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

Ex Parte Appeal - Serial No.	90599769
Appellant	Thore Unlimited, LLC
Applied for mark	NOBSACTIVE
Correspondence address	DAVID W. SAR BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P 230 N. ELM ST. 2000 RENAISSANCE PLAZA GREENSBORO, NC 27401 UNITED STATES Primary email: dsar@brookspierce.com 336-271-3175
Submission	Appeal brief
Attachments	NOBSActive Appeal Brief 2023 03 31.pdf(254166 bytes)
Appealed classes	Class 027. First Use: None First Use In Commerce: None All goods and services in the class are appealed, namely: Yoga mats Class 041. First Use: Jan 1, 2019 First Use In Commerce: Jan 1, 2019 All goods and services in the class are appealed, namely: Educational services, namely, providing on-line and streamed classes and videos in the field of physical fitness, nutrition and health, not including yoga instruction; Educational services, namely, providing online instruction in the field of physical fitness, nutrition and health via an online website, not including yoga instruction
Filer's name	David W. Sar
Filer's email	dsar@brookspierce.com
Signature	/DavidWSar/
Date	03/31/2023

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

March 31, 2023

In re application of:	Thore Unlimited, LLC
Mark:	NOBSACTIVE
Serial Number:	90599769
App. Filing Date:	March 24, 2021

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I. Introduction / Issue Presented

Applicant, Thore Unlimited, LLC ("Applicant" or "Thore") hereby submits this brief in support of its appeal for application serial number 90599769. Applicant appeals the examining attorney's final refusal to register, based on an asserted likelihood of confusion, the mark NOBSACTIVE for "Yoga mats" in international class 27 and for "Educational services, namely, providing on-line and streamed classes and videos in the field of physical fitness, nutrition and health, not including yoga instruction; Educational services, namely, providing online instruction in the field of physical fitness, nutrition and health via an online website, not including yoga instruction" in international class 41.

II. Description of the Record / Facts

Applicant filed on March 24, 2021 the instant application for NOBSACTIVE (the "Applied-For Mark"). March 24, 2021 Application, TSDR p. 1. The Application was initially a five-class application, but was subsequently divided after the initial Office Action limited the refusal to register to classes 27 and 41. November 9, 2021 Office Action, TSDR p. 1. The three non-objected to classes have been removed to a child application.[1]

In the final Office Action, the examining attorney cited four (4) registrations against Applicant's application for likelihood of confusion under Section 2(d). They are:

(i) 6494828: NO BS WOMEN, by Phit-N-Phat Personal Training, LLC, for chatrooms and online forums in class 38 and for certain seminars, podcasts, online newsletters and a website, in class 41, with first use dates of March 2020 (the "WOMEN Mark");

[1] On December 13, 2022, a Notice of Allowance was issued for the child application, Serial No. 90977849 for "water bottles sold empty" (Class 21), "athletic pants; athletic shirts; athletic shorts; t-shirts; tank tops" (Class 25), and "dumbbells; jump ropes" (Class 28).

(ii) 6300305: logo of NO BS WEIGHTLOSS PROGRAM

, by Phit-N-Phat Personal Training, LLC, for downloadable course materials in class 9, chatrooms and online forums in class 38 and for certain seminars, podcasts, online newsletters and a website, in class 41, with first use dates of June 17, 2020 (the "WEIGHTLOSS Mark");

(iii) 6151637: logo of NOBS WELLNESS PODCAST

, by Holexia, for certain podcasts and blogs in class 41, with a first use date of Dec. 16, 2019 (the "WELLNESS Mark"); and

(iv) 5300371: NO B.S., JUST YOGA, by Moxie Yoga LLC, for yoga instruction in class 41, with a first use date of Jan. 1, 2017 (the "JUST YOGA Mark").

(collectively, the "Cited Marks"). *See* November 9, 2021 Office Action, TSDR p. 1; June 8, 2022 Final Office Action, TSDR p. 1.

Applicant filed a Request for Reconsideration on November 23, 2022 and timely filed for appeal on December 5, 2022. 1 TTABVUE 1. This appeal was suspended to allow the examining attorney to consider the request for reconsideration. 2 TTABVUE 1. Upon the examining attorney's denial of Applicant's request for reconsideration, this appeal resumed on January 31, 2023. 5 TTABVUE 1.

III. Arguments

The sole issue(s) on which the examining attorney's refusal is based is asserted likelihood of confusion under Trademark Act, Section 2(d), 15 U.S.C. § 1052(d) with each of the four cited marks.

Under Lanham Act § 2(d)(1), a mark that can distinguish an applicant's goods from the goods of others must not be refused registration on the principal register unless it "so resembles a registered mark or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, to deceive." 15 U.S.C. § 1052(d)(1).

The standard to be applied in an ex parte appeal to the Board such as the instant appeal asks whether there is a "likelihood of confusion." *Glenwood Labs., Inc. v. American Home Prods. Corp.*, 455 F.2d 1384, 173 U.S.P.Q. 19 (C.C.P.A. 1972). Thirteen likelihood of confusion factors were set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973).

The examining attorney's analysis of the Applied-For Mark focused the similarity of the marks and the marks' goods and services. Upon considering those primary factors, the decision of the examining attorney should be reversed.

a. Similarity of the Marks

The examining attorney's entire analysis of the similarity of the Applied-For Mark and the Cited Marks hinged on the commonality of NOBS / NO BS. However, whether there is a likelihood of confusion must be decided on each case's own facts, *In re E.I. DuPont de Nemours & Co.*, 476 F.2d at 1361, 177 U.S.P.Q. at 567, and case law directs that marks as a whole must be analyzed to determine likelihood of confusion. *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007, 212 U.S.P.Q. 233, 234 (C.C.P.A. 1981). Thus the examining attorney's analysis was flawed, as the examiner only compared the NOBS / NO BS portions of the marks, merely concluding that "[t]he word portions of the marks are nearly identical in appearance, sound, connotation, and commercial impression; therefore, the addition of a design element does not obviate the similarity

of the marks in this case." November 9, 2021 Office Action, TSDR p. 1; June 8, 2022 Final Office Action, TSDR 1. The remainders of the marks, however, are clearly different, and the examiner (i) does not address any of the many differences between the Applied-For Mark and the Cited Marks, and (ii) cites utterly no supporting evidence in this situation for why consumers or the public would only focus on NOBS (or NO BS, for some of the cited marks), writing only that "consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark." June 8, 2022 Office Action, TSDR p. 1.

There is no *per se* rule that the first element of a mark is dominant. *See e.g.*, *Trump v. Caesars World, Inc.*, 645 F. Supp. 1015, 1021–22, 230 U.S.P.Q. 594, 599–600 (D.N.J. 1986), *aff'd sub nom. Trump v. Caesars World, Inc.*, 819 F.2d 1135 (3d Cir. 1987) (finding that that the term "PALACE" was the dominant element in the marks "TRUMP PALACE" and "CAESARS PALACE"); *Am. Cyanamid Co. v. S.C. Johnson & Son, Inc.*, 729 F. Supp. 1018, 1022 13 U.S.P.Q.2d 1032, 1035 (D.N.J. 1989) (finding that "MAX" "does not stand out as the dominant word" of the trademark "MAXFORCE"); *In Re Digirad Corp.*, 45 U.S.P.Q.2d 1841, 1845–46 (T.T.A.B. 1998) (finding that "DIGIRAY" and "DIGIRAD" are not confusingly similar).

Importantly, the Applied-For Mark does not incorporate any of the full Cited Marks; each of the Cited Marks and the Applied-For Mark contains many dissimilar features, unlike in many of the cases cited by the examining attorney. *See* November 9, 2021 Office Action, TSDR p. 1 (citing *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 U.S.P.Q. 689, 690-91 (T.T.A.B. 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1495, 1 U.S.P.Q.2d 1813, 1817 (Fed. Cir. 1987) (finding COMMCASH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 U.S.P.Q. 65, 66 (T.T.A.B. 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin*

Milnor Corp., 221 U.S.P.Q. 558, 560 (T.T.A.B. 1983) (finding MILTRON and MILLTRONICS confusingly similar)).

In this case, NOBS / NO B S is likely the least important portion of the marks because "NO BS" is generally viewed as a descriptive or highly suggestive phrase, unlike the arbitrary or fanciful terms in *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372, 73 U.S.P.Q.2d 1689, 1692 (Fed. Cir. 2005), *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 U.S.P.Q.2d 1698, 1700 (Fed Cir. 1992), and *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303, 128 U.S.P.Q.2d 1047, 1049 (Fed. Cir. 2018). November 9, 2021 Office Action, TSDR p. 1 (citing those cases). "NO B.S." is commonly understood to mean "no bull shit," which is a relatively common phrase. Accordingly, in the context of the respective goods and services, consumers may initially think that a mark with this particular beginning is suggestive of no-nonsense goods and services. And, because it is a common phrase, consumers are unlikely to remember any of the marks as "NOBS / NO B S" alone.

In contrast to situations in which the first term in a mark might be dominant, *see, e.g., In re Detroit Athletic Co.*, 903 F.3d at 1304, 128 U.S.P.Q.2d at 1049, "[i]f the common element of two marks is 'weak' in that it is generic, descriptive, or highly suggestive of the named goods or services, it is unlikely that consumers will be confused unless the overall combinations have other commonality." TMEP § 1207.01(b)(viii); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-40, 115 U.S.P.Q.2d 1671, 1674-75 (Fed. Cir. 2015).

Many marks for goods and services, many of which overlap with the classes for the Applied-For Mark or the Cited Marks, have each been registered and currently coexist or have coexisted on the register, showing that "NOBS" / "NO BS" is not the dominant element in the marks. Below is a chart illustrating this fact.

Mark	Reg. No.	Owner	Classes
NO BS ACTIVE logo	4901018 (lapsed/cancelled 8/26/22)	Applicant	25
NO BS logo	4881469	Applicant	25, 35, 41
NO BODY SHAME	5139772	Applicant	35, 41
NO BS WOMEN	6494828	Phit-N-Phat Personal Training, LLC	38, 41
	6300305	Phit-N-Phat Personal Training, LLC	38, 41
	6151637	Holexia	41
NO B.S., JUST YOGA	5300371	Moxie Yoga LLC	41
NO B.S.	3293983	Etison LLC	16
NO BS Sales School	5884920	McKay Consulting Group, LLC	35, 41
	6897468	Digital News Media Pty Ltd	35
No BS	5429387	Bing He (individual)	30
NO B.S.	5715602	Chicago Bar Company LLC	29

November 23, 2022 Request for Reconsideration, TSDR pp. 4–5 (showing the chart), 7–47 (showing the associated exhibits with registration records).

The lack of dominance of NOBS / NO BS is heightened when it is considered that the Applied-For Mark has a double entendre in which its "NOBS" can be understood both to mean "no bull shit" and "no body shame." *See* May 4, 2022 Response to Office Action, TSDR p. 3 (citing Applicant's registration for NO BODY SHAME). Indeed, Thore is principally operated by Whitney Way Thore and her father Glenn Thore. November 23, 2022 Request for Reconsideration,

TSDR p. 2. Whitney Way Thore, the star of the long-running (tenth+ season) show *My Big Fat Fabulous Life*, which appears on the TLC channel, is both known for her viral video "A Fat Girl Dancing" and her promotion of the message of body acceptance and positive body image. *See* November 23, 2022 Request for Reconsideration, TSDR pp. 2–3.

As an additional flaw in the analysis, the examining attorney fails to appreciate that consumers may not even view the Applied-For Mark as containing the similar term "NO BS". The WOMEN, WEIGHTLOSS, and JUST YOGA Marks all separate out the term clearly as NO [space] B [space] S [space]. November 9, 2021 Office Action, TSDR pp. 10, 13, 15. And while the WELLNESS Mark doesn't use spaces to separate out the term, the capitalization in the design of the mark also makes it clear to consumers how the term should be read: No [space] B[space] S [space]. *See* November 9, 2021 Office Action, TSDR p. 7. The Applied-For Mark, on the other hand, is not so clear—consumers are just as likely to view the term as an arbitrary or fanciful term NOBS (pronounced "knobs") rather than No [space] B [space] S [space], since the Applied-For Mark does not separate out any of the words or letters in the mark. Because the Applied-For Mark doesn't separate out the terms "NOBS" and "ACTIVE," it is possible that consumers will not view the terms as separate at all. And it is also possible that consumers will recall the term "ACTIVE" since it takes up more visual space and is a recognizable dictionary word as opposed to "NOBS." The examining attorney, however, did not consider any of these possibilities.

Turning to each of the specific Cited Marks, the differences between the marks are further revealed. In each instance, the Applied-For Mark and the Cited Marks are sufficiently different and so the "similarity of the marks" factor should be found in favor of registration.

i. The WEIGHTLOSS Mark

The only common term between the Applied-For Mark and the WEIGHTLOSS Mark is "NO BS." As discussed above, the Applied-For Mark could just as easily be read as a single term "NOBS," which already cuts against confusion. But even in making the unsupported assumption that consumers would understand these elements as being common between the marks, it isn't clear that "NO BS" is the dominant element of the WEIGHTLOSS Mark. While "NO BS" is circled and set apart, the eye is naturally drawn to the term WEIGHTLOSS, which appears in large font in the middle of the mark. The term WEIGHTLOSS takes up the most visual space in the mark, and although it is descriptive of the goods and services offered under the mark, consumers are just as likely or more to remember the term WEIGHTLOSS PROGRAM, as it is the most eye-catching element of the design. Unlike the terms in the Applied-For Mark, "NO BS," "WEIGHTLOSS," and "PROGRAM" are all distinct terms with spaces between them, whereas the Applied-For Mark's terms run together as one common phrase. This makes the marks look very different. Further, the terms "WEIGHTLOSS PROGRAM" in the cited mark and the term "ACTIVE" in the Applied-For Mark do not share any similar pronunciation or appearance; they have a different number of syllables and use different letters.

The commercial impression of each mark is different, as well. "WEIGHTLOSS PROGRAM" describes exactly the service provided under the mark: a program to lose weight. The connotation and meaning of the term is based on the expected results of the specific program offered under the mark: weight loss. As discussed in more detail below, there is no such connotation with the Applied-For Mark. The word "active" means "producing or involving action

or movement." November 9, 2021 Office Action, TSDR p. 16. Rather than connoting the *result* of the goods and services offered under the mark, the term speaks to action and movement with no reference or connotation to the result of such action. Thus, although the Applied-For Mark and the WEIGHTLOSS Mark could possibly be viewed as sharing a term, the similarity of the marks is otherwise low.

ii. The JUST YOGA Mark

The only semi-common element between the Applied-For Mark and the JUST YOGA Mark is "NOBS / NO B.S."—although this Cited Mark adds periods after B and S, and then a comma. Again, even if "NOBS / NO B.S." was understood to be the same for each mark, the JUST YOGA Mark appears on its face as a grammatically correct, complete sentence, meaning "No nonsense, just yoga." The Applied-For Mark, on the other hand, is arranged as one long term with no spaces or punctuation between any of the letters or words and grammatically cannot in any form be read as a full sentence. The JUST YOGA Mark even includes punctuation in the form of a comma to further reinforce how consumers should read (and thus remember) the mark. Therefore, consumers are more likely to remember the whole phrase of the JUST YOGA Mark, or even the "JUST YOGA" portion of the mark, as that portion is longer in appearance and thus takes up more visual space. And as to pronunciation, "JUST YOGA" and "ACTIVE" are completely different and use different letters, in addition to the fact that the "NOBS" portion of the Applied-For Mark and the "NO B.S." portion of the JUST YOGA Mark may be pronounced differently, as well.

The Applied-For Mark and the JUST YOGA Mark also have different connotations and commercial impressions. ACTIVE connotes vigorous movement rather than contemplation. November 9, 2021 Office Action, TSDR p. 16. Yoga, on the other hand, is a specific "system of

physical postures, breathing techniques, and sometimes meditation" derived from a philosophy "teaching the *suppression of all activity* of body, mind and will…".[2]

iii. The WELLNESS Mark

The dominant term of the WELLNESS Mark is not "NO BS."; it instead is "WELLNESS." The whole mark is designed to look like the term "WELLNESS" has been literally painted on top of the full mark. While the term "WELLNESS" barely fails to overlap "NO BS" or "PODCAST," "WELLNESS" is designed in a larger, decorative font. It appears in the middle of the full mark and is set apart with the "paint stripe" design element. Thus, consumers' eyes are naturally drawn to "WELLNESS," making it the dominant portion of the mark. And, of course, WELLNESS has no similarity to the Applied-For Mark.

The marks as a whole also have completely different appearances, because the Applied-For Mark contains one long term, whereas the WELLNESS Mark includes at least three (and arguably, four) separate terms. Each term is spelled and pronounced differently, with the potential exception of "NOBS / NO BS." The connotations of the marks are also different and create very distinguishable commercial impressions, as "WELLNESS" connotes overall health, while "ACTIVE" connotes movement, and there is no equivalent to the term "PODCAST" in the Applied-For Mark. Further, the WELLNESS Mark, like the WEIGHTLOSS and JUST YOGA Marks, describes exactly the goods and services offered thereunder: the WELLNESS Mark covers

[2] Applicant requests the Board take judicial notice of the Merriam-Webster definition of "Yoga", available at https://www.merriam-webster.com/dictionary/yoga. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format which were not made of record prior to appeal, and may do so upon an applicant's request. TMEP § 710.01(c).

a no-nonsense podcast about general health. This makes the mark as a whole descriptive, whereas the Applied-For Mark is merely suggestive of the goods and services offered.

iv. The WOMEN Mark

As with the other marks, the Applied-For Mark and the WOMEN Mark are distinguishable in appearance, pronunciation, connotation and commercial impression. The terms in the WOMEN Mark are all set apart from each other so that each term is distinct. This appears much differently than the Applied-For Mark, which has no spaces between any of its terms. The marks are also pronounced differently, as the terms "WOMEN" and "ACTIVE" don't sound or look alike, and the terms "NOBS / NO BS" may be pronounced differently, as well.

These marks also have different connotations and commercial impressions. The WOMEN Mark creates a commercial impression that the goods and services offered under the mark are for or about women, whereas the Applied-For Mark has no connotation regarding gender and instead merely suggests at movement and vigorous activity. This makes it likely that consumers will not incorrectly mistake the source of the goods under the Applied-For Mark because it does not have any connotation regarding gender; and the WOMEN Mark has no connotation regarding movement or activity.

b. Goods and Services

In the initial Office Action, the examining attorney put great weight into the use of the terms "nutrition" and "health" in the description of the goods and services for the Applied-For Mark, the WOMEN Mark, the WEIGHTLOSS Mark, and the WELLNESS Mark, calling the goods and services "identical." November 9, 2021 Office Action, TSDR p. 1.

"[I]f the goods or services in question are not related *or marketed* in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption

that they originate from the same source, then, even if the marks are identical, confusion may not be likely." T.M.E.P. § 1207.01(a)(i) (emphasis added). Likelihood of confusion should not be found where the circumstances surrounding their marketing would not give rise to a mistaken belief that they emanate from the same source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 U.S.P.Q.2d 1713, 1722 (Fed. Cir. 2012). While the Applied-For Mark and each of the Cited Marks cover goods and services in International Class 41, the goods and services are not identical and are thus discussed individually.

i. The WOMEN and WEIGHTLOSS Marks.

The WOMEN Mark and the WEIGHTLOSS Mark both cover broad education services, podcasts, online newsletters, articles and advice columns "in the field of weight loss, weight control, nutrition, health and lifestyle wellness." November 9, 2021 Office Action, TSDR pp. 8, 11. The WEIGHTLOSS Mark also covers downloadable educational course materials in the same field under Class 9. *Id* at TSDR p. 11.

Both the WOMEN and WEIGHTLOSS Marks cover goods and services in the fields of "weight loss" and "weight control." The WEIGHTLOSS Mark in particular has put such focus on weight loss at the forefront by including it expressly as part of the mark itself. These identifications cut against the relatedness of the goods and services because the Applied-For Mark specifically excludes weight loss and/or control (or any other results related to weight).

The circumstances surrounding the marketing of the Applied-For Mark further distinguishes it from marks offering weight loss/control goods to the point that it would be unlikely for a consumer to come to the incorrect assumption that the goods and services under the Applied-For Mark emanate from the same source as those offered under the WEIGHTLOSS and WOMEN Marks. This is true despite the common terms of "nutrition" and "health" in the identification of

the goods and services under all three marks, because although those terms can be related to weight loss/control, "nutrition," "health" and "fitness" are not *per se* related to weight loss/control, especially under the specific circumstances of Thore's marketing of the Applied-For Mark.

Whitney Way Thore ("Whitney") features prominently in the advertising and marketing of the services covered by the Applied-For Mark. *See* November 23, 2022 Request for Reconsideration, TSDR p. 48 (featuring photo of Whitney). As mentioned above, Whitney is well known as the star of *My Big Fat Fabulous Life* and a viral video called *A Fat Girl Dancing*. In other words, Whitney has been well-known as "a fat girl" or having a "big fat fabulous life" and promotes a message of body positivity and acceptance through the use of Thore's prior registered marks (discussed below in section III.c) and the Applied-For Mark, reinforcing the message of "No Body Shame" (i.e., "No B S."). November 23, 2022 Request for Reconsideration, TSDR pp. 2–3. "'Body positivity' refers to the movement to accept our bodies, regardless of size, shape…and physical abilities" and is understood to "celebrate diversity in bodily *aesthetics*." November 23, 2022 Request for Reconsideration, TSDR p. 55 (emphasis added). Indeed, Thore's prior registrations (discussed below in section III.c) are in part for "positive self-esteem despite one's obesity and respecting people who are obese." January 30, 2023 Request for Reconsideration Denied, TSDR p. 1. Thus, consumers encountering the Applied-For Mark on the identified goods and services are unlikely to assume that those goods and services are from the same source as goods and services that heavily focus on weight loss/control. And conversely, consumers encountering the goods and services under the WOMEN and WEIGHTLOSS Marks are unlikely to confuse the source of goods with the Applied-For Mark, since the Applied-For Mark is marketed with a focus on body positivity and acceptance.

ii. The WELLNESS Mark.

The WELLNESS Mark covers "[e]ntertainment and educational services, namely providing podcasts in the field of maintaining physical and mental health by means of a variety of lifestyle practices" and "blogs featuring information on the proper maintenance of physical and mental health by means of a variety of lifestyle practices." November 9, 2021 Office Action, TSDR p. 5.

The Applied-For Mark does not include any mention of mental health and none of the evidence provided by the examining attorney links the provision of mental health goods and services with physical fitness or nutrition goods and services. *See generally* January 30, 2023 Request for Reconsideration Denied. Conversely, the WELLNESS Mark does not expressly cover physical fitness or nutrition. Additionally, the Applied-For Mark does not cover podcasts or blogs. Further, just as Whitney features prominently in the marketing of the Applied-For Mark (as discussed above), so do the hosts of the podcast under the WELLNESS Mark. November 23, 2022 Request for Reconsideration, TSDR p. 50. All of these factors weigh against consumer confusion as to source, despite the shared use of the term "health" in marks' goods and services.

iii. The JUST YOGA Mark

The JUST YOGA Mark, both in its registration and on its face, provides only yoga instruction services. November 9, 2021 Office Action, TSDR p. 14. The Applied-For Mark, on the other hand, expressly excludes any yoga instruction services. May 6, 2022 Amendment, TSDR p. 1. Thus, a consumer seeking yoga instruction is unlikely to confuse the source of such instruction with the services offered under Class 41 by the Applied-For Mark, since the Applied-For Mark does not include yoga instruction. As to the yoga mats offered under the Applied-For Mark, such goods are comparable to the other exercise "accessories": dumbbells, jump ropes, and

water bottles for which the same mark was approved via the child application. December 13, 2022 Notice of Allowance, Serial No. 90977849.[3]

c. Peaceful Coexistence

Applicant is the owner of the following U.S. Trademark Registrations:

(a) Reg. No. 4881469 for a composite logo of NO BS for certain goods and services in Classes 25, 35 and 41. Filing/priority date of June 5, 2015, with asserted first use in commerce of at least as early as April 10, 2015 (Applicant's "NO BS Logo Mark").

(b) Reg. No. 5139772 for NO BODY SHAME for certain services in Classes 35 and 41. Filing date of February 14, 2017, with asserted first use in commerce of at least as early as January 10, 2014.

May 4, 2022 Response to Office Action, TSDR p. 3.

Additionally, at the time of registration of the Cited Marks, Applicant was also the owner of Reg. No. 4901018 for a composite logo of NO BS ACTIVE for the same goods listed in Applicant's child application, with a filing/priority date of February 16, 2016 and asserted first use in commerce of at least as early as April 15, 2015 (Applicant's "NO BS ACTIVE Logo Mark"). *Id.*

To Applicant's knowledge, there have been no instances of actual confusion between the Cited Marks on one hand, and Applicant's prior registrations or the Applied-For Mark on the other hand. Notably, there was peaceful coexistence without actual confusion between Applicant's NO BS ACTIVE Logo Mark, though each of the Cited Marks claim first use dates ranging from 2017 through 2020. November 9, 2021 Office Action, TSDR pp. 5, 8, 11, 14. Similarly, there has been peaceful coexistence without actual confusion between Applicant's NO BS Logo Mark and all of the cited registrations. This is evidence of years of peaceful coexistence without confusion.

[3] The Notice of Allowance was issued after the Applicant's deadline to respond to the June 8, 2022 Final Office Action.

IV. Conclusion

For the foregoing reasons, Applicant respectfully requests that the Trademark Trial and Appeal Board reverse the examining attorney's refusal and approve Applicant's application for publication.

Respectfully submitted,

s/David W. Sar/
David W. Sar
N.C. State Bar Member (#23533)
Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
2000 Renaissance Plaza
230 North Elm Street
Greensboro, NC 27401
Office: 336-271-3175
Fax: 336-232-9075
dsar@brookspierce.com
Attorney for Applicant