

as shown in the image below, with the words “Brewing Co.” appearing in a much smaller font immediately below RISE. Plaintiff registered that mark with the U.S. Patent & Trademark Office (“PTO”) in November 2017, and also owns other RISE registered marks.

In 2017, Plaintiff’s CEO, Grant Gyesky, met with members of Defendant’s Innovation team to discuss a potential partnership opportunity. Two more meetings between Plaintiff and Defendant followed, first on May 10, 2018, and again on January 24, 2019. Those discussions did not result in a business relationship.

In January 2021, Plaintiff learned that Defendant intended to launch a fruit-flavored caffeinated canned beverage under the mark MTN DEW RISE ENERGY. Plaintiff’s counsel wrote Defendant’s counsel, asking Defendant to “abandon any intent” to use the mark “MTN DEW RISE ENERGY” due to potential confusion with Plaintiff’s products. The parties failed to reach agreement. Defendant’s product launched in March 2021. As shown below, the MTN DEW RISE ENERGY mark appears prominently in the top portion of the can, with the RISE portion of the logo in all-capital, brightly colored letters against a light background on the top third of the can, and MTN DEW in a smaller font immediately above RISE. This action followed.



II. PROCEDURAL HISTORY & EVIDENTIARY HEARING

Plaintiff commenced this action in the U.S. District Court for the Northern District of Illinois on June 15, 2021. Defendant moved to transfer the case to this Court on June 28, 2021.

Plaintiff moved for a preliminary injunction on June 29, 2021, with the following seven declarations in support of the motion:

- Corey Guidi -- Plaintiff's Area Sales Manager for Northern California, described placement of Plaintiff's and Defendant's products in Walmart, Safeway and Raley's stores. Mr. Guidi stated that, "[i]n all of [his] international chain accounts, PepsiCo's RISE is stocked on the same aisle as [Plaintiff's] RISE products, so consumers encounter them as alternative caffeinated beverage options."
- Grant Gyesky -- CEO and Co-Founder of Rise Brewing, described the company's founding, trademarks and products, including the company's target market and current distribution. Mr. Gyesky also described communications between the parties in 2017, as well as Plaintiff's efforts to contact Defendant regarding the launch of its RISE drink between January and April 2021.
- Melissa Kalimov -- Plaintiff's COO, described an incident on April 30, 2021, when an industry contact was confused by an in-store promotional display for *Defendant's* product and asked her, "I see coffee on here and Rise. Is this new?"
- Nia Kaye -- Plaintiff's Regional Sales Manager for the Southeast, described an incident on May 20, 2021, when she visited a Publix grocery store in Florida and asked the manager on duty to check if there was more "RISE" in the backroom because there was not much of Plaintiff's product on the shelves. In response, the manager asked if she meant "Mountain Dew RISE."
- Jarrett McGovern -- co-founder and current Chief Creative Officer of Rise Brewing, described the circumstances leading up to and including the May 2018 and January 2019 meetings with Defendant's Innovation team, and provided related emails from before and after those meetings.
- Rachel Ratliff -- Plaintiff's Senior Regional Sales Manager for the Midwest, described an incident on March 3, 2021, when a Mariano's grocery store employee texted her, saying that Rise Energy had been selected for a promotional opportunity only to learn later that the promotion was not for Plaintiff's product but instead for "a new line of energy drinks by Pepsi called RISE."
- Emily Welch -- one of the outside lawyers representing Plaintiff, provided information and documents from the PTO regarding Plaintiff's various trademark applications and registrations, as well as copies of articles, press releases and tweets regarding Defendant's product and its launch.

Defendant opposed and sought a stay of Plaintiff's preliminary injunction motion pending a decision on Defendant's motion to transfer. Plaintiff opposed any stay and, on July 8,

2021, filed a cross-motion for expedited discovery and briefing for its preliminary injunction motion. On July 22, 2021, the District Court in Illinois granted Defendant's motion to transfer.

Following the transfer to this Court, on July 26, 2021, Plaintiff filed an amended complaint (the "Complaint") and renewed its motion for a preliminary injunction (the "Motion"). A hearing was scheduled for August 13, 2021, following Defendant's response. Defendant filed its answer on August 9, 2021, and its opposition to the Motion the next day, with the following five declarations:

- Fabiola Torres -- Chief Marketing Officer, Senior Vice President of Energy Category at PepsiCo, described the development, launch and marketing of MTN DEW RISE ENERGY, including selection of the mark.
- Kathryn Walker -- Vice President of Commercial Planning for Energy, a division within PepsiCo, described retailers' marketing of Defendant's product, the extent of Defendant's sales of its product, and harm to PepsiCo if an injunction were entered.
- Philip Johnson -- a retained expert who conducted a consumer survey to measure reverse confusion between the parties' respective products and prepared a written report dated August 9, 2021.
- Melissa Pittaoulis -- a retained expert who conducted a survey to evaluate the likelihood of forward consumer confusion between the parties' respective products and prepared a written report dated August 9, 2021.
- Emily Pyclik -- one of the outside lawyers representing Defendant, provided information and documents from the PTO regarding various trademark applications and registrations of non-parties incorporating the word "RISE" or variants in connection with goods and services, and related information; Plaintiff's May 24, 2016, Office Action Response regarding its application to register RISE COFFEE CO. & Design; a side-by-side photo of the parties' respective products; and correspondence between the parties.

Upon receipt of Defendant's submissions, Plaintiff was ordered to file a reply, and the hearing was adjourned to September 9, 2021. On August 25, 2021, Plaintiff filed a reply with declarations from Allison Schmidt, Alex Tanev, Leon Kaplan, and Holly Hawkins Saporito. On August 26, 2021, Plaintiff filed a letter motion for leave to file these additional declarations,

which the Court denied on August 27, 2021. On September 9, 2021, the Court heard oral argument on the Motion.

Following oral argument, on September 17, 2021, Defendant filed a motion for an evidentiary hearing, claiming that Plaintiff had made arguments without evidentiary support and relied on the declarations filed with Plaintiff's reply. Defendant asked for "the chance to demonstrate why these declarations do not support [Plaintiff's] claims" and present evidence to assist in fashioning any injunction. The Court granted Defendant's request on September 21, 2021. On September 27, 2021, the parties filed a joint letter apprising the Court of the names of any witnesses to be called and the proposed topics to be discussed. In that letter, Defendant objected to Plaintiff's calling Allison Schmidt, Steve Salzinger or Leon Kaplan as witnesses at the hearing, which the Court overruled on September 28, 2021. On September 29, 2021, Defendant filed a motion for reconsideration or, in the alternative, asked to supplement its witness list to "respond to Plaintiff's new witnesses." Plaintiff responded the next day, countering that Defendant renewed its request for an evidentiary hearing specifically to have the opportunity "to cross-examine witnesses on the issues it alleged were raised for the first time at the [September 9, 2021], hearing," including Plaintiff's difficulties securing investments, newly obtained actual confusion evidence and Dr. Kaplan's expert report. Plaintiff also objected to Defendant's request to supplement its witness list. On September 30, 2021, the Court denied Defendant's motion for reconsideration and granted Defendant's motion to supplement its witness list.

Due to the COVID-19 pandemic, the evidentiary hearing was held via video conference on October 8, 2021. Plaintiff offered credible evidence on incidents of actual confusion, the

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