



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

**Citation: 2012 TMOB 266**  
**Date of Decision: 2012-12-13**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Valeant Pharmaceuticals International, Inc.  
against registration No. TMA678,698 for the trade-mark  
RIPPED FX8 DESIGN in the name of M. Frank Petrillo**

[1] At the request of Valeant Pharmaceuticals International, Inc., formerly Afexa Life Sciences Inc. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on March 8, 2010, to M. Frank Petrillo, the registered owner (the Registrant) of registration No. TMA678,698 for the following trade-mark (the Mark):

**RIPPED  
FX8**

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

[TRANSLATION]

Food supplements, dietetic, strengthening and toning meal replacements based on protein and/or carbohydrates and/or vitamins and/or minerals and/or amino acids and/or creatine in the form of powder, crystals, liquid capsules and tablets; protein-enriched nutrition bars, high-energy nutrition bars, diet bars; protein-enriched beverage in powdered, crystal or liquid form; carbohydrate-enriched beverage in powdered, crystal or liquid form; protein powders; vitamins in powdered, crystal, capsule or liquid form; protein in powdered, crystal, capsule or liquid form; casual pants; casual shorts; T-shirts; sweatshirts; casual jackets; gloves; hats, hair bonnets, peak caps.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and services 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 use since that date. In this case, the relevant period for showing use is between March 8, 2007 and March 8, 2010 (the Relevant Period).

[4] 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 wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[5] 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 test that has to be met by the registrant is not a heavy one [*Cinnabon, Inc v Yoo-Hoo of Florida Corp* (1998), 82 CPR (3d) 513 (FCA)]. There must nevertheless be reliable evidence from which the Registrar can make a conclusion that the trade-mark has been used in accordance with sections 4 and 45 of the Act. Furthermore, ambiguities in the evidence are to be interpreted against the interests of the registered owner [*Aerosol Fillers Inc v Plough (Canada) Ltd* (1980), 45 CPR (2d) 194 at 198; *aff’d* 53 CPR (3d) 62 (FCA)].

[6] In response to the Registrar’s notice, the Registrant furnished the affidavit of Franco Petrillo, the Registrant himself. While both parties filed written submissions, the Requesting Party was the sole party represented at an oral hearing.

[7] As a preliminary matter, the Requesting Party points to technical deficiencies in the affidavit which it argues should render the evidence unacceptable before the Registrar. The first such deficiency being that the jurat is undated, with further deficiencies being that the exhibit to the affidavit was neither properly identified as an “exhibit” nor commissioned. However, it has been held that the absence of a date in the jurat is a mere technicality which does not render the

registrant's evidence inadmissible [*Legault Joly v Akzo Nobel Coatings International B.V.* (2002), 25 CPR (4th) 277 (TMOB)]. Furthermore, exhibits that have not been notarized, but that are identified in the affidavit, have been considered acceptable in the context of section 45 proceedings [see for example: *Smith, Lyons, Torrance, Stevenson & Mayer v Pharmaglobe Laboratories Ltd.* (1996), 75 CPR (3d) 85 (TMOB)]. In the present case, Mr. Petrillo has clearly referenced the attached exhibit in his affidavit and I see no reason not to accept it. It is well established that technical deficiencies should not be a bar to a successful response to a section 45 Notice [see *Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)].

[8] Now turning to the contents of Mr. Petrillo's affidavit, I note that he indicates that he is the sole shareholder and director of a number of incorporated entities, including the following:

- 9069-8507 Quebec Inc. and 9103-7788 Quebec Inc., doing business under the name of Body Building Nutrition Center (B.N.C.);
- Muscle Media Ultimate Inc. and 9084-7856 Quebec Inc., formerly doing business under the name Body Building Nutrition Center (B.N.C.); and
- 3811182 Canada Inc., doing business under the name California Fitness/cardio.

[9] Mr. Petrillo identifies the above-mentioned entities as retail establishments, with the exception of the last entity which operates as a gym, where he sells and markets his fitness products to members via a juice bar. He explains that since the early 1990's, he has personally overseen the day-to-day operations of several small retail stores, in which he mainly sells products manufactured, branded and marketed by himself.

[10] He states that he has been selling "RIPPED FX8 products" since at least March 11, 2005, through the above-mentioned corporate entities. In particular, at the 9069-8507 Quebec Inc. retail store, he sold over \$2,000 worth of "RIPPED FX8 product" for the year 2008. At the Muscle Media Ultimate Inc. retail store, he sold over \$300 worth of "RIPPED FX8" from the period January to March 2009. His reference to "RIPPED FX8 product" and "RIPPED FX8" is in relation to a product that he later describes as a "fat burner". He also indicates that he has sold this "fat burner" in liquid format at his gym since about June 2009.

[11] Mr. Petrillo concludes his affidavit with the following paragraphs:

14. Therefore I have been selling, in the normal course of business products clearly labeled with my RIPPED FX 8 trademark as can be seen on the various advertisement herein attached and being part of this affidavit;

15. The above mentioned advertising was published between 2005 and 2006 in a Magazine called MUSCLE MACHINE / MACHINE MUSCULAIRE distributed by Benjamin News;

[12] I note that the advertisement attached includes a picture of a bottle labelled with the Mark, with the contents described as an “energy booster” dietary supplement. Notwithstanding when the advertisement was published, given Mr. Petrillo’s statement at paragraph 14 of his affidavit reproduced above, I accept that Mr. Petrillo has furnished this evidence in an effort to show how the Mark was physically affixed to the product. I note however, that the advertisement also incorporates text which identifies an entity by the name of NO1 Science as the developer of the product. Additionally of note, appearing on the advertisement is the following:

- Reference to the website [www.No1science.com](http://www.No1science.com);
- N.O.1 Science appears on the label of the bottle in the picture;
- A toll-free number for information for distributors; and
- Public notice at the bottom of the advertisement that RIPPED FX 8 is a registered trade-mark of NO1 Science.

[13] The Requesting Party argues that Mr. Petrillo’s affidavit does not show use of the Mark, as registered, by the Registrant or by a licensee within the Relevant Period for each of the wares set out in the registration and should be expunged.

[14] With respect to whether use of the Mark has been shown with each of the registered wares, the Requesting Party argues that it is unclear how the “fat burner” product referred to in Mr. Petrillo’s affidavit is encompassed by any of the wares listed in the registration, and the affiant does not provide any assistance in this regard. I note however, that the “fat burner”

product is indicated on the advertisement to be a “dietary supplement”, which I find reasonably falls within the confines of the registered ware “*food supplements*”. I do agree with the Requesting Party however, that the evidence does not clearly address any of the remaining wares.

[15] In any event, the Requesting Party argues that if there has been any use of the Mark, it was neither by the Registrant nor use that enured to his benefit. In this regard, it argues that any such use of the Mark has been through a number of corporate entities, none of which the affiant has identified as licensees of the Registrant. Furthermore, the Requesting Party argues that the Registrant has not met the requisite criteria set out in section 50 of the Act regarding licensed use; thus, any such use does not enure to the Registrant’s benefit.

[16] In the present case, I have no difficulty accepting that a license can be inferred to exist between the Registrant and the above-noted establishments that Mr. Petrillo clearly attests to owning and operating. Section 50(1) of the Act does not require a written agreement, and evidence of control by the owner can support the existence of an implied license agreement [see *Wells’ Dairy Inc v UL Canada Inc* (2000), 7 CPR (4th) 77 (FCTD)]. As Mr. Petrillo has attested that he was the sole director of these entities, I find it reasonable to accept that control over the use of a trade-mark by these entities, sufficient to satisfy the requirements of section 50 of the Act, could be inferred [see *Lindy v Canada (Registrar of Trade Marks)* (1999), 241 NR 362 (FCA); *Petro-Canada v 2946661 Canada Inc* (1999), 83 CPR (3d) 129 at 138 (FCTD)].

[17] I note however, that the evidence relating to the manner in which the Mark is affixed to the RIPPED FX8 “fat burner” product, identifies NO1 Science as the source of the product. Mr. Petrillo provides no information about this entity or its relationship to the Registrant. While the Registrant might be selling the goods in question, the evidence indicates that NO1 Science is the source of such goods. Furthermore, I cannot assume that the information in the advertising concerning NO1 Science would be any different during the Relevant Period, as the affidavit was silent on this point. Thus, absent further information surrounding the relationship between NO1 Science and the Registrant, such use does not appear to be that of the Registrant nor use that accrues to his benefit [see for example, *Gowling Lafleur Henderson v Jevco Inc* (2004), 31 CPR (4th) 304 (TMOB); *Brouillette Kosie v Bodegas Rioja Santiago, SA* (2001), 18 CPR (4th) 280

(TMOB); *Gowling Lafleur Henderson v 3651410 Canada* (2005), 40 CPR (4th) 189 (TMOB)]. This ambiguity is further highlighted by the fact that Mr. Petrillo made efforts to explain the relationship between himself and all other entities referred to in his affidavit, yet neglected to provide any such information regarding NO1 Science. An affidavit must be considered from the point of view of what it does not say; consequently, I find this ambiguity must be resolved against the interests of the Registrant [see *Plough, supra*].

#### Disposition

[18] Accordingly, having regard to the foregoing, 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