

**Action brought on 6 September 2012 — Vitaminaqua Ltd v OHIM**

(Case T -410/12)

(2012/C 355/71)

*Language in which the application was lodged: Hungarian*

**Parties**

*Applicant:* Vitaminaqua Ltd (London, United Kingdom) (represented by: A. Krajnyák, lawyer)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

*Other party to the proceedings before the Board of Appeal:* Energy Brands, Inc. (New York, United States of America)

**Form of order sought**

— Amend the decision of the First Board of Appeal of OHIM rejecting application No 8338592 for registration of the figurative mark ‘vitaminaqua’ (Case R 997/2011-1) and order the registration of the trade mark in accordance with the decision of the Opposition Division of OHIM, thereby conferring protection as a trade mark on the sign;

— Order the defendant or the other party to bear the costs.

**Pleas in law and main arguments**

*Applicant for a Community trade mark:* Vitaminaqua Ltd.

*Community trade mark concerned:* the figurative mark ‘vitaminaqua’ for goods in Classes 5, 30 and 32 (application for registration No 8 338 592).

*Proprietor of the mark or sign cited in the opposition proceedings:* Energy Brands, Inc.

*Mark or sign cited in opposition:* inter alia the national word mark ‘VITAMINWATER’ for goods in Classes 5, 30 and 32.

*Decision of the Opposition Division:* opposition rejected.

*Decision of the Board of Appeal:* decision of the Opposition Division set aside and application for registration as a Community trade mark rejected.

*Pleas in law:* infringement of Article 8(1)(b) of Regulation No 207/2009, <sup>(1)</sup> since there is no likelihood of confusion between the marks at issue.

<sup>(1)</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

**Action brought on 14 September 2012 — Xeda International and Others v Commission**

(Case T-415/12)

(2012/C 355/72)

*Language of the case: English*

**Parties**

*Applicants:* Xeda International SA (Saint-Andiol, France); Pace International LLC (Washington, United States); and Decco Iberica Post Cosecha, SAU (Paterna, Spain) (represented by: C. Mereu and K. Van Maldegem, lawyers)

*Defendant:* European Commission

**Form of order sought**

— Declare the application admissible and well-founded;

— Annul Commission Implementing Regulation (EU) No 578/2012 <sup>(1)</sup>; and

— Order the defendant to pay the costs of the proceedings.

**Pleas in law and main arguments**

In support of the action, the applicants rely on three pleas in law.

1. First plea in law, alleging that the contested act is unlawful for manifest errors of appraisal. The Commission has erred as a matter of law in justifying the contested act on the grounds of hypothetical concerns: (i) the three unidentified metabolites and (ii) processed commodities. In relation to these concerns, the Commission also erred in law by asking the applicants for *probatio diabolica*, namely by asking for the identity of the unidentified metabolites in stored apples whereas this was technically impossible, and by asking the applicants to demonstrate an absence of risk in relation to low risk compounds found below the Limit of Quantification (LOQ) in processed commodities.

2. Second plea in law, alleging that the contested act is unlawful for violations of due process and right of defence. The contested act is based on a report from the European Food Safety Authority ('EFSA') which introduced a new requirement — the submission of a fully validated analytical method — at a very late stage of the evaluation procedure. The applicants submitted the requested data to the Rapporteur, who in turn evaluated it and prepared a conclusion whereby the data were sufficient to address the issue raised by EFSA. However, the Commission disregarded the new data. Moreover, the applicants were not given an opportunity to address the issue due to the Commission's misunderstanding of Commission Regulation (EC) No 33/2008<sup>(2)</sup> concerning the submission of new data.
3. Third plea in law, alleging that the contested act is unlawful because it is disproportionate. Even if it were accepted that the new studies could not be taken into consideration, the Commission could have adopted an inclusion decision with less restrictive measures, such as making it subject to confirmatory data.

<sup>(1)</sup> Commission Implementing Regulation (EU) No 578/2012 of 29 June 2012 concerning the non approval of the active substance diphenylamine, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market (OJ 2012 L 171, p. 2)

<sup>(2)</sup> Commission Regulation (EC) No 33/2008 of 17 January 2008 laying down detailed rules for the application of Council Directive 91/414/EEC as regards a regular and an accelerated procedure for the assessment of active substances which were part of the programme of work referred to in Article 8(2) of that Directive but have not been included into its Annex I (OJ 2008 L 15, p. 5)

**Action brought on 20 September 2012 — HP Health Clubs Iberia v OHIM — Shiseido (ZENSATIONS)**

(Case T-416/12)

(2012/C 355/73)

*Language in which the application was lodged: Spanish*

**Parties**

*Applicant:* HP Health Clubs Iberia, SA (Barcelona, Spain) (represented by: S. Serrat Viñas, lawyer)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)

*Other party to the proceedings before the Board of Appeal:* Shiseido Company Ltd (Tokyo, Japan)

**Form of order sought**

The applicant claims that the Court should:

- annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 6 June 2012 in Case R 2212/2010-1;
- reject the opposition brought by Shiseido Company Ltd;
- refer the case back to OHIM for it to register the mark in respect of which registration was sought for all the contested services; and
- order the defendant and the other party involved in the case to pay the costs incurred by the applicant in these proceedings and in the earlier proceedings before OHIM.

**Pleas in law and main arguments**

*Applicant for a Community trade mark:* the applicant

*Community trade mark concerned:* figurative mark 'ZENSATIONS' for services in Classes 35 and 44 — Community trade mark No 5 778 303

*Proprietor of the mark or sign cited in the opposition proceedings:* Shiseido Company Ltd

*Mark or sign cited in opposition:* word mark 'ZEN' for goods and services in Classes 3, 21 and 44

*Decision of the Opposition Division:* opposition rejected

*Decision of the Board of Appeal:* appeal upheld

*Pleas in law:*

- Infringement of the second sentence of Article 75 and Article 76(1) and (2) of Regulation No 207/2009;
- Infringement of Article 8(2)(b) of Regulation No 207/2009

**Action brought on 26 September 2012 — Kappa Filter Systems v OHIM (THE FUTURE HAS ZERO EMISSIONS)**

(Case T-422/12)

(2012/C 355/74)

*Language of the case: German*

**Parties**

*Applicant:* Kappa Filter Systems GmbH (Steyr-Gleink, Austria) (represented by C. Hadeyer, lawyer)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)