

THIS OPINION IS NOT A
PRECEDENT OF THE
TTAB

Mailed: March 13, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—————
Trademark Trial and Appeal Board
—————

Trek Bicycle Corporation
v.
Natural Balance Foods Limited
—————

Opposition No. 91221706
—————

Mary Catherine Merz and Jennifer A. Widmer of Merz & Associates PC,
for Trek Bicycle Corporation.

Rebecca Gan of Wenderoth LLP,
for Natural Balance Foods Limited.

—————
Before Cataldo, Wellington, and Wolfson,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Applicant, Natural Balance Foods Limited, seeks registration on the Principal

Register of the mark depicted below for

Nut and dried fruit-based snack bars containing fruit, nuts,
herbs, spices and natural flavorings; nut and dried fruit-
based low carbohydrate snack bars containing fruit, nuts,
herbs, spices and natural flavorings; snack foods, namely,
processed and flavor infused raisins

in International Class 29, and

Grain-based snack bars containing dried fruit, natural flavorings and nuts; cereal products, namely, snack bars; low carbohydrate grain-based snack bars containing dried fruit, natural flavorings and nuts

in International Class 30.¹



Trek Bicycle Corporation (“Opposer”) has opposed registration of Applicant’s mark on the basis of alleged likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).² Opposer pleaded prior use and ownership of 32 registrations for TREK and “TREK-type marks” in connection with, inter alia, “bicycles, bicycle frames, and bicycle parts and accessories.”³ We focus on the following marks, because they are most closely related to Applicant’s mark:

¹ Application Serial No. 79151576, filed January 9, 2014, based on Applicant’s request for extension of protection from International Registration No. 1214866, registered January 9, 2014 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141(f). The description of the mark reads: “The mark consists of the term ‘TREK’ with the letters ‘JC’s’ written vertically to the bottom left of the letter ‘T’ in the term, with a horizontal band directly below the term; to the left of the term is a hiker wearing a cap and backpack with a mountain landscape in the background; the entire mark is surrounded by a rectangular board with vertical bands on the right and left side of the boarder.” Color is not claimed as a feature of the mark.

² 1 TTABVUE 20. Citations to material or testimony in the record that has not been designated confidential include the TTABVUE docket entry number and the TTABVUE page number. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). For material or testimony that has been designated confidential, the TTABVUE docket entry number wherein such material or testimony has been designated confidential is listed as the citation.

³ 1 TTABVUE 16.

Registration No. 1168276 for TREK for “bicycles and bicycle frames”;

Registration No. 3397739 for TREK BICYCLE STORE (“Bicycle Store” disclaimed) for “retail stores featuring bicycles”;

Registration No. 3516346 for TREK for “online retail and wholesale store services featuring a wide range of consumer products except footwear all provided via the Internet”;

Registration No. 3576106 for TREK STOP for “retail vending services in the field of automated vending machines that dispenses bicycle parts, bicycle accessories, energy bars, beverages and gels”; and

Registration No. 3709688 for TREK for “powders used in the preparation of sports drinks and energy drinks.”

If likelihood of confusion is found as to the marks and goods/services in these registrations, it is unnecessary to consider Opposer’s other pleaded registrations and common law marks. Conversely, if likelihood of confusion is not found as to the marks and goods/services in these registrations, we would not find likelihood of confusion as to the marks and goods or services in the other pleaded registrations or Opposer’s asserted common law marks. *See, e.g., Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1917 (TTAB 2015); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Applicant denied the salient allegations in Opposer’s pleading and asserted several affirmative defenses that it did not pursue at trial;⁴ accordingly they are considered waived. *See Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d

⁴ 5 TTABVUE 5.

1424, 1426 n.3 (TTAB 2013); *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013). Applicant also asserted as an “affirmative defense” that the notice of opposition fails to state a claim upon which relief can be granted; because Applicant did not file a motion to dismiss the opposition on the basis of Fed. R. Civ. P. 12(b)(6), we treat the “defense” as having been waived. *See Motion Picture Ass’n of Am. v. Respect Sportswear Inc.* 83 USPQ2d 1555, 1557 n.5 (TTAB 2007).

I. THE RECORD

The record includes the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the subject application. The record also includes:

A. Opposer’s Testimony and Evidence

1. The testimony deposition of Opposer’s head of global marketing, Dean Gore, with Exhibits 1-43 (“Gore testimony”).⁵
2. The testimony deposition of Opposer’s chief financial officer, Chad Brown, with Exhibits 44-54 (“Brown testimony”).⁶
3. Notices of Reliance on:
 - a. Printouts from the USPTO’s Trademark Electronic Search System (TESS) database of Opposer’s pleaded registrations (Exhibits A-FF);⁷
 - b. Excerpts from publically available magazines and Internet websites purporting to show how Opposer’s TREK mark is used (Exhibits A-GG);⁸
 - c. Three nonprecedential TTAB decisions involving Opposer (Exhibits A-C);⁹

⁵ 48 TTABVUE (public version); 49 TTABVUE (confidential version).

⁶ 50 TTABVUE (public version); 51 TTABVUE (confidential version).

⁷ 36 TTABVUE, First Notice of Reliance.

⁸ 37 TTABVUE, Second Notice of Reliance.

⁹ 38 TTABVUE, Third Notice of Reliance. In its brief, Opposer requested judicial notice be taken of a fourth decision, issued in *Trek Bicycle Corp. v. Celestron Acquisition LLC*,

- d. Applicant's Responses to Opposer's First Set of Requests for Admission Nos. 1, 2, 4, and 9-11 and related Exhibits A-C;¹⁰
- e. Applicant's Responses to Opposer's First Set of Interrogatories Nos. 8 and 9;¹¹
- f. Screenshots from Applicant's Facebook page accessed on September 13, 2017 (Exhibits A-S);¹²
- g. Screenshots from www.Amazon.com purporting to show Applicant's products being offered for sale (Exhibits A-P);¹³
- h. Screenshots from Applicant's Twitter account accessed on September 15, 2017 (Exhibits A-K);¹⁴
- i. Screenshots from Applicant's Instagram account accessed on September 15, 2017 (Exhibits A-G);¹⁵

Opposition Nos. 91213696, 91213957 and 91213962. The Board does not take judicial notice of USPTO records, including prior decisions that reside therein. *Cf. N.J. Inst. of Tech. v. Medjet, Inc.*, 47 Fed. Appx. 921, 927 (Fed. Cir. 2002) (in a patent case, court declined to take judicial notice of the decisions and orders entered in a prior state court action); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (Board refused to take judicial notice of petitioner's pleaded, and rejected, application for purposes of establishing petitioner's standing); *Wright Line Inc. v. Data Safe Services Corp.*, 229 USPQ 769, 770 n.5 (TTAB 1985) ("Board does not take judicial notice either of applications (or registrations) which reside in the Office, or of papers which may appear therein"). As to the three decisions that are of record, they are not binding on the Board, but have been considered for whatever persuasive value they may hold. *In re Constr. Research & Tech. GmbH*, 122 USPQ2d 1583, 1585 n.6 (TTAB 2017) ("Board decisions which are not designated as precedent are not binding on the Board, but may be cited and considered for whatever persuasive value they may hold."); *In re the Procter & Gamble Company*, 105 USPQ2d 1119, 1120-21 (TTAB 2012).

¹⁰ 39 TTABVUE, Fourth Notice of Reliance.

¹¹ 40 TTABVUE, Fifth Notice of Reliance.

¹² 41 TTABVUE, Sixth Notice of Reliance.

¹³ 42 TTABVUE, Seventh Notice of Reliance.

¹⁴ 43 TTABVUE, Eighth Notice of Reliance. (44 TTABVUE is a duplicate copy). The Notice of Reliance indicates that the screenshots are from "Applicant's Facebook page," but the web address is that of a Twitter account, <https://twitter.com/eattek?lang=en>.

¹⁵ 45 TTABVUE, Ninth Notice of Reliance. Opposer again mislabels the materials as being from "Applicant's Facebook page," but the web address accessed is an Instagram account, <https://www.instagram.com/eattek/>.

- j. Screenshots from third-party websites purporting to show channels of trade and customers for energy bars (Exhibits A-I);¹⁶
 - k. Screenshots from third-party screenshots to show that energy bars are sold at bicycle shops (Exhibits A-O).¹⁷
4. Rebuttal Notices of Reliance on:
- a. Online dictionary definitions of “trail mix”;¹⁸ and
 - b. Screenshots from third-party websites containing information about the companies identified in Applicant’s Notice of Reliance, Exhibits E-W.¹⁹

B. Applicant’s Evidence

Applicant submitted a Notice of Reliance on

- 1. Opposer’s Responses to Applicant’s First Set of Interrogatories (Exhibit C);²⁰ and
- 2. Screenshots from third-party websites to show use of “trek” in connection with snack bars and general use of the terms “trek mix” and “trail mix” (Exhibits F-W).²¹

II. STANDING AND PRIORITY

Because Opposer has properly made its pleaded registrations of record, showing that Opposer is the owner and that the registrations are valid, Opposer has established its standing. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *see also Cunningham v. Laser Golf Corp.*,

¹⁶ 46 TTABVUE, Tenth Notice of Reliance.

¹⁷ 47 TTABVUE, Eleventh Notice of Reliance.

¹⁸ 57 TTABVUE.

¹⁹ 58 TTABVUE.

²⁰ 52 TTABVUE. Exhibits A, B and D were stricken by Board order on February 1, 2018. 56 TTABVUE.

²¹ 52 TTABVUE, Exhibits F-W.

222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). For the same reasons, Section 2(d) priority is not at issue in this case as to the marks and the goods and services covered by the registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

III. LIKELIHOOD OF CONFUSION

Our determination of the issue of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We consider these factors and the other likelihood of confusion factors for which the parties introduced evidence or arguments, and treat the remaining factors as neutral.

A. Strength of Opposer's Mark

We begin our likelihood of confusion analysis with the strength of Opposer's mark and the scope of protection to which it is entitled. In determining strength of a mark, "we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength

is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Top Tobacco, L.P. v. N. Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). Commercial strength may be measured indirectly, by volume of sales and advertising expenditures and factors such as length of use of the mark, widespread critical assessments, unsolicited mention of the mark in connection with the goods or services, and general reputation of the goods or services. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014).

Opposer contends that its TREK mark has become famous. The fifth *du Pont* factor requires us to consider evidence of the fame of Opposer’s mark and to give great weight to such evidence if it exists. *See Bose Corp. v. QSC Audio Prods.*, 63 USPQ2d at 1305 (Fed. Cir. 2002); *Recot Inc. v. Becton*, 214 F.3d 1322, 54 F.2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Fame of an opposer’s mark or marks, if it exists, plays a “dominant role in the process of balancing the *DuPont* factors,” *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1456, and “[f]amous marks thus enjoy a wide latitude of legal protection.” *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, “[a] strong mark ... casts a long shadow which competitors must avoid.” *Kenner Parker Toys*, 963 F.2d at 353, 22 USPQ2d at 1456. A famous mark is one “with extensive public recognition and renown.” *Id.*

Bose Corp. v. QSC Audio Prods., 63 USPQ2d at 1305.

Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1437-38 (TTAB 2014); *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007). However, the fame of a mark is not “an all-or-nothing measure” when considered in the context of a likelihood of confusion analysis. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). Rather, likelihood of confusion fame “varies along a spectrum from very strong to very weak.” *Palm Bay Imps.*, 73 USPQ2d at 1694 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)). The fact that a mark is famous for likelihood of confusion purposes in one field of goods or services does not mean that the fame extends to all other markets. *See, e.g., Inter IKEA Sys. B.V. v. AKEA, LLC*, 110 USPQ2d 1734 (TTAB 2014) (opposer’s IKEA mark was famous for purposes of likelihood of confusion for its “retail store services in the field of furniture, housewares, and home furnishings,” but not for other goods or restaurant services); *Harley-Davidson Motor Co. v. Pierce Foods Corp.*, 231 USPQ 859 (TTAB 1986) (HARLEY-DAVIDSON and HARLEY deemed famous marks in field of motorcycles and accessories but not necessarily for other collateral goods sold largely through Harley-Davidson’s licensees); *see also Tuxedo Monopoly v. Gen. Mills Fun Group*, 209 USPQ 986 (CCPA 1981) (MONOPOLY mark

is famous but “[w]hen a famous mark, as applied to certain goods or services, is not a coined term but has other common meanings, the strength of that mark is diluted in relation to other goods or services”) (citing *Am. Can Co. v. Dixie Wax Paper Co.*, 160 USPQ 721 (1969) (fact that “DIXIE” was famous for paper cups did not support cancellation of and opposition to registration of “DIXIE” as part of a composite mark for waxed paper).

On the record before us, we find that Opposer’s mark TREK has received significant public exposure in connection with bicycles and bicycle accessories, but it is not famous for food or beverages. Although Opposer has presented very impressive evidence regarding its sales, advertising, and market share for its bicycle and related products, the record is either lacking or ambiguous when it comes to Opposer’s promotion of its marks as a retail store selling snack bars or as a source of energy drinks. Regarding the TREK mark, Opposer’s global marketing head, Mr. Gore, testified that Opposer sells snack bars and an energy drink mix through two major channels of distribution: “We sell to our retailers and they stock it in their physical brick and mortar bike stores, and then we also do sell direct to consumers through Trek.com in the United States.”²² Because none of the snack bars display a TREK mark, Opposer refers to these products as “non-proprietary” or “non-prop.”²³ There are roughly 2000 dealers of Trek products in the United States, 150 of which are

²² 48 TTABVUE 34.

²³ 50 TTABVUE 13, 35.

owned by Opposer.²⁴ Snack bars purchased from Opposer “are shipped in boxes that have Trek on it to Trek customers, but the individual bar itself would not have the word Trek on it. They’re not made by Trek.”²⁵ In 2010, Opposer launched the “Trek Super Fuel nutritional supplement,” which is a powder to which water is added to make a drink.²⁶ Opposer advertised this product in its non-bike product catalogs to its retailers,²⁷ and invoices from 2011-2013 show retailers purchased the “Trek Super Fuel EX energy drink,”²⁸ but Mr. Gore did not know if the drink mix was currently available.²⁹ Mr. Brown, Opposer’s chief financial officer, stated that he thought it was “currently out of stock,” and did not know “when we’ll have more in inventory.”³⁰ Neither of Opposer’s witnesses could quantify the amount of sales in units or dollar figures for Opposer’s energy drink mix, but Mr. Brown testified under seal to sales of “non-prop food,” referring to Exhibit 44 “Sales and Expenditures 2010-2016” (confidential).³¹ The figures in Exhibit 44 suggest that non-prop food sales do not represent a substantial percentage of Opposer’s business. Total marketing expenses

²⁴ *Id.*

²⁵ Brown test., 50 TTABVUE 13.

²⁶ 48 TTABVUE 38.

²⁷ *See, e.g.*, 48 TTABVUE 38, Exhibit 23 (confidential).

²⁸ 48 TTABVUE 40, Exhibits 25 and 26; 50 TTABVUE 24.

²⁹ 48 TTABVUE 43.

³⁰ 50 TTABVUE 21. Mr. Gore also offered conflicting testimony regarding whether Opposer, in 2007, licensed its mark for a liquid “Trek Sports Drink.” Although he described it as a licensed product, and attached a copy of a photograph of the drinks, 48 TTABVUE 193 (Exhibit 28), he also stated that Opposer does not “sell drinks that are already formulated with liquid in them.” 48 TTABVUE 72. When questioned, “you did sell it at one time?” Mr. Gore said “no.” *Id.*

³¹ 50 TTABVUE 10, Exhibit 44 (confidential) Sales and Expenditures 2010-2016.

were also listed on the exhibit but expenses for non-prop food or the Trek drink mix were not separately delineated. Regarding the TREK STOP mark, Opposer's venture into "retail vending services in the field of automated vending machines that dispenses bicycle parts, bicycle accessories, energy bars, beverages and gels" appears to have occurred around 2010, when Opposer introduced a TREK STOP vending machine that was installed at a local bike shop.³² Nutritional products were available at the vending machine, but only one such machine was ever installed, and Mr. Gore did not know if it is still active.³³ This evidence fails to show that Opposer's registered TREK and TREK STOP marks are commercially strong for snack bars or energy drinks.

Concerning conceptual strength of the marks, Applicant argues that TREK is weak, being a term used in the snack food industry in combination with the term "mix," for a type of snack food that consists of a combination of nuts, fruits, seeds, chocolate chips and the like, known as "TREK MIX." In support of its argument, Applicant submitted copies of screenshots from several online vendors selling "trek mix" and one from a website offering a recipe for "Trek Mix Bars." For example:

1. The website dontfearthevegan.com offers a recipe for making Trek Mix Bars, and the author of the recipe uses the term "trek mix" to describe the mix of ingredients: "The initial recipe used [a] variety of nuts which I replaced with our

³² 48 TTABVUE 41.

³³ 48 TTABVUE 78, Exhibit 27. The photograph of the vending machine does not show what is offered inside, as the picture is taken from the side of the machine.

favorite trek mix which contains almonds, pistachios, cashews, dried cherries and chocolate.”³⁴

2. Trader Joe’s sells a number of different varieties of “trek mix,” such as “Omega Trek Mix Handfuls”³⁵ and “Organic Trek Mix.”³⁶



The advertising copy for the Organic Trek Mix reads:

“Organic Simply Cashew, Almond & Cranberry Trek Mix is great for snacking whenever you need a sweet and crunchy fix. Feeling adventurous? Take it on a hike into the wilderness or bike ride through your neighborhood (either of these qualify as treks, in our estimation) for a quick and tasty energy boost.”³⁷

³⁴ 52 TTABVUE 119, Exhibit G.

³⁵ At traderjoes.com 52 TTABVUE 123, Exhibit H.

³⁶ At traderjoes.com, 52 TTABVUE 129, Exhibit J.

³⁷ *Id.*

3. In the online article “One Regular Guy Writing about Food, Exercise and Living Past 100,” the writer asks, “What about the New Costco Trek Mix?” and includes a picture of the product:³⁸



The evidence supports Applicant’s contention that “trek mix” has a meaning in the snack food industry as denoting a sweet and/or salty high-energy mixture of seeds, nuts, dried fruits, chocolate and the like. We agree that the term “trek” may therefore have some meaning in relation to snack foods that decreases its conceptual strength as a trademark for snack foods. However, the fact that “trek mix” may impart a particular meaning to a snack bar (such as that it is a trail mix or trek mix-based product), this purported meaning does not carry over to TREK bicycles, on-line retail store services, or powders for making energy drinks. Further, as the advertising copy from Trader Joe’s alludes in the statement “either of these qualify as treks, in our estimation,” the word “trek” has another meaning connected with hiking and outdoor activity, “to make one’s way arduously.”³⁹ Conceptually, the duality of these

³⁸ At guysandgoodhealth.com, 52 TTABVUE 176, Exhibit P. We have taken into account the evidence provided by Opposer that suggests Costco is a members-only retailer. 58 TTABVUE 9.

³⁹ From <https://www.merriam-webster.com/dictionary/trek>, accessed March 5, 2019. The Board may take judicial notice of dictionary definitions from references that are the electronic

meanings points to TREK as being suggestive in connection with snack bars, energy drinks, and retail bicycle services.


Considering the record as a whole, although Opposer's TREK mark may be considered famous for bicycles and bicycle accessories, there is insufficient evidence to show that Opposer is generally known to be in the energy food or drink business or that the renown of its TREK brand for bicycles and related goods extends to Opposer as a source of "sports and energy drinks." While it is certainly possible for marks to be strong or famous for more than one type of goods and/or services, this is not the case here. The evidence is insufficient to show Opposer's TREK marks may be considered strong for any goods other than bicycles, bicycle parts, and retail stores featuring bicycles. We disagree with Applicant that Opposer's TREK mark is weak and entitled only to a narrow scope of protection. Conceptually, the mark appears to be suggestive of the goods and the evidence of the commercial strength of the TREK mark with regard to bicycles and related goods and services has not been shown to apply to food or beverage items. We thus accord Opposer's TREK mark the scope of protection to which suggestive marks are entitled, keeping in mind the mark's wider scope of protection in the bicycle industry.

equivalent of a print reference work. *See Univ. of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1334 n.1 (TTAB 2009).

B. THE MARKS

We now consider the similarity or dissimilarity of the marks at issue in “their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *du Pont*, 177 USPQ at 567). In comparing the marks, we bear in mind that 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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). Nonetheless, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).



Applicant has applied to register the mark  for snack foods. Opposer owns registrations for TREK for “bicycles and bicycle frames”; “online retail and wholesale store services featuring a wide range of consumer products except footwear all provided via the Internet”; and “powders used in the preparation of sports drinks and energy drinks.” The marks are similar in appearance, pronunciation, connotation and commercial impression due to the presence in each of the identical suggestive term TREK. This term forms the entirety of Opposer’s mark

and is the dominant portion of Applicant's mark, as it is the largest literal element (the "J.C.'s" portion being practically illegible). And while Applicant's mark consists of an illustration of the packaging for the product and includes a design element of a hiker pausing before a mountain range, purchasers will remember and refer to the goods as TREK snack bars. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) ("In the case of a composite mark containing both words and a design, 'the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.'") (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) ("words are normally given greater weight because they would be used by consumers to request the products"); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Furthermore, the design of an individual with a backpack hiking, or trekking, on uneven terrain with mountains in the background draws further attention to the word TREK as it appears in Applicant's mark.

"Marks have frequently been found to be similar where one mark incorporates the entirety of another mark, as is the case here." *Tivo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1115 (TTAB 2018); *see also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1322 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (affirming Board's finding that the mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, that the noun LION was the dominant part of both parties' marks, and that confusion was likely). Applicant's



mark is similar to Opposer's TREK mark in appearance, pronunciation and connotation, and overall, the marks create similar commercial impressions.

With respect to Opposer's registered TREK STOP mark, we find that the mark also is dominated by the term "TREK" because it is the first word in the mark, it identifies a vending machine that dispenses, inter alia, TREK bicycle goods for which Opposer is famous. The term "stop" in the mark brings to mind the action of stopping to shop at the vending machine and thus carries a somewhat descriptive connotation. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.') (quoting *Nat'l Data*, 224 USPQ at 752). Overall, however, the mark is suggestive as a play on the phrase "truck stop" and because of the presence of the suggestive term "trek."

Because Applicant's mark is similar in appearance, sound, connotation and commercial impression to Opposer's TREK and TREK STOP marks, the first *du Pont* factor strongly favors a finding of likelihood of confusion.

C. THE GOODS; TRADE CHANNELS; CLASSES OF CONSUMERS

Where likelihood of confusion is asserted by an opposer, "the issue must be resolved on the basis of not only a comparison of the involved marks, but also on consideration of the goods named in the application and in opposer's registration and, in the absence of specific limitations in the application and registration, on

consideration of the normal and usual channels of trade and methods of distribution.” *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983) (citing *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1042-43, 216 USPQ 937, 940 (Fed. Cir. 1983)). Here, we determine the relatedness of the goods at issue by comparing Applicant’s goods as identified in the application, namely,

Nut and dried fruit-based snack bars containing fruit, nuts, herbs, spices and natural flavorings; nut and dried fruit-based low carbohydrate snack bars containing fruit, nuts, herbs, spices and natural flavorings; snack foods, namely, processed and flavor infused raisins” and “grain-based snack bars containing dried fruit, natural flavorings and nuts; cereal products, namely, snack bars; low carbohydrate grain-based snack bars containing dried fruit, natural flavorings and nuts,

and those goods and services of Opposer for which it has proven priority or for which it owns registrations. *See In re Elbaum*, 211 USPQ 639 (TTAB 1981) (determining relatedness of goods as they are recited in Applicant’s application). The respective goods need not be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis but need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that the goods emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722; *see also In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). The issue, of course, is not whether purchasers would confuse the goods or services, but rather whether there is a likelihood of confusion as to their source. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018).

As noted above, we focus on the following registrations, and accordingly, their goods and services:

Registration No. 1168276 for TREK for “bicycles and bicycle frames”;

Registration No. 3397739 for TREK BICYCLE STORE (“Bicycle Store” disclaimed) for “retail stores featuring bicycles”;

Registration No. 3516346 for TREK for “online retail and wholesale store services featuring a wide range of consumer products except footwear all provided via the Internet”;

Registration No. 3576106 for TREK STOP for “retail vending services in the field of automated vending machines that dispenses bicycle parts, bicycle accessories, energy bars, beverages and gels”; and

Registration No. 3709688 for TREK for “powders used in the preparation of sports drinks and energy drinks.”

Opposer argues that the respective goods and services are related, for several reasons. First, Opposer argues that it sells non TREK-branded food to its dealers and end consumers in packaging that contains the TREK mark.⁴⁰ Second, Opposer relies on its registrations, for “retail vending services in the field of automated vending machines” that dispense “energy bars, beverages and gels” (Reg. No. 3576106) and “on-line retail and wholesale services featuring a wide range of consumer products” (Reg. No. 3516346), to underscore the relationship between its distribution services and Applicant’s snack foods. Opposer also relies on its registration for “powders used in the preparation of sports drinks and energy drinks” (Reg. No. 3709688) as

⁴⁰ 64 TTABVUE 6.

supporting its claim that the goods are related. Finally, Opposer contends that the fame of its TREK mark for bicycles and related goods extends an umbrella of protection to Opposer's use of the mark in connection with food and beverages.

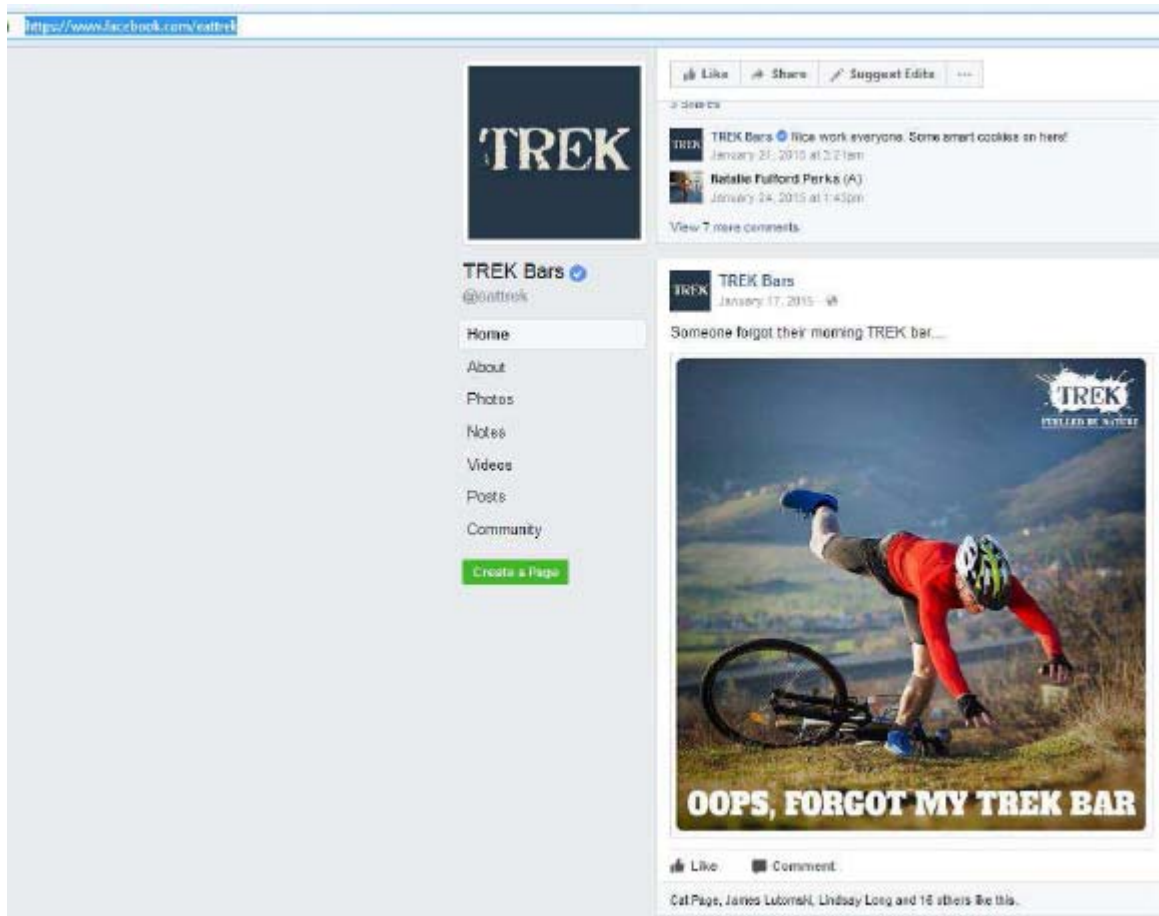
Applicant argues that the parties' goods are significantly different and that its goods are not within Opposer's "realm of expansion."⁴¹ Under this doctrine, a senior user that cannot prove actual sales penetration into the junior user's product area, and cannot prove that the reputation of its mark extends into that area, may still make a claim that the junior user is using its mark on goods that fall within the senior user's "zone (or "realm") of natural expansion." In USPTO proceedings, the issue is not whether an intervening user should be enjoined, but whether a party can claim priority because "customers are likely to link a mark in its expansion market with the original, senior usage." McCarthy, J. Thomas, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:21 (5th ed.). Regardless of the basis for the doctrine, Opposer contends that it is inapplicable because Applicant's goods are sold "**within** the realm of the bicycle industry."⁴² (emphasis in original).

In support of its assertion that Applicant's goods may be considered as being sold "within the realm of the bicycle industry," Opposer submitted several pages from

⁴¹ 61 TTABVUE 19.

⁴² 64 TTABVUE 9.

Applicant's Facebook page, showing Applicant's TREK bars being sold with a cycling theme,⁴³ such as the following:⁴⁴



Opposer's witness, Dean Gore, also noted that Applicant's TREK bars were reviewed at bikeradar.com, "one of the more popular cycling news websites in the United States."⁴⁵ Mr. Gore testified that many retail bike shops sell snack or energy bars,

⁴³ 48 TTABVUE 55, Exhibit 42, *id.* at 232-236. Opposer also submitted several advertisements for Clif Bar energy bars that include pictures of cyclists on mountain or seaside trails. ⁴⁶ TTABVUE 18, 20, and 21.

⁴⁴ At www.facebook.com/eattrek, 41 TTABVUE 21.

⁴⁵ 48 TTABVUE 23; *Id.* at 155-158, Exhibit 11.

including its own dealers;⁴⁶ and that “[p]robably the most common thing [cyclists] carry is energy food.”⁴⁷ Opposer submitted a copy of a webpage from Opposer’s trek.com website, where Opposer offers nutritional products for sale:⁴⁸



Media submitted by Opposer also suggests a connection with snack food and cycling. Results of a “2012 Readers’ Choice Results” survey conducted by

⁴⁶ 48 TTABVUE 24 “Q Do Trek dealers sell some of these bars? A Absolutely.”; 48 TTABVUE 87 (Clif Bars is “a common energy bar you would find at a bike shop.”).

⁴⁷ 48 TTABVUE 33.

⁴⁸ 48 TTABVUE 33 (“We’re looking at a page that’s in Trek.com. It’s a page that is the start of our nutrition offerings, nutrition products.”); Exhibit 19, *id.* at 181. Opposer did not submit other webpages to show the type of nutritional products it allegedly sells. As for whether Opposer sells Trek-branded snack bars, Opposer proffered inconsistent testimony. On the one hand, Opposer stated that the snack bars it sold to its company-owned stores or independent dealers were not branded TREK in any way, such as in packaging or in advertising materials. Gore confidential testimony at 49 TTABVUE 17 (48 TTABVUE 69). On the other hand, Opposer stated that it shipped snack bars in boxes that “have Trek on it.” Brown testimony, 37 TTABVUE 68. The manner in which “Trek” may have appeared on packaging, whether as a mark or trade name in a return address, for example, was not discussed, Opposer did not adduce any packaging evidence for the record, and dates of use were not clarified. We find that under these circumstances, the testimony is insufficient to establish that Opposer’s TREK mark appeared on packaging for snack bars, or that any such use predated Applicant’s constructive use date.

bicycling.com listed readers' top three "favorite midride fuels" as "energy bars, energy gels, [and] energy chews."⁴⁹ In 2017, bicycling.com ran an online article entitled "The Best New Nutrition Products for Cyclists in 2017" with a lead photo of a cyclist holding a snack bar between his teeth.⁵⁰ Finally, Opposer has shown limited engagement in co-branding initiatives involving food products, such as breakfast cereal.⁵¹

Considering the evidence and testimony of record, however, we agree with Applicant that snack bars do not fall within Opposer's natural realm of expansion. Moreover, although Opposer owns a TREK registration for powdered drinks, and a TREK STOP registration for the distribution of vending machines that dispense snack bars, these goods and services have not been shown to be related to Applicant's snack bars.⁵² On the other hand, we find the evidence and testimony shows an overlap of trade channels and classes of consumers under buying conditions that strongly favor a finding of likelihood of confusion. First, Opposer's registrations for "online retail and wholesale store services featuring a wide range of consumer products except footwear all provided via the Internet," "retail stores featuring bicycles," and

⁴⁹ 48 TTABVUE 146.

⁵⁰ 46 TTABVUE 16.

⁵¹ 48 TTABVUE 14 and Exhibit 3 ("We're looking at a Wheaties box with Lance Armstrong riding a Trek bicycle on the cover."); ⁵⁰ TTABVUE 37 (referencing confidential ⁵¹ TTABVUE 17).

⁵² Regarding Opposer's use and registration of the TREK STOP mark, we do not find the evidence and testimony highly probative of a relationship between snack food and vending machine distribution services. Because the distribution services of the TREK STOP registration include "bicycle parts, bicycle accessories, energy bars, beverages and gels," we have accorded the registration a presumption of validity under Trademark Act Section 7(b).

“powders used in the preparation of sports drinks and energy drinks” have probative value to the extent that they serve to suggest that a bicycle retail store may sell a wide variety of consumer products over the Internet, sell powdered drinks both on-line and at retail stores, and distribute snack bars via vending machines. In addition, Opposer has shown that it is common for bike shops in general to sell snack bars and that snack bars are a significant food source for cyclists. Copies of webpages from 15 third-party cycling or sports and fitness-related websites advertise a variety of brands of snack bars, energy drinks, and drink mixes.⁵³ For example:

- Landis Cyclery sells “featured bikes,”⁵⁴ energy bars, drink mixes and an energy drink, including a “Clif Clif Bar” and “Clif Clif Shot Electrolyte Drink Mix.”⁵⁵
- Black Mountain Bicycles sells “bicycles,” “accessories,” and energy bars, waffles, and drink mixes, including Hammer Nutrition “Hammer” energy bars;⁵⁶ while Black Mountain Bicycles does not offer Hammer Nutrition drink mixes, the Bicycle Village website sells several drink mixes from Hammer Nutrition, such as “Hammer Nutrition HEED (High Energy Electrolyte Drink)” mix.⁵⁷

⁵³ 47 TTABVUE.

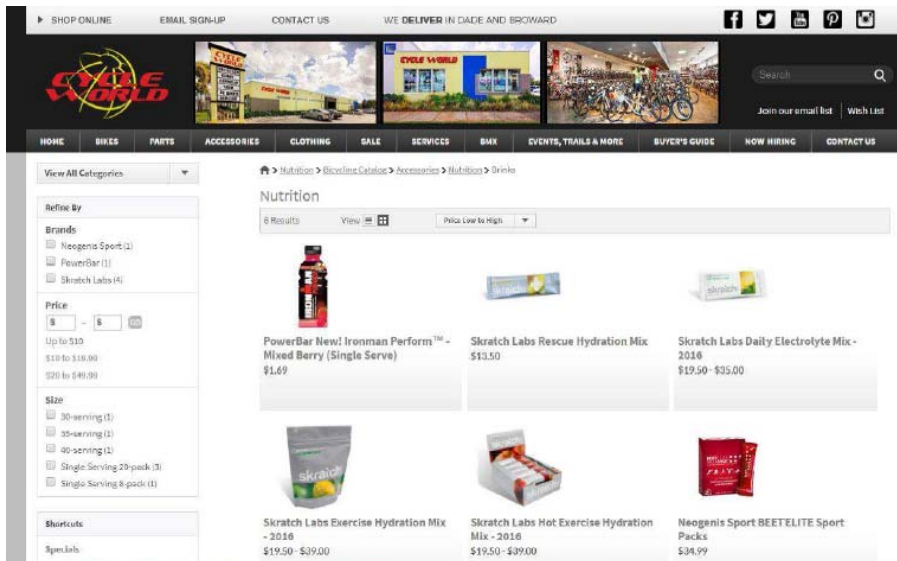
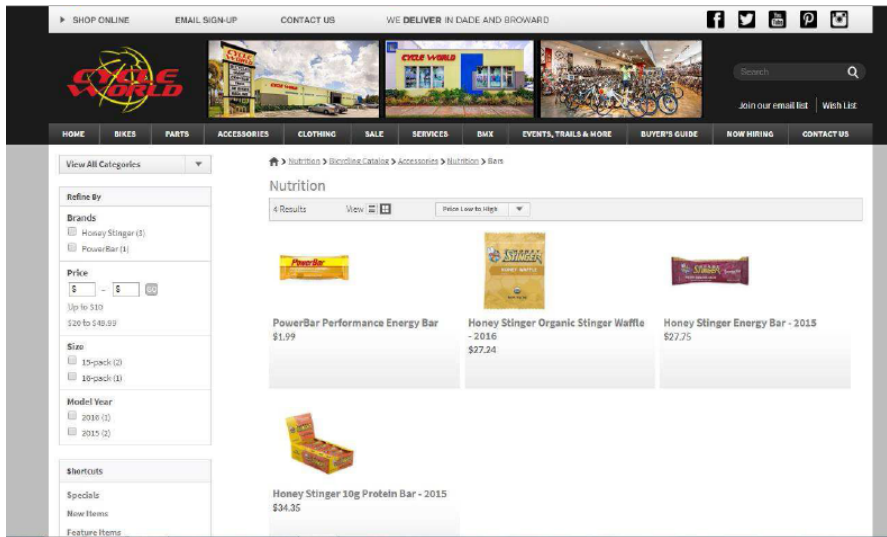
⁵⁴ The bicycle-related goods and services listed above that appear in quotations, such as “featured bikes,” indicates a link to bicycle goods on the webpage displaying snack bars or drinks.

⁵⁵ At landiscyclery.com, 47 TTABVUE 9-10, Exhibit A.

⁵⁶ At blackmountainbicycles.com, 47 TTABVUE 13-15, Exhibit C.

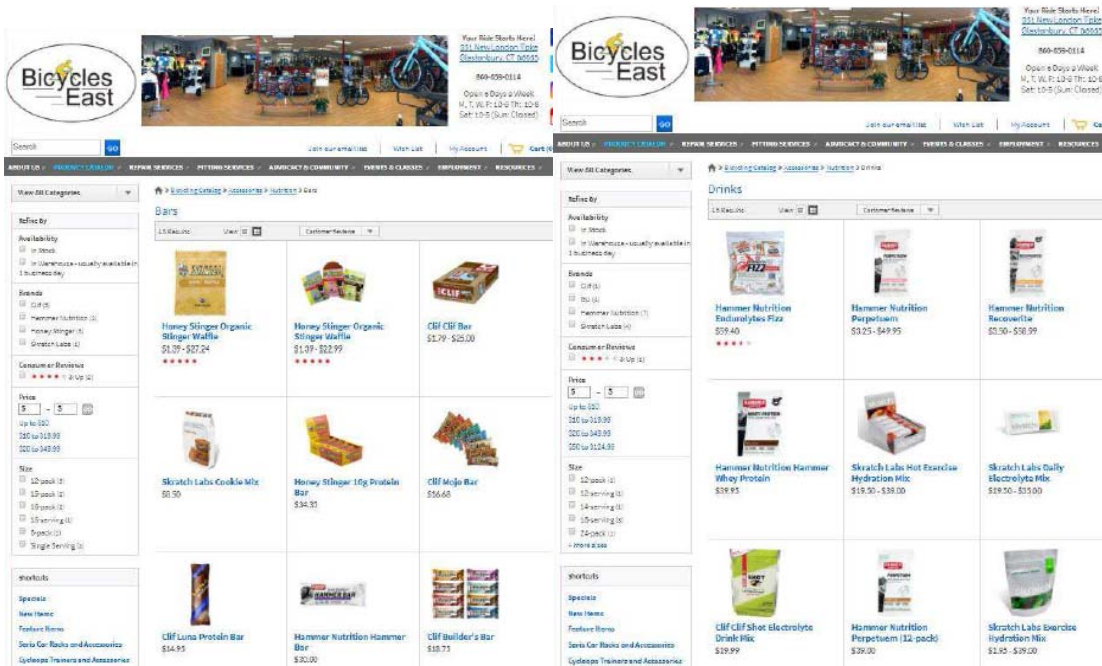
⁵⁷ Bicycle Village also sells energy bars, Honey Stinger waffles, and Skratch Labs cookie mix. 47 TTABVUE 19-20.

- Cycle World sells “bikes” and energy bars, waffles, liquid drinks and drink mixes, including a “PowerBar Performance Energy Bar” and “PowerBar New! Ironman Perform™-Mixed Berry (Single Serve)” drink on webpages displaying photographs of its storefront and interior and the goods:⁵⁸



⁵⁸ At cycleworldmiami.com, 47 TTABVUE 23-25, Exhibit G.

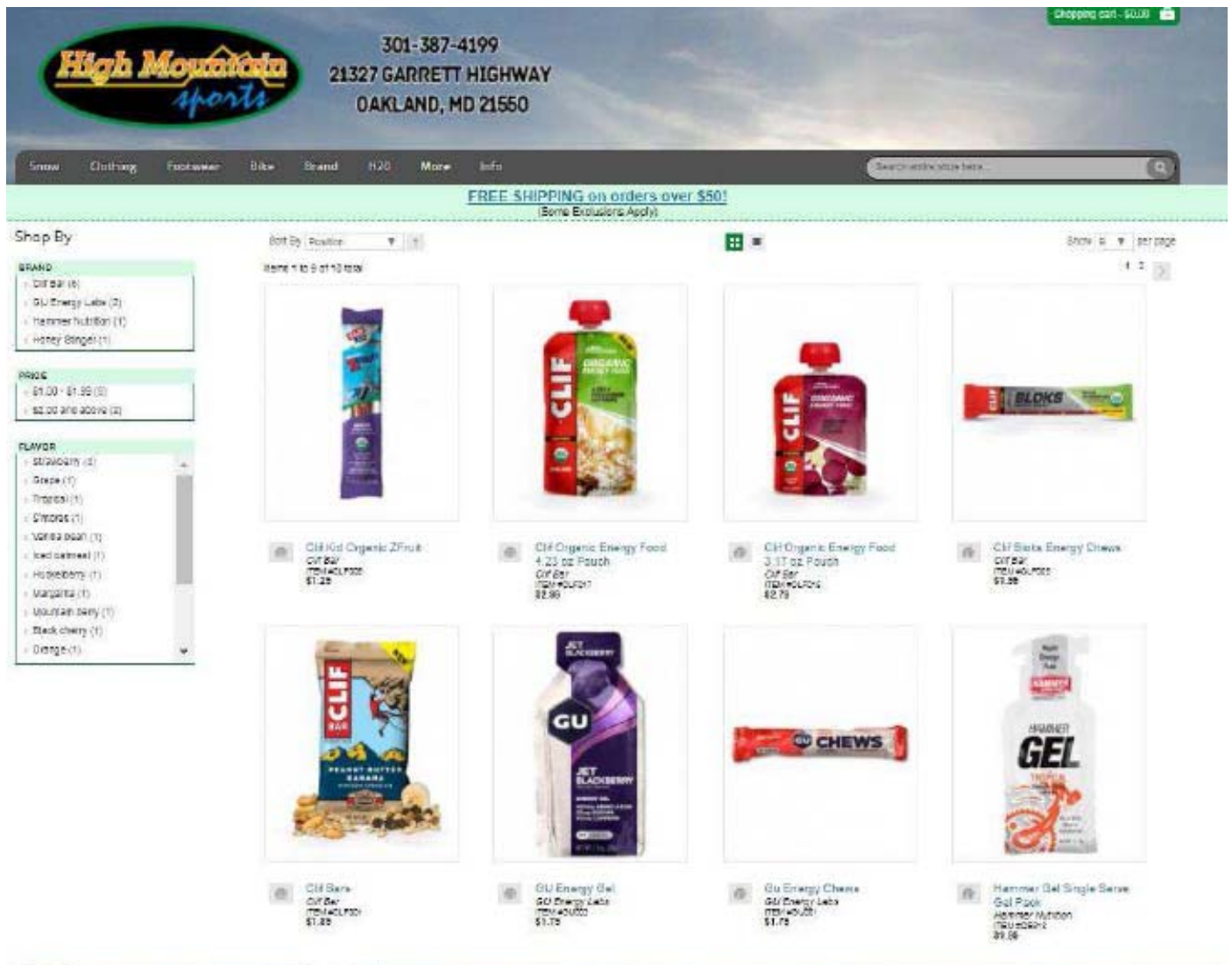
- Bicycles East also displays a photo of its interior on the pages advertising energy bars and drinks:⁵⁹



- High Mountain Sports includes a link to “Bike” on its website, and on the same page lists both snack bars and energy gels for sale, including “GU Energy Chews” and “GU Energy Gel”:⁶⁰

⁵⁹ At bicycleseast.com, 47 TTABVUE 21-22, Exhibit F.

⁶⁰ 47 TTABVUE 37.




Although we agree with Applicant that common sales by mass retailers are generally insufficient to show relatedness, here there are common trade channels in a niche market (snack food sold in bike shops) and the common sales are directed to a discrete class of purchasers (cycling enthusiasts). We thus find Opposer's limited activities, coupled with its dominance in the bicycle industry, sufficient to make confusion likely, at the least as to a perception of sponsorship or affiliation between the parties were both to use similar marks for their respective goods.

Accordingly, while the second *du Pont* factor, the similarity or dissimilarity of the goods, favors a finding of no likelihood of confusion, the third *du Pont* factor, the demonstrated identity in specific channels of trade (bike shops) and classes of consumers (cyclists) for the parties' goods and services is particularly significant and favors finding of likelihood of confusion.

IV. CONCLUSION

After considering all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion, we conclude that



confusion is likely between Applicant's  mark for the Class 29 and 30 goods listed in its application, and Opposer's mark TREK for "online retail and wholesale store services featuring a wide range of consumer products except footwear all provided via the Internet" and "powders used in the preparation of sports drinks and energy drinks," given the identity of the channels of trade and classes of consumers in the niche cycling market where Opposer's TREK mark is famous. Despite the lack of strong evidence of the relatedness of the goods and services, the goods and services of the parties being sold under their similar respective marks are likely to be encountered by the same classes of purchasers under similar buying conditions and circumstances surrounding their marketing such that confusion is likely. Hence, if consumers already familiar with Opposer's TREK powder mix for sports and energy drinks, Opposer's TREK retail store services, and Opposer's well-

known TREK mark for bicycles were to encounter Applicant's snack bars sold under its TREK and design mark in one of Opposer's or a third-party's bike store, they would likely consider Applicant's goods to be produced, sponsored, or affiliated with Opposer.

Decision: The opposition on the ground of likelihood of confusion is sustained.