

BL O/840/22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3668053

BY

FLOWX.AI R&D SRL

TO REGISTER THE FOLLOWING TRADE MARK:

ZeroRedeploy

AND

OPPOSITION NO. 428637 THERETO

BY

XERO LIMITED

Background and pleadings

1. On 13 July 2021, FLOWX.AI R&D SRL (the “Applicant”) applied to register the trade mark **ZeroRedeploy**. The contested application was accepted, and published for opposition purposes in the Trade Marks Journal on 3 September 2021. Registration of the mark is sought in respect of the following goods and services in Classes 9 and 42:

Class 9 *Recorded content; Software; Application software; Mobile software; Office and business applications; Artificial intelligence and machine learning software; Software for monitoring, analysing, controlling and running physical world operations; Web application and server software; Computer software platform embedding a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available.*

Class 42 *Software development, programming and implementation; Software as a service [SaaS]; Platform as a Service [PaaS]; Blockchain as a Service [BaaS]; Software as a service (saas) services featuring artificial-intelligence (ai) based software that embeds a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available; platform as a service (paas) services, featuring artificial-intelligence (ai) based software platform that embeds a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available.*

2. On 30 November 2021, Xero Limited (the “Opponent”) opposed the application under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). Initially the Opponent relied on three earlier rights, but subsequently limited the opposition (further to a proof

of use request). The Opponent now relies only on earlier United Kingdom Trade Mark (UKTM) 801380083:

XERO

Filing date: 6 July 2017

Receiving date: 19 December 2020

Registration date: 25 October 2019

3. For the purposes of this opposition, the Opponent relied upon only some of the goods for which the earlier mark is registered, namely:

Class 9 *Computer software and hardware.*

4. Since the filing date of the earlier mark predates that of the contested application, the Opponent's mark is considered to be an "earlier mark" in accordance with section 6 of the Act.¹ However, as the earlier mark has not been registered for a period of five years or more before the filing date of the application, it is not subject to the use requirements specified within section 6A of the Act. As a consequence, the Opponent may rely upon any or all of the goods for which the earlier mark is registered without having to show that it has used the mark at all.

5. The opposition is aimed against the entire list of goods and services in the contested application. The Opponent referred to the judgment T- 133/05, *Gérard Meric v Office for Harmonisation in the Internal Market*, and submitted that in accordance with *Meric* the contested Class 9 goods are identical to the Class 9 goods of the earlier mark, whilst the contested Class 42 services are similar to the Class 9 goods of the earlier mark.

6. The Opponent argued that the contested mark "...has the word ZERO as a standalone dominant and distinctive element". The Opponent subsequently argued

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

that the contested mark is visually similar to the earlier mark as the word 'Zero' has only one letter different from 'XERO'. The Opponent contended that the marks at issue are phonetically very similar, as the "initial standalone word element of the later mark" 'Zero' has a pronunciation that is identical to 'XERO'. In addition, the Opponent contended that the contested mark is conceptually very similar, if not identical, to the earlier mark "...because the average consumer will perceive both Zero and XERO to refer to the concept of nothing or the digit 0".

7. The Opponent submitted that the earlier mark is inherently distinctive in relation to the goods and services for which it is registered. The Opponent also submitted that there is "...no reason to presume that the average consumer of the goods and services under both marks cannot be the same person", and who would subsequently pay a degree of attention that is at least average.

8. On 7 February 2022, the Applicant filed a counterstatement in which it denied that the marks at issue are similar. The Applicant submitted that the Opponent was claiming similarity by extracting the word 'Zero' from the contested mark 'ZeroRedeploy', which it argued was not only incorrect in law, but was also something which the average consumer would not do. This is because the consumer would "...not dissect the mark in a way that would separate and isolate Zero from ZeroRedeploy." The Applicant argued that although the relevant public can recognise and analyse various details of a trade mark, any assessment of a likelihood of confusion should be made by reference to the overall impression of the mark as a whole, which, in the case of the contested mark, is the distinctive term 'ZeroRedeploy'.

9. The Applicant argued that the marks are visually and aurally different not only because of the first letter in each mark (being Z instead of X), but also because of the additional word 'Redeploy'. As for the conceptual comparison, the Applicant contended that 'ZeroRedeploy' could perhaps have the meaning of "...not a single transfer from one entity to another", whilst the earlier mark 'XERO' has no precise meaning. The Applicant suggested that the word 'XERO' of the earlier mark comes from the Greek word *xēros*, meaning 'dry', although the English-speaking consumer "...is more likely to associate the word with the genericised trade mark XEROX which is used in relation to photocopying".

10. On 6 April 2022, the Opponent confirmed that a) it did not intend to file evidence in support of its opposition, and b) further to a proof of use request by the Applicant, it wished to withdraw two of the original three earlier rights upon which the opposition was based and proceed only on the basis of UKTM 801380083.

11. On 29 June 2022, the Applicant filed submissions in support of its application. In its submissions, the Applicant reiterated that the contested mark did not contain an element that is more distinctive than the others, that no average consumer would ever divide off and only remember the word 'Zero' from the mark 'ZeroRedeploy', and that an assessment of a likelihood of confusion should be made by taking into account all of the trade mark's elements. The Applicant expressed that even if the relevant public were to divide the contested mark into 'Zero' and 'Redeploy', and subsequently compared the word 'Zero' with 'XERO', then "...the public would still be able to safely differentiate between the trade marks".

12. The Applicant argued that the difference between the first letters of the first words of each mark has a greater impact than a difference elsewhere in the marks at issue would have, because consumers generally tend to take more notice of a mark's beginning than its ending. The Applicant referred to the Judgment of the Court of First Instance (Second Chamber) of 16 March 2005 in *L'Oréal SA v OHIM* to support this argument. The Applicant also reiterated its position that the element 'Redeploy' excludes the possibility of confusion. The Applicant argued that by comparing 'XERO' with 'ZeroRedeploy', the signs are found to be different from both a visual and aural comparison. The Applicant referred to a definition of 'Xero' from Dictionary.com, whereby it apparently means "*of a combining form meaning 'dry', used in the formation of compound words e.g. xerophyte*". The Applicant argued that the Opponent's assertion that 'XERO' and 'Zero' have the same meaning (concept) is therefore misleading. The Applicant contended that the only similarity between the marks was that they coincided in the three letters 'ERO'.

13. The Applicant submitted that although certain goods and services at issue are similar, it can be observed that the Applicant's goods and services contain the particular feature of being artificial intelligence based software, whilst the Opponent's are more general in nature. The Applicant also submitted that the relevant consumer

is considered to be reasonably well informed and more attentive than a regular consumer.

14. No Hearing was requested.

15. Only the Opponent filed submissions in lieu of a Hearing. On 11 August 2022, the Opponent reiterated that the contested Class 9 goods fall within the general category of the earlier mark's *Computer Software* in Class 9, and are therefore considered to be identical. The Opponent further submitted that the contested services in Class 42 are highly similar to the Class 9 goods of the earlier mark, insofar as they provide access to computer software. In addition, it is not uncommon for the same entity to provide both downloadable (Class 9) and non-downloadable software (Class 42).

16. As to the marks themselves, the Opponent reiterated that the word 'Zero' in the contested mark is a "standalone dominant element", which is subsequently visually, aurally and conceptually similar to 'XERO'. The Opponent argued that in fact there is no reason to presume that the average consumer would *not* perceive 'Zero' as the standalone dominant and distinctive element, nor would the consumer ascribe any measure of inherent distinctiveness to the 'Redeploy' element of the contested mark. The Opponent went further to argue that "It cannot be disputed that ZEROREDEPLOY is a ZERO mark". The Opponent's position is based on the argument that the meaning of Redeploy is 'transfer', and has very little distinctive character. The Opponent stated that the Applicant had not provided any evidence to show that the term 'XERO' is anything more than a fanciful way of expressing 'Zero'.

17. Both parties are represented. The Applicant is represented by Forresters IP LLP, and the Opponent is represented by Wilson Gunn.

Decision

18. 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 upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

Section 5(2)(b)

19. Section 5(2)(b) of the Act is 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 of association with the earlier trade mark”.

Section 5A

20. Section 5A of the Act is as follows:

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

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

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the

imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

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

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

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

Comparison of goods and services

22. Both parties provided submissions in relation to the respective goods and services at issue. Whilst the parties' comments are noted, the degree of similarity or identity of the specifications, as the case may be, is something which fundamentally contributes to whether there is a likelihood of confusion. I must therefore conduct my own full analysis of the goods and services at issue. I shall refer to the submissions of each party if and when I consider them to provide assistance and clarity.

Earlier mark	Application
Class 9: <i>Computer software and hardware</i>	Class 9: <i>Recorded content; Software; Application software; Mobile software; Office and business applications; Artificial intelligence and machine learning software; Software for monitoring, analysing, controlling and running physical world operations; Web application and server software; Computer software platform embedding a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available.</i>
	Class 42: <i>Software development, programming and implementation; Software as a service [SaaS]; Platform as a Service [PaaS]; Blockchain as a Service [BaaS]; Software as a service (saas) services featuring artificial-intelligence (ai) based software that embeds a set of technologies that</i>

	<p><i>enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available; platform as a service (paas) services, featuring artificial-intelligence (ai) based software platform that embeds a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available.</i></p>
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23. 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 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

24. 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.

25. It has also been established by the General Court (GC) in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that:

“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”.

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

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

Class 9

27. I note the Applicant's reference to the specific wording of some of the contested goods in Class 9, which indicate a focus on artificial intelligence. I also note the Applicant's reference to the more general wording of the Opponent's Class 9 specification, i.e., *Computer software*. I interpret such submissions from the Applicant as intended to imply that they do not consider the goods of the earlier mark to necessarily relate to the same specific features as those of the contested mark. Nevertheless, I must consider the fact that the earlier mark is registered for the general category *Computer software* in Class 9, which subsequently includes all of the various types of software that appear in the Class 9 specification of the contested mark. Therefore, the contested *Software; Application software; Mobile software; Artificial intelligence and machine learning software; Software for monitoring, analysing, controlling and running physical world operations; Web application and server software; Computer software platform embedding a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available* are considered to be identical to the *Computer software* of the earlier mark under the *Meric* principle.

28. The contested mark also includes *Office and business applications*. The referred to *applications* in Class 9 are a short form version of the term *application software*. Essentially 'applications' and 'software' are synonyms or interchangeable wordings. Therefore, the contested *Office and business applications* is also considered to be identical to the *Computer software* of the earlier mark under the *Meric* principle.

29. The contested *recorded content* is a broad term. So broad is the scope of the term that it could include something that is tangible, and which is usually stored on a hard-disc or device, for example. Due to the broad nature of the contested *recorded content*, I can envisage a scenario whereby the content that is recorded is *computer software*. As a result, the contested *recorded content* is considered to be identical to the *computer software* of the earlier mark.

Class 42

The contested services include *software development, programming and implementation*. The purpose of software development, programming and implementation is to create the end product of software. The earlier mark is registered for *computer software*. The undertaking that produces software is invariably the company that has developed, programmed and implemented it. In my opinion, the contested *software development, programming and implementation* and the *computer software* of the earlier mark are inextricably linked. They have the same end-user, trade channel and a similar intended purpose. Also, they would likely be assumed by the consumer to be produced by the same or an economically linked undertaking. The contested *software development, programming and implementation* is therefore found to be highly similar to the *computer software* of the earlier mark. In the alternative, the contested *software development, programming and implementation* is at least complementary to the *computer software* of the earlier mark, insofar as software development etc., is indispensable or important for the use of *computer software*, and there is therefore a close connection between them, resulting in consumers thinking that the responsibility of each good and service may come from the same undertaking.

30. The contested services include the general category of *Software as a service (SaaS)*, as well as more specific types of SaaS. SaaS is the provision of software via means of subscription. SaaS has the same intended purpose, end user, producer and likely the same trade channels as computer software. SaaS and physical/tangible computer software may also be in competition. The contested *Software as a service [SaaS]; Software as a service (saas) services featuring artificial-intelligence (ai) based software that embeds a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available* are therefore identical to the *Computer software* of the earlier mark.

31. The contested services include *Platform as a Service [PaaS]*, as well as more specific types of PaaS. Neither party has provided specific submissions as to what the function of PaaS actually is. Without being an expert in such a field, and also without having a unanimous or concrete position provided by the parties as to how the

contested services do or do not interact with *Computer Software* in Class 9 of the earlier mark, it is left to me to assess the degree of similarity of the goods and services at issue, or otherwise the lack thereof, using well-established principles of case law, including those found in *Canon*, *Treat* and *Kurt Hesse*. In order to do so, I have endeavoured to understand the meaning of PaaS based on the most immediately obvious and available definitions found on the internet. It appears that PaaS is a category of cloud-computing that allows users to manage the combination of a computing platform with computer applications.² It is a cloud environment that enables the user to deliver applications.³ As decided previously, *applications* and *software* are essentially synonyms or interchangeable wordings. I therefore consider it to be self-evident that a platform system which enables the management and delivery of *applications* would also enable the management and delivery of *software*. The earlier mark is registered for *Computer software*. A user of computer software may also use a platform system that allows the use of software within a cloud environment. Therefore, the intended purpose, use, end user and trade channels are likely to be the same. In addition, they may be in competition. As a result I consider *Platform as a Service [PaaS]; platform as a service (paas) services, featuring artificial-intelligence (ai) based software platform that embeds a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available* to be similar to a high degree to the *Computer software* of the earlier mark.

32. As with PaaS, neither party has provided a definition for the contested *Blockchain as a Service [BaaS]*. Being as equally unfamiliar with BaaS as I am with PaaS, and being equally unfurnished with a definition, I have again endeavoured to discover a meaning by researching the internet. It appears to me that BaaS also uses cloud computing, whereby a host allows businesses to use their own blockchain applications on the host's blockchain infrastructure. The host essentially permits and enables users access to its blockchain network.⁴ A blockchain is a type of open-source software,⁵

² https://en.wikipedia.org/wiki/Platform_as_a_service

³ <https://azure.microsoft.com/en-gb/resources/cloud-computing-dictionary/what-is-paas/>

⁴ https://en.wikipedia.org/wiki/Blockchain_as_a_service

⁵ <https://www.investopedia.com/terms/b/blockchain.asp#:~:text=changed%20without%20notice,-,Transparency,cryptocurrencies%20like%20Bitcoin%20for%20security.>

and blockchain also enables software development.⁶ Based on my understanding of a topic to which I am certainly no expert, it would appear that as well as using/being a form of software, BaaS facilitates the further use of applications and software within an infrastructure. It seems to me a logical conclusion that a service which uses and offers software, whilst also allowing access to a shared space where further sharing and development of software can occur, has a degree of similarity to goods being *Computer software* in Class 9. I note that the Applicant has made the statement that “...there is an obvious difference between computer software ...and blockchain as a service”, however this has not been qualified by reasoning. I consider it a fair position to find that a user of computer software may also access a blockchain that allows access to, and development of, software. Therefore, I consider the end user and trade channels to be the same, whilst the goods and services may even be in competition with one another. The contested *Blockchain as a Services [BaaS]* is therefore found to be similar to at least a medium degree.

33. As I have made clear, I do not consider myself to be an expert in either PaaS or BaaS, and therefore the degree of similarity found between such contested services and the goods/services of the earlier mark is based on the most obvious and available interpretation of the wording. In case I am found to be wrong regarding the projected degrees of similarity, I am nevertheless fairly confident that both the contested *PaaS* and *BaaS* are at least complimentary to the *computer software* of the earlier mark, insofar as *computer software* is indispensable or important in the provision of each service, and there is therefore a close connection between them, resulting in consumers thinking that the responsibility of each may come from the same or an economically linked undertaking.

34. To summarise, the contested Class 9 goods have all be found to be identical, whilst the contested services have all been found to be similar to a degree ranging from at least medium to high, except for *Software as a Service*, which has been found to be identical. In the alternative, the contested *PaaS* and *BaaS* services are at least complementary.

⁶ <https://fortyseven47.com/blog/blockchain-in-software-development/>

Comparison of the marks

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

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

36. It would be wrong, therefore, to dissect the trade marks artificially, 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.

37. The respective trade marks are shown below:

Earlier mark	Application
XERO	ZeroRedeploy

38. The earlier mark consists of the term ‘XERO’. The Applicant has submitted that the term has origins in the Greek language, and is taken from *xēros* meaning ‘dry’. The Applicant also claimed it is a combining term, used in English to mean ‘dry’. According to the Applicant’s source Dictionary.com, the example given of when it is used as a combining term is *xerophyte*, which is a type of plant adapted for growing in dry conditions. Although the Opponent has implied that it is merely a fanciful way of expressing the word ‘Zero’, it does actually appear in dictionaries as a combining form

indicating dryness.⁷ The term is presented in a standard typeface. The overall impression lies in the perception of the single term, which is also where any distinctiveness lies.

39. The contested mark consists of the conjoined terms 'Zero' and 'Redeploy'. It is clear that the mark contains two terms conjoined, due to the use of an uppercase 'R' to separate the second term 'Redeploy' from the first term 'Zero'. Each term is an English language word. The word 'Zero' is recognised not only as a number, but is also used to indicate a complete lack of something. The word 'Redeploy' will be understood by the average consumer as meaning to move, transfer or reposition a person(s) or thing. The mark is presented in standard typeface. Neither term is larger or more dominant than the other, and therefore the combination hangs together. The overall impression lies in the perception of the conjoined terms, which is also where any distinctiveness lies.

40. I note the Opponent's repeated submission that the "...dominant standalone distinctive element" of the contested mark is 'Zero', and that the contested mark "...ZeroRedeploy is a Zero mark". However, for the purposes of comparing the marks it is incumbent on me to analyse the contested mark in the form in which it has been filed, i.e., 'ZeroRedeploy'.

Visual similarity

41. Visually, the marks are similar insofar as they share the 2nd, 3rd and 4th letters of each respective mark, i.e., E-R-O. This is the limit of the visual similarity. The marks differ visually as to the 1st letter of each respective mark, being X in the earlier mark and Z in the contested mark. In addition, the contested mark contains the word 'Redeploy', consisting of 8 letters, which has no counterpart in the earlier mark.

42. I consider the marks to be visually similar to a very low degree.

Aural similarity

43. The Opponent argued in its submissions in lieu that there "...is only one way in English to pronounce the letter X when followed by a vowel, which is with a Z sound".

⁷ <https://www.collinsdictionary.com/dictionary/english/xero>

I tend to agree with this submission. Although I do not discount the possibility that a small number of consumers may pronounce the mark as X-ERO (due to the fact that they are unfamiliar with the term and focus on the standalone sound of the first letter as 'ex'), I consider this to be unlikely, and I believe it is more likely that the majority of consumers will articulate the first letter as a 'Z' sound, as is more customary for words beginning with 'X' in English, e.g. xylophone (Zy-lo-fone) or xenophobic (Zen-o-fo-bic). The earlier mark will therefore most likely be pronounced as 'Zero'.

44. The marks are aurally similar to the extent that they share the two initial syllables Zee-Row. The earlier mark consists exclusively of this sound, whilst it occupies the first sound of the contested mark. The marks differ aurally to the extent that the contested mark also contains the word 'Redeploy', consisting of the three syllables Re-De-Ploy, which have no counterpart in the earlier mark.

45. I consider the marks to be aurally similar to no more than a medium degree.

Conceptual similarity

46. According to several dictionaries, the word 'XERO' is defined as a combining form in the English language, used to indicate dry, e.g., xero-phyte and xero-derma. I am not certain that the majority of consumers are aware of this meaning, as it appears to be a relatively obscure prefix, used mostly in scientific/botanical/medical fields. I certainly do not believe that the majority of consumers would be aware it is of Greek origin, from the word xēros. In addition, I disagree with the Opponent's position that 'XERO' will not be perceived as "...anything more than a fanciful way of presenting the word Zero". Although 'XERO' and the element 'Zero' are aurally identical, this does not necessarily impact their conceptual similarity. For example, 'Which' and 'Witch' are aurally identical but conceptually different. Whilst I do not entirely dismiss the possibility that a certain number of consumers may perceive 'XERO' as being a fanciful way of spelling 'Zero', as forwarded by the Opponent, it is my opinion that this perception would likely belong to only a minority of consumers, with the majority of consumers perceiving 'XERO' as a seemingly invented word.

47. The concept of the contested mark is formed by the combination of two recognised English language words, i.e., ZERO/0 (or complete lack of), plus the movement,

transfer or reposition a person(s) or thing. As a concept, the notion of nothing being redeployed is unusual and abstract.

48. For those consumers for whom the earlier mark has no obvious conceptual meaning as a seemingly invented word, there can be no conceptual comparison. For the more specialist consumer for whom the term 'XERO' will be perceived as a prefix for dryness, the marks do not share any concept at all. For the minority of consumers for whom 'XERO' is a fanciful way of presenting the word 'Zero', the marks are considered to be conceptually similar to between a low and medium degree, as despite the Opponent's submissions to the contrary, the element 'Redeploy' cannot be dismissed, and affects the overall impression of the contested mark.

Average consumer and the purchasing act

49. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.⁸ In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

50. The goods and services at issue range between those which are generic and used on a daily basis by the majority of average consumers in their personal and professional lives, such as *Computer software and hardware; Recorded content and Platform as a Service [PaaS]*, to those which have more specific functions and are likely used only by a specialist/professional consumer, such as *Software as a service*

⁸ *Lloyd Schuhfabrik Meyer*, Case C-342/97

(saas) services featuring artificial-intelligence (ai) based software that embeds a set of technologies that enables a user to change a process, a business rule or an UI (user interface) element and make it available to all clients without requiring a downtime period or a restart and that allow changes to be instantly available. The price paid for such goods and services can vary greatly. On average, the goods and services used by the average consumer on a daily basis will fall within a generally affordable price range. Accordingly, the level of attention for such goods and services will be no more than medium. In relation to those goods and services used predominantly by a specialist/professional consumer, the level of attention would likely be higher as they are being chosen to carry out a specific task.

51. Based on the nature of the goods and services at issue, I consider it most likely that the purchase process will be visually dominated. Whether the consumer is buying software, accessing a blockchain infrastructure, using PaaS to change a business rule, or viewing recorded content, for example, the consumer will predominantly be using their eyes, and would therefore most likely be making a purchase decision based on the visual appearance of the product or service provider. I do not entirely discount the possibility that the marks may be spoken, over the telephone for instance, especially when subscribing to a service or accessing a blockchain infrastructure, and as such I accept that there may be an aural element to the purchasing process. However, I believe any aural aspect to be secondary to a visual one in the purchasing process.

Distinctive character of the earlier trade marks

52. The Opponent has not made a direct claim that its earlier mark has acquired an enhanced degree of distinctive character, nor has the Opponent filed any evidence of use that may indicate such a position. My assessment of the degree of distinctive character of the earlier mark is therefore to be made only on the basis of its inherent features.

53. 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).”

54. The earlier mark is a plain word mark, and so the distinctive character of the mark rests entirely in the meaning of the word ‘XERO’. Although this term is present in dictionaries, it is exclusively used as a combining term or prefix, rather than a standalone word. Despite being present in dictionaries, I consider the prefix to be relatively obscure and unlikely to be understood by anyone other than a small minority of experts in a scientific/botanical/medical field. It should be borne in mind that even those goods and services which have been indicated as being used more by the specialist/professional consumer are not specifically related to the particular scientific/botanical/medical fields. I therefore consider it unlikely that the average consumer of the goods and services at issue would perceive ‘XERO’ as a descriptive prefix (although I do not discount it as a possibility). I am also of the opinion that the perception of ‘XERO’ as being a fanciful form for the word ‘Zero’ will be restricted to only a minority of consumers. I believe ‘Zero’ is a commonly understood English language word, which is invariably known to be spelt with the letter ‘Z’.

55. In my opinion, the term 'XERO' is most likely to be perceived as a seemingly invented term, which has no obvious descriptive or allusive meaning in respect of the goods or services at issue. Even for those consumers who would understand 'XERO' as a prefix indicating dryness, or as a fanciful form of 'Zero', there is still no obvious or immediate concept in relation to the goods or services at issue. In terms of its inherent distinctiveness, the earlier mark is therefore found to possess a medium degree of distinctive character.

Likelihood of confusion

56. 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 and services down to the responsible undertakings being the same or related.

57. 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 (see *Sabel*, C-251/95, para 22). 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 and services and vice versa (see *Canon*, C-39/97, para 17). It is necessary for me to keep in mind the distinctive character of the Opponent's trade mark, the average consumer for the 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.

58. The earlier mark consists of the term 'XERO'. According to dictionaries it is a combining term. In my opinion, it is not necessarily a well-known combining term, as it does not realistically form part of the everyday vernacular of the average consumer. It may be the case that it is used frequently in fields that discuss dryness, but these would most likely be restricted scientific/botanical/medical fields, and I again refer to the fact that the goods and services at issue do not appear to directly relate to such areas. The Opponent has implied that 'XERO' is nothing more than a fanciful way of

expression the word 'Zero'. Whilst this may have been the intention of the Opponent, I do not consider it to be the most likely perception of the average consumer, which is of course the more important consideration. Whilst I do not discount the possibility that a minority of consumers may perceive 'XERO' as being a fanciful way of spelling of 'Zero', it is my opinion that it will most likely be perceived as a seemingly invented word.

59. The contested sign consists of the conjoined terms 'ZeroRedeploy'. The Opponent has submitted on several occasions that the first term 'Zero' is the "standalone dominant and distinctive element". The Opponent has also argued that "It cannot be disputed that ZEREOREDEPLOY [sic] is a ZERO mark". Further, the Opponent has argued that the consumer would not ascribe any measure of inherent distinctiveness to the 'Redeploy' element of the mark, on the basis that by meaning 'transfer' it has very little distinctive character. The Opponent has not further particularised why the concept of 'transfer' is non-distinctive in relation to the goods and services at issue.

60. I disagree with the Opponent's position that the average consumer would dissect the mark and view it as a 'Zero' mark. It is well-established in case law that it is the overall impression of the mark for which registration is sought that must be assessed. The average consumer normally perceives a mark as a whole, and does not proceed to analyse its various elements. In order to ascertain the overall impression of a mark, it is of course permitted to analyse a mark's components and establish their relevant weight in the perception of the target public. By doing so it can be the case that a more dominant or distinctive component or element is discovered, which then becomes the component or element that the average consumer may most likely hold onto. It may also be the case that following the analysis of a mark's components a particular component or element is subsequently considered to be negligible, the result being that the assessment of the similarity between marks at issue can be carried out solely on the basis of the dominant element⁹. In relation to the contested mark at issue, I do not consider either element 'Zero' or 'Redeploy' to be a more dominant or distinctive or negligible component/element. Each component/element is a standard English

⁹ (see including C-334/05 P *OHIM v Shaker*, and C-193/06 P *Nestlé v OHIM*)

language word, with an equal degree of distinctive character in relation to the goods and services at issue.

61. I find it to be relatively clear that the contested mark 'ZeroRedeploy' is sufficiently visually, aurally and conceptually different from the earlier mark 'XERO', to the extent that it is unlikely that either the average consumer or more specialist consumer (who, with a higher level of attention, tends to notice differences between marks, which would actually reduce a likelihood of confusion¹⁰) would directly confuse the two marks. The contested mark begins with a letter 'Z' instead of a letter 'X', and contains the additional eight letter word 'Redeploy', which has no counterpart in the earlier mark. These changes and inclusions create obvious visual, aural and conceptual differences from the seemingly invented four-letter word 'XERO'. I therefore find there to be no likelihood of direct confusion.

62. Having found there to be no likelihood of direct confusion, I shall now consider the possibility of indirect confusion. It should be borne in mind that a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion.¹¹

63. In *Quelle AG v OHIM*, Case T-88/05, the GC found that visual similarity (and difference) is most important in the case of case of goods that are self-selected or where the consumer sees the mark when purchasing the goods. The Court stated that:

“68... If the goods covered by the marks in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product,

¹⁰ C-261/04 P, *Claude Ruiz-Picasso*,

40 “Where it is established in fact that the objective characteristics of a given product mean that the average consumer purchases it only after a particularly careful examination, it is important in law to take into account that such a fact may reduce the likelihood of confusion between the marks relating to such goods at the crucial moment when the choice between those goods and marks is made”.

¹¹ In *Liverpool Gin Distillery Limited v Sazerac Brands LLC* [2021] EWCH Civ 2017, paragraph 13, Arnold LJ approved this “consolation prize statement” as made by James Mellor KC’s (sitting as the Appointed Person) statement in *Cheeky Italian Ltd v Sutaria* (O/219/16) paragraph 16.

the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs (*NLSPORT*, *NLJEANS*, *NLACTIVE* and *NLCollection*, paragraph 53 supra, paragraph 49).

69. Likewise, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (*BASS*, paragraph 56 supra, paragraph 55, and Case T-301/03 *Canali Ireland v OHIM – Canal Jean (CANAL JEAN CO. NEW YORK)* [2005] ECR II-2479, paragraph 55). That is the case with respect to the goods at issue here. Although the applicant states that it is a mail order company, it does not submit that its goods are sold outside normal distribution channels for clothing and shoes (shops) or without a visual assessment of them by the relevant consumer. Moreover, while oral communication in respect of the product and the trade mark is not excluded, the choice of an item of clothing or a pair of shoes is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly, the visual aspect plays a greater role in the global assessment of the likelihood of confusion (*NLSPORT*, *NLJEANS*, *NLACTIVE* and *NLCollection*, paragraph 53 supra, paragraph 50). The same is true of catalogue selling, which involves as much as does shop selling a visual assessment of the item purchased by the consumer, whether clothing or shoes, and does not generally allow him to obtain the help of a sales assistant. Where a sales discussion by telephone is possible, it takes place usually only after the consumer has consulted the catalogue and seen the goods. The fact that those products may, in some circumstances, be the subject of discussion between consumers is therefore irrelevant, since, at the time of purchase, the goods in question and, therefore, the marks which are affixed to them are visually perceived by consumers.”

64. I have previously specified that I consider the visual aspect to be the most prevalent during the purchasing process of the goods and services at issue. Considering the visually orientated dominance of the purchasing process, it is

important to keep in mind that the marks have been found to be visually similar to a very low degree.

65. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis K.C., as the Appointed Person, explained that:

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

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

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

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

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

66. According to the Opponent, the contested mark is a ‘Zero mark’ and is similar to the earlier mark ‘XERO’ not least because they share the three letters ‘ERO’. Keeping in mind the categories identified in *L.A. Sugar Limited*, whilst it is correct that the marks share the same three letters ‘-ERO’, I do not believe that this combination can be considered to be an “element” that the marks have in common. The combination of letters ‘-ERO’ does not form a word or have a concept, and so in my opinion it does not classify as an “element”. I acknowledge that an element does not have to be a recognised, pre-existing word, and it could be an invented term that is shared identically in two marks. However, in my opinion, the combination of three letters ‘-ERO’ would appear to simply be a collection of coincidentally positioned letters in each respective mark, neither at the beginning nor end, rather than being an identifiable element. Further, I do not consider the combination of three letters ‘-ERO’ to be a “common element [which] is so strikingly distinctive” that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark.

67. The inclusion of the word ‘Redeploy’ in the second half of the contested mark cannot, in my opinion, be considered to simply be the addition of a non-distinctive element to the earlier mark. This is so not only because it does not represent an element that could reasonably be assumed to be non-distinctive, such as the examples given of Lite, Mini, Express etc., (insufficient submissions have been provided to argue that it is a non-distinctive term), but also because it has not in any case been *added* to the earlier mark. The earlier mark is ‘XERO’, which is not identically present in the contested mark, and therefore has not had ‘Redeploy’ added to it.

68. Further, I would argue that the addition of the element ‘Redeploy’ is not simply the change in, or addition of, an element that appears entirely logical and consistent with a brand extension. Rather than being considered by the consumer to be the obvious incarnation of the next stage in a brand’s development, it is my opinion that the addition

of the three-syllable element 'Redeploy' would instead appear entirely illogical and off kilter. The same applies to the change of the first letter of the contested mark from 'X' to 'Z'. If an undertaking wished to further its brand's development whilst also ensuring that existing consumers that had seen its earlier marks would continue to recognise its fundamental identifiers, the decision to change the first letter of only a four-letter mark does not appear to me to be the most obvious logical, consistent or secure way of doing so.

69. I note that the Opponent has argued that the concept of the earlier mark must be considered to be 'Zero' solus, which is very similar to, if not identical with, the concept of the earlier mark "...because the average consumer will perceive both ZERO and XERO to refer to the concept of nothing or the digit 0". In support of this submission the Opponent referred to the decision of Mr Purvis KC, sitting as the Appointed Person in *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, whereby he stated that:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

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

In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask 'in what does the distinctive character of the earlier mark lie?' Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

70. Rather than supporting a finding of a likelihood of indirect confusion, I interpret the above decision to allow a conclusion that there is in fact no likelihood of indirect confusion. In my opinion, the distinctiveness of the earlier mark lies in the fact that for

the majority of consumers it is a seemingly invented word. For such a consumer, the earlier mark has no concept and therefore cannot be considered to have a counterpart in a contested mark which consists of recognised (non-invented) English words. In the alternative, the distinctiveness of the earlier mark lies in the fact that it will be perceived as a prefix for dryness, which again is not a concept that has a counterpart in the contested mark. In relation to the minority of consumers for whom 'XERO' is distinctive by way of being a fanciful expression of 'Zero', such a fanciful representation is not present in the contested mark, and therefore does not represent a counterpart either. As stated by Mr Purvis KC, the fact that the distinctiveness of the earlier mark has no counterpart in the contested mark will not increase the likelihood of confusion, rather it will reduce it.

71. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginnings of words tend to have more visual and aural impact than the ends. The court stated:

“81. It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters 'lo' which characterise the earlier marks and which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter 'r', which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root 'mundico' in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter 'r' at the end of the two signs. Given those similarities, the applicant's argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

82. As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

83. Second, the first two syllables of the opposing signs forming the prefix ‘mundi’ are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.

72. I have previously acknowledged that the marks do coincide in the three letters ‘-ERO’, which I have also acknowledged appears near the beginning of the marks (although they are not the very first three letters). In relation to the above GC judgment, the marks at issue were MUNDICOLOR and MUNDICOR. The GC made clear that the strong visual similarity was due in part to the marks sharing the “same root”. I do not consider the coincidence of the letters ‘-ERO’ in the earlier and contested marks to constitute a shared “root” to the same degree as ‘MUNDI’ was in the respective marks in the *El Corte Inglés* judgment. In addition, I do not consider the coincidence of the letters ‘-ERO’ to be on a comparable level as a prefix to ‘MUNDI’, which the GC also considered MUNDI to be. This is because the coincidence of the shared letters ‘-ERO’ do not make up the first letters of each mark, and therefore does not constitute a prefix.

73. I refer to *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, in which Mr James Mellor K.C., as the Appointed Person stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark, as this would be mere association rather than indirect confusion. In my opinion, the fact that the marks at issue share the letters ‘-ERO’ (which I have previously argued should not be considered to be an “element”) is not enough, in and of itself, to find indirect confusion.

74. Having found there to be no direct confusion, there would need to have been a “proper basis” for finding there to be a likelihood of indirect confusion.¹² Having maintained the correct principles of law firmly in mind, I am of the opinion that upon seeing the contested mark the attentive consumer would not carry out the mental process whereby they either consciously or subconsciously assume the contested mark to be a logical extension of the earlier mark based purely on the coincidence of

¹² *Liverpool Gin Distillery Limited v Sazerac Brands LLC* [2021] EWCH Civ 2017, paragraph 13,

three shared letters, which are not the first letters of each mark, and which have no concept. I do not consider it likely that a consumer would believe that an undertaking had not only added the significantly larger (and not non-distinctive) word 'Redeploy' to its house mark, but that it would also change the very first letter of its original house mark.

75. The Opponent has contended in its submission that 'XERO' is nothing more than a fanciful way of expressing the word 'Zero'. It seems to me that if the house mark 'XERO' was deliberately chosen to be a misspelling of a pre-existing word, then it would not appear logical or consistent in the eyes of the consumer for a brand extension to proceed to drop the fanciful misspelling approach, and continue with a term that does not have such a fanciful embellishment. For those consumers for whom 'XERO' is either a seemingly invented word or a prefix for dryness, the inclusion in the contested mark of the term 'Zero' appears to have no obvious or apparent connection. This lack of connection would ultimately prevent such consumers from believing that the contested mark belonged to the same or economically lined undertaking to that of the earlier mark. In light of the above, I do not find there to be a likelihood of indirect confusion.

76. The Opponent has referred to the interdependency principle in its submissions, whereby a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services, and vice versa. I am cogent to the fact that I have found the goods and services at issue to be either identical, similar to a degree ranging from medium to high, and/or complementary. According to the principle of interdependency, such a degree of similarity between the respective specifications of goods and services could offset a lesser degree of similarity between the respective trade marks. However, in my opinion the marks at issue are visually very different, which is the most important consideration in the purchase process of the respective goods and services at issue. Whilst the marks are aurally similar to no more than a medium degree, and conceptually similar from between a low to medium degree in the view of only a small minority of consumers, I do not consider such levels to be sufficient to conclude that confusion would occur. It is my opinion that the average consumer would not consider goods and services sold under a 'ZeroRedeploy' mark to come from the same or an

economically linked undertaking which produces 'XERO' branded goods and services, even bearing in mind the notion of imperfect recollection. It is my finding, therefore, that the marks are not sufficiently similar for a finding of a likelihood of confusion, either directly or indirectly.

Conclusion

77. As the opposition has failed, the Applicant has been successful and is entitled to a contribution towards its costs. I bear in mind that the relevant scale is contained in Tribunal Practice Notice 2/2016. In the circumstances I award the Applicant the sum of £1,300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the statement of grounds and preparing a counterstatement	£350
Preparing submissions and considering the submissions in lieu	£950
Total	£1,300

78. I therefore order Xero Limited to pay FLOWX.AI R&D SRL the sum of £1,300. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 29th day of September 2022

Dafydd Collins

For the Registrar