

This Opinion is Not a
Precedent of the TTAB

Mailed: April 24, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Thor Tech, Inc.

v.

Thor Boats, LLC

—
Opposition No. 91283957
—

April L. Besl, Michael G. Frey, and Liane H. Rousseau of Dinsmore & Shohl LLP
for Thor Tech, Inc.

Julie Scheipeter and Adrianna M. Chavez of Stinson LLP,
for Thor Boats, LLC

—
Before Wellington, Dunn and Bradley,
Administrative Trademark Judges.

Opinion by Bradley, Administrative Trademark Judge:

Thor Boats, LLC (“Applicant”) seeks registration on the Principal Register of the
mark depicted below for “recreational watercraft, namely, boats” in International
Class 12:

THOR
BOATS
DROP THE HAMMER

(with “boats” disclaimed).¹

Thor Tech, Inc. (“Opposer”) opposes registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting priority and a likelihood of confusion with Opposer’s previously used and registered marks:²

- THOR in standard characters for “recreational vehicles, namely, travel trailers, motor homes, van campers and fifth-wheel trailers” in International Class 12;³ and
- THOR MOTOR COACH in standard characters (with “MOTOR COACH” disclaimed) for “recreational vehicles, namely, motor homes” in International Class 12.⁴

¹ Application Serial No. 90857298, filed July 30, 2021, claiming first use and first use in commerce on April 1, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). As discussed herein Applicant filed a motion to amend the claimed basis for its application to an intent-to-use basis. 7 TTABVUE. The mark is described in the application as consisting of the “stylized wording ‘Thor Boats Drop the Hammer’ with a mallet shape inside the letter ‘O’ in the word ‘Thor.’”

Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, citations in this opinion are in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 101.03 et seq. (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Lexis legal database. Practitioners should adhere to the practice set forth in TBMP §§ 101.03 et seq.

² 1 TTABVUE 6-8. Opposer also included in its Notice of Opposition claims for false designation of origin and dilution by blurring and tarnishment. 1 TTABVUE 8-9. However, Opposer did not pursue these claims in its brief and accordingly, they are deemed impliedly waived or forfeited. *See Monster Energy Co. v. Chun Hua Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, at *3-4 (TTAB 2023) (opposer waived claims that it did not argue in its brief).

³ Registration No. 1780830, registered on July 6, 1993; renewed.

⁴ Registration No. 5053749, registered on October 4, 2016.

In its Answer, Applicant denied the salient allegations of Opposer's Notice of Opposition.⁵

The case is fully briefed. For the reasons set forth below, we dismiss the opposition.

I. Pending Motions

A. Applicant's Motion to Amend Application

On January 10, 2024, prior to the close of discovery, Applicant filed a motion to amend the basis for its application from use in commerce to an intent-to-use basis pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The motion stated that Applicant requested that Opposer consent to this amendment of basis, but Opposer refused such consent.⁶ The Board deferred consideration of the motion until final decision.⁷

Opposer acknowledged in its trial brief that Applicant's motion to amend is pending, but has not submitted any arguments against the amendment.⁸

Pursuant to Trademark Rule 2.133(a), 37 C.F.R. § 2.133(a), Applicant may amend its application, including the basis for its application, upon motion granted by the Board. *See also Leeds Techs. Ltd. v. Topaz Communs., Ltd.*, Opp. No. 91123449, 2002

⁵ 4 TTABVUE. Applicant asserted three affirmative defenses, but did not pursue these defenses at trial, and thus they are deemed impliedly waived or forfeited. *See In re Google Techs. Holdings, LLC*, 980 F.3d 858, 862-63 (Fed. Cir. 2020); *Peterson v. Awshucks SC, LLC*, Can. No. 92066957, 2020 TTAB LEXIS 520, at *2 n.3 (TTAB 2020) (affirmative defenses waived where "[r]espondent did not present any evidence or argument with respect to these asserted defenses at trial").

⁶ 7 TTABVUE 3, 8-9.

⁷ 8 TTABVUE.

⁸ 30 TTABVUE 10, 15.

TTAB LEXIS 441, at *13 (TTAB 2002) (“post-publication amendments to the basis for an application, pursuant to Trademark Rules 2.35 and 2.133(a), are now allowed”); *Grand Canyon West Ranch, LLC v. Hualapai Tribe*, Opp. No. 91162008, 2006 TTAB LEXIS 82, at *7 (TTAB 2006) (“in the absence of a fraud claim, an applicant who bases its application on Section 1(a) (use in commerce) but who did not use the mark on some or all of the goods or services identified in the application may ‘cure’ this problem by amending its basis to Section 1(b) (intent to use)”). Applicant’s motion included a verified declaration from Applicant stating that as of the July 30, 2021 application filing date “Applicant has had a bona fide intention to use Applicant’s Mark in commerce on or in connection with Applicant’s Goods [i.e., recreational watercraft, namely, boats].”⁹ Applicant has met the requirements for pleading a bona



fide intention to use its mark BOATS DROP THE HAMMER as of its July 30, 2021 application filing date pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) and Trademark Rule 2.34(a)(2).¹⁰ Additionally, where, as here, Applicant substitutes one basis for another, we “will presume that there was a continuing valid basis, unless there is contradictory evidence in the record, and the application will retain the original filing date.” Trademark Rule 2.35(b)(3). Given Opposer’s lack of response there is no contradictory evidence of record. Accordingly, we grant Applicant’s motion to amend.

⁹ 7 TTABVUE 3, 8-9.

¹⁰ 7 TTAVUE 5-6; 16 TTABVUE 4-5 ¶ 12, 11-18 (Exhibits 1-3).

B. Opposer’s Motion to Strike Testimony

Opposer filed a motion to strike paragraphs 23 and 26 of the testimony declaration of J. Paul Jackson (“Jackson Declaration”), Applicant’s Chief Operating Officer, and pages two and three in Exhibit 11 to the Jackson Declaration.¹¹ Opposer contends that this testimony and exhibit contain information regarding Applicant’s revenue, costs, and profits, as well as its advertising spend that Applicant failed to produce in discovery in response to Opposer’s requests.¹² Applicant explains that “financial information from 2024, including the associated profit and loss statement, was not available until after the discovery period ended.”¹³ Specifically, Mr. Jackson explained that based on the quarterly reconciliation of its financial records, the 2024 profit and loss statement included in Exhibit 11 was not available before July 2024.¹⁴ Applicant filed the Jackson Declaration (including Exhibit 11) on July 17, 2024.¹⁵

We find that Applicant’s updated financial information included in the Jackson Declaration and Exhibit 11 thereto was a timely supplement pursuant to Fed. R. Civ. P. 26(e)(1)(A).

Accordingly, we deny Opposer’s motion to strike.

¹¹ 26 TTABVUE 8.

¹² 26 TTABVUE 5, 7.

¹³ 27 TTABVUE 9.

¹⁴ 27 TTABVUE 14-15.

¹⁵ 16 TTABVUE. Beyond filing its motion to strike almost two months later on September 3, 2024, Opposer does not state that it sought cross-examination of Mr. Jackson pursuant to the parties’ trial stipulation. 9 TTABVUE; 10 TTABVUE (Board order approving the stipulations). The parties stipulated that testimony would be submitted by affidavit or declaration with the non-submitting party having “the right to conduct oral cross-examination of the witness.” 9 TTABVUE 2.

II. Trial Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), the file of Applicant's involved application. In addition, the parties both submitted testimony, notices of reliance, and exhibits as listed in their briefs.¹⁶ We have carefully considered the entire record, and relevant evidence is discussed throughout this opinion. See *Medtronic, Inc. v. Daig Corp.*, 789 F.2d 903, 906 (Fed. Cir. 1986) ("We presume that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise.").

III. The Parties

THOR Industries, Inc. is a recreational vehicle manufacturer.¹⁷ Opposer Thor Tech, Inc. "is a subsidiary of the publicly traded company THOR Industries, Inc. and owns and licenses certain trademarks and other intellectual property rights, including the THOR Marks, to subsidiary operating companies of THOR Industries, Inc., which in turn manufacture land-based recreational vehicles."¹⁸ Those subsidiary operating companies are Airstream, Heartland, Jayco, Keystone RV Company, KZ, Thor Motor Coach, and Tiffin Motorhomes.¹⁹ In its brief, Opposer Thor Tech, Inc. collectively refers to itself its parent THOR Industries, Inc., and the affiliated companies as "THOR Industries" or "Opposer."²⁰

¹⁶ 30 TTABVUE 15-17; 31 TTABVUE 14-16.

¹⁷ 15 TTABVUE 2-3 ¶¶ 2-3.

¹⁸ 30 TTABVUE 7; 15 TTABVUE 2-3 ¶ 2.

¹⁹ 15 TTABVUE 2-3 ¶¶ 2-3.

²⁰ 30 TTABVUE 7.

Applicant is a boat manufacturer focused on selling advanced aluminum hunting and fishing boats.²¹

IV. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is an element of the plaintiff's case in every inter partes proceeding. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1304-05 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373-74 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014)). Opposer, as the plaintiff in the action, must show its entitlement to a statutory cause of action by demonstrating (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*, 978 F.3d at 1305-06; *Mars Generation, Inc. v. Carson*, Opp. No. 91224726, 2021 TTAB LEXIS 386, at *8 (TTAB 2021).

Here, Opposer established its entitlement to oppose Applicant's mark by making its pleaded registrations of record which form the basis for a plausible Section 2(d) likelihood of confusion claim. *See Conopco, Inc. v. Transom Symphony OpCo, LLC*, Opp. No. 91256368, 2022 TTAB LEXIS 194, at *10 (TTAB 2022); *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *19 (TTAB 2022) (opposer's pleaded registrations established its "interest in marks similar to the mark sought for registration by [a]pplicant, and thus [o]pposer's entitlement to bring a colorable claim under Trademark Act Section 2(d)").

²¹ 16 TTABVUE 3-4 ¶¶ 4, 10.

V. Priority

Opposer's pleaded registrations are of record showing active status and Opposer's ownership, and Applicant has not filed any counterclaims to cancel the registrations.²² Accordingly, priority is not at issue with respect to the marks and goods covered by the registrations. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402 (CCPA 1974); *Nkanginieme v. Appleton*, Opp. No. 91256464, 2023 TTAB LEXIS 64, at *11-12 (TTAB 2023) ("unless there is a counterclaim against the opposer's pleaded and proven registration[s], priority is not at issue in a likelihood of confusion dispute").


VI. Likelihood of Confusion

To prevail on its Section 2(d) claim, Opposer must show by a preponderance of the evidence that "use of Applicant's mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of Opposer's goods." *DC Comics v. Cellular Nerd LLC*, Opp. No. 91246950, 2022 TTAB LEXIS 453, at *23-24 (TTAB 2022) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 951 (Fed. Cir. 2000)).

Our determination under Section 2(d) of the Trademark Act involves an analysis of all of the probative evidence of record that is relevant to the factors bearing on a likelihood of confusion. See *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"); see also *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005). We must consider "each *DuPont* factor for which there is evidence and argument." *Spireon, Inc. v. Flex*

²² 11 TTABVUE 7-14, 16-24.

Ltd., 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citing *In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019)). “Not all of the *DuPont* factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control a particular case.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022) (internal quotation marks omitted).

We focus our likelihood of confusion analysis on the standard-character mark THOR in Opposer’s pleaded Registration No. 1780830 for “recreational vehicles, namely, travel trailers, motor homes, van campers and fifth-wheel trailers” which is the closest of Opposer’s two pleaded registrations to Applicant’s mark  and includes the goods listed in the THOR MOTOR COACH registration. *Monster Energy*, 2023 TTAB LEXIS 14, at *16-17 (focusing analysis on “the pleaded registration[] that has the most points in common with [a]pplicant’s mark”). “If we do not find a likelihood of confusion with respect to th[is] mark[] and [its] goods, then there would be no likelihood of confusion with the mark[] and goods in [Opposer’s] other registration[].” *Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Can. No. 92079409, 2024 TTAB LEXIS 289, at *10-11 (TTAB 2024).

A. Strength and Fame of Opposer’s Mark

Before we compare the parties’ marks, we consider the strength, including any fame, of Opposer’s mark THOR, as that may affect its scope of protection. Analysis of the fifth and sixth *DuPont* factors determines the strength of a mark. *Spireon*, 71 F.4th at 1362 (“Two of the *DuPont* factors (the fifth and sixth) consider strength.”). Under the fifth *DuPont* factor Opposer may expand the scope of protection for its

mark by providing evidence of the “fame of the prior mark (sales, advertising, length of use),” *DuPont*, 476 F.2d at 1361. And under the sixth *DuPont* factor Applicant may narrow the scope of protection for Opposer’s mark by submitting evidence of the “number and nature of similar marks in use on similar goods.” *Id.* See also *Monster Energy*, 2023 TTAB LEXIS 14, at *26. “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (internal citations omitted). “The weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1338 (internal citations omitted).

In evaluating the strength of a mark, we consider both its conceptual strength, based on the nature of the mark itself, and if there is probative evidence in the record, its commercial strength based on marketplace recognition of the mark. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength ...”); *New Era*, 2020 TTAB LEXIS 199, at *28-29 (considering “inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength”).

Applicant contends that third party registrations weaken the conceptual strength of Opposer's mark THOR.²³ Opposer contends that its mark THOR is famous and entitled to a broad scope of protection.²⁴ We address both positions below.

1. Conceptual Strength of Opposer's Mark/Evidence of Third Party Registrations

Beginning with conceptual strength, we evaluate where Opposer's mark THOR falls along the "range of increasing distinctiveness: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, or (5) fanciful." *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1339 (Fed. Cir. 2004). At a minimum, Opposer's mark THOR is inherently distinctive, i.e., at least suggestive, "as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act." *New Era*, 2020 TTAB LEXIS 199, at *29. *See also Chippendales*, 622 F.3d at 1351 ("marks that are arbitrary, fanciful, or suggestive are inherently distinctive"); 15 U.S.C. § 1057(b) ("registration of a mark upon the principal register . . . shall be prima facie evidence of the validity of the registered mark").

Opposer states that the "Thor Word Mark was created when Wade Thompson and Peter Orthwein created THOR Industries, Inc. . . . in 1980 [and] [t]he name THOR combined the first two letters of the last names of these two individuals."²⁵ Opposer asserts that "the term THOR is a conceptually strong term for . . . land-based

²³ 31 TTABVUE 39-40

²⁴ 30 TTABVUE 32-34.

²⁵ 20 TTABVUE 66-67 (Opposer's Resp. to Interrogatory No. 3).

recreational vehicles . . . as the term is arbitrary with respect to these goods.”²⁶ Applicant states that THOR lacks conceptual strength because it is a historical and geographic name.²⁷ Applicant points to evidence from Britannica Online Encyclopedia stating that Thor is a “deity common to all the early Germanic peoples, a great warrior represented as a red-bearded, middle-aged man of enormous strength, an implacable foe to the harmful race of giants but benevolent toward mankind.”²⁸

We find that Opposer’s mark THOR is arbitrary because it has no meaning or significance as applied to the travel trailers, motor homes, van campers and fifth-wheel trailers identified in Opposer’s registration. *See Nautilus Grp.*, 372 F.3d at 1340 (“an arbitrary mark is a known word used in an unexpected or uncommon way”). That Thor is also the name of a deity or mythological figure does not alter the conceptual strength of Opposer’s mark as it does not establish any relationship or significance between the term “Thor” and Opposer’s goods. *See In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *12 (TTAB 2014) (“as the name of an Aztec mythological goddess, CHANTICO is clearly not descriptive, or even highly suggestive, of food products”).

Evidence of third party registrations, which Applicant provided in this case, may bear on the conceptual strength of Opposer’s marks. “Third party registrations are relevant to prove that some segment of the composite marks which both contesting

²⁶ 30 TTABVUE 24.

²⁷ 31 TTABVUE 20-21.

²⁸ 21 TTABVUE 333 (Exhibit 27.)

parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 794 F.3d at 1339 (citation omitted). “[E]xtensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373-74 (quoting *Juice Generation*, 794 F.3d at 1339). However, such third party registrations and uses must be “similar marks in use on similar goods.” *Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (citations omitted).

Applicant submitted two third party registrations “in the same class” as Opposer’s registration “containing the term THOR.”²⁹ We find the two-third party registrations are not probative because they cover respectively, “torque converters for land vehicles; torque converters for motor cars,” and “retail store services featuring suspension, bumpers, wheels, tires, lights and automotive accessories for off-road vehicles,” which Applicant has not demonstrated are similar to Opposer’s travel trailers, motor homes, van campers and fifth-wheel trailers.³⁰ Moreover, these two registrations fall far short of the “extensive evidence of third-party registrations” needed to be probative of weakness. *Jack Wolfskin*, 797 F.3d at 1373-74.

Overall, we find that Opposer’s mark THOR is arbitrary and conceptually strong.

²⁹ 31 TTABVUE 40.

³⁰ 19 TTABVUE 662, 667.

2. Commercial Strength/Fame of Opposer's THOR Mark

Opposer asserts that its mark THOR is famous. "Commercial strength or fame may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods or services sold under the mark," and may be "supported by other indicia such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods or services identified by the marks; and the general reputation of the goods or services." *New Era*, 2020 TTAB LEXIS 199, at *31 (citations omitted). Other evidence that may be probative of fame includes promotion through "catalogs, direct mailings, email marketing, customer calls, tradeshows, retail stores, national television, radio, magazine and newspaper campaigns, digital marketing, and social media." *Omaha Steaks*, 908 F.3d at 1319.

"A famous mark is one that has extensive public recognition and renown." *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1367 (Fed. Cir. 2012) (citation omitted). For likelihood of confusion, "fame 'varies along a spectrum from very strong to very weak.'" *Palm Bay Imps.*, 396 F.3d at 1375 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). Given the "extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it." *Made in Nature*, 2022 TTAB LEXIS 228, at *36 (citing *Coach Servs.*, 668 F.3d at 1367). Opposer must establish that "a significant portion of the relevant consuming public recognizes the mark [THOR] as a source indicator." *Monster Energy*, 2023 TTAB LEXIS 14, at *30 (citing *Palm Bay Imps.*, 396 F.3d at 1375).

Opposer contends that the record shows that its mark THOR is famous based on:³¹

- Extensive use for over 40 years;
- From 2016 through 2023, sale of over 1,600,000 recreational vehicles in North America, amounting to over \$60 billion in net sales;
- Advertising expenditure of approximately \$5 million annually;
- Extensive and often unsolicited recognition in the industry and beyond;
- Thor Industries is the largest recreational manufacturer in the United States by units sold and revenue;
- High profile partnerships with famous brands such as Speedway Motorsports, the Girl Scouts of the USA, and the National Parks Foundation; and
- Advertising through social media and its website.

At the outset, we clarify that the relevant fame and the evidence relating thereto must be of the trademark THOR for the goods identified in the pleaded registrations, and not the company generally or collectively that of the related operating companies. *See DuPont*, 476 F.2d at 1361 (under factor five we consider “fame of the **prior mark** (sales, advertising, length of use”) (emphasis added); *Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) (evaluating “[f]ame of an opposer’s **mark**) (emphasis added). As Applicant points out, Opposer does not contend, and there is no testimony or any other evidence of record establishing “that all recreational vehicles manufactured or sold by THOR Industries actually bear the THOR mark.”³² Evaluating the evidence through this lens, we find that Opposer has not established

³¹ 30 TTABVUE 7-9, 32-34.

³² 31 TTABVUE 39.

that its mark THOR falls on the upper end of the fame spectrum or that it is entitled to a wide scope of protection.

Starting with Opposer's length of use, Opposer's Vice President testifies that "THOR Industries has been manufacturing recreational vehicles under its famous THOR brand since it was founded in 1980," but separately also testifies that "Thor Tech [i.e., Opposer] has used the famous trademark THOR in connection with these goods [i.e., recreational vehicles, namely, travel trailers, motor homes, van campers and fifth-wheel trailers] since at least December of 1992."³³ Given that the latter statement is specific to the mark and goods at issue in this proceeding, we will use the later date which equates to approximately 32 years of use. While Opposer's states that it has "extensive use" of the mark THOR, Opposer has not provided evidence of its use beyond some limited promotional material and social media use discussed below.³⁴ Opposer's Vice President also testifies that there has been "extensive use of the THOR Marks at high quality goods and services over the years," but provides no evidence or other context such as a representative sampling of how Opposer uses its mark in connection with its goods.³⁵ *See, e.g., Wet Seal, Inc. v. FD Mgmt.*, Opp. No. 91157022, 2007 TTAB LEXIS 21, at *19 n.13 (TTAB 2007) (Applicant's executive vice president and chief marketing officer's "testimony on [fame], including his statement that ELIZABETH ARDEN 'is one of the more established names in our industry' is

³³ 15 TTABVUE 3 ¶¶ 3, 7.

³⁴ 30 TTABVUE 33.

³⁵ 15 TTABVUE 4 ¶ 9.

conclusory and unsupported by the record.”). And approximately 32 years of use is not insignificant, but “[l]ong use is not sufficient by itself to prove fame or commercial strength.” *Keystone Consol. Indus. v. Franklin Inv. Corp.*, Can. No. 92066927, 2024 TTAB LEXIS 290, at *54 (TTAB 2024); *Genesco Inc. v. Martz*, Opp. No. 91121296, 2003 TTAB LEXIS 123, at *35 (TTAB 2003) (“Even accepting that opposer’s mark . . . has been used for over a century, mere length of time that a mark is in use does not by itself establish consumer awareness of the mark, such that the mark can be found to be famous.”).

In considering sales and advertising figures, the relevant figures are “the volume of sales and advertising expenditures of the goods **traveling under the mark.**” *Bose Corp.*, 293 F.3d at 1371 (emphasis added). We agree with Applicant that Opposer has provided sales figures (and the associated number of units sold) only for its parent THOR Industries which Opposer states “represents approximately twenty recreational vehicle manufacturers and over two hundred North American brands of travel trailers, fifth wheels, toy haulers, and Class A, B, and C motorhomes.”³⁶ Opposer’s Vice President testified that “[s]ince 1980 THOR Industries has sold hundreds of thousands of land-based recreational vehicles and related accessories within the United States of America” and that the SEC filings Opposer provides as evidence “includes information regarding the number of units sold, net sales, and profits” and “detail[] THOR Industries’ sales of its products from 2014 through

³⁶ 31 TTABVUE 38; 15 TTABVUE 3 ¶ 4.

2023.”³⁷ However, neither the testimony nor the attached SEC filing excerpts state that the sales are for products sold under the mark THOR, rather they are for all of THOR Industries products and brands. Specifically, in the Form 10-K excerpts under both “net sales” and “# of units” there is an overall listing for “recreational vehicles” and a single line item for “North American Towables” and another line item for “North America Motorized.”³⁸ Accordingly, while the overall sales figures are large, they do not demonstrate significant consumer recognition of the THOR mark because they are not limited to sales of products sold under the mark THOR. Opposer has not otherwise identified what portion of these overall sales constitute sales of goods traveling under the mark THOR.

Similarly, with respect to advertising expenditures, Opposer’s Vice President testifies that “THOR Industries spends approximately \$5 million annually, throughout the United States via online campaigns, in print and broadcast materials, for trade shows, and other marketing of the THOR brand.”³⁹ Opposer also provides exact annual advertising figures for 2019-2023, but does not otherwise breakdown this “by product, or by mark” and we therefore cannot attribute the advertising figures solely to Opposer’s mark THOR. *Keystone Consol.*, 2024 TTAB LEXIS 290, at

³⁷ 15 TTABVUE 5 ¶ 18.

³⁸ 15 TTABVUE 77-79. Opposer also asserts that it is “is also a leader in the industry as the largest recreational vehicle manufacturer in the United States, by units sold and revenue, and one of the largest globally.” 30 TTABVUE 34. But the supporting testimony states that “THOR Industries and its operating companies, **when combined**, represent the world’s largest recreational vehicle manufacturer” 15 TTABVUE 3 ¶ 4. Accordingly, such testimony is not specific to Opposer or to the mark THOR, and has low probative value in establishing the fame of the mark THOR.

³⁹ 15 TTABVUE 5 ¶ 19.

*47. Given the reference to Opposer's parent THOR Industries, and the many recreational vehicle manufacturers and brands owned by THOR Industries, it is unclear whether the reference to the "THOR brand" includes only advertising directed to the mark THOR or other marks. *See North Face Apparel Corp. v. Sanyang Indus. Co.*, Opp. No. 91187593, 2015 TTAB LEXIS 328, at *22 (TTAB 2015) ("[t]he advertising figures are even less probative [of fame], as they are the total expenditures for marketing all of [o]pposer's brands").

Additionally, the one overall figure Opposer provides covers online campaigns, print and broadcast materials, trade shows, and "other marketing" without any other breakdown or context. As such, the overall advertising figure alone has low probative value in establishing fame as there is no information on where the advertising took place (i.e., which publications, where the online campaigns ran, how many trade shows and where), the number of individuals reached by the advertising, the scope (i.e., national vs. local), etc. *See Made in Nature*, 2022 TTAB LEXIS 251, at *38-39 ("Opposer did not provide evidence regarding the extent or reach of these activities (e.g., the volume and geographical extent of the readership of the print media in which Opposer's advertisements and flyers have appeared . . . and the length of time over which these advertisements have been placed.").

For accolades and recognition, Opposer highlights its multiple features in RV Magazine, including THOR Industries being named "Newsmaker of the Year" in the January/February 2019 issue, and that THOR Industries was named to Newsweek's

America's Most Trusted Companies List in 2022.⁴⁰ However, these uses concern Opposer's parent company and/or its operating companies generally, do not appear to be in relation to the mark THOR or to the travel trailers, motor homes, van campers and fifth-wheel trailers at issue in the case. *See Calypso Tech., Inc. v. Calypso Cap. Mgmt., LP*, Opp. No. 91184576, 2011 TTAB LEXIS 259, at *34 (TTAB 2011) (evidence did not support mark was famous where "articles . . . [we]re about the company rather than about the trademark CALYPSO for the particular computer software."). The RV Magazine accolade appears to be based on THOR Industries' expansion into Europe and its development of an app.⁴¹ Additionally, RV Magazine appears to be a trade publication and there is no indication as to its circulation or exposure to consumers. And while Opposer states that "THOR branded products have also been the subject of extensive unsolicited publicity," the few examples provided do not appear to be major or national publications,⁴² and Opposer does not provide any information regarding the circulation and/or distribution of any of the articles. *See Safer, Inc. v. Oms Invs.*, Opp. No. 91176445, 2010 TTAB LEXIS 51, at *37 (TTAB 2010) ("We cannot infer that the mark is famous or enjoys public renown because there is no evidence regarding the circulation of these . . . articles.").

⁴⁰ 30 TTABVUE 33-34; 15 TTABVUE 4 ¶ 11, 11-15 (Exhibit B) (While Opposer notes other companies that it states were included in the Newsweek ranking, the exhibit only lists Thor Industries).

⁴¹ 12 TTABVUE 43.

⁴² 15 TTABVUE 5 ¶ 20, 80-112 (Exhibit I). The examples provided are reviews from Currently Traveling (a blog), RVtravel.com, MotorHome Magazine, and StressLessCamping.com.

Opposer submits three press releases, and the accompanying testimony, to show that Opposer's parent company, THOR Industries, partnered with Speedway Motorsports, the Girl Scouts of the USA, and the National Parks Foundation.⁴³ However, context is again lacking, and the evidence does not demonstrate that the partnerships involved the use of the mark THOR. For example, the Speedway Motorsports press release states that the partnership with "will elevate brand recognition for the THOR family of companies and their dealer partners" and further states that THOR Industries "[r]epresent[s] 20 RV manufacturers and over 200 North American brands of travel trailers, fifth wheels, toy haulers, and Class A, B and C motorhomes."⁴⁴ The recreational vehicle pictured in the press release bears the mark CHATEAU.

With regards to social media, Opposer's evidence shows that Thor Industries' Instagram page has 38,600 followers, and Thor Industries' Facebook page has 213,000 followers.⁴⁵ These social media pages have low probative value because once again they are for Thor Industries generally, and not specifically connected to the mark THOR. Opposer has provided a very limited screenshot of each social media page that does not show use of the THOR mark in connection with Opposer's registered goods. Additionally, Opposer provides no explanation or context as to the significance of the number of followers or how it compares to others in the industry.

⁴³ 15 TTABVUE 4 ¶¶ 10 and 12, 8-10 (Exhibit A), 16-20 (Exhibit C).

⁴⁴ 15 TTABVUE 9-10.

⁴⁵ 25 TTABVUE 3 ¶ 4, 16-17 (Exhibit B). Opposer also states that it uses X, Google plus, and Pinterest, but does not provide any screenshots or any other information about such use. 15 TTABVUE 5 ¶ 20.

Performance Open Wheel Racing, Inc. v. United States Auto Club Inc., Opp. No. 91229632, 2019 TTAB LEXIS 137, at *29 (TTAB 2019) (“Applicant provided no explanation or context as to the meaning of Applicant’s 105,000 Facebook ‘likes’ and 35,000 Twitter followers.”). As for Opposer’s website advertising, Opposer submitted what it identified as a “website analytics analysis,” but neither the report or the accompanying declaration, identifies what website is the subject of the report (and Opposer has not submitted any website screenshots in the record that would identify the website).⁴⁶ Additionally, Opposer did not provide testimony or any other context as to what the report is intended to demonstrate beyond the conclusory statement that it is “a report on impressions driven by THOR Industries’ paid advertising.”⁴⁷ Accordingly, we accord it low probative value.

Ultimately, Opposer’s evidence falls short of establishing that its mark THOR is placed at the upper end of the fame spectrum. On this record, we find that the mark THOR has average commercial strength, and we place it in the middle of the “spectrum from very strong to very weak.” *Palm Bay Imps.*, 396 F.3d at 1375. Considering the strong conceptual strength and average commercial strength, we find that Opposer’s mark THOR is entitled to a normal scope of protection. *Bell’s Brewery, Inc. v. Innovation Brewing*, Opp. No. 91215896, 2017 TTAB LEXIS 452, at *20 (TTAB 2017) (considering “evidence pertaining to both conceptual and commercial strength, we find that [o]pposer’s marks are inherently distinctive and

⁴⁶ 25 TTABVUE 3 ¶ 3, 4-15.

⁴⁷ 25 TTABVUE 3 ¶ 3

accord them the normal scope of protection to which inherently distinctive marks are entitled”). Accordingly, the fifth *DuPont* factor weighs slightly in favor of likelihood of confusion. Applicant’s evidence of two third party registrations for non-similar goods does not affect this finding, so the sixth *DuPont* factor is neutral.

B. Similarity of the Marks

We now turn to the analysis of “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 396 F.3d at 1371 (citing *DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Look Cycle Int’l*, 2024 TTAB LEXIS 289, at *19 (quoting *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018). [S]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs.*, 668 F.3d at 1368 (citation omitted). Additionally, the marks “must be considered ... in light of the fallibility of memory” *St. Helena Hosp.*, 774 F.3d at 751 (citation omitted).

“It is well-established that it is improper to dissect a mark, and that marks must be viewed in their entireties.” *Coach Servs.*, 668 F.3d at 1368; *Juice Generation*, 794 F.3d at 1341 (citing *DuPont*, 476 F.2d at 1361) (“It is the mark in its ‘entiret[y]’ that must be assessed.”). However, “[t]here is nothing improper in stating that, for rational

reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data*, 753 F.2d 1056, 1058 (Fed. Cir. 1985).

Opposer’s mark is THOR in standard characters and Applicant’s mark is



. We agree with Opposer that THOR is the dominant term in both parties’ marks and as a result there is similarity in appearance and sound. Additionally, the fact that Applicant’s mark incorporates Opposer’s mark in its entirety further increases the similarity between the marks. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1322 (Fed. Cir. 2014) (affirming “finding that [applicant’s] ‘STONE LION CAPITAL’ is ‘similar in sight, sound, meaning, and overall commercial impression’ to [opposer’s] ‘LION CAPITAL’ and ‘LION’”).

With regards to connotation, Applicant submitted evidence that Thor is recognized as the god of thunder and that “the thunderbolt that was represented by his hammer [is] the attribute most commonly associated with him.⁴⁸ Accordingly, the hammer design and the wording “Drop the Hammer” in Applicant’s mark accentuate the shared “Thor” god of thunder meaning and “reinforce[] the connotation created by the word[] [THOR] [in] the mark.” *Herbko Int’l v. Kappa Books*, 308 F.3d 1156, 1165 (Fed. Cir. 2002) (“[T]he puzzle design does not convey any distinct or separate impression apart from the word portion of the mark. Rather, it serves only to

⁴⁸ 21 TTABVUE 333.

strengthen the impact of the word portion in creating an association with crossword puzzles.”). We find the addition of the generic term BOATS in Applicant’s mark, as used on boats, does not change the connotation of the dominant term THOR. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (“the dominant portion of Dixie’s mark, which disclaims the generic word ‘cafe,’ is ‘Delta’ ... [because] the generic term ‘café’ offers [insufficient] distinctiveness to create a different commercial impression.”). Given these similarities in sight, sound and connotation, Applicant’s mark and Opposer’s mark also convey a similar overall commercial impression.

Taken in their entirety, the marks are similar in appearance, sound, connotation and overall commercial impression. Accordingly, this *DuPont* factor favors a finding of confusion.

C. Similarity or Dissimilarity of the Goods

We next assess the “similarity or dissimilarity and nature of the goods or services.” *DuPont*, 476 F.2d at 1361. We must base our analysis on “the applicant’s goods as set forth in its application, and the opposer’s goods as set forth in its registration.” *M2 Software, Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 1382 (Fed. Cir. 2006).

Opposer’s goods as identified in its registration for the mark THOR covers, “recreational vehicles, namely, travel trailers, motor homes, van campers and fifth-wheel trailers.” Applicant’s goods as identified in its application covers, “recreational watercraft, namely, boats.” Despite Opposer’s attempt throughout its briefing to broaden its goods to “land-based recreational vehicles” and Applicant’s goods to

“recreational watercraft” or “water-based recreational vehicles,”⁴⁹ we analyze this factor based on the identifications in the application and registration. As such, Opposer’s goods are not all land-based recreational vehicles,⁵⁰ but rather “travel trailers, motor homes, van campers and fifth-wheel trailers.” Similarly, Applicant’s goods are not all recreational watercraft but rather “boats.” *See In re Locus Link USA*, Expungement No. 2022-100137E, 2024 TTAB LEXIS 225, at *14-15 (TTAB 2024) (“the term ‘namely’ is definite and is preferred to set forth an identification that requires greater particularity” such as where the introductory phrase contains “indefinite wording” (e.g. “clothing, namely, shirts”)); *ProMark Brands, Inc. v. GFA Brands, Inc.*, Opp. No. 91194974, 2015 TTAB LEXIS 67, at *27 (TTAB 2015) (“In opposition proceedings in which the opposer has pleaded a registration, the relatedness of the parties’ goods is analyzed by reference to the express wording of the involved application and registration.”); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.03(a) (2024) (“goods or services listed after ‘namely,’ . . . must further define the introductory wording that precedes ‘namely’ . . .”).

Opposer argues that the parties’ goods are related based on evidence of third party registrations, third party websites, the common categorization of all of the parties’ goods as “recreational vehicles,” and that Applicant’s goods are arguably within the

⁴⁹ *See* 30 TTABVUE 9, 26-27, 29-31, 35, 39; 32 TTABVUE 9, 13, 15, 21.

⁵⁰ Opposer attempts to use an expansive interpretation of the term “land-based recreational vehicle” to expand its rights to include any vehicle that is used for “recreation” and on land including jeeps, trucks, ATVs, motorcycles, and SUVs. *See, e.g.*, 32 TTABVUE 13-15, 15 TTABVUE 5 ¶ 17, 67-76 (Exhibit G).

zone of natural expansion for Opposer's business.⁵¹ Applicant asserts that the parties' goods are dissimilar based on the co-existence of registrations for identical or substantially similar trademarks with different owners for the parties' goods, website evidence from different companies using the same or similar names for boats and travel trailers, motor homes, van campers and/or fifth-wheel trailers, the inherent differences in the nature of the goods, and Opposer's prior inconsistent statements on the dissimilarity of boats and its travel trailers, motor homes, van campers and/or fifth-wheel trailers in prosecuting other trademark applications before the U.S. Patent & Trademark Office ("USPTO").⁵² We address each category of evidence below.

1. Trademark Registrations Submitted by Opposer

"[U]se-based, third-party registrations . . . have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark." *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, Opp. No. 91197659, 2013 TTAB LEXIS 314, at *27-28 (TTAB 2013); *see also In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, at *30 (TTAB 2021) (citation omitted) ("[e]vidence of relatedness may include . . . copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration").

Opposer submitted evidence of 26 third party registrations which it asserts "include both boats and recreational vehicles, including but not limited to motor

⁵¹ 30 TTABVUE 26-30; 32 TTABVUE 9-12.

⁵² 31 TTABVUE 21-32.

homes and trailers, in the covered goods” and argues that “[t]hese registrations point to the inevitable conclusion that the goods are related.”⁵³ Initially, we discount certain registrations as having low or no probative value for the following reasons:

- two registrations do not cover “boats”;⁵⁴
- four registrations have been cancelled;⁵⁵ and
- ten registrations issued under Sections 44(e) or 66(a) of the of the Trademark Act (15 U.S.C. §§ 1126(e), 1141f(a)), and their records contain no § 71 affidavits or declarations of continuing use (15 U.S.C. § 1141k).⁵⁶

Of the ten remaining registrations, eight identify such a “diversity” of goods that it “diminishes the probative value in establishing that any two items identified in the registration[s] are related.” *In re Princeton Tectonics, Inc.*, Ser. No. 77436425, 2010 TTAB LEXIS 224, at *7 (TTAB 2010); *In re Mucky Duck Mustard Co.*, Ser. No. 73603019, 1988 TTAB LEXIS 11, at *9 n.6 (TTAB 1998) (discounting third party registrations “where a wide variety of goods and services are sold”). For example,

⁵³ 24 TTABVUE 2-4, 8-98; 30 TTABVUE 27.

⁵⁴ 24 TTABVUE 10 (Registration No. 6012042 only covers “boat bumpers”), 59 (Registration No. 5537872 registered under § 66(a) and deleted “boats” in a Section 71 filing). *Made in Nature*, 2022 TTAB LEXIS 228, at *55 (discounting as being of low or no probative value on relatedness of goods factor, “third-party registrations that [o]pposer submitted which . . . do not show both [o]pposer’s and [a]pplicant’s types of goods under the same mark”).

⁵⁵ 24 TTABVUE 15, 84, 92, 96. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, Opp. No. 91194148, 2015 TTAB LEXIS 260, at *37 (TTAB 2015) (“three of the third-party registrations . . . have been cancelled, and cannot be used for this purpose [i.e., as evidence that the goods are related]”); *Duffy-Mott Co. v. Borden, Inc.*, 1978 TTAB LEXIS 150, at *2 n.5 (TTAB 1978) (“when it is apparent that the status of a registration may have changed under 8, 15 or 9 of the Trademark Act between the time when a status and title copy of a registration . . . was made of record and the date when the case is decided, the Board will ascertain from Office records and will rely upon the status of the registration when the case is decided”).

⁵⁶ 24 TTABVUE 32-37, 39-42, 44-45, 62-63, 66, 69, 74-75, 78, 81, 87. *See In re 1st USA Realty Professionals, Inc.*, Ser. No. 78553715, 2007 TTAB LEXIS 73, at *5 (TTAB 2007) (third party registrations “based on Section 44 or Section 66 of the Trademark Act . . . are not based on use in commerce [and] have no probative value in showing the relatedness of the services”).

Opposer, in explaining in its reply brief that its argument on the relatedness of goods is limited to land-based recreational vehicles and water-based recreational vehicles, not all vehicles, notes, “[t]his is a far cry from arguing . . . that airplanes are related to bicycles, or that strollers are related to submarines”⁵⁷ Yet, five of Opposer’s remaining third party registrations **do** identify airplanes/aircraft and bicycles.⁵⁸ In addition, some of these registrations include such diverse goods as gears for bicycles, safety seats for children, space vehicles, wheelchairs, pet strollers, and self-balancing boards.⁵⁹ The mere submission of two relevant registrations provides little insight into whether the involved goods are related. *See In re Thor Tech, Inc.*, Ser. No. 85667188, 2015 TTAB LEXIS 18, at *13 (TTAB 2015) (“cannot conclude on this evidentiary record [of two third party registrations] that consumers would assume a common source for the goods”).

2. Trademark Registrations Submitted by Applicant

Pairs of third party registrations for the same mark owned by different parties for different goods may be given probative weight in establishing that the listed goods are not considered related for the purpose of establishing a likelihood of confusion. *See In re G.B.I. Tile & Stone, Inc.*, Ser. No. 77369073, 2009 TTAB LEXIS 647, at *13 (TTAB 2009) (“applicants may submit sets of third-party registrations to suggest . . .

⁵⁷ 32 TTABVUE 9.

⁵⁸ 24 TTABVUE 8 (Reg. No. 5987777 includes aircraft, bicycles, electric tricycle), 18 (Reg. No. 5659150 includes aircraft, bicycles, electric unicycles), 20 (Reg. No. 5878588 includes aircraft, bicycles, tractors), 50-51 (Reg. No. 3787596 includes aeroplanes, aircrafts, bicycles, rickshaws), 55-56 (Reg. No. 4953348 includes airplanes and structural parts therefor, aircraft, electric bicycles, go-carts).

⁵⁹ 24 TTABVUE 23, 25, 29.

that the Office has registered the same mark to different parties for the goods at issue”); *Helene Curtis Industries v. Suave Shoe Corp.*, Opp. No. 91065607, 1989 TTAB LEXIS 42, at *21 (TTAB 1989).

Here, Applicant submitted evidence of pairs of “identical or substantially similar trademark registrations on the Principal Register for boats and recreational vehicles from distinct sources.”⁶⁰ However, we do not consider the pairs of third party registrations, where the marks or goods were not similar enough to be probative,⁶¹ or the registrations were cancelled,⁶² based on §§ 66(a) or 44(e) with no use filed,⁶³ or the pair included a pending or abandoned application.⁶⁴

Nevertheless, this leaves 34 pairs of registrations,⁶⁵ and we note that, of particular interest, 32 of those pairs involve a registration owned by Opposer, or one of its aforementioned affiliated companies, as depicted in the table below:

⁶⁰ 31 TTABVUE 28. We have considered the registrations Applicant submitted at 22 TTABVUE 3-7, 38-611 (Exhibit 17), and 19 TTABVUE 153-207 (Exhibit 6 to the October 2, 2018 Office Action Response submitted by Opposer’s affiliate Jayco Inc. in Serial No. 87742035). See 31 TTABVUE 29 n.11 (Applicant states the registrations in Jayco’s office action response “provide even more evidence of concurrent registrations for boats and RVs”).


⁶¹ 22 TTABVUE 155-157, 413-418, 458-460, 527-529, 569-571, and 606-607; *Id.* at 103-110 and 135-144; *Id.* at 380-381 and 422-426; *Id.* at 306-311 and 575-577; *Id.* at 558-559, 562-563, and 584-586; *Id.* at 202-211, 315-319, 337-341, 345-349, and 524-526; *Id.* at 408-412, 492-494, and 535-537; *Id.* at 556-557 and 560-561; *Id.* at 342-344, 468-471, and 595-597; *Id.* at 371-373, 461-464, and 582-583; *Id.* at 419-421 and 591-592.

⁶² 22 TTABVUE 282-285, 443-447, 472-474, 485-487; 19 TTABVUE 158-163, 166, 169-172, 175-176, 179-180, 182-183, 185-186, 188-190, 192, 195, 201, 206.


⁶³ 22 TTABVUE 286-289.

⁶⁴ 22 TTABVUE 290-292, 564-566, 598-599, 600-601, 608-609, 610-611.

⁶⁵ 22 TTABVUE 168, 533, 482, 504, 186, 572, 356, 296, 508, 323, 478, 589, 549, 148, 212, 98, 174, 541, 197; 19 TTABVUE 197 and 22 TTABVUE 237; 19 TTABVUE 165, 164; 22 TTABVUE 76, 66, 447, 514, 387, 378; 19 TTABVUE 205, 204; 22 TTABVUE 501, 48, 163, 320, 93, 61, 362, 82, 554, 587, 403, 145, 567, 506, 158, 453, 273, 312, 192, 235, 450, 278, 488,

Reg. No.	Mark	Goods	Owner
3647198	ANTHEM	Recreational vehicles, namely, class A motorhomes	Jayco, Inc.
6154710	ANTHEM	Boats	Anthem Marine, LLC
5443333	ASTORIA	Recreational vehicles, namely, fifth wheels; Recreational vehicles, namely, towable trailers; Recreational vehicles, namely, travel trailers	Thor Tech, Inc.
5922212	ASTORIA	Boats	Brunswick Corporation
3871181	AVALANCHE	Recreational vehicles, namely, fifth wheel trailers	Thor Tech, Inc.
7094519	Avalanche 	Boats; fishing boats; inflatable boats; kayak-like boats; kayaks; personal watercraft, namely, small powerboats, personal jet boats, water scooters; pontoon boats; propeller-driven boats; sailboats; canoes; kayak paddles; oars	Avalanche IP LLC
4492466	AXIS	Recreational vehicles, namely, motor homes	Thor Tech, Inc.
3928211	AXIS	Boats and structural parts thereof; boat accessories, namely, anti-skid pads, ballast tanks, fitted covers and racks; boat trailers	Malibu Boats, LLC
5830303	CARAVEL	Recreational vehicles, namely, travel trailers	Thor Tech, Inc.
4060017	CARAVELLE	Boats	Sak Marine Co., LLC
5742486	CARBON	Recreational vehicles, namely, fifth wheels; Recreational	Thor Tech, Inc.


223, 247, 374, 580, 593, 218, 329, 465, 39; 19 TTABVUE 368, 495; 22 TTABVUE 552, 522, 399, 256, 538, 123.

Reg. No.	Mark	Goods	Owner
		vehicles, namely, towable trailers; Recreational vehicles, namely, toy haulers; Recreational vehicles, namely, travel trailers; all the foregoing not made with carbon fiber	
7313771	 CARBON CAT (Disclaimer: CARBON CAT)	Boats	Aspen Power Catamarans LLC
6687594	CRUISER RV	Recreational vehicles, namely, travel trailers, and toy haulers	Heartland Recreational Vehicles, LLC
2832743	CRUISER	Personal watercraft, namely, water scooters, single and multiple passenger recreational jet boats and structural parts therefor	Yamaha Motor Corporation, U.S.A.
2968796	DENALI	RVs, namely, travel trailers and fifth wheels	Thor Tech, Inc.
1977919	DENALI	Boats	PB Holdco, LLC
3688863	EAGLE	Recreational vehicles, namely, fifth wheels; Travel trailers	Jayco, Inc.
6430945	EAGLECRAFT	Boats	Daigle Marine Inc.
1759144	AMERICAN EAGLE	Motor homes	Fleetwood Enterprises, Inc.
3035572	SEA EAGLE	Inflatable boats and kayaks	Sea Eagle Boats, Inc.
3065783	EVOLUTION	Folding camping trailers	Fleetwood Enterprises, Inc.
4928667	EVOLUTION	Power boats	Intrepid Powerboats, Inc.

Reg. No.	Mark	Goods	Owner
1654278	FOUR WINDS	Recreational vehicles, namely motor homes	Thor Tech, Inc.
1468967	FOUR WINNS	Boats	Four Winns, LLC
5444696	FREEDOM TRAVELER	Recreational vehicles, namely, motor homes	Thor Tech, Inc.
6000133	FREEDOM YACHTS (Disclaimer: YACHTS)	Boats; Power boats; Sail boats; Sailing vessels	Marine Manufacturing Group, LLC
4864687	GEMINI	Recreational vehicles, namely, motor homes	Thor Tech, Inc.
4640876	GEMINI	Boats; Boats and structural parts therefor; Sail boats; Sailing vessels; Vessels; Yachts	Catamaran Sales, Inc.
4544885	GENESIS	Recreational vehicles, namely, motor homes, travel trailers and park trailers	Genesis Supreme RV, Inc.
2927758	GENESIS	Yachts and structural parts therefore	US Genesis, Inc.
5869666	GUIDE	Recreational vehicles, namely, towable trailers; Recreational vehicles, namely, travel trailers	Thor Tech, Inc.
928157	GUIDE TESTED	Aluminum fishing boats	Lund Boat Company
3382627	HAMPTON	Park trailers	Thor Tech, Inc.
4073314	HAMPTON	Boats and structural parts therefor; Sailboats; Yachts	Hampton Marine Co., Ltd.
1971945	HURRICANE	Recreational vehicles, namely RVs	Thor Tech, Inc.
1375730	HURRICANE	Inflatable boats	Zodiac Hurricane

Reg. No.	Mark	Goods	Owner
			Technologies, Inc.
4492521	IMPACT	Recreational vehicles, namely, travel trailers, fifth wheel trailers and sport utility trailers	Thor Tech, Inc.
1920819	IMPACT	Boats	Boston Whaler, Inc.
6570797	LAUNCH	Recreational vehicles, namely, motorhomes, class B motorhomes, vans, camping vans, camper vans, touring coaches	Jayco, Inc.
7062046	LAUNCH	Boats	CC Marine Brand Acquisition, LLC
4898791	NORTH TRAIL	Recreational vehicles, namely, towable trailers	Heartland Recreational Vehicles, LLC
2662573	NORTH RIVER	Welded aluminum jet-propelled shallow draft river boats	NW Bend Boats, LLC
6810234	OLYMPIA	Recreational vehicles, namely, travel trailers	Jayco, Inc.
5922237	OLYMPIA	Boats	Brunswick Corporation
3443593	OUTBACK	Recreational vehicles, namely, travel trailers, and sport utility trailers	Thor Tech, Inc.
5426185	OUTBACK	Kayak-like boats	Hobie Brands International, L.C.
3306995	OUTLAW	Recreational vehicles, namely motor homes	Thor Tech, Inc.
4011570	OUTLAW	Pleasure boats	Iconic Marine Group, LLC

Reg. No.	Mark	Goods	Owner
3955702	PINNACLE	Recreational vehicles, namely, fifth wheel travel trailers	Jayco, Inc.
3062720	PINNACLE MARINE CORPORATION (Disclaimer: MARINE CORPORATION)	Commercial vessels, ships, and boats	Pinnacle Marine Corporation
5587138	PRESTIGE	Recreational vehicles, namely, motor homes	Jayco, Inc.
4100628	PRESTIGE	Vehicles, namely, yachts; sailing boats, motorboats and pleasure boats	SPBI
5729042	REATA	Recreational vehicles, namely, motor homes	Jayco, Inc.
3072120	REATA	Boats and structural parts therefore	Tracker Marine, L.L.C.
3357464	TRAIL RUNNER	Recreational vehicles, namely, travel trailers	Heartland Recreational Vehicles, LLC
4627610	SHOAL RUNNER (Disclaimer: SHOAL)	Boats	Miracle Marine, Inc.
7250530	SOLSTICE	Recreational vehicles, namely, motor homes	Jayco, Inc.
7304662	SOLSTICE	Recreational watercraft, namely, boats and kayaks; inflatable boats and kayaks; inflatable boat accessories, namely, oars, seats and air pumps specially adapted for inflatable watercraft and inflatable watercraft accessories	International Leisure Products, Inc.

Reg. No.	Mark	Goods	Owner
3004384	SPORTSMEN	Recreational vehicles, namely towable trailers, and excluding motorhomes	K. Z., Inc.
4180848	SPORTSMAN	Boats	Sportsman Boats Manufacturing, Inc.
5311421	STARCRAFT	Recreational vehicles, namely, towable trailers	Jayco, Inc.
761578	STARCRAFT	Boats	Smoker Craft, Inc.
6450462	SWIFT	Recreational vehicles, namely, motorhomes	Jayco, Inc.
5925118	 (Disclaimer: RACING)	Boats; Canoes; Hydroplanes; Kayaks; Oars; Rowboats; Rowlocks; Water vehicles, namely, hydrofoil boats supported by single or multi hulls, and structural parts therefor; Yachts; Boat hulls	Swift International Limited
5134350	TRITON	Recreational vehicles, namely, travel trailers	Thor Tech, Inc.
3301858	TRITON	Boats and structural parts therefor	Tracker Marine, L.L.C.
6342521	YUKON	Recreational vehicles, namely, fifth wheel trailers; Recreational vehicles, namely, fifth wheels; Recreational vehicles, namely, travel trailers	Thor Tech, Inc.
2404372	YUKON	Boats	Brunswick Corporation

We find this evidence of co-existing pairs of registrations for identical or substantially similar marks for recreational vehicles and boats is probative on the issue of the relationship between the goods. Similar to *Thor Tech*, the large number

of pairs of “third party” registrations includes a significant number of registrations owned by the prior user. *See Thor Tech*, 2015 TTAB LEXIS 18, at *8, 10-11 (“Significantly, seven sets of third-party registrations . . . appear to be owned, respectively, by the [r]egistrant of the cited registration and [a]pplicant or one of [a]pplicant’s related companies.”) Again, in at least 32 of the 34 instances set forth above, Opposer or a related company owns a registration covering travel trailers, motor homes, van campers and/or fifth-wheel trailers and there is a co-existing registration for the same, or substantially similar trademark, for boats. Opposer has not argued, let alone submitted evidence to show that, it contests the others’ registrations. Indeed, as discussed more fully later in this decision, Opposer, or its related companies, affirmatively argued that its later filed marks did not present a likelihood of confusion with prior registrations for boats because the goods are unrelated.⁶⁶ Accordingly, we find that Applicant’s evidence rebuts the relevant, two third party registrations made of record by Opposer.

3. Third Party Websites

Opposer argues that evidence it submitted shows “both land-based recreational vehicles and recreational watercraft together” available from the same source and supports the relatedness of the goods.⁶⁷ However, Opposer ignores that for this evidence to be probative it must show “third-party use of the **same mark** for an applicant’s identified goods . . . on the one hand, and an opposer’s . . . identified goods

⁶⁶ *See, e.g.*, 18 TTABVUE 43-56; 19 TTABVUE 85-256; 22 TTABVUE 731-771.

⁶⁷ 30 TTABVUE 26.

. . . on the other.” *Ricardo Media Inc. v. Inventive Software, LLC*, Opp. No. 91235063 2019 TTAB LEXIS 283, at *7 (TTAB 2019) (emphasis added); *L’Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, at *25 (TTAB 2012) (goods were related where the record showed “companies have marketed cosmetics and beverages under the same mark”). We agree with Applicant that none of Opposer’s proffered website evidence shows “manufacturers selling boats and recreational vehicles under a single brand or trademark such that consumers would perceive the goods as originating from the same source.”⁶⁸

For example, Opposer highlights evidence from Forest River and Winnebago which it identifies as its “primary competitors in the field of land-based recreational vehicles.”⁶⁹ But Opposer’s evidence shows that Forest River offers pontoon boats under a separate division or company, Forest Marine, and that its boats brands (Berkshire, South Bay, Trifecta, and Nepallo) each offer their boats on separately branded websites.⁷⁰ And the evidence on Winnebago shows only a press release announcing the acquisition of Barletta Pontoon Boats, and then screenshots from the website for Barletta Pontoon Boats showing information about its boat models (Reserve, Lusso, Corsa, Cabrio, Aria).⁷¹ None of the submitted website screenshots

⁶⁸ 31 TTABVUE 29-30. *See* 15 TTABVUE 21-76.

⁶⁹ 30 TTABVUE 26-27.

⁷⁰ Opposer’s Vice President testifies that “Forest River has a boat division, selling pontoon boats.” 15 TTABVUE 4 ¶ 13. The website excerpt titled “Pontoon Boats” states, “Forest River Marine, Creating Innovative Product Improvements and a Lifetime of Enjoyment on the Water” followed by links to websites for various boat brands. 15 TTABVUE 22-23.

⁷¹ 15 TTABVUE 25-33. Opposer’s Vice President’s testimony shows that boats are offered under different marks stating, “Winnebago sells boats under its Chris-Craft and Barletta brands.” *Id.* at 4 ¶ 13.

from Forest River Marine or Winnebago shows any recreational vehicles, only boats and/or links to websites for boats.⁷² Additionally, some of Opposer's third party website evidence does not even show both parties' goods, but rather other goods such as trucks, jet-skis, ATVs, and motorcycles.⁷³ Accordingly, Opposer's website evidence is entitled to very little probative weight on the relatedness of the parties' goods. *See In re White Rock Distilleries, Inc.*, Ser. No. 77093221, 2009 TTAB LEXIS 601, at *8-10 (TTAB 2009) (holding the *DuPont* factor on the relatedness of the goods favored applicant where "[t]here is no evidence that vodka, much less applicant's specific type of vodka, and wine emanate from a single source under a single mark").

Conversely, Applicant submitted probative evidence of 15 examples of the same or similar names for boats and for recreational vehicles used by two unrelated entities.⁷⁴ This evidence may be viewed as "akin to the opinion manifested by knowledgeable businessmen" that confusion is unlikely from such concurrent use. *Keebler Co. v. Associated Biscuits Ltd.*, 1980 TTAB LEXIS 37, at *14 (TTAB 1980) (citing *DuPont*, 476 F.3d at 1363). Applicant demonstrated that one of Opposer's primary competitors Forest River uses marks for its recreational vehicles (including

⁷² Opposer's Vice President testifies that he "personally reviewed the websites of both Forest River and Winnebago" and attached to his declaration "screenshots of representative RV products and representative boat products for sale from the Forest River and Winnebago websites as Exhibits D and E." 15 TTABVUE 4 ¶ 14. However, these exhibits only depict boats, and not RV products. *See* 15 TTABVUE 21-33.

⁷³ 15 TTABVUE 68-76.

⁷⁴ 31 TTABVUE 30 (Applicant states that it submits "evidence that consumers are accustomed to seeing the same or similar names used for boats and recreational vehicles from different sources."); 15 TTABVUE 4 ¶ 13; 21 TTABVUE 122-123, 136-139, 230-231, 235, 215-219, 208-209; 21 TTABVUE 96-97, 118, 159-160, 167, 154, 168, 143-146, 173, 321, 290-291, 192, 277, 255, 271-272, 250-251, 239, 317-318, 226-229, 299, 309, 184-187, 221-222, 176, 200.

fifth wheel trailers, motor homes and travel trailers) that co-exist in the market with the same marks used by a different company for boats including NITRO, SUNSEEKER, and VIKING.⁷⁵ Applicant's evidence depicts additional co-existing use of the same marks in the market by different companies for boats and recreational vehicles, including: CATALINA, MAKO, MONACO, MONTEREY, PASSPORT, PURSUIT, REGAL, SOUTHWIND, STARCRAFT, TIARA, TRITON, and XPLOER/XPLOERER.⁷⁶ Opposer does not address this evidence in its trial brief.

4. Opposer's Prior Statements Before the USPTO

Applicant argues that "Thor Tech has consistently maintained that recreational vehicles and boats are distinct goods that do not engender a likelihood of confusion" based on statements Opposer and its related companies made in the prosecution files for their registrations before the USPTO.⁷⁷ We agree with Opposer that file wrapper estoppel (i.e., precluding a party from taking contrary positions to that presented during prosecution) is not applicable in Board proceedings, and that we may not "consider a party's opinion relating to the ultimate conclusion [of likelihood of confusion] an 'admission.'"⁷⁸ *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 929 (CCPA 1978); *Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza*

⁷⁵ 15 TTABVUE 4 ¶ 13; 21 TTABVUE 122-123, 136-139, 230-231, 235, 215-219, 208-209.

⁷⁶ 21 TTABVUE 96-97, 118, 159-160, 167, 154, 168, 143-146, 173, 321, 290-291, 192, 277, 255, 271-272, 250-251, 239, 317-318, 226-229, 299, 309, 184-187, 221-222, 176, 200.

⁷⁷ 31 TTABVUE 28-29.

⁷⁸ See 32 TTABVUE 5-6.

Holding Co., Opp. No. 91171509, 2009 TTAB LEXIS 718, at *35 (TTAB 2009) (“doctrine of ‘file wrapper estoppel’ does not apply in trademark cases”).

However, the Federal Circuit “ha[s] recognized that such comments [made in response to USPTO office actions] have significance as ‘facts illuminative of shade and tone in the total picture confronting the decision maker.’” *Juice Generation*, 794 F.3d at 1340 (opposer’s statements made during the prosecution of its own marks supported applicant’s argument on the strength of the marks factor that the wording ‘PEACE & LOVE’ is suggestive or descriptive). And “prior inconsistent statements in [an] application for registration or in another proceeding . . . constitute admissions and may be considered as evidence, albeit not conclusive evidence, of the truth of the assertions therein.” *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 1982 TTAB LEXIS 205, at *7-8 (TTAB 1982).

Accordingly, we consider the following prior statements made by Opposer (or a related company identified in this proceeding) regarding the dissimilarities between recreational vehicles and boats:

- “Although the Applicant [Thor Tech, Inc.’s] mark [DENALI] is identical to the cited mark, and although both are used on types of vehicles, the two marks are used on entirely different types of vehicles. . . . Applicant [Thor Tech, Inc.] intends to use its mark on travel trailers and fifth wheels. These goods are land vehicles. By contrast, Registrant uses its mark for boats, which are water vehicles. Boats differ significantly in form and function from the travel trailers and fifth wheels to be offered by Applicant [Thor Tech, Inc.]”;⁷⁹
- “Applicant [Thor Tech, Inc.] submits that although the goods covered by the referenced registrations are in the same class as Applicant’s [Thor Tech, Inc.’s] goods, Applicant’s [Thor Tech, Inc.’s] recreational vehicles,

⁷⁹ 18 TTABVUE 50.

namely, fifth wheel trailers and travel trailers are unrelated to the registrant's . . . boats. . . . Where the goods are considerably different from one another, even identical [AVALANCHE] marks can be used by different parties without conflict.”⁸⁰

- “Consumers recognize that the same or similar marks may be used by recreational vehicles (‘RVs’) (and specifically RVs in the form of motor homes) and boats (and their structural parts) emanating from different sources. Additionally, the USPTO has long recognized the same or identical marks are used by different parties producing RVs and boats, and that such use has defined the respective distinct markets. Put another way, consumers are not likely to be confused simply because Registrant uses REATA for boats and Applicant [Jayco, Inc.] uses REATTA for RVs, namely, motor homes.”⁸¹ and
- “RVs and boats are noncompetitive, expensive, differ in utility, and have nothing in common with respect to their essential characteristics or sales appeal.”⁸²

Although not conclusive, we find these statements are relevant evidence supporting that Opposer’s recreational vehicles are dissimilar from and not related to Applicant’s boats. *See Top Tobacco, L.P. v. N. Atl. Operating Co.*, Opp. No. 91157248, 2011 TTAB LEXIS 367, at *28 (TTAB 2011) (opposer’s previous statement not “conclusive . . . rather, it is relevant evidence in support of our conclusion, based on the entire record”).

Opposer responds that its prior statements that its goods are related to boats are not relevant here because the marks at issue in this proceeding are “house marks likely to be used across the entire line of products offered by each party, and likely to be viewed by consumers as identifying not only a particular brand, but the

⁸⁰ 22 TTABVUE 738.

⁸¹ 19 TTABVUE 99.

⁸² 19 TTABVUE 109.

overarching source of that brand.”⁸³ It contends that the marks at issue in the office actions were in contrast “specific product marks, where the presence of a house mark used in conjunction therewith may serve to help obviate any potential for confusion.”⁸⁴ However, aside from noting that both companies use the term “THOR” in their names, Opposer cites no evidence supporting its claim regarding house marks. Moreover, as Opposer’s above cited statements make clear each of the marks in the office actions were one-word, stand-alone marks, and the USPTO did not consider use in connection with a house mark in determining their registrability. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207 n.4 (Fed. Cir. 1993) (“Although Shell argues that its use of RIGHT-A-WAY would be in association with other Shell trademarks, the proposed registration is not so limited. Registrability is determined based on the description in the application, and restrictions on how the mark is used will not be inferred.”).

5. Recreational Vehicles and the Nature of the Parties Goods

Opposer argues that the parties’ goods are related because they are all “types of recreational vehicles,” as demonstrated by third party registrations covering “various types of boats” that use the term “recreational vehicles” in the description of goods.⁸⁵ Opposer contends that even though “Applicant does not use the phrase ‘recreational vehicles’ to describe its goods,” that based on Applicant’s identification of goods, “it is presumed that Applicant’s Goods include all goods encompassed by the terms ‘boats’

⁸³ 32 TTABVUE 7.

⁸⁴ 32 TTABVUE 7.

⁸⁵ 30 TTABVUE 27-28.

and/or ‘recreational watercraft’ — which, as exemplified by the [third party] registrations . . . include goods that are considered ‘recreational vehicles.’”⁸⁶ However, even if Applicant’s goods could generally be described as recreational vehicles, “a finding that the goods are similar is not based on whether a general term or overarching relationship can be found to encompass them both.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, Opp. No. 91154210, 2010 TTAB LEXIS 84, at *38 (TTAB 2010). *See also In re N.A.D., Inc.*, 754 F.2d 996, 999 (Fed. Cir. 1985) (reversing refusal to register stating “[t]he most that can be said is that appellant’s anesthesia machines and [cited registrant’s] rental and leasing services are both in the medical field”); *White Rock Distilleries*, 2009 TTAB LEXIS 601, at *9 (“Although vodka and wine may both be described generally as ‘alcoholic beverages,’ this is insufficient to establish that applicant’s and registrant’s goods are related.”).⁸⁷

Applicant responds that the parties’ goods “differ in nature” pointing to water-based travel and activities for boats while RVs are primarily used for camping and/or as temporary living accommodations.⁸⁸ Applicant cites to Opposer’s website which states, “RV stands for recreational vehicle and is also commonly referred to as a camper or caravan. Most RVs are self-contained and equipped with living

⁸⁶ 30 TTABVUE 28-29.

⁸⁷ Additionally, Opposer’s evidence does not support its argument. Of the seven third party registrations Opposer provided, one has been cancelled, and another is based on §§ 66(a) and no use has been filed. 24 TTABVUE 119, 124-125. Three of the remaining five registrations are owned by the same registrant, and as such the evidence shows only three third parties have used the term “recreational vehicles” to describe their boats, which is insufficient to be probative.

⁸⁸ 31 TTABVUE 24-27.

accommodations like a bed, running water, bathroom, stove, and refrigerator.”⁸⁹ Opposer responds that RVs are not limited to camping⁹⁰ and that boats may also provide temporary living quarters.⁹¹ Both parties attempt to use dictionary definitions in support of their positions.⁹² However, neither party attached copies of the webpages with the definitions and instead supplied only website urls which is insufficient to make the definitions of record. *See Int’l Dairy Foods Ass’n v. Interprofession Du Gruyere*, Opp. No. 91232427, 2020 TTAB LEXIS 268, at *57 n.115 (TTAB 2020) (denying request to take judicial notice of a definition, “[b]ecause [a]pplicants did not submit a copy of the webpage containing the Encyclopedia Britannica entry but only provided the web address”). Accordingly, we do not consider the dictionary definitions.⁹³

⁸⁹ 31 TTABVUE 26 citing 21 TTABVUE 36.

⁹⁰ However, Opposer has focused on camping as the primary purpose for its recreational vehicles overall and for the specific types of recreational vehicles covered by its registration (e.g., travel trailers, motor homes, van campers, and fifth wheel trailers). *See* 21 TTABVUE 36 (“THOR’s family of companies offers an incredible range of products making it possible for almost anyone to start camping in a new RV.”); 15 TTABVUE 9-10 (“THOR will help deliver exceptional camping experiences to RVers at 15 Speedway Motorsports NASCAR Cup race weekends in 2024, ensuring that NASCAR fans actively enjoy the RV lifestyle.”); 18 TTABVUE 399 (“Applicant’s goods are recreational vehicles, specifically, travel trailers, fifth wheel trailers and sport utility trailers. They are primarily designed for and used by individuals and families on camping or vacation road trips.”); 18 TTABVUE 773 (“Applicant’s goods [motorhomes and travel trailers] are therefore fundamentally and primarily intended to be used as accommodations for travelers and campers”) 19 TTABVUE 101 (“RVs are specialty land vehicles intended for use as temporary living quarters for recreation or camping. . . . Motor homes come in various varieties, all of which are land based . . .”).

⁹¹ 32 TTABVUE 10-11.

⁹² 31 TTABVUE 24-27; 32 TTABVUE 10-11.

⁹³ Specifically, we do not consider the definitions Applicant cites only by website url for “boat,” “recreational vehicle,” “travel trailer,” “motor home,” or “camper.” 31 TTABVUE 24-27. Applicant did properly make of record the dictionary definition for “watercraft” (21

Separate and apart from the parties' focus on definitions, we find more probative Opposer's (and its related companies') prior statements regarding the differing nature of the parties' specific goods:

- “Applicant’s [Thor Tech, Inc.] goods are recreational vehicles, specifically, fifth wheel trailers and travel trailers. They are primarily designed for and used by individuals and families on camping or vacation road trips. Recreational vehicles typically feature a living space that includes a kitchen, beds and working restroom facilities. Applicant’s recreational vehicles are highly functional, and their primary function is to serve as mobile living quarters for their owners.”;⁹⁴
- “With respect to the registrations covering boats, typically boats are water vessels purchased for travel, personal recreation and sometimes, for sporting purposes. They differ in form and function from the recreational vehicles offered by Applicant [Thor Tech, Inc.]”;⁹⁵
- Boats differ significantly in form and function from the travel trailers and fifth wheels to be offered by Applicant [Thor Tech, Inc.]⁹⁶
- “RVs and boats have fundamentally different characteristics and functions. Although both are generally ‘vehicles’, this label is far too broad for purposes of the likelihood of confusion analysis because it does not account for fundamental differences between different types of vehicles. The goods at issue are non-competitive products with distinct essential functions and characteristics.”;⁹⁷ and
- “There are many different kinds of boats, but the provision of living quarters is not the essential function or defining characteristic of a boat. Rather, the fundamental purpose of a boat is to float and to provide transportation for people or cargo over the surface of water. . . . Motor homes and boats are therefore non-competitive and distinct goods. Each has a specific essential functions and defining characteristics which are

TTABVUE 70), but we do not find this definition relevant to our analysis. We do not consider the definitions Opposer cites only be website url for “houseboat” or “cruise ship,” or Opposer’s reference to the dictionary definitions that Applicant failed to properly make of record. 32 TTABVUE 10-12.

⁹⁴ 22 TTABVUE 739.

⁹⁵ 22 TTABVUE 740.

⁹⁶ 18 TTABVUE 50.

⁹⁷ 19 TTABVUE 100.

different from the other respective goods at issue. These differences are further made clear by the appearance of the products themselves.”⁹⁸

6. Third Party Office Actions

Opposer contends that the relatedness of the parties’ goods is evidenced by the USPTO “reject[ing] a number of applications covering recreational watercraft due to a prior registration covering land-based recreational vehicles, or vice versa.”⁹⁹ Opposer submitted evidence of six such trademark applications. However, the Board is not bound by any registrability determination of an examining attorney. *See Kohler Co. v. Honda Giken Kogyo K.K.*, Opp. No. 91200146, 2017 TTAB LEXIS 450, at *117 n.73 (TTAB 2017). In addition, as Applicant points out in five of the six trademark applications, the applicant never even responded to the non-final office action so we do not presume that the six applicants acquiesced in the examining attorney’s finding that the goods were related.¹⁰⁰ Further, this evidence is not probative as the cases involved different evidentiary records, and “[t]he Board must decide each case on its own merits.”¹⁰¹ *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001); *Parfums De Coeur, Ltd. v. Lazarus*, Opp. No. 91161331, 2007 TTAB LEXIS 36, at *20-21 (TTAB 2007) (rejecting “opposer’s position that once television services and goods

⁹⁸ 19 TTABVUE 102-103.

⁹⁹ 30 TTABVUE 27.

¹⁰⁰ 31 TTABVUE 29.

¹⁰¹ As Applicant notes several of the non-final office actions Opposer submitted included multiple registrations as the basis for the initial refusal. 31 TTABVUE 29. The registrations included other goods cited as a basis for refusal including tires, automobiles and structural parts thereof, bicycles, and trailers. 24 TTABVUE 155, 198, 201, 360-361, 363.

have been found to be related in one case, they must be deemed related in all cases, no matter what the circumstances of the particular case”).

7. Conclusion on Analysis of the Parties’ Goods

Opposer’s evidence on the relatedness of the goods, as discussed above, has low probative value and provides very little insight into whether the parties’ goods are related. Ultimately, Opposer’s evidence does not establish a degree of relationship between the goods to support a likelihood of confusion determination. To the contrary, we find Applicant’s evidence of a substantial number of pairs of registrations to be persuasive for purposes of indicating that the involved goods are unrelated for purposes of a likelihood of confusion analysis. Again, while not conclusive, Opposer’s prior statements before the USPTO regarding the significant differences between boats and recreational vehicles (including specifically travel trailers, fifth wheel trailers and motor homes), supports a finding that these goods are substantially dissimilar. Lastly, Opposer argues but failed to prove that boats are within the zone of expansion of its recreational vehicles.¹⁰² Accordingly, the dissimilarity of the goods weighs against a likelihood of confusion. *Giersch v. Scripps Networks, Inc.*, Can. No.

¹⁰² Opposer argues that even if the parties’ goods “are somehow found to be different in some manner, there is no doubt that the Applicant’s Goods are within the zone of natural expansion for THOR Industries’ business.” 30 TTABVUE 29. However, since Opposer cites no evidence in support of this contention, we give it no weight. *See Mason Eng’g & Designing Corp. v. Mateson Chem. Corp.*, Opp. No. 91066845, 1985 TTAB LEXIS 114, at *20-21 (TTAB 1985) (factors considered in evaluating a zone of expansion); *Victor Comptometer Corp. v. Shakespeare Co.*, 1974 TTAB LEXIS 270, at *8-9 (TTAB 1974) (holding prior use on fishing equipment did not extend rights to golf balls: “fishing rods and reels and golfing equipment all comprise sporting equipment, but this is a broad field encompassing a broad spectrum of goods differing widely with respect to physical characteristics and uses as well as marketing appeal and conditions and circumstances surrounding their sale and promotion”).

92045576, 2009 TTAB LEXIS 72, at *24 (TTAB 2009) (“second *du Pont* factor weighs strongly in favor of finding no likelihood of confusion” where petitioner failed to show services sufficiently related “as to give rise to the mistaken belief that they originate from the same source”);

D. Trade Channels, Classes of Consumers, and Purchaser Care

We next examine similarity or dissimilarity of the trade channels in which the parties’ goods are sold, the consumers to whom the parties’ goods are marketed, and the conditions under which sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing. *DuPont*, 476 F.2d at 1361; *Coach Servs.*, 668 F.3d at 1370-71. We must base our analysis on the identifications in Opposer’s registration and Applicant’s application. *Stone Lion Cap. Partners*, 746 F.3d at 1323; *In re Detroit Ath. Co.*, 903 F.3d 1297, 1308 (Fed. Cir. 2018) (factor “must be evaluated with an eye toward the channels specified in the application and registration”). Additionally, where, as here, there are no limitations as to channels of trade or classes of purchasers in in Opposer’s and Applicant’s identifications of goods, we must presume that the goods “travel in all normal channels and to all prospective purchasers for the relevant goods.” *Coach Servs.*, 668 F.3d at 1370.

In support of its position that the channels of trade are similar, Opposer presents evidence of nine vehicle dealers that it states sell both land-based recreational vehicles and recreational watercraft, but five appear to be small local retailers

including those that sell a variety of vehicles and thus have low probative value.¹⁰³ See *Thor Tech*, 2015 TTAB LEXIS 18, at *13-16 (“channels of trade factor does not weigh in favor of a likelihood of confusion” where third party website evidence did not show manufacturers of towable trailers or trucks but rather small retailers of various vehicles). Pop Yachts/Pop Sells, is not a dealer, but rather offers the service of connecting individual owners that want to sell their used RVs or used boats with brokers or other buyers.¹⁰⁴ Camping World sells a wide variety of goods including air conditioners, washers & dryers, mattresses, and surge protectors, such that it has low probative value in establishing the relatedness of the parties’ goods here.¹⁰⁵

Opposer also points to alleged evidence that “many vehicle dealers sell both land-based recreational vehicles and recreational watercraft,” including its primary competitors Forest River, Inc. and Winnebago Industries, Inc., and that “[a]mong the dealers who sell both types of products are several dealers identified by Applicant as selling Applicant’s Goods.”¹⁰⁶ As discussed above under relatedness of goods, Forest River distributes its pontoon boats through a separate division, Forest Marine, each of its boat brands are offered on their own separate websites, and the evidence does not show any sale of recreational vehicles in conjunction with boats.¹⁰⁷ And

¹⁰³ 15 TTABVUE 35-39, 42-44, 48-51, 59-62, 66. Each of these dealers identify a small number of locations in a single state. Among the goods sold by some of these retailers are snowmobiles, ice castle houses, park models, off road ATVs, golf carts, and lawn mowers.

¹⁰⁴ 15 TTABVUE 40-41, 52-58.

¹⁰⁵ 21 TTABVUE 57-58.

¹⁰⁶ 30 TTABVUE 30-31 (citing 15 TTABVUE 5, 35-76; 11 TTABVUE 71-72); 15 TTABVUE 4 ¶¶ 13-14.

¹⁰⁷ 15 TTABVUE 4 ¶¶ 13-14, 21-23 (Exhibit D).

Winnebago acquired a separate company, Barletta Pontoon Boats, that offers boats through its own separate website, www.barlettapontoonboats.com, that does not feature any recreational vehicles.¹⁰⁸

Both parties submitted evidence demonstrating that travel trailers, motor homes, van campers and fifth-wheel trailers and boats are sold through independent dealers. Opposer “sells products to independent recreational vehicle dealers, who in turn sell to consumers via the dealer’s own retail operations” and Opposer “also sells to companies that provide recreational vehicles for rental.”¹⁰⁹ Opposer’s Vice President testified that “[a]s of July 31, 2023, there were approximately 2,400 independent, non-franchise dealership locations carrying THOR Industries products in the U.S. and Canada.”¹¹⁰ Opposer submits no evidence showing that any of these 2,400 independent, non-franchise dealers offer boats, but contends that “even if no current overlap exists, there is the potential that in the future the use of these dealer networks will result in actual overlap where both Applicant’s Goods and THOR Industries Goods are sold at the same dealer.”¹¹¹

¹⁰⁸ 15 TTABVUE 4 ¶¶ 13-14, 24-33 (Exhibit E).

¹⁰⁹ 20 TTABVUE 77-78 (Opposer’s Resp. to Int. No. 12). We interpret Opposer’s reference to “recreational vehicles” in its response to mean the “recreational vehicles, namely, travel trailers, motor homes, van campers and fifth-wheel trailers” covered by Opposer’s registration pleaded in this case.

¹¹⁰ 15 TTABVUE 3 ¶ 5. He also testified based on data from Statistical Surveys, Inc. that “since 2019 THOR Industries’ market share for travel trailers and fifth wheels combined has consistently stayed above roughly 41%, and for motorhomes, THOR Industries’ share has stayed above roughly 44%.” 15 TTABVUE 3 ¶ 6.

¹¹¹ 30 TTABVUE 30.

Applicant's evidence shows it also offers its boats through independent dealers, specifically "through a network of specialty marine dealers that primarily sell boats and related marine accessories" and "currently has approximately 40 dealers in 15 states that sell [its] goods under the Thor Boats Drop the Hammer Mark."¹¹² Applicant markets its boats through its website and social media, its marine dealers' websites, social media and physical dealerships, at boats shows and marine industry events, and through its sponsorship of various hunting and fishing events.¹¹³

Analyzing the parties trade channels as we must based on the identifications in Opposer's registration and Applicant's application, the evidence of record establishes that trade channels for Opposer's "recreational vehicles, namely, travel trailers, motor homes, van campers and fifth-wheel trailers" and Applicant's "recreational watercraft, namely, boats" are distinct. Nearly all of the evidence demonstrates that the dealers that sell travel trailers, motor homes, van campers and fifth-wheel trailers do not sell boats, and vice versa. Specifically, at least 2,400 independent recreational vehicle dealers that distribute Opposer's goods as well as those of other recreational vehicle manufacturers, do not distribute any boats. That there may be "potential that in the future" these recreational vehicle dealers will sell boats is far too speculative to establish similarity of the trade channels. *See Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 717 (Fed. Cir. 1992) ("We are not concerned

¹¹² 16 TTABVUE 5 ¶ 16, 7 ¶ 27, 33-40 (Exhibit 6). *See also* 11 TTABVUE 56 (Applicant's Resp. to Int. No. 3 stating that "Applicant's Goods have been distributed through marine dealers who specialize in boating needs, including boat sales, service, parts, and accessories.").

¹¹³ 16 TTABVUE 5 ¶ 15, 8 ¶¶ 28-30.

with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.”).

Despite Opposer’s claim that “multiple dealers of Applicant’s goods also advertise land-based recreational vehicles,”¹¹⁴ the examples Opposer cites show that none of the dealers feature boats and travel trailers, motor homes, van campers, or fifth-wheel trailers:¹¹⁵

- Dothan Offroad & Marine: depicts boats and trucks;
- Jonesboro Cycle & ATV: does not depict either party’s goods, only a jet ski, and ATVs;
- Jimmy Jones Polaris of Orangeburg: depicts a boat, ATV, truck and a crossover utility vehicle (XUV); and
- HBS Motorsports: does not depict either party’s goods, only a Hummer and an SUV.

And none of the other evidence in the record from dealers that offer Applicant’s goods show both parties’ goods.¹¹⁶ Accordingly, the evidence of record shows that the 40 independent dealers across 15 states that sell Applicant’s boats do not sell travel trailers, motor homes, van campers, or fifth-wheel trailers covered by Opposer’s registration.

Considering the overall evidence of dealers of recreational vehicles and boats, we do not find that the evidence of record shows that the normal channels of trade for

¹¹⁴ 32 TTABVUE 13.

¹¹⁵ 32 TTABVUE 14-15.

¹¹⁶ 15 TTABVUE 5 ¶ 17, 67-76 (Exhibit G).

the parties' products are similar. Even if we credited all nine of the entities Opposer submitted, the evidence has low probative value in establishing the relatedness of trade channels when weighed against evidence that (i) 2,400 independent recreational vehicle dealers do not sell boats, (ii) Opposer's primary competitors sell boats in separate trade channels from recreational vehicles, and (iii) 40 independent boat dealers in 15 states do not sell recreational vehicles.¹¹⁷

In considering the parties' customers, Opposer states it "does not target a specific consumer of [sic] demographic" and considers "independent dealers, individual customers, and investors" to be consumers of its products.¹¹⁸ On its website Opposer advertises the use of its recreational vehicles for camping.¹¹⁹ Applicant states that its "dealers should be considered [its] primary customers" and that its "target end consumers are outdoor enthusiasts who engage in hunting, fishing, and related recreational water activities."¹²⁰ With regards to the parties' dealers, our review of

¹¹⁷ Opposer relies on *In re Eldorado Motor Corp.*, Ser. No. 73567938, 1988 TTAB LEXIS 22 (TTAB 1988), to argue that even where "the overall percentage of dealers that carry both [goods] is small" that confusion is still likely. 30 TTABVUE. However, we are not bound by the findings in that proceeding which were decided on a different record. *In re Boulevard Entm't*, 334 F.3d 1336, 1343 (Fed. Cir. 2003) ("the PTO must decide each application on its own merits, and decisions regarding other registrations do not bind either the agency or this court"); *In re The Consumer Prot. Firm PLLC*, Ser. No. 87445801, 2021 TTAB LEXIS 67, at *29 (TTAB 2021) ("Each case must be decided on its own facts, and the Board is not bound by prior decisions involving different records.").

¹¹⁸ 15 TTABVUE 6 ¶ 24. *See also* 30 TTABVUE 38. Opposer does not identify who its "investors" are or how they are consumers of its goods so we do not consider them relevant to the analysis here.

¹¹⁹ 21 TTABVUE 36, 22.

¹²⁰ 16 TTABVUE 5-6 ¶¶ 17-18. *See also* 11 TTABVUE 73 (Applicant's Resp. to Int. No. 8: Applicant "markets its boats to consumers wishing to buy hunting, fishing, or recreational watercraft.").

the parties' evidence has already established there is not overlap between the dealers that offer Opposer's and Applicant's goods. However, we agree with Opposer that its end consumers "with an interest in outdoor activities," including camping, may overlap with Applicant's end consumers engaged in hunting, fishing, and other outdoor activities.¹²¹

We must also consider the degree of care exercised by these consumers. While there is some overlap in the parties' consumers, "[p]urchaser sophistication may tend to minimize likelihood of confusion." *Palm Bay Imps.*, 396 F.3d at 1376. We must base our decision on "the least sophisticated potential purchasers", *Stone Lion Cap. Partners*, 746 F.3d at 1325, but "[i]n making purchasing decisions regarding 'expensive' goods, the reasonably prudent person standard is elevated to the standard of the 'discriminating purchaser.'" *Weiss Assocs. v. HRL Assocs.*, 902 F.2d 1546, 1548 (Fed. Cir. 1990).

Opposer's website features prices for its motor homes ranging from \$128,660 to \$419,850.¹²² Applicant's "boat packages sell for on average, approximately \$25,000 to \$45,000."¹²³ Opposer's website also contains information about financing, and explains that "the purchase process [for RVs] is similar to the way in which you would

¹²¹ 30 TTABVUE 38.

¹²² 21 TTABVUE 7-31.

¹²³ 16 TTABVUE 7 ¶ 25.

buy a car” including “select[ing] the right RV for your needs” and “secur[ing] financing.”¹²⁴ Boat and RV websites also offer information about warranties.¹²⁵

Opposer contends that “although it is undeniable” that the parties’ goods are “likely to be considered expensive items” this does not tip this factor in Applicant’s favor because it “does not necessarily mitigate the potential for confusion that arises from these highly similar marks used on related goods.”¹²⁶ However, Opposer admits that “consumers take care when deciding whether to purchase Opposer’s recreational vehicles under the Thor Marks.”¹²⁷ Opposer also has previously represented in responses to office actions filed with the USPTO that:

- Due to the expense involved, consumers are not likely to purchase items such as recreational vehicles . . . and boats on impulse or with little or no consideration. As a result, the likelihood that consumers will be confused merely because one trademark is similar to another is greatly lessened in cases such as this.¹²⁸
- [D]ue to the expense involved, consumers are not likely to purchase items such as recreational vehicles or sport utility vehicles on impulse or with little or no consideration. Instead, they will investigate and become familiar with the product and the company standing behind the product before making such a large purchase.¹²⁹
- Applicant [Thor Tech Inc.] further notes that recreational vehicles are relatively expensive items. The expense of the goods tends to lessen the

¹²⁴ 21 TTABVUE 36, 38 (explaining that “[o]n average, RV loans range from 10-15 years with interest rates depending on size of loan, length of loan, down payment and your credit rating”), 50 (featuring a “Finance Calculator”).

¹²⁵ 21 TTABVUE 119, 132, 153, 157, 171.

¹²⁶ 30 TTABVUE 39.

¹²⁷ 20 TTABVUE 11-12 (Opposer’s Resp. to Request for Admission No. 12).

¹²⁸ 22 TTABVUE 744.

¹²⁹ 18 TTABVUE 106.

probability that consumers will be confused by the similarity of the marks.¹³⁰

- Further reducing the likelihood of confusion between Applicant’s [Thor Tech Inc.’s] mark and the cited Registration is the high degree of care exercised by purchasers of recreational vehicles and cargo and utility trailers.¹³¹

As discussed previously, these statements, while not conclusive, are evidence that we may consider.

Applicant asserts that “[a] boat is an expensive purchase for most end-consumers, and [its] customers . . . have demonstrated that they are careful and particular about the boats they are purchasing.”¹³² Applicant states that “customers often call the factory to ask questions regarding the construction and quality of our boats.”¹³³ Applicant’s “target end consumer values reliability, performance, and durability in their watercraft” and “appreciates [Applicant’s] advanced engineering, cutting-edge technology, and boats that offer both toughness and agility.”¹³⁴ Applicant “aims to meet the needs of its customers by providing well-designed, robust, and feature-rich boats that enhance their outdoor marine experiences.”¹³⁵

It is clear that travel trailers, motor homes, van campers and fifth-wheel trailers, as well as boats, are relatively expensive, and that these goods are certainly not commonplace everyday purchases. *See Kiekhoefer Corp. v. Willys-Overland Motors,*

¹³⁰ 18 TTABVUE 402-403.

¹³¹ 18 TTABVUE 597-598.

¹³² 31 TTABVUE 34.

¹³³ 16 TTABVUE 6 ¶ 21.

¹³⁴ 16 TTABVUE 6 ¶ 18.

¹³⁵ 16 TTABVUE 6 ¶ 19.

Inc., 236 F.2d 423, 427 (C.C.P.A. 1956) (“the goods involved [outboard motors for boats and engines for automotive vehicles] are comparatively expensive and are not ordinarily purchased casually”; no likelihood of confusion from use of the identical mark HURRICANE). Accordingly, given the expense and the evidence demonstrating that consumers generally will only purchase after research, examination, and/or comparing with other models, as well as the fact that consumers may be interested in particular features or technology, we expect even ordinary consumers to exercise a higher degree of care when purchasing a recreational vehicle or boat. *See Pierce-Arrow Soc’y v. Spintek Filtration, Inc.*, Opp. No. 91224343, 2019 TTAB LEXIS 388, at *48 (TTAB 2019) (“automobiles are costly and . . . care goes into their selection and purchase”); *Thor Tech*, 2015 TTAB LEXIS 18, at *17 (“A consumer can be expected to pay particular attention to such purchases [of trucks and recreational vehicles] and indeed would likely make a careful personal examination of the item before buying. These types of products, at these prices, are not the kinds of products which we think reasonably prudent purchasers would buy, or without researching the product to some degree.”). Additionally, the care will likely be greater given that the evidence demonstrates that consumers may also need to consider information about financing and warranties. *See Tiffany & Co. v. Classic Motor Carriages, Inc.*, Opp. No. 91071546, 1989 TTAB LEXIS 13, at *12 (TTAB 1989) (“the care exercised in the purchase of an automobile might be greater than that for other expensive items because purchasers would require information about warranties, servicing and the like”). As such, we agree with Applicant that for the parties’ travel trailers, motor

homes, van campers and fifth-wheel trailers and boats, purchasers will exercise careful consideration and that the expense of the goods demonstrates that even ordinary consumers will be discriminating and exercise a high degree of care.

Overall, the evidence of record establishes that the parties' goods travel in distinct trade channels, and while there may be some overlap in consumers of the parties' goods, these consumers exercise a high level of care in purchasing these expensive goods that diminishes the likelihood of confusion. Accordingly, we find that these factors weigh strongly against a likelihood of confusion. *See M2 Software*, 450 F.3d at 1384 (“The unrelated nature of the parties' goods and their different purchasers and channels of trade are factors that weigh heavily against M2 Software. It is difficult to establish likelihood of confusion in the absence of overlap as to either factor.”).

E. Actual Confusion or Its Absence

Under the seventh *DuPont* factor we examine the “nature and extent of any actual confusion,” and under the eighth *DuPont* factor we consider the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 476 F.2d at 1361.

Opposer asserts that “actual confusion has already arisen” based on Applicant's response to two interrogatories:¹³⁶

Interrogatory No. 20: Identify all third-party communications involving Applicant concerning Opposer or Opposer's Marks, excluding conversations between Applicant and its counsel, if any.

¹³⁶ 30 TTABVUE 36-37.

Response [served on October 20, 2023]: Thor Boats states that one dealer inquired whether Thor Boats was affiliated with Opposer.¹³⁷

Interrogatory No. 33: Identify the dealer referenced in Applicant’s response to Interrogatory No. 20, including the name of the person making the referenced inquiry, and describe the substance of the communication referenced in Applicant’s response to Interrogatory No. 20.

Response [served on December 18, 2023]: . . . Without waiving its objections, Thor Boats responds as follows: When responding to Interrogatory No. 20, Thor Boats understood that a dealer made the referenced inquiry. However, in recalling the conversation, Thor Boats’ purchasing manager involved in the conversation clarified that an industrial supplier—not a dealer—made the referenced inquiry. An industrial supplier called Thor Boats’ purchasing manager to discuss the possibility of the supplier selling products to Thor Boats. During this phone call between Thor Boats’ purchasing manager and the industrial supplier, the industrial supplier asked whether Thor Boats had any relation to Thor Industries. This phone call occurred sometime in the Spring or early Summer of 2023. Thor Boats’ purchasing manager does not recall the name of the industrial supplier or with whom he spoke.¹³⁸

Based on the conversation described in these responses, Applicant admitted that a “third party inquired whether Applicant was affiliated with Opposer,” and that a “third party questioned an employee of Applicant whether there was any relationship between Applicant and Opposer.”¹³⁹ Applicant also admitted that it “cannot recall the name of the third party who made any inquiry about a connection between Applicant

¹³⁷ 11 TTABVUE 62-63, 67. Applicant did not make any changes to its response when it served supplemental responses on February 19, 2024. 11 TTABVUE 69, 78, 82.

¹³⁸ 11 TTABVUE 87-88.

¹³⁹ 11 TTABVUE 50.

and Opposer” that it referenced in its interrogatory responses.¹⁴⁰ Applicant’s Chief Operating Officer testified he was “aware of only [this] single instance of someone asking if Thor Boats was related to Thor Tech.”¹⁴¹ He also testified that “[t]o the best of [his] knowledge, Thor Boats is unaware of any consumer confusion between Thor Tech and Thor Boats, their respective goods, and/or the marks that are the subject of the [proceeding].”¹⁴²

Opposer contends that Applicant “changed its story regarding this inquiry throughout discovery, claiming at first the inquiry was by a dealer and later a supplier and that Applicant was unable to recall many details regarding the inquiry in an attempt to minimize the impact.”¹⁴³ We do not find it significant that Applicant initially identified the third party as a dealer, and then when responding two months later to a follow-up request clarified that it had learned that the third party was an industrial supplier. Applicant consistently identified the communication as an inquiry into whether there was an affiliation or relationship between the parties which is not evidence of actual confusion. *See Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 768 (Fed. Cir. 1993) (where two declarants “only ‘wondered’ at a

¹⁴⁰ 11 TTABVUE 50.

¹⁴¹ 16 TTABVUE 9. He similarly described the instance as “an industrial supplier called Thor Boats’ purchasing manager to discuss the possibility of the supplier selling products to Thor Boats. During this phone call between Thor Boats’ purchasing manager and the industrial supplier, the industrial supplier asked whether Thor Boats had any relation to Thor Industries. This phone call occurred sometime in the Spring or early Summer of 2023.”

¹⁴² 16 TTABVUE 9; 11 TTABVUE 78 (Applicant’s Resp. to Int. No. 21: “[Applicant] states that it is not aware of any actual confusion regarding [Applicant] and [Opposer], or either party’s trademarks.”).

¹⁴³ 30 TTABVUE 36.

possible relationship” they “were not actually confused”); *Major League Baseball Players Ass’n v. Chisena*, Opp. No. 91240180, 2023 TTAB LEXIS 117, at *68-70 (TTAB 2023) (“A single inquiry about whether a mark indicates affiliation between parties does not generally evidence actual confusion.”).¹⁴⁴ Applicant appears to have provided all the information known to it from this one interaction, and Opposer never challenged the discovery responses as deficient. *See Time Warner Entm’t Co. L.P. v. Jones*, Opp. No. 91112409, 2002 TTAB LEXIS 462, at *12 (TTAB 2002) (“[D]espite her apparent dissatisfaction with opposer’s interrogatory responses, applicant never filed a motion to compel further responses from opposer; applicant will not now be heard to complain that opposer’s discovery responses were inadequate.”).

Further, even if the one inquiry demonstrated actual confusion, a “single instance of actual confusion is insufficient to show that confusion is likely.” *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, Opp. No. 91179408, 2013 TTAB LEXIS 308, at *47 (TTAB 2013); *Nat’l Rural Elec. Coop. Ass’n v. Suzlon Wind Energy Corp.*, Can. No. 92043377, 2006 TTAB LEXIS 134, at *17-18 (TTAB 2006) (“We are not persuaded that this single instance of alleged actual confusion is significant.”). In response to discovery requests, Opposer stated that “it

¹⁴⁴ Opposer relies on *First Int’l Servs. Corp. v. Chuckles, Inc.*, Opp. No. 91072787, 1987 TTAB LEXIS 5, at *19-21 (TTAB 1984) to support its argument of actual confusion. 30 TTABVUE 37. However, there, the testimony at issue was more probative because it came from two witnesses that were affiliated with opposer, one was the president of the opposer’s franchisee, and the other was with a company owned by the same individuals who owned the opposer. And in any event, the determination of likelihood of confusion in that case was not based on this evidence. *Id.* at 20-21.

[wa]s not presently aware of any instances of actual confusion, mistake or deception” vis-à-vis Opposer and Applicant as to the actual goods listed for Applicant’s mark.¹⁴⁵

Opposer also contends that the eighth factor weighs in its favor “[g]iven the relatively short timeframe when there allegedly was concurrent use before actual confusion started.”¹⁴⁶ Applicant responds that “Opposer has presented no evidence that there has been any real-world overlap in the market between Applicant’s goods and Opposer’s goods . . . and that there has not been an opportunity for confusion to occur.”¹⁴⁷ We have already determined that Opposer’s evidence does not demonstrate actual confusion. We agree with Applicant that looking at the parties’ actual activities in the marketplace the parties use different trade channels, and given the only approximately two years of contemporaneous use, “there has not been a reasonable opportunity for confusion to have occurred.” *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 TTAB LEXIS 464, at *62-63 (TTAB 2021) (citation omitted).

Accordingly, we find both of these *DuPont* factors are neutral.

F. No Market Interface Exists

Under this factor we consider “possible market interfaces, such as: (1) consent to register or use; (2) contractual provisions designed to preclude confusion; (3) assignment; and (4) laches and estoppel attributable to the challenger that would

¹⁴⁵ 20 TTABVUE 64-65 (Opposer’s Resp. to Int. No. 1). Opposer also responded that “it currently has no documents” regarding “any instances of actual confusion between Applicant and Opposer” other than those “produced by Applicant related to the inquiry regarding whether Applicant was affiliated with Opposer.” 20 TTABVUE 49 (Opposer’s Resp. to Request for Production No. 24).

¹⁴⁶ 30 TTABVUE 39-40.

¹⁴⁷ 31 TTABVUE 42-43.

indicate lack of confusion.” *Cunningham*, 222 F.3d at 949. Opposer asserts that this factor weighs in its favor.¹⁴⁸ However, as Opposer recognized, “[n]one of these circumstances are present in this case.”¹⁴⁹ Applicant agrees “there is no evidence that Applicant and Opposer have interfaced, expressly or impliedly, in the market.”¹⁵⁰ Accordingly, “[w]e need not consider th[is] factor[].” *Heil Co. v. Tripleye GmbH*, Opp. No. 91277359, 2024 TTAB LEXIS 494, at *94 (TTAB 2024) (disregarding market interface factor where “parties did not present any evidence”).

G. Applicant’s Right to Exclude

In considering Applicant’s right to exclude we assess “whether the applicant ha[s] achieved ‘an appreciable level of consumer recognition’ **and** whether the applicant could demonstrate having ‘successfully asserted its [trademark] rights.’” *Monster Energy*, 2023 TTAB LEXIS 14, at *63 (emphasis in the original) (quoting *McDonald’s Corp. v. McSweet, LLC*, Opp. No. 91178758, 2014 TTAB LEXIS 351, at 45 (TTAB 2014)). Applicant asserts that the following evidence establishes the requisite level of consumer recognition for its mark, showing that this factor favors Applicant:¹⁵¹

- News Channel 5 Nashville article about Applicant’s Chief Operating Officer, J. Paul Jackson appearing on Southern Woods and Waters to discuss Applicant’s boats;¹⁵²

¹⁴⁸ 30 TTABVUE 40.

¹⁴⁹ 30 TTABVUE 40.

¹⁵⁰ 31 TTABVUE 44.

¹⁵¹ 31 TTABVUE 44 (and evidence cited therein).

¹⁵² While Applicant references several media appearances in its brief (31 TTABVUE 44), the cited exhibit only contains information on Southern Woods and Water. 16 TTABVUE 163-165 (Exhibit 10).

- Marketing materials used by Applicant and its dealers that feature Applicant's Mark, but without any information about the distribution of those materials;
- For January 2024-July 15, 2024 Applicant's website receiving 113,000 total impressions and averaging 600 impressions per month;¹⁵³
- Applicant's Facebook page receiving 1,100 "likes" with 1,400 followers,¹⁵⁴ and its Instagram page having 2,151 followers;¹⁵⁵
- Since April 2021, Applicant spending around \$100,000 in advertising expenditures to promote Applicant's boats bearing Applicant's Mark; and
- Between October 2022 and June 2024, Applicant selling \$7 million worth of products bearing Applicant's Mark.

However, these sales, advertising expenditures, website impressions, and social media exposure indicate a popular product and website, but do not show the required recognition of Applicant's mark. Considering this evidence in conjunction with the fact that Applicant's use of its mark is relatively recent, beginning in October 2022, we do not consider that this evidence establishes "an appreciable level of consumer recognition." *See McDonald's Corp.*, 2014 TTAB LEXIS 351, at *45, 47 (five years of sales figures and advertising and promotional expenditures that were "not substantial" are "not sufficient to establish an appreciable level of consumer recognition"); *In re Davey Prods. Pty*, Ser. No. 77029776, 2009 TTAB LEXIS 524, at

¹⁵³ 16 TTABVUE 8 ¶ 29, 191-192 (Exhibit 14). The website report states that "[t]otal impressions is how many times a user saw a link to your site in search results." *Id.* at 192. The report also states that there were 316 "unique visitors from Search." *Id.* at 195.

¹⁵⁴ Applicant lists "over 1,800" Facebook "likes" in its brief and the Jackson Declaration (31 TTABVUE 44, 16 TTABVUE 8 ¶ 30), but the Facebook screenshots in the record show 1,100 "likes". 16 TTABVUE 24-26.

¹⁵⁵ Applicant lists "over 2,700 followers" for its Instagram page in its brief and the Jackson Declaration (31 TTABVUE 44, 16 TTABVUE 8 ¶ 30), but the Instagram screenshots in the record show 2,151 followers. 16 TTABVUE 27.

*25 (TTAB 2009) (factor neutral where “applicant’s mere assertion of common-law use of its mark for ten years [does not] in itself suffice to establish that applicant has any significant right to exclude others from use of the mark”). Additionally, Applicant has not provided any evidence that it has enforced its mark against any third parties. *See Rise Above Fitness LLC v. Rise Above Performance Training*, Can. No. 92065837, 2019 TTAB LEXIS 147, at *24 (TTAB 2019) (treating factor as neutral where “there is no evidence in the record that [r]espondent has successfully asserted its rights so as to ‘exclude’ anyone else from using its mark”). Accordingly, this factor is neutral.

VII. Conclusion

After reviewing the evidence of record, and the parties’ arguments relating thereto, we find that confusion is not likely. Opposer has failed to establish that the parties’ goods are similar or that the parties’ goods travel in similar trade channels, and consumers exercise a high level of care in purchasing the parties’ expensive goods, all of which weighs strongly against a likelihood of confusion.

While Opposer’s mark is arbitrary and entitled to a normal scope of protection, the marks are similar, and there is some overlap in consumers, this is insufficient to overcome the factors demonstrating that confusion is not likely. The remaining factors discussed by the parties are neutral. Specifically, Applicant’s minimal third party registration evidence does not narrow the scope of protection for Opposer’s arbitrary mark, Opposer’s evidence does not demonstrate actual confusion, there has not been a reasonable opportunity for confusion to have occurred, there is no market interface, and Applicant has not submitted sufficient evidence to establish a right to exclude.

In view thereof, we find that Opposer has failed to prove by a preponderance of the evidence that Applicant's mark for recreational watercraft, namely, boats will be likely to be confused with Opposer's mark for recreational vehicles, namely, travel trailers, motor homes, van campers and fifth-wheel trailers.

Decision: The opposition is dismissed.

Dunn, concurring opinion:

I concur in the ultimate disposition dismissing the opposition, because, notwithstanding the marks creating the same commercial impression, Opposer offered only two third party registrations and the relationship between land and water based recreational vehicles to support its contention that the goods are related.

I do not find convincing the rationale or the legal support provided by the majority¹⁵⁶ for according probative weight to Applicant's novel reliance on printouts from fifteen pairs of third party websites purportedly showing the same mark for boats on one hand and recreational vehicles on the other hand sold by unrelated third parties to establish that there is no relationship between the goods, because the websites on their face demonstrate knowing agreement by their owners to co-exist.¹⁵⁷

¹⁵⁶ Applicant offered no legal theory or case support why the Internet pages submitted to prove that there is no relationship between the goods should be given probative weight, contending merely that it is "countervailing evidence" to the evidence that the goods are related. 31 TTABVue 30.

¹⁵⁷ The majority gives probative weight to the evidence because it is "akin to the opinion manifested by knowledgeable businessmen" that confusion is unlikely from such concurrent use, citing *Keebler Co. v. Associated Biscuits Ltd.*, 1980 TTAB LEXIS 37, at *14 (TTAB 1980) (citing [*In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1363 (CCPA 1973)]). The reference to "knowledgeable businessmen" in *DuPont* occurs in conjunction with the CCPA's finding the Board gave insufficient weight to a "detailed agreement" between the parties to the cancellation "designed to avoid conflict." The reference to "knowledgeable businessmen"

I believe the proper focus for assessing the relationship between the goods is the perception of the consumer, and not the knowledgeable trademark owner. I also believe there is no basis for the presumption that either the consumer or the trademark owner has knowledge of every use of one mark on different goods on the Internet, and so I disagree that evidence of disparate Internet uses of the same mark shows that either the consumer or the trademark owner perceives the goods as unrelated.

Turning to the evidence on which the majority relies, I exclude two pairs of webpages (MONACO and MONTEREY) because not all the goods are currently available.¹⁵⁸ In one pair of third party uses, the mark NITRO is used with a “fifth wheel toy hauler” which can be used to haul boats¹⁵⁹ The paired website for NITRO boats advertises “custom trailers” and states: “In our dedicated trailer plant in Ozark, Missouri, we custom build trailers for every NITRO boat, so you can be assured the fit will be perfect. This ensures a smooth, solid ride to and from the water, year after year.”¹⁶⁰

in *Keebler* occurs in consideration of the strength of the term CLUB as demonstrated by third party registrations. Because the cited cases involve neither the relationship between the goods nor third party uses, and the pairs of third party websites offered by Applicant include no indication that the “businessmen” owners have any knowledge of each other, I find these cases inapposite.

¹⁵⁸ The MONACO RV webpage states that “Monaco luxury RVs are no longer being manufactured,” but its parent group will provide owners of existing RVs access to replacement parts and services. 21 TTABVUE 168-170. The evidence for the MONTEREY RV advertises that a used 1995 MONTEREY RV was sold six years ago. 21 TTABVUE 173.

¹⁵⁹ 21 TTABVUE 123.

¹⁶⁰ 21 TTABVUE 139.

I exclude five pairs (SUNSEEKER, CATALINA, VIKING, PASSPORT, TIARA) which show use of the same mark on yachts only and travel trailers or motor homes.¹⁶¹ Applicant's mark is for boats, a term that encompasses a wide range of water vessels in addition to yachts. Presuming, for the sake of argument, that the consumers/trademark owners were aware of each other's use for the same SUNSEEKER mark, the evidence does not support a finding that there is no relationship between trailers or motorhomes on one hand and boats on the other. More specifically, while an owner of a SUNSEEKER yacht may not perceive a SUNSEEKER travel trailer to be related, that fact does not support a finding that the owner of a SUNSEEKER fishing boat or sailboat shares the same perception. In sum, I do not believe there is any basis for presuming that trademark owners or consumers are aware of Internet uses of the same mark on non-identical goods, and so do not believe that co-existence on the Internet demonstrates that trademark owners or consumers find the goods to be unrelated. Further, rather than the 15 pairs on which the majority relies, I find at most seven pairs (MAKO, PURSUIT, REGAL, SOUTHWIND, STARCRAFT, TRITON, XPLO/XPLOER¹⁶²) in which the same mark is used on boats other than yachts, and recreational vehicles. I do not believe this evidence should be given probative weight as indicating that there is no relationship between the parties' respective goods.

¹⁶¹ 21 TTABVUE 230-231, 235, 208-219, 96-107, 118, 321, 290, 299, .309-313.

¹⁶² 21 TTABVUE 159-160, 167, 192, 277, 255, 271-272, 250-251, 239, 250, 317-318, 226-229, 184-187, 221-225, 221-222, 176, 200.