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
The Honorable William M. Conley

REPLY BRIEF OF PLAINTIFF–APPELLANT MILLERCOORS, LLC

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INTRODUCTION

The primary issue raised by this appeal is whether this Circuit should join five others in holding that, in Lanham Act cases, proof of intent to deceive creates a presumption of confusion. AB's 70-page response brief spends little time, and provides no compelling argument, refuting the proposition that this Circuit should join its fellow circuits and adopt the presumption as the law of this Circuit.

Instead, AB devotes the majority of its brief to arguing that if the Court adopts the presumption, it should not apply here. But intent to deceive triggers the presumption, and AB has not cross-appealed the district court's key finding that its corn syrup campaign was intended to deceive consumers:

> As the court indicated during the hearing, these statements support a finding that defendant was aware of consumer concerns about and the likelihood of confusion surrounding corn syrup and HFCS, **and that defendant hoped consumers would interpret advertising statements about "made with corn syrup" or "brewed with corn syrup" as corn syrup *actually being in* the finished products.**

(R.57 at 36; A-App. 36) (emphasis added). The Court needs nothing more to apply the presumption of confusion here.

To pivot away from this point, AB argues that its campaign merely uses the same words MillerCoors has used before, just in a different context, so AB can't be held liable for misleading consumers—even in the face of proof that it *intended* to do so and succeeded. That cannot be correct. Instead, the fact that AB intended to mislead consumers should shift the burden to AB to show that consumers were *not* confused.

But even without this presumption, the district court still should have enjoined all of AB's campaign. The district court should have recognized AB's statements as ambiguous, then evaluated whether they were deceptive in the context of the entire campaign—including evidence of actual consumer confusion and the statements the district court did enjoin. Again, AB has given the Court no reason to decide otherwise.

I. The Court should adopt and apply the presumption of confusion.

In its initial brief, MillerCoors argued that this Court, like all six circuits to have considered the question, should adopt a rebuttable presumption of confusion, and, like five of those circuits, hold that the presumption applies when there is proof that an advertiser *intended* to deceive consumers. (Op. Br. at 37-42). MillerCoors identified the authorities supporting its argument

and the policy reasons that have led every other circuit court that has considered the issue to adopt the presumption (*Id.*).

In its response, AB does not argue that the cases cited by MillerCoors were incorrectly decided. Nor does it identify any contrary authorities considering and rejecting the presumption. AB does not offer any response to the considerations of judicial policy behind the presumption. In short, it makes no argument that the presumption is bad law *or* bad policy.

This is understandable. The presumption is "well established," *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 316 (1st Cir. 2002), and MillerCoors is not aware of any other circuit to have considered the presumption and rejected it. (Op. Br. at 40). Indeed, it is difficult to argue against the presumption, which merely shifts the burden to the defendant to prove that it did not accomplish what it set out to do. This is consistent with the logic behind burden-shifting presumptions generally. *Cf. King v. Gen. Elec. Co.*, 960 F.2d 617, 623 (7th Cir. 1992) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof") (quoting *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 359 n.45 (1977)); *Ray v. Clements*, 700 F.3d 993, 1010 (7th Cir. 2012) (same).

What AB does argue is that if the Court *adopts* the presumption, it should adopt only the narrow form used by the Third Circuit (Resp. Br. at 36-39, 41). AB then advances various reasons why the Court should not *apply* the presumption *in this case* (*id.* at 35, 39-41, 42). Both of these secondary arguments fail.

A. Proof of intent to deceive alone should trigger the presumption.

AB argues that if this Court does adopt a presumption of confusion, it should apply it only upon a showing of both an "intent to deceive *and* egregious conduct." (Resp. Br. at 36) (emphasis in original). But it offers no reasoning as to why "egregious conduct" should be required, or any real definition of what constitutes "egregious conduct"—a point that also troubled the district court.[1]

Instead, AB urges this Court to require a showing of egregious conduct because, it asserts, that is what at least some of the circuits adopting the

[1] (*See* R.57 at 37; A-App. 37) ("while courts appear willing to find an intent to deceive, there are no findings, as far as this court could uncover, of cases also finding 'egregious' conduct or a discussion of what that might entail to support the presumption").

presumption have done. But AB's description of what other circuits have done in adopting the presumption is neither accurate nor persuasive.

While the Third Circuit has included a "clear and egregious conduct" element in its test for the presumption, as MillerCoors already indicated in its initial brief (Op. Br. at 41), the Third Circuit's test remains the outlier, despite AB's assertions to the contrary. Moreover, a closer look at the origins of the Third Circuit's test shows that "egregious conduct" really only means deliberately acting on intent to deceive.

In *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125 (3d Cir. 1994), the Third Circuit described "'deliberate conduct' of an 'egregious nature'" as "the second part of the *Smithkline Beecham* test." *Id.* at 131–32. This was a reference to *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294 (2d Cir. 1992), where the Second Circuit said the presumption arises "'where 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.'" *Id.* at 298–99 (quoting *Resource Developers, Inc. v. Statue of Liberty–Ellis Island Found., Inc.*, 926 F.2d 134, 140 (2d Cir. 1991)).

Importantly, however, both *Smithkline Beecham* and *Resource Developers* made clear that the egregious conduct need not be anything other than spending significant sums of money to broadcast a message with intent to deceive. In *Smithkline Beecham*, the court said the presumption "may be engendered by the expenditure 'of substantial funds in an effort to deceive consumers and influence their purchasing decisions.'" 960 F.2d at 298-99 (citing *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986)). In *Resource Developers*, the court said the same, again citing *U-Haul* and clarifying: "Once it is shown that a defendant deliberately engaged in a deceptive commercial practice, we agree that a powerful inference may be drawn that the defendant has succeeded in confusing the public." 926 F.2d at 140.

Thus it is clear that the "egregious conduct" emphasized by AB was originally just an alternate description of the defendant's substantial effort to carry out its intent to deceive consumers. At most, even in the Third Circuit, this merely means the plaintiff must show intent plus action before the presumption of confusion will apply. It does *not* mean the defendant's conduct must be peculiarly dastardly before the burden will be shifted.

Turning to other circuits, AB is simply wrong in asserting that the Second Circuit categorically requires egregiousness in addition to intent to deceive and "has never strayed from this two-element standard." (Resp. Br. at 37). As AB concedes, *Church & Dwight* is itself a recent example of a Second Circuit decision finding that intent to deceive the public alone "was *sufficient* to support a presumption of consumer confusion." *Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GmbH*, 843 F.3d 48, 67-68 (2d Cir. 2016) (emphasis added); *see also (*R.57 at 37, n. 22; A-App. 37) (district court "readily acknowledge[d]" that *Church & Dwight* "may raise a question as to whether a showing of 'egregious conduct' is required").

AB also goes too far in claiming the First Circuit "has acknowledged the need to establish egregious conduct in some cases." (Resp. Br. at 37). The sole case AB cites on this point, *Clorox Co. Puerto Rico v. Proctor & Gamble*, 228 F.3d 24 (1st Cir. 2000), merely notes references to egregious conduct in other cases, and then only in a footnote. *Id*. at 36 n.9. The same footnote expressly declines to decide whether to adopt the presumption. But two years later, in *Cashmere & Camel Hair*, the First Circuit embraced as "well established" a presumption of consumer deception triggered by "proof that a defendant intentionally set out to deceive or mislead consumers," with

no mention of egregious conduct or the footnote in *Clorox*. 284 F.3d at 316 (citing Eighth and Ninth Circuit precedent). AB has offered no more recent authority suggesting that the First Circuit now requires egregious conduct in its test for the presumption, and MillerCoors is aware of none.

With the First Circuit supporting MillerCoors and the law in flux in the Second Circuit, the Third Circuit remains an outlier as MillerCoors argued. Like the First Circuit, the Sixth, Eighth, and Ninth Circuits have each held that the presumption is triggered solely by intent to deceive. (*See* Op. Br. at 39-40) (collecting cases). And again, this makes sense: intending to deceive consumers is egregious in its own right; what purpose is served by requiring still *more* egregious conduct before applying the (rebuttable) presumption—and what would such conduct even look like?

Instead of answering these questions, AB attempts to distinguish the intent-only cases from the Sixth, Eighth, and Ninth Circuits, arguing that they involved either a deliberate violation of the law or contained no meaningful analysis of the issue. (Resp. Br. at 41). This attempt fails.

In *U-Haul*, the Ninth Circuit envisioned a factual scenario like the one here, and flatly stated: "The expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing

decisions justifies the existence of a presumption that consumers are, in fact, being deceived." 793 F.2d at 1041. As noted above, such efforts were exactly what the Second and then the Third Circuit would later describe as "'deliberate conduct' of an 'egregious nature'" justifying the presumption.

In *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1333 (8th Cir. 1997), the Eight Circuit made the same point this way: "A predicate finding of intentional deception, as a major part of the defendant's marketing efforts, contained in comparative advertising, encompasses sufficient harm to justify a rebuttable presumption of causation and injury in fact." 110 F.3d at 1336 (noting that this approach recognized "the basic harm to a plaintiff who is targeted by deliberately deceptive comparative advertising").

Finally, the Sixth Circuit expressly adopted the Ninth and Eighth Circuits' approach on the issue, noting it was applicable where the defendant "targeted" the plaintiff's product. *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 694 (6th Cir. 2000) ("The reasoning of *Porous Media* is applicable to the present case since Schmitt specifically targeted Balance Dynamics' balancer, which was the only product of its kind in the market.").

In summary, AB has not provided any reason why the Court should not adopt the presumption of confusion in the form recognized by the First, Second, Sixth, Eighth, and Ninth Circuits. Three final points require clarification before turning to the application of that presumption in this case.

First, contrary to AB's suggestion, MillerCoors is not arguing for a presumption of injury separate from the presumption of actual confusion. (*Cf.* Resp. Br. at 43-44). The Eighth Circuit distinguishes between a "presumption of deception" and a "presumption of causation and injury" (both of which it recognizes), *see Porous Media*, 110 F.3d at 1333, but in comparative advertising cases like this one, actual customer confusion *is* the harm. *Web Printing Controls Co., Inc. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1203 (7th Cir. 1990) ("To prove a *violation* of the Lanham Act, proof of injury caused by actual confusion is unnecessary") (emphasis in original).[2]

As the district court correctly recognized, on a motion for injunctive relief, a misleading comparison to a competitor's product is presumed to work irreparable harm. (R.57 at 44-45; A-App. 44-45) (listing authorities).

[2] Of course, to recover *damages* at trial, MillerCoors will need to present additional proof. *Web Printing*, 906 F.2d at 1204-05.

Because AB does not challenge the district court's conclusion that MillerCoors "has put forth sufficient evidence to demonstrate irreparable injury, even without [this] presumption" (*id.* at 45, n. 25; A-App. 45), this appeal presents no question relating to injury or harm.

Second, MillerCoors has not "admitted" that egregiousness is required for the presumption to apply. (*Cf.* Resp. Br. at 38-39). At oral argument on the preliminary injunction motion, counsel for MillerCoors raised the issue this way: "If there's a showing of intent to mislead, then the burden shifts to the defendant to show lack of confusion." (R.56 at 46:5-7; A-App. 95). "And if we can convince a jury that they intended to have people draw the impression from this campaign that they would be consuming corn syrup if they drank a Miller Lite or Coors Light beer, then we can take advantage of that burden shifting." (*Id.* at 46:12-16; A-App. 95). Counsel's subsequent statement about a two-element test referenced AB's presentation of the issue in *its* brief. (*Id.* at 47:10-14; A-App. 96). And in any event, how counsel described the test in other circuits is not an "admission" of the law in this circuit, which has not yet adopted the presumption *or* the test.

Third, if the Court adopts a presumption of confusion, MillerCoors is not asking it to fashion an injunction in the first instance. (*Cf.* Resp. Br. at 44-

45). It requests a remand to the district court with instructions to enter a preliminary injunction consistent with this Court's opinion, i.e., applying the presumption if this Court adopts it. (Op. Br. at 57). MillerCoors agrees the district court is in the best position to undertake that task.

B. AB's arguments fail to show why the presumption, if adopted, should not be applied in this case.

AB advances three reasons why, if the Court adopts a presumption of confusion, it should not apply that presumption here. Each argument fails.

AB first argues the presumption of confusion does not apply where the advertising claim "does not reasonably imply a false or misleading message." (Resp. Br. at 35). For this and its assertion that "[i]f reasonable consumers could not be misled, deception also cannot be presumed" (*id.*), AB cites no authority. And how could it? This turns the test for the presumption on its head, *beginning* with a conclusion that a statement is not misleading to find the presumption does not apply regardless of intent.

But the threshold question of whether the presumption is *triggered* is determined by the defendant's intent, not the advertising content at all. If intent to deceive is found, the burden shifts to the defendant to show that its own statements *intended to deceive consumers* did not, in fact, confuse

them. (Op. Br. at 37-41). At trial, if MillerCoors shows that AB intended its ads to mislead consumers into believing there is corn syrup in Miller Lite and Coors Light, the presumption will apply to shift the burden of proof, and AB will be free to attempt to rebut the presumption by showing that its intentional, expensive, and orchestrated attempt to mislead consumers in fact was unsuccessful. But AB's arguments for rebutting the presumption do not provide a reason not to *apply* the presumption in the first instance.

Next, AB argues the presumption is only triggered if intent to deceive is undisputed. (Resp. Br. at 42). But in the one case it cites, the only evidence of intent to deceive related *solely* to an earlier version of a commercial that had been taken off the air and was not the subject of the action. *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 299 (2d Cir. 1992). Thus there was *no* evidence of intent to deceive consumers using the commercial under review, and the district court found the plaintiff's contrary argument "unavailing" on those facts. *Id.*

That places *Johnson & Johnson * Merck* in stark contrast with this case, where the district court has already found that AB intended consumers to interpret the advertising statements "made with" and "brewed with" corn syrup as meaning "corn syrup actually being in the finished products."

(R.57 at 36; A-App. 36). AB concedes that this finding of fact by the district court is "entitled to deference unless clearly erroneous." (Resp. Br. at 33). Indeed, AB has not even appealed this finding. Thus, for purposes of reviewing the preliminary injunction,[3] AB's intent is not merely "uncontroverted"; it is an operative finding by the district court.

AB's final argument against applying of the presumption is that there was no finding of egregious conduct here. (Resp. Br. at 39-41). MillerCoors has explained why this should not be required (*supra* at 4-10) and why AB's conduct *was* egregious if it is required (Op. Br. at 42), but to be clear, the district court made no finding on this point one way or the other. If the Court takes the Third Circuit's minority approach and grafts an egregiousness requirement onto the test for the presumption, then it may either find that requirement satisfied based on the current record (again, solely for preliminary injunction purposes) or direct the parties to address that element on remand. Again, however, this is not a reason not to follow

[3] MillerCoors recognizes the case has thus far only proceeded to the preliminary injunction phase, and that the district court's finding is that MillerCoors is *likely to succeed* in showing AB intended to deceive consumers. Therefore, if the Court adopts a presumption, that presumption should apply in determining preliminary injunctive relief. As with most presumptions, MillerCoors will have to show intent at trial in order to be entitled to the presumption.

the other circuits that have considered this issue and *adopt* the presumption as the law of the Seventh Circuit.

II. Even without the presumption of confusion, the district court should have enjoined all of AB's campaign.

In its opening brief, MillerCoors explained why, even if this Court does not adopt a presumption of confusion, it should still reverse the district court's decision not to enjoin select portions of AB's intentionally deceptive corn syrup campaign. AB's response does not squarely address the core argument raised by MillerCoors: the district court started its analysis in error by classifying these statements as literally true, ignoring their inherent ambiguity, and then used that conclusion to justify disregarding all the evidence that tipped these statements into the realm of the misleading.

The district court also erred in parsing each ad in isolation rather than evaluating whether AB's statements were misleading in the context of the campaign as a whole. AB's contrary arguments (Resp. Br. at 61-68) rest on cases that did not consider integrated advertising campaigns, and on a myopic reading of *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992). If the Court declines to adopt the presumption of confusion, it

should nevertheless reverse this portion of the district court's decision and remand with instructions to determine whether AB's ambiguous statements are misleading when evaluated in their proper context.

A. This case is not *Mead Johnson*: AB's statements are ambiguous, and MillerCoors is not attempting to change their meaning—through a survey or otherwise.

AB would like this case to be controlled by *Mead Johnson*, but such a stretch makes for a poor fit. First, *Mead Johnson* was about one statement—"1st Choice of Doctors"—with *only one*, unambiguous meaning: more doctors preferred Similac to any competing product. (Op. Br. at 45-47). When the plaintiff attempted to assert an alternative meaning for the phrase, claiming that "first" could mean "majority," the Court rejected that as a betrayal of the English language. *Mead Johnson & Co. v. Abbott Laboratories,* 201 F.3d 883, 884 (7th Cir. 2000) (calling any other meaning "all but impossible").

For *Mead Johnson* to control this case, AB's statements would likewise have to be susceptible to *only one* reasonable interpretation. But they are not. (Op. Br. at 47-49). MillerCoors has never disputed the narrow, technical sense in which these statements could be true. But in a more obvious sense the statements can be—and here *are*—false. This sense does

not rest on *distorting* the plain meaning of these statements, as attempted in *Mead Johnson*, but on giving them their *most natural* meaning—the very meaning the district court found AB *intended* consumers to ascribe to these words. To reach *Mead Johnson*, AB must do more than show its statements are *true in a sense*; it must show its statements *have no other objectively reasonable meaning*. (Op. Br. at 48-49). It hasn't done so, and it can't. In fact, AB concedes that ambiguous statements may be misleading. (Resp. Br. at 47, fn. 8, citing *Hot Wax v. Turtle Wax*, 191 F.3d 813, 820 (7th Cir. 1999)).

AB repeatedly points out that in the past, MillerCoors has itself used words like "brewed with" and "ingredient" in connection with corn syrup. But the fact that MillerCoors has used these words in a context where their narrow, technical meaning is evoked does not give AB license to shrewdly design a comprehensive advertising campaign to use the same words to evoke a false meaning in their new context.

If AB's statements are capable of more than one objectively reasonable meaning, then it follows that *Mead Johnson*'s rejection of survey evidence to show an "all but impossible" meaning also fits poorly here. The fundamental problem in *Mead Johnson* was the plaintiff's attempt to use survey evidence to trump simple, unambiguous meaning. 201 F.3d at 886

(surveys cannot be used "to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held"). But MillerCoors proposed no such use for its surveys.

Instead, MillerCoors used control and test groups to show that consumers viewing AB's ad were misled into a false interpretation of the statements *unless* the ad was accompanied by a disclaimer clarifying that there is *no* corn syrup in Miller Lite or Coors Light as finished products. (*See* R.9 at 18) (describing survey and results); (R.57 at 12-14; A-App. 12-14) (district court discussion of same). *Both* groups were asked what they thought "'made with' corn syrup" meant, and those who had not seen the disclaimer were significantly more likely to conclude that corn syrup is present in the finished product. *See id.* That is not redefining "made with" away from its plain meaning; it is determining *which* of that term's plain meanings consumers were more likely to attribute to the term.[4]

[4] AB criticizes Question QF7b of Dr. Wind's survey as an "improper leading question[]" that "*told* respondents that 'being "made with" corn syrup' is ambiguous." (Resp. Br. at 26 (emphasis in original)). AB thus pronounces the responses to that question as "infected by demand bias." (*Id.* at 27). This criticism is unfounded. The *Reference Guide on Survey Research*, which is part of the Federal Judicial Center's Reference Manual on Scientific Evidence, provides that "if respondents who viewed the allegedly deceptive commercial respond differently than respondents who viewed the control commercial, the difference cannot be merely the result of a leading question, because both groups answered the same

This, too, distinguishes this case from *Mead Johnson*, as well as from *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800 (7th Cir. 2001), another case where the Court rejected a definition inconsistent with plain usage. (*Cf.* Resp. Br. at 59). Nor is this case like *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241 (3d Cir. 2011), where the defendant's own label expressly stated that "Havana Club" rum was made in Puerto Rico. *Id.* at 252; (Resp. Br. at 59-60). For this case to parallel *Pernod*, AB would have had to include in its ads the same disclaimer shown in Dr. Wind's survey. Instead, AB *omitted* this information, intending to mislead consumers.

In summary, *Mead Johnson*'s holding rejects the use of survey evidence to support an interpretation at odds with the only plain meaning of an advertising statement. MillerCoors has not offered survey evidence for that purpose, so *Mead Johnson*'s holding does not apply. More importantly, nor

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question." Shari Seidman Diamond, *Reference Guide on Survey Research*, in Reference Manual on Scientific Evidence (Fed. Jud. Ctr., 3d ed. 2011), at 399, available for download at: https://www.fjc.gov/content/reference-guide-survey-research-2. In other words, if the results were "infected by demand bias," both test and control respondents would have answered similarly. Here, however, the responses from the test and control groups were significantly different. There was no demand bias. *See also* (R.57 at 39-41; A-App. 39-41) (rejecting this criticism as going to the weight rather than the admissibility of this evidence).

does its logic, which was premised on an advertising statement with only one objectively reasonable meaning. By contrast, AB's entire ad campaign hinged on the *multiple* meanings of the statements it chose to highlight.

B. AB wove its statements into one integrated advertising campaign and the Court should evaluate them that way.

AB agrees that context is important to reviewing false advertising claims under the Lanham Act (Resp. Br. at 62), and at one point argues that its own statements showing an intent to deceive consumers should be evaluated in their "full context" (*id.* at 28). But for AB, "full context" apparently stops short of the full campaign, ending at the level of each individual ad instead. (*Id.* at 63-65). AB's only argument in support of this position is that courts should not assume consumers saw every ad in the campaign, even though multiple ads appeared throughout the Super Bowl telecast and were concurrently disseminated via social media. (*Id.*).

When a series of advertisements span multiple years, as in *Pizza Hut v. Papa John's Int'l*, 227 F.3d 489, 501 (5th Cir. 2000), AB's argument may have merit. But none of AB's cases considered a rapid-fire, comprehensive multimedia blitz like AB's, where interrelated ads were initially launched on the same evenings, during two of the most highly viewed television

programs in the country (the Super Bowl and the Oscars), becoming national news in their own right, as AB intended. On those facts, it makes most sense to assume that ads designed to be viewed together *were* viewed together.

AB claims this is illogical, because the un-enjoined Super Bowl ads were the most pervasive and "it does not make sense to say that those ads were somehow colored by 'less pervasive' ads." (Resp. Br. at 65, fn. 10). Actually, the district court found exactly the opposite: "the court is persuaded that a reasonable jury could and likely would find that these [enjoined] ads encouraged consumers to draw the wrong inference from the *original* ads." (R.57 at 33, fn. 19; A-App. 33) (emphasis added).

But the district court ultimately stopped short of implementing this finding because it already had concluded that the un-enjoined statements had a literally true meaning. (*Cf.* Op. Br. at 54). If instead the court had recognized these statements' ambiguity, then under *Abbott Labs*, the remainder of the campaign should have informed the court's analysis of whether the statements were misleading. (*See id.* at 54-55).

To argue otherwise, AB characterizes this Court's focus on the "entire promotional campaign" in *Abbott Labs* as "dicta—not a legal mandate,"

then emphasizes that the Court there still reviewed the falsity of each advertising claim in the campaign. (Resp. Br. at 67). On the first point, it is difficult to see how an analytical approach modeled by this Court can be consigned to mere dicta, even if a litigant had authority to do that.

But even setting that aside, MillerCoors does not argue that one false element in a campaign renders the whole campaign false. As in *Abbott Labs*, the district court was not wrong to identify AB's various advertising claims and consider the falsity of each. But the court should not have evaluated each statement *as if AB had made no others*. Instead, just as in *Abbott Labs*, it should have evaluated each statement "in the context of [AB's] entire promotional campaign." 971 F.2d at 15.

AB's authorities are not to the contrary. For example, in *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242 (11th Cir. 2002) (Resp. Br. at 63), the court evaluated three separate printed advertisements, two of which were mailed to customers together. *Id.* at 1248, fn. 4. It declined to view the two sent together as context for the one sent alone, but found that the two mailed together provided context for each other: "Because a consumer was likely to view those advertisements at the same time, it is appropriate to analyze them together." *Id.* Far from prohibiting

one ad to serve as context for another, *Johnson & Johnson* said the point depended on whether consumers were likely to see the ads at or around the same time.

In *American Muscle Docks & Fabrication, LLC v. Merco, Inc.*, 187 F. Supp. 3d 694 (N.D. W.Va. 2016), the Lanham Act claim was a highly local affair, based on one instance of puffery and various false statements made by a dock manufacturer to one or more customers, with no evidence even *suggesting* that *any* consumer was exposed to both of the statements. *Id.* at 703. To equate that case with this one is a bridge too far.

Finally, *Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292 (4th Cir. 2017), stands for a different principle: that Lanham Act plaintiffs cannot cobble together a claim out of different statements satisfying different elements of the claim. *Id.* at 299. Instead, they "must be able to point to at least one challenged statement that satisfies all five Lanham Act requirements." *Id.* Here, MillerCoors has clearly satisfied that requirement in each of the ads the district court *did* enjoin, and simply argues that the remainder of the campaign should be evaluated in that context.

Other courts agree. For example, in *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24 (1st Cir. 2000), the court considered an

Ace bleach advertising campaign with the tag line, "Whiter is not possible." *Id.* at 39. The court found that, "[s]tanding alone, that statement might well constitute an unspecified boast, and hence puffing." *Id.* But Proctor & Gamble had used the slogan in television commercials that visually "invite[d] consumers to compare Ace's whitening power against either other detergents acting alone or detergents used with chlorine bleach." *Id.*; *see also id.* at 38-39 (describing commercials). As a result, where the same tag line later appeared in printed promotional materials that otherwise contained no actionable statements, the court could not dismiss those materials as mere puffery. *Id.; see also Telebrands Corp. v. Wilton Indus., Inc.*, 983 F. Supp. 471, 476 (S.D.N.Y. 1997) (issuing preliminary injunction against packaging that used a phrase made material by separate television advertisements, reasoning: "A consumer is likely to see the designation "AS SEEN ON T.V." on the product, remember the advertisement [on television], notice the similarity of claims made on the packaging, and purchase the product . . ."); *R.H. Donnelley Corp. v. Ill. Bell Tel. Co.*, 595 F. Supp. 1202, 1206 (N.D. Ill. 1984) ("Moreover, the television ad must be viewed in conjunction with the entire ad campaign at issue.").

MillerCoors merely asks the Court to take the same context-appropriate approach here, with the relevant context including the corn syrup ads that *were* enjoined as misleading.

CONCLUSION

At the preliminary injunction stage, MillerCoors has shown that AB "practice[d] to deceive": it wove an expensive and orchestrated campaign of interrelated ads *intended* to confuse consumers about whether corn syrup is in Miller Lite and Coors Light as finished products. Under the law of all circuits to have considered the issue, MillerCoors would be entitled to a presumption that AB's ads *did* confuse consumers as intended.

MillerCoors asks for no more and no less than that here. But even without the presumption, the result is the same: the district court should have enjoined *all* of AB's campaign. This Court should so find.

Respectfully submitted this 29th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B), as modified by Circuit Rule 32(c), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 5,417 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), as modified by Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft® Word 2016 in Book Antiqua font, with 14-point font used for body text and 12-point font used for footnotes.

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I hereby certify that on August 29, 2019, I electronically filed the foregoing brief and appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

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