

**THIS OPINION IS NOT A
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Novartis AG

v.

Cera Products, Inc.

Opposition No. 91173560
against Serial No. 78747999

Peter S. Sloane, Stephen J. Quigley and Angela M. Martucci
of Ostrolenk Faber Gerb & Soffen, LLP, for Novartis AG.

Morton J. Rosenberg and Rajiv S. Shah of Rosenberg Klein &
Lee for Cera Products, Inc.

Before Bucher, Zervas and Ritchie, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Cera Products, Inc. seeks registration on the Principal
Register of the mark **CERAFLU** (*in standard character format*)
for goods identified in the application, as amended, as
"oral hydration powdered nutritional supplement drink mix"
in International Class 5.¹

¹ Application Serial No. 78747999 was filed on November 6,
2005 based upon applicant's allegation of a *bona fide* intention
to use the mark in commerce.

Novartis AG has opposed this application on the ground of priority of use and likelihood of confusion, alleging that applicant's mark, when used in connection with the identified goods, so resembles the following marks:

THERAFLU	for "cough and cold preparation" in International Class 5; ²
THERAFLU VAPOR STICK	for "cough and cold medicine" in International Class 5; ³ and
THERAFLU THIN STRIPS	for "cough, cold and allergy preparations" in International Class 5; ⁴

as to be likely to cause confusion, to cause mistake or to deceive, under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). In addition, opposer alleged prior common law rights in the term **THERAFLU** for a variety of pharmaceutical preparations and dietary supplements for the treatment of cold and flu symptoms. Opposer has also opposed this application on the ground of dilution, alleging that applicant's mark will blur the distinctiveness of opposer's famous **THERAFLU** mark.

Applicant, in its answer, denied all the essential allegations of these claims.

² Registration No. 1452879 issued on August 18, 1987; renewed.

³ Registration No. 2744823 issued on July 29, 2003.

⁴ Registration No. 3266132 issued on July 17, 2007.

I. THE RECORD

In addition to the pleadings and the file of the involved application, the record also includes the trial transcript of Eric Edward Fehling, employed by Novartis Consumer Health as Brand Manager of opposer's **THERAFLU** brands, whose testimony was taken on June 3, 2008, along with the related exhibits; opposer's notice of reliance, filed on June 10, 2008, making of record certified copies of opposer's pleaded registrations and copies of third-party registrations; copies of applicant's answer to opposer's first set of interrogatories to applicant, applicant's response to opposer's second set of interrogatories to applicant, applicant's answer to opposer's first set of request for production of documents and things, and applicant's response to opposer's first set of requests for admissions; a copy of the confidential transcript of the discovery deposition of Charlene Riikonen, applicant's president, dated August 24, 2006, and filed under seal; and printouts from printed publications obtained through the Lexis/Nexis computer database.

Applicant filed a notice of reliance introducing into the record copies of several of its own and third-party registrations and opposer's responses to applicant's discovery requests.

Both parties filed briefs, and opposer filed a reply brief. Also, we note that both parties have designated portions of the record and the briefs as "Confidential." Accordingly, we will refer to the information so designated in only a very general fashion.

II. FACTUAL FINDINGS

Opposer is a global pharmaceutical company. Fehling Dec. at 8. Novartis AG, headquartered in Basle, Switzerland, has approximately \$39 billion in annual revenues and over 100,000 employees. Opposer's subsidiary, Novartis Consumer Health, Inc., sells personal care products ranging from cough/cold medications to dietary supplements, from analgesics to gastrointestinal products to foot care products. These products are sold under brand names such as **TRIAMINIC, COMTrex, BENEFIBER, EXCEDERIN, BUFFERIN, MAALOX, EX-LAX, LAMISIL** and **KERI**. *Id.* at 7 - 9.

Applicant, a Maryland corporation, is a small privately-held company having fewer than ten employees. Charlene Riikonen, the President of Cera Products, Inc., is responsible for promoting applicant's products, largely through visits to medical meetings. Otherwise, applicant has no sales representatives on staff. Ms. Riikonen's husband, Esko Riikonen, is also an Officer

of applicant. Riikonen Dep. at 61, 75, 77, 84, 86 - 87, 109, Opposer's Notice of Reliance at Ex. D at Answer to Interrogatory Nos. 16, 17.

III. ANALYSIS

A. Opposer's 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 (Fed. Cir. 1999), the Federal Circuit enunciated a liberal threshold for determining standing, i.e., whether one's belief that one will be (is) damaged by the registration is reasonable and reflects a real interest in the case. 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). Opposer has properly made its pleaded registrations of record. We consider this sufficient to establish opposer's interest and, therefore, standing to oppose registration of applicant's mark, in this proceeding. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

B. Opposer's Priority

Moreover, because opposer has established that it owns valid and subsisting registrations of its pleaded marks, Section 2(d) priority is not an issue in this case as to the marks therefor and goods covered thereby. 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).⁵ Opposer has also, as discussed *infra*, established its common law priority through Mr. Fehling's testimony and documentary evidence in connection with **THERAFLU** marks for additional, related products.

C. Likelihood of Confusion

We turn, then, to the issue of likelihood of confusion under Section 2(d) of the Trademark Act. 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

⁵ We note in addition that applicant does not contest either opposer's standing to bring this proceeding or its priority of use.

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).

Renown of opposer's mark

The first *du Pont* factor we consider is the factor of fame. The fame of the prior mark plays a dominant role in likelihood of confusion cases featuring a famous mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Fame for likelihood of confusion purposes arises "as long as a significant portion of the relevant consuming public ... recognizes the mark as a source indicator." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). That is, we look to the class of customers and potential customers of a product or service. In this case, the relevant public for opposer's

goods and applicant's goods includes all members of the general public.

Opposer's **THERAFLU** product was first launched in the United States in 1987. Opposer has been selling a growing number of **THERAFLU** products nationwide for over twenty years.⁶ In 2007, the most recent year for which the record contains any data, opposer enjoyed annual sales of its **THERAFLU** products approaching a hundred-million dollars (\$100,000,000.⁰⁰). Among all the products currently on the market that are directed to the treatment of flu symptoms, **THERAFLU** maintains a number one ranking measured by gross sales. Further, opposer's latest market research to evaluate the popularity and recognition of its **THERAFLU** mark shows that opposer's **THERAFLU** mark has an aided brand awareness of 93% among relevant consumers.⁷ Fehling dep. at 17 - 22.

⁶ The record includes testimonial evidence from Mr. Fehling, with documentary support, regarding a range of products offered by opposer to treat various cold and flu symptoms. Opposer's products are offered in various forms such as powder, thin strips, caplets, vapor patches, and vapor fan units. Mr. Fehling also testified about opposer's plans to expand further into homeopathic products.

⁷ This statement simply reflects the fact that Mr. Fehling testified about the results of a company study completed prior to this litigation, and not our scrutiny of a survey conducted in support of opposer's position herein.

Commensurate with the impressive sales are opposer's extensive promotional efforts surrounding the **THERAFLU** mark. Opposer spent more than \$ 32 million in advertising and promotion during the five months of the flu season of the year before Mr. Fehling's testimony in June 2008. Novartis Consumer Health, through its over-the-counter division in the United States, ties its level of promotional expenditures directly to a set percentage of sales. Hence, each year as the gross annual sales increase, so do the promotional expenditures. *Id.* at 47. While the details of opposer's nationwide promotional campaigns for **THERAFLU** products on TV, radio, and print ads remain confidential, the documentation is substantial and most detailed. *Id.* at 30 - 32, Opposer's Exhibits ## 6 and 7. For example, opposer has provided detailed flow charts listing day-by-day television ad placement information over a period of more than five years, often on popular, primetime shows on national cable and over-the-air networks. *Id.*

Mr. Fehling testified about involvement by local radio personalities (*Id.* at 33); **THERAFLU** ads targeted to the Hispanic market (*Id.* at 33 - 34); national, free standing inserts for Sunday papers having routine runs of 45 million copies (*Id.* at 34 - 35, Opposer's Exhibit #8); promotion in national drug and grocery stores (*Id.* at 36); in-store

creatives (*Id.* at 37-38, Opposer's Exhibit #9); product samples (*Id.* at 38); and Mr. Fehling authenticated an exhibit of a hundred pages of relevant screen-prints from opposer's Internet website, www.theraflu.com (*Id.* at 39, Opposer's Exhibit #10,). This website information shows bilingual (e.g., English-language and Spanish-language) pages; online coupons; an interactive flu tracker; and educational information, including an interactive solution finder for the flu-sufferer. *Id.* at 40 - 41. Opposer has advertised online through in-stream and in-banner ads through <http://www.valueclickmedia.com> (*Id.* at 42), and through targeted ads, e.g., with any Google search statement like "Flu." Opposer has placed advertisements for **THERAFLU** ads on the sides of New York City buses and billboards along busy thoroughfares. *Id.* at 43. Opposer and its **THERAFLU** products have been the subject of articles published in national trade periodicals, local newspapers and national newspapers and magazines, including *The Washington Post* and *Newsweek*. In addition, opposer points to unsolicited mentions of the helpfulness of **THERAFLU** products by national television personalities like Kelly Ripa, Deborah Norville, Anderson Cooper and Stephen Colbert. *Id.* at 48.

By the standards established by the Federal Circuit, as noted above, opposer's mark **THERAFLU** is famous for remedies

for cough, cold and flu symptoms, a point never seriously disputed by applicant. On this record, we find for purposes of our likelihood of confusion analysis, that opposer's **THERAFLU** mark is famous in connection with remedies for cold and flu symptoms and is entitled to broad protection. *Bose*, 63 USPQ2d at 1305. The Federal Circuit has stated repeatedly that there is no excuse for even approaching the well-known trademark of a competitor inasmuch as "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 22 USPQ2d at 1456. Hence, we find that the *du Pont* factor focusing on fame weighs heavily in favor of finding a likelihood of confusion herein.

The Goods

We now consider the relatedness of the parties' respective goods. Applicant seeks registration of its mark for use in connection with "oral hydration powdered nutritional supplement drink mix," in International Class 5. Opposer's registrations identify its relevant goods as remedies for cough and colds, and opposer has demonstrated its common law usage on a variety of products for treating the symptoms of colds and flu.

It is well established that the goods of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. Rather, it is sufficient that the respective goods of the parties be 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 *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). Clearly, the inquiry is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. See *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1403, 186 USPQ 476, 477 (CCPA 1975).

The involved goods are all pharmaceutical preparations and dietetic substances adapted for medical use by individuals suffering the symptoms of a cold or flu. However, in support of its position that its powdered drink mixes are quite different from opposer's goods, applicant argues that it is selling a "food product" (not regulated by

the FDA), while opposer is marketing a medicated over-the-counter (OTC) product having drugs among its ingredients, and that therefore opposer's product is regulated by the FDA.

While this distinction as to FDA approval appears to be true, it is not determinative under the facts of this case. Applicant's **CERAFLU** product is directed to users needing hydration as a result of having influenza. Opposer's original **THERAFLU** product is basically to treat flu symptoms, with a focus on medication designed to relieve cough and cold symptoms. However, we note that applicant is not marketing ordinary, light beverages (or beverage mixes) in International Class 32, but is selling beverages (or beverage mixes) *for medical purposes* in International Class 5.

Hence, both applicant's and opposer's products are designed for the individual suffering symptoms of a cold/flu. They come in the same powdered form in the same basic flavors (e.g., citrus/lemon/lime). Certainly, neither requires a prescription, and there is no evidence that consumers weigh the value of FDA approval when considering their over-the-counter, flu-treatment options.

Applicant repeatedly points out that the only way in which opposer's product provides hydration is that the

powder is necessarily mixed with eight ounces of hot water. On the other hand, the record shows that, in fact, media publications have promoted the hydrating power of **THERAFLU** and opposer points out that its **THERAFLU FORTIFENSE** packaging states that **THERAFLU** provides the additional fluids that doctors recommend for flu-sufferers: "Its powerful Hot Liquid format provides comforting warmth and *hydration* while helping to maintain a healthy immune system" (*emphasis* supplied). An oft-used slogan in opposer's television ad campaigns and on its point of sale creatives for **THERAFLU** has been: "Relieve Your Cold, Hydrate Your Body." Fehling dep. at 19, 44 - 47, Exhibits ## 12 and 13. Clearly then, hydration has been a key communication point in promotional materials directed to prospective **THERAFLU** consumers.

Opposer argues that applicant's nutritional supplements are very closely related to the cough and cold medicines and preparation covered by opposer's registrations, and the related goods for which it has demonstrated prior use. In its reply brief, opposer states "both Applicant's and Opposer's products are non-prescription, powdered products, packaged in individual serving sizes, intended to be mixed with water, to treat people suffering from influenza." Reply brief at 4. In

addition to pointing out that it markets both medicated preparations for relief of cold and allergy symptoms as well as electrolyte replacement fluids, opposer points to third-party use-based registrations to show examples of the same mark being used on both types of goods:

CIMA

for "vitamin preparations, dietary supplements, and pharmaceutical tablets, pills and capsules; namely, *cold medicines*, antacid pain relievers, analgesics, cold tablets, mineral supplements, *electrolyte replacements*, ulcer preparations, sinus preparations, antibiotics and antibacterials" ⁸



for "gelatin-coated vitamins, minerals, herbal and *nutritional supplements*; gelatin coating compositions sold as an integral component of capsules, caplets, tablets, and encapsulated liquid pharmaceuticals, namely analgesics, NSAIDS, anticonvulsants, *cough and cold preparations*, immunosuppressants, osteoporosis agents, a full line of gelatin coated pharmaceuticals and *nutritional supplements*" ⁹



for "gelatin-coated vitamins, minerals, herbal and *nutritional supplements*; pharmaceutical preparations, namely, gelatin coating compositions sold as an integral component of *capsules, caplets and tablets for the treatment and/or alleviation of*

⁸ Registration No. 1728502 issued on October 27, 1992; renewed.

⁹ Registration No. 2972571 issued on July 19, 2005.

cold, cough, flu, allergy and sinus symptoms and premenstrual syndrome; pharmaceutical preparations, namely, gelatin coating compositions sold as an integral component of capsules, caplets and tablets, namely analgesics, antitussives, anti-inflammatories, antipyretics, antihistamines, decongestants, vitamins; and a full line of gelatin-coated pharmaceuticals and nutritional supplements in oral dosage form" ¹⁰

Opposer argues correctly that third party registrations such as these that cover a number of different goods have probative value in demonstrating that such goods are of a type which may emanate from a single source. See *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1469 (TTAB 1988).

Indeed, given the close relationship of these goods, we find that this critical factor favors opposer.

Trade Channels

Under the *du Pont* factor focusing on the similarity of the trade channels, we note that none of the identifications of goods in opposer's registrations or applicant's application includes any trade channel limitations. We therefore presume that the goods of the application and

¹⁰ Registration No. 2978111 issued on July 26, 2005. No claim is made to the term "Gelcaps" apart from the mark as shown.

registrations travel in all the appropriate channels of trade for such goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); and *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ["[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade ..."].

Additionally, Mr. Fehling testified that **THERAFLU** branded products are sold in all types of drug stores like Walgreens and CVS, major national chains like Target, grocery stores like Kroger and Safeway, in discount stores like Costco, Wal•Mart and Kmart, convenience stores like the local 7/11 or small "mom and pop" stores, at gas stations, airport newsstands, military installations, etc. Opposer sells **THERAFLU** to third party repackers who repackage the product into single-dose or trial size packaging (for convenience stores, hotels, etc.) and **THERAFLU** is sold online by third parties such as [Amazon.com](https://www.amazon.com) and [Drugstore.com](https://www.drugstore.com). *Id.* at 47 -55. Applicant is hoping to ramp

up its meager sales to reach as many prospective new consumers as possible. Riikonen Dep. at 95.

Further, the record shows that the flu-remedies of both parties are available to all members of the general public online. Finally, the record shows that among the wholesale enterprises available to distribute this type of goods on to retailers, both opposer and applicant have contractual relationships with Cardinal Health Corp. for further distribution of their respective products.

Hence, the *du Pont* factor focusing on the channels of trade also weighs in favor of finding a likelihood of confusion.

Conditions of Purchase

We now consider opposer's contention at p. 29 - 30 of its brief that opposer's goods and applicant's goods are both inexpensive. In fact, applicant has admitted that its **CERAFLU** product is inexpensive. Riikonen Dep. at 29. The record shows that the parties' respective goods are often sold for under \$5.⁰⁰ a packet. Riikonen Dep. at 29, Fehling Dep. at 19 - 20. In addition to the fact that many prospective purchasers may be somewhat debilitated due to their suffering flu symptoms, the relatively inexpensive price exacerbates the risk that consumers will

mistake one product for the other. It has often been stated that purchasers of inexpensive consumer goods such as here are held to a lesser standard of care. See *Specialty Brands, Inc. v. Coffee Bean Distrib., Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984); see also *McNeil Consumer Brands, Inc. v. U.S. Dentek Corp.*, 116 F. Supp. 2d 604, 608, 56 USPQ2d 1758, 1761 (E.D. Pa. 2000) ["The average consumer does not put a significant amount of time or thought into the purchase of off-the-shelf pain reliever].

Thus, we find that the *du Pont* factor focusing on the conditions of purchase weighs in favor of a finding of likelihood of confusion herein.

Variety of Goods on Which the Mark is Used:

Opposer has used the **THERAFLU** mark on a variety of products all directed to those having flu symptoms, and the **THERAFLU** line of products has been continually increasing over the years. The **FORTIFENSE** dietary supplement is touted as coming "From the makers of Theraflu." While **THERAFLU** is often sold in its original, powdered form, the mark is also used prominently on a daytime cold and cough syrup, a nighttime cold and cough syrup, thin strips for the tongue, caplets, vapor patch, and a vapor fan unit. In

addition to the fact that the packaging for opposer's goods mentions the benefits of hydration for the flu-wracked body, it would not be a stretch for those familiar with opposer's line of flu remedies to believe that opposer was now offering a dietary supplement for persons with influenza directed to oral rehydration and electrolyte replacement. This factor also favors opposer.

We note that applicant, in defense of its adoption of its **CERAFLU** mark, points to its prior registrations for **CERASPORT, CERALYTE** and **CERA VACX**. However, we must consider applicant's mark currently before us, not the different ones in applicant's prior registrations. It is only when applicant combined its "CERA-" prefix with the "-FLU" suffix that the resulting term moved into the shadow of opposer's famous **THERAFLU** mark. Applicant's earlier-registered "CERA-" marks - none of which includes the term "-FLU" - are irrelevant in considering whether the opposer has demonstrated a likelihood of confusion during this opposition proceeding vis-à-vis its registered **THERAFLU** marks.

Actual Confusion

The absence of any known examples of actual confusion, as reported by both parties, does not compel a different

result in our likelihood of confusion analysis. Although neither party is aware of any actual confusion, evidence of actual confusion is not essential to proving a case of likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

Most importantly, we note that between February 2006 and June 2007, applicant incurred \$ 765 in promotional costs for its **CERAFLU** line of products, and had only \$ 4,000 in sales of **CERAFLU** products during this same period.

Response to Interr. ## 21 and #22 Thus, due to the fairly limited exposure of applicant's product in the marketplace, we further discount the apparent lack of actual confusion.

At best for applicant, this is a neutral factor.

The marks

We consider then the similarity or dissimilarity of the marks, determining whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports, Inc.* 73 USPQ2d at 1692. 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 their entirety that confusion as to the source of the services offered under the respective

marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

We begin our analysis of this factor mindful of the fact that as the fame of a mark increases, the degree of similarity between the marks necessary to support a conclusion of likely confusion declines. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309.

We turn first to the connotations of each of these respective marks. The derivation of the "-FLU" suffix seems obvious. Also, this fits a pattern of third-party registrations that applicant made of record, with marks having "-FLU" endings and applied to pharmaceuticals for flu prevention and/or flu symptoms (for horses and humans):

EQUI-FLU

for "equine influenza vaccine" in International Class 18;¹¹



for "pharmaceutical antiviral preparation" in International Class 5;¹²

¹¹ Registration No. 0849292 issued on May 21, 1968; second renewal.

¹² Registration No. 2576662 issued on June 4, 2002, Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged. The drawing is lined for the colors green and yellow and color is claimed as a feature of the mark.

WAL-FLU	for "flu relief medicine" in International Class 5; ¹³
DURAFLU	for "pharmaceutical preparations, namely a tablet used to treat the symptoms of flu, which consist of fever, aches and pains, runny nose, congestion, and non-productive cough" in International Class 5; ¹⁴
HEXAFLU	for "pharmaceutical preparations, namely a tablet used to treat the symptoms of flu, which consist of fever, aches and pains, runny nose and congestion" in International Class 5; ¹⁵

Applicant, Cera Products, Inc., explains its "CERA-" formative as an acronym referencing either "Cereal based rehydration assistance" or "Charlene and Esko Riikonen Associates." When combined, applicant argues that the term, "Cera-Flu," is intended to "... show that the mark **CERAFLU** is a product manufactured, sold and has a point origin from [applicant] and its use would be for users who experience dehydration." Answer to Interrogatory No. 35. In explaining the adoption of this mark, applicant refers to its earlier "CERA-" formative marks, as follows:

¹³ Registration No. 2704550 issued on April 8, 2003, Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

¹⁴ Registration No. 2712009 issued on April 29, 2003.

¹⁵ Registration No. 2859043 issued on June 29, 2004.

CERASPORT	for "thirst quenching soft drinks" in International Class 32; ¹⁶
CERAVET	for "food supplement, namely, maltodextrin combined with minerals, for domestic pets and livestock" in International Class 5; ¹⁷
CERALYTE	for "food supplement, namely maltodextrin combined with minerals, namely, sodium chloride, potassium chloride, and trisodium citrate" in International Class 5; ¹⁸
CERA VACX	for "food supplement containing rice syrup solids, sodium bicarbonate, and trisodium citrate" in International Class 5; ¹⁹

Applicant's **CERAFLU** product is an extension of its existing product line. The record shows that the **CeraSport** product is intended to prevent and/or correct dehydration due to sweat loss from physical exertion and/or heat stress. **CeraSport**, in its citrus-flavored, powder form is quite similar to the **CeraFlu** formulation - a product, as we have seen, for hydrating persons having influenza. However, despite applicant's acronym explanation for the derivation of its trade name (Cera Products, Inc.) and "CERA-" formative prefix, we view the term **CERAFLU** as a coined term whose final syllable suggests it may well be a flu remedy.

¹⁶ Registration No. 2209673 issued on December 8, 1998; renewed.

¹⁷ Registration No. 2233010 issued on March 16, 1999; renewed.

¹⁸ Registration No. 2899079 issued on November 2, 2004.

¹⁹ Registration No. 3384798 issued on February 19, 2008.

Applicant also argues in its brief that opposer's " ... prefix '*THERA*' is believed to be merely [a shortened form of] the generic word therapy." We view that as applicant's conjecture on the origins of opposer's mark.

Contrariwise, if one finds the prefix, "*THERA-*," to be arbitrary, then one is comparing two coined terms (i.e., **CERAFLU** and **THERAFLU**) without any established meaning. On the other hand, even accepting applicant's conjecture, opposer's **THERAFLU** mark, at worst, would be a suggestive term on the continuum of distinctiveness. Accordingly, even if we agreed with applicant that the marks have somewhat different meanings - one coined and the other suggestive, that is not the end of our analysis of the similarities and dissimilarities of the respective marks.

To the extent the involved products may well be called for orally, we agree with opposer that the soft "C" sound and the "Th" sound are quite similar. The soft letter "C" sounds like the letter "S." In turn, the letters "S" and "Th" also sound similar, such that an appreciable number of consumers will say or hear **THERAFLU** when **CERAFLU** is spoken and vice-versa. Although not the result of any expert testimony, applicant has submitted under notice of reliance printed publications discussing the confusingly

similar sounds created and heard by the soft letter "C" and the letters "Th":

- The letters "S" and "Th" are among sixteen consonants that are "notoriously confusable."²⁰
- Elderly consumers miss high-frequency consonant sounds, including "S" and "Th" inasmuch as they are weaker sounds that may easily be covered up by other noises. Accordingly, the elderly population is particularly susceptible to mispronouncing the marks at issue.²¹
- Spanish-language consumers (and others) whose first language is not English may encounter difficulty in properly pronouncing or hearing the marks inasmuch as the letter "C," especially when situated before the letter "E," is pronounced like the letters "Th." In real life, non-native speakers often replace the "Th" sound with an "S" sound. Given the strong bilingual nature of opposer's **THERAFLU** advertising campaigns, the

²⁰ "Speech Adaptation and Situational Optimality," *Academic Exchange Quarterly*, March 22, 2006.

²¹ "Now Hear This," *The Pantagraph* (Bloomington, Illinois) September 15, 2006.

likelihood of confusion due to such
mispronunciation is especially acute herein.²²

Given the close pronunciation of these two marks, confusion is most likely. See *G.D. Searle & Co. v. Chas. Pfizer & Co.*, 265 F.2d 385, 387, 121 USPQ 74, 76 (7th Cir. 1959), cert. denied, 361 U.S. 819 (1959) [**BONAMINE** is phonetically similar to **DRAMAMINE** as they contain the same number of syllables, they have the same stress pattern, with primary accent on the first syllable and secondary accent on the third, and the last two syllables are identical]; *Crown Radio Corp. v. Soundsciber Corp.*, 184 USPQ 221, 223 (CCPA 1974) [**CROWNSCRIBER** held confusingly similar to **SOUNDCRIBER**]; and *Hoffman-La Roche Inc. v. Knoll Pharm. Co.*, 167 USPQ 183, 185 (TTAB 1970) [**TARUXAN** and **TARACTAN**, both coined terms comprising the same number of syllables, bear a strong resemblance in sound].

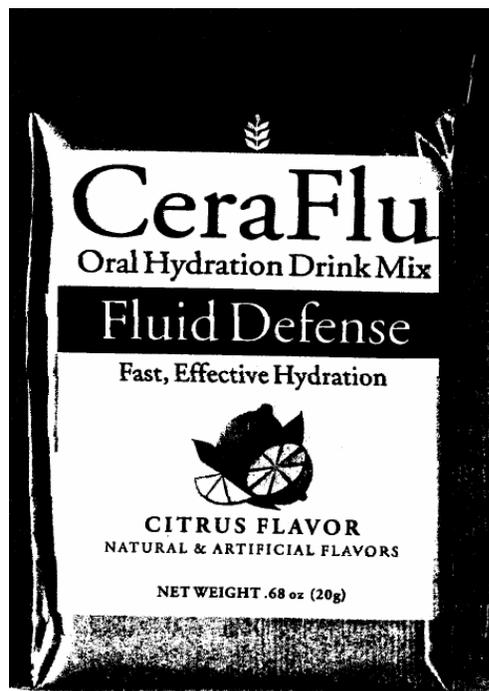
In its brief, applicant argues without support that the marks **THERAFLU** and **CERAFLU** have a "totally different appearance." Brief at 9. We disagree. In spite of the obvious difference in the initial letters ("Th" versus "C"),

²² "The Future of the Language: English is evolving fast, so how might it sound 500 or even 5000 year from now?" *New Scientist*, March 29, 2008; "English ain't gonna be what it used to," *The Dominion Post* (Wellington, New Zealand), March 28, 2008; and "Understanding Spanish," *Dow Jones Factiva*, April 27, 2007.

we find that these marks are more similar than dissimilar due to the identical remaining letters in the marks.

Because of these similarities in sound and appearance, we find that when compared in their entireties, they will engender similar commercial impressions.

Finally, we agree with opposer that applicant's labels support rather than negate that of which opposer complains: that **CERAFLU** inherently creates a commercial impression that is confusingly similar to that of **THERAFLU**. See *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984). Opposer has noted throughout the prosecution of this opposition that applicant's trade dress has a similar picture of a slice of lemon or lime placed on packets of similar size:



In sum, especially given the fame of opposer's mark, the similarities between the marks in appearance, sound and commercial impression outweigh the differences in connotation that applicant contends is most important.

Third Party Marks

Turning to the *du Pont* factor focusing on the number and nature of similar marks in use on similar goods, as seen above, applicant lists the third party uses of "-FLU" suffix marks adopted for remedies for influenza symptoms.²³

Applicant argues that opposer's likelihood of confusion claim is weakened by the presence of these third-party registrations. Brief at 16 - 17 However, we find that these third-party registrations do not diminish the distinctiveness of opposer's famous mark. The registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of purportedly similar marks in the marketplace. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin*

²³ The mark **EQUI-FLU** was adopted for use in connection with a flu vaccine for *horses* and hence has limited probative value herein.

Mint Corp., 216 USPQ 989 (TTAB 1982). Further, none of these marks [**TAMIFLU** (for a *prescription* medication); **WAL-FLU** (*Walgreen's* flu product); **DURAFLU** (suggests it is for the *toughest* of flu symptoms?); and **HEXAFLU** (suggests it is for *six* different flu symptoms?)] is as close to opposer's mark [**THERAFLU**] as is applicant's mark [**CERAFLU**].

Applicant attempts to weaken the presumptions to which opposer's pleaded registrations are entitled with the suggestion that the "*THERA-*" and "*-FLU*" components of this mark are both merely descriptive (or even generic). While applicant appears to be accurate in noting the highly suggestive nature of the "*-FLU*" suffix, we reject applicant's position that the "*THERA-*" portion of opposer's mark is weak (e.g., merely descriptive or generic) for the relevant goods. In fact, there is no evidence that "*THERA,*" which is not an English-language word, and which is not a recognized shorthand expression for the word "Therapy," is itself merely descriptive. Although two descriptive terms can be combined to create a distinctive new term, applicant's line of argument appears to comprise a collateral attack on opposer's registered marks. **THERAFLU** is the subject of several registrations which are entitled to the presumptions of Section 7(b) of the Trademark Act, 35 U.S.C. § 1057(b). None of these registrations is the

subject of a counterclaim or a separate petition to cancel. *See Countour Chain-Lounge Co., Inc. v. The Englander Co., Inc.*, 324 F.2d 186, 139 USPQ 285 (CCPA 1963); Trademark Rule 2.106(b)(2)(ii), 37 C.F.R. § 2.106(b)(2)(ii).

While third-party registrations prove nothing about the impact in the marketplace, they may be relied upon to show that a word common to each mark has a readily understood and well-known meaning and that it has been adopted by third parties to express that meaning. *Ritz Hotel Ltd. v. Ritz Closet Seat Corp.*, 17 USPQ2d 1467 (TTAB 1990). To conclude that the "-FLU" suffix, or even the combined term "Thera-Flu," is suggestive, however, does not appreciably weaken the strength of opposer's demonstrably famous **THERAFLU** marks.

At best for applicant, this is a neutral factor.

Likelihood of Confusion: Conclusion

After weighing all of the relevant *du Pont* factors, we find that opposer has established by a preponderance of the evidence that there is a likelihood of confusion between its marks and applicant's mark. **THERAFLU** is a distinctive, strong and famous mark; the respective goods herein are closely related; the trade channels are overlapping and these inexpensive goods will be directed to the same classes

of ordinary consumers; purchasers are unlikely to exercise care in purchasing the identified goods; and hence, considering the marks in their entireties, we find that the marks are sufficiently similar as to appearance, sound and commercial impressions that applicant's **CERAFLU** mark for "oral hydration powdered nutritional supplement drink mix" is likely to be confused with opposer's **THERAFLU** mark for the goods recited in the registrations, and as used under the common law.

D. Dilution

Because we have found for opposer in connection with its likelihood of confusion claim, we do not reach its claim of dilution.

Decision: The opposition on the ground of likelihood of confusion is sustained and registration to applicant of its **CERAFLU** mark is hereby refused.