

JAMES A. MAGTALAS,
doing business under the firm name of style
"AMM YANG CHOW FOOD EXPRESS",
Complainant,

-versus-

HTK FOOD SPECIALIST, INC.,
Respondent.

x-----x

IPV No. 10-2011-00017

For: Trademark Infringement
and Damages

NOTICE OF DECISION

SEE AND HERRERA LAW FIRM

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GREETINGS:

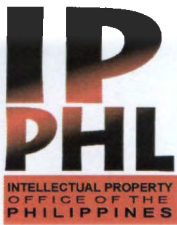
Please be informed that Decision No. 2017 - 01 dated January 18, 2017 (copy enclosed) was promulgated in the above entitled case.

Taguig City, January 23, 2017

MARILYN F. RETUAL
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Bureau of Legal Affairs

Republic of the Philippines
INTELLECTUAL PROPERTY OFFICE

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DECISION

JAMES A. MAGTALAS, doing business under the firm name and style AMM YANG CHOW FOOD EXPRESS¹ ("Complainant") filed a complaint for trademark infringement and damages against HTK Food Specialist, Inc.² ("Respondent").

The Complainant alleges the following:

"Complainant is the registered owner of the AMM Yang Chow Food Express Trademark consisting of the words 'AMM Yang Chow Food Express' and a logo consisting of a rectangular figure in an upward position, i.e. the letters 'YC' in interconnectivity, in standing positions and with a Chinese character, for Restaurant and Food Service. Complainant's AYCFE Trademark also provides for an express Claim of Color, i.e. the colors Red, Yellow and Green.³

"Complainant has been using said AYCFE Trademark since 2009 for his restaurants and food kiosks which specialize in Chinese food. He currently has two (2) AYCFE restaurants and has plans for further expansion.⁴

"During the last quarter of 2010, information reached Complainant, that, for its restaurant which also specializes in Chinese Food, and without Complainant's consent, Respondent HTK Food Specialist, Inc. has been using a sign with a font style for the word 'Yang Chow' and a red-yellow-

¹With address at Lot 12, Block 2, Phase 1-C Greenwoods Avenue, Greenwoods Executive Village, Cainta, Rizal.
²With business address at G15 Ground Floor, Shopwise Libis Branch, E. Rodriguez, Jr. Avenue, Libis, Quezon City.
³Paragraph 3.1 of the Complaint.
⁴Paragraph 3.2 of the Complaint.

green color scheme that imitates and is confusingly similar to Complainant's AYCFE Trademark.⁵

"Some of Complainant's friends were actually led to believe that Respondent's Restaurant at Shopwise was part of Complainant's AYCFE Restaurants to the point that they started asking Complainant if he has opened another branch at Shopwise.⁶

"Complainant also discovered that, notwithstanding that he (Complainant) already has a Certificate of Registration for his AYCFE Trademark issued on 18 March 2010, Respondent filed on 07 February 2011 an application with the Intellectual Property Office to register its HTK Yang Chow Sign.⁷

"To protect his intellectual property rights, Complainant, through his legal counsel, wrote Respondent on 25 January 2011 demanding that the latter immediately withdraw its application for the registration of the HTK Yang Chow Sign and, more importantly, to immediately cease and desist from using its HTK Yang Chow Sign in its Restaurant as such use violates Complainant's intellectual property rights and infringes on Complainant's AYCFE Trademark.⁸

"However, instead of complying with Complainant's just and valid demands, through a letter from its counsel dated 17 February 2011, without denying that his HTK Yang Chow Sign is confusingly similar to Complainant's AYCFE Trademark, Respondent claimed that it has the right to use its HTK Yang Chow Sign.⁹

"To date, Respondent continues to use its HTK Yang Chow Sign for his Restaurant in patent violation of Complainant's right as owner of the AYCFE Trademark. Complainant also learned that Respondent recently opened another Restaurant at EDSA near Quezon Avenue, Quezon

⁵ Paragraph 3.4 of the Complaint.

⁶ Paragraph 3.6 of the Complaint.

⁷ Paragraph 3.7 of the Complaint.

⁸ Paragraph 3.8 of the Complaint.

⁹ Paragraph 3.10 of the Complaint.

City likewise using his HTK Yang Chow Sign and also infringing on Complainant's AYCFE Trademark.¹⁰

"Despite just and valid demand from the Complainant to desist from such illegal acts, Respondent continues to use its HTK Yang Chow Sign that imitates and is confusingly similar to Complainant's AYCFE Trademark. Respondent's continued use of its infringing HTK Yang Chow Sign is with full knowledge that such sign is likely to cause confusion, or to cause mistake, or to deceive the public. Respondent's acts violate Complainant's rights as owner of registered mark under Sections 147 and 147.1 of R.A. 8293.¹¹

"Respondent is liable for Trademark Infringement and Damages in accordance with Section 155.1 of R.A. 8293 x x x¹²

"Respondent's violations of pertinent provisions of R.A. 8293 as discussed above were committed despite full knowledge that its imitation of Complainant's AYCFE Trademark is likely to cause confusion, or to cause mistake, or to deceive the public. For this reason, Complainant is plainly entitled to claim damages against Respondent x x x¹³

On 19 October 2011, Respondent filed its Answer denying the allegations of the complaint. It argued essentially that Respondent's use of the mark YANG CHOW DIMSUM & TEAHOUSE & DESIGN in its restaurant business does not constitute trademark infringement. The salient portions of Respondent's Answer are, as follows:

"Sometime in early April 2009, the Respondent applied for its incorporation with the Securities and Exchange Commission ('SEC'). The primary business of Respondent, as indicated in the purpose clause of its Articles of Incorporation filed with the SEC on 07 April 2009, is to engage in the

¹⁰Paragraph 3.11 of the Complaint.

¹¹Paragraph 4.2 of the Complaint.

¹²Paragraph 4.3 of the Complaint.

¹³Paragraph 4.4 of the Complaint.

business of operating restaurants, bars, canteens, and other eating and drinking places.¹⁴

"On 15 April 2009, the said applications was duly approved by the SEC and the Respondent was issued a Certificate of Incorporation. The Certificate of Incorporation shows that Respondent is doing business under the name 'HTK FOOD SPECIALISTS INC. DOING BUSINESS UNDER THE NAME AND STYLE OF YANG CHOW DIMSUM AND TEAHOUSE'.¹⁵

"Around the same time, Respondent applied with Rustans Supercenters, Inc. ('RSI') for a commercial space at Shopwise Bagumbayan, where it planned to put up its first restaurant. RSI issued an Award Notice to Respondent dated 27 April 2009. The Award Notice states, among others, that the Respondent had been awarded a space in Shopwise Bagumbayan located in Libis, Quezon City for the establishment of its restaurant. Almost right away after receipt of the Award Notice, Respondent began preparing for the opening of its restaurant and put up the signage outside the leased premises, in fact even weeks before its formal opening of the said restaurant.¹⁶

"A Lease Agreement was formally executed between RSI and Respondent for the lease of the subject commercial space for a period of three (3) years, commencing on 3 June 2009 and expiring on 30 June 2012.¹⁷

"Likewise, the Respondent filed an Application for Registration with the Bureau of Internal Revenue ('BIR'). Thus, on 18 May 2009, the BIR issued a Certificate of Registration to the Respondent, stating, among others, that Respondent is operating under the tradename 'YANG CHOW DIMSUM TEA HOUSE'.¹⁸

¹⁴Paragraph 12.1 of the Answer.

¹⁵Paragraph 12.1 of the Answer.

¹⁶Paragraph 12.3 of the Answer.

¹⁷Paragraph 12.4 of the Answer.

¹⁸Paragraph 12.5 of the Answer.

"In July 2009, Respondent started to formally operate its restaurant at G15 Ground Floor, Shopwise, Libis Branch, E. Rodriguez, Libis, Quezon City.¹⁹

"Evidencing the start of Respondent's commercial operations in July 2009 under the tradename and using the trademark 'YANG CHOW DIMSUM TEA HOUSE' are official receipts issued by Respondent to its customers on 26 July 2009, as well as the pictures of the opening of its Libis restaurant in July 2009.²⁰

"Subsequently, the SEC, acting on Respondent's application, approved the latter's change of its business name to 'HTK FOOD SPECIALISTS INC. Doing Business under the name and style of 'YANG CHOW DIMSUM TEAHOUSE AND GHENNE'S COFFEE SHOP', thus issuing Respondent an amended certificate of registration on 23 July 2010.²¹

"On 23 August 2010, Respondent filed an application for the registration of the mark 'YANG CHOW DIMSUM & TEAHOUSE & DESIGN' with the Honorable Office. By then, however, Respondent had already for more than a year been in commercial operations. This was designated as Application No. 42010009215.²²

"Subsequently, Respondent filed an amended application with the IPO on 7 February 2011 for the mark 'YANG CHOW DIMSUM & TEAHOUSE & DESIGN (New Version)'. The amended application was designated as Application No. 42011001344.²³

"A perusal of the amended mark shows that the dominant feature, namely, the use of the words 'YANG CHOW DIMSUM & TEAHOUSE' were retained by the Respondent. The only difference in the amended application is in the change in the design of Respondent's mark, i.e., font, color and inclusion of

¹⁹Paragraph 12.6 of the Answer.

²⁰Paragraph 12.7 of the Answer.

²¹Paragraph 12.8 of the Answer.

²²Paragraph 12.9 of the Answer.

²³Paragraph 12.9.1 of the Answer.

the words 'DIMSUM, CONGEE, NOODLES, ROASTING, SHORT ORDER' in finer prints below the words 'DIMSUM TEAHOUSE'.²⁴

"In view of the favorable public response to Respondent's first restaurant in Libis, it started to make expansion plans. Thus, this year, Respondent opened its second 'YANG CHOW DIMSUM TEAHOUSE' restaurant in Eton Centris Walk located at Edsa corner Quezon Avenue, Quezon City. At present, the Respondent is in the process of further expanding the business 'YANG CHOW DIMSUM TEAHOUSE' restaurant to more locations.²⁵

"On 25 January 2011, Respondent received a demand letter from the counsel of herein Complainant, demanding that it immediately cease and desist from using its mark 'YANG CHOW DIMSUM & TEAHOUSE & DESIGN' and from committing acts that allegedly violate Complainant's intellectual property rights. According to the said demand letter, Complainant had registered the mark 'AMM YANG CHOW FOOD EXPRESS AND LOGO' on 18 March 2010. It also alleged that Complainant 'has been using his AMM Yang Chow Trademark since 2009'. This was the first time that Respondent learned about the existence of Respondent's trademark.²⁶

"Although now denied by Complainant in the Answer dated 19 August 2011 that he filed in the Petition for Cancellation, he appears to have commenced commercial operations only towards the end of the first half of 2010. To this, herein Respondent filed a Reply rebutting this new allegation in the said Answer.²⁷

"On 05 May 2010, herein Complainant entered into a Contract of Lease with a certain Arceli Dominguez Victa covering a property located in Emilio Aguinaldo Hi-Way, Palico 4, Imus, Cavite. In the said Contract of Lease, Complainant

²⁴Paragraph 12.9.2 of the Answer.

²⁵Paragraph 12.10 of the Answer.

²⁶Paragraph 12.11 of the Answer.

²⁷Paragraph 12.12.2 of the Answer.

declared that the leased property will be used for his establishment named 'YANG CHOW', a restaurant that will serve 'Authentic Chinese Cuisine'.²⁸

"On 26 July 2010, a Certificate of Business Name Registration was issued to Complainant by the Department of Trade and Industry ('DTI') for the use of its business name 'AMM YANGCHOW FOOD EXPRESS'. Notably the DTI Certification contains the word 'YANGCHOW' instead of the two (2) separate words 'YANG' and 'CHOW'.²⁹

"After the registration with the IPO and DTI, Complainant applied for a business permit and license with the Municipality of Imus. In the Business Information Sheet attached to the application, Complainant declared that its business was established on 26 July 2010 under the business name 'AMM YANG CHOW FOOD EXPRESS'.³⁰

"In view of the above application, Complainant also filed with and/or was issued the following documents by the Municipality of Imus, Cavite: (i) Locational Clearance/Zoning Compliance Application Form dated 18 August 2010; (ii) Affidavit of Parking dated 18 August 2010; and (iii) Certification from the Office of the Barangay Captain dated 29 May 2010.³¹

"Thereafter, Complainant opened his small 'AMM YANG CHOW FOOD EXPRESS' restaurant in Imus, Cavite around the last half of 2010.³²

"It is clear from the foregoing that the Respondent had been using the mark 'YANG CHOW DIMSUM & TEAHOUSE & DESIGN' for its restaurant business prior to the registration of Complainant's 'AMM YANG CHOW FOOD EXPRESS AND LOGO' with the Honorable Office. Thus, as prior user in good faith of

²⁸Paragraph 12.12.2 (a) of the Answer.

²⁹Paragraph 12.12.2 (b) of the Answer.

³⁰ Paragraph 12.12.2 (c) of the Answer.

³¹Paragraph 12.12.2 (d) of the Answer.

³²Paragraph 12.12.3 of the Answer.

its mark 'YANG CHOW DIMSUM & TEAHOUSE & DESIGN', Respondent has a right thereto under law.³³

"In view of Respondent's status as a prior user in good faith of the mark 'YANG CHOW DIMSUM & TEAHOUSE & DESIGN', the present Complaint for trademark infringement under Sections 147, 147.1 and 155 of the IP Code, as well as his claims for damages therein, should be dismissed.³⁴

To prove his allegations, the Complainant presented/submitted evidence, marked as Exhibits "A" to "X", including their sub-markings, consisting of, among others: Certificate of Registration No. 4-2009-006737; Picture of Complainant's Yang Chow Food Kiosk at HTMT Building; Print-out of pictures of Complainant's AYCFE restaurants in NAIA Terminal I, Domestic Road and Imus, Cavite; Print-out of the status of Respondent's application for its 'Yang Chow Dimsum & Teahouse & Design (New Version) as of 23 March 2011; Pictures of Respondent's restaurant; Demand letter dated 25 January 2011 from Complainant's counsel, the See & Herrera Law Firm, addressed to Respondent; Reply letter dated 17 February 2011 from the Martinez Vergara Gonzalez & Serrano law offices addressed to Complainant's counsel; 'Certificate of Business Name Registration' issued by the Department of Trade and Industry; 'Certificate of Registration' issued by the Bureau of Internal Revenue; Sales Invoices from Complainant's Yang Chow food kiosk at HTMT Building dated 06 May 2009 (Invoice No. 0201); 22 May 2009 (Invoice No. 0205); and 11 June 2009 (Invoice No. 0210); 'Lease Agreement' dated 12 November 2008 between HTMT Mini Food Court and Complainant; 'Lease Agreement' dated 23 May 2009 between HTMT Mini Food Court and Complainant; Schematic designs prepared by Architect Jonathan O. Gan for Complainant's AYCFE kiosk in 2005; Pictures of Complainant's kiosks at HTMT building in operation; Pictures of Complainant's 'Frequency Card' used to promote his kiosk at HTMT Building and using his AYCFE Trademark; Letter of Engagement of Counsel dated 10 August 2011; "Lease Contract" dated 16 October 2009 between Complainant and SAN KAPPA DELI, INC.; Petition for Cancellation of Trademark filed by Respondent against Complainant prior to the filing of this case for trademark infringement; Various pictures showing Respondent's restaurant at Libis, Quezon City showing the material dates when the pictures were apparently taken; Various official receipts issued by Respondent's restaurant from receipt no. 0001 to receipt no. 0005 all dated 26 July 2009; Official Receipt No. 0349868 issued by the Intellectual Property Office; and "Billboard Advertising Agreement" dated 28 September 2011. Further, the Complainant himself testified.

³³Paragraph 13 of the Answer.

³⁴Paragraph 14 of the Answer.

Respondent's evidence on the other hand, marked as Exhibits "1" to "26" including their sub-markings, consists of, among others: Petition for Cancellation of Complainant's Trademark Registration No. 42009006737 filed by Respondent with the Honorable Office; Articles of Incorporation of respondent doing business under the Name and Original Certificate of Filing of Amended Articles of Incorporation of Mabuhay style of Yang Chow Dimsum Tea House, filed with the Securities and Exchange Commission ('SEC') on 7 April 2009; Certificate of Incorporation of respondent doing business under the Name and style of Yang Chow Dimsum Tea House issued by the SEC on 15 April 2009; Award Notice dated 27 April 2009 issued by Rustan's Supercenters, Inc. to respondent informing the latter that it has been awarded a space in Shopwise Bagumbayan Branch for the restaurant named Yang Chow Dimsum Tea House; Lease Agreement between RDI and respondent for the lease of an area within Shopwise which served as the location of the latter's restaurant named Yang Chow Dimsum Tea House for the period 3 June 2009 until 30 June 2012; Certificate of Registration dated 18 May 2009 issued by the Bureau of Internal Revenue to respondent for its restaurant named Yang Chow Dimsum Tea House located at Shopwise; Duplicate "Official Receipts" No. 0001 to 0005 of respondent's Yang Chow Dimsum Tea House dated 26 July 2009; "Pictures" taken on 29 July 2009 at respondent's Yang Chow Dimsum Tea House showing the restaurant signages, the customers and the dragon dance held in the premises of the restaurant on that day; Certificate of Filing of Amended Articles of Incorporation of respondent doing business under the name and style of Yang Chow Dimsum Tea House and Ghenne's Coffee Shop issued by the SEC ON 23 July 2010; Print out of respondent's Registration No. 42010009215 for the mark "Yang Chow Dimsum & Teahouse & Design" with the status indicated as Registered; Print out of respondent's Registration No. 42011001344 for the mark "Yang Chow Dimsum & Teahouse & Design (New Version)" with the status indicated as Registered; "Demand Letter" from complainant's counsel dated 25 January 2011; Print out of complainant's Registration No. 42009006737 for the mark "AMM Yang Chow Food Express and Logo" with the status indicated as Registered on 18 March 2010; "Answer" filed by complainant in the Cancellation of Trademark Case; Reply filed by herein respondent in the Cancellation of Trademark case; Application for Business Permit and License dated 17 August 2010 filed by the complainant for its restaurant; Business Information Sheet filed by complainant stating that its business named AMM Yang Chow Food Express was established/started on 26 July 2010; Locational Clearance/Zoning Compliance Application Form filed by complainant on 18 August 2010 for its restaurant; Affidavit of Parking filed by the complainant on 18 August 2010 for its restaurant; Reply letter dated 17 February 2011 sent by respondent's counsel; Judicial Affidavit of Heinrich T. Khoo filed on 21 June 2012; Pictures of respondent's Yang Chow Dimsum Tea House restaurant at Shopwise taken from E. Rodriguez Jr. Avenue in Libis, Quezon City, showing the main signage of the



restaurant; and, Letter form Hap Chan Trading & Management Corp. dated 29 October 2009 addressed to a James Aquino Magtalas, Yang Chow Shopwise, Libis, Q.C. Respondent also presented as witnesses Atty. Arleo Antonio Magtibay, Jr., Junior Associate at Martinez, Vergara, Gonzales and Serrano Law Offices and Mr. Heinrich T. Khoo, President of HTK Food Specialist, Inc.

The parties were given thirty (30) days from receipt of Order No. 2012-74 dated 09 October 2012 to file their respective Memorandum. Complainant filed his Memorandum on 09 November 2012, while the Respondent did so on 08 November 2012.

Issues

1. Whether or not Respondent's use or adoption of the mark "Yang Chow Dimsum & Tea House & Design" for its restaurant business is infringing on Complainant's right as registered owner of "AMM Yang Chow Food Express and Logo" Trademark; and
2. Whether or not Respondent is liable for damages

Section 155 of R.A. 8293, also known as the Intellectual Property Code of the Philippines ("IP Code"), provides:

Sec. 155. *Remedies; Infringement.* - Any person who shall, without the consent of the owner of the registered mark:

Sec. 155.1. Use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark or the same container or a dominant feature thereof in connection with the sale, offering for sale, distribution, advertising of any goods or services including other preparatory steps necessary to carry out the same of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

Sec. 155.2. Reproduce, counterfeit, copy or colorably imitate a registered mark or a dominant feature thereof and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or such advertisements intended to be used in commerce upon or in connection with the same, offering for sale, distribution, or advertising of goods or services or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action for infringement by the registrant for the remedies hereinafter set forth: Provided, that the infringement

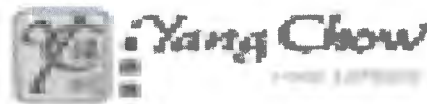
takes place at the moment of the acts stated in Subsection 155.1 or this subsection are committed regardless of whether there is actual sale of goods or services using the infringing material.

The owner of a registered mark may recover damages from any person who infringes his rights, and the measure of the damages suffered shall be either the reasonable profit which the complaining party would have made, had the defendant not infringed his rights, or the profit the defendant actually made out of the infringement, or in the event such measure of damages cannot readily be ascertained with reasonable certainty, then the court may award as damages a reasonable percentage based on the amount of gross sales of the defendant or the value of services in connection with which the mark or trade name was used in the infringement of the rights of the complaining party.

Complainant claims that the Respondent infringes his trademark "AMM Yang Chow Food Express and Logo" which was registered on 18 March 2010. However, Respondent also obtained registration for its trademark "Yang Chow Dimsum & Tea House & Design" on September 08, 2011. Complainant and Respondent gave their respective historical accounts of prior, uninterrupted, and continuous use of their trademarks "AMM Yang Chow Food Express and Logo" and "Yang Chow Dimsum & Tea House & Design," both used for restaurant business. The trademarks are shown below:



Respondent's trademark



Complainant's trademark

Both trademarks contain the words YANG CHOW. "Yang chow" or "Yeung Chow" however, is generic, referring to a popular Chinese-style "wok" fried rice dish in many Chinese restaurants. Even the font style or how the Yang Chow is printed and stylized by the parties in their marks is standard or the Chinese way of printing the word/s YANG CHOW. If common and/or generic, no one can claim exclusive right over the words and font used. In its trademark application for YANG CHOW DIMSUM & TEAHOUSE & DESIGN, Respondent disclaimed the words "YANG CHOW", "DIMSUM & TEAHOUSE". Likewise, the Complainant disclaimed the words "YANG CHOW", "FOOD EXPRESS" and "THE CHINESE CHARACTERS WHICH MEANS YANG CHOW" in his trademark application.

What is, therefore, left for comparison and examination to determine identity or confusing similarity between the competing marks is the combination

of the words and the LOGO used. Complainant's subject mark, apart from the disclaimed words, consists of a rectangular figure in an upward position, it, too consists of "YC" in interconnectivity in standing positions and a chinese charcter, which is substantially different from Respondent's trademark which consists, apart from the disclaimed words, of a background of a dragon on the left and right side with a bowl with a chopstick in the center. Hence, both trademarks vary substantially in the composition and integration of the other main and essential features, in the general design and their overall appearance. It is observed that an ordinary consumer's attention would not be drawn on the minute similarities that were noted but on the differences or dissimilarities of both service marks that are glaring and striking to the eye and ring to the ears conferred on it visual and aural projection that would easily distinguish one from the other.

Moreover, the differences they have in material aspects of their respective marks as they are used in the restaurant business does not make one a colorable imitation of the other. What is more, Respondent's mark is registered, hence, can not be guilty of trademark infringement.

This Bureau finds that Respondent's use and adoption of the mark "Yang Chow Dimsum & Tea House & Design" for its restaurant business is not constitutive of trademark infringement nor is infringing on Complainant's right as registered owner of "AMM Yang Chow Food Express and Logo" Trademark. Since there is no finding of trademark infringement, Complainant is not entitled to any damage/s as claimed.

WHEREFORE, in view of the foregoing, this Bureau finds no valid justification to hold Respondent liable for trademark infringement including damages.

SO ORDERED.

Taguig City, 18 January 2017.


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