



**SAN MIGUEL FOODS, INC., and
SAN MIGUEL MILLS, INC.,**
Opposer,

-versus-

ELPIDIO F. UNTALAN,
Respondent-Applicant.

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IPC No. 14-2012-00547
Opposition to:

Appln. Serial No. 4-2011-0011546
Date Filed: 26 September 2011

TM: RED DRAGON (STYLIZED)

Decision No. 2014- 119

DECISION

SAN MIGUEL FOODS, INC & SAN MIGUEL MILLS, INC. ("Opposers")¹ filed an opposition to Trademark Application Serial No. 4-2011-011546. The application, filed by ELPIDIO F. UNTALAN ("Respondent-Applicant")², covers the mark "RED DRAGON (STYLIZED)" for use on noodles under Class 30 of the International Classification of Goods and Services.³

The Opposers anchor their opposition on the ground that the mark "RED DRAGON (STYLIZED)" is confusingly similar to their duly registered mark "RED DRAGON & DEVICE" covered by Reg. No. 4-2002-001535.

To support their opposition, the Opposers submitted in evidence the following:

1. Exhibit "A" – Secretary's Certificate;
2. Exhibits "B" and "C" – certified true copies of the Amended Articles of Incorporation of San Miguel Foods, Inc. and of San Miguel Mills, Inc.;
3. Exhibit "D" – copy of the relevant page of the E-Gazette where Respondent-Applicant's trademark application was published;
4. Exhibit "E" – copy of the 5th year Declaration of Actual Use (DAU) filed by the Opposer SMFI;
5. Exhibits "E-1" – picture of the mark as actually used on the goods;
6. Exhibit "F" – a true print out of <http://www.sanmiguelexports.com/flour.php#reddragon> ;
7. Exhibit "F-1" and "F-2" – references to the Red Dragon & Device soft flour;
8. Exhibit "G" – true print out from <http://www.ncmf.gov.ph/halal-updates.html>;
9. Exhibit "G-1" – reference to soft flour; and
10. Exhibit "H" – copy of Trademark Reg. No. 4-2002-001535 for the mark RED DRAGON & DEVICE.

¹ Both domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with business address at The JMT Corporate Condominium, ADB Avenue, Ortigas Center, Pasig City.

² With address at 215 Arevalo Street, Purok 2, Cupang, Muntinlupa City, Metro Manila, Philippines.

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.

On 11 June 2013, Respondent-Applicant filed his Verified Answer admitting some of the allegations of the opposition while denying the material allegations thereof. He argues that his mark is not confusingly similar to the Opposers' mark because the goods covered by the two marks are different and non-competing or unrelated to each other.

In support of his trademark application, Respondent-Applicant submitted in evidence the following:

1. Exhibit "1" – Affidavit Direct Testimony of ELPIDIO F. UNTALAN; and
2. Exhibit "2" – Registrability Report issued by the Bureau of Trademarks denominated as paper no. 2 dated 05 January 2012.

Should the Respondent-Applicant's trademark application be allowed?

It is emphasized that the function of 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 product.⁴

Section 123.1 paragraph (d) of Republic Act No. 8293, otherwise known as The Intellectual Property Code of the Philippines ("IP Code") provides that:

A mark cannot be registered if it:

- (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.

As culled from the records and evidence presented by the parties, at the time the Respondent-Applicant filed his trademark application on 26 September 2011, the Opposers have already an existing trademark registration for the mark RED DRAGON & DEVICE (Trademark Reg. No. 4-2002-001535) for use on flour under Class 30.

In this regard, the competing marks are reproduced below for purposes of comparison, to wit:



Opposer's Mark

Red Dragon

Respondent-Applicant's Mark

⁴ Pribhdas J. Mirpuri v. Court of Appeals, G.R. No. 114508, 19 November 1999.

Notwithstanding the fact that the Opposers' mark has a device, the two marks are identical. This Bureau finds untenable the Respondent-Applicants' argument that the goods indicated in the trademark application are different from those covered by the Opposers' trademark registration. Goods are related when they belong to the same class or have the same descriptive properties; when they possess the same physical attributes or essential characteristics with reference to their form, composition, texture or quality. They may also be related because they serve the same purpose or are sold in grocery stores.⁵

Considering therefore that the Respondent-Applicant's mark is used on NOODLES which are made out of flour, the goods are closely related to the Opposers' goods. In fact, both products fall under Class 30. There is the likelihood of the consumers to have the impression that the parties and their respective goods are connected to each other. Consumers will likely assume that the Respondent-Applicant's mark is just a variation of or related to the Opposers' and/or the goods and services originate from the same source while in fact it is not. The likelihood of confusion, would subsist not only on the purchaser's perception of the goods but on the origins thereof as held by the Supreme Court⁶:

Callman notes two types of confusion. The first is the confusion of goods in which event the ordinarily prudent purchaser would be induced to purchase one product in the belief that was purchasing the other. In which case, defendant's goods are then bought as the plaintiff's and the poorer quality of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Here, though the goods of the parties are different, the defendant's product is such as might reasonably be assumed to originate with the plaintiff and the public would then be deceived either into that belief or into belief that there is some connection between the plaintiff and defendant which, in fact does not exist.

The field from which a person may select a trademark is practically unlimited. As in all cases of colorable imitation, the unanswered riddle is why, of the millions of terms and combinations of letters and designs available, the Respondent-Applicant had come up with a mark, identical or so closely similar to another's mark if there was no intent to take advantage of the goodwill generated by the other mark.⁷

WHEREFORE, premises considered the instant opposition is hereby **SUSTAINED**. Let the fielwrapper of Trademark Application Serial No. 4-2011-011546 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 28 April 2014.


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

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⁵[G.R. No. L-29971. August 31, 1982] Esso Standard Eastern, Inc., petitioner, vs. The Honorable Court of Appeals ** and United Cigarette Corporation, respondents.

⁶ Converse Rubber Corporation v. Universal Rubber Products, Inc. et.al. G.R. No. L-27906, 08 Jan. 1987.

⁷ American Wire and Cable Co. v. Director of Patents et.al. (SCRA 544) G.R. No. L-26557, 18 Feb. 1970.