

Stockholm the 3rd of October 2014

To the Tribunal

STATEMENT OF DEFENSE

Claimant: Tougkvas A/S
Oslo
Norway

Respondent: Rope Twist Inc.
Delaware

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

Matter: Trademark and patent infringement, breach of contract, infringement of business name.

1. Request for relief

- i) The Respondent requests that all the Claimant's claims shall be denied.
- ii) The Respondent does not accept the amount of the claim, but has no objection to the stated interest rate *per se*.
- iii) The Respondent requests reimbursement for legal attorney fees with an amount that will be specified later.

2. Legal grounds

- i) The suggested amendment of the patent claims is unlawful thus the new wording would mean a broadening of the scope of protection in breach of the Danish Patent Act ("DPA") section 39.
- ii) The suggested amendment of the patent claims in the patent applications are unlawful thus the new wording of the patent claims would mean that a new subject matter is disclosed which had not been disclosed in the original application, in breach of the Finnish, Norwegian and Swedish Patent Acts ("PA") section 13.
- iii) The Claimant cannot file a claim for patent infringement until the application results in a patent according to PA Section 60.
- iv) The Respondent's product does not fall within the scope of sought protection according to the Claimant's patent application in FI, NO and SE.
- v) The Respondent's product does not fall within the scope of protection of the Claimant's patent in DK in accordance with DPA section 39.
- vi) If the Tribunal should conclude that the Respondent's innovation falls within the scope of protection of the Claimant's patent in DK the Respondent is anyway not commercially exploiting the innovation in DK since the Respondent is not offering

the product, producing the product or putting the product out on the market in DK in breach of the DPA section 3 (1) (i).

- vii) If the Tribunal would find that the Respondent's innovation falls within the scope of protection of the Claimant's patent applications in FI, NO and SE the Respondent is anyhow not commercially exploiting the innovation in FI, NO or SE since the Respondent is not offering the product, producing the product or putting the product out on the market in these countries in accordance with PA section 3 (1) (i).
- viii) The Respondent is not using the Claimant's business name in together with the Respondent's product in accordance with the Finnish Unfair Business Practices Act ("FUP") section 1 (1).
- ix) The use of the Claimant's business name does not cause any confusion amongst the consumers in accordance with the FUP section 1 (1).
- x) The Respondent's use of the phrase "Rope Twist technology makes mountaineering safe" is not causing confusion amongst consumers about the origin of the products' technology, since the Respondent is using different a technique for its products' in accordance with the FUP section 2 (1) and the Swedish Marketing Act ("SMA") section 10 (1).
- xi) The Respondent has not obtained trade secrets unjustifiably, since all information that the Respondent has, is both general knowledge and has been given voluntarily by the Claimant, therefore there is no breach of the FUP section 4 (1) or the Swedish Act on the Protection of Trade Secrets. ("SPT") section 2 and therefore no compensation should be given based on the SPT section 6.
- xii) No violations have been made by the Respondent and therefore no injunctions preliminary or permanent should be made by the Tribunal.
- xiii) No violations have been made by the Respondent and therefore the Respondent should not be liable to pay any damages.

- xiv) The Respondent's use of the Claimant's registered trademark "mountain safe" and business name "tougkvas" as key words in Google's referencing service, "AdWords", do not adversely affect any functions of the Claimant's trademark or business name and does not constitute an infringement of the Claimant's registered trademark or business name. The Respondent is not violating 5(1)(a) TMD/Section 4(a) Norwegian Trademarks Act.
- xv) The Respondent has not acted in breach of any section in the NDA. The exception of confidentiality in section 3.1 in the NDA shall apply on the Respondent's conduct. The information that the Claimant states is confidential is not of a confidential nature.

3. Contest of facts

- i) The Respondent has not responded to the argumentation based on the Doctrine of Equivalents since this argumentation goes beyond what the parties agreed that the Tribunal should try.¹
- ii) The Respondent has not been presented the information that the material nylon could be used as an "alternative" to polyester according to the statement of Claims section 2 p. 9. This information was given as an example of materials that could be used to braid the ropes that the Claimant wanted to produce but no information was given that by using this material the same results could be obtained as by using polyester. Therefore the information that nylon could be used in the making of the ropes cannot be considered as information of an "alternative" material to polyester. Alternative should be considered meaning that the same result could be obtained by the usage of the other material.
- iii) The Respondent was not given any instructions of which material the ropes should be produced in accordance with what the Claimants is suggesting in the statement

¹ <http://www.jus.uio.no/ifp/english/research/areas/intellectualpropertylaw/nordic-ip-moot-court-competition/index.html>

of claims section 2 p. 15. The knowledge of what materials the products should be produced in was given as simple information and not as an instruction.

- iv) The Respondent is not selling its products' in DK, FI, NO or SE but in the US.
- v) The SE company Hagfjäll is buying the products' from US.
- vi) The Respondent is not producing its products' in DK, FI, NO or SE, but in the US.

4. Counterclaims

4.1 Request

- i) The Respondent request that the Tribunal makes a preliminary assessment that the amendment to the granted patent in Denmark ("DK") is unlawful.
- ii) The Respondent request that the Tribunal makes a preliminary assessment that the amendment to the patent application in Finland ("FI"), Norway ("NO") or Sweden ("SE") is unlawful.
- iii) The Defendant request that the Tribunal declares that the trademark "mountain safe" is invalid.

5. Arguments

5.1 Patent

5.1.1 Amendment of patent claims in 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 lead 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 where the patent claims is determining the scope and the description can be used to interpret the claims.

The European Patent Convention (“EPC”) art. 69 has the same wording as DPA section 39 and the DPA section 39 should be interpreted in accordance with the EPC. The first article in the protocol on the interpretation of the EPC art. 69 states that the patent claims should not be interpreted in a strict literal meaning nor should the claims serve only as a guideline. The article is to be interpreted as defining a position between these extremes which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

By examining the wording of the description and claims of the patent presented by the Claimant in appendix 1, 3.6.2, it can first be concluded that granted patent is a product patent since the innovation is embodied in the item, the rope. This means that the components mentioned in the claims are of high importance to obtain the technical solution that the rope is presenting. Therefore the scope of protection should be closely tied to the claims in the patent.

The claims should nevertheless be interpreted in the light of the description in the patent to clarify the claims. Since the wording “Polyester fibers are very useful.” is used in the description it can be stated that the intent of the Claimant was to apply for a patent for ropes made with polyester, since the Claimant is depressingly stating this in the description.

The scope of protection according to DPA should therefore comprise the use of polyester to create the ropes with the specific qualities described in the description of the patent. Deleting the wording “polyester” from the patent claims would mean that all ropes obtaining the sought effect would be comprised in the scope of protection. The deletion of the word polyester should

be considered as a change of the type of patent from a product patent to a process or method patent. This has been determined to be an unlawful change by the European Patent Office Appeal Board and the amendment should therefore solely based on this be considered unlawful.²

Also one of the weightiest arguments for the limit of amendments of patent claims is that no third party should as a consequence of the amendment be considered to infringe the patent based on the amendments.³ In the case at hand third parties will likely be affected in this way since there are other actors producing ropes in a same way but with other materials.

The suggested amendment of the patent claims should therefore be considered as unlawful thus the new wording would mean a change of the type of patent and a broadening of the scope of protection for the patent in breach of the DPA section 39.

5.1.2 Amendment of patent claims in patent applications

Amendments to the patent applications are permitted in FI, NO and SE according to PA section 13 but if the new wording would disclose any other subject-matter than what was disclosed in the application when it was filed it is considered unlawful.

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 greater opportunity to amend the claims based on the description.⁴ This means that the Claimant can add anything from the description of the patent but deleting something from the claims can only be done if it doesn't constitute a generalization of the patent.⁵ The generalization is considered to be a "new subject-matter" in the sense of the PA section 13.

By deleting the wording "polyester" from the claims the patent applications would comprise all ropes with the described function regardless of material. Since the patent application is written and argued for as a product patent this would mean that a generalization of the patent would be

² EPO G2/88.

³ NIR 2003/2, Patentkravstolkning i praxis, Bruder Maria, (pp. 136-148) pp. 137-138.

⁴ Jonshammar, Louise, Comment to the Swedish Patent Act, Karnov,

⁵ Patentbesvärsträtten mål 11-127, p. 6.

done by the deletion. By deleting the wording “polyester” from the claims it should be seen as if the Claimant is changing the whole patent which was originally applied for.

Therefore the suggested amendment of the patent claims in the patent applications are unlawful thus the new wording of the patent claims would mean that a new subject matter is disclosed which had not been disclosed in the original application, in breach of the Finnish, Norwegian and Swedish Patent Acts (“PA”) section 13.

5.2 The Respondent’s product

The scope of protection for the granted patent in DK and the patent applications in FI, NO and SE is determined to comprise the ropes made with polyester in accordance with DPA section 39 and the PA section 13, as stated in 5.1.1 and 5.1.2 above.

The Claimants patent application was made public in accordance with DPA section 22 on the 5 December 2013. The Respondent read the patent and by the use of general knowledge of materials the Respondent created a product of its own with the use of the material nylon. Since the scope of protection for the Claimant’s patent is limited to the use of polyester to create the product, the Respondent’s product must be seen as a new innovation since the material is crucial to obtain the function the product.

Therefore it should be concluded that the Respondent is not using the Claimant’s patent.

5.3 Should the Tribunal find that the Respondent is using the Claimant’s patent for its product

5.3.1 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 second paragraph until the patent is granted, why the Respondent

cannot suffer any consequences based on the provisional patent protection as the Claimant has argued in appendix 1, 3.10-3.12.

But for future determination of the provisional patent protection it should be stated that if the patents are granted in FI, NO and SE no such use has been made by the Respondent that compensation can be in question in accordance with PA section 58 second paragraph. This is due to the fact that the Respondent is producing and selling its products' in the United States ("US") and not in the countries where the patent is applied for. The SE company Hagfjäll is though buying the products' in the US and importing them to SE but since Hagfjäll is not a party in this dispute this question shall not be examined further.

It should also be reminded that the fact that the patent has been granted in DK gives no certainty that the patents will be granted in FI, NO or in SE.

The Claimant has not shown any proof that the Respondent has taken any actions with the intent or in any case through negligence to infringe the Claimant's provisional patent protection.

Thereby it can be concluded that the Claimant cannot raise any claims based on the provisional protection and for future disputes it should be concluded that the Respondent is not using the Claimant's patent in a way that can be considered infringing the Claimant's rights in PA section 3 (1).

5.3.2 Patent

The Claimant has been granted a product patent in DK and therefore holds exclusive rights according to DPA section 3 (1) (i), meaning that the Claimant has the sole right to produce, offer and put out the product on the market, in DK.

The Respondent is producing its products in the US and therefore the Respondent is not infringing the Claimants rights in DK. The Respondent is only offering its products in the US through their US-web-site in English, where all prices are in US-dollar and no information can be gained in other languages. It has been concluded that the marketing has to be "directed to" a specific market taking measures to adapt the information to the specific market.⁶ The Respondent has

⁶ MD 2001:19 and MD 2004:17.

not taken any efforts to direct its marketing to the DK-market and cannot be considered to market the products in DK. By entering an agreement with the SE company Hagfjäll, Hagfjäll is buying and importing its products from the US. The Respondent is not putting out any of their products on the DK market, but Hagfjäll might be doing this through their actions without the Respondent knowing about it.

The Claimant has not shown any proof that the Respondent has taken any actions with the intent or in any case through negligence to infringe the Claimant's patent.

Therefore it should be concluded that the Respondent is not infringing the Claimant's rights according to DPA section 3 and can thus not suffer any consequences based on the Claimant's arguments according to the appendix 1, 3.10-3.12.

5.4 Business name

The Respondent has bought "AdWords" on the search engine Google, with the name "tougkvas". This means that by searching for the name "tougkvas" an ad with a link the Respondent's web-site will be displayed under the heading "sponsored links".

The FUP aims in the first place to protect consumers from being tricked in the course of trade, this means that the examination of the question at hand has to be regarded from the consumers' point of view.

The Claimant refers to the case MAO 121/12. In the case a business had used another business name on their own commercial signs for a long time. First the court determined that the business name that was used was "well-known" and then the court determined that the business was using another's business name because of the positive associations consumers made to it.

In the case at hand the Claimant has not shown that the Claimant's business name is well-known or that the business name has positive associations. The assessment whether a business name is well-known and has a positive association should be made in the same way as the assessment considering well-known trademarks.⁷ This has not been argued by the Claimant, and with a plausible assessment it can be stated that the business name "tougkvas" would not be considered

⁷ MD 2012:15, p. 92.

as well-known or have a positive association. Therefore the case presented by the Claimant and the argumentation the Claimant has based on it is not applicable in the case at hand, and it should therefore be considered that the Claimant has no support for its claims in this part.

The Respondent's ads are published under a clear heading stating that the links beneath are sponsored. The business name "tougkvas" is not mentioned in the link or on the Respondent's web-site. The ad shows an URL to the respondent's web-site and the Respondent's business name "Rope Twist Inc." together with the word "ropes". Only by showing a link under a clearly defined space when searching for a business name cannot lead to the conclusion that the consumers will be confused regarding the origin of the products the Respondent is selling on their web-site. Especially considered the fact that the Respondent's business name is clearly stated in the ad.

It should therefore be concluded that the Respondent is not using the Claimant's business name in a way that it confuses customers in regard of what origin the products have that the Respondent is selling. No breach of FUP section 1 (1) has therefore been made and the respondent can thus not suffer any consequences based on the Claimant's arguments according to the appendix 1, 3.10-3.12.

5.5 Phrase

As stated above in 5.4 the legislation seeks to protect consumers from being confused and affected in their economical decisions based on unfair business practices.

The Respondent uses the phrase "Rope Twist technology makes mountaineering safe" on its web-site. The Claimant argues that this phrase is causing confusion amongst consumers about the origin of the products technology. Since the Respondent is using a different technique based on nylon instead of polyester as stated in 5.2 the phrase cannot be seen as confusing the consumers of the origin of the products' technology that the Respondent is selling since it is the Respondent's technology that is used to produce the ropes.

The reference to the Swedish Marketing Act (“SMA”) section 10 (1) made by the Claimant should be commented here. This section is primarily aiming at the issue of actors giving misleading information that confuses the customers of the properties embodied in products,⁸ or when it comes to information about someone else’s business it mainly aims at situations when comparative marketing is used.⁹

In the case at hand the Respondent is not giving any misleading information about the properties of the product they are selling since the Respondent’s products are of high standard and holds the ability to achieve the presented abilities. The Respondent is neither using information about the Claimant’s business by marketing its own products on their web-site in a comparative way. Therefore the SMA section 10 (1) is not applicable in the current case at all.

Therefore the Claimant has not suffered any inconvenience due to the phrase that the Respondent is using on its web-site and no confusion about the products origin or properties can occur amongst the customers when entering the web-site. Concluding the above stated no breach of the FUP section 2 (1) or the SMA section 10 (1) had been made by the Respondent and the Respondent can thus not suffer any consequences based on the Claimant’s arguments according to the appendix 1, 3.10-3.12.

5.6 Trade secrets

The definition of trade secrets is found in the SPT section 1 and comprises information concerning the business or industrial relations of a person conducting business or industrial activities which that person wants to keep secret and the divulgation of which would be likely to cause a damage to that person from the point of view of competition. The Claimant claims that the Respondent has obtained information about the Claimants business plans and information about a material that could be used to create ropes, comprising trade secrets in an unjustifiable way according to FUP section 4 (1).

The Claimant is referring to FUP section 4 (1) which requires that the trade secrets used are obtained unjustifiably. This means that the information has to be obtained against someone’s

⁸ Levin, Marianne, Comment to the Swedish Marketing Act, Karnov, 64).

⁹ Levin, 67).

will and the primary case the section aims at is espionage.¹⁰ All information that the Claimant is arguing is trade secrets was given to the Respondent voluntarily and therefore the FUP section 4 (1) is not applicable even if the Tribunal should conclude that the information is to be considered as trade secrets.

The Respondent has not used any trade secrets given by the Claimant in a way that is against good business practice according to SPT section 2. The Respondent has not obtained any information in an unjustifiable way since the Claimant has given all information voluntarily and therefore FUP section 4 (1) is not applicable in the case. No compensation can thereby be given to the Claimant based on the SPT section 6. Neither and can the Respondent suffer any consequences based on the Claimant's arguments according to the appendix 1, 3.10-3.12.

Information about contracting with Hagfjäll

Firstly it has to be determined if the information at hand can be considered as trade secrets. The Claimant is arguing that the information that the Claimant was going to negotiate a contract with the SE company Hagfjäll should be considered as a trade secret in accordance with SPT section 1. The Respondent was not informed of the fact that the Claimant had plans to negotiate a contract with Hagfjäll, the only information that the Respondent got from the Claimant was that the Respondent should start delivering the products that the Claimant asked for in mid-January 2014. The issue of to whom the Claimant was supposed to sell the delivered products was never a question between the parties.

If the Respondent would have gotten information about the Claimant's plans of contracting with Hagfjäll in the course of the parties' negotiations the information could have been considered as a trade secret in the sense the Respondent would have had information about the Claimants internal business strategies. If the Respondent would have spread the information to other actors that could have been considered a breach of the SPT section 2 or if the Respondent would have used the information in order to contract with Hagfjäll it could have been considered as a breach of SPT section 6.¹¹ The Respondent did however not do this. Instead the Respondent used the common knowledge that the company Hagfjäll is one of the largest companies in Europe who sell climbing gear, when choosing which company to contract with. Therefore the

¹⁰ Löfgren, Ola, Comment to the Swedish Act on the protection of Trade Secrets, Karnov, 16).

¹¹ Löfgren, 9), 10) and 18).

information was not in first place a trade secret and in second place the Respondent did not use the possible trade secret in breach of SPT section 2 or section 6.

Nylon

The information that nylon could be used to create ropes is argued by the Claimant to be a trade secret. The information that other synthetic materials could be used to create ropes should be considered as general knowledge and not as such information that could be considered as a trade secret according to SPT section 1 to start with.

When the Claimant mentioned the fact that nylon could be used to create ropes nothing was said about the effect that could be obtained by the use of nylon, or if it could be considered as a material equal to polyester to create the requested quality. If the Claimant would have given information about the effects or qualities gained by the usage of nylon instead of polyester in the making of the ropes this information could be seen as such to constitute a trade secret in accordance with SPT section 1. Since this is not the case and the information that was given by the Claimant is general knowledge the information that the Respondent has used was not obtained during the negotiations in accordance with SPT section 6. Therefore the information that nylon could be used as a material to create ropes should not be considered as trade secrets and the Respondent's actions should not be considered to be in breach of SPT section 2 or section 6.

5.7 Invalidity of trademark

The Respondent does not contest that the Trademark Directive ("TMD") shall be applied by the Tribunal and that the grounds for invalidity of a trademark are set out in article 3 and 4 in the TMD. Furthermore the Respondent does not contest that the Claimant's application for registration of the trademark "mountain safe" was examined by the Danish Patent and Trademark Office and that the trademark was subsequently registered. The Respondent however contests that the trademark "mountain safe" satisfies the relevant criteria of validity. Thereto the Respondent wishes to emphasize that it is irrelevant in whole that the Tribunal assesses or takes into account whether the phrases "safe mountaineering", "to make mountaineering safe" or "mountain safety" may serve in normal usage of language when assessing the Respondent's claim of declaring the trademark "mountain safe" invalid.

5.7.1 No distinctive character

The Respondent does not contest that “mountain safe” can be graphically represented. The Respondent however claims that the Tribunal shall declare that the trademark “mountain safe” according to article 3 (1) (b) TMD is devoid of *distinctive character*. In order to assess whether the word combination of “mountain safe” is capable of distinctiveness it is necessary to put oneself in the shoes of a consumer engaged in mountain climbing.¹² It is obvious that the trademark creates clear associations with safety and security when exercising mountain climbing. From that point of view and given that the goods concerned in this case are ropes used when climbing mountains, no imagination from that consumer’s point of view is required in order to create this association. An overall assessment shall be made of the combination “mountain” and “safe”. The combination of “mountain” and “safe” does not reflect a particular high degree of inventiveness. The combination of “mountain and safe” is thus devoid of any distinctive character and also the words “mountain” and “safe” seen separately shall be considered as non-distinctive elements not qualifying for protection.

5.7.2 Descriptive mark

The interest of competitors to keep the words “mountain” and “safe” for general use must be considered when assessing its distinctive character. An extensive monopoly is created by the fact that the Claimant has the trademark as a sole right which shall be considered as incompatible with the system of undistorted competition, in particular because it could have the effect of creating an unjustified competitive advantage for the Claimant, as a single trader.¹³ The public interest in free competition i.e. the interest of competitors to keep a sign available for general use, is thus an aspect to be considered in the appraisal of descriptive character, i.e. in the context of Article 3(1) (c) TMD.¹⁴ There is no doubt that “mountain safe” shall be considered as exclusively consisting of signs/indications which serve, in trade, to designate the intended purpose and characteristics of the good. The Claimant has not brought up any evidence that shows that the trademark is used in conjunction with anything else but ropes used when climbing mountains. The trademark shall thus be considered as describing its intended purpose, *to climb moun-*

¹² C-383/99, Baby Dry

¹³ C-104/01, Libertel v. Benelux Merkenbureau.

¹⁴ C-108/97 and C-109/97 Windsurfing Chiemsee

tains in a safe way. The words seen separately shall be considered as designating the characteristic of the good concerned. The descriptiveness must however be determined not only in relation to each word taken separately but also in relation to the whole which they form.¹⁵ The combination of mountain and safe shall not in any way be considered as anything else than describing the purpose of use. ECJ has stated that a sign must be refused registration *if at least one of its possible meanings designates a characteristic of the good concerned.*¹⁶ The Respondent firm position in this regard is that “mountain safe” represents the essential characteristics of the ropes, to be safe when climbing mountains.¹⁷ The trademark shall thus be declared invalid since it has a descriptive character.

5.8 Trademark infringement and infringement of business name

The Respondent testifies that the Respondent registered “tougkvas” and “mountain safe” as key words but contests that this constitutes an infringement of the Claimant’s registered trademark “mountain safe” or business name “tougkvas”. The Respondent further testifies that it uses “mountain safe” and “tougkvas” in the course of trade in relation to identical goods. This does however not mean that the Claimant as proprietor of the trademark and business name has the right to exercise its exclusive right in order to prevent the Respondent to use the trademark and the business name.¹⁸ A proprietor of a trademark has the right to prevent a third party to use a trademark or business name identical to the proprietor’s in relation to identical goods if one of the functions of the trademark or business name is adversely affected¹⁹. The Respondent’s use of the Claimant’s registered trademark “mountain safe” and business name “tougkvas” as key words in Google’s referencing service, “AdWords”, do not in any way adversely affect any functions of the trademark or the business name and does thus not constitute an infringement of the Claimant’s registered trademark or business name. The use of the referencing service Google “Adwords” is a highly increasing method of advertisement method on the market. The internet advertising occupies in trade and commerce an important position.

The Respondent contests that the Respondent’s use of the registered trademark “mountain safe” and business name “tougkvas” adversely affects the trademark’s and business name’s functions

¹⁵ C-191/01 Wrigley.

¹⁶ Wrigley p. 32.

¹⁷ Baby Dry, p.41.

¹⁸ T 301-12 Layher p.12 and C-206/01, Arsenal Football Club, p.39-40 and Stojan Brdarski, In the aftermath of Opel v. Autec – is the requirement of trade mark use relevant or not?, NIR 2007 p. 255.

¹⁹ Arsenal Football Club, p. 42-52 and Layher, p.14.

of *indicating origin*. The Respondent's use of the registered trademark "mountain safe" and business name "tougkvas" do not suggest any existence of an economic link, and a normally and reasonably attentive internet user is able to determine, on the basis of the advertising link and the commercial message attached thereto, that the Respondent is a third party vis-à-vis the Claimant. The ECJ has stated that the question whether the origin function of a trademark or business name is adversely affected depends in particular on the manner in which the ad is presented.²⁰ The Respondent's ad is in no way misleading or suggests any economic link since the ad clearly states that the advertisement originates from the Respondent. The Respondent does not use the Claimant's registered trademark or business name in the ad or in other way implies that there is a connection between the companies. The way in which the Respondent's ad is presented does thus not in any way create an economic link to the Respondent's products or business. By using the keywords the Respondent ad only presents an alternative to the Claimant's goods.²¹

The ad enables a normally informed and reasonably attentive internet user to ascertain that the ad originates from the Respondent since the ad is in no way vague to such an extent that a reasonably attentive user is unable to determine, on the basis of the advertising link and the commercial message attached thereto, which in this case only is "Rope Inc.", that the Respondent is a third party vis à vis the Claimant. Moreover the internet user entering the trademark "mountain safe" is likely to be well informed about the market of mountain climbing why he/she in no way is likely to have difficulty of determining the origin of the goods. Moreover the Respondent's webpage only contains information about the Respondent's business. This shall be considered to be in accordance with the aim of the European Union's legislation on electronic commerce. Fair trading and consumer protection is the overall aim of the legislation and it also states that all commercial communication on the internet has to be clearly identifiable, which the Respondent's ad is.²²

The Respondent wishes to emphasize that the Claimant still has the possibility to register its own trademark and business name as a keywords if the Claimant is willing to pay a higher price per click than the Respondent in order to ensure that its ad appears before that of the Respondent, which has selected the Claimant's trademark and business name as a keywords. The so

²⁰ Google, p. 83.

²¹ Google, p. 72.

²² Google, p.86.

called repercussions of the Respondent's use of the Claimant's trademark and business name does not themselves constitute an adverse effect on the *advertising function* of the trademark and business name. Moreover it shall not be in dispute that the order in which the natural results are set out results from the relevance of the respective sites to the search term entered by the internet user and that the search engine operator, Google, does not claim any remuneration for displaying those results. When internet users enter the trademark or business name of the Claimant as a search term, the home and advertising page of the Claimant will appear in the list of the *natural results*, usually in one of the highest positions on that list. That display which is free of charge means that the visibility to internet users of the goods of the Claimant is guaranteed, irrespective of whether or not the Claimant is successful in securing the display, in one of the highest positions, of an ad under the heading "sponsored links" which the Respondent currently holds. The use of Google "Adwords" is a part of a healthy competition. Taking into consideration of the foregoing it must be concluded that the use of the Respondent of the trademark "mountain safe" and business name "tougkvas" is not liable to have an adverse effect on the *advertising function* of the Claimant's trademark nor business name. The mere fact that the Respondent uses the Claimant's business name and trademark in relation to identical goods and that this obliges the Claimant to intensify its advertising in order to maintain or enhance its profile with consumers is not a sufficient basis for concluding that the Claimant's trademark *advertising function* is adversely affected. A trademark's purpose is not to protect its proprietor against practices inherent in competition, which using a search engine referencing service is. The Respondent's use of the internet advertising constitutes such a practice whose aim is to merely offer internet users alternatives to the goods of the Claimant.²³ It is all part of a healthy competition. In conclusion the Respondent's conduct does not adversely affect the Claimant's use of its registered trademark as a factor in sales promotion or as an instrument of commercial strategy. The Claimant bears the burden of proof if it claims that a function of its trademark is adversely affected. The Claimant has not put forward enough evidence that shows that the advertising function is adversely affected, for example by exemplifying how the Claimant has used or uses its trademark in the course of trade.²⁴

Finally, it cannot be accepted that the Claimant as a proprietor of a trademark in conditions of fair competition - as that the trademark's functions as an indication of origin is - , can prevent the Respondent as a competitor from using an identical trademark in relation to identical goods

²³ Google, p. 69.

²⁴ Layher, p.15 and Google, p.92.

if the only consequence of that use it to oblige the Claimant to adapt its efforts or preserve a reputation capable of attracting consumers and retaining their loyalty. Likewise, the fact that the use may prompt some consumers to switch from goods bearing the Claimant's trademark cannot be successfully be relied on by the Claimant.²⁵ The *investment function* of the Claimant's trademark and business name is thus not adversely affected.

5.9 Breach of contract

The Respondent contests that it has used confidential information in breach of the NDA entered into between the parties in October 2014. The Respondent contests that the definition of Confidential Information in the NDA covers both the use of nylon and the Claimant's plan to contract with Hagfjäll for the distribution of the Claimant's products based on the below stated reasons.

The Respondent does not contest that section 1 in the NDA stipulates the following:

“In this Agreement “Confidential Information” means financial, technical, operational, commercial, management and other information, experience and expertise of whatever kind relating to the parties or the Project.”

The Respondent however contests that the information about Hagfjäll being interested in concluding a contract of delivery and the fact that the Respondent subsequently contacted and concluded a contract of delivery with Hagfjäll constitutes a use of the Claimant's Confidential Information in breach of the NDA since this information does not relate *to the relationship between the Parties or to the Project* and is thus not of a confidential nature.

The Project according section 1 in the NDA was to “conduct business discussions of a sensitive nature regarding a possible future business co-operation *between the Parties*”. The fact that Hagfjäll was and is interested in buying ropes shall not be considered to be covered by the confidentiality undertaking according to the NDA. It is common knowledge that Hagfjäll is one of Europe's biggest producers of climbing gear. Hagfjäll is free to enter into agreements with any party its wishes on the market. There was no existing contract between Hagfjäll and the

²⁵ C-323/09 Interflora v. Marks & Spencer, p. 64.

Claimant when the Respondent and Claimant entered into discussions. Moreover the Respondent wishes to emphasize that the Respondent delivers ropes from US and does thus not conduct any commercial activity in Europe. The Respondent claims that the Tribunal shall declare that this information lies outside the scope of the NDA.

The Respondent contests that the technique that the Respondent uses to produce its ropes constitutes a use of the Claimant's Confidential Information in breach of the NDA. The definition of Confidential Information in section 1 in the NDA does not cover the use of nylon in the ropes. Since the Respondent's conduct in this regard is covered by the exception from confidentiality stipulated in section 3 in the NDA due to the fact the Claimant's patent application became publicly available on 5 December 2013. Section 3 in the NDA states the following:

"Exceptions from Confidentiality

The restrictions on use and disclosure set out in paragraph 2 above shall not apply to any information which:

- 1) At the date of its disclosure is public knowledge or which subsequently becomes public knowledge other than by any breach of this Agreement by the recipient hereunder,"*

When the Respondent started to produce its ropes with the fabric nylon (which shall be considered as very similar and an alternative to the fabric polyester) the Claimant's technique was public knowledge and was thus not attained by any breach of the NDA. There is nothing that says that it is prohibited to be influenced by publically available options, information and techniques on the market in order to develop and improve one's product and its features. All European legislation is based on the basic principle of undistorted competition. The technique that the Respondent uses for producing its ropes is a technique that the Respondent has developed *independently*.

In light of the above, the Respondent claims that the Tribunal declares that the Respondent has not acted in breach of any section of the NDA and is not acting in breach of the NDA on an ongoing basis. The Respondent claims that the Tribunal shall dismiss the Claimant's claims in this part in whole.

Should the Tribunal however find that the Respondent to some extent is using Confidential Information the Respondent claims that the definition of Confidential Information according to section 1 in the NDA shall be declared to be too broad and far-reaching.

5.10 Injunctions

The Tribunal cannot impose any injunctions against the Respondent as has been stated above, yet some comments will be given on some of the Claimant's argumentation for the proposed injunctions.

Appendix 1, 3.10.1 Preliminarily injunctions for alleged patent infringement in whole of Europe

The Tribunal cannot issue ant preliminary injunctions against the Respondent since the Respondent has not taken any actions on the markets where the products could hold any protection.

The argumentation that the Respondent is intending to launch an infringing product on any market where the Claimant holds a patent protection has not been argued for in the claims presented by the Claimant. The Claimant is arguing that the Respondent has the intention to launch infringing products, but as argued in 5.3.2 the Respondent has only business activity in the US and therefore the Tribunal cannot impose any actions against Respondent.

Appendix 1, 3.11.1 Permanent injunctions to stop the use of "mountain safe" and "tougkvas" as keywords in advertisement

Since the Respondent is not infringing the Claimant's trademark "mountain safe" and business name "tougkvas" the Respondent claims that the Tribunal shall dismiss the Claimant's demand for permanent injunctions according to section 57 of the Norwegian Trademark Act to stop the Respondent to use "mountain safe" and "tougkvas" as keywords in advertisement.

Appendix 1, 3.11.3 Permanent injunctions for alleged patent infringement in FI, NO and in SE

As stated above in 5.3.1 it is not possible to base any claims on the provisional patent until it is granted according to PA section 60. Also the provisional patent only makes it possible for the Claimant to be compensated for the use of the patent in accordance with PA section 58 (2). This means that the Claimant cannot in any case even if the patents would be granted in FI, NO or SE be able to achieve any other sanctions that compensation for the use and therefore the Claimant cannot in any case claim injunctions in accordance with PA section 57, 58 or 59 based on the provisional patent.

5.11 Damages

The Tribunal cannot impose any liability for damages for the Respondent as has been stated above, yet some comments will be given on some of the Claimant's argumentation for the proposed damages.

Appendix 1, 3.12.1 Damages for alleged breach of contract

The Respondent contests that the Claimant shall be entitled to compensation amounting to 100.000 Euros for the Claimant's "lost contract with Hagfjäll" and 300.000 Euros as fair compensation. Even if the Respondent previously in its correspondence with the Claimant stated that it "was likely that the Claimant would have gotten the contract with Hagfjäll if the Respondent hadn't got it" and in this way would have gained a profit of 100.000 Euros from the contract with Hagfjäll this does not in any way mean that the Claimant is entitled to compensation from the Respondent.

Firstly, the right to compensation requires that the Respondent's conduct relates to a *contractual relationship* between the Respondent and the Claimant. The Respondent's conduct does not relate to the contractual relationship between the parties since the use is not covered by the definition of Confidential Information according to section 1 in the NDA, the information does not relate to the Parties nor the Project. The Claimant shall thus not be entitled to any compensation since the Respondent's conduct does not relate to any breach of contract.

Secondly, should the Tribunal find that the Claimant is entitled to damages the Respondent testifies that the Claimant is entitled to any other compensation than *reliance interest* (*sw. negativa kontraktsintresset*). According to common basic principles of contractual law compensation for reliance interest means that a party is entitled to compensation corresponding to the costs and losses caused to that party due to fact that the party entered into negotiations regarding a possible entering into a contract which ends up not being concluded. That party shall be put in the same economic position that the party would have been in, had a contract been concluded or had the negotiations not lasted unnecessarily long. The costs that the party can have the right to be compensated for are costs for travel, meeting and material production. The Respondent does not contest that the Respondent informed the Claimant on 20 December 2013 that the Respondent had decided to pursue other priorities for the moment and that the negotiations thus ended without any agreement. The Respondent however wishes to emphasize that according to section 1 in the NDA entered into between the parties in October 2013, Appendix 3, the purpose of the NDA was to “*enter into business discussions of a sensitive nature regarding the possible future business co-operation*”. The NDA thus explicitly stipulates that no exact and definite obligation in this regard can be referred upon the Respondent and the Claimant and that the Respondent had no obligation to enter into any agreement with the Claimant. The Claimant was thus fully aware of this circumstance.

The Claimant has no valid legal ground for its claim for damages. According to chapter 2 section 1 in the Swedish “Skadeståndslag” anyone who causes another party pure economic loss due to a criminal act that party is obliged to compensate the other party for such loss. The Respondent has not conducted any criminal act. There exists no other valid legal ground for the Claimant’s claim for damages.

Appendix 1, 3.12.2 Damages for alleged unfair business practice

The Claimant argues that the cases KKO: 1997:181 and KKO: 2005:105 is supporting the argument that the wording “especially weighty reasons” in the Finnish Tort Liability Act chapter 5 section 1 could be the use of business secrets.

The case KKO: 1997:181 shows that the court has taken a great account to the fact that the person B had the intent to force a company that the person have had a leading position in to bankruptcy. Ergo two requirements should be considered to be leading in the determination,

one; the intent of the person who uses trade secrets and two; the severity of the injuries that the party who's trade secrets are being used are suffering.

These two requirements were further stated in the case KKO: 2005:105. The court expressly stated that the Respondent had to have the intent to take actions consisting unfair business practice and it had to have taken them with the intent to harm someone else's business.

In the case at hand firstly the Claimant has not shown that the Respondent has had any intent to take actions consisting of unfair business practice. Secondly the Claimant has not shown that the Respondent has taken any actions with the intent to harm the Claimant's business. And lastly the Claimant has not suffered any actual damages since it is not certain that the contract with Hagfjäll would have gone to the Claimant.

Also it should be noted as stated above in 5.6 the Claimant is basing its claims on FUP section 4 (1) which aims at business espionage and requires that the information was obtained unjustifiably. As stated above this has not happened in the case at hand and therefore the claims is not based on any applicable laws.

Therefore the Respondent is not liable for any damages based on the allegation that it would have used trade secrets obtained unjustifiably or that the Respondent's actions would have caused any damages to the Claimant.

Appendix 1, 3.12.4 Damages for alleged infringement of trademark

The Respondent contests that it has intentionally infringed the Claimant's exclusive rights. The Respondent's use of "mountain safe" and "tougkvas" as keywords do not adversely affect any of their functions and there thus does not exist any infringement of the Claimant's exclusive rights. The Claimant shall therefore not be entitled to any damages for trademark infringement according to section 38 of Finnish Trademark Act and section 58 of the Norwegian Trademark Act since no infringement exists.