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PARIS COURT OF APPEAL
International commercial chamber

Division 5 – Chamber 16

DECISION DATED OCTOBER 26, 2021

(no. /2021, 22 pages)



Registration no. on the general roll: **RG no. 20/04526 – Portalis no. 35L7-V-B7E-CBTPR**

Decision deferred before the Court: Judgment dated February 4, 2020 – CRETEIL
Commercial Court – RG no. 2018F00174

APPELLANT:

S.A.S. DELI

Registered with the registry of trade and companies under the number 394 42 9 3 44
9/11/13 rue Lavoisier ZAC du Montvrain 91452 MENNECY CEDEX
represented by Me *attorney at the PARIS Bar, court registration:*

RESPONDENTS:

FRUCTOFRESH CONNECT SP. Z.O.O SPOLKA KOMANDYTOWA

Czanowice 300 – GUBIN 66 - 620 – GUBIN/Poland

Represented by its legal representatives

Represented by Me *of the* *attorney at the PARIS Bar*
(submissions), court registration: *and assisted by Me*
litigating attorney at the PARIS Bar, court registration:

S.A.S. CONNECT FRUIT

Registered with the registry of trade and companies under the number 795 08 4 2 92

5, rue des Suisses 75014 PARIS 14

Represented by its legal representatives

Represented by Me *of the* *attorney at the PARIS Bar*
(submissions), court registration: *and assisted by Me*
litigating attorney at the PARIS Bar, court registration:

DRINKSTAR GMBH

A company governed under German law

Aeussere Oberäustrasse 36, D-83026 Rosenheim/GERMANY

Represented by its legal representatives

Represented by Me. 1 of the , attorney at the
PARIS Bar (submissions) court registration: , assisted by Me 1 of the
litigating attorney at the PARIS Bar, court registration:
and by Me . of the firm litigating attorney at the PARIS
Bar, court registration

S.A.S. BHARLEV INDUSTRIES

Registered with the Registry of Trade and Companies under the number 339 67 8 2 11

1 rue Paul Seramy – ZAC Les 20 arpents 77990 LE MESNIL AMELOT

Represented by its legal representatives

Represented by Me of the
attorney at the PARIS Bar (submissions), court
registration: and assisted by Me litigating attorney at the PARIS Bar,
court registration

COMPOSITION OF THE COURT:

In accordance with the provisions of Articles 805 and 907 of the French Code of Civil Procedure, the matter was heard on September 14, 2021, in a public hearing, the attorneys, informed thereof and not objecting thereto, before Mr. François ANCEL, President and Mrs. Laure ALDEBERT, in charge of the report.

These magistrates reported on the pleadings in the Court deliberation, comprised of:

François ANCEL, President
Fabienne SCHALLER, Judge
Laure ALDEBERT, Judge

Court Clerk, during the proceedings: Mrs. Najma EL FARISSI

Vu ne varietur
transmission de l'original en langue française
no. 00893

DECISION:

- In adversarial proceedings
- upon availability of the decision to the court registry, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Najma EL FARISSI, Court clerk, who received the minutes of the decision by the signatory judge.

1 – THE FACTS AND PROCEDURE

1- Deli is a company governed under French law, which produces and distributes fresh fruit salads.

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2-The company governed under Polish law, Fructofresh Connect (hereafter “Fructofresh”) carries out the same activity as that of DELI and commercializes fruit salads throughout Europe, in particular in France.

3- Connect Fruit is its French subsidiary.

4-Bharlev Industries is a company governed under French law, which produces and distributes fresh fruit juice. It also commercializes cut fruit salads.

5-Deli, Bharlev and Fructofresh are involved in the same fresh fruit salad and cut fruit distribution market, in particular, with out-of-home catering – called RHF – which includes restaurants, caterers, communities.

6-In 2013, Fructofresh presented to the professional press that it was able to produce fresh fruit salads *without preservative*, through a new process, with a conservation period of 14 days, much longer than the standard period for fresh fruit salads, which was between 4 to 10 days.

7-In 2016, Deli suspected FRUCTOFRESH of unlawfully using a preservative prohibited by the European regulation on food additives: dimethyl dicarbonate (DMDC or E242), commercialized under the name of Velcorin, to extend the duration of conservation of fresh fruit salads sold without preservative beyond the habitual period.

8-On December 27, 2016, it obtained a judicial investigation order from the President of the Créteil Commercial Court upon petition, to analyse the Fructofresh fruit salads distributed by Pomona, a French group specialized in the distribution of food products.

9-The expertise conferred upon the laboratory Expertox represented by the Dr. (...) agri-food and chemical expert, was carried out on the Fructofresh fruit salads seized in Podoma’s subsidiaries on January 9, 2017 by bailiff at Rungis.

10-On January 24, 2017, the expert, Mr. (...) filed his report concluding on the likely addition of Velcorin, a prohibited additive, in the fresh fruit salads produced by Fructofresh.

11-Considering that it had been faced with unlawful competition in France, on the basis of the expert appraisal report, Deli initiated a court action in 2017 against Pomona to prohibit it from selling Fructofresh fresh fruit salads with syrup allegedly sold without preservative.

12-In the proceedings, Fructofresh contested the use of Velcorin in its products.

13-By interim order of the Commercial Court dated February 1, 2017, confirmed by a decision of the Paris Court of Appeal dated June 23, 2017, Pomona was prohibited subject to penalty from commercializing in France “*FRUCTOFRESH fruit salads with syrup or at least, including methanol or dimethyl dicarbonate E242, prohibited by the European regulation*”.

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14-It was in this context that by deed of bailiff dated December 6, 2017, Deli summoned Fructofresh and its French subsidiary, Connect Fruit, before the Créteil Commercial Court, for it to be prohibited from selling in France the fruit salads containing Velcorin and to obtain compensation for the prejudice suffered.

15- DELI also convened the French company, Bharlev, which, according to DELI was obliged to compensate its prejudice as retailer of the FRUCTOFRESH salads and responsible for the first French market launch of the disputed products.

16-It also summoned on the same grounds the German company Drinkstar, a Velcorin supplier, which had delivered the product to Fructofresh, accusing it of gross negligence for not having verified that this preservative was used under normal conditions.

17-By judgment dated February 4, 2020, the Créteil Commercial Court, in a decision, subject to provisional enforcement:

- dismissed from the proceedings the report deposited by Mr. (...) on January 24, 2017,
- held DELI inadmissible in its claim to prohibit the Polish company Fructofresh Connect from selling in France, fruit salads or fruit segments and in its claim for Fructofresh Connect to be ordered to pay it the amount of 4,287,972.00 euros for anti-competitive practice, misleading advertising and fraud, and dismissed its claim
- held DELI inadmissible in its claims against CONNECT FRUIT and dismissed its claim
- held DELI inadmissible in involving DRINKSTAR GmbH in this matter, and dismissed all of its claims against the latter
- held DELI inadmissible in involving BHARLEV INDUSTRIES in this matter and dismissed all its claims against the latter
- dismissed the preliminary ruling by Fructofresh and held that a ruling was not required on the claim for a stay of proceedings
- held Fructofresh inadmissible in its claims for a fine and damages and dismissed its claim
- ordered DELI to pay Bharlev the amount of 7,500 euros in damages and dismissed Bharlev's additional claims
- ordered DELI to pay Drinkstar an amount of 15,000 euros under Article 700 of the French Code of Civil Procedure and dismissed Drinkstar's additional claims
- ordered DELI to pay Bharlev an amount of 5,000 euros under Article 700 of the French Code of Civil Procedure and dismissed Bharlev's additional claim
- dismissed Deli, Fructofresh and Connect Fruit of their claims under Article 700 of the French Code of Civil Procedure
- ordered the provisional enforcement, subject, in the event of an appeal, that the beneficiaries provide a bank deposit equal to the amount of the sentence pronounced in their favour
- ordered Deli to pay the costs of the proceedings.

18-By declaration at the Court of Appeal court registry on March 2, 2020, DELI lodged an appeal on the decision.

19-The parties adhered to the procedural protocol of the international commercial chamber.

20-The close of the investigation was pronounced on June 29, 2021.

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Vu le verdict
17/08/23

II/ THE PARTIES' PLEAS

21-In its latest submissions notified electronically on June 2, 2021, Deli requested of the court as follows:

- to partially OVERTURN the judgment rendered on February 4, 2020 by the Créteil Commercial Court, insofar as it:
 - dismissed from the proceedings the report filed on January 24, 2017, by Mr. (...)
 - held DELI inadmissible in its claim to prohibit FRUCTOFRESH CONNECT SP Z.O.O. SPOLKA KOMANDYTOWA from selling fruit salads or fruit segments in France, and in its claim ordering FRUCTOFRESH CONNECT SP.Z.O.O. SPOLKA KOMANDYTOWA to pay it the amount of 4,287,972.00 euros for anti-competitive practice, misleading advertising and fraudulent practice, and dismissed its claim
 - held DELI inadmissible in its claims against CONNECT FRUIT and dismissed its claims
 - held DELI inadmissible in its implication of DRINKSTAR GmbH in this matter, and dismissed all of its claims against the latter
 - held DELI inadmissible in its implication of BHARLEV INDUSTRIES in this matter and dismissed all its claims against the latter
 - held that it was not necessary to rule on the claim for the publication of the judgment in specialized reviews.
 - ordered DELI to pay BHARLEV INDUSTRIES the amount of 7,500 euros in damages
 - Ordered DELI to pay DRINKSTAR an amount of 15,000 euros under Article 700 of the French Code of Civil Procedure
 - Ordered DELI to pay BHARLEV INDUSTRIES an amount of 5,000 euros under Article 700 of the French Code of Civil Procedure
 - Ordered Deli to pay the costs of the proceedings.
- to partially APPROVE the judgment rendered on February 4, 2020 by the Créteil Commercial Court, insofar as it:
- Dismissed the preliminary ruling claim by FRUCTOFRESH CONNECT SP.Z.O.O. SPOLKA KOMANDYTOWA and CONNECT FRUIT and held that it was not necessary to rule on the claim for a stay of proceedings:
 - Held that FRUCTOFRESH CONNECT SP. Z.O.O. SPOLKA KOMANDYTOWA was inadmissible in its claims for a fine and damages and dismissed such claims.

Ruling in a further hearing:

- Acknowledged that Fructofresh quoted page 21 of its submissions of exhibits numbered 40-2 to 40-8, 40-9, 40-10, 42-3 to 42-4, 43-2, 43-3, 44-2 to 44-8, 45-2, 46-2, 46-3, 47-2, 47-3, 48-2, 48-3 and 48-4 which it did not produce and are not even listed in its statement of exhibits.
- Acknowledged that Fructofresh acknowledged to have purchased 972 kgs of Velcorin between 2013 and 2016.
- Acknowledged that Fructofresh does not establish to have used such quantity of Velcorin for another use than that of fruit salads with syrup, as it confirms, without however providing

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justification, to have resold or destroyed 630 kgs of Velcorin and to have used the remaining 354 kgs to realize tests and sales of drinks.

It also acknowledged the following:

- Fraud committed by Fructofresh concerning the use of Velcorin is established and constitutes an anti-competitive practice, misleading advertising and fraudulent practice
- Bharlev is responsible for the first market launch on the French market of products containing Velcorin from Fructofresh
- Accept Deli for it to withdraw its claims for a pecuniary sanction against Drinkstar.
- Prohibit Fructofresh and its French subsidiary Connect Fruit, from selling in France, fruit salads or fruit segments with a shelf life of 14 days without preservative, subject to a penalty of 1,000 euros per offense acknowledged
- Order Fructofresh jointly with its subsidiary Connect Fruit to pay Deli the amount of 4,287,972 euros in damages, in addition to interest at the legal rate, capitalized as from the date of the summons, in accordance with Article 1342-2 of the Civil Code
- Order Bharlev to pay Deli the amount of 60,000 euros in damages.
- Dismiss Fructofresh and Connect Fruit of their claim for a preliminary ruling.
- Dismiss Fructofresh and Connect Fruit of their counter-claim for damages for denigration, insofar as it is both inadmissible and ill-founded.
- Jointly order Fructofresh and Connect Fruit, *in solidum* with Bharlev, to pay 50,000 euros under Article 700 of the French Code of Civil Procedure,
- Jointly order Fructofresh and its subsidiary Connect Fruit to pay the costs, in accordance with Article 699 of the French Code of Civil Procedure, which shall include the costs of the expert appraisal and seizures incurred in the context of the investigation measures ordered by the President of the Créteil Commercial Court on December 27, 2016, the translation costs to translate this summons into Polish and the translation of the judgment, and the enforcement costs in Poland for this decision. Order the insertion of this decision in the following reviews: LSA (agri-food magazine for professionals), FLD (fruit and vegetables distribution magazine) and RIA (agri-food industry review) at the expenses advanced by Fructofresh, Connect Fruit, Drinkstar or Bharlev.

22-According to their latest submissions notified electronically on May 13, 2021, Fructofresh and Connect Fruit requested of the court as follows:

DISMISS DELI of all its claims, pleas and submissions,

DECLARE CONNECT FRUIT and FRUCTOFRESH admissible in their appeal on an incidental plea, and well-founded in all their claims, pleas and submissions.

AND

APPROVE THE JUDGMENT DEFERRED INsofar AS IT:

- Dismissed from the proceedings the report deposited by Mr. (14) on January 24, 2017;
- Held that DELI was ill-founded in its claim to have FRUCTOFRESH CONNECT prohibited from selling, in France, fruit salads or fruit segments, and in its claim for FRUCTOFRESH CONNECT to be ordered to pay it the amount of 4,287,972.00 euros for anti-competitive practice, misleading advertising and fraudulent practice, and dismissed its claim

OVERULE THE JUDGMENT DEFERRED INsofar AS IT

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-HELD that DELI was ill-founded in its claims against CONNECT FRUIT and DECIDING IN A FURTHER HEARING,

-HOLD AND JUDGE that DELI was inadmissible to initiate an action against CONNECT FRUIT, and

accordingly, ORDER DELI to pay CONNECT FRUIT the amount of 7,000 euros under Article 700 of the French Code of Civil Procedure,

DISMISS the claim for a stay of proceedings and the claim for a preliminary ruling by the petitioners, and, DECIDING IN A FURTHER HEARING:

RAISE the following question before the Court of Justice of the European Union "*Pending a clarification from the governmental Committee on additives, should the (EC) regulation no. 1333/2008 of the European Parliament and Council dated December 16, 2008 on food additives and its appendix II and modification regulation no.1131/2011 dated November 11, 2011 be interpreted, in particular for the purposes of prevention, as prohibiting the addition of E 202 in cut fruit salads with syrup?*"

DISMISS FRUCTOFRESH SP Z.0.0 SPOLKA KOMANDYTOWA of its claims for indemnification and, DECIDING IN A FURTHER HEARING:

ORDER DELI to pay FRUCTOFRESH SP. 2.0.0. SPOLKA KOMANDYTOWA the amount of 11,850,660 euros in damages, with the court appointing a financial expert at its discretion prior to its ruling, in order to establish the amount of FRUCTOFRESH's prejudice;

ORDER DELI to pay FRUCTOFRESH SP. Z.0.0 SPOLKA KOMANDYTOWA

3,000 euros as a civil fine for unlawful procedure;

50,000 euros in damages for an unlawful procedure;

50,000 euros under Article 700 of the French Code of Civil Procedure;

ORDER DELI to pay all the costs.

23-According to its latest submissions notified electronically on November 30, 2020, Bharlev requested of the court as follows:

-Declare DELI ill-founded in all its claims and dismiss the latter accordingly;

-Declare the latter admissible on its appeal for an incidental plea and well-founded on all its claims, pleas and submissions;

-Approve the judgment deferred insofar as it:

-Dismissed from the proceedings the report deposited by Mr. (s) on January 24, 2017;

-Held DELI inadmissible in its claim to prohibit the Polish company FRUCTOFRESH CONNECT from selling fruit salads or fruit segments in France and in its claim for FRUCTOFRESH CONNECT to be ordered to pay it the amount of 4,287,972.00 euros for anti-competitive practice, misleading advertising and fraud, and dismissed its claim;

-Held DELI inadmissible in its claims against CONNECT FRUIT and dismissed its claims;

-Held DELI inadmissible in convening DRINKSTAR in this matter, and dismissed all of its claims against the latter;

-Held DELI inadmissible in convening BHARLEV in this matter and dismissed all its claims in its regard;

Held that it was not necessary to rule on the claim for publication of the judgment in specialized reviews;

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- Dismissed the preliminary ruling by FRUCTOFRESH and CONNECT FRUIT and held that a ruling was not required on the claim for a stay of proceedings;
 - Ordered DELI to pay Bharlev the amount of 7,500.00 euros in damages;
 - Ordered DELI to pay Drinkstar an amount of 15,000.00 euros in damages;
 - Ordered DELI to pay Bharlev an amount of 5,000.00 euros under Article 700 of the French Code of Civil Procedure;
 - Ordered Deli to pay the costs of the proceedings to be recovered by the court registry;
 - Overrule the judgment deferred insofar as it:
- Dismissed BHARLEV for its additional claim for unlawful procedure;
- And, accordingly, ruling in a further hearing:
- Acknowledge that it does not commercialize the Disputed Products and shall not be defined as “*responsible for the first market launch*” of the Disputed Products;
 - Dismiss the integrality of the claims by DELI in its regard;
 - Dismiss the claim for a preliminary ruling by FRUCTOFRESH which is not necessary for the resolution of this dispute;
 - Acknowledge that DELI abused its right to initiate action before the court;
 - Accordingly, order DELI to pay it the amount of 50,000 euros for unlawful procedure;
- And, in any event:
- Order DELI to pay it the amount of 30,000 euros in accordance with Article 700 of the French Code of Civil Procedure;
 - Order DELI to pay all the costs, including the legal fees for the benefit of SCP in accordance with Article 699 of the French Code of Civil Procedure.

24- In accordance with its latest submissions submitted electronically on March 12, 2020, Drinkstar requested of the court as follows:

- Approve the judgment of the Créteil Commercial Court dated February 4, 2020 in all its provisions.
- Accordingly,
- Acknowledge that Drinkstar, a company governed under German law, entered into an agreement with Fructofresh, a company governed under Polish law, for the sale of Velcorin on the Polish market and that Drinkstar was extraneous to the alleged sale of the disputed product on the French market.
- Consequently,
- 1-Hold and judge that the provisions of the French Consumer Code are unenforceable against Drinkstar
 - 2-Hold and judge that Deli does not establish that Drinkstar was subject to any obligation which could have characterized gross negligence on its part and, even less, evidence that it had been negligent by virtue of such obligation.
 - 3-In any event, hold and judge that Drinkstar was attentive, diligent and “*reasonable*” on the one hand, by proceeding with the necessary verifications and technical arrangements and, on the other hand, by duly informing Fructofresh of the normal conditions of use of Velcorin;
- Hold and judge that Drinkstar did not commit any gross negligence which would have incurred its liability by virtue of the provisions of French and European law;
 - Hold and judge that no offensive complacency by Drinkstar with regard to Fructofresh was characterized on the basis of the provisions of the (EC) Regulation no. 1333/2008.
- Accordingly,

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-Dismiss Deli of all its claims, submissions and pleas against Drinkstar.

In any event,

-Dismiss all of Deli's claims, submissions and pleas;

-For the appeal procedure, order Deli to pay Drinkstar the amount of 50,000 euros in accordance with the provisions of Article 700 of the French Code of Civil Procedure, including the legal fees for the benefit of the (Me), in accordance with legal offerings;

-Order Deli to pay all the costs of the proceedings, including the legal fees for the benefit of the (Me), attorneys at the Paris Bar, in accordance with legal offerings.

III/ THE PARTIES' GROUNDS

• concerning Déli's claims

Concerning Fructofresh's liability

25-DELI accuses the Polish company Fructofresh for having between 2013 and 2016 commercialized in France fruit salads with syrup by unlawfully adding Velcorin (dimethyl dicarbonate, E242) in breach of the regulations on food additives, thereby committing fraud due, in particular, to the labelling including the mention "*without preservative*", enabling it to obtain a significant commercial advantage, discrediting the other fruit salads for the consumers.

26- It considers that these actions constitute an anti-competitive practice, misleading advertising and fraudulent practice, sanctioned under Articles 1240 of the French Civil Code and L.121-1 *et seq.* of the French Consumer Code, justifying compensatory measures.

27-It asserted that on December 20, 2013, Fructofresh announced that it had managed to develop a process enabling it to propose fruit salads with syrup without preservative, with a shelf life of 14 days, which, according to Deli is impossible, as the shelf life cannot exceed 10 days without preservative.

28-It asserted that Fructofresh had made a prohibited use of Velcorin under the European regulation, in order to achieve such result.

29-It also asserted by means of evidence that:

-the DGGCRF (general directorate for competition, consumer protection and the repression of fraud) suspected fraud on January 19, 2017 and the search for causes of such longevity resulted in it retaining the hypothesis of the use of Velcorin, reaching the same conclusions as the court expert Mr. (...) in his report dated January 24, 2017 and by the scientists at INRA (national institute for agricultural research) and the CNRS (National Scientific Research Council) questioned by the journal Le Monde in an article dated January 27, 2017;

-the concordance between Fructofresh's announcement in a press release dated December 20, 2013, according to which it had developed a process enabling it to produce fresh fruit salads, without preservative, with a shelf life of 14 days, and the purchase of Velcorin from Drinkstar as from September 2013;

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l'expert traducteur près la Cour d'appel de Paris
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-the testimony of the former head of production at Fructofresh, Mr. (u), who certified the use of Velcorin in the plant in Poland, in fruit salad syrup, under the fictitious pretext of an authorized use for drinks;

30-It asserted that Fructofresh did not justify the use of 972 kg of Velcorin ordered during the period in question and contested the probative nature of the elements produced by FRUCTOFRESH to establish the alleged existence of a patented process enabling the duration of fruit salad conservation to be extended.

31-It requested compensation for its prejudice by reference to the financial gain that it could have made if it had kept the Pomona wholesale market, which dereferenced it for the benefit of Fructofresh, upon presentation of its fraudulent offer from 2014 to 2016.

32-It calculated its indemnity on its 43% margin calculated on the turnover realized in 2016 by Fructofresh with Pomona, which is 14,585,392.95 zlotys i.e., 3,324,010 euros which it requested it to grant over three years (43% x 3,324,010 euros: annual margin lost=1,429,324 euros X3 = i.e., 3,324,010 euros for the period 2014 to 2016).

33-It maintained that the events disseminated in the press were substantiated, and it opposes Fructofresh's counterclaim for damages for denigration, which it considers to be inadmissible and ill-founded.

Concerning Connect Fruit's liability

34-Deli asserted that it was authorized to convene by compelled order, Connect Fruit, a French subsidiary of Fructofresh, due to its status as distributor of the Fructofresh products in France, and that Connect Fruit must be jointly sentenced with Fructofresh for the fraudulent acts committed on French territory at its prejudice.

Concerning BHARLEV INDUSTRIES' liability

35-DELI accused BHARLEV INDUSTRIES for having, until February 3, 2017, launched the FRUCTOFRESH salads on the French market and benefited from a commercial advantage constituting an unlawful action for which it requests financial compensation.

36-It asserted that such company, as being responsible for the first market launch of the FRUCTOFRESH products, incurs its liability on the basis of Articles L.411-1 of the French Consumer Code and under Articles L.423-3 and L.432-4 of the French Consumer Code insofar as it could not be unaware that Fructofresh had breached the law by offering fruit salads on the market with such a long shelf life.

37-It asserted that independently from the fact that BHARLEV INDUSTRIES had imported fruit salads or fruit segments, such company had imported and commercialized the products with syrup containing Velcorin, which prompted it, upon the announcement of the disputed events, following the release of the article in Le Monde on January 26, 2017, to suddenly terminate its commercial relations with FRUCTOFRESH on February 3, 2017.

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Concerning Drinkstar's liability

38-DELI accused Drinkstar of having sold Velcorin to Fructofresh from the period from 2013 to 2016 without having verified that the preservative was used under normal conditions.

39-It withdraws its claims and financial sanctions against Drinkstar nonetheless requesting that it be included in the proceedings to inform the court on the quantity of Velcorin delivered to FRUCTOFRESH and on the conditions under which the product had been ordered.

40-In response, Fructofresh and Connect Fruit asserted, on the basis of Article 31 of the French Code of Civil Procedure that Deli was not entitled to initiate an action against Connect Fruit on the ground that the latter had not sold or invoiced such products to Pomona or Bharlev.

41-On the merits, Fructofresh and Connect contest such accusations and uphold that the evidence of use of Velcorin in the fresh fruit salads is not established.

42-Fructofresh specifies to have used Velcorin to develop a new and complementary activity of production of aromatized drinks which it has since abandoned, and not for the production of the disputed fresh fruit salads which it continues to sell.

43-It asserted that out of the 972kg of Velcorin delivered by Drinkstar between 2013 and 2016, it had used 354 kg, corresponding to 328 bottles for fruit juice which should not be confused with the drinks produced without preservative for the German market and commercialized by FruityKing until 2017 and that the 630 kg remaining were unused for different reasons: breakage, resale, according to a chart which it produced in its submissions. It added that the volumes of Velcorin would not have enabled the production of the quantities of syrup necessary for the fruit salads produced.

44-Fructofresh and Connect contest the probative nature of the elements of evidence provided by Deli and request the approval of the decision to dismiss Mr. (...) 's court expert appraisal from the proceedings, for the reasons provided.

45-In particular, they asserted that:

- nothing was established to justify the recourse to an expertise without consulting all the parties;
- Deli did not have any genuine motive justifying the measure;
- Dr. (...) 's appointment was obtained unlawfully, insofar as Deli, which had proposed the designation of its laboratory Expertox, had not informed the Créteil Commercial Court that it had already carried out analyses for Deli's benefit;
- the presence of methanol in fruit salads is endogenous, based on the scientific data, with methanol resulting from a natural reaction of the fruit's deterioration.

46-In this regard, they emphasize that the report by the laboratory EUROFINS, which carried out the analysis of around ten fruit salads with preservative, of different brands, establishes the presence of methanol and ethanol in fruit salads and that this also applied to Deli products. They contested the probative nature of the certification by Mr. (...) , former technician at

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Fructofresh, which they considered to be fictitious and misleading and contradicted by that of Mr. (...), technician at Drinkstar, who had installed and controlled the drink production unit.

47-They added that:

- the expert that they mandated, Mr. (...), an agri-food specialist, observed several anomalies in Dr. (...)’s report;
- that the certifications obtained, in particular by Bureau Veritas showed a regular production and without fraud of any kind;
- the setup of specific processes enabled a longer expiry date to be obtained and that it had filed a patent application relating to its technique with the Polish Republic’s patent office, which was accepted under the number 234725. Such patent has been effective since September 5, 2018 and has not been contested to date;
- it regularly carries out tests according to the AFNOR NF V01003 standard.
- it still currently sells fruit salads with syrup with a shelf life of 14 days, whereas it is not contested that Drinkstar no longer sold it Velcorin.

48-**Concerning the prejudice, Fructofresh and Connect** asserted that the partial dereferencing by Pomona only occurred in October 2016, that until this date Fructofresh had only delivered Pomona products with preservative, and, accordingly, had not taken market shares from Deli prior to this date.

49-They inferred that the alleged prejudice, which they nonetheless contest, only extended at most from October 2016 to February 1, 2017, the date of prohibition, i.e., at 4 months, for the annual margin lost, the equivalent of 1,429,324 euros/12=119,110.33 X4=476,441.33 euros.

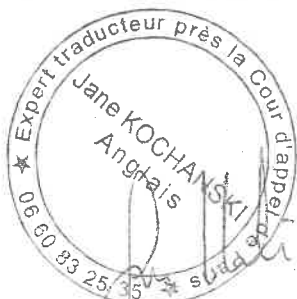
50-As a counterclaim, they filed for a preliminary ruling relating to the interpretation of the European regulation no. 1333/2008 in order to clarify whether the use of the E202 additive called “*potassium sorbate*” is authorized in cut fruit salads with syrup. They also claimed damages based on Article 1240 of the French Civil Code, given DELI’s attitude, which used Dr. (...)’s expert appraisal in bad faith, and had made denigrating comments published by the journal Le Monde on January 26, 2017, even prior to the effective date of the decision of prohibition.

51- They considered that these actions which resulted in its deprivation of sales with Pomona and BHARLEV INDUSTRIES, representing 48% of its total profit from 2014-2016, constitute actions of unfair competition, for which DELI must provide compensation.

52-**In response**, Bharlev contested its liability and requested the upholding of the judgment. It asserted that it had never purchased nor resold the disputed products, subject hereof, i.e., fruit salads without preservative with a shelf life of 14 days, and, accordingly, it may not be qualified as being “*responsible for the first market launch*” of the disputed products within the meaning of the DGCCRF’s definition, which such capacity being applicable to Pomona, for which Deli provided evidence of commercialization of the disputed fruit salads.

53-It stated:

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-that it had only been supplied by Fructofresh for supreme fruit segments with preservative (potassium sorbate), that it had placed an order to complete its production without any resale of the products delivered by Fructofresh;

-that it had ceased its supplies with FRUCTOFRESH as from January 2017, as a precautionary measure after the mediatization, calling into question the lawful nature of its activities, with an exclusively preventive objective, pending Fructofresh's justifications on the compliance of its activities.

54-In response, **Drinkstar** requested the upholding of the judgment, which dismissed the claims filed by DELI in its regard.

55-It principally asserted that French consumer law is not applicable in its regard, and that, in any event, it had not committed any fault within the meaning of Article 1240 of the French Civil Code, and may not be held liable for anti-competitive practices.

56-In support of its pleas it asserted as follows concerning the foregoing:

-that FRUCTOFRESH had been part of its client portfolio from 2013 to 2016 for the acquisition of Velcorin in the context of its production activity of sweet fruit juice drinks, to which it had delivered during the period 972 kg of Velcorin, corresponding to an average volume of 0.9 million 1 liter drinks per year.

-Fructofresh had installed a bottling line in its plant and had provided its recipe for its drinks;

-FRUCTOFRESH was part of the industrialists producing flavored drinks and for which the supply of Velcorin did not, finally, present any statutory or technical constraint;

-if established, it could not expect another use of Velcorin.

57-It requested the dismissal of the preliminary ruling which is not useful for the dispute and to review the amount attributed by the lower court judges in compensation for its prejudice for unlawful procedure.

IV/ GROUNDS OF THE DECISION

Concerning the different stages of proceedings between the parties

58-The parties mention different procedures in their written submissions, which may be resumed as follows:

Concerning the fresh fruit salads with syrup without preservative

59-This is the subject of the dispute between the parties.

60-Following the order dated December 27, 2016 Deli obtained from the President of the Créteil Commercial Court, upon petition, a judicial investigation measure entrusted to the laboratory Expertox, represented by Dr. _____, agri-food and chemical expert, on the basis of analyses, having detected, according to the latter, a significant level of methanol in the fruit salads with syrup from Fructofresh, and commercialized in France by Pomona.

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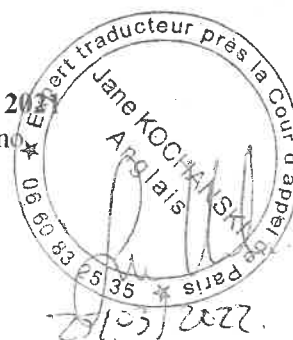
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61-The court expert filed his report on January 24, 2017, in which he concluded that *“it is unlikely that the methanol present in fruit salads would be “natural”, i.e, resulting from the fruit’s fermentation; (...), the presence of methanol may be explained by the deterioration of an additive which would have been added: dimethyl dicarbonate, also called E 242 or Velcorin, in the Fructofresh products without preservative, probably results from the addition of dimethyl dicarbonate E242 or Velcorin”*.

62-It was on this basis of the expertise that DELI summoned Pomona in order to prohibit it from selling the Fructofresh salads.

63-FRUCTOFRESH intervened in the interim proceedings contesting the use of Velcorin.

64-According to the order dated February 1, 2017, approved by the court of appeal decision dated June 23, 2017, the interim proceedings judge of the Commercial Court prohibited the commercialization of fruit salads with syrup by Fructofresh with a shelf life of 14 days.

Concerning the fruit salads with a “potassium sorbate” preservative:

65-By deed of bailiff dated September 18, 2017, FRUCTOFRESH summoned DELI in interim proceedings to be prohibited from commercializing its products, in particular, fruit salads containing a preservative, potassium sorbate (E202), on the ground of an extensive level of methanol in greater quantity than those retained by the expert, Dr. (...), in the FRUCTOFRESH fruit salads.

64-Deli, which did not contest using potassium sorbate, like the other European producers, upheld that the classification of additives authorized the use of potassium sorbate in its products.

65-By order dated November 8, 2017, the interim proceedings judge at the Créteil Commercial Court dismissed the claim given the uncertainty which would exist concerning the European regulation.

Concerning the fresh fruit juice

66-Several French producers and distributors of fresh fruit juice, i.e., Deli, Chablaisienne de Distribution-Spur, Frugi-Services and C2A-Zapple suspected their competitor Bharlev of having used the prohibited preservative, Velcorin, in its fresh orange and grapefruit juice.

67- By order dated January 23, 2017 rendered by the President of the Créteil Commercial Court, these companies obtained a court investigation measure upon petition for the purposes of analyzing the fruit juice content and detecting the presence of any Velcorin.

68- The expertise ordered was entrusted to the laboratory EXPERTOX represented by Mr. _____ who filed his report on February 10, 2017.

69-Following the interim order dated June 28, 2017, the President of the Créteil Commercial Court dismissed Bharlev’s claim for annulment of the measure ordered.

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70-In a decision dated September 28, 2018 (RG 17/13043), the Paris Court of Appeal overruled this decision and withdrew the order upon petition by the President of the Créteil Commercial Court dated January 23, 2017 and pronounced the invalidity of the bailiff reports dated January 24, 2017, accomplished in enforcement of this order, considering that the claimants had evidenced disloyalty by omitting to specify to the petition judge that the laboratory Expertox had previously intervened on behalf of a party.

71-On the basis of the aforementioned expert appraisal by Dr. (u) , and according to the deed of bailiff dated February 17, 2017, Deli, SCD-Spur, Frugi-Services and C2A-Zapple summoned Bharlev before the interim proceedings judge at the Créteil Commercial Court in order to obtain a provisional prohibition measure for the commercialization of these drinks, insofar as the latter had probably added a prohibited additive (Bharlev's exhibits no.7).

72-In an order rendered on May 3, 2017, the interim proceedings judge at the Cr teil Commercial Court dismissed this prohibition claim due to a lack of formal evidence of the addition of Velcorin.

73-In a decision dated September 28, 2018, the Court of Appeal acknowledged the withdrawal of appeal filed by Deli, SCD-Spur, Frugi Services and C2A-Zapple against this decision.

74-On July 7, 2017, Bharlev summoned Deli, SCD, Frugi-Services and C2A-Zapple in interim proceedings before the President of the Evry Commercial Court, to obtain the appointment of a court expert, with the mission of analyzing the fresh pressed fruit juice without additives, for all the parties to the procedure.

75-According to the order rendered on September 13, 2017 by the President of the Evry Commercial Court, Mr. (...) was appointed as court expert.

76-On March 16, 2019, Deli convened Mr. (b) (5) in interim proceedings before the President of the Evry Commercial Court, for the continuation of the investigation measure entrusted to Mr. (b) (5), for counter appraisal.

Concerning the estoppel opposed by Connect Fruit

77-According to Article 122 of the French Code of Civil Procedure an estoppel is defined as any means intending to have the opposing party declared inadmissible in his claim, without an examination on the merits, for default of a right of action, such as a capacity default, interest default, time-bar, fixed period, *res judicata*.

78-By virtue of Article 31 of said Code, the action is applicable to all persons with a legitimate interest for the acceptance or dismissal of a plea, subject to cases in which the law attributes the right of action to the sole persons that it defines to raise or defend a plea or defend a specific interest.

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79-It shall be recalled that the interest to initiate an action is not subordinated to the prior establishment of the admissibility of the action.

80-In this case, DELI, which asserts FRUCTOFRESH's tortious liability, for having sold products in France, in breach of the food additive regulations, justifies an interest to convene the French subsidiary FRUCTOFRESH in the proceedings, which commercializes its products in France.

81-The estoppel shall be dismissed and DELI shall, accordingly, be declared admissible to initiate an action and the judgment shall be approved on this ground.

Concerning the preliminary ruling

89-FRUCTOFRESH requested that the following question be raised before the Court of Justice of the European Union "*Pending a clarification from the governmental Committee on additives, should the (EC) regulation no. 1333/2008 of the European Parliament and Council dated December 16, 2008 on food additives and its appendix II and modification regulation no.1131/2011 dated November 11, 2011 be interpreted, in particular for the purposes of prevention, as prohibiting the addition of E 202 in cut fruit salads with syrup?*"

90-As previously mentioned, the purpose of this dispute relates to the commercialization of fruit salads without preservative and not fruit salads with preservative (see §58 *et seq.*).

91-Accordingly, it is unnecessary to establish whether the producers of fruit salads with syrup may add potassium sorbate (E202) in their products, which is subject to separate discussions.

92-As this question is not related to the purpose of the dispute, FRUCTOFRESH's claim for a preliminary ruling shall be dismissed and the judgment approved on this ground.

Concerning DELI's recognitive claims

93-DELI's claims, which are, in reality, "*recognitive*" claims, concerning the absence of certain exhibits produced in the proceedings by Fructofresh, are not pleas within the meaning of Article 4 of the Code of Civil Procedure, and, accordingly, no response is required.

Concerning the question of retention in the proceedings of Mr. (...) 's expert appraisal filed on January 24, 2017

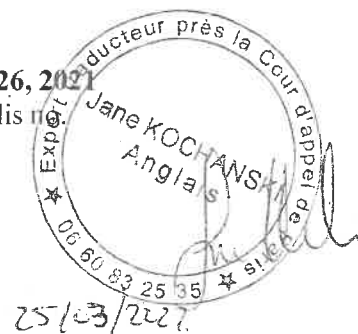
94-The Commercial Court dismissed Dr. (...) 's report by referring to the Court of Appeal's decision in its decision dated September 28, 2018, which, for an evident breach of loyalty by DELI, which had not informed the petitioning judge that it had previously had analyses carried out by this expert, had withdrawn the order, and, accordingly, cancelled the investigation measure and its report established on February 10, 2017.

95-Nonetheless, the Court of Appeal's decision, dated September 28, 2018 (RG 17/13043), to which reference was made concerns the expert appraisal relating to the analysis of the fruit

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juice commercialized by BHARLEV INDUSTRIES in which DELI and other companies suspected the use of Velcorin (see §70 of the decision).

96-This proceeding which is not in relation to this procedure, does not concern the expertise of the disputed fruit salads previously ordered upon petition according to the order dated December 27, 2016, which was not subject to any withdrawal request.

97-Furthermore, the circumstance that the measure was accomplished under non-adversarial conditions did not prevent it from being accepted as a ground of evidence and submitted for the court's appreciation, insofar as it was communicated and discussed under adversarial conditions.

98-Accordingly, the lower court judges' decision should be overruled, insofar as they dismissed Dr. ()'s expert appraisal, which shall be accepted in the proceedings as a piece of evidence.

Concerning FRUCTOFRESH's liability

Concerning the applicable law

94-In accordance with Article 6 of the EC Regulation no.864/2007 concerning the law applicable to non-contractual obligations, called Rome II, which applies in situations involving a conflict of laws, to non-contractual obligations relating to civil and commercial matters *"the law applicable to a non-contractual obligation resulting from an act of unfair competition is that of the country on the territory of which the consumers' competition relations or collective interests are or are likely to be affected."*

95-In this case, the alleged acts of unfair competition concern French territory, and, accordingly, French law, for which the application of which is stipulated by the provisions of the aforementioned Regulation, is therefore applicable, which is not contested by the parties.

Concerning the examination of the claim

96-According to Article L.121-1 of the French Consumer Code:

*"a commercial practice is misleading if it is committed in one of the following circumstances:
1° When it creates confusion with another item or service, brand, commercial name or other distinctive sign belonging to a competitor;*

2° When it is based on fictitious allegations, indications or presentations which mislead and relate to one or several of the following elements:

a) The existence, availability or the nature of the asset or service;

b) The essential characteristics of the item or service, i.e.: its substantial qualities, composition, accessories, origin, quantity, means and date of production, the conditions of its use and aptitude for use, its properties and anticipated results from its use, and the results and principle characteristics of the tests and controls carried out on the item or service;

97-According to Article L.441-1 of the aforementioned Code, it is prohibited for any person, whether or not a party to the agreement, from misleading or attempting to mislead the other

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contracting party, by any means or process whatsoever, even by the intermediary of a third party:

1° *Whether concerning the nature, type, origin, substantial qualities, composition or content of necessary ingredients for any merchandise*".

98-Failing that, the lack of respect of the administrative regulations in the exercise of a commercial activity constitutes a fault generating disruption to business for a competitor. More specifically, the non-observation of the regulations imposed for a commercial activity constitutes unfair competition with regard to the relevant competitor, insofar as the freedom of trade implies that companies exercise competition according to the merits, thereby prohibiting any unlawful process which would confer an unjustified benefit on the latter.

99-It is well-established that according to the European regulation no.1333/2008 dated December 16, 2008, modified by the regulation no.1131/2011 dated November 11, 2011, the food-additives authorized per product category are listed exhaustively in its appendix II.

100-Fresh fruit salads with syrup are listed in the category 04.2.4.1 as part of the category *"preparation of fruit and vegetables, excluding compotes"*.

101-On the list of additives authorized for this product category, from E200 to E203, neither methanol nor dimethyl dicarbonate (DMDC or E242) known under the name of Velcorin are mentioned, and, therefore, are not authorized.

102-It results from these provisions confirmed by the analysis by the DGCCRF dated March 13, 2017, in the context of this investigation that it conducted on the duration of FRUCTOFRESH's salads that the use of Velcorin in the fresh fruit salads is prohibited.

103-On the other hand, it is not contested that its use is authorized for certain drinks.

104-As mentioned in the brochure, *"Security and manipulation of Velcorin"* by the producer Lanxess, Velcorin is a preservative *"used to sterilize chilled drinks of all types/or to guarantee their conservation in accordance with the applicable national legislation."* It is a product which is used in the drinks industry through appropriate specific dose appliances.

105-Velcorin presents proven toxic risks for health, and, therefore, its handling is reserved for a qualified personnel.

106-It is also established that after the addition of Velcorin in a drink, it hydrolyses very quickly and decomposes into carbon dioxide (CO₂) and methanol. In other words, it disappears several hours after its addition to the product and cannot be detected upon analysis.

107-It is nonetheless possible, according to the opinion confirmed by the DGCCRF, to identify an addition of Velcorin in commodities by measuring the methanol.

108-In this regard, whilst methanol is naturally present in fruit, an abnormally high level of methanol in commodities may imply the use of Velcorin as a preservative.

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109-Accordingly, it was as from a level of methanol which it considers to be significant in Fructofresh's fresh fruit salads that DELI suspected the addition of Velcorin and was judicially authorized by order upon petition dated December 27, 2016 to proceed:

-with the seizure by bailiff on January 9, 2017 of several Fructofresh fruit salads in Pomona's Terreazur warehouses located in Rungis (94)

-with the analysis of these products by a court expert *"in order to identify whether these products included methanol, the quantity thereof, and in the affirmative, provide any appropriate specifications to explain the source of this additive"*.

110- The expert concluded in his report dated January 24, 2017 that *"the six fruit salads seized at Pomona include methanol at a level of 65.0; 63.8; 58.0; 34.8; 60.1 and 65.6 mg/L"*.

111-He specified that:

"methanol is not authorized as an additive in appendix II of the (EU) Regulation no. 1131/20, 11 of November 11, 2011, due to its toxicity for the consumer and its presence in fruit salads may be explained as follows: it is unlikely that the methanol present in these fruit salads would be "natural", i.e., resulting from fruit fermentation. Fruit salads are fresh and kept chilled, which slows the fermentation process and furthermore, the analyses were conducted prior to the salads' expiry date";

"the presence of methanol may be explained by the deterioration of an additive which would have been added: dimethyl dicarbonate. This composite, also called E242 or Velcorin is a preservative and is not authorized for the conservation of fruit salads according to the regulation no.1131/2011 dated November 11, 2011. The specificity of this preservative is that it has a relatively short shelf life as, in the presence of water, it deteriorates to form methanol and carbon dioxide according to the following reaction $C_6H_6O_5 + H_2O \rightarrow 2CH_3OH + 2CO_2$.

112-He deduced from this analysis that the addition of Velcorin was likely. Mr. (...) 's report, dated February 15, 2017, produced by Fructofresh, does not irrefutably dismiss this analysis. Mr. (...) 's report firstly relates to the concentration and dosage of methanol that could be found in fruit salads *"with preservative"*, which is not the case in the dispute concerning fruit salads without preservative; on the other hand, he commented on the methodology operated by the expert Mr. (...), asserting that he should have investigated other hypotheses, in particular *"that of pectin hydrolysis per enzyme"* without providing determinative complementary elements nor contradicting Dr. (...) 's conclusions concerning the possible addition of the prohibited additive.

113-It also results from the circumstances of the matter that FRUCTOFRESH had ordered Velcorin from an authorized distributor, the German company Drinkstar, during the suspected period between 2013 and 2016, and that it had prepared in its plant the product that could be added to fruit salad syrup.

114-Whilst it is not contested that FRUCTOFRESH had purchased a second-hand bottling chain to produce the contended fruit drinks from its German supplier in Velcorin, Drinkstar, to make an authorized use as a means of chilled sterilization for fruit juice, no control of its use was made by the distributor.

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115-It results from the certification by Mr. (...), head of clientele and technical advisor for Drinkstar, that he was only involved to train the personnel with the chemical product handling and did not have the opportunity to carry out sporadic activity controls as asserted by Fructofresh.

116-According to his certification, the quantity delivered of Velcorin for the period in question from 2013 to 2016, which was not contested, was 972 kg, enabling a volume of drinks processed for a maximum of 3.7 million litres, i.e., on average, a volume of 0.9 million 1 litre drinks per year.

117-Yet, FRUCTOFRESH did not justify a corresponding production or the use of the quantity ordered.

118-It established a chart in its written submissions which was intended, on the first column, to include the quantity ordered, i.e., 972 kg delivered and on the other column, its use, i.e., for test purposes or resale of fruit juice and Velcorin.

119-Nonetheless, the exhibits produced in the right side column of the chart intended to provide evidence of the resale were, for the most part, not produced nor listed on its statement such as numbered herein 40-2, 40-9, 40-10, 42-3 to 42-4, 43-2, 43-3, 44-2 to 44-8, 45-2, 46-2, 46-3, 47-2, 47-3, 48-2, 48-3 and 48-4, which renders its use or resale barely credible, for which Fructofresh should provide evidence thereof.

120-FRUCTOFRESH asserted that the Veritas audit carried out between the 27th of February and the 1st of March, realized in its plant, did not reveal anything suspicious.

121-Nevertheless, it does not concern an investigation but test reports realized after the information on the disputed events had been disseminated in the press, published in two articles in the journal Le Monde in January 2017.

122-It was also at that point that Fructofresh ceased its supplies in Velcorin with Drinkstar.

123-Elements of evidence were produced by DELI, the written testimonial by the head of the manufacturing process for the FRUCTOFRESH fruit salads until 2015, Mr (...), established on March 11, 2017. This certification, allegedly misleading and fictitious according to Fructofresh, without any probative element, was established in accordance with the requirements of Article 202 of the French Code of Civil Procedure and constitutes an element of evidence which shall be admitted amongst the others. According to Mr. (...), FRUCTOFRESH actually used the dosing pump of the bottling chain to add Velcorin in fruit salads.

124-Mr. Fogiel declared that the installation of the doser had been displaced to a concealed area with controlled access and connected to a syrup production system covering the fruit salads specifying in the diagrams the support and the circuit which enabled each fruit salad bowl to receive a dose of Velcorin.

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125-It is not disputed that due to this process which is not contradicted by any of the exhibits, the doser technically enabled Velcorin to be added to the fruit salad syrup, which disappeared a few hours later into the liquid, enabling the fresh fruit salads' shelf life to be extended.

126-Besides the process described by DELI, to explain the longevity of its products' conservation, FRUCTOFRESH opposed the existence of an innovative process, through research and investments which it patented.

127-Nevertheless, it produced a patent application filed in Poland only on March 6, 2018, accepted on March 20, 2020, under the no. 234725 entitled "*preparation method for fruit salads and single fruit products with an extended shelf-life*" without any scientific details concerning the innovation or evidence of alleged investments.

128-In this regard, the court acknowledged that the memento drafted by Poznan University in which included the response for the extended shelf-life for the FRUCTOFRESH salads duly recalled in the description of the technological process, the implementation of best practice manufacturing and hygiene processes, examples of control settings for the products, quality and certification systems ensuring a follow-up system from the fruit's arrival until its slicing and storage in the bowl without reference to any patent or technological innovation.

129-From a scientific point of view, the evidence of an innovative process explaining the fruit salads' shelf life, without preservative, for up to 14 days instead of only 9 days as announced by FRUCTOFRESH in 2013, is not provided.

130-From a financial standpoint, FRUCTOFRESH only produced an audit of the investments incurred for the period 2014-2018 presented as columns and graphics relating to the productions lines (column 1), storage (cool room) (column B), transport (general and specialized, column C), elements relating to intellectual property (column D), the latter not emphasizing the development costs for a new technology nor was any reference made to the research costs.

131-The court also acknowledged that on this item (column D), FRUCTOFRESH insisted in its written submissions to have invested in the development of the brand, in particular, through its presence in professional trade fairs.

132-No other reliable element provides an explanation for the disputed fruit salads' extended shelf-life, and subject to expert appraisal. It must be emphasized that the certification audits by Fructofresh established and the analysis reports by Eurofins after the discovery of the disputed events and the possibility that it continues to sell the same products in other countries in Europe do not enable the presumed use of Velcorin to be dismissed, between 2013 and 2016 in the fresh fruit salads' syrup, which it sold in France, as being products without preservative with a shelf-life of 14 days according to the evidence provided by Deli.

133-It results from these corroborated elements, significant, specific, concordant and consistent evidence enabling it to be presumed that FRUCTOFRESH added Velcorin to the syrup in the fresh fruit salads sold without preservative, which it purchased concomitantly from Drinkstar under the guise of a user for drinks.

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134-Accordingly, FRUCTOFRESH's failure to respect the regulations on food additives for the disputed products, accentuated by the misleading and fraudulent nature of the composition of the salads which mentioned *without preservative*, constitutes an act of unlawful and disloyal competition for DELI, generating a business disruption implying the existence of a prejudice.

Concerning Connect Fruit's liability

135-DELI also initiated action against FRUCTOFRESH's subsidiary, in charge of the commercialization of the disputed products in France.

136-Nevertheless, according to the legal announcement produced by DELI, FRUCTOFRESH's French subsidiary was Fructofresh France, which was liquidated on December 31, 2017.

137-Connect Fruit's liability, which is the new subsidiary in France for FRUCTOFRESH since 1998, may not be incurred for acts committed between 2013 and 2016, date on which it is not established that it distributed these products.

138-Accordingly, the claim shall be dismissed and the decision approved on this count.

Concerning BHARLEV INDUSTRIES' liability

139-This claim is based on DELI's assertion, pursuant to which BHARLEV INDUSTRIES would have been the first to launch on the market the disputed FRUCTOFRESH fruit salads and that it would have commercialized them until January 2017, date on which it suddenly terminated its commercial relations with FRUCTOFRESH by informing through the media, in the journal Le Monde, FRUCTOFRESH's alleged breaches of the law.

140-Nevertheless, FRUCTOFRESH acknowledged in the procedures that Pomona was responsible for the first market launch of the disputed products.

141-It confirmed without providing any proof of purchase or resale, that BHARLEV INDUSTRIES commercialized the disputed fruit salads, which the latter contested, asserting in support of the technical files, to be supplied by FRUCTOFRESH with fruit segments with preservative, which is confirmed by Fructofresh to complete its production and that it was only through a lack of confidence that it terminated its relation with FRUCTOFRESH.

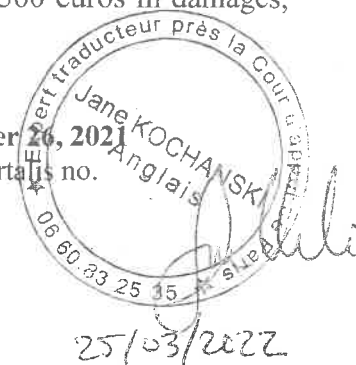
142-It results from these statements and findings that due to a lack of material evidence of the purchase and resale of the disputed salads, the claim filed against BHARLEV INDUSTRIES shall not prosper.

143-The decision which dismissed DELI's claim on this count shall, accordingly, be approved, including the sanction in its regard to pay the amount of 7,500 euros in damages, which is not contested.

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Concerning Drinkstar's liability

144-DELI abandoned its claims against Drinkstar against which it withdraws therefrom.

145-Accordingly, it is no longer necessary to rule on this claim.

Concerning the prejudice

146-The commercialization of the disputed fruit salads conferred an evident competitive advantage on Fructofresh in France, insofar as it enabled a deceleration of the fermentation and to facilitate the stock management and the production assuming a shelf life of 14 days for the fresh fruit with syrup, without preservative.

Concerning the prohibition and publication measures

147-The claim for the prohibition of the disputed products shall be accepted against Fructofresh and its French subsidiary on national territory according to the operative terms, without it being necessary to publish the decision.

Concerning the indemnity

148-The characteristic of the civil liability is to re-establish the equilibrium imbalanced by the damage, as accurately as possible, and to reinstate the victim to this situation prior to the operative event, without any loss or profit for the latter.

149-The compensation for the prejudice may be evaluated by taking into consideration the loss of earnings that may be due to loss of contracts or market share.

150-In this case, DELI requests as compensation the indemnification for the loss of profit that it could have earned if it had retained the Pomona market from 2014 to 2016, allegedly attributed to Fructofresh during this period.

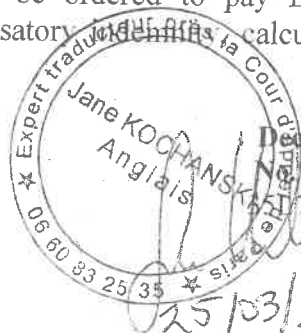
151-Whilst it is not contested that Fructofresh had obtained a Pomona invitation to tender for these disputed products in 2016, no exhibit establishes that the dereferencing of DELI at Pomona had been decided beforehand.

152-Fructofresh upheld that the invitation to tender launched by Pomona was only effective as from October 2016, but did not provide any evidence thereof.

153-The Court shall take into consideration the prejudice for the loss of earnings by DELI for the full year of 2016 until February 1, 2017, date of prohibition and as from which DELI acknowledged to have recuperated its lost turnover.

154-Accordingly, with regard to the calculation and accounting elements not discussed before the court, Fructofresh shall be ordered to pay DELI the amount of 1,548,430 euros, corresponding to its compensatory indemnities calculated on the annual margin that DELI

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could have made on the amount of annual turnover for 2016, Pomona, by FRUCTOFRESH ($43\% \times 3,324,010 \times 3,324,010 = 1,429,324 \text{ euros}/12 = 119,110 \times 13 = 1,548,434 \text{ euros}$).

Concerning the other claims filed by FRUCTOFRESH

Concerning the claim for compensation based on denigration

155-This claim partly based on events published by the journal Le Monte, albeit admissible with regard to the mandatory rules provided by the law dated July 29, 1881 on the freedom of the press, is ill-founded, insofar as FRUCTOFRESH's violation of the European regulations on food additives between 2013 and 2016 was acknowledged for the reasons mentioned above.

156-Accordingly, this claim for compensation filed against DELI shall be dismissed and the decision rendered by the lower court judges on this count should be approved.

Concerning the claim for unlawful procedure

157-FRUCTOFRESH, the unsuccessful party, is ill-founded to request compensation for an unlawful procedure.

158-Accordingly, its claim shall be dismissed and the decision shall be approved on this count.

Concerning the expenses and costs

159-FRUCTOFRESH, as the unsuccessful party shall be ordered to pay the costs.

160-Furthermore, FRUCTOFRESH must be ordered to pay an indemnity to DELI, which incurred irrecoverable costs to assert its rights, under Article 700 of the French Code of Civil Procedure, which is equitably set at 40,000 euros.

161-The acceptance of such claim shall not be necessary for Connect Fruit.

162-DELI, which withdraws from proceedings with regard to Drinkstar, nonetheless required it to incur procedural expenses on appeal.

163-It was also unsuccessful in its claims against BHARLEV INDUSTRIES.

164-Déli should be ordered to pay an indemnity to Drinkstar under Article 700 of the French Code of Civil Procedure, which is equitable to fix at the amount of 10,000 euros for Drinkstar and 15,000 euros for BHARLEV INDUSTRIES.

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IV/ THE DECISION

On these grounds,

The court,

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25/03/2022

1-Acknowledged DELI's withdrawal of its claims filed against Drinkstar;

2-Approved the decision rendered on February 4, 2020 by the Créteil commercial court, except insofar as it:

- dismissed the report filed by Mr. (...) on January 24, 2017;
- held DELI ill-founded in its claim to prohibit the Polish company Fructofresh Connect from selling fruit salads or fruit segments in France and in its claim for Fructofresh Connect to pay it the amount of 4,287,972.00 euros for anti-competitive practice, misleading advertising and fraudulent practice, and dismissed the latter's claim;
- held that it was not necessary to decide on the claim for the publication of the judgment in specialized reviews;
- dismissed Deli, Fructofresh and Connect Fruit from their claims under Article 700 of the French Code of Civil Procedure;
- Ordered DELI to pay the costs of the proceedings.

Ruling in a further hearing

3-Held that it was not necessary to dismiss the expert appraisal deposited by Mr. (...) on January 24, 2017;

4-Prohibited FRUCTOFRESH from commercializing fruit salads with syrup, without preservative, containing methanol or dimethyl dicarbonate E 242, prohibited by the European regulation, directly or through its subsidiary in France, subject to a provisional penalty of 1,000.00 euros per offense acknowledged, for a period of 6 months as from this decision;

5- Ordered FRUCTOFRESH to pay DELI the amount of 1,548,434 euros as compensation for the prejudice suffered, in addition to interest and in accordance with Article 1237-1 of the French Civil Code, this interest shall be applicable at the statutory rate as from the decision;

6-Dismissed the claim for the publication of the decision in specialized reviews;

7-Dismissed all of FRUCTOFRESH's claims;

8-Ordered FRUCTOFRESH to pay DELI the amount of 40,000 euros under Article 700 of the French Code of Civil Procedure;

In addition

9-Ordered DELI to pay Drinkstar the amount of 10,000 euros and to BHARLEV INDUSTRIES the amount of 15,000 euros under Article 700 of the French Code of Civil Procedure;

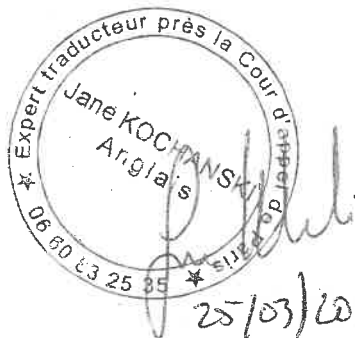
10-Ordered FRUCTOFRESH to pay the costs of the proceedings before the lower court and on appeal.

The court clerk

Najma EL FARISSI

The President

François ANCEL



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