

O/600/21

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3401303  
BY MODERN CONTRADICTION LIMITED

TO REGISTER:

**Spirited Seltzer**

AS A TRADE MARK IN CLASSES 32 & 33

AND

IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 420324 BY  
BOATHOUSE BEVERAGE, LLC

## BACKGROUND AND PLEADINGS

1. Modern Contradiction Limited (“the applicant”) applied to register **Spirited Seltzer** as a trade mark in the United Kingdom on 22 May 2019 for the goods in Classes 32 and 33 listed in the Annex to this decision. The application was accepted and published on 28 February 2020.

2. On 24 April 2020, the application was opposed by Boathouse Beverage, LLC (“the opponent”). The opposition is based on sections 5(2)(b), 3(1)(c) and 3(3)(b) of the Trade Marks Act 1994 (“the Act”) and concerns all the goods of the application.

3. Under section 5(2)(b), the opponent is relying on UK Trade Mark (“UKTM”) No. 3242273, which was applied for on 7 July 2017 and registered on 29 September 2017 for the following goods in Class 33: *Alcoholic beverages (except beer); alcoholic fruit beverages; low alcoholic drinks; alcoholic malt drinks*. The mark is shown below:



4. The opponent claims that the contested goods are identical or highly similar to the earlier goods, and that the marks are similar, and that consequently, there exists a likelihood of confusion on the part of the public, including the likelihood of association, and the contested application should be refused in its entirety under section 5(2)(b).

5. Under section 3(1)(c), the opponent claims that the contested mark is descriptive of the characteristics of the contested goods in Class 33, namely that it is carbonated water containing alcohol, or an alcoholic drink based on carbonated water. It states

that “Seltzer” is defined in the *Collins English Dictionary* as “a natural effervescent water with a high content of minerals” and that when consumers see “Spirited” in the contested mark they will understand this to mean an alcoholic drink. Consequently, the mark is unable to fulfil its essential function of guaranteeing the origin of the mark’s goods to the consumer, where the goods are alcoholic drinks.

6. Under section 3(3)(b), the opponent claims that the contested mark is deceptive as to the nature of the goods in Class 32. As the consumer would understand the mark to denote an alcoholic drink, they would be deceived as to the nature of the goods were the mark to be used for non-alcoholic drinks such as *aerated fruit juices*, *aerated waters* and *carbonated waters*.

7. The applicant filed a defence and counterstatement denying the claims made. It contends that the marks are dissimilar and, while it admits that there is some overlap in the goods, that the application is being made for a wider range of alcoholic and non-alcoholic beverages. Hence there is no likelihood of confusion. It also denies that the contested mark is either descriptive or deceptive.

8. The matter came to be heard by me by videolink on 26 May 2021. The opponent was represented by Julius Stobbs of Stobbs and the applicant by Azhar Sadique of Keltie LLP.

## **EVIDENCE AND SUBMISSIONS**

9. The opponent’s evidence in chief comes in the form of a witness statement from Harpreet Dhaliwal, a Trade Mark Attorney at the opponent’s representative, Stobbs. It is dated 13 October 2020. The exhibits consist of printouts from websites on which, according to Ms Dhaliwal, the word “spirited” is used descriptively when referring to an alcoholic beverage and other printouts that show the word “seltzer” as descriptive for beverages.

10. The applicant filed evidence on 14 January 2021. This consisted of a witness statement and nine exhibits from Amelia Skelding, a Trade Mark Associate at the applicant’s representative, Keltie LLP, dated 12 January 2021. She comments on the

opponent's evidence in chief, including whether the mark that the opponent is relying on under section 5(2)(b) of the Act is more likely to fall foul of section 3(3)(b) than the contested mark. However, the validity of the opponent's mark is not at issue here.

11. The applicant also filed another witness statement from Dr Katie Patterson, formerly Professor of Linguistics at Roehampton University. Dr Patterson stated that she was a specialist in corpus linguistics, which is a study of language as expressed in "real world" examples and her evidence supported the position that "spirited" was not used to refer to drinks containing spirits. The opponent requested that the Registry not admit this evidence, on the grounds that it constituted expert evidence, for which permission had not been sought.

12. I held a Case Management Conference on 17 March 2021 at which the parties were represented by Mr Stobbs and Mr Sadique. Having heard their submissions, I considered that Dr Patterson's witness statement and exhibits was expert evidence. Section 4.8.4.5 of the Tribunal Work Manual states that:

"There may be instances where, owing to the technical or specialised nature of the goods or services under consideration, that expert evidence about the way that the market operates may be helpful. However, it is considered that expert witness evidence will seldom be of assistance and permission for the adducing of expert witness evidence will therefore be the exception rather than the rule."

13. In my view, this tribunal is accustomed to considering whether commonly used English words are descriptive of consumer goods and services, and I was not persuaded that the evidence of Dr Patterson would be of assistance. I declined to admit this evidence into the proceedings.

14. The opponent filed evidence in reply in the form of a witness statement and eight exhibits from Ms Dhaliwal dated 15 March 2021. The exhibits consisted of an article from [hardseltzernews.com](http://hardseltzernews.com) intended to show the descriptive use of the phrase "spirited seltzer" and a series of web articles on the practice in the English language of turning nouns into verbs.

15. I have read all the evidence and will return to it in more detail below.

16. The applicant also filed written submissions on 14 January 2021 and 15 April 2021 and I shall refer to these where appropriate in my decision.

## **DECISION**

17. 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.

### **Approach**

18. I shall consider the section 3 grounds first. At the hearing, Mr Stobbs made it clear that these claims represented the opponent's primary position and that the section 5(2)(b) claim was an alternative position advanced in case I were to find against the opponent under sections 3(1)(c) and 3(3)(b).

### **Section 3(1)(c)**

19. Section 3(1)(c) of the Act is as follows:

“The following shall not be registered –

...

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

...

Provided that, a trade mark shall not be refused registration by virtue of paragraph ... (c) ... above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

20. The relevant date for my assessment is the date on which the application was made: 22 May 2019.

21. The case law under section 3(1)(c) (corresponding to Article 7(1)(c) of the EUTM Regulation, formerly Article 7(1)(c) of the CTM Regulation) was set out by Arnold J (as he then was) in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch):

“91. The principles to be applied under art. 7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

‘33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L40, p. 1), see, by analogy, [2004] ECR I-1669, paragraph 19; as regards Article 7 of Regulation No 40/94, see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr & Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18, paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I-1461, paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94. Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia, *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44, paragraph 45, and *Lego Juris v OHIM* (C-48/09 P), paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley*, paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94, it is not necessary that the sign in question actually be in use at the time of the application in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie*, paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] E.C.R. I-2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] E.C.R. I-1619,

paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland*, paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No 40/94 are those in which the sign in respect of



which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94, the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56).'

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99) [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97]."

22. In *Metso Paper Automation Oy v Office for Harmonisation in the Internal Market (OHIM) (PAPERLAB)*, Case T-19/04, a case to which Mr Stobbs referred me, the General Court (“GC”) said:

“It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see, to that effect, Case T-311/02 *Lissotschenko and Hentze v OHIM (LIMO)* [2004] ECR II-2957, paragraph 30).”<sup>1</sup>

#### *The parties’ submissions*

23. At the hearing, Mr Stobbs made detailed submissions, drawing on the case law interpreting section 3(1)(c) and the equivalent provisions in EU law. He submitted that the contested mark brings together two wholly descriptive terms without the addition of any unusual meaning and so, following *Koninklijke KPN Nederland NV v Benelux-Merkenbureau (POSTKANTOOR)*, Case C-363/99, paragraph 98, the mark must be descriptive. He contended that the descriptiveness of “SPIRITED” came from its origin in the noun “SPIRIT”, which means “a strong distilled alcoholic drink”, and that “SELTZER” was descriptive of a type of beverage. The fact that a combination of two descriptive words was not widely used was not relevant: see *PAPERLAB*. Citing *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr & Co (DOUBLEMINT)*, Case C-191/01 P, he asserted that it was not necessary for the term to be in current use, as a reasonable apprehension that it might be so used in the future was sufficient.

24. Mr Stobbs also submitted that a sign not far removed from descriptive language would be regarded as exclusively designating a characteristic of goods or services, provided that there was a direct and specific relationship between the marks and the goods or services. In his view, the word “SPIRITED” was not far removed from the

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<sup>1</sup> Paragraph 25.

word “SPIRIT”. He referred me to the Hearing Officer’s decision in *SOLAFIELDS Trade Mark*, BL O-082-15. This decision is not on all fours with the present case. There, the aural identity was significant and the missing letter “R” found to be insufficient to distinguish “SOLAFIELDS” from “SOLAR FIELDS” or “SOLARFIELDS” as a description of a characteristic of the *Production of energy from solar photovoltaic farms*.

25. Referring to the already cited judgment in *Starbucks*, Mr Stobbs submitted that:

“... for the purposes of this assessment it only really matters if a decent proportion of the relevant average consumer set – the *Interflora* average consumer set – would see that the term could be used to give an indication in relation to a characteristic of the goods and services.”<sup>2</sup>

26. He also stressed the importance of the context in which a mark is used, citing the judgment of Arnold J (as he then was) in *Frank Industries Pty Ltd v Nike Retail BV & Ors* [2018] EWHC 1893 (Ch). Here, the judge found that the evidence did not establish that the consumer would perceive LNDR as meaning “Londoner” when it was used on an item of clothing or a swing ticket or label attached to said item. Neither did the evidence establish that LNDR would have been perceived as denoting a characteristic of the clothing.<sup>3</sup>

27. In his skeleton and at the hearing, Mr Stobbs referred to a further two decisions of the GC: *Ratiopharm GmbH v OHIM (BioGeneriX)*, Case T-48/07, and *Neoperl Servisys AG v OHIM (HONEYCOMB)*, Case T-256/06. For neither of these decisions is an official translation available. However, I have had the benefit of seeing machine translations and the French language versions. Mr Stobbs also thoroughly explained the points that he was drawing from both these judgments.<sup>4</sup> Both cases apply the principles already set out above. In particular, speaking about *BioGeneriX*, he submitted that:

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<sup>2</sup> Transcript of the hearing, page 9.

<sup>3</sup> Paragraphs 84-85.

<sup>4</sup> Transcript, pages 4-7.

“This is not about normal usage. It is not about a term that necessarily is in current usage. It is not always about terms that are dictionary defined. It is about how the average consumer would perceive the term in the context of the goods and services and whether that would create a specific and direct link to a characteristic of those goods and services.”<sup>5</sup>

28. Mr Sadique had noted that the opponent, while quoting the *Collins English Dictionary* definition of “seltzer”, had not filed the definition for “spirited”. Ms Skelding for the applicant did so, and the definitions in British English are as follows:<sup>6</sup>

*Displaying animation, vigour, or liveliness*

*Characterized by mood, temper, or disposition as specified, e.g. high-spirited, public-spirited.*

29. He referred me to the decision of the Court of Appeal in *JW Spear & Sons Ltd & Ors v Zynga Inc* [2015] EWCA Civ 290, where Floyd LJ said:

“82. It is nevertheless the case that signs which are candidate trade marks lie on a continuum between the entirely generic, through the descriptive to the inherently distinctive. Not every word which alludes to or is suggestive of some aspect of the goods or services is necessarily unregistrable. It is of course trite that it is not an objection to registration that the word has a dictionary meaning, or is an ordinary English word. The objection bites on relationships between the word and the characteristics of the goods or services for which it is sought to be registered which the average consumer will immediately perceive.

83. I have found helpful and agree with the analysis of the Advocate General in his opinion in *Doublemint* at [61] to [64]. He draws attention to the fact that there is no clear-cut distinction between indications which designate a characteristic and those which merely allude suggestively to it

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<sup>5</sup> Transcript, page 6.

<sup>6</sup> Exhibit AS7.

and suggests three considerations which may determine on which side of the line the indication lies. Although the entire passage repays reading, I will summarise his three points as: (i) how factual and objective is the relationship between an indication and the product or one of its characteristics? (ii) how readily is the message of the indication conveyed? and (iii) how significant or central to the product is the characteristic? Asking those questions will assist a fact-finding tribunal to determine whether it is likely that a particular indication may be used in trade to designate a characteristic of goods.”

30. The applicant does not dispute that “seltzer” can be taken as a descriptive element, but in its skeleton submitted that the average consumer would not immediately perceive the contested mark to be a description of a carbonated beverage containing a spirit. At the hearing, Mr Sadique submitted that the relationship between the word “spirited” and beverages containing spirits would require some thought on the part of the consumer and that the mark was a play on words. He also argued that the consumer would not use the term “spirited” to order a drink at a pub, bar or restaurant. I am not persuaded that this last point is decisive. A customer is unlikely to go to a bar and ask the server for a “spirit”, but that in itself does not mean that “spirit” is not descriptive of certain beverages.

*Does the evidence show descriptive use?*

31. Mr Stobbs accepted at the hearing that the evidence did not show “huge” use of the word “spirited” in connection with drinks. There are several printouts from websites but it is either unclear what markets they are describing or, in the alternative, they appear to relate to markets outside the UK. For instance, a 2012 article from *Southern Living* entitled “65 Spirited Cocktails Sure to Quench Your Thirst” contains US spellings (“favorite”, “flavor”, “color”, etc.), refers to “cozy fall cocktails” and quotes prices in dollars.<sup>7</sup>

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<sup>7</sup> Exhibit HD5.

32. Exhibit HD7 is a printout from a UK website, Icon Beverages, showing the “Spirited Icons” range, described as “a selection of Spirits from your favourite Rock Icons”, such as the band AC/DC. This printout is undated, apart from a copyright date of 2020, and it is not conclusive evidence that “spirited” is being used descriptively.

33. Exhibits HD9-HD11 consist of searches for the word “spirited” on the Waitrose, Marks & Spencer and Asda websites. In the last of these the word “spirited” appears in the names of two products, but those are the only references. I remind myself that website searches frequently return results that are not exact matches. The applicant’s evidence shows that a search for “spirit” on the Waitrose produces an identical first page of results.<sup>8</sup> These exhibits cannot, therefore, be taken to be evidence that those retailers use the word “spirited” descriptively for any type of beverage.

34. “Spirited” is also used in the titles of two Pinterest boards: “Spirited Drink” and “Spirited Drinks”.<sup>9</sup> It is not clear when these boards were set up or where the Pinterest users are located. Neither is it certain that the word “spirited” is being used descriptively to denote drinks containing spirits. Indeed, the first of these Pinterest boards contains some Pins relating to non-alcoholic drinks. For example, in the top left-hand corner is a recipe for Christmas Morning Punch, made by combining orange juice, cranberry juice, pineapple juice, and ginger ale, none of which are alcoholic, let alone spirits.

35. In the opponent’s evidence in reply, Ms Dhaliwal seeks to rebut the applicant’s denial that “SPIRITED SELTZER” has any descriptive meaning. Exhibit HD1 contains an article from *Hard Seltzer News*, described as “your one-stop hub for everything hard seltzer”.<sup>10</sup> It is entitled “Molson Coors to launch Proof Point RTDs”, is dated 30 September 2020 and states that:

“Molson Coors continues its quest for hard seltzer domination with the announcement of its new spirit based ready-to-drink (RTD) sparkling cocktails. Called Proof Point, the spirited seltzers are made with real spirits

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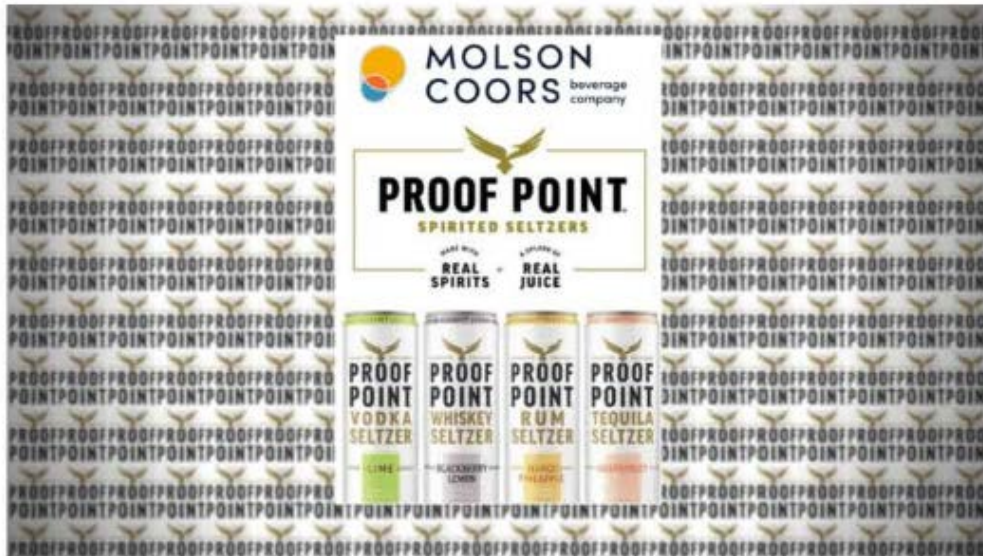
<sup>8</sup> Exhibit AS5.

<sup>9</sup> Exhibits HD2 and HD3.

<sup>10</sup> Page 3.

and a splash of real juice. The company stated in a release that the new product will be released in 2021.”<sup>11</sup>

36. The article contains the following image:



37. At the hearing, Mr Stobbs submitted that this was clearly descriptive use of the phrase “SPIRITED SELTZERS”. However, the article has a date subsequent to the date of application for the contested mark. In itself, this may not be fatal, but the article does not say that these products will be available in the UK and the use of gallons and ounces as units of measurement suggest that the website is US-facing. It is a notorious fact that there are differences between British and American English. Given the lack of other evidence, I am unable to give much weight to this particular exhibit.

38. Taking the evidence as a whole, I do not find that “SPIRITED” is used descriptively to refer to drinks containing spirits.

#### *Verbing nouns*

39. The opponent’s case does not solely rest on the argument that the phrase “SPIRITED SELTZER” is already being used descriptively. In her evidence in reply,

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<sup>11</sup> Page 2.

Ms Dhaliwal states that it is not uncommon in the English language to change a noun into a verb and Exhibits HD2-HD9 contain website articles and blogposts commenting on this practice. In the skeleton argument, the opponent submits that:

“... As shown within the evidence included within these Exhibits, examples of this include:

- The word ‘salt’ is a noun but is also used as a verb ‘to salt your food’;
- The word ‘journal’ is a noun but is also used as a verb as ‘journaled’;
- The word ‘action’ is a noun but also commonly used as a verb as ‘actioned’.”<sup>12</sup>

40. At the hearing Mr Stobbs submitted that

“The point is not to say that this has happened to the word SPIRITED, but to say that if this is a common part of how the English language develops, even if you are against us on the fact that the use shows that this is a term that is used and is understood, it is not a huge step for the average consumer of an alcoholic drink, in the context of an alcoholic drink, to see the word SPIRITED used against the word SELTZER to extrapolate and see SPIRIT turned into a verb.”<sup>13</sup>

41. The fact that some nouns are used as verbs does not, to my mind, necessarily imply that the public will immediately perceive a connection between the use of the word “SPIRITED” and the alcoholic content of a drink. This is a word with commonly understood meanings as shown in the dictionary definitions set out in paragraph 28 above. In my view, it is these meanings that will readily come to the mind of the public. At most, they might recognise a play on words, a point which Mr Sadique admitted, but this is not the same as finding a mark to be descriptive of a characteristic of the goods. The section 3(1)(c) ground therefore fails.

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<sup>12</sup> Paragraph 11.

<sup>13</sup> Transcript, page 18.



### Section 3(3)(b)

42. Section 3(3)(b) of the Act states that a trade mark shall not be registered if it is

“... of such a nature as to deceive the public (for instance as to the nature, quality or geographical origin of the goods or services).”

43. In *TWG Tea Company Pte Ltd v Mariage Frères SA*, BL O/358/17, Mr Phillip Johnson, sitting as the Appointed Person, conveniently summarised the case law as follows:

“(a) it is necessary to establish that the mark will create actual deceit or a sufficiently serious risk that the consumer will be deceived: C-87/97 *Consorzio per la tutela del formaggio Gorgonzola*, ECLI: EU:C:1999:115, paragraph 41; C-259/04 *Emanuel*, ECLI:EU:C:2006:2015, paragraph 47; C-689/15 *W. F. Gözze Frottierweberei*, EU:C:2017:434, paragraph 54;

(b) the deception must arise from the use of the mark itself (i.e. the use per se will deceive the consumer): *Gorgonzola*, paragraph 43; *Emanuel*, paragraph 49; *Gözze Frottierweberei*, paragraph 55;

(c) the assessment of whether a mark is deceptive should be made at the date of filing or priority date and so cannot be remedied by subsequent corrective statements: *Axle Associates v Gloucestershire Old Spot Pig Breeder’s Club* [2010] ETMR 12, paragraphs 25 and 26;

(d) the deception must have some material effect on consumer behaviour: *CFA Institute’s Application* [2007] ETMR, paragraph 40;

(e) where the use of a mark, in particular a collective mark, suggests certain quality requirements apply to goods sold under the mark, the failure to meet such requirements does not make use of the mark deceptive: *Gözze Frottierweberei*, paragraphs 57 and 58;

(f) only where the targeted consumer is made to believe that the goods and services possess certain characteristics which they do not in fact possess will the consumer be deceived by the trade mark: T-248/05, *HUP Usługi Polska v OHIM*, ECLI:EU:T:2008:396, paragraph 65;

(g) where a mark does not convey a sufficient specific and clear message concerning the protected goods and services or their characteristics but, at the very most, hints at them, there can be no deception in relation to those goods and services: *HUP*, paragraphs 67 and 68; T-327/16, *Aldi v EUIPO*, ECLI:EU:T:2017:439, paragraph 51;

(h) once the existence of actual deceit, or a sufficiently serious risk that the consumer will be deceived, has been established, it becomes irrelevant that the mark applied for might also be perceived in a way that is not misleading: T-29/16 *Caffè Nero Group v EUIPO*, ECLI:EU:T:2016:635, paragraph 48;

(i) where a trade mark contains information which is likely to deceive the public it is unable to perform its function of indicating the origin of goods: T-41/05 *SIMS – École de ski internationale v OHIM*, EU:T:2991:200, paragraph 50; *Caffè Nero*, paragraph 47.”<sup>14</sup>

44. The opponent submitted in its skeleton argument that when encountering the applicant’s Class 32 goods under the sign SPIRITED SELTZER in the market, the average consumer would be likely to be deceived in the following ways as it would expect the beverage to be a seltzer, which it defines as “a natural effervescent water with a high content of minerals”, and to contain some alcohol in the form of a spirit.

45. Mr Sadique submitted that, given its position that the mark was not descriptive, it did not consider that section 3(3)(b) could apply.

46. The deception envisaged by the legislation must derive from the intrinsic qualities of the mark itself at the date on which the application was made.

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<sup>14</sup> Paragraph 84.

47. There is no evidence of actual deceit, although the claim must be upheld if there is a sufficiently serious risk of deception. There can only be a sufficiently serious risk of deception if the consumer is aware of what a seltzer is and the mark would lead them to buy a product on the basis that it is that type of beverage. The relevant consumer group would be the adult general public.

48. I have been provided with the following definitions of the word “seltzer”:

*A natural effervescent water with a high content of minerals*

*A similar synthetic water, used as a beverage<sup>15</sup>*

*Water containing dissolved carbon dioxide gas, either artificially injected under pressure or occurring due to natural geological processes<sup>16</sup>*

*Seltzer is just plain ol’ water, carbonated with added carbon dioxide. This is the bubbly stuff that’s most likely to come flavored, since it’s such a neutral canvas<sup>17</sup>*

*Seltzer is ... made by carbonating plain water with carbon dioxide (CO<sub>2</sub>). Owing to its neutral profile, seltzer water is occasionally flavoured using natural fruit essences and oils<sup>18</sup>*

49. The applicant admitted in its skeleton argument that “seltzer” can be taken as a descriptive element.<sup>19</sup> Mr Sadique added at the hearing that it could be a carbonated beverage.<sup>20</sup> Little evidence has been filed on the extent of consumer knowledge of seltzers. However, I consider it likely that a significant enough proportion of the relevant consumer group would be aware of them for the claim to deception potentially to bite. In my view, they would expect the product to be a carbonated beverage, or preparations to make one, and would buy the goods because that is the type of drink

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<sup>15</sup> Exhibit HD12.

<sup>16</sup> Exhibit HD14.

<sup>17</sup> Exhibit HD15.

<sup>18</sup> Exhibit HD17.

<sup>19</sup> Paragraph 13.

<sup>20</sup> Transcript, page 33.

they wanted to consume. I find that there is a sufficiently serious risk of deception for the following goods in Class 32:

*Alcohol free aperitifs; Alcohol free beverages; Alcohol free cider; Alcohol free wine; Alcohol-free beers; Aloe juice beverages; Aloe vera drinks, non-alcoholic; Aloe vera juices; Aperitifs, non-alcoholic; Apple juice beverages; Apple juice drinks; Beverages consisting of a blend of fruit and vegetable juices; Beverages consisting principally of fruit juices; Beverages containing vitamins; Beverages (Non-alcoholic -); Beverages (Preparations for making -); Beverages (Whey -); Bitter lemon; Blackcurrant cordial; Blackcurrant juice; Bottled drinking water; Bottled water; Brown rice beverages other than milk substitutes; Carbohydrate drinks; Cider, non-alcoholic; Cocktails, non-alcoholic; Coconut juice; Coconut water; Coconut water as a beverage; Coconut water as beverage; Coconut-based beverages; Coffee-flavored soft drinks; Cola; Cola drinks; Colas [soft drinks]; Concentrated fruit juice; Concentrated fruit juices; Concentrates for making fruit drinks; Concentrates for making fruit juices; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Condensed smoked plum juice; Cordials; Cordials [non-alcoholic]; Cordials (non-alcoholic beverages); Cranberry juice; Cream soda; De-alcoholised beer; De-alcoholised drinks; De-alcoholised wines; De-alcoholized beer; De-alcoholized drinks; De-alcoholized wines; Dilutable preparations for making beverages; Distilled drinking water; Douzhi (fermented bean drink); Drinking mineral water; Drinking spring water; Drinking water; Drinking water with vitamins; Drinking waters; Dry ginger ale; Energy drinks; Energy drinks containing caffeine; Energy drinks [not for medical purposes]; Essences for making beverages; Essences for making flavoured mineral water [not in the nature of essential oils]; Essences for making non-alcoholic beverages; Essences for making non-alcoholic beverages [not in the nature of essential oils]; Essences for making non-alcoholic drinks, not in the nature of essential oils; Extracts for making beverages; Extracts for making non-alcoholic beverages; Extracts of unfermented must; Flavor enhanced water; Flavored mineral water; Flavored waters; Flavoured mineral water; Flavoured waters; Frozen fruit beverages; Frozen fruit drinks; Frozen fruit-based beverages; Frozen fruit-based drinks; Fruit beverages; Fruit beverages and fruit juices; Fruit beverages (non-alcoholic); Fruit drinks; Fruit extracts (Non-alcoholic -); Fruit flavored drinks; Fruit flavored soft drinks; Fruit flavoured drinks; Fruit flavoured waters; Fruit juice; Fruit juice bases; Fruit juice beverages; Fruit juice beverages (Non-alcoholic -); Fruit juice concentrates; Fruit juice drinks; Fruit juice for use as beverages; Fruit juices; Fruit nectars; Fruit nectars, nonalcoholic; Fruit nectars, non-alcoholic; Fruit smoothies; Fruit squashes; Fruit-based beverages; Fruit-based soft drinks flavored with tea; Fruit-flavored beverages; Fruit-flavored soft drinks; Fruit-flavoured beverages; Functional water-based beverages; Ginger ale; Ginger beer; Ginger juice beverages; Glacial water; Grape juice; Grape juice beverages; Grape must, unfermented; Grapefruit juice; Green vegetable juice beverages; Guarana drinks; Guava juice; Honey-based beverages (Non- alcoholic -); Hop extracts for use in the preparation of beverages; Iced fruit beverages; Imitation beer; Isotonic beverages; Isotonic beverages [not for medical purposes]; Isotonic drinks; Isotonic non-alcoholic drinks; Juice drinks; Juice (Fruit -); Juices;*

*Kvass [non-alcoholic beverage]; Kvass [non-alcoholic beverages]; Lemon barley water; Lemon juice for use in the preparation of beverages; Lemon squash; Lemonade; Lemonades; Lime juice cordial; Lime juice for use in the preparation of beverages; Liqueurs (Preparations for making -); Lithia water; Low alcohol beer; Low calorie soft drinks; Low-calorie soft drinks; Malt syrup for beverages; Mango juice; Melon juice; Mineral enriched water [beverages]; Mineral water; Mineral water [beverages]; Mineral water (Non-medicated -); Mineral waters; Mineral waters [beverages]; Mixed fruit juice; Mixed fruit juices; Mixes for making sorbet beverages; Mung bean beverages; Must; Nectars (Fruit -), non-alcoholic; Non alcoholic aperitifs; Non-alcoholic beer; Non-alcoholic beer flavored beverages; Non-alcoholic beers; Non-alcoholic beverages; Non-alcoholic beverages containing fruit juices; Non-alcoholic beverages containing vegetable juices; Non-alcoholic beverages flavored with coffee; Non-alcoholic beverages flavored with tea; Non-alcoholic beverages flavoured with coffee; Non-alcoholic beverages flavoured with tea; Non-alcoholic beverages with tea flavor; Non-alcoholic cinnamon punch with dried persimmon (sujeonggwa); Non-alcoholic cocktail bases; Non-alcoholic cocktail mixes; Non-alcoholic cocktails; Non-alcoholic cordials; Non-alcoholic drinks; Non-alcoholic drinks enriched with vitamins and mineral salts; Non-alcoholic fruit cocktails; Non-alcoholic fruit drinks; Non-alcoholic fruit extracts; Non-alcoholic fruit extracts used in the preparation of beverages; Non-alcoholic fruit juice beverages; Non-alcoholic fruit punch; Non-alcoholic grape juice beverages; Non-alcoholic honey-based beverages; Non-alcoholic malt beverages; Non-alcoholic malt drinks; Non-alcoholic malt free beverages [other than for medical use]; Non-alcoholic preparations for making beverages; Non-alcoholic punch; Non-alcoholic punches; Non-alcoholic rice punch (sikhye); Non-alcoholic syrups for making beverages; Non-alcoholic vegetable juice drinks; Non-alcoholic wine; Non-alcoholic wines; Non-carbonated soft drinks; Nut and soy based beverages; Nutritionally fortified beverages; Nutritionally fortified water; Oat-based beverages [not being milk substitutes]; Orange barley water; Orange juice; Orange juice beverages; Orange juice drinks; Orange squash; Organic fruit juice; Orgeat; Part frozen slush drinks; Pineapple juice beverages; Pomegranate juice; Powders used in the preparation of coconut water drinks; Powders used in the preparation of fruit-based beverages; Powders used in the preparation of fruit-based drinks; Powders used in the preparation of soft drinks; Preparation for making non-alcoholic beverages; Preparations for making beverages; Preparations for making liqueurs; Protein drinks; Protein-enriched sports beverages; Purified drinking water; Quinine water; Ramune (Japanese soda pops); Red ginseng juice beverages; Rice-based beverages, other than milk substitutes; Root beer; Root beers; Root beers, non-alcoholic beverages; Sarsaparilla [non-alcoholic beverage]; Shandy; Sherbet beverages; Sherbets [beverages]; Slush drinks; Smoked plum beverages; Smoked plum juice beverages; Smoothies; Smoothies containing grains and oats; Smoothies [fruit beverages, fruit predominating]; Smoothies [non-alcoholic fruit beverages]; Soft drinks; Soft drinks flavored with tea; Soft drinks for energy supply; Sorbets [beverages]; Sorbets in the nature of beverages; Soy beverage; Soya-based beverages, other than milk substitutes; Soy-based beverages, not being milk substitutes; Sports drinks; Sports drinks containing electrolytes; Spring water; Spring waters; Squashes [non-alcoholic beverages]; Still water; Still waters; Syrup for*

*making beverages; Syrup for making lemonade; Syrups and other non-alcoholic preparations for making beverages; Syrups for beverages; Syrups for lemonade; Syrups for making beverages; Syrups for making flavoured mineral waters; Syrups for making fruit-flavored drinks; Syrups for making non-alcoholic beverages; Syrups for making soft drinks; Syrups for making whey-based beverages; Syrups used in the preparation of soft drinks; Table water; Table waters; Tomato juice [beverage]; Tomato juice beverages; Tonic water; Tonic water [non-medicated beverages]; Unfermented preserved must; Vegetable drinks; Vegetable juice; Vegetable juices [beverage]; Vegetable juices [beverages]; Vegetable smoothies; Vegetable-based beverages; Vitamin fortified non-alcoholic beverages; Water; Water enhanced with minerals; Water (Lithia -); Water-based beverages containing tea extracts; Watermelon juice; Waters; Waters [beverages]; Waters (Table -); Wheat beer; Whey beverages*

50. While some of these terms are broad enough to encompass the term *Seltzer* (see, for example, *Water* and *Waters*), they would also cover goods where use of the term, would, in my view, be deceptive (for instance, still water).

51. The following goods are all types of beer or goods used in the brewing process: *Ale; Ales; Barley wine [Beer]; Barley wine [beer]; Beer; Beer and brewery products; Beer-based beverages; Beer-based cocktails; Beer wort; Beers; Beers enriched with minerals; Black beer; Black beer [toasted-malt beer]; Bock beer; Coffee-flavored ale; Coffee-flavored beer; Craft beer; Craft beers; Extracts of hops for making beer; Flavored beer; Flavored beers; Flavoured beers; Hop extracts for manufacturing beer; Hops (Extracts of -) for making beer; India pale ales (IPAs); IPA (Indian Pale Ale); Lager; Lagers; Low-alcohol beer; Malt beer; Malt wort; Pale ale; Porter; Saison beer; Stout; Stouts*. With respect to these goods, I do not consider there to be a sufficiently serious risk of deception. Particularly in their finished form, they are subject to restrictions on purchase and are sold in the same part of a shop, not next to the non-alcoholic drinks, or on a website, with the type of drink and alcohol volume clearly labelled. It seems to me unlikely that the consumer looking for a seltzer will be deceived by the contested mark into buying beer.

52. This leaves the following goods which, in my view, could all be described by the term “seltzer”: *Aerated fruit juices; Aerated juices; Aerated mineral waters; Aerated water; Aerated water (Preparations for making -); Aerated water [soda water]; Aerated waters; Carbonated mineral water; Carbonated non-alcoholic drinks; Carbonated soft*

*drinks; Carbonated water; Carbonated waters; Effervescing beverages (Pastilles for -); Flavoured carbonated beverages; Frozen carbonated beverages; Fruit flavored carbonated drinks; Mineral and aerated waters; Non-alcoholic carbonated beverages; Non-alcoholic flavored carbonated beverages; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic sparkling fruit juice drinks; Pastilles for effervescing beverages; Powders for effervescing beverages; Preparations for making aerated water; Preparations for making carbonated water; Seltzer water; Soda pops; Soda water; Sparkling water; Vitamin enriched sparkling water [beverages]; Water (Seltzer -).*

53. At the hearing, Mr Stobbs submitted that the contested mark would also be deceptive for some of the goods in Class 33. This point was not pleaded up front and is based on the claim under section 3(1)(c) that “spirited seltzer” is descriptive of a seltzer with spirits in it. This claim has, however, failed. Even if I were to apply my finding that “seltzer” is descriptive of a carbonated beverage, I am not persuaded that there is a sufficiently serious risk of deception in relation to the Class 33 goods for the reasons I have outlined in paragraph 51 above.

54. The section 3(3)(b) claim succeeds for the goods listed in paragraph 49 above.

### **Section 5(2)(b)**

55. Section 5(2) of the Act is as follows:

“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.”

56. An “earlier trade mark” is defined in section 6(1) of the Act as:

“(a) a registered trade mark, international trade mark (UK), a European Union trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(b) a European Union trade mark or international trade mark (EC) which has a valid claim to seniority from an earlier registered trade mark or international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired,

(ba) a registered trade mark or international trade mark (UK) which –

(i) has been converted from a European Union trade mark or international trade mark (EC) which itself had a valid claim to seniority within paragraph (b) from an earlier trade mark, and

(ii) accordingly has the same claim to seniority, or

(c) a trade mark which, at the date of application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark.”

57. The registration upon which the opponent relies qualifies as an earlier trade mark under the above provision. The opponent is relying upon all the goods for which this earlier mark is registered. As the mark was registered within the five years before the date on which the applicant’s mark was published, it is not subject to proof of use and



the opponent is therefore entitled to rely on all the goods for which the mark stands registered.

58. In considering the opposition under this section, I am guided by the following principles, gleaned 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 BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v OHIM* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

i) mere association, in the strict sense that the later mark brings 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; and

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

### ***Comparison of goods***

59. It is settled case law that I must make my comparison of the goods on the basis of all relevant factors. These may include the nature of the goods, their purpose, their users and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary: see *Canon*, paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296]. Goods are complementary when

“... 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.”<sup>21</sup>

60. Goods can be considered as identical when the goods designated by the contested mark are included in a more general category found in the earlier specification, or vice versa: see *Gérard Meric v OHIM*, Case T-133/05, paragraph 10. All the goods in Class 33 of the applicant’s specification are included in the broader category of *Alcoholic beverages (except beer)* covered by the opponent’s mark.

61. As these goods are identical, for reasons of procedural economy, the Tribunal will not at this stage undertake a full comparison of the goods at issue. The examination of the opposition under this section will proceed on the basis that the contested goods are identical to those covered by the earlier trade mark. If the opposition fails under section 5(2)(b), even where the goods are identical, it will also fail where the goods are only similar. If it succeeds, I shall return to the remaining goods.

### ***Average consumer and the purchasing process***

62. In *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

“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.”<sup>22</sup>

63. The average consumer of both parties’ goods is an adult member of the general public. They will purchase the goods from a retail outlet such as a supermarket or off-

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<sup>21</sup> *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82.

<sup>22</sup> Paragraph 60.

licence for consumption at home, or in licensed premises such as a bar, club or restaurant. In the first case, they may visit a physical shop or buy from a website where the mark will be visible on the physical product itself or an image of it. Even if the goods are stocked behind the counter and the average consumer must ask a sales assistant for them, the bottles or cans will be visible. Consequently, I find that the purchasing process will be largely visual, although I do not completely discount the aural element.

64. If the consumer is buying the goods in licensed premises, aural considerations are likely to play a larger role as the customer will order by speaking to bar staff. It is also possible that the environment may be noisy, but, even then, the consumer may see the mark on bottles or optics behind the bar or on a drinks list: see *Anton Riemerschmid Weinbrennerei und Likörfabrik GmbH & Co. KG v European Union Intellectual Property Office (EUIPO)*, Case T-187/17. In my view, the visual aspect of the mark will still be significant.

### ***Comparison of marks***

65. It is clear from *SABEL* (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 in *Bimbo* that:

“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”<sup>23</sup>

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<sup>23</sup> Paragraph 34.

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

67. The respective marks are shown below:

Earlier mark	Contested mark
	<p data-bbox="874 689 1182 725">SPIRITED SELTZER</p>

68. The contested mark consists of the words “SPIRITED SELTZER” in capital letters in a standard font. The overall impression of the mark lies in the words, which hang together as a unit, except where “SELTZER” is descriptive of the goods sold under the mark. In that case, it is “SPIRITED” which is the dominant element.

69. The earlier mark consists of the words “SPIKED SELTZER” in slightly stylised dark blue capital letters curved around the top half of a pale blue circle. Within that circle can be seen a figure of a mermaid in dark blue with a white outline. In her right hand she holds a trident which rises out of the circle and separates the two words SPIKED and SELTZER and on the middle prong of which is speared a citrus wedge. Her left hand is raised to her mouth and she appears to be blowing across the palm. The circle is filled with bubbles of different sizes.

70. The opponent submits that greater weight is paid to the verbal elements and quotes the GC’s decision in *NewSoft Technology v OHIM*, Case T-205/06, paragraph 54. The applicant, on the other hand, contends that the device is the dominant element,

taking up around two-thirds of the size of the mark. I accept that verbal elements are often more easily remembered by the average consumer, but recognise that it is not a hard and fast rule: see *L&D v OHIM*, Case C-488/06 P, paragraph 84. However, the relative size of the device leads me to find that both elements play a roughly equal role in the overall impression of the earlier mark. Where “SELTZER” is descriptive of the goods, “SPIKED” and the device will contribute equally to the overall impression of the mark.

#### *Visual comparison*

71. The opponent submits that the marks are visually similar, while the applicant argues that they are visually dissimilar. The similarities between the marks lie in the verbal elements, with a shared second word that I found to be descriptive for some goods and both first words beginning with “SPI” and ending with “ED”. The applicant’s is slightly longer, at eight letters compared to the opponent’s six. However, the device in my view forms a significant visual difference between the marks. If there is any visual similarity, it is at a very low level.

#### *Aural comparison*

72. As the device cannot be verbalised, the earlier mark will be articulated as “SP-EYE-KT SELT-ZUR”. The contested mark will be pronounced as “SPI-RI-TED SELT-ZUR”, with one more syllable. I find that there is a medium degree of aural similarity between the marks.

#### *Conceptual comparison*

73. The opponent submits that the marks are conceptually similar, as both “spiked” and “spirited” refer to alcohol. I have already found that the average consumer is unlikely to interpret “spirited” in this way and will, in my view, understand it to mean “lively”. I do consider it likely that the average consumer will associate the word “spiked” with alcohol, and agree with the applicant that this is a word often used to denote the adding of alcohol to a drink without the knowledge of the person who will be consuming it. The mermaid device also adds a point of conceptual difference. The

only shared conceptual content is “Seltzer”, and so I find that the marks are conceptually similar to a low degree for those goods that are not seltzers and conceptually dissimilar for those goods that could be described as such.

### ***Distinctive character of the earlier mark***

74. In *Lloyd Schuhfabrik Meyer*, 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 Alternberger* [1999] ECR I-0000, paragraph 49).

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

75. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has adduced no evidence of use of the earlier mark and so I have only the inherent position to consider.

76. Mr Stobbs submitted that the verbal element of the earlier mark is inherently distinctive and that the alliteration in the mark gives it a distinct and unusual linguistic flavour. While he admitted that it alluded to alcohol, he contended that there was no clear and direct relationship between the mark and the goods for which it was registered. Where the goods are seltzers containing alcohol, the distinctiveness of the verbal element would be very low, although I acknowledge that the distinctive character of the mark as a whole would be raised towards a medium level by the device. Where the goods are not seltzers containing alcohol, the distinctiveness of the mark as a whole would be slightly higher than medium.

### ***Conclusions on likelihood of confusion***

77. There is no scientific formula to apply in determining whether there is a likelihood of confusion. It is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or vice versa. It is necessary for me to take account of the distinctive character of the opponent's marks, the average consumer and the nature of the purchasing process for the contested goods. In doing so, I must be aware that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them they have in their mind.

78. In its skeleton, the opponent referred me to the decision of Mr Iain Purvis QC, sitting as the Appointed Person, in *Kurt Geiger v A-List Corporate Limited (SHOE BOUDOIR)*, BL O-075-13, where he said:

"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."<sup>24</sup>

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<sup>24</sup> Paragraph 39.



79. The opponent noted that the distinctiveness of the marks lay in the two-word alliteration, alluding to alcohol without directly describing the goods.<sup>25</sup> The distinctive character of a mark is, as the CJEU said in *Lloyd Schuhfabrik* (quoted above), is the capacity of that mark to identify the goods and services as coming from a particular undertaking. I am not convinced that alliteration in itself does this, although the shared “S” sounds contribute to the aural similarity between the marks.

80. I also found that the device contributed to the level of inherent distinctiveness of the earlier mark, and this has no counterpart in the contested mark.

81. At the hearing, Mr Stobbs submitted that the verbal and device elements of the earlier mark played independent distinctive roles. Arnold J (as he then was) set out the correct approach to such marks in *Whyte and Mackay Ltd v Origin Wine UK Ltd & Anor* [2015] EWHC 1271 (Ch):

“18. The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks – visually, aurally and conceptually – as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

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<sup>25</sup> This submission was made on the assumption that I would find the contested mark did not fall foul of section 3(1)(c).

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meaning of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

82. The judge’s third point is particularly important here. I cannot simply assume that there is a likelihood of confusion because there are similarities between the verbal elements. I must take into account the following factors:

- I found that the average consumer would be an adult member of the general public paying an average degree of attention. Even where the goods were ordered in person at a bar, the average consumer would often see the marks on a drinks menu or on cans or bottles.
- I found that the marks are aurally similar to a medium degree and that if there is any visual or conceptual similarity this is at a low level.
- I found the earlier mark to be inherently distinctive to a low to medium degree for goods that are seltzers containing alcohol and a slightly higher than medium degree for other goods.
- Some of the goods are identical, and it is these that are the current focus of my assessment.

83. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting as the Appointed Person, explained that:

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

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

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).

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

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

84. I acknowledge that the examples given by the Appointed Person are not exhaustive, but they provide a helpful focus.

85. I also take into account the comments of Mr James Mellor QC (as he then was), sitting as the Appointed Person, in *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17:

"... I think it is important to stress that a finding of indirect confusion should not be made merely because the two marks share a common element. When Mr Purvis was explaining in more formal terms the sort of mental process involved at the end of his [16], he made it clear that the mental process did not depend on the common element alone: 'Taking account of the common element in the context of the later mark as a whole.' (my emphasis)."<sup>26</sup>

86. In my view, the differences between the marks are such that the average consumer is unlikely to be directly confused. They will not mistake one for the other. Mr Stobbs invited me to find that the device element of the earlier mark was not important, although he was careful to stress that it could not be ignored. However, the device is, to my eyes, far from negligible, given its size, and, as I have already noted, it is not always the case that verbal elements dominate the overall impression of a mark.

87. The opponent submits that there is a likelihood of indirect confusion, with the average consumer assuming that the marks denote related brands from the same or economically linked undertakings. The marks share common elements: both first words begin with "S" and the second word of each is "Seltzer", which for some goods is descriptive. I do not consider this to be so distinctive that no one else would use it

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<sup>26</sup> Paragraph 81.4.

and I cannot see why the average consumer would assume that they were related. Again, the role of the device points away from confusion. I find no likelihood of indirect confusion.

88. The section 5(2)(b) ground fails.

## **Outcome**

89. The opposition has partially succeeded and the application will proceed to registration for all goods in Class 33 and the following goods in Class 32:

*Aerated fruit juices; Aerated juices; Aerated mineral waters; Aerated water; Aerated water (Preparations for making -); Aerated water [soda water]; Aerated waters; Ale; Ales; Barley wine [Beer]; Barley wine [beer]; Beer; Beer and brewery products; Beer wort; Beer-based beverages; Beer-based cocktails; Beers; Beers enriched with minerals; Black beer; Black beer [toasted-malt beer]; Bock beer; Carbonated mineral water; Carbonated non-alcoholic drinks; Carbonated soft drinks; Carbonated water; Carbonated waters; Coffee-flavored ale; Coffee-flavored beer; Craft beer; Craft beers; Effervescing beverages (Pastilles for -); Effervescing beverages (Powders for -); Extracts of hops for making beer; Flavored beer; Flavored beers; Flavoured beers; Flavoured carbonated beverages; Frozen carbonated beverages; Fruit flavoured carbonated drinks; Hop extracts for manufacturing beer; Hops (Extracts of -) for making beer; India pale ales (IPAs); IPA (Indian Pale Ale); Lager; Lagers; Low alcohol beer; Malt beer; Malt wort; Mineral and aerated waters; Non-alcoholic carbonated beverages; Non-alcoholic flavored carbonated beverages; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic sparkling fruit juice drinks; Pale ale; Pastilles for effervescing beverages; Porter; Powders for effervescing beverages; Preparations for making aerated water; Preparations for making carbonated water; Saison beer; Seltzer water; Soda pops; Soda water; Sparkling water; Stout; Stouts; Vitamin enriched sparkling water [beverages]; Water (Seltzer -).*

## **Costs**

90. Both parties have enjoyed some success, with the greater part going to the applicant who is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Notice (TPN) 2/2016. In the circumstances, I award the applicant the sum of £1120 as a contribution towards the cost of the proceedings. In calculating the sum awarded, I have taken account of the fact that the opponent was successful in the CMC described in paragraphs 12 and 13 above and reduced the award to the applicant. I have also made reductions to factor in the balance of success in these proceedings. The sum is calculated as follows:

*Preparing a statement and considering the other side's statement: £140*

*Preparing evidence and considering the other side's evidence: £280*

*(Reduced by half to account for the CMC)*

*Preparing for and attending the hearing: £700*

**TOTAL: £1120**

91. I therefore order Boathouse Beverage LLC to pay Modern Construction Limited the sum of £1120, which should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 12th day of August 2021**

**Clare Boucher**  
**For the Registrar,**  
**Comptroller-General**

## ANNEX: SPECIFICATION OF THE CONTESTED MARK

### Class 32

*Aerated fruit juices; Aerated juices; Aerated mineral waters; Aerated water; Aerated water (Preparations for making -); Aerated water [soda water]; Aerated waters; Alcohol free aperitifs; Alcohol free beverages; Alcohol free cider; Alcohol free wine; Alcohol-free beers; Ale; Ales; Aloe juice beverages; Aloe vera drinks, non-alcoholic; Aloe vera juices; Aperitifs, non-alcoholic; Apple juice beverages; Apple juice drinks; Barley wine [Beer]; Barley wine [beer]; Beer; Beer and brewery products; Beer wort; Beer-based beverages; Beer-based cocktails; Beers; Beers enriched with minerals; Beverages consisting of a blend of fruit and vegetable juices; Beverages consisting principally of fruit juices; Beverages containing vitamins; Beverages (Non-alcoholic -); Beverages (Preparations for making -); Beverages (Whey -); Bitter lemon; Black beer; Black beer [toasted-malt beer]; Blackcurrant cordial; Blackcurrant juice; Bock beer; Bottled drinking water; Bottled water; Brown rice beverages other than milk substitutes; Carbohydrate drinks; Carbonated mineral water; Carbonated non-alcoholic drinks; Carbonated soft drinks; Carbonated water; Carbonated waters; Cider, non-alcoholic; Cocktails, non-alcoholic; Coconut juice; Coconut water; Coconut water as a beverage; Coconut water as beverage; Coconut-based beverages; Coffee-flavored ale; Coffee-flavored beer; Coffee-flavored soft drinks; Cola; Cola drinks; Colas [soft drinks]; Concentrated fruit juice; Concentrated fruit juices; Concentrates for making fruit drinks; Concentrates for making fruit juices; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Condensed smoked plum juice; Cordials; Cordials [non-alcoholic]; Cordials (non-alcoholic beverages); Craft beer; Craft beers; Cranberry juice; Cream soda; De-alcoholised beer; De-alcoholised drinks; De-alcoholised wines; De-alcoholized beer; De-alcoholized drinks; De-alcoholized wines; Dilutable preparations for making beverages; Distilled drinking water; Douzhi (fermented bean drink); Drinking mineral water; Drinking spring water; Drinking water; Drinking water with vitamins; Drinking waters; Dry ginger ale; Effervescing beverages (Pastilles for -); Effervescing beverages (Powders for -); Energy drinks; Energy drinks containing caffeine; Energy drinks [not for medical purposes]; Essences for making beverages; Essences for making flavoured mineral water [not in the nature of essential oils]; Essences for making non-alcoholic beverages; Essences for making non-alcoholic beverages [not in the nature of essential oils]; Essences for making non-alcoholic drinks, not in the nature of essential oils; Extracts for making beverages; Extracts for making non-alcoholic beverages; Extracts of hops for making beer; Extracts of unfermented must; Flavor enhanced water; Flavored beer; Flavored beers; Flavored mineral water; Flavored waters; Flavoured beers; Flavoured carbonated beverages; Flavoured mineral water; Flavoured waters; Frozen carbonated beverages; Frozen fruit beverages; Frozen fruit drinks; Frozen fruit-based beverages; Frozen fruit-based drinks; Fruit beverages; Fruit beverages and fruit juices; Fruit beverages (non-alcoholic); Fruit drinks; Fruit extracts (Non-alcoholic -); Fruit flavored drinks; Fruit flavored soft drinks; Fruit flavoured carbonated drinks; Fruit flavoured drinks; Fruit flavoured waters; Fruit juice; Fruit juice bases; Fruit juice beverages; Fruit juice beverages (Non-alcoholic -); Fruit juice concentrates; Fruit juice drinks; Fruit juice for use as beverages; Fruit juices; Fruit nectars; Fruit nectars, nonalcoholic; Fruit nectars, non-alcoholic; Fruit smoothies; Fruit squashes; Fruit-based beverages; Fruit-based soft drinks*

*flavored with tea; Fruit-flavored beverages; Fruit-flavored soft drinks; Fruit-flavoured beverages; Functional water-based beverages; Ginger ale; Ginger beer; Ginger juice beverages; Glacial water; Grape juice; Grape juice beverages; Grape must, unfermented; Grapefruit juice; Green vegetable juice beverages; Guarana drinks; Guava juice; Honey-based beverages (Non- alcoholic -); Hop extracts for manufacturing beer; Hop extracts for use in the preparation of beverages; Hops (Extracts of -) for making beer; Iced fruit beverages; Imitation beer; India pale ales (IPAs); IPA (Indian Pale Ale); Isotonic beverages; Isotonic beverages [not for medical purposes]; Isotonic drinks; Isotonic non-alcoholic drinks; Juice drinks; Juice (Fruit -); Juices; Kvass [non-alcoholic beverage]; Kvass [non-alcoholic beverages]; Lager; Lagers; Lemon barley water; Lemon juice for use in the preparation of beverages; Lemon squash; Lemonade; Lemonades; Lime juice cordial; Lime juice for use in the preparation of beverages; Liqueurs (Preparations for making -); Lithia water; Low alcohol beer; Low calorie soft drinks; Low-alcohol beer; Low-calorie soft drinks; Malt beer; Malt syrup for beverages; Malt wort; Mango juice; Melon juice; Mineral and aerated waters; Mineral enriched water [beverages]; Mineral water; Mineral water [beverages]; Mineral water (Non-medicated -); Mineral waters; Mineral waters [beverages]; Mixed fruit juice; Mixed fruit juices; Mixes for making sorbet beverages; Mung bean beverages; Must; Nectars (Fruit -), non-alcoholic; Non alcoholic aperitifs; Non- alcoholic beer; Non-alcoholic beer flavored beverages; Non-alcoholic beers; Non-alcoholic beverages; Non-alcoholic beverages containing fruit juices; Non-alcoholic beverages containing vegetable juices; Non-alcoholic beverages flavored with coffee; Non-alcoholic beverages flavored with tea; Non-alcoholic beverages flavoured with coffee; Non-alcoholic beverages flavoured with tea; Non- alcoholic beverages with tea flavor; Non-alcoholic carbonated beverages; Non-alcoholic cinnamon punch with dried persimmon (sujeonggwa); Non-alcoholic cocktail bases; Non-alcoholic cocktail mixes; Non-alcoholic cocktails; Non-alcoholic cordials; Non-alcoholic drinks; Non-alcoholic drinks enriched with vitamins and mineral salts; Non-alcoholic flavored carbonated beverages; Non-alcoholic fruit cocktails; Non-alcoholic fruit drinks; Non-alcoholic fruit extracts; Non-alcoholic fruit extracts used in the preparation of beverages; Non-alcoholic fruit juice beverages; Non-alcoholic fruit punch; Non- alcoholic grape juice beverages; Non-alcoholic honey-based beverages; Non-alcoholic malt beverages; Non-alcoholic malt drinks; Non-alcoholic malt free beverages [other than for medical use]; Non-alcoholic preparations for making beverages; Non-alcoholic punch; Non-alcoholic punches; Non-alcoholic rice punch (sikhye); Non-alcoholic soda beverages flavoured with tea; Non-alcoholic sparkling fruit juice drinks; Non-alcoholic syrups for making beverages; Non-alcoholic vegetable juice drinks; Non-alcoholic wine; Non-alcoholic wines; Non-carbonated soft drinks; Nut and soy based beverages; Nutritionally fortified beverages; Nutritionally fortified water; Oat-based beverages [not being milk substitutes]; Orange barley water; Orange juice; Orange juice beverages; Orange juice drinks; Orange squash; Organic fruit juice; Orgeat; Pale ale; Part frozen slush drinks; Pastilles for effervescing beverages; Pineapple juice beverages; Pomegranate juice; Porter; Powders for effervescing beverages; Powders for the preparation of beverages; Powders used in the preparation of coconut water drinks; Powders used in the preparation of fruit-based beverages; Powders used in the preparation of fruit-based drinks; Powders used in the preparation of soft drinks; Preparation for making non-alcoholic beverages; Preparations for making aerated water; Preparations for making beverages; Preparations for making carbonated water; Preparations for making liqueurs; Protein drinks;*



*Protein-enriched sports beverages; Purified drinking water; Quinine water; Ramune (Japanese soda pops); Red ginseng juice beverages; Rice-based beverages, other than milk substitutes; Root beer; Root beers; Root beers, non- alcoholic beverages; Saison beer; Sarsaparilla [non-alcoholic beverage]; Seltzer water; Shandy; Sherbet beverages; Sherbets [beverages]; Slush drinks; Smoked plum beverages; Smoked plum juice beverages; Smoothies; Smoothies containing grains and oats; Smoothies [fruit beverages, fruit predominating]; Smoothies [non-alcoholic fruit beverages]; Soda pops; Soda water; Soft drinks; Soft drinks flavored with tea; Soft drinks for energy supply; Sorbets [beverages]; Sorbets in the nature of beverages; Soy beverage; Soya-based beverages, other than milk substitutes; Soy-based beverages, not being milk substitutes; Sparkling water; Sports drinks; Sports drinks containing electrolytes; Spring water; Spring waters; Squashes [non-alcoholic beverages]; Still water; Still waters; Stout; Stouts; Syrup for making beverages; Syrup for making lemonade; Syrups and other non-alcoholic preparations for making beverages; Syrups for beverages; Syrups for lemonade; Syrups for making beverages; Syrups for making flavoured mineral waters; Syrups for making fruit-flavored drinks; Syrups for making non-alcoholic beverages; Syrups for making soft drinks; Syrups for making whey-based beverages; Syrups used in the preparation of soft drinks; Table water; Table waters; Tomato juice [beverage]; Tomato juice beverages; Tonic water; Tonic water [non-medicated beverages]; Unfermented preserved must; Vegetable drinks; Vegetable juice; Vegetable juices [beverage]; Vegetable juices [beverages]; Vegetable smoothies; Vegetable-based beverages; Vitamin enriched sparkling water [beverages]; Vitamin fortified non-alcoholic beverages; Water; Water enhanced with minerals; Water (Lithia -); Water (Seltzer -); Water-based beverages containing tea extracts; Watermelon juice; Waters; Waters [beverages]; Waters (Table -); Wheat beer; Whey beverages*

### Class 33

*Absinthe; Acanthopanax wine (Ogapiju); Aguardiente [sugarcane spirits]; Akvavit; Alcohol (Rice - ); Alcoholic aperitif bitters; Alcoholic aperitifs; Alcoholic beverages containing fruit; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic bitters; Alcoholic carbonated beverages, except beer; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic cordials; Alcoholic egg nog; Alcoholic energy drinks; Alcoholic essences; Alcoholic extracts; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic fruit extracts; Alcoholic jellies; Alcoholic preparations for making beverages; Alcoholic punches; Alcoholic tea-based beverage; Alcoholic wines; Alcopops; Amontillado; Anise [liqueur]; Anisette; Anisette [liqueur]; Aperitif wines; Aperitifs; Aperitifs with a distilled alcoholic liquor base; Aquavit; Arak; Arak [arrack]; Arrack; Arrack [arak]; Baijiu [Chinese distilled alcoholic beverage]; Beverages (Alcoholic -), except beer; Beverages containing wine [spritzers]; Beverages (Distilled -); Bitters; Black raspberry wine (Bokbunjaju); Blackberry wine; Blackcurrant liqueur; Blended whisky; Bourbon whiskey; Brandy; Cachaca; Calvados; Canadian whisky; Cherry brandy; Chinese brewed liquor (laojiou); Chinese mixed liquor (wujiapie-jiou); Chinese spirit of sorghum (gaolian-jiou); Chinese white liquor (baiganr); Chinese white liquor [baiganr];*

*Cider; Ciders; Cocktails; Coffee-based liqueurs; Cooking brandy; Cooking wine; Cordials [alcoholic beverages]; Cream liqueurs; Curacao; Dessert wines; Digesters [liqueurs and spirits]; Distilled beverages; Distilled rice spirits [awamori]; Distilled spirits; Distilled spirits of rice (awamori); Dry cider; Extracts of spiritous liquors; Fermented spirit; Flavored tonic liquors; Fortified wines; Fruit (Alcoholic beverages containing -); Fruit extracts, alcoholic; Fruit wine; Gaolian-jiou [sorghum-based Chinese spirits]; Gin; Ginseng liquor; Grape wine; Grappa; Herb liqueurs; Hullless barley liquor; Hydromel [mead]; Japanese liquor containing herb extracts; Japanese liquor containing mamushi-snake extracts; Absinthe; Acanthopanax wine (Ogapiju); Aguardiente [sugarcane spirits]; Akvavit; Alcohol (Rice -); Alcoholic aperitif bitters; Alcoholic aperitifs; Alcoholic beverages containing fruit; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic bitters; Alcoholic carbonated beverages, except beer; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic cordials; Alcoholic egg nog; Alcoholic energy drinks; Alcoholic essences; Alcoholic extracts; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic fruit extracts; Alcoholic jellies; Alcoholic preparations for making beverages; Alcoholic punches; Alcoholic tea-based beverage; Alcoholic wines; Alcopops; Amontillado; Anise [liqueur]; Anisette; Anisette [liqueur]; Aperitif wines; Aperitifs; Aperitifs with a distilled alcoholic liquor base; Aquavit; Arak; Arak [arrack]; Arrack; Arrack [arak]; Baijiu [Chinese distilled alcoholic beverage]; Beverages (Alcoholic -), except beer; Beverages containing wine [spritzers]; Beverages (Distilled -); Bitters; Black raspberry wine (Bokbunjaju); Blackberry wine; Blackcurrant liqueur; Blended whisky; Bourbon whiskey; Brandy; Cachaca; Calvados; Canadian whisky; Cherry brandy; Chinese brewed liquor (laojiou); Chinese mixed liquor (wujiapie-jiou); Chinese spirit of sorghum (gaolian-jiou); Chinese white liquor (baiganr); Chinese white liquor [baiganr]; Cider; Ciders; Cocktails; Coffee-based liqueurs; Cooking brandy; Cooking wine; Cordials [alcoholic beverages]; Cream liqueurs; Curacao; Dessert wines; Digesters [liqueurs and spirits]; Distilled beverages; Distilled rice spirits [awamori]; Distilled spirits; Distilled spirits of rice (awamori); Dry cider; Extracts of spiritous liquors; Fermented spirit; Flavored tonic liquors; Fortified wines; Fruit (Alcoholic beverages containing -); Fruit extracts, alcoholic; Fruit wine; Gaolian-jiou [sorghum-based Chinese spirits]; Gin; Ginseng liquor; Grape wine; Grappa; Herb liqueurs; Hullless barley liquor; Hydromel [mead]; Japanese liquor containing herb extracts; Japanese liquor containing mamushi-snake extracts; Japanese liquor flavored with Japanese plum extracts; Japanese liquor flavored with pine needle extracts; Japanese regenerated liquors (naoshi); Japanese sweet grape wine containing extracts of ginseng and cinchona bark; Japanese sweet rice-based mixed liquor (shiro-zake); Japanese sweet rice-based mixed liquor [shiro-zake]; Japanese white liquor (shochu); Japanese white liquor [shochu]; Kirsch; Korean distilled spirits (soju); Korean traditional rice wine (makgeoli); Liqueurs; Liqueurs containing cream; Liquor-based aperitifs; Low alcoholic drinks; Low-alcoholic wine; Malt whisky; Mead [hydromel]; Mulled wine; Mulled wines; Natural sparkling wines; Naturally sparkling wines; Nira [sugarcane-based alcoholic beverage]; Peppermint liqueurs; Perry; Piquette; Potable spirits; Pre-mixed alcoholic beverages; Pre-mixed alcoholic beverages, other than beer-based; Preparations for making alcoholic beverages; Prepared alcoholic cocktails; Prepared wine cocktails; Red ginseng liquor; Red*

*wine; Red wines; Rice alcohol; Rose wines; Rum; Rum [alcoholic beverage]; Rum infused with vitamins; Rum punch; Rum-based beverages; Sake; Sake substitutes; Sangria; Schnapps; Scotch whisky; Scotch whisky based liqueurs; Sherry; Shochu (spirits); Sorghum-based Chinese spirits; Sparkling fruit wine; Sparkling grape wine; Sparkling red wines; Sparkling white wines; Sparkling wine; Sparkling wines; Spirits; Spirits and liquors; Spirits [beverages]; Still wine; Strawberry wine; Sugar cane juice rum; Sweet cider; Sweet wine; Sweet wines; Table wines; Tonic liquor containing herb extracts (homeishu); Tonic liquor containing mamushi-snake extracts (mamushi-zake); Tonic liquor flavored with japanese plum extracts (umeshu); Tonic liquor flavored with pine needle extracts (matsuba-zake); Vermouth; Vodka; Whiskey; Whiskey [whisky]; Whisky; White wine; White wines; Wine; Wine coolers [drinks]; Wine punch; Wine-based aperitifs; Wine-based drinks; Wines; Wines of protected appellation of origin; Wines of protected geographical indication; Yellow rice wine.*