

O/658/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003517174

**BY RECKITT & COLMAN (OVERSEAS) HEALTH LIMITED TO REGISTER THE
FOLLOWING TRADE MARK**

RELENTLESS PURSUIT

IN CLASSES 3, 5, 9, 10, 21, 35, 41, 42 and 44

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 422318 BY ENERGY
BEVERAGES LLC**

Background and Pleadings

1. On 29 July 2020, Reckitt & Colman (Overseas) Health Limited ('the Applicant') filed an application to register the trade mark shown on the cover page of this Decision, number UK00003517174. The application was published for opposition purposes in the *Trade Marks Journal* on 4 September 2020. Registration is sought in respect of classes 3, 5, 9, 10, 21, 35, 41, 42 and 44¹
2. On 3 December 2020, the application was opposed by Energy Beverages LLC ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against the following terms in the Applicant's specification, only²:

Class 5: *Malted milk beverages for medical purposes; milk powder for babies; food and beverages for babies and infants; dietetic beverages adapted for medical purposes; nutritional supplements*

Class 35: *retail and wholesale services in connection with the sale of medicated beverages, milk, other milk products, dairy products, coffee, tea, cocoa and artificial coffee, foodstuffs and beverages for animals, malt, alcoholic and non-alcoholic beverages, nutritionally fortified beverages and drinks containing dietary fibre and preparations for making up into such drinks*

3. The Opponent relies on the following earlier trade mark registration for its section 5(2)(b) ground:

UK00003254979

¹ The full specification can be found here: [Search for a trade mark - Intellectual Property Office \(ipo.gov.uk\)](https://ipo.gov.uk)

² The original pleadings opposed all of the goods and services applied for in classes 5 and 35. The Opponent, in its written submissions of 4.05.21, subsequently restricted its opposition to only some of the goods and services in those classes.

RELENTLESS

Filing date: 6 September 2017; Date registration completed: 1 December 2017

Relying on the following registered goods and services for its section 5(2)(b) ground:

Class 5: *Nutritional supplements; nutritional supplements in liquid form; nutritional supplements sold as a component in a beverage; nutritional supplements sold as an ingredient in a beverage; herbal beverages; nutritional beverages; vitamin-enriched beverages; nutrient-enriched beverages; amino acid-enriched beverages; herb-enriched beverages.*

Class 32: *Energy drinks, sports drinks, fruit juice drinks, other non-alcoholic beverages and other preparations for making beverages; beers.*

4. The Opponent claims that:
 - The Applicant's mark is similar to the Opponent's earlier mark;
 - The goods and services in classes 5 and 35, set out above at [2], are identical or similar to the Opponent's goods and services;
 - There is therefore a likelihood of confusion.
5. The Applicant filed a defence and counterstatement, denying the claim in its entirety.
6. In the evidence round, written submissions were filed by the Opponent only. Both parties has filed written submissions in lieu of a hearing.
7. The Opponent is represented by Bird & Bird LLP; the Applicant is represented by Stobbs.

8. The following decision has been made after careful consideration of the papers before me.

Relevant dates

9. Section 6A of the Act provides that where the registration date of the earlier mark is more than 5 years prior to the application date of the applied-for mark, the Opponent may be required to prove use of the earlier mark. In the instant case, Section 6A is not engaged because the registration date of the earlier mark is less than 5 years prior to the application date of the applied-for mark, i.e. 1 December 2017. Consequently, the Opponent is entitled to rely upon its mark in respect of all of the goods and services for which it is registered.

Decision

Section 5(2)(b) of the Act and related case law

10. Section 5(2)(b) of the Act states:

(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.”

11. The following principles are derived from the decisions of the CJEU³ in:

Sabel BV v Puma AG, Case C-251/95; Canon Kabushiki Kaisha v Metro-

³ 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 Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

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 C120/04; *Shake di L. Laudato & C. Sas v OHIM*, Case C-334/05P; and *Bimbo SA v OHIM*, Case C-591/12P

The principles:

(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 and services

12. Similarity of goods and services – Nice classification

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.”

13. I must therefore be mindful of the fact that the appearance of respective goods in the same class is not a sufficient condition for similarity between those goods or services.

14. I must also bear in mind the decision of the General Court (‘GC’) in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05:

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

15. The Tribunal may group goods (or services) together for the purposes of assessment:

Separode Trade Mark BL O-399-10 (AP):

“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.”

16. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties’ goods and services must be taken into account:

“[23] 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”.

17. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281⁴, identified the following factors for assessing similarity of the respective goods and services:

- (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;

⁴ *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

(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

18. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.⁵

19. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods [or services]. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that “complementary” means:

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

20. The goods to be compared are as follows:

Opponent's goods	Applicant's goods
Class 5: <i>Nutritional supplements; nutritional supplements in liquid form; nutritional supplements sold as a component in a beverage; nutritional supplements sold as an ingredient in a beverage; herbal</i>	Class 5: <i>Malted milk beverages for medical purposes; milk powder for babies; food and beverages for babies and infants; dietetic beverages adapted for medical purposes; nutritional supplements</i>

⁵ *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

<i>beverages; nutritional beverages; vitamin-enriched beverages; nutrient-enriched beverages; amino acid-enriched beverages; herb-enriched beverages.</i>	
<p>Class 32:</p> <p><i>Energy drinks, sports drinks, fruit juice drinks, other non-alcoholic beverages and other preparations for making beverages; beers.</i></p>	<p>Class 35:</p> <p><i>retail and wholesale services in connection with the sale of medicated beverages, milk, other milk products, dairy products, coffee, tea, cocoa and artificial coffee, foodstuffs and beverages for animals, malt, alcoholic and non-alcoholic beverages, nutritionally fortified beverages and drinks containing dietary fibre and preparations for making up into such drinks</i></p>

21. I will make my comparison with reference to the Applicant's goods and services.

22. The Applicant's *nutritional supplements* are self-evidently identical with the Opponent's goods because both specifications contain this term.

23. The Opponent submits⁶ that there is a high degree of similarity and complementarity between the remainder of Applicant's class 5 goods and the following of the Opponent's goods and services:

- The Opponent's beverages in class 5: i.e. *nutritional supplements sold as an ingredient in a beverage; herbal beverages; nutritional beverages; vitamin-enriched beverages; nutrient-enriched beverages; amino acid-enriched beverages; herb-enriched beverages;*
- All of the Opponent's class 32 goods.

⁶ Opponent's written submissions filed in evidence round, paragraph [15].

And

That there is a high degree of similarity and complementarity between the Applicant's class 35 services and all of the Opponent's class 5 goods.

24. The Applicant submits the following:⁷

The Applicant concedes that the following services are similar to the goods covered by the Earlier Mark but does not accept that there is a likelihood of confusion in relation to these services for the reasons set out in the paragraphs below:
retail and wholesale services in connection with the sale of coffee, tea, cocoa and artificial coffee, malt, alcoholic and non-alcoholic beverages, nutritionally fortified beverages and drinks containing dietary fibre and preparations for making up into such drinks.

25. I group the following of the Applicant's goods together, both terms relating to foodstuffs intended for babies:

milk powder for babies; food and beverages for babies and infants

26. I compare these goods against the Opponent's *nutritional beverages*. The Applicant's goods are intended to provide nourishment to babies and infants. *Nutritional beverages* will include: protein shakes/drinks e.g. to encourage weight gain for medical reasons; beverages fortified with vitamins and minerals e.g. to remedy a deficiency; beverages intended for patients unable to receive adequate nutrition from a normal diet, to name but a few. The purposes of the respective goods will overlap to the broad extent that both provide nutrition. The purposes of the goods differ to the extent that food and beverages for babies are usually 'complete' meals rather than supplements, and they are not usually substitutes for a normal diet⁸; whereas *nutritional beverages* usually are food supplements or substitutes for a normal diet. Consumers of the respective goods will differ. The average consumer of the Applicant's goods will be a parent or caregiver to babies

⁷ Applicant's written submissions in lieu of a hearing, paragraph [19].

⁸ Although it is acknowledged that *milk powder for babies* is, in many cases, a substitute for breast milk.

or infants. The average consumer of the Opponent's goods will include: members of the general public looking to maintain or improve their health; patients with medical conditions and their caregivers; and members of the professional public e.g. hospitals or pharmacies. Methods of use will be the same; both parties' goods will be ingested orally. There will be an overlap in the physical nature of the goods: some of the Opponent's goods will be in the form of powders, as will the Applicant's *milk powder for babies*; other *nutritional beverages* will be liquids, as will some goods under the term *food and beverages for babies and infants*.

27. In my view, the respective goods will often share trade channels. Both will be sold online and in pharmacies and other physical shops. I appreciate, however, that certain *nutritional beverages* intended for medical use will be available only on prescription. The Applicant's goods are likely to be found in the 'baby food section', however, and are unlikely to share a shelf with the Opponent's goods. I do not find the respective goods to be competitive or complementary.

28. Consequently, I find *milk powder for babies*; *food and beverages for babies and infants* to be similar to the Opponent's goods to a low degree. This represents the strongest comparison between these terms and the Opponent's goods. It is therefore unnecessary for me to compare the terms *milk powder for babies*; *food and beverages for babies and infants* with any other of the Opponent's goods.

29. I group the following of the Applicant's goods together, both terms relating to beverages for medical purposes:

Malted milk beverages for medical purposes; *dietetic beverages adapted for medical purposes*.

30. The above goods are nutritional beverages designed designed for patients whose medical or health conditions prevent their nutritional needs from being met by a normal diet. The Opponent's *nutritional beverages* will include these goods. I

therefore find the above goods to be identical with the Opponent's goods according to the principle in *Meric*⁹.

31. I group the following of the Applicant's services together, all being retail services in connection with the sale of beverages, or preparations for beverages, which are intended to address health or medical concerns:

retail and wholesale services in connection with the sale of medicated beverages, nutritionally fortified beverages and drinks containing dietary fibre and preparations for making up into such drinks

32. I compare these services against the Opponent's *nutritional beverages*.

33. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the General Court held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

34. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said that:

"9. ...selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35".

35. In *Oakley*, it was held that¹⁰:

"...with regard, in particular, to the registration of a trade mark covering retail services, the Court held, in paragraph 34 of the judgment in *Praktiker Bau- und Heimwerkermärkte*, that the objective of retail trade is the sale of goods to

⁹ See paragraph [14] of this Decision.

¹⁰ Case T-116/06, at [43].

consumers, which includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction, and that that activity consists, inter alia, in selecting an assortment of goods offered for sale and in offering a variety of services aimed at inducing the consumer to conclude the abovementioned transaction with the trader in question rather than with a competitor.”

36. However, on the basis of the European courts’ judgments in *Sanco SA v OHIM*¹¹, and *Assembled Investments (Proprietary) Ltd v. OHIM*¹², upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd*¹³, Mr Hobbs concluded that:

- i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer’s point of view, they are unlikely to be offered by one and the same undertaking;
- ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent’s goods and then to compare the opponent’s goods with the retail services covered by the applicant’s trade mark;
- iii) It is not permissible to treat a mark registered for ‘retail services for goods X’ as though the mark was registered for goods X;
- iv) The General Court’s findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party’s trade mark was registered (or proposed to be registered).

¹¹ Case C-411/13P

¹² Case T-105/05, at paragraphs [30] to [35] of the judgment

¹³ Case C-398/07P

37. The Applicant's *services* are necessarily different in nature to the Opponent's *goods*; goods are tangible objects whereas services are acts performed by, or benefits provided by, a service-provider. The respective purposes also differ: the Opponent's goods are intended to be drunk; whereas the intended purpose of retail services is to encourage the sale of various goods. The method of use of the goods differs from that of the services. The goods and services are not in a competitive relationship.

38. I find that the Opponent's goods, *nutritional beverages*, will include the goods which are the subject of the Applicant's retail services, i.e. *medicated beverages, nutritionally fortified beverages and drinks containing dietary fibre and preparations for making up into such drinks*. The Opponent's goods will be complementary to these services because the goods are indispensable to the retailing of them. The trade channels will also, therefore, overlap. Consequently, I find that the Applicant's services, enumerated at [31], are similar to the Opponent's goods to a medium degree.

39. I group together the following of the Applicant's services, all being retail services in connection with the sale of various beverages or preparations for beverages (e.g. malt) [none of which being intended as nutritionally-fortified/nutrient-enriched beverages]:

retail and wholesale services in connection with the sale of milk, other milk products, dairy products, coffee, tea, cocoa and artificial coffee, malt, non-alcoholic beverages

40. I compare these services to the Opponent's *other non-alcoholic beverages*¹⁴ and *other preparations for making beverages*.

¹⁴ i.e. non-alcoholic beverages that are not included in the preceding terms of the Opponent's class 32 specification, i.e. *Energy drinks, sports drinks, fruit juice drinks*.

41. My observations above at paragraph [37] also apply here. I find that the Opponent's goods set out above will include the goods which are the subject of the Applicant's services. The Opponent's goods will therefore be complementary to the Applicant's services and trade channels will overlap. Consequently, I find that the Applicant's services, enumerated at [39], are similar to the Opponent's goods to a medium degree.

42. I now compare the Applicant's *retail and wholesale services in connection with the sale of alcoholic beverages* against the Opponent's *beers*. Paragraph [37] also applies here. The Opponent's *beers* will be included in the goods which are the subject of the of the Applicant's services. The Opponent's goods will therefore be complementary to the Applicant's services and trade channels will overlap. Consequently, I find that the Applicant's services are similar to the Opponent's *beers* to a medium degree.

43. I now compare the Applicant's *retail and wholesale services in connection with the sale of foodstuffs and beverages for animals* against the Opponent's *other non-alcoholic beverages and other preparations for making beverages*. Paragraph [37] also applies here. In my view, the Opponent's goods will not be included in the goods which are the subject of the Applicant's services. There will therefore be no complementarity or overlap in trade channels. Consequently, I find the respective goods and services to be dissimilar. I do not consider comparison against any of the Opponent's remaining goods to yield any level of similarity.

Average consumer and the purchasing act

44. The average consumer is deemed to be reasonably well-informed and reasonably 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: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

45. In *Hearst Holdings Inc*¹⁵ Birss J. (as he then was) described the average consumer thus:

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

46. The Opponent has submitted the following:¹⁶

The relevant goods and services in classes 5, 32 and 35 are everyday products and retail services relating to such products, which are directed at the public at large and purchased frequently. The degree of attention is therefore low or average.

47. The Applicant has submitted that, in the case of goods ‘being either (i) medical products; or (ii) intended to be given to babies and/or infants’ the average consumer will display a higher degree of attention. It submits that, in the case of *nutritional supplements*, ‘whilst these products can be described as everyday items, they ... require a greater than average degree of attention when selecting them due to the health and nutritional benefits associated with them’.

48. In my view, the average consumer of the relevant class 5 goods will comprise members of both the general and professional public. I consider purchasers of *nutritional supplements* to be predominantly members of the general public. A number of purchases will also be made by professional purchasers in medical and healthcare settings. Many of the goods intended for medical purposes will, in my view, be purchased by professionals for a pharmacy or hospital. I consider that many of these particular goods would be available to the general public on prescription only. The goods intended for babies or infants would, in most cases,

¹⁵ *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).

¹⁶ Opponent’s written submissions in evidence round, paragraph [26].

be purchased by the general public who are parents or carers; a smaller number of these goods would be purchased by professionals in a healthcare setting. In my view, the level of attention displayed by a member of the general public when making a purchase will be in the above-average to high range. The professional purchaser obtaining the goods intended for medical use, particularly prescription-only products, will display a level of attention in the high – very high range. Factors considered will include ingredients, dosage and health warnings. The purchasing act will be primarily visual in nature. Aside from the goods intended for medical use, goods will usually be self-selected online or from shelves. Many of the goods intended for medical purposes, especially those which are prescription-only, will likely be selected from specialist catalogues.

49. I consider the average consumer of the Opponent’s class 32 goods to be a member of the general public. The purchasing act will be primarily visual; items will be self-selected from shelves in physical shops, and by ‘clicking’ on the items for goods sold online. The goods will be purchased with an average level of attention.

50. The average consumer of the class 35 services will be a member of the general public. The purchasing act will be visual to the extent that the average consumer will be exposed to the service-provider’s mark upon visiting the retail premises or website. An average level of attention will be paid when using these services.

Comparison of the marks

Opponent’s (earlier) mark	Applicant’s (contested) mark
RELENTLESS	RELENTLESS PURSUIT

51. 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.

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

53. The Opponent’s submissions¹⁷ can be summarised as follows:

- That the earlier mark is replicated at the beginning of the later mark. The Opponent argues that consumers tend to focus on the on the beginning of a sign and that, therefore, the marks are highly visually similar.
- The Opponent submits that ‘RELENTLESS’ is the first element which will be pronounced in the contested mark and that it is therefore the most important element. It argues that the marks are highly aurally similar.
- It is submitted that ‘relentless’ has same meaning in both marks and that the average consumer will recognise it as meaning ‘persistent’. It argues that the marks have a high degree of conceptual similarity.

¹⁷ Opponent’s written submissions in lieu of a hearing, paragraphs [7] – [9].

54. The Applicant's submissions¹⁸ can be summarised as follows:

- That the marks have a low degree of visual similarity, arguing that the presence of the 'PURSUIT' element in its mark 'still has a significant visual impact given its length and positioning along with the impact it has on the visual impression of the mark as a whole'.
- The Applicant submits that the marks are aurally similar to a low degree.
- On the matter of conceptual similarity, it submits the following:

The Applicant disagrees with the Opponent's submission that the consumer will understand both marks to mean 'persistent' since the Cambridge Online Dictionary defines the word 'relentless' as 'continuing in a severe or extreme way' whereas 'relentless pursuit' would be understood more positively to mean the ongoing pursuit of a particular goal.

55. The Opponent's mark comprises a single word element, 'RELENTLESS', in a plain font, all letters of uniform size and in upper case. The overall impression resides in its entirety.

56. The Applicant's mark comprises two words, 'RELENTLESS PURSUIT', in a plain font, all letters of uniform size and in upper case. The overall impression resides in its entirety, with neither element having dominance over the other.

57. Visual comparison

The Opponent's mark 'RELENTLESS' is wholly incorporated into the Applicant's mark. The only point of visual difference is the presence of the word 'PURSUIT' following the word 'RELENTLESS' in the Applicant's mark, which is absent in the Opponent's mark. The resulting difference in length of the respective marks will be discerned visually.

¹⁸ Applicant's written submissions in lieu of a hearing, paragraphs [23] – [27].

58. Courts have been willing to find similarity of marks where there is an identical verbal element that is shared by the respective marks, even though the remaining letters are different. The General Court in the case of *Lancôme v OHIM*¹⁹ considered the word marks ‘ACNO FOCUS’ and ‘FOCUS’ and concluded that there was a certain visual similarity between them by virtue of both marks containing the common element ‘FOCUS’.

59. In *El Corte Inglés, SA v OHIM*, the General Court observed that the attention of the consumer is *usually* [my emphasis] directed to the beginning of a word mark²⁰, but I am mindful that this is not an absolute rule.

60. Consequently, I find the respective marks to be visually similar to a medium degree.

61. Aural comparison

The Opponent’s mark has three syllables and will be articulated as ‘RE-LENT-LESS’, with the emphasis on the second syllable. The Applicant’s mark has five syllables and will be articulated as ‘RE-LENT-LESS PUR-SUIT’ with emphasis on the second and fifth syllables. There is aural similarity to the extent that the first three syllables of the Applicant’s mark are identical to the Opponent’s mark in its entirety. The point of aural difference is the presence of the two syllables ‘PUR-SUIT’ in the Applicant’s mark, absent from the Opponent’s mark. I therefore find the respective marks to be aurally similar to a medium degree.

62. Conceptual comparison

The Applicant has submitted the following²¹:

¹⁹ Case T-466/08 *Lancôme Parfums et Beauté & Cie v OHIM* EU:T:2011:182, para [63].

²⁰ Cases T-183/02 and T-184/02 at para [83].

²¹ Applicant’s written submissions in lieu of a hearing, paragraphs [25] – [27].

The Applicant disagrees with the Opponent's submission that the consumer will understand both marks to mean 'persistent' since the Cambridge Online Dictionary defines the word 'relentless' as 'continuing in a severe or extreme way' whereas 'relentless pursuit' would be understood more positively to mean the ongoing pursuit of a particular goal.

The Contested Mark is a composite phrase in which the first word informs the second word and impacts on the meaning and understanding of the first word i.e. the Contested Mark is not solely the word RELENTLESS, or the word RELENTLESS plus an unrelated/unconnected additional word, the Contested Mark is RELENTLESS PURSUIT which has a very different overall conceptual meaning from the word RELENTLESS. The respective marks are not conceptually similar.

63. The word 'relentless' is a word in the English dictionary with which most average consumers will be familiar. It means 'unremitting, sustained, punishing or persistent'²² or 'continuing in a determined way without any interruption'²³. An example given of the word in use is 'the relentless pursuit of wealth and power'.²⁴ In my view, the Opponent's mark would convey these very concepts to the average consumer.

64. The word 'pursuit' is also a word in the English dictionary with which most average consumers will be familiar. There are several senses of the word:

An activity or pastime; act of following someone or something; act of trying to achieve a plan/state of affairs²⁵.

65. In my view, 'relentless pursuit' is a fairly common pairing of words and conveys the concept of determination to achieve or obtain something. The presence of the word 'pursuit' in the Applicant's mark does result in some measure of conceptual difference between the respective marks to the extent that it constitutes the noun to which the word 'relentless' is predicated; whereas the Opponent's mark simply

²² <https://www.collinsdictionary.com/dictionary/english/relentless>, accessed 6 September 2021 at 16:58.

²³ <https://dictionary.cambridge.org/dictionary/english/relentless>, accessed 6 September 2021 at 17:00.

²⁴ As above.

²⁵ <https://dictionary.cambridge.org/dictionary/english/pursuit>, accessed 6 September at 17:47.

conveys the idea of relentlessness in the abstract. However, the prevalence, in everyday parlance, of the use of the word 'relentless' to describe the 'pursuit' of something²⁶ persuades me that the conceptual distance between the respective marks is not vast. Consequently, I find the marks to be highly conceptually similar.

Distinctive character of the earlier mark

66. *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

²⁶ Indeed, as already noted, the dictionary includes the 'relentless pursuit' of something as an example of the word in use.

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

67. The Opponent’s mark ‘Relentless’ neither alludes to nor describes the goods in respect of which it is registered. ‘Relentless’ is a dictionary word, not an invented one. I therefore find that the earlier mark is inherently distinctive to a medium degree.

Likelihood of confusion

68. Confusion can be direct or indirect. Mr Iain Purvis Q. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*²⁷. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*²⁸, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that he has in his mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark before him but mistakenly matches it to the imperfect image of the earlier mark in his ‘mind’s eye’. Indirect confusion occurs when the average consumer recognises that the later mark is indeed different from the earlier mark, but, concludes that the later mark is economically linked to the earlier mark by way of being a ‘sub brand’, for instance.

69. Before arriving at my decision, I must make a global assessment taking into account all of the relevant factors, including the principles a) – k) set out above at [11].

70. When considering all relevant factors ‘in the round’, I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

71. My comparison of the respective goods and services has determined that:

²⁷ Case BL O/375/10 at [16].

²⁸ *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

- The following of the Applicant's goods are **identical** to the Opponent's goods:
nutritional supplements; malted milk beverages for medical purposes; dietetic beverages adapted for medical purposes.
- The following of the Applicant's services are **similar** to the Opponent's goods **to a medium degree**:
retail and wholesale services in connection with the sale of medicated beverages, nutritionally fortified beverages and drinks containing dietary fibre and preparations for making up into such drinks, milk, other milk products, dairy products, coffee, tea, cocoa and artificial coffee, malt, alcoholic and non-alcoholic beverages.
- The following of the Applicant's goods are **similar** to the Opponent's goods **to a low degree**:
milk powder for babies; food and beverages for babies and infants.
- I find the Applicant's *retail and wholesale services in connection with the sale of foodstuffs and beverages for animals* to be **dissimilar** to the Opponent's goods.

72. I have found the respective marks to be: visually and aurally similar to a medium degree; and conceptually highly similar.

73. The Opponent's mark is inherently distinctive to a medium degree. The CJEU held in *Sabel*²⁹ that:

"24. The more distinctive the earlier mark, the greater will be the likelihood of confusion."³⁰

²⁹ *Sabel BV v Puma AG* (C-251/95), [1998] E. T. M. R. 1 (1997) at [24].

³⁰ This principle was given an important qualification by Mr Iain Purvis Q.C, as the Appointed Person, in the decision of *Kurt Geiger v A-List Corporate Limited* BL O-075-13:

74. In my view, the visual and aural distinctions between the marks are sufficient to rule out *direct* confusion.

75. However, the following factors lead me to conclude that there will be *indirect* confusion between the marks³¹:

- The respective goods and services range from identical to a low degree of similarity;
- The respective marks are highly conceptually similar;
- The earlier mark is inherently distinctive to a medium degree;
- Consequently, I find that a significant proportion of average consumers will note the differences between the respective marks but conclude that the marks relate to economically-linked undertakings, e.g. 'Relentless Pursuit' might be perceived as a range or line of products under an overarching brand 'Relentless'.
- I find this to be the case even where goods are purchased with a high level of attention.

Final Remarks

"39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything, it will reduce it."

³¹ For all of the Applicant's goods and services with the exception of *retail and wholesale services in connection with the sale of foodstuffs and beverages for animals*, which I have found to be dissimilar with the Opponent's goods.

76. This was a partial Opposition. It has succeeded in respect of all of the Applicant's goods and services opposed, with the exception of the following term:

retail and wholesale services in connection with the sale of foodstuffs and beverages for animals.

77. The following of the Applicant's goods and services were not opposed:

Class 3	<p><i>Non-medicated cosmetics and toiletry preparations; non-medicated dentifrices; perfumery, essential oils; bleaching preparations and other substances for laundry use and dishwashing; cleaning, polishing, scouring and abrasive preparations; depilatory creams; depilatory lotions; wax strips for removing body hair; soaps for brightening textiles; detergents; soaps; laundry preparations; carpet cleaners; shampoos; fabric softeners, grease removing preparations; cleaning preparations; deodorants for personal use; hair lotions; dentifrices; toothpastes; exfoliants; depilatory preparations; hair regrowth inhibitors; cleaning, polishing, scouring and abrasive preparations; decalcifying and descaling preparations for domestic use; rinse agents for machine dishwashers; dishwashing preparations; salts for use in machine dishwashers; dishwasher cleaner, freshener and deodoriser; stain removing preparations; anti-static preparations; detergents having disinfectant properties; perfumery, essential oils, cosmetics, non-medicated preparations for the care of the body and skin; chemical substances being ingredients for toiletries and skin care preparations; mouth washes and preparations for dental hygiene; products to clean dentures; perfuming preparations for the atmosphere; potpourri, essential oils, room perfume sprays; cloths, wipes, tissues and sponges impregnated with cleaning preparations, preparations for body and beauty care; laundry preparations for dry cleaners;</i></p>
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	<p><i>limescale removers, rust removers, depilatory wipes; impregnated wipes and pads for skin care.</i></p>
Class 5	<p><i>Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for human beings and animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; food adapted for medical purposes; infants' and invalids' foods; infant formula; lacteal flour for babies; dietetic foods and preparations to be administered by tube; vitamins and vitamin preparations; dietary supplements consisting of vitamins; health food supplements for persons with special dietary requirements; health food supplements made principally of vitamins; health food supplements made principally of minerals; dietary and nutritional preparations; dietary and nutritional supplements; dietary food supplements; herbal supplements; mineral nutritional supplements; medicated food supplements; minerals and mineral preparations; nutritional food additives for medical purposes; pain relief medication; pain relief preparations; antibacterial gel; topical first aid gel; lubricant gels for personal use; tissues impregnated with insect repellent; herbs (medicinal); extracts of medicinal herbs; antioxidants; preparations for supplementing the body with essential vitamins and microelements; medicated confectionery; dietetic confectionery adapted for medical purposes; probiotic supplements; probiotic preparations for medical use to help maintain a natural balance of flora in the digestive system; dietary fibre to aid digestion; digestive enzymes; oral analgesics; cedar wood for use as an insect repellent; preparations for medical purposes; liquid bandage preparations; materials for dressings; medicated skin care preparations; antiseptic preparations, anti-bacterial</i></p>

	<p><i>preparations, disinfecting preparations, germicides; insecticides and miticides; insect repellents; air freshening preparations, air purifying preparations; room air fresheners; deodorants and deodorisers (other than for personal use); odour neutralisers; first-aid boxes; medicated preparations for the care of the body and skin; wound healing preparations; bandaging materials, bandages; bandage strips for skin wounds; emollient preparations for prevention and treatment of dry skin; antiseptics and medical preparations for use in oral hygiene; preparations for the disinfection of dentures; denture fixatives; denture adhesives; medicated mouth washes; contact lens cleaning preparations; preparations for perfuming or fragancing the air; preparations and substances for neutralising, controlling or reducing allergens; medicated toiletries; preparations or substances having sanitary, disinfecting, air freshening, air purifying or fungicidal properties; omega-3 fatty acids, phospholipids and antioxidants for promoting health; radioactive substances for medical purposes; gases for medical purposes; chemical conductors for electrocardiograph electrodes; semen for artificial insemination; nutritive substances for microorganisms; food for babies; dietetic foods adapted for medical purposes; air purifying preparations; insect repellents.</i></p>
Class 9	<p><i>Scientific, research, navigation, surveying, photographic, cinematographic, audiovisual, optical, weighing, measuring, signalling, detecting, testing, inspecting, life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling the distribution or use of electricity; apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; recorded and downloadable media, computer software, blank digital or analogue recording and storage media; mechanisms for coin-operated apparatus; cash</i></p>

registers, calculating devices; computers and computer peripheral devices; diving suits, divers' masks, ear plugs for divers, nose clips for divers and swimmers, gloves for divers, breathing apparatus for underwater swimming; fire-extinguishing apparatus; software applications; downloadable software; artificial intelligence software for healthcare; health monitoring software; diagnostic apparatus for testing food; electronic databases; electronic advertising displays; publications in the form of, or in the nature of electronic mail (e-mail); publications downloadable from the Internet; electronic publications; sanitary masks for dust prevention; dust masks; protection masks; respiratory masks, for non-medical purposes; filters for non-medical respiratory masks; antipollution masks for respiratory protection; respirators, other than for artificial respiration; nose clips to prevent breathing in pollutants; downloadable electronic game programs; computer game software; electronic games that may be accessed via the Internet, computers and wireless devices; smartphone and computer software applications, downloadable; computer e-commerce software; home automation software for developers and customers; mobile application software for home automation; monitoring devices for household and kitchen appliances and equipment; recorded and not recorded machine readable data carriers for household appliances; a computer software platform enabling auto-replenishment of household cleaning products; instruments, indicators and controllers for measuring, detecting and monitoring pollution levels in the environment; software for the provision of information relating to the environment and air pollution; downloadable software for learning and storing personalised information regarding pollution levels in and information regarding air quality in the immediate environment; audio and video baby monitors; motion detectors and motion sensors; cameras; electric measuring apparatus, namely, electric

	<p><i>thermometers not for medical use; infrared sensors; temperature sensors; electric and electronic video surveillance installations, namely, cameras; safety and security devices for monitoring changes in temperature in the human body, namely, remote infrared and temperature sensors; computer software for the purpose of human temperature monitoring; computer monitors; software and software applications for mobile phones, computers and handheld computers, for collecting data on vital statistics for medical and surgical applications; software for data collection for medical purposes; health monitoring software and software applications; artificial intelligence software for healthcare; health triage software and software applications.</i></p>
<p>Class 10</p>	<p><i>Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; therapeutic and assistive devices adapted for persons with disabilities; massage apparatus; apparatus, devices and articles for nursing infants; sexual activity apparatus, devices and articles; contraceptive appliances; contraceptives, nonchemical; medical apparatus for the relief of pain;; orthotic insoles; compression socks for medical or therapeutic use; orthopaedic and therapeutic hosiery; hosiery for medical, surgical and/or prophylactic purposes; medical and surgical socks; medical ventilators; inserts for breathing masks for surgical use; inserts for breathing masks for medical use; protective nose masks for medical use; protective breathing masks for medical applications; protective breathing masks made of non-woven materials for medical applications; respirators for medical purposes; orthopaedic, orthotic, chiropody, foot care apparatus and instruments; apparatus for exercising the foot; instruments and apparatus for placing bandages; apparatus for the fixing of fingers and toes; elastic gaiters, elastic knee joints, elastic bandages, bandages for the waist, bandages for orthopaedic</i></p>

	<p><i>purposes; apparatus for measuring, examining and taking impressions of the feet; body massagers; electrically operated massagers; foot massagers; therapeutic apparatus and appliances for massaging and/or bathing; massage apparatus, instruments and appliances; electric and electronic massage apparatus, instruments and appliances; body massagers; personal massagers; vibrators; vibrating rings; marital aids; sex toys; sex aids; contraceptive or prophylactic devices; condoms; stockings for varicose veins; therapeutic nose clips for the prevention of exposure to pollutants and for medical use; electronic devices for monitoring air in the immediate environment for medical use; medical apparatus for the treatment and relief of skin and eye ailments; instruments, equipment and apparatus for hygiene, orthopaedics and for the treatment and care of the feet and skin; cushions for care of the feet; aids for the correction of the feet including supports for the arch of the foot; apparatus for the separation and the straightening of the toes; protective apparatus against the hardening of areas of skin calluses and inflammation of the toes; cushions for the heels and under-heels; metatarsal cushions; boot inserts, foot rings and foot supports; shoe insoles, orthopaedic insoles, disposable insoles, deodorized insoles for orthopaedic footwear; medical imaging apparatus; infrared diagnostic apparatus for medical purposes; electromagnetic diagnostic imaging apparatus for medical purposes; diagnostic measuring apparatus for the purpose of temperature monitoring; medical electronic monitoring instruments for vital signs and temperature; respiration monitors; breathing sensors; thermometers and pulse oximeters; heart monitors; baby monitoring sensors and alarms for medical use; infant respiratory monitors.</i></p>
Class 21	<p><i>Household or kitchen utensils and containers (not of precious metal or coated therewith); cookware and tableware, except</i></p>

	<p><i>forks, knives and spoons; combs and sponges; brushes, except paintbrushes; brush-making materials; articles for cleaning purposes; unworked or semi-worked glass, except building glass; glassware, porcelain and earthenware; carpet-cleaning brushes; carpet shampoo applicators (non-electric); household gloves for cleaning purposes; dental floss; dental floss dispensers; battery powered dental flossers; small domestic containers, not included in other classes; toilet utensils, not included in other classes; toothbrushes; apparatus for cleaning (dental) braces (not included in other classes); carpet sweepers, mops; brooms; cloths and wipes for cleaning or household use; cloths for polishing; dusters and dusting cloths; steelwool; scouring pads; cleaning rags, cloths impregnated with a detergent for cleaning, polishing, scouring or bleaching; polishing materials; dispensers and dispensing apparatus; deodorising apparatus; air fragrancing apparatus; candle holders; oil cans; oil burners; perfume burners; containers in the nature of pomanders for scenting the atmosphere or for dispensing perfumes, air freshening or air purifying preparations into the ambient atmosphere; steel wool pads impregnated with saponaceous preparations.</i></p>
<p>Class 35</p>	<p><i>Advertising; business management; business administration; office functions; promotional services in the form of sharing of multimedia content via the Internet and other computer and communications networks; online retail store services relating to household cleaning products; electronic e-commerce services, namely, providing information about products via telecommunication networks for advertising and sales purposes; services relating to advertising, marketing and public relations, organization of exhibitions and trade fairs for commercial or advertising purposes; marketing services; commercial or industrial management services; rental and leasing of vending machines; advertising services to promote public awareness of</i></p>

medical and health issues; healthcare promotion services; distribution of healthcare promotional material; development of healthcare promotional campaigns; design services for commercial purposes; compilation of statistics relating to health care utilization; providing an online marketplace for customers and sellers; organisation, operation and supervision of loyalty and incentive schemes; provision of business information; arranging of competitions for advertising purposes; arranging of competitions for business purposes; retail and wholesale services in connection with the sale of air freshening preparations, air fresheners, non-medicated cosmetics and toiletry preparations, non-medicated dentifrices, perfumery, essential oils, bleaching preparations and other substances for laundry use and dishwashing, cleaning, polishing, scouring and abrasive preparations, domestic bleaching preparations for laundry use, dishwasher preparations, preparations for removing stains, carpet cleaners, soaps, detergents, decalcifying and descaling preparations, limescale removers, rust removers, fabric softeners, laundry additives, water softening preparations, grease removers, drain and sink unblocking preparations, preparations for prevention of limescale, rust or grease, skin care preparations, medicated skin care preparations, depilatory preparations, pharmaceutical, medical and veterinary preparations, sanitary preparations for medical purposes, dietetic food and substances adapted for medical or veterinary use, food for babies, dietary supplements for human beings and animals, plasters, material for dressings, material for stopping teeth, dental wax, disinfectants, preparations for destroying vermin, fungicides, herbicides; confectionery, contraceptive preparations and substances, spermicidal gels, liquids and creams, condoms, antiseptic preparations, anti-bacterial preparations, disinfecting preparations, insecticides, insect repellents, pesticides, rodenticides, miticides, germicides, deodorants (not for personal

use), infant formula, hand tools and implements (hand-operated), cutlery, side arms (except firearms), razors, electronic foot files, electric pedicure sets, nail clippers, nail files, nail scissors, computer software, computer software applications; surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth, orthopaedic articles, suture materials, therapeutic and assistive devices adapted for persons with disabilities, massage apparatus, apparatus, devices and articles for nursing infants, sexual activity apparatus, devices and articles, air freshener dispensing systems, household or kitchen utensils and containers (not of precious metal or coated therewith), cookware and tableware(except forks, knives and spoons), combs and sponges, brushes, except paintbrushes, brush-making materials, articles for cleaning purposes, unworked or semi-worked glass (except building glass), glassware, porcelain and earthenware, clothing, footwear, headgear, insoles for footwear, meat, fish, poultry and game, meat extracts, preserved, frozen, dried and cooked fruits and vegetables, jellies, jams, compotes, eggs; cheese, butter, yogurt; oils and fats for food, meal-based nutritional products, rice, pasta and noodles, tapioca and sago, flour and preparations made from cereals, bread, pastries and confectionery, chocolate, ice cream, sorbets and other edible ices, sugar, honey, treacle, yeast, baking-powder, salt, seasonings, spices, preserved herbs, vinegar, sauces and other condiments, ice [frozen water], biscuits, starch for food, raw and unprocessed agricultural, aquacultural, horticultural and forestry products, raw and unprocessed grains and seeds, fresh fruits and vegetables, fresh herbs, natural plants and flowers, bulbs, seedlings and seeds for planting, live animals; promotional services in the form of online entertainment and education; promotional services in the form of sharing of multimedia content via the Internet and other computer and communications networks.

Class 41	<p><i>Education; providing of training; entertainment; sporting and cultural activities; health and wellness training; education, training, advice and instruction services relating to hygiene, health, nutrition and germ protection; vocational education relating to avoidance of health related problems; production, publication and distribution of educational, training, advisory and instructional materials relating to hygiene, health and germ protection; educational research; publication of books, text, articles, journals, magazines, newsletters, teaching, instructional and educational material; publication of information relating to hygiene, health and germ protection; arranging and conducting of seminars, conferences, workshops, discussion groups, lectures and other educational meetings; educational programmes in the field of medicine, health and hygiene; educational institute services; leisure activities and entertainment services; operating of lotteries; the provision of on-line electronic publications; publishing services; provision of educational health and fitness information; electronic games services, including providing on-line computer games; business training services; business training provided via an on-line game; entertainment and educational services featuring electronic media, multimedia content, videos, movies, pictures, images, text, photos, games, user-generated content, audio content, and related information via computer and communications networks; publication of texts; publication of surveys and reviews; organisation of games, competitions, information campaigns and events to promote and publicise hygiene, health and germ protection; education, advice and training, all in relation to food, home consumer products, and personal care, sexual health and well-being and healthcare consumer products; education, advice and training, all in relation to home care, personal care and healthcare management and welfare.</i></p>

Class 42	<p><i>Scientific and technological services and research and design relating thereto; industrial analysis, industrial research and industrial design services; quality control and authentication services; design and development of computer hardware and software; exploitation of intellectual property rights; research services; industrial and scientific research; laboratory research and analysis; medical research; research relating to medicines; genetic research; chemical research; biotechnological research; biological research; clinical research; research of pharmaceuticals; cosmetics research; food research; legal services; application service provider (ASP) services; providing access to non-downloadable software; software as a service (SaaS); platform as a service (PaaS); hosting multimedia content for others; hosting an online website community for users to share information, photos, audio and video content and to engage in social networking; design and development of digital technology, computer hardware, computer software and application programming interfaces; providing temporary use of on-line, non-downloadable computer software for use in e-commerce; providing temporary use of web-based applications; providing computer software relating to web-enabled household appliances; providing a website and/or mobile application in order to assist in the ordering of household cleaning products; on-line computer services being the provision of web based applications allowing consumers to review food, household, personal care, health and hygiene products; on-line computer services being the provision of web based applications allowing consumers to view and respond to opinion polls and reviews collated via a global computer network; on-line blog hosting services; on-line database hosting services.</i></p>

Class 44	Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, aquaculture, horticulture and forestry services; planting of trees; tree surgery; healthcare; providing health information; providing medical and healthcare information and advisory services; health centres; health clinic services; health counselling; public health counselling; mental health services; medical and psychological counselling services; midwife services; hospital and health care services; charitable services, namely providing medical services; providing of medical humanitarian assistance; providing health services to refugees, the sick, persons in danger and persons in need; preparation of reports relating to healthcare matters; healthcare in the nature of health maintenance organizations.
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Consequently, subject to any appeal, the Application may therefore proceed in respect of the goods and services enumerated above at [76] and [77] only.

COSTS

78. I award the Opponent the sum of **£658** as contribution towards its costs, calculated as follows³²:

Preparation of statement and consideration of the Applicant's statement:	£300
Official fee for 5(2)(b) only:	£100
Written Submissions in lieu of hearing:	£300
Sub-total:	£700

³² Based upon the scale published in Tribunal Practice Notice 2/2016.

Less 6%, i.e. £42, to reflect Applicant's partial success ³³	
Total:	£658

79. I therefore order Reckitt & Colman (Overseas) Health Limited to pay to Energy Beverages LLC **the sum of £658**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 10th day of September 2021

Mx N. R. Morris
For the Registrar,
the Comptroller-General

³³ The Applicant has succeeded in respect of 1 out of 18 terms, i.e. approximately 6%, in respect of which registration was sought. A reduction of 6% has therefore been applied.