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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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Date	02/19/2014

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Bar NND Ranch, LLC

Mark: UNGULATTE and Design

Serial No.: 77/928,601

Filing Date: February 4, 2010

Trademark Attorney: Maureen Dall Lott

Law Office: 117

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

**EX PARTE APPEAL**

**APPLICANT'S BRIEF**

## **TABLE OF AUTHORITIES**

### **STATUTES AND RULES**

TMEP Rule 807.08	2, 5
37 C.F.R. 2.52(b)(4)	2, 5

### **PRELIMINARY STATEMENT**

The present appeal concerns simply whether it is proper to show variable antlers in a design application 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.” In that part of the advertising in this case comprises antlers (which can vary in size, configuration, and number of points - particularly according to season), it is proper to show them in broken-line representation.

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 words UNGULATTE. 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.

## **DESCRIPTION OF RECORD**

### **A. PROSECUTION HISTORY**

The present application was filed on February 4, 2010, with a drawing page employing broken-line depiction of antlers with respect to the design, which includes a deer positioned with respect to the antlers. 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 went on to state that “applicant may delete them from the drawing”.

In response 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 feature of the mark.” 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). 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.

## **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.” In that part of the advertising in this case comprises antlers (which can vary in size, configuration, and number of points - particularly according to season), it is proper to show them in broken-line representation.

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

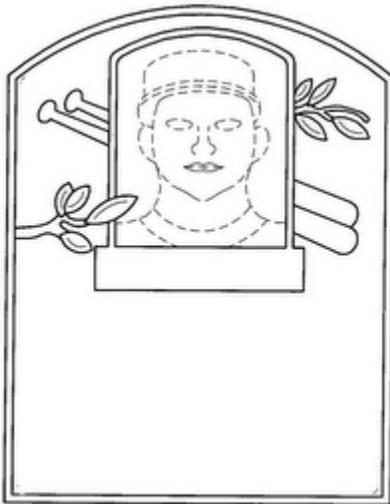
The Trademark Attorney is taking the position that the broken-line element of the drawing is improper because the antlers are inseparable from the deer in the drawing. However, the Trademark Attorney fails to appreciate that antlers are in fact separable from deer and that this occurs frequently.

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 do not shed legs or ears. Deer do shed antlers, which then later grow back.

### **III. 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 includes 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.

### CONCLUSION

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,

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