Mailed: December 2, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re 2nd Life Tech, LLC

Serial No. 86415828

Steve M. Virgil, Wake Forest Community Law and Business Clinic,
for 2nd Life Tech, LLC.

Naakwama S. Ankrah, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

Before Seeherman, Lykos, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

2nd Life Tech, LLC ("Applicant") seeks registration on the Principal Register of the design mark shown below for, as amended, "direct current to direct current converter whose use in a battery operated electronic device allows the device to utilize more of the battery's stored energy, electronic circuits, integrated circuits" in International Class 9:[1]

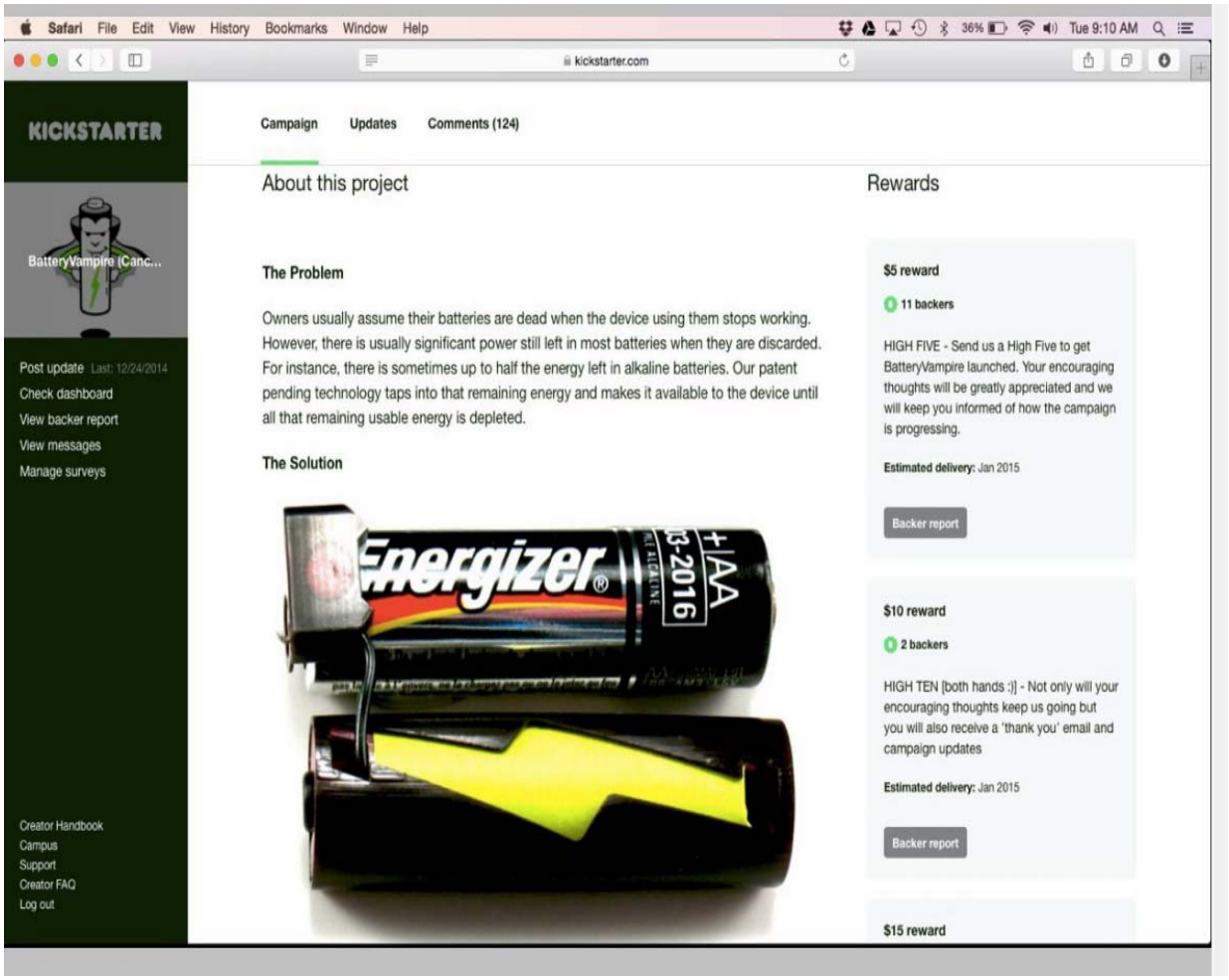
[1] Application Serial No. 86415828 was filed on October 6, 2014 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), on the basis of Applicant's claimed first use of the mark anywhere and first use of the mark in commerce on May 16, 2014.

The Trademark Examining Attorney issued a final refusal of registration under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1127, on the ground that Applicant's specimen of use does not show the applied-for mark in use in commerce in connection with the goods identified in the application. Applicant thereupon filed this appeal. Applicant and the Examining Attorney have filed briefs. We affirm the refusal to register.

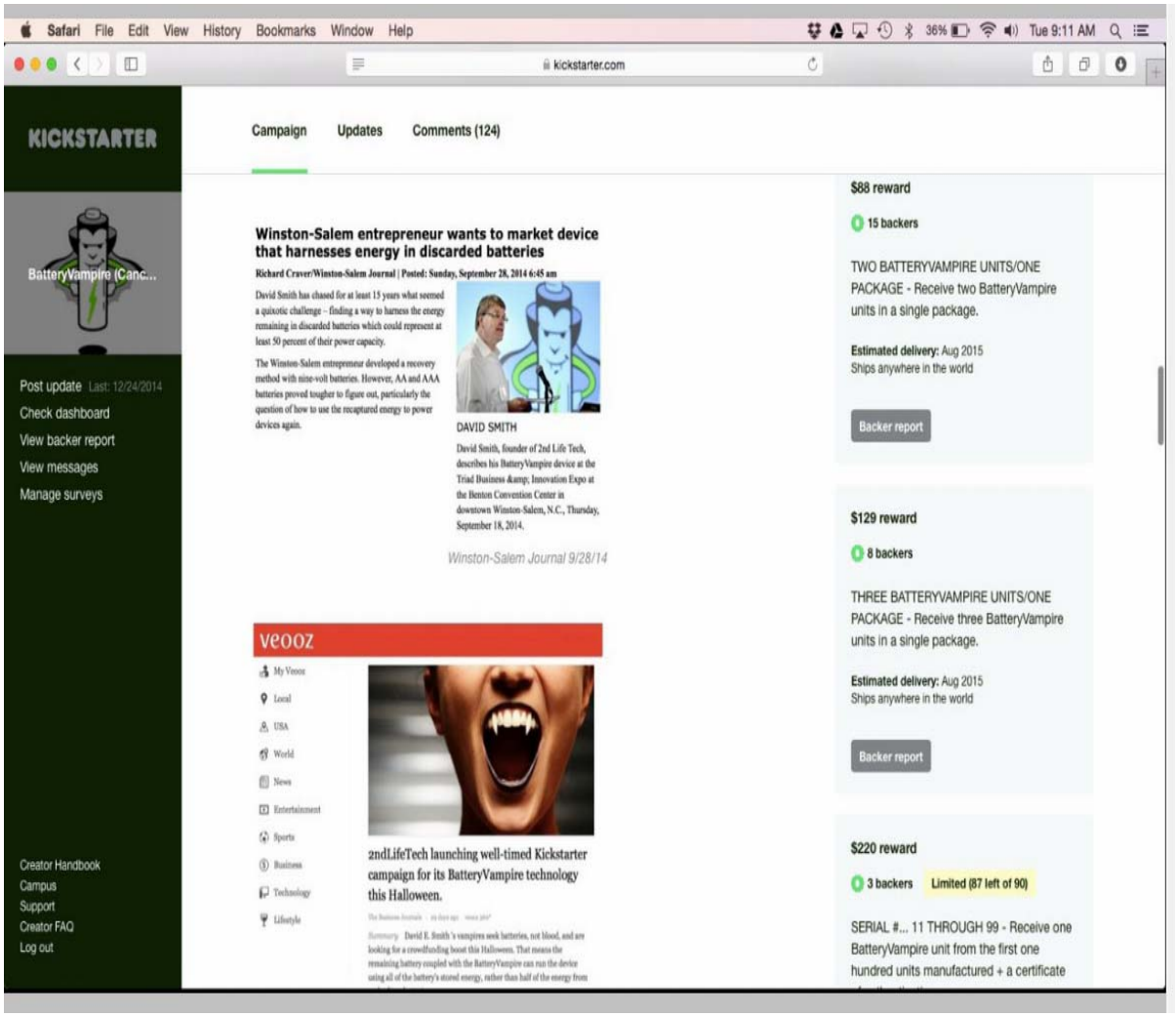
I. Prosecution History

Applicant's specimen filed with the application consisted of a pre-launch crowdfunding page showing the mark above the words "Coming to Kickstarter Soon." On January 28, 2015, the Examining Attorney issued an Office Action refusing registration on the ground that Applicant's specimen did not show the applied-for mark in use in commerce in connection with the goods, and requiring the filing of a substitute specimen.

On June 30, 2015, Applicant responded to the Office Action by filing what it described as substitute specimens**,** shown below, although we regard it as a single specimen:[2]



[2] In its brief Applicant explained that "[t]he second specimen that was submitted as a use-in-commerce specimen for this mark (screen shot 2015-04-14 at 9.11.06 AM copy) is on the same webpage as the aforementioned specimen, it is simply further down the page." 14 TTABVUE 3. Because both pages appear on the same webpage, we will refer to them and treat them as a single unitary specimen.



Applicant described the substitute specimen as follows: "each specimen is a screenshot of the kickstarter campaign done on behalf of the product. The jpg designated 9.10.44 details of the products function and purpose. The jpg designated 9.11.06 discusses the inventor, the product, and the means of acquiring the product through the campaign."

On July 22, 2015, the Examining Attorney issued a final refusal to register on the ground that Applicant's substitute specimen again did not show use of the applied-for mark in commerce in connection with the goods. Applicant requested reconsideration on the basis that the substitute specimen was a display associated

with the goods, and subsequently appealed to the Board. The Board instituted and then suspended the appeal pending disposition of the request for reconsideration. When the Examining Attorney denied the request for reconsideration, the appeal was resumed.

II. Analysis

A use-based application under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), must be supported by a "specimen showing how the applicant uses the mark in commerce. . ." 37 C.F.R. § 2.34(a)(1)(iv). "[A] mark shall be deemed to be in use in commerce—(1) on goods when—(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto . . . and (B) the goods are sold or transported in commerce." 15 U.S.C. § 1127. Although the ultimate basis for the final refusal is that Applicant's substitute specimen does not show use of the applied-for mark in commerce in connection with Applicant's goods, the specific issue on appeal is whether Applicant's substitute specimen constitutes a display associated with the goods under the line of cases beginning with *Lands' End, Inc. v. Manbeck*, 797 F. Supp. 511, 24 USPQ2d 1314 (E.D. Va. 1992), in which the Board and courts have considered whether and under what circumstances materials such as catalogs and Internet webpages can function as displays associated with the goods.

"A web page that displays a product can constitute a 'display associated with the goods' if it: (1) contains a picture or textual description of the identified goods; (2) shows the mark in association with the goods; and (3) provides a means for ordering

the identified goods." Trademark Manual of Examining Procedure ("TMEP") § 904.03(i) (Oct. 2016) (citations omitted). Applicant and the Examining Attorney both devote much of their briefs to the third element set forth in this section of the TMEP, specifically, whether the Kickstarter webpage "provides a means for ordering the identified goods" in a transaction that is a sale, or the functional equivalent of a sale, of Applicant's goods. 14 TTABVUE 3-5; 16 TTABVUE 4-6. We need not reach that issue. For the reasons discussed below, we find that Applicant's specimen is not a display associated with the goods, but we do so because Applicant's webpage does not show the applied-for mark in association with the goods.[3]

In *In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1123 (Fed. Cir. 2009), the Federal Circuit noted that "the test for an acceptable . . . specimen, is simply that it must in some way evince that the mark is 'associated' with the goods and serves as an indicator of source." The Board has applied this principle in cases analyzing whether the manner of use of a mark on a webpage was sufficient for the mark to be associated with the goods and to serve as an indicator of their source. *See In re Osterberg*, 83 USPQ 2d 1220, 1223 (TTAB 2007) (holding that applied-for mark appearing on webpage containing multiple marks was "not so prominently displayed in the website that customers will easily associate the mark with the products."); *In re Azteca Systems Inc.*, 102 USPQ2d 1955, 1958 (TTAB 2012) (holding that webpage displaying

[3] The "Board reviews an Examining Attorney's decision on appeal to determine if the refusal to register was correctly made. In doing so, the Board need not adopt the rationale of the Examining Attorney." *In re AFG Indus. Inc.*, 17 USPQ2d 1162, 1163 (TTAB 1990) (citing *In re Avocet*, 227 USPQ 566 (TTAB 1985)).

applied-for mark with other marks and textual materials failed "to exhibit an association between applicant's goods as described on the webpage and the applied-for mark appearing at the bottom of the same webpage."). Application of this principle to Applicant's substitute specimen requires us to affirm the refusal to register because on the specimen the applied-for mark is not associated with the goods in a manner to serve as an indicator of their source.

On the first page of Applicant's substitute specimen, the applied-for mark appears only in the upper left-hand corner beneath the KICKSTARTER mark and above various links. The page references a "project," "The Problem," and "The Solution." Under the heading "The Solution" is a photograph of what appears to be a prototype device attached to an Energizer brand battery. This is the only product shown anywhere on the specimen. The prototype bears what appears to be a yellow lightning bolt design. On the right side of the page, potential contributors are asked to send $5 "to get BatteryVampire launched" and are promised "a 'thank you' email and campaign updates" in response.

The second page of the substitute specimen also displays the applied-for mark in the upper left-hand corner beneath the KICKSTARTER mark, but no product is shown. Instead, the page reproduces an article from the *Winston-Salem Journal* containing a photograph of David Smith, who Applicant describes as the inventor of the product shown on the first page, showing Mr. Smith "describ[ing] his Battery Vampire device" at a conference. The article briefly describes Mr. Smith's activities. In the background of the photograph is what appears to be a life-size projection of

part of the figure in the applied-for mark.[4] Beneath the excerpt from the article containing the photograph of Mr. Smith is a reproduction of a summary of an article from *The Business Journal* with the headline "2nd LifeTech launching well-timed Kickstarter campaign for its BatteryVampire technology this Halloween." On the right-hand side of the page, contributors are offered either two or three "BATTERYVAMPIRE UNITS" for contributions of $88 or $129, respectively, or "one BatteryVampire unit from the first one hundred units manufactured" for a $220 contribution.

One "factor in the analysis of whether a specimen is an acceptable display used in association with the goods is whether the mark is displayed in such a way that the customer can easily associate the mark with the goods." *Osterberg*, 83 USPQ2d at 1223. Assuming, without deciding, that the substitute webpage specimen displays and describes the product identified in the application and that it was visited by "customers," the applied-for mark is not displayed in a manner that would enable a viewer to easily associate the mark with the goods. The only product actually depicted on the specimen bears a different design mark, and all of the descriptions of the product, as well as the instructions for its acquisition in exchange for donations,

[4] The mark is described in the application as consisting of "a cartoon character, where the body of the character is a AA battery, the body having arms with hands positioned at the hips of the body, eyes, nose, a mouth with two pointed canine teeth protruding from it, a cape, a widow's peak hairline and a vertical zig-zag bolt design on the front of the body. The color green appears on the zig-zag bolt design on the front of the body and the arms; the color white appears on the hands and most of the body and the teeth; the color black makes up the outline of the body of the battery, the mouth, the nose, the eyes, the teeth, it is the color of the outside of the cape and widow's peak hairline top to the body; and gray is the color of the inside of the cape and top of the battery above the hairline."

identify the product by the BATTERY VAMPIRE word mark. The applied-for mark appears in a corner of the specimen beneath the KICKSTARTER mark, and on the second page of the specimen it is separated from the instructions for obtaining the product by extensive textual and visual materials. Viewers of the specimen could not easily associate the applied-for mark with the goods given the uses of other indicia to adorn and identify the product itself, and the lack of proximity of the applied-for mark to the references to Battery Vampire units. *Osterberg*, 83 USPQ2d at 1223 (prominent display of mark other than applied-for mark on product shown on webpage negated applicant's claim that the use of the applied-for mark on the page was associated with the product); *Azteca*, 102 USPQ2d at 1958 (presence of other marks on webpage specimen, including applicant's "primary mark for the goods," and distance of applied-for mark from product description, diminished ability of applied-for mark appearing in the margin of the page to be associated with the goods). Any connection of the applied-for mark to the product shown and described on the specimen is simply too attenuated for the specimen to show use of the applied-for mark in commerce in connection with the identified goods, even if the specimen satisfied the other requirements to function as a display associated with the goods.

Decision: The refusal to register is affirmed.