

**O/1056/25**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 4032463  
IN THE NAME OF LAKELAND COSMETICS LIMITED  
TO REGISTER THE FOLLOWING TRADE MARK:**

**PETFRESH**

**IN CLASSES 3 AND 5**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 446949  
BY BIO8 LTD**

## Background and pleadings

1. Lakeland Cosmetics Limited (“the applicant”) applied to register the trade mark **PETFRESH** (“the applicant’s mark”) in the UK on 28 March 2024, under number 4032463. It was accepted and published in the Trade Marks Journal on 12 April 2024 in respect of the following goods:

*Class 3: Cosmetics for animals; Bath preparations for animals; Skin care products for animals; Non-medicated paw balms for pets; Conditioning sprays for animals; Preparations and products for fur care; Animal washes (non-medicated); Colognes for animals; Dental care preparations for animals; Breath fresheners for animals; Odour fresheners for animals; Animal grooming preparations; Shampoos for animals [non-medicated grooming preparations]; Hair detangling preparations; Pet odour removers; Pet stain removers; Shampoos for pets; Deodorants for pets; Non-medicated mouth washes for pets; Wipes impregnated with a cleaning preparation.*

*Class 5: Medicated animal grooming preparations; Medicated shampoos for pets; Animal washes; Disinfectants for veterinary use; Antiparasitic preparations for pets; Animal repellent formulations; Insect repellents for use on animals; Pharmaceutical preparations for animal skincare; Flea and tick spot-on treatments; Herbal sore skin ointments for pets; Herbal anti-itch ointments for pets; Ear drops; Dietary supplements for animals; Vitamins for animals; Medicated supplements for foodstuffs for animals; Nutritional additives to foodstuffs for animals, for medical purposes; Antiseptic preparations for wound care; Antibacterial sprays; Antiseptic wipes.*

2. Bio8 Ltd (“the opponent”) opposes the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed at class 3 only. This is on the basis of its UK trade mark number 3383578 which is a series of two marks, **Envii Pet Fresh** and **ENVII PET FRESH**. Since the marks in the series only differ in the use of uppercase and title case, for ease of reference I will refer to them as “the opponent’s mark” unless it becomes necessary for me to distinguish between them. The opponent’s mark was filed on 15 March 2019 and became registered on 7 June 2019. It stands registered for the following goods, all of which are relied upon by the opponent:

*Class 3: Cleaning preparations; chemical cleaning preparations for household purposes; shampoos for pets [non-medicated grooming preparations]; room fragrancing preparations.*

3. As the filing date of the opponent's mark is earlier than the filing date of the applicant's mark, the opponent's mark constitutes an earlier mark in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods identified without having to establish genuine use.

4. By virtue of filing the opposition under section 5(2)(b), the opponent argues that its goods are identical or similar to the applicant's goods, and that the competing marks are similar, resulting in a likelihood of confusion.

5. The applicant filed a counterstatement denying the ground of opposition.

6. The opponent is professionally represented by Stone King LLP, whereas the applicant is not represented. Only the opponent filed evidence in these proceedings. No hearing was requested. Neither party filed written submissions in lieu, though I note that the applicant filed written submissions during the evidence rounds. This decision is taken following careful consideration of all the papers before me.

7. 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**

8. The opponent's evidence consists of the witness statement of Oliver Peabody, dated 9 January 2025, and five exhibits (OP1-OP5). Mr Peabody is the director and owner of Bio8 Ltd. The five exhibits filed on 9 January 2025 show use of the opponent's mark. The evidence was originally filed on 2 December 2024 but was not filed in the

proper evidential format. The opponent was then directed to file amended evidence by 16 January 2024. I note that in its submissions, the applicant requested that any of the opponent's evidence that was not previously filed on 2 December 2024 be excluded from the proceedings, and argued that only the evidence that was previously filed should be taken into account. It should be noted that, whilst the opponent's filing of 9 January 2025 as a whole was admitted into the proceedings, the letter issued to the parties on 2 January 2025 made it clear that no new or additional evidence should be filed by the opponent when filing its amended evidence in proper evidential format. Furthermore, there was no request to file additional evidence. On this basis, the exhibits which were not originally filed on 2 December 2024 (namely, Exhibits OP1, OP2, OP3, OP5, and the paragraphs within Mr Peabody's witness statement which correspond to these exhibits) cannot be taken into account.

9. In making my decision, I have therefore only taken into account Exhibit OP4 (as the information supplied in this exhibit was included in the evidence filed on 2 December 2024) and the paragraphs of the witness statement which refers to Exhibit OP4. I will refer to it below where necessary.

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

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

“5(2) A trade mark shall not be registered if because-

(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”.

11. Section 5A states: [...] “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.”

12. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-*

*Goldwyn-Mayer Inc, Case C-39/97, Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V., Case C-342/97, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, Matratzen Concord GmbH v OHIM, Case C-3/03, Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.*

*The principles*

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

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

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

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

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

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

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

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

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

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

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

### **Comparison of goods and services**

13. In *Canon*<sup>1</sup>, the Court of Justice of the European Union (“CJEU”) stated, at paragraph 23 of its judgment, that when considering whether goods are similar, all the relevant factors relating to the goods should be taken into account. The CJEU stated that those factors include their nature, intended purpose, method of use and whether they are in competition with each other or are complementary.

14. The relevant factors identified by Jacob J. (as he then was) in *Treat*<sup>2</sup> for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

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<sup>1</sup> Case C-39/97

<sup>2</sup> [1996] R.P.C. 281

(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.

15. In *Kurt Hesse v OHIM*<sup>3</sup>, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*<sup>4</sup>, 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.”

16. In *Gérard Meric v OHIM*<sup>5</sup>, the GC confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

17. The goods to be compared as follows:

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<sup>3</sup> Case C-50/15 P

<sup>4</sup> Case T-325/06

<sup>5</sup> Case T- 133/05

The opponent's goods	The applicant's goods
<p>Class 3: Cleaning preparations; chemical cleaning preparations for household purposes; shampoos for pets [non-medicated grooming preparations]; room fragrancing preparations.</p>	<p>Class 3: Cosmetics for animals; Bath preparations for animals; Skin care products for animals; Non-medicated paw balms for pets; Conditioning sprays for animals; Preparations and products for fur care; Animal washes (non-medicated); Colognes for animals; Dental care preparations for animals; Breath fresheners for animals; Odour fresheners for animals; Animal grooming preparations; Shampoos for animals [non-medicated grooming preparations]; Hair detangling preparations; Pet odour removers; Pet stain removers; Shampoos for pets; Deodorants for pets; Non-medicated mouth washes for pets; Wipes impregnated with a cleaning preparation.</p>

18. In his witness statement, Mr Peabody submits that the applicant is attempting to register its mark for goods including *shampoo for pets*, *pet stain removers*, and *pet odour removers*, which, he argues “cover the categories in which our goods are described and sold in”. In its submissions, the applicant admits that the following goods are either identical or similar to the opponent’s *shampoos for pets [non-medicated grooming preparations]* on the basis that these goods are used for grooming and/or cleaning animals:

*Cosmetics for animals; Bath preparations for animals; Conditioning sprays for animals; Preparations and products for fur care; Animal washes (non-medicated); Colognes for animals; Dental care preparations for animals; Breath fresheners for animals; Odour fresheners for animals; Animal grooming preparations; Shampoos for animals [non-medicated grooming preparations];*

*Pet odour removers; Shampoos for pets; Deodorants for pets; Non-medicated mouth washes for pets.*

19. However, as the applicant has not specified which of these goods it views as being identical and which it views as similar, I will conduct a comparison for the goods in the ordinary way. The applicant also admits that the applicant's *wipes impregnated with cleaning preparation* is similar to the opponent's *cleaning preparations* and *chemical cleaning preparations for household purposes* as they serve the same purpose and the same distribution channels and manufacturers. However, the applicant argues *skin care products for animals, non-medicated paw balms for pets* and *hair detangling preparations* are dissimilar to the opponent's goods on the basis that they serve a different purpose to the opponent's *cleaning and room fragrancing preparations*. I note that the applicant has not commented specifically on the level of similarity of *pet stain removers*.

20. For the purposes of comparing goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons.<sup>6</sup> I have therefore assessed the applicant's goods by dividing the terms into groups as per below.

*Shampoos for animals [non-medicated grooming preparations]; Shampoos for pets.*

21. These terms are identical to the opponent's term *shampoos for pets [non-medicated grooming preparations]* on a literal basis.

*Animal washes (non-medicated); Preparations and products for fur care; Animal grooming preparations; Cosmetics for animals; Bath preparations for animals.*

22. It is my view that these wider terms relating to washing an animal's fur all include the opponent's narrower term *shampoos for pets [non-medicated grooming preparations]*. I include *cosmetics for animals* amongst these goods as it is my understanding that it is a wide term which incorporates products to wash the fur of an

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<sup>6</sup> *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38

animal, including shampoo. In addition to this, I understand that the term *bath preparations for animals* also includes animal shampoo, as these types of preparations are used to wash an animal's fur. As the opponent's narrower term falls within these wider terms, they are therefore considered to be identical under the principle set out above in *Meric*. However, if I am wrong in my understanding that *bath preparations for animals* is a term which incorporates animal shampoo, then alternatively it is considered that the goods are highly similar. They have the same use, which is to clean an animal's fur. Their nature overlaps as *shampoos for pets [non-medicated grooming preparations]* are viscose liquids applied to the animal's fur along with water to wash it, and *bath preparations for animals* are viscose liquids mixed with water to wash an animal's fur. The users of both are the owners or carers of animals. They will be sold through the same trade channels and will be found close to each other within retail environments. As they serve the same purpose, they are unlikely to be complementary in that one is not essential for the other. However, they are likely to be in competition with each other, as users will choose between the goods when selecting a product to wash an animal's fur. On this basis, if the goods are not deemed to be identical, then it is considered that *bath preparations for animals* are highly similar to *shampoos for pets [non-medicated grooming preparations]*.

*Conditioning sprays for animals; Hair detangling preparations.*

23. It is my view that these goods are highly similar to the opponent's *shampoos for pets [non-medicated grooming preparations]*. The users of both will be the owners or carers of animals. The nature of *shampoos for pets [non-medicated grooming preparations]* are viscose liquids applied to an animal's fur, whereas *conditioning sprays for animals* will be in the form of an aerosol which dispenses mist. As far as I am aware, *hair detangling preparations* will include a variety of forms, including both sprays and viscose liquids. Their purpose overlaps as they are both products used to groom animal fur, although the core purpose of *shampoos for pets [non-medicated grooming preparations]* is to cleanse the fur, whereas *conditioning sprays for animals* and *hair detangling preparations* are applied to the fur for their conditioning effect. They will be sold through the same trade channels and appear near each other in retail environments. It is my view that they are complementary as *shampoos for pets [non-medicated grooming preparations]* need to be applied to the fur to cleanse it before

applying *conditioning sprays for animals* or *hair detangling preparations*, and therefore they may be considered to be essential to one another. Furthermore, given that these goods are all specialist products used with the process of grooming animals, consumers are likely to believe that the responsibility lies with the same undertaking. They are unlikely to be in competition with each other, given that their purpose is not the same. Taking all these factors into account, it is my view that the goods are highly similar.

*Skin care products for animals; Non-medicated paw balms for pets.*

24. These goods are similar to the opponent's term *shampoos for pets [non-medicated grooming preparations]*. The users will be the same, as they will be the owners or carers of animals. The nature of *skin care products for animals* may be similar to *shampoos for pets [non-medicated grooming preparations]* as both may be viscose liquids, but *non-medicated paw balms for pets* will be sold as solids. The purpose will broadly overlap as all of the goods will be used within the process of grooming an animal. However, the core purpose differs as *shampoos for pets [non-medicated grooming preparations]* are used to cleanse an animal's fur, whereas *skin care products for animals* and *non-medicated paw balms for pets* perform a soothing or healing function on an animal's skin. They will be sold through the same trade channels, and are likely to appear near each other within those retail environments. It is unlikely that the goods will be seen as complementary, given that one is not essential to the other. Given the difference in the goods' purpose, they are also unlikely to be in competition with each other. Taking all of these factors into account, it is my view that the goods are similar to a low to medium degree.

*Colognes for animals; Odour fresheners for animals; Deodorants for pets.*

25. In my experience, these goods are used to improve the smell of an animal by applying it directly to the animal's fur, and therefore they are similar to the opponent's term *shampoos for pets [non-medicated grooming preparations]*. They have the same users, who will be the owners or carers of animals. Their nature will differ as *shampoos for pets [non-medicated grooming preparations]* are commonly sold as viscose liquids whereas the goods above are more likely to be sold as aerosols or sprays which are dispersed as mist over the animal. Their broad purpose overlaps in that both are

animal grooming products which improve the smell of an animal, but their core purpose differs in that *shampoos for pets [non-medicated grooming preparations]* achieve this by cleansing dirt and particles from the fur, whereas *colognes for animals, odour fresheners for animals, and deodorants for pets* imbue a scent without necessarily performing a cleansing action to remove dirt or other particles from animal fur. They will be sold through the same trade channels and are likely to appear near each other in these retail environments. It is unlikely that the goods will be seen as complementary, given that one is not essential to the other. They are also unlikely to be in competition with each other, given the goods' difference in purpose. Taking all of these factors into account, it is my view that the goods are similar to a medium degree.

*Dental care preparations for animals; Breath fresheners for animals; Non-medicated mouth washes for pets.*

26. These goods are used to improve an animal's oral hygiene. They will have the same users as the opponent's *shampoos for pets [non-medicated grooming preparations]*, who are the owners or carers of animals. There is a small overlap in the goods' broad purpose, which may be to improve the odour of an animal, but their core purpose differs in that one is for oral hygiene and the other is for cleaning the fur. They are sold through the same trade channels and may appear in similar places within those retail environments, although they may not be as close to each other on shelves as other products. Given the difference in purpose, they are unlikely to be in competition with each other. They are also not complementary, as one is not important or essential for the other. Taking all of these factors into account, it is my view that there is a low degree of similarity between the goods.

*Pet stain removers; Pet odour removers; Wipes impregnated with a cleaning preparation.*

27. It is my understanding that these goods are not applied directly to an animal, but are used to clean surfaces and floors in order to remove or neutralise animal odour. It is considered that these narrower terms are all included in the opponent's wider terms *cleaning preparations, chemical cleaning preparations for household purposes, and room fragrancing preparations*. They are therefore identical to the opponent's goods under the principle outlined in *Meric*.

## Average consumer and the purchasing act

28. 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*<sup>7</sup>.

29. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*<sup>8</sup>, Birss J (as he then was) described the average consumer in these terms:

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

30. The average consumer for the goods will be members of the general public who own or care for animals. The cost of purchase is likely to vary depending on the quality of the ingredients used within the products, but overall, the goods will be reasonably inexpensive. Overall, the goods are likely to be purchased on a fairly frequent basis. Several factors may influence the average consumer when purchasing the goods, such as the type of fragrance emitted, the quality of the ingredients, and if the product is suitable for the particular type of animal. Based on these factors, I find that the average consumer is likely to pay a medium level of attention when purchasing the goods. The goods will be selected from specialist shops (such as pet shops), general retail outlets, or online. The customer will self-select the goods from the display shelves, or by selecting the image of their desired product if purchasing online. The visual component will therefore dominate the purchasing process, but I do not discount aural considerations, such as word-of-mouth recommendations, or placing telephone orders.

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<sup>7</sup> Case C-342/97

<sup>8</sup> [2014] EWHC 439 (Ch)

## Comparison of marks

31. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*<sup>9</sup>, that:

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

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

33. The respective trade marks are shown below:

<b>The opponent's mark</b>	<b>The applicant's mark</b>
Envii Pet Fresh ENVII PET FRESH	PETFRESH

34. In its submissions, the applicant argues that the relevant public will attribute more weight to the distinctive word “ENVII” in the opponent’s mark due to the allusive nature of the word elements “PETFRESH” and “PET FRESH” in the opposing marks.

35. The opponent’s mark is a series of two plain word marks, with “Envii Pet Fresh” written in title case and “ENVII PET FRESH” written in uppercase. Whilst there is a

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<sup>9</sup> Case C-591/12P

difference in case between the first mark in the series and the applicant's mark, in *LA Superquimica v European Union Intellectual Property Office (EUIPO)*<sup>10</sup>, the GC held at [39] that word-only marks protect the word or words contained in the mark in whatever case, colour or typeface. The difference between the two marks within the series is therefore not significant, and the use of title case does not affect the level of similarity between the mark in title case and the applicant's mark in uppercase. The word "ENVII" is the most distinctive and dominant element as it will be perceived as an invented word, whereas the words "PET FRESH" play a lesser degree as they will be seen as a strongly allusive reference to the goods. As the first word "ENVII" is more distinctive, it is my view that it dominates the mark's overall impression. The words "PET FRESH" still contribute, but to a lesser degree.

36. The applicant's mark is a plain word mark written in uppercase, with no other elements within the mark. As a word-only mark with no other elements, the overall impression lies in the conjoined word "PETFRESH". Although the term is presented as one word, it is my view that the words PET and FRESH will be identified by the average consumer on the basis that they are both common dictionary-defined words which will be readily understood.

#### Visual comparison

37. The opponent does not comment on the visual similarity between the competing marks. In its submissions, the applicant argues that the competing marks are visually similar due to the shared word elements "PET FRESH"/"PETFRESH", but only to a low degree due to the inclusion of the word "ENVII" in the opponent's mark.

38. The competing marks are visually similar as both marks contain the words "PET" and "FRESH". The marks differ visually as the opponent's mark contains the additional word "ENVII" at the beginning of the mark. Furthermore, the words "PET" and "FRESH" are conjoined in the applicant's mark, whereas they appear as two separate words in the opponent's mark. However, it is my view that the visual impact of this is limited as the average consumer will readily recognise the dictionary-defined words "PET" and "FRESH" within the applicant's mark. The beginnings of words tend to have

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<sup>10</sup> Case T-24/17

more visual and aural impact than the ends<sup>11</sup>, which, in my view, results in the visual difference created by the additional word “ENVII” at the beginning of the opponent’s mark being more significant. Bearing in mind my analysis of the marks’ overall impressions, I am of the view that the marks are visually similar to a low to medium degree.

#### Aural comparison

39. The opponent does not comment on the aural similarity between the competing marks. In its submissions, the applicant accepts that the competing marks are aurally similar due to their shared use of the words “PET FRESH”/“PET FRESH” but only to a low degree due to the different first word “ENVII” in the opponent’s mark.

40. The competing marks are aurally similar as they both contain the words “PET FRESH”/“PETFRESH”. As dictionary-defined words, they will be pronounced in the ordinary manner. It is my view that, although the words “PET” and “FRESH” are conjoined in the applicant’s mark, the average consumer will readily recognise the two separate words “PET” and “FRESH” within the applicant’s mark. The conjoining of these two words will therefore not affect the pronunciation. The competing marks differ as the opponent’s mark also contains the word “ENVII”. As it appears to be a neologism, it is my view that this word will either be pronounced as “EN-VEE” or “EN-VYE”. According to the principle set out above, the beginnings of words tend to have more visual and aural impact than the ends, which, in my view, results in the aural difference created by the additional word ‘ENVII’ at the beginning of the opponent’s mark being more significant. Bearing in mind my analysis of the marks’ overall impressions, I am of the view that the marks are aurally similar to a low to medium degree.

#### Conceptual comparison

41. The opponent does not comment on the conceptual similarity between the competing marks. In its submissions, the applicant accepts that the competing marks are conceptually similar due to their shared use of the words “PET FRESH”/“PET

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<sup>11</sup> See paragraph 81 of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

FRESH” but only to a low degree due to the inclusion of the word “ENVII” in the opponent’s mark.

42. The word “ENVII” does not appear to be a dictionary-defined word. Although the applicant suggests that some consumers may understand the word “ENVII” in the opponent’s mark as a misspelling of “ENVY”, I am of the view these consumers would not constitute a significant portion. This is due to the nature of the misspelling in which the Y would be replaced with two Is. Instead, it is my view that the word “ENVII” will be perceived by the average consumer as a neologism. The Cambridge Dictionary defines the word “PET” as “an animal that you keep in your home, for pleasure rather than for work or food”. The Cambridge Dictionary defines the word “FRESH” in several ways including as an adjective meaning “clean and pleasant”. The words “PET FRESH” will be interpreted by the average consumer as a strongly allusive reference to the intended purpose of the pet cleaning goods, i.e. to make your pet fresh or clean. As the word “ENVII” is a neologism with no connection to the goods and does not mean anything that could combine with the following words “PET FRESH”, it is considered that it does not form a unitary meaning with the words “PET FRESH”.

43. The marks are conceptually similar as because they both contain “PET FRESH”/“PETFRESH”, which will be perceived as strongly alluding to, if not describing, the pet cleaning goods’ intended purpose, i.e. to make your pet fresh or clean. Whilst these two words are conjoined in the applicant’s mark, it is my view that the average consumer will understand them in the same manner as the opponent’s mark on account of the words being common and recognisable dictionary-defined words. The competing marks differ as the opponent’s mark has the additional word “ENVII” at the beginning of the mark. However, this word does not have any recognisable meaning and is therefore conceptually neutral. Due to the shared words “PETFRESH”/“PET FRESH”, insofar as the marks convey any concept, the marks as wholes are conceptually identical. However, given that the overlapping elements are strongly allusive of the goods, it is my view that it is not a distinctive overlap.

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

44. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*<sup>12</sup>, the CJEU stated that:

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

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

45. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

46. As previously explained, I am not able to consider Exhibits OP1, OP2, OP3, and OP5 as well as the paragraphs relating to them in Mr Peabody’s witness statement filed on 9 January, due to this information constituting new material which the opponent was instructed on 2 January 2025 not to submit. However, even if I had been able to

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<sup>12</sup> Case C-342/97

take them into account, they are not sufficient for the purposes of establishing that the opponent's mark enjoyed an enhanced level of distinctiveness through use. Exhibit OP1 shows the product available online, Exhibit OP2 shows a screenshot of the product listed in the Amazon best seller list, Exhibit OP3 shows that the product has been available since 14 September 2016, and Exhibit OP5 shows the opponent's Amazon advertising dashboard. Although the witness statement and Exhibit OP5 refer to the opponent's turnover and its advertising spend, there are no other details of any other marketing activities conducted to promote the mark. There are also no details in relation to the size of the relevant market or the share of that market held by goods bearing the opponent's mark. Taking these factors into account, it is my view that, even if I had been able to consider the additional evidence submitted on 9 January 2025, it would not have supported the establishment of enhanced distinctiveness of the opponent's mark. I therefore only have the inherent position to consider.

47. As stated earlier, the word "ENVII" in the opponent's mark will be interpreted by the average consumer as a neologism with no meaning. The words "PET FRESH" will be understood by the average consumer as being a strongly allusive if not descriptive reference to the purpose of the pet cleaning goods, i.e. goods used to make your pet fresh or clean. Whilst this latter element of the mark is of low distinctiveness, the inclusion of the highly distinctive neologism "ENVII" results in the mark in totality having a high level of distinctiveness.

### **Global assessment – conclusions on likelihood of confusion**

48. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no set formula for establishing a likelihood of confusion between marks; it is a global assessment where a number of factors need to be borne in mind.

49. One such factor is the interdependency principle, i.e. a lesser degree of similarity between the competing marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As mentioned above, it is necessary for me to

keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be mindful that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

50. In paragraph 4 of his witness statement, Mr Peabody submits that if the applicant's trade mark was used on the applicant's products, then "it is highly likely that it would cause confusion not only to consumers, but also to both the applicant and opponent as to who can call their goods Pet Fresh". In support of this, he refers to Exhibit OP4. This exhibit features two screenshots which show the words "pet fresh" typed into the search bar on Amazon, and the range of products yielded by the search term. In his witness statement, he argues that this "highlights existing competition between the two brands". In its submissions, the applicant argues that the relevance of the search results is "firstly, the fact that similar cleaning products of different manufacturers may be categorised together by some online retailers and displayed on the same webpage, and secondly, that the words PET and FRESH allude to the nature and purpose of the products displayed on the website". I agree with the applicant on this issue. Exhibit OP4 clearly shows that a search for the term "PET FRESH" yields not only the opponent's and applicant's goods, but also a range of other identical or similar pet-cleaning products offered by other manufacturers too. This suggests that the term "PET FRESH" is a strongly allusive reference to the purpose and nature of the goods, thus the search results returning a range of identical or highly similar products which have the intended purpose of making pets (or their environment) cleaner or fresher.

51. Earlier in this decision I found that the applicant's goods range from being similar to a low degree to being identical to the opponent's goods. The average consumer of the class 3 goods will be the general public who own or care for animals. The average consumer is likely to pay a medium amount of attention when purchasing the goods. I have found the marks to be visually similar to a low to medium degree, aurally similar to a low to medium degree, and, insofar as the competing marks convey any concept, they are conceptually identical. The earlier mark has a high level of inherent distinctive character in totality due to the inclusion of the highly distinctive neologism "ENVII", although the words "PET FRESH" within the opponent's mark are low in distinctive

character in relation to the class 3 goods due to being a strongly allusive reference to the goods' nature and purpose.

52. The overall impression of the opponent's mark lies primarily in the highly distinctive word "ENVII" and the words "PET FRESH" play a lesser role, whereas the overall impression lies solely in the conjoined word "PETFRESH" in the applicant's mark. The addition of the highly distinctive word "ENVII" at the beginning of the opponent's mark constitutes a significant difference between the marks, and it is unlikely that the average consumer would overlook this additional word. It is my view that this difference is likely to be sufficient to prevent the average consumer from mistaking one mark for the other. I therefore find that there is no likelihood of direct confusion, even in respect of identical goods.

53. This leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*<sup>13</sup>, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

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

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

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one

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<sup>13</sup> BL O/375/10

else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

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

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

54. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*<sup>14</sup>, Arnold LJ approved Mr Purvis's formulation but added:

"13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

55. It is not sufficient that a mark merely calls to mind another mark (as per *Duebros Limited v Heirler Cenovis GmbH*<sup>15</sup>). This is mere association not indirect confusion. A finding of indirect confusion should not be made merely due to a shared element within marks.

56. I also consider the relevance of *Medion v Thomson*<sup>16</sup> and the subsequent case law. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another*<sup>17</sup>, Arnold J. (as he

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<sup>14</sup> [2021] EWCA Civ 1207

<sup>15</sup> BL O/547/17

<sup>16</sup> Case C-120/04

<sup>17</sup> [2015] EWHC 1271 (Ch)

then was) considered the impact of the CJEU's judgment in *Bimbo*<sup>18</sup>, on the court's earlier judgment in *Medion*. The judge said:

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

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

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

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It

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<sup>18</sup> Case C-591/12P

remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

57. In addition to this, Emma Himsworth KC sitting as the Appointed Person in *Peninsula Business Services Limited v Face2FaceHR Partners Limited*<sup>19</sup> stated that:

“43. The question of the approach to assessment of the likelihood of confusion in circumstances where the only common element between the marks or signs in issue has no or low distinctiveness has been considered in a number of cases including *Whyte and Mackay v. Origin* [2015] EWHC 1271 (Ch) (Arnold J. as he then was) at paragraphs [43] to [45]; and *Nicoventures Holdings Limited v. The London Vape Co Ltd* [2017] EWHC 3393 (Ch) (Birss J. (as he then was) at [20] to [27]. Further guidance can also be found in the Common Communication on the Common Practice of Relative Grounds of Refusal – Likelihood of Confusion (impact of nondistinctive/weak components) dated 2 October 2014 issued the European Trade Mark and Design Network<sup>1</sup> which is referred to in the case law.

44. Taking the guidance from the case law, in circumstances where for present purposes there is no claim to acquired distinctive character and the services are identical or highly similar, the approach can be summarised as follows:

- (1) The distinctiveness of the mark as a whole must be assessed, taking into account that a minimum degree of distinctiveness must be acknowledged.
- (2) The distinctiveness of each of the components of both marks must be assessed with priority being given to the coinciding elements.
- (3) The focus of the assessment of the likelihood of confusion should be on the impact of the non-coinciding components on the overall impression of the mark.
- (4) Account must be taken of the similarities/differences in the non-coinciding elements of the marks.

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<sup>19</sup> BL O/0368/23

(5) A coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.

(6) There may be a finding of a likelihood of confusion if (a) the non-coinciding elements of the mark are of lower (or equally low) degree of distinctiveness or are of insignificant visual impact and the overall impression is similar; or (b) the overall impression of the marks is highly similar or identical.”

58. It is my view that the term “PET FRESH” in the opponent’s mark and the applicant’s mark “PETFRESH” will be understood by the relevant public as being a strongly allusive reference to the nature and purpose of the class 3 goods, i.e. goods which make your pet fresh or clean. As a result, I find that, whilst the term is not directly descriptive, the term is low in distinctiveness. I am of the view that the word “ENVII” does not form a unitary meaning with the following words “PET FRESH”. I also accept Mr Peabody’s submission in his witness statement that the distinctive word “ENVII” will be viewed as a house brand, and therefore, indicates the origin of the goods. However, it is my view that, although the strongly allusive term “PET FRESH” plays an independent distinctive role within the opponent’s mark, it does not result in there being a likelihood of confusion between the competing marks. This is because the strongly allusive nature of the words “PET FRESH” is such that I do not consider that the opponent’s mark would necessarily be viewed as a composite mark which consists of two signs (namely “ENVII” and “PET FRESH”) in the way described by *Whyte and Mackay*. Instead, it is my view that consumers will view the opponent’s mark in totality as the distinctive word “ENVII” followed by words which are a suggestive reference to the goods available under the mark. As a result, it is my view that the *Medion* principle does not apply in the immediate case.

59. It is therefore my view that the average consumer, paying a medium level of attention, would notice the differences between the marks but would not assume an economic link between the two undertakings. This is on the basis that the shared words “PET FRESH” are not so strikingly distinctive that the average consumer would assume that only the opponent was using it. Furthermore, the visual and aural differences between the marks are not consistent with a brand extension or sub-brand of a house mark, so the average consumer is unlikely to interpret it in this manner. For instance, I see no reason why an undertaking would remove the highly distinctive word

“ENVII” (the word which also gives the mark as a whole its distinctiveness) to leave them with just a strongly allusive reference to the goods, resulting in a different mark. Whilst I acknowledge that the categories in *L.A. Sugar* are not exhaustive, I can see no other basis for concluding that the average consumer would perceive the marks to be from the same, or economically linked, undertakings. Rather, it is my view that consumers would perceive the similarities between the marks as purely coincidental; in my view, they would be attributed to different undertakings using similar language which strongly alludes to the goods’ nature and purpose. I therefore find that there is no likelihood of indirect confusion between the competing marks, even in relation to identical goods.

### **Final remarks**

60. The opposition under section 5(2)(b) has failed its entirety. Subject to any successful appeal, the application will continue to registration.

### **Costs**

61. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances I award the applicant the sum of £650 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a counterstatement: £250

Preparing submissions-in-lieu: £400

62. I note that the applicant considered and responded to the opponent’s evidence within its submissions. However, the opponent’s evidence was very limited in volume and the applicant did not file any evidence of its own. As such, I have awarded a cost for preparing submissions-in-lieu which takes into account its comments on the opponent’s evidence.

63. I therefore order Bio8 Ltd to pay Lakeland Cosmetics Limited the sum of £650. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 13<sup>th</sup> day of November 2025**

**K SERRAVALLE**  
**For the Registrar**