IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91247241
Party	Plaintiff PepsiCo, Inc.
Correspondence address	PAUL J REILLY BAKER BOTTS LLP 2001 ROSS AVENUE DALLAS, TX 75201 UNITED STATES Primary email: nytmdpt@bakerbotts.com Secondary email(s): julie.albert@bakerbotts.com, paul.reilly@bakerbotts.com 212-408-2500
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Signature	/Paul J. Reilly/
Date	09/29/2023
Attachments	2023.09.28 Decl of Survey Expert Sarah Butler.pdf(253505 bytes) Exhibit 1 - Butler Expert Report.pdf(5348903 bytes) Exhibit 2.pdf(84147 bytes)

IN THE MATTER OF APPLICATION SERIAL NOS. 88/152,501, 88/205,171:

Mark 1	:	ROCKSTAR
Applicant	:	Rockstar Industries LLC
Filed	:	October 12, 2018
Published in		
the <u>Official Gazette</u>	:	February 5, 2019

Mark 2	:	ROCKSTAR
Applicant	:	Rockstar Industries LLC
Filed	:	November 26, 2018
Published in		
the <u>Official Gazette</u>	:	February 5, 2019

IN THE MATTER OF REG. NOS. 5,956,334, 5,439,539 and 5,892,882:

Mark	:	ROCKSTAR
Registrant	:	Rockstar LLC

_____x
                                        :
PepsiCo, Inc.   :
                                        :
      Opposer/Petitioner,   :   **Opposition No. 91247241 (Parent)**
                                        :   Cancellation No. 92075918
    v.   :   Cancellation No. 92076204
                                        :
ROCKSTAR INDUSTRIES LLC, and   :
ROCKSTAR LLC,   :
                                        :
      Applicants/Respondents   :
                                        :
_____x

<u>DECLARATION OF SARAH BUTLER</u>

    I, Sarah Butler, declare and testify as follows:

1.   I have been retained as an expert witness on behalf of PepsiCo, Inc. ("PepsiCo")

in the above-captioned consolidated proceedings. I submit this Testimonial Declaration

and the exhibits attached hereto, which are incorporated herein by reference, for the

purpose of identifying documentary material being submitted by PepsiCo in support of PepsiCo's claims against Applicants/Respondents, Rockstar Industries LLC and Rockstar LLC, and providing testimony and information relating to a consumer study showing, among other things, a substantial likelihood of confusion between the marks at issue amongst relevant consumers, that is, 46.2 percent overall confusion.

BACKGROUND, EXPERIECE & EXPERTISE

2.   I am Senior Managing Director at NERA Economic Consulting, Inc. NERA Economic Consulting (www.nera.com) a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For more than six decades, NERA has been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. NERA brings academic rigor, objectivity, and real-world industry experience to issues arising from competition, regulation, public policy, strategy, finance, and litigation. NERA provides expert statistical, survey, economic, and financial research analysis.

3.   At NERA, I serve as the Chair of the Survey and Statistical Sampling Practice and am a member of the Intellectual Property, Product Liability, Antitrust, and Labor Practices. My business address is 4 Embarcadero Center, San Francisco, CA 94111. NERA is a firm providing expert statistical, survey, economic, and financial research analysis.

4.   Among my responsibilities, I conduct survey research and market research and design and implement statistical samples for matters involving business and consumer decision- making, consumer choice, and consumer behavior. In the course of my career,

I have conducted research for leading corporations and government agencies on consumers, employees, and businesses. My work has been included in numerous lawsuits involving issues related to trademark and trade dress confusion, secondary meaning, false advertising, and patent infringement, as well as in antitrust and employment-related litigations. I am a member of the American Association of Public Opinion Research, the American Statistical Association, the Intellectual Property Section of the American Bar Association, and the International Trademark Association (INTA).

5.   I have also worked as a market researcher conducting surveys of consumers and professionals, focus groups, and in-depth interviews. I worked as an independent consultant conducting research for the Department of Environment and Rural Affairs in the United Kingdom. I have taught courses focused on or involving research methodologies in both the United States and Europe. I hold a Master's Degree from Trinity College, Dublin and another Master's Degree from Temple University.

6.   I have substantial experience conducting and using surveys to measure the recognition, confusion and associations with a trademark, opinions and behaviors regarding products and services including purchase processes, product attributes, consumer perception and preferences, branding and positioning, new product research, and communications strategies. During my career in academic and commercial research, I have personally facilitated a wide range of research including large-scale surveys, in-depth interviews, focus groups, and observational studies.

7.   Throughout my career, I have personally designed, supervised and implemented over 300 surveys regarding the perceptions and opinions of consumers. Over 100 of

such surveys involved consumer perception of trademarks and over 100 have been conducted online.

8.   I have submitted expert reports, been deposed, and have testified at trial within the last five years in United States District Courts across the country and before the Trademark Trial and Appeal Board. In addition, studies which I have undertaken have been admitted as evidence in numerous legal proceedings, and I have been accepted as an expert in survey research on many occasions by U.S. Federal District court, the Trademark Trial & Appeal Board of the United States Patent & Trademark Office, the Federal Trade Commission, and the National Advertising Division of the Council of Better Business Bureaus.

CONSUMER SURVEY ASSIGNMENT

9.   Pursuant to a request from Baker Botts L.L.P., counsel for PepsiCo, I independently designed and conducted an online survey of relevant consumers to evaluate the extent to which Applicant's claimed mark ROCKSTAR in connection with meal replacement products, energy bars, and/or dietary and nutritional supplements is likely to cause confusion with PepsiCo's mark ROCKSTAR.

10.   In its opposition and cancellation actions, PepsiCo has claimed that consumers are likely to be confused, mistaken or deceived by and/or wrongly affiliate, connect or associate Applicant's "ROCKSTAR" mark with PepsiCo's "ROCKSTAR" brand, including when used by Applicant in conjunction with meal replacement products, energy bars, and/or dietary and nutritional supplements identified in Applicant's registrations and applications.

11.   I understand that PepsiCo is the only entity offering energy drinks under the

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