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**PARIS COURT OF APPEAL
International Commercial Chamber**

**Division 5 – Chamber 16
DECISION DATED NOVEMBER 30, 2021**
(no. /2021, 11 pages)

Registration no. on the general roll: **RG no. 20/01931– Portalis no. 35L7-V-B7E-CBLSI**
Decision deferred before the Court: Judgment dated November 14, 2019 – Paris Commercial Court –RG no. 18/03335

APPELLANT:

WICKEY GMBH & CO.KG

A company governed under German law

With its registered office: Franz-Savels-Stasse 69, 52538 Gangelt (GERMANY)

Represented by its legal representatives,

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no 00901.

*Represented by Me _____, litigating attorney at the PARIS Bar, court
registration:*

*Assisted by Me _____ of the _____ litigating attorney of the
PARIS Bar*

RESPONDENT

VIDA XL INTERNATIONAL B.V.

With its registered office: Mary Kingsleystraat 1, 5928 SK VENLO (THE NETHERLANDS)

Represented by its legal representatives

*Represented by Me _____ of the _____
litigating attorney of the PARIS Bar, court registration:*

*Assisted by Me _____, litigating attorney at the PARIS Bar, court
registration*

COMPOSITION OF THE COURT:

The matter was heard on October 12, 2021, in a public hearing, before the Court,
composed of

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

Court clerk: during the proceedings: Najma EL FARISSI



DECISION:

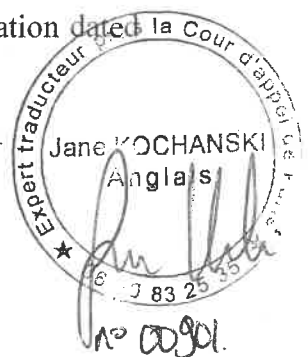
- in adversarial proceedings
- upon issuance of the matter before the court registry at the Court, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Najma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

1 – THE FACTS AND PROCEEDINGS

- 1- WICKEY GMBH & CO (hereafter “Wickey”) is a company governed under German law, which manufactures and commercializes outdoor children’s games, such as children’s castles and playsets.
- 2- Its products are offered for sale online to individuals and public establishments, either directly or on its website www.wickey.fr or through the intermediary of websites such as Cdiscount or Amazon.
- 3- It commercializes, in particular, a range of climbing frames entitled “Freeflyer”, “Multiflyer” and “Starflyer” since 2012, on which it does not have intellectual property rights.
- 4- VIDA XL INTERNATIONAL B.V. (hereafter “Vida XL”) is a company governed under Dutch law which sells multiple and various products for the home, globally, through its online stores and distributors.
- 5- In 2016, Wickey discovered that Vida XL commercialized outdoor climbing frames for children which were very similar to its products “Freeflyer”, “Multiflyer” and “Starflyer” on the website www.vidaxl.fr and on third party websites such as cdiscout.fr and www.amazon.fr, which it had acknowledged by deed of bailiff in France on December 21, 2016.
- 6- Considering that Vida XL had deliberately copied its climbing frames after an unsuccessful formal notice dated June 14, 2017, to cease the commercialization of these products, Wickey summoned Vida XL by deed of bailiff dated December 27, 2017, on the basis of unfair and parasitic competition before the Paris Commercial Court in order to cease the commercialization of the disputed climbing frames in France and obtain compensation for the prejudice resulting from such actions.
- 7- In a judgment dated November 14, 2019, the Paris Commercial Court dismissed Wickey of all its claims, according to the following terms:
 - Dismiss the company governed under German law, WICKEY GmbH & CO. KG from all its claims;
 - Order the company governed under German law, WICKEY GmbH & CO. KG to pay the company governed under Dutch law, VIDA XL INTERNATIONAL B.V., the amount of 10,000 euros in accordance with Article 700 of the Code of Civil Procedure;
 - Hold the parties inadmissible in their pleas and claims contrary to the terms hereof, and respectively dismiss their claims in this regard;
 - Order the provisional enforcement of the judgment without granting a guarantee;
 - Order the company governed under German law, WICKEY GmbH & CO. KG to pay all the costs, including those to be recovered by the court registry, settled at the amount of 78.36 euros, including 12.85 euros of VAT.
- 8- Wickey lodged an appeal on the decision before the Court of Appeal by declaration dated January 21, 2020.

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9-The parties accepted the Procedural Protocol applicable before the International Commercial Chamber.

10-The close of the investigation was pronounced on October 5, 2021.

II/ THE PARTIES' PLEAS

11-According to its latest submissions communicated electronically on September 14, 2021, WICKEY requested of the court, on the basis of Articles 9 of the French Code of Civil Procedure, 1240 *et seq.* of the French Civil Code, and in view of the exhibits produced in the proceedings, to proceed as follows:

-overrule the judgment rendered by the Paris commercial court dated November 14, 2019, insofar as it:

- Dismissed all of its claims,
- Ordered a penalty for the amount of 10,000 euros in accordance with Article 700 of the French Code of Civil Procedure, and to all the costs, including those to be recovered by the court registry, settled at the amount of 78.36 euros, including 12.85 euros of VAT.

RULING IN A FURTHER HEARING

- Held that VIDA XL INTERNATIONAL B.V. had committed acts of unfair and parasitic unfair competition by offering for sale and commercializing climbing frames with the same design as Freeflyer, Multiflyer and Starflyer commercialized by WICKEY;

Accordingly,

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-PROHIBIT VIDA XL INTERNATIONAL B.V from manufacturing, promoting and commercializing climbing frames in France reproducing or imitating in full or in part the children's climbing frames FREEFLYER, MULTIFLYER and STARFLYER by WICKEY GMBH & Co. KG, subject to a definitive penalty of 500 euros per acknowledged offense, within a period of 8 days as from the notification of this judgment;

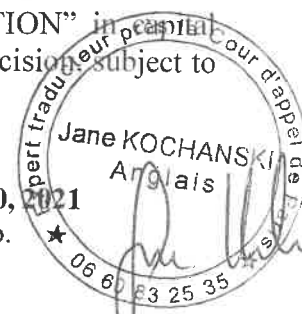
-ORDER VIDA XL INTERNATIONAL B.V. to pay it the amount of 600,000 euros in compensation for the prejudice suffered;

-ORDER the publication of this decision in three magazines or reviews of its choosing and at VIDA XL INTERNATIONAL B.V.'s expense, without the cost of each insertion exceeding 5,000 euros;

-ORDER the publication of this decision in full on the home page of the website www.vidaxl.fr preceded by the mention "JUDICIAL COMMUNICATION" in capital letters, in font size 14 and for 3 months as from the notification of the decision, subject to a penalty of 1,000 euros per day overdue;

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-DISMISS VIDA XL INTERNATIONAL B.V. of all its claims;

-ORDER VIDA XL INTERNATIONAL B.V. to pay it the amount of 40,000 euros in accordance with Article 700 of the French Code of Civil Procedure;

-ORDER VIDA XL INTERNATIONAL B.V. to pay all the costs, including the costs for the benefit of Maître in accordance with Article 699 of the French Code of Civil Procedure.

12-In accordance with its latest submissions transferred electronically on October 1, 2021, VIDA XL requested of the court, on the basis of Articles 9 of the Code of Civil Procedure, 1240 and 1241 of the Civil Code, and in view of the fundamental principle of the freedom of trade and industry, to approve the judgment in all its provisions;

Adding:

- ORDER WICKEY to pay all the costs of the appeal procedure,
- ORDER WICKEY to pay the amount of 15,000 euros under Article 700 of the Code of Civil Procedure

III/ THE PARTIES' GROUNDS

13-WICKEY, which does not assert any personal right, asserted that VIDA XL had committed a fault by replicating and commercializing several climbing frames on line, in France, which are a servile copy of three items of its climbing frame range, in particular, the climbing frames Freeflyer, Multiflyer and Starflyer, created in 2012, which it also sells on line to the French public.

14-It asserted that the mere acknowledgment of the risk of confusion generated by the replication of the design and colors of its climbing frames, combined with the imitation of several products of its range, constitutes a fault and substantiates actions of unfair competition.

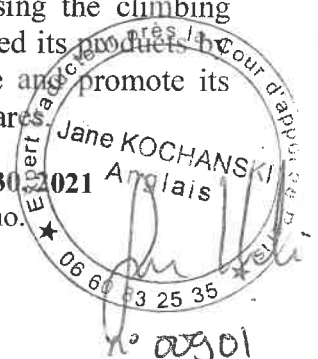
15-In support of its claim, it emphasized to have previously successfully initiated actions of unfair competition against VIDA XL in Austria and in Germany for the same events which resulted in prohibition measures, emphasizing on that occasion that VIDA XL, in the context of these procedures abroad, in particular, in Vienna, through its employee Mrs. [..] had declared to have ordered and copied the Wickey climbing frames.

16-It emphasized that multiple climbing frames existed on the market with a different design, and that its range created in 2012, whereas no identical climbing frame existed, was specific.

17-Concerning the parasitism, it asserted that VIDA XL, by purchasing the climbing frames and having them reproduced by a supplier had deliberately copied its products, unduly benefiting from its human and financial investments to create and promote its climbing frames in which it continues to invest to maintain its market shares.

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18-It requests as compensation a flat-rate amount of 500,000 euros, in addition to the 100,000 euros for prejudice to its image, with a prohibition and publication measure.

19-In response, VIDA XL asserted in the absence of personal rights, that the success of WICKEY's action is subordinated to the establishment of a fault committed at the appellant's expense, an abuse of the freedom of trade, which is not established.

20-In this regard, it sets forth that the few resemblances of the disputed climbing frames, in particular, the layout of the different elements and colors depend on the applicable regulatory standards and market trends; that, in any event, its products result from its own process of creation and do not constitute servile copies of the WICKEY climbing frames.

21-It contests the authority of the previous decisions rendered in Germany and Austria, which are provisional and rendered under the aegis of foreign law, which did not require the establishment of a fault and denies having copied the products.

22-Concerning the parasitism, it asserted that in the absence of fault in the commercialization of products free of rights and unoriginal, it may not be held liable, by establishing that the fact that it had ordered two versions of the WICKEY climbing frames for inspiration, which was all that that was acknowledged by its employee, Mrs. [redacted], is not objectionable nor is it an acknowledgment of the disputed actions.

23-Finally, it contested the exorbitant nature of the amounts claimed without justification.

IV/THE GROUNDS OF THE DECISION

Concerning the applicable law

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24-WICKEY accuses VIDA XL of actions of unfair competition which are of a tortuous nature.

25-According to 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 under civil and commercial law *"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 competitive relations or the consumers' collective interests are, or are likely to be, affected"*.

26-In this case, it is not contested that the asserted acts of unfair competition were committed on French territory, and, accordingly, that French law, the application of which is stipulated by the provisions of the aforementioned regulation, is applicable.

Concerning the examination of the claim for unfair competition and parasitism

27-It results from Articles 1240 and 1241 of the French Civil Code (formerly 1382 and 1383 of the French Civil Code) that any human action which causes damage to another

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must be compensated by the party causing the damage, with each party being responsible for the direct damage caused and also for the damage caused through its negligence or imprudence.

28-The unfair competition must be appreciated with regard to the freedom of trade principle, which implies that a sign or product which is not subject to intellectual property rights may be freely reproduced, under certain conditions, relating to the absence of fault, by the creation of a risk of confusion by the clientele on the product's origin, as an infringing circumstance for an undisturbed and loyal exercise of trade.

29-The appreciation of fault with regard to the risk of confusion must result from a practical and substantiated approach with regard to the facts of the case, taking into consideration, in particular, the more or less servile, systematic or repetitive nature of the reproduction or imitation, the duration of use, originality and notoriety of the product copied.

30-Accordingly, the principle is the freedom of trade, which implies that a product which is not subject to intellectual property rights may be freely reproduced, subject to the absence of a fault causing prejudice to an undisturbed and loyal exercise of competition.

31-In order for the sale of an identical product to constitute an act of unfair competition, it must be established that this is an offensive reproduction.

32-The economic parasitism is characterized by the circumstance according to which a person, in return for profit and unjustifiably, draws benefits from or copies the economic value of another, individualized, and gaining a competitive advantage, as a result of know-how, an intellectual work and investments.

33-In this case, WICKEY has been specialized since its creation in 2009, in the commercialization of climbing frames and different children's products such as castles, swings, huts, beds, which it sells on its website or on different online platforms accessible in Europe, and, in particular, in France.

34-It is not contested that it designed climbing frames in 2012 referred to in its catalogue Freeflyer, Multiflyer and Starflyer.

35-These products commercialized since 2012 under the Wickey brand, consecutively, are the most popular products sold by the appellant company.

36-These products present the following characteristics:

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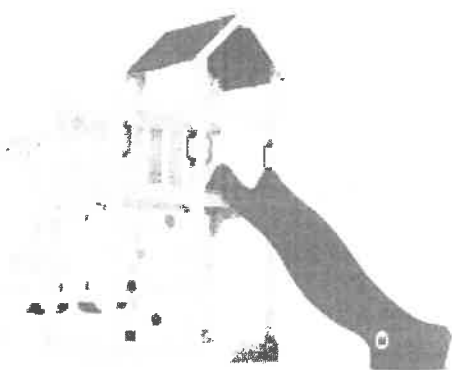
The "Freeflyer" climbing frame:



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- a pale colored and natural aspect solid wood structure, a general refined structure, including a tower with an extendable Iroquois beam attached;
- an Iroquois extension beam including two apparatus, in particular a swing, with a rotational axis composed of an individual blue colored seat with two suspension points, and an adjustable rope;
- a tower composed of a pointed roof covered with a blue canvas, including a sandpit underneath, a mid-level tray, accessible from a ladder, a blue and wavy slide and a climbing wall;
- climbing holds of various and vivid colors; red handles on two pillars of the tower.

The Multiflyer climbing frame



- a wooden a pale colored and natural aspect solid wood structure, a general refined structure, including a tower with an extendable Iroquois beam attached;
- a dual tower comprised of a pointed roof covered with blue canvas including a sandpit, a mid-level tray, accessible from a ladder, a blue and wavy slide and a climbing wall;
- an Iroquois extension beam including two apparatus, in particular a swing, with a rotational axis composed of an individual blue colored seat with two suspension points, and an adjustable rope;
- climbing holds of various and vivid colors; red handles on four pillars of the tower.

The Starflyer climbing frame



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- a wooden a pale colored and natural aspect solid wood structure, a general refined structure, including a tower with an extendable Iroquois beam attached;
- an Iroquois beam including an inclined plane extension, in the form of a ladder or net to climb;
- two apparatus are attached to the Iroquois beam, in particular, a swing, on a rotational axis, composed of an individual blue seat, with two suspension points, with an adjustable rope and two ladders to climb at either side;
- a tower comprised of a pointed roof covered with blue canvas including a slide, a sandpit underneath and a climbing wall;
- an inclined plane in the form of a ladder enabling access to the tower platform;
- a wavy slide, in plastic, with an identical color to the roof (blue) is installed on the opposite side to the inclined plane;
- climbing holds of various and vivid colors;
- red handles on four pillars of the tower.

37-VIDA XL does not establish through any probative document that the climbing frames identical to the products Freeflyer, Multiflyer and Starflyer were previously commercialized.

38-It also does not establish that it concerned regular productions.

39-The visuals produced of the Winnetoo and Jungle Gym climbing frames alleged to be “models” of similar climbing frames launched on the market prior to 2012 by other companies does not include all the forms and colors of the disputed Wickey products, mentioned above, and are different climbing frames.

40-Moreover, whilst the climbing frames mainly have common functional elements, i.e., a swing, a slide, a lookout tower, a platform to fix the slide to a ladder, a panel for climbing, there are combinations between the elements and the color choices which have a different appearance, as certified by the variety of visuals of the climbing frames produced by the parties.

41-Furthermore, whilst the European and French security standards include requisites to reduce the risks of child accidents and falls and stipulate a uniformity with respect to distances, in particular, between the elements of the swing and the ground, the gap opening sizes (to prevent a child from blocking his/her head) and curve radii, it concerns functional constraints which does not prevent the manufacturers from making color and layout choices which will give a different specific and recreational aspect to the relevant climbing frame.

42- Moreover, there are several types of elements (wavy slides, talus, curved, helicoidal or tubular slides and swings with one or several rotational axes, or with a single suspension point, or a rigid swing), which may be combined and coated with vivid colors, more attractive for children, so that the climbing frame does not follow an imposed scheme, but may be individualized as is the case for Wickey's Freeflyer, Multiflyer and Starflyer range, for which it contends that Vida XL had unduly replicated.

43-It is established by the extracts from the website www.vida.fr and the official report dated December 21, 2016 and not contested by Vida XL that the respondent commercialized climbing frames with the same structure, equipment and accessories, the same layouts and colors as those of the Freeflyer, Multiflyer and Starflyer climbing frames designed by Wickey.

44-The disputed Vida XL products replicate the characteristics of form and color of the aforementioned Wickey products, with the exception of the significantly lower dimension (the VIDA XL products measure 90 cm in height against 120 cm for those of the WICKEY products), to meet the foreign logistic considerations for climbing frame designs.

45-According to its own declarations, Vida XL, which commercializes more than 5 million items per year throughout Europe, places particular importance on the issues of delivery and packaging, with its policy being to offer products for the home and home environment at competitive prices, by sub-contracting their production and delivery.

46-It acknowledged that in its commercial strategy it had drawn inspiration from products already on the market, and, in this regard, it does not contest that it drew inspiration from climbing frames and to have ordered online in the context of a "market observation" two products of the disputed Wickey range, as mentioned by its employee Mrs. [..], in her testimonial statement before the Vienna Court in Austria on October 3, 2018.

47-Vida XL, which does not justify any design process for these climbing frames, which it did not previously commercialize, may not assert that the Wickey products which it acquired and which are included identically on its website in 2016 had not served as a reference.

48-It results from the foregoing that the offer for the sale to the public of the climbing frames which were a servile imitation of the Wickey climbing frames, i.e., the products

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Freeflyer, Multiflyer and Starflyer, without justification or necessity, created a risk of confusion for the French clientele and constitutes a fault of unfair competition.

49- As Vida XL did not contest that it commercialized its products on the same distribution networks as Wickey, these acts contrary to loyal customary trade practice, distort the normal market activity on the territory and cause a commercial disturbance which is accentuated by the simultaneous commercialization of several products constituting a range effect.

50- Furthermore, by commercializing in 2016 the copy of the products successfully and previously designed and commercialized by Wickey without incurring costs for design and development, at a competitive price to draw benefit from its commercial success, Vida XL had deliberately placed itself in Wickey's wake, by drawing undue benefit from the know-how and human and financial efforts granted by Wickey and by doing so, had also committed acts of parasitism.

51- These elements enable the establishment of the alleged acts of unfair competition and parasitism that the court had unduly dismissed.

52- Accordingly, the judgment shall be overruled on this point.

Concerning the compensation of the prejudice

53- A prohibition measure should be ordered in the decision without it being necessary to order the publication of this decision which is not required in this regard.

54- The civil liability objective is to re-establish, as accurately as possible, the equilibrium that has been destroyed by the damage and to replace the victim to its situation prior to the operative event, as if there had been no occurrence thereof, without any loss or profit.

55- The compensation of the prejudice may be evaluated by taking into consideration the loss of earnings which may be due to a loss of contracts or market share.

56- It is evident that Wickey suffered a prejudice to its image, due to the trivialization of its product by the imitation made by Vida XL, prejudice which was accentuated by the resumption of a product range effect.

57- Vida XL drew benefit without any expense in terms of investments in the development and graphics made by Wickey for the design of its products.

58- This offensive conduct caused a certain prejudice to the appellant insofar as it has an objective tendency to trivialize the Wickey climbing frames and to render them less attractive.

59- With regard to its commercial prejudice, no element is produced on the sales results for the Vidal XL climbing frames and Wickey does not justify a decline in its sales.

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60-The accounting certificates produced, which indicate a turnover of more than 1,160,436 euros realized in France between 2014 and 2016 and more than 5,732,418.55 euros, excluding taxes, for the period 2017-2020, solely for the climbing frames entitled “Freeflyer”, “Mutliflyer” and “Starflyer” do not establish a loss of market share concomitant to the market launch of Vida XL’s products, which occurred several years after the launch of the Wickey range.

61-Wickey asserted that following the launch of the disputed climbing frames by Vida XL, as from 2016, it was obliged to increase its marketing and advertising expenses to promote its climbing frames and maintain its market position.

62-Nevertheless, no element justifies the amount of the alleged expenses and investments, it being acknowledged that only a monthly invoice sent by Google for around 15,000 euros in 2012 was produced in this regard.

63-In view of all these elements at the court’s disposal, Vida XL should be ordered to pay Wickey the amount of 50,000 euros corresponding to the prejudice resulting from such offensive and parasitic conduct and to dismiss Wickey’s additional claims.

64-Accordingly, the court’s decision shall be entirely overruled.

Concerning the costs and Article 700 of the French Code of Civil Procedure

65- Equity requires that the appellant company be granted the amount of 20,000 euros on the basis of Article 700 of the French Code of Civil Procedure and to dismiss the claim in this regard filed by the respondent company.

66-The costs shall be assumed by the respondent, as the unsuccessful party, and which shall be recovered by the attorneys herein under the conditions of Article 699 of the French Code of Civil Procedure.

V/ON THESE GROUNDS

1-Overrule the commercial court’s decision dated November 14, 2019;

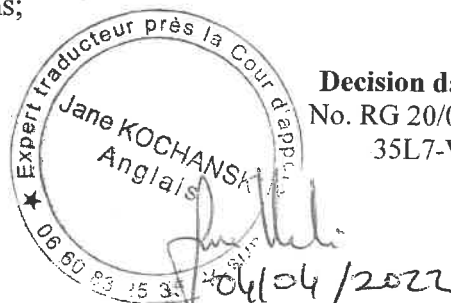
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Ruling in a further hearing:

2-Hold that by manufacturing and commercializing in France “the Vida XL climbing frames”, such as mentioned on the official report, online, dated December 21, 2016, and the extract of the website www.vidaxl.fr (Wickey’s exhibits nos. 10 and 11), identical to the Freeflyer, Multiflyer and Starflyer climbing frames, Vida XL had committed acts of unfair and parasitic competition at Wickey’s prejudice;

3-Prohibit VIDA XL INTERNATIONAL B.V. from manufacturing, promoting and commercializing these products in France, under a provisional penalty of 500 euros per proven offense; within a period of 1 month as from the notification of the decision and for a duration of 6 months;

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4-Order VIDA XL INTERNATIONAL B.V. to pay WICKEY GMBH & Co. KG the amount of 50,000 euros in damages as compensation for its material and moral prejudice;

5-Order VIDA XL INTERNATIONAL B.V. to pay WICKEY GMBH & Co. KG the amount of 20,000 euros under Article 700 of the French Code of Civil Procedure;

6-Dismiss the appellant's additional claims;

7-Dismiss all the respondent's claims;

8-Order VIDA XL INTERNATIONAL B.V. to pay all the costs which shall be recovered by the attorneys herein under the conditions of Article 699 of the French Code of Civil Procedure.

The Court Clerk

Najma EL FARISSI

The President

François ANCEL



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