NO. 24-1016

In the
Supreme Court of the United States

RISEANDSHINE CORPORATION, DBA RISE BREWING,

Petitioner,

v.

PEPSICO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

The Government's brief confirms that no further review is warranted in this garden-variety trademark dispute. As the Government explains, this case would come out the same regardless of this Court's intervention and implicates no important legal question; moreover, the Government's position on the merits is largely consistent with Second Circuit's published decision below and reinforces the illusory nature of any purported circuit split.

1. The Government correctly identifies a number of vehicle problems militating against certiorari. To begin, although RBC has teed up this case as presenting the question whether "trademark strength" is "an issue of fact" or a "question of law," Pet.i, the Government notes that "the Second Circuit's approach" to this question is "ambiguous" and "not entirely clear even with respect to the proper characterization of the inherent-strength inquiry." U.S.Br.12, 18. As the Government explains, the Second Circuit's language is "hard to reconcile with the proposition that inherent strength is a *pure* question of law" and "may simply reflect the court of appeals' view that no reasonable factfinder could have found [RBC's] mark to be inherently strong." *Id.* at 19. Indeed, the Government repeatedly observes that the Second Circuit only "suggested"—not held—"that a mark's inherent strength is a pure question of law." *Id.* at 2; *see also id.* at 12 (referring to court of appeals' "suggestion"). The lack of any clear holding by the Second Circuit on the question presented makes this case ill-suited for further review.

Additionally, as the Government observes, "it is far from clear" that any error below "was outcome-determinative," because "[o]ther, unchallenged factors also weighed against" likelihood of confusion. U.S.Br.2; *see id.* at 19-20. That is an understatement: there are multiple ways in which the Second Circuit would affirm summary judgment for PepsiCo even if inherent strength were a question of fact.

First, as the Government indicates, the court would likely hold that no reasonable jury could conclude that RBC's mark was inherently strong. U.S.Br.19. Second, the court would reiterate its prior determination—unchallenged by RBC here, *see id.* at 20—that RBC had not "raised triable issues of fact regarding … acquired strength," so the overall trademark-strength factor would continue to favor PepsiCo. App.8a. Third, the court would reiterate the district court's conclusion that the "similarity" factor "strongly" favors PepsiCo, App.35a—also unchallenged here by RBC, U.S.Br.20—and apply Second Circuit precedent holding that this factor is "dispositive" under the circumstances here. *See Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 46-48 (2d Cir. 2000). Fourth, the court would invoke RBC's failure to present surveys of consumer confusion—a failure that defeats likelihood of confusion under Second Circuit precedent. *See* App.31a-32a; BIO.26-27. Fifth, the Second Circuit treats ultimate likelihood of confusion as a question of law—a principle that RBC unsuccessfully challenged below but did not raise in its petition, *see* U.S.Br.20-21—so regardless of any factual dispute on the inherent-strength subfactor, the Second Circuit would reaffirm its prior legal conclusion that there is no

likelihood of confusion. This Court should not devote its limited resources to reviewing a case that, as the Government recognizes, is virtually certain to come out the same way despite the Court's intervention.

There are still more vehicle problems that the Government's brief confirms. For example, the Government cites *Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418 (2015), and *United States PTO v. Booking.com B.V.*, 591 U.S. 549 (2020), in characterizing the inherent-strength inquiry as a "'mixed question' … in which the factual component predominates." U.S.Br.12-16. But it is undisputed that RBC never cited *either* of these decisions below for the proposition that inherent strength is a factual question. It is equally undisputed that RBC never actually argued the merits of whether trademark strength is a question of law or fact. Consequently, the Second Circuit never meaningfully addressed the question presented—which likely explains its "ambiguous" language on this issue. U.S.Br.12; *see* BIO.27-29. The Government's brief reinforces that there are no "thorough lower court opinions" that would assist the Court in resolving the question presented, counseling against certiorari. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).[1]

[1] RBC contends that there is no "waiver" of this issue because it "presented the argument" and the Second Circuit "rejected" it. Reply.9. The problem is not waiver, however. The problem is that because RBC never meaningfully argued the merits of this issue or even cited *Hana* or *Booking.com* below on this issue, and the Second Circuit never meaningfully addressed the merits, this Court would be working off a largely blank slate, which is an undesirable posture for this Court's review.

As the Government's brief shows, reviewing the question presented would also require the Court to address significant threshold questions. For example, the Court would need to address the role that inherent strength plays in the various multi-factor tests that the courts of appeals use to evaluate likelihood of confusion—frameworks that, as the Government acknowledges, "var[y] among the circuits," U.S.Br.1. And while all circuits include trademark strength "as a relevant consideration," *id.*, different circuits assign different weights to different factors, including trademark strength, *see* BIO.19. Accordingly, whatever this Court says with respect to whether inherent strength is a question of fact or law will likely have broader ramifications regarding how the circuits treat that subfactor in their multi-factor tests, even though that consideration is not within the question presented and was not addressed below.

Additionally, it is undisputed that this case is premised on a "reverse confusion" theory, where there are "'differences from the rules'" for typical forward-confusion cases, particularly as to trademark strength. BIO.30 (quoting MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION §23.10 (5th ed. 2025)) (capitalization altered). The Court's analysis would have to account for those "differences," which creates more impediments to cleanly resolving the question presented and providing guidance to lower courts and practitioners—all for an outcome that, as the Government aptly notes, "would not meaningfully clarify the proper analytic approach in trademark-infringement cases" anyway. U.S.Br.21.

2. The Government also accurately observes that the question presented is not of sufficient importance to warrant review. As the Government explains, treating inherent strength—a "subfactor of a factor in a multi-factor test"—as a question of fact rather than law is "unlikely to have a significant effect" not only on this litigation but on "infringement cases more generally." U.S.Br.3; *see also id.* at 12 (stating that Second Circuit's decision is "unlikely to affect the resolution of th[e] ultimate question" of likelihood of confusion, not just "in this case" but "more generally"). In its view, there is "no sound reason to suppose that this Court's resolution of the question presented would have a significant practical impact on the disposition of trademark-infringement cases more generally." *Id.* at 20.

All of that is correct, if again understated. RBC's petition has garnered no *amicus* support. And as far as PepsiCo is aware, in the four years since the Second Circuit's first decision in this case (the only published decision), not one journal article has cited this case for the proposition that inherent strength is a question of law rather than fact—much less suggested that the decision implicates an important issue calling out for this Court's review. The absence of any such support should come as no surprise: as PepsiCo has explained, and RBC has never disputed, the question presented matters, if at all, only in the extremely miniscule (if not non-existent) universe of Second Circuit Lanham Act cases where treating the inherent-strength subfactor as a question of fact rather than law would tip the overall likelihood-of-confusion analysis away from one party and toward the other. That is an improbable circumstance to begin with, but it is even

more unlikely given that, in the Second Circuit, likelihood of confusion is a legal question for the district court's plenary consideration and the appellate court's *de novo* review. BIO.32.

Noticeably, the Government does not join RBC's arguments that potential forum-shopping and the jury-trial right render this case sufficiently important for the Court's review. *See* Pet.16-17. Understandably so, for PepsiCo has explained why these purported concerns are unavailing, *see* BIO.31-33, and RBC offered no response whatsoever in its reply.

3. The Government's arguments regarding the merits and the existence of a circuit split only reinforce that certiorari is unwarranted. On the merits, the Government agrees that "the inherent-strength inquiry has a legal *component*." U.S.Br.17. That is entirely consistent with the Second Circuit's published decision in this case, which stated that "there is an undeniable legal element in the determination of how much strength a given mark commands." App.55a. And it is in accord with PepsiCo's argument that examining a mark's inherent strength beyond its classification on the spectrum of distinctiveness—which everyone agrees is a question of fact (including the Second Circuit and PepsiCo)—"implicates legal issues." BIO.17-18; *see Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1039-40 (2d Cir. 1992) ("[T]he initial classification of a mark … is a question of fact[.]").

Given its acknowledgment that inherent strength "has a legal component," the Government proposes that inherent strength is "best viewed as presenting a

mixed question of law and fact—but that mixed question is one in which the factual component predominates." U.S.Br.2 (citations and quotation marks omitted); *see also id.* at 3 (describing inherent strength as "a mixed question in which the factual aspect predominates"), 20. But that view differs from RBC's position, under which inherent strength "is squarely a factual question." Pet.1. That the Government declines to endorse RBC's merits argument is a further reason to decline certiorari.

Finally, *not one* of the 25 cases cited by RBC for a purported circuit split holds that inherent strength is a "mixed" question. *See* Pet.11-12; Reply.3-4. By contrast, numerous courts of appeals *have* held, consistent with the Second Circuit's published decision below and the Government's position, that inherent strength involves more than the factual question of a mark's classification on the spectrum of distinctiveness. *See, e.g.*, App.54a (explaining that "labeling a mark 'suggestive' is not the end of the inquiry"); BIO.17 (citing cases). RBC has identified no circuit that treats that additional analysis as a question of fact—and for good reason, as it implicates the "legal component" that the Government recognizes is part of the inquiry. U.S.Br.17. On top of all of the other reasons for denying certiorari, therefore, there is no circuit split justifying this Court's intervention, underscoring the Government's position that further review in this case is unwarranted.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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