

This Opinion is not a
Precedent of the TTAB

Mailed: May 19, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Striker Brands LLC
—

Serial No. 88519404
—

Tye Biasco of Patterson Thuente Pedersen, P.A.,
for Striker Brands LLC.

Jared M. Mason, Trademark Examining Attorney, Law Office 119,
J. Brett Golden, Managing Attorney.

—
Before Taylor, Goodman and Heasley,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Striker Brands LLC (“Applicant”) seeks registration on the Principal Register of
the mark IT’S ABOUT THE FABRICS (in standard characters) for

Fabrics, namely, ultraviolet protective fabrics, bug-resistant fabrics, durable water repellent fabrics, moisture resistant fabrics, moisture absorbent fabrics, and anti-microbial fabrics used in the manufacture of fishing and hunting apparel, namely, jackets, bibs, shirts, pants,

sweatshirts, undergarments, footwear, gloves and mittens, balaclavas, and hats and caps in International Class 24.¹

The Trademark Examining Attorney has refused registration of Applicant's mark under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1127, because the specimen and substitute specimens do not show the applied-for mark as actually used in commerce in connection with any of the specified goods.

When the refusal was made final, Applicant appealed and requested reconsideration, providing additional substitute specimens. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.

We affirm the refusal to register.

I. Prosecution History

Upon the filing of the statement of use, the Examining Attorney found that Applicant's original specimen ("first specimen"), which consists of website pages displaying the mark, did not show the applied-for mark as actually used in commerce in connection with any of the goods specified in International Class 24.²

¹ Application Serial No. 88519404 was filed on July 17, 2019, based upon Applicant's assertion of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system. Applicant's brief is at 6 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

² July 30, 2020 Office Action at TSDR 1.

In response, Applicant provided a substitute specimen (“second specimen”) of additional website pages displaying the mark.³ The Examining Attorney again found that Applicant’s substitute specimen did not show the applied-for mark as actually used in commerce in connection with any of the goods specified in International Class 24.⁴

Applicant then filed a request for reconsideration and provided another substitute specimen (“third specimen”) of web pages displaying the mark.⁵ The Examining Attorney found Applicant’s substitute specimen showed finished clothing goods, not the fabric components or raw goods identified in the application.⁶ The Examining Attorney also pointed out that the link on the specimen to “inquire about our fabrics” is a link to a contact form that does not provide a means for ordering fabric goods. *Id.*

II. Arguments on Appeal

The Examining Attorney argues that the first, second and third specimens of record plainly reveal that the applied-for mark is only used for the sale of finished clothing goods in International Class 25 and not for fabrics as raw goods in International Class 24. 8 TTABVue 6.

The Examining Attorney also argues that the web pages comprising the third specimen do not constitute a display associated with the goods because the specimen does not include instructions to place an order, or an offer to accept an order. 8

³ February 1, 2021 Response to Office Action.

⁴ February 24, 2021 Office Action at TSDR 1.

⁵ August 24, 2021 Request for Reconsideration at TSDR 1.

⁶ September 21, 2021 Denial of Reconsideration at TSDR 1.

TTABVUE 4-5. The Examining Attorney argues that the link shown on the specimen for “click here to inquire about our fabrics” is a contact form and not a means for ordering the goods.

Applicant points out that all three specimens include the applied-for Mark, IT’S ABOUT THE FABRICS, the TM designation, and an identification of fabrics of specific types. 6 TTABVUE 4. Applicant asserts that the second and third specimens provide detailed information about the fabrics and a means of inquiring about the fabrics. 6 TTABVUE 5. Applicant argues that the specimens are point of sale displays, and focuses on the third submitted specimen of use in its brief. 6 TTABVUE 5-6. Applicant states: “the third specimen does not in any way include the end products manufactured and sold using the fabrics associated with the Applied-For Mark.” 6 TTABVUE 5. Applicant further states that “[t]he third specimen, submitted on August 24, 2021, is a web page that does not advertise or provide details on any finished clothing goods – it merely gives details as to what the fabrics are made of, how the fabrics are made, the benefits of the fabrics, and the differences between the fabrics associated with the Applied-For Mark and other fabrics.” 6 TTABVUE 6.

Applicant argues that potential purchasers of fabrics can use the

“Click here to inquire about our fabrics” link [on the web page] to obtain technical assistance with questions about the goods or ordering Applicant’s specialized fabrics. This information is separated from information about corporate contact information at the bottom of the page resources, or the dealer locator. This separation of the ordering information from general corporate and finished clothing goods ordering information indicates that the ordering contact information will be seen by consumers as a direct means of ordering the Applicant’s specialized fabrics.

6 TTABVUE 6.

III. Applicable Law

A specimen “must in some way evince that the mark is ‘associated’ with the goods and serves as an indicator of source.” *In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1123 (Fed. Cir. 2009); *see also In re Safariland Hunting Corp.*, 24 USPQ2d 1380, 1381 (TTAB 1992) (specimen must show “direct association” with goods).

Section 45 of the Trademark Act, 15 U.S.C. § 1127, states that a trademark is used in commerce when “it is placed in any manner on the goods or their containers or the displays associated therewith ...” See also Trademark Rule 2.56(b)(1), 37 C.F.R. § 2.56(b)(1). “Section 45 of the Trademark Act does not define the term ‘displays associated therewith,’ and ... the Board must make a case-by-case determination of whether a particular use asserted to be a ‘display’ is adequate to demonstrate use in commerce.” *In re Shipley Co. Inc.*, 230 USPQ 691, 692 (TTAB 1986).

“It long has been held that mere advertising is not sufficient to show trademark use.” *In re Quantum Foods Inc.*, 94 USPQ2d 1375, 1379 (TTAB 2010) (citing *Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965) (“it being well settled that mere advertising ... do[es] not constitute technical trademark use”); *Land’s End Inc. v. Manbeck*, 797 F.2d 127, 24 USPQ2d 1314, 1316 (E.D.Va. 1992) (“Specimens are invalid for registration purposes only if they constitute mere advertising.”)). “[T]o be more than mere advertising, a point-of-sale display associated with the goods must do more than simply promote the goods and induce a person to buy them; that is the purpose of advertising in general. The

specimen must be ‘calculated to consummate a sale.’” *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2009 (TTAB 2014), quoting *In re Bright of America, Inc.*, 205 USPQ 63, 71 (TTAB 1979).

The determination of whether the proffered specimen is merely advertising or a display associated with the goods is a question of fact. *In re U.S. Tsubaki*, 109 USPQ2d at 2003, citing *In re Shipley*, 230 USPQ at 694. “Factually, we need to ask whether the purported point-of-sale display provides the potential purchaser with the information normally associated with ordering products of that kind.” *In re Anpath Group Inc.*, 95 USPQ2d 1377, 1381 (TTAB 2010). The display should provide a “level of information ... capable of allowing a consumer to consummate a physical order” *Id.* at 1382. “[A]n Internet web page that merely provides information about the goods, but does not provide a means of ordering them, is viewed as promotional material, which is not acceptable to show trademark use on goods.” *In re Quantum Foods*, 94 USPQ2d at 1378 (citing *In re Genitope Corp.*, 78 USPQ2d 1819, 1822 (TTAB 2006)).

IV. Analysis

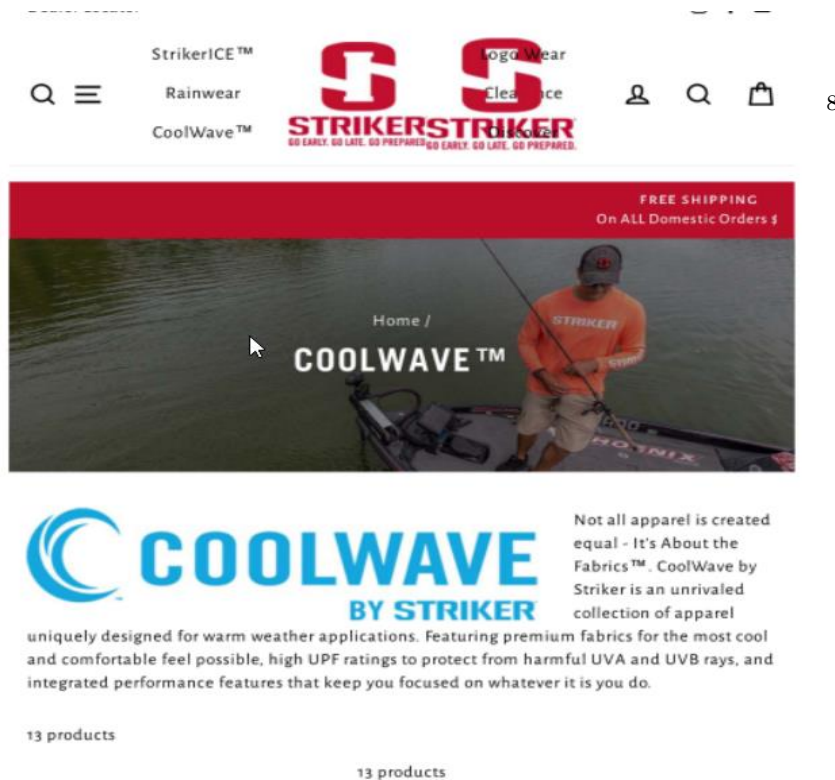
A. Whether the specimens identify the fabric goods or a component of clothing.

We consider the first, second and third specimens to address the Examining Attorney’s arguments that these specimens identify a component of clothing, rather than raw fabric goods.

A specimen for a component of a product rather than the product itself creates the required direct association between the mark and the identified goods, by visual or

verbal identification of the component rather than the product. *In re James S. Fallon*, 2020 USPQ2d 11249 at *5 (TTAB 2020).

The first specimen is twenty-eight pages. At pages 1 and 27-28 the mark is shown in connection with clothing:⁷



⁷ Specimen July 14, 2020 at TSDR 1-28.

⁸ Specimen July 14, 2020 at TSDR 1.

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FOR THE PAST DECADE, STRIKER™ HAS BEEN BUILDING GEAR AND APPAREL THAT ALLOWS ANGLERS TO BE SAFER AND BETTER PROTECTED IN THEIR PURSUIT OF ALL SPECIES OF FISH. WE'VE PIONEERED ICE FISHING SUITS WITH INTEGRATED SUREFLOTE™ FLOTATION AND NOW WE'VE SET OUR SIGHTS ON BUILDING THE BEST GEAR FOR OPEN WATER ANGLERS, WITH A FOCUS ON FUNCTIONAL STYLE AND FEATURES THAT KEEP YOU COMFORTABLE AND PROTECTED.

WHAT MAKES STRIKER'S NEW OPEN WATER FISHING LINE ATTRACTIVE? THE ANSWER LIES IN OUR PRODUCT RESEARCH AND DEVELOPMENT - IT'S ABOUT THE FABRICS™. OUR APPAREL USES THE NEWEST HIGH-TECH FABRICS TO ACHIEVE PEAK PERFORMANCE, REGARDLESS OF WHERE YOU FISH. EACH STYLE IS METICULOUSLY DESIGNED USING THE LATEST INNOVATIVE TECHNOLOGIES. FOR EXAMPLE, OUR NEW FLAGSHIP EVOLVE RAIN GEAR USES AN EVENT™ DIRECT VENTING™ SYSTEM WITH 8XB™ TECHNOLOGY, MEANING A MEMBRANE THAT IS 8X MORE BREATHABLE THAN THE COMPETITION.



STRIKER™ TECHNOLOGY



UPF The class of constantly changing molecules and DNA get targeted on the water and long days. Stay focused on performance, skills and games - we've got you protected from the beating sun.



STRETCH From leading the boat to casting for and landing buckets, stretch is a key ingredient to keeping you comfortable all day long. Don't let our fishing apparel restrict your movement.



StrikerICE™

Rainwear

CoolWave™



Logo Wear

Clearance

Discover



COOLWAVE BY STRIKER

Not all apparel is created equal - It's About the Fabrics™. CoolWave by Striker is an unrivaled collection of apparel uniquely designed for warm weather applications. Featuring premium fabrics for the most cool and comfortable feel possible, high UPF ratings to protect from harmful UVA and UVB rays, and integrated performance features that keep you focused on whatever it is you do.

13 products



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★★★★★ 3 reviews



SANIBEL BAY SHIRT

\$69.99

★★★★★ 2 reviews



SWAGGER SHIRT

\$39.99

★★★★★ 1 review

⁹ Specimen July 14, 2020 at TSDR 27-28.

Pages 1 and 28 of the first specimen include the following text: “CoolWave by Striker ... Featuring premium fabrics for the most cool and comfortable feel possible, high UPF ratings ... and integrated performance features.”¹⁰ Page 27 of the first specimen states: “Our apparel uses the newest high-tech fabrics to achieve peak performance ... For example, our new flagship Evolve rain gear uses an Event Direct Venting system with 8XB technology, meaning a membrane 8X more breathable than the competition.”¹¹

The second specimen is 26 pages and provides information about “Striker Ice Hydrapore | Waterproof – Striker Brands,” “Striker | UPF – Striker Brands” and “Striker | Permanent Cooling Technology Striker Brands.”¹²

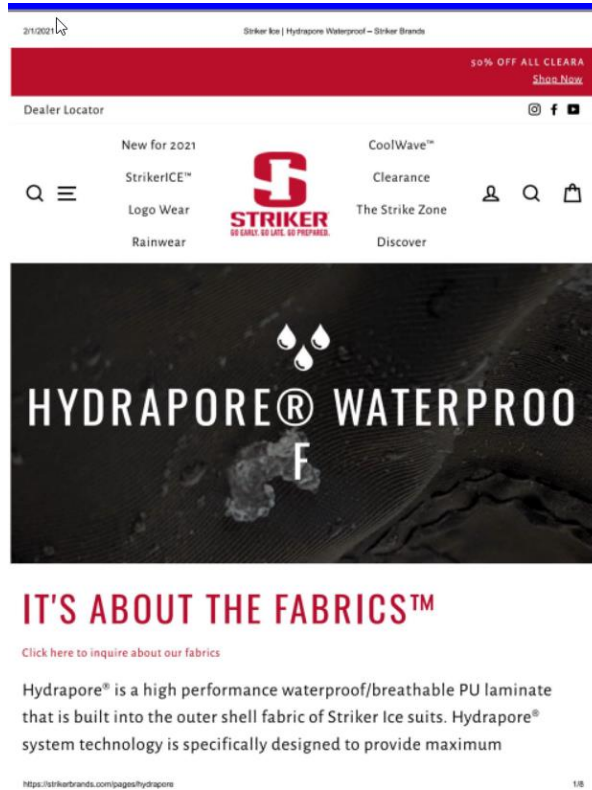
Pages 1-2 of the second specimen displaying the mark discusses “Hydrapore Waterproof” fabric used in Applicant’s clothing.¹³

¹⁰ Specimen July 14, 2020 at TSDR 1, 28.

¹¹ Specimen July 14, 2020 at TSDR 27.

¹² Specimen February 1, 2021 at TSDR 1-27.

¹³ Specimen February 1, 2021 at TSDR 1-2.



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The specimen states “Hydrapore is a high performance/waterproof breathable PU laminate that is built into the outer shell fabric of Striker Ice suits. Hydrapore system technology is specifically designed to provide protection against extreme elements.”¹⁵ A photograph of a Striker Ice product is shown on one of the following pages.¹⁶

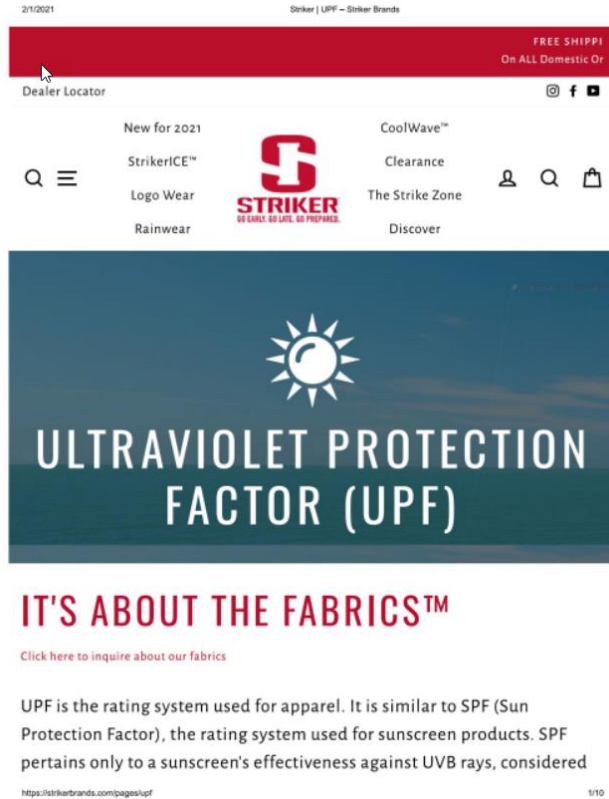
Pages 9-10 of the second specimen displaying the mark discusses the “Universal Protection Factor.”¹⁷

¹⁴ Specimen February 1, 2021 at TSDR 1-2.

¹⁵ Specimen February 1, 2021 at TSDR 1-2.

¹⁶ Specimen February 1, 2021 at TSDR 4.

¹⁷ Specimen February 1, 2021 at TSDR 9-10.



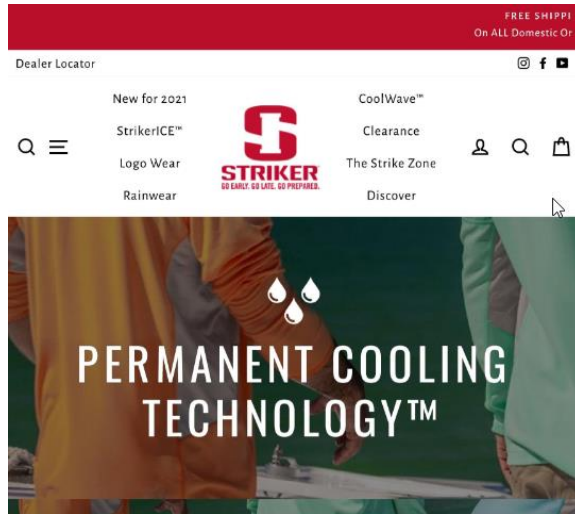
The specimen web page states “UPF is the rating system for apparel. It is similar to SPF (sun protection factor). ... Products with UPF protection.”¹⁸ The web pages discussing UPF protection are followed by web pages of clothing items featuring UPF protection.¹⁹

On pages 19-20, the second specimen displaying the mark discusses Permanent Cooling Technology.²⁰

¹⁸ Specimen February 1, 2021 at TSDR 9.

¹⁹ Specimen February 1, 2021 at TSDR 11-18.

²⁰ Specimen February 1, 2021 at TSDR 19-20.



IT'S ABOUT THE FABRICS™

[Click here to inquire about our fabrics](#)

Permanent Cooling Technology™ is an important piece of the puzzle when it comes to creating functional summertime clothing. Within Striker's open water apparel line, there are several styles that have a permanent

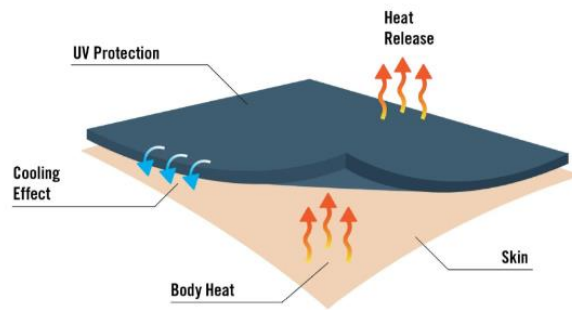
<https://strikerbrands.com/pages/permanent-cooling>

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cooling function built directly into the garment. When moisture (sweat) from the skin meets the fabric, it creates an automatic cooling sensation, often making you feel 2-3 degrees cooler.

BUILT TO LAST

Unlike many competitors who choose to use a chemical coating as an internal cooling function, Striker builds Permanent Cooling Technology™ directly into the yarn BEFORE it is woven or knitted into the final fabric for the garment. Doing this drastically extends the life of the cooling feature and prevents it from deteriorating under normal wear and tear.



PRODUCTS WITH PERMANENT COOLING TECHNOLOGY™

<https://strikerbrands.com/pages/permanent-cooling>

28

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²¹ Specimen February 1, 2021 at TSDR 19-20.

The specimen states “Within Striker’s open water apparel line there are several styles that have permanent cooling function built directly into the garment. ... Striker builds permanent cooling technology directly into the yarn before its woven or knitted into the final fabric for the garment.”²² Products with Permanent Cooling Technology follow these pages, as well as a web page with a link to dealers, and a link to shop for clothing goods.²³

The third specimen also displays the mark on page 1 in connection with Permanent Cooling Technology. The identical text as quoted above discussing “Permanent Cooling Technology” is supplied on the third specimen.²⁴

As used on Applicant’s first, second and third specimens, IT’S ABOUT THE FABRICS creates a direct association between integral features built into the finished clothing items, namely performance fabric and their features. The specimens indicate that Applicant’s clothing uses high performance fabrics in its finished clothing goods that contain, for example, Hydrapore laminate for protection from extreme elements, ultraviolet protection factor for protection from ultraviolet rays, and Permanent Cooling Technology with an automatic cooling function to make the wearer feel cooler. We also note that the second and third specimens, discussing the fabric features of Applicant’s clothing goods, provide a link to “inquire about our fabrics” in connection with those goods.

²² Specimen February 1, 2021 at TSDR 19-20.

²³ Specimen February 1, 2021 at TSDR 21-25.

²⁴ Specimen August 24, 2021 at TSDR 1.

Applicant's use of ITS ABOUT THE FABRICS supports a finding that consumers who encounter the mark will perceive it as referring to an integral component of the finished clothing items, namely specialized performance fabrics built into the clothing, and not a reference to the raw materials--fabric--used for the manufacture of clothing. Thus, Applicant's first, second, and third specimens create a direct association between the mark and a component of Class 25 finished clothing goods, rather than fabric goods in Class 24.

In sum, Applicant's first, second and third specimens do not demonstrate use of the mark in a manner that creates in the minds of potential consumers a direct association between the mark and the identified Class 24 fabrics used for manufacture of clothing.

B. Whether the third specimen is a point of sale display for ordering fabrics.

We now consider Applicant's argument that the third specimen is a point of sale display for the fabrics. Following is the specimen in its entirety:



IT'S ABOUT THE FABRICS™

[Click here to inquire about our fabrics](#)

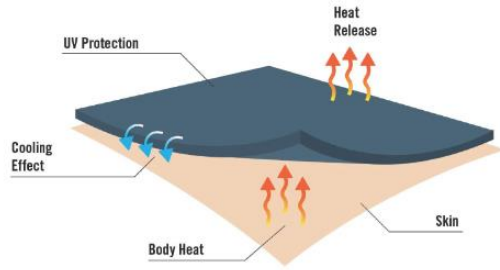
Permanent Cooling Technology™ is an important piece of the puzzle when it comes to creating functional summertime clothing. Within Striker's open water apparel line, there are several styles that have a permanent cooling function built directly into the garment. When moisture (sweat) from the skin meets the fabric, it creates an automatic cooling sensation, often making you feel 2-3 degrees cooler.

BUILT TO LAST

Unlike many competitors who choose to use a chemical coating as an internal cooling function, Striker builds Permanent Cooling Technology™ directly into the yarn BEFORE it is woven or knitted into the final fabric for the garment. Doing this drastically extends the life of the cooling feature and prevents it from deteriorating under normal wear and tear.

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²⁵ Specimen August 24, 2021 at TSDR 1.



PRODUCTS WITH PERMANENT COOLING TECHNOLOGY™



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²⁶ Specimen August 24, 2021 at TSDR 2-3.



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In addition, the Examining Attorney submitted the contact form that is linked to the “click here to inquire about our fabrics” link on the first page of the third specimen:

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We find that the third specimen does not constitute a point of sale display for purchasing fabrics. Information that we would consider essential to a purchasing decision is absent from Applicant’s third specimen. *See In re Siny Corp.*, 920 F.3d 1331, 2019 USPQ2d 127099, at *1, 3-4 (Fed. Cir. 2019) (affirming specimen refusal for fabric goods where the specimen did not display essential purchasing information). There is no information at all regarding the price, or even a range of prices, for fabric goods. There is no information regarding the weight or thickness of the fabric or the dimensions in which a bolt of the fabric would be available. There is

²⁸ September 21, 2021 Denial of Reconsideration at TSDR 2.

no information about the minimum quantities one may order, how one might pay for the products, or how the goods would be shipped. We find that customers would need a great deal more information about the Permanent Cooling Technology fabric before they would be prepared to purchase it. *See e.g., In re Quantum Foods*, 94 USPQ2d at 1379 (specimen constituted advertising and did not show an actual offer for sale of goods and to complete an online purchasing as it lacked a sales form, pricing information, offers to accept orders, and special instructions for placing orders anywhere on the specimen.).

The additional statements and links that make up the web pages of the third specimen include: “products with Permanent Cooling Technology,” “find a dealer,” “new for winter 2021,” “50% + off clearance,” and “shop,” all relate to Applicant’s **finished clothing** and not fabric goods. The link to inquire “about our fabrics” appears to relate to Applicant offering information about the clothing made from proprietary fabrics, rather than offering of the fabric itself for purchase.

We note the contact form that results from clicking the web page link to “inquire about our fabrics” has additional links above it referring to Applicant’s clothing lines (e.g., StrikerIce, Logo Wear, Rainwear, CoolWave, The Strike Zone) but no links to Hydrapore laminate, ultraviolet protection factor, or Permanent Cooling Technology fabrics. There is a section of the contact form that states “ordering” as well as a separate box to type a message. However, the web pages and the contact box do not provide the prospective purchaser with sufficient information that the customer can

select a fabric product and place an order solely for fabrics.²⁹ We find the invitation to contact Applicant regarding its fabrics is simply a means of getting information about Applicant's clothing items and not a means of ordering Applicant's fabrics.

As the Board stated in *In re Anpath Group*, 95 USPQ2d at 1381, “[o]ur hypothetical, potential customer, after reviewing Applicant’s specimen with its limited ordering information, is simply not yet at the point of purchase, and would contact applicant to obtain preliminary information necessary to order the goods; it is only after obtaining such information, which is not provided on the specimen, that the purchaser could actually place an order with applicant’s sales office.” Therefore, “[a] simple invitation to call applicant to get information—even to get quotes for placing orders—does not provide a means of ordering the product.” *In re U.S. Tsubaki*, 109 USPQ2d at 2005. Similarly, the contact form here is a simply a call to get information, but not a means to order a fabric product.

We find the third specimen is mere advertising and not a point of sale display associated with the Class 24 goods.

Decision: The refusal to register Applicant’s mark IT’S ABOUT THE FABRICS is affirmed.

²⁹ Specimen August 24, 2021 at TSDR 1-5. September 21, 2021 Denial of Reconsideration at TSDR 2.