

ATLAS BONANZA CHEMICALS,	}	Inter Partes Case No. 14-2008-00163
Represented by the heirs of Rosendo	}	
Estoye, Jr.,	}	
<i>Opposer,</i>	}	Opposition to:
	}	
-versus-	}	Appln. Ser. No. : 4-2007-013305
	}	Date Filed : 03 December 2007
	}	Trademark : "RESTORER and Label
ORYZA SATIVA ENTERPRISES,	}	Design"
<i>Respondent-Applicant.</i>	}	
x-----x		Decision No. 2009-138

DECISION

For decision is the Amended Opposition filed by Atlas Bonanza Chemicals Inc. represented by heirs of Rosendo Estoye, Jr. (hereinafter referred to as Opposer) against Application Serial No. 4-2007-013305 for the mark RESTORER AND LABEL DESIGN, for goods covering class 1 namely 'agricultural fertilizer' filed by Rushmark E. Lariosa, single proprietorship with address at 622 Dumlog, Talisay City, Cebu. Filewrapper shows that the application for the mark was in the name of Rushmarc E. Lariosa and his stated address of real and effective business establishment is Oryza Sativa Enterprises, Suldon St. Magukay, Mandaue City, Cebu. Oryza Sativa Enterprises and Rushmark E. Lariosa shall hereinafter be referred to as respondent-applicant.

The Amended Notice of Opposition states:

- "1. With all due respect, the Respondent-Applicant's application for the trademark of the brand "RESTORER Foliar Fertilizer" would constitute a serious violation of the rights of the Complainant-oppositor considering that the above-cited fertilizer brand has already been registered under the name of the latter since 1983 (a copy of the registration is hereto attached as Annex "A"). Although the said patent expired sometime last 2003 or 20 years after the patent was issued, it is the humble contention of the herein complainant-oppositor that they have as much right to renew the same since it had first been registered under their name;
- "2. In fact, Respondent-Applicant has committed several misrepresentations claiming to use the FPA Registration No. 001 and Patent No. 31671 in the marketing of their products also name "RESTORER" considering that the same are the exact registration numbers and patent registration issued to Atlas Bonanza Incorporated in the manufacture of their fertilizer also known as "RESTORER". The fact had been brought to the attention of the Fertilizer and Pesticide Authority (FPA) by the heirs to the late Rosendo Estoye Jr., a photocopy of the said letter and the product label containing the questioned FPA Registration and Patent Nos. are hereto attached as Annex "B" and "C" respectively;
- "3. In fact, in a letter sent to Atty. William Boco, counsel for the Respondent-Applicant dated 20 May 2008 (hereto attached as Annex "D"), the Fertilizer and Pesticide Authority refused to accept the registration of the brand names "Resotorer Mango Flower Inducer" and "Restorer Foliar" for the reason that such names are already registered under Atlas Bonanza Chemicals, Inc.;
- "4. Furthermore, the Complainant-Oppositor has discovered that one of the proprietor of Oryza Sativa Enterprises, Ms. Erlinda Alcontin was a former

employee and confidant of the late Rosendo Romero Estoye Jr., the owner of ATLAS BONANZA CHEMICALS INC. Unknown to the company, Ms. Alcontin has been discreetly operating a competing business against ATLAS BONANZACHEMICALS INC., through her nephew Rushmark E. Lariosa by producing the same products such as "Restorer Foliar Fertilizer", "Resulbar Fungicide" and "Rebloom Flower Inducer", the same products which ATLAS BONANZA CHEMICALS INC., has been manufacturing and distributing for the past 20 years. She has even surreptitiously attempted to change the name of the company Atlas Bonanza Chemicals to Oryza Sativa when in fact the company is still very much in existence and will not cease to exist till 2009 per DTI registration. Photocopies of her letter and the DTI registration are hereto attached as Annexes "E" and "F" respectively;

"5. As pointed out by paragraph (a) of Section 71 f the Intellectual Property Code:

(a) Where the subject matter of a patent is a product, to restrain, prohibit and prevent any unauthorized person or entity from making, using, offering for sale, selling or importing that product;

Corollary to that, Section 71.2 of the same Code also provides that:

7.1.2 Patent owners shall also have the right to assign, transfer by succession the patent, and to conclude licensing contracts for the same.

Unfortunately, in the case at bar, no transfer or assignment had been made by the Complainants-oppositors to the Respondent-Applicants, even during the lifetime of their late father Rosendo Estoye Jr and even during the effectivity of the patent.

"6. In the present case, it is undeniable that the products by which the Respondent-Applicant seeks for approval, is an infringement of the products of ATLAS BONANZA CHEMICALS INC., a product that the latter has been producing ever since, hence it cannot be a novel item. What is apparent is that even records of the Fertilizer and Pesticide Authority (FPA) acknowledge that Respondent-Applicant's product was denied registration as the same products are similar, if not a direct copy of the products, the Complainant-oppositor.

"7. Of course, in the natural course of things, the only difference the two products have are the appearance of the packaging and the fonts of the letters, an irregularity which is not substantial to warrant a difference in the products both parties are producing.

"8. I may not be amiss to stress that, no amount of denial on the part of Ms. Alcontin that her company's knowledge in the manufacturing of fertilizer was obtained through her constant familiarity with the business while she was connected with ATLAS BONANZA CHEMICALS INC. For, it would be highly impossible for Ms. Alcontin to have secured the information without her dripping her hands in company's confidential information.

"9. Moreover, it cannot be denied that she had access to the manufacturing process as she is the chief confidant of the late complainant-appellee

Rosendo Romero Estoye Jr. She even claimed that she was the Operations Manager of Atlas Bonanza Chemicals Incorporated;

- “10. It would be highly improbable for Oryza Sativa Enterprises to develop products like “Restorer” which has a close if not perfect resemblance to the products produced by the Complainant-Oppositor if the proprietors were not privies to the company of the Complainant-Oppositor.
- “11. In sum, it is respectfully submitted that the application of the respondent-Applicant be denied as prudence dictates that no one must unjustly enrich himself at the expense of another.
- “12. Given the factual scenario in the instant case, it is prayed that this Honorable Office will understand that Complainant-oppositor’s opposition be given due course and deny respondents applications for trademarks of the foregoing opposed products.


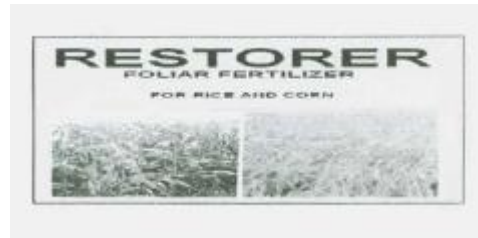
Opposer submitted the following evidence to wit:

ANNEX	DESCRIPTION
“A”	Copy of Registration No. 31671
“B”	Letter to Mr. Gerry P. Valerio
“C”	Picture of label
“D”	Letter to Atty. William G. Boco
“E”	Letter to Dr. Norlito R. Gicana from Erlinda E. Alcontin
“F”	Certificate of Business Name Registration
“G”	Samples of labels

A Notice to Answer was sent on 27 September 2008 to respondent-applicant but no Answer was filed.

The issue is whether the mark RESTORER FOLIAR FERTILIZER can be validly registered.

The marks of the contending parties are reproduced below as follows:

Opposer’s mark	Respondent-Applicant’s mark
	

The Intellectual Property Code states:

“Sec. 123. *Registrability*. – 123.1. A mark cannot be registered if it:  
xxx

(d) Is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:

- (i) The same goods or services, or
- (ii) Closely related goods or services, or
- (iii) If it nearly resembles such a mark as to be likely to deceive or cause confusion;

The Supreme Court has developed tests in determining confusing similarity. In *Mighty Corporation and La Campana Fabrica de Tabaco, Inc. vs. E & J Gallo Winery and the Andersons Group, Inc.*, G.R. No. 154342. July 14, 2004, the Supreme Court explained:

“Jurisprudence has developed two tests in determining similarity and likelihood of confusion in trademark resemblance:

- (a) the Dominancy Test applied in *Asia Brewery, Inc. vs. Court of Appeals and other cases* and
- (b) the Holistic Test used in *Del Monte Corporation vs. Court of Appeals and its preceding cases*.

The Dominancy Test focuses on the similarity of the prevalent features of the competing trademarks which might cause confusion or deception, and thus infringement. If the competing trademark contains the main, essential or dominant features of another, and confusion or deception is likely to result, infringement takes place. Duplication or imitation is not necessary; nor is it necessary that the infringing label should suggest an effort to imitate. The question is whether the use of the marks involved is likely to cause confusion or mistake in the mind of the public or deceive purchasers.”

The Supreme Court in *McDonald’s Corporation v. L.C. Big Mak Burger, Inc.*, G.R. No. 143993, dated 18 August 2004 held:

“The test of dominancy is now explicitly incorporated into law in Section 155.1 of the Intellectual Property Code which defines infringement as the “colorable imitation of a registered mark xxx or a dominant feature thereof.”

Filewrapper of the application indicates that the words FOLIAR FERTILIZER were disclaimed by the respondent-applicant. Therefore, what remains for registration is the word RESTORER and LABEL DESIGN. The word RESTORER is the most central, main and dominant feature of the mark being applied for. Applying the dominancy test and disregarding the pictures of rice and corn plants, RESTORER is the most essential feature. Evidence show that the mark RESTORER has been previously registered under Certificate of Registration No. 31671 (Annex “A”) way back in March 22, 1983 in the name of Rosendo B. Estoye, Jr. Thus, the mark being applied for is identical to a previously registered mark and applied on the same class of goods: class 1 namely “fertilizer” in violation of Section 123 (d).

Opposer’s who claim to be the heirs of Rosendo Estoye, Jr. submitted evidence consisting of DTI Certificate of Business Registration (Annex “F”) of the business name ‘Atlas Bonanza Chemicals’ in the name of their predecessor, Rosendo Estoye, Jr. valid from January 7, 2004 to January 7, 2009 and an Affidavit by one Maria Lope Estoye Layco attesting to the fact that she is the daughter of the late Rosendo Estoye Jr. and that she together with other siblings have taken over the Atlas Bonanza Chemicals.

Opposer's claim that respondent-applicant committed several misrepresentations to use their registrations of the name RESTORER. Opposer alleged that one Ms. Erlinda Alcontin, was a former employer of the late Rosendo Romero Estoye Jr., and has secretly competed against their business through her nephew, Rushmark E. Lariosa, herein respondent-applicant.

Evidence submitted show that one Erlinda Alcontin wrote a letter addressed to Dr. Norlito R. Gicana, CESO IV, of the Fertilizer and Pesticide Authority (FPA) (Annex "E") on 26 July 2007 advising FPA of the delay in the renewal of licenses due to change in management. In the same letter she stated that they are requesting a change of business name from ATLAS BONANZA CHEMICALS to ORYZA SATIVA ENTERPRISES.

On a later date the same addressee, Norlito R. Gicana, Jr. wrote a letter to one Atty. William G. Boco (Annex "D") dated May 20, 2008 advising him that the Fertilizer and Pesticide Authority cannot accept the registration of their brand names Restorer and Rebloom are duly registered products of Atlas Bonanza Chemicals sine 1983.

Finally, opposer through Maria Lope Estoye-Layco, representing the heirs of Rosendo Estoye, Jr. called the attention of the FPA through a letter dated 28 February 2008 (Exhibit "B") addressed to one Gerry Valerio, Regional officer of FPA, that respondent-applicant Oryza Sativa Enterprises uses the patent number originally assigned to Atlas Bonanza Chemicals. Attached to this letter is a photocopy of the label (Annex "C") which indicates Patent No. 31671.

A perusal of the label attached to the letter shows that Patent No. 31671 and indicates that the manufacturer is respondent-applicant Oryza Sativa Enterprises. Only the registrant of a trademark or his valid heirs or assigns have the right to use a mark. Any unauthorized use of the mark should not be allowed. The evidence presented show that the deceased Rosendo Estoye Jr. is the owner and registrant of the mark RESTORER. Opposer showed its continued use of the mark by presenting labels of the RESTORER mark (Annex "G"). Only the owner of the mark has the right register the same.

The Supreme Court in Unno Commercial Enterprises, Incorporated vs. General Milling Corporation, G.R. No. L-28554. February 28, 1983 held that

"Only the owner of the mark has the right to register the same. When the applicant is not the owner of the trademark being applied for, he has no right to apply for the registration of the same. Under the Trademark Law only the owner of the trademark, trade name or service mark used to distinguish his goods, business or service from the goods, business or service of others is entitled to register the same."

Finally, this Bureau cannot ignore the inaction of the respondent-applicant in defending its application for registration of the mark "RESTORER FOLIAR FERTILIZER" despite receipt of the Notice to Answer issued by this Office, which indicates its lack of concern in protecting its mark.

Section 230 of Republic Act No. 8293, states that "in all inter partes proceedings in the Office under this Act, the equitable principle of laches, estoppel and acquiescence where applicable, may be considered and applied." The Supreme Court in Dela Cruz v. Miguel, G.R. 144103, August 31, 2005; Heirs of Panganiban v. Dayrit, G.R. No. 151235, July 28, 2005, defined laches as "the failure or neglect for an unreasonable and unexplained length of time, to do that which, by exercising diligence, could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting the presumption that the party entitled to assert it either abandoned or declined to assert it."

WHEREFORE, premises considered the OPPOSITION filed by Atlas Bonanza Chemicals, represented by the heirs of Rosendo Estoye, Jr., opposer is hereby SUSTAINED.

Accordingly, Application Serial No. 4-2007-013305 filed by Respondent-Applicant Rushmark E. Lariosa with address at Oryza Stiva Enterprises, respondent-applicant on 3 December 2007 for registration of the mark "RESTORER FOLIAR FERTILIZER" used on goods under Class 1 used for "agricultural fertilizer", is, as it is, hereby REJECTED.

Let the file wrapper of "RESTORER FOLIAR", subject matter of this case together with a copy of this DECISION be forwarded to the Bureau of Trademarks (BOT) for appropriate action.

SO ORDERED.

Makati City, 9 October 2009.

ESTRELLITA BELTRAN-ABELARDO  
Director, Bureau of Legal Affairs  
Intellectual Property Office