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Filing date: **09/25/2018**

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

Proceeding	87345046
Applicant	Here for the Girls, Inc.
Applied for Mark	HERE FOR THE GIRLS
Correspondence Address	DUNCAN G BYERS PENDER & COWARD PC 222 CENTRAL PARK AVENUE SUITE 400 VIRGINIA BEACH, VA 23462 UNITED STATES dbyers@pendercoward.com, cholland@pendercoward.com 757-502-7396
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Filer's Name	Duncan G. Byers
Filer's email	dbyers@pendercoward.com, cholland@pendercoward.com
Signature	/Duncan G. Byers/
Date	09/25/2018

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Address

DUNCAN G. BYERS
PENDER & COWARD PC
222 CENTRAL PARK AVENUE
SUITE 400
VIRGINIA BEACH, VA. 23455
UNITED STATES

Email:

dbyers@pendercoward.com;
cholland@pendercoward.com

Filer's Name
Filer's email
Signature
Date

Duncan G. Byers
dbyers@pendercoward.com
/Duncan G. Byers/
09/25/2018

APPLICANT'S EX PARTE APPEAL BRIEF

I. SUMMARY

Applicant appeals Examiner's unacceptable specimen and Section 2(d) (likelihood of confusion) refusals of registration.

Applicant's applied-for Mark "Here for the Girls" is used in conjunction with charitable services, in particular providing support to younger women (usually under the age of 51) who have been diagnosed with and/or treated for breast cancer. The Examiner refused registration for two reasons: 1) an unacceptable specimen, which Applicant respectfully submits is cured by the submission of a new specimen with this Appeal, and 2) a refusal under Section 2(d) for being

likely to cause confusion with the registered mark “For the Girls” in Class 035. Applicant filed for registration in Class 045.

For the reasons stated herein, Applicant respectfully submits that Examiner’s refusal to register should be withdrawn, and/or the Application should be allowed to proceed to publication.

II. PROSECUTION HISTORY

Applicant filed the Application on February 22, 2017, seeking registration on the Principal Register for the mark HERE FOR THE GIRLS in standard characters in connection with “Charitable services, namely, providing emotional support services for improvement of young womens’ lives affected by Breast Cancer by means of promoting awareness along with in-person and online support” in Class 045.

The Examiner issued an Office Action on May 22, 2017, refusing registration under Section 2(d) for likelihood of confusion with the mark U.S. Registration No. 4234626 (“FOR THE GIRLS”) (the ‘626 Mark). The ‘626 Mark was registered in Class 035 for “Promoting public awareness of breast cancer over the Internet.” In support of that refusal, Examiner stated that:

“In the present case, the applied-for mark “HERE FOR THE GIRLS” merely adds the term “HERE” to the registered mark “FOR THE GIRLS”. Adding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). In the present case, the marks are identical in part as both contain the identical wording “FOR THE GIRLS”. (Internal citations omitted).

Because the marks look and sound similar and create a similar commercial impression, the marks are considered similar for likelihood of confusion purposes.”

Further, the Examiner found that the services were “of a kind that may emanate from a single source under a single mark.” The Examiner stated that services connected with

Applicant's Mark and Registrant's Mark "are of a kind that may emanate from a single source under a single mark."

Examiner also refused registration on the grounds that the specimen did not show the applied-for mark in use in commerce in connection with the services.

On November 20, 2017, Applicant submitted a Voluntary Amendment the description of services from "Charitable services, namely, providing emotional support services for improvement of young womens lives affected by Breast Cancer by means of promoting awareness along with in-person and online support" to "Charitable services, namely, providing emotional support services for improvement of young womens lives affected by Breast Cancer by means of with in-person and online support".

On November 21, 2017, Applicant submitted a Response to Examiner's Office Action of May 22, 2017. In that Response, Applicant argued that the Amendment filed on November 20 cured Examiner's rejections.

On December 13, 2017, Examiner issued a Final Office Action, reiterating the unacceptable specimen and Section 2(d) (likelihood of confusion) refusal.

Applicant filed a Notice of Appeal and a Request for Reconsideration on June 13, 2018. The Request for Reconsideration was denied on July 2, 2018 and this Appeal was resumed.

III. ARGUMENT

1. Unacceptable specimen refusal of registration.

In response to Examiner's unacceptable specimen refusal of registration, *See Exhibit 1*, Declaration of Rene Bowditch (the "Bowditch Decl.") with which is provided a screenshot of the website www.hereforthegirls.org, attached as Exhibit A to the Bowditch Decl., Applicant has submitted a specimen which shows the Mark used in commerce in connection with the services

specified in International Class 045 in the application. Applicant submits that this supplemental specimen overcomes Examiner's unacceptable specimen refusal.

2. Refusal on the basis of Likelihood of Confusion.

a. The goods sold by Registrant and the services provided by Applicant are not so similar as to be related.

The Examiner has misconstrued the commercial use of "Here for the Girls" by Registrant. A true and accurate copy of the website www.forthegirls.com from The simple fact that "Here for the Girls" is putatively used to "raise awareness" for breast cancer, an assertion unsupported by the use of "Here for the Girls" by Registrant (*See Exhibit 2*), still would not support a finding of likelihood of confusion by Examiner.

The question is not whether purchasers can differentiate the goods and services themselves, but rather whether purchasers are likely to confuse the source of the goods and services. *See Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrant's goods and services as they are described in the registration and we cannot read limitations into those goods and services. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration describes goods and services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods and services of the type described, that they move in all channels of trade normal for these goods and services, and that they are available to all classes of purchasers for the described goods and services. *See In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Finally, it is well established that goods and services may be related. *See In re*

United Service Distributors, Inc., 229 USPQ 237 (TTAB 1986) (mark for distributorship services in the field of health and beauty aids held likely to be confused with mark for skin cream).

Here, the Registrant described its services as “Promoting public awareness of breast cancer over the Internet” in International Class 035, while the applied-for Mark is in International Class 045 for “Charitable services, namely, providing emotional support services for improvement of young womens lives affected by Breast Cancer by means of in-person and online support.” **See Exhibit A to the Bowditch Decl.** Further, applicant’s use of the Mark “Here for the Girls” is targeted to a specific class of consumer – survivors of breast cancer.

Bowditch Decl. ¶ 4.

While there may be some similarities in the channels of commerce, the targeted consumers are significantly different. And, because of the inherent weakness of Registrant’s mark, there is no likelihood of confusion in the marketplace.

b. The term “the girls” is commonly used, weak, entitled to narrow protection, and is therefore unlikely to cause confusion.

A search for the words “the girls” on TESS yields 392 records, live and dead. While a search of class 045 only yields three records, one of which is Applicant’s pending application, there are 31 records in class 035 alone. In addition, a Google search for “save the girls” turns up numerous “the girls” responses related to breast cancer: “save the girls,” “know your girls,” “save the girls breast cancer sports bra,” “breast cancer; saving the girls,” and more. **See Exhibit 3.** An image search for “the girls” and cancer yields such uses as “fight for the girls,” “support the girls,” “join the girls,” “I helped save the girls,” and others. **See Exhibit 4.** The use of “the girls” in relation to breast cancer is, as evidenced above, is ubiquitous. **Exhibit 3 and Exhibit 4**

show that “the girls” in some variation or another has been extensively adopted and used as a mark of significance in the field of breast cancer awareness. *See, e.g., In re Aurum Brothers B.V.*, 2017 TTAB LEXIS 464, *10, (TTAB 2017) (a mark comprising in whole or in part a word extensively adopted and used as a service mark for jewelry store services has a significance in the jewelry industry, and a mark comprising in whole or in part the word in connection with jewelry or jewelry store services is given a restricted scope of protection); *Anthony’s Pizza & Pasta International, Inc. v. Anthony’s Pizza Holding Co., Inc.*, 95 USPTQ2d (BNA) 1271 (TTAB 2009) (the use of “Anthony’s” found to be “extensively adopted” for restaurant services and in particular for Italian restaurants and pizzerias; it therefore has significance in the industry, and “should be given a restricted scope of protection”). Registrant’s mark “for the girls” is weakened by third party use and is, therefore, entitled to only a narrow scope of protection. In addition, because “the girls” is used extensively, **Exhibit 3**, as is “for the girls,” **See Exhibit 5** (“for the girls” cancer image search results), the entirety of Registrant’s Mark “For the Girls” is weak and only entitled to narrow protection.

“The weaker [a mark], the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to a comparatively narrower range of protection.” *Manhattan International Trade Inc. and Pure & Simple Concepts Inc. v. Industrie IP Pty Limited*, 2018 TTAB LEXIS164, *29-30 (TTAB 2018), *citing Juice Generation*, 115 USPQ2d at 1674. *See also Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 45 C.C.P.A. 856, 1958 Dec. Comm’r Pat. 236, 117 USPQ 295, 297 (CCPA 1958); *Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476-78 (TTAB 2014) (finding, based on this principle, “that the mark PERKSPOT is sufficiently different from the marks PERKS and PERKSCARD to avoid a likelihood of confusion” even though the marks

were used for legally identical services); *Plus Prods. v. Natural Organics, Inc.*, 204 USPQ 773, 779-80 (TTAB 1979) (allowing registration of NATURE'S PLUS for vitamins despite prior registration of PLUS for vitamins given coexistence of a number of registrations containing PLUS for similar goods).

The Federal Circuit stated in analogous circumstances that “Jack Wolfskin's evidence demonstrates the ubiquitous use of paw prints on clothing as source identifiers. Given the volume of evidence in the record, consumers are conditioned to look for differences between paw designs and additional indicia of origin to determine the source of a given product. Jack Wolfskin's extensive evidence of third-party uses and registrations of paw prints indicates that consumers are not as likely confused by different, albeit similar looking, paw prints.” *Jack Wolfskin Austrustung Fur Draussen GmbH & Co. KGaA v. new Millennium Sports*, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). The same is true here. Consumers are conditioned to look for differences between “for the girls” and additional indicia of origin.

This factor, therefore, must weigh heavily against finding a likelihood of confusion.

IV. CONCLUSION

WHEREFORE, Applicant respectfully requests that the Board REVERSE the statutory refusal pursuant to Trademark Act Section 2(d) and REVERSE the refusal for unacceptable specimen, or in the alternative allow the Application to proceed to publication with the Applicant's amendment and supplemental specimen.

September 25, 2018.

Respect fully submitted,

/Duncan G. Byers/

DUNCAN G. BYERS

PENDER & COWARD PC
222 CENTRAL PARK AVENUE
SUITE 400
VIRGINIA BEACH, VA. 23455
UNITED STATES
Email: dbyers@pendercoward.com
Phone 757.490.3000
Facsimile 757.502.7392
Attorney for Applicant/Appellant

EXHIBIT 1

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

In the matter of Application No. 87/345,046

Filed: 02/22/2017

Mark: HERE FOR THE GIRLS

Declaration of Rene Bowditch, Esq., in support of Applicant's *Ex Parte* Appeal Brief

DECLARATION OF RENE BOWDITCH, ESQ.

I, Rene Bowditch, hereby certify that:

1. My full name is Rene Roark Bowditch, and I have personal knowledge of the facts set forth in this Declaration.

2. My full address and telephone number are:

1309 Jamestown Rd, Suite 204

Williamsburg, Virginia 23185

Telephone: 757.561.4749

Email: rene.bowditch@hereforthegirls.org

3. I am a Co-Founder of Here for the Girls, Inc., a 501(c)(3) organization that we founded 7/24/2007 under the name, Beyond Boobs!, Inc. We changed the name to Here for the Girls, Inc. 2/14/2016.

4. Here for the Girls is a charitable organization providing support for individuals diagnosed with breast cancer. The work of Here for the Girls is summarized as follows:

“We offer loving, not-your-typical support through Beyond Boobs! (our community-based, in-person support) and Pink Link (our nationwide, 24/7, online support). Here for the Girls creates and serves an extended family of young survivors (diagnosed under 51) who help one another through diagnosis, treatment, and beyond.

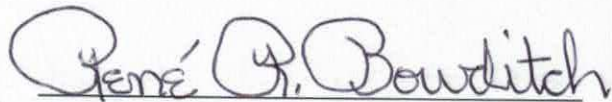
We provide a network of young women who share laughter and wipe tears, who show their scars and calm fears. They help each other face their diagnoses and learn to live life with an exclamation point (!) instead of a period.”

See www.hereforthegirls.org. A true and accurate copy of that webpage is attached to this Declaration as Exhibit A.

5. The specimen attached as Exhibit A shows the Mark in use in commerce at least as early as 02/14/2016.
6. Here for the Girls does not sell goods or services.
7. Here for the Girls does not target or serve the general public; Here for the Girls operates solely to provide the described services to young women diagnosed with breast cancer.
8. In the time since Hereforthegirls.org and Forthegirls.org have been registered and used in commerce, there have been no instances of confusion with the Registrant for the Mark "For the Girls."
9. I am familiar with the Registrant, and I am aware that Registrant provides no support services online, in person, or otherwise and, to the best of my knowledge, Registrant's only commercial use of "For the Girls" is for sales of certain pink wind chimes (as part of Registrant's retail wind chime business), a portion of which sales provide funding to breast cancer charities unassociated and unaffiliated with Here for the Girls.

Further declarant sayeth naught.

Declarant:



Rene R. Bowditch, Esq.

1309 Jamestown Rd., Suite 204, Williamsburg, VA 23185

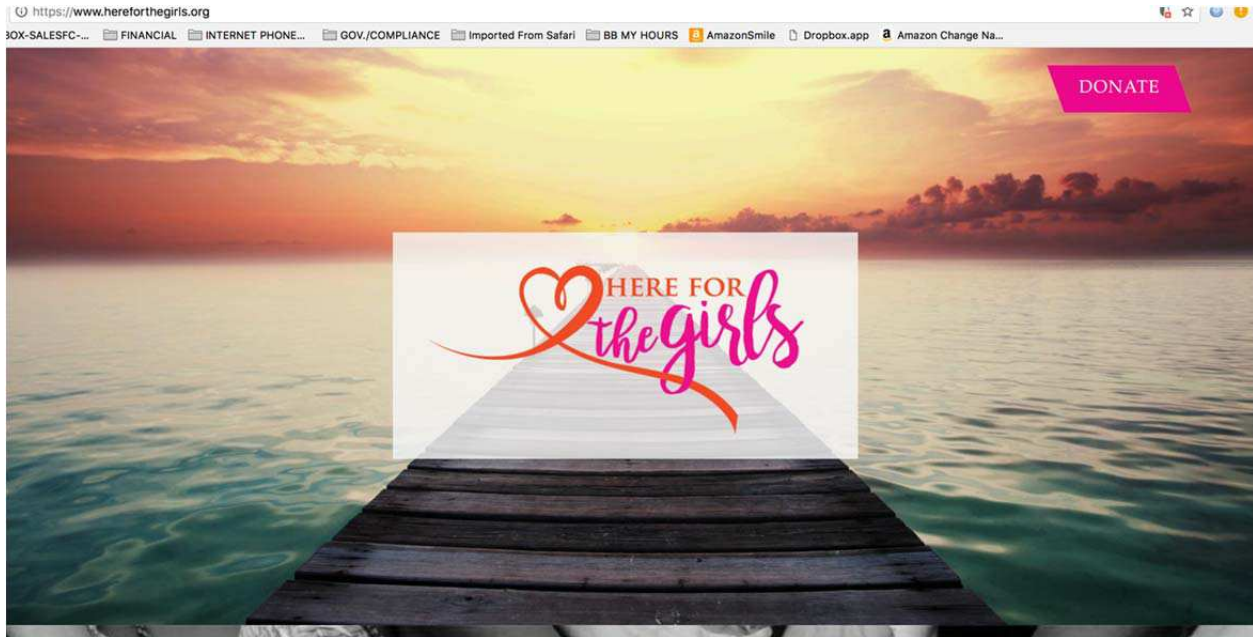
Telephone: 757.561.4749

Email: rene.bowditch@hereforthegirls.com

NOTHING FURTHER THIS PAGE

EXHIBIT A

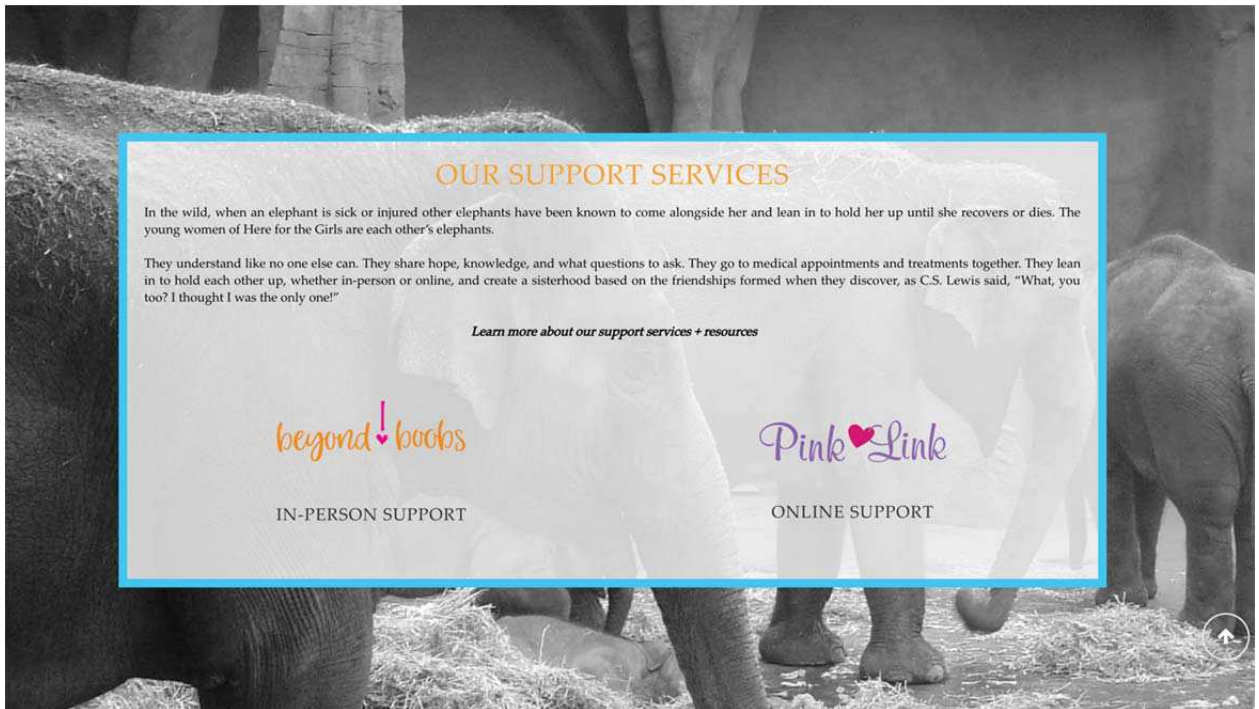
Here for the Girls TM Specimen - Screenshots from Here for the Girls Website





ARE YOU *one of the girls?*

As a young woman with breast cancer, you will face unique challenges that we understand because we've been there too. You may discover that specific resources just for young women are few and peers can be difficult to find. That's why we are **Here for the Girls** - to ensure that no young woman has to make this journey without all the love, encouragement, and information possible from peers who understand.



OUR SUPPORT SERVICES

In the wild, when an elephant is sick or injured other elephants have been known to come alongside her and lean in to hold her up until she recovers or dies. The young women of Here for the Girls are each other's elephants.

They understand like no one else can. They share hope, knowledge, and what questions to ask. They go to medical appointments and treatments together. They lean in to hold each other up, whether in-person or online, and create a sisterhood based on the friendships formed when they discover, as C.S. Lewis said, "What, you too? I thought I was the only one!"

Learn more about our support services + resources

beyond! books

IN-PERSON SUPPORT

Pink♥Link

ONLINE SUPPORT





ARE YOU ONE OF THE GIRLS?

BREAST CANCER IS SCARY. You may feel alone, even with supportive family and friends. Here for the Girls is here for you! This can be a tough journey, but it's easier together.

We provide a network of young women who share laughter and wipe tears, who show their scars and calm fears. They help each other face their diagnoses and learn to live life with an exclamation point (!) instead of a period.

Interested in support? [Click here to complete the welcome form](#)



IF YOU'RE
ONE OF THE GIRLS,
THIS IS HOW
WE'RE HERE FOR YOU.

BEYOND BOOBS!

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EXHIBIT 2

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For the Girls Windchimes

*Inspired by my own mother's personal experience, I created **For the Girls™** in honor of all women and their families affected by breast cancer. May the mellow tones ring solace for those remembering loved ones. May the soothing resonance bring hope and encouragement for those fighting the battle and the bright melodies sing a victory song to survivors!*

Patty Baisden
QMT Windchimes

For the Girls™ products have been created to benefit breast cancer charities. For June 2011, QMT has chosen to donate 50% of For the Girls™ product purchase price to [The Breast Cancer Research Foundation®](#).

Photo courtesy of [Robert Good Photography](#).



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COLLECTIONS

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- Arabesque® (https://shop.qmtwindchimes.com/collections/arabesque-c-67.html)
- Arias® (https://shop.qmtwindchimes.com/collections/arias-c-7.html)
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- Lakeshore Melodies™ (https://shop.qmtwindchimes.com/collections/lakeshore-melodies-c-68.html)
- Rotary International® Chimes (https://shop.qmtwindchimes.com/collections/rotary-international-chimes-c-69.html)
- Shenandoah Melodies® (https://shop.qmtwindchimes.com/collections/shenandoah-melodies-c-8.html)

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6 PRODUCTS

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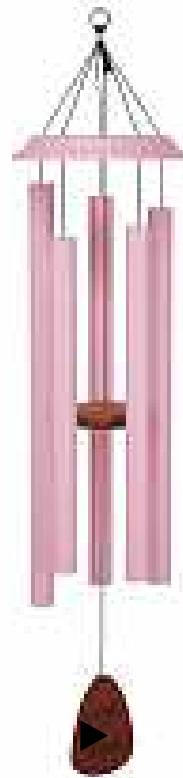
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(<https://shop.qmtwindchimes.com/collections/for-the-girls/for-the-girls-windsail-p-337.html>)

For The Girls® Windsail (<https://shop.qmtwindchimes.com/collections/for-the-girls/for-the-girls-windsail-p-337.html>)

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EXHIBIT 3



save the girls breast cancer

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Videos

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kaylea porter YouTube - Oct 20, 2015	Ad Council YouTube - May 22, 2018	Ad Council YouTube - May 22, 2018

Amazon.com: Save The Girls Breast Cancer Sports Bra (Large): Clothing

https://www.amazon.com/Girls-Breast-Cancer-SoccerGrlProbs-Sports/.../B01DKYQ3G...

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Save the Girls- Breast Cancer Awareness Mum - ACI Wholesale

https://www.aciwholesale.com/breast-cancer.../save-the-girls-breast-cancer-awareness-...

Oct 20, 2014 - Save the Girls- Breast Cancer Awareness Mum | Serving the craft industry for over 50 years.

The 'Know Your Girls' Campaign Makes A Significant Push To ...

https://www.essence.com/.../susan-g-komen-know-your-girls-campaign-push-decrease...

Jun 21, 2018 - The non-profit wishes to cut the number of breast cancer deaths in half by 2026.

Save the Boobie.....How about save the PERSON – Stupid Dumb ...

www.stupiddumbbreastcancer.com/myblog/save-the-boobiehow-about-save.../2015

Apr 2, 2015 - A sexy ad with a tiny girl taking her bra off is not breast cancer ... Those with metastatic breast cancer are not saving their boobs, they are dying ...

Forget the Ta-Tas...Save the Girl Breast Cancer Awareness | Etsy

https://www.etsy.com/listing/469516353/forget-the-ta-tassave-the-girl-breast

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Save The Girl decal in white and pink. This easy-to-apply decal comes with full installation instructions. It is removable from non-porous surfaces; however, once ...

Breast Cancer; Saving the Girls - 959 Words | Bartleby

https://www.bartleby.com › Writing

Jun 24, 2018 - Free Essay: Breast cancer is the second most prominent cause of cancer deaths in women. About 1 in 8 American women living in the U.S. will ...

EXHIBIT 4



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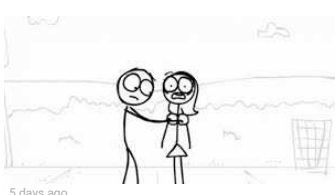
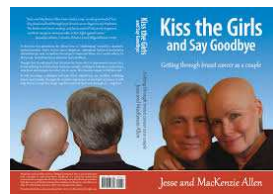


EXHIBIT 5



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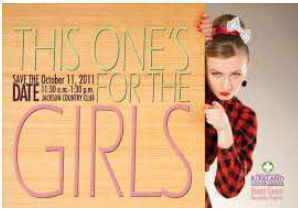
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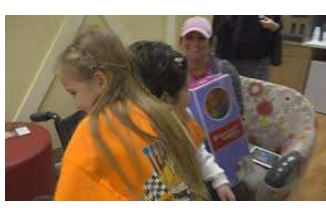
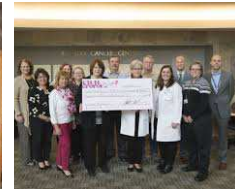
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