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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

JAN 03 2003

MICHAEL W. BROWN  
CLERK, U.S. DISTRICT COURT

ENERGIZER HOLDINGS, INC., )  
)  
)  
Plaintiff, )  
)  
)  
v. )  
)  
MONSTER CABLE PRODUCTS, INC. )  
)  
)  
Defendant. )

Civil Action No. **03 C 00069**

JURY DEMAND JUDGE GOTTSCHALL  
MAGISTRATE JUDGE ASHMAN

COMPLAINT

Plaintiff, Energizer Holdings, Inc. ("Energizer") by its undersigned counsel, Winston & Strawn, appear and complain of Monster Cable Products, Inc. ("Monster Cable" or "Defendant"), as follows:

NATURE OF THE ACTION

1. This is an action seeking the entry of a preliminary and permanent injunction and damages for false advertising and unfair competition for the violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2, the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2, and the Illinois common law of unfair competition.

2. This action arises from Defendant's practice of unfair competition in interstate commerce, by making false and misleading marketing and advertising claims regarding its Monster PowerCells alkaline battery ("Monster PowerCells") on the packaging and on its web site.

3. Defendant's packaging includes the false and misleading claim that their Monster PowerCells alkaline batteries "deliver maximum power and longer time," "last longer than standard alkalines," and have "25% More Power than standard alkalines" followed by "•More Music • More Pictures • More Game Time." This is false and misleading because Monster PowerCells alkaline batteries do not deliver "maximum power" or last longer, much less 25% longer, compared to alkaline batteries currently in the market, including Energizer batteries. Each of these statements is explicitly false and misleading.

#### THE PARTIES

4. Plaintiff, Energizer, is organized and existing under the laws of Missouri with its principal place of business at 533 Maryville University Dr., St. Louis, MO 63164. Energizer is a major manufacturer of primary batteries and flashlights and a global leader in the business of providing portable power. Its brand names include Energizer and Eveready, both of which have worldwide recognition for quality and dependability, and are marketed and sold in more than 140 countries. Energizer's subsidiaries operate 21 manufacturing facilities in 14 countries on four continents.

5. Monster Cable Products, Inc., is a publicly held corporation organized and existing under the laws of the state of California. Monster Cable's principal place of business is at 455 Valley Drive, Brisbane, California 94005. Monster Cable manufactures and sells a wide variety of consumer products throughout the United States, including audio and video cables, computer cables, power management and supply solutions, and rechargeable and alkaline batteries.

6. Energizer and Monster Cable are direct competitors in that both Energizer alkaline batteries and Monster PowerCells alkaline batteries are sold in the same channels of commerce, and the same retail outlets and stores, in every state.

### JURISDICTION AND VENUE

7. Defendants have engaged in the transaction of business and committed the acts complained of herein in interstate commerce and in the Northern District of Illinois. Jurisdiction is based upon 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(b). Venue is proper in this district under 28 U.S.C. § 1391(b) as the case in controversy arose in this judicial district. Venue is also proper in this district because Defendants are deemed to reside in Illinois pursuant to 28 U.S.C. § 1391(c).

### FACTUAL ALLEGATIONS

#### I. General Background

8. Alkaline batteries comprise the vast majority of household batteries sold in the United States for electronics. The major manufacturers of alkaline batteries sold in the United States are Energizer, Duracell, Inc. ("Duracell"), and Rayovac, Inc. ("Rayovac") which are responsible for close to ninety five percent of alkaline batteries sold.

9. Energizer and Duracell make a standard and premium alkaline battery product. Energizer markets its standard alkaline product under the Energizer Max® brand name, while Duracell markets its standard alkaline product under the Duracell CopperTop® brand name. Energizer and Duracell also manufacture and market a premium alkaline battery product called Energizer e<sup>2</sup>® and Duracell Ultra®, respectively. Standard and premium alkaline batteries are well known in the industry and to consumers, and are differentiated by their packaging, advertising, and price points. The batteries at issue in this lawsuit are standard alkaline battery products.

10. Upon information and belief, in or about October 2002, Monster Cable introduced a line of standard alkaline batteries under the brand name "Monster PowerCells."

11. Energizer and Monster PowerCells alkaline batteries are available in all standard sizes for alkaline batteries, including AAA, AA, C, D, and 9 Volt. AA size batteries are the largest selling standard alkaline batteries, constituting between 50% and 60% of the standard alkaline market.

II. Monster Cable's False and Misleading Packaging

12. Monster PowerCells standard alkaline batteries are sold in packaging that identifies the batteries as "Monster PowerCells High Capacity Alkaline." The Monster PowerCells packaging for the AA size standard alkaline batteries contains the following false and misleading claims:

- i. 25% More Power Than Standard Alkalines . . . • More Music • More Pictures • More Game Time;
- ii. Monster PowerCells Deliver Maximum Power and Longer Run Time for Today's Portable Electronics;
- iii. Monster PowerCells Last Longer Than Standard Alkalines; and
- iv. Maximum Power.

(the "Packaging"). Attached as Exhibit A hereto.

13. The Packaging also includes a bar graph on the back panel that purports to represent a comparison of battery power, titled "Hours in Use." The graph includes an unidentified "Brand A" at 170 hours, an unidentified "Brand B" at 190 hours, and Monster PowerCells at 230 hours, and repeats the claim from the front of the Packaging that Monster PowerCells offer "25% More Power." This graph actually demonstrates the falsity of Monster

Cable's prominent and unqualified superiority claims of "25% More Power Than Standard Alkalines" on the front of the packaging because, by its own comparison, Monster PowerCells are only 18% more powerful than Brand B.

14. This graph is also false and misleading because there are no commonly used consumer devices, nor are there any commonly accepted tests adopted by the American National Standards Institute ("ANSI"), in which a single set of AA alkaline batteries will last anywhere remotely near 170 to 230 hours. The graph does not indicate the basis for the comparison (*i.e.*, what device or devices were tested).

15. In recognition of the governance of ANSI testing in this industry, and in an attempt to gain the credibility that ANSI testing provides, Monster Cable has included on the Packaging at issue the statement "Test by 3rd Party, ANSI-Certified Lab," which appears below the graph, along with the statement "Test Results Available On Request." These claims are likewise false and misleading because ANSI does not certify any battery testing laboratory.

16. On November 1, 2002, Energizer's counsel wrote a letter to Monster Cable's General Counsel, David M. Tognotti, demanding that Monster Cable immediately stop disseminating its false and misleading advertising. Mr. Tognotti responded six weeks later merely apologizing for not responding sooner. On December 13, 2002, Energizer's counsel wrote Mr. Tognotti requesting the test results purportedly supporting the claims made by Monster Cable on its Packaging. Mr. Tognotti responded by letter on December 14, 2002, by failing to provide the requested test results, but admitting that the packaging for PowerCells was in the process of being changed. Mr. Tognotti's letter did not, however, advise when - or if - the false claims currently appearing on the packaging would be removed from the marketplace. A

copy each letter from Energizer and each letter from Mr. Tognotti is attached hereto as Exhibit B.

17. In fact, Monster PowerCells batteries do not provide "more power" or "last longer," much less 25% longer, than standard alkaline batteries. Upon learning of Monster Cable claims on its Packaging and on its web site, Energizer immediately commissioned an independent laboratory to conduct extensive testing of Monster PowerCells in comparison to Energizer batteries. Final results were received on December 31, 2002 which revealed that Monster PowerCells are actually 9% inferior to standard Energizer alkaline batteries. A summary of these independent laboratory test results are attached hereto as Exhibit C.

18. False and misleading superiority claims, "lasts longer," "more power," "maximum power," "25% longer" and "• More Music • More Pictures • More Game Time" in battery advertising are very powerful marketing messages and are extremely harmful to fair competition. Monster Cable's false claims of superior performance should be stopped immediately before further irreparable injury is caused to alkaline battery manufacturers like Energizer, and to the consuming public.

### III. Irreparable Injury to Energizer

19. Defendant's false and misleading superiority claims are in willful and wanton disregard of Energizer's rights and property and the interests of the consuming public, and constitute a knowing attempt by Defendants to misappropriate the customers of Energizer. Monster Cable has specifically targeted Energizer as a focus of its aggressive campaign in its web site, where it stated on July 9, 2002, "Looking for a battery that leaves the bunny in the dust, check out the new Monster Alkaline PowerCells." The "bunny" is Energizer's world renowned advertising mascot, known to consumers throughout the United States as a symbol of quality and

excellence behind the Energizer brand. Excerpts of Monster Cable's web site dated January 3, 2002 are attached hereto as Exhibit D, and the specific reference to the Energizer Bunny is attached hereto as Exhibit E.

20. Energizer has built tremendous goodwill in its Energizer brand batteries as a result of the quality of its product and its extensive advertising. The fame and success of this product has greatly enhanced Energizer's reputation in the marketplace. A key element of that goodwill and reputation is the promotion and positioning of the Energizer battery as unsurpassed in quality and performance by competing batteries.

21. Defendant's use of false and misleading superiority claims has caused and continues to cause Energizer to suffer irreparable injury to its goodwill and reputation, for which Energizer has no adequate remedy at law.

22. Defendant's false and misleading superiority claims diminishes this goodwill and diverts sales from Energizer to Monster Cable's product and tarnishes and diminishes Energizer's reputation.

23. Energizer believes that it has lost, and will continue to lose, sales as a direct result of the false claims made on Monster Cable's packaging. Energizer has lost sales and revenues, and is now forced to expend monies to counteract the negative effects of Defendant's claims.

#### COUNT I

#### LANHAM ACT

24. Energizer repeats and realleges the allegations set forth in paragraphs 1 through 23 of this complaint.

25. Defendant's false advertising claims as described above constitute false and misleading descriptions of fact and false and misleading representations of fact in interstate

commercial advertising and promotion, which materially misrepresent the performance capabilities of their Monster PowerCells batteries over other alkaline batteries, including Energizer batteries, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

26. Defendant's false and misleading descriptions of fact and false and misleading representations of fact are willful and intentional, with deceptive intent, making this an exceptional case.

27. Defendant's false and misleading advertising claims have caused, and will continue to cause, great, immediate, and irreparable harm to Energizer's business reputation, injury to its goodwill, loss of competitive advantage, and pecuniary damages.

28. Energizer has no adequate remedy at law.

## COUNT II

### ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

29. Energizer repeats and realleges the allegations set forth in paragraphs 1 through 23 of this complaint.

30. Defendant's false advertising claims as described above constitute unfair methods of competition and unfair and deceptive acts and practices, including but not limited to the use and employment of deception, fraud, false pretense, false promise, misrepresentation and the concealment, suppression and omission of material facts, with intent that others rely upon the concealment, suppression and omission of such material facts in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2.

31. Defendant's false and misleading descriptions of fact and false and misleading representations of fact are willful and intentional, with deceptive intent, making this an exceptional case.

32. Defendant's false and misleading advertising claims have caused, and will continue to cause, great, immediate, and irreparable harm to Energizer's business reputation, injury to its goodwill, loss of competitive advantage, and pecuniary damages.

33. Energizer has no adequate remedy at law.

### COUNT III

#### ILLINOIS UNIFORM DECEPTIVE TRADE PRACTICES ACT

34. Energizer repeats and realleges the allegations set forth in paragraphs 1 through 23 of this complaint.

35. Defendant's false advertising claims as described above represent deceptive trade practices in that Monster Cable: falsely represents that Monster PowerCells possesses characteristics and benefits that these batteries do not have; falsely represents that the Monster PowerCells batteries are of a particular quality or grade, when in fact it is another; disparages the goods of another by false and misleading representations of fact; and otherwise engages in conduct which creates a likelihood of confusion or misunderstanding in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2.

36. Defendant's false and misleading descriptions of fact and false and misleading representations of fact are willful and intentional, with deceptive intent, making this an exceptional case.

37. Defendant's false and misleading advertising claims have caused, and will continue to cause, great, immediate, and irreparable harm to Energizer's business reputation, injury to its goodwill, loss of competitive advantage, and pecuniary damages.

38. Energizer has no adequate remedy at law.

**COUNT IV**

**ILLINOIS COMMON LAW OF UNFAIR COMPETITION**

39. Energizer repeats and realleges the allegations set forth in paragraphs 1 through 23 of this complaint.

40. Defendant's false advertising claims as described above constitute false and misleading descriptions of fact and false and misleading representations of fact in commercial advertising and promotion, which misrepresent the performance capabilities of its Monster PowerCells battery over other alkaline batteries, including Energizer batteries, in violation the common law of the State of Illinois.

41. Defendant's unfair competition is willful and intentional, with deceptive intent.

42. Defendant's conduct is in willful and wanton disregard of Energizer's valuable rights and property and of the law and practices of advertising. By such conduct, Monster Cable knowingly seeks to misappropriate to itself Energizer's valued customers and to injure and tarnish Energizer's valuable goodwill reputation.

43. Energizer has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Energizer respectfully requests that this Court enter judgment:

A. Declaring that Defendant violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2, and the Illinois common law of unfair competition;

B. Preliminarily and permanently enjoining Defendant, its officers, subsidiaries, parents, divisions, agents, servants, employees and attorneys, and those persons in active concert

or participation with them who receive actual notice of the order by personal service or otherwise, from distributing packaging containing false and misleading claims that its Monster PowerCells batteries:

- i. Have more power or 25% more power than standard alkaline batteries;
- ii. Deliver • More Music • More Pictures • More Game Time;
- iii. Last longer than standard alkaline batteries;
- iv. Deliver "maximum power" and "longer run time" for any device;
- v. "Deliver Maximum Power and Longer Run Time for Today's Portable Electronics;"
- vi. have been tested by any ANSI certified laboratory;
- vii. using any graphic representation showing test results inconsistent with industry recognized testing, including but not limited to any representation that Monster PowerCells last for 230 hours in any device;

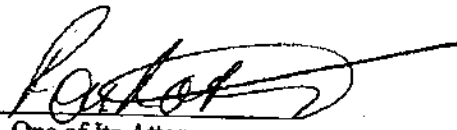
C. Preliminarily and permanently enjoining Defendant, its officers, subsidiaries, parents, divisions, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from stating, explicitly or implicitly, or suggesting by verbal message, visual image or otherwise, that Monster PowerCells batteries last longer, perform better, or are otherwise superior to, other alkaline batteries;

D. Ordering Defendant to recall all Monster PowerCells packaging currently in distribution which includes claims that its batteries last longer, perform better, or are otherwise superior to, other alkaline batteries;

- E. Ordering Defendant to publish corrective advertising to dispel the false and deceptive impressions created by its advertising;
- F. Ordering Defendant to pay Energizer its damages, trebled, and Energizer's lost profits caused by Defendant's false descriptions and misrepresentations;
- G. Ordering Defendant to pay Energizer its damages, both compensatory and statutory, by reason of Defendant's false advertising and unfair competition;
- H. Granting Energizer its costs and disbursements in this action, including reasonable attorneys' fees;
- I. Granting Energizer such other and further relief as this Court may deem just.

Respectfully submitted

**ENERGIZER HOLDINGS, INC.**

By:   
One of its Attorneys

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