

**O/281/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF THE REQUEST BY BRUNO HOUN FOR PROTECTION IN  
THE UK OF THE FOLLOWING INTERNATIONAL REGISTRATION  
WO0000001475821:**

**REVIVRE LABS**

**IN CLASSES 5 AND 44**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 418845 BY REVIVRE  
ITALIA S. p. A.**



Relying on its registered goods in **class 3**:

*Soaps; Soaps for use on the skin;  
Deodorant for personal use; Essential  
oils; Essential oils for personal use;  
Perfumery; Cosmetics; Creams for the  
face and eyes; Body creams and  
lotions; Eyebrow pencils; Eyelid  
shadow; Make up foundations; Hand  
creams; Cleansing lotions and  
emulsions for the face and eyes; Nail  
polish; Nail varnish remover; Lipstick;  
Mascara; Massage gels; Sun tan  
lotion; bronzing preparations for the  
skin; Hair preparations and treatments;  
Hair lotions; Hair dyes; Shampoo.*

3. The Opponent claims that there is a likelihood of confusion under section 5(2)(b) and its opposition is directed against all of the goods within the Holder's mark's specification.
4. The Holder filed a defence and counterstatement, denying the grounds.
5. Both evidence and written submissions have been filed by both parties.
6. The Opponent is represented by J A Kemp LLP; the Holder is represented by Claire Yam.

#### **Relevant dates**

7. Section 6A of the Act provides that where the registration date of the earlier mark is more than 5 years prior to the application date of the applied-for mark, the Opponent may be required to prove use of the earlier mark. In the instant case,

Section 6A is not engaged because the registration date of the earlier mark, i.e. 06 August 2015, is less than 5 years prior to the priority date claimed for the mark in respect of which protection in the UK is sought, i.e. 13 November 2018. Consequently, the Opponent is entitled to rely upon its mark in respect of all of the goods and services identified in its statement of use.

### **Opponent's evidence**

8. The Opponent's evidence comes from Thomas Allister Webb, Trade Mark Attorney of J A Kemp LLP, representing the Opponent. His witness statement is dated 29 July 2020.
9. Mr Webb's evidence comprises: a single screenshot from the Opponent's website displaying what appear to be three product lines relating to skin care; and 6 screenshots from the Holder's website displaying three categories of 'health supplement' targeting the hair, skin and nails, respectively.
10. Mr Webb does not state the relevance of this evidence.
11. As noted above, at [7], there is no requirement for the Opponent to prove use of its mark. How the Holder is using its mark, i.e. in respect of which particular goods and services, is not a relevant factor in the assessment of whether there is a likelihood of confusion. I must only consider the 'notional' use of the marks in relation to the goods and services in their respective specifications.
12. The concept of 'notional use' was addressed in *Compass Publishing BV v Compass Logistics* [2004] R.P.C. 41 per Laddie J.:

“22. It is frequently said by trade mark lawyers that when the proprietor's mark and the defendant's sign have been used in the market-place but no confusion has been caused, then there cannot exist a likelihood of confusion under Art.9.1(b) or the equivalent provision in the Trade Marks Act 1994 (“the 1994 Act”), that is to say s.10(2). So, no confusion in the market-place means no infringement of the registered trade mark. This is, however, no more than a

rule of thumb. It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place."

13. The Court of Justice of the European Union ("CJEU")<sup>2</sup> has stated the following<sup>3</sup>:

"Once a mark has been registered its proprietor has the right to use it as he sees fit so that, for the purposes of assessing whether the application for registration falls within the ground for refusal laid down in that provision, it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier mark in all the circumstances in which the mark applied for might be used if it were to be registered.

14. In my assessment, I must therefore consider all of the possible circumstances in which the mark applied for *might* be used if it were registered. Any actual differences between the parties' goods are irrelevant unless they are apparent from the applied-for and registered marks.

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<sup>2</sup> 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 Trade Marks Act relied on 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.

<sup>3</sup> *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06.

## Holder's evidence

15. The Holder has filed the following witness statements:

- Witness Statement of Bruno Houn, the Holder, dated 27 September 2020;
- First Witness Statement of Clare Yam, Trade Mark Attorney in France, dated 26 September 2020;
- Second Witness Statement of Clare Yam, dated 21 October 2020;
- Witness Statement of Robert Veghte, President of Roxlor LLC, a US-based manufacturer of dietary supplements, dated 17 September 2020;
- Witness Statement of Igors Fomiskins, General product Manager at Pharma Manufacture Europe, dated 28 September 2020;
- Witness Statement of Rosanna Valla, CEO of RV Faconnage, a pharmaceutical company, dated 15 August 2020.

## 16. Witness Statement of Bruno Houn and Second Witness Statement of Clare Yam

The essential point that Mr Houn makes in his Witness Statement is that the *cosmetics* and *dietary supplements* industries operate in two distinct markets. Exhibits BH4 – BH22 have been produced to support this argument.

17. Ms Yam's Second Witness Statement solely concerns the translation of Exhibit BH1 from French to English. Exhibit CY1 comprises the resulting translation.

## 18. Exhibits BH1-BH3, BH23 and CY1

These Exhibits are of little relevance to the Tribunal's assessment of the likelihood of confusion between the respective marks, for the following reasons:

19. Exhibit BH1 (the English translation of which comprises Exhibit CY1) is a print of a web page from the website 'www.webtimedias.com', accessed 29 September 2020. It displays details of a conference, hosted in Monaco, on the subject of 'oxidative stress'. The Holder has exhibited this material in the context of its statement about the history of the Holder's company. The origin and rationale of the Holder's company are irrelevant to the matter of likelihood of confusion between the marks and, therefore, cannot be taken into account.

20. Exhibit BH2 comprises screenshots from the Holder's website including details on the history of its company and listings for products and services offered by the Holder. Exhibit BH3 comprises a duplicate of a screenshot included in Exhibit BH2. Exhibit BH23 comprises excerpts from the Opponent's brochure.

21. As underlined above, at [11], the Tribunal is unable to consider how and in respect of which goods/services the parties use their marks, as part of its assessment.

## **22. Exhibits BH4 – BH22**

The Holder produces the above Exhibits as support for his statement that cosmetics and dietary supplements constitute two different markets in two different sectors.

23. Exhibit BH4 comprises prints from the webpages of the website 'alliedmarketresearch.com' containing excerpts from a section titled 'Cosmetics Market Size, Share, Industry Trends and Analysis'. These pages were accessed 29 September 2020. The content is poorly-written and the accuracy of some the information provided is questionable. For example:

During recession 2007-2009, there was an overall global rise in GDP and economies across various regions. Presently, increasing GDPs of various countries is positively affecting the global cosmetics market. Continuous rise in GDP has improved the economies of various countries and has raised the spending capabilities of individuals. Rising disposable income levels of the individuals across various regions is driving them to buy personal luxury goods, which, in turn, is positively influencing the global market growth.

### **Use of natural ingredients**

Rising trend of the use of natural ingredients in cosmetic products is observed among various manufacturers. This trend caters to the ever increasing demand for natural or organic cosmetic products among customers. Use of herbal cosmetic products minimizes the chances of any possible side effects of the product. This ultimately increases the usage of cosmetics among individuals.

24. The claim that there was an overall global rise in GDP and economies across various regions during a recession is improbable given that part of the concept of a recession is a *decline* in GDP. These deficiencies aside, the mere fact that there is no reference made to ‘food/dietary supplements’ in this material does not necessarily establish that cosmetics and food/dietary supplements occupy distinct markets. If these respective goods *do* have different markets, that alone does not necessarily establish that there is no similarity between *cosmetics* and *dietary supplements*.

25. Exhibits BH5-BH6 comprise, respectively, an article, dated 17 April 2020, about the global cosmetics market in general and a paragraph, dated 21 July 2020, commenting on the cosmetics market in the UK. The fact that dietary supplements are not mentioned in this article does not, by itself, establish that cosmetics and dietary supplements occupy different markets. Furthermore, if cosmetics and dietary supplements do in fact have different markets, that alone would not necessarily rule out similarity between the parties’ respective goods and services. These Exhibits are therefore of little assistance to the Holder.

26. Exhibit BH7 comprises a report from ‘www.grandviewresearch.com’ titled ‘Dietary Supplements Market Size, Share & Trends Analysis Report by Ingredient (Vitamins, Minerals), By Form, By Application, By End User, By Distribution Channel, By Region, and Segment Forecasts, 2020 – 2027’, showing a publication date of February 2020. There is a single mention of the UK, as set out below:

In Europe, rising protein consumption in developed countries, such as Germany and U.K. is expected to promote the usage of [amino acids \(/industry-analysis/amino-acids-market\)](#) for the production of dietary supplements. In addition, rising sales of multivitamin products particularly [vitamin B and C](#) in light of their increasing adoption among working population and bodybuilders is expected to have a strong impact on the growth in [the market](#). [\(info/privacy-policy\)](#)

The remainder of the report speaks to global trends, with mentions of, inter alia, the U. S., Asia Pacific and Mexico.

27. Exhibit BH8 comprises an article from the website ‘globalnewswire.com’ titled ‘Dietary supplements market size to reach a value of US\$ 349 billion by 2026’, dated 24 March 2020. This article focuses on general global trends; there is no particular mention of the UK.

28. The mere absence of a mention of cosmetics in either article noted above, at [26] and [27], does not, by itself, establish that cosmetics and food supplements have different markets.

29. Exhibit BH9 comprises excerpts from the Food Standards Agency report on Food Supplements Consumer Research ('the FSA Report'), dated May 2018. The 'Executive summary' and 'Introduction' sections of the report are provided. The 'Executive Summary' summarises the motivations behind purchasing food supplements. The 'Introduction' section explains what food supplements are, provides an overview of the current legislative framework and notes a growth in demand for health and fitness-related products.

30. The Holder has underlined the absence of reference to cosmetics in the FSA Report in support of his statement that cosmetics and food supplements have different markets. However, the following comment, at page 5 of the report, somewhat undermines that statement by mentioning 'beauty salons':

"Historically the type of businesses that sell supplements would have been health shops, chemists, supermarkets or direct selling. In the last few years the variety of outlets that sell supplements has increased, with supplements now sold in gyms, leisure centres, beauty salons, small retail shops and sports shops" [my underlining].

31. Exhibit BH10 comprises printouts from the website 'www.vitafoods.eu.com' detailing a 'Virtual Expo and Summit' aimed at the 'global nutraceutical supply chain. Exhibit BH11 comprises printouts from the website 'professionalbeauty.co.uk' displaying the details of an event 'Professional Beauty London' aimed at professionals in the beauty business. Exhibit BH12 comprises printouts from the website 'www.cosmoprof.com' detailing an online event aimed at the global cosmetics industry. All of these webpages were accessed 29 September 2020.

32. The Holder adduces this evidence to support his statement that 'Dietary supplements and cosmetics have their own dedicated mega exhibitions'.

The fact that an event might be dedicated to either cosmetics or dietary supplements, but not both, does not, by itself, establish that the respective goods have distinct markets; nor does it necessarily rule out any similarity between the goods.

33. Exhibits BH13-BH18 comprise screenshots from the websites of the brands L'Oréal, Estée Lauder and Coty, each displaying various cosmetics brands. All that these webpages show is the grouping together of goods belonging to the same category i.e. cosmetics. The mere absence of dietary supplements does not establish that there is no similarity between the respective goods.
34. Exhibit BH19 comprises a Wikipedia entry for 'Vitabiotics', describing it as a 'British nutraceutical company that specialises in vitamin and mineral based food supplements'. Wikipedia entries tend to carry less weight, the reason being that they can be edited by any member of the public. In any event, this evidence is of little assistance to the Holder.
35. Exhibit BH20 comprises a single screen shot from the website 'www.vitabiotics.com'. At the top of the page are 4 photographs, each denoting a different age demographic. Underneath is a row of photographs featuring three vitamin/supplement products: Pregnacare, Wellman and Wellwoman. Some laudatory text about the brand appears at the top of the page. Exhibit BH21 comprises a single screen shot from the website 'solgar.co.uk', displaying the brand's 'mission statement'. Exhibit BH22 comprises a single screen shot, from the website 'www.arkopharma.com', with a short paragraph stating when the brand was founded, its area of specialism i.e. phytotherapy, and the laudatory statement 'Arkopharma is now the European leader in natural plant-based medications and dietary supplements'. None of these screen shots are dated. These Exhibits are of little assistance to the Holder for the reason given above at [33].
36. First Witness Statement of Clare Yam

The essential point made by Ms Yam in her First Witness Statement is that *cosmetics* and *dietary supplements* differ according to: the regulations by which

the respective goods are governed; their nature and purpose; their method of use; the scientific claims that are permitted in respect of each; and the requirements as to their labelling.

### **37. Exhibits CY01-CY09**

Exhibit CY01 comprises the EU Directive 2002/46/EC relating to food supplements<sup>4</sup>.

Exhibit CY02 comprises the EU Directive 1223/2009 on cosmetic products<sup>5</sup>.

Exhibit CY03 comprises printouts of guidance on 'Food supplement use and labels' from 'www.gov.uk'.

Exhibit CY04 comprises printouts of guidance from the Food Standards Agency, at 'www.food.gov.uk' outlining the obligations that businesses must fulfil in order to sell food supplements.

Exhibit CY05 comprises the EU Regulations 2014/1855 on Food: The Food Information Regulations.<sup>6</sup>

Exhibit CY06 comprises the EU Regulations 2003/1389 Food, England: The Food Supplements (England) Regulations<sup>7</sup>.

Exhibit CY07 comprises the EU Regulations 2013/1478 Consumer Protection: The Cosmetics Products Enforcement Regulations<sup>8</sup>.

Exhibit CY08 is a duplicate of Exhibit BH9, addressed above at [29].

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<sup>4</sup> Council Directive EC 2002/46 on the approximation of the laws of the Member States relating to food supplements [2002] OJ L183/51.

<sup>5</sup> Council Directive EC 1223/2009 on cosmetic products [2009] OJ L342/59.

<sup>6</sup> Council Regulation EC 2014/1855 The Food Information Regulations [2014]

<sup>7</sup> Council Regulation EC 2003/1387 The Food Supplements (England) Regulations [2003]

<sup>8</sup> Council Regulation EC 2013/1478 Consumer Protection: The Cosmetics Products Enforcement Regulations [2013].

Exhibit CY09 comprises screenshots from the 'EU Register on nutrition and health claims' and appears to show the circumstances in which certain claims are permitted to be made in respect of certain health food/supplement products.

38. While the Tribunal recognises that *cosmetics* and *food supplements* are subject to different sets of regulations, it does not necessarily follow that the respective goods are in different markets or that there is no similarity between them. Although method of use and nature or purpose of the goods are factors that the Tribunal is obliged to consider as part of its assessment of the likelihood of confusion, I consider that it was unnecessary for the Holder to adduce much of the evidence that it has filed in relation to these factors. The fact that *food supplements* are ingested whereas *cosmetics* are applied to the exterior of the body is a matter of general knowledge and does not require support from EU Directives.

39. Witness Statements of Robert Veghte, Igors Fomiskins and Rosanna Villa

All three of these Witness Statements can be summarised as simply making the following two points:

- i. That food supplements can only be ingested; and
- ii. That the methods and production lines for manufacturing food supplements cannot be used in the manufacture of cosmetics.

Exhibit RV1 comprises screenshots of a number of pages from the Roxlor website displaying 5 types of capsules that it uses for its food supplements.

40. The following decision has been made after careful consideration of the papers before me.

**Decision**

## Section 5(2)(b) of the Act and related case law

41. Section 5(2)(b) of the Act states:

“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.”

42. The following principles are derived from the decisions of the CJEU<sup>9</sup> 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 C120/04; *Shake 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

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<sup>9</sup> 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 Trade Marks Act relied on 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.

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**

#### **43. Similarity of goods and services – Nice Classification**

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.”

44. I must therefore be mindful of the fact that the appearance of the respective goods or services in different classes is not a sufficient condition for dissimilarity between those goods or services.

45. The Tribunal may group goods (or services) together for the purposes of assessment:

*Separode Trade Mark* BL O-399-10 (AP):

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

46. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties’ goods and services must be taken into account:

“[23] “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”.

47. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281<sup>10</sup>, identified the following factors for assessing similarity of the respective goods and services:

- (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;

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<sup>10</sup> *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

(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.

48. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.<sup>11</sup>

49. 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 [or services]. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

50. In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to

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<sup>11</sup> *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“...it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

51. The goods and services to be compared are as follows:

Opponent's mark:	Applied-for mark:
<p><b>Class 3</b>  <i>Soaps; Soaps for use on the skin; Deodorant for personal use; Essential oils; Essential oils for personal use; Perfumery; Cosmetics; Creams for the face and eyes; Body creams and lotions; Eyebrow pencils; Eyelid shadow; Make up foundations; Hand creams; Cleansing lotions and emulsions for the face and eyes; Nail polish; Nail varnish remover; Lipstick; Mascara; Massage gels; Sun tan lotion; bronzing preparations for the skin; Hair preparations and</i></p>	<p><b>Class 5</b>  <i>Pharmaceutical products; dietetic foods for medical use; food supplements.</i></p> <p><b>Class 44</b>  <i>Medical services; medical assistance; alternative medicine services.</i></p>

<i>treatments; Hair lotions; Hair dyes; Shampoo.</i>	
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52. I will make my comparison with reference to the Holder's goods and services, all of which have been opposed.

53. I will compare *pharmaceutical products* against the Opponent's class 3 terms *Soaps; Soaps for use on the skin; Shampoo; Body creams and lotions.*

54. The Opponent has submitted the following at paragraph [12] of its written submissions:

The Opponent's goods 'cosmetics' and more specific goods within that category, namely 'hair preparations and treatments; hair lotions; soaps' are similar to 'pharmaceutical products' covered by the Opposed Application. They often coincide as regards purpose and share the same distribution channels, target the same public and are often manufactured by the same companies. This has been held in a number of decisions including the General Court in *El Corte Inglés v Market Watch Franchise & Consulting, Inc (T62/15) [2016]* which affirmed that pharmaceutical preparations in Class 5 were similar to cosmetics in Class 3, since:

"(i) the purpose of certain pharmaceuticals, such as skin or hair care preparations with medical properties, medicated dentifrices and medicated soaps, coincide in part with the purpose of cosmetics creams or lotions, dentifrices and soaps not for medical use and (ii) both of these types of products are sold in pharmacies" [27].

55. The Holder argues that *pharmaceutical products* are not similar to the Opponent's goods and has submitted the following at paragraphs [17]-[18] of his written submissions:

Cosmetics are defined by the European Directive 1223/2009, article 2(a) as "any substance or mixture intended to be placed in contact with the superficial parts of the human body (epidermis, hair and capillary systems, nails, lips and external genitalia) or with the teeth and oral mucous membranes with a view, exclusively or principally, to cleaning, perfuming, modifying the appearance of, protecting, maintaining in good condition or correcting bodily odours." (Exhibit CY02).

According to the Collins dictionary, pharmaceutical products are medicines. The adjective "pharmaceutical" means "connected with the industrial production of medicine". As for a medicine, it is defined as "a substance that you drink or swallow in order to cure an illness".

56. I also note the Holder's submission at paragraph [20] of his written submissions:

The UK examiner shares the same point of view, as in *Rituals International Trademarks B.V. v Cheerful Buddha Limited, O/096/21, [2021]*, he stated that "when considering their normal and natural meanings, the purpose of cosmetics is to improve appearances, while that of pharmaceuticals is to treat conditions" [31]

57. In my view, although the term *Pharmaceutical products* does indeed cover medicines<sup>12</sup>, it also includes medicated shampoos, soaps and lotions; goods which have non-medicated counterparts in the Opponent's specification.

58. Both the Opponent's goods, enumerated above at [53], and medicated shampoos, soaps and lotions are applied to the hair or skin with the aim of improving its condition and or/appearance. A medicated shampoo will be used in order to improve the condition of the scalp, as well as the hair. The intended result of application of medicated soap/shampoo/creams/lotions to treat or alleviate a skin complaint is an improvement in the condition of the skin. An improvement of the condition of the skin almost always entails an improvement in its appearance. I note the Holder's submission, reproduced above at [56], but add that the fact that a shampoo/soap/lotion is described as medicated, and is used to treat a condition, does not necessarily prevent it from being cosmetic.

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<sup>12</sup> It is well-known that medicines are not confined to substances that are ingested; topical medicines, e.g. ointments, are applied externally.

59. I consider that there will be a great deal of overlap between users of *Soaps; Soaps for use on the skin; Shampoo; Body creams and lotions* and medicated soaps/shampoo/creams/lotions. In both cases, users will be seeking to improve the condition or appearance of their skin; indeed, condition and appearance will, in most cases, go hand in hand.
60. In my view, it is conceivable that users with skin complaints might try multiple products to remedy them, some of which may be medicated and others of which may not be. I also consider that certain skin conditions, e.g. dry skin, might be remedied or alleviated by either medicated or non-medicated skin care products. I also recognise that a proportion of users with certain skin complaints might use medicated skin care products exclusively.
61. I find that the respective goods are the same in terms of physical nature; both are topical preparations with properties which are intended to improve the condition or appearance of the skin. Both are in the form of either a cream, lotion, liquid, or, in the case of many soaps, a bar, and contained in the same sorts of receptacle e.g. a bottle, tube, or tub.
62. I note the Holder's submission, at paragraph [23] of its written submissions, that cosmetics and pharmaceuticals 'do not come from the same industries (saponification industries, creators and manufacturers of perfumes and cosmetics for the former, pharmaceutical laboratories for the latter).' I disagree with this proposition to the extent that some pharmaceutical products and their non-medicated counterparts will be produced by the same processes. For example, both coal tar soap and non-medicated soap will be produced by the process of saponification.
63. I consider that the respective goods will have shared trade channels by virtue of being sold in shops and online stores. Coal tar soap, for example, will be found in the 'bathing' sections of retail premises alongside non-medicated soaps; often on the same shelf. Similarly, medicated shampoos will be found in 'hair care' sections alongside their non-medicated counterparts; medicated creams and lotions will be found in 'skin care' sections, perhaps even on the same shelves.

64. Following my finding above, at [60], I consider there to be a degree of competition between the respective goods. Some medicated soaps/shampoo/creams/lotions will be substitutable for their non-medicated counterparts to the extent that either may be purchased with the aim of improving a certain skin complaint. For example, a non-medicated skin lotion intended to moisturise the skin may have medicated counterparts. I do not find the respective goods to be complementary.

65. I therefore conclude that there is a high degree of similarity between the Holder's *pharmaceutical products* and the Opponent's *Soaps; Soaps for use on the skin; Shampoo; Body creams and lotions*.

66. This represents the strongest comparison between the Holder's *pharmaceutical products* and the Opponent's goods. It is therefore unnecessary for me to compare the term *pharmaceutical products* with any other of the Opponent's goods.

67. I now compare the Holder's *food supplements* with the Opponent's *Essential oils; Essential oils for personal use*.

68. *Food supplements* will include protein shakes/drinks (albeit specifically designed to encourage weight gain for medical reasons), vitamins and herbal extracts, nutritional substances to add to animal feed, to name a few. *Essential oils* are preparations consisting of oils extracted from plant matter diluted with another oil such as vegetable oil. Examples of *essential oils* include lavender oil and tea tree oil.

69. The purpose of *food supplements* is to either improve or maintain health. Vitamins, for example, might be taken in order to address a specific deficiency or health concern; or they may simply be routinely taken in the belief that they maintain health (e.g. in the case of 'multi' vitamin capsules). Protein shakes/drinks, for example, might be consumed in order to gain weight following illness, or where the consumer is unable to eat solid food. *Essential oils* have a number of uses, including: to enable relaxation; to relieve stress; to improve sleep; to fragrance the home; to improve the skin, to increase energy levels, to

name a few. I consider there to be some overlap in use between certain food supplements and some essential oils to the extent that some food supplements (particularly vitamins) specifically target skin health; and certain essential oils, e.g. almond oil and tea tree oil, are also used to improve the skin. Almond oil is often used to moisturise the skin; tea tree oil is known for its antiseptic properties and usefulness in reducing inflammation of the skin. On a more general level, I consider that the respective goods share the broad purpose of targeting health and wellbeing.

70. The respective methods of use are very different. *Food supplements* will be ingested; whereas the number of ways in which *essential oils* are used includes direct application to the skin, inhaling them, adding drops to pillows, bedlinen or bathwater, diffusing them in order to scent a room.
71. The physical nature of the respective goods will, in most cases, be very different. *Food supplements* will usually be in tablet, capsule or powder form. Some vitamins can be taken as a liquid; cod liver oil, for example, can be taken as an oil as well as in capsule form. Food supplements for animals will typically be mixed with their usual food. *Essential oils*, as the term suggests, exist in the form of oils.
72. I consider that the users of the respective goods will, in most cases, be the same. i.e. the general public. I recognise that a smaller number of users will be professionals working in the field of aromatherapy and/or in health spas and the like. In my view, in the case of both sets of goods, some users will be those seeking to maintain general health whereas other users will be aiming to address a specific health concern.
73. In my view, the respective goods will often share trade channels. Both will be sold online and in physical shops (particularly health shops) and supermarkets, as well as pharmacies. In physical premises, both *food supplements* and *essential oils* may well be found in the same section, often in the same aisles. I consider it unlikely that both goods would be found on the same shelves, but not impossible.
74. To my mind, there may, in some cases, be a degree of competition between *essential oils* and *some* goods within the term *food supplements*. For example, a

consumer looking to boost their energy levels or combat fatigue might deliberate over whether to purchase a supplement, e.g. a vitamin and iron preparation, or, instead, an appropriate essential oil. I recognise, however, that a competitive relationship cannot be found between *essential oils* and *all* goods included under the term *food supplements*.

75. I do not find any complementarity between the respective goods.

76. Consequently, I find that the level of similarity between *food supplements* and *essential oils* is in the low-medium range.

77. This represents the strongest comparison between the Holder's *food supplements* and the Opponent's goods. It is therefore unnecessary for me to compare the term with any other of the Opponent's goods.

78. I now compare *dietetic foods for medical use* with the Opponent's *essential oils; essential oils for personal use*.

79. *Dietetic foods for medical use* are nutritional substances designed for patients whose medical or health conditions prevent their nutritional needs from being met by a normal diet. *Essential oils* have been described above at paragraph [68]. The specific uses of the respective goods are therefore very different.

80. The respective methods of use are also very different. *Dietetic foods for medical use* are ingested either orally or straight into the stomach via a feeding tube. The ways in which essential oils are used have been underlined above at [70].

81. The users of the respective products will, in most cases, be different. Users of *dietetic foods for medical use* will be persons whose ability to receive adequate nutrition from a normal diet is compromised by reason of illness or health condition. As noted above, users of *essential oils* will be predominantly members of the general public, with a smaller number of professional users.

82. The physical nature of the respective goods will be different. *Dietetic foods for medical use* will likely be in the form of purées, gels, liquids or powders; whereas *essential oils* are, self-evidently, oils.

83. I consider that the respective goods will have different trade channels. Whereas *essential oils* will be available for purchase by self-selection from online and physical shops, *dietetic foods for medical use* will only be available either from pharmacies, albeit on prescription only, or for purchase by medical professionals from medical suppliers.

84. I do not consider the respective goods to be either competitive or complementary.

85. Consequently, I find that *dietetic foods for medical use* and *essential oils* are dissimilar.

86. I do not consider it necessary to compare *dietetic foods for medical use* with any other of the Opponent's goods (which are, in my view, also dissimilar).

87. I now compare *medical services; medical assistance* with the Opponent's *essential oils; essential oils for personal use*.

88. The terms *medical services* and *medical assistance* will include a vast array of services relating to medical care including hospital services, nursing services, pharmacy advice, dietary and nutritional advice, physiotherapy, chiropractic, medical analysis services provided by laboratories, to name but a few.

89. The *specific* uses of the respective goods and services will, in many cases, be very different. For example, analysis of blood samples by a laboratory will differ greatly from the use of an essential oil for relaxation or stress relief. I recognise, however, that there will be a measure of similarity in terms of purpose between physiotherapy and *essential oils* to the extent that the latter are used in aromatherapy, and both physiotherapy and aromatherapy have a therapeutic purpose. In *general*, there is shared use between *medical services; medical assistance* and *essential oils* only to the very broad extent that both are concerned with health and wellbeing.

90. Users of *medical services; medical assistance* will comprise both members of the general public, either as patients or carers, and medical and healthcare professionals. Certain services will almost always be used by professionals, for

example, tissue analysis by a medical laboratory in order to diagnose a patient. Nursing services, on the other hand, might be purchased by the general public (e.g. home visits) or professionals working in a nursing home. As noted, users of *essential oils* will predominantly be members of the general public.

91. The physical nature of the respective goods and services will necessarily be very different. Goods are tangible objects whereas services are acts carried out by a professional person.
92. The respective trade channels will be distinct. The way in which *medical services* and *medical assistance* are procured will depend on whether the purchaser is a health board or a member of the general public. Health Boards, for example, may procure certain services after putting out invitations to tender to various service providers. Members of the general public might purchase private medical services by approaching service providers directly after seeing advertisements or brochures, either online or in physical magazines etc. As noted, *essential oils* will be purchased from online and physical shops.
93. I consider that a degree of competition between certain mental health services and *essential oils*, for example, is at least possible where a consumer wishes to address their anxiety or stress. However, I do not consider this to be a common occurrence; nor do I find any competition with any other of the Opponent's goods. I do not find any complementarity between the respective goods and services.
94. Consequently, I find that there is no similarity between *medical services; medical assistance* and the Opponent's *essential oils; essential oils for personal use*.
95. I now compare *alternative medicine services* to the Opponent's *essential oils; essential oils for personal use*.
96. *Alternative medicine services* will include aromatherapy. Aromatherapy involves the use of *essential oils* to improve health and wellbeing. There will therefore be overlap in use between the respective goods and services to the extent that both *essential oils* and aromatherapy services will be purchased with the aim of gaining some health benefit from the *essential oils* used. There will also be much

overlap in user to the extent that users of either the goods or the aromatherapy services will be seeking a benefit to their health or wellbeing. I recognise, however, that users purchasing the goods in their capacity as aromatherapy professionals would unlikely also purchase aromatherapy services.

97. The physical nature of the respective goods and services will necessarily be very different. Goods are tangible objects whereas services are acts carried out by a professional person.

98. I consider that there will be some overlap in trade channels. Aromatherapy services will often be offered by health and beauty salons or spas where products, including *essential oils*, will also be available for purchase.

99. There will be a degree of competition between the respective goods and services; a consumer may deliberate over whether to book an aromatherapy session or, instead, purchase some *essential oils* to use at home. I also find complementarity; *essential oils* are the necessary consumables used in the course of providing aromatherapy services and an average consumer may well presume both *essential oils* and aromatherapy sessions to be offered by the same undertaking.

100. Consequently, I find a medium-high degree of similarity between *alternative medicine services* and the Opponent's *essential oils; essential oils for personal use*.

101. My findings are summarised thus:

- There is a high degree of similarity between *pharmaceutical products* and the Opponent's *Soaps; Soaps for use on the skin; Shampoo; Body creams and lotions*.
- The level of similarity between *food supplements* and the Opponent's *essential oils* is in the low-medium range.

- I find that *dietetic foods for medical use* and the Opponent's *essential oils* are dissimilar.
- I find that *medical services; medical assistance* and the Opponent's *essential oils; essential oils for personal use* are dissimilar.
- The level of similarity between *alternative medicine services* and the Opponent's *essential oils; essential oils for personal use* is in the medium-high range.

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

102. 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*.

103. In *Hearst Holdings Inc*<sup>13</sup> Birss J. described the average consumer thus:

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

104. I consider that the average consumer of the Opponent's goods will, predominantly, be a member of the general public; a smaller number of purchasers will be members of the professional public looking to equip beauty

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<sup>13</sup> *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).

salons, health spas and the like with products to be used in the provision of their services. The price of the goods will range from a few pounds to many pounds. In my view, the goods would be purchased with at least an above average degree of attention. Consumers would likely consider factors including whether the product is scented or non-scented, or hypoallergenic; in retail premises, some consumers would also sample the product by applying a small amount to the back of their hand from a 'tester' bottle/tube. The goods will, in most cases, be purchased by self-selection based on visual inspection of the goods, either physically from shelves in shops or online. Some purchases may also be made aurally by way of requests to retail staff.

105. I now consider the average consumer of the Holder's goods in Class 5. The term *pharmaceutical products* includes a vast array of drugs, topical medicines and medicated preparations. Goods range from a bar of antiseptic soap or packet of aspirin, both of which can be purchased by members of the general public by self-selection, to anaesthetics, the sales of which are tightly-regulated and authorised for professional medical purchasers only. The average consumer of *pharmaceutical products* will therefore be both members of the general public and expert professional purchasers. The level of attention displayed by a member of the general public when making a purchase will be in the above-average to high range. The purchasing process will, in many cases, be visual; some purchases will also be made aurally by way of requests to staff. The professional purchaser obtaining medicines for a pharmacy or hospital will display a level of attention in the high – very high range. These particular goods will likely be selected from a specialist catalogue.

106. I consider the average consumer of *food supplements* to be, predominantly, a member of the general public. A number of purchases will also be made by professional purchasers in medical and healthcare settings. Goods will be self-selected either from websites or shelves in physical shops and pharmacies. The purchasing act will, in many cases, be visual in nature. Some purchases will also be made aurally by way of requests to staff. The level of attention is likely to be

high. Purchasers would likely consider factors such as warning labels on the bottle/packaging, ingredients and dosage.

107. I now consider the average consumer of the Holder's class 44 services. To my mind, the average consumer of *alternative medicine services* will be a member of the general public seeking advice or therapy for a health concern. The purchasing decision will be made after viewing information displayed on a website or brochure, or after consultation with a member of staff in the service-provider's premises. I consider that the purchasing act will be visual to the extent that, in many instances, the service-provider will come to the purchaser's notice by visual means. However, in my view, the purchasing act will often not be completed until the consumer has discussed their needs with a practitioner carrying out the service. The average purchaser will display a high level of attention when booking their treatment.

**Comparison of the marks**

	<p style="text-align: center;"><b>REVIVRE LABS</b></p>
<p>Opponent's (earlier) mark</p>	<p>Holder's (contested) mark</p>

108. 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.”

109. 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.

110. The Opponent’s marks comprise two elements; a word and a device. The word ‘REVIVRE’ is rendered in Times New Roman font, all letters being upper case. The device element is positioned centrally above the word. The device comprises a number of closely-packed shapes that might be described as flourishes. If the device is intended to depict a particular object, then it is not obvious what object it represents. At most, the device might be seen as suggestive of nurdles of lotion or cream. The overall impression resides in the mark in its entirety; albeit the eye will be drawn to the ‘REVIVRE’ element first because that is the largest element and the part that can be read.

111. The Holder’s mark comprises two words, ‘REVIVRE LABS’, rendered in a plain uniform font. The overall impression resides in the mark in its entirety; ‘REVIVRE’ will be the dominant element by virtue of being more distinctive than ‘LABS’ and will therefore have greater weight in the overall impression.

112. Visual comparison

Both marks include the word element ‘REVIVRE’ rendered in a plain uniform font. The points of difference are: in the Holder’s mark, ‘REVIVRE’ is followed by ‘LABS’; the Opponent’s mark includes a device element positioned centrally above ‘REVIVRE’ as described above at [110]. Consequently, I find that the level of visual similarity between the respective marks is at least medium.

113. Aural comparison

I consider that the Opponent's mark will be articulated as 're-vee-vra', which the emphasis on the second syllable. In my view, the Holder's mark will be articulated either in full as 're-vee-vra *labs*', with the emphasis on the fourth syllable, or, as 're-vee-vra' without the 'Labs' element. I therefore find the marks to be aurally similar to a medium degree if 'Labs' is articulated; identical if 'Labs' is not articulated.

114. Conceptual comparison

The Opponent has submitted the following at paragraph [10] of its written submissions:

The marks share the word element 'REVIVRE' which has no meaning in English. It is similar to the word 'revive' and to the extent that similarity is called to mind by the average UK consumer the marks are conceptually very similar.

The Holder has not made any submissions on the matter of conceptual similarity between the marks.

115. 'Revivre' is a French word meaning 'to come alive again' or 'to be revived'.<sup>14</sup>

In my view, a number of average consumers will understand French and be familiar with this word. For the group of consumers unfamiliar with the precise meaning of the French word, I consider that, for a significant proportion, 'revivre' will call to mind the English word 'revive'. This latter group will, in my view, constitute the larger group of average consumers.

116. I must be mindful of the extent to which certain knowledge may be ascribed to the average consumer. Ms Anna Carboni, as the Appointed Person in *Chorkee Ltd v Cherokee Inc*<sup>15</sup> urged caution 'not to assume that one's personal experience, knowledge and assumptions are more widespread than they are.'

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<sup>14</sup> <https://www.collinsdictionary.com/dictionary/french-english/revivre>, accessed 9<sup>th</sup> April 2021 at 17:50.

<sup>15</sup> Case BL O/048/08

Despite it being a fact that the word Cherokee denotes the name of a tribe indigenous to North America, the Hearing Officer was not entitled to attribute this knowledge to the relevant average consumer.

117. I also bear in mind the decision in *Wunderkind Trade Mark*<sup>16</sup> where the Registrar refused to attribute knowledge of the German meaning of the word 'wunderkind' to the average consumer even though some evidence had been adduced to demonstrate its use in UK press articles.

118. I consider that a significant proportion of average consumers would perceive 'Revivre' either as an invented or 'French-sounding' word that calls to mind the English word 'revive'. I recognise that some of this group of average consumers would recognise 'revivre' as a French word, but without knowing its precise meaning. 'Revivre' would likely convey the idea of products with the power to bring about the renewal or restoration of health to the body.

119. The device element would, in my view, be seen by many average consumers as a group of decorative flourishes to which no particular concept can be attached. I recognise that some average consumers might perceive the device as waves, or, perhaps, a stylised image of nurdles of lotion or cream.

120. The 'Revivre' element of the Holder's mark would be perceived as underlined above at [118]. The 'Labs' element would be understood as an abbreviation of the English word 'laboratories, referring to facilities equipped for scientific research or the manufacture of drugs or chemicals. 'Revivre Labs' would therefore conjure the idea of a laboratory in which products are created which have powers to renew or restore health.

121. Consequently, I find that the respective marks have a high level of conceptual similarity.

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

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<sup>16</sup> [2002] R.P.C. 45.

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

123. I consider the Opponent’s mark to be somewhat allusive of the goods in respect of which it is registered. I have found that the average consumer will perceive the mark as conveying the concept of revival or renewal, whether or not they are certain of the precise meaning of the French word ‘revivre’. In my view, the idea of revival or renewal is mildly allusive of the goods to the extent that cosmetics and essential oils are very often imbued with restorative properties or the power to give the user a feeling of rejuvenation or renewal. I conclude that the earlier mark is inherently distinctive to an average degree.

## Likelihood of confusion

124. Confusion can be direct or indirect. Mr Ian Purvis Q. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*<sup>17</sup>. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*<sup>18</sup>, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that he has in his mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark before him but mistakenly matches it to the imperfect image of the earlier mark in his ‘mind’s eye’. Indirect confusion occurs when the average consumer recognises that the later mark is indeed different from the earlier mark, but, concludes that the later mark is economically linked to the earlier mark by way of being a ‘sub brand’, for instance.

125. Before arriving at my decision, I must make a global assessment taking into account all of the relevant factors, including the principles a) – k) set out above at [42].

126. When considering all relevant factors ‘in the round’, I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

127. My comparison of the respective goods and services has determined that:

- *Pharmaceutical products* and the Opponent’s *Soaps; Soaps for use on the skin; Shampoo; Body creams and lotions* are highly similar;

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<sup>17</sup> Case BL O/375/10 at [16].

<sup>18</sup> *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

- *Food supplements* and the Opponent's *essential oils* are similar to a low-medium degree;
- *Dietetic foods for medical use* and the Opponent's *essential oils* are dissimilar;
- *Medical services; medical assistance* and the Opponent's *essential oils; essential oils for personal use* are dissimilar;
- *Alternative medicine services* and the Opponent's *essential oils; essential oils for personal use* are similar to a medium-high degree.

128. My comparison of the marks has determined that:

- The level of visual similarity between the marks is at least medium;
- If the 'Labs' element of the Holder's mark is *not* articulated, then the marks are aurally identical; if 'Labs' *is* articulated, then there is a medium degree of aural similarity between the marks;
- The marks are conceptually similar to a high degree. Although I have found that not all average consumers will be aware that 'revivre' is a French word and know its precise meaning, I consider that, for the majority of average consumers, whether or not they recognise it as a French word, the idea of revival, rejuvenation or renewal would be conjured in their minds.

129. I have found that the Opponent's mark is inherently distinctive to at least a medium degree. The CJEU held in *Sabel*<sup>19</sup> that:

"24. The more distinctive the earlier mark, the greater will be the likelihood of confusion."

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<sup>19</sup> *Sabel BV v Puma AG* (C-251/95), [1998] E. T. M. R. 1 (1997) at [24].

130. This principle was given an important qualification by Mr Iain Purvis Q.C, as the Appointed Person, in the decision of *Kurt Geiger v A-List Corporate Limited*<sup>20</sup>:

“39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything, it will reduce it.”

131. In my view, the visual differences between the marks are sufficient to rule out the likelihood of direct confusion. I find this to be the case even in respect of the goods that I have found to be highly similar to the Opponent’s goods.

132. I do not find any likelihood of confusion, either direct or indirect, with respect to the following of the Holder’s goods and services:

- *Dietetic foods for medical use*
- *Medical services; medical assistance*

133. However, the observations below lead me to conclude that there is a likelihood of *indirect* confusion in respect of:

*pharmaceutical products;*  
*food supplements; and*  
*alternative medicine services.*

- The above goods and services are, respectively: highly similar; similar to a low-medium degree; and similar to a medium-high degree, to the Opponent’s goods.

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<sup>20</sup> BL O-075-13.

- The respective marks are highly conceptually similar.
- The distinctive element of the earlier mark, i.e. 'Revivre', forms the dominant and distinctive element of the Holder's mark. In the Holder's mark, the descriptive element 'Labs' is placed after 'Revivre'.
- In *Whyte and Mackay*<sup>21</sup> it was held that where an average consumer perceives that a composite mark consists of two or more elements, one of which has a distinctive significance independent of the mark as a whole, confusion may occur as a result of the similarity/identity of that element to the earlier mark. In the instant case, the 'Revivre' element has retained its independent distinctive role leading the average consumer to presume that 'Revivre Labs' is another range of products related to the brand 'Revivre'.
- In my view, the culmination of these factors will result in the average consumer discerning the visual differences between the respective marks but concluding that the marks relate to economically-linked undertakings.

## Final Remarks

134. The Opposition has succeeded in part. The request for protection of the international registration in the UK is therefore *refused only* in respect of the following terms:

*Class 5: Pharmaceutical products; food supplements*

*Class 44: Alternative medicine services*

135. The request for protection in the UK may be granted in respect of the following goods and services only:

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<sup>21</sup> *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271.

Class 5: *Dietetic foods for medical use*

Class 44: *Medical services; medical assistance*

## **COSTS**

136. Both parties have enjoyed a measure of success. There is therefore no order as to costs

**Dated this 19<sup>th</sup> day of April 2021**

**Mx N. R. Morris**

**For the Registrar,**

**the Comptroller-General**