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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Herbal Technologies Inc.

Serial No. 76671599

Thomas I. Rozsa of Rozsa Law Group LC for Herbal
Technologies Inc.

Dawn Han, Trademark Examining Attorney, Law Office 107 (J.
Leslie Bishop, Managing Attorney).

Before Hairston, Grendel and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Herbal Technologies Inc. ("applicant") filed a use-
based application on the Principal Register for the mark
COCO TRIM, in standard character form, for "nutritional
supplements for humans, namely, dietary food supplements,
herbal supplements, nutritional supplements, vitamin and
mineral supplements, natural food supplements," in
International Class 5. Applicant disclaimed the exclusive
right to use the word "Coco."

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the registered mark COCOATRIM, in standard character form, for "dietary supplements," in Class 5.¹

Our determination of likelihood of confusion 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 Company, Inc.*, 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 services. *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").

¹ Registration No. 3230360, issued April 17, 2007.

A. The similarity or dissimilarity and nature of the goods described in the application and registration.

Applicant is seeking to register its mark for, *inter alia*, dietary food supplements, and the registered mark is for dietary supplements. Dietary supplements encompass dietary food supplements as evidenced by the label applicant submitted as a specimen displaying the mark sought to be registered used in connection with a "dietary supplement." Accordingly, the goods are in part identical.

B. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Because the products identified in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now 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. *In re E. I. du Pont De Nemours & Co., supra.* In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v. Environmental Communications Incorporated*, 207 USPQ 443, 449 (TTAB 1980).

In addition, in comparing the marks, the test is not whether the marks 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

Serial No. 76671599

impression so that confusion as to the source of the goods offered under the respective marks is likely to result.

San Fernando Electric Mfg. Co. v. JFD Electronics

Components Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977);

Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir.

June 5, 1992). The proper focus is on the recollection of

the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries,*

Inc. v. Oliver & Winston, Inc., 207 USPQ 335, 344 (TTAB

1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106,

108 (TTAB 1975).

First, the marks look alike. The only difference between the marks is the letter "A" between COCO and TRIM and the space between the words in applicant's mark. The space between the words is not significant. *Thymo Borine Laboratory v. Winthrop Chemical Co., Inc.*, 155 2d 402, 69 USPQ 512, 514 (CCPA 1946) (the hyphen in applicant's mark THY-RIN has no significance); *Charette Corp. v. Bowater Communication Papers Inc.*, 13 USPQ2d 2040, 2042 (TTAB 1989) (registrant's PRO-PRINT and petitioner's mark PROPRINT are identical except for the division of registrant's mark by a hyphen between the syllables); *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n.1 (TTAB 1978) (FAST-

Serial No. 76671599

FINDER with a hyphen is substantially identical to the mark FASTFINDER without a hyphen).

Second, the marks sound alike. Both COCO and COCOA are pronounced "kō' kō'".² Thus, both marks will be pronounced as "kō' kō' trīm."

Third, the meaning of the marks is similar. COCO means coconut, and COCOA is chocolate.³ TRIM means "the condition, order, or fitness of a person or thing for action, work, use, etc.," a person "in excellent physical condition," or "slim; lean."⁴ Accordingly, the marks have a similar overall connotation to the extent that they both suggest a weight control, health aid or conditioning product.

Finally, despite the fact that COCO is coconut and COCOA is chocolate, COCO is often used to refer to chocolate. The Examining Attorney submitted the five (5) third-party registrations shown below for marks comprising the word "Coco" for chocolate products.

² Webster's New College Dictionary, p. 282 attached to applicant's November 16, 2007 response.

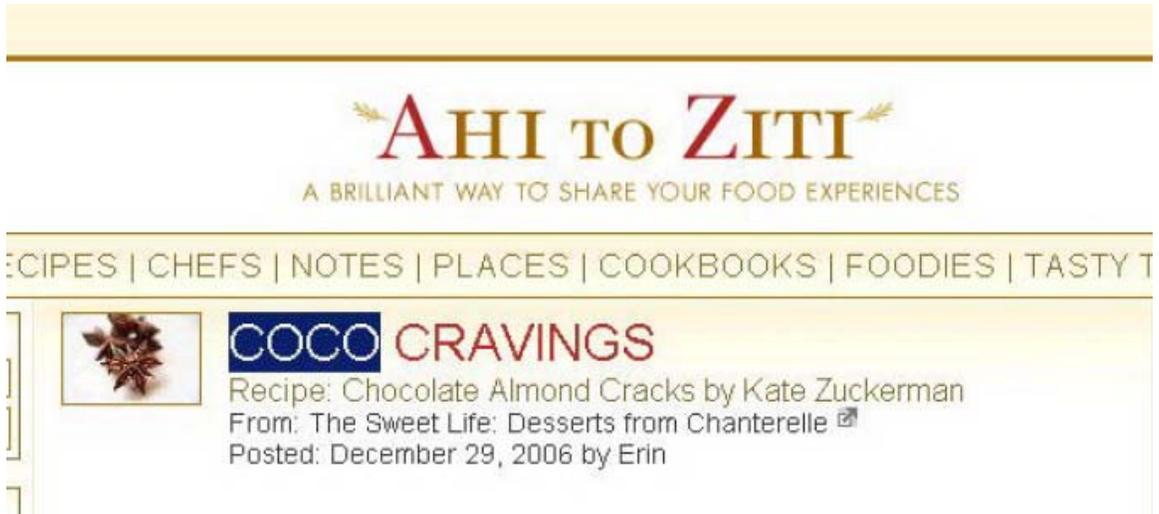
³ *Id.*

⁴ The Random House Dictionary of the English Language (Unabridged) p. 2022 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac*

Mark	Reg. No.	Goods
COCO SUPREME	1084974	Cocoa mix
COCOFECTION	1519069	Chocolate flavored candy
COCO & BEAN	2860497	Preparations for making hot and cold instant coffee based and chocolate based food beverages
THE COCO TREE	2858524	Candy, namely, milk chocolate, white chocolate and dark chocolate
COCO-BON	3120701	Chocolate truffles

The Examining Attorney also submitted excerpts from websites in which the word COCO was used in reference to chocolate.

1. www.ahitoziti.com



v. J. C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Serial No. 76671599

2. <http://aboutchocolate.wordpress.com>

Itz All About Delicious Chocolate Cake

Cake nya Ratu feat. Dimas.. aNd m¥ mOm ^_^

11.22.07 | **Coco Crunch Chocolate Cookies**

→  Posted in Cookies at 11:12 am by aboutchocolate



3. www.mercola.com

Healthy, Tasty & All-Natural Cocoa Nibs: Perfect for Snacking, Great in Recipes and Sugar & Dairy Free!

If you are like most people, chocolate is one of your favorite candy snacks. Unfortunately, the chocolate found in most stores today is processed using methods that destroy about one-quarter to one-half of chocolate's naturally occurring flavonoids, which are the powerful compounds that scavenge the free radicals in your body that can cause cancer.

Plus, most commercial chocolate is loaded with high amounts of white sugar, unhealthy oils, a host of harmful additives, and even lead!

But if you are a chocolate lover, there is hope: when properly processed, chocolate and the source it is derived from, cocoa, can actually be very good for you.

When I first began reading about the benefits of eating chocolate, I was skeptical because the chocolate companies funded the research findings. However, since then there have been many independent studies that strongly confirm the [benefits of consuming chocolate and cocoa in moderation](#). Below is a list of **some key benefits of cocoa**:



Way Healthier Coco Nibs

16 oz Package -- Just \$19.95 [Order Now](#)

Three 16 oz Packages -- \$49.95 [Order Now](#)

Limited Time Introductory Offer!!!
You will save over 15% when you buy 3-Pack plus save up to 65% on combined shipping and Handling!

4. www.newvitality.com

COCO PURE



CocoPure™

It's a "chocoholic's" dream come true.

Chocolate Tea

With Green Tea and Resveratrol

Chocolate...from pleasure food to health food!

Chocolate is one of life's most misunderstood foods. Too often it's considered an unhealthy indulgence. But just the opposite is true when you drink a concentrated pure cocoa extract. Here's the truth...in every cup of CocoPure™ Chocolate Tea you're getting 4000 mg. of pure concentrated cocoa with elevated levels of flavonoids that offer a powerhouse of antioxidant protection against free radical damage. In addition, CocoPure™ Chocolate Tea is fortified with the cardio-supporting ingredients of Resveratrol, and all the protective qualities of Green Tea. And here's another important fact to remember, there are numerous credible studies supporting the benefits of cocoa and how it may be linked to lower blood pressure, heart support, flexible arteries, increased blood flow and more energy. Finally, science has discovered how to make the great taste of chocolate a great way to get healthy.

[Click here to see Ingredients in Coco Pure](#)

Serial No. 76671599

Based on the evidence of record, consumers perceive COCO and COCA to be the same. Accordingly, COCO TRIM and COCOATRIM therefore engender the same commercial impression.

In view of the foregoing, we find that COCOATRIM and COCO TRIM are identical in sound and similar in appearance, meaning and commercial impression.

D. Balancing the factors.

When we consider the similarity of the marks and the similarity of the goods in addition to the presumption that the goods move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's mark COCO TRIM for "nutritional supplements for humans, namely, dietary food supplements, herbal supplements, nutritional supplements, vitamin and mineral supplements, natural food supplements" is likely to cause confusion with COCOATRIM for "dietary supplements."

Decision: The refusal to register is affirmed.