

This Opinion is Not a
Precedent of the TTAB

Mailed: January 10, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Correct Craft IP Holdings, LLC
v.
Club Nautique, LLC
—

Opposition No. 91227103
—

Alison R. Imber of Allen, Dyer, Doppelt, Milbrath & Gilchrist P.A.,
for Correct Craft IP Holdings, LLC.

Eric J. Goodman of Goodman Mooney LLP,
for Club Nautique, LLC.

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Before Bergsman, Shaw and Larkin,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Club Nautique, LLC (Applicant) filed an application to register the mark CLUB NAUTIQUE and design, shown below, for “boat cruises; boat rental; yacht and boat charter services,” in Class 39.¹

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¹ Application Serial No. 86587607, filed April 5, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and first use in commerce as of August 31, 2008.



Applicant describes its mark as follows:

The mark consists of the wording “CLUB NAUTIQUE” with the letters “C” and “N” in dark blue, and the remaining wording in light blue. A tilted triangle flag appears to the right of “CLUB” with a dark blue pole, red circle top, and with the top half of the flag in red and the bottom half of the flag in dark blue. A stylized white “CN” appears within the flag.

The color(s) dark blue, light blue, red and white is/are claimed as a feature of the mark.

The application includes a translation of the word “Nautique” as “Nautical.”²

Correct Craft IP Holdings, LLC (Opposer) filed an opposition under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles Opposer’s registered NAUTIQUE marks for boats as to be likely to cause confusion. Opposer pled ownership of, inter alia, the registrations identified below:

- Registration No. 0947148 for the mark SKI NAUTIQUE (stylized), shown below, for “boats,” in Class 12;³

SKI NAUTIQUE

² Applicant does not disclaim the exclusive right to use the word “Nautique,” nor does Applicant claim that the word “Nautique” has acquired distinctiveness.

³ Registered November 14, 1972; third renewal.

- Registration No. 1573234 for the mark SPORT NAUTIQUE (stylized), shown below, for “boats,” in Class 12;⁴

Sport Nautique

- Registration No. 2198994 for the mark AIR NAUTIQUE, in typed form, for “wakeboard boats,” in Class 12.⁵ The registration includes a translation of the word “Nautique” as “Nautical”;
- Registration No. 2800105 for the mark NAUTIQUE, in typed form, for “boats, namely ski boats, wakeboard boats, and runabouts,” in Class 12.⁶ The registration includes a translation of the word “Nautique” as “Nautical”; and
- Registration No. 4156612 for the mark SUPER AIR NAUTIQUE, in standard characters, for “boats,” in Class 12.⁷ The registration includes a translation of the word “Nautique” as “Nautical” and a disclaimer of the exclusive right to use the word “Super.”

Opposer did not disclaim the exclusive right to use the word “Nautique” in any of its registrations, nor did Opposer claim that the word “Nautique” has acquired distinctiveness.

Opposer also alleged that registration should be refused on the ground of res judicata.⁸

⁴ Registered December 26, 1989; renewed.

⁵ Registered October 20, 1998; renewed.

⁶ Registered December 30, 2003; renewed.

⁷ Registered June 12, 2012; Sections 8 and 15 declarations accepted and acknowledged.

⁸ Notice of Opposition ¶¶14-20 (1 TTABVUE 8-9).

Applicant, in its Answer, denied the salient allegations in the Notice of Opposition.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the application file at issue. The parties introduced the following testimony and evidence:

A. Opposer's testimony and evidence.

1. Testimony declaration of Jodie Haven MacLean, Opposer's Corporate Secretary;⁹ and
2. Notice of reliance on the following items:
 - a. Excerpts from the discovery deposition of Don Durant, Applicant's President and Chief Executive Officer;¹⁰
 - b. Applicant's responses to Opposer's Interrogatory Nos. 3, 4, 7-16, and 21;¹¹
 - c. Documents available to the general public in libraries or in general circulation, including via the Internet;¹² and
 - d. Excerpts from websites featuring Applicant.¹³

⁹ 12 TTABVUE. The exhibits to the MacLean declaration are posted at 13-32 TTABVUE. The portions of the MacLean declaration and accompanying exhibits designated as confidential are posted at 33 TTABVUE.

¹⁰ 34 TTABVUE 13-72, 35 TTABVUE, and 36 TTABVUE 2-103. The portions of the Durant discovery deposition designated confidential are posted at 39 TTABVUE 3-8.

¹¹ 36 TTABVUE 105-118. The portions of Applicant's responses to Opposer's interrogatories designated confidential are posted at 39 TTABVUE 10-12.

¹² 36 TTABVUE 120-217.

¹³ 36 TTABVUE 219-250, 37 TTABVUE, and 38 TTABVUE.

B. Applicant's testimony and evidence.

1. Testimony declaration of Don Durant, Applicant's President and Chief Executive Officer;¹⁴ and
2. Notice of reliance on Opposer's responses to Applicant's interrogatories.¹⁵

II. Standing

Standing is a threshold issue in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). To establish standing in an opposition or cancellation proceeding, a plaintiff must prove that it has "both a 'real interest' in the proceedings as well as a 'reasonable' basis for its belief of damage." *See Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Opposer has established its standing by properly introducing into evidence its pleaded registrations.¹⁶ *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Applicant, in its brief, concedes that Opposer has standing.¹⁷

¹⁴ 40 TTABVUE.

¹⁵ 41 TTABVUE.

¹⁶ 1 TTABVUE 12-49.

¹⁷ Applicant's Brief, p. 7 (44 TTABVUE 8).

III. Priority

Because Opposer's pleaded registrations are of record, priority is not at issue with respect to the goods identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). Applicant, in its brief, does not contest that Opposer has priority.

IV. Likelihood of confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*") cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant or for which there is evidence of record. See *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant."). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry

mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity or dissimilarity and nature of the goods and services.

As noted above, Applicant is seeking to register its mark for “boat cruises; boat rental; yacht and boat charter services,” and the descriptions of goods in three of Opposer’s pleaded registrations cover “boats” generally, while the descriptions in two of the registrations cover specific types of boats. To show that Opposer’s boats and Applicant’s services are related, Opposer introduced third-party registrations of marks covering the goods and services listed in both the application and Opposer’s pleaded registrations.¹⁸ Third-party registrations based on use in commerce that individually cover a number of different good or services may have probative value to the extent that they serve to suggest that the listed goods or services are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d mem.*, 864 F.2d 149 (Fed. Cir. 1988). The registrations, with relevant portions of the identifications, are listed in the table below.

¹⁸ MacLean Testimony Decl. ¶19 and Exhibit 16 (12 TTABVUE 7 and 31 TTABVUE 3-67).

Mark	Reg. No.	Goods and Services
CN	1281459	Yachts; charter services for yachts and other marine vessels
SEA ROCKET	5021594	Boats; conducting boat charters; pleasure boat cruises, rental of boats
ALESSANDRO MARCHI and design	4420778	Boats; yachts; boat rental
FARFA	4928808	Hydrofoil boats; boat rental
POND PRO	4839715	Fishing boats; conducting fishing charters
HOSMAX	4527849	Marine vessels, namely boats and ships used for offshore supply vessels in the oil-drilling industry; rental and leasing of marine vehicles, namely boats and ships used for offshore supply vessels in the oil-drilling industry
LE BOAT and design	4229221	Boats, namely canal boats and river cruisers; leasing and chartering of pleasure boats, namely canal boats and river cruisers; boat charter services
SKIPPERLINER	4240822	Boats and yachts; rental of boats and yachts
INTERNATIONAL YACHT COLLECTION	3671471	Yachts; yacht chartering
BLUEGAME YACHTING	3195439	Yachts; chartering, rental and leasing of yachts ¹⁹
THE MOORINGS	2473125	Boats; sailing boats; yachts; yacht chartering and leasing

Also, Opposer introduced evidence showing third parties advertising boat cruises, boat rentals, and boat charters featuring Opposer's NAUTIQUE branded boats.²⁰ See, *e.g.*,

¹⁹ Although Registration No. 3195439 was registered under the provisions of Section 44 of the Trademark Act, 15 U.S.C. ¶ 1127, which do not require applicants invoking foreign registrations to show use to secure a United States registration, the registrant filed a Section 8 affidavit of use which the USPTO accepted. Thus, this registration is now supported by use in commerce.

²⁰ MacLean Testimony Decl. ¶19 and Exhibit 15 (12 TTABVUE 7 and 30 TTABVUE 40-63); Opposer's response to Applicant's interrogatory No. 27 (41 TTABVUE 23-24).

- Boatbound website (<https://boatbound.co>) advertising the rental of a NAUTIQUE 200 Sport in Orlando, Florida;²¹
- Boat.Me website (<https://boat.me>) advertising the rental of a SUPER AIR NAUTIQUE G21 in Miami, Florida;²² and
- Mission Bay Aquatic Center website (missionbayaquaticcenter.com) website advertising the rental of a SUPER AIR NAUTIQUE 210 and a SKI NAUTIQUE 200 in San Diego, California.²³

In determining whether Opposer's boats and Applicant's "boat cruises; boat rental; yacht and boat charter services" are related, it is not necessary that the goods and services of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that Opposer establishes that the goods and services are related in some manner or that conditions and activities surrounding marketing of these goods and services are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015).

²¹ 30 TTABVUE 41.

²² 30 TTABVUE 44.

²³ 30 TTABVUE 46.

Through the third-party registrations and websites, Opposer has shown that both boats and the rental of boats can emanate from a single source and that they may be encountered by the same consumers.

Applicant argues that Opposer's boats and Applicant's "boat cruises; boat rental; yacht and boat charter services" are "radically different" because Applicant provides "sailing experiences to those who are not in Opposer's target demographic."²⁴ However, because we are dealing with the right to register Applicant's mark, rather than Applicant's right to use it, we must consider the goods and services as they are described in Applicant's application and Opposer's pleaded registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). In this regard, Opposer's descriptions of goods are not limited to any particular demographic or price point and Applicant's recitation of services is not restricted to sailing, and we may not read limitations or restrictions into those identifications. *See In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in

²⁴ Applicant's Brief, p. 14 (44 TTABVUE 15).

the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods.").

We find that the goods and services are related.

B. Established, likely-to-continue channels of trade and buyers to whom sales are made.

Don Durant, Applicant's President and Chief Executive Officer, testified that Applicant's business model is managing a fleet of privately owned charter boats.²⁵ Applicant sells sailboats and powerboats to others that Applicant then charters for them.²⁶ Also, Applicant arranges vacation charters for people with other charter companies.²⁷ Applicant rents these boats on a daily, weekly, or monthly basis.²⁸

To rent or charter a boat, Applicant offers a membership program for its customers who pay an initiation fee and dues in return for which they get lessons and the right

²⁵ Durant Discovery Dep., p. 9 (34 TTABVUE 22).

²⁶ *Id.* at p. 10 (34 TTABVUE 23); see also Durant Testimony Decl. ¶4 (40 TTABVUE 2) (Applicant sources the yachts and boats in its fleet from private owners.).

²⁷ *Id.* at p. 33 (34 TTABVUE 47).

²⁸ *Id.* at p. 21 (34 TTABVUE 35).

to charter and rent the boats in Applicant's fleet.²⁹ Applicant characterizes its services as "a yacht club for people who do not want to own a boat."³⁰

According to Don Durant, "[o]ur target audience would be someone who wants to go boating and the goal of instruction is to be able to go - - to have access to a boat that they can rent when they want it."³¹

We also want to be at the upper end of the market. We're by far the most expensive in the business in terms of what we charge for dues and initiation fees and we have the newest fleet and the best equipped fleet. So we're after the - you know, the country club set, or whatever you want to call it. That doesn't mean, though, that a 25-year old coater [sic] from Google isn't going to come join.³²

Applicant's clients are people who wish to rent boats and obtain a yacht charter membership.³³

Applicant primarily advertises through emails using a database of 20,000-30,000 email addresses.³⁴ Also, Applicant advertises on social media (i.e., Facebook, Instagram, Twitter Google+, and YouTube).³⁵ Applicant advertises in magazines such as Latitude 38, Bay & Delta Yachtsman, Cruising World, and Sail, as well as through social media presence and email marketing through Constant Contact. Applicant also

²⁹ Durant Discovery Dep. pp. 21-22 (34 TTABVUE 35-36). Applicant generates business for its chartering and boat rental services through its sailing and powerboat classes. Durant Discovery Dep., p. 21 (34 TTABVUE 35).

³⁰ Durant Discovery Dep. p. 24 (34 TTABVUE 38); Applicant's response to Opposer's Interrogatory No. 9 (36 TTABVUE 110).

³¹ Durant Discovery Dep., p. 47 (34 TTABVUE 57).

³² Durant Discovery Dep., p. 47 (34 TTABVUE 57).

³³ Durant Testimony Decl. ¶17 (40 TTABVUE 5).

³⁴ Durant Discovery Dep., p. 32 (34 TTABVUE 46).

³⁵ Applicant's response to Opposer's Interrogatory No. 4 (36 TABVUE 105).

participates in most boat shows in its market area and supports various boating-interest programs such as “Grow Boating”, “Discover Sailing” and “First Sail.”³⁶ Applicant places print advertising in Cruising World and Sail magazines when those publications publish their chartering or instruction issues.³⁷

Opposer’s target demographic is “anyone who is interested in, enjoys and/or appreciates boats, the outdoors, water skiing, wake surfing, wakeboarding, tubing, fishing, and/or boating.”³⁸ Opposer reaches its target demographic through email blasts.³⁹ Applicant also advertises at trade shows, wake boarding, wake surfing, and water skiing competitions, and through distributors.⁴⁰ Opposer has a YouTube channel, a Twitter page, a Facebook page, a Twitter account and an Instagram account through which it advertises.⁴¹

As discussed above, to support a likelihood of confusion, it is sufficient if the conditions surrounding the marketing of the goods and services are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate with

³⁶ Applicant’s response to Opposer’s Interrogatory No. 12 (36 TTABVUE 112). Latitude 38 is a sailing magazine. Durant Discovery Dep., p. 31 (34 TTABVUE 45). Bay and Delta Yachtsman is a magazine that is more powerboat-focused. Durant Discovery Dep, p. 32 (34 TTABVUE 46).

³⁷ Durant Discovery Dep., p. 43 (34 TTABVUE 53).

³⁸ Opposer’s response to Applicant’s interrogatory No. 5 (41 TTABVUE 12).

³⁹ Opposer’s response to Applicant’s interrogatory Nos. 5 and 7 (41 TTABVUE 12-13).

⁴⁰ Opposer’s responses to Applicant’s interrogatory Nos. 7 and 25 (41 TTABVUE 13 and 22); *see also* MacLean Testimony Decl. ¶11 (12 TTABVUE 4).

⁴¹ Opposer’s response to Applicant’s interrogatory No. 22 (41 TTABVUE 21); *see also* MacLean Testimony Decl. ¶10 (12 TTABVUE 4).

the same source. *See also Jeanne-Marc, Inc. v. Cluett, Peabody & Co., Inc.*, 221 USPQ 58, 61 (TTAB 1984) (finding an overlap in the classes of purchasers because the same consumers may purchase any or all of the products at issue); *In re Iola Techs. LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re Binion*, 93 USPQ2d 1531, 1534-35 (TTAB 2009). While Opposer's boats and Applicant's boat chartering and rental services may be marketed differently in some ways,⁴² they nevertheless are marketed to persons interested in boating and, therefore, the marks and goods and services are likely to be encountered by at least some of the same classes of consumers.

C. The conditions under which sales are made.

Applicant's "[m]emberships currently range from \$750-\$10,000. Dues are \$79/month for locals and \$39.50 for out-of-area residents. Charters range from \$45 for 1/2 day and up, depending on the boat and term. Yachts sold into our charter fleet range from about \$166,000 - \$700,000."⁴³ As noted above, Don Durant testified that these prices put Applicant at the upper end of the market or "the most expensive in the business in term of what we charge for dues and initiation fees."⁴⁴

⁴² Because social media is so ubiquitous today, the fact that both parties utilize it to advertise their goods and services is not probative of relatedness without further evidence as to whether and how the same consumers will encounter the marks and the goods and services therein.

⁴³ Applicant's response to Opposer's Interrogatory No. 16 (36 TTABVUE 115); Durant Testimony Decl. ¶14 (40 TTABVUE 4).

⁴⁴ Durant Discovery Dep., p. 47 (34 TTABVUE 57). This testimony is included to illuminate the nature of Applicant's services. Because there are no restrictions or limitations in the identification of Applicant's services as to price, we may not restrict them to "the most expensive" or most exclusive boat rental and chartering services. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Opposer's boats are expensive.⁴⁵

- In 2012, the lowest priced base model was \$64,570;
- In 2013, the lowest priced base model was \$67,121;
- In 2014, the lowest priced base model was \$69,470;
- In 2015, the lowest priced base model was \$72,388;
- In 2016, the lowest priced base model was \$73,112; and
- In 2017, the lowest priced base model was \$76,036.
- In a January 10, 1988 article in The New York Times about the New York National Boat Show, author Charles Barthold, associate editor of Yachting Magazine, reported that Opposer was displaying boats that cost as much as \$20,000 and that comparable boats “can easily cost \$5,000 less.”⁴⁶
- A 1989 article in the Miami Herald reported the price of the SKI NAUTIQUE as \$25,000.⁴⁷

⁴⁵ MacLean Testimony Decl. ¶12 and Exhibit 11 (33 TTABVUE 5 and 40). It is not clear why Opposer designated as confidential the base retail price of Opposer's boats by model year between 2012 and 2017. It is self-evident that these base prices are disclosed to prospective purchasers in the course of selling the boats, and there is no evidence that purchasers are under any obligation to preserve the confidentiality of this information. Indeed, the record shows that pricing information for Opposer's boats has been publicly disseminated. Accordingly, it is not trade secret information, nor is it commercially sensitive. Pursuant to Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g), we may treat as not confidential material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.

As noted above, there is no restriction or limitation in Opposer's descriptions of goods regarding the price of Opposer's boats. On the other hand, there is no other testimony or evidence regarding the price of boats except that Applicant's potential customers do not want, or do not have the money, to purchase a boat. Thus, based on this record, we find that boats are expensive.

⁴⁶ 36 TTABVUE 121.

⁴⁷ 36 TTABVUE 123.

- In an article in the May 25, 1992 issue of the Orlando Sentinel, Opposer's President is quoted as saying that the SKI NAUTIQUE is priced at about \$23,000 and that it "appeals to the Mercedes-Benz and Rolex Crowd."⁴⁸
- An April 1, 1999 article in Trailer Boats magazine reports that the base price of a PRO AIR NAUTIQUE is \$33,500 to \$36,400 with a trailer that the model tested for the article was listed at \$37,000 to \$39,000 with a trailer.⁴⁹

Both Opposer's boats and Applicant's services are expensive and that typically means that potential purchasers will exercise a high degree of care when making a purchasing decision. *See Weiss Assocs., Inc. v. HRL Assocs., Inc.* 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990) (in making purchasing decisions regarding expensive goods, "the reasonably prudent person standard is elevated to a standard of the 'discriminating purchaser'"). However, price alone is not the only reason why purchasers exercise care when purchasing, chartering or renting a boat because these are not the kinds of products or activities that one would get involved in without exercising care and deliberation. *See In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1551 (TTAB 2015) (citing *Tiffany & Co. v. Classic Motor Carriages Inc.*, 10 USPQ2d 1835, 1841 (TTAB 1989) (automobiles would be purchased only upon careful consideration)).

⁴⁸ 36 TTABVUE 128.

⁴⁹ 36 TTABVUE 145; *see also* 36 TTABVUE 151.

A person interested in purchasing, chartering or renting a boat will undoubtedly be an enthusiast who has a specific purpose, use, or need for a boat. In this regard, the purchaser seeks to satisfy personal tastes with respect to style and features. A boat might also be purchased as a status symbol. Likewise, someone chartering or renting a boat might be seeking the status of having a boat. Potential consumers will personally examine the boats they intend to purchase by carefully studying their features or they will carefully examine the obligations required to charter and rent Applicant's boats, as well as inspecting the quality of Applicant's boats and their availability.

We find that consumers or potential consumers will exercise a high degree of purchasing care in buying a boat or deciding to charter or rent a boat.

D. The nature and extent of any actual confusion.

Applicant is unaware of any instances of actual confusion.⁵⁰ Applicant contends that it has used its CLUB NAUTIQUE logo concurrently with Opposer's use of its NAUTIQUE marks for ten years without any instances of confusion and "submits that if confusion was likely, it would have occurred by now."⁵¹ Opposer also is not aware of any reported instances of confusion,⁵² but contends that it is not required to prove actual confusion.⁵³

⁵⁰ Applicant's response to Opposer's Interrogatory No. 20 (36 TTABVUE 117); *see also* Durant Discovery Dep., p. 32 (34 TTABVUE 46); Durant Discovery Dep., p. 42 (34 TTABVUE 52); Durant Testimony Decl. ¶¶19-20 (40 TTABVUE 6).

⁵¹ Applicant's Brief, pp. 16-17 (44 TTABVUE 17-18).

⁵² Opposer's response to Applicant's interrogatory No. 19 (41 TTABVUE 19).

⁵³ Opposer's Brief, p. 20 (42 TTABVUE 28).

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. North Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“[T]he absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”).

Applicant started using CLUB NAUTIQUE around 1980,⁵⁴ and the CLUB NAUTIQUE logo, in a different form, around 1981.⁵⁵ Applicant started using the CLUB NAUTIQUE logo sought to be registered at least as early as August 31, 2008.⁵⁶ Applicant renders its services “[p]rimarily in northern California, where the services

⁵⁴ Durant Discovery Dep., p. 16 (34 TTABVUE 29); see also Durant Testimony Decl. ¶19 (40 TTABVUE 6).

⁵⁵ *Id.* at p. 17 (34 TTABVUE 30).

⁵⁶ Durant Testimony Decl. ¶9 (40 TTABVUE 4).

are provided, and worldwide to a limited extent (e.g., Internet advertising).⁵⁷ Its boats are based in Alameda and Sausalito, California.⁵⁸ It focuses its advertising in Northern California, but does national advertising on a limited basis.⁵⁹

Opposer has been using the marks SKI NAUTIQUE since 1961, SPORT NAUTIQUE since 1989, AIR NAUTIQUE since 1996, SUPER AIR NAUTIQUE since 1998, and NAUTIQUE since 2001.⁶⁰ Opposer advertises and promotes its NAUTIQUE line of boats throughout the United States.⁶¹ As discussed more fully below, Opposer's NAUTIQUE marks are commercially strong, especially in connection with water ski and wakeboard boats, and, thus, the reputation or renown of the NAUTIQUE marks extends throughout the boating industry.

Having found that Opposer's boats are related to Applicant's "boat cruises; boat rental; yacht and boat charter services" and that the goods and services are sold to some of the same classes of consumers, we find that there has been a reasonable opportunity for confusion to have occurred. We thus find that the undisputed absence of evidence of actual confusion over a considerable period of simultaneous use of the marks supports a finding that confusion is not likely.

⁵⁷ Applicant's response to Opposer's Interrogatory No. 14 (36 TTABVUE 115).

⁵⁸ Durant Discovery Dep., p. 21 (34 TTABVUE 35).

⁵⁹ Durant Discovery Dep., p. 42 (34 TTABVUE 52); see also Durant Testimony Decl. ¶7 (40 TTABVUE 3) ("Applicant's advertising efforts are centered in Northern California, but extend across the entire United States.").

⁶⁰ Opposer's response to Applicant's interrogatory No. 11 (41 TTABVUE 15); see also MacLean Testimony Decl. ¶4 (12 TTABVUE 2_).

⁶¹ Opposer's response to Applicant's interrogatory No. 24 (41 TTABVUE 22).

E. Strength of Opposer's NAUTIQUE marks.

In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:83 (5th ed. June 2018 update) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India*, 80 USPQ2d at 1899.

1. The inherent strength of the NAUTIQUE marks.

Despite the fact that the translation of the word “Nautique” is “Nautical” and “Nautical” is defined as “of, relating to, or associated with seamen, navigation, or ships,”⁶² Opposer’s NAUTIQUE marks are registered on the Principal Register without a disclaimer of the exclusive right to use the word “Nautique” and without a

⁶² Merriam-Webster.com (40 TTABVUE 75).

claim of acquired distinctiveness. Because NAUTIQUE has been registered, it is entitled to a presumption of validity by Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), and “moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.” *Tea Bd. of India*, 80 USPQ2d at 1899. Thus, the registered mark NAUTIQUE cannot be considered merely descriptive, nor can the word “nautique” in the marks SKI NAUTIQUE, SPORT NAUTIQUE and AIR NAUTIQUE.

In assessing the inherent strength of Opposer’s mark, we note that there is no testimony or evidence regarding the number and nature of similar marks in use on similar goods or services, or third-party registrations consisting in whole, or in part, of NAUTIQUE or variations thereof.⁶³ Evidence that a mark, or an element of a mark, has been adopted by many different users and registrants may indicate that the element has some non-source identifying significance that undermines its conceptual

⁶³ Applicant contends that “[t]here are many, many third-party marks, which use the overlapping term, ‘nautique,’ which is evidence of its potentially generic and weak nature as a source indicator. A search of the USPTO records reveals 45 marks containing the word NAUTIQUE. Furthermore, a simple Internet search reveals a proliferation of businesses and products using the word NAUTIQUE.” Applicant’s Brief, p. 16 (44 TTABVUE 17). However, Applicant did not introduce any testimony or evidence to corroborate its contention, and the Board does not take judicial notice of either third-party registrations or a party’s own registration[s] insofar as the Trademark Rules of Practice specify how to make such registrations of record in an inter partes proceeding. *See* 37 C.F.R. § 2.122(d) and 37 C.F.R. § 2.122(e). *See also* MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES, 81 Fed. Reg. 69950, 69955 (October 7, 2016) (Board considered but rejected suggestion of taking judicial notice of USPTO records, explaining various reasons introduction of information contained in USPTO trademark file records is most appropriately borne by the party seeking to introduce the evidence); *In re Wada*, 48 USPQ2d 1689, 1689 n.2 (TTAB 1998) (Board denied applicant’s request to take judicial notice of the “thousands of registered marks incorporating the term NEW YORK for goods and services that do not originate in New York state or city”), *aff’d*, 194 F.3d 1297, 52 USPQ2d 1539 (Fed. Cir. 1999). Applicant’s unsupported argument does not have any probative value.

or inherent strength as an indicator of a single source. *Jack Wolfskin Austrang Fur Draussen GmbH & Co. KGAA v. New Millenium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (the extent of third-party use or registrations may indicate that a term carries a suggestive or descriptive connotation and is weak for that reason).

By virtue of the meaning of the word “Nautique” as pertaining to navigation or ships, and because Opposer’s pleaded registration are for boats, the term NAUTIQUE in Opposer’s marks is at worst highly suggestive.

2. The commercial strength of Opposer’s marks.

Opposer, through its predecessor-in-interest, has been using SKI NAUTIQUE in commerce in connection with boats since January 1962; SPORT NAUTIQUE since January 1989; SUPER AIR NAUTIQUE since February 1997; and NAUTIQUE since July 2001.⁶⁴

Opposer has advertised its various NAUTIQUE boats on its website since December 1998.⁶⁵ “From January 1, 2005 through July 24, 2017, more than 3.87

⁶⁴ MacLean Testimony Decl. ¶4 (12 TTABVUE 203).

⁶⁵ MacLean Testimony Decl. ¶9 (12 TTABVUE 4).

million people visited Opposer's ... website."⁶⁶ Opposer has advertised through YouTube.com since January 2008; through Twitter and Facebook since February 2009; and through Instagram since October 2010.⁶⁷ Opposer promotes its NAUTIQUE boats at trade shows throughout the United States.⁶⁸

Because Opposer has designated its advertising expenditures as confidential, we refer to Opposer's advertising expenditures in general terms. From 2011 through 2016, Opposer made significant expenditures in advertising.⁶⁹ However, Opposer provided just the raw advertising figures but did not explain how the expenditures were distributed and whether they included anything other than social media and trade shows. Thus, it is possible that Opposer spent all its advertising on social media and attending trade shows.

Nevertheless, Opposer's sales revenues have been substantial.⁷⁰ We refer to Opposer's revenues in general terms because they too have been designated confidential. However, Opposer failed to provide any testimony or evidence as to the number of NAUTIQUE boats that have been sold or Opposer's market share. In the absence of some sort of context for these substantial advertising and sales figures, they have less probative value on the commercial strength of Opposer's marks than

⁶⁶ *Id.*

⁶⁷ MacLean Testimony Decl. ¶10 (12 TTABVUE 4).

⁶⁸ MacLean Testimony Decl. ¶11 (12 TTABVUE 5) and Exhibit 9 (33 TTABVUE 12-31). It is not clear why Opposer designated as confidential the list of trade shows it attended because its appearance at the shows was, by definition, known to anyone who attended them or viewed a list of exhibitors.

⁶⁹ MacLean Testimony Decl. Exhibit 12 (33 TTABVUE 42).

⁷⁰ MacLean Testimony Decl. ¶14 (12 TTABVUE 5-6) and Exhibit 13 (33 TTABVUE 44).

they might have with such context. *Cf. Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 128 USPQ2d 1686, 1690-91 (Fed. Cir. 2018). Nevertheless, they do suggest that the marks have been broadly exposed in the boating industry.

Opposer has also garnered industry recognition.

Opposer has won many awards for boats marked with its **NAUTIQUE** Marks, including but not limited to the Highest Customer Satisfaction Award by J.D. Power and Associates in 2002, 2003, 2005, 2006, 2007, 2008 and 2009; the Boating Industry Top Products Award in 2014; the Marine Industry CSI award for Excellence in Customer Satisfaction in 2009 and 2016; a commendation from Mel Martinez, the Chairman for the Orange County of Florida; an April, 2000 letter from Jeb Bush, the Governor of the State of Florida, congratulating Opposer on receiving the 1999 IMTECT Innovation Award-Boat Category and 1997 Ski Boat of the Year Award from Powerboat Magazine; the Premier Partner Award from WaterSki Magazine in 2003; an Orlando Metro 100 Award in 1993; and the Manufacturer of the Year Award presented by Manufacturers Association of Florida in 2014.⁷¹

Finally, Opposer's NAUTIQUE boats also have garnered some unsolicited media coverage. For example:⁷²

- The author of the New York Times (January 10, 1988) article "Boat Show Section: Craft for Water-Skiing: Design Glides Beyond Basics" refers to

⁷¹ MacLean Testimony Decl. ¶15 (12 TTABVUE 6).

⁷² Many of the articles refer to the NAUTIQUE brand in passing. For example, The Miami Herald (October 8, 1989) (36 TTABVUE 122-125 at 123) ("Carter starts the boat, a 19-foot, 250 horsepower, \$25,000 Correct Craft Ski Nautique, and we're off."); Trailer Boats (April 1, 1999) (36 TTABVUE 148-151 at 150-151) ("[Opposer's] Super Air Nautique, Malibu's Wakesetter VLX, Ski Centurion's Elite V-Drive, and Tige's 21V Rider are also members of the V-drive wakeboard boat category.").

Opposer's Ski Nautique 2001, "designed for the die-hard skier," as a noteworthy high performance boats;⁷³

- The author of the Los Angeles Times (July 28, 1998) article "Testing the Waters: Toyota Dips Into the U.S. Boat Business" noted that MasterCraft and Nautique are the "two major players" in the tournament ski boat field;⁷⁴
- A review of the Pro Air Nautique in "Trailer Boats" (April 1, 1999) provides the following:

The Pro Air Nautique demonstrates [Opposer's] continuing dedication to pushing the performance limits of boat design. With options such as a stereo system with waterproof speakers and speed control, [Opposer] has created a luxurious boat for wakeboard enthusiasts. It also can service pleasingly as a tow boat for recreational waterskiers.⁷⁵

- Orlando Sentinel (July 23, 2000)

Boat-Building Family Celebrates Its Founder, A 'Great Floridian'

* * *

The company's longevity makes it the "oldest-family-owned and operated boat manufacture in the world," according to [Opposer's] Web site.

Since 1925, the Meloons have been making waves with all kinds of watercraft – everything from fishing boats to luxury cabin cruisers and, since 1961, with their line of Nautique water-ski and wakeboard boats.

⁷³ 36 TTABVUE 120.

⁷⁴ 36 TTABVUE 134,

⁷⁵ 36 TTABVUE 145.

Their company is as well-known for solid ethics as it is for sleek speedboats.⁷⁶

We find that Opposer's NAUTIQUE marks are commercially strong, especially in connection with water ski and wakeboard boats.

Thus, we have a situation where Opposer's marks are commercially strong and, at worst, highly suggestive. Considering the record as a whole, including evidence pertaining to both conceptual/inherent and commercial strength, we find that Opposer's marks are appropriately placed on the "strong" side of the "spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017) ("The commercial strength of Petitioner's TAO mark outweighs any conceptual weakness.").

F. Similarity or dissimilarity of the marks.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. "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.*, 101 USPQ2d at 1721; *see also* *Midwestern Pet Foods, Inc. v. Societe des Produits*

⁷⁶ 36 TTABVUE 165.

Nestle S.A., 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. 1992).

The marks are similar because they all consist of or include the dominant word “Nautique.” At the same time, they differ because Applicant’s mark includes the term “Club Nautique” in a logo format engendering the commercial impression of a boat club. The basic issue before us is whether Applicant’s use of  sufficiently distinguishes Applicant’s mark from Opposer’s marks NAUTIQUE, AIR NAUTIQUE, SUPER AIR NAUTIQUE, **SKI NAUTIQUE**, and *Sport Nautique*, or whether consumers will mistakenly perceive Applicant’s CLUB NAUTIQUE logo as an charter or rental club extension of Opposer’s NAUTIQUE boat business.

Unlike a situation involving an arbitrary or fanciful mark, the addition of other matter to a suggestive word may be enough to distinguish it from another mark. *In re Hartz Hotel Servs. Inc.*, 102 USPQ2d 1150, 1154 (TTAB 2012) (citing *In re Hunke & Jocheim*, 185 USPQ 188, 189 (TTAB 1975)).

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

Hartz Hotel Servs., 102 USPQ2d at 1154 (quoting *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958) (recognizing that the term “fit” is descriptive in connection with slip covers where proper fit is important); *Glamorene Prods. Corp. v. Earl Grissmer Co., Inc.*, 203 USPQ2d 1090, 1097 (TTAB 1978) (“Both marks [RINSENVAC and SPRAY ‘N VAC] are highly suggestive of their products and this only enhances the association of each mark with its own goods”); compare *Jonbil Inc. v. Int’l Multifoods Corp.*, 3 USPQ2d 1882 (TTAB 1987) (where LONG HAUL was found to be generally suggestive in the trucking industry, it was not held to be a weak mark because there was no evidence of third-party use).

Nevertheless, because Opposer’s NAUTIQUE marks are commercially strong, there is no evidence of any third-party use or registration of other NAUTIQUE- or NAUTICAL-formative marks, and “Nautique” is a foreign word for “Nautical,”⁷⁷ we

⁷⁷ In appropriate circumstances, the use of a foreign word instead of its English translation might be enough to distinguish two marks.

The finding that “HAUTE MODE” and “HI-FASHION” are essentially equivalent in connotation does not, of course, in and of itself, determine the question of likelihood of confusion in this case. The similarity in connotation must be viewed as but a single factor in the overall evaluation of likelihood of confusion. (Internal citation omitted). Other factors to be considered in this case are the dissimilarity in overall appearance and pronunciation of the marks, the differences in the goods to which the marks are applied, and the degree of suggestiveness of applicant's mark and the cited mark (whether rendered in French or in English) as applied to the respective goods.

In re L’Oreal S.A., 222 USPQ 925, 925-26 (TTAB 1984) (citing *See In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983) (“such similarity as there is in connotation must be weighed against the dissimilarity in appearance, sound, and all other factors, before reaching a conclusion on likelihood of confusion as to source.”)).

find that Applicant's mark  is more similar than dissimilar to Opposer's marks NAUTIQUE, AIR NAUTIQUE, SUPER AIR NAUTIQUE, **SKI NAUTIQUE**, and *Sport Nautique*, such that consumers and potential consumers will mistakenly

perceive  as an charter or rental club extension of Opposer's line of NAUTIQUE brand boats because of the presence of the word "Nautique" In the applied-for mark. The addition of the pennant design featuring the initials CN does little to distinguish the marks in light of the dominant wording "Nautique." *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("[T]he verbal portion of the mark is the one most likely to indicate the origin of the goods [or services] to which it is affixed.").

G. Balancing the factors.

Despite the lack of any reported instances of actual confusion and the high degree of care that consumers and potential consumers will exercise when making their purchasing decisions, because the marks are similar, Opposer's marks are commercially strong, the goods and services are related and are offered in some of the same channels of trade to some of the same classes of consumers, we find that

Applicant's mark  for "boat cruises; boat rental; yacht and boat charter services" is likely to cause confusion with Opposer's registered marks **SKI NAUTIQUE**, *Sport Nautique*, AIR NAUTIQUE, SUPER AIR NAUTIQUE, and NAUTIQUE for boats.

V. Res Judicata

Applicant previously applied to register the mark CLUB NAUTIQUE, in a typed drawing, for “chartering of yachts,” in Class 39.⁷⁸ Opposer’s predecessor-in-interest filed a notice of opposition against the registration of that mark. Applicant did not respond to the notice of opposition and the Board entered a default judgment against Applicant.⁷⁹ In the current opposition, Opposer alleges that registration should be denied on the ground of res judicata,⁸⁰ and it filed a motion for summary judgment based on res judicata,⁸¹ which required the Board to consider whether the marks CLUB NAUTIQUE, in typed form, and the mark  are legal equivalents.

In an order dated May 3, 2017, the Board denied Opposer’s motion for summary judgment.

Since we do not find the marks to be legally equivalent, claim preclusion is inapplicable as a matter of law. Opposer’s motion for summary judgment is therefore **DENIED**.⁸²

Based on our review of the testimony and evidence and arguments in the briefs, Opposer has not persuaded us that there is an error in our decision denying Opposer’s motion for summary judgment. For the reasons set forth in our May 30, 2017 decision

⁷⁸ Application Serial No. 73481736, filed May 23, 1984. Notice of Opposition, Exhibit B (1 TTABVUE 51).

⁷⁹ Notice of Opposition, Exhibit C (1 TTABVUE 53).

⁸⁰ Notice of Opposition ¶¶14-20 (1 TTABVUE 8-9).

⁸¹ 5 TTABVUE.

⁸² 9 TTABVUE 5.

denying Opposer's motion for summary judgment, Opposer's claim that Applicant's registration should be refused on the ground of res judicata is dismissed.

Decision: The opposition is sustained under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).