O/0959/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003733045

BY CRYOLIFE, INC.

TO REGISTER THE TRADE MARK:

ARTIVION

IN CLASSES 5, 10, 40, 41, 42 AND 44

AND IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 433333

BY BRIGHTWAKE LIMITED

BACKGROUND AND PLEADINGS

1. On 15 December 2021, CRYOLIFE, INC. ("the applicant") applied to register the trade mark shown on the cover page of this decision, in the UK. The application was published for opposition purposes on 11 February 2022 and registration is sought for the goods and services set out in Annex 1 to this decision. The application claims a priority date of 21 June 2021 (United States TM no. 90785583).

2. On 10 May 2022, the application was partially opposed by Brightwake Limited ("the opponent") based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act").[1] Under section 5(2)(b), the opponent relies upon the following trade marks:

ACTIVON
UKTM no. 2503698
Filing date 1 December 2008; registration date 3 April 2009
("the First Earlier Mark")

ACTIVON
UKTM no. 908303141[2]
Filing date 15 May 2009; registration date 1 December 2009
Priority date: 1 December 2008
("the Second Earlier Mark")

ACTIVON MANUKA
UKTM no. 917900399
Filing date 15 May 2018; registration date 20 September 2018

[1] Although the Statement of Grounds stated that the opposition was directed at all goods and services covered by the application, the Form TM7 confirmed that it was only directed at those in classes 5, 10, 41 and 44. Ms Ayers confirmed this at the hearing.

[2] On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all rights holders with an existing EUTM. As a result of the opponent having EUTMs being protected as at the end of the Implementation Period, comparable UK trade marks were automatically created. The comparable trade marks shown here are now recorded on the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and retain their original filing dates.

("the Third Earlier Mark")

3. The opponent relies upon all goods for which the marks are registered as set out in Annex 2 to this decision.

4. The opponent claims that there is a likelihood of confusion because the goods are identical or similar, and the marks are similar.

5. Under section 5(3) of the Act, the opponent relies upon the First and Second Earlier Marks. The opponent claims a reputation for all goods for which the marks are registered and claims that use of the applicant's mark would, without due cause, take unfair advantage of, and/or be detrimental to, the distinctive character and/or repute of the First and Second Earlier Marks.

6. Under sections 5(2)(b) and 5(3) of the Act, the opponent directs the opposition against the goods in classes 5 and 10 of the application.

7. Under section 5(4)(a) of the Act, the opponent relies upon the signs **ACTIVON** and **ACTIVON TULLE** which it claims to have used throughout the UK since 2008 in relation to "wound dressings and wound care compositions and in relation to related services for the promotion of its goods including education and training services about the benefits of its goods". The opposition based upon section 5(4)(a) is directed at the applicant's goods in classes 5 and 10 and the services in classes 41 and 44.

8. The applicant filed a counterstatement denying the claims made and putting the opponent to proof of use of the First and Second Earlier Marks.

9. A hearing took place before me on 29 June 2023, by video conference. The opponent was represented by Catherine Ayers of Adamson Jones and the applicant was represented by Katie Cameron of Maucher Jenkins. Both parties filed skeleton arguments in advance of the hearing.

EVIDENCE AND SUBMISSIONS

10. The opponent filed evidence in the form of the first witness statement of Stephen Cotton dated 28 October 2022, which is accompanied by 8 exhibits. Mr Cotton is the Managing Director of the opponent, a position he has held since 18 April 2013.

11. The applicant filed written submissions during the evidence rounds dated 29 December 2022.

12. The opponent filed evidence in reply in the form of the second witness statement of Mr Cotton dated 16 February 2023, which is accompanied by 4 exhibits.

13. I have taken the evidence and submissions into account in reaching my decision and will refer to them below to the extent that I consider necessary.

RELEVANCE OF EU LAW

14. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

DECISION

Preliminary issue

15. The applicant has raised the fact that the opponent is coexisting on the Register with other trade marks, both in the UK and in other jurisdictions. However, there is no evidence before me of the other trade marks actually being used in the marketplace and there may be any number of reasons why the opponent considers it is able to coexist with those marks, and not the present application. I do not consider that this assists the applicant. Similarly, the fact that the opponent has not opposed the

applicant's application in the USA is not of relevance; different considerations may apply to different jurisdictions and I do not consider that this assists the applicant.

Section 5(2)(b)

16. Section 5(2)(b) of the Act 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."

17. Section 5A of the Act is as follows:

> "5A 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."

18. The trade marks upon which the opponent relies qualify as earlier trade marks pursuant to section 6 of the Act. As the First and Second Earlier Marks had completed their registration process more than 5 years prior to the priority date of the application in issue, they are subject to proof of use, as requested by the applicant. The Third Earlier Mark is not subject to proof of use, and the opponent can rely upon the full breadth of the specification.

Proof of use

19. I will begin by assessing whether there has been genuine use of the First and Second Earlier Marks. The relevant statutory provisions are as follows:

> "(1) This section applies where:
>
> (a) an application for registration of a trade mark has been published,
>
> (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
>
> (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.
>
> (1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.
>
> (2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.
>
> (3) The use conditions are met if –
>
> (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
>
> (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.
>
> (4) For these purposes -

a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services."

20. Section 100 of the Act states that:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

21. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the First and Second Earlier Marks is the five-year period ending with the priority date of the application in issue i.e. 22 June 2016 to 21 June 2021. The relevant jurisdiction for demonstrating use of the First Earlier Mark is the UK. As the Second Earlier Mark is a comparable mark, the relevant jurisdiction for demonstrating use is the EU (including the UK) up to and including IP Completion Day (31 December 2020). After that date, only use in the UK will be relevant.[3]

[3] See paragraph 7 of Part 1, Schedule 2A of the Act.

22. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

> "114. […] The CJEU has considered what amounts to "genuine use" of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.
>
> 115. The principles established by these cases may be summarised as follows:
>
> (1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].
>
> (2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].
>
> (3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods

come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use

of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32]."

23. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real" because the use would not be "viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark" is, therefore, not genuine use.

24. I note the following from the opponent's evidence:

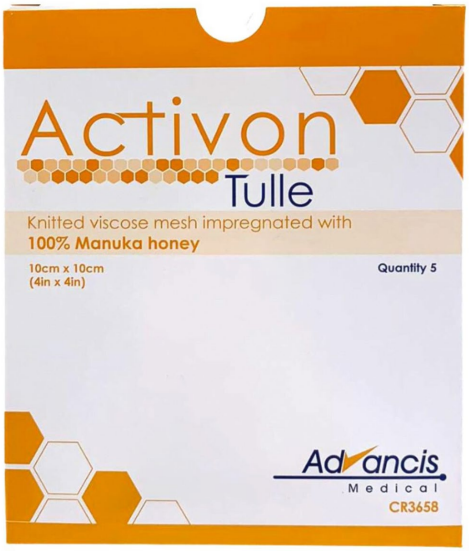
a) The opponent has continuously used the ACTIVON mark in the UK since 2011 in relation to a range of manuka honey wound care products for both medical and veterinary use.

b) Specifically, the opponent sells two products called ACTIVON Tube and ACTIVON Tulle.[4] The first of these is a tube of filtered and sterilized manuka honey for application directly to a wound.[5] The second of these is a knitted viscose mesh wound dressing, which is impregnated with manuka honey.

c) These goods were first sold in the UK in March 2011.[6]

d) The word ACTIVON has appeared on the products and packaging of these goods for the five years prior to Mr Cotton's statement as follows:[7]

[4] Exhibit SC002
[5] Exhibit SC003
[6] Exhibit SC004
[7] Exhibits SC005 and SC007



e) Turnover for ACTIVON Tube and ACTIVON Tulle products in the UK (including both medical and veterinary use products) has been consistently higher than £200,000 per annum for each product between 2016 and 2021.

f) These figures are supported by a selection of invoices showing sales of ACTIVON products to customers located around the UK during the relevant period.[8]

25. The applicant takes issue with the use of the word ACTIVON as part of the composite marks ACTIVON Tube and ACTIVON Tulle and submits that this should not be use upon which the opponent is entitled to rely. I disagree. The First and Second Earlier Marks are clearly visible in all of the uses shown above (both word only versions and stylised marks used on packaging). The word clearly continues to indicate origin

[8] Exhibit SC008

in both marks.[9] The differing font/use of colour on the packaging, would be covered by notional and fair use of the word only marks. Whilst I note that there is some disagreement between the parties as to whether the word TULLE would be recognised as descriptive in this context, which was reflected in Ms Ayers' and Ms Cameron's submissions at the hearing, nothing turns on this. This is because the addition of the word TULLE does not combine with the word ACTIVON in such a way that the word can no longer be said to indicate origin. Consequently, this is use of the mark as registered upon which the opponent may rely, whether TULLE is seen as descriptive or not.

26. I am satisfied that the First and Second Earlier Marks have been put to genuine use in relation to "honey for treating wounds" and "dressing materials for wounds, impregnated with honey". I have considered whether use of these goods would enable the opponent to retain any of the broader terms in its specifications.[10] In my view, "honey for treating wounds" is clearly an identifiable sub-category in itself. However, I accept that the average consumer is unlikely to define the category of products offered by the opponent under the ACTIVON Tulle mark by reference to the fact that it is impregnated with honey. In my view, the average consumer is more likely to simply perceive these goods as "dressing materials for wounds".

27. In reaching this decision, I have borne in mind Ms Cameron's submission that honey is not proper to class 5; Ms Cameron claims that it is proper to class 30. Honey is clearly a product which has multiple uses; it can be consumed as a food product or it can be applied to wounds for its healing properties. In my view, given the nature of the goods being sold by the opponent (being a wound treatment product), it would be proper to class 5 and not class 30. Class 30 covers foodstuffs and auxiliaries intended for improving food flavour. Clearly, the use shown by the opponent cannot be said to be either of those things. I have also borne in mind Ms Cameron's submission that pure honey would not be included within the opponent's specification. However, I disagree. Honey for the purposes of wound treatment would, in my view, be covered by the term "medical preparations" in class 5 of the opponent's specification.

[9] *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12

[10] *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited,* BL O/345/10 and *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch)

Section 5(2)(b) – case law

28. 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 greater 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 to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

29. The competing goods are as follows:

Opponent's goods	**Applicant's goods**
The First and Second Earlier Marks Class 5 Honey for treating wounds; dressing materials for wounds.	Class 5 Processed biological tissue, namely, cardiac and vascular tissue; biological adhesives for surgical and clinical use and applicators, dispensers, and

The Third Earlier Mark <u>Class 5</u> Medical, surgical and veterinary preparations; preparations for wound care; antiseptic preparations for medical, surgical and veterinary use; preparations for wound care containing honey; medical, surgical and veterinary dressings; wound dressings; dressing materials for wounds; materials for medical use in covering [dressing] wounds; wound dressings containing honey; wound healing and wound care preparations and dressings to help debride and deslough wounds; wound healing and wound care preparations and dressings to help reduce wound odour; wound healing and wound care preparations and dressings to help maintain a moist wound healing environment; radioactive substances for medical purposes; gases for medical purposes; sterilising preparations; solutions for contact lenses; cultures of microorganisms for medical and veterinary use; tissues impregnated with pharmaceutical lotions.	spreader tips for biological adhesives; absorbable hemostats for surgical and clinical use and applicators, dispensers, and spreader tips for absorbable hemostats; Surgical dressings. <u>Class 10</u> Medical devices; surgical sealants; cardiac lasers; surgical apparatuses and instruments; surgical implants; and prosthetic heart valves.

30. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "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."

31. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

> (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.

32. In *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T- 133/05, the General Court ("GC") stated that:

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut for Lernsysterne*

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."

33. 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 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."

Class 5

Processed biological tissue, namely, cardiac and vascular tissue.

34. Ms Ayers submitted that these may be goods used in the process of healing or treating wounds and, consequently, they are similar to the opponent's wound dressings and related products. I have no evidence before me that processed biological tissue (cardiac and vascular, or otherwise) would be used in the treatment/healing of wounds. Given the specialist nature of these goods, and the burden being on the opponent to demonstrate similarity of goods, I consider it reasonable to expect the opponent to have filed evidence to demonstrate such an overlap, if one existed. Consequently, I can see no point of overlap in purpose or method of use. There is clearly a difference in nature, and I have no evidence to suggest that there would be any overlap in trade channels. Clearly, both parties' goods could be used by medical professionals. There is no competition or complementarity. In my view, they are dissimilar. If I am wrong in this finding and there is some similarity in purpose, I consider that this would result in only a low degree of similarity.

Biological adhesives for surgical and clinical use […].

35. I understand these goods to be adhesives used for joining biological matter or adhesives created from biological materials. Given that these goods could be used for the treatment of wounds, I consider them to be identical on the principle outlined in *Meric to "preparations for wound care"* in the specification of the Third Earlier Mark.

36. As these goods can be used for the treatment of wounds, there will be some overlap in purpose with the goods in the specifications of the First and Second Earlier Marks. However, I recognise that the specific purposes will differ. There may be an overlap in method of use to the extent that the goods will all be applied to wounds, but the specific method of use (applied in liquid form to a wound or secured over the top of it in a thin sheet, for example) will differ. The goods also clearly differ in nature. I accept that businesses that sell goods for the treatment of wounds might sell a range of goods including dressings and adhesive. Consequently, there is some overlap in trade channels. There is no competition or complementarity. Clearly, both could be used by medical professionals. In my view, these goods are similar to between a low and medium degree.

[…] applicators, dispensers, and spreader tips for biological adhesives.

37. These goods are similar to "*preparations for wound care"* in the specification of the Third Earlier Mark because the opponent's goods could include adhesives for wound treatment. Consequently, there is an overlap in purpose. The nature and method of use of the goods are different. However, I consider it likely that the same businesses that sell adhesives are also likely to sell goods for the application of those adhesives. Consequently, there is overlap in trade channels. I also consider the goods to be complementary. There is no competition. Clearly, both could be used by medical professionals. In my view, these goods are similar to a medium degree.

38. I accept that these goods may be involved in the healing/treatment of wounds and, to that extent, they will overlap in purpose with the specifications of the First and Second Earlier Marks. However, the specific purposes of the goods clearly differ. The method of use and nature of the goods differ. Again, I accept that businesses that sell goods for the treatment of wounds might sell both applicators/dispensers for wound

adhesives and dressings. Consequently, I consider there to be an overlap in trade channels. There is no competition or complementarity. Clearly, both parties' goods are likely to be used by medical professionals. Consequently, I consider the goods to be similar to between a low and medium degree.

Absorbable hemostats for surgical and clinical use and applicators, dispensers, and spreader tips for absorbable hemostats.

39. I understand absorbable hemostats to be medical devices used to control bleeding. I accept, therefore, that there is some overlap in purpose with the opponent's goods in that they are all intended to heal/treat wounds. However, the nature of the goods is clearly very different, as is the method of use. In my view, these goods appear to be highly specialised, and I have no evidence before me to suggest that they would be sold through the same trade channels as other (more general) types of wound dressing/treatments. There is no competition or complementarity. Clearly, there is an overlap in user as both could be used by medical professionals. However, taking all of this into account, I consider the goods to be dissimilar. If I am wrong in that finding, then they are similar to only a very low degree.

Surgical dressings.

40. Clearly, these are self-evidently identical to "surgical […] dressings" in the specification of the Third Earlier Mark.

41. I also consider these goods to be identical on the principle outlined in *Meric* to "dressing materials for wounds" in the specifications of the First and Second Earlier Marks.

Class 10

Medical devices.

42. In my view, it is likely that there will be some medical devices which are intended for use with *"medical preparations"* covered by the specification of the Third Earlier

Mark. For those goods, there is likely to be an overlap in trade channels and user. I also consider them to be complementary, as the same undertakings are likely to produce and sell both the preparations and the devices used for their administration and the goods will be important/indispensable for each other. Consequently, I consider there to be a medium degree of similarity.

43. I accept that there may be medical devices that are used in the healing/treatment of wounds. To that extent, there will be a general overlap in purpose with the goods in the specifications of the First and Second Earlier Mark. However, the specific purposes of the goods are likely to differ. The method of use and nature of the goods differ. Again, I accept that businesses that sell goods for the treatment of wounds might sell both general devices for wound treatment and dressings. Consequently, I consider there to be an overlap in trade channels. There is no competition or complementarity. Clearly, both parties' goods are likely to be used by medical professionals. Consequently, I consider the goods to be similar to between a low and medium degree.

Surgical sealants.

44. My understanding is that these are used to seal wounds. Consequently, I consider there to be an overlap in trade channels, method of use, nature, purpose and user with "preparations for wound care" in the specification of the Third Earlier Mark. The goods are highly similar.

45. In relation to the specifications of the First and Second Earlier Marks, I accept that there may be some overlap in purpose due to the common aim of healing/treating wounds. However, the specific purposes clearly differ. There will be overlap in method of use, in that the goods are applied to the wound, although the specific method of use will differ. The goods are likely to differ in nature. However, I accept that businesses that sell goods for the treatment of wounds might sell a range of goods for that purpose. Consequently, there is some overlap in trade channels. There is no competition or complementarity. Clearly, there is an overlap in user as both can be used by medical professionals. In my view, the goods are similar to between a low and medium degree.

Cardiac lasers; surgical apparatuses and instruments; surgical implants; and prosthetic heart valves.

46. I can see no point of overlap between these goods and the goods of the opponent. I accept that the parties' goods may all be used in the course of surgery which involves the closing up of wounds, but I do not consider there to be sufficient overlap in nature, method of use, purpose or trade channels to result in similarity. There is no competition or complementarity. I consider the goods to be dissimilar.

47. For those goods that I have found to be dissimilar, there can be no likelihood of confusion.

The average consumer and the nature of the purchasing act

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

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

49. The average consumer for the goods is most likely to be a medical professional. I accept that some of the goods, such as wound dressings, may also be purchased by members of the general public. Even where the cost of the goods is low and they are relatively frequently used, factors will be taken into consideration such as compatibility with the particular type of wound, active ingredients and quality of materials. Further,

given the importance of these goods for the user's health/recovery, I consider that at least a reasonably high degree of attention is likely to be paid by both members of the general public and medical professionals.

50. The goods are likely to be selected following the perusal of physical signage (on packaging or in catalogues) or online equivalents. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount an aural component to the purchase, given that orders may be placed by telephone and advice may be given to the general public verbally by medical professionals.

Comparison of trade marks

51. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade 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."

52. It would be wrong, therefore, to artificially dissect the trade marks, 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 neligible and therefore contribute to the overall impressions created by the marks.

53. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
ACTIVON (the First and Second Earlier Marks) ACTIVON MANUKA (the Third Earlier Mark)	ARTIVION

Overall Impression

54. The First and Second Earlier Marks consist of the word ACTIVON. There are no other elements to contribute to the overall impression, which lies in the word itself. The Third Earlier Mark consists of the same word with the additional word, MANUKA. The overall impression of the mark lies in the combination of these words, with the word ACTIVON likely to be more distinctive due to MANUKA being recognised by at least a significant proportion of average consumers as a type of honey and, therefore, a characteristic of the goods.

55. The applicant's mark consists of the word ARTIVION. There are no other elements to contribute to the overall impression, which lies in the word itself.

Visual Comparison

56. The First and Second Earlier Marks and the applicant's mark all have the same letter pattern – A-TIV-ON. However, the second letter differs, being C in the First and Second Earlier Marks and R in the applicant's mark. In the First and Second Earlier Marks the final letters, ON, immediately follow the letter V. However, in the applicant's mark they are separated by the letter I. In my view, the marks are visually highly similar.

57. The same is true of the comparison with the Third Earlier Mark. However, the word MANUKA acts as an additional point of difference. Consequently, I consider the marks to be visually similar to a medium degree.

Aural Comparison

58. The First and Second Earlier Marks are likely to be pronounced ACT-IVV-ONN. The applicant's mark is likely to be pronounced ART-IVV-EON. Clearly, there is significant overlap in the pronunciation of the two marks. I consider them to be aurally similar to between a medium and high degree.

59. The same is true of the Third Earlier Mark. However, if the word MANUKA is pronounced by the average consumer (it may not be due to its descriptive nature), then the marks will be aurally similar to no more than a medium degree.

Conceptual Comparison

60. The words ACTIVON and ARTIVION are both invented words. Ms Cameron submitted that the differing first three letters (being the dictionary words, ART and ACT) will create different conceptual impressions in the mind of the consumer. However, in my view, these words are subsumed within the invented terms and are unlikely to be broken down by the consumer. In my view, the marks will be attributed no particular meaning by the average consumer. Consequently, the conceptual position in relation to the First and Second Earlier Marks and the applicant's mark is neutral.

61. The same applies to the comparison with the Third Earlier Mark. I acknowledge Ms Cameron's submission as to whether the average consumer would understand the term MANUKA to refer to a type of honey; Ms Cameron submitted that this was unlikely. However, in my view, it is likely that a significant proportion of average consumers will be aware of the meaning. For those average consumers, it will act as a point of conceptual difference, albeit a non-distinctive one.

Distinctive character of the earlier trade marks

62. 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 1-2779, 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)."

63. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it.

64. The First and Second Earlier Marks consist of the word ACTIVON. This is an invented word, with no clear meaning. In my view, it is inherently distinctive to a high

degree. The Third Earlier Mark contains the additional word MANUKA, which I consider to be descriptive. I consider the same finding applies in relation to this mark.

65. I have summarised the opponent's evidence of use above. Whilst I am satisfied that it is sufficient to demonstrate genuine use, I do not consider it to be sufficient to establish enhanced distinctiveness. I have no evidence regarding advertising activities and expenditure. I note that in his second witness statement Mr Cotton gave evidence regarding market share as follows:

> "7. My company's ACTIVON range of products, which include products other than ACTIVON TUBE and ACTIVON TULLE, have well over 50% of the UK market share in Manuka honey-impregnated wound dressings and medical-grade honey. Details of the full ACTIVON range were provided in Exhibit SC002 to my first Witness Statement and my company's sales figures for all products in the range, including ACTIVON TULLE and ACTIVON TUBE, are in the region of £1.5million to £2.2million per year. Our sales are made to NHS organisations, hospitals, specialist wholesalers, so these figures do not reflect a price per unit which is equivalent to retail levels. My company does not sell direct to Amazon but the 'typical price' per tube of ACTIVON TUBE outlined in SC009 is given as £7.95. My company's price per tube reflected in the sales figures provided is well under half that figure.
>
> 8. My company obtains NHS data from NHS England, NHS Scotland, NHS Wales and NHS Northern Ireland which provides us with detailed information regarding all Manuka honey products prescribed during a given period. My company's market share figure for April 2021 to March 2022 was actually 63%. I cannot provide precise figures for earlier years, but my company's market share will have been about the same in the last 5 years, at least."

66. However, the sales figures referred to by Mr Cotton relate to <u>all</u> goods sold by the opponent, not just those under the ACTIVON mark. I note that the opponent refers to the range of ACTIVON goods shown in Exhibit SC002, and whilst these appear under the heading ACTIVON on the website, they refer to products described as ALGIVON, ALGIVON PLUS, ACTILITE, ALGIVON PLUS RIBBON AND WOUND PROBE.

Consequently, I am not satisfied that the figures referred to relate only to those sold under the ACTIVON mark. Even if they are all sold under the ACTIVON mark, they relate to a broader range of goods than those for which the opponent has demonstrated genuine use. Consequently, it is not clear to me what proportion of the opponent's market share figures would be for the goods relied upon in these proceedings specifically. I do not, therefore, consider that this evidence assists the opponent. I do not consider there to be any enhanced distinctiveness.

Likelihood of confusion

67. 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 scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the marks may be offset by a high degree of similarity between the goods and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

68. I have found as follows:

a) The First and Second Earlier Marks and the applicant's mark are visually similar to a high degree and aurally similar to between a medium and high degree. The conceptual position is neutral.

b) The Third Earlier Mark and the applicant's mark are visually similar to a medium degree and aurally similar to either between a medium and high degree or a medium degree, depending on whether the word MANUKA is pronounced. The

word MANUKA acts as a point of conceptual difference, albeit not a distinctive one.

c) The earlier marks are all inherently highly distinctive.

d) The goods vary from being identical to similar to a very low degree (except where I have found them to be dissimilar).

e) The average consumer is a member of the general public or a medical professional who will pay at least a relatively high degree of attention during the purchasing process.

f) The purchasing process is predominantly visual, although I do not discount an aural component to the purchase.

69. I recognise that the relatively high degree of attention paid during the purchasing process is a factor in favour of the applicant. However, in my view, the visual similarities between the First and Second Earlier Marks and the applicant's mark are such that they are likely to be mistakenly recalled or misremembered as each other, when used on goods that are similar to a medium degree or higher. This is particularly the case given that the purchasing process is predominantly visual, and they are both invented words meaning that the earlier mark is highly distinctive and there is no conceptual hook to assist the average consumer in distinguishing between them. I also consider the same to be true in relation to the Third Earlier Mark, where the word MANUKA may be overlooked due to its descriptive nature, and the average consumer only recalls the ACTIVON/ARTIVION elements (confusing them, bearing in mind the principle of imperfect recollection). Consequently, I consider there to be a likelihood of direct confusion.

70. In relation to the Third Earlier Mark, if the average consumer does recall the word MANUKA, I consider that there is potential for indirect confusion. Firstly, the words ACTIVON/ARTIVION are still likely to be mistakenly recalled/misremembered as each other. The common element (which the average consumer will mistake for each other) is highly distinctive and the average consumer would conclude that only one party

could be using it in relation to goods that are similar to a medium degree or higher. Further and alternatively, the additional word is a non-distinctive element for a significant proportion of average consumers, which is likely to be seen as a sub-brand indicating a particular category of goods which contain manuka honey.

71. For those goods that I have found to be similar to between a low and medium degree (or less), the distance between the goods will be sufficient to offset the similarity of the marks, and there is no likelihood of direct or indirect confusion.

72. For the avoidance of doubt, my finding would remain the same even if I had found the differing letters ART and ACT in the respective marks to create different conceptual meanings. In my view, the visual and aural similarities of the marks would be sufficient to counteract the conceptual differences and there would still be a likelihood of direct confusion where the goods are sufficiently similar.

73. The opposition based upon section 5(2)(b) of the Act succeeds in relation to the following goods only:

Class 5 Biological adhesives for surgical and clinical use and applicators, dispensers, and spreader tips for biological adhesives; surgical dressings.

Class 10 Medical devices; surgical sealants.

Section 5(3)

74. Section 5(3) of the Act states:

> "5(3) A trade mark which -
>
> (a) is identical with or similar to an earlier trade mark, […] shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark

without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark."

75. Section 5(3A) of the Act states:

> "Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected."

76. I can deal with this ground relatively swiftly. Bearing in mind the evidence as summarised above, I do not consider it sufficient to demonstrate a reputation. The same deficiencies apply as set out in paragraph 73 above. Consequently, the opposition based upon section 5(3) falls at the first hurdle.

77. The opposition based upon section 5(3) of the Act is dismissed.

Section 5(4)(a)

78. Section 5(4)(a) of the Act states as follows:

> "5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -
>
> a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,
>
> aa)…
>
> b) …
>
> A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of "an earlier right" in relation to the trade mark".

79. Subsection (4A) of section 5 of the Act states:

> "(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application."

80. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

> "55. The elements necessary to reach a finding of passing off are the 'classical trinity' of that tort as described by Lord Oliver in the Jif Lemon case (Reckitt & Colman Product v Borden [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.
>
> 56. In relation to deception, the court must assess whether *"a substantial number"* of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21)."

81. Again, I can deal with this ground relatively swiftly. I am satisfied that the opponent had goodwill in relation to "honey for treating wounds; dressing materials for wounds" at the relevant date and that the sign ACTIVON was distinctive of that goodwill. There is no evidence before me that the opponent has provided a training/education service of any sort. For the avoidance of doubt, I do not consider the fact that the opponent claims to have educated customers about its own product to be the provision of an education service. Consequently, I do not consider that the opponent has shown any goodwill in relation to the services claimed.

82. I do not consider that this ground puts the opponent in any stronger position in relation to the applicant's class 5 and class 10 goods than it was under the section 5(2)(b) ground. Whilst the test for misrepresentation is different from that for likelihood of confusion in that it entails "deception of a substantial number of members of the public" rather than "confusion of the average consumer", it has been acknowledged that they are unlikely to produce different outcomes in practice.[11] Certainly, I believe that to be the case here. In my view, the similarities between the marks and those goods that I have found to be similar to a medium degree or higher above, would result in misrepresentation and damage arising. Where the goods are dissimilar, or similar to only between a low and medium degree (or less), the distance between the fields of activity would be sufficient to offset the similarity of the marks and no misrepresentation or damage would occur.

83. In relation to the class 41 and 44 services against which this ground is also directed, I consider the distance between the fields of activity for these services and the goods for which the opponent has established goodwill to be sufficiently distant to avoid misrepresentation and damage arising. Whilst I acknowledge Ms Ayers submissions that there is a relationship between medical products and educational and medical services, given the modest nature of the goodwill demonstrated by the opponent, I do not consider it likely that a significant number of members of the public would be deceived into believing that the services of the applicant were those of the opponent, given the distance between the fields of activity.

84. The opposition based upon section 5(4)(a) of the Act succeeds in relation to the goods set out at paragraph 73 above.

CONCLUSION

85. The opposition is successful in relation to the following goods for which the application is refused:

[11] *Marks and Spencer PLC v Interflora* [2012] EWCA (Civ) 1501

Class 5 Biological adhesives for surgical and clinical use and applicators, dispensers, and spreader tips for biological adhesives; surgical dressings.

Class 10 Medical devices; surgical sealants.

86. The opposition is unsuccessful in relation to the following goods and services for which the application may proceed to registration, along with those services that were unopposed:

Class 5 Processed biological tissue, namely, cardiac and vascular tissue; absorbable hemostats for surgical and clinical use and applicators, dispensers, and spreader tips for absorbable hemostats.

Class 10 Cardiac lasers; surgical apparatuses and instruments; surgical implants; and prosthetic heart valves.

Class 40 Pyrolytic carbon coating services for medical devices; Processing and cryogenic preservation of biological tissue.

Class 41 Educational services, namely, providing training, mentorship, and assistance in the field of medical devices, surgical procedures, clinical trials, and health care; teaching and training services, namely, courses, classes, lessons, and seminars related to the use and operation of medical devices, processing and cryogenic preservation of biological tissue, the resulting processed biological tissues, and health care; educational services, namely, providing classes, seminars, and lectures, all in the field of the diagnosis and treatment of vascular and arterial disorders and abnormalities; education in the nature of classes, seminars, and training in preserved human cardiac and vascular tissues, surgical adhesives and sealants, prosthetic heart valves, cardiac lasers, and other medical devices; providing online non-downloadable medical publications about preserved human cardiac and vascular tissues,

surgical adhesives and sealants, prosthetic heart valves, cardiac lasers, and other medical devices via an online searchable database.

Class 42 Scientific and technological services and research and design relating to medical devices, processing and cryogenic preservation of biological tissue, and the resulting processed biological tissues.

Class 44 Medical services related to processing of biological tissue; medical services related to medical device design; providing online information in the medical field; medical and surgical diagnostic services, namely, medical diagnosis of vascular and arterial disorders and abnormalities.

COSTS

87. The applicant has enjoyed a greater degree of success and is, therefore, entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In her skeleton argument, Ms Ayers stated:

> "The Applicant has failed to engage in settlement negotiations with respect to this case and 3 related cases in Ireland, Germany and France. The Applicant, whether identified as Cryolife, Inc. or Artivion, Inc (there was a name change last year) has instead conducted the proceedings in such a way as to create maximum expense to the Opponent, including by filing and withdrawing then refiling cancellation applications against EU registration No. 008303141 and requesting this Hearing. We ask that this is taken into account in connection with any award of costs."

88. For the avoidance of doubt, I do not consider that there is anything in this conduct that warrants a reduction in the amount of costs awarded to the applicant. The applicant was entitled to request a hearing of the matter and, in the event, was mostly successful. Nonetheless, I have applied a reduction for the only partial success. In the circumstances, I award the applicant the sum of **£1,425** calculated as follows:

Filing a counterstatement and considering	£300

the Notice of opposition	
Considering and commenting upon the opponent's evidence	£475
Preparing for and attending hearing	£650
Total	**£1,425**

89. I therefore order Brightwake Limited to pay CRYOLIFE, INC. the sum of £1,425. 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 conclusion of the appeal proceedings.

Dated this 9th day of October 2023

S WILSON
For the Registrar

ANNEX 1

Class 5

Processed biological tissue, namely, cardiac and vascular tissue; biological adhesives for surgical and clinical use and applicators, dispensers, and spreader tips for biological adhesives; absorbable hemostats for surgical and clinical use and applicators, dispensers, and spreader tips for absorbable hemostats; Surgical dressings.

Class 10

Medical devices; surgical sealants; cardiac lasers; surgical apparatuses and instruments; surgical implants; and prosthetic heart valves.

Class 40

Pyrolytic carbon coating services for medical devices; Processing and cryogenic preservation of biological tissue.

Class 41

Educational services, namely, providing training, mentorship, and assistance in the field of medical devices, surgical procedures, clinical trials, and health care; teaching and training services, namely, courses, classes, lessons, and seminars related to the use and operation of medical devices, processing and cryogenic preservation of biological tissue, the resulting processed biological tissues, and health care; educational services, namely, providing classes, seminars, and lectures, all in the field of the diagnosis and treatment of vascular and arterial disorders and abnormalities; education in the nature of classes, seminars, and training in preserved human cardiac and vascular tissues, surgical adhesives and sealants, prosthetic heart valves, cardiac lasers, and other medical devices; providing online non-downloadable medical publications about preserved human cardiac and vascular tissues, surgical adhesives and sealants, prosthetic heart valves, cardiac lasers, and other medical devices via an online searchable database.

Class 42

Scientific and technological services and research and design relating to medical devices, processing and cryogenic preservation of biological tissue, and the resulting processed biological tissues.

Class 44

Medical services related to processing of biological tissue; medical services related to medical device design; providing online information in the medical field; medical and surgical diagnostic services, namely, medical diagnosis of vascular and arterial disorders and abnormalities.

ANNEX 2

The First Earlier Mark

Class 5

Medical, surgical and veterinary preparations; antiseptic preparations for wound care; anti-bacterial preparations for medical, surgical and veterinary use; dressing materials for wounds; materials for medical use in covering [dressing] wounds; materials for protecting [dressing] wounds; wound healing creams; wound healing creams containing honey; wound healing preparations containing honey; wound dressing substances containing honey; wound healing and wound care substances and preparations to help debride and desloughs wounds; wound healing and wound care substances and preparations to help reduce wound odour; wound healing and wound care substances and preparations to help maintain a moist wound healing environment; honey-containing compositions for medical use; honey-containing compositions for dressing wounds.

The Second Earlier Mark

Class 5

Surgical and veterinary preparations; antiseptic preparations for wound care; anti-bacterial preparations for surgical and veterinary use; dressing materials for wounds; materials for medical use in covering [dressing] wounds; materials for protecting [dressing] wounds; wound healing creams; wound healing creams containing honey; wound healing preparations containing honey; wound dressing substances containing honey; wound healing and wound care substances and preparations to help debride and desloughs wounds; wound healing and wound care substances and preparations to help reduce wound odour; wound healing and wound care substances and preparations to help maintain a moist wound healing environment; honey-containing compositions for dressing wounds.

The Third Earlier Mark

Class 5

Medical, surgical and veterinary preparations; preparations for wound care; antiseptic preparations for medical, surgical and veterinary use; preparations for wound care containing honey; medical, surgical and veterinary dressings; wound dressings;

dressing materials for wounds; materials for medical use in covering [dressing] wounds; wound dressings containing honey; wound healing and wound care preparations and dressings to help debride and deslough wounds; wound healing and wound care preparations and dressings to help reduce wound odour; wound healing and wound care preparations and dressings to help maintain a moist wound healing environment; radioactive substances for medical purposes; gases for medical purposes; sterilising preparations; solutions for contact lenses; cultures of microorganisms for medical and veterinary use; tissues impregnated with pharmaceutical lotions.