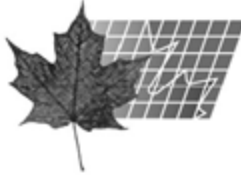


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LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2018 TMOB 59**

**Date of Decision: 2018-06-19**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Clancy Professional Corporation**

**Requesting Party**

**and**

**San Miguel Pure Foods Company, Inc.**

**Registered Owner**

**TMA817,049 for SAN MIGUEL**

**Registration**

**PUREFOODS**

[1] This is a decision involving a summary expungement proceeding with respect to registration No. TMA817,049 for the trade-mark SAN MIGUEL PUREFOODS (the Mark), owned by San Miguel Pure Foods Company, Inc.

[2] The Mark is currently registered in association with the following goods:

Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products, namely, milk concentrates and milk-based beverages; edible oils and fats.

[3] For the reasons that follow, I conclude that the registration ought to be expunged.

THE PROCEEDING

[4] On January 29, 2016, the Registrar of Trade-marks sent a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) to San Miguel Pure Foods Company, Inc. (the Owner). The notice was sent at the request of Clancy Professional Corporation (the Requesting Party).

[5] The notice required the Owner to furnish evidence showing that it had used the Mark in Canada, at any time between January 29, 2013 and January 29, 2016, in association with each of the goods specified in the registration. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last in use and the reasons for the absence of use since that date.

[6] The relevant definition of use in the present case 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.

[7] Section 45 proceedings are considered to be summary and expeditious for clearing the register of non-active trade-marks. The expression “clearing deadwood” has often been used to describe such proceedings [*Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD)]. While it is true that the threshold for establishing use in a section 45 proceeding is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD) and *Austin Nichols & Co v Cinnabon, Inc* (1998) 82 CPR (3d) 513 (FCA)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the registered goods during the relevant period [see *Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270].

[8] In response to the Registrar’s notice, the Owner furnished the affidavit of Jacky Gu, sworn August 26, 2016, together with Exhibits A and B.

[9] Neither the Owner nor the Requesting Party filed written representations or requested an oral hearing.

#### THE EVIDENCE

##### *The Gu Affidavit*

[10] Mr. Gu attests that he has been a director of AFOD Ltd. (AFOD) since December 2005. He explains that AFOD, located in Delta, British Columbia, is in the business of importing, marketing and distributing specialized Filipino and Asian food to independent stores and supermarket chains across Canada (Stores).

[11] Mr. Gu attests that AFOD has received shipments of meat products in which he has seen the Mark marked on these goods themselves or on the packages in which they are distributed. He further attests that AFOD distributed these meat products marked with the Mark to Stores during the relevant period.

[12] In support of the aforementioned, Mr. Gu provides the following:

- Exhibit A – a Bill of Lading which Mr. Gu states confirms the shipment of meat products marked with the Mark to AFOD’s warehouse in Richmond, British Columbia, on September 8, 2014. I note that the document pertains to the shipment of canned corned beef, shipped by JBS S/A from Brazil to a consignee in Vancouver, identified as AFOD Limited.
- Exhibit B – an image of the meat products bearing the Mark that Mr. Gu attests were received at AFOD’s warehouse during the relevant period. The meat product in the image is identified on its product label as corned beef, and a product of Brazil.

#### ANALYSIS AND REASONS FOR DECISION

[13] I note that Mr. Gu’s affidavit speaks only to the Mark being used in association with meat products, identified in the evidence as “corned beef”. Indeed, Mr. Gu’s affidavit and evidence are silent with respect to all other registered goods, namely:

[...], fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products, namely, milk concentrates and milk-based beverages; edible oils and fats.

[14] Furthermore, no special circumstances have been brought forth which would excuse the absence of use of the Mark in association with such goods. Consequently, these goods, at the very least, will be deleted from the registration and the ensuing discussion will be limited to the registered good “meat”.

[15] With respect to “meat”, the Exhibit B photograph clearly shows the Mark on a can of corned beef, and the Exhibit A Bill of Lading shows a shipment of this corned beef made to AFOD during the relevant period.

[16] However, the evidence does not establish the normal course of trade for the Owner. In addition, while the Owner seeks to rely on evidence from an employee of AFOD Ltd., the evidence fails to establish the relationship between the Owner and AFOD Ltd.

[17] The law is clear that the use of a trade-mark at any point along the chain of distribution is sufficient to demonstrate use as defined in section 4 of the Act, and that such use will accrue to the benefit of the owner provided that the goods bearing the trade-mark originate from the owner [*Manhattan Industries Inc v Princeton Manufacturing Ltd* (1971), 4 CPR (2d) 6 (FCTD); *Osler, Hoskin & Harcourt v Canada (Registrar of Trade-Marks)*, (1997), 77 CPR (3d) 475 (FCTD) and *Malcolm Johnston & Associates v A & A Jewellers Ltd* (2000), 8 CPR (4th) 56 (FCTD)].

[18] In the present case, to begin with, the evidence does not show the goods as originating from the Owner, and Mr. Gu does not provide any attestations in this regard. Rather, the evidence shows that the goods are shipped from and are identified on associated labelling as a product of Brazil, whereas the Owner is located in the Philippines.

[19] An owner of a trade-mark can demonstrate use of a trade-mark by relying on a licensee’s evidence, provided that the evidence establishes that the owner had the requisite control over the character or quality of the goods associated with the trade-mark, pursuant to section 50 of the Act. However, in the present case, Mr. Gu makes no mention of a licensor-licensee relationship, nor any attempt to explain the origin of the goods or the normal course of trade in the goods prior to their shipment by an unexplained entity.

[20] Further to this, while Mr. Gu describes the normal course of trade of AFOD Ltd. as including importing, marketing, and distributing food products to Canadian retailers, the Exhibit A Bill of Lading simply identifies AFOD Ltd. as a consignee for the goods. There is no evidence of payment for the goods in question and thus the Bill of Lading is not evidence of a commercial transaction involving the goods in the normal course of trade. Moreover, no evidence has been provided of further sales to Canadian retailers along the distribution chain. Indeed, it is unclear what specific role AFOD Ltd. plays in the distribution chain.

[21] Having regard to the above, I find the evidence is ambiguous as it does not clearly establish that “meat” was sold in Canada in association with the Mark and that such use of the Mark enured to the benefit of the Owner. This is a summary administrative proceeding and the evidence should not raise more questions than it answers [*Axia NetMedia Corporation v NetManage Inc* (2010), 87 CPR (4th) 254 (TMOB) at para 27].

#### DISPOSITION

[22] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

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Kathryn Barnett  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE** No Hearing Held

**AGENTS OF RECORD**

Boughton Law Corporation

FOR THE REGISTERED OWNER

Clancy Professional Corporation

FOR THE REQUESTING PARTY