GOLDEN ABC, INC., Opposer, **-versus-** **INNOVITELLE, INC.,** Respondent-Applicant.	}	**IPC No. 14-2012-00206** Opposition to: Application No. 4-2012-000352 Date filed: 10 January 2012 TM: **"FRUITY RUSH"**

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2015 - 232 dated October 27, 2015 (copy enclosed) was promulgated in the above entitled case.

Taguig City, October 27, 2015.

For the Director:

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

GOLDEN ABC, INC.,	}	**IPC No. 14-2012-00206**
Opposer,	}	Opposition to
	}	
	}	Application Serial No. 4-2012-000352
-versus-	}	Date Filed: 10 January 2012
	}	Trademark: **"FRUITY RUSH"**
INNOVITELLE, INC.,	}	
Respondent-Applicant.	}	Decision No. 2015 - 232

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DECISION

GOLDEN ABC, INC. ("Opposer")[1] filed an opposition to Trademark Application Serial No. 4-2012-000352. The application, filed by INNOVITELLE, INC. ("Respondent-Applicant")[2], covers the mark "FRUITY RUSH" for use on *"soaps, perfumery, essential oils, cosmetics, hair lotions"* under Class 03 of the International Classification of Goods.[3]

The Opposer alleges, among other things, the following:

"1. The subject mark 'FRUITY RUSH' is confusingly similar with the Opposer's following registered marks:

A) **'FRUITY MIST'** (Registration No. 4-2000-005464, under Class 3 x x x)

B) **'FRUITY FLORAL SPARKLING MIST AND DEVICE'** (Registration No. 4-2001-006104, under Class 3 x x x)

C) **'RUSH'** (Registration No. 4-2009-000904, under Class 3 x x x)

"2. Respondent's subject mark does not only possess similarity in sound and spelling with those of Opposer's trademarks, it also creates the same commercial impression with that of Opposer's Trademarks. Moreover, considering that respondent is also seeking registration of the subject mark under the same Class 3 and for the same specific goods, like soaps, perfumery, essential oils, cosmetics, hair lotions with those of Opposer's trademarks, confusion of the marks is very likely. x x x"

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[1] A corporation duly organized and existing under Philippine law with address at 880 A.S. Fortuna Street, Mandaue City, Cebu.

[2] A corporation duly organized and existing under the laws of the Philippines, with office address at 2nd Floor, Bonaventure Plaza Bldg., Ortigas Avenue, Greenhills, San Juan, Philippines.

[3] The Nice Classification of goods and services is for registering trademark and service marks, based on a Multilateral treaty administered by the WIPO, called the Nice Agreement Concerning the International Classification of Goods and Services for Registration of Marks concluded in 1957.

To support its opposition, the Opposer submitted the following, marked as Exhibits "A" to "C":

1. Copy of Trademark Registration No. 4-2000-005464;
2. Copy of Trademark Registration No. 4-2001-006104; and
3. Copy of Trademark Registration No. 4-2009-000904

The Respondent-Applicant filed its Verified Answer on 9 August 2012 arguing that 'FRUITY RUSH' is not confusingly similar to Opposer's marks 'FRUITY MIST', 'FRUITY FLORAL SPARKLING MIST AND DEVICE', and 'RUSH'. According to the Respondent-Applicant, the Opposer has neither exclusive nor any vested right to use the word 'FRUITY' and 'RUSH' and, thus, has no right to prevent others from utilizing the same.

The Respondent-Applicant's evidence consists of a copy of Certificate of Registration No. 4-2011-001436 (*Exhibit "1"*) and print-outs of the IPO Registrations of the trademarks: Fruity Splash, Fruity Blooms, Fruity Shine, Fruity Melon, Fruity Bubble Cane, Seriously Fruity, Fruity Time, Fruity Gel-a-Snack, Mr. Jussie Fruity and OK Fruity Frost (*Exhibits "2" to "11" respectively*).

The case was referred to mediation on 20 September 2012. The parties however refused and the case was set for preliminary conference on 12 March 2013. The Opposer failed to appear during the preliminary conference and was deemed to have waived its right to submit position paper. The Respondent-Applicant filed its position paper on 22 March 2013.

Should the Respondent-Applicant be allowed to register the mark 'FRUITY RUSH'?

The competing marks are reproduced below:

Fruity Mist

rush

Opposer's marks

FRUITY RUSH

Respondent-Applicant's mark

Records show that at the time the Respondent-Applicant filed its trademark application for the mark "FRUITY RUSH" on 10 January 2012, the Opposer has already existing registrations for the marks "FRUITY MIST", "FRUITY FLORAL SPARKLING MIST and DEVICE" and "RUSH", under registration numbers 4-2000-005464, 4-2001-006104 and 4-2009-000904 respectively, covering various goods under Class 3 of the International Classification of Goods.

The first word of Respondent-Applicant's word mark which is "FRUITY" is found on the Opposer's two word marks namely "FRUITY MIST" and "FRUITY FLORAL SPARKLING MIST". On the other hand, the second word of the Respondent-Applicant's mark ("RUSH") is also identical with another word mark of the Opposer which is also coined as "RUSH". While admittedly there are various marks appearing in the Trademark Registry which contain the word FRUITY, the same is not sufficient to allow the registration of the Respondent-Applicant's mark. On the contrary, it is doubted how the Respondent-Applicant came up with the mark "FRUITY RUSH" which is merely a combination of the marks registered in favor of the Opposer long before the filing of the Respondent-Applicant's trademark application.

Moreover, there is no dispute that the goods carried by the competing marks are related to each other both falling under Class 03, possessing the same characteristics and sold through the same channels of trade such as, soaps, perfumery, essential oils and cosmetics. Thus, the use by the Respondent-Applicant of the mark "FRUITY RUSH" for goods that are similar and/or related to those covered by the Opposer's trademark registrations will create the impression that the former's goods originate from or are sponsored by the latter when in fact they are not. The consumers might reasonably assume that there is some connection between the marks and/or between the parties themselves.

As held by the Supreme Court in *Converse Rubber Corporation v. Universal Rubber Products, Inc., et. al.*,[4]:

> 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 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.

The essence of trademark registration is to give protection to the owners of trademarks. The function of a trademark is to point out distinctly the origin or ownership of

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[4] G. R. No. L-27906, January 8, 1987.

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.[5]

This Bureau finds that the Respondent-Applicant failed to satisfy this function test.

WHEREFORE, premises considered, the instant opposition is hereby **SUSTAINED.** Let the filewrapper of Trademark Application No. 4-2012-000352 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 27 October 2015.

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

[5] See *Pribhdas J. Mirpuri v. Court of Appeals*, G. R. No. 114508, November 19, 1999.