

Stockholm the 6th of October 2014

To the Tribunal

STATEMENT OF CLAIM

Claimant: Tougkvas A/S
Oslo
Norway

Legal representatives: Amalia Struwe
and
Paulina Rehbinder
Rehbinder/Struwe Law
Strandvägen 7A
114 47 Stockholm
Sweden

Defendant: Rope Twist Inc.
Delaware

Matter: Patent- and trademark infringement, unfair competition,
unfair use of trade secrets and breach of contract.

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1. Claims

The Claimant pleads that the Tribunal declares

- i) that the suggested amendment of the patent granted in Denmark (“DK”) is lawful by making a preliminary assessment,
- ii) that the suggested amendment of the patent applications in Finland, Norway and Sweden is lawful by making a preliminary assessment,
- iii) a declaratory ruling that the Defendant has infringed the Claimant’s provisional patent protection during the time from that the patent applications has been published until the patents are granted in Finland (“FI”), Norway (“NO”) and Sweden (“SE”),
- iv) that the Defendant is infringing the Claimant’s patent in DK,
- v) that the Defendant has taken preparatory actions to infringe the Claimant’s patent in DK,
- vi) that the Defendant shall be prohibited to continue the infringement of Claimant’s patent in DK,
- vii) that the Defendant is prohibited by a penalty of fine of one thousand (100.000) Euro, or another penalty which the Tribunal finds effective, to use the registered trade mark “MOUNTAIN SAFE” and the registered business name “tougkvas”,
- viii) that the Defendant is obligated to reimburse the Claimant for infringing the Claimant’s registered trademark “MOUNTAIN SAFE” and the registered business name "tougkvas" by fifty thousand (50.000) Euro, or by another amount which the Tribunal finds reasonable,
- ix) that no ground for declaring the registration of the registered trademark "MOUNTAIN SAFE" invalid exists,
- x) that the Defendant has acted in conflict with good business practice in the course of trade,
- xi) that the Defendant has copied the Claimant’s product by and unfairly exploited the efforts or results of the Claimant, which presents a risk of confusion,
- xii) that the Defendant shall be prohibited of marketing the copied products with the penalty of a fine,
- xiii) that the Defendant is obligated to pay damages to the Claimant for the damages it suffered due to the Defendants actions,
- xiv) that the Defendant has acted in breach of the Confidentiality Agreement entered into between the Defendant ant the Claimant in October 2013 (“NDA”),

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- xv) that the Defendant is obliged to pay one hundred thousand (100.000) Euro plus interest according to Article 4 and 6 of the Swedish Interest Act in damage, covering lost profit, due to lost contract with third party,
- xvi) that the Defendant is obliged to pay three hundred thousand (300.000) Euro plus interest according to Article 4 and 6 of the Swedish Interest Act in compensation for misuse of the Claimant's confidential information, and
- xvii) that the Defendant has acted disloyal in conjunction with the negotiations between the Claimant and the Defendant during October 2013 – December 2013 which shall entitle the Claimant to compensation amounting to one hundred thousand (100.000) Euro.
- xviii) that the Defendant has exploited the Claimant's trade secrets
- xix) that the Defendant should cease with the exploitation of the Claimant's trade secrets under the penalty of a fine, and
- xx) that the Defendant should be responsible to pay 100.000 Euros in damages for the exploitation of the Claimant's trade secrets.

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2. Legal grounds

- i) The amendment to delete the wording “polyester” from the patent claims in the granted patent in DK shall be considered lawful thus it does not broaden the scope of protection in conflict with The Consolidate Patents Act, Consolidate Act No. 108 of 24 January 2012 (“DPA”) section 19 (2). The innovation concept, meaning the underlying solution to the technical problem. The *general innovation concept* for the patent is the technical construction of the sheathing in itself and the method of braiding the specially woven fibers to create the constructure which is clarified in the claims and the description of the patent. By deletion of the exemplified material in the claims the scope, determined through DPA section 39 and the *general innovation concept*, has not been affected since the same technical construction and the same method is still claimed and described in the new wording of the patent. Therefore the Tribunal should make a preliminary assessment that the amendments proposed are lawful.
- ii) The amendment to delete the wording “polyester” from the patent applications in FI, NO and SE shall be considered lawful thus the new wording does not disclose any other subject-matter than what was disclosed in the application when it was filed in accordance to each of the countries Patent Acts (“PA”) section 13. The disclosed subject-matter for the patent applications when filed was the technical construction of the sheathing in itself and the method of braiding the specially woven fibers to create the construction. By deletion of the exemplified material in the patent applications the subject-matter has not been affected, since the applications concern the same technical construction and the same method with the new wording. Therefore the Tribunal should make a preliminary assessment that the amendments proposed are lawful.
- iii) The Defendant is infringing the Claimants provisional patent protection through marketing the Claimants patent protected products in FI, NO and SE on the Defendants web-site. By doing so the Defendant is offering the Claimants provisionally protected products and is therefore infringing the Claimants reserved rights according to PA section 3 (1) (i) and (iii) and section 60. The Defendant knows that the Claimant has patent applications pending in FI, NO and SE due to their earlier contact and is therefore acting with intent or in any event with grossly negligence when marketing the products. The Claimant has a provisional protection for its pending patent applications from the date when the application is published according to PA section 22 (2) till the date the patents are granted according to PA section 60. It is not until the patent is granted that the Claimant can direct claims of remuneration based on the provisional protection. The Claimants patent has already been granted in Denmark why it is much likely to be granted in FI, NO and SE and a declaratory ruling to settle

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the ongoing infringement by the Defendant is therefore of importance so that the Claimant can claim remuneration according to PA section 58 (2) directly when the patents are granted.

- iv) The Defendant is infringing the Claimant's patent in DK according to DPA section 3 (1) (i) and (iii) by marketing the Claimant's protected products on their web-site. The Defendant knows that the Claimant has a patent in DK due to their earlier contact and is therefore acting with intent or in any event with grossly negligence when offering the products on their web-site.
- v) The Defendant has taken preparatory actions to infringe the Claimant's patent in DK according to DPA 3 (1) (i) and (iii) and the Swedish Penal Code ("SPC") chapter 23 section 1 and 2. Firstly by entering the agreement with Hagfjäll concerning delivering products to the company in SE which the Defendant has produced according to the Claimant's patent. The Defendant has had the intention for Hagfjäll to put the products out on the market in DK and thus infringe the Claimant's patent. Secondly the Defendant is guilty of preparations to infringement by delivering the patented products to Hagfjäll in SE with the intent to make Hagfjäll put the products out on the market in DK and thereby infringing the Claimants patent.
- vi) Since the Defendant has infringed the Claimant's patent and taken preparatory actions to infringe the Claimant's patent and the Defendant has acted with intention or in any case with grossly negligence. The Defendant should therefore be prohibited from infringing the Claimant's patent by the Tribunal according with DPA section 57 and combine the prohibition with the threat of a fine in accordance with DPA section 57 b.
- vii) The Defendant is infringing the Claimant's registered trademark "MOUNTAIN SAFE" and the Claimant's registered business name "tougkvas" by using an identical trademark and identical business name, in the course of trade, in relation to identical goods via the internet referencing service "AdWords" and thus harming, or risking to harm, the trademark functions of the Claimant's registered trademark and the reputation and functions of the Claimant's registered business name. The Claimant is violating article 5 (1) (a) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks ("TMD") and paragraph 3 p. 1 in the Swedish Business Name Act (SFS 1974:156 "SBA"). The Defendant has infringed the Claimant's registered trademark "MOUNTAIN SAFE" and the Claimant's registered business name "tougkvas" intentionally or in any event by negligence. The court shall declare that the Defendant is prohibited by a penalty of fine of one thousand (100.000) Euro, or another penalty which the Tribunal finds effective, to use the registered trade mark

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“MOUNTAIN SAFE” and the registered business name “tougkvas” in accordance with chapter 8 section 3 Swedish Trademark Act and 15 § SAB.

- viii) The Defendant’s use of an identical trademark and business name in the course of trade, in relation to identical goods via the internet referencing service "AdWords" have resulted in infringement of the Claimant’s registered trademark “MOUNTAIN SAFE” and the registered business name "tougkvas". The infringement has caused economic consequences and created serious concerns with respect to the Claimant’s registered trademark and business name by harming, or risk to harm, their functions. The Defendant is to pay damages, amounting to fifty thousand (50.000) Euro, or another amount which the Tribunal finds reasonable, in accordance with chapter 8 section 4 of the Swedish Trade Mark Act and 19 § 1 SAB. The Defendant’s conduct has been intentional or in any event negligent.
- ix) No grounds for declaring the registration of the registered trademark "MOUNTAIN SAFE" invalid according to Article 3 (b), 3 (c) or 4 of the TDM exists since the trademark "MOUNTAIN SAFE" has a distinctive character, is not descriptive and is not in conflict with any prior right.
- x) According to the Norwegian The Marketing Control Act (“NMA”)¹ section 25 “no act shall be performed in the course of trade which conflicts with good business practice among traders”. Actions in conflict with good business practice means all actions that could likely materially distort the economic behavior of consumers, causing them to make decisions they would not otherwise have made according to NMA section 6. By marketing products which the Defendant has copied from the Claimant the consumers is likely going to presume that the products has the origin of the Claimant and consumers wanting to buy the products from the Claimant would therefore be lead to think that the products were produced by the Claimant. By buying AdWords with the Claimant’s trademark for the products and the Claimant’s trade name the consumers which were searching for the Claimant’s products will be exposed to the Defendants web-site through adds and thereby presume that the products were produced by the Claimant. The fact that the Defendant is using the same slogan “makes mountaineering safe” on their web-site is further confusing the costumers impression of the origin of the products. The Defendant is acting knowingly of the fact that its behavior is affecting the costumers’ economic behavior to buy the products from the Defendant.
- xi) By copying the Claimant’s product and marketing them on their web-site the Defendant is exploiting the efforts made by the Claimant in an unfair way according to NMA section 30. The Claimant has made efforts of creating the products with both economical and time consuming efforts. The Defendant has merely copied the Claimant’s product and thereby only

¹ Act No. 2 of 9 January 2009 relating to the Control of Marketing and Contract Terms and Conditions, etc.

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used the Claimant's efforts to its own benefits. By marketing the products which are copies of the Claimant's products the consumers is most likely going to be confused with the origin of the products since they look exactly the same. And by searching for the Claimant's products or the Claimant's trade name the consumers will be exposed to the Defendants web-site through adds and this adds on to the confusion of the origin of the products. The Claimant hasn't in any way sanctioned the coping and marketing of its products which the Defendant fully understands due to the fact that no agreements on this subject has been made between the parties why the exploitation is unfair to the Claimant's efforts.

- xii) According to NMA section 25 it is prohibited to act in conflict with good business practice in the course of trade. The Defendant has intentionally or in any event in negligence acted in breach of the prohibition when marketing the copied products since the Defendant knew that the products was created by the Claimant and that they looked the same. According to NMA section 30 it is prohibited in the course of trade to use copies of distinguishing products in such a manner and under such circumstances that the use must be considered an unfair exploitation of the efforts or results of another person, and to present a risk of confusion. The Defendant has acted in breach of these prohibitions with intent or in any event with negligence since the Defendant knew that the Claimant had created the product and that the copied would look exactly the same as the Claimant's products and therefore be confusing. Therefore the Tribunal shall prohibit the Defendant to market the copied products on their web-site. The prohibition shall be combined with the penalty of a fine.
- xiii) According to NMA section 25 it is prohibited to act in conflict with good business practice in the course of trade. The Defendant has intentionally or in any event in negligence acted in breach of the prohibition when marketing the copied products since the Defendant knew that the products was created by the Claimant and that they looked the same. According to NMA section 30 it is prohibited in the course of trade to use copies of distinguishing products in such a manner and under such circumstances that the use must be considered an unfair exploitation of the efforts or results of another person, and to present a risk of confusion. The Defendant has acted in breach of these prohibitions with intent or in any event with negligence since the Defendant knew that the Claimant had created the product and that the copied would look exactly the same as the Claimant's products and therefore be confusing. Therefore the Defendant should be obligated to pay damages to the Claimant for the damages it suffered due to the Defendants actions. The damages should be estimated to 100.000 Euros.
- xiv) The Defendant has intentionally disclosed, distributed, used and copied the Claimant's Confidential Information for the Defendant's own economic advantage in breach of section 1

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and 2 in the NDA. No exception in section 3 in the NDA is applicable on the Defendant's conduct in this regard.

- xv) The Defendant's intentional disclosure, use, distribution and copying of the Claimant's Confidential Information in breach of section 1 and 2 in the NDA has caused the Claimant lost profit due to lost contract with a third party, the Swedish company "Hagfjäll". Had the Defendant not acted in breach of section 1 and 2 of the NDA the Claimant would have been able to conclude a contract of delivery with "Hagfjäll" and thus been able to make a profit amounting to one hundred (100.000) Euro. The lost profit shall be calculated in accordance with common principles of Nordic contract law.
- xvi) The Defendant's intentional disclosure, use, distribution and copying of the Claimant's confidential information in breach of section 1 and 2 in the NDA shall entitle the Claimant to fair compensation amounting to three hundred thousand (300.000) Euro. The amount of three hundred thousand (300.000) Euro relates to the headstart the Defendant has been able to achieve by misusing the Claimant's confidential Information. The headstart consists of the Defendant's being able to offer, the products protected by the Claimant's patent, on the European market and by being able to conclude the agreement with the third party, the Swedish company "Hagfjäll" by misusing the Claimant's confidential information.
- xvii) According to common principles of Nordic contract law negotiating parties have an obligation to negotiate with each other with a certain degree of care. The Defendant has intentionally misused the Claimant's Confidential Information in breach of section 1 and 2 of the NDA. The Defendant has not negotiated with care since the Defendant's real reason for entering into discussions was to access the Claimant's confidential information, which is also shown by the fact that the Defendant already in January 2014 concluded a contract with "Hagfjäll" by misusing the Claimant's confidential information. The Defendant has thus not had any real intention to enter into any agreement with the Claimant. The Defendant's conduct in conjunction with the negotiations between the Claimant and the Defendant shall thus be declared as disloyal and entitle the Claimant to compensation amounting to one hundred thousand (100.000) Euro.
- xviii) According to the Swedish Act on the Protection of Trade Secrets (SFS 1990:409)("SPT") section 1 trade secrets are information concerning the business or industrial relations of a person conducting business or industrial activities which that person wants to keep secret and the divulgence of which would be likely to cause a damage to him from the point of view of competition. The information that the Claimant's products could be obtained by the material nylon is trade secrets according to the SPT and was not disclosed in the patent application. The Claimant has clearly shown that this information should be kept secret through entering a NDA with the Defendant. The Defendant has exploited the trade secrets by producing the ropes in accordance with the trade secrets of the material nylon and entered

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agreements of delivery with the company Hagfjäll, and has acted with the knowledge that the information was supposed to be secret. This exploitation has caused damages to the Claimant by losing the contract with the company Hagfjäll in favor of the Defendant.

- xix) According to SPT section 11 the Defendant should be prohibited to exploit the Claimant's trade secrets through delivering the products obtained by the trade secrets since this has been made in breach of SPT section 2 and a violation of the Claimant's trade secrets. This prohibition should be given under the penalty of a fine.
- xx) According to STP section 6 the Defendant should pay damages for the exploration of the Claimant's trade secrets.

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3. Patent

The claimant filed an international application in accordance with the PCT Treaty on 4 June 2013. After receiving an International Search Report stating that no prior art could put the novelty or the inventive step into serious question concerning the innovation, the Claimant continued to the national phase by designating national applications in a number of countries amongst DK, FI, NO and SE. On the 5 December 2013 the Danish Patent and Trademark Office (“DPTO”) granted the Claimant’s patent application. The applications in FI, NO and SE are still pending but have all been proclaimed according to PA section 22 (3) in late June 2013.

The description and the claims in the application reads as follows:

“The main object of the invention is to provide ropes with a solid and wear resistant sheathing for demanding application purposes, both at sea and at land. In particular it is an object to create a sheathing with a surface so dense that the penetration of contaminants, such as sand, or the risk of hooking a foreign body (such as sharp rocks) is considerably reduced. According to the invention, the sheathing should be made of ribbons of substantially parallel fibres woven together with transverse threads. If the thread should burst, the construction of the sheathing will prevent it from loosening. Polyester fibres are very useful.”

Claim 1 of the application:

“Rope, comprising a core of parallel or braided core strings, and a braided sheathing of sheathing elements characterized in that in that the sheathing elements (1) are ribbons of substantially parallel polyester fibres woven together with transverse threads. “

The construction is visualized in the sketch attached to the application (see appendix 1). The sketch also shows how the braiding is made and how the fibres are constructed through the waving. The patent application also contains a description on how the ropes could be produced.

3.1. Amendment of claims

3.1.1 The granted patent

Amendments to granted patents are permitted in DK according to DPA section 19 (2) with some restrictions. The main restriction is that the amendment cannot led to a broadening of the scope of protection which was granted for the patent. The scope of protection is defined in accordance with DPA section 39 and the principle of the *general innovation concept*.

When determining whether a proposed amendment to the claims is such as to extend the scope of protection conferred, a first step must be to determine the extent of protection which is conferred by the

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patent before the amendment. It is necessary to be quite clear as to what the protection is conferred by the patent without the amendment, before one can decide whether a proposed amendment is such as to extend it.²

In DPA section 39 it is stated that the scope of protection of the patent is determined by the claims with guidance of the description. The Claimant's patent claims should therefore be read in the light of the description.³

By examining the Claimant's patent application the type of patent and the scope of patent applied and granted can be deciphered. The wording in *Claim 1* "core of parallel or braided core strings, and a braided sheathing of sheathing elements" shows the construction of the innovation. This construction creates the technical function of the innovation described as "a sheathing with a surface so dense that the penetration of contaminants such as sand, or the risk of hooking a foreign body (such as sharp rocks) is considerably reduced" in the description of the patent. The wording in *Claim 1* and the technical construction that can be viewed in the sketch in appendix 1 clearly shows that the construction gives this innovation its specific technical function why this part of the innovation should be considered as an item embodying the innovation. The claims and description should not be interpreted strictly by its wording according to DPA section 39, but with the attention of the *general innovative concept*.⁴ The *general innovation concept* is the underlying solution to the technical problem.⁵ In this case it is the construction of the braiding described and claimed by the Claimant that should be considered as the *general innovative concept*. This is because the specific construction obtains the wanted result described as "a solid and wear resistant sheathing for demanding application purposes" and "If the thread should burst, the construction of the sheathing will prevent it from loosening". This construction and *general innovation concept* is embodied in the item (the rope) which means that the patent has been granted for the product in itself in these parts.⁶

The scope of protection for the product patent should be considered to cover the claimed and described construction of the rope, regardless of materials or size.

In *Claim 1* the wording "sheathing elements (1) are ribbons of substantially parallel polyester fibres woven together with transverse threads." and the wording of the description of the patent "sheathing should be made of ribbons of substantially parallel fibres woven together with transverse threads" describes a series of steps to accomplish a technical result, the construction of the rope as described above. The sketch (see appendix 1) shows an instruction of how to braid the sheathed elements and also how

² Boards of Appeal of the European Patent Office, case T 1736/09.

³ The Commentary to the Swedish Patent Act, Karnov, Jonshammar Louise, 162).

⁴ Protocol on the Interpretation of Article 69 EPC. Art 1, Mål nr T 2980-11, p. 7, and NJA 2000 s 497.

⁵ NIR 2003/2, Patentkravstolkning i praxis, Bruder Maria, (p. 136-148) p. 139.

⁶ European intellectual Property Law, Kur Annette and Dreier Thomas, Edward Elgar Publishing Limited, Cheltenham, 2013, p. 109.

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the sheathed elements should be woven to create the right properties. The patent application also contained a description on how the ropes could be produced which also described a series of steps in obtaining the wanted technical result. The *general inventive concept* of this part of the innovation should be considered the underlying solution of how to braid the sheathing elements and how the fibres used to create the sheathing elements should be woven. By describing the specific construction of the elements used to create the technical function and by describing how the elements should be used to obtain the technical result, this part of the innovation is concerning a process patent. Therefore this part of the patent is a process patent.⁷

The scope of protection should cover how the braiding is made with the specifically woven fibers to obtain the technical function, regardless of material or size.

In conclusion the Claimant's patent is granted in DK for the technical construction of the ropes as a product patent and for the technical method of constructing the ropes as a process patent. This means that the Claimant is enjoying a combined protection for a product and a process patent. The scope of protection is according to DPA section 39 and according to the principle of *general innovative concept* consistent with the ground determining the type of patent granted.

3.1.1.1 Deletion of the wording "polyester" in the claims

The second part of the determination if an amendment of the claims is lawful is to examine if the new wording has affected the scope of protection in comparison with the original wording of the patent.⁸

In the description to the patent it can be read that polyester fibres "are very useful" to obtain the technical result the construction is creating and in the claims the material "polyester" is exemplified as a material for the fibres, not stated as a requirement for the innovation. The wording "polyester" had no impact on the scope of protection for the patent when granted since the product patent was given for the technical construction of the innovation which is the creation of the braided sheathing elements of woven fibers. Therefore the deletion of the wording "polyester" will not in any way extend the scope of protection. This is also in line with the interpretation of DPA section 39 and the principle of the *general innovation concept*. Thereby the amendment of the claims should be considered lawful.

3.1.2 The patent applications

Amendments to the patent applications are permitted in FI, NO and SE according to PA section 13 as long as the amendment does not disclose any other subject-matter than what was disclosed in the application when it was filed.

⁷ Kur and Dreier, p. 109.

⁸ Jonshammar Louise, 100).

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The subject-matter of the application filed should be determined in the same way as the scope of protection for the granted patent in DK but with a larger focus on the description.⁹ Therefore the subject-matter disclosed in the filed application should be considered both the technical construction of the sheathing in itself and the method of braiding the specially woven fibers. And the wording “polyester” in the claims is only an exemplification of a material that can be used to obtain the function according to the *general innovation concept* which is clarified by the wording “Polyester fibres are very useful.” in the description of the patent.

3.1.2.1 Deletion of the wording “polyester” in the claims

Since the subject-matter described above is not affected by the deletion of the wording “polyester” it cannot be considered as a disclosure of another subject-matter what that the application contained when filed. Particular attention should be paid to the description which clearly shows that the wording “polyester” is used as an exemplification of useful materials to obtain the construction with the wanted function.

Thereby the amendment of the claims should be considered lawful in accordance with PA section 13.

4. Provisional protection

The Claimant has a provisional protection for its pending patent applications from the date when the application is published according to PA section 22 (2) till the date the patents are granted according to PA section 60. The condition for this protection is that the patent is later granted and the Claimant cannot claim remuneration for the illegal use of the innovation according to PA section 58 (2) until the patent is granted.

The scope of protection is for the extent of the parts that are granted and the exclusive rights reserved the right holder is the same as those for a granted patentee according to PA section 3. As described above the deletion of the wording “polyester” from the claims is not affecting the scope of protection granted the patent originally. And therefore the scope of the provisional protection is not affected by the amendment of the claims.

The Claimant’s exclusive rights reserved for the product patent is according to PA section 3 (1) (i) and for the product obtained by a process patent according to PA section 3 (1) (iii) that only the Claimant can make, offer, put the product on the market, use the product, import or stock the product for such purposes.¹⁰ The Defendant is infringing the Claimants provisional patent protection by marketing the Claimant’s patent protected products in FI, NO and SE on the Defendants web-site. Marketing should

⁹ Jonshammar Louise, 79).

¹⁰ Kur, Dreier, p. 117.

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be considered as every expression of a will to on commercially terms offer a product which will conclude an infringement of the patent.¹¹

The web-site is making it possible for costumers in FI, NO and SE to receive the marketing of the patented products and therefore the Defendant is acting in a way that is reserved the right holder solely. The Defendant knows that the Claimant has patent applications pending in FI, NO and SE due to its earlier contact with the Claimant and is therefore acting with intent or in any event with grossly negligence when marketing the protected products on their web-site.

Therefor it should be stated that the Defendant has infringed the rights reserved the Claimant according to the provisional protection.

The Claimants patent has already been granted in Denmark why it is much likely to be granted in FI, NO and SE and also due to the strong statement in the International Search Report. A declaratory ruling to settle that the Defendant is infringing the Claimant's provisional patent of importance to make the Defendant stop with the infringement and so that the Claimant can claim remuneration directly when the patents are granted.

5. Granted patent

The Claimant has a granted patent in DK from 5 December 2013. The scope of protection for the patent is described above in 3.1.1 and as stated above in 3.1.1.1 the amendment of the wording in the patent is not affecting the scope of protection after 5 December. The patent gives the Claimant the exclusive rights to market, use, import or stock the product for such purposes, according to DPA 3 (1) (i) for the product patent and according to (iii) for the process patent.

5.1 Infringement

The Defendant is infringing the Claimants patent by marketing the Claimant's patent protected products in DK on the Defendants web-site. The web-site is making it possible for costumers in DK to receive the marketing and therefore the Defendant is acting in a way that is reserved the right holder solely. Marketing should be considered as every expression of a will to on commercially terms offer a product which will conclude an infringement of the patent.¹² The Defendant knows that the Claimant has patent in DK due to its earlier contact with the Claimant and is therefore acting with intent or in any event with grossly negligence when marketing the protected products on their web-site.

Therefor it should be stated that the Defendant has infringed the rights reserved the Claimant.

¹¹ Bengt Domeij, Fokus på patenträtten, 1997, p. 65.

¹² Bengt Domeij, Fokus på patenträtten, 1997, p. 65.

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5.1.1 Sanctions

Since the Defendant has infringed the Claimant's patent by marketing the Claimant's protected product on its web-site and the Defendant has acted with the intention or in any case grossly negligence to infringe the Claimant's patent the Tribunal shall according to DPA section 57 prohibit the Defendant from continuing the marketing of the products and combine the prohibition with the threat of a fine in accordance with DPA section 57 b. The sum of fine shall be estimated by the Tribunal according to Nordic principles of reimbursement.

5.2 Preparations of infringement

Through the DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights ("IPRED") it became possible to prohibit acts complying with preparations or attempts of infringing a patent according to IPRED art. 11.

This means that the Defendant can be prohibited from the preparing acts that the Defendant has and is taking to infringe the Claimants patent in DK.

By entering the agreement with Hagfjäll concerning delivering products to the company in SE with the intent for Hagfjäll to put the protected products out on the market the Defendant has prepared an infringement of the Claimant's patent since the rights of marketing and putting the patented product on the market is reserved the Claimant according to DPA section 3 (1) (i) for the product patent and (iii) for the process patent and preparations of infringement is criminalized according to the Swedish Penal Code ("SPC") chapter 23 section 1 and 2.¹³ The Defendant knows that the Claimant has a patent in DK due to its earlier contact with the Claimant and is therefore acting with intent or in any event with grossly negligence when taking preparatory actions to infringe the Claimant's patent through putting the product out on the market in DK by entering the contract of delivery with this intent.

Therefor it should be stated that the Defendant has made preparatory actions with the intent to infringe the rights reserved the Claimant.

Secondly the Defendant has made preparatory actions of infringement by delivering the patented products to Hagfjäll in SE with the intent to make Hagfjäll put the products out on the market in DK and thereby infringing the Claimants patent according to DPA section 3 (1) (i) for the product patent and (iii) for the process patent and preparations of infringement is criminalized according to SPC chapter 23 section 1 and 2. The Defendant knows that the Claimant has a patent in DK due to its earlier contact with the Claimant and is therefore acting with intent or in any event with grossly negligence when taking

¹³ Ficks Erik och Groop Tom PATENT EYE 3/2009, p. 20-21.

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preparatory actions to infringe the Claimant's patent through putting the product out on the market in DK by delivering the patented products to Hagfjäll in SE with this intent.

Therefore it should be stated that the Defendant has made preparatory actions with the intent to infringe the rights reserved to the Claimant.

5.2.1 Sanctions

The Defendant has taken preparatory actions with the intent or in any case grossly negligence to by entering an agreement concerning delivery of the patented products with Hagfjäll with the intention to put the patented products out on the market in DK and through delivering the patented products to Hagfjäll in SE with the intention to put the patented products out on the market in DK in conflict with DPA section 3 (1) (i) and (iii) and in accordance with SPA chapter 23 section 1 and 2. The Tribunal shall therefore prohibit the Defendant from delivering the patented products to Hagfjäll in accordance with DPA section 57 and combine the prohibition with the threat of a fine in accordance with DPA section 57 b. The sum of fine shall be estimated by the Tribunal according to Nordic principles of reimbursement.

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6. Trademark

6.1 The Claimant's exclusive rights

The Claimant's trademark "MOUNTAIN SAFE" is a registered trademark in all Nordic countries. The registration was granted in June-August 2014. The Claimant's trademark MOUNTAIN SAFE is also registered as an international trademark under the Madrid protocol with all the Nordic countries as designated countries. The international registration was granted in June-August 2014. A registration under the TMD and the Madrid Protocol confers on the trademark proprietor the right to enjoin unauthorized use in the course of trade of an identical mark for identical products.

Moreover the Claimant has the exclusive right to the registered business name "tougkvas" according to paragraph 3 p. 1 SAB.

6.2 Assessment of validity of trademark

Firstly, there exist no ground for declaring the trademark "MOUNTAIN SAFE" invalid according to article 3 (b) TMD since the trademark both can be graphically represented and is capable of distinguishing the goods, of one undertaking from those of other undertakings.

The combination of the word "MOUNTAIN" and "SAFE" gives the trademark its distinctiveness and creates a syntactically unusual juxtaposition¹⁴. There exists no interest of competitors to keep the combination available for general use¹⁵.

Secondly, there exists no ground for declaring the trademark "MOUNTAIN SAFE" invalid according to article 3 (c) TMD since the trademark is not only meant to be used in relation to mountain climbing but also in relation to other areas, such as sea life and wildlife why it cannot be considered as a trademark which consists exclusively of a sign or indication which serves to designate the intended purpose or other characteristics of the good¹⁶.

Thirdly, no grounds for declaring the registration of the registered trademark "MOUNTAIN SAFE" invalid according 4 TMD exists since the trademark is not in conflict with any prior right in a trademark or other distinctive sign.

In conclusion there is no ground for declaring the trademark "MOUNTAIN SAFE" invalid on the basis of article 3(b) and 3(c) or 4 of the TMD.

¹⁴ ECJ C-383/99 P, Procter & Gamble v. OHIM ("BABY DRY") [2001] ECR I-265

¹⁵ ECJ C 104/01, Libertel v. Benelux Merkenbureau [2003] ECR I-3793

¹⁶ Joined cases C-108/97 and C-109/97 Windsurfing Chiemsee v. Huber & Attenberger [1999] ECR, I-2779, Paragraph 25.

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6.3 Background to dispute

In March 2014 the Claimant discovered that the Defendant marketed ropes on the Internet, with the text “Rope Twist technology makes mountaineering safe”. On the Defendant’s webpage information could be found only about the Defendant’s history, the Defendant’s address, staff, products and also photos of climbing in connection with the text “Rope Twist technology makes mountaineering safe”. There was thus no information about the fact that the invention behind the ropes in reality originate from the Claimant.

The Claimant also discovered that the Defendant had used Google’s internet referencing service “AdWords” and registered “mountain safe” and “tougkvas” as key words, so that customers entering these words as search terms in Google search engine would receive a link to the Defendant’s website under the heading “sponsored links”.

6.4 Violation of Claimant’s exclusive rights

The Defendant has made active use of the registered trade mark "MOUNTAIN SAFE", in the course of trade, in relation to identical goods, and thereby jeopardized the protected trademark functions of "MOUNTAIN SAFE". The Claimant is by its conduct violating article 5(1) (a) of the TMD. Moreover the Defendant has without the Claimant’s consent, in the course of trade, used the Claimant’s registered business name “tougkvas” in relation to identical goods and adversely affected its functions and reputation. By its conduct the Defendant has violated paragraph 3 p. 1 SAB.

By using the internet referencing service "AdWords" the Defendant makes active use of the registered trademark "MOUNTAIN SAFE" and the registered business name "tougkvas". Also the ECJ has found that active use of a sign shall be conferred upon a competitor using the techniques of keyword advertisement for positioning its own advertisement.¹⁷ There is no doubt about the fact that the Defendant is using the keywords for positioning its own advertisement of the ropes. The use is made in the course of trade since the Defendant is using the registered trademark and the registered business name in relation to identical goods, the ropes, in the context of commercial activity with a view to economic advantage. The use by the Defendant of the identical trademark as a keyword in the context of internet referencing service falls within the concept of use “in relation to goods” in accordance with article 5 (1) (a) TMD.

The Defendant’s use of the registered trademark "MOUNTAIN SAFE" and the registered business name "tougkvas" is adversely affecting, or risking to adversely affect, the trademark functions of the Claimant’s registered trademark and the functions of the Claimant’s registered business name. The Defendant is intentionally infringing the Claimant’s exclusive rights by being fully aware of the fact that the registered trademark “MOUNTAIN SAFE” and the registered business name “tougkvas” are the exclusive

¹⁷ Case C-236–238/08, Google France and Google

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rights of the Claimant. Should the Tribunal find that the Defendant's conduct is not intentional the conduct shall in any event be considered as negligent.

6.5 Adverse effect on MOUNTAIN SAFE's trademark functions

Already in case C-206/01 (Arsenal Football plc. vs. Matthew Reed) it was adjudicated that Article 5(1)(a) of the First Council Directive 89/104/EEC of 21 December 1988 (now Directive 2008/95/EC) must be interpreted as meaning that the proprietor of a registered trademark is entitled to prevent third parties from using, in relation to the same goods or services, identical signs which are capable of giving misleading indication as to their origin, provenance, quality or reputation. Where such identity exists, there is a presumption *iuris tantum* that the use by a third party of the trademark is use of the mark as such.

The ECJ has stated that it is sufficient that one of the functions of the trademark is adversely affected, or risks to be adversely affected, for the trademark proprietor to have the right to prevent the competitor from advertising, on the basis of a keyword which is identical with the proprietor's trademark, and which has been selected in an internet referencing service by the competitor without the trademark proprietor's consent, for goods identical for which that mark is registered¹⁸. The Defendant has by its conduct adversely affected, or is risking to adversely affect, all trademark functions of the Claimant's registered trademark "MOUNTAIN SAFE".

6.6 Adverse effect on function of indicating origin

One of the essential functions of a trademark is guaranteeing to consumers the origin of the goods (the "function of indicating origin")¹⁹.

The indicating origin is adversely affected if an advertisement suggest that there is an economic link between the advertiser and the proprietor of the trademark, or while not suggesting the existence of an economic link, is vague to such an extent on the origin of the goods or services at issue, that reasonably well-informed and reasonably observant internet users are unable to determine, or enables them only with difficulty on the basis of the advertisement link and the attached commercial message whether the advertiser is an independent third party or whether on the contrary it is economically linked to the trademark proprietor²⁰. The question whether a trademark's function of indicating origin is adversely affected when internet users are shown, on the basis of a keyword identical with the trademark, a third party's

¹⁸ C-236–238/08, Google France and Google, paragraph 79, BergSprechte, paragraph 21, C-487/07 L'Oréal and others [2009] ECR I-5185, paragraph 60 and Case C-558/08 Portakabin [2010] ECT I-0000, paragraph 29.

¹⁹ C-206/01 Arsenal Football Club [2002] ECR I-10273, paragraph 51, C-236–238/08, Google France and Google paragraph 77

²⁰ C-236–238/08, Google France and Google, paragraphs 83 and 84 and Portakabin, paragraph 34

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advertisement, such as that of a competitor of the trademark proprietor, moreover depends on the manner in which that advertisement is presented.²¹

By using the registered trademark “MOUNTAIN SAFE” and the registered business name “tougkvas” via “AdWords” in combination with the commercial message “Rope Twist technology makes mountaineering safe” and thereto attached photos of mountain climbing on the Defendant’s website, the Defendant’s advertisement both suggest that there is an economic link between the Claimant and the Defendant and does not enable a normally informed and reasonably attentive internet user, or enables that user only with difficulty, to ascertain whether the goods referred to therein originate from the Claimant or the Defendant as an undertaking economically connected to the Claimant. Moreover an average internet user cannot be considered to have full knowledge how the internet referencing service “AdWords” works.

The Defendant’s use of the Claimant’s registered trademark is thus adversely affecting, or in any event is liable to adversely affect, the origin function of the Claimant’s registered trademark "MOUNTAIN SAFE".

6.7 Adverse effect on the advertising function

The Defendant’s use adversely affects the Claimant’s use of its registered trademark both as a factor in sales promotion and as an instrument of commercial strategy since the trademark “MOUNTAIN SAFE” is the Claimant’s main instrument for marketing the Claimant’s rope product both on the Internet and in other medias’.

Moreover, since the Defendant is a new player on the rope market, the home and advertising page of the Defendant will not appear in the list of natural results when entering the keyword “MOUNTAIN SAFE”, which usually is high up in the list of natural results, which additionally harms the Claimant’s use of "MOUNTAIN SAFE" as a factor in sales promotion and as instrument of commercial strategy.

The Claimant as proprietor of the trademark is entitled to prohibit a third party, thus the Defendant, from using, without the Claimant’s consent, a sign identical with its trademark in relation to goods which are identical with those for which that trademark is registered, in the case where that use adversely affects, or risks to adversely affect, the Claimant’s use of its trademark as a factor in sales promotion or as an instrument of commercial strategy²².

6.8 Adverse effect on the investment function

The Claimant’s trademark "MOUNTAIN SAFE" is of utter importance for the Claimant to be able to acquire reputation amongst consumers and retaining their loyalty. The Claimant has already invested a

²¹ C-323/09 Interflora

²² C-236–238/08, Google France and Google, p. 92

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lot in the trademark by advertising on the market and in this way built a reputation²³. The Defendant use substantially interferes with the Claimant's use of its registered trademark to acquire reputation of consumers and retaining their loyalty.

ECJ has stated that use of a third party, such as a competitor of the trade mark proprietor, of a sign identical with the trade mark in relation to goods or services identical with those for which the mark is registered, substantially interferes with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty, the third party's use must be regarded as adversely affecting, or in any event risking to adversely affect, the trade mark's investment function²⁴. The Claimant is thus entitled to prevent such use under Article 5(1) (a) TMD²⁵.

6.9 Adverse effect on the communication function

The Defendant's use of the Claimant's registered trademark "MOUNTAIN SAFE" adversely affects, or risks to adversely affect, its communication function since the trademark "MOUNTAIN SAFE" is the Claimant's central tool of communication vis-à-vis consumers and others in connection with the marketing of the Claimant's ropes, and as such worthy of protection. Also ECJ has stated that the communication function is one of the trademark's function worthy of protection.²⁶

6.10 Sanctions

6.10.1 Penalty of fine

The Defendant's actions as stated above in section 6.4 – 6.9 have resulted in infringement of the Claimant's registered trademark "MOUNTAIN SAFE" and the Claimant's business name "tougkvas". The infringement has caused economic consequences and created serious concerns with respect to the Claimant's registered trademark by adversely affecting, or risking to adversely affect, the trademark's functions and harming the business name "tougkvas".

The Claimant pleads that the Defendant is prohibited by a penalty of fine of one thousand (100.000) Euro, or another penalty which the Tribunal finds effective, to use the registered trade mark "MOUNTAIN SAFE" and the business name "tougkvas" in accordance with chapter 8 section 3 in the Swedish Trademark Act and 15 § SAB.

6.10.2 Reimbursement for infringement

The Defendant has been fully aware of the fact that the registered trademark "MOUNTAIN SAFE" and the registered business name "tougkvas" are the exclusive rights of the Claimant. The Defendant has

²³ Nordell, 2010, p. 273

²⁴ C-323/09 Interflora paragraph 60

²⁵ C-323/09 Interflora paragraph 62

²⁶ Nordell, 2010, p. 271 f. 74, C-323/09 *Interflora*, paragraph 38-40; C-487/07 *L'Oréal*, paragraph 58 och 65; C-236/08-238/08 *Google France*, paragraph 77 and 81; C-558/08 *Portakabin*, paragraph 30-31

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knowingly or with reasonable grounds to know, engaged in infringing activity by engaging in commercial activity which adversely affects, or risks to adversely affect, the functions of the trademark and the business name. The Defendant's conduct has thus been intentional or in any event negligent.

According to chapter 8 section 4 of the Swedish Trademark Act and 19 § 1 SAB anyone who intentionally or with negligence commits a trademark infringement or infringement of business name shall pay an equitable compensation for the exploitation and compensation for the future injury caused by the infringement. The compensation for using the trademark is usually based on the market license fee which the infringer should have paid if the trademark proprietor had granted license. The Claimant has not granted any license to use its trademark nor its business name. The trademark proprietor shall be set in the same situation as if the infringement never occurred. The calculation of further damages caused by the infringement is based on different aspects such as: the Claimant's lost profits, the profits made by the Defendant, damage on the Claimant's goodwill, moral damage and the Claimant's interest of avoiding infringements.

The Defendant is to pay damages amounting to one thousand (100.000) Euro in accordance with chapter 8 section 4 of the Swedish Trade Mark Act and 19 § 1 SAB. The amount corresponds to the profit that the Defendant has been able to make by using the Claimant's exclusive rights and the lost profits that the Claimant has been caused since the Claimant has not been able to sell the quantity of ropes that the Claimant had planned, due to the fact that the Defendant is infringing and harming the functions of the Claimant's exclusive rights. Consumers entering the keywords "mountain safe" and "tougkvas", thus the exclusive rights of the Claimant, are able to find the Defendant's sponsored link and by this easily entering the Defendant's website where ropes can be bought. This has led to the Claimant's possibility to start selling the ropes as fast and in such quantities as intended has been deteriorated²⁷. The Defendant has on the other hand since starting to sell and mass producing the ropes in January 2014 made a profit at least amounting to one hundred thousand (100.000) Euro since the Defendant sells the rope for fifty (50) USD/rope and has according to statistics published on its website already sold over ten thousand (10.000) ropes since January 2014 via its website. Had the Defendant not infringed the Claimant's exclusive rights the Defendant would not have been able to make the profit it has made. The amount shall be considered appropriate to the actual prejudice suffered by the Claimant as a result of the infringement, which the Claimant is of the firm opinion that one hundred thousand (100.000) Euro is. Should the Tribunal not share the Claimant's opinion on the calculation of the reimbursement, the Claimant pleads that the Tribunal in any event declares that the Defendant is obligated to reimburse the Claimant with another reasonable amount.

²⁷ NJA 1988 s. 183 (Sodastream) and NJA 1988 s. 543 (Levis's)

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7. Unfair competition

7.1 Good business practice

Actions in conflict with good business practice means all actions that could likely materially distort the economic behavior of consumers, causing them to make decisions they would not otherwise have made according to NMA section 6 and all such actions are prohibited by NMA section 25.

Every actor on the market has a responsibility to dissociate its products from other actors products on the market, a “requirement of variation” so to speak.²⁸ The Defendant has not in any way changed the appearance of the Claimant’s products to make them look different but has strictly copied the Claimant’s products. This means that the Defendant’s products should be considered as misleading to the customers concerning the origin of the product.

The costumers should be considered as reasonably well-informed and reasonably observant people and it is through their perspective that the determination of if their economic behavior has been distorted. The customers that have entered the Defendants web-site has been exposed to pictures of the copied products. Since the Defendant has produced identical products as the Claimant’s the appearance of the product looks the same as the Claimant’s products. This gives the costumers the image that the products are the same as the Claimant’s and by doing so the customers who wants to buy the products from the Claimant are misled to buy the products from the Defendant. In this way the Defendants actions of marketing are distorting the customers’ economic behavior in accordance with SPA section 6 and section 25, since the customers are lead to think that the products are on the Claimant’s origin.

The above stated is further confirmed by the fact that the Defendant has bought AdWords with the Claimant’s trademark of the products and with the Claimant’s trade name. By doing so the customers who are searching for products from the claimant are getting exposed to the Defendants products through adds and lead to the Defendants web-site where the copied products are marketed. Since, as stated above the Defendants products are copies of the Claimant’s products, the customers are exposed to products looking exactly like the Claimant’s and with the background of the search for the Claimant’s products or name has led to the web-site the customer is beguiled to think that the products are of the Claimant’s origin. The Defendant is also using the slogan “makes mountaineering safe” which has been stated by the Claimant before on its web-site the customer shall be considered to perceive the products as of the Claimant’s origin. The Defendants actions should be considered as affecting the customers to make decisions of purchase based on the wrong grounds and thereby the Defendant has acted in breach of good business practices according to NMA section 6 and section 25.

²⁸ NUK-sak nr 15/2010.

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The Defendant had knowledge about how the Claimant's products looked and decided to produce and market products looking exactly the same. Therefore it should be considered that the Defendant has acted in breach of NMA section 25.

7.1.1 Sanctions

The Defendant has acted in breach of the prohibition in NMA section 25 and in accordance with section 6. Therefore the Tribunal shall prohibit the Defendant to market the copied products on their web-site. The prohibition shall be combined with the penalty of a fine.

7.2 Copies of the Claimant's product

According to NMA section 30 it is prohibited in the course of trade to use copies of distinguishing products in such a manner and under such circumstances that the use must be considered an unfair exploitation of the efforts or results of another person, and to present a risk of confusion.

The Defendant has copied the Claimant's products and is marketing them on its web-site. The Claimant has innovated the products in question and has made economical and time consuming investments in the development and creation of the product. It should therefore be stated that the Claimant has made such efforts that are meant in NMA section 30. Unfair exploitation of the efforts made by the Claimant is prohibited. The Defendant is exploiting the Claimant's efforts in an unfair way due to the fact that the Claimant has not consented the copying of the products and the fact that the Defendant is using the products obtained by the effort with commercial benefit without the economic risk the effort contained.²⁹

Since the products that the Defendant is marketing are copies of the Claimant's product and as stated above the Defendant is using the Claimant's trademark for the products and the Claimant's trade name by using AdWords and the fact that the Defendant is using the same slogan as the Claimant on its web-site the customers are lead to believe that the products marketed by the Defendant has the origin of the Claimant. Therefore the Defendants actions should be considered as leading to a risk of confusion.

The fact that the products has a largely functional construction should not be considered as an exemption from the protection of unfair competition law as has been stated in several cases before.³⁰

The products was made before the Defendant started making copies of them and the Defendant had knowledge about the existence of the products before it started to make the copies due to the contact and negotiations the Defendant had with the Claimant, were the products were discussed.

Therefore it should be stated that the Defendant has exploiting the efforts made by the Claimant in an unfair way which has led to the risk of confusion according to NMA section 30.

²⁹ NIR 1/2013 Immaterialrettsutviklingen i Norge 2010–2012 Sejersted Anne Marie, Krag Iversen Vebjørn and Bernt Andreas, p. 110.

³⁰ RG 1988 s. 277 (Mini maglite) and NUK-sak nr. 09/2005.

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7.2.1 Sanctions

The Defendant has acted in breach of the prohibition in NMA section 30 and therefore the Tribunal shall prohibit the Defendant to market the copied products on their web-site. The prohibition shall be combined with the penalty of a fine.

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8. NDA

8.1 Background to the dispute

In October 2013 the Claimant and the Defendant entered into business discussions regarding the possibility for the Defendant to start producing ropes for the Claimant. Before starting the negotiations the Claimant and the Defendant entered into a mutual NDA, Appendix 2. According to paragraph 1 in the NDA the purpose was "business discussions of a sensitive nature regarding possible future business cooperation (the "Project"). The parties entered into the discussions under the premises that the Defendant could start production and delivery of the Claimant's ropes by mid January 2014. If this could be achieved the Claimant could have had the possibility to bid for a contract of delivery to one of Europe's biggest producers of climbing gear, the Swedish company "Hagfjäll". In December 2014 the negotiations between the Claimant and the Defendant however ended without any agreement being concluded between the Defendant and the Claimant.

8.2 Breach of NDA

According to section 1 in the NDA, confidential information shall mean "financial, technical, operational, commercial, management and other information, experience and expertise of whatever kind relating to the Claimant and the Defendant or the Project". The definition of confidential information according to the NDA is broad and shall thus include all information disclosed by the Claimant orally or in written to the Defendant during the negotiations. Thus shall the information about that the fabric nylon worked well in the ribbons as an alternative to polyester, which the CEO Rasmus Repschlagger mentioned to the Defendant during the negotiations, be considered as confidential information.

By entering into the NDA the Claimant and the Defendant undertook to not without prior written consent of the other Party to "copy, distribute or disclose any Confidential Information to any other person than employees as mentioned in section 4, or use any Confidential Information for any purpose other than in relation to the Parties assessment of the Project". The Claimant has not given any prior written consent to the Defendant. The Defendant has instead intentionally acted in breach of paragraph 2 in the NDA by disclosing, distributing, using and copying confidential information for the Defendant's own economic advantage in order to start a competing business. It is shown that the Defendant has copied and used the confidential information since the Defendant now is selling and offering identical ropes. There exists an adequate causality between the Defendant's misuse of confidential information and the Defendant's economic gain from this misuse since the Defendant has been able to conclude a contract of delivery with "Hagfjäll" by misusing the Claimant's confidential information.

According to paragraph 3, 1)-4) in the NDA certain exceptions from confidentiality exist. According to paragraph 3.1 in the NDA information which at the date of its disclosure is public knowledge or which subsequently becomes public knowledge other than by any breach of the NDA, shall not be considered

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as confidential. This exception is not applicable since the Defendant intentionally has acted in breach of the NDA by disclosing, distributing, using and copying confidential information which at the date of its disclosure was confidential.

The confidential information was not in the Defendant's lawful possession prior to the information being disclosed and was not made available to the Defendant by or on behalf of the other, why the exception in paragraph 3.2 in the NDA is not applicable.

The confidential information was disclosed by the Claimant and not by a source other than the parties in the NDA, why the exception in paragraph 3.3 in the NDA shall not apply.

The Defendant has not been required by applicable law or regulation or order of a court of competent jurisdiction or government agency to disclose the Claimant's confidential information. The Defendant has intentionally to its own economic advantage distributed, used and copied confidential information and acted in breach of the NDA. The Defendant has used the confidential information with the intent to start a competing business. The exception stated in paragraph 3.4 in the NDA shall thus not be applicable on the Defendant's conduct.

Should the Tribunal assess whether an exception to confidentiality shall apply according to 3 paragraph in the NDA, the Claimant is thus of the opinion that no exception from confidentiality shall apply.

8.3 Compensation for lost profit

The Swedish Sales of Goods Act paragraph 67 first sentence stipulates a common principle of contract law; "Damages for breach of contract includes compensation for expenses, price difference, lost profit and other direct or indirect loss relating to the breach of contract".³¹

The Defendant has acted in breach of the NDA which shall entitle the Claimant to compensation in accordance with the following. The Claimant has been caused lost profit due to the lost contract with the Swedish company "Hagfjäll". Compensation for lost profit shall be set in proportion to the probability that the profit had been realized if the Defendant had not acted in breach of the NDA. The Claimant has all the time been certain of being able to bid for a contract of delivery with "Hagfjäll"³² which would have led to profit, if the Defendant and the Claimant had entered into a contract regarding machinery and capital in order to start mass production of the Claimant's ropes. The Defendant was also fully aware of the fact that a contract between the Defendant and Claimant would have led to a real possibility to a contract of delivery being concluded between the Claimant and "Hagfjäll".

If the Claimant had known that the only real intention of the Defendant starting the negotiations with the Claimant, was to get hold of the Claimant's confidential information in order to start a competing

³¹ Ramberg & Ramberg, Allmän Avtalsrätt, 2014, p. 220.

³² NJA 1981 s. 1091, NJA 2002 p. 477. H. Saxén "Skadestånd vid avtalsbrott - HD Praxis i Finland", Ramberg & Ramberg, Allmän Avtalsrätt 2014, p. 220

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business, the Claimant would instead entered into negotiating with another counterpart in order to conclude a contract regarding machinery and capital and in that way the Claimant could have had a real possibility to bid for the contract of delivery with “Hagfjäll”. By the Defendant’s conduct the Defendant has deprived the Claimant of this possibility.

Had the Claimant concluded the contract with “Hagfjäll” the Claimant would have been able to make an immediate profit of one hundred thousand (100.000) Euro since “Hagfjäll” had made a promise of placing an order of ropes corresponding to this amount.

The Defendant shall thus be obliged to pay one hundred thousand (100.000) Euro plus interest according to Article 4 and 6 of the Swedish Interest Act in damage, covering lost profit, due to lost contract with “Hagfjäll”.

8.4 Compensation for misuse of Confidential Information

The Defendant has acted in breach of paragraph 1 and 2 in the NDA by disclosing, distributing, using and copying the Claimant’s confidential information and in this way started a competing business. By misusing the Claimant’s confidential information, especially the confidential information about that the fabric nylon works well in the ribbons as an alternative to polyester, the Defendant has been able to achieve a headstart on the market of ropes and been able to conclude the contract with “Hagfjäll” by misusing the Claimant’s confidential information. It is likely that the Defendant will keep have a headstart on the market since the Defendant already has been able to sell the ropes on the market for a period of six months and due the fact that the Defendant has concluded the contract with “Hagfjäll” by misuse of confidential information, which secures its sales of ropes for an indefinite period of time ahead. Moreover a headstart is always gained by being first on the market when launching new products. The only reason for the Defendant gaining the headstart is because the Defendant has misused the Claimant’s confidential information.

The breach of the NDA and the misuse of the Claimant’s Confidential Information shall entitle the Claimant to damages corresponding to the amount needed to put the Claimant in such an economic position had the Defendant not acted in breach of the NDA. Had the Defendant not acted in breach of the NDA, the Defendant and the Claimant would have concluded an agreement regarding machinery and capital and in this way the Claimant could by all certainty been able to conclude the contract of delivery with “Hagfjäll” and in this way become a leading rope seller on the European market. The Defendant misuse of the Claimant’s confidential information causes an ongoing negative economical consequence for the Claimant since the Defendant is gaining an economic advantage at the expense of the Claimant. The Claimant shall be entitled to compensation amounting to three hundred thousand (300.000) Euro plus interest according to Article 4 and 6 of the Swedish Interest Act.

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9. Negotiations

Culpa in contrahendo means "fault in conclusion of a contract". This legal figure recognizes a clear duty to negotiate with care, and to not lead a negotiating partner to act to his detriment before a firm contract is concluded.

The Defendant has by being fully aware of all the reasons for the Claimant entering into negotiations with the Defendant and by misusing the Claimant's confidential information for its own economic advantage intentionally acted in breach of section 1 and 2 of the NDA. The Defendant's conduct in conjunction with the negotiations between the Claimant and the Defendant shall be declared as disloyal and entitle the Claimant to compensation amounting to one hundred thousand (100.000) Euro. The compensation corresponds to the amount needed to put the Claimant in the same position as if the Defendant had negotiated loyally and with care.³³ There is a clear link between the Claimant's damage occurred by the Defendant's disloyal negotiations with the Claimant and the Defendant's conduct in conjunction with the negotiations, more about this below.³⁴

Firstly, the Defendant led the Claimant to believe that the Defendant had a serious intention of concluding a contract regarding machinery and capital by making clear statements about that this was the Defendant's intention in conjunction with the negotiations and in all other ways acting as if this was the Defendant's intention. It shall be considered as clear that the Defendant never had any intent of entering into any contract with the Claimant since the Defendant now is engaging in competing business.

Secondly, the Defendant was fully aware of the fact that one of the reasons for the Claimant entering into business discussions of sensitive nature with the Defendant was the fact that the Claimant at that time did not have the machinery and capital needed itself in order to start mass production of the Claimant's product, which the Defendant on the other hand possessed and could provide. The Defendant was also fully aware that the reason for the Claimant starting negotiations with the Defendant and not with any other company was the fact that the Defendant was able to start production and delivery of the Claimant's products by mid January 2014, which the Defendant knew was necessary for the Claimant to be able to bid for a contract of delivery with one of Europe's biggest producers of climbing gear, the Swedish company "Hagfjäll". The Defendant was thus fully aware of all the reasons for the Claimant approaching the Defendant.

Thirdly, the Defendant stated that the fact that the Defendant wanted to end the negotiations was to pursue "other priorities for the moment". The only real reason behind the fact that the Defendant ended the negotiation was to be able to misuse the confidential information that the Claimant had disclosed

³³ Ramberg & Ramberg, Allmän avtalsrätt 2014, chapter 4.1.

³⁴ NJA 1990 s. 745

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during the negotiations, which also is shown by the fact that the Defendant concluded the delivery agreement with the Swedish company "Hagfjäll" in January 2014 by misusing the Claimant's confidential information.

In light of the above it cannot be considered that the Defendant has negotiated in good faith and with care.

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10. Trade secrets

Trade secrets are to understand as information concerning the business or industrial relations of a person conducting business or industrial activities which that person wants to keep secret and the divulgence of which would be likely to cause a damage to him from the point of view of competition according to SPT section 1.

The information that should be considered as the Claimant's trade secrets is the information which has not been published in the patent application, therefore it should be considered that the information that nylon could be used to obtain the product as had been mentioned between the parties is a trade secret.³⁵ The information that nylon could be used to obtain the product should be considered as such information concerning the industrial relations of the Claimant that is a trade secret since the information gave the Defendant knowledge about how the production of the product could be obtained.³⁶ The information should also be considered as information concerning the business since the Claimant's company is built on producing the product in question and it is not possible to get hold of this information from any other party than the Claimant.³⁷

The Claimant has clearly shown that it wanted to keep the information stated above secret by entering a NDA with the Defendant and the information stated above is of such nature that it would likely cause damages to the Claimant if someone else exploited it.³⁸ The Defendant must at least have implicitly understood that the information about the nylon was of such character that it would most likely damage the Claimant if it was exploited or spread by someone else. The damages that would likely occur were that the Claimant would lose its competitiveness on the market since the product is a brand new innovation with distinct properties due to its functions and durability.

10.1 Exploitations and damages to the Claimant

The Defendant has exploited the Claimant's trade secrets by using the information to produce the Claimant's products with the material nylon in breach of SPT section 2. This information was clearly given by the Claimant in confidence of secrecy. The Defendant understood that the information was secret due to the NDA and the circumstances they were given under.³⁹

The Claimant has suffered damages through losing the contract with the company Hagfjäll to the benefit of the Defendant who got the contract with Hagfjäll through the exploitation of the Claimant's trade secrets consisting of the information that nylon could be used to obtain the Claimant's product.

³⁵ The Commentary to the Swedish Act on the Protection of Trade Secrets, Karnov, Löfgren Ola, 1).

³⁶ Löfgren Ola, 2).

³⁷ Löfgren Ola, 3).

³⁸ Löfgren Ola, 4) and 5).

³⁹ Löfgren Ola, 18).

APPENDIX 4

The contract with Hagfjäll contains an agreement of delivery of products to Hagfjäll. The deliveries started on 15 January and have continued since then. The deliveries should be considered exploitation of the Claimant's trade secrets since trade secrets are used to produce the products that are being delivered by the Defendant, which are damaging the Claimant since the Claimant cannot deliver its products to Hagfjäll.

According to the above described the Claimant has suffered damages from the point of view of competition.

10.1.1 Sanctions

The illicit exploitation of the Claimant's trade secrets according to STP section 2 should cease as soon as possible to prevent further damages to the Claimant. As stated above the Defendant is damaging the Claimant by delivering the products obtained by the Claimants trade secrets. The Tribunal should therefore prohibit the Claimant to further exploit the Claimant's trade secrets according to SPT section 11 and the prohibit should be given under the penalty of a fine according to SPT section 11.

By exploiting the Claimants Trade secrets the Defendant has caused damages to the Claimant due to the lost contract with Hagfjäll. The Tribunal should therefore impose the Defendant to pay 100.000 Euros due to the loss of contract with Hagfjäll according to SPT section 6.