

No. 20-50323

In the
United States Court of Appeals
for the Fifth Circuit

Future Proof Brands, L.L.C.,
Plaintiff-Appellant,

v.

Molson Coors Beverage Company, Formerly Known As Molson Coors
Brewing Company, and MillerCoors, L.L.C.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
Honorable James R. Nowlin, Senior U.S. District Judge

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Statement Regarding Oral Argument

This appeal turns on basic principles of trademark law, calling for a careful and comprehensive analysis of the likelihood-of-confusion factors as defined by this Circuit. Appellant respectfully submits that oral argument would help the Court conduct its review of the law and relevant record.

Table of Contents

Identity of Parties and Counsel.....2

Statement Regarding Oral Argument.....4

Table of Contents5

Table of Authorities7

Jurisdictional Statement11

Abbreviations and Record References.....12

Issues Presented13

Introduction15

Statement of the Case16

 A. Factual background.....16

 1. Future Proof builds the “Brizzy” mark16

 2. Molson Coors and its new “Vizzy” drink.....19

 B. This litigation21

Summary of the Argument.....24

Argument27

 A. The trial court erred in its application of this Court’s standards for determining the strength of a mark.....29

 B. The trial court erred in evaluating the products’ similarity.....37

 C. The trial court erred in its evaluation of actual confusion.....41

D. The trial court erred in its evaluation of the degree of care and intent factors.....43

E. The remaining Rule 65 factors support injunctive relief.....45

Conclusion.....51

Certificate of Service53

Certificate of Compliance54

Table of Authorities

Cases

Abercrombie & Fitch Co. v. Hunting World Inc., 537 F.2d 4 (2d Cir. 1976)30

Abraham v. Alpha Chi Omega, 708 F.3d 614 (5th Cir. 2013)46

Alliance for Good Gov’t v. Coalition for Better Gov’t, 901 F.3d 498, 507-508 (5th Cir. 2018)30

Am. Rice, Inc. v. Producers Rice Mill, Inc., 518 F.3d 321 (5th Cir. 2008)29

Amazing Spaces, Inc. v. Metro Mini Storage, 608 F.3d 225 (5th Cir. 2010)31

Bd of Supervisors for Louisiana State Univ. Agric. & Mech. Coll. v. Smack Apparel Co., 550 F.3d 465 (5th Cir. 2008)..... 24, 28, 29

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F. Supp. 1219 (D. Colo. 1976)47

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365 (10th Cir. 1977)47

Blendco, Inc. v. Conagra Foods, Inc., 132 F. Appx. 520 (5th Cir. 2005) 32, 33

Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387 (5th Cir. 1980)47

Chevron Chem. Co. v. Voluntary Purchasing Grps., Inc., 659 F.2d 695 (5th Cir. Unit A 1981)38

Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456 (7th Cir. 2000).....43

Elvis Presley Enters. v. Capece, 141 F.3d 188 (5th Cir. 1998)..... *passim*

Engineered Tax Services, Inc. v. Scarpello Consulting, Inc., 958 F.3d
1323 n. 10 (11th Cir. 2020).....33

Fantastic Sams Franchisee Corp. v. Moseley, No. H-16-2318, 2016 WL
7426403 (S.D. Tex. Dec. 23, 2016).....49

Fuji Photo Film Co., Inc. v. Shinohara Shoji Kabushiki Kaisha, 754 F.2d
591 (5th Cir. 1985)42

Goodyear Tire Rubber v. Big O Tire Dealers, 434 U.S. 1052 (1978).....47

Gruma Corp. v. Mexican Restaurants, Inc., 497 F. Appx. 392
(5th Cir. 2012)38

Heil Trailer Int’l Co. v. Kula, 542 F. Appx. 329 (5th Cir. 2013).....46

KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S.
111 (2004).....32

Krim-Ko Corp. v. Coca-Cola Bottling Co., 390 F.2d 728
(Fed. Cir. 1968) 39, 40

La. World Exposition v. Logue, 746 F.2d 1033 (5th Cir. 1984)41

Lakedreams v. Taylor, 932 F.2d 1103 (5th Cir. 1991)49

Marathon Mfg. Co. v. Enerlite Prods. Corp., 767 F.2d 214
(5th Cir. 1985) 38, 41

Myo, LLC v. Brull & York, LLC, No. 1:18-CV-370-RP, 2019 WL
136820 (W.D. Tex. Jan. 8, 2019)36

Nola Spice Designs, L.L.C. v. Haydel Enters., Inc., 783 F.3d 527
(5th Cir. 2015)30

Paulsson Geophysical Servs., Inc. v. Sigmar, 529 F.3d 303
(5th Cir. 2008) 27, 47

PlayNation Play Systems, Inc. v. Vex Corporation, 924 F.3d 1159
 (11th Cir. 2019)35

Quantum Fitness Corp. v. Quantum LifeStyle Ctrs., LLC, 83 F. Supp.
 2d 810 (S.D. Tex. 1999).....50

Roto-Rooter Corp. v. O’Neal, 513 F.2d 44 (5th Cir. 1975)28

*Society of Financial Examiners v. National Ass’n of Certified Fraud
 Examiners Inc.*, 41 F.3d 223 (5th Cir. 1995)42

Streamline Prod. Sys. v. Streamline Mfg., 851 F.3d 440 (5th Cir. 2017)
 30, 41

Sun Banks of Fla, Inc. v. Sun Fed. Sav. & Loan Ass’n, 651 F.2d 311
 (5th Cir. 1981)36

TGI Friday’s Inc. v. Great Northwest Restaurants, Inc., 625 F. Supp.
 2d 763 (N.D. Tex. 2009)49

Union Nat’l Bank v. Union Nat’l Bank, 909 F.2d 839 (5th Cir. 1990)37

Viacom Int’l, v. IJR Capital Investments, L.L.C., 891 F.3d 178
 (5th Cir. 2018) 41, 45

Waples-Platter Cos. v. Gen. Foods Corp., 439 F. Supp. 551, 575
 (N.D. Tex. 1977).....29

Xtreme Lashes, LLC v. Xtended Beauty, Inc. 576 F.3d 221
 (5th Cir. 2009) *passim*

Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786
 (5th Cir. 1983) 32, 33, 34

Statutes

15 U.S.C. §§ 1051.....11

28 U.S.C. § 1292.....11

Other Authorities

The Lanham Act 46, 49, 50
McCarthy on Trademarks and Unfair Competition (5th Ed. 2020)..... 33, 47
McCarthy on Trademarks and Unfair Competition (4th Ed. 2001).....46

Rules

5th Cir. R. 28.2.12
Fed. R. App. P. 32(a)(5).....54
Fed. R. App. P. 32(a)(6).....54
Fed. R. App. P. 32(a)(7)(B).....54

Jurisdictional Statement

This action arises under federal trademark law, 15 U.S.C. §§ 1051, *et seq.* This Court has jurisdiction over the trial court's denial of a preliminary injunction pursuant to 28 U.S.C. § 1292.

Abbreviations and Record References

“Future Proof” refers to Appellant Future Proof Brands, LLC.

“Molson Coors” collectively refers to Appellees Molson Coors Beverage Company F/K/A Molson Coors Brewing Company, and MillerCoors, LLC.

“BRIZZY” refers to the registered trademark for the word mark BRIZZY owned by Future Proof, U.S. Trademark Registration No. 5,933,791, for use on “alcoholic beverages, except beer; alcoholic fruit cocktail drinks; [and] prepared alcoholic cocktails.” “Brizzy®” refers to the hard seltzer products sold to consumers using the BRIZZY mark.

“VIZZY” refers to MillerCoors LLC’s trademark application for the word mark VIZZY, serial number 88631785, for use on “[a]lcoholic beverages, except beer” and “[b]eer.” “Vizzy” refers to the hard seltzer products marketed by Molson Coors bearing the VIZZY mark.

“PTO” refers to the United States Patent and Trademark Office.

Issues Presented

Future Proof registered the trademark BRIZZY for its hard seltzer drink product. Molson Coors began to market a competing hard seltzer drink under the name VIZZY. Future Proof sued for a preliminary injunction against that trademark infringement. The trial court denied Future Proof's application, finding insufficient evidence of a likelihood of confusion.

Future Proof appeals that denial. The overarching question is whether the trial court erred in applying the factors defined by this Court for evaluating a likelihood of confusion, which in turn presents four specific issues:

1. *Strength of plaintiff's mark.* Whether the trial court erred by using the wrong legal standard to classify BRIZZY as merely "descriptive of fizzy products" and therefore "weak";
2. *Similarity of marks.* Whether the trial court erred by focusing on certain visual differences in the product packaging, over the overwhelming visual and aural similarities between the marks;

3. *Actual confusion between marks.* Whether the trial court erred by using the wrong legal standard when it rejected evidence of actual confusion among product wholesalers, especially when there has been little or no opportunity yet for confusion among consumers; and

4. *Weight for degree of care and intent.* Whether the trial court erred in how it evaluated two other relevant factors—customers’ degree of care and Molson Coors’s intent—against Future Proof’s request for an injunction.

Introduction

Future Proof makes a successful “hard seltzer” drink, for which it sought and obtained the registered trademark BRIZZY. After seeing Future Proof’s success, Molson Coors began to make its own hard seltzer drink, called VIZZY. That name is textbook trademark infringement—a mark nearly identical in sight and sound to BRIZZY, on the exact same type of hard seltzer products, in the exact same category of goods, and in the exact same channels of trade. The mark was clearly calculated to confuse the market and ruin Future Proof’s business; indeed, Future Proof showed that Molson Coors’s *pre-launch* promotion of the Vizzy products has *already* caused confusion in the marketplace.

Future Proof sought a preliminary injunction to prevent Molson Coors, the junior user of this confusingly-similar trademark, from swamping the national market with misleading advertising and product placement. The trial court denied Future Proof’s application, despite acknowledging that three of the relevant likelihood-of-confusion factors “increase the likelihood of confusion,” and that a fourth also weighs in favor of granting

the injunction. In so doing, the trial court misapplied this Court's precedents that define and implement the likelihood-of-confusion factors. Proper application of those standards to the undisputed facts compels a finding in Future Proof's favor about the likelihood of confusion, and the conclusion that Future Proof is likely to succeed on its trademark infringement claim.

Statement of the Case

A. Factual background

1. *Future Proof builds the "Brizzy" mark*

Inspired by the entrepreneurial spirit of Austin, Texas, the founders of Future Proof sought to develop innovative alcoholic beverages for the next generation of drinkers. (ROA.78.) In 2014, only one year after the business's formation, the three young founders of what is now known as Future Proof—Justin Fenchel, Brad Schultz, and Aimy Steadman—pitched their beverage business, BeatBox, on the popular "Shark Tank" television show. (ROA.78.) They later walked away with a \$1 million investment from Mark Cuban, in one of the biggest investments the show had made at the time. (ROA.78.)

Future Proof quickly developed a reputation in the industry and with its customers as a company that creates innovative and distinctive products for the millennial consumer. (ROA.78-79.) The meteoric rise of the hard seltzer category has been nothing short of a phenomenon for the US beverage industry. (ROA.79.) Within the last five years, hard seltzers have grown to account for nearly half of all US mixed drinks and have led to massive innovation within the flavored malt beverage, wine, and spirit-based ready-to-drink sparkling beverages. (ROA.79.)

On September 1, 2019, Future Proof launched the Brizzy® product line with three mixology infused flavors: Watermelon Mule, Mixed Berry Mojito, and Strawberry Rosé. (ROA.79.) Future Proof partnered with the H-E-B grocery chain, where the Brizzy® products are now available to consumers at approximately 200 H-E-B locations in Texas. (ROA.79.) In addition, the Brizzy® products can be found in approximately 200 Circle K stores, 12 Kroger's stores, and over 500 other locations. (ROA.79.) In the first ninety days after the launch, the Brizzy® products have been purchased by over 1,000 retail locations across four states. (ROA.79.)

To promote and protect its intellectual property, Future Proof registered the BRIZZY mark with the United States Patent and Trademark Office (Trademark Registration No. 5,933,791). (ROA.79-80, 86-90.) As a result, Future Proof became the owner of exclusive rights in the BRIZZY mark for use on “alcoholic beverages, except beer; alcoholic fruit cocktail drinks; [and] prepared alcoholic cocktails.” (ROA.79-80.) Future Proof uses the BRIZZY mark in connection with the advertisement and sale of its hard seltzer products, including products shown below:



(ROA.80.)

The Brizzy® products are popular with consumers. Future Proof has sold 11,400 cases of the Brizzy® products to distributors since September 2019 alone. (ROA.80.) Current forecasts for revenue associated with the

Brizzy® products in 2020 exceed approximately \$2,500,000, which include new retail locations in Kansas, Virginia, California, Georgia, Oklahoma, Colorado, and potentially even more states. (ROA.80.) As a result of Future Proof’s continuous and exclusive use of the BRIZZY mark, its reputation for quality, and its sales and recognition in the marketplace, Future Proof’s BRIZZY mark has acquired substantial value and goodwill. (ROA.80.)

2. *Molson Coors and its new “Vizzy” drink*

Molson Coors also sought to capture part of the booming hard seltzer market. To this end, it recently announced that it is investing “millions” in a new brand called “Vizzy,” a product it intends to launch across the United States, using a product name and concept nearly identical to Future Proof’s Brizzy® product. (ROA.80-81.) Molson Coors has released the following images of its Vizzy products:



(ROA.81.)

Molson Coors has already marketed its product extensively in national publications and at industry conferences using the VIZZY mark. As Dilini Fernando, Molson Coors's Director of Portfolio & Brand Strategy, said in a press release about Vizzy, "[w]e're moving fast and furious," hoping "we're catching this trend at the right time." (ROA.81, 118-121, 218.) According to Fernando, Molson Coors also intends to launch a massive media blitz at the same time the Vizzy product hits the shelves, to include national television advertisements, digital marketing, and social and out-of-home advertising. (ROA.81, 120.) Again, according to Fernando, the Vizzy product has already secured major retail support at national and regional chains. (ROA.81, 120.)

Molson Coors and its executives were keenly aware of Future Proof's use of the BRIZZY mark when they launched their recent media blitz. (ROA.82.) In a recent quote for *Beer Business Daily*, Molson Coors admitted having reviewed Future Proof's website and admitted that Future Proof's Brizzy® products were *already in distribution* when Molson Coors decided on the Vizzy name. (ROA.122, 126.) At a minimum, from Molson Coors's

position in and awareness of the market, it is undisputed in this record that it had constructive notice of Future Proof's catchy unique Brizzy name and product packaging, its distribution network, and its then-pending (and later registered) trademark, when Molson Coors decided to launch a competing product with a similar name. (ROA.82.)

Molson Coors's media blitz and its sales and marketing efforts have already caused significant confusion in the market, even before the product has been officially launched into the market. (ROA.83-84.). During annual sales meetings at the end of 2019, Molson Coors's wholesalers expressed confusion about the two products to both Molson Coors and Future Proof. (ROA.82.) In addition, one of Future Proof's largest wholesalers has expressed concern about the confusion that its sales team will experience when simultaneously selling and distributing Brizzy® products alongside the Vizzy product. (ROA.82.)

B. This litigation

Future Proof sought injunctive relief to prevent the catastrophic, irreparable harm that the release of the Vizzy product will cause to Future

Proof's ongoing business. As Future Proof's CEO explained, "if the Vizzy product launches, Brizzy® will be dead in the water." (ROA.85.) It sought immediate injunctive relief to prohibit Molson Coors from, among other things, advertising or selling alcoholic beverages bearing the VIZZY mark or any other mark confusingly similar to BRIZZY.

Future Proof asked for an evidentiary hearing. (ROA.73.) The trial court first scheduled a hearing to allow the presentation of evidence, but then cancelled it and instead issued an order denying Future Proof's request for an injunction. (ROA.496, 501-10.) The trial court focused its analysis solely on the existence of a likelihood of confusion, and did not reach any of the other factors relevant to a grant of injunctive relief. (ROA.501-10.)

The trial court's application of the law on this topic creates the issues in this appeal. First, the trial court concluded that the "conceptual strength" of the BRIZZY mark is weak, based largely on its finding that the mark is "descriptive of a fizzy product." (ROA.504-05.)¹ Second, although it acknowledged the obvious similarities between the marks, the trial court

¹ See footnote five.

instead focused on certain differences in the *product packaging* to support its belief that consumers would not see a similarity between the *marks*. (ROA.507.) Third, the trial court discounted evidence of actual confusion because the confusion occurred among wholesalers, not consumers, even though the Vizzy products had not yet launched and were not even available for purchase by consumers. (ROA.509.) Finally, the Court weighed the degree of care and intent factors as neutral and against the injunction, respectively, when they should have been considered in favor of and neutral, at worst. (ROA.508.) Future Proof appeals each of these conclusions as inconsistent with this Court's precedent.

Summary of the Argument

Likelihood of confusion is typically analyzed by reference to eight “digits of confusion”: “(1) the type of mark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant’s intent, and (7) any evidence of actual confusion.” *Bd of Supervisors for Louisiana State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 478 (5th Cir. 2008). Courts also consider “(8) the degree of care exercised by potential purchasers.” *Smack Apparel*, 550 F.3d at 478. “No single factor is dispositive, and a finding of likelihood of confusion need not be supported by a majority of the factors.” *Smack Apparel*, 550 F.3d at 478.

The trial court correctly found that the third, fourth, and fifth factor weigh in favor of granting the injunction, and that the second factor “weighs only marginally in favor of granting the injunction.” (ROA.507.) The Court erred regarding the other factors as follows:

Strength of Mark. In two ways, the trial court applied the wrong legal standards to assess the distinctiveness of the mark. First, it ignored the presumption of validity that accompanies a registered trademark such as BRIZZY. Second, the trial court failed to consider any of the tests adopted by this Court to classify a trademark on the spectrum of distinctiveness. As a result, the trial court clearly erred in finding BRIZZY to be “descriptive of a fizzy product” and “weak.” (ROA.505-06.) That error alone requires reversal and reconsideration.

Mark Similarity. The trial court erred by finding that this factor “weighs only marginally in favor of granting the injunction.” (ROA.507.) It improperly focused on certain visual differences in the product *packaging*, weighing them more than overwhelming visual and aural similarities between the *marks* and how they are used in the marketplace. (ROA.507.) Had the trial court properly focused on the similarities between the marks, as this Court’s precedent requires, it would have weighed this factor strongly in favor of an injunction.

Actual Confusion. The trial court acknowledged one instance of actual confusion by a wholesaler, but rejected it because “a wholesaler is *not a consumer.*” (ROA.509.) (emphasis in original). The trial court erred in reaching this conclusion. It is well-established in this Circuit that evidence of confusion among retailers and wholesalers is relevant and probative of a likelihood of confusion among consumers. This evidence of actual confusion is especially probative here because there has been little or no opportunity for confusion among consumers.

Degree of Care by Consumers and Defendant’s Intent. Future Proof offered evidence that these beverages are low-cost products for which consumers typically make purchase decisions quickly. The trial court erred by finding that this factor “provides little or no relevance to the court’s determination.” (ROA.510.) And while the trial court found no evidence of intent, it nevertheless weighed this factor against granting the injunction. The trial court should have, at worst, determined that this factor is only neutral in the likelihood-of-confusion analysis.

Had the trial court applied the correct legal standards and properly weighed these factors, they would have compelled a different result. This Court should reverse, find that Future Proof is likely to succeed on the merits of its trademark claim, and remand for consideration of the remaining elements necessary for the imposition of injunctive relief.

Argument

The issues in this appeal are framed by a procedural rule and a substantive doctrine. *Procedurally*, this Court reviews the denial of a preliminary injunction for abuse of discretion, examining “[e]ach of the four elements required to support a preliminary injunction ... [as] a mixed question of fact and law.” *Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 306 (5th Cir. 2008). “Findings of fact are reviewed only for clear error; legal conclusions are subject to de novo review.” *Paulsson*, 529 F.3d at 306. That said, the specific trademark-law topic of “likelihood of confusion” is often reviewed de novo. *See Elvis Presley Enters. v. Capece*, 141 F.3d 188, 196, (5th Cir. 1998) (“When a likelihood-of-confusion factual finding is ‘inextricably bound up’ in, or infected by, a district court’s erroneous view

of the law, we may conduct a de novo review of the fully-developed record before us.”) (citing *Roto-Rooter Corp. v. O’Neal*, 513 F.2d 44, 46-47 (5th Cir. 1975)).

Substantively, to succeed on a trademark infringement claim, a plaintiff must: (1) establish ownership in a legally protectable mark; and (2) show infringement by demonstrating a likelihood of confusion. *Smack Apparel Co.*, 550 F.3d at 474-75. Likelihood of confusion is typically analyzed by reference to eight “digits of confusion”: “(1) the type of mark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant’s intent, and (7) any evidence of actual confusion.” *Smack Apparel*, 550 F.3d at 478. Courts also consider “(8) the degree of care exercised by potential purchasers.” *Smack Apparel*, 550 F.3d at 478. “No single factor is dispositive, and a finding of

likelihood of confusion need not be supported by a majority of the factors.”

Smack Apparel, 550 F.3d at 478.

The trial court made four errors of law in its evaluation of likelihood of confusion. This brief addresses each in turn, and concludes by reviewing the overall case for injunctive relief in Future Proof’s favor.

A. The trial court erred in its application of this Court’s standards for determining the strength of a mark.

As noted above, the first digit of confusion in a trademark-infringement case is the strength of the plaintiff’s mark. “Trademarks are characterized as running from strong to weak.” *Waples-Platter Cos. v. Gen. Foods Corp.*, 439 F. Supp. 551, 575 (N.D. Tex. 1977). “The stronger the mark, the greater the protection it receives.” *Elvis Presley Enters.*, 141 F.3d at 201. Two factors determine the strength of a mark: (1) the mark’s position along the distinctiveness spectrum; and (2) the standing of the mark in the marketplace. *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 330 (5th Cir. 2008).

To assess the distinctiveness of a word mark, this Court “rel[ies] on the spectrum set forth by Judge Friendly in *Abercrombie & Fitch Co. v. Hunting*

World Inc., 537 F.2d 4, 9 (2d Cir. 1976).” *Streamline Prod. Sys. v. Streamline Mfg.*, 851 F.3d 440, 451 (5th Cir. 2017). This spectrum divides the distinctiveness of marks into five categories: “(1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, and (5) fanciful.” *Streamline*, 851 F.3d at 451. “The latter three categories are inherently distinctive, whereas generic marks cannot be distinctive and ‘descriptive marks are distinctive only if they have acquired ‘secondary meaning.’” *Streamline*, 851 F.3d at 451 (quoting *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 537 (5th Cir. 2015)).

The trial court found that BRIZZY is a “weak” mark, concluding that it is merely “descriptive of a fizzy product.” (ROA.505.) In so doing, the trial court misapplied this Court’s precedents in two ways. *First*, it ignored the presumption of distinctiveness enjoyed by the holder of a registered trademark. A trademark is presumed to be inherently distinctive where, as here, the PTO registered the mark without requiring evidence of secondary meaning. *Alliance for Good Gov’t v. Coalition for Better Gov’t*, 901 F.3d 498, 507-508, 510 (5th Cir. 2018). To be sure, this presumption may be rebutted with evidence that the mark is not inherently distinctive. But the challenger must

do more than simply *allege* that the mark is descriptive. Instead,

The presumption of validity flowing from trademark registration ... has a burden-shifting effect, requiring the party challenging a registered mark to produce sufficient *evidence* to establish that the mark is [non-distinctive] by a preponderance of evidence. The burden shifted by the presumption is one of production rather than persuasion. If sufficient evidence of [non-distinctiveness] is produced to rebut the presumption, the presumption is “neutralized” and essentially drops from the case, although the evidence giving rise to the presumption remains.

Amazing Spaces, Inc. v. Metro Mini Storage, 608 F.3d 225, 237 (5th Cir. 2010) (emphasis added). Molson Coors offered no evidence to the trial court sufficient to rebut this presumption of validity. Instead, Molson Coors merely argued – *ipse dixit* – that the “BRIZZY mark originates in large part from the term ‘fizzy,’ which is a term used to describe the hard seltzer beverage.” (ROA.196.) As shown below, *see infra* at 32-33, that argument would fail even absent the presumption of validity; it certainly cannot be considered as evidence sufficient to overcome it.

Second, and assuming the presumption of validity was rebutted, the trial court also erred by ignoring the tests adopted by this Court to assess descriptiveness, all of which undermine Molson Coors’s arguments and the

trial court's ultimate conclusion. In *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786 (5th Cir. 1983) (*abrogated on other grounds by KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 125 (2004)), this Court considered four tests to determine whether a mark is descriptive or suggestive, none of which the trial court even considered.

The first of those tests, the “dictionary test,” asks courts to consider the definition of the words used in the mark to determine the “ordinary significance and meaning of the words to the public.” *Zatarains, Inc.*, 698 F.2d at 792 (internal quotations removed). Here, BRIZZY is a made-up word not found in *any* dictionary. Necessarily, then, the word cannot describe the product “in the sense that the word naturally direct[s] attention to the purpose or function of the product.” *Zatarains, Inc.*, 698 F.2d at 790; *see also Blendco, Inc. v. Conagra Foods, Inc.*, 132 F. Appx. 520, 521-22 (5th Cir. 2005) (finding dictionary test inapplicable because “BETTER-N-BUTTER” is not a standard dictionary term). Accordingly, the dictionary test cannot support a finding that the mark is descriptive.

Nor did the trial court apply the “imagination test,” which measures

“the relationship between the actual words of the mark and the product to which they are applied.” *Zatarains*, 698 F.2d at 792. A mark is suggestive if it “requires imagination, thought and perception to reach a conclusion as to the nature of the goods.” *Zatarains*, 698 F.2d at 792. Here, when the trial court conflated the made-up word “BRIZZY” with the idea of a “fizzy” beverage, it engaged in precisely such an “exercise of thought or imagination,” showing that the BRIZZY mark is “suggestive” under the imagination test. *See Engineered Tax Services, Inc. v. Scarpello Consulting, Inc.*, 958 F.3d 1323, 1331, n. 10 (11th Cir. 2020) (recognizing “only a small imaginative leap is necessary to make a mark suggestive”).²

The trial court also did not consider the third test, which asks “whether competitors would be likely to need the terms used in the trademark in describing their products.” *Zatarains*, 698 F.2d at 793 (stating a “descriptive

² *See also, e.g.*, 2 McCarthy on Trademarks § 11:72 (5th ed. 2020) (listing over 100 cases finding marks suggestive, including DIAL-A-MATTRESS for mattress sales over the telephone, GLASS DOCTOR for the repair and installation of glass, RAPID-SHAVE for aerosol shaving cream, SPRAY ‘N VAC for a spray rug cleaning product, and WET ONES for moist towelettes distributed individually). This Court has itself affirmed a jury verdict finding BETTER-N-BUTTER suggestive and not descriptive for a butter substitute. *See Blendco v. Conagra Foods, Inc.*, 132 F. Appx. 520 (5th Cir. 2005).

term generally relates so closely and directly to a product or service that other merchants marketing similar goods would find the term useful in identifying their own goods"). BRIZZY is a coined term. It is thus a wholly unnecessary term for describing a product. Reinforcing this conclusion, Molson Coors did not identify any other merchants using BRIZZY to market similar goods. *See infra* at 35 n. 3-4. Nor did Molson Coors allege that it needs the term "Brizzy" to market or describe its own products. (ROA.206, 218.)

The fourth test examines "the extent to which a term actually has been used by others marketing a similar service or product." *Zatarains*, 698 F.3d at 793. Molson Coors failed to identify a single competitor using the term "BRIZZY" to market any product, much less a similar one. To the contrary, the trial court compounded its legal error about the controlling standard by considering what it referred to as "a plethora of competing products humorously close to Plaintiff's mark." (ROA.554.) This error is evident because all the marks cited by Molson Coors have been abandoned,

cancelled, or involve products outside the relevant field of use,³ which this Court instructs should be ignored in this analysis. *Xtreme Lashes, LLC v. Xtended Beauty, Inc.* 576 F.3d 221, 233 (5th Cir. 2009) (“Third-party use for unrelated products is not relevant when evaluating descriptiveness.”); *PlayNation Play Systems, Inc. v. Vexel Corporation*, 924 F.3d 1159, 1166 (11th Cir. 2019) (“[S]imilar marks used by third parties in unrelated businesses or markets do not diminish the strength of a mark in a particular market.”).

To be sure, the trial court cited a handful of marks used on non-alcoholic beverages that rhyme with “fizzy.”⁴ But none of those products compete in the same field of use, *i.e.*, alcoholic beverages, except beer; alcoholic fruit cocktail drinks; [and] prepared alcoholic cocktails. Moreover,

³ BRIZZY covers alcoholic beverages; but the examples cited by Molson Coors cover “oral moisturizers and lubricants,” “[p]eripheral computers equipment,” and “pizza,” (ROA.229, 231, 234-36, and 239.), just to name a few.

⁴ *See, e.g.*, (ROA.195, 201.) (citing BIZZY, a non-alcoholic, non-carbonated coffee-based beverage registered on the Principal Register with no disclaimer); (ROA.197, 293-94.) (citing IZZE, non-alcoholic carbonated fruit juices and soft drinks registered on Principal Register with no disclaimer); (ROA.197.) (citing FIZZY FOX, a variety of non-alcoholic beverages, all registered on the Principal Register with no disclaimer of “fizzy”); (ROA.444, 466.) (citing FIZZY LIZZY, non-alcoholic carbonated beverages registered on the Principal Register with no disclaimer of “fizzy”); (ROA.444, 467-68.) (citing FIZZIES, a non-alcoholic tablet for making soft drinks registered on Principal Register with no disclaimer).

the undisputed fact that the PTO registered all of those marks on the Principal Register without proof of secondary meaning further underscores the conclusion that BRIZZY is inherently distinctive and not merely descriptive. *See supra* at 30-31.

Future Proof contends that the mark BRIZZY is arbitrary as it has no dictionary meaning, is not used by others for any other goods or services, and is a coined term. At worst, BRIZZY is a suggestive mark when properly considered under the correct legal standard, not merely “descriptive of a fizzy product” as the trial court concluded.⁵ (ROA.505.) This Court has specifically admonished trial courts to be “wary of leaping too quickly to any

⁵ In making this determination, the trial court relied on two cases, *Myo, LLC v. Brull & York, LLC*, No. 1:18-CV-370-RP, 2019 WL 136820 (W.D. Tex. Jan. 8, 2019) and *Sun Banks of Fla, Inc. v. Sun Fed. Sav. & Loan Ass’n*, 651 F.2d 311 (5th Cir. 1981). The trial court’s reliance on *Myo* was misplaced for at least two reasons: *first*, Judge Pitman found the mark – MYO MASSAGE – highly descriptive because the dictionary definition of the terms “Myo” and “Massage” provide a “literal characterization of the service provided.” *Myo*, 2019 WL 136820 at *4. BRIZZY is a coined term with no dictionary definition. *Second*, Judge Pitman identified five other trademark registrations that use the term “myo” for massage therapy providers, and another fifty registrations that use the word in other industries. *Myo*, 2019 WL 136820 at *5. Molson Coors has not identified even a single trademark registration that uses the term BRIZZY in the same field of use or a related industry. The trial court’s reliance on *Sun Banks* was misplaced for the same reason. *See Sun Banks*, 651 F.2d at 316 and n. 8 (referencing “over 4400 businesses registered with the Florida Secretary of State us[ing] the word ‘Sun’ in their names” and “50 active financial businesses employing a compound of the word ‘Sun’”).

conclusion [that a mark is descriptive] before a full presentation of the evidence.” *Union Nat’l Bank v. Union Nat’l Bank*, 909 F.2d 839 (5th Cir. 1990) (reversing denial of injunction to allow plaintiff to present evidence concerning proper classification of mark). But that is exactly what the trial court did in this instance, finding the mark “descriptive of a fizzy product,” even before the exchange of any discovery.

This clear error, if left undisturbed, may significantly affect the outcome of this case. *See Union Nat’l Bank of Texas*, 909 F.2d at 845 n. 13 (“The significance of this assignment cannot be over-emphasized since, as in this case, once a determination has been made, it *may* bring a party’s case to a halt....”) (emphasis in original). It thus provides a compelling reason for reversal.

B. The trial court erred in evaluating the products’ similarity.

The trial court also erred in evaluating the second factor by finding that it weighed “only marginally in favor granting the injunction.” (ROA.507.) It erred in two specific ways. *First*, while the trial court acknowledged the obvious similarities between the marks, it erroneously

focused on certain visual differences in *product packaging* to support its conclusion that consumers would see no significant similarity between the *marks*. (See ROA.507.) This focus was misguided. See *Gruma Corp. v. Mexican Restaurants, Inc.*, 497 F. Appx. 392, 396 (5th Cir. 2012) (“It is clear ... that the dominant *word* or *words* in a mark should be the focus of the analysis.”) (emphasis added); *Marathon Mfg. Co. v. Enerlite Prods. Corp.*, 767 F.2d 214, 219 (5th Cir. 1985) (finding “similarity of design” not “the sole or always the most important factor in the determination of infringement”); see also *Chevron Chem. Co. v. Voluntary Purchasing Grps., Inc.*, 659 F.2d 695, 704 (5th Cir. Unit A 1981) (“It was error to determine dissimilarity on the basis of a ‘close examination and comparison’ in the face of close overall similarity.”) (citations omitted).

Second, by focusing on certain visual differences in the product packaging, the trial court ignored the aural similarities between the marks “in the context that a customer perceives them in the marketplace.” See *Elvis Presley Enters.*, 141 F.3d at 197. “Similarity of appearance is determined on the basis of the total effect of the designation, rather than on a comparison of

individual features.” *Xtreme Lashes*, 576 F.3d at 228 (citations omitted). Here, the marks are so similar that they differ only by the initial character(s) – “V” instead of “BR.” Otherwise, the marks have the same number of syllables, the same stress pattern, and are made up of the exact same sequence of characters – IZZY – which causes the marks to not only rhyme, but when spoken, to also be difficult to distinguish based solely on the initial consonant sounds.

This is especially true because neither “Brizzy” nor “Vizzy” have a dictionary definition. As a result, slight variations in appearance or sound are difficult to distinguish. *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 731 (Fed. Cir. 1968) (stating that “with coined words which are meaningless so far as the English language is concerned, slight variations in spelling or arrangement of letters are often insufficient to direct the buyer’s attention to the distinction between marks.”) (internal citations omitted).

The Federal Circuit’s *Krim-Ko* case is particularly instructive. It held that BEEP (for fruit juice drinks) and VEOP (for soft drinks) were confusingly similar, reasoning:

Despite specific differences in spelling and in probable meaning, the dominant factor for consideration is the likelihood of confusion arising from the similarity in sound of the two words when spoken. The consonants "V" and "B" provide the initial aural impact on the listener and initiate the psychological processes leading to recall and assignment of a meaning to the words. *The consonant sounds "B" and "V" are likely to be misunderstood by the listener, depending as they do on such variables as the diction of the speaker and the hearing acuity of the listener.* Thus there may well be a doubt as to whether the entire words when spoken are likely to confuse a listener-purchaser. Unless both the one speaking and the one hearing the two words are particularly careful, the sound similarities of "V" and "B" may lead to a confusion in the recall process, so as to negate the effect of the differences in meaning of the words.

390 F.2d at 732 (emphasis added).

Krim-Ko involved *different* drinks—fruit juices and soft drinks. Its analysis compels the conclusion that VIZZY is confusingly similar to BRIZZY, since Vizzy and Brizzy® products involve the *same* type of drink, alcoholic seltzer products. And this aural similarity is particularly important here because these types of products are often purchased by verbal request (e.g., in a bar or restaurant), a consideration also recognized by *Krim-Ko*, but ignored by the trial court. *Krim- Ko*, 390 F.2d at 731-32 (acknowledging “sound is of particular importance when we are dealing with products like

soft drinks which may frequently be purchased by the spoken word”); *see also Marathon*, 767 F.2d at 219 (“[S]imilarity of sound as well as appearance may be taken into account...”). The clear and overwhelming similarity of VIZZY and BRIZZY make this factor weigh heavily in favor of injunctive relief.

C. The trial court erred in its evaluation of actual confusion.

The seventh factor is “actual confusion.” *See supra* at 24. Actual confusion is the “best evidence of a likelihood of confusion.” *Viacom Int’l, v. IJR Capital Investments, L.L.C.*, 891 F.3d 178, 197 (5th Cir. 2018) (quoting *Elvis Presley Enters.*, 141 F.3d at 203–04). “[V]ery little proof of actual confusion” is needed to establish a likelihood of confusion. *Streamline*, 851 F.3d at 457 (quoting *Xtreme Lashes*, 576 F.3d at 229). Indeed, “testimony of a single known incident of actual confusion by a consumer has been found to be sufficient evidence to support the district court's finding of actual confusion.” *Streamline*, 851 F.3d at 457 (citing *La. World Exposition v. Logue*, 746 F.2d 1033, 1041 (5th Cir. 1984)). If the plaintiff provides proof of actual confusion, the defendant must provide “an *almost overwhelming* amount of

proof . . . to refute such proof.” *Xtreme Lashes*, 576 F.3d at 230 (emphasis added).

The trial court acknowledged an instance of actual confusion by a wholesaler but rejected it because “a wholesaler is *not a consumer*.” (ROA.509.) (emphasis in original). It is well-established, however, that evidence of confusion among retailers and wholesalers is relevant and probative of a likelihood of consumers among consumers. *See, e.g., Society of Financial Examiners v. National Ass’n of Certified Fraud Examiners Inc.*, 41 F.3d 223, 228 (5th Cir. 1995) (evidence of confusion by consumers can be inferred from confusion of retailers, sales clerks and the like); *Fuji Photo Film Co., Inc. v. Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 59 (5th Cir. 1985) (evidence of confusion of distributors and visitors at a trade show is evidence of confusion by consumers).

This evidence of confusion is especially probative because Molson Coors had not even launched its Vizzy products to consumers at the time the trial court considered the issue. Future Proof therefore had little or no opportunity to submit evidence of *consumer* confusion. *See, e.g., Eli Lilly &*

Co. v. Natural Answers, Inc., 233 F.3d 456 (7th Cir. 2000) (when the challenged product is new on the market “it is not surprising that [plaintiff] cannot identify customers who were actually confused....”). Molson Coors had, however, discussed the product with its wholesalers, and Future Proof submitted evidence of confusion among that group. *See supra* at 21.

The trial court erred by refusing to consider evidence of wholesaler confusion. *See Xtreme Lashes*, 576 F.3d at 230 (“courts may not ignore competent evidence of actual confusion”). As a result, the trial court improperly concluded that this factor weighed against granting the injunction, providing another reason why its ruling should be reversed.

D. The trial court erred in its evaluation of the degree of care and intent factors.

Two other factors were relevant to the trial court’s analysis—the degree of care exercised by consumers and Molson Coors’s intent. The trial court did not correctly weigh either one.

As to degree of care, this Court recognizes that “[w]here items are relatively inexpensive, a buyer may take less care in selecting the item, thereby increasing the risk of confusion.” *Xtreme Lashes*, 576 F.3d at 231. In

the hard seltzer market in particular, consumers typically make quick decisions between various products in a crowded array, often in a crowded bar or restaurant. (ROA.64, 83.) In addition, the Brizzy® products sell for approximately \$14.99 (for a 12 can variety pack), and it is reasonable to assume that Molson Coors's products will sell for a similar price. (ROA.84.) The low cost of hard seltzer products and the crowded, sometimes fast-paced environments in which they are purchased weighs heavily in Future Proof's favor. The trial court acknowledged these facts but found that this factor "provides little or no relevance to the court's determination." (ROA.510.)

As to intent, proof of the defendant's intent to confuse the public is not necessary to a finding of a likelihood of confusion, but "[i]f a mark was adopted with the intent to confuse the public, that alone may be sufficient to justify an inference of likelihood of confusion." *Elvis Presley Enters.*, 141 F.3d at 203. Here, the record shows that Molson Coors and its executives were keenly aware of Future Proof's use of the BRIZZY mark when Molson Coors launched its recent media blitz. (ROA.82.) A Molson Coors representative

conceded having reviewed Future Proof's website and acknowledged that Future Proof's Brizzy® products were *already* in distribution when Molson Coors decided on the Vizzy name. (ROA.122, 126.) Defendants also had constructive notice of Future Proof's trademark application, which was filed on November 30, 2018. (ROA.63, 79-80, 86-90.)

Again, the trial court acknowledged these facts, but found no evidence suggesting that Molson Coors intended to derive a benefit from Future Proof's reputation in the market. Based on that finding, the trial court weighed this factor against Future Proof. This is clear error. The trial court should have determined that this factor is no worse than neutral. *See Viacom Int'l*, 891 F.3d at 195 ("If there is no evidence of intent to confuse, then this factor is neutral.").

E. The remaining Rule 65 factors support injunctive relief.

The trial court did not reach the remaining Rule 65 factors. Because Future Proof provided ample and credible evidence on each of them, none of them provide any potential alternative basis for affirmance of the trial court's ruling. To the contrary, the evidence offered by Future Proof on these

factors shows why the matter should be remanded for reconsideration under the proper legal standards set forth above. *See Heil Trailer Int'l Co. v. Kula*, 542 F. Appx. 329, 330 (5th Cir. 2013).

Irreparable injury. Future Proof is suffering and will continue to suffer immediate and irreparable harm. *First*, in a Lanham Act case such as this one, courts “presume the existence of an irreparable injury if the plaintiff establishes a substantial likelihood of confusion” or a “tendency to deceive.” *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 627 (5th Cir. 2013) (“All that must be proven to establish liability and the need for an injunction against infringement is the likelihood of confusion—*injury is presumed.*”) (emphasis added) (quoting 5 MCCARTHY’S ON TRADEMARKS AND UNFAIR COMPETITION § 30:2 (4th Ed. 2001)). Because Future Proof has shown that Molson Coors’s use of the VIZZY mark is likely to cause confusion, Future Proof will be irreparably harmed absent injunctive relief.

Second, even without this presumption, Future Proof showed that Molson Coors’s national launch of the Vizzy products will swamp the market, causing confusion and diverting consumers to Molson Coors.

(ROA.84.) This would be especially true in those markets in which Future Proof has not yet begun distributing its Brizzy® products. Those lost customers, lost sales, and lost profits are notoriously difficult to quantify, and thus establish irreparable injury. *See Paulsson*, 529 F.3d at 313 (considering loss of business and customer confusion components of irreparable harm).

Trademark law recognizes this situation as “reverse confusion.” *See, e.g., Capital Films Corp. v. Charles Fries Productions, Inc.*, 628 F.2d 387 (5th Cir. 1980); *see also* 4 MCCARTHY’S § 23:10 (5th Ed. 2020) (using the heading “Large Company Rolls Over Small Senior User” to explain the doctrine). The seminal case on reverse confusion, *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219 (D. Colo. 1976), *aff’d and award modified*, 561 F.2d 1365 (10th Cir. 1977), *cert. dismissed*, 434 U.S. 1052 (1978), is strikingly similar to the facts here.

In *Big O*, the senior user – Big O – sold privately labeled tires through a system of dealers in the western United States. One of its brands was BIGFOOT, which it launched in 1973 for bias belted tires. In 1974, the much

larger junior user – Goodyear – decided to use BIGFOOT for a new radial tire to be launched in the fall. Goodyear budgeted \$6 million for a national advertising blitz over a five-month period, but just before it launched its campaign, it discovered Big O's prior use of BIGFOOT on tires. After negotiations between the parties failed, Goodyear launched its massive advertising campaign anyway, thereby swamping Big O's BIGFOOT brand. Not only did consumers try to purchase Goodyear's radial tires from Big O, which Big O had to explain it did not sell, but they also assumed that Big O had stolen the BIGFOOT mark from the more well-known Goodyear.

Big O shows how a massive national media campaign of the type planned by Molson Coors can ruin a smaller company like Future Proof. Evidence showed that the national launch of the Vizzy products (coupled with its massive national media campaign) will swamp Future Proof's BRIZZY mark and stunt Future Proof's growth in its existing markets and in new markets across the country. (ROA.85.) This harm is irreparable and represents an especially egregious harm to Future Proof, who properly sought federal trademark registration to preserve its priority to enter these

same markets without interference by a third-party infringer such as Molson Coors.

Balance of Hardships. The balance of hardships ordinarily weighs against a party found to be infringing trademarks in violation of the Lanham Act. *See Lakedreams v. Taylor*, 932 F.2d 1103, 1113-1114 (5th Cir. 1991) (district court properly determined that the balance of hardships weighed in favor of alleged copyright owner, and not against the alleged infringer); *TGI Friday's Inc. v. Great Northwest Restaurants, Inc.*, 625 F. Supp. 2d 763, 773 (N.D. Tex. 2009) (“[C]ourts usually hold that when defendants improperly use a plaintiff’s trademark, the threatened harm to the plaintiff outweighs the threatened harm to the defendants.”) (internal quotation marks omitted). That is especially true here, where the requested injunction requires only that Molson Coors conduct its business in accordance with the law. *See TGI Friday's*, 652 F. Supp. 2d at 773. And any harm Molson Coors would suffer is both limited and entirely self-inflicted. *Fantastic Sams Franchisee Corp. v. Moseley*, No. H-16-2318, 2016 WL 7426403, at *6 (S.D. Tex. Dec. 23, 2016); *See Lakedreams*, 932 F.2d at 1110 n.12 (applying “the First Circuit's view” that

“[w]here the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such an argument in defense ‘merits little equitable consideration.’” (citations omitted).

While Molson Coors may incur some cost associated with rebranding the infringing products marked with the VIZZY mark and may lose its investment in the development costs of the Vizzy name, such costs pale in comparison to the harm suffered by Future Proof if the Vizzy products are allowed to launch using the infringing Vizzy name. Accordingly, a balancing of hardships strongly favors Future Proof, the party that properly exercised its rights and invested its money to protect its trademark at the PTO, rather than Molson Coors, who chose a name confusingly similar to the BRIZZY mark.

Public Interest. The public interest consideration heavily favors an injunction. Indeed, “[t]he public interest is always served by requiring compliance with Congressional statutes such as the Lanham Act and by enjoining the use of infringing marks.” *Quantum Fitness Corp. v. Quantum LifeStyle Ctrs., LLC*, 83 F. Supp. 2d 810, 832 (S.D. Tex. 1999). In fact, a primary

purpose of trademark law is to protect consumers in the public from being confused or deceived into purchasing products other than those that they intend. Accordingly, the public interest is best served in this case by enjoining Molson Coors from launching its Vizzy hard seltzer product line, which is confusingly similar to Future Proof's already successful Brizzy® hard seltzer products.

Conclusion

For the foregoing reasons, this Court should reverse, either finding that Future Proof is likely to succeed on the merits of its trademark infringement claim or instructing the trial court on the legal framework for considering the matter, and remand for proper consideration of the remaining injunction factors. Future Proof also respectfully requests all other relief to which it is entitled, consistent with the above dispositions.

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Respectfully submitted,

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Certificate of Service

The undersigned certifies that on June 10, 2020, the foregoing Petition was filed with the Clerk for the United States Court of Appeals for the Fifth Circuit, and that all counsel of record were served by electronic means on that same date.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7305 words, excluding the parts of the brief exempted by Fed R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Palatino 14-point for text; 12-point for footnotes.

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