

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
November 30, 2007
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Rug Doctor, L.P.

v.

Mohawk Brands, Inc.

Opposition Nos. 91156097 & 91159628
against Serial Nos. 78087483 & 78153433

Matthew J. Himich and Mark Sableman of Thompson Coburn LLP
for Rug Doctor, L.P.

Michael D. Hobbs, Jr. and Auma N. Reggy of Troutman Sanders
LLP for Mohawk Brands, Inc.

Before Quinn, Bucher and Mermelstein, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Mohawk Brands, Inc. seeks registration on the
Principal Register of the mark **FOREVER FRESH** for goods
identified in the application, as amended, as follows:

"carpet containing or treated with odor-
freshening chemicals" in International Class
27.¹

¹ Application Serial No. 78087483 was filed by Mohawk Carpet Corporation on October 9, 2001 claiming a *bona fide* intention to use the mark in commerce. In an amendment to allege use executed on May 30, 2002, applicant alleged first use anywhere and first use in commerce at least as early as October 9, 2001.

Applicant also seeks registration on the Principal Register of the mark **MOHAWK FOREVER FRESH** for goods identified in the application as simply "carpets," also in International Class 27.²

Rug Doctor, L.P. has opposed these applications on the ground of priority of use and likelihood of confusion, alleging that applicant's marks, when used in connection with the identified goods, so resemble its **EVERFRESH** mark, which is the subject of two registrations, as follows:

EVERFRESH for "rug and room deodorizer" in International Class 5;³ and

² Application Serial No. 78153433 was filed by Mohawk Carpet Corporation on August 12, 2002 claiming a *bona fide* intention to use the mark in commerce. In amendments to allege use executed on November 26, 2002 (in the name of Mohawk Brands, Inc.) and again on February 12, 2003 (in the name of Mohawk Carpet Corporation), applicant alleged first use anywhere and first use in commerce at least as early as September 15, 2002.

³ Registration No. 1219651 issued to Blue Lustre Home Care Products, Inc. on December 14, 1982 based upon an application filed on February 13, 1980 claiming first use anywhere and first use in commerce at least as early as January 18, 1980; renewed. According to the records of the Assignment Services Division of the United States Patent and Trademark Office, this registration was assigned to Rug Doctor, L.P., as of November 14, 2001, recorded at Reel 2406, Frame 0652.

EVERFRESH for "cleaning preparations for use on rugs, carpets, upholstery and all purpose cleaning" in International Class 3.⁴

as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Lanham Act.

Applicant, in its answers, has denied the salient allegations in both of the above-captioned opposition proceedings. The cases are both now ready for decision, and given the related nature of the records and the issues involved, these two proceedings have been consolidated for decision in this single opinion, which shall be entered in the proceeding files of both oppositions.

By operation of the rules, the records include the pleadings and the files of both opposed applications.

Opposer, as part of its case-in-chief, filed a Notice of Reliance with the United States Patent and Trademark Office on October 20, 2005, listing status and title copies of its claimed registrations and the transcript from the Rule 30(b)(6) deposition of applicant's principal, Edward H. Williams, Senior Vice President of Marketing for the

⁴ Registration No. 2398515 issued to Rug Doctor, L.P. on October 24, 2000 based upon an application filed on October 14, 1998 later claiming first use anywhere and first use in commerce at least as early as April 11, 2000; Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

Residential Carpet Division of Mohawk Industries, dated September 9, 2005, and related documents. Opposer also submitted the transcript of the testimony deposition of Tim Davidian, Secretary/Treasurer of opposer with responsibility for financial and legal matters, with exhibits.

Applicant, as part of its case-in-chief, filed a Notice of Reliance with the United States Patent and Trademark Office on December 15, 2005, listing applicant's First Request for Admissions to opposer and opposer's Responses thereto; applicant's First Continuing Interrogatories to opposer and opposer's Responses thereto; the transcript from the Rule 30(b)(6) discovery deposition of opposer's principal, Tim Davidian, dated September 2, 2005, and related documents referenced therein; a copy of this Board's earlier decision denying a motion for summary judgment in an opposition filed against a third party by Rug Doctor;⁵ third-party registrations having marks with variations on "Everfresh"; and newspaper articles in

⁵ Opposition No. 91153928 was brought against Application Serial No. 76268469 for the mark FOREVER FRESH ODOR ELIMINATOR, as shown to the right, for goods identified as "all purpose odor neutralizing preparation for general use in eliminating odors from the air" in Int. Cl. 5. On July 13, 2007, this opposition was sustained under Section 2(d) of the Lanham Act.



general circulation printed from the LEXIS/NEXIS computerized library. A week later, applicant filed its second notice of reliance on status and title copies of two federal trademark registrations it allegedly owned,⁶ and third-party registrations having marks with variations on "Everfresh." Finally, applicant submitted the transcripts of the testimony depositions of Ashland, Inc.'s witness, Michele Judith Wyatt, trade marketing manager for Ashland/Valvoline's Eagle One brands, and of Dean Brian Truitt, II, Ever-Fresh Products, LLC.'s president and CEO. The parties have fully briefed the issues before us.

Factual Findings

Opposer is a leading manufacturer of carpet cleaning machines for both the professional and the do-it-yourself carpet cleaning markets, having been in this business since 1972. Opposer has an 85% share of the do-it-yourself rental market in the United States for carpet cleaning machines. Rug Doctor has placed its rental carpet cleaning machines in all of Lowes Companies, Inc.'s stores and many

⁶ Applicant submitted copies of registrations for FOREVER FRESH⁶ and MOHAWK FOREVER FRESH⁶ for carpeting. We note that these registrations were inadvertently-issued and as such have been cancelled and returned to their earlier status as pending applications, namely, the two applications involved herein.

of The Home Depot, Inc.'s stores. Rug Doctor also sells related cleaning and deodorizing products at retail, including the EVERFRESH brand of products. Davidian Dep. at 6 - 8.

EVERFRESH deodorizing products were introduced into the marketplace in 1980 by Blue Lustre Home Care Products, Inc. Sold from 1980 until 1996, the Blue Lustre EVERFRESH product was a rug deodorizing product in the form of a powder that was sprinkled onto carpet and then vacuumed. *Id.* at 8 - 11.



Then in 1996, Opposer bought substantially all of the assets of Blue Lustre Home Care Products, including rights to the EVERFRESH mark (Registration No. 1219615). Around 2000, Opposer expanded the products sold under the EVERFRESH mark to include a new liquid cleaning product marketed in spray bottles for direct application onto carpeting (Registration No. 2398515). These new EVERFRESH cleaning products included a stain remover/odor eliminator product (at right) and a carpet cleaner and a fabric refresher. *Id.* at 11 - 18; Exhibit 7. These products are used in locations where



fibrous materials are found (e.g., the home, automobiles, bathrooms, etc.). In cleaning and deodorizing rugs, carpets and other fibrous materials, these EVERFRESH brand products are designed to remove odors from the air surrounding the carpet. Davidian Dep. at 15 - 21. The prospective consumer for opposer's EVERFRESH carpet cleaner product would be a person needing to clean a rug or carpet.



Opposer's EVERFRESH "in-line" white-label carpet cleaner products are sold next to similar deodorizing and cleaning products in supermarkets, drug stores, hardware stores, and home improvement centers across the nation. The bottles of these products sell at retail from \$4.⁰⁰ to \$14.⁰⁰, depending upon the type and size of the product.

Rug Doctor has a current sales relationship with several flooring and carpeting stores through its carpet cleaner rental program, including The Home Depot, Inc. and Lowes Companies, Inc. Davidian Dep. at 22.

Rug Doctor has a trademark monitoring policy that includes bringing oppositions against the registration of marks that it believes would create a likelihood of confusion with its EVERFRESH trademark, such as its

successful objections to Ashland Oil Company's registration of EVERFRESH as applied to an automobile vent system air freshener.⁷ We also note Rug Doctor's successful objection to World Wide Sales, Inc.'s application for the mark for "all purpose odor neutralizing preparation for general use in eliminating odors from the air."⁸



Applicant (or "Mohawk") is the second largest flooring manufacturer in the world with products such as carpets, rugs, hardwood flooring and tile. The involved carpet has been combined with odor-freshening chemicals to deal with organic odors such as pet odors, food spill odors, etc. Williams Dep. at 27 - 28. Mohawk has a contract with Fabricushion to supply the enzyme chemical used in its FOREVER FRESH / MOHAWK FOREVER FRESH carpet, and has a license to use the ODOR-EATER designation with its FOREVER FRESH / MOHAWK FOREVER FRESH carpet products. *Id.* at 30 - 31. Although both applications were filed as intent-to-use applications, Mohawk has since filed amendments to allege use of the mark FOREVER FRESH since at least as early as

⁷ In view of the stipulation filed August 3, 2005, Opposition No. 91159180 was dismissed with prejudice. See also Davidian Dep. at 24 - 25.

⁸ See footnote 5 *supra*.

October 9, 2001 and use of the mark MOHAWK FOREVER FRESH since at least as early as September 15, 2002.

Mohawk sells its FOREVER FRESH / MOHAWK FOREVER FRESH carpet in independent carpet stores and in home centers, such as those of the Lowes Companies, Inc. and The Home Depot, Inc. *Id.* at 9, 62. Copies of warranty documentation and other point of sale labels for the involved carpet are contained in the record, such as the following:

MOHAWK®
Forever
Fresh™
Pat.Pend.

AN EXCLUSIVE COLLECTION OF  CARPETS™

ANALYSIS

Standing

Opposer's standing is a threshold inquiry made by the Board in every *inter partes* case. In *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1029 (Fed. Cir. 1999), the Federal Circuit has enunciated a liberal threshold for determining standing, i.e., the opposer must have: (1) a legitimate personal interest in the opposition, and (2) a reasonable basis for the belief of damage. See also *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); and *Lipton Industries, Inc. v. Ralston Purina Company*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Rug Doctor alleges in its Notice of Opposition that it will be damaged if Mohawk Brands, Inc. were to be granted registrations for Applicant's FOREVER FRESH / MOHAWK FOREVER FRESH marks, and has submitted evidence of opposer's ownership of its EVERFRESH registrations. We consider this evidence as sufficient to establish opposer's interest and, therefore, standing, in these proceedings.

Priority

Because opposer has established that it owns valid and subsisting registrations of its pleaded mark, priority is not an issue. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); and *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995).

Likelihood of Confusion

We turn, then, to the issue of likelihood of confusion under Section 2(d) of the Trademark Act. Specifically, the focus of our determination is on the issue of whether applicant's **FOREVER FRESH** and **MOHAWK FOREVER FRESH** marks, when used in connection with carpets, and specifically carpet containing or treated with odor-freshening chemicals, so resemble opposer's **EVERFRESH** mark in the claimed registrations as to be likely to cause confusion, to cause mistake or to deceive as to source or sponsorship.

Our determination must be based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d

1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We examine first the *du Pont* factor focusing on the relatedness of the goods as described in the applications and in the claimed registrations.

With respect to the goods, it is well established that the goods of the parties need not be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *In re International*

Telephone & Telephone Corp., 197 USPQ 910, 911 (TTAB 1978). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Mohawk argues that it sells carpets - albeit, the involved carpets are treated with odor-freshening chemicals. Mohawk points out that Rug Doctor has never made carpets, has no plans to make carpets, and does not view carpet manufacturers as its competitors. Rather, opposer makes deodorizers, fabric cleaning products and carpet-cleaning equipment.

Although opposer agrees that these goods are not competitive, it argues that base products and cleaning or restoration products and services especially designed for use on, or with, the base products must be deemed to be related. For example, opposer points to cases such as *Christian Dior, S.A.R.L. v. Miss Dior of Flatbush*, 173 USPQ 416 (E.D.N.Y. 1972) [clothing goods and dry cleaning stores]; and *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) [furniture and furniture refinishing].

Similarly, opposer argues that these respective goods are functionally identical because they serve the same

function. That is, "[b]oth Mohawk's and Rug Doctor's products are designed to give consumers an odor-free and stain-free carpet that will result in a 'fresh' smelling and feeling room." Opposer's brief, p. 15. Furthermore, opposer contends that it would not be at all unreasonable for a consumer to conclude that the maker of the EVERFRESH carpet deodorizers and stain removers could also have been involved in creating the ingredients in Mohawk's manufacturer-applied, odor-protected carpet.

In fact, an ODOR EATERS product is imbedded in Mohawk's carpet, and ODOR EATERS is the brand name of one of opposer's competitors in the field of carpet deodorizing products. Applicant's own usage is evidence that Combe International, a provider of carpet cleaning products, has expanded into the field of carpets through Combe's relationship with Mohawk. If this dual usage is true of ODOR EATERS, it could also be true of EVERFRESH. Given Rug Doctor's long standing, dominant presence in the field of carpet cleaning machines and related goods and services, opposer argues that it is likely that a customer will expect Rug Doctor to associate with or sponsor carpet manufacturers, such as Mohawk, for new carpet manufacturing technologies, involving odor elimination.

Accordingly, we find that applicant's and registrant's goods are commercially-related products. The consumer viewing these products in the marketplace are likely to conclude that suppliers of carpet cleaners and deodorizers are affiliated with carpet manufacturers. Given how common it is in the current marketplace for national brands to move into functionally-related markets through logical brand extensions, it is the perception of this possibility more than the reality of the senior user's actual business plan that creates the relationship. 3 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:19 (4th ed. 2001).⁹ As seen above, Mohawk adds to this perception in the manner it touts its relationship with ODOR-EATERS through its point-of-sale materials.

Accordingly, on balance we find that the *du Pont* factor favors the position of opposer that the respective goods are related.

As to channels of trade, Mohawk's applications and Rug Doctor's registrations contain no restrictions as to the

⁹ If consumers believe, even though falsely, that the natural tendency of producers of the type of goods marketed by the prior user is to expand into the market for the type of goods marketed by the subsequent user, confusion may be likely. On the other hand, the actual intentions of the prior user with respect to future expansion will not ordinarily affect the likelihood that prospective purchasers are confused. McCarthy §24.19.

channels of trade or methods of distribution. Thus, the parties' goods may be sold in all channels of trade appropriate for such goods. *Sheraton Corp. of Am. v. Sheffield Watch, Inc.*, 480 F.2d 1400, 1401, 178 USPQ 468, 469 (CCPA 1973); *In re Cont'l Graphics Corp.*, 52 USPQ2d 1374, 1376-77 (TTAB 1999). Furthermore, "[i]t is proper to construe applicant's description of its goods in the manner most favorable to opposer." *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581, 218 USPQ 198, 199-200 (Fed. Cir. 1983).

Indeed, the evidence indicates overlapping channels of trade. While Rug Doctor's products and Mohawk's products are not always sold in the same places, Rug Doctor and Mohawk do use some of the same channels of trade. For example, Rug Doctor has a current sales relationship with several flooring and carpeting stores, including specialty carpet stores, through its carpet cleaner rental program. These could well be the same independent floor-covering dealers through which Mohawk sells its carpets. However, admittedly, only a small share of opposer's sales of EVERFRESH cleaning and deodorizing products have been made to customers through independent carpet stores. In addition to its "in-line" white-label carpet cleaner products (as shown above), Rug Doctor has also indicated

its intention to use the EVERFRESH neck label on some of its red-label carpet cleaner products sold on rental machine racks. In this event, the EVERFRESH mark will appear in hundreds of Lowes and Home Depot stores that also sell Mohawk carpets. Indeed, as Rug Doctor continues to expand its EVERFRESH line, it is likely that the overlapping channels of trade will expand greatly.

In short, opposer argues that inasmuch as its products are currently sold in the same stores as Mohawk's carpets, and inasmuch as Rug Doctor continues to expand its use of EVERFRESH, that mark will appear in hundreds or thousands of stores that also sell Mohawk's carpets. Thus, the channels of trade here have a small amount of overlap currently, but this overlap is certain to grow significantly in the years ahead, and this factor must be considered as weighing in favor of Rug Doctor and a likelihood of confusion.

As to the *du Pont* factor focusing on the conditions under which and buyers to whom sales are made, we have seen above that both Rug Doctor's and Mohawk's goods are sold to the same consumer group – those who want to eliminate odors from their homes. Opposer's products are relatively inexpensive products. Whether purchasing carpets or carpet cleaners and deodorizers, there is no evidence that this

consumer group has any special level of expertise or sophistication. Furthermore, Mohawk's carpet brand, FOREVER FRESH, will be hidden after the carpet is installed, encouraging a high degree of customer fuzziness in recalling the exact secondary mark used on the underside of the carpet. Hence, any purported sophistication of carpet consumers does not dispel the likelihood of confusion in this particular post-sale confusion context. See *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 875, 230 USPQ 831, 837-38 (2d Cir. 1986). On balance, we find that this factor also favors opposer.

We turn next to examine the similarity or dissimilarity of the parties' marks in their entirety as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). As to each of these methods for comparison, opposer argues that the parties' marks are confusingly similar.

While we must consider the similarity or dissimilarity of the marks when viewed in their entirety, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature

of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark, FOREVER FRESH, incorporates opposer's EVERFRESH mark in its entirety. We agree with opposer that the most obvious difference is the prefix "for-." However, from the standpoint of connotation and commercial impression, this prefix is largely superfluous, as it does not change the meaning or suggestion of applicant's mark. As to meaning, in the context of these two marks, the words "ever" and "forever" are synonyms. The ordinary meaning of the term "ever" is "always" and the meaning of "forever" is "for a limitless time."¹⁰ Accordingly, the connotation of opposer's "Everfresh" mark is that the deodorizing product will "always stay fresh." This is substantially the same connotation as the "stay fresh for a limitless time" meaning of applicant's "Forever Fresh." Accordingly, we agree with opposer that, as used in connection with deodorizers and carpets - especially carpet containing or treated with odor-freshening chemicals - these two

¹⁰ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1985.

formulations convey quite the same connotations and commercial impressions.

Finally, as to appearance and sound, the first part of both marks contains the identical root, "ever," and the second part of both marks contains the identical term "fresh." We concur with opposer's position that applicant, as the junior user, cannot simply sidestep this conclusion by repeatedly arguing that the alliteration it created with the addition of the prefix "for" in FOREVER FRESH distinguishes its mark from opposer's EVERFRESH. As for the MOHAWK FOREVER FRESH mark, we find that this is a case where the addition of a house mark adds to the likelihood of confusion rather than diminishing it. *Key West Fragrance & Cosmetic Factory, Inc. v. The Mennen Co.*, 216 USPQ 168, 171 (TTAB 1982).

As to the *du Pont* factor focusing on the strength of opposer's mark, opposer and its predecessor in interest have been using its mark for more than twenty-seven years. While opposer has sold millions of dollars worth of its product over the years, we cannot be sure what share of the market for such goods this represents. There is certainly insufficient information in this record to determine that

this mark is well-known when used in connection with the claimed goods. Accordingly, this is a neutral factor.

As to the *du Pont* factor focusing on the number and nature of similar marks in use on similar goods, applicant argues that the weakness of opposer's mark may well be the most important factor in our likelihood of confusion analysis. In support of this conclusion, applicant has presented information about those third-party registrations that it contends are relevant to our analysis:¹¹

EVER-FRESH

for "tobacco pouches" in International Class 34;¹²



for "aerated whipped cream" in International Class 1;¹³

EVER-FRESH

for "sour dressing of the type derived from vegetable fat rather than cream; non-dairy, vegetable-derived liquid creamer and non-dairy vegetable derived liquid adapted to be whipped for use a food topping:

¹¹ Registrations that have been cancelled or expired have absolutely no evidentiary value, such as Registration Nos. 0804890, 2270675, 2034243 and 2316254.

¹² Registration No. 0664599 issued on July 22, 1958; second renewal.

¹³ Registration No. 0891011 issued on May 12, 1970; second renewal; owned by ConAgra Brands, Inc.

half and half; cream containing vanilla, sugar and stabilizer in which cream whipping gas is dissolved under pressure for use as a food topping" in International Class 29;¹⁴

EVERFRESH

for "bacteriostatic chemicals for use in the treatment of textiles, paper, leather and other industrial goods" in International Class 1;¹⁵

Everfresh

for "frozen vegetables, namely, corn" in International Class 29;¹⁶



for "fruit juice drinks containing water" in International Class 32;¹⁷

EVERFRESH

for "food preservative; namely, a replacement for sulfites" in International Class 1;¹⁸



for "packaged minerals for use in controlling humidity in residential and commercial refrigerators and coolers" in International Class 1;¹⁹

¹⁴ Registration No. 1121087 issued on June 26, 1979; renewed; owned by ConAgra Brands, Inc.

¹⁵ Registration No. 1191932 issued on March 16, 1982; renewed.

¹⁶ Registration No. 1294712 issued on September 11, 1984; renewed.

¹⁷ Registration No. 1642216 issued on April 23, 1991; renewed.

¹⁸ Registration No. 1749151 issued on January 26, 1993; renewed.

¹⁹ Registration No. 1768349 issued on May 4, 1993; renewed.

EVERFRESH	for "spa water management system, namely, ozone generators and ion purifiers sold as part of a spa in combination with pre-filters" in International Class 11; ²⁰
EVERFRESH	for "refrigeration/air conditioning units for providing heated or cooled air to a cargo container using controlled atmosphere" in International Class 11; ²¹
EVERFRESH	for "fruit juices and fruit drinks" in International Class 32; ²²
EVERFRESH MAKEUP	for "cosmetics, namely, foundation makeup" in International Class 3; ²³
EVER FRESH CONCEALER	for "cosmetics, namely, concealer" in International Class 3; ²⁴
EVERFRESH	for "packages of paper for containing liquid food products and paper blanks for forming such packages" in International Class 16; ²⁵
EVER-FRESH SYSTEM	for "non-medicated premoistened disposable infant care wipes, tissues and towelettes in Int. Class 3; "heated dispensing unit for

²⁰ Registration No. 2200343 issued on October 27, 1998; Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

²¹ Registration No. 2522623 issued on December 25, 2001.

²² Registration No. 2555295 issued on April 2, 2002.

²³ Registration No. 2759946 issued to L'Oreal USA Creative on September 2, 2003. No claim is made to the word "makeup" apart from the mark as shown.

²⁴ Registration No. 2780810 issued to L'Oreal USA Creative, Inc. on November 4, 2003. No claim is made to the word "concealer" apart from the mark as shown.

²⁵ Registration No. 2820267 issued on March 2, 2004.

	premoistened wipes, tissues and towelettes" in International Class 11; ²⁶ and
EVERFRESH	for "fire suppressant composition and food nutrient supplements for live and cut trees" in International Class 1. ²⁷

Applicant also contends that this showing is supported by uses of the EVERFRESH mark in excerpts from LEXIS/NEXIS computerized library of news articles published in the United States:²⁸

... Landmark Products Corp. ... has introduced a home version of a popular commercial kitchen tool called the **Everfresh** FoodSaver. The unit, which contains a blend of natural nontoxic minerals, absorbs excess humidity and odors, making an optimal environment for storing foods. That means foods will stay fresh longer, vegetables will be crisper, and at the same time unwanted odors will be trapped within the unit so your butter will not smell like fish again ...²⁹

EverFresh USA: Oxygen absorber that eliminates odor from packaged food, prevents

²⁶ Registration No. 2954666 issued on May 24, 2005.

²⁷ Registration No. 3124543 issued on August 1, 2006.

²⁸ Applicant also submitted an article from the *Walkato Times*, which we have not considered inasmuch as it appears to be a newspaper in New Zealand.

²⁹ *Plain Dealer [Cleveland]*, April 13, 1994. We note that this article appears to show an expansion from commercial to residential markets by the owner of Registration No. 1768349, above, at footnote 20.

mold growth and keeps freshness without preservatives.³⁰

Litter type: Hoffman prefers clumping cat litter. She recommends **Everfresh** litter with activated charcoal.³¹

Applicant's search for the term "everfresh" within ten words of "cleaning or cleaner or deodorizer" resulted in three hits spanning a period of ten years drawn from all NEXIS news sources. In context, each one appears to be suggestive of the product. Two are used in connection with food packaging and the third with cat litter. In spite of the sixteen third-party registrations shown above (several of which are owned by the same enterprises), we find none of the marks claim use in connection with carpets, carpet cleaners or deodorizers. Furthermore, these third-party registrations made of record by applicant are not evidence, under the sixth *du Pont* factor ("the number and nature of similar marks in use on similar goods"), that the marks depicted therein are in use or that they are familiar to purchasers. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Rather,

³⁰ *Packaging Digest*, January 1, 2003. This article contains a listing of 450 exhibitors at a packaging show at the Anaheim Convention Center, of which EverFresh USA, of Placentia, CA, is one exhibitor.

³¹ *Chicago Tribune*, January 30, 2005.

combined with the several uses in the Nexis excerpts, they show the suggestive nature of this term in a variety of contexts where maintaining freshness is highly desirable. Taking into account all of this evidence, we find this factor is neutral for opposer, at worst.

As to the absence of any clear evidence of actual confusion, we also find this too to be a neutral factor in the instant case. In addition to the fact these are not competing goods and the overlap in channels of trade has been somewhat limited to date, it was not until quite recently that applicant actually began to use its mark. We have absolutely no information about the extent of applicant's promotion and actual sales of carpets under this mark. Moreover, given the relatively inexpensive nature of opposer's cleaning and deodorizing materials, consumers would be unlikely to go to the trouble of reporting any confusion. Finally, actual confusion need not be shown as the test is the likelihood of confusion.

In summary, Mohawk seeks registration of two marks we find to be confusingly similar to Rug Doctor's registered mark in connection with related goods. This is especially true in the post-sale context in the years after a consumer purchases Mohawk's FOREVER FRESH brand carpets.

Accordingly, we find a likelihood of confusion in both applications herein.

Decision: Both oppositions are sustained on the basis of likelihood of confusion under Section 2(d) of the Lanham Act and registration to applicant of both of its marks is refused.