

**O/398/20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NOS. UK00003362672 AND  
UK000003362612 BY  
SUNTAT EUROPE GMBH  
TO REGISTER THE FOLLOWING TRADE MARKS:**



**AND**

**SUNTAT**

**AS TRADE MARKS IN CLASSES 29, 30 AND 32**

**AND**

**IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO  
UNDER NOS. 416284 AND 416285 BY  
HISTON SWEET SPREADS LIMITED**

## BACKGROUND AND PLEADINGS

1. On 21 December 2018, Suntat Europe GmbH (“the applicant”) applied to register the following trade marks in the UK:



(“the applicant’s first mark”); and

SUNTAT

(“the applicant’s second mark”)

2. The applicant’s first and second marks (collectively “the applicant’s marks”) were published for opposition purposes on 8 February 2019. The applicant’s marks share identical specifications. The applicant seeks registration for the following goods:

Class 29: Meats; Charcuterie; Meat substitutes; Bouillon; Meatballs; Fish, not live; Poultry, not live; Poultry substitutes; Extracts of poultry; Poultry, processed; Game, not live; Meat extracts; Fruits, tinned [canned (Am)]; Prepared fruits; Frozen fruits; Dried fruit; Glazed fruits; Pickled fruits; Vegetable puree; Vegetable pastes; Vegetable powders; Vegetable jellies; Vegetable stock; Vegetable mousses; Vegetable chips; Vegetable spreads; Prepared vegetable dishes; Prepared vegetable products; Vegetables, tinned [canned (Am)]; Vegetable pate; Preserved vegetables; Lentils, preserved; Onions, preserved; Bottled vegetables; Vegetable-based spreads; Vegetable-based meat substitutes; Preserved vegetables (in oil); Preserved sliced vegetables; Extracts of vegetables [juices]for cooking; Frozen prepared meals consisting principally of vegetables; Snack foods based on vegetables; Jellies, jams, compotes, fruit and vegetable

spreads; Processed fruits, fungi and vegetables (including nuts and pulses); Mixtures of fruit and nuts; Canned fruit; Bottled fruits; Eggs; Processed eggs; Prepared meals containing [principally] eggs; Spreads consisting mainly of eggs; Prepared dishes consisting primarily of fishcakes, vegetables, boiled eggs, and broth(oden); Milk; Powdered milk; Dairy products; Beverages having a milk base; Lactic acid bacteria drinks; Flavoured milk; Organic milk; Flavoured milk beverages; Milk drinks containing fruits; Powdered cream [dairy]; Whiteners for beverages; Low fat dairy spreads; Coffee whiteners consisting principally of dairy products; Drinks made from dairy products; Yogurt; Yogurt drinks; Drinking yogurts; Low fat yoghurts; Flavoured yoghurts; Yoghurt made from goats milk; Tzatziki; Drinks based on yogurt; Preparations for making yoghurt; Edible oils; Flavoured oils; Oils and fats; Edible oils for use in cooking foodstuffs; Edible oils for glazing foodstuffs; Edible fats; Dried pulses; Processed Pulses; Canned pulses; Snack foods based on pulses; Dried beans; Canned beans; Beans, preserved; Split peas; Peas, processed; Peas, preserved; Dried lentils; pickled gherkins; cold meat and sausages; Smoked sausages; Pepperoni; Salami; Butter; Margarine; Margarine substitutes; Cheese; Soft white cheese; Smoked cheese; Ripened cheeses; Strained cheese; Fresh unripened cheeses; Olive oil; Olive puree; Olive paste; Olives,[prepared]; Stuffed olives; Olives, preserved; Dried olives; Cooked olives; Olives stuffed with almonds; Canned processed olives; Olive oil for food; Extra-virgin olive oil; Olives stuffed with red peppers; Olives stuffed with feta cheese in sunflower oil; Olives stuffed with red peppers and almonds; Meat spreads; Cheese containing spices.

Class 30: Fruit vinegar; Pastries containing fruit; Vegetable flour; Vegetable pies; Vegetable pastes [sauces]; Frozen pastry stuffed with vegetables; Vegetable concentrates used for seasoning; Flavourings made from vegetables [other than essential oils];

Sugar for making conserves of fruit; Sugar for making jams; Egg noodles; Egg pies; Pasta containing eggs; Egg roll cookies; Custard; Creamed rice; Toffee; Milk chocolates; Milk chocolate bars; Chocolate beverages with milk; Pulse flour for food; Coffee powdered and in whole-bean form; Rice; Semolina; Couscous [semolina]; Honey; Natural ripe honey; Sweet spreads [honey]; Sugar, honey, treacle; Turkish delight coated in chocolate; Spices; Dry seasonings; Spice extracts; Alimentary seasonings; Spice rubs; Spices in the form of powders; Salts, seasonings, flavourings and condiments; Pasta; Ready made dishes containing pasta; Dried pasta; Pasta containing stuffings; Fresh pasta; Pasta preserves; Prepared pasta; Pasta sauce; Pasta for soups; Cereals for use in making pasta; Pasta in the form of sheets; Tea; black tea; Tea mixtures; Darjeeling tea; Ginger tea; Rosemary tea; Earl grey tea; Rice tapioca; Sago; Sago palm starch [for food]; Flour; Cereal preparations; Bread; Pastries; Candy coated confections; Flour confectionery; Prepared desserts [confectionery]; Ices; Sugar; Yeast; Baking powder; Baking soda [bicarbonate of soda for cooking purposes]; Salt; Brine for pickling; Salt crackers; Savoury biscuits; Cooking salt; Edible salt; Mustard; Vinegar; Seasonings; Pounded wheat; cocoa, artificial coffee; sauces (condiments); cooling ice.

Class 32: Vegetable juices [beverages]; Vegetable drinks; Beverages consisting of a blend of fruit and vegetable juices; Fruit juice for use as a beverage; Non-dairy milk; Beer; Carbonated mineral water; Mineral water [beverages]; Non-alcoholic beverages; Fruit drinks; Juices; Syrups for making beverages; ready-to-drink tea drinks and tea-mix drinks.

3. The applicant's marks were opposed on 9 May 2019 by Histon Sweet Spreads Limited ("the opponent"). The oppositions were initially based on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). In a letter from this Office dated 1 August 2019, the opponent was advised that it needed to file its evidence

and submissions in support of the opposition by 1 October 2019. No evidence or submissions were filed and in a letter dated 31 October 2019, this Office wrote to the opponent stating that:

“As you have neither filed the evidence and submissions or requested additional time within which to file it, your opposition will, in accordance with 20(3) of the Trade Marks Rules 2008, shortly be deemed withdrawn in respect of grounds other than Section 5(2)(b) of the Trade Marks Act 1994.

If you wish to put forward reasons why this action should not be taken, please ensure that the Registry receives your written comments or your request for a hearing under Rule 63(1) on or before **14 November 2019.**”

4. No response was received and on 18 December 2019, this Office wrote to the parties confirming that the opposition would proceed on the basis of the grounds under section 5(2)(b) of the Act only.
5. The opponent relies on EUTM no. 013820279 for the following trade mark:

SUN-PAT

6. The opponent's mark was filed on 12 March 2015 and registered on 28 July 2015. The opponent relies on the following goods for which its mark is registered:

Class 29: Preserved, dried, cooked, and canned fruits and vegetables; packeted, canned, and salted nuts (fruit); jams, preserves and pickles; peanut butter; salted nuts and processed nuts.

Class 30: Cereals and preparations made from cereals; rice, tapioca, sago and preparations made from alimentary pastes; confectionary; sweets and chocolates; biscuits and cakes.

7. The oppositions are directed against the following goods within the applicant's marks' specifications only:

Class 29: Fruits, tinned [canned (Am)]; Prepared fruits; Frozen fruits; Dried fruit; Glazed fruits; Pickled fruits; Vegetable jellies; Vegetable mousses; Vegetable spreads; Vegetables, tinned [canned (Am)]; Vegetable pate; Preserved vegetables; Lentils, preserved; Onions, preserved; Bottled vegetables; Vegetable-based spreads; Preserved vegetables (in oil); Preserved sliced vegetables; Jellies, Jams, compotes, fruit and vegetable spreads; Processed fruits, fungi and vegetables (including nuts and pulses); Mixtures of fruit and nuts; Canned fruit; Bottled fruits; Dried pulses; Processed Pulses; Canned pulses; Dried beans; Canned beans; Beans, preserved; Split peas; Peas, processed; Peas, preserved; Dried lentils; pickled gherkins; Butter; Margarine; Margarine substitutes; Olive paste; Olives, [prepared]; Stuffed olives; Olives, preserved; Dried olives; Cooked olives; Olives stuffed with almonds; Canned processed olives; Olives stuffed with red peppers; Olives stuffed with feta cheese in sunflower oil; Olives stuffed with red peppers and almonds.

Class 30: Custard; Creamed rice; Rice; Semolina; Couscous (semolina); Honey; Natural ripe honey; Sweet spreads [honey]; Sugar, honey, treacle; Rice tapioca; Sago; Cereal preparations; Pastries; Candy coated confections; Prepared desserts [confectionery].

8. The opponent submits that there exists a likelihood of confusion on the part of the public in the UK due to the identical or similar nature of the goods and the fact that the marks are highly similar.
9. The applicant filed counterstatements denying that the marks were identical or similar. While the applicant admitted that the goods are "identical or at least similar", there is no likelihood of confusion on the part of the average consumer as the marks are dissimilar.

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

11. The applicant is represented by Wilson Gunn and the opponent is represented by Stone King LLP. As noted above, the opponent did not file evidence in chief. During the evidence round of these proceedings, the applicant filed written submissions rather than evidence. No hearing was requested and both parties filed written submissions in lieu of a hearing. I have taken these into consideration and will refer to them below where necessary. This decision is taken following a careful perusal of the papers.

## **DECISION**

### **Section 5(2)(b): legislation and case law**

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

“(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 or association with the earlier trade mark.”

13. Section 5A of the Act states as follows:

“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.”

14. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“(6)(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

15. The opponent’s mark qualifies as an earlier trade mark under the above provisions. As the earlier mark had not completed its registration process more than 5 years before the date of the application in issue, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods for which the marks are registered.

16. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (“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 great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

**Comparison of goods**

17. As the specifications of the applicant’s marks are identical, the same goods comparison with the opponent’s goods can therefore be applied to both of the applicant’s marks.

18. The competing goods are set out as follows:

<b>The opponent’s goods</b>	<b>The applicant’s goods</b>
<p><u>Class 29</u></p> <p>Preserved, dried, cooked, and canned fruits and vegetables; packeted, canned, and salted nuts (fruit); jams, preserves and pickles; peanut butter; salted nuts and processed nuts.</p> <p><u>Class 30</u></p> <p>Cereals and preparations made from cereals; rice, tapioca, sago and preparations made from alimentary</p>	<p><u>Class 29</u></p> <p>Fruits, tinned [canned (Am)]; Prepared fruits; Frozen fruits; Dried fruit; Glazed fruits; Pickled fruits; Vegetable jellies; Vegetable mousses; Vegetable spreads; Vegetables, tinned [canned (Am)]; Vegetable pate; Preserved vegetables; Lentils, preserved; Onions, preserved; Bottled vegetables; Vegetable-based spreads; Preserved vegetables (in oil); Preserved sliced vegetables; Jellies, Jams, compotes, fruit and vegetable spreads; Processed</p>

<p>pastes; confectionary; sweets and chocolates; biscuits and cakes.</p>	<p>fruits, fungi and vegetables (including nuts and pulses); Mixtures of fruit and nuts; Canned fruit; Bottled fruits; Dried pulses; Processed Pulses; Canned pulses; Dried beans; Canned beans; Beans, preserved; Split peas; Peas, processed; Peas, preserved; Dried lentils; pickled gherkins; Butter; Margarine; Margarine substitutes; Olive paste; Olives, [prepared]; Stuffed olives; Olives, preserved; Dried olives; Cooked olives; Olives stuffed with almonds; Canned processed olives; Olives stuffed with red peppers; Olives stuffed with feta cheese in sunflower oil; Olives stuffed with red peppers and almonds.</p> <p><u>Class 30</u></p> <p>Custard; Creamed rice; Rice; Semolina; Couscous (semolina); Honey; Natural ripe honey; Sweet spreads [honey]; Sugar, honey, treacle; Rice tapioca; Sago; Cereal preparations; Pastries; Candy coated confections; Prepared desserts [confectionery].</p>
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19. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

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

20. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

21. The General Court (“GC”) confirmed in *Gérard Meric v OHIM*, Case T- 133/05, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another or (vice versa):

“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 fur 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”.

22. The opponent has provided detailed submissions in respect of the goods comparison. Whilst I do not propose to reproduce them in full here, I will refer to them below if necessary.

23. The applicant has submitted that “It is admitted that the respective goods in classes 29 and 30 are identical or at least similar (see the table below)”. Upon review of the table referred to by the applicant, the goods are simply listed side by side with reference to their respective classes. The applicant has not provided further clarification on what goods it considers identical and what goods it considers similar (and to what extent). The applicant has, in its final submissions, submitted the following:

“In particular the following goods are not identical:

<b>Applicant’s goods:</b>	<b>Opponent’s goods:</b>
Olive paste; mixtures of fruit and nuts	Preserved, dried, cooked, and canned fruits
Vegetable mousses; vegetable spreads	Preserved, dried, cooked, and canned vegetables
Vegetable jellies; vegetable spreads	Jams and preserves
pastries	Cakes and biscuits

However, irrespective of the argument as to whether the goods are identical there is at least some level of similarity and so this is somewhat of a moot point.”

24. While the applicant has submitted that there is at least some level of similarity between these goods, it has not clarified to what degree it considers them to be

similar. I must therefore carry out my own assessment on the comparison of the goods and their degree of similarity.

25. "Jams", "rice" and "sago" in the applicant's marks' specifications both have direct counterparts in the opponent's mark's specification. These goods are identical.
26. "Cereal preparations" in the applicant's marks' specifications has a direct counterpart in the opponent's mark's specification, although expressed in a slightly different term ("cereals and preparations made from cereals"). These goods are identical.
27. The term "rice tapioca" would, in my view, cover tapioca, which is a type of grain often used as an alternative to rice. I consider this to be self-evidently identical to "tapioca" in the opponent's mark's specification. For the avoidance of doubt, even if this refers to a particular type of tapioca, it would still fall within the broader category of "tapioca" in the opponent's mark's specification and would be identical on the principle outlined in *Meric*.
28. "Fruits, tinned [canned (Am)]", "canned fruit", "dried fruit", "onions, preserved", "preserved sliced vegetables", "preserved vegetables", "preserved vegetables (in oil)", "vegetables, tinned [canned (Am)]" and "prepared fruits" in the applicant's marks' specifications all fall within the category of "preserved, dried, cooked, and canned fruits and vegetables" in the opponent's mark's specification. These goods are therefore identical under the principle outlined in *Meric*.
29. "Bottled fruits" and "bottled vegetables" in the applicant's marks' specifications is likely to cover different types of fruits and vegetables that are bottled together with some form of preservative such as brine or processed and stored in a bottle. Given that the purpose of bottling fruits and vegetables is commonly to preserve the product, these goods fall within the category of "preserved, dried, cooked, and canned fruits and vegetables" in the opponent's mark's specification. These goods are therefore identical under the principle outlined in *Meric*.
30. While they are often considered vegetables, peas are part of the legume family. "Peas, preserved" in the applicant's marks' specifications will, therefore, not fall

within any category in the opponent's mark's specification. However, the goods will overlap in user, nature and purpose with "preserved, dried, cooked, and canned fruits and vegetables" in the opponent's mark's specification. Further, pea products will commonly be found in shops and their online equivalent in the same sections as vegetables. They may also overlap in trade channels in that the same undertaking may sell peas and other types of vegetables. There may also be a degree of competition between them. These goods will therefore be highly similar.

31. "Peas, processed" in the applicant's marks' specifications are peas that have been treated in order to preserve them or that have undergone some other process such as cooking. Processed peas are commonly sold in cans. While not vegetables or fruits, "peas, processed" will overlap in user, nature and purpose with "preserved, dried, cooked, and canned fruits and vegetables" in the opponent's mark's specification. They will also be found in the same sections in shops and their online equivalents as canned vegetables. They may also overlap in trade channels in that the same undertaking may sell peas and other types of vegetables. There may also be a degree of competition between them. These goods are therefore highly similar.

32. "Split peas" in the applicants' marks' specifications describes types of peas that have been dried, peeled and split. While these goods do not fall within any category of the opponent's mark's specification, they will share user, nature and purpose with "preserved, dried, cooked, and canned fruits and vegetables". These goods will also be found in the same sections in shops and their online equivalents as dried vegetables. They may also overlap in trade channels in that the same undertaking may sell split peas and other types of dried vegetables. There may also be a degree of competition between them. These goods are therefore highly similar.

33. Pulses include all types of beans, peas and lentils and are, therefore, not vegetables or fruits. "Dried pulses", "processed pulses", "canned pulses", "dried beans", "canned beans", "beans, preserved", "dried lentils" and "lentils, preserved" in the applicants' marks' specifications have no direct counterpart in the opponent's mark's specification. They will, however, share user, nature and purpose with

“preserved, dried, cooked, and canned fruits and vegetables” in the opponent’s mark’s specification. These goods may also be found in the same sections in shops and their online equivalents as dried, processed, preserved and canned vegetables, respectively. They may also have a competitive relationship in that a consumer may wish to purchase dried, processed, preserved or canned pulses over other types of dried, processed, preserved or canned vegetables. These goods are therefore similar to a high degree.

34. “Processed fruits, fungi and vegetables (including nuts and pulses)” in the applicant’s marks’ specifications covers a wide range of goods. As set out above, the act of processing is to treat the goods in order to preserve them or that they have undergone some other process such as cooking. Therefore, “processed fruits and vegetables” will fall within the categories of “preserved, dried, cooked, and canned fruits and vegetables” in the opponent’s mark’s specification and are identical under the principle outlined in *Meric*. “Processed nuts” within this category has a direct counterpart in the opponent’s mark’s specification and will, therefore, be identical. However, “processed fungi” and “processed pulses” will not fall within any categories of the opponent’s mark’s specification. I will deal with “processed fungi” below but note that I have already dealt with the comparison of “processed pulses” at paragraph 33 above and that same comparison will apply to these goods (i.e. that they are highly similar).

35. “Processed fungi” in the applicant’s marks’ specifications describes goods such as canned or jarred mushrooms. Mushrooms are not vegetables and will, therefore, not fall within any category in the opponent’s mark’s specification. However, these goods will overlap in user, nature and purpose as “preserved, dried, cooked, and canned fruits and vegetables” in the opponent’s mark’s specification. The goods will be sold in the same sections of shops and their online equivalents as processed vegetables. They may also overlap in trade channels in that the same undertaking may sell processed mushrooms and preserved vegetables. There may be a degree of competition between them. These goods are therefore similar to a high degree.

36. “Frozen fruits” in the applicant’s marks’ specifications describes fruits that are frozen. Given that fruits are perishable goods and do not have a long shelf life, the

purpose of freezing fruit is to preserve them for a longer period of time. Therefore, these goods fall within the category of “preserved, dried, cooked, and canned fruits and vegetables” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*.

37. “Glazed fruits” in the applicant’s marks’ specifications describes different types of fruits that are coated in a heated sugar syrup. The process of glazing absorbs the moisture from within the fruit and acts as a preservative and glazed fruits are, therefore, considered preserved fruits. Further, glazed fruits are commonly considered items of confectionary in that they can be natural alternatives to processed sweets. These goods can therefore fall within the categories of “preserved, dried, cooked, and canned fruits and vegetables” and “confectionary” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*.

38. “Mixtures of fruit and nuts” in the applicant’s marks’ specifications falls within the category of “packeted, canned, and salted nuts (fruit)” in the opponent’s mark’s specification in that both terms include packaged mixes of fruit and nuts. These goods are therefore identical under the principle outlined in *Meric*.

39. Olives are the fruit of an olive tree and, therefore, “olives, preserved”, “canned processed olives”, “dried olives” and “cooked olives” in the applicant’s marks’ specifications all fall within the broader category of “preserved, dried, cooked, and canned fruits and vegetables” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*. Even if I am wrong in this finding, there will be overlap in user, use, method of use, nature and trade channels and the goods will be highly similar.

40. While olives can be eaten fresh from the olive tree, they are considered too bitter and are commonly only sold after they have been prepared accordingly. The preparation olives commonly go through prior to being sold to consumers also acts as a method of preserving the olives. “Olives stuffed with almonds”, “olives stuffed with red peppers”, “olives stuffed with feta cheese in sunflower oil”, “olives stuffed with red peppers and almonds”, “olives, [prepared]” and “stuffed olives” in the

applicant's marks' specifications are, therefore, all considered preserved fruits. These goods are also commonly sold in oil so as to maintain their preservation. These goods fall within the broader category of "preserved, dried, cooked, and canned fruits and vegetables" in the opponent's mark's specification and are, therefore, identical under the principle outlined in *Meric*. Even if I am wrong in this finding, there will be overlap in user, use, method of use, nature and trade channels and the goods will be highly similar.

41. "Olive paste" in the applicants' marks' specifications refers to a product that is made up of olives and other ingredients that are ground down into a paste. Olive paste has many uses but its most common use is as a savoury spread. "Jams, preserves" in the opponent's mark's specification are also commonly used as spreads and these goods will, therefore, overlap in user, nature and purpose with the category of "jams, preserves". These goods will also have a competitive relationship in that a consumer may choose to purchase an olive spread over other types of savoury preserves and vice versa. These goods are similar to at least a medium degree.

42. "Jellies" in the applicant's marks' specifications can be used to describe two different types of goods. Jelly can either be a translucent spread that is a type of preserve or a pre-made dessert that is commonly made from the juices of fruits which are cooked with water and gelatine. If "jellies" in the applicant's marks' specifications refers to a type of spread, it will fall within the category of "jams, preserves" contained in the opponent's mark's specification and will be identical on the principle outlined in *Meric*. However, if the term refers to a type of dessert, I find that they have no direct counterpart within the opponent's mark's specification. However, they will overlap in user and purpose with "cakes" in the opponent's mark's specification in that these goods are commonly eaten as a dessert. They will also share a competitive relationship in that a consumer, when choosing a dessert, may choose a jelly over cake and vice versa. There is unlikely to be any overlap in trade channels or nature. These goods are similar to no more than a medium degree.

43. By contrast, you would not expect “vegetable jellies” to include dessert products. Consequently, in the absence of any submissions to the contrary, I find that “vegetable jellies” in the applicant’s marks’ specifications describes a translucent vegetable spread that is a type of preserve. Vegetable jellies will include products such as beetroot jelly and chilli jelly. These goods will, therefore, fall within the category of “jams, preserves” in the opponent’s mark’s specification. These goods will therefore be identical under the principle outlined in *Meric*.
44. “Compotes” contained in the applicant’s marks’ specifications describes a type of product that is made of fruit pieces in a sugar syrup. A compote is made by cooking whole pieces of fruit in water with sugar and spices. A compote is considered a type of fruit preserve and, therefore, falls within the category of “preserves” in the opponent’s mark’s specification. These goods are therefore identical on the principle outlined in *Meric*. However, if I am wrong in my finding that compote is considered a fruit preserve, I find that these goods will overlap in user and nature in that they are both thick sugary products that contain fruit. These goods will also overlap in trade channels in that the same undertaking may sell both preserves and compotes. There may also be a degree of competition between them. These goods will therefore be similar to a high degree.
45. “Fruit [...] spreads” in the applicant’s marks’ specifications cover all sorts of spreads such as jams, conserves and marmalade, all of which are preserves. These goods will be *Meric* identical to “jams, preserves” in the opponent’s mark’s specification.
46. “Pickles” contained within the opponent’s mark’s specification is a term that is commonly used to describe an edible item that has been pickled, meaning that it has been preserved in a vinegar or brine solution. Various items are commonly pickled and can include cucumbers, onions, gherkins and other types of vegetables and fruits. “Pickled gherkins” and “pickled fruits” in the applicant’s marks’ specifications fall within the category of “pickles” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*.

47. “Semolina” in the applicant’s marks’ specifications describes small, hard grains of wheat that are used in many recipes. Given that it is a wheat product, which is a commonly consumed cereal grain, “semolina” falls within the category of “cereals and preparations made from cereals” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*.
48. “Couscous (semolina)” in the applicant’s marks’ specifications describes a type of couscous that is made from semolina. As above, semolina is a cereal grain product meaning that “couscous (semolina)” falls within the category of “cereals and preparations made from cereals” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*.
49. “Creamed rice” in the applicant’s marks’ specification is commonly considered to refer to a type of pudding made from rice. Rice is a cereal grain and these goods will, therefore, fall within the broader category of “cereals and preparations made from cereals” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*.
50. “Candy coated confections” in the applicant’s marks’ specifications fall within the category of “confectionary” in the opponent’s mark’s specification. These goods are therefore identical under the principle outlined in *Meric*.
51. “Prepared desserts [confectionery]” in the applicant’s marks’ specifications will cover a wide range of different types of prepared desserts. Prepared desserts wouldn’t typically fall within the ordinary meaning of confectionary; however, I cannot ignore the inclusion of the word ‘confectionery’ within the applicant’s marks’ specifications. I find that these goods will either fall within the category of “confectionary” in the opponent’s mark’s specification, and be identical under the principle outlined in *Meric*, or will be similar to “cakes” in the opponent’s mark’s specification. In respect of the similarity of these goods to “cakes”, I find that they will overlap in user, nature and purpose with “cakes” in that both will be eaten as a dessert. These goods may also be found in the same sections as shops and their online equivalents. They will also overlap in trade channels in that the same undertaking may sell both prepared desserts and cakes. There may also be a

degree of competition between them. These goods are therefore similar to a high degree.

52. "Butter", "margarine" and "margarine substitutes" in the applicant's marks' specifications describe goods that are generally used as a spread or in cooking. "Peanut butter" in the opponent's mark's specification is a food paste made primarily from ground peanuts. It is mainly used as a spread but I do not discount the fact it can be used in cooking. These goods will overlap in user, method of use, nature and purpose. However, they are unlikely to overlap in trade channels. I consider it unlikely that these goods will be in competition. These goods are therefore similar to a medium degree.

53. "Vegetable spreads" in the applicant's marks' specifications describes various types of spreads such as vegetable chutneys or vegetable jams. "Jams, preserves" in the opponent's marks' specification will cover all types of jams and preserves and, therefore, will include vegetable jams and other vegetable spreads. These goods will therefore be identical under the principle outlined in *Meric*. If I am wrong in my finding, then I am of the view that the applicant's goods will be similar to the category of "peanut butter" in the opponent's mark's specification. These goods both describe a type of spreadable condiment and will therefore share user, method of use, nature and purpose. They may also be found in the same sections in shops and their online equivalents. There will also be a degree of competition between them. These goods are therefore similar to at least a medium degree.

54. "Vegetable-based spreads" in the applicant's marks' specifications describes a type of vegetable-based alternative to butter that is used mainly as a spread but also in cooking. "Peanut butter" in the opponent's mark's specification is a food paste made primarily from ground peanuts. It is mainly used as a spread but I do not discount the fact it can be used in cooking. These goods will overlap in user, method of use, nature and purpose. It is unlikely that there will be any overlap in trade channels. I also consider it unlikely that the goods will be in competition. These goods are therefore similar to a medium degree.

55. "Honey", "sweet spreads [honey]" and "natural ripe honey" in the applicant's marks' specifications are all sweet food substances made by honeybees. Honey is

commonly used as an ingredient in baking, on desserts and as a spread on bread. While these goods do not fall within any category of the opponent's mark's specification, they will overlap in user, method of use, and purpose with "jams, preserves" and "peanut butter" in the opponent's mark's specification. These goods may all be used as ingredients in baking and also spread on bread. These goods will be found in the same sections of shops and their online equivalents. These goods are therefore similar to a medium degree.

56. "Treacle" in the applicant's marks' specifications is a thick sugary syrup that is used as an ingredient in baked goods. It does not fall within any category in the opponent's mark's specification but may overlap in user, method of use and nature with "jams, preserves" in the opponent's mark's specification in that both goods are thick sugary semi-liquid products. These goods will also overlap in purpose in that they can both be used as spreads. It is unlikely that there will be any overlap in trade channels. These goods are similar to a medium degree.

57. "Vegetable pate" in the applicant's marks' specifications is a paste made from vegetables that is used as a spread. It does not fall within the category of "jams, preserves" in the opponent's mark's specification as it is not considered either a jam or a preserve. However, it will overlap in user, method of use and purpose with "jams" and "peanut butter" in the opponent's mark's specification in that these goods' main purpose is as a spread. It is unlikely that there will be any overlap in trade channels. These goods are therefore similar to a medium degree.

58. "Vegetable mousses" in the applicants' marks' specifications describes a soft, aerated food made of vegetables. Vegetable mousses are similar to vegetable pates and can be used as a spread and will, therefore, overlap in user, method of use and purpose with "peanut butter" and "jams" in the opponent's mark's specification, given that both of these goods are used mainly as spreads. It is unlikely that there will be any overlap in trade channels. These goods are similar to a medium degree.

59. "Custard" in the applicant's marks' specifications describes a creamy sauce that consists mainly of milk or cream and sugar. It is commonly used as an

accompaniment to desserts. In its Notice of opposition, the opponent states that custard is similar to “cakes” in its own specification because “they usually coincide in producer, relevant public and distribution channels and they are in competition”. I accept that there will be overlap in user, in that the goods will both be used by members of the general public. I consider it unlikely that there will be overlap in trade channels, other than both being sold through general retailers such as supermarkets. Similarly, I do not consider these goods to be in competition because custard is not typically eaten on its own as a dessert but is normally used as an accompaniment. Any such competition arising from custard being eaten on its own as a dessert itself is, therefore, limited. The goods will differ in nature and method of use. I do not consider them to be complementary within the meaning of the case law.<sup>1</sup> I recognise that the applicant has admitted that the goods are similar to at least some degree. Consequently, I will proceed on the basis that these goods are similar to a low degree.

60. “Pastries” in the applicant’s marks’ specifications describes a wide range of sweet or savoury bakery products. While these goods have no counterpart in the opponent’s mark’s specifications, they will overlap in user, nature and purpose with “biscuits and cakes” in the opponent’s mark’s specification. These goods will be found in the same sections in shops and their online equivalents. They may also have a competitive relationship in that a consumer may choose to buy a pastry over a cake or a biscuit and vice versa. These goods will also share trade channels in that the same undertakings may sell pastries, cakes and biscuits. These goods are therefore similar to a high degree.

61. In respect of “sugar” in the applicant’s marks’ specifications, the opponent submits that:

“The following goods of Party B, namely:

Sugar, honey, treacle

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<sup>1</sup> *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

are similar to Party A's jams and preserves in Class 29 because they have the same purpose. They usually coincide in relevant public, distribution channels and method of use. Furthermore, they are in competition."

62. I have made findings in respect of honey and treacle above. However, I disagree with the opponent's submissions that "sugar" has the same purpose as "jams, preserves" in the opponent's marks' specifications. Sugar is typically used as a sweetener for food and beverages, whereas jam is used as a spread (such as on bread or cakes). The method of use and trade channels are also likely to differ. As the goods are typically used for different purposes, in the absence of any detailed submissions to assist me, I see no reason to conclude that they would be in competition. I note that sugar is a main ingredient in "jams, preserves", however, this does not give rise to a finding of similarity (see *Les Éditions Albert René v OHIM*, Case T-336/03). However, I accept that there will be overlap in user, in that both goods will be used by members of the general public.

63. While similarity in user is not normally sufficient on its own for a finding of similarity, I note that the applicant has admitted that there is some degree of similarity between its own and the opponent's goods. It has not, however, submitted to what degree it considers "sugar" to be similar to any of the goods in the opponent's mark's specification. In light of this, I will proceed on the basis that these goods are similar to a very low degree.

### **The average consumer and the nature of the purchasing act**

64. 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 decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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.”

65. The opponent submits that:

“the average consumer of the goods at issue is a member of the general public. The consumer’s level of attention will be no more than average, since these are everyday consumer goods.”

66. I agree with the opponent that the average consumer of the goods at issue is a member of the general public.

67. The applicant submits that “The goods at issue are everyday consumer goods and no higher degree of attention will be paid by the consumer.”

68. The goods are most likely to be sold through a range of retail shops, such as supermarkets and their online equivalents. The goods will be displayed on shelves, where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a webpage. The selection of the goods will, therefore, be primarily visual. While the visual aspect plays a greater role in the selection process, I do not discount aural consideration in the form of word of mouth recommendations and advice sought from shop assistants.

69. The goods at issue are everyday food products that are likely to be relatively inexpensive. The purchase of the goods at issue is likely to be fairly frequent. When selecting the goods, the average consumer is likely to consider such things as dietary requirements, flavour, use by/best before dates and/or nutritional

information. The average consumer is, therefore, likely to pay a medium degree of attention during the selection process. However, I recognise that some of the goods will be more casual purchases (such as confectionary, sweets or chocolates selected at checkout), and for those goods I find that the average consumer is likely to pay a lower degree of attention.

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

70. 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-0000, paragraph 49).

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

71. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, 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 made of it.

72. The opponent submits that:

“The Earlier Mark is a word mark which comprises the single word SUN-PAT, consisting of two elements conjoined by a hyphen to form a single word. The element SUN refers to the star known as the “Sun”. This word is only slightly allusive to the vague concept that the relevant goods might contain ingredients which are grown in a sunny climate. Accordingly, this word element is distinctive to a normal degree. The element PAT will have no meaning for the average consumer in the context of the goods covered by the mark. It is therefore submitted that the average consumer within the UK of the goods covered by the Earlier Mark would perceive the Earlier Mark as alluding to something to do with the Sun and that the Earlier Mark possesses a normal degree of distinctive character for the relevant goods.”

73. The applicant submits that:

“SUN-PAT consists of two English words each with a clear and immediately recognisable meaning. The concept of the mark is one of 'patting the sun' or a 'pat from the sun'. In the Collins English Dictionary 'pat' is also defined as 'to tap lightly'.”

74. The opponent has not pleaded that its mark has acquired enhanced distinctive character through use, nor has it filed any evidence to support such a claim. I have, therefore, only the inherent position to consider. I must assess the inherent distinctiveness of the opponent's mark as a whole. The opponent's mark is a word only mark that consists of the words 'SUN' and 'PAT', connected with a hyphen. In my view, and in absence of any submissions to the contrary, I consider that the hyphen is likely to be overlooked by the average consumer. The first word in the mark, being the word 'SUN' will be seen by a significant proportion of average consumers to be a reference to the Earth's sun. The second word of the mark,

being the word 'PAT', means to tap something or someone lightly.<sup>2</sup> I do not find that either the word 'SUN' or 'PAT', when taken on their own, have any allusive or descriptive qualities that would connect to any of the goods contained within the opponent's mark's specifications.

75. I have considered the applicant's submissions that the words 'SUN-PAT' will be taken to mean 'patting the sun' or 'a pat from the sun'. I do not agree with this submission and, instead, I find that the opponent's mark will be viewed by average consumers as an unusual combination of two ordinary words that will convey no obvious meaning. I find that each word in the opponent's mark will contribute equally to the distinctiveness of the opponent's mark. Overall, I consider the opponent's mark to have a medium degree of inherent distinctive character.

### **Comparison of marks**

76. It is clear from *Sabel 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.

77. 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.”

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<sup>2</sup> <https://www.collinsdictionary.com/dictionary/english/pat>

78. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

79. The respective trade marks are shown below:

Opponent's mark	Applicant's marks
<p>SUN-PAT</p>	 <p>(“the applicant’s first mark”)</p> <p>SUNTAT</p> <p>(“the applicant’s second mark”)</p>

80. I have lengthy submissions from both parties regarding the similarity of the marks. Whilst I do not propose to reproduce these in full here, I will refer to them below where necessary.

Overall Impression

*The applicant’s first mark*

81. The applicant’s first mark consists of both word and device elements. The word elements are the word ‘SUNTAT’ in a red and white font with a black border and the words ‘Mediterranean Products’ that appear in a smaller black font to the bottom of the mark and displayed in a curve. While the word ‘SUNTAT’ is likely to be seen as a reference to the sun by the average consumer, I am of the view that the mark as a whole will convey no obvious meaning. I do not find that a significant

proportion of average consumers would view the word 'SUNTAT' as being a reference to goods that originate from a sunny climate. The words 'Mediterranean Products', however, will be considered descriptive of the origin of the goods sold under the mark in that they are goods that originate from Mediterranean countries.

82. Above the word 'SUNTAT' is a device element that appears to be an image of a rising or setting sun in orange. The presence of the sun element provides an additional reference to the sun.

83. All of the above elements are placed within a yellow label device, which acts as a background. While the device elements are noticeable, I am of view that the eye is naturally drawn to the elements of the mark that can be read. I consider the overall impression lies in the combination of these elements, with the word 'SUNTAT' playing the greater role in the overall impression of the mark.

#### *The applicant's second mark*

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

#### *The opponent's mark*

85. The opponent's mark consists of the words 'SUN-PAT'. There are no other elements to contribute to the overall impression, which lies in the words themselves.

#### Visual Comparison

86. The opponent submits that:

"The SUNTAT Mark and the Earlier Mark share the following letters in the same order, S-U-N[ ]A-T. The only difference between the marks is the hyphen and the letter "P" in the Earlier Mark where the first "T" appears in the SUNTAT

Mark. For the reasons stated above, it is the element SUN which will carry the most weight in both the Earlier Mark and the SUNTAT Mark for the consumer. Overall, the marks at issue are therefore visually highly similar.”

87. The applicant submits that:

“Taking first the word elements of each mark, the Applicant's mark is the single word SUNTAT, whereas the Opponent's mark consists of two words separated by a hyphen SUN-PAT. The marks are therefore immediately dissimilar from a visual perspective, the hyphen assisting to create a visual difference between the marks.”

*The applicant's first mark and the opponent's mark.*

88. Visually, the marks coincide in the words ‘SUN-PAT’ and ‘SUNTAT’ which, save for the presence of the hyphen in the opponent's mark and the difference in the fourth letter, are identical. I find that the hyphen in the opponent's mark will be overlooked by the average consumer. The marks differ in the words ‘Mediterranean Products’, that are present in the applicant's first mark and are absent in the opponent's mark. The marks also differ in that the applicant's first mark has device elements, being the orange sun and the yellow label which acts as a background, neither of which are present in the opponent's mark. While I have found that the device, stylisation and colour elements and the words ‘Mediterranean Products’ play a lesser role in the applicant's mark, they still constitute a visual difference between the marks. I note that the opponent's mark is a word only mark and can be used in any standard typeface and registration in black and white will cover the use of the mark in different colours. Taking all of this into account, I find that the marks are visually similar to a medium degree.

*The applicant's second mark and the opponent's mark*

89. Visually, the marks coincide in the words ‘SUN-PAT’ and ‘SUNTAT’ which, save for the presence of the hyphen in the opponent's mark and the difference in the

fourth letter, are identical. I have found that the average consumer will overlook the presence of the hyphen. I find that the marks are visually similar to a high degree.

### Aural Comparison

90. The opponent submits that,

“the relevant public will pronounce both the Earlier Mark and the SUNTAT Mark as two syllables, SUN and PAT in the case of the Earlier Mark and SUN and TAT in the case of the SUNTAT Mark. The first part of the SUNTAT Mark is identical to the first word element SUN of the Earlier Mark. The hyphen in the Earlier Mark will not be pronounced and the element PAT in the Earlier Mark and the letters T-A-T of the SUNTAT Mark are phonetically similar. There is very little difference in pronunciation between SUN-PAT and SUNTAT, with the “P” and the “T” easily being heard by the consumer as the same letter. As noted above, it is also the element SUN which will carry the most weight in both the Earlier Mark and the SUNTAT Mark. For these reasons, overall, the marks at issue are phonetically highly similar.”

91. The applicant submits that, “SUNTAT and SUN-PAT have some low level of phonetic similarity. Both contain the pre-fix SUN and both end with AT.”

*The applicant's first earlier mark and the opponent's mark.*

92. Aurally, the opponent's mark consists of two syllables that will be pronounced 'SUN-PAT'. The hyphen will not be pronounced. The device elements of the applicant's first mark will not be pronounced. Further, I do not consider that the words 'Mediterranean Products' will be pronounced given that they are merely descriptive of the origin of the goods for which the applicant seeks registration. Therefore, I find that the applicant's first mark will consist of two syllables that will be pronounced 'SUN-TAT'. The first syllable of the marks are identical. The second syllables are highly similar with the only difference being at the start of the syllable, being the pronunciation of the letters 'P' and 'T'. I, therefore, find that the marks are aurally similar to a high degree.

*The applicant's second mark and the opponent's mark.*

93. For the same reasons set out in relation to the applicant's first mark, I consider the marks to be aurally similar to a high degree.

#### Conceptual Comparison

94. The opponent submits that:

“Conceptually, to the average consumer, as noted above, the marks SUN-PAT and SUNTAT will be perceived as loosely connected with the vague concept of the Sun, for example, that the ingredients are grown in a sunny climate. Since the word element PAT of the Earlier Mark and the letters T-A-T of the SUNTAT Mark have no meaning for the consumer in the context of the relevant goods, there is nothing else in either mark which alters this perception. Since both signs share the same distinctive concept evoked by SUN, the attention of the relevant public will be attracted by this element, which makes the marks conceptually identical.”

95. The applicant submits that:

“The Opponent's mark is SUN-PAT. The mark therefore comprises of two separate English words, the presence and impact of the hyphen should not be ignored. The marks being compared are not SUNTAT v SUNPAT. Visually the hyphen creates a clear distinction from the Applicant's marks SUNTAT and SUNTAT logo. More significantly there is a conceptual difference. The Opponent's mark has a meaning conveyed by the meanings of each separate word SUN and PAT, these create a concept in the mind of the average consumer and both words contribute to this concept/meaning. In the Applicant's previous submissions at point 8 details of the possible meanings / concepts are set out.

The Applicant's mark SUNTAT is an entirely invented term. It is a single word. SUN is not a separate word and it would therefore be unfair to artificially dissect the mark when making the comparison with the Opponent's mark. The first three letters of the Applicant's mark SUN are the same as the first word in the Opponent's mark, but the marks in their entirety are dissimilar.

SUNTAT is unique and highly distinctive. It has no meaning or concept."

96. The applicant refers to paragraph 8 of its previous submissions in respect of the conceptual meaning of the opponent's mark, which states:

"SUN-PAT consists of two English words each with a clear and immediately recognisable meaning. The concept of the mark is one of 'patting the sun' or a 'pat from the sun'. In the Collins English Dictionary 'pat' is also defined as 'to tap lightly'."

*The applicant's first mark and the opponent's mark*

97. I consider that the label device acts as a background only and conveys no conceptual message within the applicant's first mark. I do not consider that the hyphen in the opponent's mark will have any conceptual impact on the opponent's mark, particularly as the word SUN is likely to be identified as a separate element in the applicant's mark in any event.

98. In assessing the distinctive character of the opponent's mark and the overall impression of the marks, I have found that a significant proportion of average consumers would consider that the words 'SUN-PAT' and 'SUNTAT' within the marks would convey no obvious meaning in their entirety. However, there is conceptual overlap to the extent that both make reference to the sun. The presence of the setting/rising sun in the applicant's first mark further reinforces this. I have found that the words 'Mediterranean Products' identify the origin of the goods for which the applicant seeks to register and act as a point of difference to that extent.

99. While there are parts of the marks that convey a similar conceptual message, there are also parts of the marks that are conceptually neutral and parts of the applicant's first mark that will act as a point of conceptual difference. Overall, I find that the conceptual meaning conveyed by the marks is similar to a medium degree.

*The applicant's second mark and the opponent's mark*

100. For the same reasons set out in relation to the applicant's first mark, I consider the marks to be conceptually similar to a medium degree.

**Likelihood of confusion**

101. 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 and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and 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.

102. I have found the goods to vary from being identical to being similar to a very low degree. I have found the average consumer to be a member of the general public 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 is likely to be paid during the purchasing process although I recognise that for some

of the goods, a lower degree of attention may be paid. I have taken these factors into account in my assessment of the likelihood of confusion between the marks.

### Direct Confusion

103. I have found the applicant's second mark and the opponent's mark to be visually and aurally similar to a high degree and conceptually similar to a medium degree. I have found that that opponent's mark is inherently distinctive to a medium degree. Taking all of these factors into account, I am satisfied that the average consumer would likely mistake one mark for the other. This is particularly the case given the high visual and aural similarities between the marks. The slight differences will be overlooked or forgotten by the average consumer.

104. In respect of the goods that are similar to a medium degree, I am of the view that the similarities between the marks are sufficient to offset the lesser degree of similarity in the goods. Taking all of the above factors into account, I consider there to be a likelihood of direct confusion between the marks, even on goods that are considered similar to a medium degree. Where the goods are similar to only a low or very low degree, I consider that the differences between the goods will offset the similarities between the marks and there is no likelihood of confusion.

### Indirect Confusion

105. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10.

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later

mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

106. I must now consider the possibility of indirect confusion and whether average consumers would believe that there is an economic connection between the marks or that they are variant marks from the same undertaking as a result of the shared common elements of the marks. I have found the applicant’s first mark and the opponent’s mark to be visually and conceptually similar to a medium degree and aurally similar to a high degree. I have found that the opponent’s mark to be inherently distinctive to a medium degree. Taking all of the above into account, it is my view that the differences between the words ‘SUN-PAT’ in the opponent’s mark and ‘SUNTAT’ in the applicant’s first mark, being the fourth letter and the hyphen, will be overlooked by the average consumer. This is particularly the case given that I have found that these words play a greater role in the overall impression of the respective marks. However, I do not consider that the other elements in the applicant’s first mark (the sun device and the label/background device) will be overlooked. In my view, when encountered by the average consumer, the word elements of the marks will be misremembered and the additional elements in the applicant’s first mark will be seen as an alternative mark being used by the same or economically linked undertakings.

107. In respect of the goods that are similar to a medium degree, I am of the view that the similarities between the marks are sufficient to offset the lesser degree of similarity in the goods. I consider there to be a likelihood of indirect confusion between the marks, even on goods that are considered similar to between a low and medium degree. Where the goods are similar to only a low or very low degree, I consider that the differences between the goods will offset the similarities between the marks and there is no likelihood of confusion.

## CONCLUSION

108. The oppositions have succeeded in respect of the majority of goods for which the applicant applied for. The applications are, therefore, refused in the respect of the following goods:

Class 29: Fruits, tinned [canned (Am)]; Prepared fruits; Frozen fruits; Dried fruit; Glazed fruits; Pickled fruits; Vegetable jellies; Vegetable mousses; Vegetable spreads; Vegetables, tinned [canned (Am)]; Vegetable pate; Preserved vegetables; Lentils, preserved; Onions, preserved; Bottled vegetables; Vegetable-based spreads; Preserved vegetables (in oil); Preserved sliced vegetables; Jellies, Jams, compotes, fruit and vegetable spreads; Processed fruits, fungi and vegetables (including nuts and pulses); Mixtures of fruit and nuts; Canned fruit; Bottled fruits; Dried pulses; Processed Pulses; Canned pulses; Dried beans; Canned beans; Beans, preserved; Split peas; Peas, processed; Peas, preserved; Dried lentils; pickled gherkins; Butter; Margarine; Margarine substitutes; Olive paste; Olives, [prepared]; Stuffed olives; Olives, preserved; Dried olives; Cooked olives; Olives stuffed with almonds; Canned processed olives; Olives stuffed with red peppers; Olives stuffed with feta cheese in sunflower oil; Olives stuffed with red peppers and almonds.

Class 30: Creamed rice; Rice; Semolina; Couscous (semolina); Honey; Natural ripe honey; Sweet spreads [honey]; Honey, treacle; Rice tapioca; Sago; Cereal preparations; Pastries; Candy coated confections; Prepared desserts [confectionery].

109. The applications can proceed to registration for the following goods which I have found to be similar to a low or very low degree, or against which the oppositions were not directed:

Class 29: Meats; Charcuterie; Meat substitutes; Bouillon; Meatballs; Fish, not live; Poultry, not live; Poultry substitutes; Extracts of poultry; Poultry, processed; Game, not live; Meat extracts; Vegetable puree; Vegetable pastes; Vegetable powders; Vegetable stock; Vegetable chips; Prepared vegetable dishes; Prepared vegetable products; Vegetable-based meat substitutes; Extracts of vegetables [juices]for cooking; Frozen prepared meals consisting principally of vegetables; Snack foods based on vegetables; Eggs; Processed eggs; Prepared meals containing [principally] eggs; Spreads consisting mainly of eggs; Prepared dishes consisting primarily of fishcakes, vegetables, boiled eggs, and broth(oden); Milk; Powdered milk; Dairy products; Beverages having a milk base; Lactic acid bacteria drinks; Flavoured milk; Organic milk; Flavoured milk beverages; Milk drinks containing fruits; Powdered cream [dairy]; Whiteners for beverages; Low fat dairy spreads; Coffee whiteners consisting principally of dairy products; Drinks made from dairy products; Yogurt; Yogurt drinks; Drinking yogurts; Low fat yoghurts; Flavoured yoghurts; Yoghurt made from goats milk; Tzatziki; Drinks based on yogurt; Preparations for making yoghurt; Edible oils; Flavoured oils; Oils and fats; Edible oils for use in cooking foodstuffs; Edible oils for glazing foodstuffs; Edible fats; Snack foods based on pulses; cold meat and sausages; Smoked sausages; Pepperoni; Salami; Cheese; Soft white cheese; Smoked cheese; Ripened cheeses; Strained cheese; Fresh unripened cheeses; Olive oil; Olive puree; live oil for food; Extra-virgin olive oil; Meat spreads; Cheese containing spices.

Class 30: Fruit vinegar; Pastries containing fruit; Vegetable flour; Vegetable pies; Vegetable pastes [sauces]; Frozen pastry stuffed with vegetables; Vegetable concentrates used for seasoning; Flavourings made from vegetables [other than essential oils]; Sugar for making conserves of fruit; Sugar for making jams; Egg noodles; Egg pies; Pasta containing eggs; Egg roll cookies;

Custard; Toffee; Milk chocolates; Milk chocolate bars; Chocolate beverages with milk; Pulse flour for food; Coffee powdered and in whole-bean form; Sugar; Turkish delight coated in chocolate; Spices; Dry seasonings; Spice extracts; Alimentary seasonings; Spice rubs; Spices in the form of powders; Salts, seasonings, flavourings and condiments; Pasta; Ready made dishes containing pasta; Dried pasta; Pasta containing stuffings; Fresh pasta; Pasta preserves; Prepared pasta; Pasta sauce; Pasta for soups; Cereals for use in making pasta; Pasta in the form of sheets; Tea; black tea; Tea mixtures; Darjeeling tea; Ginger tea; Rosemary tea; Earl grey tea; Sago palm starch [for food]; Flour; Bread; Flour confectionery; Ices; Sugar; Yeast; Baking powder; Baking soda [bicarbonate of soda for cooking purposes]; Salt; Brine for pickling; Salt crackers; Savoury biscuits; Cooking salt; Edible salt; Mustard; Vinegar; Seasonings; Pounded wheat; cocoa, artificial coffee; sauces (condiments); cooling ice.

Class 32: Vegetable juices [beverages]; Vegetable drinks; Beverages consisting of a blend of fruit and vegetable juices; Fruit juice for use as a beverage; Non-dairy milk; Beer; Carbonated mineral water; Mineral water [beverages]; Non-alcoholic beverages; Fruit drinks; Juices; Syrups for making beverages; ready-to-drink tea drinks and tea-mix drinks.

## **COSTS**

110. As the opponent has enjoyed the greater degree of success, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. Given that the oppositions failed against only two of the goods against which it was directed, I do not consider this enough to warrant a reduction in the amount of costs awarded. I note that the oppositions were originally based on sections 5(2)(b), 5(3) and 5(4)(a) of the Act. As a result, the official fee paid by the opponent was £400, being £200 for the opposition of the applicant's first mark and £200 for the opposition of the applicant's second mark. However, given that

the oppositions based upon sections 5(3) and 5(4)(a) of the Act were effectively abandoned by the opponent as a result of the failure to file evidence, the opponent will receive an award of £200 (£100 for each opposition) in respect of the official fees only because only the section 5(2)(b) ground was pursued.

111. In the circumstances, I award the opponent the sum of **£800** as contribution towards its costs. The sum is calculated as follows:

Preparing statements and considering the applicant's statements:	£300
Preparing written submissions in lieu:	£300
Official fee for 5(2)(b) only (x2):	£200
<b>Total:</b>	<b>£800</b>

112. I therefore order Suntat GmbH to pay Histon Sweet Spreads Limited the sum of £800. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 11th day of August 2020**

**A COOPER**  
**For the Registrar**