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Subject: U.S. TRADEMARK APPLICATION NO. 77928601 - UNGULATTE - 32286-1001 - EXAMINER BRIEF

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**UNITED STATES PATENT AND TRADEMARK OFFICE  
(USPTO)**

**U.S. APPLICATION SERIAL NO.** 77928601

**MARK:** UNGULATTE



**CORRESPONDENT ADDRESS:**

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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:** Bar NND Ranches, LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

32286-1001

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**EXAMINING ATTORNEY'S APPEAL BRIEF**

Applicant Bar NND Ranches, LLC has appealed the examining attorney's final refusal under Trademark Act Sections 1 and 45 on the basis that applicant seeks registration of more than one mark, because the antlers shown in broken lines in applicant's drawing, comprising a stylized deer holding a coffee mug with the word "UNGULATTE" thereon, constitutes a changeable, phantom element.

Applicant also has appealed the related final refusals of registration on the basis that 1) the drawing of the mark is unacceptable, 2) the mark description is unacceptable, and 3) the drawing and mark on the specimen differ.

### **FACTS**

Applicant applied to register in connection with its coffee, coffee based beverages, and roasted coffee beans, a mark comprising the design of a deer holding a coffee mug with the word “UNGULATTE” thereon. The deer’s antlers were depicted in broken lines and identified as a “non-claimed” feature of the mark.

Registration was refused based on requirements for an acceptable drawing and mark description. In particular, applicant was advised that while broken lines are often necessary to show position or placement for certain types of marks, there did not appear to be any such necessity in this case where the mark comprises the design of an animal. A requirement for clarification of the state of incorporation also was issued.

Applicant amended the application to address each requirement. In particular, the drawing was amended to delete the antlers. The application was subsequently published for opposition, and a notice of allowance was issued.

Applicant submitted a post-publication amendment to reinstate the original drawing of the mark containing broken lines and to amend the mark description to include a statement that “the dashed lines show a ‘non-claimed’ feature of the mark.” Applicant was subsequently advised that the amendments were unacceptable. They were, therefore, not accepted.<sup>1</sup>

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<sup>1</sup> Applicant was advised that the dotted lines could be perceived as an impermissible phantom element. Please see the April 23, 2012 e-mail to applicant from the examining attorney.

Applicant submitted a statement of use, and registration was subsequently refused under Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127, because the mark on the specimen did not match the mark in the drawing. Specifically, the drawing of the mark was comprised of a deer without antlers while the mark on the specimen was a deer with large antlers.<sup>2</sup> The refusal was subsequently made final.

Applicant filed a request for reconsideration and subsequently filed a notice of appeal. In its request for reconsideration, applicant amended the drawing back to the originally-submitted drawing, which includes antlers depicted in broken lines. Applicant also amended the mark description to the following:

The mark consists of a two dimensional fanciful deer design; the deer is holding a coffee mug which has the words "UNGULATTE"; 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.

The examining attorney issued a subsequent final Office action in which the refusal on the basis that the drawing did not match the mark on the specimen was maintained, and the requirements for an acceptable drawing and mark description were reinstated and made final.

After applicant filed its appeal brief, the Trademark Trial and Appeal Board granted the examining attorney's request for remand. In addition to continuing the refusal under Trademark Act Sections 1 and 45 on the basis that the drawing and mark on the specimen differ and the requirements for an acceptable drawing and mark description, the examining attorney issued a refusal under Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127, on the basis that applicant seeks registration

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<sup>2</sup> Applicant was advised that it may either 1) submit a substitute specimen bearing the mark in the drawing, or 2) submit a new drawing that matches the mark on the specimen.

of more than one mark because the dotted antlers in the drawing represent a changeable or “phantom” element.<sup>3</sup> Each refusal and requirement was subsequently made final, and action on the appeal in this case was resumed.

### **ISSUES**

The issues on appeal are as follows:

1. Whether, the application seeks registration of more than one mark in violation of Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127.
2. Whether the drawing is acceptable pursuant to 15 U.S.C. §1051(a)(1).
3. Whether the description of the mark is acceptable pursuant to 37 C.F.R. §2.37.
4. Whether the mark on the specimen of use matches and shows use of the mark in the drawing as required by Trademark Act Sections 1 and 45, 15 U.S.C. §1051, 1127.

### **ARGUMENT**

#### **A. Applicant Seeks to Register More Than One Mark**

Registration must be refused when an applicant seeks registration of more than one mark in its application. See Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; TMEP §1214.01. An application must be limited to only one mark. 37 C.F.R. §2.52; TMEP §807.01; see 15 U.S.C. §1051(a)(1). A mark that contains a changeable or “phantom” element is considered to be more than one mark. See *In re Int’l Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999); *In re Primo Water Corp.*, 87 USPQ2d 1376 (TTAB 2008); TMEP §1214.01.

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<sup>3</sup> The examining attorney apologized for the delay in addressing this issue.

In this regard, a phantom mark is one in which an integral portion of the mark may be represented in the drawing by a blank or dashed line, dots, underlining, or a designation such as “XXXX,” which acts as a placeholder for a term or symbol that changes, depending on the use of the mark. *See In re Int’l Flavors & Fragrances Inc.*, 183 F.3d 1361, 1363 n.1, 51 USPQ2d 1513, 1515 n.1 (Fed. Cir. 1999); TMEP §1214. A phantom element may consist of a relatively minor, descriptive or disclaimed element. *See In re Primo Water Corp.*, 87 USPQ2d 1376, 1378 (TTAB 2008). Examples of phantom elements are a calendar date (usually a year), a geographic location, and a model number that is subject to change. TMEP §1214. Another example is telephone number prefixes that will vary. *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theatres Inc.*, 56 USPQ2d 1538 (TTAB 2000).

Marks with phantom elements provide insufficient notice to potential consumers and businesses as to what the mark consists of when it is in actual use in commerce. Registering such marks could facilitate confusion about the source of products sold under such a trademark as well as prevent business owners from being able to rely on the federal trademark register when adopting marks for goods or services.

As the [U.S. Court of Appeals for the Federal Circuit] stated in [*In re Int’l Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999)], a primary purpose of registration is to provide notice to potential users of the same or a confusingly similar mark, and that to serve this purpose, the mark, as registered, must accurately reflect the way it is used in commerce so that someone who searches the registers of the USPTO for the mark, or a similar mark, will locate the registered mark. The court further stated, at 51 USPQ2d 1517-18, that “phantom” marks with missing elements “encompass too many combinations or permutations to make a thorough and effective search possible. The registration of such marks does not provide proper notice to other trademark users, thus failing to help

bring order to the marketplace and defeating one of the vital purposes of federal trademark registration.” *In re Primo Water Corp.*, 87 USPQ2d 1376, 1378 (TTAB 2008).

In this case, the drawing consists of the design of a deer that is holding a steaming cup with the word “UNGULATTE” thereon. There are dotted lines representing small antlers on the deer. Applicant said that these dotted lines are not part of the mark and has identified them in its mark description as “non-claimed” matter.

Applicant has repeatedly stated its intent to use the antler design shown in broken lines in the drawing as a placeholder for a changeable, phantom element. For example applicant said each of the following:

- Applicant’s mark is for goods of coffee; coffee based beverages; roasted coffee beans. Applicant has always intended to illustrate different coffee brews and/or roasts using different antler configurations, which is why Applicant elected not to claim the antler portion of the mark in the initial filing (February 17, 2012 post-publication petition, p. 5).
- The type of antlers (i.e. felt or no felt) indicates whether the goods sold under the mark are from a caffeinated or decaffeinated coffee roast. And, the number of points on the antlers is used to describe the flavor that the consumer can expect (i.e. more bold for more points and less bold for less points) (August 15, 2012 statement of use).
- 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 some side-statement written out on the product label which describes whether the coffee is caffeinated or not and whether

the roast is more bold than another roast, Applicant is instead achieving this graphically via different antler configurations above the mark (Applicant's February 19, 2014 brief, pp. 2-3).

- 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 (Applicant's February 27, 2015 supplemental brief, pp. 2-3).

Moreover, although the specimen of record shows only one complete deer design thereon, the specimen contains additional information regarding applicant's intent to use different antler designs to identify characteristics of applicant's various coffee goods. For example, the specimen says that one antler design is used to identify "a decaffeinated product that is bolder" than another, but "not as bold" as yet another product using a different antler design. See Applicant's August 15, 2012 specimen, pp. 1-2.

The foregoing, therefore, establishes that 1) the dotted lines shown in the drawing act as a placeholder for a design element that can change, namely, an antler design that changes depending on the use of the mark, and 2) the different antler designs convey different meanings and commercial impressions relating to the characteristics of applicant's various coffee products. Therefore, it is clear that the antler design shown in broken lines in the drawing acts as a changeable, phantom element.

Finally, please keep in mind that a phantom element may consist of a relatively minor, descriptive or even a disclaimed element. *In re Primo Water Corp.*, 87 USPQ2d at 1378. Thus, the fact

that the antlers comprising the phantom element are not the largest portion of the drawing does not affect the analysis.

### **1. Applicant's Mark is Similar to Others Deemed to Contain Phantom Elements**

Applicant argues that its mark is not a phantom mark and distinguishes its mark from the mark in *In re Primo Water Corp.*, 87 USPQ2d 1376 (TTAB 2008). Applicant also attempts to distinguish its mark from the mark in *In re Int'l Flavors & Fragrances Inc.*, 183 F.3d 1361, 1363 n.1, 51 USPQ2d 1513, 1515 n.1 (Fed. Cir. 1999).<sup>4</sup> Applicant's argument, however, focuses on how its mark differs overall from the marks in those cases. Moreover, it is applicant's belief that the portions of the deer shown in solid lines in its mark are distinctive, and consumer recognition of these portions will naturally follow despite its use of the mark with several different antler designs. Applicant's supplemental brief, pp. 7-9. The examining attorney respectfully disagrees with applicant's analysis.

With respect to the *In re Primo Water Corp.* and *In re Int'l Flavors & Fragrances Inc.* cases, the examining attorney notes that the issue here is not whether applicant's mark and the marks at issue in those cases are the same or whether each comprises the same amount of distinctive matter. The relevant question is whether the dotted lines in applicant's drawing appear to be a placeholder for a changeable element in much the same way the broken lines at issue in *In re Primo Water Corp.* and the "XXXX" at issue in *In re Int'l Flavors & Fragrances Inc.* were. For the reasons discussed in detail above, the answer is "yes."

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<sup>4</sup> Applicant also referenced two registered marks in its argument that its mark should be allowed to register with the antlers in broken lines, namely, Registration Nos. 3501288 and 2661164. Applicant included registration information for each. Applicant's supplemental brief, pp. 13-14, and attachments 1-2. The examining attorney objects to the information on Registration No. 2661164 on the basis that it is untimely. The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board. 37 C.F.R. §2.142(d); TBMP §1207.01. In addition, it is noted that each registered mark referred to by applicant is distinguishable from applicant's mark. In this regard, each registered mark appears to be a configuration mark, and the dotted lines appear to help show position or placement of the mark on the goods and/or identify unregistrable functional matter than may not be claimed as a feature of the mark. Thus, the marks in those cases are readily distinguishable from the instant case.

Significantly, the issue here is very similar to that in *In re Dana Limited*, Serial No. 85447797 (TTAB 2014).<sup>5</sup> While the decision in *In re Dana Limited* is not precedential, it is probative. In that case, an applicant sought registration of a mark comprising a diamond design with the word “DANA” therein and with the number “44” shown in broken lines very close to the lower right corner of the diamond. In that case, the applicant intended the “44” to represent any number with at least two digits. Because the “44” in the mark could be replaced with many different numbers, the Trademark Trial Appeal Board affirmed the refusal under Trademark Act Sections 1 and 45 because the “44” constituted a changeable, phantom element resulting in an attempt to seek registration of multiple marks.

In this case, applicant also has included in its drawing an element shown in broken lines, namely, an antler design that is very close to and touches a larger design element. Applicant has made clear its intent that the broken lines in the drawing represent a number of different antler designs with each design identifying a particular feature or characteristic of the coffee goods on which they are placed. For example, one set of antlers may represent a bold caffeinated coffee while another may represent a decaffeinated coffee. Therefore, like the *In re Dana Limited* case, applicant is seeking to register multiple marks that create different overall commercial impressions, all in violation of Trademark Act Sections 1 and 45.

In addition, whether consumers would find the body and head of the deer in applicant’s drawing to be distinctive (or more distinctive than the marks at issue in the other cases discussed above) is irrelevant in the context of whether applicant’s mark contains a phantom element. Whether a mark or

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<sup>5</sup> This decision may be viewed at the following weblink: <http://e-foia.uspto.gov/Foia/RetrievePdf?system=TTABIS&filNm=85447797-01-30-2014> .

portion thereof has acquired distinctiveness in the minds of consumers is a separate issue from whether the dotted lines in the drawing constitute a changeable element.<sup>6</sup>

## **2. Identifying the Antlers as a “Non-Claimed” Feature Does Not Avoid the Issue of Whether the Mark Contains a Changeable, Phantom Element**

Applicant also strongly argues that its position that the dotted lines in the mark are not a phantom element is supported by 37 C.F.R. §2.52(b)(4), which provides, in part, “The applicant must also use broken lines to show any other matter not claimed as part of the mark.” Applicant essentially contends that because it may include broken lines in a drawing and because the antlers in its drawing are shown in broken lines and not claimed as part of its mark, the antlers cannot be considered a changeable feature of its mark. Applicant’s supplemental brief, pp. 10-11. The examining attorney respectfully disagrees.

The examining attorney acknowledges that drawings may often include broken lines to show matter that is not part of the mark. However, with respect to a refusal under Trademark Act Sections 1 and 45 on the basis that applicant seeks registration of more than one mark, the real issue is whether the record supports the conclusion that the dotted lines in the drawing are used merely as a placeholder for a changeable, phantom element so that the drawing constitutes more than one mark.

Significantly, the Trademark Trial and Appeal Board addressed a similar argument in *In re Upper Deck Co.*, 59 USPQ2d 1688 (TTAB 2001). In that case, the applicant argued that because the changeable element at issue (content within a hologram) was not actually claimed as part of its mark, it could not be considered a phantom element. The Board was not persuaded and said, “While applicant may argue that there are no missing or changeable elements in its mark as described, there are clearly missing or

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<sup>6</sup> Applicant also discussed a hypothetical mark. Applicant’s supplemental brief, p. 10. However, that mark is not at issue and there is no record on which to base a proper analysis.

changeable elements insofar as the images presented to the public are concerned.” *In re Upper Deck Co.*, 59 USPQ2d at 1690.

In this case, applicant has made clear its intent that the broken lines in the drawing represent a number of different antler designs with each design identifying a different feature or characteristic of the coffee goods on which they are placed. Moreover, applicant’s specimen 1) displays a mark comprising a deer with large antlers, and 2) provides information regarding applicant’s use/intent to use multiple deer marks with various antler designs where each antler design is used to represent one or more characteristics of the goods, e.g., decaffeinated, bold and caffeinated. Thus, like the *In re Upper Deck Co.* case, although applicant may argue that there are no missing or changeable elements in its mark *as described*, it is clear from the application record that there are, in fact, changeable or missing elements insofar as the images presented to the public are concerned.

#### **B. The Drawing is Unacceptable**

An application must be limited to only one mark. 15 U.S.C. §1051(a)(1); 37 C.F.R. §2.52. *See In re International Flavors & Fragrances Inc.*, 183 F.3d 1361, 1366, 51 USPQ2d 1513, 1516 (Fed. Cir. 1999).

TMEP §807.01. A special form drawing must show the mark clearly so as to produce a high quality image when copied; all lines in the drawing must be clean, sharp, solid, and not fine or crowded. *See* 37 C.F.R. §§2.52, 2.53(c), 2.54(e); TMEP §807.04(a).

However, 37 C.F.R. §2.52(b)(4) provides, in 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 [emphasis added]. The applicant must also use broken lines to show any other matter not claimed as part of the mark. For any drawing using broken lines to indicate placement of the mark, or matter not claimed as part

of the mark, the applicant must describe the mark and explain the purpose of the broken lines.

See TMEP §§807.08.

In this case, applicant has submitted a two-dimensional, special form drawing consisting of the design of a deer holding a coffee mug with the word “UNGULATTE” thereon. Included on the drawing page are antlers on the deer’s head, which are shown in broken lines and which applicant has indicated are *not* claimed as a feature of the mark. Applicant has specifically identified the broken lines in its mark description as a “non-claimed” feature of the mark that “serves to show the position of the mark.”<sup>7</sup>

The broken lines comprising the antlers in the drawing, however, are not used to represent the position or placement of applicant’s mark on its goods or their packaging (nor are they used to represent functional or other similar unregistrable matter). As discussed in detail above, it appears that the sole purpose of the broken lines is to *show position or placement of a changeable, phantom element*. Thus, drawing is unacceptable because it is not limited to one mark.

### **C. The Description of the Mark is Unacceptable**

Applications for marks not in standard characters must include an accurate and concise description of the entire mark that identifies literal elements as well as any design elements. See 37 C.F.R. §2.37; TMEP §§808 *et seq.* Applicant’s June 20, 2013 amended mark description is as follows:

The mark consists of a two dimensional fanciful deer design; the deer is holding a coffee mug which has the words UNGULATTE; 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

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<sup>7</sup> Please see the description of the mark in applicant’s June 20, 2013 response.

mark.

As discussed in great detail above, the drawing of the mark is unacceptable because it effectively comprises more than one mark. Because applicant's description of the mark describes the unacceptable drawing, the mark description also is unacceptable. In addition, in its mark description, applicant accidentally uses semi-colons rather than periods at the end of sentences, which renders the description in need of some slight grammatical clarification.

#### **D. The Drawing and Mark on the Specimen Differ**

An application based on Trademark Act Section 1(a) must include a specimen showing the applied-for mark in use in commerce for each international class of goods and/or services identified in the statement of use. 15 U.S.C. §1051(a)(1); 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a). The drawing shows the mark sought to be registered, and must be a substantially exact representation of the mark as used on or in connection with the goods and/or services, as shown by the specimen. 37 C.F.R. §2.51(a); TMEP §807.12(a).

Registration must be refused when the specimen does not show the applied-for mark in the drawing in use in commerce. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a), 1301.04(g)(i). In this case, the drawing and the mark shown on the specimen differ. The drawing and mark on the specimen both comprise a design of a deer holding a coffee mug with the word "UNGULATTE" thereon. However, the mark on the specimen shows a deer with large and prominent antlers whereas the drawing contains broken lines depicting antlers, which applicant has confirmed *are not actually part of the mark*.

Significantly, the mark on the specimen is unitary. A mark or portion of a mark is considered "unitary" when it creates a commercial impression separate and apart from any unregistrable

component. The test for unitariness inquires whether the elements of a mark are so integrated or merged together that they cannot be regarded as separable. See *In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981); *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983). The inquiry focuses on “how the average purchaser would encounter the mark under normal marketing of such goods and also ... what the reaction of the average purchaser would be to this display of the mark.” *Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1561, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991) (quoting *In re Magic Muffler Serv., Inc.*, 184 USPQ 125, 126 (TTAB 1974)). TMEP §1213.05.

In this case, the deer’s antlers are very large and prominent in the mark on the specimen, and they visually take up almost as much space as the rest of the deer and its coffee mug combined. The deer's antlers also are attached to and mixed in with the hair on the deer’s head so that there is no visual or spatial separation between the antlers and the rest of the deer.

Moreover, the antlers are similar in color to the rest of the deer on the specimen. In light of the color continuity, the prominence of the antlers, and the lack of any visual or spatial separation between the antlers and rest of the deer on the specimen, the impression of the deer and its antlers on the specimen is that of a continuous, inseparable, and unitary whole.

The drawing of the mark, on the other hand, does not contain large and prominent antlers. In fact, the small antlers in the drawing are in broken lines and not claimed as a feature of the mark. The mark on the specimen, therefore, has a significant feature that the drawing does not. In light thereof, the mark in the drawing is not a substantially exact representation of the mark on the specimen, and applicant has failed to provide the required evidence of use of the applied-for mark in commerce on or in connection with applicant’s goods. See TMEP §807.12(a).

Applicant argues that the mark on the specimen is not unitary because, in real life, deer antlers fall off.<sup>8</sup> Applicant's supplemental brief, pp. 6-7, 11-12. The examining attorney respectfully disagrees.

The issue here, is whether the mark *actually displayed on the specimen* (showing a stylized deer *with antlers*) creates the impression of a single, unitary whole, and, if so, whether that mark matches the drawing. For the reasons discussed above, the impression of the deer and its antlers on the specimen is that of a continuous, inseparable, and unitary whole. Because the drawing does not also contain the prominent antlers shown in the specimen, the mark on the specimen differs from the drawing and fails to properly show use of the applied-for mark in commerce.

### **CONCLUSION**

For the reasons noted above, the examining attorney respectfully requests that the refusals of registration under Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127, the requirement for an acceptable drawing depicting one mark, and the requirement for an acceptable mark description be affirmed.<sup>9</sup>

Respectfully submitted,

/MaureenDallLott/

Maureen Dall Lott

Trademark Examining Attorney

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<sup>8</sup> The examining attorney previously analogized deer antlers to human ears or other body parts in an effort to show that the overall commercial impression of the mark on the specimen is that of an inseparable whole.

<sup>9</sup> Applicant was previously advised that the refusals and requirements could be withdrawn if applicant 1) amended the drawing to omit the dotted lines and to be consistent with the mark on the specimen, and 2) provided an acceptable mark description that was consistent with the amended drawing.

Susan Hayash

Managing Attorney

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