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*sharing robinia competence*

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**Subject: Statement of defence – FSC vs. eurobinia**

**Statement of Defence**

Concerning

Forest Stewardship Council AC

./.

eurobinia, Gerriet Harms

R.A. Pauly pp.

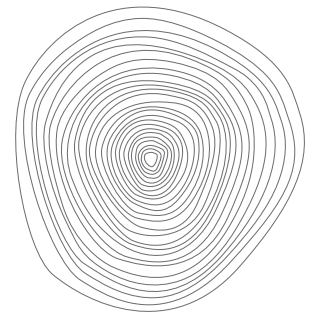
R.A. Munderloh

I apply, by virtue of the power of attorney of the defendant, for rejection of the case.

**Justification:**

The charge is unwarranted. The plaintiff has no entitlement to sue for injunctive relief, the right of disclosure and compensation against the defendant.

Initially, the plaintiff's representative effective authority is denied precautionarily. It is to criticize that the information to the plaintiff are incomplete. It is not evident by whom the plaintiff is represented. It is also not evident under which legal form the plaintiff appears in legal relations. To number I.1 of the statement of case it is only referred that the plaintiff would be an international non-profit organization. The plaintiff would have to demonstrate here in which ways and by whom an authority of the legal representation has been executed. Additionally, it would have to be set forth which legal form is hold by the plaintiff and which agency relationships are significant in that case. Especially misleading is the fact that the plaintiff states in the extract of the web appearance, added to the statement of case as attachment K 3, that the FSC was an international non-profit organization with headquarter in Bonn.



Furthermore, an investigation has shown that a Forest Stewardship Council AC is at least not existent under the address given in the statement of case. Especially a correct address of the plaintiff is inevitable in the content of an statement of case.

Beyond that it is in question who is user of the figurative trademark referred to and on which legal basis it is applied.

Additionally, it is to state as follows:

## I.

### Facts of the case

1.

Pleading ignorance, it is to deny that the plaintiff shall be an international non-for-profit organization. At least from the content of the statement of case it can be derived that the plaintiff seems to aim on commercial intents. About the benefit to the public there should be pleaded more detailed..

Pleading ignorance, it is to deny that it is the plaintiff's aim to put the demands on a sustainable development of the forests, made at the Conference on Environment in Rio de Janeiro, into practice. It is the obvious ambition of the plaintiff, using the registered figurative trademark, to supply the enterprises certified by it with economic advantages without actually guaranteeing that the principles and criteria of a sustainable forestry, brought up in the statement of case amongst others, are really observed.

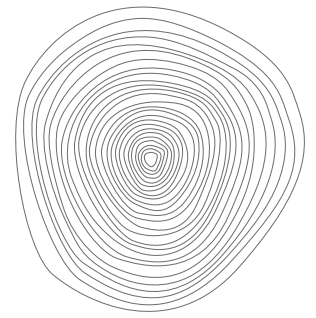
According to the certification criteria of the plaintiff not only the manufacturing and trading progress from the forest to the wholesaler but also to the manufacturing enterprise respectively the retail trader has to be certified. It is certainly correct that such certified companies are allowed to add the disputable FSC logo to their manufactured and distributed products. Such products labelled with an FSC logo shall suggest to the consumer to be products of an exceptional quality, namely to come from a supposedly ideal forestry.

Indeed, this is a matter of a gigantic misleading of the consumer, which will be explained further in the following.

2.

It is undisputed that the defendant runs a specialised trade for wood and does not have a certificate of the plaintiff respectively of one of its authorised enterprises.

The defendant runs an internet portal with several domains for commercial purposes on which it promotes its products.



This internet portal is run by the defendant under the registered word and figurative trademark "eurobinia" with the pictured tree slice. It is incorrect that the defendant offers the flyer, added as Attachment K 1 to the statement of case, for download on this portal.

The flyer in question is offered by the owner of the defendant, Gerriet Harms, on his internet portal "fragen-an-den-fsc.de", which is run only for political but not for commercial purposes. Indeed, it is correct that on page 1 of the named flyer the logo of the plaintiff is used in the way further described in the statement of case. It is further correct that the owner of the defendant in the flyer decidedly points out the reasons why the defendant explicitly refuses a certification by the plaintiff respectively by one of its authorised enterprises. It is significant that the plaintiff only refers to the English version of the flyer and not to the approachable German version, which was nevertheless added to the statement of case as Attachment K 4. It is referred to the content of the German version of the flyer as per Attachment K 4 in its entirety and this is object of the pleading on this part.

Because the plaintiff does not argue in the statement of case with single facts pointed out by the owner of the defendant, one must assume that the facts presented in the flyer are undisputed until further notice.

It is correct that a link between the internet portal run for commercial purposes by the defendant and the portal "fragen-an-den-fsc.de" is installed.

It is incorrect, that the latter portal is run by the defendant. It is exclusively run by the owner of the defendant, Gerriet Harms, for non-commercial purposes.

It is undisputed that from the portal "fragen-an-den-fsc.de", run by the owner of the defendant, a link is installed to the internet portal of the defendant.

3.

It is undisputed that the plaintiff's authorized proxy asked the defendant for an penalty based execution of a declaration of omission and obligation as well as a grant of disclosure in a written pleading from 03.12.2009. Further, it is undisputed that the defendant did not execute the requested declaration of omission and in addition, did not carry out any changes of the internet appearance in regard to the controversial plaintiff's logo.

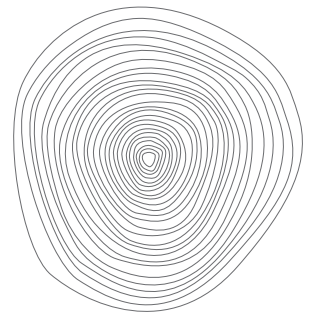
The defendant is not willing to fulfil the asserted requirements of the plaintiff and does not see itself obliged to do so as the defendant rightly asserts significant complaints about the plaintiff's certification system.

In detail, for this purpose has to be brought forward:

3.1.

First of all it will be referred to the flyer, added as Attachment K4 to the statement of case, in its entirety in which all essential complaints of the defendant about the

plaintiff's certification system can be found. The court is asked to give accordant instructions for the case, if the pure reference to the content of the flyer, added as Attachment K4 to the statement of case, is considered inadmissible and a recitation of the flyer's content is considered inevitable.



Right on the basis of the complaints presented in detail in the flyer the conclusion is allowed, that the certification system run by the plaintiff neglects actually what the plaintiff promises. The FSC-certificate suggests especially to the consumers that FSC-certificated wood features special properties, namely to come from a sustainable and legal forestry. Actually, the FSC certificate cannot meet this claim.

3.2.

On the basis of single exemplary facts the complaints about the plaintiff's certification system, expressed by the owner of the defendant, shall be substantiated. This is carried out with the plaintiff's respectively the FSC's principles in mind, which the certification system has to follow, whereupon two principles are exemplified.

#### 3.2.1. Principle 1: Compliance with laws and FSC Principles

In the international standards of the FSC the principle 1 can be found among others, in the English version as follows:

##### Principle 1: Compliance with laws and FSC Principles

"Forest management shall respect all applicable laws of the country in which they occur, and international treaties and agreements to which the country is a signatory, and comply with all FSC principles and criteria."

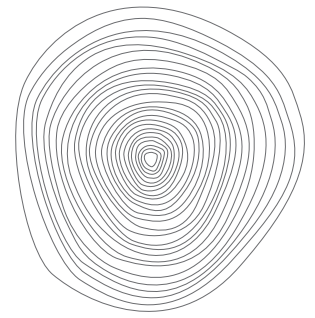
In the German standards two versions can be found. The older version reads as follows:

##### Prinzip 1: Einhaltung der Gesetze und FSC Prinzipien

„Die Waldbewirtschaftung soll alle relevanten Gesetze des Landes sowie internationale Verträge und Abkommen, welche das Land unterzeichnet hat, respektieren und die Prinzipien und Kriterien des FSC erfüllen.“

The newest valid version of principle 1 reads as follows:

"Die Waldbewirtschaftung respektiert alle relevanten Gesetze des Landes sowie internationale Verträge und Abkommen, welche das Land unterzeichnet hat und erfüllt die Prinzipien und Kriterien des FSC."



With this principle, it shall be guaranteed that wooden products come from a legal forest management.

The plaintiff violates with its own certification practice against this principle. For instance, the plaintiff respectively one of its authorised enterprises certified a total of 205 364.00 ha of forest area of the enterprise Veracel Celulose SA in Brazil, in the federal state of Bahia, in the region of Eunapolis.

Evidence: Extract from the FSC's database, added as a photocopy

Those areas are eucalyptus plantations, created in the years 1992 to 1996, which were planted on previously cleared coastal rainforests.

Evidence: 1. Certificate of...  
2. Certificate of...

If already the fact of certifying eucalyptus plantation in Brazilian rainforests is to regard as very disputable, because such facts violate several FSC principles at the same time, it is especially grave in regard to principle 1 that an essential part of those plantations was constructed in violation of the Brazilian law. This caused that the enterprise Veracel Celulose SA was sentenced to a removal of 96 000 ha of eucalyptus plantations and retransformation to a near-natural forest by the relevant federal court in the sentence of 17.06.2008.

Evidence: Sentence of the federal court in Bahia/Brazil from 17.06.2008

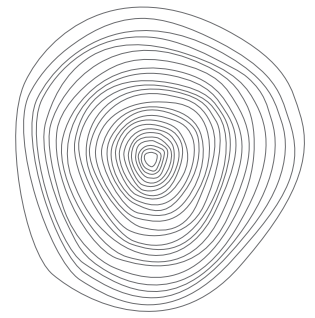
Despite the above named sentence there were no consequences in regard to the areas certificated by the FSC. In addition, no further penalties or measures against Veracel Celulose SA were initiated. In fact, it allows the conclusion that not later than the 17.06.2008 illegally manufactured wood of Veracel Cellulose SA with the FSC certificate was traded worldwide with the tolerance of the FSC.

### 3.2.1.2.1. Principle 6: Environmental Impact

In the English version of the international FSC standards this principle reads as follows:

Principle 6: Environmental impact:

"Forest management shall conserve biological diversity and its associated values, water resources, soils, unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological function and the integrity of the forest."



In the German version the principle reads as follows:

“Die Waldbewirtschaftung soll die biologische Vielfalt und die damit verbundenen Werte, die Wasserressourcen, die Böden sowie einzigartige und empfindliche Ökosysteme und Landschaften erhalten und dadurch die ökologischen Funktionen und die Unversehrtheit des Waldes erhalten.“

At first it is to state that the fact closer described above, documents a striking violation of the principle above, because the construction and cultivation of eucalyptus plantations in former rainforests is qualified for anything else but the conservation of biological diversity, the water resources, soils, and unique and fragile ecosystems and landscapes and the maintenance of the ecological function and the integrity of the forest.

Evidence: Expert Evidence

Another exemplary fact which constitutes a striking violation of the above mentioned principle of the FSC among others on FSC certificated areas is to mention with consideration of clear cutting. With principle 6, clear cutting are generally out of question. This arises at least from 6.3.11 of standard 6 of the German standards (current standard). According to the Lower Saxon law of the forest and landscape management (NWaldLG), clear cutting is defined under §12 as a logging operation which extends to a connected forest area of more than 1 ha and which decreases the stock of wood of this area to less than 25 per cent or devastates it completely.

In regard to soil ecology, clear cutting is disadvantageous, as the organic layer is mineralized faster by the suddenly increased heat radiation than the flora (reforestation, grass, herbs) can use it. This leads to an erosion of nutrients such as nitrate. If nitrate compounds end up in the ground water, it may result in problems with the drinking water abstraction. In addition, clear cuts become wet if more water is given to the soil than can drain off (due to lacking interception), seep away or can be used by the vegetation.

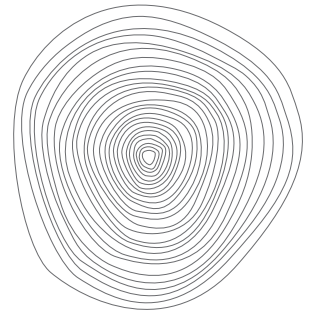
Evidence: Expert Evidence

In coniferous trees, clear cutting leads to unfreezing of the permafrost with a grave impact on the climate and the entire macro ecology. In particular, such big amounts of methane are released here, that more CO<sub>2</sub> equivalents are evoked than in the worldwide industry and traffic complex together.

Evidence: as above

Nonetheless and in striking contradiction with the above mentioned principle 6 the practice of clear cutting is tolerated in the certification system of the FSC without penalties. A especially well documented example can be found on the area of the enterprise Stora Enso Oyj, a Finnish stock corporation, which cultivates FSC

certificated areas in Sweden among others. It concerns forests in the region of Munkfors in Sweden, in the oval framed region in the added map section.



Evidence: Map section of the region of Munkfors, Sweden (Attachment B 2), added as a photocopy

In that area about 15 km<sup>2</sup> of forest were clear cut by the enterprise Stora Enso.

Evidence: 1. Photographic documentation, added as a photocopy (attachment convolute B 3)  
2. Certificate...  
3. Certificate...

Organizations of the FSC, namely FSC International gGmbH, FSC development GmbH as well as FSC Arbeitsgruppe Deutschland e.V. were informed about the above mentioned fact by a writing of the defendant from 24.12.2008.

Evidence: The defendant's writing from 24.12.2008, added as a photocopy (Attachment B 4)

The written complaint of the defendant did not result in any consequences. Especially there were no measures taken against Stora Enso. The mentioned forests are still certificated.

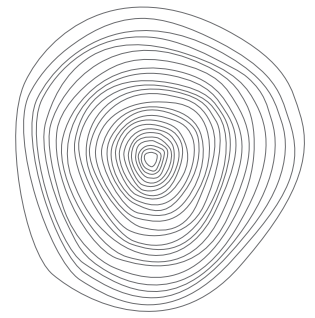
Here is also a violation of the FSC's self-established principles to observe. Such clear cuttings have nothing in common with a sustainable and legal forestry.

Evidence: Expert Evidence

That example shows an especially glaring violation of the principle of the conservation of biological diversity, because this is about a typically Swedish total clearance, in which the complete biomass, including the roots and stumps, are removed with heavy equipment.

Evidence: Expert Evidence

To sum up, it is to say that because of the mentioned deficiencies of the entire certification system of the FSC the consumer is misled, because such products traded under the FSC certification system do not necessarily feature the attributes they should have supposedly due to the FSC certificate. This means that the consumer cannot be sure that a product labelled with the FSC logo actually contains FSC certificated materials, and, even worse, such products may come from an illegal or not sustainable forestry.



### 3.2.1.3. Fault in the certification of products

With usage of the word and figurative trademark disputed here, the FSC certificated products are labelled. During the introduction of the FSC logo the basis of a product certification was 100 per cent share. This meant that the so labelled products had to be manufactured of 100 per cent of FSC certificated material. But soon the FSC began to dissociate from the high standard of only labelling such products made of 100 per cent of FSC certificated material, and began to introduce various categories of diverse product labels below that standard. By now 3 main categories of the FSC label with 5 variations exist. These categories are FSC-PURE with 100 per cent of certificated material, "FSC-recycled" and "FSC-mix".

Evidence: Extract of the "Leitfaden FSC COC zur Zertifizierung von Holz- und papierverarbeitenden Unternehmen", added as a photocopy (Attachment B 5)

Since 1993, the praxis of product certification however has passed through varied processes with different systems, in which it worked with pure percentages at first, then, in the developing progress, with a threshold value system, and in which eventually, since the year 2008, an accounting system for FSC product groups is used. In the accounting system a FSC credit system is kept for the concerning company which documents the receipt and withdrawal of FSC-certificated material in product groups and therefore decides how much may be labelled with the logo. In this connection, the continuous average value of an fixed period shall account for at least 10 per cent. In doing so, the FSC label for the concerning product group must only be used for labelling as long as the credit system for the particular product group is filled. The result of this accounting system is that a product, which does not contain any FSC certificated material, can be marked with an FSC label as long as the concerning credit system is filled and the calculated average value of all goods manufactured in the period and of the product group accounts for only 10 per cent.

Evidence: 1. Extract of the "Leitfaden FSC COC", added as a photocopy (Attachment B 6)  
2. Expert evidence

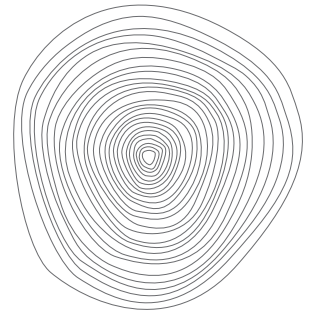
With the introduction of these possibilities of product labelling by different labels, in the end the FSC has left consequently its own principles. De facto at least 70 per cent of the product labels from the categories FSC-recycled and FSC-mix are used. Only with these labels it is possible for big wood industry enterprises to label their products with FSC labels despite very little proportions of FSC certificated material in total production (one-digit percentages) are used.

In addition the system of the product labelling is completely non-transparent and it provides enterprises the opportunity to label products, manufactured of material from an illegal forestry, with the FSC-mixed logo.

The result of this system of product labelling is that the consumer is misled objectively by trying to suggest the products to be of a special quality, at least to be



products which do not come from an illegal or non-sustainable forestry. In particular the consumer is not able to understand where the non-certificated material parts of mix-labels come from.



3.2.1.4. Procurement directives of the public authorities and associated unfair advantages in competition

The FSC certification system has expanded into the procurement directives of the federal and state governments. This arises from the common order of several state governments from 17.01.2007 under the lead management of the Federal Ministry for Traffic, Construction and Urban Development.

Evidence: Order for procurement of wooden products from 17.01.2007, added as a photocopy (Attachment B 7)

It will be referred to the content of the order named above in its entirety and this will be object of this pleading.

The central conclusion of this order is:

„Wood products which are procured by the federal administration have to verifiable origin from legal and sustainable forestry”

Evidence: as above

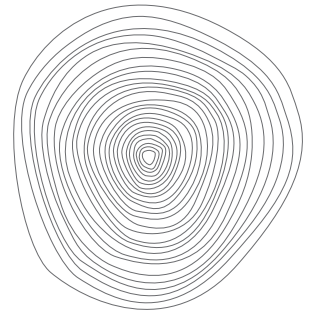
By that order, giving evidence by presenting an FSC certificate is explicitly permitted. Non-certificated enterprises are forced to present an itemisation.

Evidence: as above

Non-certificated enterprises are forced, according to the accompanying declaration about the purchase of wooden products from 13.10.2006 (attachment of the purchase directives) to let the examinations necessary for evidence be executed by the Federal Research Centre for Forestry and Forest Products in Hamburg or alternatively by the Federal Office for Environmental Protection in Bonn on their own expenses.

Evidence: as above (attachment, page 2 for digit 2)

This means that the FSC supplies the certificated enterprises with economic advantages over non-certificated enterprises with the help of its certification system, because objectively the FSC certification system is not able to proof the source of a legal and sustainable forestry demanded by the purchase order. In



contrast to that, non-certificated enterprises are forced to itemise cost-intensively with the help of according inspection authorities.

In contrast to the Federal Government, the Norwegian government has noticed the deficiencies of the FSC certification system and other certifiers in the meantime, especially the fact that such certificates are not adequate for the proof of a legal and sustainable forestry. So the Norwegian agenda 2007 to 2010 by the Norwegian government says among others:

„The government wants to stop all trade with tropical forest products that are not sustainable, or that is illegally logged. There are currently no international or national certification schemes that can provide good enough security for timber that is imported, that it is not legally and sustainably logged.“

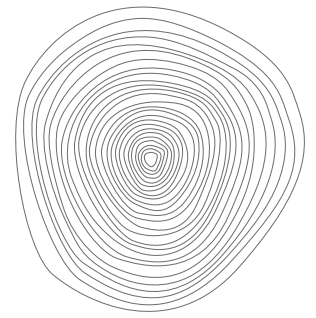
However, the European commission realized this at well in the meantime. So it says in the proposal of the European commission from 17.10.2008 for an act of the European parliament and council about the obligations of market actors who introduce wood and wooden products, explicitly:

„Wood trade associations and facilities that are developing responsible policy of procurement and consulting their members accordingly, have introduced a code of ethics. It has been developed private certification policies, to introduce standards for forest management to create a basis to acknowledge its forests, products and/or management responsible. Even though the initiatives have certain advantages, because they are flexible, appear motivating and have good cost efficiency, the voluntary character, the missing supervision of realization and the lack of sanctions in case of non-compliance of regulations, have impaired its credibility and sustainability over the years.“

Evidence: Extract from the proposal of the European commission from 17.10.2008 for an act of the European parliament and council about the obligations of market actors who introduce wood and wooden products, added as a photocopy (attachment B 8)

This also affirms the undisputable criticism of the FSC certification system expressed by the owner of the defendant on the internet platform "fragen-an-den-fsc.de" run by himself.

The owner of the defendant simply wants to demonstrate the deficiencies in the certification system, to complain about the resulting misleading of consumers and to eventually convince persons in charge to think about alternatives in the monitoring of the production and the trade chain with the aim of an achievement of a legal and sustainable forestry.



## II. Pleading

1.

Because of the reported facts, injunctive relief against the defendant is not the plaintiff's due.

As soon as the legal position of the plaintiff and especially its legal capacity are resolved, one may assume that registered figurative trademark is given here, which underlies an independent property right. But it is disputable by whom the figurative trademark is actually used, because the plaintiff obviously does not use it. In the internet portal quoted by the plaintiff, the FSC with headquarters in Bonn is mentioned, obviously a different organisation than the plaintiff. Insofar it has to be resolved on which legal basis the figurative trademark is used by third parties.

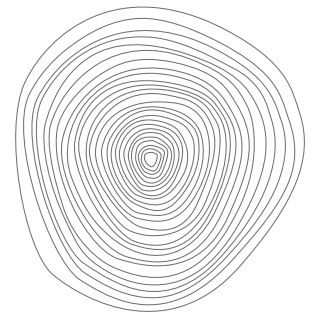
This notwithstanding, a violation of the plaintiff's registered trademark by the modified form of the trademark, published at the internet portal "fragen-an-den-fsc.de" by the owner of the defendant cannot be considered.

A condition for the elements of a violation offence under provision of § 14 Abs. 2 MarkenG is at first a trademark-corresponding usage of the collision trademark. A trademark-corresponding usage can be assumed if the symbol is used in a way that distinguishes it in the context of the product sales from goods and services of other companies (BGH from 03.02.2005, Lila-Postkarte, RZ 15, quoted after Juris).

There is a lack of this condition already, because the defendant does not use the collision trademark in the context of sales of its products. The collision trademark is rather used on the non-profit internet portal "fragen-an-den-fsc.de", run by the owner of the defendant and in context with the flyer offered on the portal for download. The designated use stands in no context with the sales of products of the defendant. On the one hand, this arises from the design of the internet portal "fragen-an-den-fsc.de" and on the other hand, from the fact that the defendant explicitly does not want to link its products to the plaintiff's figurative trademark.

This arises furthermore from the alienation of the trademark, made by the owner of the defendant by employing a red frame with a red line running from the bottom left to the top right. This sign is recognisably and definitely a worldwide known sign which is used in traffic. It is the worldwide known usual parking prohibition sign.

A trademark-corresponding usage of the collision trademark is also not given just because a link from the internet portal of the defendant to "fragen-an-den-fsc.de" and the other way round is installed, because due to the appearance of the collision trademark under usage of the worldwide known parking prohibition sign as well as due to the appearance of the internet portal "fragen-an-den-fsc.de" it is evident by implication that a usage of the symbol does not happen in the context of product sales. For the same reasons an abstract danger of confusion is no option, because to the addressed relevant public the meaning of the collision trademark and the purpose of the owner of the defendant open up easily.



Therefore any claims under provision of § 14 Abs. 2 Nr. 2 MarkenG are no option.

Equally the conditions under provision of § 14 Abs. 2 Nr.3 MarkenG are not given.

Whether the plaintiff's figurative trademark is known inland may be left aside at first. In any case, it lacks a trademark-corresponding usage of the collision trademark here. In this respect it can be referred to the explanations above.

The remaining conditions for elements of a violation offence under provision of § 14 Abs. 2 MarkenG (regardless of direct or analogue use) are indeed not existent. Because of the design of the collision trademark, the elements of utilising the distinctive character or estimation of the plaintiff's trademark are to negate. Thus, exclusively the variation of damaging the trademark comes into consideration.

The criticism on the plaintiff's certification system, uttered by the owner of the defendant with the help of the collision trademark in combination with the internet portal "fragen-an-den-fsc.de" though is justified and by the way not unfair as well. The defendant refers for that purpose to the right to freedom of thought according to Article 5 of the Basic Law. The criticism on the plaintiff's certification system uttered by the owner of the defendant on the internet portal and in connection with the flyer is well-founded and discloses remarkable deficiencies of the certificate. The due to the disclosed deficiencies justified criticism of the defendant's owner is succinctly expressed with the used collision trademark. Therefore this is a matter of a tolerable alienation of the plaintiff's figurative trademark, which expresses the criticism on the certification system of the defendant's owner. There is no question of a malapropism in this context in view of the seriousness of the motives of the defendant's owner.

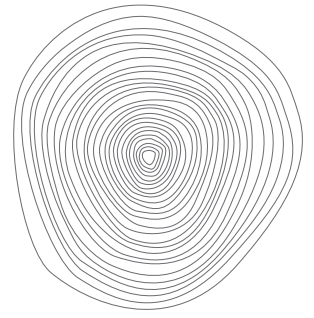
The plaintiff rather has to accept the accusation that it, using the here disputed trademark, build up a certification system which finally, due to the system-immanent deficiencies as well as due to the exemplarily disclosed facts, gravely contrasts the aims of the certification system and which is as a result able to mislead the consumers as well as the public authorities with the help of products certificated by the plaintiff.

The defendant or rather the owner of the defendant can therefore invoke the right to freedom of thought according to Article 5 of the German constitution.

Because of the reasons named above any claims against the defendant under provision of § 14 Abs. 2 MarkenG are no option.

Therefore it lacks any conditions for the execution of the clause § 14 Abs. 3 MarkenG, especially digit 5.

This notwithstanding, the defendant does not use the collision trademark in its business documents. Least of all the collision trademark is used for advertising purposes.



2.

Any claims according to the law against unfair competition are no option as well.

Here, the necessary competitive relationship of the parties is missing. On the part of the plaintiff there is no report thereto. According to the report of the statement of case, the plaintiff is an enterprise resident in Mexico. The plaintiff claims itself to be a non-for-profit organization which tries to implement requirements on a sustainable development of the forests. The plaintiff does not act as a producer or else in the wood trade.

Only because of this the elements of a crime according to the law against unfair competition named by the plaintiff are no option.

This notwithstanding, it further lacks noticeably and obviously the conditions for the elements of a crime according to the clauses §§ 4 Nr. 1 and Nr. 10 UWG. The criticism on the plaintiff's certification system uttered by the owner of the defendant is in all respects justified and factually well-founded. The claim of the plaintiff that the defendant would intend to convince the consumers of a less quality of the plaintiff's products and to ensure own advantages in competition with a degrading exposure of the plaintiff's figurative trademark is denied. On the one hand, the plaintiff does not sell any products (missing competitive relations). On the other hand, the owner of the defendant intends, using the controversial symbol, a prevention of the closer described mislead of the consumers by the plaintiff's certification system.

Because there is a lack of the necessary basis for the plaintiff's claims for injunctive relief, the right of disclosure and compensation, the case has to be dismissed.

Munderloh

Lawyer