

O-316-11

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION 2514484  
BY REVOLUTER LTD TO REGISTER THE TRADE MARKS**

**AURORA**

Aurora

aurora

**AS A SERIES OF THREE IN CLASSES 4, 7, 9, 11, 37, 39, 40 and 42**

**AND IN THE MATTER OF OPPOSITION  
THERE TO UNDER NO 99771  
BY ATLASBX CO LTD**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF Application No 2514484  
by Revoluter Ltd register the trade marks**

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**IN THE MATTER OF opposition thereto under No 99771 by Atlasbx Co Ltd**

**BACKGROUND AND PLEADINGS**

1. On 23<sup>rd</sup> April 2009, Revoluter Ltd of 67 Springfield Road,, Repton, Derby, Derbyshire DE6 6GP (hereafter, "Revoluter") applied to register the above marks for the following opposed goods (following amendment by way of exclusion):


Class 9

Acidmeters for batteries but not including acidmeters for batteries for vehicles or acidmeters for vehicle batteries; anode batteries but not including anode batteries for vehicles or anode vehicle batteries; apparatus for charging accumulator batteries but not including apparatus for charging accumulator batteries for vehicles or apparatus for charging vehicles accumulator batteries; batteries but not including batteries for vehicles or vehicle batteries; cases adapted for batteries but not including cases adapted for vehicle batteries or cases adapted for batteries for vehicles; chargers for electric batteries but not including for charges for vehicles' electric batteries or chargers for electric batteries for vehicles; dry batteries but not including dry batteries for vehicles or vehicle dry batteries; dry-cell batteries but not including dry-cell batteries for vehicles or vehicle dry-cell batteries; electric apparatus for charging batteries but not including electric apparatus for charging batteries for vehicles or electric apparatus for charging vehicle batteries; electric storage batteries; but not including electric storage batteries for vehicles or vehicle electric storage batteries; electric storage batteries for use with motors but not including electric storage batteries for use with vehicle motors or electric storage batteries for use with motor vehicles; electrical storage batteries but not including electric storage batteries for vehicles or vehicle electrical storage batteries; electrochemical batteries but not including electrochemical batteries for vehicles or vehicle electrochemical batteries;

galvanic batteries but not including galvanic batteries for vehicles or vehicle galvanic batteries; grids for batteries but not including grids for batteries for vehicles or grids for vehicle batteries; high tension batteries but not including high tension batteries for vehicles or vehicle high tension batteries; portable power supply apparatus being batteries but not including portable power supply apparatus being batteries for vehicles or vehicle portable power supply apparatus being batteries; power packs being batteries, but not including power packs being batteries for vehicles or vehicle power packs being batteries; power sources being batteries but not including power sources being vehicles batteries or power sources being batteries for vehicles; power supply apparatus being batteries but not including power supply apparatus being batteries for vehicles or power supply apparatus being vehicle batteries; power supply devices being batteries but not including for power supply devices being batteries for vehicles or power supply devices being vehicle batteries; power supply units being batteries but not including for power supply units being batteries for vehicles or power supply units being vehicle batteries; power units being batteries but not including power units being batteries for vehicles or power units being vehicle batteries; rechargeable batteries but not including for rechargeable batteries vehicles or for rechargeable vehicle batteries; rechargeable dry batteries but not including rechargeable dry batteries for vehicles or rechargeable dry vehicle batteries; separators being parts of batteries but not including separators being parts of batteries for vehicles or separators being parts of vehicle batteries; solar batteries but not including solar batteries for vehicles or vehicle batteries being solar batteries; solar batteries for domestic use; solar batteries but not including solar batteries for domestic use for vehicles or vehicle batteries being solar batteries for domestic use; solar batteries for industrial use but not including solar batteries for industrial use for vehicles batteries being solar batteries for industrial use; solar cells for electricity generation but not including for solar cells for electricity generation being vehicles batteries or solar cells for electricity generation being parts of vehicle batteries; solar collectors for electricity generation but not including solar collectors for electricity generation being vehicles batteries or solar collectors for electricity generation being parts of vehicle batteries; solar energy collectors for electricity generation but not including solar energy collectors for electricity generation being vehicle batteries or parts of vehicle batteries; solar energy operating apparatus but not including solar energy operating apparatus being vehicle batteries or parts of batteries for vehicles; solar panels for electricity generation but not including for solar panels for electricity generation being vehicle batteries or parts of vehicle batteries; stationary batteries but not including stationary batteries for vehicles or vehicle stationary batteries; electric storage batteries but not including for electric storage batteries for vehicles or vehicle electric storage batteries; storage batteries for lighting but not including storage batteries for lighting for vehicle batteries being storage

batteries for lighting; switches for detaching batteries but not including switches for detaching batteries for vehicles or switches for detaching vehicle batteries; electricity conduits but not including electricity conduits for vehicles or electricity conduits for vehicle batteries; electricity connection boxes but not including electricity connection boxes for vehicle batteries or electricity connection boxes being parts of vehicle batteries; electricity connectors but not including electricity connectors for vehicle batteries or electricity connectors being parts of vehicle batteries; electricity control panels but not including electricity control panels for vehicle batteries or electricity control panels being parts of vehicle batteries; electricity distribution boards, boxes, consoles, panels, boards and units but not including electricity distribution boards, boxes, consoles, panels, boards and units for vehicle batteries or electricity distribution boards, boxes, consoles, panel, boards and units being parts of vehicle batteries; electricity distribution apparatus and instruments but not including electricity distribution apparatus and instruments for vehicle batteries or electricity distribution apparatus and instruments being parts of vehicle batteries; electricity indicators but not including electricity indicators for vehicle batteries or electricity indicators being parts of vehicle batteries; electricity mains apparatus but not including electricity mains apparatus for vehicle batteries; electricity metering apparatus but not including for electricity metering apparatus for vehicle batteries or electricity metering apparatus being parts of vehicle batteries; electricity metering instruments but not including electricity metering instruments for vehicle batteries or electricity metering instruments being parts of vehicle batteries; electricity storage apparatus but not including electricity storage apparatus being vehicle batteries or parts of vehicle batteries

2. The application was allocated number 2514484 and was published in the Trade Marks Journal on 14<sup>th</sup> August 2009, and on 16<sup>th</sup> November 2009 Atlasbx Co Ltd of #4-42 Daehwa-Dong, Daedeok-ku, Daejeon, Republic of Korea (hereafter, "Atlas") lodged an opposition against all the goods specified above.
3. Atlas has opposed on the basis of sections 5(1), 5(2)(a) and (b), citing the following earlier mark:

<p>Mark. Filing and registration dates</p> <p>2400866</p>  <p>6<sup>th</sup> September 2005 24<sup>th</sup> February 2006</p>	<p>Goods and services relied upon</p> <p>Class 9</p> <p>Batteries for vehicles</p>
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4. Atlas say the respective marks are identical given that any stylisation in its mark would go unnoticed by the average consumer. If, in the alternative, the registrar were to consider that visually the respective marks are not identical they are nonetheless highly similar in overall impression. As far as the relevant goods are concerned, these are, taking all factors into account, either identical or highly similar.
5. Revoluter filed a counterstatement denying the grounds of opposition.
6. Evidence of fact was filed by the opponent which insofar as it is factually relevant I shall summarise below. Submissions were also filed by both parties which I shall also take into account. No hearing was requested by either party and so I give my decision based upon a careful reading of the papers.

**Opponent's evidence**

7. This takes the form of a witness statement dated 10<sup>th</sup> February 2011 from Anna Blackburn, an associate trade mark attorney at Gill Jennings and Every LLP, acting for the opponent. On 9<sup>th</sup> February 2011 she carried out searches

of the website located at [www.halfords.com](http://www.halfords.com). The results are produced at Exhibit ACB1 and show, she says, that HALFORDS offer for sale batteries for vehicles and batteries for other purposes, including chargers for batteries in the UK. These pages show what are termed 'domestic batteries' (AA, AAA, C, D size, 9v, CR, lithium, rechargeable,) sold by HALFORDS as well as larger car batteries. Battery chargers are also sold by Halfords.

8. On 10<sup>th</sup> February 2011, she conducted a search at the website [www.yuasabatteries.co.uk](http://www.yuasabatteries.co.uk) , the results being shown at ACB2. These pages show car batteries being sold along with, eg batteries for mobility vehicles, standby purposes (eg, lighting, telecommunications, UPS) and motorbikes. The batteries sold also utilise different battery technologies such as, lead acid, oxygen recombination, nickel metal hydride and nickel cadmium. Chargers are also sold by YUASA.
9. On 9<sup>th</sup> February 2011, she conducted a search at [www.bosch.co.uk](http://www.bosch.co.uk), the results being shown at Exhibit ACB3. This site shows car batteries for sale, along with lithium-ion batteries for use with, eg cordless power tools.

## DECISION

10. The relevant parts of section 5 of the Act read as follows:

**5. - (1)** A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

(2) A trade mark shall not be registered if because –

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

.....


(5) Nothing in this section prevents the registration of a trade mark where the proprietor of the earlier trade mark or other earlier right consents to the registration.

11. In the European Court of Justice (“CJEU”) Case C-291/00 (*LJT Diffusion SA v Sadas Vertbaudet SA*) (“*Sadas*”), the Court said in relation to Art 5(1)(a):

“Article 5(1)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

12. *Sadas* is the leading authority on the question of whether marks are ‘identical’. Whilst Art 5(1)(a) of the Directive 89/104 EEC, referred to in the quote above, relates to the scope of rights available to a proprietor once a mark is registered, the Court in *Sadas* says the same interpretation given to Art 5(1)(a) applies also to Art 4(1)(a), being the relevant (equivalent) provision for my purposes.

**The relevant marks to be compared**

Revoluter’s marks	Atlas’s mark
<p>AURORA Aurora aurora</p>	

13. Revoluter draws attention to the stylised nature of Atlas’s mark, in particular noting the ‘A’s at the beginning and end, describing them as inverted ‘V’s. Revoluter also notes the stippled effect in Atlas’s mark and, in this respect, it counted 88 stipples, or blocks of colour, contributing to the overall effect. Revoluter’s position is thus that the respective marks are not identical.

14. In contrast, Atlas says the stylisation of its mark is minimal, and purely decorative, such that the average consumer would still clearly see the word ‘AURORA’. In normal and fair use of both respective marks in relation to the relevant goods, the word ‘AURORA’, say Atlas, would convey the same meaning (or none at all) to the average consumer. Atlas also say that the different fonts used in the three versions of Revoluter’s marks make no difference at all. In consequence, Atlas’s position is that, applying the *Sadas* test, the respective marks are identical on the basis that any differences would go unnoticed by the average consumer.

15. In my view the stylised nature of Atlas's mark is not such as to convey a different overall impression, than the word 'AURORA'. The 'A's at the beginning and end are plainly 'A's and nothing else. Whilst the stippling is quite extensive, it is of a decorative nature only and not apt to imbue the mark with a different, visual, phonetic or conceptual identity, other than the word 'AURORA'.
16. I agree with Atlas that the respective marks are identical as, according to *Sadas*, any differences, "are so insignificant that they may go unnoticed by the average consumer".
17. I would just add that even if the marks are not, strictly speaking, identical, the differences are so insignificant that the respective marks are highly similar overall, the only differences being of a visual nature. In terms of their any respective aural or conceptual analysis, I would conclude that aurally and conceptually the marks are identical.

### **The relevant goods to be compared**

18. These are recited at paras 1 and 3 above and I shall not repeat them here. It is necessary however to preface my analysis with a statement of applicable legal principles.
19. In assessing the similarity of the goods, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the goods in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at para 23 of the Judgment:

'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature and their method of use and whether they are in competition with each other or are complementary.'
20. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.
21. In making my assessment I have the statements of case, submissions and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC, sitting as the Appointed Person said in *Raleigh International trade mark* [2001] R.P.C. 11, at para 20, that evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday



items, evidence may not be necessary. He also stated that the tribunal may, in an appropriate case, consider the question of similarity from the viewpoint of the notional member of the relevant purchasing public.

22. In another case, (BL O-399-10, "*Separode*"), dealt with by the same Appointed Person, which also happened to involve batteries, he applied a 'collective' principle (see para 14), first approved by the CJEU in Case C-239/05 *BVBA Management, Training en Consultancy v Benelux-Merkenbureau*. The question being referred to the Court was whether the Directive, on which the Act is based of course, must be interpreted as meaning that the competent authority is required to state its conclusion separately for each of the individual goods and services specified in the application. The Court answered (see para 38), saying that the competent authority was required to assess the application by reference to individual goods and services. However, where the same ground of refusal is given for a category or group of goods or services, the competent authority may use only *general reasoning* for all the goods and services concerned. Applying this principle, the appointed person in *Separode* was able, for example, to treat "batteries", "electrodes", "capacitors", "fuel cells", "battery separator membranes for use in batteries", "separator plates for use in electric storage batteries", as all being capable of grouping together on a collective basis. I intend to take the same grouping approach in this case, of which *Separode* was purely illustrative.
23. It must also be the case, finally and for the avoidance of doubt, that the use of synonyms or synonymous terms does not avoid a finding of identity. Such goods are identical.
24. Unsurprisingly, it is in relation to the similarity of goods that the parties' respective positions are most polarised. Atlas's position is that the limitation introduced by Revoluter, in relation to each of its individually specified goods, to exclude goods, being parts of vehicles, has no effect. Atlas says, that in their physical nature, batteries are containers consisting of one or more cells which are connected, and in which chemical energy is converted to electricity and stored for use as a source of power. Power supplies and their electrochemical power generators are terms which include batteries and thus are identical. In other words, a battery is a battery. If, in the alternative, says Atlas, there are differences between the goods, then they are nonetheless highly similar on the basis of the various factors I am required to consider, namely: natures, end users, methods of use, complementary nature, purposes (to provide power) and are often manufactured by the same or economically linked companies and sold through identical distribution channels and sales outlets. Atlas says its evidence establishes that car batteries and other batteries, as well as chargers, are sold through the same channels of trade. In addition, in another case before the registry, BL O/034/011 "*ACAL*", it was held that batteries for use in industry were identical

or highly similar to “fuel cells” and “power supplies and their electrochemical power generators” and “power supplies for electronic hardware and vehicles”.

25. In contrast, Revoluter says its limitation to exclude vehicle batteries and parts means that the relevant goods cannot be identical. It says Atlas has not said why, up to the point of final submissions, it considers the goods to be identical. There has been no evidence on the point and in the absence of such, the assertion must be rejected.
26. Revoluter continues that in the event I consider myself educated in the field of batteries, then I would take the view that a car battery is a specific type of battery, different from a mobile phone battery, a lap top battery, a personal stereo battery, a drill driver battery, a solar battery or other types of battery. Revoluter also notes that many of its items are not batteries at all but, eg “electricity distribution consoles” and so forth, and there is no evidence these types of non-battery products are sold through the same distribution channels.
27. In short, says Revoluter, it was incumbent on Atlas to say and prove why the respective products are identical or highly similar and it has not done so. Although Halfords sell car batteries it also sells, tents, cooking apparatus, bikes, torches and first aid kits, none of which would necessarily be taken to be similar to batteries when all the relevant factors are taken into account. It says further, that the relevant goods are not in competition with each other; a consumer cannot replace a car battery with another type of battery which would not fit or would deliver the wrong charge. Likewise, a car battery would not be used to store power for domestic electric lighting.
28. For the exclusion to work in the way Revoluter intended, it needs to clearly delineate the types of goods covered by the respective specifications in such a way that, *taking all factors into account*, as the case law requires, the goods cannot be said to be identical or even similar (to the extent that this would cause confusion).
29. In my view, Revoluter’s specification divides into certain groups of goods. Firstly, there are the goods which, despite the exclusion relating to vehicle batteries *are*, in fact, batteries, albeit of different types. Alternatively, in the case of ‘electricity storage apparatus’, such a description could be synonymous with batteries. I would identify these goods as follows:
  - Anode batteries but not including anode batteries for vehicles or anode vehicle batteries; batteries but not including batteries for vehicles or vehicle batteries; dry batteries but not including dry batteries for vehicles or vehicle dry batteries; dry-cell batteries but not including dry-cell batteries for vehicles or vehicle dry-cell batteries; electric storage batteries; but not including electric storage batteries for vehicles or vehicle

electric storage batteries; electric storage batteries for use with motors but not including electric storage batteries for use with vehicle motors or electric storage batteries for use with motor vehicles; electrical storage batteries but not including electric storage batteries for vehicles or vehicle electrical storage batteries; electrochemical batteries but not including electrochemical batteries for vehicles or vehicle electrochemical batteries; galvanic batteries but not including galvanic batteries for vehicles or vehicle galvanic batteries; high tension batteries but not including high tension batteries for vehicles or vehicle high tension batteries; portable power supply apparatus being batteries but not including portable power supply apparatus being batteries for vehicles or vehicle portable power supply apparatus being batteries; power packs being batteries, but not including power packs being batteries for vehicles or vehicle power packs being batteries; power sources being batteries but not including power sources being vehicles batteries or power sources being batteries for vehicles; power supply apparatus being batteries but not including power supply apparatus being batteries for vehicles or power supply apparatus being vehicle batteries; power supply devices being batteries but not including for power supply devices being batteries for vehicles or power supply devices being vehicle batteries; power supply units being batteries but not including for power supply units being batteries for vehicles or power supply units being vehicle batteries; power units being batteries but not including power units being batteries for vehicles or power units being vehicle batteries; rechargeable batteries but not including for rechargeable batteries vehicles or for rechargeable vehicle batteries; rechargeable dry batteries but not including rechargeable dry batteries for vehicles or rechargeable dry vehicle batteries; solar batteries but not including solar batteries for vehicles or vehicle batteries being solar batteries; solar batteries for domestic use; solar batteries but not including solar batteries for domestic use for vehicles or vehicle batteries being solar batteries for domestic use; solar batteries for industrial use but not including solar batteries for industrial use for vehicles batteries being solar batteries for industrial use; stationary batteries but not including stationary batteries for vehicles or vehicle stationary batteries; electric storage batteries but not including for electric storage batteries for vehicles or vehicle electric storage batteries; storage batteries for lighting but not including storage batteries for lighting for vehicle batteries being storage batteries for lighting. electricity storage apparatus but not including electricity storage apparatus being vehicle batteries or parts of vehicle batteries.

30. Plainly all the goods in this first group, are, in their nature, batteries, albeit of different types, properties and applications, and all of course, specifically excluding batteries for vehicles.

31. Atlas's evidence shows that HALFORDS sell vehicle batteries and other types of battery, including domestic batteries. YUASA manufacture vehicle batteries, including for motorbikes, but it also produces what are termed "alarm batteries" and "emergency lighting packs". YUASA cannot be said to only manufacture batteries for vehicles. HALFORDS cannot be said to just sell batteries for vehicles. To my mind, these facts, coupled with the nature of the product itself, are apt in the consumer's mind<sup>1</sup>, to give rise to the view that there is no straightforward divide or segregation as between, "batteries for vehicles" (specifically not limited to, "car batteries"), and any other types of battery.
32. Given this pattern of trade revealed by Atlas's evidence, I think it would be too simplistic to assume the 'batteries for vehicles' trade is such a 'discrete' trade, in the sense of being uniquely and plainly distinct from the trade in other types of batteries such that no consumer would assume that a manufacturer of vehicle batteries would venture into other areas, and vice versa. A battery is a battery and taking all factors into account, I find the goods in the first category, all being in their physical properties, batteries, (or synonymous with batteries) and used for broadly comparable purposes (non-mains power supply) are similar to Atlas's goods. The degree of similarity varies. For example, a mobile power supply device for use in starting a car with a flat battery is highly similar to a car battery, even though it is not a vehicle battery per se, whereas a stationery battery is less similar to any type of vehicle battery, but is still similar to a modest degree.
33. The second category of goods involves goods, which whilst not being batteries per se, are nonetheless items which are complementary to batteries, in the sense of being indispensable to batteries. These goods are:

Acidmeters for batteries but not including acidmeters for batteries for vehicles or acidmeters for vehicle batteries; apparatus for charging accumulator batteries but not including apparatus for charging accumulator batteries for vehicles or apparatus for charging vehicles accumulator batteries; cases adapted for batteries but not including cases adapted for vehicle batteries or cases adapted for batteries for vehicles; chargers for electric batteries but not including for charges for vehicles' electric batteries or chargers for electric batteries for vehicles; electric apparatus for charging batteries but not including electric apparatus for charging batteries for vehicles or electric apparatus for charging vehicle batteries; grids for batteries but not including grids for batteries for vehicles or grids for vehicle batteries; separators being parts of batteries but not including separators being parts of batteries for vehicles or separators being parts of vehicle batteries; switches for detaching

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<sup>1</sup> The identity of the average consumer and nature of the purchase is discussed below at paras 39-40

batteries but not including switches for detaching batteries for vehicles or switches for detaching vehicle batteries.

34. These goods comprise a range of items such as: acidmeters, chargers, cases, separators and switches. All are designated by reference to their usage, in conjunction with, or even as parts of batteries. Thus, they have no obvious, independent physical existence. Given their *physically* complementary role it is likely they would have limited or no separate *economic* existence either, and wherever the customer can access batteries of the kind specified by Revoluter, he or she can also access these complementary items. Consumers are likely to expect that batteries and parts of batteries, or battery chargers, marketed under the same mark are those of the same undertaking. Further although the exclusion means that the parts etc will not be for the same type of batteries, they may be for highly similar goods, such as power supply units used to start cars with flat batteries. On that basis, I find, again taking all factors into account, the goods of the second group are at least moderately similar to the goods of Atlas's specification.

35. The third group comprises goods which, in my opinion, are capable of being rendered 'dissimilar' to Atlas's goods but where, at present, the exclusion is not quite broad enough. The following goods fall into this category:

Solar cells for electricity generation but not including for solar cells for electricity generation being vehicles batteries or solar cells for electricity generation being parts of vehicle batteries; solar collectors for electricity generation but not including solar collectors for electricity generation being vehicles batteries or solar collectors for electricity generation being parts of vehicle batteries; solar energy collectors for electricity generation but not including solar energy collectors for electricity generation being vehicle batteries or parts of vehicle batteries; solar energy operating apparatus but not including solar energy operating apparatus being vehicle batteries or parts of batteries for vehicles; solar panels for electricity generation but not including for solar panels for electricity generation being vehicle batteries or parts of vehicle batteries.

36. The point about these goods is that Atlas's specification being 'batteries for vehicles' is capable of including within its scope 'auxiliary' batteries as well as the main car battery. Such auxiliary batteries, in the form of solar cells or panels for example, are currently used in cars such as the AUDI 8 or TOYOTA PRIUS to provide auxiliary power to, for example, the air conditioning when the engine is switched off. Given the purpose of these auxiliary power sources and their end users, the exclusion, as currently framed, is too narrow and Atlas's specification too broad to operate effectively by putting clear water between the respective goods. That said, if the exclusion were to be reframed and widened to read "none for use in vehicles",

this would satisfy me the goods are dissimilar and the problem identified by existing solar auxiliary power use in vehicles is overcome. In accordance with TPN 1/2011 para 3.2.2 (b), I will provide suitable rewording below at para 49 to render these goods dissimilar.

37. The fourth group of goods comprises goods which are currently dissimilar to Atlas's goods. In the case of these goods, given their nature and end users any particular vehicular application such as the one noted above in para 36 is less likely to blur the clear water between the respective specifications. Taking all factors into account, the following goods are dissimilar.

Electricity conduits but not including electricity conduits for vehicles or electricity conduits for vehicle batteries; electricity connection boxes but not including electricity connection boxes for vehicle batteries or electricity connection boxes being parts of vehicle batteries; electricity connectors but not including electricity connectors for vehicle batteries or electricity connectors being parts of vehicle batteries; electricity control panels but not including electricity control panels for vehicle batteries or electricity control panels being parts of vehicle batteries; electricity distribution boards, boxes, consoles, panels, boards and units but not including electricity distribution boards, boxes, consoles, panels, boards and units for vehicle batteries or electricity distribution boards, boxes, consoles, panel, boards and units being parts of vehicle batteries; electricity distribution apparatus and instruments but not including electricity distribution apparatus and instruments for vehicle batteries or electricity distribution apparatus and instruments being parts of vehicle batteries; electricity indicators but not including electricity indicators for vehicle batteries or electricity indicators being parts of vehicle batteries; electricity mains apparatus but not including electricity mains apparatus for vehicle batteries; electricity metering apparatus but not including for electricity metering apparatus for vehicle batteries or electricity metering apparatus being parts of vehicle batteries; electricity metering instruments but not including electricity metering instruments for vehicle batteries or electricity metering instruments being parts of vehicle batteries.

38. In light of my absence of 'identity' of goods findings above, it is not open to me to make an overall conclusion based upon section 5(1) of the Act. Given my findings in relation to the goods above, I must instead consider the alternative claims under section 5(2)(a), and alternatively, (b).

39. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the Court of Justice of the European Union ("CJEU") in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723,

*Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P* (LIMONCELLO). It is clear from these cases that:

- (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 great 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.

### ***The average consumer and nature of the purchase***

40. The average end consumer for Atlas's products, in a notional sense, will be the vehicle battery buying general public. Once a car or bike is purchased, the owner will from time to time be faced with replacing the battery. The owner will buy his or her batteries from outlets such as HALFORDS, specialists like KWIK FIT or NATIONWIDE (now HALFORDS), other motor factors or even online. Or, they may simply entrust a garage to do the replacement but if they do that, it is likely that the properties of any replacement batteries (including the identity of the manufacturer) are made known to the consumer.
41. In the case of Revoluter, its batteries and related items may, as we have seen from the evidence, well also be sold from large retailers such as HALFORDS, and/or manufactured by the same manufacturer, such as YUASA. But it is also fair to say their products, notably those in my third grouping of goods at para 35, may well, alternatively, be purchased for industrial application by businesses or traders, for example, in connection with solar or electrical installations.
42. The nature of the purchase for both parties' products will be one involving a high degree of circumspection, factoring in, for example, compatibility and safety issues. These observations will necessarily be factored into my overall analysis below.

### ***Likelihood of confusion***

43. At this point I need to remind myself of my various findings and bring them together in a global assessment taking, of course, into account, the doctrine of imperfect recollection, namely that consumers rarely have the opportunity to compare marks side by side.
44. I have found many of the respective goods, if not identical, to be similar to varying degrees. I have made observations on the respective average consumers and I have found the purchasing process to involve a high degree of circumspection. Finally, I have found the respective marks to be identical, or if they are not, strictly speaking, identical, they are highly similar. Needless to say that in making a global assessment, it is not a 'tick box' exercise,



whereby if I find more factors in one parties favour, it inevitably wins. All factors must be weighed in the evaluation of likelihood of confusion.

45. Finally, as is required in an assessment of likelihood of confusion. I need to assess the distinctive character of the earlier mark. An invented word, having no link or relevance to the goods or services, will be regarded as highly distinctive. There can be no doubt that, although the word 'Aurora' may have some meaning(s), there is no evidence as to any such meaning or significance. I understand from my own knowledge that Aurora is the roman goddess of the dawn but it is unsafe to impute this knowledge to the average consumer. Accordingly, I regard the mark as being highly distinctive in relation to Atlas's goods. It is important to recognise from the authorities recited at para 39 that marks having a highly distinctive nature give rise to a greater likelihood of confusion.
46. In all the circumstances, factoring in all the above, **I find there is a likelihood of confusion under section 5(2)(a) of the Act in this case in respect of all the goods I have found to be similar to varying degrees to Atlas's goods.**
47. **I would just add that in the event I am wrong to find the marks 'identical', the alternative claim under section 5(2)(b) would have succeeded, again for all those goods I have found to be similar to varying degrees to Atlas's goods.**
48. **The opposition is thus successful under section 5(2)(a), or alternatively (b), in respect of the following goods:**

Anode batteries but not including anode batteries for vehicles or anode vehicle batteries; batteries but not including batteries for vehicles or vehicle batteries; dry batteries but not including dry batteries for vehicles or vehicle dry batteries; dry-cell batteries but not including dry-cell batteries for vehicles or vehicle dry-cell batteries; electric storage batteries; but not including electric storage batteries for vehicles or vehicle electric storage batteries; electric storage batteries for use with motors but not including electric storage batteries for use with vehicle motors or electric storage batteries for use with motor vehicles; electrical storage batteries but not including electric storage batteries for vehicles or vehicle electrical storage batteries; electrochemical batteries but not including electrochemical batteries for vehicles or vehicle electrochemical batteries; galvanic batteries but not including galvanic batteries for vehicles or vehicle galvanic batteries; high tension batteries but not including high tension batteries for vehicles or vehicle high tension batteries; portable power supply apparatus being batteries but not including portable power supply apparatus being batteries for vehicles or vehicle portable power supply apparatus being batteries; power packs being batteries, but not

including power packs being batteries for vehicles or vehicle power packs being batteries; power sources being batteries but not including power sources being vehicles batteries or power sources being batteries for vehicles; power supply apparatus being batteries but not including power supply apparatus being batteries for vehicles or power supply apparatus being vehicle batteries; power supply devices being batteries but not including for power supply devices being batteries for vehicles or power supply devices being vehicle batteries; power supply units being batteries but not including for power supply units being batteries for vehicles or power supply units being vehicle batteries; power units being batteries but not including power units being batteries for vehicles or power units being vehicle batteries; rechargeable batteries but not including for rechargeable batteries vehicles or for rechargeable vehicle batteries; rechargeable dry batteries but not including rechargeable dry batteries for vehicles or rechargeable dry vehicle batteries; solar batteries but not including solar batteries for vehicles or vehicle batteries being solar batteries; solar batteries for domestic use; solar batteries but not including solar batteries for domestic use for vehicles or vehicle batteries being solar batteries for domestic use; solar batteries for industrial use but not including solar batteries for industrial use for vehicles batteries being solar batteries for industrial use; stationary batteries but not including stationary batteries for vehicles or vehicle stationary batteries; electric storage batteries but not including for electric storage batteries for vehicles or vehicle electric storage batteries; storage batteries for lighting but not including storage batteries for lighting for vehicle batteries being storage batteries for lighting; acidmeters for batteries but not including acidmeters for batteries for vehicles or acidmeters for vehicle batteries; apparatus for charging accumulator batteries but not including apparatus for charging accumulator batteries for vehicles or apparatus for charging vehicles accumulator batteries; cases adapted for batteries but not including cases adapted for vehicle batteries or cases adapted for batteries for vehicles; chargers for electric batteries but not including for charges for vehicles' electric batteries or chargers for electric batteries for vehicles; electric apparatus for charging batteries but not including electric apparatus for charging batteries for vehicles or electric apparatus for charging vehicle batteries; grids for batteries but not including grids for batteries for vehicles or grids for vehicle batteries; separators being parts of batteries but not including separators being parts of batteries for vehicles or separators being parts of vehicle batteries; switches for detaching batteries but not including switches for detaching batteries for vehicles or switches for detaching vehicle batteries.

**49. In accordance with para 3.2.2 (b) of TPN 1/2011, and subject to appeal, for the third group of goods identified in para 35 above, I find the opposition to fail on the basis of the following, reworded specification:**

Solar cells for electricity generation, solar collectors for electricity generation, solar energy collectors for electricity generation, solar energy operating apparatus, solar panels for electricity generation, but not including any such goods for use in vehicles.

**50. This rewording removes the original exclusion completely and rewrites the specification in a way which renders the goods dissimilar to Atlas's goods.**

**51. The opposition fails outright in respect of the following:**

Electricity conduits but not including electricity conduits for vehicles or electricity conduits for vehicle batteries; electricity connection boxes but not including electricity connection boxes for vehicle batteries or electricity connection boxes being parts of vehicle batteries; electricity connectors but not including electricity connectors for vehicle batteries or electricity connectors being parts of vehicle batteries; electricity control panels but not including electricity control panels for vehicle batteries or electricity control panels being parts of vehicle batteries; electricity distribution boards, boxes, consoles, panels, boards and units but not including electricity distribution boards, boxes, consoles, panels, boards and units for vehicle batteries or electricity distribution boards, boxes, consoles, panel, boards and units being parts of vehicle batteries; electricity distribution apparatus and instruments but not including electricity distribution apparatus and instruments for vehicle batteries or electricity distribution apparatus and instruments being parts of vehicle batteries; electricity indicators but not including electricity indicators for vehicle batteries or electricity indicators being parts of vehicle batteries; electricity mains apparatus but not including electricity mains apparatus for vehicle batteries; electricity metering apparatus but not including for electricity metering apparatus for vehicle batteries or electricity metering apparatus being parts of vehicle batteries; electricity metering instruments but not including electricity metering instruments for vehicle batteries or electricity metering instruments being parts of vehicle batteries; electricity storage apparatus but not including electricity storage apparatus being vehicle batteries or parts of vehicle batteries

## **Costs**

52. The balance of success in this opposition rests with Atlas. Whilst it has not been totally successful in purely quantitative terms, that is, by 'knocking out' all Revoluter's goods, it has nonetheless made good its alternative claims as regards the respective marks and many of the goods. Plainly, I do not regard the exercise of awarding costs to be based on a pure count of surviving and 'knocked out' goods and services. Looked at in the round, and on more of a

qualitative basis (that is, to include strength and success of argument), I consider Atlas to have prevailed on balance. In particular, in this case, I have been unable to agree with Revoluter that its exclusion to avoid Atlas's goods has had (based on a multifactoral analysis of similarity) the intended effect of rendering all the goods dissimilar. Accordingly, Atlas is entitled to a contribution towards its costs and neither party sought costs off the normal scale. In the circumstances I award Atlas the sum of £1000 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

1. Statutory fee for filing opposition - £200
2. Considering counterstatement- £ 200
3. Filing evidence - £300
4. Filing written submissions - £300

Total £1000

53. I order Revoluter Ltd to pay Atlasbx Co Ltd the sum of £1000. The sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 09 day of September 2011**

**Edward Smith  
For the Registrar, the Comptroller General**