



CONAGRA FOODS, INC.,  
Opposer,

-versus-

SAN MIGUEL CORPORATION,  
Respondent-Applicant.

}  
} IPC No. 14-2010-00069  
} Opposition to:  
} Appln Serial No. 4-2009-500165  
} Date Filed: 30 March 2009  
} TM: "HEALTHY CHOICE,  
} HEALTHY LIVING"

x-----x

**NOTICE OF DECISION**

**VERALAW (DEL ROSARIO BAGAMASBAD & RABOCA)**  
Counsel for the Opposer  
Rosadel Building, 1011 Metropolitan Avenue  
Makati City

**BENZON NEGRE UNTALAN**  
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Counsel for Respondent-Applicant  
Second Floor SEDDCO Building  
Rada corner Legaspi Streets  
Legaspi Village, Makati City

**GREETINGS:**

Please be informed that Decision No. 2015 - 113 dated June 17, 2015 (copy enclosed) was promulgated in the above entitled case.

Taguig City, June 17, 2015.

For the Director:

  
**Atty. EDWIN DANILO A. DATING;**  
Director III  
Bureau of Legal Affairs



CONAGRA FOODS, INC.,	}	IPC No. 14-2010-00069
	Opposer,	}
		}
-versus-		Opposition to:
		Application No. 4-2009-500165
		Date Filed: 30 March 2009
SAN MIGUEL CORPORATION,		Trademark: "HEALTHY CHOICE,
	Respondent-Applicant.	HEALTHY LIVING"
x-----x		Decision No. 2015- <u>113</u>

**DECISION**

CONAGRA FOODS, INC.<sup>1</sup> ("Opposer") filed an opposition to Trademark Application Serial No. 4-2009-500165. The application, filed by San Miguel Corporation<sup>2</sup> ("Respondent-Applicant"), covers the mark "HEALTHY CHOICE, HEALTHY LIVING" for use on "condiments namely vinegar and soy sauce" under Class 30 of the International Classification of Goods and Services.<sup>3</sup>

The Opposer alleges:

x x x

"The instant Opposition is anchored on the following grounds:

x x x

"5. Opposer is the owner of the famous and well-known mark HEALTHY CHOICE. It has registered its HEALTHY CHOICE mark in the Philippines under Certificate of Registration No. 4-1995-104756 for goods under Class 30: 'Prepared dinners and entrees consisting primarily of pasta; spaghetti; lasagna; bakery goods; and frozen confections.' It should be noted that Opposer's trademark and Respondent's trademark application covers the same class of goods (Class 30). The IPO website printout of Opposer's registration is hereto attached and marked as Exhibit 'C'.

"6. Respondent is an individual with address of record as above-stated, and where it may be served with notices and processes of this Honorable Office.

"7. On March 30, 2009, Respondent filed an application for the mark 'Healthy Choice, Healthy Living' under Application No. 4-2009-500165 covering goods in class 30, specifically for 'condiments namely vinegar and soy sauce'. xxx

"9. On December 16, 2009, January 13, 2010, and February 12, 2010, Opposer, in accordance with the Rules and Regulations on Inter Partes Proceedings, filed with the

<sup>1</sup>A foreign corporation duly organized and existing under and by virtue of the laws of the State of Delaware, United States of America, with principal office address at One ConAgra Drive 68102-5001, Omaha, Nebraska, U.S.A.

<sup>2</sup>A domestic corporation, with business address at 40 San Miguel Avenue, Mandaluyong City, Philippines.

<sup>3</sup>The Nice Classification is a classification of goods and services for the purpose of registering trademark and service marks, based on a 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 Purposes of the Registration of Marks concluded in 1957

Honorable Office three (3) successive Motions for Extension of Time to File the Verified Notice of Opposition, all of which were granted. Thus, Opposer had until March 16, 2010 within which to file its Verified Notice of Opposition.

"10. Opposer believes that it would be damaged by the registration of the mark 'Healthy Choice, Healthy Living' in the name of Respondent and hereby Opposes said application.

"The Opposer relies on the following facts:

"11. Opposer, ConAgra Foods, Inc., is one of North America's largest packaged food companies, serving grocery retailers, as well as restaurants and other foodservice establishments. Popular ConAgra Foods consumer brands include: Banquet, Chef Boyardee, Egg Beaters, Healthy Choice, Hebrew National, Hunt's, Marie Callender's, Orville Redenbacher's, Reddi-wip, PAM, and many others. Its history can be traced back to individuals and companies who were considered pioneers in food preparations and manufacturing in the United States.

"12. ConAgra Foods, Inc. maintains the website [www.conagrafoods.com](http://www.conagrafoods.com) where all information about the company can be found. Printouts of [www.conagrafoods.com](http://www.conagrafoods.com) is attached hereto and collectively marked as Exhibit 'E'.

"13. The history of the mark 'HEALTHY CHOICE' began with former ConAgra Foods Chief Executive Officer Charles 'Mike' Harper. While traveling through California on business, this hot-fudge sundae lover suffered a mild heart attack. Although he made a full recovery, he needed to evaluate his eating habits. So he began a search for food that satisfied both his taste and health needs. When his search proved unsuccessful, he took it upon himself to bring to market products that not only taste good but also good for one's health. And that's how HEALTHY CHOICE was born.

"14. In 1988, when CongAgra announced its plan to build a state-of-the-art product development laboratory and a new headquarters campus in Omaha, Nebraska. The first HEALTHY CHOICE products, frozen dinners, were introduced.

"15. Since then, HEALTHY CHOICE has been a pioneer in the development of great-tasting food that people can feel good about eating. With more than 200 products, HEALTHY CHOICE makes easy to prepare great-tasting, nutritious meals and snacks for the whole family. From savory soups to delicious lunch meats and great-tasting meals and snacks consumers can find HEALTHY CHOICE throughout the grocery stores.

"15. Healthy Choice products include: Healthy Choice frozen dinners and entrees, ice cream and novelties, canned and microwavable soup, lunch meat, deli meat, bread, pasta sauce and popcorn. Opposer maintains a separate website for its HEALTHY CHOICE products at [www.healthychoice.com](http://www.healthychoice.com). x x x

"16. Opposer is the owner of the trademark HEALTHY CHOICE in the Philippines and abroad and has active registration of the mark HEALTHY CHOICE, HEALTHY CHOICE AND DESIGN, and the family of HEALTHY CHOICE marks in various countries around the world, including x x x

"17. Below is a summary of Opposer's worldwide applications and registrations for the mark HEALTHY CHOICE, HEALTHY CHOICE AND DESIGN, and the family of HEALTHY CHOICE marks:

x x x

"18. In the Philippines, Opposer is the registered owner of the trademark 'HEALTHY CHOICE & DESIGN' under Registration No. 4-1995-104755 (Class 29), 'HEALTHY CHOICE & DESIGN OF A STYLIZED REPRESENTATION IN SILHOUETTE FORM OF A RUNNING MAN' under Registration No. 4-1995-104756 (Class 30), HEALTHY CHOICE & DESIGN under Registration No. 4-1995102506, (Class 29) and HEALTHY CHOICE & DESIGN under Registration No. 41995102507 (Class 30).

"19. A quick search over Philippine websites reveal the following: (1) Products bearing the HEALTHY CHOICE mark of Opposer can be purchased at Crossings Department Store, among others (Exhibit 'H'); and (2) An online Filipino chat community 'Kuro.ph', discussing what the chatters ate in a day mentioned an entrée consisting of Sesame Chicken by HEALTHY CHOICE (collectively marked as Exhibit 'I'). Clearly, products bearing Opposer's HEALTHY CHOICE mark is being sold and recognized in the Philippines.

"20. Clearly, and beyond any doubt, the mark HEALTHY CHOICE, HEALTHY CHOICE AND DESIGN, and the family of HEALTHY CHOICE marks is owned by Opposer and that said marks are locally and internationally well-known.

"21. In view of the foregoing, Respondent's Trademark Application for 'Healthy Choice, Healthy Living' under Application No. 4-2009-500165 covering goods in Class 30 specifically for 'condiments namely vinegar and soy sauce', should be DENIED as it is identical or confusingly similar to Opposer's owned, registered and well-known trademark 'HEALTHY CHOICE', as to be likely, when applied to or used in connection with the goods of Respondent, to cause confusion or mistake or deceive the purchasers thereof.

"22. The registration of the trademark 'Healthy Choice, Healthy Living' in the name of Respondent will violate Section 123.1 (d), (e), (f), and (g) RA 8293 which provides that:

x x x

"22. It cannot be denied that Opposer is the owner and prior user of the 'Healthy Choice' marks, in the Philippines and abroad, having first used and appropriated said mark in 1988, 22 years prior to Respondent's application.

"23. Opposer is also the prior registrant of the 'Healthy Choice' marks, abroad and in the Philippines, having first applied for registration of said mark 20 years ago.

"24. In the Philippines, Opposer has applied for registration of its 'Healthy Choice' marks in as early as 1995 or some 15 years prior to Respondent's application for a confusingly similar mark.

"25. There is also no doubt that Opposer's mark HEALTHY CHOICE is internationally well-known.

"26. First, Opposer has been using its 'Healthy Choice' marks for more than 22 years now in various countries around the world.

"27. Second, Opposer has obtained numerous registrations for its 'Healthy Choice' marks in various countries around the world, more specifically in at least 31 countries around the world.

"28. Opposer also maintains various websites promoting the mark 'Healthy Choice', which websites are accessible by consumers around the world.

"29. Consequently and pursuant to RA 8293, relevant Philippine jurisprudence, the Paris Convention, and the TRIPS Agreement, the Government of the Republic of the Philippines, through the Intellectual Property Office is mandated to protect Opposer's trademarks by rejecting all applications for the registration of identical or confusingly similar marks.

"30. It is also beyond doubt that the competing marks are confusingly similar, as will be demonstrated below

"31. Respondent's mark appropriates and includes as its dominant element, Opposer's well-known 'Healthy Choice' marks.

"32. On top of that, the competing marks cover virtually the same goods, under the same class. To summarize, below is a side by side comparison of the competing marks:

x x x

"33. Undoubtedly, Respondent's mark 'Healthy Choice, Healthy Living' is confusingly similar to the Opposer's 'HEALTHY CHOICE' marks, noting that the dominant features of both marks is Opposer's mark, HEALTHY CHOICE.

"34. The addition of the element 'Healthy Living' in Respondent's mark does not negate confusing similarity, which under Philippine Law is determined by the 'Dominancy Test'.

"35. In the case at bar, the dominant features of Respondent's mark is Healthy Choice which is identical to Opposer's well-known mark HEALTHY CHOICE.

"36. In McDonald's Corporation vs. L.C. Big Mak Burger, Inc. 437 SCRA 10, the dominancy test was used to determine whether a mark is confusingly similar. The Supreme Court held:

x x x

"37. Resolving conflicting claims in the registration of a mark involves determining the existence of confusing similarity between the opposing marks. 'Confusing similarity refers to such resemblance between a mark or trade name of a person and that of another as to likely, when applied to or used on their respective goods, business or services, cause confusion or mistake on the part of the purchasers as to the goods of services themselves or as to their source or origin.'

"38. The determination of the existence of confusing similarity between two marks can be easily determined in cases of identical marks applied on the same class of

goods, just like in the case at bar. 'If the marks or trade names are identical, used on the same or similar goods, there is hardly any problem as to who is entitled to the mark.' In this case, the prior user or adopter of the mark, which is herein Opposer, owns the same to the exclusion of others.

"39. No stretch of imagination is needed to see the obvious similarity of the subject marks - BOTH HAVE THE HEALTHY CHOICE MARK AS THEIR DOMINANT FEATURE. Finally, both are applied to the same classes of goods to which Opposer's mark has already acquired tremendous popularity and goodwill.

"41. As a matter of fact, this Honorable Bureau has already ruled in the case of 'Vitaways Healthy Choice Nutri-Drink' (IPC No. 14-2007-000223, ConAgra Inc. vs. Engracia Basa), that 'The words HEALTHY CHOICE' still dominates the whole appearance of Applicant's mark notwithstanding the insertion of the words VITAWAY'S and NUTRI-DRINK in applicant's mark, thus the similarities in the dominant feature of both marks are not lost. It is noteworthy to cite at this juncture the ruling of the Supreme Court in the cases of Co-Tiong SA vs. The Director of Patents (95 Phil 1 (1954)); Sapolin vs. Balmaceda (67 Phil 705); and Forbes Nurma and Co vs. Ang San To (40 Phil 272) which applied the dominancy test in determining the existence of confusing similarity between the trademarks, that 'if there is similarity with the essential or dominant feature of the trademark, despite some minor differences or variations in detail, there is infringement.'

"42. It should be stressed that in the above cited case, this Honorable Bureau ruled that HEALTHY CHOICE is the dominant element of the mark 'Vitaways Healthy Choice Nutri-Drink' and considering that HEALTHY CHOICE is owned and registered in the name of ConAgra Foods, Inc., the registration of the former is proscribed by the IP Code.

"43. The identical backdrop of this case with the above cited Vitaway's case cannot be denied.

"44. The applied mark subject of this Opposition case is 'Healthy Choice, Healthy Living', which contains the dominant element HEALTHY CHOICE and consequently and following the above cited ruling in the Vitaway's case, the registration of the subject mark 'Healthy Choice, Healthy Living' is proscribed by the prior registration and ownership by the Opposer of the well-known mark 'HEALTHY CHOICE'.

"45. Furthermore, the identity of the subject marks will definitely induce an ordinary prudent purchaser of grocery food items to purchase Respondent's goods believing that the same is Opposer's products.

"46. Ordinary purchasers will also be deceived as to the origin of Respondent's goods considering that is also used on goods in class 30, the same class of goods of covered by Opposer's trademark registration for HEALTHY CHOICE. Consumers will definitely be made to believe that Respondent's goods bearing the mark HEALTHY CHOICE comes from Opposer.

"47. 'In other words, to warrant a denial of an application for registration of a mark or trade name or to constitute infringement of a registered mark or trade name, the law does not require that the competing marks or trade name produce actual error or

mistake. It is sufficient that there is a possibility or likelihood of the purchaser being mistaken or deceived. The universal test is whether the public is likely to be deceived.' In the case at bar, an ordinary purchaser of a HEALTHY CHOICE product will definitely believe that he is purchasing Opposer's HEALTHY CHOICE product not knowing that he is actually buying Respondent-Applicant's goods.

"48. The confusion between the goods of Opposer and Respondent bearing the mark HEALTHY CHOICE will cause damage to the former and to the buying public as well.

"49. Hence, in view of (1) ownership by Opposer of the mark 'Healthy Choice', (2) Well-known status of Opposer's 'Healthy Choice' marks, (3) the earlier filing date of Opposer's HEALTHY CHOICE marks, (4) similar classification of goods of Opposer and Respondent, and (5) the identity or confusing similarity of the both marks, Respondent's mark cannot be registered by virtue of Section 123.1 (d) of R.A. 8293.

"50. The closing deposition of the Supreme Court in the case of Societe Des Produits Nestle, S.A. and Nestle Philippines, Inc. vs. Court of Appeals and CFC Corporation (G.R. No. 112012) enlightens the issue in the instant case, thus:

x x x

The Opposer's evidence consists of a copy of the special power of attorney/secretary's certificate appointing Del Rosario Bagamasbad & Raboca Law Office to act in behalf of Opposer in connection with this opposition; the notarized verification and certification against forum shopping executed by Atty. Jennifer D. Fajelagutan; the IPO website printout of Opposer's registration; a copy of Respondent's trademark application; printouts of [www.conagrafoods.com](http://www.conagrafoods.com); a printout of [www.healthychoice.com](http://www.healthychoice.com); representative samples of Opposer's worldwide trademark applications and/or registration for the marks HEALTHY CHOICE, HEALTHY CHOICE AND DESIGN, and the family of HEALTHY CHOICE marks; a printout of [www.crossings.com.ph](http://www.crossings.com.ph); a printout of [www.kuro.ph](http://www.kuro.ph); a copy of a letter sent by Opposer's counsel requesting for certification that the application of Ms. Basa for trademark registration for the mark HEALTHY CHOICE has been abandoned, and affidavit-testimony of Kristoffer G. De Jesus, an associate of the law firm VERA LAW.<sup>4</sup>

This Bureau issued a Notice to Answer and sent a copy thereof upon Respondent-Applicant on 29 April 2010. The Respondent-Applicant filed their Answer on 28 February 2011 and avers the following:

x x x

"Defenses

"Respondent-Applicant repleads the foregoing and further states:

xxx

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<sup>4</sup> Marked as Exhibits "A" to "L", inclusive.

"37. The trademark 'HEALTHY CHOICE' is not a well-known mark, as Opposer claims it to be. The IPO provides in Rule 102 of its Rules and Regulations on Trademarks, Service Marks, Tradenames, and Marked or Stamped Containers, the parameters in considering whether a mark is well-known, viz:

x x x

"Opposer failed to show that 'HEALTHY CHOICE' is a well-known mark based on the foregoing criteria. Opposer did not present veritable evidence on almost all of the criteria, such as the market share of its 'HEALTHY CHOICE' products in the Philippines.

"38. Opposer attempted to proffer evidence on the degree of distinction that its 'HEALTHY CHOICE' mark acquired in the Philippines. Opposer alleged in Paragraph 19 of the Opposition that:

x x x

"For the record, Respondent-Applicant is restating Opposer's Exhibits 'H' and 'I' by attaching copies of these Exhibits as Annexes 'C' and 'D', respectively, to his Verified Answer. If this Honorable Office directs its attention to Opposer's Exhibits, it will discover that - contrary to Opposer's allegation- Exhibit 'H' is not a screen printout of a website showing that 'products bearing the 'HEALTHY CHOICE' mark of Opposer can be purchased at Crossings Department Store.' In actuality, Exhibit 'H' is a screen printout of Kuro.ph. On the other hand, Exhibit 'I', which Opposer alleged to be a screen printout of the Kuro.ph website mentioning Opposer's 'HEALTHY CHOICE' products, is a printout of the alleged ConAgra Foods Website. It appears that Opposer falls short in substantiating its allegations with bona fide evidence. This fact is sufficient to conclude that Opposer attempted to mislead this Honorable Office.

"39. Even assuming that the erroneous Exhibits are due to an oversight in their numbering, a glance at the exhibited documents immediately preceding Opposer's Kuro.ph Exhibit discloses that these documents are trademark registrations and not website shot of Opposer's products being sold in Crossings Department Store.

"40. Opposer's Exhibit 'H', which shows certain webpages of Kuro.ph, is absolutely devoid of any mention of 'HEALTHY CHOICE' products. To give Opposer the benefit of the doubt Respondent-Applicant, through undersigned counsel, conducted a search in the Kuro.ph website of the key phrase 'Healthy Choice Sesame Chicken.' A post by a Kuro.ph member, Brown Angel, contained the phrase. The post dated 1 July 2007 is attached to this Answer as Annex 'E'.

"41. In the post, the Kuro.ph Member enumerated the food items that she had for lunch and supper, among which is 'Sesame Chicken by Healthy Choice.' However, it is important to note that the said Kuro.ph Member's location is at 'IA, USA' or Iowa, USA. Even assuming that the Kuro.ph member is a Filipino, she is not based in the Philippines. Her consumption of a Healthy Choice product in the United States does not even remotely prove that 'products bearing the Opposer's 'HEALTHY CHOICE' mark is being sold and recognized here in the Philippines. The Opposer's lone evidence of a Filipino's consumption of a Healthy Choice product is pitiful and meant to deceive this Honorable Office as to the true recognition (if any) of the Opposer's products in the Philippines.



"42. The absence of any evidence whatsoever to prove the popularity of Opposer's 'HEALTHY CHOICE' products can only be taken to mean that the 'HEALTHY CHOICE' mark is not well-known in the Philippines and in other parts of the world.

"43. The IPO Decision of United States Polo Association vs. Meryll Lyn Y. Dy, wherein this Honorable Office rejected the argument that Opposer's 'POLO' mark is well-known, is instructive:

"In spite of this, the evidence is insufficient to sustain a finding that (Opposer's 'POLO' mark) is well-known internationally and in the Philippines in compliance with the requirements of Philippine law. Opposer's mark identifies the goods under class 18 and 25 which have come to be identified with the association related to the advancement of the polo sport precisely so, that the mark is used is 'United States Polo Association; and not merely the word POLO. There is no evidence that such mark has been popularized in the Philippines. No evidence exist of considerable sales or advertising, promotions undertaken in the Philippines to prove the mark acquired distinction or a reputation in the Philippines. Thus, it is not a well-known mark.

"44. As mentioned in the Admissions and Denials portion of this Answer, Opposer alleged in Paragraph 18 of the Opposition that 'Opposer is the registered owner of the trademark... 'HEALTHY CHOICE & DESIGN' under Registration No. 41995102506 (Class 29), and 'HEALTHY CHOICE & DESIGN' under Registration No. 41995102507 (Class 30).' A perusal of Opposer's Exhibit 'C' reveals that there are no trademark registrations bearing such Registration Numbers. However, there are records of trademark applications - NOT trademark registrations - bearing the said numbers. The numbers are indicated as Application Numbers and not Registration Numbers. The status that appears in the records is 'Pending Application.' Based on Opposer's own Exhibits, the truth is that Opposer is not the owner of the said trademark registrations, because these registrations are inexistent. At most, the marks are still pending application. This inconsistency in Opposer's allegations and exhibits reveals Opposer's systematic course of action to mislead this Honorable Office.

"45. Paragraphs 13 to 15 of the Opposition harp on the history of Opposer's 'HEALTHY CHOICE' mark. It is alleged that 'HEALTHY CHOICE' products were first introduced in 1988. However, there is absolutely no proof or exhibit that supports these allegations. This Honorable Office should not be expected to take these uncorroborated and self-serving claims as bible truth. At the very end of the hodgepodge that is Opposer's Exhibits lies an 'Affidavit Direct Testimony' executed by Kristoffer G. De Jesus, an associate of VERALAW, Opposer's counsel. In the Affidavit, Mr. De Jesus echoes the information found in Paragraphs 13 to 15, and further alleging that, 'in his capacity as associate lawyer in VERALAW, he became 'very familiar with the Company, its products, and matters relating to its 'HEALTHY CHOICE' mark in the Philippines.

"46. Even if it is true that, in his capacity as an associate lawyer of VERALAW, Mr. De Jesus became knowledgeable about 'matters relating to the

'HEALTHY CHOICE' mark in the Philippines,' such fact cannot be taken to mean that he is an authority to attest to the history of the Opposer and the 'HEALTHY CHOICE' mark, which apparently took place in the United States. Mr. De Jesus is neither present in the happening of these events nor is he an employee of Opposer. He has no personal knowledge of the events, which he attested to in his affidavit.

"47. Paragraph 16 of the Opposition states that 'representative samples of Opposer's worldwide trademark applications and/or registration for the marks 'HEALTHY CHOICE,' 'HEALTHY CHOICE AND DESIGN,' and the family of 'HEALTHY CHOICE' marks are attached to the Opposition as Exhibit 'G'. The Opposition's Exhibit 'G' is comprised of trademark applications and/or registrations in Argentina, Aruba, Barbados, Benelux, Brazil, China, Cuba, Denmark and Dominican Republic. However, Respondent-Applicant wishes to bring this Honorable Office's attention to Rule 7, Section 3 of the Regulations on Inter Partes Proceedings, which state:

x x x

An analysis of the Opposition's Exhibit 'G' reveals that only the trademark applications and/or registrations in Aruba, Barbados and Benelux have English translations. Those from Argentina, Brazil, China, Cuba, Denmark and Dominican Republic are encoded in the countries' respective languages. Hence, Respondent-Applicant is requesting this Honorable Office to strike off from the records of this case the trademark applications and/or registrations from Argentina, Brazil, China, Cuba, Denmark and Dominican Republic, which the Opposer sought to present as evidence. The attachment of these trademark applications and/or registrations is violative of Rule 7, Section 3 of the Regulations on Inter Partes Proceedings and it warrants no consideration from this Honorable Office.

"48. After filtering out the invalid pieces of evidence, this Honorable Office is now left with Opposer's trademark applications and/or registrations from Aruba, Barbados and Benelux. Trademark applications and/or registrations from these three (3) places can hardly lead to an assumption that Opposer's mark(s) are registered worldwide. Rule 102, Paragraph (g) of the Rules and Regulations on Trademarks, Service Marks, Tradenames, and Marked or Stamped Containers states that, 'the extent to which the mark has been registered in the world' should be taken into account in determining whether a mark is well-known. Looking at Opposer's three (3) trademark applications and/or registrations, it can only be said that the extent of registration of Opposer's 'HEALTHY CHOICE' mark is very much limited. Opposer's mark failed the cited criterion for well-known marks. The mark cannot be considered well-known on the sole basis that it is registered in three (3) other places, aside from the Philippines.

"49. Paragraph 17 of the Opposition sets out a table of Opposer's applications and/or registrations for 'HEALTHY CHOICE,' 'HEALTHY CHOICE AND DESIGN,' and the family of 'HEALTHY CHOICE' marks. The Table should be given scant consideration for being unsubstantiated. Opposer did not even bother to indicate the dates of registration and expiration. Instead, Opposer merely inscribed 'REGISTERED,' 'PENDING' and 'PROPOSED' to indicate the status of the trademark applications and/or registrations in the enumerated countries. It remains dubious as to how Opposer expects this Honorable Office to confirm the veracity of these self-serving statements.

"50. For failing to show that 'HEALTHY CHOICE' is a well-known mark, this Honorable Office should not adopt a protective stance over it, but instead, be open to challenges to the mark. Opposer's acts of appending the erroneous exhibits to its Opposition should be taken as evidence of Opposer's deliberate intent of deluding this Honorable Office, or at the very least, of its gross negligence in preparing its Opposition, which shows Opposer's lack of respect for the processes of this Honorable Office.

xxx

"51. In the Opposition, Opposer strived to make it appear that 'HEALTHY CHOICE' is the dominant portion of Respondent-Applicant's 'HEALTHY CHOICE, HEALTHY LIVING' mark. Opposer submits that 'HEALTHY CHOICE' is the dominant feature of both Opposer and Respondent-Applicant's marks, in order for the 'HEALTHY CHOICE, HEALTHY LIVING' mark to be refused registration based on the application of the 'Dominancy Test.' To advance its argument, Opposer cited jurisprudence, such as McDonald's Corporation vs. L.C. Big Mak Burger, Inc.

"52. Opposer's argument is without merit. It is erroneous to conclude that 'HEALTHY CHOICE' is the dominant feature of the 'HEALTHY CHOICE, HEALTHY LIVING' mark. The phrase 'HEALTHY LIVING, is equally prevailing as the first phrase in Respondent-Applicant's mark.. Opposer cannot arbitrarily isolate the 'HEALTHY CHOICE' phrase and consider it as the dominant portion of 'HEALTHY CHOICE, HEALTHY LIVING.'

"53. It should be noted that 'HEALTHY CHOICE, HEALTHY LIVING' is a composite mark, which includes a mark 'containing different words.' The inclusion of identical words in competing marks does not necessarily amount to the two (2) marks being confusingly similar to one another. The IPO Decision of Twentieth Century Fox Film Corporation vs. ABS-CBN Broadcasting Corporation bears facts that are similar to the present case. In the Twentieth Century Fox case, this Honorable Office held:

x x x

Just as in the Twentieth Century Fox case, there are enough differences between 'HEALTHY CHOICE' and 'HEALTHY CHOICE, HEALTHY LIVING' to sustain the conclusion that no confusing similarity exists between the two (2) marks.

"54. The presence of the phrase 'HEALTHY LIVING' in the Respondent-Applicant's mark sets it apart from Opposer's mark. Respondent-Applicant's mark is longer, for having more words than Opposer's mark. Thus, the two (2) marks sound dissimilar, and they are spelled and pronounced differently. 'HEALTHY LIVING' does not have the same meaning as 'HEALTHY CHOICE.' 'HEALTHY LIVING' connotes 'a manner or style of life that is 'conducive to good health.' On the other hand, 'HEALTHY CHOICE' means a 'healthful' 'selection.' The meanings of the two(2) phrased are worlds apart.

"55. The two (2) marks are different in spelling, sound, pronunciation and meaning. Hence, the two (2) marks are neither identical nor confusingly similar to each other. 'HEALTHY CHOICE, HEALTHY LIVING' should be granted registration by this Honorable Office.

"56. Finally, Opposer's insinuation in the Opposition's final paragraph that Respondent-Applicant seeks to benefit from Opposer's trade is absolutely baseless. It is also taking exception to Opposer's allegation in Paragraph 45 of the Opposition that 'Opposer's goods...will be prejudiced or adversely affected by the inferior quality of Respondent's goods.' Respondent-Applicant wishes to point out the fact that it is the largest beverage and food firm in the Philippines. Respondent-Applicant's line of products is known to be of superior quality all throughout the nation. It is extremely absurd why Opposer would think that Respondent-Applicant is a small fish that is riding along with the tide created by Opposer, a corporation that is not heard of in the Philippines. By Opposer's own presentation of evidence (or the lack thereof), Opposer was able to establish that it has no market presence in the Philippines and it has not built any image or reputation in the country. Opposer's allegations are utterly misplaced.

The Respondent-Applicant's evidence consists a copy of Respondent-Applicant's trademark application; a copy of the notice to answer issued by this Bureau; copies of Opposer's Exhibits "H" and "I"; and, a copy of a post by a Kuro.ph member, Brown Angel.<sup>5</sup>

On 28 October 2010, the Preliminary Conference was terminated and the parties were directed to file their respective position papers. Thereafter, the case was deemed submitted for resolution.

Should the Respondent-Applicant be allowed to register the trademark HEALTHY CHOICE, HEALTHY LIVING?

The Opposer anchors its opposition on Sections 123.1, paragraphs (d), (e), (f) and (g) of Republic Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code"), to wit:

Sec. 123. Registrability. - 123.1. A mark cannot be registered if it:

x xx

- (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;"
  
- (e) Is identical with, or confusingly similar to, or constitutes a translation of a mark which is considered by the competent authority of the Philippines to be well-known internationally and in the Philippines, whether or not it is registered here, as being already the mark of a person other than the applicant for registration, and used for identical or similar goods or services: *Provided*, That in determining whether a mark is well-known, account shall be taken of the

<sup>5</sup> Marked as Annexes "A" and "E".

knowledge of the relevant sector of the public, rather than of the public at large, including knowledge in the Philippines which has been obtained as a result of the promotion of the mark;

- (f) Is identical with, or confusingly similar to, or constitutes a translation of a mark considered well-known in accordance with the preceding paragraph, which is registered in the Philippines with respect to goods or service which are not similar to those with respect to which registration is applied for: Provided, That use of the mark in relation to those goods or services would indicate a connection between those goods or services, and the owner of the registered mark: Provided further, That the interests of the owner of the registered mark are likely to be damaged by such use;
- (g) Is likely to mislead the public, particularly as to the nature, quality, characteristics or geographical origin of the goods or services;

Records show that the Opposer filed trademark applications for HEALTHY CHOICE & DESIGN OF A STYLIZED REPRESENTATION IN SILHOUETTE FORM OF A RUNNING MAN and HEALTHY CHOICE & DESIGN on 01 September 1995. The application HEALTHY CHOICE & DESIGN OF A STYLIZED REPRESENTATION IN SILHOUETTE FORM OF A RUNNING MAN matured into a registration and a Certificate of Registration was issued on 22 March 2000. The applications cover prepared dinners and entrees consisting primarily of beef, poultry, seafood and/or vegetables; stews; soups; chili; and egg product under Class 29 and bakery goods, breakfast cereals, cracker and cheese combinations, frozen entrees consisting primarily of pasta or rice, frozen yogurt, ice cream, pot pies, pizza and spaghetti sauce under Class 30 respectively. On the other hand, the Respondent-Applicant filed the contested trademark application on 30 March 2010 for use on condiments namely vinegar and soy sauce under Class 30.

The marks are shown below:

**HEALTHY CHOICE**

Opposer's trademark

**HEALTHY CHOICE, HEALTHY LIVING**

Respondent-Applicant's mark

The Respondent-Applicant's mark HEALTHY CHOICE, HEALTHY LIVING is confusingly similar to Opposer's trademark HEALTHY CHOICE & DESIGN. Even with the accompanying words HEALTHY LIVING, to the Bureau's mind, the dominant feature of the trademark are the words HEALTHY CHOICE. Both marks bear words that are similar. Their meanings are the same. Respondent-Applicant's mark HEALTHY CHOICE HEALTHY LIVING covers "condiments namely vinegar and soy sauce" under Class 30, goods (sauces) which the Opposer deals in under the mark HEALTHY

CHOICE & DESIGN. It is likely therefore, that a consumer who wishes to buy food/food ingredients/sauces and is confronted with the mark HEALTHY CHOICE HEALTHY LIVING, will think or assume that the mark or brand is just a variation of or is affiliated with the Opposer's.

The confusion or mistake would subsist not only on the purchaser's perception of goods but on the origin thereof as held by the Supreme Court, to wit:


Callman notes two types of confusion. The first is the confusion of goods in which event the ordinary prudent purchaser would be induced to purchase one product in the belief that he 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.<sup>6</sup>

In conclusion, the Bureau finds that the Respondent-Applicant's trademark application is proscribed by Sec. 123.1 (d) of the IP Code.

WHEREFORE, premises considered, the instant Opposition to Trademark Application No. 4-2009-500165 is hereby SUSTAINED. Let the filewrapper of the subject trademark application be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

**SO ORDERED.**

Taguig City, 17 June 2015.

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

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<sup>6</sup> *Converse Rubber Corp. v. Universal Rubber Products, Inc. et. al.*, G.R. No. L-27906, 08 Jan. 1987.