



Neutral Citation Number: [2019] EWHC 368 (Ch)

Case No: IL-2018-000199

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**EUROPEAN UNION TRADE MARK COURT**

The Rolls Building, 7 Rolls Buildings  
Fetter Lane, London, EC4A 1NL

Date: 22/02/2019

Before:

**MR JUSTICE FANCOURT**  
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**BETWEEN:**

- (1) JUUL LABS, INC.
- (2) JUUL LABS UK LIMITED

**Claimants**

- (1) QUICK XUUL LIMITED
  - (2) LINDA McVEIGH
  - (3) NICHOLAS JASON JUUL
  - (4) GARY WILSON
  - (5) CAXESS CORPORATION
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**Defendants**

**Mr James Mellor QC and Ms Katherine Moggridge** (instructed by Pinsent Masons LLP) for  
**the Claimants**

**The First Defendant** was represented by the Third Defendant

**The Second Defendant** and **Third Defendant** appeared as litigants in person

There was no appearance or representation on behalf of **the Fourth and Fifth Defendants**

Hearing dates: 18, 21 January 2019  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

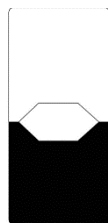
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MR JUSTICE FANCOURT

**MR JUSTICE FANCOURT:**

1. I heard the following applications on 18 and 21 January 2019:
  - (a) An application by the Second Defendant (Ms McVeigh) issued on 26 November 2018 to strike out the claim pursuant to CPR 3.4(2)(b) on the ground that it is ill-founded;
  - (b) An application by the Claimants issued on 21 December 2018 for summary judgment against each of the Defendants, alternatively judgment in default against each of the Defendants;
  - (c) An application issued by the Third Defendant (Mr Juul) issued on 31 December 2018 for summary judgment against the Claimants.
2. Mr Mellor QC and Ms Moggridge appeared for the Claimants. Ms McVeigh and Mr Juul appeared in person and Mr Juul asked for and was given permission to represent the First Defendant (the Company). The Fourth Defendant did not appear and was not represented before me. For reasons that will appear, the claim against the Fifth Defendant cannot proceed.
3. The Claimants' claim is in relation to infringement of registered EU trade marks and for the tort of passing off. Extensive interim injunctive and other relief has been granted to the Claimants against all Defendants and the Claimants now seek final declaratory and injunctive relief, consequential orders and an inquiry as to damages or, at their option, an account of profits.
4. The First Claimant is the parent company of the Juul Group, incorporated in the state of Delaware and carrying on business in San Francisco, California. It sells and supplies electronic nicotine delivery systems (ENDS) equipment and products (commonly called "vaping" equipment and products) under the proprietary brand name "JUUL". It is the registered proprietor of various trade marks relating to the JUUL brand, including the four EU trade marks in issue in this case:
  - (1) a JUUL "Word Mark", number EU012477791, registered in class 34 relating to electronic cigarettes, electronic smoking vaporisers, electronic cigarette re-fill liquids and accessories and other related goods;
  - (2) A JUUL "Stylised Mark", as follows: number EU014944251, registered in classes 11, 34 and 35, extending to retail and wholesale services connected with the sale of ENDS;
  - (3) A 2D "Figurative Mark":

**JUUL**



being a representation of the pod design sold by the First Claimant (“Pod Mark”), number EU017883607, in the same classes, and

(4) Another 2D Figurative Mark:



being a representation of the electronic vaporiser sold by the First Claimant (“Vaporiser Mark”) number EU017883609, similarly registered.

5. The Second Claimant is the exclusive licensee of the trade marks in the United Kingdom. The JUUL brand was successfully launched in the United States in 2015 and now dominates the market there. It has been hugely successful, and as such has been targeted by manufacturers and sellers of fake, counterfeit goods. The First Claimant operates a website: [www.juul.com](http://www.juul.com), to promote and make online sales in the United States. The JUUL brand was first launched in the UK on 17 July 2018. It operates through a website at [www.juul.co.uk](http://www.juul.co.uk) and a limited number of authorised retailers in the UK. In the first three months of trading in the UK, turnover was US\$2.3 million, and by the end of that period twenty thousand visitors per week used the UK website. JUUL was launched in Germany and France in December 2018.

### **The Procedural History**

6. In view of the difficulties the First Claimant has already experienced with counterfeit goods, it maintains a careful, daily watch for website or social media activity in the UK making use of its name. As a result of this, it became aware of the activities of Ms McVeigh and Mr Juul in mid-September 2018 and required them to close an Instagram page on which they were advertising the sale of JUUL products. Ms McVeigh and Mr Juul had also set up a Twitter account and another Instagram account in September 2018, and Mr Juul used his eBay pages with the intention of selling JUUL pods and equipment.
7. On 27 September 2018, Mr Juul applied to the Second Claimant for authority to sell its products. This was rejected by the Second Claimant the following day, although it appears that Mr Juul was not notified of the rejection. As a result of the application, the Second Claimant discovered the website [www.quickjuul.com](http://www.quickjuul.com), which had been established by Ms McVeigh and Mr Juul. Although the address had previously been referred to on their Twitter account, the Claimants did not discover it until later in September. The website appeared to be of a very high quality, and offered kits, vaporisers and pods for sale. It was this discovery that triggered the Claimants’ investigation.
8. On 28 September 2018, the Company was incorporated. Ms McVeigh and Mr Juul were its directors (although Mr Juul, then known as Nicholas Jason Place, did not change his surname to Juul until 17 October 2018). Ms McVeigh and Mr Juul were registered as persons with significant control of the Company.

9. The Claimants instigated four test or “trap” purchases online by persons acting on their behalf between the end of September and late October 2018. Goods were delivered from the Company, acting by Ms McVeigh, and some were then taken to California to be examined by experts. The Claimants’ evidence is that these are unquestionably counterfeit goods. Images of the goods acquired through the other trap purchases were sent to the Claimants and the Claimants contend that these too are probably counterfeit.
10. As a result of these discoveries, the Claimants applied on 31 October 2018 for a “doorstep” search order, which they executed on 1 November 2018. As a result of that, Ms McVeigh, Mr Juul and the Fourth Defendant (Mr Wilson) attended court on 2 November 2018, when further interim relief was granted. Information about Mr Wilson was obtained by the Claimants’ representatives as a result of a meeting that took place at court.
11. Prior to the return date on 8 November 2018, the Company, Ms McVeigh and Mr Juul were served with the claim form. In a witness statement dated 7 November 2018, Mr Juul explained that the assets of the Company, including the stock and websites, had been sold to the Fifth Defendant on 23 October 2018 and that Mr Wilson controlled the Fifth Defendant. He also said that Mr Wilson was now the sole director of the Company and a person with significant control of it. Ms McVeigh and Mr Juul purported to resign as directors of the Company with effect from 1 November 2018, but Ms McVeigh remained its secretary and Mr Juul remained registered as a person with significant control.
12. On the return date, Ms McVeigh and Mr Juul appeared but Mr Wilson did not. Injunctive relief against the Company, Ms McVeigh and Mr Juul was continued and similar injunctive relief was granted against Mr Wilson and the Fifth Defendant. The claim form was directed to be served on Mr Wilson and the Fifth Defendant at the address listed at Companies House for Mr Wilson.
13. It is now established by the Claimants’ recent evidence on their application that the Fifth Defendant, a Belize corporation, was dissolved in 2009. There cannot therefore have been any sale by the Company to the Fifth Defendant. The purported sale agreement, exhibited to Mr Juul’s witness statement, is a standard form business asset sale agreement and contains nothing specific to the Company’s business or assets other than the names of the Company as seller and the Fifth Defendant as buyer. It is unsigned. It is of no effect.
14. Mr Juul later purported to acknowledge service on behalf of the Company, Ms McVeigh and himself. This was procedurally irregular, but the notification of an intention to defend was followed up in due course by a Defence of all of them. Mr Juul acknowledges in his evidence that he still controls the Company, despite formally not being a director. The Company, Ms McVeigh and Mr Juul have all appeared to pursue their defence of the claim. Mr Wilson has not acknowledged service, nor done anything in response to being joined and made the subject of interim orders. This failure resulted in a committal application being made against Mr Wilson. I am not satisfied that the Defence filed by Mr Juul on behalf of “all Respondents” was filed with the authority of Mr Wilson, nor that Mr Juul had authority to act on behalf of Mr Wilson at the hearing before me. Accordingly, the right approach in

relation to Mr Wilson is to treat the Claimants' application as an application for judgment in default of acknowledgment of service or defence.

### **The Statements of Case**

15. The particulars of claim were amended on 10 December 2018 to add allegations of infringement of the Pod Mark and Vaporiser Mark. The Claimants allege a substantial reputation and goodwill created in the brand JUUL in association with ENDS products, such that JUUL signifies the Claimants' products and no others. They assert a distinctive design of vaporiser and pod, so that these are identifiable as the Claimants' product only, and that substantial goodwill and reputation exists in the designs. Importantly, although the First Claimant sells pods containing e-liquids with nicotine salts of 3% and 5% content by volume in the United States, regulatory control in the UK permits only a maximum of 1.7% volume. The Claimants therefore do not sell 3% and 5% strength pods in the UK. According to Mr Juul this has created a gap in the market, because a large number of would-be consumers in the UK wish to acquire 5% pods.
16. What is alleged by the Claimants is that Ms McVeigh and Mr Juul started to advertise ENDS products from the Company's Facebook account, using the Word Mark and Stylised Mark, from about 17 September 2018. They used photographs of JUUL products, although these did not show the mandatory UK health warning as legitimate 1.7% strength products do. The Twitter account was activated and linked to Mr Juul's eBay "Jasons-destiny" account, which from 16 October was updated to give the Company's rather than Mr Juul's details. At all times, the products advertised were 5% strength, not 1.7% strength. The trap purchases demonstrate that sales through the internet were active by the end of September and throughout October.
17. As a result of the 31 October Order, the website and eBay account were temporarily taken offline, giving the appearance of a degree of compliance, though Ms McVeigh and Mr Juul did not disclose documents or provide information about their sources and customers, or handover stock, as they were ordered to do. From 4 November, the quickjuul.com website displayed new images, referred to the new ownership of the Fifth Defendant, and referred to "Quick Xuul" products. On the same day, a new domain name of www.quickxuul.com was registered, apparently by Mr Wilson on behalf of the Company.
18. Following disclosure of the alleged sale to the Fifth Defendant, Mr Juul said that he could not provide information about sales, as required by the 31 October Order, because the business had been sold and a confidentiality agreement with the Fifth Defendant precluded it. On 7 November, the Twitter account was changed to include a stylised image using the name Xuul and stating "Xuul is better than Juul".
19. The Defence of the Company, Ms McVeigh and Mr Juul raises a number of matters that do not amount to arguable defences to the claim. There is, e.g., an attack on the ethical standards of the First Claimant and its directors, and on the corporate structures used by them. There is also an argument that the Claimants were acting wholly disproportionately, contrary to their published policy of dealing with suspected counterfeit goods, by using large legal resources and seeking urgent relief without notice, rather than writing to the Defendants and asking them to desist.

20. Apart from these matters, the Defence raises the following arguments that have at least some potential relevance to the merits of the Claimants' claim:
- (a) the Claimants have no exclusivity in the manufacture and sale of vaping equipment comprising a rechargeable vaporiser and pods containing flavoured e-liquids with nicotine salts;
  - (b) the Claimants have no exclusive right to use the name Juul, which is a common Danish surname;
  - (c) the Claimants engage in anti-competitive selling practices;
  - (d) the Claimants have no goodwill or reputation in their vaping equipment because of the harmful effect of using it and because there is a huge market in counterfeit goods that are indistinguishable from authentic products;
  - (e) use of the name Xuul does not infringe the trade marks;
  - (f) the Defendants were selling and always intended to sell legitimate (not counterfeit) JUUL products, obtained on the grey market because the pods sold were of 5% strength;
  - (g) The Defendants have the right to re-sell JUUL products, having bought them in this country;
  - (h) the Defendants later sold JUUL-compatible products under the names Xuul and LuLu, which do not infringe the trade marks and were not passed off as JUUL products;
  - (i) Mr Juul's use of the surname Juul was not an instrument of deception.

Mr Juul also relied at the hearing on having recently applied to the Intellectual Property Office in the UK for a UK trade mark in the name Xuul.

21. In the event, there was not much dispute about many of the primary facts of this case, though interpretations of the significance of the facts differed, as did secondary conclusions of fact, or of mixed fact and law, to be drawn from the primary facts. I will return to what is conclusively established as a matter of fact shortly, but will first deal with the Defendants' applications.

### **Ms McVeigh's Application**

22. Ms McVeigh's application is advanced on two grounds. First, that the court was misled by the Claimants' initial evidence, in various respects, and so should decline to grant the Claimants relief. Second, that the claim is "wholly ill-founded and vexatious".
23. Ms McVeigh argues, first, that the Claimants were wrong to say that they only became aware of the [www.quickjuul.com](http://www.quickjuul.com) website on 28 September, since the address was visible on the Company's Twitter account, which was seen by the Second Claimant on 10 September. I am satisfied that, although the Claimants COULD have discerned the existence of the website at an earlier time, they did not in fact do so and

only became aware of it as a result of their investigations into Mr Juul when he applied for authority to sell JUUL products on 27 September. The Second Claimant took steps to seek to close the Twitter account but did not identify and pursue the content of the website at that stage. The fact that the quickjuul Instagram account was taken down on 26 September does not mean that the Claimants were aware of the website at that time.

24. The next point raised by Ms McVeigh is that the affidavit of Mr Powers dated 26 October 2018 is incorrectly sworn, in that the deponent's signature is dated 10/26/10 and the authentication of the signature on oath by a notary public is on the next page. The complaint about the date is clearly mistaken. The digit "8" in the date beneath the signature is merely compressed, so that it looks like a "0". The affidavit bears the date 26 October 2018 on its front page; it is authenticated by the notary public on 26 October 2018, and could not conceivably have been sworn in 2010. Although the verification by the notary public should have been on the same page as the deponent's signature, that is no more than a procedural irregularity that does not invalidate the evidence.
25. Ms McVeigh's third argument has more substance to it. She complains that the Claimants did not disclose in their evidence on the without notice application that Mr Juul had applied to become a retailer of JUUL products. The Second Claimant must have known that, and it was material in so far as the Claimants sought to attribute malign motives to Mr Juul. The judge hearing the application on the return date might have considered it to be a serious non-disclosure, though I am doubtful whether, when weighed against the other very clear evidence of impropriety by the Defendants, he would have set aside the injunctive relief on that ground. In any event, failure to disclose that fact cannot disentitle the Claimants to pursue their claim to final judgment and seek final injunctive relief.
26. In the first trap purchase, the pseudonym Millie Brown was adopted by the Claimants' agents. Ms McVeigh and Mr Juul (as it turns out entirely wrongly) assumed that the person in question was a Hollywood actress, and on that basis alleged that the Claimants were misrepresenting the timing of various events and e-mails on 28 September 2018. However, once it is established (as it now is) that the e-mails using the name Millie Brown were sent from the UK, the point entirely falls away as a criticism.
27. The final allegation is that the Claimants' witnesses and Counsel lied in suggesting that Mr Juul, who has a significant criminal record, was prosecuted by Joe Sidhu QC. One of the offences of which Mr Juul was previously convicted was an offence of harassing Mr Sidhu QC. The Claimants' evidence on the without notice application, and Mr Mellor QC, made it clear that they assumed (not that they knew) that the harassment of Mr Sidhu QC must have been because he prosecuted Mr Juul for other offences. In fact, that was an incorrect assumption. Mr Juul explained that he was not so prosecuted but carried out the harassment of Mr Sidhu because he was paid to do so, for reasons otherwise unconnected with him. In those circumstances, the Claimants have made no false representation to the court, but have merely honestly drawn an incorrect inference.
28. The first basis of Ms McVeigh's application therefore fails. The second basis overlaps substantially with Mr Juul's application for summary judgment. The first ground is

that the Claimants' case is weak. However, as presented by Mr Juul both on paper and orally in court, this part of the application was more like an application to strike out the claim as being vexatious and malicious than an application for summary judgment. I cannot, however, accept his and Ms McVeigh's contention that the claim was brought vexatiously or maliciously. It may be that, knowing what the Claimants now know about the Defendants' operations, they would have dealt with the apparently unlawful sale of grey market or counterfeit goods by writing a letter before action, explaining that what the Defendants were doing was unlawful and requiring undertakings to desist. However, the Claimants were faced with an apparently sophisticated set up. The website was of high quality, with social media platforms linking into it. These were associated with Mr Juul, whom they identified as someone who had served substantial prison sentences for fraud and other serious offences. The Claimants carefully carried out four trap purchases using the website, over a period of time, as a result of which they were confident that the Defendants were selling counterfeit products containing unlawful 5% strength e-liquids.

29. All of this happened within months of the Second Claimants starting its business operations in the UK. The potential for harm to its interests was obvious, as were the public health concerns about unknown liquids being illegally sold to consumers. The Claimants were not seeking to victimise Mr Juul because of his criminal record, as was suggested by him. Rather, his criminal record fuelled their concerns about the unlawful operation that they were facing. Mr Juul's suggestion that he was targeted because he had harassed a QC was absurd. The foundation for this – that Mr Mellor QC was a Bencher of the same Inn of Court as Mr Sidhu QC – was entirely wrong.
30. The truth was rather that Mr Juul's record led the Claimants to believe that they were potentially dealing with a serious criminal operation, which was why they applied without notice for a "doorstep" order, designed to stop the operation and identify its supply lines. The fact that the Claimants knew, but wrongly did not disclose, that Mr Juul had applied to become an approved seller of legitimate JUUL products does not alter the reasonableness of the Claimants' inferences and actions. An honourable, would-be retailer would not set up in business, selling (at best) grey market or (at worst) counterfeit products before hearing whether or not they had been approved as a legitimate seller.
31. The contention that the claim should be struck out, or judgment entered against the Claimants, for acting vexatiously or maliciously is unsustainable. I reject that ground for Ms McVeigh's and Mr Juul's applications.

### **The Summary Judgment Applications**

32. I turn then to the established facts, in order to consider whether there is no realistic prospect of the claim succeeding (as Mr Juul contends) or alternatively there is no realistic prospect of any defence to the Claimants' claim, as the Claimants suggest.
33. There is no doubt at all that Ms McVeigh and Mr Juul together set up a business, operated through the Company once it was incorporated, which started to sell either grey market 5% pods or counterfeit 5% pods, or both, using the name JUUL and the stylised JUUL trademark. The evidence clearly establishes that both of them were involved in setting up the social media platforms, controlling the Company and purchasing the stock. Significant steps were taken in September 2018, before the



incorporation of the Company, and the first sales were apparently made as early as 11 September. The domain name, quickjuul.com, was registered on 31 August and the Facebook page was set up by 17 September.

34. The Defendants accept that they intended to sell 5% strength pods, since this – as Mr Juul cogently explained to me – was where the real demand lay and, as he put it, any offence committed by re-selling goods that could not lawfully be sold in the UK was so trivial that no one would be bothered about it. The Defence contains a list of what Mr Juul considers to be the forty most petty criminal offences, with “drank alcohol under the age of 18” at number one and “put make-up on while driving” at number forty. The suggestion is that selling 5% strength ENDS pods was all of a piece with these supposedly venial sins. Mr Juul suggested that the Claimants’ focus on the illegality of the sale of 5% pods was a devious way to alert the court to the fact that he might be committing a further criminal offence while still on licence.
35. For reasons that I will explain, it makes no difference whether the pods being sold by the Defendants were grey market genuine 5% pods or counterfeit pods. Nevertheless, Mr Juul’s case is that the goods were genuine. His evidence is that he and Ms McVeigh obtained stock from legitimate retailers, “under the counter”, and from various markets around the country. In response to the Order of 31 October to give the Claimants all documents relating to the acquisition and sale of stock, Mr Juul and Ms McVeigh produced only two invoices dated 26 October 2018 from Ecigwizard in Bristol, for small quantities of purchases costing less than £30. Mr Juul alleged that genuine 5% strength pods had been bought on this occasion.
36. As a result of further court orders, evidence was obtained from Ecigwizard. This evidence demonstrated that the pods were purchased over the counter in an apparently legitimate transaction, financed from Ms McVeigh’s bank account. Aaron Taylor, the managing director of ecigwizard, made a witness statement explaining that his company was an entirely legitimate retailer, which had no access to 5% strength pods and would not have risked its status as an authorised retailer of JUUL products by unlawful sale of 5% pods. No other specific evidence was given by Ms McVeigh or Mr Juul as to the provenance of the equipment and pods that they sold, although they alleged that purchases were made from market stalls in various towns in the UK.
37. In an e-mail dated 12 December 2018, Mr Juul complained about the heavy-handed tactics of the Claimants, explaining that “a simple letter would have sufficed re us selling products that have clearly come from DHGate.com”. The letter further asserted that:

“when Juul UK ignored my request to distribute, I found that DhGate [sic] was selling your products as genuine”.

DHGate.com is a Chinese website that acts as a platform for retail of all sorts of goods, including ENDS. In oral submissions, Mr Juul was willing to acknowledge that counterfeit JUUL products are being sold “in bulk” on DHGate.com.
38. Norwich Pharmacal disclosure from Ms McVeigh’s bank showed that she spent over £4,700 between 12 September and 18 October 2018 buying unidentified goods from DHGate.com. When asked about these transactions, her explanation was not to deny that what was purchased was fake JUUL products, but to assert that only a small

proportion of these orders had been delivered in the UK. She said that the rest had been sent to other countries, and this was alleged to be capable of proof by reference to payments of less than £200 made to DHL for duty and VAT payable on imported goods. There was no evidence to support this assertion. Whether it is true or not, on her own admission it is evident that some (almost certainly fake) JUUL vaping products were obtained from DHGate.com and imported into this country in September and October 2018, at about the time at which Ms McVeigh and Mr Juul were operating, prior to the service of the without notice search order.

39. As a result of the service of that order on 1 November, rapid changes occurred - superficially at least - in the control of the business that Ms McVeigh and Mr Juul had established. Mr Juul's evidence was that the business had been sold on 23 October to the Fifth Defendant, controlled by Mr Wilson, for a consideration of £1. Quite why there should have been a sale of what Mr Juul thought was going to be a very lucrative business for £1 over a week before the without notice application was never explained. The sale is in any event clearly a fiction.
40. The change in control of the Company notionally took effect by documents registered at Companies House on 3 November. In his witness statement, however, Mr Juul said:

“I have resigned as a Director of QuickJuul Limited but still maintain a significant control of the Company”.

There was no attempt made by Mr Juul to dispute his continued involvement in the business of selling ENDS using the names Juul or Xuul. I am sure that Mr Juul continued to exercise control over the Company notwithstanding his resignation as a director. He resigned as a director when, according to his account, he became aware for the first time that he had been disqualified from acting as a director of a company as part of a sentence for offences of fraud. The evidence also clearly demonstrates that Ms McVeigh continued to be involved in the business too. Between 28 October and 19 November her bank account funded payments for pods, fees payable to the IPO, charges payable to companies hosting domain names, Companies House and other items. The domain company in question is the host of the [www.quickjuul.com](http://www.quickjuul.com) domain name.

41. A letter to the Judicial Conduct and Investigations Office of 14 December 2018, oddly written on the letterhead of Mr Wilson's home address, complained that Snowden J and Master Price had misused their judicial status for personal gain, alleging a deliberate fraud to extract Mr Wilson's domain name without his permission and asking for the matter to be investigated. Mr Wilson appears to assert control over the web domain. Previously, on 12 December, Mr Juul had written a similar letter to the Claimants' solicitors, asserting that the website would be moved around the world to escape the Claimants' attempts to close it down, and asserting that the Fifth Defendant would run rings round them globally and that Mr Juul had “given the command to wreak havoc globally against Juul”. This coincidence of correspondence strongly suggests (assuming that Mr Wilson's correspondence is genuine, as on its face it appears to be) that Mr Juul and Mr Wilson are acting in concert and that they and Ms McVeigh are parties to a common design to infringe the Claimants' trademarks and pass off counterfeit goods as being in some way associated with JUUL products.

42. By the time that those letters were written, the website had changed its appearance, in an apparent attempt to demonstrate some compliance with court orders previously made yet at the same time continuing the Company's unlawful business activities. Following a brief closure of the website for "some scheduled maintenance", it reappeared first advertising new domain ownership and then from 17 November selling pods under the brand name XUUL. However, the website designs made use of the Pod Mark and Vaporiser Mark and referred to the name QuickJuul in the text, with an assertion that "Xuul is Better than Juul". At that time the website was still named www.quickjuul.com. The pods being advertised were 5% strength.
43. The Jasons-Destiny eBay pages were used to sell these items, indicating the item location as Burry Port, which is in West Wales near to Ms McVeigh's home address, and giving Mr Juul's address in Gravesend as the seller information. Images on these pages use JUUL packaging and the Stylised Mark as well as Pod and Vaporiser Marks.
44. Given that the items being sold were, on the basis of the evidence that I have already summarised, fake products emanating from China, these images are clearly being used by the Defendants as instruments of deception and, on the evidence of some of those who made purchases from Jason's destiny, did actually deceive the purchasers into thinking that they were buying Juul products.
45. By the end of November 2018, Jasons-Destiny eBay page was selling pods using images of the Claimants' Pod Mark, advertised as "Juul Compatible", describing them as "no frills 5%" and asserting that they are made in the same place as JUUL products, which on the Claimants' evidence is clearly false. The business seller is identified as QuickJuul Ltd at the Company's registered address.
46. On 27 November, the seller identity changed to Quick Xuul Ltd, of the same address, but with an e-mail address of sales@quickjuul.com. The terms and conditions of sale state that "Quick Xuul Ltd may be referred to as QuickJuul.com", so Mr Juul is clearly mingling the names Xuul and Juul. On 3 December there were advertised "JUUL or XUUL 5% VAPE PODS", described as equal to or better than the leading brand product and made in the same place.
47. By 12 December 2018, the eBay pages had changed to use the name xxx-trading, but were still selling "Juul Pods compatible" products and still alluding to the identity Quick Juul in the seller details and terms and conditions.
48. Up-to-date evidence of Mr Sharp in his tenth witness statement dated 14 January 2019 shows that Juul-compatible or Xuul products are still being advertised in the same way. On 8 January 2019, the Claimants were notified by the UK Intellectual Property Office that Quick Xuul had applied for a trademark in a design bearing the words "QUICKJUUL" in capitals on a green dragon motif. As a matter of law, the pending UK application has no impact on the Claimants' EU registered trademarks.
49. It is very clear that the Defendants have infringed and continued to infringe the Claimants' trademarks. The Word Mark, Stylised Mark and the Pod and Vaporiser Marks are all registered EU Trade Marks conferring on the Claimants exclusive rights in them: EU Trade Mark Regulation 1001/2017, Article 9.1. By initially advertising apparently genuine JUUL products, by using images of the packaging of JUUL

products, including the stylised form of the name, and by continuing to use the name Juul, or Quick Juul, in association with the products advertised for sale, the Defendants infringed these trademarks. By continuing to use images of the Pod and Vaporiser Marks to sell products alleged to be compatible with Juul equipment, and as being as good as or better than JUUL products, the Defendants continued to infringe those marks. This is a clear case of sale of identical goods using identical marks, falling within Article 9.2(a).

50. These are the straightforward instances of infringement to which, factually, the Defendants have no credible answer. I also find, beyond any reasonable doubt, that the Defendants were knowingly acquiring for re-sale goods that were fake copies of JUUL products, not as they allege grey market genuine US 5% products. The facts advanced by the Defendants in support of that case were paper thin and were disproved (so far as they were supported by any specific evidence of the Defendants) by the evidence that the Claimants deployed in response, in particular the evidence from Ecigwizard, from Ms McVeigh's bank account showing the purchases from DHGate.com and Mr Juul's effective admission that that was the source of products they were selling. Clearly, at one stage, Ms McVeigh and Mr Juul did buy some genuine JUUL products from Ecigwizard in Bristol. But these were not the products that the Defendants were attempting to sell and were only a very small quantity.
51. As a matter of law, any answers or arguments advanced by the Defendants are unsustainable. The fact that the Claimants have no exclusivity in the manufacture of vaporisers and pods containing e-liquids is beside the point. The point is that the Claimants do have exclusivity in the use of the name Juul, and in the trademarked designs, in connection with the sale of vaporiser equipment, pods, liquids and accessories. The Claimants have no exclusive right to use the name Juul generally, but they do have the exclusive right to use it in that connection. The suggestion that the Claimants engage in anti-competitive selling practices is wholly unsubstantiated. The Claimants clearly have the right to decide where and by whom their products are first sold in the UK and in other EU countries. The suggestion that there is a cartel in operation, whether fixing prices or otherwise, was no more than assertion, with no evidence to support it and no properly pleaded basis on which such an allegation could be established. In any event, there is no nexus between the alleged unlawful behaviour of the Claimants and the established unlawful behaviour of the Defendants.
52. There might, perhaps, otherwise be a triable issue about whether some of the goods captured by the trap purchases were authentic or counterfeit. The Defendants have had no opportunity to examine the trap purchases. The later purchases were not examined physically by the Claimants in California, who only saw photographs of them. However, even if some of the pods were authentic grey market 5% products, they were not lawfully sold in the UK because the Claimants did not consent to their sale in the UK or in the EU. The Tobacco and Related Products Regulations 2016 (SI 2016 No.507) prohibit the sale in the UK of e-liquids containing nicotine salts at a higher concentration than 20mg/ml (equating to approximately 1.7% volume). I was told by Mr Mellor QC that this was also the effect of the EU Tobacco Products Directive 2014/40/EU so far as other EU member states are concerned, whether or not it has been replicated by national legislation. That means that the 5% pods cannot have been lawfully sold in the UK or in the EU. There can therefore be no defence of extinction of the Claimants' rights by prior sale. Given that any sale of 5% pods

would be unlawful, it cannot credibly be suggested that the Claimants have impliedly consented to sale of such products on the grey market.

53. Although JUUL has only recently been launched in this country and more recently in France and Germany, it is clear that, following enormous success in the United States, the Claimants have quickly established a reputation and goodwill in this country. The “get-up” of the products and the trade marks are highly distinctive. There is no realistically arguable defence to the passing off claim that the Claimants have no goodwill or reputation because their products are harmful to health. Although, as the Claimants accept, there is a substantial worldwide industry in counterfeit goods, apparently emanating in large quantities from China, it is not seriously arguable that the Claimants’ reputation is so tarnished, as a result of customers being unable to distinguish genuine goods from counterfeit goods, that their goodwill and reputation have been lost. The Claimants are fighting hard to preserve their reputation against real threats to it, which explains the urgent relief that they sought in this case.
54. Slightly more difficult is the use of the names Xuul and Quick Xuul, in place of Juul and Quick Juul. Clearly, the names are not identical but are similar. Mr Juul explained to me that the “x” was chosen because it exists in the name of the Fifth Defendant. That may have been an attraction, but I am quite satisfied that it was chosen so as to be – visually and aurally – as similar as possible to the name Juul, as a reaction to the injunctions granted on 31 October and 8 November 2018 restraining further use of the name Juul or the stylised version of that name. The name Xuul was similar and was used, at all times, alongside the name Juul and with images of the Claimants’ Pod and Vaporiser Marks in the sale of identical goods.
55. There is, in my judgment clearly a likelihood of confusion on the part of the public from the use of the name Xuul and confusion was the intention. In these circumstances, infringement under Article 9.2(b) is established in relation to the use of the names Xuul and Quick Xuul.
56. Once the Defendants had decided to denigrate the Claimants in their advertising material, rather than pass off their products as genuine JUUL products, the use of the name Xuul and the design marks amounted to taking unfair advantage of the Claimants’ trade marks or causing detriment to their distinctive character and repute. The Defendants were trying to gain some association in the mind of purchasers with the Claimants’ products, even while identifying their products as being different from – though as good as or better than, and even made in the same place as – the Claimants’ products. The fact that the advertising material on the website and eBay pages made it clear that what were being sold were not JUUL products does not mean that the use of the name Xuul was not taking unfair advantage the Claimants’ marks. This is clearly not a case of genuine comparative advertising and all the circumstances and the cumulative effect of the use of the disputed signs have to be considered for the purposes of Article 9.2(b) and (c): Specsavers International Healthcare Limited v Asda Stores Limited [2012] EWCA Civ 24; [2012] FSR 19.
57. So far as the passing off claim is concerned, the Defendants’ sales and attempted sales have misrepresented counterfeit or similar goods as being JUUL products, or as being associated with the Claimants in some way. There is evidence that purchasers were actually deceived. The name of the Company and of the website were in themselves instruments of deception, as subsequently used by the Defendants, even if Mr Juul

could establish at trial that when they were originally set up to be authorised by the Claimants to sell JUUL products. So far as misrepresentation is concerned, it matters not whether this was intentional or unintentional, though all the evidence in this case points in the direction of its being intentional, at least from the time that Ms McVeigh was acquiring large quantities of products from DHGate.com. Damage, or risk of damage, to the Claimants' reputation and business is self-evident. Accordingly, I conclude that the claim in passing off is clearly established: the Defendants appear to have no properly arguable defence.

### **Relief**

58. I therefore, will enter final judgment for the Claimants against the Company, Ms McVeigh and Mr Juul and judgment in default of acknowledgment of service against Mr Wilson. The Fifth Defendant does not exist and the proceedings against it are therefore ineffective.
59. As for the relief to be granted, there will be declarations of infringement of each of the four EU trademarks and final injunctions restraining the use of Juul, Xuul, Quick Juul, Quick Xuul, the Pod Sign or the Vaporiser Sign in the course of trade in ENDS products, or otherwise infringing the EU trademarks or passing off goods as goods of the Claimants. I will also make an order for delivery up of any infringing products in the possession, custody or control of any of the Defendants. There will be an order that each of the Defendants must take or procure the taking of all steps in their power necessary to assign the domain names quickjuul.com and quickxuul.com to the Claimants. The Defendants must take steps to procure a change in the name of the Company to a name which does not incorporate the words Juul or Xuul. There will be an inquiry as to damages or, at the Claimants' option, an account of profits and an order for payment of all sums found due.
60. I decline to make an order restraining the Defendants from selling or supplying any ENDS products containing nicotine content of more than 1.7% strength. This the Claimants sought only in the draft order annexed to their application but not in their Amended Particulars of Claim. Further action against the Defendants in that regard is more appropriately a matter for Trading Standards or the Police and is not necessary to protect the legitimate interests of the Claimants in view of the other relief that I have decided to grant.
61. I also decline to make any order that Mr Juul change his surname. Although he may have changed his name in order to use it as an instrument of deception, there is no evidence that he has in fact done so in a personal capacity. He has not argued that his surname affords any defence under Article 14 of the EU Trade Mark Regulation. The order sought raises a real issue under Article 8 of the Convention and the Human Rights Act 1998 as to the appropriateness of granting such relief. In my judgment, in view of the other injunctive relief that I will grant, it is not necessary to require Mr Juul to change his surname in order to give appropriate protection to the Claimants.
62. I invite the Claimants to provide a draft order in accordance with the terms of my judgment and any other orders that they seek, and to circulate this draft to the First to Fourth Defendants at their previously identified email addresses in good time before the hand down hearing.

