



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 040

Date of Decision: 2023-03-03

[UNREVISED ENGLISH

CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Spectrum Brands Pet LLC

Current Owner: Junglemax Inc.

Registration: TMA438,568 for JUNGLEMAX

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. TMA438,568 for the trademark JUNGLEMAX (the Mark).

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

[TRANSLATION]

(1) Products and accessories for pets, namely: toys, balls, jaw exercisers, nylon and/or rubber bones, whistles, bells, exercise balls for rodent, wheels for rodents; chewing

objects for dogs, namely: rawhide bones and sticks; boots, buckles, sweaters and coats; collars, choke collars, harnesses, leashes, muzzles, identification devices, outdoor tie chains, tie posts; grooming accessories for pets, namely: brushes, combs, scissors for claws and fur, claw clippers, flea collars, flea treatments, fur ball treatments, vermifuge treatments, repellent products, shampoos, grooming kit; food bowls, water and food dispensers, water bottles; fences, cages, car bars, doghouses, baskets, cushions, pet doors, litter tubs, litter, litter spoons, litter deodorizers and fresheners, cat furniture, namely: scratching posts, beds; rodent houses, rodent nests; pet food, treats, honey sticks, food supplements, vitamins, mineral blocks; products and accessories for birds, namely: cages, feet for cages, parts for cages, cage covers, perches, perch covers, gravel paper, gravel, nests, exercisers, carrying boxes, toys, bells, swings, mirrors, troughs, feeders, reservoirs for water and seeds, scissors, mineral blocks, cuttle fish bone, bird feed; products and accessories for fish, namely: aquariums, aquarium furniture, aquarium stands, decorative accessories, backgrounds for aquatic decor, crushed shells, corals, gravel, decorative rocks, glass magnets, glass covers, light bulbs, lamps, water changing devices, air hoses, air diffusers, purifiers, filters, filtration materials, neutralizing products, thermometers, aquarium tubes, nets, jars; turtle bowls, turtle islands, food dispensers, fish and turtle food.

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

THE PROCEEDING

[4] At the request of Spectrum Brands Pet LLC (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on April 28, 2021, to Gestion Cyr & Sergerie Inc. (the Owner), the registered owner of the Mark at the time of the introduction of this procedure.

[5] I note that the Mark was since assigned to Junglemax Inc. (Junglemax) on June 9, 2021. The change in ownership has no bearing on this decision.

[6] The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods specified in the registration at any time within the three-year period preceding the date of the notice and, if not, the date when the Mark 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 between April 28, 2018, and April 28, 2021.

[7] The relevant definition of “use” is set out in section 4 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] In the absence of use as defined above, a trademark registration is liable to be expunged, unless the absence of use is due to special circumstances.

[9] In response to the Registrar's notice, the Owner furnished the affidavit of Renaud Sergerie, sworn on July 7, 2021, to which was attached exhibits RS-1 to RS-4.

[10] Both parties submitted written representations. Only the Requesting Party was represented at the hearing.

OVERVIEW OF THE OWNER'S EVIDENCE

[11] In his affidavit, Mr. Sergerie identifies himself as the President and co-founder of the Owner, a trademark portfolio management company that licenses the use of the trademarks under its responsibility [paras 1 and 4].

[12] Mr. Sergerie states that the Mark has been used in Canada in connection with the goods specified in the registration since at least December 8, 1994. With respect to the relevant period, he submits that the Mark was used by Junglemax as of July 1, 2018, under a licence granted by the Owner. In addition, Mr. Sergerie expressly states that the Owner has exercised control, directly or indirectly, over the characteristics or quality of the goods and the use, advertising, or exhibition of the Mark by Junglemax in Canada [paras 5–7 and 10].

[13] Mr. Sergerie generally states that Junglemax sells the registered pet products to several large stores, pet shops, distributors, and wholesalers such as Jean Coutu, IGA, Variété P. Prud'homme Inc., Promotions C.D. Inc., Distributions Franco and Yamas Animal Products [paras 11 and 17].

[14] In support of his statements, Mr. Sergerie attached the following relevant exhibits:

- Exhibit RS-2: five copies of invoices dated during the relevant period that report sales by Junglemax to some of its distributors and wholesalers in Canada;
- Exhibit RS-3: six photographs of several goods placed on displays in stores. I note that all goods are packed in transparent cellophane bags. I also note that the Mark is prominently displayed on the packaging. It also includes a drawing, in the form a caricature, of a dog and the following descriptions: [TRANSLATION] “Quality Pet Products” and “Treats and Accessories.” Mr. Sergerie states that these photographs were taken during the relevant period. He also states that these photographs are representative of the packaging of goods sold to Canadian retailers during the relevant period and appear on invoices submitted in Exhibit RS-2.
- RS-4: 55 photographs of goods taken individually. The packages show some differences from Exhibit RS-3, but the Mark, the drawing of the dog, and the descriptions specified above appear. In addition to the descriptions already specified, two products show the following description: [TRANSLATION] “Dog treats.” As with Exhibit RS-3, Mr. Sergerie states that these photographs are representative of the goods sold and appearing on invoices during the relevant period.

[15] Finally, I note that Mr. Sergerie generally describes all of the goods shown in exhibits RS-3 and RS-4 as: [TRANSLATION] “twists, sticks, strips, rawhide knotted bones, compressed rawhide bones, bully sticks, pressed rolls, pressed dumbbells, press rings, chew rings, balls, braided balls, chew balls, shoes, cocktail sausages, pig ears, rawhide dog chews, rawhide boomerangs, chew donuts, lollipops, kebabs, rolls and various dog treats” [paras 13 to 16].

ANALYSIS AND REASONS FOR DECISION

[16] Primarily, the Requesting Party submits that the registration ought to be expunged in its entirety on the ground that part of the evidence is inadmissible because it consists of hearsay. In the alternative, it submits that the Owner has only demonstrated the use of the Mark in respect of a very small part of the registered

goods, as further discussed below. In addition to the absence of evidence of use in connection with the rest of the registered goods, the Requesting Party alleges that there is no evidence of special circumstances justifying the absence of use of the Mark in connection with the latter.

The hearsay evidence

[17] In its written submissions, the Requesting Party submits that the registration must be expunged in its entirety because all invoices in Exhibit RS-2, attesting to the transfer of ownership of some of the goods covered by the registration, constitute inadmissible hearsay evidence. In particular, it points out that Mr. Sergerie limits his personal knowledge to the Owner's records and does not specify how he got access to Junglemax's invoices. At the hearing, the Requesting Party also objected to the admissibility of the photographs taken in stores on the grounds that Mr. Sergerie failed to indicate who had taken them.

[18] It is well established that, given the summary nature of section 45 proceedings, "any concerns with respect to the hearsay nature of [his] evidence can go to weight, rather than admissibility" [*Eva Gabor International Ltd v 1459243 Ontario Inc*, 2011 FC 18 at para. 18]. It is well established that an affiant's sworn statements are to be accepted at face value, and statements in an affidavit must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para. 25].

[19] In this case, Mr. Sergerie claims to have personal knowledge of the facts contained in his affidavit. In addition, he states that the documents produced in support of his affidavit, including invoices, are copies of the originals. Following *Eva Gabor* and *Oyen Wiggs, supra*, I find that these statements are sufficient to allow Junglemax's invoices as evidence. Further, in view of the summary nature of this proceeding, requiring an affidavit from an employee of Junglemax would be tantamount to requiring evidentiary overkill and would, in my view, be exaggerated and unjustified.

[20] With respect to the photographs taken in the store, taking into account the personal knowledge of Mr. Sergerie, I also allow them as evidence. It should also be

recalled that Mr. Sergerie states that these photographs and those of the goods taken individually are *representative*, without mentioning that the Requesting Party did not object to the admissibility of the photographs of the goods taken individually.

[21] Therefore, the question becomes whether the evidence satisfactorily establishes the use of the Mark in Canada in association with each of the goods covered by the registration during the relevant period.

The use of the Mark in association with each of the registered goods

[22] In its written submissions, the Requesting Party submits that the Owner has only demonstrated the use of the Mark in association with “chewing objects for dogs, namely: rawhide bones and sticks” and the evidence does not indicate any special circumstances justifying the non-use of the Mark in association with the other products specified in the registration. At the hearing, the Requesting Party explained that its position had changed and amended its alternative submission by arguing that the evidence demonstrates the use of the Mark only in association with “rawhide bones.” In this regard, the Applicant Party submits that the Act protects the goods specifically identified, not the general category in which they are found. Thus, the Requesting Party submits that the “rawhide sticks” as well as the general category “chewing objects for dogs” included in the statement “chewing objects for dogs, namely: rawhide bones and sticks” should be expunged from the registration.

[23] In response, the Owner submits that it has provided sufficient facts to enable the Registrar to conclude that the Mark is used in association with all the goods specified in the registration during the relevant period.

[24] 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. In light of this, 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. 38] and “evidentiary overkill” is not required [*Union Electric Supply Co Ltd v Registrar of Trademarks* (1982), 63 CPR (2d) 56 (FCTD) at para. 3]. Nevertheless,

sufficient facts must still be provided to enable the Registrar to conclude that the Mark was used in association with each of the goods.

[25] In this case, even though in paragraph 10 of his affidavit, Mr. Sergerie states that the Mark was used in Canada in association with pet products, *including the products specified in the registration*, he does not provide sufficient explanations and supporting documents to allow me to conclude that the Mark was so used in association with *each* of the goods covered by the registration [*emphasis added*].

[26] In view of the photos shown in exhibits RS-3 and RS-4, including two photographs taken in store (the Photographs Taken in Store) are reproduced below as examples, I note that all goods, with the exception of two that will be discussed separately below, appear to be made of the same material. In fact, apart from their shape and colour shades, which in most cases range from white to more or less dark brown, there is no essential difference in the manufacturing components. In this regard, I note that Mr. Sergerie describes certain products by specifying their manufacturing components, such as “rawhide knotted bones,” “compressed rawhide bones,” and “rawhide boomerangs.” In light of these details and the appearance of the goods, I find it reasonable to conclude that all the goods shown in the photographs of exhibits RS-3 and RS-4, with two exceptions, are made of rawhide. In the case of the invoices, the bones in them are identified as “knotted bones” or “compressed bones.” The invoices also sometimes refer to the manufacturing components of the goods listed within (“rawhide”), while at other times they refer to the function of the goods (“chew”). This is the case, for example, of “sticks,” which are, for the most part, identified on the invoices as [TRANSLATION] “chew sticks.” Thus, although Mr. Sergerie does not specifically describe the products appearing in the photos of exhibits RS-3 and RS-4 as “chewing objects for dogs”, in view of the evidence as a whole, I find that they can reasonably be considered as such and that some of them actually correspond to rawhide bones and sticks given their unequivocal shape.



[27] I therefore disagree with the position expressed by the Requesting Party at the hearing that the general category “chewing objects for dogs” and “rawhide sticks” ought to be expunged. I would add in conclusion on this point that the Federal Court of Appeal has established that when an owner demonstrates the use of a trademark in association with a good in the general class of the statement of goods, the general class should be upheld [*Ridout & Maybee LLP v Omega SA*, 2005 FCA 306 at paras 3 and 4; see also *Empresa Cubana Del Tobacco Trading v Shapiro Cohen*, 2011 FC 102, aff’d 2011 FCA 340; and *Graduate Management Admissions Council v Attachmate Corp*, 2015 TMOB 224 at para. 18].

[28] With respect to the two exceptions noted in paragraph 26, I reproduced below the Photographs Taken in Store with the exact location on the displays of the two goods concerned (the Two Goods).



[29] I also reproduced the photographs of the Two Goods taken individually.



[30] In comparing these Two Goods with the others shown in exhibits RS-3 and RS-4, I note an obvious difference in appearance. For example, the appearance of the first of the Two Goods is different from that of the other bones taken individually, of which I reproduced a few examples below. I also note that the second good is marked “Dog Treats” and that Mr. Sergerie refers to [TRANSLATION] “various dog treats” and “pig ears” in his affidavit. In addition, the invoice dated February 24, 2021, includes a bone identified as “smoked pork bone” and a “pig ear selection.” In this regard, I would like to point out that [TRANSLATION] “treats” is specified in the registration.



[31] The Registrar may automatically accept dictionary definitions [see *Gervais v CIBC Mellon Global Securities Services Co* (2004), 34 CPR (4th) 571 (TMOB) at para. 7; *Shapiro Cohen LLP v Proa*, 2017 TMOB 162 at para. 44]. Having exercised this discretion, the relevant definitions of the French online dictionary www.larousse.fr are:

[TRANSLATION]

Gâtérie [Treat]: Small present, confectionery, sweetnesses, sweets.

Régal [Treat]: A dish particularly appreciated by someone.

[32] In turn, the word [TRANSLATION] “dish” is defined as “any prepared food served for meals.” Given the latter definition, I find that, in French, neither of the Two Goods corresponds to a “régal [treat].” On the other hand, in view of the evidence as a whole, I believe that these Two Goods can reasonably be considered “gâtéries [treats] .” In closing, I would add that the Registrar does not have the authority to redefine or amend the statement of goods in respect of which the use has been demonstrated [see, for example, *Carter Wallace Inc v Wampole Canada Inc* (2000) 8 CPR (4th) 30 (FCTD); *Scott Paper Co, Re*, 1997 CarswellNat 3231 (TMOB); *Gowling, Strathy & Henderson c Multibond Inc*, 2000 CarswellNat 2474 (TMOB); and *Fasken Martineau Dumoulin LLP v. GENTEC, a partnership consisting of 901089 Ontario Limited and 2494979 Ontario Limited*, 2021 TMOB 56, aff’d 2022 FC 327].

[33] In view of all the above, I am satisfied that the Owner has provided sufficient evidence to establish the use of the Mark in association with the goods described in the

registration as “chewing objects for dogs, namely: rawhide bones and sticks” and “treats” under sections 4 and 45 of the Act.

[34] With respect to the other goods specified in the registration, I note first that Mr. Sergerie makes no reference to other manufacturing components except rawhide when describing bones. None of the supporting evidence in his affidavit suggests that it may be otherwise. Therefore, I cannot conclude that the Mark is used in association with “nylon and/or rubber bones.” For the rest of the goods, apart from a general statement of use of the Mark in relation to animal products, including the goods described in the registration, the evidence submitted is completely silent concerning the use of the Mark in association with those goods. In the circumstances, I find that no inference can be made from the evidence submitted. Thus, I am not satisfied that the facts presented by Mr. Sergerie are sufficient to establish the use of the Mark in association with the other registered goods, namely:

(1) Products and accessories for pets, namely: toys, balls, jaw exercisers, nylon and/or rubber bones, whistles, bells, exercise balls for rodent, wheels for rodents; chewing objects for dogs, namely: rawhide bones and sticks; boots, buckles, sweaters and coats; collars, choke collars, harnesses, leashes, muzzles, identification devices, outdoor tie chains, tie posts; grooming accessories for pets, namely: brushes, combs, scissors for claws and fur, claw clippers, flea collars, flea treatments, fur ball treatments, vermifuge treatments, repellent products, shampoos, grooming kit; food bowls, water and food dispensers, water bottles; fences, cages, car bars, doghouses, baskets, cushions, pet doors, litter tubs, litter, litter spoons, litter deodorizers and fresheners, cat furniture, namely: scratching posts, beds; rodent houses, rodent nests; pet food, treats, honey sticks, food supplements, vitamins, mineral blocks; products and accessories for birds, namely: cages, feet for cages, parts for cages, cage covers, perches, perch covers, gravel paper, gravel, nests, exercisers, carrying boxes, toys, bells, swings, mirrors, troughs, feeders, reservoirs for water and seeds, scissors, mineral blocks, cuttle fish bone, bird feed; products and accessories for fish, namely: aquariums, aquarium furniture, aquarium stands, decorative accessories, backgrounds for aquatic decor, crushed shells, corals, gravel, decorative rocks, glass magnets, glass covers, light bulbs, lamps, water changing devices, air hoses, air diffusers, purifiers, filters, filtration materials, neutralizing products, thermometers, aquarium tubes, nets, jars; turtle bowls, turtle islands, food dispensers, fish and turtle food.

[35] Considering the fact that Mr. Sergerie does not put forward any special circumstances justifying the non-use of the Mark in association with these specific goods, the registration will be amended accordingly.

DECISION

[36] 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:

Products and accessories for pets, namely: toys, balls, jaw exercisers, nylon and/or rubber bones, whistles, bells, exercise balls for rodent, wheels for rodents; chewing objects for dogs, namely: rawhide bones and sticks; boots, buckles, sweaters and coats; collars, choke collars, harnesses, leashes, muzzles, identification devices, outdoor tie chains, tie posts; grooming accessories for pets, namely: brushes, combs, scissors for claws and fur, claw clippers, flea collars, flea treatments, fur ball treatments, vermifuge treatments, repellent products, shampoos, grooming kit; food bowls, water and food dispensers, water bottles; fences, cages, car bars, doghouses, baskets, cushions, pet doors, litter tubs, litter, litter spoons, litter deodorizers and fresheners, cat furniture, namely: scratching posts, beds; rodent houses, rodent nests; pet food, treats, honey sticks, food supplements, vitamins, mineral blocks; products and accessories for birds, namely: cages, feet for cages, parts for cages, cage covers, perches, perch covers, gravel paper, gravel, nests, exercisers, carrying boxes, toys, bells, swings, mirrors, troughs, feeders, reservoirs for water and seeds, scissors, mineral blocks, cuttle fish bone, bird feed; products and accessories for fish, namely: aquariums, aquarium furniture, aquarium stands, decorative accessories, backgrounds for aquatic decor, crushed shells, corals, gravel, decorative rocks, glass magnets, glass covers, light bulbs, lamps, water changing devices, air hoses, air diffusers, purifiers, filters, filtration materials, neutralizing products, thermometers, aquarium tubes, nets, jars; turtle bowls, turtle islands, food dispensers, fish and turtle food.

[37] The statement of goods will read as follows:

(1) Chewing objects for dogs, namely: rawhide bones and sticks; treats.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Certified translation
Daniel Lepine

Appearances and Agents of Record

HEARING DATE: 2023-01-27

APPEARANCES

For the Requesting Party: Monique Couture

For the Current Owner: No one appearing

AGENTS OF RECORD

For the Requesting Party: Gowling WLG (Canada) LLP

For the Current Owner: CANYON IP Inc.