NEW RBW MARKETING, INC., Opposer, **-versus-** **SAN NICOLAS FOOD CORP.,** Respondent- Applicant.	}	**IPC No. 14-2009-00190** Opposition to: Appln. Serial No. 4-2008-010330 Filing Date: 27 August 2008 **TM: "San Nicolas Premium Dip Banana Catsup Label"**

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2013 - 82 dated May 15, 2013 (copy enclosed) was promulgated in the above entitled case.

Taguig City, May 15, 2013.

For the Director:

Atty. PAUSI U. SAPAK
Hearing Officer
Bureau of Legal Affairs

NEW RBW MARKETING, INC.,
Opposer,

- versus -

SAN NICOLAS FOOD CORP.,
Respondent-Applicant.
x----------x

IPC NO. 14-2009-00190
Opposition to:

Appln. Serial No. 4-2008-010330
(Filing Date: 27 August 2008)

TM: "San Nicolas Premium Dip Banana Catsup Label"

Decision No. 2013- 82

DECISION

NEW RBW MARKETING, INC.[1] ("Opposer") filed an opposition to Trademark Application Serial No. 04-2008-010330. The application, filed by SAN NICOLAS FOOD CORPORATION[2] ("Respondent-Applicant"), covers the mark "SAN NICOLAS PREMIUM DIP BANANA CATSUP LABEL" for use on "*banana catsup*" under Class 30 of the International Classification of goods[3].

The Opposer alleges, among other things, that it believes it will be damaged by the registration of the contested mark in favor of the Respondent-Applicant. According to the Opposer, the opposed trademark application was filed in bad faith. It claims that its president, Romulo H. Espiritu, was the one who conceptualized or created the brandname DIP BANANA CATSUP, coining the word "DIP", which means "Dili Ito Patis, Catsup Ini", a product talking point and "battle cry" to stimulate customer's interest. The Opposer also alleges that the Respondent-Applicant is just a "toll-manufacturer" for the Opposer, thus cannot possibly own the contested brand/mark. Mr. Espiritu, the Opposer claims, learned that the Respondent-Applicant has used the DIP Banana Catsup brand-label, with pricing schemes and discount similar to the Opposer's and "simultaneously telling to the customer that New RBW Marketing, Inc. could no longer supply DIP Banana Catsup Brand".

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[1] A domestic corporation duly organized and existing under the laws of the Philippines, with principal office address at New RBW Inc., Invictus Corp. Compound, Brgy. Del Rosario, San Fernando, Pampanga.
[2] A domestic corporation duly organized and existing under the laws of the Philippines, with principal address at 161 Bo. San Isidro, Magalang, Pampanga.
[3] The Nice Classification is a classification of goods and services for the purpose of registering trademark and services marks, based on the multilateral treaty administered by the World Intellectual Property Organization. The treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks concluded in 1957.

To support its opposition, the Opposer presented/submitted the following[4]:

1. copy of the Opposer's Articles of Incorporation;
2. sample of the brand-label "RBW Banana Catsup";
3. trademark application form for "DIP Label Mark" filed by the Opposer (with serial no. 4-2008-013419);
4. letter of the Opposer's company counsel to the Respondent-Applicant, dated 24 October2008;
5. several sales invoices issued by the Respondent-Applicant to the Opposer covering the period 2004-2008; and
6. Opposer's several internal memoranda and communications on the pricing scheme for DIP catsup/products covering the period 2005-2008.

The Respondent-Applicant filed its Answer on 02 December 2009 denying the material allegations of the Opposer. It alleges, among other things, that the Opposer was merely a former distributor of the products bearing the contested trademarks or brand, and as such has no right to prevent the Respondent-Applicant from registering it. According to the Respondent-Applicant, it is not a "toll-manufacturer" of the Opposer and it has the right to register the subject trademark, created on its behalf by its President Francisco Layug, as it was the first to file for the registration thereof.

Defending its trademarks application, the Respondent-Applicant presented/ submitted the following[5]:

1. Cert. of Trademark Reg. No. 4-2000-006475 for the mark "SNF and Device", issued on 28 August 2004;
2. "*Sinumpaang Salaysay*" of Teodoro Otayde, executed on 02 December 2009, and the annexes thereto;
3. "*Sinumpaang Salaysay*" of Joel Agrasada, executed on 02 December 2009, and the annexes thereto;
4. photographs of premises of Invictus Food Produts Corporation;
5. delivery receipt nos. 235473, 213246, 236068, and 235208 all issued in Oct. 2008 by the Opposer;
6. originals of "DIP Banana Catsup" label of the Respondent-Applicant and of "DIP Banana Catsup" label of Invictus Food Products Corporation;
8. certification and confirmation issued by GS1 Philippines, Inc. (formerly PANCI), dated 31 October 2008;
14. sales invoice nos. 78213, 72639, and 74864 all issued in Dec. 2008 by the Opposer; and
17. Registrability Report issued by the Bureau of Trademarks for Trademark Application Serial No. 4-2005-005360 for the mark "DIP" filed by the Respondent-Applicant on 09 June 2005 .

The preliminary conference was terminated on 07 January 2010. Then after, the parties submitted their respective position papers.

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[4] Opposer marked its evidence as numerically, as Annexes "1" to "6", inclusive.
[5] Respondent-Applicant marked its evidence as Annexes "1" to "11", inclusive.

It is undisputed that at the time the Respondent-Applicant filed its trademark application,

1. there is no trademark registration or an earlier and pending application for the registration of a mark composed of or featuring the word "DIP" for use on catsup or similar or related goods filed by the Opposer or by any party other than the Respondent-Applicant; and

2. the Respondent-Applicant is the source or manufacturer of catsup products bearing the mark or brand "DIP banana catsup".

Aptly, the Respondent-Applicant is wrong in stating in its Answer that "*any discussion concerning the product has no place in this case.*"[6] In fact, the Opposer, citing Sec. 122 of Rep. Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code") in relation to Sec. 2.A of Rep. Act No. 166 (old Law on Trademarks),[7] is contesting the Respondent-Applicant's use and ownership of the word "DIP" as a trademark or as a part thereof, claiming that the Respondent-Applicant is just a "toll manufacturer" whereby a " *'toller' agrees to provide a 'customer' with an end product or substance that it will manufacture*".[8] It is this argument of the existence of a toll manufacturing agreement that the Opposer hinges upon its claim of ownership of the word "DIP" as a mark or a component thereof.

In this regard, as the party opposing a trademark application, the Opposer has the burden to show that the Respondent-Applicant was just its "toll manufacturer". However, no evidence was submitted to prove that a "toll manufacturing agreement" existed between the parties, much less as early as 1996. The Opposer though would like this Bureau to consider and in effect to make conclusion that a toll manufacturing agreement existed because on the part of the Respondent-Applicant there was:

1. no price set to the Opposer, only transfer costs;
2. no sales target set;
3. no product orientations or marketing approach or sales strategy;
4. no sales monitoring and no data on marketing developments; and
5. no coordinated actual visits on areas where the catsup products are marketed.

But considering that the Opposer alleges a toll manufacturing agreement between the parties, there must be a clear and convincing proof that such an agreement actually existed. This Bureau cannot rule on the basis of one party's assumption or allegation that there was an existing toll manufacturing agreement between the parties. The points raised by the Opposer are marketing strategies or schemes that do not establish ownership of the mark or brand. In fact, the claim of the existence of a toll manufacturing agreement is contested by the Respondent-Applicant, arguing that the Opposer was just its exclusive distributor.

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[6] Par. 2.19 (p. 7).
[7] Also see *Emerald Garments Mfg. Corp. v. Court of Appeals*, 251 SCRA 600.
[8] Par. 11 of the Verified Notice of Opposition; Par. 57 of the Opposer's Position Paper.

Even the documents submitted by the Opposer itself do not support its allegation of the existence of a toll manufacturing agreement between the parties. The sales invoice, dated 08 June 2004 states that the Respondent-Applicant sold, not transferred, to the Opposer four (4) cartons each containing one-hundred fifty (150) containers of "DIP BANANA CATSUP REG." with "unit price" at P37 for the total amount of P22,200. The document clearly shows that the Respondent-Applicant has set a price for each unit at P37 each. Also, the sales invoice states that "The SAN NICOLAS FOODPRODUCTS still the owner of merchandise unless fully paid". Thus, this and the other sales invoices with similar contents and import only affirm that the Respondent-Applicant sold not just manufactured on the behest of the Opposer, catsup products bearing the mark or word "DIP".[9]

The Opposer's numerous internal memoranda and communications likewise do not prove that the Opposer is the owner of the brand or trademark. In one memorandum for that matter (dated 15 September 2004), the material statement reads: "*Please be informed that effective October 1, 2004, there will an (sic) increase in the prices of our SNF Products due to the added cost from our supplier*". Other memoranda and communications also refer specifically or list "SNF products".[10] Furthermore, the allegation that Romulo H. Espiritu created the contested mark and/or directed Francisco Layug to cause the creation of a label design bearing the word "DIP" is not supported by evidence.

Basic is the rule that mere allegation is not evidence and not equivalent to proof. Charges based on mere suspicion and speculation likewise cannot be given credence. Hence, when the complainant relies on mere conjectures and suppositions, and fails to substantiate his allegations, the administrative complaint must be dismissed for lack of merit.[11] The Supreme Court itself has stressed time and again that allegations must be proven by sufficient evidence because mere allegation is definitely not evidence.[12]

In sum, the facts, circumstances and evidence submitted, including the filing by the Respondent-Applicant of a trademark application for the mark "DIP" in 2005, are consistent with the Respondent-Applicant's claim ownership of the word "DIP" used as a mark or the defining feature of a mark. It is emphasized that the essence of trademark registration is to give protection to the owners of the trademarks. The function of a trademark is to point out distinctly the origin or ownership of the goods to which it is affixed; to secure to him, who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; to assure the public that they are procuring the genuine article; to prevent fraud and imposition; and to protect the manufacturer against substitution and sale of an inferior and different article as his products.[13]

WHEREFORE, premises considered, the instant opposition is hereby DISMISSED. Let the filewrapper of Trademark Application Serial No. 4-2008-010330 be returned,

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[9] Annex "5" series of the Verified Notice of Opposition.
[10] Annex "6" series of the Verified Notice of Opposition.
[11] *Dr. Castor C. De Jesus v. Rafael D. Guerrero III, et al.* G.R. No. 171491, 04 September 2009.
[12] *Renato Real v. Sangu Philippines and/or Kiichi Abe*, G.R. No. 168757, 19 January 2011.
[13] *Pribhdas J. Mirpuri v. Court of Appeals* G.R. No. 114508, 19 November 1999.

together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City. 15 May 2013.

ATTY. NATHANIEL S. AREVALO
Director IV, Bureau of Legal Affairs