

NESTLE PHILIPPINES, INC.,
Opposer,

-versus-

ELITE GOLD LTD.,
Respondent-Applicant.

X-----X

IPC No. 14-2014-00232

Opposition to:

Appln. Serial No. 4-2012-007610

Date Filed: 25 June 2012

**TM: KOPIKO L.A. COFFEE LOW
ACID COFFEE MIX**

NOTICE OF DECISION

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GREETINGS:

Please be informed that Decision No. 2016 - 314 dated 19 September 2016 (copy enclosed) was promulgated in the above entitled case.

Taguig City, 19 September 2016.

Atty. Z'SA MAY B. SUBEJANO-PE LIM
Adjudication Officer
Bureau of Legal Affairs

**Republic of the Philippines
INTELLECTUAL PROPERTY OFFICE**

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NESTLE PHILIPPINES, INC.,

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-versus-

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IPC No. 14-2014-00232

Opposition to Trademark

Application No. 4-2012-007610

Date Filed: 25 June 2012

Trademark: **"KOPIKO L.A. COFFEE
LOW ACID COFFEE MIX"**

Decision No. 2016- 314

DECISION

Nestle Philippines, Inc.¹ ("Opposer") filed an opposition to Trademark Application Serial No. 4-2012-007610. The contested application, filed by Elite Gold Ltd.² ("Respondent-Applicant"), covers the mark "KOPIKO L.A. COFFEE LOW ACID COFFEE MIX" for use on "*coffee, coffee with milk, coffee based cereal beverages*" under Class 38 of the International Classification of Goods³.

The Opposer avers, among others, that it is the Philippine licensee of Societe des Produits Nestle for the sale and distribution of the latter's products including beverages, particularly coffee under the "NESCAFE" brand. It is a member of the Philippine Association of National Advertisers (PANA) and a signatory of the Philippine Food and Beverages Alliance's "Responsible Advertising to Children" initiative. The Respondent-Applicant filed the contested trademark application on 25 June 2012. Subsequently, the latter released products containing "KOPIKO L.A. COFFEE LOW ACID COFFEE MIX" labels in the market. On 17 May 2014, a commercial featuring the said mark was launched.

The Opposer anchors its opposition on the provisions of Sections 123.1 (g), 168.3 (c) and 169.1 (b) of Republic Act No. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code"). It contends that the inclusion of the phrase "LOW ACID" and a human figure with a heart on the abdomen creates an impression in the mind of the consumer that the Respondent-Applicant's "KOPIKO L.A. COFFEE LOW ACID COFFEE MIX" exhibits low acidity and suggests friendliness to the gastric system, which is not entirely true. According the Opposer, Atty. Dennis Jose R. Barot, its Vice President and Intellectual Property Adviser, wrote a letter with

¹ A corporation duly organized and existing under the laws of the Philippines with business address at No. 31 Plaza Drive Rockwell Center, Makati City.

² A corporation duly organized and existing under the laws of United States of America with address at JIPFA Building, Main Street, P.O. Box 181, road Town, Tortola, Brt. Virgin Islands.

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.

the Food and Drug Administration ("FDA") raising his concern that the product branded as "KOPIKO L.A. COFFEE" contains health/medical claims which were without FDA-approved scientific justification. In the 17 June 2013 response letter, the FDA confirmed that it did not approve the claim "low acid", among others. The Opposer thus contends that the phrase "LOW ACID" is misleading as to the quality and characteristic of the product as the same suggests that the claim of low acidity is FDA approved. It asserts that the numerous online blogs raving about the low acidity of the Respondent-Applicant's products are clear evidence that the consumers are actually deceived by the misleading claim. In support of its Opposition, the Opposer submitted the following as evidence:⁴

1. affidavit of Atty. Dennis Jose R. Barot;
2. scanned copy of the "Responsible Advertising to Children" initiative;
3. printout copies of sample label products as featured in the internet;
4. cd containing a video of the commercial for "KOPIKO L.A. COFFEE LOW ACID COFFEE MIX";
5. printout of the E-Gazette publication of the contested application;
6. scanned copy of Atty. Barot's letter to the FDA; and
7. copy of the letter by the FDA dated 17 June 2013.

On 27 August 2014, a Notice to Answer was issued and served upon the Respondent-Applicant. The latter, however, failed to comply. Thus, on 06 February 2015, the Hearing Officer issued Order No. 2015-243 declaring the Respondent-Applicant in default and submitting the case for decision.

The issue to be resolved is whether the Respondent-Applicant mark "KOPIKO L.A. COFFEE LOW ACID COFFEE MIX" should be allowed registration.

Section 123.1 of the IP Code provides that a mark cannot be registered if it:

"xxx

(g) Is likely to mislead the public, particularly as to the nature, quality, characteristics or geographical origin of the goods or services; xxx"

The Opposer mainly contests the Respondent-Applicant's incorporation of the phrase "LOW ACID" in the applied mark as follows:

⁴ Marked as Exhibits "B" to "H".



The Opposer relies on the letter dated 17 June 2013 from Jesusa Joyce N. Cirunay of the Center for Food Regulation and Research of the FDA⁵ wherein it was stated, among others, that:

"x x x The said product is currently registered but the following noted claims in the label were not approved by the FDA:

- 'Low Acid'
- 'Gastric Friendly'
- Kopiko L.A. Coffee is ideal not only for people with medical conditions relating to the digestive system but also for those who have high-stress jobs and are at risk to develop sensitive stomachs as well as those who simply want to enjoy good health
- Kopiko L.A. Coffee makes it possible for coffee lovers to enjoy their coffee without discomfort.

In view of the above product claims, this Office has made the following action:

- Tridharma's appeal to reconsider the above product claims was disapproved.
- Tridharma's request to exhaust the existing labels of the product with the above claims was denied.

x x x"

Perusing the letter of Atty. Barot's to the FDA⁶ and the above response thereto, however, shows that the products involved are "KOPIKO L.A. COFFEE", which are imported and distributed by a certain Tridharma Marketing, Inc.. The Opposer did not allege, much more prove, the connection of Tridharma Marketing, Inc. to herein Respondent-Applicant. Nowhere in the exchanges between Atty. Barot and the FDA did the name of the Respondent-Applicant appear. Nor is there any evidence presented that the products referred to in the letters are the same as that which the Respondent-Applicant intends to use the applied mark. As such, there is no basis to arrive at a conclusion that FDA has in fact disapproved the Respondent-Applicant's use of the phrase "LOW ACID" in the latter's labels. This Bureau cannot simply assume that the products imported by Tridharma Marketing, Inc. are in any

⁵ Exhibit "H".

⁶ Exhibit "G".

way related to the Respondent-Applicant solely on the basis similarity of the brand names.

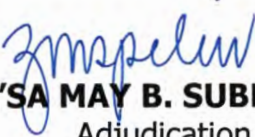
With respect to the pictures of the sample label of "KOPIKO L.A. COFFEE LOW ACID COFFEE MIX"⁷ submitted by the Opposer, they do not clearly show the name of the manufacturer, distributor and/or originator of the product. Noteworthy, in Order No. 2015-243, the Hearing Officer required the Opposer to submit the originals or certified true copies of the affidavits, documentary and/or object evidence attached to the Opposition within ten days from receipt thereof. And yet, no compliance of the said Order was received by this Bureau.

No other evidence was presented by the Opposer to support its allegation on the misleading nature of the Respondent-Applicant's use of "LOW ACID" as part of Respondent-Applicant's trademark. Indeed, the age-old but familiar rule is that he who alleges must prove his allegations.⁸ In administrative cases, the quantum of proof required is substantial evidence. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if other minds equally reasonable might conceivably opine otherwise.⁹ The burden of proof still rests on the shoulder of the Opposer, notwithstanding the fact that the Respondent-Applicant has been declared in default. In this case, the Opposer failed to discharge its burden.

WHEREFORE, premises considered, the instant opposition is hereby **DISMISSED**. Let the filewrapper of Trademark Application Serial No. 4-2012-007610 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED.

Taguig City, 11 9 SEP 2016


ATTY. Z'SA MAY B. SUBEJANO-PE LIM
Adjudication Officer
Bureau of Legal Affairs

⁷ Exhibit "G-2".

⁸ Manolo P. Samson vs. Hon. Reynaldo B. Daway, G.R. No. 160054-55, 21 July 2004.

⁹ Primo C. Miro vs. Marilyn Mendoza Vda. De Erederos, G.R. No. 172532, 172544-55, 20 November 2013.