MADRID AGREEMENT/MADRID PROTOCOL
CONCERNING THE INTERNATIONAL REGISTRATION OF TRADE MARKS

REFUSAL OF PROTECTION

notified to the International Bureau of the World Intellectual Property Organization (WIPO)
under Article 5 of the Madrid Agreement/Madrid Protocol

The boxes are crossed off when applicable ☒

I.	Office having declared refusal of protection: **Deutsches Patent- und Markenamt** **D-81534 München** **(Federal Republic of Germany)** Telephone (0 89) 21 95 - 0; Teleprinter (0 89) 21 95 - 22 21 extension no. (0 89) 21 95 - 4527
II.	No. of the international registration in respect of which protection has been refused: 1 001 397 No. of basic national registration: 346974
III.	Name and address of the holder of the registration in respect of which protection has been refused: FOODCARE SPÓLKA Z O.O. W ZABIERZOWIE PL-32-080 Zabierzów (Poland)
IV.	Provisional/final refusal *(see item VIII. below)*
V.	Grounds for refusal (earlier opposed trade marks and/or other grounds): *- see item X. -*
VI.	Applicable sections of the national law *- see item XIII. -*
VII.	☒ Refusal for all products/services. ☐ Refusal for all products/services excepting: ☐ Refusal for products/services as follows *- see item X. -*
VIII.	**Objection to and legal remedies concerning the decision to refuse protection** *(please quote the international registration No/Cl. **32** IR in all correspondence):* **The holder of the trade mark may submit his objections to the present refusal to Deutsches Patent- und Markenamt** *(address as indicated in item I above)* **within four months** **from the date on which the notification of refusal was dispatched by WIPO,** **exclusively through the agency of a representative** *(Patentanwalt or Rechtsanwalt)* **who is a resident of the Federal Republic of Germany or a national of another member state of the European Union or a contracting state of the European Economic Area to whom the details of the refusal will be communicated.** **During the above time limit, the refusal of protection is provisional.** **In the absence of objections to the refusal within the time limit of four months, the latter will become final without further notification.** **Within an additional time limit of one month** **the holder may, however, file an objection** *(Erinnerung)* **together with the fee of EUR 150.- for objection.** **In the absence of an objection refusal shall become final.** **The objection (Erinnerung) shall be addressed directly to Deutsches Patent- und Markenamt** *(address as indicated in item I above)* **through the agency of a representative** (Patentanwalt or Rechtsanwalt) **who is a resident of the Federal Republic of Germany or a national of another member state of the European Union or a contracting state of the European Economic Area.**
IX.	Date of pronouncement of refusal: October 29, 2009

X.	**Supplementary box** grounds for refusal - item V. - International Trade Mark 1 001 397 The company (companies) mentioned below has (have) lodged opposition to the admission of the trade mark because of earlier national (M) or international (IR) application or registration of its (their) trade mark(s) listed below (Sec. 9, 42, 107, 114 Trade Mark Law; Art. 6 quinquies B No 1 Paris Convention): Schwälbchen Molkerei Jakob Berz AG, Bad Schwalbach, DE (DE 2 102 010/29 – fitella); PHYTEA, Société par actions simplifiée, Reims, France (GM 005494935 – PHYTEA). <u>Note:</u> If no representative has been appointed within the provisional time limit of the first four months, this fact constitutes in itself a ground for refusal after the notification concerning the refusal of protection has become final (Sec. 96, 107 Trade Mark Law).

XII.	**Annexes** (crossed off below) ☒ 1 reproduction of 2 opposed trade mark(s) including a figurative element or a special graphic design ☐ List specifying the registration number as well as the relevant goods/services in respect of each opposed trade mark ☐ List of professional representatives ☐ List of goods/services	XI.	**Signature or official seal of the administration which pronounced the refusal** DEUTSCHES PATENT- UND MARKENAMT

XIII. (Title and date of the applicable national law)

Extract from the Trade Mark Law

version of 9 December 2004

Absolute Grounds for Refusal

8. - (1) Signs that are capable of being protected as a trade mark within the meaning of Section 3, but not capable of being represented graphically, shall not be registered.

(2) The following shall not be registered:

1. trade marks which are devoid of any distinctive character with respect to the goods or services;
2. trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of the goods or of the rendering of the services, or to designate other characteristics of the goods or services;
3. trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona-fide* and established practices of the trade for designating goods or services:
4. trade marks which are of such a nature as to deceive the public, in particular, as to the nature, quality or geographical origin of the goods or services;
5. trade marks which are contrary to public policy or to accepted principles of morality.
6. trade marks which include armorial bearings, flags or other emblems of State, or armorial bearings of a locality, an association of communities or an association of other communal entities within the country;
7. trade marks which include official signs and hallmarks, indicating control and warranty, which, according to a notice published by the Federal Ministry of Justice in the Federal Law Gazette [*Bundesgesetzblatt*], cannot be validly registered as trade marks;
8. trade marks which include armorial bearings, flags or other signs, seals, or designations, of international intergovernmental organisations which, according to a notice published by the Federal Ministry of Justice in the Federal Law Gazette, cannot be validly registered as trade marks;
9. trade marks the use of which can obviously be prohibited pursuant to other provisions in the public interest; or
10. trade marks which have been filed in bad faith.

(3) Subsection (2), Nos. 1, 2 and 3, shall not apply if the trade mark has, before the date of the decision on registration and following the use which has been made of it, established itself in affected trade circles as the distinguishing sign for the goods or services for which it has been filed.

(4) Subsection (2), Nos. 6, 7 and 8, shall also apply if the trade mark includes the imitation of a sign specified therein. Subsection (2), Nos. 6, 7 and 8, shall not apply where the applicant is authorised to include one of the signs specified therein in his trade mark even if it may be confused with another of the signs specified therein. Furthermore, subsection (2), No. 7, shall not apply where the goods or services for which the application for registration of the trade mark has been filed are neither identical with nor similar to those for which the sign or hallmark, indicating control or warranty, has been introduced. Furthermore, subsection (2), No. 8, shall not apply where the trade mark filed is not of such a nature as to falsely suggest to the public that a connection exists between the trade mark and the international intergovernmental organisation.

Filed or Registered Trade Marks as Relative Grounds for Refusal

9. - (1) Registration of a trade mark may be cancelled

1. if it is identical with an earlier filed or registered trade mark, and the goods or services for which the trade mark is registered are identical with the goods or services for which the earlier trade mark is filed or is registered;
2. if because of its identity with, or similarity to, the earlier filed or registered 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, which includes the likelihood of association with the other trade marks;
(...)

Opposition

42. - (1) Within a period of three months following the date of publication of the registration of the trade mark pursuant to Section 41, the proprietor of an earlier trade mark may give notice of opposition to registration of the trade mark.

(2) The opposition may only be based on the grounds that the trade mark may be cancelled due to

1. an earlier filed or earlier registered trade mark pursuant to Section 9 (1), No. 1 or 2;
2. an earlier well-known trade mark pursuant to Section 10 in conjunction with Section 9 (1). No 1 or 2; or
3. its registration for an agent or representative of the proprietor of the trade mark pursuant to Section 11.

(3) (deleted)

Objection Due to Non-use; Decision on the Opposition

43. - (1) If the proprietor of an earlier registered trade mark has given notice of opposition, he shall, if the other party contests the use of the trade mark, substantiate by *prima facie* evidence that, during the period of five years preceding the publication of the registration of the trade mark against which a notice of opposition has been given, the earlier registered trade mark has been put to use pursuant to Section 26, provided the earlier trade mark has at that date been registered for not less than five years. If the period of five years of non-use ends after the publication of the registration, the opponent shall, if the other party contests that use, substantiate by *prima facie* evidence that, during the period of five years preceding the decision on the opposition, the trade mark has been put to use pursuant to Section 26. In the decision, only those goods or services shall be considered of which use has been substantiated by *prima facie* evidence.

(2) If examination of the opposition reveals that the trade mark must be cancelled in respect of some or all of the goods or services for which it is registered, the registration shall be cancelled in full or in part. If the registration of the trade mark cannot be cancelled, the opposition shall be rejected.

(3) If the registered trade mark has to be cancelled because of one or several earlier trade marks, the proceedings with regard to further oppositions may be suspended until a decision on the registration of the trade mark has become final. (...)

Domestic Representative

96. - (1) Any person having neither a residence nor a seat nor an establishment in Germany may take part in proceedings before the Patent Office or the Patent Court, regulated by this Law, and may claim the rights conferred by the trade mark, only if he has appointed a patent attorney or an attorney-at-law in Germany as his representative, who shall be authorised to represent him in Patent Office and Patent Court proceedings and in civil litigation affecting the mark, and also file requests for the institution of criminal proceedings.

(2) Nationals of member states of the European Union or another contracting state of the Agreement on the European Economic Area may be appointed as representatives within the meaning of subsection 1 for rendering a service within the meaning of the Treaty Establishing the European Community, if they are authorised to pursue professional activities under any of the professional titles appearing in the respective applicable version of the annex to Section 1 of the Law on the Professional Activities of European Lawyers in Germany of 9 March 2000 [*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland*] (BGBl* I p. 182) or the annex to Section 1 of the Law on the Qualifying Examination for Gaining Admission to the Profession of Patent Attorney of 6 July 1990 [*Gesetz über die Eignungsprüfung zur Zulassung zur Patentanwaltschaft*] (BGBl* I p. 1349, 1351). In such case, proceedings can only be conducted, if an attorney-at-law or a patent attorney in the Federal Republic of Germany has been appointed as authorised recipient.

(3) The place where the representative, appointed under subsection 1, has his business premises shall be deemed, within the meaning of Section 23 of the Code of Civil Procedure, to be the place where the assets are located. If there are no business premises, then the place where the representative has his domicile in Germany shall be relevant and, in the absence thereof, the place where the Patent Office has its seat.

(4) The termination of the appointment of a representative under subsection 1 shall be effective only after the termination of the appointment and the appointment of a new representative have been communicated to the Patent Office or the Patent Court.

Application of the Provisions of this Law; Language

107. (1) The provisions of this Law shall be applicable *mutatis mutandis* to the international registration of marks under the Madrid Agreement Concerning the International Registration of Marks (Madrid Agreement) which are effected through the intermediary of the Patent Office or the protection of which extends to the territory of the Federal Republic of Germany unless otherwise provided in this Chapter or in the Madrid Agreement.

(2) All requests and other communications in the procedure concerning international registrations and the list of goods and services shall be submitted in French.

Examination as to Absolute Grounds for Refusal

113. - (1) International registration of marks shall be examined as to absolute grounds for refusal under Section 37 in the same way as marks in respect of which an application for registration has been filed. Section 37(2) shall not apply.

(2) Rejection of the application (Section 37(1)) shall be replaced by refusal of protection.

Opposition

114. - (1) For the purpose of international registrations, publications of the registration (Section 41) shall be replaced by publication in the gazette published by the International Bureau of the World Intellectual Property Organization[1].

(2) The time limit for lodging opposition (Section 42(1)) against the grant of protection for international registrations shall start on the first day of the month following the month indicated on the issue of the gazette containing the publication of the international registration.

(3) Cancellation of the registration (Section 43(2)) shall be replaced by refusal of protection.

Extract from the Trade Mark Ordinance version of 11 May 2004

Section 46

Refusal of Protection

(1) Where protection is, in full or in part, refused to an international registration the protection of which has been extended to the territory of the Federal Republic of Germany under Article 3*ter* of the Madrid Agreement or under Article 3*ter* of the Protocol Relating to the Madrid Agreement, and where this refusal is communicated to the International Bureau of the World Intellectual Property Organization to be transmitted to the proprietor of the international registration, the time limit for appointing a representative in Germany shall, to avoid final refusal, be fixed to four months from the date on which notification of refusal was dispatched by the International Bureau of the World Intellectual Property Organization.

(2) Where the refusal of protection has become final because the proprietor of the international registration has failed to appoint a representative in Germany, an objection to or an appeal from the refusal shall be filed with the German Patent and Trade Mark Office within one further month after the time limit of four months under subsection (1). Instructions about the proprietor's right to appeal shall be attached to the refusal. Sec. 61(2) of the Trade Mark Law shall apply *mutatis mutandis*.

[1] *Gazette OMPI des marques internationales/WIPO Gazette of International Marks* (published fortnightly) *(Editor's note).*

* Federal Law Gazette

[redacted]

Markeninformationen

Aktenzeichen: **2 102 010 / 29**
altes Aktenzeichen: **M 56 250**
Aktenzustand: **Marke eingetragen**
Markentext: **fitella**
☐ Transliteration:

Bilddarstellung

(kein Markenbild)

(keine Bildklassifikation)

Markenwiedergabe

Markenform: **Wortmarke**
☐ Farbige Eintragung:
☐ Markenbeschreibung:

Markendaten

☐ Verkehrsdurchsetzung
☐ verkehrsdurchgesetzter Bestandteil:

☐ Umgewandelte EM-Anmeldung/IR-Anmeldung
☐ Umgewandelte EM-Marke/IR-Marke
EM-Aktenzeichen:
Veröffentlichungstag der Voranmeldung:

Anmeldetag: **06.03.1985**
Anmeldung eingegangen am: **06.03.1985**
☐ Kollektivmarke ☐ beschleunigte Prüfung § 38
☐ Telle-Quelle ☐ elektronische Anmeldung

Anmelder

A6469833

Schwälbchen Molkerei Jakob Berz AG, 65307 Bad Schwalbach

Vertreter

V419508

Rheinpatent Kodron & Mackert Patentanwälte, 55118 Mainz

Zustelladresse

Z6996264

Kanzlei Rheinpatent
Kodron & Mackert GbR
Hindenburgplatz 3 B
Postfach 2649
55016 Mainz

Verzeichnis der Waren und Dienstleistungen

Klasse	Begriffe
29	Joghurt

Verfahrensdaten

Eintragung:	**20.11.1996**
voraussichtliche Veröffentlichung:	**20.02.1997**
Schutzbeginn:	**01.04.2005**
Schutzende:	**31.03.2015**
Ende der Aufbewahrungsfrist:	

Nr.	Verfahren	Verfahrenszustand	Abschluss	Attribut	Wert
1	Widerspruchsverfahren	Marke nicht gelöscht	21.11.1996		
				Abschlussdatum	20.11.1996
2	Umschreibungsverfahren	Umschreibung abgeschlossen	05.03.2002		
				Angaben zum Inhaber	Schwälbchen Molkerei Jakob Berz AG, 65307 Bad Schwalbach DE

Nr.	Verfahren	Verfahrenszustand	Abschluss	Attribut	Wert
				Angaben zum Vertreter	Rheinpatent Kodron & Mackert Patentanwälte, 55118 Mainz
				Angaben zur Zustelladresse	Kanzlei Rheinpatent Kodron & Mackert GbR, Hindenburg-platz 3 B, Postfach 2649, 55016 Mainz
3	(Teil-)Löschungsverfahren Antrag Inhaber	Marke teilweise gelöscht	13.11.2003		
				Löschungsgrund	Löschung wegen Verzicht nach §48
4	Verlängerungsverfahren	Schutzdauer der Marke verlängert	23.03.2005		
				Schutzende	31.03.2015

Verbundene IR-Marken

(keine verbundenen IR-Marken)

Site language
Select site language: English (en)

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CTM-ONLINE - Detailed trade mark information

Trade mark name : PHYTEA
Trade mark No : 005494935
Trade mark basis: CTM
Number of results: 1 of 1

Online Inspection Request form (for MyPage users with current account only)

Trade mark

Filing date: 23/11/2006
Date of registration: 15/10/2007
Expiry Date: 23/11/2016
Nice Classification: 3, 5, 29, 32, 44.(Nice classification)
Trade mark: Individual
Type of mark: Word
Acquired distinctiveness: No
Status of trade mark: CTM registered (Glossary)
CTM registration published (B1)
(Publication B1 or Publication B2)
(History of statuses)
Filing language: French
Second language: English

Graphic representation

No entry for application number: 005494935.

List of goods and services

Nice Classification: 3
List of goods and services Cosmetics, hair lotions and soaps; all these products possibly containing vegetable extracts and/or vegetable or animal oils or essential oils or micronutrients such as vitamins and/or minerals and/or peptides and/or amino acids and/or fatty acids, perfumery, essential oils.

Nice Classification: 5
List of goods and services Pharmaceutical, veterinary and sanitary preparations; all these products possibly containing vegetable extracts and/or vegetable or animal oils or essential oils or micronutrients such as vitamins and/or minerals and/or peptides and/or amino acids and/or fatty acids, food supplements for medical use and dietetic substances adapted for medical use; all these products possibly containing proteins, lipids, peptides and/or fibres, or micronutrients such as vitamins and/or minerals, amino acids and/or fatty acids and/or plant acids, food for babies.

Nice Classification: 29
List of goods and services Meat extracts, preserved, dried and cooked fruits and vegetables, jellies, jams, compotes, milk products, edible oils and fats; all these products being designed,

packaged and presented to create well-being and beauty, and presented in prepared forms of all kinds in capsules and sachets.

Nice Classification: 32
List of goods and services Mineral and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices, syrups and other preparations for making beverages; all these products being designed, packaged and presented to create well-being and beauty, and presented in prepared forms of all kinds and in particular in the form of liquids and sachets.

Nice Classification: 44
List of goods and services Consultancy in the paramedical, sanitary, care and beauty fields, relating in particular to the use of food supplements or phytotherapy preparations; beauty care, in particular through the use of food supplements or phytotherapy preparations; pharmacy advice.

Description

Description of the mark: -

Owner

Name: PHYTHEA, Société par actions simplifiée
ID No: 232038
Natural or legal person: Legal entity
Address: 8 bis Rue Gabriel Voisin, Le Crystalide
Post code: 51100
Town: Reims
Country: FRANCE
Correspondence address: PHYTHEA, Société par actions simplifiée Rue Gabriel Voisin F-51100 Reims FRANCIA

Representative

Name: CABINET PLASSERAUD
ID No: 12711
Address: 52, rue de la Victoire
Post code: 75440
Town: Paris Cedex 09
Country: FRANCE
Correspondence address: CABINET PLASSERAUD 52, rue de la Victoire F-75440 Paris Cedex 09 FRANCIA
Telephone: 00 33-140167000
Fax: 00 33-142800159
E-mail: **info@plass.com**

Seniority

No entry for application number: 005494935.

Exhibition priority

No entry for application number: 005494935

Priority

No entry for application number: 005494935.

Publication

Bulletin no.: **2007/017**
Date of publication: 30/04/2007
Part: A.1

Bulletin no.: **2007/059**
Date of publication: 22/10/2007
Part: B.2

Opposition

No entry for application number: 005494935.

Cancellation

No entry for application number: 005494935

Appeals

No entry for application number: 005494935.

Recordals

Title:	Owners
Sub-title:	Change of name and adress of owner
ID No:	003083972
Bulletin no.:	**2008/014**
Date of publication:	07/04/2008
Part:	C.1.3

Renewals

No entry for application number: 005494935.

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- Compatibility

Version: 9.2.0

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