**District Court, N.D. Illinois**

Artmark-Chicago Ltd. v. E. Mishan & Sons Inc.

No. 90 C 4512

Decided June 10, 1992 and August 12, 1992

## JUDICIAL PRACTICE AND PROCEDURE

**1. Procedure — Contempt; sanctions (§410.49)**

Defendant's obstructive discovery tactics warrant imposition of sanctions striking defendant's answer, affirmative defenses, and counterclaims, precluding defendant's introduction of evidence, granting plaintiff all reasonable adverse inferences against defendant, and granting plaintiff reasonable attorney's fees.

## REMEDIES

**2. Monetary — Damages — Trademarks and unfair trade practices — Profits (§510.0508.03)**

Lanham Act's Section 35(a), 15 USC 1117(a), authorizes recovery, "subject to principles of equity," of infringer's profits and any damages sustained by plaintiff, and thus might arguably be read as authorizing award of both defendant's profits and plaintiff's lost profits, but such "doubling up" award has not generally been permitted.

**3. Monetary — Damages — Trademarks and unfair trade practices — Profits (§510.0508.03)**

Sanctions imposed against infringement defendant for its obstructive discovery tactics, which included prohibiting defendant from offering evidence, should not also be interpreted to preclude, in determining defendant's profits, any consideration of costs incurred by defendant.

## TRADEMARKS AND UNFAIR TRADE PRACTICES

**4. Infringement — Willful (§335.11)**

## REMEDIES

**Monetary — Damages — Trademarks and unfair trade practices — In general (§510.0508.01)**

Separate award of damages to trademark infringement plaintiff for harm to its goodwill is not warranted, since recovery for such added harm is included within award of lost profits damages that has been trebled due to defendant's willful infringement; such trebled award also constitutes ample sanction for alleged "management distraction" caused to plaintiff by defendant's actions.

**5. Monetary — Damages — Copyrights — Statutory (§510.0509.03)**

Maximum award of $100,000 statutory damages for defendant's willful copyright infringement is not warranted, since such maximum award would be disproportionate in view of trebled damage award for defendant's trademark infringement; rather, award of $25,000 statutory damages is appropriate.

**6. Monetary — Damages — Prejudgment interest (§510.0511)**

Award of prejudgment interest is particularly appropriate against intentional infringer.

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Action by Artmark-Chicago Ltd. against E. Mishan & Sons Inc. for trademark, trade dress, and copyright infringement. Judgment for plaintiff after imposition of sanctions against defendant.

Daniel L. Kegan, Diane L. Prendiville, and Cindy D. Reicin, of Kegan & Kegan, Chicago, Ill., (Marvin N. Benn and Dawn M. Cassie, of Hamman & Benn, Chicago, and Fredric D. Abramson, Gaithersburg, Md., of counsel); Jane Shay Wald and John R. Mugno, of Gottlieb, Rackman & Reisman, New York, N.Y., for Plaintiff.

Gerard F. Dunne, New York for defendant.

**Shadur, J.**

June 10, 1992

[1] From the very beginning of this intellectual property action (which is principally though not entirely grounded in copyright infringement), defendant E. Mishan & Sons, Inc. ("Mishan") has occupied itself primarily with building roadblocks to the major efforts of plaintiff Artmark-Chicago, Ltd. ("Artmark") to engage in discovery that would bring the case to the point of readiness for trial. After a series of warnings that such stonewalling in the discovery process (and

other obstructive tactics) would not be countenanced, this Court announced its March 19, 1992 oral ruling (based on extensive briefing by the parties) in which it (1) struck Mishan's Answer, Affirmative Defenses and Counterclaims, (2) precluded Mishan's introduction of evidence, (3) granted Artmark all reasonable adverse inferences against Mishan and (4) announced that as part of the relief to be provided to Artmark it would be awarded the reasonable fees paid or payable to its counsel and paralegals, together with appropriate interest.

As for the ultimate substantive relief that was to be awarded to Artmark, as part of its March 19 ruling this Court also directed that (1) Artmark should present a memorandum and proposed order focusing on the amount of its damages, while (2) Mishan should submit only a memorandum dealing with the subject of the appropriate remedy. But — reflecting in microcosm its nonresponsive conduct throughout the litigation — Mishan opted instead to follow its own-determined path: It submitted still another brief on the question of its *liability*, this one captioned "Memorandum In Opposition to the Imposition of Sanctions Against the Defendant" and coupled with some supporting materials. That course of action obviously made it impossible for Artmark to respond in its next filing to the issues that Mishan *should* have raised (because it had been ordered to) in its opening brief, and that in turn defeated the purpose for which this Court had originally scheduled the filing of simultaneous submissions and then simultaneous responses.

As chance would have it, just as this Court ~~had~~ began to review the parties' cross-filings and cross-responses with a view to the possible development of a final order, our Court of Appeals came down with an opinion upholding the entry of a dispositive order in a case based on serious discovery violations by a litigant (*Govas v. Chalmers*, No. 91-1687, slip op. (7th Cir. June 2, 1992)). Here is what *Govas*, *id.* at 9 said in language that might well have been written for this case (except that the offender there was a delinquent plaintiff rather than defendant):

> The district court adequately warned plaintiffs that it would not tolerate any further evasive tactics, and the district court understandably got fed up when the plaintiffs willfully continued such tactics. Our case law makes it clear that a district court has the discretion to dismiss a claim when a party demonstrates a pattern of dilatory and evasive discovery tactics and when that party willfully persists in such tactics in violation of court warnings and orders. *Hal Commodity Cycles Management Co. v. Kirsh*, 825 F.2d 1136, 1138 (7th Cir. 1987) (noting that this court has repeatedly upheld the entry of default judgments for discovery violations when a party willfully chooses " 'not to conduct its litigation with the degree of diligence and expediency prescribed by the trial court. . . .' " (citing *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984)). *See also Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) (upheld entry of default judgment under Rule 37 where litigant provided few documents in response to discovery demands despite district court's warning that it would enter default judgment if documents were not produced within a specified amount of time); *Sere v. Bd. of Trustees*, 852 F.2d 285, 290 (7th Cir. 1988) (upheld dismissal against party that willfully failed to comply with court orders); *Hindmon*, 677 F.2d at 620-22 (affirmed Rule 37 dismissal against plaintiff who failed to appear for deposition, failed to properly answer interrogatories, and failed to respond to request for production). Indeed, we have indicated that less severe conduct than this warrants Rule 37 dismissal. *See,, for example, Patterson v. Coca-Cola Bottling Co.*, 852 F.2d 280, 283 (7th Cir. 1988) (indicating that dismissal for discovery violations might be permissible without a showing of willfulness or bad faith); *Hal Commodity*, 825 F.2d at 1139 (upheld entry of default judgment in the absence of interim sanctions). Plaintiffs' conduct fits soundly within that category of conduct which warrants Rule 37 dismissal, and Judge Williams acted well within her discretion when she dismissed the plaintiffs' claims for discovery violations. Indeed, she had no other choice.

It takes only a reading of the record in this case, particularly including the transcript of November 18, 1991 as well as the transcript of the March 19, 1992 proceedings and the matters that have been adverted to at some length in Artmark's two most recent filings,[1] to see that the entry of a judgment against Mishan in this action really flows a fortiori from the analysis and decision in *Govas*.

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[1] Those are Artmark's Reply Brief on Relief and Artmark's Motion To Strike Defendant's Nonresponsive Papers.

Having said that, however, this Court finds itself unable to rule now. What has happened is that because of Mishan's non-compliance with this Court's directive in its first filing, its most recent one (the Brief of E. Mishan & Sons in Opposition to Artmark's Brief for Relief) has posed issues to which Artmark has had no opportunity to respond. Accordingly Artmark is granted leave to do so by a filing in this Court's chambers on or before June 22, 1992. And to assure that Mishan has no potential claim (whether or not legitimate) that *it* has not had the opportunity to speak to Artmark's last (April 30) filing, it too is given leave to address, on the same June 22 timetable, *only* any new matters that it perceives as having been set out in Artmark's Reply Brief on Relief. This Court will then issue its final judgment in the matter.

August 12, 1992

This action is before this Court for entry of a final order. In the interest of continuity, this Court has attached its self-explanatory June 10, 1992 memorandum opinion and order (the "Opinion"), rather than adopting the alternative course of repeating the Opinion here so as to make this memorandum opinion and order self-contained. All that needs to be added before this opinion turns to the remaining open question — that of defining the scope of relief to be granted in favor of Artmark-Chicago, Ltd. ("Artmark") and against E. Mishan & Sons, Inc. ("Mishan") — is to reflect (1) that *Govas v. Chalmers* (which was quoted in the Opinion at 2-3) has since been officially reported at 965 F.2d 298 (with the language quoted in the Opinion now appearing at 965 F.2d 303) and (2) that since *Govas* our Court of Appeals has continued to uphold the imposition of the ultimate litigation sanction (either dismissal by reason of a plaintiff's misconduct or an adverse judgment by reason of a defendant's misconduct) where that result is an appropriate response to egregious conduct by a litigant in the course of the discovery process — see *Marroco v. General Motors Corp.*, Nos. 91-3045, 91-3083, 1992 U.S. App. LEXIS 13328 (7th Cir. June 12, 1992, as am. July 7, 1992).

Since this Court's issuance of the Opinion, both sides have furnished the further submissions that this Court had requested there: Artmark's "Surreply on Relief" and Mishan's "Comments Regarding Artmark-Chicago's Reply Brief on Relief." But Mishan's renewed efforts, in the course of its submission, to engage in a substantive refutation of its own *liability* (as contrasted with the requested discussion as to the appropriate measure of Artmark's relief against it) have continued to be wholly unpersuasive. Even allowing some discount for the vigor of forceful advocacy on the part of Artmark's counsel, the *factual* assertions that are contained in Artmark's Brief for Relief (filed April 17, 1992), Artmark's Motion To Strike Defendant's Nonresponsive Papers and accompanying exhibits and Artmark's Reply Brief on Relief (all of those filed April 30), as well as Artmark's post-Opinion Surreply on Relief, are entirely accurate and amply demonstrate the propriety of this Court's conclusion as announced orally on March 19, 1992 and as reconfirmed in the Opinion.

As for the remedy that should be awarded to Artmark, this Court has carefully reviewed all the submissions by both sides. It will employ the latest refinement of Artmark's work on the subject (its Exhibit 381 ("P. Ex. 381"), which was attached to its Surreply on Relief and is now annexed to this opinion [omitted] ) as a reference point for some but not all of the figures that are to be found in this opinion. After full consideration of the issues, this Court finds:

1. Artmark's methodology for the calculation of both (a) the number of infringing products sold by Mishan and (b) the unit sale prices of those products, inhibited as Artmark has been by the very stonewalling throughout the discovery aspects of this case that has led to this Court's ultimate substantive decision against Mishan, is far more credible than the materials and contentions that have been set out in Mishan's submissions (and see such cases as *Gyromat Corp. v. Champion Spark Plug Co.*, 735 F.2d 549, 554-55 [222 USPQ 4] (Fed. Cir. 1984), repeating the familiar doctrine that "when the amount of the damages cannot be ascertained with precision, any doubts regarding the amount must be resolved against the infringer"). No further space or time will be devoted to explaining why the various aspects of Mishan's presentation are rejected in favor of Artmark's. Instead the remaining discussion will begin with Artmark's numbers as the raw materials for this Court's calculations, and this opinion will in the course of its rulings explain the several respects in which this Court has not accepted the higher figures for damages that have been proposed by Artmark.

2. Even though there is considerable support for the notion that Artmark might well be entitled to recover a number of the higher amounts that it reflects in the "Partial Value" and "Full Value" columns of its P. Ex.

381, this Court has opted throughout to follow the conservative path that is traced in the "Low Element" and "Low Value" columns (Columns C and D) of that same exhibit. Those lower figures are more than amply supported in the evidence, and particularly in light of this Court's later announced determination that treble damages should be awarded to Artmark because of the willful nature of Mishan's infringements and other activity, this Court has determined that it should not further compound Artmark's recovery by applying such a multiple to higher base figures that might be viewed as containing any element of undue speculativeness.

3. In light of the direct and willful infringement of Artmark's intellectual property rights that Mishan has engaged in, it is a reasonable conclusion — and this Court finds — that all of the sales made by Mishan represent sales lost to Artmark on a one-to-one basis. Hence the most reasonable measure of the compensatory damages sustained by Artmark by reason of Mishan's infringements is the amount of profits that Artmark would have derived from the sales of those very products.

[2] 4. Artmark's Surreply on Relief and its accompanying P. Ex. 381 seek to recover *both* (a) Mishan's profits from its illicit (that is, its willfully infringing) sales and (b) the lost profits that Artmark would have derived from the sales of the same quantities of the same goods in the absence of Mishan's infringements. In that respect Lanham Act §35(a) (15 U.S.C. §1117(a)) does give the injured plaintiff the right "subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action" — so that items (1) and (2) might arguably be read as authorizing a doubling-up award of the type sought by Artmark here. But on that score 1a Jerome Gilson, *Trademark Protection and Practice* §8.08[2], at 8-181 to 8-182 (1992) (footnotes omitted) accurately sums up the courts' traditional holdings in the field:

> Section 35 provides for cumulative, not alternative, forms of monetary relief, "subject to the principles of equity," and in a proper case both damages and profits may be awarded. However, the courts have not awarded both damages based upon plaintiff's lost sales and defendant's profits attributable to sales under the infringing mark. The successful plaintiff is ordinarily put to an election of remedies between them. Recovery of both would be an inappropriate double recovery, inasmuch as recovery of the infringer's profits in all likelihood will compensate for the sales the plaintiff has lost. However, damages other than lost sales may be recovered in addition to defendant's profits.

And although the principal cases that Gilson cites in support of that discussion are not of modern vintage, our Court of Appeals has spoken to much the same effect in *Taylor v. Meirick*, 712 F.2d 1112, 1120 [219 USPQ 420] (7th Cir. 1983), where it rejected a like potential of "double counting" or "double recovery" in a copyright case (although the court in *Taylor* did point to specific statutory language in the Copyright Act of 1976 as calling for such rejection, it drew on general damages principles as well).

[3] 5. Artmark's proposed determination of Mishan's profits has wholly omitted *any* costs incurred by Mishan in obtaining its ill-gotten sales. That would be an impermissibly Draconian application of this Court's sanctions ruling that has precluded Mishan from offering evidence. Even more importantly, given the fact that the best measure of Artmark's own compensatory damages is to be found in the profits that *it* would have made on the sales that were lost to it by reason of Mishan's infringement (treated on a unit-by-unit basis), it would create an obvious distortion of those lost profits if this Court were to follow the methodology suggested by Artmark — a methodology that would take Mishan's gross sales (without deducting any costs that are inherent in those gross sales), and would then multiply that figure by the ratio that Artmark's sales prices bear to Mishan's knockoff sales prices for its shoddier merchandise. After all, *Artmark* would certainly have incurred the same elements of variable cost in its own presumed sales of those products if Mishan had not pirated those potential sales by its infringement activity.

6. Accordingly this Court (even though it has properly rejected Mishan's unpersuasive claims as to the amount of its gross sales in favor of Artmark's calculations of those sales) has accepted for current purposes — simply to calculate the relevant margin of profit for use in this opinion's further calculations — Mishan's own claim as to its profit margin as set out in Ex. A to the April 29, 1992 declaration of its lawyer Gerard Dunne, Esq. That exhibit shows $92,226.27 in net profits after having deducted (a) the cost of goods sold plus (b) 1-1/2% in sales commission plus (c) 20% in import duty from Mishan's asserted gross sales of $219,486.32, for a profit margin of 41.56353%. That same profit margin will be

treated as the appropriate measure in arriving at the determination of the profits that Artmark would have derived if *it* had sold the products that it would have been able to sell but for Mishan's infringing sales of comparable products.

7. It is true that the profit margin that has been derived in Paragraph 6 from Mishan's own figures does not take into account all overhead costs that are incurred by every business and that typically enter into net profits calculations (see *Taylor*, 712 F.2d at 1121). But when as here the calculation of net profits on *incremental* sales is at issue, the question is not one of overhead as such but rather of the variable-cost components of overhead. Nothing before this Court suggests that the incremental sales in question would have increased Artmark's general overhead burden over and above the variable items that are reflected in Paragraph 6 — and it is noteworthy that Mishan, in stating its opposition to the remedies requested by Artmark, tendered the declaration of its counsel Gerard Dunne with the assertion (Decl. ¶2 and Ex. A) that Mishan's *net profit* was the figure that it derived by making *only* the deductions that have been recapitulated here in Paragraph 6. Moreover, as *Taylor*, 712 F.2d at 1121-22 has said in upholding an infringed plaintiff's calculation of the infringer's net profits:

> After all, [plaintiff] did subtract from the "gross profits" figure the cost most likely to vary with [the infringer's] output, and it was up to [the infringer] to show what if any overhead items were really variable costs too. It is too much to ask a plaintiff who has proved infringement also to do the defendant's cost accounting.

8. Mishan's 41.56353% profit ratio, when applied to Artmark's "Low Value" figure of $516,229 for Mishan's sales of 4" and 5" bells (P. Ex. 381, line 119, col. D), would show that Mishan's calculated profits on those sales amounted to $214,562.99. To convert those profits into a determination of Artmark's lost profits if it had sold those units instead, it is necessary only to multiply that figure by 1.8 (the ratio of Artmark's sales prices to Mishan's, *id.* line 129, col. C). That multiplication produces a figure of $386,213.38 as the lost profits that were suffered by Artmark on the 4" and 5" bells.

9. Application of the same method of calculation to Artmark's Low Value figure of $53,774 for Mishan's nonstatutory 8" bell sales (*id.* line 219, col. D) would show that Mishan's calculated profits on those sales amounted to $23,350.37. To convert those profits into a determination of Artmark's lost profits if it had sold those units instead, it is necessary only to multiply that figure by 2.19 (the ratio of Artmark's sales prices to Mishan's, *id.* line 223, col. C). That multiplication produces a figure of $48,947.31 as the lost profits that were suffered by Artmark on those 8" bells.

**[4]** 10. Artmark also claims that it has sustained damage to its goodwill in addition to the just-completed determinations in Paragraphs 8 and 9 as to its lost profits on the sales that Mishan made but that Artmark would otherwise have made. Although Mishan has really offered no response in that respect, this Court finds that Artmark claim to be somewhat speculative — at least in terms of the method that Artmark suggests for its quantification. Even though there is a real likelihood that a company such as Artmark may well have suffered harm from the marketing of an inferior line of products by a blatant infringer such as Mishan, this Court considers that the trebling of Artmark's compensatory lost-profits damages (see Paragraph 12) will also provide an adequate remedy for such added harm.

11. This Court also rejects Artmark's proposal that it recover an amount for what it terms as "Management distraction," representing its arguably-incurred internal costs for having had to devote itself to this litigation. By trebling the already-calculated compensatory damages as explained in Paragraph 12, this court finds that it has provided an ample sanction for Mishan's infringements and other misconduct (and an equally ample recovery for all such factors of collateral damage that Artmark may have sustained).

12. What has already been explained as to the method of calculating Artmark's lost profits in the manner set out in Paragraphs 8 and 9, coupled with this Court's denial of any award for the other elements that have been referred to in Paragraphs 10 and 11 (even those that are certainly arguable components of a damages recovery), obviously reflect this Court's having opted for a conservative approach to the determination of Artmark's reasonably-arrived-at damages. That conservative approach has been taken in part (though not entirely) because of this Court's further determination that Mishan's track record in this litigation (something that finds an echo in its prior history of infringement as evidenced in other litigation [1]) justify the

[1] It is with some irony that this Court recalls that during what may have been the earliest court appearance of Mishan's New York counsel Gerard Dunne in this matter (or if not the earliest, then certainly a very early one), counsel Dunne

imposition of treble damages under Lanham Act §35(a). Because the compensatory damages that have been calculated in Paragraphs 8 and 9 total $435,160.69, the damages that will be awarded to Artmark are three times that figure, or a total of $1,305,482.07.

**[5]** 13. One added component of damages enters into the final judgment. Under the Copyright Act (17 U.S.C. §504(c)(2)) statutory damages up to $100,000 may be awarded for the willful copyright infringement of Artmark's 8" bells that have not been included in the earlier calculations. That ceiling figure, though requested by Artmark, seems disproportionate to the actual damages award for the other components that have already been discussed, especially given the fact that those other components are being trebled. Instead this Court has decided upon $25,000 as the statutory award to be added to the previously-calculated damages, bringing the grand total to $1,330,482.07.

**[6]** 14. Two other components of Artmark's recoverable damages are not being quantified at this moment. For one thing, prejudgment interest is unquestionably called for as part of Artmark's recovery. What our Court of Appeals has said in the trademark infringement context in *Gorenstein Enterprises, Inc. v. Ouality Care-USA, Inc.*, 874 F.2d 431, 435-36 [10 USPQ2d 1762] (7th Cir. 1989) provides so apt a parallel to the situation now before this Court that it may be paraphrased to fit this case (the emphasis, however, is in the original):

> So weak are [Mishan's] arguments regarding [its] infringement of [Artmark's] trademark, and so deliberate the infringement, that it might have been an abuse of discretion for the district judge *not* to have awarded [Artmark] treble damages, attorney's fees, and prejudgment interest. Section 35(a) of the Lanham Act, 15 U.S.C. §1117(a), provides that, "subject to the principles of equity," the owner of the infringed trademark shall be entitled to his damages; and "in assessing damages, the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount." The same section provides that "the court, in exceptional cases, may award reasonable attorney fees to the prevailing party." These provisions are properly invoked when, as in this case, the infringement is deliberate.

*Gorenstein, id.* at 436 went on to announce the rule that must apply here with equal force:

> The time has come, we think, to generalize, and to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay.
>
> The award of prejudgment interest is particularly appropriate in a case such as this where the violation was intentional, and indeed outrageous.

Prejudgment interest "is particularly appropriate" in this case for precisely the same reasons, but further input is needed as to the amount to be awarded, because by definition such prejudgment interest must be calculated as of a date certain. And as for attorneys' fees, which this Court affirmatively finds should also be awarded in Artmark's favor and against Mishan (because this is an "exceptional case" in the language of Lanham Act §35(a), as was equally true in *Gorenstein)*, those can be covered by a post-judgment submission by Artmark to pick up all the time that has been spent by its lawyers — and that can be done without thereby affecting the finality of the judgment order (*Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201-03 (1988)).

In summary, this Court hereby finds and concludes that:

A. Mishan has engaged in unlawful activities comprising the marketing and sales of crystal bells and crystal cartons infringing Artmark's established proprietary rights (trademark, trade dress and copyright) for its two-and three-paneled crystal bells and its distinctive crystal carton design. Those unlawful activities have injured Artmark's proprietary rights, entitling Artmark to the relief that it seeks and that this Court awards here.

B. Mishan's infringements of the rights referred to in Paragraph A have been willful. Moreover, its continuing infringement of those rights continues to damage Artmark in a manner that is not fully compensable by the damages hereafter awarded in Paragraph D, for that willful misconduct by Mishan has caused and will continue to cause immediate and irreparable injury, loss and

expressed great indignation at the notion that his client was sought to be tagged by Artmark as a ripoff artist. That protestation has special poignancy in retrospect, because counsel Dunne had to know better — Artmark has since shown that he had been Mishan's lawyer in other litigation when it was shown to be tarred with precisely the same kind of brush.

damage to Artmark if a permanent injunction were not to be granted.

C. It is therefore ordered pursuant to Fed. R. Civ. P. 65 that Mishan, its officers, agents, servants, employees, related companies, subsidiaries, attorneys and all persons acting in concert with any of them or on their behalf are permanently enjoined from in any manner directly or indirectly:

(a) offering, displaying, marketing, promoting, advertising, importing or selling glass or crystal bells or any other related products that is or are confusingly or substantially similar to Artmark's two-and three-panel crystal bells, or utilizing any trade dress that is confusingly or substantially similar to Artmark's crystal carton trade dress (comprising a black and gray carton with red trim and side panel photograph of the crystal item), or infringing Artmark's rights (trademark, trade dress and copyright) in any other manner or contributing to or participating in such infringement by others;

(b) preparing and circulating catalogs, letters, literature, advertisements and other graphic materials that have a manner, style or form that indicates or tends to represent that Mishan or any of its products is or are in any manner associated or affiliated with, authorized, sponsored or approved by Artmark;

(c) using any false designation of origin or false description that can or is likely to lead the trade or public, or individual members thereof, to believe that any product produced, distributed or sold by Mishan is in any manner associated or connected with Artmark or is sold, produced, licensed, sponsored, approved or authorized by Artmark;

(d) otherwise infringing Artmark's rights (trademark, trade dress or copyright) for its two- and three-paneled crystal bells and its distinctive crystal carton design; or

(e) assisting, aiding or abetting any other person in engaging in or performing any of the activities referred to in subparagraphs C(a) through (d).

D. Artmark is awarded damages of $1,330,482.07 against Mishan, to be paid with prejudgment interest compounded monthly at the prime (Corporate Base) rate of the First National Bank of Chicago through August 31, 1992 [2] (see *Gorenstein*, 874 F.2d at 437 as to the propriety of both the award of compound interest and the use of the prime rate as a convenient — though perhaps conservative — rate). This award and the final judgment to be entered on August 31 in the amount inclusive of such prejudgment interest are without prejudice to Artmark's entitlement to move before or after that date for an award of all its attorneys' fees (see paragraph 14).

E. This Court's January 4, 1991 order had included, as its Paragraph 4, a provision restricting the parties' discussion of that order. That provision is hereby vacated.

[2] That date will be the date on which the final money judgment in this action will be entered. Artmark is directed promptly to furnish to Mishan's counsel its calculation of the prejudgment interest amount through that date, together with information as to how that figure was calculated. On or before August 28 this Court shall be apprised by the parties' filing or filings in its chambers as to whether the parties have agreed on that figure or, if not, shall be furnished (also filings in its chambers) with the parties' respective calculations, in order that it may make the final calculation and the judgment may be entered on August 31.

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**District Court, S.D. California**

Miles Inc. v. Scripps Clinic and Research Foundation

No. 88-0708-R (CM)

Decided January 11, 1993

**PATENTS**

**1. Non-patent protection of products — In general (§130.01)**

Right to commercialize cell line, which is clone or population of identical cells, derived from single cell, is intangible property right, since such commercialization of cell line is interest capable of precise definition, since it is capable of exclusive possession or control, and since it is possible that putative owner of commercialization right could establish exclusivity to that right, but such intangible property right is not, under California law, protected by conversion cause of action.

Action by Miles Inc. against Scripps Clinic and Research Foundation, Rorer Group Inc., Armour Pharmaceutical Co., Revlon