

O/1117/22

TRADE MARKS ACT 1994








CONSOLIDATED PROCEEDINGS

IN THE MATTER OF TRADE MARK APPLICATIONS NUMBERED 3527864,  
3527855, 3531823, 3531808, 3591857, 3591856 AND 3591854

BY

MOTIVATES INC. LIMITED

TO REGISTER THE FOLLOWING TRADE MARKS IN CLASSES 9, 35 AND 36

1.	423157 (lead case) (no.3527864)	
2.	423212 (no.3527855)	
3.	423249 (no.3531823)	
4.	423262 (no.3531808)	
5.	426857 (no.3591857)	
6.	426860 (no.3591856)	
7.	426863 (no.3591854)	

AND CONSOLIDATED OPPOSITIONS THERETO UNDER NUMBERS

423157, 423212, 423249, 423262, 426857, 426860 AND 426863

BY

LIFESTYLE SPORTS (IRELAND) LIMITED

## Background and Pleadings

1. On 28 August 2020, 10 September 2020 and 7 February 2021, Motivates Inc. Limited (“the Applicant”) applied to register in the UK the trade marks as set out on the front cover page, in relation to goods and services in classes 9, 35 and 36. The details of each of the applications are set out in full in the annex attached hereto. I note that there are slight differences in the specifications of each application, albeit the majority of the terms overlap.

2. On 10 February 2021, 16 February 2021 and 13 September 2021, Lifestyle Sports (Ireland) Limited (“the Opponent”) filed oppositions to the applications relying on sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”).

3. Under section 5(2)(b) of the Act, the Opponent relies on the following trade marks:

(i) UK Trade Mark (“UKTM”) 2440009 (“first earlier mark”)

LIFESTYLE SPORTS

Filed: 29 November 2006

Registered: 22 February 2008

Whilst registered for goods in various classes the Opponent relies only on those services in class 35 as follows:

Class 35: The bringing together for the benefit of others of clothing, footwear, headgear, sporting apparatus and equipment to be sold online, enabling customers to conveniently view and purchase those goods via an Internet webpage or webpages specialising in the marketing of clothing and sporting goods; the bringing together for the benefit of others of clothing, footwear, headgear, sporting apparatus and equipment, enabling customers to conveniently view and purchase those goods in a retail clothing and footwear outlet; information relating to all these services.

(ii) EUTM 5817259<sup>1</sup> and its comparable equivalent UKTM 905817259 (“second earlier mark”)



Filing date: 5 April 2007

Registration date: 4 December 2008

Whilst the trade mark stands registered for goods and services in a variety of classes, for the purposes of these oppositions under section 5(2)(b) the Opponent only relies on goods and services in classes 9 and 35, namely:

Class 9: Computer hardware and software; video games and equipment; computer programs.

Class 35: Retail services in respect of clothing, headwear, footwear, gymnastic and sporting articles.

4. For each of the oppositions under section 5(2)(b) when relying on its first earlier mark, the Opponent opposes the following goods/services for each of the Applicant's specifications:

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Encoded credit

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<sup>1</sup> Whilst each of the opposition proceedings were issued after 31 December 2020 (“IP Completion Date”), applications 864, 855, 823 and 808 were filed before IP Completion Date and therefore the second earlier mark is an EUTM. In relation to trade mark applications 854, 856 and 857 the applications have filing dates after IP Completion Date and therefore the applicable earlier marks are UK comparable marks. In reality the change to the mark's status will make little difference to my assessment given that the filing dates and specifications relied upon remain the same throughout and I shall therefore deal with them collectively.

cards; Encoded membership cards; Payment cards being magnetically encoded; Encoded membership cards; Smart cards;

Class 35: Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs; Administration of loyalty programs involving discounts or incentives; Loyalty scheme services; Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

5. For each of the oppositions under section 5(2)(b), when relying on its second earlier mark, either as a EUTM or a comparable mark, the Opponent opposes, in addition to the goods and services listed in paragraph 4 above, the following goods (as indicated in the annex) namely:

Class 9: Data processing equipment; Downloadable electronic reports; Databases (electronic); Magnetic data carriers; Downloadable electronic publications; Computer software in relation to payment cards; Application software for us<sup>2</sup> in respect of payment card schemes.<sup>3</sup>

6. For its claim under section 5(3) of the Act the Opponent opposes all of the Applicant's goods and services, relying on both its first and second earlier mark as

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<sup>2</sup> Presumed to read "use".

<sup>3</sup> Whilst the Opponent in its TM7 claims to oppose "*computer software in relation to payment cards; Application software for us in respect of payment card schemes*" for each of the TM applications, for Mark 823, Mark 857, Mark 856 and Mark 854 these goods have not been applied for by the Applicant.

outlined above, however, it claims only a reputation in the following goods and services:

(i) First earlier mark

Class 18: Bags; holdalls; backpacks; rucksacks; sports bags; sports holdalls; parts and fittings for the aforesaid goods.

Class 25: Articles of clothing, sportswear, leisurewear; headwear; footwear, sports and leisure footwear; and parts and fittings therefor included in Class 25.

Class 28: Games and playthings; gymnastic and sporting articles and equipment; parts and fittings for all the aforesaid goods.

Class 35: The bringing together for the benefit of others of clothing, footwear, headgear, sporting apparatus and equipment to be sold online, enabling customers to conveniently view and purchase those goods via an Internet webpage or webpages specialising in the marketing of clothing and sporting goods; the bringing together for the benefit of others of clothing, footwear, headgear, sporting apparatus and equipment, enabling customers to conveniently view and purchase those goods in a retail clothing and footwear outlet; information relating to all these services.

(ii) Second earlier mark

Class 9: Computer hardware and software; video games and equipment; computer programs.

Class 16: Printed matter; books; magazines; printed publications.

Class 25: Clothing, footwear; headgear; sportswear.

Class 28: Games and playthings; gymnastic and sporting articles.

Class 35: Retail services in respect of clothing, headwear, footwear, gymnastic and sporting articles.

7. Under section 5(2)(b) the Opponent claims that as a result of the visual, aural and conceptual similarities between the respective marks there would be a likelihood of

confusion on the part of the public, including the likelihood of association. It is claimed that the contested goods and services are identical and/or similar to the goods/services of the earlier registrations. Under section 5(3) the Opponent contends that as a result of the use made of its earlier marks it has acquired a reputation in the UK. Use of the contested marks will therefore, without due cause, take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade marks as relied upon. This, it is contended, will lead to damage being suffered especially if the goods/services of the Applicant are of an inferior quality.

8. The Applicant filed a defence and counterstatement, in essence, denying each ground of opposition, putting the Opponent to strict proof of its claims, including proof of use of its earlier marks for all the goods/services as relied upon. Specifically, the Applicant denies similarity between the marks, identity/similarity between the respective goods/services, that consumers would be confused or that the Opponent enjoys a significant reputation.

9. In these proceedings, the Opponent is represented by FRKelly. The Applicant is unrepresented. Only the Opponent filed evidence in support of its claims. The Applicant did not file evidence in reply or submissions during the evidence rounds. Neither party requested to be heard on the matter, but both parties filed submissions in lieu of a hearing. This decision is therefore taken following a careful perusal of all the papers.

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

## **Evidence**

11. The Opponent's evidence consists of the witness statement of Paul Kelly dated 30 May 2022 accompanied by five exhibits marked PK1-PK5.

12. Mr Kelly is a trade mark attorney in the employ of FRKelly, the Opponent's representatives, a position he has held for six years. Mr Kelly confirms that he has the authority to complete the witness statement on the Opponent's behalf providing the

information from his own knowledge and taken from documents and records made available or supplied to him by the Opponent.

13. Mr Kelly states that the Opponent was founded in 1979 and is renowned for being Ireland's largest sporting goods retailer. He states that the trademark LIFESTYLE SPORTS was first used in the UK in 1979.

#### Retail Stores

14. The Opponent is said to operate 42 bricks and mortar stores across the Republic of Ireland and Northern Ireland. Four of the Opponent's outlets are said to be located in Belfast, Craigavon, Derry and Enniskillen in Northern Ireland. Details of the individual stores are produced, in so far as their locations and opening times.<sup>4</sup>

15. Exhibit PK 2 consists of screenshots taken from the Opponent's website outlining the locations and opening times of five of its stores. The extracts are undated save for a print/access date of 31 May 2022. The stores are referred to by location e.g. BELFAST VICTORIA SQUARE. The screenshots do not include any pictures of the frontage/signage of the stores or any reference to the goods/services.

16. Mr Kelly states that in November 2021 the Opponent opened a flagship store in Belfast which is one of its top five stores in terms of size. The Opponent is said to have invested over £500,000 to fit the store out and its lease for the premises extends to 25 years. Mr Kelly states that the Opponent has plans to open a further three stores in Northern Ireland in the next 12-18 months.

#### Online stores

17. Mr Kelly states that the Opponent also sells its goods online via its website [www.lifestylesports.com](http://www.lifestylesports.com). He states that this online platform sells to customers both domestically and internationally including both Northern Ireland and United Kingdom. Mr Kelly produces extracts taken from the Opponent's website said to show examples of the range of goods sold by the Opponent.<sup>5</sup> Exhibit PK1 consists of screenshots taken from the Opponent's website, displaying a selection of third party branded sports clothing, footwear and headgear offered for sale in Euros. The pages are undated save for a print date/access date of 31 May 2022. No goods are branded with either

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<sup>4</sup> PK2

<sup>5</sup> PK1

earlier mark, although the words Lifestyle Sports and the Opponent's web address appears at the top and bottom of the pages.

18. Mr Kelly produces information said to relate to the significant traffic and visitors to the Opponent's website throughout the UK, broken down by country. Exhibit PK 5 consists of four 'analytics' screenshots from an unknown source, said to show information relating to the traffic and visits to the Opponent's website between 2018 and 2021. No further information is given to explain the figures within the document, although I note that under the heading acquisitions the number of users range between 272,998 and 565,293. No information is provided within the screenshots over what period these figures are collected, they do however list various 'Regions' to include England, Northern Ireland, Scotland and Wales.

#### Sale of goods

19. Mr Kelly states as regards use of the trade mark LIFESTYLE SPORTS in the UK, "goods are sold through its stores in Northern Ireland and through UK websites to all areas of the UK". A selection of invoices are produced dated between 30 April 2018 and 8 July 2021, said to show the geographic spread of sales/orders throughout the UK, including the towns and locations where the orders were made, and products dispatched. It is conceded that the invoices and orders do not make specific reference to LIFESTYLE SPORTS, but it is said that "the trade mark does appear on the goods once despatched". PK 4 includes a total of 39 invoices dated in 2018, 2019, 2020 and 2021 showing billing addresses in the UK and Northern Ireland for orders of various goods, mainly third party branded sporting trainers and clothing. None of the invoices make reference to either the earlier marks or the Opponent.

#### Sales and Turnover

20. Mr Kelly states that the total sales of goods in the UK for the last 8 years are in excess of £43 million. Mr Kelly produces a table of the "annual turnover of goods" between 2013 and 2020, namely:

Year	Turnover
2013	in excess of £2 million
2014	in excess of £4.5 million
2015	in excess of £5 million



2016	in excess of £7 million
2017	in excess of £7 million
2018	in excess of £5.5 million
2019	in excess of £5.5 million
2020	in excess of £4.5 million

### Advertising

21. Mr Kelly states that the Opponent enjoys “47% brand awareness in Northern Ireland” as a result of its longstanding presence and marketing activities. Its total advertising and promotional activities expenditure for the past six years is in the region of £1 million, broken down as follows:

Year	Advertising spend
2015	in excess of £200,000
2016	in excess of £320,000
2017	in excess of £300,000
2018	in excess of £40,000
2019	in excess of £19,000
2020	in excess of £18,000

22. Mr Kelly explains that the reduction in advertising expenditure from 2018 is as a result of the Opponent’s increased reliance on online/digital platforms such as “Google, Facebook, Instagram and internet display properties” and its website. Samples of its promotional and advertising activities are produced.<sup>6</sup> This is in the form of a google search engine result page for the words “LIFESTYLE SPORTS ADVERTS” accessed on 31 May 2022. The results show links to the Opponent’s website and other third party platforms where reference is made to the words Lifestyle Sports. Those results include links to Wikipedia, www.oneproductions.com, www.lovindublin.com, www.adworld.ie, www.boards.ie and www.youtube.com. Only two of these references are dated within the relevant period namely a reference to the “commission of a series of social videos/photography” and the “release of their fashion range for summer

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<sup>6</sup> PK3

2018”.<sup>7</sup> Four stills of videos taken from YouTube are displayed dated 3 March 2020, 30 October 2020, 5 Nov 2021, and 13 January 2022. No information is given as to the number of consumers who accessed or viewed these sites/videos.

### Social media

23. A screenshot of the loading page of the Opponent’s Instagram account with an access/print date of 31 May 2022 is produced, under the handle “@lifestylesports”. Various undated images are displayed. The screenshot shows that the Opponent has uploaded 2,788 posts and has 119,000 followers as of 31 May 2022.

24. A screenshot taken from the Opponent’s Facebook account is produced, which was accessed on 31 May 2022, under the handle “@LifestyleSports1”. Two posts are produced dated 14 May 2021 and 26 May 2022. The former has 52 likes, has generated 5 comments and 1 share. The latter is a post publicising the Leinster versus La Rochelle rugby match, which generated 1 like. A box headed Community shows that ‘276,950 people like this and 274,095 follow this’ as of 31 May 2022, although no explanation is given as to what ‘this’ is. I note the copyright page is dated 2022 and the People box shows 10 visits.

25. This concludes my summary of the evidence. Whilst both parties filed submissions, I do not propose to summarise these here, however, I have read the submissions in their entirety and shall refer to them where appropriate later in my decision.

### **Proof of Use**

26. Given their filing dates, the Opponent’s trade marks qualify as earlier trade marks pursuant to section 6 of the Act. The Opponent claims that it has used its trade marks in relation to all the goods/services of its registrations as relied upon. This statement was made because the earlier marks completed their registration procedures more than five years before the date on which the applications were filed. Consequently, each of the Opponent’s trade marks are subject to the proof of use provisions under section 6A of the Act.

27. I will begin by assessing whether and to what extent the evidence supports the Opponent’s claim that it has made genuine use of its marks in relation to the goods

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<sup>7</sup> Dated 22 June 2018 and 9 September 2019

and services relied upon. The relevant statutory provisions are set out in section 6A of the Act, which states:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

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

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

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes -

- (a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and
- (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

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

28. For some of the opposition proceedings, the second earlier mark is a comparable mark, therefore paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union.”

29. Section 100 of the Act is also relevant. It states that:

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

### **The relevant territory of the earlier marks**

30. The Opponent relies on its second earlier mark, which is a EUTM when opposing trade mark application nos. 864, 855, 823 and 808, later becoming a comparable mark

at the end of IP Completion Day for the remaining oppositions. Where all or part of the relevant five-year period for genuine use under sections 6A falls before IP Completion Day, evidence of use of the corresponding EUTM in the EU in that part of the relevant period, up until 31 December 2020, will be taken into account in determining whether there has been genuine use of the EUTM and comparable trade mark.

### **Relevant Periods**

31. The relevant period for assessing whether there has been genuine use of the earlier marks is the five-year period ending with the date of application of each of the applied for marks.<sup>8</sup> Given their filing dates there are three overlapping relevant periods in play. These are as follows: for marks 864 and 855, 29 August 2015 to 28 August 2020 (“first relevant period”); for marks 823 and 808 11 September 2015 to 10 September 2020 (“second relevant period”) and marks 857, 856 and 854 8 February 2016 to 7 February 2021 (“third relevant period”).

32. The Opponent has directed its evidence towards use in the UK. Given that there are three overlapping periods in play I shall consider the use overall across the entirety of the three periods, that is from 29 August 2015 to 7 February 2021 (“the relevant period”).

33. What constitutes genuine use has been the subject of a number of judgments. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm*

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<sup>8</sup> Section 6A of the Act

*Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

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

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

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

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

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

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

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

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

34. The comments of the Court of Justice of the European Union (“CJEU”) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11 are relevant for determining genuine use of an EUTM. The court noted that:

“36. It should, however, be observed that..... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

....

50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

...

55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).”



35. The court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to ‘genuine use in the Community’ within the meaning of that provision.

A Community trade mark is put to ‘genuine use’ within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.”

36. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. reviewed the case law since the *Leno* case and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issues in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that

use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State". On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use."

37. The General Court ("GC") restated its interpretation of *Leno Marken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where the market for the goods/services is not limited to that area of the Union.

38. Whether the use shown is sufficient for this purpose, will depend on whether there has been real commercial exploitation of both trade marks, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant jurisdiction during the relevant five-year period. In making the required assessment, I am required to consider all relevant factors, including:

- a. The scale and frequency of the use shown;
- b. The nature of the use shown;
- c. The goods and services for which use has been shown;
- d. The nature of those goods/services and the market(s) for them;
- e. The geographical extent of the use shown.

39. Use does not need to be quantitatively significant in order to be genuine, however, proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is not genuine use.<sup>9</sup>

40. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

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

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<sup>9</sup> *Naazneen Investments Ltd v OHIM*, Case T-250/13; C-252/15 P

proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

and further at paragraph 28:

“28. .... I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

41. Furthermore, in *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

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

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes

be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

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

42. I also note Mr Alexander’s comments in *Guccio Gucci SpA v Gerry Weber International AG* (O/424/14). He stated:

“The Registrar says that it is important that a party puts its best case up front – with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it – and file the best evidence first time round- or lose it”” [original emphasis].

43. And furthermore:

“Any tribunal assessing this evidence would be bound to conclude, especially given the nature of the proprietor in question, the alleged importance of the mark and the fact that the proprietor was represented by legal advisors of

repute that a diligent and careful search had been made for relevant documents proving use and this was the best that could be found.”

44. It is clear from the guidance that a number of factors must be considered when assessing whether genuine use of the mark has been demonstrated from the evidence filed. In this case, the responsibility is on the Opponent to provide sufficiently solid evidence to counter the application, a task which should be relatively easy to accomplish. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.<sup>10</sup>

### **My assessment of the evidence for use**

45. From the outset there are difficulties with the Opponent’s evidence. Firstly it was completed by the Opponent’s legal representative. It would have been both possible and reasonable for evidence of use to have been given by officers of the company involved in these proceedings with first-hand knowledge of the facts. The statement was drafted from information and documents provided to Mr Kelly and it is said from his own knowledge. The information taken from the internet is mostly dated outside the relevant period. For example the screenshots taken of the Opponent’s website have a print date/access date of March 2022 and therefore other than demonstrating the existence of the website itself at that time, it does not by itself establish commercial use of the rights relied upon during the relevant period. Mr Kelly exhibits at PK5 “information relating to the traffic through and visits to the Opponent’s website” said to be between 2018 and 2021. Whilst at least a portion are within the relevant period, the data gives no indication as to use of the trade marks for the goods and services as relied upon, only that the Opponent’s website has been visited between these dates. No explanation is given as to the interpretation of the figures contained in the data or which figures relate to which period, since only total figures are given.

46. Similarly although Mr Kelly states that the Opponent operates 42 stores across Ireland, no indication is provided as to the goods sold or the services provided, nor the number of customers it has acquired. The screenshots produced, which are said to show details of four of its stores, are again dated outside the relevant period and do

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<sup>10</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, GC Case T-415/09

nothing more than list the opening times and the stores' locations as of 2022. I am not told when the Northern Ireland stores opened, apart from the one located in Belfast which was opened outside the relevant period. Furthermore, these screenshots do not demonstrate use of the marks for the goods and services relied upon.

47. Total advertising and promotional spend figures are provided, and whilst the figures for 2015 to 2017 show a reasonably high outlay, little details are provided as to where or how the advertising was undertaken or for what goods or services. I note that Mr Kelly explains that the reduction in the Opponent's advertising spend, which by 2020 had reduced considerably to £18,000, was as a result of a move to online platforms, however, very little other than some references to YouTube videos is produced and these are dated outside the relevant period. Ordinarily I would expect examples of the Opponent's advertising activities to be produced showing how the Opponent outwardly promotes its goods/services to the consumer and the number of consumers who have interacted with them. No evidence of this kind within the relevant period has been produced. There is virtually nothing produced by way of actual advertising dated within the relevant period for any medium and those that are referred to, show no meaningful information as to how and which of the Opponent's goods and services under the mark are promoted or advertised.

48. A similar position is demonstrated in relation to the Opponent's social media presence, which is limited. Two posts for its Facebook account are produced but these are dated outside the relevant period and are shown to have minimal interaction with its followers, only generating a handful of likes. Whilst I note that its Facebook account was created in 2009 and, under a heading marked "People" on its landing page, it shows "10 visits and 276,950 likes", no explanation is given as to the context of this information. If this figure represents followers as of March 2022, it does not indicate a particularly active social media presence particularly when assessed in conjunction with the number of likes received for its May 2021 post. Evidence of its Instagram account does not improve its position. One screenshot is produced which is undated save for an access/print date of 31 May 2022 and copyright date of 2022. Whilst I note that the post shows that, by 2022, the account has 119,000 followers, without further evidence I cannot be certain that this number of followers was accumulated within the relevant period. The follower numbers are not so significant that it would be reasonable for me to infer that many or most were gained within the relevant period. It would not

be implausible that a good number of the 119,000 might follow the Opponent's account in the year after the last relevant date. In any event even if they do represent the Opponent's actual followers within the relevant period, I note that no indication is given as to their geographical origin and, since Mr Kelly states that the Opponent's online platform is accessible to international customers it could be that its followers are not even located within the UK or EU.

49. In order to demonstrate the marketing and promotion of its brand, Mr Kelly has undertaken a Google search exercise, inputting the words "LIFESTYLE SPORTS ADVERTS" into this search engine platform. The search appears to have been undertaken as of 31 May 2022 and shows no more than two references to purported advertising campaigns and links to the Opponent's webpage and YouTube channel. Since no details are provided as to the number of relevant consumers who viewed these, again the results are of little evidential value in establishing use within the relevant period.

50. In relation to the invoices, of the 39 produced 6 are outside the relevant period. Whilst the invoices show locations across the UK, mainly in England, Mr Kelly does not state that the invoices relate to sales through the Opponent's website but rather that the "goods are sold through its stores in Northern Ireland and through UK websites." (my emphasis) No details are provided of these third party websites through which the orders are placed or whether consumers are redirected to the Opponent's website through these portals. There is no evidence to support Mr Kelly's statement that "the trade mark appears on the goods once dispatched" as no evidence of the packaging is produced, or how the goods are received by customers. Given that none of the invoices bear or make any reference to the earlier marks or the Opponent, they cannot be taken or inferred that they demonstrate genuine use of the marks.

51. Turning to level of sales, Mr Kelly states that the annual turnover figures provided only relate to goods sold under the mark but no breakdown is provided. The Opponent's business is wide ranging and its trade marks stand registered for a broad range of goods and services. The figures appear to represent the business as a whole, and therefore the absence of any breakdown means that I am unable to determine with any precision or degree of certainty what proportion of sales is attributable to what category of goods/services.



52. There is very little to support the statement that the Opponent is renowned for being Ireland's largest sporting goods retailer. No details of market share are provided. Where Mr Kelly states that the Opponent enjoys 47% brand awareness, I am unclear as to what he means by this statement and there is no evidence that this is the case. The modest turnover figures do not correlate to a 47% share of the market, given that the sporting clothing, footwear and headgear industry and the retail services for those category of those goods is a multi-billion market.

53. Whilst I note that the Applicant did not challenge the evidence until it filed its final submissions in lieu of hearing, it is still incumbent on me to form a view as a matter of judgment whether Mr Kelly's statement is sufficient to establish the relevant fact when weighed and balanced against the evidence as a whole.<sup>11</sup>

54. Little or no evidence of use was produced for any goods bearing the mark in classes 9, 16, 18, 25 or 28 and no evidence has been produced of the second earlier mark at all. In the latter scenario, this may not have necessarily been fatal, given that it is likely to have been an acceptable variant form of the word only first earlier mark.

## **Conclusion**

55. Even accounting for the fact that the assessment of genuine use must be a global assessment, taking account of the evidential picture as a whole and not whether each individual piece of evidence demonstrates use by itself. Even accepting that there is no de minimis rule, the evidence within the relevant period is overall scant and ill focussed. I cannot overlook the fact that the evidence lacks specificity and largely includes broad claims of use which have not been substantiated by evidence within the relevant period. Despite the provision of turnover figures they are not broken down by category and therefore I am unable to apportion the figures to the goods said to be sold or the provision of the services under the marks. What has been produced is vague and the majority of it is outside the relevant periods.

56. The caselaw is clear, the onus is on the Opponent to file sufficiently solid evidence to demonstrate that it has sufficiently created or maintained a share in the market for the goods and services relied upon. Given Mr Alexander's comments as outlined above and combined with the fact that the Opponent requested additional time to file

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<sup>11</sup> *Robot Energy Limited v Monster Energy Company*, O/308/20 on appeal

its evidence in chief on three occasions it appears that this was the best that could be found. It is not a matter for me to guess what the evidence is meant to show, it should be clear and unequivocal. In the decision in suit I am unable to find that the evidence unequivocally supports the claim to genuine use for any of the goods and services.

57. I regard the absence of specific evidence within the relevant period as significant. Taking into account *Awareness Plymouth* and *Gucci*, I am not satisfied that the Opponent has discharged the burden placed upon it, of demonstrating genuine use of its marks, for the goods/services relied upon, even accepting the relatively low threshold as set out by the caselaw and taking the evidence as a whole.

58. The consequence of this conclusion is that the Opponent cannot rely upon these registrations for the purposes of either of its claims under section 5(2)(b) and 5(3) and therefore the opposition under these grounds fail at the first hurdle.

59. Subject to appeal, the oppositions under sections 5(2)(b) and 5(3) of the Act fail in their entirety and each of the applications may proceed to registration for all of the goods/services as applied for.

### **Costs**

60. As the Applicant has been successful it is entitled to a contribution towards its costs.

61. As an unrepresented party, any claim for costs is awarded in accordance with The Litigants in Person (Costs and Expenses) Act 1975 which sets payment at a rate of £19.00 per hour. The Opponent was invited by the tribunal to complete and file a pro forma, setting out the hours spent on a range of given activities and the costs incurred relating to defending the proceedings. In total the Applicant claims 43.5 hours of time for preparing its case at an hourly rate of £65 per hour.

62. Firstly in assessing any costs award, as an unrepresented party and in accordance with Tribunal Practice Notice 2/2016, the hourly rate to be awarded is set at £19 per hour and not £65 per hour as claimed. Furthermore, in relation to the hours spent, I accept that as a 'lay person' the time taken by the Applicant to prepare its case would take longer than a professional. Notwithstanding that the proceedings involved seven sets of oppositions, the claims under section 5(2)(b) and 5(3) overlapped and were

relatively straightforward, which after consolidation only required one set of evidence rounds to be listed. In addition the documents filed by the parties were not voluminous.

63. Only the Opponent filed evidence during the evidence rounds and other than the initial pleadings the matters have been concluded from the papers following submissions in lieu of hearing being filed.

64. I take no issue with the 5.9 hours claimed for considering the seven oppositions and preparing seven defences. Despite the overlap in the respective claims the Opponent opposed different classes of goods and services which were not clearly outlined and would have taken some time to go through to ascertain its case.

65. In relation to the preparation time claimed for *“reviewing the evidence of use by the Opponent in respect of the request for proof of use in these proceedings and researching preparing and filing written submissions in defence to the seven oppositions filed against the Applicant’s marks”* I consider the 30 hours claimed is excessive. The evidence of use and the list of exhibits produced was straightforward and ran to no more than 80 pages. Whilst the Applicant prepared detailed submissions regarding the extent and nature of the use in its submissions in lieu of hearing, a number of pages merely rehearsed the caselaw and the relevant sections of the legislation without any narrative. I consider 20 hours an appropriate amount.

66. In relation to the 4.3 hours claimed for preparing and attending the CMC, the CMC was requested by the Opponent following the Registry’s refusal to grant the third extension of time request. Noting that the CMC was listed for no more than an hour, it ultimately went in the Opponent’s favour. I make no additional award for the costs arising from the CMC. I am unclear as to what *drafting and reviewing 7 TR8s* refers to, however if these are the TM8 forms, the costs associated with these forms is appropriately included within the 5.9 hours claimed, given that each set effectively mirrors the other.

67. I, therefore, make an award of costs on the following basis at the rate of £19 per hour:

Considering the oppositions and preparing and drafting defences (5.9 hours):	£112.10
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Considering evidence and drafting  
submissions in lieu of hearing (20 hours): £570

**Total** **£682.10**

68. I order Lifestyle Sports (Ireland) Limited to pay Motivates Inc. Limited the sum of £682.10. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 16<sup>th</sup> day of December 2022

Leisa Davies

For the Registrar

## Annex

Details of the Applicant's trade mark applications

### 1. OP000423157 (lead case)

UK00003527864 series of two ("Mark 864")



Filed: 28 August 2020

Published: 11 December 2020

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Data processing equipment; Downloadable electronic reports; Encoded credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Downloadable electronic publications; Computer software in relation to payment cards; Application software for use in respect of payment card schemes.

Class 35: Advertising and marketing services; Advertising and promotion services; Advertising and publicity; Business administration and management; Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs;

Negotiating and concluding commercial transactions for others; Administration of loyalty programs involving discounts or incentives; Collating of data in computer databases; Computer databases (Compilation of information into -); Loyalty scheme services; Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

**2. OP000423212**

**UK00003527855 (“Mark 855”)**

The logo for 'life:style' features the word 'life' in a dark purple font, followed by a colon, and the word 'style' in a lighter purple font. The colon is positioned between the two words.

Filed: 28 August 2020

Published: 11 December 2020

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Data processing equipment; Downloadable electronic reports; Encoded credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Downloadable electronic publications; Computer software in relation to payment cards; Application software for use in respect of payment card schemes.

Class 35: Advertising and marketing services; Advertising and promotion services; Advertising and publicity; Business administration and management; Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs; Negotiating and concluding commercial transactions for others; Administration of loyalty programs involving discounts or incentives; Collating of data in computer databases; Computer databases (Compilation of information into -); Loyalty scheme services; Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Financial services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

### **3. OP000423249**

**UK00003531823 (“Mark 823”)**



Filed: 10 September 2020

Published: 25 December 2020

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded

cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Data processing equipment; Downloadable electronic reports; Encoded credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Mechanisms for coin operated apparatus; Downloadable electronic publications.

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Data processing equipment; Downloadable electronic reports; Encoded credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Downloadable electronic publications.

Class 35: Advertising and marketing services; Advertising and promotion services; Advertising and publicity; Business administration and management; Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs; Administration of the business affairs of retail stores; Advertising; Negotiating and concluding commercial transactions for others; Presentation of goods and services; Presentation of goods on communication media, for retail purposes; Commercial business management; Commercial intermediation for business purposes; Office functions; Purchase orders (Administrative processing of -); Administration of loyalty programs involving discounts or incentives; Collating of data in computer databases; Computer databases (Compilation of information into -); Loyalty scheme services;



Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Financial services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

#### **4. OP00423262**

**UK00003531808 (“Mark 808”)**



Filed: 10 September 2020

Published: 25 December 2020

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Data processing equipment; Downloadable electronic reports; Encoded credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Mechanisms for coin operated apparatus; Downloadable electronic publications.

Class 35: Advertising and marketing services; Advertising and promotion services; Advertising and publicity; Business administration and management; Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs; Administration of the business affairs of retail stores; Advertising; Negotiating and concluding commercial transactions for others; Presentation of goods and services; Presentation of goods on communication media, for retail purposes; Commercial business management; Commercial intermediation for business purposes; Office functions; Purchase orders (Administrative processing of -);-Administration of loyalty programs involving discounts or incentives;-Collating of data in computer databases; Computer databases (Compilation of information into -);-Loyalty scheme services; Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Financial services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

**5. OP000426857**

**UK00003591857 (“Mark 857”)**



Filed: 7 February 2021

Published: 11 June 2021

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Data processing equipment; Downloadable electronic reports; Encoded credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Mechanisms for coin operated apparatus; -Downloadable electronic publications.

Class 35: Advertising and marketing services; Advertising and promotion services; Advertising and publicity; Business administration and management; Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs; Administration of the business affairs of retail stores; Advertising; Negotiating and concluding commercial transactions for others; Presentation of goods and services; Presentation of goods on communication media, for retail purposes; Commercial business management; Commercial intermediation for business purposes; Office functions; Purchase orders (Administrative processing of-); Administration of loyalty programs involving discounts or incentives; Collating of data in computer databases; Computer databases (Compilation of information into -); Loyalty scheme services; Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

**6. OP000426860**

**UK00003591856 (“Mark 856”)**



Filed: 7 February 2021

Published: 11 June 2021

Class 9: Magnetic cards [encoded]; Magnetic encoded cards; Magnetically encoded gift cards; Encoded cards for use in relation to the electronic transfer of funds; Encoded gift cards; Encoded prepaid credit cards; Encoded reward cards; Encoded cards; Encoded cards for use in point of sale transactions; Encoded cards for use in relation to the electronic transfer of financial transactions; Encoded loyalty cards; Encoded magnetic cards; Encoded prepaid payment cards; Encoded smart cards; Data cards; Data processing equipment; Downloadable electronic reports; Encoded credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Mechanisms for coin operated apparatus; -Downloadable electronic publications.

Class 35: Advertising and marketing services; Advertising and promotion services; Advertising and publicity; Business administration and management; Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs; Administration of the business affairs of retail stores; Advertising; Negotiating and concluding commercial transactions for others; Presentation of goods and services; Presentation of goods on communication media, for retail purposes; Commercial

business management; Commercial intermediation for business purposes; Office functions; Purchase orders (Administrative processing of-); Administration of loyalty programs involving discounts or incentives; Collating of data in computer databases; Computer databases (Compilation of information into -); Loyalty scheme services; Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

**7. OP000426863**

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credit cards; Encoded membership cards; Databases (electronic); Payment cards being magnetically encoded; Encoded membership cards; Smart cards; Magnetic data carriers; Mechanisms for coin operated apparatus; Downloadable electronic publications.

Class 35: Advertising and marketing services; Advertising and promotion services; Advertising and publicity; Business administration and management; Administration of consumer loyalty programs; Administration of customer loyalty and incentive schemes; Administration of incentive award programs to promote the sale of the goods and services of others; Administration of sales promotion incentive programs; Administration of the business affairs of retail stores; Advertising; Negotiating and concluding commercial transactions for others; Presentation of goods and services; Presentation of goods on communication media, for retail purposes; Commercial business management; Commercial intermediation for business purposes; Office functions; Purchase orders (Administrative processing of-); Administration of loyalty programs involving discounts or incentives; Collating of data in computer databases; Computer databases (Compilation of information into -); Loyalty scheme services; Promoting the goods and services of others by means of a loyalty rewards card scheme.

Class 36: Issuing electronic payment cards in connection with bonus and reward schemes; Automated payment; Payment transaction card services; Issue and redemption of tokens of value; Issuing of payment gift cards; Issuing of payment gift vouchers; Issuing of vouchers; Issuing stored value cards; Issuing tokens of value as part of a customer membership scheme; Issuing tokens of value in the nature of gift vouchers; Issuing of tokens of value in relation to customer loyalty schemes.

\*Those goods and services that are underlined are not opposed by the Opponent