

O-0547-23

TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NO 3650296
BY COLUMBUS HEALTH PRODUCTS GMBH
TO REGISTER

Axomera

AS A TRADE MARK
IN CLASSES 10 & 44
AND OPPOSITION THERETO (UNDER NO. 428062)
BY
AXOGEN CORPORATION

Background & Pleadings

1. Columbus Health Products GmbH (“the applicant”) applied to register the trade mark **Axomera** on 2 June 2021 and from which it claimed a priority date of 27 August 2018¹. The trade mark was published for opposition purposes in the Trade Marks Journal on 6 August 2021 in classes 10 and 44. The applicant subsequently amended its specifications by means of a Form TM21b dated 21 February 2022. The current goods and services are set out below:

Class 10: Medical apparatus, devices and instruments for acupuncture and/or electronic cell stimulation; electronic acupuncture devices; acupuncture needles; medical devices for percutaneous and/or transdermal cell and/or tissue stimulation; measuring instruments for medical and veterinary purposes, namely for use in acupuncture and/or electronic cell stimulation.

Class 44: Acupuncture services; health and beauty care in connection with acupuncture and electronic cell and/or tissue stimulation; provision of information in relation to medical and veterinary services in the field of neurology, orthopaedics, pain therapy, electromedicine, acupuncture and alternative medicine; provision of medical information in relation to acupuncture as well as regarding cell and tissue stimulation; services of health centers in the field of neurology, orthopaedics, pain therapy, electromedicine, acupuncture and alternative medicine; medical services in the field of neurology, orthopaedics, pain therapy and electromedicine; services in the field of alternative medicine; beauty care for human beings and animals

2. AxoGen Corporation (“the opponent”) opposed the application on 8 November 2021 based on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). Under sections 5(2)(b) and 5(3) the opponent relies on the following two UK trade marks:

UK TM No. 3643374	UK TM No. 3643372
AXOGEN	AXOGEN

¹ Germany – filing number 30 2018 020 717

<p><i>Class 5: Surgical implants comprised of biological tissue, namely, human and animal tissue, for medical use; and pharmaceutical preparations for drug therapy, namely, pharmaceutical preparations acting on the peripheral or central nervous system</i></p> <p><i>Class 42: Development of new technology for others in the field of biotechnology related to peripheral nerve repair, tissue generation, processing and transplantation.</i></p>	<p><i>Class 10: Medical and diagnostic instruments for use in nerve repair and regeneration; nervous tissue products for use in peripheral nerve repair, namely, surgical kits comprised of medical and surgical apparatus for use in the field of surgery, namely, medical and diagnostic instruments for use in nerve repair and regeneration, sutures, forceps and medical instruments for cutting tissue; and surgical implants comprised of synthetic materials.</i></p>
<p>Filing Date: 18 May 2021 Priority Date: 31 March 2016² Registration date: 8 October 2021</p>	<p>Filing Date: 18 May 2021 Priority Date: 31 March 2016³ Registration date: 8 October 2021</p>

3. Under section 5(4)(a), the opponent claims use of the sign **AXOGEN** since 2013 throughout the UK for all the goods and services set out above.

4. The opponent's marks qualify as earlier trade marks under the provisions of section 6(1)(a). As the opponent's marks had not completed their registration process more than 5 years before the application date of the mark in issue, they are not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent can rely upon all of the goods and services for which its marks are registered.

5. The applicant filed a counterstatement in which it denied all grounds of the opposition and put the opponent to proof of its claims.

² EU – filing number 1310077

³ EU – filing number 1307594

6. Both sides are represented in these proceedings. The applicant is represented by Maguire Boss and the opponent by Mishcon de Reya LLP.

7. Both sides filed evidence and submissions. A hearing was requested and was held before me on 10 February 2023. The applicant was represented by Sylvie Tate of Maguire Boss and the opponent was represented by Stuart Baran of Counsel, instructed by Mishcon de Reya. Both sides filed skeleton arguments in advance of the hearing.

8. I make this decision based on a reading of all the material before me and the submissions presented at the hearing.

Preliminary issues

9. 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.

Relevant date

10. The relevant date for the assessment of the earlier marks' reputation are the applicant's priority date namely 27 August 2018.

Opponent's evidence in chief

11. A witness statement was filed in the name of Bradley Ottinger, General Counsel and Chief Compliance Officer for the Opponent. Mr Ottinger appended 9 exhibits. In particular Mr Ottinger states that the earlier mark AXOGEN was first used in the UK in 2013 for goods and services relating to nerve repair and regeneration. Between 2013-2018 the opponent used Hospital Innovations Limited as its UK Distributors, then from 2018 to present, the opponent has a UK distribution agreement with another company namely Joint Operation (UK) LLP.

12. I do not intend to summarise every exhibit here but I find the following to be the most pertinent.

13. Exhibit BO3 (page 9) contains a screenshot dated 4 December 2017 taken by the Wayback Machine Internet Archive from the website hospitalinnovations.com which shows a section entitled “Nerve Reconstruction”. This section does not list AXOGEN but does list AVANCE and AXOGUARD which Mr Ottinger states to be the opponent’s products. On page 12 of the same exhibit, there is a screenshot from jointoperations.co.uk dated 11 April 2022 which indicates the mark AXOGEN and is also shown on subsequent pages 16, 18 and 19. Mr Ottinger states that the opponent supplies its products, via its UK distributor, to hospitals in London, Liverpool, Middlesbrough, Cambridge and Birmingham.

14. Mr Ottinger does not specify any specific turnover figures generated in the UK within the evidence. He states that,

“To date, Axogen's sales in the UK of its products bearing the AXOGEN trademark, have totalled in the millions of dollars. Axogen's gross sales in the UK of its products bearing the AXOGEN trademark have grown significantly since 2013, with 2014's gross sales more than tripling the 2013 gross sales; 2016's gross sales being about 7 times 2013's gross sales; and 2018's gross sales being almost 9 times 2013's gross sales. In 2013, Axogen's sales of its AXOGEN-bearing products in the UK comprised about 12% of its product gross sales revenue outside of the United States. That percentage grew to about 23% in 2014.”

15. Exhibit BO4 comprises a number of screenshots which are stated to show the public recognition of the opponent’s products. There include:

- An online article dated 6 January 2014 from the website biospace.com stating that the opponent won “the 2014 North American New Product Innovation Leadership Award for peripheral nerve repair by the preeminent global research organisation Frost & Sullivan”. This award was given for the opponent’s Avance Nerve Graft.
- A press release from the opponent dated 27 February 2018 stating that it had been awarded “A 2018 Employee Engagement Best Practices award. The

annual awards sponsored by DecisionWise International recognises top performing companies in the area of employee engagement and company culture”.

- An online article dated 22 June 2018 from the website biospace.com stating that the opponent’s CEO had been named as the “Ernst & Young’s Entrepreneur of the year 2018 award winner for the state of Florida in the healthcare category”
- Several screenshots from whichmedicaldevice.com (which is stated to be a UK based website) which shows the mark AXOGEN and the associated products Avance nerve graft, AxoGuard nerve connector and AxoGuard nerve protector. All entries indicate these products were added to the website in May 2013.
- A Google search for news stories including the mark AXOGEN and its subsequent results, with date parameters set between 27 August 2013 – 27 August 2018. The abstracts do not appear to have been restricted to the UK and feature a mixture of results from the USA and some other countries.
- An online article from WalesOnline.co.uk dated 25 March 2015 about the partnership between the opponent and its former distributor Hospital Innovations Limited in which the mark AXOGEN is mentioned in relation to nerve grafting.
- An online article from dailymail.com dated 27 September 2016 regarding an American amputee featured on an American TV programme in which her surgeon discusses using ‘AxoGen’s AxoGuard nerve protector’ product during her surgery.
- An online article from RTTnews.com dated 18 December 2017 outlining the opponent’s financial performance in the USA between 2013-2016 (figures are given as US dollars) and future expectations of stock prices.

16. Exhibit BO5 comprises a numbers of UK scientific and clinical studies and articles showing use of AXOGEN. These include

- An overview relating to nerve grafts dated 22 November 2017 from the National Institute for Clinical Excellence (NICE) in which the mark AXOGEN is used.

- An article from materialsviews.com dated 2016 regarding peripheral nerve injury in which the mark AXOGEN is used.
- A PhD thesis dated and published in October 2016 relating to peripheral nerve injury in which the mark AXOGEN is used.
- A number of articles from The Journal of Musculoskeletal Surgery and Research in which the opponent's products are mentioned. These include AXOGEN, AVANCE and AXOGUARD. All articles are stated to be by UK based physicians and based on clinical studies from UK hospitals have received in November and December of 2018 and published online in 2019.
- Screenshots dated 19 April 2022 from thenervesurgeon.co.uk which is a website hosted by Dominic Power, a noted UK hand and nerve surgeon. The website contains references AXOGEN and its associated nerve products.

17. Mr Ottinger also makes reference in exhibit BO6 to the opponent's attendance at medical conferences between 2015 and 2022 either in the UK or in other countries but which have UK delegates attending.

Applicant's evidence

18. A witness statement was filed in the name of Sylvie Tate, a Chartered Trade Mark Attorney at Maguire Boss who are the applicant's legal representatives in these proceedings. Ms Tate appended 9 exhibits. I do not intend to summarise these exhibits in detail but they largely concern derivations of the prefix AXO such as axonal, axon, axoplasm amongst others which are used in scientific and clinical material relating to nerves and nerve tissues.

Opponent's evidence in reply

19. The opponent filed a second witness statement in the Name of Bradley Ottinger and appended 6 additional exhibits. Mr Ottinger's second witness statement falls into two parts. The first part deals with rebuttal of the applicant's evidence regarding the derivation of the prefix AXO and the second part deals with issues raised in the applicant's written submissions, which were filed simultaneously with its evidence, regarding the respective goods and services comparison. I have considered the evidence contained in the first part of this second witness statement and will refer to

it as and when necessary and I will deal with the issues relating to the goods and services later in this decision.

Section 5(2)(b)

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

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

21. The following principles are gleaned from the judgments of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V*, Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L.Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles:

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

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

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

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

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

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

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

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

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

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

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

Comparison of the goods and services

22. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*⁴, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

23. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case⁵, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance

⁴ Case C-39/97

⁵ [1996] R.P.C. 281

whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

24. I also find that the following case law is useful in these proceedings where in *Gérard Meric v Office for Harmonisation in the Internal Market (“OHIM”)*⁶, the General Court (“GC”) stated that:

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

25. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

26. In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the

⁶ Case T- 133/05

goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

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

Whilst on the other hand:

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

27. As the two earlier rights share the same word mark, I have listed all relevant classes below in a single column for convenience. The goods and services to be compared are:

Opponent's goods & services	Applicant's goods & services
<p><i>Class 5: Surgical implants comprised of biological tissue, namely, human and animal tissue, for medical use; and pharmaceutical preparations for drug therapy, namely, pharmaceutical preparations acting on the peripheral or central nervous system</i></p>	
<p><i>Class 10: Medical and diagnostic instruments for use in nerve repair and regeneration; nervous tissue products for use in peripheral nerve repair, namely, surgical kits comprised of</i></p>	<p><i>Class 10: Medical apparatus, devices and instruments for acupuncture and/or electronic cell stimulation; electronic acupuncture devices; acupuncture needles; medical devices for</i></p>

<p><i>medical and surgical apparatus for use in the field of surgery, namely, medical and diagnostic instruments for use in nerve repair and regeneration, sutures, forceps and medical instruments for cutting tissue; and surgical implants comprised of synthetic materials.</i></p>	<p><i>percutaneous and/or transdermal cell and/or tissue stimulation; measuring instruments for medical and veterinary purposes, namely for use in acupuncture and/or electronic cell stimulation.</i></p>
<p><i>Class 42: Development of new technology for others in the field of biotechnology related to peripheral nerve repair, tissue generation, processing and transplantation.</i></p>	
	<p><i>Class 44: Acupuncture services; health and beauty care in connection with acupuncture and electronic cell and/or tissue stimulation; provision of information in relation to medical and veterinary services in the field of neurology, orthopaedics, pain therapy, electromedicine, acupuncture and alternative medicine; provision of medical information in relation to acupuncture as well as regarding cell and tissue stimulation; services of health centers in the field of neurology, orthopaedics, pain therapy, electromedicine, acupuncture and alternative medicine; medical services in the field of neurology, orthopaedics, pain therapy and electromedicine; services in the field of alternative</i></p>

	<i>medicine; beauty care for human beings and animals</i>
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28. For the purpose of a comparison, it is appropriate to group related goods and services together, where they are sufficiently comparable to do so⁷.

Class 10

29. From my own understanding of the terms in the applicant’s specification, I am aware that the practice of acupuncture is the stimulation of sensory nerves via strategically positioned needles. This can be done in a medical context by such agencies as the NHS or other medical practitioners to treat chronic pain conditions. With regard to the term “electronic stimulation”, I understand this to be apparatus targeting specific damaged tissue or nerves and applying electrical impulses through the skin. The opponent’s goods are highly specialised surgical apparatus to deal with nerve repair and regeneration. However I find the respective class 10 goods to be similar to a medium degree as both contain medical apparatus concerned with treating nerve and tissue conditions therefore I find there is some shared nature and purpose. There is also likely to be an overlap of trade channels and some overlap of users.

30. In relation to the comparison between the opponent’s class 5 goods and the applicant’s class 10 goods, the applicant contends the following in its written submissions of 5 August 2022,

“The Opponent’s class 5 goods, comprising surgical implants of human and animal biological tissue for medical use, and pharmaceutical preparations acting on the peripheral or central nervous system, are again clearly highly specialist in nature. They would be used and administered only by surgical and medical professionals, and for specific applications. Such goods would, by law, be used in formal clinical settings, under strict controls, either in relation to invasive treatments of patients under some form of anaesthetic, or

⁷ *Separode Trade Mark* decision, BL O-399-10 (AP)

under prescription. As such, goods of this nature would only be available through dedicated and regulated channels of trade, usually under contract (see again paras. 5.3 – 5.8 and 5.11 of Mr. Ottinger’s witness statement).

31. I note the applicant’s above comments. I have also considered the comparison table set out at Annex A in the opponent’s skeleton argument. This table does not contain any arguments for similarity between the opponent’s class 5 goods and the applicant’s class 10 goods. I agree with the applicant that in this particular comparison that the respective goods differ in nature, purpose, channels of trade and in user. The respective goods are neither complementary nor competitive. Therefore I find there is no similarity between the opponent’s class 5 goods and the applicant’s class 10 goods.

Class 44

32. As previously stated within the class 10 comparison, the applicant’s services namely *Acupuncture services; health and beauty care in connection with acupuncture and electronic cell and/or tissue stimulation* could be used in a medical context to treat medical conditions such as chronic pain management or damaged nerves. I consider that there may be some element of complementarity between the respective goods and services. As such I consider them to be similar to a low degree.

33. I find the applicant’s terms namely *provision of information in relation to medical and veterinary services in the field of neurology, orthopaedics, pain therapy, electromedicine, acupuncture and alternative medicine; provision of medical information in relation to acupuncture as well as regarding cell and tissue stimulation*; could be provided in various healthcare settings or online. The above services do not limit the type of information being provided, only specifying that they are provided in relation to neurology, orthopaedics, pain therapy and electromedicine. Neither do the above services specify who the information is intended for, e.g. patients seeking treatment or professionals seeking information or advice about treating others. Therefore I find there is likely to be an overlap of users with those users for the opponent’s goods in class 10 and services in class 42 as the information may cover

surgical apparatus or development of new biotechnology for nerve treatment and regeneration. Although there is no competition element, I consider that there may be an element of complementarity between the respective goods and services. As such I consider them to be similar to a low degree.

34. I find the terms *services of health centers in the field of neurology, orthopaedics, pain therapy, electromedicine, acupuncture and alternative medicine; medical services in the field of neurology, orthopaedics, pain therapy and electromedicine* to likely to be directed at patients seeking treatment. Whereas the opponent's goods and services are directed at professionals for use in surgery. Whilst the goods and services do not compete, but they may be complementary to a low degree, in that the opponent's goods may be considered alongside the applicant's services.

35. The applicant's *services in the field of alternative medicine* is a broad term which is not limited to specific forms of alternative medicine which itself encompasses a range of treatments. From my own knowledge, I understand alternative medicine is a term that is generally applied to forms of treatments and therapies which are generally non-invasive and are not considered as orthodox medical or surgical treatment. However because the term is so broad it could encompass alternative medicine in regard to treating nerve repair. The opponent's class 10 goods and class 42 services are, in my view, for use in traditional and orthodox surgical and medical treatment areas. Nevertheless I find there may be some shared nature and purpose if the services encompass treating nerve conditions. There is no apparent crossover of trade channels as medical professionals are the intended consumers of the opponent's goods whereas the applicant's services are for the general public but I find there may be some low degree of complementarity and competition. Overall I find these services to be similar to a low degree.

36. I find the applicant's services namely *beauty care for human beings and animals* to be dissimilar to the opponent's goods and services. I regard beauty care *per se* as being a service to improve the outward appearance of either a person or an animal. This could be in the nature of grooming, hair care, nail or skin care. However it will be treatments for the external appearance and does not share its nature, purpose or trade channels with the opponent's class 10 goods or class 42

services which are for use in invasive surgical and medical interventions. There is no overlap of users given that the opponent's goods and services are used by medical professionals whereas the applicant's services are for the general public. Nor do I find any complementarity or competition between the respective specifications. These services are dissimilar.

Average consumer and the purchasing process

37. I next consider who the average consumer is for the contested goods and services and how they are purchased. It is settled case law that the average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.⁸ For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.⁹

38. The average consumer for the goods at issue will be specialist businesses whereas for the services it will be the general public. The goods will be selected by primarily visual means either in physical retail premises or browsing their online equivalents. There is an aural element to consider if advice is sought from telesales staff or manufacturers. The services will be selected in the same visual way, from consumers encountering signage on a physical location to browsing websites etc. There will be a more significant aural factor to consider as services will likely have word-of-mouth recommendations or referrals from other health practitioners. Given that the nature of the contested goods and services is to treat health conditions, I find the consumer will be paying a medium to high degree of attention during the purchasing process considering any potential negative impacts or side effects.

Comparison of the marks

39. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall

⁸ *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch)

⁹ *Lloyd Schuhfabrik Meyer*, Case C-342/97.

impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*¹⁰, that:

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

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

41. The respective trade marks to be compared are:

Opponent's mark(s)	Applicant's mark
AXOGEN	Axomera

42. The opponent's two earlier marks are for the same single word namely **AXOGEN** so any further references I make to **AXOGEN** will cover both marks. There is no other aspect such as stylisation or devices so the overall impression is derived solely from the word itself.

43. The applicant's mark is a single word **Axomera** in title case with no other aspect to it so again the overall impression is derived solely from the word itself.

44. Starting with the visual comparison, both marks share their first three letters namely A-X-O but differ in their endings. The opponent's mark ends in the three letters G-E-N and the applicant's ends in the four letters M-E-R-A making it slightly

¹⁰ Case C-591/12P

longer. Taking these factors into account, I find there is a low degree of visual similarity.

45. In an aural comparison, I find there will be an identical pronunciation of the shared element A-X-O followed by two different end sounds. The single syllable GEN on the one hand and the two syllable ME-RA on the other. Overall I find there is a low degree of aural similarity between the respective marks.

46. In terms of a conceptual comparison, the applicant within its evidence¹¹ sought to show that “axo”-derived words such as axis or axon were in used in medicine to denote nerves or nerve endings. It was accepted to some extent by the opponent, in its evidence in reply,¹² that some medical terms relating to nerves do begin with the letters AXO, although more commonly AXON, but it rebutted the applicant’s statement that it is widely used medical terminology¹³. Having considered the evidence, I do not think find it is sufficient to conclude that **AXO** will be widely understood by the majority of consumers as pertaining to nerves. It follows then that the respective marks before me, namely **AXOGEN** and **Axomera**, will be perceived as invented words and as such have no concept. Therefore the respective marks are conceptually neutral.

Distinctiveness of the earlier marks

47. The degree of distinctiveness of the earlier marks must be assessed. This is because the more distinctive an earlier mark, based either on inherent qualities or because of use made, the greater the likelihood of confusion. In *Lloyd Schuhfabrik Meyer*¹⁴ the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular

¹¹ Exhibits ST3-10

¹² Paragraphs 2.1-2.5

¹³ Exhibits EH1-2

¹⁴ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97

undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

48. Registered trade marks possess varying degrees of inherent distinctive character starting from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, scaling up to those with high inherent distinctive character, such as invented words.

49. I begin by considering the inherent position. The word **AXOGEN** is an invented word and has no meaning in relation to the goods or services at issue. Consequently, I consider the marks to be inherently distinctive to a very high degree.

50. Turning to enhanced distinctiveness, the relevant market I must consider is the UK. Taking into account the *Chiemsee* factors given above, I note from the evidence that the mark was first used in the UK in 2013 and sufficient evidence such as archive screenshots has been provided to show the mark in use prior to the relevant date. On the negative side, no market share has been provided and moreover no turnover figures have been provided. The opponent states that

“Axogen’s gross sales in the UK of its products bearing the AXOGEN trademark have grown significantly since 2013, with 2014’s gross sales more

than tripling the 2013 gross sales; 2016's gross sales being about 7 times 2013's gross sales; and 2018's gross sales being almost 9 times 2013's gross sales. In 2013, Axogen's sales of its AXOGEN-bearing products in the UK comprised about 12% of its product gross sales revenue outside of the United States. That percentage grew to about 23% in 2014."

51. However no "gross sales revenue" figures are provided for the years 2013 to 2017 so I cannot assess what the percentage increase stated by the opponent above actually means. The only turnover figure that is given for a full financial year prior to the relevant date is \$83.9M in 2018 which I take to be the global revenue of the opponent and not broken down to the UK sales. In the same vein no advertising expenditure figures are provided although I note that the opponent does promote its goods and services through attendance at specialist medical conferences. In terms of a customer base, the opponent specifies that its products are used in hospitals in 5 UK locations but does not specify the extent of that custom, i.e. how often products are procured or how longstanding that custom has been. Finally in the opponent's favour, its evidence demonstrates that professional bodies within the relevant sector have cited the opponent's mark in research articles and academic papers.

52. However when taking all the *Chiemsee* factors into account, there are significant gaps with regard to the opponent's evidence. As such I do not find that the marks' distinctiveness has been enhanced through use. However given the very high degree of inherent distinctiveness, even if I had found that the use had enhanced the distinctiveness of the marks, it would not have improved the opponent's position to any material extent.

Likelihood of confusion

53. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they have kept in mind¹⁵. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the interdependency

¹⁵ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa.

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

55. In *L.A. Sugar Limited*¹⁶, Mr Iain Purvis Q.C., sitting as the Appointed Person, explained that:

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

56. However it is also settled case law that it is not sufficient to find a likelihood of confusion if a mark merely calls to mind another mark¹⁷. This is considered mere association not indirect confusion.

57. So far in this decision I have found that,

¹⁶ *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10

¹⁷ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

- There is a low to medium degree of similarity between some of the goods and services and a dissimilarity between others
- The average consumer for the goods is a professional and for the services is a member of the general public, both paying a medium to high degree of attention in a predominantly visual purchasing process
- There is a low degree of visual and aural similarity between the respective marks
- There is conceptual neutrality
- The earlier mark is inherently distinctive to a high degree

58. The respective marks share the same three letter at their beginnings namely **AXO**. However even taking into account the case law relating to the beginnings of words and the distinctiveness of the earlier mark, I find any such similarity is outweighed by the differences in the respective marks, namely the additional elements **GEN** and **MERA** which have different visual and aural impacts and have no conceptual hooks on which a consumer can hang a meaning. These endings will not go unnoticed and overall I find there is no direct confusion between the marks.

59. Having found no likelihood of direct confusion, I will go on to assess the likelihood of indirect confusion. I remind myself of the guidance given in *L.A. Sugar* that indirect confusion requires a consumer to undertake a thought process whereby they acknowledge the differences between the marks yet attribute the common element to the same or an economically connected undertaking, taking the later mark to be a possible brand extension or sub brand of the earlier mark. However I am also alert to the guidance in *Duebros* that a finding of indirect confusion should not be made simply because two marks share a common element.

60. In this instant case consumers may note the fact that the respective marks share the **AXO** beginnings but in my view this beginning does not constitute an independently distinctive element. The marks themselves are presented as wholes with no spaces or hyphens which would cause a consumer to regard the marks as having separate elements. Moreover the marks have no immediately graspable concept, so I do not find it is likely that consumers should be confused into thinking

the goods and services come from the same or connected undertakings. If one mark is brought to mind by the other on the basis of the shared letters **AXO**, then I consider this to be mere association and not indirect confusion as per the *Duebros* decision. Consequently I find that there is no indirect likelihood of confusion.

61. Having failed to find a likelihood of confusion under section 5(2). I will go on to consider the other grounds.

Section 5(3)

62. The opponent opposes the contested trade mark under Section 5(3) of the Act on the basis of its earlier mark for which it claims have a reputation. In particular the opponent argues that the applicant will,

“(i) due to the high similarity between the Trade Mark and the Earlier Trade Marks, cause the relevant public to believe that the Trade Mark is used by the same undertaking or think that there is an economic connection between the users of the Trade Mark and the Earlier Trade Marks;

(ii) free-ride on the coat-tails of the reputation and/or prestige associated with the Earlier Trade Marks and thereby derive an illegitimate benefit from them and/or illegitimately exploit the marketing efforts expended by the Opponent in order to create and maintain the Earlier Trade Marks' reputation and image;

(iii) tarnish the reputation of the Earlier Trade Marks because the Opponent will not be able to control the manner in which the Trade Mark is used, which may be in a manner adverse to the reputation of the Earlier Trade Marks; and/or

(iv) dilute the distinctive character and/or the reputation of the Earlier Trade Marks because the presence on the market of a highly similar mark will reduce the capacity of the Earlier Trade Marks to arouse an immediate association with the Opponent's goods and services for which they are registered. Taking account of the normal practice in relation to the goods and services covered by the Trade Mark, said association will create a change in the economic behaviour of the average consumer of the goods and services for which the

Earlier Trade Marks are registered, or a serious likelihood that said change will happen in future, thus diluting the Earlier Trade Marks' value and reputation. This change in economic behaviour would be reflected, for example, in a shift of consumers from the goods and services distinguished by the Earlier Trade Marks to those distinguished by the Trade Mark and a respective decrease in sales of the former”.

63. Section 5(3) of the Act states:

“5(3) A trade mark which –

(a) is identical with or similar to an earlier trade mark, [...] shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

64. Section 5(3A) of the Act states:

“Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

65. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case C-252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora* and Case C-383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows:

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

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

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

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

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

(f) the more immediately and strongly the earlier mark is brought to mind by the later mark, the greater the likelihood that use of the latter will take unfair advantage of, or will be detrimental to, the distinctive character or the repute of the earlier mark; *L'Oreal v Bellure NV*, paragraph 44.

(g) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77 and *Environmental Manufacturing*, paragraph 34.

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

(i) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV*, paragraph 40. The stronger the reputation of the earlier mark, the easier it will be to prove that detriment has been caused to it; *L'Oreal v Bellure NV*, paragraph 44.

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

66. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that its mark is similar to the applicant's mark. Secondly, that the earlier mark has achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the later mark. Fourthly, assuming that the first three conditions have been met, section 5(3) requires that one or more of the three types of damage claimed will occur. It is unnecessary for the purposes of section 5(3) that the goods be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

Reputation

67. Having found that the respective marks are visually and aurally similar to a low degree, I next consider reputation. As outlined above, for an opposition under section 5(3) to get off the ground it is first necessary for the opponent to show that it has the necessary reputation. I must be satisfied that the earlier marks are known by a significant part of the relevant public, in this case I would assess this as being those in the medical and surgical fields. From my assessment of the evidence in particular exhibits BO5 and 6, I note that the opponent's products have been used in nerve related surgeries and several of them have been cited in surgical and clinical articles in relevant medical publications although some of these articles were published after the relevant date. However I note Mr Ottinger's point¹⁸ that the research leading to these articles would have taken place in advance of publication so at least at or before the relevant date. In addition I also note that whilst the AVANCE and AXOGUARD products are highlighted, I accept that there is sufficient reference to **AXOGEN**. Taking all this into account I find that the opponent has established a qualifying reputation.

Link

68. Having found that the opponent has established the necessary reputation, I will go on to make the assessment of whether the public will make the required mental 'link' between the marks, taking account of all relevant factors. The factors identified in *Intel* (underlined below) are:

The degree of similarity between the conflicting marks

69. For the reasons given previously I find there is a low degree of visual and aural similarity but a conceptual neutrality.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

¹⁸ Bradley Ottinger's first witness statement of 14 June 2022, paragraph 8.2

70. I found that the respective goods in class 10 and some services in class 44 were similar to between a medium to low degree . However I found the remaining services in class 44 to be dissimilar.

The strength of the earlier mark's reputation

71. I found that the opponent's evidence has demonstrated some reputation in the UK at the relevant date.

The degree of the earlier marks' distinctive character, whether inherent or acquired through use

72. I found that the earlier marks are inherently distinctive to a high degree.

Whether there is a likelihood of confusion

73. Earlier in this decision, I did not find a likelihood of either direct or indirect confusion due to the differences in the respective marks.

74. The opponent argues that the "high similarity" between the respective marks is such that average consumers will make a link between the marks. I have found that the similarity is low under Section 5(2)(b). As such I reject the submission in relation to the opponent's claim under Section 5(3). While the reputation of the earlier marks is a factor in favour of establishing a link between marks in the mind of a consumer, the distance between the marks is such that makes it unlikely that the public will make any link between them. Although, for the purposes of Section 5(3), there is no requirement that a likelihood of confusion be established nor that the goods and services be similar, these factors must be taken into account in establishing a link.

75. Having considered all of the above, my finding is that, notwithstanding the reputation of the earlier marks, the coincidence of the letters **AXO** in the marks is not capable of creating any link between the marks in the mind of the consumers. In the absence of a link, there can be no damage.

76. The ground based on Section 5(3) is also rejected.

Section 5(4)(a)

77. The opponent's oppose the application under Section 5(4)(a) of the Act on the basis of its alleged earlier rights in the sign AXOGEN since 2013 for the goods and services set out in paragraph 2 of this decision. It claims to have acquired goodwill under this sign. Use of the applicant's mark in the course of trade would therefore be a misrepresentation to the public and result in damage to the aforementioned goodwill.

78. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(b) [...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

Subsection (4A) of Section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

79. The three elements which the opponent must show are therefore goodwill; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation.¹⁹

¹⁹ Discount Outlet v Feel Good UK [2017] EWHC 1400 (IPEC), Her Honour Judge Melissa Clarke, sitting as a deputy judge of the High Court.

Relevant date

80. In terms of the relevant date for assessment of this ground, in *Advanced Perimeter Systems Limited v Multisys Computers Limited*,²⁰ Mr Daniel Alexander QC, sitting as the Appointed Person, quoted with approval the summary made by Mr Allan James, acting for the Registrar, in *SWORDERS Trade Mark*:²¹

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”

81. Therefore the relevant date in this case is the priority date for the applicant’s mark namely 27 August 2018.

Goodwill

82. The first hurdle is for the opponent to show that it had the requisite goodwill at the relevant date and that the sign relied upon, **AXOGEN**, is associated with, or distinctive of, that business.

83. The concept of goodwill was considered by the House of Lords in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

²⁰ BL O-410-11

²¹ BL O-212-06

84. Given my previous analysis of the opponent's evidence, I find that it has established sufficient goodwill for these goods and services at the relevant date.

Misrepresentation

85. Having cleared the first hurdle of goodwill I now go on to consider the second hurdle of misrepresentation. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

“There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is “is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents'[product]”

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148 . The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175 ; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

And later in the same judgment:

“... for my part, I think that references, in this context, to “more than *de minimis* ” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993) . It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

86. On the subject of how many of the relevant public must be deceived or confused for the opponent to be successful in a claim under this ground, I bear in mind the

decision in *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590, where Lord Justice Lloyd commented on the paragraph above as follows:

“64. One point which emerges clearly from what was said in that case, both by Jacob J and by the Court of Appeal, is that the “substantial number” of people who have been or would be misled by the Defendant's use of the mark, if the Claimant is to succeed, is not to be assessed in absolute numbers, nor is it applied to the public in general. It is a substantial number of the Claimant's actual or potential customers. If those customers, actual or potential, are small in number, because of the nature or extent of the Claimant's business, then the substantial number will also be proportionately small.”

87. Accordingly, once it has been established that the party relying on the existence of an earlier right under section 5(4)(a) had sufficient goodwill at the relevant date to found a passing-off claim, the likelihood that only a relatively small number of persons would be likely to be deceived does not mean that the case must fail. There will be a misrepresentation if a substantial number of customers, or potential customers, of the claimant's actual business would be likely to be deceived.

88. I have found that the opponent has established goodwill in the sign **AXOGEN**. The contested mark is **Axomera** which I have found to be visually and aurally similar to a low degree but conceptually neutral.

89. I recognise that the test for misrepresentation is different to that for likelihood of confusion, namely, that misrepresentation requires “a substantial number of members of the public are deceived” rather than whether the “average consumers are confused”. However, as recognised by Lewison L.J. in *Marks and Spencer PLC v Interflora*²², it is doubtful whether the difference between the legal tests will produce different outcomes. In my view, this is the case here. I do not find that the relevant public faced with the contested mark will believe that there is a connection between **AXOGEN** and **Axomera**, the differences between the marks are too significant and

²² [2012] EWCA (Civ) 1501

there is not a logical progression from one to the other to give rise to misrepresentation. As such the opposition based on section 5(4)(a) fails.

Conclusion

90. The opposition has failed. Subject to any appeal of this decision, the application can proceed to registration.

Costs

91. The applicant has been successful in these proceedings. As such it is entitled to a contribution towards the costs incurred. Awards of costs for proceedings commenced before 1 February 2023 are governed by Annex A of Tribunal Practice Notice (TPN) 2/2016. Bearing in mind the guidance given in TPN 2/2016, I award costs as follows:

£400 Considering Notice of Opposition & preparing counterstatement

£800 Considering other side's evidence & preparing own evidence

£1000 Preparing for & attending hearing

£2200 Total

92. I order AxoGen Corporation to pay Columbus Health Products GmbH the sum of £2200. 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 12th day of June 2023

June Ralph

For the Registrar

The Comptroller-General