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

Ex Parte Appeal - Serial No.	98209334
Appellant	ALLCITY Network, Inc.
Applied for mark	KNUX
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Submission	Appeal brief
Attachments	KNUX Appeal Brief_FINAL.pdf(308110 bytes)
Appealed class	Class 025. First Use: Mar 27, 2020 First Use In Commerce: Mar 27, 2020 All goods and services in the class are appealed, namely: Clothing, namely, t-shirts, polos, tanks, sweatshirts, hoodies, jackets; headwear, namely, sports caps and hats
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Date	11/07/2025

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

In re Application of ALLCITY Network, Inc.
Serial No. 98209334
Filed: October 4, 2023
Mark: KNUX

Examining Attorney: David I
Law Office: 114

REPLY BRIEF ON APPEAL FOR APPELLANT

INTRODUCTION AND HISTORY

Applicant, ALLCITY Network, Inc. ("Applicant" or "ALLCITY"), hereby appeals the Examining Attorney's Denial of Applicant's Request for Reconsideration After Final Action dated September 6, 2025, and the Final Refusal to register the above-identified mark dated October 7, 2024, and respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney's decision.

APPLICANT'S TRADEMARK

Applicant seeks registration on the Principal Register of its Mark:

"KNUX"

For the following goods:

Class 025
Clothing, namely, t-shirts, polos, tanks, sweatshirts, hoodies, jackets; headwear, namely, sports caps and hats.

PROCEDURAL POSTURE

The Examining Attorney issued a Final Office Action ("FOA") on October 7, 2024 taking the position that Applicant's mark KNUX ("Applicant's Mark" or the "Mark") is likely to be confused with the Cited Mark, "NUX", U.S. Reg. No. 3511969, and refused registration of Applicant's Mark under the Lanham Act's Section 2(d). On April 7, 2025, following a Request for Extension to File a Response filed on January 7, 2025, the Applicant submitted a response (the "Response") to overcome the FOA. On September 6, 2025, the Examining Attorney denied Applicant's Response, maintaining the Section 2(d) refusal and the arguments raised in the FOA.

ISSUE

The issue on appeal is whether there is a likelihood of confusion between the marks,

"KNUX" for "*Clothing, namely, t-shirts, polos, tanks, sweatshirts, hoodies, jackets; headwear, namely, sports caps and hats*"

and,

"NUX" for "*clothing, namely, blouses, sport shirts, t-shirts, sweatshirts, knit shirts, seamless shirts, shirts, tank tops, short sleeve tops, long sleeve tops, seamless tops, tops, bras, sweatshorts, sweatpants, shorts, seamless shorts, miniskirts, skirts, seamless pants, pants, pantsuits, pullovers, slacks, trousers, jackets, hooded jackets, bodysuits, camisoles, dresses, jumpsuits, overalls, cardigans, caps, sweaters and vests*."

ARGUMENT

There is not a likelihood of confusion between the marks KNUX and NUX.

I. Background.

Applicant

ALLCITY is a leading national sports media company with a significant and dedicated following across the country. ALLCITY has built a strong presence in major sports markets across the country, engaging fans with in-depth coverage of their favorite sports, multimedia content, and community-driven experiences. Its portfolio of sub-brands includes a multitude of registered trademarks, including CHGO, DNVR, PHLY, and PHNX to represent its hubs across the nation. Each of these brands has cultivated a loyal fan base, reinforcing ALLCITY'S reputation as a powerhouse in sports media. More broadly, each of ALLCITY'S sub-brands follows a deliberate branding scheme using a four-letter call sign. Accordingly, the use of four-letter call signs has become synonymous with the ALLCITY brand in the sports media network.

It should come then as no surprise that at the heart of ALLCITY'S brand identity is yet the most distinctive four-letter call sign – KNUX – a mascot which has become the "face" of ALLCITY. Unlike ALLCITY'S other marks that distinguish specific regions, KNUX serves as the unifying mascot, embodying the collective spirit of ALLCITY across all of the regions. Designed to be adaptable, KNUX embodies the characteristics of each of ALLCITY'S locations, yet remains uniquely consistent with

ALLCITY'S house name. As demonstrated in the Response, some variations of KNUX as adapted to each ALLCITY sub-brand are depicted below:

Regardless of the specific embodiment, each above depiction is KNUX acting as the face of ALLCITY'S goods and services. Each distinctive KNUX mascot functions as a trademark in its own right -- depicting the foam finger mascot holding a pennant flag that incorporates the corresponding region-specific trademark. Each is called and known to consumers as "KNUX", which further reinforces the source-identifying function of the mark tied to ALLCITY'S broader brand identity. The KNUX mark is not tied to any one location but instead serves as a rallying emblem across all ALLCITY brands, reinforcing the company's overarching mission to bring sports fans together under one cohesive sports media network, despite their specific team allegiance.

Registrant

The "NUX" mark is owned by Nux Group, Inc. dba NUX Active, a Los Angeles-based apparel company founded in 2008 that only sells women's activewear, such as leggings, sports bras, tops, and loungewear. Its Italian-produced, sustainable-products are designed specifically for workouts and activewear, focusing on the quality and materials of the goods. The "NUX" mark operates as the brand's house mark, applied across a range of women's athleisure sub-lines, each of which is consistently branded with the "NUX" branding to reinforce the company's overarching identity. None of Registrant's products utilize sports symbolism or support a specific sports team. In fact, none (or very little of) Registrant's products use any graphic design, but instead consist primarily of single-color schemes.

Unlike Applicant, Registrant does not sell unisex clothing. A statement from the "About Us" page on the NUX website (https://nuxactive.com/pages/who-we-are) reads: "We are feminine. We are fierce…We pride ourselves on striking a balance between agile performance and preserving natural resources through sustainable fabrics, packaging, and developing quality goods that last, we strive to strike a balance between agile performance and preserving natural resources." As Applicant's goods are specifically tailored to collegiate and professional sports teams' fans, Registrant's goods are specifically tailored to women with a "conscious workout lifestyle". See https://nuxactive.com/collections/sustainable.

II. The Marks "KNUX" and "NUX" Differ in Appearance and Commercial Impression.

Likelihood of confusion between a mark for which registration is sought and a previously registered mark is determined on a case-by-case basis, applying the factors set out in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973), and in *Packard Press, Inc. v. Hewlett-Packard Company*, 227 F.3d 1352, 1356, 56 USPQ 1351 (Fed. Cir. 2000). The most relevant du Pont factors are (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; and (2) the similarity or dissimilarity and nature of the goods and services described in the application or registration of the mark, or in connection with which a prior mark is in use. TMEP § 1207.01; 15 U.S.C § 1052(d). In most cases, the following are also pertinent: (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and the buyers to whom sales are made; (6) the number and nature of similar marks in use on similar goods and services; and (13) any other established fact probative of the effect of use. In a particular case, any of the *du Pont* factors may play a dominant role, and, in some cases, a single factor may be dispositive. See *Kellogg Co. v. Pack'Em Enterprises Inc.*, 951 F.2d 330, 333, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("we know of no reason why…a single du Pont factor may not be dispositive"). However, not all of the du Pont factors are relevant or of similar weight in every case. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406, 41 USPQ 2d 1531, 1533 (Fed. Cir. 1997); *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 850, 23 USPQ2d 1471, 1473 (Fed. Cir. 1992); *In re Shell Oil Co.*, 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). "The fundamental inquiry mandated by Section 2(d) goes to the **cumulative effect of**

differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 U.S.P.Q. 24, 29 (CCPA 1976) (emphasis added).

The purpose of the Lanham Act's Section 2(d) is twofold: to prevent consumer confusion, and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'n Fly, v. Dollar Park & Fly*, 469 U.S. 189, 198, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64, 34 USPQ2d 1161, 1163 (1995); *In re Du Pont*, 177 USPQ at 566. The USPTO is "not concerned with mere theoretical possibilities of confusion, deception or mistake or with *de minimis* situations but with the practicalities of the commercial world, with which the trademark laws deal." *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 717, 732 USPQ 2d 1388, 1391 (Fed. Cir. 1992). "An important beneficiary of the trademark system is the public," which "has a great interest in administration of the trademark law in a manner that protects against confusion." *Guthrie Healthcare System v. ContextMedia, Inc.*, 826 F.3d 27, 50 (2d Cir. 2016).

i. Appearance

To begin, the visual dissimilarity is obvious. Applicant's Mark is four letters and starts with a "K". Conversely, the Registered Mark begins with an "N". Without the hard-edged "K" at the beginning, NUX appears more condensed and minimalistic, making it easily distinguishable from Applicant's Mark. The missing letter also alters the spacing and proportions of the Cited Mark when compared to "KNUX," ensuring that the two do not appear visually identical when presented in branding, advertising, or product packaging.

ii. Commercial Impression

"KNUX" and "NUX" also insinuate different commercial impressions. Courts have found that "otherwise similar marks are not likely to be confused if they are used in conjunction with clearly displayed names, logos, or other source-identifying designations." *Peoples Federal Savings Bank v. People's United Bank*, 672 F.3d 1, 13 (1st Cir. 2012). "[I]ncorporating a house mark alongside other elements in a word mark significantly diminishes any potential likelihood of confusion." *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622 (8th Cir. 1987) (emphasis added). The use of a house mark in conjunction with the rest of the

mark minimizes the possibility that consumers would confuse the two marks. *Reply All Corp. v. Gimlet Media, LLC*, No. 20-952-cv, at *9 (2d Cir. Feb. 19, 2021).

Applicant's Mark serves as the overall mascot for the ALLCITY brand and almost always appears in conjunction with the mascot design for Applicant. Doing so provides the context that "KNUX" is a coined term for "knuckle" as depicted in the design that KNUX takes on in each region. Yet ALLCITY'S consumers have become so familiar with KNUX that they understand the reference without visual assistance. To be even more specific, consumers encountering Applicant's KNUX mark understand it not as a reference to *all* of Applicant's merchandise, but rather as a unique series of products distinguished by the KNUX mascot design. In this way, KNUX operates similarly to how well-known brands designate individual collections or product lines—signaling to consumers that the item belongs to a distinctive theme within a larger catalog, rather than serving as the umbrella brand for all goods offered by the company. The consistent use of the word KNUX with the visual cue of the mascot significantly strengthens the commercial impression of the mark. Again, as the Mark suggests, it is a fun depiction of a "foam finger." A foam finger is typically stylized colored foam hand, with the hand clenched and the index finger outstretched, signaling the colloquial jester for "number one." Foam fingers have become iconic symbols of sports fandom. (Response Exhibits A, B, and D.) Applicant's Mark "KNUX" is a play on the word "knuckle" in reference to the foam finger.

Similarly, like *General Mills* when a mark is consistently presented in conjunction with a distinctive house mark, the likelihood of confusion with another mark is significantly reduced. Consumers are accustomed to perceiving a house mark as an indicator of source, and thus, they tend to rely on it also to distinguish between different entities offering similar goods or services. In this case, the mark KNUX, when used together with the ALLCITY house mark, would be recognized by consumers as part of the broader ALLCITY brand family. The presence of the ALLCITY house mark in conjunction with KNUX, therefore serves to assist identifying the commercial origin of the goods, minimizing any potential confusion with uses of KNUX alone.

The Cited Mark does not carry the same connotation, or even an inherent secondary meaning apart from what Registrant may have cultivated in goodwill. Instead, the Cited Mark is almost always used in connection with the word "Active," descriptive of the brand's products—women's "activewear". (Response Exhibits E and F.) ALLCITY does not sell women's activewear.

The visual representation of "KNUX" in commerce with the ALLCITY mascot establishes a unique brand association that is absent in the Cited Mark such that if consumers were to encounter the mascot independently of the wordmark consumers would immediate say "that's KNUX." This commercial usage ensures that Applicant's Mark is perceived as a distinctive character-driven symbol, further reducing any likelihood of confusion with NUX.

III. There Is No Likelihood of Confusion Between Applicant's Mark and the Cited Mark Because the Marks' Respective Goods Differ.

The goods and services of the respective marks must also be compared to determine if they are related or if the activities surrounding their marketing are ***such that confusion of origin is likely***. See *Du Pont*, 476 F. 2d at 1357 (emphasis added). The relatedness of goods and services is determined from the perspective of the consuming public. "Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services." *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002).) (emphasis added). The mere fact that "two goods are used together . . . does not, in itself, justify a finding of relatedness." *In re Station Casinos, Inc*. No. 76368583 (T.T.A.B. May 1, 2004) (establishing that "LOCALS FAVORITE" for "casino services" and "LOCAL FAVORITES" for "business directories in resort communities" are distinct, stating while a casino and a resort might be related, it cannot be inferred that consumers of these products or services would assume a shared origin). Similarly, goods and services are not necessarily related just because they "coexist in the same broad industry." *Progressive Distribution Servs., Inc. v. United Parcel Serv. Inc.*, 856 F.3d 416, 431-32 (6th Cir. 2017). Instead, the relatedness inquiry focuses on whether goods or services "that are similarly marketed and appeal to common customers

are likely to lead consumers to believe that they 'come from the same source or are somehow connected with or sponsored by a common company.'" *Id*.

Courts have found no likelihood of confusion exists between similar marks in goods encompassed in the broad fields of healthcare and medical devices, or services amongst real estate brokers, marketing companies, and shipping and fulfillment companies. *Astra Pharmaceutical Products, Inc. v Beckman Instruments, Inc.*, 718 F.2d 1201, 1203 (1st Cir. 1983) (there is no likelihood of confusion between the use of "ASTRA" for local anesthetic preparation and "ASTRA" for computerized blood analyzer machines, although both could be designated as "healthcare" products); *In re Inspired Technologies, Inc.*, No. 77272899 (TTAB January 19, 2011) (non-precedential) (finding no confusion for "SMARTDOSE" for "oxygen delivery devices" and "SMART DOSE" for "infusion pumps for delivering liquid pharmaceutical preparations to patients", both in Class 10); *Homeowners Group v. Home Mktg. Specialists*, 931 F.2d 1100 (6th Cir. 1991); *Progressive Distribution*, 856 F.3d at 432. Clothing is no different.

Nevertheless, the burden to establish relatedness rests with the Examining Attorney. The Examining Attorney must provide evidence showing that the goods and services are related enough to support a finding of likelihood of confusion. See, e.g., *In re White Rock Distilleries Inc.*, No. 77093221 (TTAB 2009); TMEP § 1207.01(b); *AutoFair Investors, LP*, No. 76012699 (TTAB June 16, 2005) (non-precedential) (finding no confusion between "AUTOFAIR" for "automobile dealership services" and "AUTOFAIR" for "conducting exhibitions in the field of custom, collector and specialty cars and trucks, and car parts" stating that the examining attorney failed to establish that consumers of these services would assume they emanate from a common source.)

Here, the Examining Attorney asserts that the goods at issue are related simply because they both fall under the broad category of "clothing." However, a closer examination of each party's commercial identity and product offerings shows that they are fundamentally different in nature, appearance, function, trade channels, and target audience. Such a broad generalization by the Examining Attorney is not the correct analysis.

Applicant's Mark, KNUX, is associated with apparel tied to a national sports media company, which operates regional sports media brands including CHGO, DNVR, DLLS, PHLY, and PHNX. These brands offer city-specific sports media content. KNUX functions as a unifying mascot across these markets. The clothing offered under the KNUX mark includes basic apparel items, such as t-shirts, crewnecks, and sports hats, featuring bold designs tailored to the specific sports teams and fanbases of these respective cities. (Response Exhibit D). Applicant's goods do not focus on sustainability or a specific "fit". The purpose of the apparel is to get the message across—that the consumer is a die-hard sports fan.

By contrast, the NUX mark is used *only* with women's activewear. As stated on Registrant's website, NUX specializes in women's-only workout clothes, activewear, and loungewear—including leggings, bras, tanks, joggers, and crop tops—with a focus on high-performance, form-fitting athletic wear made with Italian knitting technology and sustainable materials. (Response Exhibits E–H). None of Registrant's goods indicate any connection to, or support for, a specific sports team or city, or sports media in general. In fact, none of Registrant's goods have artistic design elements at all. Instead, Registrant's branding centers around a minimalistic, chic, and eco-conscious aesthetic which is a stark contrast from the bold, loud sports fan identity embodied by Applicant's KNUX-branded goods.

Applicant's KNUX mark refers directly to the name of the foam finger mascot, and is used by Applicant as the designation for a specific line of products built around that mascot. In this way, KNUX serves not as a general reference to all of Applicant's merchandise, but as the brand name of a distinct sub-line of clothing within Applicant's overall apparel offerings, and is always used in conjunction with other ALLCITY-trademarks. By contrast, Registrant's NUX mark functions as the house mark for the company and appears as the only branding on nearly any product Registrant offers. Thus, the NUX mark operates as the overarching brand, and consumers encountering it understand that the Cited Mark represents the company itself and its portfolio of offerings, rather than any single, specific product. The NUX wording on the product would likely be the only way a consumer would be able to identify Registrant's goods in the physical world since the apparel itself does not have unique identifiers- such as ALLCITY'S city- and team-specific designs. In this unique way, a consumer of KNUX apparel who encounters a consumer of NUX

apparel, each wearing the corresponding merchandise, would not be confused by the source of the two products.

Not only are the aesthetics of the clothing different, but the material, sizing, construction, and quality of each party's goods also serve as clear indicators that the products cater to highly specific audiences. Courts have recognized that different clothing styles appeal to different purchasers and thus, are not likely to be confused. In *Garan Inc. & Garan Servs. Corp. v. Manimal, LLC,* Opp. No. 91232774 (T.T.A.B. Feb. 13, 2020) (not precedential), the Board found that the marks "MANIMAL" and "GARANIMAL", each used for clothing, were not likely to be confused, in part because they are marketed to different consumers. In *Manimal*, the Board stated that, through its advertising, the "MANIMAL" consumers were "predominantly male, in the fitness industry, and between the ages of 21-40." *Id.* at 13. On the other hand, the Board stated "[t]he consumers that buy Garanimals are either parents or grandparents of the children that they are trying to dress." *Id*. at 14. Accordingly, the Board concluded that because "the parties' clothing are distinct product lines within the larger apparel industry…and sold to different classes of consumers, it is unlikely that the same consumers will encounter the parties' clothing in same marketing milieu." *Id.* at 15.

That is precisely the reasoning here. Women's performance workout clothing differs significantly from casual cotton t-shirts and sports hats in terms of materials, design, and production techniques. Unlike basic cotton tees, for example, performance apparel typically uses moisture-wicking, stretchable, and breathable technical fabrics designed to support athletic movement and regulate body temperature. The cut and construction of performance wear, especially for women, is tailored for function, and incorporate compression elements, flatlock seams, and certain fits to enhance comfort and mobility during physical activity. Further, Registrant's apparel is built from sustainable fabrics and manufactured in Italy. These distinctions result in a fundamentally different product category from casual cotton or polyester apparel produced in China, for example.

In short, concluding Registrant's women's athleisure and ALLCITY's sports fan merchandise are likely to be confused because they both fall under the broad umbrella of "clothing" is akin to saying candles

and paintings are likely to be confused because they both fall under the broad umbrella of "home decor." They may both be purchased to increase the aesthetic of the home, but they serve entirely different purposes, appeal to different audiences, and are purchased in entirely different contexts. Accordingly, the parties' respective goods, together with their commercial impressions and consumers' expectations of them, dispel any likelihood of confusion.

IV. There Is No Likelihood of Confusion Between Applicant's Mark and the Cited Mark Because the Trade Channels and Relevant Consumers for Each Mark's Goods are Distinct.

Again, the "practicalities of the commercial world," where consumers experience the goods and services and their respective marks firsthand, outweigh the "mere theoretical possibilities of confusion, deception or mistake" that an examining attorney may contemplate. *Electronic Design*, 21 USPQ2d at 1391. Under trademark law, the presumption is that goods and services are offered in all the normal trade channels, absent limitations set by the applicant. However, in a likelihood of confusion analysis, if the examining attorney fails to submit evidence as to what the "normal trade channels" are in a matter, and refuses registration, the Board may reverse the determination. See *In re Herbal Science Group, LLC*, 96 USPQ2d 1321 (TTAB 2010). "[I]n the twenty-first century, the Internet has become the venue for the advertising and sale of all manner of goods and services, so the fact that the goods or services of the parties are both found on the Internet proves little, if anything, about the likelihood that consumers will confuse similar marks used on such goods or services." *Reply Al Corp. v. Gimlet Media, LLC*, No. 20-952-cv (2nd Cir. 2021). "[T]he fact both products are offered for sale on the Internet does not create a danger of confusion among the Web-surfing public, and thus that the marketing channels used for the products are not similar." *Glow Industries, Inc. v. Lopez*, 273 F. Supp. 2d 1095, 1127 (C.D. Cal. 2003). In other words, the Internet cannot be classified as one trade channel, nor does the fact two products are sold on the Internet create any likelihood of confusion.

In fact, the Board in *Manimal* found that by exclusively selling though certain webpages, yet neither product was sold on overlapping webpages, the goods were not sold through the same channels of trade. In *Manimal*, the GARANIMAL clothing was sold exclusively at Walmart and Walmart's online service. It

later expanded and was sold through Garanimal's own website and advertised on its own Facebook and Instagram pages. Similarly, the MANIMAL clothing was sold exclusively through its own website, and advertised in its own blog posts and social media accounts, including Instagram, Facebook and Twitter. The Board concluded that "the parties' clothing are distinct product lines within the larger apparel industry, *sold through different channels of trade*, and sold to different classes of consumers, it is unlikely that the same consumers will encounter the parties' clothing in same marketing milieu." *Manimal* at p. 15 (emphasis added).

The burden is on the Examining Attorney to show that the ordinary trade channels for Applicant's goods overlap with Registrant's trade channels and class of consumers. Not only has the Examining Attorney failed to establish what the "normal" channels of trade are for the relevant goods, but has also outright rejected the notion without consideration, that the perspective of the consumers in the marketplace is what should be analyzed. From that point of view, the two Marks are distinct, being sold and marketed to entirely different groups of consumers, though independent and non-overlapping channels of trade. Applicant's goods are sold exclusively through Applicant's own website and are not available in any brick-and-mortar retail locations. By contrast, Registrant's products are distributed through its own website, in addition to a limited number of boutique fitness studios (See Response Exhibit G). Much like the distinctions in *Manimal*, consumers of ALLCITY'S sports team fan gear are not likely to be confused when encountering women's only athleisure. In the same sense, a consumer looking to purchase workout leggings and a sports bra is not likely to be confused when encountering Applicant's "Day Drinking Champions" graphic tee. The consuming public is adept to deciphering between online retail stores. Because Applicant's clothing is sold exclusively thought their website, there exists virtually no opportunity for the goods to be confused. And if a consumer were looking for the Registrant's products, and somehow came across Applicant's website, they would immediately know they are not in the right place. Accordingly, the differences in classes of consumers and channels of trade pose no likelihood of confusion.

V. There Is No Likelihood of Confusion Between Applicant's Mark and the Cited Mark Because of the Number of Marks on the Registry and Ongoing Co-Existence of the Marks.

Finally, the number and nature of similar marks used in connection with similar goods weighs against a finding of likelihood of confusion. In a crowded marketplace where there is a heavy existence of similarly situated marks, each mark is afforded relatively narrow rights (and protections) for the goods listed in its registration, and its ability to prevent other similar marks in the marketplace is lowered. See *Palm Bay*, 396 F.3d at 1373-74. "[A] mark which is hemmed in on all sides by similar marks on similar goods cannot be very 'distinctive'. It is merely one of a crowd of marks. In such a crowd, customers will not likely be confused between any two of the crowd and may have learned to carefully pick out one from the other." *Miss World (UK) Ltd. v. Mrs. Am. Pageants, Inc.*, 856 F.2d 1445, 1449 (9th Cir. 1988). In today's market, consumers are conditioned to discern between goods and their sources.

"Evidence of actual confusion is not invariably necessary to prove likelihood of confusion; on the other hand, absent evidence of actual confusion, when the marks have been in the same market, side by side, for a substantial period of time, there is a strong presumption that there is little likelihood of confusion." *Oriental Fin. Grp., Inc. v. Cooperativa De Ahorro Y Crédito Oriental*, 832 F.3d 15, 30-31 (1st Cir. 2016). A lack of evidence of actual confusion weighs against a finding of likely confusion when competing marks have competed in the same market, even for less than five years. See *Pignons S. A. de Mecanique de Precision v. Polaroid Corp*., 657 F.2d 482, 490 (1st Cir. 1981) (finding four years of coexistence sufficient), see *also Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 377 (1st Cir. 1980) (finding three and a half years of coexistence sufficient).

A comprehensive search of the USPTO database for KNUX-formative marks, including spelling and auditory variations such as NUX, NUCCS, and KNUCKS, reveals at least ten registered trademarks in classes related to Class 25. (Response Exhibit J). Such registration and coexistence of these KNUX-formative marks, particularly those that share similar classifications demonstrate a precedent of tolerance and non-conflict within the market.

The Examining Attorney simply ignores the holding in *Oriental Fin. Grp., Inc.* Applicant's Mark has been used in commerce for over five years, beginning in March 2020. Throughout this time, Applicant's Mark and the Cited Mark have coexisted without notice of potential or actual confusion. This is

understandable given the reasons stated herein, but most notably, the Examining Attorney originally cited US Reg. No. 5140329 against Applicant's Mark, which was registered in 2017 and coexisted in the exercise industry with the NUX Cited Mark from 2007 to 2023 (16 years) without issue. Applicant's Mark will not cause confusion with the Cited Mark.

VI. Conclusion.

The Lanham Act's provisions prohibiting trademark infringement, 15 USC §§ 1114(1) and 1125(a), exist to protect consumers from confusion in the marketplace. Here, the refusal citing a Section 2(d) likelihood of confusion with the Cited Mark, NUX, should be withdrawn given that Applicant's Mark and the Cited Mark differ in appearance and commercial impression. The goods, including their characteristics, qualities, materials, and purposes are deliberately distinct, and their respective markets, relevant consumers, and trade channels are so specific that there is no likelihood of confusion between the marks at issue. While it is true that sports fans could also purchase athleisure, consumers are highly educated as to the differences regarding the aesthetic, fit, material, functionality, price, and intended use of the two types of apparel. Not only that, but Applicant's and Registrant's respective goods are sold through entirely distinct channels of trade, namely, their individual websites. Consequently, there has been no consumer confusion in the previous five years. Consumer confusion will not suddenly occur as a result of Applicant's Mark being registered. Thus, Applicant respectfully requests that the Board overturn the Examining Attorney's refusal and issue an Order approving Applicant's Mark for publication.