**No. 09-2990**

In the

# United States Court of Appeals

## for the Eighth Circuit

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

*v.*

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

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

**APPELLANTS' REPLY BRIEF**

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## SUMMARY OF ARGUMENT

So vilified are mergers in violation of the antitrust laws that Congress specifically wrote the statute to reach transactions whose anticompetitive effects were *not actually known*. Section 7 of the Clayton Act makes any acquisition illegal if its effect "*may* be substantially to lessen competition." 15 U.S.C. § 18. The Supreme Court has repeatedly emphasized the "expansive definition of antitrust liability" inherent in the law, since it can deal "only with probabilities, not with certainties." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990); *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) altered none of this substantive law, which not only tolerates but necessitates some degree of uncertainty. But, the *Twombly* decision is nevertheless wielded by defendants as a supposed license for trial courts to weigh evidence at the pleading stage, as the district court did here. In the context of a Section 7 claim, which deals with probabilities, courts must be particularly careful to ensure that Section 7's expansive reach is not blunted by an aggressively narrow reading of *Twombly*.

The complaint in this case robustly alleges a violation of Section 7 under both the *actual* and *perceived* potential competition doctrines, theories which have been well established by both this Court and the United States Supreme Court. The district court dismissed plaintiffs' *actual* potential competition claim on the grounds that the complaint failed to allege InBev's "subjective intent" to enter the market. While the complaint belies this finding, the decision is legal error; "subjective intent" is not an element of the claim. The decision also erroneously dismissed plaintiffs' *perceived* potential competition claim on the ground that InBev's sale of the Rolling Rock brewery and execution of a distribution agreement "clearly signaled" InBev's withdraw from the market. The district court and defendants vastly overstate these findings. The press release announcing Inbev's sale of Rolling Rock, for instance, is not an announcement of "withdrawal," but a declaration of market entry.

The defendants offer little of value in arguing the district court properly considered material outside the pleadings. They admit that the court failed to exclude outside material which was not subject to judicial notice, thus requiring reversal.

At the very least, plaintiffs should be permitted to amend their complaint. Contrary to defendants' assertion, plaintiffs made a proffer of the substance of their proposed amendment to the district court, and the denial of their request was abuse of discretion. Certainly, the lower court had no basis to dismiss plaintiffs' claim *with prejudice.*

Finally, defendants do not contest that the complaint prays for divestiture.

Plaintiffs respectfully request the Court reverse the decision below and remand with orders to expedite discovery and trial.

# ARGUMENT

## I. THE COMPLAINT STATES A SECTION 7 CLAIM UNDER WELL-ESTABLISHED SUPREME COURT PRECEDENT

The defendants inauspiciously begin their answer with a full-throated criticism of the potential competition doctrines created and espoused for decades by the Supreme Court of the United States. Brief of Appellee ("Aple. Br.") at 17. They show little regard for this Court's adoption of these doctrines in *Yamaha Motor Corp. v. Fed. Trade Comm'n*, 657 F.2d 971 (8th Cir. 1981). And they belittle the Supreme Court's decisions in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974) or *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). None of these cases, all the seminal cases on the law, was honored enough to make defendants' list of "most apposite cases" in their statement of issues. Aple. Br. at 1. In fact, not a single potential competition case made their list.

Eschewing the case law and the doctrines they developed, defendants instead embrace the views of private critics, as well as the so-called Horizontal Merger Guidelines. Aple. Br. at 17. But, neither the critics nor the guidelines are the law; no one elected the theoreticians and staffers who drafted these materials, and none of them issued his opinion from a federal bench. Defendants criticize plaintiffs' complaint because it fails to allege a "traditional" section 7 claim, one which relies on a "significant increase in concentration" as a prerequisite to liability. Aple. Br. at 17. They act as though this is meaningful, ignoring the

Supreme Court's edict that an acquisition by a potential competitor will violate section 7 even if it does not add to concentration of the market. *Falstaff, supra*, 410 U.S. at 532.

Given their violation of it, defendants' criticism of the potential competition law is perhaps not surprising, but their disregard for the authority of the law which created and shaped it is. Unless this Court overrules *Yamaha*, or decides to goes against the well-established Supreme Court line of cases, the instant complaint must survive.

To find a violation of section 7, a plaintiff need only show – and therefore allege – that the acquisition "may" substantially to lessen competition. This Court has correctly noted that the nature of section 7 claims, by the very words of its statute, necessarily involve speculation of future events: "[w]e stress the word 'probably' in this formulation of the issue, because the question under Section 7 is not whether competition was actually lessened, but whether it 'may be' lessened substantially." *Yamaha, supra*, 657 F.2d at 977. Even the commentators cited by defendants have conceded that "truly satisfying proof cannot be demanded if these merger doctrines are going to be preserved at all." 5 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1128, at 112 (2nd ed. 2003).

### A. The Complaint Alleges That InBev Was An *Actual* Potential Competitor Because It Pled Facts Showing InBev Would Probably Enter The Market

The district court rejected plaintiffs' actual potential competition claim for one reason; it held plaintiffs' claim inadequate "because Plaintiffs have not alleged sufficient facts to establish that InBev *intended* to enter the U.S. market …." Addendum ("Add.") at 10; I Appellants' Appendix ("App.") 185 (emphasis added). However, "intent" is not an element of the actual potential competition claim, and by applying the wrong standard, the district court erred.

The "actual potential competition" doctrine was explained by the Supreme Court in *Marine Bancorporation* and adopted by the Eighth Circuit in *Yamaha*.[1] Under these cases, a section 7 prima facie violation will be shown if the defendant (1) had "available feasible means for entering the relevant market" other than by acquisition; and (2) that those means offered a substantial likelihood of ultimately producing deconcentration of that market"

[1] The defendants speciously suggest that *Yamaha* did not adopt the "actual potential competition" doctrine as a viable Section 7 theory in this Circuit. Aple. Br. at 24. But, a plain reading of *Yamaha* reveals what defendants' own cited commentators have already uncontroversially noted: "[t]he Eighth Circuit [among other courts and agencies], reads [Section 7] to cover the elimination of an actual potential entrant." 5 AREEDA & HOVENKAMP, *supra*, ¶ 1124, at 59-60 (citing *Yamaha, supra*, 657 F.2d 971).

or other procompetitive effects.[2] *Yamaha, supra*, 657 F.2d at 977-978; *Marine Bancorporation, supra*, 418 U.S. at 633.

As to the second element – whether the defendant's entry would help make the market less concentrated – the district court said nothing, and the defendants invested a single paragraph on the issue, ignoring plaintiffs' most salient arguments and effectively conceding the point. Aple. Br. at 23; Appellants' Brief ("Aplnt. Br.") at 31-33. Therefore, since the crux of the issue centers around the first element – whether InBev had "available feasible means" to enter the market – plaintiffs will focus on that issue exclusively.

1. <u>The District Court Erred By Requiring Plaintiffs To Plead InBev's "Subjective Intent" To Enter The Market</u>

Before describing what allegations a plaintiff must plead to show a defendant's "available feasible means," it is helpful to point out what a plaintiff is *not* required to plead. Specifically, a plaintiff need not plead or show that the defendant subjectively

[2] Again eschewing binding Supreme Court and Circuit authority, defendants urge adoption of *Tenneco, Inc. v. Fed. Trade Comm'n*, 689 F.2d 346 (2nd Cir. 1982) – a case from the Second Circuit. Aple. Br. at 21. Defendants offer no explanation as to why *Tenneco* should be substituted for the standard this Court has already delineated in *Yamaha*. *Tenneco* is arguably not even prevailing law in its originating circuit; its addition of the phrase "in the near future" is found nowhere in the Supreme Court's *Marine Bancorporation* case, its claimed origin. *Marine Bancorporation, supra*, 418 U.S. at 633. *Yamaha* controls here.

*intended* to enter the market. On the contrary, "[a]ffirmative proof of a subjective intention to enter the market is not a prerequisite to finding that the defendant would probably have entered the market." 5 AREEDA & HOVENKAMP, *supra*, ¶ 1128, at p. 101. As Justice Marshall explained in his concurring opinion in *Falstaff*, "[w]e have certainly never suggested that subjective evidence of likely future entry is *required* to make out a § 7 [actual potential competition] case." *Falstaff, supra*, 410 U.S. at 565 (Marshall, J. concurring) (quoting *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964)) (emphasis in original). For these reasons, "[m]ost of the cases have used subjective evidence to support a conclusion based on objective evidence." 5 AREEDA & HOVENKAMP, *supra*, ¶ 1128, at p. 99. Thus, while *Yamaha* Court analyzed the defendant's "subjective intent" to enter the market, it never held that such evidence was a necessary part of plaintiff's prima facie case. *Yamaha, supra*, 657 F.2d at 978.

Therefore, when the District Court dismissed plaintiff's claim on the basis that there was insufficient evidence of InBev's "subjective intent to enter the U.S. market *de novo*," it erred as a matter of law. Add. 12; I App. 187. Defendants dedicate three pages to repeating the district court's error. Aple. Br. at 25-27. Notwithstanding the fact that plaintiff's prima facie case does not require any allegation of defendant's subjective intent, the complaint nevertheless pleads it.[3]

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[3] Plaintiffs pled facts in support of InBev's subjective intent. Aplnt. Br. at 26. Defendants' response to these allegations is

### 2. Plaintiffs Pled Facts Showing That InBev Would Probably Enter The Market *De Novo*

What the District Court should have done, but failed to do, was analyze the allegations of *objective market evidence* to determine whether InBev could plausibly be considered a potential market entrant. As plaintiffs detailed in their opening brief, the complaint is robust because it alleges that (1) the market is economically attractive and (2) InBev has the capability to enter it. Aplnt. Br. at 24-26. This is all that is needed to plead *Yamaha*'s first element. As Areeda and Hovenkamp explained the proof, in an "actual potential competition" case,

> Probable [market] entry may be shown by proof that (1) the firm has the requisite economic capabilities for substantial *de*

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unavailing. They accuse plaintiffs of "cropping" the language from a 2007 press release, claiming the "full quotation … exposes the truth that appellants want to hide." Aple. Br. at 26. Defendants then proceed to crop the quotation themselves. *Id.* The relevant portion of the press release states "InBev's strategy is to strengthen its local platforms *by building significant positions in the world's major beer markets through **organic** growth ….*" II App. 519 (emphasis added). Defendants argue this statement "says nothing" about *de novo* entry, but "building a position" means "market entry;" "in the world's major markets" includes the United States, the world's largest "major market;" and "organic growth" means "*not* through acquisition;" in other words, InBev's strategy includes "de novo entry in the United States."

> *novo* entry and (2) such entry is economically attractive to it.[4]

5 AREEDA & HOVENKAMP, *supra*, ¶ 1121, at p. 53.

In response, the defendants make four points they contend show InBev could not *plausibly* have entered the market. They assert:

(1) InBev could not have plausibly entered the market because it sold Rolling Rock and entered into an exclusive distribution agreement (Aple. Br. at 22);

(2) In Bev could not plausibly have entered the market because the barriers to entry are high, other firms have not successfully entered the market, and many firms have exited the market (Aple. Br. at 22, 24, 25);

(3) InBev could not plausibly enter the market because it never before attempted *de novo* entry in the U.S. (Aple. Br. at 24); and

(4) InBev could not plausibly enter the market because it lacks the managerial expertise to sell beer in the United States (Aple. Br. at 25).

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[4] This passage concludes with the line, "[s]ubjective evidence, though often infected with bias, may be probative on either issue." This means that subjective evidence may help determine whether the firm has the "requisite economic capabilities" or whether the opportunity is "economically attractive." This line does *not* mean that the defendant's *subjective intent* is dispositive, as the treatise later points out: "affirmative proof of subjective intention to enter the market is not a prerequisite …." 5 AREEDA & HOVENKAMP, *supra*, ¶ 1128, at p. 101.

None of these arguments is availing. First, defendants wildly overestimate the impact of selling Rolling Rock and entering into an exclusive distribution agreement. Neither of these things makes it implausible that InBev would enter the market. Rolling Rock was simply one of over 200 brands of beer owned by InBev, and no rationale is offered to explain how shedding this minor brand would effect InBev's "available feasible means" to enter the market. Selling Rolling Rock certainly did not *prevent* InBev's entry, and defendants have offered no basis to conclude that the sale of Rolling Rock impacted InBev's *economic capability* to enter the market in any way.

Defendants also make too much of the exclusive distribution agreement. Nothing about this agreement is cited to show it would impact InBev's "available feasible means" to enter the market. The agreement presents no insuperable difficulty which would hamper InBev's capability to enter the market. *All* that is known of the agreement is that Anheuser-Busch is the exclusive distributor of *some* of InBev's brands. It may be that the agreement is easily terminated on short notice. It may be short term, renewable every 30 days. It may be legally invalid. It may have an escape clause. Based on what *is* known, the agreement specifically allows InBev to distribute *other* brands not covered by the agreement. Without knowing the terms of this agreement – and since the terms were not publicized, they are nowhere alleged in either the complaint or in any document utilized by the district court – neither defendants nor the district court can credibly suggest that this agreement *prevents* InBev from entering the market.

Second, the defendants claim In Bev could not plausibly have entered the market because the barriers to entry are high, because other firms have not successfully entered the market, and because many firms have exited the market. Defendants correctly point out that these allegations stem from paragraph 157 of the complaint. I App. 51 (¶157). But, none of these things makes InBev's "available feasible means" to enter the market any less plausible because, as the uncited portion of paragraph 157 of the complaint alleges, "[a]s a practical matter, InBev's interest in and ability to enter the relevant market is *sui generis*." *Id*. In other words, given the various difficulties firms might encounter in entering the market, InBev is *the only* potential competitor with the *capability* to successfully enter. This economic capability is amply supported by factual allegations. Aplnt. Br. at 24-26. The defendant's ability to overcome obstacles, such as high entry barriers, is perfectly consistent with a finding of liability in the prevailing cases. *Procter & Gamble*, *supra*, 386 U.S. at 580-581 (high barriers to entry not a problem for firm of defendant's size, and defendant was therefore "the most likely entrant"); *Yamaha, supra*, 657 F.2d at 978 (lack of network of dealers "an obstacle" for Yamaha, "but it is probably less so for Yamaha than for others"); *Penn-Olin, supra*, 378 U.S. at 175 (finding probability of defendant's entry where market barriers were high and defendant was only firm with resources sufficient to enter).

Third, defendants claim InBev could not plausibly enter the market because it has never attempted *de novo* entry in the U.S. in the past, unlike in *Yamaha*. Aple. Br. at 24. Defendants offer no explanation as to how this fact would make InBev's entry less plausible. InBev certainly does not need to experience a failed attempt at market entry in order to have the economic capability to enter the market. Moreover, when the *Yamaha* Court cited the defendants' previous market entry attempts, it did so while describing evidence of "subjective intent" which, as already explained, does not need to be pled.

Finally, defendants argue that InBev could not plausibly enter the market because it lacks the managerial expertise to sell beer in the United States. Aple. Br. at 25. This is an argument better reserved for summation at trial. The premise is inconsistent with the complaint, which alleges that InBev has extraordinary managerial expertise managing brands worldwide: InBev produces over 200 brands of beer, markets them throughout the world, employs 89,000 people who produce, market and sell beer, and formerly sold and marketed top-selling brands successfully in the United States. Aplnt. Br. at 25.

### B. The Complaint Alleges That InBev Was *Perceived* As A Potential Competitor And That This Perception Caused Firms To Compete More Vigorously

Once again, defendants begin their discussion of the perceived potential competition doctrine by criticizing plaintiffs' reliance on binding Supreme Court precedent from *Falstaff* and *Marine Bancorporation*. Aple. Br. at 28. Defendants dispute *Marine Bancorporation*'s recitation of the elements of the claim. They lash out by accusing plaintiffs of "badly misstating [this] Supreme Court holding" "in hope of altering the standard of proof." Aple. Br. at 28. But, in fact, plaintiffs merely quoted it from the decision. Aplnt. Br. at 35. Defendants attack plaintiffs' wording of *Marine Bancorporation*'s first element – "characteristics, capabilities, and economic incentive" – proclaiming it constitutes a "reformulated standard." Aple. Br. at 31. But, again, it is a direct quotation from the case. Meanwhile, defendants argue in the same breath that *United States v. Siemens, Corp.,* 621 F.2d 499, 505 (2nd Cir. 1980) – another case from the Second Circuit – should be applied. Aple. Br. at 28. The Supreme Court law controls: a merger is illegal if, in a concentrated market, (1) the acquiring firm has the "characteristics, capabilities, and economic incentive" to render it a perceived potential *de novo* entrant; and (2) that "the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market." Aplnt. Br. at 35 (citing *Marine Bancorporation, supra*, 418 U.S. at 625).

1. InBev Was Perceived As A Potential Competitor

It is often the case that, if a defendant is deemed to possess the "available feasible means" to enter the market as an *actual* potential competitor, then it will also be *perceived* as a potential competitor. "Proof that a firm is or is not a likely actual entrant … will ordinarily be probative that the firm is so perceived by existing sellers." 5 AREEDA & HOVENKAMP, *supra*, ¶ 1121, at p. 54. For this reason, under *Marine Bancorporation* a defendant will be deemed a perceived potential competitor if it possesses the "characteristics, capabilities, and economic incentive" to enter the market.

Notably, just as with the *actual* potential competition doctrine, this element relies on *objective* criteria, like the firm's economic strength, managerial experience, ability to innovate, and market profitability. Each of these, and other allegations, are detailed in plaintiff's opening brief and will not be repeated here. Aplnt. Br. at 36-37. They more than adequately allege that InBev was perceived as a potential competitor.

In response, defendants rely heavily on a press release announcing InBev's sale of Rolling Rock, arguing that it "clearly signaled to U.S. brewers that InBev had no intention of competing in the U.S." Aple. Br. at 29. Hardly. The press release reads:

> The decision to sell the Rolling Rock brands was based on InBev's strategic approach to the U.S. market, which is to focus on the high-growth import brands in our portfolio. InBev's sales and marketing efforts are aimed at maximizing the potential of our leading imported beers … and our strength as the U.S. leader in imported draught beer.
>
> * * *
>
> InBev … is the leading global brewer by volume. *InBev's strategy is to strengthen its local platforms by building significant*

> *positions in the world's major beer markets through* ***organic growth*** *....*

II App. 519 (emphasis added). According to both the district court and the defendants, this press release "indisputably" proves *ipso facto* that every brewer in the United States concluded that InBev, the largest brewer in the world, intended to completely withdraw from the most profitable market on earth. It is not conceivable, however, that major corporate entities would make such a rash decision involving potentially billions of dollars on a single press statement.

Moreover, the press release tells a completely different story. It declares InBev's strategy to "build[] significant positions in the world's major beer markets through *organic growth*." "Building a significant position" means "entering or increasing market presence;" "in the world's major markets" includes the United States (the largest major market); and doing this through "organic growth" means "*not* through acquisition," but rather by building its own internal organization. This is not a statement of retreat; it is a declaration of aggressive market entry.

The statement also proclaims InBev's "strength as the *U.S. leader* in imported draught beer" and announces in no uncertain terms that it will focus on "maximizing" that strength through its *own* sales and marketing efforts. Defendants apparently suggest that InBev's focus on *imported* beer somehow makes a difference. It does not. Domestic and imported beers are located in the same cooler at the corner store, and they undeniably compete in the same market for the same customers.

Not only does this press release *not* prove what the district court says, it shows the opposite: any reasonable reader understands that InBev intends to be a future force in the U.S. markets, whether or not it owns the Rolling Rock brand.

Furthermore, any U.S. competitor worth his salt would know that InBev is a major world player with more than 200 brands of beer; there is no reason why shedding a single brand would necessarily indicate that InBev intended to entirely withdraw from a given market, much less the most lucrative market on the planet.

In fact, the sale of Rolling Rock was an insignificant event for InBev, only now bandied about in litigation as a red herring. To provide an idea of just how insignificant the sale of Rolling Rock really was, consider that InBev sold it for $82 Million. II App. 519. InBev's daily revenues – that is, the amount it sells in beer in a *single day* – is $58 Million.[5] So InBev's sale of Rolling Rock was a good day's work, but not much else. Only the most exaggerated description of that sale would describe it as a "clear signal" of InBev's "exodus" from the market. Aple. Br. at 29; Add. 7; I App. 182.

Defendants apply the same hyperbole when describing the distribution agreement. The district court cited InBev's 2006 annual report as a basis for considering that document. Add. 7; I App. 182. That document reads in part:

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[5] InBev's annual revenues are $21.2 Billion, 1/365th of which is $58 Million. I App. 27 (¶6).

> In November, an agreement paved the way for Anheuser-Busch to become the exclusive U.S. importer of a number of InBev's premium European import brands including Stella Artois, Beck's, Bass Pale Ale, Hoegaarden, Leffe and other selected InBev brands. Labatt USA will continue to market and sell the Labatt and Brahma brands through a separate distribution network.

II App. 266.

Aside from the inappropriate use of this document, which was not incorporated by the complaint, it is simply not accurate that this passage definitively shows that InBev "was not in a position to enter the U.S. beer market *de novo*." Add. 7; I App. 182. According to the passage, the exclusive agreement covers only InBev's European brands, and not even all of them. The agreement does not cover every beer InBev sells, given that Labatt distributes some of InBev's other brands. Nothing from this passage would indicate InBev's complete inability to develop new brands, import different brands, or otherwise enter the market *de novo*.

The district court and the defendants make sweeping generalizations about what other U.S. brewers *knew* about the distribution agreement. In fact, they knew very little, and the terms of the agreement were not made public. "Information unavailable to existing firms cannot be imputed to them." 5 AREEDA & HOVENKAMP, *supra*, ¶ 1121, at p. 54. When the lower court determined that the agreement "precluded" InBev from distributing "some of its most recognized and marketable brands," it made an impermissible inference that it should not have made. When it concluded that the distribution agreement was "long term," it likewise imputed knowledge about the agreement that competitors simply did not have. Neither the court below nor the defendants have pointed to any allegation indicating that other brewers were aware of these terms. In fact, all that is known of this agreement is that Anheuser-Busch is the exclusive importer of certain InBev's beers in the United States. Whether this agreement can be terminated at will, or whether it shortly expires, or whether it covers new brands created by InBev to sell in the United States – are all unknown. Without this and additional information about the agreement, it cannot "undisputedly" show that *every* brewer in the U.S. definitively concluded that InBev "exited" the market.

2. The Perception Of InBev As A Potential Competitor "Waiting In The Wings" Tempered Oligopolistic Behavior In The Market

Having established that the complaint sufficiently alleges InBev is perceived as a potential competitor, the complaint also alleges that InBev's presence in the wings had a procompetitive effect on the market. Therefore, the complaint states a claim.

In their opening brief, plaintiffs pointed out that the district court, rather than adjudge all of the complaint's allegations, merely cherry picked allegations to attack as "mere legal conclusions." Aplnt. Br. at 41. Defendants commit the same fault. Their answer brief analyzes five allegations from the complaint:

paragraphs 15, 49, 40-42. Aple. Br. at 35-36. No other allegation is critiqued. However, in addition to those paragraphs, plaintiffs in their opening brief also cited the following allegations as evidence of the present procompetitive effects of InBev's presence in the wings:

¶ 16: without InBev in the wings, "there would no longer be any significant major potential competitor to influence pricing and marketing practices in the United States …" Aplnt. Br. at 40.

¶ 19: InBev is "a substantial incentive to competition," and "the constant threat of InBev has a direct and substantial effect and impact on the market behavior of Anheuser-Busch and other brewers in the United States beer market." Aplnt. Br. at 40.

¶¶ 99-101: Because Anheuser-Busch and InBev offer competing products, their direct competition constrains the pricing of the other. Aplnt. Br. at 40.

¶¶ 132-135: InBev's acquisition would make the market less competitive, allowing the combination to increase prices. Aplnt. Br. at 41.

¶¶ 142-143: In the absence of the acquisition, "InBev will probably lower prices;" "InBev will increase … diversity of products for consumers, and create a new competition in the beer industry … for the benefit and welfare of consumers." Aplnt. Br. at 41-42.

Each of the arguments involving these allegations made in plaintiffs' opening brief, ignored by defendants, has been conceded.

## II. DISTRICT COURT FAILED TO EXCLUDE MATERIAL OUTSIDE THE PLEADINGS AND ERRED BY REFUSING TO CONVERT THE MOTION TO ONE FOR SUMMARY JUDGMENT

### A. The Court Did Not Exclude Outside Material Presented To It By Defendants

Under the rules, if matters outside the pleadings are "presented to and not excluded by the court," the motion must be treated as one for summary judgment, giving plaintiffs opportunity for discovery. FED. R. CIV. P. 12(d). The district court's failure to appropriately convert the motion requires reversal. Aplnt. Br. at 44-45. In their answer brief, defendants admit they presented the court with an "internal Anheuser-Busch document"– which they concede was not subject to judicial notice – and which the court did not exclude. Aple. Br. at 37-38 & n.8 ("internal Anheuser-Busch document" was "mentioned … briefly in the court's decision," and was not subject to judicial notice). On this ground alone, the motion should have been converted, and reversal is necessary.

Defendants contend the district court's decision did not "rely" on the internal Anheuser-Busch document, but Rule 12(d) disallows any consideration of the document at all, mandating the court to "exclude" it. FED. R. CIV. P. 12(d). The document was cited; therefore, it was not excluded. Add. 8; I App. 183. Moreover, it is hard to square defendants' claim that the document was not "relied upon" in the district court's order. The document was cited in support of a finding on a material element of plaintiffs' section 7 claim. *Id.*

Defendants further contend that the district court did not "extensively rely" on other documents whose judicial notice is in doubt. That assertion is belied by the lower court's decision itself, the very backbone of which is the questionable documents. Add. 6-7; I App. 181-182.

Defendants make the specious claim that the district court was not required to convert the motion because plaintiffs "do not dispute the authenticity" of the documents. Aple. Br. at 43. They also make the nonsensical suggestion that plaintiffs "had repeated opportunity to respond to these facts" in various *other* briefs filed below. Aple. Br. at 43-44. These arguments reflect a profound misunderstanding of the purpose of Rule 12(d). Failing to convert the motion and allow plaintiffs an opportunity to respond to the submitted documents, as the district court did here, is akin to ruling on a summary judgment motion without allowing the opposing party to file affidavits in opposition. This error must be reversed.

### B. The District Court's Grant Of Judicial Notice Constituted Abuse Of Discretion

Defendants also assert that the lower court's order taking judicial notice should be left undisturbed. They posit three arguments, none of which supports their request.

First, they contend plaintiffs waived their right to challenge the district court's order granting judicial notice, claiming that it should have been challenged at various stages below. Aple. Br. at 39-40. Defendants do not appear to appreciate the procedural posture of plaintiffs' argument. Plaintiffs are not merely making a waivable argument pendant on the appeal of some other order; they are appealing the order taking judicial notice as a matter of right. Defendants' arguments fail to consider that the order granting judicial notice was not appealable as an interlocutory order under 28 U.S.C. § 1292, and was not final or challengeable until judgment was entered and a notice of appeal filed. Plaintiffs were denied their only opportunity to challenge the motion below when the district court granted it before their opposition was due. The present appeal is before this Court as a matter of statutory right, and since plaintiffs timely filed a notice of appeal, that right has not been waived.

Second, defendants argue the judicial notice order was sound. They reason that InBev's annual report is "publicly available" and therefore judicially noticeable, because it is available on the internet. Aple. Br. at 40-41. But, defendants made no such statement under oath in their declaration; it says nothing about the document's public availability. II App. 255. Moreover, not *every* fact found on the internet is judicially noticeable simply because it is found on the internet (e.g., www.ufoevidence.org). FED. R. EVID. 201.

They also reason judicial notice of the distribution agreement is justified since that document was referenced in the complaint. Aple. Br. at 41. This is irrelevant. The document improperly noticed was InBev's 2006 annual report, not the distribution agreement. The complaint does not reference, or incorporate, InBev's 2006 annual report.

Third, defendants contend the materials were not relied on for their truth, but rather for their effect on U.S. brewers' perceptions. Aple. Br. at 42-44. Not so. The evidence culled from these documents was applied to the district court's ruling on the *actual* potential competition theory, which does not involve brewers' perceptions. Add. 11-12; I App. 186-187.

Moreover, the court in fact relied on the outside materials to support certain factual findings, which are outlined plaintiffs' opening brief. Aplnt. Br. at 47. These "findings" include (1) InBev had a "plan to complete its exodus" from the U.S. market; (2) the distribution agreement was "long term;" (3) the "advantage" of the distribution agreement was to access Anheuser-Busch's network; and (4) InBev had no intent to enter the market. Aplnt. Br. at 47. Defendants fail to rebut any of these conclusions. Aple. Br. at 42-43.

## III. THE DISTRICT COURT'S PROTECTIVE ORDERS CONSTITUTE ABUSES OF DISCRETION BECAUSE THEY ARE NOT BASED ON A SHOWING OF "GOOD CAUSE"

In its order dated March 9, 2009, the district court issued a protective order that prevented the depositions of defendants' executives. I App. 142. In issuing this order, the court wrote "[t]his Court's temporary protective order (Doc. No. 150) is hereby made permanent." *Id.* In their opening brief, plaintiffs argued that this order "permanently" barring the executives' depositions was arbitrary, not based on good cause, and unfair.

In their answer brief, defendants appear to propose an alternative reading of the district court's order that does not "permanently" bar the depositions of defendants' executives. Aple. Br. at 50. They seem to suggest that the "permanent" bar was not permanent at all, but rather that it expired once the district court ruled on defendants' Rule 12(c) motion. Aple. Br. at 50. Plaintiffs' interest in challenging this order is limited to the gathering of testimonial evidence necessary to support their case. Therefore if, through their answer brief, defendants submit that the protective order covering their executive officers Carlos Brito and August Busch IV is no longer valid, and that these executives will be available for deposition if and when this case is remanded, then it would appear the parties are in agreement.

However, in such a case, given the ambiguous nature of the district court's ruling (which cannot be circumvented through agreement of counsel) plaintiffs request this Court clarify that, in the event of remand, there will be no protective order preventing the depositions of Carlos Brito and August Busch IV. Issuing such a reversal (or clarification) would be well grounded, since the district court's order is devoid of consideration of "good cause," which is an abuse of discretion. Aplnt. Br. at 54. A district court's wide discretionary latitude does not allow it to issue protective orders unless "good cause" is shown. Defendants do not dispute this.

## IV. THE DISTRICT COURT ERRED WHEN IT REFUSED TO PERMIT PLAINTIFFS TO AMEND THEIR COMPLAINT

If plaintiffs' claims are held sufficient, they should at least be given an opportunity to re-plead in an amended complaint. To deny this relief would result in manifest injustice and elevate procedural technicality over merit and substance.

In their answer brief, defendants argue that plaintiffs failed to proffer the substance of their proposed amendment or a proposed amended complaint. Aple. Br. at 51. This, they say, is fatal. In support, they cite *In re: 2007 Novastar Fin. Inc. Sec. Litig.*, 579 F.3d 878 (8th Cir. 2009). In that case, the plaintiff did not preserve its right to amend the complaint because it did not "proffer the substance of such an amended complaint" in the trial court. *Id*. at 884. That is not the case here, and it is incorrect, as defendants contend, that plaintiffs offer evidence in support of an amended complaint "for the first time" on appeal. Aple. Br. at 52. On the contrary, in the trial court, plaintiffs requested leave to amend, stating:

> Since the filing of the complaint, Plaintiffs have received 400,000 pages of discovery from the Defendants. Some of this evidence, *portions of which were presented to the Court in Plaintiffs' Motion for Reconsideration filed November 20, 2008*, could be appropriately utilized in augmenting the complaint.

I App. 173 (emphasis added). Thus, rather than making no proffer as to the substance of their amendment, plaintiffs referenced the evidence outlined in their motion for reconsideration. That motion, in the record here at II Appellees' Appendix ("Aple. App.") 222, lays out a detailed statement of fact and argument which incorporates many of the facts culled from defendants' 400,000 page document production which would be used to augment the complaint and easily correct the deficiencies identified by the district court. Some of those facts include:

- In response to InBev's creation, the U.S. beer market fell into a protracted price war that lasted between a year and 18 months, demonstrating that market participants noticed and reacted strongly to InBev as a potential competitor. II Aple. App. 238;
- During the same time period, Anheuser-Busch further cut its prices by offering greater promotional discounts;
- During the same period, U.S. advertising expenditures spiked; Anheuser-Busch increased ad spending by over 34%;
- The year InBev was created, a trade newspaper reported, "InBev is coming into a market that is like a hornet's nest that has been disturbed; Anheuser and Miller aren't willing to lose a single case, and they're spending money to ensure nobody else gains share." II Aple. App. 227;
- Anheuser Busch perceived InBev as a potential competitor, warning in internal memoranda that InBev will soon enter the market. I Aple. App. 227.
- There is also evidence bolstering the attractiveness of the U.S. beer market, showing the booming growth of imported beer (InBev's admitted focus) in the United States. II Aple. App. 237.

- The evidence includes admissions of InBev's post-merger intentions to raise prices above price-war levels. II Aple. App. 238. In fact, days after InBev's acquisition was approved, it in fact raised prices, resulting in calls for renewed antitrust scrutiny.

These facts describe the substance of plaintiffs' proposed amendments, proffered to the district court through specific incorporation of the motion for reconsideration.[6]

The district court, however, did not deny plaintiffs' request to amend on the basis that plaintiffs failed to include a proffer of their proposed amendment. Rather, the court's rejection was based on a technical procedural fault: plaintiffs' failure to file a separate motion paper. Add. 12; I App. 187. But, the failure to abide by such a technicality cannot be grounds for dismissing a plaintiffs' case *with prejudice*, especially plaintiffs who have demonstrated no delay or bad faith. This draconian measure constitutes an abuse of discretion for two reasons.

First, in those cases where the court has denied a plaintiff's request to amend because it is included at the end of an opposition brief rather than in a separate motion, the court has also relied on the plaintiff's failure to proffer the substance of its amendment. For instance, in defendant's cited authority *Clayton v. White Hall School Dist.*, 778 F.2d 457, 460 (8th Cir. 1985), the plaintiff indeed

[6] Plaintiffs proffered their proposed amendment through incorporation of another filing because they were concerned that introducing detailed facts into an opposition to a motion to dismiss might allow the court to convert the motion to one for summary judgment – a result that would severely prejudice plaintiffs.

failed to file a separate motion, but that was not dispositive. Instead, this Court based its decision on the plaintiffs' failure to "offer the substance of the proposed amendment to the district court." *Id.* Since plaintiffs proffered the substance of their proposed amendment, cases like *Clayton* and *Novastar* do not apply.

Second, the deadline to file amended pleadings, imposed by the trial court, had *not passed* by the time plaintiffs filed their opposition brief. Compare I App. 174 and I App. 135. Plaintiffs filed their opposition brief on March 19, 2009. I App. 174. The deadline for filing motions to amend the pleadings was July 1, 2009. I App. 135. At the time plaintiffs filed their opposition, the deadline to file motions to amend was three and a half months away. They reasonably believed that, if the district court granted the motion, they would have sufficient time to file a motion to amend within the deadline.

The district court rejected plaintiffs' request to amend for a second, independent reason. It held, "due to the extensive and lengthy briefing of all parties as to the legal basis for the claims asserted, this Court declines to grant leave to amend." Add. 12; I App. 187. In other words, the court determined that plaintiffs' attempted amendment would be futile. "When a district court denies leave on the basis of futility, we review the underlying legal conclusions *de novo*." *Novastar, supra*, 579 F.3d at 884. Given the facts outlined above and in plaintiffs' motion for reconsideration (II Aple. App. 238), it is clear that plaintiffs' amendment would not have been legally futile.

Finally, the district court substantially abused its discretion when it dismissed plaintiffs' case *with prejudice*. "Dismissal with prejudice is a drastic and extremely harsh sanction." *Clayton, supra*, 778 F.2d at 460. Dismissal with prejudice "is warranted *only* by a pattern of intentional delay by the plaintiff … or in cases of willful disobedience of a court order or continued or persistent failure to prosecute a complaint." *Id*. (citations omitted). "To deny forever the appellant's day in court is unjustified where, as here, there is no evidence of a pattern of delay or contumacious conduct." *Id*.

## V. THE COMPLAINT PRAYS FOR DIVESTITURE

In their answer brief, defendants ignore plaintiffs' request that this Court determine the complaint adequately alleges a remedy of divestiture. Aplnt. Br. at 52, 57 (conclusion). Having waived opposition, defendants concede the adequacy of the complaint's prayer.

## CONCLUSION

For the reasons outlined above and in Appellants' Opening Brief, plaintiffs respectfully request the Court reverse the order below and remand for further proceedings.

November 18, 2009 Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 6,987 words, as counted by the Microsoft Word version 2003 software used to prepare this brief, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

## CERTIFICATE OF VIRUS SCAN

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

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