

O-383-15

TRADE MARKS ACT 1994

**TRADE MARK APPLICATION NO. 3042911
BY NATURE'S GIFT INTERNATIONAL, INC.
TO REGISTER THE TRADE MARK**

SEVEN  OCEANS

IN CLASS 5

AND

**THE OPPOSITION THERETO UNDER NO. 402359
BY MERCK CONSUMER HEALTHCARE LIMITED**

Background and pleadings

1. Nature's Gift International, Inc. ("the applicant") applied for the trade mark shown below on 18 February 2014 for *dietary supplements, nutritional supplements, vitamins and minerals*, in Class 5:



SEVEN 7 OCEANS

2. The application was published on 21 March 2014. It was subsequently opposed by Merck Consumer Healthcare Limited ("the opponent") on the basis of sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). The opponent relies upon six earlier marks for its grounds under sections 5(2)(b) and 5(3) of the Act, as follows¹:

(i) UK 797822

SEVENSEAS

Class 5: *All goods included in Class 5.*

Filing date: 14 November 1959; date registration procedure completed: 10 August 1960².

(ii) UK 1201792

SEVENSEAS

SEVEN SEAS (a series of two marks)

Class 30: *Nutritional supplements included in Class 30; wheatgerm and bran, all for food for human consumption; ginseng (not medicinal); food products included in Class 30 containing any of the aforesaid goods or derivatives thereof; preparations made from cereals for food for human consumption*

Filing date: 17 August 1983; date registration procedure completed: 19 May 1986.

¹ This reflects the amended grounds attached to the opponent's written submissions in lieu of a hearing.

² As per the notice in Journal 5725, which confirmed that, prior to June 1986, the date of the Journal in which the fact of registration was recorded in the list of trade marks registered was the actual date of registration; see the decision of Geoffrey Hobbs Q.C., as the appointed person, in *WIS/ [2006] RPC 22*.

(iii) UK 1551922

**SEVEN
SEAS**

Class 5: *Supplements, vitamins and minerals.*

Filing date: 26 October 1993; date registration procedure completed: 25 November 1994.

(iv) UK 2508572



(series of two marks)

Class 5: *Nutritional supplements; vitamins and minerals; preparations consisting of vitamins and/or minerals; fish oils; ginseng.*

Class 29: *Nutritional supplements; products derived from edible oils.*

Class 30: *Nutritional supplements; ginseng.*

Filing date 11 February 2009; date registration procedure completed: 22 May 2009.

(v) Community Trade Mark ("CTM") 643866

SEVEN SEAS

Class 5: *Pharmaceutical, medicinal and veterinary preparations and substances; infants' and invalids' foods; nutritional supplements included in Class 5 for humans and for animals; vitamins; minerals and mineral salts, all included in Class 5; preparations included in Class 5 consisting of vitamins and/or minerals; medicinal herbs; herbal preparations included in Class 5; laxatives; cosmetic and toilet preparations, all included in Class 5.*

Class 29: *Edible oils and edible fats, including fish oils; foodstuffs included in Class 29 containing oils or fats, including fish oils; and nutritional supplements all included in class 29.*

Class 30: *Nutritional supplements; wheatgerm and bran, all for food for human consumption; ginseng (not medicine) food products included in Class 30 containing any of the aforesaid goods or derivatives thereof; preparations made from cereals for food for human consumption.*

Filing date 19 September 1997; date registration procedure completed: 20 October 1999.

(vi) CTM 7547672



Colours claimed: Yellow, white, red (PMS 186 C), dark red (PMS 1807 C) and gold (PMS 8005 C).

Class 5: *Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; pharmaceutical, medicinal and veterinary products; infants' and invalids' foods; nutritional supplements; vitamins, minerals and mineral salts; preparations consisting of vitamins and/or minerals; medicinal herbs; herbal preparations included in class 5; oils and fats and derivatives of oils and fats, all for medical purposes; fish oils including cod liver oil; laxatives; protein, ginseng, being for medicinal purposes; food supplements derived from vitamins, minerals, plant extracts, protein, vegetable matter, cereals and combinations thereof; nutritional supplements in powder form.*

Class 29: *Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats and products made principally from edible oils and edible fats; protein-based products for use as food.*

Class 30: *Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey,*

treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; preparations (foodstuffs) derived from cereals; ginseng (not medicinal); nutritional bars.

Filing date 23 January 2009; date registration procedure completed: 3 November 2009.

3. The opponent relies upon its earlier marks to oppose all of the applied-for goods. It claims that there is a likelihood of confusion under section 5(2)(b), owing to the similarities between the marks and the similarities/identity between the goods. Under section 5(3), the opponent claims that the reputation enjoyed by its marks means that use of the application would cause detriment to the earlier marks' distinctive character and reputation, would take unfair advantage of the earlier marks' reputation, and would lead to an assumption by the average consumer that there is an economic connection between the parties' marks.

4. Under section 5(4)(a), the opponent relies upon use in the UK of its signs SEVEN SEAS and SEVENSEAS since 31 December 1935 in relation to vitamins, minerals and supplements/food supplements, cod liver oil, fish oil, omega-3 fish oil, single vitamins, single minerals, traditional herbal remedies, multivitamins, bulk oils, beauty

The logo for SEVEN SEAS, featuring the words "SEVEN" and "SEAS" stacked vertically in a serif font, with a small crown-like symbol above the "V" in "SEVEN".

food supplements and medicinal products; upon use in the UK of its sign since 31 December 1994 in relation to supplements, vitamins and minerals; and



upon use in the UK of its sign since 31 December 2008 in relation to nutritional supplements; vitamins and minerals; preparations consisting of vitamins and/or minerals; fish oils; ginseng; products derived from edible oils. The opponent claims that use of the application would be a misrepresentation, which would lead to damage to the opponent's business connected with its signs. It claims, therefore, that it is entitled to prevent the use of the application under the law of passing off.

5. The applicant denies the grounds. It puts the opponent to proof of use of the goods covered by its earlier marks. Under section 6A of the Act, all but one of the earlier marks is subject to proof of use because the marks completed their registration procedures five years or more before the date on which the contested application was published. CTM 7547672 may be relied upon across the range of registered goods, for the purposes of section 5(2)(b), because there is no requirement to prove that it has been used on all, or any, of the registered goods.

6. Both parties are professionally represented; the opponent by AA Thornton & Co, and the applicant by The Trade Marks Bureau. Both sides filed evidence, and both parties also filed written submissions at the same time as their evidence was filed. The parties were asked if they wished to be heard or for a decision to be made from the papers. Neither chose to be heard, and only the opponent filed written submissions in lieu of a hearing.

Opponent's evidence

7. The opponent's evidence comes from Andrew Wines, the opponent's general manager. Mr Wines states that Seven Seas branded products are sold in more than a hundred countries and that the Seven Seas brand is the leading health supplement brand in the UK, Ireland and elsewhere in the world (outside of the EU). Mr Wines states that Seven Seas has various ranges sold under the brand, such as Haliborange, Cod Liver Oil, Joint Care and Multibionta. Due to the nature of the marketing of the Seven Seas brand, Mr Wines states that it is not possible to separate information relating to each individual trade mark; information is only available in relation to Seven Seas as a whole, which incorporates all the ranges.

8. Exhibit 1 provides a list of well over a hundred different ranges of vitamins and supplements which are sold under the Seven Seas trade marks, some with secondary trade marks, others with purely descriptive names. Mr Wines states that these goods are sold in stores including Boots, Tesco, Asda, Sainsbury's, Morrisons, Waitrose, Superdrug and Holland & Barrett, throughout the UK. Exhibit 2 provides photographs of products which are clearly boxes and tubs of vitamins on shelves, alongside other brands of such goods, in unnamed branches of Asda (8 June 2012), Boots (18 February 2011 and Tesco (26 February 2012); in Tesco in Camberley (5 April 2013), and in Boots, Tesco and Superdrug in Watford (July 2014). The detail in the photographs is rather small, but it is possible to see the words Seven Seas on the packaging. Examples of how the products look are also shown below in the 2011 'brand books' for Seven Seas Health Oils and Seven Seas Pure Cod Liver Oil (Exhibit 3).

9. Mr Wines gives the following turnover figures for goods sold under the Seven Seas brand in the UK in the last eight years (in millions of pounds):

2013	£23.9m
2012	£26.3m
2011	£29.8m
2010	£31.2m
2009	£32.7m
2008	£36.3m
2007	£36.5m
2006	£41.7m

10. The following sums of money have been spent in advertising and marketing the Seven Seas brand in the last four years: £3.9m (2010), £3.2m (2011), £4.4m (2012) and £3.8m (2013). Point of sale marketing includes shelf labels, free standing display units and coupons at the till. Exhibit 4 comprises photographs of such sales promotion, taken in branches of Tesco and Boots in the UK during 2011, two examples of which are shown here:





11. Seven Seas has been the national UK sponsor of ITV weather since 2012 and television advertisements for Seven Seas branded products are aired in association with ITV weather four times a day, every day of the year. It also sponsors the programme Eastenders in Ireland. Seven Seas has been the second largest/most popular pregnancy care brand in the UK since October 2013. Exhibit 5 comprises a DVD showing a selection of advertisements which aired in the UK and Ireland between 2011 and 2014, on mainstream channels, during, for example, Emmerdale, Downton Abbey, Doc Martin, Grand Designs and An Idiot Abroad. These advertisements were seen by over 19.5 million adults, which is 77% of the available audience, according to Mr Wines. Exhibit 6 comprises stills taken from those advertisements, such as:

Seven Seas Pregnancy – Camping – ITV National Weather Sponsorship



Seven Seas Winter Health Range – Snowy – ITV National Weather Sponsorship



Seven Seas Jointcare – Golf – ITV National Weather Sponsorship



12. Other forms of publicity for Seven Seas products include the Seven Seas website (Exhibit 11 comprises screenshots from between 2009 and 2014); retailer's websites (screenshots and customer product reviews are provided in Exhibit 14), and Seven Seas prizes in competitions in women's interest magazines and websites. Seven Seas sponsored Jack Denness, known as 'Death Valley Jack', who ran the Death Valley Ultramarathon in 2010 for the twelfth time, at the age of 75, at the same time as the Seven Seas brand celebrated its 75th anniversary. Mr Denness credits Seven Seas Cod Liver Oil as enabling him to compete and the publicity for his taking part took place on social media, in the printed press, on television and radio and via in-store appearances. A selection of such publicity is shown in Exhibits 7, 8 and 9.

13. Mr Wines states that Seven Seas has won a number of consumer awards, such as Boots customers voting Seven Seas as the best joint supplement, best multivitamin and the best children's omega 3 products in 2011.

14. Exhibit 12 comprises a selection of press articles about the Seven Seas company/brand. Examples of publications in which articles appeared, all within the relevant dates, are the websites of The Daily Mail, the BBC, The Telegraph, and in various pharmaceutical and retailer trade publications (such as The Grocer and Pharmacy in Focus).

15. Exhibit 13 comprises numerous press articles which mention Seven Seas products. There are too many to detail here (the exhibit runs to 174 pages), but there are articles from, for example Now, Full House, Women's Fitness, Healthy Magazine, Yours, Daily Mail, Woman, Metro, Closer, Daily Mirror, Wales Online (all 2010); OK!, Closer, Chat, Daily Mirror, Daily Mail, Daily Express, Tesco Magazine, Hello! (all 2011); Woman's Own, Country Living, OK!, My Weekly, Metro, Daily Mirror, Woman's Weekly, Bella (all 2012); Closer, Hello!, Daily Mail, The Sun, Daily Mirror, Woman's Own and The Guardian (all 2013).

Applicant's evidence

16. The applicant's evidence comes from Matthew Gardner of the Trade Marks Bureau, the applicant's representatives in these proceedings. He exhibits at MG1 a print from Wikipedia, which is an online user generated encyclopaedia, and from oceanservice.noaa.gov, diffen.com and tellmewhyfacts.com, to show what the differences are between an ocean and a sea. I note the following from the Wikipedia print:

"The word sea is often used interchangeably with "ocean" in American English but, strictly speaking, a sea is a body of saline water (generally a division of the world ocean) partly or fully enclosed by land."

According to oceanservice.noaa.gov, a sea is part of the ocean partially enclosed by land.

17. Mr Gardner exhibits at MG2 prints from the Intellectual Property Office's register of trade marks and from the register of CTMs, in addition to prints from gcrieber-compact.com, ocoa-apeca.gc.ca, Google Shopping and nirvanahealthfood.com which Mr Gardner states show the existence of other trade marks registered and used in the UK which also use the words SEVEN or SEAS in relation to nutritional supplements. Mr Gardner states that it is commonplace to use the words SEA(S) or SEVEN for these types of goods, in the UK. I note that International Registration 814588 for SEVEN OCEANS is used on emergency lifeboat rations (in class 30), CTM3410561 for SEVEN OCEANS is expired and there is no other information about it, although it seems linked to the lifeboat rations company; CTM5723887 is for the mark OCEAN NUTRITION CANADA, which from the website information is the name of a company in Canada which carries out research and development into the use of fish oils in food; prints from Google Shopping show a bottle called Olympian Labs Sea Nourishment Liquid Vitamin Supplement at a price of £16, tablets called Higher Nature Ocean Kelp (£5), anti-ageing capsules called Potent Sea Marine Aminos (£36) and a book called 7 Syndrome Healing: Supplements for the Mind and Body; the print from Nirvana Health Food shows a bottle of joint support capsules called Solgar 7; and there are two prints of trade mark registrations for

CTM10170207 for the mark “just the sea best of the ocean (with a shell device) in class 5 and UK2559049 for the mark “Real Sea”, with a bird-like device, also in class 5. There is no information about whether these marks are in use.

Opponent’s evidence-in-reply

18. The opponent’s trade mark attorney, Ian Gill from AA Thornton & Co, has provided a witness statement to rebut Mr Gardner’s evidence about the difference between oceans and seas. Mr Gill provides Exhibit ISG1 which comprises printouts from internet searches for definitions of the words ‘sea’ and ‘ocean’. I note the following, from Wikipedia:

“... the sea (with the definite article) is the interconnected system of the Earth’s salty, oceanic waters – considered as one global ocean or as several principal oceanic divisions...The sea is conventionally divided into up to five large oceanic sections – including the IHO’s four named oceans (the Atlantic, Pacific, Indian, and Artic) and the Southern Ocean; smaller, second-order sections, such as the Mediterranean, are known as seas.

...

Both senses of sea date to Old English; the larger sense has required a definite article since Early Middle English. As the term has been applied over time, there are no sharp distinctions between seas and oceans...In international law, the United Nations Convention on the Law of the Sea states that all the ocean is “the sea”.”

19. Prints from definition searches for sea and ocean show sea to be a synonym of ocean; also that sea is a smaller area of ocean, and that ocean means a very large stretch of sea. I also note that one of the websites used (dictionary.reference.com) gives a meaning of the noun sea as “one of the seven seas; ocean”.

Decision

20. The applicant accepts that there has been use of earlier mark UK 1551922



in relation to *supplements, vitamins and minerals*; and accepts that there



has been use of earlier mark UK 2508572 in relation to *nutritional supplements; vitamins and minerals; preparations consisting of vitamins and/or minerals; fish oils; ginseng; products derived from edible oils* [Class 29]. The opponent, in its written submissions in lieu of a hearing, limits accordingly the goods relied upon for these two earlier marks. The goods in class 5 are most germane to the comparison, so I will proceed on this basis for economy of process, also bearing



in mind that CTM 7547672 (limited to the colours yellow, white, red (PMS 186 C), dark red (PMS 1807 C) and gold (PMS 8005 C)) is not subject to proof of use. I will confine the comparison of goods for the CTM to its class 5 goods, which presents the opponent's best case.

21. Section 5(2)(b) of the Act states that:

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

(a)

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

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

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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

23. The parties' class 5 goods are:

Earlier marks	Application
<p>UK 1551922</p>  <p><i>Supplements, vitamins and minerals.</i></p> <p>UK 2508572</p>  <p><i>Nutritional supplements; vitamins and minerals; preparations consisting of vitamins and/or minerals; fish oils; ginseng; products derived from edible oils.</i></p>	<p><i>Dietary supplements, nutritional supplements, vitamins and minerals</i></p>

CTM 7547672



Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; pharmaceutical, medicinal and veterinary products; infants' and invalids' foods; nutritional supplements; vitamins, minerals and mineral salts; preparations consisting of vitamins and/or minerals; medicinal herbs; herbal preparations included in class 5; oils and fats and derivatives of oils and fats, all for medical purposes; fish oils including cod liver oil; laxatives; protein, ginseng, being for medicinal purposes; food supplements derived from vitamins, minerals, plant extracts, protein, vegetable matter, cereals and combinations thereof; nutritional supplements in powder form.

24. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-33/05, 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".

25. The goods covered by the specifications are either identical in terms, or contain terms which cover the goods of the other party. The parties' goods are identical in relation to all three earlier marks.

Average consumer

26. 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*.

27. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

28. Although health professionals prescribe the goods, the average consumer for nutritional products, vitamins and supplements is, by and large, the general public. These are goods which are sold in every pharmacy, supermarket and health food store for self-selection. The average consumer looking to improve his or her health and wellbeing is likely to pay a medium level of attention to the purchase. There is a wide variation in price and complexity in this category of goods: the purchase of, for example, a pot of simple vitamin C tablets to ward off winter colds will not cause the same amount of scrutiny as capsules or preparations for more specialised treatment. The purchasing process of the goods is overwhelmingly a visual one, although I bear in mind that the goods may be referred to orally, perhaps by a pharmacist or health food shop assistant giving advice. However, they are likely to have the product to hand for a visual inspection, so the aural part played in the process will have much less impact than the visual part.

Comparison of marks

29. 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 Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

30. 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.

31. UK registration 2508572 is for a series of two marks, one of which is in colour which corresponds to the colour-limited CTM. The other mark in the series is not in colour. As the goods of the UK mark are identical to the application and one of the series is not in colour, this represents wider protection for the opponent and so I will limit my comparison to the two UK marks for which the applicant has accepted use and for which the goods are identical to the application. The respective marks are:

Opponent	Applicant
<p data-bbox="188 927 373 960">UK 1551922</p>  <p data-bbox="188 1245 373 1279">UK 2508572</p> 	

32. The first of the opponent’s earlier marks consists of the words SEVEN SEAS and a sun-ray device emerging from the V of SEVEN. Although not negligible, the device is much smaller than the words and contributes much less to the overall impression of the mark, which is of the words SEVEN SEAS. These components are also present in the opponent’s series marks, appearing on a background which is cut away at the bottom in a curved arrangement, with two lines embellishing the cut away line. The background and the embellishment carry much less weight in the overall impression than the words because they will be seen merely as a label with a

decorative flourish underscoring the words which are the dominant and distinctive element.

33. The applicant's mark consists of the words SEVEN OCEANS, with a numeral 7 between the words in a slightly elevated position. Although the numeral occupies a central position, the words SEVEN OCEANS, proportionately, dominate the overall impression of the mark. The applicant draws attention to the overlapping OC letters, but I consider this aspect of the mark to be far less noticeable and that it carries little weight in the overall impression.

34. Although there are differences between the parties' marks, they both share the same initial word element, SEVEN. This common element, which is one half of the dominant component in each of the parties' marks, means that visually they are similar to a moderate degree. The applicant submits that its mark would be articulated as SEVEN SEVEN OCEANS, but I think this unlikely; the numeral will just be seen as a reinforcement of the word SEVEN and will not be pronounced. The visual differences will not be apparent aurally. There is a medium level of phonetic similarity between the marks.

35. In relation to the conceptual comparison, the applicant builds its case upon its claim that there are differences between seas and oceans. Whilst this might be technically the case so far as oceanographers are concerned, the average consumer is not an oceanographer, but is instead reasonably well informed and reasonably observant and circumspect. The average consumer's perception is what matters. That perception would be that there is little conceptual difference, if any, between seas and oceans, bearing in mind that the average consumer will not be pausing during the purchasing process to conduct a semantic analysis of the technical definitions of sea and ocean. Consumers in the UK are used to the coastline of the British Isles, some of which is the Atlantic Ocean, some is the Irish Sea, some is the North Sea, and some is the English Channel; nevertheless, people in the UK talk of swimming in the sea, whether it is the Atlantic, or one of the named seas. This colloquial use is borne out by the evidence filed by both sides. The marks are conceptually identical or near identical.

Distinctive character of the earlier marks

36. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*³ 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).

³ Case C-342/97.

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)."

37. The marks do not directly describe the goods, although the presence of the word SEA alludes to goods sourced from the sea, such as cod liver oil. The marks have an average degree of inherent distinctive character. However, the true picture of distinctiveness is that they are highly distinctive marks because of their level, and longevity, of use. The evidence shows that the opponent's turnover in its SEVEN SEAS marks for the five years prior to the filing of the contested application amounted to almost £144 million, and the levels of turnover were at least as strong prior to 2009. The marks have appeared on ITV at the end of the weather report four times a day, every day of the year, since 2012. Advertisements have also been shown between on mainstream channels during highly popular shows, and there is a plethora of press coverage of the opponent's goods bearing the marks.

38. For vitamins, minerals and supplements, the opponent's marks are highly distinctive.

Likelihood of confusion

39. I do not find the applicant's evidence about other parties' trade mark registrations and/or use of the words sea, ocean and seven persuasive; use on lifeboat rations, use in Canada (but not the UK), mere registration without proof of use, and descriptive use of the elements does not show that the parties' marks, considered as wholes, can live together as trade marks in the UK without causing confusion.

40. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. This includes keeping in mind the whole mark comparison, because the average consumer perceives trade marks as wholes and rarely has the opportunity to compare marks side by side, relying instead upon the imperfect picture he has of them in his mind. One of the principles in the authorities states that a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*). The parties' goods are identical. The earlier marks are also highly distinctive: there is a greater likelihood of confusion where an earlier mark has a highly distinctive character (either per se or because of the use that has been made of it). Given these factors, together with the visual and aural similarities between the marks, but

particularly the almost identical conceptual picture conveyed by the dominant elements which will be captured in the imperfect memory of the average consumer, there is a strong likelihood of confusion.

41. The opposition succeeds in full under section 5(2)(b) of the Act.

42. The opposition also succeeds under section 5(3) of the Act. In view of the opponent's success under section 5(2)(b), I will give my reasons for this finding relatively briefly. Section 5(3) states:

“(3) A trade mark which-
(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

43. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Addidas-Salomon*, [2004] ETMR 10 and C-487/07, *L'Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

44. The opponent has the requisite reputation in its marks, for identical goods. These factors, together with the closeness of the marks, will cause consumers to make a link between the parties' marks.

45. One of the types of damage claimed by the opponent is that the applicant's mark will take unfair advantage of the reputation of its earlier marks. The CJEU explained the nature of the advantage in Case C-487/07, *L'Oréal v Bellure*:

"The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an advantage taken unfairly by that third party of the distinctive character or the repute of that mark where that party **seeks by that use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image.**"

46. In other words, the later mark will call to mind the earlier mark and will therefore appear instantly familiar to the public concerned, thereby making it easier for the

applicant to establish its mark and to sell its goods without the usual marketing expenditure. I consider this to be the case here. In *Jack Wills Limited v House of Fraser (Stores) Limited* [2014] EWHC 110 (Ch) Arnold J. concluded that:

“80. The arguments in the present case give rise to two questions with regard to taking unfair advantage. The first concerns the relevance of the defendant's intention. It is clear both from the wording of Article 5(2) of the Directive and Article 9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of the Court of Justice and of the Court of Appeal that the defendant's conduct is most likely to be regarded as unfair where he intends to benefit from the reputation and goodwill of the trade mark. In my judgment, however, there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.”

47. Even though there is no evidence of the applicant's intentions in adopting the mark, I find that it is most unlikely that the applicant, intending to enter the identical marketplace in the UK, was unaware of the opponent's marks, given the scale of use of the opponent's marks in the UK. It is a legitimate inference that, in adopting a mark for identical goods which is so close to marks which have built up a huge and established reputation over many years and which their owner strives to keep in the public eye by daily exposure in mainstream media (a costly undertaking), the applicant “seeks by that use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image.”

Outcome

48. The opposition succeeds in full under sections 5(2)(b) and 5(3) of the Act. Given my findings under sections 5(2)(b) and 5(3), it is unnecessary for me to deal with the ground of opposition under section 5(4)(a) of the Act.

Costs

49. The opponent has been successful and is entitled to a contribution towards its costs, in line with the scale of costs published in Tribunal Practice Notice 4/2007. The breakdown of costs is as follows:

Opposition fee	£200
Preparing a statement and considering the counterstatement	£400

Filing evidence and considering the applicant's evidence	£1500
Written submissions	£400
Total	£2500

50. I order Nature's Gift International, Inc. to pay Merck Consumer Healthcare Limited the sum of £2500 which, in the absence of an appeal, should be paid within fourteen days of the expiry of the appeal period.

Dated this 11th day of August 2015

**Judi Pike
For the Registrar,
the Comptroller-General**