sale of beer in the United States." (I App. 40 (¶ 80).) The Complaint admits that prior to the merger InBev did not compete in the U.S. beer market or operate any breweries in the U.S. (I App. 30, 36 (¶¶ 17, 55).) In fact, in May 2006 InBev exited the production of beer in the United States when it sold its only U.S. brand, Rolling Rock, and its only U.S. brewery. (I App. 181-82.) Also in 2006, InBev entered into an agreement by which Anheuser-Busch became the exclusive importer of InBev's European brands in the United States. (I App. 36 (¶ 55); I App. 182.)

According to the Complaint, "there are significant barriers to entry in the relevant market, as well as a history of a lack of successful new entry. To the contrary, the relevant market has been characterized by the exit, rather than entry, of new breweries." (I App. 51 (¶ 157).) Additionally, the U.S. beer market is

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1 For reference, the Complaint alleges that Anheuser-Busch operates 12 breweries in the United States producing approximately 4.5 billion gallons of beer in 2007, and has a distribution network of approximately 600 independent distributors/wholesalers. (I App. 33, 34 (¶¶ 30, 38, 40).)

concededly marked by stagnant growth. (I App. 40 (¶ 83) (averaging one percent annual growth over the last ten years).)

In a ruling that was previously the subject of an unsuccessful interlocutory appeal, the district court denied appellants' motion for a preliminary injunction, finding that appellants were "overwhelmingly" unlikely to succeed on the merits of their claim. (Appellees' Appendix – Volume I (hereinafter "I Aple. App.") 104.) The merger, after receiving clearance from the United States Department of Justice, closed on November 18, 2008, whereupon the two companies merged their operations. (Addendum (hereinafter "Add.") 6 n.6, Appellants' Appendix – Volume I (hereinafter "I App.") 181 n.6 (taking judicial notice of DOJ's "approval of the merger"); I Aple. App. 105.)[2] Appellants' suggestion that they now seek "**money damages**" resulting from the completion of the merger (Br. at 5) is neither accurate nor legally permissible. Because appellants are indirect purchasers,[3] they are barred from seeking money damages by the United States Supreme Court's

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2 The assertion that entry of a final judgment in the United States District Court for the District of Columbia "finaliz[ed] the acquisition" (Br. at 10) is erroneous. The only issue before the D.C. court concerned the divestiture of the Labatt brands (a Canadian beer brewed by InBev in Canada that was imported into the U.S) by InBev to address an issue raised by the DOJ concerning competition in three metropolitan areas in upstate New York near the Canadian border – Rochester, Syracuse and Buffalo. (*See* Aple. App. 80-89.) The entry of the consent decree by the D.C. court had no effect on the parties' completion of the merger, which took place on November 18, 2008. (Aple. App. 91-95.)

3 Under the market's three-tier system, brewers sell to wholesalers, who sell to retailers. As consumers, appellants do not purchase beer from brewers.

decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Indeed, appellants previously argued to the district court that they would be irreparably harmed without a preliminary injunction because, as indirect purchasers, money damages would be unavailable. (Appellees' Appendix – Volume II (hereinafter "II Aple. App.") 191 (citing *Illinois Brick*, maintaining that "once Defendants consummate the proposed acquisition…federal antitrust law affords plaintiffs no damage remedy.").)

B. Course of Proceedings

The agreement to merge between Anheuser-Busch and InBev was publicly announced on July 14, 2008. Appellants waited two months to file their "Complaint for Injunctive Relief to Prohibit the Acquisition of Anheuser-Busch by InBev as a Violation of Section 7 of the Clayton Antitrust Act 15 U.S.C. §18." (I App. 25, 56.) After belatedly filing they took no action in the litigation for the next month.

In a good faith attempt to expedite proceedings on an anticipated preliminary injunction motion, Anheuser-Busch and InBev voluntarily produced (without having been served any formal discovery) all of the documents appellants requested – over 400,000 pages. (I App. 239.) The companies also advised appellants that the merger could close as early as November 12, 2008 after Anheuser-Busch shareholders voted on the merger, and offered to agree on a

briefing schedule that would lead to a hearing no later than November 7, 2008, so that the district court would have adequate time to issue a ruling prior to November 12. (I Aple. App. 111.) During an October 23 conference, the court below told appellants that, in light of the fact that the closing could occur as early as November 12, they needed to file "the motion and a memorandum in support very swiftly, if you intend to get some kind of hearing on this." (I App. 213.)

Appellants nevertheless insisted upon waiting until November 3 – just nine days before the Anheuser-Busch shareholder vote – which the Court observed would push the briefing "way beyond the November 12th date which may be decisive in this . . . [and] may render a lot of this moot." (I App. 214.) Despite the fact that the district court court urged appellants to "get realistic about the time frame here" (I App. 214) and invited appellants to "file your motion more quickly" (I App. 222), they elected not to do so.

Contrary to appellants' assertions, the parties never agreed to an "accelerated discovery schedule" (Br. at 5). Anheuser-Busch and InBev did offer to schedule depositions relating to any motion for preliminary injunction after the motion was filed if appellants would reciprocate and agree to make their witnesses available for deposition. (I App. 211-12.) However, appellants never responded to that proposal. (I App. 211-13.) The district court agreed with appellees that commencing depositions before filing the motion would be premature. (I App.

221-22 ("I'm not precluding you from taking a deposition, but if it's a deposition in furtherance of your position on a motion, I think we need to know what the motion is….So if you want to file your motion more quickly, that's fine too").) Appellants then voluntarily withdrew the request for depositions. (I App. 225.)

When finally filed, the motion for preliminary injunction contained little more than bald assertions of counsel, without citation. Not a single declaration of a fact or expert witness was filed in support of the motion. (*See* I App. 7 (Doc. No. 41).) In opposition, Anheuser-Busch and InBev filed declarations from multiple fact witnesses and experts, along with numerous exhibits. (I App. 9-11.) On November 18, 2008, the district court denied appellants' motion for preliminary injunction, concluding that they had failed to satisfy any of the four prerequisites for such relief:

> In sum, this Court views Plaintiffs' characterization [of InBev] as a perceived potential or actual potential competitor in the U.S. beer market as **purely speculative** and the evidence presented is insufficient to warrant granting Plaintiffs' Motion for Preliminary Injunction or holding a hearing regarding their Motion… [T]he evidence presented demonstrates that it is **overwhelmingly likely that Plaintiffs cannot succeed on the merits of their case** and Plaintiffs' Motion for Preliminary Injunction is denied.

(I Aple. App. 103-104.)

Appellants moved for reconsideration which was denied by the district court on December 17, 2008. (I App. 16 (Doc. No. 104).) In addition, a motion to have Anheuser-Busch and InBev hold their assets separate was denied on December 30,

2008. (I App. 16 (Doc. No. 109).) On January 19, 2009 appellants appealed these three orders to this Court and filed an "Emergency Motion for a Stay Pending Appeal." A panel of the Eighth Circuit held that appellants missed the deadline for filing their Notice of Appeal as to the motions for preliminary injunction and reconsideration, and dismissed the appeal of those orders for lack of jurisdiction. (I Aple. App. 167.) At the same time, the Court affirmed the order denying appellants' motion to hold the companies' assets separate. (I Aple. App. 167.)

On February 17, 2009, Anheuser-Busch and InBev moved the district court for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (I App. 20 (Doc. No. 139)), and for a stay of discovery pending the outcome of the Rule 12(c) motion. (I App. 20 (Doc. No. 141).) Appellants' response was to unilaterally set on short notice depositions of InBev CEO Carlos Brito and former Anheuser-Busch CEO August Busch IV. (I Aple. App. 169.) Anheuser-Busch and InBev were thus forced to seek a temporary protective order until the district court could rule on their already pending motion for a stay of discovery. (I Aple. App. 169.) The district court granted the temporary protective order on March 4, 2009. (I App. 141.) Five days later, after the completion of briefing, the district court granted the motion for a stay of discovery pending resolution of the 12(c) motion. (I App. 142.)

C. Disposition Below

On August 3, 2009, the district court granted judgment on the pleadings and dismissed the case with prejudice. (I App. 187.) It held that the Complaint failed to allege adequate facts to plausibly establish that InBev was a perceived potential competitor (I App. 180-84) or that InBev was an actual potential competitor in the U.S. beer market (I App. 185-87). The district court also denied a request for leave to amend, which appellants added at the tail end of their opposition brief with no indication of what the amendment would be, finding its late assertion to be procedurally inadequate and because there had already been "extensive and lengthy briefing of all parties as to the legal basis for the claims asserted." (I App. 187.) The district court entered judgment dismissing the case with prejudice the following day. (I App. 188.)

STATEMENT OF FACTS

On June 11, 2008, InBev made an unsolicited offer to purchase Anheuser-Busch at a price of $65 per share. (I App. 42 (¶¶ 108, 109).) After Anheuser-Busch rejected this initial offer, InBev made a revised offer of $70 per share on July 11, for a total purchase price of approximately $52 billion. (I App. 45-46 (¶¶ 123-126).) On that same date, Anheuser-Busch agreed in principle to InBev's offer and formally announced its Board of Directors' acceptance of the offer on July 14, 2008 in a joint press release with InBev. (I App. 45, 46 (¶¶ 123, 125).)

According to the Complaint, InBev did not "compet[e] directly in the United States beer market." (I App. 30 (¶¶ 17).) As an undisputed matter of public record, InBev exited the business of producing beer in the U.S. in 2006 when it sold its Latrobe, Pennsylvania brewery, shortly after divesting its only American beer brand, Rolling Rock. (I App. 181-82.) Later that same year, Anheuser-Busch and InBev entered into an agreement whereby Anheuser-Busch became the exclusive importer of InBev's European brands in the U.S. (I App. 35, 36, 39 (¶¶ 48, 55, 72).) Thus, at the time of the merger, InBev had only a 0.7% share of the U.S. beer market, largely consisting of its Canadian brand, Labatts, that was being imported into this country by InBev USA. (I App. 40 (¶ 93).) The Complaint also alleges that the concentration of the market "remains the same if InBev acquires Anheuser-Busch." (I App. 29 (¶ 11).)

On November 12, 2008, Anheuser-Busch shareholders overwhelmingly voted to approve the transaction. After obtaining clearance from the United States Department of Justice ("DOJ") on November 14, the merger closed on November 18, 2008. (I Aple. App. 105.) Pursuant to a Consent Decree with DOJ, InBev divested its Labatts brand in the U.S. to address an issue raised by DOJ relating to three metropolitan areas in upstate New York near the Canadian border. (I Aple. App. 86-89.)

SUMMARY OF ARGUMENT

The judgment below should be affirmed. The district court correctly found that appellants' conclusory allegations fail to satisfy the pleading requirements set forth in *Twombly* and *Iqbal* and are materially undermined by the specific facts and allegations concerning the market contained elsewhere in the Complaint and other undisputed facts in the public record. It therefore properly concluded that the Complaint should be dismissed for failure to state a plausible claim for relief.

In the process of ordering dismissal, the district court did not in any respect abuse its discretion. It properly took judicial notice of public and undisputed facts. It properly postponed the depositions of the CEOs of InBev and A-B that had been unilaterally noticed in an attempt to frustrate appellees' request to stay discovery pending consideration of the Rule 12 motion. It thereafter properly stayed all discovery while considering that dispositive motion. And its denial of appellants' belated perfunctory request for leave to amend was clearly a proper exercise of judicial discretion in the circumstances.

Appellants unjustifiably argue that the district court had a "predisposition" and "obstructed" appellants. (Br. at 16-17.) Their unfortunate accusations grossly mischaracterize the record below and the nature of the district court's rulings. For example, while they accuse the court of "unnecessary delay." (Br. at 16.) But any delay is, in fact, properly laid entirely at the feet of appellants. Having initiated

this lawsuit ostensibly to enjoin the merger, they waited four months before seeking a preliminary injunction. Appellants were repeatedly informed that the merger could close as early as November 12, and still they delayed. They were urged by the district court to file their motion for preliminary injunction expeditiously, and still they waited. Appellants even delayed filing their appeal of the court's denial the preliminary injunction motion, prompting this Court to dismiss it as untimely.

The suggestion that appellants did not have their "day in court" (Br. at 17) is equally unsupportable. Notwithstanding the DOJ's review and clearance of the merger, appellants made repeated attempts to block the transaction – a motion for preliminary injunction, a motion for reconsideration, and a motion to hold the two companies' assets separate. Each of these motions was fully considered and properly denied by the district court after "extensive and lengthy" briefing. That the decisions were not favorable to them does not mean that appellants did not have access to the court.

Ultimately, however, appellants' *seriatim* filings were as lacking in substance as the Complaint itself. The merger had no effect on competition, as the Complaint makes clear, let alone the requisite substantial effect. 15 U.S.C. § 18 (Section 7 of the Clayton Act prohibits only those mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."). The

desperate attempt to resurrect theories of "potential competition" not considered by courts in decades fared no better, particularly in light of InBev's public withdrawal from the U.S. market in the years immediately prior to the merger.

Appellants are thus entitled to no relief on this appeal, and certainly not the order they now seek from this Court authorizing money damages. This sort of convenient revisionism – not unlike appellants' last minute request to revise their Complaint upon realizing that their empty conclusory allegations were woefully deficient – is nothing more than a clumsy attempt to manipulate the judicial system and should not be countenanced by this or any other Court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ENTERED JUDGMENT ON THE PLEADINGS

A Rule 12(c) motion for judgment on the pleadings is evaluated under the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990); *Wishnatsky v. Rovner*, 433 F.3d 608, 610 (8th Cir. 2006). The movant is entitled to the relief requested where "no material issue of fact remains to be resolved" and judgment should be entered "as a matter of law." *See Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008) (*citing Faibisch v. University of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002)). An order granting a motion for

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

In deciding a Rule 12(c) motion, a district court must accept all well-pled facts as true, but "is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Although a plaintiff "need not set forth 'detailed factual allegations,' or 'specific facts' that describe the evidence to be presented, the complaint must include sufficient factual allegations to provide the grounds on which the claim rests." *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) (en banc) (internal citations omitted).

Section 7 of the Clayton Act prohibits only those mergers or business combinations whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Because "[Section] 7 deals in 'probabilities,' not 'ephemeral possibilities,'" *Marine Bancorp.*, 418 U.S. at 622-23 (citation omitted), a complaint must plead sufficient facts showing that a substantial lessening of competition will be "sufficiently probable and imminent" to warrant relief. *See id.* at 623 n.22; *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999). As this Circuit stressed in *Tenet Health Care*:

> We are mindful that competition is the driving force behind our free enterprise system and that, unless barriers have been erected to constrain the normal operation of the market, '**a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces**, bringing about the very ills the antitrust laws were meant to prevent.'

Id. at 1055 (quoting *United States v. Syufy Enterprises*, 903 F.2d 659, 663 (9th Cir. 1990)) (emphasis added).

In *Twombly*, the U.S. Supreme Court further clarified the standard that an antitrust complaint must meet in order to survive a motion directed at the pleadings, explaining that the "[f]actual allegations must be enough to raise a right to relief **above the speculative level**." 550 U.S. at 555 (emphasis added). A plaintiff must provide "more than labels and conclusions," the Court declared, "and a formulaic recitation of the elements of a cause of action will not do." *Id.* Instead, *Twombly* mandates that an antitrust complaint set forth facts "that affirmatively and plausibly suggest that the pleader has the right he claims . . ., rather than facts that are merely consistent with such a right." *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). But even before *Twombly*, this Circuit required that "[t]he essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint." *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir. 1998) (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988)).

Appellants argue that dismissal of an antitrust action before discovery is "disfavored" in this Circuit, relying on Eighth Circuit law that predates *Twombly*. (Br. at 21 (citing *Huelsman v. Civic Center Corp.*, 873 F.2d 1171, 1174 (8th Cir. 1989)). To begin with, this Circuit in *Huelsman* affirmed the dismissal of antitrust claims on the pleadings. Moreover, in light of the Supreme Court's ruling in *Twombly*, and in particular its concern over the cost of discovery in antitrust cases, the heightened dismissal standard referenced in *Huelsman* has been tempered considerably. *Twombly*, 550 U.S. at 558 ("Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") (internal citations omitted). Finally, whatever force *Huelsman* may continue to have, it is inapposite here, where appellees voluntarily produced over 400,000 pages of documents (all of the documents requested) on the same day they answered the Complaint. (I App. 239 (as appellants' counsel conceded "…all of the relevant documents were supposed to have been submitted to the Government under Hart-Scott-Rodino. Those documents have been given to [appellants]…"). Appellants have had access to significant discovery for over a year and have availed themselves of these documents to seek a preliminary injunction and a "hold separate" order from the district court. Thus, the central concern expressed in

Huelsman, that the evidence of potential anticompetitive conduct is in the hands of the defendants and outside plaintiffs' reach, is simply not present on the facts here.

A. The Complaint Fails to State a Claim Under Prevailing Section 7 Principles

On appeal, appellants do not advance, as they cannot, any allegation that the merger violates Section 7 under traditional principles of merger analysis. As noted by the district court, the Complaint alleges that InBev does not presently compete in the U.S. beer market and that existing market concentration remains unchanged after the merger. (I App. 179 n.4.) In a Section 7 case, it is ordinarily necessary for a plaintiff to be able to show that the merger would create "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." *FTC v. Freeman Hosp.*, 69 F.3d 260, 268, n.11 (8th Cir. 1995) (alteration in original; emphasis added) (*citing United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963)). The prevailing analytical framework for determining the legality of mergers and acquisitions stems from the well-accepted principle that, absent a substantial increase in concentration, mergers, even in highly concentrated markets, are "unlikely to have adverse competitive consequences and ordinarily require no further analysis." U.S. Department of Justice & Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (1992 & revised 1997), 57 Fed. Reg. 41552 § 1.51.

The Complaint here nowhere alleges that the merger would increase concentration in the U.S. beer market, let alone substantially so. On the contrary, by appellants own admission, InBev is "generally not competing directly in the United States beer market." (I App. 30 (¶ 17).) Therefore, appellants concede that market concentration under the most commonly accepted antitrust measurement, "the HHI [,] **remains the same if InBev acquires Anheuser-Busch**." (I App. 29 (¶ 11) (emphasis added).)[4]

B. The Complaint's "Potential Competition" Claims Cannot Survive the Twombly Standard

Eschewing traditional merger analysis, appellants allege that the merger violates Section 7 under antiquated "potential competition" theories. The doctrine of "potential competition" has been criticized by courts and commentators alike due to the inherently speculative nature of the legal analysis. For example, the Seventh Circuit has remarked that "[a]ssessing the significance of potential competition is difficult for the best economists and would be nearly impossible as a subject of trial." *S. Austin Coalition Cmty. Council v. SBC Commc'ns., Inc.*, 274 F.3d 1168, 1173 (7th Cir. 2001).

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4 The Herfindahl-Hirschman Index ("HHI") is a statistical measure of market concentration utilized in the Merger Guidelines of the Justice Department and Federal Trade Commission, and is calculated by summing the square value of the individual market shares of all market participants. *See FTC v. Tenet Health Care Corp.,* 17 F. Supp. 2d 937, 946 (E.D. Mo. 1998), *rev'd on other grounds,* 186 F.3d 1045 (8th Cir. 1999).

Under a "**perceived** potential competition" claim, a plaintiff must demonstrate that, in an oligopolistic market, the acquiring firm is perceived by market participants as a likely potential entrant into the market, and this perception "in fact tempered oligopolistic behavior." *Marine Bancorp*. 418 U.S. at 625. The focus of a "perceived potential competition" claim is thus on the acquiring firm's impact on **present competition**. An "**actual** potential competition" claim requires proof that, absent the transaction, the acquiring firm would actually enter the market and this entry would likely substantially produce deconcentration of the market. *Yamaha Motor Corp. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981). "Actual potential competition" claims are thus focused on the acquiring firm's effect on **future competition** in the absence of a merger.

The Supreme Court has explicitly reserved decision on the question of whether the "actual potential competition" theory is sufficient to state a viable claim under Section 7 of the Clayton Act. *Marine Bancorp.*, 418 U.S. at 625 n.28. As the Second Circuit has observed in *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980):

> One possible reason for the Supreme Court's reluctance to embrace the doctrine is that it rests on speculation about the future conduct and competitive impact of a firm currently outside the market and perhaps intending to remain so. Even if the likelihood of a firm's entry is a probability, as distinguished from an 'ephemeral possibility,' see *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962), its potential entry does not promote existing competition, since at most it may become a competitor in futuro.

Id. at 504.

The same misgivings have been voiced by leading antitrust commentators in these terms: utilization of potential competition theories has "largely fallen into disuse since the 1980s," in large measure because these theories "require[] tribunals to pile one highly speculative conclusion upon another, resulting in an unacceptable propensity for error." *See* Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1134 (2d ed. 2003).

Predictably, the Complaint's reliance here on the actual and potential competition theories is grounded entirely on conclusory allegations of a highly speculative nature. The district court thus unsurprisingly held that the Complaint did not state a valid Section 7 claim. (I Aple. App. 102 n.3 (noting the "speculative nature of Plaintiffs' theory…"); *see Twombly*, 550 U.S. at 555 (the allegations in the complaint must raise the right to relief "above the speculative level").

1. Appellants' "Actual Potential Competition Claim" is Not Plausible

a. The Complaint Fails to Plausibly Allege that InBev Was a Potential De Novo Entrant to the U.S. Market

To state an "actual potential competition" claim, plaintiffs must plead facts establishing, among other things, that (1) absent the transaction, InBev likely

would have entered the market *de novo* "in the near future", and (2) such entry by InBev "carried a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects." *Tenneco, Inc*. v. *FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (citing *Marine Bancorp.*, 418 U.S. at 633); *see Yamaha*, 657 F.2d at 977. The Complaint fails to do either.

As the Supreme Court made clear, it is not enough merely to state that "InBev is well-equipped and well financed to be able to enter the market *de novo*, building its own breweries and establishing its own national distribution network," (I App. 30 (¶ 14)), and that "[i]n the absence of the proposed acquisition, InBev will probably enter the United States market *de novo*." (I App. 48 (¶ 139).) Under *Twombly*, "a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555.

Nowhere does the Complaint allege that the supposed entry by InBev into the U.S. market was likely to occur "in the near future." *Tenneco*, 689 F.2d at 352; *Raybestos-Manhattan, Inc. v. Hi-Shear Indus.*, 503 F. Supp. 1122, 1135 (E.D.N.Y. 1980) (plaintiffs must establish that the defendant "would enter the . . . market in the near future"). There is no suggestion that any such entry by InBev was imminent, nor even a hint as to when any such entry might be expected to occur.

On the contrary, the Complaint pleads facts supporting the district court's observation that any claim of imminent *de novo* entry is "implausible." (I App.

183.) There are allegations of "significant barriers to entry, as well as a history of a lack of successful new entry" in the U.S. beer market, and averments that "the relevant market has been characterized by the exit, rather than the entry, of breweries." (I App. 51 (¶ 157).) As appellants themselves acknowledge (*see*, *e.g.*, I App. 35, 36, 39 (¶¶ 48, 55, 72)), InBev took very public steps to exit the U.S. market, by selling its only U.S. brand and brewery, and entering into a long-term exclusive import agreement with Anheuser-Busch. (I App. 181-82.) Thus, the district court did not need to "draw an inference" that InBev withdrew from the market. (Br. at 28.) Rather, the withdrawal is a matter of indisputable fact – and it is fully consistent with the allegations in the Complaint. (*See*, *e.g.*, I App. 36 (¶¶ 55, 56) ("InBev does not presently operate any breweries in the United States.")); *Little Gem Life Scis., LLC v. Orphan Med., Inc.* 537 F.3d 913, 916 (8th Cir. 2008) (the court's consideration of matters outside the pleadings that did contradict the complaint and were not critical to the outcome of the motion was not error).

Under these circumstances, therefore, appellants' canned recitation of probable *de novo* entry by InBev does not come close to "rais[ing] a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *see also FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 299 (4th Cir. 1977) (allegations that the acquiring firm would have entered the market absent the merger "is overborne by the fact that [acquiring firm] has just withdrawn from the [relevant] market …"); I Aple.

App. 103 (finding appellants allegations of InBev "as a perceived or actual potential competitor in the U.S. beer market as **purely speculative**") (emphasis added).

Additionally, the Complaint fails to allege InBev's hypothetical entry into the U.S. beer market "carried a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects." *Tenneco*, 689 F.2d at 352. Nowhere does the Complaint describe how, when, or even why InBev's alleged *de novo* entry would increase competition in the U.S. market. The district court had occasion to assess appellants' suppositions regarding the procompetitive effects that would be lost by elimination of InBev as an "actual potential entrant" and predictably found those allegations to be "purely speculative." (*See* I Aple. App. 103-105 (finding plaintiffs' allegations "about a potential increase in price and decrease in variety of beer choices and beer quality" as a result of the merger "purely speculative" and "too remote").)

b. This Court's Opinion in Yamaha Does Not Support Reversal

While appellants rely heavily on the opinion in *Yamaha Motor Corp. v. FTC*, 657 F.2d 971 (8th Cir. 1981), it is of limited precedential value here. The case reached the Circuit Court on appeal from a decision from the Federal Trade Commission ("FTC"), and thus the Court did not pass judgment on the FTC's legal findings. 657 F.2d at 977 n.7. Indeed, the Court specifically recognized that the

"Supreme Court has yet to rule specifically on the validity of the actual-potential-entrant doctrine." *Id*. at 977. Far from "adopting" that doctrine (Br. at 22), the Eighth Circuit held only that the FTC's finding "is supported by substantial evidence on the record as a whole." *Yamaha*, 657 F.2d at 980.

There are also key factual differences distinguishing *Yamaha* from the case at bar. First, Yamaha had twice attempted to enter the U.S. market *de novo* in the three years prior to entering into the challenged joint venture. *Id.* at 978-79. By contrast, there is no allegation here that InBev ever attempted *de novo* entry in the U.S. As the district court noted, the undisputed facts – both alleged in the Complaint and as a matter of public record – establish that InBev took affirmative steps to exit the U.S. market by selling its only U.S. brand and brewery, and then entering into an exclusive import agreement with Anheuser-Busch for its European brands. (I App. 181-83.) Moreover, appellants themselves allege that InBev's history has been characterized not by *de novo* entry into new markets, but by a series of mergers and acquisitions. (I App. 35, 37 (¶¶ 45, 59)

Second, the barriers to entry in *Yamaha* were far less than those alleged by appellants here. Specifically, because of Yamaha's long history of competition and brand presence in the U.S, Yamaha, unlike InBev, did not need to construct new factories, 657 F.2d at 974, or build a nationwide distribution network, 657 F.2d at 978. Yet InBev's entry into the U.S. market, according to the Complaint, was

foreseen by appellants as occurring "in a highly competitive fashion including the construction of breweries and the development of its own independent distribution network." (I App. 36 (¶ 50).) No factual basis for this entirely ungrounded speculation is offered.

Third, contrary to appellants' suggestion, the Complaint does not allege that "InBev has the managerial expertise to compete in the United States," as did Yamaha. (Br. at 25.) Rather, the allegations in the Complaint underscore that InBev had little to no experience with *de novo* entry, but rather, had a history of growth through acquisitions. (I App. 37 (¶ 59) (InBev formed in 2004 from a merger between AmBev and Interbrew); I App. 35 (¶ 45) ("InBev was created from a series of mergers and acquisitions").) As with so much of their Complaint, these allegations render the conclusions about "*de novo*" entry "implausible."

Finally, the market pled by appellants differs significantly from that in *Yamaha*, which was characterized by "rapid growth in sales and high profits." 657 F.2d at 974. The Complaint here describes the market for beer in the U.S. as stagnant (I App. 40 (¶ 83) (alleging average annual growth of 1% over 10 years), with a history of exit, not entry, and high barriers to entry (I App. 51 (¶ 157)).

c. Appellants Cannot Save Their Speculative Theory with Conclusory Allegations

The Complaint does not contain a factual basis for the conclusory allegation that "InBev has announced its intention to enter the United States market," offered

without giving any details or insight into the substance of those announcements. (I App. 30 (¶ 12)); *Double D Spotting*, 136 F.3d at 558 ("The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms…"). These conclusory (and irrelevant) allegations are devoid of any factual support and fall far short of meeting the pleading requirements both before and after *Twombly*.[5]

Seeking to fill that void, appellants rely on an announcement from a "2007 InBev press release," conveniently cropped to better serve the "intent" hypothesis. (Br. at 26 (quoting I App. 39 (¶ 73).) The full quotation from the Complaint, however, exposes the truth that appellants want to hide; it says nothing about *de novo* entry, but rather confirms that InBev's "strategy is to **strengthen its local platforms** by building significant positions in the world's major beer markets." (I App. 39 (¶ 73) (emphasis added).) Similarly, paragraph 62 of the Complaint (Br. at 26) nowhere describes InBev's goal as becoming a player in the U.S., let alone a major one. (I App. 37.)

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5 Appellants also cite to paragraph 71 of the Complaint for the proposition that InBev has had a "long-term goal of becoming a major player in the production and sale of beer in the United States." (Br. at 26.) But naked recitation of that conclusory statement (I App. 39 ¶ 71) is precisely the sort of speculative underpinning that has caused courts and commentators alike to find wanting a Section 7 claim resting on an "actual potential competition" theory. *See* discussion *supra* at pp. 18-20.

Indeed, whenever appellants attempt to offer anything more than the most conclusory allegations, the arguments do not withstand scrutiny. For example, citing paragraph 68 of the Complaint, appellants claim that "in 2004, InBev's CEO even categorized entering the United States market as 'our dream.'" (Br. at 26.) In fact, appellants are deliberately misquoting a 2004 magazine article that they themselves filed with the district court as part of their preliminary injunction briefing. (II Aple. App. 210.) The statements of InBev's then-CEO in that article, when read in their entirety, do not, as appellants allege, characterize "entering the United States as 'our dream.'" (Br. 26). Quite the opposite, the full quotation publicly states that the 2004 acquisition of the Canadian brand Labatts "**completes** our dream of becoming a **pan-American player**." (II Aple. App. 220.) In that same article, InBev's CEO publicly states that "we're not going head-to-head with Budweiser, Miller, and Coors. That would be suicidal." (II Aple. App. 220.) Indeed, once one moves beyond the self-serving wordsmithing, the one thing starkly apparent from InBev's "dream," as is clear from the full quotation, is that it did not include *de novo* entry into the U.S. market.

The district court's finding that appellants' actual potential competition theory is inadequately grounded on demonstrably credible facts and thus cannot

survive judgment on the pleadings is in full accord with the leading precedents of this Court and the Supreme Court, and should be reaffirmed.[6]

2. Appellants' "Perceived Potential Competition" Claim is Not Plausible

The focus of a perceived potential competition claim is on the **present** effect of the distant acquiring firm on competitors already in the market. *Marine Bancorp.*, 418 U.S. at 624-25. Thus, to state a viable "perceived" potential competition claim, appellants must allege sufficient facts to affirmatively and plausibly demonstrate, at a minimum, that InBev **both** "is (1) perceived by existing firms in the market as a potential independent entrant, **and** (2) has exercised a tempering impact on the competitive conduct of existing sellers." *See United States v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980) (emphasis added). The Complaint lacks factual allegations supporting either of these essential elements.

We suspect that appellants recognize as much, for, in arguing their perceived potential competition theory, they badly misstate the Supreme Court holdings in *Falstaff* and *Marine Bancorp.*, presumably in hope of altering the standard of proof. Thus they maintain that to state a claim they need only show: (1) that

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6 While Appellants are not above referencing findings by the District Court regarding the "perceived potential competition" claim to criticize rejection below of their "actual potential competition" claim (Br. at 27, citing Add. 9; I App. 84), there was no such confusion on the part of the District Court, nor any mistake in its separate analysis of the two theories.

InBev had the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant into the U.S. market, and (2) that its presence on the periphery of that market "likely" or "probably" had a procompetitive effect. (Br. at 35, 39.) However, even under this contrived, legally erroneous standard, appellants have failed to plead a plausible claim.

a. The Complaint Does Not Plausibly Allege That InBev Was Perceived as a Potential De Novo Entrant

As to the first of these essential elements, appellants offer only the bald assertions that "Anheuser-Busch has been well aware of InBev's intention to enter the United States market" (I App. 30 (¶ 13)), and that "Anheuser-Busch perceives and understands and believes that InBev is ready, willing and able to enter the United States market." (I App. 38 (¶ 64).) These conclusory observations provide only the very "formulaic recitation of the elements of a cause of action" that *Twombly* declares "will not do." *Twombly*, 550 U.S. at 555.

Neither Anheuser-Busch nor any other rational market participants in the U.S would have perceived InBev as a potential *de novo* entrant at the time of the merger. InBev's sale in 2006 of its only U.S. brewery (in Latrobe, Pennsylvania) along with the Rolling Rock brand, for example, clearly signaled to U.S. brewers that InBev had no intention of competing in the U.S. with its own breweries or domestic beers. (*See* I App. 181-82; *see also* I Aple. App. 100-101.) Furthermore,

the Complaint itself repeatedly asserts that InBev "trades in the United States through an exclusive Import Agreement with Anheuser-Busch." (I App. 36, 39 (¶¶ 55, 72).) This would have clearly signaled to U.S. brewers, especially Anheuser-Busch, that InBev had no intention of forming a new nationwide distribution system.

In the face of these indisputable facts, appellants resort to mischaracterizing the district court's rulings. The court below did not hold, as appellants claim, that the import agreement was a "complete and total bar to InBev's entry." (Br. at 29.) Rather, the district court found that "[i]t is implausible that InBev would enter or attempt to enter *de novo* a market where it would be precluded from distributing some of its most recognized and marketable brands." (I App. 183.) In short, no rational market participant would expect InBev to construct new breweries in a market it had just exited and reconstitute a nationwide distribution network it had just abandoned, and which appellants themselves allege is characterized by both stagnant growth and high barriers to entry. *See Siemens*, 621 F.2d at 507 (*de novo* entry is unlikely where, as here, the market is characterized by "slow or gradual growth").

Appellants repeatedly argue that the sheer size of InBev and its supposed capabilities adequately aver that InBev was able to enter the U.S. beer market *de novo*. (Br. at 37 (citing I App. 38, 48, 49 (¶¶ 65, 66, 67, 139-141)).) Yet, by

appellants' own account, InBev has been big for some time, but has never developed a presence in the United States despite its size. (I App. 30, 37 (¶¶ 17, 59).)

Even under appellants' reformulated standard that argues InBev had the "characteristics, capabilities, and economic incentive" to enter the U.S. beer market *de novo,* no factual support can be found in the Complaint. First, it is belied by the Complaint's allegations that InBev does not compete in the U.S. market. (I App. 30, 36 (¶¶ 17, 55).) Moreover, the allegations appellants cite in support of this assertion are all to no avail. They exclusively refer to InBev's size (I App. 35 (¶¶ 44, 47), InBev's operations and performance **outside the U.S. market** (I App. 36-37 (¶¶ 51-55, 57-58, 74, 77), or conclusory allegations that need not be accepted as true. (*See* I App. 38 (¶ 63) ("InBev is ready, willing and able to enter the United States market.").)

Falstaff does not excuse appellants' failure to allege with sufficient factual basis that InBev attempted or intended to enter the market, nor does it render evidence of InBev's subjective intent irrelevant to the "focus of the analysis." (Br. at 36.) The Supreme Court in *Falstaff* did not dispense with subjective intent. To the contrary, it found that such evidence was relevant, although "not necessarily the last word in arriving at a conclusion . . . ." 410 U.S. at 535-36. In any case, the district court relied on undisputed, objective, economic facts (virtually all of it pled

in the Complaint) – the closing of the U.S. brewery, the sale of the domestic brands, the import agreement with Anheuser-Busch, the stagnant industry growth, the high barriers to entry – to conclude that no reasonable market participant would perceive InBev as a potential entrant. (I App. 180-83.) *Falstaff* fully supports the district court's reasoning. 410 U.S. at 533 (remanding the case because "if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under § 7").

To the extent appellants recast their argument to maintain that "it is not the duty of the district court to **disbelieve** plain factual allegations in the complaint" (Br. at 38 (emphasis in original), this in no way justifies reversal. This appeal is not about disbelieving plain factual allegations; rather, it concerns the district court's right to reject conclusory allegations that are not plausible. As *Twombly* and its progeny make clear, the district court need not accept the conclusory allegations, without more, that competitors perceive InBev as a potential entrant (I App. 38)[7] or

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7 Appellants' reference to the "competitor's **quoted statement** admitting that perception" (Br. at 38 (emphasis in original) harkens back to statements made in Anheuser-Busch's Complaint in *Anheuser-Busch Cos., Inc. v. InBev NV/SA*. (*See* Br. at 37 (citing I App. 44 (¶ 122(5))).) Yet, that complaint, a copy of which Appellants filed with the District Court below, makes clear that Anheuser-Busch perceived InBev as an "entrant" **through the acquisition of Anheuser-Busch**, a perception exactly opposite to *de novo* entry. (See I Aple. App. 13-14 (¶ 17) ("InBev has indicated that Anheuser-Busch . . . **would make an attractive**

that InBev "has had a long-term goal of becoming a major player in the production and sale of beer in the United States." (Br. at 39 (*citing* I App. 39 (¶ 71).)

Finally, as previously noted, the Complaint explicitly acknowledges that the U.S. beer market is characterized by "significant barriers to entry," lack of new entry, and a history of "exit" by producers. (I App. 51 (¶ 157)); s*ee Marine Bancorp*, 418 U.S. at 639-40 (holding that, because the existing competitors presumably were aware of the significant regulatory barriers to entry, it was unlikely that they viewed the acquiring bank as a potential entrant and, therefore, unlikely that the acquiring bank exercised a procompetitive influence on the market from the wings); *Atlantic Richfield*, 549 F.2d at 298 ("entry *de novo* would be tremendously expensive, time-consuming and unusually difficult, so that it may be fairly concluded that *de novo* entry is not readily feasible"). This conclusion is further buttressed by appellants' acknowledgment that the relevant market has only a flat growth rate, thereby making it especially unattractive to *de novo* entry. *See Siemens*, 621 F.2d at 507 (*de novo* entry is unlikely where, as here, there is "a stable market or one expanding at a comparatively glacial pace."); *Atlantic Richfield*, 549 F.2d at 294 n.8 (rejecting potential competition claim in a market that "is not rapidly expanding but presently is stagnant").

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acquisition candidate"); I Aple. App. 14 (¶18) ("To achieve [InBev's] ultimate goal – the **acquisition of Anheuser-Busch** . . . .") (emphasis added).)

Thus, specific allegations contained in the Complaint demonstrate that appellants' actual potential competition theory lacks plausibility. *Twombly*, 550 U.S. at 555, 570 (without factual allegations sufficient "to raise a right to relief above the speculative level," thereby elevating the potential competition claims "from conceivable to plausible," no cognizable antitrust claim has been asserted); *Stalley*, 509 F.3d at 521.

b. The Complaint Does Not Plausibly Allege that InBev's Presence on the Periphery Had Any Present Affect on the Market

Equally fatal to appellants' "perceived" potential competition claim is the omission in the Complaint of any specific facts that even begin to suggest that "the acquiring firm's [InBev's] presence on the fringe of the target market **in fact** tempered oligopolistic behavior on the part of the existing participants in the market." *Marine Bancorp.*, 418 U.S. at 625 (emphasis added); *see also Siemens*, 621 F.2d at 509 (emphasis added) ("[T]he absence of any **present** procompetitive influence of [a potential competitor's] presence on the fringe is fatal to [a] claim under the 'perceived' potential competition doctrine"); *Raybestos-Manhattan*, 503 F. Supp. at 1135 (rejecting potential competition claim where "Plaintiff has presented no evidence that [the acquirer], by waiting in the wings of the [relevant] market, has any present effect on that market by constraining oligopolistic excesses for fear of encouraging its entry") (citation omitted); *United States v. Falstaff*

Brewing, 383 F. Supp. 1020, 1024 (D.R.I. 1974) (rejecting claim in the absence of any evidence that the acquiring company "'exerted beneficial influence on competitive conditions in th[e] market.'") (quoting *Falstaff,* 410 U.S. at 532-33).

The naked assertion that "InBev's presence on the periphery of the market . . . has been an important consideration in the pricing and marketing decisions of Anheuser-Busch and other American brewers or importers in the United States" (App Br. at 40 (citing I App. 30 (¶ 15))) is again no more than an unsupported "formulaic recitation" of an essential element and, therefore, insufficient to state a claim under *Twombly*. Similarly conclusory is the Complaint's assertion that "InBev exerts pro-competitive and beneficial influence on the marketing of beer in the United States." (App Br. at 40 (citing I App. 30 (¶ 49)).) The Complaint does not contain any factual allegations as to when or how InBev's presence outside the market might have influenced any U.S. competitor's behavior, much less which of the hundreds of beers in the U.S. were affected.

The only specific procompetitive effect argued by appellants in their brief – Anheuser-Busch's 2007 advertising expenditures – was not alleged in the Complaint to be the result of InBev's presence "in the wings." (*Compare* Br. 40 *with* I App. 34 (¶¶ 41, 42)).) Rather, the Complaint merely states that Anheuser-Busch spent $378 million on advertising in 2007 (I App. 34 (¶ 42)); there is no allegation that any of that money was spent, to quote appellants, "as a result of

InBev's presence." (Br. at 40.) Nor is there any allegation that these advertising expenditures were increased disproportionately in comparison to prior years because of InBev.

The allegation that "[o]ne of the combined company's first orders of business was to increase prices" (Br. at 15) is demonstrably untrue. In June 2008, weeks **in advance** of any agreement to merge with InBev, Anheuser-Busch **publicly stated** its intent to increase prices later that fall. (I Aple. App. 43 (June 2008 8-K in which Anheuser-Busch disclosed its intent to accelerate its "2009 price increase plan" to occur in September and October 2008).)

Appellants accuse the district court of "cherry picking" conclusory allegations from the Complaint and ignoring, for example, paragraph 15, which alleges that "InBev's presence on the periphery of the market…has been an important consideration in the pricing and marketing decisions of Anheuser-Busch and other…American brewers." (Br. at 41 (citing (I App. 30 (¶ 15)).) However, the district court specifically considered paragraph 15, among others, and held that "[s]uch conclusory allegations are insufficient under *Twombly, Iqbal*, and their progeny to survive Defendants' Motion for Judgment on the Pleadings." (I App. 183.) Though appellants argue that other, similarly conclusory allegations, "are not legal conclusions, they are stated allegations of fact" (Br. at 42), it is well settled that a court is free to reject legal conclusions "cast in the form of factual

allegations." *Wiles,* 280 F.3d at 870. The court below did just that, as both this Circuit and the Supreme Court have directed. *Twombly*, 550 U.S. at 555, *Gregory*, 565 F.3d at 473.

It is, therefore, abundantly clear that appellants' own pleadings and the present litigation's public record compel the conclusion reached by the court below – *i.e.,* that "Plaintiffs Complaint is devoid of alleged facts to support a finding that InBev's presence on the fringe of the U.S. beer market somehow influenced or tempered oligopolistic behavior by the existing U.S. beer market participants." (I App. 180; *see also* I Aple. App. 103 ("Plaintiff's characterization [of InBev] as a perceived potential or actual potential competitor in the U.S. beer market is purely speculative.").) Under *Twombly* and *Iqbal*, the district court was thus fully justified in entering judgment on the pleadings under Fed. R. Civ. P. 12(c). *Twombly*, 550 U.S. at 555 (the failure to set forth "a plausible factual context" in support of conclusory assertions of anti-competitive behavior is fatal to an antitrust claim); *Stalley,* 509 F.3d at 521 (same; *citing Twombly*).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CITING TO FACTS PROPERLY THE SUBJECT OF JUDICIAL NOTICE

The argument that the district court "relied extensively" on four documents outside the pleadings (Br. 45) is not accurate and does not provide a basis for reversal. To begin with, the district court did not rely on an "internal Anheuser-

Busch document"[8] in dismissing the Complaint. On the contrary, the district court identified the documents and facts of which it was taking judicial notice: "This Court takes judicial notice of InBev's press releases and annual reports. . . . . This Court also takes judicial notice of the Department of Justice's approval of the merger and its finding that the merger does not violate Section 7 of the Clayton Act." (I App. 181 n.7.) Nor was the district court's reliance on these materials "extensive." Indeed, the main point for which the materials were cited – InBev's sale in 2006 of the Rolling Rock brands and its only U.S. brewery – is without question a proper subject of judicial notice. *See MacGregor v. Mallinckrodt*, 373 F.3d 923, 934 (8th Cir. 2004) ("We find no abuse of discretion where the judicially noticed fact was not actually challenged nor capable of a reasonable challenge.")

It is well established that a district court "has complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." *Stahl v. United States Dep't of Agric.*, 327 F.3d 697, 701 (8th Cir. 2003) (citing 5A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1366, at 491 (2d ed. 1990). Here, the district court's decision to take judicial notice of these materials for a limited purpose should not

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8 The document, mentioned only briefly in the court's decision, had been submitted in connection with the preliminary injunction motion to show that an Anheuser-Busch price increase in the fall of 2008 had been planned before the agreement to merger with InBev. In fact, publicly-available securities filings, also submitted to the district court, showed the same thing. (I Aple. App. 43.)

be disturbed for three separate and independent reasons. First, most of what appellants now argue was never raised below. Second, the materials at issue are properly the subject of judicial notice. Third, the district court did not rely on the materials for the truth of the matters asserted.

A. Appellants Have Waived Any Objection to the District Court's Taking Judicial Notice

The district court's order granting Anheuser-Busch's request for judicial notice issued on November 12, 2008 in connection with the ruling on the preliminary injunction motion. (Br. at 48.) Although appellants complain that the order was granted before they filed an opposition, they moved for reconsideration of the denial of the preliminary injunction motion and did not raise any objection regarding judicial notice. (II Aple. App. 222.) Nor did appellants raise the issue in their interlocutory appeal before this Court. (I Aple. App. 108.)

More fundamentally, the arguments appellants now offer on this issue were for the most part never raised in their opposition to the motion for judgment on the pleadings. In the briefing below, appellants argued that the district court should not take judicial notice of the preliminary injunction ruling, and that the findings of the court in connection with that ruling were not binding on a Rule 12 motion. (I App. 168-171.) Of course, the district court did not rely on any of its findings in connection with the preliminary injunction ruling in dismissing the case. Appellants did not argue below that InBev's annual reports could not be judicially

noticed because they were not publicly filed with the SEC. (I App. 170.) Registering the objection for the first time on the instant appeal, having failed to timely raise an objection below, is an afterthought now unavailable to appellants and cannot be used to challenge the ruling of the district court. *MacGregor*, 373 F.3d at 934 ("We find no abuse of discretion where the judicially noticed fact was not actually challenged…").

B. The District Court's Exercise of Judicial Notice Was Proper

In any event, the district court's reference to the documents in question was perfectly proper. An exercise of judicial notice is reviewed for abuse of discretion. *MacGregor,* 373 F.3d at 934. It is generally recognized that a company's annual reports are a proper subject of judicial notice. *Howard v. Gap, Inc.*, No. C 06-06773, 2007 U.S. Dist. LEXIS 8510, at *15-16 (N.D.Cal. Jan. 19, 2007) (judicial notice of annual report appropriate because it was publicly available). The argument that InBev's annual reports cannot be judicially noticed because they are not filed with the SEC, made for the first time on appeal, is based on a misreading of the cases. The requirement for judicial notice is that a document be "publicly available," not that it be filed with the SEC. *Howard*, 2007 U.S. Dist. LEXIS 8510, at *15-*16. Any suggestion that InBev's annual reports are not publicly

available is meritless. Each of the annual reports in question can be downloaded from InBev's website. [9]

Appellants' objections to the district court's characterization of the Import Agreement is even more puzzling. The fact that InBev entered into an Import Agreement that gave Anheuser-Busch the exclusive right to import and distribute InBev brands into the United States was repeatedly pled in the Complaint. (I App. 35, 36, 39 (¶¶ 48, 55, 72).) While appellants now quibble over the district court's description of the Import Agreement as "long-term" (Br. at 47), they cannot dispute its accuracy since the agreement was produced to them. Indeed, because the Complaint repeatedly referenced the existence of the agreement, the district court could have relied on the document itself. *Enervations, Inc. v. 3M Co.*, 380 F.3d 1066, 1069 (8th Cir. 2004) (although "matters outside the pleading may not be considered in deciding a Rule 12 motion to dismiss, documents necessarily embraced by the complaint are not matters outside the pleadings"); *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003) (a court may consider the complaint and documents whose contents are alleged in a complaint and whose authenticity no party questions). Thus, even if it were error to describe the agreement as "long-term," which it most certainly was not, it is harmless.

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9 (*See* http://www.ab-inbev.come/go/investors/reports_and_publications/annual_and_hy_reports.cfm.)

C. The District Court Did Not Rely on the Materials For the Truth of the Matters Asserted

Appellants also mischaracterize the purpose for which the district court relied on the annual reports and the press release. They are cited in a section analyzing appellants' "**perceived** potential competition" claim for their affect on how existing competitors in the U.S. market would perceive InBev. Contrary to appellants' suggestion, the district court never "relied on the [2006] press release for **proof** of **why** InBev sold Rolling Rock" (Br. at 48 (emphasis in original)), but rather it considered the effect on the market of InBev's publicly announced rationale and "strategic approach to the U.S. market, which is to focus on the high-growth **import brands** in our portfolio." (I App. 181-82 (emphasis added).) It is entirely reasonable that the court considered this "easily verifiable" public information in reaching its determination that "no rational actor would have viewed InBev as a perceived potential competitor prior to the merger." (I App. 181.)[10]

Contrary to appellants' assertion (Br. at 48 (*citing* Add. 6-7; I App. 181-182), except for the "easily verifiable" fact that in 2006, InBev sold its only United States brand and brewery, the district court did not rely on these materials for the

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10 Appellees maintain that the 2006 sale of the brands and brewery, regardless of the reason, renders implausible the conclusory allegations that competitors perceived InBev as a potential *de novo* entrant into the U.S.

truth of the matters asserted therein. (I App. 181-82). While none of these underlying facts was ever disputed by appellants, the relevance to the district court of the fact that nowhere in the annual reports did InBev indicate any interest in pursing *de novo* entry into the U.S. market had to do with appellants' claim of how InBev's presence on the periphery of the market was **perceived** by other firms in the market. That perception was unquestionably informed by the public pronouncements by InBev that it had sold its only U.S. brand and brewery and was pursuing a "strategic approach to the U.S. market . . . to focus on the high-growth *import* brands in our portfolio" (I App. 182 (citing Doc. No. 56 (2006 InBev Annual Report).) Without any factual showing by appellants to support a contrary perception, the district court was clearly on solid ground in concluding that, given InBev's public pronouncements to the contrary, it was "unreasonable for competitors to believe that InBev was poised to enter the U.S. market." (I App. 182.)

Appellants argue that the district court erred by not converting the motion for judgment on the pleadings into a motion for summary judgment pursuant to Rule 12(d). (Br. at 49.) However, appellants do not dispute the authenticity of the annual reports or press release, nor do they dispute that the underlying facts cited to by the court below were contained in these public documents. Moreover, appellants had repeated opportunity to respond to these facts, not only in their

opposition to the motion for judgment on the pleadings, but also in their motion for preliminary injunction, motion for reconsideration, and interlocutory appeal. Thus, appellants are on no stronger grounds in complaining that the district court erred by not converting the motion for judgment on the pleadings to one for summary judgment, since such a complaint, at the very most, suggests nothing more than harmless error and provides no basis for reversal on appeal. *Surgical Synergies, Inc. v. Genesee Assocs.*, 432 F.3d 870, 873 (8th Cir. 2005).

III. THE DISTRICT COURT CONDUCTED THE PROCEEDINGS BELOW FAIRLY AND IN ACCORDANCE WITH FEDERAL AND LOCAL RULES

Appellants cannot save their pleading deficiencies with unsupported allegations of misconduct and "inequities" by the court below. At all times Judge Hamilton acted well within her discretion and in the interest of justice. Appellants' disagreement with the court's rulings does not justify the accusations in their brief.

Incredibly, appellants argue that they "have been unnecessarily delayed in a case where speed was essential." (Br. at 16.) As discussed above, however, it was appellants themselves who continually delayed throughout the course of this litigation, from filing the Complaint, to moving for a preliminary injunction, to filing an interlocutory appeal with this Court. It was the district court that repeatedly urged appellant to move forward with greater dispatch. If "speed was

essential" in this case, it is only because appellants created artificial "emergencies" by their own dilatory behavior.[11]

The accusation that the district court prohibited discovery "for no explained reason" is equally meritless. The discovery rulings of the court below were prompted by the February 17, 2009 motion for a stay of all discovery pending resolution of the motion for judgment on the pleadings. (I App. 20 (Doc. No. 141).) When appellees made a good-faith attempt to resolve the discovery issue without briefing (as is required under the Federal and Local Rules), appellants responded by unilaterally noticing on short notice the deposition of InBev CEO Carlos Brito. (I Aple. App. 169.) Shortly thereafter, appellants noticed the immediate deposition of former Anheuser-Busch CEO August Busch IV. (I Aple. App. 169.) As a result of these tactics, appellees were forced to seek a temporary protective order to postpone the depositions until the court could rule on the motion for a stay of discovery. (I App. 21 (Doc. 147).) The district court granted the temporary protective order, "**in part**, until Defendants' Motion to Stay Discovery is fully briefed and ruled upon." (I App. 21 (Doc. 150) (emphasis added).) Appellants did not object, and, instead, focused their opposition on appellees' broader stay request.

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11 For example, despite an impermissible delay in filing their interlocutory appeal, Appellants filed with this Court an "**emergency** motion for injunction pending appeal." (I App. 19 (Doc. No. 124).) (emphasis added)

After **full briefing**, the district court, on March 9, 2009, granted appellees' motion and stayed all discovery until after resolution of the motion for judgment on the pleadings. (I App. 142.) As part of that order, it granted appellees' motion for protective order regarding the depositions of Carlos Brito and August Busch IV "**in accordance with this order**." (I App. 142 (emphasis added).)

In short, the district court put off the noticed depositions of Carlos Brito and August Busch IV until the motion for judgment on the pleadings could be resolved. This is precisely the relief appellees requested in their motions for a stay of discovery and for a temporary protective order. (I Aple. App. 140, 171.) Under no reasonable reading of the underlying briefing and the district court's order could one argue that the court issued a *sua sponte* order permanently preventing appellants from taking depositions. (Br. at 9.)

Appellants also complain that they "have been denied basic request for hearings." (Br. at 16.) However, under the local rules, "[m]otions in civil cases shall be submitted and determined upon the memoranda without oral argument. The Court may in its discretion order oral argument on any motion." E.D. Mo. Local Rule 78-4.02(A). It was certainly well within the district court's discretion to rule on appellants' preliminary injunction motion without holding a hearing when it was not supported by a single affidavit from either a fact or expert witness.

Appellants' complaint that the district court denied the motion for preliminary injunction before receiving a reply brief also rings hollow. (Br. at 55 n.16.). As an initial matter, this Court's dismissal of appellants' untimely appeal of the district court's denial of the preliminary injunction motion, in which this issue was already raised, disposes of any appeal on this issue here. Additionally, appellants objected to the lack of a reply brief in their motion for reconsideration, the denial of which was also appealed to and dismissed by this Court. (II Aple. App. 225.) Nor do appellants identify any specific prejudice they suffered due to their inability to file a reply brief, which is not surprising given the complete absence of any factual support in their preliminary injunction motion.

Moreover, in the Eastern District of Missouri, reply briefs are optional and the docket entry setting the deadline for appellants' reply clearly reads "P[laintiffs] **given to** 11/19/08 to file a response, **if any**…" (I App. 11 (emphasis added); *see* E.D. Mo. Local Rule 7-4.02(C).) Appellants waited until November 19 at their own peril, especially given their allegation that this is a case where "speed was essential." (Br. at 16.) As discussed above, the district court repeatedly urged appellants to move sooner, and their failure to do so – despite being on notice that the closing was imminent and having been warned by the district court of the consequences of delay - was their own error, not the district court's.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY POSTPONING DEPOSITIONS PENDING RESOLUTION OF THE MOTION FOR JUDGMENT ON THE PLEADINGS

Appellants have failed to demonstrate that the district court's order constitutes "a gross abuse of discretion, resulting in fundamental unfairness…" *O'Neal v. Riceland Foods*, 684 F.2d 577, 581 (8th Cir. 1982). An appellate court's review of a district court's discovery order is "both narrow and deferential." *Moses.com Secs., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1060 (8th Cir. 2005) (citing *Moran v. Clarke*, 296 F.3d 638, 650 (8th Cir. 2002) (en banc)).[12]

"Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999). Accordingly, courts in this circuit and others routinely stay discovery pending a dispositive motion. *See*, *e.g.*, *Ballard v. Heineman*, 548 F.3d 1132, 1137 (8th Cir. 2008) (affirming grant of stay pending dispositive motion); *Riehm v. Engelking*, No. 06-293, 2006 U.S. Dist. LEXIS 50991, *5-6 (D. Minn. July 25, 2006); *see also Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987). In the face of these consistent pronouncements,

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12 As an initial matter, under appellants' own reasoning the district court's discovery order is irrelevant to their appeal of entry of judgment on the pleadings. (See Br. at 44 (citing *Porous Media*, 186 F.3d at 1079 ("When considering a motion for judgment on the pleadings…the court generally must ignore materials outside the pleadings…").)

appellants rely on cases concerning orders issued under Rules 54(b) and 59(e) (Br. at 53-54), none of which have any applicability to a discovery ruling.

In contrast to the rules regarding a final judgment, "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922, 925 (8th Cir. 1999) ("the federal rules confer broad discretion on the [district] court to decide when a protective order is appropriate and what degree of protection is required"). The district court, in the exercise of its broad discretion, properly granted a limited stay of discovery pending its resolution of the motion for judgment on the pleadings. This is precisely the approach the Supreme Court urged in *Twombly* – the district court should be satisfied that the Complaint states a plausible antitrust claim before costly and burdensome discovery proceeds. 550 U.S. at 558, 570.

Nor did the district court abuse its discretion by entering a temporary protective order before receiving an opposition brief. (Br. at 55.) The temporary protective order was requested only because appellants unilaterally noticed depositions after Anheuser-Busch and InBev had moved to stay discovery pending resolution of their motion for judgment on the pleadings. In fact, appellants had already filed a lengthy opposition to the motion for a stay on February 27, 2009 –

before the district court issued the temporary on March 4, 2009. The "temporary" order was only necessary to provide the district court with sufficient time to decide the stay motion, which was granted on March 9, 2009. There is no conceivable prejudice as a result of the five-day period between the entry of the two orders, during which no depositions were scheduled to take place. Furthermore, appellants' seizure on the word "permanent" in the court's docket entry is misplaced. The district court did not permanently bar appellants from taking the noticed depositions, but merely made the temporary protective order, which was granted until the court could rule on the motion for a stay, permanent "in accordance with this Order." (I App. 142.)

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANTS' CURSORY REQUEST TO AMEND THE COMPLAINT

The district court, in its order granting appellees' motion for judgment on the pleadings, also denied appellants' request for leave to amend. (I App. 187.) Appellants' request was not made in a separate motion, but rather at the conclusion of its opposition to the motion for judgment on the pleadings. (I App. 187.) Appellants' request for leave to amend did not contain the substance of the amendment, but merely stated that "should this Court determine that Plaintiffs have failed to state a viable claim, they should be granted leave to amend their complaint." (I App. 173.) A court of appeals reviews an order denying leave to

amend for abuse of discretion. *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987).

The district court denied appellants' request for leave for two reasons: 1) the request, made in an opposition brief and not a separate motion, was improper; and 2) "due to the extensive and lengthy briefing of all the parties as to the legal basis for the claims asserted." (I App. 187.) Notably, appellants do not contest the district court's holding that the request for leave to amend was procedurally improper. For this reason alone the decision should be affirmed.

"Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend 'shall be freely given when justice so requires,' there is no absolute or automatic right to amend one's complaint." *Deutsche Fin. Servs. Corp. v. BCS Ins. Co.*, 299 F.3d 692, 700 (8th Cir. 2002) (citation omitted). In *Gilmore v. Novastar Financial, Inc.*, 579 F.3d 878 (8th Cir. 2009), this Court affirmed a district court's denial of a request for leave to amend under identical factual circumstances. Just as appellants did here, the plaintiff in *Gilmore* did not submit a proposed amended complaint to the district court along with a separate motion, but merely included a request for leave to amend in response to a motion to dismiss. *Id.* at 884. Applying Eighth Circuit precedent, the Court affirmed the district court's denial of leave to amend. *Id.* at 884-85 (citing *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 460 (8th Cir. 1985)). Affirmance is equally appropriate here.

Nor can appellants justify allowing leave to amend here. They argue for the first time that "since the filing of the complaint, new information has come to plaintiffs' attention which could be used to bolster plaintiffs' allegations." (Br. at 51.) But none of this "new information" was mentioned in their perfunctory request to the district court. The failure to make this argument before the district court is alone more than sufficient reason to reject the request on appeal. *Misner v. Chater*, 79 F.3d 745, 746 (8th Cir. 1996) ("Because [appellant] raises this argument for the first time on appeal, we need not consider it unless he can show that a manifest injustice will otherwise result.").

Moreover, what little appellants offer concerning this "new information" does not withstand scrutiny. The "400,000 pages of documents" (Br. at 51) were produced to appellants over a year ago, yet no request to amend was ever made. Nor does the "exclusive distribution agreement" prompt any different conclusion. That agreement was specifically referenced in the original Complaint, and was produced last year. (Br. at 51.) Yet appellants made no mention of it below when making their perfunctory request to amend at the end of their opposition to the Rule 12(c) motion. (I App. 173.) Finally, to the extent the alleged new "developments in the news" (Br. at 51) reference articles cited in appellants' appeal brief, they post-date the district court's denial of appellants' request for leave to amend, and thus are not a proper subject of this appeal.

In short, whatever appellants have discovered in the way of "greater factual detail in support of their claims" (Br. at 51), they continue to keep the secret to themselves, and thus no reasoned basis to amend has been advanced. The district court's denial of their request in these circumstances is entirely appropriate.

CONCLUSION

For the foregoing reasons, the judgment of the district court below should be affirmed.

Dated: November 4, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 32(a)(7)(B) and (C) of the 8th Cir. R. 28A(c), that the Brief for Appellees complies with the typeface and volume limitation because this brief contains 12,041 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), as determined by the Microsoft Word 2003 word-counting system. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared using Microsoft Word, Version 2003, in 14-point Times New Roman font.

I further certify that the digital version of the brief, provided in Portable Document Format ("PDF") on a CD-ROM filed with the Court and served on all parties complies with 8th Cir. R. 28A(d) and has been scanned for viruses and is virus-free.

/s/ Grant T. Mandsager
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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2009, I caused to be delivered for filing **Appellees' Brief** (10 copies, including CD with electronic copy); **Appellees' Appendix Vol. I**; **Appellees' Appendix Vol. II – Filed Under Seal** (three copies of each), to the Clerk of the United States Court of Appeals for the Eighth Circuit by Federal Express overnight delivery.

Pursuant to Fed. R. App. P. 25(d), I certify that on November 4, 2009, I served the documents described above (2 copies of Appellees' brief and one copy of other documents listed) by Federal Express overnight delivery on the following:

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