

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: August 29, 2003

DEPT. 63

REPORTER A: not reported

CSR#

PRESENT HON. Kevin A. Enright

REPORTER B:

CSR#

JUDGE

CLERK: Mary Ann Ybanez

BAILIFF: -----

REPORTER'S ADDRESS: P.O. BOX 120128

SAN DIEGO, CA 92112-4104

GIC734991

APEX WHOLESALE INC.,
Plaintiff,

vs.

FRY'S ELECTORNICS INC.,
Defendant.

F I L E D
Clerk of the Superior Court

AUG 29 2003

By: M.A. YBANEZ, Deputy

MINUTE ORDER

On August 26, 2003, this court received evidence and heard argument of counsel and parties in the above-referenced case. This matter was taken under submission. The Court now issues a Decision Re Nonsuit and Order and Judgment of Contempt, a copy of which is attached hereto and incorporated herein by reference.

Exhibits returned to parties after Court's ruling.

IT IS SO ORDERED.

Dated: August 29, 2003

KEVIN A. ENRIGHT
KEVIN A. ENRIGHT
Judge of the Superior Court

AUG 29 2003

By: M.A. YBANEZ, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

APEX WHOLESALE INC., a California corporation, suing upon its own interest and on behalf of the general public,

Plaintiff,

v.

FRY'S ELECTRONICS INC., a California corporation; RANDY FRY, an individual; DAVID BICKNELL, an individual; DOES 1-100, BLACK CORPORATIONS, and GREY PARTNERSHIPS,

Defendants.

Case No. GIC 734991

DECISION RE NONSUIT

After the opening statements of counsel on the Order to Show Cause Re Contempt, defendant Fry's Electronics Inc. moved for nonsuit on a number of grounds.

The first ground involves the issue of whether the subject court order is a mandatory or prohibitory injunction. Both plaintiff and defendant have appealed the judgment entered in this action. A mandatory injunction is automatically stayed on appeal, while a prohibitory injunction is not. *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 835, citing *Byington v. Superior Court* (1939) 14 Cal.2d 68, 70; *City of Pasadena v. City of Alhambra* (1946) 75 Cal.App.2d 91, 95. "An injunction is prohibitory if it requires a person to refrain from a particular act and mandatory if it compels performance of an affirmative act that changes the position of the

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1 parties. (Citations.) The substance of the injunction, not the form, determines whether it is
2 mandatory or prohibitory.” *Davenport v. Blue Cross* (1997) 52 Cal.App.4th, 435, 446-447.

3 Defendant argues that the subject injunction compels the performance of a substantive act
4 (i.e., advertising in a certain manner). Defendant also argues that the injunction contemplates a
5 change in the relative position or rights of the defendant which existed at the time the judgment was
6 entered.

7 However, in essence, the subject injunction paraphrases Business and Professions Code
8 section 17504(b). As such, the wording of the injunction prohibits the defendant from violating the
9 law. The Court finds the injunction to be prohibitory as opposed to mandatory in character.

10 The second ground for nonsuit is that the subject injunction is not specific, narrowly drawn,
11 or clear enough to result in punishment for contempt of that order. The defendant argues that the
12 phrase “at least as prominent” is not a precise and unequivocal statement. Relative to
13 advertisements containing multiple unit pricing and single unit pricing, the defendant states that
14 only different font sizes and bursts were litigated in this action. The use of the white price tag
15 symbol was never litigated in this action, nor enjoined by the subject injunction, according to the
16 defendant.

17 The Court finds that the distinction between different font sizes and bursts, on the one hand,
18 and white price tag symbols, on the other, is a distinction without a difference. Hypothetically, if
19 the injunction had specifically precluded the use of different font sizes, bursts, and white price tag
20 symbols, then defendant would not be precluded from utilizing its imagination to design some new
21 type of advertisement which would violate the “at least as prominent” language. The “at least as
22 prominent” language has a common sense meaning. That language mirrors the language of the
23 statute itself.

24 The third ground of the nonsuit, which is related to the second, is that plaintiff’s counsel in
25 this case and in the case of *Bivens v. Fry’s Electronics Inc.*, who is the same person, Scott
26 McMillan, represented to the Court in the *Bivens* matter that the use of price tags in the
27 advertisement of multiple unit products “had not been litigated in the *Apex* case.” Therefore,
28 defendant argues that plaintiff should be precluded from pursuing an alleged advertisement

1 violation involving price tags in this proceeding because of that representation made in the *Bivens*
2 matter. In effect, this is a judicial estoppel argument.

3 The Court notes that regardless of the specific type of graphic utilized by the defendant, the
4 issue is whether the specific advertisement in question is violative of the injunction issued in this
5 case. The issue does not turn on what specific type of graphic is utilized. Nor does the issue turn
6 on what counsel for a party argued or did not argue in another case, unless the principles of judicial
7 estoppel are found to apply.

8 The Court finds that judicial estoppel does not apply under these facts to bar the
9 determination in this case of whether the utilization by defendant of the white price tag on the
10 February 8, 2003 advertisement violates the injunction.

11 The last ground of the nonsuit relates to the defendant's motion to bifurcate the hearing on
12 the order to show cause re contempt. That issue was previously litigated and ruled upon in a
13 previous law and motion hearing.

14 For the reasons stated above, the defendant's motion for nonsuit is DENIED.

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17 Dated: 8-29-03

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19 _____
20 KEVIN A. ENRIGHT
21 Judge of the Superior Court
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AUG 29 2003

By: M.A. YBANEZ, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

APEX WHOLESALE INC., a California corporation, suing upon its own interest and on behalf of the general public,

Plaintiff,

v.

FRY'S ELECTRONICS INC., a California corporation; RANDY FRY, an individual; DAVID BICKNELL, an individual; DOES 1-100, BLACK CORPORATIONS, and GREY PARTNERSHIPS,

Defendants.

Case No. GIC 734991

**ORDER AND JUDGMENT OF
CONTEMPT**

In the course of proceedings in the case of *Apex Wholesale Inc. v. Fry's Electronics Inc.*, case no. GIC734991, the Court gave the following order or direction to contemner, who was told that violation of the order or direction would become contempt of court on May 2, 2003:

After presiding over the jury trial and bench trial in this action, the Court entered judgment on September 13, 2002, which, in pertinent part, provided that defendant Fry's Electronics Inc. is "permanently enjoined from advertising any consumer goods for sale at a single unit price where the goods are sold only in multiple units and not in single units unless the advertisement also discloses, at least as prominently, the price of the minimum multiple unit in which they are offered. . . ." That injunction was entered based upon the issues litigated in the bench trial portion of the case.

1 Contemner willfully failed to comply with the Court's order as follows: Defendant Fry's
2 Electronics Inc. acknowledges that the judgment entered on September 13, 2002, was valid and that
3 it first had knowledge of that judgment, containing the subject order, on October 8, 2002.
4 Defendant had the ability to comply with the order because it designs and places its own
5 advertisements with newspapers of general circulation.

6 Five months after it became aware of the Court's order, the defendant placed an
7 advertisement in the *San Diego Union Tribune* on February 8, 2003. (Ex. 137.) That advertisement
8 violated the subject court order because the single unit price was displayed more prominently than
9 the minimum multiple unit price. Specifically, the single unit price was displayed on a background
10 of a white price tag within a general background of light blue. The minimum multiple unit price
11 was displayed without any background other than the general light blue background. Clearly, the
12 single unit price was displayed more prominently than the minimum multiple unit price. The
13 advertisement referenced Bose bookshelf speakers selling for \$49.98 per pair.

14 The Court heard and considered the contemner's explanation for the conduct and rejected it
15 because the Court finds that the design and placement of the subject advertisement was not an
16 accident, a mistake, or unintentional, but instead willful. While defendant concedes that the
17 placement of the subject advertisement was negligent, it argues that its conduct was not willful.

18 Evangeline Moniz, the manager of the advertising department for the defendant, testified
19 that she is ultimately responsible for placement of all of the defendant's advertisements both in and
20 out of state. She testified that once the defendant became aware of the subject order, Kathryn
21 Kolder, Executive Vice President of the defendant, sent a memo to the advertising department,
22 among others, establishing policy to comply with the Court order. (Ex. 148.) Ms. Moniz
23 supervises 39 people, 22 of whom are buyers, who have the responsibility to design the ads within
24 their respective departments. By the time the advertisements are actually published, numerous
25 people within her department view those advertisements. The buyers are responsible for proofing
26 their advertisements. Last-minute changes can be made if an error is caught. A software template
27 is used by the buyers in order to easily input and delete items within each individual advertisement.
28 A simple keystroke will delete, for instance, the white price tag background.

1 Ms. Moniz testified that between October 8, 2002 and July 4, 2003, she calculated, as best
2 she could, the number of multi-pack ads that the defendant had placed during that time period. She
3 testified that defendant runs advertisements five days a week. Two multi-pack ads per day
4 multiplied by eight California newspapers would result in 80 multi-pack ads per week. Multiplying
5 that figure by 39 weeks resulted in 3,120 multi-pack advertisements during that time period.
6 Defendant argued that in light of the number of multi-pack ads placed by defendant, the one errant
7 ad on February 8, 2003, cannot be viewed as willful.

8 In her declaration of August 25, 2003 (Ex. 139), Ms. Moniz states that the plaintiff has
9 alleged thirteen new advertisement violations after October 14, 2002. Of those new violations
10 alleged by the plaintiff, possibly nine of those advertisements would have run in California
11 newspapers. Defendant would have placed "close to 2,000 ads for multiple unit items in
12 California" during that time.

13 In discussing the template at the time the buyer designs the advertisement, Ms. Moniz
14 testified that, to her knowledge, many times the per-pair price starts off in the white price tag
15 graphic. The buyer can then change that depiction. Under cross-examination Ms. Moniz stated that
16 those changes are not an accident, but intentional.

17 Based on the above, the Court is persuaded that despite the evidence concerning the
18 defendant's policy and the overall number of advertisements placed, the disobedience of the
19 Court's order by the placement of the February 8, 2003 advertisement was willful.

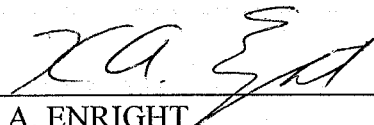
20 After due consideration, the Court finds beyond a reasonable doubt:

- 21 (a) That the contemner is guilty of contempt of court in violation of section 1209 of the
22 Code of Civil Procedure as follows: Subsection (a)(5) – Disobedience of any lawful
23 judgment, order or process of the court.
- 24 (b) That contemner had knowledge of the order, was able to comply at the time of the
25 order and continues to have such ability, and has willfully failed to comply with the
26 order.
- 27 (c) That the contemner is sentenced to pay a fine of \$1,000 within ten days of the
28 service of this order and judgment.

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(d) That the clerk of the court is ordered immediately to file this order and enter the contempt on the docket of the Court and to deliver to contemner a copy of this order.

Dated: 8-29-03



KEVIN A. ENRIGHT
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 <input checked="" type="checkbox"/> HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 <input type="checkbox"/> FAMILY COURT, 1555 6 TH AVE., SAN DIEGO, CA 92101-3296 <input type="checkbox"/> MADGE BRADLEY BLDG., 1409 4 TH AVE., SAN DIEGO, CA 92101-3105 <input type="checkbox"/> KEARNY MESA, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 <input type="checkbox"/> RAMONA, 1428 MONTECITO RD., RAMONA, CA 92065-5200 <input type="checkbox"/> SOUTH COUNTY DIVISION, 500 3 RD AVE., CHULA VISTA, CA 91910-5649 <input type="checkbox"/> JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792	<p style="text-align: center;">F I L E D Clerk of the Superior Court</p> <p style="text-align: center;">SEP 02 2003</p> <p style="text-align: center;">By: M.A. YBANEZ, Deputy</p>
PLAINTIFF(S)/PETITIONER(S) APEX	
DEFENDANT(S)/RESPONDENT(S) FRY'S	Judge: KEVIN A. ENRIGHT Dept.: 63
CLERK'S CERTIFICATE OF SERVICE BY MAIL (CCP 1013a(4))	CASE NUMBER GIC734991

I, **STEPHEN LOVE**, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

MINUTE ORDER ON DECISION RE NONSUIT AND ORDER AND JUDGMENT OF CONTEMPT

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at:

- San Diego
 Vista
 El Cajon
 Chula Vista
 Oceanside
 Ramona, California.

NAME & ADDRESS

NAME & ADDRESS

SCOTT A. MCMILLAN
4670 NEBO DRIVE, SUITE 200
LA MESA, CA 91941

JAMES D. CLAYTOR
3675 MT. DIABLO BLVD., SUITE 250
LAFAYETTE, CA 94549

STEPHEN LOVE
CLERK OF THE SUPERIOR COURT

Date: September 2, 2003

By: M. A. Ybanez, Deputy