

O/487/21

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3470111
BY NOSTER INC.
TO REGISTER AS A TRADE MARK:**

NOSTER

IN CLASSES 1, 3, 5, 29, 30 & 32

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 420349
BY CHIESI FARMACEUTICI S.P.A.**

BACKGROUND AND PLEADINGS

1. On 26 February 2020, Nitto Pharmaceutical Industries Ltd (“the original applicant”) applied to register the trade mark **NOSTER**, under number 3470111 (“the contested mark”). It was published for opposition purposes in the Trade Marks Journal on 20 March 2020. Registration is sought for the goods shown in the annex to this decision.

2. On 20 May 2020, CHIESI FARMACEUTICI S.P.A. (“the opponent”) filed a notice of opposition. The partial opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is directed against the following goods of the application:

Class 5: Pharmaceutical preparations; reagent paper for medical purposes; oiled paper for medical purposes; wrapping wafers for medicine doses; gauze for dressings; empty capsules for pharmaceuticals; eyepatches for medical purposes; ear bandages; menstruation bandages; menstruation tampons; sanitary napkins; sanitary panties; absorbent cotton; adhesive plasters; bandages for dressings; liquid bandages; breast-nursing pads; cotton swabs for medical use; dental materials; dietary supplements for humans; dietetic beverages adapted for medical purposes; dietetic food adapted for medical purposes; beverages for babies; food for babies; dietary supplements for animals.

3. The opponent relies upon its European Union trade mark number 13540547, **FOSTER** (“the earlier mark”). The earlier mark was filed on 9 December 2014 and became registered on 16 April 2015 in respect of *‘pharmaceutical preparations and substances; pharmaceutical products for treating respiratory diseases’* in class 5.

4. The opponent’s mark is an earlier mark, in accordance with section 6 of the Act.¹ However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section

¹ Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019. Tribunal Practice Notice 2/2020 refers.

6A of the Act. As a consequence, the opponent may rely upon all of the goods listed at paragraph 3.

5. In its notice of opposition, the opponent contends that the competing trade marks are similar and that the respective goods are identical and/or similar, giving rise to a likelihood of confusion, including a likelihood of association. The original applicant filed a counterstatement denying the ground of opposition.

6. On 2 December 2020, the original applicant assigned ownership of the contested mark to Noster Inc. ("the applicant"). The Registry was notified of the assignment by way of an application to record a change of ownership dated 23 December 2020. The assignment was confirmed to the parties in an official letter from the Registry dated 1 February 2021. Within the same letter, the Registry sought to confirm the following:

"In view of the assignment you should now confirm that as the new applicant you:

have had sight of any forms or evidence filed, (if not, arrangements will have to be made with the former applicant)

stand by the statements made in the counterstatement and confirm that where the name of the original applicant appears, this should be read as though it is made in your name

are aware of and accept the liability for costs for the whole proceedings in the event that the opposition is successful.

Confirmation of your agreement to the above undertakings should be submitted on or before 15 February 2021."

7. By way of response dated 4 February 2021, the applicant confirmed that it had sight of all forms and evidence filed relating to these proceedings, that it stood by the statements made in the counterstatement and that where the name of the original applicant appeared, this should be read as though it is made in the applicant's name.

Moreover, the applicant confirmed it was aware of and accepted the liability for costs for the whole proceedings in the event that the opposition is successful.

8. Both parties filed evidence in chief. The opponent did not file evidence in reply. A hearing took place before me, by video conference, on 10 June 2021. The applicant was represented by Ms Stephanie Wickenden of Counsel, instructed by J A Kemp LLP. Ms Wickenden filed skeleton arguments in advance of the hearing. The opponent has been represented throughout these proceedings by Withers & Rogers LLP, though elected not to play an active part in the hearing; it, instead, provided written submissions in advance of the hearing.

9. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive and, therefore, this decision continues to make reference to the trade mark case law of the EU courts.

EVIDENCE AND SUBMISSIONS

10. The opponent's evidence in chief consists of the witness statement of Ms Lauren Elizabeth Bray dated 27 November 2020, together with Exhibits LEB1 to LEB3. Ms Bray is a trade mark attorney in the employ of Withers & Rogers LLP, a position she has held since January 2020. Ms Bray confirms that she has conducted this matter on behalf of the opponent.

11. The applicant's evidence comprises the witness statement of Mr James Andrew Fish dated 27 January 2021, together with Exhibits JAF1 to JAF5. Mr Fish is a chartered trade mark attorney and a partner at J A Kemp LLP. He confirms that he has conducted this matter on behalf of the applicant.

12. As noted above, the opponent also filed written submissions in lieu of participating in the oral hearing.

13. Whilst I do not propose to summarise the evidence and submissions here, I have taken it all into consideration in reaching my decision and will refer to them below, as and where necessary.

PRELIMINARY ISSUE

14. In its written submissions, the opponent refers to a decision of the General Court (“GC”), Case T-550/19. A copy of the same was filed in these proceedings by the opponent on 30 June 2020.

15. The proceedings before the GC concerned a prior dispute between the opponent and the original applicant in which the former opposed the latter’s International Registration designating the EU number 1332950. Under this International Registration, the original applicant sought protection for the same mark, i.e. ‘NOSTER’, and the same goods as those listed above at paragraph 2. The opponent relied upon the same earlier mark and goods as outlined above at paragraph 3.

16. I note that the Opposition Division of the EUIPO rejected the opposition in its entirety on the basis that there was no likelihood of confusion, a decision which was then overturned in part by the Fifth Board of Appeal (“BoA”). Thereafter, the original applicant appealed to the GC, though only in relation to *‘menstruation bandages; menstruation tampons; sanitary napkins; sanitary panties’* in class 5. The GC upheld the decision of the BoA, finding those goods similar to the opponent’s *‘pharmaceutical preparations and substances’* to a “very low degree” and a likelihood of confusion between the parties’ respective marks.

17. While I note the findings of the GC in its decision and acknowledge the legal principles outlined therein, I must clarify that it would not be appropriate to derive my findings or conclusions from the decision to which the opponent refers. I accept that legal principles established by the GC are binding on this Tribunal, however, that does not extend to particular fact-finding exercises or notional assessments (such as, for example, comparisons between goods and/or services). Moreover, I note that the GC (and, indeed, the Opposition Division and BoA) considered whether there was a likelihood of confusion from the perspective of the average consumer that was

characterised as the Polish- or German-speaking public which did not speak English as a foreign language. Clearly, given that the assessment before me must be conducted from the perspective of the average consumer in the UK, who speaks and understands the English language, this will have a significant impact on the global assessment as to whether there is a likelihood of confusion between the competing marks in these proceedings. Each case must be assessed on its own merits and the determination of the opponent's claim must take into account all the relevant factors and legal principles, following an assessment of the papers before me.

DECISION

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

18. Sections 5(2)(b) and 5A of the Act read as follows:

“5(2) A trade mark shall not be registered if because -

[...]

(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.”

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

19. 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 great degree of similarity between the marks, and vice versa;

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

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

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

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

Comparison of goods

20. Section 60A of the Act provides:

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

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

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

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

21. In *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) 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”.

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

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

23. Furthermore, in *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the

existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that ‘complementary’ means:

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

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

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

25. Whilst on the other hand:

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

26. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary

and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

27. In *Separode Trade Mark*, BL O/399/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person confirmed at paragraph 5 that:

"The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision."

28. The goods to be compared are outlined at paragraphs 2 and 3, above.

'Pharmaceutical preparations'

29. At the hearing, Ms Wickenden conceded that these goods are identical to *'pharmaceutical preparations and substances'* in the specification of the earlier mark. I agree that these goods are self-evidently identical.

'Dietary supplements for humans; dietetic beverages adapted for medical purposes; dietetic food adapted for medical purposes'

30. These goods can be used to complement a normal diet or just because they are considered beneficial for health. 'Pharmaceutical' means relating to the production of

medicines,² while ‘substances’ are materials with particular physical characteristics.³ ‘Preparations’ refer to mixtures of substances, often for use as medicines.⁴ I do not agree with the opponent that these goods of the application fall within the ordinary and natural meaning of ‘*pharmaceutical preparations and substances*’. However, they may be used for medical purposes, i.e. if they are recommended by a medical professional, for example. As such, there may be an overlap in intended purpose. The physical nature of ‘*dietary supplements for humans*’ and ‘*pharmaceutical preparations and substances*’ is similar in that they may both be in the form of tablets, powders or liquids. This overlap does not extend to dietetic foods as these goods would not be found in this form. Where the opponent’s goods are in liquid form, there will be an overlap in nature with dietetic beverages. Given that the respective goods can be consumed by mouth, there is also an overlap in method of use. The respective goods may reach the market through overlapping trade channels, such as pharmacies, whereby they can sometimes be found on adjacent shelves. There is unlikely to be any meaningful competition between the respective goods and they are not complementary, since they are not important for the use of one another. Overall, I find that there is a medium degree of similarity between these goods.

‘Dietary supplements for animals’

31. These goods are typically added to animal food to complement their normal diet or because they are considered beneficial for health. Again, I do not accept that these goods fall within the ordinary and natural meaning of ‘*pharmaceutical preparations and substances*’. However, given that they may both be in the form of powders, tablets or liquids, the nature of the respective goods is similar. These goods of the application may be given to animals for medical purposes, or at least for the promotion of good health, and, therefore, there may be an overlap in intended purpose with the opponent’s goods. In some circumstances, the respective goods will have the same method of use insofar as they may be consumed by mouth. The applicant’s goods are not ordinarily found in pharmacies, though the respective goods may share overlapping trade channels where they both reach the market through pet stores or

² <https://dictionary.cambridge.org/dictionary/english/pharmaceutical>

³ <https://dictionary.cambridge.org/dictionary/english/substance>

⁴ <https://dictionary.cambridge.org/dictionary/english/preparation>

veterinary centres. The respective goods are not in direct competition. Moreover, they are not important or indispensable to the use of one another and, as such, are not complementary. In light of the above, I find that there is a medium degree of similarity between the goods under consideration.

'Gauze for dressings; eyepatches for medical purposes; ear bandages; adhesive plasters; bandages for dressings; liquid bandages'

32. The above goods can all broadly be described as first aid products. The nature of these goods and *'pharmaceutical preparations and substances'* is different. The respective goods can all be said to have a broadly medical purpose. However, the ordinary purpose of the applicant's goods is to bind up a wound or to protect an injured part of the body, not to treat health conditions per se. There will be instances where method of use overlaps as the respective goods can all be applied to the body. The respective goods are commonly sold in supermarkets and pharmacies, whereby they are sometimes located in the same section of those outlets. In these circumstances, the respective goods will share overlapping trade channels. However, I acknowledge that this is not always the case. There is no obvious competition between the respective goods. Moreover, whilst they may sometimes be used together, they are not complementary in the sense outlined in case law. Balancing the similarities against the differences, I consider there to be a low degree of similarity between the respective goods.

'Cotton swabs for medical use'

33. The above goods describe short rods, commonly made of plastic, with cotton wrapped around one or both ends. Clearly, the nature of these goods and *'pharmaceutical preparations and substances'* is different. In a very broad sense, the respective goods can be said to have a medical purpose. However, the ordinary purpose of the applicant's goods is likely to be applying medicines to an area of the body, cleaning, or taking samples. Conversely, the intended purpose of the opponent's goods is to treat health conditions. There is an overlap in method of use insofar as the respective goods can both be applied to the body. The respective goods are available from pharmacies and supermarkets. In circumstances where they are located in the

same section of those outlets, the goods can be said to share overlapping trade channels. There is no meaningful competition between the respective goods. Furthermore, while I accept that they may sometimes be used together, they are not important or indispensable to one another. Therefore, they are not complementary in the sense outlined in case law. Overall, I find that there is a low degree of similarity between the goods under consideration.

'Beverages for babies; food for babies'

34. I do not, as the opponent has suggested, consider *'beverages for babies'* or *'food for babies'* to fall within the category of *'pharmaceutical preparations and substances'*. The ordinary and natural meaning of the applicant's goods are food and beverages that are specifically manufactured for babies. These may, of course, be fortified with vitamins and the like. However, they do not ordinarily contain medicine, nor are they commonly used for the same purpose. I agree with Ms Wickenden that, whilst these goods may be sold in large retailers and chemists, they will not be found in the same section of those outlets as pharmaceutical products. Therefore, I do not accept the opponent's contention that the respective goods reach the market through shared channels of trade. The respective goods are not important or indispensable to the use of one another and are not, therefore, complementary. Neither is there a competitive relationship between them as consumers are unlikely to select one over the other. In view of the foregoing, I do not find any similarity between these goods of the application and the opponent's goods.

'Absorbent cotton'

35. The above term describes cotton which has the ability to easily absorb liquids. Given that these goods are made of a soft, fibrous material, their nature is markedly different from *'pharmaceutical preparations and substances'*. As Ms Wickenden has submitted, the applicant's goods have a variety of uses. These can include applying or removing cosmetics and dressing or cleaning wounds. However, the intended purpose of the respective goods is different: the applicant's goods are typically used to prevent leakage or for cleaning, while the opponent's goods are ordinarily used to treat health conditions. There is a limited degree of overlap in the method of use of the

respective goods as they may both be applied to the exterior of the body. I do not agree with the opponent that the respective goods reach the market through the same trade channels. Although both may be sold by large retailers and chemists, they are likely to be found in different sections of those outlets and, while they may sometimes be produced by the same undertakings, I do not consider this to be the norm. Consumers are unlikely to select the opponent's goods instead of those of the applicant, or vice versa, and, therefore, they are not in competition. I do not accept the opponent's contention that the respective goods are "highly complementary", or that they "may be absolutely indispensable". I acknowledge that, in some circumstances, absorbent cotton may be used with certain pharmaceuticals. However, it is also true that the respective goods are often used entirely independently of one another. In any event, it is clear from the case law that the mere fact that goods may be used together is not sufficient for a finding of complementarity. In my view, the goods are not indispensable or important for the use of one another in such a way that customers will assume the responsibility for them lies with the same undertaking and, as such, are not complementary. Overall, the limited overlaps identified above are insufficient to engage any similarity between the respective goods. They are dissimilar.

'Breast-nursing pads'

36. These goods refer to absorbent pieces of soft material that are used by nursing mothers. They clearly have a different nature to *'pharmaceutical preparations and substances'*. Furthermore, as they are predominantly used to protect clothing, the intended purpose of the respective goods is also different. Again, there may be a limited overlap in the method of use of the respective goods as they may both be applied to the exterior of the body. As the opponent has submitted, the respective goods may both be sold in pharmacies or supermarkets. However, they are unlikely to be found in the same sections of those outlets and I do not consider it typical that these goods are produced by the same undertakings. Therefore, I am unable to conclude that the respective goods have shared trade channels. The respective goods are not in competition and one will not be substituted for the other. It is possible that, in some instances, they may be used together. However, this is not sufficient for a finding of complementary in the sense outlined in case law. In my view, there is no similarity between the respective goods.

'Dental materials'

37. These goods describe substances that are used in dentistry. When confined to its ordinary and natural meaning, and in the absence of any evidence to the contrary, I understand the term to be referring to materials used in dental restoration, as well as materials used to create dental impressions or implants. While *'pharmaceutical preparations and substances'* can, of course, be manufactured for dental purposes, I do not agree with the opponent that these goods are sufficiently broad to encompass the goods of the earlier mark. Moreover, as the applicant's goods may consist of metallic materials (such as amalgam) or non-metallic materials (such as silicone or resins), the nature of the respective goods is different. There is a limited extent of overlap in the intended purpose of the respective goods insofar as they are both used to treat health problems, though this overlap is at a general level. The method of use of the respective goods differs: the applicant's goods will ordinarily be used during dental work, while those of the opponent are typically consumed by mouth or applied to the exterior of the body. The respective goods will not always have the same users. I do not accept that the respective goods always reach the market through shared channels of trade; the applicant's goods are likely to be purchased by dental practices from specialist outlets or manufacturers, whereas the opponent's goods can be purchased from pharmacies, supermarkets, or obtained through medical professionals. The relationship between the respective goods is not competitive. Further, I do not agree that they are complementary due to the possibility that they may be used together; the respective goods are not important or indispensable to one another. In light of the above, it is considered that there is no similarity between these goods and those of the earlier mark.

'Wrapping wafers for medicine doses; empty capsules for pharmaceuticals'

38. These goods are not pharmaceuticals per se but are, rather, packaging and empty holders for pharmaceuticals. The nature of these goods is entirely different *'pharmaceutical preparations and substances'*. In a broad sense, the respective goods could be said to have a medical purpose. However, the ordinary purpose is not the same: that of the opponent's goods is to treat health conditions, whereas that of the

applicant's goods is to hold doses of medicines and allow them to be taken orally. Given that the applicant's goods are used in the production of finished products, the method of use of the respective goods is also different. To my mind, the trade channels through which the respective goods reach the market are not the same. The applicant's goods will typically be purchased by undertakings involved in the production of pharmaceutical products from specialist manufacturers, while the opponent's goods are commonly available in supermarkets and pharmacies. Ms Bray has provided evidence of several online wholesalers and retailers that sell empty capsules.⁵ However, this does not establish that it is typical of the trade for the respective goods to be produced by the same undertakings, or that they reach the market through the same trade channels. There is no evidence that these outlets provide empty capsules alongside any goods that would fall within the ordinary and natural meaning of '*pharmaceutical preparations and substances*'. At best, the evidence suggests that there are undertakings who provide empty capsules as well as vitamins and supplements. The respective goods are not in competition. Further, while I agree with the opponent that wrapping wafers and empty capsules are a means by which pharmaceutical preparations can be contained and delivered, they are not essential and are chosen for convenience. The respective goods are not important or indispensable for the use of one another in such a way that consumers would assume they originate from the same undertaking. Therefore, they are not complementary. I find the goods under comparison dissimilar.

'Menstruation bandages; menstruation tampons; sanitary napkins; sanitary panties'

39. These goods refer to soft materials that are worn during menstruation for sanitation and to protect items of clothing. As such, there is no overlap in the nature, intended purpose or method of use of these goods and '*pharmaceutical preparations and substances*'. Ms Bray gives evidence that these goods of the application and goods she considers fall within the scope of the opponent's goods are offered alongside one another by Boots – under its Boots Pharmaceuticals brand – and Superdrug.⁶ I take judicial notice of the fact that pharmacies, and large retailers, sell pharmaceutical

⁵ Witness statement of Ms Lauren Elizabeth Bray, §7; Exhibit LEB3

⁶ Bray, §5 and §6; Exhibits LEB1 and LEB2

products as well as sanitary products such as these. The evidence relating to Boots and Superdrug does not add to this general picture. This is because these are two examples of very large pharmacy businesses. While the respective goods may all be sold in pharmacies and supermarkets, they are unlikely to be found on the same shelves and will ordinarily be located in distinct sections of those outlets. Consequently, I do not accept that the respective goods reach the market through shared trade channels. Given that they have entirely different purposes, I can see no reason why a consumer looking to purchase the applicant's goods would, instead, select those of the opponent, or vice versa. Therefore, the respective goods are not in competition. Neither, in my view, are they complementary. They are not important or indispensable to the use of one another and the possibility that they may be "purchased in conjunction with one another", as argued by the opponent, does not render them complementary in the sense described in case law. In view of the foregoing, I find that there is no similarity between the respective goods.

'Reagent paper for medical purposes'

40. I understand the above term to refer to paper that is treated with reactive substances and used for chemical testing or analysis. The nature of these goods is different from that of *'pharmaceutical preparations and substances'*. Moreover, while, generally, the respective goods can all be used for medical purposes, the intended purpose of the goods is not the same; the applicant's goods typically serve a diagnostic purpose, whereas the opponent's goods are ordinarily used to treat health conditions. In addition, the method of use of the respective goods is different: the applicant's goods will be dipped in, or otherwise exposed to, other substances, while the opponent's goods will be consumed by mouth or applied to the body. In the absence of any evidence to the contrary, I do not consider the respective goods to reach the market through the same trade channels. The applicant's goods are likely to be sold through specialist retailers or manufacturers that are unlikely to also sell the opponent's pharmaceutical products. However, even where the respective goods are available from the same outlets – such as retailers or pharmacies – they are not likely to be found in close proximity to one another. There is no competition between the respective goods. Further, the mere possibility that they may be used together is not sufficient for a finding of complementarity; these goods are not important or

indispensable to the use of one another. In consideration of all the above factors, I find that there is no similarity between the respective goods.

'Oiled paper for medical purposes'

41. These goods describe paper that is treated with oil for use in medical environments, their nature being very different from that of *'pharmaceutical preparations and substances'*. At the hearing, Ms Wickenden submitted that these goods are for protecting surfaces and ensuring cleanliness in such environments. In the absence of any evidence to the contrary, or an alternative explanation from the opponent, I accept this submission. In view of this, the intended purpose of the respective goods is not the same. Moreover, given that the applicant's goods will not be consumed by mouth or applied to the body, the respective goods do not have the same method of use. The respective goods are unlikely to reach the market through the same trade channels; in my view, the applicant's goods will be sold by medical suppliers, whereas the opponent's goods typically reach the market through pharmacies and supermarkets. There is no competition between the respective goods. They are not important or indispensable to the use of one another and are, therefore, not complementary. Overall, I find that there is no similarity between these goods.

42. For the avoidance of doubt, I have also considered the position in respect of *'pharmaceutical products for treating respiratory diseases'* in class 5 of the earlier mark. However, in my view, these goods do not put the opponent in a more favourable position than the broader category of *'pharmaceutical preparations and substances'* as they have a specific medical purpose. It follows that if there is any similarity between these goods and those in the application, it is likely to be to a lesser, rather than greater, degree.

The average consumer and the nature of the purchasing act

43. The average consumer is deemed to be reasonably well informed, observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne

in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.⁷

44. 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.”

45. In *Olimp Laboratories sp. z o.o. v EUIPO*, Case T-817/19, EU:T:2021:41, the GC considered the average consumer for and level of attention which would be paid in the selection of pharmaceutical and medical products in class 5. It stated:

“39. Where the goods in question are medicinal or pharmaceutical products, the relevant public is composed of medical professionals, on the one hand, and patients, as end users of those goods, on the other (see judgment of 15 December 2010, *Novartis v OHIM – Sanochemia Pharmazeutika (TOLPOSAN)*, T-331/09, EU:T:2010:520, paragraph 21 and the case-law cited; judgment of 5 October 2017, *Forest Pharma v EUIPO – Ipsen Pharma (COLINEB)*, T-36/17, not published, EU:T:2017:690, paragraph 49).

40. Moreover, it is apparent from case-law that, first, medical professionals display a high degree of attentiveness when prescribing medicinal products and, second, with regard to end consumers, in cases where pharmaceutical products are sold without prescription, it must be assumed that those goods will be of concern to consumers, who are deemed to be reasonably well informed

⁷ *Lloyd Schuhfabrik Meyer*, Case C-342/97

and reasonably observant and circumspect where those goods affect their state of health, and that these consumers are less likely to confuse different versions of such goods. Furthermore, even assuming that a medical prescription is mandatory, consumers are likely to demonstrate a high level of attentiveness upon prescription of the goods at issue in the light of the fact that those goods are pharmaceutical products. Thus, medicinal products, whether or not issued on prescription, can be regarded as receiving a heightened level of attentiveness on the part of consumers who are normally well informed and reasonably observant and circumspect (see judgment of 15 December 2010, *TOLPOSAN*, T-331/09, EU:T:2010:520, paragraph 26 and the case-law cited).

41. [...]

42. In the present case, having regard to the nature of the goods concerned, namely medical or pharmaceutical products in Class 5, the Board of Appeal acted correctly in finding in paragraphs 18 to 21 of the contested decision – which, moreover, is not disputed by the applicant – that, in essence, the relevant public was made up of medical professionals and pharmacists and consumers belonging to the general public with a higher than average degree of attentiveness.”

46. The parties are in agreement that consumers of the goods at issue in these proceedings will include both the general public and professional users. Further, there appears to be common ground between the parties as to the nature of the purchasing act, i.e. that it will be primarily visual in nature, though the opponent has submitted that aural considerations will also play a part. However, the parties’ respective positions differ in the level of attention that will be paid by consumers. In respect of goods which are for medical purposes, the opponent has contended that consumers will exercise an “above average” level of care, but “not necessarily always the highest level of care”, citing products such as painkillers and plasters as examples where a much lower degree of care would be paid. Conversely, Ms Wickenden argued that a high level of attention will be paid to ‘*pharmaceutical preparations*’ and that a higher than average

level of attention will be paid in respect of the other goods as they are not frequently purchased and will be used on, in, or close to the body.

47. I agree that, due to the nature of the goods at issue, it is necessary to identify two groups of relevant consumers, namely, the general public and professional users.

48. In the case of the general public, the frequency with which the goods are purchased is likely to vary and will factor upon whether the medical treatment (or dietary supplementation) necessitates repeated usage. However, overall, it is considered that they will be purchased neither extremely frequently nor infrequently. I do not consider the purchasing act of any of the goods to be merely casual. For those which are pharmaceutical or medical in nature, it would be an important choice for consumers as they will be selecting goods that affect their state of health; they will wish to ensure that the product is safe. In respect of these goods, I find that the level of attention of the general public would be above average. As for goods which may be used for medical purposes but are not strictly pharmaceutical or medical in nature (such as bandages and adhesive plasters, for example), the selection process may not be quite as careful, though consumers will still wish to ensure that the product is appropriate for their needs. Taking these factors into account, I find that the general public would demonstrate an average level of attention when purchasing these goods. Many of the goods can be purchased in supermarkets, pharmacies, and health stores, or their online equivalents. Given that the goods will be self-selected by consumers from shelves and cabinets, or after viewing information on the internet, the purchasing process is likely to be predominantly visual in nature. However, it is likely that some of the goods would need to be prescribed or made available through medical professionals. Therefore, aural considerations cannot be ignored, as the goods may be obtained following a verbal consultation with a healthcare professional.

49. As for professional users, it is likely that the goods will be frequent, repeated purchases for stocking a pharmacy, for example. In my view, the purchasing of goods that are pharmaceutical or medical in nature would follow a measured thought process; the choice for professional users would be important as they will thereafter be recommending and, in some cases, prescribing the use of the goods for medical treatment. In light of the foregoing, professional users would possess a high level of

attention when selecting these products. The selection of goods which may be used for medical purposes but are not strictly pharmaceutical or medical in nature may not require as much care, though professional users will still consider the quality and cleanliness of the product as they will thereafter be used in medical treatment. Taking these factors into account, it is considered that professional users would possess an above average level of attention when purchasing these goods. The goods will be purchased from suppliers and manufacturers, whereby the selection process would be a combination of visual and aural. Information about the products is likely to be sought primarily from brochures and webpages, though professional users may also engage in verbal discussions with salespersons.

Distinctive character of the earlier mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

51. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods or services, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will be somewhere in the middle. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

52. Although the distinctiveness of a mark may be enhanced as a result of it having been used in the market, the opponent has filed no evidence of use (nor was it required to do so). Consequently, I have only the inherent position to consider.

53. The opponent has contended that the earlier mark enjoys at least an average degree of inherent distinctiveness. Conversely, Ms Wickenden argued that the earlier mark may call to mind healthcare or the promotion of health and wellbeing and, therefore, has a below average level of distinctiveness.

54. The earlier mark is in word-only format and comprises the word ‘FOSTER’. As the earlier mark is comprised of one plain word with no other elements, its distinctiveness lies indivisibly in the word itself. The word ‘FOSTER’ may be perceived by consumers in different ways. In its evidence, the applicant produced dictionary definitions for the word.⁸ I am prepared to accept these definitions, which confirm rather than contradict my original impression of its natural meaning. The word is likely to be understood by consumers as meaning to encourage growth or development, or to bring up or raise a child. The word ‘FOSTER’ may also be perceived as a surname. Ms Wickenden submitted that the word may also be understood as meaning to nourish, nurse or care for. This is certainly possible, though I do not agree that it renders the word allusive of the opponent’s goods, as the connection between the word and its suggested allusive meaning is not sufficiently direct. In my view, irrespective of the particular meaning

⁸ Exhibit JAF1

attributed to the word by consumers, it is neither descriptive nor allusive of the goods for which the earlier mark is registered. I find that the earlier mark has a medium level of inherent distinctive character.

Comparison of trade marks

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

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

56. Therefore, it would be wrong to dissect the trade marks artificially, though it is necessary to take into account the distinctive and dominant components of the marks. Due weight must be given to any other features which are not negligible and hence contribute to the overall impressions created by the marks.

57. The competing trade marks are as follows:

The earlier mark	The contested mark
FOSTER	NOSTER

Overall impression

58. The earlier mark is in word-only format and consists of the word 'FOSTER'. As this is the only element of the mark, the overall impression is dominated by the word itself. The contested mark is in word-only format and comprises the word 'NOSTER' with no other elements. Therefore, the overall impression is dominated by the word itself.

Visual comparison

59. Visually, the competing marks are similar because they are both six-letter words and share five of those letters, i.e. 'O-S-T-E-R', in the same order. The marks are visually different in that they have different letters, i.e. 'F' and 'N', at the beginning of the marks. This position is generally considered to have more impact due to consumers in the UK reading marks from left to right.⁹ Bearing in mind my assessment of the overall impressions, I consider there to be a medium degree of visual similarity between the marks.

Aural comparison

60. Aurally, the earlier mark consists of a two-syllable word, i.e. "FOS-TER". The contested mark also consists of a two-syllable word, i.e. "NOS-TER". The competing marks aurally coincide in the identical pronunciation of "-OS-TER". However, the articulation of their respective initial letters constitutes an aural difference. Taking into account the overall impressions, I consider there to be a medium degree of aural similarity between the marks.

Conceptual comparison

61. Conceptually, the earlier mark will be immediately understood by consumers as meaning to encourage growth or development, to bring up or raise a child, or as a surname. In respect of the contested mark, Ms Wickenden suggested that 'NOSTER' may be understood by consumers as a Latin word meaning 'our'. She submitted that

⁹ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

the word is most frequently encountered as part of the phrase 'Pater Noster', the Latin equivalent of 'Our Father' (from the Lord's Prayer in Christianity). The opponent has disputed that this meaning would be attributed to the word and has, instead, argued that the contested mark has no conceptual meaning. Although the applicant's evidence does suggest that the phrase 'Pater Noster' has a meaning in Latin and the context of Christian prayer,¹⁰ it has not provided any evidence to demonstrate that a significant proportion of consumers would attach this meaning to the mark. For a concept to be relevant, it must be capable of immediate grasp by the relevant consumer.¹¹ I am unconvinced that the average consumer of the goods at issue would understand the word in the mark to mean 'our'. Given that Latin has ceased to be a commonly used language in the UK, I consider it highly unlikely. Rather, in my view, the contested mark will be perceived as an invented word. As such, it conveys no meaning. Irrespective of which meaning is attributed to the earlier mark, it provides a clear conceptual message to consumers. As none of these potential meanings are conveyed by the contested mark, I do not agree with the opponent that this renders the conceptual position neutral. Instead, I find that the competing marks are conceptually dissimilar.

Likelihood of confusion

62. 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. One such factor 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 vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier 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 they have retained in their mind.

¹⁰ Exhibit JAF1

¹¹ *The Picasso Estate v OHIM*, Case C-361/04 P

63. 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.

64. Earlier in this decision, I concluded that:

- Some of the applicant's goods are dissimilar to the goods of the earlier mark;
- Where not identical, there is a medium or low degree of similarity between the remaining goods of the application and those of the earlier mark;
- Relevant consumers of the goods include members of the general public and professional users;
- The general public will demonstrate an above average level of attention during the purchasing act of some goods, while an average level of attention will be paid in respect of others;
- Professional users will demonstrate a high level of attention during the purchasing of some goods and an above average level of attention for others;
- The purchasing process for the goods will be primarily visual in nature, though aural considerations will play their part;
- The earlier mark possesses a medium level of inherent distinctive character;
- The overall impression of the earlier mark is dominated by the word 'FOSTER', being the only element;
- The overall impression of the contested mark is dominated by the word 'NOSTER', being the only element;

- The competing marks are visually and aurally similar to a medium degree, but conceptually dissimilar.

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

“49. [...] I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.”

66. As I have found some of the opposed goods to be dissimilar to the goods of the earlier mark, the opposition under section 5(2)(b) of the Act must necessarily fail in relation to those goods, namely:

Class 5: Reagent paper for medical purposes; oiled paper for medical purposes; wrapping wafers for medicine doses; empty capsules for pharmaceuticals; menstruation bandages; menstruation tampons; sanitary napkins; sanitary panties; absorbent cotton; breast-nursing pads; dental materials; beverages for babies; food for babies.

67. As a consequence of this finding, the global assessment as to whether there is a likelihood of confusion between the competing marks is limited to the remaining goods that have been opposed, namely:

Class 5: Pharmaceutical preparations; dietary supplements for humans; dietetic beverages adapted for medical purposes; dietetic food adapted for medical purposes; dietary supplements for animals; gauze for dressings; eyepatches for medical purposes; ear bandages; adhesive plasters; bandages for dressings; liquid bandages; cotton swabs for medical use.

68. As I have identified two groups of relevant consumers, I approach the global assessment from the perspective of those who will demonstrate the lowest level of attention during the purchasing process, i.e. the general public. I have found that the general public will pay an above average level of attention in respect of some goods and an average level of attention for others.

69. I acknowledge that the competing marks share five identical letters in the same order, i.e. 'O-S-T-E-R', and that this string would be articulated in the same way, resulting in a medium degree of visual and aural similarity between the marks. However, it is important not to dissect the marks artificially and to recognise that consumers will perceive them as wholes. When considering the competing marks in this context, there are differences between them which would not be overlooked by the general public during the purchasing process. Firstly, the marks have different letters at the beginning of the marks, a position which is generally considered to have more impact. More significantly, there is a clear conceptual difference between the respective marks. Visual, aural and conceptual differences do not always carry the same weight.¹² Moreover, where the meaning of at least one of the marks at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences between the marks may counteract visual and aural similarities.¹³ Although I accept that conceptual differences do not always overcome visual and aural similarities, I certainly consider that to be the case here. The earlier mark is a dictionary word, the meanings of which will be readily understood by consumers. These meanings will be fixed in the minds of the general public and prompt their recall of the mark. On the other hand, given that it will be perceived as an invented word, the contested mark does not convey any conceptual message. Irrespective of which conceptual identity is attached to the earlier mark, this difference between the marks is not disturbed. In my view, the conceptual difference between the competing marks is likely to be sufficient for the general public to distinguish between them and avoid mistaking one for the other, even on goods which I have found to be identical. This is particularly the case in light of my findings that the general public will

¹² *New Look Limited v OHIM*, Joined Cases T-117/03 to T-119/03 and T-171/03, paragraph 49

¹³ *The Picasso Estate v OHIM*, Case C-361/04 P, paragraph 20

demonstrate at least an average level of attention during the purchasing process and the earlier mark possesses no more than a medium level of distinctive character. Accordingly, notwithstanding the principles of imperfect recollection and interdependency, it follows that there will be no direct confusion.

70. For the sake of completeness, my conclusion would be the same for professional users. This section of average consumers would demonstrate a higher level of attention than the general public during the purchasing process, in which case the competing marks will be even more easily distinguished. This factor points towards a lesser, rather than a greater, risk of confusion.

71. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., sitting as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all.

This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

72. I have borne in mind that these examples are not exhaustive. Rather, they were intended to be illustrative of the general approach.

73. I also recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.¹⁴

74. Having regard to all the above principles, I do not believe that consumers (whether that be the general public or professional users) will assume the opponent and the applicant are economically linked undertakings on the basis of the competing trade marks, even on goods which I have found to be identical. I am unconvinced that consumers would assume a commercial association between the parties, or sponsorship on the part of the opponent, merely because the marks have five letters in common. Consumers would not separate this string of letters from the respective wholes of the competing marks and would have no reason to believe that it is so strikingly distinctive that only the opponent would be using it in a trade mark. Furthermore, altering the first letter from an ‘F’ to an ‘N’ is neither simply adding a non-distinctive element nor is it characteristic of any logical brand extensions with which

¹⁴ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

consumers would be familiar. To my mind, there is no obvious reason why an undertaking would alter a trade mark consisting of a dictionary word with clear meanings, such as the earlier mark, to an invented word with no meaning, resulting in the contested mark. In light of the foregoing, I conclude that there is no likelihood of indirect confusion.

CONCLUSION

75. The opposition under section 5(2)(b) of the Act has failed in its entirety. Subject to any successful appeal against my decision, the application will become registered in respect of the full range of applied-for goods.

COSTS

76. As the applicant has been successful, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£1,250** as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the opponent's statement and preparing a counterstatement	£250
Preparing evidence and considering the opponent's evidence	£500
Preparing for and attending a hearing	£500
Total	£1,250

77. I therefore order CHIESI FARMACEUTICI S.P.A. to pay Noster Inc. the sum of **£1,250**. This sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings (subject to any order made by the appellate tribunal).

Dated this 28th day of June 2021

James Hopkins
For the Registrar,
The Comptroller-General

ANNEX

Goods of application number 3470111

Class 1: Lactic acid bacteria powder for producing food, dietary supplements for humans or beverages; other microorganism [bacteria and bacteria powder] for producing food, dietary supplements for humans or beverages; chemicals; glue and adhesives for industrial purposes; plant growth regulating preparations; fertilizers; higher fatty acids; unprocessed plastics [plastics in primary form]; gluten for the food industry.

Class 3: Cosmetics; soaps and detergents; dentifrices; perfume and flavourings for food and beverages [essential oils]; false nails; false eyelashes; breath freshening preparations; deodorants for animals; incenses and fragrances.

Class 5: Pharmaceutical preparations; reagent paper for medical purposes; oiled paper for medical purposes; wrapping wafers for medicine doses; gauze for dressings; empty capsules for pharmaceuticals; eyepatches for medical purposes; ear bandages; menstruation bandages; menstruation tampons; sanitary napkins; sanitary panties; absorbent cotton; adhesive plasters; bandages for dressings; liquid bandages; breast-nursing pads; cotton swabs for medical use; dental materials; dietary supplements for humans; dietetic beverages adapted for medical purposes; dietetic food adapted for medical purposes; beverages for babies; food for babies; dietary supplements for animals.

Class 29: Milk products; edible oils and fats; meat for human consumption [fresh, chilled or frozen]; fresh, chilled or frozen edible aquatic animals (not live); processed meat products; processed seafood products [other than "blocks of boiled, smoked and then dried bonitos [Katsuo-bushi], dried pieces of agar jelly [Kanten], flakes of dried fish meat [Kezuri-bushi], fishmeal for human consumption, edible shavings of dried kelp [Tororo-kombu], sheets of dried laver [Hoshi-nori], dried brown alga [Hoshi-hijiki], dried edible seaweed [Hoshi-wakame] and toasted sheets of laver [Yaki-nori]"]; processed vegetables and fruits; protein for use as a food additive.

Class 30: Tea; coffee [roasted, powdered, granulated, or in drinks]; cocoa [roasted, powdered, granulated, or in drinks]; confectionary; bread and buns; sandwiches; steamed buns stuffed with minced meat [Chuka-manjuh]; hamburgers[sandwiches]; pizzas; hot dogs [sandwiches]; meat pies; cube sugar, fructose [for culinary purposes]; crystal sugar [not confectionery]; sugar, maltose [for culinary purposes]; honey, glucose for culinary purposes; powdered starch syrup [for culinary purposes]; starch syrup [for culinary purposes]; ice cream mixes; sherbet mixes; flour.

Class 32: Whey beverages; carbonated drinks [refreshing beverages]; fruit juices; vegetable juices [beverages]; beer, extracts of hops for making beer.