

**O/0955/25**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003875828  
BY THE 40 FOUR GROUP LTD  
TO REGISTER:**

**ALPHA WOLFE**

**AS A TRADE MARK IN CLASSES 5, 9, 35, 42 AND 44**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 441791  
BY CRANSWICK PET PRODUCTS LIMITED**

## BACKGROUND AND PLEADINGS

1. On 08 February 2023, The 40 Four Group Ltd<sup>1</sup> (“the applicant”) applied to register the trade mark shown on the cover page of this decision, in the UK. The application was accepted and published in the Trade Marks Journal on 07 April 2023 in respect of the following goods and services:

**Class 5:** *Veterinary vaccines; veterinary preparations; diagnostic preparations for veterinary use; medicines for veterinary purposes.*

**Class 9:** *Mobile apps; downloadable smart phone applications (software); computer software; computer programs; computer software and computer programs related to veterinary services; computer software and computer programs in the field of veterinary science; computer software, hardware, programs and mobile apps for ordering veterinary products and services; programs and mobile apps in relation to uploading veterinary prescriptions on to a website; computer software, hardware, programs and mobile apps enabling customers to find and order animal and pet medications, animal and pet treatments, animal and pet training and grooming services and animal and pet accessories; computer software, hardware, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; computer software, hardware, programs and mobile apps in relation to delivering medications and treatments; computer software, hardware, programs and mobile apps in relation to veterinarians managing prescriptions; computer software, hardware, programs and mobile apps for veterinary inventory management; computer software, hardware, programs and mobile apps veterinary appointment scheduling; computer software, hardware, programs and mobile apps in relation to live chat; computer software, hardware, programs and mobile apps in relation to getting access to vets via live chat; computer software, hardware, programs and mobile apps for ordering veterinary products and services, enabling payment, and delivery of products*

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<sup>1</sup> The application was originally made by GREY WOLFE LTD, however, it was subsequently transferred to The 40 Four Group Ltd which is now recorded as the applicant to these proceedings. On 23 May 2025 The 40 Four Group Ltd also confirmed its agreement to, inter alia, accept the liability for costs for the whole proceedings in the event that the opposition is successful.

*to consumers; computer software, hardware, programs and mobile apps to view pet and animal prescriptions and treatments online in order to dispense and deliver the medication and treatment; none of the aforesaid being or relating to retail, wholesale, or import and export services of food for pets or animals.*

**Class 35:** *Business advice and assistance relating to franchising; retail services connected with the sale of subscription boxes containing medications and treatments; veterinary practice business management; retail services connected with the sale of subscription boxes containing medications and treatments for humans, pets and animals; import and export services connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail and wholesale services, provided online and offline connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail services connected with the sale of non-medicated cosmetics and toiletry preparations for animals, perfumery and essential oils for animals; retail services connected with the sale of dog shampoos; retail services connected with the sale of vitamin and mineral supplements; retail services connected with the sale of vitamin and mineral supplements for pets; retail services connected with the sale of glacial water and mineral water; retail services connected with the sale of drinking water; retail services connected with the sale clothing for pets; none of the aforesaid being or relating to retail, wholesale, or import and export services relating to food for pets or animals.*

**Class 42:** *Veterinary laboratory services; medical laboratory services; medical research; scientific research and development; pharmaceutical research services; design and development of computer software for use with veterinary technology; providing information relating to scientific research in the fields of biochemistry and biotechnology; providing information relating to scientific*

*research in the fields of epigenetics; report writing and analysing results of scientific and veterinary research and development.*

**Class 44:** *Genetic testing of animals; Medical and health services relating to DNA, genetics and genetic testing; Medical and health services relating to epigenetics; dietary and nutritional guidance; dietary and nutritional guidance for animals; medical and health services relating to animals; medical health screening services relating to animals; veterinary services; veterinary surgery; veterinary dentistry; veterinary advisory services; animal hospitals; pharmacy services; pharmaceutical services; veterinary pharmacy; dispensing of pharmaceuticals; preparation of prescriptions by pharmacists; pharmacy advice; pharmaceutical advisory services; consultancy and information services relating to pharmaceutical products; consultancy and information services provided via the internet relating to pharmaceutical products; veterinary services; veterinary advisory services; veterinary information services provided via the Internet; veterinary, research and development; veterinary diagnostic services; issuing of veterinary reports; pet grooming services; hygienic and beauty care for animals; dietary and nutritional advice; dietary and nutritional guidance; providing information relating to dietary and nutritional supplements; nutrition and dietetic consultancy; dietary and nutritional advice and consultancy for animals and pets.*

2. On 06 July 2023, the application was opposed by Cranswick Pet Products Limited (“the opponent”) based upon Sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”).

3. Under both Sections 5(2)(b) and 5(3), the opponent relies upon the following trade marks and all of the goods covered by the same, as shown below:

UK00001355566

ALPHA

Filing date: 20 August 1988

Registration date: 03 April 1992

**Class 31:** *Foodstuffs for animals; all included in Class 31.*

UK00002426668



Filing date: 08 July 2006

Registration date: 12 January 2007

**Class 31:** *Foodstuffs for dogs.*

4. By virtue of their earlier filing dates, the trade marks relied upon by the opponent are “earlier marks” in accordance with Section 6 of the Act. As the opponent’s earlier marks had been registered for five years or more at the filing date of the contested mark, they are both subject to the use conditions under Section 6A of the Act. Although, it was open for the applicant to request the opponent to provide proof of use for the earlier marks, it did not do so meaning that the opponent’s marks are not subject to the use provisions and the opponent may, therefore, proceed to rely upon all the goods identified in its notice of opposition.

5. Under Section 5(2)(b), the opponent claims there is a likelihood of confusion because the goods and services are highly similar, being for or in relation to animals, and the marks are highly similar, given that they both share the identical word element “ALPHA”. The opponent also states that the additional word ‘WOLFE’ (being a misspelling of ‘WOLF’) present in the applicant’s mark is of low distinctive character given that the goods and services concerned relate to animals.

6. Under Section 5(3), the opponent claims that its earlier marks enjoy a reputation in relation to all of the registered goods and reiterates the claim that customers will see the contested mark as an extension of the opponent's mark confusing the origin of the goods and services, leading to the applicant taking unfair advantage of, or causing detriment to, the reputation and distinctive character of the opponent's marks.

7. Under Section 5(4)(a), the opponent relies upon the unregistered sign 'ALPHA' which it is said have been used throughout the UK since 1960's in relation to *foodstuff for animals* and *retail services in relation to foodstuff for animals*. The opponent claims that the 'ALPHA' brand has been used in the UK for over 50 years, that during this period of sustained trading, the opponent has established goodwill in the UK in relation to the goods and services claimed, and that use of the applicant's highly similar mark in relation to goods and services which are highly similar to the goods and services for which the opponent has established goodwill would amount to a misrepresentation in the course of trade that the applied-for goods and/or services are those of, or connected with, the opponent when this is not the case. As a result, the opponent is likely to suffer damage, including loss of sales and reputational damage.

8. The applicant filed a defence and counterstatement, denying the opponent's claims and putting it to strict proof. The only exception to this is that the applicant partially conceded the claim to goodwill by stating that it admits that the opponent holds goodwill in relation to foodstuff for dogs.

9. The opponent is represented by Appleyard Lees IP LLP, and the applicant is represented by Wiggin LLP.<sup>2</sup>

10. Both parties filed evidence. Neither party requested a hearing, but the opponent filed written submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

### **Relevance of EU Law**

11. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, Section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

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<sup>2</sup> Novagraff previously represented the applicant but a TM33 was filed on 11 March 2025

## **EVIDENCE**

12. The opponent's evidence came in the form of two witness statements, one from Jerry Lowe, and one from Daniel James Bailey. Mr Lowe is the head of marketing at the opponent's company, a position he has held since 8 February 2021; his evidence is dated 19 March 2024, was filed as evidence in chief, and is accompanied by 6 exhibits being those labelled JL01-JL06. Mr Lowe's evidence is aimed at showing use of the earlier marks by the opponent. Mr Bailey is a Chartered Trade Mark Attorney and Solicitor employed by Appleyard Lees IP LLP, the opponent's representative in these proceedings; his evidence is dated 19 July 2024, was filed as evidence in reply, and is accompanied by 2 exhibits being those labelled DJB1EX1 - DJB1EX2. Mr Bailey's evidence is aimed at supporting the opponent's arguments about the similarity of the goods and services as well as showing examples of use of images of wolves in relation to pet food products and use of the word 'wolf' in brand names.

13. The applicant's evidence came in the form of a witness statement from Luke David Portnow. Mr Portnow is a Chartered Trade Mark Attorney employed by NOVAGRAFF UK, the applicant's former representative in these proceedings; his evidence is dated 15 May 2024 and is accompanied by 10 exhibits being those labelled LDP1 - LDP10. Mr Portnow's evidence is aimed at showing use of the words 'ALPHA' and 'WOLFE' in relation to pet food as well as providing information about the market for pet foods.

14. I do not intend to summarise the evidence (or submissions) in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

## **DECISION**

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

15. 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.”

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 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### **Comparison of goods and services**

17. When making the comparison, all relevant factors relating to the goods and services 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.”

18. 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.

19. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

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

20. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for the goods and services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander QC noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL O/255/13:

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

21. Whilst on the other hand:

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

22. 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 für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

23. Lastly, it is permissible to group goods and services together for the purpose of the assessment where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons.<sup>3</sup> The competing goods and services are as follows:

The applicant's goods and services	The opponent's goods
<p><b>Class 5:</b> <i>Veterinary vaccines; veterinary preparations; diagnostic preparations for veterinary use; medicines for veterinary purposes.</i></p>	
<p><b>Class 9:</b> <i>Mobile apps; downloadable smart phone applications (software); computer software; computer programs; computer software and computer programs related to veterinary services; computer software and computer programs in the field of veterinary science; computer software, hardware, programs and mobile apps for ordering veterinary products and services; programs and mobile apps in relation to uploading veterinary prescriptions on to a website; computer software, hardware, programs and mobile apps enabling customers to find and order animal and pet medications, animal and pet treatments, animal and pet training and grooming services and animal and pet accessories; computer software, hardware, programs and mobile apps enabling customers to find information about medications and treatments for</i></p>	

<sup>3</sup> Separode Trade Mark BL O-399-10

*their pets and animals; computer software, hardware, programs and mobile apps in relation to delivering medications and treatments; computer software, hardware, programs and mobile apps in relation to veterinarians managing prescriptions; computer software, hardware, programs and mobile apps for veterinary inventory management; computer software, hardware, programs and mobile apps veterinary appointment scheduling; computer software, hardware, programs and mobile apps in relation to live chat; computer software, hardware, programs and mobile apps in relation to getting access to vets via live chat; computer software, hardware, programs and mobile apps for ordering veterinary products and services, enabling payment, and delivery of products to consumers; computer software, hardware, programs and mobile apps to view pet and animal prescriptions and treatments online in order to dispense and deliver the medication and treatment; none of the aforesaid being or relating to retail, wholesale, or import and export services of food for pets or animals.*

**Class 31:** *Foodstuffs for animals; all included in Class 31.*

	<b>Class 31:</b> <i>Foodstuffs for dogs.</i>
<p><b>Class 35:</b> <i>Business advice and assistance relating to franchising; retail services connected with the sale of subscription boxes containing medications and treatments; veterinary practice business management; retail services connected with the sale of subscription boxes containing medications and treatments for humans, pets and animals; import and export services connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail and wholesale services, provided online and offline connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail services connected with the sale of non-medicated cosmetics and toiletry preparations for animals, perfumery and essential oils for animals; retail services connected with the sale of dog shampoos; retail services connected with the sale of vitamin and mineral</i></p>	

<p><i>supplements; retail services connected with the sale of vitamin and mineral supplements for pets; retail services connected with the sale of glacial water and mineral water; retail services connected with the sale of drinking water; retail services connected with the sale clothing for pets; none of the aforesaid being or relating to retail, wholesale, or import and export services relating to food for pets or animals.</i></p>	
<p><b>Class 42:</b> <i>Veterinary laboratory services; medical laboratory services; medical research; scientific research and development; pharmaceutical research services; design and development of computer software for use with veterinary technology; providing information relating to scientific research in the fields of biochemistry and biotechnology; providing information relating to scientific research in the fields of epigenetics; report writing and analysing results of scientific and veterinary research and development.</i></p>	
<p><b>Class 44:</b> <i>Genetic testing of animals; Medical and health services relating to DNA, genetics and genetic testing; Medical and health services relating to epigenetics; dietary and nutritional guidance; dietary and nutritional guidance for animals; medical and health services relating to animals; medical</i></p>	

*health screening services relating to animals; veterinary services; veterinary surgery; veterinary dentistry; veterinary advisory services; animal hospitals; pharmacy services; pharmaceutical services; veterinary pharmacy; dispensing of pharmaceuticals; preparation of prescriptions by pharmacists; pharmacy advice; pharmaceutical advisory services; consultancy and information services relating to pharmaceutical products; consultancy and information services provided via the internet relating to pharmaceutical products; veterinary services; veterinary advisory services; veterinary information services provided via the Internet; veterinary, research and development; veterinary diagnostic services; issuing of veterinary reports; pet grooming services; hygienic and beauty care for animals; dietary and nutritional advice; dietary and nutritional guidance; providing information relating to dietary and nutritional supplements; nutrition and dietetic consultancy; dietary and nutritional advice and consultancy for animals and pets.*

24. Section 60A of the Act provides:

1. "(1) For the purpose of this Act goods and services-

2. (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

3. (b) are not to be regarded as being dissimilar from each other on the  
4. ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

25. The opponent argues that the parties’ goods and services are highly similar because they are “*for or in relation to animals*”. It states:

*“The goods covered by the Earlier Marks and the goods and services covered by the Application share the same trade channels and distributors. These include online and offline at pet retailers, veterinary practices, trade shows and international dog shows. As shown at paragraph 3 of the Witness Statement of Daniel James Bailey and Exhibit DJB1 EX1, providers of pet food offer advice relating to nutrition, weight maintenance, supplements and vitamins, health, insurance and subscription services for the related retail services. These overlap with the challenged goods and services.*

*Further, it is well established that the retail of goods is considered to be similar to the goods themselves.”*

26. The witness statement of Daniel James Bailey is only a vehicle for introducing two exhibits and has no real narrative, being made of only two paragraphs which describe the content of the exhibits as follows:

*“Produced at Exhibit DJB1EX1 are printouts of websites of various pet food and supplement brands.*

*Produced at Exhibit DJB1EX2 are examples of relevant products containing images of wolves on their packaging and/or the word wolf in the brand name.”*

27. Turning to exhibit DJB1EX1, first it is undated, which is an issue, because ideally the evidence should be dated prior to the relevant date (the relevant date in this case being the date when the contested application was filed). In this case the only visible date is the date when the screenshots were printed, i.e. 16 July 2024, which is nearly 18 months after the relevant date. Second, and most importantly, whilst the screenshots exhibited show that providers of pet food might offer, on their website, advice relating to nutrition, weight maintenance, supplements and vitamins, the advice/information seems to be provided (a) as part of a marketing strategy aimed at guiding pet owners to buy/mix pet food products and administer them in the right amount and in conjunction with other supplements/vitamins so as to increase sales and maximise the benefits deriving from the use of the products, as well as in order to ensure returning customers and build up customer loyalty, and/or (b) in order to enhance the image of the pet food product manufacturer as a pet expert and strengthen the trust customers have in its products. Further, although the evidence does not point to pet owners advertising third-party brands, I accept that sometimes it is possible for brand owners to work together as part of a cross-promotion or a collaborative marketing where two or more brands partner together to promote each other products or services, however that does not mean that the goods and/or services share trade channels or are complementary. Accordingly, it does not seem to me that the opponent’s evidence and/or arguments are particularly helpful or material in term of establishing coincidence of trade channels and/or complementarity between goods and services that relate to pets/animals but belong to different markets, i.e. pet food versus pet insurance services or veterinary services.

28. Having said that, the evidence suggests that providers of pet food might also provide pet supplements and vitamins as a complementary pet food range. With this mind, I now turn to the actual comparison.

## **Class 5**

*Veterinary vaccines; veterinary preparations; diagnostic preparations for veterinary use; medicines for veterinary purposes.*

29. The closest clash I can see here is with the term "veterinary preparations". This is because although the term generally refers to products used in veterinary medicine, which include veterinary medicinal products that are intended to prevent, treat, or improve the health of animals, it is sufficiently broad to also include veterinary supplements that are not pharmaceutical drugs but may contain ingredients that support the health of the animals, including for example, vitamins, minerals, amino acids, zinc. On this basis, I find that similarly to the applied-for veterinary preparations, the opponent's foodstuff for animals/foodstuff for dogs might include goods fortified with vitamins or minerals which are considered very good for animals/dogs' health and useful for treating certain ailments they may have. Consequently, even though the goods might have a different nature and method of use (i.e. foodstuff versus supplements), they might have a similar use and purpose (i.e. improve the animals/dogs' health), target the same animals/dogs owners, and be used together to maximise results and benefits – in which case there is a degree of complementarity – or be seen as fungible – in which case there is a degree of competition. Lastly, the goods can be sold through the same specialised shops or by the same vets, giving rise to a coincidence in trade channels. **Overall, I consider these goods to be similar to a medium degree.**

30. Turning to the remaining Veterinary vaccines; diagnostic preparations for veterinary use; medicines for veterinary purposes, they are one step removed from the opponent's foodstuff for animals/foodstuff for dogs. In particular, vaccines, medicines and diagnostic preparations are specifically formulated to diagnose, treat, or prevent diseases, and would not include supplements which are designed to enhance the overall health by providing essential nutrients similarly to the opponent's foodstuffs for animals/foodstuff for dogs. **These goods are dissimilar to the opponent's goods.**

## **Class 9**

Mobile apps; downloadable smart phone applications (software); computer software; computer programs; computer software and computer programs related to veterinary services; computer software and computer programs in the field of veterinary science; computer software, hardware, programs and mobile apps for ordering veterinary products and services; programs and mobile apps in relation to uploading veterinary

prescriptions on to a website; computer software, hardware, programs and mobile apps enabling customers to find and order animal and pet medications, animal and pet treatments, animal and pet training and grooming services and animal and pet accessories; computer software, hardware, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; computer software, hardware, programs and mobile apps in relation to delivering medications and treatments; computer software, hardware, programs and mobile apps in relation to veterinarians managing prescriptions; computer software, hardware, programs and mobile apps for veterinary inventory management; computer software, hardware, programs and mobile apps veterinary appointment scheduling; computer software, hardware, programs and mobile apps in relation to live chat; computer software, hardware, programs and mobile apps in relation to getting access to vets via live chat; computer software, hardware, programs and mobile apps for ordering veterinary products and services, enabling payment, and delivery of products to consumers; computer software, hardware, programs and mobile apps to view pet and animal prescriptions and treatments online in order to dispense and deliver the medication and treatment; none of the aforesaid being or relating to retail, wholesale, or import and export services of food for pets or animals.

31. Although the applied-for specification covers a number of software and apps for ordering veterinary products which include the veterinary preparations that I have found to be similar to the opponent's foodstuff for animals/foodstuff for dogs, these goods are one step removed from the opponent's goods. The nature, purpose, use and method of use of the contested goods in class 9 are different from those of the earlier foodstuff for animals/foodstuff for dogs in class 31. The goods are neither complementary nor in competition and there is no coincidence in trade channels as the applied-for specification excludes goods being or relating to retail, wholesale, or import and export services of food for pets or animals. Lastly the fact that both set of goods might target the same users, i.e. owners of animals/dogs, is not sufficient to create a meaningful similarity from a trade mark perspective, neither the users nor the goods being highly specialised. **These goods are dissimilar to the opponent's goods.**

**Class 35**

Business advice and assistance relating to franchising; retail services connected with the sale of subscription boxes containing medications and treatments; veterinary practice business management; retail services connected with the sale of subscription boxes containing medications and treatments for humans, pets and animals; import and export services connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail and wholesale services, provided online and offline connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail services connected with the sale of non-medicated cosmetics and toiletry preparations for animals, perfumery and essential oils for animals; retail services connected with the sale of dog shampoos; retail services connected with the sale of vitamin and mineral supplements; retail services connected with the sale of vitamin and mineral supplements for pets; retail services connected with the sale of glacial water and mineral water; retail services connected with the sale of drinking water; retail services connected with the sale clothing for pets; none of the aforesaid being or relating to retail, wholesale, or import and export services relating to food for pets or animals.

32. As it will be recalled, in the previous paragraph I have found that there is no similarity between the applied-for software and apps for ordering veterinary products (in class 9) and the opponent's foodstuff for animals/foodstuff for dogs (in class 31). This is because, notwithstanding the applied-for software and apps could be used to order veterinary vitamins and supplements (in class 5) which I have found to be similar to the opponent's foodstuff for animals/foodstuff for dogs (in class 31), the different nature, purpose and method of use of the applied-for goods in class 9 means that they are one step removed from the opponent's goods in class 31. Likewise, I find that the same conclusion applies to the contested services in class 35 which include retail services connected with the sale of vitamin and mineral supplements for pets (those are goods which I found to be similar to the opponent's foodstuff for animals/foodstuff for dogs). I say this because the contested retail services in class 35 exclude services being or relating to retail, wholesale, or import and export services of food for pets or

animals. Admittedly, it has been recognised that retail services for particular goods are similar to those goods<sup>4</sup> because although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree. Further, in *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his judgment) that:

“9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent’s earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are ‘*similar*’ to goods are not clear cut.”

33. However, on the basis of the European courts’ judgments in *Sanco SA v OHIM*, Case C-411/13P and *Assembled Investments (Proprietary) Ltd v. OHIM*, Case T-105/05, at paragraphs [30] to [35] of the judgment, upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd* Case C-398/07P, Mr Hobbs concluded that:

i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer’s point of view, they are unlikely to be offered by one and the same undertaking;

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<sup>4</sup> *Oakley, Inc v OHIM*, Case T-116/06

ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered)."

34. The main point which to my mind has more weight here is that the applied-for retail services in class 35 expressly exclude the retail of the opponent's foodstuff for animals/foodstuff for dogs – this means that there cannot be a coincidence in trade channels or complementarity between the goods and services since the applied-for retail services will not be normally associated with the opponent's goods. Hence, I find these services are dissimilar. The position in relation to the remaining contested services in class 35 is even weaker, as they have no points in common with the opponent's goods and therefore, they must be considered dissimilar to them. Apart from being different in nature, since services are intangible, whereas goods are tangible, their purpose and method of use differ as to their producers, and distribution channels. **These services are dissimilar to the opponent's goods.**

#### **Class 42**

Veterinary laboratory services; medical laboratory services; medical research; scientific research and development; pharmaceutical research services; design and development of computer software for use with veterinary technology; providing information relating to scientific research in the fields of biochemistry and biotechnology; providing information relating to scientific research in the fields of

epigenetics; report writing and analysing results of scientific and veterinary research and development.

35. Similar considerations apply to the contested services in class 42. Aside from some of the services at issue being related to animals, they have no points in common with the opponent's goods and therefore, they must be considered to be dissimilar to them. The goods and services have a different nature, purpose and method of use and differ as to their producers, and distribution channels. In addition, the goods and services target different consumers, the opponent's foodstuff for animals/foodstuff for dogs being sought by animals/dogs' owners, the applied-for laboratory and research services being sought by vets, healthcare professionals or manufacturers of pharmaceutical or veterinary products. **These services are dissimilar to the opponent's goods.**

#### **Class 44**

Genetic testing of animals; Medical and health services relating to DNA, genetics and genetic testing; Medical and health services relating to epigenetics; dietary and nutritional guidance; dietary and nutritional guidance for animals; medical and health services relating to animals; medical health screening services relating to animals; veterinary services; veterinary surgery; veterinary dentistry; veterinary advisory services; animal hospitals; pharmacy services; pharmaceutical services; veterinary pharmacy; dispensing of pharmaceuticals; preparation of prescriptions by pharmacists; pharmacy advice; pharmaceutical advisory services; consultancy and information services relating to pharmaceutical products; consultancy and information services provided via the internet relating to pharmaceutical products; veterinary services; veterinary advisory services; veterinary information services provided via the Internet; veterinary, research and development; veterinary diagnostic services; issuing of veterinary reports; pet grooming services; hygienic and beauty care for animals; dietary and nutritional advice; dietary and nutritional guidance; providing information relating to dietary and nutritional supplements; nutrition and dietetic consultancy; dietary and nutritional advice and consultancy for animals and pets.

36. I reach the same conclusion in relation to these services which include medical, pharmaceutical and veterinary services. Although some of these services relate to

animals, the only coincidence between these services (in class 44) and the opponent's foodstuff for animals and foodstuff for dogs (in class 31) is that they are both used by animal/pet owners for their animals/pets. In every other way the services are not just not similar, they are deeply dissimilar. The only point(s) of coincidence, in relation to end users and possibly trade channels to the extent that vet surgeries might sell dog food, do not counteract all the dissimilarities including the nature, purpose and method of use of the goods and services, the lack of competition, and the absence of complementarity. **These services are dissimilar to the opponent's goods.**

### **Conclusions on the goods and services comparison**

37. Based on the above, the only term which I have found to be similar to the opponent's goods is *veterinary preparations* in class 5. Accordingly, I have concluded that there is no similarity at all between the opponent's earlier goods and the following goods and services in the contested application:

**Class 5:** *Veterinary vaccines; diagnostic preparations for veterinary use; medicines for veterinary purposes.*

**Class 9:** *Mobile apps; downloadable smart phone applications (software); computer software; computer programs; computer software and computer programs related to veterinary services; computer software and computer programs in the field of veterinary science; computer software, hardware, programs and mobile apps for ordering veterinary products and services; programs and mobile apps in relation to uploading veterinary prescriptions on to a website; computer software, hardware, programs and mobile apps enabling customers to find and order animal and pet medications, animal and pet treatments, animal and pet training and grooming services and animal and pet accessories; computer software, hardware, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; computer software, hardware, programs and mobile apps in relation to delivering medications and treatments; computer software, hardware, programs and mobile apps in relation to veterinarians managing prescriptions; computer software, hardware, programs and mobile apps for*

*veterinary inventory management; computer software, hardware, programs and mobile apps veterinary appointment scheduling; computer software, hardware, programs and mobile apps in relation to live chat; computer software, hardware, programs and mobile apps in relation to getting access to vets via live chat; computer software, hardware, programs and mobile apps for ordering veterinary products and services, enabling payment, and delivery of products to consumers; computer software, hardware, programs and mobile apps to view pet and animal prescriptions and treatments online in order to dispense and deliver the medication and treatment; none of the aforesaid being or relating to retail, wholesale, or import and export services of food for pets or animals.*

**Class 35:** *Business advice and assistance relating to franchising; retail services connected with the sale of subscription boxes containing medications and treatments; veterinary practice business management; retail services connected with the sale of subscription boxes containing medications and treatments for humans, pets and animals; import and export services connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail and wholesale services, provided online and offline connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail services connected with the sale of non-medicated cosmetics and toiletry preparations for animals, perfumery and essential oils for animals; retail services connected with the sale of dog shampoos; retail services connected with the sale of vitamin and mineral supplements; retail services connected with the sale of vitamin and mineral supplements for pets; retail services connected with the sale of glacial water and mineral water; retail services connected with the sale of drinking water; retail services connected with the sale clothing for pets; none of the aforesaid being or relating to retail, wholesale, or import and export services relating to food for pets or animals.*

**Class 42:** *Veterinary laboratory services; medical laboratory services; medical research; scientific research and development; pharmaceutical research services; design and development of computer software for use with veterinary technology; providing information relating to scientific research in the fields of biochemistry and biotechnology; providing information relating to scientific research in the fields of epigenetics; report writing and analysing results of scientific and veterinary research and development.*

**Class 44:** *Genetic testing of animals; Medical and health services relating to DNA, genetics and genetic testing; Medical and health services relating to epigenetics; dietary and nutritional guidance; dietary and nutritional guidance for animals; medical and health services relating to animals; medical health screening services relating to animals; veterinary services; veterinary surgery; veterinary dentistry; veterinary advisory services; animal hospitals; pharmacy services; pharmaceutical services; veterinary pharmacy; dispensing of pharmaceuticals; preparation of prescriptions by pharmacists; pharmacy advice; pharmaceutical advisory services; consultancy and information services relating to pharmaceutical products; consultancy and information services provided via the internet relating to pharmaceutical products; veterinary services; veterinary advisory services; veterinary information services provided via the Internet; veterinary, research and development; veterinary diagnostic services; issuing of veterinary reports; pet grooming services; hygienic and beauty care for animals; dietary and nutritional advice; dietary and nutritional guidance; providing information relating to dietary and nutritional supplements; nutrition and dietetic consultancy; dietary and nutritional advice and consultancy for animals and pets.*

38. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

“49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be

considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.”

39. Some similarity of goods and services is therefore essential for a likelihood of confusion to be established. Since I have concluded that the above goods and services are dissimilar, the opposition aimed against them fails at the first hurdle.

### **Average consumer**

40. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective 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. (as he then was) 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”


41. The average consumer of the goods at issue will be the general public who own or care for a pet/animal. The goods are sold in general and pet-specialist retail outlets (physical and online) and the marks used in relation to them may be seen on product packaging as well as in advertisements and catalogues. The goods are generally inexpensive and purchased quite frequently. I consider that the average consumer will take some care in assessing the type of foodstuff/supplements for their animals/pets. Overall, I consider that the selection process will be a largely visual process (although I will not discount aural use completely), with a medium degree of care and consideration being deployed.

## Comparison of marks

42. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

43. 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. The respective marks are shown below:

The applied-for mark	The opponent's earlier marks
ALPHA WOLFE	ALPHA 

44. Although the opponent relies on two earlier marks, the figurative mark does not add anything to the opponent's case in terms of similarity, because it consists of the same word element 'ALPHA' (which is the only component of the earlier word-only mark) and an element of stylisation that makes it less similar to the applied-for mark.

45. Having said that, the figurative mark is shown in evidence as being the main mark used by the opponent, which might result in that mark having acquired a higher degree of distinctiveness – hence I will carry out my assessment in relation to both earlier marks.

### **Overall impression**

46. The opponent's first earlier mark consists of the word 'ALPHA' presented in upper case letters. There are no other elements that contribute to the overall impression of the mark, which lies in the word itself.

47. The opponent's second earlier mark consists of the word 'alpha' presented in white in a minimally stylised font within a black triangular background with round corners. Although the letter 'l' and the vertical stroke of the letter 'h' are elongated to connect with the white outline within the triangular background, it does not prevent the verbal element of the mark from being perceived as the word 'alpha'. Whilst the stylisation of the letters and the triangular background are not negligible, they have less weight than the word 'alpha' which is how the mark will be referred to, and remains the dominant and distinctive component of the mark.

48. The applied-for mark consists of the words 'ALPHA' and 'WOLFE' presented in upper case letters; for reasons which I am going to explain when dealing with the conceptual comparison of the marks, I consider that the word 'ALPHA' is more distinctive than the word 'WOLFE' and has more weight in the overall impression.

### **Conceptual similarity**

49. Conceptually, the word 'ALPHA' will be given the same meaning in both marks, that is to say, "*An alpha animal is the most powerful and successful one in a group*".

The applicant denies the opponent's claim that the additional verbal element "WOLFE" in the application is a misspelling of the dictionary word 'WOLF', although it did not put forward any alternative argument as to how the element 'WOLFE' is going to be perceived.

50. I agree with the opponent that 'WOLFE' is visually highly similar to 'WOLF' and aurally identical. I therefore find that when used in relation to the contested goods which I found to be similar to the earlier goods (i.e. veterinary preparations for animals), the element 'WOLFE' will evoke in the mind of a significant part of the public concerned the dictionary word 'WOLF' which means "*a wild animal that looks like a large dog*". This is all the more so given that the contested goods include veterinary preparations for dogs. Consequently, I consider that the element 'WOLFE' might be seen as descriptive or allusive in the context of the contested veterinary preparations, which cover goods for dogs. Overall, I consider the applied-for mark and the opponent's earlier marks to be conceptually similar to a medium to high degree.

### **Visual similarity**

51. Visually, the opponent's first earlier mark and the applied-for mark coincide in the presence of the word 'ALPHA'. They differ in that the word 'ALPHA' is followed by the word 'WOLFE' in the applicant's mark. I bear in mind that the beginnings of marks tend to make more of an impact than the ends<sup>5</sup> and that 'WOLFE' will be seen as descriptive or allusive. Accordingly, I consider the opponent's first earlier marks and the applied-for mark to be visually similar to a medium to high degree.

52. As regards the other earlier mark, the visual impact created by the stylisation of the letters and the triangular background reduces the level of visual similarity to a medium degree.

### **Aural similarity**

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<sup>5</sup>El Corte Inglés, SA v OHIM, Cases T-183/02 and T-184/02

53. Aurally, the figurative elements of the second earlier mark have no impact on how that mark will be pronounced. The word 'ALPHA' will be pronounced identically in all of the marks. However, the pronunciation of the word 'WOLFE' in the application will act as a point of aural difference. Overall, I consider the marks to be aurally similar to a medium to high degree.

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

54. 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).”

55. 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.

56. As set out above, the opponent's word-only mark consists solely of the word 'ALPHA'. The mark is not descriptive of the goods at issue, but neither is it particularly remarkable, since in relation to foodstuff for animals, it alludes to the effects of the goods. I say this because the mark conveys an association between feeding the animal/dog with the opponent's goods and the idea of an alpha animal which, as I have said above, is the most powerful and successful one in a group. My impression is confirmed by the opponent's own evidence, which shows that the opponent markets its pet food as "*Food of Champions*" – a phrase which appears to be used as slogan as shown below:



57. As a result, I find that the inherent distinctiveness of the earlier word-only mark sits at a level between low and medium. Whilst the stylisation of the earlier figurative mark might slightly increase its distinctiveness, this is not pertinent, as it is the distinctiveness of the shared element that is the key.

58. I turn now to consider the position in respect of the opponent's evidence, to see whether the use the opponent has made of its earlier marks has enhanced their distinctive character.

59. Mr Lowe says that the opponent's company has been operating under the mark 'ALPHA' since the 1960's. Exhibit JL1 shows that the opponent is a UK based company and that its products can be purchased all of over the UK from pet shops and online. In this connection, Mr Lowe states that the opponent's products are sold through the opponent's website at [www.alphafeeds.com](http://www.alphafeeds.com) as well as through over 300

stockists throughout the UK. Screenshots from the opponent's website dated between 2005 and 2016 show that the opponent offers pet food for dogs, ferrets, cats, rabbits, guinea pigs, horses and poultry and state that *"ALPHA' is the number one name in pet food"*.

60. Turnover for the years 2020-2023 is as follows:

2022/2023: Over £2.2 million

2022/2021: Over £1.9 million

2020/2021: Over £1.7 million

2019/2020: Over £1.5 million

Total: Over £7.3 million

61. This appears to refer to the UK. I say this because having provided the above sales figures, Mr Lowe states: *"As you can see from the above data, are sales throughout the UK over the past few years have been significant"*. Further, the sample invoices provided at exhibit JL4 are all to UK customers.

62. In terms of marketing and advertising spend, Mr Lowe provides the following figures without expressly saying whether they relate to the UK or not:

2022/2023: Over £105,000

2022/2021: Over £82,000

2020/2021: Over £68,000

2019/2020: Over £75,000

Total: Over £330,000

63. In addition to the above evidence, Mr Lowe states that:

- The opponent attended and exhibited at trade shows such as (a) Crufts, an international dog show held annually in the UK, with hundreds of thousands of visitors each year, which they first attended in 2011; (b) PATS (Pet and Aquatics Trade Show) which is attended by thousands of visitors and exhibitors and (c) The Game Fair trade show. No further details are provided about the

opponent's attendance to these trade shows and the exact number of visitors. Whilst some pictures are provided which shows the figurative marks being prominently exhibited and used mainly in relation to dog food, they are undated.

- The opponent has over 5,400 followers on Facebook since its creation in 2013 and the opponent's Facebook page reached over 164,000 customers between the period of February 2021 -31 December 2023, which includes reach prior to the application date of 8 February 2023 – however, it is not said exactly how many UK customers were reached prior to the relevant date.
- The opponent has sponsored individual breeders for many years as well as events such as the Siberian Husky Club in Northern Ireland in 2021.

64. Mr Lowe also supplies evidence of two adverts which are said have appeared in magazines such as the Sporting Shooter Magazine, Pet Product Marketing and Pet Business World, however, they are undated.

65. Admittedly, the evidence points to a relatively successful and long-standing British family run business with over 50 years of trade. However, the evidence misses important points. For example, there are no turnover or marketing figures for the years prior to 2019. There is no indication of market share, but the size of the market for the goods concerned must be very large indeed and is likely to be in the billions, rather than the millions – in the grand scheme of things, a turnover of over £7.3 million over a period of five years, looks like a tiny proportion. In this connection, the applicant's evidence<sup>6</sup> indicates that (a) some of the UK top pet food brands generated turnover in the region of hundreds of millions in 2020 with the number one brand FELIX reaching nearly £250 million; (b) the UK pet food market is the second largest in the world only behind the USA, and consumers spending on pets and related products in the UK increased by 6% in 2021-2022 to reach almost £9.9 billion, (c) the UK pet food market was worth more than £3 billion in 2021 and the dog food market was worth around £1.6 billion in 2022.

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<sup>6</sup> LDP3

66. Nonetheless, I think that as a result of both the long-standing use and the high number of retailers from which the opponent's goods are available to be purchased, it is likely that the distinctiveness of the opponent's earlier marks has been materially increased to slightly above what it inherently is, that is to say to no more than a medium degree in relation to dog food, which appears to be the main product sold by the opponent.

67. For the sake of completeness, I should say that I have not overlooked the evidence filed by Mr Portnow on behalf of the applicant which shows use of the word 'ALPHA' and 'WOLF' in third party brands for dog food,<sup>7</sup> including 'ALPHA SPIRIT', 'CUNIPIC ALPHA PRO', 'WOLF OF WILDERNESS'. Suffices to say that although products sold under these marks appear to be available in the UK, as shown by the price in pound sterling, the evidence is undated and says nothing about the sales generated under these marks prior to the relevant date. This means that it is not possible to establish that the distinctiveness of the words 'ALPHA' and 'WOLF' (and in turn 'WOLFE') has been weakened by their extensive use as part of brand names by different traders in the pet food sector.

### **Likelihood of confusion**

68. 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, including that a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. I must keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

69. Earlier in this decision I found that:

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<sup>7</sup> LDP1

- The applied-for mark and the first earlier mark are visually, aurally and conceptually similar to a medium to high degree.
- The applied-for mark and the second earlier mark are visually similar to a medium degree, and aurally and conceptually similar to a medium to high degree.
- Veterinary preparations are similar to the opponent's goods to a medium degree.
- The average consumer will select the goods mainly visually, with a medium degree of attention of attention.
- The earlier marks are inherently distinctive to a low to medium degree. However, their distinctiveness has been enhanced to no more than a medium degree through use in the UK.

70. The best case for the opponent is in relation to dog food (which is covered by the specification of the second earlier mark and is also encompassed by the specification of the first earlier mark). This is because first, the distinctiveness of the earlier marks has been enhanced to a medium degree in relation to these goods, and second, the differentiating element 'WOLFE' is allusive and/or descriptive in relation to veterinary preparations for dogs.

71. Bearing in mind all of the above, I consider that given the medium to high degree of similarity between the application and the first earlier mark, the coincidence of the dominant component 'ALPHA', the allusiveness and/or weakness of the differentiating element 'WOLFE', and the no more than medium degree of distinctive character of the earlier mark, consumers will directly confuse the applicant's mark with the first earlier mark when encountering them on similar goods. Alternatively, if consumers notice the differences between the applicant's mark and the earlier marks including the stylisation of the second earlier mark, they will consider the applicant's mark as a variant mark used by the opponent and adding an allusive/weakly distinctive element to the brand

'ALPHA'. There is a likelihood of direct and indirect confusion in relation to the goods which I have found to be similar.

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

72. Section 5(3) states:

“(3) A trade mark which-

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 and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark”.

73. 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."

## **Reputation**

77. As it will be recalled I have found that notwithstanding the absence of information about market share, as a result of both the long-standing use and the high number of retailers from which the opponent's goods are available to be purchased, it is likely that the distinctiveness of the opponent's earlier marks has been materially increased to a medium degree in relation to dog food, which appears to be the main product sold by the opponent. This is also likely to amount to the opponent's earlier marks enjoying a small reputation in relation dog food.

## **The Link**

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

The degree of similarity between the conflicting marks. The applied-for mark and the first earlier mark are visually, aurally and conceptually similar to a medium to high degree. The applied-for mark and the second earlier mark are visually similar to a medium degree, and aurally and conceptually similar to a medium to high degree.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public. The only goods which I found to be similar to the goods for which the earlier marks are protected are veterinary preparations. The remaining goods and services in the application are dissimilar.

The strength of the earlier mark's reputation. The earlier marks' reputation is small.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use. The earlier marks are inherently distinctive to a low to medium degree and their distinctiveness has been enhanced to no more than a medium degree.

Whether there is a likelihood of confusion. I have found that there is a likelihood of confusion in relation to similar goods but no likelihood of confusion in relation to dissimilar goods and services.

79. I will only consider the Section 5(3) claim in relation to the goods and services for which the objection based on Section 5(2)(b) has failed. Bearing in mind all of the above, in particular the small size of the opponent's reputation, the inherently low to medium degree of distinctiveness of the earlier marks which, even if enhanced, still sits to no more than a medium degree, and the distance between the goods and services which I found to be dissimilar (and which are far too removed from what the opponent's limited reputation vets in), I consider that even if a link is made, it will be so fleeting not to cause any damage.

80. The opposition based on Section 5(3) fails in relation to the goods and services which I found to be dissimilar.

### **Section 5(4)(a)**

81. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(b) [...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

82. Subsection (4A) of Section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

83. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “a substantial number” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

84. Halsbury’s Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

“Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

### **The relevant date for Section 5(4)(a)**

85. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, as the Appointed Person, endorsed the registrar's assessment of the relevant date for the purposes of Section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’ ”

86. The *prima facie* relevant date is the date the contested mark was filed. Hence, the relevant date in these proceedings is 08 February 2023.

## **Goodwill**

87. The applicant has accepted that the opponent has goodwill in relation to dog food. In *Marks and Spencer PLC v Interflora*, [2012] EWCA (Civ) 1501, Lewison L.J. had previously cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that “*a substantial number*” of the relevant public are deceived, which might not mean that the average consumer is confused. However, in the light of the Court of Appeal's later judgment in *Comic Enterprises*, it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes. This is because they are both normative tests intended to exclude the particularly careless or careful, rather than quantitative assessments.

88. Accordingly, given that the goods in relation to which the opponent has goodwill and the sign associated with the opponent's goodwill are the same as those which I have assessed under Section 5(2)(b), the opponent's objection under this ground cannot succeed to a larger extent than that under Section 5(2)(b).

## **OUTCOME**

89. The opposition has been successful in relation to the following goods which will be refused registration:

**Class 5:** *veterinary preparations.*

90. The opposition has failed in relation to the following goods and services for which the application will proceed to registration:

**Class 5:** *Veterinary vaccines; diagnostic preparations for veterinary use; medicines for veterinary purposes.*

**Class 9:** *Mobile apps; downloadable smart phone applications (software); computer software; computer programs; computer software and computer programs related to veterinary services; computer software and computer programs in the field of veterinary science; computer software, hardware, programs and mobile apps for ordering veterinary products and services; programs and mobile apps in relation to uploading veterinary prescriptions on to a website; computer software, hardware, programs and mobile apps enabling customers to find and order animal and pet medications, animal and pet treatments, animal and pet training and grooming services and animal and pet accessories; computer software, hardware, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; computer software, hardware, programs and mobile apps in relation to delivering medications and treatments; computer software, hardware, programs and mobile apps in relation to veterinarians managing prescriptions; computer software, hardware, programs and mobile apps for veterinary inventory management; computer software, hardware, programs and*

*mobile apps veterinary appointment scheduling; computer software, hardware, programs and mobile apps in relation to live chat; computer software, hardware, programs and mobile apps in relation to getting access to vets via live chat; computer software, hardware, programs and mobile apps for ordering veterinary products and services, enabling payment, and delivery of products to consumers; computer software, hardware, programs and mobile apps to view pet and animal prescriptions and treatments online in order to dispense and deliver the medication and treatment; none of the aforesaid being or relating to retail, wholesale, or import and export services of food for pets or animals.*

**Class 35:** *Business advice and assistance relating to franchising; retail services connected with the sale of subscription boxes containing medications and treatments; veterinary practice business management; retail services connected with the sale of subscription boxes containing medications and treatments for humans, pets and animals; import and export services connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail and wholesale services, provided online and offline connected with the sale of supplements for veterinary use, veterinary pharmaceutical preparations, animal and pet accessories, programs and mobile apps enabling customers to find information about medications and treatments for their pets and animals; retail services connected with the sale of non-medicated cosmetics and toiletry preparations for animals, perfumery and essential oils for animals; retail services connected with the sale of dog shampoos; retail services connected with the sale of vitamin and mineral supplements; retail services connected with the sale of vitamin and mineral supplements for pets; retail services connected with the sale of glacial water and mineral water; retail services connected with the sale of drinking water; retail services connected with the sale clothing for pets; none of the aforesaid being or relating to retail, wholesale, or import and export services relating to food for pets or animals.*

**Class 42:** *Veterinary laboratory services; medical laboratory services; medical research; scientific research and development; pharmaceutical research services; design and development of computer software for use with veterinary technology; providing information relating to scientific research in the fields of biochemistry and biotechnology; providing information relating to scientific research in the fields of epigenetics; report writing and analysing results of scientific and veterinary research and development.*

**Class 44:** *Genetic testing of animals; Medical and health services relating to DNA, genetics and genetic testing; Medical and health services relating to epigenetics; dietary and nutritional guidance; dietary and nutritional guidance for animals; medical and health services relating to animals; medical health screening services relating to animals; veterinary services; veterinary surgery; veterinary dentistry; veterinary advisory services; animal hospitals; pharmacy services; pharmaceutical services; veterinary pharmacy; dispensing of pharmaceuticals; preparation of prescriptions by pharmacists; pharmacy advice; pharmaceutical advisory services; consultancy and information services relating to pharmaceutical products; consultancy and information services provided via the internet relating to pharmaceutical products; veterinary services; veterinary advisory services; veterinary information services provided via the Internet; veterinary, research and development; veterinary diagnostic services; issuing of veterinary reports; pet grooming services; hygienic and beauty care for animals; dietary and nutritional advice; dietary and nutritional guidance; providing information relating to dietary and nutritional supplements; nutrition and dietetic consultancy; dietary and nutritional advice and consultancy for animals and pets.*

## **COSTS**

91. The applicant has been more successful than the opponent and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicant the sum of £990 as a contribution towards the costs of proceedings applying a 10% reduction to reflect the opponent's partial success. The sum is calculated as follows:

Filing a counterstatement and considering the notice of opposition: £400

Filing evidence: £700

Total: £1,100 – 10%= £990

92. I therefore order Cranswick Pet Products Limited to pay The 40 Four Group Ltd the sum of £990. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 10<sup>th</sup> day of October 2025

TERESA PINTO

For the Registrar