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TRANSLATION
THE REGISTRAR OF TRADE-MARKS

Citation: 2018 TMOB 41

Date of Decision: 2018-04-30

**[UNREVISED ENGLISH
CERTIFIED TRANSLATION]**

IN THE MATTER OF A SECTION 45 PROCEEDING

Guixens Food Group, Inc.

Requesting Party

and

Kim Long Distributions Inc.

Registered Owner

**TMA386,242 for
MADAME GOUGOUSSE**

Registration

[1] On March 3, 2016, at the request of Guixens Food Group, Inc. (the Requesting Party), the Registrar sent the notice stipulated in section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Kim Long Distributions Inc. (the Owner), registered owner of registration No. TMA386,242 for the MADAME GOUGOUSSE trade-mark (the Mark).

[2] The Mark is registered in association with “rice” (in French, riz) (the Goods).

[3] This notice enjoined the Owner to provide an affidavit or a statutory declaration that its Mark was used in association with the Goods in Canada at any time between March 3, 2013, and

March 3, 2016, and, in the negative, indicating the date when the Mark was used for the last time and the reason for its failure to use it since that date.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act, as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[5] It is well established that mere allegations of use are not enough to establish use in the context of the procedure contemplated in section 45 [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. It is true that the level of evidence required is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)]. It is unnecessary to adduce overabundant evidence [*Union Electric Supply Co v Canada (Registrar of Trade-marks)* (1982), 63 CPR (2d) 56 (FCTD)]. Nonetheless, sufficient facts must be presented to allow the Registrar to conclude that the trade-mark was used in association with each of the goods specified by the registration during the relevant period [*John Labatt Ltd v Rainer Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[6] In response to the Registrar’s notice, the Owner filed a sworn statement by its President Yes, i was thinking online

[7] Director, Ms. Thi Huyen Dieu Duong, on April 9, 2016 in Montréal.

[8] Neither party filed written representations and only the Requesting Party requested and attended a hearing.

THE EVIDENCE

[9] In her brief sworn statement, Ms. Duong simply attested: [TRANSLATION] “That the MADAME GOUGOUSSE trade-mark, registered under number TMA 386242, has been used by [the Owner] during the three years preceding the date of the notice sent by the Canadian Intellectual Property Office, including March 3, 2016. ”

[10] Ms. Duong's statement is accompanied by three invoices. However, they are not designated as attachments to the statement by the notary who administered the oath, and are not otherwise marked as exhibits or identified in the statement. However, Ms. Duong mentions two invoices in the covering letter of the statement, namely [TRANSLATION] "A copy of the purchase invoice for *Riz Madame Gougousse*, packed by our supplier" and "A copy of the invoice addressed to one of our customers in Montréal".

[11] In fact, the first two invoices provided concur with the statement that they were remitted to the Owner by a Thai company during the relevant period. The mention "GOUGOUSSE" appears under the heading "MARK" and the description of the invoiced goods indicates Thai Long Grain White Rice.

[12] The third invoice indicates that it was remitted by the Owner to a company located in Saint-Léonard, Quebec. The mention "GOUGOUSSE PATNA RICE" appears on the list of goods sold. According to the invoice, it was remitted at the same time and to the same address as the goods. However, the delivery date indicated is March 30, 2016, after the relevant period.

ANALYSIS

[13] At the hearing, the Requesting Party argued that the evidence filed by the Owner is insufficient to establish the use of the Mark during the relevant period, both on the form and on the substance.

[14] In the first place, the Requesting Party submits that Ms. Duong's statement is insufficient regarding the facts. In this regard, the Requesting Party submits that the contents of the statement do not address the manner in which the Mark was related to the Goods, or the transfer of the Goods in the normal course of trade during the relevant period.

[15] The Requesting Party then submits that the invoices provided are not part of the statement and that, in any case, they do not prove a use of the Mark as registered, during the relevant period.

[16] Although section 45 provides for a summary procedure, and the evidential burden is not heavy, it nonetheless remains that a mere assertion of use is, in itself, insufficient to establish the

use of a trade-mark under the terms of section 45 of the Act. One must instead prove the use of the mark, by describing enough facts for the Registrar to be able to arrive at a conclusion whether the mark was used in Canada during the relevant period and in accordance with section 4 of the Act [see *Guido Berlucchi & C Srl v Brouillette Kosie Prince*, 2007 FC 245, 56 CPR (4th) 401]. In particular, it is incumbent on the registered owner to prove how the mark was marked on these goods specified in the registration or their packages—or otherwise associated with these goods—at the time of their sale or delivery in the normal course of trade.

[17] In the case at bar, Ms. Duong’s sworn statement is likened to a mere assertion of use. Ms. Duong does not provide any fact to substantiate her assertion that the Mark “was used” by the Owner during the relevant period. It should be noted that the statement does not even indicate if this “use” of the Mark was in Canada and in association with rice and in the normal course of trade. Moreover, Ms. Duong does not provide any evidence of sales or transfer of rice by the Owner during the relevant period, nor does she explain the manner in which the Mark would have been associated with the goods at the time of their transfer.

[18] Concerning the invoices provided concurrently with the statement, but without being mentioned therein, it is well established that technical deficiencies should not prevent an owner from responding to a notice provided for in section 45 when the evidence adduced could suffice to establish use [see *Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)]. In particular, the Register may occasionally admit attachments in evidence that do not bear the inscription of the Commissioner for Oaths or the notary, when they are clearly identified and explained in the body of the statement [see, for example, *Borden & Elliot v Raphaël Inc* (2001), 16 CPR (4th) 96 (TMOB)]. In the case at bar, however, Ms. Duong’s sworn statement makes no mention of attachments and offers no explanation regarding the invoices provided at the same time.

[19] It is true that the covering letter refers to two invoices. However, *three* invoices are attached and in any case, the covering letter cannot be considered evidence in the case at bar. Although the procedure stipulated in section 45 is simple and expeditious, the provisions of this section require evidence in the form of an affidavit or a statutory declaration. The covering letter does not constitute an affidavit or a statutory declaration.

[20] The fact that the invoices are not mentioned in the sworn statement or identified as attachments thereto is more than a mere technical deficiency [for such conclusions, see *Bereskin & Parr v Teletronic Communications Ltd* (1997), 78 CPR (3d) 406 (TMOB); and *Smart & Biggar v Terfloth Trade Marks Ltd*, 2014 TMOB 158, 2014 CarswellNat 4069]. Thus, I agree with the Requesting Party that the invoices in question are not admissible as evidence in the case at bar. Consequently, I do not consider them.

[21] Whatever the case may be, even if I could admit the invoices in evidence, they do not establish that there was a transfer of the property or possession of the goods concerned by the registration during the relevant period, as required by sections 4 and 45 of the Act.

[22] In this regard, if it is true that the invoice dated March 30, 2016 refers to a sale of rice by the Owner in Canada, this sale seems to have taken place after the end of the relevant period. Consequently, the invoice does not satisfy the requirements of the notice stipulated in section 45, due to the fact that it does not serve to establish a transfer of goods *during the relevant period*.

[23] As for the other two invoices, they only prove a transfer by the Thai company to the Owner. For there to have been a use of the Mark by the Owner, it is the Owner—either itself or through a licensee—who must sell or otherwise transfer the goods bearing the Mark to a third party. A *purchase* of the goods by the Owner, even for the purpose of resale, does not constitute, in itself, a use of the Mark by the Owner within the meaning of section 4 of the Act.

[24] Moreover, as the Requesting Party points out, the trade-mark appearing in the invoices is GOUGOUSSE, and not MADAME GOUGOUSSE, as registered. Consequently, the question is posed whether the presentation of the word “GOUGOUSSE” constitutes a presentation of the registered mark.

[25] In any case, as I already mentioned, the invoice from the Owner is dated outside the relevant period and, on the grounds set out above, is not admissible as evidence in the case at bar.

[26] Moreover, Ms. Duong does not describe or prove any other manner in which the Mark was presented on, or in association with the Goods at the time of transfer during the relevant period.

[27] In short, Ms. Duong's statement amounts to a mere allegation of use, rather than a statement of facts establishing use. In the absence of additional details and supporting documents, I cannot conclude that the Mark was marked on the Goods or their packages or was otherwise associated with the Goods, such that a notice of this association was given to the buyers at the time of the transfer of the property in or possession of the Goods during the relevant period. It is therefore impossible to determine the degree to which the Mark was used within the meaning of sections 4 and 45 of the Act.

DECISION

[28] In view of all of the above, I am not convinced that the Owner proved the use of the Mark in association with the goods covered by the registration during the relevant period within the meaning of sections 4 and 45 of the Act. Moreover, I do not have any evidence of special circumstances justifying failure to use.

[29] In exercising the authority delegated to me pursuant to the provisions of section 63(3) of the Act, and in compliance with the provisions of section 45 of the Act, the registration will be expunged.

Oksana Osadchuk
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

Certified true translation
Arnold Bennett

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS REGISTERED IN THE CASE**

DATE OF HEARING 2018-03-13

APPEARANCES

No appearance

FOR THE REGISTERED OWNER

Laurent Carrière

FOR THE REQUESTING PARTY

AGENT(S) IN THE CASE

No agent named

FOR THE REGISTERED OWNER

ROBIC

FOR THE REQUESTING PARTY