

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Oral Hearing Held: August 4, 2022

Mailed: August 3, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

—————
Eden Foods, Inc.

v.

Smooth Lounge
—————

Opposition No. 91265174

Christopher Kelly and Adrienne J. Kosak of Wiley Rein LLP,¹
for Eden Foods, Inc.

Jeffrey Sturman of Sturman Law, LLC,
for Smooth Lounge.

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Before Kuhlke, Pologeorgis, and Dunn,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Smooth Lounge (“Applicant”) seeks registration on the Principal Register of the standard character mark ADAM & EDEN FORMULATIONS (FORMULATIONS disclaimed) for “Dietary supplements; Herbal supplements; Mineral supplements;

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¹ Opposer’s counsel’s change of correspondence address filed on March 2, 2022 (*see* 21 TTABVUE) is noted. Board records have been updated accordingly.

Nutritional supplements; Vitamin supplements” in International Class 5.²

Eden Foods, Inc. (“Opposer”) opposes the registration of Applicant’s mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In the notice of opposition, Opposer alleges prior use of EDEN as a trademark in connection with food and beverage products since the 1960s, a family of EDEN marks, including EDEN, EDENSOY, EDEN FOODS, EDENEWS, EDENSTORES, and EDEN RECIPES, and ownership of the following Principal Register registrations:

Reg. No. 1440754 -- **EDENSOY** for “soybean-based food beverages.”

Reg. No. 1452337-- **EDEN** for “pickled plums; processed and unprocessed dried fruits; processed nuts; processed seeds; vegetable oils; namely, olive oil, safflower oil, sesame oil; snack foods consisting of processed nuts, processed seeds and dried fruits; processed grains, namely, wheat flour, buckwheat flour, millet flour, rice flour, rye flour; pasta, namely, wheat 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; unprocessed beans, namely, aduki, black turtle beans, kidney beans, great northern beans, green lentils, navy beans, pinto beans, soy beans; unprocessed peas, namely, chickpeas, 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.”

Reg. No. 1862634 -- **EDEN** for “vegetable oils, crushed tomatoes, sauerkraut, and processed canned beans; 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; unprocessed grains; namely, barley, wheat and quinoa.”

² Application Serial No. 88888081 was filed on April 26, 2020, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Reg. No. 2229053 – **EDEN** for “fruit butter, fruit sauce and fruit juices.”

Reg. No. 2503977 – **EDEN** for “dietary food supplements, namely, edible kombu root seaweed, ume plum concentrate.”

Reg. No. 2905671 – **EDENEWS** for “newsletters in the field of food and food related topics, nutrition, health and diet, farming and agricultural and environmental issues.”

Reg. No. 2977773 – **EDEN** for “processed popcorn for popping.”

Reg. No. 3102575 – **EDEN** for “dried cherries.”

Reg. No. 4065063 – **EDEN** for “providing recipes and information in the field of cooking and food preparation; providing information in the field of health, nutrition, diet, beauty and organic farming techniques.”

Reg. No. 4171490 – **EDENEWS** for “downloadable electronic newsletters in the field of food and food-related topics, nutrition, health and diet, farming and agricultural and environmental issues.”

Reg. No. 4264567 – **EDEN STORE** for “retail and on-line store featuring food and beverage products.”

Reg. No. 4264570 – **EDEN** for “retail and on-line store featuring food and beverage products.”

Reg. No. 4336312 – **EDEN RECIPES** for “downloadable software in the nature of an application for obtaining news and information in the field of food and food related topics, nutrition, health and diet and related textual, audio and video content on mobile and stationary electronic devices.”

Reg. No. 4431041 – **EDEN** for tooth powder; dietary food supplements and nutritional supplement concentrates; sushi mats; processed vegetables; chili; processed mushrooms; raisins; tofu; vegetable based food beverages; prepared entrees consisting primarily of beans with rice and other side dishes; Umeboshi plum paste; grain based food beverages; natural food sweeteners; arrowroot for use as a food thickener; rice; Ponzu sauce; prepared entrees consisting primarily of rice with beans and other side dishes; edible spices; concentrates for making non-alcoholic beverages; and cooking wine.”

Reg. No. 6138923 – **EDEN** for “gift baskets and bags primarily containing soup and also including a ceramic soup cup; gift baskets and bags primarily containing fruit butters, fruit sauces and dried fruits; processed seeds for snacking; processed

beans and gift baskets and bags primarily containing tea powder and also including a whisk, spoon and bowl; gift baskets and bags primarily containing organic teas and also including an infuser spoon and mug; gift baskets and bags primarily containing popcorn and also including a popcorn bowl; pasta and pasta sauce; processed seeds for use as seasoning; condiments, namely, ketchup, mustard, and mayonnaise.”³

Applicant filed an answer to the notice of opposition in which it denied the salient allegations asserted therein.⁴

I. Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant’s involved application file. The record also includes the evidence summarized below.

A. Opposer’s Evidence

1. Testimony declaration of Michael J. Potter (“Potter Decl.”), Opposer’s Chairman and President, and the following accompanying exhibits:⁵ (a) copy of Opposer’s current product catalog with a 2013 copyright date; (b) photograph of a retail store signage incorporating Opposer’s pleaded EDEN mark; (c) screenshots of Opposer’s website

³ Notice of Opposition ¶ 14 (e) and (n), 1 TTABVUE 11-12. Opposer’s attachment of plain copies of its pleaded registrations to the Notice of Opposition, without showing current status and title or the equivalent from the electronic database records of the USPTO, was insufficient to make the registrations of record for purposes of trial. *See* Trademark Rule 2.122(d)(1); 37 C.F.R. § 2.122(d)(1) (“A registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by an original or photocopy of the registration prepared and issued by the Office showing both the current status of and current title to the registration, or by a current copy of information from the electronic database records of the Office showing the current status and title of the registration.”). As noted *infra*, however, Opposer submitted status and title copies of its pleaded registrations via the testimony declaration of Michael Potter which makes Opposer’s pleaded registrations of record. *See* Trademark Rule 2.122(d)(2); 37 C.F.R. § 2.122(d)(2) (“A registration owned by any party to a proceeding may be made of record in the proceeding by that party by appropriate identification and introduction during the taking of testimony or by filing a notice of reliance ...”).

⁴ Applicant’s Answer to Notice of Opposition (4 TTABVUE).

⁵ 10 TTABVUE.

www.edenfoods.com; (d) print advertisements; (e) copies of electronic version of Opposer's EDENNEWS newsletter; (f) examples of promotional materials such as shelf-talkers, point-of-sale materials, and collateral promotional materials such as mouse pads, packaging clips, pencils, stickers, notepads, and potholders; (g) screenshots of Opposer's Facebook, Twitter, Pinterest, LinkedIn and Instagram pages; (h) various press releases concerning Opposer and its EDEN branded goods; and (i) status and title copies of Opposer's pleaded registrations.

2. First notice of reliance on: (1) Applicant's supplemental responses to Opposer's First Set of Interrogatories; (2) Applicant's responses to Opposer's Second Set of Interrogatories; and (3) the transcript of and exhibits to the discovery deposition of Jeff Robbins, given both in his individual capacity and as corporate representative for Applicant.⁶
3. Second notice of reliance on printouts of publicly available Internet web sites of third parties.⁷
4. Third notice of reliance on status and title copies of various third-party registrations.⁸
5. Rebuttal testimony declaration of Michael J. Potter ("Rebuttal Potter Decl."), Opposer's Chairman and President, and accompanying exhibits.⁹
6. Rebuttal notice of reliance on various screenshots of goods sold on www.amazon.com.¹⁰

Opposer filed a trial brief and a reply trial brief.¹¹

B. Applicant's Evidence

1. First notice of reliance on status and title copies of various third-party registrations submitted to show the purported weakness of the

⁶ 7 TTABVUE.

⁷ 8 TTABVUE.

⁸ 9 TTABVUE.

⁹ 19 TTABVUE.

¹⁰ 20 TTABVUE.

¹¹ 22 and 24 TTABVUE.

term EDEN in connection with goods related to Opposer's goods.¹²

2. Second notice of reliance on status and title copies of various third-party registrations submitted to show that many goods which are similar to and sold within the same channels of trade as Applicant's goods and Opposer's goods contain vitamins and/or supplements.¹³
3. Third notice of reliance on status and title copies of various third-party registrations submitted to show that Applicant's goods are commonly sold in the same channels of trade as other related goods in International Class 3.¹⁴
4. Fourth notice of reliance on status and title copies of various third-party registrations submitted to show the purported weakness of the term EDEN in connection with goods related to Opposer's goods.¹⁵
5. Fifth notice of reliance on status and title copies of various third-party registrations submitted to show clothing goods are commonly sold within the same channels of trade as Opposer's goods.¹⁶
6. Sixth notice of reliance on various third-party websites submitted to show the weakness of the term EDEN in connection with Opposer's goods.¹⁷

Applicant filed a trial brief.¹⁸

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as "standing" by the Federal Circuit and the Board, is an element of the plaintiff's case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277

¹² 13 TTABVUE.

¹³ 14 TTABVUE.

¹⁴ 15 TTABVUE.

¹⁵ 16 TTABVUE.

¹⁶ 17 TTABVUE.

¹⁷ 18 TTABVUE.

¹⁸ 23 TTABVUE.

(Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *reh'g en banc denied*, 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *cert. denied*, __ S.Ct. __, 2021 WL 4507693 (2021); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute, and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Corcamore*, 2020 USPQ2d 11277, at *4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982); *Spanishtown Enters.*, 2020 USPQ2d 11388, at *1.

Here, Opposer has submitted status and title copies of its pleaded registrations.¹⁹ Opposer's ownership of these pleaded registrations, for which status and title are established, support its plausible likelihood of confusion claim against the involved application, thereby showing its real interest in this proceeding and a reasonable basis for Opposer's belief of damage. Opposer therefore has established its entitlement to a statutory cause of action. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

¹⁹ *Id.* (20 TTABVUE 124-129).

III. Opposer's Section 2(d) Claim

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it has priority in the use of its pleaded marks and that use of Applicant’s mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of Applicant’s goods, *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1848, even in the absence of contrary evidence or argument. *Threshold TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1040 (TTAB 2010).

We decide likelihood of confusion based on Opposer’s pleaded Registration No. 2503977 for the standard character mark EDEN for “dietary food supplements, namely, edible kombu root seaweed, garlic balls and ume plum concentrate, as well as Opposer’s pleaded Registration No. 4431041 for the standard character mark EDEN for the relevant goods “dietary food supplements and nutritional supplement concentrates.” Opposer’s registered standard character EDEN mark in the aforementioned registrations is more similar to Applicant’s mark, or cover goods more related to Applicant’s goods than Opposer’s other pleaded registrations. As discussed below, the priority established through the presumptions afforded these two pleaded registrations avoids the assessment of priority of use based on common law rights.

Therefore, we need not reach likelihood of confusion based on the remaining pleaded registered marks or Opposer's alleged common law rights.

A. Priority

Because Opposer has made its pleaded Registration Nos. 2503977 and 4431041 of record, and Applicant has not counterclaimed to cancel them, priority is not an issue as to the marks and goods covered by these two registrations. *See Top Tobacco LP v. N. Atl. Op. Co.*, 101 USPQ2d 1163, 1169 (TTAB 2011) (citing *King Candy, Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 82 USPQ 108 (CCPA 1974)); *see also Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 181 USPQ 272, 275 n.6 (CCPA 1974) ("prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation"); *Itel Corp. v. Ainslie*, 8 USPQ2d 1168, 1169 (TTAB 1988) ("because of the existence of opposer's valid and subsisting registration, it need not prove prior use as to the services recited therein").

B. Family of Marks

We next consider the family of marks alleged by Opposer. In support thereof, Opposer argues that it uses a common, distinctive formative, i.e., the term EDEN, by itself and in numerous combinations with other words (both registered and unregistered), such as EDENSOY, EDEN ORGANIC, EDEN TRADITIONAL, and EDEN BALANCE.²⁰ Opposer further contends that its purported family of EDEN-formative marks are used and promoted together, such as in advertising, in recipes,

²⁰ Opposer's Trial Brief, p. 15, 22 TTABVUE 22.

on Opposer's website, social media sites, and trade shows.²¹

As support of its purported family of EDEN-formative marks, Opposer submitted, inter alia, the following testimony and documentary evidence:

- The Eden Foods catalog, with a copyright date of 2013, that reflects the marks EDEN, EDEN FOODS, EDENSOY, EDEN RECIPES, and EDEN ORGANIC marks.²²
- Opposer's print advertisements and press releases reflecting the marks EDEN, EDEN FOODS, EDEN ORGANIC, EDENSOY, and EDEN SELECTED used together and dated prior to the filing date of Applicant's involved applications.²³
- Screenshots of Opposer's www.edenfoods.com website reflecting the marks EDEN FOODS, EDEN, EDEN SELECTED, and EDENSOY.²⁴
- Numerous copies of Opposer's monthly newsletter EDENEWS reflecting the marks EDEN FOODS, EDEN, EDEN SELECTED, EDENSOY, and EDEN ORGANIC.²⁵
- Screenshots of Opposer's Facebook, Twitter, Pinterest, LinkedIn, and Instagram pages reflecting the marks EDEN FOODS, EDEN, EDENSOY, EDEN SELECTED.²⁶
- Copies of various press releases concerning awards Opposer has received for its EDEN goods.²⁷

Further, Opposer's Chairman and President, Michael J. Potter, testified to

²¹ *Id.*; see also Potter Decl. ¶ 21 and accompanying exhibits A, E, G, I, and J; 10 TTABVUE 8, 17-101, 195-343, 347-452, 471-485.

²² Potter Decl., Ex. A; 10 TTABVUE 17-101.

²³ Potter Decl., Exs. E and K; 10 TTABVUE 230, 236, 297, 495, 510.

²⁴ Potter Decl., Ex. C; 10 TTABVUE 105-186.

²⁵ Potter Decl., Ex. G; 10 TTABVUE 347-452.

²⁶ Potter Decl., Ex. J; 10 TTABVUE 476-485.

²⁷ Potter Decl., Ex. K, 10 TTABVUE 486-512.

the following:²⁸

11. In addition to our health and wellness products currently available, Eden Foods, either directly through a licensee, has also offered a variety of other products over the years, including orally ingested enzymes, minerals, vitamins and food digestion tablets. These products were sold under such EDEN formative marks as EDENBALANCE, EDEN BIFA 15 and EDEN RANCH. Eden Foods is deeply invested in product development in the supplement category. For example, we are currently considering topical supplements and pet supplements for sale under the EDEN name.²⁹

15. Eden Foods' EDEN brand products have been sold over the Internet since the late 1990s Internet outlets include sales to professional purchasers and ultimate consumers through our website found at <edenfoods.com>; to professional and ultimate consumers through such electronic retailers as Amazon.com; and through websites operated by various independent retail food stores and food store chains which carry EDEN brand products in their traditional brick and mortar stores. Our products also are sold to professional purchasers through Internet outlets restricted to business-to-business purchasers. Eden Foods' EDEN brand products are available for sale on the Internet through literally hundreds of websites.³⁰

18. Another way Eden Foods promotes its products is through the distribution of recipes. These recipes are available on our website found at <edenfoods.com> and also are contained in brochures and booklets. We also offer a downloadable software application called EDEN RECIPES. We currently offer over 1,000 recipes which are distributed widely to ultimate consumers, to professional purchasers and to the food industry. Our recipes cover all kinds of foods, and we offer options to search our recipes by categories including diet and ingredients which allows consumers to focus on particular health benefits. Our EDEN brand products are highly versatile, and our recipes highlight the many uses of our products.

19. Eden Foods also publishes a monthly newsletter called EDENEWS. The newsletter is distributed in electronic and hard copy formats and contains information about our EDEN brand products, with particular

²⁸ Potter Decl. at ¶¶ 11, 15, 18-19, 23-28; 10 TTABVUE 5-10.

²⁹ Potter Decl., ¶ 11; 10 TTABVUE 5.

³⁰ *Id.* at ¶ 15; 10 TTABVUE 6.

emphasis on the health benefits imparted by the various products. The EDENEWS newsletter is sent to approximately 60,000 subscribers each month. The newsletter also is available on the <edenfoods.com> website where it may be viewed/downloaded by visitors to the site.

23. Eden Foods also attends numerous national and regional trade shows where we promote Eden Foods and EDEN brand products. Eden Foods' presence at these shows includes the use of prominently displayed exhibits, distribution of printed materials such as the product catalogue and recipes discussed in this Declaration, display and distribution of promotional videos and the display and distribution of sample food products.

24. Another vehicle for promoting Eden Foods and EDEN brand products is through our website found at <edenfoods.com>. Eden Foods has operated its website at least since the late 1990s. Our site contains a great deal of marketing materials and advertisements relating to our products. We also use it as a platform to convey information about health and nutrition. Our website generates a great deal of Internet traffic. For example, during the one-year period between September 1, 2019 and September 1, 2020, our website had millions of page views and two (2) million unique visitors.

25. Eden Foods maintains an active Internet presence and also promotes its products through social media platforms such as Facebook, Twitter, Pinterest, LinkedIn, and Instagram, and has a dedicated YouTube channel. Eden Foods' Facebook page, by way of example, features more than 165,000 "likes." Eden Foods has nearly 200,000 combined fans/followers across its various media platforms.

26. Eden Foods and its products also receive considerable gratuitous publicity. Our products have been featured on such programs as "Good Morning America" and have been referenced in articles in such leading publications as the Los Angeles Times, The New York Times and in numerous magazines, such as People, Health, Men's Health, Real Simple and Racheal Ray Everyday and other publications.

27. In addition, our EDEN brand foods are promoted by publications and websites relating to healthy eating. For example, EDEN products are promoted by HEALINGGOURMET.COM. This website developed by health, fitness and nutrition experts is dedicated to providing nutrition and health information, including recipes and recommendations for "Best Brands." Our EDEN products frequently appear on the site under "Best Brands."

28. We invest significant time and resources advertising and promoting our EDEN products. Our annual expenditures for advertising and marketing activities are in the millions of dollars. Our annual retail sales for EDEN brand products consistently exceed 100 million dollars.

Finally, Opposer contends that the Board has determined on at least three occasions—two of which predate the ADAM & EDEN FORMULATIONS application date, and one of which was based on evidence submitted well prior to Applicant’s application filing date—that the EDEN marks constitute a family of marks.³¹

“Although the USPTO may register several individual marks comprising a family element together with one or more other elements, it does not register ‘families’ of prefixes, suffixes, or other components of a mark.” *New Era Cap Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at *6-7 (TTAB 2020). “Thus, an opposer relying on a family of marks is relying on common law rights in the alleged family.” *Id.* at *7. “The burden of proving a family of marks falls with Opposer, the party asserting the existence of the family.” *Id.*

The Federal Circuit has defined a family of marks as follows:

A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.... Recognition of the family is achieved when the pattern of usage of the common element is

³¹ While we acknowledge that the Board has previously found that Opposer owns a family of marks in non-precedential decisions, “[w]e must [nevertheless] determine whether Opposer owns such a family of marks based on the record adduced herein; the findings in the prior cases do not substitute for Opposer’s proof in this proceeding that it has a family.” *McDonald’s Corp. v. McSweet, LLC*, 112 USPQ2d 1268, 1276 (TTAB 2014).

sufficient to be indicative of the origin of the family. It is thus necessary to consider the use, advertisement, and distinctiveness of the marks, including assessment of the contribution of the common feature to the recognition of the marks as of common origin.

J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991).

Neither the mere intention to create a family of marks, nor ownership of multiple registrations containing the family term, is sufficient in and of itself to establish that a party owns a family of marks. *Am. Standard Inc. v. Scott & Fetzer Co.*, 200 USPQ 457, 461 (TTAB 1978); *Consol. Foods Corp. v. Sherwood Med. Indus. Inc.*, 177 USPQ 279, 282 (TTAB 1973); *Witco Chem. Co. v. Chemische Werke Witten GmbH.*, 158 USPQ 157, 160 (TTAB 1968).

In order to prove ownership of a family of marks, a party must establish:

[F]irst, that prior to the entry into the field of the opponent's mark, the marks containing the claimed 'family' feature or at least a substantial number of them, were used and promoted together by the proponent in such a manner as to create public recognition coupled with an association of common origin predicated on the 'family' feature; and second, that the 'family' feature is distinctive (i.e. not descriptive or highly suggestive or so commonly used in the trade that it cannot function as the distinguishing feature of any party's mark).

Marion Labs. Inc. v. Biochemical/Diagnostics Inc., 6 USPQ2d 1215, 1218-19 (TTAB 1988) (quoting *Land-O-Nod Co. v. Paulison*, 220 USPQ 61, 65-66 (TTAB 1983)). Thus, Opposer must prove the existence of an EDEN family of marks prior to any date Applicant can rely upon for purposes of priority. See *TPI Holdings. v. Trailertrader.com LLC*, 126 USPQ2d 1409, 1419 (TTAB 2018).

We have examined the record to determine what marks Opposer has used, when it used such marks, whether such use has been as a family and whether any use as a

family was prior to the filing date of Applicant's intent-to-use application. Following our review, we make the following determinations and observations.

First, the screenshots from Opposer's website, www.edenfoods.com, as well as the screenshots from Opposer's social media pages, were accessed on August 13, 2021, a date subsequent to Applicant's application filing date. There is no testimony or other corroborating evidence that these same screenshots appeared on Opposer's website or social media pages on a date prior to Applicant's filing date. Thus, this evidence has little to no probative value in determining whether Opposer possessed a family of EDEN-formative marks prior to the filing date of Applicant's involved application. Similarly, the print advertisements and newsletters of record also do not indicate whether this same evidence was available to the relevant consuming public prior to the filing date of Applicant's application and to what extent, if any.³² Accordingly, the print advertisements and EDENEWS newsletters of record do not establish that Opposer owned a family of EDEN-formative marks prior to the filing date of Applicant's involved application.

Likewise, the press releases reflecting the awards Opposer has received for its EDEN goods only reflect the accolades of a single good for each release and without

³² While Opposer's Chairman and President, Mr. Potter, testified that the copies of the EDENEWS of record are "from recent years, and a sampling from years longer past," *see* Potter Decl. at ¶19; 10 TTABVUE 7, the publication dates of the newsletters do not appear on the submitted evidence; instead, only the access date, i.e., September 21, 2021, of the newsletters downloaded from Opposer's www.edennews.com website is indicated. Additionally, while Mr. Potter testified that relevant consumers may download the EDENEWS newsletter from Opposer's www.edenfoods.com website, *see id.*, there is no evidence of record as to how many newsletters were downloaded from the website prior to the filing date of Applicant's application.

demonstrating that Opposer possesses a family of EDEN-formative marks.

As for Mr. Potter's testimony concerning the trade shows attended by Opposer, there is no evidence whether these trade shows occurred prior to the filing date of Applicant's involved application or what purported EDEN-formative marks were displayed at such trade shows. Also, Mr. Potter's testimony regarding unsolicited media in various publications is unavailing because the date those articles were published were not provided nor the contents of the articles themselves. Moreover, while Mr. Potter testified that Opposer's EDEN marks are promoted by publications and websites relating to healthy eating, including the website HEALINGOURMET.COM, Opposer failed to submit copies of these publications or websites that demonstrate use of a family of EDEN-formative marks prior to the filing date of Applicant's application. Thus, the foregoing evidence also does not assist Opposer in demonstrating that it owns a family of EDEN-formative marks.

As for Opposer's 2013-copyrighted EDEN catalogue, Mr. Potter testified that the catalogue is distributed to "ultimate consumers, to current and potential distributors and to current and potential wholesalers and retailers, among others."³³ While we acknowledge that Opposer's EDEN, EDEN FOODS, EDENSOY, EDEN RECIPES, and EDEN ORGANIC marks are displayed throughout the catalogue, there is no evidence of record demonstrating the extent the catalogue has been distributed/exposed to the relevant consuming public prior to the filing date of Applicant's involved application. Accordingly, Opposer's catalogue of record is

³³ Potter Decl. at ¶ 17; 10 TTABVUE 6.

insufficient to establish that Opposer has a family of EDEN-formative marks.

Based on the record before us, we conclude that Opposer has failed to establish satisfactorily that it owns a family of EDEN-formative marks.³⁴

C. Relatedness of the Goods

We next address the second *DuPont* likelihood of confusion factor focusing on the comparison of the goods identified in Applicants' involved application and the goods listed in Opposer's pleaded Registration Nos. 2503977 and 4431041 for the mark EDEN.

Applicant's goods are identified as "Dietary supplements; Herbal supplements; Mineral supplements; Nutritional supplements; Vitamin supplements." The goods listed in Opposer's pleaded Registration No. 2,503,977 are "dietary food supplements, namely, edible kombu root seaweed, garlic balls and ume plum concentrate." The goods listed in Opposer's pleaded Registration No. 4431041 are "dietary food supplements and nutritional supplement concentrates."

The goods identified in Applicant's broadly-worded "dietary supplements" encompass Opposer's more delineated "dietary food supplements, namely, edible kombu root seaweed, garlic balls and ume plum concentrate" listed in Registration No. 2,503,977, as well as "dietary food supplements" identified in Registration No. 4431041. *See e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB

³⁴ Even if Opposer were able to establish a family of EDEN-formative marks, we find that the structure of Opposer's marks, i.e., the term EDEN followed by a generic or highly descriptive/descriptive term, is quite dissimilar to the structure of Applicant's ADAM & EDEN FORMULATIONS mark.

2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.”); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018) (same). As such, the parties’ respective goods are legally identical in part.

Accordingly, the second *Dupont* factor heavily weighs in favor of a finding of likelihood of confusion.

D. Similarity of Trade Channels/Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. We initially note that because there are no restrictions as to trade channels or classes of purchasers set forth in the identification of goods of Applicant’s involved application or the goods listed in Opposer’s pleaded Registration Nos. 2503977 and 4431041, we presume that both Opposer’s and Applicant’s legally identical-in-part products travel in the same or overlapping trade and distribution channels and will be marketed to the same or overlapping potential consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai v. Diamond Hong*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the

same classes of customers for such goods....”); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

Accordingly, the third *DuPont* factor also favors a finding of likelihood of confusion.

E. Strength of Opposer’s EDEN mark for Dietary Food Supplements

Before we make our comparison of the marks, we consider the strength, as well as any weakness, of Opposer’s EDEN mark as used in connection with dietary food supplements. We do so because a determination of the strength or weakness of this mark helps inform us as to its scope of protection. *See In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]he strength of the cited mark is — as always — relevant to assessing the likelihood of confusion under the *DuPont* framework.”).

When evaluating the strength or weakness of a mark, we look at the mark’s inherent strength based on the nature of the term itself and its commercial strength in the marketplace, *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength)); *see also Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *17 (TTAB 2022) (quoting *DuPont*, 177 USPQ at 567); *New Era Cap Co.*, 2020 USPQ2d 10596 at *10. “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). Finally, with regard to commercial strength, “[t]he proper standard is the mark’s ‘renown within a specific product market,’ ... and ‘is

determined from the viewpoint of consumers of like products,' ..., and not from the viewpoint of the general public." *Chutter, Inc. v. Great Mgt. Grp., LLC*, 2021 USPQ2d 1001, at *31 (TTAB 2021) (quoting *Joseph Phelps Vineyards, LLC v. Fairmont Holdings*, 857 F.3d 1323, 122 USPQ2d 1733, 1734-35 (Fed. Cir. 2017)).

1. Conceptual Strength of the EDEN Mark on Dietary Food Supplements

Conceptual strength is a measure of a mark's distinctiveness and may be placed "in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Because Opposer's Registration Nos. 2503977 and 4431041 both issued on the Principal Register, without a claim of acquired distinctiveness, the mark EDEN is presumed to be inherently distinctive for those goods. Trademark Act Section 7(b), 15 U.S.C. 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a "mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods"). In other words, EDEN must, at least, be suggestive because "marks that are merely descriptive cannot be registered unless they acquire secondary meaning under § 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), but marks that are suggestive are 'inherently distinctive' and can be registered." *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017).

Nevertheless, EDEN may be weak if it is shown to be highly suggestive. *Juice*

Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). On the other hand, “the fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.” *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

Applicant does not argue that Opposer’s EDEN mark is conceptually weak. Instead, Applicant maintains that Opposer’s EDEN mark is commercially weak. Notwithstanding, we note that Applicant submitted numerous third-party registrations for various EDEN-formative marks. The Federal Circuit has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the common element has some non-source identifying significance which undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak’”) (quoting *Juice Generation, Inc.*, 115 USPQ2d at 1674).

The third-party registrations offered by Applicant, however, do not relate to any goods listed in Opposer’s Registration Nos. 2,503,977 and 4431041; instead, they relate to various topical personal hygiene and beauty goods, and clothing goods. Because the third-party registrations are directed to goods sufficiently different from

Opposer's goods at issue in this case, they have limited to no probative value in this matter. *See In Re Thor Tech, Inc.*, 90 USPQ2d 1634 (TTAB 2009) ("In this case, the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from trailers and recreational vehicles."); *In Re Melville Corp.*, 18 USPQ2d 1386, 1387-89 (TTAB 1991) ("Registrations for goods unrelated to the clothing field are irrelevant to our discussion."); *Key Chems., Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 1042 (CCPA 1972) ("Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word 'KEY.' The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here.").

Because there is no evidence of record to demonstrate that Opposer's EDEN mark for dietary food supplements is conceptually or inherently weak, we find that Opposer's EDEN mark is, at best, an arbitrary term when used in connection with these supplements, or, at worst, merely suggestive,³⁵ but not highly suggestive, of such goods. Suggestive marks, however, are inherently distinctive and should be

³⁵ We take judicial notice of the dictionary definition of EDEN which is defined as: "1. *Bible*: The garden of God and the first home of Adam and Eve. Also called *Garden of Eden*. 2. A delightful place; a paradise. 3. A state of innocence, bliss or ultimate happiness. *See* American Heritage Dictionary, www.ahdictionary.com (accessed on May 8, 2023). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Based on this definition, Opposer's EDEN mark is suggestive of that Opposer's dietary food supplements are of a quality that is pure.

accorded the scope of protection to which inherently distinctive marks are entitled. *See Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747, 750 (TTAB 1986); *Great Lakes Canning*, 227 USPQ at 485 (“[T]he fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.”). Thus, we accord Opposer’s EDEN mark the scope of protection due an inherently distinctive mark.

2. Commercial Strength or Weakness of the EDEN Mark on Dietary Food Supplements

Opposer introduced the testimony and evidence discussed below to establish the commercial strength of its EDEN marks:

- Opposer adopted and commenced use of the EDEN trademark almost fifty (50) years ago and has used the name continuously and without interruption to the present day.³⁶
- Opposer has developed a family of prominently displayed EDEN marks over the years through its widespread promotion, use and registration of a variety of EDEN formative marks covering a diverse array of food and beverage products.³⁷
- Opposer offers approximately 300 EDEN brand food and beverage products widely sold throughout the United States and internationally.³⁸
- Opposer’s EDEN food and beverage products generate annual retail sales over \$100 million.³⁹
- Opposer extensively advertises and promotes its EDEN goods and services through numerous and diverse means, including distribution of

³⁶ Potter Decl., ¶ 5, 10 TTABVUE 3.

³⁷ *Id.* at ¶¶ 7-27, 31, Ex. L; 10 TTABVUE 3-10, 513-574.

³⁸ *Id.* at ¶ 6; 10 TTABVUE 3.

³⁹ *Id.* at ¶ 28; 10 TTABVUE 10.

product catalogs, newsletters, recipes, print advertisements, Internet advertising, shelf talkers, point-of-sale displays, radio and television sponsorship, product placement, trade shows and social media.⁴⁰

- Opposer's annual advertising and promotional expenditures are in the millions of dollars.⁴¹
- Opposer's EDEN brand products receive considerable gratuitous publicity including third party promotion by product retailers, wholesalers and other distributors.⁴²
- Opposer and Opposer's EDEN products have received numerous awards for product integrity and excellence.⁴³
- Opposer either directly or through a licensee, has offered a variety of orally ingested enzymes, minerals, vitamins and food digestion tablets. These products were sold under EDEN formative marks as EDENBALANCE, EDEN BIFA 15 and EDEN RANCH. Opposer is deeply invested in product development in the supplement category.⁴⁴
- Opposer vigorously and successfully enforces its trademark rights against third parties not only in its core food and food service fields but also in other related fields.⁴⁵

To counter Opposer's evidence of commercial strength, Applicant introduced evidence of third-party uses of EDEN-formative marks used in connection with nutritional or dietary supplements. The third-party uses are identified below:⁴⁶

⁴⁰ *Id.* at ¶¶ 16-25, Exs. E-J; 10 TTABVUE 6-9, 195-485.

⁴¹ *Id.* at ¶ 28; 10 TTABVUE 10.

⁴² *Id.* at ¶¶ 26-28; 10 TTABVUE 9-10.

⁴³ *Id.* at ¶ 29 and Ex. K; 10 TTABVUE 10-12, 486-512.

⁴⁴ *Id.* at ¶ 11; 10 TTABVUE 5.

⁴⁵ *Id.* at ¶¶ 32-33, Ex. M; 10 TTABVUE 14-15, 575-590; Potter Rebuttal Decl. at ¶¶ 5-10, Exs. 1-2; 19 TTABVUE 3-23.

⁴⁶ Applicant's Sixth Notice of Reliance; 18 TTABVUE 7-15. Applicant also submitted other examples of EDEN-formative marks for goods that are sufficiently dissimilar to Opposer's dietary food supplements, namely, essential oils and cosmetics and personal hygiene products that contain vitamins. Accordingly, we have given no consideration to these third-party uses



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in our analysis. *See Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-95 (Fed. Cir. 2018) (probative value of applicant's third-party use evidence diminished because of dissimilar goods).



In reply, Opposer argues that the eight third-party uses identified above do not undermine the commercial strength of Opposer's EDEN mark because Applicant did not submit any evidence of actual sales or length of time on the market of these goods,

or anything else that would suggest public familiarity with these uses.⁴⁷ Additionally, Opposer maintains that some of the third-party uses have only been on the market for an extremely short amount of time.⁴⁸

Based on this record, we are unable to determine the commercial renown of Opposer's EDEN mark used in connection with dietary food supplements because Opposer failed to provide or delineate (i) its U.S. sales and revenues for its EDEN dietary food supplements, (ii) the length of time it has used its EDEN mark in connection with dietary food supplements; (iii) the amount of advertising dollars spent on promoting its EDEN dietary food supplements; and (iv) examples of unsolicited media referring to the Opposer's EDEN mark used in connection with dietary supplements.

Accordingly, we have insufficient evidence to find Opposer's EDEN mark used in connection with dietary food supplements has achieved any degree of commercial recognition by the relevant purchasing public. On the "spectrum from very strong to very weak[.]" *Joseph Phelps Vineyards*, 122 USPQ2d at 1734, we would afford Opposer's EDEN mark "the normal scope of protection to which inherently distinctive marks are entitled." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017).

However, the third-party uses of EDEN marks for dietary supplements of record are sufficient to show that the word "EDEN" has been adopted and used as a

⁴⁷ Opposer's Reply Brief, p. 9; 29 TTABVUE 14.

⁴⁸ *Id.* at pp. 9-10; 29 TTABVUE 14-15; Potter Rebuttal Decl..

trademark for dietary and nutritional supplements to a nontrivial extent.⁴⁹ As a result, a mark comprising, in whole or in part, the word EDEN in connection with dietary and nutritional supplements is entitled only to a restricted scope of protection. *See Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff'd*, 415 F. Appx. 222 (Fed. Cir. 2010) (citing *Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983)). In other words, Opposer's EDEN mark for dietary food supplements is not entitled to such a broad scope of protection that it will bar the registration of every mark comprising, in whole or in part, the term EDEN; Opposer's EDEN mark will only bar the registration of marks "as to which the resemblance to [Opposer's mark] is striking enough to cause one seeing it to assume that there is some connection, association or sponsorship between the two." *Id. Compare In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, 1566 (TTAB 1996) (wide-spread third-party use supported the finding that the marks were not likely to cause confusion because "at least half, if not more, of the third-party telephone directory listings of enterprises whose trade name names/marks contain the term BROADWAY have listed addresses on a street, road, avenue, etc., named 'BROADWAY.' To purchasers familiar with these enterprises, the term BROADWAY will have geographic significance.").

⁴⁹ Opposer's argument regarding the lack of evidence concerning the extent and impact of use of the third-party marks under consideration is unavailing. The Federal Circuit has held that the existence of numerous third-party uses is probative regarding the commercial strength or lack thereof of a mark at issue, even where the specific extent and impact of the third-party usage has not been established. *See Juice Generation*, 115 USPQ2d at 1674-75.

F. Similarity of the Marks

Having gauged the strength of Opposer's EDEN mark, we now turn to the first *DuPont* factor, the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692 (citing *DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 F. App'x (Fed. Cir. 2019). *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

"The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests, Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)).

Here, Applicant's standard character mark is ADAM & EDEN FORMULATIONS. The standard character mark subject to Opposer's pleaded Registration Nos. 2503977 and 4431041 is EDEN. The marks are similar in appearance and sound because they both consist in whole or in part of the word "Eden." While the incorporation of

Opposer's entire mark into Applicant's mark may increase their similarity, *see, e.g., China Healthways Inst. Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant's mark CHI PLUS is similar to opposer's mark CHI both for electric massagers); *Coca-Cola Bottling Co. of Mem., TN, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin), we nonetheless find that the connotation and overall commercial impression of the marks differ.⁵⁰

Based on the dictionary definition of EDEN provided above, we find that Opposer's EDEN mark refers to a place, i.e., the garden of Eden, while Applicant's mark, although it includes the term EDEN, is a play on the first inhabitants of the garden of Eden, namely, Adam and Eve. We thus find that the parties' respective marks evoke differing connotations and overall commercial impressions. This especially holds true in light of our finding that the mark EDEN is commercially weak for the goods at issue.

As such, we find that the marks are more dissimilar than similar in their entireties and, therefore, the first *DuPont* factor does not favor a finding of likelihood of confusion.

⁵⁰ Although Applicant argues that the term FORMULATIONS is a distinguishing element of Applicant's mark, *see* Applicant's Trial Brief, pp. 11-12; 23 TTABVUE 12-13, such generic or highly descriptive disclaimed matter is often "less significant in creating the mark's commercial impression." *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). Therefore, any slight differences between the marks resulting from the additional disclaimed term does little to distinguish the marks. *See In re Charger Ventures LLC*, 2023 USPQ2d 451, at *5 (Fed. Cir. 2023) ("So, while the Board must consider the disclaimed term, an additional word or component may technically differentiate a mark but do little to alleviate confusion.").

G. Ninth *DuPont* Factor: Variety of Goods and Services on which Opposer Uses its EDEN and EDEN-formative marks

“The ninth *DuPont* factor takes into account the variety of goods on which a mark is or is not used.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *14 (TTAB 2020). “If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s line.” *Id.* Opposer argues that its use of the EDEN name in connection with a wide array of food- and beverage-related products and services, and its use as part of a “family” of marks favors a finding of a likelihood of confusion because Opposer’s use of the EDEN mark in connection with a diverse product line makes it highly likely that consumers will purchase Applicant’s ADAM & EDEN FORMULATIONS brand products in the mistaken belief that it is one of Opposer’s products.

However, this factor is, in essence, used for purposes of showing a relatedness of the goods and because we have already found that the parties’ goods at issue in this proceeding are legally identical in part, there is no need to rely on this factor. *See Monster Energy v. Lo*, 2023 USPQ2d 87, at *39 (TTAB 2023) (“This factor may favor a finding that confusion is likely if the goods or services are not obviously related, but has less impact if the parties’ goods or services in issue are identical or closely related.”); *Made in Nature LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *60 (TTAB 2022) (“Given the relatedness of the parties’ identified goods, we find it unnecessary to rely on this factor. We therefore find the ninth *DuPont* factor to be neutral with respect to a finding of likelihood of confusion.”). Accordingly, we find the ninth

DuPont factor neutral in our analysis.

IV. Balancing the Factors

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors for which there is argument and evidence. We find that while Opposer's and Applicant's goods at issue are legally identical in part and would travel in the same or overlapping trade channels and be offered to the same or overlapping classes of consumers, we nonetheless conclude that the parties' respective marks are sufficiently dissimilar in connotation and overall commercial impression to weigh against a conclusion that confusion is likely. *See Kellogg Co. v. Pack'em Enterprises*, 951 F.2d 330, 21 UPSQ2d 1142, 1145 (Fed. Cir. 1991) (a single *DuPont* factor may be dispositive). Our conclusion is buttressed by the fact that, based on the record, Opposer's pleaded EDEN mark is commercially weak for dietary food supplements in a nontrivial manner. As such, we find that consumers are able to distinguish between different EDEN marks based on small differences in the marks when used in connection with dietary and nutritional supplements. Accordingly, we find that Opposer has not established by a preponderance of the evidence that Applicant's ADAM & EDEN FORMULATIONS mark for the identified goods so resembles Opposer's EDEN mark for legally identical in part goods as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The opposition is dismissed.