

O/920/21

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NOS.

UK00003527280 & UK00003535764

BY BODYHERO LIMITED

TO REGISTER:

BODYHERO

AND



AS TRADE MARKS IN CLASSES 5, 29, 30, 32 & 35

AND

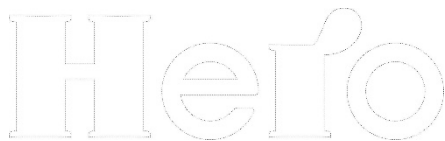
IN THE MATTER OF OPPOSITIONS THERETO

UNDER NOS. 422954 & 423064 BY

HERO AG

BACKGROUND AND PLEADINGS

1. On 27 August 2020, UPLFT Ltd (“the applicant”) applied to register the word mark shown on the cover of this decision in the UK (“the applicant’s first mark”). On 22 September 2020, the applicant applied to register the figurative mark shown on the cover of this decision in the UK (“the applicant’s second mark”). The applicant’s first mark was published for opposition purposes on 30 October 2020 and its second was published on 6 November 2020. The goods and services the applicant seeks to register are set out in the **Annex** to this decision.
2. On 20 January 2021, the applicant confirmed by way of Form TM21A that it had changed its name to Bodyhero Limited.
3. The applicant’s first mark was opposed on 28 January 2021 and its second was opposed on 4 February 2021. Both oppositions were brought by HERO AG (“the opponent”) and were done so under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). Both oppositions rely on the same earlier mark, being:



EUTM: 18153542¹

Filing date 15 November 2019; registration dated 22 May 2020

4. The opponent relies on all goods and services for which its mark is registered. These are set out in **Annex 2** to this decision.
5. In its notice of oppositions, the opponent claims that as a result of the high similarity between the marks and the identity/high similarity between the goods and services, there is a risk of confusion on the part of the public, which includes a likelihood of association. The applicant filed counterstatements denying the claims made.

¹ Although the UK has left the EU and the EUTM relied upon by the opponent now enjoys protection in the UK as a comparable trade mark, the EUTM remains the relevant right in these proceedings. That is because the application was filed before the end of the Implementation Period and, under the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, I am obliged to decide the opposition on the basis of the law as it stood at the date of application

6. By letter dated 10 June 2021, the Tribunal confirmed to the parties that the proceedings were to be consolidated pursuant to Rule 62(1)(g) of the Trade Marks Rules 2008.
7. The opponent is represented by Clarke Willmott LLP and the applicant is represented by Albright IP Limited. Neither party filed evidence but during the evidence rounds, both parties filed written submissions. No hearing was requested and neither party filed written submissions in lieu. This decision is taken following a careful perusal of the papers.
8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

PRELIMINARY ISSUE

9. I note that, in respect of the consolidation, the applicant submits that:

“[T]he rationale for the consolidation was flawed, given the dissimilarity between the opposed Marks. The logo element comprised within Application No. 3535764 is at least equal in prominence to the word element and creates a very different overall impression. the Applicant fails to understand how the two opposed Marks can be evaluated as if they are identical. [...] Further, in the Applicant’s opinion, the Opponent is taking advantage of the consolidation to diminish the impact created by the logo in opposed UK Trade Mark Application No. 3535764, treating this in the same way as if it were an Application for a word Mark.”

10. Firstly, when oppositions are brought before the Tribunal by one opponent against a number of different marks from the same applicant, it is not uncommon for those

oppositions to be consolidated. Secondly, and for the avoidance of doubt, while these proceedings are consolidated, both of the applicant's marks will be assessed in full and compared separately with the opponent's mark. Any decision I make will be based on a global appreciation of all of the marks at issue. The applicant is not, therefore, in a worse position than it would be if these proceedings were dealt with separately.

DECISION

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

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

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

(a) ...

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

there exists a likelihood of confusion on the part of the public, which includes the likelihood or association with the earlier trade mark.”

12. Section 5A of the Act states as follows:

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

13. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“(6)(1) In this Act an “earlier trade mark” means –

- (a) a registered trade mark, international trade mark (UK) or Community 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.

14. The opponent’s mark qualifies as an earlier trade mark under the above provisions. As the opponent’s mark had not completed its registration process more than 5 years before the application date of the marks at issue, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely on all goods and services for which its mark is protected.

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

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

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

16. The applicant's goods and services are set out in **Annex 1** to this decision and the opponent's goods and services are set out in **Annex 2** to this decision.

17. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

"Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

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

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

19. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that, even if goods (though it equally applied to services) are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut fur 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”.

20. In *SEPARODE Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said:

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

21. I have detailed submissions from both parties regarding the similarity of the goods and services. I have considered these in full and while I do not intend to reproduce them here, I consider it necessary to address a point raised by the applicant. In its submissions, the applicant stated that its goods are “all high ‘plant’ protein, vegan products, aimed at supporting physical recovery and muscle growth.” It further submitted that the opponent “does not purport to sell a highly specialised product”. While these submissions are noted, the goods and services comparison I must make is a notional one and will take into account the parties’ terms as they are

registered/applied for, not how they are/intended to be used.² As for the remaining submissions, I will refer to them, where necessary, below.

Class 5 goods

22. The class goods 5 in both of the applicant's marks are, for the most part, identical.

I note that some of the goods in the applicant's second mark's specification have a limitation in that they are for slimming, body-building, fitness and/or sporting purposes, health or wellbeing. I have borne this limitation in mind when comparing the applicant's goods together and, unless expressly referred to, I do not consider that it affects the following findings to any material extent.

23. "Dietetic food and beverages" in the applicant's specifications are foods and drinks that are adapted for use by people with various dietary requirements. Even taking into account the presence of the limitation referred to at paragraph 22 above, it is possible that these goods cover dietetic foods and beverages for medical purposes. For example, it is possible that dietetic foods and beverages related to health or wellbeing could also be those that are adapted for medical purposes. Therefore, I consider that the applicant's goods cover "dietetic substances adapted for medical purposes" and "dietetic beverages adapted for medical purposes" in the opponent's specification. These goods are, therefore, identical under the principle outlined in *Meric*.

24. "Nutritional supplements" in the applicant's first mark's specification has a direct counterpart in the opponent's specification. It is, therefore, self-evidently identical. As for the applicant's second mark's specification, this term contains the limitation referred to at paragraph 22 above. While the limitation means that these goods are not self-evidently identical, the applicant's term still falls within the opponent's broader term on the basis that it does not contain a limitation. These goods are, therefore, identical under the principle outlined in *Meric*.

² See *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220 and *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06

25. “Nutritional [...] drinks, snacks, bars and shakes” in the applicant’s specifications are not the same as “nutritional supplements” in the opponent’s specification. However, there is a level of similarity between them. While the nature and method of use may differ across all these goods, they share the same user and purpose in that they will be used by the same consumers with the aim of introducing nutrients into the body. The goods also overlap in trade channels in that they are likely to be produced by the same manufacturer and be found near each other in stores or in the same sections of online retailers. There may also be a level of competition between the goods as a user may wish to obtain their own supplements in pill or powder form or may opt for a drink or a snack instead, or vice versa. Overall, I consider that these goods are similar to a high degree.
26. “Protein supplements” in the applicant’s specifications is covered by the term “protein dietary supplements” in the opponent’s specification. These goods are, therefore, identical under the principle outlined in *Meric*.
27. “Protein [...] snacks, bars, and shakes” in the applicant’s specifications are, in my view, similar to “protein dietary supplements” for the same reasons I have discussed at paragraph 25 above. Therefore, I consider these goods similar to a high degree.
28. “Protein dietary supplements” in the applicant’s first mark’s specification has a direct counterpart in the opponent’s specification. These goods are self-evidently identical. While this term is also present in the applicant’s second mark, it is subject to the limitation set out in paragraph 22 above. As a result, the term in the applicant’s second mark falls within the opponent’s broader term and is, therefore, identical under the principle outlined in *Meric*.
29. “Protein powder dietary supplements” and “protein powders” in the applicant’s specifications are, in my view, protein supplements and fall within the broader category of “protein dietary supplements” in the opponent’s specification. They are, therefore, identical under the principle outlined in *Meric*.

30. “Nutritional supplements” in the opponent’s specification covers powdered supplements and pills that are used in drinks or added to foods. They are not, in my view, the same as “nutritional supplement energy bars” in the applicant’s specifications. However, there is a level of similarity between them on the basis that, while they differ in nature and method of use, they overlap in purpose, user and trade channels in that they will both be bought by the same user via the same shops or through the same producers with the aim of introducing nutrition into their diet (be that energy boosting nutrients or otherwise). Further, they may have a competitive relationship in that a user may choose to buy their own supplements to add to their food themselves or they may wish to buy energy bars to supplement their diet without having to add it to their own meals or drinks, or vice versa. Overall, I consider that these goods are similar to a high degree.

31. On the basis that protein may be used as a nutritional supplement, I consider that “dietary food supplements in the nature of protein bars and snacks” in the applicant’s specifications overlaps in purpose, user and trade channels with “nutritional supplements” in the opponent’s specification. These goods may also have a competitive relationship in that someone may wish to introduce protein into their diet via supplements or bars and snacks, or vice versa. Overall, I consider these goods to be similar to a high degree.

32. In my view, “probiotic supplements”, “carbohydrate supplements”, “vitamin and mineral supplements”, “herbal supplements and formulations”, “nutraceuticals for use as a dietary supplement” and “amino acid supplements” in the applicant’s specifications are all types of nutritional supplements. As a result, they fall within the broader category of “nutritional supplements” in the opponent’s specification. They are, therefore, identical under the principle outlined in *Meric*.

33. “Meal replacements” in the applicant’s specifications is a very broad term that can include protein powders and other types of nutritional supplements that can be used to make meal replacement milkshakes, for example. As a result, I consider that these goods can include “nutritional supplements” and “protein dietary supplements” in the opponent’s specification. This is on the basis that nutritional/protein supplements can include powders that are incorporated into

drinks and provide users with all the nutrients that a meal would usually provide without being high in calories, for example. These goods are, therefore, identical under the principle outlined in *Meric*.

34. The above goods are those that are identical across the applicant's specifications. Going forward, the class 5 specifications of the applicant differ. Further, the remaining goods in the applicant's second mark's specifications are not covered by the limitation referred to at paragraph 22 above.

35. "Supplements [...] associated with slimming, body-building, fitness and/or sporting purposes, health or wellbeing" in the applicant's first mark's specification are, in my view, covered by the broader categories of "protein dietary supplements" and "nutritional supplements". As a result, I consider that these goods are identical under the principle outlined in *Meric*.

36. "Drinks, snacks, bars, and shakes associated with slimming, body-building, fitness and/or sporting purposes, health or wellbeing" in the applicant's first mark's specification cover a range of drinks and foodstuffs that are used for the specific purpose. While not identical with "nutritional supplements" in the opponent's specification, there is a level of similarity between them. I make this finding following on from the reasons set out in paragraph 25 above. In my view, the same overlap of factors discussed there, apply here. As a result, these goods are, therefore, similar to a high degree.

37. "Protein, carbohydrate, and fibre supplements [...] all the aforesaid for use as aids to slimming, weight gain, muscle gain and well-being" in the applicant's first mark's specification are all supplements that contain nutritional benefits. Therefore, I am of the view that they will be within the broader category of "nutritional supplements" in the opponent's specification. These goods are, therefore, identical under the principle outlined in *Meric*.

38. "Vitamin, protein and mineral enriched foods and foodstuffs, all the aforesaid for use as aids to slimming, weight gain, muscle gain and well-being" in the applicant's first mark's specification can include a wide range of foods that are enriched with

vitamins, protein and minerals. The purpose of these goods is to introduce various nutrients to the user's diet. I consider that these goods, while differing in nature and method of use, will overlap in user, purpose and trade channels with "nutritional supplements" in the opponent's specification. Further, I consider that the goods will be competitive in that the user may wish to introduce nutrients into their diets by eating enriched foods or through the use of supplements, or vice versa. Overall, I consider that these goods are similar to a high degree.

39. "Beverages for meal replacement protein drinks" in the applicant's first mark's specification covers pre-made protein drinks and not the supplements used to make those drinks. While not identical with "protein dietary supplements" in the opponent's specification, they are still similar. While the nature and method of uses are different, they overlap in purpose and user. This is on the basis that the aim of both goods is to introduce more protein into their diet and a user of pre-made drinks is also likely to be a user of powdered supplements covered by the opponent's term. Further, I consider that undertakings that provide protein drinks are also likely to provide protein supplements. The goods are also likely to be found at the same specialist health food retailers meaning that the distribution channels are likely to be the same. Finally, they are also competitive with one another as a user may wish to buy a pre-made protein drink or buy the supplements so that they can add protein into their diets via different methods. Overall, I consider that the goods are similar to a high degree.

40. "Plant-based protein [...] powders" and "organic plant-based protein [...] powders" in the applicant's first mark's specification are goods that are limited in that the protein in them is derived from plant-based sources. It is my understanding that, for the most part, protein based goods are animal derived. Having said that, there is no limitation in the opponent's term "protein dietary supplements" meaning that these supplements can also be plant-based. Given that the opponent's goods cover powders, it can be said that they fall within the applicant's terms meaning that they are identical under the principle outlined in *Meric*.

41. "Plant-based protein drinks, [...] bars and snacks" and "organic plant-based protein drinks, [...] bars and snacks" in the applicant's first mark's specification are similar

to “protein dietary supplements”. While these goods differ in nature and method of use, they overlap in user and purpose on the basis that they are likely to be consumed by the same users who will use them to introduce protein into their diet. The goods are also likely to be produced by the same manufacturer and found in the same location of retail stores meaning there is an overlap in trade channels also. They also have a competitive nature in that the user may wish to buy a plant-based protein powder or a plant-based snack or drinks, or vice versa. Overall, I consider that these goods are similar to a high degree.

42. “Food supplements”, “food supplements consisting of amino acids”, “food supplements for dietetic use”, “food supplements for non-medical purposes”, “food supplements for sportsmen”, “food supplements in liquid form”, “dietary food supplements”, “health food supplements for persons with special dietary requirements”, “mineral food supplements”, “vitamin and mineral food supplements”, “protein/carbohydrate/fibre supplements” and “protein supplements” in the applicant’s second mark’s specification are all goods that are, in my view, nutritional supplements. Therefore, they all fall within the broader category of “nutritional supplements” in the opponent’s specification. As a result, they are identical under the principle outlined in *Meric*. In the event that I am wrong on my finding of identity on the basis that the goods are not nutritional, they are highly similar. This is because they all have the same nature, method of use, user, purpose and are also likely to be competitive with one another.

Class 29 goods

43. While there is some overlap between the class 29 goods in the applicant’s specifications, there are also some differences. Further, the applicant’s second mark’s specification contains a similar limitation to the one discussed at paragraph 22 above, being that all of the goods are for use as aids to slimming, weight gain, muscle gain and well-being. The same approach taken in respect of those goods also applies to the following class 29 goods.

44. It is my view that while “nut-based desserts” and “fruit-based desserts” in the applicant’s specifications can cover a wide range of desserts, they do not cover ice

creams or sorbets. I make this finding on the basis that, while ice creams and sorbets can contain nuts and fruits, they are, for the most part, cream and water based desserts, respectively. These goods are not, therefore, identical with “ice cream, sorbets and other kinds of edible ices”. However, I do consider that there is a level of similarity between them. This is on the basis that they overlap in user, method of use and purpose in that they will all be eaten by the general public who will consume them in the ordinary way for the same purpose, being either for a snack to satisfy an appetite, or as a treat after a meal. They may also overlap in trade channels on the basis that the goods may be found in the same areas of supermarkets and may also be produced by the same undertakings. They may also be competitive in that a user looking to buy a dessert may choose an ice cream over a nut or fruit based dessert, or vice versa. Overall, I consider that these goods are similar to a high degree.

45. I have said at paragraph 44 above that ice cream is mostly a cream-based dessert. However, it is possible that ice cream may also be soy-based so as to appeal to users on a vegan or non-dairy diet. Therefore, I am of the view that “soy-based desserts” in the applicant’s specifications can cover ice creams, albeit soy-based ones. As a result, I consider that “ice cream, sorbets and other kinds of edible ices” in the opponent’s specification falls within the applicant’s broader term on the basis that they can include soy-based desserts also. These goods are, therefore, identical under the principle outlined in *Meric*. However, in the event that I am wrong on my finding of identity, the same findings made at paragraph 44 above will apply here meaning that these goods are similar to a high degree.

46. “Nut-based [...] snacks and snack bars” and “organic nut [...] snacks and snack bars” in the applicant’s specifications cover goods such as “nut bars”, “nut-based bars” and “processed nuts” in the opponent’s specification. These goods are, therefore, identical under the principle outlined in *Meric*.

47. “Soy-based [...] snacks and snack bars” and “organic [...] soy [...] based snacks and snack bars” in the applicant’s specifications are similar to “nut bars” and “fruit and vegetable based snack foods and bars” in the opponent’s specification. This is on the basis that, while based on different ingredients, their general natures and

methods of use overlap in that they are edible snacks and bars that are consumed by the user. There is also an overlap in purpose in that all of these goods are consumed by the user in the same way and they may also aim to improve the user's well-being, or they may both be consumed as a snack or for energy, for example. As for user, I note that soy-based goods are commonly consumed by people on a dairy free diet. As nut, fruit or vegetable based snack foods may also be dairy free, they overlap in user also. They may also be competitive in that a user may choose a soy-based snack over a nut or fruit-based snack, or vice versa. Overall, I consider the goods similar to a high degree.

48. "Fruit-based [...] snacks and snack bars" and "organic [...] vegetable [and] fruit [...] based snacks and snack bars" in the applicant's specifications fall within the broader category of "fruit and vegetable based snack foods and bars" in the opponent's specification. These goods are, therefore, identical under the principle outlined in *Meric*.

49. "Fruit and vegetable powders" in the applicant's specification are a range of goods that are, in my view, used in the preparation of dishes. In my view, these goods share a level of similarity with "fruit and vegetable purée" in the opponent's specification. This is on the basis that while they are different in nature, they overlap in method of use and purpose in that they will both be used as cooking ingredients to add fruit/vegetable flavour to a dish. Further, there is likely to be an overlap in user in that the user of both will be those looking to prepare their own dishes. On that point, they may also be competitive in that a user may wish to buy a fruit or vegetable powder over a purée, or vice versa. The goods are also likely to be found on the same shelves or in similar locations within stores. Overall, I consider the goods to be similar to a high degree.

50. "Seed-based snacks and snack bars" in the applicant's specifications are similar to "nut bars" and "fruit and vegetable based snack foods and bars" in the opponent's specification. This is on the basis that these goods overlap in nature, method of use and user in that they are snack foods that are likely to be selected by the same user and consumed in the same way. As for purpose, the limitation of the applicant's second mark's specification does not limit this given that the

opponent's specification can also cover those same purposes. Therefore, there is an overlap in purpose, be that to satisfy the appetite or for well-being purposes, for example. They are also likely to share a competitive relationship as a user may choose to purchase a seed-based snack over a nut bar or a fruit-based snack, or vice versa. Overall, I consider these goods to be similar to a high degree.

51. "Plant, fruit, vegetable and nut based foodstuffs, all the aforesaid for use as aids to slimming, weight gain, muscle gain and well-being" in the applicant's first mark's specification covers a wide range of goods, including "fruit and vegetable based snack foods and bars" and "nut-based bars" in the opponent's specification. While they contain no limitation, these goods are, therefore, identical under the principle outlined in *Meric*.

52. "Desserts" in the applicant's first mark's specification covers goods such as "ice cream, sorbets and other kinds of edible ices" in the opponent's specification. While they are in different classes, they are not incapable of being identical.³ As a result, I consider that these goods are identical under the principle outlined in *Meric*.

53. "Vitamin, protein and mineral enriched foods and foodstuffs" in the applicant's second mark's specification covers a very broad range of goods that could technically include all types of foodstuffs so long as they are vitamin, protein and mineral enriched. These goods are similar to a number of goods in the opponent's specification, such as "preserved, frozen, dried and cooked fruits and vegetables" and "fruit and vegetable based snack foods and bars", for example. While not specifically 'enriched' as the applicant's goods are, I consider that these goods overlap in nature and method of use in that they are all foodstuffs that will be consumed in the ordinary way. The purpose of the applicant's goods are to introduce vitamin, protein and minerals into the user's body and while this is not the direct intention of the opponent's goods, some fruits and vegetables will, by their very nature, provide the user with those benefits also and may even be selected for those exact reasons. Therefore, I consider there to be a general overlap in purpose. The user will also generally overlap as the user the applicant's

³ *Procter and Gamble Company v Simon Grogan*, BL O/176/08

goods looking to introduce vitamins into their body may also seek to eat vegetables or fruits that are also high in vitamin and minerals, for example. Producers of the applicant's goods are unlikely to also produce the general goods of the opponent but I do acknowledge that dried fruits, for example, are likely to be found on the same shelves in supermarkets as other vitamin enriched foods, meaning that there is some overlap in trade channels also. The goods also have a competitive relationship as a user may wish to buy fruits or vegetables that are naturally high in protein, vitamins or minerals instead of goods that have been enriched with them, or vice versa. Overall, I consider that these goods are similar to a high degree.

54. "Nutritional foodstuffs" in the applicant's second mark's specification is, like the goods discussed at paragraph 53 above, a very broad term. For the same reasons given in that paragraph, I consider that these goods are also similar to a high degree with "preserved, frozen, dried and cooked fruits and vegetables" and "fruit and vegetable based snack foods and bars" in the opponent's specification.

55. "Protein based confectionery, with or without chocolate coating" in the applicant's specification can cover a wide range of goods that are high in protein. It is my understanding that "nut-based bars" and "processed nuts" in the opponent's specification are high in protein and may include goods covered in chocolate or not. On that basis, I consider that they fall within the broader category of the applicant and are, therefore, identical under the principle outlined in *Meric*. In the event that I am wrong in this finding, I consider these goods are highly similar on the basis that they overlap in nature, method of use, user, purpose and trade channels.

Class 30 goods

56. Save for one term, which I will assess at the end of this section, the class 30 goods in the applicant's specifications are identical.

57. "Cereal bars" in the applicant's specifications has a direct counterpart in the opponent's specification and is, therefore, identical.

58. “Snacks and snack bars made from cereals”, “high protein cereal bars”, “high fibre cereal bars and snacks”, “plant-based snacks and bars”, “organic plant-based snacks and bars” and “organic cereal based snacks and snack bars” in the applicant’s specifications can all cover different types of cereal bars. They, therefore, fall within the broader category of “cereal bars” in the opponent’s specification. As a result, the goods are identical under the principle outlined in *Meric*. In the event that I am wrong to find identity between these goods given the presence of the term ‘snacks’ throughout some of the applicant’s goods, then I consider that these goods are similar to a high degree on the basis that they overlap in method of use, user, purpose, trade channels and may also be competitive.

59. It is possible that “vegan snacks and snack bars” and “low-sugar snacks and snack bars” in the applicant’s specifications cover cereal bars made with vegan or low sugar ingredients. While some cereal bars may contain dairy, they may also be vegan or low in sugar, or both. On that basis, I consider that “cereal bars” in the opponent’s specification falls within the applicant’s goods. As a result, these goods are identical under the principle outlined in *Meric*. I also make the same finding here as I have at paragraph 58 above in that the goods are highly similar in the event that I am wrong to find identity between them.

60. “Plant flavourings for beverages” in the applicant’s specifications are, in my view, types of preparations for the making of beverages that are derived from plant flavours. They can include flavourings in the form of syrups, powders or cordials. Therefore, despite being present in different classes, I consider that these goods fall within the broader category of “syrups and other substances for the preparation of drinks” in the opponent’s specification. These goods are, therefore, identical under the principle outlined in *Meric*.

61. It is my understanding that protein bars commonly include ingredients such as cereals and nuts. On that basis, it is my view that “protein bars” and “organic protein bars” in the applicant’s specifications cover “cereal bars” and “nut-bars” in the opponent’s specification. Despite being in different classes, these goods are identical under the principle outlined in *Meric*. In the event that I am wrong in my

finding of identity, I consider that the goods overlap in nature, method of use, user, purpose and trade channels and are, therefore, highly similar.

62. I consider that “protein snacks” and “organic protein snacks” in the applicant’s specifications include snacks that are high in protein such as nuts. I also consider that a bar falls within the broader category of a snack meaning that I am of the view that “nut bars” and “processed nuts” in the opponent’s specification fall within the applicant’s broader terms. Despite being in different classes, these goods are identical under the principle outlined in *Meric*. In the event that I am wrong in my finding of identity, I consider that the goods overlap in nature, method of use, user, purpose and trade channels and are, therefore, highly similar.

63. It is my understanding that “energy bars” in the applicant’s specification are bars that consist of high sugar or other ingredients high in carbohydrates in order to give the user energy. Cereals, rice and corn are all high carbohydrate foods and, without any submissions or evidence to the contrary, I consider that “cereal bars” and “snacks based on rice, cereals and corn” in the opponent’s specification are all goods that can be used as energy bars. Therefore, I consider that the opponent’s goods cover those of the applicant. These goods are, therefore, identical under the principle outlined in *Meric*. In the event that I am wrong in my finding of identity, I consider that the goods overlap in nature, method of use, user, purpose and trade channels and are, therefore, highly similar.

64. “Protein based confectionary, chocolate coated or plain, all for use as aids to slimming, weight gain, muscle gain and well being” in the applicant’s first mark’s specification covers a wide range of confectionary goods that are high in protein. While in different classes, I make the same finding here that I have at paragraph 55 above and consider that these goods are identical to “nut-based bars” and “processed nuts” in the opponent’s specification and, if I am wrong on this finding, then they are similar to a high degree.

Class 32 goods

65. For the most part, the class 32 goods in the applicant’s specifications are identical.

66. “Non-alcoholic beverages” in the applicant’s specifications has a direct counterpart in the opponent’s specification. These goods are, therefore, self-evidently identical.
67. “Non-alcoholic beverages derived from plant-based protein sources”, “energy drinks” and “protein-enriched sports beverages” in the applicant’s specifications all fall within the broader category of “non-alcoholic beverages” in the opponent’s specification and are, therefore, identical under the principle outlined in *Meric*.
68. “Powders used in the preparation of beverages” in the applicant’s second mark’s specification falls within the broader category of “syrups and other substances for the preparation of drinks” in the opponent’s specification on the basis that other substances can include powders. These goods are, therefore, identical under the principle outlined in *Meric*.
69. “Protein drinks”, “plant-based protein drinks [and] powders” and “organic plant-based protein drinks and powders” in the applicant’s second mark’s specification all fall within the broader category of “non-alcoholic beverages” in the opponent’s specification and are, therefore, identical under the principle outlined in *Meric*.
70. “Plant-based protein [...] powders and “organic plant-based protein [...] powders” in the applicant’s second mark’s specification are present in the class 32 goods of the applicant’s second mark’s specification. Despite this, it is still capable of being similar or identical with goods in other classes. These goods, in my view, fall within the broader category of “protein dietary supplements” in the opponent’s specification. Despite being in different classes, I consider them to be identical under the principle outlined in *Meric*.
71. “Plant-based protein [...] bars and snacks” is also present in the class 32 goods of the applicant’s second mark’s specification. These goods are, in my view, similar to a high degree with “protein dietary supplements” in the opponent’s specification. This is on the basis that the opponent’s term can still cover plant-based protein supplements. Further, these goods overlap in user, purpose and trade channels.

They may also have a competitive relationship in that a user may wish to select a protein bar or snack over using a supplement, or vice versa.

72. Given that “non-alcoholic beverages” in the opponent’s specification is such a broad term, I am of the view that it can cover beverages that are used as meal replacements, such as protein milkshakes, for example. It is my understanding that protein milkshakes are commonly considered meal replacement beverages. As a result, I consider that “beverages for meal replacement” in the applicant’s second mark’s specification falls within the opponent’s broad term. Therefore, I consider that these goods are identical under the principle outlined in *Meric*. In the event that I am wrong in my finding of identity on the basis that non-alcoholic beverages are not used for the purpose of meal replacement, I consider that the goods overlap in nature, method of use, user and trade channels and are, therefore, highly similar.

Class 35 services

73. I do not consider there to be any similarity between “advertising, marketing and promotional services” in the applicant’s specifications and any of the goods in the opponent’s specification. I, therefore, find these services to be dissimilar.

74. I turn now to the remainder of the applicant’s class 35 services, being a range of retail and online retail services. I note that in *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the GC held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

75. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his judgment) that:

“9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo**

for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are 'similar' to goods are not clear cut."

76. However, on the basis of the European courts' judgments in *Sanco SA v OHIM*⁴, and *Assembled Investments (Proprietary) Ltd v. OHIM*⁵, upheld on appeal in *Waterford Wedgwood Plc v. Assembled Investments (Proprietary) Ltd*⁶, Mr Hobbs concluded that:

i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;

ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

⁴ Case C-411/13P

⁵ Case T-105/05, at paragraphs [30] to [35] of the judgment

⁶ Case C-398/07P

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

77. As set out above, the GC has explained that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore, similar to a degree. It is common for producers of various types of foodstuffs covered by the applicant's specifications to also retail in those goods. For example, a producer of a wide range of health foods such as cereal bars, protein bars, energy bars and various types of nutritional supplements may operate its own retail stores that exclusively sell their goods, or that sell a selection of goods including its own. In addition, those goods may be listed for sale on the producer's website directly rather than via third party retailers. In my view, the average consumer will be aware of the complementary relationship between the producer of these types of goods and the retailing of the same. I have found all of the parties' class 5, 29, 30 and 32 goods to be either identical or highly similar. In my view, and after careful consideration of all of the factors in this case, it follows that a medium degree of similarity exists between the opponent's goods and the services within the applicant's class 35 specifications which relate to identical and/or highly similar goods. I, therefore, find that the following services in the applicant's specifications are similar to a medium degree with various goods contained in the opponent's marks' specifications:

The applicant's first mark

Retail and online retail services in connection to the sale of dietetic food and beverages, nutritional supplements, nutritional drinks, nutritional snacks, nutritional bars, nutritional shakes, protein supplements, protein supplement snacks, protein supplement bars, protein supplement shakes, protein dietary supplements, protein powder dietary supplements, protein powders, nutritional supplement energy bars, dietary food supplements in the nature of protein bars and snacks, probiotic supplements, carbohydrate supplements, vitamin and

mineral supplements, herbal supplements and formulations, nutraceuticals for use as a dietary supplement. amino acid supplements, and meal replacements; retail and online retail services in connection to the sale of supplements, drinks, snacks, bars, and shakes associated with slimming, body-building, fitness and/or sporting purposes, health or wellbeing; retail and online retail services in connection to the sale of protein, carbohydrate, and fibre supplements; retail and online retail services in connection to the sale of vitamin, protein and mineral enriched foods and foodstuffs; retail and online retail services in connection to the sale of nutritional foodstuffs; retail and online retail services in connection to the sale of protein based confectionary, chocolate coated or plain; retail and online retail services in connection with the sale of vitamin, protein and mineral enriched foods and foodstuffs for use as aids to slimming, weight gain, muscle gain and well-being; retail and online retail services in connection to the sale of desserts, nut-based desserts, nut-based snacks and snack bars, soy-based desserts, soy-based snacks and snack bars, fruit-based desserts, fruit-based snacks and snack bars, fruit powders, vegetable powders, organic drinks, organic snacks, organic cereal bars, organic protein bars; retail and online retail services in connection to the sale of snacks and snack bars made from cereals, vegan and vegetarian snacks, vegan and vegetarian snack bars, low-sugar snacks and snack bars, organic cereal based snacks and snack bars, plant flavourings for beverages, high protein cereal bars, protein bars, protein snacks, organic protein snacks, cereal bars, energy bars, plant-based snacks and bars, organic plant-based snacks and bars, protein based confectionary, and fibre based confectionary; retail and online retail services in connection to the sale of non-alcoholic beverages, non-alcoholic beverages derived from plant-based protein sources, energy drinks, beverages for meal replacement, protein drinks, protein-enriched sports beverages, powders used in the preparation of beverages, plant-based protein drinks, plant-based powders, plant-based bars, plant-based snacks, organic plant-based protein drinks, organic plant-based powders, organic plant-based bars and organic plant-based snacks; retail and online retail services in connection to the sale of plant-based protein snacks and bars, plant based-fibre snacks and bars, organic plant-based protein snacks and bars, and organic plant based-fibre snacks and bars; information.

The applicant's second mark

Retail and online retail services in connection to the sale of dietetic food and beverages, nutritional supplements, nutritional drinks, nutritional snacks, nutritional bars, nutritional shakes, protein supplements, protein supplement snacks, protein supplement bars, protein supplement shakes, protein dietary supplements, protein powder dietary supplements, protein powders, nutritional supplement energy bars, dietary food supplements in the nature of protein bars and snacks; retail and online retail services in connection to the sale of nut-based desserts, nut-based snacks and snack bars, soy-based desserts, soy-based snacks and snack bars, fruit-based desserts, fruit-based snacks and snack bars, fruit powders, vegetable powders, organic drinks, organic snacks, organic cereal bars, organic protein bars; retail and online retail services in connection to the sale of snacks and snack bars made from cereals, vegan and vegetarian snacks, vegan and vegetarian snack bars, low-sugar snacks and snack bars, organic cereal based snacks and snack bars, plant flavourings for beverages, high protein cereal bars, protein bars, protein snacks, organic protein snacks, cereal bars, energy bars, plant-based snacks and bars, organic plant-based snacks and bars; retail and online retail services in connection to the sale of non-alcoholic beverages, non-alcoholic beverages derived from plant-based protein sources, protein drinks, protein-enriched sports beverages, powders used in the preparation of beverages, plant-based protein drinks, plant-based powders, plant-based bars, plant-based snacks, organic plant-based protein drinks, organic plant-based powders, organic plant-based bars and organic plant-based snacks; retail and online retail services in connection to the sale of plant-based protein snacks and bars, plant based-fibre snacks and bars, organic plant-based protein snacks and bars, and organic plant based-fibre snacks and bars; information.

78. Both of the applicant's specifications also include the term "advisory and consultancy services relating to the aforementioned services" at the end of its class 35 services. Where I have found the applicant's services to be dissimilar, it follows that these additional services relating to them are also dissimilar. However, where I have found the applicant's services to be similar to a medium degree with the

opponent's goods, the applicant's advisory and consultancy services relating to those services are also similar to the opponent's goods. This is on the basis that there is an overlap in trade channels. There may also be an overlap in user in that a user seeking retailing services may also seek advice and consultancy in relation to the retail of those goods. In addition, I consider that there may also be a complementary relationship between these goods and services. For example, I consider that the retailing of goods are important and indispensable to advisory and consultancy services relating to those retail services themselves. In my view, the average consumer would consider the undertaking responsible for the retail services to also be responsible for the advisory and consultancy services, and vice versa.⁷ Overall, I consider these services to be similar to a medium degree.

79. As some degree of similarity between goods and services is necessary to engage the test for likelihood of confusion, my findings above mean that the oppositions aimed against those services I have found to be dissimilar will fail.⁸ For ease of reference, those services that I have found to be dissimilar are the same in both of the applicant's marks and are as follows:

Class 35: Advertising, marketing and promotional services; advisory and consultancy services relating to the aforementioned services

The average consumer and the nature of the purchasing act

80. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

⁷ *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

⁸ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

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

81. I have submissions from both parties in respect of the average consumer. The opponent submits that the average consumer for both parties' goods will be the same and that, as the goods are every day purchases of modest value, the degree of attention paid will be lower than average. In response to this, the applicant submits that the parties do not share the same customers and that the applicant's customers will be health conscious and active individuals that will pay a very high degree of attention.

82. While a number of applicant's goods and services appear to be aimed at a more health conscious public, this does not apply to all of them. Further, there is nothing in the opponent's specification to suggest that its goods will not be aimed at the same public. In my view, the average consumer will not be limited to just members of the public with a focus on being healthy and/or active. Instead, I consider that the average consumer for both parties' goods and services is a member of the general public at large, which I acknowledge does include the health conscious public.

83. The goods will, for the most part, be available via retailers, being both general retailers and health food retailers, and their online equivalents. At the retailers' physical premises, the goods will be displayed on shelves and self-selected by the consumer. A similar process will apply when the goods are selected online, in that a consumer will select them after seeing an image on a webpage. In my view, the visual component will dominate both methods of sale, although I do not discount an aural component playing a part in the form of word of mouth recommendations and advice from sales assistants.

84. The goods will range in price but are likely to be fairly inexpensive. As for the frequency at which the goods will be purchased, I am of the view that they will be purchased on a regular basis. As for the level of attention paid, I am of the view that the consumers will consider a range of factors including the ingredients, nutritional information, flavour and expiration date. In my view, the average consumer will pay a medium degree of attention during the purchasing process of the goods at issue. However, I acknowledge that for some goods, such as snack bars selected at a checkout of a supermarket for example, the average consumer is likely to pay a lower degree of attention. I acknowledge that the applicant submits that its consumer will pay a very high degree of attention. While noted, I disagree on the basis that, even if the consumer is particularly health conscious, they are likely to consider the same factors as discussed above. Whilst there may be the occasional consumer who will pay a higher than normal degree of attention, this will not, in my view, extend the level of attention paid beyond a medium degree for the category as a whole.

85. Turning to the services at issue, I am of the view that these are most likely to be selected having considered, for example, promotional material (in hard copy and online) and signage appearing on the high street. For online retail services, these are likely to be selected after viewing online advertising or search engine links. Visual considerations will be an important part of the selection process. Such services are also likely to be the subject of word-of-mouth recommendations meaning that aural considerations will not be an insignificant feature of the selection process. When selecting these services, the average consumer is likely to consider such things as stock, price of goods offered in comparison to other retailers, delivery method (for online retail only) and knowledge of staff. I am of the view that the average consumer is likely to pay a medium degree of attention during the selection process for the services.

Distinctive character of the opponent's mark

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

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

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

87. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of 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 not claimed that its mark has acquired an enhanced level of distinctive character and has filed no evidence to that effect. I, therefore, only have the inherent position to consider.

88. The opponent’s mark consists of the word ‘Hero’. While it is displayed slightly stylised, the typeface used is, in my view, fairly standard. It is displayed in white with a black, dashed border. The opponent submits that its mark is highly distinctive for the goods for which it is registered on the basis that the word ‘HERO’ does not call into mind any food or drink products. While I accept that the word is not allusive or descriptive of the goods for which the mark is registered, I do not consider it

particularly remarkable. It is, after all, a well-known English word that will be readily understood by UK consumers. While I am of the view that the dashed-border will be noticed, I do not consider that it will contribute to the distinctiveness of the mark to any material degree. Overall, I find that the opponent's mark enjoys a medium degree of inherent distinctive character.

Comparison of marks



89. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

90. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

92. The respective trade marks are shown below:

The opponent's mark	The applicant's marks
	<p data-bbox="927 282 1318 371">BODYHERO ("the applicant's first mark")</p>  <p data-bbox="900 770 1345 806">("the applicant's second mark")</p>

93. I have submissions from both parties regarding the similarity of the marks. I do not intend to reproduce those in full here but will refer to them below, if necessary.

Overall Impression

The applicant's first mark

94. The applicant's first mark is a word only mark that consists of the word 'BODYHERO' that will, in my view, be read as two words, being 'BODY HERO'. There are no other elements that contribute to the overall impression of the mark that lies in the conjoined word itself.

The applicant's second mark

95. The applicant's second mark consists of a word and device element. The word is 'BODYHERO' that will be read in the same way as the first mark, being 'BODY HERO'. The applicant submits that the device element is an abstract leaf design. While this may be the case, I do not consider the average consumer will see it that way and will, instead, see it simply as two conjoined shapes. In my view, the word and device elements will play equal roles within the overall impression of the mark. I make this finding bearing in mind that (1) while the eye of the average consumer

is usually drawn to the element of a mark that can be read, this is not always the case and (2) the size of the device element when compared with the word element.

The opponent's mark.

96. The opponent's mark consists of the word 'HERO' in a slightly stylised, albeit fairly standard, typeface. The word is displayed in white but with a black, dashed border. In my view, the typeface used will have no impact on the overall impression of the mark whereas the dashed border will have very little impact. As a result, I find that the word itself plays the greater role in the overall impression of the mark with the dashed border element playing a minimal role.

Visual Comparison

The applicant's first mark and the opponent's mark

97. The only shared element in the marks is that they both include the word 'HERO'. This is the only element in the opponent's mark and sits at the end of the applicant's. The marks differ in the presence of the word 'BODY' at the beginning of the applicant's mark. As a word only mark, the applicant's mark may be displayed in any standard typeface that, in my view, includes one that is similar to the one used in the opponent's mark. While the differences sit at the beginning of the applicant's mark, being where the average consumer tends to focus,⁹ the visual similarities will not be negated altogether just because they sit at the end of the applicant's mark. Taking all of this into account, I am of the view that the marks are similar to a medium degree.

The applicant's second mark and the opponent's mark

98. Visually, the marks share the word 'HERO'. All other elements are different. The device element in the applicant's mark is a point of significant difference between the marks. As with the comparison at paragraph 97 above, the word 'HERO' sits

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

at the end of the applicant's mark. However, unlike the comparison above, the applicant's second mark is not a word only mark meaning that notional fair use of the mark does not cover use of different typefaces. Overall, I consider that the marks are similar to a low degree.

Aural Comparison

99. Aurally, the applicant's marks will be pronounced in the same way. They consist of four syllables that will be pronounced 'BOD-E-HE-ROE'. The opponent's mark consists of two syllables that will be pronounced 'HE-ROE'. The entire aural element of the opponent's mark is identical to the last two syllables of the applicant's marks. As I have set out above, while the average consumer tends to focus on the beginnings of marks, which is where the differences lie, it does not negate the similarities altogether. In my view, the marks are aurally similar to a medium degree.

Conceptual Comparison

100. I have set out above that I do not consider that the device element will be seen as anything other than a fanciful shape. It, therefore, carries no concept and will not impact the overall concept of the applicant's second mark. This leaves the concept of the word 'BODYHERO' as the only element in the applicant's second mark. As this is also the only conceptual element in the first mark, I will consider the applicant's marks together.

101. Both parties have given similar submissions in respect of the meaning of the word 'HERO' in that it is someone who is admired by people for doing something brave/courageous, good/noble or new. I accept that the average consumer will understand this as being the meaning of 'HERO'. The applicant submits that despite this, the word 'BODYHERO' is not attributed with any meaning and is, therefore, a fanciful word. While noted, I disagree with the applicant's submissions that it is a fanciful word. I have set out above that the word 'BODYHERO' will be read as two words. Both of these words, 'BODY' and 'HERO' have clear meanings to the average consumer. However, when taken together, I do agree that

'BODYHERO' is not a phrase that will be readily known to the average consumer. While this may be the case, I am of the view that on the goods and services at issue, it does convey a concept of a product or service that is for the betterment of the user's body. Overall, I accept that there are conceptual similarities with the reference to the word 'HERO' but the word 'BODY', in my view, introduces a conceptual point of difference. In my view, the marks are conceptually similar to a medium degree.

Likelihood of Confusion

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

103. I have found the majority of goods and services at issue to be either identical or similar to a medium degree and above. I have found that the average consumer will be a member of the general public (that includes the health conscious public) who will purchase the goods and select the services via primarily visual means, although I do not discount an aural component. I have concluded that the average consumer will mostly pay a medium degree of attention when purchasing the goods or selecting the services, however, I acknowledge that it may be lower for some goods. I have found the opponent's mark has a medium degree of inherent

distinctive character. I have found the applicant's first mark to be visually and aurally and conceptually similar to a medium degree with the opponent's mark. I have found the applicant's second mark to be visually similar to a low degree and aurally and conceptually similar to a medium degree with the opponent's mark.

104. Notwithstanding the principle of imperfect recollection and taking all of the above factors into account, I consider that the visual, aural and conceptual differences between the marks will be sufficient to enable the consumer to differentiate between the marks. This is particularly the case given that the average consumer will, for the most part, be paying a medium degree of attention during the purchase/selection process. Consequently, I do not consider there to be a likelihood of direct confusion between the marks, even on goods/services that I have found to be identical or in circumstances where the average consumer pays a lower degree of attention.

105. It now falls to me to consider whether there is a likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10.

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

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.). BL O/375/10 Page 15 of 16

(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).”

106. I have borne in mind that the examples given by Mr Purvis QC are not exhaustive. Rather, they were intended to be illustrative of the general approach.¹⁰

107. I have found that the word ‘HERO’ dominates the opponent’s mark. It also plays a significant role in both of the applicant’s marks as a result of being an equal part of their word elements, be that the dominant element (in the first mark) or an equal one (in the second mark). I find that it is likely that the average consumer, when confronted with the marks, will consider the addition of the word ‘BODY’ before ‘HERO’ in both of the applicant’s marks to be a logical brand extension of the opponent’s mark. This is on the basis that the addition of ‘BODY’ on a range of foodstuffs, particularly those that are for slimming, body-building, fitness, sporting, health or wellbeing purposes to be an indication that the brand ‘HERO’ has extended into selling a range of health foods. I do not consider that the fact ‘BODY’ is at the beginning of the applicant’s marks will avoid this. Further, I consider that

¹⁰ *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10

despite the addition of 'BODY', the 'HERO' element retains an independent role in the applicant's marks. As the common element between the marks, I am of the view that the shared use of the word 'HERO' will result in the average consumer considering that the marks originate from the same or economically linked undertaking. While I have found that the applicant's second mark to be similar to a low degree with the opponent's mark, I consider this attributable to the device element and the presentation differences between them. However, while I have found that the device element plays an equal role in the overall impression of the applicant's second mark, I am of the view that the average consumer will consider this element as being consistent with a rebranding or an alternative mark being used by the same or economically linked undertakings. I find that the same also applies to the presentational differences between the marks. Consequently, I consider there to be a likelihood of indirect confusion between the parties' marks. This finding is made while taking into account that the average consumer will, generally, pay a medium degree of attention during the purchasing/selection process of the goods and services, however, I find that the same will apply for those individual consumers that may pay a higher than medium degree of attention. This finding applies to all of the goods and services at issue, including those services that I have found similar to a medium degree.

CONCLUSION

108. The opposition has succeeded against a majority of the goods and services against which it was aimed. The applicant's marks are refused in respect of the following good and services:

The applicant's first mark

Class 5: Dietetic food and beverages; nutritional supplements, drinks, snacks, bars and shakes; protein supplements, snacks, bars, and shakes; protein dietary supplements; protein powder dietary supplements; protein powders; nutritional supplement energy bars; dietary food supplements in the nature of protein bars and snacks; probiotic supplements; carbohydrate supplements;

vitamin and mineral supplements; herbal supplements and formulations; nutraceuticals for use as a dietary supplement; amino acid supplements; meal replacements; supplements, drinks, snacks, bars, and shakes associated with slimming, body-building, fitness and/or sporting purposes, health or wellbeing; Protein, carbohydrate, and fibre supplements, vitamin, protein and mineral enriched foods and foodstuffs, all the aforesaid for use as aids to slimming, weight gain, muscle gain and well-being; beverages for meal replacement protein drinks; plant-based protein drinks, powders, bars and snacks; organic plant-based protein drinks, powders, bars and snacks.

Class 29: Plant, fruit, vegetable and nut based foodstuffs, all the aforesaid for use as aids to slimming, weight gain, muscle gain and well-being; desserts; nut-based desserts, snacks and snack bars; soy-based desserts, snacks and snack bars; fruit-based desserts, snacks and snack bars; fruit and vegetable powders; organic nut, soy, vegetable, fruit and seed-based snacks and snack bars.

Class 30: Snacks and snack bars made from cereals; vegan snacks and snack bars; low-sugar snacks and snack bars; organic cereal based snacks and snack bars; plant flavourings for beverages; high protein cereal bars; high fibre cereal bars and snacks; protein bars; protein snacks; organic protein bars; organic protein snacks; cereal bars; energy bars; plant-based snacks and bars; organic plant-based snacks and bars; chocolate coated snacks and snack bars; plant-based protein snacks and bars; plant based-fibre snacks and bars; organic plant-based protein snacks and bars; organic plant based-fibre snacks and bars; protein based confectionary; fibre based confectionary; protein based confectionary, chocolate coated or plain, all for use as aids to slimming, weight gain, muscle gain and well being.

Class 32: Non-alcoholic beverages; non-alcoholic beverages derived from plant-based protein sources; energy drinks; protein-enriched sports beverages; powders used in the preparation of beverages.

Class 35: Retail and online retail services in connection to the sale of dietetic food and beverages, nutritional supplements, nutritional drinks, nutritional snacks, nutritional bars, nutritional shakes, protein supplements, protein supplement snacks, protein supplement bars, protein supplement shakes, protein dietary supplements, protein powder dietary supplements, protein powders, nutritional supplement energy bars, dietary food supplements in the nature of protein bars and snacks, probiotic supplements, carbohydrate supplements, vitamin and mineral supplements, herbal supplements and formulations, nutraceuticals for use as a dietary supplement. amino acid supplements, and meal replacements; retail and online retail services in connection to the sale of supplements, drinks, snacks, bars, and shakes associated with slimming, body-building, fitness and/or sporting purposes, health or wellbeing; retail and online retail services in connection to the sale of protein, carbohydrate, and fibre supplements; retail and online retail services in connection to the sale of vitamin, protein and mineral enriched foods and foodstuffs; retail and online retail services in connection to the sale of nutritional foodstuffs; retail and online retail services in connection to the sale of protein based confectionary, chocolate coated or plain; retail and online retail services in connection with the sale of vitamin, protein and mineral enriched foods and foodstuffs for use as aids to slimming, weight gain, muscle gain and well-being; retail and online retail services in connection to the sale of desserts, nut-based desserts, nut-based snacks and snack bars, soy-based desserts, soy-based snacks and snack bars, fruit-based desserts, fruit-based snacks and snack bars, fruit powders, vegetable powders, organic drinks, organic snacks, organic cereal bars, organic protein bars; retail

and online retail services in connection to the sale of snacks and snack bars made from cereals, vegan and vegetarian snacks, vegan and vegetarian snack bars, low-sugar snacks and snack bars, organic cereal based snacks and snack bars, plant flavourings for beverages, high protein cereal bars, protein bars, protein snacks, organic protein snacks, cereal bars, energy bars, plant-based snacks and bars, organic plant-based snacks and bars, protein based confectionary, and fibre based confectionary; retail and online retail services in connection to the sale of non-alcoholic beverages, non-alcoholic beverages derived from plant-based protein sources, energy drinks, beverages for meal replacement, protein drinks, protein-enriched sports beverages, powders used in the preparation of beverages, plant-based protein drinks, plant-based powders, plant-based bars, plant-based snacks, organic plant-based protein drinks, organic plant-based powders, organic plant-based bars and organic plant-based snacks; retail and online retail services in connection to the sale of plant-based protein snacks and bars, plant based-fibre snacks and bars, organic plant-based protein snacks and bars, and organic plant based-fibre snacks and bars; information, advisory and consultancy services relating to the aforementioned services.

The applicant's second mark

Class 5: Dietetic food and beverages; nutritional supplements, drinks, snacks, bars and shakes; protein supplements, snacks, bars, and shakes; protein dietary supplements; protein powder dietary supplements; protein powders; nutritional supplement energy bars; dietary food supplements in the nature of protein bars and snacks; probiotic supplements; carbohydrate supplements; vitamin and mineral supplements; herbal supplements and formulations; nutraceuticals for use as a dietary supplement; amino acid supplements; meal replacements. All in relation to

slimming, body-building, fitness and/or sporting purposes, health or wellbeing. ;Food supplements; Food supplements consisting of amino acids; Food supplements for dietetic use; Food supplements for non-medical purposes; Food supplements for sportsmen; Food supplements in liquid form; Dietary food supplements; Health food supplements for persons with special dietary requirements; Mineral food supplements; Vitamin and mineral food supplements; Protein/carbohydrate/fibre supplements; protein supplements.

Class 29: Nut-based desserts, snacks and snack bars; soy-based desserts, snacks and snack bars; fruit-based desserts, snacks and snack bars; fruit and vegetable powders; organic nut, soy, vegetable, fruit, and seed-based snacks and snack bars. Vitamin, protein and mineral enriched foods and foodstuffs; nutritional foodstuffs; protein based confectionery, with or without chocolate coating; all the aforesaid for use as aids to slimming, weight gain, muscle gain and well being.

Class 30: Snacks and snack bars made from cereals; vegan snacks and snack bars; low-sugar snacks and snack bars; organic cereal based snacks and snack bars; plant flavourings for beverages; high protein cereal bars; high fibre cereal bars and snacks; protein bars; protein snacks; organic protein bars; organic protein snacks; cereal bars; energy bars; plant-based snacks and bars; organic plant-based snacks and bars; chocolate coated snacks and snack bars; plant-based protein snacks and bars; plant based-fibre snacks and bars; organic plant-based protein snacks and bars; organic plant based-fibre snacks and bars; Protein based confectionary; Fibre based confectionary.

Class 32: Non-alcoholic beverages; non-alcoholic beverages derived from plant-based protein sources; protein drinks; protein-enriched sports beverages; powders used in the preparation of beverages;

plant-based protein drinks, powders, bars and snacks; organic plant-based protein drinks and powders; energy drinks; beverages for meal replacement.

Class 35: Retail and online retail services in connection to the sale of dietetic food and beverages, nutritional supplements, nutritional drinks, nutritional snacks, nutritional bars, nutritional shakes, protein supplements, protein supplement snacks, protein supplement bars, protein supplement shakes, protein dietary supplements, protein powder dietary supplements, protein powders, nutritional supplement energy bars, dietary food supplements in the nature of protein bars and snacks; retail and online retail services in connection to the sale of nut-based desserts, nut-based snacks and snack bars, soy-based desserts, soy-based snacks and snack bars, fruit-based desserts, fruit-based snacks and snack bars, fruit powders, vegetable powders, organic drinks, organic snacks, organic cereal bars, organic protein bars; retail and online retail services in connection to the sale of snacks and snack bars made from cereals, vegan and vegetarian snacks, vegan and vegetarian snack bars, low-sugar snacks and snack bars, organic cereal based snacks and snack bars, plant flavourings for beverages, high protein cereal bars, protein bars, protein snacks, organic protein snacks, cereal bars, energy bars, plant-based snacks and bars, organic plant-based snacks and bars; retail and online retail services in connection to the sale of non-alcoholic beverages, non-alcoholic beverages derived from plant-based protein sources, protein drinks, protein-enriched sports beverages, powders used in the preparation of beverages, plant-based protein drinks, plant-based powders, plant-based bars, plant-based snacks, organic plant-based protein drinks, organic plant-based powders, organic plant-based bars and organic plant-based snacks; retail and online retail services in connection to the sale of plant-based protein snacks and bars, plant based-fibre snacks and bars, organic

plant-based protein snacks and bars, and organic plant based-fibre snacks and bars; information, advisory and consultancy services relating to the aforementioned services.

109. The applications may proceed to registration for the following services (which are identical across both applicant's marks' specifications) that I have found to be dissimilar:

Class 35: Advertising, marketing and promotional services; advisory and consultancy services relating to the aforementioned services

COSTS

110. As the opponent has been successful against all bar two of the goods and services that its opposition was aimed at, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the opponent the sum of **£1,000** as a contribution towards its costs. The sum is calculated as follows:

Preparing two notices of opposition and considering the applicant's counter statements:	£500
Preparing submissions in lieu of a hearing:	£300
Official Fees (x2):	£200
Total	£1,000

111. I therefore order Bodyhero Limited to pay HERO AG the sum of £1,000. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 17th day of December 2021

A COOPER
For the Registrar

ANNEX 1

The applicant's first mark

Class 5

Dietetic food and beverages; nutritional supplements, drinks, snacks, bars and shakes; protein supplements, snacks, bars, and shakes; protein dietary supplements; protein powder dietary supplements; protein powders; nutritional supplement energy bars; dietary food supplements in the nature of protein bars and snacks; probiotic supplements; carbohydrate supplements; vitamin and mineral supplements; herbal supplements and formulations; nutraceuticals for use as a dietary supplement; amino acid supplements; meal replacements; supplements, drinks, snacks, bars, and shakes associated with slimming, body-building, fitness and/or sporting purposes, health or wellbeing; Protein, carbohydrate, and fibre supplements, vitamin, protein and mineral enriched foods and foodstuffs, all the aforesaid for use as aids to slimming, weight gain, muscle gain and well-being; beverages for meal replacement protein drinks; plant-based protein drinks, powders, bars and snacks; organic plant-based protein drinks, powders, bars and snacks.

Class 29

Plant, fruit, vegetable and nut based foodstuffs, all the aforesaid for use as aids to slimming, weight gain, muscle gain and well-being; desserts; nut-based desserts, snacks and snack bars; soy-based desserts, snacks and snack bars; fruit-based desserts, snacks and snack bars; fruit and vegetable powders; organic nut, soy, vegetable, fruit and seed-based snacks and snack bars.

Class 30

Snacks and snack bars made from cereals; vegan snacks and snack bars; low-sugar snacks and snack bars; organic cereal based snacks and snack bars; plant flavourings for beverages; high protein cereal bars; high fibre cereal bars and snacks; protein bars; protein snacks; organic protein bars; organic protein snacks; cereal bars; energy bars; plant-based snacks and bars; organic plant-based snacks and bars; chocolate coated snacks and snack bars; plant-based protein snacks and bars; plant based-fibre snacks and bars; organic plant-based protein snacks and bars; organic plant based-fibre

snacks and bars; protein based confectionary; fibre based confectionary; protein based confectionary, chocolate coated or plain, all for use as aids to slimming, weight gain, muscle gain and well being.

Class 32

Non-alcoholic beverages; non-alcoholic beverages derived from plant-based protein sources; energy drinks; protein-enriched sports beverages; powders used in the preparation of beverages.

Class 35

Advertising, marketing and promotional services; retail and online retail services in connection to the sale of dietetic food and beverages, nutritional supplements, nutritional drinks, nutritional snacks, nutritional bars, nutritional shakes, protein supplements, protein supplement snacks, protein supplement bars, protein supplement shakes, protein dietary supplements, protein powder dietary supplements, protein powders, nutritional supplement energy bars, dietary food supplements in the nature of protein bars and snacks, probiotic supplements, carbohydrate supplements, vitamin and mineral supplements, herbal supplements and formulations, nutraceuticals for use as a dietary supplement. amino acid supplements, and meal replacements; retail and online retail services in connection to the sale of supplements, drinks, snacks, bars, and shakes associated with slimming, body-building, fitness and/or sporting purposes, health or wellbeing; retail and online retail services in connection to the sale of protein, carbohydrate, and fibre supplements; retail and online retail services in connection to the sale of vitamin, protein and mineral enriched foods and foodstuffs; retail and online retail services in connection to the sale of nutritional foodstuffs; retail and online retail services in connection to the sale of protein based confectionary, chocolate coated or plain; retail and online retail services in connection with the sale of vitamin, protein and mineral enriched foods and foodstuffs for use as aids to slimming, weight gain, muscle gain and well-being; retail and online retail services in connection to the sale of desserts, nut-based desserts, nut-based snacks and snack bars, soy-based desserts, soy-based snacks and snack bars, fruit-based desserts, fruit-based snacks and snack bars, fruit powders, vegetable powders, organic drinks, organic snacks, organic cereal bars, organic protein bars; retail and online retail services in connection to the sale of snacks and snack bars made from

cereals, vegan and vegetarian snacks, vegan and vegetarian snack bars, low-sugar snacks and snack bars, organic cereal based snacks and snack bars, plant flavourings for beverages, high protein cereal bars, protein bars, protein snacks, organic protein snacks, cereal bars, energy bars, plant-based snacks and bars, organic plant-based snacks and bars, protein based confectionary, and fibre based confectionary; retail and online retail services in connection to the sale of non-alcoholic beverages, non-alcoholic beverages derived from plant-based protein sources, energy drinks, beverages for meal replacement, protein drinks, protein-enriched sports beverages, powders used in the preparation of beverages, plant-based protein drinks, plant-based powders, plant-based bars, plant-based snacks, organic plant-based protein drinks, organic plant-based powders, organic plant-based bars and organic plant-based snacks; retail and online retail services in connection to the sale of plant-based protein snacks and bars, plant based-fibre snacks and bars, organic plant-based protein snacks and bars, and organic plant based-fibre snacks and bars; information, advisory and consultancy services relating to the aforementioned services.

The applicant's second mark

Class 5

Dietetic food and beverages; nutritional supplements, drinks, snacks, bars and shakes; protein supplements, snacks, bars, and shakes; protein dietary supplements; protein powder dietary supplements; protein powders; nutritional supplement energy bars; dietary food supplements in the nature of protein bars and snacks; probiotic supplements; carbohydrate supplements; vitamin and mineral supplements; herbal supplements and formulations; nutraceuticals for use as a dietary supplement; amino acid supplements; meal replacements. All in relation to slimming, body-building, fitness and/or sporting purposes, health or wellbeing. ;Food supplements;Food supplements consisting of amino acids;Food supplements for dietetic use;Food supplements for non-medical purposes;Food supplements for sportsmen;Food supplements in liquid form;Dietary food supplements;Health food supplements for persons with special dietary requirements;Mineral food supplements;Vitamin and mineral food supplements; Protein/carbohydrate/fibre supplements; protein supplements.

Class 29

Nut-based desserts, snacks and snack bars; soy-based desserts, snacks and snack bars; fruit-based desserts, snacks and snack bars; fruit and vegetable powders; organic nut, soy, vegetable, fruit, and seed-based snacks and snack bars. Vitamin, protein and mineral enriched foods and foodstuffs; nutritional foodstuffs; protein based confectionery, with or without chocolate coating; all the aforesaid for use as aids to slimming, weight gain, muscle gain and well being.

Class 30

Snacks and snack bars made from cereals; vegan snacks and snack bars; low-sugar snacks and snack bars; organic cereal based snacks and snack bars; plant flavourings for beverages; high protein cereal bars; high fibre cereal bars and snacks; protein bars; protein snacks; organic protein bars; organic protein snacks; cereal bars; energy bars; plant-based snacks and bars; organic plant-based snacks and bars; chocolate coated snacks and snack bars; plant-based protein snacks and bars; plant based-fibre snacks and bars; organic plant-based protein snacks and bars; organic plant based-fibre snacks and bars; Protein based confectionary; Fibre based confectionary.

Class 32

Non-alcoholic beverages; non-alcoholic beverages derived from plant-based protein sources; protein drinks; protein-enriched sports beverages; powders used in the preparation of beverages; plant-based protein drinks, powders, bars and snacks; organic plant-based protein drinks and powders; energy drinks; beverages for meal replacement.

Class 35

Advertising, marketing and promotional services; retail and online retail services in connection to the sale of dietetic food and beverages, nutritional supplements, nutritional drinks, nutritional snacks, nutritional bars, nutritional shakes, protein supplements, protein supplement snacks, protein supplement bars, protein supplement shakes, protein dietary supplements, protein powder dietary supplements, protein powders, nutritional supplement energy bars, dietary food supplements in the nature of protein bars and snacks; retail and online retail services in connection to the sale of nut-based desserts, nut-based snacks and snack bars, soy-based desserts,

soy-based snacks and snack bars, fruit-based desserts, fruit-based snacks and snack bars, fruit powders, vegetable powders, organic drinks, organic snacks, organic cereal bars, organic protein bars; retail and online retail services in connection to the sale of snacks and snack bars made from cereals, vegan and vegetarian snacks, vegan and vegetarian snack bars, low-sugar snacks and snack bars, organic cereal based snacks and snack bars, plant flavourings for beverages, high protein cereal bars, protein bars, protein snacks, organic protein snacks, cereal bars, energy bars, plant-based snacks and bars, organic plant-based snacks and bars; retail and online retail services in connection to the sale of non-alcoholic beverages, non-alcoholic beverages derived from plant-based protein sources, protein drinks, protein-enriched sports beverages, powders used in the preparation of beverages, plant-based protein drinks, plant-based powders, plant-based bars, plant-based snacks, organic plant-based protein drinks, organic plant-based powders, organic plant-based bars and organic plant-based snacks; retail and online retail services in connection to the sale of plant-based protein snacks and bars, plant based-fibre snacks and bars, organic plant-based protein snacks and bars, and organic plant based-fibre snacks and bars; information, advisory and consultancy services relating to the aforementioned services.

ANNEX 2

Class 5

Baby food; beverages for babies; food and beverages for infants; food supplements for infants; infant formula; baby milk formula; baby milk; replacement for breast milk; replacement for baby milk; baby milk powder; complementary foods for babies; gluten-free baby food; gluten-free food and food additives, all adapted for medical purposes; nutritional supplements; dietetic food adapted for medical purposes; dietetic substances adapted for medical purposes; dietetic beverages adapted for medical purposes; protein dietary supplements; food adapted for medical purposes for sick people and diabetics.

Class 29

Preserved, frozen, dried and cooked fruits and vegetables; fruit and vegetable based snack foods and bars; nut bars; nut-based bars; processed nuts; dried edible mushrooms; mushrooms, preserved; fruit slices; fruit chips; vegetable chips; jellies; jams; marmalades; compotes; fruit spreads; fruit pulp; fruit mush; fruit and vegetable purée; pre-cooked soup; preparations for making soup; nut-based spreads; hazelnut spreads; prepared meals made from meat; dishes of fish; prepared meat; preserved meat; processed meat; tomato purée; olive oil; hash brown potatoes; potato-based gnocchi; albumen for culinary purposes; milk products containing fruit pulp and fruit aromas; milk and milk products; yogurt; broth.

Class 30

Cereal preparations; Breakfast cereals; Muesli; Cereal bars; Ravioli; Farinaceous food pastes; Rice; Risotto; Gnocchi; Polenta; Snacks based on rice, cereals and corn; Puffed corn-based snacks; Ready-made dishes containing pasta; Rice-based prepared meals; Porridge oats; Porridge; Meat pies; Honey; Golden syrup; Dulce de leche; Flour; Breads; Custard; Cacao spreads; Chocolate-based spreads; Maltodextrins for nutritional use [other than medical]; Mustard; Mayonnaise; Tomato ketchup; Sauces; Condiments; Pasta sauce; Tomato sauce; Salad sauces; Dips; Seasonings (spices); Processed herbs; Ice cream, sorbets and other kinds of edible ices.

Class 32

Fruit beverages and fruit juices; lemonades; vegetable juices (beverages); fruit nectars, nectars; smoothies; syrups and other substances for the preparation of drinks; mineral and aerated water; non-alcoholic beverages.