

O/0432/25

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3922640  
IN THE NAME OF CARDOWAN CREAMERIES LIMITED  
TO REGISTER THE FOLLOWING TRADE MARK:**



**IN CLASSES 5, 29, AND 30**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 443359  
BY OLIMP LABORATORIES SP. Z O.O.**

## Background and pleadings

1. CARDOWAN CREAMERIES LIMITED (“the applicant”) applied to register the trade mark shown on the cover page of this decision (“the applicant’s mark”) in the UK on 14 June 2023, under number 3922640. It was accepted and published in the Trade Marks Journal on 30 June 2023 in respect of the following goods:

*Class 5: Pharmaceuticals, medical and veterinary preparations; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; dietary and nutritional supplements; mineral dietary and nutritional supplements; nutritional supplement meal replacements for boosting energy; dietary food supplements; dietary supplement drinks; nondairy milk for pharmaceutical purposes; protein supplements; protein dietary supplements; protein powder dietary supplements; soy protein dietary supplements.*

*Class 29: Eggs; milk and milk products; oils and fats for food; dairy products; dairy spreads; dairy-based spreads; low fat dairy spreads; butter; butter preparations; butter substitutes; concentrated butter; blended butter; savoury butters; seed butters; butter made from nuts; cocoa butter; powdered nut butters; margarine; margarine substitutes; edible fat-based spreads for bread; cream; sour cream; cream powder; artificial cream (dairy product substitutes); cream alternatives and substitutes; non-dairy milk and cream; edible oils and fats; cooking oils; nut oils; vegetable oils for food; coconut oil and fat for food; flavoured oils; olive oils; spiced oils; butter oil; blended oils for food; hydrogenated oils for food; hardened oils; clarified butter; butter for use in cooking; ghee; dips; dairy-based dips; meat substitutes; preserved, frozen, dried and cooked fruits and vegetables; vegetable and plant- based meat substitutes; vegetable spreads; vegetable-based spreads; vegetable- based snack foods; cheese spreads; cheese-based snack foods; nut paste spreads; nut-based spreads; spreads consisting mainly of fruits; fruit-based snack food; fruit snacks; dairy-based beverages; drinks made from dairy products; protein milk; cream, being dairy products; non-dairy creamer; dairy whiteners for beverages; milk powder for nutritional purposes; dairy-based whipped topping; dairy puddings and desserts; yoghurt; yoghurts; yoghurt beverages and drinks;*

*yoghurt-based beverages and drinks; drinking yoghurt; yoghurt dessert; soya yoghurt; flavoured yoghurt; custard-style yoghurts; low fat yoghurt; preparations for making yoghurt; yoghurt made with goats milk; milk products; butter milk; butter cream; milk; milkshakes; sour milk; milk curds; flavoured milks; milk solids; dried milk; milk powder; soya milk; milk beverages and drinks; milk based beverages and drinks; flavoured milk beverages and drinks; milk beverages, milk predominating; rice milk; sheep milk; goat milk; cows' milk; fermented milk; evaporated milk; oat milk; milk substitutes; milk based snacks; artificial milk based desserts.*

*Class 30: Coffee, tea, cocoa and artificial coffee; cappuccino; chocolate-based beverages; cocoa-based beverages; coffee-based beverages; bread, pastries and confectionery; pastries, cakes, tarts and biscuits (cookies); flour and preparations made from cereals; porridge; dessert soufflés; mousses; prepared desserts [confectionery]; dessert mousses [confectionery]; puddings; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar; spices; fruit sauces; sauces; flavourings, other than essential oils for foodstuffs, except etheric essences and essential oils; preparations for stiffening whipped cream; thickening agents for cooking foodstuffs; edible ices; sherbets [ices]; ice cream; binding agents for ice cream; powders for ice cream; frozen yoghurt [confectionery ices]; frozen yogurt cakes; ice milk bars; fruit ice bars; frozen confectionery containing ice cream; frozen dairy confections; ice beverages with a chocolate base; ice beverages with a coffee base; ice beverages with a cocoa base; cheese curls [snacks]; cheese-flavoured biscuits.*

2. OLIMP LABORATORIES Sp. z o.o. (“the opponent”) partially opposes the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This opposition is directed against all the goods of the application, save for “salt”, “mustard”, “vinegar”, “spices” and “flavourings, other than essential oils for foodstuffs, except etheric essences and essential oils” in class 30.<sup>1</sup> This is on the basis of its UK trade mark number 3950496, **MATRIX** (“the opponent’s mark”). The opponent’s mark was filed on 28 August 2023 and became registered on 24 November 2023. It claims a priority date of 4 May 2023 based on its EU trade mark registration number 18870416.

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<sup>1</sup> The opposition was originally directed at the whole specification as applied for, but withdrawn against these goods in class 30 in the opponent’s written submissions dated 15 April 2024.

It stands registered for the following goods, all of which are relied upon by the opponent:

Class 5: *Nutritional supplement food bars; Nutritional supplement meal replacement bars for boosting energy; Diet supplements; Vitamin and mineral preparations; Dietetic foods adapted for medical use; Food supplements; Nutritional drink mix for use as a meal replacement.*

Class 29: *Milk products; Whey; Milk beverages, milk predominating; Fruit- and nut-based snack bars; Nut and seed-based snack bars; Fruit-based snack food; Nut-based snack foods; Milk-based snacks; Butter made of nuts; Coconut butter; Almond butter; Nut-based spreads; Vegetable-based snack foods; Meat-based snack foods; Omelets; Soup powders; Prepared vegetable dishes; Prepared meat dishes; Jellies, jams, compotes, fruit and vegetable spreads; Fruit jelly spreads; Jellies for food, other than confectionery; Collagen-based snack food bars; Gelatine; Edible oils and fats.*

Class 30: *Sweetmeats [candy]; Candy bars; Chocolate bars; Cereal bars and energy bars; High-protein cereal bars; Cereal-based meal replacement bars; Chocolate-based meal replacement bars; Protein bars; Non-medicated candy; Chocolate; Chocolates; Chocolate based products; Chocolate creams; Pancake mixes; Grain products; Maize flakes; Porridge oats; Oat flakes; Muesli; Multigrain-based snack foods; Pastries; Doughs, batters, and mixes therefor; Cocoa-based beverages; Drinking chocolate.*

3. As the priority date claimed by the opponent's mark is earlier than the filing date of the applicant's mark, the opponent's mark constitutes an earlier mark in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods identified without having to establish genuine use.

4. In its statement of grounds, the opponent argues that the marks are similar and that the applicant's goods are either identical or similar to the opponent's goods. On this basis, the opponent submits that there exists a likelihood of confusion and the application should be refused under section 5(2)(b).

5. The applicant filed a counterstatement denying the ground of opposition.
6. The opponent is professionally represented by Katarzyna Eliza Binder-Sony and the applicant is professionally represented by Walker Morris LLP.
7. Only the opponent filed evidence. This consists of a witness statement from Rafal Jedlinski (Vice President of the opponent's Management Board) and three exhibits (1-3). No hearing was requested but both parties filed written submissions in lieu. I also note that the opponent filed submissions in the evidence rounds. The evidence and submissions will not be summarised but will be referred to as and where appropriate during this decision. This decision is taken following careful consideration of all the papers before me.

### **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.

### **Section 5(2)(b)**

9. 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”.

10. Section 5A states: [...] “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.”

11. I am guided by the following principles which 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.

### *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**

12. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated, at paragraph 23 of its judgment, that when considering whether goods are similar, all the relevant factors relating to the goods should be taken into account. The CJEU stated that those factors include their nature, intended purpose, method of use and whether they are in competition with each other or are complementary.

13. 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.

14. In *Kurt Hesse v OHIM*, Case C-50/15 P, 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“...there is a 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.”

15. In *Gérard Meric v OHIM* (Case T-33/05) the GC confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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.”

16. The goods to be compared are shown in the table below:



The opponent's goods	The applicant's goods
<p><i><u>Class 5:</u> Nutritional supplement food bars; Nutritional supplement meal replacement bars for boosting energy; Diet supplements; Vitamin and mineral preparations; Dietetic foods adapted for medical use; Food supplements; Nutritional drink mix for use as a meal replacement.</i></p> <p><i><u>Class 29:</u> Milk products; Whey; Milk beverages, milk predominating; Fruit- and nut-based snack bars; Nut and seed-based snack bars; Fruit-based snack food; Nut-based snack foods; Milk-based snacks; Butter made of nuts; Coconut butter; Almond butter; Nut-based spreads; Vegetable-based snack foods; Meat-based snack foods; Omelets; Soup powders; Prepared vegetable dishes; Prepared meat dishes; Jellies, jams, compotes, fruit and vegetable spreads; Fruit jelly spreads; Jellies for food, other than confectionery; Collagen-based snack food bars; Gelatine; Edible oils and fats.</i></p> <p><i><u>Class 30:</u> Sweetmeats [candy]; Candy bars; Chocolate bars; Cereal bars and energy bars; High-protein cereal bars; Cereal-based meal replacement bars; Chocolate-based meal replacement bars; Protein bars; Non-medicated</i></p>	<p><i><u>Class 5:</u> Pharmaceuticals, medical and veterinary preparations; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; dietary and nutritional supplements; mineral dietary and nutritional supplements; nutritional supplement meal replacements for boosting energy; dietary food supplements; dietary supplement drinks; nondairy milk for pharmaceutical purposes; protein supplements; protein dietary supplements; protein powder dietary supplements; soy protein dietary supplements.</i></p> <p><i><u>Class 29:</u> Eggs; milk and milk products; oils and fats for food; dairy products; dairy spreads; dairy-based spreads; low fat dairy spreads; butter; butter preparations; butter substitutes; concentrated butter; blended butter; savoury butters; seed butters; butter made from nuts; cocoa butter; powdered nut butters; margarine; margarine substitutes; edible fat-based spreads for bread; cream; sour cream; cream powder; artificial cream (dairy product substitutes); cream alternatives and substitutes; non-dairy milk and</i></p>

<p><i>candy; Chocolate; Chocolates; Chocolate based products; Chocolate creams; Pancake mixes; Grain products; Maize flakes; Porridge oats; Oat flakes; Muesli; Multigrain-based snack foods; Pastries; Doughs, batters, and mixes therefor; Cocoa-based beverages; Drinking chocolate.</i></p>	<p><i>cream; edible oils and fats; cooking oils; nut oils; vegetable oils for food; coconut oil and fat for food; flavoured oils; olive oils; spiced oils; butter oil; blended oils for food; hydrogenated oils for food; hardened oils; clarified butter; butter for use in cooking; ghee; dips; dairy-based dips; meat substitutes; preserved, frozen, dried and cooked fruits and vegetables; vegetable and plant- based meat substitutes; vegetable spreads; vegetable-based spreads; vegetable-based snack foods; cheese spreads; cheese-based snack foods; nut paste spreads; nut-based spreads; spreads consisting mainly of fruits; fruit-based snack food; fruit snacks; dairy-based beverages; drinks made from dairy products; protein milk; cream, being dairy products; non-dairy creamer; dairy whiteners for beverages; milk powder for nutritional purposes; dairy-based whipped topping; dairy puddings and desserts; yoghurt; yoghurts; yoghurt beverages and drinks; yoghurt-based beverages and drinks; drinking yoghurt; yoghurt dessert; soya yoghurt; flavoured yoghurt; custard-style yoghurts; low fat yoghurt; preparations for making yoghurt; yoghurt made with goats milk; milk products; butter milk; butter cream; milk; milkshakes; sour milk; milk curds; flavoured milks; milk solids; dried milk;</i></p>
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	<p><i>milk powder; soya milk; milk beverages and drinks; milk based beverages and drinks; flavoured milk beverages and drinks; milk beverages, milk predominating; rice milk; sheep milk; goat milk; cows' milk; fermented milk; evaporated milk; oat milk; milk substitutes; milk based snacks; artificial milk based desserts.</i></p> <p><u><i>Class 30: Coffee, tea, cocoa and artificial coffee; cappuccino; chocolate-based beverages; cocoa-based beverages; coffee-based beverages; bread, pastries and confectionery; pastries, cakes, tarts and biscuits (cookies); flour and preparations made from cereals; porridge; dessert soufflés; mousses; prepared desserts [confectionery]; dessert mousses [confectionery]; puddings; sugar, honey, treacle; yeast, baking-powder; fruit sauces; sauces; preparations for stiffening whipped cream; thickening agents for cooking foodstuffs; edible ices; sherbets [ices]; ice cream; binding agents for ice cream; powders for ice cream; frozen yoghurt [confectionery ices]; frozen yogurt cakes; ice milk bars; fruit ice bars; frozen confectionery containing ice cream; frozen dairy confections; ice beverages with a chocolate base; ice beverages with a coffee base; ice beverages with a cocoa</i></u></p>
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	<i>base; cheese curls [snacks]; cheese-flavoured biscuits.</i>
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17. In its submissions in lieu, the opponent argues that the goods are either identical or highly similar, appealing to the same consumer base seeking health, dietetic, and nutritional products in classes 5, 29, and 30. Where the goods are similar, it submits that they are complementary or supplementary, have the same nature and purpose, and are sold via the same channels. It suggests that there is an overlap for the dairy and nut-based goods in class 29 on the basis that the goods could be found in the same sections of the stores and might be manufactured or distributed by the same or economically linked enterprises. It also submits that in class 30, there are identical goods such as the meal replacement and nutritional bars or overlap in pastries and dessert-related products.

18. In its submissions in lieu, the applicant reiterates its claim made in the counterstatement, i.e. that it denies that its goods are either identical or similar to the opponent's goods. It also highlights that the applicant asked for proof that the goods were either identical or similar, and that the opponent did not provide any.

19. For the purposes of comparing goods, 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). I have therefore assessed the applicant's goods as individual terms or by dividing some into groups where required as per below.

#### Class 5:

##### *Pharmaceuticals, medical and veterinary preparations*

20. This is a wide term which covers narrower types of preparations such as medical or veterinary preparations for weight loss, which therefore may include the opponent's terms such as *diet supplements, dietetic foods adapted for medical use and vitamin and mineral preparations*. The applicant's term is therefore identical to the opponent's goods under the principle in *Meric*.

### *Dietetic food and substances adapted for medical or veterinary use*

21. The *dietetic food and substances adapted for medical... use* aspect of this term is incorporated in the opponent's term *dietetic foods adapted for medical use* and therefore I find that this part is identical as per the principle in *Meric*. The *dietetic food and substances adapted for... veterinary use* has some similarities with the opponent's term *dietetic foods adapted for medical use* in that both are foods adapted to use for specific conditions. There will be overlaps in their nature as they can come in a variety of formats. They differ as to the users and trade channels. They also are not complementary or in competition with each other. I therefore find that they have a low degree of similarity.

### *Food for babies*

22. It is my understanding that a baby is typically classed as an infant under one year old. This term may include fortified replacements for breast milk but also follow-on consumable food items introduced at six months old. It is my view that *food for babies* is similar to *dietetic foods*. The users may overlap insofar as they may both be purchased by adult members of the general public and eaten by babies. Their nature will be the same, as both may come as either solids or foods that are blended or liquified, and may both be fortified to provide specific nutrition to the user. Their use will be the same, i.e. to provide nutrition to the user. They may have similar trade channels, such as supermarkets or more specialist outlets such as pharmacies. There may be an element of competition if the person purchasing the item needs to decide whether to purchase *food for babies* or *dietetic foods* to provide nutrition to their baby. The goods are not complementary as they are not important or essential for one another. Taking all of these factors into account, I find that there is a medium degree of similarity between the goods.

### *Dietary supplements for humans and animals; dietary and nutritional supplements; mineral dietary and nutritional supplements*

23. These terms incorporate the opponent's terms *vitamin and mineral preparations*, *diet supplements*, and *food supplements*. They are therefore identical as per the principle outlined in *Meric*.

*Nutritional supplement meal replacements for boosting energy*

24. This term is an exact replication of the opponent's term, and therefore they are identical on a literal basis.

*Dietary food supplements*

25. This term is identical to the opponent's term "food supplements" on a literal basis given that dietary merely refers to a person's eating habits. The terms are therefore identical as they describe the same goods, albeit worded slightly differently.

*Dietary supplement drinks*

26. It is my view that this term incorporates the opponent's term *nutritional drink mix for use as a meal replacement* and therefore the terms are identical under the principle in *Meric*.

*Non-dairy milk for pharmaceutical purposes*

27. These goods are specialist pharmaceutical-grade milks for people who may have an intolerance or allergy to dairy or lactose. In addition to this, they may be fortified with additional specialist ingredients. They are, in my view, similar to the opponent's term *dietetic foods adapted for medical use*. The goods are used in the same way, in that they are adapted versions of regular dietary goods which are intended to manage medical conditions, such as dietary allergies. The users of both will be members of the public with medical conditions. The goods' nature will differ in circumstances where the opponent's goods come in solid form. They are both sold through the same trade channels such as pharmacies, and they will typically be found near each other within these trade channels. The goods may be bought to complement each other, such as if a non-dairy milk is needed to be added to a food item to produce the end product (such as a dry mix requiring the addition of milk before cooking) or to consume the end product (such as cereal to which the user would add milk). Given that food and beverages are frequently produced by the same undertakings, it is highly likely that the consumer would believe that the responsibility lies with the same manufacturer. The goods' specialised nature increases the likelihood of the consumer assuming this, given that a manufacturer which produces specialist medical or pharmaceutical products to manage medical conditions such as dietary allergies is likely to have a

range of different types of specialist products catering to those conditions. I therefore find that the goods have a medium to high degree of similarity with the opponent's term *dietetic foods adapted for medical use*.

*Protein supplements; protein dietary supplements; protein powder dietary supplements; soy protein dietary supplements*

28. It is my view that the opponent's wider terms *food supplements* and *diet supplements* incorporate these narrower types of protein supplements. These goods are therefore identical under the principle outlined in *Meric*.

Class 29:

*Eggs*

29. These goods are a protein-rich poultry product and have some similarity with the opponent's term *omelets*. The users of both goods will be the general public. Their uses and purpose will be the same, as they will be eaten to satiate hunger. The goods' nature overlaps in that they are both solid foods which are, or are made of, eggs. Whilst the primary ingredient of *omelets* is egg, they are formed of additional ingredients and often sold as a ready-to-eat product. *Eggs* are most commonly sold as raw ingredients. They may be cooked and eaten alone or with other foods or added to other ingredients in recipes (such as cakes or muffins). However, there may be some instances where *eggs* may be sold pre-boiled amongst a retailer's range of ready-to-eat products. The goods will be sold through the same trade channels but may be found in different areas of those outlets. Whilst pre-boiled versions of *eggs* may be found in the chilled section, the majority of *eggs* will be sold as ambient goods. *Omelets* will be sold in the chilled section amongst other ready-to-eat items. Whilst eggs are important to omelets, it is my view that consumers are unlikely to think that the responsibility for both lies with the same undertaking. This is on the basis that eggs come from farms which keep hens and do not require much further processing or treatment once the egg has hatched). *Omelets* however are cooked in professional kitchens, need additional ingredients and equipment, and will require different food handling processes when producing the end product. I think that it is unlikely that consumers would think that egg farms would have the professional capabilities to produce a range of ready-to-eat egg-based products such as *omelets*. I am therefore

of the view that the respective goods are not complementary. However, there is an element of competition between the goods as a user may decide between them when choosing which type of egg-based food to eat. Taking into account all of these factors, I find that the goods have a low to medium degree of similarity.

*Milk and milk products; dairy products; dairy-based beverages; drinks made from dairy products; protein milk; milk powder for nutritional purposes; milk products; butter milk; milk; milkshakes; sour milk; milk curds; flavoured milks; milk solids; dried milk; milk powder; sheep milk; goat milk; cows' milk; fermented milk; evaporated milk; milk beverages and drinks; milk based beverages and drinks; flavoured milk beverages and drinks; milk beverages, milk predominating; dairy whiteners for beverages; dairy-based dips; sour cream; dips; milk based snacks; cream, being dairy products; cream; cream powder; cheese spreads; cheese-based snack foods; yoghurt; yoghurts; yoghurt beverages and drinks; yoghurt-based beverages and drinks; drinking yoghurt; yoghurt dessert; flavoured yoghurt; custard-style yoghurts; low fat yoghurt; yoghurt made with goats milk; preparations for making yoghurt; dairy spreads; dairy-based spreads; low fat dairy spreads; butter; butter preparations; concentrated butter; blended butter; savoury butters; edible fat-based spreads for bread; butter for use in cooking; butter cream; dairy-based whipped topping; dairy puddings and desserts*

30. The above goods would incorporate, or be incorporated by, the opponent's term *milk products* in that they are all products of milk. On this basis I find that they are identical to the opponent's term *milk products* under the principle in *Meric*.

*Nut paste spreads; nut-based spreads; butter made from nuts; powdered nut butters*

31. *Butter made of nuts* and *nut-based spreads* are identical to the opponent's terms on a literal basis. The other two goods listed here are included within *butter made of nuts* and/or *nut-based spreads*, and therefore are identical to the opponent's goods as per the principle in *Meric*.

*Seed butters*



32. The goods have a highly similar nature to *butter made from nuts*. Whilst they differ as to their primary ingredients (i.e. one is made of nuts, and other is made of seeds), they are both pastes which have a similar macronutrient profile to one another. The users of *seed butters* and *butter made from nuts* will mostly be the same, although I recognise that some users of *seed butters* may buy these specifically for dietary conditions such as an allergy or intolerance to certain types of nuts. They have the same use and purpose, i.e. they are spread on other foods to consumer in order to satisfy hunger. They will have the same trade channels and in my experience are placed next to each other on the shelves within the ambient food section. For those without intolerances or allergies, the goods may be in competition with each other. I do not believe that they are complementary to one another. Taking all of this into account, it is my view that the goods are highly similar.

*Soya milk; rice milk; oat milk; milk substitutes; artificial cream (dairy product substitutes); cream alternatives and substitutes; non-dairy milk and cream; non-dairy creamer*

33. The nature of these goods is similar to *milk products* which can also be liquids. Their use and purpose are the same. Although dairy-free milks and creams are frequently purchased by those who do not consume dairy due to health, ethical, or religious reasons, there will be an overlap in users who may consume both interchangeably. As this latter group of users will choose from the different types of milk available, they may be in competition with each other. The respective goods are not important to one another and, as such, are not complementary. However, they reach the market through shared trade channels and may be produced by the same undertakings; dairy manufacturers are increasingly expanding their ranges to include non-dairy options, with some major manufacturers offering a range of both dairy milk and dairy-free milks. Consequently, I find that there is a high degree of similarity between the applicant's goods above and the opponent's term *milk products*.

*Butter substitutes; margarine; margarine substitutes*

34. These goods are spreads which are designed to be alternatives to *milk products* such as dairy butter. They are primarily made from seed oils (rather than being nut-based). Although *butter substitutes*, *margarine*, and *margarine substitutes* are

frequently purchased by those who do not consume dairy due to health, ethical, or religious reasons, there will be an overlap in users who may consume both *milk products* such as dairy butter and these types of non-dairy goods. They are used in the same way as *milk products* such as dairy butter. They have the same trade channels and may both be found within the chilled section. They may also be produced by the same undertakings wishing to offer both dairy and non-dairy spreads. They are not complementary in that they are not important or indispensable to one another, but there may be some competition between the goods in that a consumer could select a dairy spread over a non-dairy alternative, or vice versa. Taking all of these factors into account, I am of the view that the goods have a medium to high degree of similarity.

### *Soya yoghurt*

35. This non-dairy yoghurt is a chilled product like *milk products* such as dairy yoghurt. Although *soya yoghurt* is frequently purchased by those who do not consume dairy due to health, ethical, or religious reasons, there will be an overlap in users who may consume both *milk products* such as dairy yoghurt as well as *soya yoghurts*. The nature is similar and the purpose is the same for the dairy and non-dairy versions of the goods. The goods will reach the market through shared trade channels and may be offered by the same undertakings wishing to offer both dairy and non-dairy yoghurts. They are unlikely to be complementary to one another, but they may be in competition with each other. Taking into account these factors, I find that there is medium to high degree of similarity between the goods.

*Edible oils and fats; oils and fats for food; cooking oils; nut oils; vegetable oils for food; coconut oil and fat for food; flavoured oils; olive oils; spiced oils; butter oil; blended oils for food; hydrogenated oils for food; hardened oils; clarified butter; ghee; cocoa butter*

36. The applicant's term *edible oils and fats* is identical on a literal basis with the opponent's term *edible oils and fats*. The remaining terms listed in this group are all types of oils and fats. I have included *clarified butter* and *ghee* on the basis that they are a fat typically used in cooking, rather than being the type of butter spread on toast or crackers. I am of the view that *cocoa butter* can also be included within the wider term *edible oils and fats*. This is on the basis that *cocoa butter* is a pure fat source

which has been extracted from cocoa beans. As it can be consumed (such as when used as an ingredient of chocolate), it is my view that it can be classed as an edible fat. These goods are therefore identical under the principle outlined in *Meric*.

*Vegetable spreads; vegetable-based spreads; spreads consisting mainly of fruits*

37. These goods are included within the opponent's term *jellies, jams, compotes, fruit and vegetable spreads* and are therefore identical under the principle in *Meric*.

*Vegetable-based snack foods; meat substitutes; vegetable and plant-based meat substitutes*

38. The applicant's term *vegetable-based snack foods* is identical on a literal basis to the opponent's term *vegetable-based snack foods*. It is considered that the other two terms *meat substitutes* and *vegetable and plant-based meat substitutes* may also fall under *vegetable-based snack foods*. This is on the basis that these types of meat substitutes can be formed of vegetable ingredients such as mushrooms and produced as ready-to-eat snacks. It is my view that these two terms are subsets of the wider term *vegetable-based snack foods* and are therefore identical as per the principle in *Meric*.

*Preserved, frozen, dried and cooked... vegetables*

39. There is some similarity between these goods and the opponent's term *prepared vegetable dishes*. The users and use will be the same. There is an overlap in the goods' nature in that *preserved, frozen, dried and cooked... vegetables* will contain vegetables in various states, whereas *prepared vegetable dishes* will contain vegetables that have been processed and possibly include other ingredients too. They will be sold through the same trade channels, and at times may exist in the same places within those retail environments such as the chilled food section or the freezer section, but goods such as *dried... vegetables* may be found in different sections of the retail outlets. There may be a degree of complementarity as the applicant's goods are important to the production of the opponent's goods and consumers may assume that responsibility for them lies with the same undertaking. There may also be a degree of competition between goods, such as when the consumer is deciding which type of

vegetable to have as a side dish. Taking all of this into account, it is my view that the goods are similar to a medium to high degree.

*Preserved, frozen, dried and cooked... fruits*

40. There is some similarity between these goods and the opponent's term *fruit-based snack food*. The nature of the goods overlaps as they both consist of fruit in various states. They may also be prepared in the same way (i.e. cooked, preserved or dried). The users, use, and purpose are the same for the goods. They are sold through the same trade channels and may appear within the same place. There may be a degree of complementarity as the applicant's goods are important to the production of the opponent's goods and consumers may assume that responsibility for them lies with the same undertaking. There may also be a degree of competition between goods, such as when the consumer is deciding which type of fruit-based food to consume. Taking all of this into account, it is my view that the goods are similar to a medium to high degree.

*Fruit-based snack food; fruit snacks*

41. The first of these two terms is identical on a literal basis to the opponent's term *fruit-based snack food*. The second term is included within it and therefore identical under the principle in *Meric*.

*Artificial milk based desserts*

42. These desserts may be similar to *milk products* such as *dairy puddings and desserts*. Although *artificial milk based desserts* are frequently purchased by those who do not consume dairy due to health, ethical, or religious reasons, there will be an overlap in users who may consume both *milk products* such as *dairy puddings and desserts* as well as *artificial milk based desserts*. The nature and purpose are the same for the dairy versions and non-dairy versions of the goods. They are unlikely to be complementary to one another, but they may be in competition with each other. Taking into account these factors, I find that there is medium to high degree of similarity between the goods.

Class 30:

*Cappuccino; coffee-based beverages; ice beverages with a coffee base; coffee, tea... and artificial coffee*

43. These terms are similar to the opponent's term *cocoa-based beverages* in that they are all beverages. They may be sold as powdered or as a ready-to-drink liquid form. They will have the same users. The goods will be drunk to quench thirst, although *cappuccino, coffee-based beverages, and ice beverages with a coffee base* may also be consumed with the primary aim of caffeinating the user. They will be sold through the same trade channels and be placed near one another within the ambient good section, or in the chilled section in the case of ready-to-drink versions of the beverages. There may be an element of competition between the applicant's terms and *cocoa-based beverages* if the consumer is deciding which beverage to drink. It is my view that the goods are not complementary to one another. Taking these considerations into account, I am of the view that there is a medium degree of similarity between the goods.

*Chocolate-based beverages; cocoa-based beverages; ice beverages with a chocolate base; ice beverages with a cocoa base; cocoa*

44. *Cocoa-based beverages* are identical to the opponent's term on a literal basis. The other terms can be included in *cocoa-based beverages* and are therefore identical under the principle in *Meric*.

*Pastries; pastries*

45. These goods are reproduced in the opponent's specification. Therefore they are identical on a literal basis.

*Flour and preparations made from cereals; bread; biscuits (cookies)*

46. This term can be included in the opponent's term *grain products* and therefore the goods are identical as per the principle in *Meric*.

*Porridge*

47. This term includes the opponent's term *porridge oats* and therefore the goods are identical as per the principle in *Meric*.

*Prepared desserts [confectionery]; puddings; confectionery; cakes*

48. These terms can include the opponent's term *sweetmeats [candy]* which is a type of confectionary dessert. They are therefore identical under the principle in *Meric*.

*Honey, treacle*

49. These items are added to food or liquids to sweeten them. They may also be used to top other foods, so their use and purpose overlaps with the opponent's *jellies, jams, and compotes*. At times they may differ as to their nature. *Treacle* is a viscose liquid, whereas *honey* can be bought either as set (i.e. solid) or runny (i.e. liquid). This may overlap with the opponent's *jellies, jams, and compotes* which may be either closer to viscose liquids or sold as 'set' (i.e. solidified). The users of the goods will be the same. At times they may be in competition with each other, such as when a user may choose whether to top foods such as pancakes or yoghurt with either *honey* or *jam*. Whilst they may sometimes complement each other (such as if they are used together in a recipe), it is my view that it is unlikely that the users would think that the same manufacturer of *honey* and *treacle* would also produce *jellies, jams, and compotes*. They have the same trade channels and may appear relatively near each other in the ambient food section within those retail environments. Taking into account all of these factors, it is my view that they are similar only to a low degree.

*Yeast, baking-powder*

50. *Yeast* and *baking powder* are baking ingredients. They are sold as individual products but may also be components within the opponent's *doughs, batters, and mixes therefor* and *pancake mixes*. However, I am mindful that in *Les Éditions Albert René v OHIM*, Case T-336/03, the GC found that:

"61... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different."

51. The use and the purpose differ slightly in that *yeast* and *baking-powder* are baking additives used to produce a chemical reaction with other ingredients, thus making

foods such as breads or cakes rise during the cooking process. This differs from the use and purpose of *doughs*, *batters*, and *mixes therefor* and *pancake mixes* which are either sold as a finished product in the case of *doughs* and *batters*, or used as per the instructions to create an end product to consume in the case of the mixes. They are sold through the same trade channels and, particularly the mixes, may be sold in similar places within the ambient goods section of those channels. There may be an overlap in nature as the mixes are likely to contain yeast and/or baking powder, and they may be in powdered form too. Given their different purpose, and uses, it is unlikely that the goods will be in competition with each other. Yeast and baking powder are important to mixes containing them, and consumers may think that responsibility for them lies with the same undertakings, therefore rendering them complementary. Taking into account all of these factors, it is considered that there is a low degree of similarity between the goods.

#### *Fruit sauces; sauces*

52. There is an element of similarity with the nature, use, and purpose between these terms and the opponent's term *jellies*, *jams*, and *compotes*. The goods are used to add to foods to impart flavour or sweetness. Furthermore, they also overlap in that they are made from fruit. *Fruit sauces* and *sauces* will be sold as viscose liquids, which is similar to *jams* and *compotes*. Their users will be the same. There may be some competition between the goods where they are used to put on other foods to give them further flavour. They will be sold through the same trade channels but they may exist in slightly different areas within the ambient goods section of those channels. It is unlikely that the goods will be complementary to one another. Taking into account all of these factors, I consider the goods to have a low level of similarity.

#### *Dessert soufflés; mousses; dessert mousses [confectionery]*

53. There is some similarity between these goods and the opponent's term *sweetmeats [candy]*. The Cambridge Dictionary defines *sweetmeats* as "a small piece of sweet food, made of or covered in sugar". Whilst their precise natures may differ, the goods are all sweet foods which have the same users, purpose, and uses. They will appear in the same trade channels but may appear in different places within those retail environments, as *dessert soufflés*, *mousses*, and *dessert mousses*

*[confectionery]* will be sold in the chilled section, whereas *sweetmeats [candy]* appear (based on the dictionary definition) to be goods sold in the ambient section of those retail environments. The goods are not complementary, but they may be in competition with each other when users are deciding between which sweet food to consume. Taking these factors into account, it is my view that the goods are similar to a low degree.

### *Sugar*

54. This is added to other foods to impart sweetness. I am of the view that it differs from the opponent's terms. Whilst it may broadly have the same users and trade channels, its nature, purpose, and use differ significantly from the opponent's goods. It will also appear in different aisles within retail outlets. Whilst the applicant's goods are added to food, I do not consider it to be complementary with any of the opponent's goods because consumers are unlikely to assume that the responsibility for producing the goods lies with the same or linked undertakings. It is my view that *sugar* is dissimilar to the opponent's goods.

*Preparations for stiffening whipped cream; thickening agents for cooking foodstuffs; binding agents for ice cream*

55. It is my understanding that the opponent's term *gelatin* in class 29 can be used in a variety of ways. It can be added to cream in order to stiffen it, or used to bind ice cream, or to act as a thickening agent. I find that these three terms therefore all include *gelatin*, and they are identical under the principle in *Meric*.

*Edible ices; ice cream; powders for ice cream; frozen yoghurt [confectionery ices]; frozen yogurt cakes; ice milk bars; frozen confectionery containing ice cream; frozen dairy confections; sherbets [ices]*

56. These goods share some similarity with the opponent's term *chocolate*. Both are sweet foods which users consume. However, their nature differs in that these goods are frozen items and chocolate is a product typically served at room temperature. Their purpose overlaps in that they are consumed to satiate hunger, but these frozen goods may also be consumed to cool down the consumer. They will be sold through the same trade channels but found in different areas of those retail environments. They are not



complimentary but may be in competition where consumers are deciding which snack to consume. Taking into account all of these factors, I find that there is a low degree of similarity between the goods.

#### *Fruit ice bars*

57. There may be some similarity between these goods and the opponent's term *fruit-based snack food* in class 29. Their use may overlap as both foods can be consumed as snacks and have fruit as a key ingredient. However, their nature is likely to differ as *fruit ice bars* are frozen whereas *fruit-based snack food* is likely to be sold as either fresh or long-life goods. They will be sold through the same trade channels. However, they are likely to be placed in different sections, with *fruit ice bars* being in the freezer, and *fruit-based snack food* either sold in the chilled area or in the ambient section. They are unlikely to be complementary to one another, but they may be in competition where consumers are deciding which fruit-based snack to eat. Taking into account all of these factors, I find that there is a low degree of similarity between the goods.

#### *Cheese curls [snacks]; cheese-flavoured biscuits.*

58. It is my understanding that the primary ingredient of *cheese curls* is corn, which is a type of grain. My interpretation of *cheese-flavoured biscuits* is that they are type of grain-based savoury biscuit. I find that these terms fall within the scope of *grain products* and/or *multigrain-based snack foods* and they are therefore identical to the opponent's terms under the principle in *Merix*.

59. Whilst I have considered the similarity between the opponent's other terms, it is my view that none of the remaining goods would put the opponent in a more favourable position than outlined above.

#### **Average consumer and the purchasing act**

60. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

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

62. The average consumers of the class 5 goods will be healthcare or medical professionals, as well as members of the public who seek specialist products to manage their medical conditions. The cost of purchase will vary, but it is likely to be fairly inexpensive. The goods will be purchased on a relatively frequent basis. Several factors may influence the average consumer when purchasing the goods, such as, inter alia, the allergen information, the dietary and nutritional information, and the ingredients used. Taking into account all of these factors, and the fact that the goods will be bought for specific health and wellbeing reasons, it is my view that the average consumer will pay a medium to high amount of attention. This may be slightly higher amongst medical or healthcare professionals. The goods will be bought from specialist establishments such as pharmacies, or their online equivalents. The customer will self-select the goods from display shelves, or by selecting the image of their desired product if purchasing online, and therefore the visual component will dominate the selection process. However, I do not discount the role that aural selection may play when purchasing, such as through word-of-mouth recommendations from pharmacy staff.

63. The average consumers of the class 29 and 30 goods will be the public at large, as well as some trade customers too. The cost of purchase is likely to vary, but overall, the price will be fairly inexpensive for most of the goods. They will be purchased on a frequent basis. Several factors may influence the average consumer when purchasing the goods, such as, inter alia, the type of ingredients used, the allergen information, and the dietary and nutritional information. Taking into account all of these factors, it is

my view that the average consumer will pay no more than a medium degree of attention, although in the case of trade customers this may be slightly higher. The goods will be bought in retail outlets, specialist shops (such as bakeries), or their online equivalents. The customer will self-select the goods from display shelves, or by selecting the image of their desired product if purchasing online, and therefore the visual component will dominate the selection process. However, I do not discount the role that aural selection may play when purchasing, such as through word-of-mouth recommendations from the staff or when discussing the goods.

### **Comparison of marks**


64. 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 CJEU 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.”

65. 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.

66. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
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MATRIX	
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67. The opponent's mark is a plain word mark written in uppercase. As a word-only mark with no other elements, the overall impression lies in the word "MATRIX".

68. The applicant's mark is a composite mark which has a device of a green chef's hat to the left of the mark. Next to it is a verbal element which states "Matrix". It is written in title case and in a script typeface. The word is also underlined. At the top of the mark appears a faint grey line.

69. It is my view that the verbal element and device both contribute to the overall impression of the applicant's mark, but that the verbal element is more dominant. This is because the eye is naturally drawn to elements of marks which can be read (see paragraph 37 of *Wassen International Ltd v OHIM (SELENIUM-ACE)*, Case T-312/03). Furthermore, the word is at the forefront of the mark with the device being somewhat in the background. The colour of the device also contributes to the overall impression of the mark but plays a much lesser role. As the font is a fairly standard script typeface, I do not consider that it plays a significant role within the mark's overall impression. It is not clear whether the grey line at the top is an intentional part of the mark or the result of imprecise cropping when reproducing the mark during the application, especially as there is also a very fine line to the left of the mark. Either way, I do not consider that it plays a significant role within the overall impression of the mark.

#### Visual comparison

70. The competing marks are similar because the opponent's mark is the word "MATRIX", which is the same as the verbal element within the applicant's mark. The applicant's mark is written in title case and is written in a script typeface, whereas the opponent's mark is written in upper case. However, in *LA Superquimica v European Union Intellectual Property Office (EUIPO)*, Case T-24/17, the GC held at [39] that word-only marks protect the word or words contained in the mark in whatever case, colour or typeface. The differences created by the font and letter case used in the applicant's mark are therefore not significant.

71. The marks are different as the applicant's mark includes the device and a line under the word "Matrix".

72. Taking into account my earlier finding in relation to the overall impressions of the marks, I find that the competing marks are visually similar to a medium to high degree.

#### Aural comparison

73. The opponent's mark is the word "MATRIX", which is the same as the only verbal element within the applicant's mark. As neither mark has any additional verbal elements, I find that the competing marks are therefore aurally identical.

#### Conceptual comparison

74. The marks are similar as the opponent's mark is the word "Matrix", which is the identical to the verbal element within the applicant's mark. The applicant's submissions offer several definitions for the term "Matrix", including "the cultural, social, or political environment in which something develops", or its mathematical meaning of "a rectangular array of quantities or expressions in rows or columns that is treated as a single entity and manipulated according to particular rules", as well as meaning "a fine material used to bind together the coarser particles of a composite substance". Whichever meaning the average consumer discerns from the word, this will be common to both marks. They differ as the applicant's mark also contains the image of the chef's hat. The chef's hat device brings to mind the concept of preparing food. Although this is allusive of the goods at issue, this concept is not included in the opponent's mark. Overall, I find that the marks are conceptually similar to a high degree.

#### **Distinctive character of the earlier trade mark**

75. 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)."

76. Registered trade marks possess various 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.

77. The opponent submits that it has "established enhanced distinctiveness through long-standing use and market presence in the UK and Europe, further increasing the likelihood of confusion. The evidence provided includes social media promotions and sales invoices from 2017, demonstrating continuous use and recognition in the UK market, which was submitted alongside the Opponent's Submission dated April 15, 2024."

78. In his witness statement, Mr Jedlinski states that the opponent has been using the trade mark "MATRIX" for at least 30 years throughout Europe, and that it exports its goods to the UK and has been present in the UK market since at least 2017. In support of this, Mr Jedlinski provides a selection of invoices (Exhibits 1 and 3) and screenshots of the company's social media sites (Exhibit 2). Exhibit 1 consists of a single invoice dating from 2017 which shows the sale of three Matrix-branded products (on page 4) to a company based in Oxfordshire. Exhibit 2 shows eight posts from the opponent's

Instagram and Facebook accounts dated between 2015 and 2022 in which Matrix-branded products can be seen. Exhibit 3 consists of invoices dated between 2017 and 2021 which were sent to customers in various UK locations. These appear to show the sale of 349 Matrix-branded products during this period.

79. I do not consider that this evidence to be sufficient for the purposes of demonstrating that the opponent's mark had enhance distinctive character at the relevant date of 14 June 2023. Whilst I acknowledge that these exhibits demonstrate use of the opponent's mark since 2017, and sales of Matrix-branded goods into the UK, it is considered that the evidence does not show what share of the relevant market was held by goods sold under the opponent's mark. Whilst the evidence includes a few invoices, and I acknowledge that these were not intended to be exhaustive, no turnover figures have been provided. As such, although I accept that sales of Matrix-branded goods clearly took place, I cannot ascertain how significant those sales were. Furthermore, it is also considered that the social media screenshots are not sufficient in showing the extent to which the average consumer in the UK has been exposed to the opponent's mark. This is because the social media accounts do not appear to be specifically UK-facing accounts, and there is no evidence in relation to how many UK consumers would have seen the posts on these social media accounts. Furthermore, the evidence contains no figures in relation to advertising spend in the UK, and there is no evidence of any advertising activities having been conducted. Taking all of these factors into account, it is my view that the evidence submitted does not support the establishment of enhanced distinctiveness. I therefore only have the inherent position to consider.

80. I note that the opponent has not commented on the earlier mark's level of inherent distinctiveness in relation to the goods. In its submissions in lieu, the applicant argues that the mark "does not contain any distinctive character when considered in relation to the goods". The applicant included screenshots of the Oxford Languages Dictionary to show a variety of meanings for the term 'MATRIX' including one which states that it is a "fine material used to bind together the coarser particles in a composite substance". This, the applicant argues, results in 'MATRIX' being "a generic and descriptive term in relation to the goods in question, particularly "margarine for pastry" in the case of the Applicant". Furthermore, the applicant submits that there are 937

registered MATRIX marks, 106 of which exist in the same classes as the applicant's goods. It therefore argues that it is not distinctive in relation to the goods on that basis.

81. Firstly, section 72 of the Act stipulates that registration of a trade mark shall be taken as *prima facie* evidence of its validity. Moreover, as a registered trade mark, the opponent's mark must be considered to have at least some distinctive character: *Formula One Licensing BV v OHIM*, Case C-196/11P. As it is not subject to counter cancellation proceedings, the opponent's mark's validity is not in issue in these proceedings and it cannot be said to have no distinctive character.

82. I note that the applicant does not have the specific term *margarine for pastry* on its application, but I recognise that the wider terms *butter substitutes*, *margarine*, and *margarine substitutes* would include more specific types of margarine such as *margarine for pastry*. Whilst I acknowledge the several definitions of the word 'MATRIX' provided by the applicant, it is my view that none of these establish that it is descriptive or generic when used in relation to the goods in question. The definition of 'MATRIX' highlighted by the applicant states that it is a "fine material used to bind together the coarser particles in a composite substance". In my view, this cannot be readily applied to foods such as *margarine* given that *margarine* is solid, fat-based product, and would not be classed as a "fine material" within this dictionary definition. Furthermore, there is no evidence that the word 'MATRIX' is used in the course of trade to describe *margarine* or any of the other goods, or that the average consumer would understand the word in this way. I therefore disagree with the applicant that the term 'MATRIX' is either descriptive or generic when used in the context of any of the goods, including any of the margarine-related goods.

83. As for the applicant's argument in relation to the other registered MATRIX marks, I note that there is no evidence that any of these marks are in use. The mere existence of other registered marks is not sufficient for establishing that the distinctive character of the word 'MATRIX' has been weakened. As the GC explained in *Zero Industry Srl v OHIM*, Case T-400/06:

"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). “

84. It is my view that some consumers would recognise ‘MATRIX’ as one of the other meanings from the Oxford Dictionary included in the applicant’s submissions in lieu, such as “the cultural, social, or political environment in which something develops” or its mathematical meaning of “a rectangular array of quantities or expressions in rows or columns that is treated as a single entity and manipulated according to particular rules”. For those consumers, the mark would be arbitrary and perhaps slightly enigmatic when used in relation to the goods. I also believe that there would be a significant portion of consumers who would be aware of the word’s existence (especially due to the popularity of the film ‘The Matrix’), and perhaps the type of contexts it may be used in, but would be unsure of its exact definition. It is my view that as a dictionary-defined word that has no descriptive or allusive meaning in relation to the goods, the opponent’s mark has a medium level of inherent distinctiveness.

### **Global assessment – conclusions on likelihood of confusion**

85. 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 down to the responsible undertakings being the same or related. There is no set formula for establishing a likelihood of confusion between marks; it is a global assessment where a number of factors need to be borne in mind.

86. One such factor is the interdependency principle, i.e. a lesser degree of similarity between the competing marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be mindful 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 they have retained in their mind.

87. The opponent argues that the inclusion of the identical word "Matrix" could lead consumers to assume that the applicant's mark represents a new graphic update or stylised version of the earlier mark. The applicant submits that both marks contain what it purports to be a word with no distinctive character, and so therefore it is the "distinctive and recognisable font and chef's hat device which clearly separates" the competing marks.

88. The applicant has also submitted that it has been using the mark since before the opponent's application, and that the marks have peacefully coexisting over the twelve months without any evidence of confusion occurring. It claims that it is therefore unlikely that any likelihood of confusion would arise. In *Victoria Plumb Ltd v Victorian Plumbing Ltd* [2016] EWHC 2911 (Ch), Carr J considered the CJEU's judgment in *Budejovický Budvar NP v Anheuser-Busch Inc. (BUDWEISER)*, Case C482/09, and the Court of Appeal's judgments in that case and in *IPC Media Ltd v Media 10 Ltd* [2014] EWCA Civ 1403, and stated that a defence of honest concurrence use could, in principle, defeat an otherwise justified claim of trade mark infringement where the two parties had been using the same or closely similar names honestly for a long time and the guarantee of origin of the claimant's trade mark was not impaired by the defendant's use. The *BUDWEISER* case had demonstrated that honest concurrent use may be relevant in cancellation proceedings, and I can see no reason why it would not be relevant in opposition proceedings. Nevertheless, the CJEU noted that the circumstances of that particular case were exceptional. The Court's answer to the third question put to it was as follows:

"In the light of the foregoing, the answer to the third question is that Article 4(1)(a) of Directive 89/104 must be interpreted as meaning that the proprietor

of an earlier trade mark cannot obtain the cancellation of an identical later trade mark designating identical goods where there has been a long period of honest concurrent use of those two trade marks where, in circumstances such as those in the main proceedings, that use neither has nor is liable to have an adverse effect on the essential function of the trade mark which is to guarantee to consumers the origin of the goods or services.”

89. Whether the exceptional circumstances referred to by the CJEU in *BUDWEISER* apply in a particular case is, ultimately, a question of fact. Not only was this line of argument not specifically pleaded by the applicant, but the applicant filed no evidence of use. There is, therefore, nothing which could substantiate a finding that there has been peaceful co-existence between the parties, or honest concurrent use.

90. It is my view that, particularly when taking into account imperfect recollection, consumers may mistake or misremember the marks for one another. The opponent’s mark is the word “MATRIX”, and the later mark also contains this identical verbal element in the foreground of the mark as its dominant element. It is my view that the points of visual differences between the marks, such as the allusive and decorative chef’s hat and the minimal stylistic differences, may be overlooked by the average consumer, even when paying a medium degree of attention or higher. The average consumer is more likely to retain and recall the identical and dominant word “Matrix”, which carries a medium level of distinctiveness and exists in both marks. I therefore find that there is the likelihood of direct confusion, even where the goods are only similar to a low degree, notwithstanding the points of difference between the marks.

91. If I am wrong in this finding, I now go on to consider indirect confusion. 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)."

92. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ approved Mr Purvis's formulation but added:

"13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must

be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion.”

93. It is not sufficient that a mark merely calls to mind another mark (as per *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17). This is mere association not indirect confusion. A finding of indirect confusion should not be made merely due to a shared element within marks. As per *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10 (set out above), indirect confusion should be identified in cases where the average consumer is likely to notice the differences between the competing marks but assume an economic link between the two undertakings based on their similarities.

94. It is my view that even if consumers recognise the competing marks’ differences due to the inclusion of additional figurative elements within the applicant’s mark, these appear consistent with a brand variant or brand extension. I am of the view that consumers are likely to view the applicant’s mark as containing decorative elements added to the opponent’s house mark. Furthermore, as the chef’s hat device is allusive of food preparation and the inclusion of this element may suggest a gourmet range sub-brand when it is used in relation to food-related goods in classes 5, 29, and 30. Consumers may therefore view these differences within the applicant’s mark as a brand variant or brand extension of the existing house “MATRIX” mark, and therefore assume a commercial association between the parties. Consequently, I find that there exists the likelihood of indirect confusion, even where the goods are only similar to a low degree.

### **Final remarks**

95. The opposition under section 5(2)(b) has been partially successful. Subject to any successful appeal, the application will be refused registration for the following goods:

*Class 5: Pharmaceuticals, medical and veterinary preparations; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; dietary and nutritional supplements; mineral dietary and nutritional supplements; nutritional supplement meal replacements for boosting energy; dietary food supplements; dietary supplement drinks; nondairy milk for pharmaceutical purposes; protein*

supplements; protein dietary supplements; protein powder dietary supplements; soy protein dietary supplements.

Class 29: Eggs; milk and milk products; oils and fats for food; dairy products; dairy spreads; dairy-based spreads; low fat dairy spreads; butter; butter preparations; butter substitutes; concentrated butter; blended butter; savoury butters; seed butters; butter made from nuts; cocoa butter; powdered nut butters; margarine; margarine substitutes; edible fat-based spreads for bread; cream; sour cream; cream powder; artificial cream (dairy product substitutes); cream alternatives and substitutes; non-dairy milk and cream; edible oils and fats; cooking oils; nut oils; vegetable oils for food; coconut oil and fat for food; flavoured oils; olive oils; spiced oils; butter oil; blended oils for food; hydrogenated oils for food; hardened oils; clarified butter; butter for use in cooking; ghee; dips; dairy-based dips; meat substitutes; preserved, frozen, dried and cooked fruits and vegetables; vegetable and plant- based meat substitutes; vegetable spreads; vegetable-based spreads; vegetable- based snack foods; cheese spreads; cheese-based snack foods; nut paste spreads; nut-based spreads; spreads consisting mainly of fruits; fruit-based snack food; fruit snacks; dairy-based beverages; drinks made from dairy products; protein milk; cream, being dairy products; non-dairy creamer; dairy whiteners for beverages; milk powder for nutritional purposes; dairy-based whipped topping; dairy puddings and desserts; yoghurt; yoghurts; yoghurt beverages and drinks; yoghurt-based beverages and drinks; drinking yoghurt; yoghurt dessert; soya yoghurt; flavoured yoghurt; custard-style yoghurts; low fat yoghurt; preparations for making yoghurt; yoghurt made with goats milk; milk products; butter milk; butter cream; milk; milkshakes; sour milk; milk curds; flavoured milks; milk solids; dried milk; milk powder; soya milk; milk beverages and drinks; milk based beverages and drinks; flavoured milk beverages and drinks; milk beverages, milk predominating; rice milk; sheep milk; goat milk; cows' milk; fermented milk; evaporated milk; oat milk; milk substitutes; milk based snacks; artificial milk based desserts.

Class 30: Coffee, tea, cocoa and artificial coffee; cappuccino; chocolate-based beverages; cocoa-based beverages; coffee-based beverages; bread, pastries

*and confectionery; pastries, cakes, tarts and biscuits (cookies); flour and preparations made from cereals; porridge; dessert soufflés; mousses; prepared desserts [confectionery]; dessert mousses [confectionery]; puddings; honey, treacle; yeast, baking-powder; fruit sauces; sauces; preparations for stiffening whipped cream; thickening agents for cooking foodstuffs; edible ices; sherbets [ices]; ice cream; binding agents for ice cream; powders for ice cream; frozen yoghurt [confectionery ices]; frozen yogurt cakes; ice milk bars; fruit ice bars; frozen confectionery containing ice cream; frozen dairy confections; ice beverages with a chocolate base; ice beverages with a coffee base; ice beverages with a cocoa base; cheese curls [snacks]; cheese-flavoured biscuits.*

96. However, the application may proceed to registration for the following terms, which were not opposed or in respect of which the opposition has failed:

*Class 30*: *Salt; mustard; vinegar; spices; flavourings, other than essential oils for foodstuffs, except etheric essences and essential oils; sugar.*

## **Costs**

97. The opponent has enjoyed the most success and it is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. As this is a partial success, I have made a slight reduction in costs to reflect this.

98. In the circumstances I award the opponent the sum of £1,335 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the applicant's counterstatement: £245

Preparing submissions in lieu £395

Preparing evidence £595

Official fees: £100

99. I therefore order CARDOWAN CREAMERIES LIMITED to pay OLIMP LABORATORIES Sp. z o.o. the sum of £1,335. This 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 15<sup>th</sup> day of May 2025**

**K SERRAVALLE**

**For the Registrar**