O/127/22

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3469615
IN THE NAME OF AVACARE GLOBAL
IN RESPECT OF THE TRADE MARK

avacare health

IN CLASSES 5, 10, 35 & 44

AND

THE OPPOSITION THERETO UNDER NO. 422035
BY QCARE SITE SERVICES, INC.

Background and pleadings

1. Avacare Global ("the applicant") applied to register the trade mark 'avacare health' with the application no. 3469615 in the UK on 25 February 2020. It was accepted and published in the Trade Marks Journal on 14 August 2020 in respect of the following goods and services:

> Class 5: Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides
>
> Class 10: Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; therapeutic and assistive devices adapted for persons with disabilities; massage apparatus; apparatus, devices and articles for nursing infants; sexual activity apparatus, devices and articles.
>
> Class 35: Advertising; business management; business administration; office functions.
>
> Class 44: Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, aquaculture, horticulture and forestry services.

avacare
CLINICAL RESEARCH NETWORK

3445405. The following services are relied upon in this opposition:

> Class 35: Site management organization services, namely, business assistance services for other clinical research organizations, namely, new trial and study procurement, budgeting and contracting, business study feasibilities, creation and implementation of standard operating procedures, providing and

managing study coordinators; development of comprehensive patient recruitment strategies, overseeing informed consent administration and management; patient referral management; business consulting and management in the field of clinical trials, namely, clinical data and regulatory submission management on behalf of medical, biopharmaceutical and biotechnology companies to assist them with clinical research, clinical trials, applications for drug approval and late phase and/or real world research studies; business data compilation and tracking services for others, namely, interactive tracking of clinical trial subject enrollment, status and adverse side effects of treatment and medication, including interactive services on mobile platform; business consulting services, namely, support of regulatory inspections and biopharmaceutical and biotechnology audits.

Class 42: Medical and scientific research, namely, conducting clinical trials and translational research for others; clinical research services, namely, collection of data in connection with clinical trials of pharmaceuticals and medical devices; multitherapeutic site management organization services, namely, research and development services in the field of pharmaceuticals and drug development.

3. By virtue of its earlier priority date of 18 November 2019, this registration constitutes an earlier mark in accordance with section 6 of the Act.

4. The opponent argues that the respective goods and services are identical or similar and that the marks are highly similar visually, aurally and conceptually.

5. The applicant filed a counterstatement denying that the marks are highly similar but agreeing that there is a degree of similarity between the same. The applicant denied that the goods and services are similar or identical, with the exception of the services *business management; business administration; office functions*, which the applicant accepted are identical or similar to those relied upon by the opponent.

6. Only the opponent filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. The applicant filed written submissions during the evidence rounds which will not be summarised but will be referred to as and where appropriate during this decision.

7. Both parties are professionally represented in these proceedings. The opponent is represented in these proceedings by Marks & Clerk LLP. The applicant is represented in these proceedings by Forresters IP LLP.

8. A Hearing took place on 25 November 2021 via video conference. At the hearing, the opponent elected counsel, and was represented by Victoria Jones of 3PB. The applicant also elected counsel and was represented by Daniel Selmi of Three New Square.

9. 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. That is why this decision continues to refer to EU trade mark law.

Evidence

Opponent's evidence in chief

10. The opponent filed evidence its evidence in chief in the form of one witness statement in the name of John Ferdinand, described as a Chartered Trade Mark Attorney for the opponent's representatives. The statement introduces three exhibits, namely Exhibit 1 – Exhibit 3 and is dated 6 April 2021.

11. Exhibit 1 comprises several webpages refencing clinical trials, including pages from the NHS website www.nhs.uk. Exhibit 2 comprises various webpages from third parties who offer clinical trials and research services. All of the screenshots provided are dated 6 April 2021. Exhibit 3 provides screenshots from the opponent's website at www.avacare.com. The pages provide detail of the opponent's clinical research services. The screenshots are dated 1 April 2021. There are also pages from what Mr Ferdinand describes in his statement as "…websites for brands held by members of its corporate group, IQVIA Inc. and Clintec International."[1] The pages from IQVIA are dated 1 April 2021 and the pages from Clintec International are dated 6 April 2021.

[1] See paragraph 8

Applicant's submissions

12. The applicant made submissions during the evidence rounds. Whilst I have noted these, they will not be summarised in full at this stage. However, I note that the applicant made several criticisms of the opponent's evidence, which led to the opponent filing evidence in reply. These criticisms are summarised below:

- It is not clear that the evidence provided at Exhibit 2 shows services which are offered within the UK;

- Exhibit 3 shows the opponent's website and evidence from companies related to the opponent, and as such it should be disregarded as it does not show objective evidence to assist in the comparison of the goods and services at issue. In addition, the screenshots are dated after these proceedings commenced; and

- At best, the Opponent's evidence shows that *some* providers of clinical trials and research also provide medical services.

Opponent's evidence in reply

13. The opponent opted to file evidence in reply to applicant's submissions. This comprises two witness statements. The first statement is in the name of Mark B. Brown, described as Vice-President and Head of Global Patient and Site Solutions for IQVIA. IQVIA is described as the parent organisation of the opponent. The statement is dated 13 August 2021 and introduces 11 exhibits labelled Exhibit 1 to Exhibit 11. The second is a further statement in the name of John Ferdinand with an additional two exhibits, namely Exhibit JF1 and Exhibit JF2. This is dated 14 August 2021.

14. In his statement, Mr Brown submits that it is a legal requirement for pharmaceutical products and medical devices to have been tested and proven in clinical studies and trials,[2] and Exhibit 1 to Mr Brown's statement provides webpages from the National Institute for Health Research ("NIHR") showing the 'Clinical Trials Guide' as published on 24 June 2019, in addition to pages from the website www.gov.uk providing

[2] See paragraph 4

information on good clinical practice for clinical trials as published on 18 December 2014 and last updated on 25 March 2021.

[3] Further information on the NIHR is provided at Exhibit 2 including its annual performance statistics showing that 1,390,483 participants took part in clinical research in England for the year 2020/2021. At paragraph 5, Mr Brown specifically referenced the below paragraphs from this exhibit within his witness statement:

> **"The NIHR was established in 2006 to "create a health research system in which the NHS supports outstanding individuals, working in world-class facilities, conducting leading-edge research focused on the needs of patients and the public".**
>
> **Since that time, we have transformed research in and for the NHS and helped to shape the health and social care research landscape more broadly.**
>
> **Working in partnership with the NHS, universities, local government, other research funders, patients and the public, we fund, enable and deliver world-leading health and social care research that improves people's health and wellbeing and promotes economic growth."**

16. Exhibit 3 comprises further webpages from www.nhs.uk, in addition to pages from the website of various NHS trusts. In his statement, Mr Brown submits that UK NHS trusts have dedicated research teams which comprise specialist clinicians and other medical professionals to conduct, support and administer trials by way of running trials or coordinating recruitment, administration, data collection or analysis. The webpages from the various trusts provided detail their involvement in clinical trials and research.

17. Exhibit 4 comprises pages from various third party websites discussing their clinical research and clinical trials. These webpages are all taken from .co.uk domains. Exhibit 5 comprises pages described by Mr Brown as summary documents prepared by his colleagues providing more information on how it works with its clients and partners.[4] These discuss in detail its patient recruitment services. Exhibit 6 comprises

[3] See paragraph 5
[4] See paragraph 10

examples of advertisements and promotional materials that Mr Brown states have been created have been created by the opponent for its clients in respect of clinical trials.[5]

[6] Examples of these are provided at Exhibit 7. Within his statement, Mr Brown states as follows:

> 15. It is also the case, as discussed in the contents of Exhibit 7, that studies regularly require patients to undergo regular monitoring and assessment and for communication of medical data to be made to the participant's physician, especially where participants have been recruited by their primary care providers. As such participation in the trial will form part of participants' ongoing medical treatment. In fact, clinical trial treatments often replace approved therapies or provide treatment where no approved treatment is available.

19. Exhibit 8 provides a document created by the opponent commenting on the administration of trials and ancillary medical services, explaining these may replace or supplement care given to patients. Exhibit 9 provides an article naming the 'Top 10 Pharmaceutical companies in the world (2020)' dated June 11, 2021 and one entitled 'Who are the top 10 medical device companies in the world (2021)?' on qtcrecruitment.com. Exhibit 10 provides pages from the websites of several of the third parties listed under the 'Top 10 Pharmaceutical companies in the world (2020)' at Exhibit 9. These pages reference their involvement with clinical trials. In addition, pages from the websites of several of the companies listed in 'Who are the top 10 medical device companies in the world (2021)?' are provided, also referencing their involvement with clinical trials.

20. Exhibit 11 includes several articles from UK publications including the BBC, the Guardian, the Sun and the Daily Mail amongst others. These articles discuss various clinical trials. One BBC article dated 24 June 2017 is entitled 'UK's first heart pumps targets 2018 clinical trial' and discusses that the UK's first artificial heart pump is moving closer to use on patients. An article dated 22 November 2019 from the Daily

[5] See paragraphs 10-12
[6] See paragraph 13

Mail discusses the UK's position as second in the world ranking of early-stage clinical trials. Several articles from 2020 discuss the clinical trials for the covid vaccine, including two from the BBC from 21 July 2020 and 25 September 2020, and an article from the Guardian from 10 November 2020. Various articles provide a commentary from participants of clinical studies in the UK, including one in the Guardian from 5 July 2018, and one from the Sun dated 20 November 2020.

21. The second statement from Mr Ferdinand firstly introduces Exhibit JF1. Mr Ferdinand submits that this exhibit goes to show that the previous evidence submitted under Mr Ferdinand's Exhibit 2 is relevant. Exhibit JF1 shows various information provided on webpages connecting a number of the third parties referenced previously with the UK, either by providing a webpage featuring their UK address, or by providing articles discussing their presence in the UK. All of the screenshots are dated 12 August 2021 but at least one article about the third party Novartis places them within the UK for several years, stating that Novartis UK was certified as Top Employer for eight consecutive years.

22. Exhibit JF2 provides pages from the website of the members of the opponent's "affiliated companies"[7] including from 'IQVIA' and 'Clintec', this time dated by the web archiving site the WayBack Machine. The IQVIA website refers to 'research' on a page dated 1 July 2019, and the Clintec pages dated 6 September 2019 references its clinical research, and its page from 24 September 2017 discusses its project management for studies.

Proof of use

23. The earlier mark was registered on 28 May 2021. As this mark had not been registered for a period of five years at the date on which the application was filed, it is not subject to proof of use requirements under section 6A of the Act.

[7] See paragraph 6 of the second witness statement of John Ferdinand

Decision

Section 5(2)(b)

24. 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".

25. 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."

Likelihood of confusion

26. 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.

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

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

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

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

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

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

Comparison of goods and services

27. Section 60A of the Act provides:

> "(1) For the purpose of this Act goods and services-
>
> (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.
>
> (b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.
>
> (2) In subsection (1), the "Nice Classification" means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975."

28. 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.

29. In the judgment of the Court of Justice of 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".

30. 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 Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court ("GC") stated that goods may be considered "complementary" where:

> "...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".

31. The case law provides further guidance on how the wording of goods and services as registered and filed should be interpreted within the comparison. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

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

32. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

> "…the applicable principles of interpretation are as follows:
>
> (1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.
>
> (2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded."

33. In *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T-133/05, the GC stated that:

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

34. The goods and services for comparison are outlined in the table below:

Earlier goods	**Contested goods**
	Class 5: Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.
	Class 10: Surgical, medical, dental and veterinary apparatus and instruments;

	artificial limbs, eyes and teeth; orthopaedic articles; suture materials; therapeutic and assistive devices adapted for persons with disabilities; massage apparatus; apparatus, devices and articles for nursing infants; sexual activity apparatus, devices and articles.
Class 35: Site management organization services, namely, business assistance services for other clinical research organizations, namely, new trial and study procurement, budgeting and contracting, business study feasibilities, creation and implementation of standard operating procedures, providing and managing study coordinators; development of comprehensive patient recruitment strategies, overseeing informed consent administration and management; patient referral management; business consulting and management in the field of clinical trials, namely, clinical data and regulatory submission management on behalf of medical, biopharmaceutical and biotechnology companies to assist them with clinical research, clinical trials, applications for drug approval and late phase and/or real world research studies; business data compilation and tracking services for others, namely, interactive tracking of clinical trial subject enrollment, status and adverse side effects of treatment and medication, including interactive services on mobile platform; business consulting services,	*Class 35: Advertising; business management; business administration; office functions.*

namely, support of regulatory inspections and biopharmaceutical and biotechnology audits.	
Class 42: Medical and scientific research, namely, conducting clinical trials and translational research for others; clinical research services, namely, collection of data in connection with clinical trials of pharmaceuticals and medical devices; multitherapeutic site management organization services, namely, research and development services in the field of pharmaceuticals and drug development.	
	Class 44: Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, aquaculture, horticulture and forestry services.

35. At the hearing, both parties made comprehensive submissions on the goods and services comparison. Concessions as to similarity and dissimilarity of terms were also made. Whilst I do not intend to summarise the submissions made in full within this decision, I have considered all of the arguments raised and keep these in mind as I conduct my comparison below.

36. I note firstly that both parties agreed the applicant's goods below are dissimilar to those protected by the opponent, and so I do not need to consider these further: [8]

> *Class 5: disinfectants; preparations for destroying vermin; fungicides, herbicides.*
>
> *Class 44: agriculture, aquaculture, horticulture and forestry services.*

37. The applicant also conceded in its counterstatement and then in its submissions that the below services are identical to the opponent's services in class 35. I therefore do not need to consider these further:

> *Class 35: business management; business administration; office functions*

Class 5: Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax

38. At the hearing and in his skeleton arguments, Mr Selmi for the applicant conceded that there is a low degree of similarity between the applicant's goods above and the opponent's services in classes 35 & 42. Within his skeleton arguments, Mr Selmi set this out in the following terms:

> *14. Those class 5 goods are intended to treat, manage and prevent a medical condition. The opponent has adduced evidence on the relationship between clinical trials and medical services and the provision of medical services as part of clinical trials (Brown §§15-18 and Exhibit 7). The applicant accepts that the nature and purpose of the goods and services overlaps to that limited extent. The opponent has also adduced evidence showing that businesses offering services associated with clinical trials also provide medical services (e.g., Ferdinand §6; Brown §§19, 20). The applicant also accepts that there is some overlap in the distribution channels of the goods*

[8] Mr Selmi also conceded a low degree of similarity in respect of 'disinfectants' in this class within his skeleton arguments, but after Ms Jones conceded these were dissimilar at the hearing, Mr Selmi accepted this concession from the opponent.

and services concerned. However, it would be wrong to say that there was a complementary relationship between the goods and services just because of the relationship between them (e.g., Brown §§15-18). Clinical trials are not indispensable or important for the provision of those class 5 goods on a regular basis, any more than one might say that research in any and every field is indispensable for scientific progress – that does not make the goods / services complementary.

15. Taken together, the applicant contends that there is a low degree of similarity between the class 5 goods shown at §13 above, and the earlier class 35 and 36 services.

39. Within her skeleton arguments, Ms Jones for the opponent provided the GC decision of *Emcur Gesunheitsmittel aus Bad GmbH v EUIPO,* Case T-165/17. This case discusses the similarity of earlier class five goods, namely '*Pharmaceutical products, except pharmacy-only preparations against cardiovascular diseases, immunotherapeutic agents, cytokines and cancer-inhibiting substances (cytostatics and metastasis inhibitors); veterinary products, phytopharma, medicinal teas, preparations for health care, dietetic substances for medical purposes and food supplements'* and applied for class 42 services including '*chemical research; chemical analysis; biological and pharmaceutical research; bacteriological research; biological research; scientific and technological services and research'.* In this decision, the GC found the Board of Appeal had erred in finding these goods and services to be dissimilar, giving the following reasoning:

"47 In the first place, it should be noted that the Board of Appeal did not find that the goods and services at issue were aimed at a different public. However, EUIPO submits that the 'target consumers' for the services in question are 'clearly different' from the consumers who buy pharmaceutical products. In that regard, it should be noted that as professionals can be both users of the services at issue and users of pharmaceutical products, the relevant public overlaps to some extent.

48 In the second place, the Board of Appeal's finding in paragraph 39 of the contested decision, that the goods covered by the earlier German mark and the

services in Class 42 covered by the mark applied for are different, a finding that is not disputed by the parties and is free of error, must be upheld.

49 In the third place, as regards the assessment of whether the goods and services at issue are complementary, it should be noted that, as the applicant correctly submitted, pharmaceutical companies are involved in research and development activities. Those companies advertise, inter alia, the fact that, due to their research and development activities and innovation, they continuously improve their products. The fact that pharmaceutical companies do not generally provide those services to third parties does not preclude them from doing so and does not rule out the possibility that the relevant public may believe that the responsibility for the research services lies with the same company which manufactures the pharmaceutical products or even that a company offering the services in question is economically-linked to the company manufacturing those products. Moreover, as the applicant submits, without being challenged on this point by EUIPO, pharmaceutical companies promote and administer pharmaceutical studies for consumers and undertake research and development activities in cooperation with third parties.

50 It is apparent from the foregoing that the services in Class 42 are closely connected to pharmaceutical products. It follows that the relevant public is likely to believe that the same undertaking is responsible for providing those services and manufacturing those goods.

51 That is consistent with the case-law to the effect that research services in Class 42 and pharmaceutical products, veterinary products, preparations for healthcare and dietetic substances for medical purposes in Class 5 are similar due to the close connection between them (see, to that effect, judgment of 18 October 2007, AMS v OHIM — American Medical Systems (AMS Advanced Medical Services), T-425/03, EU:T:2007:311, paragraphs 65 and 66).”

40. Also provided with her skeleton arguments, Ms Jones directed me to the GC decision of *AMS American Medical Systems (AMS Advanced Medical Services) v OHIM* Case T-425/03 as referenced in *Emcur* above, and particularly to paragraphs 64 & 65 in which the GC stated as follows:

"64 As regards the assessment of the similarity of the disputed services, first, as rightly found by the Board of Appeal, medical, bacteriology and chemical research and tests, in particular those listed in the Community trade mark application, have close links with medical drugs, devices or articles such as those covered by the earlier mark. Next, the medical apparatus and articles protected by the earlier mark, in particular prostheses, are normally provided within the same framework of medical services such as hospitals or private clinics in the same way as those mentioned in the Community trade mark application. Finally, scientific and industrial research of various kinds can be carried out in the same field as that of the goods covered by the earlier mark.

65 Consequently, given the close link between the goods and services in question in respect of their intended use, and the complementary nature of the goods in relation to the services, the Board of Appeal rightly found that those goods and services were similar."

41. At the hearing, Mr Selmi stated that with consideration to *Emcur* filed by the opponent, he may soften his comments in his skeleton arguments on the complementarity of the goods in class 5 with the class 42 services in this instance, stating he accepted some, but not all of the class five goods are complementary to the services, but maintained the similarity between them is low. Ms Jones submitted that the similarity between the applicant's class 5 goods and the opponent's services *Medical and scientific research, namely, conducting clinical trials and translational research for others; clinical research services, namely, collection of data in connection with clinical trials of pharmaceuticals and medical devices* is high. Whilst I am not bound by the findings of the GC in respect of similarity between goods and services, I accept the reasoning shared by both parties to the extent that there will be shared users of the goods and services and that there may be shared distribution channels (or a perception of shared distribution channels in line with the reasoning set out in *Emcur* above), and that as many of the applicant's class 5 goods above will be the subject of the opponent's class 42 services, they will be important for the same or vice versa. I accept that there will therefore be complementarity in respect of at least some of the class five goods and the opponent's services. I note there is also agreement from both parties that the purpose of the goods overlaps, although the applicant

submits this is to a limited extent. Whilst I disagree that the goods and services share a specific intended purpose or nature, overall I accept Mr Selmi's concession. With consideration to all of the factors, I find goods and services are similar to a low degree.

Class 5: Dietary supplements for humans and animals

42. The parties disagree considerably in respect of the similarity of these goods and the opponent's services. At the hearing, Mr Selmi for the applicant maintained that these are dissimilar to the opponent's services, whilst Ms Jones for the opponent maintained they are similar to a high degree. At the hearing, Mr Selmi highlighted that this term does not specify they are medical dietary supplements, and that these are not pharmaceuticals. However, it is my view that this category of goods includes all types of dietary supplements for humans and animals, including those for medical purposes. I therefore find this category of goods to be subject to identical reasoning as that for *dietetic food and substances adapted for medical or veterinary use.* Whilst I accept these goods are not pharmaceuticals, I still find that where these goods are for medical purposes, including those such as iron supplements, or supplements for weight gain of the type that will regularly be prescribed by Doctors and General Practitioners for example, they will be purchased and distributed by private and public healthcare providers who will also use the opponent's services. Users will therefore be shared at least to an extent.

43. At the hearing, Ms Jones pointed to reference in the evidence in respect of clinical trials in respect of fertility and women's health and submitted these may include dietary supplements such as folic acid. Mr Selmi appeared to accept this submission, stating there are some dietary supplements that have been studied such as folic acid, but that as a general rule this will not be the case. Mr Selmi's submitted at the hearing that the dietary supplements market is unregulated and the not all the goods will necessarily be subject to clinical trials. I have considered these submissions, and I also note the following extract from the NHS webpage on clinical trials provided as Exhibit 3 to Mr Brown's statement as below:

How are trial results used to improve treatment?

Clinical trials can help:

- prevent illnesses by testing a vaccine
- detect or diagnose illnesses by testing a scan or blood test
- treat illnesses by testing new or existing medicines
- find out how best to provide psychological support
- find out how people can control their symptoms or improve their quality of life – for example, by testing how a particular diet affects an illness

Many clinical trials are designed to show whether new medicines work as expected.

These results are sent to the MHRA, which decides whether to allow the company making the medicine to market it for a particular use.

44. Whilst I therefore accept Mr Selmi's submission that it is not always the case that dietary supplements are subject to clinical trials, I accept the parties agreement that some dietary supplements will be subject to clinical trials, and it is my view that this will most likely be in respect of dietary supplements for medical purposes, such as in the instances outlined in the extract above. I also find that those supplements which are for medical purposes are likely to be produced by medical or pharmaceutical companies who will also offer the opponent's services, or, in line with the reasoning set out in *Emcur*, who the consumer is likely to assume also offer the opponent's services. However, I find the nature and method of use to differ, and I do not find these goods and services will be in competition. I do not find these will share the same specific intended purpose, with the services being for exploration and knowledge gaining, whereas the goods are for treating a specific health need. Overall, I find the above goods to be similar to the opponent's services to a low degree.

Class 10: Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials;

45. Within his skeleton arguments and at the hearing, Mr Selmi submitted that analogous arguments apply to the applicant's class 10 goods as to its class 5 goods, and conceded there is a low level of similarity in respect of those goods above. Mr Selmi submitted that the same points apply in respect of the overlap in users, nature, purpose, distribution channels and complementarity. Ms Jones also made the same arguments for a high level of similarity between these goods and the opponent's

services as she submitted in relation to the class 5 goods above. I acknowledge the concessions made by Mr Selmi, although it is again my view that there can be no real overlap in nature between goods and services in the context of trade mark law. As with the class 5 goods, I do not find the goods and services to be in competition, to share a method of use or to be for the same specific purpose, but I note the parties agreement on the some overlap in the other factors, and it is my own view that there will be an overlap in users and distribution channels for the reasons discussed in relation to the class 5 goods above. I therefore accept Mr Selmi's concession that the goods and services are similar to a low degree.

Class 10: therapeutic and assistive devices adapted for persons with disabilities

46. In respect of the above goods covered by the applicant, Mr Selmi submitted that these goods are dissimilar to the opponent's services, that they are directed at physiotherapists, rather than primary clinicians, and that the users, nature, purpose are not shared and they are not complementary or in competition. Whilst I agree with these submissions for the most part, I believe that contrary to Mr Selmi's arguments these types of goods are medical devices that will be used by a wide variety of healthcare professionals and purchased by both private and public health care providers, and so I note the overlap in users with the opponent's *Medical and scientific research, namely, conducting clinical trials and translational research for others; clinical research services, namely, collection of data in connection with clinical trials of pharmaceuticals and medical devices* who may also engage the opponent's services. I also note the same points apply in respect of the distribution channels of these goods and the medical apparatus and instruments as set out above. With consideration to all of the factors, I find these goods to be similar to the opponent's services to a low degree.

Class 10: apparatus, devices and articles for nursing infants; massage apparatus; sexual activity apparatus, devices and articles

47. Whilst I accept that there may sometimes be very general overlap in users of the massage apparatus and apparatus and devices for nursing infants where these devices are purchased for use in a healthcare setting, more generally I do not find it the users to overlap. Further, I do not find it likely or apparent from the evidence that

these goods will be provided by those offering the opponent's services or that there will be a perception that this will be the case. I find the nature and method of use to differ, and I do not find the goods to be complementary or in competition. Overall, I find the above goods in class 10 to be dissimilar to the opponent's earlier services.

Class 35: Advertising

48. In his skeleton arguments, Mr Selmi states as follows:

> *"That leaves "Advertising", which is dissimilar to any of the earlier services. On a notional and fair use basis, "advertising" includes advertising of clinical trials (and there are examples in the evidence e.g., Brown §19 and Exhibit 10), however, anything can be advertised. It would be wrong as a matter of law to hold advertising as being similar to clinical trial services just because those services are advertised. They do not share a common nature, intended purpose, distribution channel, relevant public or usual origin, nor are they in competition with or complementary to the other."*

49. I note Mr Selmi's acceptance that 'advertising' will include advertising of clinical trials, and that there are examples of this shown in the evidence. I also note Mr Selmi's submission at the hearing that there may be an overlap in distribution channels on this basis, but that the examples given relate to publicity using print media or over the internet which applies to almost any and everything. I accept Mr Selmi's submission that advertising is not similar to clinical trials, and that the fact a particular set of goods or services are advertised, be it via internal or external channels does not render advertising services similar to those goods or services which are promoted. However, I note in this case the opponent does not appear to be arguing that advertising is similar to its services due its services being advertised. Rather, it is submitted that advertising as a service is identical or highly similar to other services covered by the opponent's specification. Particularly, Ms Jones drew my attention to the two terms below:

- Site management organization services, namely, business assistance services for other clinical research organizations, namely, new trial and study procurement, budgeting and contracting, business study feasibilities, creation

and implementation of standard operating procedures, providing and managing study coordinators;

- development of comprehensive patient recruitment strategies, overseeing informed consent administration and management;

50. I note that the opponent has provided evidence of advertisements and promotional material it creates to promote third party studies, but this does not mean the material created necessarily falls within the meaning of the services as registered. To my mind, the term *Site management organization services, namely, business assistance services for other clinical research organizations, namely, new trial and study procurement* is the offering of business assistance with the procurement of new studies and trials for others. Whilst I accept that in order to procure new trials there may be an element of conveying a message either about the facilities of a site and services that may be offered, or surrounding a parties research or hypothesis for a study to third parties, I find this likely to take place in the form of corresponding directly with another party, submitting bids or tenders, and dealing with the arranging of paperwork and legalities and negotiating contracts in respect of the same. It is my view that to find *site management organization services, namely, business assistance services for other clinical research organizations, namely, new trial and study procurement* falls within the meaning of advertising would be to stretch the ordinary and natural meaning of the term, which should be confined to its core meaning.

51. In addition, I find the nature of the services to differ, and I find it unlikely they would be viewed as being offered by the same entities generally, with advertising seen as a creative endeavour, whilst new trial and study procurement will be viewed as a specialist strategic undertaking. I do not find the services to be complementary in accordance with trade mark law, nor do I find them to be in competition with each other. I find the intended purpose of advertising would be to raise the profile and awareness of goods, or of a service or brand to consumers, whereas I note the opponent's services are to assist with the actual procurement of the work itself. I find that it is possible the intended users may be shared; namely professional consumers looking to advertise their services, facilities or research and procure new studies or trials, however, overall, I do not find this sufficient to render these services similar.

52. In respect of the opponent's *development of comprehensive patient recruitment strategies,* Ms Jones submitted that a comprehensive patient recruitment strategy will include the advertisement of clinical trials. At the hearing Ms Jones directed me to several pages of the evidence showing materials produced by her client promoting various clinical trials. Ms Jones submitted that producing this material all fell within the development of patient recruitment strategies.

53. I also note the comprehensive explanation provided by the opponent at Exhibit 5 of the evidence explaining what is involved within IQVIAs offering to its clients under the heading 'Patient Recruitment'. An extract from this exhibit states as follows:

Patient Insights and Message Testing

- Prior to conducting any development activities, we understand that it is critical to fully explore each patient profile, from each study. To do this, our in-house Patient Insights team conducts upfront insights planning to assure all our recruitment and retention efforts are engaging all of the patients, in the most appropriate manner. We also leverage our patient communities and global social media insights (such as social listening) to create highly targeted patient recruitment messaging and engagement campaigns, addressing motivators and barriers to trial participation for a specific patient population and demographic.

  IQVIA uses message testing to allow the study team to quickly determine which of several creative concepts for study logo/branding and look and feel of creative materials resonates most strongly with the patient population being targeted for the study. This process can provide objective patient-reported data that can help speed decision making for various stakeholder groups. To do this, we will survey members of IQVIA's patient communities who have the disease, as well as other relevant patient communities, to gauge actual perspectives and cultural acceptance. Once selected, the concept will be applied to materials such as posters, advertisements, patient brochures, study guides, and materials that can help increase patients' understanding of the study.

  We can also provide disease-specific information and support resources for patients who are not healthy volunteers. We use multiple web communities for some targeted conditions which regularly engage members in disease and research education. We are committed to continuous evaluation of current available technology options and have tremendous relationships with partners that can provide patient engagement support though mobile applications, tailored to a wide range of ages.

  Through the IQVIA Patient Portal, a turnkey solution for patient retention and long-term engagement, we are able to distribute trial participant satisfaction surveys at the start, mid-point, and completion of a patient's clinical trial journey, that help us, and our sponsors, better understand the participant experience.

54. For clarity, I accept that the opponent and its affiliated companies offer both services for developing patient recruitment strategies, in addition to advertising services to its clients. However, the offering of both services by the opponent does not render them identical. It is my view that the development of patient recruitment strategies will include stages from the gathering of information to inform these strategies, the development of ideas for recruiting the potential patients in order to place them in the trials or studies, and even perhaps the formulation of a plan to run targeted campaigns to encourage support and participation in a trial from potential candidates. However, I do not find that the creation, development and running of the advertising campaigns themselves falls into the development of a recruitment strategy, and I do not find that the development of recruitment strategy is an advertising service in itself. I therefore do not find these services to be identical.

55. However, it is my view that there will be a cross over in users of these services to an extent, namely professionals wishing to recruit patients for their clinical trials. I note the development of a patient recruitment strategy may on some occasions be offered by the same entity that will then be engaged to provide advertising services and run an advertising campaign for a clinical trial, although I consider that the fact the opponent offers both these services does not make this the case generally. I also note in those particular circumstances, the general intended purpose, that being the ultimate goal of having patients sign up for clinical trials, will be shared. Overall, I find the opponent's *development of comprehensive patient recruitment strategies* to be similar to the applicant's advertising, which will include advertising for clinical trials, to a low degree.

Class 44: Medical services; veterinary services

56. Again, in his skeleton arguments Mr Selmi has conceded to a low degree of similarity between these goods and the opponent's services, for the same reasons given in respect of the goods in classes 5 & 10. On the contrary, Ms Jones argues these services are identical or highly similar to the opponent's class 42 services. At the hearing, Ms Jones made submissions on the evidence filed. In particular, I note the submissions and evidence that the provider of both medical services and clinical trial services will be shared, with entities such as the NHS providing both the services. I accept this.

57. I also note that the nature of the services will be shared to an extent, with the medical and scientific research by way of conducting of clinical trials involving overseeing the administration of medical and veterinary care and treatment. The same qualified health professionals will likely be involved in the offering of both of the services. I note that the continued practice of medical services, and to my mind very likely veterinary services, will be reliant on the continuation of new research and trials, and also that a large portion of research and trials may not be conducted without medical or veterinary services being administered. I therefore find there to be a level of complementarity between these services and those *Medical and scientific research, namely, conducting clinical trials and translational research for others* covered by the opponent.

58. I note Ms Jones' submission that the goods and services will be in competition. However, it is my view that the medical services and veterinary services will be for the purpose of treating ailments and health management, whether this be for humans or animals, whereas the opponent's services will be aimed at those seeking assistance in conducting clinical trials and medical research, and will for the purpose of providing services for assisting with that research. Whilst I accept the general public may participate in these studies, and choose to do so over traditional healthcare services, they are not the consumer of the opponent's services, and as such medical services for the treatment of ailments will not be an alternative to engaging the services for conducting medical research and clinical trials for the consumer, and it is my view this reasoning is paralleled for veterinary services. Where the applicant's class 44 services are engaged at a professional level, for example, where the user represents a public health service such as the NHS and is engaging the services of a private company to deal with an overflow of patients, or a specialist area of medicine, or where the users are professionals at a medical or veterinary charity, the users will overlap to an extent. However, the same reasoning regarding a lack of competition will apply. Overall, I find the applicant's services above to be similar to the opponent's services in class 42 to a medium degree.

hygienic and beauty care for human beings or animals;

59. It is my view that the above may include services ranging from traditional beauty treatments for humans and animals to the provision of personal hygiene care assisting with tasks such as washing or bathing for humans or animals. Whilst I accept these services may be offered at home, in salons (both human and animal), or in care facilities, I do not find these to be important or indispensable to the opponent's services, or that they will be considered by the consumer as being offered by the same entities as those offering the opponent's services in class 42. I find the nature of the services will differ, as will the trade channels, method of use, intended purpose and users. I find these services to be dissimilar to the opponent's services.

Comparison of marks

60. 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."

61. 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.

62. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
avacare CLINICAL RESEARCH NETWORK	avacare health

63. The earlier mark is made up of the large word AVACARE and the much smaller wording CLINICAL RESEARCH NETWORK, presented in a green colour. In addition, the wording AVACARE is presented in a slightly stylised format, most noticeably on the capital 'A' which uses a dotted line as opposed to a solid line to cross the same. The large word AVACARE plays the most dominant role in the mark, particularly

considering its size and position and the descriptiveness of the additional wording CLINICAL RESEARCH NETWORK in relation to the services. The additional wording CLINICAL RESEARCH NETWORK in addition to the stylisation of the 'A' play a lesser role in the overall impression of the mark, as does the use of the solid colour green. Whilst I note the letter 'v' in Avacare is also stylised in a fairly unusual way, this makes only a small impression and plays only a minimal role if any in the overall impression of the mark.

64. The contested mark comprises the two words 'avacare health'. As it is filed as a word mark it may be used in a range of standard fonts and in upper or lowercase lettering, and so the use of all lower-case letters does not contribute to the overall impression of the mark in this instance. In the context of the majority of the goods and services, the word health will be descriptive or non-distinctive, and this, along with the fact that the word avacare is at the start of the mark where the consumer will pay most attention means the element 'avacare' plays the greatest role in its overall impression.

Visual comparison

65. Visually, the marks coincide through the use of the dominant word 'avacare' but differ by way of the additional wording in both marks, and the stylisation of the earlier mark, particularly the 'A' element. The contested mark is a word mark meaning it may be used in a range of colours and in both upper-case and lower-case lettering, and so these elements in the earlier mark do little to differentiate the marks visually. With consideration to the similarities and the differences, it is my view that the marks are visually similar to a high degree.

Aural comparison

66. It is my view that the earlier mark will often be pronounced by the consumer simply as AVACARE due to the dominance of this element and the descriptiveness and length of the additional element. However, I acknowledge it also may be pronounced in full as AVACARE CLINICAL RESEARCH NETWORK by some consumers. It is my view that the contested mark will in some instances be pronounced as AVACARE HEALTH. Due to the identical initial nature of the first three syllables in each marks, namely AVE-AH-CARE, I find in both instances the marks are aurally similar to a

medium degree. I also consider that there will be instances where the consumer will refer to the contested mark as AVACARE only due to the descriptiveness of the word 'HEALTH', meaning there will be occasions where the marks pronounced identically by the consumer.

Conceptual comparison

67. The word AVACARE appears to be a made-up word with no meaning within the English language. However, noting that the consumer will generally identify elements of a mark that suggest a meaning or resemble words it understands,[9] it is my view that the consumer will, particularly in the context of the goods and services, identify the element CARE within the same. This will evoke to the concept of care giving. The wording CLINICAL RESEARCH NETWORK in the earlier mark will convey to the consumer the concept of a network of businesses or entities that are engaged in clinical research, conveying that the services are likely related to the same. The word 'health' in the later mark conveys to the consumer that the goods or services offered under the mark are likely to be related to health care, or the improvement of health. Due to the shared concept conveyed in respect of care giving, I find the marks to be conceptually similar to a medium degree.

Average consumer and the purchasing act

68. 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 or services in question: *Lloyd Schuhfabrik Meyer,* Case C-342/97.

69. 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. described the average consumer in these terms:

[9] See paragraphs 62 – 68 of the General Court decision in *Usinor SA v OHIM,* Case T-189/05

> "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."

70. Ms Jones submitted that the relevant consumer of the goods and services will include members of the general public as well as healthcare professionals and businesses, and that whilst the level of attention paid to some of the goods and services may be higher, there are also various goods, including those falling within the class 5 pharmaceutical goods, which will only receive a lower level of attention from the consumer. In her skeleton arguments and at the hearing, Ms Jones made reference to the general public, namely those individuals partaking in clinical trials, as being consumers of the opponent's services. On the contrary, Mr Selmi submitted that this analysis of the average consumer was incorrect, and that the only relevant group of average consumers will be those that are shared. Mr Selmi submitted that the shared consumers are primarily clinicians.

71. With reference to the conflicting submission from the parties on the relevant consumers, particularly in relation to the opponent's services, I note the evidence provided by the opponent at Exhibit 1 of Mr Brown's statement from the National Institute for Health website (NIHR), providing answers to a set of questions for those interested in clinical trials. This provides information both for those looking to conduct clinical trials, as well as some information for those interested in becoming involved in a clinical trial as a patient, pointing these people to local NHS trusts. It also states:

> What is public involvement in research?
>
> INVOLVE defines public involvement in research as research being carried out 'with' or 'by' members of the public rather than 'to', 'about' or 'for' them. The NIHR expects patients and the public to be actively involved in all stages of the

research process from project design to disseminating the findings in any research it funds.

When using the term 'public' we include patients, potential patients, carers and people who use health and social care services as well as people from organisations that represent people who use services. Whilst all of us are actual, former or indeed potential users of health and social care services, there is an important distinction to be made between the perspectives of the public and the perspectives of people who have a professional role in health and social care services.

72. It is my view that the above statement points to the industry for these services not viewing the general public or participants of research and clinical trials services in the UK as consumers of the services, but rather as participants of the research itself.

73. I also note the comments of the GC in *Alpex Pharma v EUIPO,* Case T-355/15, in which the court held that conducting research in order to develop new drugs was not a 'service' within the meaning of the word in trade mark law. There was no evidence that third parties had commissioned the registered proprietor to conduct the research in order to develop a customised product for a third party. Therefore, the research was just part and parcel of the registered proprietor's trade in pharmaceutical products. Giving its reasons for why the Board of Appeal had not erred in its original finding, the GC stated:

> *"46. First, it is apparent from paragraph 32 of the contested decision that the Board of Appeal found that obtaining marketing authorisation for pharmaceutical products or nutritional supplements for the purposes of sale to external customers was part of the process of placing those products on the market but that clinical trials in respect of obtaining marketing authorisation for pharmaceutical products or nutritional supplements did not establish that the applicant had supplied the services in Class 42 covered by the earlier mark to third parties."*

74. I find it may be construed from this that when conducting research or clinical trials to develop one's own drug (which will inevitably involve trial participants and members

of the general public) the general public are not consumers of these trials as a service. It follows that where clinical trials are offered as a service, the consumers are those looking for a third party to conduct a trial on their behalf, and not the participants in the study itself.

75. On this point, I also note the following comments provided in the document at Exhibit 1:

> Clinical trials unit
> What does a Clinical Trials Unit (CTU) do?
>
> CTUs are specialist units which have been set up with a specific remit to design, conduct, analyse and publish clinical trials and other well-designed studies. They have the capability to provide specialist expert statistical, epidemiological and other methodological advice and coordination to undertake successful clinical trials. In addition, most CTUs will have expertise in the coordination of trials involving investigational medicinal products which must be conducted in compliance with the UK Regulations governing the conduct of clinical trials resulting from the EU Directive for Clinical Trials.
>
> Units awarded UKCRC Registration are required to provide evidence to an international panel of experts of their capability to centrally coordinate multi-centre clinical trials (i.e. having overall responsibility for the design, development, recruitment, data management, publicity and analysis of a portfolio of trials), and that they have established robust systems to ensure conduct and delivery of clinical trials to the highest quality standards.
>
> More information on the UKCRC CTU Network and unit registration can be found at UKRC Registered Clinical Trials Units Network

76. To my mind, the opponent's services are the type offered by parties including the CTUs referenced, to those looking to conduct medical trials and research. It is therefore my view that the relevant consumer of the opponent's services will be

professionals and academics in the field of science, pharmaceuticals and medicine, including those at both private businesses and public entities with an interest in the development or enhancement of the field, which may include government run bodies, private and public health providers, universities and charities. The average consumer of these services is not the general public.

77. I agree with Ms Jones that the average consumer of the similar goods in class 5 will include both professionals in addition to members of the general public, but I also accept Mr Selmi's position that it is the degree of attention paid by the shared relevant consumer that should be considered. However, and in any case and contrary to Ms Jones submissions, it is well established that in respect of pharmaceutical goods, the general public will pay a higher than average degree of attention in respect of the category as a whole, with medical professionals paying a high degree. In *Olimp Laboratories sp. z o.o. v EUIPO*, Case T-817/19, EU:T:2021:41, the GC considered the average consumer for and level of attention which would be paid in the selection of pharmaceutical and medical products in class 5. It said:

> "39 Where the goods in question are medicinal or pharmaceutical products, the relevant public is composed of medical professionals, on the one hand, and patients, as end users of those goods, on the other (see judgment of 15 December 2010, *Novartis* v *OHIM – Sanochemia Pharmazeutika (TOLPOSAN)*, T-331/09, EU:T:2010:520, paragraph 21 and the case-law cited; judgment of 5 October 2017, *Forest Pharma* v *EUIPO – Ipsen Pharma (COLINEB)*, T-36/17, not published, EU:T:2017:690, paragraph 49).
>
> 40 Moreover, it is apparent from case-law that, first, medical professionals display a high degree of attentiveness when prescribing medicinal products and, second, with regard to end consumers, in cases where pharmaceutical products are sold without prescription, it must be assumed that those goods will be of concern to consumers, who are deemed to be reasonably well informed and reasonably observant and circumspect where those goods affect their state of health, and that these consumers are less likely to confuse different versions of such goods. Furthermore, even assuming that a medical prescription is mandatory, consumers are likely to demonstrate a high level of attentiveness upon prescription of the goods at issue in the light of the fact that those goods

are pharmaceutical products. Thus, medicinal products, whether or not issued on prescription, can be regarded as receiving a heightened level of attentiveness on the part of consumers who are normally well informed and reasonably observant and circumspect (see judgment of 15 December 2010, *TOLPOSAN*, T-331/09, EU:T:2010:520, paragraph 26 and the case-law cited).

41 […]

42 In the present case, having regard to the nature of the goods concerned, namely medical or pharmaceutical products in Class 5, the Board of Appeal acted correctly in finding in paragraphs 18 to 21 of the contested decision – which, moreover, is not disputed by the applicant – that, in essence, the relevant public was made up of medical professionals and pharmacists and consumers belonging to the general public with a higher than average degree of attentiveness.".

78. In respect of the dietary supplements, it is those for medical use which I have found share a level of similarity with the opponent's goods, and in respect of these goods in particular I find in respect of medical professionals, they will pay a high level of attention due to the high liability and responsibility that comes with prescribing, administering or recommending these to patients to treat health concerns. With regards to the medical devices, again I find a high degree of attention will be paid by medical professionals on the basis that they will again be used by medical professionals with during the treatment of a patient, and will have an impact on the patient's health, pain management or physical abilities.

79. In respect of the class 44 services offered, I note that whilst these will primarily be aimed at the general public, they will also be engaged by parties such as the NHS in particular where there is a requirement for specialist medical services or where the demand for NHS services outstrips the capacity that can be offered. I find in these circumstances the degree of attention will be high, with a huge liability to ensure that the healthcare provided to the public is adequate. In addition, they may be engaged by animal and medical charities, and again a high degree of attention will be paid when engaging these services for these reasons.

80. It is my view that all of the goods and services may be engaged with visually, with services sought online and goods obtained via online or physical pharmacies and wholesale stores. However, I also note that aural considerations cannot be ignored in respect of these goods and services, with verbal recommendations and discussions between professionals playing a part in the purchasing process.

Distinctive character of the earlier trade mark

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

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

80. The element AVACARE in the earlier mark appears to be a made-up word. However, whilst the word as a whole has no meaning within the English language, as

previously mentioned it is my view that the element CARE will be recognised in the mark and will in the context of the services allude to care giving. For this reason, I do not find the element AVACARE to hold the highest degree of distinctive character, but I find it is distinctive to a medium degree.

81. The stylisation of the 'A' in Avacare also adds marginally to the distinctive character of the mark as a whole, but the wording CLINICAL RESEARCH SERVICES is descriptive, and does little to contribute to the distinctiveness of the mark. I find the mark as a whole to also be distinctive to a medium degree.

82. I find the evidence in relation to the use of the opponent's earlier mark to be limited, and insufficient to show that the distinctiveness of the mark has been raised to above its inherent level.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

83. Prior to reaching a decision under Section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 26 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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 they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held by the earlier mark will have an impact on the likelihood of confusion, and that the likelihood of confusion may be increased where the distinctive character held by the earlier mark is high and may be less likely where it is low. I must remember that the distinctive character of the earlier mark may be inherent, but that it may also be increased through use, and that the distinctiveness of the common elements is key.[10] I must keep in mind that a lesser degree of similarity between the goods and

[10] See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

services may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the goods and services are obtained will have a bearing on how likely the consumer is to be confused.

84. I consider at this point that there are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.[11]

85. In *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

86. I found the earlier mark to be visually similar to the contested mark to a high degree, and to be aurally similar to a medium degree in some instances, although I found there will also be instances where the marks are pronounced identically. I found the marks to be conceptually similar to a medium degree. I found the consumer will be paying a high degree of attention in respect of the goods and services, and that the majority of these will be similar to a low degree, but in respect of some services the degree of similarity between these is higher. Where the goods and services are found to be dissimilar, there can be no likelihood of confusion, and this applies in respect of the following goods:

> *Class 5: disinfectants; preparations for destroying vermin; fungicides, herbicides.*

[11] *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

Class 10: massage apparatus; apparatus, devices and articles for nursing infants; sexual activity apparatus, devices and articles.

Class 44: hygienic and beauty care for human beings or animals; agriculture, aquaculture, horticulture and forestry services.

87. I found the earlier mark to be distinctive as a whole to medium degree, primarily on the basis of the shared element AVACARE, which alone I also found to be inherently distinctive to a medium degree. I also found the common element AVACARE to be dominant in the overall impression of both the earlier mark and the contested mark.

88. I consider the impact of the low level of similarity in respect of some of the goods and services, in addition to the high level of attention paid by the shared relevant consumer. However, in this instance, I believe this will be outweighed by the fact that the dominant and distinctive element of the marks are highly similar, and the additional wording is descriptive or non-distinctive, and keeping in mind the consumers imperfect recollection, is unlikely to be recalled even when a high degree of attention is paid. With consideration to all of the factors, it is my view that there will be a likelihood of direct confusion in respect of all of the applicant's remaining services.

89. However, for completeness, and in case that I am wrong about the likelihood of direct confusion between the marks, I will move on to consider the likelihood of indirect confusion.

90. In *L.A. Sugar* Mr Mr Iain Purvis Q.C., as the Appointed Person set out three examples of when indirect confusion may occur as below:

> 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).”

91. I note that the examples above were intended to be illustrative and are not exhaustive. At the hearing, Mr Selmi also referred me to the comments from Arnold LJ in *Liverpool Gin v Sazerac* [2021] EWCA Civ 1207; [2021] E.T.M.R. 57 at paragraph 13, at which he set out that there must be a proper basis for a finding of indirect confusion, and I keep these comments in mind in my considerations below.

92. In this instance, I consider that the most dominant elements in each of the mark, namely the word AVACARE is also the shared element, and that it is inherently distinctive to a medium degree. Further, I note again that this may be used in a similar stylisation and colour to the earlier mark. I also consider that in the context of the goods and services as registered, the additional wording in each mark is descriptive or non-distinctive in the context of the similar goods. I consider that these circumstances are at least very similar to those set out by Mr Purvis Q.C. in category B above. However, I note this is not necessarily conclusive, and I consider again the high degree of attention that will be paid by the shared consumers of the goods and services. I also note the similarities between the goods and services have been found to be low, meaning generally a higher degree of similarities between the marks will be required in order to find a likelihood of confusion. However, with consideration to these points, it is my view that even if it is the case that the consumer’s high degree of attention means the differences between the marks are recalled despite the consumers imperfect recollection, it is highly likely in the circumstances that the consumer will view the common dominant and distinctive element in each of the marks, and reach the logical conclusion that this element indicates that an economic link exists between the two offerings. It is my view the consumer would consider the different descriptive wording as simply being used to indicate the different branches of the same entity offering the different but related goods and services in the field of science and medicine. I do not find the stylisation of the ‘A’ detracts from this finding as its impact

overall is only marginal, and even where this is noticed or recalled, it will likely be put down to a slightly different stylisation used for that side of the connected business. I therefore find there is a likelihood of indirect confusion in this instance in respect of all of the similar goods and services.

Final Remarks

93. Both parties have achieved partial success in this opposition. Subject to a successful appeal, the application will be refused for the following goods and services:

> *Class 5: Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; plasters, materials for dressings; material for stopping teeth, dental wax;*
>
> *Class 10: Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; therapeutic and assistive devices adapted for persons with disabilities;*
>
> *Class 35: Advertising; business management; business administration; office functions.*
>
> *Class 44: Medical services; veterinary services*

94. The application will be registered for the following goods and services:

> *Class 5: disinfectants; preparations for destroying vermin; fungicides, herbicides*
>
> *Class 10: massage apparatus; apparatus, devices and articles for nursing infants; sexual activity apparatus, devices and articles*
>
> *Class 44: hygienic and beauty care for human beings or animals; agriculture, aquaculture, horticulture and forestry services.*

COSTS

95. Whilst both parties have achieved some success, the successful of the opponent outweighs that of the applicant. In the circumstances I award the opponent the sum of £1200 as a contribution towards the cost of the proceedings, which includes a 40% reduction in the cost award to account for the applicant's success. The sum is calculated as follows:

Official fee	£100
Preparing and filing the TM7 and considering the	
TM8 and counterstatement:	£300
Preparing and filing the evidence:	£600
Preparing for and attending the hearing:	£1000
40% reduction	-£800
Total	**£1200**

96. I therefore order Avacare Global to pay QCare Site Services, Inc. the sum of £1200. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 14th day of February 2022

Rosie Le Breton

For the Registrar