

IP Law Daily, TRADEMARK NEWS: Supreme Court asked whether mark strength is question of fact, (Mar. 25, 2025)

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By Karen Servidea, J.D.

The question arises in a suit accusing PepsiCo of infringement in marketing canned energy drinks under the mark “MTN DEW RISE ENERGY.”

Arguing that a circuit split has created unevenness in federal trademark law, RiseandShine Corporation d/b/a Rise Brewing (“Rise Brewing”), the seller of canned nitro-brewed coffee, has asked the U.S. Supreme Court to decide whether trademark strength, as a factor in a likelihood-of-confusion analysis, is a question of fact. The brewing company, which uses “RISE” to mark its products and has registered “RISE BREWING CO.” as a word mark and its RISE BREWING CO. logo as a design mark, claims that PepsiCo, Inc. (“Pepsi”) infringed those marks in the marketing of its canned energy drinks under the mark “MTN DEW RISE ENERGY.” The brewing company seeks review from the high court after the U.S. Court of Appeals for the Second Circuit [affirmed](#) a district court [decision](#) holding that, as a matter of law, the brewing company’s mark was weak, which supported an order granting summary judgment to Pepsi ([Rise and shine Corp. v. PepsiCo, Inc.](#), No. 24-1016 (U.S. filed Mar. 19, 2025)).

Rise Brewing sells canned nitro-brewed coffee nationwide through retailers. On its products, “RISE” appears in large red capital letters on the top third of the can, with “Brewing Co.” in much smaller font directly below RISE. Rise Brewing has registered “RISE BREWING Co.” as a word mark and its RISE BREWING CO. logo as a design mark. In March 2021, Pepsi launched a fruit-flavored caffeinated canned beverage under the mark MTN DEW RISE ENERGY. The cans for Pepsi’s beverage also include the word “RISE” prominently on the top of the can, in large bright letters.

Preliminary injunction. The brewing company sued Pepsi under the Lanham Act and New York statutory and common law and then moved for a preliminary injunction, which the federal district court in New York City [granted](#). The U.S. Court of Appeals for the Second Circuit [reversed](#) that decision in July 2022. Ruling that the lower court erred in granting the injunction, the appellate court found that the brewing company’s label was a weak trademark because it strongly suggested the qualities of the product.

Summary judgment. Back in district court, Pepsi moved for summary judgment, which the district court granted. Under the first *Polaroid* factor, the district court held that the brewing company’s mark was inherently weak as a matter of law per the Second Circuit’s earlier decision. Although the brewing company offered some evidence of acquired distinctiveness, the record as a whole did not overcome the inherent weakness of the mark, the court determined. Accordingly, the court held that this factor strongly favored Pepsi.

In weighing the *Polaroid* factors, the district court noted that the Court of Appeals for the Second Circuit in its preliminary injunction ruling held as a matter of law that the brewing company’s mark was weak and concluded that it was “clear error” to find that the parties’ products are similar. The remaining *Polaroid* factors in favor of the brewing company were insufficient to overcome the weakness of the mark and the Second Circuit’s finding of dissimilarity, the court determined. Thus, the court granted Pepsi’s motion for summary judgment.

The brewing company appealed to the Court of Appeals for the Second Circuit, arguing that the district court erred by: (1) analyzing the strength of the brewing company’s trademark as a question of law and ruling against it on that question; and (2) treating the likelihood of confusion test as a legal question and concluding, after balancing the

factors under that test, that Pepsi was entitled to summary judgment.

The appellate court held that the district court correctly concluded that it was bound by the previous panel's determination that the mark was, as a matter of law, an inherently weak mark. It further noted that, "when analyzed in the context of the mark's inherent weakness, [the brewing company's] evidence of secondary meaning [was] insufficient to create a triable issue of fact on that question." Thus, the appellate court concluded that the district court correctly decided that the strength-of-mark factor strongly favored Pepsi. The court also rejected the brewing company's contention that the district court erred in treating the likelihood of confusion question as a matter of law. According to the court, the brewing company's mark is inherently weak and entitled to a very narrow scope of protection and does not resemble Pepsi's mark. The appeals court said that the remaining *Polaroid* factors, which included some limited evidence of actual confusion and bad faith, did not produce a sufficiently "convincing combination" to militate in favor of the brewing company.

Question presented. The question presented by the petition is whether trademark strength is a question of fact in a likelihood-of-confusion analysis under 15 U.S.C. § 1114.

Reasons posited in favor of granting the petition. The petition argues that circuits are split on the question of whether the strength-of-mark factor should be determined as a question of fact or as a question of law in a likelihood-of-confusion analysis. Specifically, the petition contends that 12 circuits agree that the conceptual strength of a plaintiff's trademark should be determined as a question of fact, with only the Second Circuit holding that it is a legal question.

The petition further argues that the Second Circuit's approach flouts the Supreme Court's precedent on legal tests that hinge on the perceptions of ordinary consumers. According to the petition, the Supreme Court treats such tests as questions of fact.

The coffee brewing company maintains that the issue is critically important. It urges that: "Our nation's federal trademark system protects businesses' ability to uniquely identify their products and services to prevent consumer confusion....The system creates a fair and even playing field for small businesses....But this fairness extends only so far when one part of the nation applies a different standard than the rest."

Noting that the Second Circuit's approach favors parties that want to avoid juries, the petition warns of the forum-shopping that is bound to arise. The petition concludes by urging the Supreme Court to unify the standard for analyzing the strength of a trademark.

The Case is [No. 24-1016](#).

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Companies: RiseandShine Corp.; PepsiCo, Inc.

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