

16-270
No. _____

Supreme Court, U.S.
FILED

AUG 30 2016

OFFICE OF THE CLERK

In the Supreme Court of the United States

STEVEN EDSTROM, *et al.*,

Petitioners,

v.

ANHEUSER-BUSCH INBEV SA/NV, *et al.*,

Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that may “substantially . . . lessen competition, or to tend to create a monopoly” and the standards announced by this Court in *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973) require separate analysis of a transaction’s elimination of an actual and potential competitor exercising present beneficial competitive influence on the market?
2. Whether § 7 of the Clayton Act requires an increase in concentration in order to state a claim and avoid dismissal under Fed. R. Civ. P. 12(b)(6)?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, plaintiffs-appellants below are: Steven Edstrom, Barry Ginsburg, Martin Ginsburg, Edward Lawrence, Sharon Martin, Mark M. Naeger, John Nypl, Daniel Sayle, and William Stage.

Respondents in this Court, defendants-appellees below, are: Anheuser-Busch InBev SA/NV, Grupo Modelo S.A.B. de C.V., and Constellation Brands, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, reverse and remand for trial on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. Appendix to Petition for Writ of Certiorari (“App.” 1a - 5a.) The opinions of the district court (App. 6b – 7 b and App. 54e – 75e) are unreported.

JURISDICTION

The Court of Appeals rendered its decision on April 4, 2016. (App. 1a-5a.) The court denied a timely petition for rehearing with a suggestion for rehearing *en banc* on June 1, 2016. (App. 76f – 77f.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioners now file this Petition for Writ of Certiorari on August 30, 2016.

STATUTORY PROVISIONS INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. § 18, proscribes any person who is “engaged in commerce or in any activity affecting commerce” from acquiring “the whole or any part” of a business if the effect of that acquisition “may be substantially to lessen competition, or to tend to create a monopoly.” (App. 78g.)

Under Section 16 of the Clayton Act, a private plaintiff may obtain injunctive relief for violation of

Section 7 upon a showing of “threatened loss or damage.” 15 U.S.C. § 26. (App. 80g.)

STATEMENT OF THE CASE

Since 2008, the United States beer market has become increasingly concentrated through a series of mergers. Defendant Anheuser-Busch InBev now controls over 50% of the manufacture, distribution, and sale of beer in the United States. (IV ER 636). A joint venture between SAB (South African Brewing Company and Miller/Coors controls 30% of the beer market in the United States. Significant competition has been eliminated in the United States beer market because of the major brewers’ desire to grow through acquisition rather than competition.

In 2012, in the face of competition from Modelo, a Mexican Brewing company that produces Corona among other Mexican brands, ABI announced a transaction whereby it would acquire all of Modelo. In an effort to dodge further antitrust scrutiny, the transaction also included a divestiture of Modelo’s U.S. business to Constellation.

In a decision that conflicts with Supreme Court precedent in *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the panel validated an erroneous approach to analyzing transactions pursuant to § 7 of the Clayton Act, 15 U.S.C. § 18, that ignores and fails to separately consider the beneficial competitive influence exerted by an actual and potential competitor; and separately adds an increase in concentration as a necessary requirement to state a claim.

In this case, the Court did not consider the effect of the transaction on Crown, the U.S. importer of Model-

branded beer. Pre-transaction, Crown was a fierce competitor that had adopted a competitive program called the Momentum Plan. The institution of the Momentum Plan constrained ABI's price increases. After the transaction closed, Crown, which was previously owned half by Modelo and half by Constellation, became fully owned by Constellation, and the significant competitive program, the Momentum Plan, abandoned, opening up ABI's ability to raise prices. As articulated in *Falstaff*, it was error for the Court to ignore the pro-competitive effect the Crown joint venture exerted on the market. And, as made equally plain by *Falstaff*, an increase in concentration is not a requirement under § 7 to state a claim.

FACTUAL BACKGROUND

Defendant ABI is the 2008 combine of Belgium-based InBev, the largest brewer in the world, with Anheuser-Busch, the then largest brewer in the United States. The transaction at the time was the largest in the history of the antitrust laws and the largest cash payment ever offered to purchase a competitor. The United States Department of Justice allowed the transaction to proceed with a comparatively minor divestiture similar to the one contemplated here. Now, ABI controls approximately 50% of the manufacture, distribution, and sale of beer in the United States. (IV ER 636; Second Amended and Supplemental Complaint "SAC" ¶ 1.)

Plaintiffs brought their complaint against Defendants to prohibit another acquisition by ABI of its significant competitor in the United States, Modelo, to eliminate the price constraint Modelo was exerting on

ABI's desire to raise prices. In the alternative, Plaintiffs request, should the combine be finalized, divestiture and damages. (IV ER 638; SAC ¶ 10.)

In the United States, ABI was threatened by intense competition from Modelo, the largest brewer in Mexico, which imports and sells Modelo-branded beer, including Corona, in the United States through Crown. Crown is an importer, distributor, and wholesaler, which was owned 50% by Modelo and 50% by Constellation, a beer importer, spirits, and winemaker. Modelo's market share in the United States was only 5%, (IV ER 636 SAC ¶ 3.), but its high end beer at a steady price was causing consumers to "trade up" when ABI's prices began to approach Modelo's thereby steadily increasing Modelo's market share.

In the last few years, Modelo (through its U.S. importer Crown) threatened ABI's price-increasing strategy by instituting a competitive program called the "Momentum Plan" to secure more market share. Through the Momentum Plan, Modelo refused to increase its prices when ABI, generally followed by MillerCoors, raised its prices. Although MillerCoors consistently followed the prices of ABI, Modelo did not. (IV ER 637; SAC ¶ 6.) Modelo products, principally Corona, are considered to be "high end" beers, commanding higher prices than so-called premium and/or premium-plus beers, such as Bud Light and Budweiser. (IV ER 637; SAC ¶ 4.) In addition to acting as a constraint on ABI increases in price, the price differentials between Modelo beers and ABI beers have narrowed to such an extent that many consumers have "traded up" from ABI's lower-quality beers to Modelo's high-quality beers. (IV ER 636; SAC ¶ 7.)

Because of Modelo's resistance to ABI price hikes, ABI and MillerCoors have been forced to offer lower prices and discounts for their brands to discourage customers from "trad[ing] up" to Modelo brands. (IV ER 641; SAC ¶ 20.)

Constellation (the former 50% owner of the Modelo importer, Crown), however, shared the same price increasing philosophy as ABI and had constantly encouraged Crown to abandon its Momentum Plan strategy and fall in line with ABI price increases. According to the Department of Justice, "Constellation has already shown through its participation in the Crown joint venture that it does not share Modelo's incentive to thwart ABI's price leadership; and that, in fact, Constellation consistently has urged Crown to follow ABI's price increases." For example, in 2011, Constellation's managing director wrote to Crown's CEO that: "Since ABI has already announced an October general price increase, I was wondering if you are considering prices increases for the Modelo portfolio...from a positioning and image perspective, I believe it would be a mistake to allow the gaps to be narrowed. I think ABI's announcement gives you the opportunity to increase profitability without having to sacrifice significant volume." (IV ER 642; SAC ¶¶ 22-23.) Crown's CEO refused to budge.

In 2012, in an effort to thwart the competition by Modelo, and to further its march toward a world-wide beer monopoly, ABI entered into an agreement to acquire all of Modelo. In June of that year, with a legerdemain to create a façade of competition between ABI and Modelo's importer Crown, ABI entered into an agreement with Constellation, contingent on the

approval of the acquisition of Modelo. The agreement provided that ABI would sell Modelo's existing 50% interest in Crown Imports LLC to Crown's other owner, Constellation. Under this agreement, Constellation would remain an importer and would be dependent upon ABI for its supply of Modelo- branded beer. (IV ER 643; SAC ¶ 27.)

After the Department of Justice filed its complaint in January 2013, to prevent the acquisition, in the United States District Court, District of Columbia (II ER 231-258), Defendants announced a second attempt to create a mirage of competition. (IV ER 644; SAC ¶ 28.) Under the terms of the Revised Agreement, which was conditioned on the completion of ABI's acquisition of Modelo, ABI will then sell to Constellation the 50% of Crown owned by Modelo. Constellation, under the Revised Agreement, would be free to do as it always wanted to do; namely, lay off the former CEO, increase prices with ABI, and dismantle the program that was leading consumers to "trade up." ABI would also have sell the Modelo Piedras Negras brewery and grant "perpetual rights" to Constellation for Corona and the Modelo brands in the United States. (IV ER 644; SAC ¶ 29.)

However, under the Transition Services Agreement, for three years ABI would be providing "consulting services" with respect to topics such as the management of the Piedras Negras Brewery, logistics, material resource planning, and other general administrative services. In addition, the Transition Services Agreement also allowed ABI to supply essential key inputs (such as aluminum, cans, glass, malt, yeast, and corn starch.) Moreover, ABI would pay

the salaries of the workers at the brewery. Furthermore, the Interim Supply Agreement, allowed ABI to supply Constellation Modelo branded-beer each year to make up for any difference between demand and capacity at the Brewery. For at least three years, ABI would be a direct supplier of Modelo-branded beer to Constellation. (III ER 443-444, §§ 2.01(a) through (e), 2.04(e).)

In reality, Defendants' proposed "remedy" eliminated from the market Modelo, a particularly aggressive competitor, and replaced it with an entity with little to no beer brewing experience, an entity which had encouraged Crown to follow ABI price hikes, and which would, in actual effect, be ABI's puppet. (IV ER 645; SAC ¶ 33.) In addition, during a three year "transition" period, ABI would "teach" Constellation how to do what it does best--increase beer prices and diminish beer quality.

As a result, Plaintiffs and the 40% of the United States beer-consuming population, of ABI-branded beers, Modelo-branded beers and others, and who expect to continue to do so in the future, were significantly threatened with loss or damage in the form of higher beer prices, diminished quality (including cheaper hops and watered-down beer), reduced product innovation, and other diminished competitive options. Plaintiffs and the beer-consuming public sustained irreparable harm for which damages were not compensable, in that quality, innovation, and choice would be difficult restore once lost. (IV ER 662; SAC ¶ 117.)

THE LOWER COURT'S RULINGS

Plaintiffs filed their initial complaint on March 22, 2013, seeking to enjoin the acquisition of Modelo by ABI. The Second Amended Complaint was filed on June 25, 2013. (IV ER 635.)

Defendants moved to dismiss the Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) on June 28, 2013. (III ER 574 and IV ER 606; Defendants' Motion to Dismiss Second Amended Complaint, June 28, 2013, (Dkt. Nos. 64 and 66.)) On that same date, Plaintiffs moved for a Preliminary Injunction requiring Defendants to hold their assets separate and apart. Plaintiffs also moved to compel production of documents produced by Defendants to the Department of Justice under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 and to compel the depositions of certain witnesses.

Following briefing, a hearing on Defendants' Motions to Dismiss and Plaintiffs' Motion for a Hold Separate Order was held on August 9, 2013. (II ER 83-208).

In support of their Motions to Dismiss, Defendants requested judicial notice of copies of the documents supporting the acquisitions at issue in this case (Stock Purchase Agreement, First Amendment to Stock Purchase Agreement, Amended and Re-Stated Sub-License Agreement, the Transition Services Agreement, the Amended and Restated Membership Interest Purchase Agreement, and the Interim Supply Agreement.) After supplemental briefing, the Court entered an order granting Defendants' Motions to Dismiss on September 13, 2013, and denied leave to

amend Plaintiffs' claims under § 7 of the Clayton Act. (App 54e – 75e; I ER 3-18.) The Court entered judgment on October 16, 2013. (App. 51d – 53d; I ER 2.)

After judgment was entered in October, Plaintiffs discovered that Crown, under Constellation, had instituted and led price increases, just as Plaintiffs alleged in the SAC. Plaintiffs filed a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 59(e) or 60(b) or in the Alternative 60(d), arguing that Defendants had made numerous misrepresentations to the court by declaration and in the briefing on the Motions to Dismiss and that, as a result, the judgment should be vacated and that Plaintiffs should be permitted discovery on the reported price increases. On January 24, 2014, the Court denied Plaintiffs' Motion for Relief from Judgment for the reasons set forth on the record. (App. 6b – 7b; I ER 1; II ER 68-73.)

REASONS FOR GRANTING THE PETITION

I. The Decision by the Court of Appeals Overlooks and Conflicts with this Court's Holding in *Falstaff* that Requires Consideration of Whether an Acquisition Eliminates a Potential Competitor Exerting Beneficial Competitive Influence on the Market

The panel's decision upheld a standard for analyzing transactions challenged pursuant to § 7 of the Clayton Act that conflicts with a line of precedent by this Court, including this Court's decision in *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

Holding that, “As a result, the challenged transaction does not increase ABI’s market share or the concentration of the U.S. beer market. Therefore, Plaintiffs failed to plausibly allege a prima facie case that the challenged transaction is anticompetitive” (App 2a), the Court relied on its holding in *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke’s Health System, Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015). *St. Alphonsus* requires a plaintiff to show that a challenged transaction would increase concentration of firms in a relevant market to establish a prima facie case. *Id.* at 788; App. 2a.

The Supreme Court’s holding in *Falstaff* stands in stark contrast to the panel’s decision in this case. Section 7 “bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of Competition. (citations omitted) Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior.” *Falstaff*, 410 U.S. at 531.

Ultimately, this Court held that the lower court erred because it had “failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market.” *Id.* at 532-533. Like the acquisition at issue here, market share percentages were unaffected in the *Falstaff* transaction, but this Court nevertheless held that it was error for the court to refuse to consider the

transaction's elimination of potential competition, even if there were no increase in concentration.

While market shares were technically unchanged, actual and potential competition was eliminated by the transaction. Crown, the U.S. importer of Modelo-branded beers, then owned jointly by Modelo and Constellation, exerted beneficial influence on competitive conditions in the market through its implementation of the Momentum Plan. Pre-transaction, Crown, then an importer, not a brewer, was known as a "price maverick." It was a fierce competitor under the Modelo-Constellation regime. Post-transaction, as predicted, the Momentum Plan was abandoned by Crown under Constellation's wholly-owned leadership. The lower court's insistence that lack of increase in concentration thereby ipso facto failed to state a claim, and the lower court's failure to consider the effect of the transaction on Crown and its "beneficial influence on competitive conditions in the market" was error under this Court's holding in *Falstaff*.

CONCLUSION

The petition for writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, reverse and remand for trial on the merits.

Respectfully submitted,

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