Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2026 TMOB 14

Date of Decision: 2026-01-29

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Piasetzki Nenniger KVAS LLP

Registered Owner: Domfoam Inc.

Registration: TMA884,986 for GELFLEX PLUS

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. TMA884,986 for the trademark GELFLEX PLUS (the Mark).

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

> (1) A composite of visco-elastic polyurethane foam or conventional open cell polyurethane foam infused with micro gel and phase change material used in the manufacturing of carpet underlay, mattresses, mattress' toppers, quilting rolls, pillows and furniture.

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

PROCEEDING

[4] At the request of Piasetzki Nenniger KVAS LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on January 13, 2025, to Domfoam Inc. (the Owner), the registered owner of the Mark.

[5] 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 immediately preceding the date of the notice. If the Mark was not so used, the Owner was required to provide the date when the Mark was last in use and the reason for the absence of use since that date. In this case, the relevant period for showing use is from January 13, 2022 to January 13, 2025.

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

[7] Where the Owner does not show "use", the registration is liable to be expunged or amended, unless there are special circumstances that excuse the absence of use.

[8] In response to the Registrar's notice, the Owner furnished the affidavit of its Secretary, Jonathan Pomerantz, sworn on March 26, 2025, together with Exhibits A to C (the Pomerantz Affidavit).

[9] Both parties submitted written representations and attended a joint oral hearing for the registration for the Mark and registration

No. TMA825,032 for the trademark GELFLEX, for which a decision will be issued separately.

EVIDENCE AND REASONS FOR DECISION

[10] As a preliminary matter, I note that there is no dispute that the registered goods are essentially a polyurethane foam to be used in the manufacturing of carpet underlay, mattresses, mattress' toppers, quilting rolls, pillows and furniture. I also note that the Pomerantz Affidavit generally refers to the registered goods as being a "polyurethane foam".

[11] The Pomerantz Affidavit is brief as it consists of six paragraphs and three exhibits. Mr. Pomerantz states that the Owner manufactures polyurethane foam which is cut and sold in various formats according to customer specifications. He also states that the polyurethane foam has been used in association with the Mark since 2014 [paras 2 and 4].

[12] In support to his statements, Mr. Pomerantz provides, as Exhibit A, eight printouts described as "an extract of [the Owner]'s website". I accept that these printouts relate to the relevant period as among the events listed under "Upcoming Events", one is scheduled to take place in October 2024. Further, from Mr. Pomerantz's description and the presence of the email address *info@domfoam.com* in the printouts, I find it reasonable to conclude that such website is located at *domfoam.com* (the Domfoam Website). In addition to the email address, a phone number is indicated in the printouts. Also, in the second printout, I note the following indication: "[b]uy directly from us online for the best deals", followed by the domain name *domfoamfactory.com* (the Factory Website). The last printout displays the Mark, followed by the word "FOAM" and the link button "Visit Gelflex Plus".

[13] As exhibit B, Mr. Pomerantz provides nine invoices and six purchase orders from 2022 and 2023. All the invoices and purchase orders are issued

by the Owner to addresses in Canada and all the items listed therein are identified with the Mark. The invoices indicate "FILE COPY" in the footer.

[14] Lastly, as Exhibit C, Mr. Pomerantz provides six printouts taken from the Internet Archive Wayback Machine, showing the Owner's website at *gelflexplus.com* as it appeared on October 4, 2023 (the Gelflex Plus Website). The same phone number as in the Domfoam Website is indicated in all the printouts, which also include three link buttons, namely "specifications", "more details" and "download pdf". All but one of the printouts display the Mark, followed by the word "FOAM", and as part of a composite trademark (the Logo), reproduced below (collectively, the Variations).

[15] At the hearing, counsel for the Owner conceded that the registered goods were not used in association with the Mark in the manufacturing of carpet underlay in Canada during the relevant period. The evidence is also silent as to any special circumstances excusing such absence of use. Accordingly, the registration will be amended to delete "carpet underlay".

[16] 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. It is well established that the evidence need not be perfect, a registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 9].

[17] The Requesting Party submits that the Owner failed to establish use of the Mark in association with the remaining registered goods (the Goods). In this respect, it raises the following issues with respect to the Owner's evidence:

- It does not include any images of the Goods themselves or their packaging.
- It does not describe the Owner's normal course of trade.
- It does not show that the Goods can be purchased through the websites as they do not show an online portal.
- It is unclear whether the invoices and/or purchase orders accompanied the Goods at the time of their transfer, and whether the Goods were actually shipped to the purchaser of the Goods.
- The Mark does not appear as registered on the invoices and purchase orders.

[18] According to the Requesting Party, no inference can be made that customers purchased the Goods from the Owner's websites and that the invoices and/or the purchase orders accompanied the Goods at the time of transfer. Further, it submits that even accepting that these documents accompanied the Goods, it is unclear whether the Goods were shipped to the same address where the invoice was sent so as to provide the requisite notice of association [Requesting Party's written representations, paras 10-25].

[19] I disagree with the Requesting Party's contention that the evidence does not show the Goods. The second printout of the Gelflex Plus Website includes an image showing a partial view of a foam (the Image 1) preceded by a description of the Goods. In addition, I find that the image shown in the first printout sufficiently depicts the Goods (the Image 2). This finding is reinforced when considering the Goods' description on the right, which refers

to the context of one of their manufacturing uses. I reproduce Images 1 and 2 below:

Image 1

Image 2

[20] In turn, the Domfoam Website includes a reference to the Goods and to the context of the same manufacturing use, as follows:

[21] The "Visit Gelflex Plus" link button in the Domfoam Website refers to the Gelflex Plus Website and suggests that there is a webpage detailing product specifications in association with the Mark. Bearing in mind that

drawing an inference is a matter of reasonably probable, logical deductions from the evidence, I find it reasonable to conclude that such link button leads to the Gelflex Plus Website [see *Sim & McBurney v En Vogue Sculptured Nail Systems Inc*, 2021 FC 172 at para 15].

[22] The Variations are displayed in close proximity to the Images 1 and 2 depicting the Goods in the Gelflex Plus Website and to the Goods' reference in the Domfoam Website.

[23] As noted above, the Requesting Party submits that the invoices and purchase orders do not include the Mark as registered. In particular, it submits that the Mark is preceded by the number 10290, and in some instances, followed by the word "BLOCK". In addition, as the "+" symbol replaces the word "PLUS", it submits that such symbol is not the same as "PLUS". I note that the word "PLUS" is also replaced by the symbol "+" in the Logo displayed on the Gelflex Plus Website.

[24] In considering whether the display of a trademark constitutes display of the trademark as registered, the question to be asked is whether the trademark was displayed in such a way that it did not lose its identity and remained recognizable, in spite of the differences between the form in which it was registered and the form in which it was used [*Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA)]. In deciding this issue, one must look to see whether the dominant features of the registered trademark have been preserved [*Promafil Canada Ltée v Munsingwear Inc*, 1992 CanLII 12831, 44 CPR (3d) 59 (FCA); *Pizzaiolo Restaurants Inc v Les Restaurants La Pizzaiolle Inc*, 2016 FCA 265]. This is a question of fact to be determined on a case-by-case basis.

[25] Applied to the present case, I find that the Mark does not lose its identity and remains recognizable. The dominant feature of the Mark, namely, the word "GELFLEX", clearly stands out in the invoices and in the Logo despite the additions and/or replacement. Further, both word and symbol, which I note is pronounced "PLUS", are laudatory in nature, suggesting that there is something more or extra associated with the products, their materials or components. As for the additions of the words "BLOCK" and "FOAM" to the Mark, I consider such words as descriptive of the Goods at issue. Since the dominant feature has been preserved and the Mark remains recognizable, I conclude that the Logo and the Mark with the additions, including in the body of the invoices, amount to display of the Mark as registered.

[26] With respect to the normal course of trade, it has been held that there is no particular type of evidence that must be provided to show the normal course of trade in a section 45 proceeding and the evidence need not be perfect [see *Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD) at 486].

[27] The invoices and purchase orders here support use in the normal course of trade. In this respect, I note that the large quantity of items listed in the invoices and purchase orders suggest that the Owner's customers are not end costumers. This is consistent with the statement of goods itself which specifies that the Owner's customers are manufacturers operating in the furniture industry. I can therefore infer as much. Further, from the evidence as a whole, including the content of the Gelflex Plus and Domfoam Websites (collectively, the Websites), I can infer that such customers place orders either by phone or through the Factory Website, after having selected the Goods associated with the Mark on the Gelflex Plus Website.

[28] To the extent that the invoices concern orders made by phone, I am satisfied that notice of association between the Mark and the Goods was given to customers, at a minimum, when selecting the Goods on the Gelflex Plus Website. In this respect, I consider such website to be akin to catalogues featuring information about the Owner's Goods in association with the Mark [relying on *Cook Incorporated v Medical Resources Corporation*, 2011 TMOB 151 at para 35].

[29] It is well established that the requisite notice of association can be established when customers place orders by way of a catalog or brochure that displays the trademark in close proximity with those goods, and that notice of association continues when the goods are delivered and invoices are received [see *Rosenstein v Elegance Rolf Offergelt GmbH* (2005), 47 CPR (4th) 196 (TMOB); and *Swabey Ogilvy Renault v Mary Maxim Ltd* (2003), 28 CPR (4th) 543 (TMOB)]. Similarly, where a customer can order goods from a website that displays a trademark, there is use of that trademark in association with the goods so long as proof of the transfer of the goods is provided [see *Fraser Milner Casgrain LLP v LG Electronics Inc*, 2014 TMOB 232 at paras 22-24; and *Kirby Eades Gale Baker v Endress+Hauser Group Services AG*, 2021 TMOB 284 at para 24].

[30] In the present case, while I agree with the Requesting Party that Mr. Pomerantz does not specify whether the invoices or purchase orders accompanied the Goods when they were delivered, I find that the evidence sufficiently supports such a conclusion.

[31] As rightly observed by the Requesting Party, the invoices and purchase orders include redactions. That said, only the recipient's name and street number in the "bill to" and "ship to" fields are blacked out. Given that four invoices [Exhibit B, invoice numbers S1374617, S1378033, S1379924 and S1379926] show the same street name, city, province and postal code

in both fields, I find it reasonable to infer that customer copies of these invoices have accompanied the Goods when they were delivered and have been seen by the same entity or individual who selected and/or purchased the Goods [for a similar conclusion, see *Veritas Technologies LLC and Bureau Veritas, société anonyme*, 2023 TMOB 51 at para 74].

[32] In view of all the above, I find that the evidence sufficiently supports the conclusion that the Goods were sold within the Owner's normal course of trade and that such Goods were associated with the Mark at the time of transfer in Canada during the relevant period. I am therefore satisfied that the Owner has established a *prima facie* case of use within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[33] Accordingly, 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 "carpet underlay".

[34] The amended statement of goods will read as follows:

> (1) A composite of visco-elastic polyurethane foam or conventional open cell polyurethane foam infused with micro gel and phase change material used in the manufacturing of mattresses, mattress' toppers, quilting rolls, pillows and furniture.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2025-12-11

APPEARANCES

For the Requesting Party: Evan Reinblatt

For the Registered Owner: Caroline Guy

AGENTS OF RECORD

For the Requesting Party: Piasetzki Nenniger KVAS LLP

For the Registered Owner: Therrien Couture Joli-Cœur S.E.N.C.R.L.