

**O/717/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003453913**

**BY KIVA BRANDS INC. TO REGISTER THE FOLLOWING TRADE MARK:**

**KIVA**

**IN CLASS 30**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 600001391 BY KIVA HEALTH BRANDS LLC**

## **Background and Pleadings**

1. On 11 December 2018, Kiva Brands Inc. ('the Applicant') filed an application to register the trade mark shown on the cover page of this Decision, number UK00003453913. The application was published for opposition purposes in the *Trade Marks Journal* on 20 March 2020. Registration is sought in respect of the following goods only:

**Class 30**

*Edible confections containing cannabis*

2. On 19 May 2020, the application was opposed by Kiva Health Brands LLC ('the Opponent') based on section 5(1), 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all of the Applicant's goods. The Opponent relies on the following earlier International Registration for its section 5(1), 5(2)(a) and 5(2)(b) grounds:

Application no: WO0000001325580

**KIVA**

International registration date: 09 May 2016

Designation date: 09 May 2016

Office of origin: United States of America

Publication date: 18 June 2021

Date of protection of the International Registration in the UK: 21 September 2021.

Relying on the following of its goods in classes 5, 29, 30 and 32:

**Class 5**

*Food supplements; food supplements for health, diet, energy, and beauty; food supplements, namely, anti-oxidants; nutritional food additives for medical purposes in the nature of natural food extracts derived from plants including fruit, and*

*animals; powdered nutritional supplement concentrate; wheatgrass for use as a dietary supplement; dietary food supplements; dietary supplement drink mixes; health food supplements; nutritional food additives for medical purposes in the nature of natural food extracts derived from plants including fruit, and animals; nutritional supplement shakes; powdered nutritional supplement drink mix; protein supplement shakes; nutritional food supplements.*

Class 29

*Candied fruit; candied fruit snacks; dried fruit-based snacks; dried fruits; dried fruits in powder form; milk shakes; dairy-based powders for making dairy-based food beverages and shakes; dried fruits in powder form; dried vegetables in powder form; edible oil, namely, cumin oil, black seed oil, rosehip oil, jojoba oil; freeze-dried fruits; fruit-based organic food snacks also containing mango, maqui berry, camu berry, acai berry and goji berry; organic dehydrated fruit snacks; preserved berries; processed chia seeds; processed goji berries; processed acai berries; organic foods, namely, acai berry powder, maca powder, and camu camu powder; goji berries, namely, processed goji berries; chia seeds, namely, processed chia seeds; organic foods, namely, maqui berry powder, and wheatgrass powder.*

Class 30

*Candy; chocolate powder; honey; organic spices; pepper spice; saffron for use as a food*

*seasoning; spices; spices in the form of powders; vanilla; flavored salt; fruit jelly candy; herbal honey; ; mixes for making flavored tea; mixes in the nature of concentrates, syrups or powders used in the preparation of tea based beverages; mixes in the nature of concentrates, syrups or powders used in the preparation of tea based beverages; natural sweeteners; organic spices; pepper powder; pepper spice; processed cacao; spices in the form of powders; sweets; organic foods, namely, cacao powder; organic spices, namely, saffron, vanilla, black pepper, and seasoned salts.*

Class 32

*powders used in the preparation of isotonic sports drinks and sports beverages; smoothies; concentrates and powders used in the preparation of energy drinks and fruit-flavored beverages; concentrates, syrups or powders for making soft drinks or tea-flavored beverages; concentrates, syrups or powders used in the preparation of sports and energy drinks; concentrates, syrups or powders for making soft drinks or tea-flavored beverages; fruit drinks and fruit juices; preparations for making beverages, namely, powders comprised of acai berry, maqui berry, camu camu berry, moringa leaf, stevia, cacao and chocolate for making beverages.*

3. The Opponent claims that there is a likelihood of confusion under sections 5(1), 5(2)(a) and 5(2)(b).

4. The Applicant filed a defence and counterstatement stating the following<sup>1</sup>:

It is not admitted that any of the goods claimed in the Applicant's Mark are identical or similar to the goods claimed under the Earlier Mark in Classes 5, 29, 30 and 32 on which the opposition is based, and the Opponent is required to prove the same.

It is not admitted that the respective goods will be available to the same consumers, via the same distribution and trade channels and be sold or made available in the same shops or online, and the Opponent is required to prove the same.

5. Written submissions have been filed by the Opponent only.

6. The Opponent is represented by represented by Dolleymores; the Applicant is represented by Locke Lord (UK) LLP.

7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Marks Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

8. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. Leave to file evidence was requested by the applicant, and the request was granted. Both parties filed evidence, effectively moving the proceedings to a standard, rather than fast track procedure. Neither party requested to be heard following the filing of evidence. The opponent filed written submissions in lieu of a hearing.

### **Relevant dates**

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<sup>1</sup> Paragraphs [3] and [4] of Applicant's counterstatement.

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 UK protection sought in respect of the earlier International registration was conferred on 21 September 2021. Consequently, the Opponent is entitled to rely upon its mark in respect of all of the goods on which it seeks to rely as set out in its statement of grounds.

### **Preliminary issues**

#### **10. Notional use**

Both parties have, from time to time, referred to particular goods that either or the other party is currently selling or intending to sell. How the parties currently use their marks are not relevant factors in the assessment of whether there is a likelihood of confusion. I must only consider the ‘notional’ use of the marks in relation to the goods and services in their respective specifications. In my assessment, I must therefore consider all of the possible circumstances in which the mark applied for *might* be used if it were registered. Any *actual* differences between the parties’ goods or services are irrelevant unless they are apparent from the specifications of the respective marks.

11. The Court of Justice of the European Union (“CJEU”)<sup>2</sup> has stated the following on the matter of notional use<sup>3</sup>:

“Once a mark has been registered its proprietor has the right to use it as he sees fit so that, for the purposes of assessing whether the application for registration falls within the ground for refusal laid down in that provision, it is necessary to ascertain whether there is a likelihood of confusion with the opponent’s earlier

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<sup>2</sup> 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.

<sup>3</sup> *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06.

mark in all the circumstances in which the mark applied for might be used if it were to be registered.”

### **Applicant’s evidence**

12. The Applicant’s evidence comes from Scott Palmer, Chief Executive of the Applicant company. Mr Palmer’s witness statement is dated 16 April 2021; there are 10 exhibits. In short, Mr Palmer states that nature, intended purpose, consumers and distribution channels of the Applicant’s goods differ to those of the Opponent’s goods.
13. **Exhibit X-1** comprises printouts of pages, dated 21 April 2021, from the Applicant’s website providing information on the history and ethos of the company. These matters are irrelevant to the Tribunal’s assessment of whether there is a likelihood of confusion between the respective marks.
14. **Exhibit X-2** comprises printouts of pages, dated 21 April 2021, from the Applicant’s website providing information about the cannabis plant, its properties and how the compounds used in cannabis products are extracted from the plant.
15. **Exhibit X-3** comprises printouts, dated 21 April 2021, of a ‘Guide to using medical cannabis’ from the website of ‘Americans for safe Access’. The material covers: the range of compounds derived from cannabis plants and their effects upon consumption; the types of goods through which the compounds are consumed and the methods of consumption e.g. ingestion, inhalation, smoking or absorption through the skin.
16. **Exhibit X-4** comprises printouts of three articles about ‘edible confections containing cannabis’. In adducing this evidence, the Applicant seeks to demonstrate that ‘edible confections containing cannabis...are sold in the UK by numerous specialised retailers’.

17. Article from Observer.com published 6 January 2021 titled 'CBD Gummies<sup>4</sup> UK: The 5 Best CBD Gummies in 2021. The following text has been highlighted: 'Cannabidiol, CBD, has gained massive popularity in the UK. The wellness craze is set to continue throughout 2021 too. People use it for everything from insomnia and anxiety to pain and inflammation. In Britain alone, 6 million people have tried CBD'.
18. Article from Confectionerynews.com published 3 December 2020 titled 'CBDs in confectionery, it's complicated, but labelling on products is key, says expert'. The following text has been highlighted: 'The CBD market is one of the fastest growing wellbeing product categories within the UK, expected to be worth £1bn by 2025.'
19. Article from 'SW Londoner' published 2 October 2020 titled 'The UK's Top 5 CBD Gummies for 2020'. The following text has been highlighted: 'CBD gummies are fast becoming the preferred choice of ingesting CBD among many UK CBD consumers'.
20. **Exhibit X- 5** comprises a printout of guidance from [www.food.gov.uk](http://www.food.gov.uk) titled 'Cannabidiol (CBD) guidance: Business guidance on cannabidiol (CBD) as a novel food', accessed 21 April 2021. The following text has been highlighted: 'Food businesses should apply for authorisation of their CBD extracts and isolates to be placed on the GB market'.
21. **Exhibit X-6** comprises printouts of two articles, accessed 21 April 2021, from the website 'Foodnavigator.com'. The first article, published 30 October 2020, is titled 'UK CBD industry body becalmed after novel foods applications clarification' and gives a brief overview of the Food Standards Authority's requirements for 'CBD Novel Food applications'.<sup>5</sup> The second article, published 2 February 2021, titled

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<sup>4</sup> 'Gummies' are chewy sweets.

<sup>5</sup> i.e. before a food product containing CBD may be legally sold in the UK, an application must be made to, and approved by, the FSA.



'This will boost consumer confidence that they can trust these products: CBD industry predicts sales lift as deadline for novel food applications approaches', included further details on Novel Food applications.

22. **Exhibit X-7** comprises printouts of pages from the websites of 'Holland and Barrett', 'Planet Organic' and 'Boots', accessed 13 April 2021. The pages from Holland and Barrett show the following products: vitamins; manuka honey; food supplements used by gym and fitness enthusiasts; essential oils; CBD 'food enhancer'; tea, coffee and soft drinks containing CBD. The exhibit shows that CBD products are found in a sub-section of the general food and drink section.

23. Mr Palmer states in his witness statement<sup>6</sup> that '...the majority of the products sold under the website's sub-section 'CBD – food and drink' can only be purchased by consumers aged '18+'<sup>7</sup> and argues that edible confectionery containing CBD are not, therefore, held out as 'regular food'. However, just because a consumer must be at least 18 to purchase the Applicant's goods does not preclude the possibility that consumers over the age of 18 also purchase the Opponent's goods. The age restriction for one set of goods does not necessarily rule out overlap in users of the respective goods.

24. The pages from Planet Organic show product listings for: CBD chocolate; various CBD soft drinks; and CBD oil.

25. The pages from Boots show product listings for: CBD oral sprays; CBD oil capsules and drops; hemp seed oil; CBD muscle gels and rubs; CBD oil Epsom bath salts; hemp face masks; CBD oil skincare products; CBD oil; hemp skincare products; and CBD gummies.

## 26. **Exhibits X-8 and X-9**

Exhibit X-8 comprises printouts from the websites of 'Waitrose' and 'Tesco' showing search results for the term 'CBD'. The Tesco search returned two CBD

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<sup>6</sup> Witness Statement of Scott Palmer, paragraph [21].

<sup>7</sup> I understand, from my own general knowledge, that some products containing CBD may only be purchased by persons over 18 years of age.

skincare products only. The Waitrose search did not return any products related to CBD.

27. The Applicant has adduced this evidence to seek to demonstrate that edible goods containing CBD are not sold via supermarkets. It argues that the Opponent's class 30 goods 'such as *candy* and *chocolate powder*' are however sold in supermarkets; **Exhibit X-9** comprises printouts of product listings for 'candy' and 'chocolate powder, from Tesco and Waitrose, respectively. The Applicant argues that 'the respective goods do not share the same kind of distributors or outlet channels'.

28. This argument is flawed, however. The fact that a supermarket might not sell edible products containing CBD does not necessarily rule out the possibility that other shops which *do* sell those products also sell 'regular' food, including confectionery indeed, Exhibit X-7 features manuka honey, which is also sold at supermarkets.

29. **Exhibit X-10** comprises an excerpt from the 'EUIPO Guidelines' on the NICE Classification of goods and services. This does not constitute evidence. The established legal principles by which the Tribunal is bound are set out below at paragraphs [39] – [41].

### **Opponent's evidence**

30. The Opponent's evidence comes from Mr Tchad Henderson, 'Managing Member' of the Opponent company. Mr Henderson's Witness Statement is dated 11 June 2021. The following sales figures are provided:<sup>8</sup>

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<sup>8</sup> Witness statement of Tchad Henderson, para [4].

My company has been selling products to consumers in the United Kingdom under the KIVA brand. Sales figures for products sold in the United Kingdom from 1 January 2018 to 31 December 2020 are:

Period	Sterling Sales	US dollar equivalent
2018-2019	£102,128	\$144,000
2019-2020	£302,766	€426,900

The annual turnover for products sold under the brand KIVA globally is approximately US\$12 million annually.

31. These sales figures, as well as **Annexes 1, 2 and 3** contain, respectively, the Opponent's product listings, evidence of advertising and sales activity. Although the Opponent is not obliged to adduce evidence of use of their mark, this evidence may be relevant to the assessment of whether or not the earlier mark enjoys an enhanced level of distinctiveness. If evidence has been filed, it is incumbent upon the Tribunal to factor that evidence into the assessment to decide upon the overall distinctiveness of the earlier mark.

32. **Annex 4** is 'a Google Analytics map for the period January 2018 – December 2020' and includes the following table:



Region	Total Users	1. England Users	2. Scotland Users	3. (not set) Users	4. Wales Users	5. Northern Ireland Users
1. England	3,149	3,149	0	0	0	0
2. Scotland	197	0	197	0	0	0
3. (not set)	108	0	0	108	0	0
4. Wales	105	0	0	0	105	0
5. Northern Ireland	41	0	0	0	0	41
6. Isle of Man	3	0	0	0	0	0

Rows 1 - 6 of 6

It is presumed that the figures relate to the number of web searches related to the Opponent's websites.

33. **Annex 5** comprises printouts of two articles, from Sky news and RTE news, respectively, about cases of children falling ill after allegedly consuming confectionery containing cannabis.
34. **Annex 6** comprises printouts from [www.boots.com](http://www.boots.com), [www.plantorganic.com](http://www.plantorganic.com) and [hollandandbarrett.com](http://hollandandbarrett.com). This evidence has been adduced to demonstrate that these outlets sell general foodstuffs, as well as the CBD-containing goods highlighted by the Applicant in its evidence. The product listings for 'Boots' include: breakfast cereal bars; nuts and dried fruits; snacks; and honeys, jams and spreads. The product listings for 'Planet Organic' include: a variety of biscuits and crackers; snacks; and confectionery. The product listings for 'Holland and Barrett' include: confectionery; cakes and biscuits; snacks; and honeys.
35. The following decision has been made after careful consideration of the papers before me.

## **Decision**

### **Section 5(1), (2)(a) and (b) of the Act and related case law**

36. Section 5(1) of the Act states:

'5(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.'

37. Section 5(2) of the Act states:

'5(2) A trade mark shall not be registered if because—

- (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
- (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.'

38. The following principles are derived from the decisions of the CJEU 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 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**

### 39. 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.”

40. 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.

41. 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”.

42. The Opponent has indicated in its Notice of Opposition that it seeks to rely on the goods enumerated above at paragraph [2]. However, in its written submissions,<sup>9</sup> it identifies the following comparison only, in the course of its arguments on the comparison of the respective goods:

Application	Designation
Class 30 - Edible confections containing cannabis.	Class 30 - Candy; fruit jelly candy; processed cacao; sweets.

43. The Opponent submits that the Applicant’s goods are *Merit* identical with the Opponent’s goods and submits the following:<sup>10</sup>

“Notional Use”, therefore, requires consideration of the goods contained in the term, “*Edible confections containing cannabis*” in the Application. The word, “confection” is variously defined as,

- i. A food item prepared very sweet, frequently decorated in fine detail, and often preserved with sugar, such as a candy, sweetmeat, fruit preserve, pastry, or cake – Wikipedia.
- ii. any sweet preparation of fruit, nuts, etc, such as a preserve or a sweet – Collins English Dictionary
- iii. an elaborate sweet dish or delicacy – Oxford English Dictionary.

As such, the term, “Confection” has a broad range including all goods that are sweet, which will include the, “*Candy; fruit jelly candy; processed cacao; sweets*” contained in the Designation.

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<sup>9</sup> Opponent’s written submissions in lieu of a hearing, paragraphs [6] and [16].

<sup>10</sup> As above, paragraph [8].



44. It also submits the following<sup>11</sup>:

As shown in paragraph 9, the goods in the Designation are included in the more general category within the Application. As the Application only contains the general category all the goods in the Application are identical to the goods in the Designation.

45. I agree that the *Meric* principle is applicable in these proceedings, but I consider that the Opponent has applied the principle incorrectly. The Applicant's term is not merely *edible confections* but *edible confections containing cannabis* (this will include sweets and chocolates containing cannabis) i.e. goods will only fall under the Applicant's term if they are confections which have cannabis as an ingredient. Mere confections will not be included.

46. In this case, the *Meric* principle works the other way i.e. the *Applicant's* term is included under one or more of the Opponent's terms. In my view, *edible confections containing cannabis* will be included under each of the Opponent's broad terms *sweets* and *candy* ['candy' is, in my view, synonymous with 'sweets'].

47. Consequently, I find the Applicant's goods to be *Meric* identical with the Opponent's terms *sweets* and *candy*. This represents the strongest comparison between the Applicant's *edible confections containing cannabis* and the Opponent's goods.

### **Average consumer and the purchasing act**

48. 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*.

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<sup>11</sup> As above, paragraph [9].

49. In *Hearst Holdings Inc*<sup>12</sup> 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.”

50. The Opponent has submitted the following:<sup>13</sup>

These products are available for purchase by the general public in the UK, therefore, the Average Consumer must be deemed to be the UK public as a whole. As the goods in the Application are in class 30 they do not have medicinal properties and are, instead, for ingestion as recreational products. As such, there is no evidence to demonstrate that the level of attention will be any greater than that taken when purchasing goods such as alcohol. The level of attention paid by the average consumer must, therefore, be considered to be moderate at most.

51. The average consumer of the goods falling under the Opponent’s terms *candy* and *sweets* will be the general public. The purchasing process will, in most cases, be visual to the extent that consumer will select the goods from the shelves in physical shops or add the goods to the ‘basket’ when shopping for the goods online. I consider that the attention level of the average consumer to range from low to medium; a small packet of sweets will be purchased with a low level of attention, whereas a box of ‘gourmet’ or ‘artisan’ chocolates may be a more considered purchase.

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<sup>12</sup> *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).

<sup>13</sup> Opponent’s written submissions in lieu of a hearing, paragraph [19].

52. I now consider the Applicant's goods. The average consumer will, in my view, be a member of the general public; in many cases, cannabis-containing products will be purchased to address particular health concerns in respect of which the products are said to be beneficial. The purchasing act will be predominantly visual, as is the case with the Opponent's goods, however, there will be instances where products have been selected after hearing about them by 'word of mouth' or seeking advice from retail staff. In my view, the average consumer would pay at least an average degree of attention when purchasing these goods. Factors considered by the purchaser would include potency i.e. the strength or concentration of the CBD; and which conditions the product is said to be beneficial for.

### Comparison of the marks

53. The marks to be compared are:

Opponent's (earlier) mark	Applicant's (contested) mark
<b>KIVA</b>	<b>KIVA</b>

54. Both marks are rendered in a normal font. A word mark registered in standard characters may be considered to cover use of the same word presented in any normal font<sup>14</sup>. Consequently, the marks are identical.

### Likelihood of confusion

55. I have found the Applicant's goods to be *Merix* identical with the Opponent's goods; and I have found the respective marks to be identical. The opposition under section therefore 5(1) succeeds.

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<sup>14</sup> *Migros-Genossenschafts-Bund v EUIPO*, Case T-189/16

## Final Remarks

56. The Opposition has succeeded in full on the section 5(1) ground. It is therefore unnecessary to consider the remaining grounds of the Opposition.

## COSTS

57. I award the Opponent the sum of £1,200 as contribution to its costs, calculated as follows<sup>15</sup>:

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
Preparation of evidence	£500
Sub-total:	£1,200
<b>Total:</b>	<b>£1,200</b>

58. I therefore order Kiva Brands Inc. to pay to Kiva Health Brands LLC **the sum of £1,200**. 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 day of September 2021**

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

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<sup>15</sup> Based upon the scale published in Tribunal Practice Notice 2/2016.

