

**TRIBUNAL
DE GRANDE
INSTANCE
DE PARIS**

4th Chamber, 2nd
Section

No. RG :
13/06023

NO. RECORD :

Summons of :
May 10, 2011

**DECISION
of January 23, 2014**

PLAINTIFF

S.A.S. OPM FRANCE
33 rue du Bois Briand
441316 NANTES CEDEX 3

Represented by Marc LEVY, Esq., of SELARL LEVY ASSOCIES,
member of the PARIS Bar, pleading attorney, mailbox no. #P0119

DEFENDANT

Association FRANCE PALESTINE SOLIDARITE
21Ter rue Voltaire
75011 PARIS

Represented by Antoine COMTE, Esq., member of the PARIS Bar, counsel,
mailbox no. #A0638 and Jean-Jacques GANDINI, Esq., member of the
MONTPELLIER Bar, pleading attorney

COMPOSITION OF THE COURT

Ms. ROSSI, Vice-President
Ms. BERGER, Judge
Ms. PLANTIN, Vice-President

Assisted by Moinécha ALI, Clerk of the Court

**Enforceable copy
of the decision
delivered on:**

HEARINGS

During the October 31, 2013, public hearing and after closure of the pleadings, notice was given to the attorneys that a decision would be reached and held available at the clerk's office on January 23, 2014.

DECISION

Held in public hearing and available at the clerk's office

Cross-examination

In first instance

The SAS OPM FRANCE is a corporation governed by French law which distributes on the national territory diverse products manufactured by the corporations SODA CLUB LIMITED, governed by Israeli law, and SODA CLUB INTERNATIONAL BV, governed by Dutch law, and particularly products enabling consumers to produce their own carbonated beverages. These latter are manufactured in part in the West Bank and labeled of Israeli origin.

The Association FRANCE PALESTINE SOLIDARITE, in the context of a campaign called "Boycott – Divestment – Sanctions", or "BDS", conducted different actions designed to boycott products coming from Israeli colonies and to inform consumers on the origin of the above-mentioned products. These actions were the object of reports on the website of the Association.

By a writ of summons of December 6, 2010, the corporation OPM FRANCE filed suit against the Association FPS before the Tribunal de Grande Instance of PARIS.

By its summary pleadings delivered electronically on May 21, 2013, which will be expressly mentioned, the corporation OPM FRANCE asks the Court, under the benefit of provisional enforcement and according to article 1382 of the civil code, that the Association FPS be found liable for damages in the amount of 46,000€ for the commercial harm caused to the plaintiff, that an injunction be issued against the promotion or organization of actions of disparagement or boycott under a permanent restriction order with a penalty of 1,000€ per reported action, that an injunction be issued to order the Association to remove from its Internet website the articles, pamphlets, and videos mentioned in the facts section under a restriction order with a penalty of 1,000€ per day of delay. The corporation OPM FRANCE requests payment of a sum of 5,000€ to cover its legal costs as well.

To support its requests, the corporation OPM FRANCE argues that the Association FPS is liable for its disparaging actions, notwithstanding that the parties are not competitors. It claims in this regard that the actions of the Association FPS exceeded the requirements of caution and objectivity intrinsic to any criticism, by conducting virulent actions and by calling for the boycott of the products on the locations of their marketing.

In response to the Association FPS, it claims that the freedom of the press is not applicable in the present case. It notes that the actions described by the Association FPS only target the products in their origin and not the corporation OPM FRANCE which distributes them, whereas slander and libel only apply to persons and not things.

With regards to the commercial harm it suffered, the corporation OPM FRANCE invokes the publicity given to the actions of the Association FPS, particularly in the regional press, and estimates it at 1,000€ per action, thus totaling 46,000€. It considers that the harm done justifies that the Association be enjoined under a restriction order to stop its actions and remove their reports from its Internet website.

By its summary pleadings delivered electronically on June 11, 2013, which will be expressly mentioned, the Association FRANCE PALESTINE SOLIDARITE asks the Court, according to article 12 of the civil procedure code and together the law of July 29, 1881 and article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that it rejects all of OPM FRANCE's claims and requests. As a counter-claim, it asks that the corporation OPM FRANCE be found liable in damages in the amount of 5,000€ for abuse of right. In addition, it requests payment of a sum of 2,000€ under article 700 of the civil procedure code.

To support its requests, the Association argues that the articles published on-line are only reports of actions through which calls for boycott are issued. It thus claims, by invoking a directive from the Department of Justice, that the broadcasting, on an Internet website open to the public, of a manifestation of opinion such as a call for boycott falls under the law of July 29, 1881. It adds in this regard that, were the facts in the present case found to be abusive, they would constitute an abuse of the freedom of expression under the law of July 29, 1881, and consequently could not be redressed under article 1382 of the civil code. Additionally, the Association notes that the disparaging actions invoked by the corporation OPM FRANCE cannot be distinguished from the calls for boycott and from the actions designed to inform the general public. It concludes that they fall under the law on the Press, according to which it invokes the statute of limitations. Finally, it objects to the existence and amount of the alleged harm caused to the corporation OPM FRANCE which it does not consider justified.

The proceedings were closed on September 12, 2013.

THEREUPON,

On the application of the law of July 29, 1881,

Whereas the assessment, even excessive, of products, services or performance of an industrial or commercial company, does not fall under the provisions of article 29 of the law of July 29, 1881, if it does not pertain to a legal or natural person;

That in the present case, it appears from the Association's pleadings themselves that the Association did not intend, in its calls for boycott, in the actions geared

toward consumers, or in their reports on the Internet website of the association, to target the corporation OPM FRANCE, but the products it distributes;

That from this only circumstance the law of July 29, 1881 is not applicable in the present case;

On the call for boycott of SODASTREAM products

Whereas it appears, from together articles 1382 of the civil code and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the principle of freedom of expression can only endure such restrictions as are necessary to protect the rights of others; that falls under the freedom of expression the call for others to avoid a product, or “call for boycott”;

That if such an action is legal when it is designed to protect the interests of the professional or non-professional clients of the said product, it is a civil tort when it is of an abusive character; that it is so when the boycott has goals other than the defense of the clients or when the conditions of its implementation are disproportionate considering the pursued objective;

That in this regard, the principle of contractual freedom implies that the purchaser of a thing is able to form an informed opinion as to its substantial characteristics, which are freely determined by his taste, his reason or his mind; thus that moral, political or religious considerations can determine, positively or negatively, the importance he gives to the place of origin and to the conditions of manufacture of the thing that he is considering purchasing;

That the protection of moral, political or religious interests of the clients can thus justify, on the part of the one who invokes the defense of said interests, the necessary actions to prevent them from being undermined; that it is so of the call to avoid a product, the possession or use of which could appear likely to undermine moral, political or religious interests of its purchaser;

On the objective pursued by the calls for boycott of the SODASTREAM products

Whereas in the present case, the Association FPS claims to follow the campaign called “BDS” (“*Boycott, divestment, sanctions*”) to which it associates the actions conducted against SODASTREAM products; that it is constant that the said campaign seeks termination by the State of Israel of alleged violations of international law; that it relies on external pressures, particularly on the boycott of products manufactured in the West Bank;

That the corporation OPM FRANCE brings as evidence a pamphlet published on the website of the Association, which indicates that “*this call for boycott does not seek to disparage the product in itself but calls for the boycott of the products of the Israeli colonization, to oppose it*”; that thus the objective pursued in the framework of the said “BDS” campaign, while legal and compliant with the constitutional principles of freedom of expression and opinion, appears foreign in itself to the defense of the clients of the boycotted products;

That, however, the above-mentioned pamphlet published on the website of the Association indicates that purchasing SODASTREAM products “*is (involuntarily) participating to the illegal occupation of Palestine and to the exploitation of the Palestinian people by an occupying power*”; that another pamphlet asks consumers to not “be complicit in the occupation”, that thus the Association justifies the call to avoid the product by the need to prevent the involvement of the potential purchaser in a process it condemns;

That the call for boycott thus does not appear illegal with regards to the objective it pursues to protect the moral, political or religious integrity of a purchaser sensitive to the cause and arguments of the Association FPS;

On the conditions of the calls for boycott

Whereas in the present case the corporation OPM FRANCE brings as evidence numerous materials and sample letters held available to the general public by the Association FPS on its Internet website; that the sample letter intended for the departmental section of the DGCCRF and the sample letter intended for associations of consumers mention a fraud on the origin; that a pamphlet talks of a “*fraud on the origin enabling the importer corporation OPM to unduly benefit from a preferential customs tariff*” and to “*deceit consumers*”; that another pamphlet mentions the fact that the product is “*deceitfully sold as ‘made in Israel’ and sometimes ‘in China’*”;

That a record from a legal officer of the Court from November 19, 2012 puts forward a movie available on the website youtube.com relative to a “*BDS ACTION AT THE DARTY STORE OF PERPIGNAN*”; that screenshots performed by a legal officer of the Court display the expressions “*Israeli apartheid*” and show advertising posters of a SODASTREAM product in the middle of which there is the representation of a stain of blood; that these posters appear on the shelves of the retailer in the immediate vicinity of the SODASTREAM products; that this action is reported on the Internet website of the Association FPS;

That mentions of the “*deception*” of consumers, of “*fraud on the origin*” or to the undue benefit “*of a preferential customs tariff*”, cases which, if they were proven, would not in themselves justify a call for boycott, as well as the deliberately shocking diversion of an advertising document, furthermore displayed on the shelves themselves where the involved products are offered, do not present a character of necessity and exceed the requirements of caution and objectivity which weigh on the author of a call for boycott;

That there is matter to conclude that the letters and pamphlets published on the website of the Association, and the action conducted at the DARTY store of PERPIGNAN, are illegal calls for boycott and thus engage the civil liability of the Association FPS;

On the tort pertaining to the existence of disparaging actions

Whereas under together articles 1382 of the civil code and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the

principle of freedom of expression can only endure such restrictions as are necessary to protect the rights of others; that in this regard, the fact to harm a company's or a named and identifiable product's brand image in order to divert the clients from it by using objectionable wording or arguments, be they true or not, spread or issued in any event so that they reach the clients of the targeted company, be it a competitor or not of the author, constitutes the civil tort of disparagement.

That, however, the party claiming disparagement must prove its reality; that the call for boycott alone does not constitute disparagement;

That the actions of the Association and the documents published on the Internet website of the Association, brought as evidence by the corporation OPM, mention frauds on the origin of the products marketed by OPM FRANCE, violations of customs regulations committed by OPM FRANCE and, more generally, "*illegal products*";

That the article published on the Internet website of the Association FPS under the title "*Action AFPS Cévennes-Alès at DARTY for the removal of the SODA-CLUB products*" on May 21, 2010 reports that the store manager was informed of "*the illegal and fraudulent nature of the product he sells, the fact that he violates the law, and that he is criminally liable for what he sells in his store*"; that the article entitled "*BDS action in the Super U store of Mortagne Au Perche on November 6, 2010*" dated November 12, 2010 mentions "*illegal products*"; that the article entitled "*SODA-CLUB Paris Centre action in front of DARTY*" of December 22, 2010 mentions "*illegal products*", that the article "*BDS in BEAUVAIS*" of November 27, 2010 mentions the sale of "*illegal products*" and the "*illegal character*" of SODASTREAM; that sample letters to store managers offered on the website of the Association FPS also mention the "*illegal character*" of the SODASTREAM products;

That the misdemeanor decision of the Tribunal de Grande Instance de NANTES of March 21, 2013 discharged the corporation OPM FRANCE on the claims of fraud on the origin and deceitful trade practice by noting that nothing showed that a reasonably informed and attentive consumer would choose to purchase the SODASTREAM product in consideration of its origin;

That if the misdemeanors of fraud are not established, however the knowledge of the exact origin of the product can be of interest to the clients; that the misdemeanor Court of NANTES held in this regard that the labeling relative to the Israeli origin of the product was not true to the reality;

That if the corporation OPM shows that, following the BRITA decision, it took the initiative to contact the customs administration in order to regularize its situation in light of customs regulations, it remains that for a time it was able to benefit from an exemption base on an untrue indication of the origin of the products it imported;

That, however, the deliberately vague presentation of the real or supposed violations of regulations by the corporation OPM FRANCE tended to create, in

the minds of retailers or consumers of SODASTREAM or SODA-CLUB products, the idea that the products in themselves were illegal, and that the corporation OPM FRANCE acted, by marketing them, against the law; that such a design is also deducted from the frequent mention of the alleged “*illegal*” character of the product;

That the litigious terms, through their vague and deliberately demeaning character, constitute a civil tort under article 1382 of the civil code;

On the harm suffered by the corporation OPM FRANCE

Whereas under article 1382 of the civil code, the party alleging a harm has the burden to prove its existence and to assess it;

That in the present case, the actions of boycott and disparagement, causes of a commercial disturbance, imply the existence of a harm; that the victim can thus ask for the termination of the harm caused to it as well as for the compensation of the harm already suffered;

That the articles published on the Internet website of the Association FPS under the titles “*BDS at Darty*” on June 21, 2012, “*BDS in Caen*”, “*BDS in Rennes*”, “*BDS SODA-CLUB in Annecy*” on July 5 2010, “*BDS in Angers*” on September 30, 2010, “*SODA-CLUB boycott at DARTY Paris République*” on November 8, 2010, “*BDS in Rennes*” on November 15, 2010, “*BDS in Pornic*” on December 10, 2010, “*BDS in Douarnenai*” on December 17, 2010, “*SODA-CLUB of January 29, 2011 at the DARTY store in Barbès*” on February 3, 2011, mention the removal from the shelves of the products of the corporation OPM FRANCE by the retailers involved in the reported actions;

That articles published on the same Internet website under the titles “*AFPS Cévennes-Alès at DARTY for the removal of SODA-CLUB products*” on May 21, 2010, “*BDS in Manosque*” on October 29, 2010, “*BDS, questioning of the importer of Nantes SODA-CLUB*” on November 12, 2010, mention that the conducted actions were reported in the written, radio and TV local press;

That consequently to the actions and to the publicity they were given on the Internet websites of the association, on youtube.com, as well as in the written, radio and TV media, the harm caused to the product and to its marketing is undeniable and deserves compensation;

That there is matter, considering the elements know to the Court alone, to estimate the harm caused in the amount of 4,000 euros;

That there is matter as well to terminate the disturbance likely to continue, considering the permanent availability of the disparaging acts or abusive calls for the boycott of the products of the corporation OPM FRANCE on the Internet website of the Association FPS;

That in this regard, the request for an injunction pertaining to the removal of the articles and pamphlets from the Internet website of the Association FRANCE

PALESTINE SOLIDARITE, because of its reference to a list of elements without any detailed identification and additionally not up-to-date on the day of the last submission of arguments, does not enable the judge to reach an enforceable decision;

That the request for an injunction pertaining to the termination of the promotion and organization of actions of disparagement or boycott cannot be granted on the grounds that it is too generic;

That, however, the Court can, in the limits of the request, order the Association FPS to render unavailable to the public from its Internet website, of which it is not disputed that it is the editor under the law of June 21, 2004 *on the trust in the digital economy*, all contents mentioning the “*illegality*”, “*illicity*”, the “*illegal*”, “*illicit*” or “*fraudulent*” character, of SODA-CLUB or SODASTREAM products, as well as mentions of a “*deception*” of the consumer or of a “*fraud on the origin*” of the same products; that there is not matter at this stage to issue a restriction order with penalty for non-compliance or delay.

On the counter-claim

Whereas filing suit is, in principle, a right and becomes an abuse leading to a debt of damages only in the case of malice, bad faith or gross negligence equivalent to fraud;

That in the present case, since OPM FRANCE’s requests are granted, the proceedings cannot constitute an abuse of the right to sue;

That there is consequently matter to reject the Association FRANCE PALESTINE’s request;

On the costs

Whereas there is matter to find the Association FPS, losing party, liable all of costs;

On article 700 of the civil procedure code

Whereas there is matter to find the Association FPS liable to pay the corporation OPM FRANCE the sum of 2,500 euros under article 700 of the civil procedure code;

THEREFORE,

The Court, publicly reaching a decision available at the clerk’s office, cross-examination, in first-instance,

CONDEMNS THE ASSOCIATION FRANCE PALESTINE SOLIDARITE to pay the corporation OPM France the sum of 4,000 euros in compensatory damages;

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No. RG: 13/06023

ENJOINS THE ASSOCIATION FRANCE PALESTINE, at the latest in two weeks from the date of notification of the present decision, to render unavailable to the public all contents found on the pages of the website of the association FRANCE PALESTINE SOLIDARITE <http://www.france-palestine.org> or of any other Internet website of which it would be the editor under the law of June 21, 2004 *on the trust in the digital economy*:

- Mentioning the “*illegal*” or “*fraudulent*” or “*illicit*” character of SODASTREAM or SODA-CLUB products;
- Describing SODASTREAM or SODA-CLUB products as “*illegal*”, “*fraudulent*” or “*illicit*”, as a “*fraud on the origin*” or “*deceit of consumers*” ;

CONDEMNS THE ASSOCIATION FRANCE PALESTINE SOLIDARITE to pay the SAS OPM FRANCE the sum of 2,500 euros to cover its legal costs;

CONDEMNS THE ASSOCIATION FRANC PALESTINE SOLIDARITE to pay all costs;

REJECTS any other request;

ORDERS provisional enforcement of the present decision.

Done and judged in Paris on January 23, 2014

The Court’s Clerk

The President

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