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SUPREME COURT OF VIRGINIA
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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 740662

ARVIN, INCORPORATED

V.

SONY CORPORATION OF AMERICA

FOR APPELLANT:
Jerald P. Cohen
Michael D. Toobin
LAINOF & COHEN
1513 King Street
Alexandria, Virginia
22314

FOR APPELLEE:
Albert H. Grenadier
FAGELSON, SCHONBERGER
BILLOWITZ & GRENADIER
124-126 So. Royal Street
Alexandria, Virginia
22314

George R. Kucik
David L. Cohen
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, NW
Washington, D.C.

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PETITION FOR AN ORDER TO SHOW CAUSE AND FOR RELIEF FOR CIVIL CONTEMPT

(Filed February 1, 1974)

Comes now the complainant, Sony Corporation of America, by its attorneys, and respectfully petitions this Honorable Court to issue an order requiring the defendant Arvin, Inc. to show cause, at a hearing to be held without delay, why an order adjudging it in civil contempt for violating the terms of the Final Decree previously entered in this action on November 22, 1972, and granting relief against it therefor, should not be made and entered, and for its reasons states as follows:

1. This action was originally instituted by the complainant under the provisions of Title 59, §§ 59.1-1 to 59.1-10 of the Code of Virginia, commonly known as the Virginia Fair Trade Act, seeking, inter alia, a permanent injunction restraining defendant Arvin, Inc. from violating the provisions of complainant's fair trade program in this Commonwealth.

2. The action was commenced on November 9, 1972, by the filing of a verified Bill of Complaint, together with a Motion for Temporary Injunction and supporting Affidavits.

3. Thereafter, negotiations between counsel for complainant and defendant Arvin, Inc. resulted in the execution

of a consent Final Decree for a permanent injunction. The pertinent language of said Final Decree (attached hereto and incorporated herein as Exhibit A), duly signed by the Honorable Franklin P. Backus on the 22nd day of November, 1972, provides as follows:

> ADJUDGED, ORDERED AND DECREED that the Defendant, ARVIN, INCORPORATED, its agents, employees, successors and assigns and all persons in active consert or participation with the Defendant shall be, and hereby are, permanently enjoined and restrained from the following:
>
> (1) Advertising, offering for sale and or selling any commodity which bears, or the labor [sic] or container of which bears, the trademark or tradename "Sony" at less than the price stipulated in any fair trade contract in force and effect in the Commonwealth of Virginia (a representative copy of the fair trade contract presently in force being attached hereto and incorporated herein);
>
> (2) Offering and/or giving any article of value in connection with the sale of any such commodity;
>
> (3) Offering and/or making any concession of any kind whatsoever, whether by giving of coupons or otherwise, in connection with the sale of any such commodity;
>
> (4) Offering for sale or selling any such commodity in combination with any other commodity; and
>
> (5) Otherwise violating the terms and conditions of any fair trade contract described in Paragraph (1), above, or engagingin unfair competition with respect to any commodity described in Paragraph (1), above, in violation of Chapter I, Title 59, of the Code of Virginia (§§ 59.1-1 to 59.1-10).

Upon information and belief, defendant has received actual notice of the said Final Decree.

4. Notwithstanding the aforesaid permanent injunction of this Court and notice thereof by defendant, defendant Arvin, Inc. has violated, and upon information and belief is continuing to violate, the Final Decree entered by this Court on November 22, 1972. An example of defendant's contumacious conduct is evidenced by the affidavit of Mark W. McKinley (attached hereto and incorporated herein as Exhibit B) and defendant's sales slip (attached hereto and incorporated herein as Exhibit C), indicating the sale by defendant on December 26, 1973 of a Sony Model KV-1710 17-inch color television set, then and now fair traded under complainant's Schedule of Minimum Retail Prices (attached hereto and incorporated herein as Exhibits D and E) at $469.95, for the sum of $410.00, plus $16.40 sales tax.

5. Upon information and belief, defendant has had actual notice of the minimum retail prices applicable to the sale of fair traded Sony products in the Commonwealth of Virginia at all times relevant hereto.

6. The continued price cutting activities of the defendant are, therefore, willful and flagrant violations of the lawful mandate of this Court, without legal justification or excuse; and its activities have impaired, impeded and prejudiced, and, if continued, with further impair, impede and

prejudice the rights of complainant secured by the Final Decree previously entered by this Court in this action.

WHEREFORE, complainant prays that this Honorable Court:

(a) Issue an Order requiring defendant Arvin, Inc. to show cause, at a hearing to be held without delay, why an order adjudging it in civil contempt for violating the aforesaid Final Decree of this Court, dated November 22, 1972, should not be made and entered;

(b) Adjudge the defendant Arvin, Inc. in civil contempt for violating the aforesaid Final Decree of this Court, dated November 22, 1972, and with respect thereto award complainant damages, including but not limited to, the profits made by defendant by reason of its violations of said Final Decree, the costs incurred by complainant for investigations of violations by defendant of said Final Decree, attorney's fees and court costs; and

(c) Grant such other and further relief as may be appropriate in the premises.

SONY CORPORATION OF AMERICA
Complainant

By: Albert H. Grenadier
Its Counsel

ORDER TO SHOW CAUSE
(Entered February 13, 1974)

This cause came on to be heard this day upon the papers formerly filed and read herein and upon the Complainant's Petition for an Order to Show Cause and for Relief for Civil Contempt, together with the affidavit and all other Exhibits attached thereto; and,

IT APPEARING TO THE COURT that there is sufficient cause therefore, it is this 13th day of February, 1974,

ADJUDGED AND ORDERED, that the Defendant, ARVIN, INCORPORATED, show cause on the 22nd day of April, 1974, at 10:00 A.M., or as soon thereafter as the matter can be heard, why it should not be held in civil contempt of Court for violating the terms of the Final Decree entered by this Court on November 22, 1972, and have granted relief against it therefor; and it is further

ADJUDGED AND ORDERED that a copy of this Order be forthwith served upon the Defendant.

Entered: February 13, 1974

Wiley R. Wright, Jr.
CIRCUIT COURT JUDGE

LETTER TO DAVID L. COHEN, ESQ. AND JERALD P. COHEN, ESQ.
(Written May 7, 1974)

Gentlemen:

The Court has found the defendant in civil contempt for violating the final decree entered in this cause on November 22, 1972. At the conclusion of the hearing, the Court took under advisement the question of what sanctions to impose against the defendant.

Although there are no Virginia cases precisely on point, there is ample authority in other jurisdictions for the proposition that it is within the discretion of the trial court to allow a reasonable attorney's fee in a civil contempt proceeding. See 43 ALR 3d 793. Furthermore, an award of counsel fees is consistent with the principle that the violator of an injunction should be required to restore the status quo as far as may be possible.

Having considered the record in this case, the evidence adduced at the hearing and the representations by counsel for the complainant in regard to the amount of time and effort devoted to this case as a direct result of the defendant's violation, I have concluded that the complainant should be awarded an attorney's fee in the amount of $1,750.00, plus the court reporter's fee for the deposition of Arvin N. Bielen. The defendant will be granted a

reasonable period of time within which to pay the attorney's fee.

The Court does not deem it appropriate under the circumstances of this case to require an accounting of defendant's profits.

Counsel for the complainant is requested to submit an appropriate order endorsed by counsel for the defendant.

Very truly yours,

Wiley R. Wright, Jr.

This will maintain proper margins and allow for binding.

D E C R E E

(Entered May 21, 1974)

This cause came on to be heard upon the papers formerly filed and read herein, upon the Complainant's notice and petition for a rule to show cause and for relief for civil contempt and exhibits tendered therewith; upon the order to show cause entered herein on February 13, 1974 and upon the sworn testimony of witnesses taken in open Court on April 22, 1974 and exhibits tendered in connection with said testimony; and upon the Memorandum of the Court dated May 7, 1974, and was argued by counsel,

WHEREUPON, IT APPEARING TO THE COURT that the Defendant is in civil contempt for violating the final decree entered in this cause on November 22, 1972 and that civil sanctions should be imposed upon the Defendant for said violations; and,

IT FURTHER APPEARING TO THE COURT that reasonable counsel fees should be awarded for the investigation and prosecution of this contempt proceeding, as well as the court reporter's fee for the deposition of Arvin N. Bielen and the court costs of the proceeding, it is,

ADJUDGED, ORDERED AND DECREED that the Defendant be, and he hereby is, found to be in civil contempt for violating the final decree of November 22, 1974; and it is further

ADJUDGED, ORDERED AND DECREED that on or before sixty (60) days from this date the Defendant pay to Albert H. Grenadier and David L. Cohen, Attorneys for the Complainant herein, the sum of One Thousand Seven Hundred Fifty Dollars ($1,750.00) as counsel fees herein, and One Hundred Seventy Three Dollars and Sixty Eight Cents ($173.68) for costs advanced by counsel for the court reporter's fee in taking the deposition of Arvin N. Bielen and Eighteen Dollars ($18.00) for court costs advanced by counsel.

To which ruling by the Court the Defendant, by counsel, excepts.

And this decree is final.

Entered this 21st day of May, 1974.

CIRCUIT COURT JUDGE

ASSIGNMENTS OF ERROR
(Filed June 12, 1974)

Defendant assigns as error the following:

1. The Court erred in awarding counsel fees to the complainant, as a matter of law.

2. The Court erred in awarding counsel fees to the complainant, in the absence of competent evidence to base such an award.

ARVIN, INCORPORATED
By Counsel

AGREED STATEMENT OF FACTS
(Filed July 15, 1974)

This cause came on to be heard on Complainant's Petition for an Order to Show Cause and for relief for Civil Contempt wherein Complainant alleged that Defendant had violated the permanent injunction of this Court entered November 22, 1972, to wit: that Defendant had sold certain fair traded products bearing the trade mark "SONY" at less that [sic] the stipulated fair trade price, and wherein Complainant prayed for an award of damages, including an accounting of Defendant's profits from sales of fair traded Sony products below the stipulated price, and for costs and attorney's fees. A hearing was held on April 22, 1974 wherein testimony was taken and exhibits were tendered by the Complainant in support of its Petition.

At the hearing of April 22, 1974, Complainant called three witnesses: Mr. Arvin Bielen, preseident of Defendant, as an adverse witness; Mr. Thomas Lawton, fair trade administrator for the Sony Corporation; and Mr. Mark McKinley, an employee of Pinkertons, Inc. Complainant introduced into evidence the following exhibits: a certified copy of Complainant's registered trademark "SONY"; certain advertisements of products bearing the trademark "SONY" which had or were about to appear in national magazines; a fair trade contract which

had been in effect continuously since prior to November 22, 1972, between Complainant and Cary's, Inc. of Richmond, Virginia; ninety-nine sales receipts of sales made by Defendant of fair-traded Sony products below the stipulated price, since November 22, 1972; a sales receipt of a sale of a fair-traded Sony product to Mr. Mark McKinley on December 26, 1973; all Sony fair trade price change notices effective since November 22, 1972; and a document which compiled the sales prices of the products shown in each of the ninety-nine sales receipts and the then-applying stipulated fair trade price for each product sold.

During his examination by counsel for Complainant, Mr. Bielen several times invoked the privilege against self-incrimination. On a number of occasions counsel for Complainant read into evidence portions of the transcript of Mr. Bielen's deposition. The testimony of Mr. Bielen, along with the portions of the deposition read into evidence, tended to show the following: that Defendant was aware that by consenting to the permanent injunction of November 22, 1972 it had agreed not to sell fair traded Sony products below the stipulated price; that Defendant regularly received from Complainant notices of changes in the stipulated fair trade price; that all of the ninety-nine sales receipts

were genuine documents showing sales by Defendant of fair-traded Sony products; that several of the aforementioned sales receipts showed sales occuring after Defendant received notice of Complainant's Petition; that one of the aforementioned sales receipts showed a sale occuring after Defendant had been ordered to show cause why it should not be held in contempt of court; and that many of the sales shown in the ninety-nine sales receipts were made personally by Mr. Bielen.

The testimony of Mr. Lawton tended to show the following: that Complainant is the owner of the registered trademark "SONY"; that Complainant has an extensive program for establishing and maintaining the goodwill in its registered trademark through national advertising; that Complainant maintains a fair trade program in the State of Virginia; that since prior to November 22, 1972, Complainant has had in effect in the State of Virginia a fair trade contract with Gary's, Inc. of Richmond, Virginia; that Complainant regularly sent to Defendant notices of all changes in the stipulated price for fair-traded Sony products; that he had examined the aforementioned ninety-nine sales receipts and compared them against the then-obtaining fair trade prices for the Sony products shown therein, and had determined that

each such sales receipt showed at least one sale of a fair-traded Sony product below the stipulated price; and that he had examined, corrected, and verified the accuracy of the document which compiled the prices shown on the ninety-nine sales receipts and the then-obtaining fair trade prices.

He also testified that Sony then retained counsel for the purpose of enforcing the provisions of the injunction dated November 22, 1972. No specific evidence was presented as to the extent of the counsel fees for filing the motion, preparation and trial, although counsel for the Complainant made certain representations to the court concerning the same.

The testimony of Mr. McKinley tended to show the following: that he was employed by Pinkerton's, Inc. and on December 24 and 26, 1973 had been in the store of Defendant attempting to purchase a fair traded Sony product as part of an assignment from his employer; that on December 24, 1973 a salesman of Defendant had offered to sell him a fair-traded Sony color television set below the fair trade price; that on December 26, 1973 he had purchased a Sony fair-traded color television below the fair trade price; that a person whom he believed to be the store manager had told the salesman, "That is fair-traded. Remind me about it when I

write it up in the books."; and that, upon a eyewitness identification in the courtroom, the person he believed to be the store manager was Mr. Bielen.

Defendant offered no direct testimony.

At the conclusion of Complainant's evidence, Defendant moved to strike the evidence on various grounds, including that Complainant had adduced no evidence of actual damages to it and no evidence of or relating to Complainant's attorney's fees.

The Court denied Defendant's motion to strike, being satisfied that the evidence sustained the allegations of the Petition. The Court orally found that the Defendant was in contempt of Court for violation of the permanent injunction of November 22, 1972. The Court requested memoranda from counsel on the question of damages, including an accounting of profits, and on the question of costs and attorney's fees, taking these matters under advisement.

Counsel for the parties submitted memoranda as requested by the Court, and on May 7, 1974 the Court wrote counsel setting forth its conclusions. (A copy of the Court's letter is attached hereto.) The Court stated:

> "Having considered the record in this case, the evidence adduced at the hearing and the representations by counsel for the Complainant in

regard to the amount of time and effort devoted to this case as a direct result of Defendant's violation, I have concluded that the Complainant should be awarded an attorney's fee in the amount of $1,750.00, plus the court reporter's fee for the deposition of Arvin N. Bielen."

The Court declined under the circumstances of the case to require an accounting of Defendant's profits.

The Final order entered by the Court, in addition to the award of attorney's fees and stenographer's fee of $173.68, also awarded Complainant $18.00 in court costs. The award of attorney's fees was not based on any specific sworn testimony or documentary evidence as to actual fees. Rather it was based on the Court's own expert knowledge of reasonable attorney's fees for legal services, considered in light of the Court's examination of the record and its observations at the hearing of April 22, 1974, along with the representations of counsel for the Complainant.

SONY CORPORATION OF AMERICA

BY Albert H. Grenadier
Counsel

ARVIN, INCORPORATED

BY _____
Counsel

AFFIDAVIT OF MARK W. McKINLEY
(Signed December 28, 1973)

DISTRICT OF COLUMBIA, SS:

I, Mark W. McKinley, being duly sworn, depose and say:

1. That I reside at 3967 Warner Avenue, Apt. D-1, Landover Hills, Maryland 20874.

2. That on December 24, 1973, at approximately 1:30 P.M., I entered the store operated by defendant and commonly known as "Stereo World," located at 3250 Duke Street, Alexandria, Virginia, and inquired of a salesman, whose name was Mike, as to the price of a Sony model number KV-1710 17-inch Sony color television set. Said salesman at first stated the price to be $469.95, but later offered to sell me said merchandise for $425.00. I told said salesman that I would decide and come back if I wanted to purchase the set.

3. That as I was leaving defendant's store, the salesman described in Paragraph 2, above, called to me and said, "The manager said if you buy the set today, he will give it to you for $410.00." I again told said salesman that I would decide and return if I wanted to purchase the set.

4. That two days later, on December 26, 1973, at approximately 3:00 P.M., I went back to defendant's store and told the salesman described in Paragraph 2, above, that I

was ready to buy the Sony model number KV-1710 17-inch color television set which he had offered to sell me two days before. Thereupon, said salesman inquired of a man whose first name Norman and who appeared to be the store manager, as to whether there were any Sony KV-1710's in stock. Norman replied that there were two in stock. I then purchased a Sony model number KV-1710, bearing the serial number 593620, for the sum of $410.00 plus $16.40 sales tax, as indicated by defendant's sales slip, attached hereto.

5. That as the salesman, Mike, began to write up the sales slip, said Norman came over to him and said, "Wait, I'll show you how to do it. This is fair traded." He told Mike to combine the price and the sales tax together on the sales slip, and said, "Remind me about this one when I put it in the books."

6. That said merchandise which I purchased bore the trademark and trade name "SONY," and appeared to be new and in good condition. At no time was it said, or was any suggestion made, that said price was offered in connection with the closing out of the owner's stock of said merchandise; that the owner was discontinuing dealing in said merchandise; that said merchandise was altered, second-hand,

damaged, defaced or deteriorated; or that the sale was being effected by an officer acting under the orders of any court.

Mark W. McKinley

Subscribed and sworn to before me this 28th day of December, 1973.

Mary J. Lantz
Notary Public, D.C.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT three copies of the foregoing Appendix has been served upon Albert H. Grenadier, Esquire, 124-126 South Royal Street, Alexandria, Virginia 22314, Attorney for Appellee by mailing said copies to him this 26th day of November, 1974.

Michael D. Toobin

Michael D. Toobin