



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2026 TMOB 13

Date of Decision: 2026-01-29

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Piassetzki Nenniger KVAS LLP

Registered Owner: Domfoam Inc.

Registration: TMA825,032 for GELFLEX

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. TMA825,032 for the trademark GELFLEX (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 pellets in densities between 1.5-10 lb./cu.ft. 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. TMA884,986 for the trademark GELFLEX PLUS, 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 the 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 2011 [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. The last printout displays the Mark, followed by the words "PLUS FOAM".

[13] As Exhibit B, Mr. Pomerantz provides five invoices from 2022 with their respective purchase orders. I note that a pair of which is duplicated, i.e., purchase order number 2022-DF005 and invoice number S1364168. 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 two printouts taken from the Internet Archive Wayback Machine, showing the Owner's website at *gelflex.ca* as it appeared on December 13, 2024 (the Gelflex Website). The same phone number as in the Domfoam Website is indicated in the printouts, which also include three link buttons, namely "specifications", "more details" and "download pdf". The first printout displays the Mark, followed by the words "MEMORY FOAM", and as part of a composite trademark (the Logo), reproduced below (collectively, the Variations).



[15] The same Exhibit includes a printed flyer entitled "GELFLEX™ Memory Foam" which promotes the Goods.

[16] 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".

[17] 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].

[18] 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, purchase orders and/or the flyer accompanied the Goods at the time of their transfer, and whether the Goods were actually shipped to the purchaser of the Goods.

[19] According to the Requesting Party, no inference can be made that customers purchased the Goods from the Owner's websites and that the invoices, purchase orders and/or the flyer 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 10-24].

[20] Notwithstanding the Requesting Party's submissions, I find that the image included in the first printout of the Gelflex Website sufficiently depicts the Goods. This finding is reinforced when considering the Goods' description on the right of the image, which refers to the context of one of their manufacturing uses, as reproduced below:



514 325.8120



Home

Specifications



GELFLEX MEMORY FOAM

MEMORY FOAM

The Rest Comes Easy

Domfoam introduces, a true breakthrough in memory foam innovation.

GELFLEX FOAM provides enhanced support while reducing motion transfer across the mattress surface for an undisturbed sleep.

The open cell structure and gel particles promote airflow allowing for a cool, comfortable sleep.

[more details](#)

[download pdf](#)

[21] I note that the Domfoam Website includes a reference to the Goods and to the context of the same manufacturing use, as follows:

Gelflex Plus Foam

This "phase-change" material is encapsulated within the gel particles. It is designed to absorb or give off heat to maintain a specific temperature. This is the mechanism that regulates sleeping-surface temperature.

Gelflex Plus will cycle back and forth between heating and cooling an infinite number of times.

Phase-change material has 10 times the heat capacity of regular foam, keeping heat away from the body.

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

[23] Although the Requesting Party made no submissions concerning these Variations, applying the principles set out in *Canada (Registrar of Trade*

Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA (1985), 4 CPR (3d) 523 (FCA) and *Promafil Canada Ltée v Munsingwear Inc*, 1992 CanLII 12831, 44 CPR (3d) 59 (FCA), I find that the Mark does not lose its identity and remains recognizable despite the addition of the words "MEMORY FOAM" and "PLUS FOAM", which are descriptive and laudatory in nature. The dominant feature of the Mark, namely, the word "GELFLEX", clearly stands out despite the additions. Since the dominant feature has been preserved and the Mark remains recognizable, I conclude that the Mark with the additions and the Logo in the evidenced websites amount to display of the Mark as registered. The same conclusion applies to the addition of the number 10290 to the Mark in the body of the invoices dated during the relevant period.

[24] 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].

[25] 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, I can infer that such customers place orders by phone after having selected the Goods associated with the Mark on the Gelflex Website.

[26] 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 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].

[27] 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)].

[28] 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.

[29] 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 each of the invoices 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 the Goods on the Gelflex Website [for a similar conclusion, see *Veritas Technologies LLC and Bureau Veritas, société anonyme*, 2023 TMOB 51 at para 74].

[30] 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

[31] 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".

[32] 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 pellets in densities between 1.5-10 lb./cu.ft. 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.