

ORDER OF: May 15, 2019
FOLDER N°: N ° RG 19/00153 - Portalis No. DB2N-W-B7D-GRKY
CASE: Association National Committee for Tobacco Control
v. **S.A. PHILIP MORRIS PRODUCTS,**
S.P.A. DUCATI MOTOR HOLDING,
S.A. GROUP CANAL +

HIGH COURT OF LE MANS

Room 9 CIVIL

REFERRAL ORDER OF 15 May 2019

PLAINTIFF

Association NATIONAL COMMITTEE FOR TOBACCO CONTROL,
headquartered at 13 rue d'Uzès - 75002 PARIS

represented by Maître Pierre LANDRY of SCP PIERRE LANDRY AVOCATS, lawyers at
the Bar of MANS, Maître Hugo LEVY of AARPI COURREGÉ-FOREMAN, lawyers at the
Paris Bar

DEFENDANTS

S.A. PHILIP MORRIS PRODUCTS,
headquartered at 3 Quai Jeanrenaud - 2000 NEUCHÂTEL - 57340 SWITZERLAND

*represented by Benjamin VAN GAVER of SCP AUGUST DEBOUZY, lawyers at the Paris
Bar, and Emmanuelle MIGNON of SCP AUGUST DEBOUZY, lawyers at the Paris Bar*

S.P.A. DUCATI MOTOR HOLDING,
headquartered Via Cavalieri Ducati 3 - BOLOGNA (BO) - CAP 40132 – ITALY

*represented by Maître Olivier LOIZON of AARPI VIGUIÉ SCHMIDT & ASSOCIÉS, lawyers
at the Paris Bar, substituted by Maître Laure-Anne MONTIGNY of AARPI VIGUIÉ
SCHMIDT & ASSOCIÉS, lawyers at the Paris Bar*

S.A. GROUP CANAL +,
headquartered at 1 place des Spectacles - 92130 ISSY LES MOULINEAUX

represented by Maître Frédéric BOUTARD of SCP LALANNE - GODARD - HERON - BOUTARD - SIMON - VILLEMONT - MEMIN, lawyers at LE MANS Bar, Maître Pierre-Louis DAUZIER, lawyer at the Paris Bar

INTERVENING PARTY

S.A.S. CANAL + EDITION SOCIETY,

headquartered at 1 place des Spectacles - 92130 ISSY LES MOULINEAUX

represented by Maître Frédéric BOUTARD of SCP LALANNE - GODARD - HERON - BOUTARD - SIMON - VILLEMONT - MEMIN, lawyers at LE MANS Bar, Maître Pierre-Louis DAUZIER, lawyer at the Paris Bar

COMPOSITION OF THE TRIBUNAL

PRESIDENT: François GENICON

CLERK: Ivan DUPLAISIS during the debates
Isabelle BUSSON during the pronouncement

DEBATES

At the public hearing on May 13, 2019.

At the end of the hearing, the President informed the parties that the order would be made available on 15 May 2019 through the court registry.

ORDER OF 15 May 2019

- contradictory order
- in the first instance
- signed by the President and the Clerk

FACTS, PROCEDURE, AND MEANS OF THE PARTIES

The NATIONAL COMMITTEE FOR TOBACCO CONTROL [Comité national contre le tabagisme] (CNCT) is a public organization whose mission is to ensure compliance with tobacco control legislation. It ensures in particular the application of the provisions of Article L 3512-4 of the Public Health Code.

In accordance with the request of April 30, 2019, the CNCT sought authorization to serve Philip Morris, Ducati, and the group company Canal +, with an emergency writ of summons at short notice.

With the request was attached a draft assignment which stated as follows:
"Having regard to Articles 485, 491, paragraph 2, 145 and 809 of the Code of Civil Procedure, Considering Article L3512-4 of the Public Health Code, The President of the Tribunal de Grande Instance of Le Mans is summoned to give an urgent ruling at the indicated time:

- *Directing Philip Morris Products SA and Ducati Spa Motors to make no mention of, or reproduction of, the "Mission Winnow" trademark, or any use of the expression "Mission Winnow", whether or not associated with the name "Ducati" on the occasion of the MotoGP competition organized between May 17 and 19, 2019 at the Bugatti circuit of Le Mans, or in the communication that surrounds it, on pain of a penalty of € 10,000 per violation noted;*
- *Declare this decision opposable to the company CANAL + GROUP;*
- *Direct the companies Philip Morris Products SA and Ducati S.p.a Motors to communicate to the CNCT the partnership agreements that bind them.*
- *Order the defendants in solidum to the sum of 10,000 euros on the basis of Article 700 CPC to the benefit of the CNCT."*

By acts of April 30th and May 2nd, 2019, the CNCT summoned Philip Morris Products SA, Ducati S.p.a Motors and the Canal+ Group Company before the judge hearing applications for interim relief, to which it requested:

- Directing Philip Morris Products SA and Ducati Spa Motors to make no mention of, or reproduction of, the "Mission Winnow" trademark, or any use of the expression "Mission Winnow", whether or not associated with the name "Ducati" on the occasion of the MotoGP competition organized between May 17 and 19, 2019 at the Bugatti circuit of Le Mans, or in the communication that surrounds it, on pain of a penalty of € 10,000 per violation noted;
- Declare this decision opposable to the company CANAL + GROUP;
- Direct the companies Philip Morris Products SA and Ducati S.p.a Motors to communicate to the CNCT the partnership agreements that bind them.
- Jointly order the defendants to the sum of 10,000 euros on the basis of Article 700 of the CPC in favor of the CNCT.

The CNCT argued in particular the following pleas and arguments:

Philip Morris, a tobacco products manufacturer, has implemented an advertising, promotion and sponsorship project for sporting events entitled "Mission Winnow".

The project aims in particular to financially support car and motorcycle racing teams.

A partnership has been set up with the Ducati team.

"Winnow Mission" is a direct reference to tobacco, and especially with the Marlboro brand.

There was strong indication that during the French motorcycle Grand Prix to be held on May 17-19 at Le Mans (that will be broadcast by the Canal+ television channel), Ducati Corso,

sponsored by Philip Morris Products (PMP), would compete under the team name *Mission Winnow Ducati* and include the brand "Mission Winnow" on its drivers and their motorcycles, which would constitute a violation of Article L3512-4 of the Public Health Code.

Using or referring to "Mission Winnow" would be a sports sponsorship operation by a tobacco manufacturer and direct or indirect advertising for banned tobacco products.

This imminent harm must be prevented and this obviously unlawful disorder must be ceased.

Philip Morris asks the judge to dismiss all the CNCT's requests and that there be no order for the payment of 10 000 € on the basis of Article 700 of the Code of Civil Procedure.

Philip Morris made the following pleas and arguments:

- "Winnow Mission" is not an advertising or promotional operation for tobacco products;
- For the French motorcycle Grand Prix at Le Mans, it was decided that the drivers would not wear the "Mission Winnow" logo or emblems and would instead use the graphics of their choice without any reference or any link with "Mission Winnow";
- The application is therefore not applicable;
- The request for disclosure of documents is inadmissible since it does not appear in the emergency writ order, and is not based on any legal basis.

Ducati asked the judge to dismiss the CNCT's request and refuse the order for it to pay the sum of €10,000 on the basis of Article 700 of the Code of Civil Procedure.

It agreed with the position of Philip Morris and argued in particular with the following pleas and arguments:

- The logo "Mission Winnow" will not appear on motorcycles or the outfits of drivers or any other accessories on the occasion of the French motorcycle Grand Prix at Le Mans;
- Claims based on article 809 of the Code of Civil Procedure are not applicable and must be rejected;
- The request made under Article 145 of the Code of Civil Procedure is inadmissible to the extent that the emergency writ did not contain this request; moreover, no legitimate motive is shown or even alleged.

The Canal + group company asked the judge to determine its case taking into account that it does not ensure the broadcasting of the Grand Prix.

The publishing company of Canal + voluntarily intervenes to the proceeding and refers to the justice on the requests taking into account the conclusions of the company Philip Morris.

REASONS

On the request based on Article 809 of the Civil Procedure Code.

It ensues from the provisions of Article 809 of the Code of Civil Procedure that the urgent-applications judge can always, even in the presence of a serious dispute, prescribe the necessary precautionary or reinstatement measures required to prevent imminent damage or to stop a clearly unlawful disorder.

According to the provisions of Article L 3512-4: "Propaganda or advertising, direct or indirect, in favor of tobacco, tobacco products, or its ingredients as defined in Article L. 3512-2, as well as any free distribution or sale of a tobacco product at a price lower than that approved in accordance with Article 572 of the General Tax Code is prohibited "... and "Any sponsorship or patronage operation is prohibited when it is carried out by manufacturers, importers or distributors of tobacco products or when its purpose or effect is direct or indirect propaganda or advertising in favor of tobacco, tobacco products or ingredients defined in Article L. 3512-2 "; and according to the provisions of article L 3512-5: "Propaganda or advertising is considered as such in favor of an organization, service, activity, product or article other than tobacco, tobacco products or an ingredient defined in Article L. 3512-2 when, by its graphic design, its presentation, the use of a mark, advertising emblem or other distinctive sign recalls tobacco, tobacco products or an ingredient defined in Article L. 3512-2. "

Yet, it is common ground that:

- Philip Morris, a tobacco manufacturer, has implemented an advertising, promotion and sponsorship project for sporting events entitled "Mission Winnow".
- The "Mission Winnow" brand belongs to Philip Morris, and the company initiated the project and has denominated it with the name;
- the international brands database and the European Union reveals close links between "Mission Winnow" and tobacco, as well as its derivatives or associated products;
- The "Mission Winnow" project aims in particular to financially support car and motorcycle racing stables.
- Philip Morris is the publisher of a website called "Mission Winnow" from which it appears that the company in question has established a partnership with the Ferrari and Ducati teams;
- The link between Philip Morris and the "Winnow Mission" sport sponsorship project is established;
- The "Ducati Corse" team has taken the name of "Mission Winnow Ducati" and affixes on its motorcycles the brand "Mission Winnow";
- The colors of the "Mission Winnow" project and its logo clearly recall the Marlboro cigarette brand that has long been associated with motorsports;

- Professionals of the sector know perfectly well and clearly recognize that the "Winnow Mission" project only conceals sponsorship actions from a tobacco manufacturer and likens the project to a "return of Marlboro".

It follows from the foregoing that the name and the "Mission Winnow" logo constitute some reference, although indirect and implicit, to tobacco, and in particular to the Marlboro brand and its owner, Philip Morris. In this, the use of this brand and logo falls under the prohibition of propaganda or advertising enacted by Article 3512-4 of the Public Health Code.

In addition, the partnership between Philip Morris and Ducati, under cover of the organization and the "Mission Winnow" brand, is clearly a sponsorship or patronage operation prohibited by law.

There is strong indication that during the French motorcycle Grand Prix to be held on May 17-19 at Le Mans, Ducati Corso, indirectly sponsored by Philip Morris would compete under the team name *Mission Winnow Ducati* and would use the associated livery, which incorporates many attributes of the famous Marlboro brand on their pilots and motorcycles. The imminence of the occurrence of damage is established as well as the existence of a clearly unlawful disorder in case of use of the logo in question.

The fact that Philip Morris and Ducati have, immediately after the summons and in response thereto, stated that the "Mission Winnow" brand and logo would not be used at the French motorcycle Grand Prix (so-called to offer drivers the opportunity to run with custom motorcycles), is an implicit but necessary recognition of the merits of the CNCT resources and requests.

It should be acknowledged that Philip Morris and Ducati companies do not intend to use the "Mission Winnow" brand or logo during the French motorcycle Grand Prix.

Nevertheless, the CNCT's request must be granted insofar as, on the one hand, the procedure was not useless since some of the claims contained in the summons were spontaneously fulfilled; on the other hand, the Philip Morris and Ducati companies must respect their commitment by preventing any future intention to use the disputed brand.

On the request for disclosure of documents based on Article 145 of the Code of Civil Procedure

The request for the disclosure of documents was included in the draft assignment appended to the motion requesting authorization to assign urgently, so that the request is admissible.

Article 145 of the Code of Civil Procedure states that "if there is a legitimate reason for keeping or establishing before any trial the evidence of facts that may be relied upon in the solution of

a dispute, the legally admissible measures of inquiry may be ordered at the request of any interested person, on request or in summary " .

The provisions of Article 146 of the Code of Civil Procedure shall not apply in the context of an application based on Article 145 of the same Code.

It is accepted that this latter provision may be used as a basis for the request of the production or the communication of documents which constitutes a preliminary investigation measure for a legally admissible trial.

Article 145 of the Code of Civil Procedure only requires the plaintiff to justify a legitimate reason for having an expert report ordered. The existence of a serious dispute, drawn from contractual stipulations, does not constitute an obstacle to the implementation of these provisions.

Article 145 of the Code of Civil Procedure does not, in fact, imply any prejudice to the liability of the persons called as parties to the proceedings, nor as to the chances of success of the trial which may be subsequently initiated.

The legitimacy of the applicant's ground is the result of the demonstration of the plausibility and credibility of the dispute, although only possible and future, and the judge must only find that such a trial is possible and has a sufficiently determined purpose and basis, which is the case here.

The judge may only reject the request for an external expertise if it is intended to support a claim whose incorrectness is already obvious and which is clearly doomed to fail, which is not the case here.

Finally, the sought measure must be relevant, appropriate, of indisputable usefulness and proportionate to the eventual future dispute, which is the case here.

Indeed, the violation of the public policy provisions of the Public Health Code is sufficiently obvious that the use of the "MISSION WINNOW" logo or even the existence of the "MISSION WINNOW" project can be questioned as well as the partnership agreement with Ducati. The CNCT therefore has a legitimate interest in obtaining the solicited material and it is therefore appropriate to grant its request.

On the implication of the company Canal + group

It is not clearly demonstrated that this company is responsible for the broadcast of the French motorcycle Grand Prix so it should not be hold accountable.

On the voluntary intervention of the Canal + publishing company

It is necessary to note the voluntary intervention of the publishing company of Canal + and to conclude that this decision will be opposable to it/them.

On Article 700 of the Code of Civil Procedure

Philip Morris and Ducati companies are unsuccessful and therefore are ordered to pay the costs. As a result, they are necessarily liable to the CNCT for an amount under Article 700 of the Code of Civil Procedure which will be set at € 10,000.

FOR THESE REASONS

Finally, the interim relief judge:

- pronounces the dismissal of GROUPE CANAL +;
- Finds voluntary intervention of the CANAL + EDITION CORPORATION;
- Acknowledges that the companies Philip Morris and Ducati do not intend to use or display the "Mission Winnow" brand or logo at the Grand Prix de France held on 17, 18, 19 May 2019 at Le Mans;
- Where necessary, prohibits Philip Morris Products SA and Ducati Spa Motors from making any use of the mark, the logo, or the expression "Mission Winnow", whether attached or not to the name "Ducati", on the occasion of the Moto GP competition held on May 17, 18, and 19, 2019, at the Bugatti circuit in Le Mans or in the communication surrounding it, and this under penalty of € 10,000 per violation noted;
- Declares this decision enforceable against the CANAL + publishing company
- Declares the request for disclosure of admissible documents and enjoin the companies Philip Morris Products SA and Ducati Spa Motors to communicate to the CNCT the partnership agreements which binds them, grants them for this purpose a period of one month from the service of the decision and agrees that after this period he will run against them a penalty of 2000 € per day of delay;
- Unburdens the parties of their other requests;

- Orders the Philip Morris and Ducati companies, together, to pay the CNCT the sum of € 10,000 on the basis of Article 700 of the Code of Civil Procedure.

THE CLERK,

THE PRESIDENT,

Isabelle BUSSON

François GENICON