

**O/0307/23**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003601102**

**BY MEHDI ASGHARI**

**TO REGISTER THE FOLLOWING MARK:**



**IN CLASS 42**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. OP000426440**

**BY FORTEX TECHNOLOGIES, INC. DBA FORTEX, INC.**

## Background and pleadings

1. On 25 February 2021, Mehdi Asghari (“the applicant”) applied to register the trade mark shown below and the application was published for opposition purposes on 28 May 2021.



2. The registration is sought for the following services:

Class 42      Cloud computing; Cloud seeding; Cloud computing services; Computer software design; Computer system design; Conversion of computer programs and data, other than physical conversion; Consultancy in the design and development of computer hardware; Server hosting; Web site design consultancy; Internet security consultancy; Providing search engines; Computer rental; Rental of computer software; Computer virus protection services; Technological services relating to computers; Creating and maintaining web sites; Hosting computer sites; Website design and development; Website design; Creating and designing website-based indexes of information for others [information technology services].

3. Fortex Technologies, Inc. DBA Fortex, Inc. (“the opponent”) opposes the trade mark on the basis of sections 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is reliant upon the mark shown below.
4. UK00914283949, filed on 22 June 2015, registered on 21 October 2015.

# FORTEX

5. The opposition is directed against all of the applicant's services and is reliant upon the goods and services below.

Class 9      Computer software for processing, routing, executing and exchanging multi-asset classes, namely, equities, options, futures, currencies and other financial derivatives of financial trading and financial investments to facilitate trading; computer software for collecting, processing, distributing, broadcasting and analyzing real-time and historical financial market information to facilitate financial trading; computer software for risk management and providing analytics to support decision-making of financial trading and financial investments to facilitate financial trading; computer software for settlement, clearing and compliance of financial trading and financial investments to facilitate financial trading; computer software for financial trading; computer software relating to financial trading; computer software applications, downloadable.

Class 42      Providing temporary use of on-line, non-downloadable software for use in financial trading; providing temporary use of non-downloadable computer software for use in relation to management of investments; consultancy, information and advisory services relating to all of the aforesaid services.

The opponent's Form TM7 was received by the Registry on 31 August 2021.

6. The applicant filed a Form TM8 which was received by the Registry on 28 March 2022. The applicant denied the opponent's claims and requested proof of use of the earlier mark. In his counterstatement, the applicant refers to having held the applied-for trade mark in other jurisdictions "for almost 25

years”. However, that is not relevant except where a priority date comes into play, which is not the case here.

7. The opponent filed evidence of use, described below.
8. Both parties filed written submissions.
9. The applicant is represented by Wiki by Law and the opponent is represented by SHEPARD AND WEDDERBURN LLP.

## **Evidence**

10. Having been put to proof of use, the opponent filed a witness statement from Daniel Chen, Chief Executive and Co-Founder of the opponent. It is signed and dated 5 July 2022.
11. Mr Chen’s witness statement is accompanied by seven exhibits, Exhibits DN1 to DN7.

## **DECISION**

12. Although the UK has left the EU, section 6(3)(a) of the European (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 Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

13. Sections 5(2)(a) and 5(2)(b) of the Act read as follows:

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

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

(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.”

14. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“(1) In this Act an “earlier trade mark” means—

(a) a registered trade mark, international trade mark (UK) a European Union trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

15. Given its filing date, the trade mark upon which the opponent relies qualifies as an earlier trade mark as defined above.

### **Proof of use**

16. I note that the earlier marks had been registered for more than five years at the filing date of the application and therefore the proof of use provisions apply. As stated above, the applicant has requested proof of use.

17. The proof of use provisions are set out in section 6A of the Act, the relevant parts of which state:

“(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), (b) 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) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(5A) [...]

(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.”

18. Section 100 of the Act is also relevant, which reads:

“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.”

19. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier marks is the five-year period ending with the applicant’s filing date i.e. 26 February 2016 to 25 February 2021. The opponent’s mark is a “comparable mark” – a mark derived from an EU trade mark as part of the transitional arrangements that were put in place as a result of the UK leaving the European Union. Tribunal Practice Notice 2 of 2020 explains that “where all or part of the relevant five-year period for genuine use under sections 6A, 46(1)(a) or (b), or 47 falls before IP

Completion Day [31 December 2020], evidence of use of the corresponding EUTM in the EU in that part of the relevant period before IP Completion Day will be taken into account in determining whether there has been genuine use of the comparable trade mark. For that part of the relevant period, for the purposes of the genuine use assessment, the EU will be taken to include the UK.”

20. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J 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 Bundervsvereinigung 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 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].”

21. As the opposing mark is derived from an EUTM, 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. 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.”

And:

“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.”

And:

“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)”.

At paragraphs 57 and 58, 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 mark 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.”

22. 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 Harmonization 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 issue 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 Guilford, 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."

23. 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).

24. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods at issue in the Union 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 for which use has been shown;
- d. The nature of those goods and the market(s) for them; and
- e. The geographical extent of the use shown.

25. 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, therefore, not genuine use.

26. 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>1</sup>

27. In paragraph 2.1 of his witness statement, Mr Chen says the following: “The Trade Mark was first used in the United Kingdom no later than 2016. Continuous use of the Trade Mark has been made throughout the United Kingdom for the goods in class 9 and the services in class 42 of UK trade mark registration no. UK00914283949 since at least 2016.” Mr Chen reiterates this statement at paragraphs 2.5, 2.8 and 3.

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<sup>1</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

28. While Mr Chen states that the mark has been in continuous use throughout the UK since at least 2016 and therefore was in use during the relevant period, I must look for evidence that corroborates that statement.
29. In terms of sales, turnover, market share and marketing spend, no data is provided in respect of the UK (or the EU in the relevant period up to and including IP Completion Day). The only evidence which gives an indication of the size of Fortex as a company comes in the form of standard “about us” text in exhibits such as Exhibits DN5 (March 2018): “Fortex is the world’s leading ECN [Electronic Communications Networks] platform with \$12 billion in currency, metals, energy, and CFD trades and 500,000 tickets a day for tens of thousands of traders around the world.” While these pieces of evidence are within the relevant period, they only provide information at a global level and give no indication as to how much money Fortex makes from the transactions carried out on its platform.
30. The opponent’s website evidence as it relates to its products is characterised by examples of products that could be accessed from the UK because of the worldwide nature of the internet, but which equally could be accessed from elsewhere in the world. In this regard, I am mindful of *Warner Music UK Ltd v TuneIn Inc.* [2019] EWHC 2923 (Ch), where Birss J. summarised the case-law relating to the accessibility of intellectual property on websites and whether this counts as use of the IP in the UK. The summary is set out below.

“16. The legal principles are:

- i) The mere existence of a website and its accessibility by local consumers is never enough to establish a territorial link, see Kitchin LJ in *Merck v Merck* [2017] EWCA 1834 para 168 and *L’Oreal v eBay* para 64.

ii) The issue of targeting is to be considered from the perspective of the public in the relevant state (i.e. the UK), see *Merck v Merck* para 169 and *L'Oreal v eBay* para 65. [...].

iii) The test is objective in the sense that a party's subjective intention cannot turn a website or page which is objectively not targeted at the UK into one which is (*Argos v Argos* [2018] EWCA Civ 2211 para 51). However that does not mean evidence of intention is irrelevant. On the contrary such evidence is relevant and possibly determinative in an appropriate case (*Merck v Merck* paras 169-170 and *Argos v Argos* para 51).

iv) The court must carry out an evaluation of all the relevant circumstances, see *Merck v Merck* para 169 and *L'Oreal v eBay* para 65.

v) It may be appropriate to treat a website as a whole, but in another case it may be appropriate to conduct a more fine grained analysis. Depending on how a website is organised, not all pages are necessarily targeted at the same place(s), see *Argos v Argos* para 51 [...].

17. The following is a non-exhaustive summary of factors which may be considered, the weight they bear necessarily varying from case to case:

i) The appearance of the web pages themselves, which can include explicit statements of an intention to provide goods or services to the public in the UK and the highlighting of the UK in lists or maps.

ii) Other aspects of the web pages such as language(s), currency(ies), telephone numbers, and the use of national top level domain names.

iii) The nature and size of the service provider's business, the characteristics of the goods or services offered and provided, and the number of visits made by the public from the UK.”



31. The evidence does not show Fortex’s products being targeted at UK-based consumers. As Mr Chen himself acknowledges at the beginning of paragraph 2.9 of his witness statement: “Fortex's multi-asset trading platform is delivered from the cloud and can be accessed from anywhere in the United Kingdom and other locations.”
32. The ability to access Fortex products from within the UK is not borne out by any tangible information on how many UK-based customers Fortex had during the relevant period. For example, Exhibit DN3 features a page from the Fortex website advertising the Fortex “AlgoX Algorithmic Trading Engine” and Exhibit DN4 includes a screenshot from the Fortex website listing the advantages of Fortex’s “MT4 WebTrader”. Mr Chen says that Exhibit DN3 “shows how the Trade Mark has been in used in the UK” and, in relation to Exhibit DN4, he says, “The Trade Mark has been used by Fortex in the United Kingdom since 2014 to date for the Fortex MT4 WebTrader product.” However, these exhibits are undated and come from fortex.com, a generic top-level domain (.com) for which there are no UK tabs or sub-domains offered in evidence. The same applies to the Fortex products shown in Exhibits DN1, DN2, and DN6.
33. There is a small amount of evidence which could be construed as a sign of website activity aimed at the UK, but it falls outside the relevant period. Exhibit DN4 includes screenshots from a YouTube video called “Fortex WebTrader Demo”. The screenshots were taken on 13 November 2014 at which point the video had 683 views. The YouTube screenshots have the suffix “GB” which stands for Great Britain, indicative of the YouTube video having been viewed on a UK-based computer.
34. There is evidence of a physical presence in the UK in the form of Exhibit DN5, which details the launch of a “hosting facility” (paragraph 2.11 of the witness statement) using a London-based data centre<sup>2</sup>. The exhibit dates

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<sup>2</sup> There are also two references to Fortex having a London office, but no other details about the form that the London office took (Exhibit DN5, page 2 of 3, article from fortex.com (March 2018) and

from February and March 2018 and is therefore within the relevant period. The exhibit consists of a tweet from the Fortex Twitter account, an article from [forum.equinix.com](http://forum.equinix.com) (Equinix being a data centre operator and the only third-party source offered throughout the evidence), and an article from [fortex.com](http://fortex.com).

35. Mr Chen states that the launch of the hosting facility “was designed to speed up local service in London to better deliver Fortex's entire product suite to its customers in the United Kingdom.” While Exhibit DN5 shows that computing facilities were provided that used hardware that is based in London during the relevant period, the evidence indicates that the main benefit of such infrastructure was to increase the speed of transmission of prices on the London market to customers who could just as easily be based outside the UK. The exhibit offers no evidence that the hosting service was actually used by any UK-based customers during the relevant period.
36. The Fortex article in Exhibit DN5 quotes an Executive Vice President of the company as follows: “This platform enables us to better deliver Fortex’s entire product suite to the EMEA market, including liquidity aggregation, matching and white label solutions within the L [text obscured by chat pop up] in the biggest hub of FX trading globally enables us to grow our market and better serve our clients across the region.” The region in question is Europe, Middle East, and Africa and so the target consumer is based across a much larger area than the UK. Again, there is no evidence provided that the potential to better serve the relevant customer base led to any sales during the relevant period.
37. While no figures have been offered in evidence in relation to marketing, the opponent has provided some evidence of marketing activity in the form of attendance at trade fairs. Exhibit DN7 features in-date evidence of Fortex's attendance at and sponsorship of the TradeTech FX Conference (“the top conference for buy side FX trading”) in London in October 2016 and its

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Exhibit DN7, page 1 of 3, Fortex blog about upcoming attendance at the Finance Magnates London Summit (October 2016)).

attendance at the Finance Magnates London Summit in November 2016. In relation to the TradeTech conference, a Fortex employee is quoted as follows: “Hundreds of heads of trading and portfolio management in the FX space were there, and the Fortex brand was everywhere.” The TradeTech evidence includes two photographs of Fortex’s branding on display. The Finance Magnates summit is described as “the largest trading industry conference in Europe. However, there is no evidence offered of any expressions of customer interest (UK-based or otherwise) having been recorded at either event.

38. To sum up, the opponent has provided no data whatsoever in terms of UK sales, turnover, market share and marketing spend.
39. All of the opponent’s website exhibits in relation to its products are undated and come from a website which has a generic .com domain, with nothing to show targeting of UK-based customers (or EU-based customers up to and including IP Completion Day).
40. While there are references to Fortex having a London office (but no other details) in October 2016 and March 2018, attendance at trade fairs in October and November 2016, and the launch of technical infrastructure in London in March 2018, there is nothing to say that Fortex’s London presence was maintained or built upon after March 2018. There is also nothing in the form of UK customer numbers deriving from this London presence.
41. As per section 100 of the Act, the onus is on the opponent to show what use has been made of the mark. Overall, taking the evidence as a whole into account, I do not consider the opponent to have established use of the mark to the extent that there has been real commercial exploitation of the mark in order to maintain or create a share in the market for the goods and services it is relying upon during the relevant period.

## CONCLUSION

42. The opposition has failed. The application will proceed to registration, subject to appeal.

## COSTS

43. The applicant has succeeded. In line with Annex A of Tribunal Practice Notice 2 of 2016, I award costs to the applicant as below.

Preparing a statement/considering the other side's statement:	£200
Considering the opponent's evidence:	£500
Preparation of submissions:	£300
<b>Total:</b>	<b>£1000</b>

44. I order Fortex Technologies, Inc. DBA Fortex, Inc. to pay Mehdi Asghari the sum of £1000. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 27<sup>th</sup> day of March 2023**

**JOHN WILLIAMS**

**For the Registrar**