

KOLIN ELECTRONICS CO. INC.,
Opposer,

-versus-

KOLIN PHILIPPINES INTERNATIONAL, INC.,
Respondent-Applicant.

IPC No. 14-2016-00227

Opposition to:

Appln. Serial No. 4-2013-006028

Date Filed: 27 May 2013

TM: KOLIN AIR CONDITIONER

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NOTICE OF DECISION

BENGZON NEGRE UNTALAN

Counsel for Opposer

Second Floor SEDCCO Building

Rada corner Legaspi Streets,

Legaspi Village, Makati City 1229

CAYANGA ZUÑIGA & ANGEL LAW OFFICES

Counsel for Respondent- Applicant

2nd Floor, One Corporate Center

845 Arnaiz Avenue, Legaspi Village

Makati City

GREETINGS:

Please be informed that Decision No. 2017 - 304 dated 07 August 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 August 2017.

MARILYN F. RETUAL

IPRS IV

Bureau of Legal Affairs

Republic of the Philippines
INTELLECTUAL PROPERTY OFFICE

Intellectual Property Center # 28 Upper McKinley Road, McKinley Hill Town Center, Fort Bonifacio,
Taguig City 1634 Philippines • www.ipophil.gov.ph

T: +632-2386300 • F: +632-5539480 • mail@ipophil.gov.ph

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IPC No. 14-2016-00227

Opposition to:
Application No. 4-2013-006028
Date Filed: 27 May 2013
Trademark: "KOLIN AIR
CONDITIONER"

Decision No. 2017- 304

DECISION

KOLIN ELECTRONICS CO., INC.¹ ("Opposer") filed an opposition to Trademark Application Serial No. 4-2013-006028. The application, filed by KOLIN PHILIPPINES INTERNATIONAL, INC.² ("Respondent-Applicant"), covers the mark "KOLIN AIR CONDITIONER" for use on "*business management and information; providing website for promotion and on-line sales*" under Class 35 of the International Classification of Goods and Services.³

The Opposer alleges:

x x x

"10. As narrated in the Affidavit of Ms. Julie Tan Co and judicially determined in the proceedings in Inter Partes Case No. 14-1998-00050, the mark 'KOLIN' has been in use by Opposer in the Philippines through its predecessor-in-interest, KOLIN Electronics Industrial Supply (KEIS) as early as February 17, 1989. KEIS was involved in the business of manufacturing, distributing and selling electronic products.

"11. On 20 November 1995, Miguel Tan, proprietor of KEIS, executed a Deed of Assignment of Assets of even date, assigning all the assets of his business, including its business name, KOLIN Electronics Industrial Supply, in favor of Opposer. Attached to the Affidavit of Ms. Julie Tan and made an integral part hereof as Exhibit 'C' is a copy of the Deed of Assignment of Assets dated 20 November 1995 between Miguel Tan and Kolin Electronics Company Incorporated, represented by Johnson N. Tan as General Manager of Opposer.

"12. Despite its peaceful and legal use of the trade name and trademark since 1989, Opposer was compelled to defend its ownership over the mark 'KOLIN' in 1998,

¹With address at 2788 Anacleto Extension, Tondo, Metro Manila.

²With address at Kolin Bldg., EDSA cor. Magallanes Ave., Magallanes Village, Makati City, Metro Manila, Philippines.

³The 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.

when TKLC filed an opposition to the application for registration of KECI's mark 'KOLIN' docketed as Inter Partes Case No. 14-1998-00050.

"13. To prove its legal right over the trade name and trademark, Opposer submitted evidence of its prior and continuous use of the mark. The Bureau of Legal Affairs (BLA) eventually ruled that, 'upon consideration of the records and the documentary as well as the testimonial evidence presented by the parties,' it found that '(KECI) is the prior adopter and user of the mark 'KOLIN' in the Philippines, having been able to prove the date of first use of its mark in the year 1989 which is ahead of (TKCL's) use in the Philippines which is in the year 1996 as shown by its advertisements in the newspaper, PHILIPPINE DAILY INQUIRER and the PHILIPPINE STAR.' Thus, the BLA denied TKCL's Opposition. A copy of Decision No. 2002-46 dated 27 December 2002 is attached to the Affidavit of Ms. Julie Tan Co and made an integral part hereof as Exhibit 'D'.

"14. Decision No. 2002-46 was affirmed by the Director General in a Decision dated 6 November 2003, where the Director General stated, among others, that indeed, KECI is the prior and actual commercial user and owner of the trademark 'KOLIN' in the Philippines. A copy of the said Decision dated 6 November 2003 is attached to the Affidavit of Ms. Julie Tan Co and made an integral part hereof as Exhibit 'E.'

"15. The findings of the BLA and the Director General were also upheld by the Court of Appeals in its Decision dated 31 July 2006 in CA-G.R. SP No. 80641. TKCL withdrew its appeal with the Supreme Court: hence, the Court of Appeals' Decision has since become final and executory. Copies of the Court of Appeals Decision dated 31 July 2006 in CA-G.R. SP No. 80641 and TKCL's withdrawal of appeal are attached to the Affidavit of Ms. Julie Tan Co and made integral parts hereof as Exhibit 'F' and 'G,' respectively.

"16. Since the Decision of the Court of Appeals in CA-G.R. SP No. 80641 became final and executory, the IPOPHL issued in favor of Opposer Certificate of Registration No. 87497 for 'KOLIN' under Class 9, for 'automatic voltage regulator; converter; recharger; stereo booster; AC-DC regulated power supply; step-down transformer; and PA amplified AC-DC'. Opposer also secured registration of the mark 'KOLIN' under Class 35, 'for the business of manufacturing, importing, assembling or selling electronic equipment or apparatus'. Copies of the Certificates of Registration covering the aforementioned marks are attached to the Affidavit of Ms. Julie Tan Co and made integral parts hereof as Exhibits 'H' and 'I,' respectively.

"17. Opposer is also the owner of the domain names www.kolin.com.ph and www.kolin.com.ph. Opposer likewise sought registration of the trademarks 'www.kolin.com.ph' and 'www.kolin.ph', both under Class 35 for 'business of manufacturing, importing, assembling or selling electronic equipment or apparatus'. Copies of the application for registration of the said marks are attached to the Affidavit of Ms. Julie Tan Co and made integral parts hereof as Exhibits 'J' and 'K,' respectively. An original print-out of the webpage www.kolin.com.ph is likewise attached to the Affidavit of Ms. Julie Tan Co and made an integral part hereof as Exhibit 'L'.

"18. It is significant to note that, at the time Opposer, through its predecessor, started using 'KOLIN' as its trade name on February 17, 1989, which was during the effectivity of Republic Act No. 166 ('R.A. 166'), use in Philippine commerce, and not

registration, was the basis of ownership of a trademark or trade name. Section 2-A of R.A. 166 provides:

x x x

"19. Further, Section 165 of Republic Act No. 8293 or the Intellectual Property Code ('IP Code') provides for the right of an owner of a trade name:

x x x

"20. Hence, the provisions of R.A. 166 and the IP Code are clear that owners of trade names or business names are accorded protection against any unlawful act committed by third parties. The IP Code does not even require the owner of the trade name to register the said trade name before the owner is protected because trade names or business names are protected even prior to or without registration from unlawful acts of third parties. Corollarily, the IP Code goes as far as to declare the subsequent use of the trade name by a third party, whether as a trade mark or trade name, to be an unlawful act committed against the owner of the trade name.

"21. Thus, the Supreme Court declared in *Coffee Partners, Inc. v. San Francisco Coffee & Roastery, Inc.*:

x x x

"22. The IP Code defines a trade name as 'the name or designation identifying or distinguishing an enterprise.' It is used to designate the entire enterprise or business, regardless of the goods it sells or the services it provides. By reason of Opposer's prior use in the Philippines of the trade name 'KOLIN' since 1989, it is clear that Opposer is entitled to the exclusive use of the said trade name in the Philippines. Opposer has a clear right to oppose Respondent-Applicant's trademark application considering that the registration of KOLIN AIR CONDITIONER in the name of Respondent-Applicant violates Opposer's right as a trade name owner.

"23. It bears remembering that Section 165.2 of the IP Code makes it unlawful for any third party to subsequently use the trade name, whether as a trade name or a mark or service mark, and regardless on which goods or services it is applied to, for as long as such use is likely to mislead the public. In the instant case, Respondent-Applicant's use of the mark 'KOLIN' for its entire business, regardless of the goods or services it actually applies the mark to, has ACTUALLY MISLED THE PUBLIC, as evidenced by various electronic mails (e-mails) from consumers that were sent to Opposer's email address asking for information or services, or otherwise stating complaints about the goods of Respondent-Applicant which were confused or mistaken to be Opposer's products. It has also confused third parties like Ben Line and PLDT. Similarly, Respondent-Applicant's use of the mark KOLIN AIR CONDITIONER whether as trade name, trademark or service mark, is unlawful and should be disallowed by this Honorable Office.

"24. This Honorable Office should further take note that Section 123 (d) of the IP Code provides for instances when a mark cannot be registered, to wit:

x x x

"25. Section 123 (d) of the IP Code explicitly proscribes the registration of a mark 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 the same goods or services, or

closely related goods or services, or if it nearly resembles such a mark as to be likely to deceive or cause confusion.

"26. In this case, the contending trade name and trademarks are as follows:

x x x

"27. x x x

"28. It is undeniable from the above that the mark KOLIN AIR CONDITIONER sought to be registered by Respondent-Applicant appropriated the entirety of Opposer's already registered marks 'KOLIN' in Class 9 and 'KOLIN' in Class 35.

"29. As for the goods or services involved, it is patent from Section 123.1 (d) that it is not necessary that the goods of the junior user be identical to the goods enumerated in the senior user's certificate of trademark registration. Furthermore, Section 138 of the IP Code clearly states:

x x x

"30. Thus, if the goods of the junior user are closely related to the goods covered by the registration of the senior user, the latter should be protected. Also, it is not necessary for the subject goods to be within the same class for the same to be considered closely related.

"31. As early as 1942, the Supreme Court in Ang v. Teodoro has ruled that two goods classified under different classes may nevertheless be considered as belonging to the same class if the simultaneous use of trademarks on the goods will likely result in the confusion as to the origin or personal source of the goods:

x x x

"32. Also, in Chua Che v. Phils. Patent Office, the issue before the Supreme Court was whether petitioner Chua Che can be allowed to register 'T.M.X-7' for soap when private respondent Sy Tuo had previously registered and used the mark 'X-7' for toilet articles (perfume, lipstick and nail polish). The Supreme Court upheld the decision of the Director of Patents in rejecting the application of Chua Che and held that it is not necessary to establish that the goods of the parties possess the same descriptive properties:

x x x

"33. Moreover, in Sta. Ana v. Maliwat, the issue was whether Sta. Ana could be allowed to register 'FLORMEN' for ladies' and children's shoes when respondent Maliwat had previously registered 'FLOMANN' for shirts, pants, jackets, and shoes for ladies, men and children. The Supreme Court disallowed the application of Sta. Ana because of the close similarity between the two marks and the likelihood of confusion of one to the other. The Supreme Court instructed:

x x x

"34. In fact, Section 144.2 of the IP Code clearly states:

x x x

"35. In this case, the goods and services involved are as follows:

x x x

"36. x x x

"37. It cannot be denied that the services 'advertising; business management and information; providing website for promotion and on-line sales' covered by the Respondent-Applicant's application is broad enough to cover the goods and services covered by Opposer's trade name and marks.

"38. Furthermore, Opposer's trademarks are also protected in product and market areas that are the normal potential expansion of his business. Thus, the Supreme Court in Dermaline, Inc. vs. Myra Pharmaceuticals, Inc. instructed that:

x x x

"39. In the same manner that the public may mistakenly think that Dermaline is connected to or associated with Myra, and/or would likely be misled that Myra has already expanded its business through Dermaline from merely carrying pharmaceutical topical applications for the skin to health and beauty services, the public may mistakenly think that Respondent-Applicant is in any way connected to or associated with Opposer, or the public would likely be misled that either party has already expanded its business into another field or through the other party, or the use by Respondent-Applicant of the mark forestalls the normal potential expansion of Opposer's business. The registration of the mark KOLIN AIR CONDITIONER in Class 35 would effectively bar Opposer from enjoying protection in products and market areas that are clearly within its normal potential expansion of business, such as 'advertising; providing website for promotion and on-line sales; business management and information'. In fact, 'advertising; providing website for promotion and on-line sales; business management and information' are services that are already incidental to Opposer's conduct of its business, considering it is the owner of the domain names www.kolin.com.ph and www.kolin.ph. Opposer also has an email facility, and may be contacted through its e-mail addresses, including support@kolin.com.ph and sales@kolin.com.ph.

"40. The function of a trademark is to point out distinctly the origin or ownership of the goods (or services) 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. Corollary to this, the true test of non-registrability of a mark is its propensity or likelihood to deceive or mislead the purchasing public into believing that the products to which the marks are applied originated from the same source.

"41. In this case, there is not only likelihood of confusion, but actual confusion of the public, who are led to believe that [i] Respondent-Applicant's products and services and Opposer's products and services are of the same origin, or [ii] that Respondent-Applicant and/or TKCL are somehow related to Opposer.

"42. There is actual proof that consumers have been confused and/or deceived into believing that Respondent-Applicant's goods bearing the identical mark KOLIN emanate from or are under the sponsorship of opposer Kolin Electronics Co., Inc., owner/registrant of the trademark KOLIN. Proof of such actual confusion consist of various electronic mails (e-mails) from consumers that were sent to Opposer's e-mail address asking for information or service, or otherwise stating complaints about the

goods of Respondent-Applicant which were confused or mistaken to be Opposer's products. As stated in the Affidavit of Ms. Julie Tan Co, over the span of many years, she has received from the email addresses of Opposer numerous e-mail queries and/or complaints regarding products manufactured and distributed by Respondent-Applicant, TKCL, and Kolinphil, none of which are connected with Opposer. A compilation of print-outs of said e-mail requests are attached to the Affidavit of Ms. Julie Tan Co and made an integral part of this Opposition as Exhibit 'M' and series. Such e-mail messages are mere representative samples of all e-mail messages Opposer has received over the years showing confusion among the public with respect to the origin of the goods and/or services identified by the KOLIN mark. Other samples of e-mail messages evidencing confusion have been submitted in the various proceedings in which the parties are involved. However, due to technical constraints in Opposer's IT system, these other emails have recently been archived and are not readily available for printing.

"43. In an effort to lessen confusion as to the source of the goods to protect its reputation which began long before the instant opposition, Opposer was even constrained to issue a disclaimer to the public as early as 2004. A copy of the Opposer's newspaper publication in the 29 November 2004 issue of the Philippine Daily Inquirer is attached to the Affidavit of Ms. Julie Tan Co and made an integral part of this Opposition as Exhibit 'N.'

"44. On 20 December 2007, an Arrival Notice addressed to Julie Tan Co via facsimile was sent by Ben Line Agencies Philippines, Inc., a customs brokerage firm that is used both by Opposer and KPPI/Kolinphil. The Arrival Notice was meant for KPPI/Kolinphil, as shown by the column under 'Number' on the upper left portion of the Notice, with address at 'Kolin Bldg. EDSA cor. Magallanes Village, Makati City, Philippines,' which is not KECI's office address, but of KPPI/Kolinphil. A copy of the faxed Arrival Notice is attached to the Affidavit of Ms. Julie Tan Co and made an integral part of this Opposition as Exhibit 'O.'

"45. Even the Philippine Long Distance Telephone (PLDT) has confused Respondent-Applicant with Opposer, as shown in Ms. Julie Tan Co's e-mail exchanges with PLDT. Original print-outs of Ms. Julie Tan Co's e-mail exchanges with PLDT are attached to her Affidavit and made an integral part of this Opposition as Exhibit 'P' and series.

"46. Thus, any speculations on the relatedness of the subject goods and services are trumped by the fact that there is actual confusion of business in the instant case. Respondent-Applicant's mark does not merely have a propensity or likelihood to deceive or mislead, it actually confuses the public with respect to the origin of the goods and/or services using the 'KOLIN' mark. Such confusion would be perpetuated and legitimized if Respondent-Applicant's application for registration of the mark KOLIN AIR CONDITIONER under Class 35 were to be allowed. Clearly, Respondent-Applicant's mark should not be allowed registration by this Honorable Office.

"47. Section 147.1 of the IP Code of the Philippines vests upon the owner of a registered the exclusive right to prevent all third parties, without its consent, from the use of identical or similar signs which would result in likelihood of confusion.

x x x

"48. Clearly, and explicitly, under the foregoing IP Code provision, Opposer, the registered owner of the mark KOLIN possess the right to prevent Respondent-

Applicant Kolin Philippines International Inc. from using the trademark KOLIN AIR CONDITIONER through its registration with the IPO of the Philippines. The trademark KOLIN AIR CONDITIONER is 'similar', if not 'identical' to opposer's trademark KOLIN and is intended 'for services which are identical to those in respect of which the trademark (KOLIN of Opposer) is registered, where such would result in a likelihood of confusion'.

"49. The only means by which the Respondent-Applicant may validly use the mark KOLIN AIR CONDITIONER through a registration with the IPO of the Philippines is by 'having the owner's (Opposer) consent' which it did not have nor does it have. Needless to state, the Respondent-Applicant never secured Opposer's consent to its application.

"50. In view of the foregoing, Opposer's mark KOLIN which is legally protected under Philippine law bars the registration in the Philippines of the confusingly similar mark KOLIN AIR CONDITIONER of Respondent-Applicant Kolin Philippines International Inc.

The Opposer's evidence consists of the Corporate Secretary's Certificate appointing the law firm of Bengzon Negre Untalan Intellectual Property Attorneys as Opposer's counsel and attorneys-in-fact in connection with this opposition case; the Affidavit of Julie Tan Co, Corporate Secretary of Opposer Kolin Electronics Co., Inc.; a copy of the Deed of Assignment of Assets dated 20 November 1995 between Miguel Tan and Kolin Electronics Company Incorporated; a copy of Decision No. 2002-46 dated 27 December 2002; a copy of Decision dated 6 November 2003 in Appeal No. 14-03-24 rendered by the Director General of the Intellectual Property Office of the Philippines ("IPOPHL"); copies of the Court of Appeals Decision dated 31 July 2006 in CA-G.R. SP No. 80641 and Taiwan Kolin Co. Ltd.'s withdrawal of appeal; copy of Trademark Reg. No. 4-1993-087497 for the mark KOLIN covering goods in Class 9; copy of Trademark Reg. No. 4-2007-005421 covering services in Class 35; copies of the application for registration of the marks www.kolin.com.ph and www.kolin.ph; print-out of the webpage www.kolin.com.ph; copies of various electronic mails (e-mails) sent to Opposer's e-mail address regarding goods of Respondent-Applicant; a copy of the Notice to Public posted in the Philippine Daily Inquirer; a copy of the Arrival Notice sent by Ben Line Agencies Philippines, Inc.; copies of electronic mails sent to Opposer by PLDT and print-out of the E-Gazette Publication concerning Respondent-Applicant's proposed mark.⁴

This Bureau issued a Notice to Answer and served a copy thereof upon Respondent-Applicant on 22 June 2016. The Respondent-Applicant filed their Answer on 5 September 2016 and avers the following:

x x x
SPECIAL AND AFFIRMATIVE DEFENCES



⁴ Marked as Exhibits "A" to "Q", inclusive.

"39. KPII's application for registration of 'kolin air conditioner' is intended for use in advertising, business and website in connection with KPII's business involving the wholesale manufacturing, importing, assembling, selling or distributing and marketing of KOLIN-branded air-conditioners.

"40. KPII is responsible in making available in the Philippine market, way back in 1996, the KOLIN-branded Home Appliances of Taiwan Kolin of Taiwan, Republic of China (R.O.C.).

"41. Taiwan Kolin is the originator of the name, mark and symbol 'KOLIN' when it adopted and used the mark as early as 1963 on various home appliance goods and services. 'KOLIN' is a coined word derived from two (2) Chinese words 'Ko,' meaning song, and 'lin,' meaning forest, or 'FOREST OF SONGS.'

"42. Taiwan Kolin's home appliance goods are widely advertised, distributed and sold not only in Taiwan, R.O.C. but also in several countries. To protect its intellectual property rights and the goodwill that it has built overtime on the KOLIN-branded Home Appliances, Taiwan Kolin has caused to be duly registered the name and symbol 'KOLIN' in various jurisdictions.

"43. Taiwan Kolin caused the 'KOLIN' mark and symbol to be registered in the intellectual property office of Taiwan, R.O.C. in 1996. Taiwan Kolin also caused the registration of and holds the certificate of registration for the name and symbol 'KOLIN' in the People's Republic of China (1992), Vietnam (1996) and Malaysia (1996), among others. The certified true copy of the Affidavit of Chi-Lei Liu, Director of Taiwan Kolin is hereto attached as EXHIBIT '1' while the certified true copy of the various trademark registration certificates obtained by Taiwan Kolin in Taiwan, R.O.C., People's Republic of China, Malaysia and Vietnam are hereto attached as EXHIBITS '2' to '7'.

"44. At the time of the filing of KPII's Trademark Application No. 4-2013-006028 for the registration of its mark 'kolin air conditioner' subject of the instant case, KPII is the only entity authorized by Taiwan Kolin to register the mark 'KOLIN' in the Philippines for use in business in connection with the marketing, selling and distribution of KOLIN-branded Home Appliances, specifically: KOLIN television sets and DVD players in Class 9; KOLIN air-conditioners, refrigerators, electric fans, desk fans, dehumidifiers, microwave ovens, rice cookers, flat irons in Class 11; and KOLIN water dispensers in Class 21, proof of which is hereto appended and made an integral part hereof as EXHIBIT '8'.

"45. Being the only entity in the Philippines dealing with KOLIN-branded Home Appliances, particularly KOLIN air-conditioners, and by virtue of its actual use in business, KPII is entitled to the registration of the mark 'kolin air conditioner' for adoption and use in relation to its business involving KOLIN-branded Home Appliances, and KOLIN air-conditioners in particular. This right of KPII to the registration and protection of its mark is guaranteed under the Republic Act No. 8293, otherwise known as the Intellectual Property Code.

"46. Section 168.1 of Republic Act No. 8293, provides:

x x x

"47. In accordance with the above-quoted provision of Republic Act No. 8293, KPII is entitled to the protection of its goodwill over the mark 'KOLIN,' which is deemed by law as a proprietary right, being the only entity responsible for introducing and making available to the Philippine market the KOLIN-branded Home Appliances, particularly the KOLIN air-conditioners. Hence, KPII's proprietary right with regard to KOLIN-branded Home Appliances, and KOLIN-branded air-conditioners in particular, should be upheld by granting KPII's trademark application for the mark 'kolin air-condtioner.'

"48. The existence and the ownership of Taiwan Kolin and KPII of proprietary right over the mark 'KOLIN' has already been favourably settled and affirmed by the Supreme Court in a decided case that has attained finality.


"49. In case entitled 'Taiwan Kolin Co., Ltd. vs. Kolin Electronics, Inc.,' with docket number G.R. N. 209843, the Supreme Court rejected the opposition filed by KECI and gave due course to Taiwan Kolin's Trademark Application Serial No. 4-1996-106310 involving the mark 'KOLIN' in class 9 of the NICE Classification. In its Decision promulgated on March 25, 2015, the Supreme Court held that Taiwan Kolin is entitled to the registration of the mark 'KOLIN' which is being used and applied in connection with Taiwan Kolin's KOLIN-branded Home Appliances consisting of television sets and DVD players. The said Supreme Decision has already attained finality with the issuance by the Supreme Court of the corresponding Entry of Judgment. Certified true copy of the Supreme Court Decision dated March 25, 2015 and the corresponding Entry of Judgment are hereto appended and made integral parts hereof as EXHIBITS '9' and '10', respectively.

"50. The Supreme Court Decision having attained finality, the same was executed with the issuance by the IPO of Certificate of Registration No. 4-1996-106310 for the mark 'KOLIN' in Class 9, for the goods of 'Television and DVD player,' copy of which is hereto appended and made an integral party hereof as Exhibit '11'.

"51. Therefore, the proprietary right of Taiwan Kolin having been established and affirmed by the Supreme Court, KECI cannot oppose the use by Taiwan Kolin and KPII of the mark 'KOLIN,' including their right to the protection thereof by causing its registration.

"52. It is worthy of note that this Honorable Office has already recognized Taiwan Kolin's proprietary right, and therefore that of KPII's, over the mark 'KOLIN' in various cases that the Honorable Office has decided in favor of Taiwan Kolin.

"53. In IPC No. 14-2006-00196 entitled 'Kolin Electronics, Co., Inc. vs. Taiwan Kolin Co., Ltd.,' this Honorable Office denied the verified opposition filed by KECI to Taiwan Kolin's Trademark Application No. 4-2002-011004 covering Taiwan Kolin's KOLIN Water Dispenses in CLASS 21 of the NICE Classification. This paved the way to the issuance in the name of Taiwan Kolin Certificate of Trademark Registration No. 4-2002-011004 covering the mark 'KOLIN'. Certified true copy of the Decision of this Honorable Office in IPC No. 14-2006-00196 is hereto attached and made integral part hereof as EXHIBITS '12'.

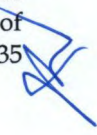


"54. In IPC No. 14-2004-000105 entitled 'Kolin Electronics Co., Inc. vs. Taiwan Kolin Ltd., Co., 'involving Taiwan Kolin's trademark application for 'KOLIN' in CLASS 11 of the NICE Classification, this Honorable Office denied the opposition filed by KECI and ruled that Taiwan Kolin is entitled to the registration of the mark 'KOLIN' for KOLIN branded Home Appliances which include the KOLIN air conditioners. Although the Honorable Office's decision was reversed by the Director General of the Intellectual Property Office (IPO Director General) on appeal, the Court of Appeals reversed the Decision of the IPO Director General thereby reinstating the Decision of this Honorable Office. Certified true copy of the Decision of this Honorable Office in IPC No. 14-2004-000105 and the Amended Decision promulgated by the Court of Appeals in CA-G.R. SP No. 131919 entitled 'Taiwan Kolin Ltd., Inc. vs. Kolin Electronics Co., Inc.,' are hereto attached and made integral parts hereof as EXHIBITS '13' and '14', respectively.

"55. With regard to CLASS 35 under which the trademark application subject of the instant case falls, the Court of Appeals also upheld the proprietary right and, therefore, the right of KPII to register the mark 'KOLIN.' In CA-G.R. No. 13198 entitled 'Kolin Philippines International, Inc. vs. Kolin Electronics, Co., Inc.,' the Court of Appeals reversed and set aside the Decision of the IPO Director General which upheld the Decision of this Honorable Office in IPC No. 14-2006-00064, denying KPII's trademark application for the mark 'KOLIN' for the business of manufacturing, importing, assembling, selling products such as air conditioning units, television sets, audio/video electronic equipment, refrigerators, electric fans and other electronic equipment or product of similar nature. Certified true copy of the Court of Appeals Decision promulgated on February 16, 2016 is hereto attached and made an integral part hereof as EXHIBIT '15'. KECI filed a Motion for Reconsideration of the said Court of Appeals Decision but the same was denied in a recent Resolution promulgated by the Court of Appeals on August 11, 2016, copy of which is hereto attached and made an integral part hereof as EXHIBIT '16' /

"56. It should be noted that KPII's trademark application for registration of the mark 'KOLIN' in Class 35, certified true copy of which is hereto attached and made an integral part hereof as EXHIBIT '17', which was upheld and given due course in the above-mentioned Court of Appeals Decision and Resolution in CA-G.R. No. 131918, was filed ahead of KECI's trademark application in Class 35 as can be gleaned from KECI's Exhibit 'I.' In other words, KPII, in fact, holds the priority in application with respect to Class 35 for the mark 'KOLIN.'

"57. The foregoing decisions rendered in various cases in favor of KPII and its affiliated Taiwan Kolin, involving Class 9, Class 11, Class 21 and Class 35 put to rest any question as regards the proprietary right of KPII and its affiliate Taiwan Kolin over the mark 'KOLIN.' The foregoing decisions upholding the trademark rights of KPII and Taiwan Kolin constitute an unmistakable rejection of KECI's sweeping claim that it is entitled to the exclusive use of KOLIN in the Philippines. Therefore, the verified opposition filed by KECI grounded on its assertion that has already been rejected by the Supreme Court should be denied for utter lack of merit and KPII's trademark application for 'kolin air conditioner' in Class 35 should be given due course.



"58. KECI's argument that the rights emanating from its trademark registrations will be violated with the registration of KPII's mark 'kolin air conditioner' is bereft of factual and legal basis.

"59. This argument of KECI has already been raised and was already rejected by the Supreme Court in the above-cited G.R. No. 209843 when the Supreme Court upheld the right of Taiwan Kolin to the registration and use of the mark 'KOLIN' in Class 9 of the NICE Classification.

"60. In its opposition to Taiwan Kolin's application for registration of the 'KOLIN' mark in Class 9 of the NICE Classification, KECI advanced the very same argument of KECI in the instant case that the registration of Taiwan Kolin's 'KOLIN' mark in Class 9 is in derogation of KECI's trademark right arising from its trademark registration in Class 9. In rejecting KECI's argument, the Supreme Court gave credence to Taiwan Kolin's assertion that the right obtained by KECI from its trademark registration is actually a LIMITED RIGHT as it relates only to KECI's POWER SUPPLY goods. The Supreme Court held that the fact that one person has adopted and used a trademark would not prevent the adoption and use of the same trademark by others on goods that are not related and of different kind, thus:

x x x

"61. It is clear that the above-quoted ruling of the Supreme Court that the mere fact that KECI has adopted the mark KOLIN for its POWER SUPPLY goods would not prevent the registration of KPII's mark KOLIN in relation to goods and services that are not related and of different kind from those of KECI's. In other words, KECI's right for the mark KOLIN is a LIMITED RIGHT as it extends only to goods and those that are related thereto as specified in KECI's Certificate of Registration No. 14-1993-087497, that is 'Automatic voltage regulator, converter, recharger, stereo booster, AC-DC regulated power supply, step-down transformer, PA amplified AC-DC.'

"62. KECI's trademark right having already been adjudged with finality as a LIMITED RIGHT, it is ludicrous for KECI to claim in the instant case that its trademark right would be violated with the registration of KPII's 'kolin air conditioner' which relate to KOLIN-branded air-conditioners, not related to its POWER SUPPLY goods.

"63. It is not difficult to decipher that KECI's trademark rights corresponding to POWER SUPPLY goods do not extend to the KOLIN branded air-conditioners of KPII as it is very obvious that air-conditioners which fall under Class 11 are not related to and are of different kind from 'Automatic voltage regulator, converter, recharger, stereo booster, AC-DC regulated power supply, step-down transformer, PA amplified AC-DC' of KECI classified under Class 9.

"64. It is significant to mention that the above-mentioned ruling of the Supreme Court is in accord with the provisions of the Intellectual Property Code. Sections 138 and 147.1 of the Intellectual Property Code provide, to wit:

x x x

"65. Pursuant to the above-quoted Section 138, the trademark right acquired by KECI from its trademark registrations is a LIMITED RIGHT as it extends

specifically to the goods or services specified in its trademark certificate and those related thereto. KECI's Certificate of Registration No. 4-1993-087498 indicated Class '9' for its applied mark 'KOLIN,' and specified the following goods: 'Automatic voltage regulator, converter, recharger, stereo booster, AC-DC regulated power supply, step-down transformer, PA amplified AC-DC.' Accordingly, the right secured by KECI emanating from its trademark registration extends only to the Class 9 goods specified in its Certificate of Registration No. 4-1993-087487 namely 'Automatic voltage regulator, converter, recharger, stereo booster, AC-DC regulated power supply, step-down transformer, PA amplified AC-DC' as stated in its trademark registration.

"66. The above-quoted Section 147, on the other hand, clearly states that the right extended to KECI to prevent third parties from using its registered mark is in relation to goods which are identical or similar to KECI's 'Automatic voltage regulator, converter, recharger, stereo booster, AC-DC regulated power supply, step-down transformer, PA amplified AC-DC.' Accordingly, KECI cannot prevent third parties from using its registered mark on goods which are not identical or similar to its power supply goods.

"67. All told, KECI does not own or possess the exclusive right over the mark 'KOLIN' as to prevent the registration of KPII's mark which is being applied on goods which are unrelated to KECI's goods. KECI, therefore, cannot claim in the instant case that its trademark rights relating to the POWER SUPPLY goods specified in its trademark registration would be violated by the registration of KPII's 'kolin air conditioner' which relates to air-conditioners.

"68. KECI's allegation that the continued use by KPII and/or its affiliate Taiwan Kolin of the mark KOLIN, has been causing confusion among the public is bereft of factual and legal basis.

"69. The fact that no confusion of business between KPII on the one hand and KECI on the other hand will arise from the registration of the mark 'KOLIN' in favor of KPII has already been settled and affirmed by the Supreme Court in the afore-mentioned G.R. No. 209843. The Supreme Court rejected KECI's claim of confusion of business on two grounds:

x x x

"70. According to the Supreme Court, KECI's contention that the registration of the mark 'KOLIN' in favor of Taiwan Kolin will likely cause confusion and deception cannot be sustained because KECI's Power Supply goods are NOT RELATED to the KOLIN-branded Home Appliances. The Supreme Court held, to wit:

x x x

"71. In the case of *Might Corporation vs. E. Jo. Gallo Winery* (434 SCRA 473 [2004]), the Supreme Court held that no conclusion of business will arise even though similar marks are used when the goods upon which the SIMILAR MARKS are applied are entirely UNRELATED such that it cannot be assumed that they originate from the same manufacturer. Thus:

x x x

"72. Since it has already been declared with finality by the Supreme Court that KOLIN Home Appliances are NOT RELATED to KECI's power supply goods, it is, therefore, beyond cavil that no confusion of business would arise from the registration of the 'KOLIN' mark in favor of KPII.

"73. Clearly, the ground relied upon by KECI in opposing the application for trademark registration of KPII's 'kolin air conditioner,' that likelihood of confusion will result if the registration will be allowed, is bereft of factual and legal basis.

"74. The Supreme Court further declared in G.R. No. 209843 that no confusion or mistake will be caused on the part of the public by the use of the 'KOLIN' mark in KOLIN-branded Home Appliances which, according to the Supreme Court, are luxury items. The Supreme Court rejected KECI's allegation of confusion of business stating that considering the nature and cost of KOLIN-branded Home Appliances, the casual buyer is predisposed to be more cautious and discriminating in and would prefer to mull over his purchase such that confusion or deception is less likely. According to the Supreme Court:

x x x

"75. The above final and executory ruling of the Supreme Court should be applied in resolving the issue raised by KECI in the instant case about confusion of product origin. KOLIN-branded air-conditioners after all belong to that segment of commodities that are considered of great value.

"76. As early as the case of Lim Hoa vs. Director of Patents (100 Phil 214 [1956]), the Supreme counted air conditioning units among the group of commodities of relatively great value. The Supreme Court stated that confusion in TRADEMARKS and brands which are SIMILAR may not be so great with respect to commodities or articles of relatively great value such as AIR CONDITIONING UNITS for the buyer is expected to exercise prudence and care when buying these goods. According to the Supreme Court:

x x x

"77. The prevailing jurisprudence considered, the assertion of KECI that likelihood of confusion will result if the application for trademark registration of KPII for 'kolin air conditioner' will be granted must necessarily fail.

The Respondent-Applicant's evidence consists of the Affidavit of Chi-Lei Liu, President and Corporate Secretary and Director of Taiwan Kolin Co., Ltd.; a copy of Trademark Registration for the mark KOLIN issued in Taiwan on 1 December 1986; a copy of Trademark Registration No. 01011246 issued in the Republic of China on 16 September 2002; a copy of Trademark Registration Certificate No. 561082 for the mark KOLIN issued by the Trademark Bureau of State Administration for Industry and Commerce of the People's Republic of China on 30 November 2004; copy of Trademark Reg. Certificate No. 614786 for the mark KOLIN issued by the Trademark Bureau of State Administration for Industry and Commerce of the People's Republic of China; copy of Renewal Certificate of Registration of Trademark No. 96003245 for the mark KOLIN issued by the Registrar of Trademarks, Malaysia on 9 August 2003; a copy of the

Certificate of Trademark Registration No. 22686 issued by the Ministry of Science and Technology, The National Office of Intellectual Property of Vietnam for the mark KOLIN with filing date on 13 January 1996; copy of the Secretary's Certificate executed by Liu Chi-Lei authorizing Kolin Philippines International, Inc. to use and register the mark KOLIN in the Republic of the Philippines; copies of the Supreme Court Decision dated 25 March 2015 in G.R. No. 209843 entitled Taiwan Kolin Corporation, Ltd. vs. Kolin Electronics Co., Inc. and the corresponding Entry of Judgment; copy of Trademark Registration No. 4/1996/0106310 for the mark KOLIN issued on 29 July 2015; copy of Decision No. 2007-120 dated 30 August 2007 rendered by the Director of Bureau of Legal Affairs ("BLA"); copies of the BLA Decision in IPC No. 14-2004-000105 and the Amended Decision promulgated by the Court of Appeals in CA-G.R. SP No. 131919 entitled Taiwan Kolin Ltd., Inc. vs. Kolin Electronics Co., Inc.; copy of the Court of Appeals Decision in C.A.-G.R. SP No. 131918 promulgated on February 16, 2016; copy of Resolution in C.A.-G.R. SP No. 131918 promulgated by the Court of Appeals on 11 August 2016; and copy of Trademark Application Serial No. 4-2002-011003 for the mark KOLIN for services under Class 35.⁵

On 9 May 2017, the Preliminary Conference was terminated. Then after, the Opposer filed its position paper on 19 May 2017 while the Respondent-Applicant filed its position paper on 26 May 2017.

Should the Respondent-Applicant be allowed to register the trademark KOLIN AIR CONDITIONER?

The Opposer anchors its opposition on Section 123.1, paragraph (d) 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 x x

(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;"

Records show that at the time the Respondent-Applicant filed its trademark application on 27 May 2013, the Opposer already owns trademark registrations for the mark KOLIN under Trademark Reg. Nos. 4-1993-087497 and 4 -2007-005421 issued on 23 November 2003 and 22 December 2008 respectively. These registrations cover "automatic voltage regulator, converter, recharger, stereo booster, AC-DC regulated

⁵ Marked as Exhibits "1" to "17", inclusive.

power supply, step-down transformer, PA amplified AC-DC" under Class 9 and "for the business of manufacturing, importing, assembling or selling electronic equipment or apparatus" in Class 35. On the other hand, the Respondent-Applicant has previously filed on 27 December 2002 an application for the mark KOLIN likewise covering services under Class 35, specifically "for business of manufacturing, importing, assembling, selling products as: airconditioning units, television sets, audio/video electronic equipment, refrigerators, electric fans and other electronic equipment or product of similar nature".

Hence, the question, does KOLIN AIR CONDITIONER resemble KOLIN such that confusion or deception is likely to occur? The marks are shown below:

KOLIN

Opposer's trademark

kolin
air conditioner

Respondent-Applicant's mark

There is no dispute that the competing marks are identical, both marks bearing the word KOLIN. Being the prior adopter and user of the mark KOLIN in the Philippines (1989), Opposer is considered the owner of the mark pursuant to the requirement under the old Trademark law⁶ that actual use in commerce in the Philippines is an essential prerequisite for the acquisition of ownership over a trademark. Sec. 2 of R.A. 166 provides that:

Sec. 2. *What are registrable.* – Trade-marks, trade-names, and service-marks owned by persons corporations, partnership or associations domiciled in the Philippines and by persons, corporations, partnerships or associations domiciled in any foreign country may be registered in accordance with the provisions of this Act: *Provided*, That said trade-marks, trade-names, or service-marks are actually in use in commerce and services not less than two months in the Philippines before the time the applications for registration are filed: *And provided, further*, That the country of which the applicant for registration is a citizen grants by law substantially similar privileges to citizens of the Philippines, and such fact is officially certified, with a certified true copy of the foreign law translated into the English language, by the government of the foreign country to the Government of the Republic of the Philippines. (Emphasis supplied)


⁶Republic Act No. 166 (An Act To Provide for the Registration and Protection of Trademarks, Trade-names and Service-Marks, defining Unfair Competition and False Marking and Providing Remedies against the same, and for other purposes.

Opposer, as prior adopter and user of the mark KOLIN in the Philippines, is engaged in the business of manufacturing, distributing, and selling of electronic products such as automatic voltage regulators, converters, rechargers, transformers, and amplifiers. Opposer, therefore, anchored its arguments that it is the owner of the mark KOLIN by virtue of prior use and that, at the time it filed the mark for registration, Respondent-Applicant had no existing registration nor pending application for its mark KOLIN in the Philippines.

Respondent-Applicant's principal, Taiwan Kolin Co., Ltd ("TKLC"), on the other hand, is the owner of the mark KOLIN by virtue of prior use and registrations abroad, before the Opposer was able to register its KOLIN trademark in the Philippines. TKLC is the registered owner of the mark KOLIN for the following goods "refrigerator, air conditioner, washer, cooling fan, warm fan, dryer, electric stove, electric fan, electric pan, electric cooker with insulation function, toaster, electronic cooker and electric iron".⁷ Taiwan Kolin Company's right/s to the mark KOLIN for its home electrical products and/or home appliances is registered and recognized both in China and in Taiwan, R.O.C. since 1986. In 1995, its local affiliate, Kolin Philippines International, Inc. (KPII), herein Respondent-Applicant, was established. Before Opposer was able to register the mark KOLIN here in the Philippines, the KOLIN trademarks have been used for a considerable length of time by Respondent-Applicant's principal, Taiwan Kolin Company in China and in Taiwan for its wide range of home electrical products and/or home appliances.⁸

The Respondent-Applicant's principal, Taiwan Kolin Co. Ltd.'s filing of its trademark application for the mark KOLIN in 1996⁹ is subsequent to the Opposer's trademark application in the Philippines (1993). In this regard, this Bureau emphasizes that it is not the application or the registration that confers ownership of a mark, but it is ownership of the mark that confers the right of registration. A trademark is an industrial property and the owner thereof has property rights over it. The privilege of being issued a registration for its exclusive use, therefore, should be based *on the concept of ownership*. The IP Code implements the TRIPS Agreement and therefore, the idea of "registered owner" does not mean that ownership is established by mere registration but that registration establishes merely a presumptive right of ownership. That presumption of ownership yields to superior evidence of actual and real ownership of the trademark and to the TRIPS Agreement requirement that no existing prior rights shall be prejudiced. In *Berris v. Norvy Abyadang*¹⁰, the Supreme Court held:

The ownership of a trademark is acquired by its registration and its actual use by the manufacturer or distributor of the goods made available to the purchasing public.



⁷ Exhibit "2", Respondent-Applicant.

⁸ Exhibits 10-11-g, Respondent-Applicant.

⁹ Exhibit "11", Respondent-Applicant.

¹⁰ G.R. No. 209843, 14 April 2015.

Section 122 of the R.A. 8293 provides that the rights in a mark shall be acquired by means of its valid registration with the IPO. A certificate of registration of a mark, once issued, constitutes *prima facie* evidence of the validity of the registration, the registrant's ownership of the mark, and of the registrant's exclusive right to use the same in connection with the goods or services and those that are related thereto specified in the certificate. R.A. 8293, however, requires the applicant for registration or the registrant to file a declaration of actual use (DAU) of the mark, with evidence to that effect, within three (3) years from the filing of the application for registration; otherwise, the application shall be refused or the mark shall be removed from the register. In other words, the *prima facie* presumption brought about by the registration of a mark may be challenged and overcome, in an appropriate action, by proof of the nullity of the registration or of non-use of the mark, except when excused. Moreover, the presumption may likewise be defeated by evidence of prior use by another person, i.e., it will controvert a claim of legal appropriation or of ownership based on registration by a subsequent user. This is because a trademark is a creation of use and belongs to one who first used it in trade or commerce. (*Underscoring supplied*)

By virtue of Respondent-Applicant's principal's use of the mark KOLIN since the 60s and the registration in 1986 of the mark KOLIN in Taipei, Taiwan in connection with its home electrical products and/or home appliances, Respondent-Applicant has vested rights to and is the owner of the same. Trademark ownership inures to the legal entity who is in fact using the mark as a symbol of origin.

Moreover, in a Decision of the Supreme Court in G.R. No. 209843 promulgated on 25 March 2015 in the case of "Taiwan Kolin Corporation, Ltd., vs. Kolin Electronics Co., Inc."¹¹, the Supreme Court held that:

"While both competing marks refer to the word 'KOLIN' written in upper case letters and in bold font, the court at once notes the distinct visual and aural differences between them: Kolin Electronics' mark is italicized and colored black while that of Taiwan Kolin is white in pantone red color background. The differing features between the two, though they may appear minimal, are sufficient to distinguish one brand from the other.

"It cannot be stressed enough that the products involved in the case at bar, are generally speaking, various kinds of electronic products. These are not ordinary consumable household items, like catsup, soy sauce or soap which are of minimal cost. The products of the contending parties are relatively luxury items not easily considered affordable. Accordingly, the casual buyer is predisposed to be more cautious and discriminating in and would prefer to mull over his purchase. Confusion and deception, then, is less likely. As further elucidated in *Del Monte Corporation v. Court of Appeals*:

x x x

"Respondent has made much reliance on Arce & Sons, Chua Che, Ang, and Khe, oblivious that they involved common household items – i.e., biscuits and milk, cosmetics, clothes and toilet articles, respectively – whereas the extant case involves luxury items not regularly and inexpensively purchased by the consuming public. In accord with common empirical experience, the useful lives of televisions and DVD players last for

¹¹Exhibit "9" for Respondent-Applicant (S.C. Decision in G.R. No. 209843)

about five (5) years, minimum, making replacement purchases very infrequent. The same goes true with converters and regulators that are seldom replaced despite the acquisition of new equipment to be plugged onto it. In addition, the amount the buyer would be parting with cannot be deemed minimal considering that the price of televisions or DVD players can exceed today's monthly minimum wage. In light of these circumstances, it is then expected that the ordinary intelligent buyer would be more discerning when it comes to deciding which electronic product they are going to purchase, and it is this standard which this Court applies herein in determining the likelihood of confusion should petitioner's application be granted.

"To be sure, the extant case is reminiscent of Emerald Garment Manufacturing Corporation v. Court of Appeals, wherein the opposing trademarks are that of Emerald Garment Manufacturing Corporation's 'Stylistic Mr. Lee' and H.D. Lee's 'LEE'. In the said case, the appellate court affirmed the decision of the Director of Patents denying Emerald Garment's application for registration due to confusing similarity with H.D. Lee's trademark. This Court, however, was of a different beat and ruled that there is no confusing similarity between the marks, given that the products covered by the trademark, i.e., jeans, were, at that time, considered pricey, typically purchased by intelligent buyers familiar with the products and are more circumspect, and, therefore, would not easily be deceived. As held:

x x x

"Consistent with the above ruling, this Court finds that the differences between the two marks, subtle as they may be, are sufficient to prevent any confusion that may ensue should petitioner's trademark application be granted. As held in Esso Standard Eastern, Inc.:

x x x

"All told, We are convinced that petitioner's trademark registration not only covers unrelated good, but is also incapable of deceiving the ordinary intelligent buyer. The ordinary purchaser must be thought of as having, and credited with, at least a modicum of intelligence to be able to see the differences between the two trademarks in question."

Respondent-Applicant's principal, Taiwan Kolin Co. Ltd., as the true owner and originator of the mark KOLIN, its local affiliate, herein Respondent-Applicant KPIL, may apply for registration of the mark KOLIN AIR CONDITIONER for use on "business management and information; providing website for promotion and on-line sales" under Class 35.

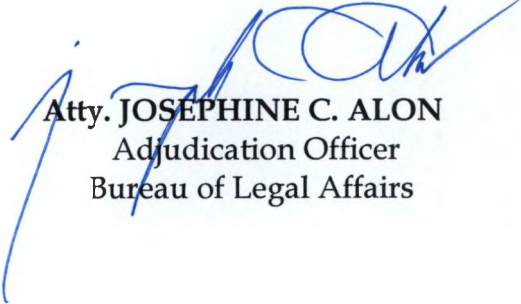
The essence of trademark registration is to give protection to the owners of trademarks. The function of a trademark is to point out distinctly the origin or ownership of the goods to which it is affixed; to secure to him, who has been instrumental in bringing into the market a superior article of merchandise, 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.¹² This Bureau finds that the Respondent-Applicant's mark sufficiently serves this function.

WHEREFORE, premises considered, the Notice of Opposition is, as it is hereby **DISMISSED**. Let the filewrapper of Trademark Application Serial No. 4-2013-006028, together with a copy of this Decision, be returned to the Bureau of Trademarks for appropriate action.

SO ORDERED.

Taguig City, 07 AUG 2017.



Atty. JOSEPHINE C. ALON
Adjudication Officer
Bureau of Legal Affairs

¹²Pribhdas J. Mirpuri vs. Court of Appeals, G.R. No. 114508, 19 Nov. 1999.