O/0015/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 4011883

IN THE NAME OF LUNA CORPORATE SPÓŁKA Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ TO REGISTER THE FOLLOWING TRADE MARK:

IN CLASS 5, 32, 34 AND 35

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 448770 BY

INTERCONTINENTAL GREAT BRANDS LLC

Background and pleadings

1. LUNA CORPORATE SPÓŁKA Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ ("the applicant") applied to register the Trade Mark as shown on the cover of this decision in the UK on 7 February 2024 (UK Trade Mark ("UKTM") no: 4011883). It was accepted and published in the Trade Marks Journal on 26 April 2024 in respect of the goods/services as set out in Annex 1.

2. Intercontinental Great Brands LLC ("the opponent") partially opposed the trade mark application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 ("the Act") as against some of the goods/services in Classes 5 and 35 (as set out later in my decision). This is on the basis of its earlier comparable Trade Mark, LUNA (UKTM no:907197437) filed on 28 August 2008 and registered on 26 November 2009. The opponent's mark is registered for goods in Class 29, 30 and 32, however, for the purposes of this opposition, only the following are relied upon:

Class 29	Soy-based food bars also containing grains, nuts and fruit.
Class 30	Grain-based food bars also containing nuts and dried fruit.

3. The mark relied upon by the opponent is deemed an earlier mark in accordance with section 6 of the Act. Given that it has been registered for more than five years form the date of the application ordinarily it would be subject to the proof of use requirements under section 6A of the Act. However, the applicant did not put the opponent to proof of use of its mark and consequently it may rely upon all of its goods as identified.

4. Under section 5(2)(b) of the Act, the opponent claims that there is a likelihood of confusion on the basis that the marks are similar, and the goods/services are either identical or highly similar leading to a likelihood of confusion, including a likelihood of association, and that the contested mark should be refused registration.

5. The applicant filed a counterstatement denying the claims made and submitting as follows:

"The goods and services on offer under Classes 5 and 35 differ significantly from those of the opposer under Classes 29 and 30. The distinct differences in product type, market and classification indicate that there is no likelihood of confusion between my trade mark and that of the opposer. There is minimal to no similarity between our client goods and those of my opposer. They differ in type, purpose, function and target market. As a result, the likelihood of consumer confusion is very low, which should strongly support my response to the opposition.

2. Weakness of the Opponent's Mark

The term "LUNA" is relatively weak as it is a common term with multiple meanings and uses across various industries. The Opponent's claim to exclusivity of such a term should therefore be narrowly interpreted. Furthermore, Applicant's trademark incorporates additional distinctive elements that clearly set it apart from the generic nature of the opponent's mark"

Representation

6. The opponent is represented by Wilson Gunn and the applicant is represented by Ewelina Jasion. The applicant filed submissions within the evidence rounds dated 24 January 2025. The opponent chose not to file evidence in chief in these proceedings, however, further to the applicant's submissions, they sought leave to file evidence in response to those submissions, which was granted, and their evidence was filed on 6 March 2025. No hearing was requested, however the opponent filed additional submissions in lieu of a hearing dated 10 April 2025. This decision is taken following a careful consideration of the papers filed.

Relevance of EU LAW

7. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated

law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Evidence

8. The opponent has filed evidence in response to the applicant's submissions, in the form of a witness statement of Terry Roy Rundle of Wilson Gunn dated 6 March 2025, who is the Trade Mark Attorney for the opponent. The statement is accompanied by fifteen exhibits. Mr Rundle provides extracts from various webpages showing the parties' relevant goods for sale, which I understand is to illustrate that the contested goods may be distributed and sold through the same trade channels as the earlier goods.

9. The evidence submitted by Mr Rundle makes reference to well-known wellness stores and supermarkets within the UK, as well as Amazon, and provides screenshots of various vitamins, supplements and snacks that are on sale within the stores, to counter the applicant's claim within it's written submissions that its contested goods and the opponent's earlier goods are distributed and sold through different trade channels "i.e. food stores vs. pharmacies and specialised health stores". I will assess this evidence later on in my decision, within my goods and services assessment.

10. I have given due consideration to all of the documents filed by both parties but will only refer to the evidence/submissions as appropriate within my decision.

Decision

Section 5(2)(b)

11. Section 5(2)(b) of the Act is as follows:

> "5(2) A trade mark shall not be registered if because-
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

12. Section 5A of the Act states as follows:

> "Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

Relevant law

13. The following principles are gleaned from the decisions of the Court of Justice of the European Union ("CJEU") in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only

when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

14. The competing goods/services as relied upon and as opposed are shown in the table below:

The earlier mark	The contested mark
	Class 5 - Food supplements, Nutritional supplements, Vitamin supplements;

	Vitamin and mineral supplements; Multi-vitamin preparations; Dietary and nutritional preparations; nutritional supplements; protein dietary supplements; dietary supplements for human beings; Food supplements for sportsmen; Food supplements; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Fitness and endurance supplements; Dietary supplements consisting of vitamins; Dietary supplements for humans not for medical purposes
Class 29 - Soy-based food bars also containing grains, buts and fruit	
Class 30 - Grain-based food bars also containing nuts and dried fruit	
	Class 35 - Retail services in relation to dietary supplements; retail services in relation to foodstuffs; Wholesale services in relation to foodstuffs; Wholesale services in relation to dietary supplements

15. The applicant submits as follows:

“Nature of Goods

The Opponent's goods are primarily food products (snack bars) meant for nutrition and consumption, while Applicant's goods are health-related products, including supplements. These are entirely different purposes and functions compared to snack bars.

Target Market:

The Opponent's products target consumers looking for convenient snacks or meal replacements.

Applicant's products target individuals seeking health supplements, smoking cessation airs or specific dietary needs. The markets are distinct, with minimal overlap

Classifications

Opponent's goods fall under food related categories (Classes 29 and 30), while Applicant's goods are classified under pharmaceutical and nutritional categories (Class 5) and retail/wholesale services (Class 35). The difference in classifications further emphasizes the distinction between the products."

16. The opponent submits as follows:

"There is no dispute that the Opponent's food products are intended for nutrition and consumption, but this does not exclude that they may also be health-related products such as soy-based and grain-based food bars. The Applicant incorrectly refers to the Opponent's food products as "snack foods" or "snacks" without considering that the Opponent's "food bars" may be consumed other than as snack foods or snacks.

As far as the nature of the goods is concerned, the Applicant is wrong to claim this is a case of "snack foods vs. health supplements". First, the Opponent's earlier goods are not restricted to snack foods, and second, health supplements may be presented in the format of food bars. All of the contested goods may be presented in the format of food bars, and in that format they are highly similar, if not identical, to the Opponent's goods.

As regards the intended purpose, the Applicant wrongly presents this as a case of “satisfying hunger vs. dietary supplementation”. There is no reason why the Opponent’s goods cannot both satisfy hunger and provide dietary supplementation.

The Applicant is wrong to assert that for the method of use it is a case of “snacks vs. dietary aids”. The Opponent’s goods as stated above and as registered are “food bars” which are not restricted to “snacks”. Moreover, the Opponent’s goods may be used as “dietary aids”.

The Applicant’s claim that the distribution channels are quite different is wrong and the Applicant has failed to provide any evidence to support such a claim. On the contrary, the Opponent has provided evidence that proves the said claim is wrong, namely the Witness Statement of Mr Terry Roy Rundle dated 06 March 2025. The exhibits to said Witness Statement are evidence of the fact that the contested goods and the Opponent’s goods are sold through the same distribution channels”.

17. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

18. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary."

19. The relevant factors identified by Jacob J. (as he then was) in the *Treat case*, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

20. In *Gérard Meric v OHIM*, Case T- 133/05, the General Court ("GC") stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or

where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

21. Further, in *Kurt Hesse v OHIM*,[1] the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*,[2] the GC stated that "complementary" means:

> "…there is close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking."

22. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

> "[…] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR) [2012] ETMR 42 at [47]- [49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

23. I bear in mind that it is permissible to group goods and services together for the purposes of the assessment[3].

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[1] Case C-50/15 P
[2] Case T-325/06
[3] *Separode Trade Mark* O/399/10

Class 5

Food supplements, Nutritional supplements, Vitamin supplements; Vitamin and mineral supplements; Multi-vitamin preparations; Dietary and nutritional preparations; nutritional supplements; protein dietary supplements; dietary supplements for human beings; Food supplements for sportsmen; Food supplements; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Fitness and endurance supplements; Dietary supplements consisting of vitamins; Dietary supplements for humans not for medical purposes

24. The applicant's terms are types of nutritional and health food supplements in Class 5, which is defined by the Nice Classification as "Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for human beings and animals…", whereas Classes 29 and 30 relate to foodstuffs, including "foodstuffs of animal origin as well as vegetables and other horticultural comestible products which are prepared for consumption or conservation" in Class 29 and "foodstuffs of plant origin prepared for consumption or conservation as well as auxiliaries intended for the improvement of the flavour of food" in Class 30. As per section 60A of the Act, goods and services are not to be regarded as being similar or dissimilar to each other on the ground that they appear in the same class under the Nice Classification (the converse may be true in different classes). However, I consider that this is relevant in this instance, as the goods in Class 5 are pharmaceutical/medical preparations, which are specific[4].

25. The opponent's specification includes the terms *soy-based food bars also containing grains, nuts and fruit* in Class 29 and *grain-based food bars also containing nuts and dried fruit* in Class 30. Giving consideration to the fact that the goods fall within differing Nice Classes, and that the opponent's specification includes foodstuffs, whereas the applicant's goods are supplements, I find the uses of the goods are dissimilar, as are the users, as the consumer of the opponent's goods is likely to be seeking a snack, whereas the consumer of the applicant's goods will be seeking health

[4] *Altecnic Ltd's Trade Mark Application* [2002] RPC 34 (COA) - In *Altecnic Ltd's Trade Mark Application* the Court of Appeal decided that "*the Registrar is entitled to treat the Class number in the application as relevant to the interpretation of the scope of the application*"

supplements. The nature of the goods will also differ as the opponent's goods are food bars, whereas the applicant's goods are likely to be in the form of tablets, powder, drops or liquid.

26. The opponent has submitted evidence in respect of trade channels, which it states is to establish whether "there was any truth in the Applicant's claim in its written submissions of 24 January 2025 that its contested goods and the Opponent's earlier goods are distributed and sold through different channels ie "food stores vs. pharmacies and specialized health stores". A number of exhibits are provided from various websites and photographs of the aisles of well-known supermarkets following which the opponent submits "there can be no doubt that the Applicant's contested goods and the Opponent's earlier goods may be distributed and sold through the same trade channels". As I have stated, the goods in this instance fall within different Nice Classes and have different uses, although both are consumable and directed at the general public, however, I do not consider that consumers will believe these goods to be similar. Even if they happen to be sold by the same retail premises, they are unlikely to be on the same shelves; as snack bars would be displayed on separate shelves to supplements. Whilst the goods may well be sold in the same supermarkets/health shops and will thus on a very general level overlap in trade channels, this is insufficient in accordance with the caselaw[5]. I do not find competition, as I do not foresee that a consumer who is seeking nutritional supplements would purchase a food bar as an alternative, nor do I find complementarity. The fact that they are all goods which may be found in the same store is not enough for similarity. I therefore find the goods to be dissimilar.

[5] The case of *2nine Ltd v Office for Harmonization in the Internal Market* (Trade Marks and Designs) (OHIM) Case T-363/08 stated as follows in relation to the similarity goods:

"40. It must, moreover, be pointed out that the fact that the goods in question may be sold in the same commercial establishments, such as department stores or supermarkets, is not particularly significant, since very different kinds of goods may be found in such shops, without consumers automatically believing that they have the same origin (*PiraÑAM diseño original Juan Bolaños*, paragraph 30 above, paragraph 44; see also, to that effect, Case T[1]8/03 *El Corte Inglés v OHIM – Pucci* (EMILIO PUCCI) [2004] ECR II-4297, paragraph 43)."

Class 35

Retail services in relation to foodstuffs; Wholesale services in relation to foodstuffs;

27. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the GC held that although retail services are different in nature, and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

28. However, on the basis of the European courts' judgments in *Sanco SA v OHIM*, Case C-411/13P and *Assembled Investments (Proprietary) Ltd v. OHIM,* Case T-105/05*,* at paragraphs [30] to [35] of the judgment, upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd* Case C-398/07P, Mr Hobbs concluded that:

> i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;
>
> ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;
>
> iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;
>
> iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

29. As highlighted in *Oakley* above, the GC held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree. The applicant's specification includes *retail services in relation to foodstuffs*, which is a wide term which would encompass the opponent's goods in Classes 29 and 30. Therefore, it stands to reason that the retail services of those same goods would also be similar. Whilst the use and nature/ purpose of the goods/services will differ, there would be an overlap in user. The goods and the services are indispensable to each other and likely to be offered by the same undertaking, and as such are complementary, overlapping in trade channels and end consumers. It is recognised that consumers would consider that those entities responsible for producing the goods would be the same entity that brings the goods to market, whether physically in store, online, via mail order or wholesale. I therefore find that the contested services in Class 35 are similar to the opponent's goods to a medium degree.

Retail services in relation to dietary supplements; Wholesale services in relation to dietary supplements

30. The applicant's terms relate to the retail/wholesale of dietary supplements. I have found above that the applicant's supplements are dissimilar to the opponent's goods in this instance. As the retail/wholesale services are specifically in relation to dietary supplements, which I have found are dissimilar to the opponent's goods, I do not consider that the goods and the services are indispensable to each other and I do not believe that consumers would consider that those entities responsible for producing the goods, would be the same entity that brings the goods to market, therefore I do not find complementarity. I find the goods/services to be dissimilar.

31. As some degree of similarity between goods and services is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition aimed against those goods and services that I have found to be dissimilar will fail[6]. Therefore, the opposition under section 5(2)(b) fails for the following goods and services:

[6] *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

Class 5 Food supplements, Nutritional supplements, Vitamin supplements; Vitamin and mineral supplements; Multi-vitamin preparations; Dietary and nutritional preparations; nutritional supplements; protein dietary supplements; dietary supplements for human beings; Food supplements for sportsmen; Food supplements; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Fitness and endurance supplements; Dietary supplements consisting of vitamins; Dietary supplements for humans not for medical purposes

Class 35 Retail services in relation to dietary supplements; Wholesale services in relation to dietary supplements

The Average Consumer and the Purchasing Act

32. It is necessary for me to determine who the average consumer is for the respective parties' goods/services. I must then determine the manner in which the goods/services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited,* [2014] EWHC 439 (Ch), Birss J. (as he then was) described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

33. The applicant submits as follows:

> "When it comes to everyday food products, consumers typically demonstrate a lower level of attention compared to specialized goods. Such products are purchased both in delicatessens and hypermarkets, and due to their common use, the average consumer purchases them without deeper reflection or

analysis of their markings. This lower level of attention is characteristic for everyday food products that are purchased frequently and routinely".

34. I find that the average consumer will be members of the general public and professionals, with the purchase of the goods / use of the retail services most likely to be used by the individual consumer, whereas professionals are most likely to use the wholesale services. Both types of consumers will be interested in the range of goods on offer, levels of customer service, location and any delivery arrangements, and prices, amongst other things. In my view, the average consumer, whether professional or individual, would pay a medium degree of attention. Consumers will choose a provider of services after having seen promotional material, such as advertisements, browsing websites or seeing signage on physical premises. Visual considerations are, therefore, likely to dominate the selection process. However, given that word of mouth recommendations may be made, or requests made to staff, I do not completely discount an aural component to the purchase.

Comparison of marks

35. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> ".....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

36. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the marks

and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

37. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
LUNA	

38. The applicant submits:

> “Visual, phonetic, and conceptual comparison of the marks reveals significant differences that preclude any likelihood of confusion. From a visual perspective, while the Opponent's mark consists solely of the word "LUNA" in standard characters, the Applicant's mark incorporates distinctive design elements - notably a green dot bullet positioned below the word "luna" and the word "Store" placed underneath, creating a visually complex and unique composition. Phonetically, the Opponent's mark is pronounced as a single word "LUNA", whereas the Applicant's mark includes an additional element "Store", resulting in a different overall pronunciation and rhythm. Conceptually, while both marks incorporate the word referring to the moon, the Applicant's mark creates a distinct commercial impression through the addition of "Store", suggesting a retail establishment, and the green dot bullet that serves as a distinctive design element. These visual, phonetic, and conceptual differences, when considered together, create a distinct overall impression that enables consumers to easily differentiate between the two marks.”

39. The opponent submits:

> “The Applicant has claimed that there are significant differences when comparing the respective marks. The differences have been duly noted, but we

submit that they are insignificant and do not in any way alter the fact that the dominant and distinctive component of the contested mark is the word LUNA which is identical to the Opponent's mark.

It is denied that the Opponent's mark is relatively weak and certainly not so because the Applicant has wrongly claimed that "it is a common term with multiple meanings". The Applicant has failed to identify any of those multiple meanings and instead has stated in its later observations that LUNA is a word referring to the moon".

Overall comparison

40. The opponent's mark is a word-only mark, LUNA. The word is presented in a plain typeface. There are no other elements to contribute to the overall impression of the earlier mark which lies in the word itself.

41. The applicant's mark is a figurative mark, consisting of the two-words 'luna Store', which is written in a black simple stylised font. The word 'luna' appears above 'Store' and is significantly larger. There is a green dot after the word luna, which could be interpreted as a stylised full stop. The word 'Store' is descriptive/non-distinctive and indicates a shop where goods will be purchased. Therefore, the dominant element of the mark is the word luna, which plays the greater role in the overall impression, with the other elements, being the word 'Store' and the green dot playing only weak roles in the overall impression of the mark.

Visual comparison

42. Visually, the competing marks are similar to the extent that they share the word LUNA/luna. A word trade mark protects the notional use of the word itself irrespective of font capitalisation or otherwise and therefore the difference in casing will have little impact on the assessment. I note the presence of the second word, STORE, in the applicant's mark. As the word STORE is descriptive/non-distinctive, and given its size and position within the mark in comparison to the word luna, I consider that this may be overlooked, as may the green dot, which I have found to play a weak role in the overall impression of the mark. I also note that due to the prominent size and position of the word 'luna' and the fact that it is positioned above 'Store', it will be read first and

will have the greater impact. The stylisation of the contested mark is also a point of dissimilarity, as against the earlier mark's word only mark. Overall, I am of the view that the shared use of LUNA/luna is such that the marks are visually similar to between a medium and high degree.

Aural comparison

43. Despite the contested mark being a figurative mark, this stylisation and the green coloured full stop will not play a part when the words are articulated. I note that the word LUNA is a commonly known word and will be pronounced as LOO-NAH. The word, STORE, is an ordinary English dictionary word and will be pronounced in the normal way. The point of aural overlap lies in the word LUNA as this is the same in both marks and will be pronounced identically. I consider that the applicant's marks maybe shortened to LUNA, as I have found STORE to be descriptive/non-distinctive and therefore it may not be verbalised. Overall, I find that if STORE is not verbalised, the marks are aurally identical, whereas if STORE is verbalised the marks are similar to a high degree.

Conceptual comparison

44. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer, as highlighted in numerous judgments of the GC and the CJEU[7].

45. The opponent has submitted that LUNA is "the word referring to the moon". I agree with this submission. In the context of the applied for mark, the average consumer will understand STORE to be a place where you can buy goods, or a place where things are kept until needed, and therefore this gives rise to a conceptual difference, but not significantly so, given that this element is descriptive/non-distinctive of some of the goods and services on offer. The stylisation does not impact the concept of the applicant's mark. Overall, I find there to be a high degree of conceptual similarity between the marks.

[7] *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29

Distinctive character of the earlier trade mark

46. In *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV,* Case C-342/97 the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *WindsurfingChiemsee* v *Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

47. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent filed evidence which they purport to show that the applicant's contested goods and the opponent's earlier goods are distributed and sold through the same trade channels, however, no evidence has been filed in support of the opponent's mark having an enhanced degree of distinctive character, and therefore, I only have the inherent position to consider.

48. The earlier mark comprises of the word, LUNA. For the reasons that I have set out above, I consider that the average consumer would interpret the opponent's mark as being related to the moon. The word LUNA is sufficiently common in usage that it's meaning will be known, and it does not allude to the goods at issue. I consider that the earlier mark is inherently distinctive to a medium degree.

Conclusions on Likelihood of Confusion

49. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods/services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

50. I have found as follows:

- The services at issue are similar to a medium degree to the opponent's goods in classes 29 and 30. I have also found some goods and services to be dissimilar, however, as I set out above, these will not factor into the following assessment;

- I have identified that the average consumer will be members of the general public or professionals. They will select the contested services by primarily visual means, although I do not discount an aural component;

- I have concluded that a medium degree of attention will be paid by members of the general public/professionals;

- The contested mark is visually similar to the earlier mark to between a medium and high degree;

- I have found that if the word STORE is not verbalised, the marks are aurally identical, whereas if STORE is verbalised the marks are similar to a high degree;

- I have found the contested mark and the earlier mark to be conceptually similar to a high degree;

- I have found the earlier mark overall to be inherently distinctive to a medium degree;

51. I begin by considering a likelihood of direct confusion. The competing marks share the word LUNA/luna; however, the contested mark also includes the word, STORE, making the mark LUNA STORE with a green full stop. In this instance, I find LUNA to be the dominant element of the contested mark, as the word STORE is descriptive / non-distinctive of some of the goods and services on offer and along with the green dot after the word luna, (which could be interpreted as a stylised full stop) these elements play only weak roles in the overall impression of the mark. I have found the word, LUNA, to be the dominant element of the marks, and this gives rise to a visual, aural and conceptual similarity, even when considering the simple stylisation of the contested mark. Given this similarity and the fact that the respective services/goods are similar to a medium degree, it is my view that consumers may mistake one mark for another. Taking all the above into account, and bearing in mind the principle of imperfect recollection, and that the marks will not be considered side by side, I consider that there exists a likelihood of direct confusion. In case I am wrong about that, I will move on to consider indirect confusion.

52. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark'.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).
(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).
(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)."

53. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal[8]. I recognise that a finding of indirect confusion should not be made merely because the

[8] *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207

competing marks share a common element. The Court of Appeal has also emphasised that, where there is no direct confusion, there must be a "proper basis" for finding indirect confusion.

54. When assessing indirect confusion, I find that as a result of the common word, LUNA, consumers will be confused between the two entities as this appears identically in each mark. When considering the differences within the marks, namely the inclusion of the word STORE in the contested mark, which is descriptive / non-distinctive of some of the services on offer, and the full stop, I find that LUNA will be considered as the distinctive element of the mark. Therefore, I find that LUNA STORES is likely to be interpreted as a sub-brand or indicative of goods and services provided by the same, or a linked undertaking. I am satisfied that such is the similarity between the marks visually, aurally and conceptually, and due to the interdependency principle, there would be a likelihood of confusion. As a result of this, I find a likelihood of indirect confusion.

Final Remarks

55. The opposition is partially successful. Therefore, subject to appeal, the application will be refused in relation to the following services:

Class 35 Retail services in relation to foodstuffs; Wholesale services in relation to foodstuffs;

56. However, in light of my earlier findings and given that there was no opposition raised against all the applied for goods/services the application will proceed to registration in relation to the following:

Class 5 Nicotine sachets for use as a smoking cessation aid; Food supplements; Dietetic beverages adapted for medical purposes; Dietary supplemental drinks; Food supplements; Nutritional supplements; Vitamin supplements; Vitamin and mineral supplements; Liquid vitamin supplements; Nicotine gum for use as an aid to stop smoking; Mineral dietary supplements; Mineral dietary supplements for humans; Mineral nutritional supplements; Powdered fruit-flavored dietary supplement drink mix; Dietary

supplement drink mixes; Powdered nutritional supplement drink mix; Multi-vitamin preparations; Effervescent vitamin tablets; Dietary supplemental drinks; Vitamin drinks; Dietary and nutritional preparations; Food supplements; Albumin dietary supplements; Anti-oxidant food supplements; Nutritional supplements; Glucose dietary supplements; Protein dietary supplements; Dietary supplements for human beings; Food supplements in liquid form; Food supplements for sportsmen; Food supplements; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Fitness and endurance supplements; Dietary supplements consisting of vitamins; Dietary supplements for humans not for medical purposes; Oral pouches containing taurine; Oral pouches containing caffeine; Oral pouches containing vitamins.

Class 32 Carbonated non-alcoholic drinks; Low-calorie soft drinks; Non-alcoholic malt drinks; Non-alcoholic sparkling fruit juice drinks; Flavoured carbonated beverages; Non-alcoholic preparations for making beverages; Essences for making beverages; Non-alcoholic essences for making beverages; Aerated fruit juices; Cocktails, non-alcoholic; Smoothies; Non-alcoholic fruit cocktails; Concentrates for use in the preparation of soft drinks; Concentrates for use in the preparation of sports drinks; Concentrates for making fruit drinks; Concentrates for use in the preparation of energy drinks; Fruit juice concentrates; Mixed fruit juice; Cocktails, non-alcoholic; Fruit-flavoured beverages; Soft drinks; Sports drinks; Non-alcoholic beverages containing fruit juices; Non-alcoholic drinks enriched with vitamins and mineral salts; Sports drinks containing electrolytes; Energy drinks; Energy drinks [not for medical purposes]; Energy drinks containing caffeine; Functional water-based beverages; Powders for effervescing beverages; Isotonic beverages; Isotonic beverages [not for medical purposes]; Fruit-based beverages; Smoothies; Soft drinks; Fruit drinks; Fruit juice beverages; Non-alcoholic fruit

juice beverages; Fruit squashes; Beverages consisting of a blend of fruit and vegetable juices; Protein-enriched sports beverages; Syrups for beverages; Carbohydrate drinks; Nutritionally fortified beverages; Beverages consisting principally of fruit juices; Beverages containing vitamins; Non-carbonated soft drinks; Preparations for making non-alcoholic beverages; Dilutable preparations for making beverages; Powders for the preparation of beverages; Powders used in the preparation of fruit-based beverages; Concentrated fruit juice; Cordials; Powders for making soft drinks.

Class 34 Tobacco-free nicotine pouches; Tobacco pouches; Tobacco and tobacco substitutes; Cigarettes and Cigars; Electronic cigarettes and Mouth sprays for smokers; Articles for use with tobacco; Smokeless tobacco; Tobacco products; Tobacco and tobacco products (including substitutes); Articles for use with tobacco; Herbs for smoking; Personal vaporisers and electronic cigarettes, and flavourings and solutions therefor; Devices for heating tobacco for the purpose of inhalation; Devices for heating tobacco substitutes for the purpose of inhalation; Tobacco free oral nicotine pouches [not for medical use]; Snus without tobacco; Snus with tobacco; Snus; Tobacco substitutes not for medical purposes; Tobacco substitutes; Electronic devices for the inhalation of nicotine containing aerosol; Electronic nicotine inhalation devices; Oral vaporizers for smokers; Cigarette tips; Cigarette tips; Books of cigarette papers; Cigars; Cigar holders; Cigarettes containing tobacco substitutes, not for medical purposes; Cigarettes; Pocket-size cigarette rolling machines; Cigarillos; Flavourings, other than essential oils, for tobacco; Flavourings, other than essential oils, for use in electronic cigarettes; Tobacco jars; Humidors; Electronic cigarettes; Tobacco; Electronic cigarette liquid [e-liquid] comprised of flavorings in liquid form used to refill electronic cigarette cartridges; Electronic cigarette liquid [e-liquid] comprised of

propylene glycol; Electronic cigarette liquid [e-liquid] comprised of vegetable glycerin.

Class 35 Retail services in relation to articles for use with tobacco; Wholesale services in relation to articles for use with tobacco; Retail services in relation to non-alcoholic beverages; Retail services in relation to dietary supplements; Wholesale services in relation to dietary supplements; Retail services in relation to tobacco products; Retail services in relation to tobacco; Retail services in relation to electronic cigarettes; Retail services in relation to electronic cigarette liquid [e-liquid] comprised of flavorings in liquid form used to refill electronic cigarette cartridges; Retail services in relation to cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; Retail services in relation to chemical flavorings in liquid form used to refill electronic cigarette cartridges; Wholesale services in relation to tobacco products; Wholesale services in relation to tobacco; Wholesale services in relation to electronic cigarettes; Wholesale services in relation to electronic cigarette liquid [e-liquid] comprised of flavorings in liquid form used to refill electronic cigarette cartridges; Wholesale services in relation to cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; Wholesale services in relation to chemical flavorings in liquid form used to refill electronic cigarette cartridges; Retail services in relation to the following goods: Oral nicotine pouches; Retail services in relation to the following goods: Oral energy pouches; Retail services in relation to the following goods: Oral pouches containing taurine; Retail services in relation to the following goods: Oral pouches containing caffeine; Retailing of the following goods: oral pouches containing vitamins; wholesale services for: Oral nicotine pouches; wholesale services for: Oral energy pouches; wholesale services for: Oral pouches containing taurine; wholesale services for: Oral pouches containing caffeine; wholesale services for: Oral pouches containing vitamins.

Costs

57. Despite the fact that only some of the goods and services were opposed, I consider that the applicant has achieved a greater measure of success and therefore, is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023 which governs costs in proceedings issued after 1 February 2023. In the circumstances, I award the applicant the sum of £1200.00 as a contribution towards the costs of proceedings. The sum is calculated as follows:

Considering notice of opposition and preparing a counterstatement:	£250.00
Considering evidence of the opponent and commenting on the same	£600.00
Preparing written submissions	£350.00
TOTAL	**£1200.00**

58. I therefore order Intercontinental Great Brands LLC to pay LUNA CORPORATE SPÓŁKA Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ the sum of £1200.00. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 13th day of January 2026

LA Bailey

For the Registrar

Annex 1

Class 5 Nicotine sachets for use as a smoking cessation aid; Food supplements; Dietetic beverages adapted for medical purposes; Dietary supplemental drinks; Food supplements; Nutritional supplements; Vitamin supplements; Vitamin and mineral supplements; Liquid vitamin supplements; Nicotine gum for use as an aid to stop smoking; Mineral dietary supplements; Mineral dietary supplements for humans; Mineral nutritional supplements; Powdered fruit-flavored dietary supplement drink mix; Dietary supplement drink mixes; Powdered nutritional supplement drink mix; Multi-vitamin preparations; Effervescent vitamin tablets; Dietary supplemental drinks; Vitamin drinks; Dietary and nutritional preparations; Food supplements; Albumin dietary supplements; Anti-oxidant food supplements; Nutritional supplements; Glucose dietary supplements; Protein dietary supplements; Dietary supplements for human beings; Food supplements in liquid form; Food supplements for sportsmen; Food supplements; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Fitness and endurance supplements; Dietary supplements consisting of vitamins; Dietary supplements for humans not for medical purposes; Oral pouches containing taurine; Oral pouches containing caffeine; Oral pouches containing vitamins.

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alcoholic drinks enriched with vitamins and mineral salts; Sports drinks containing electrolytes; Energy drinks; Energy drinks [not for medical purposes]; Energy drinks containing caffeine; Functional water-based beverages; Powders for effervescing beverages; Isotonic beverages; Isotonic beverages [not for medical purposes]; Fruit-based beverages; Smoothies; Soft drinks; Fruit drinks; Fruit juice beverages; Non-alcoholic fruit juice beverages; Fruit squashes; Beverages consisting of a blend of fruit and vegetable juices; Protein-enriched sports beverages; Syrups for beverages; Carbohydrate drinks; Nutritionally fortified beverages; Beverages consisting principally of fruit juices; Beverages containing vitamins; Non-carbonated soft drinks; Preparations for making non-alcoholic beverages; Dilutable preparations for making beverages; Powders for the preparation of beverages; Powders used in the preparation of fruit-based beverages; Concentrated fruit juice; Cordials; Powders for making soft drinks.

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Oral pouches containing caffeine; wholesale services for: Oral pouches containing vitamins.