

COMESTIBLES MASTER CO., LTD.,  
Petitioner,

-versus-

ALBERT TAN,  
Respondent-Registrant.

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} IPC No. 14-2012-00266  
} Petition for Cancellation:  
} Reg. No. 4-2009-009401  
} Date Issued: 21 January 2010

}  
} TM: CAFÉ 85°C  
}

**NOTICE OF DECISION**

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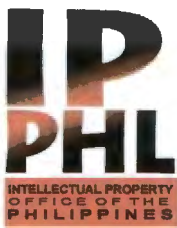
**GREETINGS:**

Please be informed that Decision No. 2017 - 197 dated 06 June 2017 (copy enclosed) was promulgated in the above entitled case.

Pursuant to Section 2, Rule 9 of the IPOPHL Memorandum Circular No. 16-007 series of 2016, any party may appeal the decision to the Director of the Bureau of Legal Affairs within ten (10) days after receipt of the decision together with the payment of applicable fees.

Taguig City, 07 June 2017.

  
**MARILYN F. RETUAL**  
IPRS IV  
Bureau of Legal Affairs



COMESTIBLES MASTER CO., IPC NO. 14 – 2012-00266 LTD.,

Petitioner,

Petition for Cancellation:

- versus -

Reg. Serial No. 42009009401  
Date filed: 21 January 2010  
TM: "CAFÉ 85°C"

ALBERT TAN,

Respondent-Registrant.

DECISION NO. 2017 - 197

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### DECISION

Cosmetibles Master Co. Ltd., (Petitioner),<sup>1</sup> filed a Verified Petition for Cancellation of the Trademark Registration No. 4 - 2009 - 009401 on 4 June 2012. The subject trademark registration filed by Mr. Albert Tan (Respondent-Registrant),<sup>2</sup> covers the mark "CAFÉ 85°C" for " *Brewed Coffee, Roast Coffee, Instant Coffee, Specialty Coffee, Coffee Drinks (Hot or Cold) Tea, Tea Drinks, Cocoa, Chocolate, Candy, Pizza, Pasta, Cake, Bread and Restaurant, Takeout Services, and Catering Services* " under Classes 30 and 43 of the International Classification of Goods.<sup>3</sup>

The Petitioner based its Petition for Cancellation on the following grounds:

1. The Petitioner is the owner of the trademark 85°C Bakery Café and has acquired enormous goodwill over the said trademarks.
2. Respondents' trademark is almost identical to the trademark and trade name of the Petitioner, with the contending marks covering identical/closely related goods and services.

<sup>1</sup> A foreign corporation duly organized and existing under and by virtue of laws of Taiwan, R. O. C., with business address at 1F, No. 35, Gongyecyu 23<sup>rd</sup> Rd. Nantun District, Taichung City 408, Taiwan.

<sup>2</sup> A Filipino citizen with postal address at No. 35, Sandiko St. BF Homes, Brgy. Holy Spirit, Capitol Hills, Quezon City.

<sup>3</sup> The Nice Classification of Goods and Services is for registering trademarks and service marks based on multilateral treaty administered by the WIPO, called the Nice Agreement Concerning International Classification of Goods and Services for Registration of Marks concluded in 1957.

3. The registration of the mark Café 85°C in the name of Respondent should be cancelled pursuant to paragraph 1 of Section 151.1 of the IP Code in relation to Section 123.1 (d), (g) and 165.2 (a) and (b) of the IP Code.
4. The contending marks are nearly identical/confusingly similar and covering identical/related goods and services, with the Petitioner having an earlier and superior filing and registration date.
5. The registration of the mark CAFÉ 85°C in the name of Respondent should be cancelled because it is likely to mislead the public that the Respondent's business is affiliated with or is under the sponsorship of the company/Petitioner.
6. The term 85°C Bakery Café is a tradename of the Petitioner which must be protected.
7. The registration of the Respondent should be cancelled pursuant to paragraph of Section 151.1 of the IP Code in relation to Section 123.1 (d), (g) and 165.2 (a) and (b) of the IP Code.

The pertinent portion in the Petition are quoted as follows:

3.1.1. Petitioner operates a Taiwanese chain of coffee shops called 85°C Bakery Café.

3.1.2 The chain of coffee shops was founded pursuant to the vision of its President and founder, Wu Cheng Hsueh, of providing five-star quality coffee, pastries and services at an affordable price.

3.1.3. The Company's brand "85°C" was a product of Wu Cheng Hsueh's belief that 85°C (185°F) is the optimal temperature to serve coffee. It was his belief that under this temperature, the sweetness, bitterness and sourness of the premium made coffee can be tasted.

3.1.4. Wu Cheng Hsueh opened his first shop in Bao-Ping, Taipei County in July 2004.

3.1.5. Once opened, the shop was serving almost 2000 guest per day and selling over 2000 cups of coffee.

3.1.6. The success of the first store led to the opening of two more stores. The second store opened in August of 2004 in Yuan Toun, Taipei Country and the other in Goun Yi, in Taichung City in November 2004. The opening of the third store marked the beginning of the 85° Bakery Café Franchise.

3.1.7. The 85° Bakery Café franchise is known for its coffee, pastries and the overall "Low Price Luxury" products and services.

3.1.8. By reason of its success, the Company has sought intellectual property protection over its brand "85°C". It was able to secure trademark registration for the aforementioned brands worldwide. Its

earliest registration was granted in its home country in year 2005 and now has registrations in countries such as the United States, Canada, Singapore, Australia, New Zealand, Philippines, among others.

3.1.9. In the Philippines, the Company obtained registration for its trademark "85°C" on 5 February 2007 under Registration no. 4-2005-011001. x x x

3.1.10. The ownership of the company over the mark "85°C" and the trade name "85°C Bakery Café" is beyond cavil. Clearly, the company was the inventor, first user and the first to register the trademark "85°C". In fact, since its inception, the company has been using the trade name 85°C Bakery Café.

3.1.11. From its humble beginnings, the Company now has over 500 stores with branches located in Taiwan, China Australia and the United States. In Taiwan alone, the company has at least 300 outlets x x x

3.1.12. The estimated annual revenue of the company is around US\$200 million.

3.1.13. As early as 2007, the Company is already considered as one of the top 5,000 largest corporations in Taiwan. x x x

3.1.14. The success of the Company and its shops is recognized by numerous write ups about its products. x x x

3.1.15. While already enjoying considerable success, the Company is working on further expansion and growth. x x x

3.1.16. The success and the recognition of the Company's success are clearly demonstrated in the above discussion. The aforementioned success is now expanding worldwide. This success and the rapid growth of the business coupled by the company's aggressive promotion of its business created enormous goodwill over its brand/trademark "85°C" and the trade name "85°C Bakery Café."

3.1.17. The submitted overwhelmingly suggests that the company and its brand have now become well-known, not only in its home country, but worldwide. x x x

3.2.1. The side-by-side comparison of the contending marks would readily show that these marks are nearly identical and actually cover similar and closely related goods and services. x x x

3.2.2. It is apparent that the contending marks are nearly identical and are in fact confusingly similar. It can easily be seen that the Respondent's mark has for its dominant element the Petitioner's trademark "85°C." x x x

3.2.3. It can be pointed out that the term "CAFÉ" in the configuration of the Respondent's mark is a descriptive term which is incapable of exclusive appropriation rendering the contending marks to be identical for all intents and purposes.

3.2.4. The similarity between the contending marks is not limited to visual appearance. Worse, such similarity extends to the goods and services covered by their registration. It has been stressed that the contending marks cover identical and closely related goods/services under Class 30 and 43 of the Nice Classification. Specifically, the contending marks cover the identical goods in coffee products and identical services in restaurant services and catering services, with the rest of the goods and services covered by the contending marks being closely related. x x x

3.3.4. The Petitioner's trademark "85°C" covering goods and services under Classes 30, 32 and 43 was registered in the Philippines prior to Respondent's filing of an application and grant of registration for the mark "CAFÉ 85°C."

3.3.5. The possibility of confusion between the competing marks is evident as these marks differ only in term "CAFÉ" in the configuration of the mark sought to be cancelled. Even then, as previously stated, the contending marks may be treated as identical marks because the term "CAFÉ" may be considered as descriptive of the goods/services covered by the Respondent's registration and hence, incapable of exclusive appropriation.

3.3.6. The aforementioned possibility of confusion is bolstered by the fact that the contending marks cover identical and closely related goods under classes 30 and 43. This is supported by Section 147 of the IP Code which declares in no uncertain terms that "In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed." x x x

3.3.9. Even assuming that the term "CAFÉ" in Respondent's mark is not descriptive, the conclusion would still be the same. In applying the dominance test, the contending marks are confusingly similar by reason of the dominance for the 85°C element in both marks and the similarity and relatedness of the goods and services covered. x x x

3.4.1. Section 123.1 (g) of the IP Code bars the registration of a mark which is likely to mislead the public, particularly as to the nature, quality, characteristics or geographical origin for the goods or services. x x x

3.4.2. Respondent's use of the mark "CAFÉ 85°C" constitutes clothing the former's business and goods with the general appearance of the Petitioner's trademarks, since the marks are confusingly similar, if not identical. Respondent's business and goods are likely to confuse or deceive the public into believing that it is under the sponsorship of the Petitioner, to the great damage and prejudice of the latter. x x x

3.5.1. As discussed in the onset, the Company is the inventor, owner, prior user and registrant of the term "85°C". It is likewise the inventor, owner and prior user of the trade name "85°C Bakery Cafe"

3.5.2. Under Section 165.2 (a) and (b) of the Intellectual Property Code (IP Code) trade names shall be protected against any subsequent use of a third party when such use will likely mislead the public x x x

3.5.6. Respondent's adoption of the term "CAFÉ 85°C" encroaches directly on Opposer's [Petitioner's] prior right to the Company / Opposer's [Petitioner's] trade name. This being so, the registration of the mark "CAFÉ 85°C" is contrary to the IP Code and to the Paris Convention to which the Philippines is a party signatory and should not therefore be countenanced.x x x

3.6.2. As clearly discussed above, the registration of the mark of the Respondent was obtained fraudulently or contrary to the provision of the IP Code and its rules because the Respondent caused such registration in violation of Section 123.1 paragraphs d, and g and 165.2 paragraphs a and b fo the IP Code. x x x

To support its claim, the Petitioner submitted the following evidence:

- Exhibit "A" – Details of Registration No. 4-2009-009401 for the mark CAFÉ 85°C;
- Exhibit "B" – Special Power of Attorney appointing Del Rosario Bagamasbad and Raboca as counsel for the Petitioner;
- Exhibit "C" – Verification and Certification of Non-Forum Shopping;
- Exhibit "D" – Details of Registration no. 4-2005-0011001
- Exhibit "E" – Affidavit of Direct Testimony
  - Annex A – Worldwide schedule of trademark registration for the 85°C mark
  - Annex B to F – Certified True Copies of the Certificate of Registration issued by the trademarks register of Taiwan, United States, Australia and European Union.
  - Annex G-1 t o G-27 – Photocopies of Certificate of Registration or Acceptances issued in various jurisdictions
  - Annex H – publication showing that the Petitioner is one of the top 5000 corporation in Taiwan
  - Annex I to L – Sample write-ups about the Petitioner and/or its product
  - Annex M to O – Advertising materials as used in Australia, China and the United States
- Exhibit "F" – List of outlets in Taiwan
- Exhibit "G-I" – Computer snapshots or print out from the various websites of the Company
- Exhibit "J" – Memorandum of Exhibits

This Bureau issued a Notice to Answer on 14 June 2012 and served to the Respondent-Registrant on 21 June 2012. On 15 August 2012, the Respondent-Registrant filed its Verified Answer denying the pertinent allegations in the Petition for Cancellation. The Respondent-Registrant further averred that:

1. The Petitioner has no legal capacity to institute its Petition for Cancellation.
2. Petitioner is not the owner of the mark 85°C, thus, not a real party in interest in filing the instant Petition.
3. Petitioner's trademark is not well known, either internationally or locally.
4. Respondent's trademark is not confusingly similar with the trademark of Petitioner and will not ever cause confusion, deception on the part of the prudent purchasing public.
5. Petitioner's tradename is not entitled for protection under the IP Code.
6. Petitioner's mark registration must be removed from the registry for failure to file its declaration of actual use.

The pertinent portion of the Answer are quoted as follows:

16. It should be emphasized that Petitioner, Cosmetibles Master Co. Ltd., admitted that it is foreign corporation duly organized and existing under the laws of Taiwan, R.O.C. As a foreign corporation duly organized and existing under the laws of Taiwan, R.O.C. As a foreign corporation, it must comply with all the requirements of the Philippine laws before it can institute an action before Philippine Courts or administrative agencies pursuant to Section 129 of Batas Pambansa Blg. 68, otherwise known as the Corporation Code of the Philippines x x x

18. A careful perusal of the petition together with the pieces of evidence attached, nowhere can be shown that its capacity to sue has been proved affirmatively except by virtue of petitioner's allegations. x x x

19. Pursuant to Sec. 122 of Republic Act No. 8293, otherwise known as "Intellectual Property Code of the Philippines. (IP Code for brevity)", the right to the mark shall be acquired through registration made validly in accordance with the IP Code x x x

20. However, this mark must be read together with Sec. 124.2 of the same law which requires the filing of the declaration of actual use x x x

21. Thus, under the present IP Code of the Philippines as contrary to the old IP Code, trademarks are acquired through registration and subsequent actual use. Without the declaration of actual use, petitioner never acquired any rights over their trademark sought to be protected. Much more to sought the cancellation of the Respondent's mark;

22. A simple and careful perusal of the Petition together with its annexes nowhere can it be shown that the declaration of actual use has been filed by the Petitioner. Considering that grace period for them to file the

declaration of actual use had lapsed, which is (3) years from 8 November 2005 or until 7 November 2008. Up until now, petitioner had never filed a declaration of actual use. It is almost seven (7) years since 8 November 2005 – more than enough time had been afforded. Thus, petitioner is not the owner of the mark 85°C;

x x x

23. In determining whether a mark is well known or not, the following criteria or any combination thereof may be taken into account by competent authority of the Philippines, to wit:

a. The duration, extent and geographical area of any use of the mark, in particular, the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or service to which the mark applies;

b. The market share in the Philippines and in other countries, of the goods and/or services to which the mark applies;

c. The degree of the inherent or acquired distinction of the mark;

d. The quality image or reputation acquired by the mark;

e. The extent to which the mark has been registered in the world;

f. The extent to which the mark has been used in the world;

g. The commercial value attributed to the mark in the world;

h. The record of successful protection of the rights in the mark;

i. The outcome of litigations dealing with the issue of whether the mark is well known mark; and

j. The presence or absence of identical or similar mark validly registered for or used on identical or similar goods or services and owned by persons other than the person claiming that his mark is a well-known mark. (Rules and Regulations on Trademarks, Service Marks, Trade Names and Marked or Stamped Containers)

24. It should be emphasized that nothing in the Petition or any of its annexes will show that any one or a combination of the abovementioned requirements had been complied with by the petitioner. Thus, their mark is not well known, locally or internationally;

25. Even assuming without admitting, that the mark of the petitioner is well known internationally, such fact is not sufficient to establish their rights in the instant case. Pursuant to Sec. 123 (e) and (f) of the IP Code, a trademark must be well known internationally AND in the Philippines before it can be considered as a well known mark x x x

26. Thus, the same scenario in the case of Kabushi Kaisha Isetan vs. The Intermediate Appellate Court et. al., the Supreme Court ruled that although the mark is well-known in Japan, but not in the Philippines, the mark cannot be considered a well-known mark under the IP Code. Thus, the trademark "Isetan" being claimed by Kabushi Kaisha Isetan, a foreign corporation organized and existing under the laws of Japan, "is unknown to Filipinos", the mark is not internationally well-known;

27. Nowhere in the petition together with its annexes can show that the mark 85°C is well known to the Filipinos. Thus, they cannot claim that the mark 85°C is well known.



28. The term "confusingly similar" 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 purchaser as to the goods or services or as to their source of origin; x x x

30. An examination of the two marks will clearly distinguish that these two marks are not the same. While both marks contain the word 85°C, the mark of the respondent contains the word Café for its differentiation. Although that respondent disclaim exclusivity over the word Café for its differentiation. Although the respondent disclaim exclusivity over the word Café, but it doesn't mean that the word Café will not serve any purpose at all;

33. The very purpose of a disclaimer is to permit the registration of a mark that is registrable as a whole but contains matter that would not be registrable standing alone. As used in trademark registration, a disclaimer of a descriptive component of a composite mark amounts merely to statement that, in so far as the particular registration is concern, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and that the particular registration represents only such rights as flow from the use of the composite mark;

34. As contrary to the claim of the petitioner, their mark consist of generic term which cannot acquire exclusion of others;

35. Pursuant to paragraph (h) and (i) of Sec 123 of the IP Code, a generic word cannot be registered as trademark x x x

37. Not even a single piece of evidence has been shown that their mark acquired a secondary meaning which affords protection under IP Code;

38. The clear evil intent of the petitioner is obvious, to prevent their competitor from entering the market; x x x

41. Petitioner is trying to mislead this Honorable office into believing that they own the tradename 85°C;

44. As judicially admitted by the Petitioner in their petition and its attached Secretary Certificate, the name of their enterprise is COSMETIBLES MASTER CO. LTD., contrary to the alleged 85°C. The clear intent is obviously to mislead this Honorable Office in resolving the issues involved in the instant case;

45. Even assuming, without admitting, that 85°C is in fact their tradename, such fact is insufficient to afford them protected under the IP Code of the Philippines or Paris Convention x x x

46. It is elementary that the tradename shall be acquired by adoption AND prior use, and it belong to the one who first uses them and gives them value. The IP Code protects trade names from infringement even if they are not registered with the IPO, provided, such trade name must previously be used in trade or commerce in the Philippines. Otherwise, protection is not applicable.x x x

48. Considering that the herein Petitioner failed to file its declaration of actual use within (3) years from the time of filing their application or until 07 November 2008. Thus, their registration must be removed from the registry of the IP Office;

49. Further considering their mark is a generic term which under our IP Code cannot be registered. It is *juris publici*, incapable of appropriation by any single individual to the exclusion of others.

On 6 September 2012, the Petitioner filed its Reply, refuting the allegations of the Respondent and reiterating its arguments that: Respondent's mark CAFÉ 85°C is identical to Petitioner's well known mark 85°C and 85°C Bakery Café; Petitioner is the owner of the well-known 85°C mark; and the Petitioner has capacity to sue; and the counterclaim must be dismissed because it has no legal and factual justification.

On 8 April 2012, the preliminary conference was terminated and the parties were directed to file their respective Position Papers. Consequently, this case was submitted for decision.

The primary issue to be resolved in this case is whether the trademark "CAFÉ 85°C" covered by Trademark Registration No. 4-2009-009401 should be cancelled.

Before discussing the said substantive issue, this Bureau will deal first with the question on legal capacity of Petitioner as raised by the Respondent-Registrant.

Section 3 in relation to Section 160 of the Intellectual Property Code, expressly provides that "Any person who is a national or who is domiciled or has a real and effective industrial establishment in a country which is a party to any convention, treaty or agreement relating to intellectual property rights or the repression of unfair competition, to which the Philippines is also a party, or extends reciprocal rights to nationals of the Philippines by law, shall be entitled to benefits to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of an intellectual property right is otherwise entitled by this Act."

In the instant case, the Petitioner has sufficiently shown that it is a national of Taiwan, R. O. C. or at the very least has a real and effective industrial establishment in Taiwan. On this score, this Bureau takes judicial notice that the Philippines is a party to IP conventions or agreements, among which is the Trade Related Aspect of Intellectual Property System or TRIPS Agreement where there are 164 members including Chinese Taipei or Taiwan. Accordingly, the

Petitioner has the legal capacity to sue on aspects relating to intellectual property rights or unfair competition.

Proceeding now with the main issue in the instant case, this Bureau finds that the Petition for Cancellation is meritorious.

The present petition is anchored on Section 151 of the Intellectual Property Code. The particular provisions are hereby quoted as follows:

**Section 151. Cancellation.** - 151.1. A petition to cancel a registration of a mark under this Act may be filed with the Bureau of Legal Affairs by any person who believes that he is or will be damaged by the registration of a mark under this Act as follows:

(a) Within five (5) years from the date of the registration of the mark under this Act.

(b) At any time, if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or has been abandoned, or its registration was obtained fraudulently or contrary to the provisions of this Act, or if the registered mark is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used. x x x

The trademarks of both parties are reproduced below for comparison.

85 C

Petitioner's Mark

Café 85°C

Respondent-Registrant's  
Mark

This Bureau finds that the dominant feature of the two wordmarks is the word "85°C." The distinct "85°C" mark is the one that leaves an impression on the buying public. The additional word "Café" found in the Respondent-Registrant mark is merely descriptive of the type of business subject of the mark and does not provide any separate or distinctive identity to the Respondent-Registrant's mark. Moreover, the similarity of the said distinguishing dominant feature is all the more apparent, considering that even the lettering style and the design are identical.

Moreover, this Office also finds that the goods subject of the two (2) competing marks are closely related. The Respondent-Registrant's

trademark is being applied on: *brewed coffee, roast coffee, instant coffee, specialty coffee, coffee drinks (hot or cold), tea, tea drinks, cocoa, chocolate candy, pizza, pasta, cake, bread, and coffee shop, restaurant, take out services, catering services based services.*

The above enumerated products are closely related if not outright competing to the products subject of the Petitioner's mark, to wit: *farinaceous food pastes; biscuits; cookies; sweetmeats (candy); cocoa products; coffee cakes; chocolates; popcorn; icecream; cocoa beverages with milk; coffee beverages with milk; chocolate beverages with milk; bread; honey; noodles; pies; meat pies; sandwiches; pastries; spaghetti; pasty; pizza; rusks; pancakes; sushi; tortillas; edible ices; oat-based food; coffee-based beverages; cocoa-based beverages; chocolate-based beverages; custard; fruit jellies [confectionery]; iced tea; tea based beverages; tea; non-alcoholic fruit extracts; beer; non-alcoholic fruit juice beverages; whey beverages; fruit juices; water [beverages]; mineral water [beverages]; seltzer water; must lemonades; vegetable juices; [beverages]; grape must [unfermented]; soda water; sherbets [beverages]; sorbets [beverages]; sorbets [beverages]; tomato juice [beverages]; non-alcoholic beverages; milk of almonds [beverages]; aerated water; non-alcoholic beverages; milk of almonds [beverages] aerated water; non-alcoholic fruit nectars; non-alcoholic aperitifs; non-alcoholic cocktails; isotonic beverages; non-alcoholic cider; bar services; food and drink catering; cafes; cafeterias; canteens; hotels; restaurants; self-service restaurants; snack bars; rental of chairs; tables; table linen; glassware; boarding houses; mobile supply of beverage and food; teahouse; carry-out restaurants; restaurants featuring home delivery; and salad bars.*

Undoubtedly, the used of such identical dominant mark on similar, related and even competing goods would result to public confusion and detrimental to the consumers. Therefore, it is imperative to determine who between the contending parties has the right over the dominant mark.

The records bear out that when the Respondent-Registrant applied for registration of his trademark "Café 85°C" on 17 September 2009, the Petitioner has already an existing registration of the trademark "85°C" for over two (2) years. In fact, the said mark was applied by the Petitioner way back in 2005 or four (4) years before the Respondent-Registrant. Moreover, the Petitioner has shown that it was the prior adopter of the mark and the said mark is subject of trademark registrations not only in the Philippines but also from other jurisdictions.<sup>4</sup>

Under the Sec. 123.1 (d) of Republic Act No. 8293 or the IP Code, a mark cannot be registered if it is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of: a.) the same goods or services, or b.) closely related goods or services or c.) if it nearly resembles such a mark as to be likely to deceive or cause confusion. Pursuant thereto,

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<sup>4</sup> Exhibit "E" of the Petitioner


the registration of the Respondent of the mark “85°C”, which is confusingly similar with the earlier trademark of the Petitioner and was applied to similar or closely related goods and services, was in violation of the provision of the IP Code.

Time and again, our Supreme Court has consistently ruled that registration of a trademark merely creates a prima facie presumption of the validity of the registration, of the registrant’s ownership of the trademark, and of the exclusive right to use thereof.<sup>5</sup> The presumption is rebuttable and must give way to the evidence to the contrary.<sup>6</sup> In the instant case, the Petitioner has sufficiently proven that the registration of the Respondent trademark was contrary to the provision of the IP Code and should be cancelled.

**WHEREFORE**, premises considered, the instant Petition for Cancellation is hereby **GRANTED**. Accordingly, the Certificate of Registration No. 42009009401 is **CANCELLED**. Let the filewrapper be returned together with a copy of this Decision to the Bureau of Trademarks (BOT) for appropriate action.

**SO ORDERED.**

Taguig City, 10<sup>6</sup> JUN 2017

  
Atty. **Leonardo Oliver Limbo**  
Adjudication Officer  
Bureau of Legal Affairs

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<sup>5</sup> Birkenstock Orthopaedic GMBH and Co. KG vs. Philippine Shoe Expo Marketing Corporation, G.R. No. 194307, 20 November 2013.

<sup>6</sup> *ibid*