

No. 24-1016

---

IN THE  
**Supreme Court of the United States**

---

RISEANDSHINE CORPORATION, DBA RISE BREWING,  
*Petitioner,*

*v.*

PEPSICO, INC.,  
*Respondent.*

---

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

---

**BRIEF OF *AMICUS CURIAE*  
AMERICAN INTELLECTUAL PROPERTY LAW  
ASSOCIATION SUGGESTING REVERSAL**

---

SALVATORE ANASTASI  
*President*

AMERICAN INTELLECTUAL  
PROPERTY LAW ASSOCIATION  
2000 Duke Street, Suite 300  
Alexandria, VA 22314

JOSEPH R. RE,  
*Counsel of Record*

ADAM B. POWELL  
KNOBBE, MARTENS, OLSON  
& BEAR, LLP  
2040 Main Street, 14<sup>th</sup> Floor  
Irvine, CA 92614  
(949) 760-0404  
joe.re@knobbe.com

*Counsel for Amicus Curiae  
American Intellectual Property Law Association*

---

September 15, 2026

## TABLE OF CONTENTS

|                                                                                             | Page No. |
|---------------------------------------------------------------------------------------------|----------|
| I. STATEMENT OF INTEREST OF<br><i>AMICUS CURIAE</i> .....                                   | 1        |
| II. SUMMARY OF THE ARGUMENT.....                                                            | 2        |
| III. ARGUMENT .....                                                                         | 3        |
| A. Only the Second Circuit<br>Treats Conceptual Strength<br>As A Question Of Law .....      | 3        |
| B. Evaluating Conceptual<br>Strength As A Question Of<br>Fact Makes Sense.....              | 5        |
| 1. Conceptual Strength Is<br>An Inherently Factual<br>Question .....                        | 5        |
| 2. Conceptual Strength Is<br>Only One Aspect Of<br>Likelihood Of Confusion.....             | 8        |
| 3. The Second Circuit's<br>Opinion Threatens<br>Litigants' Seventh<br>Amendment Rights..... | 10       |
| C. The Court Should Adopt A<br>Uniform Rule .....                                           | 11       |
| IV. CONCLUSION.....                                                                         | 12       |

## TABLE OF AUTHORITIES

### Page No(s).

|                                                                                                                            |         |
|----------------------------------------------------------------------------------------------------------------------------|---------|
| <i>A&amp;H Sportswear, Inc. v. Victoria's Secret Stores, Inc.</i> ,<br>237 F.3d 198 (3d Cir. 2000).....                    | 6       |
| <i>Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry</i> ,<br>494 U.S. 558 (1990) .....                            | 10      |
| <i>U.S. Bank Nat'l Ass'n ex. rel CWC Capital Asset Mgmt. LLC v. Vill. At Lakeridge, LLC</i> ,<br>583 U.S. 387 (2018) ..... | 8       |
| <i>Dairy Queen, Inc. v. Wood</i> ,<br>369 U.S. 469 (1962) .....                                                            | 10      |
| <i>Hana Financial, Inc. v. Hana Bank</i> ,<br>574 U.S. 418 (2015) .....                                                    | 2, 4, 5 |
| <i>Hard Candy, LLC v. Anastasia Beverly Hills, Inc.</i> ,<br>921 F.3d 1343 (11th Cir. 2019) .....                          | 11      |
| <i>Jack Daniel's Props., Inc. v. VIP Prods. LLC</i> ,<br>599 U.S. 140 (2023) .....                                         | 8       |
| <i>Moke Am. LLC v. Moke Int'l Ltd.</i> ,<br>126 F.4th 263 (4th Cir. 2025).....                                             | 4, 5    |

**TABLE OF AUTHORITIES**  
**(cont'd.)**

**Page No(s).**

|                                                                                                                   |      |
|-------------------------------------------------------------------------------------------------------------------|------|
| <i>Polaroid Corp. v. Polarad Elecs. Corp.</i> ,<br>287 F.2d 492 (2d Cir. 1961).....                               | 8, 9 |
| <i>RiseandShine Corp. v. PepsiCo, Inc.</i> ,<br>No. 21-civ-6324, 2021 WL 5173862<br>(S.D.N.Y. Nov. 4, 2021) ..... | 6    |
| <i>RiseandShine Corp. v. PepsiCo, Inc.</i> ,<br>No. 21-CIV-6324, 2023 WL 4936000<br>(S.D.N.Y. Aug. 2, 2023) ..... | 9    |
| <i>Star Indus., Inc. v. Bacardi &amp; Co.</i> ,<br>412 F.3d 373 (2d Cir. 2005).....                               | 5    |
| <i>Streetwise Maps, Inc. v. VanDam, Inc.</i> ,<br>159 F.3d 739 (2d Cir. 1998).....                                | 6    |
| <i>Two Pesos, Inc. v. Taco Cabana, Inc.</i> ,<br>505 U.S. 763 (1992) .....                                        | 5    |
| <i>United States Patent &amp; Trademark<br/>Office v. Booking.com B.V.</i> ,<br>591 U.S. 549 (2020) .....         | 6    |
| <i>Variety Stores, Inc. v. Wal-Mart<br/>Stores, Inc.</i> ,<br>888 F.3d 651 (4th Cir. 2018) .....                  | 5, 6 |

**TABLE OF AUTHORITIES**  
**(cont'd.)**

**Page No(s).**

|                                                                                   |   |
|-----------------------------------------------------------------------------------|---|
| <i>Wal-Mart Stores, Inc. v. Samara Bros., Inc.</i> ,<br>529 U.S. 205 (2000) ..... | 9 |
| <i>Water Pik, Inc. v. Med-Sys, Inc.</i> ,<br>726 F.3d 1136 (10th Cir. 2013) ..... | 9 |

**OTHER AUTHORITIES**

|                          |        |
|--------------------------|--------|
| Seventh Amendment .....  | 10, 11 |
| Fed. R. Civ. P. 56 ..... | 3, 11  |

I. **STATEMENT OF INTEREST  
OF AMICUS CURIAE**

The American Intellectual Property Law Association (“AIPLA”) is a national bar association representing the interests of approximately 6,500 members engaged in private and corporate practice, government service, and academia. AIPLA’s members represent a diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of trademark, copyright, and patent law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.<sup>1</sup>

AIPLA’s mission includes providing courts with objective analyses to promote an intellectual property system that stimulates and rewards invention, creativity, and investment while accommodating the public’s interest in healthy competition, reasonable costs, and basic fairness. AIPLA has no stake in any of the parties to this litigation or in the ultimate result of the case. AIPLA’s only interest is in seeking correct and consistent interpretation of the law as it relates to intellectual property issues.

---

<sup>1</sup> Pursuant to this Court’s Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amicus curiae, its members, or its counsel, made a monetary contribution intended to fund its preparation or submission.

## II. SUMMARY OF THE ARGUMENT

There can be no reasonable debate that the Second Circuit's decision treating conceptual strength as a pure question of law is an anomaly. Every other circuit court in the country agrees that conceptual strength is a question of fact. This Court's 2015 decision in *Hana Financial* also strongly suggests that conceptual strength is a question of fact.

Those decisions make sense because the conceptual-strength inquiry is inherently factual in nature. The Second Circuit's opinion in this case was clearly based on its own factual findings as to an ordinary consumer's association between the trademark at issue ("RISE") and the products sold with that trademark (coffee). Further, conceptual strength is an important consideration, but it is only one of many factors used in assessing the ultimate factual issue of likelihood of confusion. Deciding this one factor as a matter of law while deciding the ultimate conclusion as a question of fact makes little sense. Doing so in a jury trial would require the judge to instruct the jury as to the strength of the mark and then ask the jury to determine likelihood of confusion. But that strength instruction would likely dominate the jury's determination, just as it dominated the district court's decision here.

Incorrectly determining that factual issues are questions of law may also deny litigants the opportunity to present those issues to the jury. Indeed, that is what happened in this case. Both parties have a right to trial by jury because RiseandShine Corp. ("Rise Brewing") seeks actual damages, a classic remedy at law. The Second Circuit essentially eliminated

that right by determining the mark was weak as a matter of law when it vacated the preliminary injunction. The district court then entered summary judgment based on the Second Circuit's instruction as to the strength of the mark. As a result, the trademark holder was in effect denied its right to trial by jury on this factual issue.<sup>2</sup>

Adopting a uniform rule on this important issue would be beneficial to established brands and new entrants alike. It would also be beneficial to the public, which relies on trademarks as indicia of quality and origin. Uniformity promotes predictable legal standards, which lowers business and litigation costs across jurisdictions. Companies may more confidently invest in their businesses if they know courts will treat this important issue the same way regardless of where a suit is ultimately filed.

Accordingly, AIPLA suggests that the Court hold that conceptual strength of a mark is a question of fact.

### **III. ARGUMENT**

#### **A. Only the Second Circuit Treats Conceptual Strength As A Question Of Law**

All circuit courts other than the Second Circuit consistently hold that strength of the mark, including

---

<sup>2</sup> AIPLA takes no position on the ultimate merits of this case or whether summary judgment should be granted under the appropriate legal standard. If this Court remands, the district court would need to determine whether a genuine issue of material fact exists. *See* Fed. R. Civ. P. 56.

both conceptual strength (inherent distinctiveness) and commercial strength (acquired distinctiveness), is a question of fact. Most recently, the Fourth Circuit unambiguously held “[t]he genericness or distinctiveness of a mark is a question of fact that we generally review for clear error.” *See Moke Am. LLC v. Moke Int’l Ltd.*, 126 F.4th 263, 286 (4th Cir. 2025). All the circuit courts of appeal other than the Second Circuit agree. *See* Brief for Petitioner at 27-31 (compiling cases).

As the Solicitor correctly explained, this Court’s decision in *Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418 (2015), also supports treating conceptual strength as a question of fact. *See* U.S. Amicus Br. at 11-14. In *Hana Financial*, the Court considered whether trademark tacking should be decided by a judge or jury. Tacking allows a trademark owner to claim the priority date of an earlier mark where its two marks are “legal equivalents.” *See Hana Fin.*, 574 U.S. at 420. The term “legal equivalents” means “two marks that ‘create the same, continuing commercial impression[.]’” *Id.* at 422. Such commercial impression “must be viewed through the eyes of a consumer.” *See id.* (citation omitted). Such a determination “relies upon an ordinary consumer’s understanding of the impression that a mark conveys” and, as such, “falls comfortably within the ken of a jury.” *Id.* Because “the relevant question is how an ordinary person or community would make an assessment,” the “jury is generally the decisionmaker that ought to provide the fact-intensive answer.” *Id.*

The same logic applies to conceptual strength. Conceptual strength requires evaluating the

associations that *consumers* draw from the mark. Based upon those associations, the decisionmaker can classify the mark along the spectrum from generic to fanciful and determine its strength. That is a classic question of fact. The Second Circuit's decision to the contrary is an outlier that is inconsistent with every other circuit and the Court's reasoning in *Hana Financial*. The Court should resolve this split by holding that conceptual strength is a factual issue.

**B. Evaluating Conceptual Strength As A Question Of Fact Makes Sense**

**1. Conceptual Strength Is An Inherently Factual Question**

*Conceptual* strength concerns a mark's inherent ability to identify the source while *commercial* strength concerns a mark's marketplace recognition. See 1 McCarthy on Trademarks and Unfair Competition § 11:80; *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 384-85 (2d Cir. 2005). In evaluating conceptual strength, courts first classify marks as (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).<sup>3</sup> This distinctiveness analysis is a factual question that requires determining how

---

<sup>3</sup> Descriptive marks “describe a function, use, characteristic, size, or intended purpose of the product[.]” See *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 661 (4th Cir. 2018). For example, “5 Minute Glue” describes a product that will glue in five minutes. See *id.* Suggestive marks require an additional step to link the mark with the good or service. For example, “Glass Doctor” requires the consumer to connect the healing capabilities of a doctor and window repair. See *Moke America*, 126 F.4th at 270.

consumers are likely to perceive the mark and the extent to which consumers associate the mark with the source of a product. *See Streetwise Maps, Inc. v. Van-Dam, Inc.*, 159 F.3d 739, 743-44 (2d Cir. 1998).

The factual nature of this inquiry is supported by this Court’s analysis in *United States Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549 (2020). There, this Court rejected the Patent Office’s contention that a generic term coupled with a generic top-level domain such as “.com” was necessarily generic. *Id.* at 557. The Court held that determining whether “generic.com” was generic “depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class.” *Id.*

Further, a mark’s placement on the distinctiveness spectrum alone does not determine conceptual strength. *See, e.g., Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 662 (4th Cir. 2018). One suggestive mark may be stronger than another. Thus, determining how conceptually strong a mark is within each category requires additional fact inquiry. *See A&H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 222 (3d Cir. 2000).

This case is a good example. In granting a preliminary injunction, the district court held that the “RISE” mark was suggestive. Pet.App. 82a (*RiseandShine Corp. v. PepsiCo, Inc.*, No. 21-civ-6324, 2021 WL 5173862, at \*7 (S.D.N.Y. Nov. 4, 2021)). The Second Circuit agreed but explained that “labeling a mark as ‘suggestive’ is not the end of the inquiry.” Pet.App. 54a. When vacating the preliminary

injunction, the Second Circuit held that the district court erred when it “failed to note that the strong logical associations between ‘Rise’ and coffee represent weakness[.]” *Id.* at 55a. In making that determination, the Second Circuit examined the associations that it believes ordinary consumers would draw between the word “rise” and “coffee.” *Id.* at 56a. The court explained that “rise” suggests “waking up and ‘rising’ from bed.” *Id.* It found “rising is generally associated with the morning, a time when many crave a cup of coffee, relying on its caffeine to jumpstart their energy for the day.” *Id.* Thus, it concluded “[c]offee’s capacity to wake one up and lift one’s energy . . . is such an important part of the perceived virtue of coffee *in the eyes of the consuming public* as to render this suggestive mark decidedly weak.” *Id.* at 57a (emphasis added). Those determinations are classic *factual* findings about how ordinary consumers perceive words and products.

The Second Circuit also discounted the district court’s finding that Rise Brewing was the exclusive user of “RISE” “to identify a single-serving, canned caffeinated beverage.” *See id.* at 58a. In doing so, it expressly weighed and relied on PepsiCo’s factual “evidence of over 100 uses of the term . . . in connection with coffee, tea, bottled beverages, energy drinks, soft drinks, drinkable health supplements, cafes, yogurts, and granolas” for support. *Id.* Based on that evidence, it found that third-party uses of the term “in the same way” reinforced the mark’s inherent weakness. *Id.* Such an evaluation again required a factual analysis of the understanding of an ordinary consumer.

These determinations by the Second Circuit bear little resemblance to a court's determination of pure questions of law, such as the meaning of disputed statutory provisions or the interpretation of a contract. *See U.S. Bank Nat'l Ass'n ex. rel CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 395-98 (2018) (analyzing whether the mixed question was predominantly factual). Thus, the Second Circuit's conclusion does not reflect the application of legal analysis or expertise. Rather, it represents the Second Circuit's fact-dependent assessment of ordinary consumers' experience and perceptions. This further demonstrates why the issue of conceptual strength is an inherently factual issue.

## **2. Conceptual Strength Is Only One Aspect Of Likelihood Of Confusion**

Analyzing conceptual strength as a question of fact is also consistent with the bulk of authority treating the likelihood-of-confusion conclusion as a factual issue. The central question is not conceptual strength in a vacuum, but instead "whether the defendant's use is 'likely to cause confusion, or to cause mistake, or to deceive.'" *See Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 147 (2023). Each circuit employs multi-factor tests in determining the likelihood of confusion with conceptual strength as a single factor. *See U.S. Amicus Br.* at 5.

For example, the Second Circuit evaluates likelihood of confusion under the *Polaroid* framework. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961). The framework includes eight factors: 1) the strength of the plaintiff's mark, 2) the similarity of

the marks, 3) the proximity of the products, 4) the likelihood that the plaintiff will bridge the gap, 5) actual confusion, 6) the defendant's bad faith, 7) the quality of the defendant's product, and 8) consumer sophistication. *Id.* Other circuits adopt similar tests. *See* U.S. Amicus Br. at 5 (explaining factors differ by circuit but all treat strength as one relevant consideration). Assessing the strength of a mark depends on two subfactors: conceptual (or inherent) strength and commercial (or acquired) strength. *See Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210-11 (2000). Thus, conceptual strength is one sub-factor in the overall test for likelihood of confusion.

Most regional circuits also treat the overall likelihood of confusion question as a factual issue. *See, e.g., Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013) ("Likelihood of confusion is a question of fact[.]"). Treating strength of the mark as a legal issue in a jury trial would require the judge to inform the jury of the mark's strength and then ask the jury to determine likelihood of confusion. That strength instruction would likely dominate the jury's determination, just as it dominated the district court's decision here. After the Second Circuit instructed the district court that the mark was weak as a matter of law, the district court granted summary judgment of no likelihood of confusion. *See* Pet.App. 29a (*RiseandShine Corp. v. PepsiCo, Inc.*, No. 21-CIV-6324, 2023 WL 4936000, at \*6, 11 (S.D.N.Y. Aug. 2, 2023)) (granting summary judgment after explaining the Second Circuit's decision "compels a finding" that the mark "is inherently weak as a matter of law"). The opposite would likely occur if a jury were instructed that a mark is inherently strong.

Accordingly, assessing conceptual strength as a factual matter is consistent with the overall analysis of likelihood of confusion. The fact finder should be free to determine likelihood of confusion by looking at all facts relevant to all of the factors.

### **3. The Second Circuit's Opinion Threatens Litigants' Seventh Amendment Rights**

The Second Circuit's decision also has great ramifications for the right to trial by jury under the Seventh Amendment. The Seventh Amendment right to trial by jury in a trademark case, like other cases, normally hinges on the nature of the remedy sought by the plaintiff. To preserve the right to a jury, the plaintiff must seek a remedy "at law," such as actual damages. *See Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) ("[W]e examine both the nature of the issues involved and the remedy sought. ... The second inquiry is the more important in our analysis."); *see also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-473 (1962).

However, trying any matter before a jury presumes the parties' evidence reflects a genuine issue of material fact. Holding that conceptual strength is a purely legal question would eliminate one important question of fact for the trier of fact, typically a jury. Thus, incorrectly classifying conceptual strength as a

legal issue has the potential to eliminate a litigant's constitutional Seventh Amendment rights.<sup>4</sup>

### **C. The Court Should Adopt A Uniform Rule**

Businesses market their products and enforce their marks across the nation and sometimes across the world. Yet the process for evaluating trademarks' strength varies in the Second Circuit compared to all of the other circuits. As a result, parties cannot reasonably predict how their marks or a competitor's marks will be evaluated. The process should not change merely because a given defendant must be sued either inside or outside the Second Circuit. Nor should parties be allowed to significantly influence the process by choosing where to file suit when more than one forum is possible. Clarification and uniformity would reduce litigation costs and forum shopping. It would also allow companies to more confidently invest in their businesses and make informed decisions about the strength of a given mark. Furthermore, it would strengthen the reliability of trademarks to serve as notice of quality and origin to consumers. Thus, adopting

---

<sup>4</sup> To be clear, not all trademark cases must be decided by a jury, and nothing in this brief is intended to suggest that courts can never grant summary judgment on the issue of trademark strength (or any other factor). Courts may do so, for example, when the evidence does not give rise to a genuine dispute of material fact. See Fed. R. Civ. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). Moreover, when trademark holders seek only equitable remedies, such as injunctions or disgorgement, litigants in those cases have no right to trial by jury. See *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343, 1359 (11th Cir. 2019).

a uniform rule on this important issue would have many benefits.

#### IV. CONCLUSION

For the foregoing reasons, this Court should reverse and hold that conceptual strength is an issue of fact. AIPLA takes no position on the merits of this case, the strength of the mark at issue, or which party should ultimately prevail.

Date: September 15, 2026

Respectfully submitted,

JOSEPH R. RE  
*Counsel of Record*  
ADAM B. POWELL  
KNOBBE, MARTENS, OLSON  
& BEAR, LLP  
2040 Main Street, 14<sup>th</sup> Floor  
Irvine, CA 92614  
(949) 760-0404  
joe.re@knobbe.com

SALVATORE ANASTASI  
*President*  
AMERICAN INTELLECTUAL  
PROPERTY LAW ASSOCIATION  
2000 Duke Street, Suite 300  
Alexandria, VA 22314

*Counsel for Amicus Curiae*  
*American Intellectual*  
*Property Law Association*