

DECISION
of the First Board of Appeal
of 11 April 2023

In case R 1807/2022-1

FOX HEAD, INC.

16752 Armstrong Avenue
Irvine 92606
United States of America

Opponent / Appellant

represented by Bardehle Pagenberg, SO Square Opéra 5, rue Boudreau, 75009 Paris,
France

v

Big Hug Nutrition GmbH

Kantstraße 149
10623 Berlin
Germany

Applicant / Defendant

represented by Meissner & Meissner, Hohenzollerndamm 89, 14199 Berlin, Germany

APPEAL relating to Opposition Proceedings No B 3 146 325 (European Union trade
mark application No 18 344 606)

THE FIRST BOARD OF APPEAL

composed of G. Humphreys (Chairperson), E. Fink (Rapporteur) and
A. González Fernández (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 25 November 2020, Big Hug Nutrition GmbH ('the applicant') sought to register the figurative mark



for goods in Classes 5, 25, 29, 30 and 32, including the following:

Class 25: *Clothing; headgear; footwear; hats; evening wear; evening coats; American football bibs; bowties; dress pants; suits; work clothes; arm warmers [clothing]; warm-up pants; leather belts [clothing]; sleeveless jerseys; trunks; bath robes; swim shorts; swimming trunks; bathwraps; bandanas [neckerchiefs]; bandeaux [clothing]; baseball uniforms; girls' clothing; clothing for martial arts; sportswear; bodies [clothing]; teddies [underclothing]; boleros; bomber jackets; boxer shorts; brassieres; bustiers; pea coats; capes; ladies' dresses; womens' outerclothing; knickers; down jackets; down vests; donkey jackets; fleece vests; leisure suits; slacks; leisurewear; waist belts; gloves [clothing]; gloves for cyclists; handwarmers [clothing]; men's underwear; trousers; trousers shorts; denims [clothing]; denim jeans; denim jackets; jogging sets [clothing]; shell suits; sweatpants; jogging tops; dresses made from skins; pockets for clothing; knee highs; short sets [clothing]; neckties; short-sleeved or long-sleeved T-shirts; short-sleeved T-shirts; short-sleeve shirts; body warmers; running suits; running vests; casual trousers; leggings [trousers]; light-reflecting jackets; outerclothing for girls; coats; nighties; combinations [clothing]; overshirts; parkas; crew neck sweaters; mock turtleneck sweaters; V-neck sweaters; slipovers; slipovers [clothing]; bloomers; pajama bottoms; pyjamas; cyclists' clothing; cycling shorts; skirts; scarves; shawls and headscarves; sweatbands; sweat bands for the wrist; tennis sweatbands; anti-perspirant socks; boy shorts [underwear]; underpants; sports bras; sports clothing [other than golf gloves]; casual shirts; sports shirts with short sleeves; sports pants; sports jackets; sports caps and hats; gym suits; sports socks; sports jerseys; sports jerseys and breeches for sports; beach clothes; beach robes; stretch pants; knit shirts; cardigans; thongs; stockings; sweat-absorbent stockings; tank tops; camouflage shirts; camouflage pants; camouflage jackets; camouflage vests; sweat shorts; tracksuit tops; bib shorts; triathlon clothing; knitwear [clothing]; strapless bras; uniforms; ladies' underwear; sweat-absorbent underwear; undershirts; nappy pants [clothing]; waterproof capes; waterproof outerclothing; water socks; waterproof trousers; rainproof jackets; oilskins [clothing]; reversible jackets; waistcoats; thermally insulated clothing; wind vests; winter gloves; heavy coats; woollen socks; yoga shirts; yoga pants; gussets for leotards [parts of clothing]; gussets for underwear [parts of clothing].*

- 2 On 7 May 2021, Fox Head Inc ('the opponent') filed an opposition pursuant to Article 8(1)(b) EUTMR against the European Union trade mark application for part of the goods, namely those indicated in paragraph 1 above.

- 3 The opposition was based on the earlier International registration designating the European Union No 1 493 276 for the figurative mark



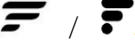
filed and registered on 19 August 2019, for goods in Classes 9 and 25. The opposition was based on part of the earlier goods, namely the following:

Class 25: Clothing, namely, jackets, rain jackets, sweatshirts, jerseys, shirts, tanks, blouses, pants, tights, shorts, hats, caps, sweatbands, headbands, neck gaiters, swimwear, gloves, belts, tennis shoes, shoes, sandals, boots and socks; gloves for motorcyclists and cyclists; jerseys for motorcyclists and cyclists; pants for motorcyclists and cyclists; jackets for motorcyclists and cyclists.

- 4 By decision of 19 July 2022 ('the contested decision'), the Opposition Division rejected the opposition in its entirety on the grounds that there was no likelihood of confusion, and ordered the opponent to bear the costs.
- 5 The Opposition Division proceeded on the assumption that all of the goods were identical. They were directed at the public at large and a professional public. The degree of attention was considered to be average and the relevant territory was that of the European Union. The signs were purely figurative, each depicting geometrical shapes. The first element of the earlier IR was a parallelogram from which a small triangle extended to the left side. Below, there was a bigger parallelogram from which a triangular shape extended downwards on the right side. The earlier IR as a whole would trigger an association with the number seven in the mind of the average consumer. The first element of the contested sign was a grey parallelogram. Below, there was an irregular grey pentagon shape oriented to the left. The contested sign as a whole might be perceived by part of the relevant public as a stylised letter 'F', as stated by the applicant. The signs had no element that could be considered clearly more dominant than the other elements. The earlier IR had a normal degree of distinctiveness.
- 6 The signs were visually similar to a low degree and aurally and conceptually dissimilar for the part of the public who perceived the number seven in the earlier IR. For the remainder of the public, an aural and conceptual comparison was not possible. This applied also to consumers who perceived the contested sign as the single letter 'F', since that letter had no meaning for the goods at hand. Both signs were composed of geometrical shapes arranged in a similar way, one on top of the other. However, these shapes displayed several differences resulting in a different overall impression. These differences were clearly perceivable and sufficient to exclude any likelihood of confusion between the signs, even for identical goods.

Submissions and arguments of the parties

- 7 On 15 September 2022, the opponent filed an appeal against the contested decision requesting that the decision be entirely set aside, followed by the statement of grounds on 21 November 2022.

- 8 The opponent confirms that the goods are identical or similar and essentially argues that the slight visual differences between the signs, such as the difference in the length of the space between the upper and lower parallelograms, the difference in the degree of inclination or the colour are not eye-catching and cannot dispel the high degree of visual similarity arising from their overall impression. This results from the presence of two parallelograms horizontally inclined to the left, separated by a space, and a downward stroke departing from the bottom parallelogram and forming a triangle, as well as the overall similar proportions of the signs, the thickness and width of the geometrical shapes and their overall shape suggestive of a lightning bolt. The contested sign is a slightly amended mirror image of the earlier IR, in which the lower triangle has been flipped horizontally. This assessment is in line with the decision of the Opposition Division (18/07/2021, B 3 126 137, ). In order to grasp the slight differences between the signs, the consumer would have to carry out a detailed examination which is unlikely, given that the average consumer only rarely has a chance to compare the various marks directly but must rely on his imperfect recollection of them. This is even more true in the clothing sector where marks are usually small in relation to the goods on which they are affixed or hardly discernible because of their colour (20/07/2017, T-521/15, D (fig.) / D (fig.) et al., EU:T:2017:536; 07/10/2014, T-531/12, T, EU:T:2014:855). An aural or conceptual comparison of the signs is not possible. The contested decision's finding that the earlier IR and the contested sign will be readily perceived by at least part of the relevant public as the number '7' and the letter 'F' respectively, is erroneous. At any rate, the reasoning that the single letter 'F' is meaningless for the goods at hand equally applies to the digit '7'. The goods are identical. Therefore, the general public with an average degree of attention is likely to assume that the goods covered by the contested sign originate from the opponent or from an undertaking economically linked to it.
- 9 In its response received on 20 January 2023, the applicant requests that the appeal be dismissed. It essentially reiterates that there is no likelihood of confusion. The signs are visually dissimilar since they do not share any graphic element and show different figurative arrangements. There can be no aural comparison because only the contested sign will be pronounced as the letter 'F' whereas the earlier IR will be seen as a device element. Conceptually, the earlier IR has no meaning whereas the contested sign conveys the concept of a letter.

Reasons

- 10 The appeal is not well founded. There exists no likelihood of confusion within the meaning of Article 8(1)(b) EUTMR.



Article 8(1)(b) EUTMR

- 11 Pursuant to Article 8(1)(b) EUTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered if because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; a likelihood of confusion includes a likelihood of association with the earlier trade mark.

- 12 Since the earlier mark is an IR designating the European Union, the relevant territory is the European Union. The conflicting goods are essentially clothing, sport clothes and clothes for (motor)cyclists that mainly address the public at large, who displays an average level of attention with regard to these goods.
- 13 For reasons of procedural economy, the Board will follow the approach of the Opposition Division and proceed on the assumption that all the contested goods in Class 25 are identical to the earlier goods in the same class. This approach, which moreover was not disputed by the parties, is the best-case scenario for the opponent.

Comparison of the signs

- 14 The comparison of the conflicting signs in relation to the visual, aural and conceptual similarities between the signs in question has to take into account the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).
- 15 The signs to be compared are:

| <i>Contested sign</i> | <i>Earlier IR</i> |
|--|---|
|  |  |

- 16 The contested sign is a figurative mark composed of a grey parallelogram tilted to the left and a smaller arrow-like shape of the same colour arranged below with the tip pointing to the left. The two elements run in parallel and show a black shadow effect on their right side.
- 17 Contrary to the position taken in the contested decision, there is no indication that part of the relevant public will perceive the contested sign as a stylised letter 'F'. While it is true that consumers, when perceiving a figurative sign may tend to search for verbal elements that suggest a concrete meaning or for letters that look familiar, it remains that in order for a graphic device to be recognised as a letter, it must present the basic structure of such letter (26/03/2021, R 551/2018-G, Device (fig.) / Device (fig.), §§ 45-49). In that respect, the figurative device differs from the letter 'F' in that the latter is represented by an inverted L-shape with an additional smaller horizontal line in the middle that equally points to the right. None of these elements are present in the contested sign which does not show any inverted L-shape and no vertical or horizontal lines. To recognise the letter 'F' in the contested sign would require several mental steps which the relevant consumer is unlikely to perform. For the same reason, the contested sign will not be perceived as a stylised depiction of a lightning bolt, as contended by the opponent, because it does not contain the typical zigzag shape of such depiction. Rather, it will be recognised as an abstract combination of basic geometrical shapes.

- 18 The earlier IR is a figurative mark composed of a black parallelogram slightly tilted to the left from which a small beak-like and downward pointing shape extends to the left. Below and in parallel, there is an arrow-like shape of the same colour with the tip pointing to the right. Like the contested sign, it will be perceived as the combination of basic geometrical shapes.
- 19 Contrary to the position taken at first instance, consumers are unlikely to perceive the number seven in the earlier IR because it does not contain any of the graphic elements that typically constitute that number. There is also no indication that the earlier IR will be associated with the stylised depiction of a lightning bolt, as contended by the opponent, since it does not contain the typical zigzag shape of such depiction.
- 20 Visually, the signs coincide in the element of a parallelogram tilted to the left with an arrow-like device arranged in parallel below. However, there are significant differences which will not go unnoticed by the relevant consumer. The contested sign is depicted in grey with a shadow effect in black while the earlier IR is depicted in black. With regard to the opponent's argument that the earlier IR does not claim any colour, it suffices to note that a mark that does not claim any specific colour cannot be considered to cover all colour combinations (09/04/2014, T-623/11, *Milanówek cream fudge*, EU:T:2014:199, § 39). The upper part of the contested sign consists of a plain parallelogram whereas the parallelogram of the earlier IR shows a beak-like device on the left. There are also differences in the arrow-like devices which is smaller than the parallelogram and more compact in the contested sign but of equal width than the parallelogram and more elongated in the earlier IR. Overall, the degree of visual similarity is low.
- 21 Aurally, a comparison is not possible. As set out above (s. paras. 17 and 19), consumers are unlikely to discern any element in the respective signs that could be pronounced.
- 22 For the same reason, a conceptual comparison is not possible as the signs, being abstract geometrical shapes, have no discernible semantic content. Even if it were to be accepted that the contested sign could be perceived as the letter 'F' – quod non –, a conceptual comparison would still not be possible in the case where single letters do not convey any concept, or would be not similar in the case where single letters convey a concept or generate a specific meaning in relation to the goods (26/03/2021, R 551/2018-G, *Device (fig.) / Device (fig.)*, § 77).

Global assessment of the likelihood of confusion

- 23 The appreciation of the likelihood of confusion on the part of the public depends on numerous elements and, in particular, on the recognition of the earlier mark on the market, the association which can be made with the registered mark, the degree of similarity between the marks and between the goods or services identified. It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, § 18; 11/11/1997, C-251/95, *Sabèl*, EU:C:1997:528, § 22).
- 24 Such a global assessment of a likelihood of confusion implies some interdependence between the relevant factors, and in particular, the similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C-342/97, *Lloyd*

Schuhfabrik, EU:C:1999:323, § 20; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17).

- 25 Contrary to what has been held in the contested decision, the inherent distinctive character of the earlier IR is low. While it has no meaning in relation to the goods on which the opposition is based, it only consists of basic geometrical shapes that are unlikely to attract consumers' attention (see 17/05/2013, T-502/11, Stripes, EU:T:2013:263, §§ 56-60). As pointed out by the opponent, trade marks used for clothing items might be relatively small in size or their colour may not be sufficiently distinct from the colour of the garment (see 20/07/2017, T-521/15, D (fig.) / D (fig.) et al., EU:T:2017:536; 07/10/2014, T-531/12, T, EU:T:2014:855). In the absence of any additional verbal element, consumers therefore will find it difficult to distinguish a sign that is solely composed of basic geometrical shapes from a mere ornamentation and to perceive it as an indication of commercial origin. Enhanced distinctiveness was not claimed or proven by the opponent.
- 26 Taking into account the low distinctive character of the earlier IR, the low visual similarity and the absence of any aural or conceptual similarity, it must be confirmed that there is no likelihood of confusion on the part of the relevant public even for identical goods. The judgments relied upon by the opponent cannot call these findings into question since they concern signs that were reminiscent of the same capital letter which is not the case here (see 20/07/2017, T-521/15, D (fig.) / D (fig.) et al., EU:T:2017:536; 07/10/2014, T-531/12, T, EU:T:2014:855). The same applies to the Opposition Decision B 3 126 137 referred to by the opponent. In addition, it must be observed that the Board cannot, in any event, be bound by the decisions of lower-ranking adjudicating bodies of EUIPO (30/03/2017, T-209/16, Apax Partners EU:T:2017:240, § 31).
- 27 In the circumstances of the case, taking into consideration the principles of interdependence and imperfect recollection, there is no reason to assume that the relevant public in the European Union will be misled into thinking that the goods, even if they were identical, bearing the conflicting signs, come from the same undertaking or, as the case may be, from undertakings that are economically linked.
- 28 In light of all the foregoing, the Opposition Division correctly rejected the opposition, and the appeal is dismissed.

Costs

- 29 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the opponent, as the losing party, must bear the applicant's costs of the opposition and appeal proceedings.
- 30 With regard to the appeal proceedings, these consist of the applicant's costs of professional representation of EUR 550.
- 31 As to the opposition proceedings, the Opposition Division ordered the opponent to bear the applicant's representation costs which were fixed at EUR 300. This decision remains unaffected. The total amount for both proceedings is therefore EUR 850.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the opponent to bear the costs of the opposition and appeal proceedings, which are fixed at EUR 850.**

Signed

G. Humphreys

Signed

E. Fink

Signed

A. González Fernández

Registrar:

Signed

p.o. E. Apaolaza
Alm

