21-2786-cv

United States Court of Appeals

for the

Second Circuit

RISEANDSHINE CORPORATION, DBA Rise Brewing,

Plaintiff-Appellee,

– v. –

PEPSICO, INC.,

Defendant-Appellant.

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

BRIEF FOR PLAINTIFF-APPELLEE
(Page Proof Brief)

PAUL TANCK
ALSTON & BIRD LLP
90 Park Avenue, 15th Floor
New York, New York 10016
(212) 210-9400

JASON D. ROSENBERG
HOLLY H. SAPORITO
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street, NW,
Suite 4900
Atlanta, Georgia 30309
(404) 881-7000

KIRK T. BRADLEY
ALSTON & BIRD LLP
One South at The Plaza
101 South Tryon Street, Suite 4000
Charlotte, North Carolina 28280
(704) 444-1000

Attorneys for Plaintiff-Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee RiseandShine Corporation, d/b/a Rise Brewing certifies that it does not have any parent corporation, and that no publicly held companies own 10% of more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

ISSUES PRESENTED

RiseandShine Corp., d/b/a Rise Brewing ("Rise Brewing") disagrees with the statement of issues presented by PepsiCo, Inc. ("Pepsi"). This appeal presents only one issue for this Court to resolve:

1. Did the District Court abuse its discretion in finding that Rise Brewing was entitled to a preliminary injunction to stop PepsiCo from using the mark MTN DEW RISE ENERGY in connection with the promotion, sale, or distribution of single-use, canned energy beverages?

In considering that issue, this Court should address the following subsidiary issues:

a. Did the District Court clearly err in finding that many of the *Polaroid* factors favor Rise Brewing and that none of the factors favor PepsiCo, and did the District Court correctly balance those factors in concluding that Rise Brewing had shown a likelihood of success on the merits of its trademark infringement claim?

b. Did the District Court abuse its discretion in finding that Rise Brewing would suffer irreparable harm absent an injunction and that both the balance of the hardships and the public interest weigh in favor of granting the preliminary injunction against PepsiCo?

INTRODUCTION

Founded in 2014, Rise Brewing sells ready-to-drink coffee and tea beverages, both in kegs and cans. Rise Brewing owns all rights, title, and interest in its RISE Mark (defined below), and uses the RISE Mark in association with its beverages, including its canned caffeinated coffee and tea beverages.

Starting in 2017, PepsiCo employees met with Rise Brewing's leadership multiple times to discuss partnership opportunities, with Rise Brewing explaining to PepsiCo its business model, its history, and its place in the market. But instead of entering a partnership, PepsiCo chose to take the valuable RISE Mark for itself. In January 2021, Rise Brewing learned that PepsiCo was launching an energy drink targeted to morning caffeinated beverage consumers under the confusingly similar mark, MTN DEW RISE ENERGY. Rise Brewing reached out to PepsiCo to express its concerns that PepsiCo's use of that mark on a competing canned, caffeinated beverage was likely to cause confusion with Rise Brewing's RISE Mark. PepsiCo rejected Rise Brewing's pre-launch concerns, and moved forward with its new product regardless.

Just two months later, in March 2021, PepsiCo launched "with great fanfare" its canned, caffeinated beverage under the infringing MTN DEW RISE ENERGY mark. Opening Br. at 3. Within days of PepsiCo's product hitting store shelves, Rise Brewing began receiving word that its customers and consumers were confused by

PepsiCo's new product, stemming from consumers' incorrect assumption that Rise Brewing's existing RISE beverages came from the same source as PepsiCo's MTN DEW RISE ENERGY. This confusion, called ***reverse*** confusion, arose from consumers' incorrect assumption that PepsiCo's new MTN DEW RISE ENERGY beverages and Rise Brewing's existing RISE beverages were from "the same company" and involved "the same brand." [[Evidentiary.Hearing.Tr.76:11–22]]. Rise Brewing quickly contacted PepsiCo, informing them of the confusion and seeking an amicable resolution. After weeks of settlement negotiations, the parties reached a stalemate, and Rise Brewing filed both a lawsuit and a motion for a preliminary injunction. [[Dkt.1]]; SDNYDkt.25.

After reviewing extensive briefing and fourteen factual declarations (including three expert witness declarations), hearing oral argument, and conducting a separate evidentiary hearing involving live testimony from eight witnesses ([[Dkt.149.at.3–6]]), the District Court issued an order preliminarily enjoining PepsiCo from using or displaying any mark that is confusingly similar to Rise Brewing's RISE Mark, and specifically from using or displaying PepsiCo's MTN DEW RISE ENERGY mark. [[Dkt.149.at.23]]. The District Court found that Rise Brewing demonstrated "a clear or substantial likelihood of success on the merits" of its claim for reversion confusion, premised on the holistic analysis set forth in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961).

[[Dkt.149.at.8. n.3, 10]]. In analyzing the *Polaroid* factors, the District Court did not err in finding that the parties' marks are confusingly similar in appearance ([[Dkt.149.at.15]]), the parties' products are in similar areas of commerce ([[Dkt.149.at.17]]), and there was "credible testimony . . . of multiple instances of actual confusion since [PepsiCo's] product launched in March 2021." [[Dkt.149.at.18]].

Additionally, the District Court found that PepsiCo failed to rebut the presumption of irreparable harm caused by its infringement. [[Dkt.149.at.20]]. In so finding, the District Court applied the presumption of irreparable harm applicable to all trademark cases set forth in the Trademark Modernization Act of 2020. *See* 15 U.S.C. § 1116(a) ("A plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm . . . upon a finding of likelihood of success on the merits for a violation identified in this subsection in the case of a motion for a preliminary injunction.").[1] As this Court has recognized, the loss of control over the reputation of a mark and the destruction of consumer goodwill that result from trademark infringement is an inherently incalculable and irreparable

[1] Congress recently confirmed that the presumption of irreparable harm applies in all trademark cases. *See* 15 U.S.C. § 1116(a). Congress intended the codified presumption of irreparable harm to "clarify[] the standard for injunctive review in trademark infringement cases." H.R. Rep. No. 116–645, at 8 (2020) ("Purpose and Summary").

harm. *Power Test Petro. Distribs. v. Calcu Gas, Inc.*, 754 F.2d 91, 95 (2d Cir. 1985). The scope of the harm is especially magnified in this case, as Rise Brewing uses its infringed RISE Mark both on its flagship canned caffeinated beverages and to represent the company itself. [[Dkt.29.at.4–7, ¶¶ 13–19]]. The District Court found that the infringement at issue here—by a company of PepsiCo's size, with PepsiCo's resources—threatened harm from which Rise Brewing might never recover. [[Dkt.149.at.21]]. The District Court further found that, because the harm to PepsiCo was of its own making, the balance of hardships from a preliminary injunction favored Rise Brewing. [[Dkt.149.at.8, n.2, 21]]. Lastly, the District Court found that the public's interest in being free from confusion, deception, and mistake favored entry of a preliminary injunction ([[Dkt.149.at.22]]), and thus the court entered the preliminary injunction against PepsiCo.

This Court reviews the grant of the preliminary injunction for an ***abuse of discretion***, establishing a "formidable hurdle" for PepsiCo to overcome. *Brennan's, Inc. v. Brennan's Rest., LLC*, 360 F.3d 125, 129 (2d Cir. 2004). PepsiCo has not come close to demonstrating any abuse of discretion, nor any clear error in the underlying factual findings. Recognizing (but not applying) these formidable standards of review, PepsiCo throughout its Opening Brief tries to recharacterize the District Court's factual findings as "legal errors." But simply "relabeling" the factual findings as legal errors does not make them so. In the end, there was no abuse of

discretion, and there were no clearly erroneous findings of fact. The District Court got it exactly right. This Court should affirm.

STATEMENT OF THE CASE

I. Factual Background

A. Rise Brewing Created an Award-Winning Beverage Sold Under the RISE Mark.

Rise Brewing's product offerings began with nitro-brewed coffee, first in kegs and then, starting in 2016, in cans. [[Dkt.29.at.2 ¶¶ 3–4]]. Rise Brewing was the first company in the United States to offer a shelf-stable nitro cold brew coffee can using a nitrogen releasing "widget" in the can for a smoother, creamier pour. *See* [[Dkt.29.at.2 ¶ 6]]. Rise Brewing now sells its canned beverages nationwide in locations such as Kroger, Publix, and Wal-Mart. [[Dkt.29.at.2–4, 8, ¶¶ 4–13, 23]].

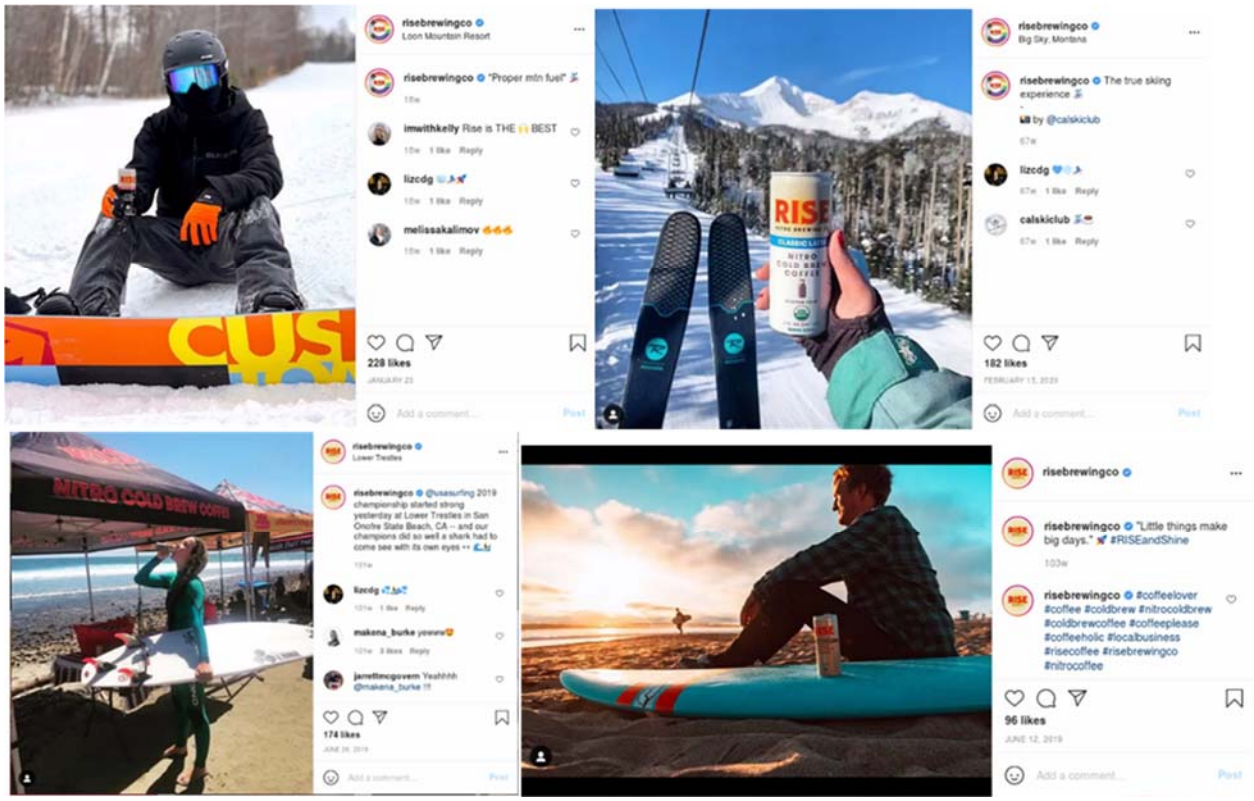
In 2017, Rise Brewing secured a federal registration for both its RISE BREWING CO. word mark, Reg. No. 5,168,377, and its RISE BREWING CO. design mark, Reg. No. 5,333,635, shown below (the "RISE Mark").[2] [[Dkt.35.at.2]].

[2] Though not registered, Rise Brewing also claims common law rights in the mark RISE on its own, without additional terms, to identify its products, as well as various other rise-formative marks for which Rise Brewing does hold federal registrations (collectively the "RISE Marks"). *See* [[Dkt.29.at.4–7, ¶¶ 14–19]]; [[Dkt.35.at.2–3]].

Rise Brewing displays its RISE Mark prominently on each canned beverage it sells, with the word RISE in large, red capital letters printed on a light-colored upper half of the can. The terms BREWING CO. are printed in much smaller letters below the word RISE:

[[Dkt.149.at.2]].

Rise Brewing markets its canned caffeinated drinks as a source of energy particularly, but not exclusively, for consumption in the morning, as well as for exercise and athletic pursuits. [[Dkt.29.at.7–8, ¶¶ 20–21]]. For example, many of Rise Brewing's marketing campaigns target the athletic and wellness communities, including outdoor enthusiasts such as surfers and snowboarders. [[Dkt.29.at.7–8, ¶ 21]].



[[Dkt.35.at.5, ¶ 8]].

Rise Brewing's RISE-branded drinks are in the locker rooms of the New York Yankees, the New York Mets, and the New York Giants. [[Dkt.29.at.7–8, ¶ 21]]. Rise Brewing has partnered with the USA Surf, Climbing, and Ski & Snowboard teams, and was a sponsor of the FOX Sports 2020 college football season. [[Dkt.29.at.7–8, ¶ 21]].

Rise Brewing won the 2017 Best New Product award from industry publication *BevNet* for its nitro cold brew. [[Dkt.29.at.8, ¶ 22]]. Success followed success with a 2018 Beverage Innovation of the Year award from *Beverage Industry* magazine, and a 2018 NEXTY Best New Organic Beverage award from New Hope

Network. [[Dkt.29.at.8, ¶ 22]]. Rise Brewing's canned nitro cold brew also won People Magazine's 2019 award for Best Canned Coffee. [[Dkt.29.at.8, ¶ 22]].

B. PepsiCo Repeatedly Met with Rise Brewing.

Long before PepsiCo launched MTN DEW RISE ENERGY, various PepsiCo employees and executives met with Rise Brewing's leadership (and others) at least *five* times, at both industry events and in meetings organized specifically to familiarize PepsiCo with Rise Brewing's brand, products, and company. [[Dkt.29.at.8, ¶ 24; Dkt.33.at.2–4, ¶¶ 4–13]]. As early as 2017, PepsiCo employees met with Rise Brewing's CEO to discuss partnership opportunities. *See* [[Dkt.149.at.2]]; *see also* [[Dkt.29.at.8, ¶ 24]]. Rise Brewing's officers, believing that PepsiCo had a legitimate interest in their company, explained Rise Brewing's business model, history, and place in the beverage market. [[Dkt.29.at.8, ¶ 24]]. Subsequently, Rise Brewing's Chief Creative Officer met with members of the PepsiCo Innovation team, who specifically requested samples of Rise Brewing's canned drinks. [[Dkt.149.at.2; Dkt.33.at.2–3, ¶¶ 4–8]]. PepsiCo also asked Rise Brewing to host "PepsiCo's President and C-Suite group." [[Dkt.33.at.3–4, ¶¶ 9–11]]. Rise Brewing's Chief Creative Officer similarly met with PepsiCo's Vice President of Mergers and Acquisitions at an industry event in 2019. [[Dkt.33.at.4, ¶¶ 12–13]]. But instead of forming a partnership, PepsiCo chose to take the valuable

RISE Mark for itself, launching a competing morning caffeine drink under the confusingly similar MTN DEW RISE ENERGY mark, as shown below.

Plaintiff's Product	Defendant's Product
	

[[Dkt.149.at.2]].

PepsiCo's actions were not coincidental. While PepsiCo was meeting with Rise Brewing, PepsiCo's consumer insights division had publicly identified that the "biggest untapped moment for energy drinks is the 'get started' coffee hour." [[Dkt.35-1.at.51]]. PepsiCo launched a drink to fill that gap, which it consistently called "Mtn Dew Rise," or simply "Rise." [[Dkt.35-1.at.47–52]]. PepsiCo specifically positioned MTN DEW RISE ENERGY for morning caffeinated beverage drinkers, proclaiming that it was "excited to introduce the new Mtn Dew Rise Energy for those looking for a morning boost . . . that helps you conquer the morning." [[Dkt.35-1.at.61]]. Indeed, both on cans and in prominent advertising, PepsiCo directly compared its new drink to coffee:

[[Dkt.35.at.7, ¶ 11]]

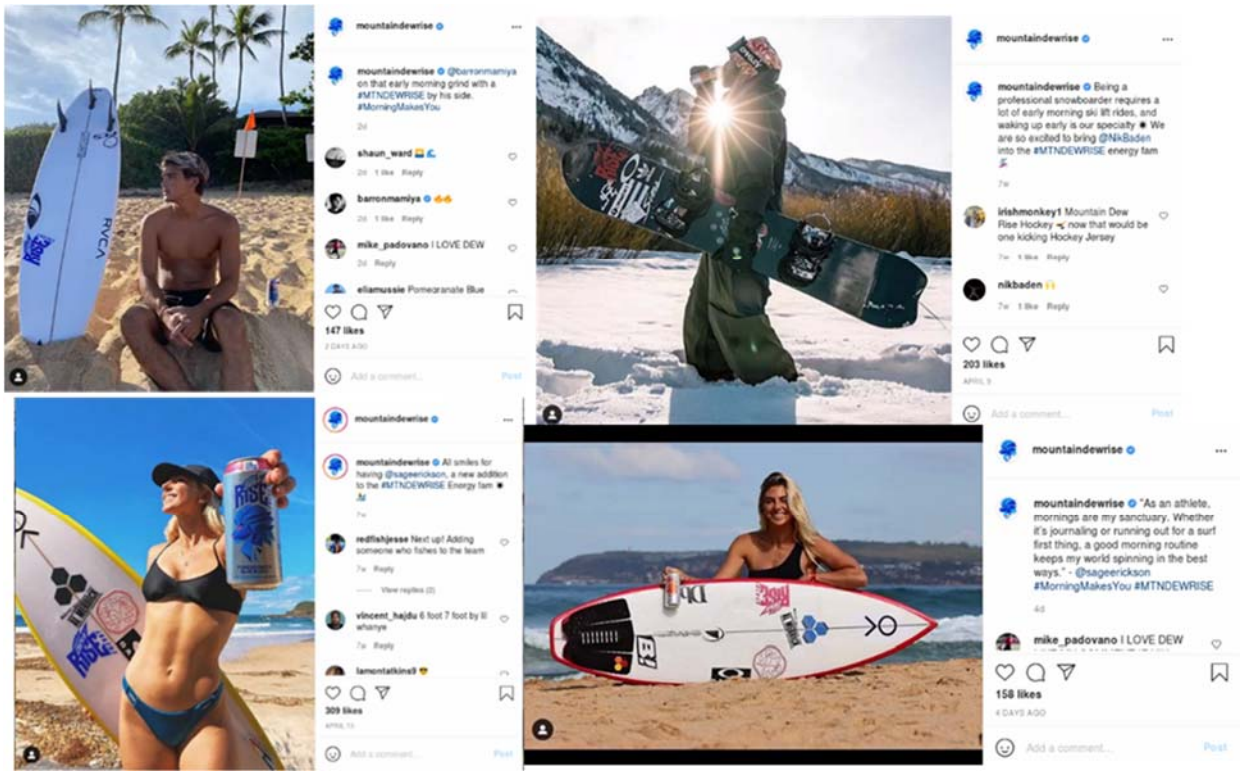
[[Dkt.104.at.4]]

PepsiCo also positioned its product as a healthy alternative to other beverages, highlighting the lack of added sugar and the mental stimulants:

[[Dkt.35.at.6, ¶ 10]]

[[Dkt.104.at.6]]

And as does Rise Brewing, PepsiCo promoted its new caffeinated beverage through association with outdoor fitness enthusiasts such as surfers and snowboarders:



[[Dkt.35.at.6, ¶ 9]].

C. PepsiCo's Launch of a Competing Drink Using the MTN DEW RISE ENERGY Mark Resulted in Actual Confusion.

Rise Brewing learned that PepsiCo was developing a product under the mark MTN DEW RISE ENERGY in or around January 2021. [[Dkt.149.at.2]]; *see also* [[Evidentiary.Hearing.Tr.24:13–19]]. Thereafter, Rise Brewing contacted PepsiCo through counsel to inform PepsiCo of Rise Brewing's rights and the risk of confusion. [[Dkt.149.at.2]]; *see also* [[Dkt.108-7.at.2–3]]. PepsiCo refused to change course, instead flooding the market with advertisements and hiring megastar LeBron James as the spokesperson for MTN DEW RISE ENERGY. *E.g.*, [[Evidentiary.Hearing.Tr.124:18–125:12]].

Within days of MTN DEW RISE ENERGY hitting store shelves, Rise Brewing began learning that people were confused by PepsiCo's new product. Rise Brewing employees saw PepsiCo's products stocked on shelf space designated for Rise Brewing's products. [[Dkt.28.at.2–3, ¶¶ 4–6]]. In one example of confusion, Rise Brewing's customer contacted Rise Brewing's Senior Regional Sales Manager for the Midwest about an upcoming promotional event, but later clarified that he was confused because, as he found out, the promotional event was intended for PepsiCo's products, not Rise Brewing's products. [[Dkt.149.at.3 (citing [[Dkt.34.at.3, ¶¶7–9]]), 6 (citing [[Evidentiary.Hearing.Tr.67:18–22]])]]. In another example of confusion, Rise Brewing brand ambassador Allison Schmidt testified about a conversation with a customer employee—a stocker at a grocery store—who said that he placed a MTN DEW RISE ENERGY product display next to Rise Brewing's products because he believed that the products were from "the same company" and involved "the same brand." [[Evidentiary.Hearing.Tr.76:11–22]]. Moreover, Ms. Schmidt, who conducts in-store tastings to raise awareness about the RISE brand, testified about other examples of actual reverse consumer confusion, explaining that she had been "regularly asked if [Rise Brewing's] product is the new coffee version of Mountain Dew." [[Dkt.149.at.6 (citing [[Evidentiary.Hearing.Tr.84:21–85:2]])]]; *see also* [[Evidentiary.Hearing.Tr.73:10–16]]. As Ms. Schmidt further explained to the District Court, this confusion had been happening so often at her tastings that it had

become the "norm . . . not the exception at this point." [[Dkt.149.at.6 (quoting [[Evidentiary.Hearing.Tr.85:12–15]])]].

The District Court also found actual confusion associated with Rise Brewing's "proposed sponsorship of certain athletic events." [[Dkt.149.at.6 (citing testimony by Ms. Schmidt)]]. As Ms. Schmidt testified, Rise Brewing lost a significant health and wellness event sponsorship because the event's organizer was confused upon seeing MTN DEW RISE ENERGY, not appreciating that it was different than Rise Brewing's RISE beverages. [[Evidentiary.Hearing.Tr.82:6–16]]. The organizer decided that Rise Brewing's RISE beverages would not be a good fit for the event, but her decision was based on her confusion between MTN DEW RISE ENERGY and Rise Brewing's RISE beverages. [[Evidentiary.Hearing.Tr.82:6–16]].[3]

D. Rise Brewing Filed Suit Against PepsiCo and Sought a Preliminary Injunction.

Rise Brewing filed a lawsuit against PepsiCo on June 15, 2021, bringing claims for trademark infringement and unfair competition under both federal law and Illinois common law.[4] [[Dkt.1]]. Shortly thereafter, Rise Brewing filed a motion

---

[3] After these and other instances of actual confusion, Rise Brewing again reached out to PepsiCo, informing them of the confusion and seeking an amicable resolution. [[Dkt.149.at.20]]; *see also* [[Dkt.29.at.11, ¶¶ 34–35]]. After weeks of settlement negotiations, the parties reached a stalemate. [[Dkt.149.at.20]]; *see also* [[Dkt.29.at.11, ¶¶ 34–35]].

[4] After transfer to the Southern District of New York, Rise Brewing filed the operative amended complaint involving claims for trademark infringement and

for a preliminary injunction, which included six fact witness declarations and one declaration from counsel, seeking to enjoin PepsiCo from using or commercially exploiting the MTN DEW RISE ENERGY mark. [[Dkt.149.at.3]]. The case was subsequently transferred to the Southern District of New York, where Rise Brewing renewed its motion, again requesting a preliminary injunction barring PepsiCo from selling its MTN DEW RISE ENERGY products or any other products that infringed Rise Brewing's RISE Marks. SDNYDkt.81.

II. The District Court Entered a Preliminary Injunction Against PepsiCo.

A. The District Court Considered an Extensive Record Built Over Months of Briefing and Multiple Hearings.

The District Court set a hearing on Rise Brewing's motion for a preliminary injunction for August 2021 and, after receiving PepsiCo's response in opposition, subsequently adjourned that hearing until September to provide time for a reply from Rise Brewing. SDNYDkt.109. Then, following oral argument in the District Court, PepsiCo filed a motion requesting a full evidentiary hearing. SDNYDkt.120. The District Court granted PepsiCo's request and on October 8, 2021, held an evidentiary hearing during which the District Court heard testimony from four fact witnesses for Rise Brewing, Rise Brewing's expert witness, and three fact witnesses for PepsiCo.

---

unjust competition under federal law and New York common law, and unjust enrichment under New York common law. SDNYDkt.80.

[[Dkt.149.at.6–7]]. PepsiCo elected not to present its survey expert who had opined on the likelihood of confusion. [[Evidentiary.Hearing.Tr.136:4–10]].

B. The District Court Entered a Preliminary Injunction Against PepsiCo Upon Finding That Rise Brewing Had Shown a Likelihood of Success on the Merits, Characterizing It as a "Clear or Substantial" Likelihood of Success.

On November 3, 2021, the District Court issued an Opinion & Order granting Rise Brewing's motion for a preliminary injunction. SDNYDkt.148. The next day, the District Court issued an Amended Opinion & Order that corrected certain minor errors without altering the substance of the original. [[Dkt.149]].

In its Amended Opinion & Order, the District Court found that Rise Brewing "is entitled to a preliminary injunction because [Rise Brewing] has demonstrated irreparable harm, a likelihood of success on the merits of the federal trademark claim and that the public interest weighs in favor of granting the injunction." [[Dkt.149.at.8]]. On the merits of Rise Brewing's claim, the District Court found that "[PepsiCo's] use of the term 'RISE' on its caffeinated drink is likely to cause confusion with [Rise Brewing's] Mark. [Rise Brewing] has shown that it is likely to prevail on that question particularly because of the similarity between the two marks, the proximity of [PepsiCo's] area of commerce to [Rise Brewing's] and the credible testimony at the October 8, 2021 hearing . . . on instances of actual confusion." [[Dkt.149.at.11]].

The District Court additionally found that Rise Brewing "sustained its burden of showing irreparable harm," as Rise Brewing is "entitled to a presumption of irreparable harm" under 15 U.S.C. § 1116(a), and PepsiCo failed to rebut that presumption. [[Dkt.149.at.20]]. The District Court specifically found that the timing of Rise Brewing's motion, particularly in view of "the parties' ongoing [pre-suit] discussions," "do not support the inference that [Rise Brewing] delayed, not perceiving any immediate or irreparable harm from the launch of [PepsiCo's] RISE product." *Id*. Next, the District Court found that the balance of hardships, with PepsiCo's "substantial rebranding costs, lost sales and harm to its goodwill" on the one hand, and Rise Brewing's "existential threat from [PepsiCo's] infringement" on the other, favored Rise Brewing. [[Dkt.149.at.20, 8 n.2]] The District Court further found that the harm to PepsiCo was "of its own making" since PepsiCo had invested heavily in its product while on notice of infringement. [[Dkt.149.at.21–22]]. Finally, the District Court found that Rise Brewing "met its burden of demonstrating that 'the public interest would not be disserved by the grant of a preliminary injunction.'" [[Dkt.149.at.22]].

Based on these underlying factual findings, the District Court preliminarily restrained and enjoined PepsiCo from using or displaying the MTN DEW RISE ENERGY mark, or any other mark that is confusingly similar to Rise Brewing's RISE Mark, in connection with the promotion, sale or distribution of single-use,

canned energy beverages. [[Dkt.149.at.23]]. The District Court gave PepsiCo seven days to comply with the Order, and required Rise Brewing to post a bond in the amount of $250,000. *Id.* PepsiCo then filed in the District Court an Emergency Motion to Stay Preliminary Injunction on November 4, 2021, asking for either a stay pending appeal, a stay of eleven weeks for transition, or a stay of seven days to give this Court time to consider a motion to stay. SDNYDkt.151. The District Court denied PepsiCo's motion for stay in its entirety. SDNYDkt.156.at.2–3. This appeal then followed, accompanied by PepsiCo's motion to stay the preliminary injunction, which this Court denied on December 7, 2021. On December 10, 2021, PepsiCo filed with the District Court a Notice of Compliance with Preliminary Injunction, stating that "PepsiCo has renamed the product that formerly was sold with the MTN DEW RISE ENERGY mark in the United States. The name of the product is currently MTN DEW ENERGY." SDNYDkt.170.at.1.

SUMMARY OF THE ARGUMENT

This lawsuit stems from PepsiCo's introduction to the marketplace of a beverage product with labeling that infringes Rise Brewing's RISE trademark, which Rise Brewing has been using for years for its own beverage products. PepsiCo introduced its competing—and infringing—product while knowing of Rise Brewing's prior use, and after it had ended partnership discussions with Rise Brewing. Consumers quickly became confused about PepsiCo's newly released

MTN DEW RISE ENERGY product vis-à-vis Rise Brewing's existing RISE product offerings—leading to instances of actual confusion, and specifically "reverse" confusion, whereby consumers were mistakenly believing that Rise Brewing, rather than PepsiCo, is the infringer or that Rise Brewing's products are those of PepsiCo.

The District Court did not abuse its discretion when it granted a preliminary injunction against PepsiCo after two separate hearings, including a full evidentiary hearing with live witness testimony. The District Court appropriately considered and resolved (in favor of Rise Brewing) each of the elements for a preliminary injunction, including: (1) a likelihood of success on the merits of Rise Brewing's trademark infringement claim; (2) a likelihood of irreparable harm to Rise Brewing in the absence of an injunction; (3) that the balance of hardships favors Rise Brewing; and (4) that the public interest would not be disserved by the injunction.

In this appeal, PepsiCo—applying the wrong standard of review—contends that the District Court "erred" in certain respects. There was no error, but more importantly, under the correct standard of review, the District Court did not abuse its discretion in entering the preliminary injunction. And the District Court did not commit any clear error in analyzing the underlying facts supporting the injunction, including the facts pertinent to the *Polaroid* factors for a likelihood of success in the trademark context.

Each of the District Court's findings is well supported, and its decision to enter a preliminary injunction falls well within the broad discretion that the law affords the court. The District Court did not, as PepsiCo claims, "fail[] to conduct [a] 'holistic' analysis" of the parties' marks and products when assessing likelihood of confusion. Opening Br. at 6. Instead, after due consideration of the evidence presented, including all of the evidence highlighted by PepsiCo in its Opening Brief, the District Court reached the opposite conclusion of what PepsiCo had advocated. In doing so, the District Court did not abuse its discretion in granting the injunction, and the District Court did not commit any clear error (or any errors at all) in its underlying factual findings. Affirmance is thus warranted.

Foremost, the District Court did not commit clear error in evaluating any of the *Polaroid* factors. The court fairly and correctly evaluated each of the factors, finding that most of them favored Rise Brewing and that none of them favored PepsiCo. Analyzing the first factor, the court evaluated the strength of the RISE Mark, considering the mark's inherent distinctiveness as well as its "marketplace distinctiveness," *i.e.*, "commercial strength." Next, the District Court found that the similarity of the marks favored a finding of likely confusion. The District Court undertook a holistic analysis of the parties' marks as they are presented to consumers in the marketplace, determining that the use of an identical term (RISE) as the dominant portion of the mark, in light of numerous other similarities, weighed in

favor of Rise Brewing. Further, the District Court did not commit any errors in finding that PepsiCo's MTN DEW house mark was unlikely to mitigate the similarity between the parties' marks.

Addressing additional *Polaroid* factors, the District Court did not commit clear error in finding that the parties' products are in competitive proximity and that the "bridging the gap" factor need not be considered in light of extensive evidence that the products can be found, quite literally, next to each other on store shelves.

Next, the District Court fairly—indeed correctly, and certainly without any clear error—considered and credited Rise Brewing's evidence of actual consumer confusion. And the District Court appropriately found that Rise Brewing's evidence of actual confusion outweighed PepsiCo's consumer survey—a survey that Rise Brewing's expert testified was fundamentally flawed. Notably, PepsiCo chose not to provide testimony from its survey expert during the evidentiary hearing. Rise Brewing's expert (and various fact witnesses), by contrast, testified live, describing multiple instances of actual confusion, with full cross-examination by PepsiCo. The District Court appropriately considered the witness testimony, specifically finding that Rise Brewing provided "credible testimony . . . describing multiple instances of actual confusion since [PepsiCo's] product launched." [[Dkt.149.at.18]].

Turning to another *Polaroid* factor, the District Court did not commit clear error in finding that the potential for perceptions of quality discrepancy between the

parties' products weighed in favor of Rise Brewing. The District Court properly considered that this factor primarily relates to the harm that Rise Brewing would suffer should PepsiCo be permitted to continue its infringement, which was shown to be substantial.

Next, for the factor regarding PepsiCo's bad faith conduct, the District Court did not commit clear error in finding that this factor, at the preliminary injunction stage, favored neither party. PepsiCo argues in this appeal that the District Court failed to adequately account for PepsiCo's alleged *good* faith, but PepsiCo cannot and does not dispute the uncontroverted evidence of its years-long awareness of Rise Brewing and its knowledge of Rise Brewing's concerns well prior to launch, which Rise Brewing presented as evidence of PepsiCo's ***bad*** faith. Regardless, PepsiCo has not demonstrated that the District Court erred in any respect, much less clearly erred, in deeming this factor neutral.

After considering each of the *Polaroid* factors, the District Court found that Rise Brewing demonstrated not only a likelihood of success on the merits, "but also a clear or substantial likelihood of success on the merits." [[Dkt.149.at.8, n.3]]. PepsiCo's arguments challenging these findings do not come close to carrying the day; in the District Court's view, which is afforded considerable deference on appeal, Rise Brewing's likelihood of success was shown to be "clear or substantial."

The District Court's treatment of the other elements for a preliminary injunction likewise are well supported. The court found that Rise Brewing would be irreparably harmed absent an injunction. In so finding, the District Court did not clearly err (and in fact was correct) in finding that Rise Brewing reasonably pursued its claims, first through pre-launch notice to PepsiCo, then through extensive pre-suit settlement communications once actual confusion arose, and finally through this lawsuit and the accompanying motion for a preliminary injunction after the parties' discussions broke down. Equally, the District Court did not clearly err when it found that the balance of the hardships favored the preliminary injunction, and the court did not abuse its discretion when it found that the public interest favors the injunction against PepsiCo.

And in the end, upon due consideration of the evidence presented, the District Court did not abuse its discretion in granting the preliminary injunction. This Court should therefore affirm.

ARGUMENT

I. The Applicable Standards of Review.

This Court reviews the grant of a preliminary injunction for abuse of discretion. *Really Good Stuff, LLC v. BAP Inv'rs, L.C.*, 813 F. App'x 39, 43 (2d Cir. 2020). "A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law." *People's United Bank v.*

PeoplesBank, 401 F. App'x 607, 608 (2d Cir. 2010) (quoting *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir. 2010)). In the context of a preliminary injunction in a trademark suit, this Court "review[s] the district court's findings on each of the *Polaroid* factors under a deferential standard and will set them aside only for 'clear error,' and [] review[s] the overall balance of the *Polaroid* factors as a legal issue *de novo*." *People's United*, 401 F. App'x at 608. Findings regarding irreparable injury are also reviewed for abuse of discretion. *Twentieth Century Fox Film Corp. v. Marvel Enters.*, 277 F.3d 253, 258 (2d Cir. 2002). Determinations regarding the balance of the hardships are "ordinarily give[n] substantial deference." *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 79 (2d Cir. 1985); *see also C.D.S. Inc. v. Zetler*, 691 F. App'x 33, 35 (2d Cir. 2017) (reviewing a determination on the balance of the hardships for clear error). Determinations regarding the public interest are reviewed for abuse of discretion. *See Really Good*, 813 F. App'x at 45.

II. The District Court Did Not Abuse Its Discretion in Entering a Preliminary Injunction Against PepsiCo.

The District Court did not abuse its discretion in entering the preliminary injunction. As this Court has explained, demonstrating an abuse of discretion in order to overturn a preliminary injunction is a "formidable hurdle" for an appellant to overcome. *Brennan's*, 360 F.3d at 129; *see also People's United*, 401 F. App'x at

608. PepsiCo has not come close to demonstrating an abuse of discretion—because there was none.

As the District Court recognized, to obtain a preliminary injunction, Rise Brewing needed to show "'(1) a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation' and the balance of hardships tips 'decidedly in the plaintiff's favor; (2) a likelihood of irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the plaintiff's favor; and (4) that the public interest would not be disserved by the issuance of an injunction.'" *Woodstock Ventures, LC v. Woodstock Roots LLC*, 837 F. App'x 837, 838 (2d Cir. 2021) (quoting *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015)); *see* [[Dkt.149.at.7–8, n.2]]. The District Court found that Rise Brewing had established not merely the required likelihood of success on the merits, but "a clear or substantial likelihood of success on the merits." [[Dkt.149.at.8, n.3]]. The District Court also found that there was a likelihood of irreparable harm to Rise Brewing, and that the balance of hardships favored Rise Brewing, particularly because PepsiCo's alleged harm was "of its own making," resulting from PepsiCo's repeated discussions with Rise Brewing before launching its own RISE product. [[Dkt.149.at.21–22 (quoting *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 287 (2d Cir. 2012) (stating it is "axiomatic that an infringer . . . cannot complain about the loss of ability to offer its infringing product"))]]. Finally, the District Court

found that "'the public interest would not be disserved by the grant of a preliminary injunction.'" [[Dkt.149.at.22 (quoting *WPIX*, 691 F.3d at 287)]].

As explained in detail below, the District Court did not commit clear error with regard to any of these underlying factual findings, thus warranting affirmance. And to be sure, the District Court acted well within its discretion in granting the preliminary injunction. PepsiCo's Opening Brief focuses on "[w]hether the district court erred" (*see* Opening Br. at 1–2 ("Issues Presented")), but that is not the standard. The District Court indeed did ***not*** err, and in fact was entirely correct in resolving these issues after multiple hearings and a thorough record, but this Court's standard of review is not one of assessing "error." PepsiCo must demonstrate that the District Court ***abused its discretion*** in granting the injunction—a "formidable hurdle," *Brennan's*, 360 F.3d at 129—and that the court did so based on underlying findings involving ***clear error***. There simply was none. This was not a close case. This Court should affirm.

A. The District Court Did Not Clearly Err in Connection with Its Findings Regarding the *Polaroid* Factors.

The District Court found that nearly all of the *Polaroid* factors favored finding a likelihood of confusion, while none weighed against. [[Dkt.149.at.11, 20]]. More specifically, the District Court found that the factors concerning the strength of mark, the similarity of the parties' marks, the proximity of the parties' products, and actual confusion all favored Rise Brewing. The District Court further found that the

products were proximate and, therefore, that the "bridging the gap" factor did not apply. [[Dkt.149.at.17]]. Next, the District Court found that, at the preliminary injunction stage, the record evidence favored neither party with respect to PepsiCo's bad faith. [[Dkt.149.at.18–19]]. The District Court also found that the quality of the parties' products favored Rise Brewing with respect to overall likelihood of success on the merits. [[Dkt.149.at.19]]. The District Court further found that the record evidence regarding consumer sophistication was inconclusive. None of the factors favored PepsiCo.

As explained below, the District Court's factual findings regarding the *Polaroid* factors were not clearly erroneous, nor were there any errors of law as PepsiCo contends.

1. The District Court Did Not Clearly Err in Finding That the Strength of Rise Brewing's Mark Favors a Likelihood of Confusion (*Polaroid* Factor 1).

The District Court did not clearly err in finding that the strength of the marks factor "tilts slightly in [Rise Brewing's] favor" ([[Dkt.149.at.11]]); instead, the District Court correctly evaluated this factor in finding that it supports a likelihood of confusion. In its analysis, the District Court considered the inherent distinctiveness of the RISE Mark, as well as its distinctiveness in the marketplace. [[Dkt.149.at.12]]. The District Court concluded that Rise Brewing's RISE Mark is suggestive, as it is evocative of the morning, "which 'suggest[s] a quality or qualities

of the product through the use of imagination, thought and perception.'" *Id.* (citing *Star Indus. v. Bacardi & Co.*, 412 F.3d 373, 385 (2d Cir. 2005)). Suggestive marks—like Rise Brewing's RISE Mark—are inherently distinctive. *Star Indus.*, 412 F.3d at 385.[5] The District Court further found that Rise Brewing's RISE Mark had distinctiveness in the marketplace based on Rise Brewing's investment of more than $17.5 million into promoting the brand, as well as its receipt of numerous industry awards. [[Dkt.149.at.13]].

PepsiCo asserts in its Opening Brief that the District Court's analysis "was wrong" because, according to PepsiCo, the court failed (1) to find that the strength of Rise Brewing's RISE Mark weighs against actual confusion; (2) to find that the RISE Mark is weak due to its use of the English word "rise"; (3) to consider statements made by Rise Brewing to the PTO six years ago (which the PTO rejected) during an unsuccessful prosecution of a separate rise-formative mark; and (4) to consider the existence of other rise-formative marks. Opening Br. at 32–35. But the District Court correctly evaluated each of these issues relating to the strength-of-mark factor, finding in favor of Rise Brewing. Notably, this Court does not review those findings *de novo*, as PepsiCo would have it, but under the clearly erroneous standard. *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 1003 (2d

[5] PepsiCo does not dispute the District Court's finding that the RISE Mark is suggestive. Opening Br. at 31–37.

Cir. 1997) (reviewing each of the district court's findings with respect to the eight *Polaroid* factors under the clearly erroneous standard). What PepsiCo calls legal error is actually nothing more than its disagreement with the District Court's factual findings and resulting conclusions. PepsiCo has not demonstrated clear error in any of the District Court's findings.

i. The District Court Did Not Clearly Err in Finding That the Strength of Rise Brewing's RISE Mark Favored a Likelihood of Reverse Confusion.

The District Court did not commit any error in finding that the strength of Rise Brewing's RISE Mark favored a finding that reverse confusion was likely. Courts have held that an inherently distinctive mark weighs in favor of the mark holder "on both forward and reverse confusion theories." *THOIP v. Walt Disney Co.*, 736 F. Supp. 2d 689, 710 (S.D.N.Y. 2010). This Court itself has affirmed a permanent injunction where reverse confusion was "perhaps the primary type of confusion involved," "***despite*** the weakness of [the senior user's] mark." *Banff, Ltd. v. Federated Dep't Stores, Inc.*, 841 F.2d 486, 491, 493 (2d Cir. 1988) (emphasis added). Applying the logic of *Banff*, a strong mark does not necessarily weigh against a likelihood of confusion under a reverse confusion theory. The District Court did not clearly err in finding, in light of the evidence presented, that the strength of Rise Brewing's RISE Mark favored a likelihood of confusion.

ii. The District Court Did Not Clearly Err in Finding the RISE Mark Suggestive Despite the Use of a Common English Word.

PepsiCo complains that the District Court failed to consider the fact that the RISE Mark contains a common English word (Opening Br. at 32–33), but that is incorrect. First, the District Court found that as a registered mark, the RISE Mark is presumptively valid. [[Dkt.149.at.9]]. As a registered mark, the RISE Mark is at least suggestive, and suggestive marks "are entitled to registration without proof of secondary meaning." *McGregor-Doniger Inc. v. Drizzle Inc.*, 599 F.2d 1126, 1131 (2d Cir. 1979). The District Court also considered the overall RISE Mark, including the stylized logo in which the term "rise" is presented. [[Dkt.149.at.14]] (citing *Gruner + Jahr USA Publ'g v. Meredith Corp.*, 991 F.2d 1072, 1078 (2d Cir. 1993)).

PepsiCo's argument that the District Court did not "acknowledge" precedent regarding use of pre-existing English words falls flat. In truth, the District Court considered precedent instructing courts to consider not just the English word within a mark "alone and out of context" but also "'the stylized logo of that name including the unusual form and shape of the letters comprising the word.'" [[Dkt.149.at.14 (quoting *Gruner + Jahr*, 991 F.2d at 1077–78)]]. This analysis is in accordance with the various cases cited by PepsiCo for the proposition that marks using common English words are weak, as much of that precedent actually stands for the proposition that the strength of a mark should not be evaluated solely on the basis of use of a

common term, but as a whole. *E.g.*, *Nabisco, Inc. v. Warner-Lambert Co*., 220 F.3d 43, 46, 48 (2d Cir. 2000) (declining to assess the strength of the relevant marks, but discussing the import of considering "the overall impression created by [the marks in] context"); *P&G v. Johnson & Johnson, Inc.*, 485 F. Supp. 1185, 1197 (S.D.N.Y. 1979), *aff'd* 636 F.2d 1203 (2d Cir. 1980) (finding mark for just the word "sure" to "fall into the weakest end of the suggestive range" but finding its strength moderate in light of the mark holder's use of the mark).

The District Court did clearly err in considering both the term "rise" and the stylized RISE Mark as a whole, and in finding that the strength of the RISE Mark weighed in favor of likelihood of confusion.

iii. The District Court Did Not Clearly Err in Declining to Bind Rise Brewing to Prior Statements Rejected by the PTO.

PepsiCo argues that the RISE Mark is weak, relying heavily on its argument that Rise Brewing should be bound by unsuccessful arguments made to the PTO during prosecution of a different mark—the RISE COFFEE CO. & Design application—six years ago. The District Court did not commit any error of law or clear error of fact when it declined to do so.

Indeed, the District Court correctly rejected PepsiCo's attempts to bind Rise Brewing to those arguments, citing precedent that "courts do not bind parties to their statements made or positions taken in ex parte application proceedings in front of

the PTO." [[Dkt.149.at.14]] (citing *Alpha Media Grp., Inc. v. Corad Healthcare, Inc.*, No. 13 Civ. 5438, 2013 WL 5912227, at *3 (S.D.N.Y. Nov. 4, 2013)); *see also, e.g.*, *Polo Fashions, Inc. v. Extra Special Prods., Inc.*, 451 F. Supp. 555, 561 (S.D.N.Y. 1978) (trademark owners are not bound by statements made to the PTO in *ex parte* trademark prosecutions). The District Court further recognized, correctly, that "prosecution history estoppel," a tenant of patent law, does not apply in trademark cases. *Polo Fashions*, 451 F. Supp. at 561; *see also PenGems, LLC v. Morgan*, No. 1:17-CV-1018-LY, 2018 WL 3732730, at *3 (W.D. Tex. Aug. 3, 2018), *report and recommendation adopted*, No. 1:17-CV-1018-LY, 2018 WL 4701811 (W.D. Tex. Aug. 23, 2018) ("courts have repeatedly refused to apply the doctrine of prosecution history estoppel to trademarks and trade dress"); *Davis v. Lost Int'l LLC*, CV 12-8002 GAF (MANx), 2013 WL 12137103, at *1 (C.D. Cal. Apr. 8, 2013); *Metal Jeans, Inc. v. Affliction Holdings, LLC*, No. CV-15-0743 PA (Ex), 2015 WL 3833858, at *3 (C.D. Cal. June 19, 2015); *Goodyear Tire & Rubber Co. v. A. J. Industries Corp.*, 165 U.S.P.Q. (BNA) 665, *4 (T.T.A.B. 1970); *Eskimo Pie Corp. v. Canada Dry Corp., Inc.*, 181 U.S.P.Q. (BNA) 191, *2 (T.T.A.B. 1973).

PepsiCo's citation to a single Third Circuit case, *Freedom Card, Inc. v. J.P. Morgan Chase & Co.*, 432 F.2d 463 (3d Cir. 2005), to support its allegation that "courts often weigh these prior statements against the markholder" (Opening Br. at 35) is unavailing. The arguments at issue in that case were instrumental to the

registration of the subject marks. 432 F.3d at 476. In contrast, here, Rise Brewing's rejected arguments concerned a *different* mark than the one at issue in this case. [[Dkt.108-6]]. Thus, *Freedom Card* (which is non-binding in any event) does not apply here, where the PTO rejected both the argument presented and the application for which the argument was made. The District Court appropriately rejected PepsiCo's insistence on a different result.

Moreover, Rise Brewing provided additional evidence to the District Court regarding the strength of its mark. The District Court reviewed evidence on the inherent distinctiveness of the RISE Mark, and noted that PepsiCo's arguments that the mark was weak were undercut by the testimony of PepsiCo's own employees that the term is valuable because it has "an emotional meaning" that appeals to consumers. [[Dkt.149.at.14]]; [[Dkt.149.at.14 (quoting [[Evidentiary.Hearing.Tr.120:10–25]])]]. The District Court also reviewed Rise Brewing's use of its rise-formative marks, and its extensive use and promotion of the RISE Mark. [[Dkt.149.at.13]]. Based on all of the evidence presented, and the District Court's evaluation of it, the District Court unquestionably did not clearly err (or err at all) in finding that the evidence showed that the RISE Mark was suggestive and that the strength-of-mark factor tilts in favor of Rise Brewing.

iv. The District Court Did Not Clearly Err in Its Consideration of Other Rise-Formative Marks.

The District Court did not clearly err in finding that, although "there are other commercial uses of the term 'RISE' among morning beverages," Rise Brewing appeared to be "the exclusive user of the principal term 'RISE' to identify a single-serving, canned caffeinated beverage (until the launch of [PepsiCo's] product)." [[Dkt.149.at.13]].[6] PepsiCo presented evidence only of Rise-formative registrations, applications, and snippets of websites, not evidence of the extent or nature of actual use of any such marks, and PepsiCo focused its arguments solely on the common term "rise" and not on the alleged similarity of the marks and their use as a whole.

First, PepsiCo's argument reveals a fundamental misunderstanding of trademark law, as it conflates ***registration*** with ***use***. As this Court has held, "[t]he existence of [] registrations is not evidence of what happens in the marketplace." *Scarves by Vera, Inc. v. Todo Imports, Ltd. (Inc.)*, 544 F.2d 1167, 1173 (2d Cir. 1976) (rejecting defendant's claim that a mark was weak due to multiple coexisting registrations containing the term "Vera"); *see also* McCarthy on Trademarks and Unfair Competition § 11:89 (5th ed. Dec. 2021) ("[t]hird party ***registrations*** are ***not evidence of use***" (emphasis added)). Importantly, none of the cases cited by PepsiCo regarding coexisting trademark registrations warrant a different conclusion. In *Estee*

[6] The District Court further took judicial notice of the co-pending litigation filed by Rise Brewing in the Western District of North Carolina. [[Dkt.149.at.13, n.4]].

Lauder, Inc. v. Gap, Inc., 108 F.3d 1503, 1511 (2d Cir. 1997), this Court held that the existence of other trademark registrations and applications demonstrated only that a term was not ***inherently*** distinctive. But here, PepsiCo does not challenge the suggestive, and therefore inherently distinctive, nature of the term "rise" in Rise Brewing's RISE Mark. Next, in *W. Publishing Co. v. Rose Art Industries, Inc.*, 910 F.2d 57, 61 (2d Cir. 1990), the district court found that over 2000 registrations, 113 of which were in the same field as the complainant's mark, weakened the plaintiff's descriptive mark. That determination, however, does not mandate that in this case the District Court must find the RISE Mark weak in light of the comparably meager 60 registrations or applications provided by PepsiCo, particularly given that PepsiCo provided no evidence of actual *use* of the marks from any of those 60 registrations or applications. In PepsiCo's next case, *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1005 (2d Cir. 1983), the mark PLUS was found to be a weak descriptor based on not only the presence of third party marks, but also the fact that the term "plus" "merely implies additional quantity or quality." In contrast, here, as noted above, PepsiCo *itself* presented evidence of the value of the term "rise" as a mark because of its emotional appeal to consumers. [[Dkt.149.at.7]]. Lastly, in *Streetwise Maps v. VanDam, Inc.*, 159 F.3d 739, 744 (2d Cir. 1998), there was evidence of "third party use," including evidence of actual use on similar products—evidence that is absent here.

It is disingenuous for PepsiCo to insist that, with regard to third-party use, the District Court "refus[ed] to even consider that evidence." Opening Br. at 37. The District Court ***did*** consider the evidence, and the court found—correctly, and certainly without clear error—that Rise Brewing enjoyed exclusive use of its mark for canned caffeinated beverages, and that the RISE Mark had market distinctiveness despite "other commercial uses of the term 'RISE' among morning beverages." [[Dkt.149.at.13]].

Further, PepsiCo's argument that the RISE Mark is weak due to the allegedly crowded field of other marks is based only on the common term "rise," without consideration of the overall commercial impression of the other marks identified by PepsiCo. *E.g.*, Opening Br. at 32–33. As the district court recognized, many of the cited registrations and purported uses are for completely dissimilar marks. [[Dkt.149.at.13]]. For example, over a dozen of the registrations or other alleged marks cited by PepsiCo are for SUNRISE- or MOONRISE-formative marks. [[Dkt.108.at.2–6, ¶¶ 4.h, 4.k, 4.l, 4.q, 4.r, 4.s]]; [[Dkt.108-5.at.3, 5 at.6, 8–10 at.12]]. Thus, the District Court considered the evidence and fairly determined that Rise Brewing's mark was sufficiently strong to find that this *Polaroid* factor favors Rise Brewing.

2. The District Court Did Not Clearly Err in Finding That the Similarity of the Marks Favors a Likelihood of Confusion (*Polaroid* Factor 2).

The District Court also did not clearly err in finding that the similarity of the marks favored a likelihood of confusion.[7] The District Court conducted a holistic analysis of the similarity of the parties' marks, expressly considering the common term "rise" in the parties' respective marks, the common highlighting of that term in the parties' respective marks, the common placement of the parties' respective marks on the top third of the beverage can, the common use of large typeface, the common use of capital letters, the common use of a bright color against a light background, and the fact that the parties' respective house marks "appear in much smaller lettering"—all leading to the court's finding that the marks were confusingly similar in appearance. [[Dkt.149.at.15]].

[7] PepsiCo claims that "[t]he court also erred in its analysis of the similarity of the trademarks." Opening Br. at 37. However, a district court's findings regarding similarity are reviewed not for error but for ***clear error***. *Gruner + Jahr*, 991 F.2d at 1078.

[[Dkt.106-3.at.2]]

[[Dkt.108-6.at.3]]

This Court has affirmed similar comprehensive considerations by district courts, where a common dominant portion of a composite mark warrants a finding that the marks are similar. *See*, *e.g.*, *Guinness United Distillers & Vintners B.V. v. Anheuser-Bush, Inc.*, No. 02 CIV. 0861 (LMM), 2002 WL 1543817, at *3, *7 (S.D.N.Y. July 12, 2002) (finding two marks confusingly similar where both contain the same prominent term, despite differences in bottles between the two beverages, and the presence of distinct house marks, and issuing a preliminary injunction), *aff'd Guinness United Distillers & Vintners v. Anheuser-Busch, Inc.*, 50 F. App'x 52, 53 (2d Cir. 2002); *Sports Auth., Inc. v. Prime Hosp. Corp.*, 89 F.3d 955, 963 (2d Cir. 1996) (finding similarity between marks on the basis of common words, as "the marks are similar in "the context in which the respective marks are generally presented" including various advertisements and when spoken). The District Court

did not, as PepsiCo states, "fail to even acknowledge" (Opening Br. at 44) differences between the parties' marks and packaging. To the contrary, the court expressly considered PepsiCo's arguments that the products' cans "are different sizes" and that the "logos are in different fonts." After doing so, the court found that PepsiCo's arguments as to those specific features, in a vacuum, "fail[ed] because they do not consider the parties' respective marks holistically" as mandated by this Court. [[Dkt.149.at.15–16]]. The cases PepsiCo cites regarding the similarity analysis actually demonstrate that the holistic analysis conducted by the District Court was correct, and certainly far from clear error. *E.g.*, *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 395 (2d Cir. 1995) (noting that while the presence of a house mark could aggravate, rather than mitigate the possibility of confusion when used in association with identical marks, it was clear error for the district court to fail to consider the total effect of the marks at issue); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 107 (2d Cir. 2009) (affirming the district court's decision to analyze the similarity of the marks as a whole); *King Research, Inc. v. Shulton, Inc.*, 454 F.2d 66, 68 (2d Cir. 1972) (affirming denial of preliminary injunction where "the packaging techniques used in the two products are sharply different"); *Lang v. Ret. Living Publ'g Co.*, 949 F.2d 576, 581 (2d Cir. 1991) (court should take into account all factors that potential purchasers will likely perceive); *J.T. Colby & Co. v. Apple Inc.*, No. 11-cv-4060, 2013 WL 1903883, at *16 (S.D.N.Y.

May 8, 2013) (courts should consider marks and context) *aff'd*, 586 F. App'x 8 (2d 2014); *Star Indus.*, 412 F.3d at 386 (considering logos, labels, and packaging as a whole); *Nabisco*, 220 F.3d at 48 (court should consider "the overall impression created by [the mark in] context"); *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 117 (2d Cir. 1984) ("each trademark must be compared in its entirety").

The District Court also did not commit any error of law, as PepsiCo asserts, in evaluating the presence of PepsiCo's MTN DEW house mark in the context of Rise Brewing's claim for reverse confusion. While the prominent presence of a house mark may dispel confusion in some instances, in the context of reverse confusion, "the inclusion of a famous house mark "may actually ***increase*** the misappropriation by linking defendant's name to plaintiff's goodwill." *Banff*, 841 F.2d at 492 (emphasis added); *see also THOIP*, 788 F. Supp. 2d at 185–86. This Court's opinion in *W.W.W. Pharmaceutical Co. v. Gillette Co.*, 984 F.2d 567, 573 (2d Cir. 1993), is distinguishable because in that case the defendant's house mark was the dominant portion of the infringing mark. Here, by comparison, the District Court did not clearly err in finding that the dominant portion of the infringing mark was not PepsiCo's house mark, but rather the common term "RISE." [[Dkt.149.at.15]].

Even in the context of forward confusion, this Court has affirmed a district court's determination that the use of a house brand "might suggest to consumers a

collaboration" in an industry, like the beverage industry, where companies are constantly "leverag[ing] the equity of their brands by applying their names [to other products]." *See Guinness*, 2002 WL 1543817, at *3, *aff'd*, 50 F. App'x 52, 53. The District Court committed no error in finding that the presence of the MTN DEW house mark did not mitigate similarity in a reverse confusion case. The District Court correctly and reasonably found that the similarity of the marks weighs strongly in favor of a likelihood of confusion.

3. The District Court Did Not Clearly Err in Finding That the Products' Proximity Favored a Likelihood of Confusion and That There Was No "Gap to Bridge" Because the Parties' Products Were Already in Competitive Proximity (*Polaroid* Factors 3 and 4).

The District Court did not clearly err in finding that the parties' products are proximate and that there was no gap to bridge, thus favoring Rise Brewing. The District Court did not clearly err in finding that parties' products "are both canned, caffeinated drinks," "are sold through the same trade channels—grocery stores and convenience stores," "are sold nationally," and are "indisputably" in "similar" "areas of commerce." [[Dkt.149.at.16–17]]. The District Court considered substantial evidence showing the proximity of the products not only at the same stores, such as Kroger, Publix, and Wal-Mart ([[Dkt.29.at.2–4, 8, ¶¶ 4–13, 23]]), but on the very same shelves in these stores, for example:

[[Pl.Ex.2]].

[[Pl.Ex.4.at.10]].

In finding that the parties' "canned and caffeinated drinks indisputably are" in similar areas of commerce [[Dkt.149.at.17]], the District Court made findings based on not only the relevant goods' proximity in stores, but also the relevant market—an analysis that is appropriate under, for example, both *Hamilton International Ltd. v. Vortic LLC*, 13 F.4th 264, 278 (2d Cir. 2021), and *Vitarroz Corp. v. Borden, Inc.*, 644 F.2d 960, 967 (2d Cir. 1981). PepsiCo's argument that the parties are not in the same market ignores that PepsiCo positioned MTN DEW RISE ENERGY for the morning caffeinated beverage drinker, selecting "the name 'Rise' for its product because it connotes 'morning' and also had 'an emotional meaning' that encourages consumers to 'g[e]t their day started right" ([[Dkt.149.at.7 (quoting [[Evidentiary.Hearing.Tr.120:10–25]])]]), and proclaiming that it was "excited to introduce the new Mtn Dew Rise Energy for those looking for a morning boost . . . that helps you conquer the morning." [[Dkt.35-1.at.61]]. Through its introduction of MTN DEW RISE ENERGY drinks, PepsiCo expressly attempted to merge the energy drink and morning caffeine categories, comparing its product not to the amount of caffeine in Red Bull®, but in ***coffee***. [[Dkt.35.at.7, ¶ 11]]; [[Dkt.104.at.4]]. Further, as discussed above, the District Court was not obligated to bind Rise Brewing to the statements it (unsuccessfully) made in *ex parte* proceedings before the PTO in defining the relevant market. Additionally, and in light of the competitive proximity of the parties' products, the District Court did not clearly err

in finding that "there is 'no gap to bridge, and this factor is irrelevant to the *Polaroid* analysis.'" [[Dkt.149.at.17]] (quoting *Star Indus.*, 412 F.3d at 387).

4. The District Court Did Not Clearly Err in Finding That Rise Brewing's Credible Evidence of Actual Confusion Favored a Likelihood of Confusion (*Polaroid* Factor 5).

The District Court did not clearly err in finding[8] that the evidence of actual confusion weighed in favor of Rise Brewing. In particular, the District Court did not clearly err in finding that Rise Brewing's "credible testimony . . . describing multiple instances of actual confusion since [PepsiCo's] product launched" weighed in favor of likelihood of confusion. [[Dkt.149.at.18]]. The District Court also did not clearly err in giving little weight to PepsiCo's contrary survey evidence, which Rise Brewing's expert critiqued as unreliable. [[Dkt.149.at.18]].

i. The District Court Did Not Clearly Err in Finding Rise Brewing's Evidence of Actual Confusion Credible and Compelling.

As an initial matter, the District Court did not commit any error of law in considering Rise Brewing's evidence of actual confusion. This Court has expressly

[8] In its Opening Brief, PepsiCo argues that the evidence put forth by Rise Brewing was "legally irrelevant" and "legally insufficient," as if the question were a matter of law. Opening Br. at 50, 51. These issues are questions of *fact* and entitled to deference. This Court reviews the factual findings pertaining to the sufficiency of the evidence regarding the *Polaroid* factors under the clearly erroneous standard. *See, e.g.*, *Fun-Damental*, 111 F.3d at 1003–04 (finding no clear error in the district court's finding that certain "statements [were] sufficient to support a finding of actual confusion at the preliminary injunction stage of the proceedings").

held that employee testimony regarding actual confusion testimony is admissible and not hearsay when, as here, it is not offered for the truth of the matter asserted but instead is offered because it is probative of confusion in the mind of the declarant. *Fun-Damental*, 111 F.3d at 1003–04 (affirming the district court's admission of employee testimony regarding anecdotal evidence of confusion, finding of actual confusion, and issuance of a preliminary injunction). Notably, PepsiCo never objected to any of this evidence on any basis, including hearsay.

Turning to the evidence itself, the District Court did not clearly err in finding that the "credible testimony of [Rise Brewing's witnesses]" weighed in favor of likelihood of confusion. [[Dkt.149.at.18]]. Rise Brewing presented multiple instances of credible, probative evidence of actual confusion. ***First***, Rise Brewing presented evidence that both its customers (retailers) and end consumers were confused by PepsiCo's MTN DEW RISE ENERGY mark. With respect to Rise Brewing's retail customers, Rise Brewing presented evidence that PepsiCo's product was mis-stocked in Rise Brewing's shelf space ([[Dkt.28.at.2–3, ¶¶ 4–6]]), that employees erroneously thought that Rise Brewing was participating in a promotional event designated for PepsiCo ([[Dkt.149.at.3, 6 (citing [[Dkt.34.at.3, ¶¶ 7–9]], [[Evidentiary.Hearing.Tr.,67:18–22]])]]), and that customers believed that PepsiCo's MTN DEW RISE ENERGY products and Rise Brewing's RISE products are from "the same company" and involved "the same brand."

[[Evidentiary.Hearing.Tr.76:11–22]]. Similarly, with respect to end consumers, Rise Brewing presented credible testimony that consumers were confused, mistakenly believing that Rise Brewing's products were "the new coffee version of Mountain Dew." [[Dkt.149.at.6 (quoting [[Evidentiary.Hearing.Tr.84:21–85:2]])]]; *see also* [[Evidentiary.Hearing.Tr.73:10–16]].

Second, Rise Brewing presented evidence that this confusion was not mere inquiry, but reflected actual confusion on the part of consumers, and in at least one instance resulted in a lost business opportunity for Rise Brewing. The relevant consideration with respect to instances of confusion is whether the instances "could inflict commercial injury [on Rise Brewing] in the form of either a diversion of sales, damage to goodwill, or loss of control over reputation." *Reply All Corp. v. Gimlet Media, LLC*, 843 F. App'x 392, 397 (2d Cir. 2021) (quoting *Lang*, 949 F.2d at 583). In this vein, this Court has held that actual confusion can be reflected by actions other than mistaken purchases. *E.g.*, *Sports Auth.*, 89 F.3d at 963–64 (crediting misplaced phone calls as evidence of actual confusion). The retailer confusion detailed above resulted in misplaced product, with PepsiCo's products and Rise Brewing's products being displayed together as though from a single source. This loss of control of its brand, and the resulting financial harm, was confirmed by Rise Brewing's lost partnership with the "Flying Pig Marathon" where the event coordinator mistakenly thought Rise Brewing's RISE-branded drinks were

associated with MTN DEW RISE ENERGY. [[Evidentiary.Hearing.Tr.82:6–16]]; *see also* [[Dkt.149.at.6]].

This evidence is distinguishable from the evidence at issue in *Merriam-Webster, Inc. v. Random House, Inc.*, 35 F.3d 65, 72 (2d Cir. 1994), where this Court concluded that the evidence did not show any actual confusion affecting purchasers. *See also Trs. of Columbia Univ. v. Columbia/HCA Healthcare Corp.*, 964 F. Supp. 733, 747 (S.D.N.Y. 1997) (finding little evidence of actual confusion without evidence of decisions made based on confusion). Similarly, the instances of inquiry discussed in *Nora Beverages, Inc. v. Perrier Group. of America, Inc.*, 269 F.3d 114, 124 (2d Cir. 2001), are distinguishable because the evidence in *Nora Beverages* concerned inquiries regarding affiliation between two companies. The instances of actual confusion here, by comparison, were founded on the incorrect assumption that Rise Brewing's product was PepsiCo's, without any real consideration for Rise Brewing as an independent company. [[Evidentiary.Hearing.Tr.76:11–22]]. Consumers were associating Rise Brewing's beverages with PepsiCo; they were not inquiring about an affiliation between the two companies (Rise Brewing and PepsiCo) as in *Nora Beverages*.

Third, Rise Brewing presented evidence of actual confusion relevant to the District Court's specific holding that there is a likelihood of reverse confusion. Reverse confusion is shown by "purchasers or prospective purchasers of [the senior

user's] products who believed that [the senior user's products] were produced by or affiliated with [the junior user]." *Lang*, 949 F.2d at 583. Here, as described earlier, retail employees thought that Rise Brewing's products and PepsiCo's products were from "the same company" and involved "the same brand." [[Evidentiary.Hearing.Tr.76:11–22]]. The consumers at Ms. Schmidt's tastings, for example, thought Rise Brewing's product was the "coffee version of Mountain Dew" ([[Dkt.149.at.6]]), not that MTN DEW RISE ENERGY was the fruit version of Rise Brewing's offerings. And the organizer of the Flying Pig Marathon declined to work with Rise Brewing because MTN DEW RISE ENERGY did not appear to be organic or natural, and she assumed the same about Rise Brewing's coffee offerings that she had confusingly associated with Mountain Dew. [[Evidentiary.Hearing.Tr.82:6–16]]; *see also* [[Dkt.149.at.6]]. While the confusion regarding Rise Brewing's participation in a store promotion campaign was arguably evidence of forward confusion, that instance arose in March 2021, when PepsiCo's product was just launching. [[Dkt.149.at.6 (citing [[Dkt.34.at.3, ¶¶ 7–9]])]]. This evidence of brief moments of forward confusion, before PepsiCo's product overwhelmed Rise Brewing's place in the market, followed by a shift in the orientation of that confusion, still counseled in favor of a finding of a likelihood of confusion. The numerous instances of actual confusion, in the few short months that

the products competed in the marketplace, is not, as PepsiCo argues, *de minimis* evidence of confusion. The District Court did not clearly err in relying on them.

ii. The District Court Did Not Clearly Err in Discrediting PepsiCo's Survey Evidence.

The District Court did not clearly err in weighing the parties' competing expert reports and subsequently finding the critique provided by Rise Brewing's expert credible. Interestingly, PepsiCo makes much of a survey conducted by an expert it chose not to call to testify at the hearing that PepsiCo itself had demanded. This decision prevented PepsiCo's expert from facing cross-examination by Rise Brewing, and foreclosed any opportunity for the District Court to evaluate the expert's credibility or ask questions of its own. [[Dkt.149.at.6–7]]; *see also* [[Evidentiary.Hearing.Tr.136:4–10]]. In critical contrast, Rise Brewing called its rebuttal expert to the stand, giving PepsiCo the opportunity to cross-examine him, and allowing the District Court to assess his credibility. *E.g.*, [[Dkt.149.at.6]]; *see also* [[Evidentiary.Hearing.Tr.155:19–21]]. Given these circumstances and the evidence presented, it was in no way "clear error" for the District Court to credit Rise Brewing's expert, including his critique of PepsiCo's survey evidence, and find that PepsiCo's "survey results may be particularly unreliable" "'when there has been neither long nor significant experience of the two trademarks operating side-by-side in the same market.'" [[Dkt.149.at.18 (quoting *Guthrie Healthcare Sys. v. ContextMedia, Inc.*, 826 F.3d 27, 45 (2d Cir. 2016))]].

The District Court also did not clearly err in finding actual confusion without a supporting survey from Rise Brewing. "Although the absence of surveys is evidence that actual confusion cannot be shown . . . a trier of fact may still conclude that actual confusion exists in the absence of such evidence, so long as there is other evidence of actual confusion." *Sports Auth.*, 89 F.3d at 964. This Court has further clarified that there is no requirement of a survey regarding customer confusion "before a plaintiff may obtain a preliminary injunction." *LeSportsac*, 754 F.2d at 78. Additionally, this Court has previously affirmed the grant of a preliminary injunction based on underlying claims of trademark infringement where (1) the defendant proffered a survey showing "evidence of no confusion"; (2) the plaintiff offered no competing survey showing actual confusion; and (3) there was no anecdotal evidence of actual confusion. *See Guinness*, 2002 WL 1543817, at *5, *aff'd Guinness*, 50 F. App'x at 53. Tellingly, although in *Guinness* the district court found that the actual confusion factor weighed in favor of the defendants, it nevertheless issued a preliminary injunction, and this Court affirmed.

* * *

Rise Brewing presented significant, credible evidence of actual confusion, and a strong rebuttal to the PepsiCo survey conducted by an expert that PepsiCo decided not to allow to testify. The District Court did not clearly err in finding that the actual confusion factor favored Rise Brewing.

5. The District Court Did Not Clearly Err in Finding That Rise Brewing's Evidence of PepsiCo's Bad Faith Favored Neither Party (*Polaroid* Factor 6).

As the District Court recognized, "[Rise Brewing] assert[ed] that [PepsiCo] adopted its mark in bad faith after meetings between the parties failed to produce a partnership." [[Dkt.149.at.18–19]]. The court recounted portions of the parties' dealings during 2017 to 2019 (*see* [[Dkt.149.at.2]]), but ultimately determined that "[a]t this stage prior to any discovery, the record is too thin to support a finding of bad faith." [[Dkt.149.at.19]]. It is undisputed that the meetings took place. It is also undisputed that PepsiCo was on notice of Rise Brewing's concerns regarding its infringement two months prior to launching MTN DEW RISE ENERGY.

PepsiCo nonetheless asserts that the record developed at this early stage in the litigation "conclusively establishes that no one involved in the development" of MTN DEW RISE ENERGY had any interaction with Rise Brewing. Opening Br. at 58. But the portions of the record cited by PepsiCo relate only to the notion that PepsiCo's decision to launch a nameless Mountain Dew Energy drink "had nothing to do with Rise Brewing" ([[Evidentiary.Hearing.Tr.101:19–23]]) and that MTN DEW RISE ENERGY was developed by "the energy team" ([[Evidentiary.Hearing.Tr.118:10–15]]). None of PepsiCo's evidence disputed the prior interactions between Rise Brewing and PepsiCo, or PepsiCo's awareness of Rise Brewing and its RISE Mark. In fact, the record at this stage remains unclear

whether the "energy team" at PepsiCo was aware of Rise Brewing and its RISE Marks, and whether the "energy team's" knowledge was even PepsiCo's sole relevant consideration. Although Rise Brewing strenuously contends that PepsiCo conducted its activities in bad faith, and has already uncovered evidence of this fact that contradicts PepsiCo's representations to the District Court, the District Court will be in a position to fully evaluate PepsiCo's bad faith as the case progresses. Nevertheless, PepsiCo has not shown here that the District Court clearly erred in its weighing of the preliminary bad faith evidence before it.

6. The District Court Did Not Clearly Err in Finding that the Products' Quality Favored Issuing a Preliminary Injunction (*Polaroid* Factor 7).

The District Court did not clearly err when concluding that the reputational differences between the parties' products weighed in favor of Rise Brewing. [[Dkt.149.at.19]]. The District Court also did not clearly err in affording this factor little weight. *Id.* As the District Court properly noted, "[t]his factor primarily affects the issue of harm to the senior user's reputation, and is less pertinent to the likelihood of confusion." *Id.* citing *Virgin Enters. v. Nawab*, 335 F.3d 141, 151 (2d Cir. 2003). The District Court thus correctly found that the risk to Rise Brewing's reputation "as a provider of healthy or organic products . . . weighs in favor of a finding of a likelihood of success on the merits." [[Dkt.149.at.19]].

7. The District Court Did Not Clearly Err in Finding That Rise Brewing's Evidence of Buyer Sophistication Was "Inconclusive on This Record" (*Polaroid* Factor 8).

The District Court did not clearly err in finding that the buyer sophistication factor did not favor either party. [[Dkt.149.at.19]]. As the court noted, Rise Brewing relied on "the products' low price point as indicative of low customer sophistication." *Id.* The District Court simply found "this factor inconclusive on this record." *Id.* While Rise Brewing maintains that the products' low price point is evidence of low buyer sophistication, the District Court did not clearly err in finding that this factor was inconclusive.

B. The District Court Correctly Balanced the *Polaroid* Factors in Concluding That Rise Brewing Demonstrated a Likelihood of Success on the Merits.

As discussed above, the District Court did not commit any error, much less any clear error, in its factual findings regarding the *Polaroid* factors. This Court has held that the strength, similarity, and proximity factors are "perhaps the most significant in determining the likelihood of confusion." *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 258 (2d Cir. 1987). Here, the District Court found that each of those factors weighed in favor of a likelihood of confusion ([[Dkt.149.at.11, 20]], but the District Court did not stop there. The District Court also credited Rise Brewing's actual confusion testimony, finding that this factor likewise favored a likelihood of confusion. [[Dkt.149.at.20]]. Notably, in its

analysis, the District Court found that none of the factors weighed against a finding of likelihood of confusion or success on the merits.

In the end, the District Court correctly balanced the *Polaroid* factors, and its findings for each of those factors were well supported. Because the District Court did not clearly err for any of those findings, PepsiCo's arguments should be rejected.

C. The District Court Did Not Abuse Its Discretion in Determining That Rise Brewing Would Suffer Irreparable Harm Absent an Injunction.

Upon a finding of a likelihood of success on the merits, Rise Brewing was entitled to a presumption of irreparable harm pursuant to the Trademark Modernization Act of 2020. *See* 15 U.S.C. § 1116(a). The District Court appropriately applied that presumption here, and the District Court did not abuse its discretion in determining that PepsiCo failed to rebut the presumption of harm. The District Court found that PepsiCo's claims of "substantial rebranding costs, lost sales and harm to its goodwill" associated with the preliminary injunction were outweighed by Rise Brewing's "credible evidence that [Rise Brewing] faces an existential threat from [PepsiCo's] infringement." [[Dkt.149.at.21]]. The court also found that it was "unpersuaded that the harm facing [PepsiCo] is not of its own making." *Id*. Moreover, when the District Court denied PepsiCo's emergency motion for a stay, it again found that PepsiCo "has not shown irreparable injury absent a stay." SDNYDkt156.at.2–3. Upon review of the merits of PepsiCo's request

for a stay of the preliminary injunction, this Court similarly found that "[PepsiCo] has not demonstrated that a stay is warranted." CA2Dkt.76.

The District Court did not err with respect to any matter of law, nor clearly err with respect to any finding of fact, in determining that the time between Rise Brewing's first awareness of the MTN DEW RISE ENERGY mark and filing the motion for a preliminary injunction did not preclude injunctive relief. The District Court properly applied the law holding that several months' gap before filing a motion for preliminary injunction is not inherently unreasonable where the parties are engaged in settlement discussions. [[Dkt.149.at.20–21]] (citing *Goat Fashion Ltd. v. 1661, Inc.*, No. 19 Civ. 111045, 2020 WL 5758917, at *6 (S.D.N.Y. Sept. 28, 2020) (four-month delay did not rebut presumption of irreparable harm given ongoing settlement discussions); *Marks Org., Inc. v. Joles*, 784 F. Supp. 2d 322, 333–34 (S.D.N.Y. 2011) (sixteen-month delay did not vitiate finding of irreparable harm where the parties were holding settlement discussions); *Polar Corp. v. PepsiCo, Inc.*, 789 F. Supp. 2d 219, 239 (D. Mass. 2011) (rejecting PepsiCo's argument that a seven-month delay was unreasonable, and finding irreparable harm))]].

The cases PepsiCo cites are all pre-Trademark Modernization Act and are readily distinguishable. In *Tough Traveler, Ltd. v. Outbound Products*, 60 F.3d 964, 968 (2d Cir. 1995), the plaintiff waited over a year after being aware of the product

on the market, and there were no allegations of investigation into infringement, or settlement negotiations. In *Century Time, Ltd. v. Interchron, Ltd.*, 729 F. Supp. 366, 367–68 (S.D.N.Y. 1990), the district court declined to find irreparable harm for a motion regarding products the plaintiff learned about through discovery. On the court's suggestion, the plaintiff had reviewed the defendant's proposed noninfringing alternative products. *Id.* The plaintiff concluded at the review that the proposed products were infringing, but delayed moving for a preliminary injunction, which the court found counseled against irreparable harm. *Id.* Next, in *Stokely Van Camp, Inc. v. Coca-Cola Co.*, No. 86 C 6159, 1987 WL 6300, at *3 (N.D. Ill. Jan. 30, 1987), the district court did not identify any settlement negotiations or other communications between the parties prior to the motion for preliminary injunction. In *Life Technologies Corp. v. AB Sciex Pte. Ltd.*, No. 11-cv-325, 2011 WL 1419612, at *7–8 (S.D.N.Y. Apr. 11, 2011), the plaintiff waited to file suit for over three months after the final settlement communication between the parties, and further, those settlement negotiations had slowed to less than once a month in the four months prior. Similarly, in *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276–77 (2d Cir. 1985), this Court considered a situation (that is very different than the one presented here) in determining that a delay by the plaintiff indicated a lack of irreparable harm. The analysis considered a period of ten weeks between the defendant's opening of an office under the defendant's mark and the plaintiff's motion, and a period of nine

months between the plaintiff's first notice of the defendant's intentions to open that office and the plaintiff's motion, as well as the defendant's years of prior advertisement of its mark. Further, in *Citibank*, unlike in this case, there was no evidence of any settlement discussions or other pre-motion communications between the parties to explain the delay. *Id.* Finally, in *Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir. 1985), the plaintiff was aware of the complained-of conduct for ***years*** before filing a preliminary injunction motion. None of these cases warrants a finding that Rise Brewing unreasonably delayed and that any such perceived delay rebutted the presumption of irreparable harm.

The District Court did not clearly err in finding that the parties' attempt to negotiate a licensing deal did not negate the irreparable harm. [[Dkt.149.at.20–21]]. PepsiCo argues that Rise Brewing admitted that it would accept a royalty, undercutting its claim of irreparable harm. Opening Br. at 63. However, Rise Brewing's CEO Grant Gyesky testified that it was his belief that PepsiCo suggested a license. [[Evidentiary.Hearing.Tr.43:2–6]]. The District Court did not clearly err in choosing not to weigh these settlement communications against a finding of irreparable harm. This Court has affirmed a district court's similar finding that statements by a plaintiff that he was "shelving' [the] legal action" did not rebut the presumption of irreparable harm. *King v. Innovation Books*, 976 F.2d 824, 832 (2d Cir. 1992). The opinion in *ActiveVideo Networks, Inc. v. Verizon Communications,*

Inc., 694 F.3d 1312, 1340 (Fed. Cir. 2012), is inapplicable, as the court there found that the plaintiff's consistent offer of a patent license weighed against a permanent injunction, with no consideration of a statutory presumption of irreparable harm as provided by 15 U.S.C. § 1116(a).

* * *

As detailed above, in assessing the question of irreparable harm to Rise Brewing, the District Court did not commit any errors of law or abuse its discretion. Instead, the court acted reasonably in finding that PepsiCo "has not rebutted" the presumption of irreparable harm afforded to Rise Brewing. [[Dkt.149.at.20]].

D. The District Court Did Not Clearly Err in Finding That the Balance of the Hardships Weighs in Favor of Granting the Preliminary Injunction Against PepsiCo.

The District Court did not clearly err in finding that the balance of the hardships favored granting the preliminary injunction.[9] The District Court also did not clearly err in expressly finding that Rise Brewing "faces an existential threat from [PepsiCo]'s infringement" and that Rise Brewing's "corporate identity is at risk." [[Dkt.149.at.21]]. Nor did the District Court clearly err in finding that the harm

[9] PepsiCo argues that "[t]he court thus erred in failing to conclude that the balance of hardships favors PepsiCo." Opening Br. at 65. However, the appropriate question on review is whether "the district court committed ***clear error*** in determining that the balance of hardships favored" the moving party. *C.D.S.*, 691 F. App'x at 35 (emphasis added). It did not.

facing PepsiCo was of its own making. *Id.* Courts have consistently held that loss of the ability to offer an infringing product is not the type of hardship that counsel against a preliminary injunction, and the District Court permissibly—indeed appropriately—applied that same view here. *See, e.g.*, *WPIX*, 691 F.3d at 287; *Off-White, LLC v. Alins,* No. 19 CIV. 9593 (AT), 2021 WL 4710785, at *5 (S.D.N.Y. Oct. 8, 2021); *3M Co. v. CovCare, Inc.*, 537 F. Supp. 3d 385, 404 (E.D.N.Y. 2021).

In its Opening Brief, PepsiCo asks this Court to consider the harm resulting from PepsiCo's volume of sales and distribution "[b]y the time of the evidentiary hearing." Opening Br. at 64. PepsiCo omits that much of this harm was incurred during the four months between Rise Brewing's motion for preliminary injunction and the evidentiary hearing. As the District Court recognized, PepsiCo "apparently continued to invest heavily in its product while it seemingly prolonged the adjudication of [Rise Brewing's] motion." [[Dkt.149.at.22]]. The District Court was correct in this observation, and did not clearly err in discrediting PepsiCo's asserted harm on the ground that it was "of [PepsiCo's] own making." [[Dkt.149.at.21]]. The District Court appropriately found that the balance of the hardships favored issuing the preliminary injunction.

E. The District Court Did Not Abuse Its Discretion in Determining That the Public Interest Weighs in Favor of Granting the Preliminary Injunction Against PepsiCo.

It is well settled that preventing consumer confusion is in the public interest and favors injunctive relief. *See Park'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 193 (1985). Here, the District Court did not abuse its discretion in concluding that an injunction serves the public interest. In fact, PepsiCo does not even assert that the District Court abused its discretion or committed clear error in its analysis of the underlying facts; PepsiCo merely asks this Court to reach a different conclusion, stating that "the public interest also disfavored an injunction." Opening Br. at 65–66. PepsiCo is wrong, but also PepsiCo disregards this Court's role, which is not to find facts anew but to review the District Court's ruling for an abuse of discretion. *See Really Good*, 813 F. App'x at 45.

None of PepsiCo's arguments indicate any abuse of discretion by the District Court, or any clear error for the court's factual findings. PepsiCo first argues that the District Court's Order eviscerates the "crowded field" doctrine. That is plainly incorrect. As discussed above, the District Court considered PepsiCo's evidence regarding other marks and found that Rise Brewing was "the exclusive user of the principal term 'RISE' to identify a single-serving, canned caffeinated beverage (until the launch of [PepsiCo's] product)." [[Dkt.149.at.13]]. The District Court did not clearly err in finding, accordingly, that Rise Brewing's RISE Mark was sufficiently

strong. In any event, the District Court's prohibition on PepsiCo's use of any mark confusingly similar to Rise Brewing's mark has no impact on the crowded field doctrine, as the District Court did not base its finding of similarity merely on the common term "rise" but instead on a holistic consideration of the parties' marks as a whole. [[Dkt.149.at.15]].

Second, the District Court did not clearly err in declining to find that the alleged "needless waste" of assets does not constitute a public interest preference against injunction. Again, any harm to PepsiCo was of its own making, including its loss of assets, as the District Court correctly found. [[Dkt.149.at.21]].

Finally, the District Court did not clearly err in finding that the public interest favored an injunction despite PepsiCo's assertion that consumers' well-settled preferences and expectations, or retailers' sales, allegedly would be harmed by the change from MTN DEW RISE ENERGY to PepsiCo's replacement name (after implementation of the injunction), MTN DEW ENERGY. PepsiCo itself seems unconcerned by this alleged harm to the public interest, as demonstrated by PepsiCo's recent representations to this Court that, despite months of sales under the MTN DEW ENERGY mark, PepsiCo might now disrupt those same preferences and expectations, and risk those same sales, by changing ***back*** to MTN DEW RISE ENERGY. *See* CA2Dkt.83. The District Court did not abuse its discretion in finding that the public interest favored an injunction.

* * *

In sum, the District Court did not abuse its discretion in granting the preliminary injunction. It committed no errors of law and no clearly erroneous factual findings with respect to the likelihood of confusion, and the court's balancing of the *Polaroid* factors was sound. The District Court likewise committed no abuse of discretion or clear error in resolving the questions of irreparable harm, the balance of the hardships, and the public interest. And in the end, upon considering and balancing all of the *Polaroid* factors as well as the other involved elements, the District Court unquestionably did not abuse its discretion in awarding Rise Brewing a preliminary injunction to halt PepsiCo's wrongful conduct. Because there was no abuse of discretion, the preliminary injunction must stand. This Court should affirm.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Rise Brewing respectfully requests that this Court affirm the District Court's Amended Opinion & Order entering a preliminary injunction against PepsiCo.

Dated: January 31, 2022

Respectfully Submitted by:

/s/ Paul Tanck
Paul Tanck
ALSTON & BIRD LLP
90 Park Ave
New York, NY 10016
(212) 210-9400

Holly Hawkins Saporito
Jason Rosenberg
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

Kirk T. Bradley
ALSTON & BIRD LLP
One South at The Plaza
101 South Tryon Street, Ste. 4000
Charlotte, NC 28280
(704) 444-1030

Attorneys for Plaintiff-Appellee RiseandShine Corp. d/b/a Rise Brewing

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), the word limit of Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this document contains 13,557 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Times New Roman.

Dated: January 31, 2022

Respectfully Submitted by:

/s/ Paul Tanck
Paul Tanck