No. 19-2200

In the
United States Court of Appeals
for the Seventh Circuit

MILLERCOORS LLC,

Plaintiff-Appellant,

v.

ANHEUSER-BUSCH COMPANIES, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:19-cv-00218-wmc.
The Honorable **William M. Conley**, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE ANHEUSER-BUSCH COMPANIES, LLC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2200

Short Caption: MillerCoors LLC, Plaintiff-Appellant v. Anheuser-Busch Companies, LLC, Defendant-Appellee

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Anheuser-Busch Companies, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Dowd Bennett LLP; Godfrey & Kahn, S.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Anheuser-Busch InBev Worldwide, Inc.; Anheuser-Busch InBev NV/SA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Anheuser-Busch InBev NV/SA

Attorney's Signature: s/ James F. Bennett Date: June 28, 2019

Attorney's Printed Name: James F. Bennett

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Anheuser-Busch InBev NV/SA

Attorney's Signature: s/ Kendall W. Harrison Date: 7-5-2019

Attorney's Printed Name: Kendall W. Harrison

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RESPONSE TO JURISDICTIONAL STATEMENT

Defendant-Appellee Anheuser-Busch Companies, LLC ("A-B") states that Plaintiff-Appellant MillerCoors's jurisdictional statement is complete and correct.

INTRODUCTION

MillerCoors claims its appeal is about "simple facts." It is correct. It is an undisputed fact that corn syrup is an ingredient of MillerCoors's light domestic lagers, Miller Lite and Coors Light. It is undisputed that Miller Lite and Coors Light are "brewed with" corn syrup. It is also undisputed that those two beers are "made with" or "use" corn syrup. It is undisputed that corn syrup is a processed, less costly ingredient. And, it is true that A-B's light domestic lager, Bud Light, is *not* brewed with corn syrup.

Many of these facts are known to be true because MillerCoors has admitted them for years. Since 2015, MillerCoors has published an ingredients list online. That list identifies corn syrup as an ingredient of Miller Lite and Coors Light. For all its claims about the "natural meaning" of "brewed with corn syrup," from 2015 until this year when the challenged advertising began, MillerCoors never bothered to inform consumers of the supposedly crucial distinction that its corn syrup ingredient is not "*in the final product*." Nothing could show more sharply the essential contradiction between MillerCoors's marketplace conduct and its litigation claims.

Earlier this year, after Bud Light's Super Bowl commercials communicated the admitted fact that Miller Lite and Coors Light are "brewed with" corn syrup, MillerCoors announced to the marketplace, through a full-page advertisement in the *New York Times*, that "Miller Lite is indeed *brewed with* 'corn syrup'" and "the 'corn syrup,' *is a fact*." In a flurry of ensuing social media posts, MillerCoors reiterated three facts, over and over again:

- Miller Lite and Coors Light are brewed with corn syrup;
- They are made with corn syrup; and
- They use corn syrup.

Despite these public statements, MillerCoors sued to prevent A-B from conveying the same information. In particular, MillerCoors moved to preliminarily enjoin Bud Light's Super Bowl commercials. It did not succeed. The district court correctly held that, viewed in context, Bud Light's ads stating that Miller Lite and Coors Light are "brewed with," "made with," or "use" corn syrup are literally true and not misleading.

Beyond those simple facts, this appeal presents straightforward legal questions. First, under the Lanham Act, can a plaintiff manufacture an actionable false-advertising claim by using a consumer survey to redefine

words in a manner that is out-of-step with any plain meaning? This Court previously addressed that question in *Mead Johnson v. Abbott Laboratories*, 201 F.3d 883 (7th Cir. 2000), *opinion amended on denial of rehr'g*, 209 F.3d 1032. The answer is no. But, that is exactly what MillerCoors seeks to do when it claims the district court was required to use its survey to interpret "brewed with," "made with," and "uses" corn syrup. Those phrases have plain meanings, none of which is "*in the final product*." In other Lanham Act cases, MillerCoors itself has argued that "brew" "refers specifically to the process by which a product is currently made."

The second question is whether this Court should adopt the narrow presumption of deception that is recognized by some circuits in false-advertising cases where the plaintiff shows the defendant acted with intent to deceive and egregious conduct. The answer, again, is no. MillerCoors asks this Court to adopt this approach because without such a presumption, it has no possibility of pursuing a false-advertising claim against the ads the district court declined to preliminarily enjoin. It is undisputed that MillerCoors publicly displayed "corn syrup" as a Miller Lite and Coors Light ingredient on its website up to and after the Super Bowl, and ran a full-page ad admitting that Miller Lite is brewed with corn

syrup. Thus, the accused ads are literally true and not misleading. MillerCoors cites no case applying the presumption of deception under comparable circumstances.

At bottom, MillerCoors's position is that Bud Light should be prevented from advertising accurate information about MillerCoors's use of corn syrup in the brewing of Miller Lite and Coors Light simply because MillerCoors prefers not to highlight its use of that ingredient to consumers. That stance, however, turns the Lanham Act on its head. The Lanham Act protects against advertising that is *false*; it is not a tool to suppress truthful information *from* consumers. The district court's ruling was correct and should be affirmed.

STATEMENT OF THE CASE

I. Statement of Facts

A. Bud Light's Commitment to Transparency.

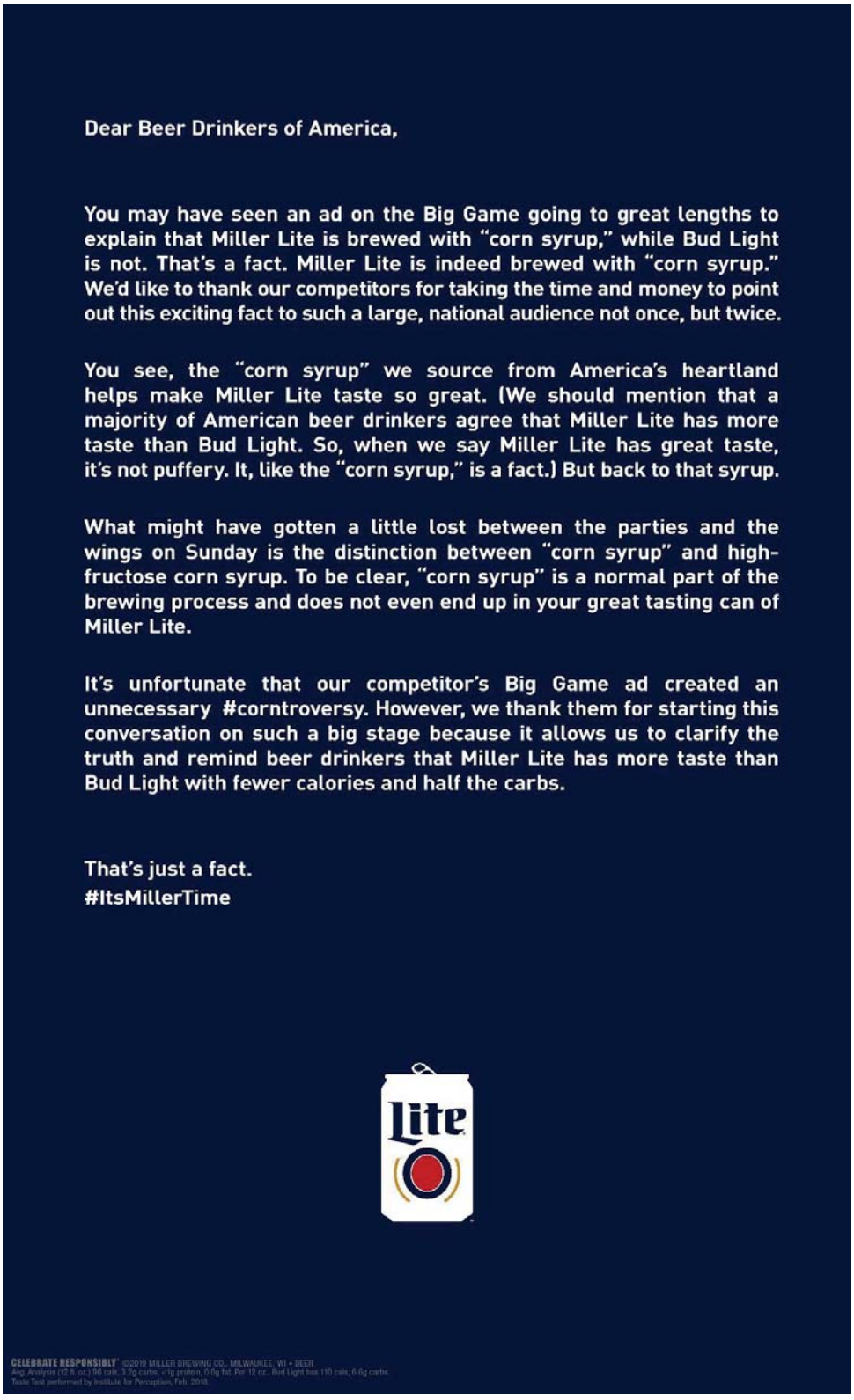
The U.S. beer industry is regulated by the U.S. Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB). Unlike the U.S. Food and Drug Administration with respect to food producers, the TTB does not require brewers to disclose the ingredients used to brew their beers.

Bud Light, a light American lager, is the best-selling beer in the United States. (Dkt. 31, Decl. of Andrew R. Goeler, at ¶ 6.) A-B, as industry leader, is deeply committed to consumer transparency. In 2012, A-B became the first major brewer to list its ingredients on its website, starting with its iconic brands Budweiser and Bud Light. (*Id.* at ¶ 12.) Confirming its position as industry leader in providing consumers with transparency, in February 2019, Bud Light became the first major beer in the United States to add a comprehensive ingredients label on its packaging. (*Id.*)

Bud Light is brewed with four essential ingredients: barley, hops, rice, and water. (*Id.* at ¶ 8.) The rice that is used to develop the Bud Light wort is a whole agricultural product. (Dkt. 56 at 23:12-25:15; R. 14, Ex. 22; A-App. 72-74, 173.) Unlike corn syrup, Bud Light's rice is not processed or reduced to a syrup but, instead, is put directly into the mash cooking as whole grains. (*Id.*) Rice is also more costly than corn syrup. (Dkt. 34, Decl. of Russel R. Harville, at ¶ 2.) A-B is proud of the ingredients used to brew Bud Light.

B. Undisputed Facts Regarding MillerCoors's Corn Syrup Ingredient.

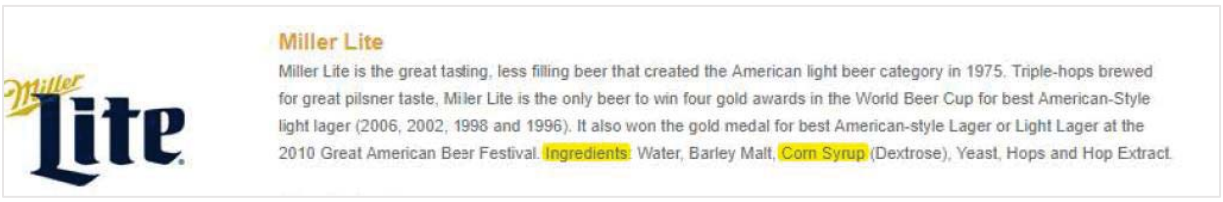
The following are key established facts regarding MillerCoors's use of corn syrup in the brewing of Miller Lite and Coors Light. *First*, MillerCoors's light domestic lagers, Miller Lite and Coors Light, *are* "brewed with" corn syrup. (Dkt. 13, Decl. of Anthony J. Manuele, at ¶¶ 9-10; Brief of Appellant ("Brief"), at 5 ("Miller Lite and Coors Light are 'made with,' brewed with,' and 'use' corn syrup ….")) On February 5, 2019, two days after Bud Light's Super Bowl commercials premiered, MillerCoors published a full-page *New York Times* advertisement, confirming that "Miller Lite is indeed *brewed with* 'corn syrup'" and "the 'corn syrup,' *is a fact*":



(Dkt. 40, Decl. of Kendall W. Harrison, Ex. 8 (emphases added)).

It is also undisputed that Miller Lite and Coors Light are "made with" or "use" corn syrup. (Dkt. 40, Exs. 6-7; Brief at 5.) Thus, in marketplace statements, and to this Court, MillerCoors has confirmed that "brewed with," "made with," and "uses" are accurate ways to describe its use of corn syrup in the brewing of Miller Lite and Coors Light.

Second, corn syrup is undisputedly an "ingredient" of Miller Lite and Coors Light. MillerCoors has displayed its corn syrup ingredient online for years. An archived copy of the "Our Brands" pages from MillerCoors's website from June 2015 shows:



(Dkt. 40, Exs. 1-2 (emphases added).)

Since 2015, MillerCoors has continued to consistently identify corn syrup as an ingredient of Miller Lite and Coors Light. The company's "Brand Nutritional Data" for Coors Light for years (and up to Super Bowl

Sunday) showed:

Revised 12/18/2018

Brand	Brand Style	ABV	Total Calories	Total Fat (grams)	Calories from Fat	Saturated Fat (grams)	Trans Fat (grams)	Cholesterol (mg)	Sodium (mg)	Total Carbohydrates (grams)	Fiber (grams)	Sugars (grams)	Protein (grams)	Ingredients
Coors Light	American-Style Light Lager	4.2	102	0	0	0	0	0	10	5.0	0	1	< 1.0	Water, Barley Malt, Corn Syrup (Dextrose), Yeast, Hop Extract

MillerCoors did the same for Miller Lite:

Revised 12/18/2018

Brand	Brand Style	ABV	Total Calories	Total Fat (grams)	Calories from Fat	Saturated Fat (grams)	Trans Fat (grams)	Cholesterol (mg)	Sodium (mg)	Total Carbohydrates (grams)	Fiber (grams)	Sugars (grams)	Protein (grams)	Ingredients
Miller Lite	American-Style Light Lager	4.2	96	0	0	0	0	0	5	3.2	0	0	< 1.0	Water, Barley Malt, Corn Syrup (Dextrose), Yeast, Hops and Hop Extract

(Dkt. 31 at ¶ 17; Dkt. 40, Ex. 3 (emphases added).)

MillerCoors now asserts that the "natural meaning" of "made with," "brewed with," and "uses" is that "corn syrup is present *in* these beers." (Brief at 43.) But, it was not until Bud Light's advertising began that MillerCoors contrived this "natural" definition. From 2015 to 2019, all while displaying its corn syrup ingredient online, MillerCoors never informed consumers of the supposedly crucial point that corn syrup is not "*in*" Miller Lite and Coors Light.

Even *after* Bud Light's Super Bowl commercials aired, MillerCoors continues to refer to corn syrup as an ingredient of Coors Light and Miller Lite on its "Our Great Beers" webpages:

Coors Light

Coors Light

Adolph Coors established his brewery in the Rockies in the 1870s. In 1978, Coors Light was born in the breathtaking Rocky Mountains, a setting that continues to inspire our brewing today. Coors Light is always lagered below freezing and cold-filtered, resulting in brilliant clarity, and a clean, crisp taste. Coors Light is bottled cold and never heat pasteurized, which means you get the ultimate in cold refreshment, every time.

Ingredients: Water, Barley Malt, Corn Syrup (Dextrose), Yeast, Hop Extract

Visit the site

Miller Lite

Miller Lite

Miller Lite is the original light beer. Introduced in 1975, Miller Lite was brewed to be a great tasting beer that just happened to be light, not some lesser version of a full-calorie beer. While many other light beers have been developed over the years, Miller Lite remains the original, always upholding Miller's commitment to "quality uncompromising and unchanging." The Miller Lite recipe uses a unique blend of choice Saaz and Pacific Northwest hops and a significant amount of caramel malt. In addition, we are still proud to use the same strain of brewer's yeast that Frederick Miller brought with him from Germany in the 1850's. Our beer continues to be purposefully brewed for more taste, aroma and golden color than other light beers, with just 96 calories.

Ingredients: Water, Barley Malt, Corn Syrup (Dextrose), Yeast, Hops and Hop Extract

Visit Miller Lite

(Dkt. 31 at ¶¶ 18-19; Dkt. 40, Exs. 4-5 (emphases added).) Missing from these pages (still shown online) is any disclaimer that MillerCoors's corn syrup ingredient is not "in" the final beer.

To be sure, MillerCoors is capable of indicating where an "ingredient" is used only to create alcohol. The ingredient lists for other MillerCoors products, such as Capeline Sparking Cocktails, state, "Alcohol from Real Cane Sugar." *See* https://www.millercoors.com/beers/great-beers/cape-line (last visited Aug. 19, 2019). Yet, even today, Miller Lite's website displays the statement, "Get the facts about *what's inside your favorite lite beer*," with a link to a webpage that shows corn syrup as an ingredient. *See* http://www.millerlite.com/our-beer (emphasis added) (last visited Aug. 19, 2019). That MillerCoors publicly acknowledges corn syrup as an ingredient "*inside*" Miller Lite is contrary to the premise of its false-advertising claim.

Third, unlike the rice that is used to brew Bud Light, which enters the mash cooking as whole grains and "not some derivative syrup" (A-App. 24), corn syrup is a *processed* ingredient derived from corn starch. As MillerCoors's expert described, corn syrup is manufactured by "hydrolyzing very long chain molecules of corn starch into shorter chain

glucose mono-, di-, oligo- and polysaccharides." (Dkt. 12, Decl. of John S. White, at ¶ 4.) To be clear, Bud Light is *not* brewed with any "rice syrup" equivalent.

Fourth, the corn syrup that is used to brew Miller Lite and Coors Light admittedly affects the "taste" of these beers. "Taste" is a product characteristic that MillerCoors emphasizes in its own comparative advertising against Bud Light. For example, MillerCoors's *New York Times* ad for Miller Lite declares, "[T]he 'corn syrup' … helps make Miller Lite *taste so great*." (Dkt. 40, Ex. 8 (emphasis added); *see also* Dkt. 40, Ex. 23 at 4 ("[W]e're going to keep our … advantage focused on taste versus … Miller Lite and keep Coors Light in the refreshment space.")))

These undisputed facts are important. They demonstrate that Bud Light's ads stating that Miller Lite and Coors Light are "brewed with," "made with," or "use" corn syrup are true. These key facts also refute MillerCoors's claim that A-B had "no reason" to advertise truthful information about MillerCoors's corn syrup ingredient. (Brief at 47.) Consumers are interested in ingredient transparency, including the source of the alcohol. (Dkt. 31 at ¶ 9.) Advertising that a competitor brews its beers with a processed ingredient that affects the product's taste, as opposed to a

more costly agricultural product, is a useful, legitimate point of differentiation to assist consumers in their purchasing decisions.

C. MillerCoors's Aggressive Comparative Advertising.

The market for light domestic lager beers in the United States is highly competitive. MillerCoors has run aggressive comparative advertising since before 2016, claiming that Miller Light has "more taste" than Bud Light. (Dkt. 31 at ¶ 10.) These ads target Bud Light with a comparison of calories and carbohydrates, which are product attributes that MillerCoors believes give Miller Lite a competitive advantage. (Dkt. 40, Ex. 16 (claiming that Miller Lite "differentiates itself … on taste, calories, and carbs"); *id.*, Ex. 20 (claiming that Miller Lite seeks to "position[] itself as the healthier and better-tasting option"); *id.*, Ex. 21 (acknowledgment by MillerCoors spokesman that "Miller Lite has been using a lot of competitive messaging."))

On February 2 and 3, 2019 (Super Bowl weekend), before Bud Light's commercials aired, MillerCoors posted the following on its Twitter account:

(Dkt. 40, Ex. 22.)

D. Bud Light's Truthful Responsive Advertising.

In response to MillerCoors's years of aggressive comparative ads, Bud Light introduced its own advertising to accurately communicate the ingredients used to brew Bud Light versus those used to brew Miller Lite and Coors Light.

The campaign began on February 3, 2019, with "Special Delivery," a 60-second commercial that ran during the first quarter of the Super Bowl. (Dkt. 14, Ex. 4; Dkt. 40, Ex. 32; A-App. 5-6, 144.) "Special Delivery" was

followed by "Medieval Barbers" and "Trojan Horse," two 15-second spots that were aired during the Super Bowl. (Dkt. 14, Exs. 5-6; Dkt. 40, Exs. 33-34; A-App. 6, 145-46.) "Special Delivery" is set in the "Dilly, Dilly" kingdom, a whimsical medieval kingdom that is home to the Bud Light Knight and Bud Light King, among other characters. (A-App. 5-6.) "Special Delivery" follows the fanciful, humorous journey of the Bud Light King and his troupe to return a barrel of corn syrup to the brewers of Miller Lite and Coors Light. (*Id.*) It accurately refers to Miller Lite or Coors Light as "using" or "brewing with" corn syrup, and ends with the accurate statement, "Bud Light, Brewed with no Corn Syrup." (*Id.*) Similarly, "Medieval Barbers" and "Trojan Horse" accurately refer to Miller Lite and Coors Light as being "made with" corn syrup. (A-App. 6, 145-46).[1]

"Cave Explorers" and "Mountain Folk" were released after the Super Bowl, followed by the "Thespians" spot during the Academy Awards. (Dkt. 14, Exs. 10-13; Dkt. 40, Exs. 35-37; A-App. 7-10, 147-50.) "Cave Explorers" and "Mountain Folk" portray medieval characters who

[1] A-B is not actively running "Medieval Barbers" or "Trojan Horse" with any paid media. (Dkt. 87, Answer to First Am. Compl., at ¶¶ 56, 61.)

accurately state the ingredients that Bud Light versus Miller Lite and Coors Light are "made with." (*Id.*) Again, the commercials close with the truthful statement that Bud Light is "Brewed with no Corn Syrup." (*Id.*)[2]

In sum, Bud Light's unenjoined ads consist of the "neutral, truthful statement" that Miller Lite and Coors Light are "brewed with," "made with," or "use" corn syrup – phrases that MillerCoors confirms are accurate ways to refer to its use of corn syrup. (A-App. 30; Brief at 5.) As the district court found, those ads do not disparage corn syrup; imply that Miller Lite or Coors Light "contain" corn syrup; or mention high fructose corn syrup (HFCS). (A-App. 22-31.)[3] Setting the ads in Bud Light's fanciful "Dilly, Dilly" kingdom allowed A-B to convey information in truthful, clear manner, but also in a whimsical way.

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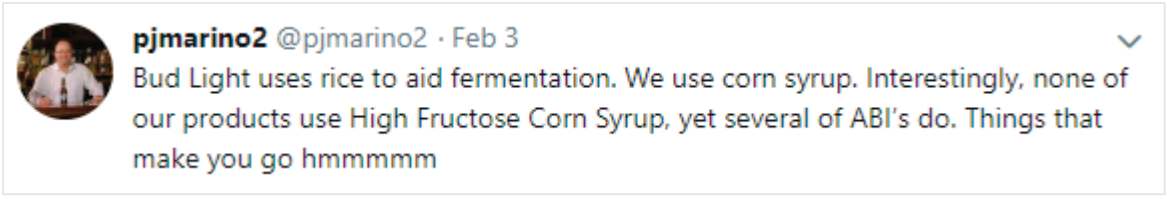
[2] MillerCoors refers to certain ads that are not at issue in this appeal. On March 20, 2019, in response to comparative ads by MillerCoors pretending that actors on the A-B set drink Miller Lite, A-B released a commercial that portrayed the Bud Light King and, again, referred to the fact that MillerCoors "brew[s] beer with corn syrup." (Dkt. 40, Ex. 38; A-App. 10, 184.) Bud Light released other creative assets, such as point-of-sale displays and billboard signage. While some of these are not advertisements or are obvious examples of non-actionable parody, as A-B noted at the preliminary injunction hearing, the Natural Light Twitter post and billboard signage that MillerCoors references (Brief at 17-18), have been removed and are no longer being displayed. (Dkt. 56 at 29-30; Dkt. 14, Exs. 18, 20; A-App. 9, 47, 78-79, 156-64.)

[3] It would not make sense for A-B to disparage corn syrup, which A-B uses to brew certain products, such as Natural Light and Busch Light, as disclosed on its website. (Dkt. 31 at ¶ 13.)

E. MillerCoors's Marketplace Claims Confirm the Accuracy of the Advertising.

Immediately after the first airing of Bud Light's Super Bowl commercials, and in the days and weeks that followed, MillerCoors confirmed in the marketplace and on social media that Miller Lite and Coors Light are, in fact, "brewed with," "made with," or "use" corn syrup. The most prominent example is MillerCoors's full-page *New York Times* ad for Miller Lite, published on February 5, 2019, shown above. (Statement of Facts, Part I.B, *supra.*) Styled as a letter to the "Beer Drinkers of America," the ad informed the public that "Miller Lite is indeed *brewed with* 'corn syrup'" and "the 'corn syrup,' *is a fact*." (Dkt. 40, Ex. 88 (emphases added).) MillerCoors thanked Bud Light for "point[ing] out this exciting fact to such a large, national audience," and, unlike Bud Light, discussed HFCS. (*Id.*)

The *New York Times* ad was accompanied by a deluge of social media postings in which MillerCoors and its executives repeated, over and over again, that Miller Lite and Coors Light are "made with," "brewed with," and "use" corn syrup. MillerCoors's Chief Communications Officer Pete Marino tweeted during the Super Bowl that MillerCoors's products "*use* corn syrup" but not HFCS:



(Dkt. 40, Ex. 6 (emphasis added).)

In other Twitter posts from February 3, 2019, excerpted below, MillerCoors again injected HFCS into the conversation; reiterated that Miller Lite "*uses*" corn syrup; and confirmed that Miller Lite is "*[m]ade with*" corn syrup:

(Dkt. 40, Ex. 7; Dkt. 31 at ¶ 25 (emphases added).)

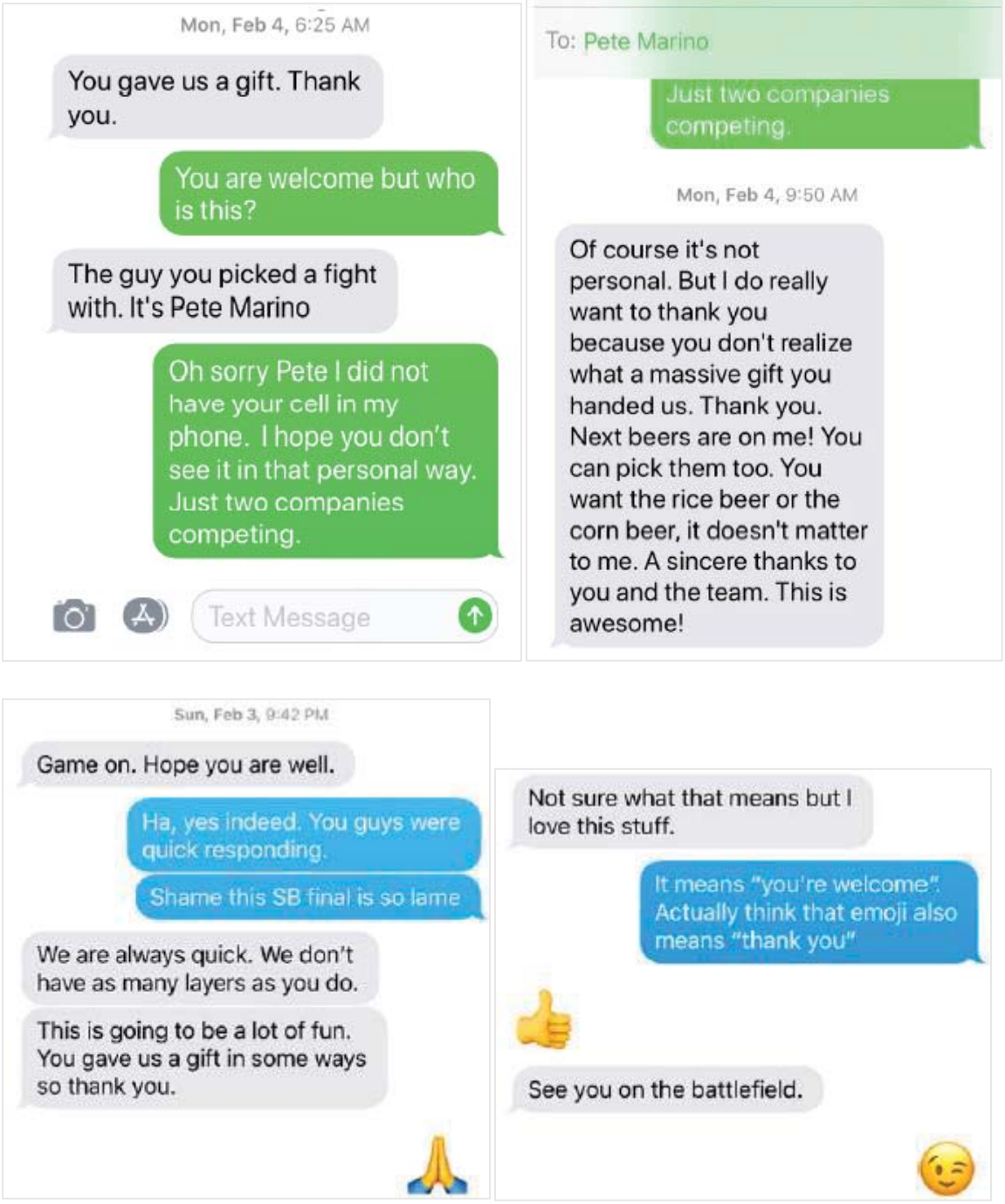
On February 4, 2019, MillerCoors followed up its social media posts with a posting on its "Behind the Beer" blog that referred to HFCS as "Public Health Enemy No. 1." (Dkt. 40, Ex. 28.) Thus, it was MillerCoors,

not A-B, who repeatedly brought HFCS into the discussion, and disparaged an ingredient.

MillerCoors not only confirmed that Miller Lite and Coors Light are "brewed with," "made with," and "use" corn syrup, it declared great pride in its corn syrup ingredient and described the advertising as a "fight" between competitors:

(Dkt. 40, Ex. 9.)

While these social media statements were in the public eye, behind the scenes, MillerCoors's Marino sent messages to A-B's Vice President of Legal and Corporate Affairs and Vice President of Communications, describing the ads as a "gift," thanking A-B, and stating, "See you on the battlefield":



(Dkt. 32, Decl. of Cesar Vargas, at ¶¶ 2-4, Ex. 1; Dkt. 33, Decl. of Gemma Hart, at ¶¶ 3-4, Ex. 1.)

F. MillerCoors's Claims of Increased Sales and Market Share.

While the issue of injury is not before this Court, MillerCoors's public statements also rebut any claim of harm. MillerCoors's CEO Gavin Hattersley called the ads a "gift." (Dkt. 31 at ¶ 30.) In February, Marino claimed in an interview that Bud Light's ads "in some ways did us a favor." (Dkt. 40, Ex. 23 at 5.) In March, Anup Shah, Vice President for the Miller Brands, acknowledged the company's "consistent growth." (Dkt. 40, Ex. 16 at 3.) The same article claimed that Miller Lite "[p]osted share gains" and "pick[ed] up share not only in its segment, but across the entire beer category." (*Id.*)

Until at least mid-May 2019, MillerCoors has continued make claims on social media, interviews, and its corporate blog of share gains, brand growth, and increased sales for Miller Lite, and that Coors Light share has "held":

MillerCoors @MillerCoors · Mar 8

Miller Lite:

-> Barreled its way into Nielsen's Top 10 Growth Brands list in three channels
-> Posted share gains among mainstream beers in every channel through January
-> Is up 1.2 percent in sales dollars and 0.2 in sales volume overall year-to-date

With sales and share gains, Miller Lite outflanks segment | MillerCoor…

So far, so good for Miller Lite in 2019. The Original Light Beer, which is on a 17-quarter run of share gains in the American light lager segment, continu...

millercoorsblog.com

MillerCoors
@MillerCoors

Follow

Since #corntroversy, Bud Light has lost share at an accelerated pace. Meanwhile, Miller Lite has posted share gains and Coors Light has held share.

Bud Light sales plummet post #corntroversy | MillerCoors Behind the Beer

The early returns are in. And for Bud Light, it's not pretty. America's top-selling beer was off 8.8 percent in the four-week period since the Super Bowl, deteriorating signifi...

millercoorsblog.com

4:30 PM - 11 Mar 2019

MillerCoors @MillerCoors · May 9

Miller Lite is growing. The Original Light Beer grew 4.1% over the most-recent 4 weeks, good enough to leapfrog into the No. 9 place Nielsen's Top 10 Growth List, which tracks the biggest share-gainers among all beer brands. More here -->

(Dkt. 40, Exs. 18, 25; Dkt. 54-2 at 5.) These boasts are diametrically at odds with any claim of injury.

G. The CCRB's Order Validating Bud Light's Ads.

A-B and MillerCoors are members of the Beer Institute, a national trade association for the U.S. brewing industry.[4] Members agree to comply with its Advertising and Marketing Code.

On March 14, 2019, the Beer Institute's Code Compliance Review Board (CCRB) issued a ruling validating Bud Light's Super Bowl advertisements. (Dkt. 40, Ex. 30.) The CCRB is an independent, three-person panel that "reviews complaints from the perspective of a 'reasonable adult consumer of legal drinking age.'" (*Id.*) In response to a complaint, the CRRB ruled that Bud Light's Super Bowl ads were factual and did not imply that Miller Lite or Coors Light "contain … additives or ingredients," and stated, "There is no question that MillerCoors uses corn syrup in the production of Coors Light and Miller Lite. MillerCoors has stated both in tweets and advertising that the firm uses corn syrup." (*Id.*)

[4] *See* http//www.beerinstitute.org/about/overview (last visited Aug. 19, 2019.)

The CCRB noted that MillerCoors' *New York Times* ad "acknowledges both the humor and veracity of AB's commercial." (*Id.*)

H. Whether Miller Lite or Coors Light "Contain" Corn Syrup Is Disputed.

The district court correctly held that Bud Light's advertising statements that Miller Lite and Coors Light are "brewed with," "made with," or "use" corn syrup do not imply the presence of corn syrup "in" the final product. (A-App. 22-31.) However, MillerCoors misleads this Court when it characterizes the alleged absence of corn syrup "in" those beers as an undisputed fact. (Brief at 5, 32.) Although MillerCoors "represents" that Miller Lite and Coors Light do not "contain" corn syrup, and the court "assume[d]" that to be true for "the present motion" (A-App. 4, 22-23), an assumption is not a fact.

A-B disputed this claim because, without discovery, it cannot know what ingredients are *in* MillerCoors's beers. (Dkt. 30 at ¶ 18.) Discovery is underway. No ruling can be based on MillerCoors's disputed claim that "none of these beers actually contain corn syrup." (Brief at 5.)

I. MillerCoors's Survey and Social Media Evidence.

To support its motion for preliminary injunction, MillerCoors presented a consumer survey by its expert, Dr. Yoram Wind. (Dkt. 11.) The main purpose of Dr. Wind's survey was to redefine "brewed with," "made with," and "uses," away from their plain meaning, and to show those phrases instead mean "*contained in the final product*." Under this Court's decision in *Mead Johnson*, that purpose is impermissible. The court properly did not use MillerCoors's survey to "determine the meaning of words." 201 F.3d at 886.

Like the survey in *Mead Johnson* that impermissibly defined "first" to mean "majority," MillerCoors's survey asked improper leading questions aimed at eliciting definitions of "made with" that support MillerCoors's legal theory. For example, MillerCoors asserts that a net 35% of respondents were misled, but omits that Question QF7b (on which that percentage is based) *told* respondents that "being 'made with' corn syrup" is ambiguous as it "may mean a number of different things":

QF7b. You said that **[BRAND(S)] is/are** made with corn syrup. Being "made with" corn syrup may mean a number of different things. Which, if any, of the following statements does the TV commercial say, suggest, or imply about **[BRAND(S)]**? *(Select one only)* **[ROTATE FIRST TWO ITEMS, ANCHOR LAST THREE]**

1. Corn syrup is used only during the brewing process for **[BRAND(S)]**, but is not in the **[BRAND(S)]** you drink
2. Corn syrup is only in the **[BRAND(S)]** you drink, but is not used during the brewing process for **[BRAND(S)]**
3. Corn syrup is both used during the brewing process for **[BRAND(S)]** and is in the **[BRAND(S)]** you drink
4. None of the statements above **[ANCHOR]**

97. Don't Know/Unsure **[ANCHOR]**

(Dkt. 11, App. G-9; A-App. 39-41.) The responses, as shown, were variations on whether corn syrup is used "during the brewing process" or is "in" the final product. (*Id.*) As A-B's expert, Dr. John Hauser, explained, leading questions, like this, depart from any accepted or reliable methodology and produce responses infected by demand bias. (Dkt. 37, Decl. of John R. Hauser, at ¶¶ 17-36.)

MillerCoors also submitted a "social media analysis" and review of "32 total communications, out of the approximately 100 million people who watched the Super Bowl." (A-App. 42-43.) The court found such anecdotal evidence inadequate, standing alone, to show consumer deception. (*Id.*) Moreover, the court noted the tiny sample size and that many hand-picked comments described MillerCoors's use of corn syrup accurately. (*Id.*)

J. A-B's Alleged Intent Regarding the Advertising.

Because the unenjoined ads are truthful and not misleading MillerCoors relies on a handful of statements attributed to Andy Goeler, A-B's head of marketing for Bud Light, to distributors, that supposedly show A-B's intent underlying the ads. (Brief at 9-11; Dkt. 14, Exs. 21-22; A-App. 166-76.) While certain reported statements do refer to ingredients in beer, (which is no different from MillerCoors's displaying corn syrup as an ingredient), the full context shows that Bud Light sought to differentiate between brewing with rice (an agricultural product) and brewing with corn syrup (a processed, less costly ingredient). (*E.g.*, A-App. 166, 172-73.)

II. Procedural History

A. MillerCoors Files Suit.

MillerCoors filed this lawsuit on March 21, 2019, alleging counts under the Lanham Act for false advertising and trademark dilution. (Dkt. 1.) On March 28, seven weeks after the advertising began, MillerCoors moved for a preliminary injunction on its false-advertising count. (Dkt. 8-9.) The district court held a hearing on that motion on May 16, 2019. (Dkt. 56; A-App. 50-126.)

B. The District Court's Opinion and Order.

On May 24, 2019, the district court issued a detailed Opinion and Order that granted in part, and denied in part, MillerCoors's motion for preliminary injunction. (A-App. 1-49). Bud Light's Super Bowl commercials were not enjoined. No advertisement that used the "neutral, truthful" statements that Miller Lite and Coors Light are "brewed with," "made with," or "uses" corn syrup was enjoined. (*Id.* at 30.) The court granted a "limited injunction" that affected only a small number of ads, most of which had already been discontinued. (*Id.* at 47-49.)[5]

Several aspects of this ruling are important. First, the court did not parse isolated words but, instead, reviewed "the alleged misleading statement … in the *context of the full advertisement*." (*Id.* at 22 (emphasis added).) That approach was correct. Viewing the ads in that context, the court correctly found that "the statements that Miller Lite and Coors Light 'use' or are 'made with' or 'brewed with' are literally true." (*Id.*)

Second, describing the ads as "a neutral, truthful statement," the court found that MillerCoors had not pointed to anything "to allow a

[5] While A-B did not appeal the court's "limited" preliminary injunction, A-B does not concede that any advertisements were false or misleading.

reasonable consumer to draw the inference that 'brewed with,' 'made with' or 'uses' corn syrup means that corn syrup is *in* the final product." (*Id.* at 29-30.) For example, "the Bud Light commercials containing the 'made with' or 'brewed with' language … do not show corn syrup being added to the finished Miller Lite or Coors Light products. Moreover … Bud Light is apparently brewed with whole grains of rice, not some derivative syrup." (*Id.* at 24.) The court also rejected the case law MillerCoors claimed was dispositive because, unlike here, the ads in those cases included "disparaging or derogatory references" or "suggest[ed] a quality not present in a product is in fact in the product." (*Id.* at 23-25, 28-29.)

Third, the court followed this Court's *Mead Johnson* decision. In *Mead Johnson*, this Court reasoned that surveys cannot be used to "determine the meaning of words," and rejected the court's reliance on a survey that supposedly showed that "first" meant "majority." 201 F.3d at 884-86. Because the district court found the ads stating that Miller Lite and Coors Light are "brewed with," "made with," or "use corn syrup" did not reasonably suggest corn syrup is "*in* the final product," it properly rejected MillerCoors's use of a survey to interpret those words. (A-App. 22-31.) The court properly found that MillerCoors's survey was relevant only to the

ads that "cross the line between susceptible to misunderstanding and misleading because of the language used and the context surrounding that language." (*Id.* at 44.)

Fourth, the court analyzed intent. While the court found that certain alleged statements above (*see* Statement of Facts, Part I.J, *supra*) indicated "hope[]" that consumers would be confused, the court did not apply the presumption of deception sought by MillerCoors. (A-App. 35-38.) Instead, the court found that this "presumption" has never been applied in this Circuit, and the Second and Third Circuits, which "developed the law surrounding the role of intent in the Lanham Act context," require a showing of egregious conduct. (*Id.* at 36-37.) At the hearing, the court expressed doubt that MillerCoors had met that showing. (Dkt. 56 at 48:17-25, 60:14-61:6; A-App. 97, 109-10.) The court ultimately concluded that:

> Because all advertising seems to be an effort to exploit consumer likes and dislikes, interests and fears, applying the Lanham Act to neutral, truthful statements intended to exploit … consumer beliefs is problematic, especially in light of the arguable value of comparative advertisements in promoting intelligent consumer decision-making.

(A-App. 38.)

SUMMARY OF ARGUMENT

This appeal presents two questions. First, should this Court adopt a rebuttable presumption of consumer deception, never before recognized in this Circuit, that is applied by some courts in false-advertising cases where the plaintiff shows intent to mislead and egregious conduct? The answer is no. The court found that the unenjoined ads are literally true and do not reasonably imply a misleading message. MillerCoors cites no case applying this presumption under analogous circumstances.

Moreover, MillerCoors asks this Court to adopt an abbreviated version of the presumption. As MillerCoors acknowledges, in the Third Circuit, both intent to mislead *and* egregious conduct are required elements. The same is true in the Second Circuit, although MillerCoors fails to inform the Court of that fact. If this Court adopts the presumption, it should follow the lead of the Second and Third Circuits. Unsurprisingly, MillerCoors seeks to dispense with the second element because it cannot possibly show "egregious conduct" where A-B's advertising merely repeats accurate information about MillerCoors's use of corn syrup that MillerCoors has itself published for years. As to intent, the evidence is indirect and controverted.

The second question presents an issue previously rejected by this Court in *Mead Johnson*: whether a court may use a survey to redefine the plain meaning of words? MillerCoors seeks to retread that ground. It argues that the district court erred when, after finding that the unenjoined ads were literally true and not misleading, it did not use MillerCoors's survey to conclude that "brewed with," "made with," or "use" instead mean "in the final product." The district court's approach was correct and hews to this Court's precedent. Its ruling should be affirmed.

LEGAL STANDARDS[6]

This Court reviews the district court's decision to grant or deny a preliminary injunction under the abuse of discretion standard. *Ty, Inc. v. Jones Grp.*, 237 F.3d 891, 896 (7th Cir. 2001). "A district court when analyzing the relevant factors abuses its discretion when it commits a clear error of fact or an error of law." *Id.* This Court "may not substitute [its] judgment for that of the district court." *Id.* The determination of whether an advertisement is false or misleading is a "finding of fact, entitled to deference unless clearly erroneous." *Abbott Labs. v. Mead Johnson*, 971 F.2d

[6] The legal standards regarding false-advertising claims under the Lanham Act are set forth at pages 35-36 of MillerCoors's brief.

6, 14 (7th Cir. 1992); *see also Mead Johnson*, 209 F.3d at 1034 ("whether a claim is either 'false' or 'misleading' is an issue of fact rather than law").

MillerCoors mischaracterizes certain issues as "pure question[s] of law." (Brief at 35.) Whether a presumption of deception should apply, and whether the district court correctly applied *Mead Johnson*, are mixed questions of law and fact, which are subject to the standards above.

ARGUMENT

I. This Court Should Not Adopt the Rebuttable Presumption of Consumer Confusion.

Mistaking this Court for a fact-finding tribunal, MillerCoors argues this Court "may presume that the corn syrup campaign is confusing consumers." (Brief at 37.) And, although it never raised the issue previously, MillerCoors argues that *injury* should be presumed on this basis, as well. These claims should be rejected. This Court has never recognized those presumptions. MillerCoors cites no case that applies them where, as here, the court has held that the accused ads are literally true and could not mislead reasonable consumers.

A. Deception Cannot be Presumed Where the Ads Are Literally True and Reasonable Consumers Could Not be Misled.

Even if this Court were to find that a rebuttable presumption of consumer deception is theoretically available in false-advertising cases (which it should not), under this Court's reasoning in *Mead Johnson*, that presumption does not apply to cases, like this one, where the district court has determined that an advertising claim does not reasonably imply a false or misleading message. If reasonable consumers could not be misled, deception also cannot be presumed.

The district court correctly found that the unenjoined Bud Light advertisements at issue are literally true and that reasonable consumers could not "draw the inference that 'brewed with,' 'made with,' or 'uses' corn syrup means that corn syrup is *in* the final product." (A-App. 29.) The "in the final product" inference is an integral part of MillerCoors's attempt to fashion a false-advertising claim out of an unambiguous and truthful statement. Because the advertising at issue did not reasonably imply a false or misleading message about corn syrup "in the final product," no presumption of deception could apply even if this Circuit recognized the presumption.

B. The Presumption of Deception Does Not Apply.

MillerCoors barely describes the rebuttable presumption of deception that it asks this Court to adopt. When it does, it misstates the law.

1. The presumption is narrow, and egregious conduct is required.

This Circuit has never adopted the rebuttable presumption of deception. Where recognized, it is a "narrow exception" to the rule that a plaintiff must present extrinsic evidence of consumer deception to state an actionable claim that an advertisement is misleading. *Merck Eprova AG v. Gnosis*, 901 F. Supp. 2d 436, 450 (S.D.N.Y. 2012), *aff'd*, 760 F.3d 247 (2d Cir. 2014); *accord Tiffany (NJ) v. eBay*, 2010 WL 3733894, at *3 (S.D.N.Y. 2010) (noting "single, narrow exception").

To presume deception, the plaintiff must establish intent to deceive *and* egregious conduct. Those elements are demanding and confirm the presumption's limited scope. As the Second Circuit has described, "[W]here a plaintiff adequately demonstrates that a defendant has intentionally set out to deceive the public, and the defendant's deliberate conduct in this regard is of an egregious nature, a presumption arises that consumers are, in fact, being deceived." *Johnson & Johnson * Merck Consumer*

Pharm. v. Smithkline Beecham Corp., 960 F.2d 294, 298-99 (2d Cir. 1992) (quotations omitted) (declining to apply presumption).

Although not mentioned by MillerCoors in its brief, the Second Circuit has never strayed from this two-element standard. *See Church & Dwight v. SPD Swiss Precision Diagnostics*, 843 F.3d 48, 65 (2d Cir. 2016) (reaffirming that "courts have allowed implied falsity to be supported by evidence that the defendant intended to deceive the public through 'deliberate conduct' of an 'egregious nature,' in which case a rebuttable presumption of consumer confusion arises") (citation omitted).[7]

Like the Second Circuit, the Third Circuit requires proof of intent to mislead and egregious conduct to trigger the presumption of deception. *Johnson & Johnson-Merck Consumer Pharm. v. Rhone-Poulenc Rorer Pharm.*, 19 F.3d 125, 131-32 (3d Cir. 1994). Similarly, the First Circuit has acknowledged the need to establish egregious conduct in some cases. *See*

[7] In *Church & Dwight*, after stating the two-element standard above, the Court "highlight[ed] some of the more significant evidence credited by the district court." 843 F.3d at 67. While egregious conduct was not among evidence the Court "highlighted," the *Church & Dwight* district court ruled that the defendant "intentionally set out to deceive consumers and that this conduct was of an egregious nature." *Church & Dwight v. SPD Swiss Precision Diagnostics*, 2015 WL 4002468, at *20 (S.D.N.Y. 2015), *aff'd*, 843 F.3d 48 (2d Cir. 2016).

Clorox Co. Puerto Rico v. Proctor & Gamble, 228 F.3d 24, 36 n.9 (1st Cir. 2000) (noting requirement of "deliberate conduct of an egregious nature"). The Third Circuit is not an "outlier," as MillerCoors suggests. (Brief at 41.)

MillerCoors's claim that requiring egregious conduct is "impractical" or would make the presumption "superfluous" is incorrect. (*Id.*) Clearly, the Second and Third Circuits do not think so. In *Johnson & Johnson-Merck*, the Third Circuit addressed advertising claims regarding the "strength" of an antacid product, based upon its acid neutralizing capacity (ANC). 19 F.3d at 127-28. While ANC "strength" did not provide "superior relief," strategy documents showed the defendant intended to make that association in its advertising. *Id.* at 130-31. Yet, the Court did *not* presume deception because that type of advertising was "pervasive throughout the antacid industry" and thus did "not reach the egregious proportions that would warrant a presumption shifting burden of proof." *Id.* at 132.

In any event, MillerCoors has admitted both elements are required. During the preliminary injunction hearing, MillerCoors's counsel conceded: "[I]t's a two-element test. You have to show intent *and that the conduct was egregious*." (Dkt. 56 at 47:10-14; A-App. 96 (emphasis added).) The district court recognized and emphasized this admission. (*Id*. at 61:15-

17; A-App. 110 ("[W]e're agreed there's two prongs. Even if the Seventh Circuit adopts it, there is intent and egregiousness ….")) MillerCoors's arguments contradict its position in the district court.

2. There was no finding of "egregious conduct."

If this Court were to adopt the presumption of deception, it should require egregious conduct, consistent with the Second and Third Circuits, which "developed the law surrounding the role of intent in the Lanham Act context." (A-App. 37). MillerCoors argues otherwise because the record does not support a finding of "egregious conduct," as the district court recognized. (Dkt. 56 at 48:17-25, 61:15-25; A-App. 97, 110.)

MillerCoors has displayed its corn syrup ingredient online for years, and publicly confirmed that Miller Lite and Coors Light are "brewed with," "made with," or "use" corn syrup. (*See* Statement of Facts, Parts I.B, E, *supra*.) It would be impossible to say that A-B acted "egregiously" by accurately describing MillerCoors's use of corn syrup in the same terms that MillerCoors uses.

Unsurprisingly, the district court did not find "egregiousness." MillerCoors itself identifies *no* "egregious conduct." When the court pressed MillerCoors at the hearing for what evidence of egregious conduct

it had, MillerCoors cited an inapposite FTC-enforcement case having nothing to do with the presumption of deception. (Dkt. 56 at 47:12-48:11; A-App. 96-97 (citing *Simeon Mgmt. v. F.T.C.*, 579 F.2d 1137 (9th Cir. 1978.))

The evidence here comes nowhere close to being "egregious," as that term has been interpreted. In *PPX Enterprises v. Audiofidelity Enterprises*, 818 F.2d 266 (2d Cir. 1987), the Second Circuit found the defendant acted egregiously where it sold "patently fraudulent" albums; "the advertising accompanying those products was the vehicle employed to perpetrate the fraud"; and the "only possible conclusion to be derived … was that consumers actually were deceived." *Id.* at 272-73; *see also Church & Dwight*, 2015 WL 4002468, at *12-17 (applying presumption where defendant "deliberate[ly] attempt[ed] both to evade FDA limitations and convey a false message"); *Merck Eprova*, 901 F. Supp. 2d at 455 (applying presumption where defendant "deliberately referred" to folate mixture product "in terms that refer only to the pure … [p]roduct"). As such, egregiousness is often aligned with conduct that violates the law or is tantamount to fraud.

Even in those circuits where "egregious conduct" is not specifically required, the cases applying that presumption involve extreme

circumstances, such as violations of the law. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 316-17 (1st Cir. 2002) (applying presumption where defendant marketed recycled cashmere blazers "without any 'recycled' designation, as required by law"). No analogous facts are present here.

3. A different standard should not apply.

MillerCoors cites two cases from the First and Ninth Circuits to argue that not all courts require a finding of egregiousness. But, it omits that, as noted above, the First Circuit has discussed this presumption inconsistently, with some decisions acknowledging a requirement of egregiousness or "bad faith." *Clorox Co. Puerto Rico*, 228 F.3d at 36 n.9.

Moreover, MillerCoors's authorities are inapposite. There was no deliberate violation of the law here, as in *Cashmere & Camel Hair.* And, there was no meaningful analysis of the issue in *William H. Morris v. Grp. W*, 66 F.3d 255 (9th Cir. 1995), which was remanded due to the "inconclusive state of the record." *Id.* at 259. These First and Ninth Circuit cases do not support applying the presumption to literally true statements that were found not to reasonably imply a misleading message.

4. Intent to mislead must be uncontroverted.

The courts that recognize a presumption of deception have held that the evidence supporting intent to mislead must be free from doubt. *E.g.*, *Johnson & Johnson * Merck*, 960 F.2d at 299 (presumption inapplicable where evidence of intent was "indirect and controverted"). While the district court found that certain statements indicated "hope[]" that consumers would interpret the advertising language incorrectly, that evidence (consisting of reported interview statements) is indirect and controverted. (Statement of Facts, Part I.J, *supra*; Dkt. 30 at ¶¶ 68-74.) If this Court were to adopt the presumption of deception, A-B submits that such evidence is not sufficient.

Additionally, MillerCoors does not seek merely to "presume" deception. Rather, as discussed below, it asks for a "presumption" that consumers interpreted A-B's truthful statements in a manner that is contrary to ordinary usage. As the district court correctly found, it would be "problematic" to presume deception based upon "neutral, truthful statements," such as those in the unenjoined Bud Light ads. (A-App. 38.) Cases that *have* found sufficient "intent to deceive" do not involve truthful advertisements that mirror language used by the plaintiff.

C. A Separate Presumption of Injury Does Not Apply.

Beyond a presumption of deception, MillerCoors also urges this Court to adopt a presumption of *injury*. Plaintiff's injury, or at least likely injury, is a separate and independent element of a false advertising claim. *Eli Lilly v. Arla Foods*, 893 F.3d 375, 382 (7th Cir. 2018). This argument should be rejected, first and foremost, because MillerCoors never raised it in the district court. This Court follows the "well-established rule that arguments not raised to the district court are waived on appeal." *Uncommon, LLC v. Spigen*, 926 F.3d 409, 424 (7th Cir. 2019).

Even if MillerCoors *had* presented the issue below, its arguments to this Court are underdeveloped and conclusory, consisting of a single reference within a string citation. (Brief at 39-40.) This also "constitutes waiver." *Spigen*, 926 F.3d at 424-25; *accord Puffer v. Allstate Ins.*, 675 F.3d 709, 718 (7th Cir. 2012) (stating that "even arguments that have been raised may still be waived on appeal if they are underdeveloped, conclusory, or unsupported by law").

As to the merits, MillerCoors improperly seeks to merge the presumption of deception with the *separate* issue of whether to presume injury. Confusion and injury are distinct elements of a false-advertising

claim. *Eli Lilly*, 893 F.3d at 381-82. The circuit courts that *have* recognized a separate presumption of injury based upon intent to mislead require factors not present here. *See Merck Eprova*, 760 F.3d at 260-61 (noting presumption of injury where plaintiff established "deliberate deception in the context of a two-player market"); *Porous Media v. Pall Corp.*, 110 F.3d 1329, 1336 (8th Cir. 1997) (recognizing presumption of injury where "intentional deception" was a "major part" of defendant's comparative advertising); *Balance Dynamics v. Schmitt Indus.*, 204 F.3d 683, 694-95 (6th Cir. 2000) (declining to presume injury where plaintiff did not lose sales or experience changed financial condition).

MillerCoors has not proven the existence of a "two-player market" or that any alleged intent to mislead was a "major part" of the advertising. A-B has found no case that applies such a presumption where the ads were found not to reasonably imply a misleading message. This presumption of injury should not be adopted, and it does not apply in any event.

D. If this Court Recognizes Either Presumption, Remand to the District Court Is Required.

MillerCoors claims that, if this Court were to adopt either presumption noted above, it should "remand to the district court with

instructions to enter a preliminary injunction." (Brief at 57.) That proposed remedy is incorrect and would usurp the fact-finding role of the district court. While this Court should not adopt either presumption for the reasons previously stated, if it does, the proper remedy is to remand to the district court for further proceedings.

Whether to apply a presumption of deception or injury involves factual questions that must be addressed by the district court. There are multiple open fact issues. The court did not find that A-B's conduct satisfies the demanding standard required to show "egregiousness." Similarly, the court did not find that Bud Light's advertising was directed to a two-player market. These are examples of the critical fact questions that would need to be resolved before either presumption could be applied.

Moreover, both presumptions are rebuttable. If the district court were to find that either presumption *did* apply, A-B must have the opportunity to present evidence to rebut it. This could include evidence that consumers are not confused; MillerCoors has not lost sales or experienced any change in financial condition; or any alleged injury is related only to "consumer

awareness that [MillerCoors's] products are brewed with or made with corn syrup." (A-App. 46-47.)

II. As the District Court Correctly Held, Bud Light's Unenjoined Ads are True and Not Reasonably Misleading.

A. The Court's Finding of Literal Truth Is Not Clearly Erroneous.

The district court found that "the statements that Miller Lite and Coors Light 'use' or are 'made with' or 'brewed with' corn syrup are literally true." (A-App. 22.) The accuracy of this ruling cannot be reasonably disputed, and MillerCoors ultimately does not dispute it. (Brief at 43-44.) MillerCoors has relied on the very same language to describe its products and, for years, has displayed corn syrup as an ingredient of Miller Lite and Coors Light. (*Id.*) The court's finding of literal truth was correct and not clearly erroneous.

Nonetheless, MillerCoors argues the district court should have found the ads to be ambiguous. According to MillerCoors, while the ads are literally true in a "technical sense," there is a "colloquial sense" in which they are false. (Brief at 43.) This purported ambiguity in the alleged "senses" of the ads is enough, in MillerCoors's view, to make them misleading. MillerCoors is wrong, as its irrelevant hypotheticals

themselves demonstrate. For example, consumers who see the claim, "brewed with fresh tea leaves," would understand that tea leaves are an ingredient used to brew tea but would not expect to find the actual leaves "*in*" the final tea. (*Id.*) Where the product is beer, reasonable consumers would understand that "brewing" refers to the process of converting ingredients *into* alcohol. MillerCoors's examples show that Bud Light's ads *do* "align with the natural meaning of these phrases." (*Id.*)[8]

B. The Court Did Not Err in Finding that the Unenjoined Ads Do Not Reasonably Imply a Misleading Message.

MillerCoors next argues that the court erred in concluding the ads were not misleading based on the plain meaning of the language and other features of the ads, and asserts that survey evidence should have been allowed to show a contrary meaning. The court's ruling is supported by its own careful review of the ads in context, this Court's precedent in *Mead Johnson*, and other Lanham Act cases. The district court did not err.

1. The court carefully reviewed the advertisements.

[8] MillerCoors conflates "ambiguous" and "misleading," arguing the ads were misleading "due to their own inherent ambiguity." (Brief at 44.) Under the Lanham Act, a claim can be ambiguous *without* being misleading. *Hot Wax v. Turtle Wax*, 191 F.3d 813, 820 (7th Cir. 1999). It is not enough for an ad to be ambiguous; it must also be misleading to establish an actionable claim.

To determine whether Bud Light's literally truthful ads were nevertheless misleading, the district court properly "view[ed] the 'made with,' 'brewed with' or 'uses' statements in the context of the full commercials," including the words and imagery that accompanied those phrases. (A-App. 24.) The court found that "there are no express or implicit messages that the corn syrup is actually *in* the finished product," and "the Bud Light commercials containing the 'made with' or 'brewed with' language … do not show corn syrup being added to the finished Miller Lite or Coors Light products." (*Id.*) The court also found that "the Bud Light 'made with,' 'brewed with' or 'uses' ads do not disparage corn syrup or otherwise expressly draw attention to any negative health consequences." (*Id.* at 25.) And, it noted that Bud Light is "brewed with grains of rice, not some derivative syrup." (*Id.*)

After canvassing Lanham Act case law, the district court further acknowledged that "requiring plaintiff to point to some other aspect of the ad besides a truthful statement is entirely consistent with the approach of the Seventh Circuit and other courts in the cases cited by plaintiff." (*Id.* at 28.) Based upon this reasoned analysis, the court did not err in concluding that MillerCoors had not "point[ed] to something in the advertisement to

allow a reasonable consumer to draw the inference that 'brewed with,' 'made with' or 'uses' corn syrup means that corn syrup is *in* the final product." (*Id.* at 29.)

2. *Mead Johnson* is directly on point.

MillerCoors faults the court for not using its survey to re-define "made with," "brewed with," and "uses" from their ordinary meanings to something more helpful to its current litigation position. But, as discussed, the court's ruling was based on its conclusion that the ads did not reasonably imply that "made with," "brewed with," or "uses" mean "in" the finished product. Using survey evidence to redefine words with a plain meaning is exactly what *Mead Johnson* forbids. "Under these circumstances, a district court can properly disregard survey evidence as immaterial, because, by definition, § 43(a)(1) does not forbid language that reasonable people would have to acknowledge is not false or misleading." *Pernod Ricard USA v. Bacardi U.S.A.*, 653 F.3d 241, 253-54 (3d Cir. 2011) (applying *Mead Johnson*).

In *Mead Johnson*, a plaintiff alleged that the claim, "1st Choice Of Doctors," on the packaging for Similac infant formula was actionable false advertising because market research supposedly showed that less than 50%

of doctors recommended it over competing brands. 201 F.3d at 883-84. But, this Court held that "1st Choice Of Doctors" was a clear and truthful statement that more doctors preferred Similac to any competitive product. *Id.* As such, the claim was truthful and not misleading.

As *Mead Johnson* explained, "first is ordinal" and "denotes rank in a series," and the district court thus erred in accepting a survey that incorrectly treated "first" as a cardinal number. *Id.* at 885-86. This Court stated that surveys cannot be used "to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held." *Id.* at 886.

In short, where an advertisement is truthful and plain according to ordinary usage, as it is here, *Mead Johnson* holds that survey evidence cannot be used to show the claim is misleading. *See also* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (5th ed.) § 27:55 ("An advertising claim which is truthful and clear on its face cannot be proven to be misleading by surveying consumers to probe for their possible misunderstanding of the challenged message."). The district court's ruling hews to *Mead Johnson*.

a. Mead Johnson is on point. First, at issue in *Mead Johnson* was the meaning of "first," which this Court found had a plain definition in the English lexicon. Here, too, the "plain, dictionary definition[s]" (Brief at 51) of "brew," "make with," and "use" confirm the accuracy of the district court's ruling and Bud Light's use of those terms.

The *Oxford English Dictionary* defines "brew" as, "To make (ale, beer, and the like) by infusion, boiling, and fermentation." *See* "brew, v." *Oxford English Dictionary* (June 2019) ("*OED*") (citing 1.a). In the context of ingredients, "make with" means, "To produce (a substance) by the combination of ingredients, by extraction from a source, or by modification of some other substance by mechanical or chemical processes." *See* "make, v.1" *OED* (citing 3.b); *see also id.* (1.b, "To produce (a material thing) by combination of parts …."); *see also* "use, v.," *OED* (8.a, "To put (an instrument, implement, etc.) to practical use ….").[9] These words refer to the process of creating something and do not mean "*in the final product*." Given these definitions, and MillerCoors's public acknowledgment that corn

[9] *See also* "make," *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary ("3.a: to bring into being by forming, shaping, or altering material"); "use," *id.* ("4: to carry out a purpose or action by means of"); "brew," *id.* ("1: to prepare (beer, ale, etc.) by steeping, boiling, and fermentation or by infusion and fermentation") (last visited Aug. 19, 2019).

syrup is an ingredient, it is impossible to call Bud Light's statements that Miller Lite and Coors Light are "brewed with," "made with," or "use" corn syrup misleading.

Courts often look to dictionaries in Lanham Act and other intellectual property cases. *See PBM Prods. v. Mead Johnson*, 639 F.3d 111, 119 (4th Cir. 2011) (in false advertising and defamation case, using dictionary to interpret meaning of "lie"); *HBAC Matchmaker Media v. Google*, 650 F. App'x 990, 993 (Fed. Cir. 2016) (in patent infringement case, stating it is "entirely appropriate" to consult dictionaries to "aid in arriving at the plain meaning of a claim term"); *Haymond v. Lundy*, 2001 WL 15956, at *4-5 (E.D. Pa. 2001) (in false advertising case, relying on dictionary definition of "supervise" to determine whether claim was actionable), *aff'd sub nom.*, *Lundy v. Hochberg*, 79 F. App'x 503 (3d Cir. 2003).

MillerCoors's marketplace statements further corroborate the district court's ruling. As described above, in addition to displaying corn syrup as an "ingredient," MillerCoors has publicly confirmed that "Miller Lite is indeed brewed with 'corn syrup'"; "the 'corn syrup,' is a fact"; and corn syrup "helps make Miller Lite taste so great." (Statements of Facts, Part I.B, *supra*.)

In contrast, MillerCoors offers irrelevant, litigation-oriented hypotheticals to support its speculation about "ordinary usage." But, "[a]ny definition of a word that is absent from many dictionaries … is hardly a common or ordinary meaning." *Taniguchi v. Kan Pac. Saipan*, 566 U.S. 560, 569 (2012) (describing the *OED* as "one of the most authoritative on the English language"). Moreover, its arguments *contradict* its position in other cases. Recently, when MillerCoors was the defendant in false-advertising litigation over its claim that Coors Light was "born in the Rockies," it argued that "brew" "refers specifically to the process by which a product is currently made." *Lorenzo v. MillerCoors LLC*, No. 16-16726-EE (11th Cir.), 2017 WL 396004, at *27 (Appellee Brief). This definition is consistent with Bud Light's usage and contrary to MillerCoors's claims that "brew" actually means "in."

Second, as described by this Court, the *Mead Johnson* district court's cardinal error was relying on a survey that redefined "first" away from its plain meaning:

> Everything in the district court's analysis depends on the survey of consumers about their understanding of the phrase "1st Choice of Doctors." It is a problematic exercise, for the survey assumes that "first" is a cardinal number—that is, a count such as "246" or "55" or a ratio of two such numbers, rather than a place in a series…. "First" does not mean 51%, or

> 90%, or any other ratio, so it is not surprising that the responses were all over the lot.

Mead Johnson, 201 F.3d at 885. MillerCoors's survey did the same.

Worse, MillerCoors used its survey to elicit responses that *confirmed* its litigating position. Closed-ended question QF7b instructed respondents: "*Being 'made with' corn syrup may mean a number of different things*. Which, if any, of the following statements does the TV commercial say, suggest, or imply about [BRAND(S)]?" (Statement of Facts, Part I.I, *supra* (emphasis added).) The possible answers were variations on whether corn syrup was "used *only* during the brewing process" or was "in" the beer that consumers drink. (*Id.*) Thus, MillerCoors's survey *told* consumers that the ad was ambiguous and presented a closed universe of meanings aligned with its legal claims. It was not a neutral survey to probe consumer understandings.

Third, neither *Mead Johnson* nor this case has other factors that imply a misleading message, notwithstanding the truthful statement. In *Mead Johnson*, this Court found that "this record does not support a conclusion that Abbott's statements implied falsehoods about Similac." 209 F.3d at 1034. Considering the language in context, the district court here found that

Bud Light's ads "do not disparage corn syrup or otherwise expressly draw attention to any negative health consequences." (A-App. 25.) Indeed, Bud Light's ads are *more* neutral than Abbott's superlative claim, "1st Choice of Doctors," in that there is no claim of product superiority.

b. Mead Johnson's rationales are served here. Advertisers should not be subject "to a level of risk at odds with consumer protection." *Pernod*, 653 F.3d at 254. In *Mead Johnson*, this Court was concerned that "interpreting 'misleading' to include factual propositions that are susceptible to misunderstanding would make consumers as a whole worse off by suppressing truthful statements that will help many of them find superior products." 209 F.3d at 1034. That concern is warranted here: A-B is providing truthful information that is useful to consumers, which MillerCoors, for purely competitive reasons, seeks to suppress. (*See* Statement of Facts, Part I.B, *supra*.)

As described, Bud Light is brewed with rice, an agricultural product, and "not some derivative syrup." (A-App. 24.) Miller Lite and Coors Light, in contrast, are brewed with corn syrup, a corn derivative that is reduced into a syrup. (Statement of Facts, Part I.B, *supra*.) Pointing out that Bud Light is brewed with a more costly agricultural product is a significant

differentiator, in that it highlights that Bud Light uses a "real ingredient versus a syrup." (Dkt. 56 at 23:12-25:15; A-App. 30 n.17, 72-74.) A-B presented evidence that such information is valuable to consumers. (Dkt. 31 at ¶ 9.)

In *Mead Johnson*, this Court also feared that using a survey to interpret language would supplant the scholarly (and neutral) work of lexicographers and philologists with "the first impressions of people on the street." 201 F.3d at 886. Doing so, in turn, "would subject any advertisement … to numerous variables, often unpredictable, and would introduce even more uncertainty into the marketplace." *Am. Italian Pasta v. New World Pasta*, 371 F.3d 387, 393 (8th Cir. 2004). MillerCoors's survey exemplifies these concerns. Relying on deeply leading questions with embedded assumptions, that survey sought to weaponize language as a litigation tool.

3. MillerCoors fails to distinguish *Mead Johnson*.

MillerCoors's tries unsuccessfully to distinguish *Mead Johnson*, citing A-B's allegedly deceptive intent. However, this argument is unconnected to *Mead Johnson*, which ascribes no relevance to a defendant's intent in determining whether an ad is misleading.

If anything regarding intent can be inferred from *Mead Johnson*, it is that intent was *not* a part of this Court's calculus. This Court amended its opinion to remove the following language from the original decision: "A 'misunderstood' statement is not the same as one designed to mislead." 201 F.3d at 886. While that sentence perhaps could be interpreted to speak to intent, as the district court aptly noted, it did not survive panel rehearing. (A-App. 27.) The amended decision replaced it with, "'Misleading' is not a synonym for 'misunderstood,'" thus eliminating the single portion of the opinion that conceivably could be read to address intent. 209 F.3d at 1034.

MillerCoors also contends that *Mead Johnson* is distinguishable because the advertising there supposedly had an "obvious meaning," whereas Bud Light's does not. (Brief at 46.) This parameter, too, is manufactured. *Mead Johnson* never described its analysis in terms of "obviousness." Instead, the Court stated the ordinary usage of "first" and indicated that a dictionary (not a survey) is an appropriate tool "to determine the meaning of words." 201 F.3d at 886.

Further, the ads here are no less "obvious" than the statements discussed in *Mead Johnson*. MillerCoors offers no reason why "1st Choice" is more "obvious" than "brewed with" "made with" or "uses" –

particularly where Bud Light's usage of those terms aligns with dictionary definitions and MillerCoors's own statements. MillerCoors also does not explain why Bud Light's ads are any less "obvious" than the claim, "useful for arthritis," an example this Court indicated was *not* misleading. *Mead Johnson*, 209 F.3d at 1034 (rejecting claim that aspirin seller could not label drug as an "anti-inflammatory useful for arthritis … if a survey showed that consumers confused palliation of symptoms with a cure for the disease"). Certainly "useful for arthritis" *could* be interpreted in different ways, but this Court indicated that was not enough to be "misleading." In fact, when counsel suggested that this language was potentially misleading, this Court rejected that claim as "so counterproductive that the basic position cannot be accepted." *Id.*

Much like the statements in *Mead Johnson*, and as the district court found, Bud Light's advertising *is* "obvious" and not misleading. MillerCoors cannot claim otherwise, having publicly stated that "made with," "brewed with," and "use" are all accurate ways to refer to its use of corn syrup to brew Miller Lite and Coors Light, and having used those words in such manner itself.

4. The court's reasoning aligns with other Lanham Act cases.

Other false-advertising case law confirms that the district court's conclusions were correct. In *First Health Group v. BCE Emergis Corp.*, 269 F.3d 800 (7th Cir. 2001), the use of the term PPO in communications regarding health insurance programs was the subject of a § 43(a) claim. This Court ruled that the plaintiff could not redefine that term in a manner different from its ordinary meaning, as would be required to render defendant's statements actionable. *Id.* at 804-05. *First Health Group* reaffirms that a false-advertising claim cannot be based on a definition that is inconsistent with plain usage.

In *Pernod*, the Third Circuit held that "Havana Club" rum was not deceptive as to its geographic origin because the label also indicated that the rum was made in Puerto Rico. 653 F.3d at 252. Despite survey evidence indicating that some consumers were misled, the district court "decided at step one of the analytical process that no false or misleading statement was made, so no survey evidence was needed." *Id.* at 248. The Third Circuit affirmed. As the district court found when it analyzed the language in the

context of Bud Light's whimsical ads, the Third Circuit held that no reasonable consumer could be misled by the rum's full label. *Id.* at 253.

This same reasoning was followed by the Eighth Circuit in a puffery case, *American Italian Pasta*. Like the court here, the trial court rejected survey evidence purporting to show that the defendant's self-laudatory claim, "America's Favorite Pasta," was actionable false advertising. 371 F.3d at 392-93. The Eighth Circuit affirmed, stating that "the Lanham Act protects against misleading and false statements of fact, not misunderstood statements," and that a survey could not be used to transform subjective puffery "into a specific, measurable claim." *Id.* at 393-94.

More broadly, MillerCoors has not cited *any* case where a truthful, neutral advertisement was enjoined without some other factor, such as disparagement. (A-App. 28-31.) Here, there is none. "Special Delivery" implied no message of disgust or impurity, and thus this case is nothing like *Polar Corp. v. Coca-Cola*, 871 F. Supp. 1520 (D. Mass. 1994), where a polar bear is seen tossing a can of Coke into a trash bin labeled "Keep the Arctic Pure." *Id.* at 1521. This case also bears no resemblance to other false-advertising cases that MillerCoors cited to this Court or the district court. *E.g.*, *Eli Lilly*, 893 F.3d at 379 (enjoining ads comparing rbST supplement to

a "monster with razor sharp horns and electric fur," and implying it was "weird stuff"); *Abbott Labs.*, 971 F.2d at 13-15 (enjoining ads that made literally false comparisons between rice syrup and rice). The court's ruling is consistent with the weight of Lanham Act authorities, providing additional grounds for affirmance.

C. The District Court Considered the Accused Ads in their Proper Context.

MillerCoors next claims the district court erred when it did not view the challenged phrases in the "context" of Bud Light's "entire promotional campaign." (Brief at 52.) This claim, however, is based upon a misinterpretation of *Abbott Labs* and an inapt comparison of Bud Light's ads to a "sitcom" or "big commercial." (*Id.* at 53.) In reality, from its marquee Super Bowl commercials (none of which was enjoined) down to social media posts, Bud Light's campaign consists of multiple facets released over many months – from February 2019 through the present. There is no evidence that consumers saw multiple (much less all) ads

released over this campaign. The district court did not err by declining to assume context.

1. The relevant context is the *advertisement* as a whole.

The "context" relevant to evaluating an advertisement is not a matter for serious debate. Courts are in accord that, in reviewing a false-advertising claim under § 43(a), a court should consider the challenged words "in the context of the entire accused advertisement." *Pernod*, 653 F.3d at 253; *see also Johnson & Johnson Vision Care v. 1-800 Contacts*, 299 F.3d 1242, 1248 (11th Cir. 2002) (stating that "a court must analyze the message conveyed in full context" and should not "examin[e] the eyes, nose, and mouth separately") (quotations omitted); *Apotex v. Acorda Therapeutics*, 823 F.3d 51, 67 (2d Cir. 2016) (while "the relevant context of the advertisement is the overall message conveyed by the brochure," the court "was not required to consider external marketing documents"). These authorities support the common-sense principle that litigants cannot surgically excise phrases to show whether or not an advertisement conveys a false message.

However, it is equally true that courts may not *assume* context. In *Johnson & Johnson Vision Care*, the Eleventh Circuit explained:

> [T]he district court did not assess each advertisement independently, but instead evaluated the three in concert. The court reasoned that "[i]f the ad campaign as a whole would be misleading to the reasonable consumer, then the defendant should be enjoined from using that ad campaign." … While the court should consider context, it may not *assume* context. The problem with the district court's approach is the assumption that consumers will be exposed to every advertisement in a campaign.

299 F.3d at 1247–48 (citations omitted); *see also Am. Muscle Docks & Fabrication v. Merco*, 187 F. Supp. 3d 694, 703 (N.D. W.Va. 2016) ("Plaintiff has offered no evidence to suggest any consumer was exposed to both statements, and this Court will not *assume* they were."). The Eleventh Circuit also noted the issue of "time lapse" – that "even if a consumer saw each advertisement in a campaign, it is unlikely that the consumer would use the elements of Advertisement A seen on a Monday to interpret Advertisement B seen on a Thursday." *Johnson & Johnson Vision Care*, 299 F.3d at 1248 n.4.

In *Pizza Hut*, the Fifth Circuit rejected a claim, identical to MillerCoors's here, that Papa John's advertising slogan, "Better Ingredients. Better Pizza." must be interpreted in the context of a multi-year advertising campaign. *Pizza Hut v. Papa John's Int'l*, 227 F.3d 489, 501 (5th Cir. 2000). As here, there was no evidence that this slogan had become "forever 'tainted' by its use as the tag line in the handful of misleading

comparison ads." *Id.* at 502 n.11. And, as here, there was no evidence that a "small fraction" of misleading ads "had become encoded in the minds of consumers such that the mention of the slogan reflectively brought to mind the misleading statements." *Id.* The Fifth Circuit vacated the injunction. *Id.* at 504.

In *Verisign, Inc. v. XYZ.COM*, 848 F.3d 292 (4th Cir. 2017), the Fourth Circuit stated that "a Lanham Act claimant may not mix and match statements, with some satisfying one Lanham Act element and some satisfying others." *Id.* at 299. Thus, circuit courts uniformly reject the approach urged by MillerCoors: that a district court, like a magician, must "conjure" a fictitious consumer who has seen every ad from a campaign (no matter how far apart in time), and then rule based on assumptions about the message perceived by that imaginary person.

2. The court reviewed each accused advertisement in context.

The district court took the "holistic" approach that MillerCoors argues is required. The court expressly found that, "viewing the 'made with,' 'brewed with' or 'uses' statements in the context of the full commercials here, there are no express or implicit messages that the corn

syrup is actually *in* the finished product." (A-App. 24.) As discussed, the court's analysis was informed by the words and imagery in Bud Light's whimsical commercials. (*Id.* at 24-25.) This reasoning was not erroneous.

What the district court properly did *not* do was to assume context without evidentiary basis. Rather, it rejected MillerCoors's argument that the ads should be interpreted collectively as "too much of a stretch." (A-App. 30.) The court's analysis was correct because there is *no* evidence that consumers saw all or multiple parts of Bud Light's campaign, which was released over many months and across different markets. MillerCoors's suggestion that a small number of enjoined ads "necessarily colored" other statements from the campaign is wholesale speculation. (Brief at 54.)[10]

3. The approach modeled in *Abbott Labs* is no different.

MillerCoors's claims regarding context are based upon its misinterpretation of *Abbott Labs*. There, the Seventh Circuit considered advertising claims relating to Abbott's oral electrolyte solution, Ricelyte, that was used to prevent dehydration in infants caused by vomiting and

[10] MillerCoors's theory is illogical, even if this Court *were* to consider the ads collectively. As the district court noted, the unenjoined Super Bowl commercials were the most "pervasive" and clearly refer to the brewing process. (A-App. 6, 30.) It does not make sense to say that those ads were somehow colored by "less pervasive" ads. (*Id.* at 30.)

diarrhea. Abbott's advertising campaign associated Ricelyte with rice (often portraying images of whole grains of rice) because rice carbohydrates had therapeutic benefits in preventing dehydration. 971 F.2d at 9-11. But Ricelyte contained only rice syrup solids, which were chemically and functionally different from rice carbohydrates. *Id.* The Seventh Circuit affirmed the district court's finding that certain "rice claims" and the name, Ricelyte, were literally false because they imparted "the express message that Ricelyte contains rice and rice carbohydrates." *Id.* at 14. In dicta, this Court also referred to "the entire promotional campaign," noting that Abbott's verbal and pictorial representations of rice could support a finding of implied falsity. *Id.* at 15.

In arguing that *Abbott Labs* "modeled the correct approach" for evaluating the context of advertising, MillerCoors significantly overstates this Court's ruling and ignores critical facts that distinguish its reasoning. (Brief at 52.) This Court's *Abbott Labs* analysis is nothing like the "approach" advanced by MillerCoors. *Abbott Labs* does not hold that a literally true advertisement can be found misleading by interpreting it together with other ads and then assuming an imaginary consumer has seen the entirety. Instead, the Court noted that a false link between Ricelyte

and rice was evident throughout Abbott's campaign. This was logical because "Ricelyte" was the name of the product at issue, a fact which further distinguishes *Abbott Labs* from the present case. And, this Court's reference to the "entire promotional campaign" was dicta – not a legal mandate.

The analytic approach "modeled" by this Court in *Abbott Labs* was no different from that described in the cases above. The Court reviewed each advertising claim separately (*i.e.*, "rice claims," "Ricelyte name," and "comparison claims") to assess whether they imparted a false message. 971 F.2d at 13-16. If MillerCoors were correct that a false or misleading message could be derived, with no evidentiary support, by "invoking" or "conjur[ing]" other ads (Brief at 53), this sequential analysis would not have been necessary. Having found one claim literally false, the Court could have decreed the others false, as well. That is not what this Court did in *Abbott Labs*, and it is not the law.

Even if *Abbott Labs* were interpreted to mean that an entire campaign can be reviewed in some circumstances, this is not such a case. Unlike here, the advertising in *Abbott Labs* was "professionally driven," meaning that it was marketed directly to physicians and nurses. 971 F.2d at 10. Where

advertising is hand-delivered by sales representatives, it may be reasonable to infer that the intended audience has seen the campaign in full. No similar inference can be made here.

4. The court was consistent in its approach to the evidence.

Finally, MillerCoors argues that the district court failed to consider its social media posts and consumer communications, which it contends provides additional context to evaluate the advertisements. (Brief at 49-50.) But, as the court found, this evidence consisted of 32 *total* consumer communications relating to corn syrup (many of which "accurately described that Miller Lite and Coors Light use or are brewed with corn syrup"), and social media andecdata. (A-App. 43.) The court found that, "[v]iewed in isolation" (that is, without reference to the survey), this evidence was "insufficient to prove that a substantial segment of consumers are likely to be deceived by the advertisements." (*Id.*) Accordingly, this remaining evidence provides no independent indication of consumer confusion. At most, it could show that a tiny fraction of consumers misunderstood the ads. However, as this Court has held, "'[m]isleading' is not a synonym for 'misunderstood.'" *Mead Johnson*, 209 F.3d at 1034.

CONCLUSION

For the foregoing reasons, the district court's Order of May 24, 2019, should be affirmed.

Dated: August 19, 2019

Respectfully submitted:

/s/ James F. Bennett
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STATEMENT ON ORAL ARGUMENT

Consistent with MillerCoors's Statement on Oral Argument, A-B agrees that, pursuant to Federal Rule of Appellate Procedure ("Rule") 34(f), oral argument is warranted, and that this Court's Order of July 2, 2019 (Dkt. 8), states that "[o]ral argument shall be set by separate court order to occur during the month of September 2019."

/s/ James F. Bennett
James F. Bennett

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because this document contains 13,548 words (including the text in all textboxes) and excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: August 19, 2019

/s/ James F. Bennett
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, the Brief of Defendant-Appellee Anheuser-Busch Companies, LLC, was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ James F. Bennett
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