

JOLLIBEE FOODS CORPORATION
Opposer,
- versus -

IPC 14-2007-00008

Opposition to:
TM Application No. 4-2001-008219
(Filing Date: 31 October 2001)

PHILUSA CORPORATION,
Respondent-Applicant.

TM: "Love My Honey and
Representation of a Bee"

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Decision No. 2007 – 134

DECISION

Before this Bureau is an Opposition case filed on 02 January 2007 by herein Opposer, JOLLIBEE FOODS CORPORATION, a domestic corporation with business address at 10th Floor, Jollibee Plaza Building, No. 10 Emerald Avenue, Ortigas Center, Pasig City against the application for registration of the trademark "LOVE MY HONEY AND REPRESENTATION OF A BEE" bearing Application Serial No. 4-2001-008219 filed on 31 October 2001 for honey falling under Class 30 by PHILUSA CORPORATION, herein Respondent-Applicant, a corporation organized and existing under the laws of Philippines, with address at 28 Shaw Boulevard, Pasig City.

The subject trademark application was published for opposition in the Intellectual Property Office Official Gazette which was officially released for circulation on 01 September 2006.

The grounds relied upon by Opposers are reproduced herein, to wit:

"1. The registration of the mark subject of this opposition is contrary to the provisions of Section 123.1 (d), (e) and (f) of Republic Act no. 8293, as amended;

"2 The Opposer is the owner of the bee mascot device which is registered under Registration No. 4-1995-105714 issued on July 12, 2000

"3. The bee device forming part of Respondent-Applicant's mark resembles the Opposer's bee mascot device as to be likely to deceive or cause confusion. Hence, the registration of the Respondent-Applicant's Mark will be contrary to Section 123.1 (d) of Republic Act No. 8293. Clearly, Respondent-Applicant intends to exploit the goodwill associated with the bee mascot device.

4. The Respondent-Applicant's use of the bee device forming part of its mark will mislead consumers into believing that the Respondent-Applicant's goods are produced by, originate from, or under the sponsorship of the Opposer.

5. The Respondent-Applicant's use of the bee device forming part of its mark will mislead the public into believing that the Respondent-Applicant's goods are associated with Opposer. Therefore, potential damage to the Opposer will be caused as a result of the Opposer's inability to control the quality of the goods put on the market by the Respondent-Applicant under the mark subject of this opposition.

6. The Respondent-Applicant use of the bee device forming part of its mark will take unfair advantage of, dilute and diminish the distinctive character or reputation of the Opposer's bee mascot device and will encroach on the zone of the natural expansion of the opposer's business on which the bee mascot device is used.

7. The denial of the application subject of this opposition is authorized under the provisions of Republic Act No. 8293."

Opposer relied on the following facts to support its opposition:

"1. The Opposer is the owner of bee mascot device, which has been applied for registration in the name of the Opposer in the Philippines and in other countries prior to the filing date of the opposed application

"2. The bee device forming part of the subject of the opposed application is almost visually identical to the Opposer's bee mascot device.

"3. The Opposer has not consented to the Respondent-Applicant's use and registration of the bee device forming part of the Respondent-Applicant's mark, or any other mark identical or similar to the bee mascot device.

"4. The Respondent-Applicant's use of the bee device as a trademark is likely to deceive or cause confusion and will dilute the distinctiveness of the Opposer's registered bee mascot device.

"5. The Opposer's bee mascot device has been in commercial use the Philippines and in other countries and territories prior to the filing date of the application subject of this opposition, Opposer's use of the bee mascot device in the Philippines as early as 1975 and has been continuous and uninterrupted ever since then.

"6. The Opposer has not abandoned the bee mascot device and continues to use bee mascot device in trade and commerce in the Philippines and in other countries and territories.

"7. By virtue of the prior and continuous use by the Opposer of the bee mascot device in the Philippines, the bee mascot device has become popular and well-known and has established for the Opposer valuable goodwill with the public which has identified the Opposer as the source of goods on which the bee mascot device is used.

"8. Over the years, the Opposer has obtained significant exposure for its goods on which the bee mascot device is used, in various media including television, the internet, commercials, outdoor advertisements, and other promotional materials. The bee mascot device is also promoted at the domain www.jollibee.com.ph, which can be readily accessed by internet user."

Together with the Verified Notice of Opposition (Exhibit "A") Opposer submitted the following documentary evidence:

Exhibit	Description
"B" inclusive of submarkings	Affidavit of Luis Enrico Salvador with With annexes
"C"	Certification on authority of Luis Enrico Salvador to verify the Notice of Opposition and Execute the Certificate of Non-Forum Shopping

On January 8, 2007, this Bureau issued a Notice to Answer. After granting several motions for extension of time to file the answer, Respondent-Applicant filed its answer on 11 May 2007. In its answer on 11 May 2007, Respondent-Applicant pleaded the following Special and/or Affirmative Defenses:

"1. Opposer has no valid and legal ground to oppose the application for the registration of Respondent-Applicant's trademark LOVE NY MONEY for honey under Class 30;

2. Respondent –Applicant, a wholly-owned affiliate company of the Mercury Group of Companies, Inc was established for the purpose of providing the Philippine market with high quality but affordable pharmaceutical and consumer products.

3. Respondent-Applicant designed, adopted and used its LOVE MY HONEY trademark to distinguish the honey product (imported from Argentina) it is distributing in the Philippines.

4. It is of general and common knowledge that honey is a sweet syrupy substance that the bees make as food from the nectar of flowers and store in honeycombs. Hence, the word honeybee referring to a bee that makes honey, especially the common hive bee.

5. The word Honey and representation of a bee, and their association to one another as regards honey product, are so common generic and non-distinctive that the examiner in the opposed application required Respondent-Applicant to disclaim the word "HONEY" and representation of a bee apart from the composite mark. Respondent-Applicant disclaimed the two.

6. But Respondent-Applicant's disclaimer of the representation of a bee apart from the composite mark, that part must be disregarded in resolving the issue of confusing similarity. Opposer therefore has nothing to oppose.

7. Besides, Respondent-Applicant's disclaimed representation of bee in the composite mark LOVE MY HONEY is not a colorable imitation nor identical much less so resembles Opposer's bee mascot device, as to be likely, when applied to or used in connection with the good and business of Respondent-Applicant, to cause confusion or mistake or to deceive purchaser.

8. Trade confusion is next to impossible for these basic reasons-

9. Respondent- Applicant's LOVE MY HONEY trademark and Opposer's bee mascot device are very dissimilar in sound, appearance, presentation, from, Style and format.

10. More importantly, the marks flow through different channels of trade. Opposer's marl is a service mark for establishments, essentially engaged in procuring food or drinks prepared for consumption such as services

rendered by self-service and fast food restaurant under Class 42. On the other hand, Respondent-Applicant's mark covers honey under Class 30.

10.1 The ordinary purchaser desiring to buy fast food products of Opposer (e.g. Jollibee hamburger, chickenjoy, fries, etc) will not go to the confectionary section of the supermarket where Respondent-Applicant's goods are located. He will go to the Jollibee where food products are exclusively sold.

10.2. In the same vein, the ordinary purchasers wanting to buy honey will not go to a Jollibee store. He will go to the sugar /confectionery shelves of the supermarket wherein he will definitely not find any Jollibee food products on sale.

11. For these reasons, Opposer cannot validly claim that it will be damaged at all by the approval of Respondent-Applicant Serial No. 4-2001-08219."

In this verified Answer, Respondent-Applicant attached the following exhibits:

EXHIBIT	DESCRIPTION
"1"	Affidavits of Mr. Manuel Luis C. Baylosis. Marketing Manager of Respondent-Applicant
"2"	Print copy of the History and Establishment of Philusa Corporation from its website ww.philusa.com.ph
"3"	Certified copy of the Declaration of Actual Use of Respondent-Applicant's mark LOVE MY HONEY filed on October 5, 2004 including its Attachements
"4"	Certified copy of Official Action Paper No. 2 mailed o February 20, 2003 addressed to Romulo Mabanta & Associates issued by the Bureau of Trademarks
"5"	Certified copy of Respondent-Applicants Response to Official Action Paper No.2 dated April 16, 2003

On May 23, 2007, this Bureau issued a Notice of Preliminary Conference setting the preliminary conference in June 18, 2007. On June 1, 2007, Opposer filed its Reply alleging that the Answer was not properly verified since the certification and verification page was notarized on May 7, 2007 while the answer was dated May 8, 2007. In its Rejoinder filed on June 8, 2007, Respondent claimed that the answer was verified properly and further argued that it is opposer's verification that was defective since it was signed by Opposer's corporate counsel without proper authorization from the Board of directors. It likewise submitted additional evidence which consist of a Letter to Atty. Edgardo B. Valbuena dated September 20, 2007 (Exhibit "6") and Letter of Atty. Valbuena to Atty. Joaquin Sayoc dated May 9, 2007 (Exhibit "7"). During the Preliminary conference on June 18, 2007, only counsel for Respondent-Applicant was present. In view of the absence of Opposer's counsel or any representative, Respondent-Applicant's counsel moved that the preliminary conference be terminated. He also moved that Opposer's right to submit its Position Paper be waived on the ground of failure to appear during the preliminary conference.

The motion was granted in open court, On July 6, 2007, Order No. 2007-1239 was issued directing Respondent-Applicant to file its Position Paper within ten (10) days from receipt of the order. On July 23, 2007, despondent-Applicant submitted its Position Paper; hence, this case was submitted for decision.

The lone issue to be revolved in this case is: WHETHER OR NOT RESPONDENT-APPLICANTS'S MARK LOVE MY HONEY AND REPRESENTATION OF A BEE IS CONFUSINGLY SIMILAR TO THAT OF OPPOSER'S BEE MASCOT DEVICE.

Before dealing with the main issue at hand, let us first address the issue raised by both parties regarding the verification and certification in the Notice of Opposition and the Answer.

Opposer asserted in its Reply that Answer was not verified and should thus be considered as not having been filed. Opposer stated that the Answer's verification and certification page was notarized on May 7, 2007, while the Answer was dated May 8, 2007. As such, it is impossible for the affiant to have read the Answer and certify to the correctness of the allegations therein since he executed the verification before the Answer was completed. In its Rejoinder, Respondent-Applicant contested the allegation of Opposer and claimed that as early as February 30, 2007, the council already sent to Philusa drafts of the Answer and Affidavit of the witness. Philusa reviewed the drafts and incorporated its comments and inputs, finalized the Answer and have it verified by Manuel Baylosis and execute the Certification of Non-forum Shopping. Respondent-Applicant further stated that the Opposer's Notice of Opposition that not properly verified since it failed to attach a Board Resolution authorizing Mr. Luis Enrico Salvador to execute and sign the verification and certification of non-forum shopping.

We agree with Respondent-Applicant. The dating of the Answer a day later than the verification is negligible. Respondent-Applicant was able to prove that despite the discrepancy in date, Respondent-Applicant read and certified its correctness before its authorized representative in the person of Baylosis signed the verification and certification, as shown by letters marked as Exhibit "6" and "7".

With respect to the legality of the execution and signing of the verification and certification of non-forum shopping by Mr. Luis Enrico Salvador absent any Board Resolution authorizing him, the Supreme Court in the case of BPI Leasing Corporation vs. Court of Appeals held:

As to the first issue, the Court agrees with respondents' contention that the petition should be dismissed outright for failure to comply with Supreme Court Circular 28-91, now incorporated as Section 2 of Rules of Court. The records plainly show, and this has not been by BLC, that the certification was executed by counsel who has not been shown to have specific authority to sign the same for BLC.

In BA Savings Bank v. Sia, 12 it was held that the certificate of non-forum shopping may be signed, for and on behalf of a corporation, by specifically authorized lawyer who has personal knowledge of the facts required to be disclosed in such document. This ruling, however, does not mean that any lawyer, acting on behalf of the corporation he is respecting, may routinely sign certification of non-forum shopping. The Court emphasizes that the lawyer must be "specifically authorized" in order validly to sign the certification.

Corporations have no powers except those expressly conferred upon them by the Corporation Code and those that are implied by or are incidental to its existence. These powers are exercised through their board of directors and/or duly authorized officers and agents. Hence, physical acts, like the signing of documents, can be performed only by Natural persons duly authorized for the purpose by corporate by laws or by specific act of the board of directors.

The records are berift of the authority of BLC, counsel to institute the present petition and sign the certification of non-forum shopping. While said counsel may be the counsel of record of

BLC, the representation does not vest upon him the authority to execute the certification on behalf of his client. There must be a resolution issued by the board of directors that specifically authorizes him to institute the petition and execute the certification, for it is only then that his actions can be legally binding upon BLC.

In the case at bar, Opposer did not submit a Board Resolution to show that Mr. Salvador was authorized to execute the sign the verification and certification for and in behalf of the corporation. Without such authority it is as if there was no verification and certification. And as such, the Opposition can be dismissed outright on this ground alone.

Nevertheless, we still find it necessary to resolve the issue on confusing similarity. Section 123(d) of Republic Act No 8293 provides.

“SEC.123.Registrability. – 123.1 A mark cannot be registered if it:

x x x x

(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. It nearly resembles such a mark as to be likely to deceive or cause confusion;”

In the case of *Mighty Corporation et. al. vs. E. & J. Gallo Winery*, the High Court enunciated in this wise:

“A crucial issue in any trademark infringement case is the likelihood of confusion, mistake or deceit as to the identity, source or origin of the goods or identity of business as a consequence of using a certain mark. Likelihood of confusion is admittedly a relative term, to be determined rigidly according to the particular (and sometimes peculiar) circumstances of each case. Thus, in trademark cases, more than in other kinds of litigation, precedents must be studied in the light of each particular case.

There are two types of confusion in trademark infringement. The first is “confusion of goods” when an otherwise prudent purchaser is induced to purchase one product in the belief that he is purchasing another, in which case defendant’s goods are then bought as the plaintiff’s and its poor quality reflects badly on the plaintiff’s reputation. The other is “confusion of business” wherein the goods of the parties are different but the defendant’s products can reasonably (through mistakenly) be assumed to originate from plaintiff, thus deceiving the public into that there is some connection between the plaintiff and defendant which, in fact, does not exist.

In determining the likelihood of confusion, the Court must consider: [a] the resemblance between the trademarks; [b] similarity of the goods which the trademarks are attached [c] the likely effect to the purchaser and [d] the registrant’s express or implied consent and other fair and equitable considerations.

In the instant case, there is no likelihood of confusion, mistake or deceit as to the identity or source of Opposer’s and Respondent-Applicant goods or business. There is no resemblance at all in the marks of Opposer and Respondent-Applicant with respect to sound, appearance, presentation, form and style. While it is true that Opposer has used its bee mascot device in its fast food business, its bee device is entirely different from the representation of a bee appearing in Respondent-Applicant’s composite mark that there is a remote possibility that the goods of Respondent-Applicant are likely to be confused or

mistaken as a product of Opposer or that it was manufactured under the sponsorship of Opposer.

In addition, Respondent-Applicant is correct when he made the following observation that: "the marks flow through different channels of trade. Opposer's is a service mark for establishments, essentially engage in procuring food or drink prepared for consumption such as services rendered by self-service and fast food restaurant under class 42. On the other hand, Respondent –Applicant's mark covers honey under class 30.

The ordinary purchaser desiring to buy fast food products of Opposer (e.g. Jollibee hamburger, chickenjoy, fries, etc.) will not go to the confectionary section of the supermarket where Respondent-Applicant's goods are located. He will go to Jollibee store where Jollibee food products are exclusively sold.

In the same vein, ordinary purchasers wanting to buy honey will not go to a Jollibee store. He will not go to the sugar/confectionery shelves of the supermarket wherein he will definitely not find any Jollibee food products on sales.

Moreover, we take note of the fact that in Respondent –Applicant's subject mark word "Honey" and a Representation of a Bee are disclaimed, hence, no exclusive right accrue to Respondent-Applicant with respect to use of the same.

Finally Opposer's reliance in Decision No. 2007-17 of this Bureau in IPC Case No.14-2006-00113 (Jollibee Food Corporation vs. Atlas publishing Company) is misplaced. In the said decision, this office merely recognizes that Jollibee mark has become popular or well known in the Philippines. Even so, being popular mark does not operate to prevent any party from applying for a registration of a mark different from the mark of Opposer.

WHEREFORE, premises considered the instant Opposition is as, it is hereby REJECTED. Accordingly, application bearing Serial No. 4-2001-008219 for the mark "LOVE MY HONEY AND AREPRESENTATION OF A BEE" (the word Honey and a Representation of a Bee, disclaimed)filed a name of PHILUSA CORPORATION on 31 October 2001 under Class 30 of the international classification of Goods is hereby GIVEN DUE COURSE.

Let the file wrapper of "LOVE MY HONEY AND A REPRESENTATION OF A BEE", subject matter of this case be forwarded to the Bureau of Trademarks (BOT) for appropriate action in accordance with this Decision.

SO ORDERED.

26 September 2007 Makati City.

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