

O/171/20

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO. UK00003362432

IN THE NAME OF CLINTON OGBENNA

FOR THE FOLLOWING TRADE MARK:



IN CLASS 25

AND

IN THE MATTER OF AN APPLICATION FOR INVALIDATION THERETO

UNDER NO. 503057 BY

NIKE INNOVATE C.V.

## BACKGROUND AND PLEADINGS

1. Clinton Ogbenna (“the proprietor”) is the owner of the trade mark shown on the cover page of this decision (“the Contested Mark”). The Contested Mark was filed in the UK on 20 December 2018 and registered on 15 March 2019. It stands registered for the following goods:

Class 25      Clothes.

2. On 6 March 2020, NIKE INNOVATE C.V. (“the applicant”) applied to invalidate the Contested Mark under section 47 of the Trade Marks Act 1994 (“the Act”). The applicant relies upon sections 5(2)(b) and 5(3) of the Act. The relevant date for the purposes of my assessment is the date of application for the Contested Mark i.e. 20 December 2018. Under both grounds of invalidation, the applicant relies upon the following trade marks:

CORTEZ

EUTM no. 6402432

Filing date 30 October 2007; registration date 11 September 2009

(“the First Earlier Mark”)

COR72Z

EUTM no. 7585003

Filing date 6 February 2009; registration date 15 September 2009

(“the Second Earlier Mark”)

CORTEZ

UKTM no. 1114342

Filing date 15 May 1979; registration date 15 May 1979

(“the Third Earlier Mark”)

3. Under section 5(2)(b), the applicant relies upon all goods for which the earlier marks are registered as set out in the Annex to this decision. The applicant claims that there

is a likelihood of confusion because the parties' respective marks are similar and the goods are identical or similar.

4. Under section 5(3) the applicant claims a reputation in respect of all goods for which the earlier marks are registered. The applicant claims that use of the Contested Mark would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character and/or reputation of the earlier marks.

5. The proprietor filed a counterstatement denying the claims made and putting the applicant to proof of use.

6. The proprietor is represented by Wilson Gunn and the applicant is represented by Stobbs. Only the applicant filed evidence. Neither party requested a hearing, but both filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

## **EVIDENCE AND SUBMISSIONS**

7. The applicant filed evidence in the form of the witness statement of Kristen K. Downer dated 11 September 2020. Ms Downer is the Manager of Nike Innovate C.V, a position she has held since 15 May 2016. Ms Downer's statement is accompanied by Exhibits A to K.

8. Ms Downer explains that CORTEZ is one of Nike's signature product lines. She states that it was first used in 1972 and has been used continuously since that date. Ms Downer states that the brand has been used in countries around the world including France, Greece, Croatia, Bulgaria, Slovenia, Romania and the United Kingdom. Ms Downer has provided the following sales information for products sold under the earlier marks in EU countries:<sup>1</sup>

<b>Country</b>	<b>Date Range</b>	<b>Total Sales (USD)</b>
Austria	1996-2018	9,500,000

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<sup>1</sup> Exhibit C

Belgium	1996-2018	11,000,000
Croatia	2000-2018	36,600,000
Czech Republic	2001-2018	4,700,000
Denmark	1997-2018	2,200,000
Finland	1993-2018	1,000,000
France	1992-2018	102,000,000
Germany	1994-2018	110,000,000
Greece	1994-2018	3,400,000
Hungary	2000-2018	11,000,000
Ireland	1998-2018	30,600,000
Italy	1993-2018	100,900,000
Netherlands	1994-2018	172,000,000
Poland	1999-2018	12,000,000
Portugal	2001-2018	25,900,000
Slovakia	2002-2018	3,400,000
Slovenia	2000-2018	1,200,000
Spain	1994-2018	263,500,000
Sweden	1997-2018	906,000

9. The same document confirms that sales of products under the earlier marks in the UK between 1998 and 2020 have amounted to \$468,500,000.

10. Ms Downer states that “every year, NIKE spends large sums of money in advertising the products sold under the CORTEZ Brand Marks”. Ms Downer has provided a series of print outs from the applicant’s social media accounts dated 2012 and 2017 which reference the CORTEZ mark in relation to trainers.<sup>2</sup> Ms Downer has also provided a selection of example articles which were printed in publications including *Metro* (2016), *The Telegraph* (2016), *The Sun* (2017), *The Independent* (2013), *The Sunday Times* (2017), *The Evening Standard* (2014 and 2017), *Mail Online* (2017) and *The Guardian* (2014).<sup>3</sup> These all refer to the CORTEZ brand in reference to trainers.

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<sup>2</sup> Exhibit E

<sup>3</sup> Exhibit F

11. Ms Downer has provided some examples of products being sold under the earlier marks.<sup>4</sup> Many of the print outs provided are undated or are dated after the relevant date/relevant period (as explained below). However, of those that are dated prior to the relevant date/relevant period, I note as follows:

a) A baseball cap described as a “Nike Cortez Cap” available for sale on a website called “Size?” on 9 December 2018;

b) A baseball cap described as a “Nike Cortez Cap Black” available for sale on a website called “Novoid Plus” on 9 December 2018;

c) A man’s top described as a “Nike Cortez T-Shirt/Green” available for sale from Carers Guildford on 9 December 2018;

d) A man’s sweatshirt available for sale on 9 December 2018 from Asos Marketplace which is described as a “Vintage Nike Cortez Sweatshirt” and displays the following:



e) A man’s t-shirt described as “Nike Cortez 1 T-Shirt in White” available for sale from Asos on 9 December 2018;

f) A series of “Cortez” trainers available for sale from Asos on 9 December 2018;

g) A printout from the JD Sports website which shows offers “Men’s Nike Cortez”, “Women’s Nike Cortez and “Kid’s Nike Cortez” trainers available for sale on 18 September 2018.

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<sup>4</sup> Exhibit G

12. Ms Downer has provided a series of articles referring to celebrities who have worn Cortez trainers.<sup>5</sup> These include Serena Williams (*People Magazine* and *Vogue* 2017) and Bella Hadid (*Sneaker News* 2017).

13. That concludes my summary of the evidence to the extent that I consider it necessary.

14. As noted above, both parties filed written submissions. Whilst I do not propose to summarise the written submissions here, I have taken them into consideration and will refer to them below where appropriate.

## **DECISION**

15. Sections 5(2)(b) and 5(3) have application in invalidation proceedings pursuant to section 47 of the Act. Section 47 reads as follows:

“47(1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground –

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2ZA) [...]

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<sup>5</sup> Exhibit H

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered –

(i) within the period of 5 years ending with the date of application for the declaration; and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) [...]

(2D) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection 2B or 2C to the United Kingdom shall be construed as a reference to the European Union.

(2DA) [...]

(2E) 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.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c).

[...]

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) [...]

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall be deemed never to have been made.

Provided that this shall not affect transactions past and closed.”

16. By virtue of their earlier filing dates, the trade marks upon which the applicant relies qualify as earlier trade marks pursuant to section 6 of the Act. As the earlier marks had completed their registration process more than five years before the date of the application for invalidity, they are subject to proof of use pursuant to the above provisions.



17. Although the UK has left the EU, section 6(3)(a) of the European (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.

### **Proof of use**

18. The first issue I must consider is whether, or to what extent, the applicant has shown genuine use of the earlier marks.

19. I bear in mind section 100 of the Act, which reads:

“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.”

20. Pursuant to section 47(2B) of the Act, there are two relevant periods for assessing whether there has been genuine use of the earlier marks: 1) the five-year period ending with the date of the application for invalidity i.e. 7 March 2015 to 6 March 2020 and 2) the five-year period ending with the date of the application for the Contested Mark i.e. 21 December 2013 to 20 December 2018.

21. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J 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 Bunderversammlung 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]."

22. As the First and Second Earlier Marks are EUTMs, the comments of the Court of Justice of the European Union (“CJEU”) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, are relevant. The court noted that:

“36. It should, however, be observed that [...] the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And:

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

And:

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down

(see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77)".

At paragraphs 57 and 58, the court held that:

"Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to 'genuine use in the Community' within the meaning of that provision.

A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the mark concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity."

23. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods/services at issue in the Union during the relevant 5 year period. In making the required assessment I am required to consider all relevant factors, including:

- a. The scale and frequency of the use shown;
- b. The nature of the use shown;
- c. The goods and services for which use has been shown;
- d. The nature of those goods/services and the market(s) for them; and

- e. The geographical extent of the use shown.

24. 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.

### **Form of the marks and genuine use**

25. The First and Third Earlier Marks have been used throughout the evidence as registered. Clearly this will be use upon which the applicant can rely.

26. I bear in mind that an assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.<sup>6</sup>

27. In its written submissions in lieu, the proprietor states:

“We have reviewed the proof of use submitted by Nike and this is discussed in detail later in these submissions. The conclusion is however that the evidence is generally insufficient to support use of the earlier marks for all of the goods. In class 25 there is limited evidence of use in CORTEZ for ‘footwear’. We therefore consider that the opposition should be limited to these goods in class 25 because these are the only goods supported by evidence.”

28. The First and Third Earlier Marks have clearly been used throughout the European Union and the UK for a significant number of years. The evidence is clear that there have been significant sales in the EU since 1992 under the earlier marks. In its written submissions in lieu, the proprietor criticised the applicant for not filing invoices or other documentary evidence in support of these figures. However, I note that this criticism was not raised in the evidence rounds, such that the applicant could have filed

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<sup>6</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

evidence in reply to answer it.<sup>7</sup> Further, I note that a similar criticism was raised in *DAILY RITUAL Trade Mark*, BL O/005/21 which led Mr Iain Purvis QC, sitting as the Appointed Person, to state:

“23. I see no difficulty with an informed witness summarizing in tabular form the records of his company as to the sales of a particular brand in the UK without exhibiting the actual records. Nor do I see any difficulty with them giving a general account of the lines of products sold under a brand, with some support in the form of archived website extracts, without providing documentation showing each and every item, when it was sold and for what price.”

I do not, therefore, consider that the lack of invoices or other documents to support the figures provided by Ms Downer should call into question the weight to be attributed to her evidence in this regard.

29. I note that I do not have any market share figures for the sales made by the applicant and I recognise that this will undoubtedly be an extensive market in both the UK and the EU. However, given the extent of the use set out in Ms Downer’s witness statement, I am satisfied that the applicant would have had a reasonable market share during the relevant periods. Ms Downer confirms that the applicant spends “large sums of money” promoting the earlier marks each year. This evidence is not challenged and I see no reason to doubt it. Further, references to the applicant’s CORTEZ mark have been made in a range of national publications throughout the relevant periods. I have no breakdown of what goods the sales made relate to. However, the supporting evidence filed seems to overwhelmingly refer to trainers. I accept that there are some references to products such as t-shirts and baseball caps, but this is very limited. As the specification of the Third Earlier Mark covers “articles of sports clothing” only, use in relation to trainers does not assist the applicant. Consequently, I am unable to find that there has been genuine use of the Third Earlier Mark in relation to the goods covered by its specification. However, taking the evidence as a whole into account, I am satisfied that the applicant has demonstrated genuine use of the First Earlier Mark in relation to trainers.

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<sup>7</sup> *EXTREME Trade Mark*, BL O/161/07

30. Turning now to consider the Second Earlier Mark, I note that very little evidence has been filed which shows this mark in use. Even if I proceed on the basis that the evidence that has been filed displays acceptable variants of the Second Earlier Mark, there are clearly issues with the applicant's evidence in this regard. Whilst the sales figures provided by Ms Downer are said to relate to goods sold under all of the earlier marks, the evidence before me overwhelmingly relates to use in relation to the word CORTEZ, not the letters and numerals COR72Z. To my mind, this suggests that the sales figures provided by Ms Downer are also likely to overwhelmingly refer to goods sold under the CORTEZ marks as opposed to the COR72Z mark. Consequently, I am unable to find that there has been genuine use of the Second Earlier Mark during the relevant periods.

### **Fair Specification**

31. I must now consider whether, or the extent to which, the evidence shows use of the First Earlier Mark in relation to the goods relied upon. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

32. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair



specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

33. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 (Court of Appeal), a case which concerned pharmaceutical substances and preparations,

Kitchen LJ held that it was well established that (1) a category of goods/services may contain numerous subcategories capable of being viewed independently and, (2) the purpose and intended use of a pharmaceutical product are of particular importance in identifying the subcategory to which it belongs.

34. The applicant has demonstrated genuine use in relation to trainers only. The specification of the First Earlier Mark covers:

Class 25 Sports clothing, footwear, sports headgear (excluding non-sport clothing and headgear).

35. I do not consider that the applicant should be able to rely upon the general category of “sports footwear” merely because it has used it in relation to trainers only. I consider “trainers” to be an appropriate sub-category of goods that would be identified by the average consumer. Consequently, I consider the following to be a fair specification for the First Earlier Mark:

Class 25 Trainers.

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

36. Section 5(2)(b) of the Act states 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.”

37. 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**

38. In its counterstatement, the proprietor admitted that “the respective goods in class 25 are identical or at least similar”. However, as the proprietor did not identify which goods in the applicant’s specifications it considers to be identical and which goods it considers to be similar (or to what degree), I will conduct a full goods comparison. In light of my findings above, the competing goods are as follows:

<b>Applicant’s goods</b>	<b>Proprietor’s goods</b>
<u>Class 25</u> Trainers.	<u>Class 25</u> Clothes.

39. In the *Treat* case, [1996] R.P.C. 281, Jacob J. (as he then was) identified the following factors for assessing similarity:

- (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.

40. The respective users of the goods will be the same i.e. members of the general public. The uses of the goods will overlap to the extent that they are intended to protect the body and provide warmth. The nature of the goods will differ, but the method of use will overlap to a degree. It is common for trainers and clothing to be sold through the same trade channels and, where they are sold in general outlets such as supermarkets, they are likely to be sold in the same area if not the same aisle. The goods will not be in competition, nor will they be complimentary within the meaning of the case law.<sup>8</sup> Taking all of this into account, I consider the goods to be similar to a medium degree.

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<sup>8</sup> *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

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

41. As the case law above indicates, it is necessary for me to determine who the average consumer is for the 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 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.”

42. The average consumer for the goods will be a member of the general public. The cost of the purchase is likely to vary, but will be relatively low. The goods may be purchased reasonably frequently. Even where the cost of purchase is low, various factors will be taken into consideration such as durability, aesthetics and fit. Taking all of this into consideration, I consider that a medium degree of attention will be paid during the purchasing process for the goods.

43. The goods are likely to be purchased by self-selection from the shelves of a retail outlet or an online equivalent. Visual considerations are, therefore, likely to dominate the selection process. However, I do not discount that there will also be an aural component to the purchase given that advice may be sought from retail assistants.

## **Comparison of trade marks**

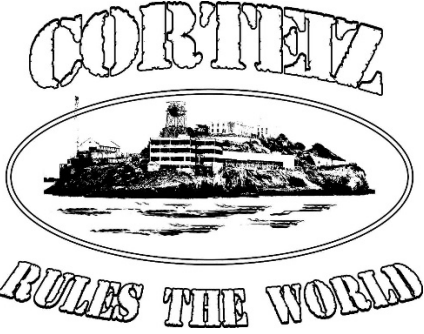
44. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and

conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade 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.”

45. 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 negligible and therefore contribute to the overall impressions created by the marks.

46. The respective trade marks are shown below:

Applicant’s mark	Contested Mark
<p style="text-align: center;">CORTEZ (the First Earlier Mark)</p>	

47. The First Earlier Mark consists of the word CORTEZ. There are no other elements to contribute to the overall impression, which lies in the word itself. The Contested Mark consists of the word CORTEIZ presented above an oval pictorial device, which itself appears above the words RULES THE WORLD. The wording is presented in a

white slightly stylised font and outlined in black. The word CORTEIZ plays the greater role in the overall impression due to its size and the fact that the eye is naturally drawn to elements that can be read. The device plays a slightly lesser role. The words RULES THE WORLD play a lesser role in the overall impression because they are likely to be seen as a laudatory slogan.

48. Visually, the marks coincide in the first five letters – CORTE. The ending of the word in the First Earlier Mark is -Z whereas in the Contested Mark it is -IZ. The oval pictorial device and the words RULES THE WORLD in the Contested Mark are also a point of visual difference, as they have no counterpart in the First Earlier Mark. Taking all of this into account, I consider the marks to be visually similar to between a low and medium degree.

49. Aurally, the First Earlier Mark is likely to be pronounced CORE-TEZ. The Contested Mark may be attributed a number of different pronunciations, but is most likely to be pronounced CORE-TEE-EZZ or CORE-TEEZ. As the words RULES THE WORLD are likely to be seen as a descriptive slogan they may not be pronounced. If that is the case, then the marks will be aurally similar to between a medium and high degree. If they are pronounced, then they will be aurally similar to no more than a medium degree.

50. In relation to the conceptual comparison, the proprietor submits as follows:

“The proprietor’s mark conveys a concept completely different to any concept conveyed by the earlier mark.

The inclusion of the logo/image of a geographical place in the proprietor’s mark combined with the wording CORTEIZ RULES THE WORLD creates a concept of a location call ‘CORTEIZ’ ruling the world.

In contrast the earlier mark CORTEZ has no obvious meaning or concept.

[...]



The average consumer in the UK is most likely to understand CORTEZ as being a word of Spanish/Latin American origin representing a surname. The average consumer in the UK is less likely to understand CORTEZ as being a geographical location.

Furthermore, the image in the proprietor's mark and the words RULES THE WORLD, provide that mark in its entirety with a different concept to any possible concept that could be derived from CORTEZ.

51. Conceptually, I consider it unlikely that either mark will be identified as a name, whether a surname or a place name. In my view, it is more likely that both CORTEZ and CORTEIZ will be viewed as invented or foreign language words which will be attributed no meaning by the average consumer. They will, therefore, be conceptually neutral. The words RULES THE WORLD in the Contested Mark will be seen as a laudatory slogan, promoting the prominence of the brand. The oval device will be recognised as depicting a particular place, as buildings are visible, but I consider it unlikely that the location will be recognised. Nonetheless, as submitted by the proprietor, these will act as points of conceptual difference.

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

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in *Joined Cases C-108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-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).”

53. 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.

54. The applicant claims that the First Earlier Mark is highly distinctive “both per se and because of the use made of it”. I will begin by assessing the inherent distinctiveness of the First Earlier Mark. The First Earlier Mark consists of the word CORTEZ. As noted above, I consider that this will be viewed as an invented or foreign language word which will be attributed no meaning by the average consumer. Consequently, I consider it to be inherently distinctive to a high degree.

55. As noted above, the applicant has filed evidence of the use made of the First Earlier Mark. The mark has been used in the UK since 1998 and sales from this date to 2020 amount to approximately \$468,500,000. I recognise that not all of this sum will fall prior to the relevant date. However, this works out as an approximate annual figure of over \$21,000,000. Clearly, this is a significant sum and would represent a reasonable market share. There are references to the applicant’s trainers being sold in national retailers such as JD Sports, which would suggest that use has been geographically widespread. Ms Downer’s unchallenged evidence is that “large sums” have been spent on advertising and references are made to the applicant’s mark in national publications. Taking all of this into consideration, I consider that the

distinctiveness of the First Earlier Mark has been enhanced through use to a very high degree.

### **Likelihood of confusion**

56. 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 respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the First Earlier Mark, 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.

57. I have found the First Earlier Mark and the Contested Mark to be visually similar to between a low and medium degree and aurally similar to between a medium and high degree or no more than a medium degree, depending upon how they are pronounced. I have found the words CORTEZ and CORTEIZ to be conceptually neutral, but the oval pictorial device and words RULES THE WORLD in the Contested Mark, act as points of conceptual difference. I have found the earlier mark to be inherently distinctive to a high degree, which has been enhanced further through use. I have found the average consumer to be a member of the general public, who will purchase the goods predominantly by visual means (although I do not discount an aural component). I have concluded that a medium degree of attention will be paid during the purchasing process for the goods. I have found the goods to be similar to a medium degree.

58. Bearing in mind that the purchasing process will be predominantly visual, the visual differences will be particularly important when considering direct confusion. In my view, the oval device will not be overlooked, and notwithstanding the principle of imperfect recollection, the marks will not be misremembered or mistakenly recalled. Consequently, I do not consider there to be a likelihood of direct confusion.

59. I must now consider whether there is a likelihood of indirect confusion. I consider it likely that the words CORTEZ and CORTEIZ will be misremembered. This is particularly the case given that there is no conceptual hook to assist the average consumer in distinguishing between them. Given the high degree of distinctiveness of the First Earlier Mark (both inherently and through use), I consider that the additional elements in the Contested Mark are likely to be viewed as an alternative mark being used by the same or economically linked undertaking. The device is likely to be seen as a different mark that might be used on packaging or advertising, when the word only version (as in the First Earlier Mark when the words are misremembered) might be seen as one used in text or in publications. The additional words RULES THE WORLD will be viewed as a laudatory slogan being used by the same business. Taking all of this into account, I consider there to be a likelihood of indirect confusion for those goods that I have found to be similar to a medium degree.

60. The application for invalidation based upon section 5(2)(b) of the Act succeeds in its entirety.

### **Section 5(3)**

61. 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 (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) 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.”

62. As noted above, by virtue of its earlier filing date, the First Earlier Mark qualifies as an earlier mark pursuant to section 6 of the Act. I have found that the applicant has satisfied the proof of use requirements in relation to the First Earlier Mark only. I have found a fair specification to be “trainers” in class 25.

63. I bear in mind the relevant case law set out in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The conditions of section 5(3) are cumulative. Firstly, the applicant must show that the First Earlier Mark has achieved a level of knowledge/reputation amongst a significant part of the public. Secondly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the First Earlier Mark being brought to mind by the later mark. Thirdly, assuming that the first and second conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

64. The relevant date for the assessment under section 5(3) of the Act is the date of the application for the Contested Mark i.e. 20 December 2018.

## **Reputation**

65. In *General Motors*, Case C-375/97, the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

66. In determining whether the applicant has demonstrated a reputation for the goods in issue, it is necessary for me to consider whether the marks will be known by a significant part of the public concerned with the goods. In reaching this decision, I must take all of the evidence into account including "the market share held by the trademark, the intensity, geographical extent and duration of use, and the size of the investment made by the undertaking in promoting it."

67. The First Earlier Mark is an EUTM. Consequently, the applicant must establish a reputation in the EU. The applicant has used the First Earlier Mark in a number of EU countries, with sales amounting to several million dollars in many member states. The sales figures provided by the applicant cover a number of different periods, but all of which date between 1992 and 2018. Total sales across this period in the EU (excluding the UK) amount to approximately \$900,000,000. Clearly, this is a significant sum, even when broken down by year. In addition to this, sales in the UK (which at the relevant date was a member state of the EU) have amounted to \$468,500,000. As noted above, the UK sales figures cover the years 1998 to 2020, so not all of these sales would have been prior to the relevant date. However, clearly a significant proportion would have been. Although the evidence does not confirm what products these sales relate to, print outs from various websites as well as articles in national publications have

referred overwhelmingly to the applicant's sales of trainers. The evidence indicates that such products have been sold in UK national retailers such as JD sports, suggesting use has been geographically widespread within the UK, as well as across the rest of the EU. Ms Downer's unchallenged evidence is that the applicant has spent "large sums" on promoting its products and evidence has been provided to show collaborations with celebrities. Taking all of this into account, I am satisfied that the applicant has demonstrated a strong reputation in the EU for trainers.

## **Link**

68. As I noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

### The degree of similarity between the conflicting marks

I have found the First Earlier Mark and the Contested Mark to be visually similar to between a low and medium degree and aurally similar to between a medium and high degree or no more than a medium degree, depending upon how they are pronounced. I have found the words CORTEZ and CORTEIZ to be conceptually neutral, but the oval pictorial device and words RULES THE WORLD in the Contested Mark will act as points of conceptual difference.

### The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

I have found the goods to be similar to a medium degree.

### The strength of the earlier mark's reputation

The First Earlier Mark has a strong reputation in the EU in relation to trainers.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

I have found the First Earlier Mark to be inherently distinctive to a high degree, which has been enhanced further through use.

Whether there is a likelihood of confusion

I have found there to be a likelihood of indirect confusion.

69. Taking into account the above factors, particularly the similarities between the marks and the goods, the high distinctiveness of the First Earlier Mark and the strength of its reputation, I consider it likely that a link will be made by a significant part of the relevant public.

**Damage**

70. I must now assess whether any of the three pleaded types of damage will arise.

71. In circumstances in which the relevant public will be confused as to trade origin of the goods, as identified above, there is clearly a likelihood of damage arising. In addition to this, the applicant claims unfair advantage, stating:

“15. Use of the CORTEIZ Registration in the United Kingdom would also take unfair advantage of the distinctive character and repute of the Earlier Registrations. Such use would constitute parasitism or free-riding, being the advantage taken by the Proprietor as a result of the use of a highly similar mark to the Earlier Registrations. It covers, in particular, cases whereby reason of a transfer of the image of the mark or the characteristics which it projects to the goods identified by the identical or similar sign, there is a clear exploitation on the coat-tails of the mark with a reputation (*L’Oreal v Bellure*).”

72. In *Jack Wills Limited v House of Fraser (Stores) Limited* [2014] EWHC 110 (Ch) Arnold J. considered the earlier case law and concluded that:



“80. The arguments in the present case give rise to two questions with regard to taking unfair advantage. The first concerns the relevance of the defendant's intention. It is clear both from the wording of Article 5(2) of the Directive and Article 9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of the Court of Justice and of the Court of Appeal that the defendant's conduct is most likely to be regarded as unfair where he intends to benefit from the reputation and goodwill of the trade mark. In my judgment, however, there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.”

73. I note that the applicant's evidence shows that its trade mark has been linked with some high profile celebrities and its products have been described in national publications as “iconic”.<sup>9</sup> Taking into account the strength of the applicant's reputation, the similarities between the marks and the similarity of the goods, it is clear that there is potential for this image to be transferred to the proprietor. The proprietor would secure a commercial advantage, benefitting from the applicant's reputation without paying financial compensation and would, therefore, be likely to take unfair advantage of the First Earlier Mark. Damage is made out.

74. As I have found in favour of the applicant under this head of damage, I do not consider it necessary to go on to consider the remaining heads of damage pleaded.

75. The opposition based upon section 5(3) succeeds in its entirety.

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<sup>9</sup> Exhibit F

## CONCLUSION

76. The application for invalidity succeeds in its entirety and the Contested Mark is hereby declared invalid in respect of all goods for which it is registered. Under section 47(6) of the Act, the registration is deemed never to have been made.

## COSTS

77. The applicant has been successful and is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£1,850**, calculated as follows:

Filing a Notice of invalidation and considering the proprietor's counterstatement	£350
Filing evidence	£950
Written submissions in lieu	£350
Official fee	£200
<b>Total</b>	<b>£1,850</b>

78. I therefore order Clinton Ogbenna to pay NIKE INNOVATE C.V. the sum of **£1,850**. 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 16th day of March 2021**

**S WILSON**

**For the Registrar**

## ANNEX

### The First Earlier Mark

Class 25 Sports clothing, footwear, sports headgear (excluding non-sport clothing and headgear).

### The Second Earlier Mark

Class 18 Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; Attaché cases; Backpacks; Bags for sports; Bandoliers; Beach bags; Briefcases; Card cases [notecases]; Chain mesh purses; Clothing for pets; Collars for animals; Frames for umbrellas or parasols; Game bags [hunting accessories]; Gold beaters' skin; Gut for making sausages; Handbags; Handbag frames; Umbrella covers; Haversacks; Music cases; Net bags for shopping; Pocket wallets; Purses; School bags; Shopping bags; Sling bags for carrying infants; Slings for carrying infants; Straps for soldiers' equipment; Straps for skates; Suitcase handles; Umbrella handles; Umbrella or parasol ribs; Umbrella rings; Umbrella sticks; Vanity cases, not fitted; Walking cane handles; Walking stick seats; Wheeled shopping bags; frames for umbrellas or parasols; frames (handbag-); handles (suitcase-); handles (walking stick-); infants (slings for carrying-); ribs (umbrella or parasol-); wallets (pocket-).

Class 25 Clothing, footwear, headgear; Boot uppers; Cap peaks; Dress shields; Fittings of metal for shoes and boots; Footwear uppers; Hat frames [skeletons]; Heelpieces for boots and shoes; Heelpieces for stockings; Heels; Inner soles; Non-slipping devices for boots and shoes; Pockets for clothing; Ready-made linings [parts of clothing]; Shirt fronts; Shirt yokes; Soles for footwear; Studs for football boots [shoes]; Tips for footwear; welts for boots and shoes.

Class 28 Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees; Bags especially designed for skis and surfboards; Bladders of balls for games; Cricket bags; Divot repair tools [golf accessories]; Golf bags, with or without wheels; Gut for rackets; Masts for sailboards; Novelties for parties, dances [party favors, favours]; Protective paddings [parts of sports suits]; Rollers for stationary exercise bicycles; Rosin used by athletes; Scrapers for skis; Seal skins [coverings for skis]; Ski bindings; Sole coverings for skis; Strings for rackets; Surfboard leashes.

### **Third Earlier Mark**

Class 25 Articles of sports clothing.