

TRADE MARKS ORDINANCE (Cap. 559)

OPPOSITION TO TRADE MARK APPLICATION NO.: 303505987



MARK:

CLASSES: 9, 41 and 45

APPLICANT: Infinitus Intellectual Property Limited

(夢造者知識產權有限公司)

OPPONENT: LKK HEALTH PRODUCTS GROUP LIMITED

(李錦記健康產品集團有限公司)

STATEMENT OF REASONS FOR DECISION

Background

1. On 14 August 2015, Infinitus Intellectual Property Limited (夢造者知識產權有限公司) (the “**Applicant**”) filed an application (the “**subject application**”) under the Trade Marks Ordinance (Cap. 559) (the “**Ordinance**”) for the registration of the following mark:



(the “**subject mark**”).

2. Registration is sought in respect of certain goods under Class 9 (the “**subject goods**”) and services under Classes 41 and 45 (the “**subject services**”), particulars of which are set out in **Annex 1** hereto.
3. Particulars of the subject application were published on 18 December 2015. LKK HEALTH PRODUCTS GROUP LIMITED (李錦記健康產品集團有限公司) (the “**Opponent**”) filed on 17 March 2016 a notice of opposition to the subject application together with a statement of grounds of opposition (“**Grounds of Opposition**”). A counter-statement (“**Counter-statement**”) was filed by the

Applicant on 31 May 2016 in response to the Grounds of Opposition filed.

4. In support of the opposition, the Opponent filed under Rule 18 of the Trade Marks Rules (Cap.559, sub. leg.) (the “**TM Rules**”) a statutory declaration made by Lee Wai Sum Sammy (“**Sammy**”) dated 12 January 2017 (“**Sammy’s 1st SD**”) together with exhibits. The Applicant filed a statutory declaration (“**Li’s SD**”) made by one Li Kai Sing (“**Li**”) dated 14 July 2017 in support of its application. Sammy filed a further statutory declaration dated 11 December 2018 (“**Sammy’s 2nd SD**”) pursuant to rule 20 of the TM Rules.
5. The opposition hearing was scheduled to be heard on 22 January 2020. Both parties filed a Form T12 to confirm attendance at hearing. Skeleton Submissions and Skeleton Argument together with a list of authorities and copies of the authorities were filed respectively on behalf of the Applicant and the Opponent on 17 January 2020. At the hearing, Mr. Sebastian Hughes, counsel, appeared for the Opponent and Mr. CW Ling, counsel, appeared for the Applicant. I reserved my decision at the conclusion of the hearing.

Notice of opposition

6. According to the Grounds of Opposition, the Opponent has registered its “**INFINITUS**” trade mark in different versions in Hong Kong (collectively, the “**Opponent’s Marks**”) as shown in the following:

(i) Trade Mark No.300299827:  (“**Mark No.1**”)

(ii) Trade Mark No.301291004:  (“**Mark No.2**”)

(iii) Trade Mark No. 301374949:  (“**Mark No.3**”)

(iv) Trade Mark No. 301374958: **INFINITUS** (“**Mark No.4**”)

INFINITUS

(v) Trade Mark No.302413098: (“**Mark No.5**”)

The representations of Mark No.2 and Mark No.3 are identical while Mark No. 4 and Mark No.5 are almost identical. Particulars of the Opponent’s Marks are set out at **Annex 2** hereto.

7. The Opponent opposes the subject application under sections 3, 11(1)(a), 11(4)(b), 11(5) and 12(3), 12(4), 12(5)(a) of the Ordinance. However, in the Skeleton Argument of the Opponent, Mr. Hughes for the Opponent only relies on sections 11(5)(b), 12(3), 12(4) and 12(5)(a) of the Ordinance.¹

Counter-statement

8. In the Counter-statement, the Applicant denies that the subject mark is derived from the word “infinite” and “us” as pleaded by the Opponent. The Applicant avers that it adopted the word “infinitus” and the Chinese characters “夢造者” as its trade mark by reason that “infinitus” has the meaning of “boundless, unlimited” whereas the Chinese characters “夢造者” mean “dream maker”. As a whole, the subject mark embodies the company’s vision that dreams and their impact are boundless for the subject goods and subject services which belong to the entertainment/creative industry. The Applicant denies that “infinitus” is the main and most distinctive element of the subject mark. It is averred that the subject mark and the Opponent’s Marks are distinguishable visually, phonetically and conceptually and the subject goods and subject services are dissimilar to the goods covered by the Opponent’s Marks. The Applicant also denies that the subject application was made with the knowledge of the Opponent’s reputation and goodwill in its trade marks. It is also pleaded that the Opponent did not provide any particulars of bad faith on the part of the Applicant.

Relevant date

¹ Paragraph 14 of the Opponent’s Skeleton Argument

9. The relevant date (“**Relevant Date**”) for considering the opposition is 14 August 2015, which is the filing date of the subject application for registration.

Evidence of the Opponent

10. Sammy is the Director of the Opponent. According to Sammy’s 1st SD, the Opponent is a business group that specializes in R&D, production, sales and services of Chinese herbal health products; TCM plantation management and sales of raw Chinese medicinal materials; mobile internet platform and related products and services and property investment. It is claimed that the Opponent established Infinitus (China) Company Ltd. (“**Infinitus China**”) in Guangzhou in 1992 having identified the tremendous prospects of Chinese herbal health products. It is said “Infinitus” is its core brand. Infinitus China has set up 36 branches, 29 service centres with over 6,000 exclusive stores in the Mainland of China. Exhibit “**LWSS-1**” contains copies of booklets of the Opponent’s products in simplified characters (2013), copies of photos of the Opponent’s products such as toothpaste, shampoo (mostly undated), several printouts showing images of products from www.infinitus.com.cn (some undated or some post-dated) and some copies of photos showing the shopfront of the Opponent’s stores in the Mainland of China (undated).
11. According to paragraph 12 of Sammy’s 1st SD, the Opponent launched its Mission Upgrading and Global Branding Strategy, unifying corporate name, business name and product name into “Infinitus” in 2009. The “Infinitus” logo was adopted and the Opponent announced a venture into overseas market. The Opponent’s expansion resulted in sub-dividing into four branches, namely the establishment of 4 companies mentioned in the following: Infinitus China, Infinitus International Company Ltd., Infinitus (Hong Kong) Company Ltd. (“**Infinitus Hong Kong**”), Infinitus International (Malaysia) Sdn Bhd. Exhibit “**LWSS-2**” is a copy of the corporate profile of the Opponent and its companies.
12. According to Sammy, the Opponent also expanded its business scope into property investment. In 2009, the Opponent bought Infinitus Centre in Guangzhou at a cost of RMB 300 million and in 2010 purchased Infinitus Plaza in Hong Kong for over HK\$ 4 billion.
13. The Opponent also earned a number of recognitions for its corporate social responsibility practices such as CSR Awards by GoldenBee. Some awards relate

to certification, food safety, or quality assurance e.g. “National Food Safety Demonstration Unit Award”, “Top Ten Enterprises of China Food Safety”, “Top Ten China Credible Health Products Brands” etc. Exhibit “**LWSS-3**” is a copy of printouts of webpages showing certain awards and recognition of the Opponent e.g. “Corporate Social Responsibility Awards by Golden Bee”, “Outstanding Corporate Social Responsibility Award” by the Mirror from Hong Kong.

14. Copies of printouts of the website of World Brand Labs report (世界品牌大会暨中国 500 最具价值品牌排行榜) in 2011 and 2014 are produced in Exhibit “**LWSS-5**”. The brand value of the Opponent’s brand stood respectively at RMB 19.558 billion, ranking 49th in 2011 and RMB 36.889 billion, ranking 46th in 2014 among “China’s 500 Most Valuable Brands”. The brand name shown on these pages are the Chinese characters “无限极” and the major trade is health products (保健品). Sammy believes that the rank valued by World Brand Labs covers Hong Kong as well.

15. The Opponent established a mobile internet platform and provided related products and services with the objective of fulfilling the mission of “helping people lead a happier life” through setting up one HeHa Digital Health Limited in 2015.

16. According to Sammy, “Infinitus” has been the core brand created and owned by the Opponent since at least 1994. The creation is said to stem from the idea “Infinite” and “Us” and it is a Latin word scarcely used by people in Hong Kong in the early 1990s. Exhibit “**LWSS-4**” is a copy of printouts of first 5 pages from the Google search of “INFINITUS HONG KONG”. The search results show pages relating to the Opponent. There is only one result showing the name of the Applicant.

17. Sammy claims that the Opponent has used in Hong Kong the mark



since 1994 and the marks , **INFINITUS** and in various forms since 2009. A list of trade mark registrations is set out in Sammy’s 1st SD. Exhibit “**LWSS-6**” contains a compiled list of registrations of trade marks of the Opponent in various countries and areas in the world. Exhibit “**LWSS-7**” contains copies of registration certificates of various Opponent’s trade marks containing the word “INFINITUS”.

18. It is claimed that sales of the Opponent's goods in Hong Kong ranged from HK\$7 million in 2011 to HK\$21 million in 2014, while worldwide sales ranged from about RMB\$8,307 million in 2011 to RMB\$15,005 million in 2014. Sammy confirms in Sammy's 2nd SD at paragraph 52 that those figures relate primarily to herbal products, health products, body care products, beauty care products and other household items. There is produced in Exhibit "LWSS-8" copies of sample invoices in support of the Opponent's sales. The invoices include invoices issued by Infinitus Hong Kong and Infinitus China.

19. Sammy also sets out the approximate expenses on promotion of the Opponent's marks between 2012 and 2014 as ranging from about RMB\$48 million to RMB\$85.5 million in 2014. Exhibit "LWSS-9" contains copies of promotional literature including extracts from various publications, advertisements, newspaper reports and photos of the Infinitus 2012 World Walking Day in the Mainland of China. The coverage mostly relates to newspaper media in the Mainland of China. The identifier is "无限极". Exhibit "LWSS-10" contains copies of printouts from the Opponent's official website featuring pictures of products sold in Hong Kong (date unknown). Exhibit "LWSS-11" contains copies of printouts from the Opponent's official website showing photographs of the 13th International Conference and Exhibition of the Modernization of Chinese Medicine & Health Products ("ICMCM") which took place in Hong Kong in 2014. The mark shown



in the photograph of the booth of the Opponent is 无限极 .

20. Sammy believes that since the Opponent has used the word "Infinitus" and has developed substantive and worldwide reputations for more than 20 years, he infers that the Applicant has copied the Opponent's Marks to take advantage of the Opponent's worldwide goodwill and reputation. Exhibit "LWSS-12" shows copy of printouts from the online dictionaries (Oxford dictionary, cdict.net, and thesaurus.com) which show no search results of the word "infinitus".

21. With regard to the rest of the contents of Sammy's 1st SD, they are submissions as to the similarity of the Opponent's Marks and the subject mark.

22. Sammy's 2nd SD contains mainly observations and comments on the Applicant's evidence set out in Li's SD on one hand and some further evidence relating to the alleged use of the Opponent's Marks on the other hand. I will summarize the

further evidence of the Opponent in Sammy's 2nd SD in the following.

23. According to Sammy, the Opponent and/or the members of its group (“**LKK Group**”) has been using the Opponent’s Marks in relation to goods under Class 9 and services under Classes 41 and 45. He claimed that Infinitus Global Innovations Limited (“**Infinitus Global**”), a member of the LKK Group launched the Google mobile phone software application “無限極-智享無限” in or about 2015 which features the Opponent’s Marks including Mark No.2/ Mark No.3 and Mark No.4/ Mark No.5. It is said that this software application enables users to conduct online shopping, review products catalogues, access self-learning programs, conduct health assessment etc. Exhibit “**LWSS-14**” contains copies of webpages from Google Play featuring a software application “Infinitus Products” and sample pages of the software application. Exhibit “**LWSS-15**” contains a photo of a sample VCD and copies of invoices and quotations issued to Infinitus International (M) Sdn Bhd by Intelture Technology Sdn. Bhd. in Malaysia for production of a corporate video. It is stated that the Opponent’s Marks were used on VCDs which contained the Opponent’s corporate videos for distribution to Opponent’s members and business partners. Moreover, the Opponent’s Marks are said to have been used on various online publication websites e.g. the Facebook page. The mark



shown is 無限極 and the launch date of the Facebook page of the Opponent is 7 August 2014. Exhibit “**LWSS-16**” shows sample printouts from Opponent’s Facebook pages. Exhibit “**LWSS-17**” shows sample printouts from the Youtube pages in which the videos relating to the Opponent, Infinitus Hong Kong were published (the date joined was stated to be 5 June 2014).

24. Sammy also claims that the Opponent’s Marks have been used on various educational programmes and sporting events which are services under Class 41. It is said that the Opponent established the Hong Kong Traditional Chinese Medicine Research Centre in 1996 on the campus of Hong Kong University of Science and Technology. Infinitus Hong Kong also participated in the ICMCM in Hong Kong from 2010 to 2014 and 2016, which was said to be an educational event with information exchange between professors of different universities and exhibitors working in the industry. He believes that the participation in the ICMCM are educational activities which would come under the services of Class 41. Exhibit “**LWSS-18**” contains copies of photographs taken during ICMCM and the Opponent’s media clipping reports about the said exhibition. Exhibit “**LWSS-19**”

is a copy of the press release from the website of Hong Kong Trade Development Council setting out the objective of ICMCM. In 2012, Infinitus University (“IU”) was established in Jiangmen, Guangdong, the Mainland of China. It is stated that the IU provides courses on culture and leadership and aims to cultivate high-calibre staff and members for the future development of the Opponent. Sammy claims that the reputation of IU in the Mainland of China has been carried over into Hong Kong even though the educational entity is located in the Mainland of China and not directly related to Hong Kong activities. Exhibit “LWSS-20” is a copy of the Opponent’s website article describing the IU and sample printouts from the website of IU.

25. According to Sammy, the Opponent has organized the “INFINITUS WORLD WALKING DAY” campaign in various cities in the Mainland of China for promoting a habit of walking. The said campaign has been held for 8 consecutive years since 2010, which was said to have attracted a lot of media coverage. Exhibit “LWSS-21” and Exhibit “LWSS-22” contain respectively copies of printouts from the Opponent’s website together with some photos of the said event and some media reports relating thereto. Most of the news clippings covering the said event are media from the Mainland of China and that the said campaign only started to be held in Hong Kong in about 2014.
26. Sammy states that there have been videos created by Infinitus Hong Kong for use on its corporate VCDs and Youtube pages and that the use of animation can be found in some of those videos. Exhibit “LWSS-23” shows screenshots of certain videos claimed to have use of animation. According to Sammy, the videos on the Opponent’s website are available for the Opponent’s members and business partners for downloading and sharing to potential customers. Exhibit “LWSS-24” contains printout of a webpage from the Opponent’s website showing a list of videos (undated).
27. Exhibit “LWSS-25” contains copies of some photos showing a sign on exterior of Infinitus Plaza in Hong Kong and some direction signs placed inside Sheung Wan MTR station in which the words “無限極廣場 Infinitus Plaza” is shown.
28. According to Sammy, Infinitus Hong Kong participated in the charity walks organized by the Community Chest in 2011 to 2013 and 2015 and the charitable race organized by Lok Chi Association Limited. Exhibit “LWSS-26” contains

copies of photos taken during the New Territories Walk organized by the Community Chest and copies of donation receipts issued by the Community Chest to Infinitus Hong Kong. Exhibit “**LWSS-27**” contains copies of photos taken during the event showing the Opponent’s Mark No.2/ Mark No.3 on participants’ T-shirts. Infinitus Hong Kong is also an awardee under the Caring Company Scheme since 2014. Exhibit “**LWSS-28**” is printout from the website of the Caring Company Scheme (Year of Award is stated to be 2014-2015).

29. Sammy also mentioned that international awards have been received in respect of the Opponent’s products (whitening essence and dried tangerine peel pu’er tea as shown in Exhibit “**LWSS-29**”). Two awards were granted by Monde Selection in Portugal and received in June 2015. Exhibit “**LWSS-29**” shows news articles reporting the Opponent’s receipt of the aforesaid awards. Exhibit “**LWSS-30**” shows extract of a survey which the Opponent claimed to have been arranged in Hong Kong in around July 2018. It is claimed that in the said survey, it was found that INFINITUS ranks 1st amongst other direct sales companies in terms of “favourable impression” and ranks 5th in terms of level of recognition by consumers. Exhibit “**LWSS-31**” shows copies of sample sales orders relating to sales of the Opponent’s products in Hong Kong produced from the Infinitus Distributor System which appears to be an internal document of the Opponent.

Evidence of the Applicant

30. Li’s SD was made by Li, a director of the Applicant, in support of the subject application.
31. According to Li’s SD, Infinitus Entertainment Limited (“**IEL**”) was established in 2015 as a result of a collaboration between Focus Films Limited Hong Kong (“**Focus Films**”) which has experience in film production for over 20 years, and the Chairman of a listed company in Malaysia. Infinitus Entertainment Holdings Limited is the holding company of the Applicant and IEL (the said 3 companies are collectively known as the “**IE Group**”). The intellectual property used by IE Group are owned by the Applicant and licensed to companies within the IE Group. According to Li, the Applicant’s goods and services comprise of film production, CDs, DVDs and other goods related to the films produced by the Applicant. Copies of printouts from <http://www.infinitusfilms.com/> (undated) and <http://www.focusgroup.cc/infinitus/index.htm> (undated) are produced in

Exhibit “**LKS-2**”. Exhibit “**LKS-3**” contains a WHOIS printout of the domain name ininitusfilms.com, which shows that the website was created on 3 July 2015.

32. It is stated in Li’s SD that the Applicant has since its inception in August 2015 used the subject mark in connection with film production services and related goods in Hong Kong and worldwide. The Applicant, either alone or with its associated companies, and in conjunction of other film companies co-presented the film “*From Vegas to Macau III*” in 2015 and released the same in Hong Kong in 2016. Following the *Vegas* film, other films have been produced or distributed in Hong Kong. There is little evidence that the Applicant has used the subject mark in Hong Kong prior to the Relevant Date. The Exhibits “**LKS-4**” to “**LKS-15**” shows promotional materials featuring the subject mark, news/information about certain films, screenshots of the Applicant’s Facebook page, business cards with the subject mark, and they are either undated or dated posterior to the Relevant Date. Exhibit “**LKS-17**” is copy of a printout of the definition of “ininitus” from the Latin dictionary Lewis and Short. The meaning is stated to be “*not enclosed within boundaries, boundless, unlimited*”.
33. According to Li, the subject mark was created by the Applicant with a specific concept in mind, which is entirely distinguishable from the Opponent’s Marks. Ininitus is a Latin word meaning “boundless, unlimited” and the Chinese characters “夢造者” mean “dream maker”. The conceptual relationship between the two is that of the company’s vision that dreams and their impact are boundless and that the company strives to make such dreams a reality.
34. The rest of Li’s SD is devoted to comparison between the subject mark and the Opponent’s marks, comparison of goods/ services of both parties, and criticism of the evidence of Sammy’s 1st SD.

Decision

Opposition under section 12(3) of the Ordinance

35. Section 12(3) of the Ordinance provides as follows:

“A trade mark shall not be registered if–

- (a) *the trade mark is similar to an earlier trade mark;*
- (b) *the goods or services for which the application for registration is made are identical or similar to those for which the earlier trade mark is protected; and*
- (c) *the use of the trade mark in relation to those goods or services is likely to cause confusion on the part of the public.”*

36. According to section 7(1) of the Ordinance, in determining whether the use of a trade mark is likely to cause confusion on the part of the public, the Registrar may take into account all factors relevant in the circumstances, including whether the use is likely to be associated with an earlier trade mark.

37. The basic principles regarding the assessment of similarity between signs and the likelihood of confusion between them are set out in *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] F.S.R. 19. Such principles have been adopted in Hong Kong and confirmed by the Court of Appeal and Court of Final Appeal in *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd* [2015] 1 HKLRD 414 and *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd (No 2)* [2016] 4 HKC 486. Lam VP of the Court of Appeal cited (at paragraph 35) the propositions endorsed by Kitchin LJ in *Specsavers* (at paragraph 52) as follows:

“On the basis of these and other cases the Trade Marks Registry has developed the following useful and accurate summary of key principles sufficient for the determination of many of the disputes coming before it:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their

distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

38. Section 12(3) essentially prohibits the registration of a trade mark which would be likely to cause confusion on the part of the public as a result of its being similar to an earlier trade mark and because it is to be registered in respect of goods the same as or similar to those the subject of the earlier trade mark. I must therefore consider whether there are similarities between the subject mark and the Opponent’s marks and the goods/ services covered, and whether they would combine to create a likelihood of confusion.

Earlier trade marks

39. Each of the Opponent’s Marks set out at Annex 2 hereto has a date of the application for registration earlier than the application date of the subject mark. According to section 5(1)(a) of the Ordinance, each of those marks is an earlier trade mark in

relation to the subject mark. Each of the earlier trade marks must be considered in turn for the purpose of determining whether it prevents acceptance of the subject application for registration under section 12(3) of the Ordinance (*Torremar Trade Mark* [2003] R.P.C. 4).

The Average Consumer

40. The subject goods under Class 9 include a variety of goods such as CDs, DVDs, USB flash drives, computers, computer software, portable mobile phone chargers, magnetic data carriers, other digital recording media, certain life-saving and teaching apparatus and instruments etc. The subject services under Classes 41 and 45 include broadly entertainment and education services, such as film production, movie studios, music composition services, arranging, organizing and conducting balls, concerts, competitions, exhibitions, shows, conferences, workshops, trainings, seminars for entertainment or education purposes, providing of training; sporting and cultural activities etc and licensing of animation. The average consumers in question include members of the general public in Hong Kong and professional customers who are interested in these goods or services. Whilst members of the general public are reasonably well-informed, observant and circumspect, they are expected to exercise an average level of care and attention in selecting those goods or services. For business consumers who are interested in the subject goods or subject services, in addition to being reasonably well-informed, observant and circumspect, they are expected to pay a higher level of attention in selecting those goods or services.

Distinctiveness of the Opponent's Marks (Marks Nos. 1 to 5)

41. The distinctive character of the earlier trade mark is a factor to be taken into account in the assessment of the likelihood of confusion. As mentioned in paragraph 37 above, it is well established that there is a greater likelihood of confusion where the earlier mark has a highly distinctive character either because of its inherent qualities or because of the use that has been made of it.

42. In determining the distinctive character of an earlier trade mark, I must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings.

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 (*Windsurfing Chiemsee v Huber and Attenberger* [1999] ETMR 585 at paragraph 51; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR 77 at paragraph 24).

43. The Opponent's Marks 1 to 5 can broadly be divided into 2 groups:
- a) Mark No.1, Mark No.2 and Mark No.3 ("**Opponent's Composite Marks**"); and
 - b) Mark No.4 and Mark No.5 ("**Opponent's Plain Word Marks**");
44. Mr. Hughes is of the view that the Latin word "infinitus" (meaning boundless, unlimited, endless) with no dictionary meaning in the English language is not in any way descriptive of the registered goods, that it is unlikely that the average consumer would be aware of the meaning of the word in Latin hence it is inherently distinctive. He submitted that the Chinese component of the Opponent's Composite Marks "無限極" bears the same meaning as "Infinitus".² Moreover, he is of the view that the inherent distinctiveness of the Opponent's Marks has been significantly enhanced through substantial use.³
45. Mr. Ling is of the view that the Opponent's Plain Word Marks consist of a single word INFINITUS, a Latin word meaning "boundless". However, the average consumer in Hong Kong is unlikely to be familiar with the word or its meaning. In his Skeleton Submissions, Mr. Ling expresses his view that it suffices to consider the Opponent's Plain word Marks which contain only the word INFINITUS since he believes that if the Opponent's Plain Word Marks do not succeed under section 12(3) of the Ordinance, the Opponent's Composite Marks do not stand a better chance to succeed under this ground.⁴

² Paragraph 2 of the Opponent's Skeleton Argument

³ Paragraph 68 of the Opponent's Skeleton Argument

⁴ Paragraphs 6 and 8 of the Applicant's Skeleton Submissions

Opponent's Composite Marks



46. Mark No.1  is comprised of the Chinese characters “無限極” and the Latin word “INFINITUS” in capital form in plain font. The Chinese characters “無限極” presented in vertical form are more prominent than the word INFINITUS. The character “極” is in a much bigger size than the other two Chinese characters “無限” and is emphasized by its stylized representation. “無限” mean “limitless”, “endless” while “極” has a number of different meanings when used in combination with other Chinese characters e.g. “the utmost point (四極), the poles of the earth (北極), utmost and final (無極), to the highest degree <https://humanum.arts.cuhk.edu.hk/Lexis/Lindict/>. “INFINITUS” is a Latin word which cannot be found in an English dictionary. The meaning is “boundless, unlimited”. Although an average consumer would not be expected to know the exact meaning of “INFINITUS”, they may perceive it as a foreign word and somehow associate it with English words like “infinite” or “infinity”, which in fact have similar semantic content (i.e. “limitless or endless in space, extent, or size; impossible to measure or calculate” <https://www.lexico.com/en/definition/infinite>). Like the word “INFINITUS”, the combination “無限極” may be perceived as relating to certain concepts of “boundless and limitless to the extreme”. The Chinese characters “無限極” do have a similar concept as the word “INFINITUS” and the two phrases reinforce each other with the concept of “limitless”. As “無限極” and “INFINITUS” are not descriptive of the registered goods and the combination is not commonplace in respect of the cleansing products, skin care and cosmetic products, medicinal and pharmaceutical preparations, health foods, herbal foods, fruits and vegetables, beverages etc. (although I believe it may have some laudatory implication in it given that it indicates the concept of without any limit), I am of the view that as a whole the combination is inherently distinctive of the registered goods to a medium to high degree. “無限極” and “INFINITUS”, in my view, are the most dominant and distinctive elements of Mark No.1 .



47. Mark No.2  comprises the Latin word “INFINITUS” in capital form in plain font placed in the middle of the mark, a device containing 3 arrows with heads

converging at the centre at the top, and the Chinese characters “無限極” at the bottom. Mark No.3 is identical to Mark No.2. For Mark No.2, the registered goods include basically similar goods as covered by the registered goods in Mark No.1 with the addition of beers and other beverages in Class 32. As for Mark No.3, the registered goods are alcoholic beverages under Class 33. As said above, “無限極” and “INFINITUS” are not descriptive of the registered goods. As the principle words speak louder than devices apply, I find “無限極” and “INFINITUS” to be the most dominant and distinctive elements of Mark No.2/ Mark No.3. As a whole, the inherent distinctiveness of Mark No.2 and Mark No.3 in respect of the registered goods is of a medium to high degree.

Opponent's Plain Word Marks

48. Each of Marks No.4 and Mark No.5 is comprised of only the word “INFINITUS” in capital form and in plain font. There is no decoration or stylization. Nor is there any colour claim. Mark No.4 is registered in respect of different alcoholic beverages in Class 33 while Mark No.5 is registered in cleansing products, skin care and cosmetic products in Class 3, medicines and nutritional supplements in Class 5, milk products, fish, poultry etc. in Class 29, beverages and desserts in Class 30 and various non-alcoholic beverages in Class 32. I have referred to the meaning of the word “INFINITUS” above. As a whole, the inherent distinctiveness of Mark No.4 and Mark No.5 in respect of the registered goods is of a medium to high degree.

Analysis of the evidence of the Opponent

49. In the course of making submissions with reference to the evidence at the hearing, Mr. Hughes handed in 5 colour copies of certain photographs (3 of which were photographs of a certain building with 2 photographs of a certificate purported to be China's 500 Most Valuable Brands in 2014 and 2017) which were not evidence filed under rule 18 or rule 20 of the TM Rules. According to Mr. Hughes, of the 3 photographs depicting a building, 2 of them showed a better view of the top of the Infinitus Plaza in Hong Kong with 1 photo showing a building in Shanghai. The remaining photos showed 2 certificates relating to China's 500 Most Valuable Brands in 2014 (which was referred to in Exhibit LWSS-5) and 2017. Mr. Ling objected to the admission of the said documents. He said the photographs of the buildings did not add anything to Exhibit LWSS-25, which already showed Infinitus Plaza in Hong Kong. As to the certificates, Mr. Ling objected since it was not a

public document and he did not have the chance to verify the document (in this case, the photographs showed the images of certificates). In the present case, the new documents were not exhibited by way of a statutory declaration and the explanation of those documents came only from Mr. Hughes. I do not think it fair to the Applicant if I were to allow those documents to slip in as evidence at the substantive hearing. In any event, it does not appear that there were any important issues which turned on those copies of photographs. At the hearing, I decided to decline to consider or admit those documents as evidence.

50. The Opponent's evidence in support of the opposition have been summarized in paragraphs 10 to 29 above. It is noted that a number of exhibits to Sammy's 1st SD and Sammy's 2nd SD contain materials which are either dated posterior to the Relevant Date or are undated (e.g. copies of printouts from the Opponent's official website (Exhibit LWSS-10)). Such materials do not assist much in establishing enhanced distinctiveness through use, any goodwill or reputation of the Opponent before the Relevant Date.
51. As observed from the Opponent's evidence, the Opponent is a business group that specializes in R&D, production, sales and services of Chinese herbal health products, sales of raw Chinese medicinal materials etc. Infinitus China was established by the Opponent in Guangzhou in 1992. According to Sammy, "infinitus" is the core brand created and owned by the Opponent since at least 1994. It was created with the thought of the English word "Infinite" and "Us".
52. Based on Sammy's 1st SD, the Opponent's business of selling health products etc. started out and developed in the Mainland of China in the early 1990s. I note from the invoices issued by Infinitus China in Exhibit LWSS-8 (earliest invoice dated 23 January 2010 at page 32) that they mainly relate to sales of products in the Mainland of China and the products' descriptions include e.g. 无限极红果清露, 无限极维康素片, 植雅洗手液. The word INFINITUS does not appear anywhere in those invoices.
53. According to Sammy, the Opponent began expanding into overseas market in 2009. Infinitus Hong Kong was only set up in Hong Kong since about 2010. As observed from the evidence, despite the claim that the Opponent has used in Hong Kong Mark No.1 since 1994 and its Marks Nos. 2 to 5 since 2009, the earliest use of the Opponent's Marks in Hong Kong found was on 2 January 2010, at Exhibit LWSS-

8 at page 1, which is a sales receipt issued by Infinitus Hong Kong. The mark shown thereon is  (i.e. Mark No.2) and the word “Infinitus” also appears

in the description of products e.g. “Infinitus Lily Bulb Plus” which Mr. Hughes referred to as use of the word mark “Infinitus” simpliciter. The marks were used in relation to health foods or beverages and certain body care products. No use has been found for use of alcoholic beverages (i.e. goods covered by registration of Mark No.3 or Mark No.4). Before the Relevant Date, the use of the Opponent’s Mark (i.e. Mark No.2)⁵ on health products in Hong Kong is some 5 years and 7 months. As per the evidence, Mark No.1 was not found to be used in Hong Kong or China.

54. In respect of the use of the Opponent’s Marks in Hong Kong, Mark No.2 outnumbers all other Opponent’s Marks. Mark No.2 appears in the sales receipts (Exhibit LWSS-8) and certain promotional materials such as the Opponent’s Facebook pages in Hong Kong (Exhibit LWSS-16), the Opponent’s Youtube page (Exhibit LWSS-17), and some charitable activities participated by Infinitus Hong Kong e.g. the banner of the Opponent in the Walk for Millions, and the 13th ICMCM (Exhibits LWSS-11 and 18). Mark No.2 also appears on the exterior wall of the Infinitus Plaza in Hong Kong (Exhibit LWSS-25). The use of the Opponent’s Plain Word Marks are scanty.

Sales and promotion

55. The Opponent’s sales in Hong Kong ranged from HK\$7 million in 2011 to HK\$21 million in 2014 while worldwide sales ranged from about RMB\$8,307 million in 2011 to RMB\$15,005 million in 2014. There is no breakdown of these figures in relation to each of the Opponent’s Marks or the category of goods or services on which the Opponent’s Marks were used. However, as per the sales receipts issued by Infinitus Hong Kong, sales are shown to relate to certain healthcare and body care products in Hong Kong.

56. With regard to promotion, the amount expended ranged from about RMB\$48 million to RMB\$85.5 million in 2014. It is noted that many of the advertising media set out in the evidence relate to media in the Mainland of China e.g. China Central Television, Guangdong TV. Neither the proportion/ amount spent on

⁵ Whilst Mark No.3 is identical to Mark No.2, I will only refer to Mark No.2 for analyzing the evidence since there is no use of Mark No.3 on the registered goods i.e. alcoholic beverages in the evidence.

promotion in Hong Kong nor the goods/ services to which the amount relates was provided. Copies of promotional literature including extracts from various product catalogues, publications, advertisements, newspaper cuttings and photos of charitable activities have been exhibited and the majority relates to newspaper media in the Mainland of China. The mark referred to in publicity materials in



many instances relates to the mark 无限极 and the word “无限极” appears in a lot of coverage by media in the Mainland of China. In Exhibit LWSS-1 (at the 8th page), there are catalogues dated September 2013 issued by Infinitus China



which show the mark 无限极. It is unclear if those promotional or advertising materials target customers in Hong Kong or had ever been made available to potential customers in Hong Kong or if so, the extent to which those materials had been circulated in Hong Kong and the extent of recognition in Hong Kong regarding the Opponent’s products or the Opponent’s trade marks advertised in the Mainland of China. In Exhibit LWSS-1, there are photos of products which show the word “INFINITUS” (which Mr. Hughes referred to at the hearing). However, as those photos are undated and it is unclear as to the context they appear in, it will not be considered. In fact, evidence shows that there is a website (Exhibit LWSS-10) which is titled “無限極香港” apparently dedicated to Hong Kong customers.

57. Exhibit “LWSS-4” is a copy of printouts of the Google search results of “INFINITUS HONG KONG”. It is not known when the said searches were conducted. In my view, the search result in itself cannot infer the use of the Opponent’s Marks in Hong Kong.

58. The Opponent had also participated in a number of public welfare programmes and activities including e.g. the Infinitus World Walking Day in the Mainland of China since 2010. There is no evidence whether or to what extent the relevant consumers in Hong Kong are aware of the aforesaid event. It is noted that a similar event started to be held in Hong Kong in about 2014. Infinitus Hong Kong also participated in the ICMCM exhibition, charitable walk and events such as the Walk for Millions organized by the Community Chest, Lok Chi Association Ltd. It also received the award from the Caring Company Scheme (since 2014). I agree that those activities carried out in Hong Kong would be relevant to the promotion of the Opponent’s Mark No.2 with regard to healthcare and body care products of the Opponent and the image of the Opponent to a certain extent.

Many of the said events took place within 5 years immediately before the Relevant Date.

59. The Opponent and/or its related companies received a number of awards. Many of the awards relate to certification, food safety, or quality assurance. The majority of awards were accorded by authorities or organizations in Mainland China with some in Hong Kong and two from Portugal.
60. With regard to the recognition of the ranking as shown in the “China’s 500 Most Valuable Brands” in 2011 and 2014, Sammy states that since Hong Kong is part of China, the Opponent’s aforesaid ranking will cover Hong Kong. Mr. Hughes also relies on the alleged cross-border reputation of the Opponent or as I understand a spill-over of reputation to Hong Kong of the claimed reputation of the Opponent’s Marks in the Mainland of China. As observed from Exhibit LWSS-5, the ranking referred to the brand “无限极” and not “Infinitus” and the “main business” was stated to be health products. There is no evidence to show that such recognition is known by consumers in Hong Kong.
61. In Sammy’s 2nd SD, he also refers to the extract result of a survey (Exhibit LWSS-30) which the Opponent arranged in Hong Kong in around July 2018. It was conducted or compiled after the Relevant Date and is irrelevant. In any event, it was not known whether or not the said survey was carried out by an independent body, sample size and how the survey was conducted.

Use/ reputation of the Opponent’s Marks in areas other than healthcare/ body care products?

62. In Sammy’s 2nd SD and Mr. Hughes’s submissions, it is claimed that the Opponent had used the Opponent’s Marks on a number of different goods in Class 9, and services in Classes 41 and 45. At Exhibit LWSS-14 there are copies of webpages from Google Play featuring a software application “Infinitus Products” and sample pages of the software application. As noted from Exhibit LWSS-14, the software application enables customers to purchase the Opponent’s health products online. The software application is an electronic platform for the purpose of selling or promoting the Opponent’s health products online. The fact that the Opponent’s creation of the said software application alone will not render the Opponent a software or mobile application developer or confer goodwill or

reputation in relation to Class 9 goods.

63. With regard to the sample VCD produced in Exhibit LWSS-15, it is observed that the VCD was marked with “For internal use only” and the VCD was produced by a company in Malaysia. Mr. Hughes submitted that the Opponent’s Marks are being used on various online publications and online media e.g. the Opponent’s Facebook pages and Youtube pages where the videos relating to the Opponent or Infinitus Hong Kong were published. In my view, the VCD, Facebook pages or Youtube videos can hardly be considered as use of the Opponent’s Marks on Class 9 goods such as downloadable image files, given that they are merely means or media for designating or promoting the Opponent’s health products, herbal products etc. Moreover, the production of VCDs for internal use or the videos for promotion of the Opponent’s products do not support any alleged use of the Opponent’s Marks on licensing of animation in Class 45 or that the Opponent would gain reputation as a producer or licensor of animation.
64. The Opponent also relies on its participation in ICMCM (re Exhibit LWSS-18) which is said to be an educational event which falls within Class 41 services (e.g. seminars for entertainment or education services). The ICMCM is an occasion of product exhibition cum conference. I am unable to conclude that the Opponent provides education services under Class 41 based solely on its participation in ICMCM. As to the reference to Infinitus University (Exhibit LWSS-20), as Sammy has admitted, it is located in the Mainland of China and not directly related to Hong Kong activities. There is no evidence that there is any reputation of this education institute under the Opponent’s Marks in the first place or that it is known to the potential customers in Hong Kong at all. In the same vein, the Infinitus World Walking Day in the Mainland of China or the equivalent event in Hong Kong cannot be regarded as conferring reputation on the Opponent as a service provider for organizing training, conference or seminar for education under Class 41 services.
65. It is noted that the Opponent has registered its trade marks in a number of jurisdictions including Australia, India, Mainland China, Hong Kong etc. It is also noted that the Opponent has invested in certain landed properties in Hong Kong, including one in Hong Kong being named Infinitus Plaza. Such investment does not appear to relate to the use of the Opponent’s Marks as to healthcare or body care products or any of the subject goods or services.

66. Taking into account the totality of the evidence filed, I find that the level of distinctiveness of the Opponent's Mark No.2 has been enhanced through its use in certain healthcare and body care products. As there is no use of Mark No.1 and little use of the Opponent's Plain Word Marks "INFINITUS", I consider that there is no enhanced distinctiveness of those marks.

Comparison of marks

67. A comparison of the marks concerned has to be based on an overall appreciation of the visual, aural and conceptual similarities of the marks in question, taking into account the overall impressions given by the marks, and bearing in mind, in particular, their distinctive and dominant components. In comparing the marks concerned, I should consider the perception of the marks in the mind of an average consumer of the relevant goods/ services.

Submissions of the parties

68. Mr. Hughes is of the view that the element "INFINITUS" is the most distinctive and dominant element forming the subject mark and Mark No.1 and Mark No.2 without other elements being negligible. He also submitted that a Chinese-speaking person in Hong Kong on seeing the subject mark would perceive the Chinese characters as subordinate to the word in English/ Latin text "INFINITUS" and refer to the word "INFINITUS" alone. He is of the view that the Chinese component of both the subject mark and Mark No.1 are not the most distinctive elements even if they come first in the sign. The word "INFINITUS" is a common component of the subject mark and the Opponent's Marks⁶

69. At paragraph 8 of the Skeleton Submissions of the Applicant, Mr. Ling submitted that "夢造者" is by far the most distinctive and dominant element not only because of its relative large size but also because the word "infinitus" is not an English word in everyday use. He is of the view that the average consumer with imperfect recollection is more likely to remember the Chinese words than the word "infinitus".

70. Mr. Hughes also made a bold proposition that the Registrar should compare the subject mark with the Opponent's Marks without regard to the words "無限極" and

⁶ Paragraphs 57 and 58 of the Opponent's Skeleton Argument

“夢造者” by reason that fair and notional use of Mark No.1 and Mark No.2 of the Opponent and of the subject mark must include use of the word “INFINITUS” without the Chinese language component.⁷ He relied on the case *PARK REGIS & Device*, Decision of the Trade Marks Registry, 19 October 2017 at p.17 paragraphs 65 to 67 in support. He referred to a number of exhibits at the hearing saying that sometimes the Opponent’s Mark No.2 are used without the Chinese characters “無限極” (e.g. Exhibit LWSS-21 website of Infinitus Global). In his view, fair and notional use includes a mark without the Chinese characters or the device.

71. With respect, I do not agree with Mr. Hughes’ proposition. It is trite law that the global appreciation test in relation to relative grounds must be made based on fair and notional use of the earlier and later marks, rather than taking into account the actual use in the marketplace as required in the equivalent assessments in relation to infringement.⁸ Indeed, this is also the submission made by Mr. Hughes in his Skeleton Argument.⁹ As such, I do not see any justification that the Chinese language component of the subject mark and Opponent’s Marks should be taken away when making a comparison between those marks. It would not and could not be fair and notional use when one of the most distinctive elements of the subject mark and the Opponent’s Composite Marks are taken away for comparison purpose. It is plainly wrong that the fair and notional use of Mark No.1 and Mark No.2/ Mark No.3 of the Opponent and of the subject mark must include use of the marks which leave out the distinctive components of “無限極” and “夢造者”.

72. I also do not see any relevance with regard to Mr. Hughes’ reference to the *PARK REGIS* case. At paragraph 65 of the *PARK REGIS* case, it was stated, *inter alia*, that “*Moreover, the global appreciation assessments in relation to the relative grounds for refusal in section 12 of the Ordinance must be made on the basis of fair and notional use of the earlier and later marks. Fair and notional use of Mark A and Mark B must include use of “ST. REGIS” without any of the Opponent’s Chinese Registered Marks. I must therefore compare the subject mark with Mark A and Mark B without regard to the Opponent’s Chinese Registered Marks.*” In *PARK REGIS*, the opponent’s Mark A and B as registered in Hong Kong are the words “ST. REGIS” simpliciter and the opponent’s Chinese Registered Marks are
RE JI 錄瑞
瑞吉, 瑞吉 錄瑞. It is plain that in the said case, the opponent’s Mark A and

⁷ Paragraph 56 of the Opponent’s Skeleton Argument

⁸ *Kerly’s Law of Trade Marks and Trade Names* 16th Ed paragraph 11-30

⁹ Paragraph 55 of the Opponent’s Skeleton Argument

Mark B are without any Chinese characters hence any comparison taking into account of their notional and fair use undoubtedly should *not* include the opponent's Chinese Registered Marks which are formed by Chinese characters. I do not agree that the *PARK REGIS* case would lend any support to Mr. Hughes' proposition that the Registrar must compare the subject mark with the Opponent's Composite Marks without regard to the words “無限極” and “夢造者”. In the circumstances, I will compare the marks as they appear on the register and as applied for.



73. The subject mark consists a series of two marks.

Mark A of the subject mark contains the Chinese characters “夢造者” with the word “infinitus” in plain small letters at the bottom. There was a set of 3 ascending floating bubbles device in different size. The floating bubble device is a symbol commonly used to denote dreams or thoughts in cartoons or animation. The said device is presented to form part of the Chinese character “造”. Literally, “夢造者” can be perceived to mean “dream maker” while “infinitus” means “limitless”. I fail to see there exists a link between the two that one would call to mind the other, whether in terms of their literal meanings or otherwise. Hence they convey distinguishable concepts from one another. Mark B is exactly identical to Mark A of the subject mark with the only difference being that the “floating bubbles” in Mark B are in blue instead of black colour. The Applicant claims the colour light blue and black as elements of Mark B of the subject mark in the series. It is obvious that the floating bubbles device reinforces the concept of “dream”. In the present case, the principle that words speak louder than devices applies. Since “夢造者” and “infinitus” do not have any descriptive meaning in respect of the subject goods or subject services, I find both terms are distinctive of the subject mark. Given that “infinitus” is not an English term but a Latin term, “夢造者” is a term more readily comprehensible term and is more likely to impress on the Chinese speaking and bilingual consumers in Hong Kong although for those consumers who only know English would remember “infinitus”. I do not see how Chinese speakers in Hong Kong can perceive the Chinese characters as subordinate to Latin text “infinitus”. In my view, “夢造者” and “infinitus” are both distinctive, but considering the position and size of “夢造者”, I find it a bit more prominent than “infinitus”. I bear in mind that the bubble device should not be overlooked.

74. In comparing the marks, I do bear in mind that an average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, and

rarely has the chance to make direct comparisons between marks but must instead rely upon the imperfect picture of them he has kept in his mind.

Mark No.1



75. Visually, Mark No.1 and the subject mark (both Mark A and Mark B in

the series)   are only similar to the extent that they

contain the word “infinitus/INFINITUS”, which is placed at the bottom. The stylized presentation of “無限極” and the distinctive “夢造者” together with the bubble device are visually very different. I find the visual appearance of the two marks to be dissimilar as a whole.

76. Aurally, if one tries to pronounce the subject mark, consumers may refer to the literal elements instead of the figurative elements. Therefore, the subject mark may possibly be referred to as “夢造者” and/or “infinitus”. Likewise, Mark No.1 may be referred to as “無限極” and/or “INFINITUS”. The identical phonetic element is “infinitus”. I find the aural similarity between the two marks is moderate.

77. Mr. Ling submitted that the subject mark conveys the predominant impression of a dream maker, being the literal meaning of the Chinese characters “夢造者” and the concept is augmented by the image of the effervescent bubbles rising from the middle character. The Opponent’s Marks containing the word INFINITUS would either mean nothing or something akin to “infinity” or “infinite”. Mr. Hughes submitted that the Chinese language component “夢造者” of the subject mark is conceptually similar to the Chinese language component of the Opponent’s Composite Marks i.e. “無限極” and reflects the meaning of the Latin text “infinitus”.¹⁰ With respect, I do not agree. In terms of the semantic content, I do not see any similarity in “夢造者” and “無限極”/ “infinitus”. The meaning of “無限極” is on a more abstract level whereas the dream maker can mean someone who makes dreams. I have not lost sight of the overlapping element “infinitus”, which means limitless (as not disputed by the parties) and it is an element equally distinctive as compared with the Chinese element of the marks. Notwithstanding,

¹⁰ Paragraph 51 of the Opponent’s Skeleton Argument

I find on the whole that the conceptual similarity to be low.

78. Having regard to the visual, aural and conceptual similarities and differences between the subject mark and Opponent's Mark No.1, I find that the overall impression created by the subject mark is very different from that created by Mark No.1. I therefore consider the subject mark is dissimilar to the Opponent's Mark No.1 when the marks are considered in their entirety

Mark No.2 and Mark No.3



79. As for Mark No.2 i.e. 無限極, like Mark No.1, for similar reasons, it is considered to be inherently distinctive to a medium to high degree in respect of the goods registered. Visually, the subject mark and Mark No.2 only overlap to the extent that they both contain the word "infinitus/INFINITUS", the position of which is different (one at the centre of Mark No.2 and the other at the bottom of the subject mark). Given the differences in the Chinese characters "夢造者" and "無限極" as well as the differences between the very distinctive devices of the floating bubbles and the converging arrows, I find that on the whole the visual similarity between the two marks to be very low. Aurally, the devices in Mark No.2 and the subject mark cannot be pronounced and would unlikely be referred to. With regard to the subject mark, as said before, it may possibly be referred to as "夢造者" and/or "infinitus" while Mark No.2 may be referred to as "無限極" and/or "INFINITUS" in speech. I find the phonetic similarity between the two marks to be moderate. Conceptually, as explained above, I do not see any similarity in "夢造者" and "無限極". The devices are also very different in presentation and has no resemblance in terms of concept. Hence, the only element which is common is "INFINITUS/ infinitus". I find that as a whole, the conceptual similarity to be low.

80. Having regard to the visual, aural and conceptual similarities and differences between the subject mark and the Opponent's Mark No.2, I find that the overall impression created by the subject mark is different from that created by Mark No.2. The two marks are dissimilar. As Mark No.3 is identical to Mark No.2, the aforesaid conclusion also applies to the comparison between Mark No.3 and the subject mark.

Mark No.4 and Mark No.5

81. As for Mark No.4 i.e. INFINITUS, contains only the word “INFINITUS” in upper case without any decoration or stylization. It is considered to be inherently distinctive to a medium to high degree in respect of the goods registered. Visually, the subject mark and Mark No.4 only overlap to the extent that they both contain the word “infinitus/INFINITUS”. The words “夢造者” and the bubble device are more prominent than the “infinitus”. As compared with the subject mark, visually, the two marks are of moderate similarity. Aurally, Mark No.4 may only be referred to as “INFINITUS” since it is the only element of the mark. The subject mark would possibly be referred to as “夢造者” and/or “infinitus”. I find the level of aural similarity between the two marks is medium. Although the Chinese element of the subject mark is “夢造者” and the bubble device are in my view not conceptually similar to “infinitus”, one cannot deny that the common element “INFINITUS/infinitus” in both marks would become apparent. On the whole, I find that the conceptual similarity to be moderate.

82. Having regard to the visual, aural and conceptual similarities and differences between the subject mark and the Opponent’s Mark No.4 and the overall impression created by each of them, I find that the subject mark is similar to Mark No.4 to a moderate degree. As Mark No.5 is almost identical to Mark No.4, the aforesaid conclusion also applies to the comparison between Mark No.5 and the subject mark.

Comparison of goods and services

83. In assessing the similarity of the goods and services concerned, the following factors set out by Jacob J (as he then was) in *British Sugar Plc v James Robertson and Sons Ltd* [1996] R.P.C. 281 (at pages 296-7) should be taken into account:

- (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 services;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-service 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;

and

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

84. It was also held in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1999] E.T.M.R. 1 (at paragraph 23) that when comparing the similarity of the goods or services in question, all the relevant factors relating to the goods or services, including but not limited to their nature, their end users, their method of use and whether they are in competition with each other or are complementary, should be taken into account.

85. Mr. Hughes submitted that the subject goods and subject services are similar to the registered goods covered by the Opponent's Marks by reason that they are offered and promoted using the same trade channels (including via internet) and targeting the same customers (members of the general public). It was also submitted that the Opponent relies on the evidence as to the manner in which its relevant goods have been promoted and sold using Class 9 goods and Class 41 and 45 services.¹¹

86. Mr. Ling submitted that there is not the remotest similarity between the subject goods and subject services and those goods registered under the Opponent's Marks (including alcoholic drinks, cosmetic and body care products, medicine and health food, milk powder, tea, confectionery and non-alcoholic beverages). The subject services, as submitted, relate to film and entertainment which are enjoyed by movie goers and those enjoy watching movies at home or on mobile devices. They are different in nature, usage, audience and sales channel from the goods covered by the Opponent's Marks which are made for physical consumption or for enhancement of personal hygiene and appearance.¹²

87. The subject goods under Class 9 include computer hardware, computer software, computer peripherals such as USB flash drives, data processing equipment, audio-visual equipment and accessories such as portable media players, CDs, DVDs, recording discs etc. and certain miscellaneous items such as straps for mobile phones, scientific, nautical, surveying, photographic, cinematographic, optical,

¹¹ Paragraphs 65 of the Opponent's Skeleton Argument

¹² Paragraphs 12 and 13 of the Applicant's Skeleton Submissions

weighing, measuring, signaling, checking (supervision), life-saving and teaching apparatus and instruments etc. As compared with the goods registered under the Opponent's Marks including cleansing products, skin care and cosmetic products under Class 3, medicinal and pharmaceutical products, health food and supplements, herbal beverages etc. under Class 5, food items, alcoholic and non-alcoholic beverages under Classes 29, 30, 32 and 33, the nature, use, trade channels are wholly different from those of the subject goods under Class 9. Whilst it is true that all these goods may be patronized by the members of the general public, having considered the combined factors, I am of the view that these goods are dissimilar.

88. With regard to the subject services under Class 41, which includes entertainment; entertainment information; film production (other than advertising films); modelling for artists; production of music, radio and television programmes, shows; theatre production; production of animation; photographic recording studios; movie studios; music composition services; videotaping; arranging, organizing and conducting balls, concerts, competitions, exhibitions, shows, conferences, workshops, trainings, seminars for entertainment or education purposes; arranging of beauty contests; organization of fashion shows for entertainment purposes; presentation of live performances; club services; booking of seats for shows; ticket agency services (entertainment); rental of audio equipment; rental of camcorders; rental of cine-films; rental of lighting apparatus for theatrical sets or television studios; rental of movie projectors and accessories; rental of radio and television sets; rental of show scenery; rental of stage scenery; rental of motion pictures; rental of sound recordings; providing online electronic publication; education; providing of training; sporting and cultural activities, and Class 45 namely licensing of animation, these services have nothing in common with any of the registered goods under the Opponent's Marks in terms of nature, use, trade channels. They are neither competitive nor complementary and are considered to be dissimilar.

Likelihood of confusion

89. The likelihood of confusion must be appreciated globally, taking into account all relevant factors which have a degree of interdependency. The matter must be judged through the eyes of the average consumer of the goods who is deemed to be reasonably well-informed and reasonably observant and circumspect. In this case, the average consumers for the subject goods and subject services include both members of the general public and professional consumers who are interested in

those goods and services. Members of the general public are reasonably well-informed, observant and circumspect and are expected to exercise an average level of care and attention. For professional consumers who are interested in the subject goods or subject services, they are expected to pay a higher level of attention in selecting those goods or services.

90. Applying the relevant legal principles and as analysed in paragraphs 10 to 29 and 49 to 65 above, when comparing the subject mark with Mark No.1/ Mark No.2/ Mark No.3 of the Opponent in their entirety, I consider the marks to be dissimilar on the whole. I have also found that Mark No.1 and Mark No.2/ Mark No.3 are inherently distinctive of their registered goods. Due to a lack of use of Mark No.1, there is no question of its distinctiveness having been enhanced. As for Mark No.2, I find its level of distinctiveness has not been enhanced through use significantly. The Opponent's registered goods covered by Mark No.1 and Mark No.2/ Mark No.3 are dissimilar to the subject goods and subject services. Taking into account the combined effect of all of the aforesaid, I consider that despite the inherent distinctiveness of Mark No.1 and Mark No.2/ Mark No.3, given the dissimilarity between the subject mark and Mark No.1/ Mark No.2/ Mark No.3, and the dissimilarity between the goods registered under Mark No.1/ Mark No.2/ Mark No.3 respectively and the subject goods and services, the average consumer would be able to distinguish the marks and would not be confused into thinking that the subject goods and services and the Opponent's registered goods covered by Mark No.1/ Mark No.2/ Mark No.3 come from the same or economically-linked undertakings.

91. I have also found that Mark No.4/ Mark No.5 possesses inherent distinctiveness in respect of the Opponent's registered goods although its distinctiveness has not been enhanced through use. Having regard to the visual, aural and conceptual similarities and differences between the subject mark and the Opponent's Mark No.4/ Mark No.5, I find moderate similarity between the marks. The subject goods and subject services are wholly dissimilar to the Opponent's goods registered under Mark No.4/ Mark No.5 as well. Taking into account the combined effect of all of the above considerations, I consider that when the subject mark is used in relation to those of the subject goods and subject services, the average consumer would unlikely be misled into believing that those goods and services and the Opponent's goods registered under Mark No.4/ Mark No.5 come from the same or economically-linked undertakings.

92. The opposition under section 12(3) therefore fails.

Opposition under section 12(5)(a) of the Ordinance

93. Section 12(5) of the Ordinance provides, *inter alia*, as follows:

“(5) ... a trade mark shall not be registered if, or to the extent that, its use in Hong Kong is liable to be prevented –
(a) by virtue of any rule of law protecting an unregistered trade mark or other sign used in the course of trade or business (in particular, by virtue of the law of passing off);...”

94. The requisite elements for establishing a passing-off action were formulated in the case of *Reckitt & Colman Products v. Borden Inc.* [1990] R.P.C. 341. These elements have been repeatedly relied upon by the courts in Hong Kong including the Court of Final Appeal in *Re Ping An Securities Ltd.* (2009) 12 HKCFAR 808 (FACV 26/2008). In essence, in the present context, the Opponent has to establish that:

- (a) the Opponent enjoys **goodwill** attached to the goods which it supplies in the mind of the purchasing public by association with a trade mark under which its goods are offered to the public, such that the trade mark is recognized by the public as distinctive specifically of the Opponent’s goods;
- (b) the Applicant has made a **misrepresentation** to the public leading or likely to lead the public to believe that the subject goods or subject services offered by it are the goods or services of the Opponent; and
- (c) the Opponent suffers, or is likely to suffer, **damage** by reason of the erroneous belief engendered by the Applicant’s misrepresentation that the source of the Applicant’s subject goods or subject services is the same as the source of goods or services offered by the Opponent.

95. To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

96. In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.¹³

97. Mr. Hughes's submissions under this ground are summarized in the following¹⁴:

- a) The Opponent claimed enormous fame, popularity and reputation in the Opponent's Marks obtained through the alleged extensive use of the Opponent's Marks (in particular Mark No.2) worldwide and in particular China, Hong Kong, Malaysia, Taiwan and Singapore. He relies on *Kabushiki Kaisha Yakult Honsha v Yakudo Group Holdings Ltd* (No 4) [2004] 2 HKLRD 587, 593) as support for his proposition that even absent any use of a mark in the jurisdiction, trade mark owners can possess goodwill in Hong Kong arising from use of their marks without the jurisdiction and in particular in China. He submitted that the goodwill and reputation in the Opponent's Marks in Hong Kong is significantly enhanced by virtue of its strong brand presence in China and in particular Guangdong province.
- b) Evidence shows the reputation and goodwill of the Opponent's Marks also

¹³ *Halsbury's Laws of Hong Kong* (2nd Edition) Vol. 33, para. 225.021; *Oasis Stores Ltd.'s Trade Mark Application* [1998] R.P.C. 631 at 642.

¹⁴ Paragraphs 76 to 81 of the Opponent's Skeleton Argument

extend to use in Hong Kong in respect of Class 9 goods and Classes 41 and 45 services as a result of use of the Opponent's Marks in relation to such goods and services.

- c) The question of misrepresentation is closely related to the question of likelihood of confusion under section 12(3) of the Ordinance and the same or similar factors in respect of section 12(3) ground apply. The Opponent is likely to suffer damage by reason of the erroneous belief engendered by the misrepresentation that the source of the goods and services of the Applicant is the same as the source of those offered by the Opponent. One form of damage is the erosion of the distinctiveness of the Opponent's Marks.

98. Mr. Ling's submissions on section 12(5)(a) of the Ordinance¹⁵ may be summarized as follows:

- a) There is no breakdown for each of the Opponent's Marks and products in respect of the Opponent's turnover figures and the marketing of products. It is unclear as to which marks of the Opponent has been used in relation to the invoices produced. That promotional activities and literature in relation to the Opponent's Marks e.g. television, newspapers, magazines were almost exclusively targeted at the market in the Mainland of China, where the brand is known as 无限极 rather than "INFINITUS".
- b) If any goodwill may have accrued to the Opponent in Hong Kong at the



application date, it would be limited to the use of Mark No.2 无限极 and its core business of herbal products, body care products, beauty care products and other household items. He commented on various exhibits in Sammy's 1st and 2nd SD. For instance, the purported use of the Opponent's Mark No.2 in Hong Kong in certain exhibitions, conferences and community events are really promotion for the Opponent's core business of health products, body care products etc. and that any goodwill will not be extended to any goods or services that lie far beyond this field, such as entertainment services.

- c) As to the ranking by World Brand Labs, the information does not shed light on the nature or extent of the Opponent's goodwill in Hong Kong at the material time. The purchase of Infinitus Plaza in Sheung Wan in 2010 might generate some goodwill in favour of the Opponent as a landlord of shopping

¹⁵ Paragraphs 17 to 35 of the Applicant's Skeleton Submissions

malls and office buildings but a far cry from the subject goods and subject services.

- d) Regarding the alleged use of the Opponent's Marks in relation to the mobile application, distribution of VCDs and Facebook page/ Youtube page, Mr. Ling is of the view that those goods and services do not confer on the Opponent reputation in those areas of goods/ services. This observation also applies to the Opponent's reliance on the educational programmes, sporting events, establishment of the Infinitus University in the Mainland of China, videos which can be downloaded on the Opponent's website/ Youtube pages etc.
- e) The Opponent has not discharged the heavy burden to prove misrepresentation given that the Opponent and the Applicant operate in different field of activities. None of the peripheral activities give rise to any relevant goodwill that could found an action of passing off.

Goodwill

99. The relevant date for considering this ground is the date of application of the subject mark, or if the Applicant has used the subject mark in Hong Kong before such date, the date of commencement of the conduct complained of. There is nothing filed in these proceedings to suggest that the Applicant has used the subject mark in Hong Kong before the date of application. Therefore, the relevant date for considering this ground remains the date of application, that is, the Relevant Date.

100. As stated by Sammy, expansion into overseas markets (including Hong Kong) only happened since 2009. No evidence has been shown that Mark No.1 has been used in Hong Kong at any material time. Taking into account the Opponent's evidence as summarized and analysed in paragraphs 10 to 29 and 49 to 65, I find that Mark



No.2 無限極 has been used in Hong Kong since January 2010 in relation to healthcare and body care products although no substantial use of the INFINITUS mark simpliciter i.e. Mark No.4/ Mark No.5 is found. Taking into account the Opponent's evidence and both parties' submissions, I am satisfied that as at the Relevant Date, the Opponent has sufficient goodwill in Hong Kong in relation to the Opponent's healthcare and body care products which are known to the public by association with the Opponent's Mark No.2, though I do not find such goodwill to be very extensive. However, as per my analysis in paragraph 62 to 65 above, I

do not consider that use of the Opponent's Mark No.2 or indeed any other Opponent's Marks supports the Opponent's claim that reputation has been extended to any Class 9 goods, Class 41 or Class 45 services by association with any of the Opponent's Marks.

101. In the present case, I accept that goodwill arises from the use of Opponent's Mark No.2 in Hong Kong and this is not a case where there is no use within the jurisdiction such that one would rely on the spill-over of reputation from use of mark outside jurisdiction. While Mr. Hughes emphasizes and advocates that the goodwill and reputation of the Opponent's Marks in Hong Kong is significantly enhanced by virtue of its strong brand presence in China, in the absence of any evidence that the sales and the marketing activities in the Mainland of China also target or have been made known to consumers in Hong Kong, or that goods offered by the Opponent in the Mainland of China are made available to customers in Hong Kong, I simply cannot infer that the goodwill in the Opponent's Marks in Hong Kong has been enhanced as a result of claimed reputation in the Mainland of China. Besides, reputation and goodwill in China are largely associated with “无限极” as shown by e.g. the “China's 500 Most Valuable Brands”, the sales invoices issued by the Infinitus China, the Mainland Chinese media reports although it is noted that

in some instances there is use of the mark  .

Misrepresentation and damage

102. I consider the subject goods in Class 9 and subject services in Classes 41 and 45 are wholly different from the healthcare or body care products in respect of which the

 Opponent's mark 无限极 has established a goodwill and reputation in Hong Kong. There is no overlap between the fields of activity of the Applicant and those of the Opponent, namely entertainment services and goods related thereto on one hand and health products on the other. Moreover, in order for the Opponent to succeed under section 12(5)(a), the Opponent has to show that the subject mark is similar to

 of the Opponent in order to demonstrate misrepresentation by the Applicant to the public leading or likely to lead the public to believe that the goods or services offered by the Applicant are the goods or services of the Opponent or

are connected to the Opponent. I have already found that the overall impression created by the subject mark is different from that created by Mark No.2. Given the dissimilarity between the subject mark and the Opponent's Mark No.2, on seeing the subject mark used in relation to the subject goods or the subject services, even assuming the imperfect recollection of the marks, the public would unlikely be misled into believing that the subject goods or the subject services offered by the Applicant are of the same origin as the Opponent's goods or are connected to the Opponent. The element of misrepresentation is not made out. As such, there is no question of any damage resulting from misrepresentation.

103. As the elements of misrepresentation and damage for establishing a case under section 12(5)(a) are not proved, the opposition under section 12(5)(a) must fail.

Opposition under section 12(4) of the Ordinance

104. Section 12(4) of the Ordinance provides, *inter alia*, as follows:

“... a trade mark which is–

(a) identical or similar to an earlier trade mark; and

(b) proposed to be registered for goods or services which are not identical or similar to those for which the earlier trade mark is protected,

shall not be registered if, or to the extent that, the earlier trade mark is entitled to protection under the Paris Convention as a well-known trade mark and the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

105. The meaning of “well-known trade mark” is defined in section 4 of the Ordinance. In determining whether a trade mark is well known in Hong Kong, the Registrar or the court shall have regard to Schedule 2 of the Ordinance. According to section 1(1) of Schedule 2 of the Ordinance, the Registrar or the court shall take into account any factors from which it may be inferred that the trade mark is well known in Hong Kong. These factors include, for example, the degree of knowledge or recognition of the trade mark in the relevant sectors of the public; the duration, extent and geographical area of any use of the trade mark; the duration, extent and geographical area of any promotion of the trade mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods or services to

which the trade mark applies; the duration and geographical area of any registrations, or any applications for registration, of the trade mark, to the extent that they reflect use or recognition of the trade mark; the record of successful enforcement of rights in the trade mark, in particular, the extent to which the trade mark has been recognized as a well-known trade mark by competent authorities in foreign jurisdictions; and the value associated with the trade mark.

106. To succeed under section 12(4) of the Ordinance, the Opponent has to establish that:
- (a) the Opponent's trade mark is an earlier trade mark which is entitled to protection under the Paris Convention as a well-known trade mark;
 - (b) the subject mark is identical or similar to an earlier trade mark of the Opponent; and
 - (c) the use of the subject mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.
107. It is pleaded that the Opponent's Marks are entitled to protection under the Paris Convention as well-known trade marks and the use of the subject mark, which is said to be a copy of the Opponent's Marks, would take unfair advantage of, or be detrimental to, the distinctive character or repute of the Opponent's Marks. As such, the subject marks should be refused under section 12(4) of the Ordinance.
108. Mr. Hughes submitted that the Opponent's Marks enjoy well-known status as of the Relevant Date. He highlighted the growth and development of the Opponent's group of companies since 1992, the sales figures and promotion expenditure worldwide and in Hong Kong, the branding survey and the ranking in the China's 500 Most Valuable Brands, the various awards and recognition received by the Opponent, the registration and use of the Opponent's Marks worldwide and participation in charitable activities and the naming of buildings in Guangzhou, Shanghai and Hong Kong etc. It was submitted that such has not been disputed by the Applicant in its pleading or evidence and that by choosing to register and use the subject mark, the Applicant is attempting to ride on the coat-tails of the Opponent's Marks, thereby, without due cause, take unfair advantage of and acting in detriment to the distinctive character or repute of the Opponent's Marks.¹⁶
109. Mr. Ling disagreed that any of the Opponent's Marks is a well-known mark and

¹⁶ Paragraphs 87 to 90 of the Opponent's Skeleton Argument

argued that no “link” has been established as a result of the dissimilarity between the subject mark and the Opponent’s Marks. He concluded that no unfair advantage had been taken by the Applicant of the distinctive character or repute of the earlier marks. There is also no evidence to support the other two type of injuries (i.e. blurring or tarnishment) under section 12(4).¹⁷

110. I have considered the Opponent’s evidence, as summarized and analysed in paragraphs 10 to 29 and 49 to 65 above. The Opponent did not specify which of the Opponent’s Marks to rely on as earlier trade marks under section 12(4) of the Ordinance. As stated earlier, there is no evidence that Mark No.1 has been used in Hong Kong at any material time and that for Mark No.4/ Mark No.5 INFINITUS simpliciter, there is scanty use or promotion which could give rise to any reputation.



While I accept that Mark No.2 無限極 has acquired some goodwill in respect of healthcare and body care products in Hong Kong before the Relevant Date, having taken into account information concerning the matters referred to in paragraph 105 above, I do not consider that Mark No.2 has become well-known in Hong Kong at or before the Relevant Date.

111. However, even assuming that Mark No.2 is considered to be well-known under section 12(4), the Opponent will need to satisfy the condition as stated in paragraph 106(b) above, i.e. there must be a degree of similarity between the earlier mark of the Opponent and the subject mark such that the relevant section of the public establishes a link between them, even though it does not confuse them (*Adidas-Salomon AG v Fitnessworld Trading Ltd* [2004] ETMR 10).
112. The existence of such a link must be appreciated globally, taking into account all factors relevant to the circumstances of the case, including the degree of similarity between the conflicting marks; the nature of the goods or services for which the conflicting marks were registered, the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public; the strength of the earlier mark’s reputation; the degree of the earlier mark’s distinctive character, whether inherent or acquired through use; and the existence of likelihood of confusion on the part of the public (*Adidas-Salomon* (supra); *Intel Corporation Inc. v CPM United Kingdom Ltd.* [2009] R.P.C. 15 at paragraph 42).

¹⁷ Paragraphs 42 to 45 of the Applicant’s Skeleton Submissions

113. I have already found the Mark No.2 and the subject mark are dissimilar on the whole, and when the subject mark is used in relation to the subject goods and subject services which are dissimilar to the Opponent's health products, the average consumer would unlikely be confused into thinking that the subject goods and the subject services offered under the subject mark come from the same or economically-linked undertakings. I have also considered the Opponent's evidence (paragraphs 10 to 29 and 49 to 65 above) and find that although it appears the Opponent has been selling healthcare and body care products in Hong Kong since 2010, it has not been involved in the business of entertainment, education, training or production of computer products etc. No reputation has been gained in those areas by the Opponent's use of its marks. The subject goods and subject services are wholly different from the Opponent's health products. Having considered all the factors relevant to the circumstances of the case, I consider it unlikely that when the subject mark is used in relation to the subject goods and subject services, it would call to mind Mark No.2 in the minds of the relevant consumers. I am not persuaded the relevant consumers would establish a link between the subject mark and Mark No.2.

114. In any event, as stated in the *Intel* case, even if a link is found to exist, such link is not sufficient, in itself, to establish any of the three types of injury under section 12(4).¹⁸ Further, detriment to and unfair advantage of distinctive character or repute must be provable by real, as opposed to theoretical, evidence and cannot be merely assumed from the fact that the earlier mark has a substantial reputation (*Creditmaster Trade Mark* [2005] R.P.C. 21).

115. As the Opponent has failed to establish that use of the subject mark in respect of the subject goods or subject services would give rise to a link with the Opponent's Mark



No.2 無限極 in the minds of the relevant public, it follows that there is nothing

¹⁸ Paragraph 37 of the *Intel* case reads “*In order to benefit from the protection ..., the proprietor of the earlier mark must adduce proof that the use of the later mark ‘would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark’.*” Paragraph 68 further states “*...like the existence of a link between the conflicting marks, the existence of one of the types of injury ..., or a serious likelihood that such an injury will occur in the future, must be assessed globally, taking into account all factors relevant to the circumstances of the case, which include the criteria listed in para.42 of this judgment.*” For factors in para.42 of the *Intel* case, please see paragraph 112 of this decision above.

from which it could be inferred that in consequence of such a link, the use of the subject mark either takes unfair advantage of the distinctive character or repute of the Opponent's Mark No.2 or is detrimental to that distinctive character or repute. The requirement referred to in paragraph 106(c) above is not established.

116. Since the Opponent has failed to establish the requirement referred to under paragraphs 106 above, the ground of opposition under section 12(4) of the Ordinance has not been made out.

Opposition under section 11(5)(b) of the Ordinance

117. Section 11(5)(b) of the Ordinance provides that:

“(5) A trade mark shall not be registered if, or to the extent that –

(a) ...

(b) the application for registration of the trade mark is made in bad faith.”

118. The term “bad faith” is not defined in the Ordinance. In *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] R.P.C. 367 at 379, Lindsay J. said in relation to section 3(6) of the UK Trade Marks Act 1994 (equivalent to section 11(5)(b) of the Ordinance):

“I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context: how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances.”

119. In *Harrison v Teton Valley Trading Co (CHINAWHITE)* [2005] F.S.R. 10, the English Court of Appeal said (at paragraph 26):

“The words “bad faith” suggest a mental state. Clearly when considering the question of whether an application to register is made in bad faith all the circumstances will be relevant. However the court must decide whether the knowledge of the Applicant was such that his

decision to apply for registration would be regarded as in bad faith by persons adopting proper standards.”

120. Further, in *Ajit Weekly Trade Mark* [2006] R.P.C. 25, the Appointed Person stated as follows:

“The subjective element of the test means that the tribunal must ascertain what the defendant knew about the transaction or other matters in question. It must then be decided whether in the light of that knowledge, the defendant’s conduct is dishonest judged by ordinary standards of honest people, the defendant’s own standards of honesty being irrelevant to the determination of the objective element.”

121. The above legal principles have been applied in *深圳市德力康電子科技有限公* *司* v *LG Corporation & Anor* (“**LG case**”) HCMP 881/2013, 26 March 2014.

122. In *ROYAL ENFIELD Trade Marks* [2002] RPC 24, it was held by the Appointed Person Mr. Simon Thorley QC that:

“An allegation that a trade mark had been applied for in bad faith was a serious allegation and tantamount to an allegation of a form of commercial fraud. Such a plea should not be lightly made and, if made, it should be distinctly alleged and proved. It was not permissible to leave fraud to be inferred from the facts and the same considerations applied to an allegation of bad faith made under section 3(6) of the Trade Marks Act 1994”.

123. In *Brutt Trade Marks* [2007] RPC 19, the Appointed Person therein referred to the above passage in *Royal Enfield* and further stated that:

“I agree with Mr. Thorley that allegation of bad faith is a serious allegation which must be distinctly alleged and which should not be made unless it can be properly pleaded. I also agree that it must be distinctly proved: as discussed above, the standard of proof is on the balance of probabilities, but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith.”

124. In the Grounds of Opposition the Opponent pleaded as follows:

“18. Further or in the alternative the Opposed Mark should be refused under section 11(5)(b) of the Trade Marks Ordinance on the ground that *the application for registration*

of the Opposed Mark was made with the knowledge of the Opponent's reputation and goodwill in its trade marks and was therefore made in bad faith (emphasis added)."

125. In Sammy's 1st SD, at paragraphs 30, 36, 39 and 40, Sammy states that:

"30. I take the view that the Opposed Mark is confusingly similar to the Opponent's Trade Marks for the reasons that the Applicant plagiarizes and copies in bad faith the word "infinitus" in the Opposed Mark from the Opponent's Trade Marks.

36. ...The Applicant did not explain in its Counter-Statement why they have used the rarely used Latin word "Infinitus" instead of the more commonly used English word "Infinite" for the meaning of "boundless, unlimited, in particular "Infinitus" has been adopted by the Opponent as its trade mark and has developed substantial and worldwide reputations for more than 20 year. The only inference I can think of is the Applicant copied the Opponent's Trade Mark in order to take advantage of the Opponent's worldwide goodwill and reputation...

39. Further, giving extensive promotion and marketing campaigns launched by the Opponent in relation to the Opponent's Goods and Services under and by reference to the Opponent's Trade Marks and substantial sales that that the Opponent has achieved worldwide prior to the date of filing of the Applicant's application for the Opposed mark, I have no doubt that the purpose of the Applicant adopting a trade mark substantially and confusingly similar to the Opponent's Trade Marks for use on or in relation to goods which are identical to or similar to or can be closely associated with those of the Opponent is to misappropriate the substantial goodwill and reputation which the Opponent has acquired and enjoys in respect of its services and the Opponent's Trade Marks.

40. Further I am advised by my trademark agents Vincent Luk & Associates and verily believe that the intention to prevent the Opponent from marketing a product, may in certain circumstances, be an element of bad faith on the part of the Applicant. I therefore verily and strongly believe that the Applicant copies the Opposed Mark from the Opponent's Trade Marks in bad faith."

126. In *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* (Case C-529/07) [2009] E.T.M.R. 56 (the "**Lindt**" case), the Court of Justice of the European Union held that "the fact that the applicant knows or must know that a third party has long been using... an identical or similar sign for an identical or similar product

capable of being confused with the sign for which registration is sought is not sufficient, in itself, to permit the conclusion that the applicant was acting in bad faith. Consequently, in order to determine whether there was bad faith, consideration must be given to the applicant's intention at the time when he filed the application for registration." The applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case. Although the relevant time is the application date, later evidence is relevant if it casts light backwards on the position as at the application date (*Red Bull GMBH v Sun Mark Ltd, Sea Air & Land Forwarding Ltd* [2013] ETMR 53 at [132]).

127. In order for its opposition to succeed under the ground of bad faith, the Opponent has to provide sufficient proof to establish that the Applicant acted with dishonest intention when the subject application was filed on 14 August 2015.

The Opponent's submissions

128. According to Mr. Hughes, the Opponent's case is as follows: the Opponent has substantial goodwill and reputation in the Opponent's Marks, that the Applicant must have knowledge of the Opponent's Marks before the date of the application of the subject mark, that the subject mark is considered to be strikingly similar to the Opponent's Marks such that it must have been copied from the Opponent's Marks with "an intention to confuse or mislead the public" that the subject mark is associated with the Opponent (reference is made to the UK case *CA Sheimer (M) Sdn Bhd's Trade Mark Application* [2000] RPC 484). Mr. Hughes also emphasized that the words "夢造者", (particularly when viewed in conjunction with the word "infinitus") is highly similar conceptually to the concept of "boundless, unlimited" conveyed by the Latin word INFINITUS. Moreover, the Applicant did not address the Opponent's allegation of copying apart from bare denial and it did not file evidence or offer explanation as to how the subject mark was devised. It also failed to deny knowledge of the Opponent and the Opponent's Marks in its pleading. I was invited to draw the adverse inference that the Applicant must have copied the Opponent's Marks and acted in bad faith in applying for the subject mark.¹⁹ At the hearing, Mr. Hughes also claimed that the Opponent is active in Malaysia and the Chairman of the Applicant is also in Malaysia.

¹⁹ Paragraph 38 of the Opponent's Skeleton Argument

The Applicant's submissions

129. In reply, Mr. Ling argued that that the Opponent offered no evidence but merely alleged similarity between the marks and the goods/ services in question, which in his view cannot be established as a result of the dissimilarity of the respective marks and respective goods/ services. The overlapping word “INFINITUS” is a Latin and not a made-up word. There are a number of companies in Hong Kong whose names contain the word “INFINITUS”. It cannot be inferred from the mere adoption of the same word that the Applicant must have known the Opponent’s Marks and has intended to copy them. The alleged copying is no more than speculation. To conclude, the Registrar should not uphold the Opponent’s allegation of bad faith, in effect condemning the Applicant’s conduct as dishonest by the ordinary standards of honest people.²⁰
130. At the hearing, Mr. Ling also submitted that the alternative ground of bad faith i.e. the intention to prevent the Opponent from marketing a product may in circumstances be an element of bad faith (re paragraph 40 of Sammy’s 1st SD) has not been pleaded and should not be entertained by the Registrar. So is Mr. Hugh’s suggestion that there is some connection between an investor of the Applicant (being a Malaysian) and the Opponent having a registered mark in Malaysia. It is neither pleaded nor substantiated by evidence. Moreover, knowledge of the reputation of the marks of the Opponent alone, which is not admitted by the Applicant, is in Mr. Ling’s view, not sufficient to find bad faith (as per paragraph 40 of the *Lindt* case referred to above).
131. Mr. Ling also responded to paragraph 38(4) of the Opponent’s Skeleton Argument in which Mr. Hughes referred to the case *CA Sheimer* (in fact Mr. Hughes did not make reference to any particular text of that case). He submitted that bad faith was found in the *CA Sheimer* case due to its peculiar circumstances. The “intention to confuse or mislead” was not pleaded in the Grounds of Opposition as the Opponent only referred to knowledge. At the hearing, Mr. Hughes interrupted to make a formal objection to Mr. Ling’s submission concerning the *CA Shimer* case. He said Mr. Ling was making a new point and it was not in the Applicant’s Skeleton Submissions. I have expressed at the hearing that Mr. Ling’s submissions were made in response to Mr. Hughes’ Skeleton Argument filed and he was referring to the contents of the legal authority cited and relied on by Mr.

²⁰ Paragraphs 38 to 40 of the Applicant’s Skeleton Submissions

Hughes. I do not see any justification in Mr. Hughes' objection. In this case, as both parties filed and served their skeleton submissions on the same day i.e. 3 days before the substantive hearing pursuant to the Registrar's directions, it is not unreasonable that a party may wish to supplement and respond to the other side's written submissions at the hearing. In this instance, Mr. Ling was merely responding to Mr. Hughes's reference to a court case by way of submission, which I think he was entitled to do. I do not find any impropriety for a party (whether the Opponent or the Applicant) to make responses to the other side's written submissions, be it on the law or the facts.

Knowledge and copying

132. Mr. Hughes alleged that the Applicant must have had knowledge of the goodwill and reputation of the Opponent's Marks and that the Applicant has failed to deny the same in its pleadings. However, I note that at paragraph 14 of the Counter-statement, the Applicant did deny paragraph 18 of the Grounds of Opposition which alleges that the subject mark was made with the knowledge of the Opponent's reputation and goodwill in its trade marks. The Applicant also pleaded that it has no knowledge of paragraphs 2 to 5, 8 of the Grounds of Opposition (i.e. the Opponent's company, its background, business, scale, its brand value etc.), and does not admit paragraphs 10 to 11 (the use or promotion of the Opponent's marks on its goods and services) of the Grounds of Opposition.²¹ As in the analysis of evidence above, I have found that the Opponent has gained some



reputation in its Mark No.2 無限極 in relation to its healthcare and body care products in Hong Kong though it is not very extensive and it has not spilled over to other areas such as software application or education or entertainment and the said mark has only been used for some 5 years in Hong Kong. It is noted that the Applicant is in the business of entertainment and film production, which are of a very different nature from the Opponent's business.²² It would not be surprising that the Applicant did not have knowledge of the Opponent's Marks or the reputation as at the Relevant Date. Apart from relying on the proposition that the Applicant must have known the reputation of the Opponent or its marks, no evidence (direct or indirect) has been adduced to substantiate that the Applicant has had knowledge of its reputation or that such knowledge can be inferred.

²¹ Paragraphs 3, 5 and 7 of the Counter-statement

²² Paragraphs 2 and 10 of Li's SD

133. Moreover, Mr. Hughes’s proposition of copying of the Opponent’s Marks by the Applicant stems from the Opponent’s view that the subject mark is considered to be strikingly similar to the Opponent’s Marks. Such proposition is not tenable



given that I have found that 無限極, though with some goodwill and reputation

A



B



attached, is dissimilar to the subject mark

I also do not find the words “夢造者” and “無限極/infinitus” to be similar conceptually. As submitted by Mr. Ling, while one may think there is some connection between the concept of boundless and dream making at a very high level of abstraction, no dishonest intention can be inferred as a result.

134. I note that Mr. Ling submitted that the “intention to confuse or mislead” point based on the *CA Sheimer* case was not pleaded in the Grounds of Opposition. I agree that this only came up for the first time in Mr. Hughes’s submissions. As such, the Opponent should not be permitted to run at the substantive hearing an unpleaded case of “intention to confuse or mislead”. In any event, the *CA Sheimer* case does not really help to advance the Opponent’s case as the facts therein are distinguishable from the present case. In the said case, the Appointed Person considered that Visa International (the opponent)’s earlier trade mark VISA was the target of Sheimer (the applicant)’s desire to use a famous name for the products intended to market under the applied for mark. Evidence in that case showed that the presentation of the identical word VISA on the packaging of Sheimer’s goods was calculated to trigger recollection in the minds of people familiar with the form in which Visa International habitually uses the word VISA.²³ In the present case, the subject mark is found to be dissimilar or of moderate similarity to Opponent’s Marks and there was no evidence to show that use of the subject mark which point to “intention to confuse or mislead”.

135. Mr. Hughes also referred to paragraphs 31 and 32 of the *LG* case cited above and argued that a case of bad faith is not always established by way of direct evidence and that where circumstances are such that a conclusion that there has been copying is warranted, a bad faith claim may well succeed. The *LG* case involves De Li Kang (the appellant)’s appeal against a finding of bad faith against its registration of its mark (suit mark) in favour of Joo-Sik-Hoi-Sa LG and another

²³ *CA Sheimer (M) Sdn Bhd’s Trade Mark Application* [2000] RPC at page 509

(LG Corp). In the said appeal, Judge B Chu affirmed the hearing officer's finding and held that the hearing officer was entitled to draw the inference of bad faith based on the facts found, which include LG Corp's substantial turnover of products in Hong Kong using LG Corp's mark, De Li Kang's business dealings with LG Corp's subsidiary in India prior to the date of application of the suit mark, absence of denial of that De Li Kang was aware of LG's mark at the time of designing the suit mark and intentional copying, the similarity of the suit mark and LG's mark, lack of persuasion of the explanation provided by De Li Kang as to the origin of the suit mark etc. Whilst I am in agreement with the principle referred to in the *LG* case, I do not think such principle is applicable in the present case for me to draw an adverse inference for deliberate copying.

136. An allegation of bad faith is a serious allegation which must be distinctly alleged and which should not be made unless it can be properly pleaded. It must be distinctly proved and cogent evidence is required due to the seriousness of the allegation (paragraphs 122 and 123 above). As said earlier, the Applicant denied the subject mark was made with the knowledge of the Opponent's Marks. Both parties are in very different areas of businesses and the subject goods and subject services are dissimilar to the Opponent's healthcare and body care products. There is no evidence to show any past dealings between the parties or any other evidence which point to knowledge of the Opponent's Marks as of the Relevant Date. While it is true that the word "INFINITUS" appears in both the subject mark and Mark No.2 which I find to have certain reputation in healthcare and body care products in Hong Kong, as in my finding, in view of their overall differences, I find them to be dissimilar. A prima facie case of copying cannot be inferred. It is noted that in the Counter-statement at paragraph 8(a) and paragraph 32 of Li's SD, the Applicant averred that "infinitus" has the meaning of "boundless, unlimited" whereas the Chinese characters "夢造者" mean "dream maker" and that the subject mark embodies the company's vision that dreams and their impact are boundless and the company strives to make such dreams a reality. Although it may not be a very satisfactory explanation of the creation of the subject mark, having considered all the circumstances, I am unable to infer or conclude that there is a dishonest intention on the part of the Applicant or that the subject mark was devised by copying of any of the Opponent's Marks.
137. I also do not accept Mr. Hughes's claim that the Opponent is active in Malaysia and the Chairman of the Applicant is also in Malaysia should be considered in

the first place when it has never been pleaded. Neither is it supported by any evidence. It is no more than a mere allegation. I also agree with Mr. Ling's view that the alternative ground of bad faith i.e. the intention to prevent the Opponent from marketing a product may in circumstances be an element of bad faith only emerged from Sammy's 1st SD is no more than an allegation and will not be considered.

138. There is no basis for concluding that the Applicant's decision to apply for registration of the subject mark in respect of the subject goods and subject services would be regarded as having been made in bad faith by persons adopting proper standards. The ground of opposition under section 11(5)(b) of the Ordinance must fail.

Conclusion

139. The opposition against the subject application fails as none of the Opponent's grounds of opposition has been made out.

Costs

140. As the opposition has failed, I award the Applicant costs. Subject to any representations as to the amount of costs or calling for special treatment, which either party makes within one month from the date of this decision, costs will be calculated with reference to the usual scale in Part I of the First Schedule to Order 62 of the Rules of the High Court (Cap. 4A) as applied to trade mark matters, unless otherwise agreed between the parties.

(Winnie WH Ng)
for Registrar of Trade Marks
20 July 2020

The subject goods and the subject services

“subject goods”:

Class 9

CDs, DVDs, optical discs, video cassettes, videotapes, apparatus for recording, transmission or reproduction of sound or images, magnetic cards, USB flash drives, exposed films, recorded computer programmes, downloadable computer programmes, software applications, computer game software, downloadable image files, downloadable music files, downloadable electronic publications, portable media players, straps for mobile phones, cases for mobile phones, portable mobile phone chargers, scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; magnetic data carriers, recording discs; other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus.

“subject services”:

Class 41

Entertainment; entertainment information; film production (other than advertising films); modelling for artists; production of music, radio and television programmes, shows; theatre production; production of animation; photographic recording studios; movie studios; music composition services; videotaping; arranging, organizing and conducting balls, concerts, competitions, exhibitions, shows, conferences, workshops, trainings, seminars for entertainment or education purposes; arranging of beauty contests; organization of fashion shows for entertainment purposes; presentation of live performances; club services; booking of seats for shows; ticket agency services (entertainment); rental of audio equipment; rental of camcorders; rental of cine-films; rental of lighting apparatus for theatrical sets or television studios; rental of movie projectors and accessories; rental of radio and television sets; rental of show scenery; rental of stage scenery; rental of motion pictures; rental of sound recordings; providing

online electronic publication; education; providing of training; sporting and cultural activities.

Class 45

licensing of animation.

Annex 2

The Opponent's Marks

	Registration No.	Earlier Mark	Date of Registration	Specification
Mark No.1	300299827		12.10.2004	<u>Class 3</u> bleaching preparations and other substances for laundry use; cleaning, polishing, scouring, smoothing, disinfecting and abrasive substances and preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices; toiletries; manicure preparations; pedicure preparations; products, substances and preparations for the care and cleansing of the face, hands, feet, body, hair, skin and teeth; adhesives for cosmetic purposes; after-shave lotions and preparations; shaving preparations; antiperspirants; aromatics (essential oils); bath salts; cosmetic preparations for baths; beauty masks; cosmetic kits; cosmetic preparations for slimming purposes; cotton sticks for cosmetic purposes; cotton wool for cosmetic purposes; cosmetic creams, lotions, serums and preparations; skin whitening creams, lotions, serums and preparations; creams for leather; degreasers (other than for use in manufacturing processes); tooth whitening preparations; tooth paste; tooth gel; tooth powder; dental cream; dental cleaning preparations; denture polishes; preparations for cleaning dentures; deodorants; astringents for cosmetic purposes; emery boards; cosmetic dyes;

			<p>Eau de Cologne; hair cream, hair gel, shampoos, hair conditioner, hair moistening preparations, hair serums, hair fixing preparations, hair styling preparations, hair dyes, hair spray, hair colorants, hair waving preparations, substances and preparations for stimulating hair growth and prevention of hair loss; toilet water; perfumes; lipsticks; creams, lotions, serums and preparations for the skin, face, body, hands and feet; bleaching preparations [decolorants] for cosmetic purposes; eyebrow cosmetics; eyebrow pencils; false eyelashes; make-up; make-up powder; make-up preparations; make-up removing preparations; mascara; mouth washes, not for medical purposes; nail care preparations, nail polishes, nail varnishes and thinners therefor; cosmetic pencils; pomades for cosmetic purposes; potpourris [fragrances]; pumice stone; scented wood; scented water; sun block, sun-tanning preparations, after-sun face care and skincare preparations; tissues impregnated with cosmetic lotions; tonic lotions and toner lotions containing essential oils or extracts of flower, plant or fruit; varnish-removing preparations; depilatory wax; depilatory preparations; jelly (petroleum) for cosmetic purposes; incense sticks [joss sticks]; fragrances; talcum powder for toilet use; extracts of flowers [perfumes]; ethereal oils and essences; incenses.</p> <p><u>Class 5</u> medicinal and pharmaceutical</p>
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			<p>preparations; health foods, health food supplements and preparations; nutritional and dietetic foods; nutritional and dietetic supplements, additives, substances and preparations; mineral preparations and supplements; vitamin preparations and supplements; multi-vitamin and multi-mineral preparations and supplements; fibre preparations and supplements; non-alcoholic beverages containing protein, vitamins, minerals and/or fibres; stimulants of vitamins or minerals; antioxidants for supplementary use; herbal extracts in the form of liquid concentrates, herbal oils, herbal powders, herbal pills, herbal capsules, herbal tablets, herbal foods, herbal ointments, herbal supplements, herbal teas, herbal beverages and herbal preparations; Chinese herbal teas, beverages, pills, tablets, liquid concentrates, powders, and nutritional and dietetic supplements and preparations; Chinese herbal medicines and medicinal products; tonics (for medical purpose); pastilles and lozenges for medical purpose; medicinal teas and drinks; medicinal oils, balms and ointments; medicinal herbs; preparations for the treatment of burns; food for babies; infants' and invalids' foods.</p> <p><u>Class 29</u> meat, fish, crustaceans, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies; jams; fruit sauces; eggs, milk and milk beverages and products; edible oils and fats; protein for</p>
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			<p>human consumption; edible birds' nests; albumen for food; non-medicated health foods and snack foods; non-medicated food, dietetic and nutritional supplements, additives and preparations; foods, health foods and dietetic food supplements, additives and preparations made from or containing essences, substances or extracts from meat, fish, seafood, crustaceans, animals, poultry, game, vegetables, fruits, eggs, milk or whey (not for medical purpose); dietetic, nutritional and health food supplements, additives and preparations containing fish oils, edible oils, edible fats or fatty acids (not for medical purpose); potato chips and crisps; nuts, prepared; salads; garden herbs, preserved; soups and preparations for making soups; tofu; pickles; whey; casein for food; yoghurt; tomato purée; broth and broth concentrates; butter; margarine; cheese.</p> <p><u>Class 30</u> coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and foods made from flour, preparations and foods made from cereals; bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments), condiments, seasonings, herbs (dried spices), spices; ice; biscuits; cakes; chips; essences for food stuffs (except etheric essences and essential oils); flavourings (other than essential oils); royal jelly for human consumption (not for medical purpose); sugar substitutes; sweeteners (natural);</p>
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				<p>glucose for food; flour-milling products; fruit jellies (confectionery); pies; tarts; puddings; ice cream; infusions (not medicinal); propolis [bee glue] for human consumption; pasta; macaroni; spaghetti; vermicelli; rice vermicelli; noodles; farinaceous foods; non-medicated health foods and snack foods; non-medicated food, dietetic and nutritional supplements, additives and preparations; foods, health foods and dietetic food supplements, additives and preparations made from or containing essences, substances or extracts from plants (not for medical use); herbal health foods for non-medical purpose; herbal tea and non-herbal tea beverages, not for medical use; non-medicated health drinks, nutritional drinks and tonics; powders and granules for making non-medicated health drinks and nutritional drinks.</p>
Mark No.2	301291004		20.2.2009	<p><u>Class 3</u>²⁴</p> <p>bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, cosmetic kits; make-up removing preparations; beauty masks; toiletries; hair lotions; shampoos; hair waving preparations; hair dye; pomades for cosmetic purposes; hair spray; cosmetics for hair; hair care products (non-medical use); dentifrices; non-medical mouthwash; cosmetic preparations for skin; skin protection products; cosmetic preparations for baths;</p>

²⁴ The specification herein is an English translation adopted from the Grounds of Opposition.

			<p>shower gel; bath salts not for medical use; depilatory preparations; shaving preparations; antiperspirants (toiletries); cosmetic preparations for slimming purposes; sunscreen preparations; manicure preparations; nail polish removal preparations.</p> <p><u>Class 5</u> medical and veterinary preparations, sanitary preparations for medical purposes, dietetic food adapted for medical use, food for babies, plasters, materials for dressings, material for stopping teeth and dental mold, disinfectants, preparations for destroying vermin, fungicides, herbicides.</p> <p><u>Class 29</u> Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats.</p> <p><u>Class 30</u> Coffee, tea, cocoa; sugar, rice; tapioca, sago; artificial coffee; flour and preparations made from cereals; bread, pastries and confectionery; edible ices; honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.</p> <p><u>Class 32</u> Beers; mineral and aerated waters and other non-alcoholic beverages; fruit</p>
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				beverages and fruit juices; syrups and other preparations for making beverages.
Mark No.3	301374949		30.6.2009	<u>Class 33</u> ²⁵ Alcoholic beverages (except beers); Chinese wine; wu jia pi liquors; vodka; liqueurs; piquette; alcoholic beverages containing fruit; alcoholic fruit beverages; alcoholic liquid; alcoholic syrup; whisky; aperitifs; cooking wine; Japanese wine; rum; geneva; medlar liquors; white curacao; perry; kirsch; sparkling wine; sake; arak; rose liquors; brandy; white spirit; rice alcohol; red wine; bitters; cider; anisette [liqueur]; wine; distillation extract (liqueurs and spirits); cook extract (liqueurs and spirits); distilled beverages; distilled alcoholic beverages; peppermint liqueurs; rum; mead [hydromel]; alcohol (beverages); cocktails; highland barley wine; edible alcohol; champagne; yellow rice liquors.
Mark No.4	301374958	INFINITUS	30.6.2009	<u>Class 33</u> ²⁶ Alcoholic beverages (except beers); Chinese wine; wu jia pi liquors; vodka; liqueurs; piquette; alcoholic beverages containing fruit; alcoholic fruit beverages; alcoholic liquid; alcoholic syrup; whisky; aperitifs; cooking wine; Japanese wine; rum; geneva; medlar liquors; white curacao; perry; kirsch; sparkling wine; sake; arak; rose liquors; brandy; white spirit; rice alcohol; red wine; bitters; cider; anisette [liqueur];

²⁵ The specification herein is an English translation adopted from the Grounds of Opposition.

²⁶ The specification herein is an English translation adopted from the Grounds of Opposition.

				wine; distillation extract (liqueurs and spirits); cook extract (liqueurs and spirits); distilled beverages; distilled alcoholic beverages; peppermint liqueurs; rum; mead [hydromel]; alcohol (beverages); cocktails; highland barley wine; edible alcohol; champagne; yellow rice liquors.
Mark No.5	302413098	INFINITUS	24.10.2012	<p><u>Class 3</u>²⁷ make-up removing preparations; beauty masks; toiletries; shampoos; hair waving preparations; hair dye; pomades for cosmetic purposes; hair spray; cosmetics for hair; hair care products (non-medical use); non-medical mouthwash; cosmetic preparations for skin; skin protection products; cosmetic preparations for baths; shower gel; bath salts not for medical use; depilatory preparations; shaving preparations; antiperspirants (toiletries); cosmetic preparations for slimming purposes; sunscreen preparations; manicure preparations; nail polish removal preparations; bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, shampoos; dentifrices; car air fresheners.</p> <p><u>Class 5</u> Medicine pills; throat lozenges; calcium; oral liquid medicine; Chinese herbal medicated preparations; mineral nutritional supplements; mineral food supplements; protein nutritional</p>

²⁷ The specification herein is an English translation adopted from the Grounds of Opposition.

				<p> supplements; Cyanobacteria extract tablet (medicinal); green algae extract tablet (medicinal); ginseng products (powder); seaweed extract tablet (medicinal); camellia oil pills (medicinal); nutrient tonic (medicinal); wheat germ dietary supplements; garlic extract capsules (medicinal); lingzhi mushroom extract capsules (medicinal); herbal fiber powder (health food) (medicinal); antioxidant for nutritional supplements; protein powder (medicinal); protein nutritional additive (medicinal); evening primrose extract oil capsules (medicinal); fish extract oil capsules; nutritional supplements; vitamin nutritional supplements; capsules for nutritional supplements (medicinal); carotene (medicinal); nutrition adjuvant (medicinal); capsules for chitin (medicinal); fish meal nutritional supplements; lecithin powder (medicinal); bird's nest essence; herbal fiber slimming tablets (medicinal); cordyseps essence (medicinal); diabetic bread; nutritional supplements (medicinal); starch for pharmaceutical and slimming purposes; albuminous for medical purposes; medical preparations for slimming purposes; nutritional supplement for medical use; milk of protein for pharmaceutical purposes; capsules for medicines; natural nutritional supplements (medicinal); lecithin dietary supplements; nutritional food supplements (medicinal); disinfectant for environmental sanitation use; disinfectant for chemical toilet; </p>
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			<p>sanitary napkins; panty liners; air purifying preparations; deodorants for refrigerator; deodorants for clothing ; fumigation incense ingots; deodorants, other than for human beings or for animals; deodorants for clothing and textiles; anti-rheumatism bracelets; medical and veterinary preparations; sanitary preparations for medical use; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; plasters, materials for dressing; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; lingzhi mushroom extract tea powder (medicinal); 24 flavors herbal tea.</p> <p><u>Class 29</u> Milk powder; low-fat powder; skimmed milk powder; lactobacillus milk powder; condensed milk; cheese; cheese; goat's milk tablet; cow's milk tablet; yogurt; fruit milk powder; almond milk powder; milk shake concentrated powder; curd fermented milk; goat's milk yogurt; milk products; meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oil and fats.</p> <p><u>Class 30</u> Scented tea bag; tea-based beverages;</p>
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			<p>natural sweeteners; glucose for culinary purposes; cake frosting icing (coating); candy; royal jelly; bee glue; biscuits; oatmeal; oat flakes; multi-grains powder; coffee, tea, cocoa and artificial coffee rice; tapioca and sago; flour and preparations made from cereals ; bread, pastry and confectionery; ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.</p> <p><u>Class 32</u> Plant beverages; non-alcoholic beverages; beverage made of herbal plants and powdered beverages; plant extracts beverage; bird's nest drink; crystal sugar bird's nest drink; vinegar beverage; beverage rich in cereal fiber and protein; beers; mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages.</p>
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