

(Mountain) Dew Process: SCOTUS Takes Up the RISE Brewing Trademark Dispute

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by Breanne Wernars

The Supreme Court has granted a petition for writ of certiorari in the matter of *RiseandShine Corporation, dba Rise Brewing, v. PepsiCo, Inc.* to determine if the strength of a trademark in a likelihood of confusion analysis is a question of fact for a jury, or a question of law for a judge.

The dispute has been brewing (pun very much intended) since 2021 after RiseandShine Corporation, dba Rise Brewing (“Rise”) filed suit against PepsiCo, Inc. (“Pepsi”) in the U.S. District Court for the Southern District of New York, alleging, in part, trademark infringement and reverse confusion based on PepsiCo’s launch of its MTN DEW RISE energy drink. Since at least as early as 2014, Rise has been using its RISE trademark in connection with nitro cold brew and canned coffee beverages. In its Complaint, Rise claims that PepsiCo’s launch of its MTN DEW RISE product in 2021, was just another attempt by PepsiCo “to squeeze senior user Rise Brewing out of the market by launching its own infringing RISE-branded canned caffeine drink. Indeed, by adopting Rise Brewing’s RISE Mark on its own canned caffeine drinks, PepsiCo’s plan follows a well-established pattern—flooding the market with products bearing confusingly similar marks in order to cause consumers to confuse and improperly associate RISE with PepsiCo rather than Rise Brewing.”

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Following an evidentiary hearing, a jury granted Rise's preliminary injunction, requiring PepsiCo to halt use of its MTN DEW RISE mark. PepsiCo successfully appealed the injunction with the Second Circuit finding that the district court erred in its assessment of the inherent strength of Rise's RISE mark, noting it should have been found less distinctive based on the association of RISE and coffee, as well as other third-party uses of RISE with caffeinated beverages. On remand, the district court granted PepsiCo's Motion for Summary Judgement, which was affirmed by the Second Circuit.

In its cert petition filed in March of 2026, Rise asked the Supreme Court to weigh in on whether trademark strength is a question of *fact* in a likelihood-of-confusion analysis under 15 U.S.C. § 1114, or whether it is a question of *law*, as suggested by the Second Circuit. Twelve circuits treat a mark's placement on the spectrum of distinctiveness as factual, typically decided by a jury and reviewed with substantial deference on appeal. In the present case, the Second Circuit has isolated itself by determining a mark's inherent strength is a legal question for the court to decide.

The case is scheduled to be heard before the Supreme Court in its October 2026 session, where experts expect it may side with Rise given recent decisions whereby SCOTUS has focused on the necessity of consumer conception being considered in trademark disputes. The TMCA Blog team will continue to monitor this case closely, so be sure to subscribe.