O/0940/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004153817

IN THE NAME OF AMJAD HUSSAIN

TO REGISTER THE FOLLOWING TRADE MARK:

Nutriina

IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP000453989

BY N. V. NUTRICIA

Background and pleadings

1. On 29 January 2025, Amjad Hussain ("*the Applicant*") applied to register the trade mark shown on the cover page of this decision in the UK under number UK00004153817 ("*the Contested Mark*"). The application was accepted and published in the Trade Marks Journal on 7 February 2025. Registration is sought for the goods listed in the goods comparison below in this decision.

2. On 1 May 2025, N. V. Nutricia ("*the Opponent*") opposed the application in full under section 5(2)(b) of the Trade Marks Act 1994 ("*the Act*"). The Opponent relies upon the following earlier registration:

   UK Registration no. UK00915078851[1] ("*the Earlier Mark*")
   Representation: NUTRINI
   Filing date: 5 February 2016
   Registration date: 30 May 2016
   Relying upon all the goods in class 5

3. By virtue of its earlier filing date, the above registration constitutes an earlier mark within the meaning of section 6 of the Act. As the Earlier Mark completed its registration procedure more than five years before the filing date of the Contested Mark, it is subject to the use provisions set out in section 6A of the Act. The Opponent has stated that it has used the mark for all the goods relied on.

4. In its statement of grounds, the Opponent submits that the competing marks are highly similar and that the Applicant's goods are identical or similar to the Opponent's goods. The Opponent contends that, as a result, a likelihood of confusion on the part of the public, including a likelihood of association between the marks, will occur. For this reason, the Opponent requests that the application be refused in its entirety and that a cost award be made in its favour.

[1] Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Registration designating the EU. As a result, the opponent's mark was converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.

5. The Applicant filed a defence and counterstatement denying all of the claims made by the Opponent and stating that the competing trade marks are dissimilar and that the respective goods are different. The Applicant also puts the Opponent to proof of use for all the goods relied upon by the Opponent under the Earlier Mark. The Applicant submits that the opposition should be dismissed and that the application should proceed to registration.

Relevance of EU law

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Evidence and submissions

7. During the evidence rounds, only the Opponent filed evidence in chief, dated 20 October 2025, in the form of a witness statement by Shilpa Dixit and accompanied by exhibits SD1 – SD11. Ms Dixit is the Intellectual Property Director for the Specialised Nutrition, Corporate & Waters businesses at Nutricia International B.V. (a sister company of the Opponent) and she has held this position since January 2025.

8. Neither party requested a hearing and only the Opponent filed submissions in lieu of a hearing. I will not summarise here the evidence or submissions, but I will refer to them as and where appropriate in this decision. This decision is taken following a careful consideration of the papers.

9. The Opponent is represented by Stobbs. The Applicant is not legally represented.

Preliminary matters

10. In its submissions in lieu, the Opponent states that the evidence shows the Earlier Mark's reputation and goodwill. Whilst the Opponent's submission is noted, it nonetheless appears more consistent with a section 5(3) and section 5(4) claim.

For clarity, section 5(2)(b) is the only pleaded ground in the present proceedings and, in the absence of a direct pleading, the scope of the opposition does not extend, for example, to grounds such as section 5(3) or section 5(4) of the Act.

11. In its counterstatement, the Applicant submits that many coexisting marks include the common the prefix "Nutri-" without causing consumer confusion. No evidence was provided on this point. Whilst I acknowledge the Applicant's submissions, I find that the potential existence of other third-party marks containing the prefix "Nutri" does not provide much assistance in relation to the assessment of similarity between the marks at hand. In accordance with the comments of the GC in *Zero Industry Srl v OHIM*,[2] the presence on the UK register of marks containing the same or shared elements is not evidence of how many of such trade marks are in fact used in the market, nor does it clarify whether consumers have or have not been confused by the presence of such marks. The decision I am required to make is based on a notional assessment of the likelihood of confusion.

Decision

Proof of use

12. I will begin by assessing whether there has been genuine use of the Earlier Mark.

The law

13. Section 6A of the Act 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

[2] Case T-400/06.

(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."

14. As the Earlier Mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

> "7. (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.
>
> (2) […]
>
> (3) Where IP completion day falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day -
>
> (a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and
>
> (b) the references in section 6A to the United Kingdom include the European Union".

15. Section 100 of the Act states that:

> "100. 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."

16. Consequently, the onus is upon the Opponent to prove that genuine use of the registered trade mark was made in the relevant period. The relevant period in which genuine use must be established is the five-year period ending on the filing date of the Contested Mark, namely, **30 January 2020 – 29 January 2025** ("*the relevant period*"). By virtue of paragraph 7 of Part 1, Schedule 2A of the Act, use within the EU is relevant for part of the relevant period which falls prior to IP Completion Day (i.e., 31 December 2020).

Case law

17. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, 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 I9223, 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], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], 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], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a subcategory of goods or services, the principles 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]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(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]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(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]; *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].

107. The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office* [EU:C:2020:166] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33]. In *Awareness Ltd v Plymouth City Council* [2013] RPC 24 Daniel Alexander QC sitting as the Appointed Person said:

> "19. For the tribunal to determine in relation to what goods or services there has been genuine use of a mark during the relevant period, it should be provided with clear, precise, detailed and well-supported evidence as to the nature of that use during the period in question from a person properly qualified to know.
>
> […]
>
> 22. […] 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 […] 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.'"

18. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs QC (as he then was) as the Appointed Person stated that:

"21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

'[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.'

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."

19. What I take from this case law is that there is no requirement to produce any specific form of evidence, but that I must consider what the evidence as a whole shows me and whether on this basis I can reasonably be satisfied on the balance of probabilities that there has been genuine use of the marks in respect of the goods and/or services for which they are registered.

20. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real"[3] 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.

Assessment of the evidence of use

21. Ms Dixit clarifies that the Opponent markets nutritionally complete tube feed for special medical purposes, namely, the dietary management of disease related malnutrition in children aged 1-6 years or 8-20kg in body weight.[4]

22. The evidence shows extracts from the Nutricia website (nutricia.co.uk) showing the Opponent's NUTRINI medical food product.[5] The evidence also features three screen shots, dated 11 August 2022, of a third-party retailer website in the UK offering for sale a variety of NUTRINI tube feed.[6]

23. The revenue figures for the NUTRINI products in the UK for the relevant period are as follows:

[3] *Jumpman* BL O/222/16.
[4] Ms Dixit's witness statement at paragraph [5].
[5] Exhibit SD2.
[6] Exhibit SD3, pages 1-3.

UK Sales Figures - NUTRINI branded products

Year	Net sales (GBP)
2021	18,495,276
2022	18,980,984
2023	20,656,493
2024	22,621,247
2025 (to date)	17,116,043

24. Although the revenues are not broken down by product, Ms Dixit provided some of the Opponent's sample invoices, dated between 3 March 2021 and 27 January 2025, for various parts of the UK relating to a variety of NUTRINI tube nutritional foods. Although the total value of the invoices is redacted, the invoices show considerable quantities of NUTRINI products (i.e., different types of tube feed) being retailed.

25. Ms Dixit also provides a table showing the volume of consumer engagement that the Opponent's sales team had for the NUTRINI brand in relation to face-to-face, email, phone and virtual advertising. The table reports the following figures for each category:

Customer Engagement	2020	2021	2022	2023	2024	2025 YTD
F2F	322	47	190	121	187	135
Virtual	132	117	161	31	13	17
Phone	358	193	425	145	172	113
Email	629	359	698	159	176	150
Spec	0	0	0	0	7	6
Total	**1,441**	**716**	**1,474**	**456**	**555**	**421**

26. Ms Dixit reports that the data relate to the period between October 2024 and September 2025. Clearly the table shows numbers between the years 2020 and

2025. In relation to the year 2025, I appreciate that most of the evidence is dated outside of the relevant period (ending on 29 January 2025).

27. Finally, Ms Dixit reports that the Opponent has advertised the NUTRINI tube feed product lines to healthcare professionals in the UK in the relevant period. The evidence shows presentational material dated November 2023 for the NUTRINI paediatric tube feed range of products. The evidence also contains extracts of an informational booklet presenting the characteristics and benefits of one of the Opponent's NUTRINI product lines (namely, the "NUTRINI Peptisorb Energy").

28. Looking at the evidence, I appreciate that part of it is dated outside of the relevant period (e.g., some extracts concerning the third-party retailers and a few of the invoices). I also note that Ms Dixit did not provide the Opponent's marketing spend or the market share it occupies. Nonetheless, the evidence shows that the NUTRINI tube feeds are advertised on the Opponent's website and that they are offered for sale on a third-party online retailer. The NUTRINI tube feeds generated revenues in the UK, within the relevant period, for an average of over £20 million per year and the invoices showed that the Opponent has distributed its tube feeds in various parts of the UK. Additionally, the Opponent has advertised its products under the NUTRINI mark to healthcare professionals in the UK within the relevant period and the Opponent has also had some degree of consumer engagement for the purpose of advertising the NUTRINI brand of tube feeds in the UK.

29. In light of the above considerations, I find the evidence provided shows use sufficient to be genuine for tube feed for children. Later in this decision I will clarify what constitutes a fair specification.

Form of the mark

30. Before I move on to assess the Opponent's fair specification, I must consider whether I find the use of the mark as shown in the evidence to be use of the Earlier Mark as registered or an acceptable variant of the registered mark.

31. The registered mark is the word-only "NUTRINI" and its distinctive character lies in the word itself. I note that in the evidence the earlier registration is mostly used as a word in purple applied on the goods' packaging (Figure 1). Irrespective of its

change in capitalisation,[7] these are clearly uses of the mark as registered. The colourful representation of "Nutrini" (and its background) does not alter its distinctive character.[8] In the evidence the "Nutrini" mark is also represented in combination with the Opponent's company name "NUTRICIA", a figurative device on the left-hand side and some additional wording such as, for example, "Peptisorb" or "Low Energy Multi Fibre" (Figure 1 and Figure 2). The use of a mark generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.[9] In the case at hand, it is my view that the combination of the word "Nutrini" with either the Opponent's name or the wording "Peptisorb" or "Low Energy Multi Fibre" are, as a whole, acceptable variants of the registered mark upon which the Opponent can rely to show genuine use of the Earlier Mark.

[7] *LA Superquimica v EUIPO*, Case T-24/17, [39].
[8] *LA Superquimica v EUIPO*, Case T-24/17, [39]; *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19.
[9] *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12, at paragraph [32].



Figure 1



Figure 2

Fair specification

32. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors*, [2017] EWCA Civ 1834, Kitchin LJ (as he then was) set out the approach to be followed when considering partial revocation of a trade mark. The same approach is relevant when framing a fair specification. He said:

> "244. As I described in *Maier v Asos*, the approach to be adopted is relatively straightforward (although I readily acknowledge that it may on occasion be difficult to apply) and it is in my view consistent with the earlier decisions of the Court of Appeal to which I referred at paragraph [63]. On reflection, I think it can be expressed more clearly as follows.
>
> 245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.
>
> 246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other categories.
>
> 247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.
>
> 248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.
>
> 249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not

used, be subject to revocation. […] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered."

33. The same approach was endorsed by the Supreme Court in *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36 at paragraph [261].

34. I also remind myself that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods capable of being viewed independently is their purpose and intended use.[10] Furthermore, fair protection is to be achieved by identifying and defining not the particular examples of goods for which there has been genuine use but the particular categories of goods they should realistically be taken to exemplify.[11]

35. According to Ms Dixit's witness statement and the evidence, the Opponent's products are "*Foods for Special Medical Purposes (FSMP), for the dietary management of disease related malnutrition in children aged 1-6 years or 8-20kg in body weight*".[12] Further evidence indicates that some of the Opponent's "NUTRINI" tube feeds (namely, "Mix Multi Fibre") are "*nutritionally complete, ready to use, fibre containing tube feed, for children from 1 year onwards*".[13] The advertising material also shows that the "NUTRINI" product lines are meant for various ages ranging from 1 to 6.[14] Overall, I find that the fair specification in class 5 upon which the Opponent can rely for these proceedings is the one originally registered: "*Tube feed for children aged one to six years*".

[10] *Ferrari SpA v DU* (Joined Cases C-720/18 and C-721/18) at paragraph [40].
[11] *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10.
[12] Ms Dixit's witness statement at paragraph [5] and exhibit SD2, page 46.
[13] Exhibit SD4, page 23.
[14] Exhibit SD11, page 10.

Section 5(2)(b)

36. The opposition is based upon section 5(2)(b) of the Act, which reads as follows:

> "5(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".

37. Section 5A of the Act states that:

> "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."

38. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

> (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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

Comparison of goods

39. Section 60A of the Act provides:

> "(1) For the purpose of this Act goods and services-
>
> (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.
>
> (b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.
>
> (2) In subsection (1), the "Nice Classification" means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975."

40. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, the court stated at paragraph 23 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."

41. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

    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.

42. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM),* Case T-325/06, the General Court ("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 that the responsibility for those goods lies with the same undertaking."

43. In *YouView Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J stated:

> "[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

44. For the purposes of considering the issue of similarity of the goods, it is permissible to consider groups of terms collectively where appropriate: *Separode Trade Mark*, BL O-399-10.

45. The parties' goods are listed in the table below.

Applicant's goods	**Opponent's goods**
Class 5 Vitamin supplements; Dietary supplements; Nutritional supplements; Herbal supplements; Probiotic supplements; Homeopathic supplements; Chlorella dietary supplements; Flaxseed dietary supplements; Calcium supplements; Anti-oxidant supplements; Colostrum supplements; Protein supplements; Dietary supplements consisting of vitamins; Prebiotic supplements; Lecithin dietary supplements; Food supplements; Mineral dietary supplements; Zinc dietary supplements; Mineral nutritional supplements; Propolis dietary supplements; Acai powder dietary supplements; Dietary and nutritional supplements; Liquid dietary supplements; Nutraceuticals for use as a dietary supplement; Vitamin supplements for animals; Protein dietary supplements; Vitamin and mineral supplements; Linseed dietary supplements; Liquid nutritional supplements; Yeast dietary supplements; Casein dietary	Class 5 Tube feed for children aged one to six years.

supplements; Liquid vitamin supplements; Enzyme dietary supplements; Dietary supplements for animals; Dietary supplements for pets; Anti-oxidant food supplements; Dietary food supplements; Alginate dietary supplements; Albumin dietary supplements; Liquid herbal supplements; Flaxseed oil dietary supplements; Wheat dietary supplements; Vitamin and mineral supplements for pets; Dietary supplements for humans; Dietary supplements for infants; Pollen dietary supplements; Glucose dietary supplements; Vitamin and mineral food supplements; Protein powder dietary supplements; Dietary supplements in powder form; Mineral dietary supplements for animals; Nutritional supplements for veterinary use; Dietary supplements with a cosmetic effect; Dietary supplements for medical use; Medicated food supplements; Mineral dietary supplements for humans; Whey protein dietary supplements; Food supplements for sportsmen; Nutritional supplements consisting primarily of magnesium; Protein supplements for animals; Dietary supplements consisting primarily of magnesium; Soy protein dietary supplements; Vitamin supplement patches; Health-aid foods	

supplements containing ginseng; Health food supplements made principally of vitamins; Vitamin preparations in the nature of food supplements; Soy isoflavone dietary supplements; Dietary supplement drinks; Linseed oil dietary supplements; Dietary supplements and dietetic preparations; Nutritional supplements consisting of fungal extracts; Brewer's yeast dietary supplements; Nutritional supplements consisting primarily of calcium; Dietary supplements consisting primarily of calcium; Calcium tablets as a food supplement; Nutritional supplements consisting primarily of zinc; Dietary supplements for controlling cholesterol; Nutritional supplements for livestock feed; Herbal dietary supplements for persons special dietary requirements; Nutritional supplements consisting primarily of iron; Food supplements for veterinary use; Dietary supplements and dietetic preparations containing CBD oil; Dietary supplements consisting primarily of iron; Food supplements for dietetic use; Nutritional supplement energy bars; Dietary supplements promoting fitness and endurance; Multivitamins; Medicated supplements for animal feedstuffs; Dietary food supplements used for modified fasting; Dietary supplement drink mixes; Health food	

supplements made principally of minerals; Feed supplements for veterinary use; Mineral supplements for feeding livestock; Food supplements for medical purposes; Ganoderma lucidum spore powder dietary supplements; Medicated supplements for foodstuffs for animals; Activated charcoal dietary supplements; Zinc supplement lozenges; Food supplements in liquid form; Food supplements for non-medical purposes; Fitness and endurance supplements; Natural dietary supplements for treating claustrophobia; Wheat germ dietary supplements; Protein supplement shakes; Dietary supplements for pets in the nature of a powdered drink mix; Ground flaxseed fiber for use as a dietary supplement; Vitamin supplements for use in renal dialysis; Antibiotic food supplements for animals; Royal jelly dietary supplements; Pine pollen dietary supplements; Diet capsules; Health food supplements for persons with special dietary requirements; Dietary supplements for humans not for medical purposes; Food supplements consisting of amino acids; Nutritional supplement meal replacement bars for boosting energy; Powdered nutritional supplement drink mix; Dietary supplements for human beings; Fodder supplements for	

veterinary purposes; Vitamins and vitamin preparations; Dietary pet supplements in the form of pet treats; Preparations for supplementing the body with essential vitamins and microelements; Health-aid foods supplement containing red ginseng; Capsules for medicines; Nutritional supplements made of starch adapted for medical use; Multi-vitamin preparations; Food supplements consisting of trace elements; Powdered nutritional supplement energy drink mix; Powdered fruit-flavored dietary supplement drink mix; Delivery agents in the form of coatings for tablets that facilitate the delivery of nutritional supplements; Preparations of vitamins; Antioxidant pills; Dietary supplemental drinks; Multivitamin preparations; Vitamin tablets.	

46. In its counterstatement, the Applicant submits that the respective goods are not similar in that "*"Nutrini" is a Food for Special Medical Purposes intended for use under medical supervision. In contrast, "Nutriina" is a range of general nutritional supplements for youth and adults, including products designed to support sports performance and general well-being. These include vitamins, minerals, protein supplements, and health-focused products such as turmeric capsules. The intended purpose, target audience, and method of sale differ significantly between the two brands*".

47. In its submissions in lieu, the Opponent has put forward specific combinations of the contested terms for comparison with the Opponent's "*Tube feed for children aged one to six years*".

48. I will bear in mind both parties' submissions in my assessment and I will refer to them where appropriate.

49. Ms Dixit defines the Opponent's goods as "*Foods for Special Medical Purposes (FSMP), for the dietary management of disease related malnutrition in children aged 1-6 years or 8-20kg in body weight. It is suitable as a sole source of nutrition*". The Opponent submits that these goods are close to "food for medical purpose". From the definition provided by Ms Dixit and the evidence,[15] I agree that the Opponent's products are a type of food containing a variety of nutrients (including various types of vitamins, whey protein concentrate, fibres, sodium, potassium, magnesium, calcium, zinc, folic acids) especially adapted for nutrition via tube (i.e., liquid) for children aged between 1 and 6 years old. These goods are likely to be sold via specialised outlets such as, for example, pharmacies (whether online or physical) or other specialised retailers. Ms Dixit clarifies that the goods are available to purchase with an NHS prescription and they are for use under medical supervision. The goods are meant for children with a condition that requires tube feeding; the goods are likely targeted at parents (or other members of a family) with children who need such particular tube feeds and the goods will be purchased and consumed under the doctor's instructions. I note, however, that as prescribable goods, product selection will also be made by medical professionals directly.

50. Furthermore, the Opponent's nutritional products have been approved by the Advisory Committee on Borderline Substances ("*the ACBS*") which is part of the UK Government's Department of Health and Social Care. The evidence shows that to receive approval the goods must comply with specific requirements. For example, the vitamin dosage contained in the tube food must comply with regulated parameters.

- "*Dietary supplements for medical use; Medicated food supplements; Food supplements for medical purposes; Nutritional supplements made of starch adapted for medical use*"

51. The contested goods are food supplements for medical purposes. The respective goods partially overlap in their nature because the contested goods can be liquid

[15] Exhibit SD2.

and contain a variety of nutrients similarly to the Opponent's tube foods. However, I bear in mind that normally supplements are intended for oral consumption whereas the Opponent's goods are delivered via a tube. The respective goods can also overlap in their intended purpose as they target specific medical nutritional needs. They differ in their method of use because supplements are not standalone food, but they complement one's diet whereas the Opponent's goods are ready-to-use foods that are meant to cover most of the children's nutritional needs. The respective goods are unlikely to be important to or used in combination with each other because the Opponent's goods must comply with pre-approved regulated dosages. Thus, they are not complementary. Although the respective goods can be sold via the same trade channels (e.g., pharmacies or other specialised outlets), the Opponent's goods are meant for a specific type of consumer and therefore the respective goods neither target the same users nor are they in competition with one another. Whilst I appreciate that the Opponent contends that these goods are highly similar, I find them to be similar to a low degree.

- *"Food supplements for dietetic use; Dietary supplements for infants; Liquid nutritional supplements; Liquid dietary supplements; Liquid vitamin supplements; Food supplements in liquid form; Nutritional supplements; Dietary supplements; Dietary and nutritional supplements; Food supplements; Dietary food supplements; Dietary supplements for humans; Dietary supplements for human beings; Dietary supplements and dietetic preparations*"

52. The respective goods may share the same nature (liquid goods containing different nutrients) and intended purpose (i.e., satisfy specific nutritional needs). The respective goods overlap in trade channels (e.g., pharmacies or other specialised outlets), but they differ in method of use and users as well as being neither complementary nor in competition with each other. Overall, I find them to be lowly similar.

- *"Vitamin supplements for use in renal dialysis"*

53. The respective goods can have the same nature (liquid and contain types of vitamins) but they differ in their method of use and intended purpose: supplements are not standalone food but they complement one's diet whereas the Opponent's

goods are ready-to-use foods that are meant to cover most of the children's nutritional needs. Although the respective goods can share the same channels of trade (e.g. pharmacies or other specialised outlets), they target different users (individuals who need renal dialysis versus children with specific nutritional needs), and they are neither in competition nor complementary to one another. I find them to be dissimilar.

- *"Dietary supplement drinks; Dietary supplemental drinks; Dietary supplement drink mixes"*

54. The respective goods overlap in their nature (liquid) and they partially overlap in their intended purpose (provide nutrients to the user), but they differ in their method of use (supplements must be added to drinks whereas the Opponent's goods are ready-to-use foods). As already found above, the respective goods are not in competition with each other, do not target the same users and they are not complementary. They can share the same trade channels. Overall, I find the goods to be similar to a low degree.

- *"Powdered nutritional supplement drink mix; Powdered nutritional supplement energy drink mix; Powdered fruit-flavored dietary supplement drink mix"*

55. The respective goods have different nature (liquid versus powder) and method of use, but they partially overlap in their intended purpose (satisfy nutritional needs for the user). As already clarified above, the respective goods can overlap in their trade channels, but they differ in users and they are neither complementary nor competitive. Overall, these goods are similar to a low degree.

- "*Protein supplement shakes; Protein dietary supplements; Whey protein dietary supplements; Casein dietary supplements; Soy protein dietary supplements; Protein supplements; Albumin dietary supplements; Vitamin supplements; Dietary supplements consisting of vitamins; Vitamin and mineral supplements; Mineral dietary supplements for humans; Vitamin and mineral food supplements; Mineral dietary supplements; Mineral nutritional supplements; Zinc dietary supplements; Calcium supplements; Nutritional supplements consisting primarily of calcium; Dietary supplements consisting primarily of calcium; Nutritional supplements*

consisting primarily of magnesium; Dietary supplements consisting primarily of magnesium; Nutritional supplements consisting primarily of iron; Dietary supplements consisting primarily of iron; Multivitamins; Multivitamin preparations; Multi-vitamin preparations; Vitamin preparations in the nature of food supplements; Preparations of vitamins; Vitamins and vitamin preparations; Preparations for supplementing the body with essential vitamins and microelements; Food supplements consisting of trace elements; Probiotic supplements; Prebiotic supplements; Enzyme dietary supplements; Anti-oxidant supplements; Anti-oxidant food supplements; Colostrum supplements; Lecithin dietary supplements; Glucose dietary supplements; Food supplements consisting of amino acids; Health food supplements for persons with special dietary requirements; Nutritional supplements consisting primarily of zinc; Dietary supplements for controlling cholesterol"

56. The contested goods above are all essentially dietary and food supplements for the user's general health (including special dietary requirements). They can come in various forms including liquid. The respective goods can share the same nature (liquid) and intended purpose (meet one's specific dietary or nutritional needs) although they differ in method of use (supplements are generally intended for oral consumption whereas the Opponent's goods are delivered via a tube). The respective goods share the same trade channels (e.g., pharmacies or other specialised health stores). I note the Opponent's argument that the goods are complementary because the Opponent's tube feed contains magnesium, calcium, multivitamins, etc.; however, just because particular goods may be used as a part, element or component of another, it should not result in a finding of similarity between those goods.[16] I do not find that these goods are complementary in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking. I also note that the Opponent contends that these goods target the same individuals with specific nutritional needs. I do not find that this is the case: those children who suffer from a condition that requires them to feed via a tube with the Opponent's goods (following the doctor's instructions) differ from the

[16] *Les Éditions Albert René v OHIM*, Case T-336/03.

general public (including children and adults) who integrate their diet with supplements to improve or maintain their general health. Therefore, the respective goods do not target the same users and they are not in competition with each other. Overall, they have a low degree of similarity.

- "*Protein powder dietary supplements; Calcium tablets as a food supplement; Vitamin tablets; Antioxidant pills; Dietary supplements in powder form*"

57. The respective goods have different nature (liquid versus tablets/pills/powder) and method of use but they overlap in their intended purpose (meet one's nutritional needs). The respective goods can share the same trade channels, but they target different users and they are neither in competition nor complementary with one another. Overall, I find them to be similar to a very low degree.

- "*Capsules for medicines*"

58. The Applicant's goods are shells, and they are generally made to allow medicines to be taken orally. Therefore, the respective goods differ in their nature (liquid versus solid form), method of use and intended purpose. The contested goods are likely to be sold via specialised professional channels to medicine/pharmaceutical manufacturers since capsules are a component for medicines. The respective goods therefore do not share the same trade channels and users. The Opponent's products do not need a capsule to be taken; thus, the respective goods are neither complementary nor in competition with each other. Overall, they are dissimilar.

- "*Diet capsules*"

59. The respective goods have different nature (liquid versus capsules), different purpose (lose weight versus meet some children's specific nutritional needs) and methods of use (capsules are generally taken orally whereas the Opponent's goods are provided via a tube). Although these goods can share the same trade channels (pharmacies or other specialised health stores), they do not target the same users and they are neither complementary nor in competition with each other. I find them to be dissimilar.

- "*Food supplements for sportsmen; Dietary supplements promoting fitness and endurance; Fitness and endurance supplements"*

60. The contested goods are dietary supplements specially designed to support sportsmen's performance. These goods can be liquid in nature but they are generally meant for oral consumption. Therefore, whilst the respective goods may share the same nature, they differ in their method of use and intended purpose. These goods are clearly aimed at different users (adults practicing physical activity versus children with specific nutritional needs). The goods can overlap in their trade channels but they are neither in competition with each other nor complementary. I find these goods to be similar to a very low degree.

- *"Nutritional supplement energy bars; Nutritional supplement meal replacement bars for boosting energy*"

61. The respective goods are energy bars that are generally meant for oral consumption. These goods are not food themselves, but they are additional to one's diet to provide more energy. Therefore, the respective goods differ in their nature (liquid versus bars) and method of use although they partially overlap in their intended purpose (give energy and nutrients). These goods can be provided via the same trade channels, but they target different users and they are neither complementary nor in competition with each other. They are similar to a very low degree.

- "*Dietary food supplements used for modified fasting*"

62. The contested goods are food supplements for a low-calorie diet; they can be liquid and they are likely meant for oral consumption (being food supplements). Therefore, the respective goods share the same nature and intended purpose (satisfy one's specific nutritional needs), but they differ in their method of use. The goods may share the same trade channels but differ in users and they are not complementary or in competition with each other. Overall, they are lowly similar.

- "*Herbal supplements; Homeopathic supplements; Chlorella dietary supplements; Flaxseed dietary supplements; Propolis dietary supplements; Linseed dietary*

supplements; Yeast dietary supplements; Liquid herbal supplements; Flaxseed oil dietary supplements; Wheat dietary supplements; Pollen dietary supplements; Soy isoflavone dietary supplements; Nutritional supplements consisting of fungal extracts; Brewer's yeast dietary supplements; Linseed oil dietary supplements; Herbal dietary supplements for persons special dietary requirements; Health-aid foods supplements containing ginseng; Health-aid foods supplement containing red ginseng; Health food supplements made principally of vitamins; Health food supplements made principally of minerals; Wheat germ dietary supplements; Ground flaxseed fiber for use as a dietary supplement; Royal jelly dietary supplements; Pine pollen dietary supplements; Nutraceuticals for use as a dietary supplement; Ganoderma lucidum spore powder dietary supplements; Activated charcoal dietary supplements; Zinc supplement lozenges; Dietary supplements and dietetic preparations containing CBD oil; Food supplements for non-medical purposes; Dietary supplements for humans not for medical purposes"

63. The contested goods above are different types of dietary supplements including supplements with natural ingredients. Notwithstanding their various possible applications (and ingredients), the contested goods can be liquid (e.g., oils), they are generally meant for oral consumption, and they are normally added to food to supplement one's specific dietary or nutritional requirements. Therefore, the respective goods can overlap in their nature and intended use, but they differ in their method of use. These goods do not target the same users, albeit they share the same trade channels, and they are neither complementary nor in competition with each other. I find them to be similar to a low degree.

- "*Acai powder dietary supplements; Vitamin supplement patches*"

64. The same considerations outlined in the paragraph above apply apart from the fact that the respective goods differ in their nature (liquid versus powder/patches). Therefore, the respective goods are similar to a very low degree.

- "*Natural dietary supplements for treating claustrophobia*; *Dietary supplements with a cosmetic effect*"

65. The contested goods are dietary supplements with a specific purpose different from the nutritional one that supplements normally have. Therefore, although the respective goods can overlap in their nature (liquid), they differ in their method of use (oral consumption versus feeding tube) and intended purpose. These goods can overlap in trade channels (pharmacies or other health specialised stores), but they do not target the same users. They are neither complementary nor in competition with one another. I find them to be dissimilar.

- "*Delivery agents in the form of coatings for tablets that facilitate the delivery of nutritional supplements*"

66. The same considerations outlined at paragraph [58] apply. These goods are dissimilar.

- "*Vitamin supplements for animals; Dietary supplements for animals; Dietary supplements for pets; Vitamin and mineral supplements for pets; Mineral dietary supplements for animals; Nutritional supplements for veterinary use; Protein supplements for animals; Nutritional supplements for livestock feed; Food supplements for veterinary use; Feed supplements for veterinary use; Mineral supplements for feeding livestock; Medicated supplements for animal feedstuffs; Medicated supplements for foodstuffs for animals; Antibiotic food supplements for animals; Fodder supplements for veterinary purposes; Dietary pet supplements in the nature of a powdered drink mix; Dietary supplements for pets in the nature of a powdered drink mix; Nutritional supplements for veterinary use; Food supplements for veterinary use; Medicated supplements for foodstuffs for animals*"

67. The Opponent contends that the respective goods share the same users consisting of "*living species*" and they also share the same trade channels in that there are pharmaceutical companies that distribute pharmaceuticals (including supplements) to both humans and animals. Although I note the Opponent's submissions, I find that whilst the respective goods may have the same nature (liquid), they are likely to have different ingredients or compositions since the Applicant's goods are intended for animals (including pets and livestock) whereas the Opponent's goods are aimed at children with specific nutritional needs. Additionally, absent evidence to the contrary from the parties, I find it reasonable

to believe that supplements for animals are generally administered orally (e.g., directly in their mouths or combined with their food). Therefore, the respective goods clearly differ in their method of use and intended purpose. These goods also target different consumers and do not share the same trade channels because the contested goods are likely to be offered in pet stores, be available in veterinary shops or be retailed via more specialised outlets (e.g., in relation to supplements for livestock). Conversely, the Opponent's goods are retailed in pharmacies or other health specialised shops meant for human consumption. The respective goods are neither complementary nor in competition with each other. Overall, I find them to be dissimilar.

Conclusion on the goods comparison

68. As some degree of similarity between the respective goods is necessary to engage the test for likelihood of confusion,[17] my findings above mean that the opposition reliant upon the 5(2)(b) ground aimed against those goods I have found to be dissimilar must fail.

69. In light of my findings above, the opposition proceeds only in relation to the goods listed in Annex A to this decision.

Average consumer and the purchasing act

70. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.,* Case C-342/97.

71. In *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

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

(a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;

(b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;

(c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

72. The relevant goods for which I found some degree of similarity are various types of dietary and food supplements as well as tube feeds for children. I find that the relevant goods are mostly directed at the public at large. However, I note that the Opponent, in its submissions in lieu, points out that the tube feeds are advertised to healthcare professionals. I find that the relevant public for these products is mostly comprised of the public at large (being the end consumers) such as, for example, the parents (or other family members) of those children in need of the goods. However, since the goods are prescribable and to be used under medical

supervision, I accept that also healthcare professionals may form part of the relevant public and who will pay a higher degree of attention. In any case, I bear in mind that the likelihood of confusion must be assessed from the perspective of the former (the general public) since they are the group who will pay the lower degree of attention.[18]

73. Generally, as per *Olimp Laboratories sp. z o.o. v EUIPO*, Case T-817/19, the level of attention is likely to be higher where pharmaceuticals are concerned. I consider this also to extend to nutritional/dietary supplements and tube feeds as consumers are likely going to carefully consider goods that are intended for ingestion (in some form) for the support of their health (or the health of their children). I therefore find that a level of attention between medium and high will be paid even where the goods are relatively low cost.

74. I believe the purchasing process to be a largely visual one and that the consumer will handle the goods to check that they are suitable for their needs/symptoms/illness. If the consumer is buying online, then I also note that they will see the marks on the websites. I do not, however, ignore the potential for the marks to be spoken, for example, by pharmacists, doctors or sales assistants.

Comparison of the marks

75. It is clear from *Sabel BV v Puma AG,* Case C-251/95 (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. 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

[18] Case T-356/14, *CareAbout v OHMI - Florido Rodríguez (Kerashot)*, paragraph 25.

impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

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

77. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
NUTRINI	**Nutriina**

Overall impression

78. The respective marks consist of the all-capitalised word "NUTRINI" and the capitalised word "Nutriina" albeit as word marks they could be presented in any case.

79. The marks' overall impressions lie in the single words that form those marks.

Visual similarity

80. Both marks consist of three-syllable words overlapping in their first five letters "nutri-" and the letter "n" whilst differing in the additional "i" in the Contested Mark and their respective last letter/vowel. The respective marks have almost the same length with the Contested Mark having one additional "i" in the middle of the mark. Taking into account the general rule of thumb that consumers tend to focus more on the beginnings of marks,[19] I find the respective marks to have a high degree of visual similarity.

Aural similarity

81. The respective marks coincide in their beginnings "nutri-" and partially differ in their endings ("-ni" versus "-na") with the last vowel being different. Although I appreciate

[19] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02.

that the Contested Mark has an additional "i" (making a slightly longer "e" sound), the respective letter sequences "nutri-" and "nutrii-" in the marks will be pronounced almost identically. The marks differ in their final vowel. Overall, the marks have a very high aural similarity.

Conceptual similarity

82. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU, including *Ruiz Picasso v OHIM*.[20] The assessment must, therefore, be made from the point of view of the average consumer.

83. In its counterstatement, the Applicant contends that "*the prefix "Nutri" is widely used in the food, health, and nutrition industry to denote nutritional value or health benefits […]"*. In its submissions in lieu, the Opponent states that "*both marks are conceptually similar in that they are made-up words without any meaning in the English language*".

84. Whilst I appreciate the parties' submissions, I agree with the Applicant that it is generally recognised that the prefix "Nutri-" in food-related goods connotes nutrition. Although I appreciate that both marks combine "nutri-" with additional letters to create a neologism (i.e., "NUTRINI" and "Nutrina"), I bear in mind that even a made-up word may carry conceptual weight.[21] Therefore, insofar as the respective marks share the same meaning of "nutrition" I find the marks to be conceptually identical. In the event I am mistaken, I nonetheless find that the marks have a very high degree of conceptual similarity.

Distinctive character of the earlier trade mark

85. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In *Lloyd Schuhfabrik*, the CJEU stated that:

[20] [2006] ECR I-643; [2006] E.T.M.R.
[21] *Ontex NV v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-353/04 at paragraph [91].

"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)."

86. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the services, to those with high inherent distinctive character, such as invented words.

87. Dealing first with the inherent distinctiveness of the Earlier Mark, although it is an invented word, the prefix "Nutri-" clearly alludes to the nutritional qualities of the goods. Overall, I find that the mark has a medium inherent distinctive character.

88. Turning to the question of whether the inherent distinctiveness of the Earlier Mark has been enhanced through use, the Opponent submits that the Earlier Mark enjoys an enhanced degree of distinctive character as a result of the extensive use made of it in the UK for many years as demonstrated by the evidence provided. I already provided my account of the Opponent's evidence at paragraphs [21] – [29]. Following my assessment of the evidence, the Opponent showed that the NUTRINI-branded tube feeds, marketed by the Opponent and third-party retailers,

have been distributed in various parts of the UK, they have generated an average of over £20 million per year in revenues and the Opponent has engaged in some marketing activity with a relevant consumer reach. It is therefore my view that the Earlier Mark's medium distinctiveness has been enhanced through use to a high degree.

Likelihood of confusion

89. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

90. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other (*L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10).

91. In relation to those goods for which some degree of similarity exists, I have found the respective goods to be similar to a low or very low degree. The level of attention of the relevant consumer is between medium and high for the general public and higher for the healthcare professionals; the likelihood of confusion must be assessed from the perspective of the general public since they are the group who will pay the lower degree of attention. The medium inherent distinctiveness of the Earlier Mark has been enhanced through use to a high degree. The visual similarity is high, the marks are aurally similar to a very high degree, and they are conceptually identical or, alternatively, very highly similar. The purchase of the contested goods is considered to be mainly visual but the potential for aural use is borne in mind. I found that the respective marks overlap in their beginnings, which is where generally the consumers pay more attention, along with their penultimate letter "n". The marks differ in the additional letter "i" in the Contested Mark, which does not substantially affect the marks' aural similarity, and they also differ in their

last vowel (i.e., “i” versus “a”). I appreciate that I found a low or very low degree of similarity between the respective goods; however, I find particularly relevant the marks’ high and very high visual and aural similarity, their conceptual identity and the Earlier Mark’s degree of inherent distinctiveness enhanced to a high degree. Overall, taking all these factors into my global assessment and bearing in mind the principle of imperfect recollection whereby the average consumer rarely has the opportunity to make direct comparisons between trade marks, I reach the conclusion that the relevant consumers, relying upon the imperfect picture of the marks that they retained in their minds, will fail to accurately recall the marks’ differences and they will mistake one mark for the other. Thus, there is a likelihood of direct confusion between the marks.

92. Having reached the above conclusion, I have also considered whether, in the event that I am wrong to have found that the marks are likely to be mistaken for one another (also known as ‘direct confusion’), there is nevertheless a likelihood of indirect confusion between them. Suffice it to say that I consider this to be highly improbable. Neither mark is an entirely logical and consistent brand extension of the other and I can see no other ‘proper basis’[22] for finding that the average consumer, having recognised that the marks are not the same, is nevertheless likely to put the similarities between them down to the respective goods coming from the same/linked undertaking(s). It seems to me that this is a case of direct confusion or no confusion at all.

Conclusion

93. The opposition succeeds in part under section 5(2)(b) of the Act and, subject to any successful appeal against my decision, the Contested Mark is refused for the goods listed in Annex A to this decision.

94. The Contested Mark may (again, subject to any successful appeal of my decision) proceed to registration for the following goods in class 5:

Vitamin supplements for use in renal dialysis; Capsules for medicines; Diet capsules; Natural dietary supplements for treating claustrophobia; Dietary

[22] *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207.

supplements with a cosmetic effect; Delivery agents in the form of coatings for tablets that facilitate the delivery of nutritional supplements; Vitamin supplements for animals; Dietary supplements for animals; Dietary supplements for pets; Vitamin and mineral supplements for pets; Mineral dietary supplements for animals; Nutritional supplements for veterinary use; Protein supplements for animals; Nutritional supplements for livestock feed; Food supplements for veterinary use; Feed supplements for veterinary use; Mineral supplements for feeding livestock; Medicated supplements for animal feedstuffs; Medicated supplements for foodstuffs for animals; Antibiotic food supplements for animals; Fodder supplements for veterinary purposes; Dietary pet supplements in the nature of a powdered drink mix; Dietary supplements for pets in the nature of a powdered drink mix; Nutritional supplements for veterinary use; Food supplements for veterinary use; Medicated supplements for foodstuffs for animals.

Costs

95. The Opponent has enjoyed the greater degree of success in these proceedings and, as such, is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. I appreciate, however, that the opposition has failed against various terms listed in the contested application. Therefore, I deem it appropriate to reflect this via a reduction of the Opponent's costs award. The sum is calculated as follows:

Official fee	£100
Preparing a statement and considering the other side's statement	£200
Preparing evidence	£570
Preparing submissions in lieu of a hearing	£300
Total:	**£1,170**

96. I order Amjad Hussain to pay N. V. Nutricia the sum of **£1,170**. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case, if any appeal against the decision is unsuccessful.

Dated this 20th day of October 2026

Andrea Rossi
For the Registrar

Annex A

Contested goods for which some degree of similarity was found

Class 5

Dietary supplements for medical use; Medicated food supplements; Food supplements for medical purposes; Nutritional supplements made of starch adapted for medical use; Food supplements for dietetic use; Dietary supplements for infants; Liquid nutritional supplements; Liquid dietary supplements; Liquid vitamin supplements; Food supplements in liquid form; Nutritional supplements; Dietary supplements; Dietary and nutritional supplements; Food supplements; Dietary food supplements; Dietary supplements for humans; Dietary supplements for human beings; Dietary supplements and dietetic preparations; Dietary supplement drinks; Dietary supplemental drinks; Dietary supplement drink mixes; Powdered nutritional supplement drink mix; Powdered nutritional supplement energy drink mix; Powdered fruit-flavored dietary supplement drink mix; Protein supplement shakes; Protein dietary supplements; Whey protein dietary supplements; Casein dietary supplements; Soy protein dietary supplements; Protein supplements; Albumin dietary supplements; Vitamin supplements; Dietary supplements consisting of vitamins; Vitamin and mineral supplements; Mineral dietary supplements for humans; Vitamin and mineral food supplements; Mineral dietary supplements; Mineral nutritional supplements; Zinc dietary supplements; Calcium supplements; Nutritional supplements consisting primarily of calcium; Dietary supplements consisting primarily of calcium; Nutritional supplements consisting primarily of magnesium; Dietary supplements consisting primarily of magnesium; Nutritional supplements consisting primarily of iron; Dietary supplements consisting primarily of iron; Multivitamins; Multivitamin preparations; Multi-vitamin preparations; Vitamin preparations in the nature of food supplements; Preparations of vitamins; Vitamins and vitamin preparations; Preparations for supplementing the body with essential vitamins and microelements; Food supplements consisting of trace elements; Probiotic supplements; Prebiotic supplements; Enzyme dietary supplements; Anti-oxidant supplements; Anti-oxidant food supplements; Colostrum supplements; Lecithin dietary supplements; Glucose dietary supplements; Food supplements consisting of amino acids; Health food supplements for persons with special dietary requirements; Nutritional supplements

consisting primarily of zinc; Dietary supplements for controlling cholesterol; Protein powder dietary supplements; Calcium tablets as a food supplement; Vitamin tablets; Antioxidant pills; Dietary supplements in powder form; Food supplements for sportsmen; Dietary supplements promoting fitness and endurance; Fitness and endurance supplements; Nutritional supplement energy bars; Nutritional supplement meal replacement bars for boosting energy; Dietary food supplements used for modified fasting; Herbal supplements; Homeopathic supplements; Chlorella dietary supplements; Flaxseed dietary supplements; Propolis dietary supplements; Linseed dietary supplements; Yeast dietary supplements; Liquid herbal supplements; Flaxseed oil dietary supplements; Wheat dietary supplements; Pollen dietary supplements; Soy isoflavone dietary supplements; Nutritional supplements consisting of fungal extracts; Brewer's yeast dietary supplements; Linseed oil dietary supplements; Herbal dietary supplements for persons special dietary requirements; Health-aid foods supplements containing ginseng; Health-aid foods supplement containing red ginseng; Health food supplements made principally of vitamins; Health food supplements made principally of minerals; Wheat germ dietary supplements; Ground flaxseed fiber for use as a dietary supplement; Royal jelly dietary supplements; Pine pollen dietary supplements; Nutraceuticals for use as a dietary supplement; Ganoderma lucidum spore powder dietary supplements; Activated charcoal dietary supplements; Zinc supplement lozenges; Dietary supplements and dietetic preparations containing CBD oil; Food supplements for non-medical purposes; Dietary supplements for humans not for medical purposes; Acai powder dietary supplements; Vitamin supplement patches