

O/300/20

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NO. UK00003390785 AND APPLICATION
NO. UK00003390779

BY IN60 MEDIA LIMITED

TO REGISTER THE TRADE MARKS:



AND



(SERIES OF 2)

AND

Super Hero Energy

IN CLASSES 5, 29, 30 AND 32

AND

IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO

UNDER NO. 417081 AND 417082 BY

BARE BIOLOGY LTD

BACKGROUND AND PLEADINGS

1. On 9 April 2019, IN60 Media Limited (“the applicant”) applied to register the trade marks shown on the cover page of this decision in the UK. The applications were published for opposition purposes on 19 April 2019 and registration is sought for the goods set out in the Annex to this decision.

2. On 19 July 2019, Bare Biology Limited (“the opponent”) opposed the application based upon sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). Under both grounds, the opponent relies on the following trade mark (registration no. 3080496):



3. The opponent’s mark was filed on 7 November 2014 and registered on 10 February 2017. It stands registered for the following goods:

Class 5 Nutritional additives and supplements; functional food additives; additive to prepare food; nutritional additives derived from biological sources; mineral nutritional additives; vitamins; fish oil additives, namely fish oil, omega-3 for children.

Class 29 Dietetic substances; omega 3 fish oil; edible oils.

Class 30 Salad dressings; sauces.

4. Under section 5(2)(b), the opponent relies upon all goods for which the earlier mark is registered and claims that there is a likelihood of confusion because the marks are similar, and the goods are identical or similar.

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

6. The applicant filed counterstatements denying the claims made.

7. By letter dated 20 August 2019, the Tribunal confirmed that the proceedings were to be consolidated pursuant to Rule 62(1)(g) of the Trade Marks Rules 2008.

8. The applicant is represented by Cloch Solicitors and the opponent is represented by Basck Limited. Both parties filed evidence in chief. The opponent elected not to file evidence in reply. Neither party requested a hearing, but both parties filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

EVIDENCE

The Opponent's Evidence

9. The opponent filed evidence in the form of the witness statement of Melanie Lawson dated 21 October 2019, which is accompanied by 3 exhibits. Ms Lawson is a Director of the opponent, a position she has held since 2 April 2012.

10. Ms Lawson states that the mark relied upon was first used in commerce in August 2014. Ms Lawson goes on to explain that since the mark was first used, over 30,000 products have been sold under it.

11. Ms Lawson has provided a number of examples of products displaying the earlier mark available for purchase online.¹ However, all of these appear to be undated. The same exhibit also displays examples of the opponent's social media pages but these are, again, undated.

12. Ms Lawson states that approximately £250,000 has been spent on advertising the goods sold under the mark by the opponent.

13. Ms Lawson has provided a print out of what appears to be a promotional booklet, setting out where the mark has been seen within publications, customer reviews and stockists.² This booklet is, itself, undated. Further, none of the article extracts of photographs within it are dated. I note that the document does contain a reference to a nutrition event which took place in March 2019 and contains 4 customer reviews dated between March 2019 and August 2019.

14. Ms Lawson has also provided a number of links to articles concerning the opponent and/or the earlier mark.³ I will return to the admissibility of 'links' as evidence below, but having followed these links, I note as follows:

- a. An article from Forbes Magazine dated January 2018 contains a number of pictures of products by the opponent, but none of these display the earlier mark relied upon. However, there is a reference in the text to "Super Hero".
- b. Articles from blogs entitled The Curiosity Gap and Island Living 365, and dated September 2014 and September 2016 respectively, reference Super Hero products and the latter also displays the mark as registered.
- c. A number of the articles provided are dated after the relevant date. I note that two of these are only dated a short time after the relevant date (an article from Vogue dated 11 April 2019 and an article from The Evening Standard

¹ Exhibit ML2

² Exhibit ML1

³ Exhibit ML3

dated 26 April 2019). Whilst these both reference the opponent, they do not reference the mark relied upon.

- d. A number of other articles are dated prior to the relevant date (such as articles from Forbes Magazine, The Daily Mail and The Telegraph) but whilst these reference the opponent, they do not reference the mark relied upon.

15. I note that the opponent's evidence was accompanied by written submissions. As noted above, the opponent also filed written submissions in lieu. Whilst I do not propose to summarise those submissions here, I have taken them into consideration in reaching my decision and will refer to them below where necessary.

The Applicant's Evidence

16. The applicant filed evidence in the form of the witness statement of Philip Adamson Hannay dated 23 October 2019, which is accompanied by 2 exhibits. Mr Hannay is the solicitor acting on behalf of the applicant in these proceedings.

17. Mr Hannay has provided a print out of the Register in relation to the mark relied upon by the opponent in these proceedings.⁴ Mr Hannay notes that two Notices of Threatened Opposition were filed against the mark relied upon in January 2015. He also notes that the mark is recorded as having been opposed in March 2015.

18. Mr Hannay has also provided a copy of the Notes to Abbreviated Accounts of the opponent filed at Companies House for the years ending March 2015, 2016, 2017 and 2018.⁵ He states:

"It is noted that the registration relied [sic] upon by Party A is UK00003080496 with filing date 07 November 2014. It appears that that mark was accounted for under in [sic] the accounts of Party A for the years ending 31 March 2015. The sum attributable is only £2,210". There is an entry showing (see note 2) for

⁴ Exhibit IN60-01

⁵ Exhibit IN60-02

additions of “intangible fixed assets” during the year. Note 1 explains the policy that such assets would be written off on a straight line basis over their useful economic lives of five years (until around the date hereof then, which would show in the accounts to 31 March 2020). However, it is noted that Party A’s accounts to 31 March 2018 show that, during that year, the intangible fixed assets including, specifically, the “Trademarks” formed a “disposal” and written off the accounts. This would suggest that Party A does not, in fact, own the company’s trademarks, including UK00003080496 replied [sic] upon. Even if it did not suggest that (which it does), it shows that as at the filing date of the contested applications, UK00003390785 and UK00003390779, Party A counted UK00003080496 as worthless and having no economic value.”

19. The Notes to the Accounts state as follows:

“Intangible fixed assets

Intangible assets that are acquired by the company are stated at cost less accumulated amortisation and impairment losses.

Unless otherwise stated, intangible fixed assets are amortised at rates calculated to write off the assets on a straight basis over their estimated useful economic lives of five years. Impairment of intangible assets is only reviewed where circumstances indicate that the carrying value of an asset may not be fully recoverable.”

20. The 2018 accounts record the cost of trade marks as at 1 April 2017 as £2,210. Beneath that figure is (£2,210) recorded as “disposals” and Amortisation at 1 April 2017 as £2,210. As at 31 March 2018, an “Eliminated on disposal” figure is provided as (£2,210), leaving a net book value of £0.

21. The applicant’s evidence was accompanied by written submissions. As noted above, the applicant also filed written submissions in lieu. Whilst I do not propose to summarise those here, I have taken them into consideration and will refer to them below where necessary.

PRELIMINARY ISSUES

22. In its written submissions, the applicant states:

“5. It is of crucial importance to note that Ms Lawson claims [...] that “I am the sole owner [of] all brands...”. That claims is founded upon and Ms Lawson should not be permitted to resile form [sic] the same. Confusion between personal assets and wholly owned company assets is common. But that is not the case here. There is produced herewith a witness statement of Philip Hannay. Mr Hannay introduces evidence (namely exhibit IN60-02) and explains that the accounts of Party A show that Party A divested itself of ownership of its “trade marks” in the year ending 31 March 2018. This is likely to put the marks out of reach of the opponent who raised the opposition proceedings during 2015 (see exhibit EN60-01) or further opponents. Such action is understandable. It certainly supports Ms Lawson’s claim to be the personal owners of the mark. The register has therefore not been updated. But, the right of Party A to raise opposition proceedings is hotly contested. Party A has no such right and the oppositions should be immediately rejected on that basis.”

23. In its written submissions in lieu, the opponent states that the reference to Ms Lawson being the “sole owner” is “a figure of speech, given that Melanie is the only person involved in the management of the business at hand”. The opponent further states:

“4. [...] The Opponent submits that the Applicant’s allegations regarding the alleged lack of right to raise the opposition proceedings are wholly without merit. The evidence provided by the Applicant does not support the allegation, as the statement of accounts do not prove any change of ownership of the mark. Furthermore, the cost-based value in the financial statement is not a valid proof, as is the Applicant’s attempt to prove the alleged change of ownership. Further, it is not up to the Applicant to assess what value the Opponent assigned to their trade marks, and the Opponent strongly denies any such assumptions, not it is [sic] the subject of these proceedings. Therefore, the Opponent clearly has the right to start these proceedings and they shall proceed further.”

24. I have no evidence from either party as to the meaning of accountancy terms contained within the Accounts filed. I also note that only part of the Accounts have been filed by the applicant. My understanding is that a reference to a 'disposal' in a company's Accounts does not automatically mean that the asset has been sold. An asset may be recorded as disposed of in a number of circumstances, for example, where it is no longer considered to be of value. Without the benefit of any further detail as to why this disposal was recorded, it is not possible to infer that a sale has taken place. Further, even if this was evidence that a sale had taken place, there is nothing to confirm that it relates to the trade mark relied upon. The opponent clearly owns other trade marks (some of which have been referred to in evidence in these proceedings) and it is not possible to know to which of those trade marks the Accounts refer. Consequently, I do not consider this to be evidence that the opponent does not own the trade mark relied upon. They are recorded as the registered owner on the Register and, as such, are entitled to bring the proceedings in issue. For the same reason, we cannot know if this is intended to reflect the value of the trade mark relied upon in these proceedings or some other trade mark of the opponent.

25. Further, the applicant has stated that this office did not notify them of the existence of the earlier mark at the examination stage in relation to one of the applied-for marks. The applicant suggests that this demonstrates agreement on the part of the office that the marks were not confusingly similar. However, the initial search undertaken by an examiner upon receipt of an application to register a trade mark is not an exhaustive search of the Register for potentially similar marks. It was made clear to the applicant in our correspondence dated 12 April 2019 that "if you proceed, your application will be published in the online Trade Marks Journal and anyone can oppose your application should they have grounds to do so. If such action were to be successful, this would likely result in a costs award against you." It is, therefore, clear that the search undertaken by the examiner is not indicative of the merits of this opposition.

26. In its counterstatement, the applicant has made reference to the fact that it informed the opponent in pre-action correspondence of its intention to challenge the validity of the earlier mark on the basis that it is deceptive. The applicant's claim in this regard is based upon the fact that it includes the words OMEGA 3 FISH OIL in relation to goods other than Omega 3 Fish Oil. No such application appears to have been

made to date. I do not consider the applicant's submissions in this regard to be relevant to the issues before me.

27. I note in its written submissions, the applicant has made reference to the 'get-up' of the opponent and certain aspects of this that draw attention to certain parts of the earlier mark. In its written submissions in lieu, the opponent notes:

"24. [...] the choice of colours on a website or advertising is not relevant as still the Opponent's mark is registered as a standalone brand and the colour and font in advertising is used for consistency with the registered brand as a whole, not to strengthen any of its features."

28. The opponent is correct. It is the similarity of the marks as registered/applied for that is relevant to my assessment. The way in which the parties use their marks in practice does not assist the applicant.

DECISION

My Approach

29. As both oppositions are based upon the same earlier mark, I will consider them at the same time, addressing each ground in turn.

Section 5(2)(b)

30. Section 5(2)(b) of the Act reads as follows:

"5(2) A trade mark shall not be registered if because –

(a)...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

31. Section 5A of the Act reads as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

32. By virtue of its earlier filing date, the trade mark upon which the opponent relies qualifies as an earlier trade mark pursuant to section 6 of the Act. The opponent’s mark had not completed its registration process more than 5 years before the filing date of the applications in issue and is not, therefore, subject to proof of use pursuant to section 6A. Consequently, the opponent can rely upon all of the goods it has identified.

Section 5(2)(b) – case law

33. 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

34. The specifications of both applied-for marks are identical, with the following exceptions:

a) UK registration no. 3390785 (“the First Application”) has the additional words “parts and accessories for all the aforesaid goods” at the end of class 30 which has no counterpart in the specification of UK registration no. 3390779 (“the Second Application”); and

b) the First Application has “parts and accessories for all the aforesaid goods” at the end of class 5, whereas the Second Application has the words “parts and fittings for all the aforesaid goods”.

35. I do not consider that the phrases “parts and accessories” and “parts and fittings” have any difference in meaning in this context. Consequently, all of the terms contained within the Second Application’s specification are duplicated in that of the First. I will, therefore, use the specification of the First Application for the purposes of my comparison. The competing goods are as follows:

Opponent’s goods	Applicant’s goods
<p><u>Class 5</u> Nutritional additives and supplements; functional food additives; additive to prepare food; nutritional additives derived from biological sources; mineral nutritional additives; vitamins; fish oil additives, namely fish oil, omega-3 for children.</p>	<p><u>Class 5</u> Nutritional supplement energy bars; nutritional supplement meal replacement bars for boosting energy; liquid herbal supplements; dietary and nutritional supplements, infusions and dietetic preparations; tinctures; meal replacement powders; meal replacement</p>

<p><u>Class 29</u> Dietetic substances; omega 3 fish oil; edible oils.</p> <p><u>Class 30</u> Salad dressings; sauces.</p>	<p>bars; meal replacement drink mixes; dietary supplement drink mixes, nutraceuticals for use as a dietary supplement, topical creams, gels, salves, sprays, balms and ointments for analgesic purposes; nutrition supplements in drop form, capsule form and in liquid form; edible hemp oil for use as a dietary supplement; hemp protein powder for use as a nutritional food additive for medical purposes; hemp oil as a nutritional supplement; hemp protein powder for use as a nutritional food additive for culinary purposes; fruit-based meal replacement powders, not for medical purposes; tobacco-free cigarettes for medical purposes; pharmaceuticals, medical preparations; dietetic preparations; dietetic food and substances; dietetic food and substances adapted for medical use; dietary supplements for humans; diet capsules; dietary supplements and dietetic preparations; dietary supplements for humans; Dietary supplements for humans not for medical purposes; dietary supplements for infants; dietary supplements for medical use; dietetic beverages adapted for medical purposes; dietetic confectionery adapted for medical purposes; dietetic foods adapted for medical use; food for restricted diets; food supplements for</p>
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	<p>dietetic use; health food supplements for persons with special dietary requirements; herbal dietary supplements for persons special dietary requirements; mineral dietary supplements; natural dietary supplements; milk of almonds [beverage]; parts and accessories for all the aforesaid goods.</p> <p><u>Class 29</u></p> <p>Processed fruits and vegetables (including nuts and pulses); candied fruit snacks; coconut-based snacks; dried fruit-based snacks; fruit snacks; legume-based snacks; milk-based snacks; potato snacks; snacks of edible seaweed; tofu-based snacks; parts and accessories for all the aforesaid goods.</p> <p><u>Class 30</u></p> <p>Cereal bars and energy bars; cereal based energy bars; cereal-based savoury snacks; cereal based snacks; cereal bars; high-protein cereal bars; cereal-based savoury snacks; cereal based snacks; cereal snacks; cheese balls [snacks]; cheese curls [snacks]; cheese flavored puffed corn snacks; corn-based savoury snacks; crispbread snacks; extruded corn snacks; extruded snacks containing maize; extruded wheat snacks; flour based savory</p>
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	snacks; fruit cake snacks; granola snacks; puffed cheese balls [corn snacks]; puffed corn snacks; rice cake snacks; rice snacks; snacks made from muesli; snacks manufactured from muesli; snacks manufactured from cereals; tortilla snacks; sweets; candy; confectionery; ice confectionery; sugar; honey; spices; sweets; desserts; puddings; muffins; cakes; non-medicated confectionery; coffee; artificial coffee; coffee beans; tea; green tea; tea bags; loose tea; tea pods; herbal teas; tea beverages; fruit teas; fruit flavoured teas; infusions; tea extracts and essences; instant tea; preparations made from or containing tea; tea substitutes; tea-based beverages; iced tea; cocoa; chocolate; based drinks; hot chocolate; candy; frozen confections; chilled confections; ice; edible ices; ices; ice cream; ice cream products and frozen confections; preparations for making ices, ice cream, ice cream products and frozen confections; frozen yogurt; biscuits; shortbreads; sauces [condiments]; mustard; vinegar; preparation for making sauces; salad dressings; mustard relishes; marinades; mousses; treacle; flavourings other than essential oils; sauces; chutneys; fruit sauces; vinaigrettes; dressings; parts
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and accessories for all the aforesaid goods.

Class 32

Energy drinks; non-alcoholic beverages; aerated water; aerated water (preparations for making -); aerated beverages; aloe vera drinks, non-alcoholic; aperitifs, non-alcoholic; beer; beers; shandy; beer wort; non-alcoholic beers; beverages (preparations for making -); cider, non-alcoholic; cocktails, non-alcoholic; de-alcoholised drinks; essences for making beverages; fruit beverages; fruit drinks; fruit juices; fruit nectars, non-alcoholic; ginger ale; grape must, unfermented; hops (extracts of -) for making beer; isotonic beverages; kvass [non-alcoholic beverage]; lemonades; liqueurs (preparations for making -); lithia water; malt beer; malt wort; mineral water [beverages]; mineral water (preparations for making -); must; non-alcoholic beverages; non-alcoholic fruit extracts; non-alcoholic fruit juice beverages; non-alcoholic honey-based beverages; orgeat; pastilles for effervescing beverages; peanut milk [non-alcoholic beverage]; powders for effervescing beverages; sarsaparilla [non-alcoholic beverage]; seltzer water; smoothies; soda water; sorbets [beverages]; syrups and other

	preparations for making beverages; syrups for beverages; syrups for lemonade; table waters; tomato juice [beverage]; vegetable juices [beverages]; waters [beverages]; whey beverages; non-alcoholic wines; parts and accessories for all the aforesaid goods.
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36. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

Class 5

39. The following goods in the applicant’s specification fall within the broader category of “nutritional additives and supplements” in the opponent’s specifications and can, therefore, be considered identical on the principle outlined in *Meric*:

Nutrition supplements in drop form, capsule form and in liquid form; hemp protein powder for use as a nutritional food additive for medical purposes; hemp oil as a nutritional supplement; hemp protein powder for use as a nutritional food additive for culinary purposes.

40. Dietary supplements and preparations are, to my understanding, products taken in order to add additional nutrients to the diet. Consequently, I consider the following goods in the applicant’s specification to also be *Meric* identical to “nutritional additives and supplements” in the opponent’s specifications:

Dietary and nutritional supplements, infusions [...]; edible hemp oil for use as a dietary supplement; dietary supplements for humans; dietary supplements [...]; dietary supplements for humans; Dietary supplements for humans not for medical purposes; dietary supplements for infants; dietary supplements for medical use; food supplements for dietetic use; health food supplements for persons with special dietary requirements; herbal dietary supplements for persons special dietary requirements; mineral dietary supplements; natural dietary supplements.

41. Dietetic preparations could, in my view, cover a broad range of goods. However, this term could clearly cover nutritional additives and supplements intended to add any missing nutrients or vitamins from a consumer's diet. Even where the goods are not identical, there will be overlap in user, use, purpose and trade channels as all of the goods will be intended to provide the user with a healthy diet and the full range of nutrients required. They may all be used, for example, where someone practices a limited diet (such as not consuming dairy products or meat) and consequently needs to obtain nutrients from an alternative source. There may, therefore, be a degree of competition between the goods. I recognise that, where the goods are not identical, the nature and method of use may differ. Consequently, I consider the following goods to be either *Merici* identical or highly similar to "nutritional additives and supplements" in the opponent's specifications:

[...] Dietetic preparations; dietetic preparations; dietetic food and substances; dietetic food and substances adapted for medical use; [...] dietetic preparations; dietetic confectionery adapted for medical purposes; dietetic beverages adapted for medical purposes; dietetic foods adapted for medical use; food for restricted diets.

42. "Liquid herbal supplements" in the applicant's specification would, in my view, include nutritional supplements obtained from herbal sources. Consequently, I consider these goods to be *Merici* identical to "nutritional additives and supplements" in the opponent's specifications.

43. “Nutritional supplement energy bars” and “nutritional supplement meal replacement bars for boosting energy” in the applicant’s specification are snack bars that have been enhanced with additional nutrients for the benefit of the consumer. These goods may overlap in trade channels, user and use with “nutritional additives and supplements” in the opponent’s specification. The goods are likely to differ in nature and method of use. However, there is likely to be a degree of competition between them as someone may choose to consume a nutritional supplement on its own such as in the form of a tablet or powder, or to consume a snack in the form of a bar which has been enhanced with the required nutrient. Taking this into account, I consider the goods to be similar to a high degree.

44. Meal replacement products and diet tablets are normally items consumed in place of a traditional meal to assist the consumer in losing weight, whilst still obtaining the necessary nutrients for the body to function. There is, therefore, overlap in use between “nutritional additives and supplements” in the opponent’s specifications and the following goods in the applicant’s specification:

Meal replacement powders; meal replacement bars; meal replacement drink mixes; fruit-based meal replacement powders, not for medical purposes; diet capsules.

However, I recognise that the purpose differs to the extent that the applicant’s goods are typically (although not always) aimed at weight loss. There may be a degree of overlap in trade channels and the user will be the same. However, I recognise that the nature and method of use of the goods are likely to differ. I do not consider the goods to be complementary or in competition. I consider the goods to be similar to a medium degree.

45. “Pharmaceuticals, medical preparations” in the applicant’s specification is a broad term which covers a wide range of goods intended for the treatment of illness. There may be a degree of overlap in use with “nutritional additives and supplements” in the opponent’s specification because illnesses associated with nutrient deficiencies such as anemia may call for treatment with medicines that supplement those deficiencies. There will also be overlap in use, method of use and nature. There may be a degree

of competition between them. I consider the goods to be similar to at least a medium degree.

46. “Tobacco-free cigarettes for medical purposes” in the applicant’s specification are goods typically used to assist in giving up traditional cigarettes and combat nicotine addiction. I can see no overlap in use, method of use or nature with the opponent’s goods. I recognise that there may be overlap to the extent that that they may all be used by members of the general public and prescribed by medical professionals. I also recognise that there may be overlap in trade channels to the extent that all the goods may be purchased from pharmacies, but they would be sold in different sections of such retailers. However, there is no competition or complementarity. I consider the goods to share no more than a very low degree of similarity.

47. “Milk of almonds [beverage]” in the applicant’s specification is a plant-based milk manufactured from almonds. It is highly nutritious and often consumed by individuals who have a dairy-free diet. I recognise that there may be overlap in user with the opponent’s goods to the extent that the goods will all be consumed by members of the general public. I also recognise that there may be overlap in purpose to a degree, given that almond milk may, at least in part, be consumed for its nutritional properties. However, any such overlap is minimal and there is no overlap in nature or method of use. In the absence of any evidence to the contrary, I see no reason to conclude that there is any overlap in trade channels. There is no complementarity and I see no reason for there to be competition. Taking all of this into account, I consider the goods to be similar to only a low degree.

48. “Tinctures” in the applicant’s specification is “a medicine consisting of alcohol and a small amount of a drug”.⁶ None of the opponent’s goods could properly be considered ‘medicines’ of alcohol and drugs. In the absence of any submissions to assist me, I see no reason why there would be any overlap in use, method of use or nature. I recognise that there may be some overlap in trade channels to the extent that both may be sold in pharmacies, and overlap in user to the extent that both may be used by members of the general public or prescribed by medical professionals.

⁶ <https://www.collinsdictionary.com/dictionary/english/tincture>

However, any such overlap is minimal and there is no complementarity or competition between them. Taking this into account, I consider the goods to be similar to no more than a very low degree.

49. “Dietary supplement drink mixes, nutraceuticals for use as a dietary supplement, topical creams, gels, salves, sprays, balms and ointments for analgesic purposes” in the applicant’s specification is ambiguous in its meaning. The term ends “for analgesic purposes” which means the purpose is to provide pain relief.⁷ It is not clear to me why a dietary supplement drink mix or a nutraceutical for use as a dietary supplement would be used for pain relief. I suspect the use of commas rather than semi-colons in this part of the specification was an oversight on the part of the applicant rather than intended. Nonetheless, dietary supplements generally are covered elsewhere in the applicant’s specification and are dealt with above. As the purpose of all of these goods appears to be for the purposes of pain relief, I see no overlap with any of the opponent’s goods. The goods differ in nature and method of use. There will be no competition or complementarity between them. I recognise that there may be overlap in trade channels to the extent that they may all be sold through pharmacies and they may overlap in user to the extent that both may be used by members of the general public or prescribed by medical professionals. Taking this into account, I consider the goods to be similar to a very low degree.

50. The final term in the applicant’s specification is “parts and accessories for all the aforesaid goods”. The meaning of this term is not clear to me. I cannot identify what goods may be described as “parts and accessories” for the goods listed in class 5 of the applicant’s specification. I will return to this point in paragraphs **71 to 74** below.

Class 29

51. All of the goods in class 29 of the applicant’s specification (with the exception of “parts and accessories for all the aforesaid goods”, which I shall return to below) are likely to contain some form of nutrients beneficial for the consumer’s diet. However, this does not render them identical to “dietetic substances” in the opponent’s

⁷ <https://www.collinsdictionary.com/dictionary/english/analgesic>

specifications or any of the opponent's other goods. The goods will differ in nature, method of use and use. I recognise that there may be overlap in user to the extent that all of the goods may be consumed by the general public. However, I do not consider there to be any significant overlap in trade channels. There is no competition or complementarity. Consequently, I consider the goods to be dissimilar. If I am wrong in this finding, then they will be similar to only a very low degree.

52. Again, the meaning of the term "parts and accessories for all the aforesaid goods" is not clear to me. I will deal with this term in paragraphs **71 to 74** below.

Class 30

53. "Salad dressings" and "sauces" appear identically in both the applicant's specification and the opponent's specifications.

54. "Sauces [condiments]" in the applicant's specification is self-evidently identical to "sauces" in the opponent's specifications.

55. "Fruit sauces" in the applicant's specification falls within the broader category of "sauces" in the opponent's specifications. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

56. A sauce is a thick liquid or semi-liquid which is added to food (or in which food is cooked) to give it flavour. Consequently, I consider "mustard" and "vinegar" in the applicant's specification to fall within the broader category of "sauces" in the opponent's specifications. These goods can, therefore, be considered identical on the principle outlined in *Meric*. Even if I am wrong in this finding, there will be overlap in user, method of use, nature and trade channels. There may also be a degree of competition between them. I consider the goods to be highly similar.

57. "Vinaigrettes" in the applicant's specification refers to a type of dressing, commonly used on salads. Consequently, I consider this to fall within the broader term "salad dressing" in the opponent's specification. These goods are identical on the principle outlined in *Meric*.

58. “Dressings” in the applicant’s specification would include salad dressings, as well as other types of sauces. Consequently, I consider these goods to be *Meric* identical to “salad dressings” and “sauces” in the opponent’s specification.

59. “Marinades” in the applicant’s specification are defined as “sauces of oil, vinegar, spices, and herbs, which you pour over meat or fish before you cook it, in order to add flavour, or to make the meat or fish softer”.⁸ In my view, this falls within the broader category of “sauces” in the opponent’s specification and the goods can be considered identical on the principle outlined in *Meric*. If I am wrong in that finding, then they will overlap in nature, purpose, trade channels and use. There will also be a degree of competition between them. I consider the goods to be highly similar.

60. “Preparation for making sauces” in the applicant’s specification would include goods such as powders which can be added to other ingredients in order to create sauces. I, therefore, consider there to be overlap in use, user and trade channels with “sauces” in the opponent’s specifications. There is also a degree of competition between them. I recognise that the goods will not overlap in nature or method of use. Taking this into account, I consider the goods to be similar to at least a medium degree.

61. A ‘mustard relish’ is similar to a chutney in texture, but with mustard as a key flavouring. In my view, both “mustard relishes” and “chutneys” in the applicant’s specification differ with the opponent’s goods in nature and method of use. There may be a degree of overlap in use to the extent that both can be added to food as an additional flavouring. I also consider that there may be a degree of overlap in trade channels because businesses that make sauces (including mustard) may also make these relishes. I consider the goods to be similar to a medium degree.

62. “Honey” and “treacle” in the applicant’s specification are both liquid ingredients typically used to add sweetness to food. They overlap in user and use with “sauces” in the opponent’s specifications. Whilst the applicant’s goods are commonly used in cooking, they can also be used in the same way as sauces such as when they are

⁸ <https://www.collinsdictionary.com/dictionary/english/marinade>

used as a topping for yoghurt, cakes or pancakes. I consider that there is overlap in nature and method of use. There is also a degree of competition between them. I consider the goods to be similar to at least a medium degree.

63. “Spices” and “flavourings other than essential oils” in the applicant’s specification are added to food in order to create a particular flavour. They will overlap in use and user with “sauces” in the opponent’s specification. There may be a degree of overlap in trade channels to the extent that businesses producing particular types of sauces (such as curry sauces, for example) may also sell their own spice or flavouring mix to be used as an alternative. Consequently, I also consider there to be a degree of competition between them. The goods will differ in nature and method of use. Taking this into account, I consider the goods to be similar to a medium degree.

64. “Sugar” in the applicant’s specification may overlap in use and user with “sauces” in the opponent’s specifications to the extent that both can be used by members of the general public and both are used to add flavour to food. However, any such overlap is minimal and I see no overlap in trade channels, method of use or nature. There is no competition or complementarity between them. Taking this into account, I consider the goods to be dissimilar. Even if I am wrong in this finding, they will be similar to only a low degree.

65. The terms “cereal bars and energy bars”, “cereal based energy bars”, “cereal bars” and “high-protein cereal bars” could all include goods that are intended to add protein to the user’s diet. Such goods are often fortified with additional protein. I, therefore, consider there to be overlap in use and user with the opponent’s “nutritional additives and supplements”. I consider that there will be no overlap in nature or method of use. Any overlap in trade channels would be minimal. I consider the goods to be similar to a medium degree.

66. I note that the term “parts and accessories for all the aforesaid goods” also appears in this part of the applicant’s specification. Again, I will return to this point in paragraphs **71 to 74** below.

67. In respect of the remaining terms in the applicant's specification, I see no overlap in trade channels, use, method of use or nature. I also see no reason for there to be competition with the opponent's goods or any complementarity. I recognise that all of the goods will be used by members of the general public, but this is not sufficient on its own for a finding of similarity. Consequently, I consider the remaining goods in class 30 of the applicant's specification to be dissimilar to the opponent's goods.

Class 32

68. In relation to the applicant's class 32 goods, the opponent states:

"22. The goods provided by the Opponent and the Applicant are of similar nature and even if categorized in different class, [sic] they would be certainly placed in the same category in stores and shops, incl. online shops. The Opponent's "dietetic substances" may be an essential ingredient of all Applicant's goods in class 32, and the same reasoning applies to "Nutritional additives and supplements; functional food additives; additive to prepare food" in class 5 of the Opponent's mark."

69. I am not convinced by the argument that any of the goods referred to above would be an essential ingredient of the applicant's class 32 goods. For example, I see no reason why "nutritional additives and supplements" would be part of "beers". In the absence of any detailed explanation by the opponent, I see no reason why the average consumer would expect any of these goods to contain dietetic substances or nutritional additives as an essential ingredient. Even if the opponent's goods could be said to be an essential ingredient of the applicant's, the fact that a particular product is used as part of another is not sufficient to show that the finished goods containing that component are similar to the product in its original form. This is because the nature, purpose and customers of the goods may be very different.⁹ I consider that to be the case here. I see no overlap in nature, purpose or method of use. I accept that the goods may be sold through the same general retailers such as supermarkets, but they would be located in different sections of those retailers. All of the goods may be

⁹ *Les Editions Albert Rene v OHIM*, Case T-336/03

purchased by members of the general public, but this is not sufficient for a finding of similarity. I see no reason for there to be competition or complementarity between them. Consequently, I consider the goods to be dissimilar.

70. Again, I note that class 32 of the applicant's specification includes the term "parts and accessories for all the aforesaid goods". I will return to this point in paragraphs **71 to 74** below.

"Parts and accessories for all the aforesaid goods"

71. As noted above, at the end of each class of goods in the specification of the First Application, the above term is listed. As well as this term, the term "parts and fittings for all the aforesaid goods" is also referenced in the specification of the Second Application. As I explained above, it is not clear to me what is meant by either of these terms in the context of the goods covered by the applications.

72. "Parts", "fittings" and "accessories" are not typically terms used in relation to the items covered by the applicant's specifications. I recognise that there may be an argument that 'parts' may refer to ingredients for the items listed. I see two issues with this line of argument. Firstly, 'parts' would not ordinarily be used to describe an ingredient within food. Secondly, the ingredients for a number of the items listed would not necessarily fall within the same class within which the finished product is listed.

73. I am mindful of the following principles summarised by Lord Justice Arnold in *Sky Plc & Ors v Skykick UK Ltd & Anor* [2020] EWHC 990 (Ch) in relation to construing terms within specifications:

"(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

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

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

(my emphasis added)

74. It seems to me that the terms referred to above covered by the applicant's specification cannot be said to be imprecise or unclear so as to be required to be construed narrowly. Rather, they are terms which it is not possible to interpret in this context. In *Skykick* Lord Justice Arnold was, of course, construing terms covered by the opponent's specification rather than the applicant's specification. However, I see no reason why the same principles should not apply to terms covered by both. It is not possible to conduct any meaningful goods comparison in relation to terms that have no identifiable meaning. In my view, these terms in the applicant's specification should be disregarded and struck out of the applications accordingly. I invite the applicant to make written submissions on this point within the 28 days of the date of this decision, following which I will issue a further supplementary decision dealing with this point specifically.

The average consumer and the nature of the purchasing act

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

76. The average consumer for the majority of the goods will be a member of the general public. However, I recognise that for some of the goods, the average consumer may also include medical professionals. The goods are likely to be reasonable in price and purchased reasonably frequently. Even for general consumer goods, various factors will be taken into account such as flavour and nutritional properties. Consequently, I consider that the average consumer will pay a medium degree of attention when purchasing the goods. However, I recognise that for some of the goods which are aimed at medical treatment or nutritional goods which may be used to target specific deficiencies, the level of attention paid will be higher due to the health consequences for the end user.

77. The goods are likely to be selected from the shelves of a retail outlet or their online or catalogue equivalent. Visual considerations are, therefore, likely to dominate the selection process. However, I recognise that for some of the goods, they may be purchased after an aural consultation with a medical or pharmaceutical professional. Further, orders may be placed by telephone or advice sought from retail assistants. Consequently, I do not discount that aural considerations will also play a role in the purchasing process.

Comparison of trade marks

78. 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.”

79. It would be wrong, therefore, to artificially dissect the trademarks, 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.

80. The respective trade marks are shown below:

Opponent’s trade mark	Applicant’s trade marks
	 <p data-bbox="946 1458 1251 1529">(SERIES OF 2) (the First Application)</p> <p data-bbox="922 1675 1275 1787">Super Hero Energy (the Second Application)</p>

81. In its counterstatement, the applicant states:

“8. It is acknowledged (after repeated comparisons) that both marks contain the words “SUPER” and “HERO”, and that coincidence might create some similar sound between the marks. However, contrary to the Opponent’s reasoning which follows therefrom, the words “SUPER” and “HERO” are not distinctive of the Opponent’s Registration. They are likely to be considered fanciful elements of that mark rather than allude to any particularly [sic] owner themselves.”

82. By contrast, the opponent argues that it is the words SUPER HERO which are the distinctive and dominant element of the earlier mark. The earlier mark consists of the white stylised words SUPER HERO presented within a purple shield device. The shield also contains the words OMEGA 3 FISH OIL in smaller text, as well as various other small device elements including fish and a vial. The overall impression of the earlier mark lies in the combination of these elements. I see no reason to find the words SUPER HERO to be not distinctive within the earlier mark, as suggested by the applicant. Rather, they are by far the largest text element within the mark and are likely to be the part of the mark to which the consumer’s eye is drawn. Consequently, I consider that the words SUPER HERO play the greater role in the overall impression of the mark, with the other elements playing a lesser role.

83. The First Application consists of the words SUPER HERO presented in a combination of black text on grey background or grey text on black background. The middle section of the letter O has been replaced with what appears to be the device of a super hero. The overall impression of the First Application lies in the combination of these elements, with the words SUPER HERO playing the greater role due to its size and the eye being naturally drawn to the element that can be read.

84. The Second Application consists of the words SUPER HERO ENERGY. There are no other elements to contribute to the overall impression of the mark, which lies in these words.

Visual Comparison

The First Application and the earlier mark

85. Visually, the First Application and the earlier mark overlap in the presence of the words SUPER HERO. They differ in the presentation of these words, with different fonts being used and different backgrounds and devices. There is also the addition of the words OMEGA 3 FISH OIL in the earlier mark, which has no counterpart in the First Application. Taking all of this into account, I consider the marks to be visually similar to no more than a medium degree.

The Second Application and the earlier mark

86. Visually, the Second Application and the earlier mark overlap in the presence of the words SUPER HERO. They differ in the addition of the word ENERGY in the Second Application which has no counterpart in the earlier mark and in the presence of the words OMEGA 3 FISH OIL in the earlier mark which has no counterpart in the Second Application. There is also the addition of the device elements in the earlier mark which have no counterpart in the Second Application. Taking all of this into account, I consider the marks to be visually similar to between a low and medium degree.

Aural Comparison

The First Application and the earlier mark

87. Aurally, the marks overlap in the pronunciation of the words SUPER HERO, which will be pronounced identically. I recognise that there is also an additional word element in the earlier mark i.e. OMEGA 3 FISH OIL. However, given its much smaller size and fainter colour, I do not consider that this will be pronounced. Consequently, the marks will be aurally identical. If I am wrong in this finding, then they will be aurally similar to a medium degree.

The Second Application and the earlier mark

88. Aurally, the marks overlap in the pronunciation of the words SUPER HERO, which will be pronounced identically. They differ in the addition of the word ENERGY in the Second Application. Again, I do not consider that the words OMEGA 3 FISH OIL in the

earlier mark will be pronounced. Consequently, I consider the marks to aurally be similar to a higher than medium degree. If I am wrong in this finding, they will be aurally similar to a medium degree.

Conceptual Comparison

The First Application and the earlier mark

89. Conceptually, the meaning conveyed by the words SUPER HERO will be identical for each mark i.e. a reference to a super hero character. This will be further enhanced by the presence of the super hero device in the First Application. The marks differ in the presence of the words OMEGA 3 FISH OIL in the earlier mark, which is likely to be seen as a reference to the type of, or ingredients in, the goods sold under the mark. This is reinforced by the fish devices within the shield background. The applicant suggested, in its counterstatement, that the additional device elements in the earlier mark (such as the lightning bolt, cogs, stars etc.) are likely to suggest magical connotations to the consumer. In my view, this is unlikely to be a conceptual message which is clearly conveyed to the average consumer. Taking the marks as a whole into account, I consider them to be conceptually highly similar.

The Second Application and the earlier mark

90. Conceptually, the same points apply for the Second Application as above (with the exception of the super hero device which is absent from the Second Application). However, the Second Application has the additional word ENERGY which is absent from the earlier mark. This is likely to convey the meaning that the goods sold under the mark will give the user some sort of energy boost. Taking the marks as a whole into account, I consider them to be conceptually similar to a higher than medium degree.

Distinctive character of the earlier trade mark

91. 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).”

92. 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 distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

93. I will begin by assessing the enhanced distinctiveness of the mark. The opponent has provided no evidence about the market share held by the mark. However, the opponent claims to have sold 30,000 products under the mark since it was first used in 2014. That amounts to around 6,000 products per year, which does not appear to me to be particularly significant given what must undoubtedly be an extensive market. The opponent’s evidence is that £250,000 has been spent on advertising the goods sold under the mark. Whilst this may not be an insignificant amount, this equates to

only around £50,000 per year. It does appear that the opponent took part in an event in or around March 2019, but it is not clear what the nature of this event was or how many people attended.

94. Some of the evidence filed by the opponent is provided in the form of links to online content. I am mindful of the judgment of the GC in *Kustom Musical Amplification, Inc v OHIM*, Case T-317/05 in which the use of links was considered to be unacceptable. In that case, the Court stated:

“[...] the sending of the points of fact constituting the basis of a decision of the Board of Appeal, in the form of internet links which are inaccessible at the time of the Court’s investigation of the case, or in the form of accessible links whose content has changed or might have changed since the examination by the examiner or the Board of Appeal, does not constitute a sufficient statement of reasons for the purposes of the case-law cited in paragraph 57 above, since it does not enable the Court to review the validity of the contested decision.”

95. Clearly, the same issues apply in the present case; internet content can be changed and therefore links are inherently unreliable. Nonetheless, I am mindful of the comments of Mr James Mellor QC, sitting as the Appointed Person in *Silver Spectre*, Case BL O/265/19, in which he stated that evidence in this form can be acceptable. Specifically, he noted:

“[...] In modern commercial communications between co-operative parties, if a link to a video is sent for a particular purpose (and the link is apparently trustworthy), the sender of the link normally assumes that the link is clicked on and the video viewed. Of course, if the recipient responds and gives a particular reason why he or she has not clicked on the link and has not seen the video, then the sender has the opportunity to address the issue and find a different way to send the video or similar content to the recipient.

The problem here, as it seems to me, is a combination of an incomplete review of defects in this evidence and the lack of a hearing. In terms of the review, the provision of a link to the YouTube video was plainly a defect so far as the UK

IPO is concerned, but not a defect which was apparent to the Appellant. If a hearing had been attended, the Hearing Officer would have been bound to point out to the Appellant that the link had not been followed and so she had not seen the video. [...]"

96. Taking these cases in combination, I consider the position to be that the Registry is entitled to view evidence in the form of links as unacceptable for the reasons set out above. However, this should be brought to the attention of the party seeking to rely on the links during the evidence rounds, so that an opportunity can be given for the defect to be rectified. In the ordinary course of proceedings, this issue would be raised by the Registry during the evidence rounds. However, I note that, in this case, the opponent has not been informed of this defect by the Registry. Consequently, in light of the *Silver Spectre* case cited above, I have followed the links provided and summarised my findings above. In any event, I note that only three of the examples of magazine and blog articles provided by the opponent were dated before the relevant date and referred to the mark in issue. One of these was printed in Forbes Magazine which, clearly, has a large audience, but no information is provided about how many viewers the blog articles would have reached. No information is provided about the geographical spread of the use made of the mark in issue. Taking all of this into account, I am not satisfied that the opponent has demonstrated that its mark has acquired enhanced distinctiveness through use.

97. I have, therefore, only the inherent position to consider. The earlier mark consists of the words SUPER HERO presented in a white stylised font on a purple shield background. The words OMEGA 3 FISH OIL also appears on the background in much smaller, fainter text, as well as a number of devices (such as fish and a vial). The words SUPER HERO are inherently distinctive to a medium degree. They do not appear to have any direct link with the goods sold under the mark. Further, the use of devices contributes to the distinctive character of the mark, meaning that it is inherently distinctive to between a medium and high degree overall.

Likelihood of confusion

98. 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 undertaking 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the 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.

99. I have found both applications and the earlier mark to be visually similar to no more than a medium degree. I have found the First Application and the earlier mark to be aurally identical (or similar to a medium degree depending on whether OMEGA 3 FISH OIL is pronounced). I have found the Second Application and the earlier mark to be aurally similar to a higher than medium degree (or to between a low and medium degree depending on whether OMEGA 3 FISH OIL is pronounced). I have found the First Application to be conceptually highly similar to the earlier mark and the Second Application to be conceptually similar to a higher than medium degree to the earlier mark. I have found the earlier mark to have between a medium and high degree of inherent distinctive character overall, with the words SUPER HERO having a medium degree of inherent distinctiveness. I have identified the average consumer to be a member of the general public or a medical professional, who will purchase the goods primarily 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 majority of the goods, with a higher degree of attention being paid for goods intended to impact upon the end user's health. I have found the parties' goods to vary from dissimilar to identical.

100. There are clearly similarities between the marks, particularly when encountered aurally. Whilst I recognise that the purchasing process is predominantly visual there is, in my view, a likelihood of direct confusion where the marks are encountered aurally. In these circumstances, where only the words SUPER HERO are pronounced, the marks will be aurally identical. This will be the case where the marks are used on goods that are similar to a medium degree or higher.

101. I recognise that when encountered visually, the device and presentational differences between the marks is not likely to go unnoticed. These elements are likely to prevent the marks from being mistakenly recalled or misremembered as each other. However, the common use of the words SUPER HERO will, in my view, lead to the consumer concluding that the marks are being used by the same or economically linked undertakings. They are likely to be viewed as alternative marks, perhaps being used to identify a different type of product (such as one that contains Omega 3 in the case of the earlier mark), or perhaps one intended to be used by a different audience (such as children). I consider there to be a likelihood of indirect confusion in relation to goods that are similar to at least a medium degree. Bearing in mind the interdependency principle, where the goods are less similar, I consider that the differences between the marks and goods will be enough to avoid confusion.

102. The oppositions based upon section 5(2)(b) succeed in relation to the following goods in the specifications of both applications which are similar to at least a medium degree:

Class 5 Nutritional supplement energy bars; nutritional supplement meal replacement bars for boosting energy; liquid herbal supplements; dietary and nutritional supplements, infusions and dietetic preparations; meal replacement powders; meal replacement bars; meal replacement drink mixes; nutrition supplements in drop form, capsule form and in liquid form; edible hemp oil for use as a dietary supplement; hemp protein powder for use as a nutritional food additive for medical purposes; hemp oil as a nutritional supplement; hemp protein powder for use as a nutritional food additive for culinary purposes; fruit-based meal

replacement powders, not for medical purposes; pharmaceuticals, medical preparations; dietetic preparations; dietetic food and substances; dietetic food and substances adapted for medical use; dietary supplements for humans; diet capsules; dietary supplements and dietetic preparations; dietary supplements for humans; Dietary supplements for humans not for medical purposes; dietary supplements for infants; dietary supplements for medical use; dietetic beverages adapted for medical purposes; dietetic confectionery adapted for medical purposes; dietetic foods adapted for medical use; food for restricted diets; food supplements for dietetic use; health food supplements for persons with special dietary requirements; herbal dietary supplements for persons special dietary requirements; mineral dietary supplements; natural dietary supplements.

Class 30 Cereal bars and energy bars; cereal based energy bars; cereal bars; high-protein cereal bars; Honey; spices; sauces [condiments]; mustard; vinegar; preparation for making sauces; salad dressings; mustard relishes; marinades; treacle; flavourings other than essential oils; sauces; chutneys; fruit sauces; vinaigrettes; dressings.

103. The oppositions based upon section 5(2)(b) are unsuccessful in relation to the following goods that I have found to be dissimilar or similar to only a low degree:

Class 5 Tinctures; dietary supplement drink mixes, nutraceuticals for use as a dietary supplement, topical creams, gels, salves, sprays, balms and ointments for analgesic purposes; tobacco-free cigarettes for medical purposes; milk of almonds [beverage].

Class 29 Processed fruits and vegetables (including nuts and pulses); candied fruit snacks; coconut-based snacks; dried fruit-based snacks; fruit snacks; legume-based snacks; milk-based snacks; potato snacks; snacks of edible seaweed; tofu-based snacks.

Class 30 Cereal-based savoury snacks; cereal based snacks; cereal-based savoury snacks; cereal based snacks; cereal snacks; cheese balls [snacks]; cheese curls [snacks]; cheese flavored puffed corn snacks; corn-based savoury snacks; crispbread snacks; extruded corn snacks; extruded snacks containing maize; extruded wheat snacks; flour based savory snacks; fruit cake snacks; granola snacks; puffed cheese balls [corn snacks]; puffed corn snacks; rice cake snacks; rice snacks; snacks made from muesli; snacks manufactured from muesli; snacks manufactured from cereals; tortilla snacks; sweets; candy; confectionery; ice confectionery; sugar; sweets; desserts; puddings; muffins; cakes; non-medicated confectionery; coffee; artificial coffee; coffee beans; tea; green tea; tea bags; loose tea; tea pods; herbal teas; tea beverages; fruit teas; fruit flavoured teas; infusions; tea extracts and essences; instant tea; preparations made from or containing tea; tea substitutes; tea-based beverages; iced tea; cocoa; chocolate; based drinks; hot chocolate; candy; frozen confections; chilled confections; ice; edible ices; ices; ice cream; ice cream products and frozen confections; preparations for making ices, ice cream, ice cream products and frozen confections; frozen yogurt; biscuits; shortbreads; mousses.

Class 32 Energy drinks; non-alcoholic beverages; aerated water; aerated water (preparations for making -); aerated beverages; aloe vera drinks, non-alcoholic; aperitifs, non-alcoholic; beer; beers; shandy; beer wort; non-alcoholic beers; beverages (preparations for making -); cider, non-alcoholic; cocktails, non-alcoholic; de-alcoholised drinks; essences for making beverages; fruit beverages; fruit drinks; fruit juices; fruit nectars, non-alcoholic; ginger ale; grape must, unfermented; hops (extracts of -) for making beer; isotonic beverages; kvass [non-alcoholic beverage]; lemonades; liqueurs (preparations for making -); lithia water; malt beer; malt wort; mineral water [beverages]; mineral water (preparations for making -); must; non-alcoholic beverages; non-alcoholic fruit extracts; non-alcoholic fruit juice beverages; non-alcoholic honey-based beverages; orgeat; pastilles for effervescing beverages; peanut milk [non-alcoholic beverage]; powders for effervescing beverages;

sarsaparilla [non-alcoholic beverage]; seltzer water; smoothies; soda water; sorbets [beverages]; syrups and other preparations for making beverages; syrups for beverages; syrups for lemonade; table waters; tomato juice [beverage]; vegetable juices [beverages]; waters [beverages]; whey beverages; non-alcoholic wines.

Final Remarks

104. I note in its written submissions, that the applicant has offered a fallback position. It is willing to limit its specification in classes 5, 29 and 30 to exclude omega 3 fish oil or goods containing the same. As the goods relied upon by the opponent are not omega 3 fish oil or goods containing the same, I do not consider that such a limitation would assist the applicant in avoiding a likelihood of confusion. Consequently, I do not consider it appropriate to make such a limitation in this case.

Section 5(3)

105. 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.”

106. As noted above, by virtue of its earlier filing date the opponent's mark qualifies as an earlier mark pursuant to section 6 of the Act.

107. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Addidas-Salomon*, Case C-487/07, *L'Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows:

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

108. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the 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 earlier mark being brought to mind by the later marks. Thirdly, assuming the first and second conditions have been met, section 5(3) requires that one or more of the types of damage claimed 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.

109. The relevant date for the assessment under section 5(3) is the date of the applications i.e. 9 April 2019.

Reputation

110. 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.”

111. In determining whether the opponent has demonstrated a reputation for the goods in issue, it is necessary for me to consider whether its mark 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 trade mark, the intensity, geographical extent and duration of use, and the size of the investment made by the undertakings in promoting it.”

112. The opponent has provided no information about the market share held by the mark relied upon. However, it claims to have sold 30,000 products under the mark since it was first used in 2014 (around 6,000 products per year). I do not consider this to suggest a particularly significant market share given what must, undoubtedly, be an extensive market. I have no information about the geographical spread of the use of the mark. I note in its written submissions that the applicant states as follows:

“There is no guidance on how much each “product” was sold for, who they were sold to, or what the nature of the “product” was. The claim is therefore seriously lacking in [sic] specificity and should be rejected. Given that Party A also filed for protection across the EU (EU016071037: Lion Heart) then any sales (and any reputation) is likely outside the UK.”

113. As noted by the opponent in its written submissions in lieu, Ms Lawson makes it clear that the number of products sold refers to goods sold under the mark in issue. I see no reason to conclude that the registration of the above EU mark means that the sales referred to would have been outside the UK, particularly as it relates to another mark entirely. However, that being said, the applicant is correct that there is no information provided by Ms Lawson about the location of the customers to which these products were sold or, indeed, exactly what goods these sales relate to.

114. I recognise that in terms of investment made in promoting the mark, the opponent has spent around £250,000, which amounts to around £50,000 per year. I also recognise that there is evidence of the opponent’s mark being advertised in a well known magazine (Forbes) prior to the relevant date, as well as two blogs. However, there is no information provided about how many people view the blogs in question. Further, as the applicant notes in its written submissions, no detailed breakdown is provided to demonstrate how the above sums were spent and what marketing or advertising activities have been undertaken. Taking the evidence as a whole into account, I am not satisfied that the opponent has demonstrated that the mark will be known by a significant part of the public concerned with the goods. I do not consider that the opponent has demonstrated a reputation.

115. The oppositions based upon section 5(3) fail in their entirety.

CONCLUSION

116. The oppositions against UK application no. 3390785 and UK application no. 3390779 are successful in relation to the following goods for which the applications are refused:

Class 5 Nutritional supplement energy bars; nutritional supplement meal replacement bars for boosting energy; liquid herbal supplements; dietary and nutritional supplements, infusions and dietetic preparations; meal replacement powders; meal replacement bars; meal replacement drink mixes; nutrition supplements in drop form, capsule form and in liquid form; edible hemp oil for use as a dietary supplement; hemp protein powder for use as a nutritional food additive for medical purposes; hemp oil as a nutritional supplement; hemp protein powder for use as a nutritional food additive for culinary purposes; fruit-based meal replacement powders, not for medical purposes; pharmaceuticals, medical preparations; dietetic preparations; dietetic food and substances; dietetic food and substances adapted for medical use; dietary supplements for humans; diet capsules; dietary supplements and dietetic preparations; dietary supplements for humans; Dietary supplements for humans not for medical purposes; dietary supplements for infants; dietary supplements for medical use; dietetic beverages adapted for medical purposes; dietetic confectionery adapted for medical purposes; dietetic foods adapted for medical use; food for restricted diets; food supplements for dietetic use; health food supplements for persons with special dietary requirements; herbal dietary supplements for persons special dietary requirements; mineral dietary supplements; natural dietary supplements.

Class 30 Cereal bars and energy bars; cereal based energy bars; cereal bars; high-protein cereal bars; Honey; spices; sauces [condiments]; mustard; vinegar; preparation for making sauces; salad dressings; mustard

relishes; marinades; treacle; flavourings other than essential oils; sauces; chutneys; fruit sauces; vinaigrettes; dressings.

117. The oppositions against UK application no. 3390785 and UK application no. 3390779 are unsuccessful in relation to the following goods for which the applications may proceed to registration:

Class 5 Tinctures; dietary supplement drink mixes, nutraceuticals for use as a dietary supplement, topical creams, gels, salves, sprays, balms and ointments for analgesic purposes; tobacco-free cigarettes for medical purposes; milk of almonds [beverage].

Class 29 Processed fruits and vegetables (including nuts and pulses); candied fruit snacks; coconut-based snacks; dried fruit-based snacks; fruit snacks; legume-based snacks; milk-based snacks; potato snacks; snacks of edible seaweed; tofu-based snacks.

Class 30 Cereal-based savoury snacks; cereal based snacks; cereal-based savoury snacks; cereal based snacks; cereal snacks; cheese balls [snacks]; cheese curls [snacks]; cheese flavored puffed corn snacks; corn-based savoury snacks; crispbread snacks; extruded corn snacks; extruded snacks containing maize; extruded wheat snacks; flour based savory snacks; fruit cake snacks; granola snacks; puffed cheese balls [corn snacks]; puffed corn snacks; rice cake snacks; rice snacks; snacks made from muesli; snacks manufactured from muesli; snacks manufactured from cereals; tortilla snacks; sweets; candy; confectionery; ice confectionery; sugar; sweets; desserts; puddings; muffins; cakes; non-medicated confectionery; coffee; artificial coffee; coffee beans; tea; green tea; tea bags; loose tea; tea pods; herbal teas; tea beverages; fruit teas; fruit flavoured teas; infusions; tea extracts and essences; instant tea; preparations made from or containing tea; tea substitutes; tea-based beverages; iced tea; cocoa; chocolate; based drinks; hot chocolate; candy; frozen confections; chilled confections; ice; edible ices; ices; ice cream; ice cream products and frozen confections;

preparations for making ices, ice cream, ice cream products and frozen confections; frozen yogurt; biscuits; shortbreads; mousses.

Class 32 Energy drinks; non-alcoholic beverages; aerated water; aerated water (preparations for making -); aerated beverages; aloe vera drinks, non-alcoholic; aperitifs, non-alcoholic; beer; beers; shandy; beer wort; non-alcoholic beers; beverages (preparations for making -); cider, non-alcoholic; cocktails, non-alcoholic; de-alcoholised drinks; essences for making beverages; fruit beverages; fruit drinks; fruit juices; fruit nectars, non-alcoholic; ginger ale; grape must, unfermented; hops (extracts of -) for making beer; isotonic beverages; kvass [non-alcoholic beverage]; lemonades; liqueurs (preparations for making -); lithia water; malt beer; malt wort; mineral water [beverages]; mineral water (preparations for making -); must; non-alcoholic beverages; non-alcoholic fruit extracts; non-alcoholic fruit juice beverages; non-alcoholic honey-based beverages; orgeat; pastilles for effervescing beverages; peanut milk [non-alcoholic beverage]; powders for effervescing beverages; sarsaparilla [non-alcoholic beverage]; seltzer water; smoothies; soda water; sorbets [beverages]; syrups and other preparations for making beverages; syrups for beverages; syrups for lemonade; table waters; tomato juice [beverage]; vegetable juices [beverages]; waters [beverages]; whey beverages; non-alcoholic wines.

118. It is the Registry's preliminary view that the terms "parts and accessories for all the aforesaid goods" and "parts and fittings for all the aforesaid goods" should be struck out of the application. If the applicant wishes to challenge this preliminary view, it should file written submissions within 28 days of the date of this decision, setting out the reasons it considers this view to be incorrect and the meaning it considers should be attributed to these terms in this context.

COSTS

119. Following the filing of written submissions in lieu, the applicant raised issue with the fact that the opponent had elected not to file evidence or submissions in reply, but

had addressed points in the applicant's evidence in their written submissions in lieu. The applicant noted that this deprived the applicant of an opportunity to address those points in its written submissions in lieu. Consequently, the applicant asks that this should be reflected in any award of costs made.

120. The opponent noted that its submissions did not contain any new evidence of fact, but rather referred to the previous submissions of both parties and made comments on the issues raised during proceedings and summarised the case. The opponent asks that the applicant's request for an award of costs in respect of this be rejected.

121. I see no issue with the submissions filed by the opponent. They did, of course, revisit matters that had been addressed in the parties' evidence. However, this is the purpose of written submissions in lieu. They did not contain any new evidence of fact. Written submissions in lieu are intended to give a party the opportunity to make any points that they would have wanted to make in oral submissions at a hearing (had one been requested). The fact that the opponent had elected not to file submissions during the evidence rounds in reply to the applicant's evidence would not have prevented them from commenting upon the applicant's evidence during the course of a hearing. Consequently, I do not consider that they should be prevented from doing so during the course of written submissions in lieu.

122. As both parties have been partially successful, I do not consider it appropriate to make an award of costs in this matter.

Dated this 1st day of June 2020

S WILSON

For the Registrar

ANNEX

UK registration no. 3390785:

Class 5

Nutritional supplement energy bars; nutritional supplement meal replacement bars for boosting energy; liquid herbal supplements; dietary and nutritional supplements, infusions and dietetic preparations; tinctures; meal replacement powders; meal replacement bars; meal replacement drink mixes; dietary supplement drink mixes, nutraceuticals for use as a dietary supplement, topical creams, gels, salves, sprays, balms and ointments for analgesic purposes; nutrition supplements in drop form, capsule form and in liquid form; edible hemp oil for use as a dietary supplement; hemp protein powder for use as a nutritional food additive for medical purposes; hemp oil as a nutritional supplement; hemp protein powder for use as a nutritional food additive for culinary purposes; fruit-based meal replacement powders, not for medical purposes; tobacco-free cigarettes for medical purposes; pharmaceuticals, medical preparations; dietetic preparations; dietetic food and substances; dietetic food and substances adapted for medical use; dietary supplements for humans; diet capsules; dietary supplements and dietetic preparations; dietary supplements for humans; Dietary supplements for humans not for medical purposes; dietary supplements for infants; dietary supplements for medical use; dietetic beverages adapted for medical purposes; dietetic confectionery adapted for medical purposes; dietetic foods adapted for medical use; food for restricted diets; food supplements for dietetic use; health food supplements for persons with special dietary requirements; herbal dietary supplements for persons special dietary requirements; mineral dietary supplements; natural dietary supplements; milk of almonds [beverage]; parts and accessories for all the aforesaid goods.

Class 29

Processed fruits and vegetables (including nuts and pulses); candied fruit snacks; coconut-based snacks; dried fruit-based snacks; fruit snacks; legume-based snacks; milk-based snacks; potato snacks; snacks of edible seaweed; tofu-based snacks; parts and accessories for all the aforesaid goods.

Class 30

Cereal bars and energy bars; cereal based energy bars; cereal-based savoury snacks; cereal based snacks; cereal bars; high-protein cereal bars; cereal-based savoury snacks; cereal based snacks; cereal snacks; cheese balls [snacks]; cheese curls [snacks]; cheese flavored puffed corn snacks; corn-based savoury snacks; crispbread snacks; extruded corn snacks; extruded snacks containing maize; extruded wheat snacks; flour based savory snacks; fruit cake snacks; granola snacks; puffed cheese balls [corn snacks]; puffed corn snacks; rice cake snacks; rice snacks; snacks made from muesli; snacks manufactured from muesli; snacks manufactured from cereals; tortilla snacks; sweets; candy; confectionery; ice confectionery; sugar; honey; spices; sweets; desserts; puddings; muffins; cakes; non-medicated confectionery; coffee; artificial coffee; coffee beans; tea; green tea; tea bags; loose tea; tea pods; herbal teas; tea beverages; fruit teas; fruit flavoured teas; infusions; tea extracts and essences; instant tea; preparations made from or containing tea; tea substitutes; tea-based beverages; iced tea; cocoa; chocolate; based drinks; hot chocolate; candy; frozen confections; chilled confections; ice; edible ices; ices; ice cream; ice cream products and frozen confections; preparations for making ices, ice cream, ice cream products and frozen confections; frozen yogurt; biscuits; shortbreads; sauces [condiments]; mustard; vinegar; preparation for making sauces; salad dressings; mustard relishes; marinades; mousses; treacle; flavourings other than essential oils; sauces; chutneys; fruit sauces; vinaigrettes; dressings; parts and accessories for all the aforesaid goods.

Class 32

Energy drinks; non-alcoholic beverages; aerated water; aerated water (preparations for making -); aerated beverages; aloe vera drinks, non-alcoholic; aperitifs, non-alcoholic; beer; beers; shandy; beer wort; non-alcoholic beers; beverages (preparations for making -); cider, non-alcoholic; cocktails, non-alcoholic; de-alcoholised drinks; essences for making beverages; fruit beverages; fruit drinks; fruit juices; fruit nectars, non-alcoholic; ginger ale; grape must, unfermented; hops (extracts of -) for making beer; isotonic beverages; kvass [non-alcoholic beverage]; lemonades; liqueurs (preparations for making -); lithia water; malt beer; malt wort; mineral water [beverages]; mineral water (preparations for making -); must; non-alcoholic

beverages; non-alcoholic fruit extracts; non-alcoholic fruit juice beverages; non-alcoholic honey-based beverages; orgeat; pastilles for effervescing beverages; peanut milk [non-alcoholic beverage]; powders for effervescing beverages; sarsaparilla [non-alcoholic beverage]; seltzer water; smoothies; soda water; sorbets [beverages]; syrups and other preparations for making beverages; syrups for beverages; syrups for lemonade; table waters; tomato juice [beverage]; vegetable juices [beverages]; waters [beverages]; whey beverages; non-alcoholic wines; parts and accessories for all the aforesaid goods.

UK registration no. 3390779:

Class 5

Nutritional supplement energy bars; nutritional supplement meal replacement bars for boosting energy; liquid herbal supplements; dietary and nutritional supplements, infusions and dietetic preparations; tinctures; meal replacement powders; meal replacement bars; meal replacement drink mixes; dietary supplement drink mixes, nutraceuticals for use as a dietary supplement, topical creams, gels, salves, sprays, balms and ointments for analgesic purposes; nutrition supplements in drop form, capsule form and in liquid form; edible hemp oil for use as a dietary supplement; hemp protein powder for use as a nutritional food additive for medical purposes; hemp oil as a nutritional supplement; hemp protein powder for use as a nutritional food additive for culinary purposes; fruit-based meal replacement powders, not for medical purposes; tobacco-free cigarettes for medical purposes; pharmaceuticals, medical preparations; dietetic preparations; dietetic food and substances; dietetic food and substances adapted for medical use; dietary supplements for humans; diet capsules; dietary supplements and dietetic preparations; dietary supplements for humans; Dietary supplements for humans not for medical purposes; dietary supplements for infants; dietary supplements for medical use; dietetic beverages adapted for medical purposes; dietetic confectionery adapted for medical purposes; dietetic foods adapted for medical use; food for restricted diets; food supplements for dietetic use; health food supplements for persons with special dietary requirements; herbal dietary supplements for persons special dietary requirements; mineral dietary supplements; natural dietary supplements; milk of almonds [beverage]; parts and fittings for all the aforesaid goods.

Class 29

Processed fruits and vegetables (including nuts and pulses); candied fruit snacks; coconut-based snacks; dried fruit-based snacks; fruit snacks; legume-based snacks; milk-based snacks; potato snacks; snacks of edible seaweed; tofu-based snacks; parts and accessories for all the aforesaid goods.

Class 30

Cereal bars and energy bars; cereal based energy bars; cereal-based savoury snacks; cereal based snacks; cereal bars; high-protein cereal bars; cereal-based savoury snacks; cereal based snacks; cereal snacks; cheese balls [snacks]; cheese curls [snacks]; cheese flavored puffed corn snacks; corn-based savoury snacks; crispbread snacks; extruded corn snacks; extruded snacks containing maize; extruded wheat snacks; flour based savory snacks; fruit cake snacks; granola snacks; puffed cheese balls [corn snacks]; puffed corn snacks; rice cake snacks; rice snacks; snacks made from muesli; snacks manufactured from muesli; snacks manufactured from cereals; tortilla snacks; sweets; candy; confectionery; ice confectionery; sugar; honey; spices; sweets; desserts; puddings; muffins; cakes; non-medicated confectionery; coffee; artificial coffee; coffee beans; tea; green tea; tea bags; loose tea; tea pods; herbal teas; tea beverages; fruit teas; fruit flavoured teas; infusions; tea extracts and essences; instant tea; preparations made from or containing tea; tea substitutes; tea-based beverages; iced tea; cocoa; chocolate; based drinks; hot chocolate; candy; frozen confections; chilled confections; ice; edible ices; ices; ice cream; ice cream products and frozen confections; preparations for making ices, ice cream, ice cream products and frozen confections; frozen yogurt; biscuits; shortbreads; sauces [condiments]; mustard; vinegar; preparation for making sauces; salad dressings; mustard relishes; marinades; mousses; treacle; flavourings other than essential oils; sauces; chutneys; fruit sauces; vinaigrettes; dressings.

Class 32

Energy drinks; non-alcoholic beverages; aerated water; aerated water (preparations for making -); aerated beverages; aloe vera drinks, non-alcoholic; aperitifs, non-alcoholic; beer; beers; shandy; beer wort; non-alcoholic beers; beverages (preparations for making -); cider, non-alcoholic; cocktails, nonalcoholic; de-

alcoholised drinks; essences for making beverages; fruit beverages; fruit drinks; fruit juices; fruit nectars, non-alcoholic; ginger ale; grape must, unfermented; hops (extracts of -) for making beer; isotonic beverages; kvass [non-alcoholic beverage]; lemonades; liqueurs (preparations for making -); lithia water; malt beer; malt wort; mineral water [beverages]; mineral water (preparations for making -); must; non-alcoholic beverages; non-alcoholic fruit extracts; non-alcoholic fruit juice beverages; non-alcoholic honey-based beverages; orgeat; pastilles for effervescing beverages; peanut milk [non-alcoholic beverage]; powders for effervescing beverages; sarsaparilla [non-alcoholic beverage]; seltzer water; smoothies; soda water; sorbets [beverages]; syrups and other preparations for making beverages; syrups for beverages; syrups for lemonade; table waters; tomato juice [beverage]; vegetable juices [beverages]; waters [beverages]; whey beverages; non-alcoholic wines; parts and accessories for all the aforesaid goods.