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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35912
D.C. No. 1:15-cv-02250-CL

[Filed August 8, 2018]

JAMES DEHOOG; BRIAN BOUTELLER; SHONNA BOUTELLER; CARLY BOWEN; TOM BUTTERBAUGH; ERICA I. CORONA; MARIA G. CORONA; CHRIS DENNETT; JOHN DESBIENS; MATTHEW JOHNSON; CYNTHIA A. KREITZBERG; EDWARD LAWRENCE; JERUSHA MALAER; ROBERT MALAER; MICHAEL MARTIN; MICHAEL MCATEE; DAVID MILLIGAN; JEFF REEDER; RALPH REEDER; WADE SCAGLIONE; BETH H. SILVERS; BRADLEY O. SILVERS; PATRICE WADE, *Plaintiffs-Appellants*,	)
v.	)
ANHEUSER-BUSCH INBEV SA/NV; SABMILLER, PLC, *Defendants-Appellees.*	)

OPINION

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted May 15, 2018
Portland, Oregon

Filed August 8, 2018

Before: M. Margaret McKeown and Richard A. Paez, Circuit Judges, and Cynthia A. Bashant,[*] District Judge.

Opinion by Judge McKeown

SUMMARY[**]

Antitrust

The panel affirmed the dismissal of an action brought under § 7 of the Clayton Act by consumers and purchasers of beer, seeking to enjoin Anheuser-Busch InBev, SA/NV, from acquiring SABMiller, plc.

As a condition of approving the transaction, the U.S. Department of Justice required SABMiller to divest entirely its domestic beer business. Because the divestiture left SABMiller without a presence in the U.S. beer market, the consumers did not and could not plausibly allege that ABI's acquisition of SABMiller

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[*] The Honorable Cynthia A. Bashant, United States District Judge for the Southern District of California, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

would substantially lessen competition in that market. The panel held that the consumers therefore failed to state a claim under the Clayton Act.

COUNSEL

Joseph M. Alioto (argued) and Jamie L. Miller, Alioto Law Firm, San Francisco, California; Rachele R. Selvig and Christopher L. Cauble, Cauble and Cauble LLP, Grants Pass, Oregon; Gil D. Messina, Messina Law Firm P.C., Holmdel, New Jersey; Jeffery K. Perkins, Law Offices of Jeffery K. Perkins, Tiburon, California; for Plaintiffs-Appellants.

Yonatan Even (argued), Cravath Swaine & Moore LLP, New York, New York, for Defendants-Appellees.

OPINION

McKEOWN, Circuit Judge:

This case features a bevy of beer aficionados trying to undo the acquisition of one brewing behemoth by another. James DeHoog and other consumers and purchasers of beer ("Consumers") appeal the district court's dismissal of their private antitrust action to enjoin Anheuser-Busch InBev, SA/NV ("ABI") from acquiring SABMiller, plc ("SAB"). Although the merger closed in October 2016 with the blessing of antitrust authorities, Consumers' private suit persists.

Like the district court, we conclude that Consumers failed to state a claim under Section 7 of the Clayton Act, 15 U.S.C. § 18. As a condition of approving the transaction, the U.S. Department of Justice ("DOJ") required SAB to divest entirely its domestic beer business. Because the divestiture left SAB without a

presence in the U.S. beer market, Consumers did not and could not plausibly allege that ABI's acquisition of SAB would substantially lessen competition in that market.

BACKGROUND

ABI, whose brands include Budweiser, Stella Artois, and Michelob Ultra, is the largest producer and seller of beer in the United States, comprising roughly 46 percent of the U.S. market share. At the time of this suit, SAB was a multinational brewing company that operated in the United States exclusively through a joint venture with Molson Coors Brewing Company ("Molson").[1] The SAB/Molson joint venture, MillerCoors, LLC ("MillerCoors"), was the second-largest producer and seller of beer in the United States, controlling roughly 25 percent of the U.S. market share.[2]

In November 2015, ABI and SAB announced the terms of a $107 billion acquisition of SAB by ABI. As part of the transaction, ABI also announced a contingent agreement with Molson: upon completion of ABI's acquisition of SAB, SAB would completely divest its interest in MillerCoors. Per the terms of the agreement, Molson would acquire SAB's 50 percent voting interest and 58 percent economic interest in MillerCoors, making MillerCoors a wholly-owned

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[1] Molson, the world's third largest brewer, is not a defendant.

[2] SAB and Molson each held 50 percent of the governance rights in MillerCoors. The DOJ approved the MillerCoors joint venture in 2008. MillerCoors brands include Miller Lite, Coors Light, Blue Moon, and Zima.

subsidiary of Molson. Molson would maintain full control of the business operations and resulting economic benefits of MillerCoors. In short, ABI would acquire SAB but not before spinning off SAB's ownership in MillerCoors (i.e., SAB's U.S. interests) to Molson.

After reviewing the proposed transaction for its effect on competition, on July 20, 2016, the DOJ reached a settlement with ABI to allow the acquisition to move forward. ABI was required to divest SAB's entire U.S. business—including SAB's ownership in MillerCoors—such that the settlement would "prevent any increase in the concentration in the U.S. beer industry." The settlement also prohibited ABI from acquiring beer distributors or brewers without allowing for DOJ review of the acquisition's likely competitive effects and prevented ABI from engaging in certain anti-competitive practices. According to the DOJ, the settlement would "help preserve and promote competition" in the U.S. beer industry.

That same day, the DOJ Antitrust Division filed a civil lawsuit against ABI in the U.S. District Court for the District of Columbia to block the transaction, on the ground that the acquisition violated Section 7 of the Clayton Act, along with the proposed settlement, which—if approved by the court—"would resolve the competitive harm alleged in the lawsuit."[3] The filings complied with the requirements of the Antitrust Procedures and Penalties Act ("the Tunney Act"), a part of the federal government's review of certain

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[3] See United States v. Anheuser-Busch InBev SA/NV, No. 1:16-cv-01483 (D.D.C.).

mergers and acquisitions. 15 U.S.C. § 16. Pursuant to the Tunney Act, the DOJ published the terms of the settlement and a competitive impact statement in the Federal Register and gave the public 60 days to submit comments. *Id.* § 16(d).

After consideration of the public comments, the DOJ and several international competition authorities cleared the transaction, which closed on October 10, 2016. Molson then promptly announced that it had completed its acquisition of SAB's interest in MillerCoors. At the time of this opinion, one Tunney Act procedure remains outstanding: the U.S. District Court for the District of Columbia must determine whether entry of the settlement "is in the public interest." *Id.* § 16(e). In making that determination, the court may "take such other action in the public interest as the court may deem appropriate." *Id.* § 16(f).

Parallel to the government's antitrust enforcement efforts, on December 1, 2015, Consumers filed a private antitrust action against ABI and SAB in the District of Oregon, seeking to enjoin the acquisition.[4] Consumers likewise alleged that the proposed acquisition violated Section 7 of the Clayton Act, "in that the effect of the proposed acquisition may be substantially to lessen competition, or to tend to create a monopoly in the production and sale of beer in the United States." More specifically, Consumers alleged that the acquisition threatened to cause them "loss and damage in the forms of higher prices, fewer services, fewer

[4] Consumers are "twenty-three consumers and purchasers of beer in the United States" who reside in Oregon, California, and Washington.

competitive choices, diminished product quality and product diversity, [and] suppression and destruction of smaller competitors through exclusive distribution arrangements . . .” Consumers further claimed that the acquisition would “increase ABI’s buying power” globally. Although Molson was not a named defendant, Consumers made a corollary allegation regarding Molson’s acquisition of SAB’s interest in MillerCoors: “Given the resulting change in management and Molson’s new increased size and scope in the United States market following the ABI-SAB acquisition, Molson’s management is likely to have incentives to change its practices to match ABI’s.”

The district court dismissed the complaint for failure to state a claim. The court found that Consumers failed to allege that the acquisition would increase ABI’s market power in the U.S. beer market; allegations regarding Molson’s future conduct in the ownership of MillerCoors were too speculative to state a claim for relief against ABI; and allegations concerning ABI’s buying power were too vague to state a plausible claim. In dismissing with prejudice, the court concluded that any amendment to the complaint would be futile because Consumers “cannot plausibly allege that the challenged transaction will increase either ABI’s market share or the concentration of firms in the U.S. beer market.” By securing the complete divestiture of MillerCoors, the DOJ had reached a settlement to prevent increased concentration in the U.S. beer industry.

ANALYSIS

This appeal centers on a longstanding antitrust law that empowers the public to sue to block allegedly

anticompetitive mergers. Section 7 of the Clayton Act generally prohibits business acquisitions whose effect "may be substantially to lessen competition, or tend to create a monopoly" in a relevant market. 15 U.S.C. § 18. In addition, "[a]ny person" may "sue for and have injunctive relief . . . against threatened loss or damage by a violation of" Section 7, as long as the standard equitable principles for injunctive relief are met. *Id.* § 26.

I. CONSUMERS FAILED TO STATE A CLAIM UNDER THE CLAYTON ACT

Our de novo review of a dismissal under Federal Rule of Civil Procedure 12(b)(6) is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court has taken judicial notice. *See Metzler Inv. GMBH v. Corinthian Coll., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).[5] We benchmark Consumers' claims against the now-familiar standard of *Twombly* and *Iqbal*: "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Those factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

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[5] Consumers' motion to take judicial notice of government documents, court filings, press releases, and undisputed matters of public record concerning the ABI-SAB transaction (Dkt. No. 17) is granted.

Section 7 of the Clayton Act requires Consumers to "first establish a prima facie case that a merger is anticompetitive." *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015). In practical terms, this means adequately alleging facts that an acquisition creates "an appreciable danger" or "a reasonable probability" of anticompetitive effects in the relevant market. *Id.* at 788; *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984).[6] Consumers' allegations do not belly up to this bar.

A. BECAUSE OF THE DIVESTITURE, ABI DID NOT ACQUIRE AN ACTUAL COMPETITOR IN THE U.S. BEER MARKET

Consumers' frontline allegations are that the acquisition eliminated SAB as an "actual . . . competitor in the United States." But as the district court correctly found, ABI's acquisition of SAB did not create a reasonable probability of anticompetitive effects in the U.S. beer market because ABI did not acquire any business interests in the U.S. beer market. Pre-transaction, SAB operated in the United States exclusively through its joint venture MillerCoors. As a condition of closing the acquisition, SAB divested completely its interests in MillerCoors to Molson. By requiring full divestiture of SAB's U.S. interests, the DOJ ensured that the acquisition will not create "any increase in the concentration in the U.S. beer industry."

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[6] The parties agree that the relevant product market is the production and sale of beer, and the relevant geographic market is the United States.

Faced with a similar ABI acquisition, we recently affirmed dismissal of a Section 7 suit for failure to state a claim, albeit in an unpublished disposition. *See Edstrom v. Anheuser-Busch InBev SA/NV*, 647 F. App'x 733 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 258 (2016).[7] In that case, beer purchasers sought to enjoin ABI and Constellation Brands, Inc. ("Constellation") from acquiring Grupo Modelo S.A.B. de C.V. ("Modelo"). Under the terms of that agreement, "ABI would purchase Modelo but grant Constellation an irrevocable, exclusive license to import Modelo brands into the United States." *Id.* at 735. ABI retained no right to sell Modelo beer in the United States. *Id.* Because "the challenged transaction d[id] not increase ABI's market share or the concentration of the U.S. beer market," we concluded that "Plaintiffs failed to plausibly allege a prima facie case that the challenged transaction is anticompetitive." *Id.* So too, here. The challenged transaction did not increase ABI's market share because ABI acquired no interests in the United States. The concentration of the U.S. beer market stayed precisely the same because MillerCoors remained in the market as a competitor (with SAB's share transferred fully to Molson).

Since SAB did not compete in the market before the transaction except *as* MillerCoors, and MillerCoors still competes in the market, Clayton Act cases addressing the elimination of an actual competitor in a relevant market—and a concomitant increase in market

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[7] Although our decision in *Edstrom* is not precedential and we do not rely on it here, it is instructive as to the reality of a transaction where ABI acquired no interests in the U.S. market. *See* Ninth Circuit Rule 36-3.

concentration—are inapposite.[8] Consumers argue that these cases "establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing" in a highly concentrated market like the U.S. beer market. *See Hospital Corp of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986). Yet with the exception of the potential competitor cases, discussed below, Consumers' cited cases involve the removal of an actual competitor *from the relevant market*. MillerCoors remains as a competitor in the market.

B. ABI DID NOT ACQUIRE A POTENTIAL COMPETITOR "POSITIONED AT THE EDGE OF THE MARKET, CONTINUALLY THREATENING TO ENTER"

Recognizing the reality that ABI did not acquire an actual competitor, Consumers claimed in summary fashion that the acquisition would eliminate SAB as a "*potential* competitor." (Emphasis added). The claim is doomed from the start because the potential competitor theory lacks factual allegations in the complaint. Indeed, by alleging that ABI and SAB were actual competitors, Consumers undermine their assertion that the brewers were potential competitors. Taking

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[8] *See, e.g.*, *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550 (1966) (merger of "two very large brewers competing against each other in 40 States"); *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966) (merger of "two of the most successful and largest [grocery stores] in the area" to create the second largest grocery store in Los Angeles); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 281 (1964) (acquisition of "an aggressive competitor" in the same market).

Consumers' factual allegations as true, as we must at this stage, SAB was not a potential competitor with ABI. *See In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016) (we accept as true all factual allegations in the complaint, but "do[] not have to accept as true conclusory allegations in a complaint"). Instead, before the transaction and divestiture, SAB was an actual competitor through its joint venture MillerCoors.

Consumers' effort on appeal to recast SAB as a "potential competitor . . . so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market" fails. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532–33 (1973). SAB was not poised on the edge of the market "continually threatening to enter." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 173 (1964). Nor was SAB "eager[] to enter that market." *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 660 (1964). SAB had already entered the market, through the MillerCoors joint venture. SAB's beneficial influence on competitive conditions in the market thus was *through* MillerCoors, an entity still competing in the market today.

Consumers did not allege in their complaint that SAB was a potential competitor because of "the ever-looming threat of the possible end of the [SAB-Molson] joint venture [MillerCoors] and the resulting re-entry of the parents." But such a claim also would be futile because allegations regarding the potential dissolution of MillerCoors and its competitive effects would be entirely speculative. *See Twombly*, 550 U.S. at 555.

C. ALLEGATIONS CONCERNING THE NEW MILLERCOORS' DISTRIBUTION PRACTICES ARE TOO SPECULATIVE TO STATE A CLAIM

Consumers make one last speculative argument: Post-transaction, MillerCoors—now a wholly-owned subsidiary of Molson—will adopt the distribution practices of ABI. Consumers provide no support for that assertion.[9] Merely stating that "it is likely that a 100 percent Molson Coors-owned MillerCoors will follow ABI's lead in its dealings with distributors," without more, is insufficient. *See Iqbal*, 556 U.S. at 678 (emphasizing that "labels and conclusions" are not enough to survive a motion to dismiss). This allegation is a classic speculative conclusion. General allegations regarding past acquisitions in the market, which prompted distinct DOJ remedies, do not alter the equation. The bottom line is that the complaint offers only speculation as to how a MillerCoors operated solely by Molson, as opposed to by Molson and SAB,

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[9] After briefing on the motion to dismiss, Consumers filed a supplemental declaration with an attached letter written by the American Antitrust Institute regarding potential post-merger coordination in the U.S. beer market. That letter was not incorporated into the complaint. Regardless, the letter was addressed to the DOJ Antitrust Division to encourage the agency to order pro-competitive remedies if it approved the merger, some of which the DOJ adopted in its settlement agreement with ABI. *See* Press Release, U.S. Dep't of Justice, Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition (July 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer.

will do business.[10] Such speculation "stops short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557 (alteration and internal quotation marks omitted).[11]

In view of our conclusion that Consumers do not have a viable Clayton Act claim, we need not reach Consumers' claim for injunctive relief.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE COMPLAINT WITH PREJUDICE

The only remaining question is whether Consumers' complaint could be "saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008). Ultimately, the district court did not abuse its discretion in concluding that Consumers could not plead around the elephant in the room. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655–56 (9th Cir. 2017). Since SAB divested its interests in the U.S. beer market, the transaction could not increase ABI's market share or the concentration of that market. As the district court aptly observed, the DOJ reached a settlement to "prevent increased concentration" in the market. While Consumers contend that the settlement only partially remedies their alleged injuries, they curiously did not submit public comments opposing the

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[10] Molson is not a defendant in this action. But if Molson conducts its MillerCoors business in the U.S. beer market in violation of the antitrust laws, it does so at the risk of private and public antitrust enforcement suits.

[11] Consumers do not appeal the district court's decision that allegations about ABI's buying power are too speculative.

settlement, as they were entitled to do. *See* 15 U.S.C. § 16(d).

Consumers' new arguments on appeal underscore that any amendment to their complaint would be futile. Consumers argue that they would add factual allegations regarding SAB's role in the relevant market managing MillerCoors as a joint venture, or (perhaps contradicting themselves), on the "edge of the market." Given the legal deficiencies in applying the "actual competitor" and "potential competitor" theories to the present facts, further allegations would not salvage the complaint.

Consumers also assert that they would add allegations regarding the closing of a MillerCoors brewery in Eden, North Carolina in September 2015. According to Consumers, the shuttered brewery once brewed on a contract basis for competitor Pabst and its closure "increased market concentration to presumptively illegal levels." However, Consumers do not explain why a brewery closed by MillerCoors months *before* ABI announced its proposed acquisition of SAB has anything to do with the merger, as opposed to being merely the product of MillerCoors' independent business judgment. The weakness of these proposed amendments underscores that the district court was within its discretion to dismiss the complaint with prejudice.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

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

[Filed July 22, 2016]

JAMES DEHOOG, et al, Plaintiffs,	)
v.	)
ANHEUSER-BUSCH INBEV, SA/NV, and SABMILLER, PLC, Defendants.	)

REPORT & RECOMMENDATION

CLARKE, Magistrate Judge,

On December 1, 2015 Plaintiffs filed their Complaint (#1), bringing this action against the defendants for violations of Section 7 of the Clayton Act. Plf. Compl. ¶ 1. Both defendants, Anheuser-Busch InBev SA/NV ("ABI") and SABMiller, plc ("SAB"), move, separately, to dismiss the Complaint. For the reasons below, both motions to dismiss (#41) (#43) should be GRANTED.

BACKGROUND

Plaintiffs are individual citizens of Oregon, Washington, and California. Pl. Compl. Ex. 1 (#1). Each plaintiff has purchased beer produced by one or both of the defendants and expects to continue to purchase beer produced by one or both of the defendants in the future. Pl. Compl. ¶ 8. Plaintiffs are also consumers of craft beer produced in Oregon. *Id.* Defendant ABI is the largest producer and seller of beer in the United States, accounting for approximately 46 percent of the United States market share. Pl. Compl. ¶ 10. Defendant SAB is a multinational brewing and beverage company. Pl. Compl. ¶ 13. SAB operates in the United States and Puerto Rico exclusively through a joint venture with Molson Coors Brewing Company ("Molson"), who is not a named party in this action. Pl. Compl. ¶ 14. The SAB and Molson joint venture, MillerCoors, LLC ("MillerCoors"), is the second-largest producer and seller of beer in the United States, accounting for 25 percent of the United States market share. *Id.* SAB and Molson each hold 50 percent governance rights in MillerCoors. Def. Mot. at 9 (#41). The Department of Justice ("DOJ") approved the MillerCoors joint venture on June 5, 2008. *Id.*

On November 11, 2015, ABI and SAB announced that ABI will acquire the entire share capital of SAB. Pl. Compl. ¶ 17. Concurrent with that announcement, ABI announced an agreement with Molson for complete divestiture of SAB's interest in MillerCoors. Even Decl. Ex. 3 at 1 (#44-3). The transaction is conditional on the completion of ABI's acquisition of SAB. *Id.* Upon completion of the transaction, Molson will acquire SAB's 50 percent voting interest and 58 percent

economic interest in MillerCoors, making MillerCoors a wholly-owned subsidiary of Molson. *Id.* Molson will maintain full control of the operations and resulting economic benefits of MillerCoors. *Id.*

Plaintiffs' Complaint alleges that the proposed agreement by ABI to purchase SAB "constitutes a violation of Section 7 of the Clayton Antitrust Act ("Clayton Act"), 15 U.S.C § 18, in that the effect of the proposed acquisition may be substantially to lessen competition, or to tend to create a monopoly in the production and sale of beer in the United States." Pl. Compl. ¶ 100. Plaintiffs specifically allege that the acquisition threatens to cause them "loss and damage in the form of higher beer prices, fewer services, fewer competitive choices, diminished product quality and product diversity, [and] suppression and destruction of smaller competitors through exclusive distribution arrangements . . ." Pl. Compl. ¶ 25. Moreover, Plaintiffs allege that the acquisition of SAB by ABI will "increase ABI's global buying power" and "give [ABI] leverage over the commodities used in brewing beer and many other facets of the beer industry that will likely affect competition in the United States." Pl. Compl. ¶ 54. With regard to Molson's acquisition of SAB's interest in MillerCoors, Plaintiffs allege that "[g]iven the resulting change in management and Molson's new increased size and scope in the United States market following the ABI-SAB acquisition, Molson's management is likely to have incentives to change its practices to match ABI's." Pl. Compl. ¶ 33. Plaintiffs seek to permanently enjoin the acquisition of SAB by ABI. Plf. Compl. ¶ 1.

STANDARD

Pursuant to Rule 12(b)(6), a motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief may be granted. In order to state a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)).

Dismissal under Rule 12(b)(6) is proper "if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Id.* (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). In evaluating a motion to dismiss, the court must accept the allegations of material fact as true and construe those allegations in the light most favorable to the non-moving party. *Odom v. Microsoft Corp.*, 486 F.3d 541, 545 (9th Cir. 2007) (internal citations omitted).

DISCUSSION

Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits the acquisition of stocks or assets if the effect of such acquisition "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. To state a claim under Section 7, "a plaintiff must allege that the acquisition will create an appreciable danger of anticompetitive consequences." *Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.*, 259 F. Supp. 2d 992, 1003 (N.D. Cal. 2003). To determine if antitrust injury exists, the first step is to define "the relevant geographic and product markets in which the alleged anticompetitive effects occurs." *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 307 (S.D.N.Y. 2003). Defining the relevant market allows the court to determine "whether the defendant has monopoly power in that market, what the area of competition is, and whether the allegedly unlawful acts have anticompetitive effects in that market." *Cupp v. Alberto-Culver USA, Inc.*, 310 F. Supp. 2d 963, 969 (W.D. Tenn. 2004).

Similarly, "monopsony power is market power on the buy side of the market." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007). The requirements for alleging monopsony under Section 7 mirror those for alleging a monopoly claim: plaintiffs must demonstrate that an acquisition will substantially lessen competition or tend to create a monopsony in some defined product and geographic market and they are, as a result, threatened with loss or damages. *See Weyerhaeuser Co.*, 549 U.S. at 322; Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 12 (Apr. 19, 2010).

I. ABI's Motion to Dismiss should be granted.

Defendant ABI moves this Court for an Order dismissing the Complaint pursuant to Rule 12(b)(6) on the basis that Plaintiffs have failed to state a claim under Section 7 of the Clayton Act. ABI's motion should be granted.

a. Plaintiffs' Complaint should be dismissed because the allegations admit that ABI's market share in the United States will be unaffected by the proposed acquisition.

As discussed above, Section 7 prohibits a corporation from acquiring the whole or any part of a business's stock or assets if the effect of the acquisition "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Substantial competitive harm may result if an acquisition creates or enhances an entity's "market power." *See Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 464 (1992); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). To determine whether an acquisition will create or enhance "market power" in violation of Section 7, a party must adequately allege that "the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result . . . in a significant increase in the concentration of firms in the market.'" *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963)). Moreover, a party must adequately allege that "at the time of suit, there was a reasonable probability that the acquisition may lead to a restraint [on competition] or a monopoly." *United States v.*

Phillips Petroleum Co., 367 F. Supp. 1226, 1261 (C.D. Cal. 1973).

Plaintiffs' allegation that ABI's market power in the United States will increase is contradicted by their acknowledgment that the proposed acquisition includes the complete divestiture of SAB's market share in the United States. Pl. Compl. ¶ 33. Plaintiffs concede that Molson will obtain 100 percent ownership of SAB's market share in the United States. Pl. Compl. ¶¶ 33-34. On the face of the complaint, therefore, Plaintiffs have not adequately alleged that there is a reasonable probability that the proposed acquisition will increase ABI's market power and thereby lessen competition or create a monopoly in the United States beer market.

Recently, in *Edstrom v. Anheuser-Busch InBev SA/NV*, a district court in the Ninth Circuit considered an acquisition that closely mirrors the proposed acquisition at issue in this case. *Edstrom v. Anheuser-Busch InBev SA/NV*, No. C 13-1309, 2013 WL 5124149 (N.D. Cal. Sept. 13, 2013)[1]. In that acquisition, ABI acquired full ownership of Grupo Modelo, S.A.B. de C.V. ("Modelo"), and at the same time sold Modelo's United States business to Constellation Brands, Inc. ("Constellation"). *Id.* As a result, Constellation became an independent brewer and the exclusive seller of Modelo beer brands in the United States. *Id.* The court determined that under the terms of that transaction, ABI's percentage share of the United States market did

[1] The United States Court of Appeals for the Ninth Circuit affirmed in an unpublished decision. *Edstrom v. Anheuser-Busch InBev SA/NV*, ___ F. App'x ___, No. 14-15337, 2016 WL 1297380 (9th Cir. April 4, 2016).

not increase. *Id.* at *5. For this reason, the court held that plaintiffs failed to adequately allege that ABI's market power would increase as a result of the acquisition. Although there are postural differences between *Edstrom* and this case, the fundamental reasons for dismissal are the same. Like in *Edstrom*, ABI's percentage share in the United States market will not change as a result of ABI's acquisition of SAB. Therefore, Plaintiffs have failed to adequately allege that there is a reasonable probability that the proposed acquisition will increase ABI's market power.

b. Plaintiffs' allegations regarding Molson's future conduct in the ownership of MillerCoors are too speculative to state a claim for relief.

"[A]lthough [Section] 7 'was intended to arrest the anticompetitive effects of market power in their incipiency,' the Act does not authorize suits by those whose allegations of threatened injury amount to little more than conjecture." *Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 317 (D.D.C. 2011) (citations omitted). Plaintiffs allege that given the resulting change in management and Molson's new increased size in the United States market following the acquisition of SAB, Molson's management is likely to have incentives to change distribution and pricing practices to match ABI's. Pl. Compl. ¶¶ 33, 45. These allegations are purely speculative and not supported by any specific facts.

First, Plaintiffs fail to plead facts supporting their claim that Molson will follow ABI's restrictive distribution practices. Plaintiffs claim that just as Constellation began following ABI's pricing strategies

after acquiring the United States market share of Modelo, Molson will change its distribution strategies to follow ABI's after this acquisition. Pl. Comp. ¶ 33. However, Plaintiffs fail to explain how Constellation's post-acquisition decision accurately predicts how Molson will do business following this acquisition. Plaintiffs' claim is not based on any specific factual allegation, but merely on an analogy to different companies with different business strategies. Therefore, it is pure speculation that Molson will have incentives to change its distribution practices.

Second, Plaintiffs fail to plead facts supporting their claim that Molson will increase prices to follow those set by ABI. Currently, an "independent pricing dynamic exists between ABI and SAB," Pl. Comp. ¶ 24, however, for the "past several years, SAB has followed ABI's annual price increases to a significant degree," Pl. Compl. ¶ 82. If Molson does not change SAB's current pricing strategy following the acquisition, Molson will already be following prices set by ABI, and the prices would stay the same regardless of the acquisition. Moreover, Molson is not a named party in this action. The speculative allegations about the future conduct of an unnamed party, especially when such future conduct is unlikely to affect the status quo, are insufficient to state a claim for relief against ABI.

c. Plaintiffs' monopsony allegations are vague and do not sufficiently state a plausible claim for relief.

Plaintiffs allege that, following the acquisition of SAB, ABI will have monopsony power with respect to the purchase of hops and packaging material. Pl. Compl. ¶¶ 53-58. With respect to hops, there are three

problems with Plaintiffs' allegation: (1) Plaintiffs do not define or show how the transaction will influence the hops market; (2) Plaintiffs' allegations do not support their "waterbed" theory of harm; and (3) Plaintiffs do not adequately allege an injury based on these monopsony claims. With respect to packaging materials, Plaintiffs fail to define the aluminum can market or allege a cognizable injury. For these reasons, Plaintiffs' monopsony allegations cannot support a Section 7 claim.

First, Plaintiffs fail to identify the scope of the hops market, the geographic market in which ABI would allegedly have monopsony power, or how the transaction would affect either market concentration or the combined entity's market share. Plaintiffs allege that ABI "is a powerful buyer in the bitter hops market" and that, post-acquisition, ABI could "depress prices in the bitter hops market." Pl. Compl. ¶ 56. Plaintiffs attempt to allege that these depressed prices would come as a result of ABI demanding, and receiving, lower prices from their hops suppliers. Receiving lower prices on hops would mean ABI's costs to produce its beer would go down. ABI's ability to produce its beer at a lower cost would allegedly cause other beer producers to pressure their own hops suppliers to offer lower prices in order to compete with ABI. However, nowhere in these allegations do Plaintiffs attempt to define the hops market, the geographic scope of the hops market, or the competitors active within it. Plaintiffs likewise do not allege how concentrated the purported hops market is, what percentage of the market ABI or SAB currently enjoy, or how the transaction would affect either market concentration or the combined entity's market share.

Plaintiffs' failure to define the hops market and the relevant impact of the acquisition on the hops market is fatal to this claim.

Second, Plaintiffs' "waterbed" theory of harm is not properly supported. Plaintiffs allege that "small buyers like craft brewers" are vulnerable to the "waterbed effect," whereby "a powerful buyer demands lower prices or other concessions from its suppliers, causing the supplier to, in turn, increase prices to smaller buyers." Pl. Compl. ¶ 55. But this proposed effect does not support Plaintiffs' theory of harm because monopsony cases typically concern alleged harm to sellers of the relevant commodity, not to competitors of the monopsonist. Plaintiffs' "waterbed" theory fails because the theory itself is concerned with alleged harm to competitors of ABI post-acquisition, which is inconsistent with typical monopsony claims and has nothing to do with the Plaintiffs themselves.

Further, the proposed "waterbed effect" is inconsistent with Plaintiffs' allegation that efforts by ABI to decrease the price of bitter hops will "cause [United States] farmers to abandon the bitter hops market in favor of more profitable aroma hops," which are the very type of hops used "predominantly by craft brewers." Pl. Compl. ¶ 56. This allegation suggests that hops producers have the ability to avoid lower prices by switching to more profitable aroma hops, meaning they would avoid Plaintiffs' proposed "waterbed" theory of harm altogether. Plaintiff's allegations are inconsistent and their unsupported "waterbed" theory fails.

Third, Plaintiffs do not allege a cognizable antitrust injury, as they fail to explain how ABI's purported monopsony power threatens to injure Plaintiffs in their

capacity as beer consumers. Plaintiffs allege that small beer-producing competitors will face higher prices of aroma hops and shortages of bitter hops, but neither is a threatened injury to Plaintiffs.

Plaintiffs' allegation regarding packaging material is also problematic. Plaintiffs fail to define the relevant market and provide any theory of loss or damage. They allege that "[s]maller buyers are likely to experience delays, poorer terms, and even unavailability" of aluminum cans needed for packaging beer post-acquisition. Pl. Compl. ¶ 58. Plaintiffs claim that Crown Holdings, an aluminum can manufacturer, "recently . . . dropped both new and existing small craft customers and lengthened lead times, suggesting capacities are becoming limited in the industry." *Id.* at ¶ 57. However, Plaintiffs do not explain how the alleged capacity constraints of a single manufacturer relate to the broader aluminum can market in general. Plaintiffs also do not define the aluminum can market, nor do they to show how Crown Holding's capacity constraints will injure Plaintiffs as beer consumers. For these reasons, Plaintiffs' monopsony allegations fail to state a claim for relief and should be dismissed.

II. SAB's Motion to Dismiss should be granted because Section 7 of the Clayton Act only applies to acquirers, not sellers, and SAB is a seller.

Defendant SAB moves this Court to dismiss the Complaint on the basis that Plaintiffs have failed to state a claim under Section 7 of the Clayton Act. Pl. Compl. ¶¶ 33; 99-101. Section 7 provides that "[n]o person engaged in commerce . . . shall acquire . . . the stock or other share capital . . . of another person . . .

where . . . the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. The Ninth Circuit has held that "[b]y its express terms [Section] 7 proscribes only the act of acquiring, not selling . . . ." *United States v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 227 (9th Cir. 1978) (citing *Dailey v. Quality Sch. Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967)). Numerous courts around the country have reached precisely the same result and held that sellers cannot be liable under Section 7. *See Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004); *Berlyn, Inc. v. The Gazette Newspapers, Inc*., 157 F. Supp. 2d 609, 623 (D. Md. 2001); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1329 n.399 (E.D. Pa. 1981).

Congress's intent to hold only sellers liable under Section 7 is clear when compared with Section 3 of the Act. Section 3 makes it "unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . where the effect of such lease, sale or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14. The Ninth Circuit interprets Section 3 as "liability in terms of a person who makes a sale or contracts for sale and nowhere provides for liability of the buyer[,]" while Section 7 "applie[s] only to an acquiring corporation and not to the corporation being acquired." *McGuire v. Columbia Broad. Sys., Inc.*, 399 F.2d 902, 906 (9th Cir. 1968) (citing *Dailey*, 380 F.2d at 488). Had Congress intended Section 7 to apply to sellers, as well as buyers, it would have provided for it expressly within the Act.

While Section 7 applies only to acquirers, courts do make an exception and join sellers "when the plaintiff, usually the federal government, seeks rescission or divestiture and the Court needs jurisdiction over both the buying and selling company in order to fashion such equitable relief pursuant to 15 USC § 25." *Arbitron Co. v. Tropicana Prod. Sales, Inc.*, No. 91 Civ. 3697 (PKL), 1993 WL 138965, at *7 (S.D.N.Y. Apr. 28, 1993). Courts have the authority to exercise this exception, however, the Ninth Circuit refrains from joining the selling party unless the sale has already been consummated. *See, e.g., Coca-Cola Bottling*, 575 F.2d at 229-30 (allowing joinder because parties had finalized the acquisition and assets had been transferred prior to the government filing the complaint); *Phillips Petroleum Co.*, 367 F. Supp. at 1228-30, 1262 (ordering divestiture after defendant had acquired a division of another oil company), *aff'd*, 418 U.S. 906 (1974).

It is undisputed that SAB is a selling party to this acquisition and the sale has not been consummated. The acquisition of SAB by ABI is pending: no assets have been transferred from SAB to ABI, nor, based on the acquisition plan, will any assets within the United States be transferred from SAB to ABI. Moreover, the proposed acquisition is currently under investigation by the DOJ, and the parties have agreed to not consummate the acquisition until the DOJ provides authorization. Therefore, SAB's Motion to Dismiss should be granted.

RECOMMENDATION

The Defendants' motions (#41) (#43) should be granted. The Complaint (#1) should be dismissed. This Report and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is filed. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* Fed. R. Civ. P. 72, 6. Parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 22 day of July, 2016.

/s/ Mark D. Clarke
MARK D. CLARKE
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

1:15-cv-02250-CL

[Filed October 3, 2016]

JAMES DEHOOG, ET AL., Plaintiffs,	)
v.	)
ANHEUSER-BUSCH INBEV, SA/NV; SABMILLER, PLC, Defendants.	)

ORDER

AIKEN, District Judge:

On July 22, 2016, Magistrate Judge Mark D. Clarke filed a Findings and Recommendation (#102), and the matter is now before this Court. See 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). Plaintiffs have filed Objections (#106), Defendants have responded to Plaintiffs' Objections (##108, 109) and I have reviewed the file of this case *de novo*. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981).

I have given this matter *de novo* review. I find no error. Accordingly, I ADOPT the Findings and Recommendation. Defendants' Motions to Dismiss (##41, 43) are GRANTED.

I turn then to the question of amendment. Dismissal without leave to amend is appropriate where amendment would be futile. Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002). After reviewing the Complaint, briefing, and the exhibits submitted by both parties, I conclude that any amendment would be futile, particularly in light of the Ninth Circuit's ruling in a factually-similar case, Edstrom v. Anheuser-Busch InBev, 647 F. App'x 733 (9th Cir. 2016). In Edstrom, the court held that "[t]o establish a prima facie case, a Section 7 plaintiff generally must show that the challenged transaction would increase the concentration of firms in the relevant market." Id. at 735. The Ninth Circuit noted that the challenged transaction in Edstrom did not "increase ABI's market share or the concentration of the U.S. beer market," and found that the plaintiffs "failed to plausibly allege that the challenged transaction is anti-competitive." Id.

Plaintiffs in this case, like those in Edstrom, cannot plausibly allege that the challenged transaction will increase either ABI's market share or the concentration of firms in the U.S. beer market. Aside from the complete divestiture of SAB's interest in MillerCoors, which was discussed at length by Judge Clarke, Plaintiffs' own exhibits show that the Department of Justice has reached a settlement with ABI and SAB which will prevent increased concentration in the U.S. beer industry. Alioto Decl. Ex. B, at 1.

Accordingly, dismissal shall be with prejudice. Any outstanding motions are DENIED as moot.

It is so ORDERED and DATED this 3rd day of October ~~September~~, 2016.

/s/ Ann Aiken
ANN AIKEN
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

1:15-cv-02250-CL

[Filed October 3, 2016]

JAMES DEHOOG, ET AL.,	)
Plaintiffs,	)
	)
v.	)
	)
ANHEUSER-BUSCH INBEV, SA/NV; SABMILLER, PLC,	)
Defendants.	)
	)

JUDGMENT

AIKEN, District Judge:

For the reasons set forth in the Findings and Recommendation of Magistrate Judge Clarke (#102) and my accompanying Order, Defendants' Motions to Dismiss (##41, 43) are GRANTED. This case is dismissed with prejudice.

IT IS SO ORDERED.

DATED this 3 day of October ~~September~~, 2016.

/s/ Ann Aiken
ANN AIKEN
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35912
D.C. No. 1:15-cv-02250-CL
District of Oregon, Medford

[Filed September 18, 2018]

JAMES DEHOOG; et al.,
Plaintiffs-Appellants,

v.

ANHEUSER-BUSCH INBEV SA/NV and SABMILLER, PLC,
Defendants-Appellees.

ORDER

Before: McKEOWN and PAEZ, Circuit Judges, and BASHANT,* District Judge.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has

* The Honorable Cynthia A. Bashant, United States District Judge for the Southern District of California, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.