

**NESTLÉ SCHWEIZ AG v. MASTERFOODS AG**  
**(MALTESERS, FIG. ./ . KIT KAT POP CHOC)**

SWISS FEDERAL SUPREME COURT, NO. 4P.222/2006

DECISION OF DECEMBER 21, 2006 (= BGE 133 III [•])

TRANSLATED BY TOM BRAEGELMANN AND NEIL CONLEY

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Legal sources cited in the opinion have been retained in their original form for reference. Footnotes from the translators offer further clarifications.

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**NESTLÉ SCHWEIZ AG v. MASTERFOODS AG**  
**(Maltesers, fig. ./ . Kit Kat Pop Choc)**

Decision of the Swiss Federal Supreme Court no. 4P.222/2006  
dated December 21, 2006 (= BGE 133 III [•])

1. Civil Department

Federal Justice Corboz Chairperson/President

Justices Klett and Kiss and

Clerk of the Court Widmer

Nestlé Schweiz AG,

*Appellant,*

*Represented by the lawyers Dr. Patrick Troller and Dr. Gallus Joller*

v.

Masterfoods AG,

*Appellee,*

*Represented by the lawyer Dr. Thierry Calame and/or the lawyer  
Lara Dorigo,*

\*\*\*\*

Commercial Court of the Canton of Aargau, First Chamber

Article 9 of the Federal Constitution (Prohibition of arbitrariness;  
preliminary measures; unfair competition).

Constitutional Complaint against the decision of the Commercial  
Court of the Canton of Aargau, First Chamber, dated July 31,  
2006.

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**FACTS**

**A.**

Masterfoods AG, (“Masterfoods”) the Appellee (originally the plaintiff),<sup>1</sup> is a publicly traded company with its corporate headquarters in Baar [Switzerland]. Masterfoods oversees the production and distribution of food products for both animal and human consumption. Masterfoods is the owner of the Swiss word-picture

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<sup>1</sup> “Beschwerdegegnerin.”

trademarks CH [abbreviation for Switzerland] No. 362'763 and 524'249 "Maltesers" (with two color claims: red, white, brown and black; and red, white, brown, and yellow) and distributes chocolate covered malted milk balls with the following corresponding trade dress:<sup>2</sup>



Nestlé Schweiz AG ("Nestlé"), the Appellant (originally the defendant),<sup>3</sup> is a public corporation with its corporate headquarters in Vevey [Switzerland]. Its objective is the production, sale and distribution of goods of all kinds.

#### B.

Masterfoods filed, with its motion for preliminary injunction on April 11, 2006, and its reply on June 20, 2006, the following request for a legal remedy with the President of the Commercial Court of the Canton of Aargau:

The defendant [Nestlé] shall be immediately enjoined in Switzerland, subject to its corporate officers and directors being penalized pursuant to Article 229 of the Swiss Criminal Code, from manufacturing, offering, distributing, exporting, storing, placing into the stream of commerce, including the use in advertising, or allowing third parties to use, or aiding and abetting third party use of, goods that the defendant offers for sale under the mark "KIT KAT POP CHOC," with the following trade dress (...).



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<sup>2</sup> As of August 1, 2008, the decision, as available at the Swiss courts' official website, <http://relevancy.bger.ch>, does not provide the exhibited images. The images here are taken from the decision's reproduction at [www.decisions.ch](http://www.decisions.ch), a website dedicated to the publishing of Swiss trademark case law, operated by Dr. Mark Schweizer, LL.M. The decision can be found here: [www.decisions.ch/entscheide/urteil\\_4P\\_222\\_2006.html](http://www.decisions.ch/entscheide/urteil_4P_222_2006.html).

<sup>3</sup> "Beschwerdeführerin."

Masterfoods' primary claim was that Nestlé, because of its distribution of the product "KIT KAT POP CHOC" with the trade dress described in Masterfoods' complaint, violated Article 2 and Article 3 lit. d<sup>4</sup> of the Swiss Unfair Competition Act ("UWG"), as well as paragraph 1 of Article 13 of the Swiss Trademark Act ("MSchG"), by creating a likelihood of confusion with respect to Masterfoods' trade dress and trademarks and also by unfairly misappropriating<sup>5</sup> Masterfoods' trade dress. Nestlé is planning a country-wide launch of its products into Switzerland in the near future. Masterfoods contends that it would thus be threatened with a disadvantage because of the dilution of its reputation and because of market confusion, all of which would not be easy to repair, thus the urgency of the matter. However, it is the position of Nestlé that there is absolutely no danger of a likelihood of confusion concerning the trademarks and the trade dresses.

The Vice President of the Commercial Court in Aargau ("Vice President") concluded in his decision on July 31, 2006, that the Appellee, Masterfoods, had credibly shown<sup>6</sup> that there was a violation of Article 3 lit. d. and Article 2 of the UWG as well as an imminent harm and an urgency to the matter. As a precautionary measure, the Vice President enjoined the Appellant, Nestlé, effective immediately and under the threat of criminal penalty for its officers and directors pursuant to Article 292 of the Swiss Criminal Code ("StGB"), from doing the following in Switzerland: "offering, distributing, exporting, introducing into the stream of commerce or using in business or in advertising, allowing third parties to use, or aiding and abetting third party use of, the goods that the defendant offers for sale under the term "KIT KAT POP CHOC."

The Vice President dismissed Nestlé's motion to compel Masterfoods to pay a bond.

### C.

Nestlé filed a constitutional complaint [with the Swiss Federal Supreme Court] demanding the repeal of the [Commercial Court of the Canton of Aargau's] decision dated July 31, 2006, maintaining that this decision would violate the principle of prohibition of arbitrariness (Article 9 of the Swiss Constitution).

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<sup>4</sup> The abbreviation "lit." is used in German to describe paragraphs and sub-paragraphs of an Article; instead of numbers, letters are used.

<sup>5</sup> The term "heranschleichen" literally means, in English, "unfairly sneaked up to."

<sup>6</sup> The translators have used the English term "credibly shown" as the translation for the German legal term, "glaubhaft gemacht."

Masterfoods made a motion to dismiss this constitutional complaint. The Vice President, waiving a consultation, adhered to its opinion pursuant to its contested decision [of July 31, 2006].

## THE OPINION

The Federal Supreme Court takes the following into consideration:

### 1.

A citizen has the right to file a complaint in the Federal Supreme Court (Article 84, paragraph 1 lit. a OG)<sup>7</sup> against final decisions of the cantons (Article 86 OG) for, among other things, violations of his or her constitutional rights.

There is no cantonal legal remedy available against the challenged decision of the Vice President of the Commercial Court of the Canton of Aargau (hereinafter Vice President), who had ordered preliminary measures in a summary proceeding (§ 416 ZPO)<sup>8</sup> based on Article 14 of the UWG in conjunction with Article 28c-28f ZGB.<sup>9</sup> (Bühler/Edelmann/Killer, commentary to the civil procedure art. of Aargau, Aargau 1998, No.1 of the foreword to §§317-351 and No.2 to § 317). In practice, a decision regarding preliminary injunctions can always be challenged with a constitutional complaint, notwithstanding its qualification either as an intermediary or as a final decision (Article 86.87 OG), as there is always the danger of irreversible harm. (BGE<sup>10</sup> 116 Ia 448ff.; 114 II 368 E. 2a p. 369; 108 II 69 E. 1 p. 71, each with further reference). The complaints brought by Nestlé cannot be brought using other legal remedies (Article 84, paragraph 2 of the OG); specifically, there is no appeal permitted because the challenged decision had made no determination of the parties' material legal claims. (Article 48 of the OG; cf. BGE 128 III 250 E. 1b S. 252; 131 III 667 E. 1.1 S. 669). The timely (Article 89 in connection with Article 34,

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<sup>7</sup> The acronym "OG" (Swiss Federal Code) stands for "Bundesgesetz vom 16. Dezember 1943 über die Organisation der Bundesrechtspflege," also shortened to "Bundesrechtspflegegesetz, OG," which was the federal law governing the organization and procedure of the federal judiciary at the time of the decision. Effective January 1, 2007, it was replaced by a new statute, the Bundesgesetz vom 17. Juni 2005 über das Bundesgericht ("Bundesgerichtsgesetz, BGG").

<sup>8</sup> Zivilrechtspflegegesetz (Zivilprozessordnung, ZPO), that is, the Code of Civil Procedure of the Canton of Aargau.

<sup>9</sup> Schweizerisches Zivilgesetzbuch, that is, the Swiss Civil Code.

<sup>10</sup> The "Entscheidungen des Schweizerischen Bundesgerichts," that is, the official collection of the decisions of the Swiss Federal Supreme Court.

paragraph 1 lit. b. of the OG) filed complaint of the materially and formally charged Appellant (Article 88 of the OG) is admissible, as far as the allegations are properly substantiated pursuant to Article 90, paragraph 1 lit. b.. (BGE 130 I 258 E. 1.3; 129 I 113 E. 2.1 S. 120, 185 E. 1.6 S. 189).

## 2.

Pursuant to Article 14 of the UWG, in connection with Article 28c of the ZGB, there needs to be a credible showing of the conditions that required the preliminary measure. Complete persuasion of the court is not necessary. A fact is already credibly shown if certain elements speak in favor of its existence, even if the court is taking into account the possibility that the fact did not exist. (BGE 130 III 321 E. 3.3 S. 325, with references). This standard of proof<sup>11</sup> for a credible showing applies to the existence of a claim for protection as well as for the alleged violation. (BGE 132 III 83 E. 3.2 S. 86; 120 II 393 E. 4c S. 397 f.). The court must also be satisfied with a preliminary legal assessment, otherwise the court would anticipate the actual decision in the matter; the claim of the applicant will be protected using the procedure of preliminary measures when the applicant shows its claim for protection to be credible after a summary assessment of the legal questions. (BGE 108 II 69 E. 2a S. 72, with references).

Where it is asserted that a preliminary measure was arbitrarily adopted, it must be pointed out that, according to long-standing case law, arbitrariness does not exist simply because a different solution would be justifiable or even preferable; rather, the federal court will reverse a decision only if it is in obvious contradiction to the factual situation, blatantly violates a norm or an uncontroversial fundamental legal principle, or runs contrary to the principles of equity. At the same time, however, a reversal of the challenged decision [in the present case] is only justified if its result is also unconstitutional. (BGE 132 III 209 E. 2.1 S. 211, 129 I 49 E. 4 S. 58, each with references).

## 3.

The Vice President deemed it to be credibly shown that the planned distribution of KIT KAT POP CHOC in the trade dress as described in the complaint of Masterfoods is an unfair act within the scope of Article 3 lit a. of the UWG because it would create an

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<sup>11</sup> "Beweissmass" can also be translated to mean "amount of necessary evidence."

<sup>11</sup> "Beweissmass" can also be translated to mean "amount of necessary evidence."

indirect likelihood of confusion with the trade dress of Masterfoods.

### 3.1

According to Article 2 of the UWG, any behavior or business practice that affects the relationship between competitors, or between suppliers and customers, is unfair and unlawful if it is deceptive or if it in any way infringes the principle of good faith. Particularly, one commits an act of unfair competition according to Article 3 lit. d of the UWG if one takes steps that are capable of causing confusion with the goods, works, services or businesses of others.

Encompassed by these factual elements, which have been described as trademark protection by unfair competition law, is any behavior that creates a likelihood of confusion in the mind of the public, particularly if committed in order to exploit the reputation of a competitor. (BGE 128 III 353 E. 4 S. 359; 126 III 239 E. 3a S. 245, each with further references). The likelihood of confusion may result from the fact that the goods of a competitor, due to their trade dress, are mistaken for the goods of another party that are already on the market. However, likelihood of confusion does not necessarily need to be a likelihood of confusion with the goods. It may also be collateral or indirect if it leads the public to the conclusion that the goods are confusingly marked or designed or originate from businesses that are closely linked/affiliated economically. (BGE 116 II 365 E. 3a; cf. also BGE 128 III 146 E. 2a S. 148f.; 127 III 160 E. 2a, each with further references). Moreover, a likelihood of confusion may also result if the junior mark unambiguously conveys a message that the contents are a "substitute for" or "as good as" other goods. Even such referencing with regard to the strength and advertising power of the senior mark may interfere with the senior mark's function as a distinguishing mark, even if false attributions are unlikely. (BGE 126 III 315 E. 6b/aa). Under unfair competition law, the creation of a likelihood of confusion is only relevant to the extent that the imitated trade dress of a good is distinctive due to either its originality or secondary meaning, such that the public recognizes it as signifying the source of origin. (BGE 116 II 365 E. 3b S. 368 f.; 108 II 69 E. 2b S. 73 f.; Pedrazzini/Pedrazzini, *Unlauterer Wettbewerb UWG 2. Aufl.*, Berne 2002, Rz. 5.171).

The danger of confusion with products that are similarly marked has to be ascertained by using the actual presentation of the goods, taking into account an assessment of all the circumstances

that constitute the distinctiveness [individualization] of the labeled products for the average, attentive consumer. (cf. BGE 116 II 365 E. 3a und 4a; Decision 4C.169/2004 of September 8, 2004 E. 2.4, sic! 2005 S. 221ff.). The closer the similarity of the goods upon which the marks at issue are used, the greater the risk of confusion. Where two marks are used for identical types of goods, a stringent standard must be applied when determining likelihood of confusion. Furthermore, it must be noted that consumers are less attentive and less discriminating where general goods for daily consumption are concerned than they would be with specialty products whose market consists, more or less, of a small circle of professionals or business people. (BGE 126 III 315 E. 6b/bb, 122 III 382 E. 3a S. 287 f., each with references).

### 3.2

The Vice President first found, correctly and without objection, that the trade dress in question, for which protection was sought in the case at hand, consisted of the entire packaging in which the products of the Appellee are presented; in addition to the color scheme, the writing and script used on the packaging must also be considered. The Vice President confirmed the protectability of the packaging. The Appellee had credibly shown, [in the opinion of the Vice-President] with statements and supporting evidence regarding long term, continuous, and intensive use and advertising, that the trade dress had acquired secondary meaning and that a significant number of average consumers would associate Appellee, Masterfoods, as being the manufacturer of the trade dress. The [Vice President also held that the] question of whether the trade dress met the threshold of inherent distinctiveness need not be addressed.

While assessing the likelihood of confusion between the contentious trade dresses, the Vice President bore in mind that one could not assume that the customers would be very attentive. Among the buyers of the Appellee's products are mostly children and customers in a hurry, for example [those] at stores in railway stations, who do not engage in extensive considerations while buying and who consume the products immediately or shortly thereafter. Moreover, the products sold in the contentious trade dresses are almost identical. In addition, the Vice President considered the fact that Appellant's [, Nestlé's,] packaging displayed different brand names, but reached the result that this cannot – when considering the two trade dresses in their totality – exclude an indirect likelihood of confusion. This was the case here where the



Appellant's trade dress, when viewed in its totality, was borrowing essential elements of the Appellee's, [Masterfoods'] trade dress. Appellant's trade dress used Appellee's concept of a seemingly arbitrary depiction of three-dimensional chocolate balls, of which one was cut open. Moreover, the coloring scheme of the packaging would leave an almost identical impression on one's short-term memory. Granted, Nestlé was using yellow for the description of the product as well as for the background as an indicator that the product was new. Even the description of a product with a noticeably displayed name could, however, still lead to consumers mistaking the product of Nestlé for a new product of Masterfoods, if consumers would notice that the former product [Nestlé's product] is not exactly like a Masterfoods product. This risk is increased with the use of the word "New."<sup>12</sup> The simple fact that Nestlé's packaging displayed a different brand name could not prevent inattentive consumers from thinking that the goods are interchangeable. In addition, because the Appellee's trade dress was well known, there was also the risk that customers would think that Appellant's product was a slightly different product, but nevertheless, a product originating from Masterfoods.

### 3.3

#### 3.3.1

Nestlé admits that the Vice President correctly held in the present case that the whole packaging qualifies as trade dress, i.e., the coloring scheme and the attached logo. However, [Nestlé claims] that the Vice President, while addressing the question of what constituted Appellee's trade dress, failed to provide a definite answer to this question anywhere in his decision. [Nestlé further claimed that] not a single word of the Vice President's opinion dealt with the central question, which was whether elements of the packaging are relevant under trademark law, and which [elements] are relevant under trademark law to the overall impression of the Appellee's packaging. The challenged decision showed [, Nestlé argued,] that the Vice President only considered elements like the red background color and the depiction of chocolate balls as being essential elements to a comprehensive analysis and completely ignored the label MALTESERS, which was a blatant violation of fundamental principles of trademark law and obviously untenable. Because the Vice President did not consider the logo that dominates the packaging as part of Appellee's trade dress, [Nestlé contends] it would also appear that he left it open as to whether the

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<sup>12</sup> English word appears in the original text.

packaging was inherently distinctive. [Nestlé claims this] because [it believes] there is no doubt that the word, MALTESERS, by itself, would be inherently distinctive and would, therefore, impart distinctiveness to Appellee's trade dress. The Appellee, however, [Nestlé points out] never contested or offered refuting proof during the preliminary motion that the Appellee had always used only the word MALTESERS on the packaging of its commercial products. Therefore, [Nestlé argues] from the outset, it would be a contradiction of the files on record and arbitrary that the Vice President, based on the alleged claims and evidence of the Appellee, considered that the secondary meaning of the trade dress, dissociated from the word MALTESERS, was credibly shown. The Vice President was thus mistaken, [Nestlé maintains], that documents [evidence] that dealt solely with the use of the packaging with the word MALTESERS would not allow conclusions to be inferred as to the alleged secondary meaning of individual elements of the packaging, isolated from the logo [or writing] on the packaging.

### 3.3.2

These claims [by Nestlé] rest on an imprecise analysis of the challenged decision. The considerations of the Vice President that were reproduced in the preceding paragraphs clearly show that he actually did take account of all the elements of Masterfoods' packaging in order to assess whether these elements, considered together, leave an overall impression that could result in confusion with Nestlé's trade dress. In particular, he did not ignore the logo on the packaging. He started by finding that, in addition to the coloring scheme of the trade dress, the logo on the packaging also constituted the trade dress. One cannot conclude, based on the considerations in the appealed decision at 3.2.4.3.2 [of the Vice President's decision], that the Vice President ignored the various lettering on the packaging during the consecutive assessment of whether there exists, after an overall analysis, a danger of confusion between the contested trade dresses. At this point, the Vice President first stated that Nestlé's trade dress was, based on an overall analysis, imitating the essential elements of the Appellee's trade dress, of which the Vice President immediately thereafter only described as being the coloring scheme and the depiction of brown chocolate balls. However, the Vice President subsequently looked at – according to the opinion of Nestlé – whether the labeling of the product with an ostentatiously displayed brand name might prevent an indirect likelihood of confusion caused

by the use of the trade dresses and ultimately found that it would not prevent indirect likelihood of confusion. This shows clearly that he included the labeling of the product with an ostentatiously displayed name as being another essential design element in his assessment of the overall impression [of the trade dress]. This is confirmed by the conclusion in the following consideration, whereby the fact that Nestlé's packaging bore a different trademark could not prevent inattentive consumers from thinking that the goods are interchangeable or that the goods originated from the same manufacturer. Moreover, the Vice President then underscored that one would have to take into account the trademarks and the logo printed on the respective packaging for the overall analysis, even though these would not have – against the backdrop of an overall view of all of the characteristics of the packaging – the importance that Nestlé would like them to have. It is, therefore, not true that the Vice President in his determination of likelihood of confusion ignored the essential element of the logo MALTESERS in looking at the overall impression of the packaging. Essentially, there can be no other result in this case, where the Vice President found credible the fact that the trade dress, with the logo, had acquired secondary meaning, although he left open the issue of whether Masterfoods' trade dress was inherently distinctive, despite Nestlé having argued that there could be no doubt about inherent distinctiveness. In addition, it does not follow that the Vice President assessed and confirmed the secondary meaning of the Appellee's trade dress while excluding the logo MALTESERS. In the same context, the Vice President also correctly held that, if all the necessary legal elements – including distinctiveness – are met, only the packaging as a whole would be protected, not the individual elements of the packaging or combinations of individual elements (e.g., the trade dress without the logo). After the Vice President had made note of all the essential elements that encompass the Appellee's trade it becomes obvious that he also found the secondary meaning of the trade dress to be credibly shown only in its entirety, with all its characteristics. Therefore, there is no merit in the allegation that the Vice President acted arbitrarily in finding, without sufficient evidence, that Appellee had credibly shown secondary meaning in its trade dress separate from the logo.

### 3.4

#### 3.4.1

Nestlé also argues that the Vice President arbitrarily applied Article 3 lit d. of the UWG. Nestlé maintains that the Vice President erroneously ignored the fact that within the scope of the assessment of the overall impression not all elements are to be given the same weight. The distinctive elements are essential, while the overall impression might even be decisively influenced by a single element. This is the case with the word MALTESERS. Not only does it stand out visually, but it would also be distinctive in connection with chocolate products, especially in light of the fact that the Federal Court deems the name to be decisive for such products. The court explained in BGE 116 II 365 E. 4c, referencing BGE 95 II 195, that when it came to consumer goods for daily consumption, namely chocolate, the name of the good would have special weight. Other elements of the Appellee's packaging could not influence the overall impression of the good in any legally significant way, especially not the merely descriptive image of brown chocolate balls and the public-domain-image of products in front of a red background, as the color red receives absolutely no protection. It would be arbitrary and erroneous for the Vice President, in gross violation of undisputed fundamental principles of trademark law, to label these aspects as irrelevant and unsuitable, ignoring them from then on. Pursuant to the legal consensus in this area of the law,<sup>11</sup> there is no relevant likelihood of confusion in a trademark law sense when trademarks are only similar in aspects that are part of the public domain and unprotectable. Even the law of unfair competition would not allow monopolization of descriptive and public domain information. Because the logo MALTESERS determines the overall impression of the Appellee's packaging, while Nestlé's packaging contains neither the same nor even remotely similar logo, there would be no room for a finding of an indirect likelihood of confusion.

#### 3.4.2

Nestlé has failed to show that the Vice President arbitrarily found that there was proof of an indirect likelihood of confusion and, therefore, has failed to show that the Vice President violated Article 3 lit d. of the UWG. Though Nestlé is of the opinion that elements other than the logo MALTESERS may not influence the

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<sup>11</sup> "[H]errschende Auffassung," that is, a legal consensus among scholars and courts in this area of the law that determines the outcomes of cases.

Appellee's packaging in any legally relevant way and, in addition, denies the distinctiveness and protectability of individual elements that were used, Nestlé is mistaken because the scope of the protection for trade dresses mandates an assessment of whether the trade dress as a whole, i.e. with all its design elements, is both protectable as a trademark and can be mistaken for the trademark of a competitor. The impression that the trade dress makes upon consumers, through its overall appearance, is crucial for the existence of a likelihood of confusion. It is incorrect to dissociate the elements of the trade dress into their individual parts and then compare them in isolation. (BGE 90 IV 168 E. 3 S. 174; Carl Bauderbacher, *Lauterkeitsrecht*, Basel/Genf/München 2001, N. 60 about Art. 3 lit d UWG).

According to the considerations presented above, under 3.3.2, the Vice President correctly assessed the secondary meaning, and thus the distinctiveness of the Appellee's trade dress as a whole, and also found in a constitutional and unobjectionable manner that the secondary meaning and distinctiveness of the trade dress was credibly shown. He did not violate any principles of trademark law when he stated that it was irrelevant whether the coloring scheme, the depiction of the chocolate balls, or other isolated elements of the Appellee's trade dress were in any way distinctive and thus protectable on their own. This is because the question of protection, i.e. the likelihood of confusion, is only relevant for the entirety of the design elements of the Appellee's trade dress in which the products are presented – this includes, in addition to the logo, the coloring scheme and the concrete modalities in which the chocolate balls are depicted. This is, contrary to Nestlé's opinion, not about the protection, or rather monopolization, of isolated elements of the trade dress that supposedly are just descriptive or which are in the public domain, namely the red background color or the depiction of the chocolate balls on the packaging, but, rather, it is only about the protection of all the elements of the trade dress in combination with each other.

The case law<sup>14</sup> that Nestlé cites does not support the proposition that the names given to chocolate products always have a formative and decisive influence on the legally relevant overall impression. Granted, the Swiss Federal Supreme Court explains in the

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<sup>14</sup> Here, the court strictly refers to prior case law from the Swiss Federal Supreme Court, but not necessarily only to decisions from the same judges or internal divisions/departments within the Swiss Federal Supreme Court, the highest court in Switzerland.

decisions BGE 95 II 191 E. 3c ["Polar Menthe"] and BGE 116 II 365 E. 4c ["Nivea/Jana"], where it found no likelihood of confusion, that the naming of cosmetics and chocolate would, as far as the overall analysis is concerned, have special weight or may even be decisive because the population is generally able to distinguish between these different products and usually recognize chocolate products and especially cosmetics according to the name of the manufacturer. However, one has to take into account that these court decisions, in contrast to the case at hand, had to assess trade dresses that differed a great deal from each other with regard to elements other than just the logo, specifically in regards to the form of the goods, i.e. the coloring and graphical design – all things the Swiss Federal Supreme Court thoroughly noted. Recently, the Swiss Federal Supreme Court heard a case in which – in contrast to the present case – similar products (lemon juice or lime juice) were presented in a bottle whose form and coloring scheme left a uniform impression in the mind of the inattentive consumer. The Swiss Federal Supreme Court used this occasion to underscore the fact that a label is not always capable of eliminating an otherwise established likelihood of confusion. A label does not necessarily change the impression a form makes on the average, inattentive consumer of food stuffs (groceries) who uses the entire trade dress for his or her orientation, not feeling compelled to corroborate that he or she did not choose a competitor's product. (decision 4C 169/2004 of September 8, 2004 E. 2.4, sic! 2005 S. 221ff.).

Aside from this, one has to take into account, in the present case, that the Vice President did not find that a goods-related likelihood of confusion was credibly shown, i.e., that the consumers would accidentally mistake one product for another. However, the Vice President did not rule out that consumers might realize, because of the different labels, that the products are different. Rather, the Vice President found, using sound reasoning (refer to 3.2. *supra*), that the indirect likelihood of confusion was credibly shown because the not especially attentive consumers - whose existence was not disputed - of the products in question, which are almost identical, may think that the products are either interchangeable due to their practically identical appearance<sup>15</sup> – apart from the very different logo [or labeling] – or that the goods originate from the same manufacturer or at least from manufacturers that are economically affiliated. There is no arbitrariness apparent in the Vice

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<sup>15</sup> "Appearance" has been used to translate the German word "Aufmachung."

President's reasoning here, and Nestlé does not even claim that he was arbitrary in this regard.

4.

Pursuant to the preceding analysis, the Vice President concluded *without arbitrariness that the Appellee credibly showed that the planned distribution of Nestlé's products in the packaging/trade dress described in the motion (for preliminary injunction) would violate Article 3 lit d. of the UWG, as claimed by the Appellee. Therefore, the preliminary injunction is not constitutionally objectionable. Whether the Vice President acted arbitrarily, as Nestlé also claims, because he held that an imminent violation of Article 2 of the UWG was credibly shown, need not be addressed.*

The constitutional complaint is dismissed. This outcome requires the fees of the court to be paid by Nestlé (Art. 156 1 OG). Nestlé must also compensate the Appellees for the proceedings at the federal court (Art. 159 para. 2 OG).

Hence, the federal court holds:

1. The constitutional complaint is dismissed.
2. The fees of the court of CHF 5,000 have to be paid by Nestlé.
3. Nestlé has to pay damages of CHF 6,000 to the Appellee for the proceedings at the federal court.
4. This decision will be transmitted in writing to the parties and to the Commercial Court of the Canton Aargau, First Chamber.

Lausanne, December 21, 2006

In the name of the First Civil Department

of the Swiss Federal Court

The President:    The Clerk: