O/0101/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004056116

IN THE NAME OF

KANTHOS LIMITED

TO REGISTER THE FOLLOWING TRADE MARK:

IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP000449474

BY HAVEA GROUP

Background and pleadings

1. On 25 May 2024, Kanthos Limited ("***the Applicant***") applied to register the trade mark shown on the cover page of this decision in the UK. The application was accepted and published in the Trade Marks Journal on 07 June 2024 in respect of the following goods:

   Class 5: Food supplements.

2. On 04 September 2024, HAVEA GROUP ("***the Opponent***") opposed the application under section 5(2)(b) of the Trade Marks Act 1994 ("***the Act***"). The opposition is directed against all the goods in the application. The Opponent relies upon the following three marks ("***the Earlier Marks***"):

   VITAVEA

   UK Registration no. UK00918194025 ("***the first earlier mark***")

   Filing date: 10 February 2020

   Date of registration: 13 June 2020

   Relying upon the following goods and services:

   Class 5: Pharmaceutical preparations not for use in the dental field; Pharmaceutical preparations for medical use not for use in the dental field; Sanitary preparations for medical purposes; Dietetic foods adapted for medical purposes; Dietetic substances adapted for medical use; Food for babies; Dietetic preparations adapted for medical use; Dietary supplements for humans; Dietetic beverages adapted for medical purposes; Nutritional supplements for medical purposes; Vitamin preparations; Herbal teas for medicinal purposes; Medicinal tea; Medicinal infusions; Preparations of trace elements for human use; Prepared food supplements for human consumption adapted for medical purposes; Nutritional supplements; Dietary beverages for medical purposes in the form of liquids, powders, capsules, pills, tablets, coated tablets, gel capsules or sachets; Medicinal herb infusions; Dietetic infusions for medical use; Tea made from medicinal plants;

Slimming tea for medical purposes; Tisanes [medicated beverages]; Medicinal herbs; Extracts of medicinal herbs; Decoctions of medicinal herb; Herbal supplements; Medicinal herbs in dried or preserved form; Herbal compounds for medical use; Medicinal drinks; Dietary supplemental drinks; Herbal beverages for medicinal use; beverages with vitamins for medical use; Dietary supplement drink mixes; Infusions for medical purposes and tea preparations for medical purposes containing fruit and/or plant extracts for medical purposes, and/or flavoured and/or enriched with vitamins and/or in instant form and/or enriched with minerals; Medicinal tea and medicinal herbs for making infusions; Dietary supplements and dietetic food preparations in liquid, powder, capsule, pill, tablet, dragee, gel capsule or sachet form; Fortifying agents, tonics, stimulants, snacks in the form of protein-rich dietetic food adapted for medical use; Powdered milk for babies; Formula milk; Milk for babies; Lacteal flour for babies; Antiseptics, Serums, Eosin (disinfectant), Liniments; Pharmaceuticals for the prevention of stretch marks; Medical preparations for nasal sprays; arnica gel; Pharmaceutical preparations for skin care; Prebiotic supplements; Chicory-based dietary supplements for maintaining flora; Probiotic preparations for medical use for maintaining the natural equilibrium of skin flora; Babies' creams [medicated]; Dietary supplements with cosmetic effects; Dietary supplements for infants, babies and children; Diapers.

Class 35: Retailing or wholesaling of dietary supplements, nutritional supplements, food for babies, […] dietetic food and substances adapted for medical use; Electronic commerce (e-commerce), namely providing of commercial information to consumers relating to food supplements, dietary supplements, food for babies, pharmaceuticals, sanitary goods, foodstuffs and dietetic substances adapted for medical use, infusions and teas via telecommunications networks for advertising and/or sales purposes in the context of electronic commerce (e-commerce); Import-export of dietary supplements, nutritional supplements [...]; Import-export of dietary supplements, nutritional supplements.

UK Registration no. UK00918194696 ("***the second earlier mark***")

Filing date: 10 February 2020

Date of registration: 18 June 2020

Relying upon the following goods and services:

Class 5: Pharmaceutical preparations not for use in the dental field; Pharmaceutical preparations for medical use not for use in the dental field; Sanitary preparations for medical purposes; Dietetic foods adapted for medical use; Dietetic substances adapted for medical use; Baby food; Dietetic preparations adapted for medical use; Dietary supplements for humans; Dietetic beverages adapted for medical purposes; Nutritional supplements for medical purposes; Vitamin preparations; Herbal teas for medicinal purposes; Medicinal tea; Medicinal infusions; Preparations of trace elements for human use; Prepared food supplements for human consumption adapted for medical purposes; Nutritional supplements; Dietary beverages for medical purposes in the form of liquids, powders, capsules, pills, tablets, coated tablets, gel capsules or sachets; Medicinal herb infusions; Dietetic infusions for medical use; Tea made from medicinal plants; Slimming tea for medical purposes; Tisanes [medicated beverages]; Medicinal herbs; Extracts of medicinal herbs; Decoctions of medicinal herb; Herbal supplements; Medicinal herbs in dried or preserved form; Herbal compounds for medical use; Beverages adapted for medicinal purposes; Dietary supplemental drinks; Herbal beverages for medicinal use; beverages with vitamins for medical use; Dietary supplement drink mixes; Infusions for medical purposes and tea preparations for medical purposes containing fruit and/or plant extracts for medical purposes, and/or flavoured and/or enriched with vitamins and/or in instant form and/or enriched with minerals; Medicinal tea and medicinal herbs for making infusions; Dietary supplements and dietetic food preparations in liquid, powder, capsule, pill, tablet, dragee, gel capsule or sachet form; Fortifying agents, tonics, stimulants, snacks in the form of protein-rich dietetic food adapted for medical use; Powdered milk for babies; Formula milk; Milk for babies; Lacteal flour for babies; Antiseptics, Serums, Eosin (disinfectant), Liniments; Pharmaceuticals for the prevention of stretch marks; Medical preparations for nasal sprays; arnica gel;

Pharmaceutical preparations for skin care; Prebiotic supplements; Chicory-based dietary supplements for maintaining flora; Probiotic preparations for medical use for maintaining the natural equilibrium of skin flora; Babies' creams [medicated]; Dietary supplements with cosmetic effects; Dietary supplements for infants, babies and children; Diapers.

Class 35: Retailing or wholesaling of dietary supplements, nutritional supplements, food for babies, […] dietetic food and substances adapted for medical use; Electronic commerce (e-commerce), namely providing of commercial information to consumers relating to food supplements, dietary supplements, food for babies, pharmaceuticals, sanitary goods, foodstuffs and dietetic substances adapted for medical use, infusions and teas via telecommunications networks for advertising and/or sales purposes in the context of electronic commerce (e-commerce); Import-export of dietary supplements, nutritional supplements, food for babies, and pharmaceuticals.

VITAVEA BIEN-ÊTRE

UK Registration no. UK00004029029 ("***the third earlier mark***")

Filing date: 21 March 2024

Date of registration: 16 June 2024

Relying upon the following goods:

Class 5: Pharmaceutical preparations not for use in the dental field; Pharmaceutical preparations for medical use not for use in the dental field; Sanitary preparations for medical purposes; Dietetic foods adapted for medical purposes; Dietetic substances adapted for medical use; Food for babies; Dietetic preparations adapted for medical use; Dietary supplements for humans; Dietetic beverages adapted for medical purposes; Nutritional supplements for medical purposes; Vitamin preparations; Herbal teas for medicinal purposes; Medicinal tea; Medicinal infusions; Preparations of trace elements for human use; Prepared food supplements for human consumption adapted for medical purposes; Nutritional

supplements; Dietary beverages for medical purposes in the form of liquids, powders, capsules, pills, tablets, coated tablets, gel capsules or sachets; Medicinal herb infusions; Dietetic infusions for medical use; Tea made from medicinal plants; Slimming tea for medical purposes; Tisanes [medicated beverages]; Medicinal herbs; Extracts of medicinal herbs; Decoctions of medicinal herb; Herbal supplements; Medicinal herbs in dried or preserved form; Herbal compounds for medical use; Medicinal drinks; Dietary supplemental drinks; Herbal beverages for medicinal use; beverages with vitamins for medical use; Dietary supplement drink mixes; Infusions for medical purposes and tea preparations for medical purposes containing fruit and/or plant extracts for medical purposes, and/or flavoured and/or enriched with vitamins and/or in instant form and/or enriched with minerals; Medicinal tea and medicinal herbs for making infusions; Dietary supplements and dietetic food preparations in liquid, powder, capsule, pill, tablet, dragee, gel capsule or sachet form; Fortifying agents, tonics, stimulants, snacks in the form of protein-rich dietetic food adapted for medical use; Antiseptics, Serums, Eosin (disinfectant), Liniments; Pharmaceuticals for the prevention of stretch marks; Medical preparations for nasal sprays; arnica gel; Pharmaceutical preparations for skin care; Prebiotic supplements; Chicory-based dietary supplements for maintaining flora; Probiotic preparations for medical use for maintaining the natural equilibrium of skin flora; Babies' creams [medicated]; Dietary supplements with cosmetic effects; Dietary supplements for infants, babies and children; Diapers.

3. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Registration designating the EU. As a result, the Opponent's first and second earlier marks were converted into comparable UK trade marks. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.[1]

4. By virtue of their earlier filing dates, the above registrations constitute earlier marks within the meaning of section 6 of the Act. As the earlier marks had not

[1] See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

completed their registration process more than five years before the filing date of the application in issue, they are not subject to the use provisions contained in section 6A of the Act. The Opponent can, therefore, rely upon all of the goods and services it has identified without having to demonstrate use.

5. The Opponent, in its statement of grounds, submits that the respective marks are similar in that they share the same element "VITAV" and the goods and services are identical or similar leading to a likelihood of confusion. For this reason the Opponent requests that the application be refused in its entirety and that a cost award be made in its favour.

6. The Applicant filed a counterstatement within which it denied the claims made by the Opponent.

7. The Applicant is not professionally represented; the Opponent is represented by Page, White & Farrer Limited.

Relevance of EU law

8. 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 and submissions

9. The Opponent filed evidence in the form of a witness statement of James Philip Cornish, UK trade mark attorney and director of Page, White & Farrer Limited (the Opponent's representative), signed and dated 18 February 2025. The witness statement is accompanied by exhibits JPC1 – JPC6.

10. The Applicant filed evidence in the form of the witness statement of Abdulrahman Alsawadi, co-founder and director of Kanthos Limited, signed and dated 15 April 2025. The witness statement is accompanied by exhibits AA1 – AA5.4.

11. The Opponent filed evidence in reply, in the form of the witness statement of Fanny Nédélec, in house lawyer for Havea Group, signed and dated 23 June 2025. The witness statement is accompanied by exhibits FN1 – FN12.

12. Neither party requested a hearing, however, both parties filed submissions in lieu. I will not summarise the evidence and submissions here, but I will refer to them as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

Approach

13. The Opponent relied upon three earlier registrations in the notice of opposition (as set out above in this decision). I find the first earlier mark represents the Opponent's strongest case as it consists of the word-only "VITAVEA" with no additional matter and the specification is essentially identical or covers the same specification as the other two earlier rights. The second earlier mark consists of the stylised word "Vitavea" with a stylisation of the mark's first "V". Thus, the second earlier mark's stylisation introduces an obvious further point of difference (at least visually) in respect of the Contested Mark. The third earlier mark "VITAVEA BIEN-ÊTRE", although it features the word "VITAVEA", it contains the additional word combination "BIEN-ÊTRE" that offers a further point of difference (at least visually and aurally) from the Contested Mark. I do not consider that assessing either the second earlier mark or the third earlier mark would improve the Opponent's position. I will return to consider the position in respect of the remaining earlier marks should I consider it necessary to do so.

Preliminary matters

State of the Register argument

14. The Applicant, in its counterstatement, submits that the word "VITA" and "VITAV" found in the Earlier Marks have a weak distinctive character.[2] This is on the basis that there are many "VITA" and "VITAV" marks on the register. The Applicant has provided evidence resulting from a search carried out on the UKIPO register

[2] Applicant's counterstatement dated 16 December 2024, at [4].

database, showing that there are over 1,000 trade marks consisting of (or including) the word "VITA" as well as including "VITAV" (in combination with other letters) in relation to class 5 goods. For the reasons that I will now explain, these search results do little to assist the Applicant.

15. I note that in the case of *Zero Industry Srl v OHIM*, Case T-400/06, the General Court ("GC") stated that:

> "73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '… there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy Case T-135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR II 4865, paragraph 68, and Case T-29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II 5309, paragraph 71)."

16. The fact that there are a number of trade marks that consist of or contain the word "VITA" (or a variation of it, such as "VITAV" along with additional letters) with class 5 protection does not provide much assistance in relation to the distinctiveness of the Opponent's marks. The Applicant has filed no evidence to demonstrate that any of these marks are actually in use in the marketplace and this evidence does little, therefore, to assist the Applicant. The assessment that I must undertake is based on the perception of the average consumer. The outcome of this opposition will be determined after making a global assessment whilst taking into account all relevant factors and the state of the register offers little to that assessment.

Applicant argues they market the goods differently from the other party

17. Mr Alsawadi, in his witness statement, argues that while both parties market food supplements under class 5, the respective goods are not identical and there is not

a likelihood of confusion in that the respective goods are marketed differently. Mr Alsawadi reports that the competing parties (and their respective goods) differ in their branding, product formulation, range, packaging, sales channels, and transparency in communication with the result that the respective parties occupy different positions in the marketplace, making consumer confusion highly improbable.[3] The Applicant restates and expands on this argument also in its submissions in lieu.[4]

18. In this regard, I am required to make the assessment of the likelihood of confusion notionally and objectively based on the Opponent's goods and services, as registered, and the Applicants' goods, as applied for, in accordance with the relevant case law. That assessment requires that I must not take into account the actual way that either party has used their marks in the marketplace or the kinds of goods or services that those marks have been used in relation to thus far. Rather, I must consider all of the circumstances in which the mark applied for might be used if it were registered. This is because trade mark registrations are items of property which may be sold by the Applicant and/or Opponent to third parties in the future and may therefore be used in a different way, or upon/in relation to different goods and/or services, than those used by the current proprietors of those marks. In this connection, in *Devinlec Développement Innovation Leclerc SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-171/06P, the Court of Justice of the European Union ("CJEU") stated:

> "59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks."

[3] Abdulrahman Alsawadi's witness statement dated 15 April 2025, at [12] – [19].
[4] Applicant's submissions in lieu dated 12 August 2025, at [10] – [28].

19. I also note that the Opponent, in the person of Fanny Nedelec, in her witness statement, provides a detailed comment of Mr Alsawadi's submission concerning the above matter.[5]

20. Following from the above considerations, it is not appropriate for me to take the factors outlined by Mr Alsawadi and Ms Nedelec into account in my assessment. However, I will make an assessment, later in this decision, as to the degree of similarity (if any) of the respective goods/services as well as to who the average consumer could be for the goods and services at issue.

Previous EUIPO decision cited and its applicability

25. The Applicant, first in Abdulrahman Alsawadi's witness statement and subsequently in various other parts of its submissions, refers me to an EUIPO decision (decision number B3203756) as the basis for its arguments. Firstly, at paragraph [8] above I observed that EU-assimilated case law predating IP completion day (i.e., 31 December 2020) remains applicable in the UK. However, the decision cited by the Applicant is dated 6 November 2024 and concerns an opposition filed before the EUIPO on 22 September 2023, that is, after IP completion day. Secondly, while I note the contents and findings of such decision, it suffices to say that I am not bound by previous decisions of the EUIPO and/or this Tribunal and I must draw my own conclusions on the similarity of the goods and services as well as the marks before me, as rationalised in the following paragraphs.

The size of the Applicant's business

26. The Applicant points out that the Opponent incorrectly referred to the fact that the Applicant is a recently incorporated business. The Applicant argues that this argument should not be considered in assessing the likelihood of confusion (or lack thereof) between the marks at hand.[6] I agree with the Applicant. As mentioned above in this decision, I am called to carry out a notional and objective assessment of the degree of similarity (or lack thereof) between the respective marks and their

[5] Fanny Nedelec's witness statement dated 23 June 2025, at [4] – [13].
[6] Applicant's submissions in lieu at [4] – [9].

goods and/or services and whether the Applicant's business is recently incorporated is not an element I am called to take into consideration for the proceedings at hand.

Decision

Section 5(2)

21. The opposition is based upon section 5(2)(b) of the Act, which reads as follows:

> "5(2) A trade mark shall not be registered if because -
>
> (a) […]
>
> (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".

22. The following principles are gleaned from the decisions of the EU courts 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 C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.

(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

23. 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."

24. 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.

25. In *YouView Ltd v Total* Ltd [2012] EWHC 3158 (Ch) at [12] Floyd J stated:

> "[...] 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."

26. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

27. The full specification relied upon by the Opponent's first earlier mark is set out in paragraph [2] above. I have identified only those goods that I consider represent the Opponent's best case in the table below. With that in mind, the goods to be compared are shown in the table below:

Opponent's goods	**Applicant's goods**
Class 5: Dietary supplements for humans.	Class 5: Food supplements.

Class 5

"*Food supplements*"

25. As a preliminary point, I note that both parties filed extensive submissions and evidence concerning the similarity (or lack thereof) between the goods at hand. I also note that much of the submissions and evidence concerns marketing considerations and, thus, as already explained above at paragraphs [17] – [19],

such considerations are irrelevant for my assessment. While I have noted the parties' submissions and evidence, as there is no proof of use element to this matter, I must make a notional evaluation of the goods as they are registered/applied for. The Opponent's specification features the term "*Dietary supplements for humans*" in class 5. Mr Cornish, in his witness statement, provides definitions of "food supplement" and "dietary supplement" to show that these terms have essentially the same meaning and that can be used interchangeably.[7] I also note that Mr Alsawadi states that "*both brands offer food supplements under Class 5*"[8] albeit he then goes on arguing that the respective goods have different nature and do not share the same trade channels on the basis of market-related arguments I already addressed at paragraphs [17] – [19].

26. According to the general definition (and my understanding) of dietary and food supplements, they are both substances one takes to make up for a deficiency in one's diet. Therefore, I agree with the Opponent that dietary and food supplements are essentially synonyms. It follows that the Applicant's "*Food supplements*" and the Opponent's "*Dietary supplements for humans*", although worded differently, are identical.

27. In the eventuality I am mistaken, I find the respective goods to be highly similar. Accordingly, these goods share the same nature (additional supplements to one's diet to support with specific nutritional needs), intended purpose (aimed at supporting with specific nutritional needs) and method of use (generally both dietary/nutritional supplements come in pills, tablets or powders for oral consumption). The respective goods also share the same providers (e.g., supermarkets, pharmacies, or specialised health food shops such as, for example, 'Boots' or 'Holland & Barrett') and address the same end users (consumers who are looking to improve their health and wellbeing). I also find that the goods overlap in their channels of trade and that they are in competition with each other.

28. I note the Applicant provided a "backup specification" for its class 5 goods as indicated below:

[7] Mr Cornish's witness statement dated 18 February 2025, at [3].
[8] Mr Alsawadi's witness statement at [12].

Class 5 Vitamin supplements, Probiotic supplements, Herbal supplements, Anti-oxidant supplements, Prebiotic supplements, Food supplements, Mineral dietary supplements, Dietary and nutritional supplements, Vitamin and mineral supplements

29. The Applicant's original specification comprises "*Food supplements*" in class 5. I observe that the fall-back specification does not limit the original specification. This is because, first, the fall-back specification includes the term "food supplements" identically to the original specification; and, second, all other terms in the fall-back specification are types of food supplements and therefore fall within the broader category of "*Food supplements*". Accordingly, they are identical (or highly similar) to the Opponent's "*Dietary supplements for humans*", as explained above at paragraphs [**Error! Reference source not found.**] – [27].

30. I acknowledge the Applicant's submission that it intends to market its food supplements in "capsule form" and does not intend to produce or market gummies, liquid supplements, tablets, or other alternative delivery formats.[9] I note, however, that limiting the goods by reference to the form in which they are marketed (i.e., capsules) is an unacceptable restriction, as it concerns a characteristic of the goods rather than a distinct subcategory or category and does not alter their inherent nature/function (i.e., food supplement).[10] Accordingly, I must undertake a notional and objective assessment of the contested goods, as already indicated at paragraph [18] of this decision. In any event, even if the Applicant's proposed mode of marketing were considered an acceptable limitation, the fall-back specification would still conflict with the Opponent's specification for the reasons set out in the preceding paragraph.

Average consumer and the purchasing act

28. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods for which I found identity (or similarity). I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc,*

[9] Applicant's submissions in lieu at [67].
[10] *Croom's Trade Mark Application* [2005] RPC 2 at [30].

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. 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 words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median".

29. The average consumer for the above goods will primarily be the general public. I find that the price of the goods will vary but they are unlikely to be particularly expensive.

30. The level of attention taken by the general consumer will be influenced by their own requirements and users are likely to consider the suitability of the goods for either a specific minor health concern or for general wellbeing. Although consumers who purchase the goods might be particularly attentive to their dietary needs and lifestyle, the goods are relatively low in price and frequently purchased, and the degree of attention is likely to be medium. However, there may be some circumstances when the goods are purchased for very particular dietary or nutritional requirements, and here the average consumer might pay a slightly higher level of attention to ensure that they are fit for that particular purpose.

31. There could also be a proportion of professional consumers who will purchase the goods to sell them in pharmacies, health stores and supermarkets. Professional consumers are likely to pay a higher level of attention when selecting the goods and along with the above considerations, such as suitability, they will be aware of their increased liability when passing or recommending these goods onto the end user, along with further considerations relating to the quality of the goods and the impact goods of a poor quality can have on the reputation of a business. Nonetheless even in the eventuality that the relevant public were professionals (businesses offering for sale nutritional/dietary supplements), the likelihood of

confusion must be assessed from the perspective of the former (the general public) since they are the group who will pay the lower degree of attention.[11]

32. The goods are likely to be obtained directly from the provider via websites or in specialised retail outlets. As such, it is my view that the purchasing process will be predominantly visual in nature. However, aural considerations in the form of word-of-mouth recommendations or verbal discussions with the provider, for instance, cannot be excluded entirely.

Comparison of the marks

25. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
VITAVEA ("*the first earlier mark*")	

Overall impression

25. The overall impression of the first earlier mark resides in the single word "VITAVEA" of which it is composed.

26. The Contested Mark consists of a dark-green stylized device resembling a human figure with upraised arms forming a V-shape and surrounded by a semicircular arrangement of six leaves represented in light green. Below the design the mark features the wording "VitaV" in the same dark green of the stylised human figure.

[11] Case T-356/14, [25] – [26].

27. Both the figurative and verbal elements are clearly visible in the mark. Since the eye is naturally drawn to the element that can be read,[12] the verbal element "VitaV" is the main distinctive element in the mark. The figurative device is also clearly visible in the mark and it contributes, in part, to the mark's overall impression although less than the verbal element "VitaV".

Visual similarity

25. The Applicant argues that the respective marks are visually distinct given their visual representations, especially regarding the Contested Mark's figurative device and the addition of "V" to the word "Vita-".[13] The Opponent, in the person of James Phillip Cornish, contends that the respective marks share the first five letters "VITAV" and they only differ in the additional "EA" in the Contested Mark placed at its end.[14]

26. The five letters forming the Contested Mark are wholly contained in the first earlier mark. The marks differ in the additional two letters "-EA" contained in the first earlier mark as well as in the stylised figurative device depicted in the Contested Mark which introduces a further visual difference. I bear in mind that consumers read from left to right and that the beginning of words tends to have more visual impact than their endings.[15] Taking into account the overall impression of the marks and their similarities and differences, I find there is a medium degree of visual similarity.

Aural similarity

27. The Opponent contends that the first earlier mark will be pronounced as "VI-TA-VEE" on the basis that "EA" can be pronounced "EE" (as in "tea" or "beat") and that, likewise, the last letter "V" in the Contested Mark will be pronounced with the same "vee" sound.[16] The Applicant, in the person of Mr Alsawadi, contends that the capital "V" at the end of "VitaV" and the addition of "vea" in the first earlier mark create a clear phonetic difference.[17] More specifically, Mr Alsawadi argues that the

[12] *Migros-Genossenschafts-Bund v EUIPO*, T-189/16, [52].
[13] Counterstatement dated 16 December 2024, at [2.1] and Mr Alsawadi's witness statement at [33.1].
[14] Mr Cornish's witness statement at [7].
[15] Joined Cases T-183/02 and T-184/02, *El Corte Ingles, SA v OHIM*.
[16] Ms Nedelec's witness statement at [24].
[17] Mr Alsawadi's witness statement at [33.1] and [34].

first earlier mark is pronounced “VIT-AV-E-YAH” with its ending “ea” sounding like the one in “Ikea” or “Nivea”.[18] Mr Alsawadi also provides dictionary extracts showing the phonetics of some words such as, for example, “idea”, “bear” or “diarrhoea” at support of its argument that the first earlier mark should be pronounced as “VIT-AV-E-YAH”.[19] To this regard, whilst I appreciate that the first earlier mark can be pronounced as “VIT-AV-E-YAH”, including as the Opponent communicates the mark in the relevant market, nonetheless, I find that another separate and relevant proportion of the relevant consumer, when confronted with the mark, will voice it as “VI-TA-VEE”. Furthermore, although I appreciate Mr Alsawadi’s submissions and evidence that the Opponent refers to the first earlier mark as “VIT-AV-E-YAH”, however, I must note that a significant proportion of the relevant consumer, when confronted with either the first earlier mark or the Contested Mark, is likely to be unaware of how the Opponent markets (and communicates) the first earlier mark and it will rely exclusively on their own way of reading (and pronouncing) the marks.

28. When perceiving a verbal sign, consumers may break it down into elements that suggest a concrete meaning, or that resemble words that they already know.[20] This may also be the case when a mark contains elements that would encourage such a split, such as irregular capitals. It is possible for the consumer to break down a word mark even if only one of the elements making up that mark is familiar to the consumer.[21] Therefore, I find that the relevant consumers will recognise the word “VITA” in both marks. Accordingly, as stated above, at least a significant proportion of the relevant consumers will articulate the first earlier mark as “vita-vee”. Consumers will voice the Contested Mark as “vita-vee”. Although I appreciate that the Contested Mark also contains a device resembling the letter “V”, given the overall representation of the device (i.e., resembling a human), I do not find that consumers will attempt to articulate the figurative device. Overall, I consider that the marks are aurally identical.

Conceptual similarity

[18] Idem at [40] and [44.1].
[19] Exhibit AA4.
[20] Case T-256/04, Respicur, at [57]; Case T-146/06, Aturion, at [58].
[21] Case T-585/10, *Penteo*, at [72]; Case T-356/02, *Vitakraft / krafft (fig.)*, at [51].

25. The Opponent argues that "*conceptually, the marks all have the elements VITA so they have similar connotations suggesting life to some people*".[22] Mr Cornish states that "VITA" is not an English dictionary word and states that the relevant consumers are not likely to know that "VITA" is the Latin words for "life". Nonetheless, Mr Cornish states that "*to the extent that VITA is perceived to mean life this creates the risk of confusion as both marks share the same VITA element […]*".[23]

26. The Applicant contends that "VitaV" has a different meaning from the first earlier mark. It is submitted that "Vita" is a descriptive term for "vitality", while the standalone capital "V" is a widely recognised cultural and historical symbol for "victory" and that such meaning is further reinforced by the "V" shape in the human figure".[24] Mr Alsawadi restates that "VITA" is "*widely recognised as meaning "life" […]*".[25] Mr Alsawadi also states that "'*VITA' is commonly associated with life, vitality, and vitamins*".[26]

27. Mr Cornish disagrees with the interpretation provided by the Applicant for the letter "V" in the Contested Mark. He states that the letter "V" has various meanings (for example, the Roman number 5) and that consumers will not understand the letter "V" in the Contested Mark as indicating "victory" and they will not assume that such letter has any particular meaning.[27]

28. From the parties' submissions and arguments, it seems that they share the view that the average consumer will read (and understand) the word "VITA", in the respective marks, as a reference to "life/vitality" or "vitamins", thereby discerning a common meaning for this word. I am of the view that the UK consumer is unlikely to know that "VITA" is the Latin-derived (or Italian) word for "life". However, I consider that at least a significant proportion of the relevant consumer will likely read and understand "VITA" in both marks as a shortening of the word "vitality" or "vitamins", both of which are highly allusive to either the ingredients of the supplement goods, or the effect/purpose of taking them (i.e. the supplements will give you energy or liveliness).

[22] Statement of grounds dated 4 September 2024, at [3].
[23] Mr Cornish's witness statement at [6].
[24] Counterstatement at [2.3] and Mr Alsawadi's witness statement at [51].
[25] Mr Alsawadi's witness statement at [23].
[26] Idem at [31].
[27] Mr Cornish's witness statement at [8].

29. With regard to the letter "V" in the Contested Mark, I agree with the Opponent that the relevant consumers will not understand it as "victory" and they will not attach any meaning to this letter (beyond it consisting of a recognised letter of the alphabet).

30. Although the words "VITAVEA" and "VitaV" in their totality are neologisms, in my view, the conceptual commonality created by "VITA-" will result in some conceptual similarity.[28] Overall, I find the marks have a medium degree of conceptual similarity.

Distinctive character of the earlier trade mark

31. 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 *Windsurfing Chiemsee* 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)."

[28] See *Usinor SA v OHIM,* Case T-189/05; *Mundipharma v OHMI - Altana Pharma (RESPICUR)*, Case T-256/04.

32. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods and services, to those with high inherent distinctive character, such as invented words.

33. Although the distinctiveness of a mark may be enhanced as a result of it having been used in the market, the Opponent has filed no evidence of use of its mark. Accordingly, I have only the inherent position to consider.

34. The Applicant contends that "VITA" is generic as it is widely used in relation to dietetic and food supplements as well as being descriptive of such goods' nature and/or purpose being typically associated with concepts of life, vitality, and well-being.[29]

35. Ms Nedelec states that the Opponent is not seeking a monopoly in the word "VITA" (neither as a prefix nor as a word by itself).[30] The Opponent also states that the combination of the five letters "VITAV-" forming part of the mark is distinctive and unusual.[31]

36. I note the parties' submissions and I note that the first earlier mark's distinctive character should not be assessed merely with regard to the word "VITA", but, rather, as the word combination "VITAVEA" forming the mark as a whole. As delineated above in this decision, the "Vita-" component may allude to the goods at issue (i.e., vitamins) or the goods' intended purpose (i.e., vitality), but the totality of the word "VITAVEA" shows a measure of inventiveness. Therefore, I recognise that "VITAVEA", as a whole, forms a neologism, but I cannot ignore that the mark includes an allusive element. Thus, overall, I find that the first earlier mark is inherently distinctive to a medium degree.

Likelihood of confusion

33. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average

[29] Applicant's counterstatement at [3] first and second bullet points.
[30] Ms Nedelec's witness statement at [14].
[31] Opponent's submissions in lieu dated 18 August 2025, at page 4 first paragraph.

consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

34. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other (*L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10).

35. The Applicant contends that the shared element "VITA" between the marks is not sufficiently distinctive to cause confusion among consumers[32] and that the clear differences between the marks created by the additional (verbal and/or figurative) elements in both marks remove any likelihood of confusion.[33] The Applicant also directs me to a previous decision from this Tribunal (BL O/458/20) where it was stated that trade marks are assessed as a whole, rather than focusing on a single element, and even when marks share some elements, clear distinctions in dominant components prevent confusion.[34] Regarding this latter submission, I remind myself that I am not bound by previous decision of this Tribunal. In any case, although I appreciate that the principle expressed in the prior decision from the Tribunal is a general one that I must consider also for my assessment, the decision cited to me concerned two very different marks from the ones under consideration. Therefore, I do not believe this decision is relevant to my assessment.

36. The Opponent argues that there is a risk of direct confusion between the marks as well as a risk of indirect confusion in that even if the consumers will notice the differences between the marks (i.e., the stylised device and the letter "V" in the Contested Mark), they would still believe the marks are economically linked.[35]

37. I have found the respective goods to be identical or, alternatively, highly similar. The level of attention is either medium or above medium for the general public. Part of the relevant public for the goods at issue could be professionals who would

[32] Mr Alsawadi's witness statement at [24].
[33] Idem at [36].
[34] Idem at [32].
[35] Opponent's submissions in lieu at page 8.

pay a higher level of attention, but another part of the relevant public will be members of the general public who will demonstrate a medium degree of attention. I will assess the likelihood of confusion from the perspective of the general public that pays a medium degree of attention since they are the group who will pay the lower degree of attention. The distinctiveness of the first earlier mark is medium. The visual and conceptual similarity is medium; the competing marks are aurally identical. The purchase of the contested goods is considered to be mainly visual but the potential for aural use is borne in mind.

38. With regard to the figurative device, the Applicant argues that "*the opposition is concerned with the alleged similarity between VitaV and Vitavea […]. The fact that many health and wellness brands use common visual elements (e.g. human figures, leaves, green colour schemes) does not establish confusion between VitaV and Vitavea. If anything, the prevalence of such elements in Class 5 branding demonstrates that consumers are accustomed to seeing them and can easily differentiate between distinct brands despite shared visual themes. Trade mark law does not grant exclusive rights over commonly used design features*".[36] The Opponent submits that the Applicant seems to indicate that the figurative device contained in Contested Mark is commonplace since human figures, leaves and green colour schemes are common visual elements for health and wellness brands.[37] I appreciate that albeit the figurative device in the Contested Mark is fairly stylised, especially in regard to the representation of the human figure raising its arms, I also note that green leaves and a green palette is quite common among brands to communicate health and well-being. I will bear this in mind in my assessment.

39. Taking all the above into account, and bearing in mind that the marks consist of invented words which evoke the notion of nutrition, nutrients, vitality, or vitamins, and that they overlap in the sequence "VITAV-", which comprises the entirety of the verbal element of the Contested Mark; that the goods are identical (or highly similar) and are commonly purchased items for which consumers will display a medium level of attention at the time of purchase; and further considering that the device element in the Contested Mark is rather commonplace and assumes a less

[36] Mr Alsawadi's witness statement at [57] and [58].
[37] Opponent's submissions in lieu at page 4.

prominent role, one that may easily be overlooked due to the principle of imperfect recollection, particularly given the general rule in trade mark law that "words speak louder than devices".

40. Given that the average consumer seldom has the opportunity to compare marks side by side and will instead encounter them in different contexts and at different times, and bearing in mind the interdependency principle, I consider that a likelihood of direct confusion arises. I reach this conclusion particularly because the marks coincide almost entirely in their verbal elements and differ only in the final two letters of the first earlier mark and in the device element of the Contested Mark, as well as because the marks will be pronounced identically by a significant proportion of consumers. Although I appreciate that the purchasing process will be primarily visual, the marks' aural identity will become especially decisive where aural considerations assume greater significance. Furthermore, I note that the relevant consumers, once having read the first earlier mark as "vita-v", they will retain in their minds that letter combination deriving from their pronunciation of the mark (i.e., "vita-v"). This fact further contributes to a finding of direct confusion since consumers will misremember the first earlier mark as "vita-v" and confuse it with the Contested Mark. Therefore, I find a likelihood of direct confusion.

37. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis QC, (as he then was) sitting 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)."

38. 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. I recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.[38]

39. Furthermore, in *Liverpool Gin*,[39] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis"

[38] *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17
[39] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

40. Even if the average consumer recalls that one mark contains a device element and the other not, I still consider that the marks would be indirectly confused for identical goods, with "VITAVEA" and "VitaV" imperfectly recalled as each other given their overlap in "VITAV-", the structure of the letters, the conceptual similarity and the aural identity will aid the average consumer to perceive the marks as coming from the same or related undertaking and with the difference in the device element put down to the use of a brand variant.

Conclusion

41. The opposition under section 5(2)(b) succeeds in full and the application, subject to any appeal, will be refused for all goods.

Costs

42. The Opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Annex A to the Tribunal Practice Notice (TPN) 1/2023. Bearing that scale in mind I award costs to the Opponent as follows:

Official fee	£100
Preparing a statement of grounds and considering the other side's statement	£250
Preparing evidence and considering and commenting on the other side's evidence	£600
Preparing submissions-in-lieu	£350
Total	**£1,300**

43. I therefore order Kanthos Limited to pay HAVEA GROUP the sum of **£1,300**. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the final determination of the appeal proceedings.

Dated this 6th day of February 2026

Andrea Rossi
For the Registrar