

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: August 16, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Nautica Apparel, Inc.*

*v.*

*REV Recreation Group, Inc.*  
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Opposition No. 91263603  
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Stephen L. Baker, John M. Rannells and Brian M. Gaynor of  
Baker and Rannells, PA  
for Nautica Apparel, Inc.

Timothy R. Brownlee and Courtney McKenna of Waits & Brownlee  
for REV Recreation Group, Inc.  
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Before Bergsman, Lynch and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

REV Recreation Group, Inc. (“Applicant”) seeks registration on the Principal Register of the mark NAUTICA (in standard characters) for “[r]ecreational vehicles, namely, motor homes” International Class 12.<sup>1</sup>

<sup>1</sup> Application Serial No. 88656609 was filed on October 16, 2019, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Trademark Act Section

In its Notice of Opposition,<sup>2</sup> Nautica Apparel, Inc. (“Opposer”) opposes registration of Applicant’s NAUTICA mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the goods identified in the Application, so resembles Opposer’s following NAUTICA marks (all registered in standard characters or in typed form)<sup>3</sup> as to be likely to cause confusion, mistake, or deception:

<b>Reg. No.</b>	<b>Mark</b>	<b>Goods/Services</b>
1862585	NAUTICA	Class 25: footwear.
3837562	NAUTICA	Class 25: Bathing suits; Belts for clothing; Belts made from imitation leather; Blouses; Dress shoes; Dresses; Foul weather gear; Gloves; Hats; Jackets; Jeans; Men's suits; Outer jackets; Over coats; Pajamas; Pants; Raincoats; Robes; Scarves; Shirts; Shorts; Skirts; Socks; Sport coats; Sweaters; Swim trunks; Swimwear; T-shirts; Ties; Underwear; Vests
2242969	NAUTICA	Class 27: Rugs, wallpaper, and vinyl wall covering.
1580007	NAUTICA	Class 16: notebooks, desk top organizers made of leather or imitation leather.  Class 18: umbrellas, luggage, trunks, duffle bags, garment bags for traveling travel kits and leather boxes in the nature of jewelry boxes.

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1(b), 15 U.S.C. §1051(b). The application contains the following translation statement: “The English translation of the word ‘NAUTICA’ in the mark is ‘NAUTICAL.’” Although no statement of use has been filed in connection with this Application, as we discuss later in this decision, Applicant has been using the NAUTICA mark in connection with motor homes since June of 2020.

<sup>2</sup> 1 TTABVUE. References to the pleadings, the evidence of record and the parties’ briefs refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page and paragraph references, if applicable.

<sup>3</sup> Prior to November 2, 2003, “standard character” marks were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks.”).

		Class 25: belts and suspenders.
3536443	NAUTICA	Class 24: Comforters; Bed and table linen; Bed blankets; Bed linen; Bed linen and table linen; Bed pads; Bed sheets; Bed skirts; Bedspreads; Curtains; Shower curtains; Bath towels; Beach towels; Hand towels; Towels; Washcloths; Washing mitts; Bath linen.
2306324	NAUTICA	Class 21: glass and plastic beverage ware; dinnerware; candlesticks not of precious metal.
2246317	NAUTICA	Class 20: outdoor furniture; living room furniture; bedroom furniture; furniture, namely wall units; furniture tables; bookcases; and picture frames.
2304411	NAUTICA	Class 11: lamps.
1557528	NAUTICA	Class 3: perfumes.
5396745	NAUTICA	Class 2: enamel paints; interior paint; paints; paints, lacquers, varnishes; wood stains, all the aforementioned goods being intended for use in the architectural and decorative coating markets only.
3850361	NAUTICA	Class 28: Floating recreational lounge chairs; Floats for recreational use, namely, foam floats, swim floats; Inflatable float mattresses or pads for recreational use; Inflatable inner tubes for aquatic recreational use; Inflatable mattresses for recreational use; Inflatable ride-on toys; Kick board flotation devices for recreational use; Paddle boards; Swim boards for recreational use; Swim fins; Swim floats for recreational use; Swimming aids, namely, pool rings for recreational use.
5802441	NAUTICA	Class 9: eyewear; snorkels, diving snorkels, scuba snorkels, face masks for diving, scuba diving masks, scuba goggles, swim goggles, diving goggles.
3232846	NAUTICA	Class 35: retail store services in the field of wearing apparel, fashion accessories, home fashions, eyewear, luggage and personal care products.
3114379	NAUTICA	Class 36: financial sponsorship of sporting events, tournaments, competitions, and contests.  Class 41: organizing and operating sporting events, tournaments, competitions and contests.

Opposer further asserts that granting registration of the NAUTICA mark to Applicant for motor homes will harm the reputation of Opposer and Opposer's famous

NAUTICA mark, or impair the distinctiveness of Opposer's famous NAUTICA mark, thereby resulting in dilution by tarnishment or dilution by blurring in violation of Trademark Act Section 43(c), 15 U.S.C. §1125(c).

Applicant denied the salient allegations of the Notice of Opposition in its Answer.<sup>4</sup>

The case is fully briefed. "Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, its asserted grounds of (i) priority and likelihood of confusion and (ii) dilution." *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1267 (TTAB 2003) (citing *Cerveceria Centroamericana, S.A. v.*

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<sup>4</sup> Answer, 4 TTABVUE. Applicant's first affirmative defense in its Answer, that the Notice of Opposition fails to state a claim upon which relief can be granted, is not an affirmative defense because it asserts the insufficiency of the pleading of Opposer's claims rather than stating a defense to a properly pleaded claim. *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1101 n.6 (TTAB 2019). Because Applicant did not pursue the purported insufficiency in Opposer's pleading by way of motion, nor argue it in its brief, Applicant has waived it. *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014).

Applicant's second through fifth affirmative defenses merely are amplifications of Applicant's denials of Opposer's claims. Although it is permissible to amplify a denial of an allegation in a pleading, *see Morgan Creek Prods., Inc. v. Foria Int'l, Inc.*, 91 USPQ2d 1134, 1135-36 (TTAB 2009), such amplifications are not (and should not be pled as) separate "defenses," and we do not treat them as such here. *Illyrian Import, Inc. v. ADOL Sh.p.k.*, 2022 USPQ2d 292, at \*5 (TTAB 2022) (citing *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*4 n. 5 (TTAB 2021)).

Applicant's sixth combined affirmative defenses of laches, estoppel and waiver were inadequately pled, but, in any event, because Applicant neither litigated nor addressed these defenses in its brief they are waived. *Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at \*1 n.3 (TTAB 2020).

Applicant's seventh affirmative defense, a reservation of the right to assert additional affirmative defenses, is not an appropriate affirmative defense but merely an advisory statement that Applicant reserves the "right" at some future date to add additional affirmative defenses after conducting discovery in this matter. A defendant cannot reserve unidentified defenses because that does not provide a plaintiff fair notice of such defenses. *DC Comics v. Cellular Nerd LLC*, 2022 USPQ2d 1249, at \*5 n.14 (TTAB 2022).

*Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989) and *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000)). Having considered the evidentiary record, the parties' arguments and applicable authorities, as explained below, we find that Opposer has not carried this burden, and dismiss the Opposition on all grounds.

## **I. The Evidentiary Record**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, the parties introduced the following evidence:

### **A. Opposer's Evidence**

- Opposer's First Notice of Reliance ("ONOR1") on its asserted registrations, with exhibits [15 TTABVUE].
- Opposer's Second Notice of Reliance ("ONOR2") on its additional cancelled and active registrations (not asserted in the Notice Opposition), and pending applications, with exhibits [16 TTABVUE].
- Opposer's Third Notice of Reliance ("ONOR3") on (as applicable) pleadings, stipulations and orders from prior oppositions and cancellation proceedings Opposer has brought before the Board against third parties, and court litigations Opposer has brought against third parties, with exhibits [21 TTABVUE].
- Opposer's Testimony Declaration of Naushaba Moeen ("Moeen Decl.") the Executive Vice President, Lifestyle Brands USA and Canada, of Authentic Brands Group, Opposer's parent company, with exhibits [21-24 TTABVUE].<sup>5</sup>

### **B. Applicant's Evidence**

- Applicant's First Notice of Reliance ("ANOR1") on trademark registrations owned by it and third parties, with exhibits [34 TTABVUE].

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<sup>5</sup> Exhibit 22 to the Moeen Declaration, titled "Nautica Apparel, Inc. Fame Survey Methodology and Results" by Robert L. Klein, was stricken by the Board's Order of July 25, 2022, 33 TTABVUE.

- Applicant’s Second Notice of Reliance (“ANOR2”) on certain of Applicant’s interrogatories, Opposer’s answers thereto, and a copy of the Notice of Opposition (the last of which was unnecessary), with exhibits [35 TTABVUE].
- Applicant’s Third Notice of Reliance (“ANOR3”) on captures of third-party websites, and the dictionary translation of the term NAUTICA from Italian into English [36 TTABVUE].
- Applicant’s Testimony Declarations of representatives from its independent dealers: Angie Morell (“Morell Decl.”), Curt Curtis (“C. Curtis Decl.”), Charles E. Curtis (“C.E. Curtis Decl.”), John McKee (“McKee Decl.”) and Tony Russo (“Russo Decl.”), none of which have attached exhibits [37-41 TTABVUE].
- Applicant’s Testimony Declaration of Donald L. Gephart (“Gephart Decl.”), the Marketing Manager in Applicant’s Class A Division, with exhibits [Public/Redacted, 42-43 TTABVUE; Confidential, 44 TTABVUE].

## II. The Parties

Opposer was founded in 1983, originally as a clothing producer, and since then has marketed and sold an expanding variety of products under the NAUTICA mark throughout its history.<sup>6</sup> Applicant’s business is limited to the manufacture and sale of recreational vehicles, and replacement parts for recreational vehicles, and the service and repair of recreational vehicles.<sup>7</sup>

## III. Opposer’s motion to Strike Applicant’s Brief

Opposer objects to, and moves to strike, Applicant’s Brief as exceeding the 55-page limit established by Trademark Rule 2.128(b), 37 C.F.R. § 2.128(b), “including the table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary.” *Id.*<sup>8</sup> While conceding that “Applicant’s Trial Brief is exactly [55] pages in length[,]” Opposer nonetheless

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<sup>6</sup> Moeen Decl., 22 TTABVUE 5-9, 26, ¶¶ 12, 52, and 23 TTABVUE 102-603, Exh. 19 (articles dating from 1987-2008).

<sup>7</sup> Gephart Decl., 42 TTABVUE 3, ¶ 7.

<sup>8</sup> Opposer’s Reply Brief, 52 TTABVUE 2-5

complains that “all of Applicant’s case citations are cited as footnotes, as opposed to being cited within the body of the brief[; thus being used] ... as a subterfuge to avoid the [55] page limit.”<sup>9</sup>

Having read Applicant’s Brief, the Board does not believe it violates either the letter, spirit or intent of Trademark Rule 2.128(b) with respect to its length, and that Applicant’s use of footnotes for the placement of its case citations is not a subterfuge to avoid compliance with the Rule. Opposer’s motion to strike Applicant’s Brief is denied.

#### **IV. 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, at \*6-7 (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, at \*3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (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 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)); *Meenaxi Enter., Inc. v. Coca-*

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<sup>9</sup> Opposer’s Reply Brief, 52 TTABVUE 4.

*Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at \*2 (Fed. Cir. 2022); *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at \*1 (TTAB 2020).

Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic*, 2020 USPQ2d 10837, at \*3; *Empresa Cubana*, 111 USPQ2d at 1062. There is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*.” *Corcamore*, 2020 USPQ2d 11277, at \*4. Thus, “a party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act] .... Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” 2020 USPQ2d 11277, at \*7.

Opposer established its entitlement to bring and maintain the present opposition by: (1) its assertion with proof of a claim of priority and likelihood of confusion that is not wholly without merit, *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); and (2) making of record its valid and subsisting registrations for its NAUTICA mark owned by Opposer on which Opposer bases its Trademark Act Section 2(d) claim,<sup>10</sup> *Cunningham*, 55 USPQ2d at 1844. Once Opposer meets the requirements for entitlement to a statutory cause of action on one claim, it

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<sup>10</sup> See TESS and TSDR records of Opposer’s asserted registrations for its NAUTICA mark. ONOR1, 15 TTABVUE 6-55. See also, Moeen Decl., 22 TTABVUE 10-11, ¶ 14, asserting Opposer’s ownership of its registrations for the NAUTICA mark.



can rely on any available statutory grounds for opposition set forth in the Trademark Act. *Empresa Cubana Del Tabaco v. General Cigar Co., Inc.*, 2022 USPQ2d 1242, at \*23 n. 45 (TTAB 2022).

## V. Priority

Because Opposer relies on its asserted NAUTICA registrations that have been made of record, and Applicant did not challenge these registrations by way of any cancellation counterclaims, Opposer's priority is not at issue with respect to the mark and goods identified in its pleaded registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

## VI. Likelihood of Confusion

Trademark Act Section 2(d) 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.

Our analysis is based on all of the probative evidence of record. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*” – noting the factors to be considered). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993)

("[T]he various evidentiary factors may play more or less weighty roles in any particular determination.).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect trademark owners from damage caused by the registration of similar marks for related goods or services that are likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). We discuss below these factors, and the other *DuPont* factors for which there is evidence and argument.

#### **A. Strength of Opposer's Mark**

Before we evaluate the similarity or dissimilarity of the parties' marks, we first consider the strength of Opposer's asserted NAUTICA mark. The fifth *DuPont* factor enables Opposer to prove that its pleaded mark is entitled to an expanded scope of protection by adducing evidence of "[t]he fame of the prior mark (sales, advertising, length of use);" the sixth *DuPont* factor allows Applicant to contract that

scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567.

Since the strength of Opposer’s mark affects the scope of protection to which it is entitled, *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*20 (TTAB 2022), we thus consider the inherent or conceptual strength of Opposer’s NAUTICA mark based on the nature of the mark itself, and we consider its commercial strength based on marketplace recognition of the mark. *See 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....”).

### 1. Conceptual Strength

“Conceptual strength is a measure of a mark’s distinctiveness, and distinctiveness is often classified in categories of generally increasing distinctiveness[:] ... (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Spireon Inc. v. Flex Ltd.*, 2023 USPQ2d 737 at \*4 (Fed. Cir. 2023) (internal citations and quotation marks omitted). We begin with Applicant’s submission into the record of the Italian-to-English translation of NAUTICA as denoting “navigation, nautical science, seamanship, navigation techniques, boating, sailing, boat show.”<sup>11</sup> A foreign translation statement of NAUTICA as meaning NAUTICAL in English appears in all but one of Opposer’s asserted registrations,<sup>12</sup> and in Applicant’s opposed

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<sup>11</sup> CAMBRIDGE Italian-English Dictionary, ANOR3, 36 TTABVUE 24.

<sup>12</sup> Asserted NAUTICA registrations, ONOR1, 15 TTABVUE 6-55.

Application.<sup>13</sup> For completeness, a definition of NAUTICAL from a recognized English dictionary is “of, relating to, or associated with seamen, navigation, or ships.”<sup>14</sup>

From the Italian translation, Applicant argues that “Nautica is an Italian word, meaning ‘navigation techniques, boating, sailing, navigation, nautical science, seamanship.’ A generic Italian word, even translated to English, lacks distinctiveness.”<sup>15</sup> Opposer characterizes Applicant’s contention as an “absurd argument,” explaining “there is absolutely no evidence of record that Nautica is an Italian word, or that Nautica has any meaning aside from the secondary meaning achieved by Opposer’s use of NAUTICA.”<sup>16</sup> We find both parties’ arguments to be overstated.

On the one hand, no evidence has been made of record demonstrating, and Applicant offers no evidence or explanation why, under the doctrine of foreign equivalents, NAUTICA qualifies as a word from a common, modern language that the consuming public would stop and translate to determine its connotation in English. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en*

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<sup>13</sup> See footnote 1, *supra*.

<sup>14</sup> Definition of NAUTICAL from the online MERRIAM-WEBSTER dictionary (<https://www.merriam-webster.com/dictionary/nautical>, last viewed August 2, 2023). The Board may take judicial notice of dictionary definitions from online sources when the definitions themselves are derived from dictionaries that exist in printed form or have regular fixed editions. *See Gerson Co. v. United States*, 898 F.3d 1232, 1236 n.4 (Fed. Cir. 2018); *McGowen Precision Barrels, LLC v. Proof Research, Inc.*, 2021 USPQ2d 559, \*24 n.93 (TTAB 2021).

<sup>15</sup> Applicant’s Brief, 51 TTABVUE 54.

<sup>16</sup> Opposer’s Reply Brief, 52 TTABVUE 15-16.

1772, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005). The doctrine is applied when it is likely that “the ordinary American purchaser would ‘stop and translate [the word] into its English equivalent.’” *Id.* “When it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied.” *Id.* The fact that a translation statement of NAUTICA to NAUTICAL appears in the majority of Opposer’s asserted registrations, or in Applicant’s opposed Application, does not establish Applicant’s proposition. *In re Medline Indus., Inc.*, 2020 USPQ2d 10237, at \*11 n.38 (TTAB 2020) (“consumers are unaware of the descriptions [of marks set forth in registrations or applications] ...”). Therefore, we decline to apply the doctrine of foreign equivalents in assessing the meaning of NAUTICA.

On the other hand, stating the obvious, with the exception of the letter “L” at the end of the word “Nautical,” there is very little difference between NAUTICA and NAUTICAL. *See In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831-32 (Fed. Cir. 2007) (“The appearance and meaning of ASPIRINA and aspirin are similar. Adding an ‘a’ to aspirin results in virtually no distinction with respect to the visual impressions of the terms.”).

Opposer’s position that “Nautica has ... [no] meaning aside from the secondary meaning achieved by Opposer’s use of NAUTICA” is belied by its own evidence. Opposer repeatedly has educated the public to associate its NAUTICA apparel with nautical themes and concepts. This is well-demonstrated by the product offerings on

Opposer's website,<sup>17</sup> social media pages,<sup>18</sup> and event signage.<sup>19</sup> We also note that the drawing page of one of Opposer's non-asserted registrations for its NAUTICA mark depicts the word portion accompanied by a sailboat image.<sup>20</sup> A few of Opposer's other non-asserted registrations show the sailboat image by itself,<sup>21</sup> but on Opposer's website, social media pages and event signage, the sailboat image (or a boat anchor image) and the NAUTICA mark often are used together – emphasizing the nautical refrain.

The public's understanding of NAUTICA as being associated with “nautical” concepts and themes also is demonstrated by statements Opposer has made to the public that have been reported in the media, and in media articles describing Opposer's business:<sup>22</sup>

- “As a nautical-influenced classic American sportswear brand, we inspire and enable people to experience the joy of water.” [PERFORMANCE PLUS RETAILER GUIDE, 2022; AMERICAN TRAVELER, undated].

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<sup>17</sup> Opposer's website offerings, Moeen Decl., 22 TTABVUE 43-118, 237-240, Exhs. 2, 10.

<sup>18</sup> Opposer's INSTAGRAM, PINTEREST and TWITTER pages, Moeen Decl., 22 TTABVUE 241-44, Exh. 11.

<sup>19</sup> Opposer's event signage, Moeen Decl., 23 TTABVUE 20-31, Exh. 15.

<sup>20</sup> Opposer's non-asserted NAUTICA registration inclusive of a sailboat image, ONOR2, 16 TTABVUE 26-29. *See* Trademark Rule 2.122(d)(2), 37 C.F.R. 2.122(d)(2) (discussing admissibility, and method of introduction, of non-asserted trademark registrations owned by a party). *See also, Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at \*1 n.5 (TTAB 2019) (unpleaded registration submitted under notice of reliance may be considered, like third-party registrations, for whatever probative value it may have under the *DuPont* factors).

<sup>21</sup> Opposer's non-asserted registrations showing a sailboat image by itself, ONOR2, 16 TTABVUE 33-36, 45-48, 56-63, 76-79.

<sup>22</sup> Articles, Moeen Decl., 22 TTABVUE 220-236, Exh. 9. Although several of these articles are missing their URLs and publication or capture dates, Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), Applicant did not object to their submission. The first example cited in the main text above also qualifies as a non-hearsay statement against interest. Fed. R. Evid. 801(d)(2).

- “Drawing inspiration from its iconic sailing heritage and the classic styling of like of deck, Nautica is a global lifestyle brand that’s modern and innovative in its fit, feel and function.” [FOCUS BRANDS, undated].
- “Born in 1983, the [NAUTICA] brand took its name from the Nautilus, and ocean-going yacht that was also the fastest of its day. ... Nautica has built its reputation on the quality of its nautical-themed sportswear.” [BESTUNDER250, undated].
- “The [NAUTICA] name is an adaptation of ‘nauticus,’ which is the Latin term for ship.” [Forbes, January 22, 2020].


We therefore find NAUTICA to be suggestive<sup>23</sup> of nautical-influenced products (at the very least apparel). “[Suggestive] marks, because their intrinsic nature serves to identify a particular source of a product, are deemed inherently distinctive and are entitled to protection.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 USPQ2d 1081, 1083 (1992). In any event, Opposer’s registrations are “prima facie evidence of the validity of the registered mark,” see Trademark Act Section 7(b), 15 U.S.C. § 1057(b), such that we must assume Opposer’s NAUTICA mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. See *Tea Board of India v. The Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). See also *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*10 (TTAB 2020). However, “[s]uggestive marks, in general, are not entitled to the same scope of protection as arbitrary marks.” *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1045

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<sup>23</sup> “[I]f a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods ..., then the mark is suggestive.” *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 1332, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003).

(TTAB 2010) (citing *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992)).

We now turn to Applicant’s efforts to show that Opposer’s NAUTICA mark is weak. Applicant made of record the following use-based, active, third-party registrations for marks comprising the word NAUTICA or containing the word NAUTICA:<sup>24</sup>

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods and/or Services</b>
NAUTICA	1471348	Dehumidifiers, air conditioners, heaters, ventilators, heat exchangers, heating coils, cooling coils, condensers, dampers, and air flow conduit chambers for use in high humidified environments, Cl. 11.
CERVEZA NAUTICA	2632830	Beer, Cl. 12
 (Translation Statement: “The English translation of ‘AERONAUTICA MILITARE’ in the mark is ‘AIR FORCE’.”)	6399493	Extensive listing of goods, including: “Backpacks; Travelling bags; All-purpose carrying bags for use by campers ...”, Cl. 18; “Clothing, footwear, headwear, namely, shirts, jackets, sweaters, tee shirts, sweatshirts, hoodies, pants, shoes, boots, slippers, flipflops, bath robes, trunks, swimwear, shorts, polo shirts, skirts, dresses, scarves, gloves, hats, belts, vests ...,” Cl. 25, and “retail and wholesale store services featuring clothing, footwear,

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<sup>24</sup> Third-party NAUTICA registrations, ANOR1, 34 TTABVUE 43-46 and 51-57. We do not consider the NAUTICA marks of Trademark Reg. Nos. 2498679 or 1583491, ANOR1, 34 TTABVUE 47-50 and 58-59, because the registrations for these marks were cancelled. A cancelled or expired registration is not evidence of any presently existing rights in the mark shown or that the registrant ever used the mark. *Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989); *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at \*4 n.5 (TTAB 2023).



<b>Mark</b>	<b>Reg. No.</b>	<b>Goods and/or Services</b>
		headwear, eyewear, leather and imitation leather goods, bags ..." Cl. 35.

"The existence of third-party registrations on similar goods can bear on a mark's conceptual strength. ... Specifically, third-party registrations containing an element that is common to both the opposer's and the applicant's marks can show that that element has a normally understood and well-recognized descriptive or suggestive meaning." *Spireon, Inc. v. Flex Ltd.*, 2023 USPQ2d 737, at \*3-4 (cleaned up, citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) and *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)).

Moreover:

Evidence of composite third-party registrations is also relevant because ... [s]uch registrations could ... show that the [US]PTO, by registering several marks with such a common segment, recognizes that portions of such composite marks other than the common segment are sufficient to distinguish the marks as a whole and to make confusion unlikely. That is, the presence of such a descriptive or suggestive weak segment in conflicting composite marks is not per se sufficient to make confusion likely.

*Spireon*, 2023 USPQ2d 737, at \*5 (citing J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (5th ed. 2023)).

Qualitatively and quantitatively, Applicant's evidence falls short of showing that Opposer's NAUTICA mark is conceptually weak and entitled to only a narrow scope of protection for its identified goods and services. Opposer's and Applicant's involved marks are identical. Therefore, third-party registered marks incorporating other

elements are of less probative value. *Cf. Spireon*, 2023 USPQ2d at \*5 (“At least where the registrations and application are for non-identical marks, as they are here, it is error for the Board to effectively disregard third-party composite marks.”). That is especially true here, where the additional wording in two of the three third-party marks cited by Applicant (CERVEZA NAUTICA and AEURONAUTICA MILITARE) is significant enough to make those marks less similar to Opposer’s NAUTICA mark. *See Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*25 (TTAB 2021) (“[W]hile the registered marks all contain the word ‘MIRAGE,’ they contain additional elements that cause many of them to be less similar to Petitioner’s mark than Respondent’s marks are.”).

Moreover, the third-party NAUTICA registration identifies goods that are wholly different from the goods or services in which Opposer claims rights in its registrations. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”).

Collectively, we find these three third-party registrations do not demonstrate that NAUTICA is conceptually weak for Opposer’s identified goods and services. *See In re Inn at St. John’s LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019) (four third-party registrations and no third-party uses

were “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant” in *Jack Wolfskin* and *Juice Generation*).

## 2. Commercial Strength

Opposer contends its “NAUTICA ... [m]ark and name have achieved a remarkable public recognition and renown and are famous.”<sup>25</sup> The fame or commercial strength of an opposer’s mark “plays a dominant role in cases featuring ... [such] mark[s].” *Kenner Parker Toys Inc. v. Rose Arts Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). *See also Palm Bay Imps.*, 73 USPQ2d at 1694 (“Fame of an opposer’s mark, if it exists, plays a dominant role in the process of balancing the *DuPont* factors.”) (citing *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000)). Famous marks are accorded more protection than obscure or weak marks. *Id.* “[A] strong mark ... casts a long shadow which competitors must avoid.” *Id.* A mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark. *Id.*

As stated in *Kenner v. Rose Arts*, 22 USPQ2d at 1456:

[T]he Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark. As a mark’s fame increases, the Act’s tolerance for similarities in competing marks falls. ... The driving designs and origins of the Lanham Act demand the standard consistently applied ... – namely, more protection against confusion for famous marks.

Since famous marks thus enjoy a wide latitude of legal protection, *Recot*, 54 USPQ2d at 1897, “[i]t is the duty of a party asserting that its mark is famous to

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<sup>25</sup> Opposer’s Brief, 50 TTABVUE 46.

clearly prove it.” *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007). “[L]ikelihood of confusion fame varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (cleaned up).

Moreover, fame alone is insufficient to prove likelihood of confusion. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USPQ 505, 507 (Fed. Cir. 1983). “It must also be established that there is a reasonable basis for the public to attribute the particular product ... of another to the source of the goods ... associated with the famous mark. To hold otherwise would result in recognizing a right in gross, which is contrary to principles of trademark law and to the concepts embodied in 15 U.S.C. § 1052(d).” *Id.*

Fame for likelihood of confusion purposes may be measured indirectly<sup>26</sup> by the volume of sales of and advertising expenditures for the goods and services identified by the marks at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1368, 63 USPQ2d 1303, 1305-06 and 1309 (Fed. Cir. 2002). Raw numbers alone may be

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<sup>26</sup> “Fame for likelihood of confusion purposes also may be measured directly by consumer survey.” *Monster v. Lo*, 2023 USPQ2d 87, at \*22 n.44 (citing *Omaha Steaks*, 128 USPQ2d at 1689). As we noted above, Opposer attempted to submit such a survey (and accompanying expert report). See Moeen Decl., 24 TTABVUE 154-66, Exh. 22. However, the Board, in its Order of July 25, 2022, 33 TTABVUE, struck this evidence from the record on a motion by Applicant because Opposer failed to produce it in response to Applicant’s discovery inquiries prior to trial.

misleading, however. Thus, some context in which to place raw statistics may be necessary, for example, market share or sales or advertising figures for comparable types of goods. *Id.* at 1309. Fame also may be demonstrated by “considerable contextual evidence of the type of advertisements and promotions ... [the famous mark owner] uses to gain sales.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018).

To determine whether Opposer’s NAUTICA mark is famous for likelihood of confusion purposes, we accept whatever relevant evidence is made of record up to and including the time of trial (that is, not stopping our evidentiary consideration at the filing date of Applicant’s opposed intent-to-use Application). *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1439 (Fed. Cir. 2012) (“[W]hile a party asserting dilution in an opposition proceeding must establish that its mark had become famous prior to the filing date of an intent-to-use application ..., no such restriction applies to the use of evidence of the strength of a mark for purposes of showing likelihood of confusion.”).

We begin our fame analysis with the array of products in connection with which Opposer claims it has used the NAUTICA mark:<sup>27</sup> apparel, apparel accessories, hair accessories, kitchen ware, dinnerware and tableware, beverage ware, cookware, personal care products, fragrances/cosmetics, hair care products, bath ware, housewares, furniture, floor coverings, infant and children’s products, lighting

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<sup>27</sup> We will return to this subject upon our consideration of the ninth DuPont factor: “[t]he variety of goods on which a mark is or is not used.” *DuPont*, 177 USPQ at 567.

products, bedding, fabrics/drapery/hangings, pet products, eyewear, luggage/bags/leather goods, paint/wall coverings, watches/clocks, jewelry, exercise equipment/sporting goods, game products, water recreational products, outdoor lifestyle equipment, and paper goods.<sup>28</sup> The vast majority of Opposer's documented evidence, however, demonstrates that the chief or core products with which Opposer promotes its NAUTICA mark are apparel goods and accessories.<sup>29</sup>

Opposer considers its NAUTICA mark to be a "lifestyle brand," "defined as a well-known famous brand that sells a full and diverse offering of lifestyle products that loyal consumers choose and associate with as being symbolic of and/or being a representation of their lifestyle, their values, aspirations, interests, attitudes, and status. Such brands reflect the consumer's way of life."<sup>30</sup> For our purposes in considering strength, a mark is not accorded fame as a "lifestyle brand" merely by its owner saying so. The Board requires proof.<sup>31</sup>

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<sup>28</sup> Moeen Decl., 22 TTABVUE 5-8, ¶ 12. Ms. Moeen's declaration goes into further detail, providing examples of the items covered by each category of goods.

<sup>29</sup> Moeen Decl., 22 TTABVUE 43-118, 241-321, Exh. 2 (nautica.com website showing use of the NAUTICA mark to promote mostly the sales of clothing, and also drinkware, eyewear, towels, jewelry, wallets, handbags, bedding, small boats and gear, camping gear, snow gear, indoor/outdoor furniture & furnishings, lamps, cookout gear, table wear, scents, luggage), Exh. 11 (Instagram, Pinterest and Twitter pages promoting mostly fashion items), Exh. 12 (media placement records 2000-2013 (to the extent readable), with the majority of items promoted being sportswear and other clothing items), Exh. 13 (circulation records for print and online media advertising 2016-2017, with the majority of items promoted being clothing or fashion accessories; some furniture).

<sup>30</sup> Moeen Decl., 22 TTABVUE 16, ¶¶ 28-29.

<sup>31</sup> Several of the online media articles Opposer made of record referring to NAUTICA as a "lifestyle brand," Moeen Decl., 22 TTABVUE 220-36, Exh. 9, are undated and lack website source (i.e., URL) information, lessening their persuasiveness.

From her review of company business records, Opposer’s sole witness, Naushaba Moeen, provided Opposer’s annual U.S. sales figures and annual U.S. advertising/promotional expenditures for goods bearing the NAUTICA mark, as follows:<sup>32</sup>

<b>Fiscal Year</b>	<b>U.S. Annual Sales</b>	<b>U.S. Advertising Spend</b>
2001	\$886,574,000	\$35,537,565
2002	\$920,570,000	\$35,111,056
2003	\$925,058,000	\$37,685,943
2004	\$877,320,000	\$37,643,000
2005	\$862,738,000	\$39,904,000
2006	\$929,648,000	\$35,686,000
2007	\$924,621,000	\$35,194,000
2008	\$826,270,000	\$31,442,000
2009	\$685,936,000	\$16,634,000
2010	\$699,585,000	\$21,721,000
2011	\$731,981,000	\$21,161,000
2012	\$770,433,000	\$23,344,000
2013	\$791,780,000	\$27,875,000
2014	\$847,235,000	\$25,946,000
2015	\$870,291,000	\$23,691,000
2016	\$771,321,000	\$19,116,000
2017	\$1,190,877,357	\$14,200,000
2018	\$1,162,736,167	\$9,585,114
2019	\$1,460,236,884	\$8,385,664
2020	\$1,123,476,643	\$30,195,618 (U.S. & foreign)
2021	\$1,600,759,233	\$38,000,000 (U.S. & foreign)

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<sup>32</sup> Moeen Decl., 22 TTABVUE 17-19, ¶¶ 32, 35-36.

While these sales and advertising figures are impressive, they are not broken down by product category and, therefore, we cannot assess Opposer's revenues vis-à-vis product categories (e.g., if 90% of Opposer's sales are for apparel, the revenues would support consumer renown for NAUTICA for apparel but not much else). Opposer notes the above advertising and promotional expenditures also do not include outlays for NAUTICA fragrances, which Ms. Moeen says average between \$8 and \$17 million annually.<sup>33</sup>

Since, as we noted above, raw sales and advertising figures can be misleading, market share information is useful to put this information in context. Opposer provided market share data from the consumer purchase tracking company NPD Group, showing that between 2004 and 2007 Opposer had between a 4.7 and 5.6 percent market share of the U.S. menswear business in the department store channels of trade, a rank of #2 in the country based upon total sales volume. In 2012, discounting "Private Label" combined and "PVH" combined (PVH is a holding company for multiple brands), NPD Group showed that Opposer had a market share of 2.77 percent (an apparent rank of #6).<sup>34</sup> We note that the evidence Opposer provided to support these figures is difficult to read, much less to interpret without further explanation, and in any event is dated and thus stale.

Opposer's products are offered for sale and sold throughout the entire United States in department stores, specialty stores, Opposer's own stores in the United

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<sup>33</sup> Moeen Decl., 22 TTABVUE 18-19, ¶¶ 33-34.

<sup>34</sup> Moeen Decl., 22 TTABVUE 31, ¶¶ 53-55, 24 TTABVUE 151-153, Exh. 21.



States (75 stores), over the Internet via its licensees' websites, on amazon.com and authorized customer and portal websites. Examples of stores where Opposer's NAUTICA products are sold are: TJ Maxx (approx. 1,270 stores), Marshalls (approx. 1,100 stores), HomeGoods (approx. 800 stores), Macy's (approx. 600 Macy's stores), Dillard's (approx. 294 stores), Belk (approx. 300 stores), Stage stores (i.e., Stage, Beall's, Palace Royal and Peebles-approx. 800 stores), Bed Bath & Beyond (approx. 1000 stores), Boscov's, big box stores (e.g., Costco, Burlington, Sam's Club, Ross Stores), and thousands of independent stores throughout the nation.<sup>35</sup>

In the United States, Opposer and its licensees advertise and promote NAUTICA branded products through print, outdoor signage (e.g., billboards, bus shelters, taxi tops, etc.), radio, TV, digital online, POS, social media, email blasts, and mall advertising. Nautica also participates in sponsorship events and cause marketing and has endorsement agreements with sports figures.<sup>36</sup>

Since the early 1990s, Opposer has operated its website nautica.com, where products and services are marketed and displayed in connection with the NAUTICA mark. The website also has a shopping cart for consumers to purchase NAUTICA products directly from the website. The NAUTICA mark is prominently featured on the pages of the website.<sup>37</sup> Nautica also has a social media presence, including on: Facebook (nearly 6 million followers), Twitter (over a quarter million followers),

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<sup>35</sup> Moeen Decl., 22 TTABVUE 4, ¶ 9.

<sup>36</sup> Moeen Decl., 22 TTABVUE 19-20, ¶ 38.

<sup>37</sup> Moeen Decl., 22 TTABVUE 20, 43-118, 237-40, ¶ 39, Exhs. 2 and 10.

Instagram (since October 2009, approximately 632,000 followers), and Pinterest (over 581,000 monthly views).<sup>38</sup>

Opposer's advertising for its NAUTICA mark has appeared in print and online media including such magazines as GQ, IN STYLE, PEOPLE magazine, SPORTS ILLUSTRATED, ESPN, MEN'S HEALTH, OUTDOOR, ELLE DECOR, HOUSE BEAUTIFUL and COASTAL LIVING.<sup>39</sup> Opposer provided the circulation figures for its print and online advertising for 2016-2017, covering fashion, jewelry, furniture, paint, and leather goods<sup>40</sup> Opposer's television advertising placements have been on popular and prime-time shows, such as NCIS, FRIENDS, EVERYBODY LOVES RAYMOND, GREY'S ANATOMY and UGLY BETTY.<sup>41</sup> Opposer provided its media placement records for 2000-2013, many pages of which are unreadable.<sup>42</sup> Generally, we note the circulation figures and media placement information, although impressive, are somewhat dated, and thus stale.

Opposer's NAUTICA mark also is promoted in connection with Opposer's sponsorships, endorsements, and charitable activities, such as golf, sailing, swimming, surfing, volleyball, the Olympics, triathlons, concerts, breast cancer awareness, and ocean preservation events. Opposer's event signage prominently uses

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<sup>38</sup> Moeen Decl., 22 TTABVUE 20, 241-44, ¶ 40, Exh. 11.

<sup>39</sup> Moeen Decl., 22 TTABVUE 20, ¶ 41.

<sup>40</sup> Moeen Decl., 22 TTABVUE 279-321, Exh. 13.

<sup>41</sup> Moeen Decl., 22 TTABVUE 20, ¶ 42.

<sup>42</sup> Moeen Decl., 22 TTABVUE 245-78, Exh. 12. *See Alcatraz Media*, 107 USPQ2d at 1758 n.16 (“[T]he onus is on the party making the submissions to ensure that, at a minimum, all materials are clearly readable by the adverse party and the Board.”).

and displays the NAUTICA mark at each event. Some of these events garner millions to over a billion impressions (views). Opposer provided representative materials from or relating to these events for the period 2006-2019.<sup>43</sup>

Opposer's NAUTICA products have been featured in numerous national television programs, books, newspaper and magazine articles, and online publications, including in or on (as applicable): CNN, CBS, ABC, NBC, CNBC, MSNBC, NPR, YAHOO!, ABOUT.COM, FOX, BLOOMBERG, THE NEW YORK TIMES, USA TODAY, THE CHICAGO TRIBUNE, BUSINESS WEEK, FORBES, THE WALL STREET JOURNAL, NEWSDAY, THE WASHINGTON POST, THE LOS ANGELES TIMES, THE MIAMI HERALD, THE ATLANTA CONSTITUTION AND JOURNAL, and the DETROIT FREE PRESS.<sup>44</sup> Opposer provided copies of articles in which the company (by name) and its NAUTICA mark have been the subject of news coverage in connection with clothing, apparel accessories, swimwear, towels, luggage, leather goods, watches, jewelry, eye ware, fragrances, umbrellas, textiles, furniture, home furnishings, bedding, tableware, sponsorships and charities in local, regional, national and specialty publications (e.g., fashion) for the period 1987-2008.<sup>45</sup> We note the dated/stale nature of this evidence, and that the vast majority of the featured products are clothing.

Opposer further provided, and highlights, evidence of the enforcement of its NAUTICA mark against third parties before the Board (numerous) and in the courts

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<sup>43</sup> Moeen Decl., 22 TTABVUE 21-25, ¶¶ 45-50, Exhs. 14-18

<sup>44</sup> Moeen Decl. 22 TTABVUE 25, ¶ 51.

<sup>45</sup> Moeen Decl. 22 TTABVUE 102-603, Exh. 19.

(four litigations) for the period 1996-2019,<sup>46</sup> touting this as proof that “[t]he NAUTICA [m]ark has been judicially determined to be well-known and famous” for likelihood of confusion purposes.<sup>47</sup> We have problems with this evidence on a number of levels.

“[E]vidence of successful enforcement frequently is submitted to show strength or fame under the fifth *DuPont* factor ....” *Monster Energy v. Lo*, 2023 USPQ2d 87, at \*43 n.83. However, the vast majority of the enforcement evidence Opposer provided consists of proceedings and litigations that were resolved well before a decision on the merits, either by the defending party’s default, voluntary abandonment or withdrawal (of an application), surrender (of a registration), concession on a dispositive motion, stipulation or judgment on consent. We cannot say that Opposer’s enforcement matters resolved in this fashion are “probative of the ... [fame] of ... [its] mark as opposed to the ... [defending] parties’ desire to avoid litigation.” *In re Dimarzio, Inc.*, 2021 USPQ2d 1191, at \*12 n. 24 (TTAB 2021) (citing *In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7, 8 n.2 (CCPA 1977)).

Opposer provided copies of four non-precedential Board decisions involving enforcement of Opposer’s NAUTICA mark in which Opposer was successful on the merits.<sup>48</sup> However, this list is not complete. Opposer and its NAUTICA mark were

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<sup>46</sup> ONOR3, 21 TTABVUE 2-422; Moeen Decl., 24 TTABVUE 167-305, Exh. 23.

<sup>47</sup> Opposer’s Brief, 50 TTABVUE 26.

<sup>48</sup> *Nautica Apparel, Inc. v. Crain*, Opp. No. 91113893 (TTAB Sept. 21, 2001); *Nautica Apparel, Inc. v. Carlucci*, Opp. No. 91165909 (TTAB Dec. 18, 2007); *Nautica Apparel, Inc. v. Martanna LLC*, Opp. No. 91177192 (TTAB Jan. 22, 2010); and *Nautica Apparel, Inc. v. Nauti Marine*, Opp. No. 91205138 (TTAB Jun. 16, 2014). Moeen Decl., 24 TTABVUE 168-219, 256-305.

involved in two more-recent Board proceedings, one in which Opposer succeeded, the other which Opposer lost.<sup>49</sup>

The non-precedential decisions in which Opposer was successful concerned marks of the defending parties that were registered or sought for registration in connection with goods for which Opposer had one or more prior registrations that covered those goods. Those decisions also involved different evidentiary records, different arguments of counsel, and were decided on their own merits, on a case-by-case basis. Moreover, most of the decisions in which Opposer's NAUTICA mark was found famous limited the finding of fame to the apparel and accessories fields. While we give the decisions in which Opposer was successful some weight, they are not probative on the fame of Opposer's NAUTICA mark in this proceeding to the extent Opposer claims.

We now turn to Applicant's efforts to show that Opposer's NAUTICA mark is commercially weak in connection with the goods (or services) identified in its asserted registrations. "The purpose of introducing evidence of third-party use is 'to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.'" *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694). Third-party uses of similar marks for similar goods may bear on the commercial weakness of a mark, *Tao Licensing, LLC v. Bender*

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<sup>49</sup> *Nautica Apparel, Inc. v. Palmerton*, Canc. No. 92056754 (TTAB Oct. 21, 2015); *Nautica Apparel, Inc. v. Grow Marketing, LLC*, Canc. No. 92064768 (TTAB October 21, 2020).

*Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017), and may be “relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1693).

In this connection, Applicant made of record captures of six third-party websites showing the use of NAUTICA in connection with their services:<sup>50</sup>

<b>Name</b>	<b>Website</b>	<b>Services</b>
HEALTHNAUTICA♦COM	healthnautica.com	Cloud-based app for surgery scheduling
THE NAUTICA, NAVY YARD	massneighborhoods.com/boston/the-nautica-condos	Condominium listings
NAUTICA QUEEN	nauticaqueen.com	Cruise ship
NAUTICA REALTY	nauticarealty.com	Beach realtor
NAUTICA WEALTH ADVISORS	nauticawealthadvisors.com	Financial planning
OCEANIA CRUISES’ NAUTICA	oceanacruises.com/ships/nautica	Cruise ship

Having reviewed Applicant’s submissions of third-party “NAUTICA ...” marks as a whole, we do not find this evidence persuasive. None of Applicant’s website materials shows use of the third-party marks for any of the goods or services identified in, or similar to those identified in, Opposer’s asserted registrations. *Omaha Steaks*, 128 USPQ2d at 1694 (in a case involving meat products, holding it was error to consider alleged weakness evidence involving different types of food products, alcoholic beverages, or restaurants).

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<sup>50</sup> ANOR3, 36 TTABVUE 5-20.

### **3. Summary: Strength of Opposer's Mark**

In sum, although we find Opposer's NAUTICA mark to be inherently distinctive, it is suggestive of nautical-influenced products (at the very least apparel). Conceptually, Opposer's NAUTICA mark does not have as a great a scope of protection as an arbitrary mark. We further find Opposer's NAUTICA mark is famous in connection with apparel and apparel accessories, but based on this record, we cannot make such a finding in connection with the other products and the services identified in Opposer's asserted registrations, and therefore accord the mark average commercial strength as to those. Overall, these factors weigh in favor of a finding that confusion is likely.

#### **B. The Similarity or Dissimilarity of the Parties' Marks**

We now consider the similarity or dissimilarity of the parties' marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *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*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). In this connection, by "commercial impression" we mean "what the probable impact will be on the ordinary purchaser in the market place ...." *T. W. Samuels Distillery, Inc. v. Schenley Distillers, Inc.*, 458 F.2d 1403, 173 USPQ 690, 691 (CCPA 1972).

"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.” *In re i.am.symbolic*, 123 USPQ2d at 1751 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted)). A proper emphasis is on the recollection of the average customer who normally retains a general, rather than specific, impression of trademarks. *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991). For opposer’s wide array of goods, the average consumer would be a member of the general public. For Applicant’s goods, the average consumer would be the purchaser or potential purchaser of a motor home.

“To state the obvious, [A]pplicant’s ... [NAUTICA] mark is identical to [O]pposer’s ... [NAUTICA] mark in sound and appearance ...” *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Applicant admits as much.<sup>51</sup> However, Applicant argues that “[t]he commercial impressions conveyed by Applicant’s mark and Opposer’s marks are different.”<sup>52</sup> Applicant says it “intends to convey through its NAUTICA mark ‘an innovative, technically advanced and consumer-driven design.’”<sup>53</sup> To make the contrast, Applicant says “Opposer[] ... presents itself as a water-related seller of apparel and home goods.”<sup>54</sup> Concluding, Applicant says that its mark and the mark of “Opposer present differing commercial impressions, one for an innovative and technically advanced motor home, and the other for water-inspired

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<sup>51</sup> Applicant’s Brief, 51 TTABVUE 19.

<sup>52</sup> Applicant’s Brief, 51 TTABVUE 20.

<sup>53</sup> Applicant’s Brief, 51 TTABVUE 20, citing Gephart Decl., 42 TTABVUE 6, ¶ 22.

<sup>54</sup> Applicant’s Brief, 51 TTABVUE 20.



clothing and household items.”<sup>55</sup> At the same time, Applicant concedes “the connotation of the NAUTICA mark on a motor home may not be immediately apparent.”<sup>56</sup> In fact, the exterior of Applicant’s NAUTICA motor homes is painted with the design of what appears to be crashing waves,<sup>57</sup> emphasizing a nautical theme to Applicant’s product much like Opposer’s clothing lines.

In support of its position, Applicant cites *Coach Servs.*, 101 USPQ2d at 1721-1722, and *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312, 1314 (TTAB 1987), neither of which assist us in distinguishing the parties’ marks. In *Coach Servs.*, the U.S. Court of Appeals for the Federal Circuit affirmed the Board’s findings that the applicant’s COACH mark, when applied to educational materials, brought to mind someone who instructs students, while the Opposer’s COACH mark, when used in connection with luxury leather goods, brought to mind traveling by carriage. These distinct commercial impressions outweighed the similarities in sound and appearance. *Id.*

In *In re Sears*, the Board found that the applicant’s mark CROSS-OVER, when applied to brassieres, was suggestive of the construction of those goods. The registrant’s mark CROSSOVER, when applied to ladies’ sportswear, was likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which “crosses over” the line between informal and more formal wear. As a result of their different meanings when applied to the respective

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<sup>55</sup> Applicant’s Brief, 51 TTABVUE 20.

<sup>56</sup> Applicant’s Brief, 51 TTABVUE 21.

<sup>57</sup> Gephart Decl., 42 TTABVUE 28, 32, 35, Exh. 2; 43 TTABVUE 14, 20, 29-38, 45-50 Exhs. 7, 9, 10

goods, the two marks created different commercial impressions, notwithstanding the fact that they were legally identical in sound and appearance. Significantly influencing the Board's decision to reverse the refusal to register the applicant's mark was the presence of a consent agreement to use and registration between the applicant and the owner of the cited registration. *In re Sears*, 2 USPQ2d at 1314-15.

In both *Coach Servs.* and *In re Sears*, the involved marks (COACH and CROSS-OVER/CROSSOVER) comprised dictionary terms, with known dual-meaning connotations based on the evidence before the Board in each case. Here, NAUTICA is not of that character. The evidence presently before us shows that NAUTICA has a "nautical" suggestiveness for at least Opposer's core goods (clothing and accessories). On the other hand, beside the unsupported averment of Applicant's witness, there is no evidence that NAUTICA connotes an "innovative, technically advanced and consumer-driven design" in connection with Applicant's motor homes. As applied to Applicant's goods, NAUTICA would appear to be an arbitrary designation to consumers. There also is no consent agreement present in this case.

Applicant also seeks to distinguish the parties' marks by arguing "Applicant's 'NAUTICA' mark is used exclusively on its motor homes, and always with or near the manufacturer 'Holiday Rambler' brand or shortened 'HR' stylized trademark."<sup>58</sup> This is entirely irrelevant. *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914-15 (TTAB 2000) (Where neither the applicant's mark nor the opposer's

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<sup>58</sup> Applicant's Brief, 51 TTABVUE 20, citing Gephart Decl., 42 TTABVUE 5-6, 27-35, ¶¶ 18, 21, and Exh. 2A.

registered mark includes a house mark, “determination of likelihood of confusion must be based on the specific marks at issue.”); *Chesebrough-Pond’s Inc. v. Soulful Days, Inc.*, 228 USPQ 954, 956 (TTAB 1985) (noting that where the applicant was seeking to register the mark AZANIA by itself, the fact that the applicant may use another mark along with the mark sought to be registered was “irrelevant in the determination of likelihood of confusion”).

The identity of Opposer’s and Applicant’s marks weighs in favor of a finding that confusion is likely.

**C. The Similarity or Dissimilarity of Opposer’s Goods vs. Applicant’s Goods<sup>59</sup>**

We now turn to the comparison of the goods at issue, the second *DuPont* factor. *DuPont*, 177 at 567. In making our determination regarding the similarity of the goods, we must look to how they are identified in the opposed Application and Opposer’s Registrations. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of

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<sup>59</sup> We note Opposer’s assertion of its NAUTICA mark of Reg. No. 3232846 for “retail store services in the field of wearing apparel, fashion accessories, home fashions, eyewear, luggage and personal care products” in Class 35; and of Reg. No. 3114379 for “financial sponsorship of sporting events, tournaments, competitions, and contests” and “organizing and operating sporting events, tournaments, competitions and contests” in Classes 36 and 41. We find no similarities between these services and Applicant’s motor homes, either on their face or by way of evidence made of record.

trade or the class of purchasers to which the sales of goods are directed.”)); *see also Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”).

Further, “the goods ... of the parties need not be similar or competitive, or even offered through the same channels of trade to support a holding of likelihood of confusion.” *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1356 (TTAB 2014). “Even if the goods ... are not identical or specifically related in kind, they may be sufficiently related in the mind of the consuming public to cause confusion concerning the source or origin of the goods....” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002). “It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer [or other source].” *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Moreover, with respect to likelihood of confusion, the issue is not whether consumers will confuse the products, but rather whether they will confuse the source of those goods. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (the similarity or dissimilarity and nature of the goods “considers whether ‘the consuming public may perceive [the respective goods and services of the parties]

as related enough to cause confusion about the source or origin of the goods and services.”) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (citing *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)).

“The confusion that is remedied by trademark and unfair competition law is confusion not only as to source, but also as to affiliation, connection or sponsorship.” J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, § 23:8 (5th ed., June 2023 Update). Proof of this type of confusion “will vary with the circumstances.” *Id.* See also, *Int’l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153, 120 USPQ.2d 1388, 1394 (2d Cir. 2016) (It was error for the lower court to consider only likelihood of confusion as to source and not consider confusion as to sponsorship, affiliation or connection, citing treatise. “[C]onsumer confusion is plainly not limited to source confusion.”). In this connection, co-sponsorship activities of seemingly unrelated products within the same commercial space can render consumers more likely to make an assumption of common source. *Philip Morris, Inc. v. K2 Corp.*, 555 F.2d 815, 194 UPSQ 82 (CCPA 1977) (Upholding the Board’s finding that the parties’ cigarettes and skis were related: “It would not be unusual for consumers, simultaneously confronted with the same arbitrary mark for intrinsically unrelated goods, to assume a relationship between the sources of the goods.”).

In this Opposition, Opposer has not asserted ownership of a single active registration of its NAUTICA mark for motor homes or any other motorized vehicles.

In fact, any NAUTICA registrations Opposer had in the past for motorized vehicles of any kind have been cancelled.<sup>60</sup> Similarly, Opposer has not asserted any common law rights in its NAUTICA mark for motor homes or any other motorized vehicles. Applicant spends a good portion of its brief pointing to these gaps in Opposer's rights as a weakness in Opposer's likelihood of confusion claim.<sup>61</sup>

Instead, Opposer argues the relatedness of some unspecified goods or services in its pleaded registrations to motor homes. In support thereof, Opposer points to its prior use of the NAUTICA mark in association with a collaborative cobranding of a Lincoln-Mercury Villager Nautica Edition Mini Van manufactured from 1993-1999.<sup>62</sup> Over two decades later, insofar as the record reflects, Opposer has not pursued any other such collaborative cobranding.

Opposer also provides the following evidence (from 2015-2021) of its competitors in their collaborative cobranding with RV (recreational vehicle) manufacturers or as part of RV renovation projects:<sup>63</sup>

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<sup>60</sup> See Reg. Nos. 1854123, 1849194, 1866327, ONOR, 16 TTABVUE 8-18. As we already have discussed, a cancelled or expired registration is not evidence of any presently existing rights in the mark shown or that the registrant ever used the mark. *Action Temp. Servs.*, 10 USPQ2d at 1309 ; *Monster Energy*, 2023 USPQ2d 87, at \*4 n.5.

<sup>61</sup> Applicant's Brief, 51 TTABVUE 26-35.

<sup>62</sup> Opposer's Brief, 40 TTABVUE 41-42; Moeen Decl., 22 TTABVUE 14, 119-140, ¶ 20, Exh. 3; and press articles, 23 TTABVUE 169-73, 184-91, 205-08, 232-33, 290-92, 295-97, 336-39, Exh. 19.

<sup>63</sup> Moeen Decl., 22 TTABVUE 16-17, 177-219, ¶ 26, Exh. 8.

<b>Nautica Competitor and Products</b>	<b>Vehicle Company and Product</b>	<b>Comments</b>
EDDIE BAUER interior design elements	AIRSTREAM RV	Collaboration for AIRSTREAM RV model “nautical style” trailer.
PENDLETON WOOLEN MILLS interior accessories kit	AIRSTREAM RV	Collaboration for AIRSTREAM RV model, providing “cabin-like aesthetics.”
WOOLRICH	FOUR WHEEL CAMPERS	Collaboration for limited edition pop-up truck campers; because the entire article was not provided, the contribution of Woolrich is not clear.
NORTH FACE Futurelight fabric and tent design	BMW camper unit	Collaboration on a concept model (non-production) trailer-type pop-up camper.
NEIMAN MARCUS	BOWLUS ENDLESS HIGHWAYS BESPOKE PERFORMANCE EDITION travel trailer RV	2020 promotion for NEIMAN MARCUS fantasy gift collection; entire product designed and produced by Bowlus.
RALPH LAUREN interior design elements	AIRSTREAM RV	Collaboration for AIRSTREAM RV models, each having a different interior decor.
TOMMY BAHAMA interior design elements, floor plans	AIRSTREAM RV	Collaboration for AIRSTREAM RV model with various interior upgrades.
SANUK interior design elements	AIRSTREAM RV	Collaboration for AIRSTREAM RV model with various décor accoutrements.
POTTERY BARN	AIRSTREAM RV	Collaboration for AIRSTREAM RV model with interior décor elements contributed by Pottery Barn design team.

Opposer offered no other evidence or argument as to the relatedness of the parties' respective goods/services. When viewing this evidence as a whole, we find that consumers would not encounter the practice of designer/RV manufacturer collaborations as commonly as Opposer suggests. For example:

- We cannot discern the respective companies' contributions to the WOOLRICH/FOUR WHEEL CAMPERS product, because the whole article was not made of record.

- The NORTH FACE/BMW product is only one in concept; not in production so that it is available to consumers. The product also is not an RV or motor home, but a pop-up camper. Additionally, the record does not show the product was available to consumers, and we cannot find that any consumers would be aware of it.

- The NEIMAN MARCUS/BOWLES product was designed and manufactured solely by BOWLES. This does not reflect co-branding, but instead only that a BOWLES product was featured in a NEIMAN MARCUS special catalog.

This leaves us with one company, AIRSTREAM, which according to the evidence has an ongoing practice of collaborating with fashion companies for the design of its RV interior decors. From the evidence Opposer provided, consumers understand which named company manufactured the RV and which differently named company designed the décor of the interior. While we find Opposer's evidence regarding AIRSTREAM's business practices to be probative, we further find that one company engaging in this practice does not show generally that consumers would tend to think the parties' very disparate goods come from the same source. Merely because it is



possible to envision a scenario where the identified goods of Applicant and Opposer can be used together (and the above collaborative cobranding examples do not even support that premise), this does not mean that the goods are related.

The second *DuPont* factor, similarity of the goods, does not support a finding that confusion is likely.

**D. The Similarity or Dissimilarity of Established, Likely-to-Continue Trade Channels<sup>64</sup>**

The third *DuPont* factor “considers ‘[t]he similarity or dissimilarity of established, likely-to-continue trade channels.’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). The trade channels factor considers the modalities and means (e.g., print, media, store aisles or shelves, or online) by which the respective goods are marketed, *see In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003), sold or distributed, *see Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

Our determination must be based on the recitations of goods in Opposer’s pleaded Registrations and subject Application because they define the scope of the benefit of registration. *Stone Lion*, 110 USPQ2d at 1162. Where, as here, Opposer’s Registrations and Applicant’s opposed Application do not contain any specific limitations, they each encompass all goods of the types described, moving in all

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<sup>64</sup> Again, because we found no similarities between Opposer’s services and Applicant’s motor homes, either on their face or by way of evidence made of record, we find no evidence that the same consumers would encounter Opposer’s services and Applicant’s motor homes in the same or overlapping channels of trade.

normal channels of trade, and are available to all classes of purchasers. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) (citing TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1207.01(a)(iii)). On the other hand, on the face of Opposer's Registrations and Applicant's Application, there is no overlap in trade channels between Opposer's and Applicant's identified goods.

To demonstrate the alleged overlap in the parties' trade channels, Opposer says it entered into a license agreement with CWGS Group, KKC, owner of the website Camping World ("Camping World") as of January 1, 2021, granting a license for Camping World to manufacture and sell NAUTICA brand marine, water, and outdoor products. Although Opposer did not introduce the license agreement, it made of record a press release announcing the parties' arrangement.<sup>65</sup> This press release is hearsay, and we do not rely on it as proof that any of Opposer's NAUTICA products have been promoted or sold through the Camping World website. However, Opposer's witness does say that NAUTICA brand inflatable rafts and pull-alongs are currently being sold through Camping World.<sup>66</sup>

Opposer also introduced a few pages from what appears to be the Camping World website.<sup>67</sup> NAUTICA-branded folding tables, outdoor chairs, piling post and

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<sup>65</sup> Moeen Decl., 22 TTABVUE 15, 144-46, ¶ 22, and Exh. 5 (Press Release).

<sup>66</sup> Moeen Decl., 22 TTABVUE 15, ¶ 21.

<sup>67</sup> Moeen Decl., 22 TTABVUE 141-43, and Exh. 5. Opposer did not provide the URL or capture date for these website pages, lessening their persuasiveness. Because Applicant did not object to this evidence, and cited to this evidence throughout its brief, we consider it for whatever probative value it may have. *W. R. Grace & Co. v. Herbert J. Meyer Indus., Inc.*, 190 USPQ 308, 309 (TTAB 1976).

inflatable ribbed, fenders, a screen shelter, a various towable tubes, inflatable docks, and an outdoor canopy are pictured on the site. While we accept the captured website pages as probative of showing that these products were promoted together on the same site, at least on the date the pages were captured, there is no evidence as to when, or for how long, these products have been advertised or sold. The absence of this supporting information diminishes the probative value of the Camping World website evidence.

Opposer additionally introduced a few Camping World press releases, announcing its creation of a “Home on Wheels Improvement” department whose Design, DIY (do-it-yourself) and Renovation Centers will include bath, kitchen, flooring, furniture, mattresses, cabinets, countertops, lighting, bedding, appliances, along with a wide choice of products from brands such as Kathy Ireland, Thomasville and NAUTICA.<sup>68</sup> Aside from marine furniture and water recreation equipment, the press releases do not say what items will be branded with the NAUTICA mark. These press releases also are hearsay, and we do not accept them for the truth that in fact any of these products have been promoted or sold through the Camping World website. Further, there is no proof of record regarding the degree of dissemination of the press releases.

Opposer further provided other Camping World website pages showing its offerings for sale of RVs, camping equipment, outdoor and indoor furniture, outdoor cooking equipment, outdoor recreational equipment, outdoor apparel and accessories

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<sup>68</sup> Moeen Decl., 22 TTABVUE 15, ¶ 23, Exh. 6 (Press Releases and accompanying Camping World Twitter postings).

and fishing equipment under various brand names.<sup>69</sup> There is no evidence when, or for how long, these products have been advertised or sold. Absent further explanatory witness testimony, these materials once more are hearsay, and we only consider these website pages for what they show on their face. Also, Applicant's motor homes are not shown on these pages. Opposer attached a further page from the Camping World website to Opposer's Reply Brief, showing Applicant's HOLIDAY RAMBLER VACATIONER motor homes for sale, but we do not consider this evidence as it was not timely made of record.<sup>70</sup> However, Applicant itself made of record a page from the Camping World website with a drop-down menu showing that several models of Applicant's motor homes (except not its NAUTICA line) are available for sale on the site.<sup>71</sup>

Arguing the disparity of the parties' trade channels, Applicant contends that its NAUTICA "motor home is sold exclusively through recreational vehicle dealers."<sup>72</sup> Citing to Opposer's Brief, Applicant says that Opposer's goods are sold at department stores, specialty stores, Nautica's own stores, and over the internet.<sup>73</sup> "Unlike Opposer's goods, Applicant's goods cannot be purchased online, and must be

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<sup>69</sup> Moeen Decl., 22 TTABVUE 15, ¶ 25, Exh. 7.

<sup>70</sup> Opposer's "Evidence submitted outside of the trial periods — including that attached to briefs — is untimely, and will not be considered." *Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, 90 USPQ2d 1112, 1116 (TTAB 2009) (citing *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008)).

<sup>71</sup> Camping World website pages, ANOR, 36 TTABVUE 21-23.

<sup>72</sup> Applicant's Brief, 51 TTABVUE 35, citing Gephart Decl., 42 TTABVUE 6, ¶ 24.

<sup>73</sup> Applicant's Brief, 51 TTABVUE, 35, citing Opposer's Brief, 50 TTABVUE 15.

purchased from licensed brick-and-mortar motor home dealers.”<sup>74</sup> Thus, says Applicant, “[t]he channels of trade could not be more different or exclusive of each other.”<sup>75</sup> However, Applicant’s arguments concerning the parties’ allegedly different trade channels are not well taken where the opposed Application is not limited to promotion or sales only within certain trade channels. *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991) (because there were no limitations on the applicant’s trade channels in its application, applicant’s argument that its channels of trade were limited to wholesale and schools was not well taken). Moreover:

An opposer need not establish the sale of both parties ... [goods] by the same vendor to show employment of the same trade channels. ... [C]hannels of trade [are not limited] to identical stores or agents ... [or] by a specific chain of supermarkets or agents. Rather to invoke this *du Pont* factor, an opposer must show the sale of an infringing product in [similar] supermarkets or ... agents in general ....”

*Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

While we do not accept Applicant’s arguments regarding disparate trade channels, Opposer is the party with the burden of proof. The Camping World website materials attached to Ms. Moeen’s testimony declaration are accompanied by very little explanation. All Ms. Moeen says is that Opposer’s inflatable rafts and pull-alongs are currently being sold through Camping World, and that in 2021 Opposer granted a license to manufacture and sell NAUTICA brand marine, water, and outdoor

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<sup>74</sup> Applicant’s Brief, 51 TTABVUE 35, citing Gephart Decl., 42 TTABVUE 7, ¶ 27.

<sup>75</sup> Applicant’s Brief, 51 TTABVUE 36.

products. The Camping World press release and website materials also are not accompanied by a declaration from a Camping World representative, testifying to what NAUTICA branded products actually have been promoted and sold through the Camping World website, and for how long.

At best, Opposer's Camping World website evidence points to just one website, which appears akin to a big-box store, and the parties' respective goods at issue do not appear on the same web page. In addition, due to the largely hearsay nature of Opposer's evidence, the third *DuPont* factor, allegedly overlapping trade channels, does not weigh in favor of a finding that confusion is likely.

**E. The Conditions under which and Buyers to whom Sales are Made, i.e. "Impulse" v. Careful, Sophisticated Purchasing**

The fourth *DuPont* factor examines "the conditions under which and buyers to whom sales are made, i.e., 'impulse vs. careful sophisticated purchasing.'" *DuPont*, 177 at 567. "Purchaser sophistication may tend to minimize the likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect." *Palm Bay Imps.*, 73 USPQ2d at 1695 (citing *Recot*, 54 USPQ2d at 1899 (Fed. Cir. 2000)).

Our analysis under the fourth *DuPont* factor "must be based on the identification[s] of goods in the pleaded Registration[s] and subject Application, as that determines the scope of the benefit of registration." *Sock It to Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*7 (TTAB 2020) (citing *Stone Lion*, 110 USPQ2d at 1162). Literally, because there are no identified restrictions, the parties' identifications of goods "include[] all goods of the type identified, without limitation as to their nature

or price.” *Id.*, at \*9. However, we consider the evidence of record regarding the nature and pricing of the types of goods at issue.

The prices for the goods bearing Opposer’s NAUTICA mark range from \$8.00 for socks up to \$1,200 for mattresses.<sup>76</sup> Opposer says that its “consumers are experienced and knowledgeable of the diverse and large variety of goods bearing the NAUTICA [m]ark ....”<sup>77</sup>

The goods identified in the opposed Application, motor homes, perforce must be considered expensive. Although the websites of Applicant’s authorized dealers show Applicant’s motor homes on sale for lower “discounted prices” (and even these discounted prices are not cheap),<sup>78</sup> Applicant’s 2022 NAUTICA model retails from \$329,818 to \$344,328, before additional options are added. With options added the total retail price can be as high as \$368,422.<sup>79</sup> A retail customer may select and buy a recreational vehicle that a dealer has in inventory, or has the option to create a quote of any product and model through the “Build Your Own” feature on Opposer’s website. In ordering a customized motor home, the customer has different floorplans (with preferred layouts of the bedroom, kitchen and dining areas), exterior color options and décor package options to choose from.<sup>80</sup>

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<sup>76</sup> Opposer’s Answer to Int. No. 11, ANOR2, 35 TTABVUE 18.

<sup>77</sup> Opposer’s Brief, 50 TTABVUE 33, citing Moeen Decl., 22 TTABVUE 17, ¶ 30.

<sup>78</sup> Dealer websites, Gephart Decl., 42 TTABVUE 7, 101-36, ¶ 26, Exh. 5

<sup>79</sup> Gephart Decl., 42 TTABVUE 6, ¶ 23.

<sup>80</sup> Gephart Decl., 42 TTABVUE 8-9, ¶¶ 29-32; 43 TTABVUE 2-11, Exh. 6.

Applicant submitted testimony declarations from five of its authorized dealers. Although the declarations are fairly uniform in their content, and two of the dealers appear to be related to one another, as a whole they are probative as to the circumstances surrounding the purchase of a motor home:<sup>81</sup>

- 70-95% of customers who enter the dealership have previously researched motor homes.
- 75-90% of customers who enter the dealership arrive with general specifications and criteria in mind for the motor homes they would like to view.
- 60-80% of customers who enter the dealership have a price range for the motor homes they would like to view.
- 50-75% of customers who purchase motor homes from the dealership use some form of financing to purchase their motor home.
- The process of selling a motor home ranges from a number of hours to a number of weeks.
- It takes on average anywhere from an hour to months, it all depends on the buyer's timeline, which varies a lot, to sell a motor home.
- Given the sales price in the hundreds of thousands of dollars, the number of details to decide upon, the substantial down payment and process of financing, our customers make a careful, sophisticated purchasing decision.
- For a motor home such as a Holiday Rambler Nautica which since its introduction has been priced between \$276,432 and \$344,328 at retail before additional options, most customers are very careful and attentive to all details of the manufacturer and product and have no question about who makes the product.
- The manufacturer of a recreational vehicle is an important part of the recreational vehicle selection process. Because of the importance of manufacturer's warranties in the recreational vehicle industry, the customer is not only aware of the manufacturer of their selected recreational vehicle, but strongly consider the manufacturer and its warranties in selecting the recreational vehicle.

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<sup>81</sup> Morell Decl., 37 TTABVUE 4-6, ¶¶ 4-10, 20-21; C. Curtis Decl., 38 TTABVUE 4-6, ¶¶ 4-10, 20-21; C.E. Curtis Decl., 39 TTABVUE 4-6, ¶¶ 4-10, 20-21; McKee Decl., 40 TTABVUE 4-6, ¶¶ 4-10, 20-21; and Russo Decl., 41 TTABVUE 4-6, ¶¶ 4-10, 20-21.



Where the relevant persons — potential or actual purchasers — are sophisticated enough, likelihood of confusion can be remote. *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992). Even “[w]here the purchasers are the same, their sophistication is important and often dispositive because “[s]ophisticated consumers may be expected to exercise greater care.” *Id.* (quoting *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 212 USPQ 246, 252 (1st Cir. 1981)). “[T]here is always less likelihood of confusion where goods are expensive and purchased after careful consideration.” *Id.* (quoting *Astra Pharm. Prods., Inc. v. Beckman Instrs., Inc.*, 718 F.2d 1201, 220 USPQ 786, 790 (1st Cir. 1983)).

Here, the inherently expensive nature of Applicant’s goods, motor homes, as well as the careful, lengthy and detailed circumstances surrounding their purchase, to consumers who are sophisticated in their buying decisions, as shown by the evidence of record, weighs against a finding, under the fourth *DuPont* factor, that confusion is likely.

#### **F. Absence of Actual Confusion**

The seventh *DuPont* factor is the “nature and extent of any actual confusion, while the eighth *DuPont* factor considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Applicant argues: “[t]here is no evidence of actual confusion of Applicant and Opposer’s marks. Applicant has never been contacted[, and its

testifying dealers have not been contacted,] by any third party regarding the origin of Applicant's Nautica motor home, or any of Opposer's goods or services."<sup>82</sup>

On these points – the presence or absence of actual confusion including the opportunity for such confusion to occur – we note the opposed Application is based on intent-to-use with no Statement of Use (in commerce with or within the U.S.) having yet been filed. Applicant began selling its NAUTICA branded motor homes in June 2020,<sup>83</sup> and first began advertising the mark and product on its website in September 2020.<sup>84</sup> The trial in this case (including Opposer's last opportunity to demonstrate actual confusion between the parties' marks and goods) closed in October 2022.<sup>85</sup> This indicates a period of just over two years of concurrent use.

As of August 2022, Applicant's NAUTICA motor homes have been available for sale by 57 different dealers, in 57 U.S. cities in 25 states.<sup>86</sup> Applicant's sales and advertising figures were designated confidential, so we only discuss them in general terms. Since Applicant's NAUTICA motor homes have been available for sale, Applicant's unit sales, at wholesale and by its dealers at retail, have not been that large (in the hundreds).<sup>87</sup> While Applicant's wholesale revenue from these sales has

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<sup>82</sup> Applicant's Brief, 51 TTABVUE 46, citing Gephart Decl., 42 TTABVUE 13-14, ¶¶53-56; Morell Decl., 37 TTABVUE 4-5, ¶¶ 2-3, 16-17; C. Curtis Decl., 38 TTABVUE 4-5, ¶¶ 2, 16-17; C.E. Curtis Decl., 39 TTABVUE 4-5, ¶¶ 2-3, 16-17; McKee Decl., 40 TTABVUE 4-5, ¶¶ 2-3, 16-17; and Russo Decl., 41 TTABVUE 4-5, ¶¶ 2-3, 16-17.

<sup>83</sup> Gephart Decl., 42 TTABVUE 5, ¶ 19.

<sup>84</sup> Gephart Decl., 42 TTABVUE 11, ¶ 44.

<sup>85</sup> Board trial schedule of July 25, 2022, 33 TTABVUE 4-5.

<sup>86</sup> Gephart Decl., 42 TTABVUE 7, ¶ 25.

<sup>87</sup> Gephart Decl., 42 TTABVUE 10, ¶ 38.

been in the tens of millions of dollars,<sup>88</sup> that is because of the considerable sale price of each item.

Applicant's reported advertising expenditures attributed to its NAUTICA motor homes, as of January 2022, have not been that substantial.<sup>89</sup> Moreover, in its online and print advertising, including the advertising done by Applicant's dealers, Applicant's HOLIDAY RAMBLER house mark has been emphasized in larger or more prominent font than Applicant's NAUTICA product mark.<sup>90</sup> Applicant's NAUTICA motor home print advertising has been in publications directed to RV enthusiasts, each with a relatively low subscriber base,<sup>91</sup> and in no nationwide publications.

As of August 2022, the number of views of the NAUTICA home page on Applicant's HOLIDAY RAMBLER website have been less than 50,000.<sup>92</sup> Applicant's NAUTICA motor homes have been advertised on Google, but Applicant does not provide the extent of this advertising. From May of 2021 to August of 2022, Applicant's Facebook ads for its NAUTICA motor homes had reached just over 403,000 people and achieved just over 641,000 impressions.<sup>93</sup>

Given the restricted geographical reach and limited period of time during which Applicant's NAUTICA mark has been in use, we do not attribute great significance

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<sup>88</sup> Gephart Decl., 42 TTABVUE 10-11, ¶¶ 39-40.

<sup>89</sup> Gephart Decl., 42 TTABVUE 12-13, ¶ 47-49.

<sup>90</sup> Gephart Decl., 42 TTABVUE 101-136, Exh. 5; 43 TTABVUE 2-24, 28-50, Exhs. 6, 7, 9, 10.

<sup>91</sup> Gephart Decl., 42 TTABVUE 11, ¶ 42.

<sup>92</sup> Gephart Decl., 42 TTABVUE 11, ¶ 43-44.

<sup>93</sup> Gephart Decl., 42 TTABVUE 13, ¶ 50.

to the lack of actual confusion evidence in this case. “The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by applicant of its mark[s] for a significant period of time in the same markets as those served by opposer under its mark[].” *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007).

The absence of any reported instances of confusion therefore is not meaningful in this case. The record does not demonstrate appreciable and continuous use by Applicant of its NAUTICA mark for a significant period of time in the same markets as those served by Opposer under its NAUTICA mark, *Citigroup*, 94 USPQ2d at 1660; *Gillette Can.*, 23 USPQ2d at 1774, such that there would have been a reasonable opportunity for confusion to have occurred. *Barbara’s Bakery*, 82 USPQ2d at 1287.

In any event, evidence of actual confusion is not required to prove a likelihood of confusion. *See Herbko*, 64 USPQ2d at 1380; *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395-96 (Fed. Cir. 1983). We therefore find the seventh and eighth *DuPont* factors, the presence or absence of actual confusion under appropriate circumstances, to be neutral in our likelihood of confusion analysis. *Made in Nature*, 2022 USPQ2d 557, at \*56-57 (where circumstances demonstrating the

parties' overlapping uses of their marks in the same markets are lacking the absence of actual confusion is a neutral factor).

### **G. The Variety of Goods on which Opposer's Mark has been Used**

The ninth *DuPont* factor addresses “[t]he variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark).” *DuPont*, 177 at 567. One of the circumstances mentioned in this *DuPont* factor is the variety of goods on which a prior mark is used. *See, e.g., In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001) (use on a wide variety of goods weighs in favor of likelihood of confusion). “[C]onsumers who may be familiar with various products in ... [Opposer's NAUTICA] product line, when confronted with [A]pplicant's mark, ... [could] view the goods marked therewith as additional products from ... [Opposer].” *In re Hitachi High-Techs. Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014).

Opposer's witness, Ms. Moeen, testified to the wide variety of products with which Opposer's NAUTICA mark has been used.<sup>94</sup> This testimony stands unchallenged by Applicant. The variety of goods on which Opposer's NAUTICA mark has been used, the ninth *DuPont* factor, weighs in favor of a finding that confusion is likely.

### **H. The Market Interface between the Parties**

The tenth *DuPont* factor considers “[t]he market interface between applicant and the owner of a prior mark ...” *DuPont*, 177 USPQ2d at 567. There are no agreements or understandings between the parties regarding the use or registration of the

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<sup>94</sup> Moeen Decl., 22 TTABVUE 5-9, ¶ 12. *See also* product offerings on Opposer's website. Moeen Decl., 22 TTABVUE 43-118, Exh. 2.

NAUTICA mark.<sup>95</sup> This *DuPont* factor is neutral in our analysis of whether confusion is likely.

### I. Applicant's Right to Exclude Others<sup>96</sup>

The eleventh *DuPont* factor contemplates “[t]he extent to which applicant has a right to exclude others from use of its mark on its goods.” *DuPont*, 177 USPQ2d at 567. “The applicant’s right to exclude is a right appurtenant to the applicant’s trademark use.” *Monster Energy*, 2023 USPQ2d 87, at \*43. “In a likelihood of confusion determination, ‘applicant’s right to exclude’ considers applicant’s place in the market and any resulting consumer perception as defined by the applicant’s trademark use, insofar as that use is reflected in the mark and goods described in the application.” *Id.* at \*43-44.

In the actual confusion portion of our decision above, we outlined the extent of Applicant’s common law use of the NAUTICA mark in connection with motor homes for the period June 2020 to August 2022. “However, the mere assertion of common-law use does not in itself suffice to establish the extent to which an applicant has a right to exclude others from use of the mark.” *McDonald’s Corp. v. McSweet, LLC*, 112 USPQ2d 1268, 1284 (TTAB 2014).

Rather, “an applicant’s right to exclude ... assess[es] whether the applicant had achieved ‘an appreciable level of consumer recognition’ **and** whether the applicant could demonstrate having ‘successfully asserted its [trademark] rights.’” *Monster*

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<sup>95</sup> Opposer’s Brief, 50 TTABVUE 53; Applicant’s Brief, 51 TTABVUE 48.

<sup>96</sup> Opposer briefed this issue as “the extent to which Opposer has a right to exclude others from use of its marks.” Opposer’s Brief, 40 TTABVUE 53-54. This is an incorrect statement and argument of the eleventh *DuPont* factor.

*Energy*, 2023 USPQ2d 87, at \*45 (quoting *McDonald's*, 112 USPQ2d at 1285). Here, Applicant's sales figures, and its advertising and promotional expenditures, are not sufficient to establish an appreciable level of consumer recognition in the NAUTICA mark associated with Applicant as the source of motor homes. Importantly, there is no evidence that Applicant, in fact, has successfully asserted its rights so as to "exclude" anyone else from using NAUTICA or any similar mark. Accordingly, we treat the eleventh *DuPont* factor as neutral in our consideration of whether confusion is likely.

#### **J. The Extent of Potential Confusion**

The twelfth *DuPont* factor examines the extent of potential confusion, and whether it is substantial or de minimis. *Recot*, 54 USPQ2d at 1897 (citing *DuPont* 177 USPQ at 567). In *Calypso Tech., Inc. v. Calypso Cap. Mgmt. LP*, 100 USPQ2d 1213, 1223 (TTAB 2011), the Board found that, "because of the limited number of overlapping potential purchasers of the parties' goods and services, and their sophistication, the extent of potential confusion [wa]s de minimis."

Here, notwithstanding the strength of Opposer's mark, the variety of Opposer's goods offered under its mark, and the identity of the parties' marks, Applicant's goods are expensive, Applicant's purchasers are sophisticated, purchasing conditions for Applicant's goods are lengthy and detail-oriented, and sufficient evidence has not been made of record to show that the parties' goods and/or services are related or travel in overlapping trade channels. The potential for confusion to occur in the future is de minimis. The twelfth *DuPont* factor weighs against a finding that confusion is likely.

**K. Balancing and Weighing the *DuPont* Factors**

Balancing and weighing the *DuPont* factors for which there has been evidence and argument in this appeal, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at \*7 (Fed. Cir. 2023) (“[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”), Opposer’s NAUTICA mark is suggestive, but has acquired fame in connection with apparel and apparel accessories (although we note a good portion of Opposer’s fame evidence is stale). The parties’ marks are identical. Opposer’s mark is used in connection with a wide variety of goods.

On their face, there is no similarity between Opposer’s goods and services and Applicant’s goods as identified in the asserted Registrations and opposed Application. Opposer proffered insufficient evidence of relatedness or that the respective goods and/or services of the parties travel in overlapping trade channels. Applicant’s goods are expensive, purchasing Applicant’s goods is a lengthy and detailed process, and Applicant’s consumers are sophisticated in their purchase of Applicant’s goods. Opposer’s consumers, who are knowledgeable of NAUTICA branded products, also exercise a heightened degree of care in their purchases of Opposer’s goods. On this record, the extent of potential confusion is de minimis. The presence or absence of actual confusion, the market interface between the parties, and Applicant’s right to exclude others are neutral considerations.

Based on our evaluation of the record as a whole, and balancing as well as weighing the various *DuPont* factors for which there has been evidence and argument, Opposer has not met its burden of showing that confusion is likely for the



NAUTICA mark in connection with Opposer's goods and services versus Applicant's goods. Opposer's likely of confusion claim is dismissed.

## **VII. Dilution**

Opposer alleges dilution by both blurring and tarnishment.<sup>97</sup> However, in the dilution portion of its brief on the merits (which spans just two pages),<sup>98</sup> it only argues dilution by blurring. Therefore, Opposer's dilution by tarnishment claim is waived. *Monster Energy*, 2023 USPQ2d 87, at \*3 (citing, *inter alia*, *Alcatraz Media*, 107 USPQ2d at 1753).

To prevail on its dilution by blurring claim, Opposer must show that: (1) it owns a famous mark that is distinctive; (2) Applicant is using a mark in commerce that allegedly dilutes Opposer's famous mark; (3) Applicant's use of its mark began after Opposer's mark became famous; and (4) Applicant's use of its mark is likely to cause dilution by blurring. *Spotify AB v. U.S. Software Inc.*, 2022 USPQ2d 37, at \*20-21 (TTAB 2022) (citing *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1502 (TTAB 2015) (quoting *Coach Servs.*, 101 USPQ2d at 1723-24).

### **A. Distinctiveness**

As we determined regarding Opposer's likelihood of confusion claim, Opposer's NAUTICA mark is distinctive, both inherently, and by acquisition as a result of widespread use and consumer recognition. Conceptually, Opposer's mark is suggestive of nautical themed goods (at the very least, apparel). It is registered on

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<sup>97</sup> Notice of Opposition, 1 TTABVUE 11-12.

<sup>98</sup> Opposer's Brief, 50 TTABVUE 54-56.

the Principal Register without a claim of acquired distinctiveness, and is therefore presumed distinctive. *See Tea Board of India*, 80 USPQ2d at 1899.

### **B. Fame for Dilution Purposes**

The fame that must attach to a mark for it to be eligible for protection under the dilution provisions of the Trademark Act is greater than that which qualifies a mark as famous for the *DuPont* analysis of likelihood of confusion. *See Coach Servs.*, 101 USPQ2d at 1724 (“Fame for likelihood of confusion and fame for dilution are distinct concepts, and dilution fame requires a more stringent showing.”); *Palm Bay Imps.*, 73 USPQ2d at 1694. An opposer must show that, when the general public encounters the mark ‘in almost any context, it associates the term, at least initially, with the mark’s owner.” *Coach Servs.*, 101 USPQ2d at 1725 (quoting *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1180-81 (TTAB 2001)); *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1103-04 (TTAB 2018). “In other words, a famous mark is one that has become a ‘household name.” *Coach Servs.*, 101 USPQ2d at 1725.

Opposer argues, however, that its proofs for establishing the fame of its NAUTICA mark for likelihood of confusion purposes under the *DuPont* factors should equally suffice to show the fame of its NAUTICA mark for dilution purposes.<sup>99</sup> This is not a correct interpretation of the dilution statute or its jurisprudence. Simply, “a mark can acquire ‘sufficient public recognition and renown to be famous for purposes of likelihood of confusion without meeting the more stringent requirement for dilution

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<sup>99</sup> Opposer’s Brief, 50 TTABVUE 55-56.

fame.” *Coach Servs.*, 101 USPQ2d at 1724 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1722 (TTAB 2007)).

“The federal dilution statute [also] clearly sets forth the requirement that a plaintiff’s mark must be famous prior to the date an allegedly dilutive mark is first used by the defendant.” *TiVo Brands*, 129 USPQ2d at 1112 (citing Trademark Act Section 43(c)(1); 15 U.S.C. § 1125(c)(1)). In the context of this proceeding, “Opposer must prove that its mark[] became famous before the filing date of Applicant’s intent-to-use Application[].” *N.Y. Yankees P’ship*, 114 USPQ2d at 1506 (citing *Coach Servs.*, 101 USPQ2d at 1725). As noted (see footnote 1 above), Applicant’s filing date was October 16, 2019.

As for whether Opposer’s NAUTICA mark is sufficiently “famous” to be entitled to protection against dilution, we consider:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- (iii) The extent of actual recognition of the mark.
- (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

*Spotify*, 2022 USPQ2d 37, at \*21-22 (citing Trademark Act Section 43(c)(2)(A), 15 U.S.C. § 1125(c)(2)(A)).

Here, there is no doubt that Opposer’s NAUTICA mark is registered on the Principal Register.<sup>100</sup> Opposer’s annual U.S. sales and advertising/promotional

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<sup>100</sup> Asserted Federal Registrations, ONOR1, 15 TTABVUE 6-55.

expenditures for goods bearing the NAUTICA mark are considerable, but as we said earlier, except for fragrances they are not broken down by product category.<sup>101</sup> Opposer's market share data<sup>102</sup> is limited to the U.S. menswear business, and in any event is dated and thus stale.

Opposer's products are offered for sale and sold throughout the entire United States in department stores, specialty stores, Opposer's own stores, over the Internet via its licensees' websites, on amazon.com and authorized customer and portal websites, and thousands of independent stores throughout the nation.<sup>103</sup> In the United States, Opposer and its licensees advertise and promote NAUTICA branded products through print, outdoor (billboards, etc.) signage, radio, TV, digital online, POS, social media, email blasts, and mall advertising, and through event sponsorships, cause marketing and endorsement agreements with sports figures.<sup>104</sup> Opposer promotes its NAUTICA-branded products for sale online through its website nautica.com,<sup>105</sup> and through its social media presence, including: Facebook, Twitter, Instagram, and Pinterest.<sup>106</sup> The vast majority of this evidence pertains to NAUTICA branded apparel and apparel accessories.

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<sup>101</sup> Moeen Decl., 22 TTABVUE 17-19, ¶¶ 32, 35-36.

<sup>102</sup> Moeen Decl., 22 TTABVUE 31, ¶¶ 53-55, 24 TTABVUE 151-153, Exh. 21.

<sup>103</sup> Moeen Decl., 22 TTABVUE 4, ¶ 9.

<sup>104</sup> Moeen Decl., 22 TTABVUE 19-20, ¶ 38.

<sup>105</sup> Moeen Decl., 22 TTABVUE 20, 43-118, 237-40, ¶ 39, Exhs. 2 and 10.

<sup>106</sup> Moeen Decl., 22 TTABVUE 20, 241-44, ¶ 40, Exh. 11.

Opposer's advertising for its NAUTICA mark has appeared in print and online media throughout the United States.<sup>107</sup> Opposer's circulation figures for its print and online advertising cover fashion, jewelry, furniture, paint, and leather goods.<sup>108</sup> Opposer's television advertising placements have been on popular and prime-time shows.<sup>109</sup> Opposer's media placement records made of record were largely unreadable.<sup>110</sup> Generally, as we noted above, Opposer's circulation figures and media placement information, although impressive, is somewhat dated and stale.

Opposer's NAUTICA products have been featured in numerous national television programs, books, newspaper and magazine articles, and online publications.<sup>111</sup> The vast majority of the articles in which Opposer (by name) and its NAUTICA mark have been the subject of news coverage featured clothing products,<sup>112</sup> and we again note the dated/stale nature of this evidence.

The overwhelming majority of the evidence that Opposer provided of the enforcement of its NAUTICA mark against third parties before the Board and in the courts,<sup>113</sup> consists of proceedings and litigations that were resolved well before a decision on the merits by the defending party's concession, which is less probative of

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<sup>107</sup> Moeen Decl., 22 TTABVUE 20, ¶ 41.

<sup>108</sup> Moeen Decl., 22 TTABVUE 279-321, Exh. 13.

<sup>109</sup> Moeen Decl., 22 TTABVUE 20, ¶ 42.

<sup>110</sup> Moeen Decl., 22 TTABVUE 245-78, Exh. 12. *See Alcatraz Media*, 107 USPQ2d at 1758 n.16 (“[T]he onus is on the party making the submissions to ensure that, at a minimum, all materials are clearly readable by the adverse party and the Board.”).

<sup>111</sup> Moeen Decl. 22 TTABVUE 25, ¶ 51.

<sup>112</sup> Moeen Decl. 22 TTABVUE 102-603, Exh. 19.

<sup>113</sup> ONOR3, 21 TTABVUE 2-422; Moeen Decl., 24 TTABVUE 167-305, Exh. 23.

the fame of Opposer's mark as opposed to the defending parties' desire to avoid litigation. The four non-precedential Board decisions that Opposer made of record involving enforcement of Opposer's NAUTICA mark in which Opposer was successful on the merits,<sup>114</sup> as well as the additional decisions we found,<sup>115</sup> and in which Opposer's NAUTICA mark was found famous, limited the finding of fame to the apparel and accessories fields.

Taken together, this record evidence tends to show that Opposer's NAUTICA mark has achieved some level of fame for Trademark Act Section 2(d) purposes, mostly in connection with apparel and apparel accessories. However, this evidence fails to establish that Opposer's mark is "widely recognized by the general consuming public of the United States as a designation of source," which is the standard set by the dilution statute, Trademark Act Section 43(c)(2)(A), 15 U.S.C. § 1125(c)(2)(A). Moreover, because of the largely stale nature of Opposer's evidence, raising a question as to its more recent strength, Opposer did not establish any degree of fame in the NAUTICA mark as of Applicant's Application filing date. *N.Y. Yankees P'ship*, 114 USPQ2d at 1506 (citing *Coach Servs.*, 101 USPQ2d at 1725).

By using the "general consuming public" as the benchmark, the Trademark Dilution Revision Act ("TDRA"), which was signed into law on October 6, 2006,

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<sup>114</sup> *Nautica Apparel, Inc. v. Crain*, Opp. No. 91113893 (TTAB Sept. 21, 2001); *Nautica Apparel, Inc. v. Carlucci*, Opp. No. 91165909 (TTAB Dec. 18, 2007); *Nautica Apparel, Inc. v. Martanna LLC*, Opp. No. 91177192 (TTAB Jan. 22, 2010); and *Nautica Apparel, Inc. v. Nauti Marine*, Opp. No. 91205138 (TTAB Jun. 16, 2014). Moeen Decl., 24 TTABVUE 168-219, 256-305.

<sup>115</sup> *Nautica Apparel, Inc. v. Palmerton*, Canc. No. 92056754 (TTAB Oct. 21, 2015); *Nautica Apparel, Inc. v. Grow Marketing, LLC*, Canc. No. 92064768 (TTAB October 21, 2020).

eliminated the possibility of “niche fame,” which some courts had recognized under the previous version of the statute. *Coach Servs.*, 101 USPQ2d at 1726. Under the current standard set by the TDRA, Opposer has not established that its NAUTICA mark is a “household name” as of Applicant’s filing date, and has not carried its burden of proving its NAUTICA mark is famous for purposes of protection against dilution. Opposer’s dilution claim is dismissed.

**Decision:**

Opposer’s opposition to registration of Applicant’s NAUTICA mark of Application Serial No. 88656609 is dismissed in its entirety.