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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86394529
Applicant	NexBank Capital, Inc.
Applied for Mark	NEXBANK
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Serial No.: 86394529
Mark: NEXBANK
Applicant/Appellant: Nexbank Capital, Inc.
Examining Attorney: Anne M. Farrell
Law Office 118

**EX PARTE APPEAL
APPELLANT'S REPLY BRIEF**

I. Likelihood of Confusion – “Would Be” Not “Could Be”

In the Examining Attorney’s Appeal Brief, at the onset, the Examining Attorney paraphrases the proper standard:

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer **would be** confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d).

See Office Action dated July 1, 2016 at 2 (emphasis added – the actual standard is “to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive”).

However, as with the preceding prosecution, the Examining Attorney applies a “**could be**” standard, i.e., not “to be likely” but rather “to be possible,” for concluding that there “exists a likelihood of confusion . . .” between the Examining Attorney’s cited registrations and the instant applications for NEXBANK. *See id.* As will be shown below, absent the Examining Attorney’s improperly applied standard and/or faulty paradigm, the Examining Attorney would have likely already allowed this application.

A. NEXT MYNEXTBANK.COM (Registration No. 4,380,835)

The Examining Attorney specifically states:

consumers are generally more inclined to **focus on the first word**, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (finding similarity between **VEUVE ROYALE** and two **VEUVE CLICQUOT** marks in part because “VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 USPQ2d 1698, 1700 (Fed. Cir.

1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because “consumers must first notice th[e] identical lead word”)

See Office Action dated July 1, 2016 at 5 (emphasis added).

Regarding the instant application for NEXBANK and the Examining Attorney’s reliance on the NEXT MYNEXTBANK.COM registration for refusal, there can be no confusion or mistake that the “first word” of the applied-for NEXBANK is “NEXBANK” and “first word” of the registered NEXT MYNEXTBANK.COM is “NEXT” – there can also be no mistake or confusion regarding the fact that “NEXBANK” and “NEXT” are not “identical lead word[s].” See *id.* (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d at 1700). Accordingly, while there may be a slight possibility that consumers “could be” confused between the trademarks of NEXBANK and NEXT MYNEXTBANK.COM -- based on the Examining Attorney’s own cited case law, there is no possibility that consumers “would be” confused between the trademarks of NEXBANK and NEXT MYNEXTBANK.COM. Therefore, because the proper standard for likelihood of confusion “likely to cause,” e.g., the Examining Attorney’s “would be” standard, the Examining Attorney has not provided sufficient evidentiary support to maintain the refusal of the application for NEXBANK based on Registration No. 4,380,835 for NEXT MYNEXTBANK.COM.¹

¹ Regarding the Examining Attorney’s reliance on *Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985), and *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983), none of these cases support the Examining Attorney’s determination that NEXBANK and NEXT MYNEXTBANK.COM “create a similar overall commercial impression” because all of the Examining Attorney’s cited cases involved the comparison of single word marks, wherein the applied for trademarks differed from the registered trademarks by an average addition/deletion of

B. NXT BANK (Registration No. 4,978,333)

The Examining Attorney specifically states:

Regarding Registration No. 4,978,333, registrant's mark is NXT BANK. The examining attorney attached evidence Regarding Registration No. 4,978,333, registrant's mark is NXT BANK. The examining attorney **attached evidence** to the Office action dated October 2, 2017, showing that "NXT" is an abbreviation for "NEXT."

See Office Action dated July 1, 2016 at 5 (emphasis added).

Appellant respectfully submits the Examining Attorney's "attached evidence to the Office action dated October 2, 2017, showing that "NXT" is an abbreviation for "NEXT," is identified as Attachments 4-7 and consist of printouts from the website AR Acronym Finder, available at www.acronymfinder.com. *See* Office Action dated July 1, 2016 at 5. Appellant also respectfully submits that the Examining Attorney's reliance on AR Acronym Finder for the meaning of "NXT" precludes "NXT" from being confused with the sound/pronunciation of the term "NEXT," "NEX," or "NEXBANK." Acronym is defined as "a word (such as NATO, radar, or laser) formed from the initial letter or letters of each of the successive parts or major parts of a compound term." *See* Merriam-Webster Dictionary, *available at*, <https://www.merriam-webster.com/dictionary/acronym>. As such, the Examining Attorney's reliance on "NXT" being an acronym means that the letters in "NXT" must actually represent three distinct words or terms – i.e., "NXT" cannot stand for the single word "NEXT." Moreover, the Examining Attorney's reliance on the website

less than two letters. *See* Office Action dated July 1, 2016 at 5. Aside from the fact that NEXT MYNEXTBANK.COM is not a single word trademark, the instant NEXBANK trademark differs from the cited NEXT MYNEXTBANK.COM by ten letters.

AR Acronym Finder for the meaning of “NXT” also means that “NXT” would not be pronounced to sound like the word “NEXT,” but rather would be pronounced as “N” “X” “T” much like FBI is pronounced “F” “B” “I.” See Merriam-Webster Dictionary, *available at*, <https://www.merriam-webster.com/dictionary/initialism> (“an abbreviation formed from initial letters . . . *acronym* should only be used for terms like NATO, which is pronounced as a single word, and that *initialism* should be used if the individual letters are all pronounced distinctly, as with FBI.”). Furthermore, as summarized by Daily Writing Tips:

an acronym is an invented word made up of the initial letters or syllables of other words, like NASA or NATO. Fewer probably know that an initialism is a type of acronym that cannot be pronounced as a word, but must be read letter-by-letter, like FBI or UCLA.

See Daily Writing Tips, *available at*, <https://www.dailywritingtips.com/acronym-vs-initialism/>.

The Examining Attorney simply has provided no support for the conclusion that the term “NXT” in the trademark “NXT BANK” would be pronounced like the word “NEXT,” in fact, the Examining Attorney’s “evidence” supports the conclusion that the term “NXT” in the trademark “NXT BANK” would be pronounced “N” “X” “T.” See Merriam-Webster Dictionary, *available at*, <https://www.merriam-webster.com/dictionary/initialism>.

It appears as though the Examining Attorney’s own paradigm, i.e., that the term “NXT” “**could be**” pronounced to sound like the word “NEXT,” caused the Examining Attorney to ignore the facts that (1) the term “NXT” should be pronounced “N” “X” “T,” (2) that term “NXT” has a particular meaning in banking parlance, *see* Exhibit 1 (“NXT is an advanced open source blockchain platform that builds on the first wave of pioneering cryptocurrencies like Bitcoin. The NXT platform includes many core-level features, such as a Decentralized Asset Exchange,

Marketplace, and Voting system, all in addition to the NXT digital currency itself.”), and (3) if the term “NXT” in the trademark “NXT BANK” was intended to be pronounced to sound like the word “NEXT,” the term “NXT” in the trademark “NXT BANK” would have been made to be an abbreviation ending with a period (“NXT.”), much like “MR.” (pronounced “MISTER”), “PROF.” (pronounced “PROFESSOR”), or “DR.” (pronounced “DOCTOR”), *see* Guide to Grammar, *available at*, <https://guidetogrammar.org/grammar/abbreviations.htm>.

Based on the foregoing, Appellants respectfully submit that just because the Examining Attorney has concluded that the term “NXT” “**could be**” pronounced like the word “NEXT” – such a conclusion cannot meet the Trademark Act Section 2(d)’s standard for likelihood of confusion because the Examining Attorney has proffered no evidence that (1) consumers would be likely to pronounce the term “NXT” in the trademark “NXT BANK” like the word “NEXT” or that (2) consumers would be likely to confuse Registration No. 4,978,333, pronounced as “‘N’ ‘X’ ‘T’ BANK,” with the instant “NEXBANK” trademark. *See* 15 U.S.C. §1052(d).

Due to the Examining Attorney’s own evidence, and the absence of any evidence that the term “NXT” would not be pronounced as “N” “X” “T,” there can be no likelihood of confusion between the registered “NXT BANK” trademark and the instantly applied-for “NEXBANK” trademark because “it is **[not]** likely that a potential consumer **would be** confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant.” *See* Office Action dated July 1, 2016 at 2 (citing 15 U.S.C. §1052(d)) (emphasis added).

CONCLUSION

For the reasons given above, the Examining Attorney has failed to meet the burden necessary to establish that Appellant's mark, that NEXBANK is confusingly similar to either NEXT MYNEXTBANK.COM or NXT BANK. In light of the above, Appellant respectfully requests that the Board grant this Ex Parte Appeal and allow the registration of NEXBANK.

If a telephone conference would facilitate the resolution of any issue or expedite the prosecution of the mark, the Examining Attorney is invited to telephone the undersigned at the telephone number given below.

Respectfully submitted,
WICK PHILLIPS GOULD & MARTIN, LLP

Date: July 22, 2019

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EXHIBIT 1



Home / What is Nxt?

WHAT IS NXT?

Nxt is an advanced open source blockchain platform that builds on the functionality of the first wave of pioneering cryptocurrencies like Bitcoin. The Nxt platform includes many core-level features, such as a Decentralized Asset Exchange, Marketplace, and Voting system, all in addition to the NXT digital currency itself. Nxt is easy-to-use, permissionless and gives its users complete freedom in many ways. For example, using the NXT currency as a payment system cannot be restricted, creating a marketplace listing cannot be denied, and, for developers, neither is creating advanced blockchain-based applications through the Nxt Application Program Interface (API).

The screenshot shows the Nxt Desktop interface. At the top, there's a navigation bar with 'Send NXT' and 'Send Message' buttons. The main dashboard area is titled 'Dashboard' and includes several summary cards: 'Account Balance' (279,105.28), 'Assets Value (1 Assets Owned)' (70,058.42), 'Currencies Value (0 Currencies Owned)' (0), and 'Purchased Products' (0). Below these are cards for 'Pending / Completed Sales' (0/0), 'Messages' (0), 'Aliases' (0), and a clock showing '5/9/2017 3:41:22'. A 'Recent Transactions' table is also visible, listing various payments and account info.

Date	Type	Amount	Fee	Account	Height	Confirmations
5/7/2017 18:50:29	Ordinary Payment	-2,566.0	1	You ○ NXT-5DEV-4MBT-4QLA-3YNWL	1295262	1,440
5/7/2017 6:00:40	Ordinary Payment	5,072.0	1	NXT-H9FP-JMRB-5HRD-HDSZW ○ You	1295606	1,440
5/2/2017 19:32:14	Ordinary Payment	5,085.0	1	NXT-TGXN-KVAB-L7Y4-AGZJ9 ○ You	1289157	1,440
4/30/2017 20:53:51	Ordinary Payment	-11,239.0	3	You ○ NXT-4ZVN-EQHC-5LXJ-9SE7D	1286231	1,440
4/26/2017 17:01:57	Ordinary Payment	-20,000.0	3	You ○ NXT-QGT4-VNOK-7FQ3-4KFBA	1280325	1,440
4/20/2017 9:38:39	Ordinary Payment	2,562.0	1	NXT-HKYK-UGQ6-FMUC-6GWVPV ○ You	1271290	1,440
4/2/2017 19:45:55	Ordinary Payment	-900.0	1	You ○ NXT-972M-SBPV-W7YJ-5E7RS	1246047	1,440
4/1/2017 17:04:08	Account Info		3	You ○ /	1244452	1,440
3/25/2017 1:02:00	Ordinary Payment	5,423.6	1	NXT-UWJU-XXST-3MPQ-2JWGT ○ You	1233514	1,440

NXT: CRYPTOCURRENCY VALUE

Decentralized cryptocurrencies have been with us since the launch of Bitcoin in 2009, the first widely-adopted decentralized cryptocurrency. Bitcoin and other cryptocurrencies combine cutting-edge encryption technology with a decentralized peer-to-peer network of users and computer systems.

The advantages that cryptocurrencies can offer over traditional methods of payment are truly remarkable. They allow people to securely and safely store and transfer their money without the need for any external agency. For the first time in the history of finance, an

individual can have complete control over their own funds online and can send money anywhere on the planet within a few minutes without the need for any banks, payment companies, or other intermediaries. [Get started](#) [Announcements](#) [Support](#) [Community](#)

Nxt is a digital currency that acts as the fuel for the Nxt ecosystem. In addition to it being used as a transaction fee when transferring Nxt from one user to another, it is also used to create assets that can represent things like bonds or ownership of a project, create a decentralized poll on the blockchain, or storing arbitrary data on the blockchain. Of course, it can also be used as an external currency, in the same way that you can spend Bitcoins or dollars to buy goods and services.

Here are some of the decentralized features of Nxt:

- [Assets and Asset Exchange](#)
- [Monetary System](#)
- [Marketplace](#)
- [Messaging](#)
- [Voting](#)
- [Account Control](#)
- [Coin Shuffling](#)
- [Data Cloud](#)
- [Alias System](#)
- [Other Features](#)

NXT: BLOCKCHAIN 2.0



What is Nxt?

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1 NXT = \$0.0236247176

One of the most essential elements of Nxt is arguably the blockchain itself. This is the sequence of blocks that contain the complete transaction history since the creation of Nxt in 2013. New transactions are recorded as part of new blocks processed in a decentralized manner into the chain, thus incorporating those new transactions into the Nxt blockchain.

The first generation of cryptocurrencies pioneered the concept of using a blockchain to keep a secure, trustworthy, and stable, yet completely decentralized and open record of transactions. Initially, blockchain technology was primarily used to track the transaction and creation of cryptocurrencies. But, the creators of Nxt saw the potential to use blockchain technology for something much more by adding multiple core-level features.

Nxt gives project developers and individuals a powerful toolkit, combined with an easy to use API system, thus allowing people to integrate and use Nxt blockchain technology in their own applications and projects.

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1 NXT = \$0.0236247176

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