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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STONE BREWING CO., LLC, Plaintiff / Counterclaim Defendant, v. MILLERCOORS LLC, Defendant / Counterclaim Plaintiff.	Case No. 3:18-cv-00331-BEN-MDD **DEFENDANT MILLERCOORS LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL** District Judge: Hon. Roger T. Benitez **Date:** November 14, 2022 **Time:** 10:30 **Ctrm:** 5A Complaint filed: February 12, 2018

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After four years of litigation, Stone Brewing Company ("SBC") could not identify a single person who actually bought Keystone thinking it was made by SBC or provide any evidence that it lost even one sale due to the Keystone refresh. Instead of evidence, SBC relied on unsupported opinions, inflammatory arguments, and ambush tactics to extract a favorable verdict. The purpose of Rules 50(b) and 59 is to provide a check on just such a scenario—correcting verdicts that no reasonable jury could have reached (R. 50(b)) or that were against the clear weight of the evidence (R. 59). That is the proper result here. But even if the Court determines that JMOL or an unconditional grant of a new trial is not appropriate, the Court should grant remittitur to correct the erroneously inflated damages award.

The Court should intervene for several reasons. ***First***, the record contains no evidence that anyone was actually confused between SBC's beers and Keystone. To the contrary, Nielsen data on nationwide sales show there was no such confusion. (Part I.A.) ***Second***, MillerCoors has used "Stone(s)" in connection with the sale of Keystone since before SBC was founded, and therefore SBC cannot enforce its mark against MillerCoors. (Part I.B.) ***Third***, SBC's case rested heavily on unreliable testimony from its purported expert, Dr. Palmatier. But because SBC added Dr. Palmatier as an expert late and misrepresented that he would only provide "limited supplemental opinions" based on new data, MillerCoors was denied the opportunity to exclude his testimony via *Daubert*. That alone necessitates a new trial under controlling law. (Part II.A.) ***Fourth***, SBC failed to disclose Sapporo's offer to purchase SBC, despite having an obligation to do so. (Part II.B.) ***Finally***, the evidence and the law establish that SBC has not suffered any cognizable lost profits and is not entitled to corrective advertising, making JMOL or a new trial appropriate as to damages. (Part III.) At the least, the Court should condition denial of a new trial on SBC accepting a reduction of the award, as it far exceeds any damages proved at trial and, if allowed to stand, would be an extreme outlier in this Circuit. (*Id*.)

ARGUMENT

The Court should grant MillerCoors' renewed motion for JMOL under Rule 50(b) or, alternatively, a new trial under the more relaxed standards of Rule 59.

JMOL under Rule 50(b) is appropriate where "the evidence permits only one reasonable conclusion and the conclusion is contrary to that reached by the jury." *Lakeside-Scott v. Multnomah Cnty.*, 556 F.3d 797, 802 (9th Cir. 2009) (quotation omitted). While the court "view[s] the evidence in the light most favorable to the party in whose favor the jury returned a verdict and draw[s] all reasonable inferences in [its] favor," "a reasonable inference" must be "supported by … significant probative evidence." *Id.* In contrast, when considering a motion for new trial under Rule 59, the Court "is not required to view the trial evidence in the light most favorable to the verdict" and "can weigh the evidence and assess the credibility of the witnesses." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014); *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) (judge "ha[s] the right, and indeed the duty, to weigh the evidence as he saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in his conscientious opinion, the verdict is contrary to the clear weight of the evidence"). Specifically, under Rule 59, the Court should order a new trial "where 'the verdict is against the weight of the evidence,' 'the damages are excessive' or, 'for other reasons, the trial was not fair to the moving party.'" *Claiborne v. Blauser*, 934 F.3d 885, 894 (9th Cir. 2019) (quotation omitted). Where a damages verdict is excessive, the Court may grant a new trial unless the plaintiff accepts a remittitur reflecting "the maximum amount sustainable by the proof." 765 F.3d at 1094. Applying these standards, the judgment should be set aside.

I. JMOL OR NEW TRIAL IS WARRANTED BASED ON THE TRIAL RECORD AS TO INFRINGEMENT.

A. SBC Failed To Prove Likelihood Of Confusion.

No reasonable jury could find that the refreshed Keystone packaging or advertising was likely to confuse "an appreciable number of people," as is necessary to establish infringement. *Falcon Stainless, Inc. v. Rino Cos.*, 572 F. App'x 483, 484-86 (9th Cir. 2014) (affirming JMOL for defendant after plaintiff's verdict). But even if the Court finds that there is enough evidence for SBC to survive JMOL, a new trial is warranted because, once the force and credibility of the evidence is considered, the jury verdict was clearly contrary to the weight of the evidence. *Coach, Inc. v. Celco Customs Servs. Co.*, 2014 WL 12573411, at *14-16 (C.D. Cal. June 5, 2014) ("new trial … may be ordered by the district court if, in its opinion, the jury's verdict was clearly contrary to the weight of the evidence"). Indeed, the Court has remarked that "had [the Court] been in the position of fact-finder in this case, [the Court] would have found" that a reasonably prudent consumer would not be confused by the refreshed Keystone packaging. ECF 710, at 4. The Court's view is correct: the jury verdict was clearly against the weight of the evidence, and a new trial is appropriate.

1. There Is No Evidence Of Actual Confusion.

Five years after the refreshed Keystone packaging launched, SBC is still unable to present any credible evidence of actual confusion. *Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1050 (9th Cir. 1999) ("We cannot think of more persuasive evidence that there is no likelihood of confusion between these two marks than the fact that they have been simultaneously used for five years without causing any consumers to be confused as to who makes what."); *see* 3/18/22 PM Tr. 47:14-21 (Wagner) (SBC cofounder not aware of data showing SBC lost business due to Keystone); 3/21/22 AM Tr. 85:4-20 (Stewart deposition clip) (SBC's expert not aware of evidence that anyone purchased wrong product as a result of confusion). Rather, the record contains substantial evidence demonstrating that there was no confusion.

Shifting Reports Show No Confusion. Third-party market research firm Nielsen—which both parties used in their business—compiles detailed data on customer purchasing patterns that is presented in "shifting reports." *See* DX6537, 6575 (Keystone); DX6534, 8491 (SBC). These reports show "the brands you're taking volume from and … the brands you're losing volume to." 3/11/22 PM Tr. 61:6-14 (Wexelbaum). Multiple shifting reports show that since the Keystone refresh, SBC has not lost customers to Keystone nor has Keystone picked up customers from SBC—as would have been the case if consumers were confused about the source of the products. *See* DX6575, at 9 (only 2% of Keystone consumers drawn from entire craft beer segment); DX6534 (SBC not gaining or losing sales to Keystone); 3/21/22 PM Tr. 95:22-96:8 (Distler) (conceding that SBC shifting report, which "give[s] you very pointed, real-world data in terms of …. who Stone is losing to," did not list Keystone). SBC offered no substantive challenge to this data, and the Court correctly concluded that "[e]vidence is [] lacking demonstrating Keystone Light sales coming at the expense of [SBC] products." ECF 718, at 3 (citing shifting reports).

***SBC's Surveys Are Not Evidence of Confusion*.** While avoiding the shifting reports, SBC points to five surveys presented by Dr. Palmatier. DX10131-D, 10132-F & H; 3/21/22 AM Tr. 72:7-10 (Palmatier). As explained below, the Court correctly concluded that "[t]he expert testimony of Dr. Palmatier was based on seriously flawed survey methodology, including the way the Keystone Light can was presented to survey subjects." ECF 718, at 3.

Two of SBC's surveys purportedly followed the *Squirt* methodology. 6 McCarthy § 32:173; DX10131-D. But only one of those *Squirt* surveys used an accurate image of a Keystone product—***and this survey found no confusion***. 3/21/22 AM Tr. 33:2-41:15 (Palmatier) (net confusion was around 4-5% which, according to SBC's expert, is not sufficient evidence of likely confusion); *see also* 6 McCarthy § 32:189 (confusion "not likely" when percentage is below 10%).

The other survey conducted by SBC purporting to follow the *Squirt* methodology used an incomplete, skewed view of a Keystone can displaying only the word "Stone," which SBC's own expert admitted was inaccurate. 3/18/22 PM Tr. 156:2-14 (Palmatier) (image did not reflect a can found in the marketplace). And the picture of the Keystone carton that was shown concealed the multiple sides of the carton that displayed the Keystone mark. 3/21/22 AM Tr. 17:5-18:9 (Palmatier). Given the use of improper stimuli,[1] this second survey cannot provide evidence of confusion. *Beneficial Corp. v. Beneficial Cap. Corp.*, 529 F. Supp. 445, 451 (S.D.N.Y. 1982) (marks presented out of context did not provide meaningful evidence of actual confusion); *Scotts Co. v. United Indus. Corp*., 315 F.3d 264, 281 (4th Cir. 2002) (improper to show part of package where issue is reaction to whole advertisement).

None of SBC's other three surveys—the "product association" survey, the "name recognition" survey, or the in-person survey—was conducted using a methodology recognized ***by any court*** as a reliable method for testing likelihood of confusion. DX10131-D; DX10132-F; DX10132-H; 6 McCarthy § 32:173. The surveys consisted of word association questions (3/21/22 AM Tr. 48:11-19, 58:7-15, 72:11-18 (Palmatier)), which are meaningless and irrelevant in demonstrating likelihood of confusion. 6 McCarthy § 32:176; *Charles Schwab & Co. v. Hibernia Bank*, 665 F. Supp. 800, 807 (N.D. Cal. 1987). Moreover, the surveys incorporated an inaccurate and misleading image of MillerCoors' product—consisting of an extreme close-up photograph of a Keystone can with shadows that obscured all wording except for "Stone"—which Plaintiff's expert acknowledged impacted the respondents' word associations. 3/21/22 AM Tr. 50:12-25, 54:5-19, 57:7-17 (Palmatier) ("What you are seeing in a picture is going to impact what you select."). In SBC's in-person survey, instructions were not provided to the interviewer; the interviews took place with multiple respondents in the room; the interviewer rearranged the subject products without guidance or approval; and the interviewer gave inappropriate and leading prompts. 3/21/22 AM Tr. 74:20-82:22 (Palmatier); 3/23/22 Tr. 31:7-36:23 (Stec); *see Scotts*, 315 F.3d at 277-278 (district court abused discretion by relying on survey containing similar deficiencies). SBC's expert even

[1] *See, e.g.*, 3/22/22 PM Tr. 161:1-11 (Poret) (surveys were "one of the worst distortions of the marketplace reality that I have ever seen").

admitted that the in-person study "wasn't an empirical survey." 3/21/22 AM Tr. 79:15-21 (Palmatier). Moreover, SBC's experts conceded that the surveys did not show actual confusion. *Id.* at 85:4-20 (Stewart deposition clip played during Palmatier cross); *id*. at 68:18-69:19 (Palmatier) (SBC's expert did not know if any in-person survey respondents were confused).

Thus, SBC presented the jury with evidence of multiple studies that used images of Keystone "products" that either did not actually exist in the real world or were so distorted as to be severely misleading.[2] As MillerCoors' expert succinctly put it: "Dr. Stewart showed photographs and made sure that people taking the survey ***could not see that it said 'Keystone.'***" 3/22/22 PM Tr. 141:14-15 (Poret) (emphasis added). When MillerCoors' survey expert (who has conducted over 1,000 surveys) reran SBC's *Squirt* survey using proper images, he found a net confusion rate of 2%—a number "that would always be accepted to mean that there is not any meaningful likelihood of confusion." *Id*. at 136:8-10, 148:17-23.

In denying MillerCoors' Rule 50(a) motion, the Court stated that it "was similarly unconvinced by the evidence proffered from Stone's surveys, but that goes to the weight of the evidence." ECF 710, at 5. However, in ruling on a motion for a new trial, the Court ***is*** tasked with weighing the evidence. *Hendrix*, 762 F.3d at 841. The record demonstrates that SBC's survey evidence is flawed, not credible, and cannot support a finding of likely confusion.

SBC's Social Media Evidence Is Absurd. SBC failed to offer the testimony of a single individual who was actually confused by the post-refresh Keystone packaging. SBC instead relied on social media posts, each of which was dated ***after***

[2] *E.g.*, 3/18/22 PM Tr. 156:2-14 (Palmatier) (image of Keystone can did not reflect a can in the marketplace); DX10132F.0022 (shadowy picture of Keystone can with only the word "Stone" visible); 3/21/22 AM Tr. 17:5-18:9 (Palmatier) (image of Keystone carton concealed multiple sides that displayed Keystone mark); *id.* at 13:25-14:9, 17:20-18:1 (Keystone packaging used on the market for 6-8 weeks).

SBC filed this lawsuit and specifically asked its fans for support. 3/15/22 PM Tr. 24:23-25:6, 38:11-67:9 (Koch). As the Court noted, "the timing of social media posts regarding confusion and the tongue-in-cheek nature of some of the comments do not provide much evidence of actual confusion." ECF 718, at 3.

SBC's social media evidence was laughable, literally—cross examination of co-founder Greg Koch about the social media posts on which SBC placed great weight devolved into laughter over the absurdity of the evidence. 3/15/22 PM Tr. 56:22-57:1; 60:1-4 (noting courtroom laughter during Koch cross). The individuals that posted about alleged "confusion" were, in reality, SBC fans responding to Mr. Koch's call to arms. All of the posts were made after Mr. Koch announced the lawsuit in a video sent to his thousands of followers. *Id.* at 19:17-25. One responsive post used SBC's hashtag of "#TrueStoneVsKeystone," showing that the individual was aware of the difference between the products. *Id*. at 62:16-63:7 (Koch). Mr. Koch conceded that other posts, such as one stating "Man, I hope I don't mistake this for a Keystone Light" accompanied by three laughing emojis, were in fact jokes. *Id*. at 74:16-75:17 (Koch).[3] No reasonable jury could find that SBC's social media posts constitute evidence of confusion, and these posts should be given no weight. *See Hendrix*, 762 F.3d at 842 (when ruling on a motion for a new trial, the court "can weigh the evidence and assess the credibility of the witnesses").

2. The Other *Sleekcraft* Factors Undermine SBC's Claim.

As for the other *Sleekcraft* factors, no reasonable jury could find that the evidence supports a finding of infringement, and any jury determination to the contrary is against the clear weight of the evidence. *See Brookfield*, 174 F.3d at 1055.

STONE And KEYSTONE Marks Are Not Similar. The evidence SBC put forward at trial was focused on the word "Stone," cut off from the rest of the

[3] *See also* ECF 708, Def.'s Resp. to Supp. Submission (addressing every purported piece of SBC's "evidence" and explaining why it should be given zero weight).

KEYSTONE LIGHT mark and its surrounding context. But "marks must be considered in their entirety and as they appear in the marketplace." *Proven Methods Seminars, LLC v. Am. Grants & Affordable Hous. Inst., LLC*, 519 F. Supp. 2d 1057, 1069 (E.D. Cal. 2007) (quotation omitted). SBC presented ***no*** evidence that MillerCoors used only the "Stone" component of the mark on either its primary packaging (cans) or secondary packaging (cartons); in fact, the record establishes that the full KEYSTONE LIGHT mark was used on both. *See* DX9453 (can); DX9451 (carton). SBC, instead, drew attention to the fact that cans of Keystone stacked the term KEY above the term STONE. This Court already rejected that argument. ECF 85, 3/26/19 Order Den. Prelim. Inj., at 8-9 ("[W]hat Stone conveniently fails to mention is that a consumer picking up, or even just looking at a Keystone can[,] see[s] the full name KEYSTONE LIGHT (twice), as well as the bright-yellow house mark of Coors, printed on the can as well.").[4] And while certain portions of certain Keystone marketing materials used the word "Stone" separately, the unrebutted evidence shows that the materials, when viewed in full, always included the KEYSTONE LIGHT mark. *E.g.*, DX10104 (ad with "To Each Their Stone" tagline accompanied by KEYSTONE LIGHT mark); 3/21/22 PM Tr. 136:22-25, 139:2-15 (Reischauer) (billboards and social media always used Keystone name). *See Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 633 (9th Cir. 2005) (courts "should analyze each mark within the context of other identifying features.").

Craft And Economy Beers Are Not Related Goods. No reasonable jury could conclude that SBC's craft beers and MillerCoors' economy beers are related goods, and any jury determination to the contrary would be against the clear weight of the evidence. SBC's craft beers and MillerCoors' economy beers belong to different market segments with essentially no crossover or competition between the two,

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[4] The USPTO similarly concluded that the two stacked syllables had the same commercial impression as the registered mark KEYSTONE mark. PX2862, at 68-73.

thereby negating the opportunity for confusion. *See, e.g.*, DX6575 (shifting report showing only 2% of Keystone consumers were drawn from entire craft beer segment); 3/16/22 PM Tr. 108:11-14 (Stipp) (SBC's closest competitors are other craft brewers: Sierra Nevada, New Belgium, Firestone Walker, and Lagunitas). The unrebutted evidence showed that Keystone competed not against craft beers but other economy beers, in particular Natural Light and Busch Light. *E.g.*, DX6537, at 17 (comparing Keystone performance to Natural Light and Busch). There is no dispute that the products have different price points, with SBC beers selling for three to four times the price of a can of Keystone. DX9139, 9143.

SBC's Trademark Is Weak. A reasonable jury would have no choice but to conclude that SBC's mark is weak due to the widespread use of "Stone," coupled with SBC's concession that its mark is not well-recognized. Any jury determination to the contrary would be against the clear weight of the evidence. Commercial strength of a mark is based on "actual marketplace recognition." *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1149 (9th Cir. 2011). SBC's own CEO conceded that at least "half the beer market out there didn't even know who [Stone] was" in 2017, just prior to this lawsuit being filed, and SBC itself believed that it was "not a broadly known brand." 3/16/22 PM Tr. 15:3-20 (Stipp); 3/17/22 AM Tr. 70:21-24 (Stipp). Moreover, in a crowded field of similar marks, each member of the crowd is relatively weak in its ability to prevent use by others in the crowd. 2 McCarthy § 11:85. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1144 (9th Cir. 2002) (when "marketplace is replete with products using a particular trademarked word, … the likelihood [is] that consumers will ***not*** be confused by its use"). Numerous other trademarks incorporate the term "Stone" that are used for beer products. *See, e.g.*, 3/15/22 AM Tr. 63:18-81:6 (Koch); 3/16/22 AM Tr. 52:15-53:22 (Koch); DX9228, 9039, 9160, 9033, 9030, 9044.

The Products Are Sold Through Different Channels. A reasonable jury could only conclude that SBC's beers and Keystone are marketed through different channels (and any finding to the contrary would be against the clear weight of the evidence). The evidence showed that 30-40% of SBC's beers are sold on-premises, whereas only 2% of Keystone is sold on-premises. 3/14/22 PM Tr. 143:3-13 (Koch); 3/17/22 AM Tr. 34:16-35:2 (Stipp); DX6450, at 7 (2% of Keystone sold on premise). In addition, the products are sold in different regions. *Compare* 3/16/22 PM Tr. 123:25-124:11, 126:19-25 (Stipp) (40% of SBC's sales are in Southern California), *with* DX6537, at 18 (70% of Keystone sold in "Central" and "South" regions of U.S.).

SBC's And MillerCoors' Consumers Exercise A High Degree Of Care. SBC's consumers are "[c]raft die-hard customers" who are committed to high quality craft beers and are willing to pay for them. DX8176, at 23-27. Keystone consumers, in contrast, are budget conscious and select beer based on small differences in price. DX6412, at 8 (economy buyers "disproportionately value-conscious vs. the average consumer"); 3/10/22 AM Tr. 21:7-24 (Hattersley) (economy buyers do math to "make sure that they're getting the best value"). In each case, a reasonable jury must conclude that the consumer is highly attentive to what the consumer is purchasing.

No Intent To Confuse. The trial record contains no evidence that MillerCoors' packaging refresh was designed with the intent to confuse consumers with SBC's products. SBC has instead focused on MillerCoors' unremarkable goal of improving its sales and regaining market share, but "an 'intent' sufficient to support … a finding of a likelihood of confusion must be an intent to confuse." 4 McCarthy § 23:120. In any event, the jury found MillerCoors did not act willfully. *See* ECF 625, Jury Verdict.

No Likelihood Of Expansion. The trial record contains no evidence or testimony as to the expansion of SBC's product lines to economy beer, and in fact SBC emphasized it was important to SBC's identity that it did ***not*** make low-end beer. *E.g.*, 3/14/22 PM Tr. 68:16-70:4 (Koch); 3/15/22 PM Tr. 124:19-126:11 (Koch).

In sum, no reasonable jury could conclude that these factors favored a finding of trademark infringement. And to the extent the jury found otherwise, its verdict is seriously erroneous and clearly contrary to the weight of the evidence. As such, the

Court should grant JMOL or a new trial. *Coach*, 2014 WL 12573411, at *14-16.

B. MillerCoors Established Its Prior Use Defense.

An independent justification for granting JMOL or a new trial is that any reasonable jury would conclude that MillerCoors used "Stone(s)" continuously in commerce from the early 1990s—before Stone was founded—through today, and any contrary finding is against the great weight of evidence. *See* App'x 1 (summary of use of "Stone(s)"); DX9258 (summary of Keystone artwork); 3/22/22 PM Tr. 13:20-14:2 (Whitley) (distributors and retailers referred to Keystone as "Stone(s)" in 1989-91). *See* ECF 661, 4/25/22 Reply ISO Mot. for JMOL, at 7-12.

II. NEW TRIAL IS WARRANTED FOR ADDITIONAL REASONS.

A. Dr. Palmatier's Testimony Should Have Been Excluded.

1. SBC's Late Switch To Dr. Palmatier Prevented MillerCoors From Seeking To Exclude His New Opinions.

Pursuant to *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993), the Court has an obligation to act as a gatekeeper before allowing any proposed expert testimony. The Court abuses its discretion when it "either abdicates its role as gatekeeper by failing to assess the scientific validity or methodology of [an expert's] proposed testimony, or delegates that role to the jury by admitting the expert testimony without first finding it to be relevant and reliable." *U.S. v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1189 (9th Cir. 2019) (quotation omitted); *see also Est. of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014). The failure to make any findings is "necessarily an abuse of discretion." *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1069 (9th Cir. 2017); *see also Murray v. S. Route Mar. SA*, 870 F.3d 915, 925 (9th Cir. 2017). Applying these standards, MillerCoors should have been allowed to challenge Dr. Palmatier via *Daubert*.

SBC's original expert, Dr. Stewart, was apparently unable to testify at trial, and SBC sought leave to substitute Dr. Palmatier after expert disclosure and *Daubert* motion deadlines had passed. ECF 449. The parties' briefing on that motion addressed only timing and prejudice (not *Daubert* standards). ECF 449, 450, 454. SBC represented that Dr. Palmatier would "adopt and endorse" Dr. Stewart's opinions and deposition testimony and contribute "***limited supplementary opinions***" solely to reflect "new developments since expert reports were issued in Summer 2019." ECF 449, at 2, 10 (emphasis added). SBC said nothing about also using Dr. Palmatier to introduce ***brand new opinions***. The Court permitted the substitution and took steps to mitigate the potential for prejudice. *See* ECF 459, at 5. Later, when MillerCoors asked for an opportunity to file a *Daubert* motion to exclude Dr. Palmatier's "new opinions" that "didn't exist before" and "weren't at issue" with respect to Dr. Stewart, SBC repeated that "[w]hat happened here is simply that … Dr. Palmatier took account of an additional two years of data that has accrued since reports were last issued in this case to update" Dr. Stewart's opinions. 7/13/21 Hr'g Tr. 11:14-17. The Court relied on SBC's statement in disallowing a *Daubert* challenge as to Dr. Palmatier. *Id.* at 11:21-25; ECF 472 ("No new *Daubert* motions will be allowed.").

Contrary to SBC's statements to the Court, Dr. Palmatier ***did not*** just substitute in for Dr. Stewart wholesale and supplement his opinions with new data. Instead, Dr. Palmatier injected multiple entirely new opinions, including (1) his "brain node" analysis; and (2) his "regression" analysis. The Court's decision, based on SBC's misrepresentations, not to serve as a gatekeeper and exclude Dr. Palmatier's irrelevant and unreliable new opinions is a *per se* abuse of discretion that can only be fixed with a new trial. *See, e.g.*, *City of Pomona*, 866 F.3d at 1069.

2. The Lack of *Daubert* Scrutiny Was Not Harmless.

When a district court fails to perform its role as a gatekeeper for expert testimony, the next step is to determine whether the error was harmless. *Ruvalcaba-Garcia*, 923 F.3d at 1190. The Court presumes prejudice, and the party proposing the testimony bears the burden to show that the admission was harmless. *Id.*; *Barabin*, 740 F.3d at 464. SBC cannot satisfy its burden, given SBC's heavy reliance on Dr. Palmatier's testimony at trial, where Dr. Palmatier's testimony lasted nearly a full day, and in its post-trial briefing.[5] A new trial is the proper remedy for the non-harmless *Daubert* error. *U.S. v. Bacon*, 979 F.3d 766, 769-770 (9th Cir. 2020).

Dr. Palmatier's "Brain Node" Analysis Was Irrelevant And Unreliable. One prejudicial opinion erroneously shared with the jury was Dr. Palmatier's testimony regarding "brain nodes" and "association," an opinion never propounded by Dr. Stewart. 3/18/22 PM Tr. 61:13-67:5 (Palmatier). This testimony fails under *Daubert* for the threshold reason that it is not relevant. *U.S. v. Valencia-Lopez*, 971 F.3d 891, 897-98 (9th Cir. 2020) (testimony must be both relevant and reliable). At trial, SBC's case was limited to claims of likely consumer confusion. *See* 3/23/22 Tr. 44:12-23 (instructing jury regarding likelihood of confusion). The "brain node" testimony addressed not the question of ***confusion*** among customers, but rather whether customers might ***associate*** alleged lesser attributes of Keystone with SBC products. *See, e.g.*, 3/18/22 PM Tr. 66:24-67:2 (Palmatier) ("Stone attributes start getting linked to the attributes from the Keystone and get linked to Stone"); *id.* at 65:14-68:25 (testifying at length about the "nodes" and association of attributes theory). This is a "dilution" of trademark theory—not what the jury needed to decide here. *Infra*, Part III.A (explaining difference between dilution and infringement claims). SBC voluntarily dismissed its dilution claim prior to trial (ECF 491-1), and therefore Dr. Palmatier's "brain node" opinion was irrelevant and should not have been introduced.

Dr. Palmatier's "brain node" testimony was also prejudicial because he was not qualified to offer an opinion on the science of how a brain reacts. *See* Fed. R. Evid. 702 (requiring that "the witness is sufficiently qualified as an expert by knowledge, skill, experience, training or education"). Indeed, he acknowledged that he is not a "brain scientist" and has no experience or degrees in neurology, neuropsychology, anatomy, or any field associated with brains. 3/18/22 PM Tr. 126:14-22 (Palmatier).

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[5] *See, e.g.*, ECF 632, at 9-10, 12-14, 15, 17-19; ECF 638, at 8, 21-25; ECF 654-1, at 18, 23-24; ECF 660, at 4-5.

Finally, Dr. Palmatier did not follow any acceptable, reliable methodology in his "brain node" opinion, and so the opinion fails the third part of the *Daubert* analysis. Fed. R. Evid. 702(b)-(d); *Valencia-Lopez*, 971 F.3d at 897-98. He never explained any scientific method that he employed, citing only a diagram he drew himself. 3/18/22 PM Tr. 126:3-13. Instead, Dr. Palmatier offered a pseudo-scientific explanation that "your mind is a set of nodes with links." 3/18/22 PM Tr. 61:20-21 (Palmatier). He then opined that MillerCoors' Keystone refresh campaign has subconsciously reprogrammed the "nodes" in consumers' brains to "link" SBC's beers with attributes like "low quality." This supposed reprogramming of consumers' brain "nodes" (whatever those are) purportedly resulted in SBC losing over $100 million in sales and requires $42 million in corrective advertising to repair. 3/18/22 PM Tr. 61:17-63:11, 67:7-25, 121:20-123:16 (Palmatier). This unsupported opinion is inadmissible. Fed. R. Evid. 702 (b)-(d); *Valencia-Lopez*, 971 F.3d at 897-98.

Dr. Palmatier's Regression Analysis Was Unreliable. The jury also should never have heard Dr. Palmatier's testimony about a regression analysis that purportedly correlated Keystone's marketing spending with SBC's declining sales. *See* 3/18/22 PM Tr. 101:7-110:21 (Palmatier). "Because the burden of proving helpfulness and relevance rests on the proponent of a regression analysis, it is the proponent who must establish that other major factors have been accounted for in a regression analysis." *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 973 (C.D. Cal. 2012) (quotation omitted). Courts exclude flawed regression analyses. *See, e.g., Grasshopper House, LLC v. Clean & Sober Media, LLC*, 2021 WL 3702243, at *1 (9th Cir. Aug. 20, 2021) (affirming exclusion of regression analysis that "was so fundamentally flawed that it should not be presented to the jury"); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1273 (S.D. Cal. 2010) (holding that a regression analysis "may become so incomplete that it is inadmissible").

Dr. Palmatier's regression showed no greater correlation between Keystone marketing and SBC's sales than Keystone marketing and Florida rainfall. 3/22 PM

Tr. 98:17-99:7 (Hosfield). Dr. Palmatier looked at SBC's slower growth rate and Keystone's marketing spend and growth. 3/18/22 PM Tr. 104:6-105:9. Dr. Palmatier had six yearly totals as his only data points, and divided them by four, incorrectly using the average as a data point for each of the 24 quarters. 3/22/22 PM Tr. 97:12-97:14 (Hosfield). When Dr. Palmatier "regressed advertising against Stone Brewing Sales, he didn't get any relationship." *Id.* at 97:22-23. So he "play[ed] around with some other things" and improperly used "cumulative advertising" as a metric. *Id.* at 97:23-25. Dr. Palmatier's "regression" analysis should have been excluded.

3. Dr. Stewart's Marketing Studies Were Unreliable.

Dr. Palmatier next opined on surveys that he adopted from Dr. Stewart. In its *Daubert* brief regarding Dr. Stewart, MillerCoors explained that Survey I did not use an image or taglines as they appeared in the marketplace. ECF 164-1 at 9-14; ECF 236 at 5-7. SBC insisted that "Survey I's Keystone product images accurately reflect the way Rebranded Keystone products appear in the marketplace" and "the tag line portion … accurately reflects marketplace reality." ECF 209 at 9 and 11.

Apparently relying on these representations, the Court denied the *Daubert* motion and stated: "Here, the Court finds in the case of *Survey I,* Defendant's criticism of the product images is meritless because the images portray the rebranded can and packaging materials as they are found in the marketplace." ECF 339 at 22. But the evidence at trial showed that SBC misled the Court. After the trial, the Court corrected its earlier ruling and concluded: "The expert testimony of Dr. Palmatier was based on seriously flawed survey methodology, including the way the Keystone Light can was presented to survey subjects (*i.e.*, not in a manner that consumers would normally encounter the product in the marketplace)." ECF 718, at 3.

The Court's conclusion is well-supported. The underlying surveys were flawed, and Dr. Palmatier's opinions based on Dr. Stewart's surveys should not have been admitted. Fed. R. Evid. 702 (b)-(d). The Court may "reevaluate" its pre-trial ruling allowing for expert testimony to be introduced and conduct a "post-trial *Daubert* review as to parts of the [p]laintiffs' experts' trial testimony," even where the court ruled prior to trial that the expert testimony could be introduced. *U.S. v. J-M Mfg. Co., Inc.*, 2020 WL 4196880, at *20 (C.D. Cal. June 5, 2020). A new trial is appropriate where a court determines, after trial, that expert testimony was inadmissible. *Id.*

B. SBC's Failure to Disclose Sapporo's Offer Was Prejudicial.

SBC's failure to disclose Sapporo's offer and subsequent agreement to purchase SBC also warrants a new trial. This issue arose when SBC attempted to present evidence regarding SBC's alleged decrease in value. 3/14/22 PM Tr. 99:9-100:5 (Koch). The Court's questioning revealed that SBC's claimed "valuation" of $450 million was actually an offer from Sapporo, one of the largest breweries in the world, 3/15/22 PM Tr. 3:17-18 (Koch), and that SBC had withheld evidence of that offer from MillerCoors for months before trial. 3/16/22 AM Tr. 30:9-15 (Koch). Stating that it "thought [it] was being gamed" by the valuation testimony, 3/16/22 AM Tr. 29:2-4, the Court instructed the jury to disregard the evidence. *Id.* at 52:3-6. Only after trial concluded did MillerCoors learn that not only had Sapporo made an offer to purchase SBC, but Sapporo in fact did purchase SBC. ECF 704, 7/14/22, Def.'s Status Rep., at 4. SBC's withholding of the Sapporo proof substantially affected MillerCoors' presentation of its case and therefore warrants a new trial.

Under Rule 59's test for discovery misconduct, borrowed from Rule 60(b)(3), the movant must (1) prove "that the verdict was obtained through fraud, misrepresentation or other misconduct," such as discovery misconduct; and (2) "establish that the conduct … prevented the losing party from fully and fairly presenting his case or defense." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990). Discovery misconduct can include "even accidental omissions." *Id.* at 879. Further, "the [moving] party need not establish that the result in the case would be altered." *Jones*, 921 F.2d at 879. Rather, "the moving party need only prove this misconduct resulted in a substantial interference with the presentation of the case." *Youngevity Int'l v. Smith*, 2020 WL 7048683, at *3 (S.D. Cal. Sept. 8, 2020).

The first element—that there has been misconduct—is met when "(1) [the movant] exercised due diligence in their discovery requests, (2) [the non-movant] knew, or was charged with knowledge, of the missing document, and had constructive (if not actual) possession of it; and (3) [the non-movant] did not divulge the document's existence." *Jones*, 921 F.2d at 879. Here, each of these elements is met. *First*, MillerCoors exercised due diligence in its discovery requests. In its first requests for production, MillerCoors asked for "All documents referring or relating to any valuation of [SBC]." *See* Ex. A, 9/14/18 SBC's Resp. to RFP No. 6. SBC wrote that it would produce responsive documents, but never produced the Sapporo offer, despite attempting to introduce it as evidence of SBC's valuation at trial. *See id.* MillerCoors also asked SBC to describe "the nature, measure, and proper calculation of any and all monetary relief sought[.]" *See* Ex. B, 5/21/19 SBC's Supp. Resp. to Interr. No. 9. SBC responded and supplemented its response, but never disclosed the fact or amount of the offer. *See id.* Likewise, MillerCoors requested "All documents relied on by [SBC] for calculation of damages, including … any document produced by third parties that [SBC] intends to use to support its claims[.]" *See* Ex. A, 9/14/18 SBC's Resp. to RFP No. 48. SBC responded that it would produce these, but did not produce any document related to the Sapporo offer.[6] *See id.*

Second, SBC "knew … of the missing [evidence], and had constructive (if not actual) possession of it" because SBC tried to introduce evidence of the offer as proof of SBC's valuation at trial. 3/14/22 PM Tr. 99:18-100:12 (Koch; Hagey); *id.* at 103:2-6 (Hagey). SBC also relied on the offer to argue in its opening that SBC "lost approximately 355 million dollars" in value. 3/7/22 PM Tr. 121:15-16 (Hagey). *Third*, despite knowing about this evidence for four months, and despite having a duty to

[6] In addition, because SBC attempted to present the Sapporo offer in support of its damages case, SBC was required to disclose the offer under Rules 26. *Callow v. Riverview Marina, Inc.*, 2005 WL 8165404, at *4-6 (D. Idaho Sept. 15, 2005) (granting new trial where party failed to supplement Rule 26 disclosures).

provide it to MillerCoors "in a timely manner," Fed. R. Civ. P. 26(e)(1)(A), SBC did not divulge the evidence's existence until it decided to have a witness testify to the offer because SBC believed that the testimony benefitted SBC. *See* 3/16/22 AM Tr. 31:1-4, 11-12 (The Court: "It's not until we're in trial … that you disclosed to MillerCoors that there's this $450 million offer, and you have never supplemented your answers between November and the day of trial; is that right? … Hagey: We have not"). These facts demonstrate, "at a minimum, an avoidable … omission which is the equivalent of 'misconduct.'" *Intel Corp.*, 1993 WL 135953, at *4.

SBC's withholding of the Sapporo evidence also satisfies the second element, as it "prevented [MillerCoors] from fully and fairly presenting [its] case or defense." *Jones*, 921 F.2d at 879. This requirement is met when movants demonstrate "substantial interference by showing the material's likely worth as trial evidence or by elucidating its value as a tool for obtaining meaningful discovery." *Id.* (quotation omitted). That occurred here for at least the following three reasons.

First, this evidence fatally undermines SBC's primary damages argument—that SBC was in a death spiral from which only the jury could save it and that SBC's very "survival" was at stake. 3/17/22 PM Tr. 25:22-23 (Koch) ("I just hope to get a lifeline"); 3/23/22 PM Tr. 61:1-6 (Hagey) (repeatedly asking the jury during closing to "resolve and address" "the survival of Stone"); *id.* at 65:7-9 ("[W]hether Stone can return to what it is and what it was meant to be … is in your hands"). The "saving" of SBC was so central to its case that its counsel both opened and closed the trial with a plea to the jury to do just that. 3/7/22 PM Tr. 79:23-80:2 (Hagey) ("The reason we are here is … to determine … whether my client Stone deserves to be saved"); 3/23/22 PM Tr. 144:22 (Hagey) ("Ladies and gentlemen …. We ask that you Save Stone.").[7]

[7] SBC's representations to the jury on this subject contrast sharply with those made by SBC after the Sapporo sale was announced publicly, including that the Sapporo purchase will "double[] the size of [SBC]," ECF 704, at 4, and that the purchase "will add exponential opportunities for growth," ECF 713, at 1.

As the Court pointed out, even the *fact* of the purchase—regardless of the purchase amount—undermines SBC's theory of harm. ECF 718, at 3 ("[T]he Stone brand was not so tarnished, if at all, as to cancel its recent purchase by a major international brewing company."). Given the fact that this evidence would have refuted SBC's incessant, doomsday proclamations, "the trial value of [this evidence] is obvious." *Intel Corp.*, 1993 WL 135953, at *4; *see also Wharf v. Burlington N. R.R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995) (ordering new trial where defendant "took advantage of [plaintiff's] ignorance by arguing the false position to the jury.").

Second, the fact that SBC was entertaining an offer from and arranging for a sale to Sapporo undermines SBC's entire theory regarding the character and intentions of SBC, its founders, and its beer, as contrasted with MillerCoors and Keystone. *E.g.*, 3/7/22 PM Tr. 102: 9-10 (Hagey) ("Stone…is one 100th of …the size of the defendant."); *id.* at 94:24-95:1 (Hagey) ("You're going to hear a lot about craft and a lot about what it means to make Stone beer versus the kind of beer that MillerCoors makes with Keystone"). Likewise, Dr. Palmatier told the jury that SBC had suffered harm as a result of becoming associated with Keystone—a lighter, less expensive beer made by a "big beer" company. 3/18/22 PM Tr. 66:20-23 (Palmatier).

SBC made these representations while withholding evidence that ***SBC was planning to associate itself with a "big beer" company like MillerCoors, which makes light beer like Keystone***—in other words, voluntarily entering into the precise type of association that had allegedly caused SBC's claimed damages. At the very least, the failure to disclose this evidence "clos[ed] off a potentially fruitful avenue of … cross-examination" with respect to SBC's witnesses, which is by itself grounds for a new trial. *Youngevity*, 2020 WL 7048683, at *3 (quotation omitted); *see also Cal. Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1405 (9th Cir. 1995) (new trial proper where withheld evidence "could serve as valuable impeachment evidence").

Third, this evidence was a "valu[able] tool for obtaining meaningful discovery." *See Jones*, 921 F.2d at 879 (quotation omitted). Indeed, had SBC disclosed the Sapporo offer and negotiations as required, MillerCoors would have moved to take additional discovery into its origin, basis, and the circumstances around it, as the Court itself recognized. 3/16/22 AM Tr. 42:8-17 (The Court) ("[I]f had been told what we learned in this trial, I would have … asked for a continuance[,] I would have asked for supplemental discovery to find out what the specifics were of the offer."). *See also Cal. Sansome*, 55 F.3d at 1405 (affirming grant of a new trial where the withheld evidence "could lead to more evidence … upon further discovery."). B SBC's withholding of the Sapporo offer justifies a new trial.

III. THE DAMAGES AWARD CANNOT STAND.

The jury awarded $56 million in damages to SBC, but that number is not tied to any of SBC's damages claims and it is entirely unsupported by the evidence. The jury's award is an extreme outlier among trademark cases, and if allowed to stand would be ***one of the largest—if not the largest—compensatory damages award*** in this Circuit in at least the last 30 years. **Appendix 2** sets forth all judgments awarding $1,000,000 or more in compensatory damages for trademark claims in the Ninth Circuit in the last 30 years that MillerCoors has been able to locate. There are only eighteen such awards, and only four exceed $10,000,000, with the largest award standing at $50,300,000. On the record here, there is no justification for such an outsized award. *See Clark v. City of Tucson*, 2020 WL 914524, at *18-20 (D. Ariz. Feb. 26, 2020) (remitting award from $1,900,000 to $250,000 based on comparison to other awards); *Sooroojballie v. Port Auth. of N.Y. & N.J.*, 816 F. App'x 536, 545-48 (2d Cir. 2020) (ordering new trial/remittitur based on survey of comparable cases).

None of SBC's three damages theories—past lost profits, so-called "future lost profits," and corrective advertising—holds up as a matter of law or fact.

A. SBC's "Past Lost Profits" Damages Theory Fails.

SBC claimed that it lost $32.8 million in past profits. 3/21/22 PM Tr. 46:19-20 (Distler). This category cannot support the jury's damage award for several reasons.

First, SBC's damages model for past lost profits was legally flawed, as it was based not on a theory of trademark ***infringement*** but on a theory of trademark ***dilution***—a claim that SBC ***voluntarily dismissed from the case before trial***. ECF 491-1. SBC's expert conceded that her damages theory was based on a purported negative "association" developed in consumers' minds between SBC's products and Keystone: "[T]he harm that is occurring to Stone is that its brand … is being impacted by a negative association. So there may not necessarily be substitution between the two products but the brand is harmed and generating less sales as a result of that association." 3/21/22 PM Tr. 107:10-18. That is, SBC's damages model rested on a theory of trademark ***dilution***, which is different from trademark infringement and is no longer part of this case.

There are two types of dilution claims—blurring and tarnishment—and both deal with the types of purported "associations" that SBC put before the jury. 15 U.S.C. § 1125(c)(2)(B)-(C). Dilution by blurring turns on an "association" with the plaintiff's famous mark based on similarity with the defendant's mark; this is legally distinct from a likelihood of confusion. 4 McCarthy § 24:117 ("Dilution 'association' [in a blurring claim] cannot mean the same thing as infringement 'confusion.'"); *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 805 (9th Cir. 2002) (dilution "works its harm not by causing confusion…"). Despite this distinction, SBC's damages expert conceded that the purported association between SBC's products and Keystone is the basis for SBC's claimed damages. *E.g.*, 3/21/22 PM Tr. 107:4-18 (consumers do not want to buy Stone "[o]nce it's been associated with Keystone").

Dilution by tarnishment, meanwhile, deals with the positive associations with a mark being degraded by negative associations. 4 McCarthy § 24:89; *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 507 (2d Cir. 1996) ("sine qua non of tarnishment" is negative association due to defendant's use). Both SBC's damages and marketing experts as well as its CEO testified that the alleged harm was caused by purported tarnishment, ***not*** a likelihood of confusion. *E.g.*, 3/21/22 PM Tr. 107:4-

9 (Distler); 3/18/22 PM Tr. 79:2-14 (Palmatier) (alleged inability for SBC to command high prices is "very common when the brand starts getting associated with some of these negative attributes"); 3/16/22 PM Tr. 57:12-23 (Stipp) ("[Y]ou have an economy brand taking a super premium beer brand's name and putting it on their can …. It[] just … erodes it."). Dr. Palmatier's "brain nodes," which were central to his theories, likewise turned on negative associations. 3/18/22 PM Tr. 111:22-112:5 ("[T]hey're taking these really bad attributes and applying it and the more and more time[s] they do it, the more those bad attributes are mapped on to Stone.").

Those admissions confirm that SBC's claim of past lost profits is not tied to the confusion-based trademark infringement theory put to the jury, but to SBC's abandoned theory of dilution. Dilution-based damages are not recoverable because SBC does not have a dilution claim. ECF 491-1; *Playboy Enters.*, 279 F.3d at 805 (dilution and infringement claims address different harms).

Second, SBC's damages expert implausibly assumed that "***every lost sale[] by Stone Brewing Company is due to the Keystone re-fresh***." 3/21/22 PM Tr. 89:23-90:3 (Distler) (emphasis added). But as the Court correctly ruled, there was "scant evidence" that Keystone's refresh had caused SBC to lose market share, "especially in light of the other factors … that are much more likely the cause of the losses Stone claims." ECF 716, at 4. *See Hendrix*, 762 F.3d at 846 (affirming new trial on damages where court disbelieved that drop in revenue was result of infringing). The evidence shows that SBC lost sales for a plethora of reasons that had nothing to do with Keystone's packaging refresh, like: SBC's decision to raise prices; SBC closing its Napa, Berlin, and China locations; the number of craft breweries exploding from about 3,400 in 2015 to over 8,400 today; the craft brewing industry falling into the "doldrums"; consumers' tastes changing; SBC suffering from negative publicity; and SBC's on-premises sales plummeting as a result of the COVID-19 pandemic.[8]

[8] 3/14/22 PM Tr. 116:10-137:33 (Koch); 3/15/22 AM Tr. 85:8-92:1 (Koch); 3/15/22 PM Tr. 15:6-17:3 (Koch); 3/16/22 AM Tr. 67:18-68:6 (Stipp); 3/16/22 PM Tr.

Instead of supporting SBC's claim for damages, the evidence demonstrated that SBC ***did not lose sales*** to Keystone. As the Court has recognized, Nielsen's shifting reports "indicat[e] no Stone-to-Keystone or Keystone-to-Stone customers." ECF 716, at 4; DX6537, 6575, 6534, 8491 (reports). Indeed, SBC's damages expert was forced to concede that SBC's shifting reports, which "give you very pointed, real-world data in terms of … who Stone is losing to," did not even list Keystone. 3/21/22 PM Tr. 95:22-96:8. SBC offered no substantive challenge to this data, and the Court was correct in concluding that "[e]vidence is … lacking demonstrating Keystone Light sales coming at the expense of Stone Brewing Company products." ECF 718, at 3.

Thus, SBC's theory of "past lost profits" cannot support the damages award. As a result, the Court should grant JMOL, order a new trial, or issue a remittitur making clear that SBC is not entitled to any damages for past lost profits.[9]

B. SBC's "Future Lost Profits" Damages Theory Fails.

Likewise, neither the law nor the evidence supports damages for SBC's so-called "future lost profits" of $141.5 million. 3/21/22 PM Tr. 46:19-24 (Distler). As an initial matter, future lost profits are not a cognizable form of damages for infringement. *See* 5 McCarthy § 30:57 (not identifying future losses as damages). But even if they were, courts deny damages awards that, like here, are "remote and speculative." *Lindy*, 982 F.2d at 1408; 3/23/22 Tr. 58:11-12 (closing instructions).

SBC's claim for future lost profits is nothing but speculation. Only SBC's damages expert testified to the amount of future damages, and she provided no

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114:24-118:9, 130:23-131:22 (Stipp); 3/17/22 AM Tr. 36:4-11 (Stipp); 3/18/22 PM Tr. 30:22-31:6, 35:22-36:21 (Wagner); DX8316.

[9] Even if the Court were to permit an award for past lost profits (it should not), SBC's $32.8 million figure would need to be reduced by 20% to account for sales attributable to Stone's Arrogant Bastard-branded beers. *See* 3/22/22 PM Tr. 100:8-19 (Hosfield). SBC did not introduce evidence of confusion between Keystone and Arrogant Bastard products, which do not use the "Stone" name. *Compare* 3/16/22 PM Tr. 68:6-9 (Stipp) (Arrogant Bastard is "sold as a separate brand"), *with* 3/21/22 PM Tr. 38:7-12 (Distler) (lost profits based on sales for all SBC beers). SBC cannot recover damages for Arrogant Bastard when its claim is about Stone. *Lindy II*, 982 F.2d at 1407-08.

supporting evidence or even explanation for her claim that SBC would lose $84 million in profits from the time of trial through 2031. Ms. Distler testified only that she "fix[ed] the last barrelage," without specifying what that barrelage was, on what basis it was selected, or why it was entitled to any weight. 3/21/22 PM Tr. 44:18-45:4. She then testified that she "calculate[d] the revenue, and the profits" for SBC, without providing any explanation as to the basis for those calculations. *Id.* She then "appl[ied] a discount factor to control for … what will those dollars be worth … today," without specifying the discount factor or why it was proper. *Id.* As to SBC's damages after 2031, the ***entirety*** of the evidence justifying an additional $57 million in purported damages is the following testimony from SBC's expert: "This is a standard formula for calculating a terminal value for the ongoing losses after 2031. So if you plug those values into the formula, you end up [at] $57,087,720 after 2031." *Id.* at 46:13-16.

Courts decline to award damages even where there is a modicum of evidence as to lost profits. *See Hansen Bev. Co. v. Vital Pharm., Inc.*, 2010 WL 3069690, at *8 (S.D. Cal. Aug. 3, 2010) (granting judgment where evidence of lost profits did not "provide a sufficient basis for a damages determination").[10] Here, there is ***no*** evidence supporting Ms. Distler's purported measures of future lost profits and therefore they cannot be a basis for damages. Accordingly, the jury's damages award cannot be justified based on any "future lost profits." *See, e.g., ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 442 F. Supp. 3d 1329, 1363 (D. Or. 2020) (new trial warranted where damages expert's testimony on lost profits was unreliable).

C. SBC's "Corrective Advertising" Damages Theory Fails.

Finally, SBC is not entitled to damages for corrective advertising as a matter of law and, even if it were, such damages could not reach the $41,870,000 figure put forward by SBC. 3/21/22 PM Tr. 46:19-24 (Distler). The purpose of corrective

[10] *N. Atl. Operating Co. v. LA Price Check, LLC*, 2018 WL 5099479, at *4 (C.D. Cal. Mar. 27, 2018) (refusing to infer lost profits with insufficient evidence); *Clarke-Reliance Corp. v. McNab, Inc.*, 1994 WL 62818, at *5 (S.D.N.Y. Feb. 23, 1994).

advertising is to "restore" a trademark. *Quia Corp. v. Mattel, Inc.*, 2011 WL 2749576, at *5 (N.D. Cal. July 14, 2011). Thus, SBC needed to show that "repair of the old trademark, rather than adoption of a new one, is the least expensive way to proceed." *Van Burren v. Envii, Inc.*, 2019 WL 3220013, at *3 (C.D. Cal. Mar. 27, 2019). SBC instead built its case on the premise that its STONE mark ***could not*** be repaired—indeed, that "the value of the STONE mark" had been entirely "***destroyed***." 3/7/22 AM Tr. 8:8-10 (Court's introductory statement) (emphasis added); *see also* 3/18/22 PM Tr. 121:7-8 (Palmatier) ("Stone's brand has been permanently damaged."); 3/21/22 PM Tr. 46:2-4 (Distler) (SBC's marketing expert and CEO believe brand is "permanently damaged" and cannot "recover"). Thus, corrective advertising cannot be a proper basis for damages as a matter of law. *HM Elecs., Inc. v. R.F. Techs., Inc.*, 2015 WL 1757804, at *4 (S.D. Cal. Apr. 17, 2015) (party "cannot spend more money advertising [its] brand than what [party] believed the brand to be worth").

If the Court were nonetheless to find that corrective advertising damages are available (and it should not), the award should be reduced to $10,467,500, or 25% of MillerCoors' alleged advertising expenditures, as the law holds. 3/21/22 PM Tr. 46:19-24 (Distler). *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1375-76 (10th Cir. 1977), announced the rule that a plaintiff is entitled to no more than 25% of a defendant's advertising expenditures, adopting the FTC standard. The 25% cap has been endorsed by the Ninth Circuit and consistently applied. *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 989 n.2 (9th Cir. 1996).[11] MillerCoors is not aware of ***any*** court in this Circuit that has permitted prospective corrective advertising in excess of 25% of a defendant's expenditures, and this Court should not be the first.

CONCLUSION

For the foregoing reasons, MillerCoors respectfully requests that the Court grant MillerCoors' renewed motion for JMOL, a new trial or, barring that, a remittitur.

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[11] *See also Marketquest Grp., Inc. v. BIC Corp.*, 2018 WL 1756117, at *5 (S.D. Cal. 2018); *HM Elecs.*, 2015 WL 1757804, at *3-4; *Quia*, 2011 WL 2749576, at *5.

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