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LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2022 TMOB 097**

**Date of Decision: 2022-05-16**

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

**BCF s.e.n.c.r.l./BCF LLP**

**Requesting Party**

**And**

**Dr. Matthias Rath**

**Registered Owner**

**TMA695,400 for OSTEOFORTE**

**Registration**

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA695,400 for the trademark OSTEOFORTE (the Mark), currently owned by Dr. Matthias Rath (the Owner).

[2] All references are to the Act as amended June 17, 2019 (the Act), unless otherwise noted.

[3] The Mark is registered for use in association with the following:

Nutritional and dietary supplements, namely vitamins, minerals, amino acids and trace elements; minerals and aerated waters, carbonated non-alcoholic drinks, non-alcoholic fruit drinks, non-alcoholic fruit juices, syrups for making non-alcoholic fruit-flavoured beverages; tea, cacao, sugar, honey, spices, candy, effervescent sticks, effervescent tablets, pastilles, chocolate, licorice, jellied fruits and other sweets (the Goods).

[4] For the reasons that follow, I conclude that the registration ought to be maintained in part.

#### THE PROCEEDINGS

[5] At the request of BCF s.e.n.c.r.l./BCF LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on April 8, 2021, to the Owner of the Mark.

[6] The notice required the Owner to show whether the trademark was used in Canada in association with each of the goods specified in the registration at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is April 8, 2018 to April 8, 2021 (the Relevant Period).

[7] The relevant definition of use in the present case is set out in section 4(1) of the Act as follows:

4(1) A trademark 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.

[8] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448 at para 68] and “evidentiary overkill” is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with the goods.

[9] In the absence of use, pursuant to section 45(3) of the Act, the registration is liable to be expunged, unless the absence of use is due to special circumstances.

[10] In response to the Registrar's notice, the Owner furnished an affidavit of Dr. Matthias Rath to which was attached Exhibits 1 to 3 inclusive.

[11] The parties did not file written representations and no hearing was held.

#### THE EVIDENCE

[12] Dr. Rath is the owner of the Mark. He states that he designs natural health products, including nutritional and dietary supplements (the Owner's products).

[13] Dr. Rath explains that the Owner's products are manufactured by third parties in accordance with the directions he provides or by companies that he controls.

[14] Dr. Rath affirms that he licensed the Mark to Dr. Rath International, Inc. (the Licensee), a company that he controls. He adds that under that license he has "direct and indirect control of the character and quality of the manufacture, sale and distribution of the [Owner's products] that the Licensee sells and distributes in association with the Mark in Canada".

[15] Dr. Rath adds that he establishes "the quality standards to be met by the [Owner's products] sold and distributed by the Licensee in connection with the Licensee's use of the Mark and I actively ensure such standards are in fact met".

[16] Dr. Rath affirms that the Owner's products have been sold in Canada by the Licensee in association with the Mark during the Relevant Period.

[17] To substantiate this allegation, Dr. Rath attaches to his affidavit the following Exhibits:

- Exhibit 1: Wayback Machine website extracts of the website available at <http://int.drrath.com> as it was available on August 28, 2018 and February 23, 2019;
- Exhibit 2: Photographs of packaging for the Owner's products sold and delivered in Canada during the Relevant Period in association with the Mark;
- Exhibit 3: Invoices issued by the Licensee to Canadian Purchasers during the Relevant Period for the sale of the Owner's products.

[18] Dr. Rath affirms that the Owner's products referred in those invoices were in packaging bearing the Mark when they were delivered to Canadian purchasers.

#### ANALYSIS AND REASONS FOR DECISION

[19] There is no reference in the evidence to the following goods:

minerals and aerated waters, carbonated non-alcoholic drinks, non-alcoholic fruit drinks, non-alcoholic fruit juices, syrups for making non-alcoholic fruit-flavoured beverages; tea, cacao, sugar, honey, spices, candy, effervescent sticks, effervescent tablets, pastilles, chocolate, licorice, jellied fruits and other sweets.

[20] Given that there is no allegation of special circumstances that could justify the non-use of the Mark in association with those goods during the Relevant Period, the registration will be amended accordingly.

[21] The photographs of the packaging (Exhibit 2) together with the invoices (Exhibit 3) and the statements made by Dr. Rath about the license in place between the Owner and the Licensee lead me to conclude that there is evidence of use of the Mark in Canada during the Relevant Period that enures to the Owner. However has there been use of the Mark in association with each of the remaining goods?

[22] Dr. Rath does not specify the nature of the nutritional and dietary supplements sold in Canada in association with the Mark during the Relevant Period. However, I notice that packaging contains the following references:

- "A daily dietary supplement"
- Under "Supplement facts" there is a listing of the different vitamins contained therein, as well as "calcium";
- Under "trace elements" there is reference to "manganese" and "zinc".

[23] This information appearing on the packaging as well as the invoices (Exhibit 3) enable me to conclude that there is evidence of use of the Mark in association with: nutritional and dietary supplements, namely vitamins, minerals and elements.

[24] However, nowhere on the packaging or in the affidavit of Dr. Rath is there a reference to "amino acids". Dr. Rath does not explain what is meant by "amino acids". Consequently, I cannot conclude that the evidence described above establishes use of the Mark in association

with “amino acids”. The registration will be amended accordingly, given that there is no evidence of special circumstances excusing the non-use of the Mark in Canada in association with “amino acids” during the Relevant Period within the meaning of section 45(3) of the Act.

DISPOSITION

[25] Pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be amended to delete the following:

Nutritional and dietary supplements, namely vitamins, minerals, ~~amino acids~~ and trace elements; ~~minerals and aerated waters, carbonated non-alcoholic drinks, non-alcoholic fruit drinks, non-alcoholic fruit juices, syrups for making non-alcoholic fruit flavoured beverages; tea, cacao, sugar, honey, spices, candy, effervescent sticks, effervescent tablets, pastilles, chocolate, licorice, jellied fruits and other sweets.~~

[26] The amended statement of goods will read as follow:

Nutritional and dietary supplements, namely vitamins, minerals and trace elements.

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Jean Carrière  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No Hearing Held

**AGENTS OF RECORD**

Ridout & Maybee LLP

For the Registered Owner

BCF s.e.n.c.r.l./BCF LLP

For the Requesting Party