

O/0204/23

TRADE MARKS ACT 1994

IN THE MATTER OF
TRADE MARK APPLICATION NO. 3676429
BY STADA ARZNEIMITTEL AG
TO REGISTER THE TRADE MARK:

MOVicare

IN CLASSES 5, 9, 10, 35, 38, 41, 42 & 44

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 428845
BY PAUL HARTMANN AG

Background and pleadings

1. On 18 July 2019¹, **Stada Arzneimittel AG** (“the applicant”) applied to register the trade mark **MOVicare** in the UK, under number **3676429** (“the contested mark”). The contested mark was published for opposition purposes on 19 November 2021. Registration is sought for the goods and services set out in the annex to this decision.

2. On 6 December 2021, **Paul Hartmann AG** (“the opponent”) filed a notice of opposition. The partial opposition² is brought under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all the goods and services of the application, except for the following:

Class 5:

Dietetic food and substances adapted for medical or veterinary use, food for babies; Dietary supplements for humans and animals; Material for stopping teeth, dental wax

Class 41:

Entertainment; Sporting and cultural activities.

3. To support its claim, the opponent relies upon its International Registration Designating the UK, under number **1430886**,³ **Molicare**, (“the earlier mark”). The earlier mark was registered on 1 February 2018. With effect from the same date, the opponent designated the UK as a territory in which it sought to protect the International Registration under the terms of the Madrid Agreement. Protection in the UK was granted on 17 January 2019 in respect of the goods and services in classes 5, 9, 10,

¹ On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 59 of the Withdrawal Agreement between the UK and EU, applications for EUTMs made before the end of the transition period that had received a filing date can form the basis of a UK application with the same filing date as the corresponding EUTM, provided they were refiled in the UK within 9 months of the end of the transition period. The applicant’s EUTM number 18096774 was filed at the EUIPO on 18 July 2019, whereas its UK application was filed on 3 August 2021. Accordingly, the UK application was given the same filing date as its EUTM.

² Initially, the opponent opposed all the goods and services within the application. However, following a preliminary indication issued by the Tribunal on 19 April 2022, the opponent confirmed in an email dated 3 May 2022 that it agreed with the Tribunal view that goods and services listed in paragraph 2 of this decision were dissimilar. Consequently, as goods and services which are dissimilar cannot give rise to a likelihood of confusion, they no longer form part of the opposition.

35, 39 and 42 set out in the Annex of this decision, all of which the opponent relies on for the purposes of this opposition.

4. Given the respective filing dates, the opponent's mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been protected 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. Consequently, the opponent may rely upon all of the goods and services identified without having to establish genuine use.

5. Within its notice of opposition the opponent argues that the respective goods and services are identical or similar and that the marks are similar, giving rise to a likelihood of confusion.

6. The applicant filed a counterstatement denying the ground of opposition. The applicant denies that the respective goods and services are identical or similar. Alternatively, it argues that, even where there is identity or similarity between the goods and services, the differences between the marks means no likelihood of confusion will occur.⁴

7. The opponent is professionally represented by **William Powell**, whereas the applicant is professionally represented by **Potter Clarkson LLP**. Neither party elected to file evidence. Both parties were given the option of an oral hearing, though neither asked to be heard on this matter. However, both parties filed written submissions in lieu of an oral hearing. This decision is taken following a careful perusal of the papers.

8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark case law.

⁴ Applicant's counterstatement, paragraph 8

Decision

Section 5(2)(b)

9. Sections 5(2)(b) and 5A of the Act read 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”.

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

Case law

10. 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:

(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

11. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, [...] 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”.

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

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

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

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

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

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

13. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Meric')*,⁵ the General Court ("GC") stated that:

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

14. For the purposes of considering the issue of similarity of goods or services, 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 (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

15. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that 'complementary' means:

⁵ Case T-133/05

“[...] 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 *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. (as he then was), sitting as the Appointed Person, noted in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL O/255/13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes”,

whilst on the other hand:

“[...] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together”.

17. The goods and services to be compared are those set out in the Annex to this decision with the exception of those listed in paragraph 2.

Class 5

Sanitary preparations for medical purposes; disinfectants; materials for dressings

18. The applicant’s above terms are explicitly named within the opponent’s specification. As such, I find that these goods are identical.

Plasters

19. The opponent's term "medical and surgical plasters" would be encompassed by the above term. Consequently, the goods are *Meric* identical.

Pharmaceuticals

20. The opponent's specification includes the term "chemical products for curative purposes and healthcare (medical), in particular for care of, cleansing and protecting the skin" which is a type of pharmaceutical. In view of this, the applicant's broader term covers the opponent's term. As a result, I find that the goods are identical under the *Meric* principle.

Medical and veterinary preparations; Diagnostic preparations for medical purposes

21. The goods listed in the opponent's specification do not explicitly state whether they relate to human or animal care, therefore I have interpreted them as relating to both. The applicant's above terms and the opponent's class 5 term "sanitary preparations for medical purposes" are both substances (often premixed) for medical purposes, therefore, the nature and intended purpose of the goods overlap. However, the method of use differs. Sanitary preparations for medical use are typically applied to surfaces (including the surface of the body) in medical settings, to remove dirt and bacteria that cause disease, whilst the applicant's goods include substances used to treat and diagnose medical conditions, either by adding a sample to the solution to obtain a result, or ingesting/injecting the solution to treat medical conditions. It is possible that these different types of preparations for medical purposes would be manufactured and sold by the same companies, especially as they target the same users i.e. medical professionals. It is also common for sanitary preparations to be used alongside diagnostic preparations to obtain accurate medical results. For example, to sanitise equipment or skin before taking a sample to test with a diagnostic preparation. Without the use of sanitary preparations to obtain uncontaminated samples, it would often be impossible for diagnostic preparations to provide precise medical results. Furthermore, consumers may believe these goods are produced and offered by the same companies. Consequently, there is a degree of complementary between the goods. However, the goods cannot perform the roles of each other and, therefore, they

are not competitive in nature. Overall, I find that the goods are similar to a medium degree.

Class 9

Computer software

22. This term is expressly named in both the applicant's and opponent's specifications. As such, the goods are identical.

Mobile apps

23. The applicant's above term and the opponent's term "computer software, in particular for mobile devices, including mobile telephones" are simply an alternative way of expressing the same term. Therefore, it follows that the goods are identical.

Document management software, Virtual reality software, Artificial intelligence and computer training software, Artificial intelligence software for healthcare, Augmented reality software, Machine-learning software for healthcare purposes, [...] interactive software, mobile software, content management software

24. These are all types of non-downloadable software. Accordingly, they fall into the opponent's broader term "computer software". It follows that these goods are identical under the principle in *Meric*.

Downloaded software applications

25. The applied for good is a type of downloadable software, therefore it would be included under the opponent's terms "downloadable software". As such, these terms are *Meric* identical.

Computer databases

26. The applicant's goods are not identical to the opponent's goods "computer software" per se. A database is a collection of information usually held on computer hardware, such as, hard drives and accessed through the use of computer software.

As such, the nature and method of use differ from computer software. Computer software is broad enough to include database software which clearly overlap in purpose. The goods are also complementary as database software is essential to computer databases. Furthermore, consumers may believe that the responsibility for both the databases and the software lies with the same undertaking. Trade channels will overlap as companies that offer database software may also provide computer databases. Users will also overlap. However, the goods are not competitive in nature as databases cannot replace the function of computer software. Overall, I find that the goods are similar to between a medium and high degree.

Information technology and audiovisual equipment

27. The applicant's goods would include computer hardware which differs in nature and method of use to the opponent's term "computer software". Computer hardware is the physical equipment used for processing and storing data, whereas software refers to the electronic programmes which run on the hardware. The intended purpose overlap insofar as both goods enable a computer system to function. The goods are complementary as computer hardware is fundamental to the use of computer software and consumers may presume that the same company is responsible for both computer hardware and computer software, particularly software that is preloaded into the computer system. Trade channels will also overlap as the same retail stores are likely to sell both the computer hardware and computer software, and users will be the same. However, computer software cannot carry out the function of computer hardware or vice versa. Accordingly, I find there to be a medium degree of similarity between the goods.

Humanoid robots with artificial intelligence

28. Computer software would include artificial intelligence software. As such, there would be a degree of complementarity between the goods as the applicant's humanoid robots would need artificial intelligence software to function; furthermore, it would be reasonable for consumers to believe that the undertaking that created the humanoid robot would also create the artificial intelligence software for the humanoid robot to function. Trade channels are also likely to be the same, as technology companies that

produce humanoid robots are also likely to create specific artificial intelligence software. Moreover, it is likely the goods will target the same users. However, the nature differs as one is simply the artificial intelligence software that could be placed into a car or computer and the other includes the physical form/apparatus that encases the artificial intelligence software. Due to the physical nature of the applicant's humanoid robots, the method of use and intended purpose would also differ. Humanoid robots with artificial intelligence have a physical presence that could be used to automate a variety of tasks that human beings perform. Artificial intelligence software itself cannot be used in the same manner or for the same purpose. Overall, I find that the goods are similar to a medium degree.

Recorded and downloadable media

29. Media is a form of communications such as film or music. The applicant's term would include media that is pre-recorded on DVDs as well as media downloadable from the internet. These goods have some similarity with the opponent's term "computer software" which would include computer software for watching multimedia content. The nature, method of use and intended purpose differ as media such as film and music are watched or listened to for the purpose of enjoyment, whilst computer software, even multimedia software, is used to process, store and display data for the purpose of allowing users to watch media. Although multimedia software may be needed to view films or listen to music on a computer consumers will not assume that the multimedia software and a pre-recorded downloadable film would be produced by the same undertaking, as such, the goods are not complementary per the case law. Trade channels will differ as film and music companies will produce and sell the pre-recorded downloadable media whilst software companies will create and sell software for viewing such media content. However, users will be the same. Taking all factors into account, the goods are similar to a low degree.

Electronic publications, downloadable

30. I have compared the applicant's above goods to the opponent's term "computer software". I acknowledge that the applicant's term would involve the use of computer software to download the publication, however, a downloadable publication is not a

computer program or software itself. Similarly, the importance of the publication lies in the information contained in the publication rather than the use of software to present the data or information. Accordingly, they differ in nature, method of use and intended purpose. The trade channels will differ as downloadable publications will not be provided by the same undertakings that offer computer software. The goods are not competitive, neither are the goods complementary in nature, as although computer software may be needed to access the publication, consumers will not believe that the responsibility for both these goods lies with the same undertaking. Users may overlap, but this is not enough to engage similarity. As a result, I find that the goods are dissimilar.

Scientific, research, navigation, surveying, photographic, cinematographic, life-saving and teaching apparatus and instruments; Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data

31. The applicant's above terms include apparatus and equipment that are used in scientific laboratories, or live-saving equipment such as bullet proof clothing or smoke alarms. For clarity, it does not include medical apparatus or instruments. Although some of these goods may require the use of the opponent's "computer software", that is not determinative. For example, scientific equipment may use computer software to process and display digital information, however the physical nature of these goods is different, as is the method of use and the intended purpose. Computer software is used by inputting data for the purpose of processing, storing, or display data, whereas scientific equipment is used in laboratories and will have a specific purpose, i.e. to separate chemicals. Trade channels would differ as consumers would not expect companies that produced the applied-for apparatus and instruments to also provide computer software, however users may overlap. The goods are not in competition with one another as software by itself would not be able to carry out the functions of the physical apparatus. Neither are the goods complementary as although software may be important to the operation of some apparatus and equipment, consumers are unlikely to believe that the responsibility for the competing goods lies with the same undertaking. Consequently, overall, I find that the goods are not similar.

Class 10

Orthopedic articles

32. As this term is expressly named in the specifications of both the applicant and the opponent, it follows that these goods are identical.

Surgical, medical, dental and veterinary apparatus and instruments; Medical apparatus and instruments

33. The applicant's above terms are broad and cover all the goods within the opponent's class 10 specification, especially as terms such as "clothing for use in operating theatres" and "operating caps and head coverings for operating" are not specific and could be used in a surgical, medical, dental or veterinary setting. Consequently, I find the goods are identical under the principle in *Meric*.

Prosthetics and artificial implants; Artificial limbs, [...]; Orthopedic and mobility aids; therapeutic and assistive devices adapted for the disabled; Physical therapy equipment; Massage apparatus

34. Orthopedics is "the branch of medicine dealing with the treatment of deformities, diseases, and injuries of the bones, joints, muscles, etc..".⁶ It follows that the applicant's above terms are all types of orthopedic items, as they are items that are used for the purpose of attempting to correct deformities within a person's bones, joints or muscles. Consequently, they fall into the opponent's broader term "Orthopedic articles" and are, therefore, *Meric* identical.

Applicators for medications; Medical apparatus for introducing pharmaceutical preparations into the human body.

35. The opponent submits that the applied for terms are similar to its terms in class 10, however, class 10 does not contain similar goods. Instead, I have considered the opponent's class 5 term "chemical products for curative purposes and healthcare (medical), in particular for care of, cleansing and protecting the skin" which is a type

⁶ <https://www.collinsdictionary.com/dictionary/english/orthopedics>

of medication. The goods differ in nature, method of use and purpose as the opponent's good is a medication applied to the skin for the purpose of treating an infection, whereas the applicant's goods are the applicators and medical apparatus used for the purpose of applying medications to the skin so that the medication can perform its role. The trade channels may overlap as some companies that supply medication may also provide the applicators or apparatus to assist in applying the medication. In fact, it is not uncommon for them to be sold in the same box. The applicator goods are useful, but not inescapably essential to the application of medication, as such the goods are not complementary. Neither are the goods competitive in nature as they cannot satisfy the role of the other. However, users will be the same. Taking everything into account, these goods are similar to low level.

Artificial [...] eyes and teeth

36. Unlike artificial limbs, artificial eyes and teeth are not similar to the opponent's "orthopedic articles". As discussed above orthopedics specifically deals with the treatment of deformities, diseases, and injuries in the bones, joints and muscles. Orthopedic articles are specifically attached or used on a person's body for the purpose of enabling people to weight bare or move. Whilst artificial eyes and teeth have different purposes; typically, you cannot see out of an artificial eye and therefore these artificial articles are more often fitted for confidence and cosmetic reasons. Consequently, they differ in nature, method of use and intended purpose. The trade channels are likely to differ, they are likely to be provided by different companies and will be distributed to different branches of medical/dental establishments. For example, artificial teeth are likely to be offered by a company selling dental products to dentists, and artificial eyes are likely to be offered by companies that deal with optometry. In contrast orthopedic articles are likely to be produced by companies that specifically offer goods related to orthopedics. The users will also differ. Moreover, the goods are not complementary as they are not essential for the use of one another, regardless, consumers would not reasonably expect the same undertaking to be responsible for producing the opposing goods. Neither are they competitive in nature as the goods cannot satisfy the role of the other, i.e. an artificial eye cannot be replaced by orthopedic articles. Overall, I find that the goods are dissimilar.

Class 35

Business consultancy and advisory services, in particular counselling provided by doctors' surgeries and clinics

37. Both parties having included within their specification the term “Business consultancy and advisory services” as the phrase “in particular” within the applicant’s term merely gives an example of the types of services the applicant wishes to rely upon within its broader term “business consultancy and advisory services”. As such, the above term is expressly named within the competing specifications and is, therefore, identical. However, if I am wrong, the opponent’s broad term will cover the applicant’s applied-for term and as such it will be *Meric* identical in any event.

Wholesale and retail services in connection with computer hardware, computer software, [...]

38. The above applied-for term and the opponent’s class 35 term “retail and wholesale services in relation to computer software and computer hardware” are self-evidently identical.

Wholesale and retail services in connection with [...] mobile apps [...]

39. Mobile apps are a type of computer software that are used on mobile devices, such as mobile phones and mobile tablets, they can be both downloaded or found on the initial set up of a mobile device such as a “settings app”. In my view, the opponent’s term “retail and wholesale services in relation to computer software and computer hardware” would, therefore, cover wholesale and retail services in connection with mobile apps. Accordingly, these services are *Meric* identical.

Wholesale and retail services in connection with [...] diagnostic apparatus for medical purposes, application devices for medicines and medical apparatus for introducing pharmaceutical preparations into the human body, namely needles and syringes.

40. In my opinion, the goods used in the applicant’s above services can all broadly be described as medical supplies, therefore, it follows that the opponent’s services “retail

and wholesale services, including via the internet, relating to medical supplies [...]” would encompass the applied-for services. As a result, I find that these services are identical under the *Meric* principle.

Class 38

Providing of user access to internet platforms, in particular in connection with patient support programmes; Transmission of information relating to pharmaceuticals, medicine and hygiene; Providing of internet forums; Electronic communication by means of chatrooms, chat lines and Internet forums; Electronic message exchange; Communication by online blogs

41. All the applied-for services are in the context of telecommunication services that provide a means of communication to online users. The opponent has not specified which class 9 or class 42 terms are relied upon to oppose the applicant’s above services. In the absence of details on this matter, I will compare the applicant’s services against the opponent’s class 9 goods “computer software” as I find that this represents the opponent’s best case. Although computer software may be needed for the transmission of information or to enable users to communicate online, these goods and service are fundamentally different in nature, method of use and intended purpose. The services are engaged for the purpose of enabling online communication, whereas computer software merely allows the input, display, processing or storage of data through direct user interaction. The trade channels would differ, as companies offering services for the transmission of information and telecommunication services such as chatrooms and electronic message exchange are unlikely to create and offer computer software themselves. The goods and services are not complementary as although the use of computer software may be important for the transmission of information and online communication services, consumers would not assume that same undertaking is responsible for both the goods and services. Neither are they competitive in nature as computer software by itself is not capable of fulfilling the role of the services. Although the users might overlap this is not sufficient for a finding of similarity. As a result, I find that the goods and services are dissimilar.

42. For completeness I have also considered the applicant's services against the opponent's class 42 services, however, none provide a more favourable outcome for the opponent.

Class 41

Education; Providing of training; Arranging and conducting of training courses and seminars, including online; Educational services in the healthcare sector

43. The opponent states within its submissions:

"The opponent's Mark does not cover class 41 services. However, the services covered by the Applicant's class 41 services are all highly similar to the Opponent's Goods and Services. Both parties provide goods and services within the medical field. They therefore have the same consumers. The end services provided by the Applicant is the same as that of the Opponent's Goods and Services. It would therefore be likely that the Opponent would also provide these Services. The relevant public are likely to assume that these educational services are economically linked to the Opponent."

44. I disagree with the opponent's submissions in relation to the similarity between the applicant's class 41 services referred to above and the opponent's goods and services on the core basis that both parties provide medical services. As the opponent's specification does not include class 41 services, I have instead considered each of the opponent's terms across the entirety of its specification relied upon, however, none have any obvious relation to the applicant's education and training services. Taking what I consider to be the opponent's best case, I have considered the applicant's education and training services and the opponent's goods in classes 5 and 10. These goods are intrinsically different in nature to educational and training services, even where the subject matter of the educational services relates to the medical goods in classes 5 and 10. The method of use and intended purpose differ; the goods are to be used for physically treating medical conditions, whereas users of the educational services will attend a scheduled course for the purpose of learning. The trade channels will be different as typically companies that provide medical goods will not provide

training. The educational services can be important to the use of the goods in circumstances where professionals are educated on the best techniques and materials to use for suturing a wound for example. However, it is reasonable for consumers to believe that the responsibility for the goods and services rests with different undertakings, as such they are not complementary. Neither are they competitive in nature as educational services cannot relinquish the role of goods in class 5 and 10. Some users may overlap, i.e. those in the medical profession, but this is not enough by itself to engage similarity. Overall, taking everything into account, I find that the goods and services are dissimilar.

45. However, I have also considered whether the applicant's educational services above are similar to the opponent's class 9 term "computer software". In my view, computer software is broad enough to encompass educational software. The goods and services clearly differ in nature and method of use as users of the services will attend a scheduled course, whereas the users of the opponent's goods require direct user interaction with the goods themselves. Nevertheless, there is an overlap in intended purpose where the software is for educational purposes; furthermore, users would overlap. However, without evidence to the contrary, it is my view that trade channels will differ as educational services that provide the training are unlikely to produce the educational software themselves. There will be a degree of competition between the goods and services; individuals could choose to attend the applicant's education and training services or alternatively purchase software that delivers the equivalent education and training, albeit, without any interaction with a skilled and knowledgeable tutor. However, the goods and services will not be complementary, although software may be used for the provision of educational services it is not essential, nor would consumers expect the same undertaking to bear responsibility for both computer software, including educational software, and the education and training services themselves. In weighing all the factors, I find that the goods and services are similar to between a low and medium degree.

Publication of information relating to health-related training courses, health and fitness training and physical exercise, including via the internet and via mobile apps.

46. The opponent has failed to specify exactly which of its goods and services it believes is similar to the applicant's above terms, instead I have a rather vague comparison relying on all the goods and services of the earlier mark. In light of this, I have decided to compare the applicant's above services against the opponent's terms "Computer software, in particular for mobile devices, including mobile telephones; computer software applications (apps); computer software". The competing goods and services are intrinsically different in nature. Companies providing services for the publication of information will be approached by organisations for the purpose of publishing important information. Therefore, the method of use and intended purpose clearly differs to the opponent's goods. I acknowledge that computer software is important to the publication of information, especially information published on the internet and on mobile apps, but it does not automatically follow that the goods are complementary to the services; consumers would not believe that the companies offering publication services would also produce the computer software to facilitate these services. Neither are the goods and services competitive as they cannot fulfil each other's roles. Moreover, the trade channels would differ as would the end users. Taking everything into account, the goods and services are dissimilar.

Class 42

Scientific and technological services and research and design relating thereto

47. In relation to the applicant's term "scientific and technological services and research and design relating thereto", the applicant accepts⁷ that this is an identical term. I agree to the extent that the applicant's term would be encompassed by the opponent's broader term "scientific and technological services" and is therefore, identical under the principle outlined in *Meric*.

Research and development in the field of medicine and veterinaries; Pharmaceutical research and development; Design and development of computer hardware and computer software; Computer software design; Computer software consultancy;

⁷ Applicant's written submission, paragraph 29

Providing online, non-downloadable software; Creation, maintenance and adaptation of software; Design and development of virtual reality software in the health sector.

48. The applicant's above class 42 terms would all fall into the opponent's broader term "scientific and technological services" as the applicant's terms are all services in the fields of science and technology. Accordingly, these terms are *Meric* identical. However, if I am wrong in relation to the creation, design, development, maintenance, consultancy and provision of software and hardware services, then they would still be encompassed by the opponent's terms "Design and development of computer hardware and software; development of software and providing temporary use of on-line applications; provision of technical consultancy relating to the development of software; design, development, installation, monitoring, maintenance and updating of computer programs, creating programs for data processing". Therefore, these terms are *Meric* identical in any event.

Class 44

Medical services; Medical care; Consultancy relating to health care [...]; Provision of medical information relating to diseases via the internet; Dissemination of medical information by means of an interactive platform in connection with the treatment of osteoporosis.

49. All of the applicant's above class 44 services all relate to the provision of medical services including providing medical care and medical information, including in relation to osteoporosis which is a condition relating to the fragility of bones.⁸ I will compare these terms with the opponent's medical goods, taking in particular "orthopedic articles" in class 10. The competing terms differ in nature and method of use as the opponent's term is a good used for the specific purpose of physically assisting a weakened or deformed bone structure in a patient's spine or limb. Whilst the applicant's terms are services provided to the user through interaction with medical centres and medical professionals. However, the overarching purpose of both is to treat or improve medical conditions for patients. Trade channels would differ as

⁸ <https://www.collinsdictionary.com/dictionary/english/osteoporosis>

companies that provide the medical information and services are not likely to also produce the orthopedic articles themselves. The users of these goods and services would be the same, i.e. patients seeking advice and treatment for their health conditions. Although the services require the goods in order to perform the services, without evidence to the contrary, I do not consider them to be complementary as consumers will not assume that the goods and services are produced by the same company. Furthermore, the goods are not competitive in nature as the goods themselves cannot perform the role of the services. Considering all the factors, I find that the goods and services are similar to a low degree.

Human hygiene [...] care

50. The applicant's above services are for the purpose of keeping people or their environment clean with the aim of preventing disease or infection. Therefore, it overlaps in purpose with the opponent's class 10 terms "draw-sheets for sick beds and incontinence sheets (included in class 10); draw-sheets for sick beds, with an absorbent layer above an outer layer impermeable to liquids; catheters, urinals, in particular condom urinals for medical purposes; urinary leg bags, urine drainage tubes; goods made using textile composite materials, namely, surgical cloths, table and bed sterile sheets, all of the aforesaid goods being disposable articles for hospital use; clothing for use in operating theatres; bed liners of cellulose, unwoven material, plastic, textile fabric and/or rubber for incontinents [sic] or invalids; medical mouth and nose masks; operating caps and head coverings for operating" as these are all goods used for the purpose of keeping an individual and their environment clean or sterile in order to prevent disease or infection. However, the physical nature and method of use differ, as the applicant's terms are services provided by professionals, whilst the opponent's terms are goods used directly on a patient or applied to their environment. Users would differ as the users of the services would be patients, conversely the users of the goods would be the medical professionals and medical practices. Trade channels will also differ as companies offering the services do not typically produce the goods used in the provision of these services. The goods and services are not complementary as, although the goods may be important to the provision of the services, consumers would not expect the responsibility for them to rest with the same undertaking. Neither are the goods and services competitive in nature as the goods by themselves cannot

satisfy the requirement for the services. Overall, I consider the goods and services are similar to a low degree.

Consultancy relating to [...] diet; [...] beauty care

51. The opponent has not outlined where it believes any similarity to be. In the absence of any focused pleadings, it is unclear which terms are obviously similar. Therefore, I consider the opponent's best case rests in the term "“retail and wholesale services, including via the internet, relating to [...] dietetic substances [...]”". The nature of these services clearly differs as does the method of use and intended purpose. The applicant's services involve professionals giving advice on diet and beauty. Conversely, the opponent's services are retail services for the purpose of selling dietetic substances. The trade channels differ as professionals offering advice in relation to diet do not typically provide retail service for goods related to diet. The services are not essential to one another, and are, therefore, not complementary. Neither are the services competitive in nature as they have distinct roles. The users may overlap but that is not enough for a finding of similarity. Overall, I find that the services are not similar.

52. For the avoidance of doubt, I have also considered the other goods and services relied upon across the specification of the earlier mark and none puts the opponent in a more favourable position.

53. As some degree of similarity between the goods is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition must fail against goods of the application that I have found to be dissimilar, namely:⁹

Class 9: Scientific, research, navigation, surveying, photographic, cinematographic, life-saving and teaching apparatus and instruments; Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; Electronic publications, downloadable

⁹ *eSure Insurance v Direct Line Insurance* [2008] ETMR 77 CA

- Class 10: Artificial [...] eyes and teeth
- Class 38: Providing of user access to internet platforms, in particular in connection with patient support programmes; Transmission of information relating to pharmaceuticals, medicine and hygiene; Providing of internet forums; Electronic communication by means of chatrooms, chat lines and Internet forums; Electronic message exchange; Communication by online blogs
- Class 41: Publication of information relating to health-related training courses, health and fitness training and physical exercise, including via the internet and via mobile apps.
- Class 44: Consultancy relating to [...] diet; [...] beauty care

The average consumer and the nature of the purchasing act

54. 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 or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

55. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. (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.”

56. In *Olimp Laboratories sp. z o.o. v EUIPO*, Case T-817/19, EU:T:2021:41, and *Bayer AG v EUIPO*, Case T-261/17, the GC held that the average consumer pays a heightened level of attention when selecting pharmaceutical products, including such products available without a prescription, and that the average consumer of these goods would be the medical professionals and pharmacists on the one hand and patients, i.e. the general public, on the other.

57. With respect to the goods and services, it is necessary to identify two groups of relevant consumers, namely, members of the general public, and professionals (medical, healthcare, or IT) or business users.

58. In relation to goods in classes 5 and 10, for the general public these types of products include pharmaceutical products some of which are not available to the public without a prescription and would most likely be given in a hospital or other medical centres. Others will be available without prescription and are typically purchased in retail outlets or pharmacies over the counter. The frequency at which the goods are purchased will vary, depending on whether they are required for occasional use or as part of ongoing treatment. The goods are likely to vary in price depending on their nature, but the price is not likely to be at the highest end of the spectrum. Overall, taking account of the finding in *Bayer AG*, I find that general public would pay a higher than average degree of attention in the selection process, considering factors such as quality, suitability, effectiveness, and possible side effects. In my view, visual considerations would dominate the purchasing process, though I do not discount aural considerations entirely, as it is possible that consumers will have conversations with medical professionals. For medical professionals these goods are typically found in specialist brochures or their online equivalent, they will be purchased frequently to meet the continuous needs of medical facilities. The price is likely to vary and will be reliant on the nature of the goods. Medical professionals are likely to consider relevant clinical trials, safety, effectiveness and costs of the goods upon purchase. Weighing the relevant factors, I consider medical professionals will also exercise a higher than average degree of attention when selecting the goods. Overall, it is my view that the purchasing process would be primarily visual in nature, though I do not discount that

aural considerations will play their part as it is possible that discussions will take place with medical suppliers before purchase.

59. With regards to goods in class 9, the average consumer is likely to be both the general public, and business users or I.T professionals. The frequency and cost of these purchases will vary for members of the general public. As for businesses and professionals, purchases are likely to be recurrent to support ongoing business and professional demands, varying in price depending on the nature of the goods. Overall, the purchasing process will be more considered for business and professional users, however, for members of the general public it is not likely to be merely casual. When selecting the products, both sets of consumers will consider factors such as, the cost, quality, and specification of the goods, however, business and professional users will also have to consider the impact of the goods on their business or working environment. Taking the above factors into account, I find that, overall, business and professional users demonstrate a higher than average level of attention in respect of these goods, whereas members of the general public will display an average level of attention. The goods are typically sold in retail outlets such as electrical and computer or gaming stores, or their online equivalents, where the goods will be self-selected. In these circumstances, visual considerations would dominate, though I do not discount aural considerations entirely, as it is possible that consumers will have conversations with sales assistants or receive word of mouth recommendations. As such, overall, the purchasing process would be primarily visual in nature, though I do not discount aural considerations entirely.

60. In relation to the services, the average consumer will include both the general public and business users. For the general public, the frequency at which the services are purchased will vary depending on their nature, as will the price. The selection process is likely to be careful for services connected with health and I.T, and more casual for other services, such as, retail services. Factors such as quality, suitability, ease of use and cost will be considered in the selection process. Overall, the general public is likely to pay an average degree of attention in the selection of the services, save for, medical services where they will demonstrate a higher than average degree of attention. The services are likely to be purchased directly from the service provider after viewing information in a catalogue, brochure or the service provider's website or

in the case of retail services, shop fronts. In these circumstances, I find that visual considerations would dominate, however, I do not discount aural considerations entirely as it is possible that the purchasing of these kinds of services would involve discussions with professionals, or retail assistants.

61. As for business users, the frequency at which these services will be purchased will vary based on the nature of the services, however they are likely to be fairly regular to support ongoing business demands. The price will depend on the nature and the extent of the services required to meet business needs. Selection of these services will be important to ensure success for businesses, factors such as quality, compatibility, and cost will be considered. As a result, business users would pay a higher than average degree of attention. The services are likely to be purchased directly from the service provider after viewing in specialist catalogue or its online equivalent. I find that the visual considerations would dominate the purchasing process, although aural considerations will play their part where orders are placed by telephone, or conversations are had with services provider's representatives.

Distinctive character of the earlier mark

62. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

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

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

63. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods or services will be somewhere in between. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion, the more distinctive the earlier mark, the greater the likelihood of confusion.

64. Further, although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use (nor was it required to do so). Consequently, I have only the inherent position to consider.

65. The earlier mark is in word-only format and consists of the word “Molicare”. The word has no dictionary meaning and is, instead, likely to be perceived as an invented word. Nevertheless, consumers tend to naturally break down trade marks into elements which they can identify and understand, as such, they will identify the word “care” within the earlier mark. In the context of some of the goods and services the mark as a whole will be seen as allusive of their intended purpose. For example, medical services, retail services for medical goods and the medical goods themselves in classes 5 and 10. Overall, I consider that the earlier mark, as a whole, possesses a medium of inherent distinctive character for the goods and services it is allusive of. As for goods and services that are not connected to the notion of care, (i.e. computer

goods and services not related to medical services) the mark will have a high degree of inherent distinctive character.

Comparison of the marks

66. It is clear from *Sabel BV v. Puma AG*¹⁰ 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 them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, Case C-591/12P, that:

“34. [...] 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.”

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

68. The respective trade marks are shown below:

Earlier mark	Contested mark
Molicare	MOVicare

¹⁰ Case C-251/95, paragraph 23

Overall impressions

69. The earlier mark is in word-only format and consists of the word “Molicare”. As there are no other components to the mark, the overall impression of the mark resides in the word itself.

70. The contested mark is also presented in word-only format and comprises the word “MOVicare”. As it is the only element of the mark, the overall impression lies in the word itself.

Visual comparison

71. The competing marks are visually similar as they both contain an invented eight letter word which are identical, except for their respective third letters (“L” in the earlier mark and “V” in the contested mark). I do not consider the distinction in letter case between the earlier mark and the contested mark to be a point of significant difference between them. This is because the registration of word-only marks provides protection for the words themselves, irrespective of whether they are presented in upper or lower case. Taking into account the overall impressions, I find that the competing marks are visually similar to a high degree.

Aural comparison

72. The applicant argues¹¹ “There are clear visual and phonetic differences between the marks as the beginning of the marks “MOL vs MOV” have a very different pronunciation – the Opponent’s Marks [sic] would be pronounced MOLI-CARE, whereas the Applicant’s Mark would be pronounced MOV-I-CARE, and therefore, overall have sufficient visual and phonetic differences to find the marks to be dissimilar.” I disagree. In my view, the marks are likely to be phonetically split the same way due to their identical composition. Consequently, the opponent’s mark will be articulated as “MOL-EE-CARE”, while the applicant’s mark will be pronounced as “MOV-EE-CARE”. Both marks comprise three syllables, the last two syllables being identical. The beginning of the first syllable is also the same. The only aural difference

¹¹ Applicant’s written submissions, paragraph 13

between the competing marks arises from the ends of the respective first syllables. Consequently, I find the marks to be aurally similar to a high degree.

Conceptual comparison

73. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.¹² The applicant contends that “There is no conceptual similarity between the marks ‘MOLICARE vs MOVicare””.¹³ I have no submissions from the opponent as to whether either of the marks will convey any meaning to consumers. In the contested mark, the word “MOVicare” will be perceived by the average consumer as an invented word, though one which conveys the concept of care. This is also true of the earlier mark “Molicare”. Bearing in mind my assessment of the overall impressions, to the extent that the marks convey a meaning, they are conceptually identical.

Likelihood of confusion

74. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services, and vice versa. It is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be aware of the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

75. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods or services down to the responsible undertakings being the same or related.

¹² *Ruiz Picasso v OHIM* [2006] E.T.M.R 29.

¹³ Applicant’s written submissions, paragraph 14.

76. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C. (as he then was), as the Appointed Person, explained that:

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

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

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

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

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent

with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

77. These examples are not exhaustive but provide helpful focus.

78. Furthermore, in *Liverpool Gin*,¹⁴ Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (Case BL O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

79. I have found that the parties’ goods are identical or similar to between a high and low degree. I have found that the average consumer of the goods and services will be either the general public, or professionals in the fields of medicine/healthcare and IT, and business users. The general public will pay an average degree of attention for the goods and services, except for medical goods and services where they will exercise a higher than average degree of attention. As for professionals and business users, they will demonstrate a higher than average level of attention in relation to all the goods and services. I have found that the purchasing process will be largely visual, however, I have not discounted aural considerations. The overall impression of the competing marks lies in their respective words “Molicare” and “MOVicare”. I have found that the earlier mark and the contested mark are visually and aurally similar to a high degree, and conceptually identical. I have also found that the earlier mark possesses a medium degree of inherent distinctive character for goods where the mark is allusive of its intended purpose and a high degree of inherent distinctive character where the goods are unconnected to the mark.

80. I acknowledge the difference between the marks in the third letter of the respective marks i.e. “L” and “V”. However, the marks are identical in length, both consisting of eight letters with seven identical letters. The beginnings of the competing marks are identical, a position to which the attention of the consumer is usually directed,¹⁵ as are

¹⁴ *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

¹⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

the ends of the marks. As noted above, I do not consider the difference in case between the marks to be significant as the registration of word-only marks provides protection for the words themselves, irrespective of whether they are presented in upper or lower case. In my opinion, the difference in the third letters of the competing marks could be misremembered. Aurally, the last two syllables of the competing marks are identical, with the only difference in sound arising from the end of the first syllable. Furthermore, even though both marks are invented words, they both convey the notion of care. Taking into account the overall levels of similarity between the marks, the aforementioned differences deriving from a single letter difference are likely to be insufficient to distinguish the marks from one another. In my judgement, taking into consideration imperfect recollection, it is highly likely that consumers, paying even a higher than average level of attention during the purchasing process, would misremember the marks for one another, and fail to recall the differences; especially as the difference is located in the centre of the mark. Overall, taking into consideration the similarities, I find that there is a likelihood of direct confusion, even for goods and services that are similar only to a low degree. Furthermore, for goods and services which have no direct connection to the notion of care, the earlier mark is more distinctive. This leans further towards, rather than away from, the existence of a likelihood of confusion.

Conclusion

81. The opposition under section 5(2)(b) of the Act has been partially successful. Subject to any appeal against my decision, the application will be refused in relation to the following goods and services:

Class 5: Pharmaceuticals, medical and veterinary preparations; Sanitary preparations for medical purposes; Diagnostic preparations for medical purposes; Plasters, materials for dressings; Disinfectants.

Class 9: Information technology and audiovisual equipment; Recorded and downloadable media, computer software, Document management software, Virtual reality software, Artificial

intelligence and computer training software, Artificial intelligence software for healthcare, Augmented reality software, Machine-learning software for healthcare purposes, Mobile apps, Downloadable software applications, Interactive software, Mobile software, Content management software; Humanoid robots with artificial intelligence; Computer databases.

Class 10: Surgical, medical, dental and veterinary apparatus and instruments; Medical apparatus and instruments; Prosthetics and artificial implants; Artificial limbs, [...]; Orthopedic articles; Orthopedic and mobility aids; therapeutic and assistive devices adapted for the disabled; Physical therapy equipment; Massage apparatus; Applicators for medications; Medical apparatus for introducing pharmaceutical preparations into the human body.

Class 35: Business consultancy and advisory services, In particular counselling provided by doctors' surgeries and clinics; Wholesale and retail services in connection with computer hardware, computer software, mobile apps, diagnostic apparatus for medical purposes, application devices for medicines and medical apparatus for introducing pharmaceutical preparations into the human body, namely needles and syringes.

Class 41: Education; Providing of training; Arranging and conducting of training courses and seminars, including online; Educational services in the healthcare sector

Class 42: Scientific and technological services and research and design relating thereto; Research and development in the field of medicine and veterinaries; Pharmaceutical research and development; Design and development of computer hardware and computer software; Computer software design; Computer software consultancy; Providing online, non-downloadable software; Creation, maintenance and adaptation of software;

Design and development of virtual reality software in the health sector.

Class 44: Medical services; Medical care; Human hygiene [...]; Consultancy relating to health care [...]; Provision of medical information relating to diseases via the internet; Dissemination of medical information by means of an interactive platform in connection with the treatment of osteoporosis.

82. The application will proceed to registration in the UK in respect of the following goods and services, which were not opposed or against which the opposition has failed:

Class 5: Dietetic food and substances adapted for medical or veterinary use, food for babies; Dietary supplements for humans and animals; Material for stopping teeth, dental wax

Class 9: Scientific, research, navigation, surveying, photographic, cinematographic, life-saving and teaching apparatus and instruments; Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; Electronic publications, downloadable

Class 10: Artificial [...] eyes and teeth

Class 38: Providing of user access to internet platforms, in particular in connection with patient support programmes; Transmission of information relating to pharmaceuticals, medicine and hygiene; Providing of internet forums; Electronic communication by means of chatrooms, chat lines and Internet forums; Electronic message exchange; Communication by online blogs

Class 41: Entertainment; Sporting and cultural activities; Publication of information relating to health-related training courses, health and

fitness training and physical exercise, including via the internet and via mobile apps.

Class 44: Consultancy relating to [...] diet; [...] beauty care

Costs

83. As the opponent has enjoyed a greater measure of success, it is entitled to a contribution towards its costs based upon the scale published in Annex A of Tribunal Practice Notice 2 of 2016, with an appropriate reduction to reflect the applicant's level of success. Applying this guidance, I award the opponent the sum of **£500**, which is calculated as follows:

Official fee: ¹⁶	£100
Preparing the notice of opposition and considering the applicant's counterstatement:	£150
Preparing written submissions:	£250
Total:	£500

84. Accordingly, I hereby order **Stada Arzneimittel AG** to pay **Paul Hartmann AG** the sum of **£500**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 27th day of February 2023

Sarah Wallace
For the Registrar

¹⁶ The official fee connected with the filling of the Form TM7 is not subject to a reduction.

Annex

Goods and services of UK trade mark application no. 3676249

(Applicant's mark)

Class 5: Pharmaceuticals, medical and veterinary preparations; Sanitary preparations for medical purposes; Diagnostic preparations for medical purposes; Dietetic food and substances adapted for medical or veterinary use, food for babies; Dietary supplements for humans and animals; Plasters, materials for dressings; Material for stopping teeth, dental wax; Disinfectants.

Class 9: Scientific, research, navigation, surveying, photographic, cinematographic, audiovisual, optical, weighing, measuring, signalling, detecting, testing, inspecting, life-saving and teaching apparatus and instruments; Apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; Information technology and audiovisual equipment; Recorded and downloadable media, computer software, Document management software, Virtual reality software, Artificial intelligence and computer training software, Artificial intelligence software for healthcare, Augmented reality software, Machine-learning software for healthcare purposes, Mobile apps, Downloadable software applications, Interactive software, Mobile software, Content management software; Humanoid robots with artificial intelligence; Electronic publications, downloadable; Computer databases.

Class 10: Surgical, medical, dental and veterinary apparatus and instruments; Medical apparatus and instruments; Prosthetics and artificial implants; Artificial limbs, eyes and teeth; Orthopedic articles; Orthopedic and mobility aids; therapeutic and assistive devices adapted for the disabled; Physical therapy equipment; Massage apparatus; Applicators for medications; Medical apparatus for introducing pharmaceutical preparations into the human body.

- Class 35: Business consultancy and advisory services, In particular counselling provided by doctors' surgeries and clinics; Wholesale and retail services in connection with computer hardware, computer software, mobile apps, diagnostic apparatus for medical purposes, application devices for medicines and medical apparatus for introducing pharmaceutical preparations into the human body, namely needles and syringes.
- Class 38: Providing of user access to internet platforms, in particular in connection with patient support programmes; Transmission of information relating to pharmaceuticals, medicine and hygiene; Providing of internet forums; Electronic communication by means of chatrooms, chat lines and Internet forums; Electronic message exchange; Communication by online blogs.
- Class 41: Education; Providing of training; Entertainment; Sporting and cultural activities; Arranging and conducting of training courses and seminars, including online; Educational services in the healthcare sector; Publication of information relating to health-related training courses, health and fitness training and physical exercise, including via the internet and via mobile apps.
- Class 42: Scientific and technological services and research and design relating thereto; Research and development in the field of medicine and veterinaries; Pharmaceutical research and development; Design and development of computer hardware and computer software; Computer software design; Computer software consultancy; Providing online, non-downloadable software; Creation, maintenance and adaptation of software; Design and development of virtual reality software in the health sector.
- Class 44: Medical services; Medical care; Human hygiene and beauty care; Consultancy relating to health care and diet; Provision of medical information relating to diseases via the internet; Dissemination of

medical information by means of an interactive platform in connection with the treatment of osteoporosis.

Goods and services of International Registration designating the UK (IRUK) no 1430886

(Opponent's mark)

Class 5: Sanitary preparations for medical purposes; medical and surgical plasters, materials for dressings; disinfectants; napkins, napkin liners, napkin pants and absorbent pads, mainly consisting of paper, cellulose or other fiber materials being disposable articles, fixing pants, woven and/or knitted of textile fibers or consisting of cellulose, for fixing absorbent pads, all the aforesaid goods for incontinency purposes; chemical products for curative purposes and healthcare (medical), in particular for care of, cleansing and protecting the skin; belts for sanitary napkins (towels); belts for incontinence pads and linings.

Class 9: Computer programs associated with delivery services for supplying hospitals with the goods listed in this mark, and also for processing hospital waste; computer software, in particular for mobile devices, including mobile telephones; computer software applications (apps); data recordings; computer software, computer programs recorded on data carriers; downloadable software.

Class 10: Orthopedic articles; suture materials; draw-sheets for sick beds and incontinence sheets (included in class 10); belts for medical purposes; draw-sheets for sick beds, with an absorbent layer above an outer layer impermeable to liquids; catheters, urinals, in particular condom urinals for medical purposes; urinary leg bags, bed bags and fastenings therefor for medical purposes; urine drainage tubes; goods made using textile composite materials, namely, surgical cloths, table and bed sterile sheets, all of the aforesaid goods being disposable articles for hospital use; clothing for use in operating theatres; bed liners of cellulose, unwoven material, plastic, textile fabric and/or rubber for incontinents or

invalids; medical mouth and nose masks; operating caps and head coverings for operating.

Class 35: Advertising, public relations, organisation, arranging and conducting of exhibitions for commercial and advertising purposes; business administration; business management and organization consultancy; business consultancy and advisory services; professional business consulting; business information; business organisation consulting; retail and wholesale services, including via the internet, relating to medical supplies, cleaning articles, toiletries, dietetic substances, sanitary apparatus for human beings, sanitary sector goods, pharmacy articles and cosmetics; retail and wholesale services relating to sanitary preparations and articles, incontinence care, clothing, footwear; retail and wholesale services relating to apparatus for recording transmission or reproduction of sound or images, digital recording media; retail and wholesale services in relation to computer software and computer hardware; business consultancy, in particular for the elderly.

Class 39: Courier services, namely, collecting [transport] and delivery for hospitals and retirement homes and homes for the disabled of the following goods: sanitary preparations for medical use, plasters, materials for dressings, disinfectants, napkins, napkin liners, napkin pants and absorbent pads, mainly consisting of paper, cellulose or other fiber materials being disposable articles, fix pants, woven and/or knitted of textile fibers or consisting of cellulose, for fixing absorbent pads, all the aforesaid goods for incontinency purposes, chemical preparations for curative purposes and healthcare (medical), in particular for care of, protecting and cleaning the skin; services of a medical manufacturer, namely, transportation and delivery services for old people's homes and homes for the disabled (transport and delivery of goods).

Class 42: Design and development of computer hardware and software; development of software and providing temporary use of on-line applications and software tools for smartphones; scientific and

technological services; industrial analysis, research and development services; provision of technical consultancy relating to the development of software; design, development, installation, monitoring, maintenance and updating of computer programs, programs for mobile electronic apparatus (programming of apps) and websites; electronic storage of messages, information, images and texts of all kinds; creating programs for data processing.