

This Opinion is Not a
Precedent of the TTAB

Mailed: April 24, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Porter
—

Serial No. 87227122
—

Gene Bolmarcich of Law Offices of Gene Bolmarcich,
for Nicolas Porter.

Valerie Kaplan, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

—
Before Bergsman, Shaw, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Nicolas Porter (“Applicant”) seeks registration on the Principal Register of the mark TRUWALLET in standard characters for “providing on-line cash account services offered in connection with a network marketing service,” in International Class 36.¹ The Trademark Examining Attorney refused registration of Applicant’s mark under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, on

¹ Application Serial No. 87227122 was filed on November 4, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

the ground that Applicant's specimen, submitted with his Statement of Use, does not show use of the mark for the identified services. *See* Trademark Rule 2.56(a), 37 C.F.R. § 2.56(a). After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Issue

Before discussing to the merits of the refusal, we address the Examining Attorney's objection to Applicant's submission with his appeal brief of a registration certificate for the trademark TRUNITED for "network marketing services" which appears to be owned by Applicant, purportedly to demonstrate that the specimen submitted with the Statement of Use is a page from Applicant's TRUNITED website on which the TRUWALLET service is advertised. *See* 4 TTABVUE 3 (Applicant's Brief) and 5 TTABVUE (registration certificate²). The Examining Attorney objected to the registration on the ground of untimeliness.³ Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides in relevant part "[t]he record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal." Insofar as the Examining Attorney has timely interposed an objection in her brief to Applicant's late-filed evidence, the objection is sustained and the registration certificate submitted concurrently with Applicant's

² Registration No. 5031582 issued August 30, 2016.

³ In a footnote, Applicant's brief acknowledges that the registration is untimely and states that "Applicant fully expects this 'evidence' to be objected to as untimely" 4 TTABVUE 3.

appeal brief has been given no consideration.⁴ *See e.g., In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014).

II. Applicable Law

We now consider whether the specimen of record shows the mark TRUWALLET used to identify “providing on-line cash account services offered in connection with a network marketing service.”

Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a service mark is used in commerce “when it is used or displayed in the sale or advertising of services.” “[A]n acceptable specimen must show ‘some direct association between the offer of services and the mark sought to be registered therefor.’” *In re Pitney Bowes, Inc.*, 125 USPQ2d at 1419 (quoting *In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973)). In determining “whether a mark is used in connection with the services described in the [application], a key consideration is the perception of the user.” *In re JobDiva, Inc.*, 843 F.3d 936, 121 USPQ2d 1122, 1126 (Fed. Cir. 2016).

Applicant submitted the following specimen which he described as an “online brochure for the services”:⁵

⁴ We are nonetheless aware of Applicant’s earlier statement that “[t]he specimen refers to TruWallet in several places . . . that clearly explains it is . . . for members of the Trunited marketing network.” August 25, 2017 Response to Office Action, TSDR 1. *See In re Pitney Bowes, Inc.*, 125 USPQ2d 1417, 1420 (TTAB 2018) (consideration given to information provided by specimen itself and to explanation offered by Applicant clarifying nature, content, or context of use of specimen if consistent with what specimen shows). All citations to the TSDR database are to the downloadable .pdf version of the documents.

⁵Statement of Use, TSDR 1. Page breaks and blank space have been removed from the specimen so it will fit on a single page in this decision; no text or image has been removed.



Hello! I created this site to share my excitement and hopefully answer any questions you might have about Trunited. I can't wait to work with you after you join!

[Click Here To Meet Joshua](#)

OVERVIEW

ABOUT

Join Trunited For Free

Get paid back for your everyday purchases.

It only takes is 30 seconds to create an account. And yes, it's free.



[Learn about Profit Points >](#)

How much will I get paid back?

Each member is given a percentage of the Payout Pool bonus that reflects their accumulated profit points and social influence.

When will I get paid back?

You accumulate points from the 1st of the month until the 31st of the month. You receive your truWallet and Affiliate Cash on the 7th of the following month.



Does it matter which items I buy?

Each product contributes a different amount of money into the payout pool, some as high as 70%. Products with more profit points will ultimately earn you more.

How's it free?

Trunited is simply a platform where brands and consumers meet and is therefore not for profit. 100% of the profits are paid right back into your truWallet.



[Learn about truWallet >](#)



Do I need to connect others?

No. You will still earn money back for your purchases even if you don't connect others, however, that option is always available when you so choose.



Profit Points

Each profit point you earn represents \$1 that is added to the Trunited piggy bank, which ultimately gets paid out to all of us each month.

To determine your percentage of the total profit the number of profit points you've accumulated in a given month is divided by the total number of profit points earned in the entire company.



TruBox

The TruBox Club is a subscription service that allows you to pre-order products from Trunited's many Affiliate Brands, The Point Store, and The Gift Card Shop and have them automatically delivered to you each month.

The TruBox allows you to get the products you need today, yesterday, and earn an extra 10% for the Profit Pool as well. All orders over \$99 come with free shipping!



truWallet

Your purchases are rewarded with earnings that go into your truWallet. These earnings are good toward future purchases.

Paying with your truWallet saves the network 3-5% that would otherwise go to merchant fees, and in many states will also save you the 6-8% sales tax.



Pay Plan 360

The Pay Plan 360 is a compensation structure unique to Trunited. It is designed so that when people join the network, they're not only given compensation for their connections in a downward fashion, but also up, down, left, and right.

The Pay Plan 360 is set up so that all of the profit in the Trunited Payout Pool is paid out in equal portions to what people input to create that profit.

* This website is not affiliated or endorsed by Trunited Marketplace LLC in any way. The purpose of this site is to provide information about Trunited.

[Privacy](#)

In support of her refusal, the Examining Attorney relies on the following definitions and description of the term “cash account”:⁶

- 1. [A]n account in which all transactions are in money. 2. Finance. [A]n account in which purchases are paid for in full, as distinguished from purchasing on credit or margin;⁷
- [1] A brokerage account that settles transactions on a cash—rather than credit—basis. [2] A brokerage account requiring that cash payments on purchases and delivers on sales be made promptly. . . . The cash account is the most popular type of brokerage account [3] A ledger account which records all of a company’s cash incomings and outgoings;⁸ and
- This type of account asks you to deposit cash, and then you can use that cash to buy stocks, bonds, mutual funds, or other investments. It’s not much more complicated than that.⁹

The Examining Attorney argues that Applicant’s TRUWALLET services appear to be a reward program using credit that can be used to pay for future transactions.¹⁰

⁶ Also of record is a definition of “cash account” from the COLLINS ENGLISH DICTIONARY (www.collinsdictionary.com) attached to the September 27, 2017 Office Action, TSDR 8. However, because the definition is British English, it has no probative value. See *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1313 n.18 (TTAB 2014).

⁷ Dictionary.com Unabridged, based on the Random House Dictionary © Random House, Inc. 2017; attached to September 27, 2017 Office Action, TSDR 7.

⁸ TheFreeDictionary (financial-dictionary.thefreedictionary.com); attached to September 27, 2017 Office Action, TSDR 10-11.

⁹ “Cash Account vs. Margin Account: What’s the Difference?,” from The Motley Fool (www.fool.com); attached to September 27, 2017 Office Action, TSDR 5.

¹⁰ Examining Attorney’s Brief, unnumbered p. 4 (7 TTABVUE 5).

In support of this argument, she points to wording in the specimen which explains to a user of Applicant's Trunited platform that "You accumulate points from the 1st of the month until the 31st of the month. You receive your truWallet and Affiliate Cash on the 7th of the following month" and "Your purchases are rewarded with earnings that go into your truWallet. These earnings are good toward future purchases."¹¹ The Examining Attorney explains that the combination of these statements on the specimen suggest that Applicant is providing a rewards program using credit that can then be used to pay for future transactions; specifically, that the specimen indicates that consumers will be "rewarded with earnings" each month that "are good toward future purchases," creating the impression that the services offered constitute a points program or a consumer loyalty program using credit.¹²

In his March 14, 2017 Response to Office Action, Applicant explained that he "provides a network marketing service (Trunited.com) whereby participating members sell goods and earn financial rewards from a pool of money generated by the operation of the sales network. Truwallet is the financial account, provided by Applicant's service, where individual members accrue their earnings from the marketing network."¹³ In his Appeal Brief, Applicant further explained that "[t]he profits made by Applicant in connection with [his] operation of the Trunited platform are paid out to the consumers based on a proprietary algorithm . . . [and t]hese

¹¹ *Id.*

¹² *Id.*

¹³ March 14, 2017 Response to Office Action TSDR 1.

payouts are accumulated for the consumer members in the TruWallet cash account . . . [which] can be used as cash to pay for additional purchases on the Trunited platform.”¹⁴ After the Examining Attorney’s initial specimen refusal, Applicant submitted an annotated copy of the specimen to explain that TRUWALLET “is a ‘cash account,’ regardless of how the money is paid into the account,” “acts as a ‘cash account,’” and “can be used as cash.”¹⁵

Looking to the definitions of “cash account” that the Examining Attorney made of record, it is clear that Applicant does not provide brokerage accounts or corporate ledger accounts. It also appears that Applicant does not offer accounts in which all transactions are in money, or an account in which purchases are paid for in full. In fact, Applicant did not argue that his services fit any of the record definitions of “cash account.” Instead, Applicant merely argued that the earnings a user may receive “can be used as cash.” That, however, does not fit any record definition of “cash account.”

The specimen does not indicate that the TRUWALLET account is one in which all transactions are in money, or one in which purchases are paid for in full. There is no indication that a user may deposit or withdraw money from the account, or even withdraw the rewarded earnings for cash; instead the account is limited to a user’s share of Trunited profits that are credited by Applicant based on points earned from using the Trunited platform and which must be used solely for future purchases on the Trunited platform. We agree with the Examining Attorney that consumers will

¹⁴ Applicant’s Brief, pp. 2-3 (4 TTABVUE 3-4).

¹⁵ August 25, 2017 Response to Office Action, TSDR 3-4.

perceive Applicant's TRUWALLET service as a points program or consumer loyalty program in which the user is rewarded with earnings each month that are good only toward future purchases.

III. Decision

The refusal to register Applicant's mark TRUWALLET because the specimen does not show use of the mark on the identified services is affirmed.