O/0691/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003850267
BY DOSE LABS LTD
TO REGISTER:

DOSE LABS

AS A TRADE MARK IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 439472 BY
DOSE INTERNATIONAL LIMITED

BACKGROUND AND PLEADINGS

1. On 17 November 2022, Dose Labs Ltd ("the applicant") applied to register the trade mark on the cover page of this decision in the UK ("the applicant's mark"). The applicant's mark was published for opposition purposes on 2 December 2022 and registration is sought for the following goods:

    Class 5: Nutraceuticals for use as a dietary supplement; Vitamin supplement patches; Dietary supplement drinks; Vitamin supplements; Zinc dietary supplements; Prebiotic supplements; Nutritional supplements; Vitamin and mineral supplements; Vitamin and mineral food supplements; Nutritional supplements consisting of fungal extracts.

2. On 1 March 2023, the applicant's mark was opposed by Dose International Limited ("the opponent"). The opposition was initially based on sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). However, the reliance upon the section 5(4)(a) ground was subsequently dropped upon the filing of an amended notice of opposition meaning that the opposition will proceed in respect of the section 5(2)(b) ground only. Under this ground, the opponent relies on the following trade marks:

    DOSE & CO.
    UK registration no. 918146908[1]
    Filing date 5 November 2019; registration date 22 May 2020
    Relying on some goods only, namely:

    Class 5: Vitamin and mineral preparations and supplement; therapeutic, dietary and nutritional preparations and supplements; pharmaceutical and medicinal preparations and supplements; dietetic food, beverages and substances adapted for medical use; preparations for making dietetic or medicated food or beverages;

[1] The opponent's marks are comparable marks based on earlier EUTMs. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing EUTMs.

electrolyte replacement beverages for medical purposes; nutritional supplements; mineral food supplements and additives; powders, essences, concentrates and other preparations for making medicated food and beverages and herbal food and beverages for medical use; nutritional meal replacements; nutritional meal replacement powders; naturopathic and homeopathic preparations; herbal preparations; protein supplements; protein preparations for use as additives to foodstuffs for human consumption (adapted for medical purposes); collagen preparations for medical use.

("the opponent's first mark"); and

DOSE & CO.
UK registration no. 918242312
Filing date 21 May 2020; registration date 17 October 2020
Relying on some services only, namely:

Class 35: Retail services in relation to foodstuffs; retail services relating to foodstuffs and therapeutic, dietary and nutritional preparations and supplements; wholesale distributorship services for food and beverages; wholesale services in relation to foodstuffs; wholesale services relating to foodstuffs and therapeutic, dietary and nutritional preparations and supplements.

Class 42: Research and development services in the field of food and therapeutic, dietary and nutritional preparations and supplements; research in the field of food and therapeutic, dietary and nutritional preparations and supplements; research on food and therapeutic, dietary and nutritional preparations and supplements; technical consultancy in relation to research services relating to foods and dietary supplements; technical consultancy relating to research services in the field of foods and dietary supplements.

("the opponent's second mark")

3. The opponent claims that given the high similarity of the marks as well as the identical class 5 goods and similar class 35 and 42 services, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association.

4. The applicant filed a counterstatement wherein it denies that there exists a likelihood of confusion between the marks.

5. The opponent is represented by HGF Limited and the applicant is represented by Potter Clarkson LLP. Both parties filed evidence in chief. No hearing was requested and both parties filed written submissions in lieu. This decision is taken after a careful perusal of the papers.

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

7. The opponent's evidence came in the form of the witness statement of Ms Emma Pallister dated 9 August 2023. Ms Pallister is a Chartered Trade Mark Attorney at the opponent's representative firm and is, therefore, duly authorised to file evidence on its behalf. Ms Pallister's evidence is accompanied by eight exhibits, being those labeled EP1 to EP8.

8. The applicant's evidence came in the form of the witness statement of Ms Sarah Talland dated 9 October 2023. Ms Talland is a Chartered Trade Mark Attorney at the applicant's representative firm and is, therefore, duly authorised to file evidence on its behalf. Ms Talland's evidence is accompanied by 15 exhibits, being those labeled ST1 to ST15.

9. I do not intend to summarise the parties' evidence or submissions in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

Section 5(2)(b): legislation and case law

10. Section 5(2)(b) of the Act reads as follows:

> "(2) A trade mark shall not be registered if because-
>
> (a) […]
>
> (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 or association with the earlier trade mark."

11. Section 5A of the Act states as follows:

> "Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

12. An earlier trade mark is defined in section 6 of the Act,[2] the relevant parts of which state:

[2] As it stood prior to IP Completion Day.

"(6)(1) In this Act an "earlier trade mark" means –

(a) a registered trade mark, international trade mark (UK), European Union trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

13. Given their filing dates, the opponent's marks qualify as earlier trade marks under the above provisions. The opponent's marks had not completed their registration processes more than five years prior to the filing date for the applicant's mark, meaning that they are not subject to proof of use pursuant to section 6A of the Act. This means that the opponent can rely upon all of the goods and services that it has highlighted in its notice of opposition.

14. The following principles are gleaned from the decisions of the EU courts *in Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(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 be dominated by one or more of its components;

(f) however, it is also 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 creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

15. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated that:

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

16. The applicant's goods are as follows:

> *Nutraceuticals for use as a dietary supplement; Vitamin supplement patches; Dietary supplement drinks; Vitamin supplements; Zinc dietary supplements; Prebiotic supplements; Nutritional supplements; Vitamin and mineral supplements; Vitamin and mineral food supplements; Nutritional supplements consisting of fungal extracts.*

17. In its written submissions in lieu, the applicant seeks to argue that the goods in class 5 of the parties' specification are different. In making such an argument, the applicant argues that the applicant's goods consist primarily of nutritional supplements aimed at the general consumer whereas the opponents' goods are aimed at the manufacturer of medicated food or beverages who are focused on the formation and production of the respective goods. In making this argument, the applicant refers to a decision of this Office wherein the Hearing Officer made

findings in relation to pharmaceutical and medical goods.[3] Firstly, I am not bound by that Hearing Officer's findings. Secondly, and more importantly, not all of the goods at issue in the opponent's class 5 list of goods relate to medical use. It consists of a number of terms that can be said to cover a wide range of supplements that are aimed at the general consumer. As an example, I refer to the term "therapeutic, dietary and nutritional preparations and supplements" which can be said to cover any type of therapeutic, dietary or nutritional supplement. Given that the applicant's specification consists of a range of different terms that are all dietary or nutritional supplements, it follows that all of those goods can be said to fall within the aforementioned term of the opponent. As a result, I find that these goods are identical under the principle outlined in *Meric*.

18. Given the finding of identity between the goods, I see no reason to proceed to consider a comparison of the applicant's goods against the opponent's services relied upon under its second mark. Given the identity of the opponent's marks, the reliance on its second mark offers nothing further. As a result, I will proceed in considering this opposition in respect of the opponent's first mark. It follows that if the reliance upon the first mark is successful, the outcome in respect of the second mark is of no consequence. Alternatively, if the opponent's first mark fails in respect of identical goods, then it follows that any reliance upon the opponent's second mark for what is likely to be similar services will also fail.[4]

The average consumer and the nature of the purchasing act

19. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

[3] *MEDX*, Case BL O/276/21

[4] I say this on the basis that the opponent's second mark consists of retail services that would cover the sale of the same goods of the applicant. In the case of *Oakley, Inc v OHIM*, Case T-116/06, it was found that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

20. I note that in making its submissions in respect of the similarity of goods, the applicant also argued that the consumers for the parties' goods are different. While that may be the case for some goods of the opponent, the goods at issue are identical and are aimed at the same consumer, being members of the general public at large. The goods will be available via a range of retail stores, be that general or more specialist, and their online equivalents. In physical stores, the goods will be displayed on shelves where they will be self-selected by the consumer. A similar approach will apply to online purchases in that the goods will be selected after having viewed an image of them on a website. As a result, I find that the selection process for the goods at issue will be primarily visual. Having said that, I do not discount an aural component playing a role in the form of word of mouth recommendations or advice from sales assistants.

21. As the terms at issue cover products that are likely to be consumed on a daily basis in order to supplement the user's dietary or nutritional needs, I am of the view that the goods are likely to be purchased on a relatively frequent basis and at a relatively low cost (though I do not consider that the goods would necessarily be classed as cheap goods). In terms of the level of attention paid, I note that the applicant submits that this would be high because the goods effect the user's health and wellbeing and the selection of the same is a conscious and thought out choice based on their nutritional needs. While I appreciate that users will take some care as to the nature of their supplements, I fail to see why the considerations they make will be on the higher end of the scale. For example, if a user has an iron or vitamin C deficiency that requires them to take supplements to provide them with the same, the selection process will simply involve that user looking for a

supplement that contains iron or vitamin C. While they will not be casual selections (as they involve the selection of goods that are consumed), I do not consider that the factors involved are so involved that the level of attention would be high. Instead, I consider that the consumer will pay a medium degree of attention.

Distinctive character of the opponent's mark

22. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51)."

23. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent

has not pleaded that its mark has obtained an enhanced level of distinctiveness and neither has it filed any evidence of use. Therefore, I have only the inherent position to consider.

24. Before doing so, however, I consider it necessary to discuss the applicant's evidence. The applicant argues that 'DOSE' has a clear meaning within the marketplace of the goods at issue in that it is used to measure the amount of a vitamin or supplement. On this point, I note that a definition of the word 'DOSE' has been provided, as taken from the Collins Dictionary.[5] This sets out that '*a dose of medicine or a drug is a measured amount of it which is intended to be taken at one time'.* This is in line with my own understanding of the word and one that I consider to be commonplace across the UK population. In the context of the opponent's goods that are at issue, I see no reason why the same meaning would not be attributed to '*a dose of a supplement*'. In addition, the applicant provides examples of how the term 'DOSE' is used in this descriptive non-distinctive manner in relation to the goods at issue. This evidence comes in the form of a range of printouts from various online sources such as the NHS,[6] myprotein.com,[7] drinkag1.com[8] and sealions.com.[9] Essentially, all this evidence shows is use of the word 'dose' in a sentence. While noted, I do not see what it adds beyond the finding I have made above that 'DOSE' has a known meaning that would be widely understood.

25. The evidence then goes on to introduce examples of third party companies that use the word 'DOSE' in their branding. This is done by way of a number of printouts of third parties' websites.[10] Firstly, all of these printouts are undated so are not capable of pointing to the position on the market as at the relevant date. Secondly, five of the printouts are taken from '.co' or '.com' websites with no indication as to whether they are targeted at the UK market or not.[11] Even if I were to take all the evidence as relevant to the assessment I must make here, eight examples of websites that show use of other brands marketing products with the word 'DOSE'

[5] ST2
[6] ST3 and ST4
[7] ST5
[8] ST6
[9] ST7
[10] ST8 to ST15
[11] On this point, I note that one '.co' website (not included in the number mentioned here) has a product listed in British sterling.

as part of their branding is not particularly compelling. I say this because there is nothing before me to demonstrate how these marks are effectively used in the market place. In short, the mere fact that a limited number of undertakings may use the word 'DOSE' on their products is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned.[12]

26. Turning now to consider the inherent distinctiveness of the opponent's mark, I note that it is a word only mark that consists of the words 'DOSE & CO.'. This will be understood as being short for 'DOSE and company'. The reference to 'and company' is something that is so common across many businesses in the UK that consumers will attribute it very little weight from a trade mark perspective. As a result, I find that the word 'DOSE' will dominate the distinctiveness of the mark. All of this being said, I consider that while the words '& CO.' will not be overlooked outright, they will not contribute to the distinctiveness of the mark beyond the level created by the word 'DOSE' itself.

27. All of the above being said with regard to the lack of assistance in the applicant's evidence, I am of the view that the known meaning of the word 'DOSE' is such that it will be viewed as being somewhat allusive to the goods relied on by the opponent. I say this because, as set out above, the consumer will readily understand that 'DOSE', in the context of the goods at issue, refers to a single measurement of a supplement. I accept that this is allusive, however, it does not directly describe the goods at issue. Therefore, even though 'DOSE' may be of a lower degree of inherent distinctiveness, it is not outright low. In my view, the inherent distinctiveness of 'DOSE', and therefore, the inherent distinctiveness of the mark as a whole, is somewhere between a low and medium degree.

Comparison of the marks

28. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to

[12] See *Zero Industry Srl v OHIM*, Case T-400/06

analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

29. The Court of Justice of the European Union ("CJEU") stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> "… it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

30. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

31. The respective trade marks are shown below:

The opponent's mark	The applicants' mark
DOSE & CO.	DOSE LABS

32. Not only do I have submissions from the parties as to the similarity of the marks, I also have evidence before me regarding the word 'LABS'. I will not reproduce the submissions here but will, briefly discuss the evidence of the parties. The opponent's position is that 'LAB' is short for 'laboratory' and, therefore, 'LABS' is to be read as being the location where the product has been created, i.e. the labs. In support of this, the opponent has provided evidence of a printout from Collins Dictionary which shows the definition for the term 'LAB' as being short for

laboratory.[13] I note that the opponent has also introduced evidence regarding the word 'LABS' (for example, in the context of being a term used in connection with healthcare tests).[14] While noted, this does little to advance the opponent's position beyond the inherent meaning of the word 'labs'. In response to this evidence, the applicant reproduced the same dictionary definition printout taken from Collins Dictionary[15] but placed emphasis on the second definition provided, namely that, in Britain, 'Lab' is the written abbreviation for Labour. While noted, the definition refers to politician 'Diane Abbott (Lab, Hackney North and Stoke Newington). Clearly, this is a reference to the MP Diane Abbott and the Labour Party. The introduction of this argument is, in my view, misguided as any reference of 'Lab' as being short for 'Labour' is very context specific and not one that consumers would readily make when considering the word 'LABS' in any other scenario. Having considered the evidence, and based on my own understanding of the word 'LABS', it is my view that consumers would readily see it as a reference to laboratories.

33. For the avoidance of doubt, I confirm that I have taken the evidence and submissions into account in making the following comparisons.

Overall Impression

34. The applicant's mark is a word only mark that consists of the words 'DOSE LABS'. The applicant submits that the addition of the word 'LABS' places less emphasis on the word 'DOSE'. On the contrary, the opponent argues that 'LABS' will play a lesser role as it will describe the location where the product has been created. Firstly, I see no reason why the addition of 'LABS' would diminish the role of 'DOSE'. Alternatively, it is my view that 'LABS' would play a somewhat lesser role due to its understanding as a reference to goods made in laboratories. As suggested by the opponent, this will be viewed as an indication that the products covered by the applicant's mark were made in laboratories. As a result, I am of the view that while 'DOSE LABS' may hang together somewhat (in that it refers to a

[13] EP1
[14] EP2 to EP8
[15] ST1

series of ‘DOSE’ laboratories), ‘DOSE’ will play the greater role in the overall impression of the mark with ‘LABS’ playing a lesser role.[16]

35. The opponent’s mark is also a word only make that consists of the words ‘DOSE & CO.’. For reasons I have discussed when considering the distinctiveness of this mark above, I find that ‘DOSE’ plays the greater role in the overall impression of the mark with ‘& CO.’ playing a lesser role.

Visual Comparison

36. Visually, the marks share the word ‘DOSE’. This sits at the beginning of each mark and is their strongest elements. The marks differ in the presence of the word ‘LABS’ in the applicant’s mark and ‘& CO.’ in the opponent’s mark. While these differences play lesser roles in their respective marks, they are still points of visual difference. Taking all of this into account and also bearing in mind that consumers tend to focus on beginnings of marks (being where the point of identity lies),[17] I find that the marks are similar to between a medium and high degree.

Aural Comparison

37. Despite their roles in their respective marks, I find that the words ‘LABS’ and ‘& CO.’ will be pronounced. I say this whilst bearing in mind the comments of Mr Phillip Harris, sitting as the Appointed Person, in the case of *Purity Hemp Company Improving Life as Nature Intended* (Case BL O/115/22) wherein he stated that descriptiveness of an element does not render it aurally invisible. While I do not consider ‘LABS’ and ‘& CO.’ to be descriptive, I consider that a similar principle should apply here. As such, both marks will be pronounced in full meaning that the applicant’s mark consists of two syllables whereas the opponent’s mark consists of three syllables. Both marks will, in my view, be pronounced in their ordinary ways but, for the avoidance of doubt, I confirm that I consider ‘& CO’ will be pronounced

[16] While I appreciate that ‘DOSE’ is allusive (as discussed at paragraph 27 above), I am of the view that ‘LABS’ will be attributed lesser weight from a trade mark perspective because, as set out in this paragraph, it merely describes the location of the goods. Therefore, despite my finding that the words hand together to some degree, ‘LABS’ is still the lesser element.
[17] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

as ‘and co’ (as opposed to ‘and company’). Both marks share an identical first syllable but the remaining syllables differ entirely. Bearing in mind what I have said above regarding the beginnings of marks, I am of the view that the marks are aurally similar to between a medium and high degree.

Conceptual Comparison

38. Regardless of the meanings of the parties’ marks as wholes, I am of the view that the concept carried by the word ‘DOSE’ will be identical in both marks, namely a reference to a measured dose of something (be that a medicine or a supplement).[18] While the additional words ‘& CO.’ and ‘LABS’ will create points of conceptual difference between the marks, their impacts will be slight due to their roles in their respective marks (namely as an indication of the type of business and the allusion to the fact that the goods are likely produced in a laboratory, respectively). As a result, I am of the view that the marks are conceptually similar to a high degree.

Likelihood of confusion

39. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct

[18] While I appreciate that, in the context of the goods at issue, the connection would be to a supplement. However, I remind myself that when assessing the conceptual similarity of marks, it is usually done without reference to the goods or services at issue. See paragraph 62 of the decision of Professor Phillip Johnson in *EMILIANA*, Case BL O/052/22

comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

40. I have found the goods to be identical. I have found the average consumer for the goods to be members of the general public at large who will select them via primarily visual means, although I do not discount an aural component. I have concluded that the average consumer will pay a medium degree of attention. I have found the opponent's mark possesses between a low and medium degree of inherent distinctive character. In respect of the comparison of the marks, I have found them to be visually and aurally similar to between a medium and high degree and conceptually similar to a high degree.

41. Taking all of these factors into account together with the principle of imperfect recollection, I consider that the average consumer is likely to mistake the parties' marks for one another. This finding is, in my view, supported by the fact that the marks at issue share identical first words. Given that the additional elements in the marks have lesser impacts on their marks, I am of the view that consumers will misremember which mark was 'DOSE' followed by 'LABS' and which was 'DOSE followed by '& CO.'. I say this because both 'LABS' and '& CO.' are fairly unremarkable from a trade mark perspective so are unlikely to remain in the minds of the consumer, especially when considering imperfect recollection. While I appreciate that 'DOSE' is of a lower level of distinctive character, I remind myself that a weaker degree of distinctive character does not preclude a finding of confusion.[19] Given the identity of this element together with the identity of the goods at issue, I find that this is the case here. Consequently, I consider that there exists a likelihood of direct confusion between the marks.

42. I turn now to consider indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

[19] *L'Oréal SA v OHIM*, Case C-235/05 P

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark'.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

43. In the event that consumers recognise the differences between the marks and those differences are sufficient to avoid direct confusion, then I find that consumers

will still consider that the marks originate from the same or economically connected undertakings. I make this finding on the basis that the points of difference between the marks, being 'LABS' and '& CO.', are those that consumers will consider to be logical indicators consistent with a sub-brand or brand extension. I appreciate that 'DOSE' is of a lower degree of distinctive character, however, I do not consider its shared use to be coincidental. As a result, I am of the view that when consumers are confronted by the marks on identical goods, they will consider that 'DOSE & CO.' has expanded its brand to create a sub-brand or brand extension of supplement products that are manufactured in a laboratory. Consequently, I consider that there exists a likelihood of indirect confusion between the marks.

CONCLUSION

44. The opposition succeeds in full and the applicant's mark is hereby, subject to any successful appeal of my decision, refused registration for all of the goods applied for.

COSTS

45. As the opponent has succeeded, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the opponent the sum of £1300 as a contribution towards its costs. The sum is calculated as follows:

Preparing the notice of opposition:	£250
Evidence rounds:	£600
Written submissions in lieu:	£350
Official fees:[20]	£100

[20] While the official fee was initially £200, the opponent did not pursue its section 5(4)(a) ground. As such, I consider it appropriate to reduce the official fee to cover the grounds that were pursued, being section 5(2)(b). Oppositions brought solely in reliance upon this section of the Act attract an official fee of £100.

Total:	**£1,300**

90. I hereby order Dose Labs Ltd to pay Dose International Limited the sum of £1,300. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 19th day of July 2024

A COOPER
For the Registrar