

O/199/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003351965

BY ALLDAY PHARMA PVT LTD.

TO REGISTER THE TRADE MARK:

SWISSLIFE FOREVER

IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 415228 BY

SWISSE WELLNESS PTY LTD

BACKGROUND AND PLEADINGS

1. On 8 November 2018, ALLDAY PHARMA PVT LTD (“the applicant”) applied to register the trade mark **SWISSLIFE FOREVER** in the UK. The application was published for opposition purposes on 23 November 2018 and registration is sought for the following goods:

Class 5 Vitamins; Dietary food supplements; Food supplements; Mineral food supplements.

2. On 23 January 2019, Swisse Wellness Pty Ltd (“the opponent”) opposed the application based upon sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”).¹ Under section 5(2)(b), the opponent relies upon the following European Union trade marks (“EUTM”):



EUTM no. 3252152

Filing date 2 July 2003; Registration date 4 February 2005

(“the First Earlier Mark”)



EUTM no. 10759454

Filing date 26 March 2012; registration date 14 September 2012

(“the Second Earlier Mark”)

¹ The section 5(3) ground was added following the filing of a Form TM7G dated 15 July 2019 which was accepted by the Tribunal.

SWISSE

EUTM no. 8764839

Filing date 17 December 2009; registration date 13 July 2010

("the Third Earlier Mark")

SWISSE

EUTM no. 10759371

Filing date 26 March 2012; registration date 14 September 2012

("the Fourth Earlier Mark")

3. The opponent relies upon all goods for which the earlier marks are registered (as set out in the Annex to this decision) and claims that there is a likelihood of confusion because the respective goods are identical or similar, and the marks are similar.

4. Under section 5(3) the opponent relies upon the Second, Third and Fourth Earlier Marks only. The opponent claims that it has a reputation in respect of the following goods:

Second Earlier Mark:

Class 5 Mineral food supplements; herbal formulations, mineral supplements and nutritive elements including vitamins, minerals, nutritive elements and herbal formulations in capsule, tablet and liquid form; preparations of trace elements, vitamins, vitamin preparations, tonics, and pharmaceutical preparations for medicinal purposes.

Third Earlier Mark:

Class 5 Vitamins and vitamin preparations; herbal formulations; mineral supplements; nutrient supplements including ginseng, anti-oxidants, co-enzyme Q10, evening primrose oil.

Class 29 Processed foods containing essential fatty acids, vitamins and minerals in the form of powder, tablet, liquid or capsule.

Class 30 Processed foods containing herbs, vitamins and minerals in the form of powder, tablet, liquid or capsule.

Fourth Earlier Mark:

Class 5 preparations of trace elements, vitamins, vitamin preparations, tonics, and pharmaceutical preparations for medicinal purposes; antiseptics and disinfectants; herbs and products containing herbs and herbal extracts for medicinal purposes; nutritional additives for medicinal purposes; mineral food supplements; herbal formulations, mineral supplements and nutritive elements including vitamins, minerals, nutritive elements and herbal formulations in capsule, tablet and liquid form; nutrient supplements including ginseng, anti-oxidants, co-enzyme Q10, evening primrose oil; processed foods containing essential fatty acids, herbs, vitamins and minerals in the form of powder, tablet, liquid or capsule and these goods have health benefit or are meal replacement.

5. The opponent claims that use of the applicant's mark would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character and/or reputation of the earlier marks.

6. The applicant filed a counterstatement denying the claims made and putting the opponent to proof of use.

7. The opponent is represented by Handsome IP Ltd and the applicant is unrepresented. Only the opponent filed evidence, which was accompanied by written submissions. I have read those submissions in their entirety and will refer to them below where necessary. Neither party requested a hearing, nor did they file written submissions in lieu of attendance. This decision is taken following a careful perusal of the papers.

PRELIMINARY ISSUES

8. In its written submissions, the opponent states:

“It is submitted that the Application is contrary to the provisions of Section 5(2)(b) and Section 3(a) of the Act.”

9. However, as the opponent has not pleaded a section 3 objection, I will proceed on the basis that this was a typographical error.

10. In its Counterstatement, the applicant has made reference to an “international mark” relied upon by the opponent in these proceedings which is registered for “bleaching preparations”. As none of the opponent’s marks are international registrations or marks which cover “bleaching preparations”, I will proceed on the basis that this submission has been included in error.

EVIDENCE

11. The opponent filed evidence in the form of the witness statement of Liza Zhou dated 15 July 2018. Ms Zhou is the Associate Legal Director of a business called Health and Happiness (H&H) Hong Kong Limited (“HH”), a position she has held since December 2016. HH acquired an 83% share in the opponent in 2015 and acquired the remaining 17% in 2017. I have read Ms Zhou’s evidence in its entirety and summarise it below only to the extent that I consider necessary.

12. Ms Zhou states that Swisse has been used as a trade mark by the opponent in the UK since 2015. Ms Zhou states that the mark has been used on vitamins, supplements and herbal formulations. Ms Zhou has provided the following sales figures in relation to these goods sold under the Swisse mark in the UK:

March 2015 to June 2016	2,738,760 USD
July 2016 to September 2016	306,110 USD
October 2016 to December 2016	362,380 USD
January 2017 to March 2017	64,560 USD
April 2017 to June 2017	696,260 USD
July 2017 to September 2017	180,060 USD

TOTAL

4,348,130 USD²

13. Ms Zhou has provided photographs which, she states, were taken in 2015.³ These show vitamin and herbal products being sold under the mark Swisse in the high street pharmacy retailer Boots.

14. Print outs from the opponent's website show that the mark Swisse has been in use on its UK-based website throughout the relevant period.⁴ These confirm that the opponent sells "vitamins, minerals and botanical extracts". The opponent's website has had 85,000 visits since March 2018.⁵

15. In August and September 2016, the opponent's brand was advertised in a number of publications including Take A Break, Woman's Weekly, Telegraph Magazine, Times Magazine, Daily Mail, Daily Telegraph and The Guardian.⁶

16. Ms Zhou has provided two prints outs from the Team GB Facebook page which state: "With 7 days to The Olympic Games, our athletes need you more than ever. We're teaming up with Swisse Vitamins to support your nutrition, so you can cheer on the team from start to finish!".⁷ These posts also display the First and Second Earlier Marks and have been viewed by 15,900 and 9,900 people respectively. The posts are undated, but Ms Zhou states that they are taken from 2016.

DECISION

The Law

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

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

² Exhibit A

³ Exhibit B

⁴ Exhibit C

⁵ Exhibit D

⁶ Exhibit E

⁷ Exhibit F

(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.”

18. Section 5(3) of the Act states:

“5(3) A trade mark which -

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

19. By virtue of their earlier filing dates, the trade marks upon which the opponent relies qualify as earlier trade marks pursuant to section 6 of the Act.

Proof of Use

20. As the opponent’s marks had completed their registration process more than 5 years before the date of the application in issue, they are all subject to proof of use pursuant to section 6A of the Act. The applicant has requested that the opponent provide proof of use of its marks. The relevant statutory provisions are as follows:

“Raising of relative grounds in opposition proceedings in case of non-use

6A-(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form of which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

21. Section 100 of the Act is also relevant, which reads:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

22. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier marks is the 5-year period ending with the date of the application in issue i.e. 9 November 2013 to 8 November 2018.

23. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV*

[EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

24. As the earlier marks are all EUTMs, the comments of the Court of Justice of the European Union (“CJEU”) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, are relevant. The court noted that:

“36. It should, however, be observed that [...] the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And:

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

And:

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise

all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77)".

At paragraphs 57 and 58, the court held that:

"Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to 'genuine use in the Community' within the meaning of that provision.

A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the mark concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity."

25. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. reviewed the case law since the *Leno* case and concluded as follows:

"228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issue in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guilford, and thus a finding which still left open the possibility of conversion of the community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State." On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use."

26. The General Court (“GC”) restated its interpretation of *Leno Marken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union.

27. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTMs, in the course of trade, sufficient to create or maintain a market for the goods/services at issue in the Union during the relevant 5-year period. In making the required assessment I am required to consider all relevant factors, including:

- a. The scale and frequency of the use shown;
- b. The nature of the use shown;
- c. The goods and services for which use has been shown;
- d. The nature of those goods/services and the market(s) for them; and
- e. The geographical extent of the use shown.

28. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is, therefore, not genuine use.

29. There are examples of all of the earlier marks appearing in the opponent’s evidence as registered.

30. I recognise that an assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.⁸

31. It is clear that the sale of goods under the Third and Fourth Earlier Marks had generated over 4million USD in sales between March 2015 and September 2017. The opponent has clearly sold vitamin and herbal products in Boots, a national retailer, and through its own website during the relevant period. The fact that the opponent sells goods through a national retailer, suggests that the geographical extent of the use would be throughout the UK and, as noted above, use in one Member State can be sufficient to constitute genuine use of an EUTM. There are examples of the First and Second Earlier Marks in use on Facebook posts in which the opponent has been referenced. Taking the evidence as a whole into account, I am satisfied that the opponent has demonstrated genuine use of the earlier marks during the relevant period. I will now turn to assess what would be considered a 'fair specification'.

32. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

33. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

⁸ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria’s Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 (“Asos”) at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

34. The evidence shows that the opponent has used the earlier marks in relation to vitamins, minerals and herbal products. I do not consider there to be any evidence to support a finding that there has been use in relation to the broader range of goods for which the opponent's marks are registered. Consequently, I consider the following to be fair specifications for the earlier marks:

The First Earlier Mark:

Class 5 Vitamins, herbal formulations, mineral supplements in capsule, tablet and liquid form.

The Second Earlier Mark:

Class 5 Vitamins; mineral food supplements; herbal formulations in capsule, tablet and liquid form.

The Third Earlier Mark:

Class 5 Vitamins; herbal formulations; mineral supplements.

The Fourth Earlier Mark:

Class 5 Vitamins; mineral food supplements; herbal formulations in capsule, tablet and liquid form.

Section 5(2)(b)

35. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.



Comparison of trade marks

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

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

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

38. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
<div data-bbox="354 286 639 409" style="text-align: center;">  </div> <p data-bbox="354 465 635 506" style="text-align: center;">(First Earlier Mark")</p> <div data-bbox="336 584 651 698" style="text-align: center;">  </div> <p data-bbox="336 723 651 763" style="text-align: center;">(Second Earlier Mark)</p> <p data-bbox="432 835 555 869" style="text-align: center;">SWISSE</p> <p data-bbox="264 891 724 931" style="text-align: center;">(Third and Fourth Earlier Marks)</p>	<p data-bbox="930 309 1267 342" style="text-align: center;">SWISSLIFE FOREVER</p>

39. The First Earlier Mark consists of the word Swisse presented in white title case font on a black oval background, which is itself presented on a red rectangular background. The 'dot' on the letter 'i' in the word Swisse is presented in the same colour red as the rectangular background. The word SWISSE plays the greater role in the overall impression of the mark, with the backgrounds and use of colour playing a lesser role. The Second Earlier Mark consists of all the same elements as the First Earlier Mark, in slightly different proportions. This does not impact upon the overall impression of the mark and so the same findings apply. For the purposes of my assessment, I will deal with both the First and Second Earlier Marks together as the slightly different proportions will not make an impact on my findings. The Third and Fourth Earlier Marks consist of the word SWISSE presented in uppercase font. There are no other elements to contribute to the overall impression of the marks which lies in the word itself.

40. The applicant's mark consists of the words SWISSLIFE FOREVER, presented in uppercase font. The opponent submits that the words LIFE FOREVER "allude to the properties of the goods – namely that taking vitamins extend one's life and these words therefore add little to the overall distinctiveness of the trademark leaving the dominant

element being the word 'SWISS'. I do not agree that the average consumer will dissect the mark in this way. The mark as a whole is likely to be taken to mean Swiss life continuing forever. Consequently, I consider that the overall impression lies in the combination of these words as a whole.

Visual Comparison

The Applicant's Mark and the First and Second Earlier Marks

41. Visually, the marks coincide in that the word elements all begin with the same four letters SWISS-. However, in the applicant's mark these letters are followed by -LIFE FOREVER whereas in the First and Second Earlier Mark they are followed by the letter -E. There is also the point of difference created by the use of colour in the First and Second Earlier Marks, although I recognise that registration of a mark in black and white (as in the applicant's mark) will cover use of that mark in any colour. The opponent notes that the beginnings of trade marks tend to make more of an impact than the ends. That is, of course, true. Notwithstanding that, when taking the marks as a whole into account, I consider the marks to be visually similar to a low degree.

The Applicant's Mark and the Third and Fourth Earlier Marks

42. Visually, the same comparison applies as for the First and Second Earlier Marks, save for the fact that there are not the added points of difference created by the use of colour and the presence of the oval and rectangular background. I consider the marks to be visually similar to between a low and medium degree.

Aural Comparison

43. Aurally, the opponent's marks will all be pronounced identically. Consequently, the same aural comparison will apply for each. The applicant's mark will be pronounced SWIS-LYF-FORE-EVER. The opponent's marks are likely to be pronounced SWIS. I consider the marks to be aurally similar to between a low and medium degree.

Conceptual Comparison

44. Conceptually, the opponent's marks are likely to be seen as a reference to the country of Switzerland or its language. It is likely to be seen as a misspelling or foreign language spelling of the word 'Swiss'. The word SWISSLIFE in the applicant's mark will be seen as a reference to life in Switzerland and the word FOREVER will be given its ordinary dictionary meaning i.e. to continue indefinitely. In the context of the mark as a whole, I consider that the applicant's mark is likely to be seen as a reference to life in Switzerland continuing indefinitely. I do not consider the use of colour or background to contribute in any meaningful way to the message conveyed by the First and Second Earlier Marks. Overall, I consider the marks to be conceptually similar to no more than a medium degree.

Comparison of goods

45. As the Third and Fourth Earlier Mark share the greater degree of similarity with the applicant's mark and, therefore, represent the opponent's best case, I will proceed with my analysis on the basis of these marks. In light of my findings above, the competing goods are as follows:

Opponent's goods	Applicant's goods
The Third Earlier Mark <u>Class 5</u> Vitamins; herbal formulations; mineral supplements.	<u>Class 5</u> Vitamins; Dietary food supplements; Food supplements; Mineral food supplements.
The Fourth Earlier Mark <u>Class 5</u> Vitamins; mineral food supplements; herbal formulations in capsule, tablet and liquid form.	

46. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

47. 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.

48. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the GC stated that:

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

49. “Vitamins” appears identically in both the opponent’s specification and the applicant’s specification.

50. “Vitamins”, “herbal formulations” and “mineral supplements” in the opponent’s specification could all fall within the broader categories of “dietary food supplements” and “food supplements” in the applicant’s specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*. If I am wrong in this finding then there will be overlap in use because both goods will be intended to improve a person’s wellbeing through ensuring that their regular diet is supplemented with the appropriate nutrients. There will be overlap in user, method of use, nature and trade channels. I consider the goods to be highly similar.

51. “Mineral food supplements” appears identically in both the applicant’s specification and the opponent’s specification.

The average consumer and the nature of the purchasing act

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

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

53. The average consumer for the goods will be a member of the general public. The goods are likely to be reasonable in price and purchased reasonably frequently. I recognise that in some circumstances the average consumer will pay a higher degree of attention when purchasing vitamins and supplements, such as where the goods are purchased in order to combat a particular medical issue or deficiency. However, even where this is not the case, various factors will be taken into account such as the benefits provided by the particular product, the flavour and the particular ingredients. Consequently, I consider that at least a medium degree of attention will be paid during the purchasing process.

54. The goods are likely to be selected from the shelves of a retail outlet or their online or catalogue equivalent. Visual considerations are, therefore, likely to dominate the selection process. However, I recognise that advice may be sought from retail assistants or specialists, particularly where the goods are purchased to target a particular deficiency. I do not, therefore, discount an aural component to the purchase.

Distinctive character of the earlier trade mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other

undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

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

56. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

57. I will begin by assessing the inherent distinctiveness of the mark. I have found that the opponent's marks will be seen as a reference to the country Switzerland, or to the Swiss language. This will be viewed by the UK average consumer as a reference to the geographical origin of the goods. Consequently, I consider the Third and Fourth Earlier Marks to be inherently distinctive to between a low and medium degree. The opponent has, of course, filed evidence of the use made of the mark in the UK. Whilst the sales figures provided by the opponent are not insignificant they do not, in my view, represent a high market share in what is, undoubtedly, an extensive market in the UK. However, the evidence does show that the opponent has advertised its marks in various national publications over a period of time during 2016. Further, the opponent's marks have been referenced in relation to a significant sporting event i.e. the Olympics, in social media posts that have been viewed by thousands of people. Taking

the evidence as a whole into account, I consider that the distinctive character of the opponent's marks has been enhanced to no more than a medium degree through use.

Likelihood of confusion

58. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade marks, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

59. I have found the marks to be visually and aurally similar to between a low and medium degree and conceptually similar to no more than a medium degree. I have found the opponent's marks to have between a low and medium degree of inherent distinctive character which has been enhanced to no more than a medium degree through use. I have identified the average consumer to be a member of the general public who will purchase the goods primarily by visual means (although I do not discount an aural component). I have concluded that at least a medium degree of attention will be paid during the purchasing process, although I recognise the attention paid may be higher where the goods are purchased to combat a particular medical issue or deficiency. I have found the parties' goods to be identical or highly similar.

60. I consider that the visual, aural and conceptual differences between the marks are sufficient to avoid them being mistakenly recalled or misremembered as each other. I

do not consider that the different endings of each mark will be overlooked by the average consumer, notwithstanding the principle of imperfect recollection. I consider this to be the case even where the marks are used on identical goods.

61. A finding of indirect confusion should not be made merely because two marks share a common element.⁹ In this case, the common element is the letters SWISS-. However, the addition of the letter -E in the opponent's marks and the words -LIFE FOREVER in the applicant's mark mean that this common element is incorporated into different words. In my view, this prevents these marks from being natural variants or brand extensions of each other. In my view, the average consumer is likely to view the common element SWISS- as being a reference to products that originate from or, in the case of the applicant's marks refer to life in, Switzerland rather than identifying goods that originate from the same or economically linked undertakings. I do not consider there to be a likelihood of indirect confusion.

62. As I have found there to be no likelihood of indirect confusion in respect of the Third and Fourth Earlier Marks, there is also no likelihood of confusion with the First and Second Earlier Marks as they share a lesser degree of similarity with the applicant's mark.

63. The opposition based upon section 5(2)(b) is unsuccessful.

Section 5(3)

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

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

⁹ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

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

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

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

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

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

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

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs

particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

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

65. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the earlier marks have achieved a level of knowledge/reputation amongst a significant part of the public. Secondly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the later mark. Thirdly, assuming that the first and second conditions have been met, section 5(3) requires that one or more of the types of damage claimed will occur and/or that the applied-for mark will, without due cause, take unfair advantage of the reputation and/or distinctive character of the reputed mark. It is unnecessary for the purposes of section 5(3) that the goods be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

66. The relevant date for the assessment under section 5(3) is the date of the application i.e. 8 November 2018. As I have found the Third and Fourth Earlier Marks to be the most similar to the applicant's mark, I will assess the opposition based upon section 5(3) in relation to these marks in the first instance, as these represent the opponent's best case.

Reputation

67. 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.”

68. In determining whether the opponent has demonstrated a reputation for the goods in issue, it is necessary for me to consider whether its mark will be known by a significant part of the public concerned with the goods. In reaching this decision, I must take all of the evidence into account including “the market share held by the trade mark, the intensity, geographical extent and duration of use, and the size of the investment made by the undertakings in promoting it.”

69. As the earlier marks are EUTMs, they must have a reputation in a substantial part of the EU. As noted above, the UK can, itself, amount to a substantial part of the EU. The opponent’s UK sales figures are not insignificant. However, they do not represent

a particularly significant market share within the UK. I recognise that, given the goods are sold in a national retailer, which is likely to indicate sales throughout the UK. Further, there has been a reasonable amount of advertising in national publications which would have raised awareness of the opponent's brand. The opponent's marks have also been referenced in relation to the Olympics in social media posts by Team GB, which have been viewed by thousands of people. Taking all of this into account, I am satisfied that the opponent has demonstrated a small reputation in the UK in relation to vitamins, mineral supplements and herbal formulations. I consider that this is sufficient to demonstrate a reputation within a substantial part of the EU.

Link

70. 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

I have found the marks to be visually and aurally similar to between a low and medium degree and conceptually similar to no more than a medium 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

I have found the parties' goods to be highly similar or identical. The relevant public for the goods will be identical i.e. members of the general public.

The strength of the earlier mark's reputation

I have found the opponent to have a small reputation.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

The earlier marks are inherently distinctive to between a low and medium degree, which has been enhanced to no more than a medium degree through use.

Whether there is a likelihood of confusion

I have found there to be no likelihood of confusion.

71. Given the opponent's only small reputation and the fact that there is only a low to medium degree of visual and aural similarity, and no more than a medium degree of conceptual similarity, between the marks, I do not consider that a link will be made by the relevant public. Notwithstanding the fact that the parties' respective goods are identical or highly similar, I consider that the differences between the marks will be sufficient to avoid a link being made. If any link is made, it would be too fleeting for the image of the earlier marks to transfer to the later mark in such a way as to give it an unfair advantage.

72. As I have found no link in respect of the Third and Fourth Earlier Marks, which share the greater degree of similarity with the applicant's mark, there will also be no link in respect of the Second Earlier Mark.

73. The opposition based upon section 5(3) is unsuccessful.

CONCLUSION

74. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

75. As the applicant has been successful, it would normally be entitled to a contribution towards its costs. However, as the applicant is unrepresented, at the conclusion of the

evidence rounds the tribunal wrote to the applicant and invited it to indicate whether it intended to make a request for an award of costs. The applicant was informed that, if so, it should complete a pro-forma, providing details of its actual costs and accurate estimates of the amount of time spent on various activities in the defence of the opposition. The applicant was informed that “if the pro-forma is not completed and returned, costs, other than official fees [...] may not be awarded”. The applicant did not file a costs pro-forma. That being the case, I make no award of costs.

Dated this 30th day of March 2020

S WILSON

For the Registrar

ANNEX

The opponent is relying upon the following goods:

The First Earlier Mark

(EUTM no. 3252152)

Class 5 Vitamins, vitamin preparations, herbal formulations, mineral supplements and nutritive elements including vitamins, minerals, nutritive elements and herbal formulations in capsule, tablet and liquid form.

The Second Earlier Mark

(EUTM no. 10759454)

Class 5 Medicated sun screen and sun block preparations, herbal remedies and unguents; yeast and preparations containing yeast for medicinal purposes; tinctures and oils for medicinal purposes; preparations of trace elements, vitamins, vitamin preparations, tonics, and pharmaceutical preparations for medicinal purposes; antiseptics and disinfectants; herbs and products containing herbs and herbal extracts for medicinal purposes; liniments, creams and lotions for medicinal purposes; plant products and plant extracts for medicinal purposes; salts for medicinal purposes; pharmacological preparations for skin care; nutritional additives for medicinal purposes; lozenges for medicinal purposes; mineral food supplements; dietetic substances adapted for medical use; essential and all other oils for medicinal purposes; medicated confectionery and candy for medicinal purposes; beverages and food for medicinal purposes; substances for medicinal purposes; materials for dressing; sanitary preparations; herbal formulations, mineral supplements and nutritive elements including vitamins, minerals, nutritive elements and herbal formulations in capsule, tablet and liquid form; dietetic substances for medical use; analgesics; medicinal drinks including teas; nutrient supplements including ginseng, anti-oxidants,

co-enzyme Q10, evening primrose oil; biocides, antiseptics; none of the aforesaid goods being cleaning agents; processed foods containing essential fatty acids, hers, vitamins and minerals in the form of powder, tablet, liquid or capsule and these goods have health benefit or are meal replacements.

The Third Earlier Mark

(EUTM no. 8764839)

Class 5 Vitamins and vitamin preparations; herbal formulations; mineral supplements; dietetic substances for medical use; analgesics; balms for medical purposes; medicinal drinks including teas; nutrient supplements including ginseng, anti-oxidants, co-enzyme Q10, evening primrose oil; biocides; antiseptics, bacterial preparations and disinfectants; pharmaceutical preparations including preparations for the skin, hair and scalp; dermatological preparations; medicated sun screen and sun block preparations; cleansing bars; skin lotions and skin creams.

Class 29 Processed foods containing essential fatty acids, vitamins and minerals in the form of powder, tablet, liquid or capsule.

Class 30 Processed foods containing herbs, vitamins and minerals in the form of powder, tablet, liquid or capsule.

The Fourth Earlier Mark

(EUTM no. 10759371)

Class 3 Skin care preparations; cosmetics; soaps; creams and lotions for cosmetic purposes; perfumery; cosmetic kits, cosmetic dyes; hair lotions, pomades, shampoos and hair care products; dentifrices; shaving preparations; after-shave lotions; toiletries; deodorants for personal use; astringents for cosmetic purposes; scented and aromatic waters for personal use; perfumes and eau de cologne; greases and petroleum jellies for cosmetic purposes; make-up and makeup preparations of all

types; bath salts not for medical purposes and cosmetic preparations for baths; depilatories; beauty and cleansing facial masks; cosmetic skin cleansers and toners; essential oils for cosmetic purposes; skin support supplements containing a combination of one or more vitamins, herbs and minerals.

Class 5 Medicated sun screen and sun block preparations, herbal remedies and unguents; yeast and preparations containing yeast for medicinal purposes; tinctures and oils for medicinal purposes; preparations of trace elements, vitamins, vitamin preparations, tonics, and pharmaceutical preparations for medicinal purposes; antiseptics and disinfectants; herbs and products containing herbs and herbal extracts for medicinal purposes; liniments, creams and lotions for medicinal purposes; plant products and plant extracts for medicinal purposes; salts for medicinal purposes; pharmacological preparations for skin care; nutritional additives for medicinal purposes; lozenges for medicinal purposes; mineral food supplements; dietetic substances adapted for medical use; essential and all other oils for medicinal purposes; medicated confectionery and candy for medicinal purposes; beverages and food for medicinal purposes; substances for medicinal purposes; materials for dressing; sanitary preparations; herbal formulations, mineral supplements and nutritive elements including vitamins, minerals, nutritive elements and herbal formulations in capsule, tablet and liquid form; dietetic substances for medical use; analgesics; medicinal drinks including teas; nutrient supplements including ginseng, anti-oxidants, co-enzyme Q10, evening primrose oil; biocides, antiseptics; none of the aforesaid goods being cleaning agents; processed foods containing essential fatty acids, herbs, vitamins and minerals in the form of powder, tablet, liquid or capsule and these goods have health benefit or are meal replacement.