

# 23-0810-cv

---

**United States Court of Appeals**

*for the*

**Second Circuit**

---

CERVECERIA MODELO DE MEXICO, S. DE R.L. DE C.V.,  
TRADEMARKS GRUPO MODELO, S. DE R.L. DE C.V.,

*Plaintiffs-Appellants,*

– v. –

CB BRAND STRATEGIES, LLC, CROWN IMPORTS LLC,  
COMPANIA CERVECERA DE COAHUILA, S. DE R.L. DE C.V.,

*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

## **BRIEF FOR DEFENDANTS-APPELLEES**

---

SANDRA C. GOLDSTEIN, P.C.  
STEFAN ATKINSON, P.C.  
ROBERT W. ALLEN, P.C.  
DANIEL R. CELLUCCI  
KIRKLAND & ELLIS LLP  
601 Lexington Ave.  
New York, New York  
10022 (212) 446-4800

GEORGE W. HICKS, JR., P.C.  
KIRKLAND & ELLIS LLP  
1301 Pennsylvania Avenue  
Washington, DC 20004  
(202) 389-5000

SIERRA ELIZABETH, P.C.  
KIRKLAND & ELLIS LLP  
2049 Century Park East  
Los Angeles, California 90067  
(310) 552-4200

*Attorneys for Defendants-Appellees*

---

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1(a), CB Brand Strategies, LLC, Crown Imports LLC, and Compañía Cervecera de Coahuila, S. de R.L. de C.V. certify that they are not publicly traded corporations. CB Brand Strategies is 100% owned by a wholly-owned indirect subsidiary of Constellation Brands, Inc. Crown Imports LLC is 100% owned by two wholly-owned indirect subsidiaries of Constellation Brands, Inc. Compañía Cervecera de Coahuila, S. de R.L. de C.V. is wholly-owned by two indirect subsidiaries of Constellation Brands, Inc. Constellation Brands, Inc. is a publicly-traded corporation.

**TABLE OF CONTENTS**

INTRODUCTION..... 1

ISSUES FOR REVIEW ..... 7

STATEMENT OF THE CASE ..... 8

    A. Factual Background..... 8

        1. Modelo and Constellation first define “Beer”  
           when forming the Crown joint venture. .... 8

        2. DOJ sues to enjoin ABI’s proposed acquisition of  
           Modelo. .... 11

        3. ABI and Constellation negotiate all key terms in  
           the Sublicense in February 2013..... 12

        4. DOJ reviews ABI’s and Constellation’s new  
           transaction and dismisses its lawsuit. .... 15

        5. Constellation releases Corona Refresca. .... 16

        6. Constellation exercises its broad innovation  
           rights and releases Corona Hard Seltzer. .... 17

        7. DOJ takes no position on this dispute..... 19

    B. Relevant Procedural History. .... 20

        1. ABI’s motion for summary judgment. .... 20

        2. Key evidentiary issues. .... 20

        3. Jury instructions and the verdict. .... 23

STANDARD OF REVIEW.....	25
SUMMARY OF ARGUMENT.....	26
ARGUMENT .....	31
I. THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT TO ABI. ....	31
A. New York contract law does not place dictionary definitions of individual words over the expressed intent of the parties found in the contract as a whole. ....	31
B. ABI fails to establish one definite and precise plain meaning of “beer” and “malt beverages” that excludes Corona Hard Seltzer. ....	34
C. The broad language “any other versions” in the Sublicense’s definition of “Beer” does not definitely and precisely exclude Corona Hard Seltzer.....	43
D. The Sublicense as a whole does not unambiguously require malt or hops.....	48
II. THE JURY CHARGE WAS CORRECT AND DID NOT PREJUDICE ABI. ....	52
A. ABI’s “plain meaning” instruction would have misinformed the jury on New York contract law. ....	52
B. The jury instructions adequately informed the jury of the law and were not misleading.....	54
C. ABI’s evidence fails to demonstrate that additional instructions would have changed the jury’s verdict.....	61

III. ABI FAILED TO PRESERVE ITS CHALLENGE TO THE EXCLUSION OF THE DOJ CORRESPONDENCE AND FAILS TO SHOW THAT EVIDENTIARY RULING WARRANTS A NEW TRIAL. ....	66
A. The <i>in limine</i> exclusion of the DOJ correspondence is not subject to appellate review since ABI chose not to obtain a ruling on the issue at trial. ....	66
B. ABI fails to satisfy the onerous standard for obtaining a new trial based on a supposedly erroneous evidentiary ruling. ....	68
1. ABI fails to show that the district court clearly abused its discretion when excluding the DOJ correspondence. ....	69
2. Excluding the DOJ correspondence was not so prejudicial to ABI that the verdict was seriously erroneous or a miscarriage of justice. ....	71
CONCLUSION .....	73

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Aetna Cas. &amp; Sur. Co. v. Gosdin</i> , 803 F.2d 1153 (11th Cir. 1986).....	69, 70
<i>Alexander &amp; Alexander Servs., Inc. v. Certain Underwriters at Lloyd’s</i> , 136 F.3d 82 (2d Cir. 1998) .....	32, 61
<i>Anheuser-Busch, Inc. v. Elsmere Music, Inc.</i> , 633 F. Supp. 487 (S.D.N.Y. 1986).....	39
<i>Au New Haven, LLC v. YKK Corp.</i> , 2022 WL 595951 (S.D.N.Y. Feb. 26, 2022).....	34
<i>Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Cap., Inc.</i> , 821 F.3d 297 (2d Cir. 2016) .....	51
<i>Beazley Ins. Co., Inc. v. ACE Am. Ins. Co., et al.</i> , 880 F.3d 64 (2d Cir. 2018) .....	39, 41
<i>In re Bernard L. Madoff Inv. Sec. LLC</i> , 773 F.3d 411 (2d Cir. 2014) .....	45
<i>Bitterman v. Gluck</i> , 9 N.Y.S.2d 1007 (1st Dep’t 1939).....	53
<i>Cabell v. Markham</i> , 148 F.2d 737 (2d Cir. 1945) .....	33
<i>Canon Inc. v. Tesseron Ltd.</i> , 146 F. Supp. 3d 568 (S.D.N.Y. 2015).....	50
<i>CGS Indus., Inc. v. Charter Oak Fire Ins. Co.</i> , 720 F.3d 71 (2d Cir. 2013) .....	39, 40

*Chalet Liquors, Inc. v. Supervalu, Inc.*,  
2004 WL 885356 (Minn. Ct. App. Apr. 27, 2004) ..... 38

*Chemung Canal Tr. Co. v. Montgomery Ward & Co.*,  
163 N.Y.S.2d 332 (3rd Dep’t 1957) ..... 33

*Collins v. Harrison-Bode*,  
303 F.3d 429 (2d Cir. 2002) ..... 49

*Compagnie Financiere de CIC et de L’Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*,  
232 F.3d 153 (2d Cir. 2000) ..... 53, 54

*Cont’l Cas. Co. v. Rapid-Am. Corp.*,  
609 N.E.2d 506 (N.Y. 1993) ..... 34

*Curtis v. M&S Petroleum, Inc.*,  
174 F.3d 661 (5th Cir. 1999)..... 69, 70

*Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*,  
9 F.3d 1060 (2d Cir. 1993) ..... 44, 46

*Dish Network Corp. v. Ace Am. Ins. Co.*,  
21 F.4th 207 (2d Cir. 2021)..... 41, 42, 60

*Faigin v. Kelly*,  
184 F.3d 67 (1st Cir. 1999) ..... 69, 70

*Feldman v. Van Gorp*,  
2010 WL 2911606 (S.D.N.Y. July 8, 2010)..... 69, 70

*Feldman v. Van Gorp*,  
697 F.3d 78 (2d Cir. 2012) ..... 69

*Fischer v. Aetna Life Ins. Co.*,  
32 F.4th 124 (2d Cir. 2022)..... 25

*Flores-Figueroa v. U.S.*,  
556 U.S. 646 (2009)..... 35

*Frigaliment Importing Co. v. B.N.S. Int’l Sales Corp.*,  
190 F. Supp. 116 (S.D.N.Y. 1960)..... 33

*Gary Friedrich Enters., LLC v. Marvel Characters, Inc.*,  
716 F.3d 302 (2d Cir. 2013) ..... *passim*

*Global Reinsurance Corp. of Am. v. Century Indem. Co.*,  
91 N.E.3d 1186 (N.Y. 2017) ..... 49

*Graev v. Graev*,  
898 N.E.2d 909 (N.Y. 2008) ..... 33, 42

*Halifax Fund, L.P. v. MRV Commc’ns, Inc.*,  
54 F. App’x 718 (2d Cir. 2003) ..... 56

*Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*,  
252 F.3d 608 (2d Cir. 2001) ..... 39, 40

*InspiRx, Inc. v. Lupin Atlantis Holdings SA*,  
554 F. Supp. 3d 542 (S.D.N.Y. 2021) ..... 34

*Kodak Graphic Commc’ns Can. Co. v. E.I. Du Pont De  
Nemours & Co.*,  
640 F. App’x 36 (2d Cir. 2016) ..... 55

*Lamborn v. Dittmer*,  
873 F.2d 522 (2d Cir. 1989) ..... 58

*Lore v. Syracuse*,  
670 F.3d 127 (2d Cir. 2012) ..... 25, 26

*Lucente v. Int’l Bus. Mach. Corp.*,  
310 F.3d 243 (2d Cir. 2002) ..... 31, 37

*Mallad Constr. Corp. v. Cnty. Fed. Sav. & Loan Ass’n*,  
298 N.E.2d 96 (N.Y. 1973) ..... 53

*City of N.Y. v. Pullman Inc.*,  
662 F.2d 910 (2d Cir. 1981) ..... 69, 70

*O’Dell v. Hercules, Inc.*,  
904 F.2d 1194 (8th Cir. 1990) ..... 69

*Omega SA v. 375 Canal, LLC*,  
984 F.3d 244 (2d Cir. 2021) ..... 37



*Palmieri v. Defaria*,  
88 F.3d 136 (2d Cir. 1996) ..... 68

*Parker v. Reda*,  
327 F.3d 211 (2d Cir. 2003) ..... 26, 58, 69

*Parker v. Sony Pictures Ent., Inc.*,  
260 F.3d 100 (2d Cir. 2001) ..... 25, 56

*Quick v. Am. Steel & Pump Corp.*,  
397 F.2d 561 (2d Cir. 1968) ..... 52

*Republic of Iraq v. Beaty*,  
556 U.S. 848 (2009)..... 45

*Reuland v. Hynes*,  
460 F.3d 409 (2d Cir. 2006) ..... 57, 60

*Saint Laurie Ltd. v. Yves Saint Laurent Am., Inc.*,  
2015 WL 12991205 (S.D.N.Y. Mar. 27, 2015) ..... 50

*Sayers v. Rochester Tel. Corp.*,  
7 F.3d 1091 (2d Cir. 1993) ..... 32, 36, 44

*SEC v. Payton*,  
726 F. App'x 832 (2d Cir. 2018) ..... 62

*Seiden Assocs., Inc. v. ANC Holdings, Inc.*,  
959 F.2d 425 (2d Cir. 1992) ..... 32, 33, 53

*Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc.*,  
783 F.2d 159 (10th Cir. 1986)..... 69, 70

*Sincoff v. Liberty Mut. Fire Ins. Co.*,  
183 N.E.2d 899 (N.Y. 1962) ..... 34, 38

*Topps Co. v. Cadbury Stani S.A.I.C.*,  
526 F.3d 63 (2d Cir. 2008) ..... 25, 32, 41, 51

*Townsend v. Benjamin Enters., Inc.*,  
679 F.3d 41 (2d Cir. 2012) ..... 26

<i>Turley v. ISG Lackawanna, Inc.</i> , 774 F.3d 140 (2d Cir. 2014) .....	26, 61
<i>U.S. Fid. &amp; Guar. Co. v. Braspetro Oil Servs. Co.</i> , 369 F.3d 34 (2d Cir. 2004) .....	34
<i>U.S. Fire Ins. Co. v. Pressed Steel Tank Co.</i> , 852 F.2d 313 (7th Cir. 1988).....	53
<i>U.S. v. Birbal</i> , 62 F.3d 456 (2d Cir. 1995) .....	67
<i>U.S. v. Gonzales</i> , 520 U.S. 1 (1997).....	45
<i>U.S. v. Malpeso</i> , 115 F.3d 155 (2d Cir. 1997) .....	56
<i>U.S. v. Yu-Leung</i> , 51 F.3d 1116 (2d Cir. 1995) .....	58, 67, 68
<i>Unelko Corp. v. Prestone Prod. Corp.</i> , 116 F.3d 237 (7th Cir. 1997).....	34
<i>VKK Corp. v. Nat’l Football League</i> , 244 F.3d 114 (2d Cir. 2001) .....	50
<b>Statutes and Regulations</b>	
27 C.F.R. § 7 .....	9
27 C.F.R. § 25 .....	9
27 C.F.R. § 27 .....	9
68 Fed. Reg. 14292 .....	37
27 U.S.C. § 117(a).....	9
27 U.S.C. § 211(a)(7).....	40

## Rules

Fed. R. Civ. P. 50(a).....	37, 62
Fed. R. Evid. 103 .....	67
Fed. R. Evid. 401 .....	20, 21, 58, 69
Fed. R. Evid. 402 .....	20, 21, 58, 69
Fed. R. Evid. 403 .....	<i>passim</i>

## Other Authorities

<i>Merriam-Webster’s Dictionary</i> 1390 (11th ed. 2003) .....	43
<i>New Oxford Dictionary</i> 2055 (1st ed. 1998).....	43
<i>Oxford English Dictionary</i> (2d ed. 1989) .....	37
Perillo, <i>Contracts</i> § 3.10 (7th ed.).....	53
11 <i>Williston on Contracts</i> § 32:1 (4th ed.).....	54

## INTRODUCTION

This case concerns the intent of two sophisticated alcohol beverage industry participants when negotiating a perpetual license to effect the sale by Anheuser-Busch InBev (“ABI”) of the U.S. business of Grupo Modelo (“Modelo”) to Constellation. ABI claims that the parties hamstrung that business with an unwritten, unspoken requirement that all future products released by Constellation use malt. But products like Corona Hard Seltzer, which meet the federal definition of beer, are labeled and regulated as beer, and are sold by beer businesses nationwide, are within the license. Following a two-week trial before the Honorable Lewis A. Kaplan, a jury considered the words of the Sublicense, its purpose, the circumstances in which it was negotiated, and extrinsic evidence of intent, and unanimously found that ABI failed to prove Constellation breached its license. This Court should affirm.

In 2012, ABI decided to acquire Modelo for \$20 billion. The Department of Justice (“DOJ”) filed a lawsuit to enjoin the deal. To avoid litigation, ABI sold Modelo’s U.S. business to Constellation for \$4.75 billion. As ABI’s then-CEO explained, ABI’s acquisition of Modelo was about “making Corona more global in all markets other than the

U.S., where the brands will be owned and managed by Constellation.” (JA-3477.) The Sublicense was one of multiple integrated agreements, negotiated between ABI and Constellation, to effect that deal.

Because Constellation was acquiring a business in perpetuity, Constellation bargained for broad rights to innovate new Corona and Modelo products so it could adapt to changing consumer preferences. Reflecting the parties’ objective of selling a business, the Sublicense broadly defines “Beer” to include “beer, ale, porter, stout, malt beverages, and any other versions or combinations of the foregoing, including non-alcoholic versions of any of the foregoing.” (JA-2105 (JX-1) (the “Sublicense”) § 1.1.) Constellation also negotiated for the right, in “its sole discretion,” to develop “entirely new Recipes” for innovative products that did not then exist, termed “Brand Extension Beer[s].” (*Id.* § 2.15(a); JA-2089 (Tr.148:7-10).) Similarly, for existing recipes, Constellation can “use functional substitutes or replacements” for “any particular ingredients.” (Sublicense § 3.3.)

To be sure, Constellation’s innovation rights are subject to express limitations. Constellation may “not use any distilled spirits as an ingredient in any Recipe for a Brand Extension Beer,” unless ABI does so

with Modelo's products in Mexico or Canada. (Sublicense § 2.15(c).) The definition of "Recipe" specifies "yeast cultures" and "brewing processes," though when developing "entirely new Recipes," Constellation otherwise may use "entirely new ... ingredients." (*Id.* §§ 1.1, 2.15(a); JA-1657 (Tr.335:1-12).) Constellation's innovations also must adhere to certain limited "Quality Standards," including compliance with "regulatory standards." (*Id.*)

The Sublicense contains no requirement that Constellation's "entirely new Recipes" contain malt or hops. And no witness recalled discussing such limitations during negotiations.

By 2019, an innovation in the beer industry had become immensely popular: hard seltzers. Beer companies sometimes brew hard seltzers from sugar and sometimes from malt, as permitted by federal regulations governing "[m]aterials for the production of beer." (SPA-30.) After fermentation, whether made from sugar or malt, all hard seltzers are filtered to a neutral alcohol base. Flavors are then added to create a light, refreshing beverage.

Constellation released Corona Hard Seltzer in February 2020. An initial prototype was made from malt. Constellation then developed and

released a sugar-based version of the same product. By using sugar, Corona Hard Seltzer could be labeled “Gluten Free,” while the malt-based Corona Hard Seltzer could not. ABI concedes the malt-based Corona Hard Seltzer would be licensed as “Beer.” (Br.29.) But ABI claims the sugar-based version is not, even though it was meant to be the same product.

None of ABI’s three arguments warrants overturning the jury’s verdict. ABI *first* argues that the Sublicense so definitely and precisely excludes Corona Hard Seltzer that reasonable minds could not disagree, even though eight jurors did just that. ABI argues that the supposed “plain meaning” of four words—“beer,” “malt beverages,” and “versions”—shows that all 23 words the parties used to define “Beer” unambiguously convey one meaning: beverages made with malt. That interpretation is not reasonable, and it is certainly not the one definite and precise meaning of the defined term “Beer.” To the contrary, the definition of “Beer” reasonably can be construed to include Corona Hard Seltzer. ABI’s interpretation of “Beer” also ignores the Sublicense as a whole, including Constellation’s right to innovate entirely new recipes and the absence of any malt or hops requirements despite the existence

of other limitations.

Second, there was no error (reversible or otherwise) in the jury instructions. ABI argues the jury needed to be told to determine and apply the plain meaning of disputed terms in the Sublicense definition of “Beer.” That instruction would have improperly placed the jury in the shoes of the court, which alone is empowered to construe contracts as a matter of law. Having determined the Sublicense is ambiguous, the district court correctly instructed the jury that the “[d]etermination of the intentions of the parties is accomplished by looking first at the words of the contract itself,” and that it also “may consider the objective manifestations of the intent of the parties.” (JA-2052 (Tr.1468:16-22).) The jury instructions were appropriate, and ABI falls far short of establishing that some additional charge would have swayed the verdict.

Third, the purported evidentiary error that ABI identifies does not warrant a new trial. ABI seeks a do-over based on DOJ correspondence, from seven years after the Sublicense was signed, regarding ABI’s compliance with a judgment resolving DOJ’s lawsuit to enjoin the ABI-Modelo deal. This issue is not subject to appellate review since ABI did not obtain a ruling at trial. Moreover, the district court acted well within



its discretion to exclude this evidence because, among other reasons, DOJ expressly took “no position on whether Corona Hard Seltzer is a permissible brand extension under the [S]ublicense.” (JA-1293.) ABI does not cite a single case suggesting the district court erred. Finally, ABI’s prejudice argument misconstrues the record below, spotlighting why this issue had to be raised at trial to preserve the argument for appeal.

At bottom, ABI asks this Court to blue-pencil the Sublicense because ABI wants to sell products like Corona Hard Seltzer in the U.S. (Br.6.) But seller’s remorse does not manufacture a malt requirement that ABI—as sophisticated a party as they come—could have tried to obtain during negotiations. ABI’s regrets do not justify the extraordinary relief of setting aside a jury verdict.

## ISSUES FOR REVIEW

1. Whether the district court correctly denied ABI summary judgment because the Sublicense does not unambiguously exclude Corona Hard Seltzer and Modelo Ranch Water.

2. Whether instructing the jury that it must look first at the words of the Sublicense, and declining to instruct on “plain meaning,” constitutes reversible error warranting a new trial.

3. Whether ABI’s challenge to the exclusion of certain correspondence with DOJ is subject to appellate review, and if so, whether that ruling constitutes reversible error warranting a new trial.

## STATEMENT OF THE CASE

### A. Factual Background.

1. Modelo and Constellation first define “Beer” when forming the Crown joint venture.

In 2007, Modelo and Constellation formed a joint venture, Crown Imports LLC (“Crown”), to import and sell the original Corona and Modelo products, along with any other “Beer,” in the U.S. The Crown agreements prohibited the parties from independently selling “Beer” in the U.S. without first offering that opportunity to the joint venture. (JA-2736-37 (JX-30H) § 3.3(b).) “Beer” needed to be defined broadly since neither party wanted their partner competing with Crown. But Constellation had separate wine and spirits businesses, which it wanted to operate independently. (JA-1775-79 (Tr.722:13-726:13).) So Constellation proposed a definition of “Beer” meant to encompass anything regulated as “beer” or distributed by U.S. beer companies, while excluding wine and spirits. (*Id.*)

Constellation wrote the first drafts of the Crown agreements in April 2006. (JA-2374 (JX-11).) Those drafts 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.” (JA-2381 (JX-11).) Constellation used terminology from federal statutes: “beer, ale, porter, stout” from the Internal Revenue Code (“IRC”) (SPA-26), and “malt beverages” from the Federal Alcohol Administration Act (“FAA”), 27 U.S.C. § 117(a). (JA-1775-77 (Tr.722:13-724:23).) The Alcohol and Tobacco Tax and Trade Bureau (“TTB”) uses these two statutory definitions to regulate nearly every aspect of the U.S. beer industry, *e.g.*, 27 C.F.R. §§ 7, 25, 27, *et seq.*, including materials for the production of beer (SPA-30). Constellation removed statutory alcohol-by-volume specifications to accommodate for non-alcoholic products, and also removed all references to ingredients. (JA-1775-77 (Tr.722:13-724:23).) Constellation added expansive language—“any other versions or combinations”—to ensure the definition covered all products distributed and sold by U.S. beer companies like Crown. (*Id.*)

When circulating these first drafts to Modelo, Constellation explained in writing that it had “grounded many definitions and concepts on the applicable U.S. Internal Revenue Code.” (JA-2374 (JX-11).) Modelo’s lawyer, David Mercado, testified that Constellation later told him that “the definition [of ‘Beer’] was from the Internal Revenue Code.” (JA-1718 (Tr.563:9-14).) Constellation’s position never changed, nor did

the definition of “Beer.”

Modelo never communicated its interpretation of “Beer.” Mercado testified that, when he was told the definition of “Beer” was from the IRC, he did not know what that meant. (JA-1705 (Tr.536:20-23); JA-1718-19 (Tr.563:9-564:1).) Nevertheless, Mercado claimed he told Constellation that Modelo “would not be prepared to incorporate” the IRC, but he was “happy to look at the words, and if the plain meaning of the words reflects what Modelo thinks beer is, I’m sure it will be fine.” (JA-1707 (Tr.538:5-9).)<sup>1</sup> Mercado did not claim to have told Constellation “what Modelo thinks beer is,” never mind that the definition of “Beer” implicitly required malt. After this conversation, Mercado “look[ed] up the definition” of “beer” in the IRC for the first time. (JA-1709 (Tr.540:5-18).)

Modelo then accepted Constellation’s definition of “Beer.” Despite agreeing to review Constellation’s proposal with his client, and after reviewing the IRC, Mercado never discussed the definition of “Beer” with Constellation again. (JA-1711-12 (Tr.542:17-543:7).) Nor did Mercado

---

<sup>1</sup> Contradicting this testimony, Mercado also claimed the parties agreed “Beer” includes malta, a non-alcoholic soft drink. (JA-1700 (Tr.531:17-23).)

paper his supposed objection to Constellation's proposal. (JA-1717-19, SA-92 (Tr.561:10-564:7).) In fact, Modelo never revised Constellation's definition of "Beer" (JA-3018 (PX-56 (Modelo revisions))), which appears in the executed Crown agreements (JA-2725 (JX-30H)).

2. DOJ sues to enjoin ABI's proposed acquisition of Modelo.

In 2012, ABI agreed to acquire Modelo. Anticipating an antitrust challenge, ABI negotiated a "fix-it-first" deal to sell Modelo's stake in Crown to Constellation, along with a ten-year license to distribute Modelo's portfolio in the U.S. (JA-1604 (Tr.275:1-21); JA-1737 (Tr.651:12-20).) Under this deal, Constellation would have no production capacity or innovation rights. (JA-1737-38 (Tr.651:10-652:9).)

In January 2013, DOJ sued to enjoin ABI's acquisition of Modelo. (JA-3548 (DX-491).) DOJ alleged that ABI's "fix-it-first" deal was insufficient to protect competition because Constellation would "remain[] simply an importer," would "acquire no Modelo brands or brewing facilities," and would "depend on ABI for its supply." (JA-3551 (DX-491).)

ABI anticipated DOJ's lawsuit but had no interest in litigation. ABI told DOJ it would go back and negotiate with Constellation "[a] complete divestiture to Constellation/Crown of Modelo's U.S. brands that

would give Crown a perpetual brand license with no right of termination such that Crown will fully own the business.” (JA-2367 (JX-6).)

3. ABI and Constellation negotiate all key terms in the Sublicense in February 2013.

ABI and Constellation then negotiated that sale of Modelo’s U.S. business. (JA-3476-77 (DX-106); JA-3581 (DX-604).) To carve out Modelo’s U.S. business while preserving ABI’s acquisition of Modelo worldwide, the parties negotiated multiple agreements effecting, among other transactions, the sale of Modelo’s state-of-the-art brewery, Modelo’s U.S. import business (its interest in Crown), and a perpetual license to use Modelo brands to make products for sale in the U.S. (*Id.*; JA-1737-43 (Tr.651:10-657:10).) These negotiations occurred in February 2013, without DOJ involvement. (JA-1734-36 (Tr.647:7-14, Tr.649:20-22).) At this time, ABI and Constellation agreed on all at-issue provisions of the Sublicense.

Aspects of the Sublicense were based on an existing license ABI entered into with a third party regarding the Labatt brand. The parties used this agreement as a baseline because it allowed for innovation (JA-1754 (Tr.668:4-22)), and there are similarities between the Sublicense and the Labatt license (*compare* JA-3501 (DX-207 (Labatt Agmt.)

§ 2.4 (“Brand Extensions”)), *with* Sublicense § 2.15 (“Brand Extension Marks and Brand Extension Beers”). ABI and Constellation did not, however, use Labatt’s ingredient-based definition of “Beer,” which requires “starch.” (JA-3494 (DX-207 (Labatt Agmt. § 1.1)).) Malt contains starch. (JA-1573 (Tr.172:20-21).) Instead, they used the broad definition of “Beer” from the Crown agreements, which did not reference ingredients.

In February 2013, the parties discussed and agreed that Constellation would have broad rights to innovate new products to meet changing consumer tastes. These rights were critical for Constellation. Unlike the 2012 “fix-it-first” proposal under which Constellation would have only imported and sold products made by Modelo, Constellation now was buying a business, including a brewery, and would be manufacturing products in perpetuity. (JA-1743-44 (Tr.657:11-658:9).) So the parties discussed and agreed that “Beer,” when read with the Sublicense innovation provisions, was “sufficiently broad” to allow Constellation to “innovate the types of products [it] would need out into the future.” (JA-1745-48 (Tr.659:15-662:24).) ABI confirmed the definition of “Beer” allowed Constellation to make sweet and fruity products like Zima,



Mike's Hard Lemonade, and hard sodas—far from golden, hoppy beer. (*Id.*) When signing the Sublicense, ABI's counsel commented “now you guys are probably going to run off and make a product that's got strawberry flavoring in it.” (JA-1749 (Tr.663:18-25).)

ABI and Constellation also negotiated limitations on Constellation's innovation rights. ABI proposed severe restrictions—that Constellation's innovations had to have a “physical aroma” and “taste[] consistent with other Modelo brands.” (JA-1757-58 (Tr.671:20-672:13); *see also* JA-2596-97 (JX-21) (draft Sublicense).) Constellation rejected this proposal. Instead, the parties agreed to limited “Quality Standards”: Constellation's new products must merely be “merchantable,” compliant with “regulatory standards,” and “free from microbiological defects.” (Sublicense §§ 1.1, 2.15(a).) In February 2013, Constellation also agreed “not [to] use any distilled spirits as an ingredient” unless Modelo provided the recipe. (JA-240.) At no point, in February 2013 or thereafter, did the parties discuss a malt or hops rule. (JA-1756-57 (Tr.670:25-671:2).)

While malt and hops were not discussed during Sublicense negotiations, rules regarding these ingredients were negotiated for ABI's

obligations under the Transition Services Agreement (“TSA”), an agreement integrated with the Sublicense. (Sublicense § 9.6.) There, ABI agreed to provide “aluminum cans, glass, malt, crowns and caps, hops, corn starch, can lids, Cartons and Yeast” for the manufacture of Modelo’s original brands for three years to ensure business continuity. (JA-3407 (PX-205 (TSA § 2.01(e))).) But ABI requested, and the parties explicitly agreed, that ABI’s obligation to provide “malt” and “hops” did not apply to Constellation’s future “innovation[s].” (JA-3407 (PX-205 (TSA § 2.01(e)(ii))); JA-1765 (Tr.700:3-15).)

4. DOJ reviews ABI’s and Constellation’s new transaction and dismisses its lawsuit.

After ABI and Constellation reached their new agreement, they presented executed contracts to DOJ. (JA-155.) Both parties’ antitrust counsel testified that, during its review, DOJ asked whether Constellation could make “Corona Green Tea.” (JA-1942 (Tr.1313:5-24); JA-1945 (Tr.1316:21-24).) ABI responded that Constellation could innovate “Corona Green Tea” in the U.S. (JA-1942 (Tr.1313:5-24).) Green tea is obviously not a product made with malt and hops.

The parties also revised certain provisions of the Sublicense during DOJ’s review. For example, Constellation can now use distilled spirits if

ABI does so first in Mexico or Canada. (Sublicense §2.15(c).) The parties also agreed to detailed rules on sharing and preserving Modelo’s “mother Yeast.” (*Id.* § 2.21.) No revisions restricted the innovation rights Constellation had bargained for with ABI in February 2013.

DOJ then filed a proposed final judgment to resolve its lawsuit. (JA-995.) There, DOJ defined “Beer” as “fermented alcoholic beverages,” made from “water, a type of starch, yeast, and a flavoring.” (JA-998.) As ABI’s antitrust expert testified before trial, the definition of “Beer” in the “sublicense is broader than the final judgment.” (JA-1169 (Dep.Tr.150:9-17); *see also* JA-89-90 ¶25.) While DOJ included ingredients (such as starch) in its definition of “Beer,” the parties did no such thing in the Sublicense.

The resolution of DOJ’s lawsuit allowed ABI to acquire Modelo and complete its sale of Modelo’s U.S. business to Constellation.

5. Constellation releases Corona Refresca.

In 2018, Constellation introduced an innovation called Corona Refresca. Corona Refresca is brewed from malt, but the malt is filtered out to create a neutral alcohol base that is flavored to taste like fruit. (JA-1916-17 (Tr.1220:6-1221:6).) ABI alleged Corona Refresca is a

“seltzer look-alike” (JA-95 ¶40), yet agrees it is “Beer” under the Sublicense (JA-3595-96 (DX-853A)).

6. Constellation exercises its broad innovation rights and releases Corona Hard Seltzer.

By 2019, hard seltzers brewed by beer companies like ABI had surged in popularity. Sometimes brewers use malt as a fermentable source of alcohol, sometimes they use sugar, and sometimes they combine the two. (JA-1915 (Tr.1219:14-16); JA-374-75.) Malt hard seltzers cannot be labeled “Gluten Free,” whereas sugar-based versions can be. (SPA-31; JA-1858 (Tr.1072:16-22); JA-1898-99 (Tr.1145-46); JA-1906 (Tr.1200:14-20).) Otherwise, the choice between fermentables is immaterial—whatever fermentable the brewer uses, hard seltzers are filtered to create a neutral alcohol base. (JA-1895-97 (Tr.1137:19-1139:12); JA-1916-19 (Tr.1220:21-1223:1); *see also* JA-372-73 ¶68; JA-906 ¶62.) Flavors are added to create a light, refreshing product. (JA-1589 (Tr.188:10-22).)

Hard seltzers are not the only beers that are sometimes made without malt and without hops. Other beers are also sometimes made without malt. (JA-1905 (Tr.1199:3-9); JA-1908-09 (Tr.1202:11-1203:10); JA-463 (Tr.15:16-21).) ABI itself sells as “beer” a product called

Redbridge, a gluten-free beer made from fermented sorghum. (JA-1906 (Tr.1200:3-13).) Beers, including Corona Extra, often use a combination of malt and other fermentables. (JA-3407 (PX-205 (TSA § 2.01(e))) (“corn starch”).) And there is a category of beer made without hops. (JA-1591-92 (Tr. 209:8-210:7); JA-371 ¶46; JA-887 ¶23.) The use of fermentables other than malt, and the absence of hops, is permitted by federal regulations governing materials for the production of beer. (SPA-30.)

To keep up with other beer businesses, Constellation released Corona Hard Seltzer in February 2020. Corona Hard Seltzer is brewed with water, hops, sugar, and the Modelo “mother Yeast.” (JA-1843 (Tr.1032:5-19); JA-1915-16 (Tr.1219:1-1220:2).) After fermentation, Corona Hard Seltzer is filtered to a neutral alcohol base and flavored. (JA-1916 (Tr.1220:6-25); JA-1919-20 (Tr.1223:25-1224:7).) Because Corona Hard Seltzer is made with sugar, it is “beer” under the IRC and TTB definition. (JA-3538 (DX-376 (TTB approving Corona Hard Seltzer as an “IRC Beer”)).) Every can of Corona Hard Seltzer states it is “BEER.” (JA-3576 (DX-550); JA-338-43.)<sup>2</sup>

---

<sup>2</sup> Modelo Ranch Water was released in 2022 and is made, labelled, and classified the same way as Corona Hard Seltzer. Both products are referred to generally as “Corona Hard Seltzer.”

Constellation considered different fermentables for Corona Hard Seltzer. Constellation first developed a malt-based Corona Hard Seltzer (JA-1857 (Tr.1070:4-6)), which ABI agrees would be licensed (*e.g.*, Br.29; JA-1206 (“Constellation has always had an allowable path under the Sublicense: malt-based hard seltzers.”)). Some within Constellation believed the malt-based prototype had an off taste, though objective taste panels disagreed. (JA-1891-96 (Tr.1132:12-1138:22).) Instead of refining the production process, Constellation switched to sugar so it could market Corona Hard Seltzer as “Gluten Free.” (JA-1900 (Tr.1147:14-24).) Thus, the sugar-based Corona Hard Seltzer on the market today was developed to be the same product as the malt-based version ABI concedes would be licensed.

ABI waited for eight months while Corona Hard Seltzer competed against its sugar-based Bud Light Seltzer. Then, in August 2020, ABI sent Constellation a letter claiming Corona Hard Seltzer is not licensed. (JA-928.)

7. DOJ takes no position on this dispute.

Constellation informed DOJ of ABI’s letter. DOJ decided not to prosecute ABI, concluding that “the definition of ‘Beer’ within the Final

Judgment does not ... encompass Corona Hard Seltzer.” (JA-1292.) DOJ’s decision was limited by “the information available” to it at the time and was made under the “clear and convincing standard.” (*Id.*) Regarding the parties’ dispute here, DOJ was clear: “The Division takes no position on whether Corona Hard Seltzer is a permissible brand extension under the sublicense agreement, which was negotiated between ABI and Constellation.” (JA-1293.)

**B. Relevant Procedural History.**

1. ABI’s motion for summary judgment.

Below, ABI argued for summary judgment because dictionary definitions of three words in the Sublicense—“beer,” “malt,” and “versions”—supposedly exclude Corona Hard Seltzer. (JA-792-94.) The district court denied ABI’s motion, reasoning that “dictionaries, however important, do not resolve this case.” (SPA-5.) The district court held that “the sublicense as it relates to [Corona Hard Seltzer] is ambiguous.” (*Id.*)

2. Key evidentiary issues.

Before trial, Constellation moved to exclude evidence related to DOJ’s decision in 2020 not to prosecute ABI under the final judgment pursuant to Rules 401-403. (SA-54.) Constellation argued this evidence was not relevant since, among other reasons, DOJ took no position on

this dispute but addressed only the narrower definition of “Beer” in the final judgment. Furthermore, admitting this evidence substantially risked the jury giving undue weight to DOJ’s decision, and would necessitate a trial-within-a-trial regarding DOJ’s process and conclusions. The district court granted Constellation’s motion under Rules 401-402 and, alternatively, under Rule 403. (SPA-16-17.) Despite challenging other *in limine* rulings at trial, ABI never revisited this ruling.

Constellation also moved to exclude ABI’s antitrust expert, Kenneth Elzinga. (SA-1.) The district court granted the motion in part, but allowed testimony on certain DOJ-related topics, subject to a limiting instruction that such evidence is offered to show “the context in which the Sublicense came into being.” (SPA-21.) ABI elected not to call Elzinga at trial.

Constellation also moved to exclude dictionaries under Rules 401-403. (SA-75.) Constellation argued that admitting vague and inconsistent dictionaries that no party consulted during negotiations would be confusing, waste time, and improperly risk suggesting to the jury that dictionaries control this dispute. The district court granted



Constellation's motion. (SPA-14-15.)

At trial, ABI introduced a request for admission containing a *Webster's* dictionary definition of "beer" anyway. (JA-3458 (PX-471).) That definition was admitted over Constellation's objection. (JA-1795-97 (Tr.787:7-789:8).) ABI made no effort to use dictionaries again at trial and did not ask the district court to revisit its *in limine* ruling.

ABI moved *in limine* to exclude industry usage regarding the term "beer." (SA-27.) Despite now claiming "beer" has one definite and precise meaning, ABI argued there are "many inconsistent purported understandings of 'beer' in the industry" and so "none provides the 'fixed and invariable' definition that is required" for trade usage to be admitted into evidence. (*Id.*) The district court granted this motion (SPA-6-11), prohibiting trade usage testimony regarding "beer" from any party's expert (SPA-11 n.15; JA-1505 (Tr.46:17-25)).

ABI also moved *in limine* to exclude evidence that, in 2012, Modelo presented, and the Crown joint venture accepted, the opportunity to sell a malt-free, hops-free product called Somersby Hard Cider. (SA-51.) ABI moved under Rule 403, arguing that Crown's "principal purpose" included the sale of "Beer" and "any other lawful business," so the fact

that Crown sold Somersby Hard Cider did not necessarily mean it was “Beer.” (*Id.*) Constellation responded that the joint venture non-compete clause only obligated Modelo to present this opportunity to Crown, and share profits with Constellation, if the product was “Beer.” (SA-85.) That Modelo offered this malt-free, hops-free product to Crown is evidence Modelo did not believe there was a malt requirement in “Beer.” (*Id.*) The district court denied ABI’s motion. (SPA-12.)

At trial, ABI renewed its objection to the Somersby Hard Cider evidence. (JA-1809-10 (Tr.843:25-844:11).) This time, the district court sided with ABI. (JA-1811-16 (Tr.845:3-850:23).) When Constellation raised the pre-trial ruling, the district court explained: “[A]ny *in limine* ruling is inherently tentative and subject to change at trial.” (JA-1816 (Tr.850:17-18).) ABI never revisited the *in limine* ruling it now challenges on appeal.

### 3. Jury instructions and the verdict.

The district court issued a proposed charge after considering both parties’ proposed instructions submitted prior to trial. The district court then refined its instructions at the charge conference, accepting the majority of ABI’s proposals while rejecting most Constellation proposals.

(JA-1949-78 (Tr.1323:4-1352-25).)

On dictionaries, the district court followed ABI's proposals to the word. Regarding the *Webster's* definition in evidence, ABI's counsel waived its appellate argument at trial, telling the district court: "I don't have any objection to [the instruction:] you are to ignore that reference to the dictionary." (JA-1958-59 (Tr.1332:22-1333:12).) Instead, ABI asked the district court not to instruct the jury "to put out of your mind any dictionary definition of beer of which you may be aware." (JA-1958-60 (Tr.1332:22-1334:20).) The district court agreed not to give that instruction. (*Id.*)

ABI also suggested the district court "ought to include a sentence [that] you can consider your common and ordinary understanding" of words in the Sublicense—in ABI's words, a reminder to the jury that "Language is language. English is English." (JA-1959 (Tr.1333:13-17); JA-1962 (Tr.1336:4-5).) Instead, the district court instructed the jury that "the cardinal principle for the construction and interpretation of contracts is that it's the intention of the parties ... that control" and "[d]etermination of the intentions of the parties is accomplished by

looking first at the words of the contract itself.” (JA-2052 (Tr.1468:16-20).)

The jury then deliberated and returned a unanimous verdict in Constellation’s favor. (SPA-23.)

### **STANDARD OF REVIEW**

This Court reviews the denial of summary judgment *de novo*. *Fischer v. Aetna Life Ins. Co.*, 32 F.4th 124, 135 (2d Cir. 2022). Summary judgment is warranted in a contract case only where “the contractual language ... is found to be wholly unambiguous and to convey a definite meaning.” *Topps Co. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 68 (2d Cir. 2008).

This Court reviews *de novo* whether jury instructions are legally correct. *Lore v. Syracuse*, 670 F.3d 127, 156 (2d Cir. 2012). An erroneous jury instruction “misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.” *Id.* Otherwise, district courts have “discretion in the style and wording of jury instructions.” *Parker v. Sony Pictures Ent., Inc.*, 260 F.3d 100, 106 (2d Cir. 2001).

Erroneous instructions are grounds for a new trial only when the appellant identifies an error that is “prejudicial in light of the charge as

a whole.” *Lore*, 670 F.3d at 156. Erroneous instructions are not prejudicial “when [this Court] is persuaded [they] did not influence the jury’s verdict.” *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 56 (2d Cir. 2012). “An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.” *Lore*, 670 F.3d at 156. A new trial is not warranted if the instructions, “read as a whole, presented the issues to the jury in a fair and evenhanded manner.” *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 152 (2d Cir. 2014).

Evidentiary rulings are reviewed for “clear abuse of discretion.” *Parker v. Reda*, 327 F.3d 211, 213 (2d Cir. 2003). Erroneous evidentiary rulings warrant a new trial only when the ruling “was so clearly prejudicial to the outcome of the trial that” this Court finds the jury verdict “seriously erroneous” or “a miscarriage of justice.” *Id.*

## SUMMARY OF ARGUMENT

I.A. ABI is not entitled to judgment as a matter of law. To prevail, ABI must show that the Sublicense is wholly unambiguous, containing a definite and precise meaning that provides no reasonable basis for encompassing Corona Hard Seltzer. When reviewing contracts as a matter of law, words are not considered in isolation; instead,

contracts are reviewed as a whole and in light of the parties' contracting purpose.

I.B. ABI fails to establish a single plain meaning of either "beer" or "malt beverages" that would unambiguously exclude Corona Hard Seltzer. Some of ABI's dictionaries say "beer" is only "usually" made from malt and hops, meaning that beer is sometimes made without either. Still more provide that "beer" can be brewed from sugar, as Corona Hard Seltzer is, and without hops. And ABI identifies no dictionary defining "malt beverages." The words "beer" and "malt beverages" can also reasonably be interpreted by reference to prevailing federal definitions. Under federal law, Corona Hard Seltzer is beer. Since ABI fails to establish one definite and precise meaning for these words, and they can reasonably be construed to encompass Corona Hard Seltzer, ABI is not entitled to judgment as a matter of law.

I.C. The expansive language "any other versions" in the definition of "Beer" forecloses ABI's argument that the Sublicense unambiguously excludes Corona Hard Seltzer. ABI's interpretation—that the language "any other versions" is superfluous, and limited to products that are already "beer" or "malt beverages" under ABI's cherry-

picked definitions—conflicts with the dictionaries ABI itself identifies, not to mention any natural reading of the definition of “Beer” and the canon against superfluity. “Beer” is, at least, reasonably construed to cover Corona Hard Seltzer.

I.D. Finally, ABI’s interpretation relies on isolated words while ignoring the Sublicense as a whole. The Sublicense grants Constellation “sole discretion” to develop “entirely new Recipes” with new ingredients, and to substitute “any particular ingredient” in existing Recipes. Malt and hops are not included anywhere as exceptions. By contrast, other ingredients, such as yeast and distilled spirits, are explicitly covered in the Sublicense. Similarly, the TSA, which is integrated into the Sublicense, required ABI to provide Constellation “malt” and “hops” to manufacture existing Modelo products for three years. That obligation expressly did not apply to Constellation’s “innovation[s].” In light of these careful limitations, the absence of any malt or hops requirement in the Sublicense can reasonably be construed as intentional.

II.A. ABI’s claim that it is entitled to a new trial because the jury was not instructed to determine and apply plain meanings fails. It

would have been legal error for the district court to give that instruction since the plain meaning rule does not apply when a contract is ambiguous and there is relevant extrinsic evidence.

II.B. The district court did not mislead the jury on the law. The jury was charged to look first to the words of the contract, which necessarily meant the jury was told to consider its common understanding of those words, if any. The jury was then invited to consider extrinsic evidence. Those instructions, among others, provided the jury with accurate legal guidance.

II.C. ABI fails to show prejudice arising from the jury instructions. In making its prejudice argument, ABI exclusively cites extrinsic evidence, which is not relevant to the plain meaning doctrine or jurors' common understandings. ABI says its extrinsic evidence showed the parties intended to adopt ABI's plain meaning argument, but the jury apparently disagreed; they were expressly told to consider extrinsic evidence of intent. The jury's disagreement with ABI's characterization of its evidence is not surprising given that ABI did not establish plain meanings of the words in the Sublicense or that the parties adopted such meanings. Both parties argued ordinary understandings to the jury



during summation, so it is hard to see how ABI can claim prejudice on appeal. Additional instructions would not have swayed the verdict.

III.A. ABI is not entitled to a new trial based on the *in limine* exclusion of DOJ's correspondence. To preserve challenges to evidentiary rulings requiring the balancing of probative value and prejudice, appellants must obtain a definitive or unequivocal ruling. DOJ's correspondence was excluded under Rule 403 before trial and, at trial, the district court stated all *in limine* rulings were tentative. Yet ABI chose not to seek a ruling on this issue at trial, foreclosing appellate review.

III.B. ABI also cannot show the district court clearly abused its discretion by excluding DOJ's correspondence. That ruling comports with the overwhelming weight of authority excluding evidence of this nature due to its minimal (if any) probative value as compared to the substantial risks of prejudice, confusion, and delay attendant to introducing government agency decisions into evidence.

III.C. ABI's claim that this evidentiary ruling was prejudicial relies on a counterfactual recitation of Constellation's arguments at trial. At trial, both parties introduced evidence regarding DOJ from 2013 to

show the context in which the Sublicense came into being and contemporaneous statements made by the parties. Constellation did not suggest DOJ believed Corona Hard Seltzer was licensed. Had Constellation done so, ABI would no doubt have attempted to admit DOJ's correspondence.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT TO ABI.

ABI's dictionaries and *ipse dixit* regarding the supposed plain meaning of four words in the Sublicense—"beer," "malt beverages," and "versions"—fail to establish that the Sublicense as a whole unambiguously excludes Corona Hard Seltzer.

#### A. New York contract law does not place dictionary definitions of individual words over the expressed intent of the parties found in the contract as a whole.

ABI faces a significant burden in asserting that the Sublicense unambiguously excludes Corona Hard Seltzer. ABI must demonstrate that the Sublicense is "wholly unambiguous" in excluding these beverages. *Lucente v. Int'l Bus. Mach. Corp.*, 310 F.3d 243, 257 (2d Cir.

2002).<sup>3</sup> “No ambiguity exists” only where “contract language has a definite and precise meaning, unattended by danger of misconception ... and concerning which there is no reasonable basis for a difference of opinion.” *Sayers v. Rochester Tel. Corp.*, 7 F.3d 1091, 1095 (2d Cir. 1993). If contract terms “suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement,” then “the agreement is ambiguous.” *Gary Friedrich Enters., LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 313-14 (2d Cir. 2013); *see also Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). Ambiguity can arise from the language itself or from inferences that can be drawn from that language. *Alexander & Alexander Servs., Inc. v. Certain Underwriters at Lloyd’s*, 136 F.3d 82, 86 (2d Cir. 1998). All ambiguities and inferences must be resolved in Constellation’s favor. *Topps*, 526 F.3d at 68.

ABI contends the Sublicense is unambiguous by stressing the “plain-meaning” doctrine under which courts “commonly ‘refer to the dictionary.’” (Br.26.) This assertion fails several times over. As an initial

---

<sup>3</sup> Internal citations, alterations, quotations, and subsequent history are omitted, and emphasis is added, unless otherwise stated.

matter, ABI ignores the “primary objective” of New York contract law, which is “to give effect to the intent of the parties as revealed by the language they chose to use.” *Seiden*, 959 F.2d at 428. In so doing, courts “do not consider particular phrases in isolation, but rather interpret them in light of the parties’ intent as manifested by the contract as a whole.” *Marvel*, 716 F.3d at 313.

Furthermore, New York courts do not place undue reliance on dictionaries. As this Court has explained:

[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that [contracts] always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

*Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.); *see also Chemung Canal Tr. Co. v. Montgomery Ward & Co.*, 163 N.Y.S.2d 332, 337-38 (3rd Dep’t 1957). Indeed, contract terms do not always have one plain meaning found in dictionaries. *Frigaliment Importing Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Supp. 116, 117-18 (S.D.N.Y. 1960) (Friendly, J.) (finding “chicken” ambiguous after consulting dictionaries); *Graev v. Graev*, 898 N.E.2d 909, 916 (N.Y. 2008). Dictionaries are “just a sampling of usages, with no pretense to exhaustiveness or to sensitivity to the full

range of nuances that context lends to meaning.” *Unelko Corp. v. Prestone Prod. Corp.*, 116 F.3d 237, 240-41 (7th Cir. 1997) (Posner, J.). Courts applying New York law thus often disregard dictionaries when the definitions are vague, inconsistent, or contain multiple meanings. *E.g.*, *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 77 (2d Cir. 2004); *Au New Haven, LLC v. YKK Corp.*, 2022 WL 595951, at \*4 (S.D.N.Y. Feb. 26, 2022); *InspiRx, Inc. v. Lupin Atlantis Holdings SA*, 554 F. Supp. 3d 542, 554-55 (S.D.N.Y. 2021); *Sincoff v. Liberty Mut. Fire Ins. Co.*, 183 N.E.2d 899, 901 (N.Y. 1962). Indeed, conflicting dictionary definitions “point toward ambiguity.” *Cont’l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 513 (N.Y. 1993).

Notwithstanding these principles, ABI offers a smorgasbord of dictionary definitions for “beer” and say-so on the supposed plain meaning of “malt beverage,” to argue that Corona Hard Seltzer is neither of those beverages. (Br.28.) That effort, and ABI’s other attempts to deny ambiguity in the Sublicense, fail.

**B. ABI fails to establish one definite and precise plain meaning of “beer” and “malt beverages” that excludes Corona Hard Seltzer.**

ABI contends that “every available dictionary” defines “beer” as “a

fermented alcoholic beverage brewed from malt and flavored with hops.” (Br.29-30.) Not so. Two of ABI’s own selected dictionary definitions provide “beer” is “usu[ally]”—as in, not always—“made from malted cereal grains” and “flavored with hops.” (*Id.*; see also JA-826; JA-830; JA-1645 (Tr.340:14-18).) Since these *Merriam-Webster’s* definitions do not mandate malt or hops, they neither exclude Corona Hard Seltzer nor convey ABI’s proposed definite and precise meaning.

Ironically, ABI disputes the natural reading of these definitions. ABI contends that what Merriam and Webster really meant by “usually” is that “beer” must *always* be made with “malted cereal grains” or “malted non-cereal grains.” (Br.38-39.) ABI offers no basis for this self-serving interpretation. Naturally read, “usually” modifies all the terms that follow. See *Flores-Figueroa v. U.S.*, 556 U.S. 646, 650 (2009). And beer is, in fact, sometimes not made with malt and sometimes not flavored with hops. (Factual Background § A.6.) In any event, that the meanings of the *Merriam-Webster’s* definitions are apparently up for debate confirms “beer” in the Sublicense does not have one definite and precise meaning.

ABI’s other dictionary definitions of “beer” underscore why

dictionaries do not provide one definite and precise meaning for the term. Some definitions do not require malt. (Br.30 (*Random House* definition, requiring “cereals,” whether malted or unmalted, which conflicts with ABI’s self-serving interpretation that *Merriam-Webster’s* requires malting but not “cereal[s]” (Br.38-39)); JA-851.) Some suggest sugar is required. (JA-861.) Others do not require hops. (*E.g.*, JA-836; JA-845.) Still more do not require bitterness. (JA-840; JA-848; JA-851; JA-855; JA-861; JA-863.)

Some of ABI’s dictionaries also contain other definitions of “beer” that do not mention malt or hops. *Random House*, for example, provides a second definition of “beer,” covering “beverages, whether alcoholic or not, made from roots, molasses or *sugar*, yeast, etc.” (JA-836; *see also* JA-826; JA-833; JA-840; JA-845.) ABI’s only response is to proclaim that “no one believes the parties intended” such “second[ary] definitions in the Sublicense.” (Br.40.) Much more clearly, no one believes two sophisticated participants in the alcohol beverage industry defined “beer” by reference to dictionaries in the first place; they did not. (SPA-15.) It takes more than *ipse dixit* to establish that “beer” has one “definite and precise meaning.” *Sayers*, 7 F.3d at 1095.

Furthermore, at least one prominent dictionary defines “beer” explicitly to include beverages made from sugar and without hops. (JA-1201 (*Oxford English Dictionary* (2d ed. 1989) (“beer” is “[a]n alcoholic liquor obtained by the fermentation of malt (*or other saccharine substance*), flavoured with hops *or other aromatic bitters*”)).<sup>4</sup> ABI dismisses this definition as “unusual” because it has “not been updated” since 1888. (Br.39.) What is “unusual” is to disclaim a dictionary definition because it has remained the same for a century—which would presumably *burnish* the definition’s authoritative quality.<sup>5</sup> ABI’s response hardly bolsters its assertion that the meaning of “beer” is “wholly unambiguous.” *Lucente*, 310 F.3d at 257.

ABI’s successful motion to exclude trade usage of “beer” further undermines its plain meaning argument. (SA-27.) As the district court

---

<sup>4</sup> ABI claims Corona Hard Seltzer is not “flavoured with hops” or “aromatic bitters” (Br.39), yet neither is required by the Sublicense (*e.g.*, Br.28). Moreover, Corona Hard Seltzer is brewed with hops; their role in the brewing process, and what ingredients add bitterness, was disputed. (*E.g.*, SA-100 (Tr.1239:25-1241:10); JA-2955-56.) ABI forfeited challenges to fact-related issues by not moving for judgment as a matter of law “before the case [wa]s submitted to the jury.” Fed. R. Civ. P. 50(a); *Omega SA v. 375 Canal, LLC*, 984 F.3d 244, 251-52 (2d Cir. 2021).

<sup>5</sup> Like *Oxford English*, the federal definition of “beer,” used nationwide today, has included beer made from sugar since 1869. 68 Fed. Reg. 14292, 14294.



ruled at trial: “Testimony about trade usage [of the word ‘beer’] is out unless somebody is going to come in and say that there is a fixed and invariable usage. Nobody has said that in this case.” (JA-1505 (Tr.46:11-25).) ABI cannot below argue “beer” has no settled meaning within the industry, while arguing on appeal the word has one definite and precise plain meaning in the Sublicense. *See Sincoff*, 183 N.E.2d at 900-02.

ABI repeatedly invokes *Chalet Liquors, Inc. v. Supervalu, Inc.*, 2004 WL 885356 (Minn. Ct. App. Apr. 27, 2004), for the proposition that “beer is a fermented drink made with malt and flavored with hops.” (*E.g.*, Br.3.) *Chalet Liquors* is an unpublished Minnesota state court decision, addressing a contract governed by Minnesota law, that no other court has cited for that definition. The analysis in *Chalet Liquors* relied on inconsistent dictionaries and never concluded that “beer” had a “definite and precise meaning,” as New York law requires. (Argument § I.A.) Moreover, under New York law, courts interpret terms in light of the contract as a whole and consistent with the parties’ purpose. *Marvel*, 716 F.3d at 313. In *Chalet Liquors*, “beer” was used narrowly in a land-use restriction. 2004 WL 885356, at \*1. Here, “beer” is used in a contract effecting the sale of a business, in which Constellation is afforded broad

flexibility regarding ingredients and recipes. It is entirely reasonable to construe “beer” more broadly in this contract.

ABI’s “plain meaning” argument regarding “malt beverages” is likewise infirm. Having emphasized dictionary definitions of “beer,” ABI offers only *ipse dixit* for “malt beverages”—that “the essential characteristic of ‘malt beverages’ is malt.” (Br.29.) ABI’s inability to point to anything other than its own say-so indicates ambiguity as well. *E.g., Anheuser-Busch, Inc. v. Elsmere Music, Inc.*, 633 F. Supp. 487, 491 (S.D.N.Y. 1986) (finding ambiguity where “dictionaries and encyclopedias disclose[d] no definition that provide[d] guidance”).

Outside of dictionaries, “beer” and “malt beverages” reasonably can be construed by reference to their prevailing federal definitions. In *Hugo Boss Fashions, Inc. v. Federal Insurance Co.*, 252 F.3d 608, 618 (2d Cir. 2001), this Court held that where a contract “use[s] terms and concepts that are firmly rooted in federal law, and where there are no explicit signals to the contrary, [the Court] can presume that the prevailing federal definition controls.” *See also Beazley Ins. Co., Inc. v. ACE Am. Ins. Co., et al.*, 880 F.3d 64, 69 (2d Cir. 2018); *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 77-78 (2d Cir. 2013). Here, the Sublicense

definition of “Beer” uses the same four words as the IRC (“beer, ale, porter, stout”). (SPA-26.) Unlike ABI’s dictionaries, the FAA defines “malt beverages.” 27 U.S.C. § 211(a)(7). The Sublicense does not contain any “explicit signals” rejecting this federal statutory regime. *Hugo Boss*, 252 F.3d at 618. Instead, this is the most reasonable explanation for the words “beer, ale, porter, stout, [and] malt beverages”—certainly more plausible than ABI’s claim that “ale, porter, stout” is random surplusage. (Br.21.)<sup>6</sup> Under this framework, Corona Hard Seltzer is “beer.” The product meets the federal definition of “beer” since it is made from sugar, a legal substitute for malt. (Factual Background § A.6.) Unsurprisingly, TTB has reviewed the formulas for Corona Hard Seltzer and determined it is “beer” under the IRC. (*Id.*)

---

<sup>6</sup> Since the Sublicense includes the IRC language “beer, ale, porter, stout,” and the parties discussed the IRC during negotiations, the IRC “definition is [not] cherry-picked.” (Br.46 n.4.) Unlike the recent, post-Sublicense customs ruling cited by ABI (*id.*), the IRC definition has existed for over 150 years, and TTB uses it to regulate nearly every aspect of the industry nationwide; it is the “prevailing federal definition.” *Hugo Boss*, 252 F.3d at 618.

Constellation is not arguing that the IRC definition is “fixed and invariable” trade usage. (*Cf.* Br.47-48.) The presumption in favor of federal definitions does not require “complete unanimity,” *CGS*, 720 F.3d at 78, and applies even if there is no “established industry usage,” *Hugo Boss*, 252 F.3d at 618.

ABI argues that the Sublicense “says nothing ... about the IRC.” (Br.45.) But the presumption in favor of prevailing federal definitions applies in the *absence* of specific citations to law. *E.g.*, *Beazley*, 880 F.3d at 69. The Sublicense does not need to include statute citations for “Beer” to reasonably be construed this way.

ABI observes that the Sublicense “does *not* include the IRC language about malt substitutes.” (Br.46.)<sup>7</sup> But “Beer” omits *all* IRC language on ingredients and alcohol-by-volume requirements, including the IRC language “brewed or produced from malt.” (*See* SPA-26.) At best, ABI’s observation that the ingredient language from the IRC is not restated in the Sublicense raises a question of fact—whether the parties intended the defined term “Beer” to include products in addition to those meeting the IRC definition of “beer,” or only a subset of products meeting that definition. That question must be decided in Constellation’s favor. *Topps*, 526 F.3d at 68.

ABI cites *Dish Network Corp. v. Ace American Insurance Co.*, 21 F.4th 207 (2d Cir. 2021), to try to steer this Court back to dictionaries.

---

<sup>7</sup> The original Modelo products, which are indisputably “Beer,” rely on this “substitutes” language to incorporate fermentables other than malt, such as “corn starch.” (JA-3407 (PX-205 (TSA § 2.01(e))).)

(Br.47.) There, this Court held that dictionary definitions of “broadcasting” established an unambiguous “plain and ordinary meaning,” while rejecting narrower legal meanings of that word. *Dish*, 21 F.4th at 213-15. But there, this Court found no potential ambiguity in the word “broadcasting” after consulting dictionaries. *Id.* at 213. By contrast, dictionary definitions of “beer” are vague, inconsistent, and sometimes expressly cover sugar-brewed products. Moreover, in *Dish*, “broadcasting” appeared alone, *id.* at 215, while the Sublicense defines “Beer” with multiple words from the IRC.<sup>8</sup>

Ultimately, “[w]ithout extrinsic evidence as to the parties’ intent, there is no way to assess the particular factors inherent in the dictionary meanings or [legal definitions that] the parties may have meant to embrace or emphasize.” *Graev*, 898 N.E.2d at 916. Since ABI fails to establish one definite and precise meaning for “beer” and “malt beverages” that excludes Corona Hard Seltzer, it is not entitled to judgment as a matter of law.

---

<sup>8</sup> This Court can affirm without deciding whether “Beer” must be interpreted by reference to federal law. It is ABI’s burden to establish the Sublicense is wholly unambiguous, which ABI has failed to do for reasons described herein.

**C. The broad language “any other versions” in the Sublicense’s definition of “Beer” does not definitely and precisely exclude Corona Hard Seltzer.**

The expansive phrase “any other versions” in the Sublicense independently confirms ABI was correctly denied summary judgment. Below, the parties offered two definitions of “version”: “a particular form of something differing in certain respects from an earlier form or other forms of the same type of thing” (*New Oxford Dictionary* 2055 (1st ed. 1998)), or a “form or variant of a type or original” (*Merriam-Webster’s Dictionary* 1390 (11th ed. 2003)). (JA-1063.) ABI extracts the phrase “particular form” from the first definition, while ignoring that versions “differ[] in certain respects from,” and are “variants of,” the original. ABI claims these dictionaries show the word “versions” is definitely and precisely limited to products already meeting its proposed definitions of “beer” and “malt beverages” in all respects. (Br.21, 36.) No dictionary, to Constellation’s knowledge, provides that “versions” must retain all defining characteristics of the original.

Simply, ABI’s interpretation reads out of the contract nearly every word of the definition of “Beer,” including the broad language “any other versions.” Interpretations rendering contract language superfluous are

to be avoided. *E.g.*, *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1065 (2d Cir. 1993). According to ABI, however, the broad language “any other versions” is limited to beverages that are also “beer” and “malt beverages,” as defined by ABI. (Br.32; *see also id.* at 29 (“[A] ‘version’ of a malt beverage is any form of a drink made with malt.”).)

ABI downplays the canon against superfluity, claiming “it is obvious that the drafters took a belt-and-suspenders approach” to reach “all types of malt beverages.” (Br.35.) ABI’s unsupported characterization of the drafters’ intent as “obvious” is pure question-begging. Regardless, ABI would have this Court reverse a jury verdict on the basis that two sophisticated parties wrote “beer, ale, porter, stout, malt beverages, and any other versions or combinations of the foregoing, including non-alcoholic versions of any of the foregoing,” when they supposedly meant to write “products made with malt.” That is an unreasonable interpretation, but at the very least, it is not the one “definite and precise” meaning of this language. *Sayers*, 7 F.3d at 1095.

To the contrary, the language “any other versions” in the definition of “Beer” can reasonably be read to cover beverages that differ in some ways from the supposed plain and ordinary “beer” and “malt beverages.”

Unlike ABI's interpretation, this gives meaning to the expansive language "any other versions" in the Sublicense definition of "Beer." Moreover, this interpretation aligns with the dictionary: "versions" may "differ[] in certain respects from," or be "variant[s]" of, these products. (JA-1063.) This is consistent with everyday usage—film "versions" of novels rarely share all common characteristics of the original; they are presented in a different medium, often with changes to plot, setting, and characters.

Constellation's interpretation of "versions" also makes sense in the context of the Sublicense definition of "Beer." "Beer" includes "*any* other versions" of "beer, ale, porter, stout" or "malt beverages." (Sublicense § 1.1.) Because "versions" is modified by the word "any," *all* conceivable versions or variants of "beer" and "malt beverages" are "Beer." *E.g.*, *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 419 (2d Cir. 2014). The words modifying "versions"—ignored by ABI—show that "versions" in the definition of "Beer" should not be limited to the same thing as "beer" and "malt beverage." *See Republic of Iraq v.*



*Beaty*, 556 U.S. 848, 856 (2009); *Deloitte*, 9 F.3d at 1065. Instead, as modified by “any other,” “versions” in the Sublicense is broad, and is reasonably construed to cover beverages that are similar to, but different in some ways from, ABI’s supposed plain and ordinary “beer” and “malt beverages.”

The inclusion of “non-alcoholic versions” in the definition of “Beer” supports Constellation’s interpretation. All of ABI’s preferred dictionary definitions say “beer” is “alcoholic.” (Br.30.) And if a “customer asked for a ‘beer,’ and the bartender brought” back a non-alcoholic beer, “no one would think the customer had gotten what” was ordered. (*Id.* at 4.) Because “non-alcoholic versions” of “beer” are expressly allowed under the definition of “Beer,” reading the earlier usage of “versions” in that same definition as limited to products with all supposed defining characteristics of “beer” and “malt beverages” cannot be correct.

ABI claims Constellation’s interpretation of “versions” renders “Beer” limitless. (Br.36-37.) To be sure, “Beer” is intentionally broad, consistent with the purpose of this contract, to sell a business. “Beer” was meant to cover products distributed and sold by U.S. beer businesses in perpetuity, while excluding products of the separate wine and spirits

businesses. (Factual Background § A.1.) So ABI's concern that "wine [and] vodka" are licensed is unfounded. (Br.35.) ABI, on the other hand, has never explained why an implicit malt requirement makes sense in light of the parties' contracting purpose and the Sublicense as a whole.

A reasonable interpretation of "any other version" of "beer" or "malt beverage" readily encompasses Corona Hard Seltzer. Even if ABI were right that "beer" has one plain meaning—an alcoholic beverage made with malt and hops—beer as defined by federal regulations is another "version" of "beer" and includes Corona Hard Seltzer. (Factual Background § A.6.) So too for the many dictionary definitions of "beer" that either expressly allow for sugar-brewed beer (*e.g.*, JA-836; JA-1201) or do not mandate the use of malt or hops (*e.g.*, JA-826; JA-830). Even if those beverages are not "beer" under ABI's interpretation, it is surely reasonable to consider them conceivable "versions" of beer.

Likewise, Corona Hard Seltzer can reasonably be construed as a "version" of a "malt beverage." ABI admits that malt-based seltzers are licensed malt beverages. (Br.29.) Sugar-based versions are meant to be the exact same product, except they can be labeled "Gluten Free." (Factual Background § A.6.) Corona Hard Seltzer is thus reasonably

construed as a gluten-free version of a malt beverage.

**D. The Sublicense as a whole does not unambiguously require malt or hops.**

ABI's argument also fails because it focuses myopically on specific words, while ignoring the Sublicense as a whole. New York law is clear that when reviewing contracts as a matter of law, courts "do not consider particular phrases in isolation, but rather interpret them in light of the parties' intent as manifested by the contract as a whole." *Marvel*, 716 F.3d at 313. The Sublicense as a whole does not unambiguously manifest an intent to limit Constellation's license to products made with malt.

*First*, Constellation's broad innovation rights make little sense with ABI's proposed malt requirement. For example, Section 2.15(a) provides Constellation with "sole discretion" to develop "entirely new Recipes" for "Brand Extension Beer[s]" like Corona Hard Seltzer. "Recipes" is defined to include "ingredients," "raw materials," "yeast cultures," and "brewing processes." (Sublicense § 1.1.) Read together, Constellation must use "yeast cultures" and "brewing processes," but otherwise can use "entirely new" "ingredients" and "raw materials," when developing Brand Extension Beers. Similarly, Section 3.3 of the Sublicense allows Constellation to use "functional substitutes or replacements" for "*any*

particular ingredients” in existing “Recipe[s].”<sup>9</sup> If the parties had a shared intent to limit Constellation’s broad discretion with a strict malt requirement, that limitation would of course be stated in light of these extraordinarily broad rights. “[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.” *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 91 N.E.3d 1186, 1193 (N.Y. 2017).

ABI counters that these provisions are limited to “Beer” (Br.41-45), but that is Constellation’s point. In *Collins v. Harrison-Bode*, 303 F.3d 429, 433-34 (2d Cir. 2002), for example, this Court found that a defined term was ambiguous after reviewing how that term was used throughout the contract. How “Beer” is used throughout the Sublicense is obviously relevant to its meaning.

Second, the Sublicense contains explicit rules regarding ingredients

---

<sup>9</sup> ABI incorrectly claims this provision is limited to “established products like Corona Extra.” (Br.43.) Section 3.3 applies to “Importer Products,” which include “Brand Extension Beer[s]” like Corona Hard Seltzer. (Sublicense § 1.1.) Moreover, even if Section 3.3 were limited to legacy products like Corona Extra, then ABI’s position must be that Constellation can substitute malt with sugar in Corona Extra, but is barred from doing the same when innovating its own “entirely new Recipes.” That interpretation is counter-contractual and nonsensical.

like distilled spirits and yeast, but omits rules regarding malt and hops, badly undercutting ABI's construction. Under New York law, express limitations on a subject indicate that omitted limitations were intentional. *E.g.*, *Canon Inc. v. Tesseron Ltd.*, 146 F. Supp. 3d 568, 578 (S.D.N.Y. 2015) (agreement limited licensee's rights to sublicense in two ways but did not "prohibit[] retroactive sublicensing[,] demonstrat[ing] that these sophisticated parties chose not to include" such restriction); *Saint Laurie Ltd. v. Yves Saint Laurent Am., Inc.*, 2015 WL 12991205, at \*9 (S.D.N.Y. Mar. 27, 2015); *see also VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 130 (2d Cir. 2001). Here, the Sublicense expressly limits Constellation's use of "distilled spirits as an ingredient in any Recipe for a Brand Extension Beer." (Sublicense § 2.15(c).) The parties also set forth detailed rules on the sharing and preservation of Modelo's mother "Yeast" (*id.* § 2.21), defined "Recipe" to include "yeast cultures" and "brewing processes" (*id.* § 1.1), and mandated compliance with "applicable regulatory standards" (*id.* §§ 1.1, 2.15(a)). But the Sublicense contains no mention of malt or hops requirements, further indicating ABI's interpretation is not unambiguous.

Third, the TSA defeats ABI's efforts to show the Sublicense

definition of “Beer” implicitly, but unambiguously, requires malt. Specific language in a separate contract provision is significant if that same language is omitted elsewhere. *E.g.*, *Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Cap., Inc.*, 821 F.3d 297, 306 (2d Cir. 2016). In the TSA, which is integrated with the Sublicense (Sublicense § 9.6), ABI agreed to provide Constellation with specific ingredients to make the original Modelo products for three years: “malt,” “hops,” “corn starch,” and “Yeast.” (JA-3407 (PX-205 (TSA § 2.01(e))).) The parties omitted any language about malt or hops in the Sublicense, which “is particularly significant” because those “sophisticated drafters ... employed precisely such language to establish” ABI’s ingredient obligations in the TSA. *Bank of N.Y. Mellon*, 821 F.3d at 306; *see also Topps Co.*, 526 F.3d at 68. In fact, not only did the parties omit malt and hops from the Sublicense, but in the TSA, the parties expressly provided that ABI’s malt and hops obligations did not apply to “innovation[s]” like Corona Hard Seltzer. (JA-3407 (PX-205 (TSA § 2.01(e))).) The clear inference to be drawn from this language—and one that must be drawn in Constellation’s favor, *Topps*, 526 F.3d at 68—is that ABI did not want to provide ingredients for Constellation’s innovations, which might not use malt or hops.

Confirming its disregard for the Sublicense as a whole, ABI requests a new trial if any of “beer,” “malt beverages,” or “versions” are unambiguous. (Br.48-49.) This is tantamount to a request that words in the defined term “Beer” be redacted so a second jury can consider its “particular [words] in isolation,” in contravention of New York law. *Marvel*, 716 F.3d at 313.

\*\*\*

Considering the broad language in the definition of “Beer,” the parties’ contracting purpose, and the Sublicense as a whole, if any party is entitled to judgment as a matter of law, it is Constellation. This Court can affirm on this basis alone. *Quick v. Am. Steel & Pump Corp.*, 397 F.2d 561, 564 (2d Cir. 1968).

## **II. THE JURY CHARGE WAS CORRECT AND DID NOT PREJUDICE ABI.**

### **A. ABI’s “plain meaning” instruction would have misinformed the jury on New York contract law.**

ABI’s argument that the district court erred by not instructing the jury that “it needed to determine what the ordinary meaning is of ‘beer,’ ‘malt beverages,’ and ‘versions’ of those drinks” (Br.54; *see also id.* at 51-52, 57) is without merit. “Even in a plain meaning jurisdiction,” the jury does not assign plain meanings to contracts; instead, “[i]t is for the court

to say whether there is a ‘plain meaning’ or whether an ambiguity exists.” Perillo, *Contracts* § 3.10 (7th ed.); see also *Mallad Constr. Corp. v. Cnty. Fed. Sav. & Loan Ass’n*, 298 N.E.2d 96, 100 (N.Y. 1973) (“[W]here a question of intention is determinable by written agreements, the question is one of law.”). When ambiguity exists, the jury’s role is then to determine the parties’ actual intent, which may be determined by “disputed evidence or inferences outside the written words.” *Mallad*, 298 N.E.2d at 100; see also *Seiden*, 959 F.2d at 430. So ABI’s argument that the jury should have been instructed that it must decipher and assign plain meanings to the Sublicense is wrong. *E.g.*, *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316 (7th Cir. 1988) (“instruct[ing] the jury that the plain meaning of [contract] language is controlling” was error); *Bitterman v. Gluck*, 9 N.Y.S.2d 1007, 1009 (1st Dep’t 1939).

ABI’s own authority, *Compagnie Financiere de CIC et de L’Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153 (2d Cir. 2000) (Br.51), confirms the jury’s role below was not “to determine the plain and ordinary meaning” of the Sublicense. (Br.55.) There, when deciding whether the contract was unambiguous, this Court acknowledged that the plaintiff’s interpretation was the “most



reasonable and natural meaning.” *Compagnie*, 232 F.3d at 159. But this Court also expressly stated that the “*the parties could have chosen to give the phrase a different meaning.*” *Id.* Accordingly, after finding ambiguity, this Court did not just apply the “most reasonable and natural meaning”; instead, it considered “the record as a whole,” including “extrinsic evidence” of intent, the “purpose of the agreement,” and “natural and ordinary usage.” *Id.* at 159, 161. This tracks the jury instructions given in this case. ABI’s plain meaning instruction is not an accurate statement of New York law, so there was no error in the jury charge.<sup>10</sup>

**B. The jury instructions adequately informed the jury of the law and were not misleading.**

The jury was instructed to consider both the language of the Sublicense and extrinsic evidence, consistent with New York law. The

---

<sup>10</sup> ABI cites *Williston* (Br.51), but that treatise states that the plain meaning rule applies to ambiguous contracts where “the court must necessarily determine” party intent, 11 *Williston on Contracts* § 32:1 (4th ed.), which only happens in the absence of relevant extrinsic evidence, *Compagnie*, 232 F.3d at 159. Otherwise, party intent becomes a question of fact for the jury. *Id.*

The New York Pattern Jury Instructions also do not support ABI’s position. (*Cf.* Br.56.) The cases cited in the commentary supporting the text quoted by ABI involved *unambiguous* contract interpretation by courts. N.Y. Pattern Jury Instr. – Civil 4:1, cmt. VI.A.5.

jury was first instructed that “the cardinal principle for the construction and interpretation of contracts is that it’s the intention of the parties ... that control. Determination of the intentions of the parties is accomplished by *looking first at the words of the contract itself.*” (JA-2052 (Tr.1468:16-22).) The jury was then instructed that it “may consider the objective manifestations of the intent of the parties as revealed by their expressed words and deeds.” (*Id.* (Tr.1468:20-22).) Those are accurate legal instructions (Argument § II.A), and in no way prevented the parties from appealing to jurors’ natural readings of the Sublicense.

In light of these instructions placing primacy on the words in the Sublicense, the jury did not also need to be reminded that the words of the contract might mean what they thought they mean. Mere “linguistic quibble[s]” are not grounds for a new trial. *Kodak Graphic Commc’ns Can. Co. v. E.I. Du Pont De Nemours & Co.*, 640 F. App’x 36, 39 (2d Cir. 2016). Here, ABI explained to the district court that its proposals amounted to instructions that “Language is language. English is English.” (JA-1962 (Tr.1336:4-5).) No reasonable juror, listening to the charge as a whole, would have concluded otherwise.

This Court's decision in *Halifax Fund, L.P. v. MRV Communications, Inc.*, 54 F. App'x 718 (2d Cir. 2003), is analogous. There, the appellant argued that the trial court erred by failing to instruct that "the most obvious way of indicating assent is by signing an agreement reduced to writing." *Id.* at 719. This Court found that argument "entirely without merit." *Id.* "[T]he fact that a written contract is the most obvious way of evidencing assent is virtually a truism." *Id.* Here too, it is axiomatic that "English is English." Having been instructed to consider the words of the Sublicense first, the "jury presumably gave [those words] 'ordinary or natural' meaning[s]," if any. *See U.S. v. Malpeso*, 115 F.3d 155, 165-66 (2d Cir. 1997).

ABI raises three baseless arguments as to why other instructions supposedly compounded this non-issue.

First, ABI concedes that the jury instructions on defined terms were legally correct, but claims those instructions "reinforc[ed] that the jury was not to use ordinary meaning." (Br.53.) Provided the charge conveys accurate and sufficient legal guidance as a whole, trial courts have "discretion in the style and wording of jury instructions." *Parker*, 260 F.3d at 106-07. As ABI argued below, "there is a defined term capital

B beer, but that term confusingly, perhaps, uses the undefined term little-[b] beer in it.” (JA-1960-61 (Tr.1334:23-1335:3).) To prevent any such confusion, the district court wisely emphasized that defined terms *must* be given “the meaning that’s provided in the definition”—*i.e.*, the words the parties chose to define “Beer.” (JA-2051-52 (Tr.1467:22-1468:8).) That was important legal guidance, and in no way suggested the jury could ignore the words used to define “Beer.”

Second, ABI argues the jury should not have been instructed to ignore the *Webster’s* dictionary in evidence (Br.54-56), even though ABI’s counsel told the district court at trial: “I don’t have any objection to [the instruction:] you are to ignore that reference to the dictionary.” (JA-1959 (Tr.1333:7-8).) By consenting to this instruction—something ABI seeks to conceal from this Court—ABI expressly waived the right to challenge it on appeal. *Reuland v. Hynes*, 460 F.3d 409, 419 (2d Cir. 2006). Moreover, after consenting to that instruction, ABI asked the district court to remove a proposed instruction that the jury should “put out of [their] mind[s] any dictionary definition of beer of which [they] may be aware.” (JA-1960 (Tr.1334:5-8).) ABI argued this revision would preserve the jurors’ ability to rely “on their ... common understanding of

terms.” (JA-1958 (Tr.1332:21-25); JA-1959 (Tr.1333:1-5).) The district court accepted ABI’s proposal. (JA-1960 (Tr.1334:18-20).) The instructions on dictionaries were as requested by ABI and confirm the charge was fair and even-handed.

ABI also argues that the district court erred by excluding dictionaries *in limine*. (Br.54-56.) ABI is not seeking a new trial because of this ruling, so this argument is irrelevant.<sup>11</sup> Moreover, evidentiary rulings are reviewed for abuse of discretion. *Parker*, 327 F.3d at 213. ABI points to one instance when another court admitted a dictionary. (Br.55 (citing *Lamborn v. Dittmer*, 873 F.2d 522, 528 (2d Cir. 1989)).) The use of a dictionary in a separate trial does not undermine the district court’s sound decision to exclude a laundry list of conflicting, vague dictionaries no party consulted in this case. Moreover, ABI wanted to use its dictionaries to “argu[e] for [the] contract’s plain meaning.” (Br.55.) Before trial, the district court correctly held that the Sublicense

---

<sup>11</sup> This argument also was not preserved. Dictionaries were excluded *in limine* under Rules 401-403, and the district court later confirmed that pre-trial rulings were tentative. (JA-1816 (Tr.850:6-22).) Nevertheless, ABI admitted a *Webster’s* definition at trial (JA-1795-97 (Tr.787:7-789:8)), yet never sought a definitive ruling on the issue, *U.S. v. Yu-Leung*, 51 F.3d 1116, 1120-21 (2d Cir. 1995); (Argument III.A).

did not have one plain meaning in this dispute. (SPA-5.) The jury's role at trial was not to second guess that legal holding, but instead to determine the parties' actual intent. (Argument § II.A.)

*Third*, ABI's attempt to use instructions on regulations to criticize the jury charge fails. The jury was charged to consider the words of the Sublicense independently from extrinsic evidence. (JA-2052 (Tr.1468:16-22).) The jury was also clearly instructed that regulatory definitions should be considered only if the parties' "expressed intentions" evidenced an intent to adopt or encompass such definitions. (JA-2053 (Tr.1469:5-23); JA-2060-61 (Tr.1476:19-1477:4).)

Furthermore, ABI consented to the instruction on the IRC definition of "beer" since that definition was "discussed by the parties" during negotiations. (See JA-1966 (Tr.1340:2-6).) ABI also proposed a limiting instruction: that "the parties were not required to incorporate any regulatory definition in their contract." (JA-1964 (Tr.1338:4-7).) That proposal was accepted (JA-1965 (Tr.1339:12-24)), and the jury was so instructed (JA-2057-58 (Tr.1473:25-1474:3)). ABI cannot now argue

the charge was misleading or unfair on this basis. *Reuland*, 460 F.3d at 419.<sup>12</sup>

Finally, despite consenting to the IRC instruction at trial (JA-1966 (Tr.1340:2-6)), ABI now claims that instruction is “impossible to square” with the district court’s order denying Constellation summary judgment and *Dish*. (Br.56.) The summary judgment order and *Dish* concerned unambiguous contract interpretation; trial concerned a contract the district court had already held was ambiguous. When reviewing an ambiguous contract, the jury can consider extrinsic evidence. (Argument § II.A.) As the district court correctly held before trial, “regulations that were discussed or consulted by the parties in negotiating the Sublicense,” such as the IRC (Factual Background § A.6), are “extrinsic evidence of the parties’ intent” (SPA-12).

The district court “did not provide a misleading impression or

---

<sup>12</sup> For instructions on regulations other than the IRC, at ABI’s request (JA-1966 (Tr.1340:2-18)), the district court issued clear limiting instructions that those regulations “may not have been discussed by the parties during negotiations,” opined that “they were not,” and explained the limited contextual purpose for which they were being described. (JA-2057 (Tr.1473:12-16); *see also* JA-2060 (Tr.1476:19-1477:4).) ABI also fails to mention that it successfully advocated for its own regulatory instructions. (JA-2058-60 (Tr.1474:4-1475:8, 1475:25-1476:18).)

inadequate understanding of the law.” *Turley*, 774 F.3d at 154.

**C. ABI’s evidence fails to demonstrate that additional instructions would have changed the jury’s verdict.**

In an effort to manufacture prejudice, ABI reviews extrinsic evidence presented at trial. (Br.57.) But extrinsic evidence has nothing to do with plain meaning; plain meaning (if any) is determined by judges “*without* the aid of extrinsic evidence.” *Alexander*, 136 F.3d at 86. Nor would extrinsic evidence shed light on jurors’ “ordinary understanding of words”; as ABI’s counsel argued at trial, jurors possess any such understandings “when they walk into the jury room.” (JA-1960-61 (Tr.1334:23-1335:14).) For this reason alone, ABI’s extrinsic evidence cannot establish prejudice arising from the instruction ABI demands.

Even if, as ABI claims on appeal, the extrinsic evidence it cites constituted “strong *evidence* that the *parties intended* for the plain meaning of the Sublicense to govern” (Br.57), the jury was expressly invited to consider extrinsic evidence of the parties’ intent (JA-2052 (Tr.1468:16-22); JA-2054-55 (Tr.1470:19-1471:6)). All of ABI’s extrinsic evidence cited on appeal was presented to, and considered by, the jury. The jury also considered powerful extrinsic evidence favoring Constellation’s case, including that the Sublicense was intended to effect



the sale of Modelo's U.S. business; the parties rejected multiple ingredient-based definitions of "Beer"; the parties never discussed malt or hops when negotiating the Sublicense but did discuss fruity innovations like Zima and Mike's Hard Lemonade; the definition of "Beer" was grounded in the IRC; Corona Hard Seltzer is labeled "BEER" and federally regulated as such; and Corona Hard Seltzer was designed to be the exact same product as the malt-based seltzers ABI concedes are licensed. (Factual Background §§ A.1-6.) Even where appellants preserve challenges to the sufficiency of the evidence—an argument ABI forfeited by not moving under Rule 50(a) at trial—deference is given to the jury's weighing of evidence, credibility determinations, and reasonable inferences. *SEC v. Payton*, 726 F. App'x 832, 835 (2d Cir. 2018). ABI cannot show prejudice arising from the charge by citing extrinsic evidence the jury was expressly invited to consider.

ABI's extrinsic evidence also did not establish a plain meaning of "Beer" or that the parties intended to adopt any plain meaning.

*First*, ABI cites extrinsic evidence regarding the definition of "Beer" in the Crown agreements. With regard to Mercado's testimony (Br.57-58), he testified that Constellation told him the Crown definition of "Beer"

was based on the IRC. (Factual Background § A.1.) Mercado claims he responded that Modelo would not “be prepared to incorporate the IRC,” but the jury was entitled to weigh the credibility of that testimony given Mercado (longtime Modelo counsel) also claimed he did not know what the IRC definition of beer was at the time, did not paper his supposed objection, and accepted Constellation’s proposed definition of “Beer” verbatim. (*Id.*) Mercado also claims to have said his client would review Constellation’s proposal and, if its plain meaning “reflects what Modelo thinks beer is, I’m sure it will be fine”; but Mercado never got back to Constellation, nor did he explain “what Modelo thinks beer [means].” (*Id.*; JA-1707 (Tr. 538:5-9).) With regard to Constellation’s decades-old Forms 8-K (Br.58), the jury heard testimony that the summaries of “Beer” in these filings were inaccurate in many respects and were qualified by the actual agreements. (JA-1780-1783 (Tr.728:9-731:16).)

Second, ABI cites four pieces of evidence that have nothing to do with the plain meaning rule or jurors’ ordinary understandings. For Modelo’s annual report (Br.58-59), there was no evidence that this report was sent to Constellation, never mind that it was relevant to the parties’ intent. ABI also cites Constellation’s answer to DOJ’s allegation that

“beer” is “usually made from a malted cereal grains” and hops. (Br.59.) This shows that Constellation believed, in 2013, that “beer” does not need to be made from malt or hops, supporting Constellation’s position that Corona Hard Seltzer is licensed. (Argument I.B.) ABI cites marketing documents, from years after the Sublicense was signed, using industry terminology to describe Corona Hard Seltzer. (Br.60.) These documents bear no relation to the parties’ intent or whether a product is licensed; they describe Corona Refresca as a “Flavored Cocktail[]” (JA-3467) that “drives penetration beyond beer” (JA-3463), but ABI concedes Corona Refresca is “Beer” (JA-3594-95). Finally, despite the supposed irrelevance of regulations, ABI cites Corona Hard Seltzer trademark applications containing Class 33 language provided by the U.S. Patent and Trademark Office (“USPTO”). (Br.61.) The jury heard testimony that this language was from USPTO’s website, that beer can be registered in either Class 32 or Class 33, and that Corona Hard Seltzer was filed under Class 33 as a trademark protection strategy since “Corona” was already registered under Class 32. (JA-1821-25 (Tr.917:18-921:6).) None of the foregoing is relevant to plain meaning or jurors’ ordinary understandings of “beer,” never mind the remaining words in

the defined term “Beer” or the contract as a whole.

*Third*, ABI cites a privileged document admitted into evidence after a waiver ruling at trial. (Br.59-60.) At best, this suggests that someone in Constellation’s legal department, years after the Sublicense was signed, may have believed Constellation needed to use malt. (JA-3473 (PX-826).) That person may have had nothing to do with negotiating the Sublicense.<sup>13</sup> The same document shows that guidance was revised shortly thereafter, and nearly a year before Corona Hard Seltzer was launched, to confirm that products meeting the federal definition of “beer” are licensed. (JA-3473 (PX-826).) This document also emphasized Constellation’s development process to the jury, confirming that Corona Hard Seltzer is a gluten-free “version” of the malt prototype it replaced. (Argument § I.C.) This document, like all ABI’s extrinsic evidence, bears no relevance to the instruction challenged on appeal.

ABI’s prejudice argument separately fails since it presupposes that ABI’s ordinary meaning interpretation is correct and was the only

---

<sup>13</sup> These questions were not asked at trial since ABI strategically introduced this document through a brewmaster, who did not prepare the document or negotiate the Sublicense, after all Constellation legal representatives had already testified. (JA-1886-89 (Tr.1125:10-1128:18).)

interpretation offered to the jury. The jury was charged that it should first consider the words of the Sublicense, which instruction was clearly delineated from other instructions, such as those concerning extrinsic evidence. (JA-2052 (Tr.1468:16-22); JA-2054-55 (Tr.1470:19-1471:6).) Consistent with those instructions, ABI began summation: “[Y]ou already knew ... when you walked into the courthouse [that] hard seltzer is not beer.” (SA-103 (Tr.1354:11-19); *see also* SA-104-05 (Tr.1355:19-24, 1356:12-14).) Constellation responded with its own ordinary understanding argument regarding the defined term “Beer,” emphasizing the broad language “any other versions.” (*E.g.*, JA-2018-20 (Tr.1427:24-1429:3).) Both parties made their case on ordinary understandings of the definition of “Beer,” and the jury disagreed with ABI. That is not prejudice.

### **III. ABI FAILED TO PRESERVE ITS CHALLENGE TO THE EXCLUSION OF THE DOJ CORRESPONDENCE AND FAILS TO SHOW THAT EVIDENTIARY RULING WARRANTS A NEW TRIAL.**

#### **A. The *in limine* exclusion of the DOJ correspondence is not subject to appellate review since ABI chose not to obtain a ruling on the issue at trial.**

Appellants generally “must both confront and challenge an adverse evidentiary decision at trial” to preserve the issue for appellate review.

*Yu-Leung*, 51 F.3d at 1120; *see also U.S. v. Birbal*, 62 F.3d 456, 464-65 (2d Cir. 1995). Rulings *in limine* may preserve an evidentiary objection only “when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pre-trial hearing, and (3) is ruled upon without equivocation.” *Yu-Leung*, 51 F.3d at 1120; *see also* Fed. R. Evid. 103(b) (only “definitive[]” *in limine* rulings preserve evidentiary issues for appeal). “Because an appellate court cannot review a trial court’s balancing of probative value and prejudice” without reference to evidence and argument presented at trial, Rule 403 rulings are rarely “the type of issue that can be finally decided” before trial. *Yu-Leung*, 51 F.3d at 1120.

Here, the district court excluded the DOJ correspondence *in limine* on, among other grounds, Rule 403. (SPA-17.) ABI argues (incorrectly) that the DOJ correspondence should have been admitted as “rebuttal evidence” in light of “Constellation’s decision to rely *at trial* on DOJ’s views of the scope of the antitrust remedy.” (Br.63.) These arguments needed to be raised at trial since the district court necessarily could not consider them when ruling *in limine*. Moreover, at trial, the district court was clear that “any *in limine* ruling is inherently tentative and subject to

change at trial.” (JA-1816 (Tr.850:6-22).) It cannot be said that the district court’s *in limine* ruling was definitive and final under these circumstances. *Yu-Leung*, 51 F.3d at 1120. Having chosen not to raise this issue below, ABI cannot now challenge the issue on appeal.

It also is clear that ABI strategically waived its appellate challenge. Challenges to *in limine* rulings also are waived where the appellant consciously chose not to raise the issue at trial. *Yu-Leung*, 51 F.3d at 1123; *see also Palmieri v. Defaria*, 88 F.3d 136, 140-41 (2d Cir. 1996). On the first day of trial, both parties discussed the issues ABI now claims caused it prejudice on appeal. (JA-1490-91 (Tr.15:16-16:23); JA-1517-19 (Tr.62:1-64:6).) And the district court reversed other pre-trial rulings when raised by ABI. (*E.g.*, JA-1816 (Tr.850:6-22); JA-1862-78 (Tr.1087:5-1103:5).) ABI’s counsel “did not simply fall asleep at the wheel,” *Yu-Leung*, 51 F.3d at 1123; they made a tactical decision not to raise this supposedly case-changing issue at trial.

**B. ABI fails to satisfy the onerous standard for obtaining a new trial based on a supposedly erroneous evidentiary ruling.**

This Court will not order a new trial based on evidentiary rulings unless the ruling was (1) “a clear abuse of discretion” and (2) “so clearly

prejudicial to the outcome of the trial that” the verdict was “seriously erroneous” or “a miscarriage of justice.” *Parker*, 327 F.3d at 213. ABI fails both prongs.

1. ABI fails to show that the district court clearly abused its discretion when excluding the DOJ correspondence.

The district court was well within its discretion to exclude DOJ correspondence regarding ABI’s compliance with the final judgment. Appellate courts across the country routinely affirm orders excluding, under Rules 401-403, government actions touching on the merits of a civil dispute. *E.g.*, *City of N.Y. v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981); *Feldman v. Van Gorp*, 2010 WL 2911606, at \*3 (S.D.N.Y. July 8, 2010), *aff’d* 697 F.3d 78 (2d Cir. 2012); *see also Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 672-73 (5th Cir. 1999); *Faigin v. Kelly*, 184 F.3d 67, 80 (1st Cir. 1999); *O’Dell v. Hercules, Inc.*, 904 F.2d 1194, 1203 (8th Cir. 1990); *Shoppin’ Bag of Pueblo, Inc. v. Dillon Cos., Inc.*, 783 F.2d 159, 165 (10th Cir. 1986); *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1160 (11th Cir. 1986); (SA-54 (collecting cases)).

Here too, the district court properly excluded the DOJ correspondence. On relevancy, DOJ’s decision not to prosecute ABI in 2020 is temporally divorced from the negotiation of the Sublicense in



2013, and so “could have no more than the most attenuated, if any, value in determining the intentions of the parties to the Sublicense.” (SPA-17.) DOJ also explicitly took “no position” on the question in this lawsuit: whether Corona Hard Seltzer is a permitted Brand Extension Beer under the Sublicense. (JA-1293); *Shoppin’ Bag of Pueblo*, 783 F.2d at 165; *Feldman*, 2010 WL 2911606, at \*2-3. And, as ABI’s expert testified, the definition of “Beer” in the final judgment is narrower than the definition of “Beer” in the Sublicense. (JA-1169; *see also* JA-89-90 ¶25 (ABI alleging the final judgment and Sublicense definitions of “Beer” are different).)

On the other hand, admitting this evidence would have violated Rule 403. The evidence is highly prejudicial because of the substantial risk the jury would give undue weight to DOJ’s decision. *Curtis*, 174 F.3d at 672-73; *Faigin*, 184 F.3d at 80; *Pullman*, 662 F.2d at 915. The evidence also would have led to a confusing, time-consuming side show. (SPA-17); *Pullman*, 662 F.2d at 915. The jury would have needed an education on the “clear and convincing” evidentiary standard DOJ applied as compared to ABI’s burden of proving its case by a preponderance of the evidence. (JA-1292); *Aetna*, 803 F.2d at 1160. The jury also would have had to consider the evidence available to DOJ versus

the evidence presented at trial, DOJ's decision-making process, and prosecutorial discretion.

ABI cites no authority suggesting that the district court even erred, never mind that this decision was a clear abuse of discretion. (Br.62-66.)

2. Excluding the DOJ correspondence was not so prejudicial to ABI that the verdict was seriously erroneous or a miscarriage of justice.

ABI claims Constellation argued that “sugar-based hard seltzer was covered by ‘Beer’ because *that’s what DOJ wanted.*” (Br.65.) Not so. Both parties relied on evidence related to DOJ, from 2013, to show “the context in which the Sublicense came into being.” (SPA-21.) For example, ABI’s lead in-house negotiator explained at length the impact DOJ’s antitrust challenge had on ABI’s negotiations with Constellation. (JA-1600-05 (Tr.271:19-276:13); JA-1609-11 (280:22-283:11); *see also*, *e.g.*, JA-1727 (Tr.611:2-11 (ABI’s CEO testifying regarding the same)).)<sup>14</sup> Constellation witnesses similarly testified regarding how DOJ’s antitrust challenge prompted Constellation to negotiate broad rights to innovate new products with ABI. (*E.g.*, JA-1737-1739 (Tr.651:10-653:13); JA-1785

---

<sup>14</sup> ABI could also have presented expert evidence regarding DOJ’s publicly-stated antitrust concerns (SPA-21), but chose not to.

(Tr.734:7-20).)

Both parties also relied on party statements, made in one another's presence in 2013, to DOJ. While ABI claims Constellation argued that "DOJ pressed" the parties to include "Corona Green Tea" in the definition of "Beer" (Br.66), Constellation argued that this testimony was a "statement[] that ABI made" in 2013 (JA-2000 (Tr.1409:18-19))—that is, extrinsic evidence of ABI's understanding of the broad contract terms it had just negotiated directly with Constellation. Similarly, ABI continues to rely on Constellation's answer to DOJ's allegation that beer is "usually" (*i.e.*, not always) made from malt and hops. (Br.59.) These statements are not relevant because DOJ asked the question or made the allegation; they are relevant because the parties heard their counterparty's responses.

Constellation did not suggest that DOJ took a position, in 2013 or in 2020, on whether Corona Hard Seltzer was licensed. Had that happened, ABI would have objected or tried to admit the DOJ correspondence at trial. ABI claims "Constellation argued that if ABI wanted a narrower definition of 'Beer,' ABI should have 'pushed back harder *on the DOJ.*'" (Br. 65-66.) Constellation actually argued: "Now

ABI is having seller's remorse. Now they're wishing they had pushed back harder on the DOJ and on Constellation." (JA-2015 (Tr.1424:9-12).) Constellation's point was twofold. ABI did not have to abandon the 2012 "fix-it-first" remedy; ABI could have litigated with DOJ to preserve its ownership of Modelo's U.S. business. (JA-1609-11 (Tr.280:22-283:19).) Separately, when negotiating the Sublicense with Constellation in February 2013, ABI could have tried to obtain the nonexistent malt limitation it now seeks through litigation. ABI did neither of those things.

### **CONCLUSION**

This Court should affirm the district court's judgment entered following the unanimous jury verdict in Constellation's favor.

Dated: November 21, 2023

Respectfully submitted,

*/s/ Sandra C. Goldstein*

---

GEORGE W. HICKS, JR., P.C.  
KIRKLAND & ELLIS LLP  
1301 Pennsylvania Ave.  
Washington, DC 20004  
Telephone: (202) 389-5000  
Facsimile: (202) 389-5200

SANDRA C. GOLDSTEIN, P.C.  
STEFAN ATKINSON, P.C.  
ROBERT W. ALLEN, P.C.  
DANIEL R. CELLUCCI  
KIRKLAND & ELLIS LLP  
601 Lexington Ave.  
New York, NY 10022  
Telephone: (212) 446-4800  
Facsimile: (212) 446-4900

SIERRA ELIZABETH, P.C.  
KIRKLAND & ELLIS LLP  
2049 Century Park East  
Los Angeles, CA 90067  
Telephone: (310) 552-4400  
Facsimile: (310) 552-5900

*Counsel for Defendants-Appellees*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Local Rule 32.1. It contains 13,999 words, excluding those parts of the document exempted by Fed. R. App. P. 32(f). This brief further complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: November 21, 2023

*/s/ Sandra C. Goldstein*  
SANDRA C. GOLDSTEIN, P.C.  
*Counsel for Defendants-Appellees*