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

Proceeding	77928601
Applicant	Bar NND Ranches, LLC
Applied for Mark	UNGULATTE
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Submission	Appeal Brief
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Bar NND Ranch, LLC

Trademark Attorney: Maureen Dall Lott

Mark: UNGULATTE and Design

Law Office: 117

Serial No.: 77/928,601

Filing Date: February 4, 2010

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

EX PARTE APPEAL

APPLICANT'S AMENDED APPEAL BRIEF

TABLE OF AUTHORITIES

STATUTES AND RULES

TMEP Rule 807.08	2, 6
37 C.F.R. 2.52(b)(4)	2, 6, 10, 11
TEMP Rule 1213.05	11, 12
TMEP Rule 710.03	14

PRELIMINARY STATEMENT

The present appeal concerns simply whether it is proper to show non-claimed subject matter in broken lines. Authority for such representation is found in 37 C.F.R. 2.52(b)(4) (as well as TMEP Rule 807.08), which reads in pertinent part: “If necessary to adequately depict the commercial impression of the mark, the applicant may be required to submit a drawing that shows the placement of the mark by surrounding the mark with a proportionately accurate broken-line representation of the particular goods, packaging, or advertising on which the mark appears. **The applicant must also use broken lines to show any other matter not claimed as part of the mark.**” (emphasis added). The non-claimed matter in the instant case comprises antlers. Not only is it proper to show them in broken lines, but because they are not claimed as a portion of the mark, Applicant “must” use broken lines to show them.

As best illustrated in the three-page specimen filed with the statement of use on August 15, 2012, Applicant’s mark consists of a two dimensional fanciful deer design; the deer is holding a coffee mug which has the word UNGULATTE written thereon. Applicant places different antler configurations above the deer to describe particular qualities for each particular coffee product sold.

For example, Applicant applies antlers having more tips (i.e. “points”) above the deer for bolder coffee. For decaffeinated coffee, Applicant applies antlers having velvet thereon above the deer. Thus, consumers are still buying the same brand of coffee from the same provider. However, rather than having language written above the mark, such as “Bold Roast” or “Decaffeinated”, Applicant is instead achieving this graphically via different antler configurations shown above the mark.

DESCRIPTION OF RECORD

A. PROSECUTION HISTORY

The present application was filed on February 4, 2010, with a drawing page employing a broken-line depiction of antlers above the claimed mark. The application included the following statement in the description of the mark: “the matter shown by the dashed lines in the drawing show placement of the mark; the matter shown by the dashed lines in the drawing is a “non-claimed” feature of the mark and serves to show the position of the mark.” On May 10, 2010, the Trademark Attorney stated that “the use of broken lines and a claim that they are not part of the mark is not proper”. With regard to the dashed lines, the Trademark Attorney further stated “applicant may delete them from the drawing”.

In reply to that Office Action, Applicant’s response of October 29, 2010 stated “the trademark attorney provisionally refused registration as to the dashed lines showing ‘non-claimed’ features of the mark. Per the Trademark Attorney’s assertion that such is not necessary and that the dashed lines should simply be removed, Applicant has thus amended the drawing to delete the ‘non-claimed’ material. . .” Thus, per the Trademark Attorney’s

recommendation, the antlers were deleted from the mark, as well as the statement in the description relating to them as “non-claimed”.

After receiving a Notice of Allowance for the instant application, Applicant’s counsel contacted the Trademark Attorney regarding the submission of a specimen which shows a deer having felt-covered antlers. The Trademark Attorney advised Applicant’s counsel that such a drawing would not be acceptable in view of the current antlerless drawing. The Trademark Attorney went on to explain that the drawing of the instant application could first be amended to show such an antler design and then such a specimen could be filed. This is contrary to Applicant’s initial statement that the dashed antlers were a non-claimed feature of the mark and this is further contrary to the Trademark Attorney’s statement that because the dashed antlers are not claimed, that they should be deleted. If they are not a claimed feature of the mark, then it is unusual that such non-claimed features, or portions which the Trademark Attorney regards as not being a portion of the mark, should have any material importance in determining the validity of a specimen of use which does show the mark.

In light of that conversation with the Trademark Attorney, Applicant then sought to amend the drawing back to the original form with broken-line depiction of the antlers. This was denied on April 23, 2012. On August 15, 2012, Applicant submitted its Statement of Use showing the design in conjunction with antlers (and with text noting the variability of antlers on deer, which is used in conjunction with the mark to identify characteristics of the associated coffee goods). On September 10, 2012, the Trademark Attorney rejected the specimen due to the presence of the antlers, and again on January 7, 2013. Applicant on June 20, 2013 then

amended the drawing back to the original form. The application was then finally rejected on September 11, 2013, which rejection forms the basis for this appeal.

However, after filing the instant appeal, the Trademark Attorney requested that the matter be remanded back to her so that she could raise new grounds of rejections. The matter was thus remanded and the new rejections were raised in an Office Action which was issued on May 16, 2014. Applicant then responded to the new grounds of rejection in the response filed on November 17, 2014. The Examiner then issued the Final Office Action, which maintains the rejections, on December 16, 2014. The matter was finally returned to the Board and Applicant was granted additional time to file a new Appeal Brief to address the new grounds of rejection that have been raised.

B. TRADEMARK ATTORNEY'S EVIDENCE

The Trademark Attorney provides several photographs of deer and antlers.

C. APPLICANT'S EVIDENCE

The Board is asked to take administrative notice that antlers are shed by deer and typically grow back in a different configuration and with a different number of tips (i.e. "points"). See: Webster's Ninth New Collegiate Dictionary 93, 330 (1986). Antler is defined as "the solid deciduous horn of an animal of the deer family." Deciduous is defined as "falling off or shed seasonally or at a certain stage of development in the life cycle."

ARGUMENT

I. LEGAL STANDARD

The applicable rule, 37 C.F.R. 2.52(b)(4) (as well as TMEP Rule 807.08), reads in pertinent part: “If necessary to adequately depict the commercial impression of the mark, the applicant may be required to submit a drawing that shows the placement of the mark by surrounding the mark with a proportionately accurate broken-line representation of the particular goods, packaging, or advertising on which the mark appears. **The applicant must also use broken lines to show any other matter not claimed as part of the mark.**” (emphasis added).

II. THE EXAMINING ATTORNEY IS INTERPRETING THE CONTROLLING REGULATION TOO NARROWLY.

The Trademark Attorney is taking the position that the broken-line element of the drawing is improper because the antlers are inseparable from the deer in the drawing. However, the Trademark Attorney fails to appreciate that antlers are in fact separable from deer and that this occurs frequently.

This misunderstanding is demonstrated starkly by the statements of the Trademark Attorney in the second full paragraph on page 5 of the Final Office Action: “To say the antlers are separable would be akin to saying that legs that are attached to the trunk of a body or ears that are attached to a head in marks depicting humans are separable. Body parts work together in real life. Legs move the whole body. Ears are attached to the head and take information in, which is transmitted to the brain

in the head. Attached body parts, whether human or animal, simply create the impression of a single whole.”

While colorful, the analogy by the Trademark Attorney is flawed because humans (and deer) do not shed legs or ears. Deer do shed antlers, which then later grow back, most typically in a different configuration.

III. THE ANTLERS DO NOT CONSTITUTE A PHANTOM ELEMENT BECAUSE THEY ARE NOT PART OF THE MARK.

In asserting that the mark is a “phantom mark” and in attempting to assert that even dashed lines, which are described as non-claimed matter, can be regarded as a phantom element in a mark, the Examining Attorney relies heavily on the case of *In re Primo Water Corp.* 87 USPQ2d 1376 (TTAB 2008) (hereinafter “Primo”). The only thing that that case has in common with the mark of the instant application is that they both contain dashed lines – everything else about Primo is completely different – including the reason that Primo used the dashed lines and the manner in which Primo used all those dashed lines.

To summarize the Primo matter, the mark in Primo was entirely formed from dashed lines – the only part that of the drawing of the mark that was not dashed was the box in which the mark would be placed. That drawing showed one set of dashed lines that spelled out “PRIMO” and another set of dashed lines that was upside down. Because the entire mark was dashed lines, however, the mark could have been absolutely any drawing or text or combination thereof. When discussing the mark in Primo, the TTAB stated that “because applicant’s proposed mark does not consist of any particular indicia, but can encompass any text or graphic material as long

as it is presented in identical inverted versions, applicant's proposed mark contains a phantom element" Id. at 1379.

Unlike the mark in *Primo*, the drawing of the instant mark does consist of a significant amount of particular indicia. Unlike the completely dashed line drawing in *Primo*, the solid line drawing portion of Applicant's mark contains a very specific drawing of a deer holding a mug of coffee. The solid line portion of the drawing also shows that coffee has steam coming up from it. The solid line portion of the drawing further reveals that the coffee mug contains the word "ungulatte". Thus, unlike the proposed mark in *Primo*, which was completely formed from dashed lines, Applicant's highly detailed mark provides sufficient notice to potential consumers and businesses as to what the mark consist of when it is in actual use. To be clear, anytime that a consumer sees Applicant's highly stylized deer image with the deer holding a coffee mug and with steam coming up off of the coffee and with the word "ungulatte" written on the coffee mug, consumers and businesses will know that the source of the goods is Applicant. Just like any tag-lines that may or may not appear on packaging and advertising along with the mark, antlers, which describe characteristics of the roasted coffee may or may not accompany the highly stylized and very specific deer image.

Fortunately, consumers are not mindless idiots. They can thus easily spot Applicant's highly stylized deer image, whether there is an antler with two points above its head or an antler with four points above its head.

Just like other logos which are used on coffee and which contain words such as "Bold Roast" or "Decaffeinated" consumers can still recognize the logos under such information

statements. Likewise, Applicant's novel use of graphical indicia to convey the exact same message via different antler drawings above its logo also allows consumers to recognize Applicant's consistent graphical deer image.

Applicant's highly detailed drawing is completely unlike the entirely dashed-line mark of Primo. Because the instant mark and the mark in Primo are completely different and because the instant mark does in fact contain a significant amount of particular indicia, the logic in rejecting the mark in Primo has no rational use in determining the validity of the instant mark.

The Examining Attorney also pointed to the case of *In re International Flavors & Fragrances, Inc.* 183 F.3d 1361 (1999) (hereinafter "*Flavors*"). However, the mark in that matter was also completely unlike Applicant's mark. This is because the only two portions of that entire mark that were not in dashed lines were the words "living" and "flavor(s)". Unlike Applicant's solid-line drawing of the deer holding the coffee cup with the word "Ungulatte" on the cup, has much more detail than simply the words "living" and "flavors".

The dashed antler portion of Applicant's mark is atop the claimed portion of the mark and is not imbedded in the center of the mark which was the case with the mark in *Flavors*. Applicant's dashed antler portion, along with the language in the specimen of record, which describes the commercial meaning of the different antler configurations, the more points, the bolder the coffee, creates a separate commercial impression from the rest of the deer image. This is also unlike the mark in *Flavors*. The reason for this is because the rest of Applicant's deer image acts as a trademark and thus serves as a brand indicator for the goods, whereas the antlers merely describe a particular characteristic or quality of those goods.

In a hypothetical comparison, it is extremely unlikely that the Examining Attorney would take issue with Applicant filing an application for a highly stylized deer logo for a brand of coffee and then submitting a specimen which shows that deer logo used on a coffee package also has the words “Bold Roast” right above the logo. It therefore makes no sense for the Examining Attorney to assert that Applicant’s use of antlers (which fall off of a deer every year anyway) would not be acceptable to tell consumers that they are looking at a package of coffee which has a bold roast. Certainly, in our hypothetical example, the term “Bold Roast” above the deer image would not be a claimed portion of the mark; and likewise, neither is the antler portion of Applicant’s mark, which is evidenced by the dashed lines that Applicant is required to use under 37 C.F.R. § 2.52 for this non-claimed matter.

The Trademark Attorney attempts to introduce unnecessary confusion by repeatedly highlighting a less-relevant portion of 37 C.F.R. 2.52(b)(4), thus implying that Applicant somehow relies on that less-relevant portion of the rule. Specifically, in the Final Office Action of December 16, 2014, the Examiner repeatedly bolded the phrase “if necessary” in the first sentence of 37 C.F.R. 2.52(b)(4). However, to be clear, the portion of the rule that Applicant claims requires Applicant to use dashed lines for the non-claimed antler portion of the drawing is the second sentence of that rule which states “[t]he applicant must also use broken lines to show any other matter not claimed as part of the mark”. Applicant believes that the Trademark Attorney is intentionally misdirecting attention away from the most relevant portion of that rule because the clear language of that rule in combination the very definition of what a phantom mark would make it impossible for the Trademark Attorney to continue to reject the application in good faith. Specifically, on page 4 of the

Final Office Action of December 16, 2014, under the heading of “Phantom Mark Refusal”, the bold first sentence of the third paragraph of that refusal, the Trademark Attorney specifically states “A phantom mark is one in which an integral portion of the mark may be represented in the drawing by a blank or dashed lines, dots or underling. . .” (emphasis added). Thus, the clear language of the definition requires that the dashed line be “an integral portion of the mark” and the clear language of 37 C.F.R. 2.52(b)(4) requires that “matter not claimed as part of the mark” be shown in dashed lines. The antlers of Applicant’s drawing is not an “integral portion of the mark”. In fact, the antlers aren’t even claimed as any portion of the mark. The Trademark attorney has tried, over and over, to say that antlers on a real deer are an integral portion of the deer - just like its ears or its legs or its head. Then, Applicant explained to the Trademark Attorney that antlers on real deer fall off every year and replaced by different antlers that have a different configuration.

The Trademark Attorney, in the Office Action of May 16, 2014, asserted that the mark on the specimen is a single unitary mark. In making this assertion about the mark on the specimen, the Trademark Attorney (at footnote 1) made the statement that “attached hereto are Internet excerpts showing photos of deer, which establish that, when deer have antlers, the antlers are attached to their heads”. That statement, however, has absolutely no bearing on what constitutes a “unitary mark”. TMEP at § 1213.05, makes it clear that “a unitary mark has certain observable characteristics. **Specifically, its elements are inseparable . . .** in other words, a unitary mark must create a single and distinct commercial impression” (emphasis added). Thus, contrary to the Trademark Attorney’s misinterpretation of the defining characteristics of a unitary mark, the threshold question is not whether something is “attached or not”. Rather, it is a question of

whether something is “separable”. Clearly, when the male deer seasonally lose antlers, it is because the antlers have been separated from the rest of the deer. Thus, the antlers, even when they were attached to the deer, will one day be separated from the rest of the deer. The antlers have always been and always will be separable from the rest of the deer. It is, therefore, impossible to regard antlers as being inseparable from a deer. If antlers cannot be regarded as being inseparable from the rest of the deer, a drawing of such antlers is not unitary to a drawing of the rest of the deer. This separability and thus non-unity of the antlers and the rest of the deer are certainly not lost on the consumers of Applicant’s coffee. This is clearly evidenced by the distinct commercial impression that the antler portion of the image provides (i.e. to inform customers about the characteristics of a particular roast of coffee). Because the drawing of the deer holding the mug of coffee with steam rising off of the coffee and the word “ungulatte” written on the coffee mug act as a brand identifier to consumers, and because the antlers merely identify characteristics of the coffee roast, the antler portion of the mark thus creates a separate and distinct commercial impression from the rest of the deer image. Therefore, because TMEP § 1213.05 requires that the elements be inseparable and create a single and distinct commercial impression and because Applicant’s antler portion is separable (just like in real-life) and do create a separate and distinct commercial impression, the antler portion and the rest of the deer cannot possibly be regarded as a unitary mark as that term is defined by TMEP §1213.05.

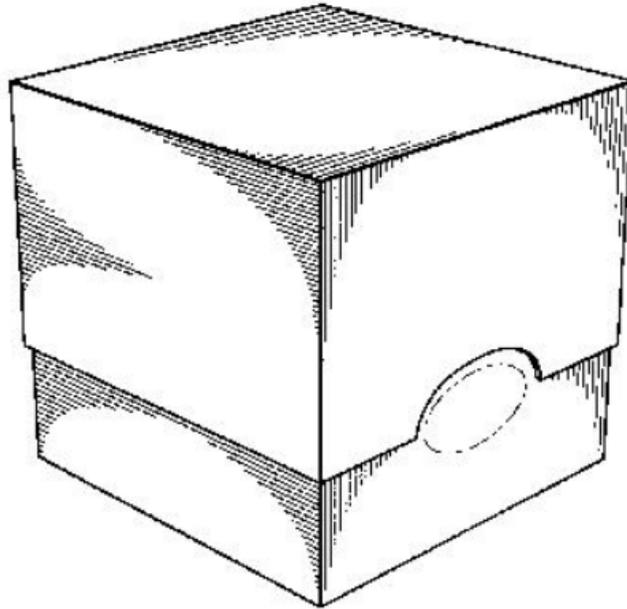
IV. PRIOR REGISTRATIONS SHOW USE OF BROKEN LINE DECORATIVE ELEMENTS

While unusual, broken line elements are used from time to time to indicate decorative material as opposed to “configuration-of-goods” elements that are not part of the mark. For example, note U.S. Trademark Registration No. 3,501,288, to National Baseball Hall of Fame and Museum, Inc., for the following design mark:



The description of the mark is as follows: “The broken lines indicating a picture of a person is not part of the mark”. The broken-line element provides positioning context for the remainder of the mark but is itself a decorative element. In that application, the specimen of record shows several different images being used in place of the dashed lines. The present application is similar in that the mark is positioned with respect to a particular broken-line element – the antlers of a deer.

U.S. Trademark Registration No. 2,661,164 to Seattle Chocolate Company, LLC shows the following design mark:



The description of the mark is as follows: “. . .such a sticker/printing is shown in broken lines in the drawing and is not part of the mark”. In that application, the specimen of record shows several different images being used in place of the dashed lines. The present application is similar in that the mark is positioned with respect to a particular broken-line element – the antlers of a deer.

Applicant is hereby submitting copies of the registrations for each of the foregoing marks in accordance with TMEP §710.03.

CONCLUSION

Antlers, both in real life and on applicant's highly stylized deer image, are separable from the rest of the deer. Antlers are deciduous and from year to year, the same deer will have a different antler configuration (see <http://dictionary.reference.com/browse/deciduous>). Further, the antlers in Applicant's specimen convey a separate and distinct commercial impression from the rest of the deer image. Because of this, the antlers and the rest of the deer do not meet the requirements of a unitary mark under § 1213.05. Because the antlers and the rest of the deer are not a unitary mark, and because the antlers are a non-claimed element, the use of dashed lines for the antlers is proper and does not constitute a phantom element. Applicant's drawing, which incorporates the dashed lines, does match the drawing on the specimen. Because consumers can easily see and are therefore appraised that applicant's mark consists of the highly stylized image of a deer holding a mug of coffee, with steam rising off of the coffee, and with the word "ungulate" written on the coffee mug, whether there are words "bold roast" or a drawing of antlers having eight points displayed above that highly stylized deer drawing does not confuse consumers as to the source of the goods.

Still further, because the addition or deletion of antlers above the highly stylized deer logo does not alter the mark itself, the use of dashed lines does not constitute a phantom mark. This is because the mark will always be that of the highly stylized deer shown in the solid lines just like it was shown in application as originally filed.

For all the foregoing reasons, Applicant respectfully submits that the Trademark Attorney has failed to properly interpret the regulations regarding broken-line drawing elements and

requests that the grant this Ex Parte Appeal and allow the registration of Applicant's mark UNGULATTE and Design on the Principal Register.

Respectfully submitted,

Peacock Myers, P.C.

By: /Justin R. Jackson/
Justin R. Jackson

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Attorneys for Applicant

Int. Cl.: 14

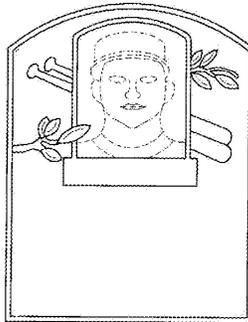
Prior U.S. Cls.: 2, 27, 28 and 50

United States Patent and Trademark Office

Reg. No. 3,501,288

Registered Sep. 16, 2008

TRADEMARK
PRINCIPAL REGISTER



NATIONAL BASEBALL HALL OF FAME AND
MUSEUM, INC. (NEW YORK CORPORATION)
25 MAIN STREET, P.O. BOX 590
COOPERSTOWN, NY 133260590

FOR: MINIATURE PLAQUES MADE OF PRE-
CIOUS METAL, AND JEWELRY, NAMELY, PIN
SETS MADE OF PRECIOUS METAL, IN CLASS 14
(U.S. CLS. 2, 27, 28 AND 50).

FIRST USE 2-14-1986; IN COMMERCE 2-14-1986.

OWNER OF U.S. REG. NO. 1,441,622.

NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE THE CONFIGURATION OF THE
OUTSIDE EDGE OF THE PLAQUE, APART FROM
THE MARK AS SHOWN.

THE MARK CONSISTS OF THE CONFIGURA-
TION OF A THREE-DIMENSIONAL PLAQUE
SHAPED LIKE A TOMBSTONE. A TOMBSTONE-
SHAPED PICTURE FRAME APPEARS ON THE TOP-
HALF OF THE PLAQUE. TWO BASEBALL BATS
AND A LEAF DESIGN CROSS EACH OTHER
DIAGONALLY BEHIND THE FRAME. THE BATS
APPEAR DIAGONALLY FROM THE TOP LEFT-
HAND SIDE TO THE BOTTOM RIGHT-HAND SIDE
OF THE FRAME. THE BROKEN LINES INDICAT-
ING A PICTURE OF A PERSON IS NOT PART OF
THE MARK.

SEC. 2(F).

SER. NO. 77-383,180, FILED 1-29-2008.

STEPHEN AQUILA, EXAMINING ATTORNEY

Int. Cl.: 30

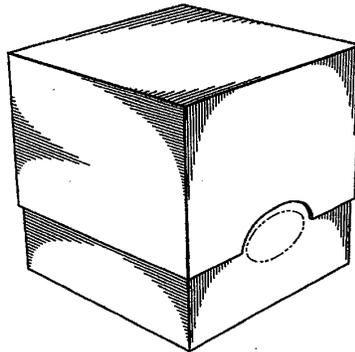
Prior U.S. Cl.: 46

Reg. No. 2,661,164

United States Patent and Trademark Office

Registered Dec. 17, 2002

**TRADEMARK
PRINCIPAL REGISTER**



SEATTLE CHOCOLATE COMPANY LLC (WA-SHINGTON LIMITED LIABILITY COMPANY)
1962 FIRST AVENUE SOUTH
SEATTLE, WA 98134

FOR: CANDY, IN CLASS 30 (U.S. CL. 46).

FIRST USE 9-0-1995; IN COMMERCE 9-0-1995.

THE LINING IS FOR SHADING PURPOSES ONLY AND DOES NOT INDICATE COLOR.

THE MARK IS A SUBSTANTIALLY CUBICLE BOX HAVING A LID TELESCOPED OVER THE

BASE. A SIDE OF THE LID HAS AN ARCUATE RECESS ALONG ITS BOTTOM EDGE WHICH CAN FORM A FRAME FOR THE UPPER PART OF A STICKER OR PRINTING ON THE BOX OF SIMILAR SHAPE. SUCH A STICKER/PRINTING IS SHOWN IN BROKEN LINES IN THE DRAWING AND IS NOT PART OF THE MARK.

SEC. 2(F).

SER. NO. 75-867,447, FILED 12-9-1999.

PAULA MAHONEY, EXAMINING ATTORNEY