This Opinion is Not a Precedent of the TTAB

Mailed: August 4, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Primary Investments Grp. Ltd.

Serial No. 86732652

Thomas W. Cook of Thomas Cook Intellectual Property Attorneys,
for Primary Investment Grp. Ltd.

Kelley L. Wells, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

Before Cataldo, Adlin and Gorowitz,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Primary Investments Grp. Ltd. ("Applicant") filed an application for registration of MULTI-FIBER COLON CLEANSE (in standard characters) for "vitamins and nutritional supplements" in International Class 5.[1] The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the

[1] Application Serial No. 86732652 was filed on August 21, 2015, seeking registration on the Principal Register based upon Applicant's allegation of use of the mark in commerce as of August 11, 2014 under Section 1(a) of the Trademark Act. In response to the Examining Attorney's refusal of registration under Section 2(e)(1), Applicant amended the involved application to seek registration on the Supplemental Register. The Examining Attorney accordingly withdrew the refusal of registration under Section 2(e)(1).

Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with Registration No. 1600268, issued on the Principal Register for the mark COLON CLEANSE (in typed form)[2] for "bulk forming fiber laxative" in International Class 5.[3] When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We reverse the refusal to register.

I. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co.,* 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks"). We consider these factors and the other *du Pont* factors concerning which Applicant or the Examining Attorney submitted evidence or argument.

[2] Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. §2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A mark depicted in typed form is the legal equivalent of a standard character mark.

[3] Issued on the Principal Register on June 12, 1990. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Second renewal.

A. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

We turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)).

In comparing the marks, we are mindful that the test is not whether they can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Elec's. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rest's. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Applicant's mark is MULTI-FIBER COLON CLEANSE in standard characters whereas Registrant's mark is COLON CLEANSE in typed form. Obviously, the COLON CLEANSE portions of the marks are identical in appearance, sound and meaning, suggesting a treatment intended to remove impurities from the colon, as discussed more fully below. However, we must consider the entire marks, including

the prefix MULTI-FIBER in Applicant's mark, to determine their commercial impressions.

The term MULTI is defined as "a combining form meaning 'many,' 'much,' 'multiple,' 'many times,' 'more than one, 'more than two,' 'composed of many like parts,' 'in many respects,' used in the formation of compound words: *multiply*; *multiple*."[4] FIBER is defined, *inter alia*, as "a slender, threadlike root of a plant."[5] The addition of the term MULTI-FIBER to COLON CLEANSE indicates goods consisting of multiple fibers or sources of fiber intended to remove impurities from the large intestine, or colon. The marks COLON CLEANSE and MULTI-FIBER COLON CLEANSE therefore create similar commercial impressions because they both connote goods intended to treat the colon, albeit with Applicant's goods being more specifically identified as consisting of multiple fiber sources. The fact that Applicant's mark connotes a narrower category of goods does not create a significantly different commercial impression. It is long established that generally the mere addition of a term to a registered mark does not obviate the similarity between the marks nor does it overcome a likelihood of confusion under Trademark Act Section 2(d). *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (GASPAR'S ALE and JOSE GASPAR GOLD); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (BENGAL and BENGAL LANCER); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (THE

[4] Dictionary.com, *Id*. at 80.

[5] *Id*. at 81.

LILLY and LILLI ANN); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266 (TTAB 2009) (TITAN and VANTAGE TITAN).

Customers who are familiar with Registrant's goods, upon seeing Applicant's mark, or vice versa, would likely assume that the goods were related and that MULTI-FIBER COLON CLEANSE is a subset of the COLON CLEANSE brand. Compared in their entireties, the marks are similar in sound, appearance, meaning and commercial impression. This *du Pont* factor favors a finding of likelihood of confusion.

B. The nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of purchasers.

We turn to the *du Pont* factor involving the similarity or dissimilarity of Applicant's goods and Registrant's goods. It is settled that in making our determination, we must look to the goods as identified in the application vis-à-vis those recited in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1161; *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). The respective goods need only be "related in some manner" or "the circumstances surrounding their marketing such that they could give rise to the mistaken belief that [the goods] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

The issue here is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Applicant's goods are "vitamins and nutritional supplements." Registrant's goods are "bulk forming fiber laxative." The Examining Attorney has introduced evidence that Registrant's goods are described as a "bulk forming fiber laxative/dietary supplement" on the GNC.com internet website,[6] and are listed under the general heading of vitamins and dietary supplements on the amazon.com website.[7] The Examining Attorney further introduced evidence from the naturessecret.com website advertising Applicant's goods as indicated below:

[8]

This evidence suggests that Applicant's "nutritional supplements" may be used for colon detoxification and to promote bowel movements to enhance digestion and

[6] *Id.* at 9-11.

[7] *Id.* at 12-18.

[8] Examining Attorney's May 25, 2016 final Office action at 8-9.

elimination. In other words, Applicant's goods appear to perform a function similar to Registrant's "bulk forming fiber laxative." In addition, this evidence suggests that Registrant's goods may be advertised as a form of dietary supplement. Thus, while we do not find this website evidence to be sufficient to support the Examining Attorney's contention that the goods are "in essence the same types of goods,"[9] the goods nonetheless appear to be sufficiently related that confusion as to their source could arise.

As further evidence that Applicant's goods are related to Registrant's, the Examining Attorney has submitted a number of use-based, third-party registrations.[10] Among these, we note that the following registrations list, in their identifications of goods, both vitamins or dietary/nutritional supplements and laxatives of various types:

2045934	2417799	3047388
3171929	4310909	4094111
2941616	3440804	4155173
4045494	4262523	4202458
4413584	4578853	4613503
4832863	4820950	4865485
4764681	4910038	5000141

Third-party registrations that are based on use in commerce have some probative value to the extent that they suggest that the listed goods are of types which may emanate from the same source. *In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783, 1785-86; *In re Mucky Duck Mustard Co. Inc.,* 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

[9] 10 TTABVUE 6.

[10] Examining Attorney's September 17, 2016 denial of Applicant's first request for reconsideration at 6-100.

Although such registrations do not prove that the registered marks are actually used in the marketplace on both vitamins and nutritional supplements and laxatives, they at least demonstrate that a number of third parties have sought and obtained registrations of marks for use on both types of goods.

In sum, we find Applicant's vitamins and nutritional supplements and Registrant's bulk forming fiber laxatives are related because they are of a kind that may emanate from a single source under a single mark. For this reason, we find that the *du Pont* factors relating to the similarity of the goods, trade channels, and classes of purchasers weigh in favor of finding a likelihood of confusion.

C. The number and nature of similar marks in use on similar goods.

We begin with the commercial strength of the cited mark under the sixth *du Pont* factor. *Du Pont,* 177 USPQ at 567. In an *ex parte* appeal, "[t]he purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions." *Palm Bay*, 73 USPQ2d at 1694. "[T]he strength of a mark is not a binary factor" and "varies along a spectrum from very strong to very weak." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). If the evidence establishes that the consuming public is exposed to third-party use of similar marks used in connection with similar goods, it "is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Palm Bay*, 73 USPQ2d at 1693. "The weaker [the Registrant's] mark, the

closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection." *Id*. at 1676 (internal citations omitted). Evidence of extensive registration and use by others of a term on the same or very similar goods can be "powerful" evidence of weakness. *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation,* 115 USPQ2d at 1674.

Applicant argues that

> potential purchasers have been educated to distinguish between all marks which contain the phrase "colon cleanse" based on the minute differences between such marks. We can even see in some of this evidence instances in which potential purchasers of supplements are exposed to marks closer to each other than the cited phrase "colon cleanse" is to applicant's mark, and such purchasers appear to be distinguishing between such marks.[11]

In support, Applicant introduced excerpts from twenty third-party internet web pages showing use of the term "COLON CLEANSE" to identify and describe products and product categories, as well as in URLs for websites offering similar products.[12]

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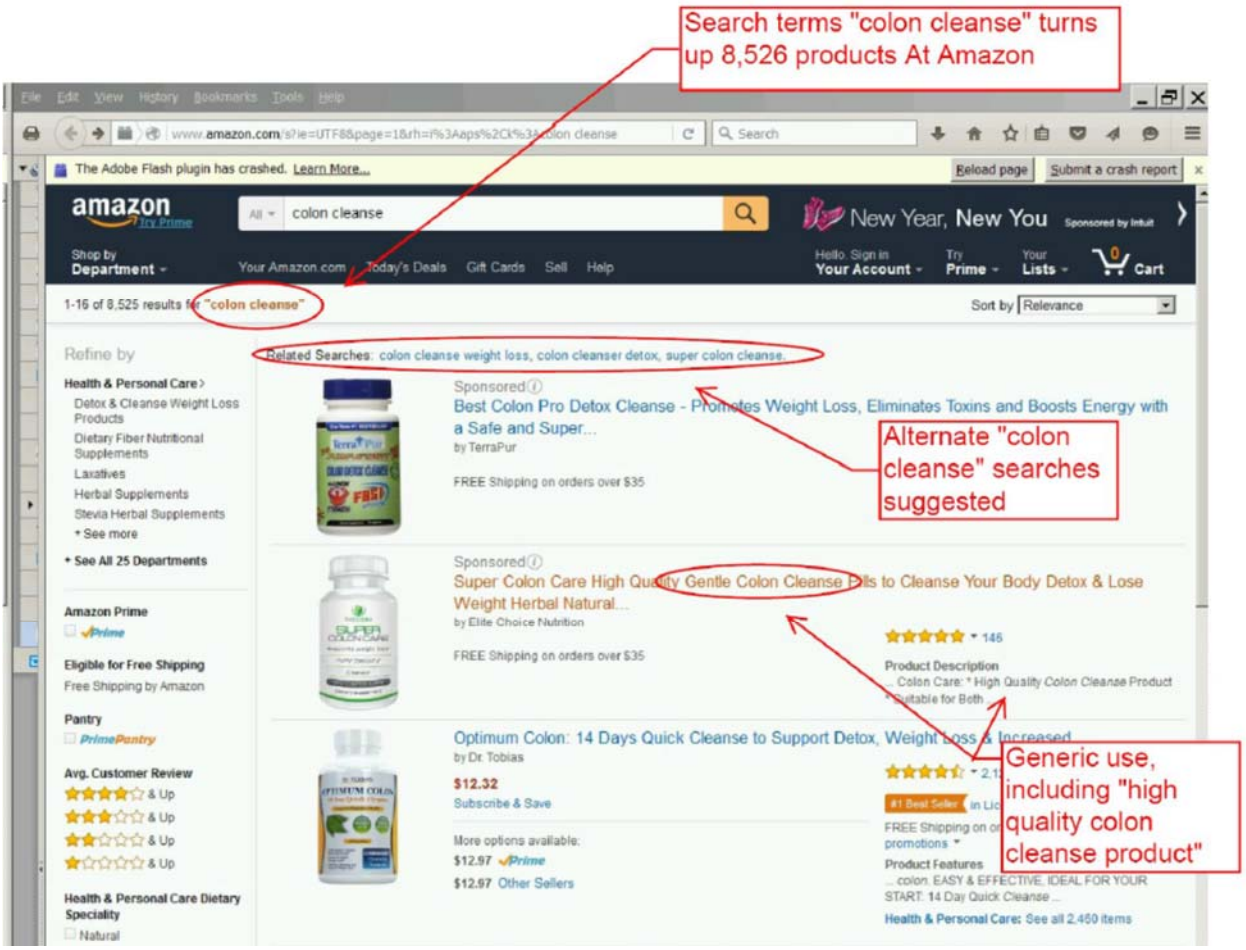
[11] Applicant's May 6, 2016 response to the Examining Attorney's first Office action at 10. Page references herein to the application record refer to the .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs refer to the Board's TTABVUE docket system.

Applicant refers in its briefs and Office action responses to the "generic phrase" colon cleanse. However we do not construe Applicant's comments as an impermissible collateral attack upon the cited registration, which is not relevant or appropriate in an *ex parte* appeal. *In re Dixie Restaurants*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). *See also In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Rather, we construe Applicant's arguments as being directed toward the weakness of the mark in the cited registration.

[12] *Id*. at 17-76. The third-party internet websites include blessedherbs.com; amazon.com; 3daycleanse.com; gnc.com; walgreens.com; bestcoloncleanserreviews.com; coloncleanse.net; athomecoloncleanse.com; weightlosscoloncleanse.org; mayoclinic.org; medicaldaily.com; webmd.com; best-colon-cleanse.com; coloncleanse.net; coloncleansereviewer.com;

The twenty internet web pages all show use of the term "COLON CLEANSE" by third parties discussing, comparing, critiquing and offering for sale the same types of goods as Applicant and Registrant. Representative samples of the web pages are reproduced in part below.[13]

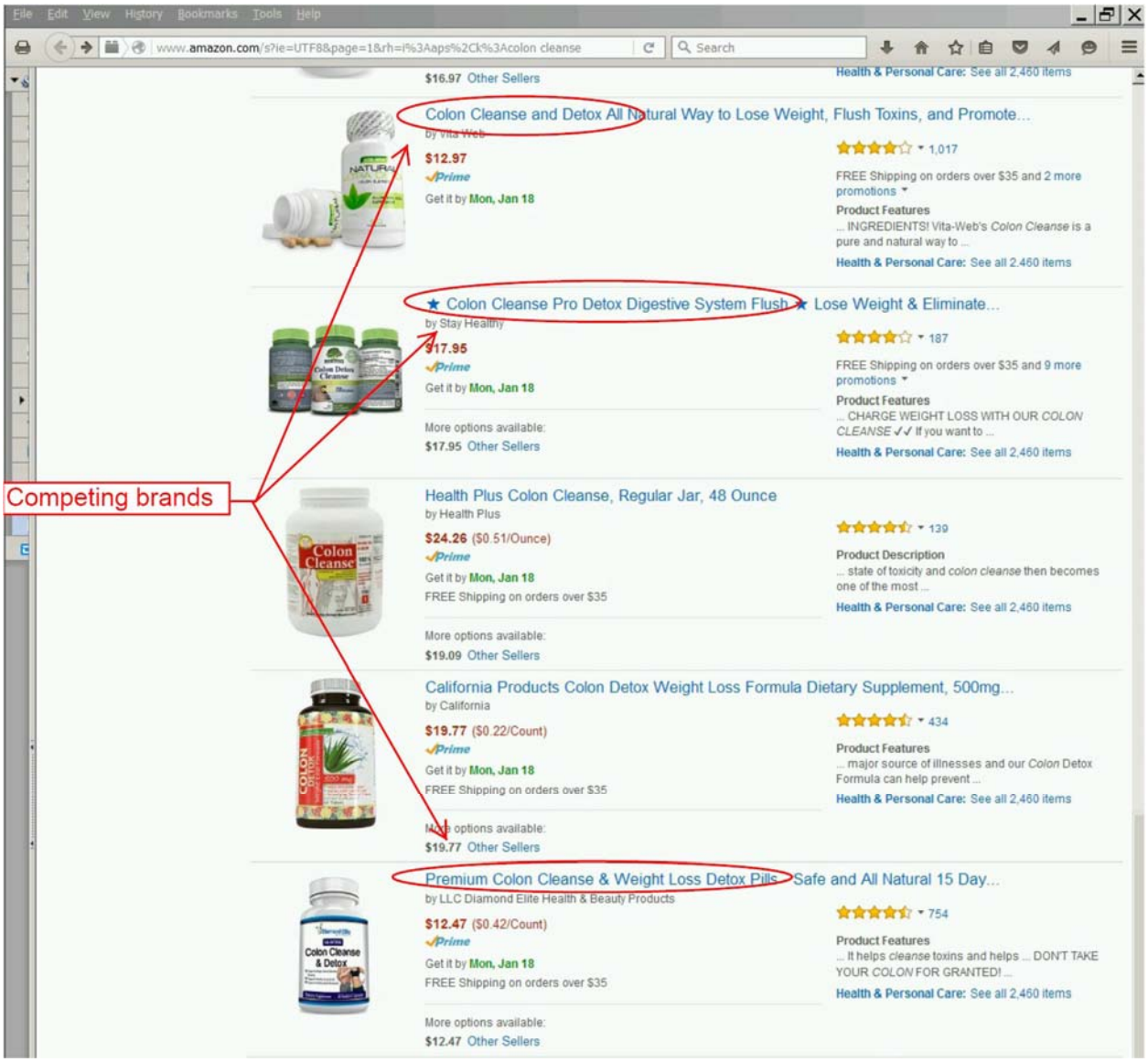


[14]

consumereview.com; scientificamerican.com; drnatura.com; columbia.edu; and naturains.com.

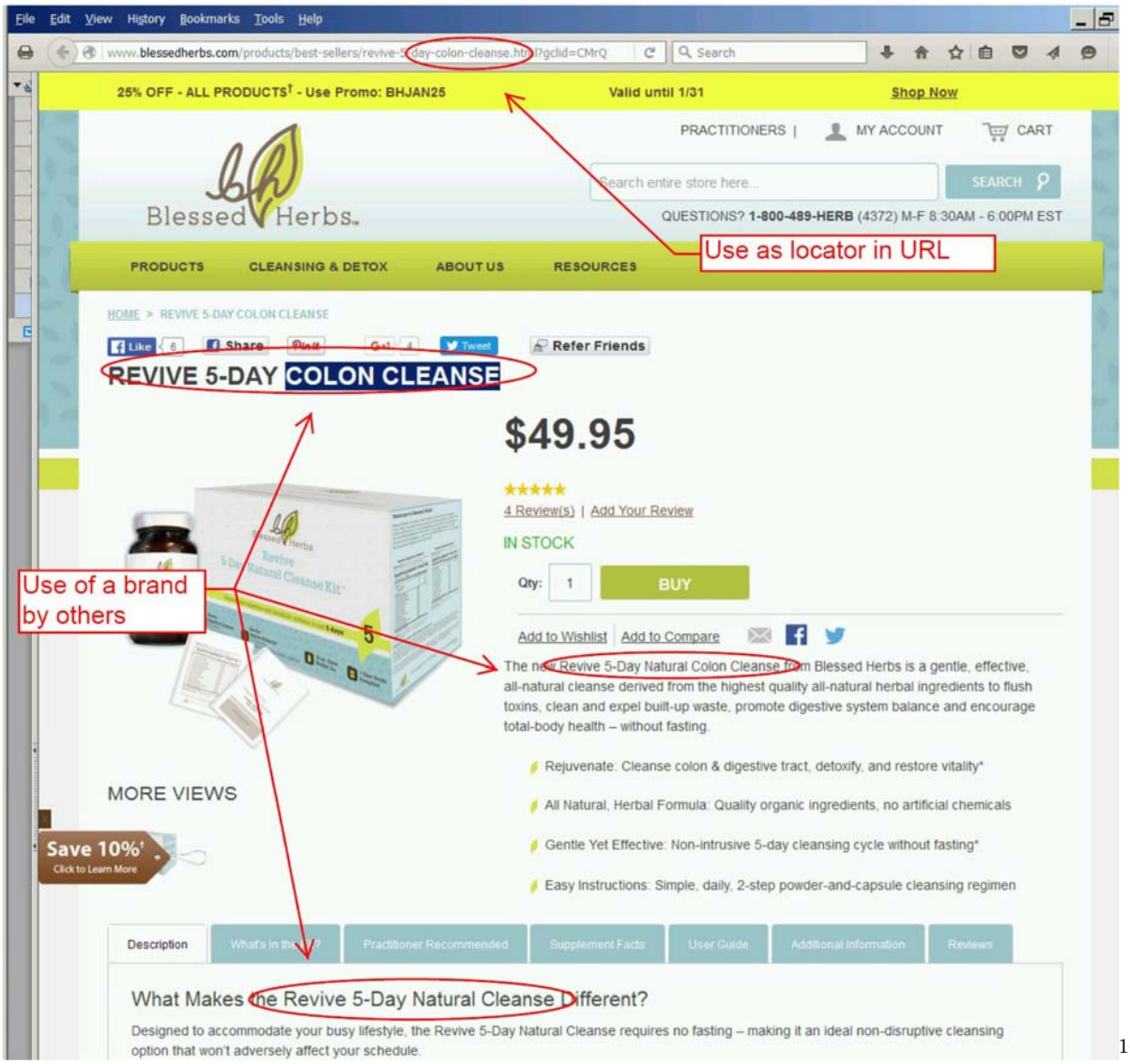
[13] Emphasis and notations provided by Applicant.

[14] *Id.* at 21.


File Edit View History Bookmarks Tools Help
www.amazon.com/s?ie=UTF8&page=1&rh=i%3Aaps%2Ck%3Acolon cleanse
Search
$16.97 Other Sellers
Health & Personal Care: See all 2,460 items
Colon Cleanse and Detox All Natural Way to Lose Weight, Flush Toxins, and Promote...
$12.97
Prime
Get it by Mon, Jan 18
1,017
FREE Shipping on orders over $35 and 2 more promotions
Product Features
... INGREDIENTS! Vita-Web's Colon Cleanse is a pure and natural way to ...
Health & Personal Care: See all 2,460 items
★ Colon Cleanse Pro Detox Digestive System Flush ★ Lose Weight & Eliminate...
by Stay Healthy
$17.95
Prime
Get it by Mon, Jan 18
More options available:
$17.95 Other Sellers
187
FREE Shipping on orders over $35 and 9 more promotions
Product Features
... CHARGE WEIGHT LOSS WITH OUR COLON CLEANSE ✓✓ If you want to ...
Health & Personal Care: See all 2,460 items
Competing brands
Health Plus Colon Cleanse, Regular Jar, 48 Ounce
by Health Plus
$24.26 ($0.51/Ounce)
Prime
Get it by Mon, Jan 18
FREE Shipping on orders over $35
More options available:
$19.09 Other Sellers
139
Product Description
... state of toxicity and colon cleanse then becomes one of the most ...
Health & Personal Care: See all 2,460 items
California Products Colon Detox Weight Loss Formula Dietary Supplement, 500mg...
by California
$19.77 ($0.22/Count)
Prime
Get it by Mon, Jan 18
FREE Shipping on orders over $35
More options available:
$19.77 Other Sellers
434
Product Features
... major source of illnesses and our Colon Detox Formula can help prevent ...
Health & Personal Care: See all 2,460 items
Premium Colon Cleanse & Weight Loss Detox Pills - Safe and All Natural 15 Day...
by LLC Diamond Elite Health & Beauty Products
$12.47 ($0.42/Count)
Prime
Get it by Mon, Jan 18
FREE Shipping on orders over $35
More options available:
$12.47 Other Sellers
754
Product Features
... It helps cleanse toxins and helps ... DON'T TAKE YOUR COLON FOR GRANTED! ...
Health & Personal Care: See all 2,460 items

15

[15] *Id.* at 23.

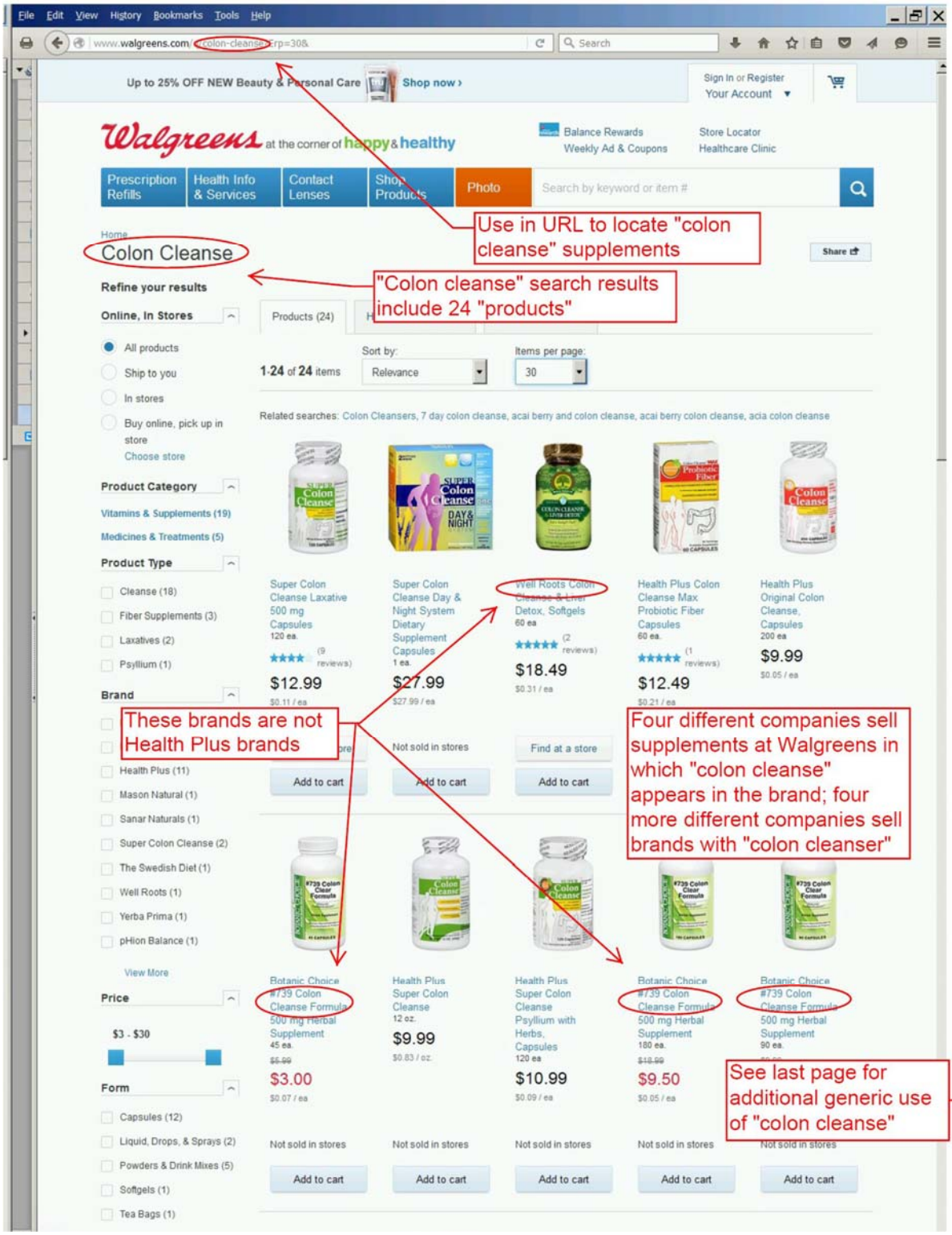

File Edit View History Bookmarks Tools Help
www.blessedherbs.com/products/best-sellers/revive-5-day-colon-cleanse.html?gclid=CMrQ
Search
25% OFF - ALL PRODUCTS† - Use Promo: BHJAN25
Valid until 1/31
Shop Now
PRACTITIONERS |
MY ACCOUNT
CART
Blessed Herbs
Search entire store here...
SEARCH
QUESTIONS? 1-800-489-HERB (4372) M-F 8:30AM - 6:00PM EST
Use as locator in URL
PRODUCTS
CLEANSING & DETOX
ABOUT US
RESOURCES
HOME > REVIVE 5-DAY COLON CLEANSE
Like 6
Share
Tweet
Refer Friends
REVIVE 5-DAY COLON CLEANSE
$49.95
4 Review(s) | Add Your Review
IN STOCK
Qty: 1
BUY
Add to Wishlist
Add to Compare
Use of a brand by others
The new Revive 5-Day Natural Colon Cleanse from Blessed Herbs is a gentle, effective, all-natural cleanse derived from the highest quality all-natural herbal ingredients to flush toxins, clean and expel built-up waste, promote digestive system balance and encourage total-body health – without fasting.
Rejuvenate: Cleanse colon & digestive tract, detoxify, and restore vitality*
All Natural, Herbal Formula: Quality organic ingredients, no artificial chemicals
Gentle Yet Effective: Non-intrusive 5-day cleansing cycle without fasting*
Easy Instructions: Simple, daily, 2-step powder-and-capsule cleansing regimen
MORE VIEWS
Save 10%†
Click to Learn More
Description
Practitioner Recommended
Supplement Facts
User Guide
Additional Information
Reviews
What Makes the Revive 5-Day Natural Cleanse Different?
Designed to accommodate your busy lifestyle, the Revive 5-Day Natural Cleanse requires no fasting – making it an ideal non-disruptive cleansing option that won't adversely affect your schedule.
16

[16] *Id.* at 17.


www.3daycleanse.com
Call to order 1-800-590-6979
Home | FAQs | Contact Us | Sitemap |
3 Day Cleanse
SO EASY
COLON
CLEANSE
Start your Colon Cleansing Today
ORDER NOW!
Discover a secret that can help you lose 10 pounds
Free Unwanted Build-up
3-Day Colon Cleanse
Descriptive Use? Use of Registered mark COLON CLEANSE.
What It Does
The Benefits
Verifiable Testimonials
FREE Video
Health Breakthrough
The 3 Day Cleanse is nothing short of a breakthrough from the Far East. The secret is a fiber from the oil palm tree that penetrates the accumulation in the colon and lubricates the colon wall - making it slippery so that the rubbery accumulation "slips right out". Remember the summer toy "slip 'n slide?"
Read More...
What is MUCOID PLAQUE
It's easy as 1-2-3
By cleansing your colon, you can probably save $2,000-$5,000 a year on medical, supplements food and drugs. Hundreds of healing centers and retreats now charge $3,000+ for intensive 30 juice fasts and cleanses to get that build-up out.
Read More...
Colon Cleansing & Weight Loss
Read the Article by Leading Expert
Healing Breakthrough
Many of our customers have told us it felt like the mucoid plaque (encrusted fecal matter) slipped right out effortlessly.
We should know, because it's happened to us. WARNING: THESE PHOTOS ARE NOT FOR THOSE OF YOU WITH WEAK STOMACHS
See their results...
Testimony from a Certified Colon Hydrotherapist
Hear it from the expert
Fill out the form below to immediately watch our video on how the 3 Day Cleanse works and the amazing benefits you'll receive from it.
First Name
Last Name
Email Address
Phone Number
Submit
Order NOW! Click Here

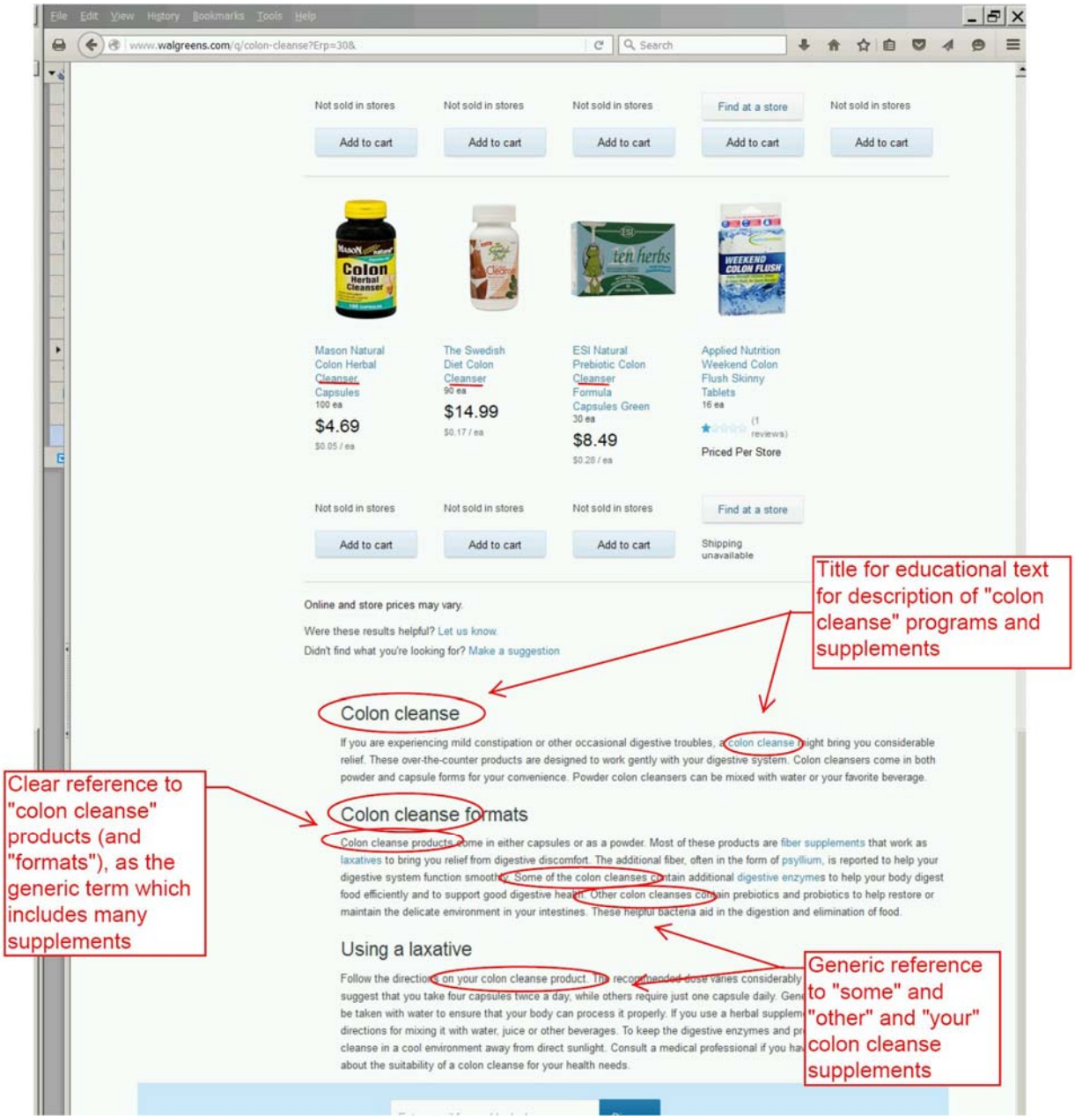
17

[17] *Id.* at 19.


Use in URL to locate "colon cleanse" supplements
"Colon cleanse" search results include 24 "products"
These brands are not Health Plus brands
Four different companies sell supplements at Walgreens in which "colon cleanse" appears in the brand; four more different companies sell brands with "colon cleanser"
See last page for additional generic use of "colon cleanse"

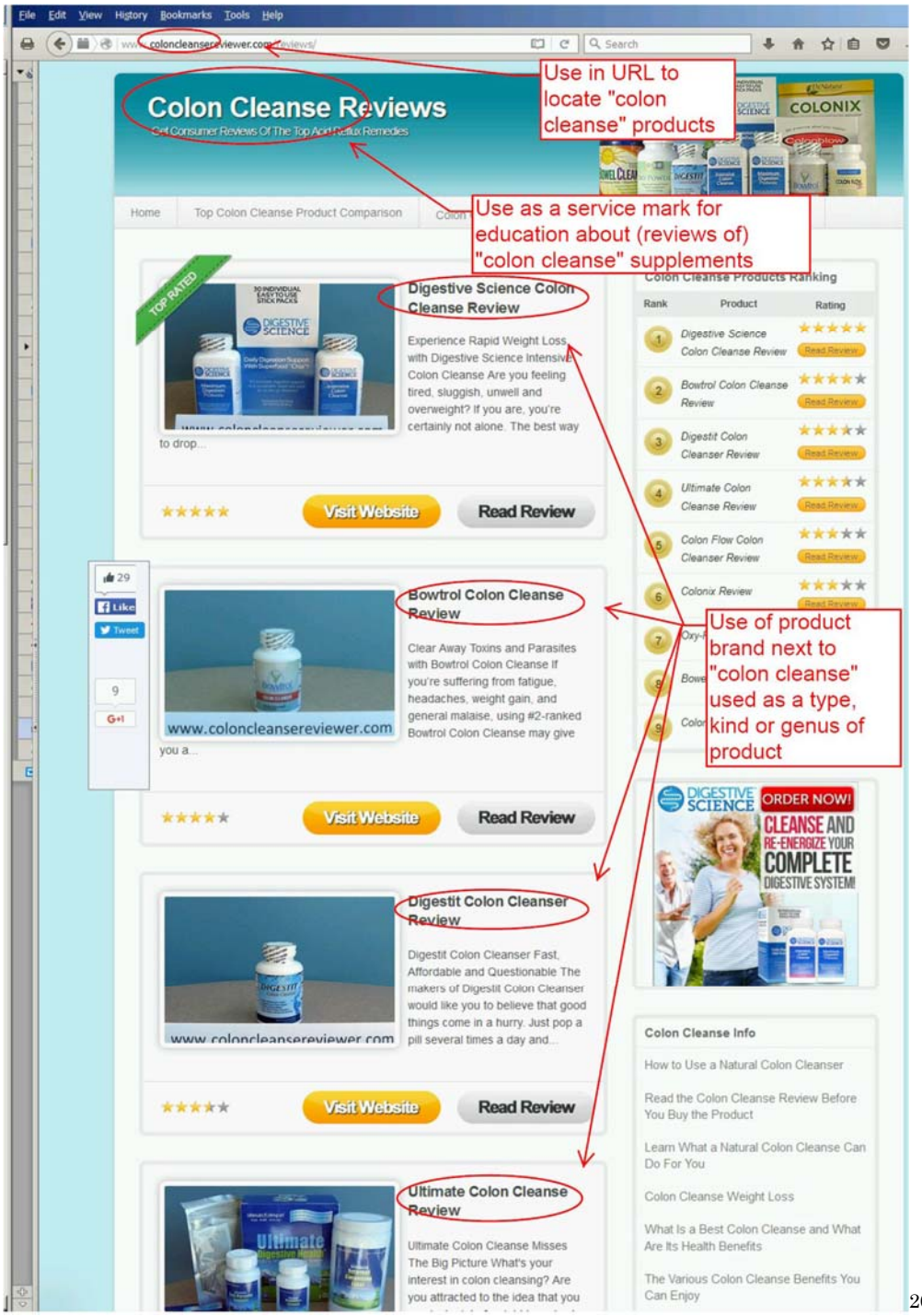
[18]

[18] *Id.* at 31.


www.walgreens.com/q/colon-cleanse?Erp=30&
Not sold in stores
Add to cart
Find at a store
Mason Natural Colon Herbal Cleanser Capsules
100 ea
$4.69
$0.05 / ea
The Swedish Diet Colon Cleanser
90 ea
$14.99
$0.17 / ea
ESI Natural Prebiotic Colon Cleanser Formula Capsules Green
30 ea
$8.49
$0.28 / ea
Applied Nutrition Weekend Colon Flush Skinny Tablets
16 ea
Priced Per Store
Shipping unavailable
Online and store prices may vary.
Were these results helpful? Let us know.
Didn't find what you're looking for? Make a suggestion
Colon cleanse
If you are experiencing mild constipation or other occasional digestive troubles, a colon cleanse might bring you considerable relief. These over-the-counter products are designed to work gently with your digestive system. Colon cleansers come in both powder and capsule forms for your convenience. Powder colon cleansers can be mixed with water or your favorite beverage.
Colon cleanse formats
Colon cleanse products come in either capsules or as a powder. Most of these products are fiber supplements that work as laxatives to bring you relief from digestive discomfort. The additional fiber, often in the form of psyllium, is reported to help your digestive system function smoothly. Some of the colon cleanses contain additional digestive enzymes to help your body digest food efficiently and to support good digestive health. Other colon cleanses contain prebiotics and probiotics to help restore or maintain the delicate environment in your intestines. These helpful bacteria aid in the digestion and elimination of food.
Using a laxative
Follow the directions on your colon cleanse product. The recommended dose varies considerably; some suggest that you take four capsules twice a day, while others require just one capsule daily. Gener
be taken with water to ensure that your body can process it properly. If you use a herbal supplem
directions for mixing it with water, juice or other beverages. To keep the digestive enzymes and pr
cleanse in a cool environment away from direct sunlight. Consult a medical professional if you ha
about the suitability of a colon cleanse for your health needs.
Title for educational text for description of "colon cleanse" programs and supplements
Clear reference to "colon cleanse" products (and "formats"), as the generic term which includes many supplements
Generic reference to "some" and "other" and "your" colon cleanse supplements

19

[19] *Id.* at 33.



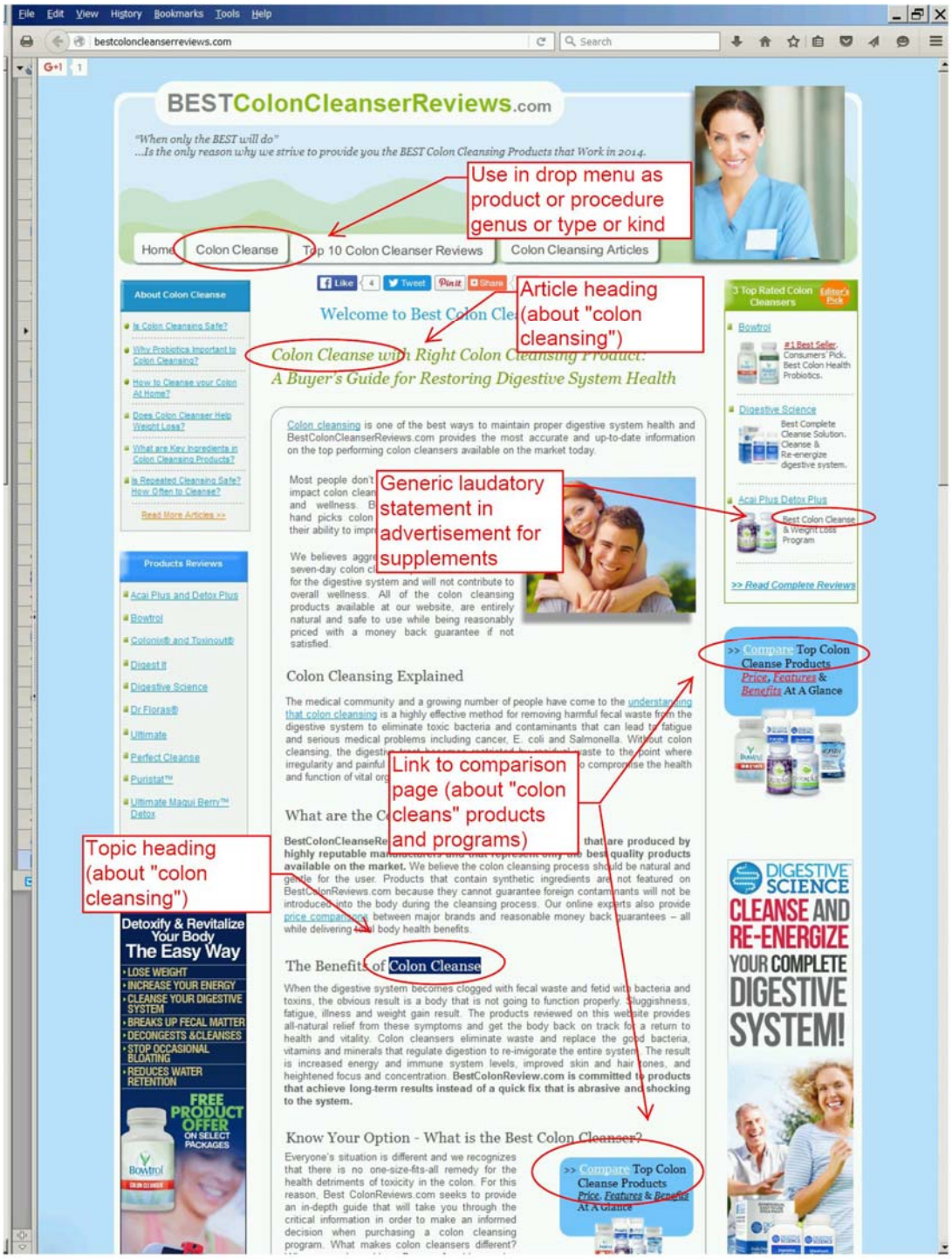
[20]

This evidence shows that the term "COLON CLEANSE" is widely used by third-parties for goods identified in the involved application and cited registration as well

[20] *Id.* at 63.

as goods related thereto. While Applicant has not presented specific evidence concerning the extent and impact of these uses, it nevertheless presented "evidence of these marks being used in internet commerce" for the goods at issue and related goods. *Jack Wolfskin*, 116 USPQ2d at 1136; *see also Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011) (Internet printouts "on their face, show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein"). We find this evidence of the commercial weakness of "COLON CLEANSE" to be "powerful on its face. The fact that a considerable number of third parties use similar marks was shown," *Juice Generation*, 115 USPQ2d at 1674. *See also Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co., Inc.*, 95 USPQ2d 1271, 1278 (TTAB 2009) (testimony and evidence shows that the name "Anthony's" has been extensively adopted, registered and used as a trademark for restaurant services, and therefore has a significance in this industry.); *In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, 1563 (TTAB 1996) ("evidence offered by applicant is sufficient to establish prima facie that a significant number of third parties are using trade names/service marks containing the term BROADWAY for restaurant/'eating place' services, as well as for goods and services related thereto."); *Plus Products v. Natural Organics, Inc.*, 204 USPQ 773, 779-80 (TTAB 1979) (allowing registration of NATURE'S PLUS for vitamins despite prior registration of PLUS for vitamins given coexistence of a number of registrations containing PLUS for similar goods).

In addition, Applicant has submitted evidence of conceptual weakness of "COLON CLEANSE" in connection with the goods at issue. This evidence, excerpted below, suggests extensive use of "COLON CLEANSE" to describe products related to the goods at issue herein. This evidence demonstrates that "COLON CLEANSE," at a minimum, has a recognized suggestive meaning in connection with the goods at issue, namely, vitamins, nutritional supplements and laxatives. *See In re Box Solutions*, 79 USPQ2d 1953, 1957-58 (TTAB 2006) ("BOX is, at a minimum, highly suggestive of computers and we accord this term a very narrow scope of protection.").


bestcoloncleanserreviews.com
BESTColonCleanserReviews.com
"When only the BEST will do"
...Is the only reason why we strive to provide you the BEST Colon Cleansing Products that Work in 2014.
Use in drop menu as product or procedure genus or type or kind
Home
Colon Cleanse
Top 10 Colon Cleanser Reviews
Colon Cleansing Articles
Article heading (about "colon cleansing")
Colon Cleanse with Right Colon Cleansing Product:
A Buyer's Guide for Restoring Digestive System Health
Generic laudatory statement in advertisement for supplements
Colon Cleansing Explained
Link to comparison page (about "colon cleans" products and programs)
Topic heading (about "colon cleansing")
The Benefits of Colon Cleanse
Know Your Option - What is the Best Colon Cleanser?
Detoxify & Revitalize Your Body The Easy Way
LOSE WEIGHT
INCREASE YOUR ENERGY
CLEANSE YOUR DIGESTIVE SYSTEM
BREAKS UP FECAL MATTER
DECONGESTS &CLEANSES
STOP OCCASIONAL BLOATING
REDUCES WATER RETENTION
FREE PRODUCT OFFER ON SELECT PACKAGES
DIGESTIVE SCIENCE
CLEANSE AND RE-ENERGIZE YOUR COMPLETE DIGESTIVE SYSTEM!
[21]

[21] *Id.* at 38.

The evidence of third party use discussed above suggests that the term "COLON CLEANSE" is in fact commercially weak, and also conceptually weak, when used in connection with nutritional supplements and laxatives, and it is therefore entitled to only a quite narrow scope of protection. Unlike fanciful or arbitrary marks, where a party chooses a mark that is inherently weak, it will not enjoy the wide latitude of protection afforded to owners of strong trademarks, and unlike commercially strong marks, where a party's mark is commonly used by others for similar products, it will similarly be entitled to a limited scope of protection. As such, these *du Pont* factors weigh heavily against finding a likelihood of confusion.

D. Conclusion

In summary, we have carefully considered all of the evidence of record pertaining to the relevant *du Pont* likelihood of confusion factors, including any evidence not specifically discussed herein, as well as Applicant's arguments with respect thereto. As explained above, the similarity of the marks and relatedness of the goods and trade channels weigh in favor of finding a likelihood of confusion. There are instances, however, where a single *du Pont* factor is dispositive (*see, e.g., Kellogg Co. v. Pack'em Enters. Inc.,* 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991)) outweighs these other *du Pont* factors. Such is the case here where the terminology in the cited mark renders it commercially and conceptually weak such that "the public will look to other elements to distinguish the source of the [goods or] services." *See Juice Generation,* 115 USPQ2d at 1674-75. *See also Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915,

189 USPQ 693, 694-95 (CCPA 1976). Balancing these factors, we find no likelihood of confusion.

Decision: The Section 2(d) refusal to register Applicant's mark is reversed.