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9 Attorneys for Defendant Anheuser-Busch, Inc.

10
 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 _____)
 UNITED BRANDS COMPANY, INC.)
 14)
 Plaintiff)
 15)
 v.)
 16)
 ANHEUSER-BUSCH, INC.)
 17)
 Defendant)
 18)
 19)
 20)
 21)
 22)
 23)
 24)
 _____)

Civil Action No. 3:10-cv-02281- BEN (WMc)

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANT’S MOTION TO STRIKE
 PLAINTIFF’S “FIRST AMENDED
 COMPLAINT” AS IMPROPER AND
 UNTIMELY UNDER FED. R. CIV. P. RULE
 15(a)(1)(B)**

Hearing Date: February 22, 2011
 Time: 10:30am
 Courtroom No.: 3

1 **INTRODUCTION**

2 Defendant Anheuser-Busch, Inc. (“A-B”) moves to strike the First Amended Complaint filed
3 by Plaintiff United Brands Company, Inc. (“UBC”) on January 6, 2011. Apart from the substantive
4 defects in the First Amended Complaint that fail to cure the deficiencies in its original pleading,
5 UBC’s First Amended Complaint was filed in violation of Fed. R. Civ. P. Rule 15(a)(1)(B) and
6 therefore is untimely. Under the rules, UBC needed A-B’s consent or leave of the Court to amend its
7 complaint. UBC obtained neither. Accordingly, A-B requests that the Court strike UBC’s Complaint
8 and order it to demonstrate why its untimely filing should be excused.
9

10 **ARGUMENT**

11 On December 10, 2010, A-B filed and served upon UBC a motion under Rule 12(b)(6) to
12 dismiss UBC’s Complaint. Pursuant to Local Rule 7.1.e.2., UBC’s opposition to A-B’s motion to
13 dismiss was due on or before January 4, 2011—fourteen (14) days prior to the noticed hearing date.
14 UBC did not file any opposition or other response to A-B’s Rule 12(b)(6) motion to dismiss on or
15 before January 4, 2010. Rather, on January 6, 2011, UBC filed its First Amended Complaint which
16 purportedly addresses certain of the claims which are the subject of A-B’s Rule 12(b)(6) motion to
17 dismiss.¹ However, UBC did not as required under Fed. R. Civ. P. Rule 15 seek leave from this Court,
18 or A-B’s consent, prior to the filing of the First Amended Complaint.
19

20 As amended effective in December 2009, Rule 15(a)(1)(B) provides, in pertinent part, that:
21

22 A party may amend its pleading once as a matter of course . . . :

23 (B) if the pleading is one to which a responsive pleading is
24 required, 21 days after service of a responsive pleading or 21
25 days after service of a motion under Rule 12(b) . . . , whichever is
26 earlier

27 ¹ For example, the First Amended Complaint deletes the prior claim for trademark infringement under
28 § 32(1) of the Federal Trademark Act, 15 U.S.C. § 1114(1), which is one of the flawed claims that is
the subject of A-B’s motion to dismiss.

1 Under the plain mandate of Rule 15(a)(1)(B), UBC was permitted to filed an amended
2 complaint once as a matter of course only if that amended pleading were filed and served within
3 twenty-one (21) days following the filing of A-B's December 10th Rule 12(b)(6) motion to dismiss,
4 namely, by January 3, 2010.² On January 10th, the Court dismissed A-B's motion to dismiss as moot
5 in view of UBC's filing of its "Amended Complaint." (ECF No. 18.) However, UBC's January 6th
6 filing is untimely under Rule 15(a)(1)(B) and unexcused. As such, the First Amended Complaint
7 should be stricken and UBC should be ordered to demonstrate why its original complaint should not be
8 dismissed for the reasons set forth in A-B's Motion to Dismiss. *See, e.g., Patel v. Home Savings of*
9 *America*, 2010 U.S. Dist. LEXIS 111492 (S.D. Cal., Oct. 19, 2010); *Solomon v. E-Loan, Inc.*, 2010
10 U.S. Dist. LEXIS 52925 (E.D. Cal., May 5, 2010).

11
12 Consistent with striking UBC's First Amended Complaint as untimely under Rule 15(a)(1)(B),
13 A-B respectfully requests the Court to vacate the Order entered on January 10, 2011 denying its Rule
14 12(b)(6) motion to dismiss as moot based on the filing of the untimely First Amended Complaint.
15

16 Respectfully submitted,

17 Dated: January 11, 2011

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27 ² The actual due date of Friday, December 31, 2010, fell on a legal federal holiday with the result,
28 under Rule 6(a)(1)(C) Fed. R. Civ. P. that the due date fell on the next day that was not a Saturday,
Sunday or legal holiday, namely Monday, January 3, 2011.

1 Certificate of Service

2 I hereby certify that on January 11, 2011, I electronically filed the following documents with
3 the Clerk of the Court for the United States District Court for the Southern District of California by
4 using the CM/ECF system:

5 **MEMORDANDUM IN SUPPORT OF DEFENDANT’S MOTION TO STRIKE**
6 **PLAINTIFF’S “FIRST AMENDED COMPLAINT” AS IMPROPER AND UNTIMELY**
7 **UNDER FED. R. CIV. P. RULE 15(a)(1)(B)**

8 The participants listed below in the case who are “active” registered CM/ECF users will be
9 served by the CM/ECF system:

10 Nancy O. Dix, Esq.
11 DLA Piper LLP (US)
12 401 B. Street, Suite 1700
13 San Diego, California 92101-4297

14 I declare that I am employed by a member of the Bar of this Court, at whose direction this
15 service was made.

16 Dated: January 11, 2011

17 /s/ Bobby A. Ghajar
18 Bobby A. Ghajar