

23-0810-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CERVECERÍA MODELO DE MÉXICO, S. DE R.L. DE C.V., AND TRADEMARKS
GRUPO MODELO, S. DE R.L. DE C.V.,
Plaintiffs-Appellants,

v.

CB BRAND STRATEGIES, LLC, CROWN IMPORTS LLC, AND COMPAÑÍA
CERVECERA DE COAHUILA, S. DE R.L. DE C.V.,
Defendants-Appellees.

On Appeal From the United States District Court
Southern District of New York (No. 21-cv-1317 LAK)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Cervecería Modelo de México, S. de R.L. de C.V. and Trademarks Grupo Modelo, S. de R.L. de C.V. state that both companies are wholly owned through subsidiaries by Anheuser-Busch InBev SA/NV, which is a publicly traded corporation.

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INTRODUCTION

This appeal presents a question that only lawyers could debate: what is beer? The origin of this case dates back to 2012, when Anheuser-Busch InBev SA/NV (ABI) agreed to acquire Grupo Modelo, the historic Mexican beer company. The U.S. Department of Justice, concerned about the competitive effects of a merger of the largest and third-largest brewers of beer sold in the United States, sued to block the deal. To resolve its antitrust concerns, DOJ ultimately required Modelo to divest its U.S. beer business to Constellation Brands. Modelo and Constellation therefore entered into a trademark licensing agreement in 2013—the Sublicense—that is the subject of the current dispute.

In that Sublicense, Modelo granted Constellation a perpetual license to use certain of Modelo’s world-famous trademarks—such as those on best-selling beers like Corona Extra and Modelo Especial—on “Beer” produced in Mexico and sold in the United States. “Beer” is a defined term in the Sublicense that is comprised of a series of undefined terms. It is defined as “beer, ale, porter, stout, malt beverages, and any other versions or combinations of the foregoing, including non-alcoholic versions of any of the foregoing.” J.A. 2105 (Sublicense (JX-1) § 1.1). In other words, Constellation

may make Modelo-branded “beer,” “malt beverages,” or “versions” of beer or malt beverages. But it may not use Modelo’s trademarks outside of those drinks.

That agreement worked fine for a few years. Constellation sold Modelo’s existing beers, and even developed new beers and malt beverages using the Corona and Modelo trademarks, all without complaint from Modelo. But in the mid-2010s, a new type of drink known as “hard seltzers”—popularized by brands like White Claw—burst onto the scene. Constellation decided that it wanted to jump into that market, and it wanted to use Modelo’s trademarks to do it. At the time, Constellation’s own legal department recognized that it was limited to a malt-based product by the terms of the Sublicense. But when Constellation tried to develop a hard seltzer with a malt base, the beverage failed internal taste tests.

Constellation then switched directions (and its legal position) and developed what became Corona Hard Seltzer: a clear, carbonated, alcoholic seltzer that is made from fermented *sugar* rather than malted grain and that tastes like a flavored vodka soda. Constellation followed that with Modelo Ranch Water, which is essentially a flavor of Corona Hard Seltzer under different branding. The problem, of course, is that because Constellation’s

hard seltzers use sugar rather than malt as a base, they are neither “beer” nor “malt beverages” under an ordinary understanding of those terms. For obvious reasons, Constellation admits its hard seltzers are not “malt beverages” because they do not contain malt. But it nevertheless maintains that its hard seltzers are “beer,” “versions” of beer, or “versions” of malt beverages.

Those arguments should have been dead on arrival. The parties agree that the Sublicense is governed by New York law, which gives contractual terms their ordinary meaning. *See Brooke Grp. Ltd. v. JCH Syndicate* 488, 87 N.Y.2d 530, 534 (1996). Dictionaries agree that the ordinary meaning of beer is “an alcoholic drink made from yeast-fermented malt flavored with hops.” J.A. 851 (*New Oxford American Dictionary* (3d ed. 2010)). The only courts to consider the question agree that beer is a fermented drink made with malt and flavored with hops. *See Chalet Liquors, Inc. v. Supervalu, Inc.*, 2004 WL 885356, at *5 (Minn. Ct. App. Apr. 27, 2004), *aff’g* No. CT02005761 (Hennepin Cnty. Dist. Ct.). Constellation’s hard seltzers lack both malt and hops flavoring, and so cannot be “beer” or “malt beverages.” And because they lack essential elements of “beer” and “malt beverages,” they are not “version[s]” of those things.

Common usage leads to the same conclusion. If a customer asked for a “beer,” and the bartender brought a Corona Hard Seltzer or Modelo Ranch Water (or a White Claw), no one would think the customer had gotten what he or she ordered. Remarkably, Constellation does not disagree. It acknowledged below that hard seltzers are not “beer” according to “what the average person on the street might think.” (Dkt. 18 at 30.) And during closing argument to the jury, Constellation’s counsel conceded that when she first read Modelo’s complaint, she thought “there is no way hard seltzer is beer.” J.A. 1988 (Trial Tr. 1397:2-8). Applying New York’s plain-meaning rule, that should have been the end of the analysis. Modelo was entitled to judgment as a matter of law, and this case never should have gone to trial.

So how did we get here, with a jury verdict that Constellation’s hard seltzers are “Beer” under the Sublicense? The district court made three interrelated errors that together produced a head-scratching result. First, the district court held that the definition of “Beer” in the Sublicense is ambiguous, but it never explained *why*. Neither Constellation nor the district court has ever offered any ordinary understanding of the key contractual terms—“beer,” “malt beverages,” and “versions” of those drinks—that covers malt-free, sugar-based hard seltzers. Constellation has pointed to regulatory

definitions that would cover sugar-based seltzers, but even the district court recognized that the parties did not incorporate those definitions into the contract. What matters is the plain meaning of the contract's language, and terms like "beer" and "malt beverages" are not genuinely ambiguous.

Second, having decided to hold a trial, the district court should have been clear with the jury about its job under New York law: to give the terms of the Sublicense their ordinary meaning. But the court rejected Modelo's requests to instruct the jury that it should—or even *could*—consider the plain meaning of the terms in the definition of "Beer." To make matters worse, the court would not allow Modelo to introduce dictionary definitions, it told the jury to ignore the single reference to a dictionary admitted during trial, and it further instructed that the Sublicense was not a contract using "plain, everyday language" and the jury should interpret the contract only "[using] the defined terms." J.A. 1482, 2055 (Trial Tr. 5:18-6:25, 1471:16-19). Individually and in tandem, the instructions sent the message that, contrary to New York law, the jury was not to interpret the Sublicense by reference to its ordinary meaning.

Third and finally, the district court excluded the single most important piece of evidence that could have rebutted Constellation's theory that DOJ intended the Sublicense to cover products like Constellation's hard seltzers.

In response to Constellation’s own request, DOJ explained in 2020 that the competitive concerns giving rise to the Sublicense were limited to the beer market, and Constellation’s hard seltzers have nothing to do with that market. The jury heard none of that evidence—and Constellation took full advantage at trial, particularly during closing. Constellation repeatedly argued that pressure from DOJ resulted in a Sublicense broad enough to encompass everything from hard seltzers to even *green tea*. Modelo never had the chance to show that DOJ, which participated in the Sublicense negotiations and approved it, did not understand its antitrust concerns to reach malt-free beverages like Constellation’s hard seltzers.

The net result is a verdict that defies normal rules of contract interpretation and common sense. The Sublicense gives Constellation only the right to make Modelo-branded “Beer,” which means “beer,” “malt beverages,” and “versions” of either. No ordinary English speaker would ever understand those words to cover sugar-based seltzer waters that contain neither malt nor hops flavoring. That plain-meaning rule is important enough, but there is more at play than just an interpretive principle. By virtue of the decision below, Modelo is forever barred from selling its own branded products in the hard-seltzer market in the United States, and it opens the door to future

arguments by Constellation that other products that contain neither malt nor hops flavoring are somehow Beer (such as the malt-free, hops-free *cider* Constellation claimed was “Beer” at trial). That outcome cannot be tied to the terms of this Sublicense and is manifestly unfair. Modelo respectfully submits that this Court should reverse or vacate the judgment below.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Modelo’s federal trademark infringement claim under 15 U.S.C. § 1121(a) and 28 U.S.C. §§ 1331 and 1338, and it had supplemental jurisdiction over Modelo’s state-law breach of contract claim under 28 U.S.C. § 1367.

The district court entered final judgment on March 15, 2023, S.P.A. 23, and denied Modelo’s motion for post-trial relief on April 14, 2023, S.P.A. 24. Modelo filed a timely notice of appeal on May 12, 2023. J.A. 3600. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that the Sublicense definition of “Beer” is ambiguous with respect to Constellation’s sugar-based hard seltzers, which do not qualify as “beer,” “malt beverages,” or “versions” of those drinks under the terms’ ordinary meanings.

2. Whether the district court erred in not instructing the jury that it should (or even could) interpret the terms of the Sublicense in accordance with their plain and ordinary meaning, as required by New York law.

3. Whether the district court abused its discretion in excluding DOJ’s statements that it did not consider sugar-based hard seltzers to implicate the antitrust concerns that led to the Sublicense, when Constellation’s principal argument to the jury was that the Sublicense should be interpreted broadly to accommodate DOJ’s supposed competition concerns.

STATEMENT OF THE CASE

A. Factual Background

1. Before the Sublicense, Modelo and Constellation formed a joint venture to import Modelo “Beer” into the United States.

The definition of “Beer” in the Sublicense dates back to 2006, when Modelo and Constellation created a joint venture to import Modelo beer into the United States. J.A. 2373 (2006 JV Agreement Draft (JX-11)). Constellation prepared the first drafts of the joint venture agreements, which defined “Beer” as “beer, ale, porter, stout, malt beverages, and any other versions or combinations of the foregoing, including, without limitation, non-alcoholic versions of any of the foregoing.” J.A. 2381 (JX-11). The relevant language appears verbatim in the 2013 Sublicense at issue here.

When the parties discussed the joint-venture drafts, Constellation’s attorney stated that the definition of “Beer” was based on a definition of “beer” from the Internal Revenue Code (“IRC”). J.A. 1705 (Mercado Test. 536:9-23). Modelo’s counsel thought it was “quite unusual to have the definition of a commercial product like beer somehow attached to a tax definition.” J.A. 1713 (Mercado Test. 544:11-13). Modelo responded to Constellation that it “would not be prepared to incorporate the U.S. Internal Revenue Code into the definition of beer,” but would nonetheless accept the proposed definition “if

the plain meaning of the words reflects what Modelo thinks beer is.” J.A. 1707 (Mercado Test. 538:5-9).

Then as now, the IRC defined “beer” as “beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor.” 26 U.S.C. § 5052(a) (2006). Modelo ultimately accepted Constellation’s different definition, which it recognized “bore no real resemblance” to the IRC, including because it does not reference malt substitutes or saké (a Japanese rice wine). J.A. 1709 (Mercado Test. 540:19-541:1, 542:19-543:13).¹

To notify investors about the new joint venture—called Crown Imports—Constellation drafted and filed two Form 8-Ks with the SEC. J.A. 2967 (7/17/2006 Form 8-K (PX-35)); J.A. 2975 (2/2/2007 Form 8-K (PX-37)). In both 8-Ks, Constellation described the scope of the venture—*i.e.*, the “Beer” that Crown would import—as alcoholic beverages that were “malt-based, an

¹ Constellation’s counsel testified at trial that he did not remember any discussions about the definition of “Beer” in the JV Agreements. J.A. 1769-71 (Bourdeau Test. 708:9-710:3). Constellation offered no other evidence to dispute the account of Modelo’s counsel.

ale, a porter or a stout,” and confirmed that the parties could independently sell any product that was “not malt-based” (*i.e.*, not “Beer”). J.A. 2967, 2975.

2. Modelo granted Constellation a perpetual license to sell Modelo-branded “Beer” in the United States.

Six years later in 2012, ABI announced that it was acquiring Grupo Modelo. As the merger would combine the largest and third-largest beer companies in the United States, DOJ expressed concern that the deal could harm competition in the beer market, and it ultimately sued to enjoin the proposed merger. J.A. 3548 (DOJ Complaint (DX-491)). DOJ’s complaint alleged that the proposed merger would hinder competition in the product market for “beer,” which it defined as “alcoholic beverages usually made from a malted cereal grain, flavored with hops, and brewed via a process of fermentation.” J.A. 3555 (DX-491). Constellation intervened in the DOJ action, and in its answer admitted that definition of beer. J.A. 2990 (Constellation’s Motion to Intervene (PX-42)).

To satisfy DOJ’s concerns, ABI, Modelo, Constellation, and DOJ agreed that Constellation would take over Modelo’s U.S. beer business, J.A. 1609-1612 (Blood Test. 280:22-283:11), the terms of which were memorialized in a final judgment entered by the United States District Court for the District of Columbia. J.A. 995 (2013 Final Judgment). The final judgment required

Modelo, among other things, to grant Constellation a perpetual trademark sublicense for the use of the Modelo brands on “Beer” in the United States. J.A. 1004 (2013 Final Judgment).

To define “Beer” in the Sublicense, the parties borrowed the relevant language from the 2006 joint venture agreements: “beer, ale, porter, stout, malt beverages, and any other versions or combinations of the foregoing, including non-alcoholic versions of any of the foregoing.” J.A. 1791 (Bourdeau Test. 745:9-17). In the years immediately following the Sublicense’s execution, Constellation took full advantage of its rights under the agreement. Constellation sold Modelo’s existing, widely popular beers, but it also developed new malt-based products without objection from ABI or Modelo. In 2018, Constellation launched Corona Premier, a low-carb light lager; and in 2019, Constellation launched Corona Refresca, a flavored malt beverage. JA 1633-34 (Blood Test. 315:5-316:12).

3. Constellation adopted a new interpretation of “Beer” in order to launch Modelo sugar-based hard seltzers.

After the Sublicense was executed, a new type of alcoholic beverage became popular: hard seltzers. Seeking to break into that new market using the strength of Modelo’s brand, in late 2018 Constellation began developing Corona Hard Seltzer. J.A. 1799-1800 (Bourdeau Test. 797:4-13, 798:19-22).

But Constellation ran into a problem: it could not make a marketable product. Consistent with the terms of the Sublicense, Constellation first tried to develop its hard seltzer “using neutral malt base.” J.A. 3473 (PX-826). But the initial malt-based “prototypes” tasted bad, with “a bitter after taste” and “unbalanced flavor,” and fell short of “expectations when comparing to White Claw.” *Id.* White Claw and other popular hard seltzers used sugar as a base rather than malt, but Constellation’s legal department had cautioned that Corona Hard Seltzer’s alcohol had to come from malt because “non-malt base alternatives [for Corona Hard Seltzer] were not in line with the [Sublicense].” *Id.*

Three months later, when development of a malt-based seltzer failed, Constellation’s legal department changed its advice from “non-malt base alternatives were not in line with the [Sublicense]” (consistent with its 8-Ks from over a decade earlier) to “non-malt base alternatives [are] considered OK so long as [the] ultimate legal product classification is beer (rules governed by IRC / FDA vs. TTB).” *Id.* In other words, Constellation’s legal team justified a sugar-based beverage by interpreting “Beer” in the Sublicense to incorporate the IRC definition—the same definition that Modelo had rejected in negotiations more than a decade earlier.

Armed with that new interpretation, Constellation developed a sugar-based Corona Hard Seltzer. Notably, everyone else within Constellation understood what Corona Hard Seltzer would be—and what it would *not* be. In an internal product brief describing what the research and development team was expected to create, Constellation described Corona Hard Seltzer as trying to “drive penetration *beyond beer*” and target consumers seeking “*non-beer* alcoholic beverages.” J.A. 3463 (PX-520A) (emphases added). And in a pre-launch presentation to Constellation’s Board of Directors, Constellation described Corona Hard Seltzer as a “Betterment *Non-Beer*.” J.A. 3467 (PX-754) (emphasis added). Internally, Constellation recognized that Corona Hard Seltzer was not a beer.

4. DOJ declined to endorse Constellation’s new interpretation of “Beer.”

After Corona Hard Seltzer launched in 2020, Modelo notified Constellation that the new product was not permitted by the Sublicense. J.A. 928 (8/04/2020 Modelo Ltr. to Constellation). In response, Constellation ran to DOJ, “implor[ing]” the government to prevent Modelo from “harming competition” in the beer market. J.A. 1025 (8/12/2020 Constellation Email to DOJ). Constellation described Modelo’s position as “ludicrous” because the Sublicense permits “beer . . . and versions thereof. . . . Corona Seltzer, which

is a sugar-based product, is labelled as a ‘beer’; is defined as ‘beer’ under Federal law and regulations; and is taxed as ‘beer.’ ” *Id.*

DOJ was unmoved. After three months of voluminous submissions from Constellation, DOJ wrote to Constellation that “[t]he purpose of the Final Judgment was to eliminate the likely anticompetitive effects of ABI’s acquisition of Grupo Modelo ‘in the market for beer in the United States and the 26 local markets identified in the Complaint.’ ” J.A. 1292 (10/23/2020 DOJ Ltr. to Constellation). DOJ concluded that Modelo’s objection to Corona Hard Seltzer did not “directly implicate[] the purpose of the Final Judgment to protect the ability of Constellation to effectively compete in the beer market.” *Id.* DOJ took no position on the merits of the private dispute between Modelo and Constellation. J.A. 1293.

B. Procedural Background

1. Pre-Trial Proceedings

Because Constellation continued to sell Corona Hard Seltzer (and later launched Modelo Ranch Water), Modelo filed this trademark-infringement action. After the district court denied Constellation’s motion to dismiss, J.A. 80 (MTD Tr. 36:12-25), the parties engaged in extensive discovery and then cross-moved for summary judgment. In its motion, Constellation argued that its sugar-based hard seltzers are permitted under the Sublicense because

(i) they are “beer” under the definition of that term from the IRC and related regulations, and (ii) even if not “beer,” they are at least a “version” of “beer” or “malt beverages.” S.P.A. 2. By contrast, Modelo contended that (i) Constellation’s seltzers are not “beer” under the ordinary dictionary definition because they lack both malt and hops flavor; and (ii) because they are neither “beer” nor “malt beverages,” they cannot be “versions” of either. S.P.A. 4-5.

The district court denied both motions in two separate orders. As to Constellation’s motion, the court reasoned that (i) “the parties quite obviously were well aware of the varying regulatory definitions of ‘beer’ but elected to negotiate their own, different definition for purposes of the sublicense,” and (ii) “[t]he term ‘versions’ itself, in this context, perhaps favors Modelo unequivocally . . . [but f]rom [Constellation’s] point of view, it is no better than ambiguous.”² S.P.A. 2-3. In a subsequent order denying Modelo’s motion, the district court ruled that “[t]he meaning of the sublicense as it relates to [Constellation’s] hard seltzer products is ambiguous,” but the court did not

² In their submissions, the parties had agreed that a “version” is “a particular form of something differing in certain respects from an earlier form or other forms of the same type of thing.” J.A. 1063 (Constellation MSJ Opp.).

explain what made the Sublicense ambiguous or how the ordinary meaning of its terms could encompass sugar-based hard seltzers. S.P.A. 5. The court thus sent the entire case to trial.

Before trial, the district court made a series of *in limine* rulings that skewed the evidentiary presentation at trial. Although the Sublicense does not refer to regulatory definitions of “beer,” the court allowed Constellation to offer evidence on those regulatory definitions and stated that it would instruct the jury on legal definitions. S.P.A. 12. By contrast, the court ruled that Modelo could *not* offer any evidence of dictionary definitions, even though the court had previously recognized that “[d]ictionary definitions address the plain, ordinary meaning of words.” S.P.A. 15. The court also excluded all post-dispute correspondence between Constellation and DOJ, including DOJ’s statements that Corona Hard Seltzer did not implicate DOJ’s competitive concerns about the beer market. S.P.A. 17.

2. Trial

Trial occurred over seven and a half days in March 2023. After the close of evidence, the district court held a charge conference to address the jury instructions. Among other issues, Modelo’s counsel proposed instructing the jury that “parties are assumed to use common, ordinary terms in their

common and ordinary way in writing a contract.” J.A. 1962 (Trial Tr. 1336:1-8). While the district court stated that it was “not quarrelling with the proposed language,” the court nonetheless decided it was “not going to add it.” *Id.*

In the instructions it did give, the district court emphasized that “[w]hen a contract contains a definition of a word or a phrase, you must give that word or phrase the meaning that’s provided in the definition.” J.A. 2051 (Trial Tr. 1467:22-24). The court never instructed the jury on how to interpret words *within* a defined term, including that such undefined words should be given their common and ordinary meaning. And because the jury had seen a single reference to a dictionary in a discovery response referring to the plain meaning of “beer,” the court admonished the jury to “ignore that reference to the dictionary.” J.A. 2055 (Trial Tr. 1471:9-19). Notwithstanding its summary-judgment ruling that the Sublicense did not incorporate regulatory definitions, the court also instructed the jury on regulatory definitions of “beer.” J.A. 1962, 1966, 2056-58 (Trial Tr. 1336:9-11, 1340:11-13, 1472:22-1474:3). Thus instructed, the jury returned a verdict for Constellation. J.A. 2078 (Trial Tr. 1496:15-25).

After trial, Modelo filed a motion for judgment as a matter of law and in the alternative for a new trial. (Dkt. 628.) Two days later, the district court denied the motion in a one-sentence minute order. S.P.A. 24. Modelo timely appealed. J.A. 3600 (Notice of Appeal).

STANDARD OF REVIEW

This Court reviews the district court's denial of a motion for summary judgment *de novo*, *Am. Fed. of Musicians & Emps.' Pension Fund v. Neshoma Orchestra & Singers, Inc.*, 974 F.3d 117, 120 (2d Cir. 2020), including "questions as to the ambiguity and meaning of the language of a contract," *Omni Quartz, Ltd. v. CVS Corp.*, 287 F.3d 61, 64 (2d Cir. 2002).

After a jury trial, this Court "reviews the jury instructions *de novo* and as a whole." *Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 390 (2d Cir. 2006). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id.* "An erroneous instruction requires a new trial unless it is harmless," meaning it was "clear that [the error] did not influence the jury's verdict." *Id.*

The district court's "decision to admit or exclude evidence" is reviewed "for abuse of discretion." *In re 650 Fifth Ave. & Related Props.*, 934 F.3d 147, 169 (2d Cir. 2019). "An abuse of discretion can consist of an erroneous view of

the law or a clearly erroneous assessment of the evidence.” *United States v. Glenn*, 744 F.3d 845, 847 (2d Cir. 2014). An erroneous evidentiary ruling requires a new trial unless it is harmless, which means that the reviewing court can “conclude with fair assurance that the error[] did not substantially influence the jury.” *United States v. Litvak*, 889 F.3d 56, 70 (2d Cir. 2018) (alteration in original).

SUMMARY OF ARGUMENT

I. The district court erred in concluding without explanation that the Sublicense definition of “Beer” is ambiguous. Constellation contends that its sugar-based hard seltzers are “beer,” “versions” of “beer,” or “versions” of “malt beverages,” but the ordinary meaning of those terms cannot reasonably be construed to include sugar-based hard seltzers that contain no malt or hops flavoring.

A. 1. Under New York law, which governs the Sublicense, courts should interpret “the words and phrases used by the parties” according to “their plain meaning.” *Brooke Grp.*, 87 N.Y.2d at 534. “[T]o determine the plain and ordinary meaning of words to a contract,” New York courts commonly “refer to the dictionary.” *10 Ellicott Square Ct. Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 120 (2d Cir. 2011).

2. The terms within the Sublicense’s definition of “Beer,” when read in light of their plain and ordinary meaning, do not include Constellation’s hard seltzers. The ordinary meaning of “beer” is a beverage made with malted grains and flavored with hops. Constellation’s sugar-based hard seltzers contain neither malted grains nor hops flavoring, and are therefore not beers. And because Constellation’s hard seltzers lack malt, they cannot be “malt beverages.” Finally, the parties agreed that the plain and ordinary meaning of “version” is a “particular form” of something, and Constellation’s hard seltzers lack necessary elements of beer or malt beverages, so they cannot be “versions” of either.

B. The district court never explained why it found the Sublicense ambiguous, and none of Constellation’s arguments supplies any such ambiguity.

1. Constellation argues that that its interpretation is necessary to give separate meaning to “versions,” but attempting to avoid superfluity does not make sense when, as here, a contract already builds in layers of surplusage. For example, “Beer” in the Sublicense includes “ale, porter, [and] stout,” which are just types of “beer.” And Constellation’s arguments based

on isolated dictionary definitions of “beer” fail to demonstrate that malt and hops flavor are not essential ingredients of beer under its ordinary meaning.

2. Constellation’s arguments based on other provisions of the Sublicense fundamentally misread those provisions. Constellation points to two provisions that give it discretion to modify or substitute ingredients in beverage recipes, but both are restricted by the definition of “Beer,” meaning they do not permit Constellation to use Modelo’s trademarks on something that is *not* a “Beer.” And the fact that unrelated provisions of the Sublicense specifically mention *other* potential ingredients of beverages under the Sublicense does not change the ordinary meaning of “beer” or “malt beverages.”

3. Constellation’s primary theory has been that “beer” in the Sublicense incorporates a definition from the Internal Revenue Code. But the definition in the Sublicense is significantly different from the IRC definition, which the Sublicense does not reference. That renders the regulation irrelevant under this Court’s precedent. *See, e.g., Dish Network Corp. v. Ace Am. Ins. Co.*, 21 F.4th 207, 215 (2d Cir. 2021).

II. A. The district court’s most critical jury instructions misstated New York law because they failed to instruct the jury that it should (or even

could) interpret the words in the Sublicense definition of “Beer” in light of their common and ordinary meaning. The district court compounded its error by instructing the jury on regulatory definitions that were irrelevant to the Sublicense and even by instructing the jury to disregard a dictionary definition that was referenced during trial. The court’s instructions thus suggested to the jury that it should *ignore* plain meaning.

B. These instructional errors were highly prejudicial. Given the substantial evidence at trial showing that the parties intended the plain meaning of “Beer” in the Sublicense, the jury might well have reached a different result had it been properly instructed on New York law.

III. Finally, the district court erred when it excluded perhaps the single most important piece of extrinsic evidence to rebut Constellation’s theory of the case. By the end of trial, Constellation’s primary argument was that DOJ, in light of its concerns about competition for beer, had forced Modelo to grant to Constellation a Sublicense broad enough to include sugar-based hard seltzers. But DOJ had expressly told Constellation that its antitrust concerns were *not* implicated by sugar-based hard seltzers. The erroneous exclusion of this critical evidence allowed Constellation’s

misrepresentation of the facts to go uncontested. Because the jury could have been swayed by hearing this evidence, a new trial is warranted.

ARGUMENT

The jury in this case decided that sugar-based hard seltzers are “beer,” “malt beverages,” or “versions” of those drinks, even though they contain no malt or hops flavoring. That puzzling verdict rests on three independent but cascading errors. First, the district court erred in finding that the contractual language lacks an accepted, ordinary meaning and thereby allowing the case to go to trial. Second, the district court did not instruct the jury that it should (or even could) interpret the Sublicense in light of its ordinary meaning, and in fact instructed the jury in other ways that suggested the jury should look beyond ordinary meaning. Third, the district court excluded critical evidence that Constellation’s main argument at trial—the Sublicense is broad to accommodate DOJ’s antitrust concerns—is false. For those reasons, the judgment below should be reversed or vacated.

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE TERM “BEER” IN THE SUBLICENSE IS AMBIGUOUS.

This case never should have gone to trial. The Sublicense authorizes Constellation to use the Modelo and Corona brands for “Beer,” which the Sublicense defines as “beer, ale, porter, stout, malt beverages, and any other

versions or combinations of the foregoing, including non-alcoholic versions of any of the foregoing.” J.A. 2105 (Sublicense (JX-1) § 1.1). Constellation does not contend that its hard seltzers are themselves “malt beverages,” because it is undisputed that they do not contain malt. Constellation instead contends that its seltzers are “beer,” “versions” of “beer,” or “versions” of “malt beverages.” S.P.A. 2. The ordinary meaning of those terms cannot be construed to include hard seltzers that lack malt or hops flavoring. Modelo is therefore entitled to judgment as a matter of New York law.

A. The Plain Meaning Of “Beer” Does Not Include Sugar-Based Hard Seltzers.

There is no dispute about the facts necessary to decide this appeal, which is why the parties cross-moved for summary judgment. The parties agree on the ingredients in Constellation’s hard seltzers, how they are made, and that they use Modelo’s trademarks. The only dispute is one of contractual interpretation: whether sugar-based hard seltzers fall within the Sublicense’s list of “beer, ale, porter, stout, malt beverages, and any other versions or combinations of the foregoing, including non-alcoholic versions of any of the foregoing.” J.A. 2105 (Sublicense (JX-1) § 1.1). They do not, on an ordinary understanding of those terms.

1. The undefined terms in the Sublicense should be given their plain and ordinary meaning.

The parties agree that New York law governs the interpretation of the Sublicense. J.A. 2132 (Sublicense (JX-1) § 6.1). Under New York law, courts interpret “the words and phrases used by the parties” according to “their plain meaning,” *Brooke Grp.*, 87 N.Y.2d at 534, within “the context of the entire integrated agreement,” *Lucente v. Int’l Bus. Machines Corp.*, 310 F.3d 243, 257 (2d Cir. 2002). *See, e.g., Olin Corp. v. Ins. Co.*, 762 F. Supp. 548, 560 (S.D.N.Y. 1991), *aff’d*, 966 F.2d 718 (2d Cir. 1992) (courts interpreting a contractual term under New York law adopt the “meaning given to the word in everyday usage”). “[T]o determine the plain and ordinary meaning of words to a contract,” New York courts commonly “refer to the dictionary.” *10 Ellicott Square*, 634 F.3d at 120; *see Goldman Sachs Lending Partners v. High River Ltd. P’ship*, 34 Misc. 3d 1209(A), at *7 (Sup. Ct. N.Y. Cnty. 2011) (“[P]lain and ordinary means as defined by a dictionary.” (internal quotation marks omitted)).

In applying the plain-meaning rule, not every dispute between contracting parties gives rise to genuine ambiguity. Interpreting a contract becomes a fact question only if “on its face” the contract “is reasonably susceptible of more than one interpretation.” *China Privatization Fund*

(*Del*), *L.P. v. Galaxy Ent. Grp. Ltd.*, 945 N.Y.S.2d 659, 660 (1st Dep't 2012). Such ambiguity must be found within the four corners of the agreement: “[i]t is well settled that extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.” *Sec. Plans, Inc. v. CUNA Mut. Ins. Soc’y*, 769 F.3d 807, 815-16 (2d Cir. 2014) (internal quotation marks omitted; alteration in original).

New York’s plain-meaning rule is a critical feature of its public policy. It promotes “clarity and predictability, two concepts that are ‘particularly important in the interpretation of contracts.’” *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, 2010 WL 3155176, at *14 (S.D.N.Y. July 30, 2010) (quoting *Moran v. Erk*, 11 N.Y.3d 452, 457 (2008)), *aff’d*, 694 F.3d 155 (2d Cir. 2012). By honoring the natural meaning of words chosen by contracting parties, the plain-meaning rule “imparts stability to commercial transactions by safeguarding against,” among other things, “the fear that the jury will improperly evaluate the extrinsic evidence.” *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) (internal quotation marks omitted). New York law thus cautions against “strain[ing] the contract language beyond its reasonable and ordinary meaning” in order to find an ambiguity that

supposedly must be resolved by a jury. *L. Debenture Tr. Co. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010). If the meaning of everyday English words like “beer” could only be decided through protracted jury trials, New York’s civil courts would be overwhelmed.

2. Sugar-based hard seltzers are not beer, malt beverages, or versions of either.

In the district court, Constellation argued that its sugar-based hard seltzers qualify as “Beer” under the Sublicense because they are “beer,” “versions” of “beer,” and “versions” of “malt beverages.” The Sublicense does not define any of those terms, so the question is whether the “ordinary, popular and nontechnical meaning” of those words could be construed to include Constellation’s sugar-based hard seltzers. *Lopez v. Fernandito’s Antique, Ltd.*, 760 N.Y.S.2d 140, 141 (1st Dep’t 2003). The answer is no.

“versions” of “malt beverages.” Constellation has never contended that its hard seltzers are themselves malt beverages—for the obvious reason that they lack malt. To be sure, the term “malt beverages” is broader than “beer” and the types of beer that precede it. For instance, Zima is a clear, malt-based beverage that is generally citrus-flavored. *See Chalet Liquors*, 2004 WL 885356, at *2, *5 (holding that “Bartles & Jaymes, Bacardi Silver, Zima, and Skyy Blue” are types of malt liquor but are not beer because they

are not flavored with hops). But the essential characteristic of “malt beverages” is malt, which all agree Constellation’s seltzers do not contain.

Constellation thus argued below that its hard seltzers are “versions” of malt beverages. But at summary judgment, the parties agreed on the plain and ordinary meaning of the term “version”: it is “a particular form of something differing in certain respects from an earlier form or other forms of the same type of thing.” J.A. 1063 (Constellation MSJ Opp.). In other words, a “version” of a malt beverage is any form of a drink made with malt. It includes malt beverages that the parties could have anticipated at the time of contracting (like Zima), as well as later-developed malt beverages. For instance, Constellation developed and sells Corona Refresca, a fruit-flavored malt beverage that Modelo has *not* challenged. Malt-based seltzers are allowed by the terms of the Sublicense; non-malt seltzers are not. They are not a “form[] of the same type of thing” because they lack the ingredient common across all versions of malt beverages: malt.

“beer” or “versions” of “beer.” The question thus reduces to whether Constellation’s hard seltzers qualify as “beer” or “versions” of “beer.” So what is beer? Answering that question should be straightforward. Beer is “a fermented alcoholic beverage brewed from malt and flavored with hops.”

J.A. 848 (*American Heritage Dictionary* (5th ed. 2011)). As Modelo explained to the district court, every available dictionary defines beer in that way. The various Webster's dictionaries all do:

- J.A. 826 (*Merriam-Webster's New Collegiate Dictionary* (11th ed. 2004)) (an “alcoholic beverage usu[ally] made from malted cereal grains (as barley), flavored with hops, and brewed by slow fermentation”);
- J.A. 833 (*Webster's Third New International Dictionary* (2002)) (“a malted and hopped somewhat bitter alcoholic beverage”);
- J.A. 836 (*Random House Webster's Unabridged Dictionary* (2d ed. 2001)) (“an alcoholic beverage made by brewing and fermentation from cereals, usually malted barley, and flavored with hops and the like for a slightly bitter taste”);
- J.A. 840 (*Webster's II New College Dictionary* (1999)) (“[a] fermented alcoholic beverage brewed from malt and flavored with hops”); and
- J.A. 845 (*Webster's New Twentieth Century Dictionary* (2d ed. 1983)) (“[A] mildly alcoholic drink made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance then extracted by hot water. This extract or infusion is boiled in caldrons, and hops or some other substance of an agreeable bitterness added.”).

So do the Oxford dictionaries:

- J.A. 851 (*New Oxford American Dictionary* (3d ed. 2010)) (“an alcoholic drink made from yeast-fermented malt flavored with hops”); and
- J.A. 855 (*Oxford Compact English Dictionary* (2d ed. rev. 2003)) (“an alcoholic drink made from yeast-fermented malt flavoured with hops”).

This raft of dictionaries confirms common sense: beer is made with malted grains and flavored with hops.

Perhaps because the meaning of “beer” is so well understood, this question rarely arises in courts. But the only other appellate court to address the ordinary meaning of “beer” adopted the standard definition. In *Chalet Liquors*, a Minnesota store bound by a restrictive covenant to sell only “beer” began selling flavored malt beverages—such as Bartles & Jaymes, Bacardi Silver, Zima, and Skyy Blue. 2004 WL 885356, at *2. Those drinks had one characteristic of beer (malted grain) but not another (hops flavoring). *Id.* And like New York law, Minnesota law required that the term “beer” in the covenant be given its “plain [and] ordinary” meaning. *Id.* at *5. The Minnesota Court of Appeals therefore concluded as a matter of law that “the common meaning of beer, as used in the covenant, is an alcoholic beverage flavored with hops, and does not include the offending [flavored malt beverage] products.” *Id.* at *6. Simply put, “hops flavoring is essential to the ordinary definition of beer.” *Id.* at *5.

Here, the relevant facts are not in dispute. Constellation’s hard seltzers are fermented with yeast, as of course are other non-beer drinks like wine or kombucha. But they lack the other two necessary characteristics of beer in

ordinary usage. First, Constellation’s hard seltzers are not made with malt. *See* J.A. 1879, 2023 (Trial Tr. 1106:12-16, 1432:13-14). Second, as Constellation’s own brewer admitted, its seltzers are not flavored with hops. They contain a particular type of hop extract as a preservative, but that hop extract by design imparts no flavor at all. J.A. 1880-83 (Aguirre Test. 1116:20-1119:16); J.A. 2942 (PX-11). The absence of either malt or hops flavoring would alone be enough to distinguish Constellation’s seltzers from beer; the absence of *both* leaves no room for debate.

Finally, for the same reason that Constellation’s hard seltzers are not “versions” of “malt beverages” (because they do not contain malt), they are not “versions” of “beer” (because they do not contain malt *and* hops flavoring). To be sure, there are many different versions of beer. The Sublicense lists “ale, porter, [and] stout,” but lager and pilsner are others. And even within those types, there are countless combinations of malted grains, brewing processes, and additional flavorings. But what all of those beverages have in common—what mark them as *beer* in plain and ordinary English—are malted grain and hops flavoring. Constellation has never explained what other characteristics could possibly unite the range from ale to lager without sweeping in a host of drinks not thought of as beer.

B. Constellation’s Efforts To Avoid The Plain Meaning Of “Beer” Are Meritless.

In its summary judgment decision, the district court never explained why or how it found the Sublicense ambiguous. The district court assumed that New York law looks to the plain meaning of contract terms. S.P.A. 5. The court also recognized that “Modelo has more dictionaries on its side of this debate over the meaning of ‘beer’ than does [Constellation]” (although, as explained below, Constellation does not really have *any* on its side). *Id.* But the court observed that “dictionaries, however important, do not resolve this case.” *Id.* The court then offered, without explanation, that “[t]he meaning of the sublicense as it relates to [Constellation’s] hard seltzer products is ambiguous. It is a genuine issue of material fact that forecloses summary judgment.” *Id.* The court did not say *why* the meaning of the Sublicense is ambiguous, or what reasonable interpretation of its terms could encompass a malt-free hard seltzer with no hops flavoring.

To be sure, the district court acknowledged that “Modelo perhaps has the better of the argument.” *Id.* And in denying Constellation’s summary judgment motion, the court stated that “[t]he term ‘versions’” in the Sublicense “perhaps favors Modelo unequivocally.” S.P.A. 3. But those hedged statements did not matter because the court sent the entire case to the

jury—which could have decided that Constellation’s hard seltzers were beer, versions of beer, or versions of malt beverages. Constellation offered various arguments based on the Sublicense’s text, dictionary definitions, other provisions of the Sublicense, or extrinsic evidence, but none creates genuine ambiguity. We address them in turn below because it is not clear what was the basis for the district court’s denial of summary judgment.

1. The Sublicense’s text and dictionary definitions do not support Constellation.

a. **“versions” of “beer” or “malt beverages.”** Before the district court, Constellation asserted that even if its hard seltzers are not beer or malt beverages, they are *versions* of beer or malt beverages. Constellation argued that after listing “beer, ale, porter, stout, [and] malt beverages,” the parties listed “versions” of those things—so versions of beer cannot themselves be beer. Versions of beer, Constellation said, must be different from beer. J.A. 1064 (Constellation MSJ Opp.). That argument is pure sophistry. By adding “versions” of beer (or malt beverages), the parties captured all of the different types and varieties of beer (or malt beverages). But every “version[]” of a beer must share the common characteristics of beer. It is not a license to include things that are *not* beer.

As if to illustrate the absurdity of its position, Constellation repeatedly argued below that its hard seltzers are a “gluten-free version of a malt beverage.” J.A. 125 (Constellation MSJ Br.); J.A. 1509 (Trial Tr. 54:8-12). That is sheer nonsense. Constellation could produce an actual “gluten-free version of a malt beverage” by using malted grains that do not contain gluten, like rice or sorghum. J.A. 883-84 (Shellhammer Report ¶ 16 & n.17). But Constellation cannot produce a seltzer *that lacks any malt*—and say it is simply a malt-free “version” of a malt beverage. Beyond the violence that does to language and logic, the definition of “Beer” in the Sublicense would be virtually limitless: at a minimum, it would encompass any beverage, from wine to vodka, that is fermented but lacks malt. Once a *malt beverage* no longer requires *malt*, everything is fair game.

Constellation has argued that if the term “version” is not interpreted expansively to mean something that is *not* beer or a malt beverage, then it is superfluous. J.A. 123 (Constellation MSJ Br.). First, the Sublicense already builds in surplusage in two ways: it lists “ale, porter, [and] stout” alongside “beer,” and it then adds “malt beverages,” which would itself cover beer. J.A. 2105 (Sublicense (JX-1) § 1.1). Where it is obvious that the drafters took a belt-and-suspenders approach—to reach all types of malt beverages, with beer

being the most prominent—the canon against superfluity is not a useful aid in interpretation. *See, e.g., Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020) (“Sometimes the better overall reading of the statute contains some redundancy” because “Congress employed a belt and suspenders approach.” (brackets and internal quotation marks omitted)). Second, there is not even any superfluity in Modelo’s interpretation, as the district court recognized. S.P.A. 3. The Sublicense names certain specific versions of beer like “ale, porter, [and] stout.” The phrase “any other versions . . . of the foregoing” makes clear that other unlisted types of beer—like lager or pilsner, for example—are also covered, along with any particular form of any of those types (like a pale ale, Irish stout, and so on).

The real superfluity is in Constellation’s interpretation. The Sublicense grants the right to use Modelo’s trademarks on “Beer.” J.A. 2112 (Sublicense (JX-1) § 2.1). Looking solely at the definition of “Beer” in Section 1.1 of the Sublicense, Constellation has never articulated any limits on its ability to use Modelo’s trademarks. Constellation has never explained how the definition of “Beer,” standing alone, does any work in the Sublicense. *See JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118, 124 (2d Cir. 2022) (“[A]ny interpretation ‘that has the effect of rendering at least one clause superfluous

or meaningless . . . is not preferred and will be avoided if possible.’ ” (quoting *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992)); see also *United States v. Atlantic Rsch. Corp.*, 551 U.S. 128, 137 (2007) (“It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.”).

To be sure, by looking to *other* provisions of the Sublicense, Constellation has divined three supposed limits on products it can sell as “Beer” under the Sublicense: the product “must incorporate ‘yeast cultures,’ ” “shall not use any distilled spirits as an ingredient,” and must be “brewed” using water and heat. J.A. 124, 138 (Constellation MSJ Br.); J.A. 1066 (Constellation MSJ Opp.). The problem with those limits is that they are not tied to the ordinary meaning of beer or malt beverages. Constellation has simply gerrymandered a made-up definition to include its hard seltzers but exclude other types of alcoholic beverages. And even as gerrymandered, Constellation’s definition apparently sweeps in beverages from kombucha tea to certain types of wine. None of this can be gotten out of an ordinary reading of the Sublicense’s definition of “Beer.”

b. **“beer.”** Because “versions” of beer must still share the common characteristics of beer, the central question remains: what is beer? As

explained below, Constellation answers that question solely by looking to the Internal Revenue Code's definition of "beer," a definition that the parties unequivocally did not adopt and that is unambiguously different from the definition in the Sublicense. *See infra* pp. 45-48. Constellation does not even try to tie its interpretation to the ordinary meaning of the term "beer." Instead, Constellation just attacks Modelo's reliance on the host of dictionaries that define beer as "an alcoholic drink made from yeast-fermented malt flavored with hops." J.A. 851 (*New Oxford American Dictionary* (3d ed. 2010)). If anything, Constellation's defensive arguments only confirm that there is an ordinary understanding of "beer," and thus that Constellation bears the burden of showing that the parties foreswore that ordinary meaning for a particular regulatory definition.

First, Constellation pointed below to the fact that one of the many dictionaries Modelo cited defines beer as "*usu[ally]* made from malted cereal grains (as barley)." J.A. 826 (*Merriam-Webster's New Collegiate Dictionary* (11th ed. 2004)) (emphasis added). Seizing on "usually," Constellation argued that beer can sometimes be made from other ingredients. But the definition says that beer is usually made with malted *cereal* grains. It can also be made with malted *non-cereal* grains (like buckwheat). *Merriam-Webster* was not

suggesting that beer could be made without malted grains of any sort. And in any event, under the definition, beer still must be “flavored with hops.” *Id.* As *Chalet Liquors* concluded, the definition’s “usually” qualifier applies only to malted cereal grains, not hops flavoring (or fermentation). *See* 2004 WL 885356, at *5 (reading the same definition as including a “requirement of flavoring with hops”).

Second, Constellation pointed below to a single unusual definition of beer as “[a]n alcoholic liquor obtained by the fermentation of malt (or other saccharine substance), flavoured with hops or other aromatic bitters.” J.A. 1201 (*Oxford English Dictionary* (2d ed. 1989)). Constellation urged that because sugar is a “saccharine substance,” its sugar-based hard seltzers count as beer. But Constellation’s seltzers still are not “flavoured with hops or other aromatic bitters,” so they fail under this definition too.

There may also be a reason why this definition is so unusual: it has not been updated since the *Oxford English Dictionary* was first published in 1888. Whatever “beer” may have meant in late nineteenth-century Britain, the question here is what it means in twenty-first-century America. *See Olin Corp. v. Ins. Co.*, 221 F.3d 307, 319 (2d Cir. 2000) (evidence is relevant only if probative of parties’ “intent at the time of contract”). And according to the

2010 *New Oxford American Dictionary*, which Oxford holds out as “the most comprehensive and accurate coverage of *American English* available,”³ beer is “an alcoholic drink made from yeast-fermented malt flavored with hops.” J.A. 851.

Finally, Constellation observed that certain dictionaries contain a second sense of the word “beer.” See J.A. 1061 (Constellation MSJ Br.). For example, *Webster’s Third New International Dictionary* first defines “beer” as “a malted and hopped somewhat bitter alcoholic beverage,” which supports Modelo’s reading of the Sublicense. J.A. 833. *Webster’s Third* then provides a second definition: “a carbonated nonalcoholic or a fermented slightly alcoholic beverage with flavoring derived from roots and other plant parts,” such as “Birch Beer, Ginger Beer, Root Beer, Spruce Beer.” *Id.* But no one believes the parties intended that second definition in the Sublicense. From the beginning, Constellation has been producing Corona Extra and Modelo Especial, not Modelo-branded *root beer*. Cf. *Chalet Liquors, Inc.*, 2004 WL 885356, at *5 (rejecting the second definition as irrelevant).

³ Oxford Reference, *New Oxford American Dictionary* (3d ed.) (emphasis added), <https://www.oxfordreference.com/display/10.1093/acref/9780195392883.001.0001/acref-9780195392883;jsessionid=BB0BDA9F88F82962AC3082D36DD78AA2> (last visited August 22, 2023).

2. Other provisions in the Sublicense do not support Constellation.

Constellation has argued that, even if the plain meaning of the definition of “Beer” excludes its sugar-based hard seltzers, other provisions of the Sublicense show that the parties allowed it to develop and sell those products anyway. *E.g.*, J.A. 1070 (Constellation MSJ Opp.). The overarching problem with the argument is that Section 2.1(a) of the Sublicense only grants Constellation the right to use Modelo’s trademarks on products that are “Beer.” J.A. 2105, 2107, 2112 (Sublicense (JX-1) §§ 1.1, 2.1). If Constellation’s seltzers do not qualify under the definition of “Beer,” that should be the end of the analysis. But in any event, by their own terms, none of the other provisions in the Sublicense somehow expands the contract’s definition of “Beer.”

a. Constellation first points to Section 2.15(a) of the Sublicense, which grants Constellation the right to develop “entirely new Recipes” in its “sole discretion.” Constellation has contended that Section 2.15(a) authorizes it to develop a drink that contains neither malt nor hops flavoring. J.A. 138 (Constellation MSJ Br.). But read in full, Section 2.15(a) makes clear that any end product must still be a “Beer.”

Section 2.15(a) grants Constellation “the right to determine in its sole discretion the *Beer* Recipe it uses for each new Brand Extension *Beer*, which *Beer* Recipes may be variations or derivatives of Recipes of then-existing Products or entirely new Recipes.” J.A. 2124 (emphases added). That is likewise true of the term “Recipe” itself, which the Sublicense defines as the “information that is reasonably necessary for a brewmaster to produce a particular *Beer*.” J.A. 2110 (emphasis added). Section 2.15(a) thus authorizes Constellation to develop new recipes for “Beer,” which the contract defines as beers and malt beverages. Section 2.15(a) does not authorize Constellation to develop new recipes for other kinds of drinks.

b. Section 3.3 of the Sublicense allows Constellation to “use functional substitutes or replacements” for “any particular ingredients” specified in a “Recipe,” and Constellation has argued that means it can make a malt beverage by substituting sugar for malt. J.A. 139-40 (Constellation MSJ Br.). The argument suffers from all the same flaws. First, Section 3.3 only permits substitution of an ingredient in a “Recipe,” which in turn can only be designed “to produce . . . Beer.” J.A. 2110. Constellation is free to substitute many types of ingredients, but it has to produce a beverage that qualifies as a beer or a malt beverage. Removing malt means that a beverage

is no longer a beer or a malt beverage. Second, if that were not true, the licensing limitation to “Beer” would be meaningless. Constellation could substitute for any ingredient and produce beverages without malt, hops, yeast, or anything else. Like Section 2.15(a), Section 3.3 gives Constellation some room to modify its malt-based products; it does not gut the contract’s limitation to malt-based products.

More generally, Constellation is reading Section 3.3 out of context. The provision is located in Article III of the Sublicense, which governs “Quality Control.” J.A. 2127. Section 3.3 specifies the requirements for Constellation and its suppliers to “comply with the quality standards in this Article III” as pertaining to *existing* Recipes. *Id.* In other words, when producing Beer according to an existing Recipe, Constellation may use “functional substitutes or replacements” so long as they “*do not change the finished product*, as would be determined by a reasonable Qualified Brewmaster.” J.A. 2128 (emphasis added). The point is to ensure that Constellation does not use subpar “ingredients” or “brewing processes” when producing established products like Corona Extra or Modelo Especial. *Id.* Section 3.3 does not remotely allow Constellation to create new products that fall outside the scope of “Beer.”

c. As explained above, Constellation has never offered any limits on “Beer” that come from the contractual definition itself, but instead has cobbled together limits based on other provisions of the Sublicense. Specifically, the definition of “Recipe” in Section 1.1 references “yeast cultures” and “brewing processes,” and Section 2.15(c) prohibits Constellation from adding “distilled spirits as an ingredient in any Recipe” unless certain conditions are met. From those references, Constellation infers that “Beer” must have yeast cultures, undergo brewing, and generally may not have distilled spirits—full stop. J.A. 1066 (Constellation MSJ Opp.). According to Constellation, any beverage that satisfies those three conditions qualifies as “Beer” under the Sublicense.

That is not a plausible reading of those provisions. Section 1.1 defines a “Recipe” as “the description and measure of ingredients, raw materials, yeast cultures, formulas, brewing processes, equipment, and other information that is reasonably necessary for a brewmaster to produce a particular Beer.” J.A. 2110. It does not say that every Recipe must contain yeast cultures to qualify as “Beer,” much less address whether malt or hops flavoring must be among the “ingredients” or “raw materials.” Section 2.15(c) imposes requirements before Constellation can “use any distilled spirits as an ingredient” in a “Beer.” J.A. 2125. That tells Constellation if and when spirits may be used *in* a “Beer.”

It does not say what “Beer” *is*, let alone that a malt-free, hops-flavorless beverage is a “Beer.”

3. Regulatory definitions and trade usage do not support Constellation.

a. Throughout the litigation, Constellation has always maintained that “beer” and “malt beverages” should *not* take their ordinary meaning. *E.g.*, J.A. 146-54 (Constellation MSJ Br.). In particular, Constellation has argued that the term “beer” incorporates a definition from the IRC found in 26 U.S.C. § 5052(a). That provision defines “beer” for purposes of the federal tax laws as “beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor.” Section 5052(a)’s definition is expressly made broad enough to encompass sugar-based hard seltzers (and a number of other non-beer beverages, like “sake or similar products”).

Constellation’s argument runs headlong into an obvious problem. The Sublicense says nothing—not one word—about the IRC or Section 5052(a). To the contrary, the definition of Beer in the Sublicense is importantly different from the IRC definition. The two definitions track for the first four words—

“beer, ale, porter, stout”—but then diverge sharply. The Sublicense definition of “Beer” does *not* include the IRC language about malt substitutes, which is exactly the portion of the IRC definition that captures sugar-based hard seltzers. Moreover, the parties plainly knew how to incorporate federal statutory definitions, because the Sublicense does that in other places. For instance, Sections 2.14(a) and (b) both refer to the use of marks in commerce, “as the term is defined in 15 U.S.C. § 1127.” J.A. 2123. Section 9.11 also refers to the treatment of the contract “under 11 U.S.C. Section 365(n) of the Bankruptcy Code.” J.A. 2138. But the parties said nothing in Section 1.1 (which defines “Beer”) or Section 2.1 (which grants the license for “Beer”) about the IRC.⁴

For precisely those reasons, the district court rejected Constellation’s argument. The court concluded that “the parties quite obviously were well aware of the varying regulatory definitions of ‘beer’ but elected to negotiate their own, different definition for purposes of the sublicense.” S.P.A. 3. That

⁴ Constellation’s preferred definition is also cherry-picked. There is no reason the Sublicense should incorporate the IRC, rather than, for example, the interpretation of beer given by the United States Customs and Border Patrol, which determined that White Claw—another sugar-based hard seltzer—is not a beer for the purposes of tariff classifications. J.A. 815 (White Claw Ruling).

conclusion is clearly correct under this Court's cases. Most recently in *Dish Network Corp. v. Ace American Insurance Co.*, the Court explained that where parties wish to incorporate a statutory or regulatory definition into a private contract, they must do so expressly. 21 F.4th at 215 ("If the parties had intended 'broadcasting' to take on a definition assigned by the FCC or the FCA, they could have easily pointed to those sources."). But having gotten that right, the district court did not then explain why the plain meaning of the parties' chosen definition is supposedly ambiguous. Just as in *Dish*, the district court should have "discern[ed the Sublicense's] plain and ordinary meaning by looking to the dictionary." *Id.* at 213.

b. Constellation has also tried to drag the IRC definition through the back door, by claiming that "beer" is understood within the alcoholic beverage industry to refer to the IRC definition of "beer." That claim is wildly implausible on its face: that alcohol salespeople, liquor store managers, and bartenders generally understand beer to include sake and sugar-based hard seltzers.

But in any event, the district court correctly recognized that Constellation cannot meet the standard for offering trade-usage evidence. S.P.A. 6. An industry term of art can supplant the plain meaning of a contract

only when the purported trade usage is “fixed and invariable” in the industry. *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 135 (2d Cir. 2006). Constellation’s own industry expert explained during discovery that people in the industry would have “no reason to know” about the IRC definition of “beer” unless their job is “related to taxation or finances,” J.A. 954 (Kallenberger Dep. Tr. 99:9-100:13), and one of Constellation’s senior executives stated that he did not even know there was a definition of “beer” in the IRC, let alone what that definition was, J.A. 988 (Gallagher Dep. Tr. 161:5-25).

* * *

It has long been New York law that a court should not “strain itself to find an ambiguity where words have a definite and precise meaning.” *Colson Servs. Corp. v. Ins. Co.*, 874 F. Supp. 65, 68 (S.D.N.Y. 1994). Yet that is exactly what the district court did here, mistakenly asserting that a plain English word is indecipherable without a jury trial. If “beer” is not safe from ambiguity, then what is? If this Court agrees that the reasonable, ordinary reading of the Sublicense definition of “Beer” in its entirety cannot encompass a malt-free, hops-flavorless hard seltzer, then the judgment below should be reversed. At a minimum, if this Court agrees any one of “beer,” “malt

beverages” or “versions” thereof is unambiguous and should never have been put before a jury, then the judgment below should be vacated and a new trial ordered. *See, e.g., Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 439 (2d Cir. 1995) (vacating judgment where it could not be known “what the jury would have done had it received a correct instruction” on how a contract should be interpreted).

II. THE DISTRICT COURT ERRED IN NOT INSTRUCTING THE JURY TO GIVE THE TERM “BEER” ITS PLAIN MEANING.

Because the district court deemed the Sublicense ambiguous, a jury had to decide whether Constellation’s hard seltzers qualify as beers, malt beverages, or versions of those. The jury heard two competing theories: Modelo’s plain-meaning interpretation, and Constellation’s more specialized interpretation. But in its jury charge, the district court effectively loaded the dice by refusing Modelo’s request to instruct the jury that it should—or even *could*—consider the plain and ordinary meaning of words in the Sublicense. At the same time, the district court gave other instructions suggesting that the jury should look beyond ordinary meaning, and even told the jury it was required to ignore any references to a dictionary during the trial. These instructions sent a clear and prejudicial message, contrary to New York law, that the jury was to check its common understanding of words at the

courtroom door. *See Fidelity & Guar. Ins. Underwriters, Inc. v. Jasam Realty Corp.*, 540 F.3d 133, 139 (2d Cir. 2008) (granting new trial because the jury’s verdict was likely tainted by “a misleading impression or inadequate understanding of the law” from the jury instructions).

A. The District Court Erred In Not Giving A Plain-Meaning Instruction.

Both before and during trial, Modelo requested an instruction that the jury should consider the “common and ordinary understanding” of the undefined terms in the Sublicense when interpreting “Beer.” J.A. 1959 (Trial Tr. 1333:14-17); *see* J.A. 1962 (Trial Tr. 1336:2-5) (“[The jury instructions] should say something about the fact that parties are assumed to use common, ordinary terms in their common and ordinary way in writing a contract.”); J.A. 1259 (Modelo’s proposed jury instructions); J.A. 1477 (Modelo’s amended proposed jury instructions).

As discussed earlier, Modelo’s proposed instruction reflects a bedrock principle of New York contract law that “[t]he words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning.” *Brooke Grp.*, 87 N.Y.2d at 534. For that reason, courts in the Southern District of New York commonly instruct juries to give undefined contract terms their plain and ordinary meaning. *See, e.g.*, Jury Instrs.,

Bayerische Landesbank v. Neb. Inv. Fin. Auth., No. 15-cv-7287, ECF No. 124 at 72 (Trial Tr. 613:18-20) (S.D.N.Y. Oct. 5, 2017) (Failla, J.) (“[Y]our analysis must begin with the relevant contract language. In general, you should give the words in the contract their plain and ordinary meaning.”); Jury Instrs., *Feingold v. Chrismas*, No. 10-cv-8458, ECF No. 66 at 69 (Trial Tr. 551:22-23) (S.D.N.Y. Feb. 17, 2012) (Rakoff, J.) (“The language of this contract should be given its ordinary English meaning.”); *Barton Grp. v. NCR Corp.*, 796 F. Supp. 2d 473, 488 (S.D.N.Y. 2011) (“The jury was instructed . . . to determine the meaning of language in the 2003 Contract according to . . . ‘the plain and ordinary meaning of the words.’ ”).

That principle does not fall away because of the district court’s erroneous belief that the Sublicense is ambiguous: it is hornbook law that “the primary rules of interpretation—[including] the plain meaning rule . . . are generally applicable without regard to whether the language of a contract or agreement is ambiguous or unclear.” 11 Williston on Contracts § 32:1 (4th ed., May 2023 update); *see, e.g., Compagnie Financiere de CIC et de L’Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 155, 161 (2d Cir. 2000) (Sotomayor, J.) (interpreting ambiguous phrase in light of its “natural and ordinary usage”). In other words, assuming the Sublicense is

ambiguous, the jury's job still was to ascertain the most natural meaning of its terms.

The district court nonetheless declined to instruct the jury that undefined words in a contract should be given their plain and ordinary meaning. J.A. 1962 (Trial Tr. 1336:2-8). Although the district court stated that it was “not quarrelling with the proposed language,” the court decided it was “not going to add it,” stating that the issue was “a matter [for] argument.” *Id.* But lawyers do not get to argue over what the governing legal standard is. They can argue about what the standard means or how it should be applied, but instructing a jury on the applicable law—here, rules of contract interpretation—is a *court's* job. And of course a lawyer's argument is no substitute for the court's binding instruction to the jury. J.A. 2063 (Trial Tr. 1479:18-19) (“Your duty includes following my instructions on the law.”); *cf.* J.A. 2064 (Trial Tr. 1480:19-20) (“[A]rguments . . . by lawyers are not evidence.”).

The district court's decision not to provide a legally accurate plain-meaning instruction was particularly damaging in light of its other instructions, which suggested that the jury should not interpret the Sublicense according to its ordinary meaning. *See Norville v. Staten Island Univ. Hosp.*,

196 F.3d 89, 100 (2d Cir. 1999) (“Failure to give a requested instruction, if it results in such a misleading charge, constitutes reversible error.”). For one thing, the district court repeatedly emphasized that this case involves defined terms that take on something other than their ordinary meaning. At the outset, the court explained to the jury that in contrast to cases involving “simple agreements” that use “plain, everyday language,” the jury’s job in this case was “going to be to interpret this contract, applying the defined terms.” J.A. 1482 (Trial Tr. 5:18-6:25). Worse still, the court emphasized during the closing charge that “[w]hen a contract contains a definition of a word or a phrase, you must give that word or phrase the meaning that’s provided in the definition . . . even if the meaning you ordinarily might give to that defined word or phrase doesn’t match with the definition in the contract.” J.A. 2051-52 (Trial Tr. 1467:22-1468:8). To colorfully illustrate the point, the district court instructed the jury that the definition of “Zebra” in a contract could refer to “three pieces of furniture,” reinforcing that the jury was not to use ordinary meaning as its touchstone. J.A. 1483, 2052 (Trial Tr. 6:15-22, 1468:1-8).

Modelo of course agrees that a defined term like “Beer” takes on its defined meaning. But that is not the central question here. The term “Beer” is defined as “beer, . . . malt beverages, and any other versions . . . of the

foregoing,” J.A. 2105, and the question is how those *undefined words* should be interpreted. The answer under New York law is clear: they should be interpreted in accord with their ordinary meaning, unless the parties have adopted a specialized meaning in the contract. By stressing that this case was not about “plain, everyday language,” and that the meaning of terms could diverge from ordinary meaning, the court’s instructions did not fairly inform the jury that it needed to determine what the ordinary meaning is of “beer,” “malt beverages,” and “versions” of those drinks.

The district court erroneously reinforced that message by excluding dictionary definitions from evidence at trial, and then affirmatively instructing the jury to *disregard* the sole reference to the dictionary it had heard at trial. In particular, in its jury charge, the district court noted that the jury had seen “a reference to a dictionary” (in a discovery response referring to the plain meaning of “beer”). The court instructed the jury: “You are to ignore that reference to the dictionary. You are the ones who must decide, based on all the evidence, the meaning of the defined terms in this contract.” J.A. 2055 (Trial Tr. 1471:16-19). Certainly the jury had to decide the contract’s meaning, but it should not have been instructed to ignore dictionary definitions—which, after all, is the same as being told to ignore the way that people normally use

words. The court's instruction was yet another signal to the jury not to determine the plain and ordinary meaning of the contract's language.

The district court's jury instruction tracked its pre-trial ruling granting Constellation's motion to exclude all references to dictionaries at trial. The court reasoned that dictionaries "ordinarily are not extrinsic evidence of the intent of the parties in interpreting contractual terms." S.P.A. 15. That is simply not true. This Court has approved presenting dictionary evidence to a jury in a breach-of-contract case. *See Lamborn v. Dittmer*, 873 F.2d 522, 528 (2d Cir. 1989) (relying on "at least one of the dictionary definitions of 'allocate' offered by Dittmer at trial" in finding "sufficient evidence from which a reasonable juror could have found [in favor of the plaintiff]"). The district court did not cite any contrary authority. Its only case holds that a court may consider dictionaries without violating the rule against consulting extrinsic evidence when interpreting an unambiguous contract. *See* S.P.A. 15 n.3 (citing *Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 10 F. Supp. 3d 460, 494 (S.D.N.Y. 2014), *aff'd*, 822 F.3d 620 (2d Cir. 2016)).

There is no basis for a rule that a court can consider dictionary definitions when interpreting a contract, but a jury cannot. That rule would strip a party arguing for a contract's plain meaning of potentially its most

important source: dictionary definitions, which can shed light on how people normally use a particular word. In fact, the commentary for the New York pattern jury instructions for contract cases explains that “[t]he words in a contract are ordinarily applied according to their plain and ordinary meaning,” and “New York courts regularly refer to dictionaries to determine the plain and ordinary meaning of words in a contract.” N.Y. Pattern Jury Instr. – Civil 4:1, Comment VI.A.5 (Dec. 2022 update). There is no apparent reason why courts should be *required* or at least *encouraged* to consult dictionaries to determine the ordinary meaning of contractual terms, but juries should not even be *permitted* to consider them.

Finally, over Modelo’s objection, the district court instructed the jury on regulatory definitions of “beer” (including the IRC definition) that are inconsistent with the ordinary meaning of beer. J.A. 1962, 1966, 2056-58 (Trial Tr. 1336:9-11, 1340:11-13, 1472:22-1474:3). And the court did so despite having held at summary judgment that “the parties quite obviously were well aware of the varying regulatory definitions . . . but elected to negotiate their own, different definition for purposes of the sublicense.” S.P.A. 3. It is impossible to square the court’s instruction with its summary judgment ruling or this Court’s decision in *Dish Network*. Having correctly recognized that the

parties did not incorporate a regulatory definition, the jury's task was to resolve ambiguity in the Sublicense by giving the terms their most natural meaning. Instead the court's instructions suggested that the jury should be doing something else.

B. The District Court's Instructional Errors Were Harmful.

Erroneous jury instructions can be ignored on appeal only if they were harmless, meaning that it is "clear that [the errors] did not influence the jury's verdict." *Boyce*, 464 F.3d at 390. The opposite is true here. The central issue was what the parties meant when they used the words "beer," "malt beverages," and "versions" of those drinks. There is strong evidence that the parties intended for the plain meaning of the Sublicense to govern, so there is a strong likelihood that "[t]he jury might well have reached a different result" had it been properly instructed. *Holzappel v. Town of Newburgh*, 145 F.3d 516, 525 (2d Cir. 1998).

First, the relevant witnesses at trial all agreed that the definition of "Beer" in the 2013 Sublicense originated with the 2006 Joint Venture Agreements, which contain the same definition. J.A. 1630-31, 1747 (Blood Test. 312:20-313:9, Bourdeau Test. 661:17-23). And the *only* testimony about the negotiations over the definition of "Beer" in those 2006 Agreements was

that (i) Modelo expressly rejected importing a regulatory definition from the tax code, and instead would understand the provision according to its plain meaning, J.A. 1707 (Mercado Test. 538:4-20), and (ii) the language in those 2006 Agreements was not a regulatory definition. J.A. 2381 (2006 JV Agreement Draft (JX-11)).

Second, soon after entering the 2006 Joint Venture Agreements, Constellation filed two form 8-Ks explaining to the SEC, Constellation's investors, and the public how Constellation understood "Beer": *i.e.*, beverages that are "malt-based, an ale, a porter or a stout." J.A. 2967 (7/17/2006 Form 8-K (PX-35)); J.A. 2975 (2/2/2007 Form 8-K (PX-37)). Those two 8-Ks, which are admissions by Constellation consistent with a plain-meaning interpretation of the Sublicense, are the *only* contemporaneous written evidence about the meaning of "Beer" when the parties adopted that definition in 2006.

Third, evidence immediately prior to the execution of the Sublicense in 2013 further demonstrates that the parties understood malt to be a fundamental, indispensable attribute of small-b "beer." Like Constellation's securities filings, Modelo's annual report during the time the parties were negotiating the Sublicense explained that "[t]he basic raw material utilized in

the production of beer is malt.” J.A. 2812 (JX-44). And when Constellation intervened in DOJ’s 2013 lawsuit against ABI, Constellation admitted in its answer to the complaint that “beer” is an alcoholic beverage “usually made from a malted cereal grain, flavored with hops, and brewed via a process of fermentation.” J.A. 2990 (PX-42). Constellation’s current interpretation is an after-the-fact effort to shoehorn sugar-based hard seltzers into the Sublicense.

Fourth, Constellation’s own legal department took the view that “non-malt base alternatives were not in line with the [Sublicense]” until January 2019. J.A. 3473 (PX-826). Constellation attempted to shield that document behind a claim of privilege, until the district court found the privilege forfeited by Constellation’s affirmative use of inconsistent testimony. J.A. 1876 (Trial Tr. 1101:2-5). The document makes clear that Constellation understood, consistent with its prior 8-Ks and the contract’s ordinary meaning, that it was limited under the Sublicense to making only a *malt-based* Corona Hard Seltzer.

Constellation changed its legal opinion only when it was unable to develop a malt-based seltzer that tasted good enough for people to buy. J.A. 3473 (PX-826). Even then, Constellation concluded that a sugar-based hard seltzer was permissible only because the Sublicense supposedly

incorporated the IRC definition of “beer.” In other words, Constellation did not change its mind on the plain meaning of the contractual language. Constellation simply decided that plain meaning was a barrier to its commercial ambitions, and so invented the fiction that the Sublicense adopts a regulatory definition—a notion that is wrong under the Sublicense’s language and this Court’s cases, and that the district court correctly rejected. Even Constellation’s self-serving revised opinion was built on legal error.

Still, Constellation’s internal documents could not avoid describing Corona Hard Seltzer in common-sense terms as a non-beer. In an October 2019 presentation to Constellation’s Board of Directors, Constellation described Corona Hard Seltzer as a “Betterment *Non-Beer*.” J.A. 3467 (PX-754) (emphasis added). Then in a product brief to Constellation’s research and development team, Constellation’s innovation team described Corona Hard Seltzer as trying to “drive penetration *beyond beer*” and target consumers seeking “*non-beer* alcoholic beverages.” J.A. 3463 (PX-520A) (emphasis added). Those references, echoing how Constellation’s consumers would understand its products, underscore that Constellation’s hard seltzers are not described as beer in ordinary English.

Fifth, Constellation stated in government filings that Corona Hard Seltzer is not a beer. In its November 2019 trademark application submitted to the U.S. Patent and Trademark Office (PTO), Constellation described Corona Hard Seltzer as “Alcoholic beverages, *except beer*; Hard seltzer; Flavored malt-based alcoholic beverages, *excluding beers*.” J.A. 3025 (PX 108) (emphasis added); *see* J.A. 3031 (PX 109); J.A. 1834 (Merriman Test. 962:14-17). Constellation again described Corona Hard Seltzer as not a beer when it amended the application after the product’s launch. *See* J.A. 3037 (PX 110); J.A. 3040 (PX 111). Those descriptions reflect Constellation’s understanding of the ordinary meaning of “beer,” because PTO guidance tells applicants to “describe terms in their ordinary meaning.” J.A. 1832, 1672 (Merriman Test. 960:18-21, Bueno Test. 403:21-404:2).

Taken together, all of this evidence strongly supports the notion that if the jury had been properly instructed and had been asked (or even fully allowed) to consider the Sublicense’s ordinary meaning, it would have reached a different result. Because the evidentiary record at trial “could support a jury’s reaching the opposite conclusion had it been instructed correctly,” the district court’s “erroneous instruction[s] require[] a new trial.” *Tardif v. City*

of *New York*, 991 F.3d 394, 414 (2d Cir. 2021) (internal quotation marks omitted).

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY EXCLUDING CRITICAL EVIDENCE OF DOJ'S VIEWS ON THE CIRCUMSTANCES GIVING RISE TO THE SUBLICENSE.

As a reason for the jury to interpret expansively the Sublicense, Constellation claimed that DOJ's competition-based concerns about ABI's proposed 2013 merger forced Modelo to agree to a broad conception of "Beer" in the Sublicense. J.A. 2014 (Trial Tr. 1423:17-18 ("ABI was at DOJ's mercy" and "didn't want to fight DOJ.")); J.A. 1404:7-8, 13-14 (urging jury to "review the complaint that [DOJ] filed" because it "will show you what ABI meant to accomplish with the sublicense"). That theory, as Constellation knew, was demonstrably false, but the jury never got to hear why because the district court had already improperly excluded the key evidence.

In fact, DOJ had explained to Constellation that Constellation's sugar-based hard seltzers did not implicate the concerns that led to the Sublicense. In August 2020, after receiving Modelo's notice of breach of the Sublicense, Constellation contacted DOJ and campaigned for DOJ to take the position that Modelo was violating the Sublicense and Final Judgment by seeking to prevent Constellation from selling its sugar-based hard seltzers. J.A. 1025

(8/12/2020 Constellation Email to DOJ). But Constellation’s tactic failed, because DOJ gave the opposite answer. As DOJ explained, its objective in 2013 was “to eliminate the likely anticompetitive effects of ABI’s acquisition of Grupo Modelo ‘in the market for beer,’ ” and it did *not* view this dispute about sugar-based hard seltzers as “implicat[ing] . . . the ability of Constellation to effectively compete in the beer market.” J.A. 1292 (10/23/2020 DOJ Ltr. to Constellation).

That would have been incredibly important rebuttal evidence given Constellation’s decision to rely at trial on DOJ’s views about the scope of the antitrust remedy. DOJ was a contemporary participant in the contract negotiations and signed off on the Sublicense.⁵ But DOJ’s actual understanding directly refuted Constellation’s entire theory, and the jury

⁵ See, e.g., J.A. 1396 (email from ABI’s antitrust counsel to DOJ, copying Modelo and Constellation antitrust counsel, stating: “I attach a revised version of the sub-license reflecting the distilled spirits provision change you requested along with a marked version of the changed page.”); J.A. 1294, 1299 (email from DOJ to ABI’s and Constellation’s antitrust counsel attaching draft term sheet prepared by DOJ “for discussion purposes” that includes proposals for the Sublicense); J.A. 1303 (email from ABI’s merger counsel to Constellation’s merger counsel attaching revised draft of Sublicense); J.A. 1308 (draft of Sublicense including footnote with “Note to DOJ”); J.A. 1310 (same); 1318 (same); 1322 (same); 1326 (same); 1330 (same); 1332 (same).

never heard that evidence because the district court excluded *all* evidence of Constellation's post-dispute correspondence with DOJ, including DOJ's conclusion that hard seltzer had nothing to do with its concerns about the beer market in 2013.⁶

The district court reasoned that “[t]he interactions with the DOJ that are the subject of this motion then were years in the future [after the Sublicense was executed] and thus could have no more than the most attenuated, if any, value in determining the intentions of the parties to the Sublicense in 201[3].” S.P.A. 17. That reasoning mistakes the relevance of the evidence. Modelo was not offering the evidence affirmatively, but to rebut Constellation's injection of DOJ's supposed views. Nor was Modelo offering the evidence to show what DOJ thinks about the beer market *today*, which undoubtedly would be irrelevant. Instead, DOJ's response to Constellation speaks to how it understood the beer market *at the time of the Sublicense*, which Constellation itself made a central issue in this case. It is no different

⁶ The district court, without providing any reasoning, also excluded Constellation's post-dispute correspondence with DOJ where Constellation could not help but distinguish between beer and hard seltzer; for example, Constellation complained to DOJ that Modelo's lawsuit would “harm competition in both hard seltzer *and beer*.” J.A. 1025 (8/12/2020 Constellation Email to DOJ) (emphasis added).

from any other participant in the negotiations—such as the ABI, Modelo, and Constellation witnesses who testified at trial—recounting their contemporaneous understanding of the facts giving rise to the Sublicense.

The prejudice from the district court’s ruling cannot be overstated. It would be one thing if the district court had excluded *all* references to DOJ’s competition concerns, from either party. Instead, while allowing Constellation to make a number of arguments to the jury about what DOJ wanted in 2013, the court excluded *only* the correspondence that Constellation had with DOJ in 2020 that would have contradicted those arguments by showing that (i) Constellation itself differentiated between “beer” and “seltzer,” and (ii) DOJ’s concerns about competition in the beer market that led to the Sublicense did not extend to non-malt, non-hops flavored beverages like Corona Hard Seltzer. As a result, without any way for Modelo to call them on it, Constellation’s team played fast and loose with the facts, arguing that sugar-based hard seltzer was covered by “Beer” because *that’s what DOJ wanted*.

In fact, Constellation began and ended its summation about the parties’ intent by pointing to “the Department of Justice.” J.A. 1992, 2014, 2042 (Trial Tr. 1401:14-17, 1423:12-22, 1451:18-19). Constellation argued that if ABI had

wanted a narrower definition of “Beer,” ABI should have “pushed back harder *on the DOJ.*” J.A. 2015 (Trial Tr. 1424:9-12) (emphasis added). Constellation went so far as to argue that DOJ pressed for the Sublicense definition of “Beer” to include *green tea*. J.A. 2000 (Trial Tr. 1409:15-17) (“Think about how broad this contract is. It’s so broad that the DOJ is asking about Corona green tea, and ABI is saying they can make that.”). But as Constellation knew, its story was flatly contradicted by the DOJ statements that were withheld from the jury. DOJ’s statements were unequivocal that DOJ did *not* believe that Constellation’s sugar-based hard seltzers were relevant to its competition concerns about the beer market following the ABI-Modelo merger.

Because the district court improperly excluded perhaps the single most important piece of extrinsic evidence relevant to Constellation’s theory at trial, it is likely that the jury was “in some material respect . . . swayed” by hearing Constellation’s argument without knowing what DOJ’s actual competition concerns were. *Costantino v. David M. Herzog, M.D., P.C.*, 203 F.3d 164, 174 (2d Cir. 2000). This warrants a new trial. *Id.*

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's summary judgment ruling and remand for the court to enter judgment in favor of Modelo. At a minimum, in light of the prejudicial instructional and evidentiary errors, the Court should vacate the judgment and order a new trial.

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