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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**

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11 STEVEN EDSTROM, and others,

12 Plaintiffs,

13 v.

14 ANHEUSER-BUSCH InBEV SA/NV,
15 GRUPO MODELO S.A.B. de C.V., and
16 CONSTELLATION BRANDS, INC.,

17 Defendants.

Case No. 13-cv-01309 MMC (NC)

**ORDER DENYING MOTION TO
COMPEL**

Re: Dkt. No. 75

18 In this private antitrust suit challenging a beer industry merger, plaintiffs seek
19 document and deposition discovery before the district court rules on a pending motion to
20 dismiss the complaint. The issue is whether plaintiffs have shown good cause under
21 Federal Rule of Civil Procedure 26 to obtain these documents and depositions earlier than
22 ordinarily permitted under the Federal Rules. Plaintiffs invite this Court to ignore, evade, or
23 distinguish the Supreme Court's analysis in *Bell Atlantic Corp. v. Twombly*, requiring a
24 "plausible" antitrust complaint before proceeding to expensive antitrust discovery. The
25 Court declines the invitation. Because plaintiffs have not demonstrated good cause for
26 early discovery, the Court DENIES plaintiffs' motion to compel.

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1 **I. BACKGROUND**

2 Plaintiffs filed a complaint on March 22, 2013, challenging the acquisition of Grupo
3 Modelo by Anheuser-Busch InBev under § 7 of the Clayton Act. Plaintiffs seek injunctive
4 relief. Dkt. No. 1. On April 1, 2013, District Judge Maxine M. Chesney set a case
5 management conference for June 28, 2013. Dkt. No. 13. Plaintiffs then amended their
6 complaint on April 17, 2013, and added claims under § 1 of the Sherman Act, alleging that
7 the merger would result in price fixing and was likely to create a monopoly. Dkt. No. 14.
8 The parties stipulated to extend the time for defendants to respond, and on June 3, 2013,
9 defendants filed a motion to dismiss plaintiffs’ amended complaint for failure to state a
10 claim for relief under Federal Rule of Civil Procedure 12(b)(6). Dkt. Nos. 36, 40, 41. That
11 same day, plaintiffs filed a motion for a temporary restraining order to prevent the
12 acquisition of Grupo Modelo by Anheuser-Busch InBev. Dkt. No. 42.

13 After a hearing on June 5, 2013, Judge Chesney denied plaintiffs’ motion for a
14 temporary restraining order. Dkt. Nos. 50, 51. Judge Chesney also ordered the parties to
15 meet and confer regarding a new date for the initial case management conference. Dkt. No.
16 50. In accordance with that order, the parties filed a stipulation that postponed briefing on
17 defendants’ pending motion to dismiss, proposed a schedule for plaintiffs to submit an
18 amended complaint and for defendants to move to dismiss it, and set the case management
19 conference for August 2, 2013. Dkt. No. 60. Under that schedule, the parties agreed to
20 exchange initial disclosures by July 26, 2013. Dkt. No. 60. Judge Chesney granted the
21 stipulation, deemed defendants’ pending motion to dismiss withdrawn without prejudice,
22 and set the case management conference for October 11, 2013. Dkt. No. 61.

23 On June 25, 2013, plaintiffs filed their second amended complaint, seeking to enjoin
24 the acquisition of Grupo Modelo by Anheuser-Busch InBev under § 7 of the Clayton Act
25 and § 1 of the Sherman Act. Dkt. No. 63. In the interim, defendants had closed the
26 transaction on the merger. *Id.* at 30. So, as an alternative to equitable relief, plaintiffs also
27 asked for divestiture and damages in their second amended complaint. *Id.*

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1 Defendants then moved to dismiss plaintiffs’ second amended complaint on June 28,
2 2013, arguing again that plaintiffs failed to state a claim for relief. Dkt. Nos. 64, 66.

3 That same day, plaintiffs filed two motions of their own. Plaintiffs filed a motion
4 asking the Judge Chesney to order preliminary relief in the form of a “hold separate” order
5 that would compel defendants to hold their assets separate and maintain the status quo. Dkt.
6 No. 68 at 7. Plaintiffs also filed a motion to compel production of documents defendants
7 had provided to the Department of Justice under the Hart-Scott-Rodino Act during the
8 government’s review of the merger. In addition, plaintiffs moved to compel the depositions
9 of Carlos Brito, CEO of Anheuser-Busch InBev; Rob Sands, CEO of Constellation Brands;
10 Bill Hackett, President of Crown Imports; and Carlos Fernandez, Chairman and CEO of
11 Grupo Modelo. Dkt. No. 75. Plaintiffs stated that the requested discovery was necessary
12 “to enable them to prepare and present a Motion for Preliminary Injunction and a Motion
13 for Injunction Seeking Hold Separate Order.” *Id.* at 2.

14 Judge Chesney referred the motion to compel to this Court. Dkt. No. 76. This Court
15 set a hearing on the motion for July 31, 2013, in advance of Judge Chesney’s hearings on
16 plaintiffs’ motion for preliminary injunction and defendants’ motion to dismiss. Dkt. No.
17 77. On July 15, 2013, Judge Chesney granted the parties’ stipulation to extend the briefing
18 schedule on defendants’ motion to dismiss and continued the hearings on both the motion to
19 dismiss and the motion to hold separate to August 9, 2013 at 9:00 a.m. Dkt. No. 86. Two
20 weeks later, the parties stipulated to continue the hearing on plaintiffs’ motion to compel to
21 the afternoon of August 9, 2013. Dkt. No. 92. This Court granted the stipulation and set
22 the motion for a hearing on August 9, 2013 at 1:00 p.m. Dkt. No. 93.

23 Judge Chesney heard the motions to dismiss and hold separate on August 9, 2013 and
24 took the matters under submission. Dkt. No. 96. At the hearing, Judge Chesney ordered
25 defendants to decide by August 19, 2013 whether they would move to file under seal
26 redacted merger agreements they had submitted in support of their motion to dismiss. *Id.*
27 An administrative motion to seal is currently pending. Dkt. No. 113.

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1 Judge Chesney also stated that she would entertain further briefing if defendants filed
2 unredacted versions of the agreements, and if, unredacted, the agreements changed the
3 analysis of the motion to dismiss. On August 21, 2013, Judge Chesney allowed plaintiffs to
4 submit a supplemental brief within five days of receiving a copy of defendants' unredacted
5 documents. Dkt. No. 112. Defendants have another five days to file a reply to plaintiffs'
6 supplemental brief. *Id.*

7 This Court heard plaintiffs' motion to compel on August 9, 2013, immediately after
8 Judge Chesney's hearing.

9 II. DISCUSSION

10 Generally, "[a] party may not seek discovery from any source before the parties have
11 conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d)(1). This rule may be modified
12 by court order, however, or even by stipulation. *Id.* Courts in the Northern District "apply
13 a good cause standard in determining whether expedited discovery [under Rule 26(d)] is
14 warranted." *Semitoil, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 274 (N.D. Cal.
15 2002). "Good cause may be found where the need for expedited discovery, in consideration
16 of the administration of justice, outweighs the prejudice to the responding party." *Id.* at
17 276. Courts "commonly consider factors including: (1) whether a preliminary injunction is
18 pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the
19 expedited discovery; (4) the burden on the defendants to comply with the requests; and
20 (5) how far in advance of the typical discovery process the request was made." *Apple Inc.*
21 *v. Samsung Electronics Co., Ltd.*, 768 F. Supp. 2d 1040, 1044 (N.D. Cal. 2011) (internal
22 quotation marks and citation omitted).

23 The Supreme Court has cautioned against forging ahead with expensive antitrust
24 discovery where the sufficiency of a plaintiff's complaint is at issue, however. *Bell Atl.*
25 *Corp. v. Twombly*, 550 U.S. 544, 558 (2007). The district court "must retain the power to
26 insist upon some specificity in pleading before allowing a potentially massive factual
27 controversy to proceed." *Id.* In *Twombly*, the Court noted that the expense was "obvious"
28 where "plaintiffs represent[ed] a putative class of at least 90 percent of all subscribers to

1 local telephone or high-speed Internet service in the continental United States, in an action
2 against America’s largest telecommunications firms (with many thousands of employees
3 generating reams and gigabytes of business records).” *Id.* at 559. Similarly, here,
4 defendant Anheuser-Busch InBev is “the largest brewer in the United States” and “has 49%
5 of the beer market in the United States.” Dkt. No. 63 at 16, 21. The documents plaintiffs
6 request total approximately 8 million pages or 1.5 terabytes of data. Dkt. No. 80 at 21.
7 And, Judge Chesney is considering currently the sufficiency of plaintiffs’ second amended
8 complaint. Thus, this Court must “take care” “to avoid the potentially enormous expense of
9 discovery” until Judge Chesney has determined that plaintiffs’ allegations reach the level
10 suggesting a plausible claim for relief. *Twombly*, 550 U.S. at 559.

11 Nor does Plaintiffs’ motion for a hold separate order justify expedited discovery.
12 Plaintiffs argued in their motion to compel that they require the Hart-Scott-Rodino
13 documents and need to depose defendants’ executives in order to prepare and present a
14 motion for a preliminary injunction and a hold separate order. Dkt. No. 75 at 2. This
15 statement, and plaintiffs’ need for discovery, is undermined by their stipulation to continue
16 the hearing on the motion to compel until *after* Judge Chesney heard their motion for a hold
17 separate order. Judge Chesney has taken that motion under submission. In light of this, the
18 Court fails to see the urgency related to that motion.

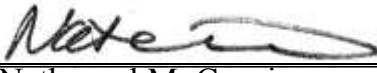
19 The potential prejudice to plaintiffs of not having these documents and depositions at
20 this moment is slight. With the case management conference set for early October,
21 discovery will open in late September, just a few weeks away. In contrast, the potential
22 prejudice to defendants from compelled early discovery is more significant. Although they
23 have already organized these documents to produce to the government, some review and
24 further refining would be necessary before turning them over to plaintiffs. In addition, the
25 documents include confidential business documents, which, depending on Judge Chesney’s
26 ruling, may not need to be produced at all. And, defendants would incur considerable time
27 and expense preparing their executives for depositions related to these voluminous
28 documents.

1 Given that plaintiffs' request is concurrent with Judge Chesney's review of the
2 sufficiency of their complaint, and because the request for expedited discovery is not based
3 on a time-sensitive motion such as a motion for a temporary restraining order or preliminary
4 injunction, the Court concludes that plaintiffs have not shown good cause to depart from the
5 ordinary discovery schedule. Accordingly, the Court DENIES plaintiffs' motion to compel
6 the Hart-Scott-Rodino documents and the depositions of defendants' executives.

7 Any party may object to this order within fourteen days. Fed. R. Civ. P. 72(a).

8 IT IS SO ORDERED.

9 Date: August 26, 2013

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11 Nathanael M. Cousins
12 United States Magistrate Judge