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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Eden Foods, Inc.,
v.
Thomas Brenkwitz, d/b/a Brenkwitz Farms

Opposition No. 91151474
Against Serial No. 75873814

J. Timothy Hobbs and Christopher Kelly of Wiley Rein & Fielding LLP for Eden Foods, Inc.

C. Todd Kennedy for Thomas Brenkwitz.

Before Quinn, Bucher and Drost, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

On December 16, 1999, Thomas Brenkwitz d/b/a Brenkwitz Farms filed an application to register the following mark



for "fresh fruits" in International Class 31.¹

On February 25, 2002, Eden Foods, Inc. filed an opposition seeking to prevent the registration of this mark for fresh fruits on the ground of priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d). Opposer has taken the position that applicant's mark, when applied to applicant's goods, would so resemble EDEN formative marks it has used since at least January 1967 (through a predecessor in interest) in connection with a variety of vegetable, fruit and beverage products, and would so resemble previously registered marks on a wide array of food and beverage products, as to be likely to cause confusion, to cause mistake, or to deceive. In fact, Eden Foods, Inc. alleges that it owns a family of previously used and registered EDEN marks for a variety of food and beverage products, dietary supplements and restaurant services, including the following registrations of the mark EDEN alone:

REGISTRATION NO. 1452337 **EDEN** (STANDARD CHARACTER DRAWING)
for "pickled plums; processed and unprocessed dried fruits;
processed nuts; processed seeds; vegetable oils; namely, corn

¹ Application Serial No. 75873814 was filed based upon applicant's allegation of use in commerce at least as early as June 15, 1992. The application includes a statement that the mark in the drawing is lined for the colors red, orange, yellow, blue, purple and brown.

oil, olive oil, safflower oil, sesame oil; snack foods consisting of processed nuts, processed seeds and dried fruits" in International Class 29;

"processed grains, namely, corn meal, soy flour, chickpea flour, barley flour, wheat flour, buckwheat flour, millet flour, rice flour, rye flour; pasta, namely, wheat noodles, wheat and egg noodles, wheat and soy noodles, wheat and spinach noodles, wheat and buckwheat noodles, soy sauce; barley malt syrup for table use; vinegar; mustard; tomato based spaghetti sauce; sea salt for table use; beverage consisting of tea and herbs" in International Class 30; and,

"unprocessed beans, namely, aduki, black turtle beans, kidney beans, great northern beans, green lentils, mung beans, navy beans, pinto beans, soy beans; unprocessed peas, namely, chickpeas, split peas; unprocessed nuts; unprocessed edible seeds; unprocessed grains, namely barley, rice, wheat, buckwheat and millet; unprocessed corn and unpopped popcorn; unprocessed sea vegetables, namely sea weed" in International Class 31;²

REGISTRATION NO. 1862634 **EDEN** (STANDARD CHARACTER DRAWING)

for "vegetable oils, crushed tomatoes, sauerkraut, and processed can beans," in International Class 29;

"pasta; pizza sauce; teas; crackers; chips; misos; and condiments; namely, mustard, sea salt, processed sesame seeds, garlic pastes, furikake, pickled beefsteak leaf powder, bonito flakes, pickled ginger, tekka, wasabi powder, tamari, and shoyu," in International Class 30; and

"unprocessed grains; namely, barley, wheat, and quinoa," in International Class 31;³

REGISTRATION NO. 2172245 **EDEN** (STANDARD CHARACTER DRAWING)

for "restaurant services" in International Class 42;⁴

² Registration No. 1452337 issued August 11, 1987, reciting March 1967 as the date of first use and November 1969 as the date of first use in commerce; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

³ Registration No. 1862634 issued on November 15, 1994, reciting 1987 as the date of first use and date of first use in commerce for goods in International Class 29, 1975 as the date of first use and date of first use in commerce for goods in International Class 30, and 1978 as the date of first use and date of first use in commerce for goods in International Class 31; Section 8 affidavit accepted and Section 15 affidavit acknowledged; renewed.

⁴ Registration No. 2172245 issued on July 14, 1998, reciting May 22, 1996 as the date of first use and date of first use in

REGISTRATION No. 2229053 **EDEN** (STANDARD CHARACTER DRAWING)
for "fruit butter and fruit sauce" in International Class 29 and
fruit juices in International Class 32;⁵

REGISTRATION No. 2360206 **EDEN** (STANDARD CHARACTER DRAWING)
for "food supplement, namely, an orally ingested enzyme
beneficial to human intestinal bacteria" in International
Class 5;⁶

REGISTRATION No. 2503977 **EDEN** (STANDARD CHARACTER DRAWING)
for "dietary food supplements, namely, edible kombu root
seaweed, garlic balls and ume plum concentrate" in
International Class 5;⁷

as well as the following federal trademark registrations
where composite marks contained other words added to the
family name, EDEN, registered for a variety of food and
beverage products, dietary supplements, as well as a
number of related goods and services:

REGISTRATION No. 1440754 **EDENSOY** (STANDARD CHARACTER DRAWING)
for "soybean based food beverage," in International Class 29;⁸

commerce; Section 8 affidavit accepted and Section 15 affidavit
acknowledged.

⁵ Registration No. 2229053 issued on March 2, 1999, reciting
March 1967 as the date of first use and November 1969 as the
date of first use in commerce; Section 8 affidavit accepted and
Section 15 affidavit acknowledged.

⁶ Registration No. 2360206 issued on June 20, 2000, reciting
September 30, 1998 as the date of first use and date of first
use in commerce.

⁷ Registration No. 2503977 issued on November 6, 2001,
reciting July 1983 as the date of first use and date of first
use in commerce.

⁸ Registration No. 1440754 issued on May 26, 1987, reciting
July 1983 as the date of first use and date of first use in
commerce; Section 8 affidavit accepted and Section 15 affidavit
acknowledged.

REGISTRATION No. 1918958 **EDENBLEND** (STANDARD CHARACTER DRAWING)
for "soy bean and rice based food beverages," in International
Class 30;⁹

REGISTRATION No. 2166493 **EDEN BIOSCIENCE** (STANDARD CHARACTER DRAWING)
for "pesticides for agricultural or domestic use; plant
inoculations to prevent disease and insects," in International
Class 5;¹⁰

REGISTRATION No. 2184768 **EDEN BIOSCIENCE** (STANDARD CHARACTER DRAWING)
for "plant growth regulators for agricultural use; plant food,"
in International Class 1;¹¹

REGISTRATION No. 2272652



for "vegetable oils; processed vegetables; soybean based food
beverages; soybean based misos; nut and fruit butters;
processed nuts; processed edible seeds; processed mixture
consisting of any combination of fruits, nuts and seeds;
vegetable chips; and dried fruits" in International Class 29;
"tea; sugar; rice; pasta and noodles; flour; breakfast cereals;
honey; syrup for table use; candy; salt; mustard; vinegar;
sauces, namely, pizza and spaghetti sauces, soy sauce;
processed grains; rice and grain based food beverages; herbal
food beverages; seasonings, namely, processed sesame seeds,
garlic pastes, furikake, pickled beefsteak leaf powder, bonito
flakes, pickled ginger, tekka, wasabi powder; crackers; brown
rice chips; granola" in International Class 30; and
"unprocessed fruits, unprocessed vegetables, unprocessed grains,"

⁹ Registration No. 1918958 issued on September 12, 1995,
reciting January 14, 1994 as the date of first use and date of
first use in commerce; Section 8 affidavit accepted and Section
15 affidavit acknowledged.

¹⁰ Registration No. 2166493 issued on June 16, 1998, reciting
May 1996 as the date of first use and date of first use in
commerce; Section 8 affidavit accepted and Section 15 affidavit
acknowledged. The word "Bioscience" is disclaimed apart from
the mark as shown.

¹¹ Registration No. 2184768 issued on August 25, 1998,
reciting May 1996 as the date of first use and date of first use
in commerce; Section 8 affidavit accepted and Section 15
affidavit acknowledged. The word "Bioscience" is disclaimed
apart from the mark as shown.

unprocessed nuts and unprocessed edible seeds" in International Class 31;
"fruit juices; beverage concentrates for use in making non-alcoholic soft drinks" in International Class 32;¹²

REGISTRATION NO. 2281740 **EDEN BIOSCIENCE** (STANDARD CHARACTER DRAWING)
for "agricultural and horticultural analysis and consultation, namely, providing soil and plant tissue sampling, analysis, and written laboratory reports in connection therefor; providing plant food, pesticide, herbicide and fungicide use recommendations, nematode assaying, soil assaying, fungus assaying, plant tissue assaying; seed pathology, mycorrhizal assessment; plant tissue testing and analysis; providing and maintaining plant nutrient graphs for others for agricultural and horticultural purposes; agricultural and horticultural disease control," in International Class 42;¹³

REGISTRATION NO. 2326024 **EDENBALANCE** (STANDARD CHARACTER DRAWING)
for "a food supplement, namely, an orally ingested enzyme beneficial to human intestinal bacteria," in International Class 5;¹⁴

REGISTRATION NO. 2396738 **EDEN RANCH** (STANDARD CHARACTER DRAWING)
for "food supplements - vitamins, minerals, food digestant aids in tablet form for human use," in International Class 5;¹⁵

REGISTRATION NO. 2465964 **EDEN SPRINGS** (STANDARD CHARACTER DRAWING)

¹² Registration No. 2272652 issued August 24, 1999, reciting January 1996 as the date of first use and date of first use in commerce for goods in International Classes 29, 30, and 31 and November 1997 as the date of first use and date of first use in commerce for goods in International Class 32. The word "Organic" is disclaimed apart from the mark as shown.

¹³ Registration No. 2281740 issued on September 28, 1999, reciting July 1994 as the date of first use and first use in commerce. The word "Bioscience" is disclaimed apart from the mark as shown.

¹⁴ Registration No. 2326024 issued on March 7, 2000, reciting October 1998 as the date of first use and date of first use in commerce.

¹⁵ Registration No. 2396738 issued on October 24, 2000 reciting November 1954 as the date of first use and first use in commerce for food products. This application was originally filed by one Patricia Moore on January 29, 1998, and was then assigned to Eden Foods, Inc., on August 25, 2000.

for "bottled spring water" in International Class 32;¹⁶

REGISTRATION No. 2475031 **EDEN BIFA 15** (STANDARD CHARACTER DRAWING)
for "food supplement, namely, an orally ingested enzyme
beneficial to human intestinal bacteria," in International
Class 5;¹⁷

REGISTRATION No. 2583453 **EDENSOY LIGHT** (STANDARD CHARACTER DRAWING)
for "soybean based food beverage" in International Class 29;¹⁸
and

REGISTRATION No. 2905671 **EDENEWS** (STANDARD CHARACTER DRAWING)
for "newsletters in the field of food and food-related topics,
nutrition, health and diet, farming and agricultural and
environmental issues," in International Class 16.¹⁹

Applicant, in its answer, denied the salient
allegations of likelihood of confusion.

The Record

The record consists of the pleadings; the file of the
involved application; trial testimony, with related
exhibits, taken by each party; the status and title copies
of opposer's pleaded registrations, as well as applicant's

¹⁶ Registration No. 2465964 issued on July 3, 2001 reciting
September 22, 2000 as the date of first use and first use in
commerce. The word "Springs" is disclaimed apart from the mark
as shown.

¹⁷ Registration No. 2475031 issued on August 7, 2001 reciting
September 30, 1998 as the date of first use and first use in
commerce.

¹⁸ Registration No. 2583453 issued on June 18, 2002 reciting
December 29, 2000 as the date of first use and January 2, 2001
as the date of first use in commerce.

¹⁹ Registration No. 2905671 issued on November 30, 2004
reciting October 1999 as the date of first use and first use in
commerce.

responses to opposer's Interrogatories Nos. 3 and 11, and official records from the United States Patent and Trademark Office, all introduced by way of opposer's notices of reliance; and opposer's responses to two of applicant's requests for admission and Interrogatory No. 12, made of record by applicant's notice of reliance. The parties fully briefed the case, but an oral hearing before the Board was not requested by either party.

Eden Foods, Inc., (hereinafter "opposer") started out as a small, local food cooperative in Ann Arbor, Michigan, in the late 1960's. It evolved from a loose co-op into a for-profit, corporate, retail store in November 1969, and soon started wholesale distribution to other health food stores in that region of the country. Since then, opposer has grown into the large, international manufacturing and wholesale enterprise it is today.

Opposer deals primarily in food products, covering a broad range of items including grains and flours, pastas, beans, sauces, as well as fruits and vegetables sold in a variety of forms. According to the testimony of Mr. Michael J. Potter, opposer's president and chairman of the board, opposer has been engaged in the manufacture and distribution of high quality natural food and beverage

products under the EDEN name, both as a trade name and a trademark, continuously and without interruption, since 1969. It has been a leader in natural and organic food and beverage products, known for foods grown without the use of chemical herbicides, pesticides and caustic fertilizers. As a pioneer in organic certification standards, opposer developed the first "audit trail" in the organic food industry for tracing the source of a particular product to the specific field where it was grown. Most of opposer's products are organically certified in this manner.

Opposer's fruit products include dried cherries, juices such as apple, cherry and apple-cherry juice, apple and cherry juice concentrates, as well as butters and spreads made from apples, cherries, and/or strawberries.

Opposer's food products are sold throughout North America as well as in an array of foreign countries. In recent years, in addition to its wholesale and mail order operations, opposer has grown its business significantly with its presence on the Internet. Its retail food merchandising outlets include nationwide and regional supermarket chains such as Safeway, Whole Foods, Kroger, Giant, Albertsons, Meijer, Piggly Wiggly, Publix, etc., as

well as natural food stores, convenience stores and department stores. Opposer's annual gross sales are now consistently over one-hundred million dollars.

Opposer's products have received numerous awards from groups such as the Center for Science in the Public Interest (CSPI), the National Association for the Specialty Food Trade, Inc. (NASFT), the Canadian Health Food Association, etc., resulting in considerable free publicity in a variety of publications, including periodicals such as Alive, Consumer Reports, Cooks' Illustrated, Child and Prevention Magazine, newspapers such as The Wall Street Journal and The New York Times, and many others.

In his testimony, Mr. Potter introduced numerous other promotional items used by opposer, including coupons, recipe collections and brochures. Opposer has a trademark enforcement policy that Mr. Potter describes as "very vigorous," and has made of record a summary of civil actions and Board proceedings initiated against other parties.

The Opposition

Priority

There is no dispute as to opposer's Section 2(d) priority, in view of opposer's pleaded registrations, made of record in this proceeding by appropriate identification and introduction during the testimony of Mr. Potter. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

We agree with opposer that inasmuch as applicant has not sought cancellation of opposer's pleaded registrations, applicant's claim of priority, asserted for the first time in its brief, is impermissible as a matter of law. Moreover, applicant's claim that his great-grandfather adopted "Garden of Eden" as the name of a farm in the 1870's is not relevant to this proceeding. Whatever intellectual property rights may have originated with Frank Wede in 1878 have not been shown to have any chain of title leading to applicant, nor is there any evidence showing that this alleged use of the "Eden" name has been continuous and ongoing during the intervening 127 years.

Rather, to the extent that applicant has demonstrated trademark use of any mark containing the word EDEN, it is

use of the EDEN GARDEN name, and applicant commenced use of this name as a trademark in 1992 or 1993, decades after opposer adopted and began using the EDEN name.

Likelihood of Confusion

Accordingly, we turn to the issue of whether or not a likelihood of confusion exists in this case. In making this determination, we have followed the guidance of *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). The *du Pont* case sets forth the factors that should be considered, if relevant, in determining likelihood of confusion. As dictated by the evidence, different factors may play dominant roles in determining likelihood of confusion. *Kenner Parker Toys v. Rose Art Industries*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). The factors deemed pertinent in the proceeding now before us are discussed below.

We turn first to the similarity of the goods as described in the involved application and in opposer's registrations and in connection with which its prior mark has been in use. Opposer uses its mark in connection with, *inter alia*, fruits processed in a variety of forms. The involved products include dried cherries, apple, cherry and apple-cherry juice, apple and cherry juice

concentrates, and butters/spreads made from apples, cherries, and/or strawberries.²⁰ Applicant's goods are identified simply as fresh fruits.

While applicant argues that its fresh fruits are not related to opposer's processed fruits, we find that argument unpersuasive. Processed packaged fruits will be found within the same retail outlets, if not in the same section of the supermarket. Potter Dep. at 46.

Of course, it is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association or connection

²⁰ We refer primarily to the goods in Registration Nos. 1452337, 1862634, 2229053, 1440754, 1918958, 2272652, 2465964 and 2583453. In limiting our discussion to the food and beverage products identified in these particular registrations, we do not mean to imply that there is no likelihood of confusion between applicant's mark and the remaining cited registrations. On the contrary, it is simply not necessary herein to find that these other goods and services are also related to applicant's fresh fruits.

between the producers of the respective goods. See In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); and In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978). Although there is certainly no *per se* rule that all food items are related, this Board has had occasion in the past, on another record, to conclude that fresh fruits are indeed related to canned fruits. In re Wilson, 57 USPQ2d 1863 (TTAB 2001).

In a related du Pont factor focusing on the similarity of established, likely-to-continue trade channels, there are no restrictions on the trade channels of applicant's or opposer's goods. Furthermore, both parties market their goods through nation-wide supermarket outlets (e.g., Safeway) and both promote their products over the Internet. Accordingly, we find that the channels of trade are identical.

As to the conditions under which and buyers to whom sales are made, we find that both parties' goods are offered to the same classes of ordinary consumers, including many of whom could well be making "impulse" purchases of inexpensive food and/or beverage items in their local supermarket.

We turn then to the du Pont factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. 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 impression that confusion as to the source of the goods 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 a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

In making the case for why these marks are confusingly similar, opposer argues as follows:

In this case, the first part of Applicant's mark, EDEN, is identical in every respect to Opposer's EDEN mark. As observed by the Board, "it is often the first part of a mark which is most likely to be impressed upon the minds of a purchaser and remembered." Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988) [KIDWIPES confusingly similar to KID STUFF]. The inclusion of the word GARDEN does not obviate the confusing similarity between EDEN GARDEN and Opposer's EDEN mark. The word EDEN engenders the notion of an ideal place; and the word GARDEN, when combined with EDEN, similarly brings to mind the idea of a

place. Mother's Restaurant, Inc. v. Mother's Other Kitchen, Inc., 218 USPQ 1046, 1049 (TTAB 1983) [MOTHER'S OTHER KITCHEN confusingly similar to MOTHER'S PIZZA PARLOR]; see also In re McWilliams, 200 USPQ 47 (TTAB 1978) [MT. EDEN VINEYARDS confusingly similar to EDEN]. EDEN GARDEN, moreover, is highly similar in both structure and connotation to Opposer's EDEN RANCH and EDEN SPRINGS marks -- all are composite marks comprised of the word EDEN and another word that suggests a particular place.

The design element in Applicant's mark does not diminish the confusing similarity between EDEN GARDEN and Opposer's EDEN mark[s]. The design component of Applicant's mark consists essentially of a representation of an apricot and otherwise incorporates images commonly associated with farming. Applicant's design component is largely descriptive and plays only a minor role in forming the mark's commercial impression. See In re Wilson, 57 USPQ2d 1863, 1865 (TTAB 2001) [PINE CONE BRAND & design confusingly similar to PINE CONE]; see also 1 McCarthy, *Trademarks and Unfair Competition*, §7:36 at 773 (4th ed. 2004) ["Picture that is merely a representation of the goods themselves is regarded as merely descriptive of the goods."]

Finally, in marks consisting of both words and a design element, the word portion generally is the dominant feature because purchasers will refer to the word portion when calling for the goods. In re Mango Records, 189 USPQ 126 (TTAB 1975).

There is consistent authority both at the Board and elsewhere that the mere addition of a term to a mark will not avoid likelihood of confusion. See, e.g., Lilly Pulitzer, Inc. v. Lilli Ann Corp., 153 USPQ

406 (CCPA 1967); [THE LILLY and LILLI ANN confusingly similar].

Many of Opposer's EDEN brand product labels contain colorful depictions of fruit, including apples, cherries, grapes and tomatoes, and pastoral scenes containing trees and flowers, and generally are reminiscent of the design element contained in Applicant's mark. To the extent that the design element in Applicant's mark is considered, its similarity to Opposer's various product labels only enhances the likelihood of confusion in this case. Cf. Kenner Parker Toys Inc. v. Rose Art Industries Inc., 22 USPQ2d 1453 (CAFC 1992); Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 223 USPQ 1281, 1284 (CCPA 1984).

Opposer's brief, pp. 11 - 12.

By contrast, applicant argues that the marks are dissimilar in their entirety:

Applicant seeks to register a design mark. ... The similarity of appearance is determined by an "eyeball" test which emphasizes the total effect rather than individual features ... The possibility that purchasers with imperfect recall are likely to believe Applicant's homespun, busy artwork, viewed in its entirety, as simply another of corporate Opposer's simple word-marks is vanishingly small.

The words may be dominant, but even so, the words in the respective marks serve differently. Opposer's mark is EDEN, an unqualified noun standing alone. In Applicant's mark EDEN GARDEN, garden is the noun, Eden being a qualifier; in speech as in logic, the qualifier is subservient to the dominant noun ... Garden is displayed upon a field of trees, emphasizing the

point of the word; Eden is placed on a ribbon, without any relation to the design.

Applicant's brief, p. 13.

However, it is well established that the literal portion of a mark generally is the dominant feature. See In re Dacombe, 9 USPQ2d 1813, 1814 (TTAB 1988). Hence, while we must consider the marks in their entireties, it is entirely proper for us to focus on the word portion of applicant's mark in determining whether it is confusingly similar to opposer's marks. Although applicant attempts to argue that the word GARDEN is the dominant portion of applicant's mark, we disagree. As to connotation, the word EDEN alone, like the word GARDEN combined with the word EDEN, engenders the notion of an outdoor paradise. In making this contrast, applicant also contends that opposer uses the EDEN name "standing alone." However, the record shows that opposer also uses EDEN as a composite in such marks as EDEN SPRINGS and EDEN RANCH. Opposer's composite marks, like the literal portion of applicant's mark, consist of the word EDEN and another word suggesting a particular place, and are hence quite similar to applicant's mark as to sound and appearance.

We also agree with opposer that the evidence of record shows that the trade dress on opposer's labels

includes colorful depictions of fruit and pastoral scenes reminiscent of the design elements contained in applicant's composite mark. Hence, to the extent that the design portion of applicant's mark is considered, its similarity to opposer's product labels serves to enhance the likelihood of confusion in the instant case. *Cf.*

Kenner Parker Toys Inc. v. Rose Art Industries Inc., *supra*; *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (CCPA 1984).

In summary, on this *du Pont* factor, we find that a proper evaluation of the marks in their entireties show that they are highly similar as to overall commercial impression, and that the minor differences one might discover with a side-by-side comparison certainly do not outweigh these similarities.

We turn next to a discussion of the fame of opposer's prior marks. The strength of a mark is determined by a variety of factors, including the length of time the mark has been in use, the volume of sales under the mark and the extent of advertising or promotion of the goods with which the mark is used. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Accordingly, after carefully reviewing this

extensive record, we find that opposer's EDEN marks are well-known, strong marks in this field and are entitled to a broad scope of protection. Opposer has used its EDEN marks continuously and without interruption for thirty-five years in connection with a wide variety of food and beverage products. In recent years, annual sales of these products have generated more than one-hundred million dollars in gross revenues for opposer. Potter Dep. at 7-9, 40. The costs of opposer's promotional activities and advertising expenditures have been exceeding two million dollars per year. The record shows that opposer's promotional efforts have resulted in widespread awareness and recognition of opposer and opposer's EDEN marks. As a result of opposer's position within the industry, we consider the strength of its EDEN marks to be such that the scope of protection afforded opposer's marks would encompass foods products beyond the immediate range of processed fruit products presently offered by opposer. This would be particularly true if applicant's food products were organically certified. Since applicant's goods as identified in its application are unrestricted as to the nature of the goods, even if applicant has not

claimed such usage, we must presume that applicant's food products could include organically-grown fresh fruits.

Similarly, opposer's aggressive trademark enforcement activities reinforce the strength of opposer's EDEN marks. See 2 J.T. McCarthy, McCarthy on Trademarks and Unfair Competition, §11.91 (" ... active program of prosecution of infringers ... enhances the distinctiveness and strength of a mark").

As to a related du Pont factor focusing on the number and nature of similar marks in use on similar goods, we find an absence of any evidence in this record of third-party use of similar marks in the food and beverage field. Although applicant argues that EDEN formative marks are inherently weak because of Eden's connection to "the Biblical Eden," we find this allegation unpersuasive and uncorroborated by any evidence in the record.

As to the du Pont factor focusing on the variety of goods on which a mark is or is not used, the evidence of record demonstrates opposer's use of the EDEN name in connection with a wide array of food and beverage products, including a variety of fruit products. Use of a mark on a wide variety of products reflects and enhances the mark's strength. Kenner Parker Toys Inc. v. Rose Art

Industries Inc., *supra* at 1458. We agree with opposer's position that its use of its EDEN marks in connection with a diverse product line makes it more likely that consumers will purchase applicant's EDEN GARDEN brand fresh fruits in the mistaken belief that they represent one more of opposer's products.

Opposer has also argued that it possesses a "family" of marks. The family of marks doctrine has applicability in those situations where the plaintiff had established a family of marks characterized by a particular feature, so that the defendant's subsequent use of its mark containing the feature will cause the relevant purchasing public to assume that defendant's mark is yet another member of the plaintiff's family. See Blansett Pharmaceutical Co. Inc. v. Carmrick Laboratories Inc., 25 USPQ2d 1473 (TTAB 1992); Econo-Travel Motor Hotel Corp. v. Econ-O-Tel of America, Inc., 199 USPQ 307 (TTAB 1978); and Porta-Tool, Inc. v. DND Corp., 196 USPQ 643 (TTAB 1977).

It is well settled that merely adopting, using and registering a group of marks having a feature in common for similar goods or related goods or services is insufficient to establish, as against a defendant, a claim of ownership of a family of marks characterized by the

feature. Rather, it must be demonstrated that prior to defendant's first use of its challenged mark, the various marks said to constitute the family, or at least a good number of them, were used and promoted together in such a manner as to create among purchasers an association of common ownership based upon the family characteristic.

See J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); Hester Industries Inc. v. Tyson Foods Inc., 2 USPQ2d 1646 (TTAB 1987); and Cambridge Filter Corp. v. Sensodyne Corp., 189 USPQ 99 (TTAB 1975).

In the present case, opposer has made of record a copy of its catalogs, sales sheets, pamphlets and brochures, multiple issues of Eden News, advertisements and articles, press releases spanning many years, as well as a screen print from its website at www.edenfoods.com. Throughout these materials, the housemark, EDEN, and the trade name, , are used along with EDEN as a product mark and all of the other EDEN-formative marks claimed herein. Sales sheets and catalogues contain listings and photographs of a sizeable number of EDEN and EDEN-formative marks on a myriad of different food items. Advertisements promote, and the authors of articles use,

these various marks together in such a manner as to create among purchasers an association of common ownership based upon EDEN, the family surname. Hence, we find that opposer indeed possesses a family of EDEN marks.

We turn briefly to the du Pont factor focusing on the length of time during and conditions under which there has been concurrent use without evidence of actual confusion. Initially, we note that the issue before us is one of likelihood of confusion, and hence the absence of known instances of actual confusion is not determinative.

Yet, applicant argues that the absence of any known instances of actual confusion in this case is particularly compelling because of applicant's use of EDEN "for over a century." However, as noted above, the record in this case shows that applicant has used his mark for no more than twelve or thirteen years. Moreover, applicant business only "got ...rolling" after the publication of an article in 1997. Brenkwitz Dep. at 23. Applicant has never widely advertised or actively marketed its products, and presently engages in no significant promotion of its products. *Id.* at 7, 24. Applicant has introduced no evidence suggesting a noteworthy volume of sales of its fruit products under the EDEN GARDEN name. Hence, there

is nothing in the record to show that there has been a meaningful opportunity for confusion to occur, and therefore we do not find the absence of any evidence of actual confusion to be a significant fact herein.

Upon balancing all the relevant du Pont factors, and giving each its appropriate weight, we find a likelihood of confusion herein.

Decision: The opposition is sustained on the ground of likelihood of confusion under Section 2(d) of the Lanham Act, and registration to applicant is hereby refused.