

TRADE MARKS ORDINANCE (CAP. 559)
OPPOSITION TO TRADE MARK APPLICATION NO. 304687732

Mark: ^A  Atwo illumina

^B illumina  Atwo

Classes: 5, 29
Applicant: Société des Produits Nestlé S.A.
Opponent: The a2 Milk Company Limited

STATEMENT OF REASONS FOR DECISION

Background

1. On 3 October 2018, Société des Produits Nestlé S.A. (“**Applicant**”) filed an application (“**Subject Application**”) under the Trade Marks Ordinance (Cap. 559) (“**Ordinance**”) for the registration of the following series of trade marks (collectively, “**Subject Marks**”):

 (“**Subject Mark A**”);

illumina  (“**Subject Mark B**”).

2. Registration is sought in respect of the following goods in Classes 5 and 29 (“**Subject Goods**”):

Class 5

Formulated milk for babies; infant formula; food and beverages for babies; nutritional supplements for babies; dietetic food for babies adapted for medical use; food substances for babies adapted for medical use; dietetic food and beverages for children adapted for medical use; food substances for children adapted for medical use; food substances for pregnant mothers adapted for medical use; dietetic food for nursing mothers adapted for medical use; food substances for nursing mothers adapted for medical use; milk powder for babies; lacteal flour for babies.

Class 29

Formulated milk and milk powder for children; food preparations having a base of milk; milk powder; powdered milk.

3. Particulars of the Subject Application were published on 16 November 2018. The a2 Milk Company Limited (“**Opponent**”) filed a notice of opposition, which includes a statement of grounds of opposition (“**Grounds of Opposition**”), on 12 April 2019. The Applicant in turn filed a counter-statement (“**Counter-Statement**”) on 12 July 2019.

4. The opposition hearing took place before me on 13 September 2023. Mr Ling Chun Wai, Counsel, and Mr William Tse, Counsel, represented the Opponent and the Applicant respectively. Both parties had filed skeleton submissions before the hearing. I reserved my decision at the end of the hearing.

5. Before the present hearing, this Registry had issued decisions for the following two opposition cases between the same two parties:

- (a) In *a2 Store Trade Mark* [2023] HKTMR 29, which involves an opposition by the Applicant against the Opponent’s application to register “a2 Store” in respect of various goods and services in Classes 5, 9, 29, 30 and 35 (no. 304287097), it has been held, among others, that “A2” or “a2” may be used to designate in the trade a type of milk or a type of protein as at the relevant date of that case (i.e. 27 September 2017).
- (b) In *ATWO Trade Mark* [2023] HKTMR 30, which involves the Applicant’s opposition against the Opponent’s application to register “ATWO” in respect of various goods in Classes 5 and 29 (no. 304676815), it has been held, among others, that the word “ATWO” was not devoid of any distinctive character as it could not be said to carry any descriptive connotation in respect of the applied-for goods as at the relevant date of that case (i.e. 21 September 2018) in view of the different possible interpretations of the string of letters “ATWO” and the unlikelihood that the relevant public would, upon perception of the mark, immediately associate it with “A2” and understand it to refer to a type of milk or a type of protein.

In the hearings of those two cases, the Opponent and the Applicant were also represented by Mr Ling and Mr Tse respectively.

Grounds of Opposition

6. The Opponent claims to be the proprietor of “a2”, “a2 Milk” and other trade marks containing “ATWO” and “a2” (collectively, “**Opponent’s Trade Marks**”) and it has used and obtained registration of one or more of them in relation to milk and milk products, milk powder, infant formula, and nutritional supplements, as well as the retail and promotion of those goods (“**Opponent’s Goods and Services**”) in various countries and territories around the world including Hong Kong.¹ Details of the applications and registrations of the Opponent’s Trade Marks in Hong Kong are provided in **Annex A**.

¹ Paragraphs 2 to 5 of the Grounds of Opposition.

7. In the Grounds of Opposition, the Opponent pleads that the Subject Application be refused on grounds under section 12(3), (4) and/or (5) of the Ordinance.² At the hearing, the Opponent limits its grounds to section 12(3) only, arguing that the Subject Marks are confusingly similar to the Opponent’s registered mark “ATWO” (“**Opponent’s ATWO Mark**”).³

Counter-Statement

8. The Applicant states that “A2” is one of the two primary variants of beta-casein protein in cow’s milk (the other being “A1”) and serves in the trade to designate the characteristics of milk and milk-based products that are free or predominantly free of A1 beta-casein protein or to refer to A2 beta-casein protein in such products.⁴

9. The Applicant denies similarity between the Subject Marks and the Opponent’s ATWO Mark. According to the Applicant, what renders the Subject Marks distinctive is the combination of the term “Atwo” inside a double droplet device together with the term “illumina”. “Atwo” and “ATWO” are visually different. The term “Atwo” is not a prominent or dominant feature in the Subject Marks as it is embedded in the double droplet device, which is a highly distinctive artistic work, thereby lowering any prominence of the term “Atwo”. In addition, the word “illumina”, appearing in a bigger font in the Subject Marks, is in itself a distinctive mark registered and used since 2010 in relation to the Subject Goods and is exclusively associated with the Applicant. Therefore, the Applicant submits that the relevant consumers will unlikely be confused between the Subject Marks and the Opponent’s ATWO Mark.⁵

Relevant Date

10. The relevant date for the present opposition is the filing date of the Subject Application, i.e. 3 October 2018 (“**Relevant Date**”).

Opponent’s Evidence

11. The Opponent’s main evidence consists of the following:

- (i) the Statutory Declaration of Dr Andrew John Clarke, Chief Scientific Advisor of the Opponent, dated 20 August 2020 (“**Clarke’s Declaration**”);
- (ii) the Statutory Declaration of Ms Susan Massasso, Chief Growth and Brand Officer of the Opponent, dated 20 August 2020 (“**Massasso’s Declaration**”); and
- (iii) the Statutory Declaration of Ms Yu Ka Yi, IP Manager at Rouse & Co. International (Overseas) Limited, the Opponent’s agent, dated 25 August 2020 (“**Yu’s**”).

² Paragraph 14 of the Grounds of Opposition.

³ Paragraph 4 of the Opponent’s Skeleton Submission.

⁴ Paragraph 7.3 of the Counter-Statement.


⁵ Paragraph 10.3(c) of the Counter-Statement.

Declaration”).




12. The Opponent’s evidence in reply consists of the Statutory Declaration of Mr Jaron James McVicar, Chief Legal and Sustainability Officer and Company Secretary of the Opponent, dated 24 October 2022 (“**McVicar’s Declaration**”).

13. I note from the above declarations the following:

- (a) Conventional milk contains a mix of variants of beta-casein protein, such as A1 and A2; by contrast, the Opponent manufactures and sells only dairy products that do not contain A1 beta-casein protein.⁶
- (b) There are research findings showing the health benefits of consumption of milk without A1 beta-casein protein as compared to conventional milk containing both A1 and A2 variants, such as a reduction of gastrointestinal discomfort.⁷
- (c) There is no chemical solely referred to as “A2” as it is a common affix in the nomenclature of biological substances such as proteins and fats that may be found in milk or is used as a part of families of proteins; “A2” does not signify any substance or compound in or of itself.⁸
- (d) The Opponent was founded in New Zealand in 2000 with the initial focus on dairy farm breeding programs for developing herds that would naturally produce milk free of the A1 variant; it also licensed its trade marks to third parties to produce A1-variant-free dairy products under the Opponent’s “a2” and “a2 Milk” marks.⁹ From 2010 onwards, the Opponent became a milk producer in its own right.¹⁰
- (e) The Opponent commenced the use of the “a2”, “a2 Milk” and “THE a2 MILK COMPANY” marks (collectively, “**Opponent’s Core Marks**”, all containing “a2” as an element) in 2000, 2003 and 2014 respectively.¹¹ Different stylised forms of

the Opponent’s Core Marks such as “**a2**”, “**a2 Milk**”, “”,



“**a2**”, “**a2 Milk**”, “”, “”, “” have also been used on the packaging, and for the promotion, of the Opponent’s products in various places around the world; in Hong Kong, the use of these marks dates back to 2015.¹² However, no evidence of use of the Opponent’s ATWO Mark has been provided.

⁶ Paragraphs 9 and 10 of Clarke’s Declaration.

⁷ Paragraphs 11, 13 and 14 of Clarke’s Declaration.

⁸ Paragraphs 17 to 19 of Clarke’s Declaration.

⁹ Paragraph 8 of Massasso’s Declaration.

¹⁰ Paragraph 12 of Massasso’s Declaration.

¹¹ Paragraph 19 of Massasso’s Declaration.

¹² Paragraphs 25, 26, 28 to 32, 45 to 53 of Massasso’s Declaration.

14. Annexes B, C, D and E are summaries of the contents of the exhibits to Clarke’s, Massasso’s, Yu’s and McVicar’s Declarations.


Applicant’s Evidence




15. The Applicant’s evidence consists of the following:

- (i) the Statutory Declaration of Ms Chan Wing Eleanor, Head of Legal, Hong Kong of Nestlé Hong Kong Limited, an associated company of the Applicant, dated 23 September 2021 (“**Chan’s Declaration**”); and
- (ii) the Statutory Declaration of Ms Isabelle de Blic-Hamon, Senior Legal Counsel IP of the Applicant, dated 26 October 2021 (“**de Blic-Hamon’s Declaration**”).

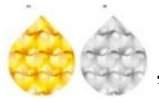
16. I note from these declarations the following:


- (a) The Applicant produces a wide range of dairy products. In Hong Kong, it launched in or around March 2019 under the Subject Marks the WYETH® ILLUMA® HUMAN AFFINITY® A2 β-casein Milk Formula product line, which covers formula milk powder for newborns, infants and children.¹³

- (b) The Subject Marks consist of the word “illumina” (“**illumina Mark**”) and “” (“**Atwo Device**”) in a smaller size.¹⁴

- (c) The Applicant has obtained trade mark registration for “**ILLUMA**” in Hong Kong in Classes 5 and 29, with the date of registration being 4 March 2010. The illumina Mark was later varied and adopted in the Applicant’s other trade marks, such as “”, “”, and “ **illumina**” (registrations obtained in 2014, 2017 and 2019 respectively). The illumina Mark has been applied to all products incorporating Nestlé’s “Human Affinity Formula” (“**illumina Brand Series**”) since 2011.¹⁵

- (d) The Atwo Device consists of the word “Atwo” embedded inside a double droplet

device, which is derived from “” (“**Initial Drop Device**”). The Applicant obtained registration for the Initial Drop Device in Classes 5 and 29, with the date of registration being 26 May 2015. The Initial Drop Device was later

varied and adopted in the Applicant’s other trade marks, such as “”,

¹³ Paragraphs 13, 17 and 19 of Chan’s Declaration.

¹⁴ Paragraph 20 of Chan’s Declaration.

¹⁵ Paragraphs 21, 22 and 25 of Chan’s Declaration.

“illumas^{sn-2}_{hmo}”, “HMO⁺_{complex} illumas” and “HA” (registrations obtained in 2014, 2017, 2019 and 2019 respectively).¹⁶

- (e) According to Ms Chan, the Applicant’s efforts and resources expended on advertising and marketing the illumas Brand Series products over the years have secured widespread recognition and reputation of the illumas Mark among the Hong Kong public, and the popularity of the illumas Brand Series products is reflected in a third-party market survey in 2020.¹⁷
- (f) Ms Chan lists out the Applicant’s spending on advertisements from 2011 to 2021, with breakdowns based on the advertisement types, namely (i) TV commercials and digital advertising on YouTube and Facebook, (ii) brochures and leaflets, (iii) out-of-home advertising campaigns (e.g. in shopping centres, MTR stations, etc), and (iv) advertisements on the Applicant’s website www.illumas.com.hk and its online members’ platform “ILLUMAMA Community”.¹⁸ Examples of use of the illumas Mark, the Initial Drop Device and its variants in the Applicant’s advertisements



(June 2018).¹⁹ It can be seen that superimposed on the Initial Drop Device or its variants are terms, phrases or images, such as “sn-2 Palmitate”, “Global 1st Launch”, “HMO”, and the mother and child image. Although the average consumer may or may not understand the meaning of “sn-2 Palmitate” or “HMO”,

¹⁶ Paragraphs 30 to 35 of Chan’s Declaration.

¹⁷ Paragraphs 46 and 61 of Chan’s Declaration.

¹⁸ Paragraphs 46 to 57 of Chan’s Declaration.

¹⁹ Exhibits **CWE-18**, **CWE-19** and **CWE-20**.

when such terms appear superimposed on the Initial Drop Device or its variants, the average consumer would likely perceive them as indicating an active ingredient or a major characteristic of the dairy products in question. The phrase “Global 1st Launch” merely describes the fact that a particular product was first launched globally. The mother and child image alludes to the target users of the relevant milk products, and the average consumer would not perceive a droplet device with such an image as indicating the trade origin of those products.

17. **Annexes F and G** are summaries of the contents of the exhibits to Chan’s and de Blich-Hamon’s Declarations.

Observations on the Parties’ Evidence

18. Although the Opponent has filed much evidence about the worldwide use of the Opponent’s Core Marks and its stylised forms, all of which contain “a2” as an element of the mark. No evidence of use of the Opponent’s ATWO Mark in Hong Kong or elsewhere has ever been produced.

19. There are plentiful references of “A2 milk” and “A2 protein” in the evidence which unambiguously refer to a type of milk or a type of protein, and references of “A2” referring to that type of milk or protein. Those references before the Relevant Date have been listed out in paragraphs 72, 74, 79 and 81 of the decision of *a2 Store Trade Mark* [2023] HKTMR 29, and I am not going to repeat them here.²⁰ As already held in that previous case, the average consumer in Hong Kong may have been aware of the descriptive meaning of the term “A2” to refer to “A2 milk” or “A2 protein” when it is used on dairy-based and protein-based goods as at the relevant date of that case (i.e. 27 September 2017). “A2” is therefore a descriptive and indistinctive term in respect of the Subject Goods as at the Relevant Date of the present case.

Opposition under section 12(3) of the Ordinance

20. As mentioned in paragraph 7 above, the sole ground of opposition pursued by the

²⁰ The evidence submitted for the case *a2 Store Trade Mark* [2023] HKTMR 29 and extracted in the tables in paragraphs 72, 74, 79 and 81 of that decision also forms part of the evidence of the present case. However, there are differences in the exhibit numbers and page numbers of the relevant extracts as summarized below:

[2023] HKTMR 29		Present case
Paragraph of the decision	Exhibit/page number in exhibit	Exhibit/page number in bundle
72	IBH-3	IBH-2
	CWE-9	CWE-17
74	IBH-3	IBH-2
	CWE-3	CWE-11
79	Exhibit-8 (pp.278, 331, 333)	Exhibit-4 (pp.372, 425, 427)
	Exhibit-10 (p.384)	Exhibit-6 (p.478)
81	Exhibit-15	Exhibit-11

Opponent is under section 12(3) of the Ordinance on the basis that the Subject Marks are confusingly similar to the Opponent's ATWO Mark.

Legal provisions and principles

21. Section 12(3) of the Ordinance states that:

- “(3) 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.”

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

23. In assessing likelihood of confusion, the following principles have been held by the Court of Appeal in *Tsit Wing (Hong Kong) Co Ltd v. TWG Tea Co Pte Ltd* [2015] 1 HKLRD 414, at paragraph 35, and the Court of Final Appeal in *Tsit Wing (Hong Kong) Co Ltd v. TWG Tea Co Pte Ltd (No.2)* (2016) 19 HKCFAR 20, at paragraph 47 to be a useful and accurate summary of the approach:

- (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.

24. Regarding the concept of “independent distinctive role” in principle (f) above, which finds its origin in the CJEU case of *Medion v Thomson Multimedia Sales Germany & Austria GmbH* [2006] ETMR 13, the Opponent draws my attention to the subsequent clarifications on this principle in *Whyte and Mackay Ltd v Origin Wine UK Ltd* [2015] ETMR 29, at paragraphs 18 to 21:

“18. The judgment in *Bimbo* confirms that the principle established in *Median v Thomson* is **not confined to the situation** where the composite trade mark for which registration is sought contains an element which is **identical** to an earlier trade mark, **but extends to the situation** where the composite mark contains an element which is **similar** to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks-visually, aurally and conceptually-**as a whole**. In *Median v Thomson* and subsequent case law, the Court of Justice has recognised that **there are situations** in which the average consumer, **while perceiving a composite mark as a whole**, will **also perceive** that it consists of two (or more) signs **one (or more) of which has a distinctive significance** which is **independent of the significance of the whole**, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can **only apply** in circumstances where the average consumer would **perceive the relevant part** of the composite mark **to have distinctive significance independently of the whole**. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, **even where an element of the composite mark** which is **identical or similar** to the earlier trade mark **has an independent distinctive role**, it does **not automatically follow** that there is a **likelihood of confusion**. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.” (emphasis added)
25. Such an interpretation of the principle is also emphasised by the Applicant, who refers to, among others, the decision of the Appointed Person of the UKIPO in *Lions Gate Entertainment Inc v Telegraph Media Group* [2019] FSR 16, at paragraphs 12 and 15:
- “12. In short, even after a finding that the earlier mark is a common element in a composite mark, and that it has an independent distinctive character, it is **still necessary** to consider **whether consumers would think that there was a common origin leading to a likelihood of confusion** (see *Whyte and MacKay Ltd v Origin Wine UK Ltd* [2015] EWHC 1271 (Ch); [2015] F.S.R. 33 at [21] per Arnold J). Expressing what *Median* [2006] E.T.M.R. 13 means in a negative fashion may make clearer what it is really about: if the common element is not very distinctive then it will not play an independent distinctive role in the composite mark and so the average consumer will give it less attention, meaning that the other elements of the composite of the mark will make it unlikely that there would be any likelihood of confusion.
- ...
15. In short, *Medion* [2006] E.T.M.R. 13 **does not create a shortcut** to concluding there is a likelihood of confusion where there is a common element (the house mark X) in a composite mark X + Y; rather, it rejects a shortcut going the other way (Pragetheorie). The test, as is clear from *Bimbo* [2014] E.T.M.R. 41, requires a **global assessment of all the factors** to assess whether there is a likelihood of confusion (see *Whyte and MacKay* [2015] F.S.R. 33 at [21]).” (emphasis added)
26. From the legal provisions and relevant authorities mentioned above, it can be seen that section 12(3) of the Ordinance essentially prohibits the registration of a trade mark which would likely cause confusion on the part of the public as a result of its being similar to an earlier trade mark and its application being in respect of goods or services identical or similar to those in respect of which the earlier trade mark is registered. Similarity between the trade mark in suit and the earlier trade mark is assessed by reference to the overall visual, aural and conceptual impressions of the marks, bearing in mind their distinctive and dominant components. While perceiving the marks as wholes, the average consumer may also perceive the trade mark in suit as consisting of two (or more) elements, one (or more) of which has a distinctive significance independent of the significance of the whole mark. Yet, even if that element is identical or similar to the earlier mark, it does not automatically follow that there is a likelihood of confusion, which must after all be appreciated globally, taking into account all relevant factors.

Earlier trade mark

27. The applicability of section 12(3) of the Ordinance lies on the prerequisite that the mark that the Opponent relies on is an “earlier trade mark”. “Earlier trade mark” is defined in section 5 of the Ordinance. The relevant part of the section reads:

“(1) In this Ordinance, **earlier trade mark** (在先商標), in relation to another trade mark, means—

- (a) a registered trade mark which has a date of the application for registration earlier than that of the other trade mark, taking into account the priorities claimed in respect of each trade mark, if any; ...”

28. As the date of application of the Opponent’s ATWO Mark (i.e. 21 September 2018) is before the Relevant Date, the Opponent’s ATWO Mark constitutes an “earlier trade mark” in relation to the Subject Marks.

Average consumer and the purchasing act

29. The likelihood of confusion must be judged through the eyes of the average consumer of the goods in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, and whose attention varies according to the category of goods or services in question.

30. The Subject Goods are food and supplements for babies and mothers in Class 5 and milk and milk powder in Class 29. The relevant consumers in question are members of the general public who are interested in obtaining those goods. For supplements and food for medical use in Class 5, the relevant consumers also include medical and dietary professionals. The average consumer for the Subject Goods would take reasonable care in selecting those goods and in looking at the marks used in relation to them. The level of attention displayed by the average consumer is likely to range from average to high, depending on the price and the specialised nature of the goods in question.

31. Most of the Subject Goods are available to the general public in Hong Kong through retailers such as supermarkets and online shops. Consumers would likely see the products bearing the marks when making purchase, and the selection process of such goods would be primarily visual. Therefore, the visual impact of the marks will likely have more importance in the selection process, although I will not rule out the aural impact of the marks completely.

Distinctiveness of the Opponent’s ATWO Mark

32. The distinctive character of the Opponent’s ATWO Mark is a factor to be considered in the assessment of the likelihood of confusion. As per sub-paragraph (h) of paragraph 23 above, 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.

33. This Registry has previously held in *ATWO Trade Mark* [2023] HKTMR 30 that the word “ATWO” is not devoid of any distinctive character as, despite the descriptiveness of the term “A2” in referring to a type of milk or a type of protein, there are different ways to interpret the string of letters “ATWO” and it is unlikely that the relevant public would, upon perception, immediately associate it with “A2” and understand its descriptive meaning. The relevant date in that case is only 12 days before the Relevant Date in the present case. There is no evidence showing that the distinctive character of the word “ATWO” has been enhanced through use before the Relevant Date.

Comparison of Marks

34. As mentioned, the comparison of marks is based on an overall appreciation of the visual, aural and conceptual similarities of the marks in question, bearing in mind their distinctive and dominant components.

35. For easy reference, the marks in question are set out as follows:

Opponent’s ATWO Mark	Subject Marks
	A 
	B 

36. On the comparison of marks, the Opponent argues that:

- (a) visually, each of the Subject Marks consists of three components, namely the word “Atwo” written across a device of two overlapping droplets and the word “illumina”, all arranged horizontally in two clusters;²¹
- (b) “Atwo”, a fancy word, draws the reader’s attention and is a dominant and distinctive component of the Subject Marks;²²
- (c) the double droplet device, purely decorative or allusive to liquid milk, accentuates the visual impact of the word “Atwo”;²³
- (d) the word “illumina”, although being a large component of the marks, does not lessen the overall impact of the word “Atwo”, even in Subject Mark B where the “Atwo” component is positioned to the right of the word “illumina”;²⁴
- (e) conceptually, the Subject Marks do not have any recognisable or conventional

²¹ Paragraph 11 of the Opponent’s skeleton submissions.

²² Paragraph 12(1) of the Opponent’s skeleton submissions.

²³ Paragraph 12(2) of the Opponent’s skeleton submissions.

²⁴ Paragraphs 12(3) and 14 of the Opponent’s skeleton submissions.

meaning as “ATWO” is meaningless and the word “illumina”, despite the possibility of evoking the idea of light or illumination, has no dictionary meaning; the droplet device, suggesting the idea of liquid milk, is merely descriptive of the Subject Goods;²⁵

- (f) phonetically, the Subject Marks are pronounced as either “Atwo illumina” or “illumina Atwo”, and “Atwo” has the same pronunciation as “ATWO” in the earlier mark.²⁶

37. On the other hand, the Applicant argues that:

- (a) the word “illumina” is the most dominant and distinctive element of the Subject Marks since it is inherently distinctive and visually prominent;²⁷
- (b) the Atwo Device, alluding to the idea of hydration/liquid with “Atwo” substance, is descriptive of the Subject Goods as it refers to their method of use (oral absorption with water) and their intended purpose (rehydration with “Atwo”);²⁸
- (c) insofar as Subject Mark A is concerned, the fact that the Atwo Device precedes “illumina” does not automatically make it the most distinctive component;²⁹
- (d) visually, the marks in question are similar to a very low degree as brevity and simplicity are key attributes of the Opponent’s ATWO Mark, which does not contain any device or the dominant and distinctive element “illumina”;³⁰
- (e) aurally, the average consumer would unlikely pronounce a long mark in its entirety and would only utter the dominant element, namely “illumina”, in the Subject Marks; even if “Atwo” is also pronounced, the overall aural impression of “illumina” and “Atwo” in the Subject Marks is different from the pronunciation of “ATWO” alone;³¹
- (f) conceptually, the Opponent’s ATWO Mark is meaningless while “illumina” in the Subject Marks brings to mind the notion of light or illumination.³²

38. Each of the Subject Marks consists of two components, the word “illumina” and the Atwo Device. The Atwo Device contains the word “Atwo” written across a double droplet device. The only difference between Subject Mark A and Subject Mark B is the relative positions of the two components on a horizontal plane.

39. Neither of the words “illumina” and “Atwo” has any dictionary meaning. While I agree with both parties that the word “illumina” may suggest the notion of light or illumination, the word itself is a coined word with inherent distinctive character. The word “Atwo” is presented in a combination of upper- and lower-case letters, instead of all capital letters as in the Opponent’s ATWO Mark, and such a difference in letter cases may have a slight impact on how the average consumer perceives the term. As held in *ATWO Trade Mark* [2023] HKTMR

²⁵ Paragraph 15 of the Opponent’s skeleton submissions.

²⁶ Paragraph 16 of the Opponent’s skeleton submissions.

²⁷ Paragraph 9.3 of the Applicant’s skeleton submissions.

²⁸ Paragraph 9.2 of the Applicant’s skeleton submissions.

²⁹ Paragraph 9.5 of the Applicant’s skeleton submissions.

³⁰ Paragraph 10.1 of the Applicant’s skeleton submissions.

³¹ Paragraph 10.2 of the Applicant’s skeleton submissions.

³² Paragraph 10.3 of the Applicant’s skeleton submissions.

30, an average consumer may interpret the term “ATWO” in multiple ways, including treating it as an abbreviation of a phrase with all letters spelt out individually as “*ay-tee-duh.blyoo-oh*” or as an acronym of a longer term. However, the word “Atwo” in both upper- and lower-case letters will unlikely be considered as an abbreviation or an acronym. The term “Atwo” is written across a double droplet device. Given that the width of the word “Atwo” conforms with the widest part of the double droplet device and that the font of the word and the lines of the device are of similar thickness, the word “Atwo” appears to blend in with the double droplet device instead of conspicuously standing out against the device background. Therefore, the average consumer would likely perceive the Atwo Device as a whole instead of singling out the word “Atwo”. I agree with both parties that the double droplet device merely alludes to liquid milk or the idea of hydration or liquid. When the word “Atwo” and the double droplet device is viewed as a whole, it alludes to the idea of liquid milk containing, or hydration with, a substance called “Atwo”. The average consumer will likely perceive the Atwo Device as an indication of a characteristic of the products in question. Therefore, he or she will instead focus on the word “illumina” and consider it as a distinctive and dominant component of the Subject Marks.

40. Visually speaking, the word “illumina” takes up around 3/4 of each of the Subject Marks and is undeniably the most eye-catching component of the marks. The Atwo Device takes up the remaining 1/4 of the mark, and the word “Atwo” in it is even smaller when compared to the word “illumina”. The larger relative size of the word “illumina” also reinforces the finding that it is a distinctive and dominant element of the Subject Marks. The Atwo Device, while remains noticeable by the average consumer, will have a much smaller visual impact. As the Opponent’s ATWO Mark consists solely of the term “ATWO” without any device, the Subject Marks and the Opponent’s ATWO Mark are only visually similar to a low degree due to the overlapping of the word “Atwo”/“ATWO”.

41. On aural comparison, the pronounceable words in the Subject Marks are “illumina” and “Atwo”. As the word “illumina” is a distinctive and dominant component of the Subject Marks, the average consumer will more likely refer to the Subject Marks as simply “illumina” than as “Atwo illumina” or “illumina Atwo”. Even if both “illumina” and “Atwo” are pronounced, the overlapping element “Atwo”/“ATWO” in the Subject Marks and the Opponent’s ATWO Mark only renders the overall pronunciations of these marks similar to a low degree, as the distinctive and dominant component “illumina” is absent in the Opponent’s ATWO Mark.

42. In terms of conceptual comparison, the Opponent’s ATWO Mark has no apparent meaning to the average consumer. The Subject Marks, on the other hand, contain the word “illumina”, which alludes to light or illumination. As mentioned, the word “Atwo” in both upper- and lower-case letters against the double droplet device background implies the idea of liquid milk containing, or hydration with, a substance called “Atwo”, indicating the characteristics of the products in question. The average consumer will instead focus on the word “illumina” and the connotation of light and illumination, which are missing in the Opponent’s ATWO Mark. Therefore, the Subject Marks and the Opponent’s ATWO Mark give different conceptual impressions to the average consumer.

43. Having regard to the visual, aural and conceptual similarities and differences between the Subject Marks and the Opponent’s ATWO Mark, as well as the circumstances in which the goods in question are marketed and the pre-purchase selection process of the average consumer, I find that the overall impression created by each of the Subject Marks is very different from that created by the Opponent’s ATWO Mark. The degree of similarity between the Subject Marks and the Opponent’s ATWO Mark is low.

Comparison of Goods

44. The well-known tests for assessing similarity in goods are found in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1999] RPC 117 and *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281 and applied in *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd (CA) (supra)*. They require considerations of all relevant factors relating to the goods including, among others, their nature, intended purpose, method of use, whether the goods are in competition with each other or are complementary, as well as their users and the channels through which they reach the market.

45. The goods can be considered as identical when the goods designated by the earlier mark are included in a more general category designated by the trade mark application, or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (*Gérard Meric v OHIM* Case T-133/05, 7 September 2006, at paragraph 29).

46. For easy comparison, the Subject Goods and the goods covered by the Opponent’s ATWO Mark (“**Opponent’s Registered Goods**”) are set out below:

Opponent’s Registered Goods	Subject Goods
<p><u>Class 5</u> Food for infants; milk and powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder (dietary supplement).</p>	<p><u>Class 5</u> Formulated milk for babies; infant formula; food and beverages for babies; nutritional supplements for babies; dietetic food for babies adapted for medical use; food substances for babies adapted for medical use; dietetic food and beverages for children adapted for medical use; food substances for children adapted for medical use; food substances for pregnant mothers adapted for medical use; dietetic food for nursing mothers adapted for medical use; food substances for nursing mothers adapted for medical use; milk powder for babies; lacteal flour for babies.</p>
<p><u>Class 29</u> Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating; milk-based protein drinks; whey; dry whey; protein powder for use as a food additive.</p>	<p><u>Class 29</u> Formulated milk and milk powder for children; food preparations having a base of milk; milk powder; powdered milk.</p>

47. The Opponent contends that the goods in question are identical, or at least highly similar.³³ The Applicant submits that the goods in question overlap considerably.³⁴

48. Among those covered by the Opponent's ATWO Mark in Class 5 are "food for infants", "milk and powdered milk for infants", "dietetic foods adapted for medical purposes", "dietetic beverages adapted for medical purposes" and "nutritional supplements", which are broad enough to cover all the Subject Goods in Class 5. Pursuant to the principle in *Gérard Meric*, those of the Subject Goods in Class 5 can be considered as identical to the goods in Class 5 under the Opponent's ATWO Mark.

49. For Class 29, the items "milk powder" and "milk" are general terms that cover "formulated milk and milk powder for children", "milk powder" and "powdered milk". These goods are therefore also considered identical. The remaining item of "food preparations having a base of milk" in the Subject Goods is also similar to "milk powder" and "milk" as they are in competition with each other, target the same users, and are sold through the same channels. Therefore, all the Subject Goods in Class 29 are either identical or similar to the goods covered by the Opponent's ATWO Mark in Class 29.

50. In conclusion, all the Subject Goods are either identical or similar to the goods covered by the Opponent's ATWO Mark.

Likelihood of confusion

51. The likelihood of confusion must be appreciated globally, taking account of all relevant factors. The matter must be judged through the eyes of the average consumer of the goods and services in issue who is deemed to be reasonably well-informed and reasonably observant and circumspect. The average consumer, while perceiving the marks as wholes, may also perceive the trade mark in suit as consisting of two (or more) elements, one (or more) of which has a distinctive significance independent of the significance of the whole mark. Yet, even if that element is identical or similar to the earlier mark, it does not automatically follow that there is a likelihood of confusion. Moreover, a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods or services, and vice versa.

52. The Opponent submits that:

- (a) the word "Atwo" has a distinctive significance independently of the Subject Marks as (i) it appears in a separate cluster next to the word "illumina" and is a self-standing distinctive component; and (ii) there is no perceivable connection between "Atwo" and the double droplet device and "illumina" to confer any additional meaning over

³³ Paragraph 19 of the Opponent's skeleton submissions.

³⁴ Paragraph 12 of the Applicant's skeleton submissions.

and above that conveyed by the individual components;³⁵

- (b) apart from those adapted for medical use, all Subject Goods are commonly available and do not warrant a high degree of consumer circumspection; given the independent distinctive role of “Atwo” in the Subject Marks, the average consumer would mistakenly perceive the Subject Goods as originating from, or being economically linked with, the Opponent;³⁶
- (c) the Applicant has used “illumina” in conjunction with other signs such as “HMO+” and “Wyeth” and the Opponent has a history of licensing its brands to other third parties for use; to the average consumer, the Subject Marks may indicate a commercial connection between the Applicant (owner of the “illumina” brand) and the Opponent (owner of the “ATWO” brand).³⁷

53. The Applicant, on the other hand, submits that:

- (a) the word “Atwo” does not have distinctive character independently of the Subject Marks as (i) the distinctive character of “Atwo” must be viewed in its context, i.e. embedded in the double droplet device; (ii) “illumina” is the most distinctive and dominant element in the Subject Marks; and (iii) “Atwo” is not a self-standing distinctive component;³⁸
- (b) even if “Atwo” retains an independent distinctive character, there is no likelihood of confusion as it, at most, calls to the mind of the average consumer the Opponent’s ATWO Mark, which is insufficient to find a likelihood of confusion;³⁹
- (c) although the goods are identical or similar, the marks in question are dissimilar or similar to a very low degree and thus the consumers are unlikely to be confused.⁴⁰

54. The issue of whether the word “Atwo” plays an independent distinctive role in the Subject Marks (paragraph 52(a) and (b) above) should be considered in its context. As mentioned in paragraph 39, given (i) the alignment of the width of the word “Atwo” and that of the double droplet device and (ii) the thickness of the font and of the lines, the word “Atwo” appears to assimilate into the Atwo device and the average consumer will likely consider the Atwo Device as a whole. Therefore, while the word “Atwo” may be viewed as a meaningless coined word in respect of the Subject Goods, it is unlikely that the average consumer would single out the word “Atwo” from the double droplet device. Instead, he or she will likely consider the Atwo Device as a whole as an indication of a characteristic of the products in question. For that reason, he or she will unlikely treat “Atwo” as a separate element in the Subject Marks and perceive it as having an independent distinctive role.

55. Even if the average consumer perceives the element “Atwo” as having an independent

³⁵ Paragraph 21 of the Opponent’s skeleton submissions.

³⁶ Paragraphs 23, 26(1) to (3) of the Opponent’s skeleton submissions.

³⁷ Paragraphs 24, 25, 26(4) of the Opponent’s skeleton submissions.

³⁸ Paragraphs 11 and 13.3 of the Applicant’s skeleton submissions.

³⁹ Paragraph 13.4 of the Applicant’s skeleton submissions.

⁴⁰ Paragraphs 13.1, 13.2 and 13.5 of the Applicant’s skeleton submissions.

distinctive role in each of the Subject Marks, it does not necessarily follow that there is a likelihood of confusion between the Subject Marks and the Opponent's ATWO Mark due to the common element "Atwo"/"ATWO". The likelihood of confusion must be appreciated globally. The word "illumina" remains a distinctive and dominant component in the Subject Marks. As held in paragraph 43 above, the overall impression created by each of the Subject Marks is very different from that created by the Opponent's ATWO Mark. Despite the identical/similar goods in question, I consider that when the Subject Marks are used in relation to the Subject Goods, the average consumer exercising the normal level of attention would unlikely be misled into believing that those goods come from or are related to the Opponent.

56. Regarding the Opponent's argument referred to in paragraph 52(c) above, I consider that even if the Applicant has used "illumina" in conjunction with other signs and the Opponent has a history of licensing its brands to other third parties, it does not mean that the Subject Marks would likely indicate to the average consumer a commercial connection between the Applicant and the Opponent. The Applicant has used "illumina" with other droplet devices (paragraph 16(f) above). In the Subject Marks, the Atwo Device as a whole is likely to be perceived by the average consumer as merely an indication of a characteristic of the products in question, instead of any commercial connection with the Opponent.

57. Taking into account all relevant factors, I consider that given the low degree of similarity between the Opponent's ATWO Mark and the Subject Marks, when any of the Subject Marks is used in relation to the Subject Goods, the average consumer would not be confused into believing that those goods and any of the Opponent's Registered Goods offered under the Opponent's ATWO Mark come from the same or economically-linked undertakings. Therefore, the opposition under section 12(3) of the Ordinance fails.

Costs









58. As the opposition is unsuccessful, I award the Applicant costs.









59. 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.


(Frederick Kwok)
for Registrar of Trade Marks
23 January 2024

Annex A

Details of applications and registrations of the Opponent's Trade Marks in Hong Kong

Trade Mark and Trade Mark No.	Date of Application	Specification and Goods/Services
<p>ATWO</p> <p>304676815</p>	21-09-2018	<p>Class 5 Food for infants; milk and powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder (dietary supplement).</p> <p>Class 29 Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating; milk-based protein drinks; whey; dry whey; protein powder for use as a food additive.</p>
<p>A </p> <p>B </p> <p>C </p> <p>D </p> <p>300210202</p>	06-05-2004	<p>Class 29 milk and milk products, full cream, milk powder, full cream milk powder, skim milk powder, whey and whey products, butter, cheese, milk beverages, other goods in this class which include milk or milk products as ingredients.</p>
<p></p> <p>300729559</p>	26-09-2006	<p>Class 5 Semen products; medicated animal breeding products and materials; infant foods; milk and milk powder for infants; all included in Class 5.</p>
<p></p> <p>300865710</p>	07-05-2007	<p>Class 5 Semen products; medicated animal breeding products and materials; infant foods; milk and milk powder for infants.</p> <p>Class 29 Milk and milk products in this class, other goods in this class which include milk or milk products as ingredients.</p> <p>Class 44 Veterinary services; animal breeding services; animal testing services for breeding purposes.</p>
<p>THE a2 MILK COMPANY 302942857</p>	28-03-2014	<p>Class 5 Infant foods; milk and milk powder for infants; dietetic foods and beverages for medical use.</p>
<p>A </p> <p>B </p> <p>303123341</p>	03-09-2014	<p>Class 29 Milk and milk products in this class; other goods in this class which include milk or milk products as ingredients.</p>

<p>THE a2 MILK COMPANY 304135031</p>	<p>10-05-2017</p>	<p><u>Class 5</u> Food for infants; milk and milk powder for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; protein dietary supplements. <u>Class 29</u> Milk powder; milk; cream; butter; cheese; yoghurt; milk beverages, milk predominating.</p>
<p>A </p> <p>B </p> <p>304136364</p>	<p>11-05-2017</p>	<p><u>Class 5</u> Food for infants; milk and milk powder for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; protein dietary supplements. <u>Class 29</u> Milk powder; milk; cream; butter; cheese; yoghurt; milk beverages, milk predominating. <u>Class 30</u> Ice cream; frozen yoghurt; ices; frozen desserts.</p>
<p>A </p> <p>B </p> <p>304136391</p>		
<p>A </p> <p>B </p> <p>304136427</p>		
<p>A </p> <p>B </p> <p>304136454</p>		

<p>A</p>  <p>B</p>  <p>304136382</p>	<p>11-05-2017</p>	<p><u>Class 5</u> Food for infants; milk and milk powder for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; protein dietary supplements.</p> <p><u>Class 29</u> Milk powder; milk; cream; butter; cheese; yoghurt; milk beverages, milk predominating.</p> <p><u>Class 30</u> Ice cream; frozen yoghurt; ices; frozen desserts.</p>
 <p>304136535</p>	<p>11-05-2017</p>	<p><u>Class 5</u> Food for infants; powdered milk for babies; dietetic beverages adapted for medical use; nutritional supplements; protein dietary supplements; animal semen; diagnostic preparations for veterinary purposes for detecting genetic predispositions; diagnostic test reagents for veterinary use.</p> <p><u>Class 29</u> Milk powder; milk; cream; butter; cheese; yoghurt; milk beverages, milk predominating.</p> <p><u>Class 30</u> Ice cream; frozen yoghurt; ices; frozen desserts.</p> <p><u>Class 44</u> Veterinary services; animal breeding; providing information relating to animal breeding; genetic testing of animals for breeding purposes; breeding and stud services for animals.</p>
<p>a2 PLATINUM 304309867</p>	<p>20-10-2017</p>	<p><u>Class 5</u> Food for infants; milk and powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; protein dietary supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder (dietary supplement).</p> <p><u>Class 29</u> Milk powder; milk; cream; butter; cheese; yoghurt; milk beverages, milk predominating; whey; dry whey.</p>
<p>a2白金 304309885</p>		
<p>a2 True 304404276</p>	<p>19-01-2018</p>	<p><u>Class 5</u> Food for infants; milk and powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder (dietary supplement).</p> <p><u>Class 29</u> Milk powder; milk; butter; cheese; cream [dairy products]; yoghurt; milk beverages, milk predominating; milk-based protein drinks; whey; dry whey; protein powder for use as a food additive.</p>

Annex B

Summary of the contents of exhibits to Clarke's Declaration

Exhibit	Description
AJC-1 & AJC-2	Copies of scientific journal articles on the health benefits of consumption of milk that does not contain A1 beta-casein protein

Annex C

Summary of the contents of exhibits to Massasso's Declaration

Exhibit	Description
Exhibit-1	A copy of the market announcement on the change of the Opponent's name in 2014
Exhibit-2	Photos of packaging of the Opponent's products in different jurisdictions that contains at least one of the Opponent's Core Marks
Exhibit-3	A list of the Opponent's pending applications for and registrations of trade marks containing the Opponent's Core Marks in different jurisdictions (as at 1 August 2018)
Exhibit-4	Screen captures from the Wayback Machine Web Archive showing various websites of the Opponent between 2003 and 2018
Exhibit-5	Extracts from the Opponent's China T-Mall website as at 3 July 2020 showing the Opponent's "a2" brand and infant formula products
Exhibit-6	Screen captures from the Wayback Machine Web Archive of the Opponent's Hong Kong website showing the Opponent's Core Marks and its products
Exhibit-7	Screen captures from the Wayback Machine Web Archive of the Opponent's Hong Kong T-Mall website as at 5 November 2018 showing the Opponent's Core Marks and its products
Exhibit-8	A list of chain retail stores, pharmacy outlets, grocery and convenience stores in Hong Kong where the Opponent's products bearing at least one of the Opponent's Core Marks were sold (as at August 2020)
Exhibit-9	Photos of the Opponent's products bearing at least one of the Opponent's Core Marks in selected pharmacy outlets and supermarkets in Hong Kong (as at November 2019)
Exhibit-10	Printouts of online retail platforms in Hong Kong selling the Opponent's products bearing at least one of the Opponent's Core Marks (most of them printed on 20 February 2020, some undated)
Exhibit-11	News articles from New Zealand's media in which the Opponent's Core Marks are referred to
Exhibit-12	The Opponent's half-year reports and annual reports from 2010 to 2019
Exhibit-13	The Opponent's presentation slides accompanying its half-year and annual reports
Exhibit-14	The Opponent's selected market announcements between 2014 and 2017
Exhibit-15	Printouts of online articles and publications showing the Opponent's products
Exhibit-16	Photos taken from the episodes of the 2013 MasterChef Australia cooking competition television series which feature the Opponent's products
Exhibit-17	Photos taken at the mother class activity hosted by Hong Kong Suning/Baby Kingdom and sponsored by the Opponent in Hong Kong in 2018
Exhibit-18	Printouts of Facebook posts of daigou intermediaries selling the Opponent's overseas products in Hong Kong between May 2017 and August 2018


Annex D

Summary of the contents of exhibits to Yu's Declaration

Exhibit	Description
YKY-1	An article about the launch of the Opponent's infant formula and milk powder products in Hong Kong chain retail stores in November 2017, and printouts of search results of "a2" on the websites of two local pharmacies
YKY-2	A Chinese news article on the bulk purchase of baby formula products in Australia by daigou intermediaries (dated September 2018)
YKY-3	News articles from Australian media on the bulk purchase of the local baby formula products by daigou intermediaries (dated October 2018)
YKY-4	Online articles and forum posts regarding the purchase of the Opponent's formula products in Hong Kong
YKY-5	Printouts of the offerings of the Opponent's formula products by Hong Kong daigou intermediaries on Facebook, Taobao and other websites (some overlap with Exhibit-18 to Massasso's Declaration)
YKY-6	News articles relating to the sales/purchase of infant formula and milk products and the related export control imposed by the HKSAR Government
YKY-7	A news article relating to the sales of counterfeit Opponent's products from Hong Kong to mainland China
YKY-8	Printouts of the posts on Baby Kingdom concerning the Opponent's products

Annex E

Summary of the contents of exhibits to McVicar’s Declaration

Exhibit	Description
JJM-1	Printout of the details of the Opponent’s “ATWO” application (no. 304676815) from the online database of the Hong Kong Trade Marks Registry
JJM-2	Reprint of the screen captures bearing the date of 4 September 2018 of the Opponent’s Hong Kong website in Exhibit-6 to Massasso’s Declaration
JJM-3	Printout of the details of the Opponent’s registration (no. 304136391) from the online database of the Hong Kong Trade Marks Registry
JJM-4	Printout of the Prime Video website showing the 2013 MasterChef Australia as one of the available programmes
JJM-5	Printout of the details of the Opponent’s  “Milk” registration from the online database of the European Union Intellectual Property Office
JJM-6	Decision of the Federal Court of Australia in <i>a2 Milk Co Ltd v LD&D Australia Pty Ltd</i> [2021] FCA 1515, which held that “a2” or “A2” did not directly describe the Opponent’s products
JJM-7	Decisions of Beijing Intellectual Property Court and the UK Intellectual Property Office that held that the evidence submitted did not show that “A2” was a descriptive term or the consumers might understand it as such as at the relevant dates of those cases
JJM-8	Printouts of search results for “A2 milk” on the online Cambridge Dictionary Collins Dictionary and Merriam-Webster Dictionary
JJM-9	Excerpts from the decision of the Federal Court of Australia in <i>Moroccanoil Israel Ltd v Aldi Foods Pty Ltd</i> [2017] FCA 823
JJM-10	Printouts of search results on the Macquarie Dictionary Online for “google”, “hoover” and “xerox”, which are registered trade marks in Hong Kong
JJM-11	Printouts of the details of various Opponent’s registrations and applications from the online database of the relevant trade mark registries
JJM-12	Decisions of the China National Intellectual Property Administration that held that the question of whether “A2” had become a generic term was beyond the examination scope of the respective cases

Annex F

Summary of the contents of exhibits to Chan’s Declaration

Exhibit	Description
CWE-1	A copy of the Certificate of Incorporation of Admirable Profit Limited, the former name of Nestlé Hong Kong Limited
CWE-2 & CWE-3	Printouts from the online database of the Hong Kong Trade Marks Registry of the details of the registrations and/or application of the illuma Mark and the Applicant’s other trade marks that contain a varied version of the illuma Mark
CWE-4	Images of the illuma Brand Series products sold in Hong Kong
CWE-5	Printouts from various popular Hong Kong online shopping platforms showing the availability of the illuma Brand Series products
CWE-6	Photos of the illuma Brand Series products in store
CWE-7 to CWE-9	Printouts from the online database of the Hong Kong Trade Marks Registry of the details of the registrations and/or applications for the Initial Drop Device and the Applicant’s other trade marks that contain a varied version of the Initial Drop Device
CWE-10	Printouts from various popular Hong Kong online shopping platforms showing the range of “A2 milk” products available
CWE-11	Photos of “A2” infant milk products in Hong Kong chain pharmacies and supermarkets
CWE-12	Examples of the Applicant’s advertisements in shopping centres, MTR stations and buses around Hong Kong
CWE-13	Articles from Hong Kong media on “A2 milk”
CWE-14	A printout from the website of the Race Relations Unit of the Home Affairs Department of the HKSAR Government, which shows that about 92% of the Hong Kong population is ethnically Chinese
CWE-15	Various online articles discussing the widespread prevalence of lactose intolerance among Chinese populations
CWE-16	Research articles on the benefits of “A2 milk” on lactose intolerant persons
CWE-17	An article by Hong Kong Adventist Hospital summarising the findings on the benefits of “A2 milk”
CWE-18	Screen shots from TV commercials and digital advertisements featuring the illuma Brand Series products
CWE-19	Copies of brochures and leaflets of the illuma Brand Series products
CWE-20	Photos of out-of-home advertising campaigns showing the illuma Brand Series products
CWE-21	Screen shots from various pages of the www.illumama.com.hk accessed on 25 February 2021 that featured the illuma Brand Series products
CWE-22	Screen shots of information showing the illuma Brand Series products that was shared through the ILLUMAMA Community
CWE-23	Results from a market survey conducted by Kantar Insights Hong Kong in 2020, which show that 45% of the surveyed mothers said “illumama is the first choice of infant milk formula used for transiting from breastmilk to infant milk formula”
CWE-24	A printout from the website www.digitalnews.net showing the subscriber base of Now TV as at 31 December 2013
CWE-25	A printout from the Wikipedia page on “MasterChef Australia (series 5)”, which comments on the low viewership and ratings for the 2013 season

Annex G

Summary of the contents of exhibits to de Blic-Hamon's Declaration

Exhibit	Description
IBH-1	Various academic journal articles on the differences between "A1 milk" and "A2 milk"
IBH-2	Articles and website printouts showing "A2" or "A2 protein" is used as a short form of, or reference to, A2 beta-casein protein
IBH-3	Decisions from different trade mark offices supporting that "A2" is a short form reference to A2 beta-casein protein
IBH-4	Printout of an excerpt from the online version of the Macquarie Dictionary, which defines "A2 milk" as "milk which contains A2 beta-casein proteins, thought to be less allergenic than milk which contains A1 proteins"
IBH-5	Various scientific papers that use "A2" or "A2 protein" to refer to A2 beta-casein protein
IBH-6	Printouts of the Opponent's website www.a2milk.com/our-story showing use of "A2 protein" by the Opponent
IBH-7	An online financial news report using the term "A2 milk" to refer to milk that "contains only the A2 beta-casein protein"
IBH-8	Copies of the Opponent's presentation slides at the CLSA Investors' Forum (dated 11 and 12 September 2018) showing the use of "A2 protein" by the Opponent
IBH-9	Printouts from the HKTV mall website showing the Opponent's product packaging, on which the term "A2 protein" is used
IBH-10	Printouts of the Opponent's website www.a2australia.com.au between 14 April 2005 and 21 September 2007 as captured by the Wayback Machine Web Archive showing the use of "A2" as a reference to A2 beta-casein protein
IBH-11	Details of various applications and registrations for the Opponent's Trade Marks as printed out from the online database of the Hong Kong Trade Marks Registry
IBH-12	Printouts from the Opponent's websites
IBH-13	A decision from the Swiss Federal Institute of Intellectual Property, which held that one of the Opponent's stylised "a2" mark "does not satisfy the requirements of well-known brand in Switzerland"
IBH-14	Printouts of online register records of the Applicant's refused or cancelled trade marks that contain the element "A2" or "a2" in various jurisdictions