

**O/0532/23**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION  
NO. 3724248 BY  
AGING ANALYTICS LTD  
TO REGISTER THE TRADE MARK:**

**Health as the New Wealth**

**IN CLASSES 16, 36, 41 & 42**

**AND**

**OPPOSITION THERETO  
UNDER NO. 433960  
BY  
GEETA SIDHU-ROBB**

## BACKGROUND & PLEADINGS

1. AGING ANALYTICS LTD (“**the applicant**”), applied to register the trade mark shown on the front page of this decision in the United Kingdom on 22 November 2021. It was accepted and published in the Trade Marks Journal on 4 March 2022 for various goods and services in Classes 16, 36, 41 and 42. For the purposes of this opposition the relevant services in the specification are:

**Class 41:** Academies [education]; boarding school education; club services [entertainment or education]; coaching [training]; organization of competitions [education or entertainment]; educational or entertainment services provided by art galleries; educational examination; educational examination for users to qualify to pilot drones; educational services provided by schools; educational services provided by special needs assistants; organization of exhibitions for cultural or educational purposes; practical training [demonstration]; arranging and conducting of in-person educational forums; providing information in the field of education; religious education; teaching / educational services / instruction services; rental of training simulators; training services provided via simulators; tutoring; vocational retraining; vocational guidance [education or training advice]; arranging and conducting of workshops [training].

2. Geeta Sidhu-Robb (“**the opponent**”) opposes the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“**the Act**”). The opponent is the proprietor of the following mark:

<b>Trade Mark no.</b>	UK00003128307
<b>Trade Mark</b>	Health is Wealth
<b>Goods &amp; Services Relied Upon</b>	<b>Class 32, 41 &amp; 43</b>
<b>Relevant Dates</b>	Filing date: 23 September 2015
	Date of entry in register: 4 March 2016

3. For the purpose of this opposition, the opponent, as shown above, relies on her services in Class 41 of the earlier mark.
4. In her notice of opposition, the opponent claims that the contested mark are “phonetically and conceptually similar to the Opponent’s registration and visually similar to a high degree”. The opponent asserts that the competing services in Class 41 are identical and/or highly similar.
5. The applicant filed a notice of defence and counterstatement denying the claims made in relation to the similarity of the marks. The applicant also made contentions as to the scope of goods and services without addressing the identity or similarity of the competing services in question. However, this was addressed in the applicant’s written submissions.
6. The applicant requested that the opponent provides proof of use of its earlier mark relied upon.
7. Only the opponent filed evidence in these proceedings, which will not be summarised but will be referred to as and where appropriate during this decision.
8. Both parties filed written submissions in lieu of a hearing which will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.

9. In these proceedings, the opponent is represented by Harper James and the applicant is unrepresented.
10. Although the UK has left the EU, Section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

### **Relevant Date/Period**

11. An “earlier trade mark” is defined in Section 6(1) of the Act:

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

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

[...]

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered. [...]

12. As the earlier mark relied upon had been registered for more than five years on the date on which the contested application was filed, Section 6A of the Act applies, which states:

“(1) This Section applies where–

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

13. In accordance with Section 6(1) of the Act, the opponent’s trade mark clearly qualifies as an earlier mark. The relevant period for proof of use of the opponent’s mark is **23 November 2016 to 22 November 2021**. The relevant date for the assessment of likelihood of confusion as per Section 5(2)(b) is the date on which the contested application was filed, namely **22 November 2021**.

## **EVIDENCE**

### **Opponent’s Witness Statement**

14. Only the opponent filed evidence in these proceedings. It consists of a witness statement, dated 7 November 2022, of Geeta Sidhu-Robb, the CEO and founder of Nosh Detox Delivery Limited, who has held this position since 2008 and (as CEO) since incorporation in 2010, introducing 5 Exhibits. The main purpose of the evidence is to demonstrate that the earlier mark has been genuinely used in the UK for the relevant period.
15. I have read and considered all of the evidence and will refer to the relevant parts at the appropriate points in the decision.

## DECISION

### Proof of Use

16. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

“114. [...]The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C 416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I 4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

- (1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].
- (2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d)



the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus, there is no de minimis rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

17. The onus is on the proprietor of the earlier mark to show use. This is in accordance with Section 100 of the Act, which states:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

18. Proven use of a mark which fails to establish that “the commercial exploitation of the marks is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is, therefore, not genuine use.

## Genuine Use

19. As indicated in the case law cited above, use does not always need to be quantitatively significant to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as “warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.
20. In making my determination as to whether the evidence presented shows the necessary genuine use, I also take account of judicial comment as to probative and evidential issues in such cases. In *Awareness Limited v Plymouth City Council*, Case BL O/230/13, Daniel Alexander QC (as he then was) sitting as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use [...]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

21. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person stated that:

“22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

22. In *Naazneen Investments Ltd v OHIM*, Case T-250/13,<sup>1</sup> the General Court upheld a decision by the OHIM Board of Appeal that the sale of EUR 800 worth of non-alcoholic beverages under a mark over a five year period, which had been accepted was not purely to maintain the trade mark registration, was insufficient, in the economic sector concerned, for the purposes of maintaining or creating market share for the goods covered by that Community trade mark. The use was therefore not genuine use. The relevant part of the judgment of the General Court is as follows:

“46. In the fifth place, the applicant argues that, in accordance with the case-law cited in paragraph 25 above, use of a trade mark is to be regarded as token if its sole purpose is to preserve the rights conferred by the registration of the mark. It claims that the Board of Appeal contradicted itself by stating, on the one hand, in paragraph 31 of the contested decision, that the total amount of transactions over the relevant period seemed to be token, and by stating, on the other hand, in paragraph 42 of the contested decision, that it did not doubt the intention of the proprietor of the mark at issue to make real use of that mark in relation to the goods in question.

47. In this connection, suffice it to point out that the applicant’s argument is based on an incorrect reading of the contested decision.

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<sup>1</sup> The judgment of the General Court was upheld on the appeal to the CJEU. In this regard, see Case C-252/15 P.

The Board of Appeal used the term 'token' to describe the total amount of transactions, approximately EUR 800, and not to categorise the use of the mark at issue.

48. In the sixth place, the applicant claims that the Board of Appeal, by relying solely on the insufficient use made of the mark at issue, did not comply with the case-law according to which there is no quantitative threshold, determined a priori and in the abstract, that must be chosen in order to determine whether use is genuine. The Board of Appeal also failed to comply with the case-law according to which even minimal use may be sufficient in order to be deemed genuine.

49. According to the case-law, the turnover achieved and the volume of sales of the goods under the mark at issue cannot be assessed in absolute terms but must be assessed in relation to other relevant factors, such as the volume of commercial activity, the production or marketing capacities or the degree of diversification of the undertaking using the trade mark and the characteristics of the goods or services on the relevant market. As a result, use of the mark at issue need not always be quantitatively significant in order to be deemed genuine (see, to that effect, judgments in *VITAFRUIT*, cited in paragraph 25 above, EU:T:2004:225, paragraph 42, and *HIPOVITON*, cited in paragraph 27 above, EU:T:2004:223, paragraph 36). Even minimal use can therefore be sufficient in order to be deemed genuine, provided that it is warranted, in the economic sector concerned, to maintain or create market shares for the goods or services protected by the mark. Consequently, it is not possible to determine a priori, and in the abstract, what quantitative threshold should be chosen in order to determine whether use is genuine. A *de minimis* rule, which would not allow OHIM or, on appeal, the General Court, to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, to that effect, order of 27 January 2004 in *La Mer Technology*, C-259/02, ECR, EU:C:2004:50,

paragraphs 25 and 27, and judgment of 11 May 2006 in *Sunrider v OHIM*, C-416/04 P, ECR, EU:C:2006:310, paragraph 72).

50. In the present case, contrary to what the applicant claims, the Board of Appeal did not determine a minimum threshold ‘a priori and in the abstract’ so as to determine whether the use was genuine. In accordance with the case-law, it examined the volume of sales of the goods in question in relation to other factors, namely the economic sector concerned and the nature of the goods in question.

51. The Board of Appeal accordingly took the view that the market for the goods in question was of a significant size (paragraph 28 of the contested decision). It found also that the goods in question, namely non-alcoholic beverages, were for everyday use, were sold at a very reasonable price and that they were not expensive, luxury goods sold in limited numbers on a narrow market (paragraph 29 of the contested decision). Furthermore, it took the view that the total amount of transactions over the relevant period, an amount of EUR 800, seemed to be so token as to suggest, in the absence of supporting documents or convincing explanations to demonstrate otherwise, that use of the mark at issue could not be regarded as sufficient, in the economic sector concerned, for the purposes of maintaining or creating market shares for the goods covered by that mark (paragraph 31 of the contested decision).

52. It is therefore apparent, contrary to what the applicant claims, that it was in accordance with the case-law cited in paragraph 49 above that the Board of Appeal took the view that, in the present case, minimal use was not sufficient to be deemed genuine.”

23. In *JUMPMAN Trade Mark*, BL O/222/16, the Appointed Person upheld a Hearing Officer’s finding that sales of around 55,000 pairs of trainers over a 16-month period were insufficient to qualify as genuine use for an EUTM registration.

24. I include these extracts from case law merely as examples of instances where certain levels of sales have been insufficient to establish genuine use, but clearly, each case must be determined on its own merits, facts and relevant factors, and I do not overlook that the relevant territory in the present case is not the EU, but the smaller territory of the UK.

Consideration of the evidence of use in this case

25. The opponent's evidence comprised a witness statement of Geeta Sidhu-Robb, dated 7 November 2022, who is the opponent in these proceedings, with 5 Exhibits. Her evidence comes from her own knowledge.

26. As a general remark, I note that the majority of the Exhibits are undated, which is a shortcoming by itself limiting the evidential value.

27. Exhibit GSB1 consists of undated screenshots of what it appears to be a presentation containing information which are said to be information in relation to "the Health is Wealth programme". In her witness statement, Ms Geeta Sidhu-Robb claims that the registered mark is prominently displayed on the first page (shown below). However, it is my view that the mark serves more as a headline than an indication of origin. This is because the 'NOSH' logo appears on every page of the presentation (see reproduced screenshots below) and on the product bottles, which I consider to be a stronger indicator of trade mark significance. **Therefore, the evidential value of Exhibit GSB1 is limited due to these shortcomings.**



Your Health, Our Passion™

Organic Juices, Foods, Vitamins Drips & Nutrients  
Delivered fast, to your home or office

5

**+ Step 2 – Support Solutions**

- a) 6 Month Coaching – we offer a structured coaching programme based on Institute of Integrative Nutrition guidelines. The Executive signs a contract at inception and the meetings are held at a pre-determined time each week either in person or on the phone. Check in happens at each session and feedback happens at the 3 month mark and the 6 month mark. This coaching works across each area of life, encompassing food, diet, exercise, mental and emotional approaches. This approach has an unparalleled success rate in creating lasting transformation.
- b) Nutritional Support – our in-house Nutritionist offers ongoing nutritional support including the ability to offer sample meal plans to those not on the Nosh foods plan. 3 sessions are included in the package and any extra are charged at £150 per session.
- c) Nutritional Requirements - We deliver high quality pure nutrient rich food daily. Individuals living a high stress life, burn up to 3x the normal energy; they require enormous amounts of high nutrient fuel to remain at peak performance.



28. According to the witness, Exhibit GSB2 is a print of an advert that has been used since 2017. I note that again in this instance there is no date on the Exhibit and the registered mark is used next to the Nosh logo. Notably, it can be inferred from the Exhibit that Nosh is the provider of the nutritional programmes and not HEALTH IS WEALTH. Therefore, **such shortcomings limit the evidential value of the Exhibit.**



**Nutrition has a direct impact on our cognitive performance:**  
At Nosh we believe healthy employees translate into an improved company culture & a healthier bottom line

**Did you know ...?**

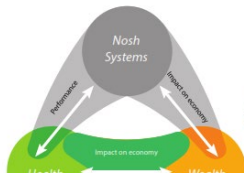
- According to the WHO, adequate nutrition can raise ones productivity levels by 20%, yet 33 percent of European employees suffer from the effects of lack of sleep. 28 percent of employees struggle with stress-related conditions and 38 percent of respondents make poor nutrition choices\*
- Companies that implement wellness programmes have a 28% reduced in sick leave & a 26% reduction in health care costs
- In the States, medical costs fell by on average \$3.27 for every \$1 spent on wellness programmes

**The Cost of UK Un-Wellness :**

**TO THE INDIVIDUAL :**  
Both a physical & mental cost of ill health affecting personal & professional contentment, performance & drive

**TO THE COMPANY**  
Losses in output & revenue due to reduced productivity, health care costs, sick pay, inefficiencies

**TO SOCIETY AS A WHOLE**  
Costs of healthcare, increase in benefit payments, taxes forgone, general discontentment & negative impact on friends & family



**Nosh nutritional programmes can achieve:**

- Improved productivity
- Heightened individual as well as group performance
- Boosted team/employee morale & engagement
- Reduction in absenteeism & presenteeism

**Why Nosh?**

Nosh offers a very personal & individual approach to diagnostics & treatment. We promote & encourage a lifestyle with a dedicated commitment, clear & measurable results & 'I have completely changed my diet since doing the programme & I eat & think very differently'

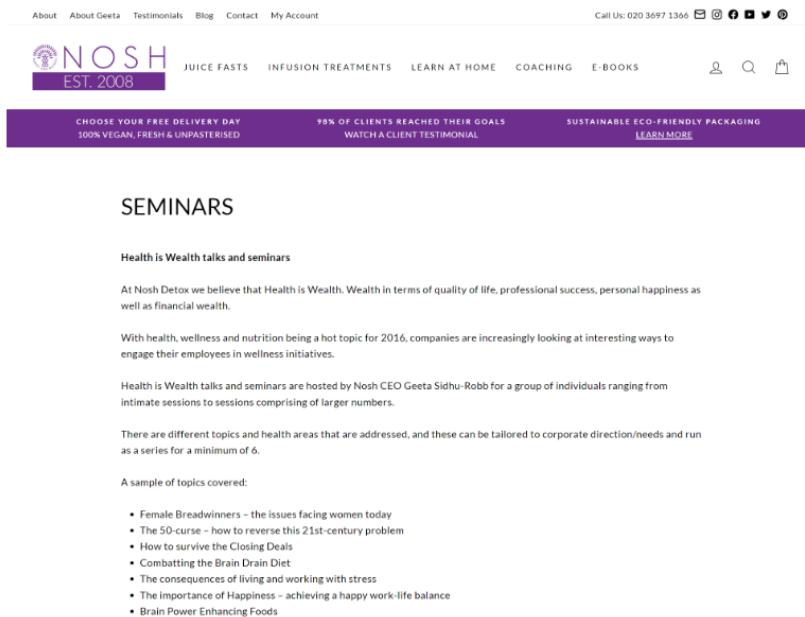
– Roger Brosch, CEO Foster Denovo

**WAYS IN WHICH NOSH CAN ASSIST IN NUTRITIONAL WELLNESS FOR YOUR EMPLOYEES :**

<p><b>Health is Wealth Talks &amp; Seminars</b></p> <p>Powerful &amp; relevant topics are discussed at this series of sessions, highlighting modern issue in the work place and what can be done to address &amp; prevent these.</p>	<p><b>Health is Wealth Workshops</b></p> <p>Personal &amp; integrated sessions designed to address actual &amp; observed issues from one2one consultations. Nutrition and lifestyle discussions are had at these.</p>
<p><b>Stocking Of Juices &amp; Powders</b></p> <p>Nosh can stock offices with juices and Superfood sachets on a weekly basis to ensure employees always have the opportunity to grab healthy alternatives when at work.</p>	<p><b>Eating At Meetings &amp; Eating At Work</b></p> <p>Nosh has created delicious yet nutritional menus which are energy rich and heighten brain agility. Menus are delivered for meetings as well as for individuals unable to leave the office.</p>
<p><b>Deal Closing Support</b></p> <p>Deal Closing Support is designed to offer a 300 when executives need it most in periods of high pressure &amp; stress. Nosh can provide juices, breakfast/lunch/dinner, vitamin infusions or a combination of all three for the ultimate nutritional performance boost.</p>	<p><b>Individual Nutritional Programmes</b></p> <p>Individual programmes are based on in-depth consultations with individual employees to highlight underlying health concerns through tests as well as lifestyle analysis. From this, individual nutritional programmes are created to overhaul the individual's internal as well as external.</p>

www.noshdetox.com/corporate | corporate@noshdetox.com | 0203 697 1366

29. As to Exhibit GSB3, although Ms Geeta Sidhu-Robb states that the screenshots provided show the company website of the opponent, the Exhibit is again undated, and no web address appears on the files. As shown below, in this Exhibit again, the NOSH logo features at the top of the page under the menu bar of the web page. I consider that **such shortcomings limit the evidential value of the Exhibit.**





30. Exhibit GSB4 is said to be a snapshot of the Health is Wealth booking system when accessed by customers. As reproduced below, I note that the registered mark sits under the NOSH logo. However, **the lack of a date on this Exhibit limits its evidential value.**



31. Exhibit GSB5 consists of screenshots demonstrating a list of appointments between 2018 and 2019. In her witness statement, Ms Geeta Sidhu-Robb claims that “[a]ll of these customers would have seen the Registered Mark when looking through my promotional materials in Exhibits GSB1-3 and when logging into my booking system at Exhibit GSB4.” I note that the mark is not visible in Exhibit GSB5, and, as a result, I disagree with the view in the witness statement that the consumers will encounter the registered mark. **Therefore, the content of the Exhibit shows nothing as to the position during the relevant period.**

### **Conclusion on Evidence of Genuine Use**

32. I have given close consideration to the evidence provided by the opponent in order to demonstrate that her use of her earlier mark, in respect of the services relied upon, during the relevant period, meets the requirements for genuine use as per *Walton*, set out earlier in this decision. I note that the opponent has had the benefit of professional representation during these proceedings. I also have in mind the guidance from the *Dosenbach-Ochsner* and *Awareness* appeal cases emphasising the need to consider what the evidence fails to “show” and what might reasonably have been

conclusively shown. In my analysis throughout the paragraphs above, I have highlighted numerous shortcomings in the evidence.

33. In addition, I note that it is typical to see evidence, such as turnover figures or invoices under the mark, particularised in relation to the services relied upon. Such information should have been available to the opponent, and relatively easy to provide. Despite the witness having full access to her own company records and despite having provided that the turnover under the registered mark during the relevant period was £100,000 per annum, the witness evidence is vaguely expressed in important aspects, and the exhibits are of limited, if any, evidential value.
34. Further, there is no clear evidence of how the services under the mark are promoted or offered for sale. That said, the opponent provided screenshots of an undated advert which is said to have been used since 2017. Even in that case, the registered mark features next to the NOSH logo, potentially giving the consumers the impression that it is merely a headline. The evidential picture as a whole is not sufficiently consistent, and what relevant evidence there is of limited value.<sup>2</sup> It is my view that the evidence is not sufficiently “solid or specific to enable proper and fair evaluation of the scope of protection to which the opponent is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the [applicant], the opponent and, it should be said, the public.”<sup>3</sup> Consequently, the above evidence fails to show real commercial exploitation of the mark to create and maintain a share of the UK market for the given services.

## **OUTCOME**

35. Since I have found that the evidence filed is insufficient to establish genuine use of the earlier mark in the UK during the relevant period, the

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<sup>2</sup> See paragraphs 31, 35, and 36 of this decision.

<sup>3</sup> See *Awareness Limited v Plymouth City Council*, Case BL O/230/13.

opponent is unable to rely on any part of her registration as a basis to pursue her section 5(2)(b) objection. **Consequently, the opposition fails, and the application, subject to appeal, may proceed to registration in its entirety.**

## **COSTS**

36. The applicant has been successful and is entitled to a contribution towards its costs. The applicant was not professionally represented and had to submit a completed cost proforma to the Tribunal, outlining the number of hours spent on these proceedings. In an official letter to the parties, dated 20 January 2023, the Tribunal stated that “[...] If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded.[...]” As the applicant elected not to complete a costs pro-forma and as it has incurred no official fees in the defence of its application, I make no order as to costs.
37. The appeal period will run from the date of this decision.

**Dated this 8<sup>th</sup> day of June 2023**

**Dr Stylianos Alexandridis  
For the Registrar,  
The Comptroller General**