

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**FUTURE PROOF BRANDS, LLC**

**Plaintiff,**

v.

**MOLSON COORS BEVERAGE  
COMPANY F/KA/ MOLSON  
COORS BREWING COMPANY and  
MILLERCOORS, LLC,**

**Defendants.**

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**CIVIL ACTION NO. 1:20-cv-144  
JURY TRIAL DEMANDED  
  
REQUEST FOR HEARING**

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**PLAINTIFF FUTURE PROOF'S MOTION FOR PRELIMINARY INJUNCTION**

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## I. INTRODUCTION

Future Proof seeks immediate injunctive relief to prohibit Molson Coors from the imminent national launch of Molson Coors’s “Vizzy” products – which may occur as early as March 30, 2020.<sup>1</sup> Future Proof Brands, LLC (“Future Proof”) is the owner of exclusive rights in the BRIZZY mark for use on “alcoholic beverages, except beer; alcoholic fruit cocktail drinks; [and] prepared alcoholic cocktails” by virtue of its registered trademark (U.S. Trademark Registration No. 5,933,791). According to their own press and promotional materials, Molson Coors Beverage Company and MillerCoors (collectively “Molson Coors”) have already begun marketing – and will soon launch across the United States – a line of “Vizzy” hard seltzer beverages that will compete directly with Future Proof’s Brizzy® hard seltzer products. Molson Coors’s use of VIZZY – a nearly identical mark in sight and sound to BRIZZY– on the exact same type of products in the exact same category of goods and in the exact same channels of trade constitutes trademark infringement.

Molson Coors’s use of the VIZZY mark on hard seltzer products is likely to confuse consumers concerning the source, affiliation, sponsorship or approval of these products. In fact, its pre-launch promotion of the Vizzy products has *already* caused Future Proof to suffer irreparable harm as a result of the confusion Molson Coors has created in the marketplace between Future Proof’s Brizzy® products, which are already successfully being sold, and Molson Coors’s

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<sup>1</sup> See App. at 036 (Fenchel Decl. at Ex. A-3) (AdAge article citing March 30, 2020 launch date). Although Federal Rule of Civil Procedure 65 allows the Court to issue a temporary restraining order in certain circumstances without notice to Molson Coors, Future Proof is *not* seeking an *ex parte* temporary restraining order, given Molson Coors’s agreement not to launch the Vizzy products before March 20, 2020. On February 21, 2020, counsel for Molson Coors agreed not to launch the Vizzy brand hard seltzer to the public until after March 20, 2020. Instead, Future Proof asks the Court to set this matter for hearing as soon as reasonably possible, but certainly before the launch of the Vizzy products, to preserve the *status quo* and prevent further irreparable harm to Future Proof.

Vizzy products, which have not yet been released to consumers. Future Proof now seeks a preliminary injunction to prevent the further significant irreparable harm that Future Proof will suffer if Molson Coors is permitted to launch the infringing Vizzy products nationally. For these reasons, Future Proof respectfully asks this Court to enter a preliminary injunction as soon possible, but before the imminent launch of these infringing products.

## **II. FACTS AND EVIDENCE OF TRADEMARK INFRINGEMENT**

### **A. Future Proof and the Development of the Brizzy® Products**

Inspired by the entrepreneurial spirit of Austin, Texas, and united through a love of music, the founders of Future Proof sought to develop innovative alcoholic beverages for the next generation of drinkers. App. at 002 (Fenchel Decl. at ¶ 3). In 2014, only one year after its founding, the three young founders of what is now known as Future Proof – Justin Fenchel, Brad Schultz, and Aimy Steadman – pitched their beverage business, BeatBox, on the popular Shark Tank television show. *Id.* They later walked away with a \$1 million investment from Mark Cuban, which was one of the biggest investments the show had made at the time. *Id.*

Future Proof quickly developed a reputation in the industry and with its customers as a company that creates innovative and distinctive products for the millennial consumer. The meteoric rise of the hard seltzer category has been nothing short of a phenomenon across the US beverage industry. App. at 002-03 (Fenchel Decl. at ¶ 4). Within the last five years, hard seltzers have grown to account for nearly half of all US mixed drinks and have led to massive innovation within the flavored malt beverage, wine, and spirit-based ready-to-drink sparkling beverages. *Id.*

Hoping to ride this trend and to capitalize on its prior successes in the market, Future Proof teamed up with renowned mixologist Terance Robson in 2018 to create “Brizzy,” a premium, cocktail-inspired hard seltzer beverage. App. at 003 (Fenchel Decl. at ¶ 5). A flavor-forward take

on the hard seltzer phenomenon, the Brizzy® product looks to add value to the nearly \$2.5 billion hard seltzer category by drawing in consumers from the craft beer and cocktail segments. *Id.*

On September 1, 2019, Future Proof launched the Brizzy® product line with three mixology infused flavors: Watermelon Mule, Mixed Berry Mojito, and Strawberry Rosé. App. at 003 (Fenchel Decl. at ¶ 6). Future Proof partnered with H-E-B, where the Brizzy® products are now available to consumers at approximately 200 H-E-B locations in Texas. *Id.* In addition, the Brizzy® products can be found in approximately 200 Circle K stores, 12 Kroger’s stores, and over 500 other locations. *Id.* In the first ninety days after their launch, the Brizzy® products have been purchased by over 1,000 retail locations across four states. *Id.*

To promote and protect its intellectual property rights, Future Proof registered the BRIZZY mark with the United States Patent and Trademark Office (Trademark Registration No. 5,933,791). App. at 003-04 (Fenchel Decl. at ¶ 7). As a result, Future Proof is the owner of exclusive rights in the BRIZZY mark for use on “alcoholic beverages, except beer; alcoholic fruit cocktail drinks; [and] prepared alcoholic cocktails.” *Id.* Future Proof’s trademark registration is valid, subsisting, and in full force and effect. *Id.* Future Proof actively uses and markets the BRIZZY mark in commerce throughout the United States, including in Texas, South Carolina, North Carolina, and Michigan. Future Proof uses the BRIZZY mark in connection with the advertisement and sale of its hard seltzer products, including products depicted below:



The Brizzy® products are popular with consumers. Future Proof has sold 11,400 cases of the Brizzy® products to distributors since September 2019 alone. App. at 004 (Fenchel Decl. at ¶ 9). Current forecasts for revenue associated with the Brizzy® products in 2020 exceed approximately \$2,500,000, which include new retail locations in Kansas, Virginia, California, Georgia, Oklahoma, Colorado, and potentially more states. *Id.* As a result of Future Proof’s continuous and exclusive use of the BRIZZY mark, its reputation for quality, and its sales and recognition in the marketplace, Future Proof’s BRIZZY mark has acquired substantial value and goodwill. *Id.*

#### **B. Molson Coors and Vizzy**

Molson Coors also sought to capture a piece of the booming hard seltzer market. To this end, Molson Coors recently announced that they are investing “millions” in their new brand called “Vizzy,” a product they intend to launch across the United States in March 2020 using a product name and concept that is nearly identical to Future Proof’s Brizzy® product. Molson Coors has released the following images of its Vizzy products:





Although Molson Coors has publicized its intent to launch Vizzy in March, it has already marketed its product extensively in various national publications and at industry conferences using the VIZZY mark. As Dilini Fernando stated in a press release related to Vizzy, “[w]e’re moving fast and furious,” hoping “we’re catching this trend at the right time.” App. at 005 (Fenchel Decl. at ¶¶ 12-13). According to Fernando, Molson Coors also intends to launch a massive media blitz at the same time the Vizzy product hits the shelves, which it represented will include national television advertisements, digital marketing, and social and out-of-home advertising. App. at 005 (Fenchel Decl. at ¶ 13). Again, according to Fernando, the Vizzy product has already secured major retail support at national and regional chains. *Id.*

Molson Coors and its executives were keenly aware of Future Proof’s use of the BRIZZY mark when they launched their recent media blitz. In a recent quote for Beer Business Daily, Molson Coors conceded having reviewed Future Proof’s website and acknowledged that Future Proof’s Brizzy® products were *already* in distribution when Molson Coors decided on the Vizzy name. App. at 050 (Fenchel Decl. at Ex. A-5) (Beer Business Daily Article). Upon further information and belief, Defendants had also reviewed and were aware of Future Proof’s catchy unique Brizzy name and product packaging, its distribution network, and its then-pending (and

later registered) trademark, but nevertheless decided to launch a competing product using a confusingly similar name. App. at 006 (Fenchel Decl. at ¶ 14).

Defendants' use of the nearly identical VIZZY mark to sell a competing hard seltzer product is likely to confuse consumers into believing that their products are made by, sponsored by, connected with, endorsed by, or otherwise affiliated with Future Proof's Brizzy® products. Molson Coors's deliberate infringement is likely to succeed in causing consumer confusion. App. at 006 (Fenchel Decl. at ¶ 15). Not only is Molson Coors's VIZZY mark substantially identical to Future Proof's BRIZZY mark, but Molson Coors intends its hard seltzer products to compete head-to-head with Future Proof's Brizzy® hard seltzer products in store aisles, bars, and in restaurants. Worse, consumer confusion is just as likely outside of the grocery and liquor stores because the two companies use nearly identical distribution and marketing channels, with Future Proof and Molson Coors sharing the same distributors in many areas of the country. App. at 007 (Fenchel Decl. at ¶¶ 17-18).

Defendants' media blitz and their sales and marketing efforts have *already* caused significant confusion in the market, even before the product has been official launched into the market. App. at 007-08 (Fenchel Decl. at ¶ 19). During the companies' annual sales meetings at the end of 2019, Molson Coors's wholesalers expressed confusion about the two products to both Molson Coors and Future Proof. App. at 006 (Fenchel Decl. at ¶ 15). In addition, one of Future Proof's largest wholesalers has expressed the confusion that its sales team will experience when simultaneously selling and distributing Brizzy® products alongside the Vizzy product. *Id.* Future Proof seeks this injunctive relief to prevent the catastrophic irreparable harm that the release of the Vizzy product will cause to Future Proof's business. To quote Future Proof's CEO, "if the Vizzy product launches, Brizzy® will be dead in the water." App. at 009 (Fenchel Decl. at ¶ 24).

### III. ARGUMENT & AUTHORITIES

#### A. Standard

This Court should enjoin Molson Coors from launching the Vizzy products in the United States because its use of the VIZZY mark violates Section 32 of the LANHAM ACT, 15 U.S.C. § 1114(1)(a). Section 34 of the Lanham Act empowers the Court to “grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office....” 15 U.S.C. § 1116(a). The four elements a plaintiff must establish to obtain injunctive relief are: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

#### B. Future Proof Is Substantially Likely to Succeed on the Merits.

A trademark is “‘any word, name, symbol, or device, or any combination thereof,’ that is used or intended to be used ‘to identify and distinguish’ a person’s goods ‘from those manufactured or sold by others and to indicate the source of the goods even if that source is unknown.’” *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 475 (5th Cir. 2008). To succeed on a trademark infringement claim, a plaintiff must: (1) establish ownership in a legally protectable mark; and (2) show infringement by demonstrating a likelihood of confusion. *Id.* at 474. To prove ownership in a legally protectable mark, a plaintiff may rely on a federal trademark registration. *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 237 (5th Cir. 2010). To prove infringement, a plaintiff must show a “likelihood of confusion as to the source, affiliation, or sponsorship of the products or services at issue.” *Id.* As the following

conclusively demonstrates, Future Proof is substantially likely to succeed on the merits.

**1. Future Proof Owns a Legally Protectable Mark.**

Future Proof owns all right, title, and interest in the BRIZZY mark, including U.S. Trademark Registration No. 5,933,791. App. at 011-014 (Fenchel Decl. at Ex. A-1) (Trademark Registration). Accordingly, Future Proof has satisfied the first element of its trademark infringement claim. *See Choice Hotels Int'l v. Patel*, 940 F. Supp. 2d 532, 539 (S.D. Tex. 2013) (“Proof of registration of a service mark or trademark with the United States Patent and Trademark Office is *prima facie* evidence of the registrant’s exclusive right to use the mark in commerce for the services specified in the registration.”).

**2. Molson Coors’s Use of the Vizzy Mark on Identical Products Causes a Likelihood of Confusion.**

Molson Coors’s use of the VIZZY mark on its products causes a likelihood of confusion. In the Fifth Circuit, likelihood of confusion is typically analyzed by reference to eight digits of confusion: “(1) strength of the plaintiff’s mark; (2) similarity of design between the marks; (3) similarity of the products; (4) identity of retail outlets and purchasers; (5) similarity of advertising media used; (6) the defendant’s intent; (7) actual confusion; and (8) degree of care exercised by potential purchasers.” *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 329 (5th Cir. 2008) (internal citations and quotation marks omitted). However, “[t]he absence or presence of any one factor ordinarily is not dispositive; indeed, a finding of likelihood of confusion need not be supported even by a majority of the . . . factors.” *Id.*

Where, as here, a defendant uses a plaintiff’s exact mark or a nearly identical mark, “a thorough analysis of the digits of confusion is unnecessary, and a presumption of confusion exists.” *Choice*, 940 F. Supp.2d at 540 (citing *Paulsson Geographic Servs., Inc. v. Sigmar*, 529 F.3d 303, 310-11 (5th Cir. 2008)); *TGI Friday’s Inc. v. Great Nw. Rests., Inc.*, 652 F. Supp. 2d 763, 767

(N.D. Tex. 2009); *Petro Franch. Sys., LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, 788 (W.D. Tex. 2009); *Top Tobacco, L.P. v. Thobani*, No. 3:19-cv-275, 2019 WL 5085423 at \*2 (E.D. Va. Oct. 10, 2019) (“Because the defendants sold cigarette rolling papers with marks *nearly identical* to the TOP and JOB marks, the plaintiffs receive a presumption of confusion.”) (emphasis added).

Here, Molson Coors intends to use VIZZY – a nearly identical mark in sight and in sound to BRIZZY – on the exact same type of products in the exact same category of goods and in the exact same channels of trade. As the Ninth Circuit has observed, “[t]he slam-dunk evidence of a conceptually strong mark together with the use of identical marks on identical goods is difficult to surmount.” *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426, 436 (9th Cir. 2017). But even absent this presumption of confusion, virtually all of the digits of confusion suggest a likelihood of confusion:

***Strength of Plaintiff’s Mark.*** Future Proof’s BRIZZY mark is conceptually strong. “Trademarks are characterized as running from strong to weak.” *Waples-Platter Cos. v. Gen. Foods Corp.*, 439 F. Supp. 551, 576 (N.D. Tex. 1977) (citations omitted). “The stronger the mark, the greater the protection it receives.” *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 201 (5th Cir. 1998). Two factors determine the strength of a mark: (1) the mark’s position along the distinctiveness spectrum; and (2) the standing of the mark in the marketplace. *See Am. Rice, Inc.*, 518 F.3d at 330. With respect to the first factor, BRIZZY is an arbitrary or fanciful mark that enjoys a presumption of distinctiveness due to its trademark registration. *Nola Spice*, 783 F.3d at 537 (registration of a mark with the PTO is *prima facie* evidence that the mark is inherently distinctive).

With respect to standing in the marketplace, Future Proof has invested significant amounts of money and time promoting its Brizzy® products to consumers and has acquired substantial

goodwill in the marketplace. *See* App. at 006-07 (Fenchel Decl. at ¶ 16) (stating Future Proof has invested more than \$2.6 million in labor costs for its products, a substantial portion of which relates to the marketing and development of Brizzy®, in addition to more than \$500,000 in hard costs and approximately \$800,000 in inventory costs and expenses). Moreover, there is no significant third-party use of the BRIZZY mark on similar goods. *Id.* Accordingly, the strength of the BRIZZY mark means this factor weighs in Future Proof’s favor. *See Bd. of Supervisors v. Smack Apparel Co.*, 550 F.3d 465, 478-79 (5th Cir. 2008) (“Generally, the stronger the mark, the greater the likelihood that consumers will be confused by competing uses.”).

***Similarity of the Marks.*** Molson Coors’s VIZZY mark looks and sounds the same as Future Proof’s BRIZZY mark. Courts consider the parties’ respective use of the marks “in the context that a customer perceives them in the marketplace.” *See Capece*, 141 F.3d at 197. Mark similarity “is determined by comparing the marks’ appearance, sound, and meaning.” *Id.* at 201. “Similarity of appearance is determined on the basis of the total effect of the designation, rather than on a comparison of individual features.” *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 228 (5th Cir. 2009) (citations omitted).

Here, the marks are so similar that they differ only by the initial character(s) – “V” instead of “BR.” Otherwise, the marks have the same number of syllables, the same stress pattern, and are made up of the exact same sequence of characters – IZZY – which causes the marks to not only rhyme, but when spoken, to be difficult to distinguish based solely on the initial consonant sounds.<sup>2</sup> Even Molson Coors’s intended presentation of the VIZZY mark on its products is similar to Future

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<sup>2</sup> It is commonly known that the “b” and “v” sounds are difficult for many speakers to distinguish, especially those who speak Spanish as well, which according to the last census included at least 41,000,000 people in the United States (or approximately 13.4% of the population). *See*, CNN Library, “*Hispanics in the US Facts*” available at <https://www.cnn.com/2013/09/20/us/hispanics-in-the-u-s-/index.html> (last accessed 2/27/2020).

Proof's presentation of the BRIZZY mark on its products: both appear prominently at the top of an aluminum can, in all capital letters, in a similar size, and in a similar font.

There can be no reasonable dispute that the marks are confusingly similar based on the totality of considerations. The use of a "V" instead of a "BR" before "-IZZY" does not sufficiently distinguish the trademarks under these circumstances.<sup>3</sup> This is especially true because neither "Brizzy" nor "Vizzy" have a dictionary definition, making slight variations in appearance or sound difficult to distinguish. *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 731 (Fed. Cir. 1968) (stating "with coined words which are meaningless so far as the English language is concerned, slight variations in spelling or arrangement of letters are often insufficient to direct the buyer's attention to the distinction between marks.") (internal citations omitted). The aural similarity is particularly important because these products are sometimes purchased by verbal request (*e.g.*, in a bar or restaurant), not only in self-service locations, like a grocery or liquor store. *Id.*

The *Krim-Ko* case is particularly instructive. In *Krim-Ko*, the court sustained an opposition after finding that BEEP for fruit juice drinks and VEEP for soft drinks were confusingly similar marks. 390 F.2d at 732. In a case that could not be more on point, the court noted:

Despite specific differences in spelling and in probable meaning, the dominant factor for consideration is the likelihood of confusion arising from the similarity in sound of the two words when spoken. The consonants "V" and "B" provide the initial aural impact on the listener and initiate the psychological processes leading to recall and assignment of a meaning to the words. The consonant sounds "B" and "V" are likely to be misunderstood by the listener, depending as they do

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<sup>3</sup> Professor McCarthy explains: "To find infringement only by exact identity and not where the junior user makes some slight modification would 'be in effect to reward the cunning infringer and punish only the bumbling one.'" MCCARTHY, § 23:20 (citation omitted); *see also Baker v. Master Printers Union*, 34 F. Supp. 808, 811 (D.N.J. 1940) (stating "few would be stupid enough to make exact copies of another's mark or symbol. It has been well said that the most successful form of copying is to employ enough points of similarity to confuse the public with enough points of difference to confuse the courts.").

on such variables as the diction of the speaker and the hearing acuity of the listener. Thus there may well be a doubt as to whether the entire words when spoken are likely to confuse a listener-purchaser. Unless both the one speaking and the one hearing the two words are particularly careful, the sound similarities of "V" and "B" may lead to a confusion in the recall process, so as to negate the effect of the differences in meaning of the words.

While appellant argues that "Veep" and "Beep" are well known dictionary terms and cites several cases allegedly in support of the theory that where words have *well known and understood, widely different meanings*, a small difference or spelling *may* be sufficient to distinguish them, the fact is the words "Beep" and "Veep" are entirely arbitrary marks in reference to the goods involved, without any significance or suggestive connotation. There is virtually no distinction in sound or visual impression between the words. It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.

The likelihood of confusion of the marks "VEEP" and "BEEP" has been found to reside in the similarity of the consonant sounds of "V" and "B" which control the meaning assigned to the words as entireties. The Trademark Trial and Appeal Board properly observed:

\* \* \* sound is of particular importance when we are dealing with products like soft drinks which may frequently be purchased by the spoken word.

*Id.* at 731-732 (some internal citations omitted).

The analysis in *Krim-Ko* – which involved *different* types of drink products – necessarily leads to a finding that VIZZY is confusingly similar to BRIZZY, especially considering the Vizzy and Brizzy® products are the *same* type of hard seltzer products. As Judge Friendly famously observed, courts do “not look with much favor on the businessman who, out of the wealth of words available, chooses as a trademark one which comes as close as he dares to a well-known mark on the identical product.” *A.T. Cross Co. v. Jonathan Bradley Pens, Inc.*, 470 F.2d 689, 692 (2d Cir. 1972). The clear and overwhelming similarity of VIZZY and BRIZZY make this factor weigh heavily in Future Proof’s favor.

***Similarity of the Products.*** The Vizzy products and the Brizzy® products are not just similar, but rather are identical. The marks are both used on hard seltzer products that will directly



compete for customers in the same markets. “The greater the similarity between the products and services, the greater the likelihood of confusion.” *Xtreme Lashes*, 576 F.3d at 229. And where, as here, the goods are directly competitive, the degree of similarity required to prove a likelihood of confusion is less than in cases involving dissimilar products. MCCARTHY, § 23:20.40 (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed. Cir. 2010) (finding likelihood of confusion between “ML” for personal care products and “ML Mark Lees” for competitive skin care products)). The identical nature of the products in this case weighs heavily in Future Proof’s favor.

***Identity of Retail Outlets and Purchasers.*** The Vizzy products and the Brizzy® products are intended for the same consumers and through the same outlets. “The greater the overlap between the outlets for, and consumers of, the services, the greater the potential for confusion.” *All. for Good Gov’t*, 901 F.3d at 512. Not only is Molson Coors’s VIZZY mark substantially identical to Future Proof’s BRIZZY mark, the Vizzy hard seltzer products will compete head-to-head with Future Proof’s Brizzy® hard seltzer products in grocery and liquor stores, bars, and restaurants. App. at 007 (Fenchel Decl. at ¶ 17). Worse, consumer confusion is just as likely outside of the grocery and liquor stores, where the products may even appear side-by-side on the same shelf, because the two companies use nearly identical distribution and marketing channels, with Future Proof and Molson Coors sharing the same distributors in many areas of the country. *Id.* The fact that the retail outlets and consumers that Molson Coors targets with its Vizzy products are identical to the retail outlets and consumers that Future Proof already sells its Brizzy® products to means that this factor heavily weighs in Future Proof’s favor.

***Similarity of Advertising Media.*** Molson Coors’s initial marketing efforts for its Vizzy products makes clear that its products are and will continue to be advertised in the same media channels and outlets as Future Proof’s Brizzy® products. “The greater the degree of overlap in the

marketing approaches of the two entities, the greater the likelihood of confusion.” *Dallas Cowboys Football Club, Ltd. v. Am.’s Team Props., Inc.*, 616 F. Supp.2d 622, 639 (N.D. Tex. 2009). Future Proof advertises the Brizzy® products through in-store sampling, bar/restaurant events, internet marketing (e.g., website, social media, online review websites), press releases, industry conferences, and sponsorships of events. App. at 007 (Fenchel Decl. at ¶ 18). Although the Vizzy products have not officially launched, Molson Coors has already advertised their imminent release in many of the same channels. See App. at 023 (Fenchel Decl. at Ex. A-2) (Molson Coors’s transcript of earnings call stating Molson Coors has planned a “robust” campaign involving national TV, digital, social, and out-of-home advertising). Accordingly, the ongoing and expected continuing use by Molson Coors of the same and similar media outlets to promote its Vizzy products as Future Proof uses to market its Brizzy® products weighs heavily in Future Proof’s favor.

***Defendants’ Intent.*** Proof of an intent to confuse the public is not necessary to a finding of a likelihood of confusion, but if a mark was adopted with the intent to confuse the public, that alone may be sufficient to justify an inference of likelihood of confusion.” *Houston Coll. of Law*, 214 F. Supp. 3d at 590 (quoting *Elvis Presley Enters.*, 141 F.3d at 203). Here, Molson Coors and its executives were keenly aware of Future Proof’s use of the BRIZZY mark when Molson Coors launched its recent media blitz. In a recent quote for Beer Business Daily, Molson Coors conceded having reviewed Future Proof’s website and acknowledged that Future Proof’s Brizzy® products were *already* in distribution when Molson Coors decided on the Vizzy name. App. at 050 (Fenchel Decl. at Ex. A-5) (Beer Business Daily Article).

Upon further information and belief, Defendants had also reviewed and were aware of Future Proof’s catchy unique Brizzy name and product packaging, its distribution network, and its

then-pending (and later registered) trademark, but nevertheless decided to launch a competing product using a confusingly similar name. App. at 006 (Fenchel Decl. at ¶ 14). At a minimum, Molson Coors had constructive knowledge of Future Proof's trademark application, which was filed on November 30, 2018. *See* App. at 003-04 (Fenchel Decl. at ¶ 7). At this stage of the case, however, Molson Coors has not produced any of its internal correspondence concerning the development of Vizzy, and therefore Future Proof currently lacks direct evidence of Molson Coors's intent. Future Proof believes that, when coupled with Molson Coors's own prior admissions of knowledge of Future Proof's Brizzy® products, the evidence that will be produced during discovery will demonstrate that Molson Coors's selection of the Vizzy name was not just an act of knowing infringement, but also show an intent to confuse consumers. In any event, this factor is no worse than neutral to Future Proof's trademark infringement claim. *Viacom Int'l*, 891 F.3d at 195 ("If there is no evidence of intent to confuse, then this factor is neutral.").

**Actual Confusion.** Molson Coors's pre-launch media blitz has already generated demonstrable instances of actual confusion at least among the distributors that both Molson Coors and Future Proof rely on to get their products to consumers. Actual confusion is the "best evidence of a likelihood of confusion." *Viacom Int'l*, 891 F.3d at 197 (quoting *Elvis Presley Enters.*, 141 F.3d at 203-04). "Even if initial consumer confusion is quickly dispelled, this initial misunderstanding is evidence of confusion." *Id.* "To show actual confusion, a plaintiff may rely on anecdotal instances of consumer confusion or consumer surveys." *Id.* Importantly, "very little proof of actual confusion" is needed to establish a likelihood of confusion. *Streamline*, 851 F.3d at 457 (quoting *Xtreme Lashes*, 576 F.3d at 229). "Testimony of a single known incident of actual confusion by a consumer has been found to be sufficient evidence to support the district court's finding of actual confusion." *Id.* (citing *La. World Exposition v. Logue*, 746 F.2d 1033, 1041 (5th

Cir. 1984)).

Here, Future Proof has encountered instances of actual confusion, *even before the launch of Molson Coors's Vizzy product into the marketplace*, based on Molson Coors's pre-launch advertising and promotion to the industry. In a recent Annual Business Planning meeting, a wholesaler asked a Future Proof employee to talk about Vizzy, confusing Vizzy with Future Proof's product, Brizzy®. *See* App. at 007-08 (Fenchel Decl. at ¶ 19). This evidence is more than sufficient, especially at this stage of the case, to support temporary injunctive relief. *See Am. Rice*, 518 F.3d at 333; *see also, e.g., Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 506 (5th Cir. 1980) (explaining that "evidence of actual confusion ... is not essential to a finding of likelihood of confusion"). The fact that actual confusion among consumers has already begun before Molson Coors has even officially launched the Vizzy product means this factor weighs heavily in Future Proof's favor.

*Degree of Care Exercised by Potential Purchasers.* Hard seltzer products are comparatively inexpensive to consumers, meaning that many consumers will exercise little to no care in attempting to distinguish between two products with confusingly similar marks. "Where items are relatively inexpensive, a buyer may take less care in selecting the item, thereby increasing the risk of confusion." *Xtreme Lashes*, 576 F.3d at 231. In the hard seltzer market in particular, consumers typically make quick decisions between various products in a crowded array (and sometimes in a crowded bar or restaurant), and the effects of even initial confusion are likely to be substantial. *See e.g., CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051, 1076 (E.D. Cal.), *aff'd*, 348 F. App'x 288 (9th Cir. 2009) ("In this case, the RTD protein products at issue are inexpensive items in which consumers are less likely to use particular care in selecting a specific protein drink. As such, there is a higher risk of consumer confusion. A single-serve RTD MUSCLE

MILK® product retails on average between \$3.00 and \$5.00.”).

The Brizzy® products sell for approximately \$14.99 (for a 12 can variety pack), and while not yet officially launched, it is reasonable to assume that Molson Coors’s products will sell for a price somewhere between \$13.99 and \$15.99, which are the average prices for hard seltzer products already on the market. *See* App. at 044 (Fenchel Decl. at Ex. A-4) (Beer & Beyond article stating “Vizzy will be line priced with White Claw and Truly, the top two sellers in the hard seltzer segment.”). The low cost of hard seltzer products and the crowded, sometimes fast-paced environments in which they are purchased weighs heavily in Future Proof’s favor.

In sum, this is not a close call. Of the eight digits of confusion used by the Fifth Circuit to assess likelihood of confusion, seven of those digits weigh heavily in favor of Future Proof, and the eighth – intent to confuse – is at worst neutral, although Future Proof believes that evidence obtained in discovery will demonstrate that even this factor weighs in Future Proof’s favor. The Court, weighing all of these factors together, should find a likelihood of confusion and that Future Proof is substantially likely to succeed on its claim for trademark infringement.

**C. Future Proof Will Suffer Irreparable Harm if Molson Coors is Not Enjoined**

Future Proof is suffering and will continue to suffer immediate and irreparable harm to its business as a proximate result of Molson Coors’s conduct if it is not enjoined. “[A]n injury is irreparable only if it cannot be undone through monetary remedies.” *Enter. Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985); *see also ADT, LLC v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 697 (N.D. Tex. 2015) (“A party sufficiently proves that monetary damages are not adequate when it brings forward evidence, in the form of affidavits, declarations, or any other support, that shows imminent harm that is difficult to quantify.”).

In cases involving the LANHAM ACT, courts within the Fifth Circuit “presume the existence of an irreparable injury if the plaintiff establishes a substantial likelihood of confusion” or a “tendency to deceive.” *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 627 (5th Cir. 2013) (“All that must be proven to establish liability and the need for an injunction against infringement is the likelihood of confusion—*injury is presumed.*”) (emphasis added) (quoting 5 MCCARTHY’S ON TRADEMARKS AND UNFAIR COMPETITION § 30:2 (4<sup>th</sup> Ed. 2001)); *see also Sparrow Barns & Events, LLC v. Ruth Farm Inc.*, Civil Action No. 4:19-CV-00067, 2019 U.S. Dist. LEXIS 61515, at \*22 (E.D. Tex. Apr. 10, 2019).<sup>4</sup> Because Future Proof has shown that Molson Coors’s use of the VIZZY mark is likely to cause confusion among consumers, the Court may presume that Future Proof will be irreparably harmed if the requested injunctive relief is not granted.

Even in the absence of this presumption, however, Future Proof would still be entitled to injunctive relief because it has established irreparable injury. Courts emphasize that injury may be established by “drawing fair inferences from facts in the record.” *ADT*, 145 F. Supp.3d at 697. As explained in the Fenchel Declaration, Molson Coors’s use of the confusingly similar VIZZY mark will cause irreparable harm for the following reasons:

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<sup>4</sup> *See also Better Keiki, LLC v. MairicoDirect*, Civil Action No. 4:17-cv-00850, 2018 U.S. Dist. LEXIS 204167, at \*16-17 (E.D. Tex. Oct. 23, 2018) (“Plaintiff has shown that these infringing acts show a likelihood of market confusion regarding their products and therefore, an irreparable injury.”); *OrthoAccel Techs., Inc. v. Propel Orthodontics, LLC*, No. 4:16-CV-350, 2016 U.S. Dist. LEXIS 148059, at \*19-20 (E.D. Tex. Oct. 26, 2016) (applying irreparable injury presumption to case involving false advertising claim under Lanham Act, but also noting that, in any event, plaintiff’s evidence supported claim that it was losing market share to defendant); *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, at \*52 (S.D. Tex. Mar. 10, 2015) (presuming irreparable injury in LANHAM ACT case “based on alleged comparative misrepresentations” in advertisements); *Healthpoint, Ltd. v. Stratus Pharm.*, 273 F. Supp. 2d 769, 813 (W.D. Tex. 2001) (“When injunctive relief is sought under the Lanham Act, the finding of a tendency to deceive satisfies the requisite showing of irreparable harm.”); *see also Myo, LLC v. Brull & York, LLC*, No. 1:18-CV-370-RP, 2019 U.S. Dist. LEXIS 3424, at \*19-20 n.8 (W.D. Tex. Jan. 8, 2019) (noting that “likelihood of confusion in a trademark action is generally sufficient to establish risk of irreparable harm”).

*First*, the launch of the Vizzy products – if allowed – will flood the market nationally, causing confusion and diverting consumers to Molson Coors. App. at 008 (Fenchel Decl. at ¶ 21). This would be especially true in those markets in which Future Proof has not yet begun distributing its Brizzy® products, but for which Future Proof’s federal trademark registration reserves to Future Proof the right of priority of use. *Id.* Those lost customers, lost sales, and lost profits are notoriously difficult to quantify. *See Paulsson*, 529 F.3d at 313 (considering loss of business and customer confusion components of irreparable harm). Accordingly, the total damages caused by Molson Coors’s infringement is not readily ascertainable and will likely be unrecoverable if not immediately enjoined.

*Second*, but perhaps just as important for a smaller, high-growth company like Future Proof, the launch of Molson Coors’s Vizzy products will irreparably damage Future Proof’s ability to expand into new markets. As explained above, Future Proof partnered with H-E-B, where the Brizzy® products are now available to consumers at approximately 200 H-E-B locations in Texas. In addition, the Brizzy® products can be found in approximately 200 Circle K stores, 12 Kroger’s stores, and over 500 other locations. App. at 008-09 (Fenchel Decl. at ¶ 22). Future Proof is in talks for even more outlets to carry the Brizzy® products in even more states, but the Brizzy® products and the Vizzy products will be competing for shelf space in these same markets. *Id.* “One of the goals of a preliminary injunction is to preserve the status quo.” 5 MCCARTHY’S ON TRADEMARKS AND UNFAIR COMPETITION § 30:50 (5<sup>th</sup> Ed. 2019). Here, the status quo is that Future Proof’s Brizzy® products enjoy great success in these initial markets and will soon roll out to even more markets, while Molson Coors’s Vizzy product has not even launched. That status quo is threatened – irreparably – by the imminent release of the Vizzy products and a massive national advertising campaign.

This will be a textbook case of “reverse confusion.” The doctrine of reverse confusion is a well-recognized. *See* 4 MCCARTHY’S § 23:10 (5th Ed.) (using the heading “Large Company Rolls Over Small Senior User” to explain the doctrine); *see also Capital Films Corp. v. Charles Fries Productions, Inc.*, 628 F.2d 387 (5th Cir. 1980). A smaller senior user of a registered trademark – like Future Proof – may lose the value of its mark, its goodwill, and the ability to enter new markets when a larger junior user – like Molson Coors – launches a competing product using a confusingly similar mark, thereby swamping the senior user’s mark. The seminal case on reverse confusion, *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F.Supp. 1219 (D. Colo. 1976), *aff’d and award modified*, 561 F.2d 1365 (10th Cir. 1977), *cert. dismissed*, 434 U.S. 1052 (1978), is strikingly similar to the facts here.

In *Big O*, the senior user – Big O – sold privately labeled tires through a system of dealers in the western United States. One of its brands was BIGFOOT, which it launched in 1973 for bias belted tires. In 1974, the much larger junior user – Goodyear – decided to use BIGFOOT for a new radial tire to be launched in the fall. Goodyear budgeted \$6 million for a national advertising blitz over a five-month period, but just before it launched its campaign, it discovered Big O’s prior use of BIGFOOT on tires. After negotiations between the parties failed, Goodyear launched its massive advertising campaign anyway, thereby swamping Big O’s BIGFOOT brand. Not only did consumers try to purchase Goodyear’s radial tires from Big O, which Big O had to explain it did not sell, but they also assumed that Big O had stolen the BIGFOOT mark from the more well-known Goodyear.

*Big O* demonstrates how a massive national media campaign of the type planned by Molson Coors can ruin a smaller company like Future Proof. Here, the national launch of the Vizzy products (coupled with its massive national media campaign) will swamp Future Proof’s the



BRIZZY mark and stunt Future Proof's growth in its existing markets and in new markets across the country. App. at 009 (Fenchel Decl. at ¶ 24). This harm is irreparable, and represents an especially egregious harm to Future Proof, who properly sought a federal trademark registration to preserve its priority to enter all of these same markets without interference by a third-party infringer such as Molson Coors. There is simply no reason to allow this breach of the status quo especially given that Molson Coors has not already launched its products to consumers.

***Finally***, Future Proof has no control of the quality of Molson Coors's Vizzy products, which are new products not tested by many or all potential consumers. App. at 009 (Fenchel Decl. at ¶ 23). Future Proof is rightfully concerned that consumers who purchase Vizzy hard seltzers from Molson Coors may be confused as to the source of those products and fault Future Proof for any disappointing product experiences, even though they did not purchase Future Proof's Brizzy® products. *Id.* This would harm Future Proof's and its Brizzy® products' reputations, a harm that cannot be cured by a damages award. Future Proof will thus be powerless to control its reputation and place in the market without an injunction against Molson Coors's launch of its Vizzy products if those products are inferior to Future Proof's Brizzy® products. *See ADT*, 145 F.Supp.3d at 696 (considering the loss of control of reputation and place in the market to be irreparable harm); *Paulsson*, 529 F.3d at 313. For all of these reasons, the damage caused by Molson Coors's infringement cannot be measured or cured by monetary damages, and thus an injunction against Molson Coors's imminent launch of the Vizzy products is a necessary remedy in this case.

**D. The Balance of Hardships Favors an Injunction**

Future Proof will suffer immediate irreparable harm to its business, its goodwill, and its reputation unless Molson Coors's imminent launch of the Vizzy products is enjoined. The balance of hardships ordinarily weighs against a party that is found to be infringing trademarks in violation

of the LANHAM ACT, which Molson Coors is doing in this case. *See Flowserve Corp. v. Hallmark Pump Co., Inc.*, No. 4:09-CV-0675, 2011 WL 1527951, at \*10 (S.D. Tex. April 20, 2011); *TGI Friday's Inc.*, 625 F. Supp. 2d at 773 (“[C]ourts usually hold that when defendants improperly use a plaintiff’s trademark, the threatened harm to the plaintiff outweighs the threatened harm to the defendants.”) (internal quotation marks omitted).

This is because the requested injunction requires only that Molson Coors bring its business in line with the requirements of the law. *TGI Friday's*, 625 F. Supp. 2d at 773. And while Molson Coors may incur some cost associated with rebranding the infringing products marked with the VIZZY mark and may lose its investment in the develop costs of the Vizzy name, such costs pale in comparison to the harm suffered by Future Proof if the Vizzy products are allowed to launch using the infringing Vizzy name. In any event, the harm Molson Coors will suffer should this Court issue the requested temporary restraining order is both limited and entirely self-inflicted. *Fantastic Sams Franchisee Corp. v. Moseley*, No. H-16-2318, 2016 WL 7426403, at \*6 (S.D. Tex. Dec. 23, 2016); *VPI Holding Co. v. Success Res. USA, LLC*, No. 3:12-CV-3785-N, 2013 WL 12100770, at \*6 (N.D. Tex. July 22, 2013) (injunction warranted where “any potential damage [to Defendants] by the injunction is due to [Defendants’] own actions that are likely to be found infringing.”). Accordingly, a balancing of hardships strongly favors Future Proof, the party that properly exercised its rights and invested its money to protect its trademark at the USPTO, rather than Molson Coors, who admittedly chose a name similar to Future Proof’s registered BRIZZY mark for products it intends to directly compete with the Brizzy® products. App. at 050 (Fenichel Decl. at Ex. A-5) (Beer Business Daily Article).

**E. The Public Interest Would Be Best Served by the Issuance of an Injunction**

The public interest consideration weighs heavily in favor of issuance of an injunction.

Indeed, “[t]he public interest is always served by requiring compliance with Congressional statutes such as the Lanham Act and by enjoining the use of infringing marks.” *Quantum Fitness Corp. v. Quantum LifeStyle Ctrs., LLC*, 83 F. Supp. 2d 810, 832 (S.D. Tex. 1999). In fact, a primary purpose of trademark law is to protect consumers in the public from being confused or deceived into purchasing products other than those that they intend. Accordingly, the public interest is best served in this case by enjoining Molson Coors from launching its Vizzy hard seltzer product line, which is confusingly similar to Future Proof’s already successful Brizzy® hard seltzer products.

#### **IV. CONCLUSION AND PRAYER**

Future Proof respectfully seeks an emergency temporary restraining order and/or preliminary injunction prohibiting Molson Coors, its agents, assigns, successors, employees, affiliates, franchisees, representatives, vendors, and all other persons and entities acting by, with through, or under it (the “Enjoined Parties”):

- (a) from advertising or selling alcoholic beverages or any similar or related products bearing the VIZZY mark or any other mark confusingly similar to the BRIZZY mark;
- (b) from using, registering, and applying to register the VIZZY mark, or any variation thereof, and any other mark, name, domain name, slogan, or designation that is confusingly similar to the BRIZZY mark (regardless of capitalization, spelling, stylization, or other format) in connection with alcoholic beverages or any similar or related products.

February 27, 2020

Respectfully submitted,

/s/ Christopher J. Schwegmann

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 27th day of February, 2020, a true and correct copy of the above and foregoing document was served *via electronic mail* and *certified mail* on Defendants' counsel as follows:

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**CERTIFICATE OF CONFERENCE**

Counsel for Plaintiff and counsel for Defendants have personally conducted a conference at which there was a substantive discussion of the items presented to the Court in this Motion, and Defendants are opposed to this Motion.

/s/ Christopher J. Schwegmann  
Christopher J. Schwegmann

**REQUEST FOR ORAL HEARING**

Pursuant to Local Civil Rule 7(h) of the Civil Rules, Local Court Rules for the Western District of Texas, Plaintiff respectfully requests an oral hearing of this Motion.

/s/ Christopher J. Schwegmann  
Christopher J. Schwegmann