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Subject: U.S. TRADEMARK APPLICATION NO. 87545533 - TRUMP-IT MY PACKAGE OPENER - TrumpIt
gold - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 87545533

MARK: TRUMP-IT MY PACKAGE OPENER



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: ADCO INDUSTRIES - TECHNOLOGIES, L.P.

CORRESPONDENT'S REFERENCE/DOCKET NO:

TrumpIt gold

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EXAMINING ATTORNEY'S APPEAL BRIEF

I. INTRODUCTION

Applicant, Adco Industries – Technologies, L.P. (hereinafter “Applicant”), has appealed the final refusals to register the proposed mark TRUMP-IT MY PACKAGE OPENER and design on the Principal Register for “Utility knives” in International Class 8. Registration is refused pursuant to Trademark Act Section 2(a), 15 U.S.C. §1052(a), on the ground that the applied-for mark consists of or comprises matter that may falsely suggest a connection with persons, institutions, beliefs or national symbols. Registration is also refused pursuant to Trademark Act Section 2(c), 15 U.S.C. §1052(c), on the ground

that the applied-for mark consists of or comprises a name, portrait, or signature identifying a particular living individual whose written consent to register the mark is not of record. Finally, Applicant failed to provide information regarding the relationship between Applicant and Donald Trump as required pursuant to 37 C.F.R. §2.61(b).

It is respectfully requested that these refusals, and the requirement for information concerning the relationship between Applicant and President Trump, be affirmed.

II. STATEMENT OF FACTS

On July 27, 2017, Applicant filed a use-based application for registration on the Principal Register for the composite mark TRUMP-IT MY PACKAGE OPENER for goods identified as “Utility knives” in International Class 8.

On August 28, 2017, the undersigned examining attorney (“Examining Attorney”) refused registration of the applied-for mark under Trademark Act Section 2(c), 15 U.S.C. §1052(c), on the ground that the mark consists of or comprises a name, portrait, or signature identifying a particular individual whose written consent to register the mark is not of record. In addition, Applicant was required to enter a disclaimer of the wording “PACKAGE OPENER” apart from the mark as shown, amend the description of the mark, and submit an additional processing fee of \$125 per class because the application as filed did not meet the TEAS Plus application filing requirements.

On September 18, 2017, Applicant submitted arguments against the Section 2(c) refusal, a disclaimer of “PACKAGE OPENER,” an amended description of the mark, and the additional \$125 processing fee.

On October 16, 2017, the Examining Attorney issued a final refusal of the applied-for mark pursuant to Trademark Act Section 2(c).

On November 21, 2017, Applicant filed a request for reconsideration of the final refusal, asserting that Section 2(c) violates the Free Speech Clause of the First Amendment.

On December 26, 2017, the Examining attorney denied the request for reconsideration.

On January 6, 2018, Applicant filed the present appeal with the Trademark Trial and Appeal Board (“Board”).

On March 8, 2018, the Examining Attorney filed a Request for Remand with the Board, seeking to suspend the instant appeal and remand the application to the Examining Attorney in order to address a new ground for refusal based on the false suggestion of a connection under Trademark Act Section 2(a). The Board granted the request on March 8, 2018.

On March 30, 2018, the Examining Attorney issued a non-final Office action refusing registration under Section 2(a) because the applied-for mark consists of or includes matter which may falsely suggest a connection with Donald Trump, President of the United States, and requiring information regarding the relationship between Applicant and President Trump.

On July 2, 2018, Applicant filed a Response to Office Action arguing against the Section 2(a) and 2(c) refusals.

On August 7, 2018, the Examining Attorney issued a final Office action maintaining and making final the Section 2(a) refusal and the requirement for information regarding the relationship between Applicant and Donald Trump.

On August 18, 2018, the Board resumed the instant appeal, allowing Applicant sixty (60) days within which to file a Supplemental Brief.

On October 3, 2018, Applicant filed a Supplemental Brief arguing against the Section 2(a) and 2(c) refusals.

III. ISSUES

The issues on appeal are (1) whether the proposed mark consists of or comprises matter that may falsely suggest a connection with President Donald Trump, (2) whether the proposed mark consists of, or includes a name, portrait, or signature identifying a particular living individual whose written consent to register the mark is not of record, and (3) whether Donald Trump has any connection with Applicant's goods.

IV. ARGUMENT

Section 2(a): False Suggestion of a Connection

Trademark Act Section 2(a) bars registration on either the Principal or Supplemental Register of a designation that consists of or comprises matter that may falsely suggest a connection with persons, institutions, beliefs, or national symbols. *See* 15 U.S.C. §1052(a); TMEP §1203.03. To establish that an applied-for mark falsely suggests a connection with a person or an institution, the following is required:

- (1) The mark sought to be registered is the same as, or a close approximation of, the name or identity previously used by another person or institution.
- (2) The mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution.
- (3) The person or institution identified in the mark is not connected with the goods sold or services performed by applicant under the mark.
- (4) The fame or reputation of the named person or institution is of such a nature that a connection with such person or institution would be presumed when applicant's mark is used on its goods and/or services.

In re Pedersen, 109 USPQ2d 1185, 1188-89 (TTAB 2013); *In re Jackson Int'l Trading Co.*, 103 USPQ2d 1417, 1419 (TTAB 2012); TMEP §1203.03(c)(i); *see also Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 1375-77, 217 USPQ 505, 508-10 (Fed. Cir. 1983) (providing foundational principles for the current four-part test used to determine the existence of a false connection).

A. TRUMP-IT MY PACKAGE OPENER is a close approximation of the name or identity previously used by Donald Trump

When determining the existence of a false suggestion of a connection, the first prong in the four-part test inquires into whether applicant's mark is the same as, or a close approximation of, the name or identity of a particular person, regardless of whether the particular person actually used the name or identity himself or herself. *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1644 (TTAB 2015) ("[T]he initial and critical requirement is that the name (or an equivalent thereof) claimed to be appropriated by another must be unmistakably associated with a particular personality or 'persona.'" (quoting *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 1376-77, 217 USPQ 505, 509 (Fed. Cir. 1983))). Thus, the applied-for mark must only clearly identify a particular person. *Nieves*, 113 USPQ2d at 1644.

In this case, the applied-for mark begins with the term "TRUMP," which is the surname of President Donald Trump. The evidence of record shows that President Trump is commonly referred to simply as "TRUMP" and the media has and continues to use the name "TRUMP" by itself in referring to the President. President Trump is also the owner of a number of federal trademark registrations for

marks consisting solely of his surname TRUMP in connection with a variety of goods and services.¹ Thus, the pervasive use of the name “TRUMP” by the President himself and the media has resulted in the consuming public’s unmistakable association of the name “TRUMP” with the President.

In addition, the applied-for mark as a whole clearly identifies Donald Trump by virtue of the stylization of the letter “T,” which resembles a wave of hair much like that of the President, and the color gold appearing in the mark. Indeed, Applicant concedes that its mark features “Trump’s iconic hair wave” and that “President Trump is associated with gold, quality, and richness.” Applicant’s Supplemental Brief, filed October 3, 2018, at 3-4, 7 (hereinafter “Applicant’s Supp. Br. at ___”).

Applicant contends that although Donald Trump uses the name “TRUMP” alone, neither Donald Trump nor his business uses the expression “TRUMP-IT.” Applicant’s Supp. Br. at 5. This argument is unpersuasive as evidence of President Trump’s use of TRUMP-IT is not required to satisfy the first prong of the test for false suggestion of a connection. Indeed, a party’s interest in a name or designation does not depend on adoption and use as a technical trademark or trade name. *Univ. of Notre Dame du Lac*, 703 F.2d at 1375-77, 217 USPQ at 508-09. As stated by the Board in *Nieves*, “[a] term may be considered the identity of a person even if his or her name or likeness is not used. All that is required is that the mark sought to be registered clearly identifies a specific person” (i.e., Donald Trump). *Nieves*, 113 USPQ2d at 1644; see *In re Sauer*, 27 USPQ2d 1073 (TTAB 1993), *aff’d* 26 F.3d 140 (Fed. Cir. 1994) (affirming a false suggestion of connection refusal under §2(a), since BO would be recognized by purchasers as a reference to Bo Jackson, despite absence of evidence that Bo Jackson used the name BO BALL). In this case, there is ample evidence in the record demonstrating that President Trump is commonly referred to as “TRUMP.” See, e.g.:

- From the 10/16/2017 Office action:
 - Nick Hoppe, *Do we really need an invincible president?; Trump’s delusion of invincibility puts us all at risk*, SAN FRANCISCO CHRONICLE, Oct. 17, 2017
 - Steve Chapman, *Trump declares war on the Constitution*, CHICAGO TRIBUNE, Oct. 15, 2017
 - Peter Baker, *Trump Wields Words Louder Than Actions*, THE NEW YORK TIMES, Oct. 15, 2017
 - George F. Will, *The sinister agendas of some Trump backers*, THE WASHINGTON POST, October 15, 2017

¹ See TSDR pp. 162-196 [from the 10/16/2017 Office action]

- Editorial, *Trump threatens our rights*, THE DALLAS MORNING NEWS, October 15, 2017
- Kevin Aldridge, *Abandoning Puerto Rico an impeachable offense*, THE CINCINNATI ENQUIRER, October 15, 2017
- From the 03/30/2018 Office action:
 - Justin Baragona, *Trump Refers to Himself in the Third Person While Claiming Memo ‘Totally Vindicates’ Him*, Mediaite, <https://www.mediaite.com/online/trump-refers-to-himself-in-the-third-person-while-claiming-memo-totally-vindicates-him/>, February 3, 2018, TSDR p. 12 (“And, oh yeah, [Donald Trump] referenced himself in the third person while placing his name in quotes”)²
 - Vanessa Barford, *Why do some people refer to themselves in the third person?*, BBC News, <http://www.bbc.com/news/magazine-33943762>, August 28, 2015, TSDR p. 2 (“Republican presidential candidate Donald Trump quite often refers to himself as ‘Trump’ – instead of using the words ‘I’ or ‘me’.”)
 - *When it comes to name game, Trump trumps haters*, TRIB Live, <http://triblive.com/lifestyles/morelifestyles/10558823-74/trump-kyff-rob>, June 3, 2016, TSDR p. 18

The evidentiary record shows the media’s pervasive use of “TRUMP” to refer to and identify Donald Trump. Indeed, in the context of the name “TRUMP” and the media storm surrounding Donald Trump’s presidential campaign and ultimate election to the presidency, there is little doubt that TRUMP-IT MY PACKAGE OPENER, used in connection with Applicant’s goods and featuring President Trump’s stylized wave of hair and the color gold with which the President is frequently associated, refers to Donald Trump.

B. TRUMP-IT MY PACKAGE OPENER would be recognized as a reference to Donald Trump because it points uniquely and unmistakably to him

Applicant’s mark TRUMP-IT MY PACKAGE OPENER and design points uniquely and unmistakably to Donald Trump because it features not only the President’s surname TRUMP, but also a stylized version of the President’s wave of hair over the letter “T” and the color gold. Applicant itself acknowledges that the applied-for mark features the President’s “iconic hair wave” and concedes that the color gold is commonly associated with the President. Applicant’s Supp. Br. at 3-4. Moreover, the

² All citations to the Trademark Status and Document Retrieval (TSDR) database are to the PDF versions of the documents.

evidence of record demonstrates that Donald Trump's wave of hair is a well-known characteristic of the President and is often featured on "Trump" merchandise. See, e.g.:

- From the 10/16/2017 Office action:
 - Gnarly Tee's, <https://store.gnarlytees.com/products/trump-hair?variant=16332940741>, TSDR p. 136
 - Malitshirt, https://malitshirt.com/products/america-its-going-to-be-yuge-funny-donald-trump-t-shirt-212?utm_medium=cpc&utm_source=googlepla, ("This Funny Donald Trump Quote Shirt with original political slogan is perfect for Trump fans who love his trendy hair"), TSDR p. 143
 - RedBubble, https://www.redbubble.com/people/electrovista/works/15591044-trump-your-cat-for-halloween?body_color=red_triblend&p=triblend-tee&print_location=front&size=medium&utm_source=google&utm_medium=cpc&utm_campaign=g.pla+notset&country_code=US&gclid=EAlaIqobChMIhOfV9uPX1gIVBmSGCh0gVwPvEAKYASABEgIYOPD_BwE, TSDR p. 146
 - TeeShirtPalace, https://www.teeshirtpalace.com/products/lordy-i-hope-there-are-tapes-trump-hair-t-shirt?gclid=EAlaIqobChMIy_nD8eTX1gIVU1qGCh3CwSDEAKYJCABEgIWffD_BwE, TSDR p. 149
 - VPTshirt, https://vptshirt.com/products/donald-trump-inauguration-day-1-20-17-with-trump-haircut-274?utm_medium=cpc&utm_source=googlepla ("Donald trump inauguration day, 1.20.17 with Trump Haircut"), TSDR p. 154
 - Zazzle, https://www.zazzle.com/trump_45_with_hair_blue_temporary_tattoos-256346357084342987 ("Trump-45-with-Hair-Blue Temporary Tattoos"), TSDR p. 157
- From the 03/30/2018 Office action:
 - *The Complete Evolution of Donald Trump's Hair*, BuzzFeed, https://www.buzzfeed.com/sarahburton/mind-if-i-comb-over?utm_term=.vyrYRN8DR#.imeOg8RVg, September 9, 2015, TSDR p. 22
 - Monica Hesse, *Commentary: The 100 greatest descriptions of Donald Trump's hair ever written*, Chicago Tribune, <http://www.chicagotribune.com/news/opinion/commentary/ct-donald-trump-hair-20160617-story.html>, March 23, 2018, TSDR p. 37

- FineArtAmerica, Donald Trump For President Gop Elephant Hair, <https://fineartamerica.com/featured/donald-trump-for-president-gop-elephant-hair-insideout.html>, TSDR p. 47
- KC McGinnis, *Evangelicals Aren't Just Praying for Trump – They're Commissioning Him*, Vantage, <https://medium.com/vantage/evangelicals-arent-just-praying-for-trump-they-are-commissioning-him-2a227c8d8e57>, March 23, 2018, TSDR p. 50
- PoliWear, Trump's Hair – 2016 Presidential Campaign – blue logo, <https://www.poliwear.com/collections/trump-2016/products/trumps-hair-2016-blue-womens-t-shirt>, TSDR p. 59
- TBO, Donald Trump campaign logos are all about the hair, <http://www.tbo.com/entertainment/blogs/pop-rocks/donald-trump-campaign-logos-are-all-about-the-hair-20150625/>, June 25, 2015, TSDR p. 65

The following articles from LexisNexis® show that Donald Trump favors the color gold and gold is commonly associated with the President. *See, e.g.:*

- From the 03/30/2018 Office action:
 - *Guggenheim doesn't waste a chance to tweak Trumps*, THE BOSTON GLOBE, January 26, 2018 (“The president favors the color gold”), TSDR p. 183
 - Brian Bennett, *President tees up trade talk in Japan; Trump plays golf with prime minister vaguely warns business execs*, CHICAGO TRIBUNE, November 6, 2017 (“When the newly arrived Trump showed up on Sunday at Kasumigaseki Country Club outside Tokyo to play golf, Abe surprised him with the sort of trucker caps Trump favors, in his preferred color – gold”), TSDR p. 185
 - Michael S. Rosenwald, *In his empire, it's all Trump – down to the shampoo*, THE WASHINGTON POST, January 20, 2017 (“The shower head, like other resort furnishings, is [Trump's] preferred color gold”), TSDR p. 184

Furthermore, the evidence of record suggests that applicant does intend to trade upon the goodwill of Donald Trump. Specifically, Applicant admits that the applied-for mark “references our great president Donald J. Trump” and was, in fact, intentionally chosen to express such an association with the President. Applicant's Appeal Brief, filed January 6, 2017, at 3 (hereinafter “Applicant's Appeal Br. at ___”). *See also, e.g.:*

- the applied-for mark references President Trump [Applicant's Appeal Br. at 3 (“Applicant submits this appeal to the ‘Request for Reconsideration Denied’ office action mailed on Dec 26, 2017, in which the examining attorney refused registration of applicant's applied

for mark 'TRUMP-IT My Package Opener Make Opening Packages Great' which references our great president Donald J. Trump.”)]

- the applied-for mark expresses “some of the positive character traits of richness, superior quality of products and ideas to make American [sic] great again in which President Donald J. Trump and Donald J. Trump as an exceptional business man espouses.” [Applicant’s Appeal Br. at 6]
- “[A]pplicant has been inspired by President Donald J. Trump to make his products of rich and superior quality and wishes to express this theme in both his applied for mark and his product’s design and manufacturing.” [Applicant’s Appeal Br. at 6]
- “[A]pplicant is by analogy expressing an association to the quality, richness and greatness of his products to those same business qualities which President Donald J. Trump stands for to many in our great country.” [Applicant’s Appeal Br. at 7]
- “[A]pplicant has been inspired by our great President Donald J. Trump’s theme of Making America Great Again to make the best products the applicant is able to in order to help contribute to the overall goal of making America great again.” [Applicant’s Appeal Br. at 9]
- “The applicant’s mark takes a very laudatory stance on a political figure, here the political [sic] being President Donald J. Trump.” [Applicant’s Supp. Br. at 3]
- Applicant concedes that its marks “have Trump’s now almost iconic vision of Trump’s hair wave, ... and gold in the mark” [Applicant’s Supp. Br. at 4]
- “Trump’s political commentary expression is closely related to one of the applicant’s marks.” [Applicant’s Supp. Br. at 4]
- “This cute, creative, and clever logo implies and shows a play on words and play on images between President Donald J. Trump and the analogy of Trump’s high quality to also the high quality of the applicant’s package opener sold under the applied for mark.” [Applicant’s Supp. Br. at 5]
- “The applicant’s trademark is doing more than just identifying the source of goods, but is going on to say something more, maybe something about the richness and fullness of President Trump’s hair and President Trump’s personal golden richness, expressing patriotism. **The applicant is wishing to identify himself and his products with the positive quality character traits of President Donald J. Trump.**” [Applicant’s Supp. Br. at 9 (emphasis added)]

The above evidence demonstrates Applicant's intention to associate its mark with Donald Trump. Indeed, it is difficult to imagine any other purpose for using the stylized wave of hair over the word "TRUMP" in such a prominent manner except to draw the connection between President Trump and Applicant's products. While intent to identify a party or trade on its goodwill is not a required element of a §2(a) claim of false suggestion of an association with such party, the Board has held that evidence of such intent could be highly persuasive that the public would make the intended false association. *Univ. of Notre Dame du Lac*, 703 F.2d at 1377, 217 USPQ at 509.

Here, Applicant's use of the President's surname in combination with the color gold and the wave of hair forming the top portion of the letter "T" all invite purchasers to make a connection between Applicant's products and Donald Trump. Accordingly, when the name TRUMP is used in connection with Applicant's goods, the relevant consumers would perceive TRUMP-IT MY PACKAGE OPENER as pointing uniquely and unmistakably to Donald Trump.

C. Whether Donald Trump is connected with the goods sold by the Applicant

The record indicates that Donald Trump is not connected with the goods sold by Applicant under the applied-for mark. Applicant did not respond to the examining attorney's requirement for information concerning the relationship between Applicant and Donald Trump, an issue which is also on appeal. *See, infra*. The failure to comply with the information requirement warrants an inference that Donald Trump is not in fact connected with the goods sold by Applicant under the proposed mark. *Id.* Moreover, Applicant has stated that "none of President Donald J. Trump's businesses sell package openers." Applicant's Appeal Br. at 6.

D. The fame or reputation of Donald Trump is of such a nature that a connection with him would be presumed when Applicant's mark is used on its goods

If applicant's goods and/or services are of a type that the named person or institution sells or uses, and the named party is sufficiently famous, then it may be inferred that purchasers of the goods and/or services would be misled into making a false connection of sponsorship, approval, support or the like with the named party. *See, e.g., Nieves*, 113 USPQ2d at 1647-48 (holding ROYAL KATE used with applicant's consumer products, including fashion products, suggested a connection with Kate Middleton would be inferred because evidence showed that Kate Middleton, by virtue of being the wife of Prince William of the British Royal family, has become a celebrity and fashion trend-setter the media reports on, including the clothes she wears, what she does, and what she buys); *In re Cotter & Co.*, 228 USPQ 202, 204-05 (TTAB 1985) (holding WESTPOINT used with applicant's firearms suggested sponsorship,

approval, support or the like from West Point because evidence showed that West Point is a well-known U.S. Military Academy).

The fact that purchasers would realize, at some point after purchase, that no connection exists between the listed goods and/or services and the person or institution falsely connected, is not relevant. The focus is on “the initial reaction or impact of the mark when viewed in conjunction with the applicable goods or services.” *In re U.S. Bicentennial Soc’y*, 197 USPQ 905, 906 (TTAB 1978) (internal punctuation omitted) (quoting *In re Nat’l Intelligence Acad.*, 190 USPQ 570, 572 (TTAB 1976)).

In this case, the evidence of record, which includes news articles and websites from diverse sources, demonstrates that Donald Trump is the subject of frequent (if not constant) media attention and, therefore, his identity is of sufficient renown that when Applicant’s mark TRUMP-IT MY PACKAGE OPENER and design is used in connection with Applicant’s goods, a connection with President Trump will be presumed.

Moreover, because Donald Trump uses the TRUMP mark on everything from campaign merchandise, clothing, home accessories, housewares, drinkware, luggage and perfume, to food and beverages, wine keys with knife component, pet accessories, and toys, consumers are well accustomed to viewing the TRUMP mark used on a wide variety of goods in the marketplace. *See, e.g.:*

- From the 03/30/2018 Office action:
 - Daniel B. Kline, *Donald Trump’s Name is Everywhere – But What Does He Actually Own*, The Motley Fool (“Trump’s biggest singular asset is his name”), TSDR p. 154
 - Aaron Williams and Anu Narayanswamy, *How Trump made millions by selling his name*, THE WASHINGTON POST, January 25, 2017, TSDR p. 159
 - Trump Winery, <http://trumpwinery.orderport.net/product-details/0008/Wine-Key>, TSDR pp. 127-28, 136-37
 - The Trump Collection, <https://www.trump.com/merchandise/signature-collection/>, TSDR pp. 138-39, 142-44
 - Trump Store, <https://www.trumpstore.com/collections/gifts>, TSDR pp. 140-41
 - Eyeglasses.com, <https://www.eyeglasses.com/search.html?q=donald+trump> (Trump eyewear), TSDR p. 145-47
- From the 08/7/2018 Subsequent Final Office action:

- Donald Trump campaign website, <https://shop.donaldjtrump.com/collections/>, TSDR pp. 2-13
- Trump Home, <https://trumphomecollection.com>, TSDR pp. 14-16
- Trump Store, <https://www.trumpstore.com/collections/>, TSDR pp. 17-33
- Trump Winery, <http://trumpwinery.orderport.net/merchandise/Gifts>, TSDR pp. 34-44

Accordingly, upon encountering the applied-for mark used in connection with the subject goods, consumers would be misled into making a false connection of sponsorship, approval or support with President Trump. *See, e.g., Nieves*, 113 USPQ2d at 1647-48 (holding ROYAL KATE used with applicant’s consumer products, including fashion products, suggested a connection with Kate Middleton would be inferred because evidence showed that Kate Middleton, by virtue of being the wife of Prince William of the British Royal family, has become a celebrity and fashion trend-setter the media reports on, including the clothes she wears, what she does and what she buys).

Applicant does not dispute that Donald Trump is a well-known figure. Indeed, Applicant’s own statements support the fame of Donald Trump. *See, e.g.,* Response of July 2, 2018 (acknowledging that “President Donald J. Trump has tremendous amazing worldwide fame” and that President Trump has “immense worldwide fame to all corners of the globe”); *see also* Applicant’s Supp. Br. at 4. Instead, Applicant argues that “when consumers see anything associated with President Donald they are wary and would not believe a certain product having the word ‘Trump’ in it would be unmistakably associated with President Donald J. Trump.” Applicant’s Supp. Br. at 4 (emphasis in original). This argument is unpersuasive, particularly as the record is devoid of evidence supporting Applicant’s arguments in this regard.³ *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (citing *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)(“Attorney argument is no substitute for evidence”)); *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1339 (Fed. Cir. 2004) (“Statements

³ Applicant’s internet materials have not been properly made of record and are objected to. *See* Applicant’s Supp. Br. at 7-8. Although applicant has discussed the contents of webpages as evidence against the refusals, applicant provided only their web addresses and/or hyperlinks, which is not sufficient to introduce the underlying webpages into the record. *In re Olin*, 124 USPQ2d 1327, 1331 n.15 (TTAB 2017) (citing *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013); *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012)); TBMP §1208.03; TMEP §710.01(b).

To properly introduce Internet evidence into the record, an applicant must provide (1) an image file or printout of the downloaded webpage, (2) the date the evidence was downloaded or accessed, and (3) the complete URL address of the webpage. *See In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018); *see* TMEP §710.01(b). Accordingly, the underlying webpages associated with the web addresses and/or links will not be considered.

of counsel, however, are not evidence.”). Indeed, it is noteworthy that, throughout the prosecution of the instant application, Applicant has relied exclusively on attorney argument, rather than evidence, in support of its contentions.

In this case, the evidence of record aptly demonstrates that Donald Trump is a famous political figure by virtue of who he is, namely, the President of the United States. In view of the undisputed fame of President Trump and the vast array of goods bearing the TRUMP mark to which consumers are exposed in the marketplace, a connection with the President would be presumed when Applicant’s mark TRUMP-IT MY PACKAGE OPENER is used on Applicant’s goods.

E. Conclusion

Based on the evidence of record, and the reasons stated above, the examining attorney respectfully submits that all four of the relevant factors weigh in favor of finding that the applied-for mark TRUMP-IT MY PACKAGE OPENER and design consists of or includes matter which may falsely suggest a connection with Donald Trump, President of the United States. Accordingly, the examining attorney requests that the Board affirm the refusal under Trademark Act Section 2(a).

Section 2(c): Name Identifying a Particular Living Individual

Trademark Act Section 2(c) bars registration on either the Principal or Supplemental Register of an applied-for mark that consists of or comprises a name, portrait, or signature identifying a particular individual without that individual’s written consent. See 15 U.S.C §1052(c). For purposes of Section 2(c), a name in a mark identifies a particular living individual if the person bearing the name will be associated with the mark as used on the goods or services because: “(1) the person is so well known that the public would reasonably assume a connection between the person and the goods or services; or (2) the individual is publicly connected with the business in which the mark is used.” *Nieves*, 113 USPQ2d at 1650; see *In re Hoefflin*, 97 USPQ2d 1174, 1175-76 (TTAB 2010); *Krause Publ’ns, Inc.*, 76 USPQ2d 1904, 1909-10 (TTAB 2005).

Section 2(c) applies not only to the full name of an individual, but also to any first name, surname, shortened name, pseudonym, stage name, title, or nickname that identifies a particular living individual. *In re Nieves*, 113 USPQ2d at 1639 (holding registration of the mark PRINCESS KATE barred under Section 2(c) in the absence of consent to register, because the mark “points uniquely and unmistakably to Kate Middleton,” the Duchess of Cambridge, whose identity is renowned); *Hoefflin*, 97 USPQ2d at 1177-78 (holding registration of the marks OBAMA PAJAMA, OBAMA BAHAMA PAJAMAS,

and BARACK'S JOCKS DRESS TO THE LEFT barred under Section 2(c) in the absence of consent to register, because the marks create a direct association with President Barack Obama); *Sauer*, 27 USPQ2d at 1074-75 (holding registration of a mark containing BO, used in connection with a sports ball, barred under Section 2(c) in the absence of consent to register, because BO is the nickname of the well-known athlete BO JACKSON and thus use of the mark would lead to the assumption that he was associated with the goods), *aff'd per curiam*, 26 F.3d 140 (Fed. Cir. 1994).

In this case, the name "TRUMP" in the applied-for mark identifies President Donald Trump because he is so well known that the purchasing public would reasonably assume a connection between President Trump and the goods specified in the application. Accordingly, because President Trump's written consent to register is not of record, registration must be refused.

A. President Donald Trump is so well known that the public would assume a connection between the President and the subject goods.

The evidence of record, comprised of news articles, political commentary, and advertisements for goods utilizing President Trump's name or image, clearly demonstrates that President Donald Trump is so well known that members of the purchasing public will associate the name "TRUMP" as used in Applicant's mark with the President and will reasonably assume that President Trump is being identified. *See, e.g.:*

- From the 08/28/2017 Office action:
 - Michael Scherer, *2016 Person of the Year Donald Trump*, TIME, <http://time.com/time-person-of-the-year-2016-donald-trump/>, TSDR p. 60
 - *Donald Trump*, WIKIPEDIA, https://en.wikipedia.org/wiki/Donald_Trump, TSDR p. 4
- From the 10/16/2017 Office action:
 - Sheryl Gay Stolberg, *Jeff Flake's Lesson for Republicans: Cross Trump at Your Own Risk*, THE NEW YORK TIMES, Oct. 15, 2017, <https://www.nytimes.com/2017/10/15/us/politics/jeff-flake-trump.html>, TSDR p. 2
 - Michael Scherer and Zeke J. Miller, *Donald Trump After Hours*, TIME, <http://time.com/donald-trump-after-hours/>, TSDR p. 55
 - David Caplan, *Baldwin reprises Trump 'SNL' role: Eminem, Puerto Rico, Obama, Corker provide fodder*, ABC NEWS, Oct. 15, 2017, <http://abcnews.go.com/Politics/baldwin-reprises-trump-snl-role-eminem-puerto-rico/story?id=50490667>, TSDR p. 96

- Indira A.R. Lakshmanan, *Donald Trump's hypocritical attacks on the news media*, BOSTON GLOBE, Oct. 12, 2017, <https://www.bostonglobe.com/opinion/2017/10/12/donald-trump-hypocritical-attacks-news-media/lmi4kTyqJyPV0MiVW1lubK/story.html>, TSDR p. 107
- Daniel Marans, *Trump Accuser Demands Release of Documents on All His Sexual Assault Allegations*, HUFFINGTON POST, Oct. 15, 2017, https://www.huffingtonpost.com/entry/summer-zervos-subpoena-donald-trump-sexual-assault_us_59e3a30de4b03a7be5816360, TSDR p. 112
- Article Excerpts from LexisNexis®:⁴
 - Fredreka Schouten, *Trump's health care move jolts many in Washington; Democrats and some GOP lawmakers fret about its effect on their constituents*, THE ARIZONA REPUBLIC (PHOENIX), Oct. 15, 2017
 - Karen De Young and Greg Jaffe, *Allies resigned to a Trump world*, THE BALTIMORE SUN, Oct. 15, 2017
 - Kristi Turnquist, *The collision of TV, talk, comedy and politics*, THE OREGONIAN, October 15, 2017
 - Kevin Horrigan, *Horrigan: The Great Divider doesn't even pretend to worry about healing*, ST. LOUIS POST-DISPATCH, October 15, 2017
 - Jarvis DeBerry, *Puerto Rico is ours. But Donald Trump isn't acting like it.*, TIMES-PICAYUNE, October 15, 2017

The evidence establishes that Donald Trump is the subject of frequent media attention and is, therefore, well known by the public. Indeed, he is so well known that the name "TRUMP" in the applied-for mark would be construed by the public as a reference to President Trump. The fact that a mark also contains other matter, in addition to a name, portrait, or signature, does not alter the requirement for written consent to register from the identified individual. *See Reed v. Bakers Eng'g & Equip. Co.*, 100 USPQ 196, 199 (PTO 1954).

The connection between President Trump and the name "TRUMP" in the applied-for mark is made unequivocal by the stylization of the letter "T" in "TRUMP." Specifically, as explained above, the top portion of the letter "T" in the applied-for mark is stylized to resemble a wave of human hair much

⁴ Attached at the end of the 10/16/17 Office action, TSDR p. 1.

like that of President Trump. This type of hair is a well-known characteristic of President Trump and is often featured on “Trump” merchandise. *See* Evidence attached to the 10/16/2017 Office action, discussed under Section 2(a) refusal, Part B, *supra*. As such, consumers viewing the applied-for mark, particularly with its stylized representation of human hair, would associate the word “TRUMP” in the mark with Donald Trump.

Perhaps the most telling evidence supporting the instant refusal are the concessions made by the Applicant in its appeal brief. *See* Applicant’s Appeal Br. at 3, 6, 7 and 9, discussed under Section 2(a) refusal, Part B, *supra*. In view of these admissions, it is clear that the applied-for mark was selected by Applicant in an attempt to associate the mark and Applicant’s goods with President Donald Trump, thereby benefiting monetarily from the fame of President Trump. Such commercial exploitation is precisely the type of activity that Section 2(c) is intended to prevent. *See Hoefflin*, 97 USPQ2d at 1176 (noting that the purpose of requiring the consent of a living individual to the registration of his or her name, signature, or portrait is to protect rights of privacy and publicity that living persons have in the designations that identify them); *see also* TMEP §1206.

Applicant notes that “none of President Donald J. Trump’s businesses sell package openers.” Applicant’s Appeal Br. at 6. This fact, even if true, is not dispositive. Indeed, the Board has previously held:

While with lesser-known figures there may have to be evidence showing that the consuming public connects them with the manufacturing or marketing of the goods at issue, well-known individuals such as celebrities and **world-famous political figures are entitled to the protection of Section 2(c) without having to demonstrate a connection with the involved goods or services.**

See Hoefflin, 97 USPQ2d at 1177 (emphasis added) (because Barack Obama is the President of the United States, the purchasing public will reasonably assume that marks consisting of the names BARACK and OBAMA identify President Barack Obama); *In re Masucci*, 179 USPQ2d 829, 830 (TTAB 1973) (in spite of any common law rights applicant may have, EISENHOWER for greeting cards was refused on the ground that it consisted of the name of the late President Eisenhower during the life of his widow, and application for registration was filed without her consent). Here, the record is replete with evidence showing that Donald Trump, as President of the United States, is extremely well known. Accordingly, the name “TRUMP” in the applied-for mark will instantly create an association with the President.

Applicant argues that “had the top of the stylized letter ‘T’ been of plain font it is foreseeable another trademark examiner may have found the mark not sufficiently identifiable to President Donald J. Trump since both the words ‘Trump’ and ‘Trump-it’ are in the English language standing apart and distinct from President Donald J. Trump’s personal name.” Applicant’s Appeal Br. at 11. This argument is also unavailing inasmuch as the hypothetical mark to which Applicant refers is not the mark at issue. As such, Applicant’s statements are irrelevant to the facts at issue in this case.

The evidence of record establishes that Donald Trump, as President of the United States, is so well known that the purchasing public will associate the name “TRUMP” as used in the applied-for mark with the President. Accordingly, in the absence of President Trump’s written consent, registration of the applied-for mark must be refused under Section 2(c) of the Trademark Act.

B. There is no “First Amendment” exception to an individual’s rights of privacy and publicity under Trademark Act Section 2(c).

Applicant’s contentions regarding its First Amendment rights are unpersuasive. Indeed, neither the statute nor the case law carves out a “First Amendment” exception to the right of privacy and publicity. Moreover, applicant has not submitted any legal basis for its assertions in this regard.

C. Conclusion

Based on the evidence of record, and the reasons stated above, the examining attorney respectfully submits that the proposed mark TRUMP-IT MY PACKAGE OPENER and design identifies a particular living individual whose consent to register is not of record and registration must be refused. Accordingly, the examining attorney requests that the Board affirm the refusal under Trademark Act Section 2(c).

The Board Cannot Rule on Applicant’s Constitutional Arguments

Applicant devotes much of its appeal briefs to arguing that Sections 2(a) and 2(c) of the Trademark Act violate the Free Speech Clause of the First Amendment. See Applicant’s Appeal Br. at 3-12; Applicant’s Supp. Br. at 6-11. Specifically, Applicant contends that Sections 2(a) and 2(c) are unconstitutional because they constitute “content based regulations,” viewpoint discrimination, are “not narrowly drawn in [their] suppression of freedom of expression,” and are unconstitutionally vague because “applicant does not know the level of strength of the overall message in the applied for mark

that determines if the mark will particularly identify a certain living individual.”⁵ Applicant’s Appeal Br. at 9; Applicant’s Supp. Br. at 8-11.

The Trademark Trial and Appeal Board is an administrative tribunal, not an Article III court, and is empowered to determine only the right to register a mark. TBMP §102.01. As such, the Board has no authority to declare provisions of the Trademark Act unconstitutional. *In re District of Columbia*, 101 USPQ2d 1588, 1602 (TTAB 2012) (no authority to declare provisions of the Trademark Act unconstitutional), *aff’d sub nom. In re City of Houston*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013); *Blackhorse v. Pro-Football Inc.*, 98 USPQ2d 1633, 1638 (TTAB 2011) (no authority to rule on the constitutionality of the Trademark Act on its face or as applied); *Harjo v. Pro-Football, Inc.*, 50 USPQ2d 1705, 1710 (TTAB 1999) (no authority to declare provisions of the Trademark Act unconstitutional no to determine whether Trademark Act 2(a) is overbroad or vague), *rev’d on other grounds*, 284 F. Supp. 96, 68 USPQ2d 1225 (D.D.C. 2003).

Requirement for Information Regarding Relationship Between Applicant and Donald Trump

Due to the renown of the institution or person named in the mark, and the fact that there is no information in the application record regarding a connection with Applicant, the examining attorney required Applicant to specify whether the person named in the mark (i.e., Donald Trump) has any connection with Applicant’s goods, and if so, to describe the nature and extent of that connection. *See* 37 C.F.R. §2.61(b); TMEP §1203.03(c)(i). The requested information was reasonably necessary to establish whether an element of the test for false suggestion of a connection under Trademark Act Section 2(a) is met, i.e., whether Donald Trump is connected with the goods sold by applicant under the applied-for mark. Applicant had a duty to respond to the information requirement, and it failed to do so. *See Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1284-1285 (Fed. Cir. 2005) (“So long as there is some legitimate reason for seeking the information . . . the applicant has a duty to respond.”).

⁵ Within its “Free Speech arguments,” Applicant asserts that registration should not be refused under Section 2(a) or 2(c) because (1) TRUMP-IT is a generic word, and (2) consumers would not be confused by the source of the goods. Applicant’s Supp. Br. at 6-7, 10. As explained in the Office Action dated October 16, 2017, however, if the wording “TRUMP-IT” were indeed generic, it could not be registered as a trademark or service mark under any circumstances as generic terms are by definition incapable of indicating a particular source of goods and/or services. *In re Cordua Rests., Inc.*, 823 F.3d 594, 599, 118 USPQ2d 1632, 1634 (Fed. Cir. 2016) (quoting *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987)); *see* TMEP §1209.01(c). Further, the basis of the instant refusal is not source confusion but the rights of privacy and publicity that living persons have in the designations that identify them. *In re Hoefflin*, 97 USPQ2d 1174, 1176 (TTAB 2010); *see also Univ. of Notre Dame du Lac*, 703 F.2d at 1376 n.8, 217 USPQ at 509 n.8.

It is axiomatic that the failure to comply with a request for information is grounds for refusal. *See In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013) (“Failure to comply with a request for information is grounds for refusal,” where applicant provided equivocal responses to the examining attorney’s questions and did not address this issue in its brief); *In re DTI P’ship LLP*, 67 USPQ2d 1699 (TTAB 2003) (deeming §2(e)(1) refusal moot, since failure to comply with requirement for information is sufficient basis, in itself, for refusal); *In re SPX Corp.*, 63 USPQ2d 1592 (TTAB 2002) (finding registration properly refused where applicant ignored request for information); *In re Page*, 51 USPQ2d 1660 (TTAB 1999) (finding intent-to-use applicant’s failure to comply with requirement for information as to the intended use of the mark constituted grounds for refusal); *In re Babies Beat Inc.*, 13 USPQ2d 1729, 1731 (TTAB 1990) (finding registration properly refused where applicant failed to comply with examining attorney’s request for copies of patent applications and other patent information); *In re Air Prods. & Chems., Inc.*, 192 USPQ 157, 158 (TTAB 1976) (“[Trademark Rule 2.61(b)] has the effect of law.”).

Moreover, TMEP §814 expressly states that “[a]n applicant’s failure to comply with an information request may lead to the presumption that had applicant responded to the requirement, the response would have been unfavorable to the applicant. *See AOP*, 107 USPQ2d at 1651 (noting because applicant had failed to comply with the examining attorney’s information requirement, “to the extent there is any ambiguity regarding the origin and certification of applicant’s goods we address both [merely descriptive and deceptively misdescriptive] refusals in the alternative based on the presumption that had applicant directly and fully responded to the examining attorney’s inquiries, the responses would have been unfavorable,”); *In re Cheezwhse.com, Inc.*, 85 USPQ2d 1917, 1919 (TTAB 2008) (making factual presumptions unfavorable to the applicant in considering alternative statutory refusals under §§2(e)(2) and 2(e)(3), in view of the applicant’s failure to comply with the examining attorney’s requirement for information as to the geographic origin of the goods).

In this case, a requirement was made for specific information relevant to the registrability of the applied-for mark. Applicant failed to comply with this requirement. Accordingly, the examining attorney requests that the Board affirm the refusal to register based on the failure to comply with the requirement for information pertaining to the relationship between Applicant and Donald Trump.

Respectfully submitted,

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